

6 Tips for Mediation Opening Statements

Not every mediation starts with opening statements, but for those that do, plan your use of this opportunity carefully so that you can maximize the chances of a successful mediation. Rather than simply launching into your jury address, consider the following tips when preparing your opening:

1. Assume everyone knows the facts of the case. Please PLEASE do not start your opening by reviewing all the details of the case. You have provided a clear and concise mediation memo which was served on all counsel and the mediator and everybody read it. Presumably the opposing lawyers and parties know the facts the case. The time in your opening should be spent focusing on the issues that need to be addressed in order to settle the case. Is it liability? Is it damages? If damages, are there specific big ticket heads of damages that are going to make or break the settlement discussions? You know what the key issues are for your client's case so go directly to them.
2. Speak directly to the opposing party. The mediation opening session is one of the very few opportunities during the life of the case when you will be able to speak directly to the opposing party. During this very valuable time, do what you can to actually connect with this person. They know you are opposing counsel, they know you are not friends and are not there to help them, so imagine the change in tone you can create when you speak to them directly with a more personal, less confrontational and legalistic tone.
3. Speak the language of risk – to ALL parties. The mediation is not the trial. You cannot “win” the mediation but you can certainly set the table for a resolution that benefits your client. Instead of giving an opening that talks about why your client is right and why the opposing party is wrong, consider talking about the risks that the parties face. All parties. By talking candidly about the risks your own client faces (which everyone will know anyway), it gives you persuasive credibility when you talk about the risks facing the opposing party, and establishes right away that your client is there to mediate, not to try the case.

4. Acknowledge and address previous offers and settlement discussions. If there have been previous offers or discussions, it will greatly assist the mediation process to address them in your opening. This will contextualize the offers your client will make during the mediation, particularly the first offer. Was a previous offer a one-time offer that is now off the table? If so, why? And if not, use a previous offer to set the table for the offers to come. And if it is your client's expectation that a previous exchange of offers back and forth essentially established the "goalposts" for future discussion, you should make that clear in your opening. This is not tipping your hand – it is using the mediation process and your opening statement effectively and efficiently.

5. Consider the appropriate length of time for your opening and stick to it. There is no ideal length for a mediation opening statement. Having said that, it is obviously advisable to keep it shorter rather than longer, more focussed rather than wide-ranging. It is not helpful to say "I will be very brief and only have a few comments to make" and then carry on for 25 minutes covering every aspect of the case. It IS helpful to say, "I will focus my comments on the two key issues and I will be less than 5 minutes", and then indeed conclude your comments within five minutes. You will have everyone's attention and it will be clear you are prepared and focussed.

6. Decide in advance if you will have your client say anything after your opening. Not all mediations require a party to speak during the opening session. There are many factors that go into counsel's decision to have the client speak or not. So please consider this issue in advance of the mediation, not at the conclusion of your opening. If it is your view that the client should not speak, tell the client and tell them why. And if you do want the client to speak, tell them what the topic will be and make sure they are comfortable talking about it. You should tell them the question you will ask them at the conclusion of your opening statement and work through what they will say in response.