

Don't bogart that joint (session), my friend

My theory on why joint opening sessions have become less common in mediation

By Michael G. Balmages

Editor's note: Mr. Balmages says that the title to this article has nothing to do with its substance other than the word "joint." He just liked the sound of it from the movie, "Easy Rider."

In mediation, the opening joint session is magical. Opposing litigants and their counsel get together in the same room with a skilled mediator and exchange thoughts and prayers and reach a fair, just, and equitable resolution to their dispute. A resolution that heals and restores prior relationships and leads to peace on earth and goodwill towards men. Kumbaya.

At least, that's the theory. I've never experienced it.

My first experience with joint opening sessions was in the late 1980s, before mediation was as commonplace as it now is. I represented a large athletic shoe company in defense of a series of employment cases. We scheduled a mediation session with a mediator who had been recommended to the company's general counsel. This mediator operated out of her very cool home, which was located on a hilltop in a beach community just north of LA. There was a great and expansive view of the Pacific.

At the outset, the mediator had all parties and counsel meet in the same room, where she introduced herself and talked about the process. So far, so good. She then asked the plaintiff to tell her story; her whole story from her birth, to the horrors she suffered working for my client, to her (constructive) job termination. When the plaintiff finished, the mediator repeated everything the plaintiff said, in the first person, as if she was the plaintiff: "*I* was born in a little house in Norwalk;" "*I* did my job well;" "they made life hell for *me*." The mediator did this in an overly theatrical and melodramatic way and in a stage voice as if this was really happening to her. It went on for 30 minutes and was both amazing and off-putting at the same time. Then the mediator asked the company's representative to tell the company's side of the story, again from the beginning, i.e., the company was founded in a garage in Bellflower in the 1970s; it grew exponentially; it values and cares for its employees. The mediator then became the company and told its story with all the histrionics she could command. At the end, everyone in the room except the mediator was exhausted and somewhat shell shocked.

I do not remember whether that case settled, but we did four or five more mediations with that mediator and each time we were treated to the same dramatic performance. Personally, I found them to be bizarre and sickening. Our relationship with this mediator came to an end.

I have done more than 1,000 MSCs as a temporary judge in the Orange County Superior Court. In the old (pre-pandemic) days they were all done at the courthouse. You'd report to the department at 8:30 a.m., the clerk would hand you a file and you would lead all the parties and counsel to the third-floor cafeteria. Often the plaintiff and defendant would insist on riding down to the cafeteria in separate elevators. That was a hint as to how well a joint opening session would go.

At the cafeteria I would gather all the lawyers and parties around a table and ask the plaintiff to tell me what the case was about, who was suing whom for what, as I had not had a chance to read any of the MSC statements. The plaintiff would start and within the first few seconds defense counsel would interrupt to tell me that plaintiff's counsel was lying. This would happen several times and I would ask the defense counsel to please let plaintiff finish and then defense counsel would have his turn. After a while I stopped doing these joint cafeteria sessions and would meet with one party at a time.

My last joint opening session was about 20 years ago. It was an employment case and plaintiff's counsel was one of the best-known employee lawyers in Orange County. He insisted on doing a joint opening session. I told him that I would not do that without the consent of defense counsel. Defense counsel did not want to do a joint session but relented. We were treated to a 45-minute performance by plaintiff's counsel in the style of Lin-Manuel Miranda but without the music or clever lyrics.

According to plaintiff's counsel, this was a case of his client fighting for truth, justice, and the American way against the evil empire. It was a historic imperative that plaintiff be vindicated. Defendant must never do this to anyone else ever again. When plaintiff's counsel finished, defense counsel said he had nothing to say, but wanted to talk to me alone. Defense counsel then summarized what we had just witnessed by quoting what 19th century British Prime Minister Benjamin Disraeli said about his political rival William Gladstone.

Disraeli said that Gladstone was *"a sophistical rhetorician, inebriated with the exuberance of his own verbosity, and gifted with an egotistical imagination that can at all times command an interminable and inconsistent series of arguments to malign an opponent and to glorify himself."* It was perfect because that was exactly what had happened. I have not had a joint opening session since then.

Still, I am not completely opposed to joint sessions, and have occasionally suggested them when the moment seemed right. However, when one party asks to do a joint session and I ask opposing counsel if they are willing to have a joint session, they almost always tell me that they do not want one and I do not force the issue.

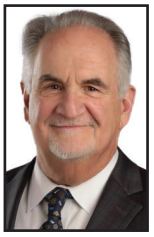
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To conclude, joint sessions used to be de rigueur. Not so much anymore. To verify this, I asked ChatGPT "Are joint sessions common in mediation?" This is what I was told:

"No, joint sessions are not as common in mediation as they once were, having fallen out of favor due to concerns about increasing hostility and the effectiveness of early communication. While they were once the expected starting point, with studies showing a significant drop in their regular use, especially in civil and family cases, they remain a potentially valuable tool. Their effectiveness depends on mediator skill and the specific circumstances of the dispute, with many mediators now opting to begin with separate caucuses to manage conflict and build a foundation for later joint engagement."

Fair enough, I guess, although I think mediator skill has little to do with it. I think it has more to do with lawyers who are inebriated with the exuberance of their own verbosity.



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