



The Telephonic Mediation: Viable Alternative or Pipe Dream?

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In thinking about new ways to provide value as a mediator, I came up with the idea of a telephonic mediation. The way it would work is that both sides still reserve a date and submit briefs, but the actual mediation would take place via private telephone caucuses with counsel throughout the day.

This idea was borne out of my days as a practicing attorney when I had a smaller case that I wanted to resolve quickly and efficiently. If I had a good working relationship with my opposing counsel, I would pick up the phone and have a candid discussion about the possibility. If the opportunity was there, then we would commence a negotiation over several rounds of phone calls and/or e-mail until we reached a deal. However, if I didn't have the right working relationship with my opposing counsel to make it work, then we might have to retain a low-cost mediator or perhaps use the court's pro bono mediation program, if available.

It's a shame that more cases can't be resolved between the attorneys, because doing it that way would be more efficient and cost effective. That said, it wouldn't work in every case. In fact, it probably wouldn't work in the majority of cases.

The common characteristics of a case where a telephonic mediation might work are: (1) there is relatively low exposure; (2) the key facts are undisputed, or there is conclusive evidence going one way or the other; (3) there is a high level of trust between the

attorneys; (4) the attorneys have strong client control; and (5) the parties are not emotionally invested in the litigation.

But what about a middle ground where you have some of these characteristics, but there are still obstacles to negotiating directly with the other side? In these cases, why not retain a mediator, on a reduced-fee basis, to help the parties close the gap without a full-blown mediation? In this day and age we have telephonic court appearances, telephonic meetings and telephonic depositions, so why not have a telephonic mediation? In fact, substantial time at most mediations already is spent in private caucuses with counsel, outside the clients' presence.

Ultimately, I'm not suggesting that telephonic mediations are the wave of the future, because most cases can't be resolved that easily. But where the conditions are right, I would urge the parties and counsel to consider it as an outside-the-box option.

What's next, mediation via text message?

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