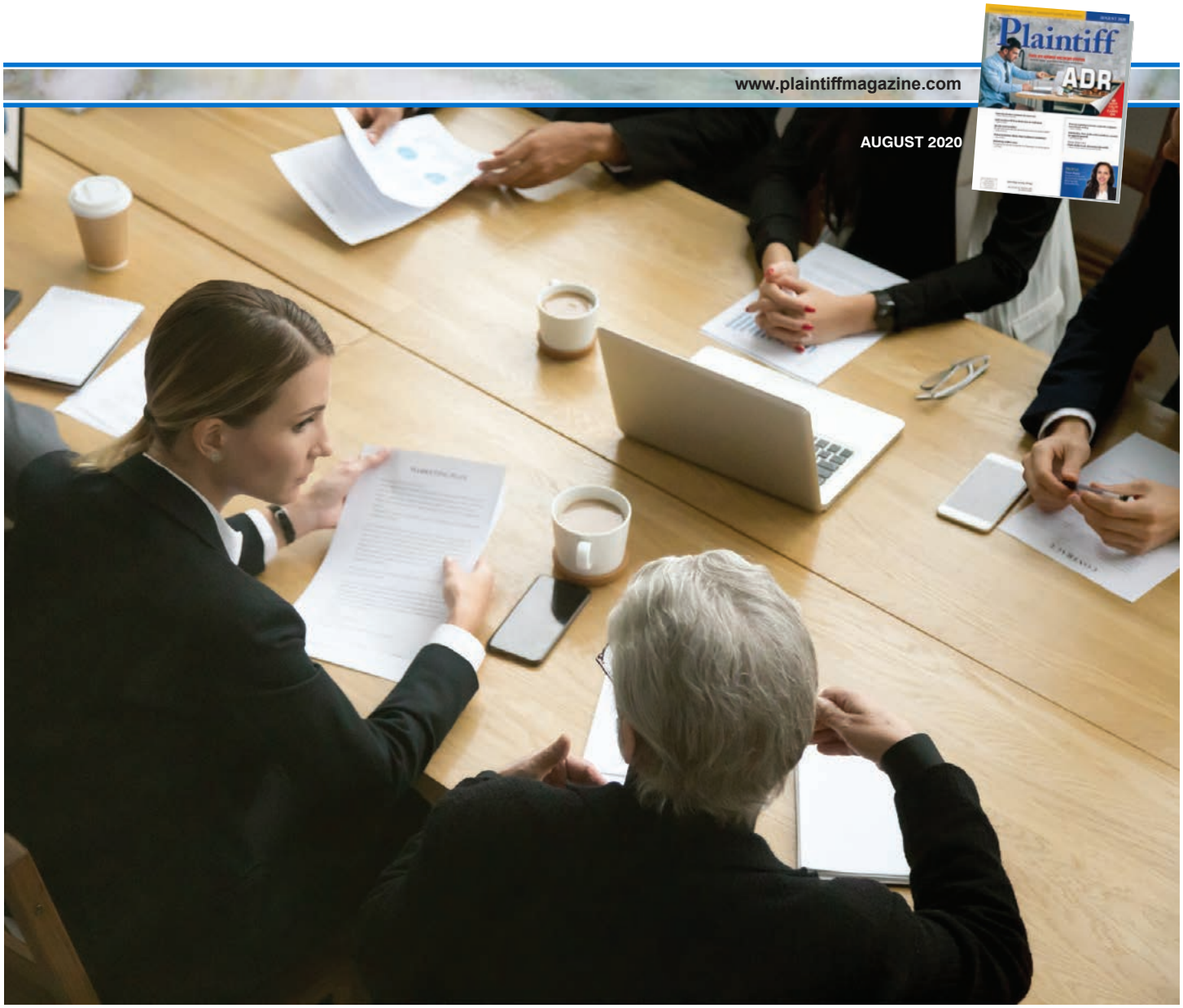

Healthy joints in mediation

Mediation with joint sessions has declined in popularity, but still has its place in dispute resolution

By Rebecca Grey

Remember the '90s, when more of us had a Nintendo Game Boy than a cellphone, when The Real World was the only reality show on television and when mediations always included a joint session? In those olden days, when I first began practicing law, mediations started with a joint session in which the lawyers, parties and mediator awkwardly assembled in a conference room, shaking hands over one another, introducing the clients, playing a clumsy impromptu game of musical chairs, making too-loud small talk and then proceeding through some round-the-circle kumbaya opening process.

This could be as simple as introductions or could be as involved as an opening statement, a PowerPoint presentation or a lengthy colloquy about questions of law and fact. As a litigator, I found this ritual tense and tedious. These sessions generally served only to frighten the client, irritate the lawyers and turn the heat up on the hostility.

Over the last few decades in California the ubiquitous joint session seems to have faded into history, and increasingly the lawyers and parties have stayed in their own rooms for the entire process, occasionally shaking hands when the deal was made. The once *de rigueur* opening joint session fell out of favor, particularly on the West Coast, and some

commentators rightly worry about its demise.

Problems with shuttle diplomacy

The push and pull of the joint versus caucus models play out in the big stage of ADR historical norms and at the micro-level of the individual mediation. The joint session can play a critical role in effective dispute resolution, one that can be overlooked because of the uncomfortable and unruly nature of the beast. The utility of the all-together-now approach is championed by several thoughtful commentators, some of whom espouse joint sessions as the default, if not exclusive, approach to mediations of legal disputes. (See, e.g., Friedman & Himmelstein, Challenging Conflict: Mediation Through Understanding). Some of these commentators not only advocate the use of joint sessions, but they generally eschew caucusing as well as holding any secret information, including confidential briefs.

The caucus-based model, these critics contend, confers too much power on the mediator at the expense of the parties' self-determination. The mediator has all the information and benefits from observing all of the communication interplay that unfolds in each room. As the person controlling the information flow, the mediator becomes the definer of both the problem and the author of the solution. The process takes much of the decision-making and pro-activity away from the parties and their representatives and rests it with the person least familiar with the issues, personalities and underlying motivations. The parties, not the mediator, have to live with the outcome and so the parties, not the mediator, should be in control of the process, the information and the result.

The "understanding based" process advocated by Friedman and Himmelman also stresses the importance of some aspect of assumed conversion, in which through listening to the other side express their point of view, the parties may be disabused of their reactive hostility and ascription of malevolence. How many times have you mediators heard one side refer to the other side as a "pathological liar"? In the "understanding based" model, the parties "work through the conflict" rather than avoid it. This can lead the adversaries to recognize the "humanity of the situation" which may soften intransigence and foster compromise. It is much harder to demonize a person with whom you are face to face.

The judicial model: Neutral as king

The business of private mediation of legal disputes evolved to some degree out of the judicial settlement conference model, in which the lawyers and their clients in a case would appear before a judge in sequential caucus sessions in an effort to settle the matter shortly before trial. The model presupposes an authoritative decisionmaker with the gravitas of the judicial robe and honorific, who typically noisily evaluated the respective legal and factual circumstances in an effort to persuade and cajole the lawyers and sometimes the parties into compromise.

Retired judges who populated the early ranks of professional mediators carried the judicial settlement conference model into the burgeoning private dispute resolution universe. The judge is an authority in whom lawyers and laypeople rest the power to make decisions and order results. These roots are problematic progenitors for a process that can be a litigant's singular exercise of control in the litigation process.

Joint sessions foster connection

Joint sessions serve several purposes. They are particularly effective where the parties desire relationship preservation, such as in family law disputes (where joint session is the default) and civil matters involving co-parents, co-workers, neighbors, landlords/tenants and family estate disputes, just to name a few. By conceiving of solutions together, opposing parties have a greater stake in the deal that can benefit in life after litigation. Where personal relationships are central, the parties are in the best position to assess the problem and to conceive of and tune a solution.

Proponents of a no-caucus model articulate several other important benefits. Caucusing gives all the information to the mediator, empowering her with the collection of stories, evidence, personalities and key arguments. She becomes the cherry-picker of the information, which gives her more power than the parties operating with less complete information. Often the information exchanged through the mediator is directed to the attorneys in language that the party may not understand, further alienating them from the process.

In joint sessions, the parties can hear and observe everything that takes place. This includes not only the facts and legal arguments, but the appearance, tone and non-verbal cues that convey most of the information in communication. This information flow empowers participants. Skilled joint-session mediators facilitate the *parties*' creation of the dispute resolution process itself from soup to nuts. The parties set out the problems, the ground rules of the process and the opposing interests through carefully staged discussion with the mediators and attorneys. This reduces the primacy of the mediator as sole architect and manager of the disputes and their solutions. Where parties author the solution, they are far more likely to be satisfied with the outcome, leading to sustainable agreements.

The prisoner's dilemma

Asymmetry of information can hamper successful negotiation by creating a prisoner's dilemma in which neither side knows what the other is doing, and thus each acts solely in a way that they think maximizes their self-interest, even when cooperation would increase the outcome.

In the prisoner's dilemma, two known criminal co-conspirators are arrested and jailed. The prosecutor gives each defendant the choice to testify against the other for a reward. If the defendants both stay silent, the prosecutor will not be able to charge them with a

serious charge, but they will both serve a one-year prison sentence. If both prisoners betray each other, they will both serve two years in prison. If one prisoner testifies and the other stays silent, the silent one will serve three years in prison and the tattletale will go free. Since the prisoners cannot communicate with each other, both have a rational self-interest to betray the other, even though cooperating would lead to a less severe result overall. Shared information may improve the ultimate compromises available.

I know what many of you are thinking: Joint sessions are unpleasant, counterproductive and even strategically dangerous. The parties can't shake the deer-in-the-headlights look or they inadvertently say something harmful ("I'll do anything to settle this case!"). The lawyers almost invariably posture in the theatre of the conference room, creating a hostile environment for meaningful discussions of downside risks for each side. The non-verbal communication can be toxic and disdainful. Confirmation bias runs riot. ("Did you see the way she was looking at me?")

Joint-session practitioners deal with this by structuring the process in stages, starting with an in-person meeting to decide how the mediation itself will proceed, ideally driven largely by the parties. The legal discussion is a separate topic in which both sides are encouraged to discuss the merits *and risks* of their own cases in a back and forth meant to foster an incremental mutual vulnerability. The underlying interests and motivations are jointly discussed in a deeper colloquy intended to unearth the unspoken drivers of the dispute.

This ideal is appealing, particularly its focus on empowering the disputants. The parties, rather than the mediator, can create and drive the solutions. Hearing each other can help parties step outside of the "conflict trap" of dichotomous right/wrong thinking and reduce the knee-jerk assumption of blame and malevolence which fills an oppositional communication vacuum. Both parties can brainstorm solutions together beyond the distribution of a monetary pie, particularly when business or familial relationships are ongoing. Friedman's concept prioritizes *understanding* over coercion.

The only "day in court"

The decline in the number of jury trials highlights another aspect of mediation in general and the joint session in particular – it may be the parties' only "day in court." The ability to tell one's story, to deny accusations, to describe the injuries and to feel a sense of accountability are important parts of the adversarial process. Mediation may be the only time the participants get to explain their side of the story in their own words to an opponent and to a third-party evaluator. Not only is sharing their story with the other side important to many litigants, hearing from the opponent may be equally valuable. Some mediations involve face-to-face apologies, or at least acknowledgements, which can help facilitate both the emotional and financial resolution.

There are also drawbacks to the model. Efficient, it ain't. A low- to no-caucus mediation can take many times longer than the more common shuttle diplomacy. It's hard enough to have a joint *phone call* to schedule a mediation, much less getting everyone in the room to have a mediation about how the actual mediation will be mediated. Once together, it takes time and a lot of messy conversation between adversaries, lawyers and the mediator to get to a point of trust sufficient to expose vulnerabilities and to reveal underlying interests and motivations. The odds of heightening tensions and bad feelings are high and when this happens, it can take hours to repair the damage. It's hard to justify such an onerous, time-consuming process in many garden-variety legal disputes.

Importantly, pre-existing power imbalances impair genuine cooperation and consent, particularly when the parties are at a conference table together. In sexual harassment cases, for example, the plaintiff may be traumatized and fearful to the point of paralysis when negotiating in the same room as her alleged harasser. Flooding of fight-or-flight emotions impedes rational thought. Corporate representatives, often attorneys themselves, are likely to be more familiar with the substance and confident in the process than an individual plaintiff in court for the first time. Putting them together to cooperate, even with lawyers, may only worsen the effect of the power imbalance, leading to capitulation or an inequitable result.

Adding value as a mediator

People pay a lot of money for the services of a private mediator. Despite experienced lawyers' proven ability to negotiate effectively with their colleagues, many hire mediators for the value they add to the process. Parties use mediators to help achieve agreements they cannot reach themselves. Skillful mediators can "translate" opposing arguments in a way that permits the parties to understand them, without the reactive devaluation inherent in communication with an adversary. Mediators can focus the conversation toward future solutions; they help participants, particularly the parties, assess the downside of proceeding in litigation, both from a risk standpoint, and also taking into account business interruption, psychological stress, expense, and time. Mediators can be vitally important in assisting with client control, corroborating an argument, explaining hard realities through a neutral lens and offering the mediator's own experience with similar issues. If I'm going to advocate a robust examination of the alternatives to settling the case to each side, I need to do that with them privately. These aspects of mediation are not bugs, but features.

Effective mediators listen to and feed-back individual experience, of plaintiffs, individual defendants and corporate representatives, many of whom who are scared, offended, outraged and/or traumatized by the underlying events, accusations and the litigation process. I try to acknowledge the stress of the mediation

process itself while pointing out that if mediation is frightening, exhausting and difficult, trial will add a factor of ten.

Evaluative mediators help the parties and the lawyers see how the case comes across to a new neutral set of ears. At a minimum, an evaluative mediator can act as a focus group of one to demonstrate what works and what does not in terms of the case narrative. Lawyers tend to dwell deep inside the exquisitely detailed factual forest, having marinated in their client's oppositional, angry and/or painful feelings for years. I see myself as an advocate for peace in the form of a sane solution, which often (but not always) means settlement, and its attendant control, compromise and closure.

Unrealistic expectations are one of the most significant barriers to settlement and contributor to buyer's remorse when a deal is reached. Overly rosy assessments affect parties and attorneys. The assessment of the best alternative to a negotiated agreement ("BATNA") is one of the most common cognitive miscalibrations to which the human mind is prone. It's important for a mediator to act as a reality check in the dialogue about the likelihood and extent of success. That conversation cannot happen the same way in a joint session.

The ability to provide many of these services depends upon controlling the parties' exchange to some degree, which is difficult if not impossible in an all-player joint session. Well-timed and discreet joint sessions can be a lynchpin to settlement, but assessing and preparing for those joint discussions is, for me, best done in caucus. The ability to receive and maintain secrets can be a deal-*maker*. If I learn, for example, that the party has a reason they *have* to settle the case, I can be far more effective than if I am operating blindly. If I learn one side has potentially game-changing information it wishes to keep confidential, which I would never learn in a joint session, I can discuss whether and how to use the information in the other room. These gems stay buried in the no-caucus universe.

The effect of video conference

Video-conferenced mediations – which will last well beyond current stay-in-place restrictions – are different in several obvious respects. Getting all the stakeholders together in one place is now much easier, since no travel is necessary. The mediation experience is also totally different, perhaps especially the joint session. Participants in a Zoom mediation are usually in their own environment, surrounded by the comforts of home, where they are more likely to feel safe. Two-dimensional boxes on a screen are much less threatening to the litigation naif. Insurance adjusters and corporate representatives do not have to travel across the country, which saves money, and which offers a better alternative to the adjuster-on-phone-standby default many traditional mediations entail, as the adjuster/defendant can speak face to face to the mediator and observe the plaintiff, witness or expert.

Use joint sessions with care

Joint sessions are unpredictable and often uncomfortable. They are also highly effective and underutilized tools to further settlement negotiation. Mediators should be mindful not to avoid joint sessions due to their own discomfort; that is what they are being paid for. However, skilled screening, translating, and reframing are services that add value to the negotiation process. Controlling the process does not mean taking control away from the players. Effective communication management by the mediator can actually confer greater control to the parties.

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