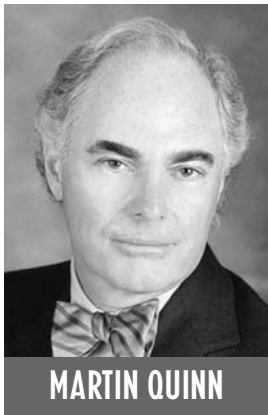


## Exercise Diligence When Preparing For Corporate Mediations

**Y**ou are the chief patent counsel of a significant public company on the East Coast. Tonight you will fly to Los Angeles to attend a mediation tomorrow of a patent infringement case that your company is defending. You will meet for dinner at 8:30 p.m. with your experienced outside counsel to prepare for the mediation. The two of you have traded messages for the past week, but have not talked about the mediation since it was first scheduled. A company vice president, second-in-command of the division that makes the patented product, is flying in from Phoenix for the mediation and hopes to join you for dinner.



MARTIN QUINN

You have not discussed the mediation with her since you asked her to attend. Since you long ago concluded that the other side's claims are bogus, you haven't wasted time learning about the other side's history, its products or its financial position, nor do you know who the other side will bring to the mediation. To get rid of the case, you have authority from the general counsel to pay nuisance value, far less than your anticipated defense costs. Because the case has no merit, you have not given any thought to possible business solutions or royalty arrangements. The general counsel is on vacation with his family in the Himalayas.

While this is an exaggerated caricature of real-life, experienced mediators often encounter elements of such slipshod preparation by highly competent and experienced in-house counsel. Because a case is likely to settle during mediation, corporate counsel should take essential steps to

prepare with every bit of diligence they would devote to an impending trial.

### Determine the Corporation's Objectives

Identifying for mediation purposes the interests at stake in a corporate lawsuit is usually more complex than totaling up the damages sought in the complaint. Parties to a mediation are free to craft business solutions to their dispute that range far beyond the relief that a court could grant. Contracts can be rewritten; real estate can be exchanged; business relationships can be crafted; divisions or entire companies can be bought or sold. Therefore, corporate counsel should initiate an in-house discussion to identify all the objectives — legal and business — the corporation would like to achieve in a negotiated solution. Counsel needs to think broadly, not only about advantages that his or her own company can achieve, but should consider also solutions that will mutually benefit both sides.

Having identified and prioritized the company's goals for mediation, corporate counsel should address the means to achieve those goals. If the company wants only to recover the most money or pay the least, there is little to brainstorm. But if the company has identified broader, more complex objectives, in-house counsel's intimate knowledge of the company's people and resources must come into play. Counsel is perfectly positioned to convene the people with the knowledge needed to formulate creative solutions. Will a cross-license arrangement resolve the patent case? Is a joint venture between the two parties a possibility?

### Select the Right Corporate Representatives

Determining the team to represent the company at the mediation will be a collaborative decision by in-house and outside counsel. They need to identify company representatives with the "right stuff" for that mediation. At

the most basic level, counsel needs to decide whether to bring the in-house client, that is people who participated in the events that led up to the dispute or will be affected by the outcome, or instead to bring uninvolved representatives who may be more objective. In making that decision, counsel should strive to assemble a team with four attributes: Knowledge, Authority, Demeanor and Impact.

Typically, an effective mediation requires people in the room with command of not only the facts that created the dispute, but also the future solutions that will satisfy the company's objectives. Counsel should look for representatives who will present the corporation in the best light: firm but respectful, personable but determined, flexible but focused. In a corporate case I mediated earlier this year, one side brought a senior member of its financial department who made a compelling presentation to the other side about the impact of the dispute on corporate morale, reputation with customers and financial reporting requirements. He was also able to project both empathy for the other side's losses, and a willingness to search for a solution that benefited both parties. The mediation finally resolved after this representative and his counterpart on the other side met alone in a room for half an hour.

Finally, corporate counsel should consider what impact its representatives will make on the other side. Each side needs to believe that the other side takes the dispute seriously, and will try in good faith to negotiate a settlement. Bringing a low-level employee without convincing knowledge and authority accomplishes nothing.

### Obtain Full Authority to Negotiate

Mediations usually crater because parties in the room lack full authority to negotiate freely. Because corporations are made up of diverse stakeholders (business divisions, legal department, senior officers, directors, shareholders), obtaining truly full authority to negotiate a solution at a corporate mediation is very difficult. Ideally, a mediator wants to have in the room everyone necessary to negotiate a solution that the other side might be expected to accept. They should have the authority to agree to options and settlement formats they hadn't considered, and to make compromises they hadn't anticipated would be necessary. In a recent mediation between an insurance company and its policyholder, new facts came to light that persuaded the business representative from the insurance company to agree to a settlement structure that was the reverse of the structure he had hoped to achieve. The case settled only because the company representative had the authority to negotiate the best solution for his company given the new reality.

Obtaining full authority in this sense is often impossible in a corporate structure. So the fallback is for the representative who will attend the mediation to obtain some limited authority in advance from more senior decision-makers. Before asking for authority, corporate counsel should obtain

a current litigation budget through trial from their outside counsel. Moreover, as one experienced corporate litigation counsel put it, "It's better to obtain a little more authority than you think you'll need so you don't have to go back for more and have to explain why you were wrong the first time." Counsel should not base their request for authority only on how they and outside counsel assess the case. They should ask for the authority that will cover what the other side might reasonably be expected to demand. If all the authority is not expended, corporate counsel will return a hero.

Mediators know that "telephone standby" usually means that the "standby" is really at his daughter's soccer game with his cell phone turned off. Even when the person is actually reachable, it is very difficult to convey how the dynamics of the mediation have altered the perceived value of the case. Therefore, avoiding this strategy if at all possible will make life much easier for everyone involved.

### Prepare a Negotiation Strategy

If the coach and quarterback of a football team can script a game's first 10 plays, counsel at a mediation ought to be able at least to plan their opening offer or demand, to anticipate the possible responses and have their next moves at hand. Yet, when mediators ask for an opening offer or demand, they are often met with, "Oh, can you give us half an hour to talk...?"

Counsel should plan not only their opening moves, but also should develop a range of acceptable solutions, from a "stretch" goal to the least acceptable result. With that range of goals in mind, counsel should then approach the negotiations with the mental flexibility to adjust their goals to reflect unexpected evidence or arguments from the other side and reality checks from the mediator.

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*Martin Quinn, Esq., is a full-time mediator and arbitrator with JAMS, The Resolution Experts, based in San Francisco. He can be reached at [mquinn@jamsadr.com](mailto:mquinn@jamsadr.com) or (415) 982-5267.*

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