

IN PRAISE OF JOINT SESSIONS

By Geoff Sharp, Commercial Mediator and 2009 LEADR Fellow

www.geoffsharp.co.nz

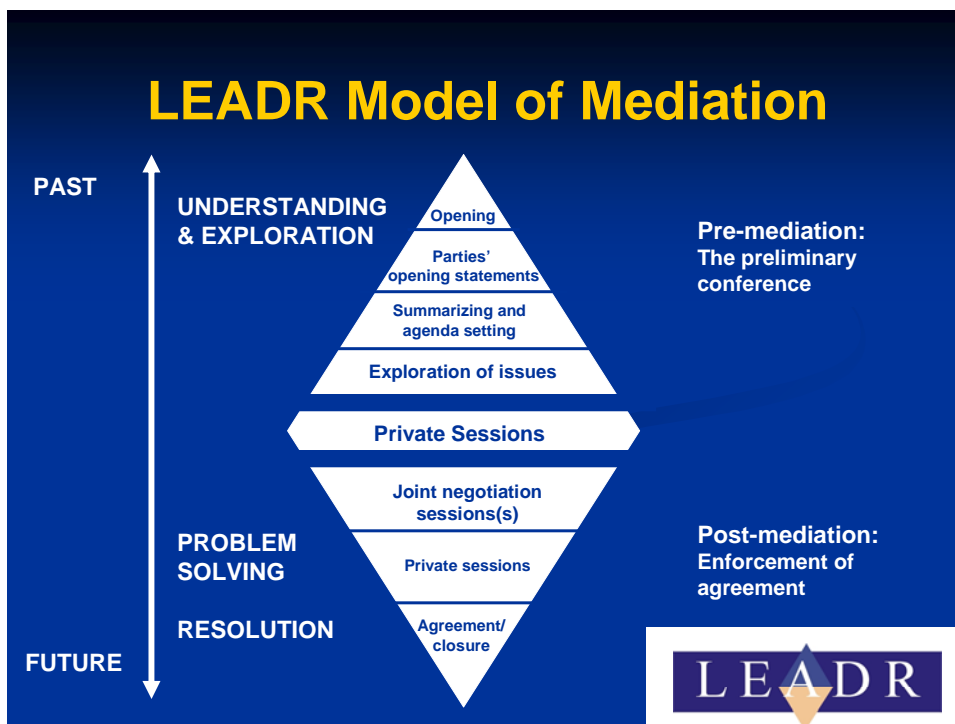
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The working premise for this paper is that over the last 3 to 5 years we have seen a move away from mediators doing their work in joint session with all the mediation parties together at the table towards the process becoming dominated by private or caucus sessions where the mediator meets privately with individual parties only.

This paper, which is written in the context of mediating the litigated case, will deal with this increasing trend amongst mediators to do away with a joint session and adopt a shuttle mediation model.

This is an especially topical debate amongst mediators with some advocating that a purely caucus model saves time and is what the market now requires. This compares with other mediators resisting the demise of the joint session, saying it is at the heart of what we do and of what mediation is.

1. The default model for mediation of legal disputes in Australasia is as follows:



2. In this model the engine room of the mediation is the joint session where issues are explored and where parties drill down into key matters identified in the opening statements as needing debate and dialogue – usually with the mediator facilitating an exchange of party perspectives or sometimes the parties simply staying in a legal frame and claiming the merits of their own position against the demerits of the other. In the mediation of legal disputes we have come to know this as 'valuing the case'.

3. While it would be a mistake to claim that there is one right way of mediating and while the debate between the different 'schools of mediation' is subsiding, one commentator has suggested that the bright line that historically divided our field is no longer along the facilitative versus evaluative fault line, but now more about a "dialogue based" versus "separation based" rift.¹
4. One hears that the "market", with its' invisible hand, *requires* a separation based model with some of the repeat players (often lawyers) claiming "I never do joint session", "I never let my client talk in a joint session", "We don't need a joint session... we all know the issues" or "If we do a joint session, the whole thing will blow up".²
5. Indeed, my own experience observing mediations in 'mature jurisdictions' suggests there is far more work carried out by the mediator with individual parties in private than with parties collectively in joint session and engaged in party-to-party dialogue. Talking to one practitioner in California, she described joint sessions as 'nearly a dead letter here in Los Angeles'. In one case I observed, the parties did not meet for the entire mediation – not to introduce themselves at the start of their working day, nor when they settled and, in fact, the lawyers for the parties only met by accident in the photocopy room as the already signed agreement was being copied.

Pros and Cons of Joint and Private Sessions

6. Let's look at joint and private sessions from the point of view of the constituents to the process; the mediator, the legal advisers and the parties.

6.1 Joint Sessions

- (a) From the *mediator's* perspective a joint session allows insight into the interaction between the parties (and lawyers) and throws up clues about the best way to reach a consensus.
- (b) When I am in joint session it is primarily the *behavioural dynamic* that I am interested in although it also presents grand opportunities for the mediator to ply his/her craft including setting an appropriate tone, building trust and demonstrating even-handedness.
- (c) From the *parties'* perspective it is slightly different; whilst many parties would say that the primary gift of a joint session is the opportunity to *speak directly* to those with whom they are in dispute, and to be sure it is a golden opportunity for face-to-face, the real value for parties in joint is they get to *hear and evaluate* the other side.
- (d) Evaluation in the sense of the legal case, the emotional disposition of decision-makers on the other side of the table, the credibility of those who may give evidence if the matter goes to trial, and importantly the positions and interests they will need to negotiate around during the mediation.
- (e) From the *lawyers'* point of view, a joint session is really the only place in the process to demonstrate skill and expertise (subject matter knowledge, legal/trial skills and people skills). And it is possibly the only time during the entire period of the litigation (often stretching over years) that lawyers can have direct communication with the opposite decision-maker without the distraction of an intervener, like opposing counsel. Many however have come to see it as a necessary evil (*'we know the issues, let's just cut to the chase'*).

6.2 Private Sessions

- (a) For the parties, private sessions represent an opportunity to break from the intensity of a joint session and in this way serve as a useful period of down time for individual reflection and regrouping.
- (b) They are also a safer place to construct possible negotiating strategies and in some cases, especially at the end of a long day and with the gap narrowed, from which to deliver offers in simple money mediations.
- (c) The point being that when there has been a valuing of the case and a testing of that value in the bright light of joint session, the retreat to a private room is not simply an escape to a more comfortable forum from which to launch unrealistic and misunderstood positional outcomes, but rather a place *now to work from*.
- (d) Perhaps one of the most legitimate benefits of a private session is the avoidance of reactive devaluation -- where one party simply rejects a proposal simply because it came from the other. Private sessions, with some risk of manipulation by the mediator, have the ability for the mediator to minimise this reaction by acting as messenger.
- (e) For the mediator, private sessions are a useful place to aggressively identify and evaluate progress by reality testing emerging attitudes, behaviours and possible outcomes of the parties.
- (f) In addition, my own practice is to use private sessions as a coaching opportunity for parties who are struggling to frame the conversation in a constructive way or are failing to identify interests being served up to them in joint or who might need some help in dealing with a developing roadblock that I can see appearing out of the murk but they cannot - in other words for the mediator to be *mutually partial*.³

6.2.1 As Diane Levin of The Mediation Channel⁴ reminds us, caucus does offer much and can be used, for example, to;

- (a) Assess candidly the benefits, costs, or risks involved under various scenarios.
- (b) Allow parties to safely let off steam or vent without the negative fallout that might result otherwise.
- (c) Let parties digest unexpected or painful revelations in private to save face.
- (d) Mediate within the mediation, addressing differences in expectations or interests between participants on one side of a dispute or between an attorney and the attorney's client.
- (e) Enable a mediator to regain a party's trust in the event a mediator has inadvertently misstepped in joint.
- (f) Permit parties to explore the full range of potential options for settlement or resolution.
- (g) Realistically weigh options on the table against the best and worst case alternatives to a mediated agreement.
- (h) Provide a cooling-off period for angry or highly emotional parties or give parties a break from each other in particularly stressful cases⁵.

6.2.2 But;

- (a) Mediator manipulation is the big danger of a mediation conducted primarily through private sessions. The potential for abuse of mediator power is real simply because the mediator becomes the sole conduit of information between the parties and can get horribly caught up in trying to get an agreement.
- (b) These types of mediations take much longer than a mediation where the parties communicate directly. The parties become detached from each other because of the lack of “constructive confrontation” which in turn manifests itself in the parties engaging in pointless fighting talk as they sit alone, outrageous offers and unnecessary posturing.
- (c) The parties spend much energy in persuading me, the mediator, instead of each other. This is, to a limited degree, found in all mediations however the parties make the mistake of unconsciously using the mediator as their agent to advocate their case to the other side when they are reduced to sitting in separate rooms only.
- (d) Overall the lack of transparency that comes with this type of model should be of concern to our field. By way of illustration, assume that I am conducting shuttle mediation in a family dispute over a deceased's father/husband's will⁶. The widow wishes to make a monetary offer to her two sons through me of \$50,000.00 and once she has authorised me to make that offer, I have a number of options;

“Your mother is offering you each \$50,000.00.” *(I just stick to the facts)*

“Your mother is offering you each \$50,000.00 because that will allow you to finish your education abroad which you have signalled is very important to you and your mother wants to recognise that.” *(I justify the offer)*

“Your mother is offering you each \$50,000.00 but she is very sad that some of your father's wishes will not now be carried out because of this payment and the cost to the estate while you quarrel over it. She hopes this proposal will end the arguments and improve family relations.” *(I include the emotional dimensions surrounding the proposal)*

“Your mother is offering each of you \$50,000.00 and she is committed to coming to an agreement today – she wants to be fair and reasonable to both of you and she would like to talk about family reconciliation once this matter is settled. Now her offer at the moment is \$50,000.00 ...” *(I gift-wrap the proposal and intimate that there might be still room to move)*

- (e) This lack of transparency comes into sharp focus when a mediator sometimes uses the caucus to *prevent the creation of common knowledge* by controlling the flow of information. Not telling a party certain available information may well aid the negotiation (for instance by preserving uncertainty), but is it a legitimate intervention by the mediator?⁷

Why is there a Move Away From Joint Sessions – Could it be the ‘F’ Word?

- 7. Whether it is the wish of the ‘market’ to have a more settlement conference orientated process or it is at the initiative by mediators -- we are seeing less joint sessions because of **FEAR**. Fear by lawyers, parties and even mediators, fear of the uncertainty and lack of

control that comes with people in dispute being in the same room at the same time - because one thing we can all agree on; you can't script a joint session, anything might happen. Unlike a courtroom, there are no real rules and once the structure of the opening 'speeches' is spent all those involved will have to react in the moment as a participant in (on one level) an uncontrolled environment.

8. *After all, I suggest mediation is still very much an oral sport and I believe will remain so if it is to keep its utility ahead of other ADR processes.*
9. And it is here that I should make a confession; I am absolutely guilty of getting people in the same room and "seeing what happens" in a commercial mediation setting. Sometimes it goes well, other times - not so much. But the point is our skills as mediators should enable us to manage a joint session in combination with an appropriate mix of private sessions towards a more efficient, more sustainable and safer process and outcome.
10. Some of that uncontrolled environment may include difficult or emotional conversations. But we should not see the venting of emotions in a joint session as a necessary evil – participants, and especially mediators, should see it as usually leading to a more constructive approach by those involved. Mediators learn to balance the ever present risk of a joint session doing harm.
11. I do not think I do a disservice to the busy commercial lawyer when I say that many find it hard to deal with the emotional issues that often surface in mediation, even in the most businesslike of business mediations. They feel somehow that this is not their realm and that it is not a fitting professional task for them to deal with this aspect of a commercial case. So what sense does it make for them to indulge the other side by listening to or even debating a directionless non legal issue? In their frame that has nothing whatsoever to do with the resolution of their legal case.⁸
12. But as I say, it is the *listening* that sophisticated users value above all else in a joint session and the very best negotiators would add, '*why cede that power to a shuttling mediator to act as our eyes and ears?*'
13. And I say that in the knowledge of the tight rope that counsel walk at mediation -- that of an effective mediation advocate with people skills sometimes needing to take priority over legal ones versus the battle hardened trial lawyer demonstrating a steely resolve to take the case to trial.⁹

Joe McMahon¹ asks why dialogue is resisted and he suggests these four factors:

> **Denial and avoidance** of the conflict or its underlying actions, or the person's ego or self-identity.

"I don't deal with people like that."

"I won't talk with people who accuse me of [taking money, breaching an agreement, lying, etc]."

"My presence [their presence] will make things worse. It's better for us to be separated."

"I am tired of them; just go away."

"I don't have to justify my offer or my views to them."

> **Confusion** about what is needed to participate in dialogue, or lack of any experience in real dialogue. This occurs when a person does not understand that it is possible to engage in dialogue while remaining steadfast to key interests. Parties might have a feeling that even meeting with the opposing party is an admission of wrongdoing or in some way will weaken their position.

"If I do so, I will be pressured to give up a key interest."

"If I do so, I will appear weak, or not as steadfast as I really am."

"I don't want to be talked out of my position."

> **Desire to “spin” or “game”** the mediation process. It often is perceived to be easier to spin or game the process when not in the presence of the other party. This is particularly true of a party who makes “sham” offers. There may be a desire for some anonymity in making very self-centered proposals for settlement, relying on the mediator to convey the offer.

> **Real fear for safety** and physical security for self or others, due to prior events or threats. This is rather rare in commercial matters but not wholly out of the question; it is more common in harassment and victim-offender matters.

Why Should We Care?

14. If indeed there is a move away from working in joint sessions, what does it matter?
15. Some would say it does not. Some would say that the settlement conference model has become the norm and, in litigated cases at least, it is the best road to settlement where parties are meant to sit in private rooms with the mediator shuttling between – that is just the way it is and just the way it has come to pass.
16. Andy Little in his book, *Making Money Talk*¹⁰ says;

‘One of the most striking characteristics of civil trial mediation is the extensive use of private sessions. Most of the mediator’s time is spent shuttling back and forth from one team’s breakout room to another. This procedure may sound foreign, and even offensive, to mediators who work with clients in other kinds of disputes ... we use private sessions for a particular purpose – and that purpose in civil trial court mediation is to deal with ... the parties’ need for privacy.’
17. Just as we saw when arbitration took hold in many jurisdictions, the litigation model is making itself felt in the mediation room and it makes absolute sense to plaintiffs and defendants, who are engaged in a titanic courtroom struggle, to bring that mindset into the mediation room. After all, having sat on opposite sides of the courtroom and dialogued through their lawyer, they now sit in separate mediation rooms conversing through the mediator.
18. From a process point of view, we should care passionately. Joint sessions, even the difficult ones, let the sunlight in and thereby keep the mediator honest and the process transparent.

Ring the bells that still can ring
Forget your perfect offering
There is a crack in everything
That's how the light gets in

Leonard Cohen
19. One of the most common complaints against mediators is that he or she lacked integrity or somehow behaved unprofessionally -- a charge much easier to make when the mediator's workplace is the corridor and not the common room.
20. Virtually every mediator I know has lingered between rooms when shuttling, simply to allow time to pass so as not to be seen to be bringing back a counter proposal too soon, the lack of time indicating too much keenness or not enough serious consideration. Every mediator has opened the door to a private room stony faced for effect, not wanting to disclose a developing consensus for fear that one party will sense a win and overreach in its subsequent demands.
21. And most parties who prefer to work in private session find it easier to make outrageous demands or deliver unrealistic proposals from the cocoon of their private space. They are able to do so without explanation or justification, throwing the responsibility for the outcome of the negotiation onto the mediator...

"go in and get something to make us stay..."

"tell them we're serious, that's our final offer and we are out of here"

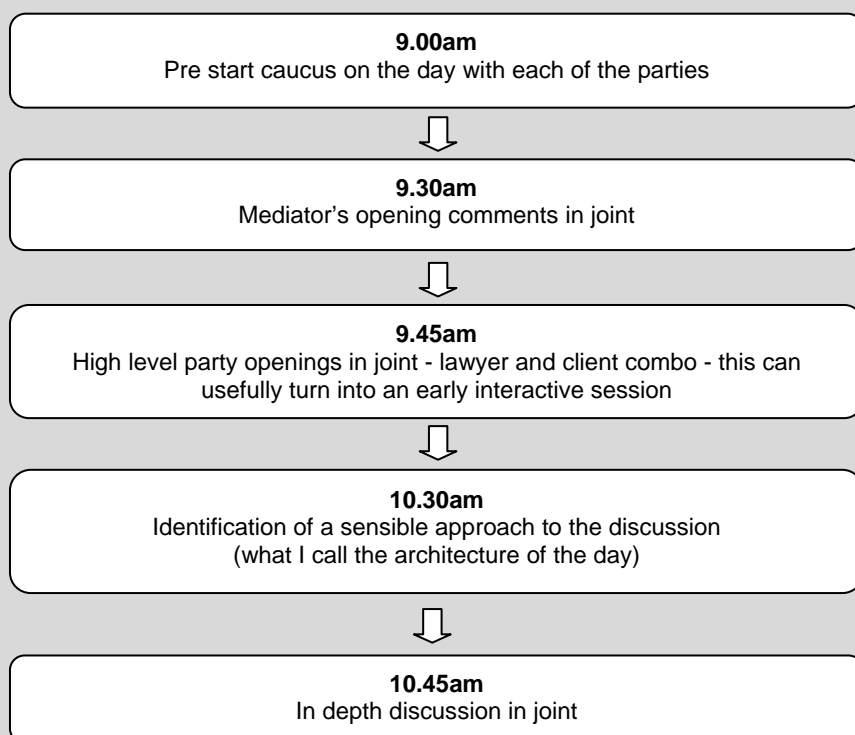
"is that really the best you can do...?"

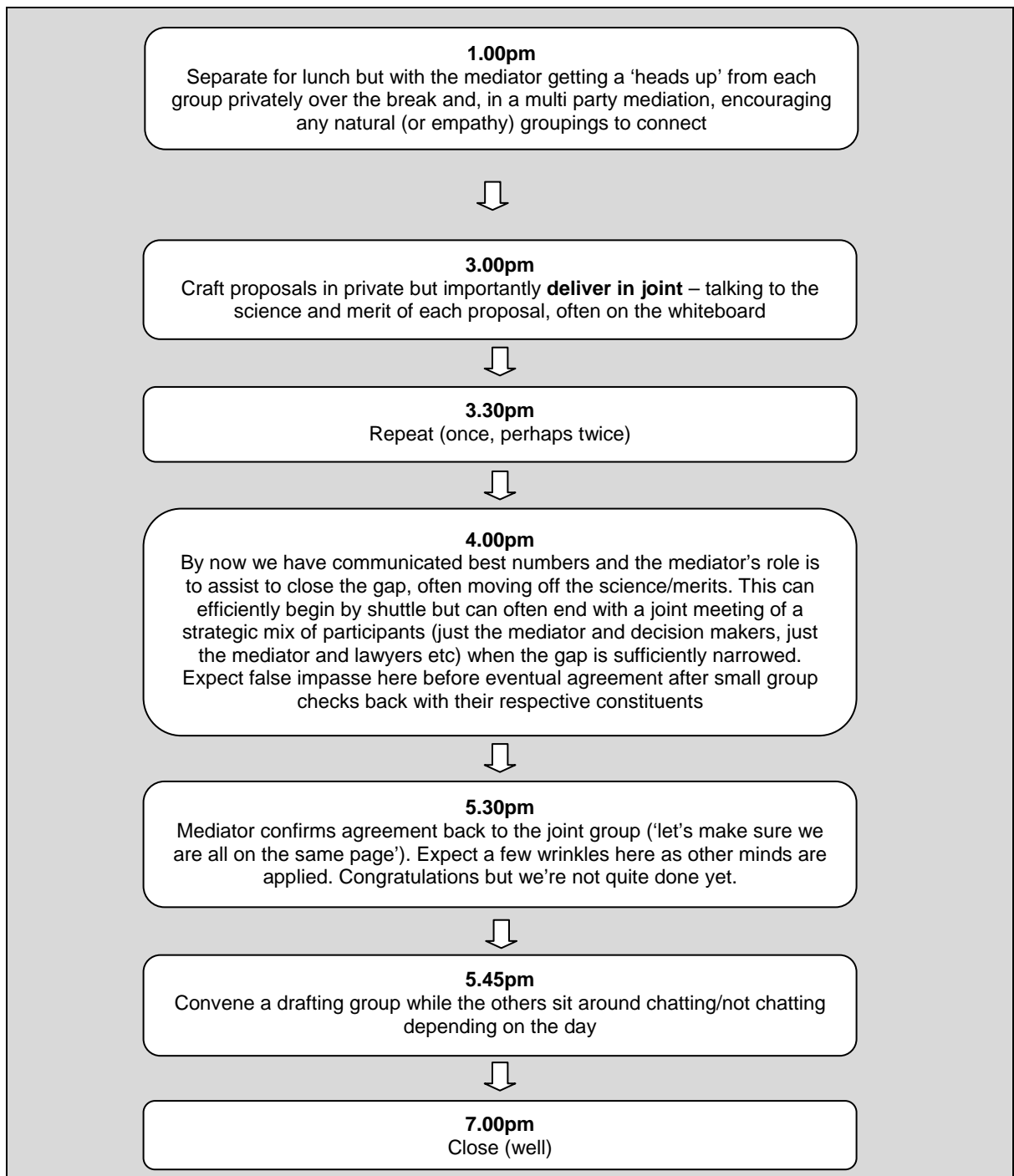
22. Joint session was where I was always taught that the surgery happened, and in some cases, even the magic. The heart stopping success or failure of a large commercial mediation often occurs in joint in those pivotal moments where the mediation sets its course, north or south. In my 10 years of mediation, I have never seen a party make the kind of movement, whether emotionally or financially, in private as they do in joint. Sure, movement may manifest itself away from the public glare but it is usually as a result of insight gained in the fire of a joint session.

Is the answer Selective Caucusing?

23. In researching for a new edition of his book - *Mediation Representation – Advocating In A Problem-Solving Process* - Professor Harold Abramson of Touro Law Center in New York divides the world of caucusing into three; no caucusing, mostly caucusing and selective caucusing.
24. He favours a selective caucusing approach by first, starting with a presumption in favour of a joint session and only using caucuses when it becomes evident that the goals of the joint session cannot be accomplished.
25. Then second, using caucusing to accomplish two purposes: to either share information with the mediator (the early or information stage of negotiation) or to enlist the mediator to help with the next negotiating/bargaining stage.
26. By keeping the purposes to two broad areas, the mediator, lawyers and parties will be able to think more clearly about why a caucus is needed.

To my mind, *if* there is a perfect 'selective caucusing' template for a one day commercial mediation with two or three parties (and there is not), it is as follows;





Conclusion

I have resisted thus far saying what I *really* think of a mediation process where the parties never meet as my aim is to present a balanced debate.

But I cannot conclude without observing that, in my view, shuttle mediation has arisen, in part, out of a *laziness* by mediators.

Why? It's just *easier* to work separately – it's far less effective in so many ways, but it *is* easier.

Because, you see, the air is just not as thick in caucus and it takes less effort to breathe there.

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- 1 Moving mediation back towards its historic roots – suggested changes Joseph P McMahon, Jr <http://tiny.cc/MemYL>
 - 2 The Joint Session: What's In It For You, Tracy Allen and Eric Galton, International Academy of Mediators, 2008
 - 3 Come on down, Mr Lee Jay Berman <http://tiny.cc/Pj1At>
 - 4 Defending the caucus: the benefits for parties in facilitative mediation <http://tiny.cc/K4cYH>
 - 5 Stuart M. Israel, Two Dozen Reasons For Using Caucuses In Facilitative Mediation, <http://tiny.cc/LDyZk>
 - 6 Laurence Boulle, Mediation Skills and Techniques, Butterworths Skills Series 2001.
 - 7 See generally; Common Knowledge As A Barrier To Negotiation <http://tiny.cc/Wv0zr> and Jennifer G. Brown & Ian Ayres' theory of "noisy disclosure" in their Economic Rationales For Mediation paper <http://tiny.cc/UqPaN>
 - 8 Why Is It Hard for Lawyers to Deal with Emotional Issues? Dwight Golann, Suffolk University Law School, Helaine Scarlett Golann, Clinical Psychologist <http://tiny.cc/sbfqw>
 - 9 Where Angels Fear To Tread: The Tricky Matter of How A Commercial Mediator Shows Respect For The Attorney/Client Relationship <http://tiny.cc/4H24s>
 - 10 J. Anderson Little, ABA Publishing 2007 <http://tiny.cc/2dUNt>

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