

WHEN MERITORIOUS OPENING STATEMENTS UNDERMINE MEDIATIONS

By Nick Lavkulik, Devry Smith Frank LLP

It's the norm: opening statements focused on the merits of the case end up angering people more than helping them see the case differently. Mediation, a process where a neutral third party helps both sides negotiate a resolution, often becomes the best way to bridge the gap. But in many cases, trading numbers back and forth, tempered through a shuttled diplomat mediator, can become the only hope for progress. Is there a better way?

Neuroscience confirms that “95% of purchase decisions are driven by emotions subconsciously and then justified with logic afterward.”

Intuitively, it makes sense, but rationally it might seem less applicable in technically oriented legal negotiations and more aligned with consumer marketing. While the law's intricacies may not be intuitive to the uninitiated layperson, aren't lawyers the technical experts here?

While many negotiators already engage with their (lay) clients emotionally, it's perhaps even more critical to do so with opposing counsel and sophisticated parties, rather than focus solely on technical and rational specifics. Emotional intuition pervasively influences everyone subconsciously—not only the uninitiated—and can be especially impactful on those who tend to discredit intuition in complex situations.

When understood, we begin to recognize when to let legal arguments flow or hold back, choosing instead to address the emotions of an opposing party. When misjudged, it becomes evident in caucus discussions that speaking to the wrong side leads to assumptions of another other side's naivety, ignorance, or outright dishonesty. This undermines merits-based negotiations, reduces the chances of a favourable settlement, and potentially damages a lawyer's reputation.

Good litigators frame facts persuasively, but great litigators present facts with sensitivity. This sensitivity isn't about avoiding conflict—it's about building credibility. “There's a world of a difference between truth and facts. Facts can obscure the truth.” While zeal can reveal good reason, it can also conceal precision. And even if the truth supports one side, an *avoidable* step on another's offside foot is likely to inspire small invisible emotional decisions for the worse. Points we all know, but are harder in practice, especially when the burden of proof lays on an opposing party.

The greatest litigators carefully navigate the intertwined threads of each listener's heart and mind. They pace the nuance of their points throughout the mediation, rather than “front loading” it all in openings—a tactic as unrealistic as breezing through DVP rush hour traffic. This patience helps avoid the all-too-common “argument avalanche”.

Hazard: Spreading support thin may spread a *decision maker's attention* thin.

Injury: Overwhelming an already *begrudged attendee* risks irritation or disengagement.

Urgent Response: Stopping rolling rocks with *tempting top-of-mind* counters—secondary arguments to rebut and fair generalizations to needlessly complicate.

Outcome: Preventing *what's most important* from being fairly heard, leaving the initiator of the avalanche buried in the rubble.*

*This rubble can become the focal point for an entire mediation, blocking the road to resolution.

Less is more, often when less invites more. When we focus on the right problem at the right time, it maintains momentum and makes room for more. Sensitivity allows for meaningful contributions, helping us understand each other's beliefs, address them, and move steadily toward settlement—one small step at a time.



I'm pretty straightforward. I mediate personal injury cases. And I do them at Roster rate.

I help lawyers present their cases in a way that's persuasive, credible, and cooperative. With experience coaching everyone from AM200 lawyers to solo practitioners and hands-on mediation starting years ago in small claims court, I know how to cut through the noise and keep things on track. My goal is to get you to the finish line—a good deal, case settled, and file closed.

For practical advice to enhance your mediation skill set (and to approach negotiations in your own way), connect with me on LinkedIn or email me at nick.lavkulik@devrylaw.ca.