

# Featured Blogs of the Month

Blogs selected for this column are published through the State Bar of Wisconsin's section blogs as well as WisLawNOW, the State Bar's aggregated community of Wisconsin legal bloggers.

## Pre-Mediation Submissions: Some Practical Suggestions

BY HON. DAVID E. JONES

Mediation submissions are often seen as a necessary chore, and there's little guidance as to what should go into them. By keeping in mind the various members of the audience of your statement, and addressing a few critical topics, lawyers can set the stage for an efficient and effective mediation.

According to a 2018 survey, over 75% of mediators "always" or "usually" require parties to submit mediation statements, usually about a week before the show.<sup>1</sup>

But many mediators, myself included, rarely provide much guidance to lawyers on what to include (or not include) in their statements. This article makes amends for my failings in this area.

Here are a few steps to setting the stage for an efficient and effective mediation:

### Audience and Tone

Before discussing content, it's important to keep in mind the different folks who will constitute your audience. For a mediation statement, there are at least three and maybe four audience members: the mediator, the client, yourself, and perhaps the opposing party or counsel. Meeting and balancing the needs of all these audience members takes some skill and warrants spending more time in drafting than I ever devoted when I was in practice.

I include you in the audience because the act of drafting the statement will make you lift your head up from the everyday jousting of litigation and think about what your client might actually achieve if the case does not settle. It should also impel you to think about the legal spend in going forward.

I also included the opposing party/counsel because I have found that exchange of mediation statements, or at a minimum damages calculations, is useful in some cases. An exchange of full or redacted statements can ensure that the parties have a clearer-eyed understanding of the other side's position and attendant risks. This can include legal

## Dispute Resolution Blog

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limitations on certain types of damages or other legal arguments that may lead to a successful dispositive motion.

Polemical or sarcastic language will put off most mediators, and it may inflame your clients to the point that they have no interest in settling. Instead, you want to show that you are level-headed and accurate about what the record does or does not show.

So, take a reasonable tone, and try to keep your submission to 5-10 pages single-spaced – for the sake of all audience members.

Not every mediator will agree with me, but I think the items listed below are critical for the mediator and can serve the needs of the other members of the audience.

### The Players at the Mediation

Tell me who is going to participate in the mediation and whether they'll be with you in the room or (as is increasingly common) in another location participating by videoconference. When an insurance adjuster is going to play a key role, then I will want them to participate in person (rare) or virtually (now fairly common and far better than teleconference).

If there are subrogated parties, it helps for me to know who they are, the size of their liens or interests, and whether they have been kept informed about the mediation. This information can serve as a useful, up-front reminder to your clients that there may be other demands on any settlement proceeds.

### The Plot

Your recitation of the factual background should be as nonargumentative as possible. Use a timeline or bullet-point dates if

chronology matters. This isn't a brief, so I don't need citations to the record. Keep it direct, and don't get bogged down with recitations of discovery disputes or other sideshows. In noncomplex cases, there will need to be a really good reason for you to spend more than three pages on the background.

### Key Legal Issues

Here's where you tell me why you think you win on the law. If you're the plaintiff, set out the elements of your claims and tell me why you can satisfy them. If you're a defendant, tell me why some dispositive legal issue or damages limitation will go in your favor.

The mediator isn't going to decide your case, obviously, but you do want to explain why the risk analysis favors your client. Drafting this section will focus you on the key aspects of the suit and will help your client see the challenges ahead if the case doesn't settle.

### Procedural Status and Remaining Work

Significant procedural dates, such as the trial, summary judgment, expert reports, or key depositions, are useful pressure points. They can also help clients understand the length of the road ahead.

On this last point, the cost of completing the remaining work is a matter that you should discuss with your client before the mediation. It can be uncomfortable during mediation for clients

to realize for the first time how much it will cost to get a case all the way through trial. Oh, and don't forget the appeal.

### Prospect of Trial

Be honest about whether the matter is one in which summary judgment is possible. If there are significant issues of intent or flat-out material factual disputes, then say so. Contract interpretation matters can often be resolved as a matter of law, but issues involving performance are often fact-dependent and likely to go to trial.

### Damages

Explain what your best day at trial might look like and link damages to specific claims. Discuss if some damages claims are more likely than others, and address whether there are any grounds for fee shifting. A spreadsheet showing the math can be incredibly useful for everyone and will equip a mediator to respond when the other side complains that they can't understand how damages were calculated.

This will be helpful for all four audience members, as it will require you to think carefully about what you might reasonably get at trial, it will give your client a more realistic understanding of what is at stake, and it can educate the mediator and your opponent (if submissions are exchanged) as to the bounds of



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## Podcast of the Month

### Nate Cade on Extreme Ownership, from Big Law to Solo Practice

In Episode 9 of the Bottom Up Podcast, produced by the State Bar of Wisconsin, co-hosts Kristen Hardy and Emil Ovbiagele speak with Milwaukee-based attorney Nate Cade, who wakes up at exactly 4:06 a.m. every morning to start his routine.

A heavy-hitting litigator who often works on high-profile cases, Cade spent the first 17 years of his career at a large law firm, honing his craft as a trial lawyer and making his own opportunities. One day, about a decade ago, he decided to hang his own shingle. In this episode, we learn why Cade

made the decision to go solo after 17 years, the challenges and opportunities of doing so, and what it means to take extreme ownership of your career.

Listen to the episode at <https://www.wisbar.org/blog/Pages/Bottom-Up-Podcast.aspx>, or wherever you get your podcasts. **WL**



a settlement range. Indeed, a key reason why mediations don't succeed is that a defendant cannot understand how a plaintiff can get to a demanded number. An exchange of damages information can obviate this obstacle.

Claimants are often convinced that they are entitled to significant punitive or exemplary damages. As a practical matter, very few settlements include significant amounts for punitives, and even fewer defendants will even entertain the prospect. It therefore makes sense to discuss this reality with a client before the mediation.

### History of Settlement Discussions

The mediator will need to know whether there have been prior discussions, and if not, why. If discussions occurred, tell me whether a mediator was involved and set out the parties' opening and final positions. No need to get into why the discussions weren't successful, as this will only energize your client.

### Paths to Settlement

This is another area that can spur productive pre-mediation conversation with your client. Get them thinking about what life might look like without litigation. If there are nonmonetary provisions your client needs or wants, it's helpful to identify those early.

But do not stake out a bottom line.

The vast majority of settlements involve a number somewhere between what each party thought they should do when they came into the mediation. A firm number in the mediation statement will become a difficult hurdle for the mediator to overcome. Worse, you may determine that a different number makes sense during the course of mediation, and explaining to your client why you've changed your mind just presents a problem that you don't need to have.

### Attachments

Most mediators don't want you to reinvent the wheel, and they want to see for themselves key documents. They like to get the operative pleadings and will skim through any substantive submissions, like summary-judgment briefing.

As for deposition transcripts, I like to get them. They are helpful for substance, as I like to see what a witness actually said rather than reading a characterization of the testimony. In addition, transcripts give me some insight as to lawyer and client dynamics. As an aside, it has been my great pleasure to see that lawyers in Wisconsin almost unfailingly conduct courteous and skillful examinations. There are few speaking objections, and the lawyers work together professionally.

### Conclusion: A Necessary Chore

I know that drafting the mediation statement is a chore. But the effort can have salutary effects.

You can establish yourself to the mediator as the level-headed participant. You can create the opportunity for thoughtful examination by your clients about what they really need out of the litigation.

When statements are exchanged, you can make certain that the other side clearly sees the risks in going forward. And you may see some things about your case that you hadn't thought about before. **WL**



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### ENDNOTES

<sup>1</sup>See Brian Farkas & Donna Navot, *First Impression: Drafting Effective Mediation Statements*, 22 Lewis & Clark L. Rev. (2018). **WL**