



CO-MEDIATION: NOT JUST FOR FAMILY LAW OR PERSONAL INJURY CASES

By Deborah Gage Haude, Esq.

Recently I mediated a case where the parties were all new to mediation, so I took more time explaining what mediation is, is not and its benefits. A benefit in any mediation, of course, is that, because the parties control the process and the outcome, they can work with the mediator to design a process tailored to their case and their needs. In certain cases, another benefit can be designing some or all of the case as a co-mediation.

Managing complex multi-party cases—keeping the ball moving and everyone's head in the game.

Everyone who has mediated has experienced the momentum that builds at some point, hopefully not too late in the day, to help move a case to resolution. Many have learned that if the process bogs down and loses momentum, opportunities for resolution on the day of the mediation session can be lost. Some cases have so many parties, and/or issues in the primary case, and/or underlying issues such as bankruptcy or insurance coverage, that it would be unwieldy for one mediator to keep all parties engaged and moving forward during the mediation. Some of these issues may be handled before the mediation session by phone calls, information exchanges, or preliminary meetings. However the day of the session is still key.

One of my colleagues, known for his expertise in construction cases, regularly mediates cases alone. However, from time to time, he has recommended that the parties agree to have me co-mediate the day(s) of the mediation session with him. Our mediation styles complement each other's, allowing me to go off and work with the smaller subs who seem inevitably drawn into such cases (and their sometimes multiple insurers

and/or bankruptcy counsel) and help get their issues resolved. That way he and the primary parties can concentrate on the core issues of the case. When my work is done, I can either leave the mediation or go back and work in tandem with him on other issues, depending on the design of the mediation.

This co-mediation design also worked well in a recent IP case where, although there were not as many parties, another colleague stayed with the primary parties and I worked with one sub-group with distinct issues that would have drawn disproportionate time and attention away from the main case. Were a case not to settle on the day of the mediation, bringing the two mediators back together for a closing session could generate more options for next steps and follow-up.

Two heads and personalities and backgrounds can be better than one.

Certain employment cases and non-profit board cases can be highly emotional. Many can be mediated by one mediator, but sometimes a case comes along where co-mediation is a good strategic design to enhance your chance of success. For example, you might anticipate that one or more of the parties will need a lot of attention, or the underlying dispute may have manifested in such a variety of legal issues that you want mediators with different backgrounds. As in a jury trial, some decision-makers may feel more affinity to one mediator than the other or may be able to accept one way of framing an issue more than another. Plus, as with co-counsel at trial or a key deposition, the mediator who is not speaking can watch and gauge the reactions of the various decision-makers and their counsel. When I

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have co-mediated these situations, the mediators have stayed together and worked as partners in the mediation.

In addition to the benefits analogous to co-counseling a jury trial, giving the parties the opportunity to watch two neutrals discussing legal theories and possible resolutions helped reduce the emotional decibels in the room and opened up the possibility for more focus on problem-solving. In one case, it also seemed to help a party who was wedded to a position that seemed totally unrealistic. Although initially it may appear that it will be more expensive to hire two mediators, this may not be true if it helps the case get resolved sooner, rather than after additional months of discovery following an unsuccessful mediation session. Also, having two neutrals get to the same place through different routes also may provide protection against buyer's remorse.

Style can matter

In selecting co-mediators, it is important to understand what you, your clients and the other participants will need in terms of substance and style. One of the cases I co-mediated was a case where both mediators had the same kind of strong substantive background, but in most of the others, only one of us did. In one unusual and very emotional case, neither of us had an extensive substantive background on all the issues.

Conclusion

When the right case presents itself, designing a co-mediation with mediators whose mediation styles are complementary may enhance your chances of getting a resolution for your clients on the day of the mediation session. ■

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