How In-House and Outside Counsel Can Collaborate to Maximize Results in Mediation

By Gilda R. Turitz

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Mediation has become an increasingly popular vehicle to settle pre-litigation disputes, actively litigated cases, and even cases on appeal. For case management purposes and as a matter of judicial policy, federal and state courts now frequently mandate that parties engage in some form of alternative dispute resolution (ADR), such as mediation, early neutral evaluation, or non-binding or binding arbitration. Whether litigants agree to mediation because of court ADR programs or as a result of counsels' initiative, they often find it a good solution because it offers alternatives, is non-binding, is explicitly tailored to facilitate settlement as opposed to the other ADR processes, and is the most flexible process that can be customized to the parties' particular needs.

Mediation also offers the corporate litigant a tremendous opportunity to avoid the investment of additional fees, expenses, and resources—not to mention the uncertainty in outcome—inherent in continuing litigation rather than settling. This is not to say that mediation itself does not require a significant investment of time and resources for the company. Mediation requires attendance by management with settlement authority and/or in-house counsel as well as outside counsel, fees for preparation of a mediation brief and other supporting material (including possibly the expert's work product for damage analyses or other important factors), the mediator's fees, and possible travel expenses. In addition to corporate commitment to the process, corporations that negotiate the best possible settlements typically share a common approach—their in-house counsel collaborate with outside counsel at every phase of the process. The more thorough and thoughtful counsel's collaborative planning is, the more likely the corporation will be able to resolve the case in mediation.

Time It Right

In-house and outside counsel should candidly discuss the optimal timing in the dispute for mediation under the circumstances and determine what information each needs to appropriately evaluate the company's various alternatives. If, for example, the company and the opposing party have been exchanging demand letters over a contract, the material documents and key correspondence comprise a relatively small universe, and there is no pressing limitation process (or a tolling agreement could be signed), then pre-filing mediation may be beneficial. Under these circumstances, pre-filing mediation could enhance the possibility of a settlement or a negotiated restructuring of the parties' business relationship that may otherwise be impossible if suit is filed. Alternatively, and more commonly, counsel may determine that mediation would be premature if conducted before certain documents are produced and key depositions are taken in discovery. This may be especially important in a case involving "he said, she said" allegations where witness credibility is critical, or where counsel cannot reasonably assess litigation risks without having the testimony of certain witnesses on important events and facts. In-house and outside counsel should also evaluate whether disclosure of some or all expert opinions before mediation would significantly enhance their ability to determine the company's best and worst alternatives to a negotiated agreement (BATNA and WATNA, respectively).

In addition, in-house counsel should advise outside counsel before mediation regarding corporate timing needs for settlement payments. Counsel should discuss whether from a tax, cash flow, or other business perspective, it would be particularly advantageous to make or receive a settlement payment before the end of a particular quarter or fiscal year. In-house counsel may need to discuss such matters internally with management or tax advisors before analyzing these issues with outside counsel. Such corporate-timing considerations may be important factors in determining if and when to mediate, and may even play a role in driving an ultimate settlement decision.

Timing with respect to litigation events is also important. Counsel should consider whether the company will be in a stronger position for mediation if important motions are pending and the parties are therefore at risk for adverse court rulings. On the other hand, it may be better to mediate first and avoid such litigation costs. As a savvy mediator will undoubtedly question the company's attorneys about the anticipated costs of trial or other phases of the litigation when discussing settlement offers in private caucus, in-house and outside counsel should carefully analyze litigation costs and alternatives as part of their mediation preparation even if a litigation budget is already in place.

Select the Right Mediator

While some court programs appoint a mediator, in most instances, the parties will mutually agree on a mediator. In-house and outside counsel should carefully vet the potential choices, as mediator selection is often a major factor in the success of the mediation. Counsel should consider the corporate decision makers who will attend the mediation and the type of mediator most likely to resonate with them and assist in finding appropriate and creative solutions, e.g., an evaluative versus a facilitative mediator, or a retired judge versus a lawyer with pertinent subject-matter expertise, such as securities, trademark law, or employment discrimination. Where cross-cultural issues are involved, counsel should collaborate on selecting a mediator who will be sensitive to such

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issues. In most instances, outside counsel will be familiar with the mediators in the litigation venue. Outside counsel should therefore guide the company's choice by providing in-house counsel with as much information about the mediator's style, expertise, and track record as possible so that in-house counsel can have a high degree of confidence that the mediator is well-suited to the corporation's decision makers and concerns.

Calculate Liability Risks

In preparing for the mediation, collaboration between in-house and outside counsel is essential to realistically assess the risk of prevailing in the prosecution or defense of the claims at issue. In-house counsel should be direct with outside counsel about the type of evaluative report and level of detail the corporation's decision makers will need on the liability issues to make an informed decision about settlement. Some tough questions counsel should discuss include the following:

- What are the chances of prevailing on or defeating summary judgment?
- Will our key witnesses be believed, or are they vulnerable to impeachment on material issues because of incriminating documents, inconsistent statements, poor demeanor in general or at deposition, or other bad behavior that might adversely impact the fact finder at trial?
- Are the corporation's defenses highly technical and not likely to be favored by a jury?
- Is the adverse party very sympathetic even if his or her liability case against the corporation is weak?

No case is perfect, and a good mediator will probe these areas vigorously, so advance consideration of such questions is essential. Well-thought-out and appropriate responses to these tough questions can only increase the mediator's confidence in the company's position and therefore improve the company's chances for a reasonable settlement as well.

Calculate Damages

If the corporation is seeking damages, in-house counsel will play a critical role in obtaining information on the various damage components that the company will need to build its damage case at trial. It is essential that in-house counsel gather the necessary information promptly so that the company's experts can complete as much damage-analysis work as possible before mediation. If the corporation is resisting a damage claim, the same may be true depending on the type of case, such as one involving industry competition, trademark or copyright infringement, or loss of wages. Counsel should be mindful that experts may need substantial lead time to get their materials ready for review by in-house counsel and corporate decision makers, and such high-level review must usually occur before outside counsel may use the expert materials at mediation. Thus, advance planning is important.

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An experienced mediator will probe deeply into assumptions upon which the parties are positioning themselves with respect to damages. Will the corporation's damages, or exposure to damages from the opposing party, be easily quantifiable or highly subjective, even aspirational or speculative, in the judgment of the third-party fact finder? In addition to relying on experts when appropriate, outside counsel should advise in-house counsel on jury verdict information from similar types of cases if available. Comparable data can provide a more realistic picture of the potential range of damages to which the corporation may be exposed or that it may be able to recover.

Counsel should consider how much of the company's damages analysis they want to share with the opposing party in mediation. Counsel should also consider how to best present this information. Charts and graphs can readily be prepared on common computer programs without much expense and can have a powerful impact. For example, these figures may be overlaid with timelines and other factual information to demonstrate a failure to mitigate by the opposing party or to justify the corporation's actions that had an economic impact.

Anticipate Non-Monetary Issues

Ironically, while money is sometimes the hardest issue to resolve, settlements may elude the parties because of non-monetary demands. In appropriate cases, counsel should discuss prior to mediation how the company will respond to possible requests for apologies, letters of recommendation, pledges of non-disparagement of the opposing party, and confidentiality. If non-compete clauses are at issue, counsel should be fully apprised as to whether or under what conditions they are enforceable in their jurisdiction and what the company would be willing to accept in that regard. If a continuing business relationship or contract is an aspect of a potential settlement, counsel should collaborate on desired terms and anticipated issues before mediation.

Prepare Documents in Advance

Most mediations that result in a settlement at the session will conclude with the parties signing a term sheet, memorandum of agreement, or memorandum of understanding. Depending on the explicit language of the document and

the jurisdiction, the document itself may be enforceable as a settlement agreement or even for entry of judgment. In more complex matters, it is generally anticipated that counsel will prepare full settlement documentation after the mediation, including comprehensive releases. Such mediated settlements that are subject to full settlement documentation commonly drag on for weeks, or even months, as the parties argue over what they understand the term sheet to mean or try to negotiate additional terms and protections that were never discussed at mediation.

The well-prepared in-house and outside counsel should consider fully drafting a settlement agreement that they would find acceptable—leaving monetary and other controversial terms blank—before mediation. Counsel may also want to share the draft in advance with opposing counsel if they have a cooperative relationship with them. Even if counsel decides not to share a draft agreement in advance, it is advantageous to bring the company's proposed settlement documents to the mediation. Then, if settlement is reached, counsel can easily modify the drafts onsite, preferably with a laptop. If it is generally understood by the parties that additional documents will be necessary to consummate a settlement—for example, real property deeds, stock redemption documents, or license agreements—counsel should also consider preparing such documents in advance and sharing them with opposing counsel before the mediation to clarify and finalize "boilerplate" and other standardized terms. Advance preparation of key settlement documents will save time and cut down on disputes after the mediation in finalizing the settlement documentation.

Bring the Right People to Settle

No mediation can succeed unless both sides bring party representatives with settlement authority. In-house and outside counsel should candidly discuss who is necessary to be at the mediation and make sure that the mediation is scheduled to ensure those individuals' attendance, including insurance adjusters if applicable. Input from tax advisors and experts in advance and during the mediation may be necessary; therefore, appropriate arrangements should be made if these people need to be reached for consultation. If the parties reach an agreement-in-principle at mediation that must be approved by additional corporate individuals who are not in attendance (e.g., the Board of Directors), counsel must be careful not to bind the company to such agreement. Counsel must be explicit at mediation about the company's need to present the agreement's terms to the appropriate governing body for final approval.

Conclusion

As advocates, we prepare thoroughly for our client's day in court. We should prepare just as thoroughly with our in-house or outside counsel's assistance for a mediation, which may terminate the litigation and bring a lasting agreement between the combating parties. By working together and preparing in advance, in-house and outside counsel should maximize the chances for a successful mediation for the company.

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