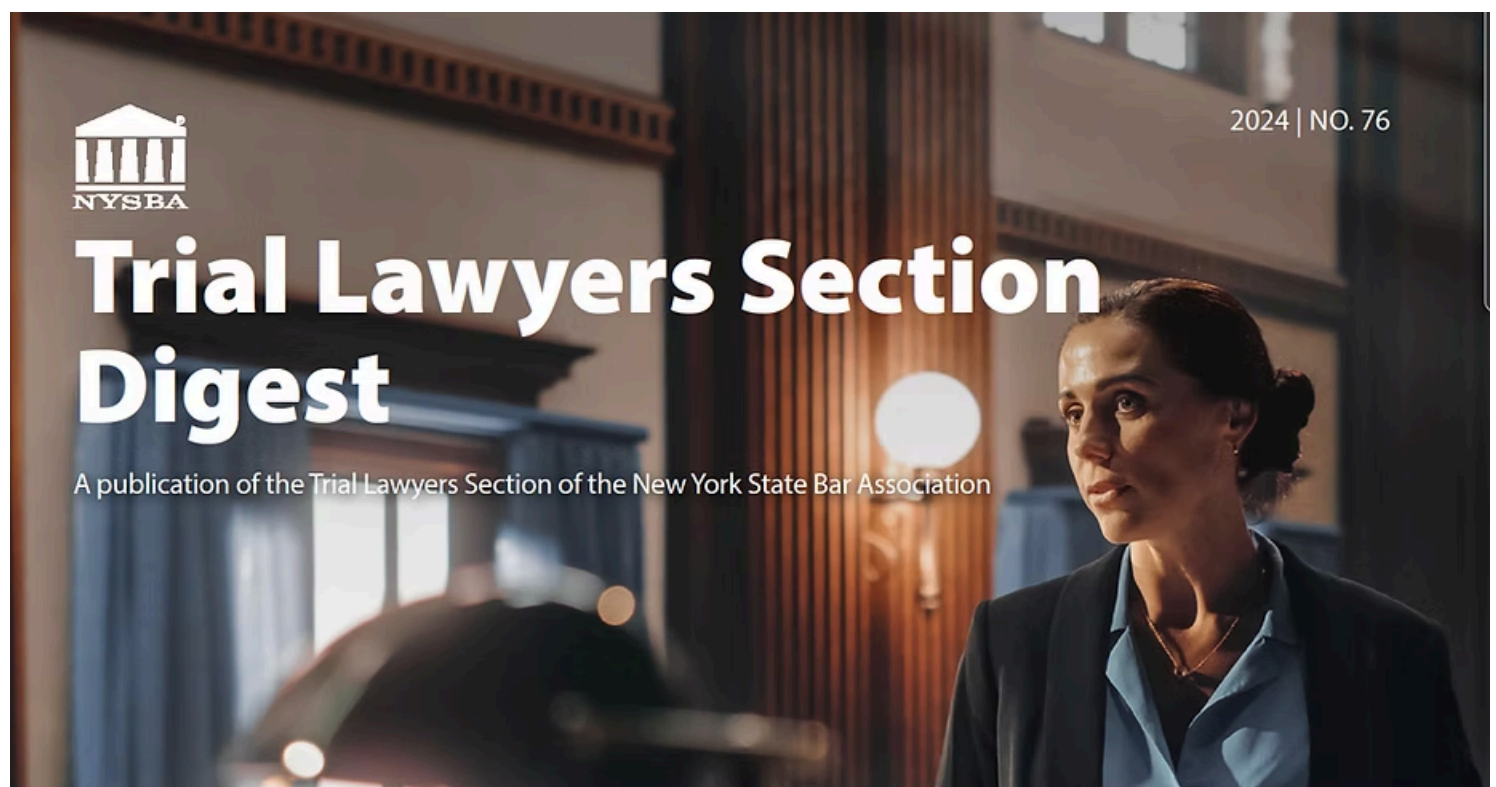


The Benefits of Joint Sessions at Mediation in 'The Room Where It Happens'

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Introduction

Lin-Manuel Miranda's song, "The Room Where It Happens," in the musical Hamilton, is an unforgettable showstopper. The legendary tune stars the play's antagonist, Aaron Burr, who was an American Revolutionary and then aspiring New York politician. When he learns that he was a political outsider to a June of 1790 secret dinner meeting attended by his nemesis, Alexander Hamilton, then Secretary of the Treasury, Thomas Jefferson, and James Madison, his bitterness wells up. The song spotlights Burr's resentment from not only being excluded from the dinner meeting, but not knowing what happened in the proverbial "room where it happens" and how a

monumental compromise agreement that shaped the emerging nation, was struck by three powerbrokers. In the play, Burr sings his complaints:

No one really knows how the game is played
The art of the trade
How the sausage gets made
We just assume that it happens
But no one else is in the room where it happens
...
No one really knows how the parties get to
"Yes"
The pieces that are sacrificed in every game
of chess
We just assume that it happens
But no one else is in the room where it happens
...
My God, In God We Trust
But we never really know what got discussed
Click boom! Then it happened
But no one else was in the room where it
happened . . .

Behind closed doors, the song goes, Hamilton, Jefferson, and Madison mysteriously agreed upon an unprecedented political quid pro quo. They mutually consented to collaborate and push through the Residence Act, placing our new nation's capital city in the South, on the Potomac River, in exchange for Congressional support of Hamilton's Assumption Act, a financial plan whereby federal taxes increased and the federal government assumed all states' debts.

While the song is a theater fan favorite, Miranda's dramatic storyline would have us believe that the deals were spontaneously struck and agreed over one dinner in one room where it all happened. But history informs us otherwise.

The dinner meeting was a joint session negotiation of political parties who had been in protracted disputes, and previously vying to win their positions, like embattled litigants and litigators in court cases. Unlike Miranda's song,

the negotiations were a culmination of preparation, relationship building, and settlement collaborations over time which yielded the Compromise of 1790. Miranda nailed the observation though, that Hamilton, Jefferson, and Madison, were pivotal decision makers in the final negotiations over dinner. Their togetherness in the room, in joint session negotiations, optimized the chance to achieve what litigators call a “global settlement of all claims, with none remaining.”

The Broadway hit song does not mention another bargain that was struck during their joint session meeting. Madison, seeing his chance to leverage against Hamilton’s anxiousness to pass his financial plan, seized the opportunity and garnered a plumb sweetener to close the deals: Hamilton conceded a tax break to Madison’s state of Virginia to the click boom, Lin-Manuel Miranda like tune, of \$1.5 million dollars.

But what if Hamilton, Jefferson, and Madison had been represented by counsel who exclusively spoke and negotiated for them while they were sequestered from each other in separate dining rooms? Or what if their negotiants identically separated from each other, and bargained solely through intermediaries? Would the Compromise of 1790 and Virginia’s fat tax break have happened? Would Lin-Manuel Miranda have written a historical rap musical, about the Civil War, instead?

Making a Case for Joint Sessions at Mediation

In this article I explore the advantages of utilizing joint sessions in mediation for protracted or contentious personal injury and civil litigation cases. Joint sessions are those where disputing parties and/or their lawyers meet together, in person or remotely with the mediator, and all sides remain together in the main room where the mediation happens. On the other hand, caucuses are privately held by the parties and/or their lawyers with the mediator in “breakout sessions/breakout rooms.”

Joint sessions have been debated for their effectiveness and risks. They are frequently sidelined by litigators at mediation. Counsel for the parties commonly state that caucuses by counsel are preferred, because their side is not ready, or altogether unwilling, for the opposing side to know what they are thinking, their strategies in the negotiation, or their bottom line for potential settlement. Litigators also say that if parties directly participate, the chance of adverse or spontaneous reactions to what they may hear in mediation, is not “worth the risk.”

Unless there is consensus to remain in joint session, mirroring the “Understanding Model” of mediation taught at the Harvard Law School Program on Negotiation, in most civil and personal injury cases, the respective lawyers and party representatives invariably promptly request to caucus soon after mediation begins. The common automatic default setting to caucus, engages the mediator in shuttle diplomacy, oftentimes for the remainder of the mediation.

This article, however, argues that joint sessions offer five compelling benefits that can optimize the mediation process and shift the dynamics in negotiations, exactly like Alexander Hamilton achieved, to increase the chance of satisfying interests with a settlement agreement. The benefits discussed include: fostering communication, promoting understanding, facilitating negotiation, saving time and costs, and increasing the likelihood of forging terms for total dispute resolution. Understanding these advantages is crucial in the context of resolving personal injury and civil conflicts at mediation, which is increasingly sought by litigating parties or in cases referred to mediation via New York statewide court annexed ADR programs.

1. Fostering Communication

One of the primary benefits of joint sessions in mediation is their ability to foster direct communication between the parties involved and/or their lawyers and representatives. In contentious and protracted personal injury and civil litigation cases, where emotions and tensions can run high, direct communication can humanize the opposing parties and lead to a better understanding of each other's perspectives. When parties hear directly from one another, they are more likely to appreciate the other side's concerns and motivations, which can pave the way for a more cooperative and less adversarial negotiation process.

For example, in a day long mediation of a seven-year litigated case by an injured plaintiff bicyclist claiming he was knocked down, allegedly by a corporate defendant's van door opening into the bike lane, the case settled only after the lawyers for both sides agreed to resume joint session at the suggestion of the mediator. The parties were on the precipice of impasse after defendant's "best and final" offer was conveyed, and plaintiff's counsel was skeptical that defense counsel was holding back on a better offer. However, together in joint session, in what became the final hour of mediation with robust discussion facilitated by the mediator, the direct communication between the lawyers influenced reaching an agreement to settle the case.

First, defense counsel explained that he was in direct communication all day throughout the mediation with the defendant corporate stakeholders who were "deeply angry" about plaintiff's lawsuit. He explained that the defense intended to prove not only that they were not liable, but that defendant's employees working on location at the scene of the accident were good Samaritans who aided the plaintiff after the unwitnessed accident. Second, defense counsel conveyed with words and tone that he "respected plaintiff's counsel" and that he had "pushed hard but ran out of road in being able to convince the principals" to increase the money offer after hours of negotiations; this, because defendant had a self-insured retention policy which meant they were directly paying the settlement for the claim that they were "deeply angry about." Information, tone, and choice of words in direct communication with each other made the difference in achieving resolution of the case.

2. Promoting Understanding

In addition to fostering communication, joint sessions promote understanding between the parties by providing an opportunity for them to articulate their positions and interests clearly. Personal injury and civil litigation cases often involve complex legal and factual issues that may be difficult to convey, particularly through written submissions alone. A skilled mediator guiding the information sharing in joint session, helps to support all sides to identify interests and explain the underlying reasons for their positions. Joint sessions can provide context that may not be apparent from pleadings, motions, records, documents, or other evidence in the case.

Moreover, joint sessions also allow for real-time clarification of misunderstandings or misinterpretations that may arise during negotiations. Instead of relying solely on the mediator to convey information between parties, direct dialogue can clear up issues promptly and prevent unnecessary delays in reaching a settlement.

In a hotly contested litigation by plaintiff against a commercial building owner and retail tenant for alleged violations of law including the Americans with Disabilities Act, the parties agreed to remotely mediate the case prior to costly summary judgment motion practice. At mediation, architectural drawings and historical records of the Landmarks and Preservation Commission, were raised by plaintiff's counsel in an opening statement. Thereafter, all counsel for the parties remained in joint session which allowed for vigorous discussion, analysis, and important clarity about the documentary evidence raised by plaintiff which had not been previously disclosed in discovery. With the mediator helping to identify, organize, and narrow categories of issues in dispute, combined with screen sharing enabled of photos, complex schematics, and documents, all sides remained in the main mediation room together for productive discussion of points and counter points relative to the evidence. The direct communication between and among all sides enhanced clarity and understanding in real-time that directly shaped the negotiations.

The benefit of the joint session paved the way to explore creative solutions to settle all claims in the case. The co-defendants agreed to provide modification of display aisles in the interior portion of the retail store and a commercial portable ramp for the exterior entrance steps. These agreements addressed the plaintiff's underlying interests in the lawsuit and led plaintiff to accept a monetary offer of settlement for his personal damages, which was substantially less than what he initially demanded for settlement.

In personal injury cases, party plaintiffs rarely participate in joint sessions with the defense. Plaintiff's counsel should consider this option, however, where a plaintiff needs or wants to be heard and understood, especially concerning their emotional journey related to injuries. This was successfully executed in a remote mediation of a college bound woman with significant bodily disfigurement alleged in connection with medical malpractice in a breast reduction surgery. After the mediator helped plaintiff and defense counsel to agree on a plan for the joint session with the plaintiff, they met to speak directly. The defense attorney carefully listened, thanked the plaintiff for mediating the case, and then offered an apology phrased, "we are sorry for the physical pain and emotional

trauma that you have experienced.” The joint session communication was a poignant and pivotal moment of expressed empathy for plaintiff which proved to be crucial to plaintiff’s agreement to accept a substantial offer of compensation by the defense. Plaintiff’s satisfaction in being heard and understood in connection with what she had experienced, was as important to the plaintiff as the meaningful compensation offered for her damages. The joint session with the plaintiff directly led to settlement of the entire case.

3. Facilitating Negotiation

Joint sessions also facilitate negotiation by creating a structured environment where parties can engage in discussions with the helpful guidance of the mediator. Unlike caucuses, where negotiations may be limited to offers and counteroffers exchanged through the mediator, joint sessions allow parties to explore options directly with each other.

For instance, joint session to discuss potential apportionment of fault or comparative negligence percentages can promptly identify zones of agreement in personal injury mediations. In a question of lights case involving two drivers in an accident in a multi lane Y-shaped intersection, conceded by all sides as difficult for drivers to navigate, both plaintiff and defense counsel in joint session openly discussed liability and agreed that testimony and photographs cut both ways for the parties with a “50/50 or 60/40 likelihood to prevail” for either of them at trial. The joint session zone of agreement identified a near evenly split chance to win at trial, and this quickly opened negotiations at mediation.

A settlement amount which represented approximately 50% of the anticipated full value of the plaintiff’s damages was ultimately agreed to and ended the litigation. In another personal injury case on the eve of trial, where plaintiff’s counsel was frustrated with a final offer of settlement tantamount to only “costs for trial” on a case with a high risk of

loss on liability and evidence potentially undermining plaintiff’s damages, plaintiff’s counsel directly expressed frustration that the defense did not call to discuss the offer instead of spending time and money on mediation. This complaint was validated by defendant by offering to additionally reimburse plaintiff their share of costs for mediation. In joint session, defense counsel further extended that the offer of settlement remained on the table while plaintiff’s counsel consulted his “difficult” client, explored final lien reductions, and both sides collaborated to seek an adjournment of imminent trial. Direct engagement helps in identifying solutions that meet the interests of all sides and increases the chance for settlement.

4. Saving Time and Costs

From a practical standpoint, joint sessions can save time and costs associated with the mediation process. By reducing the need for separate caucuses and shuttle diplomacy, joint sessions can streamline communication and negotiation efforts.

For example, plaintiff and defense counsel in a personal injury case who were well known to each other during the case and openly acknowledged high respect for the skills of the other at the outset of the mediation, remained in joint session throughout the entire mediation to settle the case. They energetically discussed with the mediator and each other the strengths, weaknesses, risk analysis, and anticipated further litigation and trial costs. With negotiations then advanced to each side by the mediator, they remained in joint session discussing each advancement and openly made several moves with counter proposals for settlement. Their excellent preparation in advance of the mediation, with clear settlement authority and having built trust based upon a relationship cultivated before the mediation took place, consequently cleared the way for a six-figure settlement reached in under ninety minutes of mediation. The efficiency of their entirely joint session mediation accelerated the pace of mediation to reach a resolution of the case. This can be particularly beneficial in cases where time is of the essence, where parties are eager to avoid imminent trial, or to avoid steep costs incurred in next steps in litigation.

Moreover, by reducing the length of time or number of mediation sessions needed to reach a settlement, joint sessions can lead to significant cost savings for parties involved in personal injury and civil litigation cases. Efficient and fewer mediation sessions mean reduced mediation costs, reduced time spent in preparation/attendance by lawyers, and potentially reduced time spent by support staff associated with scheduling and preparing for multiple mediation sessions. This cost-effectiveness makes joint sessions an attractive option for parties looking to resolve disputes efficiently and economically.

5. Increasing the Likelihood of Settlement

The primary goal of mediation in personal injury and civil litigation cases is to achieve a settlement that satisfies the interests of all parties involved. Joint sessions play a crucial role in increasing the likelihood of reaching a settlement. When parties engage directly and openly with each other with their navigation charted by a skilled mediator, they are more likely to identify common ground and explore mutually acceptable solutions that address their underlying interests.

In cases where not only hefty costs and exposures in litigation are at stake, but also the personal relationship of the litigants, joint session at mediation may initially seem like a fiery and unnavigable path to dispute resolution. However, the time spent in joint session with a mediator who carefully facilitates and reframes communication, can create the best chance to achieve settlement and the possibility to overcome personal animus.

For example, in a protracted litigation with court filings peppered with ad hominem attacks by a plaintiff brother against his defendant sister arising from their broken, albeit unwritten, partnership agreement in a restaurant, the parties came to the initial mediation session deeply entrenched in perpetuating personal attacks and allegations

of wrongdoing against the other. Plaintiff demanded high six figures and the defendant emotionally declared that she would “never pay him a dollar.” But time spent in joint session with the mediator guiding the dialogue, and with their respective lawyers present and contributing clarification on legal issues, allowed both sides to air anger, hurt, frustration, and mistrust which were the underpinnings of the litigation and counter claims. Amidst the milieu of emotions it became evident that neither party wanted to run the business into the ground or to further deplete their personal resources with time and money spent on continued litigation. It was also apparent that a limited documentary exchange regarding receivables and banking transactions would serve to provide clarity about plaintiff’s allegations of profit stealing. An agreement to exchange limited discovery, was the parties’ first win at mediation.

When mediation resumed in a second session after the documentary exchange, the parties resumed joint session with significantly diminished emotionality and mutually modified positions. Plaintiff acknowledged that his initial valuation of damages was excessive, and defendant acknowledged that she owed plaintiff some money from profits in the business the year they parted ways. Further joint discussion around painful strife that the litigation caused with their parents, respective spouses, and alienation of each other’s young children from experiencing and enjoying an extended family relationship, broke down the final barrier to negotiating a settlement for low five figures paid by defendant in twelve installments and plaintiff discontinuing a separate litigation for defamation against defendant’s husband.

The joint sessions in this case, allowed the parties to express emotions and renew communication with each other throughout the mediation process and this was essential in overcoming initial blinding emotions and unrealistic expectations. The mediator’s role in offering and creating a collaborative atmosphere where the parties in joint session felt heard and understood, effectively reduced hostility, defensiveness, and shifted focus and energy to constructive information sharing and dialogue. This ultimately enabled the parties to find their way out of toxic litigation to compromise and settlement agreement.

End Scene

Joint sessions in mediation offer several distinct advantages that make them a valuable tool for resolving disputes in personal injury and civil litigation cases. By fostering communication, promoting understanding, facilitating negotiation, saving time and costs, and increasing the likelihood of settlement, joint sessions can lead to a more effective and efficient mediation process. This article, highlighting examples of successful dispute resolution arising from joint sessions in contested claims, is aimed to invite litigators to be more open to mediating in joint session. While caucuses have a role in certain situations, the benefits of joint sessions make them a compelling option.

By embracing the unique opportunity of joint sessions to resolve conflict altogether in the room where the mediation happens, lawyers on behalf of their clients can maximize chances for achieving global settlements of claims. They can also potentially gain more value or unexpected concessions than what they initially bargained for, like Hamilton and Madison's tax break tethered to the Compromise of 1790. With planning, mindful execution, and a skilled mediator for support, joint sessions are ripe opportunities for litigators to narrate their party's story so that it is clearly understood and simultaneously effective in achieving a satisfying settlement agreement worthy of a song.

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