

# Don't Torch the Joint Session

By Eric Galton and Tracy Allen

## Burning Down the House

**H**ave you heard? Perhaps you have witnessed or participated in a very disturbing trend in mediation – the avoidance of a joint or general session including all counsel and parties in decision-making. This phenomenon, which is “reshaping” the customary mediation process, is increasingly evident throughout the United States.<sup>1</sup> In our view, this phenomenon is market driven and is resulting in the structural dismantling of the mediation process. While this message may sound a bit like Chicken Little’s warning, we believe that the abandonment of the bedrock foundation of mediation poses a critical danger to the process and the modern mediation movement. This article will discuss why this trend should be reversed and how the reversal could benefit parties, lawyers, and mediators.<sup>2</sup>

Many of us have wondered what the mutant child of the marriage of law and mediation might look like. Now we know: deconstruct the process and turn mediation into the more familiar judicial settlement conference. Enlist the mediator to do everyone’s “heavy lifting,” and if that doesn’t work, try a mediator’s proposal. In this manner, we take the parties and their emotions out of the process and allow the courtroom advocates to stay in their familiar roles rather than serve as settlement coaches and counselors. This result is the very antithesis of one of the key values and benefits of mediation.

## In the Beginning

Long before neuroscience and psychology were able to track brain activity and before numerous studies helped us understand the science of judgment and decision-making,<sup>3</sup> Christopher Moore,<sup>4</sup> Leonard Riskin, and others promoted a basic mediation model that divided the process into stages. Properly conducted, each stage naturally propels the participants to the subsequent steps with an end goal: the fullest possible opportunity (at that moment in the dispute) to effectively explore settlement

options and evaluate risks, resulting in an informed decision about the future of the conflict.

The early and current basic models focus on active participation of all the players, recognizing that each participant has valuable contributions and worthwhile perspectives to consider in exploring resolution. The process encourages all participants to maximize the talent and wisdom of everyone at the table in seeking livable solutions to end the conflict. While we have continued to teach these mediation model variations in a linear fashion for the sake of academic certainty, quality, and consistency, experienced mediation users and providers realize the process is rarely linear.<sup>5</sup> Perhaps this is where the crack in the model begins.

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When we look at current research, we discover just how “spot on” our mediation forefathers were in advancing a process that includes the face-to-face meeting of the stakeholders. We know that in conflict, the brain path to resolution needs a staged de-escalation sequence that includes constructive conversation among the disputants. This kind of conversation is not only part of the de-escalation; it is necessary to

risk analysis and management of risk aversion.<sup>6</sup> Without the conversation and understanding that can come from a joint meeting, one’s ability to persuade and analyze is limited.

## Causation – So What is Happening?

We suspect the decision to abandon joint conversations in mediation is driven by at least two formidable forces in the market: lawyers and mediators. Lawyers frequently assume “everyone knows what the case is about,” or “we don’t want to have a meeting where people will just get upset.” The joint session, we often hear, is a waste of time. Many lawyers actually believe these are legitimate reasons to eliminate the joint session, and many mediators (often fearful of losing market-share) are afraid to cross their customer base. Ironically, many mediators and lawyers also share a fear of the joint

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session “blow up,” preferring to avoid it rather than tackle it in a productive, meaningful manner.<sup>7</sup>

These basic rejections of the joint session (including those relayed in the companion article in this issue by Lynne Bassis on page 30) illustrate a disturbing ignorance and inflexibility of users at a time when promoters of the process should be raising the bar to craft multiple versions to deploy this valuable tool. Most lawyers have never gone to mediation advocacy school. They draw conclusions about what they should be doing from a fountain of misinformation, believing, for example, that a joint session is an emotional, accusatory diatribe by the opponent, a chance to take shots at their client and their case. We have both seen many attorneys come to the mediation table without having given five seconds of thought on how to use a joint session to persuade the opponent. Some mediators, and (sadly) many judge-mediators, think the joint session is about the mediator telling the parties and attorneys why their case stinks. These mediators do not establish ground rules, they don’t pre-screen the content of the conversation, and they don’t coach the participants on what would be most helpful and persuasive.

There is a small but countervailing trend in some commercial markets. Informed commercial users such as general counsel and management decision makers have learned through experience that identifying, dealing with, and managing a party’s emotions and interests are key to successful mediation outcomes. They see value in keeping control over their own content and conversation as opposed to defaulting to the mediator, and they remain curious about and desirous of understanding the opponents’ views. We can learn from their wisdom.

### Imagine All the People

Beginning with the 1976 Pound Conference, observers predicted that the modern mediation movement would, among other things, provide citizens with better access to justice and direct participation and inclusion. In the 1980s and 1990s, the movement spoke of “party ownership” of the process. Even today, for the majority of parties involved in mediation, mediation may be their first and only exposure to the civil justice system. While this may not be true for a large insurer or multinational corporation, the first-time consumer of mediation, to the extent effectively advised by counsel, may come to the table expecting to be a direct participant in the process. Most do not come to mediation expecting to be ignored or to witness only an exchange of legal terminology between their lawyer and the mediator.

Concerns that parties or lawyers might be uncomfortable with participation in a comfortable environment, in a private conference room, in a controlled dialogue, are absurd. Without a settlement, the parties will be exposed to rigorous cross-examination and open scrutiny in a public courtroom. Judgments will be cast. Lawyers will have to perform and react quickly for extended periods of time, with much at stake. How can the predictability of courtroom drama be any less traumatic than a learning conversation of legal theories, factual disagreement, and possible solutions in an environment controlled by the stakeholders? More likely, avoidance is the result of the advocates’ discomfort in having to deal with the parties’ emotions, anxiety about how things might escalate, and skepticism about the sincerity of their own legal arguments.

### The Rewards of the Joint Session

#### *For Parties*

The joint session can have multiple designs – and adjustments that are made to “tailor the suit” to the conflict. Approaches include addressing content, timing, participants’ roles and contributions, the mediator’s script and influence, and the role/dialogue of attorneys. When properly designed, an effective joint session brings forth many tangible benefits for the parties to:

1. Feel increased value in and ownership of the process
2. Get a better understanding of the process as explained and demonstrated by the mediator
3. Feel that positions and interests have been advocated, described, and heard by all, particularly the opponents
4. Express feelings and concerns directly to the other side (if prudent)
5. Express regret, apologize, and seek forgiveness without admitting liability (if prudent)
6. Gain better awareness and understanding of the other side’s positions and interests
7. Understand more fully the risks and uncertainty of proceeding with litigation
8. Have an opportunity (because of all the above) to identify nonmonetary interests and options that may be part of a resolution
9. Learn new information, in a risk-free way, about the dispute that may result in a reevaluation of a position or claim
10. “Save face” while shifting a position or proposal

Generally, parties benefit from the joint session because it informs. It gives definition to their concerns. It creates a feeling of direct participation and ownership of the process. A redirection of a party's mistrust can often be critical to unlocking the impasse that brought the dispute to mediation. The sense of ownership helps parties believe the mediation process is just and trustworthy. Process control enhances people's perception of procedural justice.<sup>8</sup>

### *For the Advocate*

Mediation purists may suggest that it matters not what the lawyers think of a joint session because mediation is the parties' process. Market realities, however, dictate that lawyers' opinions do matter. For a lawyer to recommend mediation with a joint session is to "expose" his/her litigation strategy and the client, so from the advocate's perspective, the return on the investment in a joint session better be significant. Lawyers often forget that such sessions provide unique and essential opportunities for both the lawyer and the client. Among the many benefits, we note that joint sessions allow lawyers to:

1. Speak directly to the other side, constructively and clearly setting out the client's position (This is the only time lawyers can do so ethically. Many lawyers have brilliantly converted litigation advocacy into mediation advocacy, and their approaches to joint sessions have favorably impacted resolution.)
2. Evaluate the position and interests of the other side, lawyer and client
3. Encourage the client to better appreciate risk by listening to the presentation of the other side
4. Establish credibility and demonstrate empathy with the other side
5. Demonstrate preparedness both for the mediation and for the litigation that may follow
6. Show commitment to the mediation and settlement process
7. In appropriate cases, introduce a client who can make an effective presentation or statement
8. Demonstrate to the client the difference between counsel's roles as settlement advocate and as trial warrior
9. Establish greater value with the client by demonstrating excellence as a mediation advocate and settlement counselor
10. Have a "dress rehearsal" of the arguments and responses relevant to the legal, judicial, and personal aspects of the conflict

The joint session provides almost unlimited opportunities for an effective mediation advocate to share and significantly advance the client's interests and settlement

goals. The advocate can easily establish value and credibility with the client (and the opposition) by effective participation in a joint session. The joint session also gives the advocate reasons to reconsider the other side's positions and potentially reevaluate risk and use risk analysis effectively in discussions with the client.

### *For the Mediator*

The joint session is the best chance for the mediator to establish the nature, purpose, and integrity of the mediation process, especially for the parties attending the mediation. The joint session is a front-row seat into the heart of the conflict, a perspective the mediator cannot get when visiting with one side privately. The joint session provides the mediator with essential benefits and opportunities to:

1. Experience the dynamics of the conflict with the parties in the same room. (The skilled mediator can observe body language, see and hear how people react to what is being said, study each participant's risk awareness, and judge the participants' credibility quotient in the face of uncomfortableness in adversity.)
2. Get all parties to commit to the process and to working through difficult problems
3. Accurately describe the purposes of the mediation process and provide a deeper understanding of the role of the mediator, covering topics such as neutrality, confidentiality, risk assessment, party self-determination, time, cost savings, and closure
4. Emphasize the mediator's own commitment to and belief in the process
5. Demonstrate preparedness, focus, and understanding of the particular dispute
6. Continue to build the parties' and advocates' trust in the process and in the mediator by designing and managing a successful joint session
7. Facilitate a real-time communication between the parties that identifies needs and interests and reflects honest emotion
8. Better understand the dimensions of the dispute, including aspects that were not obvious from written submissions
9. Clarify issues and identify all the parties' goals
10. "Push" the participants in a symmetrical, simultaneous, persuasive manner

### **How to Beat Back the Trend**

Mediators must appreciate, not arrogantly, that they are stewards of the process. Mediation existed long before it was co-opted to be part of the civil justice system. Mediators must also appreciate – and promote – the underlying goals of the modern (and historic) movement,

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those of access to and participation in justice. They should envision and require party participation. Lawyer-mediators talking to lawyers or former-judge-mediators talking to lawyers is not party participation. In fact, such a procedure is demeaning and disenfranchising to the parties.

Similarly, consumers of the mediation process, who are indeed stewards of the outcome, must respect the professional mediator's expertise and knowledge of the power of the process. Capitulation by mediators to unsophisticated and untrained users who wish to skip the joint session will result in a dangerous erosion of mediation and further incursions into the mediator's role. Simply stated, this trend must be stopped in its tracks.

Having diagnosed some of the causes and identified some of the symptoms of the disappearing joint session trend, we turn to solutions. Possible prescriptions for "Wellness Mediation" begin with an awareness and appreciation of the opportunities an effective joint session can bring to a conflict, including all those noted above for the parties, their advocates, and the neutrals working with them. This should be followed by the development of an appropriate design and strategy of deployment of the joint session in the particular mediation, one that is case-specific and strategic enough to "fit the forum to the fuss." This basic action plan mostly involves education, communication, awareness, and courage.

1. Mediators need additional training. A two-hour sound bite on the joint session in the less-than-adequate 40-hour basic training does not cut it. A full day, maybe two, of advanced training and discussion of the joint session is critical to overcoming fear and arming mediators with more tools to design and manage effective joint sessions.
2. Mediators need to take a more directive role at the "front end" (i.e., case intake) to assist lawyers in preparing themselves and their clients for the mediation and particularly for the joint session. It is not a "one-size-fits-all" model: a joint session, for example, may not come at the beginning of the mediation. The content and purpose of the joint session can be explored and agreed upon in advance through a more proactive mediator role, as a negotiation coach to the disputants. Knowing what to do and what to expect for the joint session reduces everyone's anxiety about the gathering and allows all to reap the benefits discussed above.<sup>9</sup>

3. Lawyer advocates need to reflect on, for each case, the benefits a joint session can bring to them, their clients, and the opposition, and then craft their summaries and presentations to maximize these benefits. A joint session can be a "dry run" of the opening statements to the jury; what wise attorney waives that critical stage of a trial?
4. Mediators need to have more conversations with the litigators they serve (outside of the mediation) to better educate litigators about the joint session's intrinsic benefits and advocacy opportunities and instruct them on how to maximize these benefits. In these conversations, mediators should listen to litigators, to further understand their concerns, the obstacles they perceive, and their bad experiences.
5. State and federal agents/judges should advise mediators and counsel who engage in court-annexed cases that party involvement and participation is a significant goal (and requirement) of the mediation process. Courts should survey participants in court-annexed cases to determine if they were actually allowed to participate and to measure their overall level of satisfaction with the process.
6. National, state, and local bar associations should visibly support the use of the joint session as well as private providers who have mastered the art of managing it.
7. Corporate users of mediation services should make it known that they support use of the joint session and that mediators who handle them well are their preferred mediators.

### Conclusion

As mediators, we feel strongly about the power of mediation. Both of us have witnessed hundreds of examples of the benefits and healing properties of this form of conflict resolution, cases in which deeply estranged people have been able to understand their opponents' interests, reassess their own options, and work toward a lasting resolution that allows both sides to move on.

But we also believe that successful mediation outcomes often come from meaningful exchanges, face-to-face meetings in which everyone involved can look others in the eye and speak openly. For so many, these meetings are the start of true understanding of the nature of their conflict.

Mediators and advocates need to become the movement's own promoters of strategically designing and directing joint sessions, ones that restore power, control, dignity, and respect to the participants. ♦

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### Endnotes

1 In the companion article by Lynne Bassis, she describes some theories of how and why this trend developed. Our own informal survey of highly experienced mediators who practice in California, and specifically Los Angeles, informs us that hosting a joint session is now the exception to the rule. While this trend may not be as pervasive in San Diego, San Francisco, or other California cities, it remains a trend that has spread to other large metropolitan areas across the country. See Tamara Relis, *Consequences of Power*, 12 HARV. NEGOT. L. REV. 445, 456-59 (2007) (observing various studies of Toronto-based mediation centers); Elizabeth Ellen Gordon, *Attorneys' Negotiation Strategies in Mediation: Business as Usual?*, MEDIATION Q., Summer 2000, at 377, 382 (discussing the North Carolina Mediated Settlement Conference Program); Bobbi McAdoo, *A Report to the Minnesota Supreme Court: The Impact of Rule 114 on Civil Litigation Practice in Minnesota*, 25 HAMLIN L. REV. 401, 405-06, 434 (2002); Bobbi McAdoo & Art Hinshaw, *The Challenge of Institutionalizing Alternative Dispute Resolution: Attorney Perspectives on the Effect of Rule 17 on Civil Litigation in Missouri*, 67 MO. L. REV. 473, 524 tbl.33 (2002); Thomas B. Metzloff et al., *Empirical Perspectives on Mediation and Malpractice*, 60 LAW & CONTEMP. PROBS. 107, 124-25, 144-45 (1997) (discussing court-ordered mediation in the North Carolina court system) (cited in: Nancy Welsh, *Thinning*

*Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?* 6 HARV. NEGOT. L. REV. 1 (2001); Nancy Welsh, *Making Deals in Court-Connected Mediation: What's Justice Got to Do With It?* 79 WASH. U. L. REV. 820 (2001); Len Riskin & Nancy Welsh, *Is That All There Is? "The Problem" in Court-Oriented Mediation*, 15 GEO. MASON L. REV. 863 (2008) (discussing the demise of the joint session).

2 This article is not about the facilitative-evaluative style debate of the 1990s. Everyone has begun to recognize that mediators deploy a variety of styles, often in the same case, searching to apply an approach that is effective for the specific case and participants.

3 See Barry Goldman, *THE SCIENCE OF SETTLEMENT- IDEAS FOR NEGOTIATORS* (2008).

4 Christopher W. Moore, *THE MEDIATION PROCESS: PRACTICAL STRATEGIES FOR RESOLVING CONFLICT* (4th ed, 2014).

5 Joseph Stulberg & Lela Love, *THE MIDDLE VOICE: MEDIATING CONFLICT SUCCESSFULLY* (2nd ed. 2013).

6 Douglas Noll, *PEACEMAKING-PRACTICING AT THE INTERSECTION OF LAW AND HUMAN CONFLICT* (2003).

7 See Riskin & Welsh, *supra* note 1; see also Leonard L. Riskin, *The Represented Client in a Settlement Conference: The Lessons of C. Heilman Brewing Co. v. Joseph Oat Corp.*, 69 WASH. U.L.Q. 1059, 1099, 1108 (1991).

8 See E. Allan Lind & Tom R. Tyler, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* 58-60, 96-101 (1988).

9 See ABA Section of Dispute Resolution, *Task Force on Improving Mediation Quality: Final Report* 6-12 (2008) (showing that clients valued mediator's assistance with preparation); Riskin & Welsh, *supra* note 1 at 891-892 (on working with the parties before mediation to "map" the issues and how best to address them).



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