Creating an effective mediation brief

The five critical elements of a mediation brief

By Nancy Neal Yeend

If you are a lawyer going into mediation, you may be asked to submit a mediation brief to the mediator. You may also want to prepare one to organize your strategy. But first, what is a mediation brief? And, how does it differ from a motion or trial brief? Any number of articles have been published on how to write a mediation brief; however, most focus on three topics.

1. How to justify a position rather than how to effectively assess the case;
2. How to educate and prepare everyone for the mediation, including the mediator; or
3. How to develop successful negotiation strategies.

If you start justifying a position, creative solutions will evaporate. Your conversations with opposing counsel will sound more like arguments presented at trial, rather than true dialogue. If you, in your mediation brief, and for that matter your opening statement, start with "We want..." or "We will not...," you will only increase the probability of a stalemate. You may find that your client, not being satisfied with the outcome, may suffer "buyer's remorse," which can create significant issues for both you and the mediator.

If you only seek to educate, you will miss the opportunity to present potential solutions, a key step in the process.

And, if you only focus on negotiation strategies, that is, on process, you will likewise miss the opportunity to tell your client's story.

In sum, a mediation brief should focus on the structure and timing of the brief and the case itself, including the facts, procedural history, applicable case law, decision-making factors, and unresolved issues and potential options for settlement.

Early considerations: Structure and timing

Before starting to assess the case, you must consider two fundamental questions – how long your brief should be and when you should submit it to the mediator. Briefs should be just that – brief. Typically, five pages should be sufficient; however if you have complicated issues to resolve, multiple parties or other mitigating circumstances, your brief might be as long as 15 pages. You should always check local court rules and mediation practices as some alternative dispute resolution programs limit the length of briefs, sometimes to 10 or fewer pages.

You should submit your brief to the mediator at least 30 days prior to the scheduled mediation, and hopefully at least 60 days prior. The mediator will then have sufficient time to evaluate the case and, if needed, contact you for more information. If the case

was evaluated more than 60 days in advance of the mediation, then you would be wise to be certain that nothing essential has significantly changed.

Case analysis: The five elements

You must address the following five critical elements when writing a mediation brief:

1. Summary of facts
2. Procedural history
3. Case analysis
4. Decision-making factors
5. Issues with options for resolution

By diligently tackling each element, you will increase the likelihood of a creative solution that meets the unique emotional and financial needs of the client. You will also increase the likelihood that the parties will fulfill the terms of the settlement.

Summary of facts

Ideally, to be persuasive, without being misleading, the facts should show rather than tell the story. Several techniques are available for organizing the facts, especially in an emotionally charged situation. Two of these include storyboarding and writing the backstory. You may want to use simple storyboarding with your client to visualize the conflict in context, how it escalated to the point of threatened litigation and under which scenarios it would be resolved.

Additionally, you may consider using the backstory approach in which you tell your client's story, as the client would want it

told. As part of either approach, you can ask your client to put themselves in their opponent's shoes and tell the opponent's story to you. Your client may, as a result, see the dispute in a new light and become more open to dialogue and new solutions that can inform the mediation brief.

One tip: When you consider the facts related to the case, be sure to identify both the undisputed and disputed facts. Rather than attempting to justify particular positions or facts, you should state the relevant facts and point out those that are not in dispute. You will have a better chance of preventing both sides "digging in their heels," or going off on tangents and rehashing old wounds, making a settlement harder to achieve.

Procedural history

Briefly outline the chronology of events that led to the case. Include a summary of any offers, demands, or attempts to negotiate a settlement. Sometimes, when the parties review the chain of events, especially offers and proposals, they begin to realize that they may not be so far apart. If you can restart direct negotiations, you may be able to settle without incurring additional cost and time for your client associated with a formal mediation process.

Case analysis and evaluation

Of the five elements of the mediation brief, the most critical will be your analysis of relevant case law and how the holdings apply to the facts of the case at hand. Keep in mind, however, that the point of a mediation brief is not for you to argue the case to a judge, but rather to articulate for the mediator the strengths and weaknesses of each side in the mediation.

Lawyers often skip this step by only viewing the case from their own perspective. To better prepare, you should conduct a 360-degree analysis of the case. For this step, you can draw on the preliminary efforts you and your client made in framing the facts from both sides. The other side will certainly point out the weaknesses, so if you can anticipate the issues and develop a strategy for dealing with them, you will find that reaching a settlement will be easier in the long run.

One technique for assessing the case from both sides is to begin by assessing one side and then physically move to a different room, table or desk and assess the case from the other side's perspective. When you look at the pros and cons of the case from both sides in advance of the mediation with the client, you will also enhance the likelihood that the parties will settle and your client will be satisfied with the mediation process and your work.

Decision-making factors

One step, which lawyers rarely complete is to identify the key, in addition to the law, that the client, as well as the other side, will use to decide if they accept or reject an offer. Attorneys typically use the law as their decision-making criteria; however, clients rarely do.

A variety of factors influence whether a person will move forward and settle. These are as varied as the people involved in the case. That said, you should consider some of the common ones typically associated with your type of case. For example, if you represent a victim in a personal injury case, your client may want enough money to pay medical bills. If opposing counsel represents a medical provider or an insurance company, these clients may want confidentiality to prevent copycat cases. If you represent a husband or wife in a divorce and child custody dispute, one or both parties may be concerned about preserving relations, especially if they will be co-parenting.

In many instances, clients are also concerned with practical things, such as containing costs, enforcing settlement terms, minimizing tax impacts or simply ending the dispute and achieving a sense of finality. Some may have emotional needs, such as being able to save face, being recognized for having been right, or obtaining an apology for having been wronged.

Once you have considered the likely decision-making factors of all participants, including the insurance companies and creditors if they are involved, you will be better equipped to address the last element: identifying unresolved issues and potential solutions.

Issues and options

To begin, list all the issues that must be resolved for a comprehensive settlement. As you draft this list, you should work with your client to identify at least three possible options for each issue. This is your final and critical step. It will also demonstrate your client's good faith interest in reaching a settlement as they go into mediation.

For example, if you represent an employee in a wrongful termination case, you might suggest the company re-instate the employee in their position or a comparable position, train the employee for a different position within the company or elsewhere, or agree to provide a positive recommendation on behalf of the employee when asked. If you represent a client in a real estate matter, you could include options that relate to the profession's customs and standards. Here again, you can draw on the work you and your client did in the previous steps, to anticipate the issues and options and be better able to engage the other side in crafting terms and conditions that they and your client will accept.

Conclusion

Grasp the opportunity. Use the mediation brief to shape the outcome of your case in favor of your client. Follow the guidelines presented and you will achieve this goal.

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