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PERSPECTIVE

# Master the art of mediation briefing

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The mediation briefs attorneys submit are often a mediator's first look at a case. They are a lens through which the mediator develops an understanding of the facts and begins to identify the strengths and weaknesses of the parties' positions. Mastering the art of the mediation brief is no easy feat but can be accomplished with the right structure and supporting information. In my mediation practice, I have seen many different approaches to briefing, some more effective than others. This article includes a number of recommended best practices to help you improve your mediation briefs and better prepare your mediator to assist the parties on the day of mediation.

As with other types of persuasive writing, a mediation brief should be clear, concise, and compelling. Unlike other advocacy pieces, however, a mediation brief should focus on the best arguments, while anticipating the other side's arguments and addressing them head-on.

Your brief should provide a comprehensive picture of what happened and capture your best evidence. Then it should focus on the legal significance of the facts and supporting evidence, highlighting any analogous case law and jury verdicts or published settlements with similar facts.

To best structure and support your positions, be sure to do the following:



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- tell your story once from start to finish,
- explain the procedural status and anticipated next steps should the matter proceed,
- provide the relevant legal authority and supporting evidence,
- detail the potential exposure, and
- recap any prior settlement discussions.

With this framework in mind, your mediator should be prepared from the outset to navigate the facts and issues with an eye toward resolution.

## I. Follow your mediator's rules

Before you put pen to paper or start typing away, check to see whether your mediator has set out

any guidelines for your submission, including with respect to the timing, length, spacing, font, and how to package your exhibits.

Absent any mediator-specific preferences, here are some recommendations to keep in mind:

- **Timing** - Submit your brief at least three business days before your mediation to provide your mediator sufficient time to review

and reach out in advance if he or she would like to follow up on any points or request any additional supporting documentation.

- **Length** - Ten pages or less, not counting any exhibits excerpted in the brief. Being concise will help your mediator see your main points and best evidence clearly and will enable him or her to quickly locate the information as needed.

- **Spacing** - Single-spaced throughout with spacing between paragraphs will allow you to cover the most content on each page, while distinguishing one subject from the next.

- **Font** - A legible 12-point font like Arial or Times New Roman. A smaller or illegible font will make your brief harder to read and absorb, and a larger font will unnecessarily lengthen your brief.

- **Page Numbers** - Include page numbers at the top or bottom of each page. These references will make it easier to revisit certain points with your mediator.

- **Margins** - Standard one-inch margins free from obstruction will permit your mediator to add notes and follow-up questions next to the relevant text.

- **Footnotes** - Use sparingly, if at all, as they require your reader to move back and forth in the text. Incorporate as much as possible into the body of your brief. Often, the material can follow where you would have placed the footnote, as in the case of citations, exhibit references, and additional color. You can use a parenthetical to differentiate an aside.

- **Exhibits** - Compile your exhibits in a single PDF, with a cover page for each exhibit, and attach the PDF to your brief or provide the compilation separately. Your mediator has to open and either print or save a digital copy of each document, so having at most two documents (your brief and a PDF of your exhibits) streamlines this process.

## **II. Consider how much to keep confidential**

Mediation briefs are most often submitted to the mediator for his or her eyes only. Before you follow suit, consider the options with respect to confidentiality.

First, you can prepare your brief in confidence. This approach has

the dual advantages of allowing you to be forthright about any concerns or open issues without fear of reprisal and to get straight to the point without concern about how the information will be received by the other side. You can then talk with your mediator about what to share and when and how to best communicate it to the other side to get the most buy-in as you negotiate.

Second, you can prepare your brief to be shared with the mediator as well as your opposing counsel at the same time. This approach has the benefit of educating the mediator and your opposing counsel about your positions, and your transparency may engender more trust during the mediation process.

Third and finally, you can take a hybrid approach and share your main brief while preparing a confidential supplement for your mediator's eyes only to get the best of both approaches.

## **III. Curate your content**

### **A. Introduce the players and themes**

Keep your introduction brief, half a page to a page in length. Identify the parties and other key players and their roles, and explain what happened at a high level—the main contentions and facts that would support or undermine them, depending on your client's perspective. Avoid summarizing your factual background and instead provide overarching themes to help ground your mediator. It often helps to write this section after the body of your brief, when you have a sense of the most important facts and issues to highlight.

### **B. Focus on the facts**

Tell a comprehensive story from start to finish. In chronological order, walk your mediator through what happened as it relates to your claims or defenses in the case. Aim to address any bad facts of which you have become aware. It is better if you put those facts in the proper context for your mediator than for your mediator to hear them taken out of context from the other side.

### **C. Bold first references to names, key dates, and exhibits**

Help your mediator identify when you first introduce someone

new to the story, when a key event takes place, and when you are providing supporting material by bolding the name, date, and exhibit reference.

### **D. Chart key data points**

Does your case revolve around a series of data points? If so, you may want to use a chart to capture the key information in an easy-to-reference way. In class and/or PAGA actions, for example, you could chart the class and PAGA periods, total number of employees and former employees, and number of workweeks and pay periods at issue. When you include a chart, you do not need to separately state the same information elsewhere.

### **E. Excerpt your best evidence**

Pull together your best evidence—any applicable policies, pertinent communications, key admissions in depositions or discovery responses, performance reviews or disciplinary records, or examples of compliant or unlawful time records and wage statements—and embed them in the portion of your brief alongside your discussion of them. It often works best to excerpt the relevant portions. Having the supporting material in the proper context will aid your mediator's comprehension of the case and ability to recall the material in explaining your positions to the other side.

Still provide or have available full copies of your excerpted materials, as your mediator, with your permission, may find it helpful to share or reference the complete documents with the other side.

Apart from excerpted materials, when you attach or separately package exhibits, select the most illustrative examples and salient support. The more voluminous your exhibits, the more counterproductive, as it may result in your mediator searching for a needle in a haystack of evidence or worse, coming across something that cuts against the arguments you seek to advance.

When you provide deposition testimony, highlight the transcript to indicate what portions your mediator should focus on. Also highlight relevant discovery responses and other evidence within longer documents to make it easy to reference.

If you plan to include any corre-

spondence, such as text messages, in a foreign language, provide the English translation for your mediator in case he or she is not well versed in the other language.

## **IV. Set forth the procedural status**

For pre-litigation matters, note any informal exchanges of information and the anticipated venue, discovery, and motion practice.

For filed cases, note the venue (court or arbitration), what major filings have been made, the status of discovery and plans for additional discovery, any pending motions, and upcoming dates and deadlines.

This background will help your mediator understand how far you are in the litigation and what would need to be accomplished if it were to continue toward trial. Consider using bullet points to convey this information concisely. For example, bullet points would be effective after “The parties exchanged the following information in informal discovery....”

## **V. Refine your legal analysis**

### **A. Focus on your best arguments**

Avoid arguments in the alternative and instead focus on your best arguments to have the most persuasive impact. If your alternative positions are not as strong, they will detract from your stronger points.

### **B. Limit the law**

Mediators with specialized practices are often familiar with the law, so you can summarize the applicable legal standards. Often the seminal case or the jury instruction suffice. Add any recent developments in the law or cases analogous to yours. Draw parallels to authoritative decisions where possible and persuasive authorities where the case law in your jurisdiction is still being developed. For each case you cite, offer a parenthetical or other short explanation to show its relevance.

### **C. Affirmatively address weaknesses**

A mediation brief should be forthcoming with any perceived weaknesses and prepare your mediator to address them with the other side. If you have any evidence to back up your position, make sure to include it for your mediator to reference.

#### **D. Utilize summary paragraphs**

For longer sections of argument, consider using a summary paragraph at the outset of your discussion of each legal claim that includes the facts on which it is based and sums up your arguments as to why it will or cannot be established.

Defense attorneys, it is generally safe to assume that the Plaintiff's counsel has conveyed to the mediator what has been shared with you in a demand letter and/or complaint. As a result, you can avoid reciting the factual allegations before addressing them.

#### **VI. Calculate the potential exposure**

Once you have addressed the issues related to liability, walk through the full extent of potential damages. Break down the amounts associated with each line item. In an employment case, for example, this may include past lost

wages, future lost wages, wage-and-hour claims, emotional distress, attorneys' fees and costs to date and anticipated through trial, and punitive damages. Address any mitigation and treatment for emotional distress.

For the categories of damages that would fall to a fact-finder to decide, like emotional distress and punitive damages, point to awards in jury verdicts and published settlements in your jurisdiction that involve a similar fact pattern and legal issues.

#### **VII. Restate key points in your concluding remarks**

As you conclude, take advantage of one final opportunity to advocate, highlighting the most important facts and persuasive legal arguments from your client's perspective. If you presented a theme elsewhere in your brief, revisit it here. Aim to keep this section to a paragraph or two.

If you have not already, let your mediator know the status of any prior negotiations between or among the parties and who will be participating in the mediation from your side, including counsel, clients or client representatives, insurance adjusters, and/or support persons.

#### **VIII. Polish your prose**

Once you have completed a draft, try to take a break before you read it through with fresh eyes. As you work through it again, fill in any gaps, try to anticipate the other side's arguments and address those, and trim down your exhibits to those most essential for your mediator to review.

With this overall approach, you can clearly and concisely tell the story of your case, convey your main arguments, and capture the potential damages. As the mediation progresses, your mediator will have the foundation he or she needs to address the key themes, best evi-

dence, and legal authority on point with the other side and to help everyone involved work toward a resolution.

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