

Chapter 13

Mediating multi-party disputes by David Richbell

13.01

This is about mediating disputes where there are more than a single claimant and a single defendant involved. However, such techniques, skills and strategies that are noted in this chapter could well be used in two party mediations, especially where a lot of people are in attendance. Managing a two party mediation with twenty or thirty people attending has as many challenges as a three or four party mediation with the same number of people. It is more about crowd control, and building a relationship of trust with each individual is a challenge, to say the least.

13.02

Because a large proportion of the disputes that I mediate are in the construction/civils/heavy engineering sectors, most of my mediations are multi-party. A good proportion of those also have an international dimension, which multiplies the challenges somewhat. These sectors are also heavy on detail and contractual argument, and the volume of paperwork is usually enormous. So this chapter is written from twelve years experience of mediations overcrowded by people and paper, high on argument and emotion and always in danger of diving into the detail rather than viewing the big picture. I love it! But it is only my experience and there are other respected mediators who have different techniques and strategies. This is what works for me.

13.03

Whatever the sector, when all the glamour(?) and mystery of the mediator's trade are stripped away, the mediator is there to give the parties their best chance at doing a deal. This is the ultimate measure of all the mediator's decisions – to ask "Is this going to move them closer to a deal?". And if it does not then it is probably not the right decision. Of course, it is up to the parties whether they make the best of that chance, or not. That measure will be mentioned several times in what follows.

Particular challenges of multi-party mediations

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Once you get past the 'simple' two party mediation (I suppose such mediations exist) there are many possible permutations:

- One claimant (or defendant) against several defendants (or claimants).
- Several claimants against several defendants (ie multi-party both sides).

Sometimes there is only one issue in dispute, but often there are several. So a multi-party, multi-issue dispute can get a little complicated. Michael Leathes (BAT head of Intellectual Property and a wonderful advocate of mediation) does a talk which demonstrates the complexity of multi-party disputes, showing that a three-way dispute has six sets of rights, obligations and interests, whereas a five-way dispute has not ten but twenty sets of rights, obligations and interests:

<Multiplicity of Parties chart?>

The great thing with mediation is that it is so suited to such complexities. All it needs is structure, trust and patience. And a day or two for everyone to get together.

13.05

Most mediators experience the need occasionally for mediations within mediations. Helping one side to speak with a united voice. A classic for me was a dispute with one claimant and thirteen defendants, all insurers. The first day was spent mediating and obtaining an agreement between the defendants so that, on the second day, they could negotiate a deal in confidence with the claimant (they didn't. They set a limit that was too low for the claimant but it did mean that the subsequent post-mediation negotiations were successful once limits were reviewed). The defendant mediation was tough and in the end was achieved on a percentage liability deal (each of the thirteen defendants taking a different percentage of the eventual offer to the claimant). Another typical mediation within mediation is in construction where a contractor is either claiming and having subcontractors requiring part of the settlement, or is defending and wishing to pass liability down the line. The main mediation is often two-party but the sub-mediation is often many parties.

13.06

Similarly, the more people there are the more likely it is that personal dynamics become an issue. Whether it be people within a company or disunity within a team of several companies, it is likely to present the mediator with a potential blockage if it is not recognised and dealt with early on. For example, a project architect who is part of a client team claiming against the contractor will, more often than not, be fearful of a potential professional negligence claim. S/he may therefore be so guarded that any useful contribution will be lost. It is best to get this sort of issue out 'on the table' right at the start (in the party's room and therefore in private) so that everyone knows where they stand, and so that the person can feel free to help their party achieve a settlement (or to leave early if they can't).

13.07

Crowd control is one of the biggest challenges for the mediator in a multi-party mediation. This can be avoided by pre-mediation discussion with the parties on who comes and the size of their team, but even if only essential people are included in a team, a six party mediation is likely to have at least thirty people present. How does the mediator keep them all engaged and committed for the duration of the mediation? How does the mediator prevent them from becoming disengaged? How can you get them all seated around one table in the first place? My preference is to keep everyone together in open session as long as possible so that they all hear what is being said and can contribute to the discussion. If someone appears to be disengaging I can bring them back by aiming a question or inviting them to comment. Beyond that I have to rely on the team leader (usually the lawyer) to keep her/his team engaged and working positively towards settlement. I am not, incidentally, in favour of, when the teams are big, some members remaining in their room during the open sessions. I want everyone to hear, to contribute and to be committed because they may otherwise become blockages to progress.

13.08

Probably the biggest challenge of all in a multi-party mediation is the idle time. In any mediation, the time when the mediator is with other parties is a time of potential boredom and dissatisfaction. No matter how much warning the mediator gives, and no matter how experienced the parties' advisors might be, the idle time will be a problem. In a six party mediation, if the mediator spends half an hour with each party, it will take three hours to return to the first party. How can that time be used productively? How can boredom, disengagement and dissatisfaction be avoided? One thing is for sure, contrary to thinking in the early days of mediation, it cannot be the Mediator's responsibility to keep

everyone entertained. Sometimes credible tasks are set by the Mediator but that will not always happen. It is usually the lawyer who decides who is to attend, hopefully with the Mediator's advice, and it must therefore be the lawyer who has strategies for keeping her/his team engaged. Some of these are mentioned later.

13.09

Then there is the paperwork. A mediator will usually ask for a five to ten page summary of the dispute from each party, and if possible a small agreed bundle of key documents. Dream on! The summary may be received but agreed bundles are rare and never small. Usually the five to ten page summaries are accompanied by several files (or boxes of files) of papers from each party. Construction disputes seem to be the worst. How can parties possibly believe that 300 + detailed time sheets could be documents vital for the mediation?

13.10

Cultural issues are present in every mediation. This does not mean just nationality, although in international mediations that obviously plays a part. Everybody sees the same facts and issues from a different position. Background, education, politics (office or community politics more than national), relationships, authority (or lack of it) all play a part. In most cases it does not mean that a particular party's interpretation of those facts and events are any more right or wrong, only different. That is a fact of life (and a reason why an adjudicated decision which gives an outright winner/loser is invariably unjust). Mediation allows for these differences to be taken into account. I mention this because so many multi-party mediations have an element at least of an international dimension, and therefore cultural issues become even more significant.

Preparing for multi-party mediations

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It will probably be stated in almost every chapter of this book: preparation is the key to effective mediation. Preparing:

- the parties
- self
- the process.

13.12

Taking the third item first: the process. We talk of mediation being a flexible process yet what we really mean is that it is flexible within a fairly rigid framework. It is a framework (opening session followed by private sessions and then a mixture of private/open/group sessions) that works and in which we have all grown to trust. But there is something that can be learned from environmental mediation where the starting point is to design a mediation process that most suits the dispute. An important part of giving the parties the best chance of doing a deal is to ask "What is the process that is most suited to this particular dispute?". This is not a matter of whether or not to start with an open meeting. It is much more a matter of starting with a blank sheet of paper and, with this particular dispute in mind, designing a process that it suits most. As an example I would mention a large civil engineering multi-party dispute where, in a pre-mediation meeting, all the parties agreed that, although the 'coal-face' people (who had lived the project on a day-to-day basis) needed to have their say, they were also seen as a potential blockage to settlement. They could only see their own version of the facts and events as being right. So it was agreed to have two days for a structured (with an agreed agenda and presentation order) initial meeting for the 'coal-facers' to have their say, their days in court, and for the mediation proper to have only the key decision-makers and their legal advisors present. We designed a process to suit the dispute that gave the parties the best chance of doing a deal. So the message is be prepared to think about and prepare

the process. Be prepared to work out of your normal comfort zone and be creative in finding what process most suits the dispute.

13.13

Preparing the parties includes discussing:

- who comes
- level of paperwork
- mediation framework
- pre-mediation work/meetings
- strategies for idle time
- Co-Mediation, or not?

13.14

Taking the last first again; almost without exception, multi-party mediations should be Co-Mediated. Chapter 17 deals with this in detail, but the advantages are many and the perceived disadvantages fall away when they are properly examined. Cost is not an issue, ignorance is. More efficient use of the mediation time, two minds applied to giving the parties the best chance of doing a deal, a potent combination of skills and experience; all are compelling reasons for using a Co-Mediation pairing. Read the chapter!

13.15

One of the ways to avoid the problem of crowd control is to avoid the crowds. In discussing with each lawyer who should come to the mediation, the guide should be to 'keep it lean and keep it keen'. Of course, this applies as much to two party mediations as to multi-party, but overcrowding is much more likely in multi-party cases. As few as possible should be the rule, and those that do come should be positive about achieving a settlement in the mediation. So start with the highest level of decision-maker, add the lawyer and then think hard about the rest. Most teams are put together for comfort (just in case) or to balance with the other sides (counsel/counsel, expert/expert). The mediator can have a significant influence on who comes to the mediation, using experience and common sense, especially if the conversation takes place a reasonable time before the mediation date whilst there is still time to make adjustments.

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On a direct appointment the mediator will normally email the lawyers at an early stage, confirming the appointment, giving dates for receipt of information and outlining the sort of information necessary for his/her proper preparation. The level of preparation varies with each mediator although it does seem to be the case that non-lawyer mediators require less documentation than lawyer mediators. It must be quite difficult for lawyers, whose life is based upon examining the detail, not to read every document provided even if it does go to several lever arch files. My view is that the reason the parties are in this situation of unresolved dispute is generally that they have wallowed in the detail for so long that they have lost sight of the big picture, the reason for the dispute arising in the first place. The mediator is able to step back from that and help parties find a commercial solution (that may have nothing to do with the detail, or the law). So I ask for the paperwork to be kept to the minimum, and if faced with a mountain of paperwork, I will be very selective. It is rumoured that I randomly put yellow flags in files of papers to suggest that I have read them all. Not true.....well, not any more. Not often. If necessary I will ask the lawyers to point me towards the most important papers. Better still, I ask the lawyers to send me only the most important papers anyway.

13.17

I mentioned earlier about designing the process to fit the dispute. Mediation is a flexible process but is often performed within a rigid framework. It is worthwhile, particularly with multi-party mediations, asking the question "What is most suitable for this case?". Pre-

mediation meetings, delaying the open session, engaging in sub-mediations (as mentioned above) are just some of many possibilities. This discussion needs to be had with the parties, particularly the lawyers, probably at a pre-mediation meeting. Even if the usual framework is retained it is worth discussing the pattern of private and other meetings to get a feel of priorities and how the time may be best used. Agreeing a joint strategy on the mediation process not only gives parties a sense of direction but also begins the process of co-operation. And it keeps the responsibility for using the mediation time effectively firmly with the parties. The mediator is giving them the best chance of doing a deal. It is up to them how they use that chance.

13.18

Pre-mediation meetings can be very useful although it is often difficult to get a date where all lawyers (and others if they are involved) are free and there is, of course, also a cost implication. Conference calls are a little easier, and cheaper, to arrange but anyone who has undergone some communication skills training will know that the telephone is only marginally more efficient than the written word, but nothing like as efficient as face to face. In Scotland, the CORE* model of mediation requires a pre-mediation meeting before any mediation and there may be something for mediators south of the border to learn from that. Undoubtedly, it is far easier for the mediator to have party representatives around the table at one time to discuss the mediation process and to agree the most efficient strategy, than to do so in separate telephone calls. Whatever the form of pre-mediation contact, preparation is vital. At the very least the mediator needs to have an agenda for the meeting/conversation and to circulate that to everyone involved beforehand.

*Based in Edinburgh, CORE is the currently the main mediation provider and training body north of the border.

13.19

One of the issues that should be included in the pre-mediation contact is the matter of idle time. The realistic situation is that the mediator cannot be expected to keep everyone present fully occupied for the duration of the mediation. The mediator may be able to set credible tasks for each party whilst s/he is with someone else but there will always be idle time. That time should be the lawyer's responsibility. It is the lawyer who puts the mediation team together and it is the lawyer who should keep everyone in that team engaged and active. That means accepting that idle time is inevitable and preparing strategies to use that time effectively. Updating risk analysis, brainstorming possible solutions, visioning the issues through the other's eyes, suggesting/setting up working groups, taking a break are all better strategies than doing the crossword or doing other work unconnected with the mediation. The lawyer needs to keep the team working as a team and so devising credible joint activities is important. There is nothing better for the mediator to return to a team that is united, eager and positive.

13.20

Preparing self for a multi-party mediation is no different to a two-party mediation. It just takes longer. But proper preparation is vital for effective mediation:

- Reading sufficient documents to have a confident grasp of the issues, the chronology, the key players and the construction of claims (and counterclaims).
- Ensuring that pre-mediation contact (meeting or telephone) is properly structured, has a defined purpose and is forewarned. Most experienced mediators have a check-list of items that need to be covered in this early contact (see below for an example).
- Preparing profiles of the parties to identify their needs and drivers. [*check HB comments*] Henry Brown, revered 'Grandfather' of UK mediation, prepares such profiles before every mediation. The obvious challenge to this is that the mediator

inevitably makes assumptions, which is a sin. Henry's response to that is that, of course all assumptions need to be checked out, and replaced by facts as they emerge; but it gives him an insight to parties that he finds invaluable in preparing for his strategy in a mediation.

- Briefing the Assistant (you do have one don't you?), or meeting with your Co-Mediator, to define roles, exchange reactions to the documents and pre-mediation contact and clear any issues between them. With an inexperienced Assistant I will generally ask them to keep a chronological log of the key events, note learning and turning points and suggestions of alternatives to what I did. We will then have a debrief for an hour after the mediation (providing it finishes before 22.00 hours) which helps me go home more relaxed and sometimes gives me insights for improving what I do. It also gives the Assistant a written record of learning points for their own development.
- Have a survival strategy, including emergency food supplies and a determination to have a regular intake of fresh air (most mediation venues are air conditioned and it is only when you breathe the real stuff that you realise what a poor substitute conditioned air has become).

[add pre-mediation check list]

Managing multi-party mediations

13.21

Once into the mediation, there are several techniques that can help the progress of multi-party mediations. For example:

- Managing through co-operation
- Grouping issues
- Extending the opening session
- Timetabling
- Alliance building
- Cutting separate/several deals

Some of these are just about keeping parties informed of what is going on. Idle time is made worse if the mediator does not give regular progress reports and, although this applies equally to two party mediations, in multi-party mediations there are often a lot of people to keep informed.

13.22

Managing the process of multi-party mediation can be greatly eased by involving the lawyers in each team. Even where to sit people in the opening session, whilst not an issue to be left to chance, does not have to be the mediator's decision alone. The lawyer knows the relationships, the dynamics and the hierarchy of her/his team and can best advise on seating arrangements. But there are other considerations. Most mediators like to balance the seating; lawyer opposite lawyer, decision-maker opposite decision-maker, expert (if they have to attend!) opposite expert. That is relatively easy in a two party mediation but with several parties around the table it is far more difficult. The mediator must be the one to decide, but the lawyers can help, if invited, by suggesting the most appropriate seating arrangements for the parties and individuals involved. Similarly with who opens and who follows with the opening statements. In the early stages of a mediation, when rapport is still at an early stage, there could be sensitive issues in deciding on order of presentation. Whilst the claimant may be the obvious one to open there may be several to choose from. Similarly, it is not always clear, when several defendants are present, what order of priority would apply. Highly emotional parties could also affect the order of presentation, so that they are allowed to have their say

ahead of the rest. The lawyers will help but the key is for the mediator always to explain the reasoning behind the decision, preferably in the private briefing sessions before the main opening session, so that everyone understands and can comment if necessary. Thinking about this, and sharing your concern, is vital preparation for a smooth start to the first open session.

13.23

In any multi-issue mediation, grouping and prioritising the issues is essential. Unless the parties are seeking a global deal right from the start, some detailed discussion will be expected on the issues and that has to be managed efficiently. By far the best way is to get the parties in the first open session to list the issues and decide either on priorities or on the order of discussion (which may not be the same). The flipchart is an invaluable tool for this. I would also get the parties to agree a timetable, if only to get them to take responsibility for the reality of the timing for each group of issues. It does not take a mathematician to work out that ten issues at half an hour each uses up five hours of the mediation. And not many issues can be dealt with in half an hour! Sometimes parties come to the mediation wanting to co-operate and this strategy is productive. Usually that is not the case, but to me this is a necessary part of getting parties out of the detail and into the big picture. The frustration of trying to pick the issues/groups of issues off, and getting little agreement in the process, helps parties accept that usually 'going global' is the only way a deal will happen. But they make that choice, not the mediator.

13.24

One of the techniques that I tend to be associated with is, where appropriate (and that is most mediations), extending the opening session. I am sure that many experienced mediators do so, especially as we cover it in the MATA Advanced Mediator Training course. The logic is that, if one of the roles of the mediator is to reopen lines of communication and get the parties talking to each other, it is very difficult to do so if they are in separate rooms. In multi-party mediations the logic is slightly different. The longer parties are together in open session the more efficient the time is being used. Everyone is hearing what is being said and everyone has the opportunity to contribute to the discussion. Of course, there are comfort breaks and sometimes parties will also want to break so that they can prepare for a particular issue, but it is not unusual for the opening session to fill the morning. This needs to be with purpose and managed efficiently and is usually preceded by the grouping and prioritising (and timetabling) the issues as mentioned above. The flipchart is a vital tool in bridging the moment between the opening statements and the subsequent discussion. It is the time when the (perhaps less-experienced) mediator is tempted to break into private sessions, yet it can be the best time for creating dialogue and understanding. I usually write up the key issues that are to be addressed in order to get a settlement and ask questions as they are written up. This usually gets the parties talking, at first to me, and then to each other. It is a great time for the parties to recognise and understand why it is that the others see the same facts and events yet have different interpretations.

13.25

Timetabling is essential in multi-party mediations, especially if the mediator is working alone. In Co-Mediation, which is so suited to multi-party mediations, timetabling is different for it revolves around the hourly mediator briefing meetings, which take place when the mediators are working apart (see Chapter 17). In single-handed mediations, the timetabling is to give parties notice as to when the mediator will be with them. Again, the flipchart can be a useful tool for this. In many ways the idea of timetabling seems to be against the principle of a flexible process where the mediator is able to give whatever time is necessary to each party. But the purpose of this is to keep the parties informed of what is going on, not to put a rigid constraint onto the mediator. Most mediators will say

that the biggest danger in the mediation is that people disengage or get frustrated because of the idle time and not knowing what is going on. It is vital that the mediator gives regular updates (without challenging confidentiality) either in person or through the use of the flipchart. Timetabling can vary according to the need of the mediation, although having a set time allocation for each party can help them focus on what they really want to cover in the time that the mediator is with them. So it is a tool for efficiency as well as communication.

13.26

One of the early tasks for the mediator in a multi-party mediation is to identify potential alliances. Where is there common ground or common interest? Who can work with who on what issue? A typical example in a construction case might be that a subcontractor who is in the main contractor's mediation team (or even a separate party in the mediation) works with the building owner's expert to identify a solution to a particular problem. Another might be that the main contractor and subcontractor negotiate the apportionment of any settlement. Another where several defendant insurers meet together to discuss the sharing of a settlement offer to the claimant. This may be for the duration of the mediation itself but is more likely to be on particular issues and will lead to working groups being formed to deal with those issues or even mini-mediations taking place to enable some parties to speak with one voice. It is often appropriate to discuss this in open session or, if more sensitive, with the lawyers once the opening session is over. Such alliances often become obvious as the open session progresses and common interests identified. There are several benefits with this strategy, particularly that it uses people and time efficiently (the mediator can be dealing with several parties in one meeting) and also nibbles away at issues and solutions.

13.27

Finally, it is often the case that multi-party mediations, particularly multi-issue/multi-party mediations lead to several deals being made. This may be in settlement of the overall dispute or in settlement of some issues with the others left unresolved on the day. One six party construction mediation led to settlements being reached between the main contractor and several key subcontractors on the day whilst the main building owner/contractor dispute was not resolved despite a serious offer being tabled. It was still seen as 'successful' because a complicated dispute had been narrowed to only one issue. 'Success' in mediation is very difficult to define and is seen differently by each person involved. The measure for the mediator should be that s/he gave the parties the best chance of doing a deal. If s/he did that, whether it settled or not, the mediation should be seen by the mediator as successful.

Summary of key points

13.28

So many of the techniques for multi-party mediations are suited to two party mediations. They are just good practise:

- Prepare well. Plan the pre-mediation contact and forewarn them.
- Be flexible on the process. Design the process to suit the dispute.
- Try to influence at an early stage who attends and the volume of paperwork to be provided.
- Use mediation time efficiently. Keep the open session going; form alliances; timetable meetings.
- Always keep parties informed on time and progress. Give regular updates.
- Group the issues and group the people.
- Be realistic about idle time. Make the parties responsible for using it productively.

- Keep the parties responsible for the problem and the solution(s). Concentrate on managing the process to give them the best chance of doing a deal.
- Why not Co-Mediation?

Conclusion

13.29

Doing an occasional two-party mediation reminds me of just how demanding multi-party mediations can be. They require extra levels of stamina, alertness, flexibility and realism; and an acceptance that even mediators are human and therefore may not be able to help everyone out of the messes that they get themselves into. But, no matter how big the mess, no matter how many people are wallowing in that mess, no matter how despairing it all may seem, most do settle.