The Case for Co-Mediations

John M. Drath
Charles F. Hawkins
ADR Services, Inc.

In large and complex cases, attorneys often retain other lawyers, as either co-counsel or consultants, to address or assist with specific issues. Insurers, while defending a case under a reservation of rights, routinely engage coverage counsel and, in trial; second chairs are commonplace. Yet, when it comes to mediation, the common practice is to select a sole mediator who is expected to address and be conversant with all the issues, regardless of the complexity of the case or the number of parties involved.

Unfortunately, many of such matters cannot be resolved in a single session. We submit that in the proper case the use of two mediators may prove more efficient, more effective and, probably, less costly. Last year, we were selected to conduct separate, but simultaneous mediations, a first for both of us. The case settled, and all parties expressed high satisfaction with the process.

In our case, there was an indemnity agreement between the two defendants, 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. Our case involved a serious job site injury, with two separate, but jointly owned and separately insured defendants. 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 wanted to go to mediation, but instead of picking just one mediator, they asked that Charles Hawkins deal with the injury case while John Drath work on 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 on our respective areas of responsibility.

Based on pre-mediation calls, the challenge was thought to be getting offers to the plaintiff without first getting an agreement on the coverage issues. We were able to get past that issue early in the session, and so 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.

We found that we worked together well and the process became an intuitive, and collaborative, experience. We spent time with one group, and then quickly compared notes and adjusted our strategy before going to the next group. We had 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. In the rare instances that we had differing reads on a room, we would go back and get clarification before moving on. Our objective was to give the parties the benefit of two heads, and we think we succeeded. We doubt that a single mediator would have been able to resolve the case at the initial mediation.

Of course, there are other, more conventional methods of mediating this type of case. One is to conduct a separate mediation with just the insurers or a defense only mediation. The problem with that approach is that the percentage that an insurer is willing to contribute often changes as the negotiations with the plaintiff progress. Asking a carrier to make an early commitment to a percentage in the abstract rarely works and frequently creates an insurmountable challenge to a successful coverage mediation.

Another conventional approach is to engage a single mediator to deal with all parties and all issues in one mediation. While commonly done in large and complex cases, it is frequently not successful. As an example, when coverage disputes are involved, 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.

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With two mediators, the process can keep moving on all fronts.

Also, the sheer weight of numbers can have a profound effect on the chances of reaching a resolution in large and significant cases. We have both been asked to mediate cases which have complex issues and so many parties that the physical limitations placed on the mediator made a resolution difficult if not impossible. Recently, there was a mediation with 14 parties, only one of which was the plaintiff. While this is an extreme example, it is not unusual for us to have cases with 6 to 8 parties with few of them having common interests.

In these circumstances, simply meeting everyone takes considerable time and inevitably after an hour or two, the parties start grumbling that the mediator has not talked to them recently. Multiple mediators are a tremendous advantage in these situations. Introductions progress with increased alacrity and as negotiations progress the mediators can sustain the momentum of the mediation. Let's be realistic: Everyone coming to a mediation must have reasonable access to the mediator. Sitting around drinking coffee while one mediator makes the rounds of all the rooms is rightfully perceived as a waste of everyone's time.

Today, co-mediations are the exception, not the norm, even in high value, complex cases. Based on our experience, we think the question ought to 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. In the case that we mediated together, we frequently went into different rooms and then got together to discuss what we had learned and accomplished. The efficiencies of the process became readily apparent.

Obviously, the cost of using dual mediators initially results in twice the cost of one mediator, but in reality, the cost of mediation is small compared to court costs, expert fees and attorney fees. Most experienced litigators, claims representatives and sophisticated parties understand that mediation costs are usually the best dollars spent on a large, complex case. Also, a case that would typically take multiple sessions can be resolved in one setting, so the cost considerations disappear.

One other upside to the co-mediation concept lies in the selection process. We have all seen parties waste days if not weeks rejecting each other's proposed mediators in an effort to find one satisfactory to all parties. And that is just in a two-party case. A useful analogy is the use of "party" arbitrators in a three-person arbitration. Each side is selecting someone whom they believe will understand and appreciate their perspective on the case. That same strategy can be applied to the mediator selection process: Let the parties each pick a mediator who is in its comfort zone and let the mediators team up.

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. Give it a try, and you may become a convert!

John M. Drath

Charles Hawkins

John M. Drath and Charles Hawkins are very experienced neutrals affiliated with ADR Services. John received his undergraduate degree from the University of Washington and his law degree from the University of San Francisco School of Law. John is a past President of ADCNCN. Charlie acted primarily as plaintiff's counsel prior to turning to mediation. He received his Bachelor's degree from Stanford University and his law degree from UCLA School of Law.