

Sotomayor Law
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A
Newsletter
on
Dispute
Resolution

M *Mediation* Matters

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How to Draft a Really Useful Mediation Brief

Why did you decide to read this article? Perhaps you are about to write your first-ever mediation brief. Or maybe you've written hundreds of them before. I'll bet you're looking for something new to help get the best results possible.

Of course I can give you an objective list of items that are always helpful, but really pretty standard. And you know those already: (1) the operative facts of the case, (2) the parties' legal positions, (3) the details of the relief sought, (4) the history of any settlement discussions, (5) copies of any key documents.

All of that information is necessary for you, your client, and the mediator to prepare for the mediation. However, so much more can be achieved just through the brief. I'm not talking about the "sell," but rather all of the stuff you think will move the mediation participants toward a successful settlement. This does not mean you should tack another caption page on the front of your summary judgment motion.

Consider the following ideas in addition to the old standard.

1. Exchanging Briefs – Are You Kidding?

What do you expect to achieve by keeping your factual and legal analysis between you, your client, and the mediator? By submitting briefs in confidence, lawyers and parties relin-

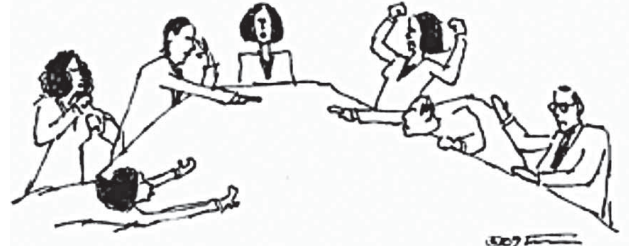
quish control over conveying information to the other side. If everything in your brief is confidential, how is the mediator supposed to move and impress your opponent with your position in the case?

More often than not, once we get into the mediation conference room, counsel and clients almost immediately exchange briefs. Wouldn't it save time, and more importantly, promote pre-mediation evaluation of the parties' positions, to just share the information before you get there?

Consider the value of conveying to your opponent, for purposes of settlement, not only why you think you will win, and to highlight key factual disputes, but also the keys to what it will take to move your client.

Moreover, sharing your brief with the other side allows everyone the opportunity to find areas of agreement you might not have considered before, and to drill down to the real areas of disagreement that are at the heart of the case.

Beware of exchanging a brief that could be considered insulting or arrogant. Save that stuff for a separate communication with the mediator. All you have to do is send a confidential cover letter or e-mail to the mediator with all the dirty laundry.



Mediation, Act I: Posturing

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2. The Reason You're in Mediation.

I recently met a very aggressive litigator who said, "The only reason I go to mediation is if I have a problem or a pain point." Well, I'd like to meet an attorney who doesn't have a "problem or a pain point" in every single case on his desk. Nobody has a perfect case.

As counter-intuitive as it may seem, take the opportunity to convey your problem or pain point to the mediator. Do it confidentially, in that cover letter, e-mail, or otherwise. The first task is to actually identify the problems in your case, and that will take some work. Conveying that information to your client will also get your client to start warming up to the idea of compromise.

3. You Need a Whole Section in Your Brief about Obstacles to Settlement.

So why would it help you or your client to share that kind of information with the mediator and, possibly, your opponent? Won't the mediator simply exploit the situation to make your cli-

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ent pay more or take less? And why on earth would you expose your view of the obstacles to the other side?

Say you're litigating against a party whose representative at the mediation is an insurance adjuster or perhaps in-house counsel. These interested parties go through a process to determine the settlement value of the case, and this always happens before the mediation. Rarely is only one person involved in and in control of the settlement. In virtually every case, there is a chain of command and individuals (and computer programs) demanding documentation and other information to support the settlement.

Why should you care? Because if you supply all of the information the adjuster or in-house counsel needs to justify the highest possible settlement value, well in advance, then your opponent will come to the table with a greater appreciation of your view of the value of the case and with more money, options, and ideas than they otherwise would have secured without the information.

In short, do the adjusters' or in-house counsel's job for them. Summarize the numbers in your brief. Supply all supporting documents in advance.

What if your opponent is all bluster and arrogance and simply can't be reasoned with? Think about what he needs; tell the mediator what you think might be his problem and come up with suggestions that you think might be a work-around. Do this part confidentially.

The mediator – and you – must identify the obstacles to settlement in order to avoid impasse. Without knowing what is really preventing parties and lawyers from reaching a settlement, the mediator – and you – are left in the proverbial boat without a paddle.

Determining the obstacles to settlement takes considerable reflection. Before the mediation, I often hear parties and lawyers say they don't think there is any chance of settlement. This almost always changes once we actually get to mediation. Why? The process is designed to examine what everyone needs to resolve the dispute, and parties and counsel really start to focus and examine their needs and what they actually "can live with."

Examining the factors that will identify and address your needs, your clients' needs, and the opposing party's and lawyers' needs will lead to a greater ability to come up with solutions. Conveying that information in the brief will help your mediator begin working for you to address and meet these needs.

4. Include a Discussion of the Interests, Dynamics, and Personalities in Play.

From the mediator's perspective, your brief will be most useful and productive if you provide your assessment of what's really at issue in the lawsuit. Legal arguments will only get you so far. Then what do you do if you feel we can't get any more movement?

If, at the outset, you examine and tell the mediator what you think lies at the heart of the parties' dispute, the mediator can better understand the nature and cause of the conflict in the first place. Sometimes communication failure is the problem that escalates into a lawsuit. Sometimes the parties simply can't appreciate the other's legal position, and they become polarized. Sometimes the emotions of everyone involved, including counsel, are behind all kinds of disputes, and reason is out the door altogether. Perhaps financial worries have created the conflict; you know how desperate people do desper-

ate things. And don't forget the time-honored favorite: the parties' desire to "have their day in court," no matter what.

Finally, sometimes the lawyers themselves add fuel to the fire because clients need them to aggressively support their position in court. Lawyers don't want to be perceived as weak, but they also know that sooner or later, more than 90% of civil cases settle before trial. In the mediation, the mediator needs you to wear many hats, not just the pit bull hat the client expects you to wear. The mediator, as well as your client, needs you to wear the hat of the wise and practical counselor whom your client depends on and trusts.

Your views on the dynamics in play are vital to the mediator's ability to connect and work with you and your clients to get the job done.

5. Be True to the Theme of Your Brief – How You Will Achieve Agreement, NOT How You Will Crush Your Opponent at Trial.

While it is essential to explain in your brief how and why your position will ultimately prevail in court, consider the real purpose of your brief – to achieve an agreement among the parties. Then, consider how to craft the brief, and your tactics at the mediation itself, in order to reach that goal.

What information or tone will engage your opponent? Perhaps some recognition and validation of the opponent's position (for example, "Although defendant disagrees with plaintiffs' view of the facts as well as their interpretation of the applicable law, defendant understands that plaintiffs believe they delivered goods that complied with the terms of the contract and should be paid the full contract price. Defendant respectfully disagrees for the following reasons . . .

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. . Defendant values the longstanding business relationship with plaintiff.”)

At the end of the day, you want your clients to be satisfied with the mediation process, the results, and especially you and the efforts you

made on their behalf. Your brief can be significantly more effective than the standard informational, argumentative, summary judgment-like document. Crafting a brief that will move your opponent toward agree-

ment, not to a continuation of hostilities, will create a mediation environment most likely to lead to resolution of the conflict.

Is Pre-litigation Mediation Too Early?

Attorneys often say that pre-litigation or early-litigation mediation just doesn't work for them or their clients. The client may be too angry at the outset to consider the concept of compromise. The lawyer may need to impress a potential client with his "pit bull" aggressiveness as a litigator. The client may insist on having his "day in court." And, what about discovery? Shouldn't a responsible lawyer conduct discovery before settling his client's case? Why should the lawyer give a preview of his case to the other side?

As one of my colleagues likes to say, "you either pay now or you pay later." And that applies to both sides. All litigators know that well in excess of 90% of civil cases settle before trial. The real question is when will the case settle – before filing the action and plunking down a retainer, the filing fee, the service costs, and facing the inevitable deadlines and burdens of discovery? Or, after years of anxiety-driven phone calls to the lawyer, ever-expanding expectations of success, followed by the flurry of last-minute discovery, annoying or stress-inducing depositions, expensive motion practice, even more expensive trial preparation, trial court delays, and finally, the HUGE BILL from the lawyer? Then, of course, there is the ubiquitous fear of appearing weak to the other side by even mentioning the concept of pre-litigation or early mediation of disputes.

Wow. How can you achieve the best result for your client . . . and for you? I have never met a client who doesn't want his problem solved as quickly and cheaply or for the maximum recovery as possible. Emphasis on "quick."

What to do? The best way to achieve an early settlement is to investigate and work up your case as completely and as early as possible. The smart plaintiffs' lawyer will gather and provide everything the defendant needs to evaluate, and put a monetary value on, the case. That means a straightforward "package" of the information and documents that you know the defendant will need.

The reality is that most defendants will work up a case with more than one decision-maker, then have a roundtable evaluation, and then attach a value to the claim. If a plaintiffs' lawyer withholds key information, the kind that could really increase the value of the claim substantially from the defendant's point of view, the plaintiff could well be at a disadvantage at mediation. The defendant's hierarchy of decision-makers would not have had the benefit of that information in determining the value of the case.

In federal court, much of this can be accomplished through the Rule 26 initial disclosures if the lawsuit has already been filed. But both sides of the dispute can exchange packages akin

to initial disclosures even before a case is filed. It is nevertheless critical to do a thorough investigation of the facts to ensure that an early settlement is based on complete information.

Will you appear weak if you suggest early mediation? The most sophisticated plaintiffs' lawyers I know tend to reach out before filing an action to begin the negotiation process. Savvy defendants and their lawyers appreciate the reality that a lawsuit is sure to follow. In federal court, you'll be contacted pretty quickly to select an ADR procedure, and you'll have to follow the mediation program anyway. In state court, since the closure of the ADR program, you're left on your own to broach the subject of settlement, most likely later rather than sooner.

The reality is that most lawyers want the pressure of a court "order" or referral to mediation so they don't appear to lack confidence in their case. Consider your approach to your experienced opponent. Don't you both know that eventually the case will have a 90+ percent chance of settling? The opportunity to bring in a trusted mediator to initiate negotiation could be part of your pre-trial schedule and checklist. It really is an objective procedure, arguably akin, at least in the life of a case, to a case management conference or scheduling conference. Parties need to understand that other than a dispositive motion, mediation is

their only, and best, chance to resolve the case before trial.

How do you deal with a client who insists on having his day in court? Mediation is the perfect vehicle for letting both sides air their dispute in a setting where they can control the outcome of the dispute, and not a third party who just may not see it their way. Some parties benefit from the opportunity to communicate their position to the opposition face to face. Others benefit from just the opposite. Unlike a court trial, a mediation is custom-made.

Sometimes, a mediator can be called in before litigation is commenced to assist the lawyer in conveying the costly and risky realities of litigation. This approach helps both client and lawyer and relieves the lawyer of conveying any kind of weakness that is contrary to what the client is looking for at the moment.

In fact, calling in a neutral third party before a dispute escalates too far can save relationships, partnerships, businesses, and money. A mediator can help in many kinds of disputes

that don't even contemplate litigation. Where communication fails, with relationships at risk, the value of facilitating communication and brainstorming solutions is enormous.

Consider the usefulness of engaging a mediator before you or your client give up on a business, throw in the towel on a deal, letting the "pit bull" loose on the opposition, or investing too heavily in a case that will cost more than it's worth. This could be your most valuable strategy ever.

b2b – Commercial Mediation

Do you and your business partner have a dispute? Is your company about to dissolve because of a conflict you can't resolve? Is your business having trouble with a vendor, client, or customer?

Are you trying to resolve your dispute quickly, fairly, and inexpensively, without going to court?

Consider this: An impartial third person with experience in both litigation and pre-litigation dispute resolution can help you save your business and important income-generating relationships, even relationships in family business disputes. How?

First, a business mediator will essentially dissect the problem by working with all sides to determine all of the interests in play. This is the foundation

of both the dispute and its resolution. This is the hardest part of the process because it takes time, introspection, and a willingness to examine, communicate, and address the motives behind the dispute.

Second, a business mediator who is trusted to be fair and impartial will work with all sides to explore alternatives to the worst outcome, which could be dissolution of your business, loss of valuable customers, or the enormous expense and delay of litigation.

Third, a business mediator will facilitate communications that have broken down and assist in reducing or eliminating the emotional obstacles to getting on with business. The mediator could even serve as a provisional

director to help the board tackle problems or regular issues in a productive way.

Don't let the courts take control of your b2b – commercial dispute! With a business mediator committed to helping you and your business, you and your business partner can devise your own win-win solution. You will save yourselves tons of money, time, and aggravation by avoiding the courthouse.

Mediation really works. Try mediation before giving in to the problem and dissolving businesses and relationships. A trusted business mediator will help you to beat the problem and continue on your productive path to success.

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Rande S. Sotomayor, Esq. is a mediator and arbitrator with over 30 years of civil litigation, business, and dispute resolution experience throughout California. She is well known for her common-sense and cost-conscious approach to assisting parties and counsel resolve their disputes, especially before or during the early stages of litigation.

