

Co-Mediation

by Joe Epstein and Susan Epstein

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This column is sponsored by the CBA Alternative Dispute Resolution Committee. The articles printed here describe recent developments in the evolving field of ADR, with a particular focus on issues affecting Colorado attorneys and ADR providers.

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Co-mediation, where two or more mediators work together, can be an effective and efficient method of dispute resolution. This article provides a general overview of co-mediation types, procedures, and benefits.

Mediation is negotiation with the assistance of a neutral third party.¹ As distinguished from an arbitrator, a mediator does not have the power to impose a resolution.² Co-mediation involves two or more mediators working together to assist the parties in dispute resolution.³ It is a process that parties might wish to consider in multi-party complex cases, as well as cases requiring gender balance or technical expertise.⁴ This article provides a general overview of the different types of co-mediation that are available to Colorado attorneys to help resolve their clients' disputes. It also includes a discussion of considerations and benefits of co-mediation.

Types of Co-Mediation

There are several types of co-mediation that parties can use to help resolve disputes. These include peer mediation; lead/assistant or lead/student mediation; and med/arb, all of which are discussed below.

Common goals of all types of co-mediation are to:

- provide an extra set of eyes and ears to help resolve the dispute
- organize the mediation process before the start of the actual mediation
- speed up the mediation process and encourage prompt agreement of the parties
- facilitate effective follow-up after completion of the mediation.

Peer Mediation

In multi-party cases with multiple issues, parties might want to consider

peer mediation or co-equal mediation, where mediators of equal stature work together as a team. The mediators can divide issues and parties according to expertise, suitability, and compatibility, while also coordinating their tasks.

For example, in the construction context, one peer mediator can work with the project owner, the design experts, and the general contractor, while the other peer mediator can work with the general contractor and its subcontractors. Both mediators might have to work together on coverage issues.

In some cases, the parties might opt for a mediation team that includes a lead mediator and an industry expert. The lead mediator/technical expert combination can be useful in a variety of cases, including those involving professional liability, health care, intellectual property, and international law. The technical expert can serve as a co-mediator or as a consultant for the mediator.

When the technical expert serves as a consultant, the disputing parties will supply the mediator with the issues and data, work with the mediator to frame the key questions for the expert, and allow the mediator to be the contact person for the expert. In such instances, the expert can provide a report and/or attend the mediation.

Examples of neutral experts that parties might consider employing in the context of personal injury cases include: governmental benefits specialists, life care planners, rehabilitation experts, neurophysiologists, and structured settlement specialists. In business and real estate cases, the parties might agree to employ joint forensic accountants, ap-

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praisers, and cost estimators. Of course, all experts must have a reputation for honesty, integrity, and neutrality.

Lead/Assistant and Lead/Student Mediation

In addition to co-equal mediation, other forms of mediation include lead/assistant mediation and lead/student mediation, where an experienced or lead mediator works with an assistant or student mediator. In mediation, a variety of interests and motives are in play. For example, in a defense caucus, attorneys, adjusters, and clients all might have somewhat differing underlying objectives. Interests, objectives, and negotiation styles are varied; thus, an extra set of eyes and ears is very helpful to the lead mediator and the new mediator, as well as to the parties.

Med/Arb

Another type of co-mediation, commonly referred to as “med/arb,” involves one mediator and one arbitrator. While the mediator conducts the mediation, the arbitrator listens to the information shared in the general sessions and considers the non-confidential written submissions of all parties.⁵ The arbitrator reaches findings but does not share those findings unless an impasse is declared. If an impasse is declared by the mediator, the arbitrator’s ruling is disclosed and governs. Because the arbitrator has the power to impose a resolution, his or her presence might create the incentive for parties to reach a mediated resolution.

In some instances, one person may play both roles. Thus, in med/arb, the mediator/arbitrator first serves as a mediator and tries to persuade the parties to come to a negotiated resolution. However, if that effort fails, the mediator switches hats and issues a ruling as an arbitrator.

Co-Mediation Considerations And Benefits

Co-mediation requires careful preparation, planning, and communication between the mediators, as well as between the mediators and the parties. Also, co-mediation allows mediators with different

talents and expertise to help the parties actually determine the direction the mediation process will take to resolve their dispute. Efficiency is enhanced because the mediators can divide the work before, during, and, if necessary, after the mediation.

Designing the Co-Mediation Process

Parties need not worry about the coordination required for effective co-mediation. Co-mediators must plan how and when to: (1) organize the mediation; (2) divide the work; (3) confer during the mediation; and (4) report back to the parties.⁶ Like any team, co-mediators must work together to develop a process and effective schedule for the mediation.

When designing the process and schedule for the mediation, mediators and parties should confer about the following issues: (1) timing of the mediation; (2) pre-mediation discovery or information sharing that must occur; (3) participants who must be at the mediation table; (4) use and scheduling of pre-mediation meetings or caucuses attended by the parties and mediators; and (5) design of the mediation process itself.⁷

After the parties design the mediation, the co-mediators start working with them to get the case ready for mediation. For example, in a construction case, one co-mediator might work with the parties on coverage issues while the other works on discovery issues. The mediators also might divide the responsibility of working with the general contractor and its subcontractors and the responsibility of working with the architect and the design team. In short, the mediators divide the work to make scheduling easier and move the case to a better position for mediation.

During the mediation, in some instances, it makes sense for the co-mediation team to stay together. In other instances, it makes sense to split up during the mediation but reconvene at set times to check in with each other and review what has been accomplished. This process offers the advantage of keeping more of the parties engaged in a multi-party mediation and aids in increasing the pace of the mediation. For example, in a sexual

harassment case, it might make sense for the team to stay together for the entire mediation process. In multi-party cases or multi-issues cases, the mediators and the parties might designate logical divisions of primary responsibility. In all instances, care must be taken by the mediators to remain neutral and avoid the trap of seeming to be the “mediator advocate” for a particular party.

The more experience the co-mediators have in working together as co-mediators, the better the process is likely to work, because good chemistry and coordination tend to produce positive results. However, this does not necessarily mean that the mediators will always agree as to their evaluation of a case. If both mediators present the basis of their varying evaluations in a cogent, thorough, and objective manner, the parties likely will respect the fact that they have been presented with two objective, independent evaluations. This gives the parties an idea as to how different judges or juries might form differing opinions as to the facts of the case.

Efficiency

Many parties assume that co-mediation will be more costly than working with a single mediator.⁸ However, co-mediation usually results in shorter, more efficient mediations and, consequently, less cost to the parties.⁹ Also, co-mediation often results in a faster-paced mediation process, so that resolution is more likely to occur and follow-up is more effective.¹⁰

One of the biggest complaints mediators face in multi-party mediations involves the “dead time” parties experience while waiting for the mediator to join their caucus. This dead time can result in the parties becoming impatient, ill-humored, or rigid—or even backsliding.¹¹ Also, a sole mediator might feel pressured to rush the process while in a caucus because of the perceived time pressure.¹² In such instances, co-mediation will accelerate the pace of the mediation and reduce problems associated with dead time.¹³ A two-party team has a greater opportunity to build trust and to listen and learn from the parties while providing feedback. A co-mediator’s ability to observe and brainstorm provides the opportunity for en-

hanced strategic planning, greater creativity, and more risk-taking during the course of the mediation.

Communications and Trust

Although e-mail and voicemail are useful methods of communication, personal contact between a mediator and a participant has enhanced value. When co-mediators work on a case together, the give-and-take of direct personal communication is increased and often is critical in the closing of a settlement.

Additionally, co-mediation teams can provide comfort and security to the parties by attending to gender diversity, technical issues, or linguistic diversity. International business disputes, employment cases, personal injury cases, and family law disputes all could benefit from co-mediation. Business dissolutions, family firm disputes, and professional firm conflicts might require a lawyer/accountant or lawyer/business administrator co-mediation team. Special mediation teams could be effective for oil and gas, intellectual property, and other technical cases.

Follow-Up

Even if a case is not resolved, mediators might make substantial progress toward resolution and then follow up with the parties after the mediation has ended. Most highly regarded mediators are busy and unable to follow up as quickly as they or the parties would like, especially if there are multiple parties involved. The

involvement of an additional mediator who fully participates in the mediation session can make a major difference in the ability to quickly follow up while there is still settlement momentum. If this availability results in a case getting resolved, it is hard to argue that any additional cost of having a co-mediator is not justified.

Conclusion

Co-mediation is not necessary for all cases, but is a helpful tool that should be considered for multi-party and emotionally charged cases. Co-mediators must communicate well with each other and with the parties. Co-mediation teams that have similar backgrounds can work best in instances such as multi-party tort cases. In other instances, such as family firm disputes, a male/female co-mediation team that combines litigation and business backgrounds might be the best option. In some instances, such as international business transaction disputes, a cross-cultural co-mediation team might be the best method to evoke the trust and understanding needed to enable a peaceful resolution of the conflict.

Parties must keep in mind the cost of the lost opportunity to settle and the reduced efficiency of trying to have one person do it all when making the decision to co-mediate commercial, construction, employment, wrongful death, catastrophic injury, and multi-party cases. Co-media-

tion often provides efficient, fast-paced mediation that results in greater satisfaction with the mediation process and with the end result.

NOTES

1. See Picker, *Mediation Practice Guide* (American Bar Association 2d Ed. 2003) at 2-3; see also Trachte-Huber and Huber, *Alternative Dispute Resolution* (Anderson Pub. Co. 1996) at 276-77; Moore, *The Mediation Process* (Josey-Bass 1986) at 13-19.

2. Moore, *supra* note 1 at 17; see also Picker, *supra* note 1 at 3.

3. Newman and Monaghan, *Butterworths Mediators on Mediation* (Tottle Pub. 2005) at 297-98.

4. See *id.* at 297-99. See generally Laflin and Piazza, *Co-Mediation of the Complex Construction Case* (Shepard's McGraw-Hill Construction Litigation Reporter 1995).

5. Compare Riskin and Westbrook, *Dispute Resolution and Lawyers* (West Pub. Co. 1997) at 657-70 with Picker, *supra* note 1 at 8-9.

6. See Newman/Monaghan, *supra* note 3 at 301-5.

7. See generally Epstein and Berkowitz, "Proactive Mediation," Vol. 48, Issue 5 *Trial Talk* 13 (Oct.-Nov. 1999); Newman/Monaghan, *supra* note 3 at 301-5.

8. Newman/Monaghan, *supra* note 3 at 300-1.

9. *Id.*

10. *Id.*; see also Laflin/Piazza, *supra* note 4 at 7-8.

11. Laflin/Piazza, *supra* note 4 at 7-8.

12. *Id.*

13. *Id.* ■

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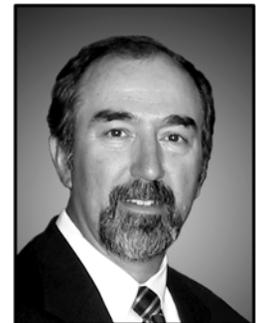
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