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# Use and abuse of private session and shuttle in mediation and conciliation

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# ADR bulletin

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## Practical strategies in ADR

# Use and abuse of private session and shuttle in mediation and conciliation

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This article addresses some of the reasons for private sessions and shuttle in mediation and conciliation. As mediators frequently use either or both processes the reasons for the intervention are highlighted, together with some of the pitfalls in their use. While opinions about the use of private session and shuttle may differ from one mediator to another, or between models of mediation and conciliation, it is important to generate some general understanding of the practice and its purpose. The following is intended as a trigger for reflection on our practice. From such a reflection mediators can perhaps make better use of private sessions or shuttle as powerful interventions in their mediation and conciliation work.

For clarity on mediation and the role of the mediator, in contrast to conciliation and the role of the conciliator, the following description by NADRAC<sup>1</sup> is used.

Mediation is:

A process in which the parties to a dispute, with the assistance of a neutral third party (the mediator), identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement.

The mediator has no advisory or determinative role in regard to the content of the dispute or the outcome of its resolution; but may advise on, or determine, the process of mediation whereby resolution is attempted. Although the components of mediation usually occur, they do not necessarily occur in every mediation and are not necessarily sequential.

Conciliation is:

A process in which parties in dispute, with the assistance of a neutral third party (the conciliator), identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement.

The conciliator may have an advisory role on the content of the dispute or the outcome of its resolution, but not a determinative role. The conciliator may advise or determine the process of conciliation whereby resolution is attempted, and may make suggestions for terms of settlements, give expert advice on likely settlement terms, and may actively encourage the parties to reach agreement.

It is clear that the mediator and the conciliator have authority over the process; it is only the conciliator, however, who may play an advisory or determinative role in regard to the content of the dispute.

### Use of private sessions within the mediation process

As facilitators of the process, most mediators use extensive exploration and negotiation skills. It is either standard or optional that at some stage the mediator intervenes in the process by staging a 'private session' or 'separate meeting' (also referred to as a 'caucus') with each party individually.



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**Some reasons for private sessions**

For the parties to:

- separate emotions from factual information
- vent and/or save face
- consider new, or unexpected information
- have a break so as to be able to continue thereafter with more understanding, patience or respect
- focus on the other party's interests and further explore issues and generate options
- consider if there is anything else that needs to be discussed openly or if there is information to be shared
- discuss proposals and options that fulfil stakeholders' needs, especially children
- sit quietly and think about their suggestions and reflect on the other party's counter proposals
- have a comfort stop, to make phone calls to stakeholders or to obtain advice
- do calculations and or other 'homework' while waiting for the mediator to reconvene the joint meeting.

For the mediator to:

- check their own impulses and self-talk or motivations
- intervene when there is a breakdown in negotiations, help resolve a 'logjam'<sup>2</sup>
- check how the session is going for each party and allow venting and or face-saving
- check if there is anything else that needs to be discussed, aired or said that the parties may have been hesitant to raise in joint session
- be more empathic, without taking sides, and manage power fluctuations
- check if a party is participating in 'good faith', explore hidden agendas and get to the real and competing interests
- use the list of issues or agenda to recap proposals to date and how these are perceived as potential solutions, flag the next issue to be discussed and consider what may work to resolve this by summarising agreements and differences
- help each party to develop insight, get back in touch with their goals, and assist them to take responsibility for their part in the dispute and/or

suggestions for solutions to existing problems

- go through the list of issues and work with each party to help come up with liveable proposals, especially in regard to consistency in existing patterns for children and possible changes to these
- reframe from past to future, what did not work to what might work, and evaluate options and actively work with alternative proposals
- assist each party to consider their physical, mental and economic resources in relation to their options
- check on how the conflict is affecting their lives and well-being (including family and work environment)
- reality test, for example WATNA, BATNA, PATNA, and help explore alternatives and consequences
- develop negotiation strategies and use 'linked' bargaining
- help parties to consider the merits of certain options or proposals rather than ignoring or rejecting possibilities before considering them seriously
- mentor, coach and educate each party regarding the issues and concerns
- help prepare the parties to come back to joint sessions with proposals for negotiation and how they might do this
- check for areas of confidentiality
- have a break between seeing each party, or have time with a co-mediator.

**Possible pitfalls of private session**

For the mediator to:

- call caucus too early in the process or respond to a request by one party to be seen privately and not scheduling this break in the process when appropriate
- get over-involved in the solution or be drawn in by one or both parties
- ignore or not work through the list of issues or agenda systematically
- call a private session when it may be culturally inappropriate to be alone in the same room with one of the parties
- become triangulated or use his or her power or knowledge inappropriately
- discover incompatibilities with a co-mediator
- breach confidentiality or not see one of the parties privately
- react to one of the parties and possibly lose even-handedness or

- become biased
- get stuck with their hypothesis and/or power-balancing interventions and strategies
- abuse the privacy of the meeting by putting undue pressure on one or both parties
- use his/her expertise inappropriately, for example, by commencing counselling or giving legal opinions
- spend significantly longer time with one of the parties
- inadvertently or purposely shuttle proposals rather than allowing the parties to negotiate directly when back in joint session or not being able to give control back to the parties.  
For the party(ies) to:
- stick to their position, dig in, become less co-operative and/or consider the private session a waste of time
- use the privacy of the meeting to criticise the mediator and/or the process or to blame or badmouth the other party
- raise many more concerns and issues or be unable to move onto possible options and/or suggestions for solutions
- not to address issues and/or proposals in context, for example, not considering the needs of other employees, the manager, other neighbours and so on
- raise serious allegations and/or illegal behaviour or unlawful practices or intentions
- consider caucus time-consuming, become suspicious, lose trust or walk out.

The timing of private sessions is highly dependent on the training and skills of mediators and party needs. In some cases no amount of private sessions may help the parties to settle. Conversely an early separate session may help deal with unresolved emotions blocking the discussions. A separate session somewhere in the middle may help evaluate options and avoid premature acceptance of offers. And a separate meeting at the end may just be enough for parties to cross the last gap in their negotiations or achieve a psychological settlement.<sup>3</sup>

The timing of mediation and the use of private sessions can also be too early or too late in a conflict or dispute. A conflict may be part of a long-term,

underlying disagreement between parties based on a belief that they have a clash of values and that their deep human needs are incompatible with each other. A dispute may be seen as individual episodes within such a long-running conflict and arises when parties perceive their needs or goals to be incompatible and subsequently fulfil their individual interests, often at the expense of others.<sup>4</sup>

### **Differences in approaches**

Some mediators believe that separate meetings are the most significant features, or the 'guts', of the mediation process, their main objective, as Slaikeu<sup>5</sup> phrases it, being to get to the heart of the matter. Others see private sessions as just another intervention or tool to help parties make progress, chosen only if there is an obvious cue. In some models of mediation it is suggested that parties cannot really negotiate until all issues are explored, or make agreements until the mediator has listened to each party alone in private session. In other approaches mediators begin with a series of private meetings before any joint meeting takes place.<sup>6</sup> In yet other settings separate meetings are never used, to avoid the mediator being seen as potentially biased.

Boullé<sup>7</sup> agrees that there are potential concerns with separate meetings, in particular that they can afford mediators considerable power and leverage over parties and their decisions. While mediators do not have any formal decision-making authority, they can significantly influence the parties' decision-making.

Despite these concerns, most models, approaches or styles of mediation include the opportunity for private session at some stage of the process.

### **Before and after private session**

Mediators should explain in the introduction how private sessions will be conducted and if what is said is confidential or whether the mediator would prefer not to have to keep secrets. It seems customary in most mediation approaches that, before scheduling a private session, the mediator will summarise what has happened so far in the joint session and will be transparent about why and what will happen during private session and beyond. At the end

of private session most mediators check again with the party as to their readiness to proceed in joint session.

### **Joint session**

In most approaches it is customary to bring the parties together after the private meetings. At the beginning of this joint session mediators often frame the value of having seen each party separately and encourage the potential for constructive negotiations, further option generation or coming to agreement.

The main purpose of this joint meeting is to provide an opportunity for each party to take responsibility for their own suggestions, options and proposals for negotiation with the other party. The focus is on responsibility remaining with the parties to self-determine, in recognition of the parties' abilities to settle the dispute themselves. This part of the process ideally ends in mutual understanding and agreements with which all can live.

Consider the following scenario:

*In a workplace dispute with two professional and highly-regarded people the mediator explored, in private session, how their health and well-being was affected by the dispute. This seemed to stop each party in their respective tracks. The mediator was able to observe a significant change in each party's attitude when brought together again and the case settled shortly thereafter.*

### **Variations**

From time to time mediators continue to conduct the mediation with a series of separate meetings. However, it is important for the mediator to bring the parties together as soon as it is opportune, particularly where significant new issues or other important information is divulged, a range of new concerns or potential threats are coming to the surface, or bottom lines or final offers are being proposed. If, as a last resort, a party or the mediator decides that the mediation should be terminated, it is customary for the sake of transparency to meet again in joint meeting prior to suspending the mediation. In cases of domestic violence and other safety concerns a mediator



may need to make arrangements for departing parties.

If the session ends up, deliberately or inadvertently, in shuttle mediation there are some questions to consider: Could it be important to make this transparent and discuss it with the parties? Should the mediator get their consent to proceed with shuttling? Can the mediator legitimately make process interventions without being transparent about their purpose? If so, which interventions should be transparent and which can remain hidden?

In co-mediation mediators often openly discuss the perceived need for caucus or shuttling interventions in the process. Co-mediators need to have worked out what role each is going to take in advance of the mediation. Perhaps they need to check again before starting a private session regarding whom will 'lead' and facilitate which private session. Smooth collaboration and teamwork is vital for co-mediation to succeed. This also provides a good model for the parties in working together even when each co-mediator has different ideas!

Consider the following scenario:

*A co-mediation conducted for two parties came to private session and one party had a written proposal they wanted the other to peruse.*

*One of the mediators went to copy the proposal so all parties had a record of the document and found on their return that this party was ready to leave. It seemed that they were in a hurry. The mediator handed the proposal back and went into the room where the session had taken place asking their co-mediator 'what happened?' The other mediator said, 'As soon as you were out of the room the party started badmouthing the other, and said, "I am out of here."'*

Question:

*What could have been done differently in this situation?*

Private sessions are generally more frequent in conciliation work. This occurs especially in a conciliation process in which the parties are first together in joint session. Often after initial exploration of the issues listed on the agenda the conciliator sees each party (and their lawyer where

applicable) separately, returns to joint session and continues with several private sessions, if necessary. Altobelli<sup>8</sup> describes the conciliator as a more active intervener, using a more proactive form of asking questions than a mediator, particularly in the option generation stage where the conciliator can actively contrast suggestions against likely outcomes at hearing. As the session progresses the conciliator might engage in more robust reality testing. The conciliator may suggest possible answers and suggest options the parties had not previously considered.

### **Time management**

Separate meetings are time-consuming and need to be managed proportionally well within the constraints of the whole mediation or conciliation session. In conciliations the advantages and disadvantages of serial private sessions can be amplified because of their frequency. The parties and conciliator can get confused, tired, stressed or anxious about how little progress is made or prematurely optimistic about how much is being achieved.

### **Record-keeping**

Proposals and the details of commitments, undertakings and/or agreements need to be accurately recorded and repeatedly checked and linked with further options and ideas as encouragement for resolution or clarity about the settlement.

Despite any amount of private sessions, many mediation or conciliation efforts and agreements have subsequently become undone as a result of agreements recorded vaguely or not as remembered by one or more parties. Lack of comprehensive and clear, substantive, relational and procedural agreements may leave parties at a loss after the session is over. The wording of agreements not generated in joint session can also make or break a deal.

### **Shuttle mediation**

Shuttle mediation is a process in which parties are located in different rooms and the mediator 'shuttles' between them, conveying the parties' viewpoints, settlement ideas and financial offers.<sup>9</sup>

The most likely reason for shuttle

mediation is an intake assessment about what process may be best suited to particular clients. The history of conflict and the nature of the dispute, and one party's strong preference, may provide indicators that shuttle is appropriate. Shuttle is significantly different from the serial use of private sessions during a mediation.<sup>10</sup> Since it takes time to shuttle and to transport information between the parties, most mediators use and promote more negotiation skills to facilitate this process.

Mediation is understood here as *facilitative mediation*.

Some reasons for shuttle mediation For the party(ies):

- physical and emotional safety so parties can act rather than react, and to protect one or both from strong acrimony
- allowing strong emotions to flow freely, or for fear of a party not being able to express needs in the same environment as the other
- for an un-represented party not to feel intimidated by other parties and their representatives and to deal with power fluctuations
- inability to negotiate because of previous threats, abusive behaviour, bullying or intimidation, including orders to prevent parties being in the same environment, or previous attempts at resolving issues in joint meetings having failed
- to talk to the mediator rather than each other, which previously may have caused blaming and other emotional reactions or for cultural appropriate segregation.

For the mediator to:

- bring information from one side to the other and to sanitise and reframe what is said by each party so as not to inflame the situation
- build trust in the mediator, the process and the possibility of coming to a resolution when not having to face the other party directly and be able to empathise without being seen as taking sides
- voice proposals, suggestions and options as an independent third person and help the parties to focus on specific details and responses
- encourage a common-sense approach to issues in dispute and reframe from past concerns to future possibilities

- check if either party perceives the need for future contact with the other and establish reasonable working relationship guidelines
- educate regarding children's needs and interests in the short and longer term
- reality test, for example, explore the WATNA, BATNA, and PATNA
- actively assist each party in framing proposals and solutions in a way that the other party is likely to accept or can suggest alternative proposals.

**Possible pitfalls of shuttle mediation**

Most pitfalls are very similar to the pitfalls listed under private sessions. Some others are:

- the timing of the shuttle is too early or too late in the conflict or dispute
- the mediator is more likely to be involved in the content of the issues and could influence decision-making due to poor or lack of preparation by the parties
- danger of bias in reporting information from one to the other, or forgetting to pass on relevant information and/or not having the full background to a suggestion
- presenting offers in a non-verbal way, tone of voice or language that may influence negatively or positively
- the mediator is more likely to want to smooth things over, which may not help the parties in their future dealings with each other
- a party criticising the mediator or process because he/she wanted to be in the same room with the other party
- wanting the mediator to pass on messages that may be deemed not useful to the discussions
- a party or their representative 'shooting the messenger'
- the mediator having to deal with an amount of unresolved emotional issues that perhaps need to be first dealt with in a counselling setting or additional issues getting raised, adding to the complexity
- one or both parties not ready to negotiate and/or settle.

Consider the following scenario:

*In a shuttle mediation a parent*

*accused the other parent of not being a fit parent to have contact with their 1 and 3 year old children because the parent had been sexually abused as a child.*

*Question: What choices does the mediator have when this arises in the course of a shuttle mediation?*

**Some advantages of shuttling:**

- to keep the parties from attacking each other physically or emotionally
- to keep parties focused on the future

In co-mediation mediators often openly discuss the perceived need for caucus or shuttling interventions in the process. Co-mediators need to have worked out what role each is going to take in advance of the mediation.

- and on their goals
- to express emotions without these affecting another parties, and to help save face
- for parties to reflect on how the dispute is affecting their health and wellbeing
- to give parties time to consult experts during the process.

Shuttle and acting as a go-between is particularly time consuming. On one hand this can be an advantage – parties may hurry up and get it sorted. On the other it may be difficult to achieve much in the allotted time.

Interestingly Charlton<sup>11</sup> raises concerns in relation to a multi-party dispute in which parties formed coalitions and met with each other, without the shuttling mediator's knowledge. The danger is that this results in unstructured direct negotiations between some of the parties while left for long periods to their own devices.

**Conciliation**

Conciliation is generally a court-ordered facilitative process for alternative or primary dispute

resolution. While conciliation processes vary significantly, when they are conducted solely as shuttles they have the following advantages and disadvantages.

**Some advantages of shuttling in conciliation:**

- for each party to have their say and discuss their interests in a confidential environment
- to initially keep legal representatives away from each other and for lawyers

- to have an opportunity to coach, advise and reality check with clients in private
- for the conciliator to share their respective expertise: for example; workplace relations, anti-discrimination, child developmental or family law
- the conciliator can meet with each party and their solicitor individually, or meet with solicitors in private to create a more level power base from which to negotiate
- for the conciliator to challenge proposals and provide their understanding of what a likely outcome in a court may be and for parties and/or lawyers to save face.

**Some disadvantages in shuttling in conciliation**

Many of the pitfalls listed under shuttle mediation are relevant to shuttle conciliation. Some additional issues to watch out for are:

- it can be time-consuming where there is a scheduled court hearing
- additional issues get raised adding to the complexity
- positional bargaining rather than



- interest-based negotiation
- the negotiations becoming linked to something else that needs to be sorted out as well; for example, in property conciliation it is often argued that children's matters need to be addressed as well
- the parties not getting a 'voice' when legal representatives are present
- the conciliator working harder than the parties or their representatives to get a settlement
- a party or representative criticising the process or the conciliator or 'shooting the messenger'
- parties feeling pressured and/or exhausted or a party or lawyer maintaining they will take their chances in court
- when no lawyers are present, a party not being able to make a decision without their representative or their advice and guidance
- the conciliator censoring or forgetting information that may need to be conveyed.

Consider the following scenario:

*After a conciliation a party complains to their spouse that he/she felt pressured to agree to the undertakings negotiated in the conciliation. The spouse then took it upon themselves to contact the organisation and complain about the conciliator and the 'unfair' process used.*

*Question: What can be done?*

## Equidistance

In any process there are challenges for mediators and conciliators to maintain patience, rapport, trust and confidentiality, to work with differences and tolerate ambiguity, to refrain from forming alliances or demonstrating some affinity, to remain equidistant and even-handed. Particular attention needs to be paid to these goals when using private sessions and shuttle as the mediator is having a conversation with each party in turn without the scrutiny of the other, often for the purpose of finding out information previously not shared. Becoming that party's confidante, or supporting or promoting a certain outcome, is a real risk when the mediator becomes the conduit between the parties by transferring messages

from one to the other for the purpose of facilitating a negotiated settlement.

Becoming the scapegoat for the dissatisfaction of one or more participants can also become risky. It may be useful to use a disclaimer in shuttle, for example by clearly stating that the information to be conveyed is not that of the mediator/conciliator and as such they have no vested interest in what each party wants to consider.<sup>12</sup> This could avoid a party's perception of partiality or favouritism based on gender, ethnic or professional background, topics for discussion and the particular process or intervention used.

## Conclusion

This article has highlighted some of the uses and abuses of private sessions and shuttle, showing the advantages, disadvantages and pitfalls for mediators, conciliators and parties. There are many warning signals that need to be considered to maintain a level of not only being seen as competent but also feeling confident about the use of separate meetings or shuttle. When the parties leave, the mediator or conciliator is left to reflect on what went well and what could have been done differently. It is hoped that this article has helped to clarify some of these practice dilemmas in some detail. ❖

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