

Preparing for Mediation: Pre-Mediation Submissions

written by: Rena Barron
and Jennifer W. Morrow, MDR

The momentum to mediate is building in the Midwest. Judges are increasingly prone to recommend mediation, or order it, prior to trial. More and more clients are considering mediation as a means to settle disputes. In addition, lawyers are seeking the following advantages of mediation for their clients: confidentiality, cost containment, control over the choice of mediator and control over the outcome of the mediation. Many lawyers are questioning whether a non-adversarial approach might be more appropriate in any given case. The reality of law practice today is a motivator for counsel to consider mediation as one more tool in their toolbox for effective advocacy.

Once agreement is reached to mediate, or an order has been filed by a judge, and selection of the mediator is made, there are several critical factors for counsel to consider in preparing for a productive mediation session. One such critical factor discussed in this article is preparing effective pre-mediation submissions. First, the value of pre-mediation submissions will be explored; then, key factors regarding confidentiality, length, content and timing will be considered.

Why pre-mediation submissions?

Pre-mediation submissions are extremely useful in helping the mediator, counsel and their clients prepare for the mediation session. Mindset for mediation requires a paradigm shift from that of litigation. Mediation focuses on the *interests* of parties, the *future* of the parties and requires a willingness to negotiate, collaborate and compromise with the other side. With that in mind, preparing pre-mediation submissions requires counsel to outline not only the factual history and legal issues in the case but also where their client would like to go with settlement and what that settlement might look like. It requires that both counsel and their client begin thinking about what they might be willing to concede and what they might be willing to offer, in order to shape a realistic and durable settlement. Counsel may choose not to include all of the above in their written submissions, but the paradigm shift in thinking for both counsel and client is key to the success of the mediation process.

Most mediators request pre-mediation submissions. Some mediators *require* them and take a very directive role with counsel on what needs to be included.

Either way, written submissions serve to prepare the mediator for the session. They provide context for the dispute, outline the legal and factual complexities of the case and provide critical information with regards to the nature of the business, personalities and relationships of the parties involved in the conflict. Pre-mediation submissions help the mediator “set the stage” for the in-person session of mediation. Additionally, information in submissions helps the mediator to determine if there is a need to do supplementary research on key aspect(s) of the case.

Thoughtful, well-organized submissions can help save time at the mediation session, and provide a base-line for the agenda of issues to be negotiated. Lastly, many mediators, make pre-mediation contact with counsel after reading submissions, but prior to the in-person session in order to ask questions and clarify any information submitted. It also allows counsel to share information in confidence that they would prefer not to do so in writing, with the mediator. Thoughtful, efficient pre-mediation submissions take time to prepare, but ultimately save counsel and their client time and money, and help set the stage for a productive mediation.

What to consider when preparing pre-mediation submissions?

There are four components to consider when preparing pre-mediation submissions:

- 1) Confidential or Shared Submissions
- 2) Length of Submissions
- 3) What to Submit
- 4) When to Submit

Confidential or Shared Submissions

In “Mediation in A Nutshell”, Kimberlee K. Kovach argues that shared pre-mediation submissions should be the norm because (1) “An exchange of information would assure that all parties are “reading from the same page”” (2) “an understanding or acknowledgement of the other party’s viewpoint often encourages increased participation and interaction at the mediation, and (3) “...making decisions about potential options for resolutions may require specific information” from the other side.

Most mediators recommend that parties exchange their submissions at the same time they

submit them to the mediator. Submissions not only educate the mediator, but serve to educate and clarify information for opposing counsel and their client. Exchanging information prior to the mediation session may help counsel and their clients re-evaluate their positions and prepare to more effectively negotiate with the other side.

Since mediation is a facilitated negotiation, parties control whether information is shared and at what point in the process the information is shared. If counsel has critical and confidential information, she/he may come to the mediation prepared to share it at a strategic point in the negotiations. Counsel and their client have the option to share the information in private caucus, or with the other side in a group session. Either way, when key information is shared, counsel should have a reason and strategy behind the “when” and “how” the information is shared. By including “smoking gun” information in the pre-mediation submissions, counsel has lost control over how and when that information impacts the negotiations with the other side and negotiations with and through the mediator.

Ultimately, it is counsel's choice as to whether submissions are shared or confidential. Upon submission, all materials should be clearly marked as copied to opposing counsel or confidential to the mediator only.

Length of Submissions

When preparing submissions, start with a written overview of the case. Use it as an exercise to clearly and succinctly articulate the issues in narrative form. Depending on the complexity of the case, the narrative can be anywhere from 1-15 pages long. Comprehensive narratives may include the following:

- Statement of Facts
- Statement of any Agreed Upon Facts between Counsel
- Theory Relative to Liability
- Basis for Damages
- Summary of Expert Reports
- Summary of Non-Expert Witnesses
- Summary of Consultant Reports
- Status of Case / Trial Date
- Brief History of Negotiations to Date
- Last Demand and Offer

Consider discussing length of pre-mediation submissions with opposing counsel. Often, counsel can agree on a maximum

length for the narrative. Since the mediator will bill for the time spent reading the submissions, it can be a more balanced approach when both sides submit a similar amount of reading materials.

What to Submit

After writing the narrative, consider what additional documents are needed to support or further clarify the position(s) taken in the narrative. These documents should include:

- Depositions
- Complaints / Counter-Complaints
- Motions and Court Orders
- Pertinent Contracts, Insurance Policies, Statutes and Verdicts Reports
- Photographs, Charts, Data

Any lengthy documents should include an articulated summary, and counsel should tab key pages for the mediator to review in detail. For example, if counsel is submitting an Independent Medical Report (IMR), then it is in counsel's best interest to provide a summary that references specific pages/ comments in the document that highlight the facts related to their case. This allows both the mediator and counsel to quickly refer to

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important information.

According to Hon. Stuart Nudelman (Ret.), an active mediator and arbitrator with ADR Systems of America, another benefit of counsel summarizing lengthy documents is that they take the opportunity to thoroughly review the materials, once again, before submitting. One devastating mistake that could have been avoided in a case Judge Nudelman recently settled involved an IMR that was submitted by claimant's counsel that had information pertaining to the wrong person.

On highly complex, multi-party mediations, it is not unusual for counsel to request a pre-mediation conference call to discuss and agree on components of the submissions. At ADR Systems of America, case managers often facilitate these calls either among counsel, or with the mediator and counsel to determine who will submit certain documents to avoid duplication and ensure that the mediator receives all that he/she feels is necessary prior to the mediation.

Lastly, on all submissions, it is important to include a brief cover letter or memo that identifies the case name, mediator's name, whether the materials are shared or confidential, date,

time and location of the mediation, as well as name of submitting attorney and contact information.

When to Submit

Good mediators are busy mediators! Consider the number of parties and complexity of the matter to be mediated. Allow at least 10 days for the mediator to review all of the submissions. This gives the mediator the opportunity to fully absorb the information, do any additional research and contact counsel with any questions prior to the day of the mediation. Thoughtful, well-organized submissions submitted in a timely manner reflect the attitude of counsel towards the mediation process

itself. Most mediators appreciate the time and effort invested in efficient but substantive submissions. It often reflects the level of preparedness of counsel and can impact the length and outcome of the mediation session in a dramatic fashion.

In Conclusion

Being an advocate in mediation requires the same passion, intellectual commitment and preparation required for trial. In addition, one critical factor in effective advocacy in mediation is the careful attention to and preparation of pre-mediation submissions.

In mediation, as in trial, and in life, ".....failure to prepare is preparing to fail"

~ John Wooden.

About the Authors:

Jennifer W. Morrow, MDR has a Law Degree and Master's Degree in Dispute Resolution from Pepperdine University School of Law. She has over 12 years experience in the ADR industry including mediating cases and corporate consulting work. She currently serves as Vice President, Commercial Services at ADR Systems of America, and teaches Negotiation and Mediation at Northwestern University.

Rena Barron, currently serves as Marketing Director at ADR Systems of America, Chicago's largest ADR services provider. She is responsible for all market outreach programs including the marketing launch of new neutrals, Continuing Legal Education Programs (CLE) and all other marketing related activities. For more information, or to obtain a copy of this article, please contact Jennifer or Rena at 312-960-2260 or visit www.adrsystems.com.

