Why You Should Consider Joint Sessions in Your Next Mediation

By

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INTRODUCTION[1]

Because no two disputes are precisely alike, the best tools for settling them are probably not the same, either. Fortunately, mediation is a flexible process, which can be tailored to meet the unique aspects of each matter; and the individual and specific needs and interests of the parties and litigators involved. To get the most out of the mediation process, therefore, every dispute warrants careful analysis and evaluation to determine which style or method of mediation would be best.

As many litigators are either unfamiliar with joint sessions or reluctant to incorporate joint sessions into their practice, this paper will provide some background and recommendations for why you should consider giving joint sessions a try.

WHAT ARE JOINT SESSIONS?

Joint sessions come in many different formats. The most common is where parties and counsel remain in the same room following delivery of the mediator's opening statement. In this model, the participants – lawyers, parties or lawyers and parties – take advantage of the opportunity to speak directly to one another by making preliminary remarks or opening statements. Sometimes only the lawyers speak; sometimes only the parties; but often both. Plaintiff might explain why he brought the suit. Defendant might share her perspective and why she agreed to mediate. Counsel might share their view of the legal framework. Each side is

expected to listen to the other without interruption. After opening remarks, the parties may remain together to answer questions from the mediator - or each other – if everyone agrees.

A joint session may be used to exchange information, share personal perspective or identify potential risk directly, rather than as translated or presented by the mediator. A joint session may also be used to deliver an effective apology or acknowledgement concerning personal responsibility; to deliver a complicated offer or counter-offer coupled with an explanation; or, to engage in confidence building discussions to begin repair of a prior constructive relationship.

In another joint session model, the parties may not be interested in making formal opening presentations. However, they may be willing to remain together in a joint session after the mediator's opening remarks to answer simple factual questions, identify key topics to discuss, seek agreements regarding the law, find common ground, trim the number of issues to discuss or consider process changes since the pre-mediation conference call. An additional party, for example, may be attending who was not previously expected.

In still another model, the parties remain in caucus mode until the mediator suggests a joint session has become appropriate. The mediator might wish to bring everyone together to discuss certain clearly identified issues: are the parties interested in relationship repair? Do they both agree that a certain event took place? Is there agreement surrounding the legal issues? Do the parties agree about the orientation of the judge deciding a dispositive motion? If they've done business together in the past, would it be useful to discuss doing so again in the future? In an employment case where the plaintiff remains employed, a joint session to discuss how the parties will work together may help avoid future conflicts. Perhaps new channels of communication are needed. A joint session provides a golden opportunity to craft them.

If key decision makers are present at the table from each side, putting the CEOs together to hammer out final details is often a productive use of the joint session after relying on joint sessions to bring the parties close to resolution.

When parties keep an open mind concerning process and timing, other creative uses of the joint session can be identified to increase the likelihood of reaching agreement. Despite the advantages and benefits of joint sessions, the caucus model with "shuttle diplomacy" is the preferred approach for most Michigan litigators. This paper will explore some of the reasons why and highlight the value of joint sessions. My hope is that litigators and their clients will give joint sessions due consideration before making final decisions about process design.

THE MICHIGAN CLIMATE FOR JOINT SESSIONS

Most Michigan litigators today opt for an "all caucus all the time" model of mediation with the mediator engaged in shuttle diplomacy like Henry Kissinger or Jimmy Carter. All across the state disputants ignore or fail to consider joint sessions in their process design. Only occasionally are they willing to consider the possibility of a joint session. Why? Sometimes the litigators have good reasons:

- The parties or lawyers are already aggravated and upset with one another. Putting them together in the same room will only make matters worse and undermine the negotiation process.
- Counsel fear their clients will blurt out something damaging or harmful to the process.
- The parties have been through discovery and believe they will learn nothing new. Accordingly, a joint session is seen as a waste of time and resources.
- There is little or no trust coupled with a belief they will hear nothing honest.
- One or both sides have concluded the other won't listen, so why bother?
- A participant is reluctant to share information in joint session because discovery isn't over or they're "saving it for trial."[2]
- Attorneys fear their clients won't live up to direction from counsel to conceal their emotions and limit their remarks.

Some mediators suspect there are additional reasons:

- Inexperience: Lawyers who have not seen an effectively managed joint session find it difficult to appreciate the many advantages joint sessions offer.
- Inertia: Lawyers have always defaulted to an all caucus model and see no reason to change.

- Ignorance: Many lawyers are unaware that they can participate in process design to tailor the individual mediation process to the dispute.
- Time: Preparing for a joint session can require additional time and preparation. Sometimes busy practitioners lack the time and resources to adequately prepare.
- Preparation anxiety: Busy litigators fear they may have overlooked something and do not want to appear unprepared without an adequate explanation in front of the other side – or their client.
- Competitive instincts: Some litigators are concerned their clients will inadvertently give something away or provide the other side with an advantage they did not anticipate.
- Manipulation: Some lawyers hope to use the mediator to do or say things they wouldn't do or say themselves.
- Control: Advocates can maximize their control over the process and negotiation by shaping each message the mediator carries into the other room.
- Lack of encouragement: Some mediators have little or no experience with joint sessions and lack confidence to encourage or adopt them even where the parties believe a joint session would be helpful.
- Posturing: Easier to hide behind the mediator when the goal is to play tough at the mediation (especially court ordered) to set-up a better deal down the road.
- Bad facts, bad law or both: Joint sessions make tomfoolery more difficult.

In my experience, the time-consuming and destructive scenarios feared by litigators reluctant to try joint sessions are rare. When managed by an experienced mediator comfortable with keeping the parties together, joint sessions can add great value to the process. If someone anticipates the process spinning out of control, they can always request return to the caucus model.

JOINT SESSIONS ADD VALUE

There are many ways in which joint opening sessions, when properly managed, provide value and enhance the likelihood of a satisfactory resolution. Here are several ideas to consider:

- Studies show increased party satisfaction and a greater likelihood the agreement will be adhered to when the parties are involved directly in the process. Parties play a larger role in joint session than in caucus, which tends to be attorney oriented.
- In an era of "The Vanishing American Trial," joint opening sessions provide the parties with the closest thing to "their day in court."
- Joint sessions allow the parties to find common ground on which to build a satisfactory resolution.
- Joint sessions are a training ground to improve negotiation and persuasion skills.

- If the parties have any interest in a continuing relationship, relationship repair begins in joint session: employer-employee disputes, landlord-tenant conflicts, and buyer-seller transactions are just three examples that come to mind.
- Joint sessions are the only place where parties to a dispute are provided the opportunity to communicate directly with one another in a safe environment.
- The most effective apologies are those delivered directly and face-to-face.
- Shuttle diplomacy is an inefficient way to transfer information or explore risk. If the parties are in the same room together, they can answer and parry each other's arguments directly and quickly. This also eliminates the risk that the mediator will communicate the wrong information.
- In joint session, each side can size up opposing parties and their counsel: are they persuasive, compelling, sympathetic, talented, reasonable, engaging?
- The same is true about evaluating and assessing the strengths and qualities of the advocates. Good lawyers know how to put their skills and assets on display; they know how to engage with the other side and talk sensibly.
- Cases do not settle unless both sides agree. In joint session, each side can make it's pitch directly to the other in the most compelling and persuasive fashion. No matter how talented and well prepared the mediator, the parties and their lawyers are best suited to explain where they're coming from and why resolution is in their interest.
- Brainstorming creative options is richest and most robust during joint sessions. Joint brainstorming sessions typically occur later in the mediation process.
- If a lawyer is an obstacle to resolution, in joint opening sessions arguments and explanations can be made directly to decision makers without being filtered through their attorney.
- When a party has a need to vent, speaking directly to the other side can be more constructive and beneficial than venting to the mediator so long as everyone is prepared for it.
- Where party credibility is at issue, joint sessions present an opportunity to make personal observations and make an informed judgment about who and what to believe.
- If a party has a visual aid or PowerPoint show to demonstrate solid preparation, sound arguments and compelling advocacy, a joint session provides the best forum to play it out.
- In joint opening sessions, which include both preliminary remarks and exchanges between the parties, each side can better assess the constellation of factors contributing to valuation for settlement.
- In a joint session, the parties are better able to recognize the needs and interests of the other side, which leads in turn to more tailored offers and counter-offers leading to WIN/WIN resolution.
- Unlike the results of cross-examination in a deposition environment or an evidentiary hearing, the joint session permits each side to humanize their clients.

- When parties directly participate in a settlement process they reach more satisfactory resolution. When the resolution is satisfactory, parties rarely experience buyer's remorse.
- Because so many disputes result from a failure to communicate, real breakthroughs may occur when the parties listen to one another and develop an understanding of their perspective.
- Richard Hurford[3], a long time respected litigator and corporate representative who attended hundreds of mediations, makes these additional points in favor of joint sessions:
- The best way to determine whether the other side is participating in the process in good faith is to see and hear with your own eyes and ears what words are used, how the words are used and how the other side responds in real time.
- Absent a joint session, it is impossible to pick up all the clues and messages the other side is trying to convey in each round as the mediator either filters what he or she hears or translates everything into the mediator's own words. Nuance may be lost; important evidentiary points unappreciated by the mediator may be omitted; and the message could be garbled.
- Joint sessions allow you to see the emotional trigger points and interests of the other side in ways the mediator could not and probably would not reveal. Reading the other side will have an impact on BATNA, WATNA and LATNA.

COMMON EXAMPLES WHERE JOINT SESSIONS WORK WELL

One size does not fit all. There are as many reasons to consider a joint session as there are conflicts. Here are a number of common situations where a joint session is likely to add value.

- One or both parties has a need to vent.
- An apology or acknowledgement is in order.
- The parties are looking for ways to repair their relationship because of a desire to work together, engage in a business venture or maintain peace where they will continue to encounter one another after the mediation is over.
- High level decision makers are present who understand each other and quickly get to the heart of the dispute.
- The parties are concerned their message is not being heard or understood because it is filtered through opposing counsel or the mediator.
- Common ground exists which can best be recognized when discussed openly and together.
- The parties don't have all the facts – generally, discovery has not yet started – and prefer to ask questions of each other directly.
- There are issues of credibility – and each side would like to assess the credibility of the other more directly.
- The parties seek an opportunity to observe one other in action.

- Someone would like to see one or both of the litigators demonstrate their skills, finesse and talent.
- A party wants to observe the reaction of the other to certain statements or arguments.
- A participant believes he or she can articulate a key point better than anyone else at the table.
- The dispute is intractable and a joint brain-storming session to identify creative new options is in order.

CONCLUSION

Joint sessions have a bad rap. Lawyers fear escalating emotions, unscripted outbursts and unforeseen consequences, but have little actual experience with joint sessions managed by trained and experienced mediators. Joint sessions are not without risk, but by and large, the risk is minimal, the fears overstated. Instead, joint sessions hold promise and add value. The next time you're planning to try mediation, I hope you will consider joint sessions. Building joint sessions into your process design might just make for a more efficient, effective and satisfying experience.

[1] A version of this paper was originally prepared with Steven J. Barney, Petosky and Daniel P. O'Neil, Traverse City as co-authors for the 2015 ADR Section Annual Meeting.

[2] Mediators, of course, ask, "What trial is that?" Statistics from the State Court Administrative Office (SCAO) demonstrate that only 1.2 % of all cases filed in Michigan actually go to trial.

[3] Hurford now offers ADR services himself through Dispute Resolution Services, P.C.

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