

## MEDIATION BRIEF CHECKLIST

### A. What to consider before drafting

1. Who is the real audience?
  - i. *Mediator?* Yes. Needs to be informed about factual framework and the issues in dispute and the parties' positions. This is NOT a factum.
  - ii. *Opposing counsel?* Not really. Counsel knows the case and the issues.
  - iii. *Opposing party?* Quite possibly. This is a chance to set out your view of the case for the opposing party to read, unfiltered by opposing counsel.
  - iv. *Your own client?* Your client will read your memo so you will want to keep that in mind as you draft.
  
2. What is the procedural and legal context of the mediation?
  - i. Is this a true attempt at resolution or is it simply a mandatory step in the litigation?
  - ii. Have discoveries been held? This will significantly influence how much detail goes into the memo.
  
3. Tone
  - i. This is a facilitated settlement meeting, not a motion, trial or appeal. So your memo is not a factum.
  - ii. The mediator is not a judge who will determine who is right and who is wrong.
  - iii. Lay the groundwork for resolution, not total victory.
  - iv. Always adopt a civil tone, even if you are taking strong positions.
  
4. Goal/Objective
  - i. Does your client want to settle no matter what? Or is there a reasonable range within which the case can resolve?
  - ii. Is your goal to maintain a firm position with little compromise or flexibility?
  - iii. Is this an exploratory exercise to test the resolve of your opponents?

## B. Form and Content of the Brief

- i. Provide a pared down overview in plain language. This is your one minute 'elevator pitch.'
- ii. Then outline the essential factual matrix, stripping out the additional facts that are commonly found in pleadings.
- iii. Only include facts necessary for the mediator to be able to understand the issues.
- iv. Identify the real issues in dispute, not every single issue in the case.
- v. Provide a concise statement of your client's legal position, referring to case law only if absolutely necessary.
- vi. Use 'point first advocacy' throughout your memo.
- vii. Address non-legal issues which can influence settlement such as:
  - a. Availability of insurance
  - b. Solvency of defendant/collectability of judgment
  - c. Costs
  - d. Reputational risks
  - e. Precedential value
  - f. Delay
- viii. PRO TIP: Where possible, acknowledge weaknesses of your case or strengths of opposing case, then explain how they can be addressed. This sets the stage for productive mediation.
- ix. Similarly, highlighting areas of agreement will be a productive element of your memo.
- x. If there are credibility issues with the parties or key witnesses, be sure to highlight these and acknowledge the risks associated with them.
- xi. If you have non-party witness information, be sure to produce it in advance. Consider attaching witness statements to your brief.
- xii. Consider including actual numbers, your assessment of value, in your memo. Will this be your opening position at the mediation itself?
- xiii. Use headings throughout the memo to facilitate navigation.
- xiv. Always be editing. Always be paring down and stripping out superfluous information.

### C. Attachments to the Brief

- i. Restrict attachments to key documents only.
- ii. Fewer documents have greater power.
- iii. For longer documents, attach only key excerpts, or consider putting the excerpts directly into the body of your memo.
- iv. Where it is warranted, a chronology can be very helpful to the mediator as a stand alone document.
- v. If your opponent has a key document or expert report, acknowledge and address it and even consider attaching it.
- vi. Don't overwhelm the mediator with voluminous attachments
- vii. If you serve your materials electronically, be sure to bookmark or separate the attachments for ease of navigation.
- viii. If you must attach case law, highlight the key passages. Consider attaching excerpts only.

### D. Timing/Delivery

- i. Contact opposing counsel in advance to discuss a schedule for delivery of briefs whereby plaintiff serves brief first.
- ii. If you have a new expert report or new information, make sure it is served as far in advance of the mediation as possible.
- iii. If you want to influence the opposing party directly (especially an insurer), make sure you serve your brief several weeks in advance of the mediation – ideally a month.
- iv. Send two copies of your brief to opposing counsel and invite them to send the second copy to their client.
- v. If serving electronically, include the suggestion to forward the brief to their client.
- vi. Similarly, ALWAYS ensure your client sees and reads the opposing brief, not just your own.