

Mediation Matters
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“A bird in the hand is much safer than one overhead.”

— Anonymous

The Caucus: Shuttle Diplomacy or a Power Grab

Caucusing in divorce mediation, that is, separate meetings of the mediator with a party and their attorney in the absence of the other party, is common in Michigan. In fact, some mediation experts claim the old “Michigan Model” of shuttle diplomacy is barely mediation at all. The caucus has become more and more controversial, as mediation purists advocate for use of joint sessions only. The reason often given by them is that the caucuses give too much power to the mediator and the lawyers to define issues, to the exclusion of the parties.

Other mediators use caucuses routinely. They view it as an opportunity to convey messages from one side to another without conflict in a setting which allows for individual care and empathy. So, after giving each side an opportunity to lay out their positions for the other side, the parties are separated often not to see one another again until a resolution is reached.

The Michigan Supreme Court Administrator’s Office (SCAO) has adopted a model which, in setting out its training for court-appointed mediators, chose a model which uses the caucus sparingly. The SCAO suggests that mediation should be a joint conflict resolving process for good reason. The process is supposed to rely on parties working together to reach an agreement. When parties come to their own agreements, contributing

to the final result, the agreements make sense to them. They feel that their participation matters and agreements last longer.

Advantages of Caucus

Why have a caucus at all? After all, when the caucus is used extensively, from the viewpoint of the party participant he or she simply sits for many hours and waits for the mediator who is in another room, having little to do. This is hardly a joint decision making endeavor.

Nonetheless, there are times when a caucus is of value. The use of a caucus is viewed as a meeting which will allow a party to be more forthcoming with information, proposals and concessions. Other times, when tempers are rising, the mediator may want to use the caucus for a cooling off period. Sometimes a party is about to do some destructive act in a high conflict case which may end mediation altogether. This, too, may signal the time for a caucus.

Sometimes a mediator may choose to caucus with just the attorneys for the parties. Outside the presence of their clients, attorneys can be more candid and the conversation can move forward more efficiently because the attorneys don't need to impress the clients. Other times a mediator may want to caucus with the attorney for Party 1 and the attorney for Party 2 and Party 2 so that a good idea for a resolution of an issue can be presented by its proponent. This can be reversed when Party 2 and his/her attorney have a proposal.

Other hybrids on the caucus which may be creative and constructive involves meeting with the expert(s) for the parties alone or with one or both of the attorneys. Sometimes a variation which some mediators believe is helpful is to give an issue to the experts, say business evaluations for the parties, to caucus on the issue of value and/or

payout, while the mediator works with the couple and their attorneys on other issues.

Disadvantages of the Caucus

Mediation in family law is supposed to be much more than simply resolving a conflict. It is supposed to allow the parties to reach a better understanding of themselves, each other and to find a methodology for dealing with conflict. To do that the parties must work together and separate meetings do not assist them. For example, parents sometimes have differing parenting styles. To have a mediator caucus with the parties may take care of the immediate problem but does nothing to help the parties deal with a similar future problem.

Another critique of the caucus is, in a worse case scenario, a party may blatantly lie to the mediator and the mediator, in protecting the liar's confidentiality, may allow the lie to influence the balance of mediation. The other party, rightly or wrongly perceives a change in the mediator when he/she comes back into the room and believes the mediator has lost neutrality. This usually ends with a failure to settle. Other times, through no one's fault, the mediator misinterprets information and miscommunicates the message. It doesn't take a genius to see how harmful this can be.

The majority of mediated divorces deal with parties who have children. Having the last acts of their marriage (the mediated divorce) be partly in secret (in the caucus) does not seem the best way to end a marriage and begin a lifetime of co-parenting¹.

Finally, if the all-caucus method is used, one side is left for extended periods of time with nothing to do but stand by "at the ready" in case the mediator comes back to caucus with them. Of course the "meter is running" on the non-engaged attorney's time.

Despite the growing dispute between no-caucus and all-caucus models of mediation,

there has been little written about it until recently. In 2008 and 2009, several respected authors have addressed it ². To say that their positions are all over the map is an understatement. The conclusion that may be drawn from a review of books and articles on the caucus seems to be that an eclectic model which includes caucusing, hopefully after analyzing the reasons for and probable effectiveness of it, seems to be what is going on in family mediation. Successful mediation in Michigan requires mediators to look at old and new mediation models, be flexible and remember to keep the owners of the process, the parties, in control.

1. Laurie Israel, *To Caucus or Not to Caucus - That is the Question* <<http://yourfamilymatterslawblog.com/to-caucus-or-not-to-caucus-that-is-the-question>> (accessed March 7, 2011).

2. Hoffman, David A., *Mediation and the Art of Shuttle Diplomacy*, draft to be published in the *Negotiation Journal* (2010) citing:

Friedman, G and Himmelstein, J., *Challenging Conflict: Mediation Through Understanding* (Chicago, IL: American Bar Association and the Program on Negotiation at Harvard Law School, 2008);

Geoff Sharp, *In Praise of Joint Sessions* <<http://geoffsharp.co.nz/articles/in-praise-of-joint-sessions-27>> (accessed March 7, 2011).