

The Confidential Mediation Statement: An Overlooked Tool for More Productive and Successful Family Law Mediations

By Heather Krans and Ashley Taylor



Krans



Taylor



There are many factors that can contribute to the productivity (or lack thereof) in a family law mediation: case complexity, how entrenched or reasonable each party is, and the parties' respective motivations to settle, just to name a few. However, mediation statements are one tool that family law practitioners may overlook in preparing for mediations. According to a leading New Hampshire family law mediator, approximately 62 percent of lawyers do not submit a mediation statement prior to mediation.

When the mediator has a more complete understanding of how both parties view the primary issues in these often-emotional cases *in advance* of the mediation, the mediator can focus his or her time during the mediation on nudging the parties to a resolution. In contrast, without a mediation statement, the mediator must spend valuable (and, for clients, expensive) time during the mediation slowly learning these crucial details.

Mediation statements need not be long and complicated, but rather tailored to give the mediator only the most necessary details. In our practice, we often take a somewhat formulaic approach to mediation statements, which also has the benefit of being familiar and easy to review for mediators we use often. Since facilitating efficient mediations benefits everyone, a summary of our approximate "formula" for mediation statements follows.

Intro: This is the most consistent part of the mediation statement, the point of which is to remind the mediator when your mediation is, who you represent (including whether they prefer to be addressed by a nickname), and who represents the opposing party. While we also watermark our mediation statements with a "CONFIDENTIAL" stamp, it is also helpful to indicate in the first paragraph that you intend for the mediation statement and its contents to be confidential. By keeping the mediation statement confidential (in contrast to typical practice in many civil litigation cases), you can be more candid about what your client is hoping to achieve in the mediation and whether there are any dealbreakers in terms of proposals that the opposing party might make.

"I am writing with regard to the [mediation date] mediation in the above-referenced matter, in which you have agreed to serve as mediator. As you may recall, this firm represents Catherine ("Cat") Client. [Opposing counsel] represents Cat's husband, Patrick ("Pat") Party. Please consider this Cat's confidential mediation summary."

Procedural History: Here, we summarize the procedural posture of the case.

For example, has there been a petition filed yet? If so, by whom and when? Is there a temporary hearing scheduled, and if so, when is it? Are there any orders already in effect? Have the parties already attended mediation with a court-appointed mediator? Are there any pending motions or other upcoming hearings? We typically limit this section to one or two paragraphs- the goal is to summarize in a high-level manner, rather than provide the mediator with a blow-by-blow of all case activity.

Status of Discovery: In the first part of this section, we tell the mediator whether the parties have exchanged 1.25-A disclosures yet, including whether there have been any notable deficiencies or delays in this process. In the second part, we describe whether either party has pro-pounded discovery requests on the other, and the status of responding to those requests.

Enclosed Documents: Next, we include a bulleted list of any documents we are enclosing with the mediation statement for the mediator's review, including the dates of such documents. These typically include any proposed orders we hope to address at mediation, the parties' most recent financial affidavits, any relevant orders in effect, relevant recent pleadings (e.g. a motion to compel), and any other documents that we believe may be helpful for the mediator to review. For example, if the opposing party has a habit of sending your client demeaning emails insulting his parenting skills and telling him that he'll never see the children again, consider including copies of one or two of the most egregious examples of such emails. Additionally, consider enclosing copies of any valuation reports (i.e. home appraisal, pension valuations, valuations of a party's business interests, etc.) if the values may be in dispute or are relevant to resolution.

Family Description: How old are the parties and how long have they been married (if a divorce) or in a relationship (if a parenting action)? Is it their first marriage? If there are children, what are the

children's names and ages? And where do the parties currently live?

"Cat is 42 years old; Pat is 45 years old. The parties have been married for approximately 21 years. It is Cat's first marriage and Pat's second. Cat and Pat have three children together: Tweedle (age 20), Dee (age 18), and Dominic ("Dom," age 10). Pat also has a daughter, Patricia (age 24), from his first marriage. Pursuant to the Temporary Decree, Pat continues to reside in the marital home on Old Town Road in Pittsfield, NH; Cat resides in a nearby 2-bedroom apartment in Concord, NH."

Education and Employment: This section should include details about the parties' educational backgrounds, current employers and employment history, and income from employment and any other source (including a source for these numbers such as the client's financial affidavit or parties' last tax return). Especially in a case where child support or alimony might be requested, this section offers a concise way to give the mediator a glimpse of any potential issues related to ability to obtain employment or earning capacity.

Desired Outcome(s) and Why: What is the ideal goal of the mediation? Would your client be happy if the parties could agree on a temporary parenting plan? Or is the hope to reach a global resolution of the entire case? Where possible, we also like to describe our client's motivation behind the resolution they are seeking.

"The primary issues in this case are the timing of payment of Cat's equitable share of the marital estate and parenting time. Currently, Cat's Concord apartment does not have enough space for Dee, a high school senior, and Dom, in fourth grade, to have their own bedrooms. As a result, Cat agreed, on a temporary basis, to limit her parenting time to Friday through

Sunday nights, so that Dee and Dom can be in their regular bedrooms during the school week. She would like to purchase a larger home in Pittsfield and move to a 50/50 allocation of parenting time (ideally allowing the parties to alternate weekends) but cannot afford to do so until Pat pays her equitable share of the marital estate."

Potential Quagmires and Primary Disputes: Now that the mediator has a sense of what we are asking for and why, we briefly detail what might stand in the way of resolving these issues in our client's favor. This is an opportunity to share what you understand to be the opposing party's position on the primary case issues and articulate your client's counterargument. For example, perhaps one party is insistent on an upward deviation from the child support guidelines but lists several questionable or inflated monthly expenses on their financial affidavit. This section is also an opportune place to specify whether your client has any dealbreakers (i.e., "Cat will not enter into any settlement that requires her to pay Pat alimony, especially if he remains in the marital home").

Status of Negotiations: To the extent that the parties, including through counsel, have previously attempted to negotiate, describe them toward the end of the mediation statement. Were any proposals exchanged? When? Did either party provide feedback on any such proposals? Why or why not? Ending the mediation statement off on this note gives the mediator a clear idea of the status quo of any prior attempts at ADR, setting the stage for the next attempt.

Finally, we end our mediation statement with a standard request to contact us with any questions.

In terms of timing, the mediation statement is best sent at least a full business day prior to the mediation so that the mediator has an adequate opportunity to review and digest it. The more enclosures you include, the more time you should allow for review. As a bonus tip, we also either preface or follow up the mediation statement with a quick (10 minutes, give or take) phone call to the mediator, to candidly go over any issues that may have been too sensitive or nuanced for the mediation statement.

Taking an hour or two to draft a comprehensive yet concise mediation statement is a worthwhile investment in the future productivity of the mediation. When mediators need to learn on the job, so to speak, clients are paying twice (attorney's fees and mediator fees). Additionally, the time each party must spend educating the mediator on the central facts in the case and parties' respective motivations (including a party's perceptions of the opposing party's motivations) during the mediation only delays the mediator's ability to begin facilitating resolution of the case.

Heather E. Krans, a founding partner of Pastori | Krans in Concord, NH, is a nationally recognized family law attorney with over 20 years of experience in the practice of law. Ashley D. Taylor is an associate at Pastori | Krans with a diverse range of practice areas that includes family law, employment law, and general litigation. Both Heather and Ashley are members of the Bar's Family Law Section. ■