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The Pre-Mediation Submission — A Powerful, Invaluable Tool

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BY ABRAHAM J. GAFNI
Special to the Legal

When people ask me what most attorneys overlook when representing clients in mediation, I invariably respond: failing to prepare a written pre-mediation submission that will convert the mediator into an ally.

This response often mystifies the questioner who views the mediator as a neutral and impartial facilitator, who must avoid any suggestion of bias when dealing with the opposing parties. Such a limited view of the mediator's role, however, misperceives a key role of the mediator, which is critical to the mediation process.

In fact, you hope that the mediator will enlighten the opposing party about the problems facing him in a non-confrontational manner so that a more flexible negotiating posture will be adopted.

But how can the mediator educate your opponent about the merits of your position and his potential vulnerability if the mediator herself is not sufficiently familiar with the matter?

One of the most powerful tools allowing the attainment of this goal is a carefully prepared pre-mediation submission. Armed with the information provided by you, the mediator will be prepared to engage your opponent in a form of "reality-testing" through a series of probing questions.

But what should the pre-mediation submission contain, and how should it be structured so that the mediator can learn, quickly and efficiently, about significant legal and non-legal issues, which will form the basis for such reality testing?

Initially, you must recognize that you will be seeking to immerse the mediator, in a matter of a few hours, about a case that you have had the luxury of absorbing over months (or even years). This means that the written memorandum must be "user-friendly," allowing the mediator not only to absorb the material quickly but also to integrate it into her general store of knowledge so that potential hypotheses or solutions acceptable to you are similarly understood and viewed by the mediator as reasonable, practical and potentially acceptable to the opposing party.

Accordingly, this user-friendly memorandum must allow the mediator to locate any necessary document or other referenced item easily. This suggests that the memorandum, even in a case of minimal complexity, should contain a table of contents, reflecting what is contained in each section of the submission. (Consecutive pagination, in addition to sections, is even more helpful as it allows the mediator to go directly to a page, without having to thumb through multiple pages in a section).

Sections should be readily locatable through the use of Tabs. Never separate the sections in your memo by simply inserting an additional page between sections and writing e.g. a big " Section 2" on it. Mediators often become frustrated when they must waste time trying to locate the hidden section divider.

The memorandum should almost always begin with a statement outlining the nature of the case. The journalist's traditional questions, " who, what, when, where and how" serve as a good guide in this regard. This statement, with cross-references to appropriate attached documents, should include, but not be limited to (and not necessarily in this order), the following information:

ABRAHAM J. GAFNI, *a retired judge, is a mediator with ADR Options Inc. and a professor of law at Villanova University School of Law.*

• What is the present litigation status? Has a complaint been filed; has a trial date been set; has discovery commenced or been completed; have experts been retained and paid for; what remains to be done; will this be a jury, non-jury or arbitration hearing?

• What is the settlement status? Have there been any demands or offers; are there multiple parties who may share responsibility; are there limitations on insurance coverage or have there been denials of coverage?

• What special damages are being claimed? Have they been broken down to reflect past, present and anticipated future losses? Which of the claims are either disputed or undisputed?

• What factual disputes remain unresolved? Are there questions of breach of contract, negligence or comparative negligence, and how hard are they being pressed?

• What unusual issues of law, if any, are being presented and what is the present state of the law in that regard? Be fair — if there is precedent against you, acknowledge it, but explain why it should not be deemed relevant in this case.

This list, of course, is only illustrative; it is for the attorney to carefully consider what is important for the mediator to know and to craft the memorandum accordingly. But even the best memorandum will have only limited value if the critical documents,

cross-referenced by section and page, are not assembled and incorporated with care.

Do not simply attach all of the case documents "for the sake of completeness." The mediator will generally not be in a position to review every document in a voluminous file and will have difficulty recognizing what is truly important.

You should judiciously select and organize the most important documents (including photographs) and highlight with a marker critical points that the mediator might otherwise miss. If you are compulsive and feel uncomfortable about not giving the mediator every piece of paper in your file, you may create a companion volume containing every document.

Included with these documents should be the major judicial opinions (or the head notes and relevant sections if the opinion is overly long) or other authority that support your position. Again, highlight the specific language in the opinion, which the mediator should note.

Armed with your memo and documents the mediator will feel confident when she engages in "reality testing" with the opposing party during private caucuses. For example, in a simple personal injury case, the mediator will be in a position to confront the opposing party with the following types of questions suggested by your memorandum:

- "How do you think a fact-finder will react to the fact that the ER report makes no reference to injuries to your client's knee, even though he claims it was painful immediately after the accident?
- "The photo shows damage to the rear of the plaintiff's car — does this mean that the plaintiff had entered the intersection before your client?"
- "The other side has witnesses to the accident. Will you be able to present witnesses supporting your position as well?"
- "Do you agree with the statement of your own IME doctor that plaintiff's surgery and lengthy hospital stay were warranted?"
- "How will you explain to the jury that you will have a future annual loss of wages of $40,000 a year when your tax returns do not reflect that you ever earned that amount?"
- "What is the impact of the recent decision of the Supreme Court, which seems to allow the type of damages claimed by plaintiff in this case?"
- "Apparently, the dockets in this county are so backed up that you may not even get to trial for two more years. How do you feel about such a delay?"

In short, the issues and observations contained in your memo and documents, if written and assembled skillfully, will assist the mediator in "bringing the opposing party back to Earth," and cause him to negotiate based upon a realistic view of the conflict.

Finally, and most importantly, as I recently heard a U.S. magistrate judge explain at a CLE program, the mediation memo, however expertly prepared, will be virtually valueless if it arrives only a few hours before the mediation is to commence. Every responsible and experienced mediator prefers to receive the mediation memo sufficiently in advance of the mediation so that she can fully assess the matter and prepare her strategy in questioning the parties. A late arriving memo will allow little more than a cursory review often resulting in superficial "reality-testing".

One more thing — I have only discussed your memo and how the mediator will use it to encourage the opposing party to alter his fixed position But the mediator will presumably have received a memorandum of a quality equal to yours, and will subject you and your client to equally discomfiting "reality testing." How you and your client may prepare for that situation, however, is best left for future consideration. •