

## **Effective Mediation Statements -- A Lost Opportunity for Advocacy**

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The typical mediation statement is written trying to convince the mediator of the correctness of one side's position. Lost opportunity. After reviewing over 10,000 mediation/position statements over 22 years it seems the composition of the statements is now often treated as a routine, if not painful task. Too many submissions are simply a recycling of a report to a client or cut and paste of a pleading. Drafting mediation statements with due respect to who will be the true decision maker is critical. The unique opportunity to address the decision maker on the other side of a dispute is therefore lost forever. With the virtual elimination of joint sessions, the use of the mediation/position paper is usually the only unfiltered way to "communicate" to the other party directly. Embrace the opportunity to put forth a truly persuasive, informative, well written and enlightening analysis of your position in the dispute. If done correctly, it can be both constructive and effective in assisting your client in obtaining their goals in the dispute. If done poorly, it speaks to the core of your ability to communicate the correctness of your client's position.

In the actual statement, avoid personal attacks or lingering on unsavory personal observations of the parties. This approach makes the issue about the people not problem solving. From the mediator's perspective it is usually unhelpful, and from the opposing parties perspective likely offensive. While some points are unpleasant for the other party to read, it can be done in a way that is neither abusive nor rude. Be factual and draw conclusions, but most of all be practical. If there are problems, identify them and recognize they are considered in your client's analysis of the entirety of the dispute. Sometimes seeking input from your client in a matter can assist the manner of presentation of the issues.

Some considerations to remember when drafting a mediation statement are:

- Who is the decision maker and what is their background?
- What issues do I believe the other party is NOT considering?
- How do I communicate my position without writing like a lawyer submitting a brief?
- In addition to identifying contested issues in the dispute, it is often useful to define the points of agreement.
- Of those issues still in disagreement, define the positions of both sides and why you believe you have the better side of the issue in a factual/legal supportive fashion.
- When embroiled in a contractual dispute, attaching the entire contract where only a small part is at issue can overwhelm and confuse the decision maker and sometimes the mediator as to the actual issues in controversy.

- If crucial issues of case law or statutes need to be discussed, put the information as often as possible in a footnote and do not feel it necessary to put it in the body of the position paper.
- Admit your case weaknesses ... it is refreshing and allows the other side to know they are considered in your analysis. Acknowledge that a risk assessment on those troubling issues has been conducted prior to the mediation.
- Offer an apology, if appropriate. It is powerful and cannot be used in trial or subsequent pleadings.
- Emphasize the benefits of a resolution to both sides of the dispute.
- Include "official" prior settlement discussions.
- Reaffirm your willingness to listen and appreciate the complexity of the dispute.
- Keep it short---statements over 10 pages, even if well written, are less effective.
- It is advisable to have your client review the statement before sending to the opponent if they have an ongoing relationship.
- Send your mediation statement to the opposing side two weeks before the session is to take place. If there are discrepancies of information causing reconsideration of past positions, then this can be undertaken before the session.

A mediator may need additional information before the session other than what was included in the mediation statement. A pre-mediation conference by phone can be extremely useful to assist the mediator with issues that are better not put in writing. Separate emails or letters only to the mediator are also common. A joint pre-mediation conference with just the attorneys present is often productive and streamlines the actual mediation with the clients in attendance.

The days of not exchanging the mediation statements should stop. They are useful and powerful tools. A properly written position/mediation statement exchanged with your opponent will enhance your credibility with all concerned including your own client. It should be thoughtful, respectful and appropriate for the decision maker. If these suggestions are utilized, the chances of a successful resolution for your client are tremendously enhanced.