

In Praise of the Mediation Joint Session: An Effective Tool If You Know How to Use It

by Paul Garrison, Esq.

In this time of global conflict, most of us are thinking about how we can resolve disputes and achieve enduring peace. Since geopolitics is obviously too daunting, it is easier to focus on what we can do locally. Peace generally begins with us individually.

This has come up for me as a mediator, not only in the context of decrying unrest in world affairs, but also with respect to the neutral work I do almost daily. I constantly think about how I can help parties resolve their disputes.

Generally, in mediation, the parties come together on a certain date. Both parties express their perspectives about the conflict through a neutral party, the mediator, who facilitates that discourse and the sharing of proposals. The exchanges continue until the parties agree on the specific terms regarding how the dispute will be settled. The parties' agreement is subsequently reduced to writing that is legally enforceable in court.

In the past, parties would convene with the mediator in face-to-face meetings for the duration of the mediation. Nevertheless, due to the cultural shift caused by the pandemic, the mediation session can now take place either in person or virtually, or a combination of both, often called a hybrid proceeding. Irrespective of the format, the parties come together to gain an understanding of the strengths and weaknesses of their cases and the value of reaching a solution now rather than enduring protracted and costly litigation.

The physical coming together at the start of mediation is the focus of this article. A mediation typically begins with the parties and the neutral gathering together before break-

ing into separate caucuses. The plenary meeting is typically called a joint session. In the joint session, after pleasantries have been exchanged, the mediator lays the foundation for the session. This includes stating the guidelines for respectful and informative discussion during the joint session and explaining what may happen during the remainder of the mediation. In a joint session, the parties will share their perspectives as to why the dispute occurred, what harm was caused by the other party's actions and what can be achieved during the session.

About 25 years ago, the joint session was quite popular. In fact, a joint session was the expected starting point for all mediations. However, the joint session has fallen out of favor. According to the American Bar Association, approximately 20 years ago, 80% of mediations started with a joint session, but now only 45% do. Folberg, Jay, "The Shrinking Joint Session: Survey Results," *Dispute Resolution Magazine*, p. 12, Winter 2016.

Why did the joint session fall out of favor? There is no single reason. Its decline is likely due to many factors. For example, if the mediator was not effective as a "traffic cop," the purpose of the joint session was unclear to both advocates and their clients, the real parties to the dispute, which can exacerbate an already emotionally charged atmosphere. If the foundation for the joint session was not adequately laid in advance, advocates did not see the value of a joint session. Thus, because party representatives and parties did not find joint sessions productive, mediators determined that they were no longer a necessary aspect of the dispute resolution process and stopped scheduling them altogether.

Another reason may be that the opening statements by the parties and unchecked dis-

cussion during the joint session inflamed the parties' passions. Lawyers have been known to become angry and confrontational with each other in the presence of their clients. While this may be shocking, it adds to the confusion in this setting. This behavior creates a hostile environment that is not conducive to settlement. Thus, the parties become calcified in their positions, and the prospect of productivity dims.

When I was a litigator, I experienced mediators allowing bullying to occur during a joint session. One party effectively told the other that they would be pummeled into the ground in litigation if the case didn't settle. Aside from bullying, I also observed parties disparaging each other. This was clearly not a productive way to start a mediation. That behavior had a chilling effect on the subsequent dialogue that was difficult to overcome for the remainder of the mediation. Therefore, if a joint session is held, it's important for the mediator to open the floor for the parties to articulate their goals in a manner that won't cause tempers to flare.

Thirdly, the value of a joint session diminishes greatly when party representatives do not prepare their clients for it. In a joint session, the parties may be in the same room for the first time since the dispute erupted. Without proper preparation and if the parties don't have the emotional intelligence to handle the encounter, meaningful dialogue may not occur.

Moreover, if the advocates have not prepared their clients to hear opposing views or educated them about the perceived and/or actual weaknesses of their cases, the value of a joint session is decreased. If, prior to the mediation, a party has only heard how strong their case is, they will likely be shocked to

receive a “reality check” at the joint session. It will expand the chasm between the parties, not bring them together.

All in all, many parties and their representatives came to view the joint session as simply a delay tactic that did not ultimately serve either party’s goal of spending their time efficiently in mediation. Thus, they disfavored participating in them.

How can a joint session be used effectively?

The mediator needs to be well prepared in order to effectively fulfill the role. This includes understanding the nature of the dispute, learning about the backgrounds of the parties involved and gaining knowledge about the relevant facts, among other information. In cases where the ongoing relationship between the parties is expected to continue after resolution, having a joint session may be beneficial.

For example, I mediate employment disputes where the plaintiff may be required or choose to leave the organization as part of the settlement. If that is established in the early part of the mediation, it may be more productive for the parties to start off and remain in separate caucuses for the duration of the mediation. This may also be appropriate in situations where the parties understand from the outset that any resolution will involve money exchanging hands and the relationship will end. That scenario occurs frequently in personal injury and breach of contract cases. Caucuses are effective when insurance adjusters play a prominent role in negotiating the settlement of a dispute, rather than the adverse parties.

Is there a case to be made for holding a joint session? Yes, indeed.

1. Use a joint session to break impasse.

A joint session may be successful where an only-caucus approach has failed. Even if mediation does not begin with a joint session, there is no prohibition against using it later in the process as a tool to break an impasse. Sometimes, the neutral may need more time to learn about the dispute and the parties’ respective interests and styles. Invariably, a well-conducted joint session will illuminate nuances that do not appear in the pre-media-

tion briefs. After a joint session, it may be easier for the parties to interact with one another without causing any aggravation. A joint session is particularly effective after progress has been made in negotiations and the issues have been narrowed.

2. Establish the rules for an opening joint session.

This is not to say that a joint session cannot be used effectively from the start. It can be very useful if the mediator sets ground rules for the session. For example, a joint session can help humanize the parties. It is easy to say no to an unknown individual and objectify them as a bad actor. This typically happens when the party holding the purse strings harbors resentment toward the party seeking compensation and repeatedly expresses negative beliefs and sentiments about them during the caucus, which hinders making progress later in the mediation process.

However, this phenomenon flows both ways. Often, an individual demonizes the party holding the purse strings, particularly when an insurance adjuster appears at the mediation with no fundamental understanding of the facts underlying the dispute. The mediator must not allow the parties to cancel each other out, but rather urge them to listen without judgment and try to understand the interests of the other party.

3. Encourage creativity concerning settlement proposals.

Moreover, don’t let facts, law and litigation-style arguments dominate the discourse in a joint session. Focusing on those things tends to be inflammatory and results in the parties becoming more entrenched in their positions, which naturally inhibits progress. From the outset, the mediator should explain to the parties that while the facts and law will inform the dialogue, the parties should not focus too much on them. They should be reminded that there is a forum for that and it’s in the courtroom, not in mediation. The purpose of the mediation is, more importantly, to discover and leverage the opportunity for the parties to work together to create their own solution.

Furthermore, consider whether in-kind demands and responses are better exchanged in

a joint session. For example, an oral apology for causing harm is better conveyed in person than through the mediator. Everyone appreciates a face-to-face apology. Such a gesture during a joint session would likely have a positive effect on negotiations.

Additionally, don’t forget to point out areas of commonality—not only those that directly pertain to the dispute, but also those that are more personal. These can be shared interests such as a love for animals or a certain sports team. This is best done early during introductions or soon thereafter as an icebreaker. Most people are more receptive to those who share a common interest and are relatable.

Give peace a real chance with proper preparation and effective use of a joint session. It is a tool in the mediator’s toolbox, so it should be used. To be sure, there is no one approach that fits all situations. The parties, through their advocates, may certainly ask for a joint session. If managed well, a joint session can be quite useful in achieving settlement in mediation.

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