

# **The Mediation Brief**

*By Laurel Greenspan Kaufner*

A mediation brief gives the advocate a unique opportunity to present the mediator with a thoughtful statement of the issues and goals from his perspective, outside the limitations and structure of the mediation session.

Whether or not a mediation brief is used often depends upon the preferences of the mediator chosen. There are many mediators who require them, many with whom it is optional and still others who will not read them. The necessity of a brief is also often dependant on the complexity of the dispute and whether the parties are represented by attorneys or not. In all cases, it is best practice to check with the mediator. If your intent regarding briefing differs from the mediators' expectations, discuss it thoroughly with the mediator.

Refusing or failing to provide a brief without specific discussion of the subject actually tells the mediator that you either don't care about the particular case or that you don't care about the professional expectations of the person whom you are asking to assist you in resolving the conflict. Either way, you are not helping your client.

## **What matters in mediation briefs?**

Although most briefs contain a discussion of the law, many are missing a detailed description of the facts. Unless your legal issue is unique, a points and authorities are not usually necessary. On the other hand, a discussion of how you view the facts in relation to the applicable law is often helpful.

Among the things that should be included in the confidential brief are:

- A thorough and clear discussion of the facts and damages;
- A statement of your understanding of your clients' needs and goals in resolving the dispute;
- Your settlement position (including any prior settlement discussions);
- The status of discovery and what it has shown or not shown;
- Your opinion on the credibility of the witnesses (including your own witnesses);
- What kind of experts you intend to use and their opinions; and
- Who is going to try the case if it isn't the writer of the brief.

Come to your mediation knowing the full amount of all liens and/or other expenses (including costs to date and expected future costs) due and owing out of your litigation, and the negotiability of each. Whether or not you are willing to share this information with your mediator (hopefully you will), you will be able to provide your client with an exact value of the benefit or cost of a settlement and your client

will be able to make a more fully informed decision. Your client may not notice that you've "gone the extra mile" when you do this, but rest assured, they always notice when you don't!

### **Focus your arguments for persuasive evaluation**

There is no case that is perfect in every way, shape and form. Your greatest asset in mediation is likely to be your use of the strengths and weaknesses of your case. Addressing both, the strengths and weaknesses, in a credible and reasonable manner will help the mediator to understand the basis for your evaluation and help others understand it.

As defense counsel, you may lose the ear of the experienced mediator and other parties if, in the case of a plaintiff who began therapy 6 weeks post accident, you take the position that "credible doctors will testify that soft tissue injuries will heal within 4 - 6 weeks with or without treatment and so the treatment that the plaintiff got was unnecessary". It is likely that the same thing will probably happen where plaintiff's counsel attempts to argue that a plaintiff, who was a seasoned athlete and habitual weightlifter for years prior to the accident in question, was rendered completely disabled and unable to work for 9 months at his job as a waiter/bartender, by what his doctors have repeatedly diagnosed as sprain and strain, even after thorough diagnostic studies. Both of these examples may appear extreme without other details, but each of them has come up recently in mediations of mine. Not surprisingly, neither of these arguments added anything at all to resolution of the disputes. In fact, after these arguments were made, in both cases, we spent significant time repairing credibility in order to be able to focus on the strengths of the case. It is not important in mediation that every part of your case be strong or that you can respond in a "winning" way to everything. Where there are glaring weaknesses, acknowledging them and framing them in the light that does the least damage to your case will gain you credibility.

In both of the above mediations, had counsel focused on the strengths of their cases, rather than detracting from them with untenable arguments, the disputes would have been resolved far more expeditiously, and perhaps with a better result for that party. The defense in the above example could have focused their arguments on the delay in treatment and relatively short duration, both strengths for them, which were acknowledged privately by plaintiff's counsel. Plaintiff's counsel above could have focused on the fact that this plaintiff had suffered a previous injury, which caused the effects of this accident to be far more serious, and made him more susceptible to greater difficulty in handling the specific demands of his job, even though he had apparently suffered only soft tissue injuries. Neither counsel in these cases was terribly off the mark in their evaluation of settlement value, but both missed the opportunity to credibly persuade the other parties of the strengths of their cases because of their focus on the "wrong" issues. At the outset of your mediation, spend some time reviewing your arguments with your mediator before presenting them to the other parties in your dispute. Your mediator has been retained to help you resolve your dispute and helping you frame your evaluation in

the most credible manner to another party is part of being your guide in the mediation process.

### **Educate your opposition!**

You want something from your opposing advocates and unless you share the information necessary for them to properly evaluate your position, they may not have the ability to seriously consider and discuss settlement of the matter.

For plaintiffs, provide defense and the carrier at least 8-10 days before the session, as complete a statement of damages as you can, accompanied by all the supporting evidence you have (regardless of the fact that they have already received it in discovery or failed to request it). For defendants, request from plaintiff's counsel any documentation or evidence you still need in order to properly evaluate their claim.

If you choose to do a confidential mediation brief, make this a separate statement to opposing counsel, but attach a copy of this statement to your brief or include this information so that your mediator has the benefit of it as well.

### **Timing of the mediation brief**

Mediation briefs should be provided to the mediator within a reasonable time prior to the mediation to afford the mediator adequate time for thorough review, research (if necessary) and the opportunity to ask for additional information or clarification. A mediation brief handed to the mediator at the mediation serves no purpose except to frustrate the parties and the mediator through the presentation of a document that can't be thoroughly reviewed or used for its intended purpose.

Remember, a mediation brief is an opportunity for you to speak confidentially with the mediator in a thoughtful presentation prior to your initial meeting. Most mediators appreciate this and are happy to receive confidential briefs. Use it to begin the mediation process, not to try to win a motion for summary judgment.



© 2004, **Laurel Greenspan Kaufer** holds a J.D. from Loyola University Law School and a B.A. from UCLA. A former litigator, Laurel has been an active mediator in the Southern California Dispute Resolution community since 1995 and currently serves as a member of the Board of Directors and Webmaster of the Southern California Mediation Association, in addition to serving on the Board of Ventura County Dispute Services and numerous mediation panels in the Southern California area. Laurel specializes in resolving construction, real estate and business disputes.