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PERSPECTIVE

Exchanging mediation briefs: The simplest path to success

By Robert M. Cohen

Each February, the winner of the Super Bowl is awarded the Lombardi Trophy, emblematic of the greatest team victory in American sport. Vince Lombardi, perhaps the most revered and brilliant coach in the history of American football, famously said: "Winning isn't everything; it's the only thing!"

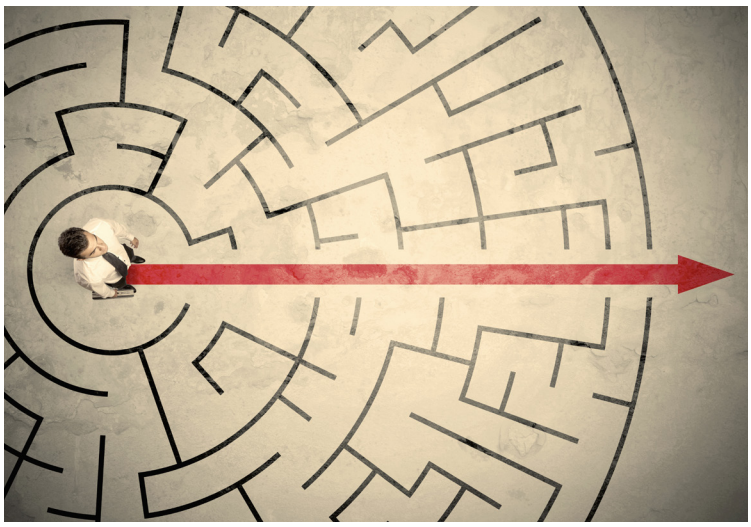
Had Lombardi coached mediators, he would have substituted in "great communication": "Great communication isn't everything; it's the only thing!"

Mediation, unlike the Super Bowl, is not a zero-sum game where the winner takes all; it is a voluntary process requiring the consent of two opposing parties and counsel, and it is a collaborative process at its core.

So how can mediation participants be collaborative without first clearly setting out their stories, wants, and limitations through the exchange of mediation briefs with opposing counsel? The mediation process should require this, yet the exchange of mediation briefs between counsel (and parties) is the exception rather than the norm.

According to noted mediator, arbitrator and trial lawyer Sidney Kanazawa, "The best mediation briefs I have seen leave out adjectives and adverbs. They do not place their clients on a pedestal while demeaning the opposition; and they concede as many points as possible. By minimizing aggressive advocacy and conceding points, opposing counsel immediately gain credibility and trust — the most powerful tools in the collaborative environment of mediation."

Kanazawa advises that legal briefs in the style of motions and complaints are inappropriate models. He believes that combative and aggressive brief writing does not encourage collaboration and that a brief which makes overstatements, exaggerations or misstatements undercut otherwise powerful arguments and becomes the unintended focal point of the mediation process.



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While mediation, compared to full-blown arbitration or trial, is economical, it is not inexpensive. Many top mediators charge more than $10,000 per day. Wasted time is wasted money. What reasonable litigation attorneys would walk into a mandatory settlement conference or trial without exchanging briefs (irrespective of the requirements of local rules)? To do otherwise would be disruptive and wasteful, let alone disrespectful of the judge's and everyone else's time. Why should mediation be any different?

A good mediation brief is a roadmap of the dispute, setting out the facts, evidence and law and highlighting the key disagreements — while conceding weaknesses and shortcomings. Consider the advantages to exchanging mediation briefs several days prior to the session:

- The litigants and decision-makers are educated and allowed to consider the opposition's position — strengths and weaknesses — in advance of the mediation;
- The mediator is provided with a bully pulpit or platform to work from when questioning and communicating with counsel and the decision makers;
- Counsel and their clients are forced to evaluate their opponent's positions versus their own;
- Decision-makers have more time to obtain a realistic understanding of the risks associated with rejecting settlement and proceeding to trial; and
- The mediation process becomes more efficient and effective, reducing the time necessary to reach partial or complete settlement, and reducing mediator and attorney fees and costs.

Sadly, because mediation is purely consensual, there is a trend among most mediators not to request — let alone require — the exchange of mediation briefs. Interestingly, many attorneys believe that by exchanging mediation briefs they are giving up "leverage" and providing the opposition with too much information. In other words, they believe they will lose their competitive edge. But real power in mediation comes from knowledge, self-awareness, and credibility as emphasized by Kanazawa. Rarely does bluffing and obfuscation settle cases, nor does it create an atmosphere of respect and trust.

Whether mediation counsel are young lawyers, two to five years out of law school, or seasoned veterans, five years from retirement, the exchange of clear, cogent, and well thought out mediation briefs, besides being persuasive, establishes credibility in the eyes of the mediator, opposing counsel, and the litigants. And the California Legislature has made it clear that information disclosure, "for the purpose of, in the course of, or pursuant to a mediation or mediation consultation" is inadmissible in subsequent proceedings.

While counsel may be concerned about disclosing evidence or legal theories to maintain a real or perceived tactical advantage, counsel can easily excerpt such information from the mediation brief and make a private, confidential disclosure to the mediator.

At mediation, great communication by counsel is neither a sign of superior advocacy nor of weakness; rather, it is the most essential element in obtaining a net positive and successful outcome in the process that is unique to mediation of the litigated case: meaningful, sincere and serious collaboration between litigation adversaries.

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