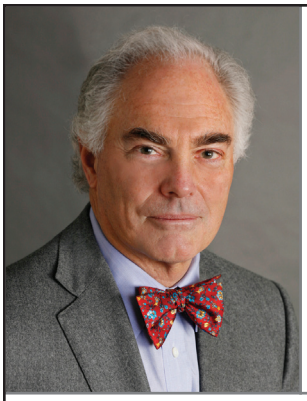

JOINT SESSIONS: ARE LAWYERS RIGHT TO HATE THEM?

By Martin Quinn, Esq.

Mention holding a joint session and you are sure to provoke an argument between mediators and teachers of mediation on one side and lawyers who represent clients in mediations on the other. That dichotomy is not wholly accurate because many mediators have also abandoned the use of joint sessions. As a mediator of well over a thousand business-oriented lawsuits and disputes for 20 years and as a law school teacher of mediation practice for almost 10 years, I will offer a few thoughts and some experience on this divisive topic. I come with a bias: The disputes I mediate usually involve parties who have a business or relationship that is in tatters but just may be extended or rekindled. This is frequently true of employment, neighborhood or landlord-tenant cases; disputes among contracting parties or business competitors; partnership, stockholder and family quarrels; and healthcare business disputes. To a certain extent, despite the parties' immediate differences, going forward they usually need each other or at least will benefit from a civil relationship. Therefore, this article is of less relevance for personal injury and other cases in which the parties have never met before and are unlikely ever to meet again.

As envisioned in the classic mediation training, the mediation commences with all participants—the mediator, lawyers and clients—together in a room. Such a meeting, it is thought, promotes many objectives. It allows the mediator to demonstrate their expertise with the process and their mastery of the relevant facts; to obtain consensus on an agenda for addressing the key issues; to explain confidentiality principles; to assess the competence, preparation and styles of the lawyers; to begin to understand each party's mind-set and needs; and generally, to set the tone for a collaborative discussion. A joint session allows counsel to demonstrate confidence and readiness to try the case if it does not settle, to establish credibility with the mediator, to show off in front of their clients and critically, to speak directly to the opposing party. The parties, it is said, benefit from a chance to "tell their story" to a receptive listener, to demonstrate both their confidence in their case and their openness to a reasonable settlement and possibly to mention non-legal personal and emotional motivations that they will need to have addressed.

Theoretically, the climate for negotiations will be improved by beginning the day with a conversation in which everyone is cautioned to speak respectfully and to listen attentively.

The daily reality is so very different. Counsel always tell the mediator in a pre-session call that a joint session will be useless, counterproductive, get them off on the wrong foot or provoke a screaming match. Or they arrive at the session and ask out of the box, "You aren't going to make us be together, are you?" Whereupon I, and most other mediators in my field, will forego any substantive joint session in favor of a mere few minutes of meet-and-greet. So are lawyers right that everyone knows the other side's arguments and that meeting together will at worst inflame emotions and at best accomplish nothing?

Except in the very rare instance—sexual harassment cases come to mind—when the parties truly cannot be even briefly together in the same room, I believe that lawyers are dead wrong. Fearful that their clients will be emotional and harder to "control," not having coached their clients on how to be effective in a joint meeting and often unprepared themselves for a public airing of the issues, lawyers reflexively run for the safety of the caucus room. In doing so, they overestimate how well the other side understands their case. But more tragically, they forego the truly golden opportunity—available to them only in a mediation—to argue their case persuasively directly to the opposing party or insurance adjuster.

Orchestrated by a competent mediator, a productive joint session would proceed like this. The mediator would introduce him- or herself and, if necessary, have each participant do the same. Each counsel would be asked to outline in not more than 10 minutes a few salient points of his or her case, adhering to the rule to "be hard on the issues, but soft on the people" and avoiding legal jargon. Remember that if you are trying to reach agreement with someone, you do not accuse them of fraud, RICO violations and bad faith. Counsel should speak directly to the opposing party, with respect for their point of view. Lawyers greatly boost their credibility with the mediator and their opponents by acknowledging their

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key challenges and explaining how they will overcome them. The mediator will then offer each party a chance to speak. If they are well-prepared, they will explain briefly how the dispute deeply affected them personally, financially or emotionally. The mediator should then ask whether either side needs information from the other side in order to negotiate effectively. Perhaps a chronology or calculation needs to be harmonized, a damage analysis clarified, an assumption corrected. The mediator may ask clarifying questions but will avoid criticizing either side and will prohibit cross-examination or argument. Ideally, the session will last no more than 30 minutes.

What has been gained? For starters, the parties, and sometimes counsel, often do not know the other side's best arguments. Mediation briefs all too often seem to discuss different lawsuits. Second, by talking publicly about the deep impact the dispute has had on them and by telling their story to the mediator, who will show his or her appreciation, the parties begin to relinquish the dispute and move on. Third, any insurance adjusters present will hear the other side's best case and be able to size up the effectiveness of the parties and counsel. With luck, the mediator can lighten the atmosphere with some light banter and reframe the dispute into a more neutral, less poisonous perspective. Any experienced mediator can control the discussion to prevent recriminations and accusations from inflaming emotions.

When should you really refuse a joint session? First, in the rare instance when the parties really cannot even bear to see one another. Second, if your client will not make an effective appearance. In every single other mediation, at least of a business-oriented dispute, I recommend that you seize this stage from which to dazzle your opponents and to directly persuade the opposing party of the need to settle. ■

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