

# MATA

## Co-Mediation

Co-Mediation is the most effective, most rewarding, most valuable method of mediating disputes, yet few people use it and even fewer do it (properly). Other strands of mediation, such as Matrimonial and Community Mediation, do it without thinking but Commercial Mediation has yet to discover, let alone adopt, the advantages of Co-Mediation. It is not clear why Commercial Mediation should have adopted a different process to Community (and Matrimonial) Mediation. But, just as Community Mediation may learn the benefits of private (caucus) meetings, which are taken for granted in Commercial Mediation, so Commercial Mediation may learn the benefits of Co-Mediation, which are taken for granted in Community Mediation. It is time for all strands of mediation to learn from the experiences of the others.

Why the reluctance of users of Commercial Mediation to adopt Co-Mediation? I assume ignorance to be the main barrier (as it is in those who do not use mediation itself); and a presumption that Co-Mediations double the cost of the mediator and is therefore not economic or justifiable. Both assumptions will be challenged by this paper.

### **What is Co-Mediation?**

At its best, Co-Mediation is the harmonious working of two complementary mediators who offer a diversity of skills, experience and personality. My pairing with Presiley Baxendale QC was formed in 2001 because one of us is female and brought a significant experience and reputation from the legal world; and the other is male, has grey hair (which represents wisdom), had by then already a decade of mediation experience, is a non-lawyer and comes from a business background. My further pairing with Jane Gunn was for similar reasons, mainly to focus on employment and clinical negligence cases, but also as a natural extension of our pairing as MATA Lead Trainers. And all three of us mediate from the soul. But it goes so much further than that. Mutual respect, an instinctive understanding of the other's thinking, a common sense of humour and enjoyment of each other's company glues the skills and experience together. That is why we use the word 'harmony' because effective Co-Mediators think and act as a unit, with the focus on the parties, not on themselves.

With that as the background, it has to be said that most commercial Co-Mediations are not Co-Mediations. So many are ad-hoc pairings that are put together by parties advisors, being seen as a 'good idea' because, for example, a famous name (FN) can be paired with someone who is known to be able to mediate. Somewhere in there is an assumption that 'FN' will control the parties through sheer force of personality and their (the parties) instinctive respect; the experienced mediator can work away in the background, effectively managing the process. Somewhere in there is also the glamour of 'FN' mediating "our case".

Most ad-hoc pairings work as leader and supporter which is one step up from Lead and Assistant mediator. Sometimes the mediator is paired with an expert in the field of dispute being mediated. Some work, but they are not truly Co-Mediation. Often they arise from the assumption by the advisors that some expertise is needed in the sector of the dispute as well as experience and competence in commercial mediation. Of course, most regular users and practitioners of mediation accept that expertise is rarely necessary and specialism is there usually as a comfort-factor (the mediator understands my problem) and common language (jargon).

So, if Co-Mediation is to work to optimum effect, the pairing should be carefully selected, both by the mediators themselves and also by the users.

### **Choosing your partner**

Of course, I see my pairings with Presley and Jane as being perfect and unbeatable! But inevitably what I write is based upon our own experience and what works for us. It is just possible that other combinations could work as well.

For a pairing to work there are two principal criteria. They must be:

- Complementary in personality, and
- Complementary in background.

Although humility is an essential quality of an effective mediator, most of us resort to quoting numbers of cases we have mediated, and their settlement rates (assuming both are high of course). It is difficult not to take pride in a job well done, when parties (and lawyers) say that settlement “couldn’t have been achieved without you”. It is great to see parties move from being anchored in the past (usually demanding revenge) to facing the future without a dispute (or loss of blood, or losing face). All (well, some of it) because of ME (or, in this case, US)! Put two such egos together in a Co-Mediation pairing and it is easy to see the potential for competition. Add to that the assumption of authority, of each being the one in charge (because mediation is a solitary business and we have to be in charge as it is our job to manage the process), and the potential for disharmony is clear.

Complementary personalities does not mean being the same. The Baxendale/Richbell and Gunn/Richbell pairings could never be seen as cloning. Complementary personalities mean mutual respect, if not admiration, and a total trust that the other will always be working with you. This does not always mean agreeing, because one of the beauties of Co-Mediation is the combination of differences. Co-Mediators need to enjoy each others company, to be open and honest, and vulnerable with each other, so that, as they work more together, they become a ‘unit’, joints unseen, seamless, thinking and acting as one. That is complementary in personality.

Complementary backgrounds, are perhaps easier to find. A lawyer/non-lawyer pairing is invaluable, if only to keep a balance between ‘big picture’ (which tends to come from a business-based background) and the details and parties rights (which tend to dominate a legal mind). Lawyers tend to identify with the legal teams, non-lawyers with the parties.

This is particularly beneficial where parties see lawyer mediators as continuing the legal process from which many parties want to move away, but conversely it also gives a legal authority to which the advisors may comfortably respond.

A male/female pairing has obvious benefits. Besides bringing together different styles and approaches and covering the issue of a party’s potential gender preference, it also facilitates the ‘P’ factor. Most experienced mediators are alert to the opportunity provided by a party (and sometimes a lawyer) taking time out. It could be for some fresh air or a smoking break; often it is to visit the toilet (hence the ‘P’ factor). Many blockages have been by-passed by off-the-record conversations with the mediator whilst standing at the wash bowls washing hands. That is not so easy when the mediator is of the opposite sex, so a mixed-gender pairing will maximise the potential that these opportunities afford. Of course, the mediator needs to check that the cubicles do not house people from the other side (which in itself can be a disconcerting exercise if the party is not forewarned by the mediator!) so that confidentiality is preserved. I recall a case where the Claimant had hinted at a figure that we felt might settle the dispute, but whose lawyer was being very protective (probably wanting the best deal for his party), so stifling his client. An ‘of the record’ chat in the washroom confirmed the hints and from that moment there were two

negotiations, one public, one private. The deal was done an hour or so later at a figure slightly higher than the one hinted.

### **Parties selecting Co-Mediators**

It will be seen from the above that selecting a Co-Mediator pairing deserves a lot of thought and preparation. After all, the mediators are there to give the parties the best opportunity of doing a deal, and different styles and techniques may be appropriate to different cases. So ask:

- Do the parties need facilitators (to shepherd them towards a deal) or deal-makers who will 'bang heads' together? Or both?
- Does a male/female pairing bring added benefit?
- Has the proposed pairing a 'history'? If so, should references be obtained (not always possible in a confidential process)?
- Should they be interviewed to be sure that they will give confidence to the parties?
- Who has the reputation (and what for)? Other peoples experience of the pairing should be a good guide (but not always the best because they may not have chosen well!).

The above assumes that the pairing will be lawyer/non-lawyer as I believe that should be a 'given' for Co-Mediation.

If the case deserves Co-Mediation, price should not be an issue. Certainly a pairing should not be chosen (or rejected) on price alone.

### **The case for Co-Mediation**

It is probably easier to deal first with the case against Co-Mediation. There are two main reasons (both, in my unbiased opinion, untenable) and one misconception.

The first reason against is ignorance. Rather like the abundance of ignorance that still prevails on mediation itself, there is an almost total ignorance of why Co-Mediation should be an automatic consideration for most commercial disputes. Co-Mediation is not considered by most because most of those doing the considering are not aware of, or, rather, have not thought about, its benefits.

The question to be asked is not "Why use Co-Mediation?" but rather "Why not use Co-Mediation?". Once asked, it is difficult to come up with persuasive reasons against.

The second, and usual reason against using Co-Mediation is cost. Why pay double when you only need to pay for one? This disregards the fact that the mediator is (usually) paid the lowest fee of those present at the mediation (certainly if each team is properly costed). The total cost of a days mediation for a Co-Mediation pair is less than 1% of a £1million dispute. Cost is therefore hardly a credible argument against considering Co-Mediation. "But", some mediation users will say, "we get deals using only one mediator". "That may be fine (and well done you)" I reply "but what about the potential deals that one mediator didn't think of?".

That is the main advantage, beyond those already listed, of using a Co-Mediation pairing; the bringing of two minds to helping parties reach a settlement. Two intellects (well, in our case, one) applied to the problems, two sources of creative problem-solving, two centres of experience focussed on the parties disputes.

Of course, rather than be an extra cost, Co-Mediation may generate cost savings. Two mediators may halve the mediation time. As noted below, it does not quite work out like that but time is used more efficiently, especially in multi-party disputes, with the likelihood of consequential savings in team and management time. Undoubtedly mediations that have been arranged for two or more days have been significantly reduced in time by using Co-Mediators.

This leads us to the common misconception about Co-Mediation; that it is only suited to complex multi-party cases. Of course it is suited to multi-party cases, complex or not. It is even more suitable when there are several parties defending and several

parties claiming in the same dispute. But parties should consider Co-Mediation for all commercial disputes (although I accept that it may not be cost effective for cases less than, say, £200,000 in claim value). The advantages of two minds, two backgrounds, two genders and two styles apply to all mediations, large and small, simple and complex.

One of the selling points of mediation is the 'added value' brought by the mediator in being a neutral voice, bringing experience and a mind uncluttered by the detail (in which some people have often been wallowing for years). That 'added value' can only increase with the right Co-Mediation pairing.

What follows deals with the process and techniques of effective Co-Mediation:

### **Preparing for the mediation**

One of the challenges with Co-Mediation is to keep each other informed of developments and, particularly at the beginning, to ensure that each mediator in the pairing obtains equal exposure. It is important that the parties see the mediators as a pair from the start and that the mediators demonstrate that each has an equal part to play. It is particularly important at the start because, right or wrong, first impressions are crucial. This means planning. Co-Mediators should meet some time before the mediation day(s) and plan their roles and strategies. It is no good going into a mediation assuming that you are good enough to work it out as you go along. The three rules of a successful lawyer also apply here: preparation, preparation, preparation. And that includes preparing individual roles, managing the public image and eradicating irregularities in the pairing.

It would be ideal for the pair to 'read in' together. If this is not possible, then a pre-mediation briefing is necessary to exchange comments and impressions from the documents provided. Bearing in mind that the pair is likely to be from different professional backgrounds, there will be different interpretations and perceptions and this again underlines the benefit of two minds working on the same problem.

The first and main issue to address when preparing for the mediation is: how will the initial contact be made, and by whom? Ideally the contact should be by conference call so that both mediators share the contact and contribute to the communication. This also enhances the image of the mediators being a pairing from the first contact. However, it is not always possible for the pair to be together for this first contact, and so it must be agreed who takes responsibility for the contact, what it should cover and how the results will be relayed to the other.

At all times the mediators must use the word 'we', never allowing the impression to be made that the pair are separate and can act alone.

If the first contact is by one mediator then it would be usual for the other to lead in the first open session of the mediation itself, so equalising, to some extent, their exposure.

Sometimes, particularly in large cases, pre-mediation meetings will be requested. Again, it is important that the pairing plans for this beforehand, so that they are seen to be a pair from the start, even down to arriving at the meeting venue together.

### **Starting the mediation**

Continuing this principle of being seen to be a pair from the start, it is important for the mediators to arrive together on the day, to greet the parties together when they arrive and to settle them into their rooms, together. Neither taking the lead or appearing to be dominant over the other.

Equal exposure does not, of course, mean equal air time. Whilst each mediator should be sensitive to the other, and ensure that each has their say, it is not about measuring time that each has taken. Whatever has been decided, or whatever is comfortable, is the right time. When the pairing is working in harmony this will not be an issue, but it might take time, with a new pairing, to find the right balance; which will be found if the mediators are complementary as previously outlined.

The first open session gives the Co-Mediators their first exposure to all the parties at the same time. As mentioned before, a good strategy is for the mediator who has not been involved in the pre-mediation contact to do the introductions and set the ground rules. If both mediators made the pre-mediation contact through conference calls, then they can decide who starts and when the other mediator picks up. This might be to invite the opening statements or an alternative would be to pick up after the opening statements. Again, this is a matter of planning so that each mediator knows her/his role and the pair can be seen to be working in harmony together.

This matter of being seen by the parties to be clearly working as a pair together becomes less important as the mediation progresses. The first impressions of a pair working in harmony together set the pattern and give confidence to the parties. In the end, though, it is what works and is appropriate.

In any mediation there is a good case for keeping the opening session going beyond the opening statements. This gives an opportunity to reopen lines of communication between the parties and to create an atmosphere for dialogue. This can be even more beneficial in Co-Mediation, especially if there are several parties involved.

Once the opening session is over, it is best that the pair see each party in private session together before deciding on the strategy for the next phase of the mediation. Again, this emphasises the fact that they are a pair working together, and it means that both get the immediate reactions from each of the parties following the opening statements and subsequent discussion.

### **During the mediation**

Co-Mediators in Matrimonial and Community Mediation never part. Indeed most do not have private meetings, so the issue does not arise. Commercial Mediation, however, does have private meetings, so the mediators have the choice of working together or apart.

The biggest challenge for Co-Mediators is not so much how to use their time most effectively but more about how to maintain effective communication. One of the justifications for two mediators is that they can halve the workload and see parties separately. The downside of this is that they are not both hearing what is being said by each party, so a strategy must be devised to ensure that each mediator is being updated by the other on a regular basis. One easy solution is to set a rule from the start that everyone buys into, that (for example) the mediators meet every hour on the hour for a five-minute briefing. If parties are warned, then it becomes an accepted, and expected, part of the process from the start. There will be other strategies, but the outcome must be regular communication. It is not too difficult to understand the potential danger of one mediator following one line of thought and discussion that could be wasted or damaging if the other is going in a completely different direction. That underlines the need for planning and preparation so that these possibilities are anticipated and strategies agreed beforehand.

Another danger of the mediators separating and each taking responsibility for a party is that they may then become that party's mediator. The mediator only hears that side of the story and cannot have a balanced picture. This is not easily overcome because swapping mediators around will only mean that the parties have to retell some of what they have already told the other mediator. This will not only frustrate the parties but also lose much of the benefit of halving the workload. This again emphasises the need to have a strategy for regular communication between the mediators and a relationship that can reality-test each others position.

It is quite likely that further open meetings, or smaller working groups will be arranged, as in any mediation. It is also likely that the Co-Mediators will be together for those meetings, reinforcing again that they are working as a pair, even though they may be working apart.

Finally, when the deal is done and the lawyers are writing up the settlement agreement, one mediator can be overseeing the agreement whilst the other is pouring the wine!

### **Challenges for Co-Mediators**

Co-Mediators need to be aware of potential dangers, particularly in the early days of a pairing:

- You may not be compatible! Liking someone is not enough for an effective pairing. It needs thought and an objective analysis of the criteria listed earlier for there to be a chance of success.
- One mediator may disengage. It may be because the other is assuming control or has more energy, or that s/he is finding a party particularly difficult. This needs sorting immediately and probably requires the mediators having a private session of their own.
- You may disagree with each other. That in itself could be good but could also be destructive if it is not immediately sorted. This should have been one of the matters discussed before the mediation and a strategy agreed so that it will not become an issue within the mediation.
- One mediator becomes identified with a party because s/he has been working with them whilst the other mediator is with another party. This should not be a problem unless the mediator is being used by the party as their advocate or appears partial to one party in front of the other. Each mediator needs to have permission to check this out with the other at any time.
- A party tries to drive a wedge between the mediators. Unlikely, it would seem, because both mediators are there to help the parties do the deal. What would be the purpose of separating them? Possibly tactics, possibly because the party is not in the mediation with honest intent of seeking a solution, possibly because it might give the party an element of power and control. Whatever the reason, it has happened and the mediators need to have a relationship where this can be checked out at any time.

### **Summary of key points**

If you are a user:

- Ask the question "Why not Co-Mediation?"
- Decide what you need from the mediators in style, experience and combination.
- Ask other users of their experience and for any recommendations.
- If you are unsure, interview the pairing(s) before appointment.

If you are a practitioner:

- Choose a partner who is complementary in personality and background. Liking someone is not enough.
- Work together as often as possible, firstly to get experience of each other and so build an instinctive understanding, and then to keep that relationship fresh and effective.
- Always prepare well and anticipate problems (caused by yourselves as well as the parties).
- Be open and honest with each other at all times. It means, amongst other things, that you will work together when times get tough.
- Take every opportunity to demonstrate to the parties that you are a pair, not two individuals, and together impossible things become possible!

### **Conclusion**

It is always a surprise to Presley, Jane and me that Co-Mediation is not used much more. It brings so many advantages and not just to complex and/or multi-party cases. It should be seen as an effective tool for most cases and the main reason, it seems

to us, that it is not seen as such is due to ignorance. The message therefore must be, whether you are a user or a practitioner, try it! The more that do use Co-Mediation the greater will become its reputation and therefore its use.

**DRichbell: October 04**

*Adapted from the chapter in "Mediators on Mediation" published by Butterworths*

