

Feature Article

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Pre-Mediation Telephone Conference with a Mediator—an Important Tool for Counsel

In many cases, all parties and their counsel come to mediation optimistic about the prospects for settlement. Typically, the parties expect that settlement will be achieved, and are prepared to exchange meaningful and realistic proposals and counter-proposals until a meeting of the minds is reached. But in other cases, the parties are so divided on legal and factual issues that neither party is motivated to negotiate a settlement. When this happens, counsel has little or no expectation for a successful outcome.

There is a third category of cases: where legal and factual issues are not novel such that settlement at mediation should be achievable but counsel knows of special barriers to success at mediation. In other words, counsel knows information that if not dealt with properly at mediation will make an otherwise achievable settlement unlikely. In these cases, dealing appropriately with these special features will make the difference between success and failure at mediation. What can a lawyer do in preparation for a mediation where settlement seems achievable but a special impediment exists? A well planned and executed pre-mediation telephone call to the mediator may be the answer.

Counsel would never initiate *ex parte* contact with a judge or an arbitrator to talk about a pending matter without the agreement or participation of the other parties. See ILL. R. PROF'L CONDUCT, 3.5(b). Mediation, however, presents a different situation. There is no prohibition on talking to the mediator on an *ex parte* basis. Indeed, during the mediation session, most of a mediator's time is spent talking separately to each side. In fact, some experienced mediators will initiate pre-mediation calls as part of their own preparation.

Such *ex parte* communications should be conducted with the understanding that the mediator will keep information learned during the telephone call confidential from the other side. Counsel can, therefore, discuss the case with the mediator without fear of revealing weaknesses in the client's case or proposed negotiation tactics. However, "confidentiality" is important in a different way. Counsel may want to discuss case-related matters with the mediator outside the presence of his or her client. For instance, there may be aspects of the client's personality, emotional makeup, attitudes, or level of sophistication which, if disclosed to the mediator in the client's presence, might be embarrassing or hurtful to the client. These types of discussions with a mediator do not constitute any disloyalty on the part of counsel. On the contrary, because such discussions are meant to carry out the representation of and advance the client's interests, they are impliedly authorized by the client. See ILL. R. PROF'L CONDUCT 1.6(a).

Because experienced mediators do more than just carry demands and offers between the parties, they generally welcome a "heads up" from counsel as to any circumstances that may adversely impact the chances of a

successful outcome. Although every case is different, there are some recurring special barriers. These barriers, which counsel may recognize in advance of a mediation session, are appropriate subjects of a pre-mediation *ex parte* conference with the mediator.

- **A non-party will attend the mediation.** Sometimes a client will bring a non-party friend or relative for moral support. In some cases, it is clear to counsel that this friend is a *de facto* advisor and the client will not act at the mediation without the approval of this person. If the mediator knows this in advance, this advisor can be treated courteously and appropriately throughout the mediation, thus eliminating the risk that an offended advisor derails the mediation.
- **The plaintiff may need his or her “day in court” at mediation.** By the time of the mediation, some plaintiffs will not have had the opportunity to explain what they have gone through because of their injuries. They will need, and want, to vent and verbalize their story before they can consider any settlement. Counsel whose client will need such an opportunity should discuss this with the mediator in advance of the mediation. In some cases, the plaintiff may need a chance to address the defendant directly. In other cases, the plaintiff may be satisfied if he or she is allowed to fully discuss the matter during a confidential caucus with counsel and the mediator present. In any case, alerting the mediator to this issue will allow the mediator and counsel to structure the mediation so that the plaintiff’s need is met.
- **The client will be coming to the mediation in an emotional state.** Either the plaintiff or the defendant may carry heavy emotional baggage to the mediation that may prevent resolution of a case through mediation. A prepared mediator can ensure these emotional factors are handled effectively, so prospects for ultimate settlement are not diminished.
- **The client has unreasonable opinions on settlement value.** Counsel may know that his or her client will have unreasonable opinions on settlement value. Even intelligent and well-meaning clients may have unreasonable expectations. An experienced mediator can be prepared to deal with those expectations by conducting the mediation in a helpful and non-coercive way to modify those expectations so that a settlement is possible.
- **The client has personal concerns that make a settlement imperative.** Generally, all parties to a suit have many things other than the lawsuit to deal with each day. The party may have health problems, a personal crisis, or serious financial concerns that make a quick end to the pending litigation imperative. Counsel, in these cases, may wish to alert the mediator of these circumstances so long as the mediator does not disclose such urgency to the other side. In these situations, a mediator armed with this information will not allow the mediation to end if some hope that continued efforts may lead to resolution. In fact, the mediator may offer to follow up with the parties in coming days to keep settlement discussions going.
- **The plaintiff needs an apology.** Just as in some cases a plaintiff may need to tell his or her story, in other cases counsel may perceive that the plaintiff needs to hear the defendant express sincere regret. The defendant may balk at this, but sometimes an apology may go a long way toward setting the stage for resolution by lessening the plaintiff’s animosity to the defendant and resistance to settlement. If that is the case, a mediator can be ready to give the defense an opportunity to offer such a statement. Typically, these statements are given at the beginning of the mediation to set the proper tone for the actual negotiations.

There are many other types of challenging scenarios that might exist. The critical point is that often times by alerting the mediator to these issues in advance, the mediator can be prepared to effectively address these issues.

Certainly, a telephone conference is not a substitute for a well written mediation statement. A written submission is the primary way to give the mediator important and relevant information about the dispute being mediated and your client's position. When a special barrier exists, a telephone discussion has certain advantages over a written submission. First, it is more flexible than a written submission and allows for a dynamic sharing of information. During a telephone call the mediator can ask immediate questions thus allowing the mediator and counsel to share insights into the problem and share proposals for handling it. Second, a telephone call allows counsel to advance the client's interests through a discussion of personal and sensitive matters that are not appropriate in a written submission.

Conclusion

A pre-mediation telephone call with the mediator is not necessary in every case. There are some cases where a telephone call to the mediator is helpful. The mediator wants to facilitate a successful resolution and alerting him or her to these special circumstances allows the mediator to help everyone achieve their goal—a successful settlement.

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