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Don't Forego the Opening Statement!

I had the pleasure of co-presenting a seminar to the ADR and Trial Lawyer's Sections of the Florida Bar at the Winter Meeting in January. The purpose of the seminar was to teach trial lawyers how to become more effective mediation advocates. Why am I going across the state and to law firms teaching mediation theory? Because no one is predicting that the frequency of trials will increase. If trials were a traded stock, you would probably short them. Mediation is value stock. Mediation provides tangible benefits to litigants in short order.

You would be surprised at the difference in mediation practice, even in supposedly progressive and high-profile jurisdictions like California. In truth, mediation practice in Florida is highly evolved compared to other jurisdictions. I had occasion to mediate in California recently, and some of the lawyers were suggesting that we dispense with opening statements in a contentious dispute, and the mediator was equally willing to dispense with the joint session. Why would you want to give up your opportunity to speak directly to the opposing party? I think for some lawyers it is because they are uncomfortable speaking informally and in the language of negotiation outside the constraints of rules, discussion of governing law and procedure. Law and procedure have nothing to do with the opening session.

Some people naturally desire to avoid conflicting personalities and unpleasantness in opening session, which, on one level, is understandable, but that natural impulse has to be squelched. Opening sessions are critically important for ensuring that everyone has the same facts and that we try to eliminate erroneous assumptions, dispel rumors and bad

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facts. You cannot easily negotiate when the facts are horribly misunderstood, The opening statement is a wonderfully efficient way to discover immediately what the other side knows and thinks and to identify factual inconsistencies or discrepancies. Discovering your facts and assumptions are wrong, or educating the other side to cure their misperceptions, is hugely important in developing a baseline consensus that can lead to a deal.

If you travel out of state or you are with an inexperienced mediator and the parties want to forego opening statement, don't do it. Use the opportunity to educate yourself, see the other side, watch the dynamics. Use the opening session to probe, to question. You might find out that the other side has a few valid points and your client has not been entirely forthcoming. Maybe the elements of damage include some items you overlooked. There is always information to be learned in opening statements. At a minimum you can assess whether opposing counsel is an articulate and compelling public speaker or an off-putting troll with a horrible speaking voice. Opening statements are a rich source of information if you tune in, ask questions and actively listen. You have to be comfortable sitting during an uncomfortable conversation to get the value out of opening sessions. That which is tough is usually good for you. Think of opening session like group therapy for your case – because it is.

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