



The Pre-Mediation Conference Call: Help Me Help You!

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One of the luxuries of having a fledgling mediation practice is that I can be generous with my time. One way I like to take advantage of this and provide added value is to have a pre-mediation conference call with the attorneys of record. This call is not a time to get into the merits of the case or discuss numbers. Instead, I see it as an opportunity to get a head start on laying the groundwork for the negotiations. Ultimately, I want to know how I can best help the parties and counsel resolve their dispute.

For the pre-mediation conference, I have a few goals in mind. My first goal is to understand what forces may be driving the attorneys in the case. For instance, if I haven't worked with counsel previously, I want to get a feel for the type of practice in which they work. In addition to building rapport, learning about an attorney's practice model, including the typical case load, practice areas and trial experience, provides valuable insight into his or her negotiation style and objectives.

I also want to understand the nature of the working relationship between counsel. If counsel have a good working relationship, then I know I can appeal to their sense of achieving a common goal. If the relationship is more contentious, then I know I will need to spend time building mutual respect and understanding between them.

My next goal is to determine the level of client control that counsel have. Understanding the dynamics of the attorney-client relationship is vital to determining the role I will

play as mediator, and the approach I need to emphasize during the settlement discussions. If there are client control issues, then I know I will need to spend more time speaking directly to the client to gain trust and credibility. If counsel have good client control, then I know I will be spending most of my time persuading the attorneys that a settlement is in their clients' best interests. If there is an insurance carrier involved, then I know I will have to spend time pushing another set of buttons in order to close the deal.

Lastly, I want to know if there are any particular obstacles to a settlement (other than the monetary expectations of the parties). For example, the financial wherewithal of a defendant may be a factor in setting the realistic settlement range for the case. In an employment dispute, the tax treatment of any settlement may be an issue. Where such obstacles exist, the pre-mediation conference is a good time to brainstorm with counsel about solutions, such as the parameters of a payment plan for a financially distressed party, or getting an opinion from tax counsel regarding the proposed tax treatment of a settlement.

While these are topics that can and should be discussed during the actual mediation, speaking with counsel before the mediation, outside their respective clients' presence, promotes more candor and trust. This is understandable, because during the mediation counsel are often in a bind in their roles as zealous advocate for their client and collaborator with the mediator and opposing counsel. An effective mediator will help the attorneys reconcile these roles, but counsel have to do their part during the pre-mediation conference. As the famous line from Jerry Maguire goes: "Help me help you!"



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