The Mediation: Strategy for the Initial Joint Session

This is the eighth article in this series on mediation advocacy. The seventh article, published July 25, discussed the strategic uses of pre-mediation submissions. The article continued a scenario in which the parties, Widgetronics and DesignMetrics, entered into a contract containing a dispute resolution clause and became embroiled in a dispute over Widgetronics' alleged wrongful termination of the contract. During the preliminary conference call with the mediator, the parties and mediator formulated a framework for the mediation session, including the initial joint session. This article provides tips on effective advocacy for that initial session.

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Most mediations begin with a joint session in which the parties meet with the mediator. During this session, the mediator typically makes introductory remarks about the mediation process and covers basic ground rules. The parties may deliver opening statements, and then the parties and mediator may ask questions of one another. A common practice is that, after this session, the mediator meets separately with each party in a private caucus, shuttling back and forth between them multiple times during the day. As appropriate, the mediator may convene a session with only the attorneys or principals, or hold another joint session with all participants. The mediation session continues until the parties have reached an agreement, decided mediation is no longer worth pursuing or decided to break and resume the next day or another time.

As we discussed in the fifth article in this series, on building the framework for your mediation, counsel will want to structure the mediation process to fit client needs and the circumstances. Counsel may believe, for instance, that given the animosity between the parties, opening statements or even a joint session would not advance the mediation process. Or counsel might suggest dispensing with opening statements to save time because they know one another's positions from prior negotiations, discovery or briefing on the issues.

Flexibility of the process is one of the reasons mediation is so effective for resolving disputes, and counsel should consider before — and even during — the mediation session how they might structure the process to obtain the most effective use of the mediator and participants. What strategic use of the process will likely result in an agreement? For the initial joint session, for example, if counsel agree to deliver opening statements, they should then consider who goes first, whether to set a time limit, whether to take a break between the statements or before a question period and whether exhibits should be used.

While counsel typically determines these issues during the preliminary conference call or ex parte with the mediator well in advance of the mediation session, circumstances may prompt counsel and the mediator to revisit the agreed-upon plans. In an actual situation, during a pre-mediation call, counsel agreed to deliver opening statements. Subsequent communications between counsel revealed that one side was upset about the circumstances surrounding a pending

lawsuit the other side had filed. Counsel for the party who filed the lawsuit contacted the mediator the day before the mediation to suggest that counsel forego opening statements. The mediator acknowledged the concerns but recommended no change of plans. When that party and its counsel arrived at the mediation venue, however, the mediator greeted them and suggested the parties not give opening statements based on a meeting with the other side that morning.

Mediators are split on whether to recommend opening statements. Some mediators believe they are usually beneficial, some believe they don't help the process and some proceed cautiously, on a case-by-case basis. Particularly where there is palpable animosity between the parties, or the parties already have a good understanding of each other's positions, opening statements may, at best, be a distraction and, at worst, only rub salt in the parties' wounds.

An opening statement potentially does provide the parties with a number of benefits, including the opportunity to:

• Showcase the client (particularly if the client would make a good trial witness), and trial counsel's advocacy skills.

• Express willingness to be flexible and a desire to resolve the dispute, show empathy and build rapport.

• Hear relevant information directly from the opponent or gain a better appreciation for their position, which can influence thinking and enhance the potential for settlement.

• Give parties some satisfaction that they've had their "day in court."

Counsel should neither categorically dismiss nor acquiesce to opening statements without considering carefully the particular circumstances surrounding the dispute and the participants attending the mediation. Consider whether opening statements would likely be beneficial and whether that benefit would outweigh any risk, and then have a candid discussion with opposing counsel and the mediator to agree upon an approach. In our hypothetical case between Widgetronics and DesignMetrics, the parties and mediator have agreed to opening statements in the initial joint session because the dispute is at an early stage, the parties have not engaged in discovery and the clients' emotions are not overwhelming the process.

The parties also need to decide who will present the opening statement — counsel, the client or both. Some factors affecting this decision include:

• Who is likely to have the most positive impact for settlement?

• Is the client's representative personable and does he or she present well?

• Is the status of the client's representative sufficient enough to be likely to gain the attention of the opposing party?

Often, the client is in the best position to tell their story and to explain relevant facts that either have not yet surfaced or have not yet resonated with the opposing party. The sincerity with which a client delivers a message to an opponent can be a powerful influencer. In addition, the position that client's representatives hold in their company or their reputation in an industry can have an impact on the message they deliver.

The opening statement is a golden opportunity for explaining the strengths of the client's case and pointing out the weaknesses of the opponent's case. The other side is a captive audience and the opening statement may be the first and only time to address directly the other side's decision-makers. To maximize the opportunity and the likelihood the message will be heard and considered, employ the following tips:

• Speak directly to the other side's representatives, not to the mediator or opposing counsel.

• Tell the story in plain English.

• Acknowledge the other side's concerns, interests and needs.

• Use an appropriate tone.

• Consider using visual aids, as they can be effective in telling the story.

• Keep the presentation concise to keep the other side's interest and to avoid appearing to lecture.

• Express the client's interest in resolving the dispute, and its willingness to be open, creative and flexible.

Another advocacy issue is whether to include an offer in the opening statement. While many parties resist this practice, it does have advantages. The party that presents first has the opportunity to make the first offer, which "anchors" the expectations of the parties, resulting in the negotiations revolving around that offer. If, on the other hand, an offer might be

better received if delivered by the mediator in a caucus, or could be improved with input from the mediator, waiting to make an offer could be the better course.

If client representatives are presenting any portion of the opening statement, they should practice with counsel to ensure they will deliver the message as intended. At the mediation, counsel should listen to their client's presentation for any variance from the planned presentation, as well as observing the other side's body language and demeanor.

When it is the opponent's turn to present, give them your undivided attention. Try to shut out any distracting chatter in your head that may interfere with your ability to pay attention. Such chatter may be the voice in your head reacting to what is being said, or thoughts about something else in your life. Display active listening techniques, head-nodding or other indications of listening and understanding, and make eye contact. Listen for new information and to understand the other side's perspective, and try to identify the interests and feelings that are underneath the content of the spoken words. Counsel should advise their client not to interrupt and to stay patient and calm even if they are hearing statements they feel are wrong. They will have an opportunity to raise their issues later. Demonstrating attentive listening shows respect and models the behavior the client will want the other side to afford them during their presentation.

During the other side's presentation, counsel should observe the demeanor of their client as well as assess the competency of the presentation. After it is completed, consider paraphrasing the presentation. This is another active listening technique that will impress the other side with the level of your attention and enable you to confirm your understanding of the other side's views. An expression of empathy for the other side's situation, possibly even an apology for the circumstances (without admitting any blame) can also be valuable for building rapport and trust. The end of the opening statement is also the time to raise questions about what was said or to seek clarification.

In preparing for the mediation, identify the questions both the other side and the mediator might ask after opening statements, and determine who would be best suited to answer them. Plan a default response for unanticipated questions, including deciding ahead of time who should attempt to answer unexpected questions, or agreeing to reply with a statement that the client would like to think about the question. This provides an opportunity to determine whether to use the mediator to respond to the opponent's question or to respond directly at a later time. Finally, listen carefully to the mediator's questions, as those questions can be revealing as to what the mediator feels are the vulnerabilities of the parties.

In our next article, we will address tips for effective advocacy during the private caucuses.

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