THE TRIAL LAWYER'S ROLE IN MEDIATION ADVOCACY

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Opening Statements in Mediation? Go or No-Go Considerations
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A critical decision in preparing for mediation is whether to give an opening statement. Opinions on the utility of opening statements are mixed, ranging from "a complete waste of time and counterproductive" to "essential to the process, as it is your one and only opportunity to talk directly to the other side." I have worked with a number of mediators recently who have encouraged their use. And while opening statements are not always appropriate in mediation, there are times when presenting one can add value and make settlement more likely. Following are factors to take into account as you consider whether to make an opening statement or skip to private caucus sessions in the mediation process.

Educating the Mediator

An opening statement offers the most efficient means to educate the mediator on the nature of the dispute and the issues that need to be addressed to achieve settlement. Exchanging information through the mediator during a series of caucus sessions by slowly dribbling out critical facts and theories may require too much time and create a risk of miscommunication. Making an opening statement helps "cut to the chase" and arms the mediator with arguments he or she can use in the caucus sessions with the other party. Likewise, an opening statement can bring to life for the mediator issues that may not have been clear during the premediation conferences or in written submissions.

Yet you should consider if the information the mediator needs to resolve the case can just as effectively be conveyed through written submissions. For example, issues in the case may already have been thoroughly briefed in the litigation, and the briefs can be submitted to the mediator. The mediator may also allow briefing prior to the mediation session, including ex parte mediation statements. Well-prepared briefs and mediation statements may be sufficient to give the mediator enough information to understand the issues and impediments to settlement in advance of the mediation session. An opening statement, however, will not be educational nor worth the cost incurred if it is simply a regurgitation of what is presented in mediation statements or other submissions.

Educating the Opposing Party

An opening statement also provides an opportunity to advocate your position directly to the opposing party, who may be hearing the strengths of your client's position for the first time. This is particularly germane where you sense that the opposing lawyer is failing to communicate both the pros and cons of the case to their client. Or worse yet, he or she is embellishing and exaggerating the strength of the client's case, and thus has created unrealistic expectations for what is a fair settlement. In any event, it is rare for any lawyer to be as effective in articulating the opposing party's case, and it is often beneficial for a party to observe the strength of the opposing party's advocacy. An opening statement at the mediation will allow you to present the issues directly to the other side and, likewise, to expose your client to the other party's lawyer and his or her presentation.

This approach, however, can fail if the opening statement

is constructed with the sole purpose of trying to persuade the opposition of the correctness of your position rather than to educate them about the evidence in the case, the differing legal theories and the risks of further litigation. You need to get the right balance between making an effective presentation as an advocate for your client's position while, at the same time, communicating an openness to discussion and settlement. Done right, an opening statement can ensure that both sides are educated on the issues and starting the negotiations based on a common understanding.

Personalizing Your Client

In many cases, the mediation may be the first and only time the parties have the opportunity to meet face-to-face. The opening statement can be an opportunity to personalize your client and demonstrate that your client has a rational view of the dispute and is not out to destroy the other side—that there are real concerns involving real people at stake in the mediation. The type of case can impact this consideration. But even in a business dispute it may be important to show that your client representative has a rational view and empathy for the other side's position.

One method of using the opening statement is to have your client take part in the presentation. This could give your client the opportunity to speak directly to the other party without the opposing lawyer or the mediator filtering the message. You should decide whether your client will speak on his or her own behalf during the opening statement and, if so, if the client will present all or only a portion of the statement. Both strategies can help humanize your client, but it must be done effectively or will it be counterproductive in the joint session setting.

Recognizing the Parties' Feelings

An opening statement likely will be ineffective if emotions are running high and personality conflicts exist between the parties and/or lawyers. Indeed, if the underlying litigation has been particularly hostile and having the parties in the same room is nearly impossible, then the costs of giving opening statements far outweigh any benefits. In those cases, the goal of resolving the dispute is probably better served by the mediator, not the attorneys, explaining the parties' respective strengths and weaknesses as a neutral observer during the private caucuses.

But in certain instances, opening statements can be used to assuage the parties' negative emotions. For example, mediation provides an opportunity for parties to be heard and air their grievances, which may be therapeutic and more important to achieving resolution than the magnitude of a settlement payment. Likewise, it may be advantageous to address negative emotions—distrust, anger, resentment, jealousy—head-on in the opening statement to clear the air. It can demonstrate to the other side that your client recognizes that emotional scars need to be healed as part of the mediation process and that it is in the parties' best interests not to let these feelings cloud their ability to resolve the case. Thus, an effective opening statement can defuse negative emotions and start the mediation on a positive note.

Setting the Tone

Finding the right tone for the mediation is beneficial to achieving settlement by making it clear to the other side that your client is not at the mediation to fight but to resolve the case. Recognizing the differing viewpoints in the case establishes an atmosphere for cooperative negotiation. The best way to set the tone in the opening statement is to make conciliatory statements and focus on areas of agreement between the parties. Likewise, if there are weaknesses in your client's case, acknowledging them develops credibility with both the mediator and the opposing party. An opening statement during the joint session may provide great value if it can be used constructively to get the other side to lower its guard and listen.

But be sure your rationale is sound. An opening statement should not be used if it is impossible to strike the right tone. A hostile statement utilizing courtroom theatrics will not get the parties on a path to settlement, but will back the other side into a corner and polarize the proceedings. Indeed, an opening statement is pointless if your client firmly believes the case is frivolous or without evidence or merit. In such circumstances, it is nearly impossible to give an opening that is not going to inflame the opposition. However, candidly showing the other side what you will present at trial if the case is not resolved and utilizing a matter-of-fact tone and soft words can be effective.

Considering the Timing

One factor in determining the utility of an opening statement is when the mediation occurs relative to the stage of the underlying litigation. An opening statement may be more valuable when the mediation occurs early in the case. If the mediation occurs before the case is even filed, an opening statement is almost essential. If, however, mediation is being conducted after or near the close of discovery, there may be little new information gleaned from an opening statement. At that point in the litigation, the mediation is focused more on arriving at a monetary settlement. This is not to say that because a mediation

comes later in the judicial process, an opening statement is not of value because in certain circumstances it may still make sense. Thus, a key consideration is whether the mediation is being conducted as part of an attempt at an early resolution or after the parties' positions have been communicated via pleadings, motions, and discovery in the litigation.

Conclusion

Whether to present opening statements at a mediation is an important decision that the parties should not take lightly. There is no bright-line test for when to give an opening statement; it can set the stage for a successful resolution of the dispute or it can backfire and spoil the possibility of settlement. Addressing the factors discussed above on a case-by-case basis can help you determine whether there is value in presenting an opening statement.

Opening Statements in Mediation: Balancing Between a Throwdown and a Group Hug
Anthony (Tony) Rospert

Presenting a powerful opening statement at mediation plays an important role in achieving success, but you need to reach into your toolbox for more than just a hammer. As American psychologist Abraham Maslow famously said, "I suppose it is tempting, if the only tool you have is a hammer, to treat everything as if it were a nail." Seeing a mediation opening statement as a nail and an opportunity to hammer the opposing side is an unproductive strategy for obtaining a resolution. To be an effective advocate at mediation, use subtlety and finesse in making your opening statement to help foster a constructive conversation with the other side and begin to build an atmosphere of trust and a willingness to compromise.

Mediation is not litigation and making an opening statement at mediation is not the same as delivering an opening statement at trial. Your role in giving a mediation opening statement is to show strong advocacy without creating resentment. Use the opening remarks in a joint session to begin the mediation on a positive note rather than advocating why your client will win at trial. To reach this goal, you need to strike a balance between promoting your client's position and proceeding in a conciliatory manner consistent with the goal of settlement.

But while using an adversarial approach in mediation is generally counterproductive, the skills necessary to be an effective advocate in your mediation opening are similar to those used in the trial context. This article outlines best practices for giving an opening statement in a joint mediation session and illustrates how the same approaches and skills you use to deliver a great opening statement at trial also apply in the mediation context.

Know and Educate Your Audience

The goal of an opening statement, whether in the trial or mediation context, is to use your advocacy skills to begin laying the groundwork for persuading the decision-maker. A skilled trial lawyer giving an opening statement knows the audience, identifies who he or she seeks to persuade and fashions a message that best resonates with the audience. By recognizing who you are trying to convince, you can craft and share the message compellingly.

An opening statement in litigation seeks to persuade the judge or jury. The focus of your opening remarks in mediation should be on the opposing party, who is the real decision-maker, not the mediator or the other party's lawyer. You are trying to convince the opposing party that your client has the better case and that the risk of continued litigation necessitates settlement.

Like a trial opening, an opening statement in mediation should educate the decision-maker on the facts of the case and help persuade them to settle. Too many lawyers decline the opportunity to explain the key evidence and their client's position during opening statements, focusing instead on rebutting the other side's arguments. But this is your best – and perhaps only – chance to educate the opposing party, who may be hearing some of the evidence for the first time.

For example, I have seen lawyers make strong monetary demands in mediation opening statements. They use the opening statement to profess, in an antagonistic manner, that their client will only settle for X, an approach that sabotages the mediation process. Instead of making incendiary and argumentative declarations about damages, the opening statement should clarify for the opposing party the framework your client used to arrive at its settlement position and its method for calculating damages. It may even be appropriate to acknowledge

the other party's injury, followed by a statement that your client should not be responsible for the full amount of damages demanded.

But be aware that using your opening to educate the opposing party can fail if its sole purpose is to persuade the opposition of the correctness of your client's position rather than to inform them about the evidence in the case, the differing legal theories and the risks of further litigation. You need to strike the right balance between effectively advocating for your client's position and communicating a willingness to compromise. Done right, an opening statement educates both sides on the issues and starts the negotiations based on a common understanding.

Preparation Is Key

As in a jury trial, preparing to give an opening statement at mediation is critical to the overall success of the process. Like a trial opening, an effective mediation opening statement takes significant time and effort; you can't wing it. A well-crafted and confidently delivered opening statement goes a long way toward achieving a favorable settlement for your client.

Not only must you prepare, but your opening statement should communicate your readiness to the opposing party. A statement suggesting that you are in command of the case's facts and law and can explain how the case will unfold if the parties do not settle conveys preparedness. This is particularly germane in a case where the opposing side's position is weak; a powerful, evidence-based opening can persuade the party to settle on more favorable terms.

Effectively using visual tools, such as PowerPoint, underscores your command of the facts and that your client is prepared to litigate if the case is not resolved. Your presentation should highlight the key evidence by showing snippets of deposition testimony and documents you will use at trial. Using PowerPoint can help you convince the decision-maker that you are prepared and ready to go to trial if the case is not settled at the mediation. If you approach mediation seriously with your eye on a trial, you will increase your chances for settlement.

A word of caution: Using case citations in a PowerPoint presentation can backfire. Relying on citations can alienate your primary audience – the opposing party – who is unlikely to understand the nuances of case law or appreciate the significance of precedent. Instead, focus on the facts and evidence, which is more likely to resonate. Also, be selective in using PowerPoint. If your slide deck is not concise and the presentation drags on, it can antagonize the other side rather than educate them and show that you are prepared.

Finally, you should explicitly state in your opening that you and your client have spent significant time preparing for the mediation and that you have a desire to act in good faith to resolve the case.

Coming to mediation with a carefully crafted opening statement can help you impress the other side by illustrating that you are a skilled and talented trial attorney who will make an even more compelling argument for your client in the courtroom, which can greatly increase your chance of reaching a settlement.

Set the Right Tone

Tone is critical when delivering an opening statement for litigation or mediation, and it's important to understand the difference. An opening statement at mediation should be a conversation, not a trial argument you would deliver to a jury. A mediation opening statement requires a level of refinement and measured temperament. You fail as an advocate in your mediation opening if you set an adversarial tone by trying to convince the participants of the absolute correctness of your client's position and the baselessness of the opposition's. No one likes to be told that they are wrong or that a court will never accept their legal position. Such an approach will not encourage compromise.

Rather, your opening statement should encourage the opposing party to lower its guard and avoid provoking an aggressive response. You can accomplish this by setting a positive tone and avoiding statements that will elicit a strong negative reaction. A good trial lawyer has the skills necessary to make an effective presentation without creating resentment and the ability to foster an atmosphere of trust and willingness to compromise.

How do you do this? It is important to avoid exaggerating and using tactics that convey the impression that you are merely engaging in chest beating and table pounding. Instead, speak with conviction and emphasize the strengths of your client's case, but avoid melodrama and theatrics.

To set the right tone, you also need to be careful about how you characterize the other side's position. Show the opposing party that you understand their position and arguments by referring to key points in their mediation statement or filed pleadings. And if possible, emphasize in your opening statement areas of agreement between the parties before highlighting points of disagreement.

When discussing areas of disagreement, it is important to concede that the other side makes some valid points to consider and state that you hope they will recognize that some of your arguments have merit as well. The goal is to confront your weaknesses and be conciliatory where appropriate by acknowledging the other side's strengths, then weigh the uncertainties of those strengths against the law and facts of the case.

Be explicit about your purpose. Stress that you and your client are not at the mediation to be adversarial, but to work with the opposing party to resolve the dispute. It may also be appropriate in the opening statement to address any negative emotions, known resentments and/or levels of distrust between the parties. By personalizing each side and emphasizing that the case involves real people, you can help defuse tension and encourage the parties to work toward a resolution.

Conclusion

Avoid the urge to use a hammer at mediation. While the advocacy skills necessary to give an effective mediation opening statement are similar to those used in the trial context, you need to have the right touch to engage the opposing party in a civil discussion about the merits of the case. Your mediation opening statement should not be used as a dress rehearsal of your trial opening. It can be forceful and show conviction by suggesting what will happen if the case does not settle and stressing the risks of further litigation, but it also needs to foster a tone of cooperation and express your hope to resolve the dispute. Like a trial lawyer, an effective mediation advocate uses an opening statement to communicate preparedness, conviction and a desire for justice, but refrains from overselling their case and creating atmosphere of adversity by using a hard-driving approach.

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As a partner in the Business Litigation group, Tony helps clients overcome legal obstacles to protect their assets and manage litigation risk in pursuit of their strategic goals. He believes that a big part of his job is assessing risk for his clients to help them make the best possible decisions. Tony also views himself as a legal quarterback for in-house counsel who matches his clients' needs with Thompson Hine's resources to ensure success.

Tony has a passion for helping his clients succeed by treating them like his best friends by being loyal, well-connected and honest with them about the strengths and weaknesses of their legal positions. As a result, clients rely on him as a "go-to" litigator for their most significant matters.

Tony focuses his practice on complex business and corporate litigation involving financial services institutions, private equity firms, real estate development and management companies, commercial and contract disputes, indemnification claims, post-closing disputes in mergers and acquisitions, shareholder actions, business transactions, class actions, and directors and officers (D&O) litigation.

Litigation can be time-consuming and costly, so for many disputes it may be more effective to seek methods of resolution other than traditional court litigation. Although Tony has an impressive record of courtroom achievements, he seeks to optimize case outcomes while managing the costs, time and stress of a lawsuit by regularly using arbitration, mediation and other forms of alternative dispute resolution (ADR) as pragmatic ways to meet his clients' needs.

Outside the courtroom, Tony is a certified BBQ judge and judges 7-10 sanctioned competitions per year.

Practice Areas

- Business Litigation
- Securities & Shareholder Litigation
- Environmental

Presentations

- "Maturing Market for R&W Insurance: Transaction and Claims Experience," Association of Corporate Counsel, October 3, 2019
- "Is Mediation the New Jury Trial? Approaches and Strategies to Effective Mediation," Celesq, May 21, 2019 – Audio I PDF
- "The Art of Argument: Using the Pixar Storytelling Formula to Persuade Judges and Jurors," Celesq, December 14, 2018

Distinctions

- Benchmark Litigation 40 & Under Litigation Hot List, 2019
- Crain's Cleveland Business Forty Under 40 Class of 2013
- Listed as an Ohio Super Lawyers® Rising Star in Business Litigation, 2009, 2010, 2013, 2016 and 2017

Education

- Vermont Law School, J.D., magna cum laude, senior editorial board, business manager, Vermont Law Review
- John Carroll University, B.A., magna cum laude, Outstanding Political Science Major