

Weighing the Pros and Cons of Co-Mediation

A Team Effort

By Nancy Neal Yeend



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the co-mediation model; and a review by attorneys of the factors that influence preparation and representation.

I have predominately mediated civil, non-family cases for more than 35 years, and less than 3 percent of them involved co-mediation. However, every one of those cases — from pre-suit through the appellate stage — eventually settled.

Case Analysis

Co-mediation may be a viable option, especially when the participants take the time to analyze the case and determine if it has any unique characteristics that suggest benefits for using two mediators.

For example: Are there a large number of parties or participants? Are there gender, cultural or religious issues or beliefs that may compound the disagreement? Are there unique or specialized aspects related to a specific industry or profession, or other factors that indicate that the co-mediation model is appropriate? (See “*Co-Mediation Options*,” Page 32.)

In several of the cases I’ve handled, the answer to at least one of those questions was, “Yes.”

One case involved more than 20 parties, so the co-mediation model was ideal for managing all of the caucuses and keeping everyone engaged. In addition, the case involved a massive construction project with zoning issues and diverse groups whose interests ranged from environmental issues to housing, so having a co-mediator with subject-matter experience, as well as understanding how to manage confidentiality for a case that also involved the public’s right to know, was critical.

When there are a significant number of parties, co-mediators need to have a strategy for making sure each mediator is aware of what is happening during each caucus. Typically, one mediator will keep track of

the perspective or suggestions provided by each side, while the other circulates between the caucus rooms to be sure that everyone is working on the assignments provided by the mediators. (In two-party cases, of course, it’s important not to have each mediator only meet with one side. When possible, have both mediators participate in all caucuses, so that the parties do not get the impression that one mediator will be their advocate.)

In an employment case, I was brought in as a co-mediator to provide gender balance. The case involved a woman who was fired by a male manager. Having both a male and a female mediator jointly managing the process created balance, which in turn made the parties feel that the process was fair. Each of the parties had someone that they could relate to, and because both mediators had been both employers and employees, they were able to acknowledge the different perspectives of the participants. The parties come up with a very innovative settlement that avoided bad publicity for the company without damaging the future career of the employee.

In a divorce case, I was brought in to assist a less-experienced family mediator, and because a family business was involved, my subject-matter background was useful. In this particular case, the family mediator was the lead mediator on all issues related to custody, while I took the lead when business issues were discussed and negotiated — and that’s an important point. Before the mediation starts, the mediators need to clarify with one another as to who will do what or who will be in charge of a particular topic.

For an appellate case, I was appointed by the court to mediate because most of the issues involved significant real estate holdings, and real estate was an area in which I initially focused my practice. One of the five

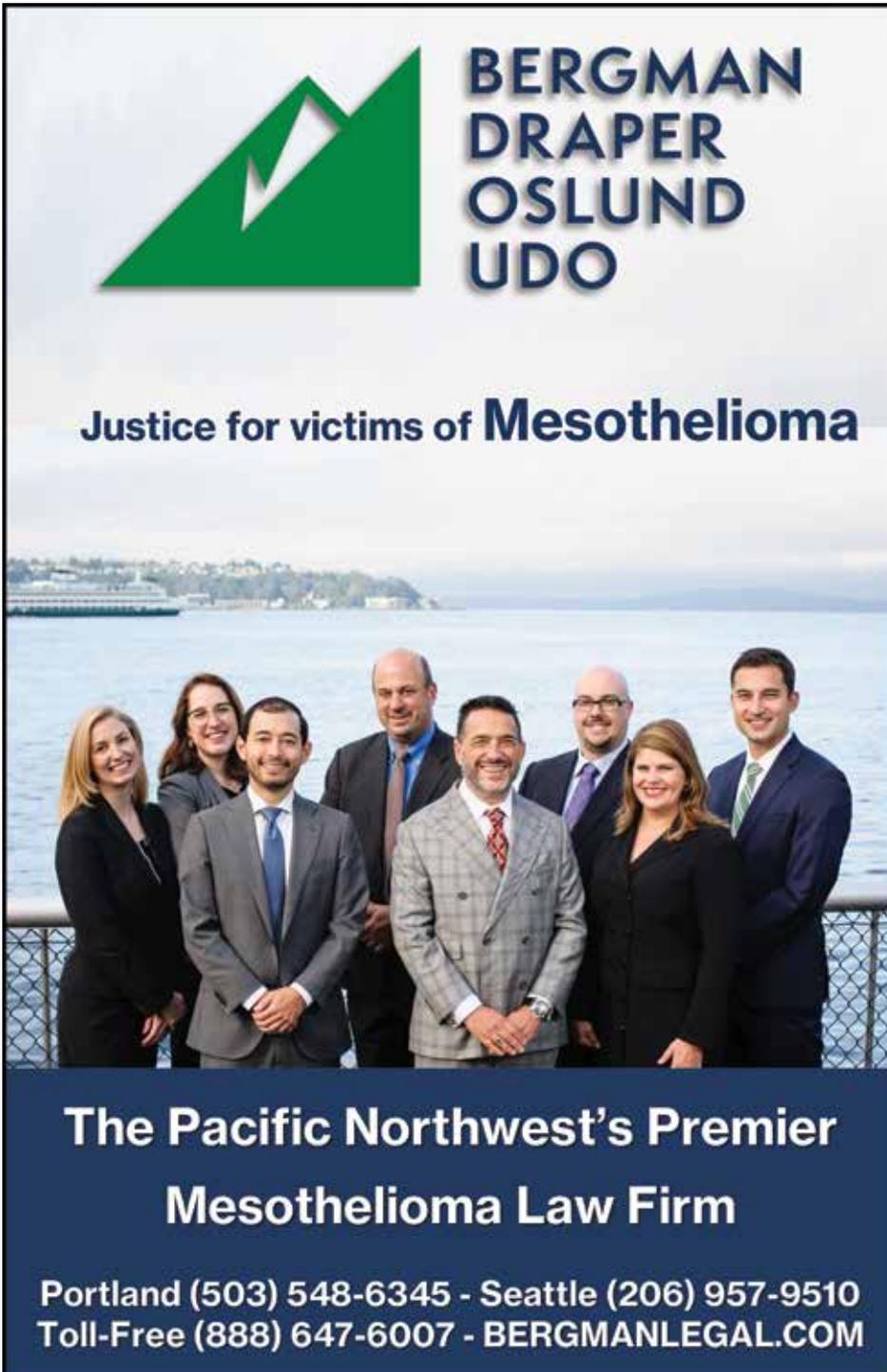
With court backlogs increasing due to the pandemic, mediation has continued to expand as a process that enables disputants to craft their own solutions. Co-mediation has also increased as attorneys and litigants begin to recognize its benefits.

Typically, cases involve a single mediator who needs to have both mediation experience and subject matter understanding or expertise. Co-mediation, on the other hand, allows the parties to select mediators who are more proficient in only one area: one mediator with 20 years of mediation experience, for example, and the other very qualified in the technical details of the subject matter.

Before deciding to have more than one person serve as mediator, though, there are several critical factors that must be taken into consideration: a case analysis to determine if co-mediation is appropriate; a study of the potential risks and rewards of using

attorneys objected, though, because it was a probate case and, at that time, probate was not in my mediation sphere. The parties then agreed to co-mediation, and the court appointed a co-mediator who was a respected probate attorney.

What was most interesting about the appellate case is that it did not settle based on probate law — it settled because the co-mediators enabled the parties to “expand the pie” and come up with a solution that no court could impose. Not only did the case settle, but the relatives also remained on good terms following the settlement.



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Co-Mediation Options

When using this checklist, consider the categories under each heading. Fully discuss them with the client to determine if a co-mediator is needed and what qualifications would most benefit the client. Depending on the issues and flexibility of the parties, additional items may need to be added.

Case analysis: What makes the case unique? (*Elaborate on those items checked.*)

- Culture/Ethnic
- Religion
- Customs/Traditions
- Gender
- Number of Parties
- Other

Risk / Rewards Assessment: What are the cost and time considerations?

- Cost: mediators, site, other
- Time: estimated hours
- Participants' Unique Needs
- Other

Mediator Qualifications: What are the necessary subject matter and experience requirements?

- Mediation training
- Case specific experience
- Co-mediation experience
- Subject matter understanding:
(*Specific examples.*)
- Other

House

Risks and Rewards

When considering co-mediation, some individuals are concerned that the process will take longer and cost more. Because some attorneys believe co-mediation can be extremely expensive, they advise their clients to use the process only for cases valued at a half-million dollars or more, such as personal injury cases. Others suggest that co-mediation will take more time, which again would increase the cost.

When reflecting on my co-mediation experiences, however, I've found that neither of these problems has occurred. In fact, it appears that some cases have actually taken less time than similar cases mediated by one person.

On average, the two-party cases I've handled have been resolved in between four and 10 hours. This factor is most likely influenced by not only the techniques used by the mediators, but also by what the mediators have done to prepare themselves and the parties in advance of the mediation.

When considering co-mediation, attorneys need to balance the risks of possible increased cost and time against the benefits of achieving a settlement that might avoid having to go to trial while resolving the case with a settlement that meets the unique and special needs of the participants. As the old adage goes, "Two heads are better than one."

Co-Mediators Working Effectively

In some situations, attorneys have recommended co-mediation because they do not like the proposed mediator or they believe that the mediator will only function as an advocate for the other side. Not wanting to appear disagreeable, they suggest co-mediation in the hopes that the second mediator will be their advocate. But mediators by definition are not advocates. They are process managers who assist the parties to negotiate better solutions. (See "Questions to Determine Case-Appropriate Mediators," Page 34.)

In order for co-mediation to work effectively, both mediators must be trained and experienced in the mediation process and have some related subject-matter understanding. Skilled mediators have techniques to reality-test the participants, so that they come to conclusions on their own without being told what to do.

In addition to training and experience, co-mediators must confer with one another

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Questions To Determine Case-Appropriate Mediators

These are suggested interview questions. Training in the mediation process and subject-matter understanding are prerequisites. In addition, there are a number of different mediation models and styles, so it is important to know how the mediator envisions managing the process.

Reviewing the mediator's contracts, including confidentiality agreements, determining how available they are to mediate and listing their fees and charges will help determine if a mediator is appropriate for any given case. Unique aspects of a case may indicate that additional items need to be considered.

Experience

- Were you professionally trained? When? By Whom? How many hours of training? In person? Online?
- How long have you been mediating, and how many cases have you mediated?
- How many times have you mediated cases involving issues similar to those in this case?
- What areas of subject matter understanding or expertise do you have that specifically relate to the issues in this case?
- What other types of issues have you mediated?
- Have you mediated cases where the number of parties, complexity, and amounts in dispute are similar to this case?
- Have you ever co-mediated a case?
- Are there co-mediators you can recommend?
- Other

Role And Standards

- How do you view your role as mediator? Describe.
- Have you previously co-mediated a similar case?
- Do you know any of the parties or attorneys involved in this case?
- How many times have you previously mediated for any of these attorneys or parties?
- Do you have any predisposition regarding the issues or any of the participants in this case?
- Do you subscribe to a code of ethics? Which one?
- Are you a member of a professional association? Which one(s)?
- Other

Logistics And Cost

- What potential dates do you have available to mediate this case?
- How much mediation time have similar types of cases taken to find a settlement?
- What are your fees?
- Are there any additional fees/changes that will be associated with this case?
- What other resources, such as a mediation facility, do you provide that may enhance the probability of a successful mediation?

in advance of the first mediation session and have identical information regarding the case and the parties. One of my first experiences with co-mediation occurred when I was an observer for a mediation program; the mediators did not agree on something, and finally their different perspectives boiled over into an argument.

These mediators finally had to step out of the room to resolve their differences. They left all the parties together in the mediation room, which could have been a disaster. Instead, the parties decided they could do better and behave more civilly than the mediators, and they actually worked out a settlement while the mediators were out of the room.

That kind of outcome doesn't always happen, though. So before I co-mediate, I always meet with the other mediator to decide who will do what. We also create a plan in case we disagree on a tactic or caucus assignment.

I have developed a system so that my co-mediator, seated at the opposite end of the table, can "read" what I would like to do next without interfering with the ongoing dialogue between the parties. Determining in advance who will take the lead and whether it will be for the entire mediation or just for certain topics is critical. This is much like people co-hosting an event, where someone is in charge of the appetizers and someone else is in charge of the deserts.

Once the mediators have received information regarding the case, they need to develop pre-mediation assignments for the attorneys and their clients. Getting the participants focused on settlement in advance of the first mediation session enhances the probability of not only finding a solution, but doing it in less time. Attorneys need to be wary of mediators who fail to engage before the first mediation session.

One critical assignment for co-mediation to succeed is to have each side provide a list of all the topics or issues that they want resolved in order to have a comprehensive settlement. This prevents the sure-to-sabotage settlement tactic of waiting to the last minute before saying, "By the way, there is one more thing." In addition, for every issue listed, ask the participants to provide three potential options for resolving that specific issue. This begins to focus counsel and client on settlement, and helps prevent people from coming to the mediation with only

one option — the “my way or the highway” approach — that they’re willing to accept.

Following these guidelines will enable counsel to better prepare and to develop a more productive negotiation strategy.

Of course, it goes without saying that it is important to confirm in advance who will attend the mediation and who will have settlement authority. Indeed, it is prudent to ask the participants and counsel to define “full settlement authority” prior to the first mediation session. For example, if those attending are only able to make a recommendation to a board of directors, then the test of “full settlement authority” has not been met, and that must be disclosed prior to the first mediation session.

Other assignments are appropriate and must be designed, based on the specific issues involved, number of participants and confidentiality, just to name a few.

Conclusion

It is important to remember to analyze each case to determine if co-mediation is appropriate, to find co-mediators who will enhance the process and to develop assignments so that the attorneys, parties and mediators are all fully prepared to actively participate.

Incorporating these fundamental elements will help the participants find solutions that meet their unique needs and enhance satisfaction ratings for the process. ■

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