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Habits Can Be a Hindrance

One of the many wonderful features of mediation is the ability to improvise and the freedom of constraints. There are few rules but many habits. Conducting a joint session and breaking off into a private caucus is a common habit. But sometimes the parties need to hear one another, or the lawyers or carriers need information to evaluate the case.

Permit yourself and the mediator to depart from the more traditional format. There is a host of literature on the over-use of private sessions. If the dispute is relatively fresh and the parties are mediating “early”—meaning before or at the start of the litigation—I find that more fact and information sharing needs to take place. That usually means a longer joint session or more than one joint session. More fundamentally, the parties may still be harboring some resentment, upset or anger that needs to be respectfully acknowledged in joint session. Some litigants need to vent and say their peace to the other side. As a mediator, I will spend some time with the parties and give them a “supervised” opportunity to talk at length, as long as the communication is respectful. One has to guard against allowing the joint session to become heated and vitriolic. It is often helpful to force them to confront one another and communicate civilly in a joint session before they have to make a hard decision. If mediation is later in a case, much more information has been shared and the parties are on a different emotional and psychological plane. As such, shorter joint sessions are likely.

Lawyers do not necessarily like navigating in emotional undercurrents, but that’s a river you sometimes have to float

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to get to yes. There are times when putting the clients together in a room alone might work. Letting them talk to each other—without the attorney as a filter—can work as long as the mediator can keep the peace. Do not be afraid to reconvene in a joint caucus. Use the second caucus to find out what impediments and facts exist that we don't know. Sometimes just asking, "Why are we having such a hard time getting to settlement?" can trigger a narrative by one side or the other that reveals useful information for the attorneys and mediator. Maybe you need to get someone else involved in the discussion. Do not get stuck mediating the same way every time if things are not going well. Consider changing rooms and bringing the parties back together. If the cards are not coming out the way you like, ask the mediator to help you reshuffle the deck. There are very few rules in mediation but many habits. Be mindful of your habits, and do not be afraid to deviate from the norm or take a different path.

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