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The Mediation **Opening Statement:** Why You Should Make It and How To Make It Work

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It is not uncommon for attorneys to waive their opening statements at mediation. Sitting across the table and telling the other side why they are wrong and you are right can be difficult face-to-face. Sometimes the case has already been litigated at great length and spending time on opening statements seems a waste of precious time. The opening statement, however, is an opportunity to go beyond pure legal arguments and the typical all-or-nothing approach of litigation. In litigation you strive to prove your point and negate your opposition's position. But in mediation you must recognize your opposition's position and persuade them to agree to a resolution that meets everyone's needs. With this more collaborative approach in mind, an opening statement is an excellent opportunity that should not be waived, except in the rarest of cases.

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An opening statement provides a unique opportunity to speak directly to the other party without the filter of their attorney or the mediator. Such direct communication can often produce better results. Even if the litigation is in its later stages and you have already set forth your position in motion papers or otherwise, don't assume the other party has all that information. Everything the other side knows about the case is through opposing counsel and may be skewed by the attorney's shared perceptions and guidance regarding the case. Further, relying solely on the mediator to relay your position to your adversary can ultimately take more time and increases the risk of a miscommunication. The opening statement may be the one time you can speak directly to the other party without such filter or risk.



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While the opening statement gives you the chance to paint your case in the best light possible, it also is an opportunity to present *yourself* in the best possible light and demonstrate that you are a worthy adversary. Preparing and delivering an excellent opening statement can suggest to the opposing party that you will perform well in front of a judge or jury, and perhaps create some doubt or discomfort on their part as they evaluate your credibility—and the strength of their case.

By employing the opening statement, you can be sure the mediator and all parties present are operating with the same information, even

if there is disagreement as to the application of such information to the case at hand. Starting the settlement negotiations with the table properly set can be critical to the success of the mediation.

As you prepare your opening statement, consider the tips below to assist you in effectively using the opening statement to set the landscape for a successful mediation.

Direct your comments to the opposing party, not their attorney. Your primary audience should be the opposing party, not the mediator or opposing counsel. Opposing counsel is unlikely to be persuaded, but the opening statement is a chance to create doubt with their client and, hopefully, more flexibility toward settlement. Everything until this point has been shared with the opposing party through the lens of their attorney—with that attorney's analysis and point of view. Speak to the opposing party during your opening statement with the assumption that the information you are providing is new and they have not heard your side before. Use the opening statement to give context to the legal arguments or explain to them the impact of the dispute.

Be mindful of your audience. Not only is your client watching and evaluating your representation, but the opposing party is similarly evaluating how persuasive you will be if the case ends up at trial. They may evaluate their case differently when they see a prepared

and knowledgeable lawyer. Since the mediation opening statement is about convincing the opposing party that you have the better case, you can only accomplish this if you if they actually listen to you. Attention spans can be limited so be prepared for your presentation. Make sure your opening statement covers the necessary points but is concise. Don't be repetitive. Making the same statements over and over is unnecessary to reinforce them and may antagonize the other side.

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Avoid legalese and speak in everyday terms whenever possible.

Don't point fingers or spring new information on your adversary at the mediation. If you start the mediation by putting the other side on the defensive, your chances of reaching a settlement will diminish. A contentious or condescending opening statement will set the wrong tone for the mediation. Always be respectful and pleasant. Whenever possible, ensure you have provided the necessary information to your adversary in advance of the mediation. Providing new information the day of the mediation can make it harder for the other side to adequately—and without emotion—evaluate such

information. Forcing the other side to re-evaluate their case on the spot is unlikely to yield positive results.

Don't ignore your weak points or your opponent's strong points. The opposing party may think you are missing the "big picture" or you do not see particular areas of vulnerability. Acknowledging any weak point at the onset of mediation suggests that you remain confident in your overall position. Similarly, it is helpful to acknowledge the other side's strengths. No one appreciates being told they are completely wrong or that there is simply no merit to their position. Use the opening statement as an opportunity to recognize your adversary's strong points and then apply the law or evidence to explain why ultimately it is not enough to win the case.

The opening statement sets the stage for the entire mediation and, if well-crafted, can set the negotiations on the right track.