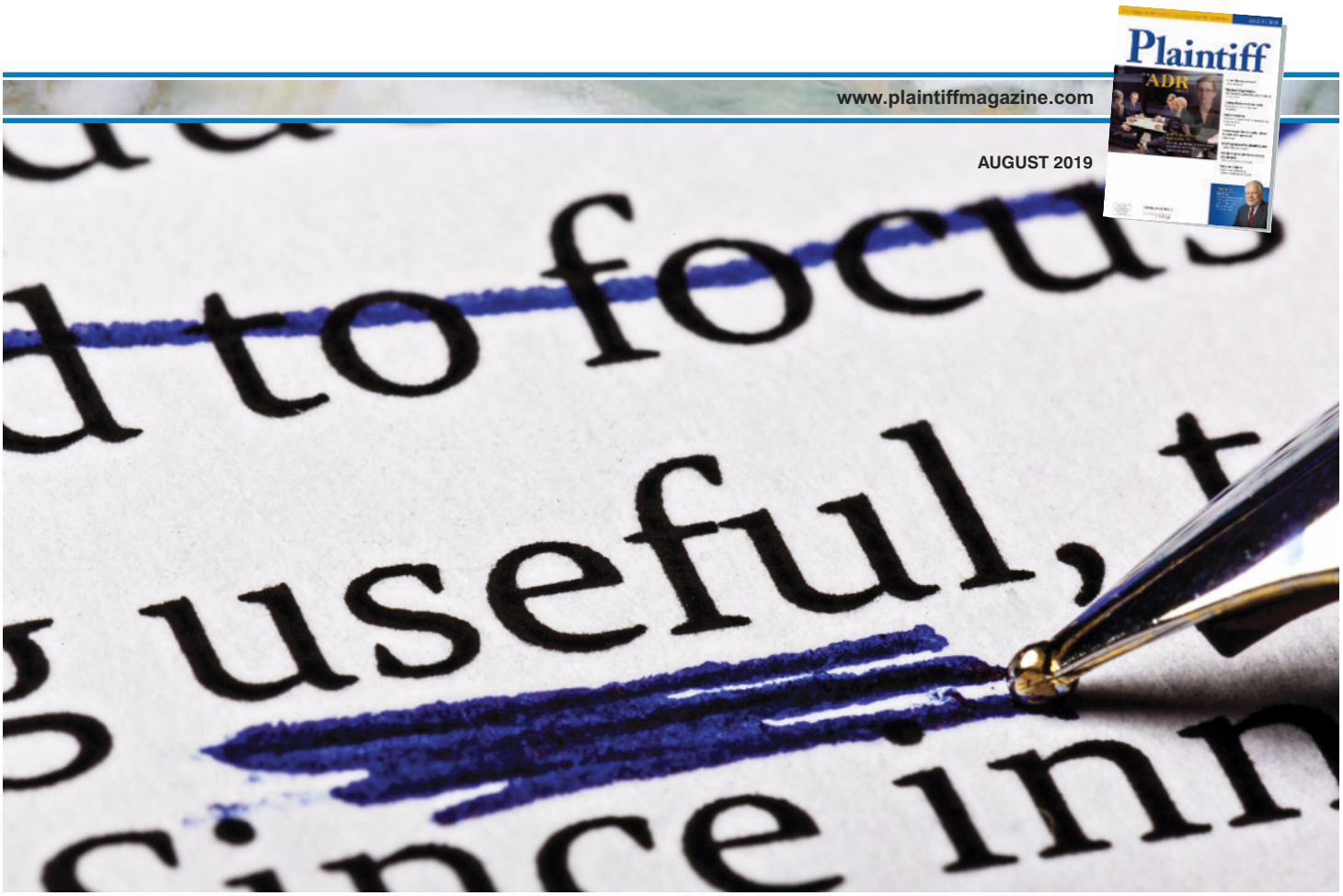


Crafting effective mediation briefs

The effectiveness of mediation briefs turns on a combination of content, length, distribution and timing

By Doug deVries

Unlike the litigation process, which is driven by adversarial efforts to prevail on the merits of a dispute, the mediation process puts aside the resolution of contested issues in order to settle the entire dispute by means of mutual agreement. In this context, the effectiveness of mediation briefs turns on a combination of content, length, distribution and timing.

Mediation brief contents

Mediation briefs have much in common with trial briefs. However, when crafting a mediation brief some differences should be kept in mind, including the differences between the mediation process and the litigation process. Mediation presents an opportunity for disputing parties to take a time out from the litigation process in an attempt to settle their dispute.

When the mediation process succeeds, it involves mutual compromise and the exercise of self-determination by the parties themselves, not determination of the outcome by a judge or jury, or by the mediator. Mediators, as neutrals, are not expected to take sides or unilaterally resolve disputes. One should therefore have in mind the difference between judges and juries on the one hand (triers of law and fact) and mediators on the other hand (facilitators).

Correspondingly, mediation briefs serve a different purpose and aim at a different audience than law and motion briefs and trial briefs.

Typically, prior to a mediation session, the parties and their counsel already know what the dispute is about, what the issues are and what their respective positions are, although they may not be fully aware of all the facts or what all witnesses and experts may ultimately say. In addition, parties and counsel do not yet know what a judge or jury might finally decide or what the ultimate outcome may be; attempts to predict the ultimate outcome of litigation are usually problematic. Typically, such predictions have little impact on the positions advanced by opposing parties. Therefore, what is at the heart of negotiations and the mediation process, and what drives the compromises that can lead to settlement agreements, is a mutual uncertainty about what may be in the parties' respective self-interests. It is important and essential to understand this reality because it is self-interest that guides the parties in their positions and

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in their negotiating strategies and ultimate decision-making.

When writing a mediation brief intended to be served on an opposing party, the content of the brief is similar to that typically included in a law and motion or trial brief. Such a brief sets forth the submitting party's take on liability and damages, and it explains why their position is strong and the opposing party's position is weak. For plaintiff, it sets forth the facts and law in support of the assertion that they are entitled to recover money and why the defendant should pay it. For defendant, it is the converse, why the plaintiff is not entitled to money. With a mediation brief, extra emphasis is placed on questioning an opposing party's positions and undermining their confidence in order to increase their sense of risk and uncertainty of outcome.

While a mediator's efforts on behalf of the parties are usually well-served by briefs laying out and explaining the parties' positions on liability and damages, the mediator's focus is primarily on what lies between the parties' positions as opposed to resolving the dispute defined by those opposing positions. This observation correlates to the very essence of the mediator's role as a neutral. The proper place for a mediator is always between the parties, not aligned with one or the other party. Therefore, mediators may be expected to read and digest the parties' mediation briefs in a manner that is markedly different than the way a judge reads a law and motion brief.

Evaluative vs. facilitative mediation

In this regard, mediators' approaches to reading mediation briefs may vary with the mediator's style and level of interest in the parties' specific positions. It is not that the parties' positions are irrelevant, but rather it is a matter of focus and the nature of the interaction between the mediator and the parties. If possible, counsel should have in mind the mediator's method and style when writing mediation briefs. Evaluative mediators are more likely than facilitative mediators, as part of the negotiation process, to focus on weighing the merits of the parties' positions with a view to influencing and directly convincing a party about the weakness of their position and the strength of the opposing party's position. Facilitative mediators are more likely to focus on, explore and emphasize the risks and uncertainties presented to each party as a result of the disputed issues and the parties' positions on those issues. The evaluative mediator may be more likely to express personal evaluative opinions directly while the facilitative mediator is more likely to challenge a party's position through critical inquiry – in other words, pressing the parties by posing the right challenging questions.

Some insight into what should be emphasized in a mediation brief may be gleaned from considering the approach mediators typically take to reading briefs. Mediators review mediation briefs with an interest in acquiring the key information likely to inform the negotiation that is expected to take place during the mediation session. In that regard, mediators preliminarily take interest in the following:

- What type of case is involved?
- Who are the parties and representatives?
- What losses and damages are claimed, and what is the support for them?
- Do opposing parties agree about the damages or take exception to them?
- What are the factual and legal matters that liability issues turn on?
- What are the factual and medical (or other) matters that damages turn on?
- What are the plaintiff's strongest and weakest positions?
- What are the defendant's strongest and weakest positions?
- What are the significant risks and uncertainties presented to each party?
- Are there any credibility issues potentially undermining the parties' positions?
- What do the parties' upsides and downsides look like? (Anticipating so-called BATNA and WATNA analyses – the best and worst alternatives to a negotiated agreement).
- What, if any, negotiations have preceded the mediation session?
- Are there any procedural or practical problems that will impact negotiations?
- Are there any other apparent impediments to meaningful negotiation that may need to be prioritized and addressed?

Mediation brief length

Mediation briefs, like legal cases themselves, come in many different forms; there is no uniform style – some are short and some are long; some are accompanied by numerous exhibits and some are not; some present summary overviews of the case and some go into exhaustive detail (including footnotes and exhibits). Mediation briefs have no uniformly accepted length limit, unless filed under certain courts' ENE, MSC or other ADR programs, in which case a typical court-imposed page limit for briefs is 10 pages.

It is no secret that mediators prefer shorter mediation briefs without multiple exhibits. While such a preference may simply reflect a desire not to be burdened with having to read a lot of material in preparation, it may also reflect a mediator's mediation style. As an example, the more evaluative the mediator's approach, the more they may be interested in receiving detailed facts and evidentiary support in advance, while the more facilitative the mediator's style, the more the mediator is comfortable waiting to develop and explore the facts and evidence through direct interaction with the parties and counsel during the mediation session itself.

Experience teaches that, with rare exception, 10-page briefs can be just as effective and informative as 30-page briefs, and sometimes more effective. Likewise, mediators' practices vary when it comes to reviewing exhibits prior to the mediation session. As a general rule, the less factual disputes are identified in the parties' mediation briefs, the less likely

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exhibits will be reviewed in detail pre-session.

Mediation briefs – to share or not to share

It makes sense that parties would share mediation briefs with each other in anticipation of, and setting the stage for, meaningful and productive negotiations. The sharing of mediation briefs is consistent with their purposes and objectives, as discussed above. Plaintiffs entering into money negotiations with an opposing party expected to be the source of money payment, including insurers or other business entities, possess an obvious self-interest in demanding the money and explaining why it should be paid. Defendants (and insurers) conversely have a self-interest in undermining a plaintiff's positions and explaining why money should not be paid.

In spite of the foregoing, there appears to be something of a non-sharing trend of late, a trend that takes various forms. Defendants tend to withhold briefs more often, but plaintiffs do so as well. In addition, even shared briefs may involve withholding of significant information from an opposing party. The justifications advanced for withholding briefs or significant information include, as follows: not assisting the opposing party; not revealing confidential or proprietary information or techniques; not sharing in response to the opposing party withholding. In the final analysis, the disadvantages associated with not sharing a mediation brief may fall disproportionately on the plaintiff seeking payment of damages when shared information might have encouraged the defense to pay (or pay more). In this regard, in the absence of information strongly presenting an opponent's position, case value determinations are more likely to be one-sided.

Should the client see the brief?

Sometimes a question arises whether a mediation brief should be shared with a client, given its content. For instance, one may not wish to subject a client who has been through a particularly traumatic experience to have to read about it in detail.

There may also be a circumstance where unreasonable client expectations are created or exacerbated by giving a client a mediation brief to read without appropriate counseling and cautionary advice. This problem arises from aggressive one-sided advocacy positions taken in the brief combined with aggressively high demands. Without detailed explanation of the negotiation process, a client may fixate on a higher amount of money than will be realistically achievable in the negotiation – a high number that may not only impede settlement, but also may not ultimately be in the client's best self-interest.

Mediation brief timing

Preparing mediation briefs well in advance of mediation sessions is recommended. Adopting such a practice can help counsel get better prepared for negotiation and aid in the preparation of a client for negotiation. It helps organize the process and test the completeness of case analysis as well as formulation of a demand and negotiation strategy.

For plaintiffs, sharing a brief well in advance of mediation sessions is also recommended. Doing so can further plaintiff's self-interest in a productive negotiation by not only informing the opposing party about plaintiff's positions, but making the opposing party confront and analyze plaintiff's positions as part of their own preparation of settlement authority. Parties, not surprisingly, are guided (and indeed driven) by self-interest in negotiations. Correspondingly, it is also not surprising that parties tend to view and assess their negotiation preparation and settlement objectives from their own self-interested point of view. Parties may understate, under-appreciate or misunderstand an opposing party's positions. Since the strongest recitation of a position is most often the one made by the party asserting it, the best way to encourage an opposing party to deal with one's position is to communicate it to them, and to do so sufficiently in advance of the mediation to influence their preparation.

In general terms, all parties go through the same steps to prepare for mediation: gaining knowledge of facts and law, assessing damages, analyzing positions and support for them, evaluating potential outcomes, and developing settlement positions and strategies.

Where plaintiffs and defendants (or insurers) differ is the more institutionalized and ritualized nature of mediation preparation process that is undertaken by insurers. Plaintiffs are well advised to define their positions for opposing parties well in advance of settlement negotiations lest their opponents define them for them.

The two briefs approach

As with length, there is no rule limiting the number of mediation briefs. Because there are two different audiences for mediation briefs – an opposing party and a mediator – consideration should be given to sharing two briefs, one to the opposing party and one to the mediator. A second confidential brief to the mediator allows a party to accomplish the following: inform the mediator about things they do not wish to share with opposing parties (including explanations or rebuttals for perceived weak positions); discuss prior negotiations and attitudes toward them (including changed circumstances); discuss practical or procedural problems that may impact negotiations (such as costs and discovery); discuss other potential impediments to negotiations (such as problems or history with opposing counsel or problems with a client or a client's attitude toward settlement); discuss any aspect of client relations or problems; bring to the mediator's attention what counsel would like the mediator to focus on or assist with during negotiations.

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Conclusion

The effectiveness of mediation briefs turns on a combination of content, distribution and timing. Extra emphasis should be placed on questioning an opposing party's positions and undermining their confidence in an attempt to increase the opponent's sense of risk and uncertainty of outcome.

Parties should share mediation briefs with each other in anticipation of, and setting the stage for, meaningful and productive negotiations. Sharing mediation briefs well in advance of mediation sessions is also recommended, and sharing two briefs may also be appropriate, one to the opposing party and a separate one to the mediator.


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