Should Mediation Begin Together or Apart?

Mediation, at its best, involves negotiating collaboratively. When the goal is not "winning," but getting the other side to say "yes," litigators become problem-solvers rather than warriors. And parties are empowered to explore solutions rather than perceiving themselves as victims.

The traditional mediation model promotes this approach by starting with a joint session in which the mediator welcomes the participants, introduces people, all of whom may not have met each other, explains the process and answers questions. Each side then makes an opening statement, sometimes followed by time for the participants to question and respond to each other before breaking into separate meetings.

But in the past several years, some mediators, litigators and parties have questioned this model. They may have experienced joint sessions that became adversarial or devolved into attacks on the character and veracity of the opponent. They may have witnessed opposing lawyers blow up a mediation by putting on a show for their clients or trying to intimidate the adversary. Or they may believe that each side understands the other's position, so "let's talk money!" These attorneys, and sometimes even mediators, prefer to skip the joint session and start the process with separate meetings.

So, which is the most effective way of beginning the process? I am aware of no statistics that answer this question, but in my experience, starting with a joint, substantive session has substantial benefits:

- It allows the mediator to set a cooperative, positive tone and begin establishing rapport and trust, which are key factors in the success of a mediation.

- It permits counsel and party representatives to speak directly to decision-makers on the other side about their view of the case, and what is important to them. It may be their only opportunity to do so.

- It may be a client's only opportunity to tell his story, giving him a "day in court," and an opportunity to vent that may increase the chances of settlement by giving him a role in the process.

- Exposing litigants who are entrenched in their point of view to the other sides' evidence and arguments may get them thinking that they are not as right as they thought. Experiencing a fundamental change in their evaluation of the case is a major factor in parties achieving resolution.

- Similarly, by listening attentively with an open mind, participants may get ideas for accommodating each other's needs and interests while achieving an acceptable outcome for themselves.

- It allows each side to size up the other's lawyers, potential witnesses and, sometimes, experts and gauge how effective they would be at trial.

- It provides parties an opportunity to observe the mediator's competence, trustworthiness and impartiality.

- If significant discovery has not occurred, it allows the parties to exchange key information.

- It permits participants to demonstrate their interest in settlement.

- It encourages a dialogue that may lead to finding common ground.

- In appropriate cases, it is an opportunity for a party to apologize, empathize or express regret, which can help open the door to settlement.

But, while substantive joint sessions have significant benefits, for some personalities and issues, they may be counter-productive. Before the mediation, I talk with counsel to solicit their thoughts on the best way to structure the proceeding. If they believe that, after my introduction, opening statements and discussions would be unproductive or counter-productive, I do not insist on them. Mediation works best if the parties and their attorneys have a voice in fitting the process to their particular case.