

Outside Counsel

Pre-Session Calls: A Crucial Step In the Mediation Process

One year ago, I retired from my position as a federal magistrate judge and joined JAMS as a neutral. While change is always challenging, I anticipated a fairly straightforward transition. After all, during my 28 years on the bench of the U.S. District Court for the Eastern District of New York, I presided over countless settlement conferences and a large number of bench trials and evidentiary hearings. How different could private mediations and arbitrations be, I thought, from the settlement conferences and bench trials and hearings with which I was so familiar?

While the similarities between settlement conferences and mediations, and between bench trials and arbitrations, far outnumber the differences, there are still significant distinctions. In this article, I will focus on one in particular: the prevalence of substantive pre-mediation-session conferences in private mediation.

As a judge, no doubt due to time constraints—and frankly because the idea just didn't cross my mind—I did not typically have substantive ex parte discussions with counsel in advance of a settlement conference. The only pre-session communications I had took

place with all counsel present either in person (pre-COVID) or by telephone, and were limited to scheduling the mediation and the submission of mediation statements as well as identifying who should be present at the session.

Upon entering the world of private mediation, I quickly learned of the prevailing view that pre-session calls are an important step in the process. Nevertheless, I was skeptical. After all, I had helped numerous parties reach settlement without holding one.

I am now convinced that pre-session calls serve several very useful purposes, and I have consistently incorporated these calls into my practice. I typically hold pre-session calls after mediation statements are submitted to me and exchanged by the parties.

Here are some of the reasons why I find pre-session calls to be so useful.

Who's Driving the Bus, and What



By
**Steven M.
Gold**

Kind of Bus Is It? I typically hold pre-session calls with only counsel present. Doing so provides counsel an opportunity to enlist the mediator's help with a recalcitrant client.

In addition, cases often raise issues that are difficult to discuss candidly in the presence of a client. In private conversations with counsel, I have learned about clients facing deportation, terminal illness and severe unrelated financial pressures. Not only might these subjects be challenging to explore in detail with the affected persons present, but raising them in advance affords me as the mediator time to contemplate how best to handle them during the session.

Pre-session calls can also give the mediator insight into the parties' pressure points. In my experience, successful mediations typically involve both a candid, open-minded consideration of the merits of the parties' respective positions and the burdens of proceeding with litigation, as well as a sensitive exploration of the emotional, psychological, and practical needs of the parties.

A pre-session call can help identify which of these are likely to play prominent roles at the mediation. Having this

information in advance helps the mediator consider how to prioritize affording the principals an extended opportunity to discuss their feelings and personal circumstances as opposed to making certain counsel has a full appreciation of how the law and facts of a case may impact the outcome if a resolution is not reached.

What Are You Saying? Judges are generalists, and mediators who are retired from the bench accordingly are as well. And even excellent attorneys who carefully prepare their mediation statements may be so intimately familiar with their cases that they do not appreciate how much background knowledge their statements presume.

I use pre-session calls to confirm that my understanding of the assertions made in the parties' mediation statements is accurate. I have found that it is much better to clear up any confusion in advance of the mediation than to have it surface during the session itself. While attorneys may appreciate that a retired judge may be quite competent yet unfamiliar with particular industries or the nuances applicable to certain specialized areas of law, a client who has spent years or even decades in a particular field may lose confidence in a mediator who seems not to understand it. It is therefore crucial to clear up any confusion ahead of time and begin the mediation with a crisp, clear, confirmed understanding of each party's position.

Get Ready! The mediator is not the only one likely to benefit from discussing the content of the mediation statements in advance. Attorneys immersed in a case and focused on developing arguments that support their clients' positions may not appreciate the force

of an adversary's contentions. Knowing that the mediator sees some merit in an adversary's argument may lead an attorney to reconsider a previously held view of the strength of a client's position, or at least take the time in advance of the session to formulate a more persuasive argument.

For example, imagine a case where the defendant asserts that the case is likely to be dismissed on summary judgment,

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ment, while the plaintiff's attorney—fully familiar with the evidence—is convinced the claims will survive any such motion, and therefore does not give credence to the defendant's view or prepare a robust rebuttal of it in advance of the mediation session. A discussion ahead of time with a mediator who sees arguable merit in the contemplated motion may prompt plaintiff's counsel to prepare a detailed itemization of material questions of fact and citations to supporting evidence from the discovery record.

As another example, consider the mediation of a class action where defendant is confident that its settlement position is well-founded. Questions from the mediator about whether the defendant's settlement proposal would be preliminarily approved by a court

might lead the defendant to reassess its position or come to the mediation equipped with case law demonstrating that its proposal is fair and reasonable and will survive the court's scrutiny.

Finally, a frank discussion of the merits of a party's position may occasionally trigger a heated reaction. Having that discussion in advance allows time for any steam to dissipate before the session itself.

These are just some of the reasons I have found pre-session calls with counsel tremendously helpful. Not only are the calls productive, but I truly enjoy them! The calls give me an opportunity to interact with counsel more informally than I likely would during a mediation session, to learn from them, and to get to know them better. What a great perk of serving as a private mediator.

Steven M. Gold (Ret.) served for 28 years as a U.S. Magistrate Judge for the Eastern District of New York, including nine years as the court's chief magistrate judge. During his nearly three decades as a federal magistrate judge, Judge Gold presided over thousands of settlement conferences, pretrial proceedings, evidentiary hearings and jury and bench trials.

