

## **Using Caucuses and Separate Appointments**

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## **Using Caucuses and Separate Appointments**

There are pros and cons to using caucuses and separate appointments as part of your case management.

Whether and when to use caucuses is the subject of much discussion among mediators. Some mediators use only joint sessions, some begin in joint session but leave the option of caucusing open, and other mediators begin mediations with individual sessions/separate appointments (like a caucus) and only after the mediator has met with all parties individually will the parties and mediator meet in joint sessions.

The civil mediation model typically uses caucuses either from the beginning, with the parties always separated, or after a very short joint session that simply outlines the facts of the case. Family mediations often minimize the use of caucuses, yet caucuses can be a very useful part of the family mediation process as well.

For the purposes of this section, we'll use the word "caucus" to mean both an individual session within a joint mediation session as well as an individual appointment scheduled by a client when no joint session is scheduled.

Our typical mediation model uses joint sessions as much as possible. We start in joint sessions if we can so that we can observe the dynamic between the parties. Of course, there are situations where joint sessions won't work or aren't desired by the parties, and we've set up our office to accommodate separate sessions and caucuses. Once in awhile, parties ask for individual sessions before the first joint session, or during the mediation orientation we've learned of domestic violence or an apparent addiction to arguing that would be counter-productive in

a joint session. That said, we believe that the most efficient, transformative progress is made in joint sessions.

There are times when caucuses are absolutely necessary, however. If you observe a client becoming more and more disregulated (*i.e.*, agitated or out of control), it may be time to caucus. Pay attention to the clients' behavior, and their apparent physiological state. You cannot rely on clients to be accurate reporters of what should happen next. They may or may not realize how out of control they are (or are becoming). A common example of this is the client who is crying but who protests "I'm fine, let's keep going." Any kind of agitated behavior is a sign to the mediator that a caucus may be the next best move. If not a caucus, at least take a short break.

Caucuses can be a great tool for making clients take the break from each other that will allow them to calm down. We use them for a variety of reasons, typically to good effect:

- Self-soothing;
- Trust building with the mediator(s);
- Helping clients reality test;
- Helping clients prioritize their goals;
- Letting clients articulate their potentially unmanageable emotions and vent

In our eyes, the three drawbacks of caucuses are (1) the increased cost because it slows the process down, (2) because caucuses slow things down, they make it harder for clients to see progress and success in the mediation session and (3) the clients are the ones who really need to hear each other and learn to listen to each other, and the caucus doesn't permit them to do that. In a situation where no progress is being made because of persistent low road behavior, and where it's apparent that clients are not listening to each other and cannot be persuaded to do so, then the two drawbacks of caucuses are overcome because it helps prepare them to return to mediation.

We've overcome what would have been a fourth drawback to caucuses by using a co-mediation method that is a little unconventional: when we caucus, the mediators split up and one mediator goes with one client and the other mediator goes with the other client. We've worked together long enough to trust what the other is doing in the other room and to anticipate what that might be. No one sits alone in our practice. We've simply found that no matter what clients tell us, *i.e.*, "I'm fine sitting here by myself. I have work to do and calls to return," that they are not comfortable sitting alone. The exceptions are rare.

If one client really needs both mediators' attention, then we ask our Dispute Resolution Associate to sit with the other client. This gives her an opportunity to

make sure that the client has completed his or her financial disclosures or to review other paperwork. At the very least, she'll sit down with the client and watch a video or make small talk. It's the rare client who is truly comfortable sitting alone with the mediators in the other room with the spouse.

This is our take on the use of caucuses in our practice. As your role model or guide, you may also want to consider Christopher Moore's analysis on some of the reasons and benefits of using caucuses as outlined in his book, *The Mediation Process* (Wiley/Jossey-Bass, 2003):

## **Caucuses** Adapted from Christopher Moore's *The Mediation Process* (Wiley-Jossey Bass 2003)

In mediation you may encounter some internal dynamics between the parties and their lawyers which may make caucuses helpful:

- Problems with the relationships between the parties or within a team
- Problems with the negotiation process
- Problems with the substantive issues under discussion

Other useful features of caucusing:

- Provides parties with a break if the joint session is too intense
- Refocus the motivation of the parties on why a settlement is important and the alternatives to a negotiated settlement (e.g., you can ask a lawyer in front of the client what the weak parts of the case are)
- Reality testing and acting as a sounding board
- Gives parties a chance to review BATNA (best alternatives to a negotiated agreement)
- Uncover confidential information that may not be revealed in joint sessions
- Control communications of parties and help them focus, helps eliminate emotions when you separate them
- Educate an inexperienced disputant about negotiation procedures or dynamics
- Prevent a party from making premature concessions or commitments
- Moving a party off an untenable or hard-line position
- Develop a single-text negotiating document when parties too numerous, issues too complex, or emotions too heated for face-to-face encounters
- Develop settlement alternatives in an environment that separates the process of generating options from that of evaluation
- Determine if an acceptable bargaining range has been established (or create one)
- Design proposals or offers that will be later brought to joint session
- Test the acceptability of one party's proposal by presenting the offer to the other party as an option generated by the mediator rather than opposing party
- Make appeals to common principles or goals

- Express your own perceptions of the situation and maybe make settlement suggestions

Timing and location are both important. Explain at beginning of mediation whether you may use a caucus, and under what circumstances. Also be clear about whether the content of the caucus is confidential, and what information will or will not be shared with the other side.

If you caucus with one party, always caucus with the other party, too, even if it's short.

Protocol—up to the mediator to do:

- Educating the parties about caucuses and why they're useful
- Overcoming resistance of the parties to separate meetings
- Making the transition to the caucus
- Deciding who to caucus with first
- Determining the duration of the caucus
- Determining what is said in the caucus
- Facilitating the return to the joint session

Despite the benefits to be gained from a caucus, however, many family mediators prefer to work without them, or mostly without them. As a family mediator, it's easy for parties to develop a "conspiracy theory" about what is happening in a room from which they've been excluded. Using or not using caucuses is not only a matter of the mediator's preference, but also the perceived needs of the parties, and the parties' tolerance for individual appointments, knowing that there will be a time when the mediator is meeting alone with the other party.

Deciding when and how to use caucuses is part of good case management and a way to move toward artistry in your mediation practice. To always handle every mediation in exactly the same way with the same format may or may not serve the clients' best interests.