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Why good mediation briefs matter

A strong mediation brief isn't just paperwork—it sharpens your case, informs the mediator, impresses clients and opposing counsel, and can be the key to a successful settlement.

By Scott Hengesbach

Attorneys who represent clients in mediation know that they are expected to write mediation briefs. They may even have read up on the mechanics of how to prepare a good mediation brief (for a refresher, see the recent article by my colleague Hon. Jonathan E. Karesh (Ret.), "Mediation briefs: Write them the right way," Jan. 23). But far less has been written about why counsel should invest the effort to prepare a great brief.

Preparing the brief may be the first step in the mediation process, but it can also be the client's best opportunity to make their case. A thoughtfully crafted mediation brief can do far more than simply inform the mediator (and opposing counsel, if not submitted confidentially) of key facts and arguments in a case.

When it is thorough and well-written, the brief can significantly increase the chance of success at mediation in a number of ways, yielding significant benefits beyond the mediation process.

Pre-mediation benefits

An attorney who commits to putting together a well-researched and well-written mediation brief is necessarily forced to dig deep into the facts and legal issues of the case. While this involves a significant level of effort, it can enable the attorney to better identify strengths and weaknesses in the client's case, well before the mediation commences.

An attorney with greater awareness of the factual and legal strengths



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and weaknesses of a case is much better prepared for what can come up during the mediation. He or she will have foreseen and grappled with arguments by opposing counsel, as well as any weaknesses or gaps in the client's story. An attorney who hasn't done this level of preparation is likely to be caught off-guard during the mediation process. A poorly developed mediation brief can leave both the attorney and the client vulnerable to disruptive surprises during mediation, undermining the ability to successfully resolve the case.

Process-related benefits

Critical information sharing

Effective mediation typically involves the exchange of factual and legal

points and counterpoints between the parties. A thorough, well-written mediation brief can foster the exchange of information during mediation, especially when the parties agree to exchange their briefs.

But even if parties elect to submit their briefs confidentially—an increasingly common practice these days—a thorough mediation brief will help the mediator pass meaningful information between the two sides throughout the mediation. The more information that is transmitted back and forth between the parties, the greater their chances of fully understanding each other's case. When parties truly understand each other's case, they are more likely to be able to resolve the matter.

Input from "evaluative" mediators

Attorneys sometimes look for input from an "evaluative mediator." Such a mediator, with the consent of the parties, can provide feedback to both sides on the strengths and weaknesses of their case throughout the process.

Not all attorneys want an evaluation from their mediator, and not all mediators are evaluative. However, for attorneys who welcome an outside perspective on their case in mediation, a well-written mediation brief is indispensable to obtaining a competent evaluation of the case by the mediator.

How can an attorney reasonably expect to get valuable feedback from a mediator if he or she does not

provide that mediator with a complete set of facts and a thorough legal analysis of the case? As the old saying goes, “the devil is in the details.” The more detailed and thorough the mediation brief, the more likely that the mediator can provide the level of insight the attorney desires.

Image management for “facilitative” mediators

A thorough, well-written mediation brief can also benefit counsel in cases where the parties employ a “facilitative mediator.” Facilitative mediators tend to be more process-driven, focusing on “reading the room” for both verbal/written and non-verbal cues from counsel and parties.

A well-written mediation brief signals to the mediator from the outset of the process that counsel has his or her act together. A persuasive mediation brief demonstrates counsel’s confidence in the analysis of the facts and issues of the case.

In this sense, the brief creates a perception of strength—just the sort of perception an attorney wants to create when a mediator is trying to get a read on counsel at mediation. When counsel shares it with opposing counsel, a well-written brief creates similar, favorable impressions on the opponent as well.

Other ancillary benefits

Attorneys often share their mediation briefs with clients, especially with their more sophisticated clients such as insurance carriers. When the attorney plans to share the mediation brief with a client, he or she should use this as an opportunity to educate the client on the pros and cons of their case. The better educated the client is, the more likely that client will be to negotiate in a productive manner.

Counsel can also use this exercise as an opportunity to bolster his or her image in the client’s eyes. Few clients actually see counsel in court,

but few things will impress a client more than a strong, persuasively written analysis of their case. Imagine how significantly a client’s perception of their attorney is elevated when they read a thorough, well-written mediation brief.

Conclusion

An attorney representing clients in mediation has many tools at his or her disposal, among them the mediation brief. There are no standards or rules for drafting these briefs; they are the attorney’s work product and can be as simple or complex as counsel desires.

But that mediation brief can be a powerful tool. It can help advance the client’s position, move the case toward successful resolution, and promote the attorney’s standing with clients and peers. Counsel’s failure to invest the time and effort to draft a thoughtful, thorough and persuasive brief could be a costly missed opportunity.

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