Hon. Norman P. Tarle (Ret.)
JUDICATE WEST

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Crafting a plaintiff's mediation brief for a standard personal-injury case

THE IMPORTANCE OF A CLEAR, CONCISE AND INFORMATIVE MEDIATION BRIEF

Mediation is one of the few exit points in a litigated case, and it should be approached with the same care as preparing for trial or arbitration. The quality and timing of a mediation brief communicate a message. Writing a well-crafted mediation brief is essential to moving a case forward, especially for a standard personal-injury case.

The mediator's pre-mediation email

Mediators hate to waste time. If a neutral has sent an email with specific instructions concerning a brief, read and follow it. Timing, page limits, topics, and format for a mediation brief will often be explained in the instructions from the mediator.

Write for your audience

Attorneys are used to writing briefs meant to persuade trial judges, appellate justices, and arbitrators. That is not what a mediator wants or needs. Mediators need the facts to understand arguments and positions. They do not need to be persuaded by them.

The most sought-after mediators are booked solidly for three to six months. They want the information in a brief to be laser-focused, easy to read, and readily understood. The brief should be a user-friendly reference guide for use during the mediation. Imagine you are the mediator. What would you want to see, and what would you hope to avoid?

Structure the mediation brief

Structure the brief in a way that makes sense. Be creative. Writing a letter brief is fine. Use many topic and sub-topic headings. A judicious use of topic and sub-topic headings may act as an outline in and of itself.

Consider using CACI [California's Civil Jury Instructions] to structure a portion of the brief. Use elements of a cause of action or verdict form questions as topic headings. These can provide a format for targeting important information and avoiding redundant or unnecessary material.

Beware of the twins: *surprise* and *frustration*

Surprise and frustration are not an advocate's friend. They tend to be spoilers. Examples of frustration include the extensive inclusion of unnecessary and undifferentiated exhibits or the receipt of a lengthy brief just before the mediation session. Examples of surprises include backtracking a prior demand, a demand without explanation, or providing a last-minute substantial and unsubstantiated increase in damages.

A mediator will often consider a workable strategy. Having a clear understanding of the case helps that mental process. However, surprise and frustration will move the mediation process backward rather than forward.

There are exceptions to this rule that transform some aspects of these twins into meaningful information. Some briefs must be lengthy and incorporate extensive exhibits due to the nature of the controversy. In other cases, a brief may include unpleasant surprises because circumstances have changed. These circumstances *must* be addressed in the brief.

Use an encapsulating format where possible

Encapsulating formats include outlines, lists, grids, and charts. They summarize information without the need for complete sentences or paragraphs. The encapsulated format is a compressed snapshot of relevant information. It provides self-explanatory information in as short a format as possible.

Conceptually, consider dividing your brief between information that may use an outline, list, grid, or chart in contrast with information that requires explanation. Take the time needed – nothing more and nothing less.

Make use of the front page

The front page of the brief is the most accessible yet underutilized portion. Consider using the space beneath the case caption to list facts as a quick reference tool. Examples include the following for a typical personal injury case:

Client name:
Age:
Employment:
Family status:
- Date of event:
- Party defendants:
- Liability:
- Causation:
- Injury:
- Insurance coverage:
- Loss of earnings:
- Medical care:
- Medical expenses:
- Lien claims:
  - Howell liens:
  - Pebley liens:

Last demand:
- Last offer:
- Trial date:

It is a burst of information that requires no searching. It is quick to write, easily understood, and readily available.

Embed exhibit information in the brief: This allows the brief to flow and capture information without requiring the mediator to pause and look through attached exhibits. It is particularly effective for a question-and-answer in a deposition or limited segment of a medical report. Keep it short.

List prior demands and offers: Make this a separate topic heading.

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Material requiring an explanation

The brief should be short, but never too short. Provide what is necessary in terms of topics and explanations. Include the following explanations:

Liability: A short statement is all that is needed when liability is clear. For complex liability issues, each party's position should be set out.

Causation: Always include causation issues as a topic in the brief. Sometimes, causation can be disposed of in a single short statement. In many cases, however, the threads of prior or subsequent accidents, conditions, or events must be disentangled from the current case and linked with statements of treating physicians, experts, or lay witnesses.

Explaining plaintiff and defense case value: It is common, during mediation, to hear an insurance representative state that they do not understand why the plaintiff believes the case value is as high as their demand. It is also not unusual to hear the plaintiff's attorney bitterly complain about a lack of good faith by the defense because they came to the negotiation with insufficient settlement authority. Explaining your position in the mediation brief may help alleviate these problems.

Negotiations to date: The mediation should continue the settlement conversation from when the parties ended their talks. While listing demands and offers will act as a quick reference tool, providing the mediator with more detailed insight into prior negotiations will allow the process to proceed more efficiently. Indicate if the offers and demands were transmitted under CCP section 998 offers of compromise.

Exhibits/attachments

Provide *only* what the mediator will need. Pages from a deposition should include the quoted portion needed to make a point and enough Q&A before and after to provide context. Highlight the significant material.

Use an editor's scalpel with medical and expert reports. Highlight the critical material. Include significant pages along with the date of the report/notes, the medical provider's or expert's name, and the applicable facility name.

Cut away nonessentials in attachments of email or text strings. Clarify the author's name, and include the date and time. Use an ellipsis […] or other method to signify a gap or elimination of text. Ensure an exhibit/attachment is referenced in your brief. If possible, provide an electronic link to the material.

Impactful presentation of information

A word of caution: Be aware that material prepared and produced for mediation may be the subject of an exclusion motion at the time of arbitration or trial. It is wise to become familiar with *Rojas v. Superior Court* (2004) 33 Cal.4th 407 before evidentiary information is provided to the mediator in a mediation brief or during the mediation. To alleviate a *Rojas* objection at arbitration or trial, approach the opposing party for an agreement that such objections will not be made for any item presented during the mediation process.

Persuasive information in the mediation brief: While persuasive methods and arguments should be reserved for a jury, bench trial, or arbitration, providing the mediator with tools to aid in the evaluative segment of mediation is different and necessary. Audio, video, photographs, and written recordings of events at the time of, or moments after an accident have the highest impact and are a treasure trove of information for a skilled and experienced neutral. These include 911 calls, CCTV of slip-and-fall events, film of collisions, contemporaneous phone messages, and photographs of injuries.

Include recordings of the relevant action before and after an accident, such as employee reactions after a slip-and-fall or post-collision activity. With CCTV, ensure the mediator can slow the action and zoom in. Using this material will make a mediator's evaluation of the case more accurate, detailed, and persuasive. It will also allow the mediator to indicate how a jury, judge, or arbitrator may view this evidence.

Damages

Past medical damages (PMD): Presentation of these damages plays a leading role in the standard personal-injury case. Take your time to get it right. The injuries that give rise to the PMD may determine future care and general damages.

The plaintiff's medical damages narrative should include two components. First, a chronological description of the plaintiff's journey to and from medical providers, with dates, findings, and treatment. Set out a list of injuries and affected body areas. Second, paint a picture that describes the pain and suffering, focusing on how life has changed. Be careful. Remember that this is not a persuasion brief. This second component sets the stage for the pre-mediation phone call and the mediator's discussion with the plaintiff during the mediation.

The chronology of treatment is essential. If necessary, a timeline may help visualize its consistency.

Mind the gaps in treatment. It is not unreasonable for the defense to assume that pain will prompt a plaintiff to seek treatment. The assumption is that the greater the pain, the more frequently a plaintiff will seek medical treatment. Gaps in treatment may indicate that pain and injury are neither significant nor present. If gaps are present, they must be addressed.

Chart past medical damages: The presentation of a chart setting out the provider's service, billing, and lien information will provide the mediator with a snapshot of complex medical information.

Clarify designations, names, dates, and locations: Medical providers, for example, can alternatively be referred to by the individual's name [e.g., Dr. Doe], the name of the medical group [e.g., AAA Medical Clinic], or the name of the medical specialty [e.g., orthopedist].

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Provide sufficient information when listing past and future medical damages to avoid confusion.

When including portions of reports and depositions, include the date of the report and sufficient information about the people involved. In deposition transcripts, identify an examiner's party affiliation.

Clarifying medical liens: The California Supreme Court declared that a plaintiff may recover, as past economic damages, no more than the medical expenses paid by or on behalf of the plaintiff or still owing at the time of trial. (*Howell v. Hamilton Meats & Provisions, Inc.* (2011) 52 Cal.4th 541.) Four years later, an appellate court explained that "the measure of medical damages is the lesser of (1) the amount paid or incurred, and (2) the reasonable value of the medical services provided." (*Bermudez v. 822 Ciolek* (2015) 237 Cal.App.4th 1311.) When an insured plaintiff chooses to be treated by medical providers outside their insurance plan, they are considered uninsured when determining economic damages. (*Pebley v. Santa Clara Organics, LLC* (2018) 22 Cal.App.5th 1266.)

In practical terms, before *Pebley*, past medical expenses paid by the plaintiff and their insurance company were often considered 'reasonable,' with disagreements between the plaintiff and defendant centered on whether the treatment was reasonably necessary. *Pebley* changed all that, with many plaintiffs opting not to be restricted by their insurers' medical providers or cost limitations. Many medical providers now agree to treat on a lien basis and are willing to wait for payment until a settlement or jury award is reached.

Whether and to what extent the medical providers discount these liens has become a significant issue during the mediation. Knowing the limit by which a lien provider will reduce its lien before negotiations is best.

Future medical expenses: Not only must these costs be reasonable and the medical care reasonably necessary, but the medical care must also be reasonably sure to be needed in the future. It is essential to describe the treatment with this in mind and include the name of the medical provider recommending it. Revealing a short portion of the medical report/notes/report where future surgery is recommended can make it more accurate. Include the basis for the projected cost of the treatment. If the recommendation is for future surgery, explain why the surgery is needed.

Non-economic or general damages: These are often the big-ticket items in the standard personal-injury case, and care should be taken when deciding the amount of this component. The basis for these damages should permeate the brief, especially in the section describing the plaintiff's pain and suffering.

Loss of earnings [LOE]: Provide the dates the plaintiff was not at work due to the accident and the amount of the loss. The mediator does not need to view documents that support the calculation, although the defense will.

If the plaintiff is self-employed, documentation is essential. The mediator needs to know the final calculation of this loss, the period involved, and the documents that prove the loss. Still, they usually do not need to see that documentation in the brief.

Where the LOE is small compared to the total damages, consider waiving the compensation and using it instead to demonstrate goodwill and a willingness to compromise.

Property damages: By the time most mediators see your case, the value of the damage to the plaintiff's vehicle has been resolved unless liability is at issue. If liability issues need to be folded into a settlement, provide the mediator with a repair estimate or fair value of the vehicle.

Other damages: Other damages may apply, such as loss of future economic opportunity, loss of a business or profession, or the ability to care for dependents. Speak to the mediator for help addressing these items. Usually, the mediator will want to know the total cost and the basis for its calculation. Damage requests set the stage for a pre-mediation phone call.

Insurance coverage

Information concerning insurance coverage in automobile collision and premises-liability cases is critical. Policy limits, authority levels, and decision-makers are essential items to be presented to the mediator for an independent evaluation. Failing to address these issues in a pre-mediation brief and phone call may result in more follow-up work or additional mediation conferences after the scheduled mediation session.

Settlement issues

The mediation brief should conclude with potential issues regarding structured settlements, court approval, and lien claim negotiations.

Confidential versus non-confidential mediation briefs

Mediation proceeds in stages. A mediator will work to move the process past the fact and position exchange to the stage where numbers flow smoothly and regularly between or among the parties. Unless otherwise agreed, the information disclosed in a pre-mediation brief remains confidential. Evidence Code section 1119, subdivision (b), states in part: "No writing, as defined in Section 250, that is prepared for the purpose of, in the course of, or pursuant to, a mediation . . . is admissible or subject to discovery. . .." The language of the statute is clear. According to *Rojas v. Superior Court* (2004) 33 Cal.4th 407, it means exactly what it says. In *Wimsatt v. Superior Court* (*Kausch*) (2007) 152 Cal.App.4th 137, the court stated that "mediation briefs epitomize the types of writings which the mediation confidentiality statutes have been designed to protect from disclosure."

Value of non-confidential briefs

Having both sides make their arguments and positions known to each other in non-confidential briefs allows the mediation to begin ahead of the starting line. It reduces the need for the

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neutral to shuttle that same information back and forth and allows all to proceed to the stage of processing the data in a way that will facilitate an agreement. Providing arguments and positions to the other side in advance eliminates surprise, allowing the opposition to "get used to" the position even if they disagree.

Exchanging briefs permits each side to compare damage numbers, which may have a clearinghouse effect on each side's information bank. Information about prior or subsequent injuries, accidents, treatment, or events should be disclosed.

Counsel can extract *confidential* information and provide it to the mediator in a separate writing or during a pre-mediation conversation. Be prepared to discuss with the mediator when and if confidential information should be revealed to the opposition.

If a *confidential* supplemental brief is provided to the mediator, ensure it is not mistakenly included as an addendum or exhibit in the non-confidential brief. Accidents happen, and confidential information should not be inadvertently revealed to an opponent.

Conclusion

A thoughtful, well-crafted, and timely mediation brief sets the stage for maximizing a mediation's potential. It communicates more than the words printed on its pages. It tells the mediator that the brief proponent is serious and committed to resolving the dispute.

Hon. Norman P. Tarle (Ret.), after more than 36 years of service as a Los Angeles County Superior Court Judge, Municipal Court Commissioner, and Superior Court Commissioner, Judge Tarle joined Judicate West *in 2021. As a judicial officer, he presided over civil and criminal calendars, hearing hundreds of jury and bench trials. He received the 2005 Judge of the Year award from the Los Angeles County Criminal Courts Bar Association. He graduated with a joint JD/MBA from UCLA. As a mediator and arbitrator, Judge Tarle specializes in personal injury, professional malpractice, business, and real property cases. He can be reached at ntarle@judicatewest.com.*