

Two Dozen Reasons For Using Caucuses In Facilitative Mediation

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*Caucuses aren't essential in facilitative mediation,
but they can be extremely effective if you identify
what you want them to accomplish*

FACILITATIVE MEDIATION, as one court rule defines it, “is a process in which a neutral third party facilitates communication between parties, assists in identifying issues, and helps explore solutions to promote a mutually acceptable settlement.”

Facilitative mediation for many lawyers is, as they say, a new paradigm. The old way typi-

cally involved an aggressive trial judge’s “shuttle diplomacy,” exemplified by an experience I had in federal court. The judge convened a mandatory settlement conference with lawyers and decision-making parties. She brought us together in a conference room and thanked us for coming (in response to her *order*). She encouraged us to make every effort to settle. If we did

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not settle, she said, she would decide the long-pending cross-motions for summary judgment and “one side would be very unhappy.” She glared at the other side’s lawyer and me and said: “I think counsel know exactly where I’m coming from.” He and I looked at one another. We had a moment of perfect silent communication: neither of us had the faintest idea of where the judge was coming from.

The judge separated our groups and commenced “shuttle diplomacy.” After hours of back-and-forth, we settled. My side came way down. The other side came way up. We later ascertained that the motivations for settling were identical. During caucus discussions the judge revealed profound ignorance of the facts and the law and extreme and reckless ideas about what a summary judgment might look like. The prospect of leaving the decision in her hands was unthinkable. Each side moderated its position. It was a good settlement—if you subscribe to the idea that the hallmark of a good settlement is that everyone is unhappy.

The reason why the judge’s caucus-based “mediation” worked was because the judge had an iron fist inside her velvet glove. She was the trial judge.

The facilitative mediator, however, has no iron fist. The facilitative mediator, as the court rule puts it, “has no authoritative decision-making power.” Under that rule, the facilitative mediator reports to the trial judge “only” that mediation was completed, who participated, and whether the case settled—not who was unreasonable (or unprepared, hostile, irrational, obstructive, passive-aggressive, etc.). In facilitative mediation, caucus is not an instrument to impose the mediator’s will and judgment on reluctant parties; rather, caucus is one of various tools available to mediators to serve the rule’s objectives: to *facilitate* communication between parties, to *assist* in identifying issues, and to *promote* a mutually acceptable settlement.

Under the facilitative mediation model, the mediator’s objective is not settlement. Rather, it is to facilitate the parties’ consideration of all possible resolutions to the dispute. The process belongs to the parties, not the mediator. The mediator’s objective is to assist the parties in reaching agreement *if* there is an agreement to be reached. There is not a *mutually acceptable* resolution to every case. The mediator—like the process—succeeds if all settlement possibilities are exhausted, even if no settlement is reached. Sometimes parties *need* their day in court.

Of course, the style of the mediator, the mediator’s commitment to the facilitative model, and the parties’ expectations and directions all influence the degree to which the mediator might press for and shape settlement. There are consumers of mediation services who want a judgmental, head-knocking expert from out of town to wield that velvet glove even if there is no iron fist inside.

Whatever the desired mediation model, caucuses can be useful tools. They are *not*, however, *required*. For some, this goes against the grain. Some old-school lawyers (and some old-school mediators) think that mediation isn’t mediation without caucuses. They think that caucuses and “shuttle diplomacy” are the essence of mediation, and that everything else is marginal. But sometimes caucuses obstruct the parties’ communication. Indeed, the central idea of facilitative mediation is that informed communication *between the parties* promotes agreement. Informed communication is more likely when the parties face each other across the table and candidly discuss their views—on the facts and the law, on interests and objectives, and maybe about right and wrong. Communication is more difficult when the parties are in different rooms.

Caucuses have other drawbacks. Caucuses can create the feeling of secrecy, interfering with the level of trust and comfort necessary to

agreement. Caucuses can cause parties to feel (rightly or wrongly) that the mediator is siding with the other party. Caucuses can shift attention from the parties' communication, where it should be in facilitative mediation, to the mediator, who can become the principal communicator for both sides. Caucuses can harden parties' positions because in caucus their positions are expressed to sympathetic ears ("preaching to the choir") in terms not tempered for the opposition's consumption. Caucuses can be time-consuming and therefore more expensive—joint sessions are more efficient, with direct communication between the parties.

TWENTY-FOUR REASONS WHY MEDIATORS MAY USE CAUCUSES IN FACILITATIVE MEDIATION

• Still, caucuses can be very useful. Mediators should use them if and whenever there is a good reason for using them, such as any or all of the following reasons to caucus.

1. To probe facts, interests, needs, motivations, justifications, concerns, perceptions, assumptions, analysis, objectives, positions, and feelings in a safe, confidential setting.
2. To ask questions to clarify, specify and expand information, to be sure the mediator knows what the mediator ought to know to be effective.
3. To test credibility, accuracy, reliability, and comprehensiveness.
4. To encourage a party to ask questions of the other side, to communicate that it is appropriate for a party to ask questions of the other side, and to assist a party in formulating questions for the other side.
5. To "coach" a party on communicating effectively with the other party, and to make suggestions for constructive approaches, and counsel against destructive approaches.
6. To "brainstorm" ideas for possible settlement in a safe, confidential setting, without judgment, fear of looking foolish, or concern about putting terms on the table without sufficient deliberation, and to encourage and assist the parties to "think outside the box."
7. To explore and evaluate ideas for possible settlement in a safe, confidential setting ("What if ...?") and to reality test by predicting, or asking a party to predict, the other party's reaction to possible settlement ideas.
8. To promote the parties' self-examination and clarification of objectives, assumptions, and expectations.
9. To aid a party in weighing options by focusing on the party's best alternative to a negotiated agreement ("BATNA").
10. To encourage the parties to do necessary arithmetic and other exercises to turn abstractions into practicalities.
11. To permit parties to vent anger, frustration, resentment, and similar emotions in a safe, confidential setting, and then regain focus on achievable objectives and alternatives.
12. To take a "time out" to change the atmosphere created in joint session:
 - To relieve tension;
 - To diffuse anger;
 - To address suspicion and insecurity;
 - To provide a "cooling off" period;
 - To provide "breathing space";
 - To allow parties and their lawyers to get things "off their chests" in a safe, confidential setting; and
 - To refocus on interests, rather than positions and personalities, and to reinforce the purposes of mediation.
13. To promote discussion and consultation between parties on the same side, or between parties and their own lawyers.
14. To address, and defuse frustration with, apparent lulls in progress.