**Crafting an Effective Mediation Summary:**

**Tips for Written Mediation Advocacy**

**By**

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***Introduction***

Your written mediation summary is a crucial communication. To your mediator it shows your talents, expertise and preparation. To your client it shows your persuasive powers, serving as a reminder of all the reasons they hired you. To your opponents it demonstrates you have a good story to tell, compelling evidence to back it up and the skill required to persuade judge or jury, should the case fail to settle at the mediation table. I believe the most important audience is the latter. The party needing the most convincing is your opposing party and her counsel. Mediation summaries offer a unique opportunity to craft precisely the message you wish to send the other side - without interruption, confident it *will* be read. A written summary designed to influence the decision making process on the other side can move the dispute a long way toward settlement.

What follows are my suggestions for producing a more cogent, persuasive and effective mediation summary. If your goal is to save time or money, of course, feel free to re-use your dispositive motion papers, your case evaluation submission or other written materials. If your goal is to make the most of mediation, however, I encourage you prepare a written summary individually tailored to the mediation process for your specific and unique dispute.

***An Effective Mediation Summary Tells a Good Story***

**Tell a story:** In many cases, your mediation summary will be the first exposure the other side will have to your theories and claims in a single, coherent narrative. Tell your story in as persuasive and compelling a fashion as you can. We are moved by good stories. Some say we are hard wired to hear and respond to good stories. The most effective trial lawyers are good story tellers. There’s a reason tens of thousands of new novels are published every year. We sympathize and relate to the participants in a good story. Your mediation summary should be a good story, well told. Why did plaintiff bring this case? Why did defendant take the actions complained of at the heart of the suit? Humanize your clients and help us understand who they are and why they acted or reacted as they did.

**Build the story around a theme:** The best stories revolve around universal themes. There are many articles and books available on developing a litigation theme, so I won’t spend a lot of time on this aspect of storytelling, but time spent in crafting a compelling theme is time well spent. Examples of commonly recurring themes include:

* “No means no.”
* “They didn’t follow the rules.”
* “Hell hath no fury like a woman scorned.”
* “Personal responsibility.”
* “They didn’t keep their promise.”

**It’s a form of settlement brochure:** Mediation summaries are not written to “win” the case in the same way Motions for Summary Judgment are written. There will be no resolution at mediation unless the other side agrees to settle. The mediation summary is written therefore as a vehicle for demonstrating that your story will be sympathetic and well-received by the fact finder. Think of your mediation summary as a form of settlement brochure: Here’s our story, here’s our theme, here’s our evidence and here’s why a judge and jury will rule in our favor.

**The medium is the message:** Marshall McLuhan taught us “The Medium is the Message.” His point was simple: The medium used to deliver the message influences how the message is perceived. The lesson for advocates is that their written mediation summaries – including the packaging of it for delivery to the other side - should convey competence, professionalism, civility, good judgment and experience. It says a great deal about the lawyer and support staff. Are they attentive? Conscientious? Do they take pride in the way their work looks? 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? Advocates who recognize the importance of McLuhan’s insight enclose their summaries in a three-ring binder or have the package tape, comb or coil bound with professional looking covers. 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. 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. That’s a message every advocate should want to convey!

**Relief requests:** Many lawyers, particularly those who represent the plaintiff, like to include a dollar demand for relief at the end of their written summaries. This is generally a mistake. First, the written demand is almost always unrealistic. Indeed, it is rare for the number written in the summary to surface again at the table. Second, I’m not certain who the target is for the written number – but it will surely be read by the other side. When the number is a departure from the last offers discussed by the parties during direct negotiations, the result is consternation, anger and sometimes a reluctance to continue the discussion. A simple statement that the writer intends to make a demand consistent with the law and evidence will generally suffice.

**Non-economic relief:** By contrast, the written mediation summary is often a good place to signal that a party has non-economic concerns as well as economic ones. For example, if plaintiff in a wrongful discharge case will be seeking reinstatement, advance notice in the written summary provides management time to meet with the appropriate parties to determine if relationship repair is in the cards.

**Encourage the other side to provide a copy to her client:** If you have a concern that the party on the other side of the case might not be given a copy of your summary to read, prepare *two* copies. Serve both on opposing counsel and explain that one copy is a courtesy for his client. Bring extra copies to mediation to provide one to the other side. If they did not share it before, you can be sure it will be read during caucus.

***Mediation Advocacy Adopts a Reasonable and Collaborative Tone***

In mediation, I ask the disputants to leave their zealous advocacy persona at the door and replace it with a joint problem solver mindset. Mediation is where we ask the parties to cooperate in the search for common ground. Everyone in the process has the exact same problem: how do we settle the dispute before us? Approaching mediation as joint problem solvers is very different from an approach using traditional advocacy models. Joint problem solvers adopt the right tone in their summaries and their oral presentations. They create the right atmosphere for settlement. They resist the urge to litigate grievances between the lawyers (“he hasn’t cooperated in discovery,” for example.) They replace invective and harsh words with a reasonable and logical presentation. They seek to de-escalate, not ratchet up the emotions. We’ve all heard the old adage, “We get more flies with honey than vinegar.” It’s equally applicable to mediation summaries. See also, “Making the Most of Mediation: 10 Top Tips for Maximizing Results in the Process,” Tip #9. http://www.starkmediator.com/?p=64

***Effective Mediation Summaries are Supported by the Evidence***

**The story must be true:** Every important statement in the mediation summary should have evidentiary support in the record or in a signed affidavit. Establish the validity and reliability of the good story you’re telling by showing you have the evidence to back it up. When evidentiary support is attached to the summary in the form of exhibits, you demonstrate readiness to try your case if it cannot be settled. Supporting exhibits compel the other side to engage in a productive conversation with the mediator which includes risk assessment, reality testing and, perhaps, a wake-up call.

**Examples:** Is the dispute centered on a lease or contract? Attach it as an exhibit. Is there a key memorandum summarizing your client’s version of the meeting? Provide a copy. If it’s likely to serve as an exhibit at trial or an attachment for dispositive motion practice, chances are it will serve a useful purpose at mediation. From the employment policy allegedly violated to the written procedure setting forth proper practice; from the inconsistent EEOC complaint to the email exchange that turned the relationship sour; from the falsified employment application to the misrepresentation about the value of an asset; from the notes summarizing the meeting to the performance improvement plan preceding discharge; from the photographs and diagrams to financial charts and graphs; all are persuasive examples of your readiness to try your case. Equally powerful are deposition transcript pages containing key admissions, effective cross-examination and support for your theories. Exhibits bolster advocate credibility, underscore the risk opposing counsel faces and set the stage for a meaningful mediation process.

**Highlight exhibits:** Some exhibits are longer than others. Don’t make the mediator or opposing counsel pore over the pages reading every word. Don’t annoy everyone by forcing your reader to figure out on her own which paragraph in a 40-page document is the one you’re relying on. Use a highlighter to focus precisely on the key language. Indeed, if the language is especially compelling, attach it *and* quote it in the body of your summary, as well.

**Don’t send the wrong message:** When counsel does not attach record evidence, several alternative conclusions are likely to be drawn by the mediator and the other side, none of them favorable. First: you don’t have the goods to back up your claims or defenses. Ouch. Second: you did not think your case was worth the time and effort to warrant the effort. (“If counsel really thought this case was worth six figures, he would have donethe work!”) Double ouch. Third: counsel is not well prepared. Hmm. One essential factor in risk assessment is sizing up the skills, motivation and effectiveness of the advocates. No self-respecting trial lawyer wants to be thought of as ill prepared and ineffective. Fourth: the documentation is vulnerable. Counsel has not produced the document because it’s weak or easily construed against him. Know too that your client may pick up on these same conclusions and start questioning your effectiveness.

***A Solid Legal Analysis Provides a Firm Foundation***

**Include a section containing your legal analysis:** I practiced law for many years. I have a good handle on any number of areas of legal specialization including employment law, business torts, police misconduct and probate. Nonetheless, I welcome a legal analysis, a quick review of the law, a reminder about burdens of proof, *prima facie* showings, presumptions and the like. It never hurts to remind the mediator and opposing counsel of express statutory language, important regulations, rules or code provisions. If there are cases that support your claim, by all means attach them as exhibits, too. Where a court has already ruled on the same exclusion provision of an insurance contract or a similar legal claim, for example, don’t assume the mediator – or even opposing counsel – is aware of it. If you’ve got the law, make certain everyone else at the table has it, too.

**Highlight cases:** If a case contains facts similar to the ones in the dispute being mediated, highlight the facts. If there are legal principles on which you rely, highlight the passage in the case you think especially apt. Don’t be afraid to “spoon feed” your reader. At least in my case, I’ll think it effective advocacy!

***The Most Persuasive Summaries Focus on Risk***

**Mediation is not about right and wrong:** The strongest and most persuasive advocates are unlikely to convince the other side that “we’re right and you’re wrong.” Efforts to persuade the other side about the facts run into a brick wall. They have their own story to tell, their own version of reality. Their resistance may be reinforced by lack of trust, a failure to communicate, bad blood, prior experience or ignorance. Most disputants reach mediation filled with skepticism for the other side’s arguments. I often hear the lawyers say that just hearing the other side’s version may be unproductive. Even where the parties agree to listen to each other with an open mind, few are able to live up to their promise. As a result, I tell the participants that we’re never going to agree on the facts, or on who is right and who is wrong. Nor am I going to spend time trying to find agreement.

**Focus on risk factors:** By contrast, in my experience, good advocates are often able to agree on identification of risk factors. This case is assigned to Judge X. How likely is Judge X to grant a dispositive motion? Both sides generally agree when Judge X is more receptive to one side or another. What happens if the motion is granted? What happens if it is denied? What leads you to think Judge X will grant a motion in *this* case? Is there a key piece of evidence supporting your claim? Is the other side likely to file a Motion in Limine to exclude it? How likely is Judge X to grant a Motion in Limine? How strong is the case if the evidence is admitted; how strong if it is not? Either way, is the question close enough to warrant an appeal, thereby costing more time, money, effort and disruption? If an important eye-witness hasn’t been found by the time of mediation, what are the odds she will be found by the time of trial? How strong is the case if the witness testifies; how strong if the witness does not appear? If a key witness or party has credibility problems, what is the likely impact on the overall claim or defense? No matter how compelling a witness, if he falsified his employment application, cheated on his expense reports or told a bald-faced lie during the investigation, there is a serious risk that *nothing* he says under oath from the witness stand will be believed.

**Spell out the risk factors:** I encourage advocates to weave a discussion of the risk factors into their mediation summary or include a separate section focused on the other side’s risks. A risk analysis from a skilled trial lawyer will often be more persuasive than an exposition of events from your client’s perspective.

**Risk factors assist the mediator:** There’s another compelling reason to focus on risk factors in your summary. They prepare the mediator to spend time with opposing counsel asking tough questions. As mediator, I want to know the strongest parts of your case and the areas of greatest risk to the other side in order to have an effective conversation in private caucus. I also welcome your candor in discussing your own weaknesses – and how you intend to handle them.

***A Picture Is Worth 1000 Words***

**Visual aides at mediation:** Visual aides, videos, photos, charts and diagrams are effective demonstrative aides at trial. Few lawyers take the opportunity to use them in mediation. Visual aides are powerful. They are compelling. They persuade. Using them in mediation gives the other side a preview of what’s in store at trial. You may lose the element of surprise, but in this era when only a tiny minority of cases are tried, they increase your settlement prospects at mediation. A well-respected federal district judge once told me that in criminal cases in his courtroom, federal prosecutors meet with the accused and defense counsel. Using “Trial Director” software, the prosecutor demonstrates how the government intends to present its case at trial. Since beginning the practice, the number of pleas shot up significantly.

**Visual aides can close the deal:** Visual aides are often far more compelling than words. We say, “a picture is worth 1000 words” for a reason. Accordingly, I encourage you to consider using them in your mediation summaries. When your case involves understanding the significance of financial data, statistics or complicated numbers, the value of charts and graphs grows exponentially.

**Incorporate technology:** Mediation is an opportunity to take advantage of technology. In a serious injury case, for example, counsel might consider providing the other side and the mediator with a video revealing a day in plaintiff’s life. In an Americans with Disabilities case, which turns on whether a machine can be modified to accommodate plaintiff’s medical condition, a video of the machine in operation could be highly effective. In a landlord-tenant dispute, video of water leaking down from the ceiling onto someone’s expensive computer as a result of inadequate roof repair can be highly persuasive.

***Private and Confidential Supplements to Your Mediation Summary***

**Mediator “eyes only” submissions:** During the pre-mediation conference call, I always offer attorneys the option of submitting something in writing on a mediator “eyes only” basis, not to be shared with the other side absent express permission to do so. Lawyers are often reluctant to take advantage of the offer.

***Ex parte* communications are proper:** An “eyes only” submission is an *ex parte* communication. Most Michigan litigators are familiar with an all-caucus model where the parties sit in separate rooms and the mediator shuttles back and forth carrying messages between them. *Every* communication in that model is *ex parte.* Why wait until the day of mediation to start sharing important but sensitive information with the mediator?

**Concentrate on interests and needs:** That said, private and confidential “eyes only” communications work best when used to discuss a party’s underlying needs and interests rather than positions. Your positions are best laid out in your public, shared submissions. The private letter is an opportunity to tell the mediator how he can best help you. Do you have a problem? Do you face a particular risk? What do you see as the biggest obstacles to settlement? What suggestions do you have to overcome those obstacles? What are your clients underlying needs and interests? Does your client have a concern that if she settles this case, there are numerous other potential claimants out there who might learn about the settlement and sue, as well? How do you size up the underlying needs and interests of the other side? What’s driving them? What would help them get comfortable putting this dispute behind them? Do you have suggestions for settlement options or terms that might be well received by the other side if the monetary issues can be resolved? In my experience, Michigan lawyers are reluctant to agree to this option.

**Decide as you write:** There is no need to decide immediately during the pre-mediation conference call. Reserve the option “just in case.” As you write your public mediation summary for exchange with opposing counsel and client, think about what you might want to say privately to the mediator. If it makes sense, draft a “private and confidential” eyes-only letter to supplements your public summary.

***Conclusion***

Most participants in mediation recognize that mediation advocacy is different from the traditional zealous advocacy most common in the judicial process. The same principles apply to your mediation summary. Your written submission presents a unique opportunity to engage in cogent and persuasive written advocacy. If you draft your next written submissions as recommended and package them to deliver a message of professionalism and competence, the results achieved at the table are likely to be better than you expect.