In Praise of the Strategic Opening Statement in Commercial Mediation

By Larry R. Rute

Over the past fifteen years, mediation has become an increasingly important tool to resolve complex commercial disputes. It is no longer unusual for mediations to be conducted that will involve multiple parties and thousands, if not millions, of dollars in potential damages. In high-stakes mediation, the consideration of whether to utilize the opportunity for an opening statement at an early stage is a very important strategic decision. The determination whether to utilize the opening statement will set into play a psychological process that may ultimately determine whether the negotiation is successful or result in impasse.

The experience of the U.S. District Court for the Western District of Missouri (Western District) in establishing the Early Assessment Program (EAP) has done much to encourage the expansion and improve the overall quality of commercial mediation throughout the Missouri/Kansas region. The Western District's EAP was originally established as a pilot court-connected alternative dispute resolution program under the Civil Justice Reform Act (CJRA) of 1990.[1] The Western District initially established a Civil Justice Advisory Group "to identify the issues and develop a plan for an ADR system that would reduce the costs of litigation by encouraging earlier settlements."[2] The advisory group believed that this goal could be best achieved if the EAP encouraged trial counsel and parties to meet at a very early stage in the proceedings to:

- confront the facts and issues before engaging in expensive and time-consuming discovery procedures;
- engage in early discussion of the issues;
- consider the views of the opposing side;
- consider the projected costs of future procedures in an effort to settle the case before costs and lawyer fees have made settlement more difficult; and,
- consider other methods of resolving the dispute.[3]

Under the original EAP, a meeting was held within 30 days of the filing of responsive pleadings, after which litigants would learn if the case would be assigned to a United States Magistrate Judge, a U.S. Bankruptcy Judge, the Administrator of the Early Assessment Program, or an outside mediator.[4] Through this mechanism, court-annexed mediation in the federal court arena became, in effect, a normal and integral part of the litigation process.

Because the EAP initially focused, in part, on employment discrimination matters, it provided the emphasis to support additional mediation efforts on the part of the Kansas Human Rights Commission (KHRC) and, later, the Equal Employment Opportunity Commission (EEOC) in the development of early

[1] Kent Snapp, "Five Years of Random Testing Shows Early ADR Successful, Dispute Resolution Magazine, p. 16, Summer, 1997.
[2] Id.
[3] Id.
[4] http://www.mow.uscourts.gov/General_Information/eappage.htm

employment discrimination mediation programs in the mid- to late-1990's. Soon thereafter, the U.S. District Court for the District of Kansas dramatically expanded its early mediation efforts.

While successful in resolving a substantial number of disputes, the early attempts at mediation in the 1990's were occasionally characterized by inexperience and lack of sophistication. Participants involved in early mediation settlement attempts have described disastrous opening statements characterized by an adversary engaging in what could be most charitably described as courtroom style theatrics. Certainly, there are occasions, even today, when mediation opening statements are not utilized to persuade the other side to accept a realistic settlement. In times such as this, mediators sometimes carefully review their career options! Fortunately, by and large, the days of the particularly disastrous outrageous opening statements are gone or at least significantly diminished.

Nonetheless, it is not uncommon for today's attorneys, and some mediators, to suggest that the opportunity for the joint session be abandoned and that the mediation immediately proceed by utilizing a series of private meetings (caucuses). Skipping the opportunity to suggest an opening statement in mediation is not a decision that should be taken lightly. Whether to conduct this component of mediation should be an important consideration in legal counsel's overall negotiation strategy.

Pre-Mediation Conference

In the early days of commercial mediation, it was quite common for mediators, immediately following their engagement, to simply set the date, time and location for the face-to-face mediation and take no further action until the mediation was convened. Upon arrival at the mediation location, the old-style mediator would often engage in a relatively inflexible fixed routine. In today's increasingly sophisticated world of mediation, the failure to schedule a meeting with legal counsel and or the parties by telephone or in person before the mediation is more the exception than the rule.

In this modern mediation era, it is much more common for commercial mediators to routinely conduct one or more pre-mediation conferences with the attorneys who will be attending the mediation. Some mediators telephone legal counsel individually, while other mediators conduct pre-mediation telephone conferences with all attorneys who will be attending the mediation. In multi-party mediation, a common method is for the mediator to establish one or more face-to-face conferences with attorneys and/or their clients to establish a protocol for a successful face-to-face mediation.

In whatever form, the pre-mediation conference permits the mediator to obtain an early "feel for the case" by gathering preliminary information regarding the general facts and theory of the case, potential legal issues involved, the amount of damages sought, the individuals attending the mediation, the emotional temperature of the participants, the form of written submissions to the mediator and other related issues. On those occasions when the mediator has not independently initiated contact, it is increasingly common for attorneys to affirmatively seek a pre-mediation conference with the mediator. Recall, there is no such thing as *ex parte* communication in mediation.

No matter the particular process or procedure established for a pre-mediation conference, it is likely that the mediator will also inquire whether the attorney or his or her client intends to make or respond to an opening statement. It is very important that attorneys attending mediation know and understand the mediator's position with respect to opening statements. This is because a significant minority of mediators refuse to entertain opening statements. This tactic is particularly common in personal injury cases where it is often the norm that mediation not be conducted until discovery is complete or nearly complete. When involved in this type of case, legal counsel may take the position that there may be little new information that can be gleaned through the mediation process and, therefore, the negotiation is really a question of "how much " by way of a monetary settlement. So, too, when the parties' emotions are particular high, there may be an understandable reluctance by counsel to present an opening statement for fear that anything said will become contentious, polarizing and/or unproductive.

A majority of mediators (and I am among them) reserve opinion whether opening statements will be given until such time as the mediator has had an opportunity to discuss the value of an opening statement with legal counsel for each party. In those cases which have not yet been filed in court or which are mediated pursuant to an "early settlement" court order, some form of opening statement may prove to be quite beneficial and effective. For example, in many commercial cases, particularly employment cases, it is quite common for legal counsel for plaintiff and respondent to propose joint opening statements. This is because "early settlement" cases often require that the mediation be conducted before significant Rule 26 discovery has been conducted. Mediations undertaken with only nominal discovery require an enhanced opportunity to exchange information, sometimes in the form of lengthy opening statements.

It is, of course, conceivable that the mediator might learn at the pre-mediation conference that one attorney would prefer to make an opening statement and that the other prefers that the opening statement not be conducted. This is very important information for the mediator to have well in advance of mediation. Any dispute regarding whether opening statements will be conducted may require early intervention on the mediator's part.

If there is an agreement that opening statements will be conducted, it is always important for the mediator to determine and direct the proposed format of the presentation. For example, it is not unusual in employment or other complex commercial cases for plaintiff or defense counsel to suggest that they will bring demonstrative evidence to the mediation in the form of a PowerPoint presentation or various types of video or audio presentations. When I become aware that one party or the other intends to utilize an extensive PowerPoint presentation, it is common for me to encourage counsel to reduce the length of their planned presentation to 30 minutes or less. It is my experience that PowerPoint presentations that are too long in duration tend to antagonize or polarize the other side. Naturally, if one side intends to present electronic information, it is important for the opposing party to be aware of this in order to avoid surprise or unnecessary time constraints.

Initial Meeting at Mediation

Many mediators utilize the initial meeting (sometimes referred to as the joint session or mediators' monologue) with attorneys and the parties for the purpose of:

- allowing the opportunity for introductions,
- reviewing the agreement to mediate,
- discussing confidentiality,
- establishing or review the suggested format for the mediation, and
- describing the role of the mediator.

It is important to remember that while counsel may have been through the mediation process many times (indeed many counsel are now, themselves, mediators), many of the clients who go through the mediation experience are doing so for the first time. It is my experience that the comfort level of the participants is enhanced if they are given the opportunity for informal contact prior to undertaking the more formal mediation process.

The initial meeting provides the mediator with an opportunity to describe the process as a means of problem solving that is distinctly different than an adversarial courtroom proceeding. The initial meeting also permits the mediator to ensure that those individuals attending who are unfamiliar with the mediation process clearly understand the role of the mediator as a facilitator and not as a judge or jury. This meeting, therefore, provides an opportunity for the mediator to explain the process and answer any questions that the parties or their attorneys may have.

Opening Statements

Based on the information received by the mediator during the pre-mediation conference, the mediation may also include opening statements by attorneys and/or the parties. In my opinion, the opportunity for legal counsel to exchange important information may prove to be quite beneficial in ultimately settling the case to the satisfaction of the parties. Indeed, without an effective opening statement, information that ordinarily must be exchanged through the mediator during private sessions (caucus) may require too much time or create a risk of miscommunication.

A well-presented opening statement provides the opportunity for counsel to paint a picture of his or her case directly to the other party with little risk of miscommunication. The opening statement can also be used to provide new information, both in terms of the facts surrounding the case and/or the law. The opening statement may provide the opportunity to present old information in a new context. It provides an additional advantage of allowing the parties' positions to be heard in an open forum, giving clients their "day in court." It is no longer particularly unusual for attorneys to permit their client(s) the opportunity to speak directly to the other party without intervention or interruption.

An effective opening statement not only provides counsel and the parties with an opportunity to share different sets of information, it also provides an opportunity for participants to, sometimes for the first time, gauge the credibility of the parties and their respective positions. The opening statement gives the parties an opportunity to meet face-to-face and provide their differing interpretations of the same information. This provides an important psychological advantage that may move the parties toward resolution. Rather than a static depersonalized process, the mediation becomes, through the communication exchange between the parties, more about the real concerns of people rather than disembodied entities. Through the strategic use of opening statements, stereotypes, false assumptions and factual discrepancies can be modified, therefore hastening and making the negotiation process more productive.

The joint session provides litigators with the opportunity to encourage the parties to alter their perspectives and to set the stage for a psychological process directed at moving the parties toward settlement. There is, of course, the legitimate fear that a joint session may exacerbate the parties' emotions and, therefore, create greater obstacles to resolution of the dispute. There are certainly situations where extreme animosity may exist (sometimes, even between opposing counsel). When emotions run high, there is a strong risk of miscommunication. Nonetheless, whether to conduct an opening statement is an issue that should be discussed well in advance with the mediator or through a separate agreement with counsel.

Practice Tips for a Successful Opening Statement

Below are a number of suggestions that may be used to assist legal counsel in developing a successful opening statement format. Naturally, only some of these suggestions are appropriate in any given mediation:

- Take the opportunity to reintroduce you and your client to the other side. If your client is a corporate representative or an insurance representative, explain his/her role at the mediation.
- Demonstrate your complete command of the case.
- Anticipate emotional issues and do not make comments to the other party that will trigger a strong emotional response.
- Confront potential weaknesses in your case early on.
- Avoid exaggeration or over-statement.
- Always slightly understate your abilities at trial (do not "saber rattle").
- Compliment (when appropriate) the opposing parties' legal counsel.
- Demonstrate that you understand the opposing parties' position or concerns.
- Do the unexpected, i.e., apologize, express concern or regret.
- Use humor, when appropriate.
- State your support for the mediation process.
- State a genuine desire to act in good faith to resolve the case.
- State a desire to be creative in developing settlement solutions.

- State that you are not there to impose solutions, but rather to listen and work through problems.
- Emphasize that settlement will be in everyone's interest.
- Express sympathy, but do not sound disingenuous or insincere.
- Consider whether to provide important documents, important evidence or case law to the opposing party during the opening statement.
- Never engage in theatrics or personal attacks.
- Do not discuss monetary demands.

Conclusion

Your decision whether to suggest an opening statement at mediation is one of the more important strategic decisions you will make as you discuss settlement with your client prior to the mediation. The opening statement provides both parties an opportunity to exchange information and individual perspectives of the case unfiltered by the mediator or the rules of evidence. By utilizing the opening statement, legal counsel can ensure that the mediator and all of the parties present are operating with the same information, even if there is an honest disagreement as to the scope and meaning of the information. Another important consideration is that the opening statement provides a means by which the parties can humanize their client, modify stereotypes and modify perspectives with respect to settlement options. Finally, the opening statement provides a method by which the parties can modify their assumptions, address goals and break down perceived barriers to negotiation. Always remember that the principle goal of the opening statement is to begin the process of persuading the other side to accept a realistic settlement.