

Opening Comments: A Key Strategic Decision In Mediation

By **Jann Johnson and William Haddad** (December 11, 2018, 12:41 PM EST)

There are good reasons for and against making opening comments in mediation. How do you decide which approach is better for your case? This article offers a framework for making this important strategic decision by outlining the associated risks and the benefits of each option, and providing tips for going forward with either option. In addition, more modern and abbreviated “hybrid” options for opening comments are discussed.

Opening Comments: Yes or No?

Arguments For Opening Comments

Presentations made with the proper content and tone can diffuse pent-up emotion or hostility and pave the way for a successful resolution. They give parties information and a preview of how the case might play out at trial. If a client has been prepared to speak, it gives counsel a glimpse of how the client might perform on the stand.

Stating or at least acknowledging in a neutral manner that one side has suffered a real loss, followed by the facts and the law, your position and why both parties face risks if the case were to go to trial, makes for a well-crafted opening. Opening comments give the parties the unique opportunity to speak to each other face to face, and also arm the mediator with information for private caucusing later. If you are not sure that opposing counsel has sufficiently advised their client about the weaknesses of their case, opening comments are a means of communicating this information.

Arguments Against Opening Comments

A presentation can potentially do more harm than good if delivered in the wrong manner. Opening comments may be considered meaningless because counsel believe they are fully aware of the other side’s position — considering it an unnecessary waste of time.

These presentations can potentially lock parties into psychological positions. If opening comments are accusatory or insulting, the other side may deem settlement impossible under the circumstances. If neither side points to the validity of any point in the opposing party’s claim, the presentation may not be



Jann Johnson



William Haddad

"listened to" by the other side, and parties can effectively shut down before the mediation begins.

If a decision is made to prepare a client to participate in opening comments, it may backfire. Even a well-prepared client may present poorly and embolden opposing counsel. Further, there are times when so much animus exists between the parties that they could not possibly be in the same room together for opening comments.

Whether you make a strategic decision to go ahead with opening comments or not, there are additional action items to keep in mind as you proceed.

If Yes, Then...

Prepare Your Client

Prior to mediation, the attorney has played the role of zealous advocate for their client. Carefully explain to your client that advocacy in mediation is different, because as their attorney, you work with a neutral mediator to negotiate with — not persuade — the other side. Explain the risks of making opening comments. Discuss with your client their interests, needs and wants.

Opening comments will not sound like an opening statement at trial. The client needs to know this well beforehand. Ask your client if there is anything he or she wants you to cover in the opening comments. If you think that strategically it would be a good idea to have your client make any remarks, prepare them for this as well.

Be Civil and Be Prepared

If the attorney displays civility, chances are the client will follow suit. One of the many reasons that you may have chosen mediation is that you have identified troublesome issues or facts that do not bode well for your client at trial. Be prepared to deliver, in a positive and civil manner, clear opening comments.

Cases have settled quickly in mediation because the other side heard an effective presentation and concluded that a proposed deal is better than the likely alternatives. Civility in the opening comments and throughout mediation will help move the negotiation process along, while losing control or attempting to vilify the other side will not.

Listen Like You Mean It

It's not difficult to tell when someone is not listening to you. If you want the other side to listen to your opening comments, listen to theirs. You might learn something or gain a broader perspective on the case.

Remember that your client will listen to opening comments with ears that have not become deaf to the case, and may hear things differently, providing additional insight. Your client might also feel differently if encouraged to listen carefully to the other side. Listening could be the key to settlement.

If No, Then...

Prepare Your Client

Make sure your client understands what you are giving up, and what you believe you will gain by not making opening comments.

Clients must understand the role of the neutral mediator and how your role as advocate in mediation negotiation will be different from your role as advocate in litigation. Explain the caucusing process — parties will be in separate rooms with the mediator shuttling between rooms. As stated earlier, discuss their interests, needs and wants before mediation.

Use the Time Saved Wisely

Without opening comments, parties have more time for the negotiation process. This may be a significant benefit if counsel or parties are unfamiliar with mediation or if offers and demands are at opposite ends of the spectrum. Mediation is a process, and some cases simply take more time to work through the issues to reach resolution.

Without opening comments, the mediator has more time to deal directly with new or emotional issues that were not identified prior to the mediation. Having extra time to work through the kinks in negotiation can be a significant benefit on the day of mediation.

Use the Mediator Wisely

Not making opening comments also gives the parties more time with the mediator, which may help build trust among them. Studies by Poitras, Bowen and Byrne (2003) and Goldberg (2005) have found that a key factor in a successful mediation is building trust with the mediator. Some of the messages counsel would have delivered in opening comments now must be delivered by the mediator. That is why selecting a trusted mediator and establishing this trust is incredibly important.

A trusted mediator will have the efficacy to do a reality check with the parties, if needed. They can also convey valid points from the other side that might be met with a defensive response. An experienced mediator will be able to help each side listen and understand why a point might have legitimacy or why there are risks in taking the case to trial. Using the mediator wisely will move the negotiations along in the right direction.

Alternative Approaches

There are alternative approaches to opening comments that fall between these two mutually exclusive approaches.

Mediation is a dynamic process. Parties come to mediation because it gives them more control over their dispute. They collectively choose the mediator and agree on the ground rules to be used in the mediation. In addition, they choose how the mediation will unfold.

Since mediation is dynamic, parties can agree to a process that falls in between making opening comments and not making opening comments. These pared-down, hybrid approaches streamline the presentation process.

One approach allows both sides to speak directly to the other side with less inherent drama and formality. The parties agree to a limited amount of time and agree to the parameters for their short presentations. Both sides also agree to end their opening comments by expressing a willingness to

negotiate in good faith and work toward resolution in the mediation. This alternative is efficient and less time consuming than preparing for and delivering traditional presentations.

Another approach, should the parties agree to forego a formal opening, is for the mediator to conduct an informal meet-and-greet. The mediator brings together attorneys, clients and key participants in a relaxed gathering to get acquainted without adversarial posturing.

A third contemporary approach involves more mediator participation in opening comments, but it also captures efficiencies. Each side makes a brief statement regarding their willingness to negotiate in good faith. Then the mediator — who has read submissions from both sides — recaps their respective positions and the issues to be mediated, and provides a quick overview of how the mediation will be conducted.

Whatever approach parties select, counsel is well served in taking time to work through the decision regarding opening comments. It is a critical strategic choice that can impact the success of the mediation.

Jann Johnson is executive director of business development at ADR Systems LLC, and a former business and employment attorney.

William J. Haddad is a mediator and arbitrator at ADR Systems, and a former trial judge in the Circuit Court of Cook County, Illinois.

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