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Considering How to Approach Opening Statements in Mediation

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Special to the Legal

When mediation is discussed, someone invariably questions whether an opening statement by the parties at the initial joint session with the mediator is advisable. The reaction is often mixed, with many attorneys asserting that they eschew opening statements because they believe them to be counterproductive.

The basis for this position is understandable. Experienced advocates contend that the opening statement rarely adds information not already known to the opposing party while its tone and content may assure the failure of the mediation. It is often presented in a manner that is insulting to the other side and creates an even greater rift than already existed. Many attorneys wrongfully view the opening statement in mediation as the functional equivalent of an address to a jury that is intended to convince both mediator and opponent of the absolute correctness of their position and the outrageousness of the opposition. Moreover, because such statements are often so argumentative, even the party who makes one often finds itself locked into a position of psychological self-righteousness from which it is difficult to extricate oneself gracefully.

In addition, there are times when a joint meeting of opposing parties is unwise because of already-existing animus. Presence in the same room alone creates



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an atmosphere that makes reasonable discussion impossible.

Nonetheless, it is apparent to most practitioners of mediation that in the appropriate circumstances, an opening statement can contribute greatly toward moving the parties to a position where the possibility of compromise and settlement becomes more palatable.

Initially, it must be recognized that parties to a dispute have often had little opportunity to interact after the dispute had arisen. Usually, their only contact has been the angry exchange of letters or other communications between their attorneys. Once the suit has been instituted, the pleadings will invariably be peppered with hostile, inflammatory and accusatory language, including such terms as malice, recklessness, disregard of another's rights, breach and fraud. Attorneys may understand these as simply reflecting the formulaic language of law suits, but to the parties, they are viewed as constituting public allegations that one has engaged in actions that were outrageous, virtually bordering on the criminal. In effect, these written exchanges end up demonizing the opposition.

The opening statement properly presented, however, can diffuse some of this anger and hostility and allow the mediation to begin with a more positive attitude. Different techniques have often been suggested.

For example, much has been written about how beginning with an apology can go far to assuaging the hurt feelings of the opposing side. Frankly, in my experience, I have rarely seen this to be particularly effective. But I have noted a lessening of hostility when, in an opening statement, a party acknowledges an appreciation that the opposition has suffered a real injury or loss, and only then follows with an explanation as to why that party should not be deemed responsible. It must be remembered that the opposing party's mistrust or dislike of the speaker already interferes with the ability or willingness to really hear what is being said. Acknowledging the validity of one aspect of the opposing party's claim will cause the listener to accept that there is some modicum of balance in the presentation and result in more positive attention; otherwise, the listener is likely to view a totally negative statement as simply reflecting all that is wrong with the speaker and his position.

Indeed, one suggested method in presenting an opening is to begin by speaking not as an advocate, but rather as if you were neutral. You set forth what you understand are the different views with respect to the case. This is followed by your side's perceptions accompanied by an expressed willingness to be educated about the perceptions of the opposition.

Gaining a better understanding of the perceptions of the other side in this manner significantly enhances the possibility of resolution.

Opening statements also provide an opportunity to overcome the demonization noted earlier. If a calm, nonaccusatory explanation is given of the party's position, the other side, still incensed by the incendiary language of the legal documents, will be mollified somewhat by a more reasonable tone. This may lead to some acceptance that the opposition's position is not totally unprincipled and irrational, but is based on a belief and perception that is honestly felt, and not asserted solely for the sake of obtaining or avoiding payment.

Here, then, are a few approaches that have been suggested to maximize the value of the opening statement:

1. Be prepared to tell your story to a party who believes there is nothing new to be learned from you. Present your understanding of the events and indicate a preparedness to listen and learn from the other side so that there is a greater joint understanding of all of the circumstances and issues. This will serve as an invitation to work together in seeking resolution. In addition, if a statement was made in the opposition's mediation memorandum that is clearly incorrect in some material respect, mentioning this in a nonconfrontational manner in the opening will provide a basis upon which the opposing party may conclude subconsciously that there is some merit in your position and provide additional reason to be flexible.

2. If your client may have been partially responsible for the situation resulting in the disagreement, you may acknowledge that, and then be in a position to note for possible consideration actions taken by the opposition that may have similarly contributed to the current disagreement.

3. If there are aspects of your case that are weak, and particularly if they are known to the other side, consider whether it may be better to refer to them in your opening statement. This can gain some credibility with the opposing side as well as the mediator as it reflects that you are not simply ignoring some aspects of the case that are harmful to your position.

4. Be prepared to generally outline your client's interests and needs while setting forth your understanding of what the opposition needs to be satisfied. At the same time, it may be helpful to suggest why resolving through litigation may provide some benefit to your client or be less beneficial to the opposition. For example, there may be value in a judicial precedent that will guide your client's future actions and perhaps forestall similar future disputes. Or, perhaps, the plaintiff should consider accepting less than what it honestly believes it deserves simply because there is a question as to the defendant's ability to pay more. Conversely, a plaintiff whose home was destroyed by fire may be able to demonstrate that the amount being offered by the insurance company is unacceptable simply because it will not allow even the most basic of his rebuilding needs.

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5. Consider whether your client should participate in the opening statement. As attorneys, we are particularly reluctant to allow our clients to speak because of the fear that they will become too emotional and abusive, be unable to articulate the position well, or, even worse, blurt out information that was intended to remain confidential.

Nonetheless, there is often significant benefit in having the client participate in the opening statements. While opposing parties often do not carefully listen to the statements of attorneys, expecting these to be mere advocacy polemics, they do listen very closely to the principal, if only because they hope to hear some concession.

Moreover, the opposition will be sizing up the client and deciding just what sort of a witness she would ultimately make should the matter proceed to trial. Is she articulate, sympathetic and convincing?

Mediator reality-testing often includes discussion of the appealing nature of the party-witness and her likely impact on a jury.

Allowing your clients to participate in this fashion will ultimately cause them to feel more satisfied, not only with the substantive results but with the psychological and procedural aspects of the mediation.

Of course, if your client is emotional, inarticulate or just a downright unappealing person, you should initially indicate to the mediator and the opposing party that you would prefer that no questions be asked directly of your client or that such be held for the time of the caucus.

6. Finally, consider whom you should be addressing in the opening. If you are simply explaining items that are obvious and acknowledged by all of the parties, addressing the neutral may be preferred to assure that the mediator has a full understanding of these facts. When apologizing, reflecting areas of possible misunderstanding and a desire to learn together how these misperceptions may be overcome, or empathizing with the other side, directly addressing the other side would generally be preferred. If one of the objectives is to demonstrate your client-witness' effectiveness as a potential witness, having the client address both the mediator and the opposing side may be best.

In short, a poorly presented, hostile, accusatory opening statement can at the very outset destroy the success of a mediation session. In the appropriate circumstances, however, when properly prepared and presented, it can be most valuable in preparing the mediator for effective reality-testing during caucusing while softening the perceptions and attitudes of the opposition so that progress toward ultimate resolution becomes possible. •