

New Beginnings in Commercial Mediations: The Advantages of Caucusing Before the Joint Session

By Michael Geigerman

Mediation professionals have long debated whether mediators should caucus or use joint sessions. Those advocating joint session emphasize the importance of enhanced understanding and relationships, while those favoring a caucus model emphasize case management. Of course, many mediators use a combination of joint sessions and caucuses. This article, however, proposes a third approach: the Caucus First Model (CFM). Specifically, the author suggests that when one or more parties are known to lack mediation experience, the mediator should begin commercial mediation sessions by caucusing with the parties.

The vast majority of plaintiffs in insurance-driven tort-based claims, as well as many participants in business and contract disputes, have not had experience with mediation. Depending on what is presented in the initial caucus, the mediator can decide whether and how to continue with a joint session and/or a combination of the joint session and caucuses. This party-directed intervention gives the mediator an opportunity to assess the intrapersonal dynamics that are likely to influence each side's perception of the dispute and ability to move toward resolution. The CFM also provides parties who are inexperienced with mediation the opportunity to assess the trustworthiness and competence of the mediator. Ultimately, the CFM can help the mediator and parties take the path to resolution that is most effective and efficient.

Differing Views about Caucusing

Mediator David Hoffman is an advocate of the flexible use of caucus. He describes its pragmatism and efficiency while also identifying how many of the goals of the joint-session model may be achieved through caucusing.¹ Hoffman suggests that the choice between favoring caucusing or joint sessions hinges on whether a continuing relationship is expected. In most tort cases and many contract disputes, the only continuing relationship will be between opposing counsel.

Gary Friedman and Jack Himmelstein view the joint session as the only viable option to promote "understanding" and avoid mediator misconduct.² In their view, direct communication in the joint session avoids distortion of the flow of information and enhances dialogue between the parties.

Nevertheless, there is a perceived decline in the use of the joint session. The American Bar Association's Section of Dispute Resolution Task Force on Improving

Mediation Quality (ABA Task Force) commented on the popularity of the opening session as follows:

Only about two-thirds of lawyer participants in our survey agreed that opening statements are useful in all, almost all or most cases; a substantial minority thought they were effective in half or fewer cases.

In focus groups with attorneys, the ABA Task Force reported that in high-conflict cases with "angry" clients, "explosive opening statements can generate more hostility, and grind the opposing parties more firmly into their opposing views, thus impeding settlement."³

Citing an unpublished survey, Hoffman indicated that the vast majority of experienced commercial mediators used a caucus model almost exclusively, a finding that has been confirmed to this writer at mediation conferences. Geoff Sharp reports the loss of joint session practice in Los Angeles, and advocates from around the country have told me they prefer to use the joint session only as a "meet and greet" opportunity.

Experienced mediators are retreating from the joint session even if they have been trained in a model of mediation that begins with joint session (which I will refer to as the Joint Session First Model, or JSFM.) The decline in the use of the JSFM and the joint session generally is not surprising, occurring at least in part because counsel and mediators have seen too many first-time clients suffer from the forced use of the JSFM. A plaintiff who has brought a discrimination case against his former employer, for example, may not want to be in the same room with that boss and/or the attorney who recently deposed the plaintiff. Efficiency and bad experiences have trumped the use of the joint session.

Still, the joint session can be an integral part of the commercial mediation process. Tracy Allen and Eric Galton have identified numerous advantages: For the parties, these include direct communication, the opportunity for apology and forgiveness and a chance to learn new information. For counsel, among the benefits are experiencing direct, unfettered communication, demonstrating preparedness, testing theories and reacting to arguments. For the mediator, the rewards include being able to see firsthand how parties and counsel interact.⁴

If problems visited upon the novice in a joint session can be minimized through proper preparation in the CFM, mediators and advocates will more likely use the joint session later in the mediation process. Participants, advocates and mediators will then enjoy the best of both worlds. The CFM may actually reverse the decline of the joint session by increasing its effectiveness.

Research Supports Pre-Mediation Consultation

Effective communication is an essential component of self-determination,

understanding and settlement, and if disputants are too worried about the mediation process to absorb relevant facts or become unwilling to communicate their interests, needs and wants, self-determination will be hindered. Research supports the use of caucusing to identify issues, solve problems and reduce the possibility of adverse selection.

Studies have shown, for example, that caucusing first improves the quality of settlement and reduces conflict in employment mediations. Emily Calhoun recommends the "first-phase private caucus" in employment discrimination disputes for the specific purpose of "cultivating the group presence."⁵ She identifies coaching, providing technical assistance, agenda-setting, sparking creativity and educating parties as additional benefits. Calhoun asserts that private caucuses before the joint session in the area of discrimination disputes prepare a disputant to participate in the mediation more thoroughly as an informed bargainer and effective problem solver.

Based on a field study of 540 employment disputes, Roderick Swaab concluded that mediators who use the caucus prior to the opening session to affirm parties public image and status (or "face") by establishing trust — but not to resolve the dispute by having a substantive discussion — reduce conflict and improve the quality of settlement.⁶

Swaab and Calhoun limited their analyses to employment disputes, and the role of counsel was not identified. Gregorio Billikopf has applied it to "interpersonal organizational conflict while conducting transformative mediations."⁷ This author acknowledges these insights and proposes expanding the concept of CFM to commercial mediations.

Pre-Mediation Consultation Is Often Not Realistic

We know from these studies that pre-mediation preparation and individual meetings with the parties enhance the mediation. Prior to the date set for the mediation session, mediators may try to meet with the participants to discuss the process, procedures and expectations. The ABA Task Force supports early intervention, concluding that pre-mediation discussions are not only useful but that many users want them to discuss process issues:

such as whether opening statements would be useful in a particular case, or about which issues in the case would best be handled in joint sessions and which in caucuses.⁸

Unfortunately, pre-mediation consultation is not always practical, economical or possible. The pre-mediation in-person consultation does not occur in the typical one-day mediation, as it will often exceed the cost and time commitment that the parties are willing to dedicate to the process. In our fast-moving society, a phone call

between counsel and the mediator also often replaces the pre-mediation consultation, so preparing the inexperienced party then is impossible. When it does occur as a face-to-face meeting, the client seldom attends. While pre-mediation briefs are helpful, in those briefs counsel is unlikely to address fundamental problems that his or her own side may have with the client or the case.

CFM to the Rescue

In most commercial mediation cases, parties do not have the economic resources and time available for an in-depth pre-mediation consultation. The attorneys may not take the time to prepare the case and their clients for mediation, and so the mediator is often the one who has to get the client ready. These are the types of cases for which I recommend the Caucus First Model, which can provide the "boots on the ground" necessary for comprehending what issues are really in play. Ultimately, the CFM meets the ABA Task Force recommendation by giving the mediator the "appropriate" amount of influence necessary to set the content and tone of the opening statements so as to maximize their productivity.

In the CFM, the mediator first meets with each mediation group in caucus to discuss in-depth the process and procedures that will be followed as well as practical issues that may arise.⁹ When dealing with an inexperienced participant, the focus should not be centered on the substantive areas of dispute but on developing a trusting relationship. Following the mediator's initial caucus with each side, unless he or she has determined that a joint session would be ill-advised, the mediator will bring the attendees together in a joint session to present their respective views.

With the other side absent from the initial discussion, each party is much more likely to engage the mediator in discussion. An interactive discussion covering the same points customarily used in the JSFM is entirely appropriate.

The mediator should provide a detailed roadmap of the joint session and beyond and describe the types of opening statements that may occur in the joint session. This will include the many different styles on the continuum from aggressive to collaborative. Parties, especially inexperienced ones, need to understand that there may be more than one intended audience in joint sessions and that statements made in these sessions may be messages intended for internal consumption by the other side. Previewing issues in the CFM reduces the likelihood that a difficult opening may cause problems.

One practical issue the mediator may want to address in the initial caucus is the recognition that an injured party may find numbers hurtful or offensive. Parties may also appreciate knowing how they may signal their desire to keep information confidential from the other side and that they may keep sensitive information from the mediator.

Venting is a critical part of the negotiation process. Theoretically, once feelings are vented and "out of the way," parties will engage in more rational exchanges and ultimately reach settlement. In many cases, it is more advantageous to vent feelings to a neutral. The CFM provides the proper timing and setting for parties to air their feelings within the initial caucus and avoid the potentially destructive consequences of venting during joint session.

Party participation in joint sessions varies. In some settings, parties seldom speak in joint sessions unless the party is exceptionally articulate or knowledgeable or can make a compelling presentation. Giving participants an opportunity to be heard at the onset, in caucus, provides validation and avoids the negatives caused by difficult opening session conversation. The CFM reduces the risk that the party participant will be reluctant to further participate if the joint session has harsh overtones. In the CFM, there is less pressure on the inexperienced party to remain silent.

Face Theory and the CFM

The underpinnings of CFM may be found in "face theory." The concept of face has been defined as "the positive social value a person effectively claims for himself by his or her self-presentation," which includes, inter alia, a person's public image, reputation, and status in a social interaction. According to Erving Goffman's version of face theory, managing face is an underlying subtext in most social actions.¹⁰

Goffman's conclusions tie "face" to the English folk term, which associates face with the notions of being embarrassed or humiliated, or "losing face." In mediation, both sides can be victims of "facial attacks." The respondent is a victim who is alleged to have failed to comply with a societal obligation, and the petitioner is a victim because rejection of the claim by the respondent is seen as denial of the right to restitution. Swaab proposes that "face time" should come from the mediator and that doing so enhances the opportunities for settlement.

When the mediator is able to caucus with the parties before they come together, Swaab has found, the parties will receive positive face time immediately rather than having it delayed or injured by a damaging opening session.

The significance of the intersection of the CFM with face theory is that it puts face first. Scholars have found that an empathetic, trusting relationship between the mediator and the parties may be the most important factor in creating the ideal environment for settlement.¹¹ The CFM allows the mediator to accelerate development of that trust.

Benefits of the CFM

The CFM has the greatest beneficial influence on the first-time client but also positively impacts the roles of all participants.

The CFM and the first-time client: The most needful individuals in tort-based mediations (such as medical malpractice and personal injury) are invariably the anxious and unsure first-time clients. They arrive with nothing to compare the mediation with except perhaps a TV courtroom drama, a prior distasteful deposition experience, a divorce court fiasco or an aggravating experience in traffic court. Business owners may enter the dispute worrying about the viability of their company.

The first-time plaintiff client is consistently outnumbered by legal and insurance professionals. When insurance coverage is involved, the defendant seldom attends, since the insurance company representative often is the defendant's placeholder. In the CFM, the novice is brought into the process in a safe place, not just brought into a conversation where a safe place is mentioned. Placing the only non-professional in this difficult situation without prior explanation can be unfair, unnecessary and destructive. Beginning the process in a secure environment reduces formality and makes the mediation less intimidating.

The CFM and other clients: Experienced participants want to take the temperature of the other room and make sure they can effectively communicate their position. The CFM provides the opportunity to explore the appropriate methodology to share information.

The CFM and counsel: Throughout the CFM, counsel can take the measure of the mediator, observing his or her interpersonal skills and assessing how best to work with the facilitator. After listening to the mediator and client in the CFM, the attorney is more likely to fully appreciate and address the client's objectives in the joint session.

The CFM also helps counsel use time wisely. Information can be gathered while the mediator attends to the other participants before the first joint session. Assuming that the CFM and the joint session take place on the same day, this work includes securing missing information, identifying legal authorities, framing an apology, securing structured settlement, researching other pertinent data, contacting a lien holder or further preparing the novice client for the joint session.

The CFM and the mediator: The CFM allows the mediator to conduct an early assessment of the direction the parties are headed. Whether a participant is nervous, fearful or facing reputation concerns, has experienced a loss of trust, or needs an apology, these issues may be placed at the beginning of the queue. Queuing is strategically important for the mediator. The earlier the mediator learns what is driving or impeding the process, the sooner he or she can recalibrate the mediation to accommodate those needs.

The CFM also allows the mediator to determine whether a joint session is

appropriate, a determination that can be made before any damage from a joint session occurs. Likewise, the mediator can determine early on if the principals or attorneys should convene alone or with the mediator.

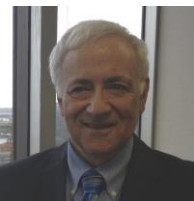
Risks Associated with the CFM

The mediator should advise the parties about the use of the CFM in the engagement letter, especially when initiating use of this methodology. Further, the mediator must be mindful of the time spent with each side in the initial caucus, pausing to advise the other side when significant delay occurs in one caucus. In this writer's experience, when properly managed, the amount of time spent with one side does not impact the parties' perceptions of the mediator's neutrality.

Conclusion

It is illogical to expect an inexperienced participant to communicate effectively with a contesting party, represented by a professional, without some initial bridge-building. The CFM provides the confidential, supportive, respectful and safe environment necessary to foster settlement. Working with the client in the initial caucus will encourage the client to be less defensive, more flexible, and more creative. Caucusing at the outset gives parties an opportunity to tell their story and be heard, explore needs and vent privately. A party who feels heard and comfortable is better able to listen to the other side and connect in a more positive way during the joint session. When the CFM model is used to open the mediation, it increases the success, efficiency and cooperation of the subsequent joint session and the entire process.

For counsel, the CFM provides the opportunity to evaluate the mediator at the outset and reassess the client's needs and objectives. For the mediator, it provides assessment and trust-building at the earliest possible moment. For the process, the words of the German scholar and poet Karl Wilhelm Friedrich Schlegel ring true: "Combine the extremes, and you will have the true center."



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Endnotes

- 1 David. A Hoffman, *In Practice: Mediation and the Art of Shuttle Diplomacy*, 27 *Negot. J.* 263 (July 2011).
- 2 GARY FRIEDMAN AND JACK HIMMELSTEIN, CHALLENGING CONFLICT: MEDIATION THROUGH UNDERSTANDING (2008).
- 3 ABA SECTION OF DISPUTE RESOLUTION TASK FORCE ON IMPROVING MEDIATION QUALITY, FINAL REPORT 12 (2008).
- 4 Tracy Allen and Eric Galton, *The Joint Session: What's in it for You*, Presentation at Ninth Annual Dispute Resolution Conference, (2007). Accessed at: [http://www.mediate.com/GeoffSharp/dc.\)cs/ABA Presentation%20%282%29.pdf](http://www.mediate.com/GeoffSharp/dc.)cs/ABA%20Presentation%20%282%29.pdf).
- 5 Emily M. Calhoun, *Workplace Mediation: The First-Phase, Private Caucus in Individual Discrimination Disputes*, 9 *HARV. NEGOT. L. REV.* 187, 189, 210 (2004).
- 6 Roderick Swaab, *Face First: Pre-Mediation Caucus and Face in Employment Disputes*, Presentation at the 22nd Annual International Association of Conflict Management Conference, Kyoto, Japan, 5 (June 2009).
- 7 GREGORIO BILLIKOPF, PARTY-DIRECTED MEDIATION: HELPING OTHERS RESOLVE DIFFERENCES 37-39 (University of California 2009), accessed at <http://www.cnr.berkeley.edu/ucce50/ag-labor/7conflict/PartyDirMediation.pdf>.
- 8 ABA SECTION OF DISPUTE RESOLUTION TASK FORCE ON IMPROVING MEDIATION QUALITY, *supra* note 4 at 7.
- 9 A framework for the initial discussion may be found at the author's website: [http://usam-midwest.com/images/Articles/](http://usam-midwest.com/images/Articles/NewBeginnings.pdf) NewBeginnings.pdf.
- 10 STELLA TING-TOOMEY, THE CHALLENGE OF FACEWORK: CROSS CULTURAL AND INTERPERSONAL ISSUES 309 (1994).
- 11 Steve Goldberg & Margaret Shaw, Further Investigation *into the Secrets of Successful and Unsuccessful Mediators*, 26 *ALT. TO THE HIGH COST OF LIT.* vol. 8 at p. 149 (2008)