



## Getting the most out of a pre-mediation conference

MEDIATION HAS BECOME A LINCHPIN IN AN ATTORNEY'S ARSENAL, AND A PRE-MEDIATION CONFERENCE HAS BECOME ESSENTIAL IN A MEDIATOR'S TOOLBOX

A recent ABA survey found that 96% of respondents thought pre-mediation meetings were important, very important, or essential. (ABA Section of Dispute Resolution Task Force on Improving the Quality of Mediation, April 2006-March 2007.) In the Southern District of New York, mediators who held pre-mediation conference calls accounted for 73% of the mediators, and they settled 57% of their cases. In comparison, 27% of the mediators who reported no pre-mediation conference settled 50%. (S. District of New York, *Mediation Program Annual Report*, 2022.) A recent study found California is the busiest state for civil disputes nationwide and ranks fourth fastest in resolving them. (Conybeare, *California among the states with quickest civil lawsuit settlements, study finds*, (11/29/2023) KTLA5.)

### What is a pre-mediation conference?

A pre-mediation conference is a telephone call or virtual meeting between a mediator and the participants, often only the attorneys without the litigants. It is best to have these meetings after the mediator reviews the mediation brief so the mediator will understand the issues and address questions not covered in the brief.

The meeting can be conducted virtually, which allows the attorney and the mediator to at least "put a face to the name." The meeting can also efficiently be conducted by telephone, which may be less formal and allow the participants to go straight to the issues and questions presented by the brief.

### A pre-mediation meeting allows everyone the opportunity for preparation

**Mediations with pro-per litigants:** Pre-mediation meetings allow a mediator to address ethical issues, especially when there is a pro-per. California Rules of Court, rule 2.4 states "a lawyer serving as

a third-party neutral shall inform unrepresented parties that the lawyer is not representing them. When the lawyer knows, or reasonably should know, that a party does not understand the lawyer's role in the matter, the lawyer shall explain the difference between the lawyer's role as a third-party neutral and a lawyer's role as one who represents a client." Thus, if you are the mediator in a case involving a pro-per, a pre-mediation meeting can be a very effective and reasonable tool to cover the process and any questions regarding ethics.

Additionally, a mediator can explain that mediators can have ex-parte communications with each side, confidentiality of the mediation process, and additional confidentiality of the ex-parte communications. Mediations with pro-per litigants are challenging, mainly if the pro-per has not provided all the necessary documents or does not understand the purpose of mediation. A pre-mediation conference may take additional time when working with a pro-per. Still, it can help focus the mediation issues and ultimately lead to a successful outcome.

**Mediations with represented parties:** Ethics, confidentiality, and the process can be discussed when a mediator speaks to counsel. However, the pre-mediation meeting usually focuses on the case issues and theories.

In a typical mediation with multiple attorneys and represented parties a pre-mediation meeting is an opportunity for a mediator to understand the issues. (Fisher and Ury, *Getting to Yes, Negotiating Agreement Without Giving In*, 1981.)

Mediators can also use a pre-mediation meeting to discuss who will attend the mediation and ensure that all affected and necessary entities will be present. For example, in a commercial trucking accident there might be multiple types of insurance, such as insurance on the trailer and insurance on the tractor, as well as

excess coverage, a pre-mediation conference can ascertain whether or not all levels of insurers will be represented or aware of the litigation. Additionally, if the defense believes excess coverage will never be reached, the mediator can at least be aware that the excess adjuster has not been engaged in the process.

A pre-mediation meeting can help set an agenda for the mediation and organize the mediator's approach. In some mediations, such as car accident cases, there may be an obvious agenda of negligence, causation, and damages. However, in other mediations, including employment and business disputes, a mediator will decide which issues are the "hot button" issues and whether to start with those issues or with easier issues and get to the more challenging issues as the day progresses.

Additionally, a pre-mediation meeting can help a mediator determine whether all parties are procedurally ready for the mediation. The mediator should be aware of discovery issues, including pending discovery responses, potential expert reports, or pending motions. At times, discovery or pending motions may necessitate a short continuance of the mediation. Many mediations occur with pending issues, but the pre-mediation conference can alert a mediator to the number and severity of the problems and assist a mediator in diffusing or leveraging arguments.

### Pre-mediation conferences can create rapport

Contact between attorneys and mediators helps establish rapport well before the actual mediation session. At times, the less stressful telephone call can lead to less stressful communication between the mediator and the attorneys. Even a virtual call, which easily allows a mediator to see and meet an attorney, is less stressful than an in-person meeting

and facilitates a quick document review through screen sharing.

Mediations often begin in caucus with counsel and their parties. Mediators are often taught to cover issues in an opening statement describing everything from confidentiality to style. Frequently, when a pre-mediation meeting occurs, the mediator can tailor this opening. Sometimes, counsel will ask for a very inclusive opening statement when counsel shares in pre-mediation that the party needs some reassurance about the process. California Rules of Court, rule 3.857 on the Quality of the Mediation Process, provides an extensive list of issues that can be covered. Conversely, if counsel advises that a client is litigation savvy, a mediator may cover some or all of the traditional opening in the pre-mediation meeting or at least tailor the opening to the level of a client's experience.

Psychologically, a pre-mediation meeting can provide the boundary between the rules, process, and negotiation. Frequently, a mediator has to gauge whether the parties are ready to pivot to issues. During a pre-mediation meeting, the parties and attorneys may understand that the mediation has already started. On the actual mediation date, the parties and attorneys are more inclined to come to the mediation ready to discuss substantive issues.

There are no hard and fast rules for the issues that can be discussed at a pre-mediation call, nor are there rules

regarding repetition. A pre-mediation call allows a mediator to introduce the process. A pre-mediation call also allows a mediator to discuss with the attorneys his or her mediation style. Presumably, the attorneys have used the mediator before and may know that the mediator prefers a certain type of approach; however, it can be a time when a mediator comes to understand that a slightly different approach is necessary. Mediators often use a combination of facilitative and evaluative approaches.

A pre-mediation call also allows mediators time to think about the issues, the attorneys, and the parties. The attorneys and parties have lived with the case for months, if not years, and the mediator has not had that same level of exposure. A pre-mediation call allows a mediator to ruminate and potentially find a creative way to approach the issues in the mediation. A pre-mediation call presents information to the mediator in a less stressful environment without a time limit. It allows a mediator time to digest information or subconsciously work on the mediation before being in the actual session.

#### **A call can start the road to a successful resolution.**

In a pre-mediation call, a mediator can remind the attorneys to know their costs, medical numbers, lien claims, and potential lien reductions. Even for liens that one might not usually think about,

such as a tax lien or a child support lien, so that when a case is resolved, there are no unknowns. The pre-mediation call also allows a mediator to understand where the settlement funds might come from and avoid possible delays or at least address the fact that funding will take time.

A pre-mediation call allows mediators to remind attorneys to have a release or settlement agreement ready. The mediator might ask each party to draft a settlement agreement to expedite settlement and perhaps even assist in identifying important issues.

#### **Conclusion**

There is no formula for a mediation and, indeed, no formula for a pre-mediation meeting. Nonetheless, a pre-mediation call is the ultimate multi-tool that allows parties and mediators to address issues and processes that can lead to a successful mediation.

*Jeanne Behling began her career as a Deputy District Attorney in Los Angeles, and during her career as a litigator she handled personal injury, products liability, and employment litigation, for both the plaintiff's side and the defense. She began her full-time mediation practice in 2016. She is an adjunct professor teaching Mediation at Chapman University, Fowler School of Law. [jbehling@adrservices.com](mailto:jbehling@adrservices.com) or [lishateam@adrservices.com](mailto:lishateam@adrservices.com).*

