

SAMPLE MEDIATOR OPENING STATEMENT & CHECKLIST

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Introductions

Hello, Good Morning/Afternoon

Please come in and have a seat.

Welcome to mediation.

Allow me to introduce myself, my name is _____, please call me _____.

What is your name and how would you like me to address you?

(You may wish to develop a seating chart at this time so you will correctly address and begin to remember each party's name.)

If attorneys are present you may wish to ask the following: "May I speak directly to your client?" (By recognizing the Attorney/Client relationship, which is a nice touch, you almost always will receive a "Yes." If not, that provides good information, as well.)

Agreement to Mediate and other appropriate paperwork

(Place paperwork in hands of attorneys. If no attorneys, then, parties.) Please review the Agreement to Mediate and other appropriate paperwork I've given you and, if okay, please sign. The Agreement to Mediate provides most, if not all, of what I'll be sharing with you in this, my opening statement. Also, you have agreed the fee will be paid immediately at the end of this mediation session or, if multiple sessions, at the end of each session. **(Here you are valuing your mediator's service.)**

Logistics

Allow me to familiarize you with this location:

- Rooms available to us will be...
- Restrooms are located...
- We have
 - Drinks
 - Refreshments
 - The telephone number here is _____ if there's an emergency
- May I ask that you turn off all cell phones or if you must keep them on, please put them on silent or vibrate. **(If appropriate,)** We do recognize you have a life outside this mediation.
- If we run through meal times, we'll have them provided **(or whatever is agreed to prior to the mediation).**

Comfort Questions (Building a 'Yes-able' Environment)

- Is the seating comfortable?
- Is the lighting okay?
- Is the temperature okay?
- Can I do anything else to make this setting more comfortable?
- **(Special Needs – will have been addressed prior to the mediation.)**

Time Requirements

Does anyone have any time or other limitations we should be aware of, i.e. appointments, hearings, picking up children? **(If so, and this is a concern, use your skills to build trust, rapport, etc. in dealing with these collateral issues.)**

Decision-makers

Are you capable of, and can you make a decision(s) regarding the resolution of this matter, if you deem it appropriate? In other words, can you make a decision without talking with anyone not here? **(If no, determine the decision-makers and necessary constituents and develop a strategy to deal with any absent decision-makers. Again, you have an opportunity to demonstrate your mediator skills.)**

Opening Statement (O/S)

My O/S:

I am now going to make what mediators call an opening statement (O/S). My O/S will tell you about your rights and entitlements, what to expect, and what will occur here to give you a heads-up as to what to anticipate in this, your mediation. After I'm finished with my O/S, I'd like to hear an uninterrupted O/S from you. Please tell me what you think I need to know to bring me up to speed so I can be as effective as possible in helping you make the most of this mediation. **(If you've been provided with pre-mediation information, review what you have received (excluding confidential info) to make sure you understand the materials and the parties are aware of it. Cover the confidential information in caucus with the appropriate party.)**

Your O/S:

As far as who makes your uninterrupted O/S (attorney if one is present, client or both) I'll leave that up to you. The way you choose to do it is the way I want to hear it. **(The attorney can make the O/S, the client, and/or both.)** This is your mediation and I will support, as much as possible, how you're going to conduct your presentations and involvement. I assure you that your O/S will be uninterrupted, however, I'll be taking notes and may stop you to make sure that my notes are accurate. If there is anything you'd like to say during the other party's O/S, I request you make notes on the paper provided so that when I get back to you, you'll have everything you want me to know, ready to share.

Mediation and the Mediator

What is mediation and what is a mediator?

Mediation is negotiation with the assistance of a neutral, the mediator. I'm here to help you negotiate. **(The following statement may be used by a judge/mediator. "I have no authority to do anything, i.e. fine anyone, hold anyone in contempt, order anyone to do anything, and/or put anyone in jail. I can't do any of those things. That is also my preference here.")**

Mediation has been around for more than 5000 years. Everyone at this table is and/or has been a mediator. If you've gotten in the middle of people having any kind of fuss (i.e. children, family, friends, neighbors, co-workers, strangers) and asked 'What's going on?' you've been a mediator. The only difference between you and me is that I don't have any personal interest in the outcome of this mediation.

Mediation is very successful in that 3/4ths of all matters going to mediation are settled. The purpose of mediation is to help you, if possible, find common ground so this matter may be resolved (ending in an agreement), if you so choose.

Rights and/or Entitlements

You have three (3) basic rights and/or entitlements:

1. Confidentiality

I will keep all that I hear in this mediation confidential and will not share any of it with anyone. I also request you keep what is discussed confidential as well. Most states consider mediation as settlement negotiations thus protecting and holding anything said inadmissible in court. However, there are some exceptions, what I call, the 'Mediator's Miranda Warnings'. I cannot keep confidential and must reveal:

- Any threat of violence, harm or worse, to anyone; and
- Past or present abuse of any kind or threat of future abuse **(Not all jurisdictions include this.)**
- **Any other exceptions that might be required by any organizations or authority (i.e. USPS, Government(s), corporations, court programs, etc.);**
- **Mandated reporters must comply with their respective mandates.**

2. Voluntary

This is a voluntary process. If this process is not meeting your needs, you may leave at anytime. If you've been ordered here, you're required to negotiate in good faith. **(This is required by many courts, but not all.)** If you think you want to leave, I request that you confer with me. You don't have to, however, I may have a perspective, as the neutral, that may be helpful to you so that any decision you make would be with all available information. By the way, anything I say in this mediation is an invitation for you to consider and nothing more. Also, consider that you've designated time on your

schedule to be at this mediation and, for most, it's costing significant sums of money so, I encourage you to use this time to the fullest extent possible to see how far we can go in resolving or, at the very least, limiting and/or clarifying the issue(s) in your conflict.

3. Neutrality

You're entitled to a neutral to assist you in this mediation. I can't just say I'm neutral, I believe I must prove it. First of all, I don't recognize any of you. Do any of you recognize me? **(If I recognize any person or they recognize me, reveal it and fully explore the extent of that recognition and/or relationship. Again, this is a good way to demonstrate your skills along with building trust and rapport.)** Let me take this a step further by telling you something about me to see if we've had any contact and/or relationship. I have done/been/engaged in... Does anyone know or had any contact with me in any of those roles? **(Fully explore the extent of such contact. After full explanation, turn to the other party and ask: "Do you have any questions or comments?" Then, ask each party:)** "May I proceed as your mediator?" Again, let me remind you that I have no power and/or I cannot make any decisions in your matter. I wear only one hat here and that's as a mediator - an individual who assists parties in their negotiations.

4. Capacity (For court Programs and others where appropriate)

Do you have the capacity to conduct good-faith negotiations, make decisions for yourselves, including a decision to end the mediation, if necessary, as well as be able to sign an agreement if you reach one?

(Add any additional rights/privileges/entitlements that are required by the institution or program through which the mediation is being conducted.)

Advice

I will not be giving you any legal, financial, and or other specialized advice. If you want or need such advice, you have agreed, by signing the Agreement to Mediate, to seek it from an appropriate resource of your choosing. **(Make sure this is consistent with the Agreement Mediate.)** In no event will you seek it from me or rely on me for advice of any kind. **(It is strongly recommended that you not give advice even if you are a member of a profession that might be a resource in this mediation. It is recommended you include this in your "Agreement to Mediate".)**

Witness

Additionally, you have agreed that you will not call me as a witness in court in this matter if it does not settle. **(This should be included in the "Agreement to Mediate.")**

Group Agreements (Ground Rules)- Mediators Information Only – not stated

Group agreements may or may not be desired, declared, developed, or required. You may wish to develop and/or review the ground rules. If they are to be

included, it is recommended you secure the parties' input in their development. Or, if you feel more comfortable to include some, please keep them to a minimum and frame them in appropriate language (not as a 'critical parent').

Mediation Process

What's going to happen? We are all together in what is called the Joint Session. We will remain in the joint session until all opening statements are presented. We may remain, after the O/S(s), in joint session if you **(the mediator and/or participants)** are okay with this or a caucus may be called. A caucus is a private meeting. Any of us may call a caucus. If you wish to speak to me privately, or, if I wish to speak to you privately, a caucus will be called. If you wish to go to caucus, we will do so immediately.

If I meet with one party in caucus, at the conclusion of that meeting, I will meet with the other party. At the conclusion of those meetings I will ask if there's anything you wish for me to hold in confidence. Whatever you request I hold in confidence, it will be done. There may be a disparity of time that I spend in caucus with one person as opposed to the other. That does not mean I'm forming any favor and/or affection for one party over another. The reason for the time disparity is that it may take longer to say what I have to say with one as opposed to the other, or it may take you longer to say what you have to say to me than does the other. Also, when I'm caucusing with one party, may I request that the other party use the time to think of some things that might work for you that you think the other would consider. That way, we'll all be working on searching for a resolution.

Consider the following. When I'm caucusing with you, I will be bringing the message of the other party to you. Conversely, when I'm with the other party, I'll be taking your message to them. Please see me as the messenger and not the message. Also, be aware that negotiating is a give and take process and, as such, most folks don't get all they want. I request that you be more flexible than you were before you came here today. Personally, I like to think positively, and invite you to do the same. Maybe you can find common ground and hopefully reach agreement or clarify and/or limit the issues so you'll be able to resolve the conflict and move on in your lives. Keep in mind, in mediation you have 100% control of the outcome. If you go to court, you have little control at best or 0% at worst. Also, to some, court is defined as "the only living autopsy from which you walk away." (Here, I ask attorneys if they agree with that statement, and all, with a smile, heartily agree.) Additionally, if there is more than one session and I have contact with either party **(whoever may initiate it [me or them])** I will consider it a caucus. After that caucus, I will contact the other party and provide them an opportunity to have their caucus. Confidentiality will continue to apply in all caucuses.

Agreement

If you reach an agreement, settling some or all issues, it will be written up. If in fact, it does reflect your understanding(s) all will sign the original and I will make adequate copies for everyone and whoever (i.e. court or otherwise) might need one. Also, if this matter is in court and all issues are settled, the agreement usually resolves all the

court's concerns. **(Sometimes the attorneys, where the rules allow, will designate who will draft the agreement. If none is drafted at the mediation, may I suggest a 'memo of understanding' be written?)**

(If partial or no agreement)

If you reach a partial agreement or not, I suggest we explore some available alternatives. **(i.e. further mediation, Arbitration, Trial; and, other available options.)**

Hopefully, we can discuss all the potential outcomes.

Thank you for listening to my opening statement. Does anyone have any questions/comments? **(Turn to a party and their attorney, if they have one, and ask:)**

May I have your opening statement?

Opening Statement Checklist

Introductions

- Welcome
 - Introductions
 - Logistics: Available rooms, restrooms, drinks, refreshments
 - All pagers and cell phones are off or on silent
 - Comfort questions: Is seating comfortable? Is lighting ok? Is temperature ok?
- (Building a 'Yesable' Environment)

Prerequisites to Getting Started

- Time requirements/restraints/special needs
- Decision-makers present or accommodated
- Contracts, releases, agreement to mediate and other appropriate paperwork

Explanation of Opening Statement (O/S) – The 'Why' we have an o/s

- What is the mediator's O/S
- What are the parties' stories and what is expected of and from the parties' O/S(s)

About Mediation

- Explanation of mediation
- History and/or benefits of mediation
- Role of the mediator: what is the mediator's authority; no professional advice and not being a witness

Rights/Entitlements

- Confidentiality: explanation and limitations (Mediator's Miranda Warnings-Exceptions)
- Voluntariness: explanation and limitations
- Neutrality: explanation and "proof of neutrality"
- Capacity: ability to negotiate/enter into agreement

The Mediation Process

- Joint session
- Caucuses: confidentiality
- Additional sessions

Agreement

- Explain the agreement process
- Writing/signing the agreement
- If no agreement is reached, explore next steps

Closing

- Thank everyone for their investment, being patient, and listening
- Are there any questions?
- Ask for parties' O/S