

HOW INSIDE AND OUTSIDE COUNSEL CAN BEST COLLABORATE IN MEDIATION LIKE THEIR JOBS DEPEND ON IT – BECAUSE THEY DO



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The partnership in mediation between inside and outside counsel poses challenges for both counsel to manage and opportunities for them to seize. Effective collaboration can improve the odds of achieving favorable settlements and avoiding problems in mediation. Inside and outside counsel should approach their partnership

by recognizing from the outset what their partner needs and expects, and what they can offer them and their common client. Through nearly 20 years and dozens of mediations as a senior in-house counsel at Ticketmaster – as the world’s leading ticketing company’s General Counsel, Chief Counsel, and head of litigation – I learned important lessons about how inside and outside counsel can most effectively collaborate for the good of their common client. Doing so not only serves their common client’s best interests, but also serves their best interests.

Understanding Each Other’s Roles and Needs

Outside and in-house counsel should be aware of each other’s needs, skills, expectations, assets, and limitations. Outside counsel should understand in-house counsel’s experience, expertise, and position in their business or organization. This includes not only what information in-house counsel needs to communicate to supervisors and decisionmakers, but also the form and substance of that information. Conversely, in-house

counsel should ensure outside counsel is well-informed about the organization’s business, the structure of its legal department, its objectives, where the case resides in their portfolio of cases, and the nature of disputes and potential problems the company is facing. Both parties should ensure that the outside lawyer knows what might be unique about their business, the departmental reporting structure, and in-house counsel’s style and expectations. Effective communication is crucial to navigate the client’s risk tolerance and appetite. Good teamwork – preparation, communication, and coordination on strategy at the mediation – often can make the difference between success or missing an opportunity for a satisfactory outcome.

Below are some considerations and suggestions for how in-house and outside counsel can work well together during the mediation process.

Key Considerations for Collaboration

Identify the In-House Lawyer: In-house lawyers are not a homogenous group. The outside lawyer should learn about the in-house lawyer’s experience, expertise, focus, responsibility, and seniority. Understanding whether they are working with a litigator, transactional lawyer, regulatory lawyer, or another type is crucial. Has in-house counsel been to mediation before and how often? How much do they want and expect to speak, contribute, and participate in the mediation? Additionally, knowing the in-house lawyer’s level of involvement in the underlying situation at issue and any sensitivities around their involvement can help manage the process diplomatically.

Understand the Legal Department’s Structure: Legal departments vary in size and structure. The in-house contact may be the entire department or one of dozens or even hundreds of lawyers. Knowing the in-house lawyer’s position in the

company, how much authority he or she has, and whether he or she needs to consult others is vital for effective mediation preparation.

Gauge Mediation Experience: How experienced, particularly in mediation, is the in-house lawyer? Depending on their experience, in-house counsel may need anything from a brief overview to a detailed explanation of mediation, how it works, and what to expect from the process.

Preparing Your In-House Client – Ultimately to Look Good

Meeting of the Minds: There should be a meeting of the minds between inside and outside counsel from the outset, or at least before getting too far into the process, and prior to the mediation. Discuss objectives and then formulate an opening settlement position to communicate to the mediator.

Effective Communication: Good communication between inside and outside counsel is fundamental. Outside counsel should figure out what the in-house counsel needs in terms of case evaluation and strategy. Prepare in advance and encourage the in-house representative to brief necessary internal stakeholders. Helping in-house counsel communicate effectively to their internal constituents is crucial for making informed decisions and granting settlement authority.

Look at the Big Picture: In order to make a good recommendation to your client, you need to understand where the case falls within the context of its other cases and litigation budget, and whether other similar cases are pending or on the horizon. Does the case need to be settled? What result could come out of a trial that could impact the organization? As an outside lawyer, this may be your only current case for the organization, but the in-house lawyer likely has a broader view and understanding of what the case represents. Access and view the situation through the in-house counsel's wider lens.

Strategy Development: Both lawyers should review the case and briefs together. They need to curate and manage the traveling squad – who is attending the mediation and, perhaps equally important, who should not be attending – while considering personalities and potential conflicts. Consider whether it would be advisable for your client to change a business practice, make a concession, or offer a public apology to facilitate a settlement.

Do not wait until the mediation to figure this out. Consult with the necessary players and obtain the necessary authority and buy-in from decisionmakers.

Understanding the Business: Outside counsel should educate themselves about the business and any unique aspects that might affect the mediation. When I was at Ticketmaster, one of the first things often required during mediation was to educate outside counsel about unique aspects of Ticketmaster's business and its role in the industry to make sure that outside counsel was fully capable of explaining it to the mediator. This pre-mediation preparation ensures that the mediator's precious time and attention are not wasted on basic explanations.

Addressing Skepticism and Reluctance

Explaining the Benefits of Mediation: Outside counsel should explain the benefits of the mediation process even if there is a reluctance to participate or skepticism about the prospects of a satisfactory settlement. Even if the dispute does not settle, the client may benefit from the process. Use it as an opportunity to stress test and carefully examine your own case. What type of evaluation can your mediator offer? Ultimately outside counsel should help the in-house partner effectively communicate these objectives to his or her stakeholders. The mediator's evaluation can be an important part of shaping that message.

Navigating Pitfalls

Common pitfalls include overconfidence, arrogance, and failure to see the matter from the other side's perspective. Below are some other common pitfalls to avoid:

- Making or taking things unnecessarily personally;
- Failing to take the process seriously, such as by assuming the other side is not there in good faith or that the matter is unlikely to settle;
- Failing to prepare properly, which can include failing to file a robust mediation statement or failing to consider some of the points discussed above.

Post-Mediation

Follow-Up: After mediation, inside and outside counsel should have after-action discussions to adjust case strategy and expectations. What did you learn and what adjustments in case strategy and expectations need to be made? Communication with management should ensure all relevant information is conveyed accurately and in the right format.

Ways for In-House Lawyers to Contribute Meaningfully

Educating Outside Counsel: In-house lawyers should explain the business and any unique aspects of the business, organization, or industry in which it operates that is relevant to the dispute. Providing background and context helps outside counsel educate the mediator effectively.

Crafting Creative Solutions: In-house lawyers can help craft creative solutions beyond monetary settlements, such as business arrangements, changes in practices, or other innovative approaches to facilitate settlement.

Summary

Effective collaboration between inside and outside counsel in mediation can significantly enhance the chances of a favorable outcome. By understanding each other's roles, preparing thoroughly, and maintaining open communication, both parties can navigate the mediation process more effectively, ultimately serving the best interests of their common client.

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