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Reframing the Opening Session in a Mediation: Tips for Setting a Mediation on a Productive Path

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Mediations used to begin with extensive opening sessions. Lawyers made presentations similar to opening and closing arguments at trial. Sometimes the mediator asked questions. Sometimes the client would speak.

Now, mediations rarely begin this way. If there is an opening session, it is a shell of its former self, limited to handshakes, introductions and a few words from the mediator about process and confidentiality. This is a missed opportunity. We need to bring back opening sessions, but with time limits and more structure and guidance from mediators. And the focus should be on a high-level sharing of values about the case.

If there is one thing mediation participants almost always agree on regarding opening sessions, it's that they hate them. They don't want to do them. As they historically occurred in the mediation of all types of litigated cases, opening sessions were for many participants either unproductive or entirely counterproductive. Mediators insisted on holding relatively unstructured opening sessions, without guiding the parties and without enforcing time limits. Participants were told this was the equivalent of having their day in court; thus, they treated the opening session as such. Attorneys prepared accordingly, summarizing their arguments and evidence as if they were in front of a judge and jury.

Over time, nearly everybody got tired of this process. The thing about an opening or closing argument is it is designed to lead to something different from a mediation. Openings start trials and give way to the detailed introduction of evidence through witnesses. Closings end trials and lead to deliberations by a judge or jury. Most mediation participants understood this. They also understood at a

fundamental level a mediation did not flow from this kind of beginning. Participants often painfully experienced the hours spent trying to come back from the intensity of the opening sessions. Over time, more and more the sessions just faded away, usually at the request of counsel for both sides. The opening session either didn't happen at all or was reduced to a few introductions, some comments on confidentiality and then a retreat to separate rooms for the rest of the day, unless there was some reason for the principals to get together.

The problem is that opening sessions in some form are critical for decision-makers. For the most part, the information that a decision-maker can obtain from an opening session is direct and actionable. I used to be a decision-maker at mediations, attending with millions of dollars of settlement authority. Even during those painful opening sessions, I always learned something valuable, and I had no idea what it would be. Among the things I learned were that my case didn't sound as good out loud as it did on paper; one of the lawyers was driving some of the contentiousness in the case, unnecessarily; and the decision-maker on the other side needed to present an issue or concern immaterial to the merits of the case but important to them. There are countless important bits of information in any opening interaction, and they will never come to light and will not inform the negotiating process unless a joint session happens. Without an opening session, the nearly exclusive way to obtain information about the other side is from the mediator. This is good but not sufficient or optimal, as it gives the mediator way too much power way too early in the process.

The challenge has been to find a way to have an opening session that the parties and lawyers view as productive and helpful. Based on my experience presiding over productive opening sessions as a mediator, I can offer a few key elements. First, remember who the audience is. There is no judge or jury. The mediator is important, but they will not be deciding the case. Second, this is not a trial, so any presentation should not be framed as an opening or closing statement. The goal is to find a way to make the points about your case in a way that will be received by the other side. Tone matters. Finding areas of agreement is helpful, such as addressing the business context of a dispute or a long-standing relationship or acknowledging missteps. None of this is meant to suggest that a strong statement of your position is inappropriate. But it should be a brief high-level overview. The goal is to give the other side a chance to reconsider the strength of its own narrative. Third, time limits should be agreed upon in advance and strictly enforced. Fourth, the decision-makers should be given a chance to speak about their expectations for the day.

These elements should lead to a productive and helpful joint session where the decision-makers can discover those actionable bits of information that only direct communication can provide. If handled appropriately, an opening session is still the best way to convene a mediation and set the session on a productive path. We just need to reframe it for mediation.

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