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Preparing an Effective Mediation Statement

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Preparing an effective mediation statement is a critical part of the mediation process. The mediation statement is often the document that gives the mediator his or her first impression of counsel and the client. It is particularly important when the mediator does not hold a joint session but proceeds immediately to caucuses.

The purpose of this article is to set out guidelines for counsel and their clients to prepare an informative and productive mediation statement.

Mediation Statement Should Be Confidential—i.e., for the Mediator's Eyes Only—or a Hybrid of Confidential and Non-Confidential Elements

The most important feature of the mediation statement is counsel's suggestions as to how the dispute may be settled. These suggestions require candor and frankness about the strengths and weaknesses of a client's position and its willingness to compromise. The best way to achieve such candor and openness to settlement is to limit the client's proposals to the mediator and not share them with the opposing counsel or client.

One way to achieve confidentiality is to make the entire mediation statement confidential. This approach preserves confidentiality, but it also deprives the opposing party of the non-confidential portion of the statement that summarizes the client's factual and legal position. This is especially important where the mediator does not conduct a joint session.

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A better alternative to a fully confidential mediation statement is a "hybrid" mediation statement in which the client's factual and legal position is shared with opposing counsel and the mediator and the client's settlement views are contained in a separate confidential document.

Treat the Mediation Statement as Seriously as a Litigation Filing

Mediation statements are usually limited to 10 pages, but the mediator can extend the page length if appropriate. Counsel should use the full amount of space allocated by the mediator to set out the client's factual and legal position.

A clear and concise recitation of the operative facts is essential. The mediator and the parties should not have to waste valuable mediation time in sorting out the facts, which are usually critical to the resolution of the dispute. If there is a dispositive case or statute that sets out the

governing law, a copy of it should be included in the exhibits. Do not submit cases or statutes that are not directly on point and conclusive.

Occasionally, counsel will cross-reference or submit to the mediator a full set of summary judgment papers that are pending with the court. These papers may be illuminating, but they are not necessarily helpful in mediation. Summary judgment papers are, by definition, advocacy pieces that usually do not present an unbiased view of the facts and the law. The client would be better served in mediation if counsel would summarize its position as impartially as possible.

Counsel sometimes ignore the formality of the mediation process and merely submit a two or three-page letter brief in lieu of a mediation statement. This informal approach should be avoided. The mediation statement should be prepared in the same format and with the same degree of formality as documents submitted to the court.

Mediation Exhibits Should Be Informative, Not Inflammatory; Deposition References Should Be Excerpts, Not Entire Transcripts; All Exhibits Should Be Available to All Parties

The exhibits attached to mediation statements are as important, if not more important than the statements themselves. In most cases, the exhibits are the primary source of the operative facts. Their significance should be explained, if necessary, in the mediation statement. Avoid exhibits that do not explain the facts but are submitted merely for the purpose of criticizing or demeaning the other party.

Unless the mediator asks to review entire deposition transcripts, do not submit them. Attach the relevant excerpts from the transcript which contain factual information not otherwise apparent from the documents. It is essential that the parties share all documents necessary to resolve the dispute prior to the mediation and include them in their exhibits. It is counterproductive for counsel to tell the mediator that they do not want to provide the opposing party with what they characterize as "free discovery."

It is virtually impossible to settle a case unless all of the facts are on the table. Most mediators will insist that documents not previously produced be made available at the mediation.

Submit the Mediation Statement Well Before the Mediation and Promptly Respond to the Mediator's Questions

It should go without saying that the mediation statement should be submitted well before the mediation hearing, no later than a week before. The mediator often has questions about the contents of the statements and exhibits. The mediator may also have questions about the client's settlement position. These questions should be answered promptly and fully before the mediation so that the mediator will be fully informed and ready to proceed.

A well-prepared mediation statement and exhibits will make the likelihood of settling the dispute much greater. Following the above guidelines will enable counsel to achieve that goal.

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