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The Write Stuff Before Mediation

My mediation engagement agreement requests that attorneys send me a mediation submittal prior to the start, so I can begin to learn the case and the cast of characters. In a two-party case, I average less than one submittal per mediation, meaning in many cases I do not get a position statement from either side. This is suboptimal for two reasons. Clearly it is better to get the mediator up to speed in advance and a position statement gives me a way to start thinking about the problem. More importantly, participants lose a valuable opportunity to speak directly to the other side.

Litigation does not afford one the opportunity to write a letter to the opposing party, but mediation does. Here is a truly unique opportunity to speak directly to the other side with no buffer between you and them (assuming the attorney forwards the letter or statement). If you write the letter and urge that it be passed along, it should be. Each side benefits from understanding how the other side views the case or conflict. Solicit a position statement and send one. The letter or position statement may highlight something the other side did not know or appreciate (attorney fee exposure, prejudgment interest, insurance coverage problems, collection issues, etc.). An exchange of position papers or letters can immediately crystallize the factual and legal issues; eliminate or highlight flawed assumptions; correct misinformation or address unfounded beliefs; and start the process of focusing the attention on resolution, rather than conflict.

Brought to you by
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Should you have additional inquiries, please contact:

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When you do write, write to the right person — not to the lawyer nor the mediator. Write in a way the actual litigants will understand. Regurgitating case law and legal positions is not that helpful. You should speak to the benefit of a deal, the practical implications of litigation and delayed resolution, the emotional and financial burden of litigation, publicity, the impact on customers, employees, or whatever else matters to the other side. If you have new information on damages, for example, it is far better to share it in advance than to surprise the other side. Take the time to solicit your client's input before sending the statement. Many times clients will have an interesting take or insight that lawyers may not appreciate.

The litigation process does not afford one the unfettered opportunity to communicate directly with the opposing party. So when presented with the opportunity at mediation, why would you give that up?

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