Doubling down. Two mediators for one case?

If case value is over $500K, there may be value in hiring two mediators to work certain types of cases

By John M. Drath and Charles F. Hawkins

In all likelihood, few if any of you reading this article have ever used two mediators in a case, so let us open the question to debate. When should two mediators be used? We suggest that the answer is, more often than you might think.

Think back to your own experience. Have you ever:

- Had a case involving multiple defendants fighting with each other, resulting in little progress and the need to schedule another session?
- Had a case in which one or more insurers were disputing coverage, as well as disputing either liability or damages or both, again resulting in little progress and the need for further sessions?
- Had a case involving a pivotal issue in a discrete area, such as the claimed bankruptcy of a key party, that was outside most mediators' (and attorneys') expertise, and which became a stumbling block in the negotiations?
- Had a case in which you really weren't crazy about your opponent's choice of a mediator, but decided to agree to him or her just to get the mediation scheduled, only to learn at the mediation that your concerns were well-founded?
- Had a case where just the sheer number of parties rendered the negotiation process so slow and cumbersome that little was accomplished by the end of the day?
- Had a case where the gender, race, religious, cultural or ethnic background of the neutral would be important to your client's trust in the process and satisfaction with the outcome, but you were unable to get the other side to agree to a neutral that satisfied that requirement?

We submit that any one of those scenarios would have been good candidates for the two-mediator approach. Before going further, let's recognize that a case must have a certain value to justify this approach. What that number is can be debated, but probably cases below $500,000 will generally not qualify. Similarly, on the other end of the spectrum is the mega-case (e.g., the Millennium Tower case) in which multiple mediators are needed to handle the many facets those cases present.

Two case studies

While there is no "one size fits all" when it comes to how co-mediations are

conducted, we can offer our own experience from the cases we have handled. One case involved a serious job site injury, but only two defendants. Though the two defendants had common ownership, they were separately insured, and one of the insurers had filed a Declaratory Judgment action in federal court based on a policy exclusion not present in the other policies. There were the usual disputes over obligations to defend, primary versus excess coverage and contribution, along with the effect of an indemnity agreement. The injury case had its own issues: liability, comparative fault, employer negligence, liens and future economic damages. Seven rooms were needed to accommodate the interested representatives and parties.

The parties decided that mediators with different backgrounds might be effective, so they retained the two of us, with Charlie to focus on the injury case and John to work the coverage side. Beyond that, we had no other instructions – it was up to us to develop a game plan. We each received extensive briefs addressed to our respective areas of responsibility.

By making pre-mediation calls and addressing the coverage issues early, we got past what we expected to be the main challenge – getting offers to the plaintiff without first getting an agreement on the coverage issues. Once that hurdle was overcome we spent the balance of the day teamed up, working the personal injury side and dealing with collateral coverage issues which kept popping up. When agreements were reached at the end of the day, we each dealt with the separate documentation of our respective areas of responsibility.

For our part, the process became an intuitive, collaborative experience. We would compare thoughts and adjust our strategy after spending time in one room before moving on to the next. We have different but entirely compatible styles and approaches and we alternated taking the lead, depending on which room we were in and which of us had the best rapport with that group. Our objective was to give the parties the benefit of two minds coming from different areas of experience, and from the feedback, it seems we succeeded. It is doubtful that a single mediator would have been able to resolve the case at the initial mediation.

In another case, again involving a serious jobsite injury, there were multiple defendants. One defendant, a contractor, had been hired by a property owner to do work for which he was not licensed. The contractor in turn hired another contractor, also not licensed. The contractor left an employee in charge of the job, and that person may or may not have asked the plaintiff to assist him. While doing so, with or possibly without the knowledge of the employee, the plaintiff was seriously injured. The insurers for the two contractors were disputing coverage based on, among other grounds, the injury to employee exclusion. One declaratory relief action was pending, and others were threatened. One of the contractors had workers' compensation insurance but the carrier had disputed coverage. There was also a product liability defendant in the case. Nearly every party had two sets of attorneys.

The parties had gone to a mediation with a single (and very capable, experienced) mediator, with a predictable outcome – they didn't get anywhere. There were simply too many competing interests for one mediator, no matter how skilled, to handle, particularly in a single mediation. Eventually the parties got to us and we started with a pre-mediation conference call with the parties to be sure we in fact had all the various interests in the mediation. Further pre-mediation calls with individual parties enabled us to make rapid progress once the mediation got started. Because there were so many moving parts, we at times worked separately, but as the day progressed we were able to work the various rooms together as we had done before. By the end of a long day the plaintiff's case was settled and nearly all the collateral issues were resolved. The remaining loose ends were wrapped up within a few days. We again received great feedback on the process.

Conventional approaches compared

Of course, there are other, more conventional methods of mediating these types of cases. When insurance coverage is a pivotal issue, a separate mediation with just the insurers or a defense-only mediation can be conducted. While this sometimes succeeds, often it is a challenge to get a carrier to commit to a percentage in the abstract. The percentage that an insurer is willing to contribute often hinges on what the overall settlement will be and will often change as the negotiations with the plaintiff progress.

More commonly, a single neutral is engaged to deal with all parties and all issues in one mediation, including in large and complex cases. Our collective experience tells us that this is not always successful, is often cumbersome, and frequently requires more than one session. When there are collateral issues involved, such as coverage disputes, the mediator needs to have both an understanding of the coverage issues and credibility with the carriers, and at the same time be well versed in the underlying case issues.

Finding mediators with good skill sets in both those areas is not easy, particularly in the age of increased specialization. With two mediators coming from different, but related backgrounds, the process can keep moving on all fronts.

Cases with a large number of parties present a logistical challenge of their own, even without complex issues. Just meeting with everyone takes considerable time and inevitably there will be stretches of time without any contact with the mediator. Dividing that process between two mediators results in more frequent contact and more efficient communications. Everyone coming to a mediation expects and must have reasonable access to the mediator. And, importantly, no one wants

to feel their time is being wasted. With two mediators, the process can be kept moving efficiently.

Factors in co-mediation selection

If you have a case that warrants co-mediators, you will want to find mediators that have the background and experience for the issues at hand, but at the same time they need to be able to work well together. In our case, though we had not worked together before, we found that we had compatible views and styles, and what we each brought to the process tended to complement rather than compete. However, we recognize that other mediators might not have such a fortunate experience, so some vetting of the prospective mediators may be required.

Do they know and respect each other? Have they worked together before? Do you get the sense that one of them wants to be in charge? Are they enthusiastic or skeptical as to the concept? Finally, and while not critical, it helps if they both are with the same provider, as that simplifies the administration. A good case manager can be very helpful in putting together a team to meet your needs.

If you are picking two mediators because you can't agree to anyone on each other's list, or because there are multiple parties and reaching agreement on a single mediator is too cumbersome, then you do not have that same degree of control. When you are up against someone who is insisting on using "their" mediator but are open to having a second one, you still need to look for compatibility. Question prospective mediators on their level of familiarity with the other side's mediator, and their attitude towards working with that individual as a co-mediator. In this scenario you are not looking for a "party mediator," but rather someone who will be able to work well with the other neutral. Using two mediators when you are having difficulty agreeing on one can be a great time saver, and both sides end up with at least one mediator who has their trust. The mediators can take it from there.

Conclusion

Today, co-mediations remain the exception, even in high value, complex cases. But perhaps the question should be: When is co-mediation not advantageous? Two professionals working together will see and hear more than they might working alone, have deeper resources for overcoming an impasse, and be better equipped to develop a successful strategy for resolving the case in one session. Having two professionals virtually assures each party that they will have trust and confidence in at least one of the neutrals. Finally, two mediators just add to the validity of the outcome, giving your clients even greater peace of mind that their case has been properly heard, handled and resolved.

Obviously, the cost of using dual mediators initially results in twice the cost initially, but arguably, you are getting twice the value in the form of two professionals with their combined skill and experience level. And, most experienced litigators, claims representatives and sophisticated parties understand that mediation costs are usually the best dollars spent on a large, complex case. If a case that would typically take multiple sessions can be resolved in one setting, then the cost considerations disappear.

We are not aware of any data or studies comparing the effectiveness of single versus co-mediators in complex or high value cases. Intuition and logic suggest that co-mediations can be superior in terms of both cost-effectiveness and overall satisfaction with the process. At least one Superior Court, Marin County, has used two attorneys for its Settlement Conference panels for years, and with evident success. Though the parties are not there by choice, and they have no input on the identity of the mediators, the advantages of co-mediation become quickly apparent to both the neutrals and parties alike.

We suspect that the rarity of co-mediations is because parties just do not think of them except in very large and very complex matters. Based on our own experience, we believe that they will become more common as attorneys and parties discover the benefits provided.


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