

Mediation Strategies

The Advocate's Opening

Getting More for a Client in Mediation Starts with the Opening Statement

By Lee Jay Berman

There is a bright line differentiating client advocacy in mediation from other forms of client advocacy. Good lawyers know the difference and are getting much better results from mediations than those who do not make this important distinction. As the legal community evolves in the effective use of mediation as a case settlement tool, it is becoming clear that attorneys' opening statements in a joint session play a vital role in their client's success in that mediation.

In most general civil cases, a good mediator will still take all participants through a mediator's introduction in order to set the tone, and disarm any adversarial or inflammatory tendencies. Although most advocates have heard this introduction many times before, it is meant to remind counsel and educate clients that all participants share an interdependence in the success of the mediation: each person came to the mediation looking for something, even if just a signed release, and the people sitting around the table are the ones who hold what each participant seeks.

Additionally, the mediator's introduction gives the advocates permission to be more congenial so their clients understand why they are not being the zealous advocates the clients might otherwise expect. It helps the clients understand that if counsel can be perceived as fair by their opposition, they are better positioned to settle the case.

While this may not be possible in all cases, successful mediations that leave clients satisfied with their representation, begin with well planned opening statements by the advocates. The most effective opening statements persuade and even "win over" the opposition.

What follows are some examples from attorneys' opening statements that have worked wonders for their clients.

- Seasoned advocates understand that they are negotiating from the very outset. They are setting the tone for the negotiations from the time they set foot into the room. Little things like standing to shake the oppositions' hands and commenting that it is nice to see them again, or thanking them for coming all start winning points - points that will go a long way toward getting a client what they want. Nothing is less effective and loses more credibility than an attorney who is offensive, argumentative or arrogant in an opening statement, and then later tries to persuade the other side. Advocates must understand that everything they do during their opening statement lays the groundwork for the day's negotiations. In cases where caucus is utilized for the majority of the day, the picture that

the other side holds of an attorney is generally that picture given to them by that attorney's opening statement. In order to get more of what your client needs from them, make it a good picture.

- Complement the other side. One of the most effective opening statements was delivered by a plaintiff's attorney in a medical malpractice case against a large hospital. Rather than starting by blasting the hospital that had clearly had a problem in this case, this very seasoned and very successful attorney began by telling the hospital that they were one of the premier hospitals in the area. He went on to say that when his parents were ill, this was this hospital that he took them to because he had such faith in the hospital and its well-earned reputation. He had researched the defendant doctors and expressed that they had impressive credentials and were extremely well respected. He assured the defendants that he was not there to tear down either the hospital or the doctors - that instead, this was a case of a simple, unpredictable mistake. He was very deferential to the defendants and treated them with the respect that he knew they thought they deserved. In the end, they rewarded his respect with a tidy settlement. One that he clearly could not have obtained had he begun in adversarial mode by berating the defendants for allowing this mistake to happen. What he did was earn their respect and allowed them to save face. By anticipating that most people and institutions hold themselves in high esteem, he earned credibility with them, which can sometimes be a challenge for plaintiffs' counsel in med-mal cases. He also disarmed them and alleviated their inherent need to defend themselves and to attack him back. Finally, the plaintiffs' attorney was able to have the defendants concentrate more on his facts, rather than feeling the need to deny and defend everything. He did so well that they confidentially admitted to liability in their opening statement. That only happens when they trust opposing counsel. Thanks to his respectful opening statement, they did.

- Empathize with those who deserve it. In another medical malpractice case, the plaintiff had checked her elderly mother into the hospital. The mother never left the hospital, passing away while under the hospital's care. After the plaintiff finished her opening statement, the hospital's insurance adjuster shocked the room by offering to speak next. This seasoned adjuster told her own personal story of checking her mother into a hospital and how her mother never came home either. She said that she too was still recovering from it. Eventually, her attorney began to speak. As his hands began to shake, and his eyes welled up, all he could say before his voice broke was that his personal situation was still too fresh and that he was not yet able to talk about it, but that he understood what the plaintiff was going through, and that he could empathize with her completely. Needless to say, that case settled within 45 minutes - and for exactly what the hospital's risk manager had previously authorized. Everyone was happy, but none more than the plaintiff, whose own adult sisters had not backed her in this litigation, and who needed the support of someone who understood her plight. In this case, she found two. And she found them in the defense's opening statement. Case closed.

- Presenting the client. Seasoned counsel understand that in addition to presenting their case at a mediation, part of what they are doing is presenting their client. Preparing the client to make an opening statement, or to take a specific or strategic role in the opening,

is important to the mediation's ultimate success. One effective technique is for the client to speak to the technical aspects of their business. It is often tempting for counsel to take this role, but by leaving it to the client, counsel can allow the client to shine.

Professionals who deal with mediation regularly can sometimes underestimate the discomfort the process can cause clients. This approach makes it easier for them, significantly increasing the chance that they will present well and appear credible to the opposing party. A credible client means a better outcome at the end of the day.

In summary, it is critical that mediation advocates understand that opening statements in mediation are an opportunity to begin to get what the client needs from the other side, and that trial advocacy tactics will have exactly the opposite effect on achieving that result.

Good luck and much success in your upcoming mediations.