



Seven Tips for a Winning Mediation Opening Statement

By **Scott J. Silverman**

I witnessed it. Truly. I saw an attorney prevail in a mediation primarily on the strength, style and presentation of his opening statement. Here are some tips:

1. Do Not Waive Your Mediation Opening Statement

A trend is developing on the West Coast to waive mediation opening statements and go directly into caucus. In my opinion, this is a mistake.

An opening statement gives you the rare opportunity to speak directly to the other party and present your position without the filter of the other attorney or the mediator. Further, it gives you the chance to present your case in the best light possible, demonstrate that you are a worthy adversary who would likely have great sway before a judge and/or jury and sow doubts in the mind of the opposing party.

In most cases, these enormous benefits should significantly outweigh any fleeting thoughts of waiver.

2. Be Conciliatory

If I kicked you in the shin and poked you in the eye, and then a minute later I asked for your help, would you give it to me? Probably not.

Always remember that you are in a mediation to try to settle your dispute. There is nothing wrong with presenting your position with vigor and emphasizing its strength, but be careful how you address an opponent's position. You can disagree with an opposing side, but you should be careful to do so without denigrating the party or their position.

It is generally effective to acknowledge the other side's "strengths" and then explain them away with law or evidence. No one likes to be told they are categorically wrong or that a judge or jury will never accept their position. Most attorneys who frequently try cases are aware they are only handicapping cases before they are adjudicated. Lawyers, no matter how perceptive they may be, are not clairvoyant.

In my experience, lawyers lose credibility with the opposing side when they inject categorical statements about judges and juries. Doing so demonstrates a lack of trial experience and suggests hubris.

3. Direct Your Comments to the Opposing Party, Not the Lawyer

How frequently has an opposing attorney convinced you that your case is a loser and that your client should just throw in the proverbial towel? Probably not very often, if ever.

This article was originally published on Mr. Silverman's personal blog.

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When making an opening statement during a mediation, your primary audience should be the party, not the party's lawyer. The odds of your convincing the other lawyer (who has likely been telling their client for over the past three years that their case is highly prosecutable/defensible) that your side will prevail and they will lose are probably slim to none.

You may not convince the opposing lawyer, but you may cause their client to question their own case. It is common for clients to hear things from the opposing attorney on opening statement that they've never heard or even considered before.

During the opening statement, you should focus on trying to create rapport with the opposing client, thereby effectively bypassing their lawyer's filter. The mediation is the only opportunity to do this. Creating doubt in the other party regarding their case should enhance their flexibility.

4. Show Your Hand

In Miami-Dade County, roughly one in 400 civil cases ever empanels a jury. With those odds, it is highly unlikely that a jury will ever decide any singular case. You are more likely to be lumped in with the other 399 cases than be the one case that goes to trial.

During mediations, it is common for lawyers to refrain from presenting all of the harmful evidence against the opposing side. They usually want to retain a trump card or ace up their sleeve for later use.

Since almost all cases never make it to trial, a lawyer should strongly consider presenting all the evidence during the opening statement. After all, if it is so damning, one would expect the opposing side to capitulate at once. If so, why hold back? In my experience, the evidence is usually not as devastating as the holder of the information may think.

5. Prepare an Effective PowerPoint Presentation

Nothing captures the attention of a group more than a video presentation. Who doesn't like to sit

in a darkened room and watch a movie? However, there are good presentations and not-so-good presentations.

An ineffective presentation is one with bullet points and words—and nothing more. Why even bother?

A good presentation seizes the attention of the opposing side and simultaneously serves as a preview of your case before a jury.

A presentation designed to achieve a beneficial settlement will likely contain elements that effectively condense the case and highlight the best evidence and strongest impeachment. This is how the attorney referenced at the beginning of this article won his case.

The attorney juxtaposed portions of a defendant corporate officer's videotaped deposition with those of corporate employees giving contradictory answers. The attorney also included subtitles on the bottom of the screen. Toward the end of the presentation, he put the conflicting statements next to one another.

PowerPoint presentations take time (and often money) to prepare, but they can make a big difference.

6. Present Helpful Jury Instructions

If I hear an attorney cite the case of *Smith v. Jones* one more time during a mediation, I will lose my mind. *Smith v. Jones*, of course, is a generic case citation. Feel free to plug in any case name.

Case citations matter most when a court is deciding a pending motion for summary judgment. They don't mean quite as much as when a judge is preparing jury instructions.

Let's start with the premise that 99 percent of the time, a judge will give standard instructions to a jury, rather than special instructions, as long as the standard instructions cover the cause of action/defense raised. Why? Trial judges are rarely reversed when standard instructions, approved by the Florida Supreme Court, are given. Special instructions create another issue on appeal (assuming an objection or fundamental error).

If you peruse the standard instructions before the mediation, be prepared to present them to the opposition (and possibly incorporate them into a PowerPoint presentation). Present your opening and use the instructions as a checklist to show why you have a *prima facie* claim or defense.

This can be effective, especially if one party is hanging onto *Smith v. Jones* as their savior case.

7. Be Mindful of Time

Today, everyone's attention span seems to be abbreviated. I recently read that between 1930 and 1960, most film scenes averaged two to four minutes. Today, they average about a minute.

Be mindful of your audience. If you are a strong presenter with a modulating voice who likes to walk around the room while changing PowerPoint slides, have at it. However, if you are not, hit your high points and move on.

Once people tire of you, you've lost their attention. They'll give you the courtesy of looking up at you every now and then, but they won't absorb your words. Once that happens, you might as well be in a room by yourself practicing your speech.

Always remember that the mediation opening statement is about convincing the opposing party that you have the better case. You can achieve that goal only if they listen to you. Use your time wisely and efficiently.

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