

Mediation Opening Arguments Should Not Be A Throwdown

By *Anthony Rospert*



Law360 (February 13, 2019) – 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.

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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

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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

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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 an atmosphere of adversity by using a hard-driving approach.

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