

To Caucus or Not To Caucus – That is the Question

by Laurie Israel

I have served clients in mediation in many roles -- as mediator, as reviewing attorney, as client's attorney in the background, and as client's advocating attorney at mediation sessions. I have seen a great range of use of caucusing by mediators (including myself), sometimes related to a mediator's style or the mediator's theoretical model of what mediation should be, sometimes relating to the particular facts of a case and needs of the clients.

In caucusing, the mediator meets separately with a party in the absence of the other party. Although more rare, some mediators also practice "pre-caucusing", in which the first meetings of the mediation take place with the mediator and each individual party, prior to the first joint meeting, sometimes on a different day than the first 3-way mediation session.

Caucusing can vary greatly. It can consist of one or two short separate meetings with the mediation clients during a mediation session (perhaps to resolve issues, big or small, at times of impasse). Or it can be the mediation equivalent of "shuttle diplomacy," where the mediator goes from room to room, mediating in what is essentially a continuous series of caucuses.

Caucusing can be seen as a "carefully considered strategic intervention" (Chip Rose, "Poles Apart", *Family Mediation News* (Winter 2007), Association for Conflict Resolution.) Some mediators feel that caucusing gives the mediator too much power to interpret messages, define issues, and engineer a result, and that these acts should be left to the parties themselves. These mediators see themselves as facilitators, with the real power held by the parties.

Other mediators use caucusing routinely as a technique. They view it as an opportunity for a mediator to work separately with mediation clients to help them process the messages sent by the other party in private, to give a party individual care and attention, and to promote resolution of issues privately with each of the parties.

Some mediators (myself included) see caucusing as interfering with the transparency of the mediation process. These mediators believe that the caucus corrupts the free flow of information and thoughts that is important to mediation, particularly family/divorce mediation.

And caucusing can pose other great dangers to the process.

Neutrality and lack of bias (to my mind) are the most powerful tools that the mediator has to offer. They let the parties both feel protected in the process, and permit one person (the mediator) to function something like a "universal joint" (to use an automotive analogy) or as Chip Rose terms it, a "communication conduit," in reflecting and accommodating the different needs and points of views of the mediation clients.

When there are private conversations between the mediator and one party, the other party may think (sometimes rightly, sometimes wrongly) that the mediator is no longer neutral when he/she comes back into the room. This real danger can overshadow the possible benefits of caucusing. And lack of neutrality (or the perception thereof) is the death of a mediation.

A related problem with caucusing is that a party may impart secrets to the caucusing mediator in private. Whether or not your mediation agreement says that secrets and confidences will (or will not be) disclosed to the other party, the disclosure itself and the effect on the mediator can throw off a mediation. Even if you tell a mediation client at the outset of the mediation not to tell you anything that he/she cannot or will not tell the other party, things slip out, especially in a caucus. This is bound to change the mind-set of a mediator who tries to retain the secret. It becomes an elephant in the room, leaving no space for the mediation to proceed healthily.

Also, caucusing generally results in a series of exchanged offers rather than the processing and exchange of views (and change of perception and understanding) that are the essence of a successful mediation. If you tend to view mediation as transformative, this is the path you do not wish take.

I generally start a mediation (prior to the first meeting, when communications are generally by e-mail) by telling the clients that all communications (including e-mails) should be 3-way. I explain the reason why – that any “ex parte” communication can lead to feelings by a party that the mediator is no longer neutral and rather favors or advocates for one or the other party.

But I am not a card-carrying “anti-caucuser,” though I tend to make efforts to avoid it in mediation. But, not at all costs.

I, myself, have been involved with extreme versions of caucusing (some leading to a successful conclusion.) I have had mediations marked by an extreme need for caucusing that required completely abandoning face-to-face meetings and proceeding with a series of phone calls and emails with each of the parties separately. It *was* mediation, because I was functioning as a neutral third party, and it worked for these clients, who needed not to be in the same room or even the same office building. (I do not believe in throwing out the baby with the bathwater, and tend to be very practical). But I believe that, at least in family/divorce cases, caucusing has many drawbacks, and mediators should try to avoid it.

To me, the most important touchstone of a successful mediation is for each of the parties to feel strongly that the mediator is neutral and not biased towards or against them. Mediation clients can easily sniff out mediator bias and lack of neutrality. It seeps out of a mediator’s pores. Usually clients correctly and rightly perceive bias and lack of neutrality (when it exists), although in some cases, the lack of neutrality and existence of bias is a misconception on the part of the clients. Non-neutrality and bias (or the perception of it) immediately derails

mediation, and the mediator almost never has another chance to remedy the blemish. The clients (or one of them) almost always abandon the process. If they continue with it they invariably feel “burned” at the end, whether or not the mediation results in agreement. This is not a good result for anyone and these clients will never recommend the mediation process to others.

A successful mediation is more than just a rushed-into agreement. It has lasting benefits for the parties. A good mediation makes it more likely that the parties can handle future challenges by themselves, without a neutral third party. That is why many of our mediation clients tell us that if they could have worked with us prior to their break-up, their marriage may have worked out. (That is how and why “marital mediation” or “mediation to stay married” often works successfully.)

There are differences in the viability of caucusing in different types of mediation. Caucusing may have varying uses in divorce mediations, marital mediations, and mediation in other types of civil disputes. The majority of mediated divorces deal with parties who have children. These are people who will be in relationship for the rest of their lives. Having the last act of their marriage (the mediated divorce) be partially in secret (in the caucus) seems to be not the best way to end a marriage and begin a lifetime of co-parenting. After all, mediation is about self-reliance and self-determination, and exchanges of a party’s “truths”. Face to face negotiations, assisted by the mediator, seem to best reflect this process.

In marital mediation, where a couple is trying to stay together and maintain their marriage, I generally avoid caucuses like the plague. (I am aware that other marital mediators have different views on this.) Working with a married couple is a very tender intervention by a mediator. For a couple to stay married, generally they need to have no secrets (at least not big ones). Caucuses can promote secrets. Also, in marital mediation, the marital mediator has a chance to model dispute resolution for the couple. Caucusing seems, to me, to make the process go awry because caucusing will not be available to the couple when they go home and deal with their own problems in “real” time. Also, without full, truthful transparency in the marital mediation process, problems in the marriage can linger, fester, and not be resolved in the marital mediation.

In civil mediation, caucusing is much more of an integral and helpful feature of the mediation process. Generally, the parties will have nothing or little to do with each other after the mediation. The burden that caucusing may pose to the future relationship of the parties is not an issue here. Often, the parties will come to the mediation with their lawyers. Anyone who has experienced a civil-matter (not divorce) mediation with the parties and their lawyers in the room, understands that in this situation a strong caucusing element with features of shuttle diplomacy by the mediator is generally very effective. It is not surprising that much of the

academic literature dealing with caucusing deals with business, not divorce, mediations. (See, for example, Richard Calkins, “Caucus Mediation – Putting Conciliation Back into the Process”, Drake Law Review Vol. 54, 2006)

I would love to hear from other mediators (and mediation clients) regarding their views on caucusing in mediation and welcome comments to this article.

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