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## How to make the most of written mediation submissions

The nice thing about writing a premediation submission is that there are no rules of civil procedure dictating what you can and cannot include, and no risk of a motion to strike if you get it wrong.

The flip side, however, is that without guidance on what to submit, lawyers frequently expend a great deal of time and effort — and clients incur unnecessary expense — on mediation submissions that include far more information than necessary or fail to address key issues that will help the mediator and parties come up with a resolution that everyone can live with.

To make the most of mediation submissions, both neutrals and lawyers should make a greater effort to ensure that submissions are efficient and effective.

Alternative dispute resolution institutions sometimes provide checklists of suggested items to cover on their websites and individual mediators may request specific items at the time of the premediation conference, but too often mediators only set deadlines and page limits, feeling that it is up to the parties to determine how they want to present their cases or lawyers ignore suggested topics.

The result is submissions that contain binder after binder of factual and legal materials with little else or a few pages of cursory information with a pledge to participate in good faith at the mediation.

The first step in writing an effective submission is to provide the right type and amount of information.

Unless the parties are explicitly seeking an evaluation from the mediator and nothing more, it should be assumed that the mediation session will be a problem-solving process where the mediator will not be telling the parties who is right and who is wrong, but will be helping them have a difficult conversation and, if all

goes well, develop a creative and durable solution based on the needs of the parties.

This means that a mediation submission limited to persuading the mediator of the merits of the legal case that includes lengthy motions and exhibits may miss the mark.

As stated by California mediator Michael Young in his recent article in *Alternatives*, “lawyers too often see the mediation brief as an opportunity to persuade ... [they] see mediation as another court process only with nicer neutrals, friendlier staff ... and food.”

While the legal case is an important aspect of the mediation, a mediation submission should also help the parties focus on their interests (rather than just their positions), assess the best and worst alternatives to a negotiated agreement and look for the reasons for impasse.

Preparing the mediation submission with your client will help you ferret out these important matters.

Some questions for discussion include: What would staying on this litigation train really mean in terms of time, money, opportunity cost and emotional cost? How would you quantify the chance of losing? What is most important to the client? What are some preliminary ideas about creative options for resolution that would meet everyone's needs?

Other questions are: What are the impediments to settlement? (Is there information that needs to be exchanged before they can come to resolution? Do the parties have a pre-existing relationship of some sort? Is the relationship between the lawyers creating a problem? Is there insurance involved? Are all the players at the table?)

While not part of the legal case, often providing information on these issues will go a long way in helping the mediator get the case resolved.

A submission is also more effective when it highlights the most



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important aspects of the dispute. Although sometimes more information is necessary, usually the critical information can be conveyed in five to 10 pages and attaching highlighted copies of key cases, deposition transcript pages, controlling contracts or other important documents is more effective than submitting stacks of pleadings, briefs and documents.

As noted by Harold Abramson in his text “Mediation Representation,” you only want to give the mediator helpful background and any attachments should be limited to the sort of information that you will discuss in the mediation session to give the other side an understanding of the strengths of your legal case. While drafting

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such a submission is more of an effort on the front end, this method will also reduce the mediator's fees for premediation preparation.

Another way to increase the effectiveness of the submission and make the mediation session more efficient is to draft a submission that will be shared with the other parties and a separate “mediator's-eyes-only” cover letter. For example, the shared submission could contain a factual chronological summary that identifies key disputed facts, the critical legal disputes with citations, the itemized damages (with supporting documents) and the status of discovery.

The private letter to the mediator could include the interests of the client, settlement history to date and your views of the obstacles to settlement. This method can save valuable time in the mediation session.

Another advantage to dividing it this way is that the mediator then avoids the problem of determining what information among the voluminous material submitted as “confidential” is actually to be kept from the other side.

Although sometimes it is not possible, your submission will also have more impact if you submit it far enough in advance of the mediation session. As Chicago neutral Mike Leech points out in his website article on mediation preparation, if an insurance company or other large organization is on the other side, you should provide the submission several weeks before the mediation to ensure that everyone who needs to give input on settlement authority has a chance to review it.

Getting the mediation submission right will increase the chances of a productive mediation session by helping the mediator and parties begin to understand key issues ahead of the session and will also help clients gain clarity on the settlement terms they need for an optimal resolution.