

Mediation Strategies

Mediators' Opening Statements Offer Insights for Successful Results

By Lee Jay Berman

After fighting traffic, finding a parking space, and locating the mediator's suite, you hope your client is on time. You walk in to find opposing counsel with her client, already looking at home. You greet them politely, and search for your client. Finding no friendly faces, you use this opportunity to step out and call your client on his cell phone - and to regroup. Your client walks in as his voicemail answers, you chat for a minute, and the mediator comes to get you both to begin.

You are prepared, having rehearsed your opening statement in the car. You spoke with your client about what to expect and what to say, if asked by the mediator. Right when you are set to begin, the mediator launches into a monologue.

Why do mediators always do this? Why the need to give a speech? After hearing a hundred of them, why should lawyers pay attention?

If nothing else, it provides the opportunity to leaf through the file to locate some precise information to beef up your opening. Doing that might be a mistake, though. There is much that can be learned from a mediator's opening - about the process, about that mediator, and about how to maximize your outcome.

- **Size up the mediator.** One problem is that if you have not worked with a mediator before, you may know very little about him. Mediator selection is different than it was even two years ago (see *Choose Carefully: All Mediators Are Not Created Equal*, Daily Journal, December 19, 2002). Today, it is popular for counsel to allow the other side to select the mediator, with no questions asked. After all, it is a non-binding process. The problem with that method is that it tends to give us little more than a mediator's C.V., website, or perhaps word of mouth from around the firm. That can leave counsel feeling a bit unarmed, and needing to improvise, react, and adjust on the spot.

The mediator's introduction is an opportunity for astute counsel to glean important information about the mediator, his preferences, and his style. Listening closely to the words the mediator uses can offer insight into the mediator's hobbies, lifestyle, frame of reference on the case, and mediation philosophy.

Much rapport can be built and strategy formed by learning about the mediator during his introduction. Is the mediator married? Does the mediator choose legal-speak or lay terms? Is the mediator's eye contact directed toward you or your client? The latter may tell you who should to persuade the mediator about the case's validity. Is the mediator

setting your expectations for compromise or collaboration? Does the mediator talk more about finding creative solutions, or settling the case?

Additionally, counsel can observe whether the mediator uses a "can't we all just get along?" style, or a more judicial or imperial style. All of this information gives counsel the ability to instantly adjust their style and be most effective with that mediator.

- **Take your cue on how to open.** Counsel's opening statements can determine how the mediation goes. A combative opening can elicit the same from opposing counsel, just as too soft an opening can send a very different message. Mediators generally model behavior in their own opening that they deem most appropriate. Wise advocates can take their cue from the mediator about how to approach their own introduction.
- **There is no jury in the room.** Although most advocates have heard mediators' introductions many times before, it can remind counsel, while educating clients, that all participants share an interdependence in the mediation's success. Perhaps the most effective perspective is that each person comes to the mediation looking for something, even if just a signed release, and the people sitting around the table are the ones who have the ability to give that thing to them.

Advocates who provoke the other side will spend the day in a bullish tug-of-war. Remember, there is nobody in a mediation who has been empowered to take something forcibly from someone else and give it to you - you must get it from them voluntarily, if you are to get it at all.

- **Allow the mediator to set your client's expectations.** A good mediator will use the introduction to set the client's expectations for the day. Some will prepare the client for the possibility of failure, or that the mediation may need to extend beyond the day's session. Others will use it as a chance to reach the client and diffuse their emotions about the case, reducing the matter to problem solving, and setting the expectation of success at the session's completion.

Remember that clients are often distracted during the mediator's introduction. Clients who are new to the mediation process can be overwhelmed. They can also be preoccupied by their opponent sitting across the table from them, especially if the mediation is the first time the two have been together since the dispute. Good advocates will jot down some key points the mediator touches on and use those points later in the afternoon if the client becomes edgy or frustrated with the negotiations. Attorneys can use the time when the mediator is out of the room to reintroduce the mediator's introductory remarks.

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. This may differ from the client's predisposed expectation, but the mediator's introduction can

help the client understand that mediation is not an adversarial hearing where the lawyer should be objecting or examining the opposition like in a trial.

- **Should your client speak?** This is always a big question. While it clearly depends on the client's abilities, the mediator will indicate, directly or indirectly, their expectations for the client. Some mediators do not want to hear from the clients, especially if they do not express themselves in succinct, cogent language that is on point. Other mediators will allow a client to go on and on, forcing the advocate to step in and cut the client off (a good reason supporting advance client preparation). Some mediators will try to build a bond with the clients to see what they are really after. In this case, it is perfectly appropriate for counsel to sit back and let the two converse, provided the mediator is not cross-examining your client or exposing weaknesses in a joint session.

Coaching your client in advance also disarms adversarial or inflammatory tendencies, and focuses them on information the mediator wants to hear. If you have concerns, have clients discuss a narrowly defined subject they know, such as the company's background and their product or service.

- **Learn something new about how to advocate in mediation.** Thousands of advocates have taken Pepperdine's "Mediating the Litigated Case" or another mediation course to better understand the process. But many miss the chance to pick up priceless tips from experienced mediators who have seen thousands of advocates' opening statements and negotiation strategies. The mediator's introduction to the process often includes many such tips, if you listen closely.

Using the mediator as a negotiation coach in caucus is nothing new, but one new idea that is paying off in larger cases is to hire a mediator as a negotiation consultant. It is becoming more common to hire experienced neutrals to act as settlement consultants to one party in a large mediation. While that is a topic for another article, it is a good example of using the neutral's knowledge for advantage.

In closing, next time you find yourself wondering why you have to sit through another mediator's introduction speech, remember that aside from simply setting the tone and laying down any ground rules, the mediator is providing tips and insights into how to maximize your success in that mediation, leaving your clients satisfied with their representation and their result.