



PREPARE FOR MEDIATION SUCCESS: SIX TIPS FOR WRITING A STRONG BRIEF

By Zela "Zee" G. Claiborne, Esq.

Writing a persuasive brief is one of the most important things an attorney can do to prepare for mediation of a business dispute. A good brief provides the opposing side with information they need to consider. Perhaps even more important though is an excellent brief that can help the mediator assist with successful resolution.

Here are six tips:

1. Outline the facts of the case, describing them from your client's point of view. For example, what duties are included in the contract between the parties? What were the actions that led to the claimed breach? Review the key facts in some detail but avoid repetition and leave out peripheral issues. Then edit to remove the excess words. Your brief will be most persuasive if it is pared down and covers only significant facts.
2. Include a discussion of the law that applies to the case. Again, keep it short since a list of cases and lengthy legal arguments may be useful at trial, but will not be the basis for a mediated settlement. It is not a good idea to send the mediator a copy of your Complaint or Motion for Summary Judgment. It is even worse to outline the details of your latest discovery dispute. Mediation is not about winning or losing legal arguments. Put those items aside and focus on the key legal principles that apply and that should be considered when evaluating the case for settlement. Then edit again.
3. Watch your tone. There is a big difference between mediation advocacy and trial advocacy. Mediation advocacy can be persuasive without being overly adversarial or demeaning. Do not accuse your opponent of lying or of cooking the books. After all, the goal is to find a business solution that the parties can accept. Hopefully, they will be able to shake hands at the end of the day.
4. Exchange briefs so that all participants are informed of the parties' positions. If there are things you want to tell the mediator in confidence, ask to talk by phone or send a confidential side letter. Often, a short phone call is the best way to enlist the mediator's help in dealing with a difficult personality on the other side or the limits of your own client control. These discussions can be strictly confidential and they help the mediator understand the underlying interests that are not readily apparent or the hidden sources of conflict not covered in the briefs.

5. While writing the brief and participating in mediation, avoid the cliché statements that every experienced mediator has heard hundreds of times, such as the other side is not negotiating in good faith and just wants "free discovery," or my client is not concerned with the litigation risks because he/she is standing on "principle." Instead, help your client understand that information exchanged in the confidential setting of mediation can be the basis for a successful settlement and also that there may be considerable risks involved in going to trial for a principle. It is important to weigh the risks of litigation in order to decide whether it makes sense to settle on the offered terms or move to trial. Have the confidence to break out of these clichéd positions.
6. Finally, the most important thing to include in the brief--or at least in a side letter to the mediator--are some thoughts about how to settle the case. Is there a business deal that might work? What is it that your client must have? What might your client be willing to give up in return? Possible solutions often include the payment of money but also might include an agreement to work together to do business in the future. Sometimes, one company even offers to buy the other. There are many solutions that thoughtful counsel and their clients might generate with the help of an experienced mediator. Often, a mediated resolution is a business deal that, in the eyes of the participants, is far superior to any remedy that might have been available in court.

Ultimately business-people like mediation because it is confidential and because it offers an opportunity to choose to settle on acceptable terms rather than having the resolution of the dispute imposed by a third party (judge, jury, or arbitrator) at trial or arbitration. Make the most of the mediation opportunity! ■

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