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The In-House Counsel's Guide to Getting Better Results at Mediation

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Phillip Cha
Mediator at Cha Mediation Services

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Not every case that goes to mediation involves parties that have in-house counsel. In cases where there are in-house counsel involved, they play a dual role of party representative and legal expert. This unique perspective allows in-house counsel to have a major impact on the outcome of the mediation. Here are my thoughts on how in-house counsel can maximize their impact and get the best possible results at mediation.

Take More Control Over the Mediator Selection Process:

The best in-house attorneys are not afraid to take a hands-on approach when it comes to litigation. Yet when I ask them about their approach for selecting a mediator, I've found that most delegate that task completely to their outside counsel. While in-house counsel are extremely busy and not always familiar with the mediators in the jurisdictions in which their clients conduct business, taking a more active role in the selection of a mediator can pay dividends.

The most effective mediators are able to build trust and rapport with the parties, including the business representatives that in-house counsel work with. Establishing that trust and rapport requires a good personality match between the mediator and business representative. Because in-house counsel are usually more in tune with the personalities and needs of their business representatives than outside counsel, they are better able to evaluate the right fit when it comes to a mediator.

In addition, to the extent that a company values diversity and inclusion, its in-house counsel should encourage their outside counsel to consider diverse mediators along with the usual suspects. If in-house counsel are already driving the call to action for diversity among outside counsel, then urging outside counsel to increase the diversity in its mediator pool is a natural and logical extension of that call to action.

Lastly, in order to be in a position to recommend mediators to their outside counsel, in-house counsel should network with and get to know more mediators. We attend the same networking events. We run in the same circles with your outside counsel. If trust and rapport are the key to a successful mediation, then getting to know your mediator is a critical step in the process.

Allow Outside Counsel to Be a Collaborator:

First and foremost, your outside counsel should be your zealous advocate. However, the mediation process differs from trial or an oral argument in that it's not necessarily about winning and losing. Instead, the mark of success at mediation is closing a deal that both sides can live with. This requires a different skill set from your outside counsel. The best negotiators think outside the box and devise creative solutions in the face of an impasse.

However, many outside counsel are wired primarily to fight, and their clients expect them to fight to the death. Those outside counsel who understand that mediation requires them to walk the line between a fight and a compromise may be reluctant to wear both hats out of fear that it will send the wrong message to the client that expects only zealous advocacy. In these situations it is up to in-house counsel to not just allow, but actively encourage outside counsel to wear the hats of both zealous advocate and collaborator for the sake of resolving the dispute.

Be Patient:

The parties at mediation are usually sequestered in separate rooms. The dynamics of each room are often very different, particularly where one of the parties is an individual and the other is a business entity. On one hand, in-house counsel typically views a case through a legal and business lens. In-house counsel usually values a mediation process that is efficient and productive. They often travel from out of town to attend the mediation with a return flight that same day.

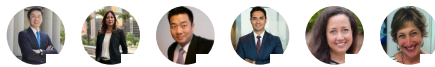
While that is a perfectly legitimate approach to mediation, the individual party in the other room often has completely different needs and agendas. Whereas the in-house counsel may want to get to the end game as soon as possible without much emotional investment, the individual party in the other room may need time to work through the emotional and psychological aspects of the dispute. This may cause frustration for in-house counsel, but trying to short-cut the process is likely to be counterproductive to reaching an agreement, which should be the shared goal of the parties.

In some cases, the business representative of the corporate party also needs time to reconcile his or her emotions. Either way, recognizing and acknowledging the emotional component of the case and allowing the individuals to take the necessary time to reconcile their emotions is part of the formula for a successful resolution.

To sum up, in-house counsel are busy, sophisticated professionals who have clear, established expectations of the mediation process. Given their unique role in the process, they can have a major impact on the outcome of a dispute. Taking measures that may be outside the box or off-script can help maximize that impact.

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Phillip Cha

Mediator at Cha Mediation Services

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