By Leslie A. Berkoff

The Continuing Value of the Joint Session in Mediation

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Traditionally, the joint session has been the foundation of the mediation process. In biblical times, sparring community members often resolved conflicts by gathering together in an open forum alongside other community members to discuss and resolve disputes in a collaborative fashion. In more modern times, the joint session has built upon this foundation to serve additional purposes, such as allowing the mediator to set the tone for and explain the mediation process to participants. In addition, the joint session provides an opportunity for the mediator to lay out the protocols for the mediation session, such as confidentiality regarding the information being exchanged and how the caucuses will work. Most importantly, the joint session allows the parties a chance to communicate directly with one another.

In that regard, it is important to remember that the origins of mediation are rooted in joint sessions rather than separate caucuses. Further, mediation was not dependent on party representation through counsel. Over time, perhaps starting in the 1990s, the mediation process morphed and the line between mediation and litigation blurred. Mediation participants began introducing litigation-based issues and demands into the mediation process at the expense of focusing on a more traditional exchange of thoughts, concerns, proposals and needs. That trend tracked with the increased number of parties retaining counsel to represent them in mediations — lawyers who were almost always litigators.

As a result, the dynamic of the joint session has been threatened. Some counsel view the opportunity as a quasi-litigation forum to posture and argue — even pounding the table to demonstrate the righteousness of client positions while the clients remain mute and entrenched in their positions. When a session is used in such a way, the mediator (who has no authority to make rulings on arguments) risks morphing into a referee in an effort to maintain some control over the process. When viewed as an opportunity for advocacy, mediation loses its essential client-driven nature with the potential for parties to speak and contribute to a creative and collaborative end result. In such settings, mediation is nothing more than a precursor to litigation or a stop along the path to the courthouse.

In recent years, some advocates have requested — and some mediators have decided — to dispense with the use of the joint session universally across the board. For some, the fear grew that allowing lawyers to use the joint session as a courtroom podium simply did not advance the mediation process and caused more harm than good.

Others who are more cynical believe that there is a more calculated purpose to seeking to dispense with the joint session: a belief that the desire comes from the individual parties thinking they can slant the facts and the mediator's focus more easily if they are in separate caucus rather than having the other side hear their view of the world and refute it directly.

Some experienced mediators believe that a more troubling basis might exist for the threat to the joint session. Specifically, in order for a joint session to be truly effective and impactful, the lawyers must prepare themselves and their clients. In order for that to be fruitful, time and effort must be expended. Lawyers and clients might not want to commit time and resources to preparing for the mediation, and this lack of preparation may result from a lack of faith in the ability of the process to work. Mediation can and does work for parties when the right mediator has the full participation and commitment of the parties. Cynics suggest one other possible reason for the threat to the joint session: the self-interest of lawyers who might be incentivized to keep the hourly clock running, although one would hate to think that this is true.

Now, in fairness, there can be some solid reasons and justifications for lawyers or even mediators to want to dispense with the joint session in a particular matter or be concerned about its use in a specific case. Emotions might be running too hot to bring the parties together due to prior history, and this might derail the entire process. A lawyer might have a client who is difficult to "manage," and the client might say or share things that could adversely impact the mediation process or undermine the client's case in open caucus. We have all had clients who have a tendency to just say too much against advice. (This is why, as an advocate, I wear high heels so I can stop on an insole.) All fun aside, in this mediator's view the joint session is an opportunity to showcase to the other side why settlement is in everyone's interest and how everyone gains in the process (this is very different than grandstanding and trying to prove you have the winning hand or that your position is better than the other party's position). Mediation should be a settlement-focused,

persuasive and cordial process. Let's emphasize this again: Courtesy and civility to the other side (and obviously the mediator) is paramount; harsh or condescending comments will get you nowhere.

Despite the threats to the joint session, the usage of the session, if the foundation and framework are properly laid out, can be an extremely effective tool in the mediator's toolkit. Of course, the joint session should be modified to meet the needs of each specific case and, if appropriate, as previously indicated, dispensed with only if the cases so warrant. The basic premise behind the joint session is that the clients have the chance to speak; in fact, this might be the only opportunity for a client to speak outside of a courtroom or deposition — both of which include much more limited and controlled statements. This is a time for the clients to have a proverbial seat at the table. When clients have the opportunity to have a voice and advocate their own positions, without the filter of an attorney, additional facts, opinions and important issues come to light and can impact the process in a positive way. Also, allowing your client to hear the other side directly can be very illuminating for them, which allows both sides to see the issues through the other's eyes.

Both clients and attorneys determine their strategies in response to the positions taken by the other side. In mediation, that decision can be impacted by the manner in which the message is conveyed. Thus, both the lawyers and clients can assess the sincerity of the other side's story or belief and commitment in their side of the case and position, as well as understand why they feel justified or aggrieved. You can also evaluate your own client's ability to project as a credible witness in an open forum and project toward a courtroom setting; this cuts both ways, for both the other side's client and your own. During this time, the legal arguments take on a life of their own and can lead to a more personalized and successful process.

It is important for the mediator to diligently control this process. Prior to the mediation, both in writing and in separate calls, I emphasize the importance of the nature of the presentations to be made at the joint session; they are to be settlement-focused, and the client should be allowed to actively participate and speak. This is a collaborative process, and the parties can (and should) identify the key areas of concern, voice their grievances and try to focus the discussion in a manner that enables the other side to "understand where they are coming from." This is where clients should focus on needs, not wants. It is common that through this face-to-face dialogue, each side learns something new about the other's position, which up until this point has not filtered through their counsel and legal papers. The joint session is also a chance to present each side's version of the case or issues to the other side. While the joint session is not a time for argument, it is a time for a party to express the basis for its position in a manner that provides the other side the opportunity to understand the basis for that position.

In order to set the tone for the joint session, I speak with counsel jointly and at times separately, and sometimes with their clients, prior to the mediation. I also emphasize to each of them that the written statements that will be shared among the parties should be settlement-focused, persuasive statements — not litigation-based treatises. I also discuss who will be present at the mediation, or perhaps who should be present. For example, at times, the existence of an intractable personal conflict between two specific individuals might preclude resolution of a conflict, while involvement of others with authority might accomplish resolution in a more peaceful manner. I encourage the parties to give careful thought to what information to bring, collect and have available, such as demonstratives in appropriate cases.

Moreover, at times other than when there is a bankruptcy trustee in place or a litigation committee, the parties might have existing longstanding relationships with one another. As such, they may have things that not only need to be said, but thoughts on constructing a resolution that might facilitate an ongoing relationship. At times, parties have been creative in resolving their differences by speaking to one another and compromising on current or future business terms or dealings in order to resolve the dispute at hand. This is accomplished much more easily without the lawyers trying to negotiate basic deal points or shuttle back and forth with a number exchange. This gets to the heart of the original purpose of mediation and the joint session, allowing the parties to speak and trade items, or dollars, in order to resolve the dispute.

Moreover, the joint session is also not just for the parties to assess each other. Rather, the session also allows the mediator to assess the dynamics among the parties and get a read on how they interact with each other and where they (versus their lawyers) are entrenched in a position, or those things that matter most to them individually. This can be very helpful in determining how to manage the process during separate caucus, as well as picking a path to develop the negotiation process and further resolution. The joint session also allows the mediator to see how the lawyers are interacting with one another and perhaps determine that there might be other factors at play in the inability to resolve the matter, such as significant personality differences that need to be managed or implicit bias concerns wherein each side might be underestimating, undermining or undervaluing the options and statements of the other to the potential detriment of the client's concerns.

All of these factors are not readily apparent outside a joint session and interplay among the parties. Separate caucus only shows a window into one specific side of the negotiation process. While the mediator can utilize the joint session to even the playing field a bit and mitigate some of these concerns, huge issues in this area (which can be flagged in early calls) might lead to a real consideration to dispense with the joint session; therefore, keep this in mind when you hold an advance lawyers-only call and how the attorneys interact with one another. The mediator's job is not to serve as counsel to the parties, so incompetent lawyering cannot be fixed by the mediator, such as by suggesting defenses to one side or claims to the other (that would be a remarkable breach of ethics by a mediator). However, the mediator can manage evidence of implicit bias that might be adversely impacting the process and manage the parties so that hot personalities do not get in the way of the process.

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Despite all of the foregoing, there are indeed times when a joint session should be skipped (*e.g.*, when the exchange of vitriol or threatening messages will lead to a breakdown in communications and the overall settlement process). However, it is still a valuable tool that should not be automatically pushed aside. So, from this mediator's perspective, the session should be utilized judiciously when it serves a purpose, and not by rote. Lawyers: When a joint session is utilized, please encourage and prepare your clients to speak! Mediation is a client-driven process that allows the chance for clients to create a solution that meets both of their needs more effectively than what might be achieved in court. Allowing this forum for open dialogue and an assessment of each side's position is invaluable to resolution. Always keep in mind something I emphasize and have now named the "four C's of effective mediation": civility, cooperation, creativity and collaboration. The joint session can be an excellent place to ensure that these four concepts are embedded in the mediation process. abi