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Writing an effective mediation submission

The most effective mediation submissions tell a concise, compelling story in clear, simple language. It's easier to write a submission with a checklist of what to include because a submission is nuanced, and it's not the same as writing a brief for trial.

If you have never written a submission for mediation or need to hit the refresh button before you write another one, here is a summary of what to include. Also covered are key considerations to ensure your submission is an effective document.

The basics

A good submission is written for both the mediator and the other side. It helps the mediator understand the case and informs the other side of information they should consider in mediation. Most mediators encourage parties to exchange submissions. If there is something that parties only want the mediator to see, they can provide that in a separate submission.

The tone should be persuasive, but not adversarial. More importantly, the submission should tell a compelling story with a clear theme.

The mediator is a neutral party and the best mediators read all the material submitted and come to the mediation prepared to facilitate negotiations. A submission should give the mediator a solid understanding of the case and the issues.

A submission that is well-written will not only get the mediator ready to help settle the case, but it also may move the other side

and prepare them to mediate with new perspectives.

The story told in the submission should humanize your client and show civility. It also must look professional and demonstrate competency. Package the submission so that it is easy to read.

The checklist

This checklist of what to include in a submission is broken down by sections.

Introduction — One or two paragraphs are sufficient. It should give a short summary of the case in a few sentences and include the demand or offer. Remember that you are writing this for both the mediator and the other side.

Statement of facts — This also should be as succinct as possible. For a mediation, this section should plainly state the facts, along with the theory of the case and supporting citations. Keep citations focused on the key principles. Mediation is not about winning legal arguments — it's about getting to settlement.

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Status of the case — The current status is explained along with the procedural history. Include the status of any settlement discussions.

Settlement offer or demand — Provide further details for the offer or demand that was sum-

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marized in the introduction section. The monetary or other components of the offer or demand can be outlined in a chart or table to make it easy to understand.

Include annotations regarding the source of the dollar figures listed. If relevant, this should be followed by a sampling of applicable jury verdicts.

Also include a contract, lease, medical records, repair records or other key information related to the offer or demand in an easy-to-read format. If it would be a key exhibit if the matter went to trial, it should be included in the submission.

Theory of liability and damages with supporting authorities — Discuss the theory of liability and damages and note what discovery has been completed. Discuss any changes to the theory of liability following discovery.

Include short summaries of depositions, quoting key testimony. Provide sound legal analysis with a quick review of the law, prima facie showings, presumptions, burdens of proof and anything else that supports your position.

Summary of opinion witnesses and nonopinion witnesses — Cite key facts impacting liability that were established during non-opinion fact discovery.

Conclusion — This section should summarize the key points in the mediation submission and reiterate the relief requested in the introduction.

The timing

A submission is most effective if the mediator receives it in plenty of time to read and digest it. It's better to get your submission to the mediator and the other side two weeks before mediation, not the night before. In addition to providing enough time for the mediator and the attorneys involved to read the submission, counsel may also need time to share information received with their clients.

Additionally, since ex parte communication is allowed in mediation, an early submission gives the mediator time to call counsel to ask questions prior to the session. Counsel may also wish to contact the mediator prior to the mediation. The sooner you can prepare and send the submission, the better.

Mediators rely on the information they receive, and timely, well-written and concise submissions go a long way toward having a successful mediation.