Persuasion: Effective Opening Statements in Mediation

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What is an effective opening statement? How does one prepare such a statement? In this article, Nancy Neal Yeend, an experienced mediator, shares the steps and processes that lead to an effective opening statement and how that statement can lead to resolution of disputes.

Obviously, if you want to negotiate effectively—preparation is the key. Mediation is a facilitated negotiation, so preparation is extremely important. What are the three most important things any negotiator can do to produce a solid mediation settlement? Critical points include: have a focused opening, establish rapport, and communicate directly. It is easy to list the elements, the hard part is preparing in such a way that you can carry them out!

Focus Opening

Opening remarks by the participants set the tone for the entire negotiation. Opening statements by each side at the start of mediation are not the same as opening arguments at trial. Without an opening, the negotiations are framed only in adversarial terms: *"I want this."*, *"No you cannot have that."*, or *"I win—you lose!"* Rather than using war analogies and attempting to "defeat" one another, a focused opening will be more productive if the aikido analogy is used—combine energies to defeat a common problem.

An effective opening, first and foremost, identifies all the issues to be resolved. It briefly outlines the background that brings the parties to the table, and it establishes a willingness to find a unique solution—one that no court could ever provide. Often mediators direct the parties to jump right into negotiating specific issues; however, this is a major mistake. Without first identifying all of the issues to be resolved, this provides the perfect opportunity for the unprincipled negotiator to bring up an issue at the last minute, just as everyone thinks they have a final agreement. Last minute surprises sabotage any possibility of negotiating a settlement.

Perhaps the negotiator might say, *"We are pleased everyone has been able to set aside the day to explore solutions to resolve this matter. To be sure our conversations go smoothly, we want to identify all our issues, so we can leave knowing this case is resolved. Our issues are: X, Y, and Z."* After identifying the issues, the negotiator might conclude with, *"We are looking forward to learning what issues you need resolved, so you too can leave the mediation satisfied."*

The list of issues is just that—a list. There is no justification offered for the reason for having an item as an issue for resolution. For example, in a malpractice case the issues for the plaintiff might include medical expenses (past and future), lost wages, prevention (how to prevent what happened from happening to anyone else), and damages. No one should sugar coat their opening statement, but it cannot be forgotten that the old adage does have validity: "*You can catch more flies with honey than with vinegar."*

It is not only important to drop the hyperbole and insulting remarks from an opening statement, but also never, ever, include any demands in the opening! Stick with the list of issues to discuss. Save demands and offers for later—after more information comes out on each topic. Naturally, any skilled negotiator will have conducted a 360º assessment of the case, and will have come up with at

least two or three possible options for each issue. The person who identifies the most settlement options, prior to the mediation, is more likely to get the better settlement. Disclosing ideas for settlement comes later—after everyone has placed their "cards" (issues) on the table. The key during opening remarks is to listen more and talk less.

Mediation is the parties' last opportunity to control the outcome of the case, and a positive outcome is far more likely with a solid, focused, and brief opening statement. Another point to consider when developing an opening is to keep it short. People begin to tune out a speaker after about five to seven minutes. Limiting the initial opening statement to 10 minutes or less is ideal. Remember, integrating a few neuro-linguistic programming (NLP) techniques helps keep people listening. Try including the person's name, mention areas of agreement, or emphasize a point with a number. For instance, these statements can help keep people listening: *"John, I want to list our issues…"* or *"Since we all agree that this situation…"* or *"There are three critical dates…"* These techniques help get people to pay attention, and reduce their "tuning out" the speaker or begin to mentally construct a rebuttal.

Establish Rapport

Making a *"human"* connection is key to any negotiation. Being civil from the initial meeting or handshake, through the entire mediation, will go a long way to *"greasing the skids"* for smoother negotiations. Of course, the fundamentals must be present: good eye contact, a smile when introductions are made, firm handshake, etc.

Experienced negotiators will often begin building rapport from the moment everyone meets. If the negotiator knows someone from the other side, a personal greeting is helpful. This is especially effective, if the two negotiators were able to resolve a previous matter. *"Susan, so nice to get another opportunity to work with you. I am confident we will find a mutually acceptable solution as we did with the Jefferson case."* No matter if one refers to this as stroking the ego of the other side, or just civility, it works!

If the case involves injuries sustained during an auto accident, and if, for example, the plaintiff's attorney starts off aggressively yelling, fist pounding the table, and making personal attacks, the settlement is either not going to happen or money will be left on the table. The defense side of the table, even when they know they have full liability, will never place anything close to what is demanded by an obnoxious plaintiff's counsel. They will make the plaintiff's side struggle for every dollar and, typically, the plaintiff will get far less than what they might have gotten if counsel had spared everyone the emotional and dramatic charade.

An example of how building rapport can reduce the adversarial conversation might sound something like; *"We certainly can understand your concerns over liability and other aspects of this case. Since we know that this is not a trial, and we are not trying to persuade a judge or jury, we can focus on finding a way to resolve this serious problem that we both face."* Creating a link that points out both sides have a need to resolve the case rather than having a group of twelve strangers decide their fate, not making personal attacks, and demonstrating a willingness to find a solution, helps build rapport and set a positive tone for the negotiations.

Communicate Directly

In recent years, mediators have tried to prevent the disputants from not only speaking directly to one another in a joint session, but also to keep the parties separated for the entire process. Any negotiator who lets someone else carry their message or to bring messages from the other side, has weakened their ability to get the best solution for their client. Good negotiators know that the words are only seven percent of the message. So why would anyone want 93 percent of their

message to be lost? It is not just the words that create the message—it is voice tone and inflection, eye contact, and body language. These factors contribute to the meaning of a message.

Reading the body language of the other side is fundamental to any negotiation. Did someone sit straighter in their chair when they heard the proposal? Did they stop looking at the speaker and glance over to the insurance adjuster? Was there a significant pause before the responder began to speak? These are significant clues as to the impact of the negotiator's message.

If the mediator is merely going to function as a messenger, then what is the point of traveling hours to some city for the session? Everyone could save a lot of time and money by just texting one another! At least the words would be accurate. Granted there is still the missing 93 percent of the message, but when a mediator is the messenger, one cannot even be sure that the seven percent was communicated correctly!

Another significant point to remember—give the client a few moments to speak. Of course the attorney will need to work with the client in advance so that emotions are under control, but in certain cases it is very powerful to have the other side see and hear the client, especially, if they will make a compelling witness. Having the insurance adjuster hear from a human perspective the impact of the accident or termination goes a long way to help find a settlement.

Providing an opportunity for the clients to listen to one another is very productive, especially when the defense has a chance for their client to give an unprompted, heart-felt, apology. Since mediation is a confidential process, admissions and apologies are often what go a long way to finding a settlement. When the parties are not allowed to talk directly to one another, and the mediator says, *"The other side said they are sorry"*, the message falls flat.

Final Thoughts

This author has mediated for over 30 years, and the one take away from all the cases is, if the parties come prepared, build rapport, and communicate directly, then there is a significantly higher probability of reaching a resolution. The terms of a settlement agreement are far more likely to be carried out when specifically tailored to meet the unique needs of the client and the explicit circumstances of the case. The parties may not design a solution that as a mediator I think is best, but they design a solution that is best for them. People who create and negotiate their own solutions are far more likely to honor their commitments and carry out the terms of the settlement.

A mediator can give assignments so the participants come prepared. They can ask reality testing questions and provide perspective during the mediation, but the mediator is the not the one living with the conflict. The parties know what will meet their needs—the mediator is there to facilitate their negotiations and is not there to serve as judge or jury. The best way to promote resolution—let the participants present their openings directly to one another.

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