

## Deciding Whether Co-Mediation Is Right For Your Case

By **Gail Andler and Cassandra Franklin** (September 4, 2020, 3:15 PM EDT)

When it comes to settling cases, two heads are sometimes better than one. That is, engaging two mediators with different perspectives or areas of expertise can enhance the mediation process and can result in creative solutions that can help to avoid impasse. However, not all cases are suited for co-mediation, and the process requires division of labor and additional planning considerations.

### Appropriate Cases for Co-Mediation

It is important to carefully evaluate whether co-mediation may enhance your mediation. Certain cases will be a better fit for co-mediation.

Take, for example, the typical business dispute with mixed contract and tort claims. The defendants have tendered the lawsuit to their insurance carriers based on the tort claims, and the carriers have reserved their rights. In such a case, a dispute with the carrier about whether all or any of the claims are covered may arise. This inevitably leads to a mediation within the mediation.

Rather than putting the mediation on hold while the insurance issues are addressed, two mediators can work in tandem and keep the mediation process moving forward. While one mediator is addressing the underlying lawsuit, the other mediator can work with the insurance carrier(s) to resolve any insurance coverage issues. The guidance of a neutral experienced in the specific area of law (and possibly the business considerations) relevant to the dispute can help the parties work through their differences.

Co-mediation in these cases should also reduce the fatigue and, on occasion, frustration experienced during the downtime when a single mediator is working with another party or parties. In the context of an in-person mediation, a single mediator must move from room to room to work with each party. Some clients have experienced even greater fatigue in virtual mediations, which are currently the norm, where the camaraderie that may exist in an in-person setting does not fully translate to a virtual proceeding.

If co-mediators are working contemporaneously with their individual groups, in essence dual-tracking the mediation, each party — or group of parties — will get more face time to work through its particular



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issues with its designated mediator than it ordinarily would with a single neutral, who can deal with only one party or group at a time.

This results in far less downtime and allows the parties to move forward simultaneously with their respective negotiations. Once sufficient progress has been made in each component of the matter, the parties and mediators can regroup and collaborate on an overall resolution.

Involving at least one mediator with relevant experience in insurance coverage issues can save time as well as reduce the negative effects of downtime. In such circumstances, despite the additional upfront expense, handling the matter as a co-mediation may well save the parties time and money in the long run.

Co-mediation can similarly enhance efficiency and effectiveness in a pure insurance coverage mediation where multiple carriers are involved, either with several layers of coverage, e.g., primary, first excess and second excess or even third, fourth or more layers of excess coverage, or with different types of coverage, such as employment practices liability insurance, directors and officers insurance, and commercial general liability insurance. Subrogation and contribution or indemnity disputes between multiple carriers are also well-suited to a dual tracking team approach.

The benefits of working with multiple mediators are not limited to matters involving insurance coverage. Co-mediation can be useful in a variety of other settings as well. For example, there are many cases that warrant bringing in a mediator with specialized expertise, such as those involving tax, bankruptcy, entertainment or intellectual property issues.

Additionally, in racial or gender discrimination cases, the parties may have a greater likelihood of identifying with a mediator who is more similar to them in terms of gender or racial/cultural background, thus enhancing the likelihood of buy-in and adding to the legitimacy of the process.

Are there drawbacks to co-mediation or situations where co-mediation may not be ideal? The answer is yes.

As noted above, not all cases warrant the additional cost of two mediators. Where the matter involves a single area of law and neither the issues nor the factual circumstances present a high level of intellectual or emotional complexity, there may be little to be gained by incurring the extra expense of two heads. Hearing the feedback from two mediators on one discrete issue might be of interest to some litigants, but not to others.

Or, take the situation where all counsel are aware of the strengths and weakness of their cases and have decided to mediate in order to provide the client with a reality check from the mediator. Under these circumstances, a single evaluative mediator might be a better choice.

Also, in a high-profile or sensitive case where the parties are concerned about limiting the number of individuals privy to the dispute, or wish to enhance the intimacy of the discussion, the parties may prefer to use a single mediator.

Additionally, the selection of two prominent mediators with very busy calendars will almost certainly make scheduling even more challenging. To avoid this problem, scheduling could be easily explored in advance before the parties commit to using the chosen mediators.

Timing could be an issue in another sense. The time provided in a half-day mediation is likely to be so limited that the mediators may not have sufficient time to share with one another what they have learned in the separate caucuses.

In such circumstances, unless the parties foresee a reasonable likelihood of continuation of the mediation, the advantage of engaging two mediators may be undercut by the difficulty of coordinating with one another to create the synergies that make co-mediation so valuable in dual-track mediations.

In short, there is no one-size-fits-all for mediations. Consideration of all of these factors can help counsel to customize a process that best meets the needs of their clients.

### **The Co-Mediation Process**

So how does co-mediation work in practice? What is the division of labor? Will the mediators work together on all aspects of the mediation? There are several potential models.

One method is the dual-track approach noted above in connection with insurance coverage mediations and other matters likely to benefit from a mediator with special substantive expertise. In this scenario, the co-mediators work separately with the parties, come together to debrief one another and then collaborate based on the needs of the parties to listen to, and react to, information before getting down to numbers or any nonmonetary relief.

Alternatively, rather than working contemporaneously on different issues, co-mediators can work separately and serially on issues within the expertise of each co-mediator to assist the parties in resolving discrete issues in a premediation prior to the main event. In this way, they can lay a foundation for achieving a global settlement.

Another model involves the mediators working together in the same room throughout the mediation, augmenting the prospects for resolution with their individual approaches. For example, the parties might decide to pair an attorney who has a specialty in a particular area, such as insurance coverage, with a co-mediator who may be more of a generalist with a facilitative approach to the exchange of offers and demands.

The facilitative mediator can sit back and observe the reactions of the parties and counsel to the evaluative input delivered by his or her co-mediator, and then use those observations to read the room and help move the parties toward agreement.

As alluded to above, the parties may wish to involve mediators of different genders or cultural and racial backgrounds working together in the same room some of the time and meeting privately with their respective parties at other times, in order to create a comfortable setting for the diverse parties.

Parties and mediators should thus work together to design a co-mediation approach that is agreeable to everyone.

### **Co-Mediation Planning**

Thorough preparation and pre-session calls with counsel are always good practices, but they are even more important when co-mediating. Indeed, the importance of the mediators working together in advance of the mediation to ensure that they communicate well and collaborate effectively on the day

of the mediation can hardly be overstated — regardless of the co-mediation model ultimately selected.

An understanding of the co-mediators' respective roles, together with an understanding of the clients' expectations, is crucial to the success of a co-mediation. To ensure that the parties have input into the mediators' approach, it is also critical for the mediators to discuss and explore plans for the co-mediation with the parties through their counsel.

The mediators will need to reach an understanding with one another in advance of the session regarding the key purpose(s) of the co-mediation, as well as the mode(s) that seems most likely to lead to a successful outcome. The mediators must also discuss which roles they will play in the session and, if they are working separately, how they will relay key information to each other in a timely manner.

Before these plans are finalized, a conference call or videoconference should be scheduled with one or more of the mediators and counsel. During this call, the mediators should confirm with counsel the reasons why a co-mediation will be beneficial and explain how they plan to work together. Additionally, the mediators should solicit counsel's input and remain open to amending or refining the process so that it meets the parties' expectations as well as their own.

Moreover, as always, it is important to remain receptive and fluid throughout the mediation session. Thus, regardless of their game plan, mediators should be flexible and, if necessary, adapt as the co-mediation evolves. For example, if one of the mediators is to set to take the lead with a particular party, but it appears that the party has developed more rapport with the other mediator, he or she might want to allow the other mediator to take the lead with that party.

Throughout the co-mediation session, the mediators should regularly step away to confer and debrief regarding the matter's progress. Through these discussions, the mediators can decide whether their approach should be refined or even retooled in light of how things are progressing.

At the conclusion of the session, whether or not settlement has been reached, the mediators should, at a minimum, voice their appreciation for the parties' efforts and commend any forward momentum that has been created.

If the matter has settled, in most cases, there will be no need for significant follow-up on the part of the mediators. If it has not settled, the mediators should let the parties know how follow-up will be conducted, such as who will be contacting them, and whom to reach out to if there are any further developments.

Ideally, the mediators should also schedule time shortly after the mediation to discuss the process with each other. If the matter settled, they can review what worked best in the session and discuss how, with the benefit of hindsight, they might have improved the process. If the matter is not yet resolved, any follow-up efforts will likely benefit from the knowledge that flows from such discussion.

Not every case is suitable for co-mediation. But where there is a compelling reason for engaging an additional mediator, co-mediation can significantly enhance the process and make it both more efficient and more effective. In such circumstances, the added upfront expense of co-mediation may well be worth it.

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