

Mediation before the mediation; The important role of a pre-mediation session.

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Introduction

Looking at the mediation articles published in journals and circulating online, there is no shortage of material regarding theoretical and practical aspects of the various procedures for mediating in person and online. There is analysis of practically every moment of the mediation process, but few, if at all, talk about the work to be done *before* a mediation proceeding even takes place. This kind of work is even more important in a virtual conference scenario, where parties have to adapt to a different, peculiar technological environment. We strongly recommend pre-mediation procedures not only to prepare the mediator for the meeting, but also to make sure that the attorneys and parties are fully prepared to have a productive and efficient mediation, whether online or offline. To increase the likelihood for a successful outcome of the mediation, it cannot be emphasized enough that preparation is essential.

Indeed, we believe that the process starts much earlier than the introductory speech of the mediators or the private sessions with the parties. It starts with emails or phone calls to the attorneys either jointly or separately, in the preliminary meetings with the lawyers, in the choice of the virtual platform or in the environment that the parties find at the mediation center. In this article we intend to focus on this part of the process, showing the reasons of our analysis, the ways to approach the parties, and the factors to take into account in order to ensure us and each one of the actors involved obtain the best possible outcome.

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Part 1. The reasons

From a mediator's perspective, there are several good reasons to implement the "mediation before mediation" process:

a) **Preliminary procedures are a great way to establish a first contact with the parties, most of the times informal.** If mediators, rather than administrative staff, start collaborating with the parties during the preliminary and administrative meetings, the parties will start the mediation believing that they already know something about the mediator's style and personality. This means saving time and – if we manage this opportunity efficiently - gaining their trust during the in-person or online meeting. With the advent of Zoom, Teams, Webex, and other videoconferencing applications, an online pre-mediation is now cost effective because participants can join from their office or home, thereby saving travel time and parking expenses. Pre-mediations online provide great benefits with a small investment of time, no more than a phone conference call. Every mediator should become familiar with conducting meetings using a videoconferencing program which is preferable to faceless phone conferencing. Moreover, reading body and facial expressions are important tools for mediators; videoconferencing allows the mediator to at least see the facial expressions of the participants. The live videoconferencing creates a new dynamic for the mediator and the parties because they are able to view each other facial expressions throughout the mediation online session; constantly staring at someone's face during an in-person meeting might make a participant uncomfortable whereas staring at faces on a screen is not so offensive.

b) **Administrative meetings before the mediation are great avenues to obtain useful information regarding how the parties will behave during the process.** We can learn a lot from what actors and lawyers are saying and from how they are saying it. Priorities, uncertainties, relationships with their counsels, peculiar feelings related to a situation or an expert. All of this could be used in our advantage later in the procedure, both in separate caucuses and joint sessions;

c) **We can establish the authority of the parties to participate in the mediation and ask for the intervention of third parties.** It is not infrequent that the parties lack representative power, or do not have a concrete interest in the disputes, or that the invited party is the wrong one. Other times, we acknowledge that someone else, whether a third party, a lawyer, an expert or an interpreter, should be invited to the procedure. Evaluating all these factors before starting the process does not only show the professionalism of the mediator, but could also save to the parties' time and money, because all

participants will be better prepared to resolve the dispute and potentially reduce the need for future meetings;

d) **We can ask the parties if they have completed discovery and are able to bring relevant documents to the mediation to substantiate their claims or defenses, such as risks assessment, sets of goals, business records, medical records, accounting records, chronologies of facts and position statements.** This is particularly useful for the successful outcome of the process. We will obtain a considerable amount of valuable information, and we will be able to obtain information about how the parties will react to our requests. Parties, indeed, will consider not only that we really understand what will be needed to resolve the dispute, but also that we properly respect their time;

e) **We can ask them to prioritize their issues before the mediation, obviously considering the possibility of changing them during the process.** This request, another kind of “homework” for the parties before the mediation, will considerably help mediators in the “*position-to-interest*” phase of the conflict;

f) **We can provide a window to the parties to answer their questions.** It is not infrequent (and it is even desirable) that parties and lawyers will use the preliminary meetings to ask questions regarding the mediation, our role, or some of the behaviors of the other parties. The mediator can also ask if attorneys expect the mediator to give an opinion about the merits of the case for each party (evaluative) or rather merely facilitate the discussion between the parties (facilitative), giving no opinion. Providing this specific information to the actors is not only useful, but it is a way to avoid possible recrimination. At the end of the day, having someone say during the procedure “*I did not know that*” is not only dangerous for the procedure, but can also alter the trust of the participants in the procedure, destroying most of the work we have done until that moment.

g) **We can check the possible conflict of interests.** What kind of relationship do we have with the parties? Their lawyers? Their consultants? Sometimes mediators omit to verify in detail this part – believing that the parties will understand their *bona fide*. However, it is absolutely necessary to check scrupulously every possible mismatch, and this not only for deontological reasons, but also to establish trust with them. As for many of the elements described in this article, what we consider trivial and minimal at the preliminary stage could become later a big obstacle in the process.

h) **We can take into account if we are the appropriate mediator for the dispute.** Sometimes the parties have made their research about the mediator, and they know everything about her.

Sometimes they already participated in other mediations with her. Other times, they refer to us just because we have been appointed by the center, or because someone made a referral. In any case, it is not improbable to realize that we are not the best mediator for the dispute. It can be a language issue, a lack of specific competency, or simply some other commitments that do not allow us to be fully committed during the various meetings. If that is the case, having the humility of indicating someone other than ourselves can be not only a good service for the clients and the mediation in general, but also a way to establish credibility and – in the long-term – receiving calls to mediate future disputes.

i) **Establishing rapport:** Another important aspect of pre-mediation meetings is supported by the underlying social science that it is essential **to establish rapport with the litigants before the mediation begins**. In his landmark book, *Influence: Science and Practice*, the noted authority, Dr. Robert Cialdini, provides the reader with six powerful tools of persuasion that can be used in any situation where influence is required. Clearly, mediation is the perfect setting for applying the six principles of persuasion because mediators have no authority to impose an outcome to resolve the dispute, but rather only have the power of persuasion to guide the parties to their own best outcome.² Furthermore, in his more recent book, *Pre-Suasion*,³ Dr. Cialdini has provided extensive documented research that one can become more effectively persuasive if you prepare the person you want to persuade with pre-suggestions that they will follow. Cialdini's main contention is that "*the guiding factor in a decision is often not the one that counsels most wisely; it's one that has recently been brought to mind.*" (pg. 28). The basis for this conclusion is the theory of "focused attention." And "*here's the point for the influence process: whatever we can do to focus people on something – an idea, a person, an object – makes that thing more important to them than before*" (pp. 29-30).

j) The power of the pre-mediation session either jointly or separately with each party or only with their attorneys is that the mediator can **direct the attention of the participants to focus their attention on solutions** to the dispute even before the day of the mediation conference. As stated above, the mediator can employ the six principles of persuasion by establishing rapport (liking), by offering suggestions for consideration that can stimulate reciprocal concessions (reciprocity), by establishing the mediator's *bona fide* and expertise as an authority (authority), by getting

² Cialdini, *Influence: Science and Practice* (5th Ed. 2009) In summary, the six principles of persuasion are 1) liking – people say yes to people they like; (2) reciprocity – people make concessions to those who give to them first; 3) people say yes to people who are viewed as an authority; 4) people will be consistent with prior commitments; 5) people follow what others are doing who are like them; and 6) people believe something is more valuable and desire it more if it is scarce – known as loss framing.

³ Cialdini, *Pre-suasion; A revolutionary way to influence and persuade* (2016 Penguin) These two books by Cialdini should be required reading for every mediator who wants to develop sophisticated tools to help participants achieve a successful resolution of their conflict.

commitments from the parties to come to the mediation prepared and in good faith with an intention to resolve the dispute with positive solutions (commitment and consistency), and by discovering the pain points of the participants (scarcity)— learning about the risks that each party wants to avoid – for example, the additional costs of going to trial with the uncertainty of outcome that may be adverse to that party (scarcity). By developing each of these pre-suasion factors, the mediator will be setting the stage for a more effective, efficient and successful outcome at the mediation hearing.

k) Consistent with Cialdini’s theory of focused attention are the works of Dr. Fredrike Bannink who advocates that the role of the neutral facilitator is to direct the parties’ attention to focus on solutions and **not just dwell on the problems of the past**.⁴ The pre-mediation setting creates an ideal opportunity for the mediator to direct the litigants’ attention to consider solutions to the conflict and not dwell entirely about what caused the problem. Dr. Bannink suggests four basic solution focused questions that the mediator can pose: 1. “*What are your best hopes?*” 2. “*What difference would that make?*” 3. “*What is already working in the right direction?*” and 4. “*What would be the next step or next sign of progress?*”. These questions posed to the disputants in a pre-mediation meeting or sent to the disputants by email will stimulate their positive thinking about solutions that can lead to the resolution of the dispute at the mediation hearing. One of the authors of this article has found this approach particularly effective in dealing with community non-litigated disputes where the parties are inclined to make an effort to consider solutions to the problems prior to meeting with the opposing parties.⁵

l) An important suggestion that the mediator can make **is to ask both attorneys to prepare a proposed settlement agreement containing the terms they would like the other party to agree to**. This suggestion forces the attorneys to focus on the desired outcome they are seeking and greatly expedites the final resolution by having a proposed settlement agreements ready to share when the appropriate time is reached and the parties are ready to settle their dispute. Too many mediations end with substantial time devoted to drafting a settlement agreement that no one has prepared in advance resulting in many hours trying to find the appropriate terms and conditions agreeable to everyone. This important step is often overlooked, but should be brought to the attention of the parties at the pre-mediation meeting.

⁴ Bannink, Fredrike, *Handbook of Solution-Focused Conflict Management*, (2010, Hogrefe)

⁵ Mr. Sankary has used these suggestions by Dr. Bannink to prepare participants in disputes relating to charter schools in Los Angeles and sports association in Southern California as well as commercial cases.

As you can see, establishing rapport with the parties before the mediation is a winning technique to save time, increase effectiveness and generally to ensure everyone at the table with more possibilities of reaching a positive outcome. The parties will feel comforted by the mediator's scrupulous approach to detail and they will be more inclined to disclose their feelings and the details of their position.

Part 2 Technical and Logistical Aspects of the Mediation

As we learned during the pandemic, most mediations moved to online video conferencing formats with Zoom or other platforms being the preferred application because of its ability to create virtual confidential breakout rooms replicating the usual in-person separate conference rooms.⁶ In the age of the online virtual mediations, it is more important than ever to use the pre-mediation opportunity to review technical competencies of the parties. Although by now, most attorneys have participated in online mediations and know how to navigate the procedures for using the most important platforms. Mediators should provide a guideline to all participants about the procedures for attending and participating in a Zoom, Webex, Meet etc. mediation.

The pre-mediation window is also **an informal occasion to discuss the procedures and logistics of the mediation**, working together with the parties to understand their best interests and delivering a service that is tailor-made to their requests. Using an online platform for pre-meditations is an excellent way to learn about the personalities and style of the participants. Pre-meditations can be open to all the parties; however, often it is best that the mediator meet only with the attorneys to review the legal aspects of the case, requesting briefs, identify documents to be reviewed, request a draft of a proposed settlement agreement and other logistical issues such as payment of fees, confirm date and time to receive briefs, and date and time of the mediation with instructions about how to join the meeting.

Dealing with the start of a mediation means dealing with several issues, both bureaucratic and related to the process.

With reference to the administrative issues, we can take into account some of the following elements:

- a) Logistics and venue (whether offline or online)
- b) Days, timeline, number of breaks and meetings;

⁶ During the pandemic and continuing now and into the future, all of the mediators on the panel of the Mediation Center of Los Angeles were required to become technically proficient using Zoom for mediations because all mediations were required to be conducted online.

- c) Fees for each party;
- d) Completion of confidentiality forms;
- e) Names of all participants, including assistants, mentees or even co-mediators, if any.

With reference to the process, we can speak about the following elements:

- a) Type of mediation⁷;
- b) Approach of the mediator. Do the parties want an evaluative, transformative, facilitative mediator? Do they want a more creative or law-oriented strategy? Do they want the mediator to provide solutions, facilitate dialogue or both of them;
- c) Determine from counsel whether a joint meeting would be possible given the emotional tone of the parties or whether separate sessions would be preferable and more productive;
- d) Procedure to choose in case of impasse and no agreement seems possible. While forecasting a negative outcome during the mediation can be seen as a negative sign (we have to provide the parties the belief that an agreement is reachable even in the worst possible conditions), doing that before the process starts can be particularly helpful, especially considering our expertise in the field. For example, when parties are considering arbitration, we can take some time to better explain the difference between mediation and arbitration. Or we can help them choose the best arbiter for the procedure. We should not forget that we are collaborators with the parties during the process. The stronger the collaboration with them, the higher their involvement in the process and their efforts of reaching an agreement with the other party.
- e) It is also advisable to consider preparing a pre-mediation check list for the attorneys to consider issues and procedures that they may not have thought about, such as whether all discovery has been completed, whether all parties required to make a decision will be at the mediation and whether the parties are attending the mediation with a good faith intention to resolve the dispute.

Due to the pandemic and the substantial benefits of online mediations - saving time, money and increasing efficiencies -, online mediations not only rose significantly in the last few years, in many situations it is now the preferred way to mediate disputes. Various online platforms are used daily by mediators and lawyers worldwide. That has of course significant consequences in terms of administration of the mediation process. The elements to take into account include the following ones:

⁷ Regarding this point, we suggest you to read Christopher Moore's article "*The Mediation Process, practical strategies for Resolving Conflict*", where the author individuates six different kinds of approaches to mediation and six different activities of the mediator with contribute to effective data collection. Christopher Moore, *The Mediation Process: Practical Strategies for Resolving Conflict*, 2nd ed., (San Francisco: Jossey-Bass Publishers, 1996).

- a) **Connection.** Online mediation requires good bandwidth, in order to let the parties benefit of both video and audio communication. It is recommended that the parties close all the windows, apps and processes, limit access to bandwidth to other family or work members, mute notifications, and make a relaunch of the device before the session starts. They could also check the internet speed at websites like <https://fast.com>;
- b) **Platform and devices.** This is the moment to discuss which platform will be used. The market offers several options, whether mass market (both in premium and free version), like Meet, Zoom, or Teams, or mediation-specific, like Modron. It is also good to know if the parties will participate through laptop, tablet or via mobile phone, because it will affect how the party will be perceived by the other participants of the table - and whether counsel and client will share the same device or not. The parties should use headphones and external microphones in order to avoid echoes, and in any case to do all the checks with proper advance, so that mediation time will be spent only on the relevant issues.
- c) **Environment.** Online mediation, like meetings in person, requires a comfortable environment, where parties are not afraid of sharing relevant information and are open to self-disclosure. Most of the times, online mediations are done from home or office, therefore it is necessary to limit possible intrusions and noises (children, washing machines, dogs etc.). Having natural light, or also an artificial light that allows to see clearly the person in front of the device is also recommendable. Under no circumstances should anyone use the internet service in a public place like a coffee shop. It is essential that the parties have confidence in the security of the meeting so that no one can join or record.
- d) **General behavior/tone.** We suggest the mediators to stress the similarities and the differences between online and in person mediation. This could be also a good moment to mention possible uses of the chat (some mediators use it for troubleshooting, others as a communication tool) and to highlight the necessity of using camera so that faces will be clearly visible and empathy will be emphasized. Other aspects to be mentioned are whiteboard management for agenda setting, interruptions (should we raise hands through the device? physically?), use of microphones (ability to mute participants) while the other party is talking, necessity to focus on the live session and avoid multitasking.
- e) **Privacy and related issues.** The online scenario poses significant questions, therefore we should ask the parties to behave in good faith, and stress this element before the session starts. What

will be the use of notes? Will the mediation be recorded by one of the parties? How can we manage possible Zoom bombing? How about screenshots? A good and careful analysis of the various aspects privacy-related, both with parties and counsels, could provide the parties the comfort they need to be open and communicative. Some of the platforms, like Modron, offer not only better quality, but also the possibility of destroying automatically documents and notes after the sessions.

f) **Breakout rooms/caucuses.** Caucuses will be mostly done in breakout rooms, therefore it is suggested to explain to the parties how the breakout rooms will be used in the opening comments by the mediator.

f) **Signature.** In case of agreement, the parties should share the document online (eg. on Google Docs) or exchange emails with the final version of the agreement to be signed. We can ask the parties to opt for software like Docusign or Adobe sign, or to exchange hand-signed word/pdf files.

g) **Worse-case scenario.** On occasion the parties may encounter technical difficulties related to internet connections. They should be told to try to reconnect or call in on their mobile phone or tablet. Sometimes a mediator may encounter problems related to the behavior of the parties. It is good to know how the situation will be managed. Mute the offender, assign them to a separate breakout room with permission of counsel. Should the mediator move to a conference call setting, postpone the meeting, or terminate the mediation?

Generally speaking, one of the most successful strategies is sending the parties a checklist so that all the following elements are duly taken into account. This way the mediator will be confident that all the elements have been clearly understood. We also suggest to highlight that an online mediation has significant advantages in terms of cost cutting and is preferred by the parties because of its significant convenience.

Part 3 Things to take into account

Just because of the fact that we are working before the mediation hearing, doesn't mean that we are working outside of the mediation field. In this meaningful, but extremely delicate phase, the mediators are subject to all the formal and social rules of the process. The following ones are some of the most relevant consequences:

- a) **A mediation before the mediation is always a mediation.** Maybe this time will not be billed to the parties, but we are not allowed to lower the guard, managing the preliminary issues superficially or, even worse, not taking into account the necessity of showing a trustworthy and impartial persona. The parties should be reminded that the rules of confidentiality begin with the very first encounter even by phone or video-conferencing.
- b) **We have to be thankful to the parties for collaborating with us.** Even when we think that everything we are doing belongs to the administrative field, therefore it is independent from the “real” mediation, we are the first ones who could considerably gain from this open approach. For this reason, we should not take for granted their support;
- c) **Parties are expecting us to read carefully all the material related to the mediation.** If a party sends us the documents, they expect us to read it and be able to use it for the advantage of the procedure. Reading carefully the documentation provided is a crucial part of the process, often it is underrated. The risk that the parties consider us not prepared influences their trust, but also the feeling of respect and authority that we worked to create. Every little step towards the party is a way to help her open, self-disclose and provide creative solutions.
- d) **We have to spend time preparing not only the mediation, but also the preliminary meetings.** The more time involved in the preparation of the mediation, the more the possibilities of making the process easier and smoother. On the other hand, the mediator should encourage not only fully understanding the claims, facts and law of both parties, but also to devote more time to think about solutions.

Part 4. Conclusion

With this article, we have demonstrated the importance of considering the mediation in a more comprehensive way, showing the need and benefits for a pre-mediation hearing to set the agenda, discuss the issues to be resolved, confirm use of technology, and focus attention on solutions. We believe that taking into account all the aforementioned elements could provide a concrete set of tools for mediators who want to increase the likelihood of achieving a positive outcome with a better understanding of the parties and their interests.

A well thought out pre-mediation process can not only provide the mediator much needed information about the dispute, but also allows the mediator to establish the pre-suasion rapport that will result in a more effective and efficient resolution of the dispute.