Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
September 2013 Issue


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Joint sessions: More arrows in the mediation-advocacy quiver

Joint sessions sometimes can outrun private caucuses

An attorney can maximize success in mediation by using one or more types of joint-session processes during some part of the mediation. Many mediations in Los Angeles currently consist only of private caucuses, where the mediator undertakes shuttle diplomacy between rooms, and the opposing parties or their counsel never meet jointly. While this format successfully produces settlements, attorneys who also choose to advocate directly to their opposition in joint session are availing themselves of more arrows in the attorney's quiver to achieve more favorable resolution for their clients. These attorneys have found that the use of some type of joint session is an effective way to persuade the other side to see the case their way, exchange key information, creatively explore resolutions to difficult problems, increase their client's confidence in them, and size-up opposing attorneys, parties and experts. The positive results which can arise from joint participation include efficiencies in the process, the opportunity for persuasive advocacy, clarity of communication, and good ideas.


From left: Renata Valree, program director for the City Attorney's Dispute Resolution Program; Geoff Wells, President-Elect of the Consumer Attorneys Association of Los Angeles; Daniel Ben-Zvi, Chairman of Mediation Awareness Week; Joe Buscaino, Councilman of 15th District; Wendy Kramer, President of the Southern California Mediation Association; William Carter, Chief Deputy City Attorney; John Shaw, ADR Liaison of the Association of Southern California Defense Counsel.

What is a joint session?

A joint session is a meeting *facilitated by the mediator* where opposing parties and/or their attorneys face each other and speak *directly to each other, rather than through the mediator*. Joint sessions can take different forms:

- All parties and their attorneys or "all hands" (e.g.: meet & greet; persuasion; information exchange);
- Only among multiple defendants or multiple plaintiffs (e.g., identify global settlement opportunities);
- With attorneys only (to determine mediation process, status of case, settlement opportunities and impediments, prior settlement discussions);
- With clients only, or with an attorney from one side presenting to all in opposition.

Purpose

Joint sessions are opportunities for attorneys and their clients to persuade the opposition, to discuss and explore solutions, and to efficiently deal with multiple parties. From exchanging pertinent facts, law and argument in a pre-mediation brief given to the other side; to a pre-session private or joint-conference call with the mediator; to the mediation itself, the trial attorney throughout the mediation process is using advocacy skills to persuade the other side of the merits of the case in order to maximize the result. For plaintiffs, this typically means obtaining a satisfactory sum for settlement. For defendants, this means minimizing the amount to be paid and cutting off future liability.

Many attorneys believe their goal in mediation is to persuade the mediator, who in turn will persuade the other side of the strengths of their case and the weaknesses of the other side's case. While this is no doubt important, the underlying goal is to persuade the other side; persuading the mediator is just one of the ways to persuade the other side. It can be more effective to directly persuade the other side through an opening statement or narrative coupled with demonstrative evidence, a PowerPoint presentation, photographs, video presentations, key documents or deposition testimony. In court, the attorney would not think of arguing and presenting indirectly.

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Imagine going to trial and instead of yourself giving the opening statement, examining the witnesses and presenting the case to the jury, you give a third-party attorney a synopsis of your case just before the trial and ask him to present your case to the jury. Yet sometimes that is what an attorney is allowing when they cede the entire presentation of their case to the mediator.

Historical perspective

For a decade or so in the 1990s, mediators and attorneys in Los Angeles often used "all hands" joint sessions for meet-and-greet, as well as presentation of opening statements by both sides. The mediator would listen to the parties and reframe and summarize their stories and positions. The parties would then break up into private caucuses. However, over the last 10 years or more, especially in consumer cases, there has been a trend away from the use of any type of joint session, relying instead upon the private caucus. This may be due to mediator styles as well as attorney preferences and experience.

Common exceptions to use of "all hands" joint sessions historically and which continue today include employment discrimination, retaliatory termination, and physical, sexual and elder abuse cases where a plaintiff is understandably too vulnerable and uncomfortable to be in dialogue or even in the same room with the alleged perpetrator. Attorney-only caucuses early in the day and "all hands" meet-and-greet only sessions remain in use, especially with the nudge of the mediator, to discuss the framework for the day, the Evidence Code provisions regarding presumptive inadmissibility of evidence, the role of the mediator, and the different process options (joint and private caucus sessions).

The Los Angeles legal community as a whole, compared to other communities, is more reluctant to use "all hands" joint sessions. This is probably due to the large size of the legal and mediation community in contrast to smaller communities that tend to have a higher degree of collegiality among its attorneys and mediators. Attorney mediators in Nashville and Toronto, for example, report that they almost always make use of a joint session. Robert Mnookin, Director of the Harvard Negotiation Research Project, is one of many in academia who strongly favors the joint session for most mediations.

Trial lawyers who use joint sessions to their benefit, as discussed in the next section, find that such sessions are worth the extra time and attention in many instances, including consumer cases.

Arrow 1: Persuasion in the joint session

In addition to coming into mediation flexible and ready to negotiate, attorneys should be prepared to argue their best case. The decision to mediate does not lessen your duty to be a zealous advocate. Trial lawyers have a wide range of advocacy skills, from courtroom advocacy to mediation advocacy. They know the difference and how to tap their separate skills. They are well trained to tailor their advocacy approach depending on who their audience is. They know which talents of persuasion are needed to best influence which decision maker. Thus, their presentation varies depending on which jury, judge or arbitrator they are seeking to influence.

Similarly, in mediation, they tailor their abilities to argue and persuade to the audience at hand. Plaintiff's counsel in mediation is routinely seeking to influence an insurance adjuster and defense counsel. Plaintiff's counsel at times will not rely only on the mediator to transmit the best arguments of the facts and law of their case. Counsel will take the bull by the horns to make their most effective presentation by delivering it in person to the opposition. This effort might include giving their mediation brief to the other side before the mediation, so in-person presentation enhances the pertinent facts and law that hold together the theme of the case.

As experts in advocating, they know that communication is far more than words. They agree with the generally accepted teaching that human communication is comprised of about 10 percent words, 30 percent tone and 60 percent body language. To these attorneys, it makes sense to use all senses. Rather than solely rely on transmitting their words via a mediator, they make use of their additional 90 percent capacity to persuade with tone and body language.

These attorneys seize the opportunity to argue directly to the adjuster or opposing party. They are sensitive to the audience and will, as always, adjust their advocacy to be most persuasive to the particular listeners. Moreover, they realize their greatest strength often rests squarely with the plaintiff. If the plaintiff presents well, the plaintiff's attorney wants the opposition to see that. If the plaintiff makes a good witness who will likely be perceived by a jury or other decision maker as seriously injured and deserving of significant compensation, the plaintiff's attorney would reveal that to the opposition effectively so that the defense will value the case accordingly.

The plaintiff's attorney recognizes that to an adjustor, seeing is believing. One senior adjustor of 30 years concedes that before she authorizes maximum settlement value, she must see and hear from the plaintiff directly.

These plaintiffs' attorneys recognize other benefits in a joint session. It's not only about their presentation. They want to watch, listen and evaluate the opposition and their counsel. Even if they come into mediation confident that they understand the opposition's case, they realize that in a joint session they can learn more about the strengths and weaknesses of the opposition's case, the defense counsel and the defendant. Sometimes nuances in the

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opposition's presentation may be instructive, such as the way counsel prioritizes their arguments.

Like joint sessions, a brief submitted in advance of mediation is another opportunity to advocate directly to the opposition. Unless there is an agreement among the attorneys to exchange briefs, attorneys generally submit confidential briefs for the mediator's eyes only. Even where the opposition decides not to share their brief, some attorneys will confidently share their own brief in order to directly present their case to the opposition.

The joint session can also be a taste of what trial will look like, even though most joint sessions last no more than an hour or two and most trials will last at least several days. During a joint session, parties can discover how difficult it is to sit quietly and listen without interrupting or reacting, as coached by the mediator, while the opposition argues its case. A joint session with the parties makes trial more real and makes the reasons to avoid the risk of trial as well as the discomfort more clear.

Another benefit of a joint session can result from plaintiff witnessing their counsel advocating for them directly to the opposition. This is the essence of why plaintiff retained an attorney. When they see their attorney standing up to the opposition, they feel protected and vindicated. When the attorney in private caucus later concedes, as prodded by the mediator, to certain weaknesses in the plaintiff's case, the plaintiff is generally a more receptive listener. This plaintiff, having seen his attorney in action in joint session, will not doubt that his attorney, now highlighting plaintiff's weak spots, is indeed his advocate.

Attorneys who are reluctant to participate in a joint session with their client may be concerned that such a session would only polarize the parties and possibly even worse, end up in a fighting match. Indeed, an "all hands" joint session can allow a party the opportunity to directly or through their counsel vent anger and frustration. This is not necessarily negative for the mediation. This can help the negotiation progress because venting is often like letting air out of a balloon. Psychologists believe that what does not get *expressed* gets *repressed*. Once such emotion is expressed, the mediation can get to the real business of a negotiation no longer emotionally charged or clouded with unspoken upset. However, concerns over the possibility of such intense emotions getting out of hand are real. That is why it's critical for an experienced mediator to minimize that possibility through pre-joint session coaching, instructions tailored to the case, and careful monitoring of the joint session. The mediator will terminate a joint session promptly if and when appropriate.

A joint session should always be designed to suit the needs of the case. If the sides agree to an "all hands" joint session to present positions, before that occurs, the mediator will coach the parties on effective mediation advocacy, given the particulars of the case as well as the personalities of the participants and attorneys. The attorneys can agree to dialogue in the joint session and even questioning of each other for a limited time and scope (e.g., damages). The sides might simply agree to remain flexible within the joint session. The mediator lets them know that it is every participant's absolute right at any time to halt, with or without cause, questioning, discussion or the joint session itself. In the joint session, the mediator aims to make all participants feel they have been heard, their positions understood and that they control the process.

A party seeks justice in court and arbitration, as well as in mediation. Justice, overall, means fairness in the process, what social scientists call "procedural justice." Parties want to have a voice in a fair forum where their side of the story can be told and heard. It has been said that people are psychologically more deeply focused on how their cases are handled than whether or not they win. This should not imply that for a mediation to be considered a fair process it needs a joint session. Parties can certainly get their voices heard without a joint session, with a mediator shuttling back and forth from room to room. Nevertheless, a mediation that includes some joint process, rather than just private caucusing, tends to leave a party with a greater sense that the process was fair and just.

The mutual presentation of cases in an "all hands" joint session can serve as a reality check for both sides because when all the arguments and stories are heard, the idea that one side has a slam-dunk winner and the other a slam-dunk loser evaporates. Parties begin to realize that the litigation process is going to be tedious, time consuming, expensive and risky. Reality sinks in that litigation may turn out to be a massive and futile effort. Collaborative problem solving through negotiation becomes more attractive.

If an attorney is not willing to expose their client to the opposition or does not wish to take the risk of an "all hands" joint session with all parties, there is still an opportunity for that attorney to participate in a joint session. That attorney could appear in a joint session without their client to argue all or part of the case. For example, the plaintiff's attorney might provide a narrative and key documents to the defense counsel and the adjustor, either in the defense room where the defendant may or may not be present, or in the plaintiff's room where the plaintiff is present but the defendant is not.

A joint session, in whatever form, should be held only if the attorneys and parties first agree to it because it is expected to advance the negotiation process. After all, it's the parties' negotiation. In mediation, the parties with their counsel's advice will decide whether and on what terms the case will resolve. They also will decide on what process will be used, such as the joint session. The mediator, trained in

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the ebb and flow of negotiation, should guide and recommend the best process for that case. Assuming the attorneys have selected the mediator out of trust in the mediator's abilities and experience, the attorneys should give due weight to that mediator's suggestions. The attorneys and parties should be reminded by the mediator that it is they who will decide what process will be used in the mediation, such as whether or not there is to be a joint session and if so, what kind. One mediator reportedly threatened at the outset of a mediation to terminate the mediation if counsel and the parties would not agree to start the mediation in a joint session where positions would be argued. Under pressure, they all acquiesced and the joint session, not surprisingly, was a failure and the mediation ended shortly thereafter.

In joint session, attorneys can argue the merits of their case and present charts, PowerPoint presentations, day-in-the-life videos, demonstrative exhibits, precedents, verdicts and settlements, jury instructions, and much more. It is often helpful for counsel to share what they plan to do in the litigation should the case not settle in that mediation. Unlike court or arbitration, in the informal setting of mediation there are practically no rules limiting what can be used to help present and argue the case. Having all case files and key source documents available can be extremely useful. Jointly reviewing and discussing key e-mails, deposition testimony and legal precedents can enhance understanding. The mediator can shed light on what counsel agree upon and disagree upon and why. This can save a great deal of time and frustration that is sometimes spent in shuttle diplomacy over an item that one side values greatly but the other side does not.

The mediator's coaching before an "all hands" joint session might suggest keeping the tone positive, speaking one at a time, asking questions in an informal and collegial way, and refraining from interruptions, arguing and grandstanding. Some mediators will coach counsel and/or clients to thank the other side for coming to mediation, or something such as "we are here to negotiate and hope that we are able to find a mutually satisfactory resolution." Where appropriate, parties might be coached to apologize. The mediator can highlight the different ways of apologizing. For example, in family relationship disputes, a party might apologize for anything done by them that in any way created confusion, harm or upset to the other side or to simply express regret that the family is in litigation (the "non-apology" apology). Such coached comments are ice-breakers that may set a positive, problem-solving tone. Of course, it is up to the party to decide whether and how to apologize.

Arrow 2: Using the joint session to gather or understand information

At many mediations, formal discovery has either not been completed or is inadequate to address key information useful for settlement. Putting attorneys or "all hands" together to ask questions about and understand such key information can be an efficient and productive way to dialogue and explore facts, law, and solutions.

Common questions for joint sessions with only attorneys include: Is there insurance, what are the limits, are they burning and what allegations are covered? Who is likely to make any payments? Are there other claims such as worker's compensation, or liens that need be addressed? Would a settlement include a release of all claims and are there indemnity concerns? What settlement discussions have already occurred? Do counsel have a sense of the impediments to settlement and how they might best conduct the mediation? Would a joint session of any type be useful and productive?

"All hands" joint sessions can also be used to explore or exchange information. In one case, the plaintiff was in another country during the mediation and had not yet been deposed. Multiple defendants gathered in a private caucus with the mediator and posed questions that the mediator then reviewed with the plaintiff. The mediator then asked somewhat modified questions in a joint session with "all hands" where the plaintiff participated using Skype video conferencing. Information was thus informally exchanged.

A joint session, or a mediation for that matter, must not devolve into a means for one side to obtain free discovery rather than genuinely explore settlement. An attorney's concern about this should be raised with the mediator in private prior to any joint session. One way that concern can be alleviated is by all parties agreeing to the reciprocal exchange of information or discovery.

Arrow 3: Pre-mediation conference call

A pre-mediation conference call with all counsel can be used to identify needed participants, physical or other means of participation, documents that would be useful to exchange, among other issues. Process design calls can help manage multiple parties and layers of representatives, especially where a physical meeting of everyone at one time is not possible.

Arrow 4: Party-to-party communications

Sessions designed for clients to speak directly with each other are common in certain disputes, such as family trust and estate disputes or family business matters. Many commercial disputes also lend themselves to this format. Mediators skilled in these types of sessions coach the parties how to vent, actively listen to each other,

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brainstorm ideas for resolution and work on viable solutions through mutual dialogue. Attorneys might be coached to allow their clients to speak. Attorneys are guided to serve more as advisors than as spokespersons for their clients. In some cases, clients choose to speak to each other without lawyers, allowing the mediator to enhance the opportunity for emotional healing, change of attitude, problem solving and closure

Arrow 5: Settlement drafting

Once the parties have reached agreement, a settlement drafting session with all counsel can be a useful way to draft settlement agreement language. Language can be worked out and drafted while everyone is together. This is particularly useful when there are several detailed terms and the parties are still together to work out sticking points in the fine print of their settlement terms. Drafting together with lawyers first can reduce the number of changes requested by clients and can make the process more efficient.

Conclusion

From exchanging briefs before the mediation, to joint pre-conference calls, bringing the case files and source evidence, to meet-and-greets and presentations to the opposition; attorneys can maximize their results in mediation using *all* of the arrows in their quivers of mediation advocacy to persuade the other side. How often do you say (or hear the other side say): "they should know my case, I gave them everything." You, in fact, may have given them hundreds of documents and evidence but they are rarely packaged in a persuasive way that gets your message clearly across. The varied forms of joint sessions are opportunities to ensure, by the way you personally package and present it, that every decision maker in the other room is aware of how your case is going to play out at trial.

As noted earlier, words make up only about 10 percent of communication. In a caucus-only mediation, the attorneys are transmitting words to each other via the mediator. Joint sessions allow counsel and/or their clients to use the other 90 percent of communication skills to persuade the other side. Tone and body language together with words employ three of the five senses: sight, hearing, and touch (shaking hands) and even our sixth sense, intuition. Depending on the case, it can make a lot of sense to use most of our senses in mediation through effective presentation in joint sessions. Willingness to engage in a joint session sends a message of confidence to the opposition and attorneys who demonstrate their ability to take their case to trial tend to get better results at mediation.

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