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Joint Support For Joint Sessions

Law360, New York (December 21, 2011, 1:07 PM ET) -- This article discusses and debates the history of, and change in shift for, the joint session and how each side of the country has experienced its evolvement.

While both mediators come from very different perspectives, they ultimately agree that a joint session, when conducted properly, can be a very positive experience for clients.

West Coast

When I received my first mediation training nearly 20 years ago in San Francisco, and in several subsequent trainings, the "model" mediation always included a joint session in which the mediator explained confidentiality, passed around the confidentiality agreement and discussed why this process was different than a judicial settlement conference, arbitration or a trial.

The lawyers then made statements summarizing their cases. Some of these were strident, some conciliatory; some focused on impressing or educating the mediator; some were aimed at the opposing party or decision-maker.

Afterward, the parties went to their separate caucus rooms, rarely meeting again unless the mediation ended in settlement.

As mediation became widely accepted, often mandated by courts, and as lawyers became experienced advocates in mediation, they have increasingly insisted that the substantive joint session be eliminated, as they believe it is polarizing.

Thus, today, the parties meet, if at all, in a nonsubstantive meet-and-greet session or, if the case settles, at the end of the mediation.

As many mediators do not insist on a substantive joint session if it is opposed by the lawyers, that sets the tone for the start of the day. In sum, the pendulum has swung from one extreme — every case has a substantive joint session — to the other — none.

As no two cases are alike, there should not be a default in flexible structure for a mediation. In most cases, this should include some form of substantive joint session, for the reasons we describe in this article.

There is no empirical evidence that cases will settle more often or more efficiently or quickly if there is a substantive joint session. We are unaware of any study in which similar types of cases were mediated with and without initial joint sessions.

Instead, it is our strong sense, as experienced mediators, that something positive can be accomplished through a carefully planned and executed joint session.

First, conventional wisdom brands joint sessions as polarizing. To us, this is a surprising conclusion from experienced litigators who normally would not eschew the opportunity to make important points when their audience is the judge or a jury.

Although there is a different audience at a mediation, there is nonetheless significant value in educating or impressing the other party, the other decision maker or the mediator about your case and why you think it should be settled in today's mediation. Why relinquish this opportunity before a captive audience?

Second, the tone of the mediation may already be polarized by the briefs. These statements, often exchanged in lieu of holding a joint session, frequently include attacks on the other side's honesty or credibility.

The briefs are rife with adjectives such as "absurd," "baseless," "frivolous" or "outrageous." The demands and offers in the briefs are often stratospheric or subterranean. The briefs, then, may have lowered expectations, so that a joint session could be used constructively to take the first steps toward settlement.

What are some of the possible positive accomplishments of a joint session? The mediator could identify, in advance, an unsettled legal issue to discuss — something that may not depend on a party's credibility.

Assumptions about lost wages or economic damages could be explored. The lawyers could make statements acknowledging risks to not only the other side, but to their client, such as the cost of litigation, the lack of a new judge's track record or the delay caused by reduced trial court funding.

In a wrongful termination case, the lawyer for the employer could mention that no termination is perfect. The employee's lawyer could state, for example that her client may have, regrettably, reacted angrily to criticism, but how would you feel after working 12 hours per day for 30 straight days?

In sum, there is much that could be accomplished if the joint session is planned and is not just a rehash of the advocates' mediation briefs. The mediator can inspire confidence by showing that he or she is familiar with the legal and factual issues, understands the key disputes from each party's perspective, and has a plan for the day.

There are cases where the substantive joint session may not be advisable in the beginning. For example, if the mediation occurs shortly after a major deposition — the plaintiff's immediate supervisor or a decision-maker — the lawyers' and parties' familiarity with one another and the tension resulting from the deposition may militate against holding an initial joint session.

However, the mediator and the parties should look for opportunities later in the day for a joint session, or, perhaps, a meeting with some of the participants for both sides. The best time for the joint session may be after the mediator has met with both sides separately, discussed the most significant legal and factual disputes and understands the dynamics between the parties.

The mediator and the lawyers can then identify issues which can be discussed in a joint session. This joint session will often occur before the parties have begun exchanging settlement proposals.

Additionally, later in the day, if the settlement gap has been substantially reduced and both sides have become stuck, a joint session acknowledging the significant movement and encouraging mutual flexibility may help renew settlement momentum.

The substantive joint session should be resurrected, but in a thoughtful, case-specific way. Mediation is not just another step in the litigation process.

This difference — the clear demarcation between the litigation process and mediation — can be emphasized by the joint session. Although the lawyers for the parties can reject holding a joint session, we urge them to resist conventional wisdom and look at the opportunities that a thoughtfully planned joint session presents.

East Coast

Joint sessions have their roots in the very foundation of mediation. When alternative dispute resolution luminaries gave form to the concept of interest-based negotiation, they developed a model comprised of several distinct phases:

1. Listen to all parties;
2. Identify their interests;
3. Create options that meet the greatest number of the highest-priority interests;
4. Eliminate those options that do not survive applicable standards or legitimate constraints; and
5. Create agreement based on a set of options that remain.

Many of us have believed for a long time that the joint session was an essential part of the mediation process. This sense was predicated on the perceived value of the early phases of mediation.

A mediation that began with a joint session permitted the parties to see who was participating, explain their perspectives, listen to the other parties, observe behavior and body language, ask questions, and respond to issues that arose.

Another advantage of this meeting was that the parties got to “vent” emotions, metabolize perceived trauma and, not least importantly, serve as a check and balance on the other parties’ perceptions of facts.

It is not surprising that this often gave rise to strong emotions and challenging behavior. While trained mediators should be comfortable with these natural consequences of such a meeting, advocates expressed increasing discomfort with the often adversarial nature of the joint session. They said their concern that what appeared to be ad hominem attacks could further entrench the parties in their dispute, making resolution more difficult.

In response to their fear, counsel began to ask mediators to skip the joint session and begin the mediation with separate sessions, often referred to as “caucuses.” The phrase, “we all know the facts and are just here to discuss money,” became a cliché.

There have been few studies on the degree to which what occurs at the start of mediation impacts the outcome. However, over time, this mediator observed that parties who skipped the joint session were having a more difficult time resolving their disputes.

In discussing this with mediators who had reached similar conclusions, it was postulated that this difficulty may have stemmed from several factors, including the failure of the truncated process to permit catharsis through venting, lack of checks and balances on factual presentations that were no longer made in the presence of opposing parties, and lack of opportunity for the parties to listen to each other, observe behavior or ask questions.

As a result, many mediators began to restore the joint session unless parties could articulate a legitimate interest in keeping the parties apart. Why this occurred on the East Coast and not on the West Coast is a paradox.

Advocates in mediation with no joint session tend to share pre-mediation statements, as they often take the place of the joint session. However, pre-mediation submissions tend to contain more and more usable information when counsel know that their submissions will not be shared.

Much of what is contained in pre-mediation briefs often never gets mentioned in the actual mediation; I observe that what gets mediated is very much driven by what is said in the joint session.

There is benefit to the “smoke and fire” often created in a joint session: not only are the parties permitted to vent, high emotions often prompt the parties to abandon their scripts and discuss the real issues, feelings, history and opportunities. The legitimate role of counsel as “protector” of the client may be reduced, permitting more direct exchange between the parties.

In my opinion, there are a number of reasons not to abandon the joint session.

It provides parties the opportunity to learn that the mediator is competent, trustworthy and capable of behaving in an unbiased manner. These perceptions are formed in the first few minutes of the joint session and are a key factor in the ultimate success of the mediation.

While it may be true that the parties own the process, it is my responsibility to use their time effectively and ensure that every aspect of the mediation is designed to get them closer to resolution.

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