

SDNY MEDIATOR TIP SHEET: Pre-Mediation Calls

This [Tip Sheet](#) starts with the presumption that it is best practice to speak with counsel prior to an in-person mediation session. Why? This is your first opportunity to inform counsel about the mediation process, and to discuss your and their preferences for how the session is conducted. By inviting comments and soliciting concerns about the process, a mediator can consider, plan, and adjust how the in-person session will be conducted. The initial joint telephone conference presents an opportunity to discuss who will attend and to emphasize the importance of decision-makers being in the room.

Additional benefits:

- [Get a preview of the interpersonal dynamics](#). The phone call may reveal an unusual or heightened level of hostility or affinity between the participants. With this information, you can tailor the structure of the session, including whether the initial moments should be in joint session or caucus.
- [Gain understanding of the issues behind the issues](#). For example, whether a grievance stems from a personal relationship that has soured, a lack of respect, bullying behavior, or unfairness that may or may not be actionable or defensible.
- [Identify topics for follow-up on an *ex parte* basis before the session. Including:](#)
 - ❖ Understanding the working relationships between counsel and clients.
 - ❖ Supporting attorneys/clients who appear to have less information or seem less knowledgeable or prepared.
 - ❖ Exploring the bases for claims/defenses including when there is an unusually high demand or low offer.
 - ❖ Preparing participants to make the most of mediation by discussing initial statements, client participation, pre-mediation discovery, submissions to the mediator, and anything else!

“IF I HAD NOT HELD PRE-SESSION PHONE CALLS, I WOULD NOT HAVE KNOWN...”

- ✓ In a gender discrimination case, that the “real” issue was that an employee with decades of experience felt that he was being kicked to the curb.
- ✓ That an insurer (not at the mediation) was involved and was the decision-maker for the defense.
- ✓ That there was disagreement about whether the mediation would cover individual or class-wide relief.
- ✓ That the participants each needed some information from the other, not covered by the discovery protocols, that each was willing to produce.
- ✓ That the plaintiff and her attorney did not see eye to eye.

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SAMPLE E-MAIL TO COUNSEL SCHEDULING JOINT CALL AND MEDIATION SESSION

[Introduction and, if necessary, any disclosures. Prompt a communication with the office if there is a chance the parties may object or you may need to recuse.]

I write in connection with scheduling a mediation session in the above-referenced matter. I have reviewed the docket sheet in this case which has provided useful background information about the litigation. In order to move forward, I think that it would be advisable to schedule a joint pre-mediation telephone conference with counsel within the next week or so.

In order to select a date for the mediation session, you will need to coordinate your schedules with those of your respective clients in advance of our joint phone call. Please request that they be as flexible as possible in reserving days on their calendar for the session. Once the date is finalized during our call, you can then advise them to release other dates from a hold status. Accordingly, I am setting forth several suggested dates in December for the mediation session, as well as some suggested dates and times for our phone conference.

The joint phone call should take about 20-30 minutes. My e-mail and phone contact information are set forth below, and I am looking forward to speaking with you in the near future.

Please reply all with your availability for these dates and times (if none of these work, please reply to everyone with proposed alternatives):

Joint Telephone Conference Availability

Wednesday, Thursday or Friday, November 10-12
Tuesday, November 16th, any time
Wednesday, November 17th (after 11 a.m.)

Suggested Mediation Dates

Wednesday, Thursday or Friday, December 10-12
Tuesday, December 16th, any time
Wednesday, December 17th (after 11 a.m.)

Regards, *[add signature with full e-mail and phone contact information]*

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SAMPLE PHONE SCRIPT FOR JOINT CALL

The following is a list of suggested topics for pre-session calls with counsel. Over time, you should develop your own list of topics that you most commonly address in your initial dealings with counsel.

- Describe Mediation and Role as a Neutral

[This is important, even if counsel have mediated before. There are many processes which are labeled “mediation” which are, in fact, not. Be clear about what counsel should convey to clients before you meet them. Briefly explain/discuss self-determination, the conduct of the mediator, opening statements (mediator, parties, attorneys), and joint and caucus sessions. Actively solicit input; for example, discuss the relative merits of party/attorney opening statements, and mediating jointly and in caucus.]

- Explain Confidentiality of the Process and that a Confidentiality Agreement will be Signed

[This is important as confidentiality rules may vary from forum to forum.]

- Ascertain Familiarity with SDNY Mediation Procedures, Including Subject-Specific Protocols

[There are a variety of ADR programs in state and federal courts. Direct counsel to the SDNY Procedures and the Mediation Office if they need assistance.]

- Convey that you are Familiar with the Case from PACER File

[Make sure to check the docket before a call as information about the case can inform some of your preliminary questions and discussion. Attorneys will appreciate the fact that you have some familiarity with the issues and procedural posture of the case.]

- Discuss who will Attend with Settlement Authority

[Have this part of the conversation with the collective goal of convening the most productive process for this particular matter. Avoid assumptions about who should/should not attend and seek counsels’ active input. If circumstances make in person attendance difficult or impossible, talk through the possibilities – including participation by phone and video conference – and ascertain from both sides their considered view of the benefits/burdens associated with in person participation.]

- Discuss Next Steps, Including Where and When Mediation Will Occur, and Pre-Mediation Statements

[Use this as an opportunity to let them know what you do and do not want to receive, using the Mediation Procedures as a basis for the discussion. If there is something that either side thinks is compelling—a recent case or a document not previously disclosed—encourage an exchange of that information before the session. Set a deadline for when those submissions should be received by you and/or exchanged.]

- Questions? Comments? Concerns?

[While each mediator brings a personal style to the session, the mediation process is guided by the needs of the parties. Soliciting and integrating input reflects that.]