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TELEPHONIC MEDIATION  
AN OVERVIEW

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# TELEPHONIC MEDIATION AN OVERVIEW<sup>1</sup>

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Telephonic mediation is an additional weapon in the arsenal of Alternative Dispute Resolution. Litigators and other mediation advocates may have heard of this option, but tend to regard it with suspicion. The author hopes that the mediation advocates will take a fresh look at this effective and flexible alternative to in-person mediation. When conducted by a mediator specifically skilled in this technique, Telephonic mediation offers an effective, less expensive option. When handled properly, it has unique advantages, few disadvantages and produces comparable results to In-person mediation. This article discusses the growing trend of telephonic mediation.

## WHAT

Telephonic mediation is exactly what it sounds like... a mediation conducted on the phone. It is decidedly low tech. Teleconferencing which requires expensive equipment is generally not necessary although of course another option. With traditional telephonic mediation, everyone remains in his or her own office although often the client will be in his or her lawyer's office. It is not uncommon for everyone to be in a different city or even time zone. The only arrangement I would not recommend would be for both lawyers and parties to be together, participating in person with only the mediator participating by phone or with the mediator with one or the other side only. Any other arrangement is acceptable.

The requirements to participate in a telephonic mediation are minimal. All that the participants need is a telephone and either a fax machine or in the alternative a scanner and computer capable of receiving and sending electronic documents or "pdfs." Obviously, the requirement of a functioning telephone is non-negotiable. I have surprisingly encountered a few equipment issues. On one case as we continued to mediate after close of business we were informed of a problem. After 5:00, the

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receptionist in one of the offices left for the day and the participants in that location could no longer receive incoming calls. No one had brought a cell phone. Happily, these participants could still dial out. It was awkward and required more than a bit of creativity and patience but we soldiered on and settled the case. On another occasion when a conference phone ordered in advance failed to function, we conducted an entire mediation with a cell phone on its speaker setting. In spite of these examples, most people can easily access a working telephone and a fax. When handled properly by a mediator comfortable mediating telephonically, this dynamic need not have an impact on any case's settlement prospects.

The pre-mediation agreement is virtually identical. All agreements should be executed and sent to the mediator prior to the mediation. With in-person mediations, parties and counsel must clear the entire day and commit to remaining until the mediation is concluded or the mediator deems it appropriate to stop for the evening. Telephonic mediations require the same commitment. In addition, parties must agree not to leave, schedule other meetings, conference calls, or lunches during the course of the mediation day. While the mediator caucuses with the other side, those waiting can work on other matters and make and accept calls. However, everyone must agree unequivocally that the mediator's calls will be accepted promptly, interrupting all other calls or work until the conclusion of the caucus.

All necessary documents should be identified during the pre-mediation telephone conversation and sent in advance to the mediator for review. Documents not deemed confidential and not already in the hands of the other side should be exchanged in advance as well. In this age of e-mail and faxes, a document identified during the course of the mediation or which is no longer deemed confidential can be given to the mediator and the other side as necessary.

When preparing for a telephonic mediation, counsel should address any concerns of their clients in advance. Talking into a speakerphone may be a little awkward initially, but only initially. The attorney also will need to discuss openings and whether or not the party should speak in the opening and if so, what he or she will say. This is especially important if the attorney and his or her client will not be in the same office.

Just as with an in-person mediation, a telephonic mediation may begin with a joint caucus. The parties and their attorneys are initially joined on a single conference call. After the mediator's introduction, the mediator invites each attorney and party to speak in turn. Even with multiple parties there tends to be little or no confusion as to who is speaking, because parties speak in order as requested by the mediator. If there is any question as to who is speaking they may be asked to identify themselves, but the parties quickly learn to identify the voices of the participants. After opening statements, the parties may exchange comments, as that may be productive. However, in most cases the joint session is terminated at the conclusion of opening statements.

The considerations for whether or not to hold a joint session still apply with the obvious difference that the parties cannot see one another. Sometimes parties want to avoid joint

caucus because of the anxiety associated with literally sitting in the same room as their adversary. Sometimes parties are too emotional to listen to what the other side has to say. Just because the parties are not literally in the same room, the emotional considerations exist and should be considered.

I am a proponent of joint session as a default position. Whether or not to hold one with a telephonic mediation should be explored as part of pre-mediation preparation. The lack of physical proximity may make it easier on the one hand to hold a joint session, but the inability to control what your client is saying or for the mediator to observe the physical reaction should be taken into account. I continue to favor joint session in telephonic settings as well as in-person. However, in all cases it makes sense to explore the pros and cons of a particular set of facts before deciding whether or not to skip joint session.

When the joint session has concluded, the mediator can terminate the joint conference call before beginning individual caucuses. Completely terminating the joint telephone call leaves no question that private caucuses are completely confidential. Although I have complete confidence that I could simply ask one side or the other to hang up, I never do that. I want all participants to be completely comfortable being candid with me.

The pace of a telephonic mediation is often similar to that of an in-person mediation. Therefore, parties should reserve the entire day. The mediation continues until the parties reach agreement. Just as with an in-person mediation, the mediation occasionally does not conclude during the initial session. In these cases, the mediator can follow up with the parties by telephone in much the same manner as the earlier sessions have been conducted. While it varies with each case, often only the lawyers and not the parties participate in these follow-up telephone calls. When the case is resolved, the parties exchange settlements and releases via facsimile. A final joint conference call is optional.

The identical considerations control the selection of who to bring to a telephonic mediation as with an in-person mediation. Obviously the difference is in how much easier it is to get the right party to a telephonic mediation since it does not involve travel or even leaving one's office. It is not unusual in a telephonic mediation to have parties and their lawyers located in other cities.

Telephonic mediation like In-person mediation is better when done earlier rather than later. Although some attorneys are of the opinion that it is better to conduct a mediation when a case is ready for hearing, I believe the opposite is true. I believe that as soon as counsel for both sides have an understanding of their case and its value, the case can be mediated. This is no less true for telephonic mediation. The preparation is virtually identical.

#### DIFFERENCES (NOT DISADVANTAGES)

The most obvious difference between a telephonic mediation and an in-person mediation is the change in the nature of the confrontation that takes place between the parties. The parties cannot sit across the table and look each other in the eye. In an in-person

mediation, a party can get an idea of how the other side will come across in a hearing even if they don't speak in opening caucus. Just shaking hands with your adversary can tell you a lot about them. However, it should be noted that sometimes shaking hands is all you learn about your adversary even after traveling cross-country to attend an in-person mediation. Many lawyers remain reluctant to permit their clients to speak to the other side in joint caucus. In such instances, the trip to the mediation for purposes of evaluating how the other side will perform at trial may be disappointing. All one will gain for having made the trip is to see what their adversary looks like. I conducted a telephonic mediation with one lawyer who addressed this issue, by including a photo of her elderly, infirm client with her papers. She also produced the photo to the other side.

In the joint caucus, because there are no non-verbal cues such as facial expressions, gestures, or general body language, what is being said is the focus rather than how it is being said. When mediating telephonically, non-verbal cues do not distract the parties from the information that is being shared.

In private caucus, there is absolutely no advantage to either party to be in-person rather than telephonic. There are certain additional demands placed on the mediator since the mediator must compensate for the absence of non-verbal cues. With experience, he or she can pick up these cues from the way the individual speaks, what they say, and always from what remains unsaid. If in doubt, the mediator can always speak privately with the attorney for a party to gauge the party's reaction to the proceedings. Just as with an In-person Mediation, ignore the cues you are given at your peril. Inattention to the parties' state of mind can torpedo the entire process. Since it is the parties who decide whether to settle and for how much. In a Telephonic Mediation as in an In-person Mediation, the mediator should make a special effort to address the interests of the parties.

In any mediation it is not unusual for parties to reach a point where they may become frustrated with the process. When this happens in an In-person Mediation, the mediator will encourage a party to remain at the mediation and to continue working. When a party physically remains at the mediation despite his reluctance to continue negotiating, the mediator can continue the mediation, relying on the party's actions rather than his words. In a Telephonic Mediation, the mediator should approach any challenges with the same determination and perseverance even though one might think it is much easier to hang up a phone than to actually leave the mediation. In reality, although I have jokingly barred many an elevator door, there is really nothing I can do or would do physically to prevent someone from leaving if they so desired. To the experienced mediator, even should someone leave, it does not mean the mediation is over. In all mediations persistence and patience are the means to settlement.

## ADVANTAGES

The most obvious advantage of Telephonic Mediation is the enormous cost savings. First, the hourly rate for Telephonic Mediation is generally less than for In-person Mediation. Second but no less important, when the Parties and Counsel are disbursed and would be required to travel to attend, there are huge savings from proceeding

telephonically. There are no plane tickets, no hotel charges, no taxi fares, no gratuities, no overpriced breakfasts and dinners. In smaller cases, the savings from travel alone might make mediation affordable.

Another aspect of cost is productivity. As is discussed above, you are much more productive in your own office than on the road. During the hours while the mediator is caucusing with the other side, you can work from your desk—even make and receive phone calls. You completely avoid all the down time associated with traveling. No time is wasted on the plane or train, in cabs, buses, or subways traveling to and from the airport, or waiting in security lines, no shuttles to the rental car or satellite parking lot. There are no missed, delayed, or cancelled flights. Weather is irrelevant. Files do not have to be packed and lugged. There are never documents that have been forgotten back at the office. You work from your own office. Should the mediation go late, you could actually mediate from home.

Even if cost and time are of no concern, although I cannot imagine that occurring today, the logistics of various conflicting schedules can make getting everyone together in the same city on the same day extremely difficult. I have conducted mediations with parties as far away as Hawaii and Europe. Other than the challenges presented by time zone differences, people can be located anywhere and participate fully. Parties and Counsel can mediate from anywhere there is a telephone and a fax.

Managing your client during a joint session is obviously much easier with a telephonic mediation. Some lawyers see the value in allowing their clients to make an opening statement. When a party does choose to speak, it conveys a lot to the other side regardless of whether the mediation is in-person or telephonic. It also can be cathartic to the party. When the mediation is telephonic and your client is sitting with you, it is possible to remind a client not to go on too long or to stop him or her from discussing matters better left unsaid. This sort of assistance is much more difficult when everyone can see everyone.

Another advantage of Telephonic Mediation is the anonymity of the telephone. For some parties, it is much more comfortable to be candid and open about personal matters with someone who remains basically unknown and unseen. The telephone can help to reduce anxiety. All mediations involve emotions. Often people are much more comfortable expressing emotions to a mediator who is on the telephone rather than confronting them in person. Telephonic Mediation is also helpful for those parties who are reluctant to confront the person they are suing. There is some measure of safety when the party does not have to physically sit across the table from the person they are in litigation with. Rather than a disadvantage, in many situations the distance and anonymity of a Telephonic Mediation are advantages.

Another situation that lends itself beautifully to Telephonic Mediation is a case involving a pro se party. Usually, pro se parties need to tell their story in detail often more than once. They will never have had the benefit of the sympathetic ear of their own lawyer. Also, a pro se party does not have anyone to adjust their expectations. They know only

their own version of the facts. With a pro se party the mediator must be particularly careful to avoid giving legal advice or exerting too much control. Generally, the approach with a pro se party is much more delicate and indirect. All of these factors make cases involving pro se parties lengthier. Since there are no planes to catch and the other side is actually able to work on other matters, the pressure of time can be relaxed. If the plaintiff needs more time with the mediator, he or she can have it.

Some will still never be comfortable without the face to face of an in-person mediation. For others who have been willing to try to mediate telephonically, the experience may be preferable to in-person mediation.

## FUTURE TRENDS

Telephonic mediation is a technique that embraces current trends in technology. People are growing more comfortable with technology as an aide to their work. Today many more people telecommute than in the recent past, relying on telephone, e-mail, and fax to communicate with clients and co-workers. In recognition of technological trends, various alternatives to in-person mediation are being tested by the more adventurous litigators.

These include Internet mediation sites where parties electronically exchange offers and demands. There are mediators who advocate e-mailing private caucuses. My own opinion is that confidentiality is much more easily compromised with this procedure. Ultimately, the most efficient and technologically responsive form of mediation may be yet another hybrid, video conferencing. Video conferencing is much more widely available than ever before and would be a logical next step in mediation alternatives when costs are eventually reduced. Telephonic mediation is an excellent transition towards teleconferencing and other new technological alternatives.

## CONCLUSION

As with mediation itself, telephonic mediation is its own best advocate because it works, Cost and convenience can be considered because results are not sacrificed. Anecdotal data indicates that telephonic mediations produce results similar to those of in-person mediations. Although most often thought of for smaller cases, telephonic mediation works equally well with large cases. I encourage those who have never tried telephonic mediation to take the plunge. I find that at some point during the day, parties become focused on the task at hand and any discomfort disappears. As the final agreement is being faxed back and forth and everyone is heading home, they have become proponents.