

## Pre-Mediation Caucuses May Improve Mediation Efficiency

By **Thomas Elkind** (June 14, 2018, 4:59 PM EDT)

Mediation has become the preferred method of resolving disputes for many litigators in the United States. Typically, prior to the commencement of a mediation, the mediator will speak with counsel for each party, usually by telephone, and may receive a written brief from each counsel describing the status of the case. The formal mediation then begins with a joint session in which the parties and their counsel meet with the mediator, and in which the lawyers make opening statements. Then the mediator caucuses with the parties separately. These initial caucuses are usually an opportunity for the parties to tell their story to the mediator, and for the mediator to develop a level of trust with the parties. This process results in each party spending a substantial amount of time waiting after the joint session while the mediator meets with the other party. Typically, after the initial caucuses, the time of each caucus is reduced as the mediator is then engaged in generating offers and counteroffers from each party.



Thomas Elkind

In order to avoid the long waits during the initial caucuses, some mediators are offering the parties the option of conducting initial caucuses a couple of days before the mediation formally begins. The mediator meets with each party and its counsel separately before the mediation. The mediation then begins with the joint session, which is still followed by separate caucuses, but these caucuses are shorter because each party has already had the opportunity to tell its story to the mediator.

In order to determine whether pre-mediation caucuses should be employed in a particular case, the parties need to consider whether any strategic advantage could be lost by having the initial caucuses held before the joint session, and whether any such loss outweighs the efficiency of the early caucuses. This depends largely on how counsel intends to use the joint session and how long counsel anticipates the initial caucuses of the parties will take.

Traditionally, the joint session included preliminary remarks by the mediator about the nature of the mediation process, followed by opening statements by counsel for each party. Counsel who give opening statements in the joint session typically try to strike a conciliatory tone while still conveying their willingness and ability to present a winning case in court if the mediation does not result in a settlement. The intent of this strategy is to show the other party that if it does not alter its position substantially during the mediation it will face the prospect of a bruising and losing battle in the courtroom. Counsel who prefer this approach hope that it will cause the other party to offer concessions in the initial caucus that otherwise would not be offered until much later in the process, if at all. Counsel

who wish to make opening statements also may prefer not to have pre-mediation initial caucuses because they want the other party to be affected by their opening statement when the other party first meets with the mediator, hoping that the other party will then make earlier concessions.

However, this strategy can also result in the parties being farther apart after the joint session than they were before the joint session began. Opening statements by counsel, unless expertly crafted, can result in increased animosity between the parties. Accordingly, many counsel now prefer not to make opening statements during the joint session. They feel that the process will be more efficient if the parties hear only the mediator's initial remarks and then go straight to the separate caucuses. This avoids the mediator having to calm the parties down after they have been subjected to adversarial rhetoric during the joint session. But, this strategy often results in long initial caucuses and the long wait times about which counsel complain.

Therefore, there is no one answer to the question of whether pre-mediation caucuses make the mediation process more efficient. The various factors must be weighed in each case to determine the best way to proceed. If counsel feel that they can obtain an advantage by making an opening statement before the other party has a chance to tell its story to the mediator, then counsel should opt for the traditional mediation process of a full joint session with separate caucuses to follow.

Another factor is whether the extra cost of early initial caucuses is worth the efficiency. If the parties are being charged for the entire day for a mediation and they feel the mediation can be completed within that time, then the extra cost of the early initial caucuses may not be worth the time savings. If counsel both are willing to forego making opening statements during the joint session, this also saves time, again possibly making early initial caucuses less cost-effective.

The primary advantage of pre-mediation caucuses therefore seems to be in cases that the parties feel may not settle in one day; when the counsel do not wish to make opening statements during the joint session; or when counsel want to be sure to avoid the long wait times of the initial caucuses. In any of these situations, counsel should seek a mediator who is willing to hold pre-mediation initial caucuses.

Mediators should also routinely offer the option of pre-mediation initial caucuses to the parties when initially speaking with counsel before the mediation. During these preliminary conversations with counsel, the mediator should try to determine whether pre-mediation initial caucuses would be advantageous in that case. The purpose of these preliminary conversations with counsel is for the mediator to get a sense of what the case is about and how difficult it may be to achieve a settlement. The mediator is often in a better position than counsel after these preliminary conversations to determine whether pre-mediation initial caucuses would be an advantage for the parties.

Mediation has proven to be a highly successful method of resolving disputes because it gives the parties control over the outcome of their dispute. The more procedural tools the mediator can offer, the higher the likelihood is that a mediation will be successful. The option of using pre-mediation initial caucuses is one additional tool that mediators should be prepared to employ in appropriate cases.

---

*Thomas I. Elkind is a mediator and arbitrator at JAMS.*

*The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.*