# The Evolution of the Opening Statement in Mediation

Written by:

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Is the formal opening statement—the initial joint caucus with the parties and the mediator—becoming extinct to the mediation process absent special circumstances? Yes and No.

The opening statement has simply evolved with the maturity and familiarity of the mediation process.

With the advent of modern mediation in the late 1980's, the purpose of the opening statement was to create a formal setting to explain the process of the mediation and the goals of the parties. In the *Mediation Theory and Practice* (Lexis 2001) casebook used to teach law students about the mediation process, it describes the opening statement as the "Mediator's Opening Statement," not the "Parties' Opening Statement." The book's commentary states "it is not advisable to skip the opening statement." See *Mediation Theory*, p. 113. The casebook explains the following reasons for starting a mediation with an opening statement:

- To establish the ground rules and the mediator's role
- To put people at ease
- To convey a sense of mediator competence and skill, thereby inviting trust and comfort with the process and the mediator
- To reconcile any conflicting expectations regarding what will happen in mediation
- To satisfy ethical requirements (if applicable).
  *Id*. at p. 114.

According to *Mediation Theory*, the opening statement has six components:

1. Introductions of the mediator, disputants and others present
2. Establishing credibility and impartiality
3. Explaining the process of mediation and the role of the mediator
4. Explaining the procedures which will govern the process (including if applicable the possibility of meeting separately with the parties)
5. Explaining the extent to which the process is confidential or inviting parties to set terms of confidentiality
6. Asking the parties if they have any questions. *Id*.

After the mediator's opening statement, the mediator invites the parties to explain their respective positions, which is the parties' opening statement.

In the early years of introducing the mediation process to litigants, this formal setting to state the ground rules and party positions was probably necessary. Twenty-five plus years later, the process has evolved. As a result, the formal opening statement has also evolved.

The opening statement is still used in cases with special circumstances. In complex cases, the parties may use an opening statement to set forth the multiple issues and state goals for the mediation. In plaintiff cases, the opening statement is used to reinforce the idea that this process is the individual plaintiff's "day in court." Opening statements are also useful when one side believes the decision-maker on the opposing side has not been given a full assessment of the facts and the law.

However, in your typical mediations, the parties are satisfied with waiving opening statements. Parties typically explain that they prefer to waive the opening statement for one or both of these two reasons: First, the parties state that they are ready to start negotiating and the opening statement would be a "waste of time." With economic pressures by clients, counsel believes waiving opening statements may save money. Second, an opening statement would only inflame the other side. By waiving the opening statement, the parties are not taking advantage of the opportunity to look the opposing party and counsel in the eye and share their

perspective of the facts and/or law of the case. Yet, a face-to-face communication among the parties may have great benefit to resolving the case. These benefits include

- Establishing rapport
- Building trust
- Expressing good faith in your negotiation efforts
- Sharing a viewpoint that the opponent had not considered
- Explaining the client's role at the mediation
- Offering an apology without admitting liability (softens opposing side)
- Demonstrating sincerity

Perhaps, litigants have lost sight of these benefits because the opening statement has been repeatedly misused. Litigants use the joint caucus to insult, abuse, inflame or accuse the other side as if making a TV version of closing remarks. When this conduct occurs, the opening statement creates an impediment to settlement instead of a pathway to settlement. As a result, the parties' opening statement has evolved into a simple "meet-and-greet" if the parties are on civil terms. The "meet-and-greet" is abandoned if the parties are hostile to one another. However, a well-prepared opening statement presented with civil decorum could avoid these controversial pitfalls and assist the parties with case resolution.

Although the parties' opening statement may be dying off, the mediator's opening statement is alive and well. The mediator's opening statement has evolved by way of its setting, but not its content. Instead of being conducted in a joint session with all parties, mediators are providing their mediator's opening statement in individual private caucus. Good mediators still communicate the six components described above, but they do it one-on-one with each party. The purpose or content of the opening statement by the mediator remains an important part of the mediation process. As the casebook advises, this part of the process should not be skipped.

In conclusion, if the opening statement has evolved, then our thinking about the use and purpose of the opening statement should also evolve. Mediators should pause and explore pre-

mediation whether a parties' opening statement would benefit the process before readily accepting the parties blanket waiver of opening statements.

*About the Author:*

Allison Skinner is a neutral at Skinner Neutral Services LLC in Birmingham, Alabama. Her services include settlement mediations at both the trial and appellate levels, discovery mediations, arbitrations, special master appointments, e-discovery consulting, e-discovery expert testimony and private training in both alternative dispute resolution (ADR) and e-Discovery. Allison has conducted numerous private trainings on both ADR and E-discovery for state and federal judiciaries, practicing attorneys, in-house counsel, organizations and other neutrals. Allison is recognized as a "Top Attorney" in mediation by the Birmingham Magazine. Allison is dedicated to the promotion of effective and efficient dispute resolution. Her firm is committed to innovating neutral services to an ever-changing marketplace to help people and organizations solve problems. She has recently opened a meeting facility called Neutral Ground for Lawyers to provide a neutral place for lawyers to meet for any purpose.

Allison represents the 10th Judicial Circuit, Place 7, as a Board of Bar Commissioners for the Alabama State Bar. Allison is Chair of the Alabama State Bar Dispute Resolution Section and Chair-Elect of the Alabama State Bar Women's Section. She previously served as the inaugural Chair of the Dispute Resolution Section of the Birmingham Bar Association (BBA). She has served on the BBA and Birmingham Bar Foundation Executive Committees. Allison is registered on the Alabama Center for Dispute Resolution Mediation Roster. In conjunction with the Center, Allison assisted in the development, training and implementation of the Center's Foreclosure Prevention Mediation Center. Allison is the co-founder of the American College of e-Neutrals, www.acesin.com. Allison has pioneered the use of ADR for pre-trial disputes, coining the terms "e-mediation," "mediated discovery plan" and "e-neutrals."

Allison serves as an Adjunct Professor at the University of Alabama School of Law teaching E-discovery & Digital Evidence. She authored the Teacher's Manual to the E-Discovery casebook (WEST 2010), which is the only casebook currently in use at U.S. law schools, and two chapters in Essentials of E-Discovery, State Bar of Texas (2014). She authored Putting the 'e' in Neutral course book (ACESIN 2011), the only training course for ESI Neutrals. She authored Alternative Dispute Resolution Expands Into Pre-Trial Practice: The Role of the e-Neutral, 13 CARDOZO J. CONFLICT RES., 113 (2012). She is a contributing editor to Law Technology News and the Alabama Lawyer; a member of the Academy of Court-Appointed Masters (1 of 3 in Alabama) and a panelist on the U.S.D.C. of Penn., W. D., E-Discovery Special Master Panel. Allison has lectured locally, state-wide and nationally in over 100+ venues. Prior to becoming a full-time neutral, Allison handled complex litigation for domestic and international clients and served as the Administrative Partner of the Birmingham office of a regional law firm. She received her J.D. from the University of Alabama School of Law.