FIRST IMPRESSIONS: DRAFTING EFFECTIVE MEDIATION STATEMENTS

by

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In civil disputes, mediators often encourage advocates to submit pre-mediation statements. These narratives are meant to educate the mediator on the most pressing factual and legal disputes between the parties before the session. Yet litigators have little guidance on drafting such statements. Unlike many legal documents—pleadings, motions, and settlement agreements—there are no standard templates or specific requirements on their form or substance. Neither law schools nor law firms provide much training on drafting pre-mediation statements, which are considered a fairly niche genre of legal writing. Indeed, mediators themselves, as well as administering organizations, usually provide little direction to advocates. Now that mediation has become firmly embedded into our litigation culture, it is time for litigators to embrace some concrete "best practices." Drawing on new empirical survey data and interviews with experienced mediators, as well as case law and statutes regarding disclosure, this Article proposes guidelines for litigators seeking to draft effective pre-mediation statements that will be most helpful for the mediator, and ultimately, for their clients.

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I. INTRODUCTION

Mediation statements are a squirrely genre of legal writing. Are they advocacy documents meant to persuade the mediator of the righteousness of your client's position? Are they confidential confessionals of wrongdoing? Are they opportunities to suggest palatable settlement options? Or are they merely vehicles to warn the mediator of the cacophony and chaos that she will soon face?

These questions have no hard-and-fast answers. Many law school writing courses and law firm training programs barely bother to ask them, much less answer them. First-year legal writing programs largely focus their time on brief writing, along with occasional demand letters.[1] Mediation statements are relatively niche, perhaps too niche for an introductory legal writing course. Law firms, which often have elaborate templates for motions and contracts, rarely offer formal instructions to

[1] Tonya Kowalski, *Toward a Pedagogy for Teaching Legal Writing in Law School Clinics*, 17 CLINICAL L. REV. 285, 310–311 (2010) (discussing the limits of the first-year writing curriculum and suggesting that clinics can narrow the skills gap by exposing students to more genres of legal writing); Alexa Z. Chew, *Citation Literacy* __ ARK. L. REV. (forthcoming 2018) (manuscript at 4) (noting the emphasis in first-year writing courses on "legal documents like memoranda and briefs" and proper citation formatting).

associates on drafting mediation statements.[2] More often, young lawyers take their direction from partners on the structure and tone of such statements.

Yet mediation has become a firm pillar of our litigation culture.[3] Courts increasingly mandate mediation in cases ranging from family disputes to complex commercial matters.[4] Parties themselves, better educated than ever about process choice, often request the opportunity to resolve conflicts before the expensive and time-consuming discovery process begins. The increasing popularity of commercial mediation—and thus the increasing use of formal pre-session submissions—suggests that the time has come to develop a set of best practices.

There has been surprisingly little academic research on the qualities of an effective pre-mediation submission. What do mediators actually want to read before a session? Are they mostly interested in an education about the *facts* underlying the dispute, so that time can be saved on "background" when the joint sessions begin? Or do mediators mostly want *law*, so that they enter the joint session with a firm understanding of the strengths and weaknesses of each side's potential dispositive motions? Should counsel include initial settlement positions? Or should they include bottom lines? Should mediation statements be exchanged among parties, or kept confidential?

And then there are more quotidian questions: Should a mediation statement be formatted as a letter (single-spaced and conversational) or as a memorandum of law (double-spaced with topic headers, a table of contents, and a more formal tone)? Should exhibits be included? Should pleadings be attached?

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[2] Law firm training programs expanded substantially during the 1980s and 1990s, hiring professionals to teach new associates "the essentials of the firm's practice." Wallace J. Mlyniec, *Lawyering Practice: Uncovering Unconscious Influences Before Rather Than After Errors Occur*, 51 NEW ENG. L. REV. 81, 85 (2016). There is little research or public information about the contents of those training programs, but we are unable to find any examples of a training session specifically on pre-mediation advocacy. Moreover, after the Great Recession of 2008, law firms and clients have been far less willing to "pay for on-the-job training," cutting back on such training programs. Robert J. Condlin, *"Practice Ready Graduates": A Millennialist Fantasy*, 31 TOURO L. REV. 75, 95–96 (2014). Consequently, it is a safe assumption that the vast majority of litigation firms offer little or no structured training on pre-mediation statements.

[3] *See* Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 460–61 (2004) (noting that the percentage of federal civil cases that were resolved by trial fell from 11.5% in 1962 to 1.8% in 2002).

[4] *See generally* Dorcas Quek, *Mandatory Mediation: An Oxymoron? Examining the Feasibility of Implementing a Court-Mandated Mediation Program*, 11 CARDOZO J. CONFLICT RESOL. 479 (2010) (surveying the rise of mandatory mediation legislation and court rules both domestically and internationally).

The answers to these questions are, of course, highly dependent on the facts of an individual case.[5] But within the broad universe of options, litigators should have a set of guidelines informed by the general preferences of the mediation community. This Article offers empirical data from a comprehensive survey of experienced mediators and litigators. We suggest concrete areas of consensus and also propose a series of critical topics for lawyers to consider before they begin writing. Taken together, this Article offers a set of best practices for advocates in drafting effective mediation statements.

II. THE LAW ON DISCLOSURE OF MEDIATION STATEMENTS

Unfortunately, the specter of discovery hangs ominously over this entire topic. Disclosure is particularly worrisome if your client's statement will offer an apology, admission, concession, or offer of settlement. Savvy lawyers must consider the possibility that "confidential" pre-mediation statements might later be used as a weapon. If the mediation fails, could this document ever reemerge in court to prove your client's liability?[6] If this particular case settles, could it be used in a subsequent proceeding against your client's interests?[7] Could it be the subject of a non-party subpoena?[8] Could it ever be made public and harm your client's reputation? The short answer is that while pre-mediation statements are generally not admissible to prove liability, they might be discoverable in certain situations—meaning the document could find its way into the hands of your adversary or a third-party.

Pre-mediation statements will usually be shielded from *admissibility* by both state and federal law. While each jurisdiction has its own laws of

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[5] Indeed, the ability of the mediation process to conform to individual disputes is one of the hallmarks of mediation. *See* Thomas J. Stipanowich, *Living the Dream of ADR: Reflections on Four Decades of the Quiet Revolution in Dispute Resolution*, 18 CARDOZO J. CONFLICT RESOL. 513, 531–532 (2017) (noting the ability of parties to customize alternative dispute resolution processes, compared with the rigidity of litigation).

[6] *See, e.g.*, Joachim v. Jackson, No. L–6584–11, 2014 WL 4745547, at *6 (N.J. Super. Ct. App. Div. Sept. 25, 2014) (allowing admission of confidential chat logs "to prove the terms and intent of the parties' agreement").

[7] *See, e.g.*, United States v. Colón Ledée, 967 F. Supp. 2d 516, 521 (D.P.R. 2013) (holding evidence of settlement agreement between former bankruptcy debtor and the United States Trustee, as settlement between debtor and government actor, was admissible in subsequent prosecution of debtor for bankruptcy fraud).

[8] *See, e.g.*, Sheldone v. Pa. Tpk. Comm'n, 104 F. Supp. 2d 511, 512 (W.D. Pa. 2000) (where plaintiffs sought discovery regarding mediation held on potential claims); Folb v. Motion Picture Indus. Pension & Health Plans, 16 F. Supp. 2d 1164, 1168 (C.D. Cal. 1998) (where plaintiff sought discovery regarding mediation on claims that were never filed).

evidence, as a general rule, offers of settlement are not inadmissible.[9] For example, Federal Rule of Evidence 408 provides:

> (a) PROHIBITED USES. Evidence of the following is not admissible—on behalf of any party—either to prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction:
>
> > (1) furnishing, promising, or offering—or accepting, promising to accept, or offering to accept—a valuable consideration in compromising or attempting to compromise the claim; and
> >
> > (2) conduct or a statement made during compromise negotiations about the claim—except when offered in a criminal case and when the negotiations related to a claim by a public office in the exercise of its regulatory, investigative, or enforcement authority.
>
> (b) EXCEPTIONS. The court may admit this evidence for another purpose, such as proving a witness's bias or prejudice, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.[10]

The language of (a)(1) essentially prohibits the use of settlement offers or agreements as evidence of liability. The language of (a)(2) forbids the introduction of any "conduct" or "statement[s]" surrounding that eventual offer of settlement. An overall reading of Rule 408 suggests that pre-mediation statements, including any settlement offers made therein, are shielded from admissibility.[11] For example, your adversary would be prohibited from attaching your pre-mediation statement to her summary judgment motion as Exhibit A, and arguing that because your client offered a large sum of money, the court should infer liability. Similarly, the overall content of the statement surrounding the offer—an apology or concession—would likewise be shielded.

But like nearly every rule of evidence, there are exceptions. Part (b) notes that the court "may admit this evidence for another purpose, such

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[9] 2 MCCORMICK ON EVIDENCE § 266 (Kenneth S. Broun ed., 6th ed. 2006) ("[G]eneral agreement exists that the offer of compromise is not admissible on the issue of liability . . . .").

[10] FED. R. EVID. 408. The rule is premised on two rationales: First, "[t]he evidence is irrelevant, since the offer [of settlement] may be motivated by a desire for peace rather than from any concession of weakness of position." And second, the rule supports "the public policy favoring the compromise and settlement of disputes." *Id.* R. 408 advisory committee's note on proposed rules.

[11] *See generally* Charles W. Ehrhardt, *Confidentiality, Privilege and Rule 408: The Protection of Mediation Proceedings in Federal Court*, 60 LA. L. REV. 91, 95–103 (1999) (exploring local rules in federal district courts protecting communications during mediation from admissibility, and examining whether a broader mediation privilege can rest on Rule 408, which excludes offers of settlement and compromise).

as proving a witness's bias or prejudice, [or] negating a contention of undue delay…." A lawyer may thus argue that a pre-mediation statement is fair game on these grounds, even if it would need to be at least partially redacted.[12]

Beyond the Federal Rules of Evidence, litigators should be aware of state-specific laws on the discoverability and confidentiality of pre-mediation statements.[13] The Uniform Mediation Act (UMA) has particularly explicit language on this topic. The UMA—a model law promulgated by the National Conference of Commissioners on Uniform State Laws—has been enacted in 12 jurisdictions since it was drafted in 2001.[14] Familiarity with the UMA will be instructive for understanding how an increasing number of jurisdictions treat pre-mediation statements when their production is sought in discovery.

Multiple provisions of the UMA aim to ensure the confidentiality of the mediation process, specifically protecting mediation communications. Section 2(2) of the UMA defines a "mediation communication" as a "statement, whether oral or in a record or verbal or nonverbal, that occurs during a mediation or is made for purposes of considering, conducting, participating in, initiating, continuing, or reconvening a mediation or retaining a mediator."[15] The drafter's comments clarify that this section includes pre-mediation submissions:

> [T]his definition would also include mediation "briefs" and other reports that are prepared by the parties for the mediator. Whether the document is prepared for the mediation is a crucial issue. For

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[12] *See, e.g.*, Basha v. Mitsubishi Motor Credit of Am., Inc., 336 F.3d 451, 452 (5th Cir. 2003) ("Settlement-related letters between parties were admissible where not used to establish liability, but, rather, to interpret parties' settlement agreement." (quoting keynote)); Westchester Specialty Ins. Servs., Inc. v. U.S. Fire Ins. Co., 119 F.3d 1505, 1512 (11th Cir. 1997) (Settlement agreements may not be "offered for the impermissible purpose of proving the invalidity of a claim or its amount, but [may be offered] for the permissible purpose of resolving a factual dispute about the meaning of the settlement agreements' terms."); Collier v. Cobra Power Corp., No. 3:14-1759, 2015 WL 1600774, at *2 (M.D. Tenn. Apr. 8, 2015) ("Rule 408 does not completely prohibit the admission of compromise offers and negotiations.").

[13] *See* Ellen E. Deason, *The Quest for Uniformity in Mediation Confidentiality: Foolish Consistency or Crucial Predictability?*, 85 MARQ. L. REV. 79, 79 (2001) (Professor Deason notes the wide disparity in state laws on mediation confidentiality and privilege and argues that "[b]y adopting the Uniform Mediation Act . . . the states would greatly advance predictability through a coordinated approach to confidentiality.").

[14] These jurisdictions include the District of Columbia, Hawaii, Idaho, Illinois, Iowa, Nebraska, New Jersey, Ohio, South Dakota, Utah, Vermont, and Washington. In 2017, Massachusetts and New York also introduced legislation to enact a version of the UMA. *Legislative Fact Sheet – Mediation Act*, UNIF. LAW COMM'N, http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Mediation%20Act (last visited Nov. 7, 2017).

[15] UNIF. MEDIATION ACT § 2(2) (NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS 2003).

> example, a tax return brought to a divorce mediation would not be a "mediation communication" because it was not a "statement made as part of the mediation," even though it may have been used extensively in the mediation. However, a note written on the tax return to clarify a point for other participants would be a mediation communication. Similarly, a memorandum specifically prepared for the mediation by the party or the party's representative explaining the rationale behind certain positions taken on the tax return would be a "mediation communication." Documents prepared for the mediation by expert witnesses attending the mediation would also be covered by this definition.[16]

With that broad definition of "mediation communications" in mind, Section 4 of the UMA provides, in relevant part:

> (a) [A] mediation communication is privileged . . . and is not subject to discovery or admissible in evidence in a proceeding unless waived . . . .[17]
>
> (b) In a proceeding, the following privileges apply:
>
> > (1) A mediation party may refuse to disclose, and may prevent any other person from disclosing, a mediation communication.
> >
> > (2) A mediator may refuse to disclose a mediation communication, and may prevent any other person from disclosing a mediation communication of the mediator.
> >
> > (3) A nonparty participant may refuse to disclose, and may prevent any other person from disclosing, a mediation communication of the nonparty participant.
>
> (c) Evidence or information that is otherwise admissible or subject to discovery does not become inadmissible or protected from discovery solely by reason of its disclosure or use in a mediation.[18]

The broad privilege[19] granted for mediation communications by Section 4(b) not only allows a person to refuse to disclose certain information in a proceeding, but also to prevent others from disclosing that information. In other words, not only could a party refuse to respond to a document subpoena requesting production of a pre-mediation statement, but they could also object to the other party attempting to disclose it.

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[16] *Id.* § 2 cmt. 2.

[17] *Id.* § 4(a). Note that section 2(7) defines a proceeding broadly as "a judicial, administrative, arbitral, or other adjudicative process, including related pre-hearing and post-hearing motions, conferences, and discovery . . . ." *Id.* § 2(7); *see also Id.* § 2 cmt. 7.

[18] *Id.* § 4(b)–(c).

[19] *See id.* § 4 cmt. 2.c.

Moreover, section 8 of the UMA notes that "mediation communications are confidential to the extent agreed by the parties or provided by other law or rule of this State."[20] Thus, in other words, if the parties enter into a confidentiality agreement prior to the mediation, that agreement will bind the parties in litigation. As the drafter's comments to this section note, the goal is even broader, aiming to prevent disclosure to individuals even outside of legal proceedings such as "family members, friends, business associates and the general public."[21]

Even jurisdictions that have not enacted the UMA have similar prohibitions on disclosure and admissibility of mediation materials. To give just a few examples: Alaska's probate courts have a court-annexed mediation program, and its rules note that "[a]n interested person's mediation brief may not be disclosed to anyone without the person's consent and is not admissible in evidence."[22] Similarly, the Delaware Court of Chancery—one of the country's preeminent courts for corporate disputes—takes the confidentiality of the mediation process seriously. Its Rules provide:

> (3) All memoranda, work product, and other materials contained in the files of the mediator are confidential. All communications made in or in connection with the mediation that relate to the controversy being mediated, whether with the mediator or a party during the mediation, are confidential.
>
> (4) Information received from other parties during the mediation that the recipient does not already have or that is not public shall be used only for the mediation and not for any other purpose.
>
> (5) The confidentiality of the mediation can be waived only by a written agreement signed by all parties and the mediator.[23]

As for federal district courts, the Alternative Dispute Resolution Act of 1998 requires that each court enact a local rule to "provide for the confidentiality of the alternative dispute resolution processes and to prohibit disclosure of confidential dispute resolution communications."[24] The resulting rules vary considerably in language from district to district, but their overall effect is similar to the state rules outlined above.

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[20] *Id.* § 8.

[21] *See id.* § 8 cmt.

[22] ALASKA PROB. PROC. R. 4.5(d).

[23] DEL. CH. CT. R. 174(g)(3)–(5). Delaware's Rules even mandate that "[t]he Register in Chancery will not include any mediation materials as part of the public docketing system." *Id.* R. 174(g)(2).

[24] 28 U.S.C.A. § 652(d) (West 2006) ("[E]ach district court shall, by local rule adopted under section 2071(a), provide for the confidentiality of the alternative dispute resolution processes and to prohibit disclosure of confidential dispute resolution communications.").

The fact that so many jurisdictions follow the UMA, or have similar statutory or common law rules, should give some litigators comfort. However, a certain level of risk remains.[25] Evidentiary exclusions like the ones listed above merely protect the *admission* of a pre-mediation statement into evidence to prove or disprove liability. But not all jurisdictions offer a broader "mediation privilege" like the one contained in the UMA. A privilege "applies regardless of the purpose for disclosing, while the evidentiary exclusion makes evidence inadmissible only when offered to prove the validity or amount of the claim."[26]

A savvy litigator must know the legal frameworks within which she is working.[27] As the above law makes clear, pre-mediation statements are almost always immune from admissibility within the same proceeding, and are *usually* immune in subsequent proceedings. However, such statements are at risk of being used for purposes other than proof of liability. They are also at risk of non-party subpoenas in unrelated proceedings. A strict confidentiality agreement will give some measure of additional security that the documents will not be released to competitors or the public.[28]

With these broad parameters and cautions in mind, we now turn our attention to best practices in drafting pre-mediation statements. We begin with the results of our survey to leading mediators about their preferences in reviewing such statements.

III. EMPIRICAL DATA AND SURVEY RESULTS

Empirical research in mediation is always challenging. Records are confidential, and each mediator runs sessions in his or her own style. There is certainly no mandatory reporting by litigators of their practices in mediation, nor reporting by mediators of their preferences. Given that, it is difficult to comprehensively study the ways that litigators craft mediation statements, or the characteristics of statements that mediators prefer to read. However, using a focused survey, we have attempted to take the pulse of leading practitioners about the qualities that make pre-mediation submissions most effective.

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[25] *See* SARAH R. COLE ET AL., MEDIATION: LAW, POLICY, PRACTICE § 9:6 (2d ed. 2010).

[26] *Id.* § 9:4.

[27] The law of the jurisdiction where litigation occurs—rather than the location of the mediation—will most likely control the applicable privilege or scope of the evidentiary exclusion. *Id.* § 9:3–9:4.

[28] In an abundance of caution, attorneys may prefer to reveal certain facts or positions to the mediator solely in pre-mediation phone conversations rather than written statements. *See infra* Part IV.

A. Survey Participants

To research these issues, we contacted four groups with an online survey: (i) Members of the NYC-DR List-Serve;[29] (ii) Members of the Dispute Resolution Legal Educators List-Serve;[30] (iii) Mediators for the U.S. District Court for the Southern District of New York;[31] and (iv) Selected mediators and litigators active in the American Bar Association's (ABA) Section of Dispute Resolution.[32] These survey results are not scientific, but they do capture the attitudes of 180 leading practitioners and scholars.

Of the 180 survey participants, 43.33% stated that they spend more than 70% of their practice as the mediator. Only 4.44% stated that they spend more than 70% of their time in mediation as an advocate, which makes sense, given the neutral-heavy groups that were surveyed. About 16.67% split their practice roughly equally between serving as the mediator and the advocate in mediation, with the remainder falling elsewhere on the continuum. As for practice areas, almost all participants are involved in either commercial mediation (63.33%) or labor/employment mediation (20.78%), with the remainder focusing on other specialized areas such as family, consumer, or intellectual property mediation.

Overall, the 180 survey participants represent an experienced cohort of professionals across a broad range of practice areas with expertise on both sides of the table—that is, both the mediator and the lawyer-advocate in mediation. There is broad consensus among this group on the overall utility of pre-mediation statements: 66.67% of respondents "always" require pre-mediation statements from the parties, and an

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[29] The NYC-DR List-Serve, hosted by the City University of New York Dispute Resolution Consortium at John Jay College of Criminal Justice, aims to connect professionals in dispute and conflict resolution, peacemaking, facilitation, restorative justice, violence prevention, social justice, and related fields in the New York City metropolitan area. *See Dispute Resolution Center*, JOHN JAY COLL. OF CRIMINAL JUSTICE, http://johnjayresearch.org/cdrc/ (last visited Nov. 7, 2017).

[30] The Dispute Resolution Legal Educators List-Serve (DRLE) is primarily targeted at law school professors, both clinical and non-clinical. We surveyed this group knowing that many professors serve as active mediators themselves and asked that only those individuals respond. *See Dispute Resolution Listserv*, UNIV. OF MO. SCH. OF LAW, http://law.missouri.edu/drle/dispute-resolution-listserv/ (last visited Nov. 7, 2017).

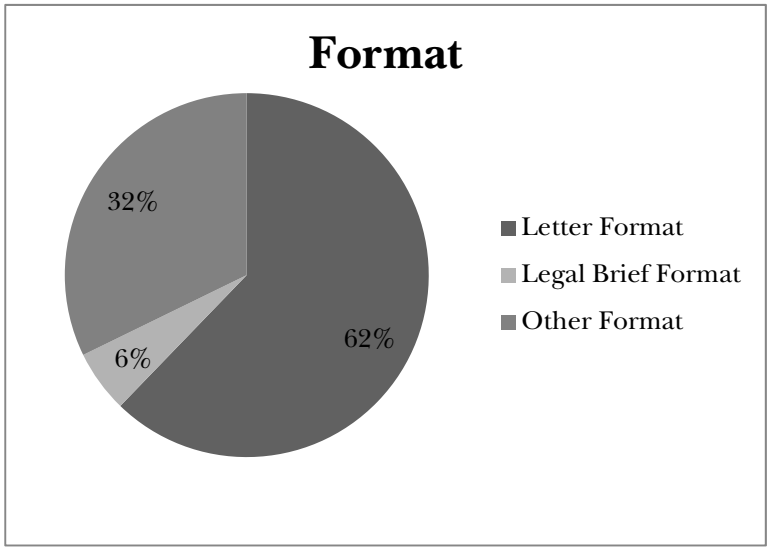
[31] The U.S. District Court for the Southern District of New York maintains an active roster of experienced mediators, competitively selected from attorneys in the community, to mediate cases assigned by the Mediation Office. *See* U.S. DIST. COURT S. DIST. OF N.Y., PROCEDURES OF THE MEDIATION PROGRAM (2013), http://www.nysd.uscourts.gov/docs/mediation/Mediation%20Program%20Procedures.12.9.13.pdf.

[32] *Section of Dispute Resolution*, AM. BAR ASS'N, https://www.americanbar.org/groups/dispute_resolution.html (last visited Nov. 7, 2017).

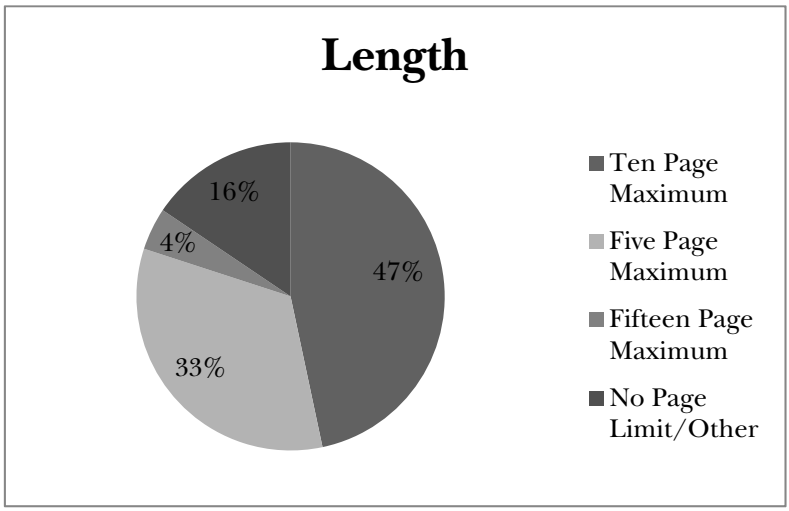
additional 14.44% "usually" require them. Only 3.33% "rarely" or "never" require them, with the remainder doing so about half the time.

B. Formatting Preferences

There is an overwhelming degree of consensus on the appropriate format for mediation statements. A resounding 62.22% of respondents prefer mediation statements to be formatted like a letter, written on firm letterhead and single-spaced. Only 5.56% of respondents prefer that mediation statements be formatted like a legal brief (double-spaced with a table of contents and authorities). About 32.22% recommend a format with specific topics/questions, which survery respondents explained in narrative comments after the question—though these special forms seem to be formatted more as letters with topic headers than briefs.



There is also broad agreement on brevity. A full 46.67% of respondents prefer a maximum page count of ten single-spaced pages; 33.33% would slash that maximum to five single-spaced pages. Only 4.44% would allow the limit to go to fifteen pages. The remainder of respondents set individual limitations depending on the case, though again, the narrative comments suggest that most prefer statements under ten pages.



Litigators may wonder whether mediators wish to see copies of the pleadings if a lawsuit is pending. A significant percentage—42.22%—would like copies of the pleadings attached to the pre-mediation statement. But 8.89% do not, and about half of respondents indicated that their preference varies from one case to the next. Many of the comments on this question showed strong disagreement between those who believe that pleadings are useful for framing the issues, and those who believe that pleadings represent an unwelcome intrusion of litigation posturing into an alternative process.

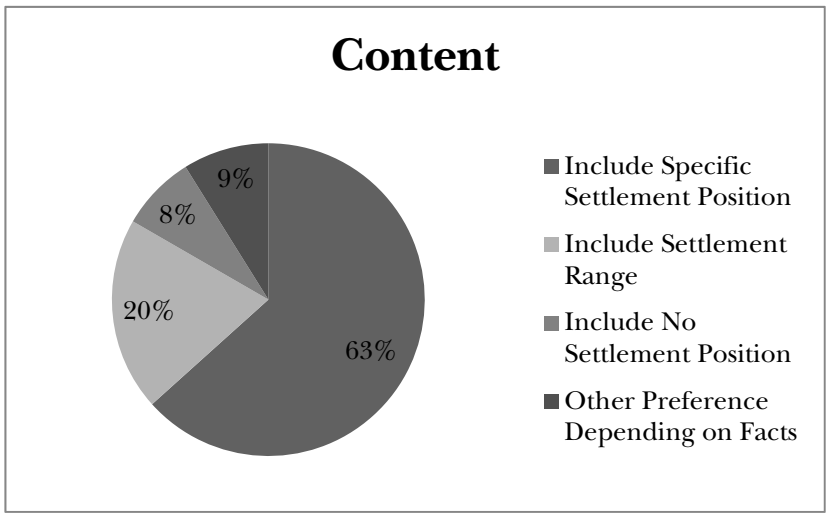
There is greater consensus when it comes to including non-pleading exhibits with the pre-mediation submission. A resounding 82.22% of respondents "always" or "usually" want to see "relevant exhibits" attached to the pre-mediation submission. The most obvious example of a "relevant exhibit" would be a contract that is central to the parties' dispute, such as a non-competition agreement or licensing agreement. Only 3.33% of respondents never want to see exhibits prior to a mediation session, with the remainder of respondents indicating that it depends on the facts of the particular case. In the comments to this question, many called for brevity in exhibit submissions, discouraging litigators from including every single document that they would need to substantiate their complaint at trial, and instead including only those documents most likely to be discussed during the mediation session. Several respondents indicated that advocates can bring a broader collection of documents to the mediation session, but need not burden the mediator with such materials beforehand.

C. Substantive Preferences

What should actually go into a mediation statement? Here, too, there is broad consensus among the respondents.

Perhaps the most unanimous result of the survey related to the tone of the statement. A resounding 50% of respondents said that a pre-mediation statement should be "significantly less formal than a legal brief" and another 44.44% said that it should be at least "slightly less formal than a legal brief." Only 5.56% prefer mediation statements that are equally as formal as legal briefs. This shows strong agreement that advocates should hold back on formality, both with respect to vocabulary (colloquialisms over jargon) and substance (common-sense statements over positional bluster).

A strong majority of respondents, 63.33%, ask advocates to include a specific statement regarding their clients' settlement position in the pre-mediation statement. Another 20% prefer to see settlement ranges—that is, a range as to acceptable dollars to pay or receive. Only 7.78% prefer that no settlement position or range is included. Generally, this means that the great majority of mediators will want to have some concrete sense of a party's settlement position before the session begins. In the comments, several respondents indicated that they encourage parties to submit a confidential (*ex parte*) statement regarding settlement position beyond their "standard" pre-mediation statement, which might be shared.



Finally, legal argument remains important. Despite a general preference for brevity and relative informality, most mediators do still want to see some legal citations. A full 58.89% of respondents stated that they want to see legal citations that the parties believe have a "dispositive

effect" on the claims. An example of such a legal citation would be, for example, a statute providing for strict liability, or a relevant statute of limitations period. Another 31.11% of respondents want an even broader inclusion of legal citation to "all relevant legal authority that could affect the outcome of the dispute." The remaining 10% of respondents indicated that they either do not want to see any legal citations in a pre-mediation statement, or wrote comments indicating that they ask for legal briefing on a case-by-case basis when appropriate.

IV. BEST PRACTICES IN DRAFTING MEDIATION STATEMENTS

To generate some workable "best practices," we combine these survey results with numerous interviews with leading mediators. We also review and synthesize the existing literature on pre-mediation statements, authored mainly by practitioners. Additional scattered guidance can be gleaned from providers like the American Arbitration Association (AAA),[33] JAMS and NAM, as well as some individual mediators, who send specific instructions about what they would like to see in the pre-mediation statements.[34] Some of this guidance is best considered before

[33] The AAA mediator training materials only briefly mention pre-mediation statements. The AAA's recommendations are based on a report of the American Bar Association (ABA) Section of Dispute Resolution. *See* ABA SECTION OF DISPUTE RESOLUTION, TASK FORCE ON IMPROVING MEDIATION QUALITY: FINAL REPORT APRIL 2006 – FEBRUARY 2008, https://www.americanbar.org/content/dam/aba/migrated/dispute/documents/FinalTaskForceMediation.authcheckdam.pdf. In its training manual, the AAA recommends that mediators consider the submissions to request from parties, and also consider whether those submissions should remain confidential or be shared. But neither the AAA nor other administering organizations provide much guidance beyond that. *See* John H. Henn., *Where Should You Litigate Your Business Dispute? In an Arbitration? Or through the Courts?*, *in* HANDBOOK ON ARBITRATION PRACTICE 41, 84 (AM. BAR. ASS'N 2010); Gerald F. Phillips, *May Arbitrators Suggest Mediation? An Informal Survey*, *in* HANDBOOK ON ARBITRATION PRACTICE 81, 84 (2010).

[34] Some mediators send short instructional memos to parties that explain the procedural aspects of the mediation, such as pre-mediation telephone calls or statements. For example, Marie Stanton, a mediator in Wisconsin with Hurley, Burish & Stanton, S.C., recommends that the parties send her a confidential pre-mediation statement at least ten days before the mediation. Telephone Interview with Marie Stanton, Attorney, Hurley, Burish & Stanton, S.C. (May 10, 2017) (notes on file with authors).

In court-annexed mediations, it is critical for advocates to read the local rules. Court annexed program rules about pre-mediation statements vary significantly from jurisdiction to jurisdiction. Some jurisdictions are silent about whether the parties should prepare pre-mediation statements, or whether such statements should be shared with the other side. Others require it to be a shared submission and others require that it be confidential with the mediator. *See* SPENCER PUNNETT, REPRESENTING CLIENTS IN MEDIATION: A GUIDE TO OPTIMAL RESULTS BASED ON INSIGHTS FROM COUNSEL, MEDIATORS, AND PROGRAM ADMINISTRATORS 131 (2013). The District of Columbia Superior Court's Multi-Door Dispute Resolution Division requires a

attorneys begin to draft, while other aspects have more to do with the practicalities of writing.

A. Issues to Consider Before Drafting

Before you begin writing a pre-mediation statement, there are a number of issues to consider. Certain issues are internal to you and your client, while others should be discussed with the mediator and opposing counsel.

1. Budget Implications

For better or worse, the size of a case and the ability of the parties to cover legal fees is an important factor in considering the nature and extent of pre-mediation submissions. While mediation can reduce legal costs by ending expensive litigation, not all clients can afford robust mediation statements. Advocates should avoid statements whose costs are disproportionate to the amount of money in dispute.

Even a mediation statement that merely summarizes the disputed and undisputed facts might take an associate four or five hours to draft, and an additional hour for a partner to review. In dollar terms, this could mean $1,000–$2,000, assuming hourly rates of $200–$400. (These hourly rates are conservative for firms in major markets). If the statement also includes legal research, legal analysis, or detailed examination of exhibits, attorneys might spend ten or more hours preparing the document at a cost of $2,000–$4,000. If the entire dispute is only $10,000, a pre-mediation statement might not be worthwhile. The size of a dispute or a client's financial constraints might prompt an attorney to suggest a 30–60 minute telephone call with the mediator in lieu of a formal written statement.[35]

In general, advocates should fully advise their clients of the costs of the mediation process. This includes the mediator's fees and the fees of

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confidential pre-mediation statement to be submitted. *See* GARY P. POON, THE CORPORATE COUNSEL'S GUIDE TO MEDIATION 68 (2010). The U.S. District Court for the Eastern District of New York's local rules spend one paragraph explaining their protocol for pre-mediation statements, which include submitting statements at least 14 days in advance and not to exceed ten pages. S.D.N.Y. & E.D.N.Y., L. Civ. R. 83.8(b)(4) (applying only to the Eastern District). The local rules of the U.S. District Court for the Southern District of New York are a bit more specific and include some information about what should be included in the pre-mediation statement and allow the mediator and parties to choose if it should be confidential or shared. *See* U.S. DIST. CT. S. DIST. OF N.Y., PROCEDURES OF THE MEDIATION PROGRAM 2, 6 (2017); *see also* S.D.N.Y. & E.D.N.Y., L. Civ. R. 83.9 (applying only to the Southern District). It is generally wise for attorneys to ask the mediator's preferences about length and substance of a pre-mediation statement. *See* HAROLD I. ABRAMSON, MEDIATION REPRESENTATION: ADVOCATING AS A PROBLEM-SOLVER IN ANY COUNTRY OR CULTURE 271 (2d ed. 2010).

[35] PUNNET, *supra* note 34, at 139, 158.

the administering organization (e.g., AAA, JAMS, NAM, etc.), as well as the legal fees related to drafting pre-mediation statements, conducting pre-mediation telephone calls, and holding pre-mediation meetings with witnesses. It is useful for clients to understand the costs, which also creates a certain amount of buy-in and a sense of ownership over the process.[36]

2. Clarifying Expectations on Format and Content

In commercial mediation, counsel will often have an initial joint pre-hearing telephone conversation with the mediator shortly after the mediator is appointed. During that call, the mediator (or the parties) may discuss the expectation for pre-mediation statements.[37] A surprising number of mediators will not give specifics about expectations for the mediation statement beyond setting a due date.

During the call, advocates should try to achieve clarity on the format and content that the mediator seeks. How long should the statement be? What format would the mediator prefer? What exhibits, if any, would the mediator like to have included? Will the statements be confidential or shared with the opposing party? To what extent does the mediator want statutes, case law, or other legal argument to be included in the statement?[38]

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[36] *See* Andrew K. Niebler, Note, *Getting the Most Out of Mediation: Toward a Theory of Optimal Compensation for Mediators*, 4 HARV. NEGOT. L. REV. 167, 169 (1999) ("Parties . . . need to have a more sophisticated understanding of . . . the mediator's fee arrangement" and the costs involved in the process.).

[37] Importantly, some mediators may not want any statements at all. *See* JOHN W. COOLEY, MEDIATION ADVOCACY 128 (2d ed. 2002) (noting that some mediators "do not want any pre-mediation submissions, believing that such submissions may have a tendency to bias them one way or the other before the mediation begins"). Indeed, in our survey results, numerous respondents indicated that pre-mediation statements are too close to litigation documents and set the wrong tone for reconciliation.

[38] Our survey reveals that surprisingly few mediators provide explicit instructions to parties regarding pre-mediation statements. Some do, however. Charles M. Newman, a mediator in New York, typically sends counsel a somewhat detailed memo on his expectations for the statement. That memo reminds the attorneys not to "treat the [statement] as another annoying court document you have to slave over . . . . Since I will not be deciding the case, you just have to inform me, not convince me." Newman encourages the lawyers to see the statement as "a good opportunity, sometimes for the first time, for lawyers and clients to sit down during the litigation and carefully parse out what is most important to the client; what the client's specific prioritized goals are; the strengths and weaknesses of both side's case; and the obstacles to resolution." Newman also provides clear page expectations: "four to seven single-spaced pages; more than ten is usually too long." We agree that setting these expectations from the start is a commendable practice for mediators, so that lawyers are not left uncertain. *See* Telephone Interview with Charles M. Newman, Mediator & Arbitrator, Charles M. Newman P.C. (May 6, 2017) (notes on file with authors).

Answering these questions during the pre-hearing telephone call will remove uncertainty from the drafting process. It will also avoid a situation in which one party writes a paragraph and the other writes a novel.

3. Confidentiality or Mutual Exchange

Perhaps the most significant strategic decision that needs to be considered before advocates put pen to paper is the question of mutual exchange. Should the parties exchange their pre-mediation statements with only the mediator, or also with one another? The answer to this question will affect the documents' tone and content.[39]

On first blush, purely confidential statements seem like a smart way of being honest with the mediator. You can communicate your client's fears, weaknesses, and underlying interests.[40]

However, confidential mediation statements also present both missed opportunity and danger. Opportunities are missed to truly understand your adversary's position on key facts prior to the mediation session. And, relatedly, there is a danger that you will be sandbagged at the session with novel arguments for which you are unprepared. Moreover, the other side might include unsupportable or one-sided legal positions that—without your objection—could convince the mediator that your argument's position is unfounded. In many situations, the exchange of mediation statements is useful as it facilitates fruitful discussion, provides the parties with an opportunity to clarify issues, and gives the parties a better sense of one another's positions, sometimes for the first time.[41] After all, it will ultimately be the clients who need to shake hands on a settlement; respectful, well-written pre-mediation

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[39] This debate about whether or not to share the pre-mediation statement is illustrated by the many names to these documents: mediation statement, pre-mediation submission, mediation letter, mediation package, and mediation brief. These terms are used interchangeably, though they refer to the same document.

[40] Mediators like when lawyers objectively evaluate their case before the mediation. *See* ERIC GALTON, REPRESENTING CLIENTS IN MEDIATION 54 (Diane Burch Beckham ed., 1994). The confidential submission allows this to occur. Most effective confidential pre-mediation statements are concise and candid about the strengths and weaknesses about their case.

[41] *See* Telephone Interview with Peter Halprin, Attorney, Anderson Kill P.C. (June 13, 2017) (notes on file with authors); *see also* PUNNET, *supra* note 35, at 127. According to Sheldon J. Stark, counsel should encourage the other side to provide a copy to her client, even giving the other side's attorney two copies and explicitly stating that the second copy is for their client. When you come to the mediation, bring three copies with you so that you can give it to the client, attorney, and mediator; there is time during caucus for the client to read your document. *See* Sheldon J. Stark, *Crafting an Effective Mediation Summary: Tips for Written Mediation Advocacy*, SHELDON J. STARK: MEDIATOR AND ARBITRATOR, http://www.starkmediator.com/articles-links/crafting-effective-mediation-summary-tips-written-mediation-advocacy/ (last visited Nov. 7, 2017).

statements may go a long way towards getting the conversation off on the right foot.

Another reason to avoid confidential pre-mediation statements is that if there is deep mistrust between the parties, confidentiality may exacerbate the suspicion.[42] Each party will wonder what the other is secretly telling the mediator.

Finally, because your own client will usually see (or approve) a confidential pre-mediation statement, an attorney may be limited in what he or she will be able to write. If there is information that you want to share with the mediator that is sensitive (for example, the complicated personal relationship between your client and the other side), consider including this in a pre-mediation telephone conversation.

If shared statements are chosen, there may be some benefit to a somewhat guarded approach.[43] Perhaps at least some information should be shared only with the mediator through a confidential telephone call.

B. Format, Tone, and Mechanics of Mediation Statements

With those preliminary issues settled, you must now begin drafting. While individual mediators have their own preferences, our survey shows a fairly clear consensus on the preferred format and tone of mediation statements.

1. Length and Format

A threshold question for any writer is space constraint. Litigators may be tempted to write a pre-mediation statement as thick as a summary judgment brief, which often runs from 25 to 35 pages.[44] Yet our survey reveals that this is far too long for most pre-mediation statements. Instead, the great majority of mediators prefer that statements be roughly five to ten single-spaced pages.[45] Moreover, the document should be formatted as a letter—single-spaced, on firm letterhead, with topic

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[42] PUNNET, *supra* note 35, at 152 (noting that the reasons for not using confidential statements are similar to the reasons why mediators will avoid caucuses in cases where mistrust exists).

[43] On the other hand, Gary Poon recommends that you may want to "set forth some of the alternative settlement proposals" that you have come up with and sometimes "it may even be appropriate to reveal to the mediator your organization's bottom line." POON, *supra* note 34, at 69.

[44] While each court and judge varies, many allow for motions reaching 20 pages or more, counting only the memorandum of law (and not even including any supplemental affidavits or affirmations and the accompanying exhibits). *See, e.g.*, CAL. R. CT. 3.1113(d) (allowing up to 20 pages for memoranda of law in support of a motion); N.Y CTY. J.R. 14(b) (McKinney) (allowing up to 30 pages); MINN. GEN. R. PRAC. 115.05 (allowing up to 35 pages).

[45] *See* Telephone Interview with Marie Stanton, *supra* note 34.

headers where appropriate.[46] Tables of contents and authorities are not necessary.

2. Tone

Just as mediators do not want the length of a summary judgment motion, they do not want its tone either.[47] 94.44% of our survey participants agreed that they would like the tone to be either "significantly" or "slighty" less formal than a legal brief. The lack of formality could manifest in two ways. First, it might simply mean removing unnecessary legal citations, jargon, and Latin phrases that are endemic to motions. Second, it means a less pugilistic and positional tone. This is particularly true in a shared mediation statement. According to Professor Harold Abramson, the pre-mediation statement "should present a balanced view of the facts and legal case and attach only essential documentary evidence."[48] The tone of the pre-mediation statement should be less adversarial than a brief, though the range should possibly be different depending on whether it is shared or confidential.[49] Advocates should convey a powerful message but "without the type of bombast that will backfire."[50] Even for shared pre-mediation statements, Canadian mediator Steven Gaon notes:

> I would encourage lawyers to set out their position succinctly and persuasively, but to avoid becoming overly aggressive or adversarial, which can hamper settlement efforts at mediation. If the goal is to settle, put forth a strong case but state in your brief that you are prepared to bargain and you recognize that compromise will be necessary.[51]

After all, what purpose is there in castigating your opponent's arguments (or personality) when, ultimately, a successful mediation depends upon both parties shaking hands? The tone of a pre-mediation statement should reflect the fact that the process inherently involves both compromise and recognition of the other side's validity.

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[46] This also refers to the appearance of the document. According to Sheldon J. Stark, "A professional-looking mediation summary package establishes that the advocate is thoughtful, effective, well-prepared, has a firm grasp of the law and facts and is likely to be a formidable opponent if the case does not settle." *See* Stark, *supra* note 41.

[47] GALTON, *supra* note 40, at 54.

[48] ABRAMSON, *supra* note 34, at 273.

[49] PUNNET, *supra* note 35, at 153–54.

[50] *Id.* at 137.

[51] Steven C. Gaon, *Tips from Mediators*, ADVOCACY CLUB BLOGS, http://www.advocacyclub.ca/how-to-prepare-a-mediation-brief.html (last visited Nov. 7, 2017).

3. Professionalism and Preparedness

Regardless of whether the document is shared with the other side, the pre-mediation statement is the beginning of your relationship with the mediator.[52] It is the first opportunity to show the mediator that you are prepared.[53] As one mediator cautions, "Some lawyers incorrectly perceive their role in the mediation is just to show up. Lawyers who labor under such misimpression will be ill prepared, reduce the chances for a successful resolution, and unable to participate in the process. . . . Preparation and effective mediation advocacy improves the chances for resolution."[54]

It is a clear sign to the mediator that the attorney is not prepared for their mediation if the attorney uses the mediation statement as a vehicle for a "discovery dump"—a huge box of documents without any annotation for the mediator. Marie Stanton, a leading mediator in Wisconsin, jokes that the mediation materials should not weigh more than the mediator.[55] Daniel Terrell cautions, "Preparation is key, if you want to have a good likelihood that the case will settle in mediation, you have to be able to see the landscape."[56] The exchange of mediation statements can also provide a means for a party to deliver their message directly to the opposing party as clients are likely to read such statements before the session.[57] According to mediator Walter Stuart, the shared pre-mediation statement is most important to the other side's client, followed by the mediator, and finally the lawyer on the other side.[58] (Incidentally, this is the reason the shared pre-mediation statement is required in the

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[52] *See* ABRAMSON, *supra* note 34, at 271; *see also* GALTON, *supra* note 40, at 56 (noting that the pre-mediation statement "is your first opportunity to assist, not *influence*, the mediator" (emphasis added)).

[53] According to John Cooley, "Your effectiveness in the mediation session may depend a great deal on the care you take and the time you devote to the preparation of the written materials you submit to the mediator in advance of the mediation session." COOLEY, *supra* note 57, at 127.

[54] GALTON, *supra* note 40, at 54.

[55] *See* Telephone Interview with Marie Stanton, *supra* note 34; Jim Walsh, *The Silent Part of the Conversation*, SUPER LAWYERS, Dec. 2014, https://www.superlawyers.com/wisconsin/article/the-silent-part-of-theconversation/b374933f-07ad-4d0e-a95e-88542520b2a3.html.

[56] PUNNET, *supra* note 34, at 128–29 (quoting Daniel Terrell, inside counsel in Louisiana).

[57] This exchange not only helps to brief the mediator but also the other side. *See* Telephone Interview with Peter Halprin, *supra* note 41; *see also* PUNNET, *supra* note 34, at 127. According to Sheldon J. Stark, you should encourage the other side to provide a copy to her client, even giving the other side's attorney two copies and explicitly stating that the second copy is for the client. When you come to the mediation, bring three copies with you so that you can give it to the client, attorney, and mediator; there is time during caucus for the client to read your document. *See* Stark, *supra* note 41.

[58] PUNNET, *supra* note 35, at 131.

rules of the mediation program in the U.S. District Court for the Northern District of California.)[59] Gary Friedman and Jack Himmelstein encourage lawyers to share the memorandum received with the other side and with their own client.[60] In short, the advocates' professionalism is critical to establishing credibility with everyone around the table.

4. Deadline

Advocates should send their pre-mediation statement as early as possible prior to the session. The U.S. District Court for the Eastern District of New York's local rules recommends sending the statement to the mediator at least 14 days before the session,[61] while the U.S. District Court for the Southern District of New York's local rules require seven days.[62] Others recommend a minimum of ten days before the session.[63] You may consider sending it even earlier than these recommended timelines, especially if the pre-mediation statement needs to be circulated among several individuals in an organization like a claims committee of a corporate defendant, which may need to meet in advance of the mediation.[64] According to mediator J. Anderson Little, in discussing dynamics involved in mediating personal injury cases:

> The plaintiff's bar typically views medical records and medical expenses as a given in the case. The defense does not. The defense scrutinizes medical records and medical expenses carefully. . . . Thus, [defendants] need time to process the information that the plaintiffs provide through discovery before deciding what value they will give the case. If they don't get basic claims information well in advance of the settlement conference, they will not be able to make informed decisions and negotiate a settlement.[65]

Unlike in litigation, where you may wish to give your opponent as narrow a timeframe as possible to respond to your papers, mediation requires time for consideration. There is no benefit to "short serving" your adversary.

5. Exhibits

From our survey sampling, 82.22% of respondents wanted "relevant exhibits" to be annexed to the pre-mediation statement. 42.22% of

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[59] *See id.*

[60] GARY FRIEDMAN & JACK HIMMELSTEIN, CHALLENGING CONFLICT: MEDIATION THROUGH UNDERSTANDING 247 (2008).

[61] S.D.N.Y. & E.D.N.Y., L. Civ. R. 83.8(b)(4).

[62] U.S. DIST. CT. S. DIST. OF N.Y., PROCEDURES OF THE MEDIATION PROGRAM 6 (2017).

[63] *See* Telephone Interview with Marie Stanton, *supra* note 34.

[64] PUNNET, *supra* note 34, at 138 (internal brackets omitted).

[65] *Id.* at 129.

respondents also want the pleadings to be annexed, if a lawsuit is already pending. Generally, attachments should be limited to "critical evidence," such as the key employment contract at issue or the "revealing excerpts" of documentary evidence and depositions.[66] If you include exhibits, make sure to give annotations and highlight the important sections, especially if they are voluminous.[67] According to Sheldon J. Stark:

> Attractive mediation summaries are written using headlines or section headings in bold font, with frequent references to the attachments. Is the summary plus attachments extensive? . . . Exhibits are attached using tabs, not a simple piece of paper with "Exhibit A" typed in the middle. Tabs make it easy for the reader to turn to the designated document without thumbing through multiple pages searching for the right one.[68]

Lay a breadcrumb trail for the mediator to make her job easier. Do not simply attach hundreds of pages of exhibits and expect her to identify the important provisions.

C. Five Topics to Include in Shared Mediation Statements

We now know that the mediation statement should usually be in the range of five to fifteen pages. We know that it should adopt a notably less formal tone than a brief. We also know the types of exhibits that should be included. Now, we must consider the contents of the statement itself. What should be included, and what should be omitted? Like other advice in this Article, it is highly case specific. To keep the statement organized and give the mediator what she needs, we generally recommend the following five topic headers for shared statements:

1. Summary of Relevant Facts

The bulk of the pre-mediation statement should be used to tell the story of the case. Despite any phone calls you may have already had with the mediator, and despite attaching the pleadings to your submission, you should treat this section as the opportunity to summarize the key facts of the case.[69] Assume the mediator knows little about the parties. A good factual summary should answer questions such as: (i) Who are the parties (i.e., their businesses, locations, etc.)? (ii) What is the nature and length of the parties' relationship? (iii) When did the dispute emerge and how was it discovered? (iv) What is the nature of the dispute? (v) What has happened since the dispute was discovered (e.g., attempts to

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[66] ABRAMSON, *supra* note 34, at 273.

[67] *See* Telephone Interview with Marie Stanton, *supra* note 34.

[68] Stark, *supra* note 41.

[69] *See* ABRAMSON, *supra* note 34, at 271–73; POON, *supra* note 36, at 67; Mike Young, *How to Draft a Mediation Brief*, MIKE YOUNG MEDIATION, http://www.mikeyoungmediation.com/how-to-draft-a-mediation-brief/ (last visited Nov. 7, 2017).

cure)? (vi) What damage has the dispute caused to each party (e.g., monetary, non-monetary, etc.)? And (vii) is there an ongoing or future relationship between these parties? Many litigators make the mistake of going into too much detail on these points. As our survey shows, this can allow the mediator to lose sight of the forest through the trees. Tell the story, but only the essential pieces. If the mediator needs clarification or exposition, trust that she will ask.

2. Key Players

For the mediator to do her job effectively, she must know the cast of characters. Particularly in complex commercial cases, with multiple corporate officers and multiple fact and expert witnesses, names get quickly jumbled. It is easier for the mediator to digest the facts with a "cast list" of everyone involved. In some cases, it is helpful to include a separate section that highlights the primary players on all sides of the dispute, along with their titles and roles. Be sure to specifically identify the representatives who will attend the mediation from your side and who has settlement authority.[70] Laying out these names allows the mediator to familiarize herself with the key individuals before meeting them.

3. Relevant Procedural History

Mediators want to know the basic procedural posture of the case because (i) it may impact the urgency of settlement and (ii) it indicates the extent of the information available to the parties.[71] Has the dispute just emerged last week, with no discovery? Or are the parties on the eve of trial, having already exchanged countless documents? Where is the case venued (i.e., federal court, state court, arbitration, etc.)? While some mediators may want a more detailed procedural history, our survey indicates that the vast majority of mediators do not. It is not necessary to describe each amended complaint, discovery motion, and court conference. For example, you might state that the complaint was filed in September in the U.S. District Court for the District of New Jersey, the defendant's motion to dismiss was denied in November, and document discovery is scheduled to begin in December with party depositions in February. If motions are pending, this information is also helpful. A short and sweet procedural history is usually sufficient.

4. Critical Legal Issues

Questions of law are sometimes at the heart of a dispute.[72] Imagine, for example, a lawsuit that turns on the tolling date of an applicable

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[70] *See, e.g.*, N.D. CAL. ADR L.R. 6-7(c).

[71] *See* POON, *supra* note 34, at 67 (suggesting the mediation brief should include the procedural posture of the case); Young, *supra* note 69.

[72] *See* ABRAMSON, *supra* note 34, at 272; *see also* Stark, *supra* note 41. An evaluative mediator may want to know more of the legal argument and a facilitative mediator

statute of limitations, or a statute that imposes strict liability on the defendant's conduct. In such cases, the mediator needs to walk into the session with some background on those points—particularly if the parties have different interpretations of applicable law. Not every pre-mediation statement requires an extensive section on "the law," however. The first word of our proposed heading is *critical*. In litigation, lawyers will raise legal issues that are, perhaps, not so critical. For example, the mediator does not need a briefing on every single affirmative defense, nor does she need an explanation of each cause of action. (Most mediators will understand that a breach of contract lawsuit will also include claims for quantum meruit, even without pages of supportive case law). In a pre-mediation statement, lawyers should be disciplined in emphasizing only the legal issues likely to be dispositive.[73] The mediator may change her approach if only laws, and not facts, are truly in dispute.

5. History of Settlement Discussions

Just as a mediator must walk into the session with a sense of the parties' identities and the dispute's origins, she must also have an understanding of prior attempts at resolution. If she does not, she may suggest a settlement that has already failed, or she may not grasp some of the parties' deeper concerns that have thus far prevented resolution. This section should address (i) whether there were prior settlement negotiations; (ii) whether there were prior mediations or court-sponsored settlement discussions; (iii) the nature of those discussions (e.g., partial settlements, offers made and rejected, etc.); and (iv) the last settlement position of each party. Many mediators agree that this section is extremely important for establishing context.[74] According to the local rules for the U.S. District Court for the Northern District of California, "[e]xcept to the extent prohibited by applicable laws of privilege or by these rules, describe the history and current status of any settlement negotiations."[75] Some mediators suggest that this section explicitly include each party's last settlement offer.[76] While there is strong consensus that pre-mediation statements include a brief history of settlement discussions, there is an open debate about whether *current* settlement positions should be included in joint statements.[77] We advise

may want to know more about the settlement options. ABRAMSON, *supra* note 34, at 97–98.

[73] *Dispositive*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("Being a deciding factor . . . [in] bringing about a final determination.").

[74] *See, e.g.*, GALTON, *supra* note 40, at 55.

[75] PUNNET, *supra* note 34, at 134.

[76] *See, e.g.*, Young, *supra* note 69.

[77] According to Gary Poon, "Many mediators would caution against staking out your position, especially so early in the mediation." POON, *supra* note 34, at 68. Nevertheless, some court programs require settlement demands. *See id.* Local Rule 5.0(F) of the San Francisco Superior Court, for example, provides that all court-

against including current positions in shared mediation statements. An offer that is too low could spook the other side into backing out of a mediation session if they feel it would be unproductive. Moreover, it can make it more difficult for the mediator to negotiate a *better* offer for you than the one that you have already put in writing. Settlement is a topic that you may want to include in a confidential statement or confidential pre-mediation phone call with the mediator.

D. Five Topics to Include in Confidential Mediation Statements

Not all issues are appropriate to share with the other side. Yet, as experienced lawyers know, it is often helpful for the mediator to have a complete picture of your client's underlying interests. During the mediation, these sorts of discussions can take place in caucus. But prior to the mediation, you may want to alert the mediator to facts that you would not necessarily want to share with opposing counsel.

This can be done in two ways: (i) a separate *ex parte* pre-mediation brief[78] and/or (ii) a confidential pre-mediation telephone call with the mediator.[79] Generally, we recommend a pre-mediation telephone call *instead of* a confidential pre-mediation brief. A phone call can have numerous advantages. It allows counsel to more honestly acknowledge the weaknesses of their case, or the strength of their opponent's case, without putting those concessions on paper. The call gives attorneys the opportunity to warn the mediator about any particular personality or internal dynamics with respect to their own client[80]—information that

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mandatory settlement conferences, "not less than five (5) Court days prior to the date of the conference, plaintiff must communicate a demand for settlement to defendant, and defendant must within two (2) Court days thereafter convey to plaintiff an offer of settlement."

[78] Different mediators use different terms to describe shared and confidential statements. For example, Spencer Punnett notes that there is some confusion among advocates about the terminology. He refers to a pre-mediation statement that is shared between the parties and given to the mediator as the "mediation memo," but refers to the pre-mediation statement that is confidential only for the mediator as a "mediator brief." PUNNET, *supra* note 34, at 130.

[79] *See* Telephone Interview with David White (May 30, 2017) (notes on file with authors); E-mail from Dwight Golann to authors (May 11, 2017) (notes on file with authors). According to Mike Young:

> Mediations are not summary judgments, so don't take your old summary judgment brief, slap a new cover page and submit it as a 'Mediation Brief.' Seriously, we don't need all that law and argument. While it might do in a pinch, so will a simple phone call with your mediator, and the phone call will invariably be more effective and useful.

Young, *supra*, note 69.

[80] PUNNET, *supra* note 34, at 159.

advocates would likely not want memorialized. Over the phone, they can speak more candidly.[81]

Another strategic reason to prefer telephone calls to "confidential" written statements is the risk of disclosure. It is generally true that documents exchanged in mediation are inadmissible. However, as Section II points out, there is a risk that they could be subject to discovery or subpoena in future litigations or arbitrations. As a result, we are hesitant to recommend committing sensitive information to paper that your client truly does not want the other side—or the public—to see.

Regardless of whether you hold a confidential telephone call with the mediator or send a confidential pre-mediation statement, there are certain topics that should be covered:

1. Weaknesses of Your Case or Strengths of Opponent's Case

A litigator is unlikely to acknowledge to opposing counsel any sign of weakness. To the extent that the opposing party has strong legal or factual arguments, an advocate is likely to minimize those in a shared pre-mediation statement. In your confidential communications, however, you can be more candid and acknowledge that you recognize a particular Achilles heel. This honesty may allow the mediator to offer a candid assessment or propose a workable negotiation strategy.

2. Strengths of Your Case and Weaknesses of Opponent's Case

Because mediation statements are shared, you may also feel uncomfortable overplaying your hand. For example, you might not want to cite all controlling law that destroys your opponent's arguments. Your confidential mediation statement is an opportunity to clearly assert your side's strengths and the other side's weaknesses without the fear of pulling your punches. Not only will this save face for opposing counsel, but it will also telegraph to the mediator the arguments about which you are particularly confident.

3. Proposed Settlements

You might give the mediator some initial ideas for how you could imagine the settlement unfolding. In a confidential communication, you can offer ideas that might seem far-fetched or that your client would feel embarrassed to share in a joint communication. For example, in a dispute over the dissolution of a partnership, one party would like to float the idea of continuing the relationship. Making this suggestion confidentially would give the mediator the ability to throw the idea out, while both sides save face.

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[81] *Id.* This will also allow for the mediator to ask follow-up questions in response to what she hears.

4. Underlying Business or Personal Interests

Your client's position might not reveal their underlying business or personal interests. Indeed, your client may be adamant about not sharing those interests. Imagine a dispute over ownership of a business; your client may not want to reveal that she has a potential acquisition lined up. Imagine a copyright dispute regarding an unpublished manuscript; your client may not want to reveal that he has a studio interested in acquiring the movie rights. Or imagine an inheritance dispute between siblings about a valuable and sentimental tract of family land; your client may not want to reveal that a developer has contacted her with interest. These secret facts might color the mediator's settlement strategy and give the mediator invaluable insight into your client's true motivations. A good mediator will take her obligation to maintain confidentiality seriously. At the same time, she will be better able to negotiate with your client's interests—rather than just their position—in mind.

5. Dynamics and Personalities

In many cases, the personalities are just as important to the resolution as the facts or the law. There may be particular client dynamics that an advocate would never feel comfortable revealing during a mediation session. For example, sometimes there will be division within a corporate client about the correct course of action. Two business partners may have different preferred outcome for a conflict. A company's CEO and General Counsel may have very different settlement numbers in mind. A company's books and records may not be as flawless as its treasurer believes. Navigating these situations is tricky, even for the most poised attorneys. But sharing at least some version of your client's internal dynamics with the mediator prior to the session will enhance the mediator's ability to bargain successfully. Another advantage of a confidential telephone call is that you can warn the mediator of your own client's personality quirks. You would likely not be so candid in writing, but this information could prove important to the mediator's strategy.

V. CONCLUSION

Lawyers love rules. In litigation, they find no shortage of them. The Federal Rules of Civil Procedure, the local court rules, and the rules of individual judges provide a fairly exhaustive (and exhausting) framework for the format, timing, and content of motions and submissions.

When writing a mediation statement, however, lawyers fly blind. Large providers like the AAA and JAMS offer little substantive guidance for attorneys in drafting mediation statements. Mediators themselves often fail to give explicit instructions about their expectations, or worse, fail to deeply consider the submissions that would be helpful in particular cases. Law schools are no better. Most schools rarely, if ever, teach budding lawyers about this niche genre of legal writing.

Despite this vacuum, our survey data, practitioner interviews, and review of existing guidance all suggest that best practices are beginning to coalesce. Most mediation statements should be between five and ten pages. They should cite only the legal authorities that would be dispositive to the outcome of the case. They should adopt a conversational, rather than adversarial, tone. They should be shared among the parties and not confidentially sent to the mediator. There should be a separate, confidential communication between each party's lawyer and mediator, whether by *ex parte* statement or by telephone call (with a preference for telephone).

Part of mediation's beauty is that the process is tailored to individual cases. Consequently, the pieces of advice in this Article will not fit every dispute. But our study suggests that they do represent the emerging mainstream for strategic representation in mediation. If litigators consider the suggestions and strategies proposed by this Article, they are more likely to put their mediator—and their clients—in a position to succeed.