



Joan B. Kessler

Mediation roadmap: The mediation brief – plain English trumps legalese

Over 20 years ago, I wrote an article for the Loyola Law Review which I co-authored with Robert Benson, one of my favorite law professors. It was entitled, *Legalese v. Plain English: An Empirical Study of Persuasion and Credibility in Appellate Brief Writing*, 20 Loyola of Los Angeles Law Review 301 (January, 1987) (*Plain English*). Eventually this article, which got much publicity, was also published in Japanese.

The conclusions that Professor Benson and I came up with in that early article still seem true today as I sit and read mediation briefs before each mediation session. I share the insights I gained from that research study as helpful hints in your own brief preparation for your mediations. That project had to do with appellate-brief writing. The concept of a brief being a roadmap to the case and an introduction of the attorney to the reader, holds true in the mediation context also.

Original study

In setting up the study of the effectiveness of appellate-brief writing, we wanted to find out what jurists thought was persuasive. Data for the study were collected while I worked as an extern at the California Court of Appeal (Second District) in Los Angeles for my now colleague at ADR Services, Inc., Hon. Robert Feinerman (Ret.). Research attorneys and justices participated as subjects. (Research attorneys were employed by justices to assist in research and analysis of cases. They read briefs and prepared written analyses for the justices.) The subjects were randomly given “legalese” segments or rewritten “plain English” segments of briefs. I left the subjects alone to read segments and fill in the answers to questionnaires. After the project, some of the justices told me stories about receiving poorly written appellate briefs previously.

Some of the problems with the legalese segment were:

- “Very long, complex sentence . . .”
- “Misplaced phrases: Phrases that seem awkward and out of place . . .”
- “Wordy: Extra words used to express simple ideas.”
- Long words when short ones would have been fine.
- Terms of art/jargon/professional slang.
- “Old English: *thereby*.”
- “Too many ideas in each sentence.”
- “Pompous and dull tone.” (*Plain English* at p. 307.)

The revised segment – the plain English version – was the legalese version that had been rewritten in plain English by omitting most of the legalese features above. The jurists and their research attorneys reviewed the legalese and plain English portions of briefs. Then they commented on how they evaluated the lawyer/ author of the brief, as to whether they were persuasive, had good credentials, and whether they wrote well. The results indicated that when briefs were perceived as wordy and full of legalese, the attorneys writing the briefs were perceived to be less persuasive, not having as good credentials and less intelligent by the jurists.

Applicability today in mediation briefs

In the initial study, we concluded that lawyers would run risks writing documents in legalese for judges and their clerks. Lawyers using legalese were seen as unpersuasive and substantively weak. Also, the lawyers using legalese were evaluated as having professional credentials that were less credible. While this study was done in relationship to evaluating appellate court judges’ perceptions of lawyers as a result of their written work, it seems relevant to mediation briefs. All lawyers want to be perceived by the mediator as credible and intelligent. Writing concise briefs without legalese may help achieve this result. Hopefully this 20-

year-old research still holds true, and I hope it will convince you to write *brief* briefs and delete the legalese.

Conclusion

As a mediator, briefs are critical to my premediation preparation. They are roadmaps to the case. Usually the briefs are very helpful in giving me insight into the case. You, as the lawyer, have lived with the case, sometimes for years, or what seems like a lifetime! After I read the brief, I usually call counsel to go over the facts and discuss possible settlement issues even before the mediation session takes place.

The information in the brief and its readability are critical in setting the tone for the whole settlement process and in giving the mediator insights into the case and into the attorneys who wrote the mediation brief.

Therefore, my suggestions for mediation brief writing:

- Keep the brief *BRIEF!*
- Delete the legalese.
- Be concise.
- Keep sentences short.

I look forward to seeing your mediation briefs!

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