Orange County Lawyer
November, 2006
[48-NOV Orange County Law. 18]

THE POWER OF PERSUASION: THE MEDIATION BRIEF

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There is nothing more satisfying in legal practice than a successful settlement. Most successful settlements are achieved after structured settlement conferences, most typically private mediation. The most important aspect of any mediation is the mediation brief.

Success in mediation requires leverage, Leverage is acquired through information that is conveyed to the other side. The most powerful and effective way to convey that information is through a detailed, thorough and persuasive mediation brief. The mediation brief is the engine that drives the settlement train. Without a powerful and persuasive mediation brief, you will never be able to maximize your settlement results.

Procedural Aspects of the Successful Mediation Brief

There are a number of critical procedural factors that are necessary for the preparation of a successful mediation brief.

First and foremost, it is critically important to serve the mediation brief on opposing counsel and the mediator well before the mediation. One week before the mediation is the absolute minimum. Two weeks or more is the optimal time. The reason is simple. If you want your brief to be persuasive and to be considered by the decision-makers for the opposing party, you must give them sufficient time to read, analyze, critique and digest your brief. Further, the more significant your case, the busier are the individuals on the other side who will be considering your arguments. Therefore, you must consider the frequently busy schedules of the decision-makers on the other side. There is no worse mistake than walking in on the day of mediation and handing a brief to the mediator and the other side. Your brief will fall on deaf ears.

Second, your mediation brief must have a highly professional appearance. It sends a strong message to the other side about your level of competence and attention to detail. You are trying to impress upon the other side that you will be a powerful force

and opponent at trial. A brief full of misspellings, unpersuasive arguments or incomplete thoughts sends exactly the wrong message. Conversely, a persuasive, well-edited and highly polished mediation brief sends a message to the other side that your approach at trial will be equally powerful.

Even matters such as formatting and copying are important in communicating your message of strength. Rather than using staples or fasteners, our office will frequently use spiral binding or other sophisticated printing techniques to bind the brief in order to give the document the most professional look possible.

When serving the brief on the other side, you should make multiple copies for the service. If you go through the expense of putting together a highly polished mediation brief and merely allow the other side to make their own photocopies, you'll be eliminating much of the "shock and awe" effect of receiving an expensively bound brief. Estimate the number of parties, counsel and insurance carriers on the other side, make multiple copies, and have them delivered by hand to counsel. For example, I will frequently make ten copies of the mediation brief for opposing counsel so they can in turn be delivered to the relevant decision-makers. Remember, this is your opportunity to have an *"ex parte"* communication with the insurance adjuster on the other side. Given that they will be personally reviewing your work, it pays to put your best foot forward by preparing a professional copy of the mediation brief, as opposed to having defense counsel's photocopy department make rough copies.

As far as timing of the mediation itself, in order to have a meaningful mediation yielding maximum value, the mediation should, in virtually every case, be held at the later stages of litigation. Most parties will not provide a true bottom line until they have completed all discovery and have conducted an analysis of the experts on ***19** the other side. If your case does have experts, the most meaningful mediations are those where the actual expert's reports are prepared and attached to the mediation brief. Even if those experts have not yet been deposed, their opinions are set in stone and are communicated to the other side. The opposing party will therefore know what that expert witness will say at trial and can adjust their analysis of the case accordingly. Conversely, if the mediation is held too early, the mediation brief will merely consist of arguments and contentions and will not be able to incorporate factual evidence and documents.

Substantive Considerations

As mentioned above, the most important substantive aspects of any mediation brief are that it be thorough, comprehensive, well-written, well-researched and extremely persuasive. The extensive amount of time you spend preparing such a brief will pay dividends many times over if the brief is successful in persuading the other side to adjust their settlement position in a meaningful manner. By way of example, in a recent case, our office spent over three weeks writing a brief in a personal injury case. That brief ended up containing eighty-two pages of text, plus 300 pages of exhibits. Even though the medical specials were only $150,000 in that case, with no loss-of-income damages, the case finally settled for $2.9 million. I am absolutely certain that our eighty-two page mediation brief, when compare to the eleven page brief prepared by the defense, made a huge impression on the insurance companies on the other side and motivated their decision to settle the case at top value.

Equally important, substantively, are the facts and information one shares with the opposing party. First and foremost, the concept of a "confidential" mediation brief is completely contrary to meaningful mediation. Defendants are especially fond of submitting confidential mediation briefs. In my opinion, that is a fundamental mistake. It is obviously impossible to motivate a plaintiff to lower its demands based on weakness and shortcomings in its case if the defense does not share such an analysis with plaintiff. It is almost as if those defendants have no desire to settle.

From my perspective, the most fruitful way to a successful mediation result is to share your best and most persuasive arguments with the other side. The only exception is if you truly have some strong and powerful facts or arguments (such as a damaging *sub rosa* tape) that the other side is not yet aware of. In that case, I would encourage a separate, confidential mediation brief discussing such issues. For example, in a recent multi-million dollar insurance bad faith case, we obtained information through private investigation that the claim adjuster who had committed the bad faith in question was formerly an attorney who had been disbarred for fraud and perjury. Seeing a prize plum with great potential as an employee, the defendant insurance company hired him to adjust claims, including our client's claim. We hoped to save this information until trial, so we did not share it in our mediation brief ... or with the mediator for that matter.

Along similar lines, too many mediation briefs are long on argument, contention and hyperbole, but short on actual facts. A powerful mediation brief should also systematically set forth all evidence and documents in the case. Furthermore, factual asser-

tions and legal arguments in the brief should be supported by specific reference to an appendix of exhibits. If there are evidentiary issues relating to such evidence, ***20** these issues should be addressed in the brief in order to persuade the other side that the evidence will indeed be presented to the jury.

One of the most difficult aspects of any mediation is proper evaluation of the settlement value of a case. Perhaps the most powerful tools for determining settlement value are verdicts and settlements from similar cases. A good mediation brief will include a detailed analysis of related verdicts and settlements from other similar cases, together with copies of the actual verdict and settlement forms. Those related verdicts and settlements will remove some of the guesswork from estimating the settlement value of a case.

Video Technology

As Bob Dylan said years ago, "The times, they are a 'changin'." With the sea storm of powerful technological changes, the prevalence of video imagery and entertainment in our society, and the fundamental shift in the manner in which people assimilate information (e-mails, mobile phone, TM, IM, internet, blogs, etc), there has been a major paradigm shift toward the introduction of digital and video technology into trials and, to a lesser extent, mediations.. That trend is manifested in one of two ways. First, the traditional approach is to prepare a detailed "day in the life" type video presentation to play at mediation and trial. Typically used in personal injury cases, these videos graphically demonstrate the permanent, lifetime injuries and changes to the lifestyle that personal injury plaintiffs undergo after suffering catastrophic injuries.

Second, a much more comprehensive approach is to prepare a lengthy "settlement video" which is much more than the typical day-in-the-life approach. Rather, the settlement video is, in effect, a digital mediation brief. Put together through sophisticated production techniques, the video would include detailed video evidence of the plaintiff both before and after the accident, interviews with the plaintiff and his family, experts sitting down and summarizing their expert testimony, third party witnesses testifying and the incorporation of sophisticated accident reconstruction and other scientific digital and video evidence. This type of production, although extremely expensive, is very powerful and persuasive in the mediation context. Under the theory that a picture is worth a thousand words, a 30 to 60 minute video production is, in effect, a mini-trial presentation for the opposing party and its insurance adjusters. The power of the video presentation to reach the intended audience is strong and focused.

One telling example of the power of the settlement video approach is a recent personal injury case that we settled for over $28 million. Our client was a forty year old truck driver who had suffered brain injury in a highway accident. We spent approximately $80,000 putting together a settlement video of almost an hour in length. The video was shot over a period of many weeks, included interviews with all the key percipient and expert witnesses, as well as graphic reconstructions of the accident. The film was narrated by a trained actor and put together by highly sophisticated production facilities. We made approximately thirty DVD copies of the video and sent them to defendants for dissemination to all of their decision-makers, including multiple levels of excess insurers. We were informed after the case had settled that several key executives at excess insurance companies on the risk in our case watched the video in their offices in London. Furthermore, when we played the video at the mediation, one of the insurance ***22** adjusters (who had been in the insurance industry for over thirty years) actually began to cry because the imagery was so moving. It is difficult to put a dollar value on the power of the message being disseminated to such a key audience, but certainly such an effect could not be achieved through the simple preparation of the mediation brief.

Insurance Considerations

It is axiomatic that insurance money settles cases. Therefore, whether you are on the plaintiff or the defense side, it is imperative that you understand and appreciate any insurance issues or disputes that may exist at your mediation. If you are defense counsel, and the insurance company has asserted a reservation of rights, you may want to advise the defendant that they have a right to independent counsel or that they should seek separate insurance coverage counsel to assist for the purposes of settlement. If you are on the plaintiff's side, it is critical to know and understand the nature and extent of insurance coverage issues so that you can address them at the mediation. In fact, if the stakes are high enough, it may be necessary for you to specifically address insurance coverage issues by way of a separate mediation brief, whether you are on the plaintiff or defense side. On the plaintiff's side, the insurance mediation brief should address why the injuries are covered and what evidence will be presented at trial to demonstrate covered damages. If you are on the defense, you will be asserting arguments to your own insurance carrier about why certain damages being alleged by the plaintiff are covered. In addition, you may be addressing issues of *Buss* reimbursement and other related coverage issues (again highlighting a need for separate insurance counsel in many instances).

A corollary to the foregoing is that, for cases involving insurance issues or disputes, it is highly preferable to select a mediator with extensive insurance experience and understanding, as well as expertise in the particular area of law at issue in the mediation. It makes no sense to prepare a sophisticated and complex separate mediation brief on insurance issues only to have it read by a mediator or neutral with little or no understanding of insurance issues. Most important, that neutral will be unpersuasive when dealing with the insurance company because he or she is unable to communicate effectively with the carrier or its counsel. There are a number of ***23** fine mediators in California with extensive insurance backgrounds and experience.

In sum, the mediation brief is the most important way to communicate facts and legal arguments to the other side in a meaningful manner. Prepare and serve the mediation brief early, make sure it is thorough and comprehensive, and seriously consider the use of digital and video technology to bolster your mediation presentation. In this manner, you will be sure to achieve many successful settlements and keep your clients happy.

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