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Column
ADR Strategy

Sincere Opening Statements Bring Best Mediation Results

By Lee Jay Berman

A bright line differentiates client advocacy in mediation from other forms of client advocacy. Good lawyers know the difference and are getting much better results from mediations than those who do not make this important distinction.

As the legal community continues to use mediation as an effective case settlement tool, it is becoming clear that attorneys' opening statements in a joint session play a vital role in their clients' success.

First, in most general civil cases, a good mediator will take all participants through a mediator's introduction to set the tone and disarm any adversarial or inflammatory tendencies.

Although most advocates have heard this introduction many times before, it is meant to remind counsel and educate clients that all participants share an interdependence in the success of the mediation. After all, each person came to the mediation looking for something, even if just a signed release, and the people sitting around the table are the ones who hold what each participant seeks.

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.

The most effective opening statements persuade and may even "win over" the opposition.

Here are some examples of attorneys' opening statements that have worked wonders:

! **Start as soon as you enter the room.** Seasoned advocates understand that they are negotiating from the outset. They set the tone for the negotiation from the moment they enter the room. Little things like standing to shake hands with the opposition and commenting that it is nice to see them again, or thanking them for coming, all start winning points - points that could go a long way toward getting a client what he wants.

Nothing is less effective and loses more credibility than an attorney who is offensive, argumentative or arrogant in an opening statement. Advocates must understand that everything they do during their opening statement lays the groundwork for the day's negotiations.

! **Compliment the other side.** One very effective opening statement was delivered by a plaintiffs' attorney in a medical-malpractice case against a large hospital. Rather than starting by blasting the hospital, which had clearly had a problem in this case, this very seasoned, successful attorney began by telling the hospital's representatives that it was one of the premier hospitals in the area.

The lawyer had researched the defendant doctors, and said that they had impressive credentials and were well respected. He assured the defendants that he did not intend to tear down the hospital or the doctors - that this was a case of a simple, unpredictable mistake.

In the end, the defendants rewarded his respect with a tidy settlement. The amount could not have been obtained had the lawyer begun in an adversarial mode by berating the defendants for allowing this mistake to happen. Instead, he earned their respect and allowed them to save face. By anticipating that most people hold themselves in high esteem, he earned credibility with them, which sometimes can be a challenge for plaintiffs' counsel in medical-malpractice cases.

He also disarmed them and alleviated their inherent need to defend themselves and attack him back. The plaintiffs' attorney was thus able to have the defendants concentrate more on his client, rather than feeling the need to deny and defend everything.

He did so well that they confidentially admitted to liability in their opening statement because they trusted their opposing counsel.

! **Empathize with those who deserve it.** In another medical-malpractice case, the plaintiff had checked her elderly mother into the hospital. The mother never left the hospital, and instead passed away while under the hospital's care. After the plaintiff finished her opening statement, the hospital's insurance adjuster shocked the room by offering to speak next.

This seasoned adjuster told her own story of checking her mother into a hospital and how her mother never came home either. She said that she too was still recovering from it.

Eventually, the defense attorney began to speak. As his hands began to shake and his eyes welled up, all he could say before his voice broke was that his personal situation was still too fresh and that he was not yet able to talk about it, but he, too, understood what the plaintiff was going through and could empathize with her completely.

Needless to say, that case settled within 45 minutes - and for exactly the amount the hospital's risk manager had authorized previously. Everyone was satisfied, but none more than the plaintiff, whose own adult sisters had not backed her in this litigation, and who needed the support of someone who understood her plight. In this case, she found two sympathizers - in the defense's opening statement.

! **Presenting the client.** Seasoned counsel understand that in addition to presenting their case at a mediation, part of what they are doing is presenting their client. Preparing the client to make an opening statement, or to take a specific or strategic role in it, is important to the mediation's success. One effective technique is for the client to speak about the technical aspects of his or her

business.

It often is tempting for counsel to take this role, but by leaving it to the client, counsel can allow the client to shine. Professionals who deal with mediation regularly sometimes can underestimate the discomfort the process can cause clients. This approach makes it easier for them by increasing the chance that they will present well and appear credible to the opposing party. At the end of the day, a credible client means a better outcome.

Remember, it is critical that advocates understand that opening statements in mediation are an opportunity to begin to settle the case on favorable terms. Adversarial, trial-advocacy-type tactics will have exactly the opposite effect.

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