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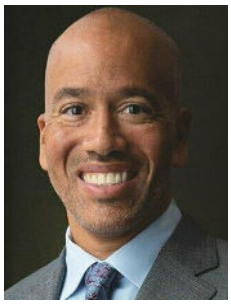
# Joint Employment Mediation Sessions Are Worth The Work

By **Jonathan Andrews** (February 27, 2023, 3:56 PM EST)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There was a time, not that long ago, when joint caucuses were an expected part of the mediation process for employment disputes. The two sides would meet together with the mediator to start the process of working toward resolution of their differences.

Typically, such joint sessions would occur at the beginning of the mediation. Counsel for each side would provide a brief statement outlining their respective party's position. The mediator would then ask general questions to help them understand the issues underlying the dispute and would remind both parties of the mediation ground rules.

How things have changed. Joint sessions — in which the parties actually talk to each other — have become almost nonexistent. This reflects the highly adversarial nature of today's litigation, in which counsel resist communicating with each other and rely on mediators to convey their respective positions to each other.

Integrative bargaining, in which the mediator appeals to the interests of both parties, has been largely replaced by distributive bargaining, in which the parties aim to obtain or protect whatever resources are available for distribution and view negotiation as a zero-sum game with a winner and a loser.

Though mediation used to be a last and final resort toward resolution, an outlier that provided an opportunity to step outside the adversarial process for catharsis and possible reconciliation, today it is almost a mandatory component of litigated cases, intertwined with litigation strategy. Anything that weakens or compromises a party's position — including, presumably, a joint session — is anathema to counsel for the parties.

However, this recent trend of joint session avoidance doesn't need to be the norm. My own experiences handling employment mediations show when and how joint sessions can be beneficial.

Employment cases are, at first blush, contentious bases for mediation. Unlike business or family disputes, in which the parties are likely to have future dealings and relationships, there is little chance that the parties in an employment dispute will ever see each other again.

Accordingly, some parties believe they have nothing to gain from showing goodwill to the other side.

This is all the more reason for a mediator to look for opportunities to find middle ground through a joint session.

The prevailing wisdom today is that parties in employment mediation who display emotion or vulnerability to the other side risk compromising their positions and are less likely to achieve a favorable outcome. Any mention of reconciliation is viewed as a sign of weakness, rather than willingness to bridge divides.

Sensitive topics are off limits, ostensibly because the parties don't want the process to blow up on them. But sensitive topics lie at the heart of most employment disputes. If the parties can't talk about them, how can they expect to resolve their differences?

**Can emotion be good?**

The main reason now given for avoiding joint sessions is that employment disputes are inherently too emotional. When parties are forced to sit with each other in the same room, the assumption is that the level of alienation and hostility will increase.

Some attorneys may worry that their clients will unwittingly betray their settlement positions while listening to or answering questions. Mediators may fear losing control of the mediation process and weakening any chance of persuasively presenting each party's position in separate caucuses.

Although emotion can certainly affect judgment and complicate interpersonal interactions, it can also be an essential catalyst for interactive, integrative dialog. Parties who do not want to acknowledge emotion in mediation may become unknowingly detached and disengaged from the process. They may be less inclined to work cooperatively to find a solution to the problem.

Sometimes, emotional intensity is the necessary ingredient to resolving conflict.

In mediation, understanding how the other side views the dispute is essential. It is one thing to hear this information from a mediator, but it is something quite different to listen to the other person's position and perspective firsthand. Counsel may be understandably concerned about a client becoming emotional, but that emotion may be exactly what the other side needs to feel.

**Why recommend a joint session?**

The most effective joint sessions often occur well into the mediation session. They are generally focused on discrete issues for which the mediator believes there is a good chance of settlement. Unlike joint caucuses that take place at the outset of the mediation, these later sessions are tightly controlled by the mediator, who makes sure that neither party misuses the process to engage in theatrical, counterproductive tactics.

When a mediator recommends a joint session to the parties, she has already had the opportunity to listen to each side's position. She has identified common ground between the parties or a misperception that she believes could be addressed through a joint session.

She will also have reviewed the procedural posture of the case and the nature of the allegations in determining whether a joint session is appropriate. How much discovery has been taken? Have the

parties already met through the deposition process? Does the nature of the allegations really lend itself to a joint meeting?

The success of a joint session will ultimately hinge on the ability of counsel to work cooperatively with the mediator. Although counsel may be reluctant at first, the mediator can help both sides feel more comfortable with the process by sharing her reasons for suggesting the joint session and explaining what she is hoping to accomplish with the session.

**What will be discussed?**

The most effective joint sessions involve targeted issues the mediator believes will move the needle toward resolution. These are issues the mediator feels strongly can be effectively addressed in a joint setting.

Imagine, for example, a prelitigation case involving the employer's failure to promote a worker. No discovery has been exchanged, and no depositions have occurred.

The mediator may sense that it would be helpful for the plaintiff to share with the employer what he felt and experienced when he was denied the promotion. In his own words, he explains why he believed he deserved the promotion, and he walks the company's representative through what its denial meant to him in terms of his emotional and financial health.

In response, the employer may explain to the worker its promotion process, helping him to understand the number and variety of factors that are involved in selecting workers who deserve to be promoted. Such candor can help each side appreciate the other side's challenges and move both parties closer to resolving their dispute.

**Who will be present?**

Typically, a joint session will include the mediator, the parties and their counsel. But sometimes, it can be more effective to include just a representative from each party and the mediator. This calls for a level of trust with both the mediator and opposing counsel.

In one wrongful termination mediation, I served as counsel for the employer. The mediation had gone on for several hours, and the mediator ultimately proposed talking with the clients without attorneys present.

The mediator had deduced from individual meetings with the parties that there was a mutual affinity between the plaintiff and the employer. The mediator appealed to that relationship, as he sensed that the dispute resulted from a misunderstanding that could be better addressed without counsel and their associated posturing.

When the parties emerged from their joint session, they were both in tears and hugging one another. Prior to the mediation, the parties expressed vastly different values for the case. After they talked with each other, the mediator was able to quickly broker a resolution that satisfied everyone.

**Why listen to each other?**

In a mediation that I recently oversaw, the plaintiff believed his employer had unfairly terminated his

employment due to his protected status. The employer, for its part, saw the plaintiff as aloof, distant and generally unreceptive to constructive feedback. As the mediation unfolded, it became increasingly clear to me that each party would benefit from hearing the other party's perspective.

During my meeting with him, the employee disclosed that he chose not to attend group lunches or happy hours with his fellow employees primarily because he felt insecure about being the only person of color in his department. He felt like an outsider at work, with others wanting to talk with him only about sports, especially basketball — a sport he never played or enjoyed.

When I shared the employee's perspective with the employer's representative, the representative was understandably moved. It had never occurred to the company that its employee's performance reflected his discomfort at feeling so isolated. After the two sides had shared their positions through me, I separately approached each side to find out if they would be willing to conduct a brief joint session.

The employer initially resisted even a brief a joint session, worried that it would only make matters worse. The employer was concerned that a joint session would antagonize the parties and push them further apart. Ultimately, the employer wanted to focus on the objective legal points made in its mediation brief.

Similarly, although the employee believed it could be useful to share his side of the story with his former employer, he was also reluctant to have a joint meeting. The thought of going through a joint session was too evocative of his termination meeting with his manager and human resources.

Understanding these emotional hurdles, I met with counsel to craft a plan that would allow the parties to address their concerns. We agreed to focus on the plaintiff's perception of being an outsider, with me being the only one asking questions. At any time, either party could adjourn the joint session. Everybody recognized that creating a safe place to have a difficult conversation was essential.

During the joint session, the plaintiff described for his former employer the excitement he felt when he received his job offer from them and how much he wanted to continue working. He also shared how difficult it was to connect with people when he began working at the company because of the isolated work groups.

The employer then shared with the plaintiff how pleased they had been when he joined the company and how concerned they became as they saw him grow increasingly disinterested and disengaged.

Ultimately, as part of a resolution, the employer agreed to bring the employee back to work. It also committed to implementing a policy of assigning a mentor to all new hires, so no one else would get lost in the new hire shuffle.

As we completed the settlement paperwork, the HR director took me aside and confided that she had initially been worried about doing a joint session because she was worried about being labeled a wrongdoer. But she now realized that if there had been no joint session during which she could listen to the employee, the employee might have viewed her resistance as just another way of perpetuating the same dismissive behavior that led to his feeling of isolation in the first place.

**Conclusion**

When parties are properly informed and prepared, a joint session can be transformative. The mediator

should preemptively explore the topic in premediation calls with counsel, helping counsel be ready to discuss the possibility of a joint session with the client prior to the mediation. All parts of the mediation process are important, and parties should never feel forced to come together in a joint session if they are not ready.

We've identified several benefits of conducting joint sessions, but there is nothing wrong with saying no to a joint session — and sometimes it is the right response. When the mediator is able to understand the reasons behind a party's reluctance to conduct a joint session, they can prepare effective communication strategies to help the parties reach resolution of their issues.

Sometimes a party's mere willingness to consider a joint session — even if it is not reciprocated by the other side — is enough to communicate to the other side an openness to listening to their position and considering creative solutions.

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*Jonathan Andrews is a neutral with Signature Resolution.*