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RESOURCE GUIDE

Five Reasons to Share Pre-Mediation Briefs

By Deborah Saxe, Esq.

Almost all experienced mediators recommend that mediation briefs be shared in advance of the mediation, but few litigators are willing to do it. This most likely is because litigators and mediators have different agendas.

Litigators are trained to protect their strategies and "smoking guns," if any, — that is, to "hide the ball" — because, if the other side cannot get certain information in discovery, the information then can be used to blindside the opponent at trial. Litigators tend to be aggressive and competitive. They want to win at trial, even if that means ambushing the other side. As a result, they play their cards close to the vest and produce documents and information to the other side only when necessary.

By contrast, most mediators value collaboration. After all, it is their job to get the parties to reach an agreement about how to resolve the case.

A good mediation brief sets out the facts, including the procedural status of the case and any prior settlement discussions. It explains your client's position on liability and the amount of damages likely to be awarded. For the reasons set out below, such briefs should be exchanged in advance.

First, you are going to mediation to settle the case. If there is a fact favorable to your client that the other side does not yet know about, there is seldom any value in keeping it confidential during the mediation. If it is to have any value in the settlement discussions, you will need to disclose it.

Second, almost nothing in a mediation brief is really confidential. You want the other side to know your legal theories and, if there has been discovery, the other side already knows your version of the facts. If discovery has not yet taken place, the other side will know that version soon enough. You can always tell the mediator any information that needs to be kept confidential. You can do this on the telephone in advance of the mediation, in person during or immediately before the mediation session, or, if you prefer, by submitting a letter brief to the mediator ahead of time.

Third, if the parties exchange briefs, you receive the value of knowing the other side's legal theories and version of the facts in advance. This lets you avoid being embarrassed by not having raised an important legal theory or factual contention with your client before the mediation session. No one likes surprises, and you almost always will look bad if your client learns about the other side's contentions for the first time at the mediation. Also, knowing what the other side has to say helps you and your client be better prepared psychologically. If the other side has negative things to say about your client, you can share them with your client before the mediation, rather than having him/her blindsided during the mediation.

Fourth, you will be better able to engage in substantive negotiations at the outset of the mediation if you have had the opportunity to read, consider, and respond to the other side's current positions before you arrive. Submitting confidential mediation briefs needlessly prolongs the mediation session by requiring verbal delivery by the mediator of information that could efficiently have been exchanged in writing by a lawyer in advance. Why spend precious time at the mediation learning the other side's version of the facts and/or current positions? If briefs are exchanged in advance, differences of fact and damages can be addressed early and the mediation can get off to a productive start. Exchanging information for the first time at the mediation often frustrates the mediation process because there is not enough time to analyze the information and review it with your client.

Fifth, although most mediators are persuasive, submitting a confidential mediation brief to the mediator deprives you of the opportunity to show the other side how persuasive *you* are. ■

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