How to write an effective mediation brief

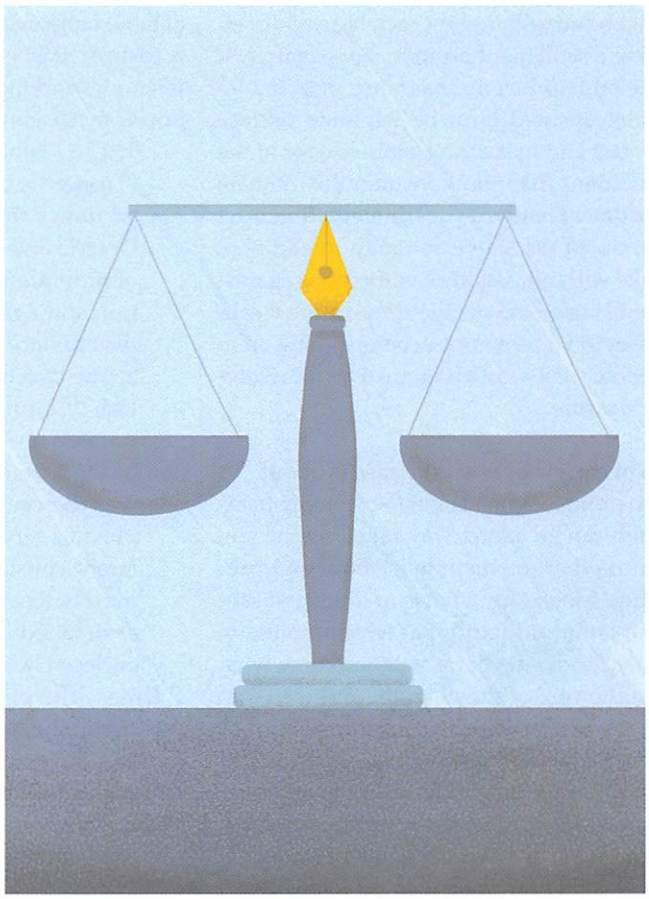
Stephen R. Morrison

Only 3 to 5 percent of litigation cases actually go to trial, and only a tiny fraction of those end up before an appellate court. Yet nowadays, whether or not mandated by the *Rules of Civil Procedure*, most cases go to mediation. So it is surprising that although many excellent articles explain how to write a first-class appellate factum, almost nothing is available on preparing an effective mediation brief. This article aims to address that deficiency.

As with most written communications, and legal writing in particular, the effective writer must begin with a clear understanding of the intended audience and the nature of the process about which something is being written. Confusion about the nature of the mediation process and the role of the mediator is often reflected in an ineffective brief. A mediation brief is neither a pleading, nor a legal opinion nor a factum. The principal audience for the mediation brief should be the mediator and not your client, opposing counsel or the adverse party. That is not to say that a brief cannot be a useful tool for communicating with others, so long as its main purpose of informing the mediator remains the focus.

A commercial mediation is not an adjudicative process and, accordingly, the mediation brief is not primarily a piece of legal writing with advocacy as its main purpose. Mediation is a facilitated settlement conference where the emphasis is on informed compromise, primarily motivated by both systemic and specific litigation risk, legal costs and potential exposure to an adverse costs award. In many cases, uncertainty with respect to the collectability of any judgment obtained represents a further risk factor. Parties that fail to understand the process often produce mediation briefs that are indistinguishable from pleadings. If a brief is merely an advocacy document similar to what is filed with the court, it adds almost nothing to the process. It also represents a missed opportunity.

As noted, the principal audience for the brief is the mediator. The purpose of the brief is to provide the mediator with a sufficient overview of the facts and underlying issues in dispute, together with the party's position on those issues, to allow for effective facilitation. Mediation briefs that reflect a belief that the mediator is someone who needs to be persuaded rather than informed belie a proper understanding of the mediator's role. Opposing counsel and their clients already know what the dispute is about and the positions being taken by their counterparts. Little is served by using the brief as a tool to restate those positions or persuade those individuals about the justice or strength of your case. In contrast, the mediation brief can be an effective tool to introduce your position with respect to settlement approaches and your willingness to compromise. When prepared effectively, such a brief can often send a positive message to the opposing party and set the stage for a successful mediation.



Unfortunately, mediation is often viewed as an extension of or step in the litigation process, rather than as an alternative dispute resolution mechanism in its own right for which a different kind of written advocacy is required. Quite often, whether owing to constraints of time or simple laziness, the mediation brief is nothing more than a pared down version of the statement of claim or defence already exchanged between the parties. Even worse, it is sometimes an expanded version of the pleading containing detailed chronologies and a comprehensive recitation of the evidence relied on by the party in support of its position. In some cases, this is accompanied by case law or statutory references, including lengthy quotations from those sources.

A mediation brief should give the mediator an overview of what the case is about, set out the essential factual matrix and provide

a concise statement of the legal position that the party relies on. A good mediation brief, however, will also attempt to communicate to the mediator and to the opposing party that there is an appreciation of the other side's case and perspective and give some indication of the range within which compromise may occur and settlement may be achieved.

An excellent mediation brief will also show a real appreciation of "below-the-surface" issues and may explore those issues in a non-contentious or even helpful way. The brief may include matters that may not even be admissible at trial, but which must be considered by each side in developing a settlement position. For example, if a defendant has no insurance or is inadequately insured, it can be helpful to disclose this fact and make the plaintiff aware of the limitations that may constrain the ultimate outcome. Finally, a superb mediation brief will do all the above and may, in addition, make without prejudice admissions against interest or acknowledge some of the weaknesses in your own case, before going on to propose some creative alternatives for resolving the case.

An overview of what the case is about

Two or three sentences in the opening paragraph can go a long way to telling the mediator what the dispute is about and providing context for what is to follow. Absent such an introductory paragraph, in many instances the mediator will not know what is at the core of the dispute until well into the document. This lack of information is frustrating and inefficient, since the mediator will not know what is important and what is superfluous to the central issues.

For example, in a medical malpractice case, the plaintiff may begin with the following:

> The plaintiff's claim arises from the failure of the defendant emergency room doctor to diagnose a ruptured spleen when the nine-year-old plaintiff was admitted to the defendant hospital following a serious automobile accident. Although the attending physician diagnosed three fractured ribs on the left side of the child's abdomen, and despite the plaintiff reporting several of the classic symptoms of a splenetic rupture, the doctor failed to order the standard diagnostic tests, any of which would have revealed a mild and repairable Grade I rupture. As a result of the misdiagnosis and resulting delay in treatment, when the rupture was subsequently diagnosed, the plaintiff had to undergo a total splenectomy, resulting in permanent susceptibility to life-threatening infections and the need to take antibiotics for the rest of the plaintiff's life.

An opening paragraph such as this one puts the mediator in the picture from the outset.

The essential factual matrix

In too many cases, mediation briefs are far longer than necessary, contain far more factual allegations than are required and often include documents filed as exhibits in support of those unnecessary allegations. It is generally easy to tell when the mediation brief writer is simply working from the pleading. Those briefs often begin as follows:

> 1. The Plaintiff, Jones Paving Co. Ltd. ("Jones"), is a corporation incorporated under the laws of the Province of Ontario and is engaged in the business of providing paving, grading, excavation and aggregate supply services in the Province of Ontario.
>
> 2. The Defendant, Smith Construction Ltd. ("Smith") is a corporation incorporated under the laws of the Province of Ontario and at all material times was the contractor which Jones supplied its services to on a variety of different construction projects predominately located in the City of Toronto, as detailed in the Statement of Claim, enclosed herein at Tab 1.

Unless the place of incorporation and the location of the projects are relevant to the issues in dispute, everything the mediator needs to know could be summarized in the following:

> Jones Paving Co. Ltd. is a paving subcontractor that supplied services to the defendant contractor, Smith Construction Ltd., in relation to 10 construction projects.

Continuing with the above example of a claim arising from the failure to diagnose a ruptured spleen, it is not uncommon to see the description of the factual matrix include a paragraph along the following lines:

> On April 23, 2017, at approximately 10:30 a.m., while a passenger in a motor vehicle operated by his father and proceeding southbound on Bathurst Street in the City of Toronto, in the Province of Ontario, the nine-year-old plaintiff was injured when the vehicle was struck on the rear passenger door by a delivery truck entering the roadway in an easterly direction from Neptune Drive. The plaintiff was eventually taken by ambulance to the Hospital for Sick Children and admitted to the emergency department at approximately 11:13 a.m., where he was seen by the attending emergency room physician, the defendant Dr. Carl Less. [Tab A – Police accident report dated April 23, 2017]

As should be apparent, 90 percent of the information in this paragraph is superfluous to the limited issue in dispute and completely unnecessary for the mediator to know. None of the details of the motor vehicle accident is germane to the issues in the mediation, nor is there any need for the mediator to review the accident report prepared by the police. All that the mediator needs to know in the context of this dispute could be captured in the following sentence:

> In the spring of 2017, the nine-year-old plaintiff was injured in an automobile accident and rushed by ambulance to the defendant hospital, where he was seen in the emergency room by the defendant doctor.

For the most part, mediation briefs are a good example of when "less is more." Unlike in pleadings, there is no need to worry about failing to state an essential element of the claim or omitting a defence. Keep it simple and straightforward.

Exhibits

It is not uncommon to receive a mediation brief of between 10 and 30 pages only to find that it is accompanied by dozens or even hundreds of pages of tabbed exhibits. Sometimes, a party will include the full text of an 80-page contract, even when the issues in dispute do not require reference to the contract terms. Other times, only one or two short provisions in the contract may require consideration. In such cases, it is sufficient either to quote the relevant contract provisions in the body of the brief or simply to include the one or two necessary pages of the contract as an exhibit.

Similarly, in a case involving product liability, a party may include as an exhibit the defendant manufacturer's entire product catalogue, rather than just the page containing the manufacturer's warranty and any limitations of liability. In a procurement case, the brief may reproduce as an exhibit the entirety of the tender documents, when the only issue in dispute is whether the bid was non-compliant for failure to properly calculate the HST. Similar examples include the attachment of reams of repetitive

strings of email correspondence, when only a few sentences are germane to the dispute. It is strategically far wiser to include only necessary information than to require the mediator to hunt for the relevant portions of the exhibits. The chances are far greater that the mediator will actually read the material.

Expert reports

Similar observations apply to the inclusion of expert reports in the mediation brief. Parties should, by all means, exchange with each other the full text of the expert reports they intend to rely on. It is generally unnecessary, however, to provide the mediator with a 75-page expert report setting out, in detail, the usual references to the documents reviewed, the technical methodology adopted, the detailed findings and the supporting appendices containing things such as laboratory reports. Moreover, a mediator will rarely need to review the expert's multi-page résumé or statement of independence. Typically, all that the mediator requires can be found in the several pages containing the executive summary and conclusion portions of the report. Sometimes, a few photographs are also helpful.

Legal authorities

References to case law and the inclusion of volumes of relevant authorities usually betray a misunderstanding of the role of the mediator, especially when the cases referred to pertain to well-established law. It may be appropriate to occasionally cite a case that is particularly on point or a recent authority that in some significant way changes the pre-existing jurisprudence. Even in these instances, it's usually sufficient to provide a reference to that case in the brief with, perhaps, a short extract by way of addendum.

Admissions and statements against interest

Parties often believe that admissions, statements against interest or acknowledgements of weakness in their position in a mediation brief are counterintuitive or that they may be used against them in subsequent proceedings. Dealing with the second concern first, like everything else associated with the mediation process, mediation briefs are "without prejudice" and confidential documents that are protected from disclosure in subsequent proceedings. They may not be used for any purpose whatsoever outside of the mediation process.

As to the counterintuitive concern, it is important to remember that mediation is not primarily an adversarial process. Rarely will an admission disclose something that the opposing party has not already figured out. Rather, the willingness to admit or acknowledge information may go a long way to encouraging the opposing party to do the same. This approach is more likely to set the stage for a fruitful negotiation than would be the case if both parties maintain intransigent positions.

Acknowledging needs and interests

Every course in negotiation theory and methodology emphasizes the importance of trying to understand the needs and interests of the opposing party. Only then can a party develop a negotiating strategy designed to get what it wants by trying to satisfy some of the other party's objectives. Although this so-called "win-win" approach rarely results in an outcome that satisfies both parties, just showing an appreciation of the other side's perspective, needs and interests can produce a more satisfactory settlement than would otherwise be the case.

The mediation brief can provide an opportunity to disclose your own party's priorities in any settlement and, to the extent possible, acknowledge your awareness of the other party's primary needs and interests. For example, in a case involving an alleged breach of a distribution agreement, parties may use the mediation brief to rank and disclose which issues are of greatest importance to them in any settlement. It may be that maintaining an ongoing business relationship or amending the terms of a non-competition provision is more important than the quantum of a damages payment or the timing of that payment. Or the plaintiff distributor may place a high priority on the manufacturer repurchasing all its unsold obsolete inventory at a fair price.

Similarly, each party will usually have a pretty good idea of what issues are important to the opposing party. These will often have been disclosed in prior negotiations, correspondence or pleadings, or they can simply be intuited based on an understanding of the opposing party's circumstances. Letting that party know you are alive to its priorities and concerns and are coming to the mediation with a view to addressing those, as well as your own needs, will often set the stage for a productive mediation session.

Creative settlement approaches

Parties who misconceive the mediation process are often afraid to propose creative approaches in their mediation briefs for fear of showing weakness or lack of resolve. This apprehension is often a mistake. Although it is rarely advisable to set out a specific settlement offer in a mediation brief, it can be helpful to the mediator to know what settlement offers have been exchanged in the past and whether they are still open for acceptance.

Another useful tool can be to set out alternative settlement approaches without necessarily specifying specific dollar amounts or other terms. For example, picking up on the earlier example of a distribution agreement dispute, the plaintiff might include something along the following lines in the concluding sections of a mediation brief.

Option 1: (a) Payment of a lump sum settlement in an amount to be determined will be made within 30 days to the plaintiff, together with a mutual agreement to immediately terminate the distribution agreement. (b) The plaintiff will co-operate with the defendant in transitioning all existing inventory, brochures and other marketing materials to a new distributor. (c) The plaintiff will adhere to the non-competition and non-solicitation provisions in the agreement.

Option 2: (a) The defendant will repurchase all existing inventory (both *current and obsolete*) at the original price within 30 days, together with a mutual agreement to terminate the distribution agreement. (b) The defendant will agree to eliminate or reduce the terms of the non-competition and/or non-solicitation provisions in the agreement. (c) The parties will distribute a joint letter to all existing customers of the plaintiff outlining the transition in positive terms.

Option 3: (a) The parties will continue under the current distribution agreement for 24 months, following which the plaintiff will co-operate in transitioning all remaining *current* inventory, brochures and other marketing materials to the new distributor. The defendant shall not be obliged at the conclusion of the arrangement to repurchase any then obsolete inventory. (b) Ninety days before expiry of the 24-month period, the parties will distribute a joint letter to all existing customers of the plaintiff outlining the transition in positive terms. (c) The plaintiff agrees not to distribute a competitor's product for a period of a further 12 months.

Although the actual settlement will rarely follow the terms of any of these options, by proposing them in a mediation brief the plaintiff identifies the issues which will need to be discussed, including those that will be of concern to the opposing party; demonstrates that the plaintiff has given thought to these issues; and, to some extent, frames the settlement discussion around those issues.

Advocacy

Despite the earlier admonition that the mediation brief is not primarily an advocacy document, when done properly, it can effectively promote a party's case. Although the mediator will have no adjudicative role to play and must remain impartial throughout the process, it would be a mistake to think there is no benefit to using the brief to advocate for your client's position. Mediators do wield a considerable amount of power within the dynamic of a mediation session, albeit limited to their powers of persuasion.

While it is true that it is largely a waste of time to try to convince the mediator of the strength of your case, it can be helpful to emphasize factors which would persuade the mediator that the justice of the situation favours your client. Mediators are human, and anything that creates sympathy for your client's position can only help, provided it is truthful, sincere and not overplayed. Persuasion can usually best be achieved by setting the facts out clearly and succinctly, and then letting them speak for themselves.

It is also enormously helpful to let the mediator know that a party is coming to the mediation with the right attitude and approach. Mediators have a job to do, and they will naturally be inclined to help parties that appear to be trying to help them do that job effectively. Accordingly, if one party comes to a mediation demonstrating a clear understanding of the process and a desire to compromise while the other comes presenting a belligerent and uncompromising attitude, most mediators will be naturally inclined to lean more heavily on the party that is seen to be a barrier to resolution.

Timing

Traditionally, most mediation briefs are concurrently exchanged and delivered to the mediator about one week before the scheduled mediation session. Since the defendant does not see the plaintiff's mediation brief when it is preparing its own, this timing usually results in a significant amount of duplication. Quite often, both parties include the same lengthy exhibits with their respective briefs. Moreover, in many cases, the defending brief does not always speak to the issues raised in the plaintiff's brief.

A preferable approach is for the plaintiff to deliver its mediation brief first and sufficiently ahead of the mediation date to allow the defendant to deliver a responding brief at least a week before the scheduled session. This scheduling avoids the need for lengthy restatements of non-contentious facts and the duplication of exhibits. Moreover, if the plaintiff has followed the constructive advice set out above, it provides an opportunity for the defendant to respond in kind.

Conclusion

Written mediation briefs exchanged well before the scheduled mediation date provide an excellent opportunity to let the other side and the mediator know that you are coming to the process with the right attitude, an appreciation of your opponent's needs and interests, and a commitment to compromise. When both parties adopt this approach in their written materials, it makes the mediator's job infinitely easier and can significantly enhance the likelihood of success.