

SPONSOR CONTENT

The Importance of Pre-Session Meetings and Post-Session Follow-up in Complex Mediations

BY HELEN E. FREEDMAN

September 26, 2023

While parties to a dispute may think of mediation as one or two sessions in which the parties and counsel meet with a mediator first jointly and then in separate caucuses, in complex business or employment cases, mediation often starts before the first session and ends well after the final in-person or virtual session concludes. Pre-session meetings can provide the mediator with extremely useful information about the nature of the dispute, the parties involved and their ultimate goals. A mediator's post-session involvement can often bring the parties to "yes."

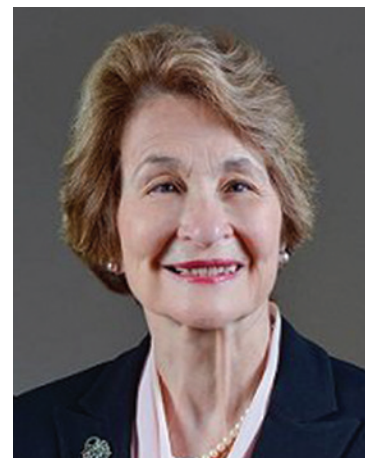
Pre-Session Meetings

Usually, the mediator's first meeting with the parties and their counsel is conducted via a conference call or virtual meeting. The mediator's goal is to become acquainted with the case and each of the parties' contentions. Before or immediately after that discussion, all relevant documents and exhibits, including contracts, important correspondence such as emails, pleadings, motions and any judicial decisions (if the case is already in litigation), should be submitted to the mediator for review. There may also be related cases or prior arbitral or judicial decisions that will help the mediator understand the history of the dispute. In some cases, it can be helpful for mediators to have the parties submit a preliminary statement as to exactly what they expect to resolve at the mediation; i.e., state their goals, even before submitting a mediation statement. I have seen this tactic be particularly successful in cases where a business is breaking up, parties are trying to work out a future relationship or

multiple insurance carriers are involved. If the parties cannot agree as to their goals, or if in a multi-party mediation some parties agree and others don't, multiple joint or individual statements setting forth issues and goals may be submitted in order for the mediator to structure the mediation in the most efficient and effective manner and to achieve complete resolution of all disputed issues. For example, the parties should agree as to what, if any, debts are outstanding if there is a dispute involving who is responsible for debts.

The mediator will set a date by which parties must submit mediation statements, allowing enough time for follow-up by the mediator before the first session. Mediation statements can be fully exchanged, confidential or partly confidential. I usually encourage as much exchange as is possible, but you should allow parties to chart their own course.

After receiving and reviewing all of the submissions, which can take a substantial amount of time depending upon the case, speaking individually with counsel is both important and useful. These calls are important because they allow the mediator and counsel to become acquainted and to give the parties confidence in the mediator's ability to effectively structure the mediation and to express optimism



Helen E. Freedman

as to its potential for resolution. The mediator can ascertain how each side views the case, find out what counsel thinks the mediation should achieve and learn about the personalities and emotional states of the parties. Often, counsel will provide confidential information about the client or counsel's own belief in the case or the client's position that cannot be included in the written mediation statement. When corporations are involved, and where general counsel will either be present at the mediation or a phone call away, outside counsel often have a great deal of useful knowledge about both the issues and what their clients' expectations and positions are. Depending on the number of parties involved and the complexity of the case, it may be necessary to have several conversations. For example, if there are multiple issues, it is important to develop a consensus as to the order in which issues will be addressed. These pre-session calls save a lot of time at the actual session and enable the mediator both to anticipate any potential roadblocks or particularly stressful issues and to structure the proceedings in the most efficient manner.

At the pre-session calls, it is important to establish if a joint session with each party setting forth its position, a joint session with just a meet-and-greet and a few preliminary remarks by the mediator and possibly each party, or no joint session is most desirable. I prefer a full joint session so parties can hear from opposing counsel what the other side believes. This decision should be guided by counsel, particularly when there is substantial antagonism between or among parties. I do urge counsel to be cooperative even when the parties are not.

Post-Session Follow-up

Oftentimes, parties that should settle, and may come close to settling by resolving some issues, do not reach a final agreement during the mediation session. That may happen for myriad reasons: A decision-maker is not available; a board of directors may have to approve the settlement terms; something tangentially related to the disputed issues has to be worked out before the parties can

go forward; participants are in different countries and the time difference interferes; or parties are just too tired after a very long day.

At the end of the session, in order to preserve the possibility of settlement, mediators should make clear that they will be in touch with the parties within a week or two. If one party objects to the follow-up but the other does not, I make my first call to the more receptive one. The follow-up can be done via conference call, individual calls, email or even a Zoom session. Sometimes the parties indicate that they think they can work out the issues themselves. In that case, I ask them to let me know what happens, and I will email them if I don't receive an update.

Follow-up can start with the party that seemed most ready to settle or the party that needed to obtain authority. Not infrequently, I have had to telephone back and forth in the same way I went back and forth between the parties during the session. When an agreement is ultimately reached, it is essential to follow up with an email setting forth the terms and offering to help craft the formal agreement. Parties can generally work out the agreement themselves and then send the mediator the final signed copy.

***Hon. Helen E. Freedman (Ret.)** serves as an arbitrator, mediator and special master (neutral evaluator) at JAMS in a variety of disputes including Business/Commercial, Construction Defect, Class Action/Mass Tort, Employment, Government/Public Agency, Insurance, Personal Injury/Torts and Professional Liability. Prior to JAMS, she served for 36 years on the New York State bench.*

