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## Why Opening Statements Matter

I write and frequently speak about the joint session and opening statements in mediation because I firmly believe they can make a significant difference in the outcome. Once, after a cordial and respectful opening statement by a defense attorney in a personal injury case, the plaintiff's attorney told me in private caucus that he appreciated the opposing counsel's respectful tone and demeanor, and he asked me to convey those sentiments to defense counsel. He also told me that a respectful opening gives him more client control. Lawyers may see opening statements as some perfunctory "talk," but for the clients this is often a novel and anxious experience. The words matter.

Assuming you conduct a typical joint opening session, it's important to use your time wisely. This is most likely your only opportunity to address the opposing party directly – with no filter. Keep it impactful, heartfelt and short. Long-winded openings can become long-winded apologies. Find something you all can agree about and articulate that, then pick three or four key points, and end it on a positive tone. No one can remember more than three or four key facts in an opening session anyway. There will be time later to educate the mediator and other side on the minutiae if you must.

Prepare your talk but be ready to improvise. Read the room and look at their reactions. If the person you are trying to engage is tuned out or indifferent, switch gears and ask a question. "What would you like to know?" "What can I tell you about my client?" If you are representing a plaintiff in a

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fairly typical personal injury case, look for the fact that makes your plaintiff memorable. If you are on the defense side, humanize the corporate defendant or insurer. During football season I ask the parties who they cheer for on the weekends. Most everyone has a favorite team. You are looking to connect on some level that makes you seem credible and reasonable.

Don't feel the need to rebut every point the other side makes. Here is an effective rebuttal message: "Defense counsel has and I am sure will continue to raise all of the legal defenses he has just articulated, but I am not sure a list of affirmative defenses is going to settle this case today."

Insults and vituperative comments are unethical and just dumb. I continue to believe that the most effective mediation advocate is respectful, avoids hyperbole and any condescension directed to the other side. Your goal is to motivate the person with the checkbook to write a check or accept your money – not dislike you to the point where he or she resists doing so.

If there are multiple defendants you must be prepared to address each one in a specific way. You cannot ignore a defendant through much of the litigation, then again in opening session and then realistically expect and demand they pay some significant percentage of the settlement at 4:30pm. Plan your comments at mediation accordingly. If you have largely ignored a defendant during the litigation process, you must address their risk and exposure in your premediation submittal and give them a reason to settle now.

If you have just won a significant ruling you should resist the opportunity to rub their nose in it (although some lawyers cannot help themselves). Pointing out the obvious just makes you look mean-spirited and snarky. The mediator can talk at length about the "bad ruling" in the private caucus and get whatever leverage is to be had from this event. In fact, ignoring the interim victory from a recent hearing or in a written ruling when the opposing side expects you to raise it

may be the most disarming way of approaching the issue.

Opening statements are your opportunity to shine, to impress, to persuade without being pejorative and to demonstrate confidence without cockiness. Plan your time and thoughts. Effective opening statements pay dividends later in the day.

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