

Opening Statements in Mediation? Go or No-Go Considerations

BY ANTHONY J. ROSPERT

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 be counterproductive in the joint session setting.

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*“If he can settle
a prison riot,
he can settle
anything!”*

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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 statement 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.



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