The Challenges of Multi-Party Mediation

By: Robert S. Glenn, Jr.

Ellis, Painter, Ratterree & Adams, LLP

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Mediation has matured as a dispute resolution technique, and in doing so, it has been proved effective in a whole range of civil cases, from two-party suits to class actions. While all mediations share certain common challenges, such as heaving the proper decision makers at the table, multi-party mediations create unique issues for the mediator and participating counsel. The purpose of this paper is to identify some of these challenges and suggest methods for dealing with them.

One of the beauties of two-party mediation is that only two parties have to agree to mediate and only two parties have to agree on a mediator. In jurisdictions where mediation is mandatory, the parties need only schedule a date and agree on a mediator. And choosing a mediator is not a big problem when court rules give judges the authority to appoint mediators in the event the parties cannot agree.

In venues where neither a statute nor a local rule requires mediation of all disputes, parties can move the court to require mediation. But courts cannot require the parties to make adequate settle offers or to make reasonable demands. Having someone attend the

mediation with "policy limits" authority and requiring that a certain level of offers be made are two entirely different matters. Generally speaking, for mediation to have the best chance for success, everyone should agree to mediate. Increasing the number of parties to seven multiplies the difficulties of getting an initial agreement to mediate. The first challenge of a multi-party mediation is convincing everyone that mediation of the dispute would be beneficial.

In order to overcome this challenge, you must recognize that you are involved in a negotiation. If you are familiar with the concept of principled negotiation, as explained in Getting to Yes, by Fisher and Ury,[1] you would start by identifying your interests and proceed to evaluate options for meeting those interests. With respect to the reluctant party (or parties), you should try to determine not only why he says he is refusing to mediate, his "position," but more importantly, what his underlying interests are. Is he concerned about costs? Is the timing not advantageous or convenient to him? Is his client resistant to

[1] Fisher, R. and Ury, W., Getting to Yes; Negotiating Agreement Without Giving In (Second Ed., 1991)

the idea of mediation? Does he lack experience with or understanding of the process? Does he have any cultural or ethnically-based bias against compromise? Is there an issue of "face" that needs to be dealt with?

What if it is the attorney who is the hold-out? This can be a significant road block. If an attorney is insistent that his client should not be in the suit, he may resist efforts to achieve a multi-lateral settlement through mediation. On more than one occasion, I have been told by attorneys in a multi-party suit that they will not participate because their client has no liability. They will say, "Don't ask me for money and don't bill me for any of the mediation fees."

Again, the parties should identify interests and search for options to achieve them. These options might involve: the manner in which the mediator is chosen; the way in which his fees are split; the location of the mediation; the prioritizing of certain issues in preliminary discussions; the content of the opening session; even the order in which certain claims are addressed. The point is to try to ascertain what will work, what will bring a reluctant party to the table.

In some cases, having adjustors or the party representatives discuss these issues among themselves may be helpful. I once had an adjustor call me to ask for advice on how to get parties to agree to mediate rather than spending huge sums litigating. He was convinced that mediation could resolve the numerous disputes that had enveloped his insured. I suggested that he contract his colleagues, the other adjustors for the parties, and see if he could persuade them to try mediation sooner rather than later. He did make contact and it worked.

Assuming that the first hurdle can be leapt and everyone has agreed to mediate, the next issue is the choice of the mediator. With seven parties, particularly if the parties are from different cultural backgrounds,[2] there could be seven different ideas of what type of mediator would be most appropriate. Some parties might insist on an experienced, interest-based mediator. Others may want an evaluative mediator. Some parties prefer former judges. Some do not. This is another negotiation and everyone must again focus on interests to try to

[2] Different cultural backgrounds could include different racial and ethnic backgrounds, different religious affiliations in certain instances, even different genders, all of which might create different approaches to negotiation.

reach an agreement. Sometimes the choice of a mediator might represent the first significant compromise among the parties. Two suggestions for overcoming difficulties with the choice of mediator are using co-mediators and employing neutral experts.

If seven parties are divided into two camps over the choice of a mediator from two finalists, consider using both of them. Two mediators who can work well together might provide a broader base of substantive expertise and double the insight into the settlement process.[3] Two mediators could divide the caucuses they attend into groups which provide a cultural match between the parties and the mediators, thereby addressing cultural, racial or gender differences among the parties and the way they negotiate or communicate. And two mediators with two different styles might provide both interest-based focus and evaluative skills to the process. If the parties cannot agree on one, two mediators might just be the ticket.

[3] There are procedural advantages to two mediators as well, which are discussed infra.

Another approach is the use of a neutral expert to assist the mediator. [4] A neutral expert can complement the mediator's process skills with a deeper understanding of technical, substantive issues. A neutral expert can help the parties evaluate the opinions of the parties' experts, without necessarily taking a concrete position of his own. And a neutral expert can in some cases suggest outcomes that facilitate settlement, especially in business disputes. Examples of neutral experts would be: a CPA in a complex business dispute; a repair contractor or engineer in a construction dispute; a physician in a medical malpractice case; and an accident reconstruction expert in a multiple-vehicle collision case.

Once the mediator (or mediators) has been chosen, it is a good idea in a multi-party case to have a preliminary conference call to discuss logistics. In addition to resolving routine questions such as the starting time and location of the mediation, the preliminary call serves to introduce the mediator to counsel for the parties and open up the

[4] See Glenn, R. and Gibson, C. A., Neutral Experts, Standing Neutrals; Facilitating Resolution When Parties Rely on Conflicting Experts, Dispute Resolution Magazine, Feb. 2006.

floor for further discussions before the time of the mediation itself. These preliminary discussions and the submittals of the parties are important and helpful in multi-party cases. One of the reasons for this is that counsel can say things to the mediator without his client being present in a way he might not otherwise be free to say them. The mediator and each counsel can begin to establish a rapport and counsel will have the opportunity to explain some of the basic facts and legal issues as background for the mediator. Sometimes these preliminary conversations can even result in a settlement of one or more of the pending claims in a multi-claim case, thereby simplifying the mediation itself. It would be a mistake in a multi-party case not to have such a conference call, since it would increase the mediator's already heavy burden of dealing with multiple parties were he to go into the mediation "cold."

One of the obvious logistical issues for a multi-party mediation is finding a facility that has sufficient rooms and amenities to accommodate the parties. Comfort, coffee and chocolate chip cookies are not the only important considerations in finding a suitable mediation location. At

least two other issues should be addressed: confidentiality and the phenomenon of the hard-nosed adjuster or his counterpart, the hard-nosed lawyer.

In some cases involving multiple personal injury claims, the claimants may prefer to discuss their injuries in private, even skipping the opening session. From a negotiating standpoint, the defendants would typically treat multiple injury claims as separate negotiations, unless of course they involve the same family. This means that there should be separate caucus rooms for each of the injured claimants and their counsel. The privacy and confidentiality of these caucuses are critical to the success of the medication.

The phenomenon of the hard-nosed adjustor is nothing unusual, except that in multi-party cases it can be particularly problematical. I once did a mediation where I suggested that the defendants meet with me in the same room to discuss what I had gone over during the caucus with the plaintiff. After this meeting, the defendants suggested that they just remain in the room for a while to talk. When I returned to the caucus room later, the defendants had worked themselves into a defense frenzy,

deciding that there were virtually no damages in the case and that the plaintiff was a malingerer. I learned that a particularly hard-nosed adjustor had essentially shamed everyone else in the room into joining his very low evaluation of the claim. The same thing can happen with the persuasive talents of a good defense lawyer or a strong and influential plaintiff's lawyer. If you allow parties to occupy the same room, you might find that they share their information, their points of view, even their evaluations, and in doing so, they adopt the toughest, least conciliatory posture. For that reason, if at all physically possible, I prefer to have enough rooms in a multi-party case for each party to have its own home base.

If there are ways in which a claims-handling approach can be agreed upon prior to the multi-party mediation, it would be helpful to explore them. For example, if there are four injured parties and three defendants, it would save significant time if the three defendants could agree to a proportionate share of liability. Perhaps for mediation the defendants might take an equal share approach with the agreement that some later process of dispute resolution would be used for a final

adjustment of their proportionate shares. Perhaps the plaintiffs might discuss some methods of standardizing their approach to damages that would save time during the mediation. When none of this occurs beforehand, the mediator would find himself mediating multiple claims with multiple defendants in the same session, a daunting task indeed.

Counsel for the parties should discuss prior to mediation the ways in which they might reduce the number of caucuses the mediator needs to hold. In the seven-party example mentioned above, perhaps the four injured parties could all be in the same room just while the mediator discusses the defendants' interests and the defendants could all be in the same room when the mediator recounts his conversations with each of the four injured parties. As a practical matter, having to resolve multiple claims in a multi-party case requires a lot of time. There is no avoiding it. Short cuts are mandatory. Hopefully, this is something the mediator will discuss with you during his pre-mediation conversations.

I mentioned co-mediation above. It can be a useful solution to the practical logistical problems raised by multi-party cases. I once

mediated a construction defect case in which the plaintiffs were seeking to certify a class of condominium owners and the defendants consisted of 10 parties, including owners, developers, the general contractor, various subs and suppliers, architects and engineers. With one mediator, it was very difficult, after a lengthy opening session, to hold more than one meaningful caucus with all the parties the first day. (We had allocated two days for the mediation.) Two mediators would obviously change the equation. Most mediators are mindful of the frustration parties feel when they sit in a room for long periods of time without having a chance to speak to the mediator. The second mediator would, in theory, cut that waiting time in half. It is true that two mediators would double the cost of the process, but in a multi-party case, the extra cost per party would normally not be substantial.

Most of the challenges discussed above would be anticipated by anyone who has participated in more than a few multi-party mediations. There is another challenge that is more subtle and definitely more problematical. It's the Rubric's Cube of defense negotiating and the bane of every mediator's existence: the evaluation that is pegged to the

proportionate contribution of another defendant . . . or all of the other defendants. For example, suppose Defendant "A" has $100,000 in authority,[5] but has strict instructions that he can only pay one-half of the amount Defendant "B" pays. Defendant "B" has, $120,000 in authority with strict instructions that he can only pay an amount equal to the contributions of Defendant "A" and Defendant "C". Defendant "C" has $75,000 in authority, with instructions that it can pay no more than two times the amount of Defendant "D". Defendant "D" has policy limits of $25,000. He is trying to save something out of his limits.

The math would go something like this. Defendant "D" is willing to contribute $20,000; that means Defendant "C" maxes out at $40,000; Defendant "B" maxes out at $40,000; and Defendant "A" maxes out at $20,000. The defendants stop negotiating in this example at $120,000. The frustrating thing is that they collectively have $320,000 in authority, an amount that would be sufficient to settle the case. Persuading the defendants to approach the negotiations from a different

[5] I realize that many readers of this paper will exclaim that a defendant is supposed to show up at a mediation with a representative who has authority to settle the case. Of course, you are correct. This issue, however, is a different discussion for a different paper.

angle is as tough as separating blue crabs from one another in a crab basket. No one wants to let go.

There are a couple of ways to deal with this issue. One is blind negotiations, a technique that is not used very often. Since it is so seldom used, people feel uncomfortable with it. In this process, the mediator would not let the various defendants know what each one is contributing toward settlement.[6] In this way, Defendant "A" would not know what offers are made by Defendant "B" and would not, therefore, be able to peg his offers to that of another Defendant. Unfortunately, people begin squirming at the very thought of blind negotiation. They are afraid that they are going to overpay in relation to the other culpable parties, based on their assessment of relative fault.

Another approach to this problem is to try to nip it in the bud. If the parties will confide in the mediator during the pre-mediation conference, he should discover that this problem is looming. He should try to persuade each defendant to get back to the basics: focus on

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[6] See Taylor, B.A. and Eshman, M., Use Of Blind Negotiations At Mediation, Drew Eckl & Farnham "Journals"; www.deflaw.com/articles/use-of-blind-negotiations-at-mediation.

interests not positions.[7] He should urge each defendant to evaluate its own interests such as its exposure, its defenses, and its risk tolerance and to negotiate to try to meet these interests. He may or may not pay a disproportionate amount of the settlement compared to another defendant. The question he should ask is whether an overall settlement with a contribution that meets his interests is preferable to no settlement at all because of his linkage to the offers of the other parties. Linked offers and evaluations should be avoided if at all possible.

A dilemma frequently confronting parties in multi-party mediations is partial settlements, letting out one defendant, for example, or settling one damage claim even though others remain pending. It would be difficult to arrive at a simple set of guidelines to govern such situations. There are too many different scenarios and considerations that could come into play in multi-party cases. A basic rule of thumb would be that if settling with one claimant or settling with one defendant can be done with finality, that is, without the risk of these parties being brought back in, there seems little reason not to.

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[7] Fisher, R. and Ury, Getting to Yes at p. 40.

Multi-party cases are challenging. Mediation, however, provides an excellent vehicle for resolution. More negotiation is required to get the parties to mediate and more planning is required on the part of the mediator to lay the groundwork for success. The end result, the settlement of a complex, multi-party case, is well-worth the additional effort that goes into it.