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Co-Mediating—Giving It a Chance

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I have changed my mind about co-mediating. I used to think that, with some very limited exceptions, it was pointless. But I was wrong.

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When I began mediating, after taking a basic training course, I accepted the first volunteer work available. It was for a children's welfare organization which offered no-cost mediation to low-income parents who were separating (most were not married) and needed to resolve issues of custody, visitation and support. The model was co-mediation. The practice paired two totally inexperienced mediators who did not know each other, and the organization offered no supervision or oversight. It was a chaotic and distressing situation and I quickly bowed out—offering

to take cases if and only if I could handle them alone. The organization accepted my offer and I was able to conduct some solo and constructive mediations.

Several years and hundreds of mediations later I was invited to join a pilot project at a major law school to mediate medical malpractice cases for participating hospitals. The protocol called for co-mediation, but this time the other panelists, most of whom I knew, were very experienced and talented mediators. So it was easy to say yes to joining the panel. The cases themselves were pretty straightforward, even the wrongful death ones. This experience proved to be a much better one, and we resolved most of the cases in only one or sometimes two sessions. But, after doing a dozen or so mediations with people I respected and enjoyed working with, I still didn't think that the co-mediation added much to the end result for the parties.

After many more years of experience, talking with colleagues and reading, I now have a different perspective. I believe that there are a number of situations in which co-mediation is warranted and is likely to improve the chances of a global settlement. A key requirement is selecting an appropriate co-mediator and knowing how you will structure working together. Will one person be the lead, for example.

Situations in which co-mediation can be very productive include the following:

Large Cases

Cases that involve multiple parties/participants or those with multiple and complex issues may benefit greatly from having co-mediators for a number of reasons. Two heads are (if the proper heads) better than one in analyzing complicated facts and proposing possible solutions. The choice of a co-mediator is critically important here, as in the other situations described herein.

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When there are a large number of parties, the mediators can separate and hold two caucuses at once, saving time and participant frustration. This requires excellent coordination and information sharing and is best done by two mediators who know each other and have compatible (not necessarily identical) mediation styles and goals.

Observation/Training of New Mediators

Most court mediation panels, and many community panels do not pay or pay very minimal fees to their mediators. Consequently, a substantial number of these panel mediators are new to the practice. As they gain experience and success, mediators typically limit their availability or move out of the programs.

Administrators of large mediator panels therefore are faced with maintaining the quality of mediations done under their auspices while admitting newly-trained mediators. A major way of evaluating the aptitude of the new mediators is by having them co-mediate with an experienced and trusted mediator. The more seasoned mediator can both observe and often guide the novice.

More Chance of a Positive Connection With the Mediator(s)

A classic explanation for using two mediators is that it gives parties two people with different personalities, thus increasing the chance that they will be comfortable relating to one of them. This is a real benefit if one or more parties is skeptical of the process or the initial mediator to begin with.

A classic situation told to me by a colleague involved a community conflict which she (a white woman) believes she could not have resolved without her mediation partnership with a black man. In cases with aspects of ethnic, racial or other group identity conflict, this type of co-mediation could only

help the parties see the process as fair.

This thought has led many people involved in family-based matters (divorce or custody battles; estate disputes; dissolution of a family business or resolution of a family real estate dispute) to suggest co-mediation. One line of thinking is that every marital matter involving a heterosexual couple should be mediated by both a man and a woman. Another suggestion is that both an attorney and a therapist be involved in such mediations. My observation is that this principle is talked about more than actually put into practice, but there are cases in which it could be helpful.

Subject Matter Expertise

Many mediators, myself among them, believe that mediation skills are generally more critical than subject matter expertise. But sometimes having both is best. This is true for the obvious reason of knowledge but also because of the perception of the parties. In bio-ethics mediations, for example, a physician or nurse practitioner may be enlisted to work with a lawyer-mediator. In complex bankruptcy cases, a bankruptcy expert could be a very useful adjunct. In intellectual property or real estate cases, someone (not necessarily a lawyer or a trained mediator) could be of help.

The Energy Factor

There are cases that can be predicted to have a high emotional content and the likelihood of a lengthy session. One example cited to me was an estate conflict between adult children already in litigation for years. The mediator first retained suggested that a colleague join him and felt that the outcome was much better for that decision. He believed that enabled a focus and freshness that one mediator would have been challenged to maintain.

Why Pay for Two Mediators?

Parties are often reluctant to consent to or pay for more than one mediator. Where substantial amounts of money are at stake and the case is in litigation, the parties or their counsel may realize upon reflection that if co-mediation leads to an earlier resolution it can be a cost-saver. Curtailing discovery costs and attorneys fees can lead to substantial savings.

Furthermore, two mediators working in tandem will sometimes reduce their fees. The process can also shorten the mediation if the co-mediators hold simultaneous caucuses rather than requiring one party to wait for the mediator's attention while the clock runs.

Conclusion

My take-away after years past my initial experience is that co-mediation can be a useful process in numerous situations and should be a part of a mediator's tool kit.

This article is informed by conversations with several esteemed colleagues Chief among them: at JAMS Vivien Shelanski, a very talented and multi-issue mediator with whom I have worked and Peter Wooden, who handles many large, complex cases and began his mediation career with the 9/11 Victims Compensation Fund; also Carol Liebman, who founded and ran Columbia Law School's Mediation program and clinic for many years, has trained hundreds of mediators and is very in favor of co-mediation; and Chris Stern Hyman, a mediator, trainer and researcher who specializes in medical malpractice work.