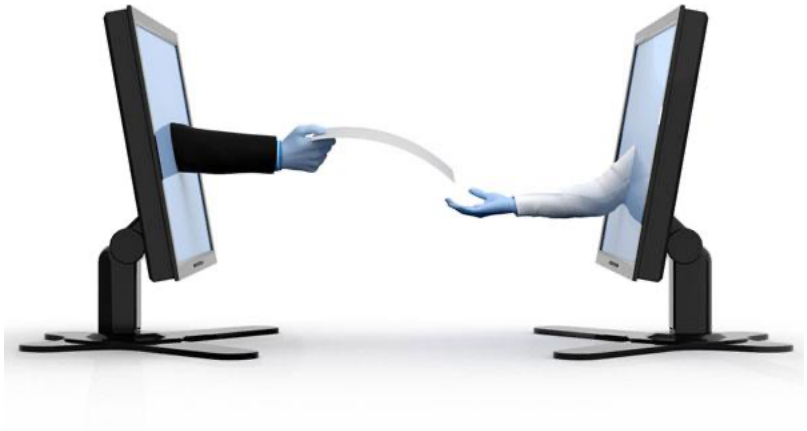
Share Mediation Briefs to Save Time and Get Better Results

Mark Fingerman, Esq., LL.M. October 2020



Mediation briefs should be shared well before the mediation session: to save time in session; to give each side the full force of the other's positions; to give each side time to *carefully* consider the other's positions and *calmly* prepare a response; to begin establishing the settlement ballpark. Let's consider the alternatives, their bases and effects.

Most lawyers mark their mediation briefs "Confidential", for the mediator's eyes only. However, when asked, those same lawyers typically agree that the entire contents of their brief may be disclosed to the other side at the mediation session. In fact, they want the mediator to forcefully do so. So at the mediation session, the mediator walks back and forth between the rooms sharing positions. This often results in a situation where, well into the afternoon, we are finally close to where we could have been late morning had counsel shared their briefs with each other.

So why do lawyers not want to share their briefs? The underlying reason is fear. Fear arising from the vicissitudes of dealing with opposing counsel, the courts and clients. Fear of the unknown, because the lawyer has always made mediation briefs "confidential" and has not thought through the effect of sharing the brief. The key coping mechanism for this fear is distrust manifested by risk aversion.

Having been a trial lawyer for 28 years, I well understand this fear and risk aversion. When I was in practice, I always marked my mediation briefs "confidential". I had a reasonable degree of success in mediation not sharing my briefs with opposing counsel. So why should you do anything different? Let me share with you what I've learned over the course of ten years as a mediator as to why sharing your brief is good for you and your client .

Sharing positions for the first time at the mediation session is grossly inefficient and far less effective. Having the mediator go back and forth between the rooms sharing positions takes a lot of time. Nuances get lost in the transmission. The flow of the presentation of positions is interrupted. Strong emotional reactions to a position presented on one issue often pollute receptivity to the positions which follow. The big picture, the *gestalt*, of each side's case is often not perceived.

The mediator is not going to be your super advocate. Unless the other side is clearly wrong on a core issue, the mediator is going to present, but not advocate, your position. The reason is simple: even if your position is stronger, it rarely is dispositive. It could go the other way. Even if the mediator likes your position better, the mediator still has to be careful about trying too hard to sell that to the other side, because the mediator needs to avoid even the appearance of bias. You know your case better than the mediator ever will. You are the best advocate for your positions.

Blindsiding does not work. Lawyers tend to think: If the other side knows the details of my positions in advance of the mediation, then they'll come up with "something", where if my positions are just sprung on them at the mediation – they'll collapse. When has that ever happened in your direct experience? Reality: when you blindside a litigator, the typical reaction is: "That's ridiculous." And what they are thinking, even if it looks like it really hurts their case is: " I can beat that. I'll go back to the office, grind on it, come up with something to defeat it or lessen the impact."

Neuroscience. When we are confronted by something that is against our interests or beliefs, the first reaction is emotional. Strong emotions take time to calm down. Then our rational mind has an opportunity and the tools to work on the issue.

"*Sleep on it*". In nearly every language and culture, that advise is given to one faced with making a difficult and important decision. This is a universal human experience because we are all basically wired the same way. When we sleep, the emotional content of what we experienced during the day is literally stripped from the memory. So when you look at the same thing the next day, you are more rational in addressing it. Equally dramatic, is that we actually work on problems while we sleep. That's why when you experience a disturbing case development at the end of the day, your head explodes; but the next day you look at exactly the same development and either have or immediately start coming up with solutions.

The foregoing has been studied at length and confirmed by modern neuroscience. See, Matthew Walker "Why We Sleep", Ch. 10 (2017). Dr. Walker is a professor of neuroscience and psychology at UC Berkeley, the director of its Sleep and Neuroimaging Lab, and a former professor of psychiatry at Harvard University.

So sharing briefs before the mediation gives each side an opportunity to *calm down* and formulate *effective* responses. Lawyers and their clients then come to the mediation "armed but not angry". (Paul Murphy, Esq., Santa Monica, CA.)

Remote decision makers. Sharing briefs gives remote decision makers (e.g., insurance adjusters) an unfiltered view of your positions, allows them time to cool off and: if on the defense side, to get more settlement authority; if on the plaintiff side, to prepare to take less to settle. It greatly enhances the mediator's ability to get the remote decision makers to better assess their exposure. They will respect you more if you help them by giving them time to consider your positions.

You will do a better job developing your positions and writing your brief. If you have a dispositive position, then you want the other side to have the time and space to let that sink in. It doesn't matter what they say if you are correct. But if you have doubts about your position, or if you haven't thought it through as well as you would've liked, then what advantage is there to waiting until the mediation to share that? That just collapses into the "I can beat that" response of opposing counsel. Knowing that you're going to share your brief has the salient effect of keeping you at your best in writing your brief, including keeping it civil and professional in tone.

You will do a better job responding to the other side's positions. Processing information at your desk vs. at the mediation session with your client present. Where are you at your best? Pre-session review gives you the time to consult others such as your experts and colleagues. You (should) do this for everything else that really matters in handling a case, so why would you not want to have that advantage for mediation?

Better client relations. Clients hate surprises, especially when they think you should have known about it in advance. Sharing briefs allows you to prepare your client for what is to come, well in advance of the mediation. It gives them time to "sleep on it" and work with you to refine positions and a settlement range they understand.

Develop the settlement ballpark. Every case has an effective settlement range, aka "ballpark". Giving opposing counsel and their client time to consider your well-crafted analysis of the numbers will have a higher likelihood of being accepted as at least credible rather than asking an often revved up opponent to calmly think through your detailed analysis at the mediation. If you keep your numbers based in reality, this should command the respect of the other side, so that you don't end up spending hours at the mediation getting to the settlement ballpark.

Early mediation. Sharing briefs is especially helpful in cases where there has not been much discovery. The other side may not know what you have and you want to know what they have so that you can properly prepare to respond in advance of the mediation session.

Half-day sessions. Sharing briefs greatly facilitates getting half-day mediations resolved in session. This is especially so where there are any issues other than settlement value or substantially divergent positions on settlement value.

Truly confidential information, such as impeachment evidence. This can easily be either redacted from your brief or even better, given to the mediator in a separate, supplemental and confidential brief.

Reciprocity? Lawyers often tell me that they will share their brief if the other side does. While that seems intuitively reasonable, it is the same emotional, fear based position generally infusing the idea of sharing briefs. If both don't agree to share, the lawyer willing to share feels that the other side will have an advantage because they will have more time to come up with stuff in opposition. While that is objectively correct, they will also have time to thoughtfully respond – which is more conducive to settlement. Sharing your brief when the other side does not shows that you and your client have confidence in your case, which gives you an advantage at the outset of the mediation session. And it still has the benefit of reducing the time it takes to go over positions at the session.

Conclusion

By disposition, training and experience, lawyers are cautious – always sensitive to avoiding giving the other side any advantage. Sharing your mediation brief gives you the advantage of presenting your positions to the other side exactly as you see them and in your own words. *You do this all the time anyway, with just about every other brief that you write in the course of a case*. It saves time (and money) in session, avoids your client being surprised and folds your client more intimately into the process. It allows each side to be better prepared to have a productive mediation session. Why not give sharing mediation briefs a try?

I would love to hear you thoughts on this. Please email me: mfingerman@adrservices.com