THE VITALITY OF THE OPENING STATEMENT IN MEDIATION: A JUMPING-OFF POINT TO CONSIDER THE PROCESS OF MEDIATION

By: John T. Blankenship

I. Introduction

"If both sides are prepared for the mediation, I tend to think the opening statements are a waste of time, at best, and inflammatory at worst."[1]

This was one of the responses I received to polls I took of two professional organizations to which I belong. I sought the opinions of the members, based on their own personal experience and practice, of the use and effectiveness of opening statements in mediation. I suppose my informal polls should be classified as merely an exchange of views among colleagues rather than scientific behavioral research.[2] The information I obtained would likely not have the validity and reliability required to be considered scientific.[3] I do believe, however, that this is valuable anecdotal evidence and serves my purposes, which were to confirm, in the practice field and jurisdictions in which I work, that: 1) this topic is one worthy of discussion and consideration, and one on which there are strong opinions; 2) many of my colleagues share the view that while opening statements were once the norm, there is a trend away from the use of opening statements

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[1] Email survey from author to the Tennessee Association of Construction Counsel and the College of Commercial Arbitrators, (Nov. 16, 2008 11:17 am CST) (on file with author). This author conducted a polling of two groups consisting of lawyers and ADR neutrals with significant experience in mediation. A total of 47 responses were received by email and are of various dates through the end of November 2008. The names of the survey respondents are omitted from this paper and will not be used for confidentiality purposes. Several of the responses will be reprinted or referenced herein as I believe they are informative and germane to the subject matter of this paper. The author has taken some license with the actual responses to correct, delete or add language to aid in clarity and readability, as the responses were often informal and cryptic.

[2] ROBERT SOMMER AND BARBARA SOMMER, A PRACTICAL GUIDE TO BEHAVIORAL RESEARCH: TOOLS AND TECHNIQUES, 1 (5th ed.2002).

[3] *Id.* at 4.

in mediation; and 3) the views and practices of my colleagues on opening statements may say something about the state of mediation, its quality and its future. The quality of mediation is an important topic and there has been some thorough and impressive study done about it.[4] I am not sure, however, how much those of us practicing regularly in the field as lawyers or mediators have actually thought about mediation as a process in a conceptual or philosophical sense.

The response reprinted above is representative of a substantial minority of my respondents who do not favor opening statements in mediation. Their responses are amazingly similar and indicate very strong opinions in this regard. I will share some of the others in this paper, as well as some of the opinions of those who favor the use of the opening statement, or at least do not advocate its complete demise. I believe that others can benefit from these opinions, as I have, and I believe they raise worthwhile questions and points of discussion about the mediation process itself. In fact, these responses changed my whole approach to this paper. What began as a relatively simple project to write solely about the opening statement in mediation as a technique or tool and its contemporary use, turned into a much more ambitious endeavor. I was struck by what my colleagues were saying, or should I say, what I read between the lines. I found myself on an inexorable journey to discuss mediation as a process and actually think about it. So, the simple study I planned turned out to be a jumping off point to ponder and discuss the process of mediation—historically, conceptually and philosophically—and the responses to my poll became sub-jumping-off points, so to speak.

[4] American Bar Association Section of Dispute Resolution, *Task Force on Improving Mediation Quality Final Report* (April 2006-February 2008). Portions reprinted herein by permission of the American Bar Association Section of Dispute Resolution. The Task Force narrowed its focus to mediation quality in private practice civil cases (not domestic, family law or community disputes) and gathered information by the use of focus groups, questionnaires and interviews. My focus in this paper will be the same.

Hopefully, some worthwhile questions and possible answers will arise in the following discussions of: the origins and evolution of mediation; seven dynamics of mediation that I suggest are inextricably linked and have a direct bearing on the vitality of the opening statement and possible trends as to its use; and concluding thoughts and suggestions. As we consider the vitality of the opening statement in mediation, I would like to explore some discrete dynamics in the process. Any change in the use of opening statements may be a part of, symptomatic of, or directly connected to other changes in the mediation process; changes that may be fundamentally at odds with the historical and philosophical roots of mediation. Mediation may have become the cornerstone of the ADR movement,[5] but we should consider what it has become vis-à-vis its original goals and values.

II. Origins and Evolution of a Process

"This little Indian believes that, in most cases, opening statements in mediation are a waste of time and serve to polarize the parties. My belief is that counsel and the mediator should thoroughly discuss the case, without parties present, before the mediation. Then, go straight to the mediation." [6]

I was struck by the "Then, go straight to the mediation" phrase. The word mediation is so common these days. Not only is the word often used, the process is suggested or ordered quite often and used consistently in the American legal system. I have to wonder if we all mean the same thing when we use the word or the process. It is easy to find a definition of mediation. The Tennessee Supreme Court has defined it as

[5] Kimberlee K. Kovach, *Privatization of Dispute Resolution: In the Spirit of Pound, But Mission Incomplete: Lessons Learned and a Possible Blueprint For the Future,* 48 S. Tex. L. Rev. 1003, 1008 (2007).
[6] *Supra* note 1.

follows: *"Mediation is an informal process in which a neutral person conducts discussions among the disputing parties designed to enable them to reach a mutually acceptable agreement among themselves on all or any part of the issues in dispute."*[7] Most, if not all, other states have defined the process as well, as have all kinds of other organizations, entities and commentators. How often, however, have the lawyers and mediators who participate routinely in mediation thought about what it is as a process, where it came from, and where it's going?

While some may think of mediation as a recent phenomenon, its use as a process for resolving conflict predates formal court systems.[8] The intervention of a neutral third party into conflicts is thousands of years old and can be traced to most world civilizations, religious and ethnic groups.[9] It is compelling that disparate cultures, theologies and ethnicities would share a common philosophy—that there is an alternative to adversarial resolution of conflict, an alternative that is wiser and better. Confucianism held that adversarial systems destroyed harmony and, therefore, resolution of disputes through moral persuasion and agreement was preferred. Similar philosophies can be found in historical customs of Japan and Africa, and these customs fostered processes to resolve conflict where elders or wise men served as informal mediators.[10] Teachings in Christianity, Islam, Hinduism and Buddhism suggest the appointment of leaders or wise community members to settle disputes rather than going to court or resorting to similar

[7] Tenn. Sup. Ct. R. 31, Section 2(i).
[8] Larry Spain and Kristine Paranica, *Considerations for Mediation and Alternative Dispute Resolution for North Dakota*, 77 N.D. L. Rev. 391, 393 (2001).
[9] CHRISTOPHER W. MOORE, THE MEDIATION PROCESS: PRACTICAL STRATEGIES FOR RESOLVING CONFLICT, 20 (3rd ed. 2003).
[10] Spain, et al., s*upra* note 8.

processes.[11] Throughout history, there appears to have been a common thought or philosophy among most groups of people that when members of the group are in conflict, it is preferable for them to resolve their dispute by agreement than by adversarial process. "To be sure, mediation has had a long, rich history that stretches from the beginning of time to its most recent contemporary uses."[12]

The "modern renaissance" of American mediation began in the mid-1970s.[13] It is not difficult to trace its roots to the Pound Conference of 1976 which is commonly designated as the beginning of the modern ADR movement.[14] The model of mediation that arose during the contemporary mediation movement was one where the disputants themselves played the central roles.[15] Perhaps for this reason, and others, there was doubt among some that the traditional order of judges and lawyers would ever see mediation as anything other than a new age fad.[16] I am one of those in the mediation field who has been around long enough to remember the late 1970s when the mention of mediation to most trial lawyers resulted in a blank stare. The stare usually signaled an in-comprehension of what you were talking about, a misconception that you were an adherent to the teachings of Maharishi Mahesh Yogi, or a defensive reaction because the lawyer, having some idea of what you were talking about, feared this new-fangled process might put him or her out of business. The words, "I don't believe in mediation," came from the lips of more than one trial lawyer in those days. It is safe to say that most

[11] Moore, *supra* note 9.
[12] Kimberlee K. Kovach, *The Intersection (Collision) of Ethics, Law, and Dispute Resolution: Clashes, Crashes, No Stops, Yields, or Rights of Way*, 49 S. Tex. L. Rev. 789, 794 (2008).
[13] MARK D. BENNETT AND SCOTT HUGHES, THE ART OF MEDIATION, 3 (2nd ed. 2005).
[14] Kovach, *supra* note 5 at 1004. *See* also Kovach, *supra* note 12.
[15] Nancy A. Welsh, *Making Deals in Court-Connected Mediation: What's Justice Got to do With It,"* 79 Wash. U. L. Q. 787, 804 (2001).
[16] Robert D. Benjamin, *Mediation as a Subversive Activity*, J. DUPAGE CO. BAR ASSN. (September 1998).

American lawyers, when first introduced to mediation, were hesitant about its use, likely because this new and unfamiliar procedure was not only uncomfortable, it was viewed as unnecessary.[17] Times have certainly changed, as I will discuss in the following section.

The heart of the early mediation movement was the "value-added" approach, which emphasized party participation, empowerment, creativity and self-determination.[18] The focus was allowing disputing parties to have greater involvement and control over their own decisions and not be completely constrained by the confines of the traditional legal system. There was a belief that parties, with sufficient information and direction, could make better decisions for themselves than lawyers and judges could.

In the early days of the modern mediation movement, almost all mediation was done outside of the court system.[19] When it was first introduced into the courts it was as an alternative resolution process that would provide a benefit to the parties when compared to litigation, based on a belief in the inherent fairness of the process.[20] In the genesis of its growth spurt, mediation was essentially an equitable system which not only rejected the relevance of the law, but was not dependent upon its effective invocation.[21] In fact, dissatisfaction with the justice system was one of the reasons Americans began looking for other ways to resolve their disputes in the 1970s,[22] and mediation quickly grew as the favored alternative. After all, mediation offered an opportunity to decrease the reliance on lawyers and the legal system, a goal of mediation still espoused by its

[17] Kovach, s*upra* note 12 at 798.
[18] Kovach, *supra* note 5 at 1019.
[19] Benjamin, *supra* note 16.
[20] Samuel J. Imperati, David C. Brownmiller and Dena Marshall, *If Freud, Jung, Rogers, And Beck Were Mediators, Who Would the Parties Pick And What Are The Mediator's Obligations?,* 43 Idaho L. Rev. 643, 680 (2007).
[21] Kovach, s*upra* note 5 at 1018.
[22] Spain, et al., s*upra* note 8.

purest advocates.[23] Accordingly, mediation first flourished in the community mediation movement[24] and volunteer dispute resolution centers;[25] that is, the use of mediation centers to resolve disputes before cases are filed.[26] In terms of the courts, it is safe to say that mediation first found purchase in "low-status" legal cases in the family law and small-claims court arenas.[27] When the modern mediation movement began it was based on the idea that it allows, or is intended to allow, the parties themselves to take an active role and have a voice in the process so that they have an opportunity to express their concerns.[28] In the first days of the modern ADR movement, the use of mediation in legal cases was so rare that early mediating practitioners did not even have a name for the procedure.[29]

III. SEVEN INEXTRICABLY LINKED DYNAMICS

A. Emergence of a Law Centered Approach and Its Embrace by Lawyers

"Typically, at least in my experience, the lawyers do the talking in the joint session, but not always. I have counseled that lawyers should not allow their clients to speak in a joint session presentation unless they are capable of handling themselves in doing so. So, the bottom line is, only let your client talk if they're able to do it effectively. Otherwise, let them vent in a separate session (caucus)."[30]

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[23] *Id*. at 394.
[24] Kovach, s*upra* note 5 at 1012.
[25] Zena D. Zumeta, *Styles of Mediation: Facilitative, Evaluative, and Transformative Mediation,* J. DuPage Co. Bar Assn. (September 1998).
[26] Kovach, s*upra* note 5 at 1010.
[27] John Lande, *How Will Lawyering and Mediation Practices Transform Each Other?,* 24 Fla. St. U. L. Rev. 839, 846 (1997).
[28] Kovach, s*upra* note 5 at 1039.
[29] Lande, *supra* note 27 at 845.
[30] *Supra* note 1.

Following the 1976 Pound conference, mediation developed on two separate but related paths, even if not always at the same pace. One path was in the direction of community mediation, and the second path was through the legal system, almost as if the courts were targeted to implement mediation.[31] After all, the lawyers, being the majority participants in the courts, were those delegated to make improvements in the legal system. It is easy to see how ADR, and mediation in particular, became to be seen as the solution to the major problems and sources of complaint in the courts—cost and delay.[32] People can disagree over whether mediation has been the panacea of efficiency for the legal system that many envisioned. It does not seem fairly debatable, however, that the paths have converged or, perhaps more accurately stated, merged into a single road that runs to or from the courthouse so that mediation is now viewed as simply part and parcel of the legal system.[33] This phenomenon has caused some scholars to conclude that the adversarial legal system, being stronger and more established, has dominated and co-opted the mediation movement,[34] and that traditional mediation seems on the path to disappearance.[35] The disappearance of mediation may be an overstatement, but much has been written about the transformation of mediation and the culture surrounding it. "Institutionalization,"[36] "legalistic,"[37] "quasi-legal,"[38] "liti-mediation,"[39] and "commoditized"[40] are some of the word pictures some insightful commentators have used

[31] Kovach, s*upra* note 5 at 1012.
[32] *Id.* at 1013.
[33] *Id.* at 1017.
[34] *Id.* at 1020.
[35] *Id.* at 1021.
[36] *Id.*
[37] *Id.* at 1023.
[38] Kovach, s*upra* note 12 at 800.
[39] Lande, s*upra* note 27 at 841.
[40] Joseph P. McMahon, *Moving Mediation Back to Its Historic Roots—Suggested Changes,* 37-Jun Colo. Law 23 (2008).

to describe this transformation. Professor John Lande, who coined the term and concept "liti-mediation," predicted over ten years ago that as mediation becomes routinely integrated into litigation practice that both lawyers' and mediators' practices would be significantly altered.[41] As one who spends a significant amount of his practice time in mediation, I find some of Professor Lande's predictions eerily prophetic. It is one of my common practices to have at least one preparatory conference call with counsel well before the actual mediation session. I have a fairly standard agenda of questions and topics I have developed; one of those being whether there have been any settlement discussions, offers, etc. prior to the agreement or order to mediate. It is not uncommon, and is becoming commonplace, for the lawyers to tell me that there have been no settlement negotiations at all. Professor Lande wrote in 1997 that, as a result of mediation becoming so much a part of the litigation process, "lawyers may refrain from direct, unmediated negotiations, anticipating that they will conduct their negotiations in mediation," and that judges and lawyers "may take it for granted that settlement negotiations will primarily take place in mediation."[42] What Professor Lande described as a possibility may have come to fruition.

In the 1980s and 1990s the use of mediation in legal disputes increased dramatically.[43] Mediation not only became more popular, it began to be court ordered and court referred.[44] State legislatures enacted statutes which authorized, and in some cases, mandated courts to order cases to mediation.[45] By the late 1990s, even when not mandated by statute, some courts would routinely order most cases on their dockets to

[41] Lande, s*upra* note 27 at 841.
[42] *Id.* at 840.
[43] *Id.* at 839.
[44] Zumeta, s*upra* note 25.
[45] Lande, s*upra* note 27 at 840.

mediation.[46] More importantly, mediation had come to be viewed positively by those who are "especially important actors in our adversarial system," the lawyers.[47] I believe that the embrace of mediation by lawyers has done as much to change the face and direction of mediation as any other single factor.

Lawyers have now so embraced mediation that some commentators say they have "hijacked" the movement and have, "consciously or unconsciously…co-opted the process."[48] Indeed, lawyers have become a primary consumer of mediation services as they are the ones who "tend to shop for the parties."[49] But the hijacking complained of has as much to do with a perceived corruption of the process as it does domination, because the evolution of "lawyering" in mediation is seen by some as having often been detrimental to the goals and objectives of mediation.[50]

As paradoxical as it seems, I tend to believe that any trend toward a reduced use of opening statements in mediation is tied to this same evolution of the lawyer's role in the process. One would think that if lawyers have so dominated and changed the process of mediation that it has become "just another stop in the 'litigation' game,"[51] they would cringe at the thought of giving up their opportunity to wax eloquent in a stirring and forceful opening statement on behalf of their righteous and aggrieved client. Nonetheless, if mediation "is now a system that is merely focused on achieving settlement,"[52] then an opening statement that is viewed as detrimental to a potential

[46] *Id.* at 845.
[47] *Id.*
[48] Welsh, s*upra* note 15 at 797.
[49] McMahon, *supra* note 40 at 24.
[50] Kovach, s*upra* note 12 at 800.
[51] Lande, *supra* note 27 at 893. (quoting Carrie Menkel-Meadow, *Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-Opted or "The Law of ADR"*, 19 FLA. ST. L. REV. 1 (1991)).
[52] Kovach, s*upra* note 5 at 1013.

settlement of the legal dispute being mediated will be dispensed with. And it will be the lawyer's call. As lawyers' roles increase in mediation, parties leave more mediation decisions to their lawyers, from the selection of the mediator[53] to the specific process to be followed.

B. The Goal of Settlement

*"**If the parties are ready to mediate it means they have decided to try to settle. If they are mediating only because they are compelled to, they are probably not ready to settle anyway."**[54]*

***"My personal experience is that attorney opening statements are very often counter-productive and detrimental to the purposes of mediation. If and when I am a mediator, I will not allow this time consuming, mood busting practice. I suppose there are rare exceptions, but I tend to think they are not useful."**[55]*

My colleagues provide some valuable insights: 1) mediation is equated with settlement; 2) settlement is the purpose of mediation; and 3) opening statements are not conducive to this purpose because they waste time and disrupt a settlement mood. This is hardly surprising. A significant number of my colleagues expressed similar sentiments. And it would be incongruous to suggest that settlement is not the goal of contemporary civil mediation. Many people believe that settlement is the whole purpose of mediation. I believe settlement is a good thing and I admit that I pursue it vigorously when I am a mediator. My anecdotal evidence has, however, caused me to question whether settlement is the only goal of mediation and whether it should be.

[53] McMahon, s*upra* note 40.
[54] *Supra* note 1.
[55] *Id.*

It has been suggested that the focus on settlement, driven by an expectation of savings in time and money, has become a "settlement obsession."[56] It is safe to say that in this new season of "liti-mediation," settlement is the reason for the season. Indeed, a key contributor to the transformation of mediation from a party-centered process to a quasi-legal one has been the focus on resolution of legal disputes.[57] The primary goals of the justice system for encouraging mediation—reduce time and cost for litigants, lighten the court docket, improve public satisfaction with the justice system, increase voluntary compliance with resolutions[58]—all boil down to one thing, settlement. So, mediation was transplanted into an institution that not only has an almost myopic focus on expedient resolution, it is one which has always tended to constrict the parties' participation in the process.[59] It is no surprise that some scholars have decried the loss of the early valuable goals of mediation because they were incompatible with traditional court ideology, positing that aspects of mediation such as party participation and self-determination have been lost in the institutionalization of the process, having "given way to demands of settlement, particularly in the court-annexed mediation context."[60]

Settlement, of course, is not a bad thing. Certainly, there are some civil cases which should be tried and not settled,[61] but the public policy favoring settlement in American state and federal civil jurisprudence is ubiquitous,[62] and it is a given that the

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[56] Kovach, s*upra* note 5 at 1016.
[57] *Id.* at 1017.
[58] Spain, et al., s*upra* note 8 at 394.
[59] Kovach, s*upra* note 5 at 1018.
[60] *Id.* at 1014, 1015, 1019.
[61] Patrick E. Longan, *The Shot Clock Comes to Trial: Time Limits for Federal Civil Trials*, 35 Ariz. L. Rev. 663, 682 (1993); Jeffrey C. Y. Li, *Strategic Negotiation in the Greater Chinese Economic Area: A New American Perspective*, 59 Alb. L. Rev. 1035, 1050 (1996).
[62] *e.g.*, William S. Greenberg and John E. Flaherty, 47 N.J. Prac. Civil Trial Handbook § 29:8 (2008); Alba Conte and Herbert B. Newberg, 4 Newberg on Class Actions § 11:4 (4th ed. 2008); Victoria Holstein-

promotion of settlement is an important value in our civil justice system.[63] Moreover, for decades judges, both state and federal, have embraced the active promotion of settlement as a major part of their judicial role, [64] and the view that settlement is superior to trial has become a dominant judicial ideology.[65] Although the judicial focus on settlement through mediation, motivated by the expectation of savings in time and money, is of relatively recent origin, most civil cases have been resolved by settlement throughout the last century.[66] And scholars raise valid questions as to whether judicial intervention has led to an increase in the quantity or quality of settlements or, for that matter, whether settlement is intrinsically good or bad.[67] Regardless, if litigation ends in settlement in the vast majority of cases,[68] then a salient question is: What does mediation have to offer that traditional lawyer to lawyer negotiation does not? [69] It may be an academic question if lawyers have begun to refrain from negotiating outside of mediation as Professor Lande suggested they might. Even so, it remains an important inquiry that should be a source of dialogue and study as mediation continues to grow and evolve vis-à-vis our legal system.

I am convinced that any disfavor of opening statements is tied directly to the belief that they have the potential to inflame the parties which, in turn, inhibits settlement. My conviction comes not only from my anecdotal evidence, but my own experience and that of others. I do not intend to judge that fact or declare it to be an

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Childress, *Mary Carter's True Colors: Champertous Settlement Agreements Under Louisiana's Nullity Doctrine*, 77 Tul. L. Rev. 885, 909 (2003).

[63]Laurie Kratky Doré, *Settlement, Secrecy, and Judicial Discretion: South Carolina's New Rules Governing the Sealing of Settlements,* 55 S.C. L. Rev. 791, 827 (2004).

[64] Marc Galanter and Mia Cahill, *"Most Cases Settle": Judicial Promotion and Regulation of Settlements,* 46 Stan. L. Rev. 1339, 1340 (1994).

[65] Marc Galanter, *The Hundred-Year Decline of Trials and the Thirty Years War,* 57 Stan. L. Rev. 1255, 1266 (2005).

[66] Kovach, s*upra* note 5 at 1014.

[67] Galanter, s*upra* note 64 at 1388.

[68] Galanter, s*upra* note 64 at 1339.

[69] Kovach, s*upra* note 5 at 1014.

improper or invalid reason. I hope we will pause, however, and consider whether we may have lost sight of mediation as a process; a process that is multifaceted and contains myriad benefits. Mediation participants often say that they learn something in mediation even if the case doesn't settle. This is obviously a benefit, but perhaps there are other benefits as well, benefits that are often missed even when the case does settle. I was made aware of this possibility by the following response from one of my colleagues: *"I participated as counsel for a party in a complex but successful mediation. We essentially skipped the opening session. These seasoned party representatives later complained that they 'never got to have their say.'" This reinforced my view that this aspect of mediation cannot be underestimated, even among professional people."*[70] Perhaps it is still important for people to know they have had a chance to be heard, and not just by the mediator. It may be the most important thing.[71]

Again, settlement is not a bad thing, and it is easy to assume that success or failure of the mediation should be judged solely by whether the case settles or not. It is also easy to assume that if the case settles the disputants have gotten what they wanted and are, therefore, satisfied. Should we, however, stop and consider such assumptions? Have those of us who travel regularly in the world of institutionalized mediation become myopically focused on settlement to the point that even the parties are secondary to the process? Assuming can always be perilous, but it could be especially so to assume that clients have the same perspective as their lawyer or that they need or want the lawyer to act as the primary advocate in mediation. Moreover, principals may have goals they

[70] *Supra* note 1.
[71] CHRIS E. RYMAN, SETTLEMENT STRATEGIES, HOW AND WHEN TO SETTLE TO SAVE THE MOST MONEY FOR YOUR CLIENT, 2004 DRI-CONSTLAW CH 8 (2004).

value as much or more than settlement, and one of the more dangerous assumptions may be to assume that settlement is the only or primary goal.[72]

Still, settlement is the world I live in as a mediator and I must confess to not only extreme myopia, but downright obsession. Hypocritical or not, I already envision writing another paper extolling the huge tangible and intangible benefits of settlement and some keys to accomplishing it. I hope my beliefs are sincere. I have certainly convinced myself they are. It is quite possible, however, for an "ends justify the means" mentality to sneak up on you. It could gradually become a permanent subconscious rudder that steers the mediation ship inexorably towards the same port despite different passengers on each voyage who may be interested in another destination. It is also possible that the "liti-mediation" culture has become so entrenched that mediators and lawyers, as the only repeat players, are content with a relationship where lawyers, rather than the principals, are the mediators' clients.[73] This is an interesting paradigm to consider—one where the fare paying passenger is not the customer.

C. Direct Party to Party Dialogue

"Yes, there are circumstances in which they (opening statements) should be avoided because the clients are so emotional that they may get their 'hackles up,' making the whole endeavor counterproductive. But a joint session, if handled properly, allows the client on the other side of the table to hear an unfiltered version straight 'from the horse's mouth.'"[74]

[72] Lande, s*upra* note 27 at 896.
[73] *Id.* at 881, 882.
[74] *Supra* note 1.

"I like opening sessions, with some degree of control, since it may well be the first time the decision makers are hearing the other side unfiltered by their counsel."[75]

An inquiry as to what part of mediation is most important and what makes it important would engender significant discussion and divergent points of view. On what makes the opening statement important, however, there seems to be significant agreement. It is the aspect of direct communication between the parties.[76] "First impressions are important in mediation, but unlike litigation, opening statements in mediation permit direct contact between the parties, because each party has the opportunity to set out for the other party (not the other party's attorney) opposing counsel's perception of the case."[77] And, it may be the only opportunity before the final hearing for counsel to speak directly to the opposing party. Some believe that the whole purpose of opening statements "is to provide each side an opportunity to present their case directly to the other party, unfiltered by the party's lawyer."[78] The salient trait of direct communication with a party is the fact that it is literally direct, not "filtered" by the parties lawyer, and this is what is viewed as "one of the most important parts of the mediation process."[79] This concept of the parties receiving information unfiltered by their counsel, was a common theme in the anecdotal evidence I have obtained, particularly among those who favored the use of the opening statement. Interestingly,

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[75] *Supra* note 1.
[76] It should be noted that the opening statement can be made by the lawyers, the parties themselves, or both. There is a considerable amount of literature on this particular point as well as disagreement among practitioners as to the advisability of the parties speaking in opening session. This point certainly merits discussion, but I will not deal with this discrete point in this paper, nor make distinction between lawyer versus party presentations.
[77] Rita Lowery Gitchell and Andrew Plattner, *Mediation: A Viable Alternative to Litigation for Medical Malpractice Cases*, 2 DePaul J. Health Care L. 421, 438 (1999).
[78] Charles R. Pyle, *Mediation and Judicial Settlement Conferences: Different Rides on the Road to Resolution*, 33-NOV Ariz. Atty'y 20, 23 (1996).
[79] Jeffrey S. Grubman, *Securities Arbitration: Taking Responsibility—Securities Mediation*, 1554 PLI/Corp 307, 318 (2006).

some lawyers not only want to be able to speak directly to the other party without that party's lawyer filtering the message, they think it is beneficial for their own client to hear the other position in the same way.[80] Several of my respondents expressed similar opinions on direct, unfiltered communication between the parties, albeit in different ways. What is clear to me from my anecdotal evidence is that there are very experienced practitioners who strongly believe that there are significant tangible and intangible benefits to such a dynamic.[81] There is, of course, a contrary point of view, as both my anecdotal and more broad-based research shows,[82] which will be discussed in the following section. There is more than one reason for the divergent views on this subject, but there may be more than disagreement at work. There may be a misunderstanding on who the audience is, as will be discussed as well.

D. A Trend Towards Party Separation

"In my most recent case (a residential home construction dispute) where we attended mediation, the attorneys asked and the mediator agreed to even forgo the introductory meeting to keep the parties apart from the very beginning of the mediation due to the intense emotions on both sides of the case which we all thought would be counter-productive to successful mediation."[83]

This response describes a strategy that may have been the very best one to employ in this particular case. I do not intend to judge or second guess this procedural decision

[80] *E.g.*, *supra* note 1 ("First, your client needs to hear the other position, and not just your analysis.").
[81] *E.g.*, *id.* ("…it's my only chance to lay out our position directly to the other side. I'm not always confident some attys have passed along our positions."); ("There's the opportunity for the principals to speak to one another, through the mediator's guidance, without counsels' intervention or direction."); ("I think the parties need to see each other and hear directly what they are going to be faced with if the litigation goes forward."); ("I think that people want to have the chance to look the other person in the eye and speak their mind.").
[82] American Bar Association Section of Dispute Resolution, *supra* note 4 at 10.
[83] *Supra* note 1.

which was apparently agreed to by all the participants. It is the parties' process and I believe it should be fashioned to suit them and their particular dispute. This is, however, a strategy that is not uncommon in many cases I have seen, and it is a departure from traditional mediation theory. It ties into the other issues we have discussed in this paper, but more importantly, it is a pertinent topic to discuss in light of our theme to look at the philosophical and conceptual constructs of the mediation process.

Party separation is antithetical to direct, unfiltered party communication. Nevertheless, for years an increasing number of mediators prefer to move quickly to caucus and keep the parties separate.[84] Not only do mediators want to avoid the possibility of emotional, hostile or inflammatory remarks they fear would be made in joint session, they believe that conversations in caucus will be more candid, reliable and subject to better control. And, research supports these preferences, especially in court-connected mediation, with settlement as the goal. Studies corroborate the logic of the mediator separating the parties as soon as possible and then controlling the communication by shuttling back and forth with information, offers and counter-offers the mediator has effectively "buffered."[85] On the other hand, with the parties isolated in separate rooms, it may be easier for a party to exaggerate, embellish or "spin" when speaking only to the mediator who does not have direct knowledge of the events. Furthermore, the separation may serve more as an avoidance mechanism than a means of addressing the challenges of direct party dialogue.[86] Nonetheless, the "settlement conference model" has become the market norm and party to party dialogue has

[84] Welsh, s*upra* note 15 at 810.
[85] *Id.* at 811.
[86] McMahon, s*upra* note 40 at 24.

diminished accordingly, which, according to some, keeps mediation from reaching its full potential.[87]

It is important to consider whether law-centered approaches to mediation have usurped the value of direct party-to-party dialogue.[88] The loss of party participation in mediation, including direct party-to-party dialogue, merits concern. After all, one of the fundamental wants and needs of disputants is to tell their stories and control the telling of those stories.[89] In law-centered mediation, lawyers have a greater role, thereby decreasing the role of the parties. It follows then, that separation of the parties rather than joint sessions, would be favored in a law-centered approach.[90] The evolution towards separation of mediating parties deserves more attention; at least as much as the perennial debate between facilitative and evaluative mediation.[91] "Perhaps it was error to frame the mediation debate of the 1990s as 'facilitative' versus 'evaluative.' Instead, the debate should focus on 'dialogue-based' versus 'separation-based' processes."[92]

When the contemporary mediation movement emerged, disputants were expected to meet in joint session and speak face to face regarding their dispute, and separating the parties into private caucuses was used sparingly as it was not seen as consistent with

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[87] *Id*. at 23.
[88] *Id*.
[89] Welsh, s*upra* note 15 at 792.
[90] McMahon, s*upra* note 40 at 25.
[91] Since I use it in the sense of perpetual, perennial may be a little harsh. It is common knowledge, however, in the academic, training and practicing worlds of mediation that for many years there has been some degree of enmity between the devotees of the two models that has not fully abated. And, there is no dearth of literature on the subject. *See, e.g.*, Joseph B. Stulberg, *Facilitative Versus Evaluative Mediator Orientations: Piercing the "Grid" Lock,* 24 Fla. St. U. L. Rev. 985 (1997); Leonard L. Riskin, *Understanding Mediators' Orientations, Strategies and Techniques: A Grid for the Perplexed*, 1 Harv. Negot. L. Rev. 7 (1996); Lande, supra note 27 at 855; 1 Cole, McEwen and Rogers, Mediation Law § 3:4 (2d ed. updated December 2008); Samuel J. Imperati, David C. Brownmiller and Dean Marshall, *If Freud, Jung, Rogers, and Beck were Mediators, Who Would the Pick and What are the Mediator's Obligations*, 43 Idaho L. Rev. 643 (2007) referring to the "professional in-fighting over what camp is the true guardian of mediation."
[92] McMahon, s*upra* note 40 at 25.

party control or self-determination. In civil (nonfamily) mediations, it appears that more and more mediators are either abandoning or greatly minimizing the joint session, fearing that "emotional, hostile, or inflammatory remarks will be made in joint session and that these remarks will make constructive conversation and settlement much more difficult to achieve."[93] So, it is not only the lawyers, but mediators as well, who are concerned about the "polarization of the parties right off the bat."[94] Does the concern justify the abandonment of the joint session?

One should consider any decline in the use of opening statements in mediation in light of the decline of the entire opening (joint) session. Though sometimes used interchangeably, as I may do in this discussion, they are not synonymous terms. The concept of the opening session in mediation is a broader construct, and involves more, than merely opening statements by the parties. The joint session is where the parties come together face to face, not separated from one another by rules, procedures or lawyers. Despite the dispute that divides them, the parties have come together with a mutual goal—obtaining a self-determined resolution. That is a meaningful thing, and it carries great significance, symbolic and otherwise. Perhaps there is more involved than merely a re-thinking of the value of opening statements. An overall philosophical shift may be occurring.

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[93] Welsh, s*upra* note 15 at 806, 810.

[94]*Supra* note 1. Excerpts of response which reads in its entirety as follows: "I believe that opening statements are a waste of precious time and more importantly, counter-productive. The last two mediations I did where the attorneys gave opening statements did not result in settlement. I don't know whether it was circumstantial or not, but I believe the mediator , not the attorneys, should be the one to explain to the parties each others respective strengths and weaknesses. The attorneys are expected to be advocates for their client and so their opinions are not credible. Conversely, the mediator is a neutral and so his comments carry a whole lot more weight with the parties. Also, trial attorneys are competitive by nature and they are going to feel compelled to try to outdo their adversary in the opening statement, thereby resulting in the polarization of the parties right off the bat. Assuming the parties come to the mediation with a good faith interest in settlement, I would not do anything to sour that spirit."

E. Who Decides?

"I stopped allowing opening statements 250 mediations ago. It just heightens tensions. Almost all the attorneys like my rule."[95]

This is the position of a very seasoned litigator, former appellate judge and now very much in demand mediator. Many mediators share this opinion and consider it their prerogative to decide if opening statements will be allowed.[96] I believe many attorneys consider it the mediator's prerogative as well. An attorney I was preparing to mediate a case for recently told me, to my surprise, that he understood I did not allow opening statements in mediation. I have never had such a "rule," but somehow that word got out there. But what if I decided to implement such a rule? Although I have the "right" to make such a decision, I believe it is valid to question whether it is solely the mediator's decision. Whose process is it anyway?

Determining whether opening statements will be given is an important procedural decision in mediation.[97] While it may not be uncommon for mediators to make this decision without the influence of the parties and to simply announce the procedure to be followed, it is believed by some scholars in the field that, in terms of self-determination and the quality process and outcome, there is much to be gained by establishing a process that offers the opportunity for all the participants to influence procedural and other mediation decisions.[98] It can certainly be argued that the concepts of party-centered and self-determination might be compromised by a mediation process in which the mediator

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[95] *Supra* note 1.
[96] Welsh, *supra* note 15 at 810.
[97] Leonard L. Riskin, *Decision Making in Mediation: The New Old Grid and the New New Grid System*, 79 Notre Dame L. Rev. 1, 36 (2003).
[98] *Id.* at 47, 49.

has total control and say-so and in which he or she sets the "rules" that will govern the process. And one can see how this could raise numerous questions and issues, not only about the mediation process, but mediation as a practice and its possible regulation and the setting of uniform standards. Serious questions have arisen, and remain, as to what mediation is and who owns the practice; questions that go to the heart and nature of the practice.[99] The opening session and the opening statement have both been identified as a distinct "stage" in the mediation process. Since we are talking about a recognized stage in an important and valued process, it is worthy of consideration from that viewpoint.

Much has been written about the "stages" of mediation, and there may be as much disagreement over how many stages of mediation there are as there is about which mediation model is superior, facilitative or evaluative. I have found that commentators list the stages of mediation as anywhere from two to nine, and I think seven is the only one within this range that I haven't seen identified as the number of the basic "stages of mediation."[100] Nevertheless, I would venture to say that in all of these differing concepts

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[99] Benjamin, s*upra* note 16.

[100] Chris Guthrie, *The Lawyer's Philosophical Map and the Disputant's Perceptual Map: Impediments to Facilitative Mediation and Lawyering*, 6 Harv. Negot. L. Rev. 145 (2001), (citing MARK D. BENNETT & MICHELLE S.G. HERMANN, THE ART OF MEDIATION 25 (1996)) (identifying intake, contracting, information gathering and issue identification, agenda setting, resolving each issue, reaching agreement and drafting the agreement as stages of mediation); JOHN W. COOLEY, MEDIATION ADVOCACY 15 (1996) ("Classical mediation consists of eight stages: (1) initiation, (2) preparation, (3) introduction, (4) problem statement, (5) problem clarification, (6) generation and evaluation of alternatives, (7) selection of alternative(s), and (8) agreement."); Douglas H. Yarn and Gregory Todd Jones, Ga. ADR Prac. & Proc. §7:7 (3d ed. 2008) ("The Georgia Office of Dispute Resolution presents a six stage model: (1) building trust and rapport; (2) encouraging party narratives; (3) identifying needs and interests; (4) encouraging collaborative thinking; (5) developing points of agreement; and (6) crafting the agreement"); (citing DWIGHT GOLANN, MEDIATING LEGAL DISPUTES: EFFECTIVE STRATEGIES FOR LAWYERS AND MEDIATORS 62 (1996) (arguing that "mediation usually takes place in two or three basic stages: the opening session (also commonly referred to as the joint session), private caucuses, and less commonly, moderated negotiations"), and citing KIMBERLEE K. KOVACH, MEDIATION: PRINCIPLES AND PRACTICE 31 (1994) (arguing that the "basic model" of mediation is comprised of nine mandatory stages—preliminary arrangements, mediator's introduction, opening statements by the parties, information gathering, issue and interest identification, option generation, bargaining and negotiation, agreement, and closure—and four optional stages—ventilation, agenda setting, caucus, and reality testing); JOSEPH B. STULBERG, TAKING CHARGE/MANAGING CONFLICT 58 (1987) (arguing that mediation is comprised of "six distinct, consecutive segments" which he labels as

of mediation stages, and despite different terms or titles being used, there is unanimity that the opening statement is a standard part of an early stage in the process. In fact, more than one commentator identifies the "parties' opening statements," as a distinct and separate stage.[101] The plain and simple truth is that the opening statement is a fundamental part of mediation. It is taught, described and listed as the central part of the opening or joint session in virtually every training program, seminar, instruction manual, model, or theory concerning mediation that I have ever been exposed to. Consider several statements that follow. "Following the introductions, the mediator typically invites each party to make and opening statement."[102] "After the mediator is introduced, counsel makes opening statements."[103] "Most mediators request that the parties do a short opening statement prior to starting the private caucuses."[104] "The opening statement is one of the most important facets of the mediation process."[105] Whether we are considering the opening statement or the joint session, perhaps neither should be dismissed lightly.

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follows: begin the discussion, accumulate information, develop the agenda and discussion strategies, generate movement, escape to separate sessions, and resolve the dispute; C. Michael Bryce, *ADR Education From a Litigation/Educator Perspective,* 81 St. John's L. Rev. 337 (2007) (listing the stages of mediation as: 1) opening a mediation, 2) information gathering and summarizing, 3) defining issues and setting the stage, 4) sequeing into joint negotiation, 5) approaching parties through separate sessions, and 6) drafting a closing agreement); Renee A. Pistone, *Case Studies: The Ways to Achieve More Effective Negotiations,* 7 Pepp. Disp. L.J. 425 (2007) ("Introductory, Information Gathering, Framing, Negotiating, and Concluding are the five stages in mediation with the mediator's main job to structure everything.").

[101] Jay E. Grenig and Nathan A. Fishbach, 2A Wis. Prac., Methods of Practice § 83.36 (4th ed. 2008-2009). *See* also, Douglas H. Yarn and Gregory Todd Jones, Ga. ADR Prac. & Proc. §7:7 (3d ed. 2008), citing the Georgia Office of Dispute Resolution ("encouraging parties' narratives"), and Kovach ("opening statements by the parties").

[102] Chris Guthrie, *The Lawyer's Philosophical Map and the Disputant's Perceptual Map: Impediments to Facilitative Mediation and Laywering,* 6 Harv. Negot. L. Rev. 145 (2001).

[103] Gitchell, et al., *supra* note 77 at 437.

[104] Pyle, et al., *supra* note 78 at 23.

[105] Bruce A. Coane and Ross W. Wooten, *Successful Strategies in Mediating Employment Cases,* 23 Wm. Mitchell L. Rev. 901 (1997).

F. Who is the Audience?

"I think opening statements are a waste of time. If the mediator does his job and reviews the written mediation statements in advance, I see no reason for opening statements. All of the lawyers are aware of what the case is about and the mediator can explore positions during the shuttle diplomacy."[106]

"The trend here is no opening statements. I happen to agree with that since the mediator knows the parties' positions from the mediation statements..."[107]

These responses represent several I received sharing a common theme—opening statements are addressed primarily to the mediator and/or the lawyers; in other words, the mediator and lawyers are the audience. This merits some discussion. Many skilled lawyers have suggested that participating in mediation is easy because all they have to do is give an opening statement and then negotiate.[108] This view has been strenuously challenged. "Lawyers don't provide litigation style opening statements in mediation sessions. A courtroom opening statement addresses a different audience than a mediation statement."[109] The real audience is the other party. Many attorneys, out of habit, address the mediator during the opening statement, but it is the decision-maker who needs to be persuaded.[110] Clearly, the mediator is not the decision maker, but many lawyers continue primarily to address the mediator in opening session. It is important to use the opening statement opportunity speak directly to the other party, and when there are multiple

[106] *Supra* note 1.
[107] *Id.*.
[108] Richard M. Markus, *Fundamental Misconceptions About Mediation Advocacy,* 47 Clev. St. L. Rev. 1, 4 (1999).
[109] *Id.* at 4.
[110] PAT MALONEY, SR. AND DAVID CLAY SNELL, 1 LITIGATING TORT CASES § 11:25 (Database updated Jul 2008).

representatives, to speak to all of them.[111] Messrs. Coane and Wooten summed it up well: "Due to the differing goals and audience, an opening statement at mediation is not the same as an opening statement at trial. In mediation, the attorney's remarks are directed to the opposing party—not the opposing attorney or the mediator."[112]

The mediator being the audience and the opposing party merely listening in is a significantly different construct than the opposing party being the audience and the mediator merely listening in. Recognizing the opposing party as the audience might change one's opinion of the merits of the opening statement.

G. The Trend Towards Evaluative Mediation

"I believe the mediator, not the attorneys, should be the one to explain to the parties each other's respective strengths and weaknesses."[113]

"There are rare occasions when the lawyer's opening statement may serve to cause the other side to begin questioning its position, but I see no reason why a mediator can't do the same thing, and more effectively as a neutral observer who can comment upon what a fact finder might do with the proof established."[114]

These responses by two of my colleagues paint an accurate picture of what most lawyers in my part of the world want a mediator to do. Contemporary civil mediation is becoming, or has become, primarily evaluative mediation, and, apparently, this trend is not limited to Tennessee. It seems that civil mediation generally has taken on an

[111] Ryman, s*upra* note 71.
[112] Bruce A. Coane and Ross W. Wooten, *Successful Strategies in Mediating Employment Cases*, 23 Wm. Mithcell L. Rev. 901, 914 (1997).
[113] *Supra* note 1.
[114] *Id*.

evaluative cast, especially, as studies indicate, in court-connected mediation.[115] I participated as an advocate in a mediation recently in which the mediator in his introductory remarks said the following: "There is a facilitative school of mediation that teaches mediators not to give their opinions on the value of the case or what might happen it the case goes to trial, but I didn't go to that school." Though this statement was made with some levity, it proved to be an accurate prediction of the mediator's style. And, this is not only the style employed by many mediators today, it is what the market wants. Lawyers want mediators to provide opinions on the merits of the case and settlement ranges. This means lawyers choose mediators who have the knowledge and experience to understand and comment on the parties' legal positions.[116] This has not always been the case. Consider the 1996 comments of an Assistant Attorney General who had represented his state in numerous complex mediations for several years – mediations that would, by definition, be heavy on legal issues: "Mediators are supposed to work as facilitators, acting in a completely neutral way to help the parties to a dispute communicate more effectively and explore mutually beneficial outcomes. Good mediators are trained not to evaluate."[117] Facilitative mediation may still be what is primarily taught in most mediator training programs, but it does not hold the primary position in contemporary practice. Though the model of mediation used may depend on the type of case, area of the law or geographic region, I suggest that the 2006 comments of a seasoned securities practitioner and mediator accurately reflect what is desired of most civil mediators today: "You want a securities mediator who is willing to be

[115]Welsh, s*upra* note 15 at 805. Besides evaluative interventions by the mediator, Professor Welsh also decries the reduced role for disputants when attorneys attend and dominate the mediation sessions, the abandonment or marginalization of the joint session, and the lack of creativity in settlements (pp. 801-816).
[116] *Id.* at 806.
[117] Pyle, s*upra* note 78 at 22.

evaluative in his or her approach…One of the reasons that it is critical for the mediator to establish trust and credibility with the parties is that those parties at some point will likely look to the mediator to tell them the relative value of their case. A mediator must be able to do this to be effective."[118] I believe that it is reasonable to conclude that civil mediation has changed this much in ten years.

I believe it is also reasonable to conclude that, based on the conceptual differences between their respective "schools," evaluative mediators would put less emphasis on the opening statement than would facilitative mediators.[119] "Unlike the evaluative mediator, the facilitative mediator does not use his own assessments, predictions or proposals…The facilitative mediator exists to encourage presentations and discussions…and to cause parties to bring about their own proposals for resolution…"[120] And, it is fundamental in the facilitative process that the parties will make opening presentations and engage in direct negotiations. Facilitative mediators generally use caucus to move the parties toward agreement when they reach an impasse, whereas evaluative mediation is often a process of shuttle diplomacy, with the parties in separate rooms while the mediator uses different negotiation and evaluative techniques to convince the parties to settle.[121]

Evaluative mediation is compatible with the settlement conference model of mediation which is not only comfortable for lawyers, it reinforces their role and power.[122] Certainly it is not uncommon for lawyers in mediations to take the dominant role; making

[118] Grubman, s*upra* note 79 at 312.
[119] I do not mean to suggest that mediators can be accurately categorized as purely evaluative or facilitative, as many mediators likely blend these two styles and use some of both.
[120] Gitchell, et. al., s*upra* note 77 at 433.
[121] Spain, et. al., s*upra* note 8 at 396.
[122] McMahon, s*upra* note 40 at 24.

the opening statement, doing most of the talking and responding to offers.[123] Mediation, in my view, is definitely an art form, but it is basically a scientific equation that as the lawyer's role increases, the party's role decreases. I believe that purely evaluative mediation can have the same effect as the lawyers playing the predominant role, and, as I have suggested, that these two are linked. Certainly, evaluative mediation is more law-centered than facilitative mediation. Lawyers are more comfortable with the evaluative/settlement oriented approach as it is more consistent with their training and everyday practice. Attorneys, being an active player in their client's litigation decision-making process, can often persuade the client (the need to persuade would be academic if evaluative mediation has indeed become a "given") to adopt or accept an evaluative approach in lieu of a less pragmatic approach. Hence, the decision-making process becomes predictable and settlement focused.[124] The anecdotal evidence provided by my colleagues certainly supports the idea that lawyer dominance and evaluative mediation are not only linked, but that they both relate directly to the vitality and use of the traditional opening statement. There is some irony here since mediation may be the first or only time the parties will have to sit down and really listen to each other.[125]

III. CONCLUDING THOUGHTS AND RECOMMENDATIONS

"My answer is, it depends. In some cases there is a well-established level of discord. It may be limited to the enmity between the parties, but it may involve lawyer on lawyer enmity. In those cases, skipping the opening is often a good approach. However, I think there is often a greater risk of lost opportunity by skipping an

[123] Lande, s*upra* note 27 at 883.
[124] Welsh, s*upra* note 15 at 807.
[125] Imperati, et al., s*upra* note 20 at 653.

opening. A respectful, well-reasoned statement of the opposing party's view can serve many productive purposes: (1) an apology; (2) letting the other side know you're not an ass, despite what their own lawyer might say; (3) expressing prior experience in similar claims; (4) allowing the clients to speak after months of a procedurally imposed gag on communication; (5) candidly conveying what you will show at trial if the case isn't settled. Of late, I have seen mediators and lawyer advocates shy away from 'opening' on the theory someone might get offended and that the wrong tone would immediately ensue. I think that sells effective lawyering short. Lawyers just need to recognize who they are talking to and shape the message accordingly."[126]

This colleague's response could serve as my concluding thoughts and suggestions. I would probably be wise to let it speak for itself, but that is contrary to all my proclivities. Actually, I do not intend to summarize the thoughts I have set forth in the preceding discussion. I have said more than enough. Mainly, I want to touch on some "nuggets" I found within my friend's response that coincide with some subtle yet important concepts which came to me as I researched and wrote this paper. Within this one response are three salient principles which sum up the conclusions I have come to in researching and writing this paper, and I will close by touching briefly on each one.

First: **"It depends."** It really does. The most consistent point made by my colleagues was that wisdom dictates that one look at each mediation, and the decision about the opening statement, on a case by case basis. In fact, this point was made more than any other. The following response said it very well: *"In my experience, mediators make a mistake when they try to do a 'one size fits all' approach to structuring*

[126] *Supra* note 1.

mediations. I believe that the decision about the structure of a mediation conference including whether there are opening statements, who makes them and what they consist of…should be made in each mediation on a case by case basis depending upon a variety of factors."[127]

The ad hoc approach applies to all the decisions about the particular mediation process, procedural or otherwise. This was a key finding of the ABA Dispute Resolution Section Task Force for which the Task Force provided an excellent summary:

> Customization is the element of preparation that involves planning a mediation process tailored to the needs of the parties and the dispute. According to the focus group participants, the timing of the mediation, exchange of information before the session, and whether to have opening statements, are all elements that can be customized to each dispute. One participant in our first interview group complained that mediators too often handle their cases with a "cookie cutter" approach. Many others voiced essentially the same sentiment, and praised flexibility as a quality desirable in mediation.[128]

Flexibility is not just a desirable quality in mediation, it is one of the jewels of the mediation process. "The key feature of mediation is the flexibility to meet the specific situation—who the parties and attorneys are, the type of dispute, etc."[129] Another of my colleagues described a mediation involving 150 plaintiffs represented by one law firm and five defendants with separate counsel. In addition to forming a plaintiff's negotiating committee, an agreed process was established where each "side" made an opening

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[127] *Supra* note 1. The following are other examples: ("I think blanket abandonment of the joint session is a mistake."); ("…it is entirely dependent on the parties coming to the table."); ("I have seen a trend toward fewer opening statements…I think it should be determined on a case by case basis."); ("I do not believe that a hard and fast rule can be established."); ("My experiences tell me that it is situational as to whether opening statements are productive to the process."); ("I'm seeing a trend for mediators to be 'flexible' in their approach on whether to have opening statements…I feel this is very favorable instead of looking at the issue as 'black or white.'"); ("There is no one right answer."); ("Depends on the case. If the procedure for mediation were totally predictable it wouldn't be nearly as successful as it is.").
[128] American Bar Association Section of Dispute Resolution, *supra* note 4 at 12.
[129] *Supra* note 1.

statement consisting of attorney and expert presentations without the presenting side's clients being present. The idea was to allow the respective points to be made to the adverse parties without the risk of "pumping up" the side making the presentation. The process proved to be very effective according to my colleague, and the case was fully resolved. It is not surprising that this colleague stated his opinion on opening statements as: "I think whether mediation opening statements are helpful depends on the case. I don't think a rigid rule on this subject is beneficial or correct."[130]

I allow for different schools of thought and the freedom of reasonable minds to differ on mediation, its varying styles and techniques. However, I do not understand or accept a mindset that embraces "rules" and absolutes about whether or not to use opening statements or any other tool in the mediation process. I have written on this pet peeve of mine before as I believe that the key attribute of all ADR is flexibility. I have even suggested that the right attitude to have about ADR is one of adaptability: "The process should be fashioned to fit the dispute rather than the dispute to the process."[131]

Mediators especially should be desirous of expanding their mediation toolbox at every opportunity so that they have a variety of tools to use. A particular tool may be better suited to one case than another, but it is nonsensical to throw it out of the box because it doesn't work in a certain instance. "Throwing the baby out with the bath water" seems an apt phrase, as does, "If the only thing you have is a hammer, everything looks like a nail."[132]

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[130] *Supra* note 1.
[131] John T. Blankenship, *Developing Your ADR Attitude: Med-Arb, A Template for Adaptive ADR,* Tenn. Bar J. (Nov. 2006).
[132] ABRAHAM MASLOW, THE PSYCHOLOGY OF SCIENCE—A RECONNAISSANCE (1996).

Second: **"Of late, I have seen mediators and lawyer advocates shy away from 'opening' on the theory someone might get offended and that the wrong tone would immediately ensue."** Despite a wide disparity of viewpoints on the advisability of opening statements and other aspects of mediation, I will venture to say that there is unanimity on the existence and importance of the correct "tone" being set in mediation. The majority of my respondents emphasized this point in one way or another.[133] When you sum it all up, the reason for opposition to opening statements in mediation is basically one of concern over what would happen to the tone of the process if the parties become upset or their emotions become inflamed. This is why the "tone" of the presentation itself is viewed as the most important determination to be made regarding opening statement.[134] Since it is universally agreed that establishing the correct tone in mediation is critical, why not use opening statements to aid in establishing that tone? It would seem that part of the preparation process would be to discuss the attitude of the parties, the known hurts, anger, resentments, distrust, etc… and use the opening session to aid in addressing these emotions and setting the desired tone. Separation of the parties might aid in avoiding a worse tone being set than the parties bring with them, but I do not see how is creates a good or better tone. Are mediators not skilled or confident enough to prepare the parties and counsel so that they can speak and dialogue together? This is a good question for me to consider personally. Are lawyers not skilled enough to make an

[133] *E.g.*, *supra* note 1 ("I believe it is up to the mediator in his/her pre-mediation conference calls to make sure the right tone is set."); ("I emphasize that the tone and nature of the presentation needs to be as non-confrontational as possible…"); ("The opening session is crucial to setting the correct tone for the mediation if done properly by the mediator and if all counsel participate properly."); ("When opening statements are utilized, the approach used by the lawyers can 'set the tone' for the success or failure of the mediation process.").
[134] Maloney, et. al., s*upra* note 110.

effective presentation that doesn't serve solely to enrage the other side? But that's the next point.

Third: **"I think that sells effective lawyering short. Lawyers just need to recognize who they are talking to and shape the message accordingly."** My colleague makes it sound so simple. I was struck by this part of the response because it was one of the last responses I received and I had made several notes to myself as I read other responses. My notes were all along the same lines: Are we as lawyers not skilled enough, not trained well enough, not capable enough to "shape the message accordingly?" Law schools have come a long way in terms of exposing law students to ADR and different skills, such as problem solving, etc., but these initiatives are not yet widespread. Although most lawyers do far more mediations than trials, skills training in trial advocacy is still the emphasis in law schools. Changes in the training and teaching of lawyers can help them expand their roles.[135] Law schools need to prepare their students to advise and represent clients in mediation.[136] Considering the enormous growth and use of mediation, it is as important for lawyers to be effective in representing a client in mediation as it is in litigation. The advocacy skills in mediation are quite different than those in trial advocacy.[137] Perhaps a view that the skills are the same is one of the misconceptions that has led some lawyers and mediators to abandon opening sessions and opening statements in mediation. Perhaps some mediators are not confident that lawyers have the necessary mediation advocacy skills. Perhaps some lawyers lack this confidence as well.

[135] Kovach, s*upra* note 5 at 1040.
[136] Lande, s*upra* note 27 at 897.
[137] Markus, s*upra* note 108 at 4.

If this is the case, I believe we can do something about it. Changing the way we train and educate lawyers is part of it. Changing the way we train and educate mediators may be part of it as well. I suggest the most important thing we can do is to think about it—really think about it. This may be trite and simplistic advice, but it all starts with taking the time to think. It is one of life's paradoxes, but sometimes thinking, really thinking, is one of the hardest things to do. It is much easier to accept what is standard, what is commonplace, what is routine. A wise man once advised all of us that thinking was one of the three things we should do every day.[138] With thinking comes resolve, with resolve action, and with action change. Mediation has a bright future. The tangible and intangible rewards it offers are tremendous. All of us in the field of mediation should be thinking, striving, growing and improving; and in so doing, grow and improve the process. I am aware that there is already a significant amount of literature and discussion in academic and professional circles on mediation practice and technique, including, specifically, the opening statement. I tend to believe, however, that the study, writing and discussion need to continue and, perhaps, expand as mediation continues to grow and evolve, and questions about its preservation, quality and effectiveness inevitably arise. As we consider the use and effectiveness of the opening statement as a part of the mediation process we have an opportunity to think about the process itself. At a time

[138] Jim Valvano, Address at the ESPY Awards (March 4, 1993). Mr. Valvano gave an acceptance speech while accepting the Arthur Ashe Courage and Humanitarian Award. His speech included the following words: "To me there are three things we should do every day. We should do this every day of our lives. Number one is laugh. You should laugh every day. Number two is think. You should spend some time in thought. And number three is you should have your emotions move you to tears, could be happiness or joy. But think about it. If you laugh, you think, and you cry, that's a full day. That's a heck of a day. You do that seven days a week, you're going to have something special." Mr. Valvano succumbed to cancer just a few weeks later.

when mediation has become commonplace in the American legal scene,[139] I think questions should continue to be raised, and answers sought, about the nature of mediation, its origins, its future, its goals and purposes and its quality, lest being commonplace begets complacency.

[139] Richard T. Cassidy, *Mediating for Money: Making Mediation Work in Civil Cases*, 33 Vt. B. J. 39 (Fall 2007).