The Benefits of the Joint Session in Family Law Matters

BY WESLEY PARKS

This article discusses the benefits of using the joint session during mediation in family law matters.

Shuttle mediation, where the parties remain apart and the mediator moves between them, is often the sole method used in family law mediations, while the many benefits of the joint session are overlooked. Family law practitioners should carefully assess the potential benefits and detriments of participating in a joint session in mediation before nixing it. This article examines empirical studies on mediation that support using the joint session and provides a framework for family law lawyers evaluating whether to recommend the joint session to their clients.

Empirical Research on Mediation

Empirical research on the mediation process and the effectiveness of mediator techniques in family law matters is sparse due to confidentiality concerns and administrative barriers to performing intra-mediation behavioral observations. Research on joint sessions is minimal and focused on the initial joint session, but the limited empirical evidence available about mediation best practices supports the use of the joint session in family law matters.[1] The following selected empirical studies provide insight on mediation best practices in the family law context.

Wissler and Hinshaw Initial Joint Session Study

Roselle L. Wissler and Art Hinshaw found that the use of the joint session in family law matters has changed dramatically from historical mediation practice, and they suggest that suboptimal settlements may result from fewer face-to-face exchanges between parties.[2] One of mediation's unique process attributes is the use of a combination of joint sessions and caucuses. A mediator will conduct a joint session between the parties and respective counsel together in the same space, whether virtually or in-person. Initial joint sessions usually involve the mediator explaining the process and discussing ground rules, followed by the parties and counsel discussing their perspectives on the dispute.[3] The traditional mediation process also includes caucuses, or separate meetings between the mediator and a subset of the participants. The mediator uses caucus sessions after the initial joint session to

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move parties toward settlement. Historically, caucus was used selectively, while joint sessions were the primary source of discourse between the parties.[4]

Wissler and Hinshaw found that family law mediation now relies more on the caucus for substantive discussions surrounding the dispute.[5] In their survey of 1,065 civil and family law mediators from eight states across four regions of the United States, Wissler and Hinshaw found that 64% of family law mediators conducted initial joint sessions with the parties and counsel together.[6] In a majority of cases, the initial joint session included only "an explanation of the mediation process and its confidentiality, the mediator's impartiality and role, the parties' roles, and the ground rules for the mediation."[7] Even when an initial joint session occurred, fewer than half of mediators explored informational, interpersonal, or substantive settlement barriers in joint session.[8] The study also revealed that the parties were more likely to make an opening statement and exchange initial proposals in the initial joint session when they were not represented by counsel.[9] The authors concluded, "As a result, the potential to achieve many of the benefits ascribed to parties' direct communication via opening statements in traditional initial joint sessions—both informational benefits as well as the psychological benefits of explaining their views to and being heard by the other party and feeling they had their day in court—is reduced."[10] The next study further supports the benefits of the joint session in family law matters.

The Maryland Study on Child Custody Mediation

In 2018, Lorig Charkoudian, Jamie L. Walter, and Deborah Thompson Eisenber found that the amount of time spent in caucus was correlated with decreased long-term faith in parents' ability to work together toward resolution of future custody disputes. This research was conducted on 130 court-annexed child custody mediation cases involving 270 participants in Maryland (the Maryland Study). The researchers performed a follow-up survey approximately six months after the mediation session and found that participants who engaged in caucus-style mediation, where parties are kept apart in separate rooms with the mediator shuttling between them, felt more hopeless about being able to resolve their conflict with the other parent.[11] In cases where the caucus was used more frequently, parties were less likely to resolve custody disputes on their own six months after the mediation, resulting in subsequent litigation.

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Conversely, the Maryland Study found that a mediator's use of joint brainstorming techniques increased parents' belief that they could work together to resolve their conflicts with a range of options after the mediation. Brainstorming techniques included "asking participants what solutions they would suggest, summarizing those solutions, and asking participants how they think those ideas might work for them."[12]

The Maryland Study also found that post-mediation litigation was more likely when the mediator used directive or evaluative techniques, such as providing case analysis, assessing the case's strengths and weaknesses, predicting court outcomes, and recommending settlement proposals.[13] The mediations in this study did not include any attorneys representing clients, but when the mediator employed evaluative techniques more associated with legal practice, the parties were not as satisfied with the outcomes. That may be partly because mediator evaluation tends to lessen party self-determination, which increases the likelihood that the parties will distrust the process and the mediator—and therefore distrust the result of the mediation.[14] Joint sessions can and should be used to increase parties' confidence in the fairness of the process, increase party participation, increase the parties' sense of self-determination, and, thus, promote lasting settlements. The next study supports the notion that mediation training decreases attorney mistakes when advising clients on whether a settlement offer should be accepted.

Attorney Errors in Settlement Advisement: The Kiser Study

Studies have found that attorneys trained in mediation are better able to counsel clients throughout all stages of litigation, including the mediation stage. For example, the groundbreaking 2008 empirical study published by Randall L. Kiser, Martin A. Asher, and Blakeley B. McShane on more than 2,000 California civil litigation cases involving nearly 5,000 attorneys evaluated the magnitude of errors made by attorneys in settlement negotiations (the Kiser Study). The Kiser Study found reduced attorney error rates during settlement negotiations when an attorney with mediation training was involved.[15] In the Kiser Study, an attorney "error" was defined as "when either a plaintiff or a defendant decides to reject an adversary's settlement offer, proceeds to trial, and finds that the result at trial is financially the same as or worse than the rejected settlement offer—the 'oops' phenomenon."[16] The Kiser Study found that, on average, a plaintiff error resulted in

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$25,000 in economic loss to plaintiffs per case, and a defendant attorney error resulted in $236,000 in economic loss to defendants per case.[17] Plaintiffs' attorneys trained in mediation had 21% fewer plaintiff decision errors. Error-free cases increased from 14.5% to 21.1% when either side was represented by an attorney trained in mediation.[18] The Kiser Study showed that attorneys trained in mediation have a greater ability to see the dispute from the other side's perspective, resulting in less errors in advising their clients.

The Kiser Study demonstrates that lawyers trained in mediation more accurately predict client outcomes and save clients unnecessary litigation expense. Lawyers with mediation training are less likely to make errors in advising their clients about whether to accept a settlement offer in mediation.[19]

Douglas N. Frankel and James H. Stark expanded on the Kiser Study and concluded that lawyers without mediation training are prone to the influence of bias and thus "are not very good at evaluating evidence and making predictions about actual case outcomes."[20] According to Frankel and Stark, mediation training in neutrality reduces bias and provides lawyers with the ability to consider the other side's position, which correlates to improved litigation outcome predictions and improved settlement advisement—significant benefits to their clients.[21] "The most effective lawyers do, of course, bring a measure of dispassion, objectivity, and even 'oppositional thinking' to client representation tasks."[22] Lawyers trained in mediation are also better at appealing to the perspective of a judge or jury.[23] Although the Kiser study did not directly address the use of joint sessions, lawyers trained in mediation are trained in the traditional mediation format, which includes a combination of both joint sessions and caucus. Arguably, lawyers trained in mediation should be more apt to use the joint session to their clients' benefit.

Neuropsychological Research

Mediators have expertise in the mediation process, and to be successful, they must create a safe space for participants to work through initial emotional responses caused by facing adversaries. By doing this, they can help the parties participate in joint problem-solving. "The mediator creates a safety zone for the disputants, a demilitarized zone where the signposts have been changed, where it is safe to meet [face-to-face], safe to identify conflict, safe to negotiate, and even safe to reach a settlement."[24]

From a neurobiological perspective, a distinctive feature of mediation is that parties in mediation experience both fear and safety at the same time. The sympathetic nervous system, the branch of the nervous system that produces the fight-or-flight response, is aroused as parties confront and negotiate with their adversaries. Yet, at the same time, the parasympathetic nervous system—which produces soothing and calming effects—is activated through the process of social engagement and communication.

Ideally, as parties' fighting and self-protective impulses are managed and controlled, they become able to think more clearly, and as a result, are more likely to reach a realistic resolution. This is the magic of mediation.[25]

Mediators help participants and counsel reassess exaggerated and inflated positions, view the dispute from a different perspective, and explore underlying interests that may lead to settlement. The process is called the "inflation, deflation, realistic solution" cycle (IDR cycle).[26] Through this process, the parties experience empathy development that often requires understanding facial visual cues that have been neuropsychologically embedded throughout our evolutionary development.[27] Neuropsychological research has shown that one's face is a key element in the brain-face-heart circuitry. Mirror neurons of the face are used to develop empathy, language, and self-awareness.[28] The face is central to shifting from a fight-or-flight state to a socially engaged state. The face is central to shifting mediation participants through the IDR cycle, from being driven by fear to being driven by logic, and from fighting to problem solving.[29]

"[W]hen 'face' is lost—that is, when the vagal brake is lifted—conflict physiology dominates."[30] Neuroscience has revealed that in conflict "the brain path to resolution needs a staged de-escalation sequence that includes constructive conversation among the disputants."[31] The ability

to persuade and analyze is reduced without the face-to-face conversations and the additional understanding that comes from a joint session.[32] "More face-to-face contact in dispute resolution might offer the opportunity to demonstrate sincerity in an emotionally convincing manner. It may also offer the opportunity to assess credibility of the party opponents or lawyers."[33] Why, then, do family law attorneys often forgo the joint session? Below we examine why joint sessions are less favored.

Reasons for the Demise of the Joint Session

Reasons why fewer family law mediations involve joint sessions range from consumer-driven economic influences to a lawyer's lack of knowledge about the mediation process. In some cases, the risks outweigh the potential benefits, such as in cases where domestic violence or control are at issue. But such cases should be the exception, not the rule.[34] Often, the reasons revolve around a lack of knowledge of the benefits of mediation and resistance to letting go of the litigation mindset, especially when mediation is court-ordered and attorneys are involved.[35] "[Lawyers] often treat mediation with the same formality as arbitration, submitting positional briefs based on the law. Frequently, they focus more attention on their positions than on the interests of their client or of their opponent's."[36]

Mediation is a private process, and mediators are essentially unregulated professionals. "Mediators today operate with few market restrictions, few controls on their conduct, and few consequences for misbehavior."[37] Therefore, market forces may influence mediators more than other professionals, such as psychologists, doctors, or lawyers, who are subject to both front-end licensure requirements and back-end regulatory scrutiny.[38] Mediators are ethically bound to ensure a quality process, but nothing specifies what that process should look like.[39]

> [C]onsumers 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.[40]

The empirical evidence regarding mediation best practices indicates that the joint session results in less future litigation over mediated agreements, yet mediators are using more shuttle diplomacy and fewer joint sessions. In a 2016 survey conducted on the nationwide JAMS panel of mediators, 80.34% started their practices using the joint session at the beginning of every mediation, but at the time of the survey, those same mediators used the joint session in only 45.1% of cases.[41] For 41.09% of those surveyed, attorney and party preference was the primary reason for the decrease in the use of the joint session. The survey observes, "The preference of attorneys is a primary consideration in deciding whether to have a joint session, and comments indicate mediator sensitivity to lawyer resistance."[42] The JAMS survey comments also emphasize a general consensus that joint sessions are important in family-related matters.[43] Attorney preference in avoiding the joint session may be influenced by providing information about the benefits of the joint session.

The Benefits of the Joint Session

Findings from selected empirical research of the joint session may help participants and counsel see how the protected joint session environment can allow them to explore oppositional thinking. That could result in better client outcomes and less attorney error in settlement advisement. The joint session also promotes participant self-determination and problem-solving behaviors, allowing the participants to control the outcome and overcome conflict, a distinguishing characteristic of mediation.[44] The sidebar lists some of the benefits of joint sessions. This list

BENEFITS OF THE JOINT SESSION

- Face-to-face negotiations yield outcomes that are different from caucusing only, and joint sessions encourage joint problem solving.
- Joint sessions provide an opportunity to build the trust necessary for settlement.
- Clients may benefit from seeing negotiation strategies firsthand without the filter of the mediator.
- Joint sessions may improve relationships and assist in modeling effective communication.
- Parties may develop empathy for one another from telling their stories directly to each other.
- The joint session can help create an agenda for the negotiation, highlight goals of the mediation, and underscore why it's important to achieve joint goals.
- The joint session promotes social interaction and provides a human dimension to the dispute. The joint session can move the parties from fight-or-flight mode into problem-solving mode.
- Attorneys can benefit from the joint session by presenting their perspective on the case to the opposing party and deflating overconfidence in entrenched positions.
- Brainstorming solutions and engaging in creative problem-solving are easier in a joint session.
- The joint session can be used to ensure the mediator has conveyed caucus messages accurately.
- A joint session often saves time and reduces the need for the mediator to relay messages back-and-forth between the parties.
- The joint session may be the only time the attorney gets to see how the opposing party will present in court.
- A joint session often can break negotiation snags and reveal common underlying interests that may lead to resolution of the dispute.

Source: Bassis, "Face-to-Face Sessions Fade Away: Why Is Mediation's Joint Session Disappearing?," 21 *Disp. Resol. Mag.* 30, 32 (2014). This list summarizes points in the article.

may assist practitioners in counseling their clients on the benefits of joint sessions. It can also be a conversation starter when discussing with clients reasons to try using the joint session in mediation.

The list is not exhaustive. There are many other benefits to the joint session, such as increased ownership and understanding the process, creating a safe space to express regret and apologize, understanding more fully the risks and uncertainty of proceeding with litigation, and identifying non-monetary solutions as part of a global settlement.

The statutory definition of mediation in the Colorado Dispute Resolution Act (CDRA) requires party participation: "Mediation" means "an intervention in dispute negotiations by a trained neutral third party with the purpose of *assisting the parties to reach their own solution*."[45] Therefore, when preparing clients for mediation, lawyers "should envision and require party participation. Lawyer-mediators talking to lawyers or former-judge-mediators talking to lawyers is not party participation."[46]

The CDRA distinguishes the mediation process from a settlement conference, which is often portrayed as mediation. It may be a good idea to counsel clients in advance on what they may encounter in these so-called "mediations." A "settlement conference" is an informal assessment and negotiation session conducted by a legal professional who hears both sides of the case and may advise the parties on the law and precedent relating to the dispute and suggest a settlement.[47]

Lawyers are ethically bound to communicate with their clients regarding the "means by which the client's objectives are to be accomplished" and to provide competent representation and the required proficiency to represent clients in mediation.[48] Lawyers are ethically required to adequately counsel clients about the types of dispute resolution processes available to them. Every family law lawyer's mediation preparation plan should include an individualized case analysis to assess whether clients may benefit from the joint session.

Conclusion

Mediators are often met with resistance to the joint session in family law sessions when parties are represented by counsel. Attorneys may be concerned about their clients' emotional state and discomfort with seeing the other party. Yet neurobiological research shows that a fight-or-flight response during conflict is a natural part of the "inflation, deflation, realistic solution" cycle, and conversation between the parties can de-escalate the conflict and open the door to problem solving. A growing body of research indicates that keeping the parties apart during mediation negatively affects long-term resolution of the conflict. This frustrates the overarching policy goal of lessening the strain on the court system and encouraging families to resolve their own disputes when possible. Defaulting to a shuttle mediation without a thorough assessment of the benefits and detriments of the joint session should no longer be considered a best practice. CL

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NOTES

1. *See generally* Landrum, "The Ongoing Debate about Mediation in the Context of Domestic Violence: A Call for Empirical Studies of Mediation Effectiveness," 12 *Cardozo J. Conflict Resol.* 425, 428 (2011). *See also* Rossi et al., "Shuttle and Online Mediation: A Review of Available Research and Implications for Separating Couples Reporting Intimate Partner Violence or Abuse," 55 *Fam. Ct. Rev.* 390, 390, 400 (2017) ("Overall, additional high-quality empirical research is critical in advancing the field on how to appropriately assist family law cases with a history of [domestic violence].").

2. Wissler and Hinshaw, "The Initial Mediation Session: An Empirical Examination," 27 *Harv. Negot. L. Rev.* 1, 41 (2021).

3. *Id.* at 3–4.

4. *Id.* at 4.

5. *Id.* at 40–41.

6. *Id.* at 10, 15. The mediators were from California, Utah, Michigan, Illinois, Maryland, and New York, not Colorado. From personal experience, the author of this article posits that the percentage of joint sessions used in family law matters is lower in Colorado when compared to these other states.

7. *Id.* at 3.

8. *Id.* at 23.

9. *Id.* at 30.

10. *Id.* at 36.

11. Charkoudian et al., "What Works in Child Custody Mediation: Effectiveness of Various Mediator Behaviors on Immediate and Long-Term Outcomes," 56 *Fam. Ct. Rev.* 544, 560 (2018). Maryland prohibits attorneys from attending child custody mediations in a representative capacity. The author suggests that further studies need to be performed to address the effect of attorney presence in mediation.

12. *Id.* at 560.

13. Nolan-Haley, "Mediation: The New Arbitration," 17 *Harv. Negot. L. Rev.* 61, 84 (2012).

14. *Id.*

15. Kiser et al., "Let's Not Make a Deal: An Empirical Study of Decision Making in Unsuccessful Settlement Negotiations," 5 *J. of Empirical Leg. Stud.* 551, 587 (Sept. 2008). Although this study was not focused on family law cases, the findings can be extrapolated to settlement errors in family law matters.

16. *Id.* at 563.

17. *Id.* at 588.

18. *Id.* at 590. The Kiser Study authors note that in other processional fields, such as medicine, these error rates would be unacceptable.

19. Frankel and Stark, "Improving Lawyers' Judgment: Is Mediation Training De-Biasing?," 21 *Harv. Negot. L. Rev.* 1, 3 (2015).

20. *Id.* at 29.

21. *Id.* at 31. Frankel and Stark note that mediation training improves a lawyer's ability to make realistic considerations and to analyze the whole dispute from both sides.

22. *Id.* at 33.

23. *Id.* at 42.

24. Wallerstein, "Psychodynamic Perspectives on Family Mediation," 1987 *Mediation Q.* 7, 15 (1987).

25. Bader, "The Psychology and Neurobiology of Mediation," 17 *Cardozo J. Conflict Resol.* 363, 364 (2016).

26. *Id.* at 363.

27. *Id.*

28. Birke, "Neuroscience and Settlement: An Examination of Scientific Innovations and Practical Applications," 25 *Ohio St. J. of Disp. Resol.* 477, 503 (2010).

29. Bader, *supra* note 25 at 371 ("Thus, when face-to-face contact occurs in an environment of safety and respect, the social engagement system is able to play a 'downregulating' or 'deflating' force in a mediation, limiting the fight-or-flight response.").

30. *Id.*

31. Galton and Allen, "Don't Torch the Joint Session," 21 *Disp. Resol. Mag.* 25, 25 (2014).

32. *Id.*

33. Birke, *supra* note 28 at 505.

34. *See* Lanzetta, "Mediation/Collaborative Law: Exploring a New Combination in Alternative Dispute Resolution in Cases of Divorce and Domestic Violence," 20 *Cardoza J. Conflict Resol.* 329, 330 (2019). (When mediating cases involving domestic violence, mediators should "(1) use . . . preliminary screening tools to determine a couple's suitability for the process, and . . . determine what procedural remedies would be appropriate to address the presence of domestic violence; (2) [implement] safeguards within the process itself, such as *setting specific ground rules to regulate the parties' interactions*, both during the mediation session and outside of it; and (3) [require] specialized training and qualifications for mediators dealing with these difficult cases.") (emphasis added).

35. Galton and Allen, *supra* note 31 at 26 (noting that "[m]ost lawyers have never gone to mediation advocacy school.").

36. Nolan-Haley, *supra* note 13 at 75.

37. Moffitt, "The Four Ways to Assure Mediator Quality (and Why None of Them Work)," 24 *Ohio St. J. of Disp. Resol.* 191, 193 (2009).

38. *Id.* at 203. Moffitt discusses four potential avenues for mediator regulation: (1) public front end where license is a bar to entry; (2) public back end where regulatory boards punish bad behavior; private front end, such as professional organizations (American Bar Association, American Medical Association, American Psychological Association, etc.); and (4) private back end civil suits for malpractice.

39. Model Standards of Conduct for Mediators, Standard VI. Quality of Process (Am. Bar Ass'n, Ass'n for Conflict Resol., and Am. Arb. Ass'n 2005) (A mediator should ensure a quality process and encourage mutual respect among the parties by promoting fairness, allowing adequate opportunities for all parties to participate in discussions, and allowing the parties to decide whether and how to proceed toward an agreement.).

40. Galton and Allen, *supra* note 31 at 28.

41. Folberg, "The Shrinking Joint Session: Survey Results," 22 *Disp. Resol. Mag.* 12, 15 (2016).

42. *Id.* at 20.

43. *Id.* at 18.

44. Nolan-Haley, *supra* note 13 at 68. Nolan-Haley argues that zealous advocacy and mediator evaluation have shifted mediation toward a process better described as a settlement conference or arbitration.

45. CRS § 13-22-302(2.4) (emphasis added).

46. Galton and Allen, *supra* note 31 at 28.

47. CRS § 13-22-302(7).

48. Colo. RPC 1.1, 1.2, and 1.4(a)(2).