

September 2015

Don't Close the Door to the Advantages of Opening Session

From time to time in a mediation, one or both attorneys will suggest dispensing with the joint opening session, where all of the involved parties sit together to offer their version of the case and to exchange information. Typically, the request to dispense with opening occurs in emotionally charged cases (e.g., death of a young child, sexual harassment) or in situations where there is great animosity between the parties or counsel. Sometimes, the request is for less compelling reasons, such as "to save time" or "I've heard it before." While a mediator cannot compel a party to sit in a joint session, opening statement is a powerful opportunity for attorneys and claims professionals that should not be overlooked.

My rule is this—if there is a possibility of great upset, outrage or concern over the safety of the participants—anything that could seriously derail the process—then I will readily accede to a request to dispense with a joint session. However, if the reason for dispensation is not compelling, I will push back because it can be hugely beneficial.

The fact is that some unpleasantness, discomfort, anxiety and uneasiness is good! Clients should be made to feel that in the absence of settlement they are "stuck together" in a lawsuit. If they cannot tolerate 20 minutes in the same room during the opening session, how are they going to feel about a two-week trial sitting a few feet apart? As a mediator, I take note of the clients' level of comfort, and if there is an uncomfortable opening session, I may hark back to "how that felt" when speaking to the parties in private caucus. This can sometimes promote concessions that help further settlement.

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Joint sessions are usually more helpful than you think. Corporate parties become humanized. Claims professionals get a good chance to evaluate the plaintiff's demeanor. Opening session also provides an opportunity to eyeball the opposition—how does your lawyer interact with opposing counsel? Are there non-verbal cues suggesting a willingness to make a deal?

As a litigator, this is your only chance to speak directly to the opposing party or insurer with no filter. That is a valuable opportunity if you are trying to convince someone to make a deal and impress upon them the key aspects of your case that they may have overlooked. I have seen defense counsel use opening very effectively to show respect to a personal injury plaintiff and speak to them in a cordial way that promotes settlement. Plaintiff's counsel may give the insurer or opposing client information their own attorney had not conveyed or to date considered important.

Explain the benefits of opening session to the mediation client, and gauge their reaction. Bring concerns to the attention of the mediator well in advance so that all parties and the mediator can formulate a plan for the start of the mediation process. A robust opening session can lead to a more efficient—and more effective—mediation for all parties concerned.

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