

Written Advocacy in Mediation

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The Osgoode Short Course in Mediation Advocacy

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Purpose

- Your Mediation Brief sets the terms of reference for the Mediation
- It alerts the Mediator and the opposing party to what you see as being the issues in the case
- It speaks to the other side's client and allows the Mediator to understand your case (it allows the Mediator to hit the ground running)

Purpose cont'd

- It creates a first impression of you, your firm, your client and his or her case
- It should be fair, accurate and professional
- It opens the lines of communication
- It persuades the Mediator
 - The Mediator will have a view of what might ultimately happen if the case goes to Trial and that view will influence how the Mediator talks to the parties

Purpose cont'd

- To be effective, the Mediator must understand the case
- You need to give the Mediator the ammunition he/she needs to advocate your case in the other room

Style and Tone

- Be concise and proportionate
- Be persuasive. The trick is to convey a powerful message without the type of attack that will backfire on you. If your choice of language and expression angers the opposing client and causes them to close their ears, you will have lost the opportunity to impact their view of the case
- Focus on your theory. This presupposes you have a theory

Style and Tone cont'd

- Think pictures. Use enough detail and description to allow the reader to “see” your theory of the case
- Think about what should NOT go into the Mediation Brief
- Consider the order of your arguments. Lead strong, but not at the cost of telling the story or ease of comprehension

Contents

- Be very careful about using precedents
- 1. Identify the parties. Introduce your client and the other parties. Give the other side and the Mediator the information they need to know about the characters
- 2. Describe the nature of the action, the history and status of the case
- 3. Describe the substance of the case, i.e. facts, issues, liability, damages, key evidence and law

Contents cont'd

4. Set out the history of prior settlement negotiations
5. Provide information about interests, needs and other considerations
6. Set out your assessment of the case or first offer (if you are the Plaintiff)
7. Address the other side's case
8. Documents

Documents

- Consider the following:
 1. Chronology of events
 2. Photos
 3. Witness will-says
 4. Expert reports
 5. Excerpts from the Discovery transcripts
 6. Caselaw
 7. Charts
 8. Visual aides

Timing

1. It will take several days or even weeks for a “claims committee” to review your material, meet, compare notes, set reserves and give instructions to the lawyer
2. Your Settlement Brief should ideally be served 3 to 4 weeks in advance of the Mediation
3. Expert reports should be served sufficiently in advance to afford the other side an opportunity to retain responding experts and serve reports

Timing cont'd

4. Send your Mediation Brief to your client for review and feedback. Be sure to give them time to consider and reflect on the Brief

Caselaw

- Whether or not you provide actual caselaw depends on the complexity and nature of the case
- Consider for what purpose you are providing caselaw:
 - Educate the Mediator and the other side
 - Show how much you know
 - Impress your client
- Don't hide adverse precedents or you will lose credibility with the other side and the Mediator

Do's and Don'ts

Do's	Don'ts
Be prepared	Don't type from a precedent
Review the whole file	Don't rely on the on-line documents
Set out the facts and law	Don't assume the other side or Mediator knows anything
Be relevant	Don't get bogged down in meaningless information
Attach relevant material	Don't recite every document, highlight the important bits

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