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Column
ADR Strategy

Neutrals Reveal Tips With Their Opening Statements

By Lee Jay Berman

Most mediations begin with the mediator's opening statement, much to the consternation of the lawyers (many of whom have heard them many times before) and their parties.

Although most lawyers prefer to launch right into their opening statements in a mediation, the mediator's speech can be very helpful.

Aside from setting the right tone and laying down any ground rules, the mediator also is providing tips and insights into how to maximize your success in that mediation.

Therefore, although lawyers are wont to ignore these statements and instead spend that time leafing through their file to locate information with which to beef up their opening, doing so is a mistake.

Lawyers can learn from a mediator's opening about the process, that mediator and how to maximize their outcome.

■ **An opportunity to size up the mediator.** If you have not worked with a mediator before, you may know very little about the person. Mediator selection is different than it was even two years ago.

Today, counsel's allowing the other side to select the mediator, with no questions asked, is popular. This is somewhat understandable, since mediation is a nonbinding process.

The problem with that method, however, is that it leaves you knowing little about the mediator.

The mediator's introduction addresses this problem by giving an opportunity for astute counsel to glean important information about the mediator, including preferences and 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.

Also, the introduction is a good time to start building rapport with the mediator and perhaps rethinking strategy based on such things as whether the mediator uses legalese or lay terms, makes eye contact with lawyers or clients, stresses compromise or collaboration and talks 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 adjust their style instantly in order to be effective with that mediator.

■ **Take your cue on how to open.** Counsel's opening statements often determine a mediation's final success or failure. Wise advocates take their cue from the mediator's opening about how to approach their own introduction.

■ **Reminds participants of interdependent nature of mediations.** Although most advocates have heard them many times before, mediators' introductions can remind counsel, while educating clients, that a mediation's success or failure depends equally on all the participants. It helps give the right perspective when the mediator reminds everyone that each person comes to the mediation looking for something (even if just a signed release) and that the people sitting around the table have the ability to give that thing to them.

The mediator's statement also helps remind participants that they also have the ability to thwart the mediation. For example, advocates who provoke the other side could spend the day in a bullish tug-of-war.

■ **Allows the mediator to set your client's expectations.** A good mediator uses the introduction to set the client's expectations for the day. Some prepare the client for the possibility that the mediation may need to extend beyond the day's session, while other mediators attempt to get the participants into a mindset of success and settlement.

Other mediators use it as a chance to reach the client and diffuse emotions about the case by reducing the matter to problem solving and setting the parties' expectation of closure.

Remember that clients are often distracted during the mediator's introduction. Clients who are new to the mediation process can be overwhelmed.

They also can 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 jot down key points the mediator makes and use those points later in the afternoon if the client becomes edgy or frustrated with the negotiations.

Additionally, the mediator's introduction gives the advocates permission to be more congenial to the other counsel and parties. A good introduction helps clients understand why their counsel are not being the zealous advocates the clients otherwise might expect.

The introduction therefore may help the clients understand that, if their counsel is perceived as fair by the opposition, they are better positioned to settle the case.

Since this stance probably differs from the client's pre-existing expectations, the mediator's introduction can help the client understand that mediation is not an adversarial hearing at which

the lawyer should be objecting or examining the opposition as in a trial.

■ **Should your client speak?** This is always a big question. While it depends on the client's abilities, mediators indicate, directly or indirectly, their expectations for the clients. Some mediators do not want to hear from the clients, especially if they do not express themselves in succinct, cogent language.

Other mediators allow a client to speak at length, forcing counsel to step in and cut the client off.

Some mediators try to build a bond with the clients to see what they really want. In this case, counsel should sit back and let the two converse, provided the mediator is not cross-examining your client or exposing weaknesses in a joint session.

Because your client may speak to the mediator, coach your client in advance.

In preparing the client, watch for any adversarial or inflammatory tendencies, and instruct the client to focus on information the mediator wants to hear.

If you have concerns, have your clients discuss a narrowly defined subject about which they know, such as the company's background and their product or service.

■ **Learn something new about how to advocate in mediation.** Since many lawyers don't enroll in mediation, advocacy or negotiation-strategy courses, the mediator's introduction often includes many tips, if you listen closely.

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