Share Your Brief with the Other Side to Promote Settlement at Mediation

By

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To increase chances that mediation will be successful, the parties should share their mediation briefs with the other side(s). Here are the reasons why:

- It ensures that both/all sides are mediating the same case. Before negotiations can become fruitful, each side must have a full understanding of the positions (facts, law, arguments) taken by the other sides. Probably the most effective means for sharing perspectives is the convening of a well-managed (by the mediator) joint session at the mediation. However, many lawyers distain joint sessions; so sharing briefs, pre-mediation, is the next most effective way of confirming that each side has a complete understanding of the positions of the other sides.
- To be successful, mediations require a willingness to waive "work product." Perhaps lawyers are skeptical about sharing mediation briefs because they do not want to give up their "work product." However, any party that has a surprise witness or "smoking gun" document will have to reveal that purported case-changing evidence if that party truly intends to settle the case at mediation. It is unrealistic to expect that the other party will accept a settlement proposal if that side is not aware of undisclosed, compelling evidence. Therefore, using the brief to provide the other side with a complete understanding of the pertinent facts, law, and arguments—including theretofore unknown witnesses or documents—will prompt the other side to reassess its position. Alternatively, if, strategically, a lawyer wishes to keep secret the identity/testimony of a witness or

the existence of a document, such things can be withheld from the brief and not disclosed until mediation. ***However***, take note of the next point in this series.

- Shared briefs result in those at mediation arriving with maximum flexibility and authority. Whereas some parties to litigation/mediation are free to make whatever decisions they see fit (e.g., an individual plaintiffs and defendants), lawyers and representatives from institutional plaintiffs and defendants do not enjoy that discretion and, instead, have others to whom they must answer. Corporate representatives carry out the instructions given them by corporate higher-ups before attending the mediation. Typically, some, but not all, members of Board of Directors (e.g., homeowners associations) attend mediation; and those who attend are limited in their authority to what the entire Board gave them. Risk Managers from public entities arrive at mediation authority given them by superiors. Claims adjusters, of course, have claims supervisors; and, whereas the claims supervisor does not attend the mediation, the claims adjuster attends mediation with whatever authority has been given him/her by the supervisor. In light of the foregoing, it is essential to the success of any mediation that the authority personnel not present at mediation possess full understanding of the other side's position so that the case can be meaningfully evaluated. If alleged facts, citations, or new arguments are shared with institutional representatives for the first time at the mediation session, there should be no expectation that those institutional representatives will have the capacity to respond with any deviation from the authority provided to them before mediation. Thus it is in a party's best interest to assure, through the sharing of the brief, that higher up decision makers are aware of all facts, witnesses, documents, citations of law, and arguments that are going to be made in the case, both at mediation, and, if necessary, at a later trial.
- It lessens chances that initial settlement proposals will incite anger and retaliation. Often, mediation negotiations get off to a bad start because, in the mind of the defendant, the plaintiff's initial demand is unreasonable. The defense usually retaliates by making an equally unreasonable offer. Both sides become discouraged and lose confidence in the process, and time then must be spent to keep parties at the table and soothing emotions. Such dynamics can be avoided—or, at least, mitigated—if briefs are exchanged before the mediation. Instead of an aggressive settlement proposal "coming out of the blue," it can be evaluated against what had been provided in the previously shared briefs. Further, if shared briefs conclude with opening settlement proposals, whether general or specific, pre-mediation knowledge of those proposals and the reasons behind them will eliminate that the "shock and awe" felt by the parties when they hear proposals for the first time at the mediation.
- There is no harm in sharing briefs. Subject to the "surprise witness or smoking document" issue discussed above, there is not harm in

sharing briefs. The Evidence Code is clear that no document prepared specifically for use at mediation can be admitted into evidence in any later non-criminal proceeding. Ev.C. 1123. Therefore, lawyers are not at risk for their mediation briefs showing up as attachments to declarations to support motions. California public policy strongly favors settlements, and the evidentiary provisions related to mediation—i.e., settlement proceedings—are designed to protect those who agree to attend mediations.

To be successful, negotiations must proceed with each party having a clear understanding of the "value" of the other side's position. To appreciate value, each party must have a complete understanding of what the other side has in terms of facts, witnesses, documents, legal authority, and persuasive argument; and they must have such information before any mediation so that those in authority can properly evaluate the case. How better to sensitize the other side the value of a case than to provide that side with a comprehensive brief days before mediation convenes?

To schedule a mediation, please contact case manager Kathy Purcell at:
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