The Crucial Prologue: Telling Your Story in the Pre-Mediation Statement

By Adam J. Halper and Bart J. Eagle

This is the start, the beginning The prologue to the yarn that you're spinning. A million synonyms will never get close to describe the feeling.
- Tomas Kalnoky

Introduction

Attorneys are storytellers. They have to tell their stories in writing before tough audiences. Attorneys spend a lot of time on writing because they understand how important it is to reduce a complicated set of facts and law into a compelling narrative. Logic and reason persuade decision-makers, but the twin currents of that stream are told in the context of a story.

To enjoy writing and telling your client's story is crucial in mediation. Mediators often ask that parties submit statements prior to the mediation session. The purpose of a pre-mediation statement is two-fold. First, a statement from each side serves to ground the mediator in the nuts and bolts of the case. Written well, the statement may also provide important context for how and why a dispute developed. Second, the statement provides an opportunity for the attorneys. In writing the statement they get a chance to include in the narrative factual and legal arguments. This may be the first time attorneys really have an opportunity tell the story of the dispute and have it heard by a neutral party. It presents a significant opportunity for lawyers to do some quality writing on behalf of their clients.

The Problem

Remarkably, many attorneys view the preparation and writing of a pre-mediation statement as a chore. Instead of creating a strong narrative, they provide the mediator with some information as to the claims, defenses and, perhaps, status of previous settlement discussions. A party seeking damages can also be expected to state their damages with enough detail so that it does not appear that they were manufactured out of thin air. And, if requested to do so by the mediator, each party is often asked to present its suggestion as to how the dispute can be settled. While it is necessary to provide the mediator with this basic information, the minimum rarely helps the mediator to fully understand the dispute and it doesn't help the attorney advance their case to settlement.

The result is foreseeable. The party seeking damages proclaims their willingness to settle for *almost* all that they seek; and the party seeking to avoid liability offers to pays *almost* nothing. In both cases, the "almost" position is used so as to appear reasonable. Thus, the pre-mediation statement is often a recitation of the complaint and the answer.

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Good attorneys know when not to miss an opportunity and mediators should be mindful of not letting the advocates off the hook easily, as both the attorney's client, and the mediator, will suffer. Attorneys and mediators should view the submission of a pre-mediation statement as an *opportunity* to assist in the preparation of session and the resolution. In a word, by submitting a strong and thoughtful pre-mediation statement, they start the mediation with a prologue, a story that provides context for the dispute and sets the tone for the mediation.

The Answer

As attorney and as mediator, how does this get done? Let us suggest some considerations, a thought outline, that puts the mediator in the role of facilitator, early, and also puts the attorney in the position of writer, advocate and storyteller, early. We suggest that mediators take some time during the first conference call to really discuss the importance of—or at least the opportunity provided by—the pre-mediation statement. Whether you are the mediator or the attorney in a dispute, the way to turn a chore into an opportunity is to start by asking the parties to discuss their *interests* in the case and not just their *positions*.

Background of the Dispute

Mediators should request and attorneys should start a statement by providing background information that may not be readily apparent from the pleadings. As attorney or mediator, good questions include: Is there a relationship between the parties that should be examined or that can

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be preserved, or that may make the dispute particularly difficult to resolve? Or that might provide an opportunity to do so? What impact has the dispute had on each party, their business or maybe even their personal lives and how might that affect the ability of each party to resolve the dispute? Many cases may not present strong answers to these questions. Still, some will and the answers might assist the mediator in exploring avenues for settlement. Even if there are no relationships to be explored and the only injury is to the checkbook, asking and considering the questions might provoke thinking. You never know. And the inclusion of substantive background in the ultimate writing of the pre-mediation statement may be helpful to the mediator.

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What *Actually* Is in Dispute

Disputes contain more context than what lives in the answer and the complaint. In preparing and reviewing the pre-mediation statement, consider, "What is the dispute really about?" For example, someone made a complex but ultimately unsuccessful business decision. In a dispute that will be determined by the provisions of a written agreement, are each party's views of the skills and business acumen of the other really important? They won't be to a court; how much time—if any—does everyone want to spend in mediation arguing about it? As a mediator who might be in the position of suggesting that attorneys think about these questions and as an attorney carefully considering whether and how to answer them, remember the party's real interests. Not all of those may get into the story in the pre-mediation statement but some of them might if only because no one had asked until that moment.

Evaluations and Expectations

Similarly, a challenging and often overlooked discussion in the pre-mediation statement is whether the parties have evaluated their cases. Mediators might consider asking attorneys what elements of the case really influence each party's assessment of the strengths and weaknesses?

Also, mediators should discuss with the attorneys in a pre-mediation conference the expectations of the parties and counsel and what parties hope to get out of it. Whether $5,000 or $5 million is at issue, these are really important considerations for the attorney and for the mediator. Party evaluations and expectations are linked and if possible, should be discussed as content for the pre-mediation statement. Not all of it might go on the paper, but perhaps some of it should.

Resolution Needs and Interests

A thoughtful evaluation leads to a discussion of how to resolve the case. As an attorney writing the statement and as a mediator in the role of reviewing the statement, ask what are the barriers to resolving the matter? Again, maybe it's money and maybe it's not. This is very different from a party's *wants*, which can often be the full surrender of the other party, along with an apology. Chances are, that won't be achieved in mediation. So, what does one want to put into the pre-mediation statement to assist the process? Come back to interests.

For example, in a dispute following the termination of employment, consider each party's *real* needs and interests and how much of that might be helpful in a statement. Employment cases are often about a lot more than just dollars and contract language. Pre-mediation statements often discuss contract law, employee severance; enforceability of non-compete provisions and trade secrets. However, what is often left out may be just as important, and may not be easily discernible by the mediator—or the parties—without exploration. For example, there may be other barriers to a resolution, such as what occurred leading up to and at the time of termination, and concerns over each party's relationships with customers and contacts. Where the balances tilt on such issues is worth considering. Of course, in any case, it could be all of the above, but any hope of settling the dispute, rather than litigating it to a conclusion, will require the mediator, the attorneys *and the parties* giving a great deal of consideration to their real needs and interests, not just their *wants*, and the real needs and interests of the other party, not just the dollars. Writing this up is a valuable exercise for everyone. Yes, the mediator is new to the picture, but the parties (and, certainly, their attorneys) may be too, and this is an important inquiry for them. The answers to these questions may help tell their story.

Even where the story is one-sided, a carefully written statement is valuable. In some disputes, the parties seeking relief, plaintiff or defendant, are entitled to all that they are seeking—which includes everything and nothing. There are times when a plaintiff is entitled "to it all," and, other times, when a defendant's "no pay" position is appropriate. Often, these parties are directed to mediation by a court or prior agreement between the parties. In these situations, it might be appropriate to consider exchanging statements. If the case is so absolute in its outcome, then a party should have no real objection to saying say so, while the other party should demon-

strate—and not just state—why that is not the case. The statements can serve to help the party in the wrong to understand the futility of its position. Or it may allow the parties to address relevant factors that are different from "right or wrong," such as a party's ability to pay, the need for a payout, etc.

Show Your Bones?

Exchanging statements is not common, but it shouldn't be overlooked. Many mediators discuss the value of having sides exchange the mediation statements. Many attorneys bristle. Still, for any attorney the writing may change significantly if it's known there is to be an exchange with the other side. However, there may be a value in sharing your arguments with your adversary, whose client may never have had them presented to her in a clear and concise manner.

Sometimes, it may be appropriate to come up with a work-around that helps to inform adversaries and educate the mediator. For example, the attorneys might write one brief statement addressing some important issues and exchange them, so that each side can be prepared to address—with their client, prior to the mediation, and at the mediation itself—the issues and facts that the other side believes are dispositive. The statements are confidential in the context of the mediation. View these statements as in the service of "setting the stage" and stating your arguments, not only as form of advocacy but also to help try and set the expectations of the other side, and, hopefully, to gain insight into the other side's needs and interests. When parties and attorneys exchange statements they may see and hear arguments differently. Simultaneously, attorneys can submit a completely separate statement to the mediator with information they view as helpful to the resolution of the case but that they do not yet want the other side to know.

Everyone Wants to Talk Numbers. Do It, but Talk About All of the Numbers

Mediators should request and attorneys should try, as best they can, to discuss calculations on what the matter will ultimately cost the clients at different stages of the case if mediation fails. This may help the mediator better understand the gulf between the parties and, perhaps, misperceptions that may exist. Numbers are hard. We get it. We do not suggest, even in a confidential statement, that attorneys put their high and low on the paper. Those might change anyway. However, we do recommend that the ranges be discussed with clients prior to the mediation session. They should be advised this will be a topic in caucus and that it will be discussed, if not in the first round, then soon thereafter. Also, the attorney should prepare to discuss the numbers in a pre-mediation call. Often, the work put in before the mediation session begins can help drive it to a successful conclusion. To the extent this can be put on paper, this is a worthy topic for mediators to request content and a worthy topic of consideration for attorneys.

Keep It Simple

In most cases, there may be contested views of legal issues central to the case. Mediators should request and attorneys should address these in pre-mediation statements. Still, there's no need to turn the statement into a brief or law review article and mediators should instruct attorneys as such. After all, one of the statement's purposes is to enable the mediator to understand the issues and each party's view of them, so that she can assist each side to factor them in when weighing the strengths and weaknesses of each side's case; it is not to provide a starting point for further legal research, to enable the mediator to render a learned opinion that will finally and definitively settle the issue. When requesting and writing a statement consider endnote citations. For those of you familiar with Brian Garner and his LawProse books, you've seen this before. It is part of the plain language approach to legal writing. Plain language statements may not be appropriate to submit to court. It is very appropriate for a mediation. Statements get a lot shorter and easier to read. This is helpful, again, for the attorney and their client as well as the mediator.

Putting It Together

How does one ask for or write this up? It may be easier than one thinks. What we have suggested is to discuss background, dispute development, evaluation, needs and interests, challenges and the possibility that some if not all of this information can be written in a statement and may even be exchanged. It is a statement with a beginning, middle and an end. In such a pre-mediation statement, there is not only a story (or several), but the chance of resolution.

Mediators may be reluctant to suggest and attorneys may be wary of putting this kind of work into a pre-mediation statement. In the presence of resistance, have attorneys and clients go back to interests above and enumerate the strongest factors that are guiding their thinking about the case and the numbers. If the local rules don't ask for hard numbers in the statements, don't put them in but do write your story about the how one should evaluate the case. Also, anticipate the other side's argument and address them. And be comprehensive and straightforward when doing so, not simply dismissive. Attorneys and parties will build credibility with the me-

diator. The stronger pre-mediation statement, the one the mediator is most likely to credit at the end of the day is the one that recognizes that even with strong facts, there are still others that may result in a loss at court or a long road that likely includes settlement after costly discovery and dispositive motions.

Conclusion

Putting effort into the pre-mediation statement is helpful because it can aid the mediator in identifying communication problems, likely areas of impasse, key interests that need to be uncovered and explored, and more. A pre-mediation statement is a story of not only how a dispute came to be, but also of why it advanced to court, discovery and more. If that is not something worth writing about, we don't know what is.

Does writing up a pre-mediation statement differently or with added non-traditional elements guarantee successful resolution? Of course it doesn't. But by thoughtfully considering how the case is to be presented in advance of the mediation, mediators and attorneys ensure that they have made every possible effort to utilize the time and the opportunity of the mediation session. And the parties will always thank you for telling the story and for telling it well.

Telling that story begins with the pre-mediation statement.

Adam J. Halper is an attorney, mediator and the Director of the Legal Wellness Institute at The Family Center, where he leads a department of lawyers, paralegals and volunteers representing thousands of clients every year. Prior to becoming Director at The Family Center, Adam was a Staff Attorney at Legal Services–NYC, the nation's largest public interest law firm. Adam is a Mediator and is on the roster of approved neutrals in the S.D.N.Y.

Bart J. Eagle is a private practice attorney in New York. Mr. Eagle is also a mediator and is listed on the American Arbitration Association's Roster of Mediators, the panel of mediators of the United States District Court, Southern District of New York, New York County Supreme Court Commercial Division, and the New York City Bar Association's Co-op and Condo Mediation Project. Prior to entering private practice, he spent six years with the Queens County, New York, district attorney's office as a trial attorney on homicides and other major crimes.