Rethinking Mediation: The Briefs
BY MICHAEL D. YOUNG

Litigators often underthink the humble mediation brief.

They provide their diligent mediator with a lengthy summary judgment motion, exhibits included, slapping on a new caption page titled "Confidential Mediation Brief," or they submit a three-page recitation of the most elemental facts.

In either case, the attorneys end with a promise that they will negotiate in good faith despite how worthless and frivolous the opponent's case happens to be. They vow either (a) to magnanimously waive costs in exchange for a dismissal, or (b) to accept full damages—but discount punitive—as the case may be.

Gee, thanks.

Neither is really helpful to the mediator ... and hence neither helps the client fully use the power of the mediation process.

Why Use a Mediation Brief?

Trial lawyers too often see the mediation brief as an opportunity to persuade. They like to focus on the legal claims, which is not surprising considering they are representing their clients in a court of law and they spent all that time in law school learning the law ...

or at least where the law is stored. (In the good old days, it was stored in books.)

These lawyers see mediation as another court process, only with nicer neutrals, a friendlier staff ... and food. Hence, the purpose of a mediation brief for these trial warriors is to convince the mediator, like the judge, that trial victory is inevitable. It's the philosophy of the late Al Davis: Just win, baby!

But of course mediation is not a win/lose process, and the mediator is not a judge. The neutral makes no substantive decisions. So providing the mediator with an advocacy piece designed to convince him or her that the case is strong and has no holes accomplishes ... what, exactly?

Others use the mediation brief to inform. They take the word "brief" literally, filing three-page high-level recitations of the facts, combined with short summaries of the basic legal principles—concluding, of course, with the obligatory "We are here in good faith."


What we need instead is a rethink.

The first place to start is with a simple question: What is the real purpose of the mediation brief?
The mediator is right there in the middle of this exploration. He or she helps the parties to investigate and analyze their options, and then to compare those options to the less-than-cuddly future they currently face—the classic “Batna” (“best alternative to a negotiated agreement”) analysis.

So shouldn’t the mediation brief be designed to help the mediator help the parties in this quest for a better future? Shouldn’t it provide the mediator with the information and tools he or she needs to help the parties identify and explore meaningful alternatives, recognize and overcome obstacles, and appreciate the Batna?

In other words, rather than focus on the law or the facts or the legal arguments, the mediation brief should instead be aimed at helping the mediator help the clients obtain the best settlement—or at least the best settlement proposal—possible through the mediation process.

In short, the mediation brief should help the neutral do his or her thing.

WHAT THE MEDIATOR NEEDS

Which begs the question: What does the mediator need to do his or her thing?

Really, only two things. First, the mediator needs to understand “the problem.” Second, he or she needs to appreciate “the solution.” Simple.

The Search For The Problem: Let’s start with the problem. Contrary to the trial lawyer’s instinct, the problem is not the legal case that will ultimately be tried to the judge or jury. Rather, for mediation purposes, the problem is whatever it is that is keeping these two parties from finding a resolution to that legal case.

Stated another way, every dispute is, as a matter of definition, at an impasse. If there is no impasse, nothing is stopping the parties from settling the case and heading to the local pub to celebrate. Find the impasse, and you are on your way to crafting a resolution.

This search for the cause of the impasse—the driver of the dispute—is the ultimate treasure hunt for your diligent mediator. If the neutral can find what is really preventing the parties from coming together, he or she can then move to step two: Helping the parties around it.

Try this analogy on for size:


A: It depends. What is the cause of the tears? Is he hungry, tired, bored, sick... or... or... or...? Once you figure out the cause of the tears, the solution is easy. (Unless like the author your solution is the same no matter what: “Here you go, dear.”)

The client wants the tears to stop. The mediator is (a) trying to figure out the cause of the tears, in order to (b) help the clients find a meaningful solution.

A mediation brief that simply says the baby is crying is a step in the right direction... but a better brief would note that the baby hasn’t been fed in a while.

Take a trade dress matter as a better example. Sure, the lawsuit is filed because the owner of the distinctively shaped and colored scalp massager thinks his competitor’s scalp massager is just a tad too... identical.

But why hasn’t the dispute settled? The similarity of the product may or may not have been the genesis of the dispute, but what is the obstacle that is preventing the dispute from resolving now?

There could be any number of obstacles. Identifying them is the first step in approaching mediation, and will guide the brief-drafting. (This same analysis affects mediator selection, as explained in “Rethinking Mediation: A
New and Better Path to Mediator Selection," 30 Alternatives 105 (May 2012.)

For instance, the article notes that the driver of this dispute—once again, the cause of the impasse—could be financial ("I only sold one scalp massager … to my mother. We have no money"); emotional ("the competitor is my former trusted partner who stole my idea; I hate him and now he has to pay!"); attorney ego ("I'm better than my opposing counsel … and I'm going to prove it"); client inattention ("the adjuster with authority is on vacation … again"); business realities ("my cash flow is seasonal—and this ain't the season"); informational ("they claim they have evidence of customer confusion, but we haven't seen it"); legal ("they misunderstand the standard for trade dress."); you or your firm ("I need trial experience"); I've been too busy to focus on this case); unrealistic client expectations ("I deserve $1 billion for their blatant copying of my beautifully distinctive head tinger"); or the opposing attorney or client ("He needs to bill this case a little longer").

So to get back to the question, what does the mediator need in order to understand the problem? He needs to find this driver, this underlying cause of the impasse. Until he can help the parties figure out why the baby is crying, the search for a solution is simply futile.

PEELING BACK THE CURTAIN: The mediation brief should help the mediator in this quest. It should allow the mediator to peek behind the curtain. It should tell him or her what the relationship is like between opposing counsel.

What about the relationship between attorney and client on each side? Perhaps more telling, what is the relationship of the two parties? What did it used to be? Why is the plaintiff suing? Why is the defendant fighting as hard as it is? What is the plaintiff doing now, and how are his or her finances? What are the defendant's finances? Is insurance involved? What is the carrier's position?

The mediation brief should look at the drivers identified above and help the mediator figure out which, if any, apply. It should understand that the search for the cause of the impasse, the real driver of the dispute, is a team effort.

THE SEARCH FOR THE SOLUTION: Which leads to the second thing the mediator needs in order to help the parties find a preferable alternate future: the solution. Understanding that the baby is hungry is a great first step. We no longer need to consider medicine, diapers, toys, etc. All we have to figure out now is how to feed the ear-piercing little angel.

Or in the trade dress example, assume the defendant/alleged infringer was a former trusted junior partner who was forced out of the plaintiff's business after it appeared he was self-dealing, and he thereafter started up a competing scalp-massage company.

The driver of this dispute is not a disagreement on the law as much as it is emotional. Accordingly, the mediation doesn't need to focus

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<thead>
<tr>
<th>Writing Problems</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>The issue:</strong> Producing mediation briefs that help settle the case.</td>
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<td><strong>The real issue:</strong> Current practices transport litigation into the mediation room instead of translating it to efficient settlement.</td>
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<td><strong>The recurring issue:</strong> Can you really discuss the roadblocks and the dynamics?</td>
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1) A short description of the case and the key legal and factual issues: This should not be long or detailed—certainly not a summary judgment rehash. It should be just enough to introduce the dispute and give the mediator an idea of what the client's existing future path looks like, the path to trial.

2) The status of the litigation: Where in the litigation process is the case? What is the status of depositions and other discovery? What is the summary judgment story? When is trial? Again, this helps the mediator and the client better understand what the client has in store for himself if the case doesn't settle. It also helps the mediator identify whether there are any significant informational gaps that could inhibit a successful mediation process. After all, nothing stymies a mediation as much as the parties operating under a completely different understanding of the underlying facts.

3) A summary of settlement discussions to date, if any: Who said what and what was the response? Include each party's last settlement position.

4) The roadblock to settlement: Now we get to the good stuff—the stuff that will lead to the development of possible alternate futures. Explain the cause of the current impasse, or the actual driver of the dispute. Address the questions set out in the "Peeling Back The Curtain" section above. Include something perhaps a little more introspective than "The current roadblock to settlement is the opposing attorney's asinine legal theories and his client's fantastical expectations"—though that could be a fine start.

5) Search for solutions: Describe dynamics that might be affecting a resolution. Are there any important views, beliefs, desires, or secret needs of the parties? What might a settlement look like? Granted, this might be the hardest to discern for the advocate, but it might also be the most valuable for the mediator and the client.

CONFIDENTIAL. OR NOT. OR BOTH.

A final note on rethinking the mediation brief: Who should see it? At the risk of sounding like a broken record: It depends on the brief's purpose and the cause of the impasse.

For instance, if part of the impasse is the opposition's perceived failure to appreciate the strength of the legal case, then exchanging po- (continued on next page)
the opposing party or attorney is, or what the client’s secret need is for resolving the case, or even how unrealistic the client herself is, then a confidential brief is a pretty good idea. After all, the goal of the brief is to assist the mediator, not inflame the opposing party.

And if it makes sense, counsel could write two briefs—one to be shared, and one with the good stuff. Items (1)–(3) above can probably be shared in most cases. Items (4) and (5), well, probably not.

... The mediation brief is an opportunity to help the client find a future that the client likes better than the predictably tortuous current path. Helping the mediator identify (a) the underlying impasse cause, and (b) the elements affecting the search for a solution, will allow the client to best harness the power of mediation.

Providing the mediator with 150 pages of legal briefs, deposition testimony, declarations, emails, and other trial evidence may help too—particularly if the goal is to help the mediator get a good night’s sleep before the mediation session.

And if it sounds like much of this could be accomplished in a pre-mediation telephone call with the mediator, it can. Perhaps a future article in this series should consider how the telephone, and a mediator with time, will make the mediation brief obsolete.

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