



PROGRAM MATERIALS

Program #2947

May 21, 2019

Is Mediation the New Jury Trial? Approaches and Strategies to Effective Mediation

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Is Mediation the New Jury Trial?

Approaches and Strategies for Effective Mediation

May 21, 2019

Anthony J. Rospert

The Vanishing Trial

- A recent Law360 article applauds the disappearance of jury trials because “lawyers who try cases to juries are ‘con men and charlatans’ and jurors are ‘gullible.’”
- “The skill of trying cases to a jury is dying for good reasons of law, procedure and market alternatives.”
- “No doubt this is a disappointment to a certain class of trial lawyers who feel they could convince anyone of anything. But that skill ... is of no value.”

The Vanishing Trial: Record Low Number of Cases Disposed of by Trial

- **Federal cases:**
 - 2002: 1.8%
 - 2015: Less than 1%
- **New York Office of Court Administration:**
 - 2017: 10%



The Vanishing Trial: Cause?

- Top reasons cited for the decline in the number of trials:

Soaring
discovery
costs

Takes
too much
time

Proliferation
of
mediation

- Parties are seeking quicker and less expensive ways to resolve disputes.

The Vanishing Trial: The New Normal

- If true, what does that mean for trial lawyers and trial skills?
- Legal commentators contend that the skills required to successfully mediate are actually incompatible with those necessary to achieve success at trial.
- They say that advocacy skills in mediation are different than those used in trial advocacy.
- **DISAGREE:** Many of the characteristics and skills that make us successful as trial lawyers also make us effective advocates in mediation.

The Vanishing Trial: Skills of Top Trial Lawyers

Ability to think on their feet

Detail-oriented

Judgment

Credibility

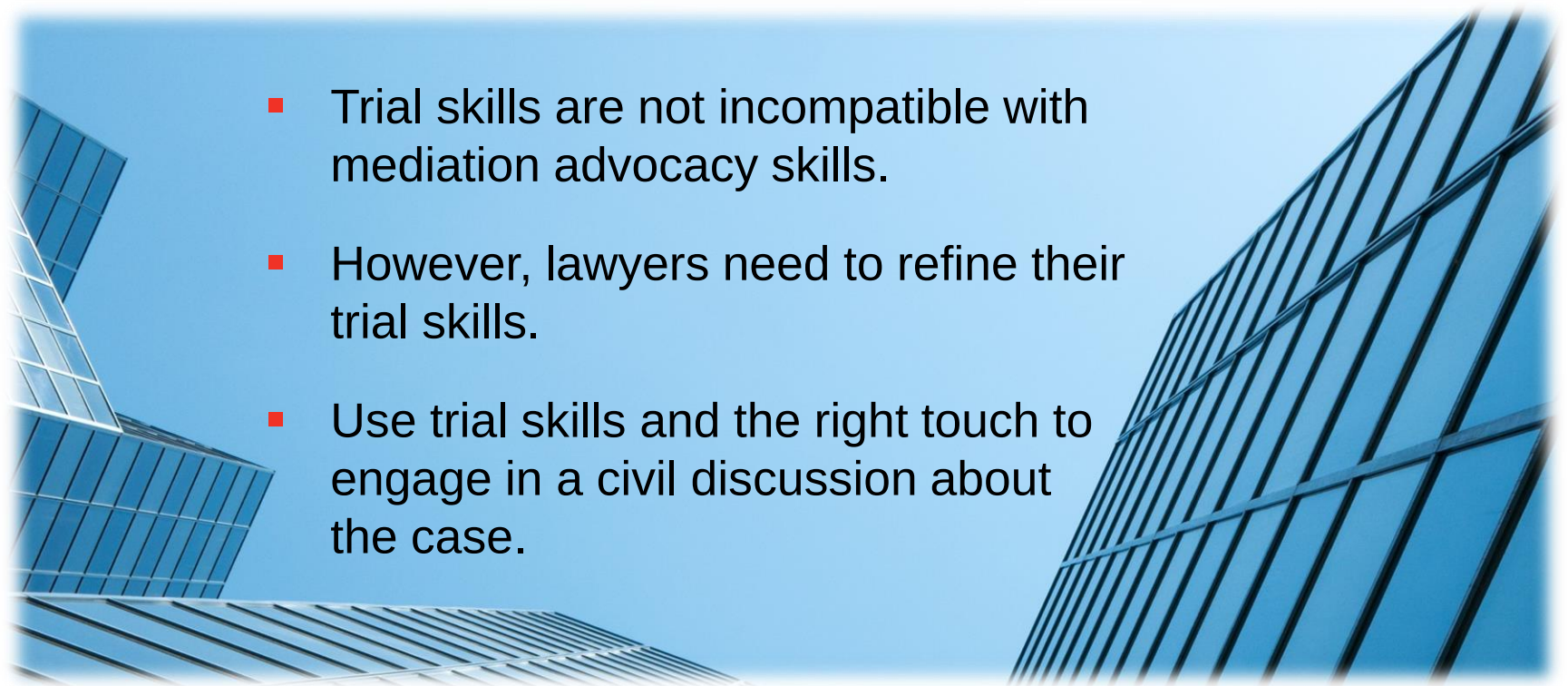
Creative

Reasonable

Prepared



Big Picture: Why Is This Important to You?

- 
- Trial skills are not incompatible with mediation advocacy skills.
 - However, lawyers need to refine their trial skills.
 - Use trial skills and the right touch to engage in a civil discussion about the case.

Big Picture: Preparation Is Key

- “By failing to prepare, you are preparing to fail.”
– Benjamin Franklin
- As in jury trials, preparation for mediation is critically important to success.
- ABA Section of Dispute Resolution Task Force on Improving Mediation Quality found that premediation preparation is critical to mediation’s success.
- Inadequate preparation does a disservice to your client.
- Take control of the process and improve the likelihood of success at mediation.



Roadmap

- **Premediation Assessment**
- **Selecting the Right Mediator**
- **Premediation Settlement Structures**
- **Using Experts at Mediation**
- **Opening Statements at Mediation**



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Roadmap

Premediation Assessment

Selecting the Right Mediator

Premediation Settlement Structures

Using Experts at Mediation

Opening Statements at Mediation

Premediation Assessment: Overview of the Process

- A premediation case assessment allows you to:

Identify your client's
goals for the
mediation

Formulate a plan to
achieve them

- Enhances the efficiency and transparency of the mediation process.
- Leads to cost-effective, business-driven solutions not otherwise available in litigation.

Premediation Assessment: Identify Your Client's Goals

- Developing an understanding of your client's objectives allows you to structure a plan to meet those goals during the mediation process.

Probe client on their goals by asking questions:

- **Genesis of the dispute**
- **Client's goals**
- **Reasons behind those goals**



Premediation Assessment: Identify Your Client's Goals

- **Prioritize these needs/ interests with your client.**

- **May need to reexamine throughout process to reach a satisfactory outcome.**

- **Role of lawyer includes**
 - identifying which goals must be satisfied to reach a resolution, and
 - formulating alternative settlement paths that align with those goals.

Premediation Assessment: Candidate for Early Resolution?

Save Money

Resources that would otherwise be used to conduct discovery and prepare for trial can instead be used to reach an early settlement.



Save Time

Provides participants with a level of predictability and can save thousands of hours that would otherwise be devoted to assisting with the lawsuit.



Keep Control

Can define the issues for the mediation to reach a resolution tailored to the situation rather than rolling the dice at trial.



Prevent Disruption

Helps preserve valuable business relationships by resolving disputes before they escalate and the relationships are forever ruined.

Premediation Assessment: Assess Evidence and Law

- Just like at trial, mastering the facts and the law is important to the outcome of mediation.
- Assess the who, what, when, why, and how of the case and determine if there are any information gaps.
- A comprehensive grasp of the facts enables you to get ahead of the process.



Premediation Assessment: Assess Evidence and Law

- Conduct interviews, review relevant documentation, and gather additional documentary support.
- Identify the key witnesses in the dispute.
- Review critical documents and consider which categories of documents (both favorable and unfavorable) require further review and analysis.
- Determine in advance if there are gaps in the facts and, if so, formulate a plan to obtain any missing information.
- Research all relevant legal issues in order to evaluate the strengths and weaknesses of the known facts.

Premediation Assessment: Evaluate Strengths and Weaknesses of Case

- Reviewing the case's strengths and weaknesses allows your client to conduct an accurate cost-benefit analysis.
- Consider the opposing parties' perspective:
 - What are they likely to argue?
 - What flaws will they see in your client's theory?
 - What bad facts will they focus on?



Premediation Assessment: Evaluate Strengths and Weaknesses of Case

- Control your client's expectations by
 - recognizing and discarding advocacy bias, and
 - engaging in a realistic assessment of the case from the perspective of a disinterested neutral.
- Failing to do so results in “optimistic overconfidence.”
- Advise your client that the aim of the mediation is not to win the case, but rather to problem solve.

Premediation Assessment: Develop a Comprehensive Budget



- Help set client expectations regarding how the case will proceed if a settlement is not reached.
- Assess whether continued litigation is cost prohibitive.
- Determine if your client is willing to incur the necessary expenses associated with taking the case to trial.
- Armed with a realistic budget, counsel and client can then compare the costs of taking the case to trial with the possibility of obtaining a business resolution at the mediation.

Premediation Assessment: Consult with Experts

- Engaging an expert early in the process can yield significant benefits, particularly in cases involving complex disputes.
- Expert can provide your client with an unbiased opinion.
- Expert can help support the legal evaluation of the case.
- Employing during the premediation assessment process can enhance the likelihood of resolution.

Premediation Assessment: Consider Roadblocks

- Identify and assess roadblocks to determine
 - if they are indeed “deal breakers,” or
 - if creative settlement paths exist to overcome them.
- Analyzing potential settlement hurdles allows your client to make an informed decision as to whether a resolution is feasible.



Premediation Assessment: Consider Roadblocks

Such obstacles can include:

Prior failed settlement negotiations

Insufficient resources to fund a settlement

The desire to avoid copycat lawsuits

Your client's need to respond to a frivolous claim

Reputational and/or stock price concerns

Difficulties in reaching a global resolution where multiple parties are involved

Stakeholders who would rather lose the case than settle

Premediation Assessment: Consider Roadblocks



- Beauty of mediation is that it is not a win-lose proposition.
- Opportunity for the parties to craft creative solutions to overcome roadblocks.
- Moving from an entrenched position is no easy task, but sacrificing the opportunity to develop inventive solutions is likely to lead to expensive, time-consuming litigation.
- Premediation assessment can lead to the development of creative settlement remedies that overcome most, if not all, roadblocks.

Premediation Assessment: Generate and Weigh Settlement Options

- Establish the monetary settlement range that would satisfy your client, along with any nonmonetary solutions that could resolve the dispute.
- Brainstorm possible settlement options that will meet needs and interests.
- Prioritize those options and place a settlement value on each.
- Collaborate with your client to evaluate the range of acceptable outcomes.

Premediation Assessment: Generate and Weigh Settlement Options

- Have a candid discussion with your client about the likelihood of each option:
 - What are the costs and benefits of this option?
 - Are there any nonmonetary costs in pursuing this option?
 - Is this the best possible outcome?
 - Does this outcome satisfy your client's needs and interests?
 - Is the other side likely to find this option acceptable?



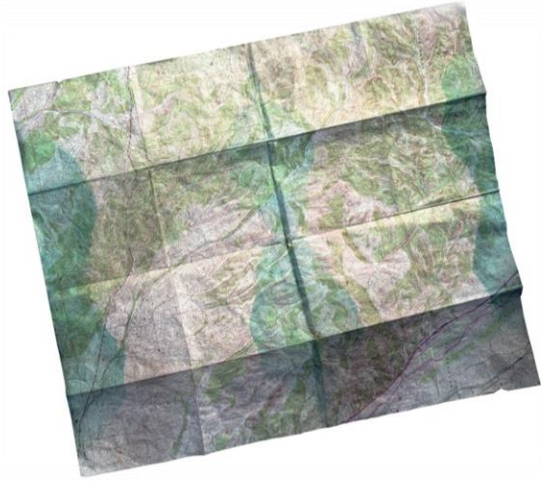
Premediation Assessment: Generate and Weigh Settlement Options

Engage in a probability analysis:

$$\begin{array}{rcl} & \text{Plaintiff's likely percentage of success} & \\ \times & \text{Likely damages award} & \\ + & \text{Defendant's projected attorneys' fees and costs} & \\ \hline = & \text{Defendant's loss exposure} & \end{array}$$

Premediation Assessment: Generate and Weigh Settlement Options

- Each settlement option should have a rationale that is buttressed by documents, calculations, and/or expert opinions.
- The worst possible settlement option to present at the mediation is the one that is pulled from thin air.
- Preparation ensures that every settlement option will have well-reasoned justification and supporting calculation to share with the mediator and the other side.



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Roadmap

Premediation Assessment

Selecting the Right Mediator

Premediation Settlement Structures

Using Experts at Mediation

Opening Statements at Mediation

Selecting the Right Mediator: Overview

- Selecting the right mediator increases the likelihood of settlement.
- Need to know the characteristics to look for in a mediator and the specific type of mediator most likely to help the parties reach a settlement.
- Bottom line: Take the time to investigate and select the right mediator.

Selecting the Right Mediator: 4 Types of Mediators



Evaluative

—

“The Hammer”



Facilitative

—

“The Hand
Holder”



Transformative

—

“The Marriage
Counselor”



Hybrid

—

“The Shape
Shifter”

Selecting the Right Mediator: The Hammer

- Typically former judges because it mirrors the process they undertook in weighing evidence and rendering decisions during trials.
- Considers the arguments and evidence then evaluates the strengths and weaknesses.
- Offers a “dose of reality” regarding the relative strength of each side’s legal arguments and will predict the likely outcome if the parties tried a case.
- Most effective in resolving business disputes, product liability claims, and matters involving the interpretation of contracts.



Selecting the Right Mediator: The Hand Holder



- A facilitative mediator helps clarify the issues or the parties' positions, but generally does not offer an assessment of a case.
- Parties' opinions drive the process more than a mediator's own assessment.
- The hallmark characteristic of this style is the use of "shuttle diplomacy" or "caucuses."
- Most effective in employment cases and matters involving business parties that have an existing relationship that will continue after resolution.

Selecting the Right Mediator: The Marriage Counselor

- A transformative mediator focuses on the underlying relationship between the parties.
- Emphasizes the parties' interpersonal relationships rather than focusing on their legal rights or individual interests.
- Role is to ask questions to help the parties recognize the importance of repairing and continuing the underlying relationship between them.
- Most effective when the parties are emotionally invested in a dispute, such as in the dissolution of a family business or a fight over intellectual property.



Selecting the Right Mediator: The Shape Shifter



- Mediations do not fit neatly into one particular box.
- Useful to find a mediator who has the flexibility to invoke different styles.
- Varies approaches and applies the most effective style under the circumstances rather than taking a rigid “one-size-fits-all” approach to the mediation process.
- Most effective mediators start off as facilitative and shift to evaluative.

Selecting the Right Mediator: Evaluating Client Needs and Goals

- Any one of the mediator styles may be appropriate depending on the needs and goals of your client.
- Important to assess the strength of your client's case in selecting a mediator.
- Selecting a mediator who can best resolve a dispute will also increase overall client satisfaction with the mediation process.

Selecting the Right Mediator: Other Factors Impacting Selection



Impact of parties' emotions



Opposing counsel style and approach



Events that have occurred before the mediation

Selecting the Right Mediator: Outlining Process with Opposing Counsel

- Get on the same page by addressing issues such as:
 - What sort of time frame do the parties want to complete the mediation?
 - How much are the parties willing to spend mediating?
 - Where will you hold the mediation?
- Discuss with opposing counsel why a particular type of mediator is likely to achieve settlement.
- If the parties do not immediately agree, develop a process for exchanging lists of names.

Selecting the Right Mediator: Finding Potential Mediators

- Assess mediator experience with the magnitude and complexity of the case.
- Intangible qualities that you can deduce through a personal interview or by talking to references.
- Track record of tenacity – takes the time to prepare for mediation and willing to see the matter through to conclusion.
- Word of caution: A mediator's fee is not necessarily a good indication of his or her experience, effectiveness, or competence.



Selecting the Right Mediator: Technical Expertise

- Substantive expertise is generally an asset because it saves time and money and increases the predictability of the mediation process.
- It can be a liability if it leads to the mediator imposing their own view and ignoring the facts and evidence presented by the parties.
- Mediator who “knows the territory” – enables him or her to focus on the issues and what really matters.
- When deciding whether to select a mediator with technical expertise, look at how important that aspect is to resolving the dispute.

Selecting the Right Mediator: Conducting Due Diligence

- Ask colleagues or other trusted contacts in the legal field about the mediator.
- Call references from the mediator's last 5 mediations.
- Conduct short interviews with potential mediators.
- Review potential mediators' written work product.
- Understand mediators' procedures and processes.



Selecting the Right Mediator: Picking the Mediator



- Goal is not to “win” your preferred mediator but to reach a mutual agreement that both parties find acceptable.
- Ideally, both parties will have at least one common mediator but sometimes the first round of exchanging names will not lead to an agreement.
- Ask your opponent to articulate the reasons for rejecting your proposed mediators.
- Be willing to accept a mediator proposed by the other side.



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Roadmap

Premediation Assessment

Selecting the Right Mediator

**Premediation Settlement
Structures**

Using Experts at Mediation

Opening Statements at Mediation

Premediation Settlement Structures: Overview

- Enables parties to iron out structural issues prior to the mediation.
- Avoids settling the case and then structuring the settlement on the fly.
- Allows parties to focus on the real issues in dispute at the mediation and agree on less controversial items premediation.
- Does not mean the parties will reach a resolution, but provides a roadmap.

Premediation Settlement Structures:

Step 1 – Brainstorm Settlement Structures



- Settlements at mediation are not conducive to a one-size-fits-all approach.
- Scenario in which the parties could continue the business relationship or is it irreparably harmed?
- Scenario where one of the parties buys out the other side's business interest?
- Typical settlement scenario – Party A pays Party B?

Premediation Settlement Structures:

Step 2 – Agree on Basic Terms



- What claims are being released?
- What parties will be released?
- How broad are the releases?
- Is a confidentiality provision and/or non-disparagement clause necessary?
- Will the parties cover their own attorneys' fees and costs?
- What is the accepted method of payment for a monetary settlement?
- Are terms needed to address unique circumstances such as tax issues?

Premediation Settlement Structures:

Step 3 – Create Term Sheets



- Should memorialize settlement scenarios and terms.
- Should be streamlined and fairly brief (i.e., several bullet points).
- Should highlight the provisions for each settlement scenario that the parties believe are vital to settlement.

Premediation Settlement Structures:

Step 4 – Share Term Sheets



- Parties should exchange term sheets.
- Discuss whether to share the term sheets with the mediator.
- Stipulate that trading term sheets is purely an exchange of information and not an agreement to agree.

Premediation Settlement Structures:

Step 5 – Evaluate Term Sheets



- Additional premediation exchanges to clarify any of the proposed scenarios?
- Determine if solution not previously considered is workable.
- Allows parties evaluate risks and rewards and explore several settlement paths.



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Using Experts at Mediation: Overview

- Experts can provide significant value during the mediation process.
- Benefits:
 - Help identify missing information.
 - Serve as a calming influence.
 - Temper expectations.
 - Offer innovative solutions to help achieve a settlement.

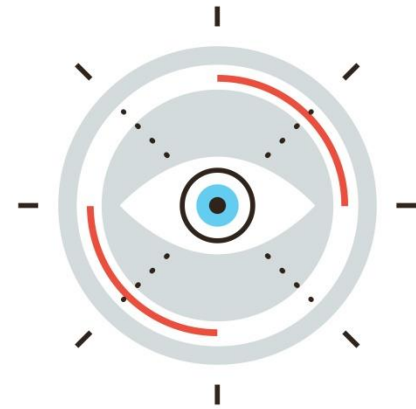


Using Experts at Mediation: Simplify the Issues

- Assist in clarifying the facts in dispute and understand the technical/scientific issues in the case.
- Can help isolate key facts and eliminate satellite issues.
- Can identify areas where the parties can agree on the facts.
- Can assist by developing summary charts, graphs, and other demonstratives.
- Solicit new information from the opposing party and prepare counterarguments.

Using Experts at Mediation: Maintain Focus on the Facts

- Help moderate the tone of mediation by presenting data with an air of objectivity.
- Takes your client out of the spotlight.
- Bring credibility to your client's position by showing that a good faith difference of opinion exists.



Using Experts at Mediation: Establish a Realistic Bargaining Zone

- Expert can temper any unrealistic expectations about the value of the case and provide a reality check for your client.
- Expert's analysis can help set brackets for ranges of value.
- Expert can evaluate proposals presented during the course of shuttle diplomacy.
- Expert can serve as an intermediary between your client and the mediator.
- Expert can bring a level of composure to the process by focusing on the numbers.

Using Experts at Mediation: Offer Innovative Solutions



- Expert can help craft creative solutions and provide alternative approaches.
- Expert can help the parties and the mediator troubleshoot potential solutions.
- Expert can suggest approaches that have worked in other cases.

Using Experts at Mediation: Word of Caution

- The use of an expert at mediation can present some risks:
 - Possible waiver of confidentiality.
 - Chance that the expert's work product could be discoverable if the matter does not settle.
- Best practices:
 - Isolate expert from mediation work product (e.g., mediation statements).
 - Label expert materials “for settlement purposes.”
 - Stipulate with the other side on discoverability issues.



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Opening Statements at Mediation

Opening Statements at Mediation: Overview



- Critical decision on whether to give an opening statement.
- Opinions on the utility range from
 - “a complete waste of time and counterproductive” to
 - “essential to the process, as it is your one and only opportunity to talk directly to the other side.”
- Same approaches and skills you use to deliver a great opening statement at trial also apply in the mediation context.

Opening Statements at Mediation: Considerations in Giving

- Not always appropriate in mediation, but there are times when presenting one can add value and make settlement more likely.
- There is no bright-line test for when to give an opening statement.

■ **Factors:**

- Educating the mediator
- Educating the opposing party
- Personalizing your client
- Recognizing the parties' feelings
- Setting the tone
- Timing aspects

Opening Statements at Mediation: Educating the Mediator

- Efficient way to educate the mediator on the nature of the dispute and the issues.
 - Dribbling out critical facts and theories may require too much time and create a risk of miscommunication.
 - An opening statement helps “cut to the chase.”



Opening Statements at Mediation: Educating the Mediator

- Brings to life issues that may not have been clear during the premediation conferences or in written submissions.
- However, well-prepared briefs and mediation statements may be sufficient.
- Opening will not be worthwhile if just a regurgitation of the mediation statements.

Opening Statements at Mediation: Educating the Opposing Party

- Opportunity to advocate your position directly to the opposing party.
 - Opposing lawyer is failing to communicate both the pros and cons of the case to their client.
 - Worse yet, embellishing and exaggerating the strength of their case and creating unrealistic expectations.
- Beneficial for a party to observe the strength of the opposing party's advocacy.
- However, can fail if constructed to persuade the opposition of the correctness of your position rather than to educate.

Opening Statements at Mediation: Personalizing Your Client

- May be only time the parties can meet face-to-face.
- Opportunity to personalize your client and demonstrate their position is rational.
- Consider having your client participate in part of the opening.



Opening Statements at Mediation: Recognizing the Parties' Feelings

- Will be ineffective if emotions are running high and personality conflicts exist.
- If the underlying litigation has been hostile, then the costs of giving opening statements far outweigh any benefits.
- However, can be used to assuage the parties' negative emotions.
- Can defuse negative emotions and start the mediation on a positive note.

Opening Statements at Mediation: Setting the Tone



- Make it clear to the other side that your client is not at the mediation to fight, but to resolve the case.
- Make conciliatory statements and focus on areas of agreement.
- Get the other side to lower its guard and listen.
- A hostile opening statement utilizing courtroom theatrics will fail.

Opening Statements at Mediation: Timing Aspects

- Consider when the mediation occurs relative to the stage of the underlying litigation.
- May be more valuable when the mediation occurs early in the case.
- However, if the mediation is being conducted after or near the close of discovery, there may be little new information gleaned from an opening statement.



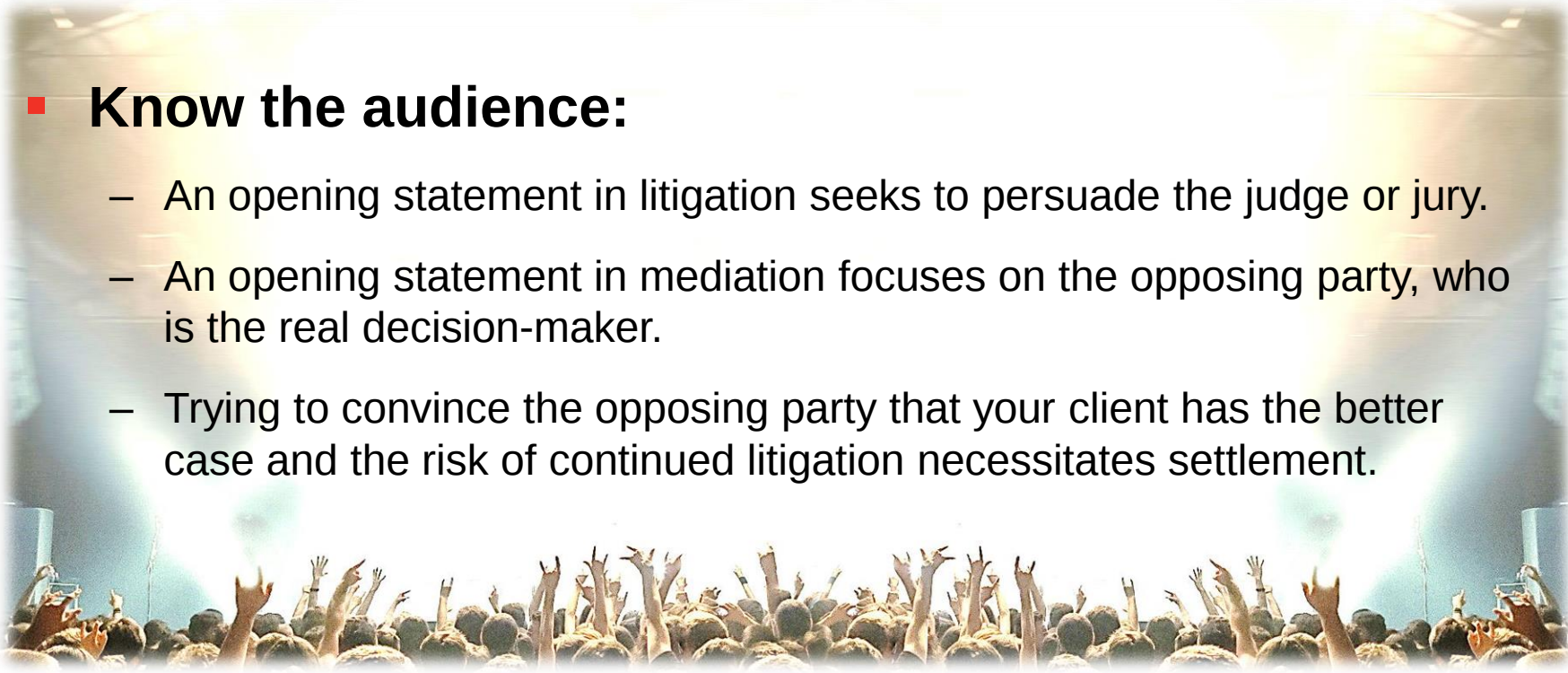
Opening Statements at Mediation: Best Practices in Giving

- “I suppose it is tempting, if the only tool you have is a hammer, to treat everything as if it were a nail.”
– Abraham Maslow
- While using an adversarial approach in mediation is generally counterproductive, the skills necessary to be an effective advocate in your mediation opening are similar to those used in the trial context.
- Strike a balance between promoting your client’s position and proceeding in a conciliatory manner consistent with the goal of settlement.

Opening Statements at Mediation: Persuading the Decision-Maker

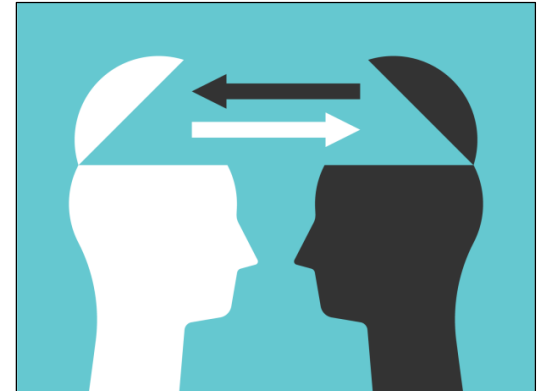
■ Know the audience:

- An opening statement in litigation seeks to persuade the judge or jury.
- An opening statement in mediation focuses on the opposing party, who is the real decision-maker.
- Trying to convince the opposing party that your client has the better case and the risk of continued litigation necessitates settlement.



Opening Statements at Mediation: Persuading the Decision-Maker

- **Educate the decision-maker:**
 - Like a trial opening, an opening statement in mediation should educate the decision-maker on the facts of the case.
 - Don't miss the opportunity to explain the key evidence by focusing instead on rebutting the other side's arguments.
 - Best chance to educate them on evidence that they might be hearing for the first time.



Opening Statements at Mediation: Persuading the Decision-Maker

■ Word of caution:

- Can fail if the sole purpose of the opening is to persuade the opposition of the correctness of your position.
- Inform them about the evidence in the case, the differing legal theories, and the risks of further litigation.
- Strike the right balance between advocating for your client's position and communicating a willingness to compromise.

Opening Statements at Mediation: Preparation Is Key



- You can't wing an effective mediation opening statement.
- Communicate your readiness to the opposing party.
- An opening demonstrating that you are in command of the case's facts and law and can explain how the case will unfold if the parties do not settle conveys preparedness.

Opening Statements at Mediation: Preparation Is Key

- Explicitly state that you and your client have spent significant time preparing.
- Preparation allows you to impress on the other side that you are a skilled and talented trial attorney who will make an even more compelling argument for your client in the courtroom.

Opening Statements at Mediation: Preparation Is Key

■ Words of caution:

- Using case citations in a PowerPoint presentation can backfire.
- Long opening can antagonize the other side rather than educate them.
- Shows that you are not prepared.



Opening Statements at Mediation: Tone Is Critical

- An opening statement at mediation should be a conversation, not a trial argument you would deliver to a jury.
- You fail as an advocate in your mediation opening if you set an adversarial tone.
- Set a positive tone and avoid statements that will elicit a strong negative reaction.
- A good trial lawyer has the skills necessary to make an effective presentation without creating resentment and the ability to foster an atmosphere of trust and willingness to compromise.

Opening Statements at Mediation: Tone Is Critical

- Avoid exaggerating and using tactics that convey the impression that you are merely engaging in chest beating and table pounding.
- Instead, speak with conviction and emphasize the strengths of your client's case.
- Be careful about how you characterize the other side's position.
- Instead, concede that the other side makes some valid points to consider and state that you hope they will recognize that some of your arguments have merit as well.
- The goal is to confront your weaknesses and be conciliatory where appropriate by acknowledging the other side's strengths.

Opening Statements at Mediation: Tone Is Critical

- Be explicit about your purpose.
- Stress that you and your client are at the mediation not to be adversarial, but to resolve the dispute.
- Address any negative emotions, known resentments and/or levels of distrust between the parties.
- Personalize each side and emphasize that the case involves real people.

Takeaways

Refine your trial skills
to be an effective
mediation advocate

Like trial, mediation
preparation is the key
to success

Engage in a
premediation
assessment

Take the time to select
the right mediator

A front-end investment
in having an expert
assist with mediation
can be beneficial

Consider giving an
opening statement at
the mediation



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