LOS ANGELES & SAN FRANCISCO
Daily Journal
www.dailyjournal.com
FRIDAY, JANUARY 23, 2026

Mediation briefs: Write them the right way

Clear, concise and strategically written mediation briefs matter as much as trial briefs because they shape how neutrals understand the facts, assess the law and guide negotiations toward efficient and successful resolution.

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When I served as a judge, I saw firsthand the importance of a well-written trial brief. With limited time and resources, judges rely heavily on briefs to educate them on the facts and the law of cases before them. A good brief prepares them to fully listen to testimony and arguments; a bad brief produces more questions than answers, leaving them ill-informed as they commence proceedings.

It can take months or years to get to trial, with a judge who has multiple demands on his or her time. A well-written brief can help that judge make informed decisions; a challenging brief can increase the challenges confronting the judge.

When legal matters are diverted to mediation, the landscape changes. Instead of waiting for their matters to be assigned to judges whose decisions can seem arbitrary or unfair, parties get to choose their own mediators, negotiate the terms upon which they will settle and, hopefully, conclude their matters relatively quickly.

What doesn't change, however, is the importance of clear, concise and well-crafted briefs. Whether a judge or a mediator will be reading those briefs, the same rules about good writing apply.

The mediator's role

The mediator is a neutral, chosen by both parties to help resolve their dispute. In this role, he or she must carefully listen to and consider both sides' positions. The mediation brief is the parties' first opportunity to present these to the mediator, and a well-drafted brief will help the mediator understand not just the facts but each party's arguments.

As a perceived authority figure, the mediator is in a position to shape the path of negotiations. When only one party's brief is clear and convincing, the mediator may rely on those arguments to influence the other side to shift its perspective. For this reason, the last thing counsel wants is to enter the mediation at a disadvantage. If the other brief has made a strong case for the opposing side's position, counsel must spend extra time and effort during the mediation educating the mediator about his or her client's position.

A well-considered and well-written brief sets the client up for a much more successful mediation experience.

Keep it brief

The fundamental purpose of a brief is not to show the mediator how smart the attorney is, or how much he or she knows. It is to advance the client's case, laying the groundwork for successful resolution of their matter. The shorter the brief, the better. A single sentence will always be more impactful than a lengthy dissertation and far more likely to be read. A concise argument will always be more effective than a lengthy one.

They're called briefs for a reason. Most judges have limited time to read and process parties' briefs. A mediator may have more time, but few mediators want to read a novel when they can get the essential story from Cliffs Notes. Attorneys should give the mediator only as much information as he or she needs to understand the case from the client's perspective.

Lead with the lede

Just as journalists begin their stories with the most important information, attorneys should begin their briefs with their strongest arguments. Even though it would never happen, it is shrewd to assume that the mediator won't read beyond the first sentence. If the "aha" is buried on page four, it may be as good as gone.

Instead of populating the brief with a litany of watered-down, flimsy arguments, get to the point right away. Lead with your strongest argument and throw out anything that doesn't further that argument.

An attorney once submitted a lengthy brief (oxymoron?) citing numerous cases, most of which were not directly on point. A single case, however, was right on point: It drove home the exact argument the attorney sought to advance on the client's behalf, but it was buried far down in the brief. A judge or mediator would have had to practice spelunking to find it. How much better if that case had instead been cited in the first paragraph. The brief would have been considerably stronger, the judge's work much easier.

Mediators, like judges, are expected to get up to speed on the issues and laws of the cases they hear, but they shouldn't be expected to do attorneys' work for them. When a case supporting an important argument is directly on point, put it at the top of the brief.

Avoid obfuscation

Or, to put it succinctly, keep it simple. Short sentences are more impactful–and more likely to be read–than long ones. If one or two words will adequately convey the message, don't use six or seven. The fewer the syllables, the better. Nobody appreciates a show-off, and nobody benefits from reading extraneous words, lots of syllables or writing they can't understand.

In a mediation brief, there is no need for "hereinafters," "whereases" or "heretofores." "Before" means the same thing as "prior to"; "leave" means the same thing as "make an exit." Double negatives create yet another set of obstacles to understanding. "Significant" is much simpler than "not insignificant"; "common" is easier to understand than "not uncommon."

Oxford Languages defines "legalese" as "the formal and technical language of legal documents that is often hard to understand." If a high-school student can understand the general thrust of a brief, it's a good one.

Be direct, be helpful

Tell the client's story in the most direct, least circuitous way possible. Use the active voice, as opposed to the passive voice. Instead of saying that a contract was signed by Mr. Smith, simply state that Mr. Smith signed the contract.

If a specific fact is cited or a prior case is referenced to explain the client's position, don't make the mediator search for it. Provide the exhibit and page number where he or she can find the fact or case.

Organize the brief so it's easy to follow. Using headings, subheadings and letter/number tabs will guide the mediator through the logical steps of your argument. Without making it personal or vindictive, point out the weaknesses of the other side's position.

Get it right

Check cites to make sure all cases cited are current. Use Shepards or Westlaw and, if possible, have a colleague read through the brief to catch typos and other errors. When working on the brief, avoid distractions and beware of AI–a tool that promises more than it provides.

Don't misrepresent the facts or the law in your case; don't stretch the holdings of prior cases. Mediators talk with each other; a suspect brief will not go unnoticed (pardon the double negative) and may hurt your reputation.

Leave it out

If the purpose of a brief is to advance the client's position, it should do just that. Beyond the one or two cases that support the client's position, there is no need for additional cites; a string of citations and "see also"s will only serve to confuse and possibly frustrate the mediator. If your case is in a California state court, cited cases should be United States Supreme Court or California opinions; unless they are the only relevant points of authority, cases from other states or other federal circuits are generally of little or no value.

Leave out exhibits unless they're critical to the argument. The mediator is unlikely to review a stack of pretty exhibits, and many trees can be saved. Also get rid of footnotes. If it's important enough to be part of the brief, it's important enough to put in the body of the text.

A brief is not the place to engage in personal attacks against the other party, to air personal frustrations unrelated to the issue in dispute, to strike self-righteous poses, or to inject humor. It may seem funny over a shared drink, but it will not be appreciated by a mediator trying to resolve a complex case.

Conclusion

A well-written mediation brief can be the difference between a protracted, challenging session and a simple path toward resolution of a complex dispute. When the mediator can quickly and easily grasp not just the facts of a case but the arguments supporting a party's position, he or she can help guide both sides to successful settlement of their matter.

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