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Understanding the interaction in mediation caucuses: Negotiation positions, disputant assessments, bias and neutrality

Angela Cora Garcia

Abstract

Previous research on how mediation helps disputing parties to reach resolution has not addressed the interaction in caucuses (i.e. separate meetings) between mediators and individual disputants which may be held in addition to the joint mediation sessions. This discourse-analytic study of videotaped mediation caucuses reveals both constructive and potentially problematic aspects of participants' interaction during the caucuses. While some disputants engaged in constructive actions, such as articulating their bottom line negotiating position or sharing information with the mediator which had not been revealed in the joint session, others produced negative assessments of the opposing disputants. Also, mediators' openness in expressing their own opinions during caucuses undermined their ability to display neutrality and avoid taking sides. The implications of these findings for mediation practice and further research directions are discussed.

Keywords: mediation caucuses, conflict resolution, mediation practice, neutrality



Introduction

The goal of mediators in facilitative mediation is to help disputants resolve their conflict while remaining neutral, maintaining fairness and protecting disputants' autonomy (see American Arbitration Association, 2005; Doneff and Ordovery, 2014; Frenkel and Stark, 2012; Seaman, 2016). Mediators strive to facilitate the process without intervening in the substance of the dispute or taking sides (Jacobs, 2002). They work to help the disputants reach agreement, and often reflect back, summarise, or reformulate their statements and positions (Woolford and Ratner, 2008).

Most facilitative mediation is conducted in joint sessions, but individual caucuses with one disputant at a time may also be used as needed. While a number of studies directly examine the interaction that occurs within the joint sessions (see Cobb and Rifkin, 1991; Garcia, 1991; Greatbatch and Dingwall, 1997; Heisterkamp, 2006a, 2006b; Jacobs, 2002; Sikveland and Stokoe, 2016), very few studies investigate the interaction that occurs within mediation caucuses.

Mediators are advised to use caucuses when disputants engage in arguing, reach an impasse, or need help articulating goals or positions (see Bishop, et al., 2015; Doneff and Ordovery, 2014; Ewert, et al., 2010; Goldberg, et al., 2017; Picard, 2016). While textbooks on mediation typically define caucuses and provide recommendations for their use, few studies directly investigate the interaction that occurs within them. This paper fills this gap in the research by analysing videotaped caucuses which occurred in small claims and divorce mediation sessions. I examine how disputants formulate their positions and refer to the opposing disputant during caucuses and how mediators display neutrality when engaged in caucuses with individual disputants. This analysis contributes to our understanding of how caucuses enhance the process of dispute resolution, and also reveals how actions problematic for disputant autonomy or the fairness of the process may emerge during the caucus.



Methodological approach

The methodological approaches used in this paper are discourse analysis and conversation analysis. These approaches include an examination of how speakers formulate their utterances (word and phrasing choices). Reframing or rephrasing a previous speaker's utterance to emphasise different aspects of a topic or position can change the implications of the utterance (Hutchby, 2005). In addition, actions such as how speakers justify their arguments, how they refer to others, and how they use pronouns to align with others may also be included in the analysis (for example, see Hester and Eglin, 1997; Proctor and Su, 2011; Sacks and Schegloff, 1979; Sahlane, 2015; Van Dijk, 2008; Wodak and Meyer, 2009).

The interactional context (previous utterances) provides a framework for understanding the utterances of interest (Heritage and Atkinson, 1984; Schegloff, 2007). Therefore, the data in this paper are the transcripts of the interaction in both the caucuses and mediation sessions where they occurred rather than summaries of the points made and positions taken. Details traditionally included in conversation analytic transcripts (such as length of pauses, simultaneous talk, inhalations, and so on) have been deleted from the transcript excerpts in this paper to enhance ease of reading. Pseudonyms are used for all names and other identifiers. In cases with two mediators, the mediators are referred to as "Mediator A" or "MA" and "Mediator B" or "MB".

Data

The data analysed in this paper were collected with a *National Science Foundation* grant (Law and Social Sciences Program SB # 9411224). Out of the 32 mediation sessions in the full data set, caucuses which occurred in six of the mediation sessions were recorded along with the joint sessions. Since caucuses were held with both disputants in each mediation, a total of 12 caucuses were recorded and transcribed. Eight of these were from small claims mediations, and the other four were from divorce mediation sessions. These mediation sessions



were examples of the facilitative approach to mediation in which the bulk of the work is done in joint sessions, with optional caucuses held as needed.

The small claims mediations were held at a city-run mediation programme in the Midwest region of the United States. The divorce mediations were held at a non-profit organisation and were conducted by trained mediators who were also licensed family therapists. This programme used a co-mediation model, with one fully certified mediator and a second family therapist who had been trained as a mediator and was gaining practical experience as a mediator.

Mediation work in caucuses

In the first section of the analysis I explore why mediators in these data hold caucuses and how they characterise the purpose of the caucus for the disputants. This is followed by an analysis of the types of actions disputants take in the caucuses. I will show that disputants reveal information in caucuses that was not shared in the joint session such as a bottom line negotiating position, and/or criticise or negatively assess the opposing disputant.

The third section of the analysis addresses challenges to mediator neutrality that may arise in the caucuses. In the concluding section of the paper I summarise the results of the analysis, discuss limitations of the research and ideas for future studies, and share practical implications of the study for mediators.

Mediator initiation and facilitation of caucuses

While there are a variety of reasons why mediators may initiate caucuses during a mediation session, the data in this study reveal a link between the decision to break off into caucus sessions and an increased tendency between disputants to argue or to escalate their conflict. While argumentative exchanges between opposing disputants only occasionally occur in mediation sessions (Garcia, 1991), mediators may decide to hold a caucus at a particular point to cut off



arguing or escalation of the conflict between the disputants. The caucus may provide a break or cooling off period, or at least prevent escalation of arguing.

For example, in one of Mike and Kelly's divorce mediation sessions, argumentative utterances or escalation of conflict immediately preceded the mediators' decision to hold a caucus. Prior to Excerpt 1, Mike was detailing his accusation that his wife (Kelly) abuses alcohol and drugs.

Excerpt 1: Mike and Kelly divorce mediation – joint session

- 1 MB: But when you use the term abuse.
- 2 Mike: Just the abuse of the substance.
- 3 MB: I mean that's that is of a different level.
- 4 Mike: Abuse of a substance.
- 5 MB: Okay.
- 6 Mike: And, that, and I'm not saying it's, it's not an every night thing.
- 7 MA: Can you say who the source of these allegations is?
- 8 Mike: Not, not now. No.
- 9 MA: Okay.
- 10 MB: And you're flat denying all the allegations.
- 11 Kelly: Never, ever have been drunk around my kids at all, ever! And I
- 12 don't use any kind of drugs. I don't know where you come up
- 13 with this bull, but I think you need to straighten out whoever you
- 14 think it is that's telling you these things. Because they're lying!
- 15 MB: Okay. Can you two agree to this, to say, say this, would be an
- 16 acceptable (home)? You know, once you make an agreement like
- 17 this, it's never cast in concrete! You can always come back to
- 18 mediation and renegotiate. And we have had that happen.
- 19 MA: Lots of times. I think I'd like to caucus for a couple minutes to. . .
- 20 MB: I think that'd be a very good idea.

As Excerpt 1 begins, the mediators work to clarify Mike's position (lines 1-9). Mediator B then directs a question to Kelly, "And you're flat denying all the allegations?" (line 10). In Kelly's response, she not only



emphatically denies the allegations (“Never, ever been drunk around my kids at all, ever! line 11), but escalates the conflict by complaining about her husband “I don’t know where you come up with this bull...” (lines 12-13) and accusing him of reporting false testimony (“they’re lying!” line 14). The intensity of her response relative to prior talk in the joint session and her accusation of falsehoods escalates the conflict between the spouses at this point in the session.

Mediator B’s response is to try to suggest ways the spouses could still reach an agreement in mediation (15-18). Note that Mediator B refocuses attention away from the accusations and complaints in Kelly’s immediately prior utterance and towards the possibility of agreement. She also uses a collective pronoun to refer to the spouses (“Can you two agree..?” line 15). This works to refocus the attention from the adversarial approach in Kelly’s response to a collective perspective on problem-solving. Note that Mediator A initially agrees with Mediator B (“Lots of times.” line 19) but then suggests that they caucus with the spouses individually. Mediator B immediately agrees with this suggestion (line 20).

In sum, while there are many reasons mediators may decide to hold caucuses, arguing seems to be one of the triggers of this decision in this study. However, arguing or conflict escalation between the disputants is never the expressed reason for the caucuses. Instead, speaking frankly or letting the disputant speak frankly, or providing opportunities to share information about bargaining or negotiating positions out of the hearing of the opposing disputant were the reasons given for the caucuses. If conflict between disputants in the joint session was the reason the mediator decided to call a caucus, the disputants might benefit from having that openly stated. Given the goal of disputant autonomy in mediation, mediators should try to be as transparent as they can about the choices they make to facilitate a session and this should include explaining why they might choose to call a caucus.



It is also possible that giving disputants more control over the topic of discussion and agenda-setting during the caucus would be advantageous. While in theory, disputants also have the right to request caucuses, none of the disputants in this study did so. The fact that mediators had control over when caucuses were held and over the agenda during the caucus is potentially problematic for the autonomy of the disputants. It could arguably enhance disputants' autonomy further if they had a role in choosing topics for discussion and setting the agenda to be followed in caucus sessions.

Disputants' actions in caucuses

In this study disputants' behaviour in the caucuses differed from their behaviour in the joint sessions in several ways. First, some disputants revealed information in the caucus that they had not revealed during the joint session. Second, regardless of whether a mediator framed the purpose of the caucus as eliciting the disputant's bottom line position, some disputants volunteered information about their negotiating positions which they had not shared in the joint session. Third, some disputants were critical of the opposing disputant in the caucus, while references to the opposing disputant in the joint sessions were typically mitigated and/or formulated indirectly (Garcia, 1991, 2019).

Revealing information in caucuses

In Excerpt 2 from a caucus held during one of Jon and Liz's divorce mediation sessions, Liz reveals some information that she had not revealed in the joint session. When Mediator A asks a general question about Liz's views on whether she and her husband should use a shared parenting plan after their divorce (lines 1-2), Liz responds by complaining about how hard it is to talk to her husband Jon (lines 3-6, 8-10). Liz expresses her concern that a shared parenting plan would not work for her and her husband because they routinely have trouble communicating with each other.

**Excerpt 2: Jon and Liz divorce mediation – caucus with Liz**

- 1 MA: So, where do you think you are with all this and with what
2 we said about shared parenting and . . . ?
- 3 Liz: Well I just don't, up until now we've always done fine. But, eh
4 sometimes it's hard to get him to talk to me. He, he'd rather, he
5 like he did just a few minutes ago, he'd rather talk to you than
6 answer my question. You know it's like-
- 7 MA: Yes.
- 8 Liz: Just answer me. But (laughs) That's all I want, just answer me.
9 You know, if he'd tell me the these things or, you know, let me
10 know what he wants? Then
- 11 MB: Mm hm
- 12 Liz: It'd be so much easier.

After the caucus with Liz, the mediators caucus with her husband Jon. Excerpt 3 shows Mediator A serving as a liaison by communicating Liz's issues to Jon. She reports that Liz "feels that you don't have a good history of making decisions together" (lines 1-2). Note that the mediator reformulates Liz's complaints to make them less provocative (lines 1-2; 6-10). Instead of describing what Jon does or does not do (as Liz has done in Excerpt 2 above), Mediator A reframes Liz's complaint as a "concern".

Excerpt 3: Jon and Liz divorce mediation – caucus with Jon

- 1 MA: One of Liz's concerns was, um, she feels that you don't have a good
2 history of making decisions together, and...
- 3 Jon: With Liz and me?
- 4 MA: Yeah.
- 5 Jon: Okay.
- 6 MA: And, she says, you know that was true when you were married,
7 from her point of view, and so she worries that, well, if you
8 couldn't do it when you were married how do you do it when
9 you're not married? You know? So, it's certainly a legitimate
10 concern.
-



- 11 Jon: And um, we had, problems uh, throughout as far as making any
12 decision. Um I think, I think that's one of the reasons why we
13 were both unhappy. I mean, towards the end we were both
14 unhappy.
- 15 MA: Right.
- 16 Jon: Uh, she's a different personality than I am. Two completely
17 different people. Uh, you know I- I- I can see that concern that's
18 something that I have. Uh, her wants and needs and her
19 aspirations for Susie and herself, are different than mine.

Jon responds thoughtfully to the substance of the issues raised. Liz is not present during the caucus, so arguing with her is not possible. Jon's response takes a collective approach to the problems rather than blaming Liz for them. He uses the pronoun "we" to refer to himself and his wife (lines 11-13). He talks about the fact that they were "both unhappy" (line 13). He then adds an explanation in terms of him and his wife being "Two completely different people" (lines 16-17), and characterises her "needs and her aspirations for Susie" (their daughter) as being different from his. This explanation takes a neutral approach rather than blaming Liz for the problems.

While having a caucus may help the disputants articulate challenging information in a safer environment than in front of the opposing disputant, the argument could be made that this behind-the-scenes sharing is actually counter-productive to the goals of resolving conflict and helping the disputants learn how to communicate openly with each other. Liz was not present to hear Mediator A's reformulation of her complaint, and thus missed an opportunity to learn how to share challenging information with her husband without being critical of him. Given their previous history of conflict (both in their relationship and in the joint mediation session), this could have been helpful for them.



Revealing ‘bottom line’ negotiating positions in caucuses

At the initiation of Jon and Liz’s divorce mediation case, Jon’s position was that he wanted sole residential custody of their daughter Susie. When the individual caucuses were held, Jon revealed that his position on getting sole custody had changed since the mediation session began, and that he is now open to considering shared parenting (joint custody). Jon states that joint custody is “something I would explore”. Jon’s new openness in his position is an indication that the mediation process is effective. At this stage in the mediation process (their first of three mediation sessions), sharing this information in the privacy of a caucus is likely helpful for the participants, given their history of conflict. As the mediation process proceeds, this couple is able to speak directly to each other more constructively, and they are also successful in communicating together about substantive issues between mediation sessions. At the end of their third mediation session they have come to agreement on a shared parenting plan. The caucuses in this initial mediation session can be seen to have contributed to that outcome.

Critical assessments of the opposing disputant

The privacy that caucuses provide gives the disputants freedom to speak directly and openly with the mediator about the opposing disputant. While in some cases, this leads to the constructive exchange of information (as shown above), in other cases it may lead to critical characterisations or complaints that could have led to an escalation of their disputes if produced during a joint session. For example, in a caucus from a small claims mediation, Tom refers to the opposing disputant Shauna as “crazy” and “hysterical”. While emotional venting may be valuable for some disputants, the communication of these unmitigated opinions in the caucuses presents a challenge for the mediator, who must avoid aligning with criticism of the opposing disputant, in order to avoid the appearance of bias.

Part of mediation work is serving as a liaison to transmit information obtained in one caucus to the opposing disputant in the second caucus. While



doing this liaison work, the mediators in these data mitigate the message by reframing or reformulating it in the subsequent caucus with the opposing disputant. For example, the complainants in a small claims mediation about the repair of a video camera produce strong negative characterizations of the opposing disputant (Pete) during their caucus with the mediator. Jake claims that Pete “broke the law,” and Maureen complains that Pete “insulted us and... tried to blackmail us with that camcorder.”

In the subsequent caucus between the mediator and Pete, the mediator conveys Maureen and Jake’s criticisms, but reformulates them in a mitigated fashion:

Excerpt 4: Camcorder repair small claims mediation – caucus with Pete

- 1 Med: I’ve had a talk, a chance to talk with Maureen and Jake.
- 2 Pete: Mm hm.
- 3 Med: Um, they feel pretty strongly that uh they’ve been inconvenienced,
- 4 by, either you or your employees because of, and that they were
- 5 treated poorly. Uh but they say they are willing to accept this.

The mediator reformulates what Maureen and Jake had said in their caucus to soften it and make it less offensive when he communicates their position to Pete (Excerpt 4). The mediator uses the passive voice in his reformulation of their accusations, saying “they’ve been inconvenienced” (line 3) rather than “you inconvenienced them”, and “they were treated poorly” (lines 4-5) rather than “you treated them poorly.” The criticisms “inconvenienced” and “treated poorly” are considerably downgraded from the word choices Maureen and Jake made in their caucus (“insulted” and “tried to blackmail”).

While the privacy of a caucus may help the disputant by letting them articulate challenging information in a safer environment than in front of the opposing disputant, the argument could be made that this back stage sharing is actually counter-productive to the goals of resolving conflict and helping the disputants learn how to communicate openly with each other. In addition, if the



mediator does not challenge the disputant's critical formulations, he or she may be seen to implicitly endorse them. This could create a subtle challenge to the mediator's display of neutrality, which may carry over to the resumption of the joint session after the caucuses.

Mediator neutrality in caucuses

In this study, some of the mediators displayed an explicit orientation to the goals of neutrality and fairness as they began the caucus. For example, in a caucus during a small claims mediation between a landlord and his tenants, the mediator solicits the tenants' bottom line position and then displays an orientation to neutrality:

Excerpt 5: Broken lease small claims mediation – caucus with Sabrina

1 Med: Reason I separate people to talk to them is just to perhaps ask
2 them questions that, um, find out what your real position is. Um
3 ask you some questions that, um, might seem a little rough to the
4 other people in the room. I'm not here to take anybody's side.

However, there is some evidence in these caucuses that disputants perceive some mediator actions to be biased against them. In some cases the mediator used the privacy provided by the caucus to side with the disputant, while in other cases the mediator challenged the disputant, and/or shared their own opinions about the case. For example, in a caucus with Tom in a small claims mediation about a car deposit, the mediator criticises Tom's position that he should not have to refund Shauna's deposit.

Excerpt 6: Car deposit small claims mediation – caucus with Tom

1 Med: The reason I separate people is so I can talk to them frankly. I'm
2 not, I'm not an attorney, okay? And it, whatever I tell you is just
3 my opinion, but
4 Tom: Right.
5 Med: Tom, you don't have a very good case.



- 6 Tom: I don't have a very good case? Why? I have a perfect case!
- 7 Med: Just to keep somebody's money, you have to justify why you
- 8 why you have to keep that money.
- 9 Tom: No no no, that, that is, that's a down payment. A down payment
- 10 is lost if you don't buy it. And if you've ever sold a car you'd
- 11 understand that.
- 12 Med: But. . .
- 13 Tom: And uh you can tell me that I don't have a very good case, and I
- 14 think you're telling me to bait me into believing you.
- 15 Med: Well! You know, you don't have to, you don't have to believe me,
- 16 Tom.
- 17 Tom: Or something.
- 18 Med: Uh, you know? Because I'm not here to take either person's side!
- 19 It's just my opinion, that if this matter goes back to court. . .
- 20 Tom: Okay, well, that's fair enough because that that that's a down
- 21 payment. That's to hold a car. I held that car a long time.

The mediator first explains that he will speak frankly, and acknowledges that he is just giving an opinion (lines 1-3). He then states “Tom, you don’t have a very good case.” (line 5). Tom protests this assessment (line 6), and the mediator continues to engage with him in subsequent turns. Tom responds with scepticism and accuses the mediator of trying to manipulate him (lines 13-14, 17). Accusations of mediator bias only rarely occur during mediation sessions (see Garcia, et al., 2002; Jacobs, 2002). This type of mediator action would not typically be performed in a joint mediation session, because it fails to display neutrality and may be seen as showing bias against the disputant.

Summary and conclusions

This paper has explored how caucuses are conducted and how they contribute to the mediation process. In these data mediators gave a variety of reasons for holding caucuses, such as giving disputants an opportunity to speak frankly and/or share their bottom line positions with the mediator, and providing a



private environment for the mediator to share their opinions. Mediators worked as liaisons between disputants, often mitigating positions or negative assessments in order to share the fundamental points with the opposing disputant without provoking an emotional response or increased conflict between the parties.

Because this study is based on a small sample the findings should be taken to be preliminary. However, the following practical recommendations may be useful when facilitating a caucus during a mediation session.

First, while the data showed that mediators provide a variety of reasons for caucusing, when the interaction in the joint sessions prior to the caucuses was examined it appeared that arguing or the threat of escalating conflict between disputants motivated the decision to hold a caucus. However, this reason was never explicitly addressed. In the spirit of maximising transparency and disputant autonomy during the mediation process, this reason for caucusing should be acknowledged so that the participants will be aware that it is the result of a likely escalation of conflict.

Second, even when the goal of neutrality was explicitly expressed at the beginning of the caucus, some mediators presented arguments which supported one side of the dispute. Caucuses can best serve the goals of the mediation process if mediators work to maintain the neutrality and impartiality that they display in the joint sessions.

Third, the analysis of the data shows that constructive actions do occur in caucuses, and that disputants do communicate information which is helpful to the mediators as they work to facilitate the process. This sharing of information enables the mediators to work as liaisons between the disputants regarding issues which they may not yet be ready to communicate directly about.

While the caucus may help the disputant by letting them articulate challenging information in a safer environment than in front of the opposing disputant, this private sharing may be counter-productive to the goals of resolving conflict and



helping the disputants learn how to communicate openly with each other. When a disputant does not get to see the work a mediator does to mitigate and reformulate their positions, complaints, or characterizations of the opposing disputant (because this information is shared in caucuses instead of in the joint sessions), an opportunity to learn how to communicate constructively about conflict without escalation is missed.

Further research should investigate how what happens in caucus is related to the resolution of the dispute and whether reverting to caucuses helps or hinders the mediation process. Further research should also explore how caucuses may be used in different types of mediation (for example, by comparing caucuses held in facilitative and transformative mediation programs).

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