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Opening Sessions and Other Oddities

A subject of great debate in mediation is the value of opening statements. The arguments against opening statements in some jurisdictions principally echo the belief that, 1) joint session is unnecessary because the parties already know most of the facts and issues, and 2) one side or the other may be hostile or argumentative and, therefore, dispensing with opening statement and keeping the parties separate tempers the anticipated hostility. These arguments are premised on a few assumptions that do not stand up to close scrutiny.

It is by no means safe to assume the parties understand all of the facts and issues and, therefore, a joint session is not an efficient use of time. While the lawyers may well understand the litigated case and legal issues, there is a host of facts and factors that are not legally relevant in a litigated context but hugely important in mediation. These include facts that reveal emotional, psychological and economic interests beyond the four corners of the lawsuit that surely influence settlement and which are important to clients and the deal. An agreement may hinge on considerations that have very little to do with the verdict form, law or evidence. Moreover, just because the lawyers claim to know the case, the parties usually don't! The exchange of the other side's "truth" can be very revealing. Each party benefits from hearing the case from the mouth of the adversary or their counsel. You also do not know if opposing counsel has accurately or thoroughly reported the

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development of the case to the client. You want to communicate your message and frame the litigation in a way the other side had not heard. It is not uncommon for one of the parties to hear something new from their own attorney! The notion that opening session is a waste of time because the facts and issues are known is horribly misguided and limits you from receiving new information.

The suggestion that we should dispense with opening as a matter of routine practice is inconsistent with our traditional way of mediating in Florida, but it happens in many states. Those who favor its elimination may argue that the parties (or more likely the lawyers) are so obnoxious they cannot be expected to behave or communicate in a manner that is conducive to settlement. This is dubious thinking on two levels. Why are we foregoing a useful opportunity to connect and communicate—because lawyers cannot act civilly or instruct their clients to keep provoking comments or hostility in check? And are the mediators in those jurisdictions incapable of managing the room when things do get heated? Is this a common occurrence or merely justification for avoiding an “uncomfortable” moment where adversaries have to sit in the same room? That is like justifying a one-hour walk to school because there are bullies on the bus, rather than dealing with the bad behavior and inadequacies of the bus driver that underlie the problem.

Of course, there are cases where tensions are high or the facts warrant separation (e.g., allegations of molestation, intentional battery, etc.). But one of the benefits of opening session is to see how people behave. In many cases, one cannot eliminate the demonization that might have occurred over the course of the dispute. The parties may have a view of the opponent or opposing counsel that is shaped by wildly-clouded misperceptions. One of the best parts of mediation is when both sides see the other is “not so bad after all” and begin—if only just a little—to empathize with the other side’s plight. That only happens when they can see

the other side both literally and with the mind's eye. It is hard to build trust among those who cannot see each other (that's why even in wartime, governments negotiate in person).

Used correctly, the opening session can set a favorable tone and create a sense that all parties have a shared challenge and a common goal. There are more benefits to a joint session than can be discussed in this article. If you travel outside Florida, be sure to ask the mediator if a joint session is anticipated, and do not willingly give up that opportunity. If your client is less than thrilled with the notion of a joint session, take time to sell them on the benefits of this rare and valuable opportunity.

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