

Effective Mediation Submissions

MEDIATION MEMOS: THE BARE MINIMUM

For those of you who practice in an area where you mediate regularly, you may have a standard submission format you use. Or, your mediator may ask for specific information. Either way, what is the bare minimum your pre-mediation memo should contain?

- Procedural Posture
- Key Players
- Claims
- Key Facts – Disputed and Undisputed
- Applicable Law
- Relevant Documents – highlighted and tabbed if extensive

CONFIDENTIAL OR EXCHANGED?

In some practice areas, it is standard to exchange, whereas in others, the pre-mediation submissions are given confidentially to the mediator. Which is better?

The benefits of exchanged memos are that each side knows, in advance, where the other party is coming from in terms of the views of the case. Education is a part of the process, and it helps if everyone knows as much as possible in advance. The downside is that the memo then serves solely as an exercise in advocacy – similar to an opening or closing argument, or a motion for summary judgement. While exchanging submissions may cause your opponent to see the deficiencies in their own case, it can sometimes have the opposite effect, especially if a new demand or offer is included – opposing counsel may think, “Wow, they really don’t see their own risks” or “we don’t have a chance of resolving, why are we going?”

And, remember – there is almost always something new that is learned in mediation, not shared or known before, even where memos are exchanged.

If you do exchange memos, submit a second, confidential one to the mediator.

ANALYSIS OF STRENGTHS AND WEAKNESSES

Regardless of whether you exchange memos or submit them confidentially, the best submissions tell the mediator not only what you view as strengths of the case, but also indicates potential weaknesses or risks. Rarely is there a 100% slam dunk case on liability – but even where this is the case, or where liability is super-strong, there can be a huge variance on the views of the range of potential damages. The more you provide to the mediator, the better.

DEMAND LETTERS, MOTIONS AND/OR RULINGS

It can certainly be a time-saver to simply give the mediator copies of past settlement correspondence, or copies of motions and/or rulings. If all issues are thoroughly addressed in those documents, why re-create the wheel? Even if this is done, though, it is still best to send a separate letter to the mediator containing your analysis of what has occurred since those documents were sent or rulings were issued and providing your insight into other personal dynamics that might come into play during the mediation.

Perhaps you are just super-busy, with limited time to put into preparation of a mediation memo. However, where no original submission is prepared, potential interpretations of that inaction could be, “I don’t care about this case,” “I don’t care if this case settles at mediation,” “I am not a very thorough lawyer.”

If 90-95% of cases resolve at mediation, this is your client’s day in court, which means it is worth the investment of time to make sure you, your client and the mediator are as armed with full knowledge to be as prepared

– and effective – as possible.

PAST SETTLEMENT HISTORY

This information is essential because it alerts the mediator to potential problems where one or both sides have differing information about where the parties left off in settlement discussions. Parties tend to prepare for mediation based on where they thought the other party was last. If there is a significant change in position or a mis-remembering of verbal discussions, that can be caught and addressed by the mediator in advance of the session.

TIMELY SUBMISSION

Most mediators will ask for memos one week in advance. There is a reason for this: the mediator wants to be able to review the submissions and have time to reach out to counsel in advance to discuss any issues or pre-mediation concerns. If the memos come in too late, there may be no time for that studied review and pre-mediation outreach.

PRE-MEDIATION CALL

Don’t hesitate to reach out to your mediator to provide any information you have not put in your memo, or to discuss particular challenges you anticipate might arise during the mediation. Remember, people go to mediation for different reasons at different times: to avoid bad PR, because they have issues communicating with opposing counsel, or could use assistance educating their clients; their clients may have a need to be heard; or the timing is such that financially it is in their best interests to resolve. The more you share with the mediator, the better your mediator will be able to get you there.



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