



MEDIATION BRIEFS: DO'S AND DON'TS

By Martin Quinn, Esq.

Here are some Do's and Don'ts from a mediator's perspective to help you prepare your mediation briefs.

Do remember that the mediation session will likely be the last day of your case. Treat the event with the importance it deserves, and start by preparing an effective, timely brief.

Do submit and exchange your brief at least one week, and preferably two, before the session. This allows time for opposing counsel to get it to their client. Particularly if an insurance company is on the other side, it needs at least 10 days to consider and react to the brief -- perhaps by increasing its reserves on the case. Moreover, mediators have a lot to read -- help them out by giving the time they need to digest your brief and put in a call to you to discuss the case.

Do set a collaborative tone and don't insult your opponent. Fisher and Ury said it all in *Getting to Yes*: "Be hard on the issues, but soft on the people." Argue the facts and the law firmly and persuasively to show your case to its best advantage. Also remember, you are trying to reach agreement with these people, not beat them into the ground. When you want to reach agreement with someone -- be it a spouse, child, partner or legal adversary -- it doesn't help to accuse them of fraud, racketeering, dishonesty and bad faith. Do let the facts and the law speak for themselves -- do not hurl *ad hominem* insults and gratuitous accusations.

Do come clean on any weakness in your case. If you are strong on liability but shaky on damages, say so in your brief -- and then explain how you are going to deal with the challenge. Nothing will increase your credibility more with the mediator and the other side. Nothing will torpedo faster any credibility you have than for the mediator to learn about some big weakness in your case only from the other side's brief.

They call them "briefs" for a reason. Do keep them short -- 10-15 pages will normally do it. Do tell the mediator the pertinent facts, explain the key legal issues, and provide the

precise procedural status of the case. Do give any pertinent negotiating history. Lead off the brief with a catchy, appealing theme for your case and then tell a good story. Don't cite endless cases. If you want the mediator to read a case, provide her with a copy of the opinion.

Do attach the key documents: the contract, important letters and e-mails, a timeline or chronology, critical medical records, diagrams or photos. Highlight or excerpt the important parts of long documents. Be selective -- a mediator can't absorb 50 exhibits, but the most important dozen are very helpful.

Do exchange briefs with the other side - always, always, always. If the other side refuses to exchange, send them your brief anyway. The principal audience for your brief is the client on the other side. Don't waste an opportunity to persuasively argue your case directly to the client who will be making the decision on settlement. If you set the proper tone, you don't have to worry about insulting or angering them.

Do provide your mediator with a confidential brief, letter, e-mail or phone call in which you discuss the strategy and challenges for reaching settlement, the "story behind the story," any personal foibles among the participants, or anything else it would be useful for the mediator to think about in advance.

If you follow this advice, your mediation briefs will make the mediator love and respect you, it will show the other side how prepared, confident and persuasive you are, and thus set the stage for settlements in which your clients get all they deserve. ■

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