Caucusing and the Cross-Cultural Divide

Nancy M. Thevenin

SEEK FIRST TO UNDERSTAND, THEN TO BE UNDERSTOOD.—STEPHEN R. COVEY

Mediators are trained to persuade disputing parties to adopt a cooperative stance and seek to resolve their differences. The best tools for the parties, counsel and the mediator to do this is to be prepared. That being said, when discussing mediation with anyone from another country or culture, one must first start by defining the process, because only then can one have some confidence that the parties are discussing the same thing. In some parts of Europe, for example, mediation includes caucusing, in other parts, it does not. Thus, the term “mediation” means different things to different people, even people from the same “culture”.

For purposes of this paper, mediation will be defined as a process where a third party neutral attempts to facilitate a negotiated settlement of a dispute between two or more parties. Mediation in this context is not intended to be a substitute for direct negotiation, but instead to give added assistance when direct negotiation has failed. It is a process in which the parties control the outcome. Very broadly, the stages of Western style mediation are: opening statements by both parties, exploration of the parties interests, negotiation of the dispute, claims and points of settlement, and then the actual settlement itself—the settlement agreement.

For me, an important element in ensuring the success of a cross-cultural mediation is private meetings between the mediator and each of the parties, something that is commonly referred to as “caucuses.” Caucuses are confidential private settings where the mediator can explore the parties’ true interests and assist in the negotiation of a possible settlement of the dispute. The mediator in caucusing does this especially through a variety of mechanisms, such as (a) a reality check, where the mediator helps the parties think through the potential ramifications of failing to resolve the dispute; (b) a facilitative role where the mediator assists the parties’ efforts to formulate a settlement without expressing a view on the merits or on the appropriate terms of settlement; and (c) an evaluative role where the mediator takes an active and interventionist role,
making suggestions or putting forward views on the merits of the case. It is in this context—through the mechanisms used to elicit the parties’ true interests—that cross-cultural factors play a key role.

Before looking at the importance of caucusing in cross-cultural disputes, let us first look at the practice itself.

**THE GO-BETWEEN WEARS OUT A THOUSAND SANDALS—JAPANESE PROVERB**

I. The Case for Caucusing

A. Background

Caucuses are a common feature of most commercial mediations, and their use is enshrined in much of the literature describing how mediations should be conducted. Nevertheless, the role that caucuses should play in mediation has been the subject of debate in recent years. Advocates in favor of caucuses argue that they help to reduce conflict and to enable the parties to reach an efficient settlement. Critics respond that caucuses transfer the power for creating a settlement away from the parties to the mediator, potentially harming the mediator’s perceived neutrality and the ability of the parties to reach an understanding. Indeed, Gary Friedman, and Jack Himmelstein propose in their book that mediators

