

Daily Journal

www.dailyjournal.com

WEDNESDAY, APRIL 23, 2025

Published In The Top Resolution Lawyers 2025 Supplement



The power of pre-session calls in negotiations

BY LYNN DURYEE

Many mediators will contact counsel separately after they've read the briefs, allowing them to focus on settlement strategies and motivations rather than reviewing facts and issues.

When settlement judges transition from the court to private mediation, they might guess that the highlight of their new career is not having to start each day with civil harassment petitions. But they'd be wrong. The best part is their newfound ability to contact counsel in advance of settlement negotiations to discuss the case privately. What a goldmine! The insightful lawyer will often tell the mediator what they need to know to approach negotiations and hit the ground running on mediation day.

Many mediators will contact counsel separately after they've read the briefs. That way, time is not spent reviewing facts and issues but instead on settlement strategies and motivations. Here's what may be covered:

1. How can the mediator be most helpful to you? Once counsel cycles through glib responses like "Get me as much money as possible" and "Make

the other side understand we're right and they're wrong," counsel may deliver the key to the case. For example, "We want to settle, but my clients really need to have their day in court." Great information! The mediator will make sure to allocate sufficient time for the parties to feel heard and understood. Or "We're not coming with enough money to get it done, but we're hoping you'll be able to give a mediator's proposal that we can take up the chain." Thank you! Very helpful for expectation management. The mediator may then focus on where the parties may be willing to go to resolve the matter and why that number is a fair one for the case. Or "I need you to help my client with an opening demand/offer." Happy to help! It is not uncommon for parties to believe they are more capable than their counsel in evaluating their case, and mediators are prepared to cover why parties should listen to

their lawyers. Variations are endless, but the skilled lawyer can help the mediator by privately sharing sensitive information in advance of the mediation.

2. Who will be in your room?

Mediators want to ensure that parties and decision-makers are present. It's helpful to know which participants have the strongest voices, whether support people will be present, and if their participation will be a help or a hindrance. Some plaintiff's lawyers wish to exclude their clients from the mediation process, and this is something that some mediators need to cover in advance because they may want parties included in the process. Also, are there any limitations on the participants' availability during our session - such as time zones, childcare or other obligations that might affect our end time? The pre-session conference will avoid unpleasant surprises and allow the mediator to plan accordingly.

3. Did parties exchange briefs?

Increasingly, it seems, lawyers are reluctant to share briefs, choosing to rely on the mediator to explain their position to their opponent. Most mediators prefer the exchange of briefs. After all, the mediators



Hon. Lynn Duryee (Ret.) is a mediator, arbitrator and special master with JAMS in San Francisco. Before joining JAMS, Judge Duryee served as a Marin County Superior Court judge for more than 20 years, serving as the presiding judge from 2006 to 2007.

are not deciding the case, so they are not the ones who need convincing. Lawyers need to convince their opponent of the strength of their stance, and are better positioned to do so because they know more about the case than the mediator. If lawyers have confidential information, they should let the mediator know in a side letter.

4. What's the relationship like between counsel? In a dream mediation, the answer is, "My opponent is a pro. We could settle the case in 10 minutes if our clients were out of the room." Why? Because lawyers who respect one another can really hear what the other side has to say. When lawyers get

along, the mediator has a bonus tool: If parties reach an impasse, the mediator can gather the lawyers and ask them what to do. They will be able to talk until an idea emerges. Analogously, if the lawyers have strained communications, the mediator may avoid joint sessions and practice caution when framing information from the other side.

5. What are latest demands and offers? If the demand at mediation is higher or the offer is lower than it was before, what has changed? If the plaintiff hasn't formulated a demand, understand the reason why. In some cases, such as when a critical expert report is pending, it might make sense

to reschedule the mediation to a more productive day. If insurance is involved, demands must be delivered well in advance of the mediation so that decision-makers can fully consider them.

6. If this is a follow-up mediation, what happened the first time? Did anything go wrong? If the mediator hears, for example, "Our first mediator waited too long to begin negotiations, and we ran out of time" or "The mediator was too evaluative with my client," the informed mediator can avoid making the same mistake in the second session.

7. Is there anything else the mediator should know? By

the end of the pre-session call, little details may pop into counsel's mind. "My client feels like she needs to stand up for herself." "My client does not want to hear how expensive litigation will be." These final insights may hold the key to unlocking settlement.

Mediation days can fly by. Every minute counts, especially in the morning when the tone is set. A pre-session call allows the mediator to walk into the room prepared - equipped with strategy, perspective and the trust of counsel. With that foundation in place, the mediator will be ready to guide the parties toward resolution and use the afternoon to fine-tune terms and close the deal.