

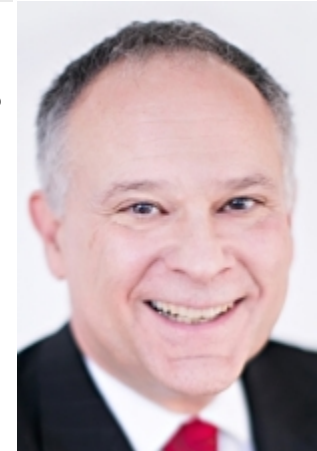


The Future Of Mediation: Joint Session 2.0

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What are we going to do about opening joint sessions in mediations? Mediators love them, but many lawyers have grown to avoid them at all costs. Can we reconcile this and invent a new, improved opening joint session which mediators and lawyers alike will applaud? Yes! To accomplish this, let's look at a page of history, learn from our experiences and move forward productively.




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A Page of History

Historically, mediation training for commercial mediators grew out of “community mediation” training. While some of what is taught in “community mediation” training is applicable to what commercial mediators do, some is not. The litigation community has rejected the conventional, community mediation-rooted joint sessions. In commercial cases, we want to use techniques which are “tested and proven.” With regard to joint sessions, though, we continue with techniques which are tested and disproven. We need to come up with something better.

In community mediation-rooted trainings, the joint session is a plenary session, with an unrestricted agenda. I reached out to the organization from which I took my first mediation training, in the early 1990s, and asked how they train people to do joint sessions nowadays. It was exactly as I recall from over 20 years ago:

“This discussion is fairly open though the mediator should decide who goes first and enforce ground rules. With the parties’ respective initial statements, the mediator will identify the key issues (typically three to five) that will help inform setting the agenda.



“We encourage the mediator to check with the parties to ensure that the agenda is correct and complete. By involving the parties in the agenda setting process, it helps the parties take ownership of resolving their dispute.”

With mediators so schooled, it’s no surprise that we got the results we got. These mediators would usher everyone into a big conference room at the beginning of the day, try to manipulate the seating so that the clients sit closer to them and the lawyers farther away, and ask everyone to say what’s on their mind, with emphasis on clients speaking directly, mediators delving, probing, searching, to unearth “underlying interests” for “agenda-setting.”

In these unguided, unrestricted, plenary joint sessions, lawyers sensed and resented these mediators’ efforts to downplay legal positions and issues, to put them on the shelf. When these lawyers got a turn to speak, they did what they knew how to do: deliver opening statements fit for the courtroom, sometimes, fueled by their resentment and frustration, with fire-breathing language and intensity. We’d go downhill from there. Can you see why the joint session is now routinely avoided?

What’s the heart of the disconnect? The “agenda,” in so many commercial cases, comes down essentially to this: How much money does the defendant have to pay the plaintiff to get the plaintiff to sign a release? While there are lots of aspects and angles to probe on the way to the answer to that question, that is the root question in many, many of our cases. So, an unrestricted opening session for the purpose of setting an agenda, when the agenda could likely be predicted in advance, was not only unproductive, it backfired. When lawyers now routinely refuse to participate in these unrestricted joint sessions, they may well be wise to do so. And, so, we are left with what we largely have today in commercial cases: caucus-only mediation.

Learning From Experience

So, what is better? What does "Joint Session 2.0" look like?

If we understand how the joint session fits into the overall mediation process in 2015, and how lawyers (and, through them, their clients) can properly prepare to participate, we can




create joint sessions which makes sense.

The chief purpose of the joint session is to set the stage for a meaningful caucus afterwards. We need “the other lawyer” to put some stuff out there which we mediators can take into caucus and discuss with the caucusing lawyer and his client, with the goal of influencing that client’s view of the terms on which the case should settle. In short, it is part of the process of “helping good lawyers break bad news to their own clients” and dealing with unrealistic expectations of what the litigation process can provide. This is the challenge which mediation is often designed to meet.

In a meaningful initial caucus, the mediator and lawyer discuss the contents of the opening joint session in the presence of that lawyer’s client. To the extent that the opposing lawyer’s comments had merit, and that merit can be acknowledged by the lawyer in her client’s presence, persuasion has a chance. The chance of persuasion is higher if the mediator and the lawyer are discussing what the opposing lawyer said in the opening joint session, rather than if the mediator appears to be arguing the opposing side’s points for it — which is what will likely happen if there is no opening joint session and the opposing lawyer does not have a chance to speak for himself. When the initial caucus follows an opening joint session, the mediator can come into the initial caucus and narrate, rather than sponsor, the opposing side’s points. It’s a conversation, not an argument, and more likely to have a persuasive impact on the client as a result. There is no need for the client to take his lawyer’s side in an argument with the mediator, because in a conversation (rather than an argument), there are no sides to take.

How Do We Get There?

In a word, preparation. Get your written statements to the mediator well before the mediation. Leave time for a phone call with the mediator after she has read all the briefs. Work in concert with the mediator to craft an agenda for the opening joint session which will set up effective initial caucuses. In those phone calls, let the mediator ask questions, get clarifications and learn the back stories and personal angles which, while not part of the formal legal issues, are likely critical to understanding the dispute in 360 degrees.



Make sure the mediator understands the rubber-meets-the-road issues, which you need to discuss with your own client. What are the points on which you wish the opposing lawyer would focus in the opening joint session, so that those points could then be productively discussed with your client in an initial caucus? What are the points you wish the opposing lawyer would avoid because they are just too inflammatory? Then, allow the mediator to make sure, as best as possible, that “the other lawyer” is prepared to use the joint session to put out the stuff which is necessary for productive conversation between you and your own client in the caucus, which is to follow. Be prepared for the mediator to make suggestions to you in these regards as well.

This way, the joint session is not used for agenda setting. The agenda is set before the mediation day, by the mediator working the phones with the lawyers. The joint session is used to discuss the items on that pre-set agenda, to set the stage for productive caucuses to follow.

There will always be some cases in which an opening joint session is just not appropriate. The number of such cases, though, is probably smaller than you may at first think. Try this approach. Let’s call it: “Opening Joint Session 2.0.” Then, not only will your opening joint sessions feel like magic, but more importantly, your initial caucuses will, too. More cases will settle and they will settle faster and more smoothly. Your client will be more satisfied with the results, and with your performance as counsel as well.

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