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Opening Statements In Mediation Talks Are Often Missed Opportunities

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FORUM COLUMN

By Robert A. Steinberg

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When parties meet to talk settlement, they start with certain courtesies and formalities. They do not just plunge into bargaining. Instead, they recognize the need to soften each other up, to *humanize* each other and begin persuasion before negotiation hardens them.

Yet this rarely occurs between the parties in mediated settlement talks. Rather, the tendency is to rely on briefs and proceed directly to private caucus. In that setting, the mediator and the parties may engage in these formalities, but the parties rarely deal directly with each other. This is a missed opportunity.

Encourage the mediator to begin with a joint session where you can make a mediation opening statement. The purpose of the opening statement is not to persuade the mediator, but to begin to persuade the other side. You achieve this goal by including a series of elements in your opening statement designed to establish your credibility with the opposing party. The following is a description of mediation opening statement "do's" and "don'ts."

Begin by re-introducing yourself to the other party. He or she may know you only as his or her deposition interrogator. This is your opportunity to humanize yourself to the other party and assume (or appear to assume) a more cooperative role. State how you would like others to address you and ask how the other party might wish you to address him or her.

Introduce your clients and explain who they are. If your client is a representative, explain her role with your client and that she has full authority. You will lose credibility if you committed in advance that full authority would be present and it is not. Avoid that.

If you have anything in common with the other side, you may want to mention it and touch them on that level. Smile a lot and look the other side directly in the eye when speaking.

State your belief in the mediation process. Clients can be uncertain at their first mediation. If you sincerely state your belief that mediation can help settle the case, the other party may absorb some of your confidence.

State that you and your client are there in good faith to resolve your case. This part can be tricky - you do not want to sound disingenuous or insincere. Still, a genuine expression of desire to settle can be helpful.

Emphasize that you are prepared to listen and work through problems. You are not there to impose solutions, but rather find them in a cooperative way.

Emphasize your belief that settlement will be in everyone's interest. Perhaps acknowledge the wastefulness of litigation to both sides, both in terms of actual costs, time away from more profitable pursuits, consumption of personal time, opportunity costs and similar factors. Be clear that you are speaking for both sides, and that both sides will benefit by settlement.

Acknowledge, where appropriate, your awareness of the parties' strong feelings and state you do not want to embarrass, upset or anger the other party. But be careful not to say you understand the other side and its feelings. People sometimes

do not like being told someone understands their feelings. Sympathize; do not empathize.

Express sympathy if your case involves an injury or death. But do so with all your skill, care and sincerity, as such statements can easily upset the other party.

Explain to the other side that you have thoroughly and objectively evaluated the case. You might mention that you will discuss your evaluation with the mediator, and you may authorize the mediator to share your evaluation with the other side (including your approach to valuation) in the course of the mediation.

Outline to the other party your position, the basis for your position, and the fact that you may have a good faith disagreement about such issues. This is your best opportunity to show the other side that there is reason to your position and that the possible trial result, in view of the reasonableness of your position, is uncertain.

Consider whether and when to provide documents or case law to the other side. The opening during joint session is often a good time to exchange important evidence or case law. The other side can then retire to private caucus to review and consider this information. Sometimes such information can disrupt the other side's pre-mediation position.

Close by emphasizing your willingness to listen and work through problems, and your hope that, with effort and patience on all sides, an agreement may be reached. Again, humanize yourself and your client and express a cooperative spirit. Emphasize the importance of effort and patience, since many mediations begin with competitive bargaining.

Never discuss money in your opening statement. Communicate your offers through the mediator in the private caucus phase of the mediation

Never personalize matters in your opening statement. The parties are there to jointly solve a problem. If you make the person the problem, you will not achieve a settlement.

Avoid absolute words, such as "won't," "never," etc. This is just part of effective communication.

Do not refer to the other party by first name unless you have asked for permission to do so. Do not assume that, because you will use your first name, others are implicitly agreeing to be called by their first names.

Do not insult or criticize the mediator - especially in the other side's presence. The mediator's stock-in-trade is his reputation and integrity and his ability to bond with each side. If you criticize him or her - in front of your client or the other side - you may make it impossible for the mediator to do the job. You would be better simply to end the mediation at that time.

Anticipate volatile issues and do not make comments to the other party that will trigger strong emotional responses. You will not be persuasive if you provoke the other party. You want to show sympathy and understanding, so the other side will listen to what you have to say. If you upset them, they will shut their ears.

Never undermine the other party's or other counsel's dignity. Again, this is counter-productive to your purposes.

Do not engage in theatrics. Theatrics are for the courtroom, not the negotiation room. Theatrics will undermine the credibility you have been trying to create.

The mediation opening statement can begin the process of persuading the other side to accept a realistic settlement. Use the techniques described in this article to make the opening statement work for you.

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