Working together to resolve disputes - uses and benefits of joint meetings in commercial mediation

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Introduction

The purpose of this article is to promote wider and fuller use of joint meetings as a major contributor to the effectiveness of the mediation process.

A 'joint meeting' is a meeting that takes place at any stage of the mediation where one or more representatives of each party are present, generally with the mediator. A joint meeting may be contrasted with a 'private meeting',[1] where the mediator meets with one or more of the representatives of one party only.

For simplicity, this paper describes joint meetings in the most usual form, where parties are present together in the same venue. Joint meetings can be arranged by telephone conference call, face-to-face by video link, or using other conference facility methods.

Joint meetings are often significantly underused in commercial mediation, serving a very limited purpose or, in some mediations, not used at all. There seem to be a range of reasons on the part of mediators for this neglect, including inexperience, lack of confidence, reliance on a historical safe beginners' model, fear of uncertainty and losing control, and even a perception that a meeting between the parties would prevent a settlement. Where a joint meeting does take place, this is often at the beginning of the day with most of the mediation spent in the private meetings with the mediator shuttling between the parties and, perhaps, bringing them together near or at the end of the mediation.

A joint meeting, however well planned and prepared for, is to some extent unpredictable, and some mediators fear that it might derail the process. Thus, many first joint meetings do not deviate much from a basic script of introductions, mediator's address, and mediation statements from each party, with possibly a few questions between the parties for clarification. In the experience of the authors the benefits of well-managed joint meetings far outweigh any possible risks. Mediators need to help the parties to learn something new or to see things in a new way, and meeting face to face with the other party can be enlightening. Later in the process - and parties often want to get down to negotiating as swiftly as possible – the dynamics of direct negotiations, again well planned and well managed, can create ideas, generate momentum and enhance progress towards settlement.

[1] This term is used throughout, rather than 'caucus', 'one-party meeting' or other name, to describe a meeting in private between the mediator and one of the parties.

It may be going too far to say that the tendency to over-use private meetings reflects a prevailing orthodoxy; however, it represents a definite trend, which has the effect of missing opportunities created by using different types of available joint meeting, thus diminishing or limiting the force of the mediation process. The authors seek to challenge that trend and the beliefs that underpin it and to bring together some ideas and initiatives that may assist all involved in the mediation process. The aim is to expand opportunities in mediations, rather than to say that one mediation model is better than another.

For every joint meeting, at whatever stage of the process, the mediator as process manager needs to be clear about:

- the purpose of the joint meeting;
- the possible benefits and risks of any meeting;
- the type and timing of the meeting;
- who should attend; and
- how the meeting should be arranged and managed.

These matters need to be conveyed to the parties so that they can be considered before the meeting, to make it as productive as possible. Herding participants into a meeting with little idea of the purpose and no time for preparation is likely to be a wasted opportunity and may even be irretrievably damaging.

Purposes of joint meetings

There are several important reasons for parties to meet in the early stages of the mediation process (whether the mediation is planned to take place over one day or spread over a longer timeframe); these include some or all of the following. To:

- welcome the parties to the mediation, emphasise commitment to the terms of the mediation agreement and confirm the process to be followed;
- establish appropriate mediator authority as manager of the process;
- enable participants to see who is present, to be introduced and to acknowledge each other; social courtesies can be an important foundation for direct communication between participants;
- enable parties to communicate in a way that sets the scene for a dialogue.

The communication during a first joint meeting may comprise some or all of the following:

- presentations regarding the background and analysis of the dispute (from lawyers and/or decision makers and/or others in the team);
- an expression of intent regarding the negotiations;
- an expression of regret about some aspect of the past;

- posing questions and making requests for information (with no obligation for a response);
- developing an agreed agenda of topics to work on;
- discussion amongst participants on any topics raised;
- information exchange between participants which might influence settlement decisions.

Later in the process joint meetings might be convened for a number of the reasons above including further information exchange, and also, for example, for discussions about technicalities, rebuilding of trust where an on-going relationship is anticipated, direct negotiation and exchange of offers, and planning for implementation of a possible agreement.

Possible risks of Joint Meetings

It may be helpful to voice some of the possible risks of joint meetings, if only to placate those who resist them and who might otherwise accuse the promoters of naivety.

The parties and their lawyers often see little purpose in engaging in a discussion where each side holds diametrically opposed views. Both lawyers and the parties may be fearful of a joint meeting. Parties might imagine that these sessions can produce an emotional escalation of the dispute or that protagonists may be angered by statements made by the opposing party and make them less willing to settle. In extreme cases, they picture the party walking out.

The unexpected can happen in joint meetings – and not always for the better, such as in the following two examples:

- The emergence of new issues can make it more difficult to settle the dispute. In one case, a claimant who was pursuing payment of unpaid invoices also brought up an earlier claim that was important to him but statute-barred and had not been mentioned in his mediation statement. This made the other side even more reluctant to pay, because this never-pursued claim reminded them of a long and unhappy history of their paying the claimant money to keep afloat their joint business activities.

- A case that looked reasonable before the joint meeting can look much worse after it, though the claimant may still believe or wish to believe that he or she has a good case. The opposing party becomes less inclined to settle because of the poor manner in which the other side presented their case, or because of information given which they believe enhances their defence.

The opposite might equally be the outcome with a party more inclined to settle because, for example, the benefits of wrapping up other disputes, or possible disputes, between the parties in one agreement seems efficient and attractive, or because a party might recognise the risks of non-settlement in the face of the other party seeming likely to make a convincing witness.

In joint meetings protagonists might be unwilling to reveal agendas or facts in front of others that they might reveal to the mediator in a private meeting. If parties merely elaborate, exaggerate or repeat their positions at length, there may be a limit to what progress can be achieved in a joint meeting.

Faced with a shared reluctance by the parties to hold a joint meeting, the mediator may need to be robust in persuading parties that a joint meeting might be constructive, explaining the mediator's experience of the benefits of joint sessions while not unduly raising expectations. Emotional escalation and other risks can be contained by the mediator by setting up, preparing for and facilitating the meeting effectively. Thus, the risks of joint meetings should not be exaggerated.

Benefits of joint meetings

Joint meetings allow parties to communicate directly, to express feelings, concerns and ideas, to see that they have been listened to and, generally, for parties to feel more fully involved in the process; mediation days made up largely of private meetings can leave the parties feeling bored, disengaged and dissatisfied.

Longer joint sessions enable the mediator and the parties to save time on the exploration phase and on information sharing, which would otherwise take two or more private meetings, although there will be aspects of exploration and information sharing that are better pursued through private meetings.

A joint meeting can re-humanise a dispute and assist the parties in resuming dialogue, particularly when they have communicated for some time through legal correspondence. In a mediation conducted by one of the authors, the two individuals had been close friends and had worked together in a very successful business. Their dialogue had ended in a heated telephone conversation, after which their solicitors had begun correspondence followed by the issue of legal proceedings, and the mediation took place with a trial imminent. Their dispute had been overtaken by the litigation process, and the mediation provided an opportunity for the two protagonists to have a conversation on their own; this was achieved through a series of joint and

private meetings, culminating in a meeting between the two, with the mediator present, at which there was a decisive breakthrough.

Joint meetings enable the parties, their insurers, lawyers and other advisers to evaluate the other side's case and assist them in making a sound risk assessment or re-assessment. In particular:

- by listening to the other side carefully, parties can review and check that they have properly considered all the arguments;
- some judgement can be made of the claimant or defendant as potential witnesses;
- parties can understand more fully facts that may be outside their knowledge; for example, if Party A claims damages for lost sales, Party B may illuminate market conditions that made on-sales difficult or impossible. In a mediation conducted by one of the authors, such information was imparted at a joint meeting by an ex-employee (employed at the time of the on-sales) and enabled the claimant to see that its substantial claim for damages was largely groundless;
- a protagonist can see the other side's lawyers for the first time. 'This can be a salutary experience, as each party will undoubtedly have had a mental image of the other side's lawyers as inhuman and incompetent, and perhaps see that they are 'human' and doing just as good a job – if not better – than their own lawyers'.[2]

Joint meetings provide an opportunity for the mediator to assess the interaction between the parties and their lawyers and can provide ideas about the best way to reach consensus.[3]

The unpredictability of a joint session can produce positive results. For example, in a joint meeting conducted by one of the authors it became clear, unexpectedly, from dialogue between the respective protagonists that each party's factual account of what had occurred at a critical settlement meeting was virtually the same, whereas the parties' mediation statements suggested a substantial disagreement.

Joint meetings are often the best way to engage the parties in joint problem-solving. Some models of mediation use joint meetings and almost nothing else.[4] This particularly suits a dispute where there is an on-going relationship, and it can sometimes work well even where an on-going relationship is not anticipated.

By appropriate questioning and moderation of the meeting, without acting as though an arbitrator, the mediator can promote an inquiry into why the parties have fallen into dispute, surface unexpressed or unexplored reasons why the protagonists have taken entrenched positions, and generally allow them to balance inquiry with advocacy.[5] Such meetings can enable

[2] Mediation, A Psychological Insight into Conflict Resolution, Strasser & Randolph p.82.
[3] In Praise of Joint Sessions, Sharp (2009).
[4] See generally, Challenging Conflict: Mediation through Understanding; Friedman and Himmelstein.
[5] Skillful Discussion: Protocols for Reaching a Decision – Mindfully; Fifth Discipline Fieldbook, Ross pp. 385-391.

the parties to listen to each other's viewpoints, thus objectivising the dispute and enabling each party to extricate itself from the 'conflict trap' and start to shift its position towards settlement.[6]

If skilfully led by the mediator, these meetings can deal not only with issues of exploration and information exchange but also important aspects of negotiation - to 'brainstorm' methods of settlement, for example. One of the authors facilitated understanding between an employee and employer through a joint session where a member of the employer's Human Relations team, who had not historically been involved in the situation, observed a dialogue between mediator and employee during which the employee's grievances were aired and the employee's proposed ways of addressing them were outlined; these ideas were then built on by both teams and settlement was reached. The dispute had been described by both parties as one that was unlikely to be capable of settlement, particularly in view of the tone of the correspondence between the parties, and so it was all the more interesting that so much constructive work was done in joint session.

Joint meetings offer opportunities to enhance and sustain a long-term relationship; the mediator can use the experience the parties have had during the mediation, of working through their differences and achieving agreement, to coach the protagonists to use mediation skills in their future working relationship. It is not going too far to say that where an on-going relationship forms part of the proposed agreement, the parties need to 'live' the future through the use of at least one joint meeting to test the feasibility of working together again.

It has been rightly observed that by choosing to use private meetings at the wrong time, the mediator has deprived the parties of the opportunity to negotiate for themselves, and has thereby failed to foster joint problem solving.[7] Excessive use of private meetings can drain parties' energy and commitment, by creating a misconception that the mediator can be left to do the work; and this can be exacerbated where parties use the mediator to put forward unrealistic offers that they would not make face to face.

Joint meetings allow 'constructive confrontation'[8] and also avoid or reduce some of the disadvantages of private meetings, such as parties trying to persuade the mediator rather than the other side, or engaging in pointless fighting talk, or making outrageous offers, and other forms of unnecessary posturing.

Neither the mediator nor the parties should worry unduly about the unpredictability of a joint meeting; provided that the meeting is purposeful, timely and managed with an appropriate balance of control and relaxation by the mediator, it can provide new insights, fresh ideas and a push towards settlement.

[6] See note 4, at pp. 3-40.
[7] Alfini *et al.*, 2001.
[8] See note 7.

Setting up and preparing for a joint meeting

Joint meetings may be convened for a variety of purposes with different combinations of participants. In preparing for a joint meeting the mediator needs to exercise judgement about:

- the purpose – always defining this clearly so that participants know what is proposed and agree to participate on that basis. Preparation for a joint meeting, including getting agreement to participate, should generally be done in separate private meetings;
- the language that the mediator will use to frame and describe the meeting;
- the timing – maybe there is something more to be understood first, by the mediator or between the parties; perhaps the parties need refreshment or a break before meeting;
- recommending who should attend – knowing that to match communication styles, for example, may give the parties a better chance of making progress;
- the need for preparation – this is often critical to the success of the meeting;
- how the meeting will be arranged and managed – stating some ground rules may be helpful, or just setting a tone, casual or more formal, that might help the parties to make best use of the opportunity to communicate directly;
- where the meeting should take place - in the main room, in an external venue such as a café, lounge area or garden or, by invitation and agreement and with other members of the team vacating the room, in the room of one or other party;
- the setting up of the room - for example, if using the main room, the mediator might decide to rearrange the chairs to indicate that this meeting will be different from an earlier meeting, or may simply want to open a window or order fresh coffee.

At the preparatory private meetings, the mediator can ask about relationships between the participants, observe the character and disposition of the attendees, their attitude to the dispute and what lies behind that attitude. The mediator might discover, for example, whether one representative has strong feelings about a representative on the other side. In addition, suitable guidance may be offered to each party on how to approach the discussion and the mediator can help with presentation, possibly by reframing accusations and judgments as feelings, interests or needs. All this enables the mediator to prepare for the subsequent discussion in a joint session so that productive dialogue can take place. Ground-rules might be set for questions, such as a requirement that no question has to be answered, that questions are put to the other party generally and not to particular individuals, and that the mediator will intervene if any question or the manner of questioning seems inappropriate.

Types of joint meetings

The mediator may or may not be present at:

Principal-only meetings

Discussions and negotiations take place without lawyers or other advisers. This type of meeting can be used to generate the lift-off that negotiations require and is often used to close a deal. In some mediations, where mediation statements have already been exchanged, a short joint meeting takes place early in the day but without an exposition of each party's legal case.

Presentations are given by principals in a later joint meeting with the mediator attended by the principals without lawyers. Adopting this approach, each side can be more open to listening to the position of the other and can move on to start the negotiating process with one or other or both making an initial offer. That offer and accompanying rationale will have been prepared in private meetings with the mediator. It would be unwise for the mediator to go into the joint meeting not knowing what those offers were going to be and, possibly, just as unwise to allow the meeting to proceed unless the mediator considers that the initial offers are realistic.

In a dispute about a pop music recording, the claimant argued that the defendant had had all the financial success and fame arising from their work together. The defendant, after some coaching, felt able to say how much he recognised the achievements of the claimant although he disagreed with the latter's claim to an interest in the copyright. The claimant felt acknowledged and this opened the way to settlement.

In another case, where one party claimed compensation of £20M, a joint meeting between the principals enabled one of the claimant company's directors to explain why he and his co-director felt so aggrieved by the other party's conduct. This led the opposing principal to agree, for the purposes of the mediation, that compensation was due and to express regret about how the relationship came to an end and the way in which it was done (by a hand-delivered letter of termination out of the blue). He then expressed his disagreement with the calculation of loss, and the meeting generated further discussion that led to settlement.

Lawyer-only meetings

These can be used to identify or discuss the essential legal issues, to enable one side to impress on the other the weight they attach to their legal case, to exchange information on costs or other aspects, or to agree about where they disagree. It can also be an opportunity for the mediator to engage in reality testing, where there are difficulties on each side's case. Although the mediator should aim not to advantage or disadvantage either side through the exercise, the expression by the mediator of a view or views or of other possible perspectives may assist each side. Another possibility is that the lawyers from each side can be tasked jointly to reach some convergence about what would likely happen in court or, generally, if settlement is not reached.[9]

Expert-only meetings

If there has been no meeting of experts under CPR Part 35.12 (which allows for joint meetings and a list of points of agreement and disagreement), such meetings can be used to identify

[9] See note 4, at pp 25-27.

common ground and to list the issues of real dispute. In some circumstances, the experts can also be used to agree objective criteria which might form a basis of settlement; e.g. valuation to determine a fair price.[10]

Meetings with another mix of participants

Board directors, finance directors or other decision makers who were not involved in the dispute are often vital to the success of a mediation. Although the presence of those who took part in the transactions which led to the dispute may be useful for the purposes of detail and fact-finding, such persons often wish to justify their actions to colleagues at the mediation. Those who were not involved in the transaction can focus on the commercial issues for settlement.

'Handshake meetings' can be useful, particularly where one or other or both parties are unwilling to engage in a joint meeting at the start of the day, as even an introduction or greeting can contribute to the process. Lunchtime meetings, perhaps as parties select their lunch in the main room, offer a chance for all to gather again informally and fairly briefly and, guided by the mediator, they might discuss where the mediation has got to and review expectations of the day.

Managing joint meetings for positive impact

The mediator needs a full range of facilitation skills to make joint meetings as effective as possible, including:

- providing a process, not a product or a solution;
- keeping alert to what is happening in the moment - paying attention with an open mind and setting aside personal prejudices;
- supporting progress and protecting freedom, equality and fairness of process;
- sometimes doing nothing, in order to facilitate change or productive exchange;

[10] Getting to Yes, Fisher & Ury Ch. 5.

- the ability to live with, and respond positively to, uncertainty, struggle and conflict - not forcing premature resolution on the parties;

- putting her/his own feelings on 'hold';

- monitoring group energy and reading the developing dynamic;

- using a range of interventions, some gentle, some persuasive and some directive;

- deploying visual and practical tools to promote discussion and decision making, including flipchart use, designing models or using matrices (for example in a case with many claimants, categories of claimant might be agreed);

- being spontaneous and using intuition as well as deploying analysis and planned activity.

How to run a joint meeting for positive impact

Joint meetings can be challenging and the mediator needs to be comfortable with this possibility, remaining alert to dynamics between people and making process choices calmly and smoothly. In joint meetings, as throughout the mediation, the mediator works with the people, the problem and the process.

When bringing people into the joint meeting the mediator considers doing the following:

- preparing the room in which the meeting will take place;
- bringing the parties into the room and indicating where they should sit;
- clarifying the purpose of the meeting;
- explaining that the mediator will manage the conversation and inviting the parties simply to say so if they would like a break from the meeting. The mediator can then address any concerns, probably in private;
- reminding parties of how to get the most out of the meeting: for example, to use the opportunity to gain a greater understanding of each other's point of view rather than simply restate their positions, which involves listening more and interrupting less, and being patient and respectful;
- clarifying the issue/s for discussion;
- inviting one party to start as arranged – or the mediator might have agreed to open the floor to the parties so that they decide who starts;

- using facilitation skills to manage the process, including encouraging exploration before solution search; as well as reflecting interests and needs, and drawing attention to common ground. The mediator might clarify requests and offers made, and if appropriate, ask for proposals.

Conversations can become heated in joint meetings, and consideration should be given to when and how to intervene, while at the same time maintaining rapport and allowing a full opportunity for progress. The type of intervention will be determined by what is happening between the parties, and will be a balance between giving space, allowing the communication to develop, and using persuasion where the mediator seeks to guide or even direct. Making demands, issuing warnings, threatening and forcing, are all inappropriate. The mediator has to balance rapport, impartiality and independence, with process control. Control should be exercised in a way that is fair, even-handed and consistent; structured, step by step, moving from less directive to more directive, as appropriate; and not triggered by the mediator's need for comfort or clarity.

It would probably be appropriate to intervene in the following circumstances; if:

- anyone seems very distressed, frightened or intimidated;
- accusation or name calling is becoming personal or deliberately hurtful;
- the discussion is going round in circles, and parties keep repeating themselves or going off the issue;
- parties seem increasingly rigid in their positions;
- one or both parties threaten to leave the room;
- racial or other prejudice is demonstrated as part of the engagement;
- facts or strong feelings need to be clarified;
- repeated attempts to keep the process on track are not working.

It might be appropriate to let parties continue speaking, without intervening, in the following in circumstances, even if they are sounding heated. Where:

- parties are saying new things, exchanging new information;

- parties seem equally comfortable and able to hold their own in the exchange;
- it is only the mediator who is uncomfortable;
- parties are hearing one another and responding to one another's statements;
- parties are being expressive rather than aggressive;
- what parties are saying is informing the issues and making things clearer.

Interventions by the mediator should generally start off being less directive, and only if they do not achieve the desired result should they become steadily more directive. The mediator may start by using non-verbal signals. Body language signals might include cutting eye contact, turning away from a party or using a hand gesture to indicate to a party to stop. The mediator could go further and stand up, sending a stronger signal. These interventions could be followed or accompanied by brief verbal interventions including using a person's name or using short statements such as asking the party to pause for a moment. The mediator might go further, by drawing the parties' attention to what is going on in the room, for example by acknowledging emotions, or pointing out behaviours or particular body language. The parties might need to be guided back to a more constructive approach with some specific process direction or even, as a last resort, reference back to ground rules discussed at the opening of the meeting. When using strategies such as these it is important that the mediator takes care not to embarrass a party, resulting in them losing face.

When ending a joint meeting the mediator should propose returning to private meetings, stating that the purpose has been achieved or that enough has been gained from the joint meeting for now. Before breaking it can be helpful to summarise progress and clarify what will now need to be worked on in further private meetings.

Private meetings complement joint meetings

Appropriate use of joint meetings can only be achieved in the context of the mediation process overall, and this requires the mediator to consider how private meetings will complement the joint meetings and *vice versa*. The authors recognise the value in using private meetings as time for parties to reflect, to confide in the mediator and to prepare. During private meetings, the mediator can act as a coach and sounding board, for example, to help parties to reassess their risks in preparation for an effective counter-offer, or to frame offers, or to rehearse so that the dialogue in a joint meeting can be as constructive as possible.

Conclusion

A mediator who understands the value of joint meetings and uses them creatively can enhance the mediation process significantly. The benefits far outweigh any risk and the existence of a

measure of risk is generally not a justification for limiting the process to a series of private meetings. Parties investing in mediation deserve the full range of techniques to be deployed in their search for resolution. The skilled and experienced mediator should be able to offer the parties the substantial benefits that can emerge from well-judged and well-managed joint sessions.