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## Opening statements: A benefit to both sides in mediation

**T**rial lawyers would agree that a well-prepared opening statement can often lead the way to a successful outcome in a contested matter. Yet many of those same lawyers believe that opening statements have no real value in mediation.

Common responses to the suggestion that each party give a short, non-adversarial opening statement are that everyone is familiar with the facts and the arguments, the parties are too emotionally involved in the case, and that clients do not want to see the other party.

I agree that opening statements may not be appropriate for every case, as they can prove to be very harmful for some matters. However, their failure is often due to attorneys approaching the process with the adversarial mindset typical of advocacy in litigation.

My experience leads me to believe that a well-prepared opening statement at the outset of a mediation session can pave the way to a successful resolution of the client's dispute.

An opening statement in mediation should not be addressed to the mediator or the adversary's lawyer. Rather, your audience should be the decision-maker for the other side. Additionally, the focus of your opening statements should not be to vindicate your client's position but to demonstrate that each side faces risks if the matter is fully litigated. This

approach will require litigators to acquire a new skill set for mediation that focuses on negotiation, not persuasion.

Here are some ideas to consider when making your next opening statement in mediation.

### Remain civil

There is no reason to vilify the other side. The reason you chose mediation is most likely that you or your client have identified facts or issues in the case that may be somewhat troublesome to your position. Emphasize your case's strengths not from your perspective but from that of a jury or judge.

Suggest that certain contested factual or legal issues will be decided in your favor, while acknowledging that outcomes in litigation are never guaranteed. Consider conceding the truth of facts that may be harmful to your position. If possible, offer neutral facts that will minimize any potential harm.

Remember, the opening statement sets the stage for a negotiated resolution of your client's dispute, not a vindication of his or her position. Further, demonstrating civility in the opening statement sets the right tone for the upcoming mediation.

### Build trust through understanding

It is equally crucial to demonstrate that you and your client understand the other side's position. Where appropriate, acknowledge the life-changing effects the incident may have had,

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or their right to be angry about what they believe your client did.

If liability is not the issue, consider accepting responsibility for the incident, understanding that such an admission is protected by the confidentiality of the mediation process. Perhaps an apology for causing the incident would be appropriate. Confirm in your opening statement that you are here to work with the mediator and the other party or parties to find a way to resolve the dispute that will be satisfactory to all.

The more you acknowledge the other side with understanding, the more easily it will be to build trust, a key element in successful negotiation.

### Be reasonable and listen

For the opening statements process to be successful, actively listening to the other side's comments is just as important as effectively delivering your own.

Showing that you are actually taking in what the other side has

to say builds good rapport and shows that you and your client are capable of being reasonable. If the other side sees that you are listening, they will be much more likely to be reasonable and consider your position in return.

To demonstrate that you are listening, reiterate the points that the other side makes in their opening statements and express understanding for their position.

Even if you disagree with the other side's comments, you should remain neutral and be aware of confirmation bias, or the tendency to interpret information in a way that supports one's own ideas. Negotiation is never one-sided and often breaks down when parties come to the table with their minds made up.

### A new approach

The primary purpose of opening statements in mediation is for each party to clearly lay out the context of the dispute and their position in the matter. However, opening statements can also be the most important step toward successful resolution when attorneys bypass their roles as litigators and approach the process as negotiators.

Demonstrating civility, understanding and actively listening to the other side builds a spirit of cooperation between parties that is necessary for success. Utilizing this approach will allow you to be a more effective advocate in mediation, benefiting both you and your clients.