Tips for mediation success

Lawyers encouraged to consider opening statements in joint sessions

BY MICHAEL McKIERNAN
For Law Times

Lawyers who avoid opening statements in mediation joint sessions should reconsider their approach, according to a Canadian mediator.

Allan Stitt, the president and chief executive officer of Toronto-based ADR Chambers, says it has become increasingly common for lawyers on one or both sides of a mediation to ask him to move straight to caucus and bypass the traditional direct opening address for fear of antagonizing the opposing party.

"The lawyers fighting against this are those without the skills to persuade the other side," he says.

"If you're going to pass up your only opportunity in the whole process to persuade the other side, then that is an admission that you are not skilled in an area that you should be as a lawyer. I see it as the equivalent of a lawyer who is about to go into court and decides not to argue before the judge because they might get angry. In mediation, it's not the judge who decides; it's the other side."

Stitt acknowledges that a bad opening statement in joint session can make the situation worse for the parties in a mediation but he says lawyers should focus on the possibility that a strong performance could lead to a better deal for their client by improving relations and increasing the possibility of a settlement.

"If your opening is making the other side mad, my reaction would be that it wasn't a very skilled opening and that you should learn how to present a better one," says Stitt.

"For lawyers to argue that the better option is to give up your right to try to persuade them altogether is absurd."

Bernard Morrow, a former litigator who's now the principal of Toronto's Morrow Mediation, says the reluctance to directly address opposing parties is part of a wider trend against the use of joint sessions in mediation. He points to a survey by global alternative dispute resolution firm JAMS International ADR Center Ltd. that found that only 45 per cent of its neutrals around the world regularly used joint sessions. The number compares with about 80 per cent of the same respondents who said they had employed joint sessions at the outset of their mediation careers.

"There is a perception on the part of some lawyers that they have more control over their client and the process when there is not a joint session," says Morrow.

"They see the potential for emotions to become inflamed or for information to be revealed that they are not prepared to divulge. Caucusing might be easier for both the client and the lawyer because it provides a buffer."

The irony, says Morrow, is that in attempting to retain agency over the process by skipping joint sessions, lawyers are happy to place more power in the hands of the mediator.

"I'm essentially the one with the most extra weight on my shoulders if I'm shuttling between the two sides, putting my own spin on the dialogue," he says.

Apart from personal injury matters, where joint sessions have retained their popularity, Morrow says he has witnessed a decline in their use in most areas of the law, including commercial disputes and particularly in employment law, despite his own strong encouragement for parties to engage in some sort of direct discussion. Morrow worries that the lack of joint sessions may have a negative effect on the outcomes of mediations and has begun research to study the impact.

It's important not to approach mediation with a litigation mindset, says Mitchell Rose.

"There's a dynamism and alacrity you get in real-time discussion that can't be duplicated in caucus," he says.

Mitchell Rose, a lawyer and mediator at Stancer Gossin Rose LLP in Toronto, says only the rarest situations, such as an extreme power imbalance between the parties or a threat of physical violence, will prompt him to recommend against a joint session. Otherwise, he says joint sessions can offer the parties a psychological benefit, especially if there will be an ongoing relationship after the dispute settles.

"They need to learn how to interact with one another. And if they can't resolve it, they're going to be seeing a lot more of each other anyway," he says.

According to Jeff Morris, the mediator has a role to play in ensuring the parties are ready for a joint session.

"Your role is to coach the parties and counsel. There needs to be some advance discussion about what they're going to talk about in the joint session and how that can move them towards, rather than away from, a resolution. You don't want a shotgun approach where everything comes up or you're simply repeating what was said in the mediation brief," says Morris, the founder of Jeff Morris Mediation in Toronto.

Rose says the biggest mistake lawyers can make in a joint session is approaching the mediation with a litigation mindset.

"If you're grandstanding and telling the other side why they are wrong and why they are going to lose, it's not going to be conducive to resolving the case," he says.

"The average person probably stops listening to negative information after a few minutes. Joint sessions require a much more subtle and careful form of lawyering that takes into account the other side's feelings."

He says one of the most effective opening statements he has ever heard of came in response to a long and traditional litigation-style opening before another mediator.

"They turned it over and the lawyer for the other side simply said: 'Thank you for coming. We appreciate it. You have a good lawyer and you will be well served at trial, but we're here to talk about settlement. Let's do that,'" says Rose. "It came out of the blue and completely disarmed the other side."

Stitt says parties in mediation are much more likely to respond to points about the risks of litigation in joint sessions rather than the relative merits of each side's case.

"People are more comfortable hearing about and considering the risk that a bad judge could decide their case wrongly than hearing about how weak their case is and what a liar they are," says Stitt.

"You're never going to persuade the other side you're right, so there's no value in doing that." **LT**

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