HOW JOINT SESSIONS WORK:
True Stories from the Field

By

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Every dispute is different. Every mediation is different. Allan Stitt, one of Canada's leading mediators, likes to say, "the first rule of mediation is there are no rules." Accordingly, the parties are free to design a mediation process to "fit the fuss." In designing a mediation process tailored to the dynamics of their particular dispute, however, litigators appear reluctant to give joint sessions a try. Numerous explanations are offered:

- We already know what they're going to say.
- Joint sessions don't work.
- Joint sessions are a waste of time.
- We'll only antagonize one another.
- The parties can't tolerate being in the same room.
- My client might say something damaging.
- Shuttle diplomacy is the only way to go.

Rarely are the litigators able to provide concrete examples from personal experience. Mostly they offer their personal anxiety about trying something new, or make reference to conventional "wisdom" drawing on the "experience" of others. I have not found this to be true. By contrast, in my practice joint sessions *work*. I've seen cases resolve or resolve earlier in the day because parties were willing to give joint sessions a chance. I have mediated multiple matters with joint sessions. Rarely have I seen the process go sideways because of something said when everyone sat in a room together. When properly prepared by a mediator experienced in the constructive use of joint sessions the resolutions can be satisfying, speedy and productive.[1]

There are many options for a joint session format[2]:

- **Option 1:** Everyone starts in one room for an opening statement by the mediator. My opening remarks are an important part of the process. My

[1] For additional reasons to consider joint sessions, see https://www.starkmediator.com/why-you-should-consider-joint-sessions-in-your-next-mediation-2/

[2] Regardless of which joint session option the parties select, I always start with a private, *ex parte*, introductory, get-acquainted meeting with each side before assembling together in the joint meeting room. The goal of the private session is to initiate the relationship building process, allay party anxiety, gain trust and confidence, answer questions, identify party goals and objectives, and preview opening remarks, if any.

opening comments are designed to enhance party understanding to get the most benefit from mediation. Once my remarks are concluded, we remain together while I ask "safe" questions[3] so long as all participants are comfortable. No one but the mediator makes a formal presentation.

- **Option 2:** After the conclusion of my opening remarks, the lawyers – *not the parties* – speak directly to the other side expressing their appreciation for their willingness to engage in mediation, and their optimism and hope that the mediation process will result in resolution. We may or may not remain together for "safe" questions. This might be called "joint sessions light."
- **Option 3:** After the conclusion of my opening remarks, the parties – *not the lawyers* – speak directly to each other, sharing anything they believe the other side needs to hear[4]. Sometimes parties are more flexible if they've been able to get something off their chest. This is a good place to let venting happen productively. Everyone is asked for a commitment to listen respectfully and with an open mind to the comments of the other. No one is required to agree with what they hear, only to listen with an open mind. We may or may not then remain together for "safe" questions.
- **Option 4:** After the conclusion of my opening remarks, the parties and lawyers each make presentations. Everyone is asked for a commitment to listen respectfully and with an open mind to the comments of the other. No one is required to agree with what they hear, only to listen with an open mind. All participants are asked to frame their remarks to reduce the likelihood of an antagonistic reaction and increase the chances the remarks will be understood and appreciated. We may or may not then remain together for "safe" questions.

What follows are examples of the kinds of matters where joint sessions made a difference in bringing contentious litigation to a successful resolution.

A. <u>FLSA Class Action</u>

In this Fair Labor Standards Act Case, Plaintiff Class representatives charged they should have been paid but were not for the time it took to key into the workplace, take off their coats, walk to their desks, boot up their computers, and log in. According to the claim, these steps were regularly taking as much as 3 to 5 minutes per day, every day, and involved potentially hundreds of employees. Often, according to plaintiff testimony, the log in time alone could take several minutes because passwords were not always recognized. Management argued the

[3] "Safe" questions inquire into matters one or both sides have openly addressed in their exchanged mediation summaries. Each side necessarily expects such questions to be raised and are generally ready to address them. Showing their ability to address tough questions often helps the parties reassess their strengths and weaknesses.

[4] I always preview these remarks with the parties privately first to insure they are productive and framed in ways the other side will actually consider. To assist parties in preparing their remarks, I provide guidelines and suggestions on my website. https://www.starkmediator.com/wp-content/uploads/sites/4/2020/04/Stark-Mediator-Effective-Presentation-Directions.pdf

complaints were overblown. They described the log in process as quick and seamless, pointing to the printouts they had produced in discovery which electronically tracked employees from start to finish. After reading the two written mediation summaries, the parties did not seem to be talking about the same workplace. After years of working at ICLE, I had some technical training but the technology here was pretty much over my head.

The lawyers agreed to make brief opening statements, then remain together in joint session while I asked questions. Within minutes, after no more than 3 or 4 basic inquiries directed primarily at understanding word choice differences regarding the log-in process, the lawyers began communicating directly, obviously understanding one another quite clearly. Within an hour or so, the lawyers were asking class and management representatives deeper questions. The atmosphere changed from adversarial tension to joint problem solving. Based on what they heard, the plaintiffs conceded on one of their issues while management – after making calls to supervisory employees back at the work place – conceded on another.

Once the claims were clarified and an understanding reached as to the risk of liability on an important issue, the lawsuit was resolved – subject to court approval and an objectors hearing. They would not have reached an understanding in reliance on shuttle diplomacy.

B. FMLA Termination

Plaintiff, a long-term, high performing employee, was terminated by her employer while on an approved leave for surgery under the Family and Medical Leave Act. The defense had initially been handled by in-house counsel until shortly before the court ordered the parties to mediation. The in-house lawyers had been defending the very advice they themselves had provided and were deeply dismayed when their motion for summary judgment was denied. They were understandably defensive. Outside counsel was retained to take over the defense starting with the mediation. The in-house lawyers participated in the mediation as corporate representatives. Everyone agreed to a joint session to start out.

Precisely when management made the decision to terminate was the central issue in the case. Plaintiff argued the decision was made only days before she was scheduled to return to work but following an extension of leave ordered by her surgeon. Management argued the decision was a reasonable business judgment unrelated to FMLA leave made months earlier but with implementation and notice to plaintiff delayed until she returned to work. Both sides could point to contemporaneous documents to support their versions of the story.

The participants did not make opening statements but did agree to answer questions "so long as the discussion was constructive." I asked Plaintiff and her counsel to marshal their documents and present the argument through admissible evidence that the decision was made on the date they said. The in-house lawyers

then presented their case – with equal support and justification in the documents showing support for the earlier date. Plaintiff's counsel, without conceding anything, appeared to recognize greater risk than initially thought. Outside counsel saw the risk presented by the way plaintiff's counsel had marshaled her evidence.

I asked if the parties might be interested in my reaction. They were. First, I noted, both sides had good arguments and ample documentation to support their alternative theories. A jury, in my opinion, could reasonably decide it either way. Second, I reminded everyone there good reasons to question the dates on the documents – both sides had plausible questions about their accuracy or when they were actually created. Third, I pointed out how much time it had taken each side to lay out their case – my patience wasn't tested, but a juror's might be. Fourth, I painted the courtroom picture: Having the burden of proof, plaintiff and her counsel would go first in all things. Plaintiffs would provide the first explanation of the dispute during *voir dire*, for example; or in making opening statements, calling witnesses, and offering documents in evidence. I reminded everyone of the studies on "primacy" versus "recency" – that juries tend to believe the first story they hear rather than the last. The parties reached agreement on a number both sides could accept.

There is no doubt in mind that each side learned a great deal about their risks by directly observing how the other planned their presentations. A description by the mediator during shuttle diplomacy would have been easy to underestimate.

C. Residential Construction Contract

Plaintiffs were a married couple with children who purchased a multi-acre woodlot out in the country on which to construct their dream house. They carefully selected a contractor to build their house and reached agreement on cost, a timeline, and an architect to design the structure to plaintiffs' specifications. Because they needed money to finance the project, plaintiffs promptly sold their existing home and moved into rental property. Eighteen months later, no construction having been started, plaintiffs fired the contractor and sued for breach of contract and return of their substantial down payment. The contractor countersued charging plaintiffs breached the contract and sought recovery of lost profits. Neither side believed a word uttered by the other and both sides questioned the others motivation, exchanging accusations of bad faith. ("This project was over the contractors head and he won't admit it!" vs. "This project was beyond their means and they pulled the plug because they couldn't afford it!")

The project was plagued with problems and increased costs from the beginning: The property was wetter than initially understood, the water table higher, forcing the parties to relocate the building site. Relocating the house required a substantially longer – and costlier – driveway out to the road. Due to wet ground and poor weather, there was trouble cutting down the trees and pulling out the stumps. The parties disputed whether plaintiff husband had agreed to handle tree removal

personally to save money. Adding to the complexity, there were several change orders, which delayed final plan approval. The construction contract provided work would not begin until final approval of the plans, but "final approval" never actually happened. Who was responsible for that was a point of heated contention.

The parties made opening statements to each other followed by brief legal statements from their counsel. We then went through various "safe" questions and concerns going back and forth giving the parties the opportunity to see and access each other's credibility and explanations for their actions. Parts of the discussion were factually complex – did the contractor fail to show up for this meeting or that one, for example? One of the parties brought a paper calendar on which was noted the dates they were supposed to meet but did not. Were the plaintiffs in touch with the architect directly or were they required to work through the contractor? Did the husband and wife convey conflicting messages?

The joint session made clear that each side had disappointed the other, each side had brought unrealistic expectations to the process, each side carried responsibility in part for the endless delays. No one had clean hands. A short discussion in joint session about costs, attorney fees and the cost of needed experts made clear that failure to resolve their dispute was NOT an option. The contractor, having heard the plaintiffs for himself and recognizing that their financial distress was sincere, made a business decision to return enough of the deposit to settle the claim. The credibility problem had been a significant impediment to finding a solution. Seeing each other tell their story was essential. Each side needed to see and judge for themselves that there truly were two credible and plausible sides to the story. This would not have been possible had the parties been kept in two separate rooms, their only communication coming from the mediator.

D. Non-Solicitation Agreement

Plaintiff financial services corporation sued one of its former top performing sales representatives for violation of the confidentiality and non-solicitation provisions of an employment agreement after the individual defendant left the firm to set himself up in a competing business. Competing was not prohibited; using confidential information learned while employed and asking firm clients to move with him were. Although defendant claimed he solicited only family members and very close friends, it was evident that his outreach to potential clients had been broader. The parties were in mediation following denial of defendant's motion to declare the employment agreement void or unenforceable. A trial was looming. Plaintiff was seeking tens of thousands of dollars in lost revenues. Defendant's new business had *not* succeeded. In fact, he'd closed the doors of his office and was living on savings. He had already invested $40,000 in defense costs and attorney fees with many more dollars likely if the case continued.

The parties agreed to make opening statements in joint session. When I met with the plaintiff company president to get acquainted and preview his opening remarks,

he was highly critical of defendant's actions. "Why didn't he talk to me [before leaving us]?" the president lamented. "He knew full well what the contract said. He knew he couldn't do that!" It soon became evident that he and defendant had had a long relationship, both personal and professional, and a sense of betrayal was driving the litigation, at least in part. I asked him to explain his underlying needs and interests. "Do you really care about recovering damages?" I asked. "I could care less about damages," he replied. "I'm concerned about all the sales representatives back at the office watching this play out and wondering if they can get away with it! I need him to concede the agreement is valid and enforceable!" When I entered defendant's caucus room to get acquainted and preview his opening statement, I asked whether he planned to appeal the decision to declare the non-solicitation agreement void. "No. I can't spend any more money on this. I've decided to retire. I'm not going to sell any more financial products. I don't *care* whether his agreement is enforceable or not!"

When I asked to hear the key bullet points of his opening presentation, defendant began with a scathing attack on the president's "greed", his methods and his "ruthless" decision to prosecute the litigation. "Do you think your remarks are going to move the ball forward?" I asked. "No," he conceded. 'What should I say?" "Well," I asked, "was there a time when your relationship was better? Was there a time when you respected him and enjoying working for his company?" "Yes! That's all true! I can say that. I can also tell him that I made a huge mistake. I should have known better."

In the joint session, the president limited his remarks to a desire to bring the litigation to an end, that filing suit was not personal, but a business decision: he couldn't afford to have sales representatives leave and go into business for themselves taking with the clients who were the backbone of his success. The defendant opened with, "I *loved* you, man!" By the time he finished, he'd admitted that it was wrong to leave without a heads up, that he should have asked which clients he could take, that the president had always been a gentleman who treated him fairly and would probably have made concessions. The president, a hard charging "all business" kind of character had tears in his eyes. They did not throw themselves into each other's arms; but they did work out the terms of a settlement with which both sides were happy: no money changed hands while defendant publicly conceded the validity of the employment agreement. "I loved you, man," would not have worked if it was delivered by the mediator during shuttle diplomacy.

E. <u>The Loan Case</u>

Defendant's life was turned upside down when her husband died unexpectedly, and she was wrongfully charged and convicted for his murder. She was alone and virtually broke. Plaintiff, the defendant's cousin, believed in her and came to her rescue. He found her a top-notch appellate specialist to challenge the conviction, contributed personal funds for her defense, raised significant additional – and

necessary - money, took her into his home when she was released after 18 months in prison, gave her a job in his business, and backed her up in every way possible.

When plaintiff began contributing large sums of his personal funds to the defense effort, he asked defendant to sign an agreement to pay back the money should she ever strike it rich from, for example, winning the lottery or selling the rights to her story. Over the next several years, the cousins drifted apart. When defendant's father died, surprisingly leaving her substantial property and assets, she refused to repay the money arguing the loan note had not contemplated an inheritance; and, therefore, a key condition precedent had not been met.

Two days were set aside for the mediation. The first day was devoted to an all caucus model using shuttle diplomacy. Their written submissions had been harsh, aggressive and highly charged. The parties arrived at the mediation venue highly escalated. They had not seen each other in years and met together only for purposes of listening to the mediator's opening. Most of the day was spent in risk assessment – whether an inheritance was meant to be included or excluded from the note, for example - and what the evidence might show. Plaintiff grew increasingly aggravated while defendant seemed impossibly ungrateful. On day two, plaintiff asked if he could speak to his cousin directly and without lawyers. Defendant and her lawyers agreed. I talked to both privately with their lawyers present to understand the message they intended to convey to one another. "I always had your back," was the theme presented by the plaintiff. "You were the only one who ever cared about me and believed in me," was the theme of her reply. In this case, they both actually did fall into each other's arms in tears. A settlement was hammered out in quick order. Without that joint session, it would not have happened.

F. <u>The Business Break Up case</u>

Plaintiff co-founded two small, related businesses with friends. The businesses thrived for several years because all three founders were involved in the operation and worked hard. In addition, one made significant loans to the operation from time to time, all of which were paid back with interest. When plaintiff lost confidence and trust in the lending partner's honesty and candor, however, she announced her decision to withdraw and invoked the buy/sell agreement requiring her "partners" to buy out her interest at "market value." Defendants acknowledged money was owed under the agreement, but the parties could not agree on an amount. When negotiations broke down and lawyers were hired, the parties decided to mediate before filing suit. Mediation commenced almost a year after plaintiff's departure. At the time of mediation, it was unclear whether the businesses were still thriving without plaintiff's participation. The lending founder asserted the businesses were operating in the red and were no longer worth much.

The parties agreed to a joint session because there had been no discovery; and, as the parties had stopped communicating, their positions as to the law and facts warranted the clarity of a face-to-face exchange.

The first issue tackled in the joint session was defendants' contention that plaintiff was only a co-founder of one business, not both. The parties had never paid close attention to the formalities of their business entities. The parties acknowledged that they all did the same things at both businesses. None of the governance documents drafted by counsel had been signed. After everyone had had their say on who owned what and which documents were (or were not) to be relied upon, it was clear to all – lawyers and parties alike – that the documentation was in the words of one participant: "a hot mess."

A review of financial records in the joint session resulted in an identical conclusion: the records were hopelessly confusing and, it could be argued, supported the claims of both sides. To make matters worse, their outside tax service provider had disappeared taking all the revenue and tax records along.

On issue after issue there was confusion, conflicting records, conflicting memories and additional references to the phrase "a hot mess."

When we turned to painting the courtroom picture should the case not resolve, it was clear each side would pay tens of thousands of dollars in legal fees; and tens of thousands more to forensic accounting and business valuation experts. The case settled. There is no question but that the defendants would never have budged if the mediation used shuttle diplomacy. After years of working together successfully, they were able to listen to one another *and* read between the lines. Next to a hanging, nothing focuses the mind quite so much as listening to yourself searching for clarity where no clarity existed.

CONCLUSION

In each of these disputes, progress and full resolution resulted in substantial part because the participants were willing to give joint sessions a try. Had agreement not been achieved, the participants learned a great deal of valuable information that would have been important to prosecuting and defending the claims had such been necessary. There were often emotions at play, yet not once did emotions escalate out of control. Calm, businesslike civility prevailed in substantial part due to advance preparation: educating the parties and lawyers about the best way to approach joint sessions; obtaining commitment to replacing zealous advocacy with a "joint problem solver" mindset; and securing commitments to listen to each other respectfully and without interruption. Did the parties irritate one another from time to time? Yes. Did that inhibit progress? No. When anyone started "revving up," and seemed to antagonize others, I intervened with gentle reminders about their commitments

Multiple impediments to understanding and resolution were overcome *because* the parties were in joint session. A caucus model using shuttle diplomacy would not have worked anywhere near as well. Parties benefit from assessing the other side's credibility for themselves. Sometimes they have a need to vent to the person sitting on the other side of the table. They can't and often don't trust the mediator's opinion. They suspect we are just "trying to reach an agreement!" No apology or acknowledgement is as effective when delivered by the mediator as when it is delivered directly and personally. In matters with complex, technical, and business aspects, shuttle diplomacy doesn't begin to do the job.

Mediators who do the work of educating participants about joint sessions, who prepare the parties and counsel to present and answer questions, and who manage a safe and respectful process will inevitably observe the power of joint sessions to bring about resolution.