CHAPTER 6

The Mediator's Opening Statement

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The words that begin a mediation establish the tone and protocol for the session. A good opening statement builds trust and puts the mediator in control of the process. A poor opening statement erodes disputant confidence and permits the eruption of power struggles between the mediator and the parties. Kathy Domenici and Stephen W. Littlejohn (2001) established three purposes for the mediator's opening statement: Introduce the disputants to the mediator and to each other, explain the mediation process, and establish trust (p. 40). The symbolic nature of the opening statement should not be undervalued. The opening statement creates the first visible commonality for the parties: Both are conceding process control to the mediator. This chapter presents the functions and practical realities of the first phase of mediation—the mediator's opening statement.

OPENING STATEMENT FUNCTIONS

The mediator's opening statement must accomplish several functions:

- Introduce the parties and the mediator to each other
- Model a positive tone
- Build trust between the mediator and each party
- Establish the mediator's control of the process
- Educate parties about mediation as a process and preview the stages
- Reduce anxiety about what will occur during the session
- Discuss the role of the mediator
- Discuss the role of the disputants
- Transition to the phase where the disputants tell their stories

Christopher W. Moore (2003) recommends that the mediator's opening remarks "should set a positive tone and meet the basic needs of the parties for comfort and safety. To establish a safe environment, the mediator should consider both emotional and physical safety" (p. 212). Physical safety concerns are accomplished nonverbally "through the physical arrangement of the parties in the room and verbally with his or her opening statement" (Moore, 2003, p. 212). In Chapter 4, we discussed the importance of seating arrangements. Establishing an emotionally safe environment equally is important. Effective mediation requires that parties feel secure enough to share information about themselves and their issues. The mediator creates the right psychological environment by appearing fair, consistent, and inclusive of each party.

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Discussion Question 6.1

CHOOSE ONE of the mediation cases presented in the previous chapters. Identify any safety issues to be considered by the mediator. How can the mediator's opening statement address those safety concerns?

The opening statement also fulfills the need of educating disputants to make informed choices. To have *informed choice,* disputants must be able to anticipate what will occur during the process, what the mediator will and will not do, and how decisions might affect their rights. Informed choice is so critical that some states specifically identify the topics to be covered in the mediator's opening statement. The Arkansas Alternative Dispute Resolution Commission (2011) *Requirements for the Conduct of Mediation and Mediators* requires mediators to discuss:

- The role the mediator plays to assist the parties in voluntary decision making
- The difference between a mediator's role and the role of a legal authority
- The procedures to be followed
- The mediator's pledge of confidentiality
- The mediator's commitment to neutrality
- The mediator's responsibility to foster a reasonable negotiating atmosphere
- The mediator's ability to stop the process for a variety of reasons
- How parties not represented by an attorney may consult legal counsel at any time
- The binding nature of mediated agreements once signed

Roxane S. Lulofs and Dudley D. Cahn (2000) believe that if disputants doubt the process or the credibility of the mediator, the information and tone of the opening statement may help to build trust (p. 351). The opening statement fulfills many functions for the mediator.

OPENING STATEMENT STYLES

Monologue Style

Mediators have choices about how to deliver the opening statement. As the term *monologue* suggests, the mediator can be the one who does most, or even all, of the talking. In sessions that are highly structured, and where consistency is paramount, an opening monologue may be scripted. For example, in state agencies dealing with discrimination issues, a pure monologue where only the mediator speaks may be prudent. Implementing

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a one-sided monologue sets a formal atmosphere where the mediator is communicating that he or she is in strict control of the mediation process.

In the monologue style, the mediator prepares a short speech that is presented in a **conversational style**. The monologue can be read from a script, memorized, or extemporized from a list of key words. In monologue style, the disputants do not speak, except at carefully chosen points. The disputants become accustomed to listening to and heeding the mediator's control of the process. The mediator might only permit the disputants to speak when answering how each one wishes to be addressed, to agree to the **ground rules**, and (at the end of the speech) to ask any questions about the process. A monologue style helps beginner mediators maintain control of the process.

Interactive Style

In an interactive approach, the mediator includes the disputants in a conversation. After providing information about the mediator's role, confidentiality, and some other elements of the opening statement, the mediator asks questions, such as "Is the goal of the mediation clear?" or "Do you have any questions about my role?" An interactive opening statement encourages the parties to take part in the creation of the process. Mediators may explain mediation in segments and invite the disputants to "buy in" to the process by soliciting their approval. In sales, this process of gaining agreement early and often is called the *yes response*. The interactive style is less rigid and allows the mediator to convey the information and functions of the opening statement through a dialogue with the disputants. For example, after explaining why ground rules are necessary, the mediator might ask the disputants what ground rules they would find useful. Creating a dialogue with the disputants has the additional benefit of checking understanding and keeping disputants focused on the main points of the opening statement. In a mediation where an informal tone is desired, more interaction between mediators and disputants may occur.

Discussion Question 6.2

WHEN WOULD a strict monologue approach be most appropriate? When would a more interactive approach be appropriate? How would a mediator decide which style would be best?

OPENING STATEMENT DYNAMICS

Every opening statement will address several key issues. While opening statements are modified in specialized contexts, such as juvenile victim–offender mediation, a general opening statement will include many of these elements:

Welcome

Introductions

Mediator's credibility statement

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Establish stakeholders are present

Overview of mediation

Voluntary

Parties create solution

Caucus/private meetings

Role of outside experts (if necessary)

Phases/steps in the process that will be followed

Explanations of mediator role

Not attorney or judge

Impartial and neutral

Confidentiality pledge

Notetaking procedures

Ground rules

Respect

Honesty

Speak one at a time

Agreement to ground rules

Breaks and facilities

Time constraints

Commitment to begin

Transition to storytelling

Length

While the list of basic components may seem long, most elements are described quite briefly. A mediator's opening statement should be long enough to cover all points, and yet short enough not to bog the disputants down in unnecessary details. Opening statements typically run one to three minutes in length and rarely more than five minutes. Opening statements will be longer if many questions are asked or if the function of the opening statement must also fulfill goals of educating the disputants about some aspect of mediation.

Order

The order of the topics in the opening statement is flexible. For example, in a mediation where there is high tension between disputants, a mediator may decide to address ground rules early

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in the opening statement. If mediator credibility must be established, more time may be spent to build confidence in the mediator. The sample opening statement in Figure 6.1 is a compact presentation of the basic elements.

FIGURE 6.1 Sample Opening Statement

Statement	Annotation
Hello. My name is Carol Hutchison. Please call me Carol. First, Welcome to the campus mediation center. I commend you both for choosing to work out a solution to your issues together. I've been mediating cases for this center for two years now, and I am confident that this process will be helpful.	*Introduces self, builds rapport, and establishes credibility*
As a mediator, I am going to walk us through a process that will ask each of you to help me understand what brought us here today, and then see whether we can come up with a resolution that meets your needs. I'm not here to make decisions for you or offer you legal counsel. My job is to help the two of you come up with a solution that works for you both. In that role, I strive to be neutral and impartial, meaning that I will not favor either one of you or champion any particular solution. If you have any concerns about how the process is going or what I am doing, please let me know so we can discuss it.	*Briefly explains process* *Establishes roles* *Explains neutrality and impartiality*
You have each been sent a copy of the Agreement to Mediate and Subpoena Waiver forms. Are there any questions? I would like to draw your attention to the confidentiality clause and remind you the only reason I would break confidentiality is if one of you threatened harm to yourself or others.	*Explains confidentiality issues*
I also want to inform you that in the event we don't resolve your dispute here and this case proceeds to court, I cannot be subpoenaed by either side. I will take notes through the course of this mediation just to keep my thoughts in order, but I will destroy those notes after this session.	*Explains subpoena waiver* *Explains notetaking procedures*
At some point I may find it necessary to meet with you individually. If so, what is said in those meetings also is confidential, unless you choose to share it with the other person.	*Explains caucus*
I've reserved this room until 4:30 today. Are there any time constraints? Good. If you need a break, let me know. Bathrooms are just across the hall.	*Discovers time constraints, explains facilities and breaks*
Just a couple of items about ground rules before we get started. I expect that you will speak honestly and bargain in good faith. I've found it easier to hear if only one person talks at a time. I may ask you to write down concerns you have while the other person is talking. I promise to make sure you have an opportunity to share your concerns. Also, if we could promise to be respectful to each other, even if we don't agree, this would be very helpful. Do either of you have anything to add? Okay. Are you both willing to following these guidelines? Great.	*Sets ground rules* *Gains agreement to rules*
Are there any questions before we get started? Okay, let's begin with Aaron since he called the center first, if that is OK with you, Selena? Aaron, what has brought you here today?	*Asks for questions before beginning, Transition to next phase*

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KEY COMPONENTS OF THE OPENING STATEMENT

Welcoming

Mediators begin by welcoming the parties to the session. A simple statement such as "I'd like to welcome the two of you to our center" can suffice. A common addition to welcoming the parties is to praise them for coming to the mediation table. These "welcoming" comments add a positive tone at a time when the individuals probably are feeling uncertain. The mediator might say, "I'd like to commend you for coming here today in an effort to work on your concerns together." The first words should be delivered conversationally, with the mediator's attention and eye contact split evenly between the two disputants. Speaking only to one disputant might imply favoritism or lack of neutrality. What the mediator does at the outset has a large effect on the overall tone of the session. An approachable mediator with a friendly tone can set the stage for positive interactions.

Introductions

The next task in the opening statement is to ensure that all parties are introduced to each other and to the mediator. Several factors are considered as an introduction strategy is devised. When high tension abounds or the context requires more formality, the mediator might use a title or honorific. For example, the mediator may name herself Dr. Hutchison and address each party formally as Mrs. Marin and Mr. Randall (or Ms. or Miss, depending on the wishes of the disputants). If you choose to use a title for yourself, then referring to your disputants as Ms. or Mr. also is advised.

If an informal tone is desired, only the mediator's first name might be used. Informality opens the door to having the parties call each other by their first names as well. For example, "Hello, my name is Sean O'Reilly. Please call me Sean. And you must be Ms. Davidson. May I call you Chloe?" Another approach could be, "My name is Sean O'Reilly. Please call me Sean. Which of you is Katherine Bradshaw? Is it okay if I call you Kathy or would you prefer Katherine? And you must be Camilla Wilson. May I call you Camilla?" If you would prefer, you can avoid the guesswork by simply stating, "Hello, I'm Sean O'Reilly. Please call me Sean. And you are?" Then wait for the parties to introduce themselves.

Formality of address also has cultural implications. For parties who are older, issues of respect and being addressed by title may be important. Elderly disputants may perceive being called by their first name without permission as rude. Not using formal titles may be considered to be disrespectful in a cross-cultural mediation. If you are unsure about decorum, we recommend erring on the side of formality.

Once the mediator has determined the names of the disputants, recording the names is a good idea. The mediator can place the names on the mediator's notetaking form, which will be discussed later in this chapter.

Building Credibility

Letting the disputants know the mediator is competent and experienced builds trust. Referring to the program or center through which you mediate may be one way to

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establish credibility. For example, a campus mediator might say, "Thank you for choosing the Campus Mediation Center. We've been helping university students like yourselves resolve disputes for over a decade."

Another means to build credibility is to refer to one's credentials. The mediator may make a statement about certifications or titles held, by saying, "Hello, my name is Madison Smith. I'm a certified mediator in the Commonwealth of Massachusetts and member of the Massachusetts Council on Family Mediation." Beginning mediators might say, "Hello, my name is Madison Smith. I'm a mediator trained by the University Dispute Resolution Program and an intern for the university in the Small Claims Court Mediation Program."

Establishing Stakeholders

If pre-mediation has not established the relevant stakeholders, the mediator will check to be sure the right parties are at the table and that they have the authority to negotiate a settlement. The decision makers and those affected by the decisions are called *stakeholders*. In small claims court, a mediator will ask, "Ms. Bradshaw, are you authorized to negotiate the issues of the case today and do you have the ability to make decisions? Great. Ms. Finnegan, are you authorized to negotiate the issues of the case today and do you have the ability to make decisions?" Using precisely the same phrasing with each party demonstrates the mediator's equal treatment of each disputant.

Explaining the Nature and Scope of Mediation

Part of upholding the disputants' informed choice and self-determination is ensuring that they understand their rights in the process. Even if the disputants are required to appear by a judge or other authority, they are not required to reach an agreement. The mediator explains that the negotiation process is voluntary. If the mediation was self-selected by the parties, the mediator might say, "I commend both of you for choosing to come to mediation today to try to work out your differences. As you probably know, the negotiations today are entirely voluntary and you are not compelled to come to any settlement if you do not wish." If the mediation was mandated, the mediator could state, "Today's mediation involves a process where you can choose to work out the issues between you, and you may or may not reach an agreement. Participating in mediation does not deter you (or the courts) from pursuing other actions if you don't reach agreement in this session."

In addition to describing the basic premise of mediation, many mediators also give the disputants a brief overview of the process. As mentioned in previous chapters, different mediation models are used in various contexts. A mediator using the balanced mediation model might relate that, "What will happen is that each of you will have a chance to tell me what brought you here today and the issues that are important to you. Once we've identified issues that need to be worked out, we'll set an agenda of the items that the two of you need to negotiate. I will then help you through the negotiation process and document any agreements you may make." An explanation of how the mediation will unfold manages the disputants' expectations and reduces anxiety about time spent initially on one person's story—the other party knows that each person will have a chance to speak.

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Explaining the Mediator's Role

Explaining what the mediator will and will not do helps the disputants understand the difference between the role of mediator and the roles of judges or others who make decisions for the parties. Mediators must be very clear in communicating their facilitative role to the disputants. If mediators are not attorneys, they must be vigilant to avoid presenting themselves as such by giving legal advice. Even when mediators are attorneys, separating the role of attorney and the role of mediator is advised. Nonattorneys who dispense legal advice may be guilty of the unauthorized practice of law (Association for Conflict Resolution, 2002). Make sure your clients know your role. "My role here today is to assist you in discussing the issues that brought you here and in helping you formulate any decisions the two of you might reach. I am not a judge or attorney, and I will not make any decisions for you. Any decisions that you make are your own. Additionally, I will not offer you any legal advice."

Explaining the Caucus

If the model permits or requires a caucus, disputants need to understand what a caucus is and what might happen during a private meeting with the mediator. The terms *caucus* and *private meeting* are interchangeable. "There may come a point in this process where I'll want to meet privately with each of you." The mediator also should explain the rules of confidentiality during caucus. For instance, the mediator may relate that, "The same rules of confidentiality apply to the caucus, and I won't tell the other party what you say without your permission."

Explaining Impartiality and Neutrality

Disputants should be made aware of the mediator's commitment to fairness in the process. The mediator explains: "During the mediation, I am impartial—meaning I don't have any stake in the outcome of the issues you decide here today—and neutral—meaning I have no bias toward either of you personally." The explanation of impartiality and neutrality should be accompanied with a disclosure of any factors that might limit neutrality or impartiality. If the mediator has seen one of the disputants before in a professional capacity or has some stake in the issue of the case, he or she must disclose those factors. "Now that I see Ms. Bradshaw, I recollect that I have mediated a case before when she also was representing the QuickRent Management Company. I don't feel that this impacts my neutrality. Ms. Wilson, do you feel comfortable proceeding with me as your mediator?" If there is a connection between the mediator and the issue, the mediator might disclose that, "I see that this case is regarding a rental in the Summer Winds subdivision. I have a home in that subdivision. In the nature of this case, I don't perceive any conflict that would cause me to recuse myself. Are both of you comfortable with me proceeding as your mediator?"

In some cases, the mediator may not be neutral or impartial. For example, when the mediator is a first-level supervisor mediating employees or a college dormitory resident advisor mediating for two roommates, the mediator has both personal knowledge of the

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disputants and a stake in an amiable solution to the conflict. Under these conditions, the neutrality and impartiality statement must be altered. "As you know, the university wants difficulties between roommates to be resolved, when possible, by the people who are closest to the issues. In this mediation, I'll be fair and equal in my treatment of each of you as you work toward a possible solution that is agreeable to you both and makes our dormitory a better place to live for everyone."

The field of mediation continues to engage in a spirited debate about the words *neutrality* and *impartiality*—recognizing that human biases may make absolute neutrality or impartiality impossible. The laws or codes of conduct in the state where a mediator practices provide insight into that region's preferred terminology. For example, some codes of conduct prefer the promise to approach the parties with *impartial regard*. Mediators who also are licensed in another field may vary their descriptions of neutrality and impartiality as required by legal, social work, or other professional codes of conduct.

Giving a Confidentiality Pledge

As discussed in Chapter 5, mediators must consider what they are willing or able to keep secret. What is and is not confidential is detailed in the mediator's *confidentiality pledge*. Most state laws require any person with knowledge about harm or threat of harm to another person to alert proper authorities. Mediators must know what limits to confidentiality are required by state, province, or local laws. Parties must be informed about the mediator's confidentiality policy and the limitations to the pledge of confidentiality. For example, the mediator may make the following promise: "Anything you say to me today I will hold confidential. The exceptions to my confidentiality are [insert the exceptions in state, local, or province law]. In addition, as a Resident Advisor for this dormitory, I am also under obligation to report underage drinking and illegal drug use."

ACTIVITY 6.1: The Confidentiality Pledge

What is your state's legal reporting requirement, and how might that affect the mediator's confidentiality pledge in the opening statement?

Disclosing Notetaking Purposes

Disputants will be curious about why the mediator is writing while they are speaking and interested in what will become of the notes. A campus mediator could make the following comment: "I'll be taking personal notes during the session just to keep things straight in my mind. I'll destroy the notes at the end of our mediation. The only information I will report to the Dormitory Grievance Board is that the two of you did meet and whether you came to an agreement."

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Destroying notes offers further protection for mediators in the unlikely event that they and their records are subpoenaed. While it is unlawful to destroy records once the courts have requested them, many mediators make a habit of destroying notes of the mediation once it is completed. Some mediators even collect the personal notes of the parties to be destroyed. On some college campuses and in many government agencies, documents may be considered part of public records available for disclosure. Once notes are classified as a public record, it may be illegal to destroy them. Therefore, a court subpoena may not be the only threat to the confidentiality of the mediation session. Unless otherwise required, mediators generally only retain a permanent copy of the agreement to mediate and memorandum of understanding forms. Mediators are encouraged to research the rules in their jurisdictions to ensure that record keeping and destroying practices are legal.

Establishing Ground Rules

Ground rules create expectations for courtesy and inform the disputants of what is and is not appropriate behavior. Most mediators have a list of ground rules in mind before they begin the session. Myra Warren Isenhart and Michael L. Spangle (2000) identify four typical ground rules:

- Only one person speaks at a time
- No interruptions while someone else is speaking
- No personal attacks will be allowed
- Information shared during the session will be treated as confidential (p. 79)

We recommend modifying the phrasing of these general ground rules. Saying that there will be "no interruptions while someone else is speaking" is not entirely true, as the mediator may interrupt the parties frequently to guide and control the flow of the session. A more accurate ground rule is that the disputants should allow each other to speak uninterrupted. Likewise, saying that information shared during the mediation session will be treated as confidential may not be accurate. Mediators must differentiate between their confidentiality (and its limits under state or territorial law) and confidentiality expected of disputants or others in the room. Unless the disputants and others at the session sign a confidentiality agreement, there is no reason to expect them to keep what has occurred secret. To be more accurate, mediators can say that they will keep information shared in the session confidential, except as required by law. As many of the cases in this text stem from real-life mediations, we have changed enough of the details and all names to protect the anonymity and confidentiality of the disputants. Each mediator should understand and be able to explain what confidentiality means.

We further recommend that mediators refrain from sounding punitive in their establishment of ground rules. Stating desired behavior instead of unacceptable behavior seems less parental. For instance, instead of saying, "Do not interrupt when the other is speaking," say, "When one of you is speaking, it is important that she is allowed to finish. If you have something you want to add when someone is talking, please write it down and I promise

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we will get to your concerns." Maintaining **civility** is an important goal for the mediation. A ground rule about respecting each other may be presented as, "In my experience, these sessions work best when we are respectful and courteous to one another, even when we don't agree." Using the term "we" here includes the mediator in the rules and sounds less dogmatic.

As a ground rule, some mediators (particularly novices) ask that disputants begin the session by talking only to the mediator and not to each other. Once emotions are moderated, the mediator seeks a congenial turning point where the disputants are asked to begin speaking directly to each other.

Another area for discussion in the ground rules section of the opening statement is a brief description of the surroundings such as the location of the restrooms or water fountains. A mediator may say, "If you need a break, please let me know. Bathrooms are down the hall to the left, and soda machines are across the foyer."

Having each party agree to the ground rules is critical and can be accomplished by asking a direct question, such as "Can we agree to these ground rules before we begin?" The mediator will look at each person to confirm that individual's agreement. If a party becomes unruly later in the session, one response strategy is to take some of the blame for the need to adhere to the rules. For example, the mediator could say, "I'm finding it very difficult to follow this conversation when more than one person is talking. Could we go back to one person speaking at a time? Jessie, please continue with your explanation." Asking for compliance to rules should be handled graciously as the "scolded" party may perceive bias in the mediator (Fraser, 2007). Major infractions may be handled most effectively one-on-one during a caucus.

An optional strategy for establishing ground rules allows the disputants to set the rules. The mediator would tell the disputants that the sessions work better when the parties agree on how they will treat each other in advance, and then ask each party what rules of behavior would be important to them. The mediator helps the parties negotiate the rules they will adopt. Once the parties agree on their rules, the mediator can add any other ground rules critical to the model being applied and praise the disputants for working together to reach their first agreement. John W. Keltner (1987) relates that in some instances rules are written and signed by all parties.

Discovering Time Constraints

Mediators must ensure that there will be sufficient time to explore issues and negotiate effectively. In one instance, a disputant was feeling that the negotiations were not going in her favor and informed the mediator that she had to leave to pick up her daughter. This tactic caused the negotiations to stall on the spot, and the mediation ended abruptly.

During pre-mediation, the disputants may have been informed of a typical range of time for the session, but reminding them of their time commitment is helpful during the opening statement. Be cautious, however, not to create a false expectation about *exactly* how much time the mediation will take. We advise not giving disputants cause to worry that they are taking too long or, if they are fast, not doing it right. Commenting, "We have scheduled the room until 4:00, so we can take the time we need to work on your concerns,"

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will give disputants an idea of their time commitment for the session. Do ask directly about their time constraints. "Are both of you alright with that time frame?" You also may wish to address avoiding distractions: "If you'll turn off your phones, I think we're ready to begin." Occasionally, disputants cannot turn off their phones for emergency purposes, but typically it is best to reduce distractions by having communication devices turned completely off.

ACTIVITY 6.2: Practicing the Opening Statement

Practice your opening statement aloud until you are comfortable with the words and phrasing. Find two partners in the class with whom to practice your opening statement. Deliver the opening statement to your partners, striving for a personable and conversational tone that will build trust and confidence in you as a mediator. While speaking, divide your attention and eye contact equally between both parties. Arrange the chairs as you would during a mediation session.

Explaining the Role of Outside Experts

At the onset of a session, disputants may believe that they have all the information and advice that they need to negotiate. However, during the mediation, they may find that access to more resources is necessary to make informed decisions. Mediators can include a statement that addresses their right to seek counsel, such as "Each of you should know that any agreements you reach today may be binding and that agreements may restrict your rights in later actions. You may seek legal counsel before finalizing any agreements if you have any doubts or need legal advice." This statement may be repeated during the agreement writing stage.

If the issue is complex enough to require impartial experts to establish facts in the case or provide criteria for decisions, the disputants should be briefed on how experts would be used. For instance, the mediator may relate that, "Should there be a dispute about facts in the case that both of you decide needs to be resolved, we may bring in an impartial outside expert to assist the two of you. If that time comes, I'll assist you in choosing an expert that you both feel will give fair and impartial facts, as well as lead a discussion to negotiate how you will pay the expert." The desire of the mediator is for disputants to be well informed and comfortable in the decision-making process.

Securing the Commitment to Begin

By this point, the disputants have received considerable information that may or may not be new to them. Asking about their readiness to move to the next phase of the mediation elicits a verbal agreement to move forward. The commitment to begin a statement should be simple, such as "Now that we've covered the basics, are there any questions? (pause) Are we ready to begin?"

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Transitioning to Storytelling

In transitioning to the storytelling and issue identification phase, the mediator must decide who will talk first and present some rationale to the disputants for the choice. If one disputant is visibly agitated, sometimes it is best to start with the more emotional person, as those who are agitated rarely can listen to the other party before their fears and emotions have been moderated. Other strategies for deciding who will speak first include selecting:

- The person who first contacted the mediator
- The plaintiff in a court case
- The individual with less power

The mediator may or may not reveal a motivation for selecting who speaks first. In a session with a professor and a student, the mediator may wish to power balance by having the student speak first. The explanation given to the disputants, however, might be that, "You were both referred to the Mediation Center by the Academic Grievance Board, so I'll have the person on my right [where the student is sitting] go first. Anthony, could you tell us what brought you here today?" Jennifer E. Beer and Eileen Stief (1997) suggest two other basic opening prompts: "Please explain to us what has been happening" and "Can you give us some background?—tell us your view of the situation?" (p. 106). More details about storytelling and issue identification are presented in Chapter 7.

BUILDING CREDIBILITY AND RAPPORT

Throughout the opening statement, the mediator strives to build **rapport** with each disputant and a perception of personal competence. William A. Donohue, Mary E. Diez, and Deborah W. Weider-Hatfield (1984) contend, "the mediator must encourage each of the disputants to attribute trust to him or her so that both parties will comply with the mediator's requests" (p. 230). The mediator may need to interrupt the parties, encourage changes in how the parties perceive the facts in the situation, coach the parties in how to hear each other's concerns, or ask the disputants to make difficult choices to transform the pattern of an intractable conflict. All of these actions require trust between the parties and the mediator. Disputants must believe that the mediator will be fair and keep the session under control.

Dominici and Littlejohn (2001) also view the opening moments of the mediation as key to the building of trust: "If a trust relationship is created, the disputants can participate openly while seeing the mediator as competent. All components of the opening statement are designed to establish trust. If a trusting environment is evident from the start, it will facilitate the entire process. People often have misconceptions

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about mediation, and this is the time to get everyone on the same track" (pp. 65–66). The mediator's demeanor during the opening statement cues the disputants that the mediator is trustworthy and competent.

THE RELATIONSHIP BETWEEN OPENING STATEMENTS AND MEDIATOR CONTROL

By definition, mediators control the process of the session. The balanced mediation model recommends a fairly active role for the mediator to guide the disputants through the phases in the model and to intervene to keep the session on-task and moving in productive directions. Donohue, Diez, and Weider-Hatfield (1984) define relational control as the "right to direct, delimit, and define the action of the relationship" (p. 229). They continue, "in mediation, control of the interaction is a key objective for the mediator to increase his or her flexibility in pursuing some particular pattern of questioning or topic development. The opposing parties may also be trying to compete with the mediator for control depending upon their objectives. Nevertheless, negotiating control is one of the relational parameters that the mediator must be able to manage" (p. 229).

The mediator establishes control during the opening statement through the creation of ground rules and by building confidence in the minds of the disputants. Isenhart and Spangle (2000) see the function of ground rules as creating a safe and predictable space for the disputants to negotiate their differences. A composed and confident presentation of the opening statement implicitly says to the disputants, "I will keep your conflict under control and create a safe space for you to work things out."

NOTETAKING FOR MEDIATORS

During the session, the disputants will disclose many facts, fears, solutions, or other information. While some mediators can retain all the information mentally, most people need to take notes. A mediator's notes are strategic and sparse rather than a comprehensive transcript. Mediators do not try to capture every word and every detail mentioned by the disputants. Any fact missed by the mediator is not lost forever, as the disputants will bring up information important to them again if it has been overlooked. Experienced mediators can attest that disputants will continue to say the same thing over and over until the mediator notices the importance of a comment.

A mediator's notes also are more than just facts—they also contain analysis. Donohue, Diez, and Weider-Hatfield (1984) explain that the mediator "uses his or her skills to listen for potential links, to sort and analyze elements of the discourse, synthesizing or structuring the information to delete the 'hidden' principles clouding the assessment of potential solutions. This is a critical interpretation skill, requiring the ability to analyze and synthesize on the spot" (p. 235).

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FIGURE 6.2 Sample Notetaking Form

Party A's Name	Party B's Name
Party A's Interests/Needs:	Party B's Interests/Needs:

Misc. Notes:

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As the mediator progresses in skill and confidence, each will develop a unique method of taking notes. Beginning mediators can profit from a simple structure. Figure 6.2 illustrates a sample notetaking form for beginning mediators. This general format can help keep notes organized.

When the disputants are introduced, the mediator fills in each party's preferred name at the top of the page, typically with the name of the person on one's left in the left column and the person on one's right in the right column. As the storytelling and issue identification phase proceeds, the mediator will note a word or short phrase in the "interest" section whenever a need is disclosed by one of the disputants. Issues will be recorded in the center of the page. Issues are common to both parties and hence are recorded in a space that represents both disputants. The issues section of the notes will contain the information the mediator uses to create the agenda for negotiation. The key to effective notetaking is not writing too much. Additional observations the mediator wishes to remember (such as settlement offers made early in the process that the mediator tabled at that time but may wish to bring back into the discussion later) can be recorded at the bottom of the page.

Mediators highlight commonalities in their notes. These very important revelations are simple but profound. *Commonalities* are practices, values, traits, goals, or other discernible facts shared by both parties. Commonalities can be indicated in the mediator's notes by connecting two interests or facts with lines across the page or by writing them separately somewhere else on the page (either in the center with issues or at the lower section of the page). Mediators treasure commonalities and will insert them strategically into the conversation, as we will discuss in later chapters.

Summary

The mediator's opening statement begins by informing the disputants about the mediator's role and the process that will be followed for the session. Opening statements may be a monologue or interactive. The opening statement serves to introduce parties, set the tone, and establish the mediator as the process facilitator for the session. Informing disputants about their rights and responsibilities is accomplished in the opening statement. Disputants should know what is expected of their behavior and how much time a mediation may take. Disputants also should be made aware of the role attorneys or outside experts may play in the mediation. One important area that deserves careful attention is the issue of confidentiality. Mediators share with the parties a confidentiality promise and its limitations.

The opening statement establishes the mediator's credibility and control of the process. Making sure that disputants are on board with ground rules and are educated about the process enables mediators to create a safe and productive negotiation environment.

The notes that mediators take during a session function as a reminder of facts and a storehouse of the mediator's insights about the case. Typically, the mediator's notes are destroyed after the session.

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Portfolio Assignments

Portfolio Assignment 6.1: Creating Your Personal Opening Statement

Examine the opening statement elements in this chapter and the sample in Figure 6.1. Create a version of the monologue that covers the required elements but is adapted to your personal vocabulary and way of speaking. Use your opening statement during class practice mediation sessions.

Portfolio Assignment 6.2: Creating Your Personal Notetaking Form

Create your own notetaking form based on the sample in Figure 6.2. Place several copies of the blank form in your portfolio. Use the form during practice mediation sessions. Revise the form as you discover personal preferences for notetaking.

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