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Mediators Talk 'East v. West' Split Over Use of Opening Sessions to Lay Out Disputes

Even the most even-keeled neutrals seem to be at odds over what they describe—approvingly or otherwise—as a growing trend in the profession to eschew opening or plenary sessions among the parties. Some say they can still be productive. Others welcome their demise.

BY GREG LAND

Courtesy photos

(l-r) Terrence Croft, with JAMS in Atlanta; James Ware, with JAMS in San Francisco; Judge John DiBlasi, with NAM in New York; and Stew Cogan, arbitrator-mediator in Seattle.

For mediators, the ability to help others reach consensus and resolve disputes is pretty much their job description.

But even the most even-keeled neutrals seem to be at odds over what they describe—approvingly or otherwise—as a growing trend in the profession to eschew opening or plenary sessions among the parties.

"It's a cancer as far as I'm concerned," said Atlanta-based lawyer, JAMS mediator and arbitrator Terrence Croft, describing as counterproductive the move away from having the parties and their lawyers convene to sketch out their positions and demands.

"It started on the West Coast, and now some [mediators] in New York and maybe Florida are following this approach," Croft said.

He traces the shift to "lawyers who have misused the opportunity to educate and instead use it to aggravate and threaten and make these bombastic statements."

"It simply poisoned the atmosphere," said Croft, "and the only thing they could think of is to do away with the plenary session."

Across the country in Seattle, fellow mediator Stew Cogan said he has advised against the use of opening sessions for years, and is glad to see their use decline.

Cogan, a former president of the American College of Civil Trial Mediators, recalled that many years ago as he attended a meeting of neutrals, "one of the first topics was opening sessions. We heard from several people about how useful they were and how to conduct them."

"I held back, but toward the end I said, 'I don't know what you're talking about, because in my practice we don't typically have opening statements,'" Cogan said. "Everyone looked at me like I had three heads."

Cogan said he discontinued the practice because such sessions typically devolved into "one in which lawyers would show me charts and graphs and rant and rave and pound on the table."

NAM (National Arbitration and Mediation) mediator and former New York Supreme Court Judge John DiBlasi described himself as a "hybrid."

"I don't think it's my job to compel people either way," he said. "Ultimately, I have a lot of faith in the attorneys who are going to appear before me that, between them, they can make an informed decision as to whether to have one or more."

But, he said, "I do think a joint session, even a brief one, is valuable. A lot of times people just do not like to meet face to face; they tend to hide emails and text messages. There's an art to communicating."

"I guess you'd have to put me in the camp of mediators who do not

convene, as regular matter, an opening session where the parties are brought together to state their positions regarding the dispute," said JAMS mediator and former federal Judge James Ware from San Francisco.

"I have a philosophical reason for that," Ware said. "My idea is that mediation is not litigation; mediation is a very party-centered process, and we want the parties to control the process, not the lawyers."

In interviews, each of the four veteran mediators expanded on their reasons for embracing or eschewing opening sessions.

Croft, who has conducted more than 4,000 mediation and arbitration sessions, said that he usually begins each mediation with "a short meet-and-greet private session between me and one side then me and the other side, mainly to relieve some tension and give everybody a first impression."

"Often lawyers hire mediators they've had experience with but their clients seldom have, and they're usually new to the process, too," he said.

"Then we convene a plenary session or opening session for everyone to make sure they understand the process, do introductions, then I call on the plaintiffs to, in effect, state their case," Croft said.

"It's up to them to explain their strategy," he said. "They can be accusatory, bombastic or whatever. It's somewhat like court, where you're telling the jurors 'here's what this case is about, ladies and gentlemen.'"

"But in a courtroom," he said, "you don't talk to the other party, you talk to the jury, so you're interfacing with a third party. In a mediation you're interfacing with your opponent.

"I've noticed that often the amount of information one party may have is quite different from what the other side may have," said Croft. "I'm concerned about getting that information out."

Mediation often takes place early in a dispute, either by court order or contract, he noted.

"The person who knows the facts has a tremendous advantage, such that the person on the short end of the stick is not as comfortable; sometimes they don't know what's going on," he said. "The problem is to bring them up to speed. Often they may not have a tremendous disagreement; when they don't know or trust each other it's very different."

Misused Opportunities?

Croft encourages opening statements.

"Not something like a bombastic closing statement to a jury, but it's an opportunity to educate the other side you never have in a litigation, he said. "There, you never get to sit down and say, 'Here's why you ought to settle this case,' and do it in a way that doesn't aggravate them instead of educate them."

"Often lawyers are not that good at educating their clients," Croft said. "A lawyer may not understand how to use that opportunity: If you yell and wag your finger at them, that may be entertaining but it's extremely unhelpful."

"What has happened is that some lawyers have misused the opportunity to educate," he said. "Some wags have described it as, 'You start at 9 in the morning and infuriate everybody, then it takes until 3 that afternoon to get them down off the ceiling.'

"Now some are just stating 'we won't have the plenary session, we'll just talk in private,'" Croft said.

"Mediation is often just common sense," he said. "While it's true that the plenary session can result in acrimony, but if you have lawyers who are experienced enough not to create acrimony you can use that opening statement as an opportunity to educate the partied about damages and the law."

While some lawyers adamantly resist opening sessions, "most of the time I'm able to persuade them to at least have a skeleton plenary session," he said. "Good lawyers jump at the chance to do that."

Cogan, who gave up litigation 25 years ago to become a full-time neutral and has overseen more than 3,000 mediations, said he makes clear from the time his services are sought that he does not want to engage in plenary sessions.

A sample engagement letter he provided instructs each party to provide a memo of no more than 10 pages detailing the dispute and claimed damages, and notes that he typically begins with a "brief joint session where I will offer a few comments for the participants.

"I do not normally expect or allow 'opening statements' by the lawyers or the parties," it said.

Cogan said he that in years past, "sometimes I'd get pushback. Then we'd talk about it and most of the time they would accede to my request. Seldom does that happen anymore; I think there's been a general shift in the profession. Here in the Northwest it is routine not to have opening statements."

While Croft said the possibility of a harsh reaction to a party's opening statement is outweighed by its educational value, Cogan said the risk of such sessions becoming "emotionally charged" with allegations flying back and forth is an unnecessary complication.

"Sometimes the lawyers want to put on a show for their client: 'I'm tough, I'm aggressive,' or they want to show their familiarity with the issues," he said. "Sometimes it can serve a cathartic purpose; everybody gets a chance to get out of their systems."

Cogan said his cases, which are largely complex business and commercial

disputes, seldom give rise to such displays.

"Sometimes people like opening statements, but I'm generally dealing with good lawyers on matters that don't lend themselves to histrionics," he said.

Cogan said he was asked early on how he could know what a dispute is about without opening statements.

"It's because the lawyers have informed me about the case," he said.

Cogan was preparing for a mediation when interviewed.

"I've got two binders of materials, plus long confidential letters of mediation," he said. "I'm pretty well prepared."

NAM's DiBlasi served as a judge in the New York Supreme Court's Commercial Division before becoming a neutral 13 years ago.

In addition to informing the parties as to the outline of the dispute, DiBlasi said opening sessions can also allow them to know who they're up against.

"I do think it's important that people introduce themselves, but it also serves a secondary purpose: By going into a joint session you're able to ascertain who is present. I've had mediations where someone would say, 'Who's that person in the back corner?'" he said.

"From a tactical standpoint, even though I've always read the materials, I like to have everyone in the room to make sure I understand their positions," DiBlasi said.

Another important consideration is making sure the parties understand their own positions going into the mediation, he said.

"A person may appear and say, 'We've had the following discussions and the following offers have been made,' and often they don't match up," he said.

"I had a classic example recently," he said. "The parties don't want to have an opening session, I said 'fine.' Then in speaking to the plaintiff's counsel, he indicated that their demands were at a certain level based on the fact that there was $25 million in insurance coverage available."

"Then I go into the other room and say, 'the demand is this'—this is a case where there's been extensive discovery, a great judge—and they say, 'no, there's only $10 million available.' Now they have to go back and communicate that to their clients.

"These are the types of things that can be avoided even with brief sessions, just to let each side ask questions," DiBlasi said.

"One reason attorneys tell me they don't want a joint session is 'We're wasting valuable time.' They're often wasting a lot more time by having me go back and forth."

DiBlasi agreed that opening sessions "can descend to a bad place, they can become nasty and counterproductive.

"I have a simple answer," he said. "I have no problem telling people to knock it off, to stop grandstanding, stop wasting time. A good mediator has to control that."

"If, 10 minutes into the session, it seems like it's going south, I tell them—in a nice way—that I'm going to dispense with it. Do I have to do that frequently? No, most people are respectful to me and to the process."

Ware, who served 22 years as a judge in California's Northern District Court before retiring and becoming a mediator in 2012, said he generally considers opening sessions counterproductive.

"I find that lawyers want to control the narrative, but it's not like litigation," Ware said. "For me the important part of what mediation does is to get people to understand their interest, not their position. Their position is 'why the law supports you'; their interest is 'how the whole thing affects you.'"

We Can Work It Out

Ware said negotiating separately is generally preferable, although there may be a point during the mediation that all the parties will come together for a joint session. Or not.

"I try to set up a circumstance where the parties can have a joint session and see where they agree, but I like to have them come together for a specific purpose instead of an opening statement where the whole gamut of issues is being discussed," he said.

"Once you have an opening session where you stake out your position, you're going to have trouble moving," said Ware.

While each case is different, he noted, in some simply getting the parties to speak to each another is sometimes not feasible.

"It's stereotypical, but I've had a case where the parties were so antagonistic they had to be put on different floors in the building," he said. "I believe if I had started with a joint session, the antagonisms would have grown and I would have needed to spend a lot of time just getting them to take the red hats off."

However strong their views as to the efficacy of opening statements, all four mediators agreed that there is growing tendency to avoid them.

Can they work it out? Probably. They are mediators, after all.

***Greg Land** covers topics including verdicts and settlements and insurance-related litigation for the Daily Report in Atlanta.*