

Do Not Forsake Joint Session in Mediation **Article 1 of 3-Part Series**

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Mediations are too often starting in caucus. While I abide by the wishes of those who retain me, I personally disfavor this approach except in the most compelling circumstance.

Why? The joint session phase of any mediation is too valuable to forsake.

Some participants fear that assembling together may amplify tension, intensify discord and impair productive dialogue. This can be a valid concern. Having inferno-igniting joint sessions is not likely the best use of your client's resources or your billable time. You hired a mediator, not a firefighter.

This fear can be allayed with preparation, planning and some level collaboration between all of the lawyers.

Broach this concern with opposing counsel in advance to see if all can agree to show respect and restraint in their presentations, avoiding needless aggression.

Having a productive joint session helps the parties. Going straight to caucus eliminates two key benefits found only in joint session.

In that shared space, you can directly communicate with the other side's decision-makers. Settlement authority at mediation is often controlled not by the parties but by insurance adjusters, risk managers, third-party administrators or others in the C-suite whom you cannot depose.



Joint session provides you a meaningful opportunity to speak directly to this captive audience.

If you have wondered whether your case is fully understood by the other side, if their decision-makers have been adequately briefed on the state of evidence or if your client needs to be seen and heard to be fully appreciated, then you should be eager to have a joint session.

Second, convening allows you to perceive your audience's nonverbal responses during your presentation. Studies confirm that word choice accounts for less than 30% of what we convey. Being in the same room allows you access to 100% of the messaging.

Furthermore, nonverbal communication is often more authentic.

The conscious brain controls verbal communication whereas nonverbal communication usually involves the subconscious.

The words of a message may be incongruent with the nonverbals that accompanied those words.

Deposition transcripts provide the classic example, as they often “read” differently than what was heard and seen in the video recording of that same deposition.

There are times when the interpersonal dynamic or volatility of the dispute justifies starting mediation in caucus. I encourage you to find ways to make the joint session viable even in such circumstances.

Being able to directly communicate with your intended audience and receive real-time nonverbal cues in response makes joint session too valuable to forsake except in the extremely rare case.

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