Focus ALTERNATIVE DISPUTE RESOLUTION

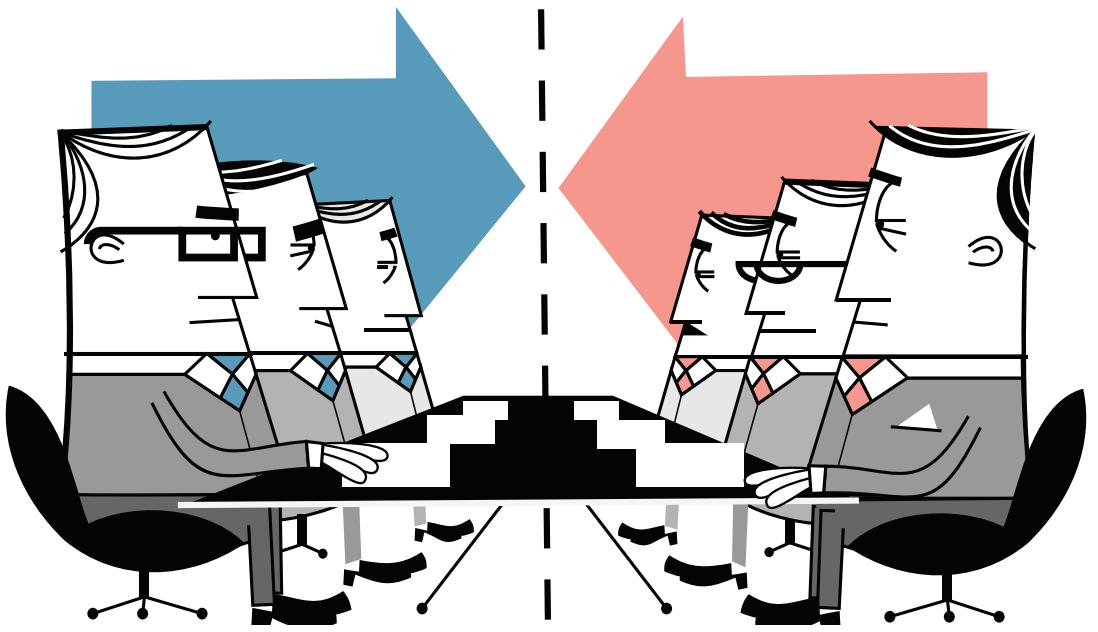
Why joint sessions deserve a second look

Kumail Karimjee

Joint sessions in employment law mediations are going the way of the dodo. Many established mediators in the field simply declare at the outset of mediations, "I don't do joint sessions," as if to say, "I am not one of those touchy-feely, let's-hold-hands-and-sing-*Kumbaya* types." There is no illusion of considering what process will best serve the parties. It is a one-size-fits-all approach — the mediator's approach — without any attempt to fulfill ADR's much-touted ability to "fit the forum to the fuss." This shift has been embraced by employment law counsel who, by and large, say either that they do not need a joint session or that it will not be helpful. What is driving this shift, and is it a good thing?

In my view, the trend away from joint sessions comes in part from the recognition that venting is not always a good thing. In mediation's early days it was thought that venting — even if it meant raised voices, anger and aggression — would help move the parties along. We now know that this is not always the case. Venting can often be harmful to the mediation process. Stream-of-consciousness vitriol is usually not the path to resolution.

A related concern is that in a joint session, counsel or a party will say something that irritates or provokes the other party, and thereby set the case off in a negative and counterproductive direction. There is some truth in this. Bringing people together always invites a risk. Joint sessions are not easy to manage; they are fluid and dynamic, and the mediator loses some control, unlike the clinical and controlled environment of shuttle diplomacy. Things can easily go sideways and require work to bring back on track. I suggest that many mediators and counsel prefer mediations without joint sessions simply because it is easier, more comfortable and controlled. At some level, the fear of the unknown drives the process. The reality is that many mediators have left the world of litigation because they don't like the high emotion and conflict it entails. At some level, the trend away from joint sessions is driven by avoidance, a common, albeit often ineffective response to conflict.



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Of course, mediation can be done without joint sessions, and high settlement rates can be achieved. This is especially so if the sole goal, as is often said, is to get a settlement that everyone is unhappy with. Interestingly, this is the bar many mediators set for the parties. Parties get a deal, the court docket is cleared of another case, and the parties, lawyers, and mediator have not been pushed out of their comfort zones.

The question in my mind, though, is what is the trade-off in opting for safe and controlled in every case, when we all know that risk, and tolerance for it, is often needed to achieve superior results? What if the goal is to search for the best possible settlement, to create value or to better understand what is really at issue for the parties? A joint session may cause some discomfort; however, in the right cases, there are also benefits to direct dialogue without the mediator's filter. Factual information can be shared efficiently; issues beyond the narrow legal concerns may be identified; greater understanding can be gained of the perspectives on both sides of the table; richer options for resolution may be generated; and in the right circumstances, genuine regret or apology may be expressed, facilitating emotional closure.

From the mediator's perspective, allowing the parties to experience some discomfort in a joint session before breaking into caucus can serve as a reality check about the alternative of litigation. A party can all too often be bullish about trial from the cool and detached comfort of the other room, sheltered from any sense of what litigation actually entails, such as the need to see and be in proximity with the opposing party and counsel.

Further, even in cases where no settlement is achieved, from counsel's perspective the joint session is an opportunity to communicate directly with the opposing party. In avoiding a joint session, counsel give up the opportunity to deliver an unfiltered message, assess the opposing party firsthand, and gain insight into what really matters to the decision-maker on the other side of a dispute.

Mediation should be a flexible process. A firm "no joint session" rule deprives mediation of its ability to be responsive to what the parties in a given case may need. While joint sessions may be ineffective and even inappropriate in some cases, we ought to be careful not to throw the baby out with the bathwater.

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Meetings: Only judges decide capacity issues

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■ Intergenerational and caregiver disputes: families with older relatives may experience problems concerning lifestyle, financial management, estate planning, health care, long-term care and placement, judgments about medication and life-sustaining treatment. Communication can be hurried and resources limited, while clients/patients can have fluctuating or diminished capacity;

■ Abuse and financial exploitation: where abuse is financial and/or psychological in nature (where there is no physical abuse or violence) and involves family members, the approach desired by the older victim is one that seeks to solve the problem in practical, efficient and human ways while preserving and repairing, where possible, the family relationship. In both the criminal and civil arenas, mediation and participatory justice methods have been successful when adapted to the vulnerable older client who may have diminished capacity. The approach, whether in an adapted court setting or using a legal services clinic in the community, is a rights-based approach which provides that the victim is represented by a specialized lawyer who ensures support and due process protections, the inquiry and intervention is multidisciplinary in nature, restitution is provided in innovative ways respectful of the client's wishes, and long-term professional and social networks assure follow-up and prevention, whether a sentence or an undertaking is obtained from the abuser/exploiter.

Older adults are beset by complex multifaceted issues which are profoundly different than those associated with other populations and, accordingly, established approaches often do not work for this segment of the population, but mediation may be the appropriate solution.

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