

## A mediator's perspective on briefs: Establishing a basis for resolution

**After 44 years in litigation and mediation, the most effective briefs aren't courtroom arguments -- they're practical tools that help resolve cases. Here are my own mediation briefing guidelines.**

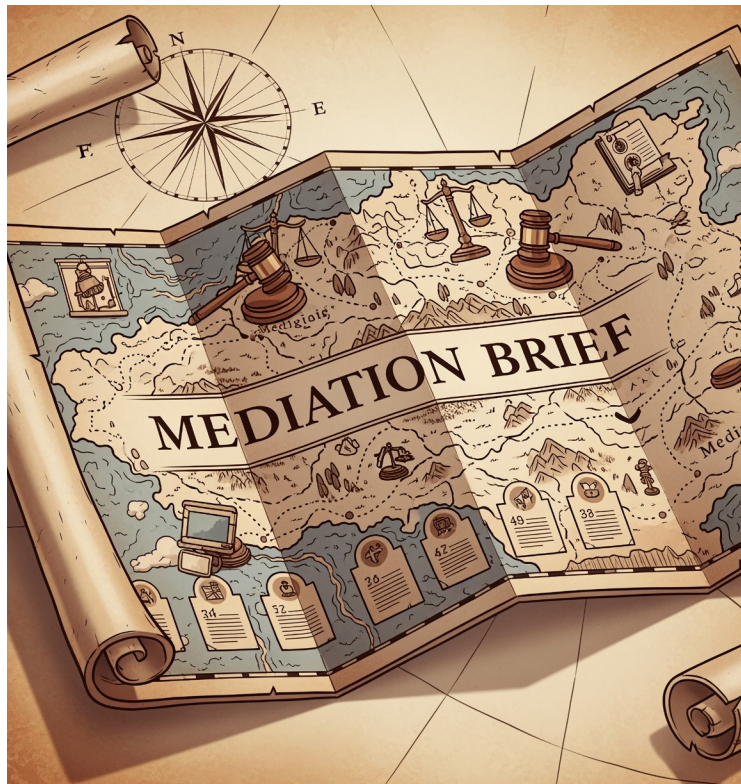
By Gary N. Stern

**A**n article on effective briefs for the mediation of a litigated case does not by itself break new ground. There are many "dos and don'ts" out there when it comes to an effective and persuasive brief. But perhaps that is the problem. After 44 years of litigating cases as a lawyer mediator, I do not want a "persuasive" brief in the sense that a trial judge or appellate judge is expected to use the briefs to help him or her arrive at a decision on the matter at hand. Instead, I want the lawyer's brief to inspire me in my role as a neutral, impartial facilitator of a process designed to resolve the case here and now. With this purpose for the brief so stated, I offer my perspective as to what I want from the lawyer's brief.

In my opening letter to counsel, I say the following about briefs:

"I am a big believer in well-prepared mediation briefs, provided to me at least five business days before the mediation session. I do not believe in artificial page limits, but...well you know the joke about lawyers and briefs! I always appreciate attachments, such as photographs, life care plan summaries, Howell analysis, etc. In employment cases, feel free to attach copies of important documents that have been exchanged during discovery and that you believe are relevant to the elements of your causes of action."

This is my usual statement, but it does not apply literally in all cases, and I do change it up depend-



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ing on the case and circumstances. Over the years, I have found that the "five business days" reference is often honored in the breach. The reality is that I am not wedded so much to time as I am to the content of the brief. Yes, a 25-page brief received via email at 9 p.m. prior to a 9 a.m. start time is not helpful. In such cases, I usually assume the lawyer sending me such a brief does not sleep as many hours as I do.

The subject matter of the case will dictate what I want and expect from counsel. In a contract case, receipt of a copy of the contract helps. The same holds true for a

landlord tenant case. I do want to see the lease.

But what I really want is practical, real-world content with minimal posturing and maximum sincerity. With that in mind, I offer my own mediation briefing guidelines.

I try very hard to convince the lawyers and their clients that I have arrived on the scene with serious intent to settle the case. I want the lawyers to do the same. I want the lawyers to prepare their clients for what is to come. And I want the lawyer's brief to be honest, practical and relevant to what we will be doing in mediation. First

and above all else, I want the lawyer to recite the facts of the case as they really are, not as the lawyer wishes them to be. If there are problems, tell me about them. With regard to plaintiff's counsel, I want to assume the lawyer took the case because it has merit. A meritorious case usually has problems that can be overcome. Be candid about those problems. With regard to defense counsel, I know he or she will tell me if the case is frivolous. But I ask that this word not be thrown around in every case. There are good plaintiff cases that are still defensible. And there are good plaintiff cases that can and should settle. Defense counsel can remain a good advocate while letting me know the parts of the case that admittedly pose issues for the defense. If plaintiff did well at her deposition, let me know that fact and that such characterization was communicated to the carrier in the lawyer's report.

I do have one pet peeve about briefs from plaintiff's counsel. If there is an insurance carrier on the other side, please, for the love of all that is holy, do not transmit the medicals and a demand for settlement for the first time two days before mediation. It is one thing for me to receive a last-minute brief; it is quite another thing to expect the carrier to come to the mediation session with money if it just received the demand and the backup one to two days before mediation.

Tell me a compelling story and do not be timid about asking me to call you the day before to discuss the case. I often arrange pre-media-

tion conferences, but that does not mean that an additional telephone conversation about last-minute developments will not pay dividends.

I expect advocacy but not with the same tone and style as if writing for a judge. The lawyers are preparing me to mediate, and I want them to expect that I will be respectful and understanding in both rooms, not merely one room. If there have been personality conflicts along the way, I want to know about them only to the extent that it may affect what we do in our mediation session. I spent an entire career trying hard to achieve civility, and I implore lawyers with whom I work to treat civility as both necessary and desirable.

I am a big believer in familiarity with jury instructions. I urge law-

yers to spend as much time as possible in their briefs discussing jury instructions and how certain allegations and defenses will be affected by them.

As with any brief, give me the pertinent facts, the key legal issues and, most importantly, the procedural status of the case. Let me know if there are special issues about one of the parties. If there is one dispositive Supreme Court case on the subject, cite that case. And please, if there is something important in the dissenting opinion in that case, share that with me as well.

I do not know why it is so common for lawyers to not serve their briefs on the other side. I estimate that in 90% of the cases where a “confidential” brief was transmitted to me, the lawyer could not iden-

tify what in her brief I should not share with the other side. I hope and expect that a good advocate for her client is proud of her case, honored to be representing her client and has very little, if anything, to hide. If there is an important issue or set of issues that cannot or should not be shared with opposing counsel, I urge a separate letter from the lawyer, addressed only to me.

Finally, spend some time in the brief offering suggestions that may help me to facilitate settlement. There may be something about the plaintiff that I should know in terms of the words I use and the tone of my voice. A mediation brief is not an appellate brief. We have a specific job to do, and the best briefs for mediation are the ones that help me to help you.

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