



MAKE THE MOST OF YOUR MEDIATION: THE BRIEF

By Hon. Lynn Duryee (Ret.)

Lawyers wonder, what's the point of writing a good brief when it seems that judges barely skim them? Judges grumble that briefs are notoriously dense and barely readable. And yet an informative and concise brief is the time-honored way to convince the judge of the merits of your case. In mediation as well, the brief presents a golden opportunity to have your case viewed by the neutral in the best-possible light, free of annoying objections and interruptions from your opponent. So is it worth the effort? According to Chief Justice John G. Roberts, "There's nothing better than a well-written brief."

Let's get to work. Here are 10 pro tips to make your next brief a winner:

1. Start writing two weeks before the brief is due. No one, but no one, can write his best brief the day it is due. The process of writing and thinking is deep and mysterious. Even great writers accept that they can only go so far in one day. You need time to develop your thoughts and arguments. Set the stage for success by starting the brief well in advance of its due date.

2. Force yourself to complete a draft. Many lawyers, disheartened by the enormity of the task before them, stare at a blank screen for hours, writing and rewriting the opening paragraph, unwilling to go on until it is perfect. Instead, try thinking of your first paragraph as a placeholder, something that you will change once you write a draft all the way through. A terrible first draft will be far more valuable to you the following day than a perfectly crafted opening paragraph because you will have thought about your case from start to finish.

3. Lead with the big picture. Your reader needs context to appreciate the details in your brief. Lead off with a one- or two-sentence introductory description of your case. For example:

- This admitted-liability high-speed car crash caused traumatic brain injury to plaintiff.
- This lawsuit between neighbors in Tiburon pits plaintiff's million-dollar view against defendant's vintage oak trees.

Remember, a brief is not a mystery novel; the reader shouldn't have to wait until the final page to figure out what kind of case it is.

4. Overcome writer's block. Commit to writing when you are at your best during the day. If you get stuck, skip to the part that you know and fill in the missing pieces later. If a section of the brief feels overwhelming, jot it down in bullet points rather than complete sentences. The more you accomplish, the more manageable the remaining work will seem.

5. Conclude with a clear demand. If you represent a plaintiff who hopes to settle a case at mediation, you must include a demand. If, as defendant, you are able to include an opening offer in your brief, do so. Exchanging proposals in advance will save considerable time on the day of mediation.

6. Use technology. If your brief is submitted electronically, let technology work for you. Color photographs, maps, videos and hyperlinks to germane materials—in moderation, of course—can make your case come alive.

7. Show your enthusiasm. The tone of your brief should be professional—free of purple passages, humor and ad hominem attacks—but it need not be boring. Demonstrate why you find the case captivating. And if you unfortunately find the case tedious and dull, here's some bad news: Your reader will as well.

8. Limit attachments. If you want your neutral to appreciate how helpful the chiropractic treatment was, say so in your brief, but do not attach 200 pages of illegible scribble. If you want her to understand how inconsistent the other side's testimony is, cite it, but do not attach the deposition. The same is true for expert reports, repair estimates, medical bills and other documents: Summarize succinctly and promise to bring the backup documentation to the mediation.

9. Edit, edit, edit. Professional writers say, "Writing is rewriting." As you rewrite your brief, be on the lookout for repetition, passive constructions, clunky phrases, dull verbs, and long subordinate clauses (they start with "which" and continue on well after even Michael Phelps would have run

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out of breath). The input from a sharp editor—a colleague or perhaps your client—is invaluable. When you think your brief is ready to send, put it aside for a day. Then challenge yourself to eliminate 100 words. Then 50. Then 10. Less is more.

10. File it on time. You've done a lot of work writing and editing your persuasive brief. Now you need only ensure that your audience has sufficient time to appreciate it. Filing the brief the night before the mediation will confirm your belief that judges barely skim briefs; delivering it on time will maximize your neutral's ability to savor it.

A well-written brief will position you for success on your day of mediation. Your thinking will be clear and your preparation evident. And if by chance your case does not settle, when you sit down to prepare your Mandatory Settlement Conferences Statement, you will need just a few minutes to update your brief, and—voilà!—you will have a submission worthy of the Chief Justice. ■

Up Next: Make the Most of Your Mediation: Effective Negotiations

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