FACT PATTERN
State Bar Labor and Employment Annual Conference
June 24, 2016 – Mock Mediation

Laticia Brown, a single mother with two children, is proud of her African-American heritage and proud of the fact that she is the first female in her family to obtain a graduate education. She earned an MBA with a concentration in Human Resources Management[1] from Johns Hopkins University. For the last 12 years, she held a senior management in the corporate offices of *Bob's Berry Farm*, a not so well known amusement park, and was called into all discussions involving policy and competitive strategy issues where human resource capital was involved. The breadth and scope of her education made her a virtual right hand to Bob Perkins, the CEO. She expected to be named CEO when Bob Perkins, 68, retired, which was to occur in about a year.

During the last 18 months Bob experienced some age-related difficulties, including memory confusion and speech issues. His speech was less precise and at times his memory was not 100%. He introduced Laticia as "L-i-c-k-Tisha," drawing out the first syllable, "my little brown filly." Laticia states that what she used to pass off as harmless banter became more frequent and more flagrant. Bob, having been born and raised on a farm and involved in the breeding of horses for most of his life, used horse references and horse metaphors on a regular basis. He recognized Laticia as a very valuable member of the management team and was relentless in his praise of her. He is puzzled about her sudden reaction to a term of endearment and thinks she is over-reacting.

After making a formal complaint to the corporate office, key job responsibilities were taken away from Laticia. She started to hear rumors that she no longer was next in line for the CEO position and went out on stress leave 3 months ago. During her medical leave, job duties were consolidated with those of another senior management employee. The decision to consolidate positions was in the planning stage for 10 months prior to the filing of her HR complaint and the final timeline for the consolidation of employee positions was circulated to all employees on the day Laticia began her stress leave. After much consternation, Laticia filed a lawsuit for sexual harassment/hostile work environment, racial discrimination, failure to accommodate/disability discrimination, constructive discharge and retaliation. Laticia's deposition was taken. Counsel have agreed to hold off on other depositions until after the mediation.

Laticia's salary was $150,000 plus benefits and in the last 3 months has incurred $5,000 in out-of-pocket medical expenses.

[1] MBA with a concentration in Human Resource Management, a new MBA focus, is a specialization that studies the interrelationships between human resources and the business organization, equipping the manager to function as an HRM specialist in business, industry and service organizations. In addition to core MBA courses, students are exposed to practitioners in Human Resources, the constantly changing roles of various HR personnel within the field, and a variety of topics and issues highly relevant to the changing workplace.

SIMPLE RISK ANALYSIS

MOCK MEDIATION

NELA CONFERENCE

June 24, 2016

DEFENDANT

10% chance of prevailing at $375,000	***$37,500***
65% chance of prevailing at $100,000	***$65, 000***
25% of prevailing at $75,000	***$18,750***
TOTAL	***$121,250***

PLAINTIFF

20% chance of prevailing at $373,000	***$75,000***
60% chance of prevailing at $100,000	***$60,000***
20% of prevailing at $75,000	***$15,000***
TOTAL	***$150, 000***

Face-to-Face Sessions Fade Away

Why is Mediation's Joint Session Disappearing?

By Lynne S. Bassis

It's a curious phenomenon: what was once the foundation of the mediation process – the joint session – has fallen out of favor among many lawyers and mediators, particularly for commercial mediations. This article explores a number of questions related to the imminent demise of the joint session. Is the phenomenon the result of the shift from client relationships to resolution of legal claims? A natural outcome of blending the old with the new? Does its source lie in a fear of conflict, a lack of skills, a disconnect between "lawyering" and "listening," inadequate training, or something else? I spoke with a number of advocates and mediators[1] to better understand their perspectives on the joint session and why it is increasingly rare in mediation.

Lynne S. Bassis *is full-time mediator with ADR Services and a mediation instructor located in southern California. Lynne mediates "at the intersection of law and human emotion" with an emphasis on employment, disability, business disputes, and health care. She can be reached at Lbassis@adrservices.org.*

In the early days of the modern mediation movement, a cornerstone of the mediation protocol consisted of dialogue between the disputing individuals only. No lawyers were involved. The process took place in joint session. Caucuses were rare.

This was the vision of Harvard Law School Professor Frank Sander, who in 1976 was invited by Chief Justice Warren Burger to present a paper at the "National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice."[2] Responding to the specter of unmanageable growth of judicial caseloads and believing that the courts were not the appropriate forum for many types of disputes, Professor Sander urged consideration of "alternative ways of resolving disputes *outside the courts*."[3] He mentioned "… the tendency of the [court] decision to focus narrowly on the immediate matter in issue as distinguished from a concern with the underlying relationship between the parties" and quoted Lon L. Fuller, author of *The Morality of Law,* who wrote that "the central quality of mediation, [was] its capacity to reorient the parties toward each other ….'"[4] With this paper, Professor Sander is credited with launching what we think of as the modern ADR movement.

In the early days of the modern mediation movement, a cornerstone of the mediation protocol consisted of dialogue between the disputing individuals only. No lawyers were involved. The process took place in joint session. Caucuses were rare.

As attorney representation of clients in mediation became more common in the 1990s and early 2000s, the joint session format continued. However, some identified the decreased use of joint sessions in the 1990s.[5] As legal claims infused the mediation process, "reorient[ing] parties toward each other" ceased to be primary a goal.

What evolved – a marriage of litigation and mediation – was a "blended family" where competing customs, rules, values, goals, and practices coexisted. Eventually the merger was complete, and with it, as noted by advocates and mediators alike, came an altered process. Mediation became the last off-ramp on the road to the courthouse. On this highway, law and economics are the biggest concerns.

As mediator and attorney David Hoffman described it, today's process is "a far cry from the vision of mediation that many of us learned when we were first trained in mediation – namely facilitated negotiation in which the mediator fosters communication and understanding."

The Cause of Death

The advocates and mediators I spoke with identified a number of reasons for the demise of the joint session.

Advocate Justene Adamec of California attributes the demise of the joint session to the considerable number of judges who have retired from the bench and shifted into mediation practice. Judges and attorneys, being accustomed to the courtroom etiquette, replicated the courtroom dialogue model in mediation. The role of the client was subsumed to the role of attorney, whose job it was to speak for client.

David Hoffman, who is a collaborative lawyer as well as a mediator, sees manipulation and better concessions as the culprits: "Declining use of joint sessions throughout the US, from my vantage point, is primarily driven by two phenomena: (a) lawyers and parties have found that they can be more successful in 'spinning' the mediator without opposing counsel in the room; and (b) mediators have found that they can be more successful in eliciting candor and extracting concessions in separate meetings."

Hoffman describes a negotiating environment where mediators, parties, and counsel are engaged in a form of manipulation that ranges from subtle to overt and bears little resemblance to the mediation process he learned decades ago.

> Mediation became the last off-ramp on the road to the courthouse. On this highway, law and economics are the biggest concerns.

California-based mediator Doug Noll stated a number of reasons the joint session has fallen out of use: "Mediators are not skilled in facilitating a joint session, especially when there is high conflict. Lawyers are uncomfortable with joint sessions because they don't know how to behave. Lawyers are ignorant of the value of joint sessions because they are not trained properly in negotiation and mediation. Lawyers, having attended many mediations, think they know what the best process is. Lawyers are impatient and want to resolve their impatience and anxiety quickly. And lawyers are generally unprepared coming to mediation, and joint sessions take some planning and work."

Another mediator offered several additional explanations: "People fear conflict, which is curious since they are in the midst of conflict. Insurance adjusters, I think, would rather not meet the people. It would add a human dimension. They [would] rather the mediator act as their scout and surrogate. And the elimination of the joint session saves time."

Advocate Stephen Danz, who specializes in employment law, said "attorneys are not comfortable outside of the case and statutory law realm." He notes that many lawyers have a follow-the-herd-mentality. "They think, 'No one else does this, so why should we?' And mediators don't push it."

Advocate Alyce Rubinfeld, who also works in employment law, put it succinctly: "The bottom line is money. Litigants are entrenched. No one seems to be interested in hearing the other side. I don't find there is a cathartic effect when plaintiff is entrenched in his/her position and defendant is entrenched in its position." Rubinfeld said that she cannot recall the last time one of her cases had a joint session during the mediation.

Advocate Miklos Varga personifies the plaintiff litigator's view of the joint session: "What I have found is that personally I have to take several steps back and basically listen and be extremely gentle with presenting my client's side or the opposition (attorney or defendant) may shut me off and not hear a word I say. I have found that a joint session is like rolling the dice. According to opposing counsel, I have never had a client with a valid claim. According to opposing counsel, I have never had a valid legal argument. According to opposing counsel, I have never had an honest client. If I say 'black,' opposing counsel says 'white.' My take on this is, why argue? I will present the legal claim and presume opposing counsel is sharp enough to realize the monetary exposure the defendant faces. If not, we have no choice but litigate."

> "People fear conflict, which is curious since they are in the midst of conflict."

Perils of the Joint Session

Based on my conversations with advocates and mediators and my own experience, I have identified various reasons advocates and their clients opt to avoid the joint session.

- Joint sessions divert attention from the legal and economic issues. Attorneys suspect the other side is there just to placate the opposing side and that any "feel good" joint session will reduce the will of their client to stay in the fight, resulting in a non-monetary recovery such as a letter of recommendation, an offer of reinstatement, or an apology.

- Joint sessions encourage posturing and puffery with no real value.

- No new or helpful information is exchanged in the joint session. Where discovery or motion practice is complete, litigators believe they can gain nothing further from a joint session. Instead, the joint session is an opportunity for the defense attorney to beat up the plaintiff in front of the defendant client and perhaps score a Pyrrhic victory for the defense client – but sour the atmosphere for settlement.

- Strong emotional issues can sabotage the joint session. A client with maturity or anger issues or whose emotional readiness to settle is questionable can cause a joint session to be transformed into the likes of *The Jerry Springer Show*.

- Joint sessions are polarizing, and clients can become entrenched. Hours are wasted recovering from the joint session, and marathon mediations result. Attorneys often prefer to have separate sessions and use the mediator as the messenger, which may allow parties to understand the opposing position in a gentler, less in-your-face fashion.

- Joint sessions consume precious time that could be better spent trading numbers. Shortened mediation sessions for economically challenged cases require early focus on numbers.

- From the plaintiff's perspective, the joint sessions serve no purpose. In a case with an insured defendant, the plaintiff's lawyer assumes that the insurance company has decided before the mediation what it will pay. The plaintiff views his or her lawyer as the "warrior" whose job it is to protect the client from any and all unpleasantness. The plaintiff also wants to get the insurance company's highest offer on the table as quickly as possible, to enable the lawyer to recommend acceptance or rejection.

- From the defense perspective, the joint sessions serve no purpose. If the "practical party in interest" is the insurance carrier, the claim was submitted to a committee for review, a consensus on a final offer was achieved, and the claims representative/defense counsel are at the mediation only to determine when and how best to present this dollar amount. The claims representative has many other cases back at the office, and a joint session merely adds unnecessary billable attorney time.

- Attorneys do not want to lose control of the process, and as one mediator stated, "Some attorneys may misinterpret the mediator's *management* of the process as an effort to wrest away *control* of their client's case." By rejecting the joint session, attorneys retain more control of the case.

Despite these understandable perils, mediators and other participants articulate numerous benefits of the joint session. What can mediators and advocates do to reap the benefits of the joint session for a particular case?

Throughout the life of a case, attorneys assess outcome, be it settlement or trial, but they may pay less attention to exploring their client's underlying interests. The joint session may yield an unanticipated solution that will meet those underlying interests.

Benefits of a Joint Session

The mediators and advocates I spoke with also identified a number of benefits of the joint session:

- Face-to-face negotiations alter the quality of the negotiations and yield outcomes that are different from those that would come from shuttle diplomacy. One goal of mediation is to maximize outcome options. Avoiding a joint session limits the discovery of outcomes that surface during face-to-face dialogue.
- A joint session provides an opportunity to integrate cultural norms into the process so that customary practices, such as finalizing an agreement with a handshake or ceremony, can occur.
- The clients, particularly those with a long-standing working relationship, may want to make or receive negotiation "moves" directly from one another. In some cases, the mediator's filter may impede the negotiation.
- The joint session can improve the post-mediation relationship and communication. If an ongoing relationship between clients exists, the joint session can be used to model effective communication.
- The joint session allows each side to hear the adversary's story. If the decision-maker has never met the plaintiff or has not been given accurate information about the liability facts or damages, the joint session may demonstrate the severely injured plaintiff's character, sincerity, or lack of exaggeration about injuries – or confirm the opposite.
- The joint session may confirm the seriousness of purpose by setting the stage for a successful mediation. The mediator can set the tone for the mediation, explain the differing roles of parties, counsel, and mediator, and create an expectation that participants are involved in a process that has integrity. Rather than being plagued by suspicion as to what the other side is doing or planning, introductions, the mediator's opening remarks, and counsel's statements can establish a roadmap for the mediation.
- The joint session provides a human dimension. As one San Diego advocate stated, "It's easy to be contentious and cast aspersions when not looking at the parties themselves. Close proximity to the other party during a joint session diffuses the situation."
- The joint session offers the attorney the invaluable opportunity to "sell" the case to the opposing side as well as have a preview of how the opposing counsel will present the case to a jury.
- The joint session can undo a negotiation snag. Where attorneys have gotten off track, a carefully orchestrated joint session can break the logjam by focusing the discussion on lynchpin issues.
- Creative problem solving is easier in a joint session. For instance, in a business breakup with operational details or inter-related issues, a joint session is a good vehicle for conducting an integrated negotiation.

Design and Flexibility

It's important for attorneys and mediators to understand that flexibility is a cornerstone of mediation and that the joint session can be designed to meet different needs of the parties. For example, some advocates and mediators like to use a "modified" joint session with counsel only, outside the presence of clients. The modified joint session allows the attorneys to be frank with each other and reduces the posturing in front of the clients.

Process choices should be strategic, not stylistic, and neither comfort level nor habit should drive process decisions.

Nina Meierding, a long-time mediator, teacher, and trainer, reminds advocates and mediators alike that process choices should be strategic, not stylistic, and that neither comfort level nor habit should drive process decisions.

What Should Advocates Do?

Advocates need to understand the perils and benefits of joint sessions and apply them to each case. Advocates should consult their client as well as the mediator about whether the joint session is appropriate in a particular case. Certainly, mediators have seen joint sessions expose solutions and options that had not emerged in caucuses with each party. Throughout the life of a case, attorneys assess outcome, be it settlement or trial, but they may pay less attention to exploring their client's underlying interests. The joint session may yield an unanticipated solution that will meet those underlying interests.

A San Diego mediator who nearly always conducts a joint session believes they provide an opportunity for a really good lawyer to demonstrate his or her prowess. At the beginning of most mediations, this mediator invites everyone into one room at the beginning of the day, does introductions, and asks a couple of neutral questions to jump start the dialogue.

What Should Mediators Do?

What should a mediator do when he or she strongly believes a case would benefit from a joint session but the attorneys (and maybe the clients) insist they do not want to participate in a joint session? I would urge mediators to use their expertise as process advocates to explain all the benefits – as well as the possible pitfalls – to the attorneys and the parties.

The mediator's consideration of the use of a joint session should be fourfold. First, the mediator must be confident that his or her skill level encompasses joint session capability and that engaging in a joint session will not inflict harm on the parties or the process. Second, the mediator must have a specific purpose for conducting a joint session, convey clarity as to what he or she expects to gain from it, and obtain buy-in from both counsel and client. Third, the mediator must think about how seating arrangements and other process choices, such as who will ask the questions (mediator or counsel?), what the scope of discussion in the joint session will be, and whether the exchange will be limited to specifically agreed-upon topics or be allowed to go where it goes. Fourth, the mediator must have a plan if things go awry and have the fortitude to end the joint session, if need be.

Conclusion

Nothing in life stays the same forever. Gone is the telephone booth that Superman used for wardrobe changes. And, as my conversations with advocates and mediators indicate, so it goes with the joint session, at least in the context of litigation cases. Advocates and mediators have voiced strong opinions about the topic. Perhaps a final thought should be that the blended family might want to pull out the old family album and see if history may be relevant today – especially when all else seems to have led to impasse. The old joint session may indeed become the new process of choice.

1 Colleagues who graciously gave of their time to express the opinions that form the basis of this article are: Michelle Abidoye, Justene Adamec, J. Bernard Alexander, Gary Barthel, Phillip Cha, Stephen Danz, Joe Epstein, Peter Garrell, Craig Higgs, David Hoffman, Alfred Klein, Hélène de Kovachich, Jeffrey Krivis, Michael Landrum, Nina Meierding, Eugene Moscovitch, Doug Noll, Jennifer Olson, Alyce Rubinfeld, Larry Rute, Lora Silverman, Curt Surls, and Miklos Varga, III. Several mediators and advocates gave the author permission to identify their quotes in this article.

2 The Conference was a gathering of legal scholars, judges, governmental officials and practicing attorneys who came together to discuss the dissatisfaction with the American legal system.

3 THE POUND CONFERENCE: PERSPECTIVES ON JUSTICE IN THE FUTURE 66 (A. Leo Levin & Russell R. Wheeler eds., 1979) (emphasis added).

4 *Id.* at 69 (quoting Lon L. Fuller, *Mediation-Its Forms and Functions*, 44 S. CAL. L. REV. 305, 325 (1971)).

5 *See* Nancy Welsh, *Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?* 6 HARV. NEGOT. L. REV. 1 (2001); Nancy Welsh, Making Deals in Court-Connected Mediation: What's Justice Got to Do With It? 79 WASH. U. L. REV. 820 (2001); *see also* Len Riskin & Nancy Welsh, *Is That All There is?: "The Problem In Court-Oriented Mediation*, 15 Geo. Mason L. Rev. 863 (2008) (discussing the demise of the joint session).

HOW *NOT* TO MAKE A DEAL IN MEDIATION

NELA Annual Convention – #NELA16
June 22-25, 2016 in Los Angeles, California

By: Mark S. Rudy
RUDY, EXELROD, ZIEFF & LOWE, LLP
351 California Street, Suite 700
San Francisco, CA 94104
Telephone: (415) 434-9800
email: msr@rezlaw.com

Although mediation has been used for several decades as a form of alternative dispute resolution, there are still techniques that lawyers utilize which actually hinder or prevent a case from being successfully resolved through this process. This paper will highlight some of the mistakes that practitioners make which result in a failed mediation.

A. Choosing the Wrong Time to Mediate.

Ordinarily, a dispute should be mediated as soon as possible, before litigation costs have begun to mount and before the parties' positions become fixed in an irrevocable opposition. Early mediation best takes advantage of the potential benefits of the process: the parties are more likely to be actively engaged in pursuing creative solutions (as opposed to their attitude once litigation has started when they have grown more accustomed to letting the attorneys do the talking), and are less likely to be fixed in their position.

However, there are some circumstances when it may be better to postpone mediation. For example, in some cases there is a great deal of information that is unknown or unavailable to one side or the other. If mediation is attempted prior to any formal or informal discovery, the parties may not be able to realistically place a value on their claims or defenses.

It will be prudent to defer mediation until insurance coverage issues are resolved. The mediator should be informed prior to the mediation session about insurance coverage or the lack

thereof. Practitioners should not wait until the mediation session to see if insurance coverage issues can be resolved.

There are times when one side adamantly refuses all invitations to mediate from the other side. If this refusal is based upon an under-evaluation of the opponent's case, the party seeking mediation may have to wait until he or she has established his or her claims, or defenses have some merit (or at least some staying power). We have seen cases settle in mediation following an unsuccessful defense motion for summary judgment. On the other hand, some cases may be ripe for mediation prior to a hearing on the summary judgment motion.

There are some cases that simply should not be mediated unless compelled to do so by court order. Often, it is the attitude of the parties, not the facts of the case, which make it a poor mediation bet. For example, if a defendant has no intention of settling a claim for more than nuisance value regardless of the merits of those claims, mediation will likely be fruitless. Similarly, if a plaintiff refuses to acknowledge the strength of an employer's potential defenses, a mediated settlement is unlikely. In short, mediation is unlikely to lead to a settlement if the parties have widely divergent views of the value of the case. Unless the parties are willing to listen to, and possibly be convinced by the other side's presentation, mediation will be a waste of time and money.

There are times when practitioners try to avoid wasting time in fruitless mediation efforts by insisting upon certain conditions. For example, plaintiff's attorney with a strong case may insist that the defendant agree to a put a certain amount of money on the table as a precondition of mediation. This prevents the plaintiff from wasting his or her time and money on a mediation that yields an acceptably low final offer, and signals to the defense that the plaintiff believes his or her claims are strong. However, such preconditions will almost certainly drive the defendant

away from the bargaining table. Consequently, the plaintiff will never know whether or not the defendant was willing to negotiate in good faith.

B. Choosing the Right Mediator.

We are fortunate throughout California to have many neutrals including former judges and practitioners who are effective mediators. It is essential that the practitioners choose a mediator whose style is best for the dispute in question. This depends largely upon the parties needs and temperaments, as well as the facts of the case. Some mediators employ a fairly tough, no-nonsense style of "tell it like it is" mediation. This process which is somewhat akin to a settlement conference, often is not the appropriate methodology to resolve a case. Such a mediator may be useful if, for example, either the client or the opposing party needs to be exposed to the harsh reality that his or her claims are unlikely to carry much weight in front of a judge or jury. Other mediators employ a more nurturing and sympathetic mediation style, which can work with clients who need to feel they are being heard and validated before they can move on to consider settlement options. Still other mediators play the role of the distant expert, offering both sides a balanced assessment of their case, but staying out of the emotional aspects of the process. Such a style can be very effective in resolving relatively bloodless business or professional disputes but not highly emotional matters.

C. The Participants.

Probably the biggest reason that a mediation fails is that the real decision makers are not committed to the process and in fact many times do not attend. There are times when it is not the plaintiff who is the most important person to make a decision on whether or not to settle but his or her spouse, partner, family member, spiritual advisor, etc. who the plaintiff will rely upon at times even more so than his or her attorney in deciding whether or not to resolve the dispute.

That person(s) should be intimately involved in the mediation process through their attendance at the mediation session.

Similarly, on the defense side, it is imperative that all of the decision makers whether company representatives, individual defendants and/or insurance representatives be urged to be present at the mediation session. These attendance issues should be worked out through a pre-mediation conference rather than having the decision makers all of a sudden appear late in the afternoon without having participated in the backs and forths of settlement discussions.

D. <u>Mediation Briefs</u>.

Do not provide mediation briefs on the day of mediation. Doing so indicates a lack of interest in the mediation process and also fails to provide the mediator and opposing counsel with an opportunity to learn about the merits of the case. Exchanging briefs with opposing counsel several days before the scheduled mediation session is highly recommended. If there is confidential information for the mediator's eyes only, counsel should prepare a more limited version for opposing counsel and inform the mediator of that decision.

The brief should include a statement of facts, a discussion of the legal theories underlying the complaint or potential claims, a statement of the procedural posture of the case, a summary of past settlement negotiations, if any, and a discussion of the damages, sometimes including a specific estimate of economic damages.

Another document defense counsel should provide to plaintiff is a sample settlement agreement and general release. Some mediations fail when, after a long day of mediation, a comprehensive settlement agreement is provided to the other side which often leads to a separate negotiation.

E. Failure to Prepare the Client for Mediation.

There are times when practitioners rely much too heavily upon the mediator in order to achieve a successful result. In preparing the client for mediation, there is essential information which must be conveyed to the client but often is not. The practitioner should inform the client of the fact that he or she may be required to place a fairly substantial speaking role in mediation session and his or her main points should be succinctly set forth. The client should understand that mediations often last all day and that significant negotiation probably will be required in order to get a matter settled.

Perhaps the most disconcerting part of any mediation for the client is the emotional roller coaster the process can often engender. For example, a party may enter the mediation room feeling fairly confident that the dispute will settle for a reasonable sum, only to be met by an over-the-top opening demand. Similarly, a plaintiff who believes that he or she has a strong case may be stonewalled with an offer of little more than nuisance value. These responses often make the client frustrated with the process and unhappy about continuing. When it appears that the other party has no intention of mediating in good faith, or of listening to your client's side of the story, practitioners must prepare for these moments and instruct the client that these incidents occur in almost every mediation. The client must be prepared beforehand and must understand that the first few rounds of negotiation may well feel dissatisfying, or even insulting.

Outrageous demands or offers are the least attractive way to negotiate a successful resolution and many times lead to an early failure. The odds of settling increase by starting in a range that parties think will keep your opponent interested.

Another significant reason why some mediations fail is because practitioners are unwilling to make concessions on behalf of their clients. A concession could become your greatest ally during settlement negotiations. Admitting obvious strengths in your opponent's

case does little to weaken your position and often will lead to respect. Concessions also demonstrate that you are interested in engaging in good faith settlement negotiations rather than using the mediation process only to obtain additional discovery or for other purposes.

F. Joint Sessions.

Many practitioners frown upon joint sessions and conclude that such a meeting would be futile and in fact counter-productive. However, in certain cases, a joint session may actually be useful in reaching a resolution. It should be tailored so that neither party grandstands or uses the session to personally attack the other side. The mediator should spend some time with the lawyers for all sides to assess what they generally intend to present at this joint meeting and the objective in requesting such a session. Often the mediator will ask each of the parties or their representatives to make a statement regarding their objectives in agreeing to mediation, or to comment on particular aspects of the dispute. It is imperative that the mediator involve the parties as much as possible in the mediation process. One of the major reasons why voluntary judicial settlement conferences have failed is because the parties have not had the opportunity to address their concerns to the settlement judge. This can cause the parties to grow suspicious about the settlement process. One of the primary benefits of the mediation process is that everyone has the opportunity to express their opinions and positions on legal and factual issues. A client who has the opportunity to tell his or her "side of the story," and who believes that he or she was listened to attentively by a mediator, receives a measure of satisfaction and ownership in the process which enhances the possibility of settlement.

G. Private Caucusing.

The real work of the mediator in getting closure occurs in the private caucus. At this time, the parties should work with the mediator to gather essential facts, clarify the applicable legal issues, and begin providing each side with feedback on their legal claims and defenses. In order

for the process to work, the parties and counsel must provide as much information about the nature of the case, the facts supporting the claims, the strengths and weaknesses of their positions both legally and factually. Failure to do so will almost certainly lead to an unsuccessful day of mediation.

Some lawyers are very impatient and in the early stages of mediation will convey a "bottom-line number." Bottom lines are obviously inevitable but they should not be asserted until it looks like the parties have reached the end of the line with regard to negotiations.

If there is truly an impasse, the lawyers should allow the mediator to try to move the case to resolution by using techniques such as bracketing the case for further negotiations or making a mediator's proposal.

If the parties indicate affirmatively that they will consider a reasonable bracket, the mediator should propose it on a confidential basis. If all the parties buy into the bracket, then the negotiation process resumes with demands and offers made within the bracketed range.

Another method of breaking an impasse is through a mediator's proposal. That should only happen if there is truly an impasse and every effort has been made through private caucusing to get the parties to agree upon a resolution of all issues. A mediator's proposal should only be made after the mediator suggests a number and the parties confirm they will seriously consider it as a way of resolving the dispute.

Mediation is a very fluid process. There are cases that do not settle at the mediation session. The parties should give the mediator an opportunity to have further discussions after the initial mediation session. Cases sometimes settle through this process or after a second mediation session once additional discovery and law and motion work has been conducted to crystalize the issues.

Conclusion

More than ninety percent of all disputes are resolved before trial. Mediation has proven to be one of the most effective methods to achieve resolution. A skilled and experienced mediator can bring the parties together even in the most rancorous disputes.