

How do I write an effective mediation statement?

1. **Isn't it obvious?**

Much of this—maybe all—will seem obvious.

Then again, perhaps it is not obvious at all. Having seen hundreds of mediation statements, I remember only a tiny handful, three or four, that were really useful, by which I mean that the information they contained saved time and energy for the intense, sometimes exhausting work of trying to navigate to a resolution.

The next time you sit down to write a mediation statement, it may help to keep in mind the concepts discussed in this memo. Think them through before you begin to write. I promise it will help you and the rest of the participants in your mediation, and enhance the prospect of success—solving the problem that the ongoing litigation represents.

Give yourself time: A good mediation statement can't be written on the fly. The attorney who starts writing a mediation statement a day or two before it's due is already lost. You may think you know the case well enough to leave it to the last minute, but the truth is you don't, and the investment you make in treating your statement with the care you would any other paper prepared for litigation will pay off.

2. **What is the Purpose of the Mediation Statement?**

Ask yourself, why am I doing this? What do I hope to achieve?

Every mediation statement has at least four goals:

First, to provide the mediator with just the right amount of information (not too much, not too little) to enable the mediator to help *the parties* reach a successful result: an agreement resolving the case.

Note, I didn't say, "to help *me—or my client*" achieve a successful result. In mediation, either all parties achieve success, or none will. Therefore, the advocate who hopes to achieve success must help the mediator help "the parties," not just one side, because *all* parties are partners in the process.

Second, to help me prepare my client for the negotiation that lies ahead.

The client's expectations are critical; disappointment leads to frustration and failure.

Third, to help me develop an effective strategy for the mediation.

What is my goal? How will I improve my chances of getting there? What opening offer or demand will convey to the opposition my client's desire to reach an agreement and set a frame for the following steps? What response or range of responses should I expect to hear? What will be my next step? And so on.

Fourth, to educate myself. There is an old saying, How do I know what I think till I see what I say? A variant: How do I know what I *mean* till I see what I say?

Writing is a process of discovery. Just having to write down ideas forces me to think about every word, every sentence, every paragraph, and when I review what I have written, I see flaws, gaps, wrong turns and I have to think about everything again. Repeat the process until I understand what I am trying to say, and then make sure what I have written expresses my thoughts and my meaning. How do I know what I mean till I see what I say. Writing and meaning are inseparable.

3. What Information Should the Mediation Statement Include?

A mediation statement should *distill* the issues in the case. Less is always more.

Start with a *single paragraph* identifying the parties and summarizing the claims.

Provide a concise summary of the key facts *without* the gory details, as objectively as possible. No rhetoric, no characterization, no flamboyance or melodrama. Joe Friday—does anyone remember Dragnet?—“Just the facts, ma’am”—is the model storyteller.

Add a *concise* summary of the governing law in this Circuit, if there is any. Cite caselaw involving parallel facts and procedure.

Identify the dispositive factual or legal issues: What will the case turn on?

Without getting into minute detail, identify the significant factual and legal strengths *and* weaknesses on *both sides*. Even the thinnest pancake has two sides.

This will also help the client understand that the case is not a sure thing and the necessity of adjusting expectations to realistic levels, and will create favorable conditions for compromise.

What is the client’s role? The client should always be involved, although the point at which you involve the client will surely vary from client to client and you will have to make a judgment about the right time for the particular client whose mediation statement you are writing. We have all had clients who wanted to be actively involved in every stage of the process, and others who just want us to tell them what to think. And everything in between. At some point, though, you should send the client a *draft*, review it with the client, get the client’s feedback, and make sure you and the client share the same understanding and expectations.

Do not *argue* the facts or the law. You are creating a roadmap, not a summary judgment motion or an appellate brief. The mediator will not decide the case or the outcome. An experienced mediator will apply a heavy discount to your glossy prediction of success and start with the premise that your expectations are unrealistic. That is not a good place to begin.

Identify any special barriers to settlement: Psychological or emotional obstacles, personality conflicts; public pressures or politics, vested or non-party interests; continuing or possible business relationships; limited resources. Anything unrelated to the case itself that might

get in the way, and how those problems might be overcome, or in some cases, exploited. Something more reasonable than the other attorney is a jerk.

4. Focus on the dispute, not the claims.

Some questions to think about, discuss with your client and to try to address, *briefly*. Don't try to answer *all* of these questions. Every case is different, not just because the facts and the law are different, but because the parties and their interests are unique. Some of these questions will resonate. Pick a few that might help illuminate the parties and their interests in *this case* for yourself, your client and the mediator.

- What is the *dispute* really about for you? What do you think the dispute is really about from the other side's point of view?
- What do the parties see or understand differently? Why do they see things so differently?
- How does your view of the dispute change, if at all, when you think about it from the other party's point of view?
- What issues do you and the other party agree about? What issues do you disagree about?
- Where do you think the opposing sides disagree most strongly?
- Is some of the dispute caused by misunderstandings or hurt feelings?
- What do you think caused the misunderstandings or generated the hurt feelings?
- If the case involves a prior or current relationship between the parties (for example, employment or contractual), what material understandings did the parties have when the relationship was formed and how were those understandings altered or disregarded?
- Do you want to rebuild or restore the relationship and what do you think it would take to accomplish that goal?
- How do you think the opposing side feels about rebuilding or restoring the relationship?
- What information, documents, legal rules, or other things might cause the other party to change his or her mind about the issues you disagree about?
- Are there any objective standards the parties could agree on that might help eliminate or narrow the areas of disagreement?

- What are your client's goals for the case, in order of importance. (For example: time, money, security, get even, get on with life, minimize risk, fairness, future plans, maintain a working relationship, etc.).
- How do you think the opposing side sees their interests, in order of importance?
- Which of these interests (if any) do you think both sides already agree about?
- Who are the real decision-makers and what are their interests? How might they be satisfied?

5. **Cut to the Chase: Settlement.**

Summarize any prior settlement discussions.

Explain why those discussions broke down. Why have the parties reached impasse?

Analyze the *settlement value* of the case:

- What is the plaintiff's potential recovery?
- What is the defendant's exposure or risk of loss?
- Does either side have any non-monetary goals?
- What is your client's probability of success at each level (motions, trial, appeal)?
- What are the costs (discovery, motions, trial, including preparation, and appeal) of getting to the end?
- How long will it take to reach an ultimate determination?

Suggest possible outcomes or a settlement range.

6. **Considering the Alternatives.**

How will you measure whether a potential agreement is a better choice than continuing to fight?

Consider and discuss:

- What are your *best alternatives* to a voluntary agreement to settle the case (BATNA)?
- What are the opposing side's best alternatives to settlement?
- What are your *worst alternatives* to settlement (WATNA)? List the possible consequences of not reaching agreement.

- What are the other side's worst alternatives to settlement?
- What are two or three potential settlements that (a) you believe will satisfy your main interests, and (b) you think the opposing side can live with?
- What are two or three potential settlements that (a) you believe will satisfy the other side's main interests as you understand them, and (b) you can live with?

What might the mediator do to help you develop an acceptable voluntary settlement?

What might the mediator do to help the other side develop a voluntary settlement?

Write it down and find out what you think.

7. **To share or not to share?**

Should mediation statements be confidential or exchanged with the other side? In whole or in part? If counsel *and* the parties understand one another's views, interests and goals, is settlement more or less likely?

Share at least a one-page summary of applicable law. There should not be any surprises regarding matters of law, and it will facilitate discussion if both sides know what law the opposition is relying on.

Keep in mind, at all times, that the object of the mediation process is not for either side to emerge victorious, but to reach an acceptable resolution; not necessarily the *best* outcome for either party, but an outcome that is *better than the alternative*: years of anxiety and expense, and most of all, uncertainty.

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