

CONCISE AND TIMELY MEDIATION BRIEFS

You have drafted a brilliant and persuasive mediation memo. Your case is in order and all the expert reports are lined up. So why didn't your mediation brief have the desired effect on not only the mediator but also opposing counsel and her client?

Well, the devil, as they say, is sometimes in the details. Sometimes all the evidence and high quality advocacy in the world cannot overcome the failure to deliver a brief that is both concise and on time. This short memo will address these two important aspects of the mediation brief.

Concise brief

By the time your case gets to mediation, you will know the few key issues that are keeping the parties apart. If you think there are a dozen issues keeping the parties apart either you don't know your case very well or your opponent doesn't. So you should have the courage and precision to address only the true issues in your memo. This will make your memo more focused and persuasive and will demonstrate to all that you know your case and you know the real strengths and weaknesses.

Also, it will lead you to include fewer and more streamlined attachments with your brief. There will be no need to attach complete hospital charts, all the tax returns, physiotherapy records, and the like. You will attach only the key pages and the important excerpts.

If you want the mediator and your opponents to read and absorb the entire brief, make it a manageable size with focused content. Always. Be. Editing.

Timely brief

It bears repeating that if you want the mediator and your opponents to read and absorb the brief, it has to be delivered into their hands with sufficient time to do that.

For starters, as most of you are already doing, please deliver your memo and the limited number of attachments by email or other reliable electronic method. Easy.

Everyone gets it instantly, as long as they have an internet connection. The days of compiling and delivering paper briefs are quickly disappearing, as is the use of couriers who may or may not get the brief to opposing counsel's office while he or she is still there.

For the mediator, delivery should be at least the day before the mediation and ideally two. On more complex cases, or at the request of the mediator, the briefs may be required even sooner.

For opposing counsel, you will want to deliver your brief at least a week before the mediation. Counsel are busy and may not get to your brief until the night before the mediation but you can at least give them a chance to skim the brief and identify any issues or concerns in a timely way.

So, you have delivered the brief to the mediator and counsel in sufficient time for them to read and absorb it. What about the opposing parties themselves? Don't you want them to read and absorb your brief and have time to ask their lawyer questions? For a productive mediation, this piece is crucial, in my view. If the "opposing party" is an insurance company, you want them to have your brief weeks in advance, if not a month or more, so that they can review it carefully, make adjustments to their reserves or even seek greater monetary authority from their supervisors before the mediation. They simply cannot do any of that on a few days' notice. Instead, send your brief weeks in advance and tell opposing counsel to please forward a copy to their client.

If the opposing party is an injured plaintiff, you will want that plaintiff to read your arguments, have them see what you know about their case and where you see the holes. You want that plaintiff to know there is an opposing case and that everything their lawyers says is not necessarily what a judge or jury will accept. Therefore, again, send your brief early and invite plaintiff's counsel to send a copy to the client. If the brief only gets to the client a day or two before the mediation, they may already be too nervous to properly absorb it, they may be too entrenched in their views and they may simply be too close to the mediation date for your memo to have any effect.

Give yourself the best chance at a productive mediation. Deliver your brief early.