

## The Shrinking Joint Session: Survey Results

By Jay Folberg

As mediation has proliferated and become part of our legal culture, how mediations are conducted has diversified. There is no “standard” process of mediation, and there is little empirical evidence to inform us about what happens behind closed mediation doors. As a result, many of us tend to think that how we conduct mediation is the norm, particularly if it is how we were trained.

I co-authored one of the earliest books on mediation, premised on the assumption that the entire process would be conducted in joint session: separate meetings with the parties would be the exception, used only when animosity was too high for the parties to be in the same room together or secret information could not otherwise be revealed.<sup>1</sup> At that time, mediators were trained to begin with a joint session that would continue until it was no longer productive. I believed that joint sessions were essential. But times have changed.

In preparation for a presentation on joint sessions at the ABA Dispute Resolution Section’s 2015 annual conference, my co-panelists and I decided to survey experienced mediators to ask whether, when, and why they use joint sessions. We were interested in individual practice differences as well as regional variations. We also wanted to learn how use of joint sessions might have changed over time, the purposes for which they are used, and what the mediators thought about their use.

### Background

We chose JAMS mediators for this survey because of my association with the organization and the likelihood of a good response rate. JAMS is a private ADR provider with more than 300 exclusive panelists in 24 resolution centers in the United States and Canada. Although JAMS panelists mediate all types of disputes, the largest category of cases is business and commercial matters in litigation where all parties are actively represented by attorneys. JAMS provides mediation workshops and continuing education programs for its panelists, but they are independent contractors who determine their own mediation style and practices.

In March 2015, we asked all JAMS panelists in the United States and Canada to respond anonymously to an electronic survey about their use of joint sessions in mediation. We received completed surveys from 205 panelists, 76% of JAMS mediators (excluding the approximately 10% of JAMS panelists who arbitrate only). We analyzed the responses to determine how often initial joint sessions are held, the purposes for which they are used, changes in frequency and purposes over time, resistance to joint sessions, and whether the mediators thought a diminishing use of initial joint sessions is positive or negative. We also were able to determine variations among JAMS’s three administrative regions: Northwest, Southwest, and East/Central.<sup>2</sup>

### Survey Results

We asked the respondents whether they regularly began with a joint session when they first started out as mediators. As seen in Question 5, slightly more than 80% of the respondents regularly began with a joint session. When we looked at these responses by regions, we learned that East/Central mediators began with a joint session 95% of the time, as compared with 72% in Northwest and 63% in Southwest.

[Insert Bar chart or other visually appealing representation of Question 5]

For most respondents, the principal purposes for conducting a joint session when they first started mediating were making introductions and discussing the process, discussing confidentiality, allowing each party to be heard, and providing an opportunity to assess parties and attorneys (Question 6). No neutrals from the

Northwest selected “beginning negotiations” as a purpose for joint sessions. In the Southwest, 12.8% selected this purpose, as compared to 4.8% in East/Central. “Exploring parties’ needs/interests” was selected by 23% in Southwest, 16.9% in East/Central, and 2.9% in the Northwest region.

[Insert Question #6 here]

In contrast to when the mediators first started practicing, now only 45% regularly use an initial joint session (Question 7). We further analyzed these answers by region: a majority of the respondents (68.5%) from the East/Central now use an initial joint session regularly, compared to 34% in Northwest and 23.6% in Southwest.

[Insert bar chart or visually appealing graphic for Question 7]

When mediators hold a joint session now, they do so for purposes similar to those from their earlier practice but with less emphasis on what might be termed the more “substantive” purposes: clarifying the procedural status of the litigation, allowing parties to be heard by other side, discussing facts, legal theories, and beginning negotiations (see Question 8). Mediators in the East/Central region now use joint sessions more for “substantive” purposes than those in either the Northwest or Southwest.

[Insert bar chart or visually appealing graphic for Question 8]

We asked the respondents whether they use a joint session later in the process, even if they do not use an initial joint session (see Question 9). Although mediators who skip an initial joint session do sometimes bring everyone together later for a joint session, most often they do not.

[Insert bar chart or visually appealing graphic for Question 9]

When asked how they decide whether to use a joint session, most respondents indicated that their primary consideration is the preference of the attorneys and the parties, followed closely by the mediator’s general policy and the nature of the case.

[Insert bar chart or visually appealing graphic for Question 10]

We asked respondents whether they consider the impact of the diminishing use of joint session to be positive, negative, or neither negative nor positive. Nearly half of the respondents (45.05%) regard it as neither positive nor negative. Of the remaining respondents, a greater percentage (32.67%) consider the trend negative as compared to the percentage who consider the trend positive (22.28%).

[Insert bar chart or visually appealing graphic for Question 11]

A majority of the survey respondents have experienced increased resistance to the use of initial joint sessions (58.4% who have, compared to 41.6% who have not). When we looked at this data by region, we saw that respondents in the East/Central region experienced much less resistance to the use of initial joint sessions (40.4%) than those in the Northwest (80.8%) or the Southwest (66.7%).

[Insert bar chart or visually appealing graphic for Question 12]

### **Respondents’ Comments**

At the conclusion of the questions, survey respondents were encouraged to share their thoughts and comments on the topic of joint sessions in mediation. The following is a sample of the responses from 103 people who provided comments.

Many mediators who regularly use an initial joint session were convinced of its importance:

- “I cannot imagine not having a joint session. It helps the parties hear from a neutral, it causes the lawyers to be a bit more credible, it saves an immense amount of time.”
- “I believe through experience that some sort of joint session is necessary. I have found that cases without joint sessions are the ones that don’t settle on the first try.”
- “I find them very helpful in setting the “tone” for the process, including letting the parties see ‘the enemy’ – often the parties have not met face-to-face and are amazed that the other side doesn’t have horns and a pitchfork.”
- “My success rate is well over 95%, and I attribute that in significant part to properly orchestrated joint sessions.”
- “The value of a direct opportunity to be heard cannot be underestimated.”

Commenters who do not use joint sessions were equally vehement about the reasons:

- “I found that they often led to grandstanding and hardening of position or were used as a delay tactic.”
- “As the negotiation skill of lawyers diminishes and financial pressures on firms increase, the joint session is often destructive to the settlement process.”
- “An initial joint session is likely to do more harm than good and make the mediator’s job more difficult.”
- “The damage typically done by posturing attorneys during joint sessions takes hours to undo.”
- “I stopped using joint sessions when it became common for lawyers and parties to get angry with each other and argue with each other, taking away from the idea of working together toward a compromise.”

Some shared more general thoughts about changes in the mediation market and the timing of joint sessions:

- “The evolution of mediation and sophistication of parties’ counsel renders joint session at the outset to be less productive and potentially harmful; best to meet individually with counsel and get ‘buy in’ for the nature and extent of the joint session.”
- I offer services in a crowded mediation marketplace. I heed the market’s wishes on joint sessions.
- “While I routinely have a joint session, parties are not regularly making opening statements. 90% in the past and 20% now.”
- “They are useful if focused on specific obstacles to settlement which have developed during the individual caucuses and only after I have had a good chance to size up the parties with an eye to my being able to steer the discussion away from the shoals of disaster.”

Others focused on the types of cases in which joint sessions are most useful:

- “I find that in complex disputes, I often end up having an issue-specific joint session.”
- “In complex construction cases, joint conferences are good ways to start the mediation and sometimes update multiple parties later in the mediation.”
- “In probate and will contests, I advocate hard for a joint session because so often the participants are family members who have become so polarized that they are not speaking to each other, and I believe the joint session provides an opportunity for a discussion led by me to open doors that may have been previously slammed shut.”
- “In family business disputes the parties need to hear one another in joint session to iron out relationship issues that are usually at the heart of the conflict.”

And some mediators noted that they have relabeled or reinvented these sessions:

- “I now call joint sessions my ‘benediction.’ I remind those assembled together why we are here, and we discuss how we will go about achieving our goal of settlement.”
- “I don’t talk about a joint session. It is a ‘recognizance meeting.’ I ask all to state their commitment to settle and try to move on.”
- “I conduct a ‘meet and greet’ so they can see who they are working with and confirm they are here to resolve this matter.”
- “The purpose of getting everyone together, after meeting separately with each side, is to design a path to settlement. No one gets what they want unless everyone gets something they want.”
- “It’s all about the ‘contact hypothesis.’ Get them in the same room, treat them as equals, and have them talk together about themselves or their situation. It’s the demonization antidote.”

### **Survey Limitations**

We understand that the makeup of the JAMS panel is not necessarily representative of the general population of mediators: for one thing, about two-thirds of the respondents have been judges (although their answers did not appear to vary significantly from those of mediators who had not been judges). And although we analyzed variations among the three JAMS regions, we note that these regions are delineated for JAMS administrative purposes only. They do not reflect an equal geographical or population triad and are subject to change.

We would have liked to ask more detailed questions regarding the specifics of how joint sessions are conducted and how mediators accomplish similar purposes when they do not have a joint session. As with most surveys, we had to strike a balance between getting all the information we wanted and getting a credible response rate.

### **Analysis**

The survey responses indicate that the use of initial joint sessions is diminishing but has not vanished. Eighty percent of JAMS mediators regularly used initial joint sessions when they began mediating, as compared to 45 percent now. There are clearly regional variations in the use of joint sessions. The comments indicate that some mediators are restructuring joint meetings and using them more selectively. The topics covered and the emphasis within joint sessions are also evolving.

Changes in the use of joint sessions appear to reflect the changing nature and maturity of mediation. When mediation was first introduced into our legal culture, few parties knew about it and most lawyers were unfamiliar with the process. Joint sessions were important to let everyone present know what to expect, set “ground rules,” demonstrate neutrality, present the mediator’s credentials, agree on confidentiality, sometimes introduce the parties and attorneys to one another, seek agreement about basic facts, define the issues, reconfirm a commitment to seek agreement, set the agenda, and begin negotiations. Although initial joint sessions can still help accomplish some of these purposes and set the tone, de-villainize the other side, and explore common interests, some of the reasons for joint sessions may no longer exist – or mediators have found that they can fill most of these purposes in other ways.

Lawyers are now familiar with mediation, so educating the bar and the parties about what mediation is and what it can accomplish often is not necessary. Experienced lawyers have been exposed to the process, and some have trained as mediators in court-connected and private settings. Newer lawyers most likely studied mediation and other ADR approaches in law school. If clients are unfamiliar with mediation, their attorneys have probably educated them about what to expect.

Attorneys, using the abundant information available on the Internet and through word of mouth about individual mediators' experience and mediation styles, are increasingly vetting mediators and carefully choosing a mediator to fit the specific dispute, so presentation of the mediator's credentials is rarely necessary. Gone, too, may be the need for introductions: more often than not, the parties and attorneys are acquainted with those on the other side and may have no desire to be reintroduced or hear again what they have heard in prior negotiations or depositions. Even formalities such as exchanging basic information and signing agreements to participate in mediation may not be necessary: although practices differ, most mediators encourage the exchange of premediation briefs, and staff often attend to agreements to mediate and provide information about confidentiality, which is established by statute and can be emphasized by the mediator separately. Ground rules, as such, are rarely used now in commercial cases, and private sessions, with their extra layer of confidentiality, may be better forums for probing interests.

The comments of some mediators indicate that they have seen joint sessions increase hostilities and derail potential agreements. Based on their experience – and perhaps their own discomfort with managing direct conflict – they would rather not risk what they see as the downside of initial joint sessions. Their comments imply that they can achieve many of the traditional purposes of joint sessions in initial private caucuses and determine later if an issue-specific joint session or one focused on specific obstacles to settlement may be helpful.

A majority of JAMS mediators have experienced increased resistance to the use of initial joint sessions. The preference of attorneys is a primary consideration in deciding whether to have a joint session, and comments indicate mediator sensitivity to lawyer resistance. Attorney resistance, however, like the use of joint sessions, varies by region. Mediators in the East/Central region experienced much less resistance to the use of initial joint sessions (40.4%), than those in the Northwest (80.8%) or the Southwest (66.7%). (See the article by Thomas J. Stipanowich on page        of this issue for additional views on regional differences and attorney resistance.)

The use of joint sessions appears to be increasingly case-specific. The comments emphasize the importance of their use in complex construction cases, family-related matters, and probate and will contests. When joint sessions are employed, the time devoted to specific components is changing. This survey and a previous one conducted by the author indicate less time spent on the mediator commenting on his/her experience and credentials and less use of opening statements by the parties and their attorneys.

JAMS mediators are using joint sessions less today than they did when they started working as neutrals, but this is not a trend that everyone celebrates. Although most respondents viewed the diminishing use of joint sessions as neither negative nor positive, the comments indicate considerable support for this one-time staple of the mediation process. Academics and many mediation trainers seem to have a fondness for joint sessions and can passionately articulate a rationale for their importance. They see joint sessions as philosophically tied to mediation's core - the idea that people talking face to face, with help from a skilled neutral, have the capacity and should be encouraged to explore and resolve their own differences. However, joint sessions are being increasingly resisted by lawyers, particularly in the West. This frames a debate about the need for joint sessions and the role of mediators in structuring the process.

### **Practice and Teaching Implications**

Although I am still a believer in the value of joint sessions, I have come to see them as a case specific technique. They may also be mediator specific, recognizing that some highly successful and much in-demand mediators rarely use joint sessions. The work we do today is not your father's (or mother's) mediation. Early writing and teaching about mediation, such as what I offered, was premised on

then existing experience and realities. The model for mediation came from labor, family, and community dispute resolution, usually conducted in joint sessions, involving cases in which the parties expected their relationships would continue after their differences were resolved. Few people had used mediation or even knew much about it, so mediators needed to educate both attorneys and parties about what to expect and get the mediation started on an even keel, with an emphasis on the mediator's neutrality. For all this and more, joint sessions were essential.

Decades have passed since I and others first wrote about mediation and offered similar step-by-step suggestions, including starting with a joint session. It is time to recognize changing circumstances and client preferences. Mediators need to deconstruct joint sessions to determine what purpose they currently serve, how they might be restructured, and what other methods are available to accomplish their intended purposes. I now encourage mediators to have pre-session telephone conversations with each side to discuss the mediation agenda and the use of joint sessions. Briefly meeting with each side at the beginning of a mediation to assess their view about a joint session and its structure is also helpful.

Some long time mediators and teachers have resisted requests to dispense with initial joint sessions. A few have labeled the joint session approach "pure" mediation, and by implication, any other approach as not pure. Given mediation's roots in flexibility and shaping the process to fit the parties self-determined needs, in contrast to more formalistic adjudicative options, insistence by mediators that we decide what process the parties must follow appears to contradict client choice. Yes, we can distinguish process from outcomes and note that the resistance often comes from attorneys (who may have sat through more mediations than the mediator), but to argue that a party's lawyer, rather than the party, is the one who does not want a joint session risks interfering with the attorney-client relationship and implies that the mediator knows best what a party should do. This mediator-knows-best perspective, whether about process or outcomes, seems the antithesis of party self-determination.

I can't help but ask if those who regard joint sessions as the hallmark of pure mediation have become the new keepers of the *status quo* by insisting on the use of joint sessions. Ultimately, the parties, through their lawyers, will choose the process they prefer by selecting a mediator who is known to use joint sessions, one who does not generally use them, or one who defers to the lawyers' process preference. The mediation market may moot the debate.

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<sup>1</sup> JAY FOLBERG & ALISON TAYLOR, *MEDIATION: A COMPREHENSIVE GUIDE TO RESOLVING CONFLICTS WITHOUT LITIGATION* (1st ed. 1984).

<sup>2</sup> East/Central includes New York, Philadelphia, Boston, Chicago, Miami and other cities in the Midwest and on the East Coast. Southwest includes Los Angeles, Santa Monica, Orange, Las Vegas and other cities in the Southwest; Northwest includes San Francisco, Silicon Valley, Sacramento, Seattle and other cities in the Northwest.