

SDNY MEDIATOR TIP SHEET:

Mediator's Opening

This **Tip Sheet** starts with the recommendation that it is best practice to begin your first in-person mediation session with an opening statement. Why? This is your opportunity to set the tone and explain the mediation process, particularly to the parties themselves who may not have been part of any pre-mediation communication. (A related best practice is to start in joint session, but even in cases that don't lend themselves to starting jointly, the mediator's opening can and should be delivered to all parties in caucus.) This tip sheet is intended to be a reference as you develop your personal style and to-do list for opening the session. The most important elements of your opening are to clarify what participants may and may not expect when mediating with you, to assure the parties that you are there to listen and to assist them in resolving their dispute, and to bring your authentic self to the table. This is also an opportunity to pick up on clues that the parties may be sending. Are they: attentive, anxious, angry, reticent? Subtle, and not so subtle, indicators may inform how you approach the mediation.

Topics You Should Cover in Your Opening Statement: The topics below should be covered in any mediator's opening, though the extent of the coverage can and should be adjusted to the needs of the participants in any given case. Do not assume that the lawyers have had experience in mediation or, even if they have, that they have spent much time educating their clients about the process and your role. Pitch your opening to the individuals in the room who have the least experience with the process.

- ∞ Introductions: Barring some unusual interpersonal dynamics, everyone attending the session should introduce themselves and express their preferences for how they would like to be addressed.
- ∞ Logistics: Where do they find food and restrooms? Any protocol for getting an outside phone line, etc.?
- ∞ Explain the mediator's role: "To help you settle this case." "To help you explore whether a settlement now is preferable to continued litigation." "To increase your understanding of this case. Hopefully this leads to a resolution, but another good outcome is if it leads to a more targeted and thoughtful litigation process if you need to continue to litigate."
- ∞ Address key aspects of the mediator's role: No personal stake, or professional, or financial interest in the outcome of the case (neutrality). No personal knowledge of the parties (impartiality). No decision-making authority (not a judge, arbitrator, fact-finder).
- ∞ Explain confidentiality: What it means for everyone in the room, including the mediator, and any exceptions to confidentiality. Explore if there is need to share information with those not in the room as part of a resolution (e.g. a business partner, executive, or spouse). Explain your protocol for preserving confidential information received in caucus. SIGN the confidentiality agreement.
- ∞ Briefly convey your familiarity with the case, the pre-mediation submissions, the PACER file, the applicable law.
- ∞ Interpreters: If an interpreter is being used, clarify whether they will be interpreting simultaneously or consecutively and any needs the interpreter might have for seating, pacing, or volume.
- ∞ Describe YOUR mediation process, for example:
 - Will you meet in joint session or caucus or both?
 - When you talk about self-determination, is your emphasis on the parties, counsel, or both?: "Today is an opportunity for the parties themselves to discuss what brought them to this point, and express their concerns in their own words." "Today is an opportunity for counsel to speak freely – to me and to each other – about the issues raised by this case."
 - Do you adhere to one process or is your process tailored to the individual case?
 - Will you explore the parties' feelings, needs, and interests?
 - Will you address the strengths and weaknesses of the claims and defenses?
 - Do you give each side "homework" to do while you are with the other side in caucus?
 - Will you continue to work with parties after an initial session and, if so, how?

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Topics You May Cover in Your Opening Statement: The topics below may be useful additions to any mediator's opening, depending on your preferences, the needs of the participants, and the overall timing of your opening.

- ∞ Your personal background, particularly if that background can help you develop rapport, underscore your impartiality or neutrality, or reveal experience that could be useful to the matter and/or enhance your credibility.
- ∞ More detailed process points, for example, pointing out that the time spent with one side or the other does not mean anything about your views on the strength or weakness of their case.
- ∞ If you use caucus to challenge views about the case, it may be useful to point out that the caucus gives you a great chance to listen to each side's view and also to question some of their assumptions. Offer guidance for how parties and counsel might make meaningful use of the time when you are in caucus with the other side.
- ∞ Recommend that the participants may want to keep an open mind and listen to each other, what is said and how it's said.

If you include settlement cheerleading in your opening, here are some things you might say to emphasize the key elements that make settling now wise: control of the resolution by the parties, finality/avoidance of uncertainty, and control of costs.

- ∞ More things to say about the parties' control of the resolution:
 - There may be components of a settlement that appeal to all that will be unavailable in a litigated outcome (e.g. letters of reference/offers of reemployment, business redesign, relationship rebuilding).
 - A mediated resolution may permit agreement on timing of remediation, payment, etc.
- ∞ More things to say about the costs of litigation:
 - Dollars and cents costs are real, continuing, and escalating for both plaintiffs and defendants. You can prepare some brief and illustrative examples to make this point, even in fee shifting cases.
 - Personal costs are not readily quantifiable but are no less real. These include time spent on litigation that could be spent elsewhere, emotional costs associated with depositions, motion practice, tolls on personal and professional relationships, etc.
 - Business costs include disruption to operations and diversion of key personnel, and trial preparation and scheduling, should it come to that, impose considerable inconvenience to parties and businesses.
- ∞ More things to say about the risks of litigation:
 - Go beyond the typical "hey, you never know what a jury will do"—yes, jurors are unpredictable, but so are judges.
 - Witnesses disappear, evidence does not quite go in the way people hope it will, memories dim, and commitments may waver.
 - Jurors, even good ones, will not care about the case as much as the parties in the room now. Jurors will bring their own experiences to the case and, at best, will apply their own concepts of justice to your circumstances.

Closing of the Opening:

- ∞ Assuming that you will have opening statements by counsel and/or parties, you will shift to those. Before doing that, you may want to point out that the attorneys are skilled advocates, but what we are trying to do today is "problem solving" as opposed to zealous advocacy.
- ∞ Ask if the parties have any questions for you or if they want to say anything while still in the joint session (or in the opening portion of the mediation, if you are in caucus). Emphasize for the parties that all questions about the process are encouraged and are welcome. Reiterate that there will be plenty of time for you to listen to them directly and understand their interests in more detail.