

Mediating by Telephone

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The biggest difference in mediating by telephone rather than face to face or in-person is the mode of communication. As simplistic or even oxymoronic as that may seem, it is true and has numerous ramifications. To be a successful phone mediator you have identify and deal with the dynamics of telephonic conversation as opposed to face to face communication.

Standard telephone calls verses meetings around conference room tables

When people come to your conference room, they come with a number of expectations. First, they usually dress in a professional manner, expecting similar dress from the others that are also there. They have taken considerable time to leave whatever else they were doing that day and drive or even fly to the location of the meeting. The very act of committing that level of time, energy and resources to the mere attendance at the meeting means that they will commit similar time, energy and resources to preparing for the meeting. (While I will acknowledge that we all have war stories of people who did show up completely unprepared, the exception proves the rule. The fact that they did so is so memorable and outside of the expected social norm that you remember the incident and even categorize it as a war story. I would also argue that in many cases the lack of preparation may well have been a deliberate negotiation tactic. In the rest of the cases, it was probably sheer laziness.)

Second, they expect a similar level of energy and commitment from the other participants in the meeting. Think of how irritated (angry) meeting participants get when they believe that others in attendance have not come prepared, “have not done their homework”. The anger comes from the belief that the other has committed a social betrayal – violated a social expectation, even disrespected you by wasting your time. When people come to your conference room, they expect to be prepared and they expect everyone else to be prepared too.

Third, they expect an agenda or organized process to the meeting. They expect someone to be in charge and for that someone to have at least an outline or roadmap as to where the meeting is going and what it is to accomplish. This is reflected in our standard mediation opening statements about the process, roles, expectations and stages of the mediation. We are confirming and satisfying the parties’ expectation that this meeting has a roadmap and a goal.

Fourth, they expect a successful outcome, or they at least have a realistic hope of a successful outcome. If they really thought that there was little to no chance of the meeting being productive, they would put their energy into getting out of the meeting, rather than getting ready for it.

When you call people on the phone, there are a very different set of expectations. First, is that this will be a very short (comparatively) meeting. While face to face meetings are usually scheduled in hour blocks of time, phone calls are recorded in tenths of hours. The expectation is

that the call will be short (less than 5 minutes) or long (15 to 20 minutes). Unless previously notified and reserved, most people do not expect a phone call to reach, much less exceed, 30 minutes. Phone calls are what we fit in between the hour long meetings in our day.

Second, “you called me, so what do you want?” There is less expectation of a meeting plan or agenda, but instead usually a point or two that is communicated or clarified. But, whatever the point of the call, it is your point and you do not (or cannot) expect me to do anything to be prepared. If you ask me anything I do not know on the top of my head, I will have to get back to you. This also means that to avoid any subject I do not wish to discuss, I must merely assert that you are asking about something that I do not have at my fingertips and I will have to get back to you – which in fact I may or may not do.

Third, when you call people you generally cannot expect them to bring energy to the conversation. It is your call, you need to energize them. They are passive and respond to your questions. But until you get them engaged, do not rely on them to be an energy source. Phone call recipients are not committed to the call the way meeting attendees usually are.

Fourth, the person who receives the call has no particular expectation as to the outcome except:
1- I hope you have a point to this call, otherwise it will be very short, and
2- If a successful outcome does not appear to be on the horizon, I will terminate your call.
The other participant has no psychological investment in the success of your call, and to the contrary reserves the right to cut off the call if it is not meeting her time and interest needs.

The bottom line is that the telephone mediator must be aware of these psychological and social differences between modes of meeting/communicating, and be ready to deal with them.

Getting ready to mediate by telephone

Bring Energy

The mediator must be ready to provide the energy to get the case rolling toward settlement. The parties are much less likely to show up with a gung ho, let’s get this case settled, attitude than they do at an in-person mediation. They will be polite, but much more passive, so you have to bring the energy. That does not mean being a rah-rah cheerleader, but rather be ready to be persistent. Do not take their lack of engagement as a sign that the case cannot settle. Neither you nor they know if it will settle, as they have not really tried yet. They are present, but you need to get them into the game. I have been told many times that my persistence is what settled a case. I do not know if I am patient or stubborn, or both, but they are helpful attributes in mediating cases by phone.

Slow Down

As noted above, most people expect a phone call to be somewhat shorter than a face to face meeting. So the expectation may be that if we are not headed toward a settlement in 15 to 20 minutes, then we need to stop the conference. Do not allow the participants to hustle you down that path. Take charge of the mediation and slow things down. If need be, explain that settlement, no matter what the forum, takes time. There are issues to discuss, information to

process, decisions to be made, and all of those take time. The main thing is to not allow yourself to feel time pressured.

Realistically, there are time differences between two methods. For me an average unsuccessful face to face civil mediation is about two hours. My average unsuccessful phone mediation is an hour. I attribute that difference mainly to how the participants prepare. For an in-person mediation, the parties come ready to make a lengthy presentation about their case and then have follow-up discussions. All of this takes a couple of hours, then if you are making progress, the mediation lasts until the parties either settle or reach impasse after exhausting all their options. For my phone conferences, even with a letter from the court requesting that they come ready to discuss the case and ready to make and respond to offers, the parties come ready to answer my questions, but without much in the way of a planned presentation. Or if there is a presentation, it runs 5 to 10 minutes, not 30 minutes. A discussion of the case and its present procedural posture, plus private conferences to elicit offers and responses, usually runs an hour.

Thus, while a phone mediation may be shorter than an in-person one, do not let the social expectation that a phone call is a short conversation pressure you into not fully exploring with the parties the case and its settlement possibilities.

Make Sure The Parties Are Prepared

Similar to the parties not bringing energy to the conference, they are inclined to not bring energy to the preparation. So you may need to prepare more than usual. While I commonly will walk into a mediation knowing little more than the general area of the law (property division, car wreck, employment discrimination), for a phone mediation I always review briefs or a memorandum to get a good grasp as to not only the area of the law, but also the claims, underlying facts and specific issues that have been or are likely to be argued to the court. The parties will get impatient with spending a lot of time bringing the mediator up to speed. This impatience may be irrational, as they do not show similar impatience in a face to face setting, it is nonetheless real.

Your preparation also adds momentum to the notion set forth above - now that they are there, get them into the game. If you have not reviewed at least parts of the file and the parties give you only a sketchy summary, you will likely not have enough information to ask insightful, penetrating questions that will get the parties engaged in the discussion. There may be significant issues that may aid or impede settlement about which you will never learn. Issues you are unaware of cannot be used to nudge the parties toward settlement.

Once you are prepared, you can more realistically assist in making sure the parties are prepared. Have they completed sufficient discovery? Is there an issue to which documentation is vital (e.g. medical bills, disability rating, the contract in dispute)? If you do not have the documents, it is possible the other side does not either. And without them, your mediation is going nowhere. Check in with the parties and make sure you get and they get what they need to have a fruitful discussion in your telephone mediation.

If in the mediation a party is lacking in information, impasse is not the only option. Send them home with work to do and set up another conference call.

Today Is Not The End Of The World

Due to the psychic energy that goes into preparing for and attending an in-person mediation, the attitude frequently is that if the case does not settle today, there is no point in continuing to try. Having invested the time and effort into preparing for and attending an in-person mediation, many parties are then reluctant to engage in serious settlement efforts again, having failed once. With telephone mediation, the opposite is true. As little effort or energy has gone into getting ready for and getting to the mediation, the parties are not upset by the idea of taking a break, allowing the lawyers and litigants to confer, then getting back together in a few days to pursue settlement further. This is aided by the parties' frequent pessimistic attitude about even the possibility of settlement. They are so surprised and pleased that progress is being made toward settlement that they offer no resistance to the notion of a second session.

My experience is that once we have swapped an offer or two, settlement discussions usually break down as someone needs to go back to their client(s) to discuss the present offer and see if more authority is forthcoming. It is the rare exception that a case settles in the first conference. Most settlements are the product of numerous calls and conferences. You need to be ready for the notion that this telephone session may not be the only one. If settlement looks like a possibility, you need to prepare the parties for the idea of having multiple calls leading to a settlement.

Getting back to preparation, if there is to be another telephone conference, the mediator must be sure everyone is prepared for it. While the parties are on the phone, everyone should pull out calendars and select a day and time for the next conference. Agree on who will be participating, and if the mediator is calling out to set up the conference, find out where the participants will be and the phone numbers at those locations. Review whatever agreements or proposals are on the table to make sure everyone is on the same page. Lastly, confirm any homework that either party has agreed to undertake, such as gathering and exchanging documents, providing backup calculations or verifying information.

Advantages to Phone Mediation

There are advantages that the experienced mediator can use. Primarily is the simplicity. Phone mediations do not take the time and energy to prepare for and to attend that a face to face mediation does. So parties that are reluctant to invest multiple hours preparing and a day meeting because they do not think settlement is very likely may be more willing to spend a few hours get ready for an hour on the phone. If no progress is made in that hour, then not much is lost. But experience teaches that many times that small investment produces a surprising return. No one thought the case would settle, but once discussions start, parties find they misperceived the other side's positions and goals. Phone mediations can also be more flexible. If you get into a face to face mediation, it is hard to put things on hold while another person comes to join you. But adding another participant to a phone call is a matter of seconds. Thus parties can be more conservative about who they bring to the conference, because additional people can always be added if it turns out their input is important.

Telephone mediation is a very different tool for the mediator in the digital age. With thought and care, it can be a very effective tool.

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