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Margaret Halsmith

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## ADR practice note

# The mediator's opening statement

Margaret Halsmith

## Introduction

This practice note arises out of my experience since the mid-1990s as a full-time mediator in a wide variety of two-party and multi-party disputes for business, government, families and individuals from Esperance to Kununurra in legal and relationship matters. It outlines some of the 'what', 'how', 'when' and 'why' of a mediator's opening statement, raises certain issues and offers what might (for some) be nuggets. It is intended as a point of discussion.

## Definition of process of mediation

### What is mediation?

This practice is premised on the following definition of the mediation process (which is also the basis of my practice). It is developed from the NADRAC (1997) definition:

Mediation is the process in which, with the even-handed assistance of a third party and together with advisors and/or support people, who may or may not be present, the people in dispute:

- listen to and are heard by each other
- identify mutual issues to be addressed
- develop options to address mutual interests
- consider alternative approaches for resolution
- endeavour to reach an agreement; and the mediator
- advises on and determines the process by which resolution is attempted
- has no advisory or determinative role in regard to the content of the issues, or the outcome.

## What is a mediator's opening statement?

A mediator's opening statement is a largely generic set of comments organised into a framework and spoken by the mediator to all participants of the mediation.

## How is a mediator's opening statement delivered?

### What will someone who is watching see?

**The space.** The observer can expect to see a private space which is decorated in a relatively neutral style and which has a sense of symmetry about it. They will see the mediator located in front of a whiteboard or the like, on which the date and possibly the participants' and mediator's names are indicated. Participants will be seated closest to the mediator. The mediator will be seated equidistant from each participant (where there are two participants) and/or central with a direct line of sight (where there are more than two participants), in a chair identical (or at least very similar) to the participants', advisors' and support peoples' chairs. Advisors (including lawyers) and support people will be seated on the far side of the person they have accompanied. Easily and equally accessible to all will be water, glasses and perhaps mints.

**The participants.** After participants are settled, the observer will see the mediator presenting a soliloquy and may see the mediator refer to a short aide memoir, the use of which will have been explained. The onlooker can expect to see all eyes on the mediator and a look of familiarity with or recognition of the content among the participants because a mediator's opening statement recaps the substance that was covered in detail in the pre-mediation session(s).

The observer will see the mediator sitting back in their chair, exhibiting an open demeanour. On the table in front of the mediator may be a file, a notebook, pens and whiteboard markers.

**The mediator.** The observer can expect to see the mediator continue to manage and take responsibility for the process, as did they or the person who

conducted the pre-mediation sessions. As the mediator delivers the opening statement, the observer will see the mediator sitting steadily and moving their head in 'tennis head' (turning from party to party) and/or 'newsreader head' (looking straight ahead), while making eye contact equally with the participants and—less so—with advisors and support people.

### What will someone who is listening hear?

**Tone.** The observer will hear procedural aspects of mediation explained as if by an authoritative—as distinct from authoritarian—peer of the participants. They will hear the confident, measured tone of the mediator methodically explaining the components of the mediation to follow in the terminology of the participants.

**Voice.** The observer will hear that it is the participants' mediation: "Then you will each..." and "I will then..." rather than "We will then..."

**Interpersonal.** The observer will hear participants being addressed individually by name, as well as collectively, and being:

- acknowledged—e.g. "I appreciate that preparing for your mediation may have been very time consuming"
- motivated—e.g. "Having met with each of you I am cautiously optimistic that..."

Mediation is premised on an adult-adult relationship, so the observer will hear:

- "I will assist you each to..." rather than "You should..."
- "I will provide you each with the opportunity to be listened to..." rather than "You are entitled to be listened to..." or "Please show respect..."

The "You should..." and "You are entitled to..." style conveys interaction based on a parent-child relationship, rather than an adult-adult relationship.

**Language.** Disputes can be ended



through resolutions premised on rights, powers, interests or a combination of these. Mediated resolutions are premised on interests. That is, the mediator's opening statement will explicitly develop an interests-premised platform for dialogue: participants' and constituents' interests and concerns, both individual and collective. For example, the mediator may state: "My role is to assist you *each* (rather than *both*) to continue to identify and refine what is important to you". The mediator's opening statement will be silent on the language of entitlement and hierarchy.

Choice of vocabulary and expression will also convey the uniqueness of each mediation, while imbuing confidence in the robustness of the process and the experience of the mediator. A tentative element, leaving space for flexibility by the use of words such as 'likely' and 'often', will be heard; words such as 'obviously' and 'always' will not.

The observer will hear the language of the mediator's opening statement used to demonstrate that those present are a group who are working together, albeit often reluctantly, to resolve their differences. The mediator is their 'expert peer'—i.e. procedural expert and content novice. Only language that assumes that participants are experts about themselves and the circumstances of the dispute will be heard. By contrast, in a determinative setting, the language is that of rights of one party versus the rights of another.

The language of the mediator's opening statement will convey (though not necessarily state in so many words) that the mediator will manage the process assertively and the content tentatively, and that the participants will be assisted to manage the content assertively and may be consulted regarding limited aspects of the process. The observer will, therefore, hear the mediator speak assertively with regard to the process and cautiously with regard to content, as well as hearing what will occur, rather than what will not occur.

### Framework: elements of the mediator's statement

The observer will hear the mediator first commence by summarising what

they will be saying (which is largely a recap of pre-mediation discussions), then saying it (broadly according to the elements following), then summarising what they have said.

The delivery will convey that, while being well-rehearsed, it is unique to the particular mediation.

The mediator's statement generally includes the following elements.

- Welcome everyone present, by name.
- Introduce people who may not be known to each other.
- Check on room temperature, etc.
- Acknowledge having met each participant in the confidential pre-mediation sessions.
- Ask whether there have been any changes pertinent to the mediation since the pre-mediation sessions.
- Note that each participant is able to make decisions should the opportunity arise.
- Advise of the process to follow and that there will be an opportunity for questions.
- Explain the mindset of mediation—namely, 'future focused; work toward an outcome which each can live with and which, if possible, adds value to the current situation'.
- Explain the goal of mediation.
- Describe and establish commitment to the roles (what can be expected) of
  - the mediator
  - the participants
  - the advisors
  - the support people
  - the others present
  - the others not present.
- Note documents, including the agreement to mediate.
- Explain the fundamental attributes of mediation—namely, admissibility and voluntariness.
- Describe guidelines to maximise the efficacy of the mediation—e.g. each person to:
  - wait until the other has finished speaking
  - address each other as for a business meeting.
- Facilitate a brief discussion regarding confidentiality to elicit a commitment to confidentiality agreements that are workable, practical and durable, including any public statements if applicable.

- Explain the stages of the mediation process to follow.
- Explain the process for terminating the mediation.
- Acknowledge the difficult situation in which participants find themselves.
- Confirm the time allocated for the session.
- Make some generic, normalised comments regarding the substance of mediations of this genre.
- Summarise the mediator comments above.
- Explain
  - the task and purpose of participants' opening statements
  - the roles of others during participants' opening statements.

### When to use a mediator's opening statement?

A full mediator's opening statement is made at the commencement of the first joint session, whatever the design of the mediation, whether co-located, shuttle mediation, video-conference, telephone mediation or online.

A selective, abbreviated mediator's opening is made at the commencement of each subsequent session.

Elements of the mediator's opening statement are usefully referred to and repeated as needed throughout mediation.

### What precedes it?

The mediator's opening statement is preceded by the initial greeting and checking-in process. This process includes ushering participants to seats that they will already be familiar with if they participated in the pre-mediation session in the same location as the joint session.

### What follows it?

The mediator's opening statement is followed by an opportunity for questions. The mediator asks "What questions do you have?" of each participant individually, instead of issuing a general invitation "Do you have any questions?"

This is followed by the mediator's linking statements, connecting the preceding exchange to the participants' opening statements.

### Why use a mediator's opening statement?

The mediator's opening statement serves a number of purposes, including to:



- settle and orient participants
- affirm confidence in the process and in the mediator
- establish the tone of the mediation
- establish the norms of the mediation
- recap information previously conveyed, this time slightly tailored to the situation
- demonstrate that the pre-mediation sessions have been even-handed
- demonstrate and describe the principles of mediation
- provide a reference point for the mediation
- elicit and confirm explicit commitment to the process.

In summary, the rationale underpinning the mediator's opening statement is to demonstrate—not state—the fundamental principles of mediation—namely, that it is a process that is informal, respectful, inclusive, peer-based, transparent, future focused, structured and tailored.

## Issues regarding the mediator's opening statement

### **Which is best: a short or long statement?**

A longer opening statement affords participants time to settle in, accomplishes the purposes outlined above, and pre-empts issues (authoritative) rather than risking later redressing them (authoritarian).

### **Why use an aide memoir?**

An *aide memoir* conveys the importance of each point, ensures consistent content from session to session, and frees the mediator to focus on how the content is delivered rather than on the content itself.

### **What language appropriately conveys the rationale and purpose?**

Language that is future focused, egalitarian, cautiously optimistic, peer oriented, respectful and positive: assertive language.

### **How can a monologue demonstrate and invite cooperative interaction?**

By the careful use of language that is inclusive, peer appropriate and future focused.

### **How is the role shared during a co-mediation?**

The role of delivering the mediator's opening statement can be shared in a variety of ways. One approach is for each mediator to speak to each aspect. Another is for the mediators to share the aspects somewhat equally, mostly (although not pedantically) alternating segments of the statement.

### **How does an opening statement vary for shuttle mediations?**

It doesn't. Participants can be asked to imagine that the other participants are in the room and the mediator can speak as if the other participants are present.

### **Why does a mediator's opening statement often describe what will not happen, e.g. "I will not make judgements"?**

It's historic. It comes from the days of yore when mediation was truly a novel, fringe activity and the reference point for dispute resolution was the court system. Imagine this: you go to the orthopaedic surgeon and she says "I'm not going to remove your appendix...".

### **Why does a mediator's opening statement often refer to 'ground rules'?**

I don't know. The principles of mediation indicate that 'guidelines' convey the essence of mediation much more accurately.

### **How are participants most appropriately referred to?**

Refer to participants by their names; never as "the parties" or "the other side".

### **Is it appropriate to thank people for coming to mediation?**

No. Participants are self-determining people doing it for themselves and each other—not for the mediator.

### **Is it appropriate to praise people for coming to mediation?**

No. The mediator walks beside the participants—not ahead of, behind or above them. A mediator can measure their success by the number of times participants tell them: "I realise now that we could have sorted this out

ourselves"; that is, the mediator became invisible.

## Core elements of the mediator's opening statement

In the first joint session, all elements are core elements.

## Optional elements of the mediator's opening statement

In subsequent joint sessions, the mediator can be selective, using only those elements that will be most constructive.

## Nuggets

- Be yourself! Your authenticity is your greatest asset. All the rest can be learnt. Fundamental to mediation is the connection between the mediator and each of the parties. It is this that sets the tone for the connections among all present. The 'therapeutic relationship' enables change to be considered.
- Ask yourself: by the end of your mediator's opening statement, what do you want parties to be thinking, feeling and doing. Write down each answer and then edit your statement accordingly.
- The role of a mediator has much in common with the role of a dinner party host: you are responsible for setting up and maintaining a situation to maximise opportunities to accomplish the goal of the evening. You are not responsible for the manner or extent to which your guests use those opportunities. You demonstrate foresight and flexibility; you treat each participant as an equal; you monitor the tone, timing, each individual and the group. You pre-empt any issues and deal calmly and assertively with any that do arise.

*Margaret Halsmith is Director and Principal Mediator, Halsmith Consulting Pty Ltd, through which she mediates full time in a variety of settings for business, government, families and individuals. Margaret is Chair of LEADR Australasia. She is also Deputy Convenor of Western Australian Dispute Resolution and a Board member of National Mediation Conferences Ltd. She can be contacted at <[margaret.halsmith@halsmithconsulting.com.au](mailto:margaret.halsmith@halsmithconsulting.com.au)>.*