

Richard M. Calkins

# The Use of Caucussing in Mediation

After attending the *Twelfth Mediation Congress* in Munich, Germany, September 20-21, 2007, it occurs to me that Germany is going through similar growing pains in the use of mediation as occurred in America. Mediation in Germany has centered primarily on family law and the victim-offender program. In commercial arenas it has been marginal. Until seven or eight years ago, this was true in the United States also. More recently, there has been a breakthrough and today mediation is used in all areas of the law, from intellectual property, commercial dealings, antitrust to legal and medical malpractice and personal injury.

It seems to me there are several possible reasons why Germany uses mediation primarily in the victim-offender and family law areas. First there is a tradition and comfort level in relying on a judge, who is highly trained and respected, to decide matters, rather than going through a conflict resolution process outside the courts. Second, lawyers in Germany may not be convinced that mediation can be successfully implemented in litigation generally because they are not specifically trained in the process. Third, the emerging German mediation market, according to one German judge, can be described as a "patchwork quilt with a rapidly growing number of organizations offering mediation services according to at least ten different dispute areas. This fragmentation leads to a confusing image for the public." In the United States, the bar has gone through the identical growing pains.

It is the goal of this paper to explain the power of mediation and the dramatic impact it is having in America as it has become more generally accepted. It is also a goal to encourage Germany to take the lead in implementing mediation as a model for Europe.

## A. The Need For Mediation In America

Unlike Germany, mediation was born of necessity in the United States. The American legal system was created with the highest ideals in mind: to seek the truth in all instances and to do justice for all who enter its hallowed halls. Yet, with overcrowded dockets and increasing numbers of cases filed each year (over 18 million), former

Chief Justice Warren E. Burger, of the United States Supreme Court, was compelled to declare that the American legal system has become "too costly, too lengthy, too destructive, and too inefficient for a civilized people."

Mediation has dramatically reversed the trend which created gridlock in American courts, by providing a mechanism which not only resolves legal disputes (a success rate of eighty-five to ninety-five percent), but is providing a means to bring conciliation, peace and healing to the parties, something that never occurs in the courts. This paper examines caucus mediation, which has proven so successful in the United States.



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## B. Reasons for the Success of Caucus Mediation

Caucus mediation is to be distinguished from conference mediation in that in the former, after the initial joint session when all parties are present, the parties are separated and assigned to different rooms. Thereafter, the mediator meets alone with each party and goes back and forth with new demands and offers until the matter is settled.

There are six reasons caucus mediation has become the process of choice in most areas of law. First, because the mediator meets alone in caucus with each side, that is, he or she will discuss the merits of the case with one side without the other being present, the mediator can ask questions which have never before been asked in litigation. The mediator can ask not only what the strengths of the case are, but what the weaknesses are. This is a question a judge, jury or arbitrator cannot ask for obvious reasons. In asking this question of both sides, the mediator gains an insight into the case no one in litigation has had before. With this information, he or she is literally in a position to guide the parties to a meaningful settlement.

Additionally, the mediator can ask what a party thinks will happen before the judge or arbitrator, best case/worst case. When both sides disclose their worst case,

there is generally an overlap, and many times settlement can be reached somewhere in this overlap. This additional information also helps the mediator in guiding the parties to resolution.

Second, by bringing in a mediator capable of understanding the positions of the parties and the strengths and weaknesses of each, he or she can give direction to the process. This may require creative thinking and analysis on the part of the mediator. Because of the mediator's absolute neutrality, he or she may see possibilities overlooked by counsel advocating in the matter. The mediator can also help each side better evaluate its position and encourage it to compromise where compromise is needed.

Finally, the skilled mediator is trained to deal with the difficult client. Many times, mediation is initiated because counsel is having difficulty with a client and needs the third party mediator to affirm what counsel has been advising. Because of the position of the mediator, often an ex judge, the client is more apt to listen and compromise where compromise is required.

Third, because mediations are conducted in a confidential setting, unlike a trial, the parties are directly benefited. Many times matters litigated are sensitive or involve confidential business information. To be able to resolve matters without public disclosure provides a means to protect the fact that there is even a dispute and/or what the terms of resolution are.

Fourth, mediation provides great flexibility. A mediation can be interrupted and a witness contacted by phone, for example, and asked critical questions. A mediation can be continued so that the mediator can investigate further the facts of the case, question witnesses, or examine premises. Or, a witness can be brought to the hearing and questioned by the parties.

Fifth, mediation is totally flexible, not only as to the process utilized, but also as to what can be resolved. A judge or arbitrator is generally limited by the facts and law as to what he or she can decide. In mediation, the parties can include anything they wish

in their settlement so long as it does not violate public policy. They can include a written apology or letter of commendation, spread out payments over months or years, make part of the settlement future business orders, whatever. Because mediation is by contract, the only limitation as to what can be included is the creativity of the parties, counsel and mediator.

And sixth, mediation, because of its flexibility, is easy to initiate and conduct. The process is entirely accommodating. It is conducted at the convenience of the parties and counsel, and it can be held at a place comfortable to all.

### C. Format of Caucus Mediation

The format of caucus mediation is really quite simple. The skill is not in the format but in working with the parties and counsel and being able to influence them.

#### I. Opening session

The mediation begins with the opening session with all parties and counsel present. The mediator begins the session by saying a few words that will set the tone of the mediation. His or her words should be calm, friendly and positive. The purpose is to still the storm that litigation engenders and calm the parties so that they will be receptive to the process. The mediator's words should also explain the caucus system so that the parties will know what to expect. It also outlines the functions of the mediator and the fact that the mediator is neutral and nonjudgmental and is bound to protect the confidentiality of the process. Finally, the mediator will ask the parties to be patient, flexible, and think creatively. Upon conclusion of the mediator's opening remarks, he or she will invite counsel to make opening statements explaining their positions in the case.

#### II. First caucus

The first caucus with each side follows the same format. The purpose of the caucus is threefold: first, to build rapport and trust with each side; second, to gather information about the case that is needed to settle it; and, third, to become acquainted with the parties and counsel and begin to evaluate what they really seek and how they might compromise. The mediator will make inquiry of the following:

#### 1. strengths of the case

The mediator will first inquire as to the strengths of the party's case. This will help the mediator to understand what the party seeks to accomplish in the litigation.

#### 2. weaknesses or concerns in the case

The question what are the weaknesses or concerns you have, is the critical question in caucus mediation. It sets it apart from any other mediation format and the courtroom trial or arbitration. When the mediator learns the weaknesses on both sides, as noted above, he or she gains an understanding of the case no one in the judicial process has ever had.

#### 3. best case/worst case before judge or arbitrator

The next question asked is what counsel believes is the best result and worst result before a judge or arbitrator that might hear the case. Learning what each side believes their worst result is, the mediator can determine if there is an overlap between the parties. This will help the mediator determine if counsel for both sides are evaluating the case realistically.

#### 4. settlement discussions

The fourth consideration is to inquire about past settlement discussions. This might show if a pattern of negotiating has emerged. It also determines which party must make the first move in the mediation. The party that moved last should not be asked to move twice in a row; thus, the other party should move first.

#### 5. new demand or offer

Upon completion of the caucus, the mediator should ask for a new demand or offer, as the case may be, to take to the other side.

#### III. Subsequent caucuses.

After the first caucus on both sides is completed, the mediator will commence the second and subsequent caucuses. In these caucuses, the mediator will raise for discussion the strengths of each side. Thus, with the plaintiff, the mediator will raise the strengths the defendant has enumerated and visa versa. In this way, the risks for each side will be identified and the media-

tor can help the parties understand the ramifications of their positions.

With each caucus, a new demand or offer should be made by the parties. This will continue until a figure agreeable to each is reached. Also, the parties in these subsequent caucuses will discuss non monetary matters they wish included in any settlement.

### D. The Peacemaker's Role In Mediation

There are three basic mediation formats: trial format, conference format, and caucus format. The mediator in the latter has the opportunity not only to resolve differences, but help the parties find conciliation, peace and even healing. The mediator can be a peacemaker, the highest calling in the legal profession. *Abraham Lincoln* stated that, "As a peacemaker, the lawyer has his greatest opportunity." And former Chief Justice *Warren E. Burger* said, "The obligation of your profession is to serve as healers of human conflict."

The qualities of a peacemaker

There are a number of qualities a peacemaker must express. First, he or she must be at *peace* within himself or herself. The person must be calm and demonstrate by appearance and the manner in which the person speaks, that he or she cares and is in control. In other words, the person's mere presence at the opening joint session should calm the participants and help them to begin concentrating on settlement and not the anger or frustration they may feel coming into the process.

Second, probably the most important quality of the successful mediator is *patience*. This means that the mediator should not be too quick to push the parties until they are ready and receptive to what is being suggested. It also means that the mediator not allow himself or herself to become frustrated or angered by the intransigence or obstructive behavior of the parties. Any show of frustration or anger, any effort to put unreasonable parties or attorneys in their places, even a sarcastic remark, will sabotage a mediation.

Third, the mediator at all times must remain *positive* and *confident*. The emotions of the parties in a mediation go through cycles. At first everyone is optimistic, the case will settle. That is why they are attending the mediation. However, after the first demand and offer is made they become discouraged. Later their spirits pick up only to be dashed later in the day when a

substantial gap still exists between the parties. The mediator cannot ride this rollercoaster. Even a minimal show of discouragement is contagious. This means the mediator must be conscious of his facial expressions and the way he carries himself to be certain no negativity is being conveyed.

The key to being positive is to make the parties understand that there is nothing different about their mediation as any other that settles. What they are experiencing is what always occurs – this needs to be conveyed even if there are serious difficulties. If the parties believe their mediation is different, they will become quite negative and even give up or refuse to proceed in good faith.

A fourth quality is to be *persistent*. An important rule of mediating is do not terminate a mediation no matter how difficult the process is proceeding. Keep working until the parties fire you or refuse to pay your fees. If they do not terminate the process at some point, there will be further progress. This means if a mediation does not settle the first day, keep it alive by contacting the parties and counsel by telephone or meet with them in subsequent caucuses.

Fifth, be *sensitive* to the feelings and motivations of the parties and counsel. At the outset, the mediator must determine if a party and/or counsel will be cooperative or difficult, whether the attorney is having difficulties with the client, whether the client wishes to get the matter resolved as quickly as possible, whether the client has a different agenda from the attorney – the client wishes to settle and the attorney to hold out, etc.

Sixth, a successful peacemaker will develop rapport and trust with each side, will be *supportive* of the party and counsel. Because the parties are in separate caucuses this is much easier to accomplish than if they were at the same conference table. As to the parties, the mediator can show support by asking the strengths of the case, what the party's best case before the decision-maker might be, and even suggest other points that might help the party.

The mediator can be supportive of counsel by working with counsel in developing the case. In other words, rather than play devil's advocate, as some mediators do, the peacemaker can suggest other possibilities and help flesh out an argument to be made on the other side. Also, the mediator can show support by complimenting counsel in front of the client for work well done on the client's behalf. Attorneys al-

ways appreciate such support particularly if they are having difficulties with the client.

Seventh, a good peacemaker will be affable, warm and friendly to the parties and counsel. He or she should not hesitate to talk about matters of common interest, even personal matters such as children, recreational interests, college background, recent vacations. With attorneys, inquiry might be made concerning their practices and how busy they are. Such inquiries should not be intrusive but demonstrate interest in the parties beyond the scope of the legal matter being mediated.

Eighth, the peacemaker should at all times be professional. This requires he or she maintain the highest level of neutrality. It also means the mediator be nonjudgmental and not try to force a settlement even if he or she feels it is appropriate. And, the mediator must maintain strict confidentiality.

In maintaining neutrality, it is as important for the mediator to maintain the appearance of neutrality as the fact of neutrality. Neutrality begins when the parties or counsel first contact the mediator. If one side calls and asks questions, the mediator should contact the other, inform it of the call, and ask if they have similar questions.

It requires the mediator travel alone to the mediation, even though it would be more convenient for the mediator to travel with one of the parties or counsel.

When the mediator arrives at the mediation site and one party is not yet present, it is preferable that the mediator wait in the waiting room and enter the conference room when all parties are present. When going to lunch or dinner, the mediator should eat alone unless the repast is being used as a caucus. This can be done with the express consent of the other side. In all instances, the mediator should always buy his or her own meals no matter how insistent a party may be to pick up the tab.

Being *nonjudgmental* means several things. A mediator should not judge the case and then seek to push the parties to a settlement he or she thinks appropriate. The skilled mediator will allow the parties to set the settlement parameters; his or her function is to help the parties, through analysis, persuasion, and guidance, reach a common figure.

Being nonjudgmental also means not to judge the worthiness of the parties. In most cases one party or the other is more attractive and if the mediator so reacts, the other will sense this favoritism, which can only undermine the process. The mediator

should conduct the mediation with the attitude that both parties are worthy and have the right to find resolution.

Finally, the mediator must maintain strict *confidentiality*. This is one of the most important aspects of caucus mediation. Unless the parties can trust the mediator's pledge to maintain this, they will not openly participate in the process and willingly disclose and discuss critical matters.

## E. Tools of the Peacemaker

In addition to having the qualities of a peacemaker, as above discussed, the peacemaker has certain tools with which to work. The underlying purpose of each tool is to build rapport and trust. *Abraham Lincoln* perhaps expressed how the peacemaker can accomplish this when he stated: "If you would win a man to your case, first convince him that you are his sincere friend." Each tool of the peacemaker is designed to make him or her a "sincere friend."

### I. The art of agreeing

An effective tool of the peacemaker is the art of agreeing. One thing the peacemaker avoids is putting a party or counsel on the defensive. For this reason he or she will not play devil's advocate. If an argument erupts, the mediator needs to end the exchange quickly, and this can be done by simply saying, "I agree with you," or, "I don't disagree with you." When these words are spoken, the argument is ended, because a person cannot argue with himself or herself. Interestingly, having ended the discussion on this point, the mediator can raise it again in a subsequent caucus and generally there can be a fruitful discussion without the prior arguing.

### II. The art of disagreeing

There are those few times when the mediator does need to take a strong position adverse to the party, because not to do so would be a disservice. In other words, if a plaintiff simply does not have a case and is spending considerable funds preparing for trial, the mediator needs to point this out as firmly as he or she can.

To disagree effectively, the mediator first needs to give counsel an opportunity to discuss the strong points of the case. Then the mediator can raise those issues which undermine the party's case, by pointing out that the other side has raised them, which the mediator could not an-

swer. When the mediator and counsel cannot effectively respond, the conclusion is clear – the claim will fail. In this regard, the mediator should allow counsel to reach this conclusion and so inform the client. At no time should the mediator confront the party or counsel or put them on the defensive.

### III. Develop a strategy for each side

Because the mediator is working in a confidential caucus with each side, he or she can help each to develop a strategy which will maximize the result for each. (This is the best possible settlement.) Neutrality is maintained because the mediator is doing this for both sides.

### IV. Use nonconfrontational language

The surest way for a mediator to create conflict and intransigence is to use confrontational language. To tell a lawyer he is wrong and will lose his case at trial, places the lawyer on the defensive and generally evokes an argumentative response. Confrontational language undermines the mediator's effort to build rapport and trust.

There are many words and phrases used which necessarily signal confrontation. To tell a party or counsel that, "That's an insult," "That's not worthy of a response," "Read my lips," "You are not listening," "You are not being flexible," "You are not acting in good faith," all signal conflict. Even softer expressions as, "I beg to differ with you," "With all due respect" signal conflict. Even informing a party that the other side is packing its bags to leave, it is adamant in its position, it feels strongly about its position, it is very confident in its case, it would just as soon go to trial, etc. raise red flags that undermine the process. Such expressions should be avoided.

### V. The apology and forgiveness

The strongest tool of the peacemaker is get the parties to apologize and forgive. If this can be accomplished, it not only assures resolution but conciliation, peace and healing.

A special word about forgiveness. Mediators hesitate to talk about forgiveness because of its religious overtones. Yet, it is the most powerful tool in the peacemaker's arsenal. The party that can forgive will find healing. *Nelson Mandela*, the great South African leader, invited his jailers to his inauguration as president. He was asked, didn't he hate what they did to him. He re-

sponded that he did because they took twenty-five years of his life beating him and humiliating him while he was in prison. But he further explained that if he could not forgive them, he would remain in prison till he died.

### F. Conclusion

Caucus mediation is having a dramatic impact in the commercial arena as discussed above. To further caucus mediation in Germany, the following might be considered:

First, with so many commercial cases going to arbitration, an effort could be made to encourage the parties to mediate as part of the arbitration process. Because mediation is nonbinding, no one is threatened by the process. More and more German corporations, with subsidiaries or branches in America, are already being introduced to mediation in American courts.

Second, as to cases venued in the courts, mediation could be an adjunct of the legal process. In other words, mediation could be done under the auspices of judges. A judge could recommend the parties mediate before a matter is tried. Being under the auspices of the court, there should be less resistance.

Third, another approach is to encourage ex-judges to become mediators, thereby giving the office greater stature.

Fourth, to gain the confidence of the bar and business community, educational programs might be conducted by individuals trained in the process.

#### Richard M. Calkins

Dean, em. Drake University Law School,  
Des Moines (IA)  
www.calkinsmediation.com  
amta@dwx.com