Mediation - *Is the Joint Session Still Alive?*

By Kim Taylor, Esq.
August 12, 2015

Most lawyers are familiar with the ordinary sequence of a mediation. Typically, the mediator conducts a pre-mediation call with the lawyers and sometimes the parties, introducing everyone to the mediation process and inviting the participants to discuss any issues that may affect settlement which are important for the mediator to know in advance, and discuss any concerns a party might have about the process.

On the day of the hearing, the long-held practice has been to commence the mediation with a joint conference among all of the parties and their counsel before breaking into individual caucuses. Proponents of the joint session believe it provides an opportunity for each participant—either directly or through counsel—to express their view of the case to the other participants, and talk about how they would like to approach settlement. For some, the goal is to begin the settlement process among all of the participants together before the mediator begins working privately with each side.

Recently, however, there has been resistance to the joint session. A recent survey of JAMS neutrals conducted in April 2015 revealed a decline in the use of the joint sessions. 80 percent of the neutrals surveyed reported that they used joint sessions when they first started mediating–ranging from four to 20 years ago. In 2015, only 45 percent regularly use joint sessions. There are regional differences. On the East Coast (where mediation was not embraced as quickly as on the West Coast), almost 70 percent continue to use joint sessions, but in Southern California that figure is just 23 percent.

What is driving this change? Many litigators and mediators believe that the joint session has lost its value because that step of the process has become more confrontational and—particularly in commercial matters—the lawyers have prepared detailed mediation briefs, both sides understand the other sides' position, and everyone wants to get down to the business of negotiating without any distractions. Some feel so strongly about this they believe the joint session is completely

This article was originally published by LAW.COM and is reprinted with their permission

counter-productive and can make it harder to settle the case. If parties approach the session as an opportunity to lash out at their opponents, the resulting alienation pushes the parties farther apart. Also, there are certain types of cases where it is not appropriate or useful for the litigants to meet in person, including some employment discrimination claims, claims for retaliatory termination and claims for abuse where bringing the alleged victim and alleged perpetrator together would be detrimental to the process.

One of the central tenets of mediation is the principle of self-determination of the participants, which means that the process should be voluntary and controlled by the parties. Most mediators will not insist on a joint session if the parties do not want one. But it is important to keep in mind that the decision to forgo an initial joint meeting will impact the kind of process that follows. If counsel and their clients decline to participate in a joint session, the mediator retains many options for bringing the parties together toward settlement through the use of caucuses, playing "devil's advocate" to explore the strengths and weaknesses of the parties' positions, helping the parties to prioritize their interests and options for settlement, occasionally convening meetings of the participants if the mediator believes it is essential to break impasse or to hear from an expert, and evaluating next steps if no settlement is reached.

However, the benefits of a joint session should not be overlooked. If the parties use the joint session as an opportunity to explain their position and try to understand the other side's and engage in a productive dialogue, the joint session can pave the way to finding common ground and a path to a deal. In some matters, joint the session may be the only opportunity for an injured party to air their grievances and feel "heard," a step that might be important to achieving closure for that person. And it may be essential for a litigant who is entrenched in his or her view of the matter to hear the other side's point of view, and what a jury or a judge will hear if the matter proceeds to trial—a useful "reality check" in many instances.

Mediation practice will undoubtedly continue to evolve, and perhaps the use of joint sessions will decline across the U.S. as it has in Southern California. Whether or not the parties choose to have a joint session, mediation has many benefits over traditional litigation. It is faster, less expensive, confidential and the parties retain control over the process and the outcome. ●

Kimberly Taylor, Esq. is Senior Vice President and Chief Operating Officer of JAMS. She oversees JAMS operations in the United States and abroad and works directly with the President and CEO. She leads a team that spans 25 resolution centers across North America and is responsible for the company's day-to-day operating activities. She can be reached at **ktaylor@jamsadr.com**.

This article was originally published by LAW.COM and is reprinted with their permission