

Should Mediating Parties Face Each Other?

Dana M. Eberle

This article is written from the perspective of an attorney and mediator who prefers shuttle mediation – when the parties are not face-to-face, but the mediator “shuttles” back and forth between the parties’ rooms. But this attorney recognizes that there are pros and cons to both methods, and that every mediator and most attorneys have strong opinions as to which is more productive. This discussion is facilitated by the following resources: “Advocating for Understanding” by H. Scott Flegal (*New Hampshire Bar Journal*, 2005); ABA Section of Dispute Resolution Report of the Task Force on Research on Mediator Techniques, 2017; “The Decline of Dialogue” by Eric Galton, Lela Love and Jerry Weiss (*Alternatives* newsletter, 2021); “Love, Death, and Money” by Gary Friedman and Jack Himmelstein; “Mediation and the Art of Shuttle Diplomacy” by David A. Hoffman (*Negotiation Journal*, 2011).

In 2005, Gary Friedman first put forward his theory that the primary purpose of mediation was not to assist the parties in reaching a resolution, but rather – this attorney would argue – to force the parties to understand each other’s perspectives, and then to facilitate an agreement based on that understanding, otherwise known as the understanding-based model (UBM). The UBM alleges that a mere resolution is not helpful unless the parties can understand each other and then carry that understanding forward to continue their relationship after the settlement. The only way to accomplish this, according to the UBM, is to keep the parties (and their lawyers) in the same room for the duration of the mediation.

The UBM’s assertion is that the parties must make the decisions together and must work collectively with the mediator to resolve their dispute. “It is important for the mediator in [this] model to view the interaction between the parties and help the parties recognize counterproductive patterns of conflict that may keep them divided.” The mediator can “focus on how the parties talk about these issues.” This method “demands a higher level of interpersonal skill on the part of the mediator.” But what the UBM does not acknowledge is that the skills it requires of the mediator are more those of a therapist than a solver of legal problems. Most mediators are attorneys, not therapists. The personal (and personality-driven) reasons for the conflict between the parties are not relevant to the legal issues that must be addressed. Many clients will be resistant to mediation because, “If we could agree on anything we wouldn’t be in this situation.” It is up to the attorneys to explain to their clients that no one is forcing them to agree with the other side – we are looking for the best out-of-court solution to their problems. We are not tasked with – nor are the courts concerned with – fixing the parties’ relationship. That is the domain of trained mental health professionals.

In criticizing the shuttle method of mediation, the UBM alleges that it gives the mediator – who has the role of a neutral – too much power. The UBM identifies the goals of a mediator as helping the parties understand what their opportunities and risks are in litigation, exploring carefully a variety of other options, and making decisions about what’s in their interests.

Allegedly, shuttle mediation is not suited to these goals because it results in the parties believing the mediator is biased and is manipulating the parties with the selective information she shares with the parties. With shuttle mediation, the mediator’s only goal is to get a settlement. That is not this attorney’s experience, and presumably good mediators would take exception to this assumption. As both an attorney advocating for the client in mediation and as the mediator, the goals should always be ensuring that the client understands the risks, understands all the options and is making informed decisions.

Shuttle mediation avoids the uncertainty and lack of control that comes with people in dispute being in the same room at the same time. It not only resolves conflicts as efficiently as possible but also achieves many of the same objectives that the UBM seeks to advance. Accusations each side is likely to bring up will only exacerbate the conflict if shared in a joint session. Private meetings allow the mediator to build relationships with each side and try to get each side to respect the perspective and motivations of the other side without them being locked in argument and continually antagonizing each other. The mediator can moderate the emotional impact of a proposal that might otherwise infuriate the other side. The pride of each party may prevent them from letting their guard down in the presence of the other. Shuttle mediation helps the parties save face, and helps the mediator identify problems

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and perspectives without interruption.

The parties may be closer to an agreement than they think. They may have a “zone of possible agreement” of which neither party is aware. In separate meetings with the mediator, the parties may be more open to sharing these underlying interests, helping the mediator pin down the “zone of possible agreement.” It is particularly conducive to a settlement for the mediator to return to the room and state, “Good news! You guys agree on all the important things! We just need to work out the details.”

Shuttle mediation solves the problem of the various barriers to reaching settlement.

- **Communication barriers:** One of the parties communicates so abrasively that the other party can't stand to be in the same room. Messages are sometimes easier to hear from the mediator after reframing.
- **Emotional barriers:** The fight-or-flight reaction, the adrenaline rush, the need to vent in a safe space.
- **Information barriers:** The reluctance to share specific information in a joint session, not knowing whether it will help or hurt the process.
- **Strategic barriers:** A reluctance to share the true bottom line.
- **Unrealistic expectations:** The mediator can use private sessions as a reality check for the parties (and their attorneys).

The benefits of shuttle mediation outweigh the slim chance that a mediator can act as a therapist for the parties under the UBM. The mediator can foster trust and build a relationship with each party in separate sessions. He can acquire insight about each party's perspectives. She can listen empathetically to the parties. He can provide validation and positive interactions without fear of the appearance of partiality. She can obtain valuable feedback from the parties as to what might settle the

case. Above all, the mediator can engage in creativity with the parties and their attorneys, arriving at solutions that would never be possible in court.

Of course, not all litigation is high-conflict and emotional. Parties will voluntarily participate in pre-suit mediation to determine if a suit can be avoided altogether. The very willingness to attempt to avoid litigation bodes well for face-to-face mediation. Even in divorce and custody cases, it is not uncommon for parties to acknowledge that, despite the end of their relationship, they still want to co-parent effectively. These parties will not hesitate to sit down together and resolve their issues respectfully.

The ABA research reflected no relationship between the choice of mediation style and a settlement being reached. Ultimately, despite the theories and scholarly articles on face-to-face mediation, it is not universally being used. Clients see mediation portrayed on television and in movies as everyone at the same table, hurling insults at each other. This impression leads clients to ask their attorneys if they “have to” be in the same room as their opponent. Mediators want repeat business, so they continue to facilitate mediation in the way that the clients prefer. Most clients (attorneys and parties) prefer a mediation style that avoids interpersonal conflict and emotional triggers. They generally prefer reality checks and a space where they can be more candid with the mediator. It is up to the mediators, the attorneys and the parties to discuss the options and determine the best mediation method for their case.

Dana M. Eberle is a partner solely practicing family law at Church, Langdon, Lopp, Banet Law. She is a registered mediator and serves as a Guardian ad Litem. Dana is currently co-chair of the LBA ADR/Mediation Section with her partner Larry Church. ■



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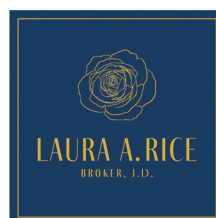
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