

Successful Caucusing Strategies

This paper is about the classical psychological factors of negotiation that often affect the outcome of a successful mediation session. In particular, this essay will discuss how to mitigate negative factors with a successful caucus. Although it is typical only to discuss the psychological factors of mediation, there are ideological and physical aspects which influence these psychological factors as well. The ideological aspects account for the voluntary nature of the event, its confidentiality, and openness, and the problem of defining equality and neutrality. The physical aspects are the time and place of the mediation, the roles played by each of the parties, and caucusing. This paper is an attempt to develop an understanding of how caucusing can be the tool to help bridge the division which develops when the ideological aspects are stifled by the classic psychological effects of negotiation.

The quality mediator will have an opening statement prepared, which will include a short definition of the more nebulous ideological aspects as well as the uses for the physical aspects—of which caucusing is a vital tool.¹ Caucusing can defuse a possible volatile situation, help the parties to hear one another better, and even allow the mediator time to regroup when tempers flare. The key to having caucusing in the mediator's tool bag is to engage in a full voiced proposal of its mechanics, helping to create an understanding for all parties present. By stressing the importance of caucusing as a tool, used only when needed, the parties will look forward to its implementation and will feel privilege at its utilization. Conversely, if the mediators seek to gain control over the parties or to insert their own agenda into the discussion by exploiting a caucus, the positive aspects of caucusing can be lost and resentment towards the mediator may develop.

The secret to proper caucusing emerges when the mediator understands how caucusing can help the parties recover from the negative characteristics of the psychological factors that emerge in mediation. The first psychological effect to discuss is conflict—the basic reason that the parties are in mediation. The typical model has two parties at some impasse over which they cannot come to a mutual agreement without the aid of a neutral third party. In the first phases of

mediation the mediator should assume that the parties' mutual past has brought them to the table after attempting to come to an agreement and uncover the effects of this past. In some cases, and in some legal scenarios,² the parties will be unable to be in the same room for the mediation because the level of conflict is already elevated and a *shuttle* mediation will be essential. Technically, this is a type of caucus. As much as conflict is the reason that the parties have sought out mediation, it is the mutual history that serves as the impetus for the mediation event. It is the mutual history that serves to unite them in seeking a mutually beneficial outcome to repair, protect, or dissolve the relationship and to continue on with their lives in a healthy manner.

The parties' conflict is most likely the result of the loss of reciprocal communication. There are many methods a mediator can utilize to overcome this, but initially the mediator must listen and give feedback to the speakers to ensure that their voice is being heard and considered in an evenhanded and dignified manner. One author offers a model for mediation, which divides the issues that emerge into the conflict regions of Data, Relationships, Interests, Values, and Structural issues (DRIVS).³ The DRIVS model will allow the experienced mediator to uncover ideals, allowing the construction of a framework around the typical risk avoidance/preference models discussed at length.⁴ Using the DRIVS model, the mediator can assess the clients for their particular priority of the different conflict regions, and then frame the discussion around these particular ideals. This ensures the client that they have benefited from active listening all throughout the reframing process.

When impasse creates tension that limits the psychological benefits of mediation, such as openness, neutrality, or equality, the mediator should consider using a caucus. The mediator should again explain what a caucus is

¹ This discussion assumes the single mediator model, with parties who have a limited or no knowledge of mediation.

² Mediation is a tool utilized by different courts for the disposition of family law matters, orders for protection, juvenile law, conciliation court, and housing to name a few.

³ Christopher Moore has written extensively concerning DRIVS.

⁴ Daniel Kahneman and Amos Tversky have researched extensively about the perception of losses and gains and Jeffery J Rachinski has written thoroughly concerning the effects of gains, losses, and the psychology of litigation.

Successful Caucusing Strategies

and then move the parties into separate rooms. Thus, the mediator can relieve the pressure that the tension creates. The notion of overcoming the psychological barrier has lead different authors to suggest caucusing as a means to helping the rational client stay rational.⁵ This is accomplished when the mediator avoids using adversarial language and, instead, uses neutral terminology in describing the issues and disputes.

It is essential that the mediator listen to the parties first and then decide whether a caucus is necessary. Tension is a healthy and therapeutic aspect of mediation and at times is an essential element in the reconstruction of the relationship. However, when shifting and reframing between the parties breaks down, or when one party or both lose their “voice,” the mediator should consider moving the parties into a formal caucus, so that can then become the vehicle by which shifting and reframing can take place. For example, values-based disputes can be reframed either by reinterpreting the issues as interests, avoiding the value elements, or by appealing to broader shared values. When the mediator is able to help the parties create or visualize broader shared values, then there is a shift in perception that takes place. This shift is a means of helping the parties overcome issues stemming from the status quo bias—the shifting perception is in itself a shift in the status quo. Realizing broader shared values also helps to alleviate the tension created by the endowment effect—with more shared values either party may become more willing to give more to the other party, rather than to hold their values dear.

Caucusing also works to mitigate or completely overcome another set of psychological effects, when the mediator moves from room to room or party to party. When either party is ready to make an offer it is wise to consider the psychological effect of anchoring and reactive devaluation.⁶ When the mediator realizes that a party is ready to make an offer, the mediator should be aware of the anchoring effect. After hearing the offer, it helps the mediation process to ask the party how they arrived at that particular offer. The mediator can

help to mitigate the anchoring effect outsiders have on the mediation process by listening for the collateral input of the parties’ associates. Using language that standardizes, but validates, the input from the associate, the mediator can help broaden the shared ideals of this single party (the offeror) by bringing in the values/interests of the absent party.

Caucusing allows the mediator certain creative flexibility as well. Properly utilizing a hybrid of the default template model helps to overcome issues that emerge from reactive devaluation as well. Reactive devaluation has the effect of creating an irrational negative association to the offer, when it comes directly from an opponent negotiator; therefore, it is sometimes essential to a healthy mediation to move into caucus prior to discussing opening offers. While in caucus, asking permission of the offeror to use the offer as an idea borne of the mediator, in effect the mediator “buys” into the offer by making notes about the offer on their own paperwork. This is most useful when the mediator uses a clipboard/notebook to keep track of the information exchanged. This creates an appearance to the offeror that the mediator considers the offer valid. Drawing upon the notes the mediator has created in the presence of each of the parties, the mediator draws up the offer and voices the offer to the offeree in terms of “I was thinking” or “we were considering,” etcetera. By “owning” the offer and drawing it out of the mediator’s paperwork, the default template is utilized creating credibility for the parties and the mediator. This alleviates the psychological effect of reactive devaluation. It should be noted that, prior to using this clipboard/notebook technique, that the mediator should have used the clipboard/notebook extensively *in the presence of both parties*, otherwise it looks more like an affectation, rather than the well used tool that it truly can be.

The writer has found that the techniques discussed above can simultaneously permit a bargaining session to continue while in caucus, but also “buffer” the parties from the negative effects generated by the more tension filled distributive bargaining techniques present when the parties are in each others presence and not in caucus. As such, the successful mediator can realize the psychological and physical aspects of negotiation are undermining the effect of mediation as a whole. Then the mediator can move into a caucus properly. Further, the disputants begin to perceive the caucus as a

⁵ Robert Mnookin and Lee Ross have written several suggestions on how this process works as well as Nancy Welsh.

⁶ Jennifer Brown & Ian Ayres, as well as Russell Korobkin have all written on this topic.

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Successful Caucusing Strategies

privileged tool that only the mediator can bring to a healthy negotiation session. When mediation compromises the facets of communication such as openness and equality, caucusing allows the parties the full opportunity to express themselves, and it allows the mediator to concentrate on understanding the parties' individual perspectives, rather than becoming a referee between combatants. As the mediator uncovers the relevant ideals (DRIVS) of the parties, the mediator can "coach" the parties in framing and vocalizing their own terms for when they move back into the joint session, or if no further joint session is available, the party gains assurance that the mediator is representing their best interests to the other party. Using these techniques the caucus conceptualizes the dignity of the parties by allowing them the opportunity for a more full voice and consideration of their psyche in mediation overall.