

MED-ARB MEMO TM

Just as litigation is getting more complicated, so too are the most common alternatives to litigation, to wit, mediation and arbitration (or to use the vernacular – med-arb). But litigators and others involved in dispute resolution, by whatever process, seem to have less and less time to spend reading lengthy articles on the dispute resolution process. So I thought it valuable to occasionally, say, every two or three months, write a note about mediation or arbitration, short and to the point, about issues in the alternative dispute resolution arena.

In that vein, if you have any issue you particularly want addressed in such a note, let me know what it is, and I will try to cover it.

—Joe Soraghan

You Should Exchange Your Briefs

Your pre-mediation briefs, that is.

It is generally agreed among lawyers that some amount of information must be possessed by both disputing parties to a mediation, if the mediation is to result in settlement. (Of course, theories on how much information is necessary, i.e. how much discovery, if any, differ with types of case and frequently from attorney to attorney.) I'll write more about that in future memos.

However, in one of my recent mediations, an interesting related situation arose. Prior the mediation, I discussed with counsel whether each of their pre-mediation briefs should be disclosed to the other party and his counsel prior to or at the mediation. One attorney agreed to disclose, but only if the other did. The other counsel refused to disclose it, apparently for strategic reasons, so the pre-mediation briefs were not disclosed to opposing parties.

No case had been filed so no discovery had been taken. The case did not settle during the mediation session, because both parties concluded they needed more information before settlement was possible. But we continued the mediation by separate telephone conferences between me and counsel.

After the mediation session and during the ensuing telephone conferences, after further information had been exchanged, the party originally refusing to disclose his pre-mediation memorandum agreed to do so. Settlement quickly followed.

The point is this: as much information as possible should be exchanged between the parties if the probability of settlement is to be maximized. Perhaps the most important such information is the information in each party's pre-mediation brief.

Although accepted mediation practice is that parties have the option whether to exchange pre-mediation briefs, it is those briefs more than all other types of information, which ought to be disclosed to opposing parties to increase the likelihood of settlement. This of course if logical. A main purpose for preparing a pre-mediation memorandum is to convince the mediator of the probability of a party's success. Obviously, it is even more important in a mediation to convince the **other party and his counsel** of the probability of one's success. And if that is one of the purposes of a pre-mediation brief, it only makes sense that the other party have the opportunity to review it.

It is not uncommon for counsel to hesitate to exchange the pre-mediation brief because there is some short portion of it—perhaps an important fact or legal argument—that counsel does not want to disclose yet. In that event I suggest that counsel delete that portion from the *brief*, and put it in a separate document to the mediator, perhaps in a cover letter or some similar document, but retain all other evidence and legal arguments in the brief, and agree to exchange it with the other party.

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Joe Soraghan represents broker-dealers and registered representatives in court, in arbitrations and mediations, and before the SEC and state securities commissions. He is a frequent arbitrator and mediator for FINRA. Published in several law reviews and a frequent speaker on securities, Joe also teaches Securities Law Litigation and Arbitration as an adjunct professor at Washington University School of Law.