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Don't Ignore the Benefits of Joint Sessions in Mediation

By John M. Delehanty
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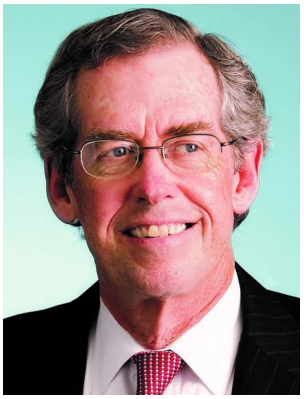
Joint Sessions Are Valuable; How to Conduct Them

Many mediators and counsel discourage the use of joint sessions in mediation. Counsel often believe that having the parties together in the same room (either physically or virtually) will exacerbate the tensions already present in the litigation and hinder resolution. Mediators often believe, with some justification, that joint sessions merely provide a vehicle for counsel to exercise their advocacy skills, i.e. "show off" for their client and belittle the arguments of their adversary. Although there is a grain of truth in both points of view, neither justifies foregoing the ample benefits which the joint session provides to the mediation process and to the ultimate resolution of the dispute.

The joint session is the only phase of the mediation in which the parties meet face to face and present their respective positions. In fact, this event may be the only time prior to trial when the parties have an opportunity to meet and address each other in person, rather than being walled off from each other through the thicket of litigation filings.

A skilled mediator must be able to tamp down the litigation rhetoric of counsel and caution them to focus on getting the facts straight and downplaying the parties' differences. Counsel should be told to focus on those issues on which the parties agree. Although counsel may believe that their legal theories are the linchpin of the case, they often are not. Focusing on legal theories often takes the parties, who are usually not lawyers, out of the mediation process. The excessive use of legal jargon does not advance the resolution of the dispute.



John M. Delehanty

In order to control emotional outbursts, the mediator should make it clear at the outset that he or she expects the parties and counsel to use a civil tone and that they may not interrupt the person who is speaking without the permission of the mediator. The parties need to be reminded that they will have ample time to rebut the other side's points when it is their turn. It is also helpful to ask the parties to fill in any gaps in the facts; they are often much more knowledgeable about the facts than their lawyers are. If the parties are invited to engage in the fact-finding process, they will frequently add to the mutual understanding of the group. In some instances, albeit rare, one or both parties may even concede points that their respective lawyers are trying to promote.

Close questioning by the mediator of both sides is also very helpful. Some mediators do not ask probing questions during the joint session because they don't want to suggest that they are favoring one side over the other. This is a mistake. The more specific, unbiased information that everyone has clearly promotes the ultimate resolution of the dispute.

Controlling the Caucuses

It is rare that cases are settled during the joint session, but they do open the door for further negotiation in caucus, particularly if counsel and the parties are willing

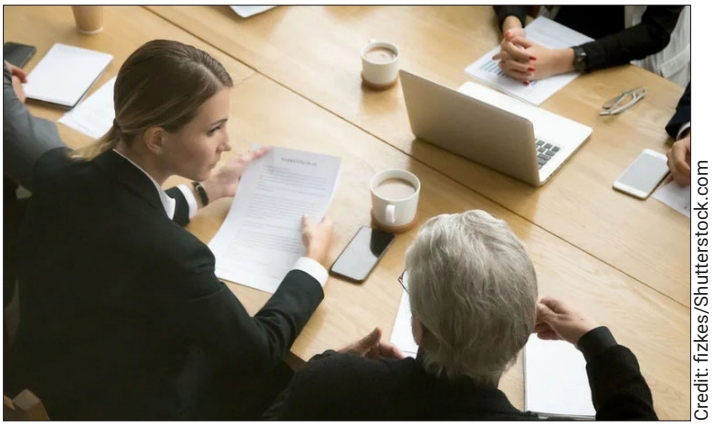
to cede some ground while they are together. Counsel often assert that they will not disclose important information during the joint session; they claim that they will only disclose it to the mediator in caucus and not to the other side at all. This behavior fosters distrust and should be strongly discouraged.

In most mediations, the negotiations take place in the caucuses where the mediator conveys demands and offers between the parties. It is a mistake for the mediator to act solely as a messenger in this process. The mediator should give his or her opinion on the reasonableness of demands and offers; if the mediator believes that a particular demand or offer will be counterproductive, he or she should say so immediately and ask the relevant party to reconsider it.

The mediator should determine whether it would be more productive to have separate caucuses with counsel alone or with the parties alone. This will depend on the mediator's perception of who is controlling the negotiations on both sides and who is more likely to become invested in a resolution of the dispute. Separating counsel and the parties is easier to do during in-person mediation, but it can also be accomplished virtually by setting up additional breakout rooms.

Another important aspect of the caucus process is for the mediator to check in regularly with the persons who are in the other caucus room. Occasionally, a caucus can be prolonged, leaving the other side to wonder what is going on. Leaving people in the dark inevitably leads to distrust. The mediator should report periodically to the non-caucusing counsel and parties about the status of the caucus with the other side and when it is likely to be concluded. It is also advisable at the outset of the caucus process to set a schedule for the duration of each caucus so that the non-participating persons can attend to other matters while they are not in caucus.

Mediators are often asked to propose demands or offers during the negotiation process. This approach should be discouraged unless, after several rounds of negotiation, the parties have reached an impasse. The negotiations are the province of the parties and their counsel; they should be encouraged to do the work necessary to come up with reasonable proposals. The only possible exception is where non-monetary solutions are considered, such as having the parties engage in mutually beneficial continued business activities. Here, the mediator may be able to suggest creative solutions which the parties may not have considered.



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It is essential for the mediator to convey to the other side only those discussions in the caucuses which the party has given its permission to disclose. The mediator should explicitly get the parties' permission before tendering any demand or offer. It is a good practice, particularly where the demand or offer is more than just a number, to have the party put it in writing so there will be no misunderstanding of what is being conveyed. This approach is strongly advised where the demand or offer involves installments, security, nonmonetary consideration, limited releases or proposals for the resolution of any future disputes.

John M. Delehanty, *of Delehanty Resolutions, is a former trial lawyer who has transferred his litigation skills from the courtroom to the dispute resolution arena. He has over 40 years of experience in litigating patent, trademark, antitrust, corporate, and employment matters for companies throughout the United States.*