Advocacy in Mediation

The Art of the Opening Statement

By Elliot G. Hicks

First you prepare, and then you trust yourself to exercise your skills when talking to the other side in a mediation.

People have commented so often on the loss of opportunities actually to try cases that little more needs to be said about it. Discovery seems unrestrained, costing so much and taking up so much time that after paying for it, the parties really don't have the stomach to take a further risk by submitting the case to the roulette wheel of the jury.

This applies to both plaintiffs and defendants. A defendant and his or her attorney cannot spend so much money before trial and then risk losing more money in the form of a jury verdict. A plaintiff and his or her attorney cannot go too far in the hole on the cost of discovery and experts and then face the possibility of figuratively setting that money on fire by losing at trial.

It adds to clients' fear of trials that judges generally are reluctant to rule on pretrial motions. Litigants don't know what the legal rulings will be before trials, leaving them in a frightening poker game, where they are forced to make bets without knowing the value of their cards. A sensible client can't bet big money on a blind-draw card game.

The expense of discovery, motions, and experts raises the stakes of litigation too high to make trials generally worthwhile. Then, if a client does decide to risk a trial, the client wants an experienced lawyer who has faced that same battle dozens of times. The client is unwilling to take the risk of sponsoring one of a lawyer's first few jury trials.

Work Harder on the Skills that We Really Use

We work long and hard to develop trial-related skills of opening statement, direct examination, cross-examination, and closing argument, but those are not the skills that we have opportunities to display. The real skills that a lawyer gets to show a client in this trial-shy environment are our mediation and negotiation skills. Those skills involve talking to the other side, advocating persuasively without creating hostility, and building an atmosphere that strongly encourages trust and resolution.

Mediation probably offers the only opportunity to talk to your opposing party without the opposing lawyer pre-screening everything that you say. Oh, the lawyer will be there, but you will have the chance to say what you like directly to the other side, assuming civility. Again, assuming civility, the other lawyer only will dispute the points that you make after you have finished speaking, and possibly in another room.

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A number of mediators have begun to discourage presenting opening statements in mediation. Those mediators act as if a mediation belongs to them and not to the parties. They worry that they cannot control the chances of a mediation's success if one of the lawyers makes some crude, ham-fisted comment when he or she has the chance to speak. They worry that opening statements will bring down their resolution "batting average."

Lawyers have exceptional anxiety about whether or not to make an opening statement during mediation these days. Some almost *expect* themselves to say something that angers the opposing party.

Your clients trust you, and you trust yourself, to make arguments before a jury of six or 12 strangers, over claims worth millions of dollars, sometimes with your client's entire business at stake. Isn't it odd that you don't trust yourself to have the right touch to speak clearly enough to engage an opposing party in a civil discussion about the merits of your case?

We can do better.

I want to speak in praise of the opening statement as a mediation tool. I want to tell you when to use them and how to use them from the perspective of a lawyer who has used them well, and from the perspective of a mediator who has heard both effective and poor ones.

Why You Use an Opening Statement

If the parties are serious about mediating a case, they will make sure that they are represented during the mediation by somebody who they think has sufficient authority to settle the case. We leave it for another article to discuss the meaning of "sufficient settlement authority."

That mediation is probably the first time that the person who might pay the money sees the person who is asking for it, and vice versa. This is the time to break down all of the demonizing that both sides have done to one another. Though unfortunate, it is not unusual for the attorneys to join their clients in a hyperbolic negative characterization of the opposing party. The corporation is "heartless and unfeeling." The plaintiff is a "money-grubbing deadbeat."

The joint session of a mediation gives each side the opportunity to personalize itself. That is, each party can show the other that there are real people hidden behind the frightening masks that their opposition has created to fan the fires of battle.

The role of the opening statement for the plaintiff's attorney in this instance is to help the defendant understand that a real person and real struggles are behind the injury that the defendant has caused. A defendant can come to understand that the plaintiff is capable of telling a compelling story about this injured plaintiff and his or her family. The flesh and blood reality of seeing the opposing party in a mediation can overcome the cartoonish image that might have been painted back in a lawyer's decision room.

A plaintiff's chance to see that the person who actually makes the decision has taken the time to attend mediation can have a healing effect on a plaintiff. It helps a plaintiff understand that a defendant respects the harm that the plaintiff claims to have suffered. Nobody can accomplish this when a mediator or the parties decide to dispense with the joint session, with everyone simply put into separate rooms, comforted only by a mere rumor that there is someone on the other side of the door participating in the mediation.

It can be a stroke of genius to have properly prepared parties speak briefly for themselves as part of an opening statement. You know how disarming it can be for your client to hear the shy but articulate plaintiff say something as simple as, "Mr. [defendant], I appreciate you taking the time to be here today. We have been hurt, and I hope you will work hard to find a way to help us get closer to our old lives before this accident."

Imagine how much anger a defendant might dispel if its representative can speak with some personal warmth to tell the plaintiff, "Ms. [plaintiff], I have made this trip to the mediation because I want to tell you personally that, even though we have some disagreements about how this all happened, we are sincerely sorry about your accident, and we want to do everything that we reasonably can do to find a way to resolve this matter so that you can recover some of the life you had."

The joint session at the beginning of a mediation that includes an opening statement by the parties can lower hostility between the parties and reaffirm their humanity in the eyes of their opposition.

When to Make an Opening Statement

I am not here to say that an opening statement is always appropriate in mediation. I am saying that it is appropriate in many more situations than it is used, though.

I conducted a mediation centered on an allegation that a woman had been routinely sexually harassed by a number of fellow employees. Most of the men who were accused came to the mediation *en masse*. A joint session to begin this mediation would have put this woman and her attorney in the room with the opposing attorney and six men, five of whom she accused of harassing her. That was not a good time to call for a joint session and an opening statement.

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An opening statement is useful when a mediation can benefit from an injection of humanity. When one stranger has inadvertently hurt another, that's a good time to have them actually see each other in mediation. That is a good time for the lawyers to explain briefly why the insurer or defendant has made the decisions it has made about its negotiation limits. That is a good time for the lawyers to reinforce the idea that these parties do not have to hate each other. Diminishing negative personal feelings will remove what is often one of the largest obstacles to settling a case.

Sometimes, before they arrive at a mediation, it seems as though parties are talking past each other. They just can't be made to understand the potential effectiveness of the other side's argument. Done correctly, the opening statement can offer a wonderful opportunity to explain your trial position better so that the other side can come to understand how effectively this argu-

ment might possibly be offered to a jury or a judge.

I have seen lawyers take that point off the deep end. They seem to think that they can intimidate the other side with a dress rehearsal of their trial opening statement, complete with pictures, engineering diagrams, and highlighted expert reports. If those lawyers are afraid that opening statements kill opportunities for settlement, when they operate in this fashion they are absolutely correct.

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You can easily watch the jaws of the opposing attorney and parties tighten as they watch their opponent try to beat them down. The party on the receiving end of this hard-core presentation builds its resolve against the presenting party, and hopes of settlement die.

How to Make a Mediation Opening Statement

A mediation opening statement must invite the opposing party into a relationship of trust, or at least into a non-threatening relationship. A joint mediation session should begin with the mediator reminding the parties that the mediation is not a trial, and explaining to the parties that their lawyers will not, and should not be as aggressive as the clients might expect at trial.

Respective counsel's statements should reinforce that disdain of aggressiveness, and a smart attorney's will. They should take a conciliatory and educational tone. You want to do everything possible to get the other side to lower its guard, remove the blinders and the earplugs, and listen to determine whether there is anything you are saying that those listeners might not have heard or understood before.

Compliment the opposing attorney, to the extent that it is true, on his or her professionalism and hard work in making this a challenging case. We lawyers are not immune to dropping our guard as a result of a little believable flattery. Pump them up in front of their client so they won't have to pump themselves up.

Find all of the complimentary things that you might say about the other party, conceding what you can, in good conscience, about the character of the party outside of this incident, and acknowledge, to the extent of the truth, that you believe that any lapse in the plaintiff's ordinary habits that led to this incident were uncharacteristic and that you do not believe that this renders him or her a bad or stupid person.

Your point during the joint mediation session is not to back the opposing party against a wall so that they have no choice but to respond aggressively.

Let's say that you have a mountain of evidence that you will present against the plaintiff. You have the choice of gloating about the "certainty" that you will be able to shove that evidence down a plaintiff's throat and walk away with the plaintiff impaled on your sword. Or you can do it another way:

> You have the expert reports and the evidence that I will be presenting. I know that you will be able to provide the jury with explanations for several of those. The bet that I have to make is that there will still be enough evidence, even after your explanations, for my client to prevail. My gamble is based on my belief that a judge, and, if it goes that far, a jury, will be persuaded by all of this.
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> I have no need to spend the time and money to present this at trial, though, and I was hoping that we could take care of this in a calm and reasonable fashion here through mediation and that we can settle this.

Which method do you think is most likely to allow you to continue to have a productive dialogue with the plaintiff?

Your mediation opening statement should impress the other party with how effectively you can make your case and how believable the judge and the jury will find it. By the end of your presentation, the other party should become aware that, if you can make your case so effectively in this calm, matter-of-fact style in the mediation setting, the dramatic atmosphere of the courtroom, with its enhanced staging of exhibits, will make your presentation that much more effective.

When representing a defendant in a personal injury case one of the big obstacles that you face is the plaintiff's perception, or the plaintiff's attorney's continuous refrain, that your client does not care about the plaintiff. The thing that costs a defendant most in trial is not that the defendant was negligent (although that certainly hurts), but that the jury comes to perceive that the defendant was indifferent to the injuries that it caused to the plaintiff.

Aside from the mediation, the defendant will never have another opportunity to apologize for the injury that the plaintiff suffered, or to say that it is sincerely sorry for the effect of the accident on the plaintiff's family. You are qualified to say this on behalf of your client because you have learned about its officers' and employees' sincere concern as you have prepared this case for mediation.

Better yet, your client can say it through its representative on its own behalf during the mediation. Even if a representative says nothing else throughout the entire mediation, this can be worth the price of the plane ticket.

I cannot say how many cases I have mediated, or how many clients I have represented in mediation, where a sincere apology has broken the ice for a fair settlement.

I recognize that there are times when you and your client believe that the plaintiff truly is nothing but a money-grubbing opportunist. I will leave it to your own discretion how the often quoted statement about feigned sincerity fits here.

Your goal in holding a joint session where you make an opening statement is the same on either side of the mediation table. You want to say enough from your own mouth, and not through the filter of the mediator, to make the other side understand that you are capable of making a credible case that will win the day. You want to convince the other side, in

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part from the appearance that your representative makes, that the party you represent can present its case in a way that has a substantial chance of ultimately prevailing.

Always balanced against that, however is your need to set an atmosphere for cooperative negotiation without intimidation. Your opposition must continue to welcome the chance to reach for a solution to the expensive and uncertain process of litigation.

In a consumer finance case that a senior citizen couple filed against my client I was able to talk to the plaintiffs about my respect for the husband's honorable military service that his lawyer had highlighted, and his earnest working career, from which he had diligently saved money for the retirement that he and his wife intended to enjoy. I complimented his dedication to his family in extending himself to cosign for a loan for his adult daughter.

But I also talked about the legal situation in which he had put himself, all as a result of his daughter's failure to keep her promise. Though his story was worthy of much respect, we reminded the plaintiff that my client's representative had to justify any decision to pay a settlement, and his attorneys needed to articulate the legal ground for doing so to his bosses. We respectfully talked about how the facts presented no legal grounds to make such a large settlement.

In the end, we respectfully challenged this elderly couple and their attorney to give us a reason that we could take to my representative's superiors to justify the large settlement that they wanted.

Today's Practice, Today's Skills

In this age of easy videoconferencing when everyone has personal communication devices at the ready, why should a representative attend a distant mediation, but for the opportunity to reduce the distance and inject some humanity into the process by talking to each other for a moment without intermediaries?

Those of us who are paid for our ability to communicate as trial lawyers should get over our fears of speaking directly to the person on the other side of a lawsuit. We are paid communicators. We must learn to speak to the opposing party, just as we learn and practice how to speak to a judge or a jury. We must learn how to speak to our opposition, just as we learn the art of direct examination or cross-examination. We need to study the skills that are relevant for our practice today, just as we studied the examination skills and oratorical skills that were at the forefront of the litigator's toolbox in the past.

First you prepare, and then you trust yourself to exercise your skills to talk to the other side in a mediation. Every lawyer doesn't possess every litigation skill. If you truly believe that you cannot speak to the opposing party without inciting a riot, perhaps you should pass the mediation phase of the case along to another lawyer who has developed those skills more than you have. But don't follow this emerging herd toward the belief that your own interpersonal skills have no place in the mediation phase of litigation. FD