Face-to-face Sessions Fade Away

Why is Mediation's Joint Session Disappearing?

By Lynne S. Bassis

It's a curious phenomenon: what was once the foundation of the mediation process – the joint session – has fallen out of favor among many lawyers and mediators, particularly for commercial mediations. This article explores a number of questions related to the imminent demise of the joint session. Is the phenomenon the result of the shift from client relationships to resolution of legal claims? A natural outcome of blending the old with the new? Does its source lie in a fear of conflict, a lack of skills, a disconnect between "lawyering" and "listening," inadequate training, or something else? I spoke with a number of advocates and mediators[1] to better understand their perspectives on the joint session and why it is increasingly rare in mediation.

In the early days of the modern mediation movement, a cornerstone of the mediation protocol consisted of dialogue between the disputing individuals only. No lawyers were involved. The process took place in joint session. Caucuses were rare.

This was the vision of Harvard Law School Professor Frank Sander, who in 1976 was invited by Chief Justice Warren Burger to present a paper at the "National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice."[2] Responding to the specter of unmanageable growth of judicial caseloads and believing that the courts were not the appropriate forum for many types of disputes, Professor Sander urged consideration of "alternative ways of resolving disputes *outside the courts*."[3] He mentioned "… the tendency of the [court] decision to focus narrowly on the immediate matter in issue as distinguished from a concern with the underlying relationship between the parties" and quoted Lon L. Fuller, author of *The Morality of Law*, who wrote that "the central quality of mediation, [was] its capacity to reorient the parties toward each other ….'"[4] With this paper, Professor Sander is credited with launching what we think of as the modern ADR movement.

As attorney representation of clients in mediation became more common in the 1990s and early 2000s, the joint session format continued. However, some identified the decreased use of joint sessions in the 1990s.[5] As legal claims infused the mediation process, "reorient[ing] parties toward each other" ceased to be primary a goal.

What evolved – a marriage of litigation and mediation – was a "blended family" where competing customs, rules, values, goals, and practices coexisted. Eventually the merger was complete, and with it, as noted by advocates and mediators alike, came an altered process. Mediation became the last off-ramp on the road to the courthouse. On this highway, law and economics are the biggest concerns.

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As mediator and attorney David Hoffman described it, today's process is "a far cry from the vision of mediation that many of us learned when we were first trained in mediation – namely facilitated negotiation in which the mediator fosters communication and understanding."

The Cause of Death

The advocates and mediators I spoke with identified a number of reasons for the demise of the joint session.

Advocate Justene Adamec of California attributes the demise of the joint session to the considerable number of judges who have retired from the bench and shifted into mediation practice. Judges and attorneys, being accustomed to the courtroom etiquette, replicated the courtroom dialogue model in mediation. The role of the client was subsumed to the role of attorney, whose job it was to speak for client.

David Hoffman, who is a collaborative lawyer as well as a mediator, sees manipulation and better concessions as the culprits: "Declining use of joint sessions

throughout the US, from my vantage point, is primarily driven by two phenomena: (a) lawyers and parties have found that they can be more successful in 'spinning' the mediator without opposing counsel in the room; and (b) mediators have found that they can be more successful in eliciting candor and extracting concessions in separate meetings."

Hoffman describes a negotiating environment where mediators, parties, and counsel are engaged in a form of manipulation that ranges from subtle to overt and bears little resemblance to the mediation process he learned decades ago.

California-based mediator Doug Noll stated a number of reasons the joint session has fallen out of use: "Mediators are not skilled in facilitating a joint session, especially when there is high conflict. Lawyers are uncomfortable with joint sessions because they don't know how to behave. Lawyers are ignorant of the value of joint sessions because they are not trained properly in negotiation and mediation. Lawyers, having attended many mediations, think they know what the best process is. Lawyers are impatient and want to resolve their impatience and anxiety quickly. And lawyers are generally unprepared coming to mediation, and joint sessions take some planning and work."

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Another mediator offered several additional explanations: "People fear conflict, which is curious since they are in the midst of conflict. Insurance adjusters, I think, would rather not meet the people. It would add a human dimension. They [would] rather the mediator act as their scout and surrogate. And the elimination of the joint session saves time."

Advocate Stephen Danz, who specializes in employment law, said "attorneys are not comfortable outside of the case and statutory law realm." He notes that many lawyers have a follow-the-herd-mentality. "They think, 'No one else does this, so why should we?' And mediators don't push it."

Advocate Alyce Rubinfeld, who also works in employment law, put it succinctly: "The bottom line is money. Litigants are entrenched. No one seems to be interested in hearing the other side. I don't find there is a cathartic effect when plaintiff is entrenched in his/her position and defendant is entrenched in its position." Rubinfeld said that she cannot recall the last time one of her cases had a joint session during the mediation.

Advocate Miklos Varga personifies the plaintiff litigator's view of the joint session: "What I have found is that personally I have to take several steps back and basically listen and be extremely gentle with presenting my client's side or the opposition (attorney or defendant) may shut me off and not hear a word I say. I have found that a joint session is like rolling the dice. According to opposing counsel, I have never had a client with a valid claim. According to opposing counsel, I have never had a valid legal argument. According to opposing counsel, I have never had an honest client. If I say 'black,' opposing counsel says 'white.' My take on this is, why argue? I will present the legal claim and presume opposing counsel is sharp enough to realize the monetary exposure the defendant faces. If not, we have no choice but litigate."

Perils of the Joint Session

Based on my conversations with advocates and mediators and my own experience, I have identified various reasons advocates and their clients opt to avoid the joint session.

Joint sessions divert attention from the legal and economic issues. Attorneys suspect the other side is there just to placate the opposing side and that any "feel good" joint session will reduce the will of their client to stay in the fight, resulting in a non-monetary recovery such as a letter of recommendation, an offer of reinstatement, or an apology.

- Joint sessions encourage posturing and puffery with no real value.
- No new or helpful information is exchanged in the joint session. Where discovery or motion practice is complete, litigators believe they can gain nothing further from a joint session. Instead, the joint session is an opportunity for the defense attorney to beat up the plaintiff in front of the defendant client and perhaps score a Pyrrhic victory for the defense client – but sour the atmosphere for settlement.
- Strong emotional issues can sabotage the joint session. A client with maturity or anger issues or whose emotional readiness to settle is questionable can cause a joint session to be transformed into the likes of *The Jerry Springer Show*.
- Joint sessions are polarizing, and clients can become entrenched. Hours are wasted recovering from the joint session, and marathon mediations result. Attorneys often prefer to have separate sessions and use the mediator as the messenger, which may allow parties to understand the opposing position in a gentler, less in-your-face fashion.
- Joint sessions consume precious time that could be better spent trading numbers. Shortened mediation sessions for economically challenged cases require early focus on numbers.
- From the plaintiff's perspective, the joint sessions serve no purpose. In a case with an insured

defendant, the plaintiff's lawyer assumes that the insurance company has decided before the mediation what it will pay. The plaintiff views his or her lawyer as the "warrior" whose job it is to protect the client from any and all unpleasantness. The plaintiff also wants to get the insurance company's highest offer on the table as quickly as possible, to enable the lawyer to recommend acceptance or rejection.

- From the defense perspective, the joint sessions serve no purpose. If the "practical party in interest" is the insurance carrier, the claim was submitted to a committee for review, a consensus on a final offer was achieved, and the claims representative/defense counsel are at the mediation only to determine when and how best to present this dollar amount. The claims representative has many other cases back at the office, and a joint session merely adds unnecessary billable attorney time.
- Joint sessions alter the traditional attorney-client balance of power. Attorneys do not want to lose control of the process, and as one mediator stated, "Some attorneys may misinterpret the mediator's *management* of the process as an effort to wrest away *control* of their client's case." By rejecting the joint session, attorneys retain more control of the case.

Despite these understandable perils, mediators and other participants articulate numerous benefits of the joint session (see the *Benefits of a Joint Session* below and the article by Eric Galton and Tracy Allen on page 25 of this issue). What can mediators and advocates do to reap the benefits of the joint session for a particular case?

Design and Flexibility

It's important for attorneys and mediators to understand that flexibility is a cornerstone of mediation and that the joint session can be designed to meet different needs of the parties. For example, some advocates and mediators like to use a "modified" joint session with counsel only, outside the presence of clients. The modified joint session allows the attorneys to be frank with each other and reduces the posturing in front of the clients.

Nina Meierding, a long-time mediator, teacher, and trainer, reminds advocates and mediators alike that process

Benefits of a Joint Session

The mediators and advocates I spoke with also identified a number of benefits of the joint session:

- Face-to-face negotiations alter the quality of the negotiations and yield outcomes that are different from those that would come from shuttle diplomacy. One goal of mediation is to maximize outcome options. Avoiding a joint session limits the discovery of outcomes that surface during face-to-face dialogue.
- A joint session provides an opportunity to integrate cultural norms into the process so that customary practices, such as finalizing an agreement with a handshake or ceremony, can occur.
- The clients, particularly those with a long-standing working relationship, may want to make or receive negotiation "moves" directly from one another. In some cases, the mediator's filter may impede the negotiation.
- The joint session can improve the post-mediation relationship and communication. If an ongoing relationship between clients exists, the joint session can be used to model effective communication.
- The joint session allows each side to hear the adversary's story. If the decision-maker has never met the plaintiff or has not been given accurate information about the liability facts or damages, the joint session may demonstrate the severely injured plaintiff's character, sincerity, or lack of exaggeration about injuries – or confirm the opposite.
- The joint session may confirm the seriousness of purpose by setting the stage for a successful mediation. The mediator can set the tone for the mediation, explain the differing roles of parties, counsel, and mediator, and create an expectation that participants are involved in a process that has integrity. Rather than being plagued by suspicion as to what the other side is doing or planning, introductions, the mediator's opening remarks, and counsel's statements can establish a roadmap for the mediation.
- The joint session provides a human dimension. As one San Diego advocate stated, "It's easy to be contentious and cast aspersions when not looking at the parties themselves. Close proximity to the other party during a joint session diffuses the situation."
- The joint session offers the attorney the invaluable opportunity to "sell" the case to the opposing side as well as have a preview of how the opposing counsel will present the case to a jury.
- The joint session can undo a negotiation snag. Where attorneys have gotten off track, a carefully orchestrated joint session can break the logjam by focusing the discussion on lynchpin issues.
- Creative problem solving is easier in a joint session. For instance, in a business breakup with operational details or inter-related issues, a joint session is a good vehicle for conducting an integrated negotiation.

Throughout the life of a case, attorneys assess outcome, be it settlement or trial, but they may pay less attention to exploring their client's underlying interests. The joint session may yield an unanticipated solution that will meet those underlying interests.

choices should be strategic, not stylistic, and that neither comfort level nor habit should drive process decisions.

What Should Advocates Do?

Advocates need to understand the perils and benefits of joint sessions and apply them to each case. Advocates should consult their client as well as the mediator about whether the joint session is appropriate in a particular case. Certainly, mediators have seen joint sessions expose solutions and options that had not emerged in caucuses with each party. Throughout the life of a case, attorneys assess outcome, be it settlement or trial, but they may pay less attention to exploring their client's underlying interests. The joint session may yield an unanticipated solution that will meet those underlying interests.

A San Diego mediator who nearly always conducts a joint session believes they provide an opportunity for a really good lawyer to demonstrate his or her prowess. At the beginning of most mediations, this mediator invites everyone into one room at the beginning of the day, does introductions, and asks a couple of neutral questions to jump start the dialogue.

What Should Mediators Do?

What should a mediator do when he or she strongly believes a case would benefit from a joint session but the attorneys (and maybe the clients) insist they do not want to participate in a joint session? I would urge mediators to use their expertise as process advocates to explain all the benefits – as well as the possible pitfalls – to the attorneys and the parties.

The mediator's consideration of the use of a joint session should be fourfold. First, the mediator must be confident that his or her skill level encompasses joint session capability and that engaging in a joint session will not inflict harm on the parties or the process. Second, the mediator must have a specific purpose for conducting a joint session, convey clarity as to what he or she expects to gain from it, and obtain buy-in from both counsel and client. Third, the mediator must think about how seating arrangements and other process choices, such as who will ask the questions (mediator or counsel?), what the scope of discussion in the joint session will be, and whether the exchange will be limited to specifically agreed-upon topics or be allowed to go where it goes. Fourth, the mediator must have a plan if things go awry and have the fortitude to end the joint session, if need be.

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Conclusion

Nothing in life stays the same forever. Gone is the telephone booth that Superman used for wardrobe changes. And, as my conversations with advocates and mediators indicate, so it goes with the joint session, at least in the context of litigation cases. Advocates and mediators have voiced strong opinions about the topic. Perhaps a final thought should be that the blended family might want to pull out the old family album and see if history may be relevant today – especially when all else seems to have led to impasse. The old joint session may indeed become the new process of choice. ◆

Endnotes

1 Colleagues who graciously gave of their time to express the opinions that form the basis of this article are: Michelle Abidoye, Justene Adamec, J. Bernard Alexander, Gary Barthel, Phillip Cha, Stephen Danz, Joe Epstein, Peter Garrell, Craig Higgs, David Hoffman, Alfred Klein, Hélène de Kovachich, Jeffrey Krivis, Michael Landrum, Nina Meierding, Eugene Moscovitch, Doug Noll, Jennifer Olson, Alyce Rubinfeld, Larry Rute, Lora Silverman, Curt Surls, and Miklos Varga, III. Several mediators and advocates gave the author permission to identify their quotes in this article.

2 The Conference was a gathering of legal scholars, judges, governmental officials and practicing attorneys who came together to discuss the dissatisfaction with the American legal system.

3 The Pound Conference: Perspectives on Justice in the Future 66 (A. Leo Levin & Russell R. Wheeler eds., 1979) (emphasis added).

4 *Id.* at 69 (quoting Lon L. Fuller, *Mediation-Its Forms and Functions*, 44 S. Cal. L. Rev. 305, 325 (1971)).

5 *See* Nancy Welsh, *Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?* 6 Harv. Negot. L. Rev. 1 (2001); Nancy Welsh, Making Deals in Court-Connected Mediation: What's Justice Got to Do With It? 79 Wash. U. L. Rev. 820 (2001); *see also* Len Riskin & Nancy Welsh, *Is That All There is?: "The Problem In Court-Oriented Mediation*, 15 Geo. Mason L. Rev. 863 (2008) (discussing the demise of the joint session).