Alternatives
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ADR Practice

The Decline of Dialogue: The Rise of Caucus-Only Mediation And the Disappearance of the Joint Session

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It had been a very painful dispute and then lawsuit. Now a mediation was ahead. The inside counsel to a large shipping company enjoyed the train ride to Boston from New York City, filled with the expectation that an emotionally wrenching, vicious and troubling conflict might get resolved in mediation.

Two years earlier, a ship had been sunk because the ballast was improperly distributed; in a rough sea, the ship listed to one side and went down. From the company's perspective, the ballast and the safety of the ship were part of the captain's responsibility. No punitive action was taken against the captain, however, despite the enormous loss. The captain at the time of the incident was a well-liked long-term employee.

One year earlier, in a move to downsize, the company let the captain go. The captain filed suit for age discrimination, naming not only the company but several decision-makers as defendants and making a seven-figure demand. The company wanted to pay nothing as the contract between the captain and the company was at will and the previous ship loss made the captain's claim seem preposterous.

Company executives knew that the captain had become extremely depressed, given the loss of his long-time employment. Altogether, it was an expensive and unhappy end to what had been a good run for all involved.

Now, on the train ride north, the inside counsel was hoping that the company could explain the decision to let the captain go and restore some of the captain's self-esteem. Possibly, a deal could be struck to give the captain part-time employment. He also was hoping that the captain might come to better understand that there was a significant emotional component as far as the company and its executives were concerned, and that none of them viewed themselves as the "legal wrongdoers" articulated in the complaint. The inside counsel was hoping for a win-win outcome.

An all-day mediation ensued. The company executives and the captain did not meet face-to-face at any point—the parties were kept in separate caucus rooms. An outside firm did all the distributive bargaining—trading of numbers—for the company, and the plaintiff's attorney spoke for the captain. Because the numbers were too far apart, no monetary settlement ensued. The mediator went back and forth, telling one side they should offer more, and the other side, they should accept less.

The result was that the company representatives thought the captain was crazy with respect to his settlement offers, and were frustrated that their own regard for the captain was never part of the conversation. The captain felt all the more disrespected and sidelined by the mediation process.

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ADR Process Design

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tion into their business models even as the world slowly returns to a new normalcy. Why would they make an exception for inherently expensive arbitration?

At most, perhaps some may take things a step at a time, barring virtual proceedings absent affirmative consent which can be exercised in whole or in part in the context of an actual dispute. But the price of such a reservation is that the counterparty retains the same veto right, thereby potentially precluding virtual proceedings even if one side does not object.

Human and Practical Factors

While advances in technology and logistics now address most nuances of ensuring a fair virtual process and will continue to evolve, they do not address the more human and interpersonal dynamics lost to a virtual forum. With virtual proceedings now firmly entrenched at least in hybrid form, panels and practitioners will need to focus heavily on how to replace these intangibles, including in the following respects.

Collegiality. Panel members have historically interacted in person during the course of hearings—including not simply conferences but likely meals and socializing—thereby fostering collegiality instrumental to forging a consensus. In a virtual setting, panelists may need to find other ways to gain that same interpersonal dynamic. Certainly, additional pre-meetings and panel conferences may help to fill the void, but panelists will need to be sensitive to building rapport in a purely remote atmosphere, especially if they have no track record together.

Team Bonding. Litigants also inherently form bonds and cultivate their newer attorneys in the context of waging battles in courtrooms or in-person arbitral hearings. Teams are cloistered in war rooms, dine together, and spend innumerable hours interacting. If they participate in a dispersed manner from different remote locations, that intangible process dissipates. Perhaps respective teams engaged in a virtual arbitration can nevertheless assemble themselves in one place at least to maintain their own sense of camaraderie and nurturing, whether the work efficiency also benefits.

Zoom Fatigue. Everyone sooner or later may suffer from Zoom fatigue. Panels should stay alert to the need for breaks and even adjournments to maintain the sharp quality of a proceeding. Parties and their counsel should not be shy to raise the issue if they feel beleaguered, or if they perceive that the panel's attention is lapsing.

Document Management. There are some aspects of arbitration that may simply be more cumbersome in a virtual setting. Handling tomes of documents and exhibits electronically may be daunting for panel members, particularly those less adept with technology. All participants should therefore seek to streamline proceedings and facilitate efficient focus on what matters. Joint binders of core documents and a consensus time line of events, for example, would obviate the need to search and distill computerized repositories.

Physical Evidence and Movement. There are obvious practical limitations when participants are not in the same room. If physical evidence is involved, it cannot be manipulated remotely. Lawyers cannot approach witnesses or the panel for emphasis, and spontaneous movement or attention-getting gambits for whatever purpose become impossible. See Jennifer Gibbs, "Virtual Litigation May Unravel the Narcissistic Lawyer," *Law360* (available at https://bit.ly/3cYoKFD). Participants in a virtual proceeding must think through in advance how they will accomplish mechanical aspects that were second nature in the context of an in-person setting. Courts and bar associations will no doubt set decorum standards as the virtual versions of such mannerisms evolve.

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Few would disagree after more than a year of virtual arbitration that it is here to stay in some way, shape or form. As time marches on inexorably, and younger generations bred with technology rise in the legal and arbitrator ranks, resistance to a virtual process will inevitably diminish and wrinkles will be fine-tuned. Until then, all arbitration participants should recognize that they are in an evolving environment and be open and receptive to making the process amenable and efficient.

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Nothing good was accomplished. Even if a settlement had been brokered and a number reached, the captain would end his career embittered. The company employees, who had shared a world of experience with the captain, would be distressed too. There was no dialogue between the key parties.

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In the legal world, mediation is—or has been—the bastion of dialogue and collaborative problem solving. Building understanding. Creating win-win solutions. Searching for and identifying underlying and non-monetary interests.

Mediation trainers have followed models that promote using joint sessions where dialogue and understanding is fostered or at least possible—a joint session comprising something more than perfunctory meetings and greetings. Mediation aspires to be a fulsome, managed discourse where listening is elevated over talking and better understanding and clarity are advanced over "winning" or making someone lose.

In short and in its most virtuous format, the joint session is a learning conversation unlike the binary narrative of a courtroom opening or closing argument, and no matter where it might find its place in the mediation, whether at the beginning, middle or end.

This contrasts with the adjudicative processes of arbitration and litigation. Or even the evaluative processes of neutral expert evaluation or evaluative mediation. In adjudicative and evaluative processes, the parties fight with each other to get the neutral on their side and get a favorable decision or opinion—or helpful advocacy—from the neutral. No fostering of dialogue or building understanding between parties is targeted.

Now this bastion of dialogue and human connection is being challenged in an era when dialogue generally is declining due to a variety of factors—political, cultural, and professional. A proper treatment of these factors is too complex for this article, but we elaborate on a few.

Professionals must be fast. They rely more and more on distracting and self-absorbing technologies, which promote efficiencies but alienate users from human contact. Additionally, the emotional avoidance inherent in many professionals, particularly attorneys, and a tendency toward their dominant adversarial paradigm, lends itself for lawyers to an increasing inclination away from the "relational" and toward the "transactional."

What better than operating from your own private caucus room and not having messy engagements with opposing clients and their argumentative attorneys?

An additional challenge is the Covid-19 pandemic and the migration of mediation to the Zoom platform. The changes to mediation wrought by taking it online will no doubt influence post-pandemic mediations.

The joint session, however, whether the mediation is virtual or not, should remain a viable mediation feature, with the virtual platform providing both challenges and benefits with respect to its use.

Ironically, the joint session was the primary reason parties would appear in person for mediation. Hence, the gradual extinction of the joint session may result in more virtual mediations and fewer in-person mediations post-pandemic.

Inability to Dialogue

A recent survey of the use of joint session and caucus, developed by this article's authors, finds a trend among some of the most formidable mediators in the world using more and more caucusing, and caucus-only formats.

[The Survey on the Use of Joint Session and Caucus was developed in 2019 by co-authors Lela Love, Jerome Weiss, and Eric Galton, with the participation of 129 mediators from the International Academy of Mediators (IAM). The authors gratefully acknowledge the helpful comments of University of Indiana Prof. Lisa Blomgren Amsler in the preparation of the survey. The authors also thank Cardozo student Krysta Hartley for her tireless and expert work on the survey.]

In our political arena, we witness the inability of Republicans and Democrats to have meaningful dialogues or to tackle and solve tough problems together. "No Talk" lines are drawn between one candidate's supporters and their opposite counterparts. Silos are dangerous for democracy.

And mediation without dialogue—or joint sessions—between parties is perhaps as regrettable a devolution. Or, the trajectory of mediation may be mirroring a fractured, polarized society where conversation is perceived as awkward, if not dangerous.

If you are thinking that there are some cases where parties are too traumatized to speak to their abusers—in employment or sexual harassment cases, for example—you are correct that caucus has an important role. Describing one's harm to those who have caused the harm, however, and having and bestowing the power of forgiveness are powerful healing mechanisms.

Seeing real people in real life is important. Allowing parties to hear something from the "horse's mouth" may allow a more human, albeit difficult, connection and an opportunity to appraise important facets such as credibility and relatability.

And the importance of such "human connection" may not only be confined to conflicts such as family, employment, or personal injury disputes. Even in the driest of commercial and business disputes, the model of collaborative problem-solving yields a less contentious and more satisfying and durable outcome.

When parties collaborate the product tends to be more durable, and their newfound relationship may lead to avoiding future conflict.

Recent research on the use of caucusing by mediators and resulting outcomes suggests that caucusing does not have advantages we might expect. A study suggests that caucusing during mediation has, with perhaps some exceptions, no effect on the settlement rate. See the American Bar Association Section on Dispute Resolution Task Force on Research on Mediator Techniques (adopted by the Section's Council in 2017) (available at https://bit.ly/3khdRAZ).

This study reviewed 47 studies with empirical data to examine the effects of mediator actions and styles on outcomes—one of the actions was caucusing. An exception in the Task Force review was that there was increased settlement with caucusing in labor-management disputes. See also, Roselle Wissler & Gary Weiner, How Do Mediator Actions Affect Mediation Outcomes? *Dispute Resolution Magazine* (Nov. 1, 2017) (available at http://bit.ly/3pFXtL3).

The study has evidence that caucusing increases the chance that disputants will return to court to file an enforcement action.

A study by the Maryland Judiciary finds that, in the short term, the more caucusing is used, the more participants are likely to feel that the neutral controlled the outcome, pressured them into solutions, and prevented issues from coming out. Maryland Judiciary Statewide Evaluation of ADR: District Court, What Works in District Court Day of Trial Mediation: Effectiveness of Various Mediation Strategies on Short-Term and Long-Term Outcomes (2013) (available at https://bit.ly/2NfyxgE). The study also found that the more caucusing, the more disputants experience powerlessness and a belief that conflict is negative. Additionally, caucusing decreases the sense of satisfaction with the process and outcome and the perception that issues were resolved with a fair and implementable outcome. Id.

The trajectory of mediation may be mirroring a fractured, polarized society where conversation is perceived as awkward, if not dangerous.

In a 2018 study of effectiveness of various mediator behaviors in custody matters, the researchers found that the greater use of caucusing had no statistically significant impact on reaching an agreement and an increase in faith in the mediator, but a decrease in faith in the problem-solving potential with the other party. Lorig Charkoudian, Jamie L. Walter & Deborah Thompson Eisenberg, "What Works in Custody Mediation? Effectiveness of Various Mediator Behaviors," 56(4) *Family Court Review* 544 (2018) (available at https://bit.ly/3sbLlDu).

Parties often enter mediation after years of battle and mistrust created by their conflict. Imagine some of the core notions of the adjudicative model, which are not far behind its façades of "truth" and "justice": *We are right and you are wrong; We are going to win and you are going to lose.*

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In short, too much heat. Way too much.

Couple with this the potential for weaponizing numbers through positional bargaining and its usual inherent negative messaging and battle. That sets the stage for a digression from discussion to further adversarial competition.

Trust and its necessary intimacies are hard enough to develop. Doing it from remote caucus rooms, even with the help of an accomplished neutral, is too often a steep and unduly painful climb. We need to ask why it is primarily lawyers and their ethos and institutions that use the caucus model, as opposed to business leaders and related entities.

The latter have somehow recognized, perhaps for very discernable reasons, that lobbing numbers from distant corners of a deal or dispute are a poor way to establish rudimentary elements of constructive, albeit difficult, discussions and agreements.

In his 2008 book The Speed of Trust, author Stephen Covey emphasizes some of the fundamental wisdom and bonuses of such intimacies and trust-building: where these positive elements exist, deals and resolution are faster and, importantly, less expensive.

Conversely, the less trust, the longer it takes and the costlier resolution can be. We need to be responsibly aware of how often we have seen disputes where spent resources, money and goodwill, by the time the dispute hits our front door or our computer screen, make it all but intractable.

How much deeper is that hole than it should have been? Mediators might help dig parties out by bringing them together.

More Training Needed

Getting settlements at the price of limiting or foreclosing dialogue is anathema to mediation in any case. Mediators are, by calling, the practitioners who "make talk work," perhaps even more so in this age of the pandemic and virtual-only "contact."

In this era of impoverished dialogue—or no dialogue—we need one professional who is expert in nurturing and promoting dialogue. To have the default mediation process be "no caucus" is going in a worrisome direction.

Note that different schools of mediation have different uses of the caucus and different process goals. Here are some variations:

- Never Caucus ➔ Understanding-Based Mediation
  Goal = understanding
- Sometimes Caucus ➔ Classical Facilitative: Caucus only when needed, and return to joint session
  Goals = understanding, problem-solving and agreement
- Follow the Parties ➔ Transformative
  Goals = empowerment and recognition
- Always Caucus ➔ No Joint Session/Settlement Brokering Primarily Between Parties' Attorneys
  Goal = get a deal done

For more on "Understanding-Based Mediation," see Gary Friedman and Jack Himmelstein, Challenging Conflict: Mediation Through Understanding (ABA Publishing 2009); for more on "Classical Facilitative," see Joseph B. Stulberg and Lela P. Love, The Middle Voice, 3d edition (Carolina Academic Press 2019), and for more on "Transformative," see Robert A. Baruch Bush & Joseph P. Folger, The Promise of Mediation: The Transformative Approach to Conflict (Jossey-Bass 2004).

The Always Caucus/No Joint Session Model is not being widely taught—and perhaps not taught at all. (See Charts 1 and 2 above and below.) In the IAM survey, virtually all IAM mediators received training where a joint session was used, although the extent and sophistication of training in any model remains an unanswered question.

Chart 1: Training

If you had mediator training, what was primary model taught?
95% trained to use joint session — Virtually all IAM mediators received some training.
(129 responses)

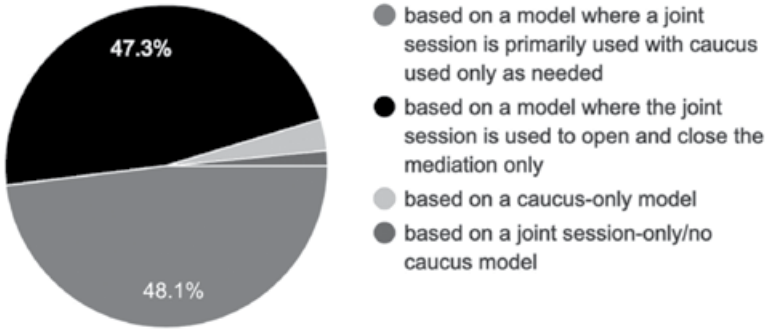
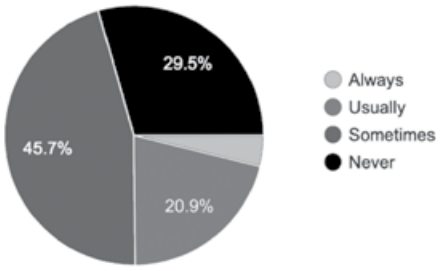


Chart 2: Caucus v. Joint Sessions

I keep the parties throughout the mediation… (129 responses)

… in caucus = always, usually or sometimes = 66.5%



… in joint session = usually or sometimes = 29.5%

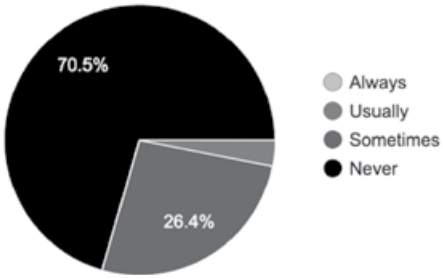
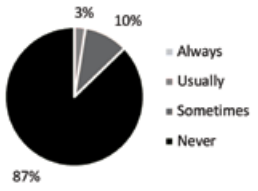


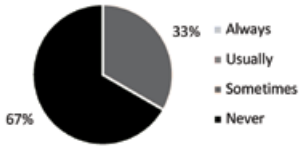
Chart 3: Regional Breakdowns

I keep the parties in joint session throughout the entire mediation (no caucus)

California = 3% usually or sometimes

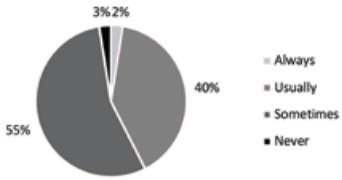


Northeast = 33% usually or sometimes

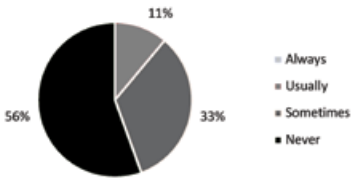


I keep the parties in caucus throughout the entire mediation

California (always or usually) = 42%



Northeast (always or usually) = 11%



In all cases, the developing mediation "profession" should own the fact that three hours in a basic 40-hour mediation training devoted to the joint session is woefully inadequate.

Chart 1: Training

Those same mediators reported that overwhelmingly their source of cases was lawyer referral, and the main reasons they did not use a joint session was that attorneys and, second choice, parties did not want a joint session. In other words, attorneys are having a mighty influence on the default process used by mediators.

This is a remarkable finding as it challenges the long-held tenet that a dispute belongs to the disputants. See ABA Model Standards of Conduct for Mediators, Standard I. Self-Determination (2005) (available at https://bit.ly/3av1L4l). Many mediators, however, fear they will be de-selected by lawyers and lose substantial income if they insist on hosting joint sessions. As Deep Throat said, "Follow the money."

Chart 2: Caucus v. Joint Sessions

After the Chart 2 overview on the preceding page, note on Chart 3 above that regional differences in the United States result in different practices with respect to keeping parties in caucus throughout the mediation.

Chart 3: Regional Breakdowns

The conclusion about regional differences is supported by a 2018-2019 survey by Dwight Golann in Boston State Superior Court, examining tort and contract cases. Golann, a law professor at Boston's Suffolk University Law School, found that 83% of the mediations in the sample of 29 cases had a "substantive" joint session, where disputants had the opportunity to discuss the merits of the dispute with the other side. This information shows that the joint session is, at least, alive in some areas of the market.

It is worth noting that caucus-only mediators report that their primary goal is getting a deal done, many believing perhaps that "closing deals" is the primary way to get repeat business. At the same time, there are multiple goals for those mediators using joint sessions. See also Chart 4 below.

Chart 4

The most important value(s) supporting a choice of ...

Joint-Session-Only or Joint-Session-with-caucus-as-needed	Mostly-Caucus or Caucus-Only
• Develop better understanding, and possibly trust, between disputants • Enhance overall party satisfaction with fairness of process and outcome • Integrate relational and emotional aspects into the mediation process	• Get a deal done

Chart 4: Law + Facts

It should be noted that even though the joint session is taught and promoted in nearly every respected mediation curriculum throughout the world, both in law schools and in mediator training programs, the joint session is not universally being used, as the IAM study shows.

And when it is used, it is often in a context where the rote legalistic and binary equation dominates: *LAW + FACTS = A CONCLUSION.* But it is an equation that misses the complexity and essence of humans in conflict.

Many mediators consider it a privilege to be involved in helping others resolve their disputes. We have witnessed many situations where, with the proper tone, content, management and example, disputants and their representatives can come to better understand their conflict and develop more nuanced outcomes

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through direct communications where mediators enable trust and problem-solving.

When people are in the same room—or on the same screen—they behave differently, and often better, when confronted with their own common humanity.

Do we help people in conflict interact and perhaps better direct the outcome of their dispute through a joint session and collaborative process? Or do we leave them with the negatives of the lawyer's adage that the sign of a good settlement is where everybody walks away unhappy (and with a stale tuna sandwich) at the end of a day?

Do we help them get out of the spin cycle of positional bargaining and the emotional misdirection that comes with it, knowing that we as neutrals cannot do the lifting of spirit and healing of wounds without the parties' help?

* * *

Let's reimagine the mediation we began with:

The sea captain-plaintiff was welcomed into the mediation session, accompanied by his lawyer. The inside counsel of the shipping company, who had known and admired the captain, was the key spokesperson for the company, accompanied and supported by outside counsel who would handle the litigation if the case proceeded in that direction.

Everyone was offered coffee, fruit, and pastries from a common plate. After introductions all around, and according to discussions and arrangements prior to the mediation session, the captain was invited to explain the situation.

The captain talked about his decades with the company and his unblemished record before his ship went down. He was supported by nods from the inside counsel.

The captain explained what had happened the day the ship sank. The first mate had supervised the placement of the ballast—which was improperly distributed. Yes, in the end the captain was responsible, but he had no reason to doubt the first mate's job—done many times without hitch.

After this incident, everything had changed. No one at the company treated him with the respect and cordiality he had come to enjoy, even though the damages from the ship's sinking were covered by insurance.

But the captain was damaged. And then to be fired! He was the most senior employee in his class, the most experienced, the most loyal. He couldn't see his dismissal as anything except age discrimination, except perhaps retribution for the incident.

His lawyer broke in, wanting to summarize the legal case. The mediator welcomed the lawyer's intervention. The lawyer explained why he expected to enjoy a complete victory in court.

The mediator turned to the company's representatives. The company's inside lawyer described his own regard for the captain, shared by others in the organization. He expressed surprise to hear what led to the ship's sinking, and said it was true that the captain had been somewhat socially ostracized—but not because of the sunk vessel, but because he himself had withdrawn.

The inside counsel explained the downsizing rationale for the captain's dismissal—not connected with age discrimination but with economic and personnel decisions that seemed compelling.

The company's outside counsel made the case that his was a clear "win" in court—no liability for age discrimination.

Both sides' legal representatives expected a complete victory in court. The mediator explored their legal analysis, which was educative for the parties, and the costs of pursuing the matter in litigation, which were high. A resolution through courts would take a long time and after years of expenditure of time, money, resources, and goodwill, even a "winner" wouldn't feel like a "winner."

> Many mediators fear they will be de-selected by lawyers and lose substantial income if they insist on hosting joint sessions.

And then a search for an acceptable outcome began. In the end, the company paid an amount—less than the demand but a respectable low six-figure amount. The company helped with setting the captain up with employment counseling, and comfortably agreed to positive references.

The captain, not wanting another full-time job, felt recognized for his lifetime service to the company. Each side expressed regret and apologized: the company for how the captain's employment had terminated so abruptly, and the captain for jumping to worst conclusions about the people he had worked with and respected.

* * *

The structuring of a mediation is, of course, a personal choice. But gentle and wise mediator guidance to consider use of the whole dance floor, instead of being confined to one's small but comfortable corner, can assist people in increasing their intimacies, listening better and perhaps walking away with a more optimal agreement.

We think there should be a presumption of a joint session with dialogue between the parties—a rebuttable presumption in particular cases, of course. Let's be sure that mediators remain leaders of understanding how to promote talk. Let's encourage the mediation field to continue to be expert in dialogue in a shrinking world which so desperately needs human interaction, collaboration, and civil conversation.

Quotes on Caucusing & Mediation

Revered leaders in our field have said:

It is not mediation if parties are kept apart.

—UC-Irvine School Of Law professor and scholar Carrie Menkel-Meadow

Our society devotes too little resources to healing. Mediation is a method for repairing the social fabric.

—Former U.S. Magistrate judge and mediator Wayne Brazil