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Caucus or joint session: To meet or not to meet?

Share facts and postures in your mediation briefs but reserve the face-to-face meeting for hammering out the final settlement agreement

Most of the time, unless both sides request it, I do not use joint sessions at the beginning of a mediation. However, there are various points in the process when joint sessions and a shared discussion of information about facts and legal issues may be productive.

Briefs: To share or not to share?

Prior to a mediation, I like to receive briefs from counsel that state the key factual and legal issues, procedural posture and any settlement efforts. I strongly suggest that counsel share these briefs with each other. Perhaps one might decide to delete case strategy or certain numbers from the shared brief and share those only with the mediator. You might decide to save those few choice words and present them just to the mediator telephonically before the mediation or privately during the mediation day as the process progresses. Otherwise, I suggest that counsel give the other side their view of the case if that has not already occurred. This is similar to a joint session, as information is shared prior to the mediation, but the parties are not forced to be in the same room at the outset.

Mediator: Get the lay of the land

I usually use the beginning hour or hours to meet the parties and counsel. I start with plaintiffs' room and get to know the plaintiff and the case. Then I go to the defense room and get to know the defendant(s) and their defense and any cross claims they might have.

Especially in employment cases, I rarely have the parties meet together. An exception is when the plaintiff really

wants an apology and defense is willing to do that. That usually occurs, if at all, after settlement is reached and everything is signed at the end.

In real estate cases there may be times when the sides need to meet to get the facts ironed out, but usually I just meet separately with the parties and their counsel in caucus and have joint sessions with counsel only, if at all.

There are exceptions and I do not have a hard and fast rule against a joint session. There are times when an all-hands-on-deck meeting is warranted. That is usually fairly far along in the process, however.

Settlement agreements: Single or co-author

When a settlement is reached, especially after a long, hard day or many days, it is a cause for celebration. In complex matters or in cases with many parties the settlement documentation can take a long time.

Most times, I suggest a very detailed deal point memo, enforceable by the court, California Code of Civil Procedure section 664.6, and outside the mediation confidentiality. I have counsel and parties sign an agreement to that effect. I usually have all of the attorneys in one room with me and we hammer out the settlement points with counsel working as a team. By addressing each issue and discussing it, the whole process moves more smoothly and usually takes less time. I have found there are fewer "surprises" at the end if we use a team approach in drafting the settlement terms or the entire Settlement Agreement.

Conclusion

So to meet or not to meet, joint session or caucus? The answer is: it depends on the situation, personalities and how things are going. One thing I always do if there is a joint session is make sure everyone understands each other, and I do a lot of paraphrasing and have counsel and the parties, if they are present in a joint session, explain what they think they heard from the other side!

Joan Kessler, a full-time mediator and arbitrator at ADR SERVICES, INC., received her Ph.D. in Communication, before she attended law school. She practiced law for over 25 years, was a jury consultant and taught communications. Many of the communication strategies she taught, her extensive experience as a litigator and her training at the U.S. Army War College enhance her mediation and arbitration practice. She specializes in employment, real estate, trust/estate, business, commercial, entertainment and insurance cases. She may be reached at: jkessler@adrservices.org or (310) 552-9800. Ms. Kessler is also on the American Arbitration Association Panel of Arbitrators. Visit www.joanbkessler.com.

