THE ART OF THE OPENING STATEMENT

The Why, When and How of Effective Mediation Opening Statements

By Elliot Hicks

People have commented so often on the loss of opportunities to actually take cases to trial that little more needs to be said about it. There seem to be no reins on discovery that costs so much and takes up so much attorney time that, after paying for it, 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. The defendant cannot spend so much money before trial, and then risk losing more money in the form of a jury verdict. The plaintiff (and his or her attorney) cannot go so 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.

The expense of discovery, motions and experts raises the stakes of litigation too high to take matters to trial. Then, if the matter really does go to trial, the client wants somebody 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.

Another thing that adds to clients' fear of taking a case to trial is the fact that judges are reluctant to rule on pretrial motions. Litigants don't know what the legal rulings will be before trial, 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.

WORK HARDER ON THE SKILLS WE REALLY USE

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

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

A number of mediators have begun to discourage opening statements in mediation. Those mediators act as if the mediation belongs to them and not to the parties. They worry that they cannot control the chances of the mediation's success if one of the lawyers

makes some crude, ham-fisted comment when he has the chance to speak. They worry that their resolution "batting average" will be brought down.

Lawyers have exceptional anxiety about whether or not to make an opening statement during mediation. Some almost expect 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 speak clearly enough to engage the opposing party in a civil discussion about the merits of your case?

We can do better.

WHY YOU USE AN OPENING STATEMENT AT MEDIATION

If the parties are serious about mediating the case, they will make sure they are represented by somebody whom they think has enough authority to get the case settled.

That mediation is probably the first time the person who might be giving money gets to see the person who is asking for money, 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 with their clients in a hyperbolic 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 gets to 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 in this instance is for the plaintiff's attorney to help the defendant understand that there are real people and real struggles behind the injury that the defendant has caused. Defendants 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 plaintiff and possibly some members of the family in the mediation can overcome the cartoonish image that might have been painted back at the defendant's decision room.

Similarly, the 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 the plaintiff understand that the defendant respects the harm that it may have caused to the plaintiff and his or her family. Nobody can accomplish this when the mediator or the parties decide to

dispense with the joint session, with everyone simply led into separate rooms, comforted only by the 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 briefly speak for themselves as part of the opening statement. Imagine how disarming it can be for the defendant 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 help us get closer to our old lives before this accident."

Imagine how much anger might be dispelled if the defendant's 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 personally tell you that, even though we have some disagreements about how this all happened, we are sincerely sorry about your accident, and we want do everything we reasonably can do to find a way to resolve this matter so we can help you recover the life you had."

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

WHEN TO MAKE AN OPENING STATEMENT AT MEDIATION

An opening statement is useful any time 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 briefly explain why they have made the decisions they have made about their negotiation limits and reinforce the idea that these parties do not have to hate each other. The diminishment of negative personal feelings removes what is often one of the largest obstacles to settling a case.

Sometimes, before they get to 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 be a wonderful opportunity to give a better explanation of your trial position so that the other side can come to understand how effectively this argument can possibly be offered to a jury or a judge.

HOW TO MAKE AN OPENING STATEMENT AT MEDIATION

The opening statement must be one that invites the opposing party into a relationship of trust, or at least a non-threatening relationship. Any joint session of mediation should begin with the mediator reminding the parties that this is not a trial, and explaining to the parties that their lawyers will not, and should not, be as aggressive in their direct interaction as the client might expect at trial.

Respective counsel's statements should reinforce that disdain of aggressiveness. They should be conciliatory and educational. 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 they 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.

Say all of the complimentary things you might about the other party. Concede what you can about the decent character of the party outside of this incident. Acknowledge, to the extent of truth, that you believe that any lapse in its ordinary procedure that caused this incident was uncharacteristic, and that you are not of the opinion that it is a bad person or company.

For the plaintiff, the ideal opening statement would discuss the research you have done on the habits of the defendant overall, but say you understand that, like everyone occasionally does, the company suffered a lapse in this case, leading to dire consequences for the plaintiff.

Even in a less benign situation it is quite acceptable if you discuss how this certain department of the company, or how this certain unit of the hospital, has stubbornly failed to keep up with the quality that you have learned is common in the rest of the corporation.

You may have to deliver a very negative report to the opposition -- one that says that you will be able to show that the company was quite habitually negligent in the matters that relate to the plaintiff's injury. Your point at mediation, though, is not to back the company representative or its insurer against a wall so that the person has no choice but to respond aggressively.

Your mediation opening should impress the other party with how effectively you can make your case, and

how believable it will be for the judge and the jury. By the end of your presentation they should be 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 will make your presentation that much more effective.

When representing defendants in a personal injury case one of the big obstacles 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 you were negligent, but that the jury comes to perceive that you were indifferent about the injuries that you caused to the plaintiff.

The defendant will never have another opportunity except at mediation to say that it is sorry for the injury that the plaintiff suffered, or 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 on its own behalf through its representative at the mediation. If the representative says nothing else throughout the entire mediation, this can be worth the price of the plane ticket.

As for the rest of the mediation, 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 part from the appearance your representative makes at the mediation, 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 opportunity to try to reach for a solution to the expensive and uncertain process of litigation.

TODAY'S PRACTICE, TODAY'S SKILLS

In this age of easy videoconferencing, what is the reason for a representative to attend a distant mediation, but for the opportunity to reduce the distance and inject some humanity in the process by talking 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 or 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 mediation. Every lawyer doesn't possess every litigation skill. If you truly believe you cannot speak to the opposing party without inciting a riot, perhaps that phase of the case should be passed 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. WVL

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