

Mediation Success Tips: The Value of Pre-Mediation Calls with Counsel

By Mediator Gene Witkin

As mediators, we are frequently re-evaluating which techniques more consistently increase the likeliness of resolution, or at least a productive session leading more quickly to resolution. Recently, I had the opportunity to attend the 5th Annual Global Dispute Resolution Conference. In listening to fellow neutrals practicing around the world, it is clear that, while mediation may be less widely used outside the U.S., factors that assist settlement are certainly consistent. These include learning what deadlines may be used to encourage settlement, focus on overlapping objectives, as well as early assessment whether the exchange of additional documents is necessary to resolution.

Conversely, from prior years in private law practice, I found that factors which used to frustrate the settlement process included missing a key moving part such as an insurance component, or spending too much time focused on a trivial detail or perhaps on a 4th party defendant who really just wants to “chip in” at the end. So, for attorneys heading into mediation, how to make your session more productive?

One strategy to significantly increase the chance of success is the private pre-mediation call between counsel and the mediator. Here are three good reasons:

1. Behind the Scenes: More often than not, there can be a driving issue with a party that needs to be aired out during the mediation session, even if it may not be case determinative. Having a pre-mediation call allows counsel to preview that for the mediator so that the mediator can be prepared with the best possible response. This can range broadly, with examples including being a sympathetic ear for a frustrated client, determining what additional documents may help to be exchanged in advance, or gaining insight as to a key deadline that may be used to get the other side to move further.

2. Candid Settlement Objectives: Once the mediation session starts, clients can frequently get entrenched in their positions as to what another party should do. However, most successful mediations require shifting focus to the parties’ respective interests (generally speaking, what’s important or valuable to a client), where there is greater likelihood of compromise. To that end, discussion in advance with the mediator regarding these issues can be very helpful in several respects. First, it minimizes the likelihood of presenting demands or offers in a way that causes the other side to freeze up or not counter meaningfully. Second, it helps the mediator steer the session to keep both sides focused on a middle ground where their interests can be achieved to a mutually acceptable level. And third, there may be something in a mediation brief, especially one shared with the other side, that is best clarified in private.

3. Insurance Angle: In cases involving property damage or bodily injury, as well as other cases with money damages, insurance frequently comes into play for defendants and third-party defendants. In these cases, an entire second layer of analysis can be critically important, including what part or parts of the claim are “covered.” A pre-mediation call is a win-win in these circumstances. From counsel to mediator – the lawyer can advise in advance where a reservation of rights is resulting in sticking points for settlement, which in turn helps the mediator plan to better direct the path of the session. Similarly, early discussion regarding other potentially impacted policies assists in ensuring the necessary insurers are on notice to actively participate in the mediation. From mediator to counsel, the lawyer can receive clarification of which plaintiff claims may be highlighted, which can help with a pre-mediation report to the insurance company to increase reserves and/or better prepare the claims representative in advance to make the mediation session more productive.

In summary, there is much to be gained by private pre-mediation discussions between counsel and the mediator. Where possible, these should be considered part of the mediation and completely subject to mediation privilege. With the pre-mediation calls, the actual mediation session will almost certainly be more productive, and the likelihood of settlement much improved.

To schedule a case with Mediator Gene Witkin, please contact AMCC at (800) 645-4874 or contact@Amccenter.com