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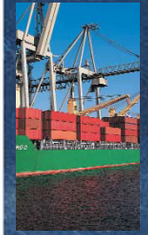

Inside This Issue

PHIL BERNS – A RECOLLECTION

I first encountered Phil almost 50 years ago, as a novice in the collision department at Burlingham's. He was then at the Justice Department's New York Office, and already a noticeable figure at the old MLAUS dinners at the Commodore; if one heard laughter, Phil was likely to be at the center. There were a lot of wonderful 'characters' in the profession in the later 1960s, but to be honest I didn't know what to make of Phil at first instance; it seemed to me as though he could step up to the stage at Grossinger's at any time and drive the crowd to a near-flatulential paroxysm of humor.

My exposure to Proctor Berns in the courtroom was in *The Northern Gulf* [Afran Transport v. United States], 1969 AMC 1897 (SDNY, 1969). Our client's loaded tanker was making a turn around West Cod Ledge Rock for entrance into Portland. Maine and the Pilot had been sighting on the marking nun buoy; the tanker grounded and fortunately there was no pollution, but the hull was damaged. In talking with local lobstermen, they reported the buoy had been off position since a severe storm some nine months previously; the buoy was visible to two Coast Guard stations ashore plus the (then) Portland Lightship, who were supposed to check the position of visible aids. The shipowner sued the United States for negligence in maintaining the buoy, and the Government's major defense was that buoys should be viewed as general indicators and not used for navigation. Since this case happened in my own 'back yard' and we needed an expert witness to bolster the testimony of the pilots, I was able to get a

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Co-Mediation of Multi-Party Maritime Cases

By Robert S. Glenn, Jr.

A colleague called me a few years ago seeking a referral. He was looking for a mediator with a rather unique set of characteristics. The mediator should be able to speak Portuguese, be familiar with contracts of affreightment (have drafted them, if possible), be familiar with English arbitration and English law, but not be a London solicitor. Try as we might, we could not find a mediator who met all of those requirements. This request is illustrative of the maturation of mediation as a technique for resolving maritime disputes.[1] Where once a party seeking a mediator in a maritime case might have been satisfied with someone who knew that ships could be arrested, now counsel are adding layers of expertise and experience as prerequisites to agreeing to a mediator. This tendency can create an impediment to the parties' willingness to mediate.

Another difficulty that arises in maritime cases is that often the most substantial cases involve multiple parties. Multiple parties (and counsel) can create additional hurdles on the track to mediation. Will all the parties and their underwriters agree to mediate?[2] Will all the parties and their underwriters agree on a mediator? Will all the parties and their underwriters support to the same extent the principle that someone with authority, the true decision-maker, should be present at the mediation? Will the parties be able to schedule a day or two when all counsel and party representatives can be in the same location to mediate? Can a mediator effectively work with seven different parties to resolve their claims?

The purpose of this paper is to suggest that co-mediation is a technique that can resolve both dilemmas: the search for the suitably qualified mediator and the challenge of multiple-party mediations. I will define co-mediation, both as it is traditionally understood and with a twist which I have advocated on previous occasions.[3] We will then consider some of the challenges of multi-party maritime cases and how co-mediation serves as a method for addressing those challenges.

Simply speaking, co-mediation involves the use of two (or more) mediators to conduct mediation. Co-mediators could be useful where a broad range of knowledge and skill is required for resolution of the dispute. It could also be helpful in cases involving numerous parties, as we shall see. There are no rules or guidelines that I know of governing co-mediation. The requirements of confidentiality, privacy, good faith and representatives with authority would be the same with any number of mediators.

Depending on the issues and the number of parties, the co-mediators might attend caucuses together or they might work independently. For example, if there were three or four parties, it might be efficient for both mediators to attend caucuses together to hear everything the parties have to say and to put their complementary skills to work simultaneously. A number of years ago, I was asked to co-mediate a case between the Internal Revenue Service ("IRS") and a corporate tax-payer. The dispute involved whether certain expenditures should be expensed over time or not. The mediation was the third one in the nation for the IRS under a program it had implemented to resolve tax-payer disputes through mediation. The IRS program required that an IRS mediator be involved.[4] We had a third co-mediator, a law professor who specialized in tax law. The three of us attended every caucus and often conferred in between caucuses to share our impressions of what we heard and to discuss options for enhancing the parties' negotiations in order to meet their interests. The law professor provided a substantive understanding of tax law that I, as a maritime lawyer, clearly did not possess. The case was settled based in part on some very helpful suggestions and observations of my fellow mediators.

When there are a large number of parties, two mediators would divide up the parties and attend different caucuses. They might meet after each round of caucuses, compare notes, and formulate an approach for the next round. The

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[1] I should qualify this statement. Mediation has matured at different rates in different cities and states. The forerunners in the use of mediation, California, Texas and Florida, have employed the technique in their judicial systems for more than 25 years.

[2] This question would not be relevant in jurisdictions where mediation is mandatory.

[3] *See* Glenn, R. and Gibson, C.A., *Neutral Experts, Standing Neutrals: Facilitating Resolutions When Parties Rely On Conflicting Experts*, Dispute Resolution Magazine (Fall 2006).

[4] Normally, a party to mediation would not be able to require that one of its own employees serve as a mediator. In this case, however, the mediator was participating in his first mediation. I was designated as the lead mediator, and the tax-payer who was adverse to the IRS, apparently, did not object.

co-mediators would share their thoughts and provide momentum to the negotiations in ways not available to the sole mediator. They might also work independently, as discussed below.

Another form of co-mediation is the use of neutral experts to assist the mediator. I have been told that I was once being vetted as a mediator for a case which involved a three-vessel collision that lead to an oil spill. One or more of the parties expressed concern that I had never been to sea and stood watch on the bridge of a ship. I lacked the depth of understanding of navigation and the rules of the road that someone felt was requisite for the mediator.[5] This problem could easily have been solved by using a neutral expert, someone skilled in navigation who, with the guidance of the mediator, would carefully avoid taking a side in the navigational issues of the dispute. This appendage to the mediator could have helped the parties to form a more balanced evaluation of the weaknesses in their case, as well as their advocated strengths. The neutral expert could have kept the parties' navigation experts "honest," by pointing out any ambiguities or errors in their expert opinions. Other examples of the use of neutral experts as co-mediators are: accountants and business evaluation experts where consequential damages are an issue; engineers or marine contractors where the cost of repair of physical damages and depreciation are an issue; and marine insurance brokers in coverage cases where standard wordings of a marine insurance policy are in dispute. The addition of a second mediator or a neutral expert would increase the cost of the mediation, of course, but if the case is large enough and especially where there are multiple parties, the benefits far outweigh the increase in costs.

Co-mediation would work very well where the parties to a maritime case are insisting upon unique skills and/or knowledge sets of the mediator. In the first example above, the elusive Portuguese speaking mediator, the chances of finding two mediators who met these criteria are much greater than the chance of finding one mediator who possessed them all. A Portuguese speaking mediator could help create a safe environment for the native Portuguese-speaking party. Two mediators might together claim experience and a broad base of knowledge in both U.S. and English law. If there were two mediators, perhaps there would be no objection that one was an English Solicitor. As a matter of fact, where two (or more) bodies of law apply to a dispute, co-mediators from different legal systems can provide the parties with neutrals who have a deeper understanding of the underlying substantive and procedural legal issues. One caution in this suggested scenario: co-mediators are not the same as party-appointed arbitrators. All parties would have to agree to both mediators and the mediators would have to commit to conducting the mediation as neutrals. This would avoid the obvious danger of a mediator who seems to "favor" one party over others. Unlike arbitration, if a party to mediation is offended by a mediator's seeming lack of impartiality, it could just walk out of the mediation, rendering the whole effort a waste of time and money.

Let us consider how co-mediation might be useful in addressing some of the challenges of a multi-party maritime case. For purposes of discussion, we will consider three types of cases: (1) disputes where there are multiple claimants and one defendant; (2) cases where there are multiple defendants and one claimant; and (3) cases where there is a casualty and a web of legal and contractual claims and cross-claims involving parties of different nationalities and inconsistent choice of law issues.

The first example above is relatively simple. If there are 10 claimants making claims against a shipowner for damages arising out of an oil spill, two or more mediators could divide up the claimants and mediate their claims separately. Obviously, one mediator would take much longer to resolve 10 claims than two would. The mediators would keep the negotiations of each claim confidential, but try to create an atmosphere of fairness and consistency on the part of the defendant and its underwriters. When negotiations gather momentum, the participating parties are more patient and less frustrated with the time spent alone in a caucus room. Many a time I have walked into a room and been greeted by the words: "Where have you been. We thought you had forgotten us." I once even had counsel for a party object to my fee statement that had been equally divided among the parties on the grounds I did not spend much time with him. More than one mediator can move a multiple claim case forward more quickly and efficiently.

In addition, with more than one mediator, the process could be devised to be mindful of cultural or gender factors. In a case involving multiple claims against a cruise ship operator, for example, a female mediator could be assigned to the personal injury claims of female passengers. A Spanish-speaking mediator could

[5] There may, of course, have been numerous other reasons I was not selected to mediate that case.

be assigned to mediate the claims of the Hispanic claimants. There are numerous ways in which the mediator could be matched with the claimant to ensure the highest level of comfort in the process and the highest potential for resolution of the claims.

Co-mediators are also useful where there are multiple defendants and only one claimant. This type of case is more challenging, however, because defendants normally want to know what the other defendants are doing in the way of settlement contributions. And if the mediator is really unlucky, he may be faced with what I call the Rubik's Cube of settlement negotiations: the situation where every defendant has pegged its settlement contribution to what another defendant does. For example: suppose Defendant "A" has $1,000,000 in authority, but has strict instructions that he can only pay one-half of the amount Defendant "B" pays. Defendant "B" has $1,200,000 in authority with strict instructions that he can only pay an amount equal to the contribution of Defendant "A" and Defendant "C". Defendant "C" has $750,000 in authority, with instructions that it can pay no more than two times the amount of Defendant "D". Defendant "D" has policy limits of $250,000. It is trying to save something out of its limits.

The math would go something like this. Defendant "D" is willing to contribute $200,000; that means Defendant "C" maxes out at $400,000; Defendant "B" maxes out at $400,000; and Defendant "A" maxes out at $200,000. The defendants stop negotiating in this example at $1,200,000. The frustrating thing is that they collectively have $3,200,000 in authority, an amount that would be sufficient to settle the case.

Solving the Rubik's Cube situation is challenging for the mediator working with or without help, but a second mediator who is also skilled at multi-party mediation can bring fresh insights and techniques into this difficult situation. In theory, two good mediators could tackle this kind of case more easily than one, keeping up the momentum of the parties as they try to achieve a settlement.

The third example set forth above, the complex maritime casualty case, is one where co-mediation could be useful for the reasons we have already discussed. In a case with numerous parties, two mediators can collect and disseminate information more quickly than one. Where there are multiple nationalities, two mediators could assign themselves to work with the parties whose cultural biases they are most aware of. A mediator's language skills or his educational background or just his familiarity with clients of different nationalities, by virtue of his past representation as an attorney, might be factors in determining with which parties he would work. And if there are different laws governing different aspects of the dispute, two mediators from two different legal systems could serve the parties well and educate each other about the legal issues without the overlay of advocacy that comes from counsel for the parties.

Even something as vague as personality conflicts can be avoided if there are two mediators. I once had a mediation where after no more than 10 minutes in the first caucus I got the distinct feeling that one of the parties did not like me at all and that he resented the fact that I was trying to help him settle his case. Unfortunately, I felt the same way about him. As you might have guessed, the mediation did not result in a settlement.

In this third scenario, there might also be opportunities to use neutral experts as mediators. Perhaps a neutral lawyer could be employed to discuss the laws of another jurisdiction. Perhaps an arbitrator who had done New York or London arbitration might be useful as a neutral to help the parties understand what they might be facing if they were unwilling to settle. Any number of substantive experts such a marine surveyors, class surveyors, average adjusters, chemists, metallurgists, former Coast Guard officers, engineers, and naval architects, could enhance the chances of settlement by assisting the mediator with technical matters and providing neutral expertise to the process.

I have no statistics that would inform us how often co-mediation is used in maritime disputes. Based upon my own experience and anecdotal information from colleagues, I do not believe it has been used very often. I suggest, however, that you consider it the next time you have a case where you are looking for a mediator with unique skills or where a neutral expert could be helpful or where a multi-party case would be mediated more efficiently with co-mediators. The small added expense of a second mediator could be more than justified by the benefits of having that second skill set hard at work to help you settle your case.

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