

TEXAS LAWYER

The Pre-Session Call: A Practical Guide for Mediators and Attorneys

By Gary Fowler

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The pre-session call is a powerful tool that can significantly enhance the efficiency, effectiveness and success of the mediation process. It can head off surprises that would otherwise derail a mediation at the outset. It also allows the parties to address critical issues thoughtfully before mediation rather than being surprised at the mediation session.

Why Have a Pre-Session Call?

A pre-session call focuses the attorneys' and the mediator's attention before the mediation session. Without it, busy attorneys may delay thinking about the mediation until the evening before (or even the morning of) the mediation session. It thus promotes more thoughtful consideration to address issues that may otherwise not be apparent until the mediation session. It also provides an opportunity to make sure that the participants are aware of what mediation is and to confirm the confidentiality of the mediation process.

Who Should Be on a Pre-Session Call?

Some mediators prefer a joint pre-session call with all attorneys, but this presents greater difficulties in scheduling. More importantly, a joint pre-session call is not as likely to be as productive, as attorneys may feel the need to advocate for their clients' positions rather than engage in conversation about resolution. Therefore, many

mediators (including me) prefer to have a separate conference with each side.

Is a Pre-Session Call Confidential?

The same confidentiality provisions applicable to a mediation session also apply to a pre-session call. A pre-session call is part of the mediation; that's why it's called a "pre-session" call as opposed to a "pre-mediation" call.

Should Clients Participate in a Pre-Session Call?

Attorneys should advise their clients of the opportunity to participate in pre-session calls. If a client does wish to participate in one, their attorney should let the mediator know. A pre-session call with the client can start the process of building trust and rapport with the client. Likewise, a pre-session call with a party who has never been in mediation can relieve anxiety by explaining the mediation process and highlighting what to expect. On the other hand, a pre-session call without clients can also be productive, as attorneys may be more candid. For example, if clients do participate, their attorneys may be less than candid on a particular issue for fear of appearing weak. Likewise, a pre-session call may allow



Gary Fowler of JAMS

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an attorney to discuss “client control” issues to enlist the mediator’s assistance through a neutral evaluation of the client’s position. Attorneys may also wish to obtain the mediator’s thoughts on how to deal with a difficult issue or a bad fact.

What Should the Invitation for a Pre-Session Call Include?

Generally, except in exceptionally complex cases, a pre-session call should take 30 to 60 minutes. Conducting a pre-session call by videoconference can be more effective, particularly if the mediator and attorney have not previously worked together. The invitation to the pre-session call should note that there is no additional charge for this call, to allay any concerns about costs.

What Should be Covered in a Pre-Session Call?

The primary purpose of a pre-session call is to help the mediator understand the core issues and subtext before the mediation session. This includes identifying key issues, potential deal breakers and areas of agreement. Prior to a pre-session call, the mediator should provide a checklist of topics for the call, including:

- **The background of the case:** Counsel should use the pre-session call to provide the mediator with an effective description of the key facts and legal issues presented, such as:
 - The nature of the dispute, including basic facts and legal theories
 - The party’s perceived strengths and, perhaps even more importantly, what the attorney sees as the other side’s strengths
 - The procedural status of the case (e.g., pre-litigation, discovery, pending motions)
 - Prior settlement talks (e.g., what offers have been made and when, who made the last offer)
 - Key documents (e.g., significant emails or texts); if an employment contract is involved, the mediator may ask who drafted it in order to avoid inadvertently criticizing the lawyer’s work in front of their client
- **Client interests and goals:** The pre-session call provides a critical forum for focusing the

case on the parties’ interests and goals, how realistic those goals are and how they may be accomplished through resolution. For example, in a discrimination case, a mediator may ask whether there are non-monetary considerations that the client would like to see as part of the resolution. These may include a neutral reference, confidentiality or an agreed statement as to the reasons for termination of employment. Or, in a case involving a covenant not to compete, the parties could consider what is essential to protect perceived interests regarding trade secrets or confidential information. Because parties do not always consider thoroughly what they want to accomplish before the mediation session, the pre-session call provides an initial opportunity to spur thoughtful consideration as to settlement terms. This can include agreements that might be included in a negotiated settlement but are not available in a court’s award, such as an employment reference.

- **Personalities and dynamics:** The pre-session conference should provide the mediator with an understanding of the parties and how they have worked together (or not) in litigating the underlying dispute.
 - The pre-session call should include discussing who will attend the mediation. For example, attorneys should also advise the mediator if a party intends to bring a spouse or friend to the mediation.
 - The parties should also advise the mediator who will attend the mediation on behalf of an employer, including their role and the scope of their authority to resolve the dispute.
 - While attorneys often tend to shy away from a full joint session, the pre-session call provides a good forum for considering whether the parties’ dispute is one where a joint session would be productive. The pre-session call can also be used to discuss ground rules that help prevent a joint mediation ses-

sion from devolving into a dress rehearsal for an opening statement at trial. Instead, the mediator should encourage the attorney to use mediation advocacy aimed at moving the other side toward resolution.

- The pre-session call also allows the mediator to understand the emotional drivers in the underlying dispute. While parties seldom like each other in litigation, understanding the degree of antipathy is important. For example, if the parties really cannot stand one another, then the mediator may want to make accommodations as to the location of the separate caucus rooms or, in extreme cases, provide for one party to participate by videoconference.
- Similarly, going into the mediation session with an understanding of the working relationship between counsel is important to an effective mediation. If the attorneys work professionally with one another, the mediator can build on that dynamic in guiding the parties toward resolution.
- **Pre-mediation statement:** If the pre-session call occurs before the mediator receives the mediation statement, it can facilitate a more efficient, effective mediation statement. The pre-session call then provides an opportunity for the mediator and the attorney to discuss what needs to be included in a mediation statement.
- **Logistics:** Going to the wrong address or not knowing where to park can cause unnecessary diversions at the beginning of the day that can spoil the entire mediation.

The pre-session call should ensure that the parties know where to park, what the meal arrangements are (including allowing for any dietary needs) and what time the mediation starts. The mediator should also ask, and the parties should advise, of any “hard stops” necessary for flights, family obligations or appointments. In videoconference mediations, the mediator should confirm that the parties have adequate equipment to participate meaningfully and confidentially—a mediation where a key party participates through a cell phone while sitting in a car is not ideal. I prefer each party to have a separate camera (as opposed to a single camera for an entire conference room) so that I can better gauge the participants’ body language and responses. The pre-session call should also address whether any reasonable accommodations are needed, such as an interpreter.

The pre-session call is a modest investment that can pay significant dividends in mediation success by promoting thoughtful consideration of critical issues and avoiding pitfalls and delays that can otherwise derail mediation. It should be included in the mediation toolbox for mediators, attorneys and their clients.

Gary Fowler *is an arbitrator and mediator with JAMS, handling employment, trade secret and other post-employment disputes, executive contracts, equity compensation, and wage and hour matters, as well as insurance, business and commercial, civil rights, health care, professional liability and federal law disputes.*