

## CREATING A WINNING MEDIATION STATEMENT

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“You never get a second chance to make a first impression.” The author of this statement is unknown. Some ascribe it to Oscar Wilde, others to Will Rogers. The only confirmed source dates back to 1966 and a men’s suit maker. Regardless, the statement is powerful and true. When it comes to commercial mediations, the first impression is made with the Mediation Statement.

A well-drafted mediation statement sets the tone for the mediation to follow, educates the mediator about your client’s case and establishes your credibility, or lack of it, in the eyes of the mediator. Unfortunately, too many litigators are demonstrably unaware of the critical nature of this document.

The purposes of the mediation statement are really quite simple. They are to: (i) advise the mediator of the underlying essential facts of the dispute; (ii) clearly and succinctly set forth the issues in dispute; (iii) identify the most appropriate supporting legal authorities; and (iv) set forth your client’s settlement posture. The often-forgotten purpose of the statement is to establish the personal credibility of the author.

A well-drafted statement becomes a roadmap for the mediator in navigating the mediation process. A poorly prepared statement starts the mediation off on a faulty/defective foundation and decreases the chances of a successful solution at the hearing.

Every attorney would be well-served to periodically review the fundamentals of legal writing. Like most writers, attorneys tend to develop catch phrases and crutch words that seem to find their way into all of their written documents. While some may be appropriate, more often than not they are simply a lazy approach to persuasive writing.

The primary objective of legal writing in the litigation arena is persuasion. The writer is attempting to persuade the reader of the correctness of the writer's position. The art of written persuasion cannot be easily taught and is often forgotten. Suffice it to say, the reader needs to come away from the written document with a firm conviction that the writer's position is solid and correct. A simple statement such as: "The defendant did not breach the contract" is clear and distinct; however, standing alone, it is not persuasive. It is merely a premise that must be supported with facts, law and argument to compel the reader to conclude that the statement is true. All too often, litigators believe by simply repeating the premise several times in the document the reader will conclude it is true. This is far from the case. A persuasive argument sets forth the premise, sets forth the facts, wraps both in the law and repeats the premise as the conclusion.

A mediation statement initially should set forth the full case caption and include the date, time and location of the mediation, as well as the name of the mediator. This simple step saves the mediator from having to look at his schedule to confirm this is his mediation and the date, time and location are correct. Thereafter, every mediation statement should begin with a summary or overview of the case. The overview is designed to capture the attention of the reader and set forth in a short, concise manner the identities of the parties, the nature of the dispute, unresolved issues and the author's desired result.

The mediation statement should then follow with a more detailed factual description and an identification of disputed issues. This should be followed with an analysis of the most relevant caselaw and statutes and argument in support of the author's position. Finally, the statement should conclude with a settlement recommendation. Many times, a litigator does not want to telegraph a settlement posture to opposing counsel. In such event, the statement should indicate a settlement position will be conveyed to the mediator, in private, at the hearing.

If deposition testimony is critical to the statement, do not attach the entire transcript. Instead, simply attach the cover page and testimony pages relevant to the case. Highlight in color the most crucial sections of the transcript for the mediator to read. Similarly, if prior rulings in the case are relevant, do not attach a multi-page opinion to the statement. Attach the cover page and the relevant portions of the ruling, again highlighted for ease of reading. Finally, as to caselaw, it is better to quote the relevant portions of the case in the body of the statement and not attach a multi-page ruling where only a small portion of the decision is pivotal.

A successful mediation statement not only attempts to persuade the mediator of the correctness of the client's position, but also demonstrates that the position of the opposing side is incorrect or fatally flawed. This is effectively done by juxtaposing the competing positions and providing evidence of why one position is clearly superior to the other. Another way is to distinguish the legal authorities relied upon by the other side or, in that rare case, to demonstrate the opposing authorities have been overruled.

Mediation statements should avoid excessive sarcasm, personal attacks on opposing counsel, and flamboyant statements that have no basis in fact. A distinct difference exists between interpreting facts in the light most favorable to your client and setting forth facts that do not exist. In the end, creating facts or denying facts that provably exist, serve only to impair the credibility of the writer and reduce the persuasive nature of the statement.

Several technical issues also may detract from the overall effectiveness of a mediation statement. Anything that interferes with ease of reading the statement distracts the reader's attention and impairs the statement's effectiveness. Common distractions include misspellings, punctuation errors, mixing singulars and plurals or past and present tenses. These simple mistakes impede the reader's attention and glaringly demonstrate that the writer is either sloppy, careless or does

not believe in the strength of the statement. Similarly, every mediation statement is due by a date certain prior to the mediation. Failing to timely file is a clear statement that the writer is too busy with other more important matters, does not value this case or client or both. Again, it diminishes the credibility of the writer and the statement.

The mistake of grossly inflating the settlement demand also undermines an attorney's credibility. Setting forth a written demand of \$1M in a mediation statement involving a case with maximum exposure of no more than \$50,000, may look impressive on paper; however, it calls into question the litigator's credibility prior to the start of the mediation. At the mediation, making an opening demand of \$1M, followed by a second demand of \$50K sends the clear signal that the litigator cannot be believed during the negotiations.

Although not part of the mediation statement, an attorney's personal conduct at a mediation influences greatly the mediator's opinion of his case. There is a clear line between being aggressive in presenting your client's position and being insulting. No litigator should cross that line. Further, personal attacks upon opposing counsel are actually counter-productive. Respectfully disagreeing with opposing counsel is fully acceptable. Indicating that opposing counsel is incompetent, deceitful or intentionally engaged in deliberate misconduct reflects negatively on the author of the statement, not the subject.

Finally, it is important to remember that when you are at a mediation hearing, your client deserves your undivided attention. It is disrespectful to the client and the mediator to devote your attention during the mediation to other matters. It conveys to both that the case at hand is not your number one priority. If absolutely necessary to take a call or send an email on another matter during the mediation, first explain to the client and the mediator the need to do so and

seek their permission. This accords both the respect they are due and demonstrates that this matter is your top priority.

Creating a persuasive mediation statement is not mysterious or difficult. It requires only attention to detail, dedication and a full measure of commitment. Be honest, concise and respectful and success will follow.

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