

Make the Most of Your Opening Session at Mediation

Your goal at mediation today is to settle the case. Your opponent wants the same. In all likelihood, a significant amount of time and money have already been invested in prosecuting and defending the case. And as litigation goes, the case has probably been pending longer than anyone would prefer. Counsel have prepared and the clients are ready for resolution – today. One of the first decisions that counsel must make is whether to conduct an opening session. Each side has the unique opportunity to address the other as one component of the effort to negotiate a fair outcome. Should each side present opening statements, or should we “just get going,” just get on with the negotiations?

Often counsel elect to skip a meaningful opening session, to get down to the *real action* – the separate caucuses where the mediator does her magic. I suggest you don’t take that route. Instead, I urge parties to take advantage of the opening session. Simply put, absent a peculiar and rare situation, don’t forgo the opening. Let me tell you why, and give you some fundamental principles to guide you in your opening session.

I refer to *your* opening session, because the opening presents a unique opportunity *for you* to accomplish *your* specific goals to benefit *your* negotiations. Simply put, the opening gives you precious time to speak directly to decision-makers on the other side of the table, to deliberately relay information important to the mediation/negotiation process. The key is to have a purpose and a plan.

Have a Purpose and a Plan...

Here’s the critical message...don’t just wing it, don’t just offer platitudes, don’t do cookie-cutter. Instead, make the most of your opening session by planning what it is you want to accomplish in your opening, and the offering deliberately chosen comments that are presented in purposeful way.

What do you want to accomplish in my opening session? What is your purpose for this opening in this particular mediation? Your goals will vary from mediation to mediation. Your presentation must be specific to this mediation. The purpose of your opening presentation may be to:

- Explain your point of view, directly and unfiltered to the other party
- Educate the opposing party – or opposing counsel – about the material facts of the case or key legal issues that will affect liability and exposure
- Demonstrate that you are prepared, have a persuasive command of the facts or applicable law, your confidence and ability as a trial lawyer, or that you are a reliable/trustworthy source of knowledge

- Secure agreement as to medical expenses, liens or other special damages
- Connect with the opposing party or counsel
- Apologize (sincerely) for the loss or injury at issue
- Set parameters (e.g. we are not here to settle a surgery case because plaintiff has not yet had surgery; or, we are not here to argue about liability in this rear-end MVA case)
- Simply listen – to actually hear, in a non-threatening forum, positions that you may not like, and perhaps acknowledge upfront certain portions of that information

Those are a sample of the variety of reasons to conduct your opening session. Most opening sessions are intended to accomplish some combination of those objectives. Even one of them justifies taking a few minutes to meaningfully engage the other side. To be most effective, however, *how* you conduct your presentation is as important as the information you convey.

It's Not Just About What You Say...

How you say what you say will either help you accomplish your objectives, or crush any chance of your comments being beneficial. Here are some keys to keep in mind:

- Be professional, courteous, calm and confident. It is (absent unique and rare circumstances) detrimental to be rude, overbearing, confrontational or obnoxious. (On the flip side, if you intend to be confrontational, then that decision must be based on circumstances that make such behavior necessary/productive for this mediation)
- Be truthful and be accurate
- Don't overstate your position so as to lose credibility
- Be sincere and authentic
- Do have your client attend the opening – whether you represent the plaintiff or defendant (this includes your claims professional if an insurance carrier holds the checkbook)
- Don't discuss general damages, demands or offers – save that for the private sessions
- Don't threaten
- Do lay the groundwork for themes that your mediator will surely reinforce throughout the mediation, themes like compromise, fairness, certainty, a settlement TODAY, conclusion, resolution, the power to control the outcome, the time value of money, et cetera

Another consideration that comes up from time to time is whether the parties should speak during the opening – should a party supplement counsel's comments? I suggest that in some circumstances it can be helpful, or at least not harmful; in other cases, it can be a disaster. I do suggest that counsel discuss the issue with the mediator beforehand, and secure the mediator's perspective on it. I have been in mediations where the plaintiff, for example, insists on making comments. He or she wants to speak, i.e. wants to *be heard*. We are in a confidential setting, and such an opportunity can be cathartic. And if you are the listener in that situation, I recommend that you actively listen to plaintiff's perspective – listen to understand, not to reply.

I also recall a mediation of a wrongful death case, where the defendant-client felt he needed to express remorse for the fact of the death. The risk of harm in expressing that remorse

was low and, in my view, because his comments were authentic and sincere, had the potential to help move the parties to resolution. (That case settled).

The mediation process starts, at the very latest, when you arrive for mediation (hopefully at the maps mediation offices). Everything that happens from that point forward (if not beforehand in terms of educating the mediator, position papers, caucuses, etc.) is part of the process. We mediators “get down to it” from the minute you walk in the door, so I recommend that you approach the opening session not as stumbling block to be skipped over so we can get to the heart of the process, but an extremely useful stepping stone along the path to resolution.

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