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Can opening statements for mediation be skipped? Tips for attorneys and mediators

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There has been a lot written recently about how to start a mediation: with or without opening remarks by the participants, and with or without an opening statement by the mediator. Some feel that if the parties and/or their counsel give an opening, the mediation will just go downhill. Others

feel a mediator's opening is not necessary, because *"We've heard it all before!"*

Then there is also the reason that some mediators feel uncomfortable or are unable to handle emotional participants. These are fascinating reasons for skipping openings; however, could it be that they are just excuses that may not stand up to closer scrutiny?

Some mediators have used their initial opening to talk about themselves and how many cases *"they settled."* This type of mediator opening misses the key reasons for spending a few minutes establishing trust, educating the participants and addressing any concerns or questions. Without the ability to establish trust in the mediator and process, the participants are less likely to settle. Briefly outlining key procedural elements, such as confidentiality, ground rules and caucus, help ensure that everyone understands the basic elements, which may be critical if counsel has not prepared the client. Providing an opportunity for questions helps involve the participants in a non-adversarial manner.

Party openings may include statements by the attorney and/or the client. When a mediator fails to prepare all participants for the mediation, it is true that most openings will be highly emotional, will focus only on demands, and will not only fail to instill trust in the process, let alone the other side, but also will do little to move the participants towards a meaningful and lasting settlement.

If attorneys resist starting the mediation with a joint session, where everyone is offered an opportunity to make an opening, then attorneys are far less likely to prepare. When anyone enters a negotiation unprepared, invariably the process will end in impasse or the negotiators will leave something on the table.

Skipping the initial joint session also paves the way for mediation to morph into a different ADR process: private judging, settlement conference, arbitration, etc. These processes do not incorporate the primary mediation principle of *"self-determination."* Changing the agreed-to process without consent from the participants could trigger significant ethical and legal issues for the mediator.

What is interesting about the shift in omitting opening remarks are the factors that have influenced the change: people declaring themselves as

mediators with no significant mediation training — relying on credentials from a different career; unprepared attorneys; clients not on the *"same page"* as their attorney (*attorney has overpromised or client is unrealistic*); or the attorney wants the mediator to be the advocate for their case, so if the case does not settle, there is someone to blame. This is not a complete list; however, it captures the essence of some of the unspoken excuses.

Building a Foundation

Mediators can take two, basic, steps to help ensure that initial opening remarks set the stage for productive negotiations: preparation of all the participants and the mediator.

First: a mediator must get all participants prepared. This means talking to counsel before the mediation — not the day of the mediation. The same applies if there are one or more self-represented litigants, SRL. When mediators are provided the following information, in advance of the mediation, cases are more likely to result in settlement. Acquiring information is extremely helpful in preventing impasse. A typical brief for a straightforward, two-party, civil case should include the following information and does not need to exceed five pages.

- Provide a brief overview of the dispute: background or cause.
- Outline the negotiation history: offers/demands.
- Identify specific undisputed and disputed facts.
- Provide a list of all topics or issues that need to be resolved.
- Identify the strengths and weaknesses of the case, and honestly assess the strengths and weaknesses of the case as if representing the other side. (*No case is perfect, and the other side will always point out flaws.*)
- Identify all individuals or entities that have the ultimate settlement authority, and specifically define *"full authority."*
- Identify all individuals who will attend and their specific role during the mediation. If no one is attending, who has *"full authority,"* then clarify how decisions can be made.
- Identify both counsel's and client's primary decision-making criteria. In other words, what factors will influence acceptance or rejection of an offer. For example: time (*will take an offer today, but not wait six months*); economic (*enough to pay the medical bills or*

other expenses); confidentiality *(prevent copycat cases*); prevention; maintain a relationship *(important in custody cases)*; personal values; finality *(reducing stress)*; tax consequences; etc.
- Provide a list to the mediator of possible options: identify at least two or three potential options for each issue identified for resolution at the mediation.
- Provide candid answers to any other mediator question, including *"What else do I need to know?" (Being candid with the mediator enhances the probability of a meaningful settlement.)*

What is fascinating, if the mediator actually spends time getting everyone to prepare for the mediation by having the participants provide all of the above referenced information, several significant things happen: statistically the case is more likely to settle; participants are typically more satisfied with the outcome, and are less likely to develop *"buyer's remorse"* and then not fulfill the terms of the settlement; are more likely to hire the attorney again; relationships have a higher probability of being maintained or at least not further damaged — especially important in family cases involving children; and the process often takes less time and conserves other resources.

Requiring participants prepare for the mediation, especially having them identify all issues to be resolved and to consider potential options prevents impasse. Attorneys who *"walk around"* their case, do an honest 360-degree review, will be less likely to be blindsided, and will develop more justified and convincing information regarding the merits of their case.

Also, having the ability to draw on previously considered options allows for more reasoned and well-thought-out offers and counters. Then there is always the obvious, having everyone let the mediator know what all of the issues are, will prevent the infamous, *"By the way there is one more thing."* — a sure way to sabotage the mediation. People, who *"hide the ball"* in negotiations, are more likely to get less than if they had been candid from the outset.

Clarifying settlement authority in advance and having all the required decision-makers at the mediation also helps avoid impasse. When attorneys consider the client's decision-making criteria, tension between the attorney and client is reduced. Attorneys use the law as their primary decision-making criteria — clients rarely do. Among other things, clients want finality — to get on with their life; to be recognized as *"right"* and that

the other person made a mistake. That is why sincere, heart-felt apologies help settle cases, and in many circumstances significantly reduces monetary demands.

Second: the mediator needs to prepare. Without gaining sufficient information from the parties in advance, mediators cannot prepare their brief opening remarks, let alone consider how they will effectively manage the process. It does not matter if a mediator has handled one or a thousand mediations — they are all different — as different as the individuals who participant in the process. Several basic factors that every mediator must consider include:

- Determine where will the parties be seated at the mediation table? Placement at the table influences the negotiations. For example, a couple of basic rules: like opposite like, and client between mediator and attorney. In other words, *"Where you sit influences what you get."*
- Review what is likely to cause an impasse in a particular case, with these unique participants, and how can impasse be prevented?
- Confirm that all the participants provided the information requested, and if not, how will this impact the mediation: should the mediation be postponed — should there be another attempt to get the information?
- Verify that the confidentiality agreement, agreement to mediate or other documents that relate to mediation sent in advance were received, so that all questions are answered prior to the mediation?
- Determine what ground rules or guidelines will be needed to constructively manage the mediation?
- Identify at least five solid, open-ended questions that will prompt the participants to provide more information.
- Consider ways to avoid giving an opinion. Compromising mediator neutrality may open the door to accusations of unethical conduct, dual representation in a case involving SRLs, the unauthorized practice of law, or other avenues for litigation.
- Identify factors that might influence having a caucus: party requests — is it premature and an effort to compromise the mediator's neutrality, or is there a legitimate reason? What would prompt a mediator's request for caucus: have the participants

stopped having productive conversations in the joint session, does the mediator regularly adjourn to caucus after openings for no apparent reason, or does the mediator not know what to do next? Caucusing is a powerful tool and is often misused and initiated prematurely.

Mediator Opening

A mediator's opening does not need to take more than five to seven minutes. Mediators who ramble on about all the cases they *"settled"*, how successful they were as a lawyer or a judge, and similar bragging, is not necessary. Skilled mediators send a resume along with all necessary forms, such as confidentiality agreement, ahead of the mediation. This cuts the time needed for a mediator's opening. It is important to understand that the parties want to *"get on with the mediation"* and so will tune out the mediator in less than eight minutes.

Having the mediator give an opening accomplishes several critical things: it clarifies the process and procedures; enables everyone to understand their roles and the limitations; helps reduce emotions, and models respectful communication.

Briefly, the mediator needs to address the three Ps of a solid opening: process, procedures and participation. A key process element: settlement is voluntary. Even if a court ordered the parties to mediation, it may not order anyone to settle. Mediation is the client's last opportunity to control the outcome. Three basic procedures to mention include: ground rules or guidelines the mediator will use to manage the process; confidentiality and any exceptions; and caucus — the ability to meet separately with the participants. A mediator needs to encourage everyone to participate, stress that the parties are the ultimate decision-makers, and that the mediator is the process manager — not the finder of *"truth"* or the decider.

A solid mediator opening, educates the parties — mediation is an opportunity to create a settlement that no judge or jury could craft. Court decisions are limited to *"Do it." "Stop doing it." "Pay it."* or *"You do not have to pay it."* A mediator can be a cheerleader and encourage the participants to be creative in finding a solution that will meet their own, distinct and unique needs.

Ground rules need to be brief and parties must be given a chance to add additional ones, if they feel appropriate, and everyone must accept the

guidelines. Basic ground rules include: no interruptions and treat each other with respect. Enforcing ground rules that everyone agreed to prevents the appearance of mediator bias, when those guidelines are equally enforced. It is appropriate for a mediator to ask questions during his/her opening. Questions help bring the parties into the process, re-enforce the concept that settlement is theirs and breaks up the opening. *"You all know each other and the issues you want resolved, so are there any additional guidelines that are needed to enable me to help you find a solution?"*

Confidentiality must be addressed in the mediator's opening, and one way to help keep the opening brief is refer to the confidentiality agreement that had been sent to and signed by all the participants in advance of the mediation. It does not hurt to ask if there are any questions. Providing everyone with a copy of the *signed* confidentiality agreement, at the start of the mediation, is a good way for the mediator to illustrate that they have agreed on something.

Caucusing is one of the most powerful tools in the proverbial mediator toolbox. Remaining in caucus for the entire duration of a mediation statistically leads to a greater probability that the mediator will be sucked into the dispute, will give an opinion or pressure the participants to settle. All are contributing factors to failed mediations, let alone raise significant ethical issues.

Attorneys who allow the mediation to be run entirely in caucus are providing a disservice to their clients and are weakening their chances of negotiating the best settlement for their client. With no opening statements, no opportunity to observe the other side, or the potential strength or weakness of a witness, cases are more likely to end up with no settlement, or the outcome will be less than ideal.

Experienced negotiators always present their own proposals, so they are able to observe for themselves the response from the other side. They want to hear the complete, unedited, response and not get the mediator's interpretation of what was said. Remember that only seven percent of a message is the words. Ninety-three percent is eye contact, tone inflection, body language, etc. What good negotiator wants to miss the furtive glace, the nervous twitch, and all the other non-verbal information?

Having a purpose, a reason, for calling a caucus will make the mediation

time more productive and will enhance the trust level of the participants in the mediator, process and perhaps even one another. Having good open-ended questions at the ready will move the joint sessions along more smoothly, as well as enhance movement during caucuses. Asking questions essentially *"throws the ball"* back into the hands of the participants and helps keep the mediator from *"changing hats"* and becoming an advocate or a decider.

The mediator who begins a caucus with an open-end question will enable the parties to generate information — information that is necessary for productive negotiations. Avoid *"why"* questions, which will place participants on a psychological defensive, and will lessen their trust in the mediator and process. Asking questions will help keep the mediator from going down the *"slippery slope"* of giving opinions, which could have significant legal consequences when working with SRLs. Certainly, no attorney who serves as a mediator with SRLs wants to hear *"dual representation."*

Participant Openings

A simple way to start the mediation with all the participants present, and after the mediator has given a brief opening, is to ask the participants to identify all the issues they want resolved. Limit the participants' initial opening to issue identification. History, claims, demands, and grandstanding will be reduced. Initially, only identifying issues helps keep emotions under control. All the other facts and perceptions will come as the mediation process moves forward, and negotiations will go more smoothly. A good motto to follow: *"Go slow to go fast."*

A mediator must never ask what is a participant's *"position."* Having parties start with the typical *"I want"* or *"I don't want"* only serves to create a psychological anchor early in the process, thus making it more difficult to pull away and create a workable solution that meets all the participants' needs. Once the participants have identified the issues, a mediator is well served to then ask solid *"open-end"* questions to tease out additional, relevant, information. For example, *"What circumstances lead to your decision to ...?"* or *"Prior to the incident, what had been your understanding of ...?"*

Good open-ended questions can draw out information by having a person describe a situation without having as much emotion. These questions

make a smoother transition from *"opening statements"* into the problem-solving stage of direct negotiations. As the mediator prepares for the mediation and identifies potential open-ended questions, it is wise to consider other ways to draw out information. Responses to commands, such as *"tell"* or *"describe"*, generate additional useful information.For example: *“Describe the events leading up to Ms. Anderson's dismissal.”*

“Tell me about the accident.”

Requests for help from the attorney or client will also produce additional information: *"Help me understand what influenced your decision."* With less emotional responses the participants are better able to receive and listen to information from another perspective.

People cannot negotiate a settlement if they are unable to exchange information — without information there is nothing to negotiate. A strong argument for mediation participants to share their openings remarks and even initial negotiations rests on the principal that direct communication produces better results. If an attorney, who prefers to remain in caucus for the duration of the mediation, thinks that he/she is getting an accurate report from the mediator as to what the other side said, or how accurate his/her offer was conveyed, then they are gravely mistaken. At best, words are only seven percent of a verbal communication. The other 93% of the message is missing! Any skilled negotiator will want 100% of the message: the words; the eye contact; tone inflection; the furtive glances between attorney and client or insurance representative; the flushed face; the nervous tick; and all the other non-verbal messages.

Conclusion

Simple things can go a long way to enhance the probability of a settlement: sending documents in advance for review, comment and signature; giving specific assignments regarding information to be included in the attorney's pre-mediation brief; thinking about where to place the parties at the table — its impact on the negotiations; and assessing how to prevent negotiation breakdown and impasse from occurring. When mediators do not prepare the participants and/or even fail to prepare themselves, statistically they are more likely to encounter more impasses and experience lower participant satisfaction ratings.

Requiring pre-mediation briefs that include listing all issues to be resolved

and identifying a range of potential options, enhances the probability that the participants will come prepared, and allows the mediator to prepare and be a far more effective process manager. Having the parties begin with a joint session of opening remarks makes it much easier to move into negotiation and ultimately settlement. Properly prepared mediation participants are much more likely to resolve their differences with creative solutions that fit their unique needs.

About the Author

Nancy Neal Yeend is a dispute management strategist and mediator. As a strategist she designs programs to reduce business related conflict. She founded The End Strategy (TES) in Portland, Oregon, and has mediated pre-suit, trial and appellate cases for over 35 years. Nancy has designed court-connected mediation programs, and is starting her 26th year as faculty at the National Judicial College.