



4 steps to prepare for productive mediation

A guide to in-house counsel's unique role in mediation

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In-house counsel who supervise litigation are all too often relegated to watching their outside counsel from the gallery. Court motions, oral arguments or even trials are usually the domain of the “hired gun” outside lawyer. But mediation is different. During mediation, in-house counsel can be the key player whom the mediator and opposing counsel will look to as the decision-maker, naturally a welcome change from watching from the sidelines.

This central position that in-house counsel play at mediation requires preparation in several ways:

1. **In-house counsel must meet with the internal client**—the appropriate business person—and review the facts and legal theories of the case, the risks of the case and the appropriate settlement range. The in-house lawyer must make sure that the business client will either attend the mediation (which is preferred) or at least be available by phone during the mediation to discuss its progress and, if need be, adjustment of the settlement range.
2. **Assuming that outside counsel will participate in the mediation, in-house counsel must meet to review the topics.** At this meeting, outside and in-house counsel also should determine what roles each will play at

the mediation. If there is a joint session with the opposing side, who will make the presentation? In private caucuses with the mediator, who will engage the mediator? Should there be a strategy of playing “good cop/bad cop” with the mediator and the opposing side, such that the outside lawyer bangs on the table and threatens to bury the opposition with discovery requests and motions while the in-house lawyer asks if the parties can’t just settle? All of this needs to be worked out in advance so that outside counsel has clear direction as to how in-house counsel wishes the mediation to proceed.

3. **In-house counsel are also uniquely qualified to consider creative settlements, if the case permits.** Most mediations are simply about money, and the parties negotiate back and forth until they reach a dollar amount that each can live with. But is there another route to resolution? Perhaps, for example, the parties engaged in litigation could resolve the matter by entering into a new business venture. This area is the true province of in-house counsel, who know the company much more intimately than outside lawyers and who might be privy to potential new business plans that the company is exploring.

For example, in the entertainment industry, it is not uncommon to settle a claim by talent for unpaid profits by engaging the talent in a new project at a higher-than-usual fee.

4. **In-house counsel might have a cost-saving incentive to suggest early mediation.** Outside lawyers often will propose that mediation be put off until a certain amount of discovery has been conducted so that the client makes an informed attempt at settlement. In-house counsel, however, may wish to save the attorney’s fees that are incurred during discovery and allocate at least a portion of these fees to the settlement. This assessment is critical to evaluating the true cost of a settlement, and in-house counsel must make it.

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