

GETTING TO THE TRADING ZONE

LESSON #7:

Who does the Talking?

Joint Session or Private Caucus?

Mediators and lawyers may agonize over whether to begin the mediation hearing in a joint session or a private caucus and whether the lawyer should do most of the talking or permit the clients to express themselves. This is the subject of controversy amongst highly professional mediators and may be of grave concern to your clients as well.

But you don't have to torment yourself or your client over these decisions if you do this.

Before going in to a mediation hearing, you should analyze your purpose of engaging a third party neutral. Essentially, it is a three-pronged analysis.

1) Is your purpose chiefly to have someone skillfully facilitate productive and much-needed communication between the clients or the lawyers (or sometimes both)? Or is the purpose of the mediation merely a matter of dividing scarce resources (such as, for example, an insured personal injury claim where the Defendant, real party in interest, is not even compelled to attend)? Obviously, the former would compel a joint session and the latter may not.

2) Look at your client's objectives. Does he or she need to be heard and to hear the strong points of the other side directly? Or is he or she likely to have enough trust in you and your mediator to effectively tell their story and listen to the other perspective within the "safe harbor" of a separate, private meeting where just the mediator is in the room?

3) Are the clients in the dispute likely to have an on-going relationship, which will need mending if it is to survive the conflict at some point? (This is almost always the case in a marital dissolution or an on-going business relationship.) If so, would a joint session be better suited at the outset of the hearing or at the end?

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Remember, lawyers are trained to speak on behalf of their clients 80% of the time and listen only 20%; whereas, mediators are trained to primarily listen and speak in the opposite proportions. Use the safe harbor offered in your mediator's conference rooms judiciously.

***P.S.** I am pleased to have published an article in the June 19, 2015 edition of the California Daily Journal, "Don't forget critical eleventh hour Issues". If you'd like a copy, please send me an email.*