

# OPENING IMPRESSIONS: STUDY OF THE USE OF THE JOINT SESSION IN MEDIATION\*

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## Introduction: Background and Purpose

To borrow an iconic phrase from Shakespeare, to use or not to use a joint session, that is the question. It's certainly been a question at the top of my mind over the past year [see my two past blog posts on the topic – [The Joint Session: Help or Hindrance](#) (June 30, 2015) and [The Joint Session: The Debate Continues](#) (December 29, 2015)].

The joint session is woven into the fabric of mediation practice – its use dates back to biblical times when religious leaders would bring together members of the community to settle their differences; it is a key component of Aboriginal talking or healing circles; it has long been an integral part of the collective bargaining process. It is also a part of the “mediation model” that most mediators practicing today were taught.

I was taught a mediation model that included the use of the joint session. [I find it has value and I support its use, in the right circumstances](#). So, when I started to notice a trend away from the use of the joint session, a trend generally supported by recent literature, I felt it was time to dig deeper to examine my own practice.

The ADR community, specifically in the United States, has noted a move away from the use of the joint session. [JAMS](#), a United States-based alternative dispute resolution organization, [noted](#) recent resistance toward the use of joint sessions. It conducted a study in April 2015, which revealed a decline in the use of the joint session. [JAMS](#) found that in 2015, only 45% of mediators surveyed conducted joint sessions regularly. Of this same group, 80% reported using joint sessions frequently when they first started mediating (ranging from 4- 20 years ago).<sup>1</sup> In an article for [Dispute Resolution Magazine](#), California-based mediator Lynne S. Bassis [reported](#) on the declining use of joint sessions after speaking with various advocates and mediators. Bassis offers several potential reasons for the increasing desire to mediate in caucus, including lawyer discomfort outside the litigation framework, time saving and anxiety about conflict or confrontation.<sup>2</sup> [Richard L. Hurford](#), the President of [Richard Hurford Dispute Resolution Services, P.C.](#) and a strong advocate for the use of the joint session, [acknowledges](#) that lawyers are increasingly wary of using joint sessions due to strained party relationships, prior negative joint session experiences, power imbalances and increased time and

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<sup>1</sup> “Mediation—Has the Joint Session Lost its Value? - From Senior VP and COO of JAMS,” January 6, 2016 (<http://bit.ly/1O88iSQ>).

<sup>2</sup> “Face-to-Face Sessions Fade Away: Why is Mediation’s Joint Session Disappearing,” Lynne S. Bassis, *Dispute Resolution Magazine*, Fall 2014 (<http://bit.ly/28a7NhG>).

\* Bernard Morrow gratefully acknowledges the assistance of Emily Tallon and Bill Denstedt in tracking the study and drafting this report. Mr. Morrow can be reached at [www.morrowmediation.ca](http://www.morrowmediation.ca). All third party sources referenced in this report can be accessed through the links provided in the electronic version of the report.

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costs.<sup>3</sup> Though the majority of research is based on American trends, we suspect there is a similar move away from the use of the joint session in Canada.

I deliver mediation services primarily in the following areas: employment, commercial, personal injury and construction. While I have observed a decline in the desire for joint sessions in employment disputes, the use of joint sessions in the personal injury area remains the norm. With my varied practice I thought it would be interesting to explore the use of the joint session and, in particular, the differences across practice areas.

What follows is a preliminary report on the results of a study on the use of the joint session in my mediation practice over the course of a 12-month period, from April 1, 2015 through March 31, 2016. The goals of the study were to measure the frequency of use of the joint session, how the joint session is utilized, the impact that type of dispute plays in the use of a joint session, and the impact that joint sessions have on the length and outcome of mediations.

Over the course of the term of the study, both half-day and full-day mediations were scheduled. Of the 79 mediations that comprised the sample, 71 were scheduled as half-day (three hour) mediations. Many of these mediations went beyond three hours and we assessed the impact of duration on the outcome of these mediations. There were eight mediations scheduled for a full-day.

This study reports solely on the objective data that was collected. While we were tempted to canvass subjective views from counsel and disputants on their use of the joint session (for example, whether they liked it or not; whether they thought it added value or not), we decided against doing so to eliminate [confirmation bias](#)<sup>4</sup> from the discussion. In a future study, we may include this component.

### **Joint Session: What Do We Mean?**

For the purposes of the study we created the following five process categories:

1. Full Joint Session
  - Opening statements by the mediator and/or parties
  - Further joint discussion at one or more points during the mediation session

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<sup>3</sup> "Please Mr./Ms. Mediator, Anything But a Joint Session!", Richard L. Hurford, September 25, 2015 (<http://premiadr.com/anything-but-a-joint-session/>).

<sup>4</sup> Confirmation bias, also called confirmatory bias or myside bias, is the tendency to search for, interpret, favor, and recall information in a way that confirms one's preexisting beliefs or hypotheses, while giving disproportionately less consideration to alternative possibilities. ([https://en.wikipedia.org/wiki/Confirmation\\_bias](https://en.wikipedia.org/wiki/Confirmation_bias))

2. Limited Joint Session – Type 1
  - Opening statements by the mediator and counsel and/or parties
  - No further joint discussion during the mediation session
3. Limited Joint Session – Type 2
  - Opening statement by the mediator only
  - No further joint discussion during the mediation session
4. Limited Joint Session – Type 3
  - No opening statement by the mediator or counsel and/or parties
  - Joint discussion at one or more points during the mediation session
5. No Joint Session
  - Mediation conducted exclusively using caucus and shuttle negotiation techniques

### **Sample and Method**

Our sample consisted of 79 mediations of civil disputes conducted over the 12-month period. All mediations involved single sessions completed over one day (either as a half-day or full-day mediation). For each matter, we recorded the following information:

- title of proceedings
- date of mediation
- type of dispute
- outcome of mediation
- duration of mediation
- whether the mediation was mandatory or private
- whether a joint session was conducted at some point during the course of mediation
- if a joint session was conducted, what kind(s) of joint sessions took place (with reference to the four process categories set out above)

Of the 79 mediations conducted, 58 were mandatory (that is, they were governed by Rule 24.1 of the *Rules of Civil Procedure*) and 21 were private. The types of disputes fell into the following five categories (with the number of disputes mediated by type set out in parentheses): personal injury (36), employment (27), commercial (10), construction (five) and estates (one).

## Outcomes and Observations

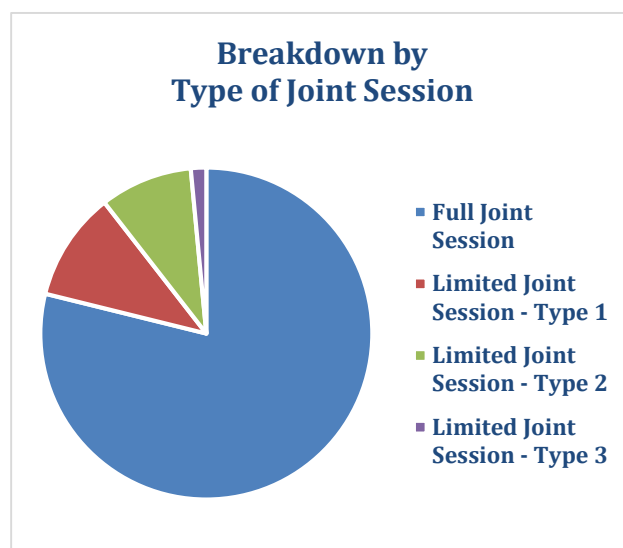
### Number of Joint Sessions

Of the 79 mediations that comprised the sample, 66 (83.5%) were conducted using some form of joint session during the course of mediation; 13 (6%) were conducted entirely in caucus.

### Type of Joint Session

For those mediations in which a joint session was conducted, the breakdown by type of joint session was as follows:

- Full Joint Session: 52 mediations (78.7%)
- Limited Joint Session – Type 1: seven mediations (10.6%)
- Limited Joint Session – Type 2: six mediations (9%)
- Limited Joint Session – Type 3: one mediation (1.5%)



### Mandatory v Private

Private mediations utilized joint sessions marginally more often (3%) than in mandatory mediations. 82.7% of mandatory mediations and 85.7% of private mediations had a joint session at some point during the course of the mediation.

### Type of Dispute

Personal injury disputes made up nearly half of the sample (45.6%). All 36 personal injury cases used a joint session at some point during the mediation session. 29 personal injury cases (or 80.5% of all personal injury cases) saw the use of a Full Joint Session (involving an opening statement from the mediator, opening statements from counsel and/or the parties, and some form of joint discussion during the course of the mediation), and the other seven had a Limited Joint Session – Type 1 (involving opening statements from the mediator and counsel and/or the parties).

Of 27 employment mediations, only 17 (or 62.9%) opted for a joint session. A Full Joint Session took place in 11 of these and a Limited Joint Session – Type 2 took place in the remaining six, with counsel and their respective clients meeting together only for the delivery of the mediator's opening statement.

Commercial mediations saw the use of a joint session 80% of the time (eight matters in total) and, of that percentage, a Full Joint Session took place in all.

Of the five constructions disputes mediated, all involved some form of joint session with four employing a Full Joint Session and one only having some form of joint discussion (Limited Joint Session – Type 3).

Type of Dispute	Full Joint Session	Joint Session Type 1	Joint Session Type 2	Joint Session Type 3
<b>Personal Injury</b> (100% opted for joint session)	29 out of 36 (80.5%)	7 out of 36 (19.4%)	0	0
<b>Employment</b> (62.9% opted for joint session)	11 out of 17 (64.7%)	0	6 out of 17 (35.2%)	0
<b>Commercial</b> (80% opted for joint session)	8 out of 8 (100%)	0	0	0
<b>Construction</b> (100% opted for joint session)	4 out of 5 (80%)	0	0	1 out of 5 (20%)

### Duration

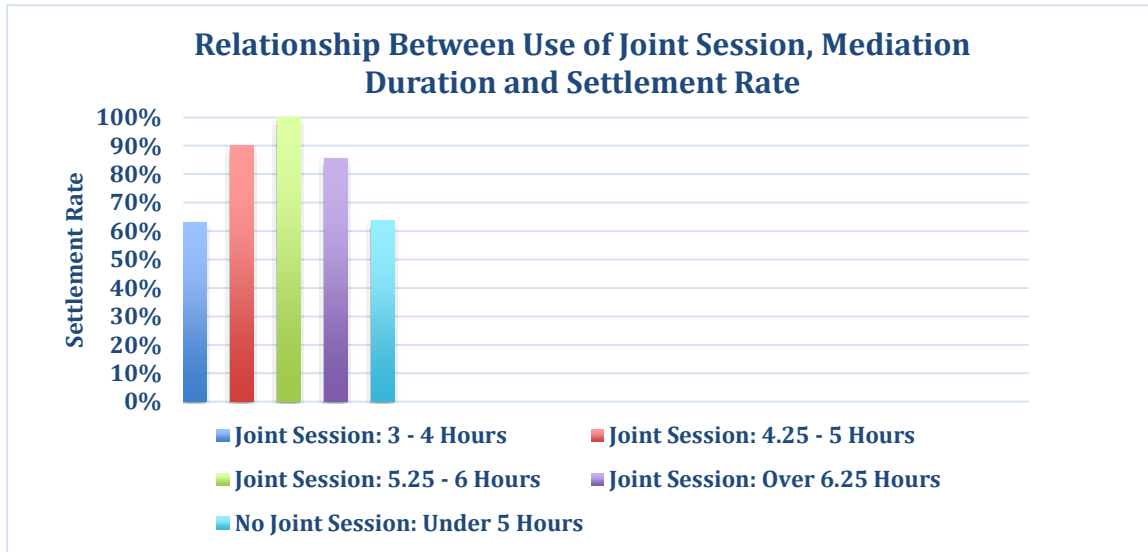
Just over half the mediations conducted (53.1%) lasted 3-4 hours. There appears to have been some relationship between length of mediation, the use of the joint session and settlement.

Mediations that employed a joint session of some kind had a higher chance of settlement the longer they lasted. Mediations that had a joint session and lasted 3-4 hours had a 63.2% settlement rate. By comparison, mediations that lasted 4.25-5 hours and employed a joint session had a 90% settlement rate and mediations that ran 5.25-6 hours had a 100% settlement rate. Of those mediations that employed a joint session of some kind and were completed in less than five hours, the settlement rate was 68%.

By comparison, in those cases in which no joint session was conducted, 84.7% of those mediations were completed in under five hours. Of those cases, the settlement rate was 63.6%.

Seven mediations that had joint sessions and had been scheduled for a half-day lasted over 6.25 hours. Of the seven, six (85.7%) settled and one (14.3%) did not. By comparison, there were no mediations that were scheduled for a half-day that were conducted exclusively in caucus that lasted longer than 6.25 hours.

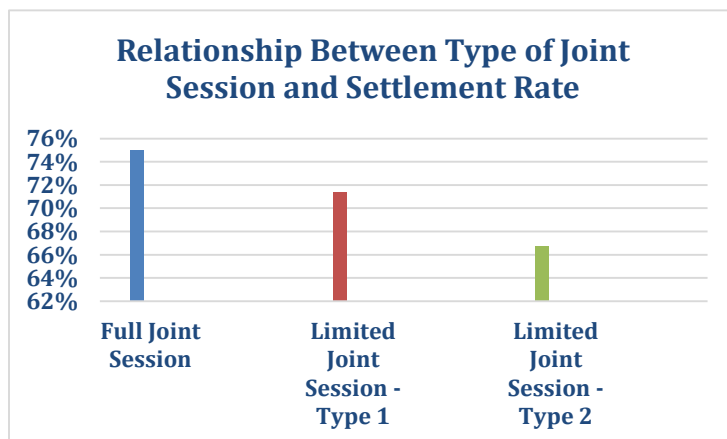
Overall, whether a mediation was conducted using some form of joint session or exclusively in caucus, there was not a marked difference in the duration of the mediation session. Mediations conducted using some form of joint session took, on average, slightly less time (4.75 hours) as compared to those mediations in which a joint



session did not occur (4.85 hours). In compiling the duration data, we have excluded scheduled full-day mediations to avoid skewing the half-day figures.

### Settlement Rate

The settlement rate for cases that had a joint session was only slightly higher than for those that did not have a joint session. Mediations that employed some form of joint session settled 72.7% of the time, while those mediations that used only a caucus format settled 69.2% of the time.



Mediations that employed a Full Joint Session (characterized by a mediator opening statement, opening statements from counsel and/or the parties, and joint discussion) had a slightly

higher settlement rate of 75%. This number decreased to 71.4% for mediations that involved the use of the Limited Joint Session – Type 1 (in which both the mediator and counsel and/or the parties made opening statements in joint session), and decreased further to 66.7% in cases mediated using the Limited Joint Session – Type 2 (in which only the mediator made an opening statement in joint session).

## Conclusions and Next Steps

Our sample was large enough to draw certain correlations and to make several significant observations.

- Mediation duration was not affected by the use of the joint session. Comparing half-day mediations that had some form of joint session with those that were conducted using only caucus, the average mediation duration was less than five hours regardless of the format employed.
- However, those mediations that went longer than four hours and utilized some form of joint session enjoyed a much higher settlement rate (90.9%) than those mediated strictly through the use of caucus and shuttle negotiation only (57.4%).
- The level of participation in some form of joint session appears to positively impact the rate of settlement. Mediations that used a Full Joint Session had a 75% settlement rate; the settlement rate decreased to 71.4% in cases in which the Limited Joint Session – Type 1 was employed; and, the settlement rate decreased further to 66.7% with the use of the Limited Joint Session – Type 2.
- Overall, mediations that had some form of joint session settled 72.7% of the time; whereas, mediations that did not have a joint session settled at a 69.2% rate.
- Cultural norms appear to play a significant role in determining the extent to which the joint session is used. For example, of the personal injury cases mediated over the term of the study, the joint session was used in one or more formats 100% of the time; by comparison, of the employment cases mediated, a joint session of some kind was used only 62.9% of the time. This represents an almost 40% difference between the two areas of law.

We are continuing to monitor our mediations using the criteria established for this study. While we are pleased with the wealth of information that this study has provided, we are actively considering ways in which we can improve the study by refining the methodology and/or expanding the categories for data collection. We hope that with further refinements, continued data collection and analysis, the conclusions to be drawn from the study on the use of the joint session will become that much richer and definitive.