

8-1-2009

Co-mediation: positives, pitfalls and lessons learned

Bianca Keys

Recommended Citation

Keys, Bianca (2009) "Co-mediation: positives, pitfalls and lessons learned," *ADR Bulletin*: Vol. 11: No. 4, Article 3.
Available at: <http://epublications.bond.edu.au/adr/vol11/iss4/3>

This Article is brought to you by epublications@bond. It has been accepted for inclusion in ADR Bulletin by an authorized administrator of epublications@bond. For more information, please contact [Bond University's Repository Coordinator](#).



Techniques for mediation practice

Co-mediation: positives, pitfalls and lessons learned

Bianca Keys

Introduction

Co-mediation can provide the variety, flexibility and integrated approach that make mediation such an attractive option for people in dispute. This is particularly so in matters involving different dynamics such as age, gender, ethnicity and cultural background. Multi-party mediations can also benefit greatly from a co-mediation model, adding a dynamic flow to the group that may potentially be obstructed by a singular approach.

However, just as mediation is not suitable for all disputes, co-mediation is not suitable for all mediated disputes.

In this article I will attempt to outline the concept of co-mediation, together with examples of where it works well. From my own experiences I will share with you lessons that I have learned about myself and other mediators and address some of the cautions that should be noted for successful co-mediation.

It is my intention to make this article anecdotal and practical for the reader by drawing on my own experiences in the hope that this may assist those either partaking in a mediation where you are assisted by more than one mediator, or for those working within the co-mediation model.

What is co-mediation and what are the potential benefits in using this model?

In its most basic form, co-mediation can exist within most, if not all, mediation models. It is the concept of two (or more) mediators working on the same matter, essentially working as a team rather than as two individuals. The basis of any decision to use co-mediation over an individual model may be varied. Many community groups and other organisations, in both Australia and overseas, have chosen to implement co-mediation as part of their procedures

for any mediation that is done through their service. Other mediators, either on their own or as part of an association or group, may make an assessment of a matter and suggest the co-mediation model for reasons of participant diversity or by way of role-modelling problem-solving behaviour for the parties to mimic in their quest for resolution.

Alternatively, many mediators may find the co-mediation model helpful to them on a personal level, as it provides the potential for short release from the intensity of mediating, and allows the opportunity for feedback and debriefing with a peer. This can be particularly useful in mentoring a less experienced mediator, but it can also be of great benefit in maintaining a fresh and vibrant approach, regardless of a mediator's level of experience.

For me personally, I have been involved in co-mediation in all of the above circumstances. I began my mediation career as a community mediator in one of London's most colourful districts, in a mediation service that fostered co-mediation as a firm, tried and true method for resolving community disputes. Under this model a team of two would meet with each party on a separate occasion before arranging a date for a mediation meeting with both parties to assist them in resolving their dispute.

In order to tackle the rather hairy issues that arose between disputants, and to do so in a manner that honoured the team-approach of co-mediation, this particular service put each mediator through an intensive training course that ran over two months. Each mediator was then subjected to an assessment, using the co-mediation model, before being ultimately accepted or rejected from the scheme. The intended outcome was to create a situation in which new

mediators would begin working with the most experienced mediators. However, limited resources meant that this did not occur and we essentially all jumped in at the deep end. Hence, there were many lessons learned that I will share with you shortly.

I have also been part of a process in which the decision to use co-mediation was made by the parties, who then selected mediators based on the diversity they could bring to the table. The reason for seeking this diversity was not to add to the differences at the table but to reflect the differences and make parties as comfortable and confident as possible with the process. In my case, gender and age have played a part in the decision to appoint me to a particular mediation and I have found this to work well for the disputes that I have been involved in as a co-mediator.

At various points in my earlier mediation days I was fortunate enough to have some very capable and experienced mediators take me under their wings and provide me with the opportunity to learn from them. In this capacity I have co-mediated with those of legal, psychology and commercial background and have benefited each time from the different styles and approaches that I have witnessed and complimented in some way. Other than taking away valuable examples for next time, co-mediation in this format provided me with the opportunity to assess the type of mediator that I wanted to be, whether by accepting or rejecting components of another's style and approach.

I have been involved in co-mediation with a group of 13 over a two-day period. The use of co-mediation in this context provided the headspace for a fresh rather than worn-out approach as time went on. It also provided the valuable opportunity to structure the



mediation well, to gain feedback and to debrief and reboot the mind for the following day.

Lessons learnt: diversity of parties and mediators

I sit at the younger end of the age spectrum of mediators. There are those at the other end with incredible life and career experience who have chosen to utilise this as they change the focus of their careers, phasing down in one respect and entering the world of mediation as they do so. Generally speaking, there are those in the middle of the spectrum who either supplement or complement an existing career with mediation work, or those that are part of a business that is focused on mediation and facilitation services. At my end of the spectrum I have dived into the deep end and embraced mediation and other forms of dispute resolution as a way of life. What has become crystal clear to me is that both myself and others are drawn to this field because we like the complexities that different personalities and different problems provide. Life is a massive tapestry of different threads and as mediators we weave through the heart of it trying to create a situation in which the threads don't fall away. It is a passion as well as a career choice.

In following this path it is very clear that no one individual is defined in one particular way. There are differences such as gender, age, relationship status, sexual preference, religious beliefs, political stances, ethnicity, culture, level of education, vocation, skill, family upbringing, natural and nurturing experiences, dreams, aspirations, tolerance levels, disability, health, ways of learning and receiving information ... just to name a handful.

To be true to the concept of building trust and rapport with the parties to a mediation, and making them as comfortable with the process as possible, there are moments and meetings where the background that a mediator brings to the table can create greater comfort, open discussion, and the opportunity for increased creativity in option generation.

I have been part of a number of co-

mediations that have taught me various lessons about diversity. One in particular comes to mind very quickly.

This particular mediation involved gender and age differences with the parties that I was able to reflect with the assistance of an older male mediator. In addition, there were indigenous affiliations on the part of both parties

Co-mediation provides the opportunity to learn great lessons from great mediators. On a reflective level it also provides an incredible opportunity to learn about yourself ...

that created confusion and inner conflict for both. My co-mediator had a background in dealing with the questions that different degrees of indigenous affiliation give rise to, which also created an environment in which the parties felt more accepted and able to communicate.

The experience was an exceptionally powerful one and taught me two great lessons in terms of diversity. First, one can never fully compartmentalise a person under one heading or category. People are complex and feel a number of ties and affiliations, which will become evident at different times. Secondly, one can never underestimate the power of reflecting a certain dynamic in mediation through the choice of the two mediators selected. The dynamics and teamwork of the two co-mediators can have the greatest of impacts on the progress of the mediation through the comfort levels and trust of the parties involved.

Lessons learnt: from others and about yourself

Co-mediation provides the opportunity to learn great lessons from great mediators. On a reflective level it also provides an incredible opportunity to learn about yourself — what works for you, what doesn't work for you and how you can carve out your own individual style.

One way in which to do this is to observe the style of your co-mediator and to learn from the process and skill decisions that they make during the mediation process. I have borrowed from both the style and the decisions made by my co-mediator in subsequent solo work that I have done, and in doing so I have found what works for

me. I have also found certain approaches that have not necessarily sat comfortably with my own style and personality and adopt those more sparingly.

Another way in which to learn these lessons is through debriefing with your co-mediator and discussing the next steps as the mediation unfolds.

I recall an example of a co-mediation that involved a larger group of participants. During a short break my co-mediator and I were discussing the best points of focus to be able to progress. My co-mediator, with a background in workplace consultancy, had a particular idea of the possible dynamic that was unfolding and a strategic approach and direction that she wished to take. In most circumstances I am very open and accepting of any idea or approach but I found myself feeling very strongly against the suggestions being made.

As I saw the situation, there was a lot of pent up frustration in the room that was going to render any forward-focus useless until the frustration was addressed. To me the vital turning point was to be an acknowledgement by the parties of their understanding of the others' points of view, and until we reached that point we could not move forward or make any assumption as to the dynamic.

Ultimately I was pleased to first recognise the strong response that I was



having to the suggestions made by my co-mediator and secondly to find the strength of character to suggest the shift of focus that I had in mind. It paid dividends as we progressed through the meeting.

I am not suggesting for a moment, however, that my instincts are always spot on. I believe that there is great value in creating a relationship with your co-mediator whereby both feel that they can raise their concerns and their 'gut-feelings'. This approach results in the best possible service being delivered to the parties and a greater chance of satisfaction, from the parties' point of view, with the process as a whole.

What is essential is that the co-mediators present a united front. As a co-mediator you are one of two role models for the parties, developing a theme of teamwork driven towards joint problem solving. The relationship that you create with your co-mediator, whether they are older or younger, more or less experienced than you is one that should involve respect and cooperation. Generally speaking, any procedural discussions are best done as a debrief or break session rather than conducted in front of the parties.

Cautionary notes

As noted in my introduction, co-mediation is not suitable for every dispute. In addition it is important to remember that co-mediation means teamwork, the presentation of a united front. You are role-modelling for the parties so best behaviour is paramount.

I would suggest as a first point of call that it is always best to know, respect and feel comfortable with your co-mediator. During my initial community mediations this was not always possible and I recall my initial meeting with one mediator that I was to work with. We were about to have a preliminary meeting with one of the parties and the co-mediator revealed their nerves as this was the first mediation they had done. From this I assumed that there would be a bit of nurture and guidance involved on my part — but I was wrong. This seemingly quiet and nervous mediator proceeded to take over the meeting and I would not be surprised if the party left the meeting feeling like they had been hit by a bulldozer, because I certainly did! This mediator then turned to me at the

end of the meeting and said 'Wow, that went well!'

As a second cautionary note I would suggest that it is a great idea to sit and relax with your co-mediator before the mediation. Drive there together or have a cup of coffee and just informally touch base as to how you might structure the meeting. Address the things that make you uncomfortable and even suggest a signal of sorts should you need it. Without some kind of loose structure and direction you will not only confuse each other but you will confuse the parties!

A separate caution relates to the above, as you do not want to go too far and create a rigid and inflexible structure. You have probably developed a mental picture and dialogue from this, of the two mediators acting as though they are reading a script for the first time and taking an uncomfortable pause between each statement, waiting for the other to begin. The goal is the reverse of this; to create fluidity within the process and a dynamic and creative dialogue between the parties. Less mediator dialogue and a more natural approach will achieve this. As a mediator it is not how much you say, but what you say and when you say it that can prove the impetus for creative change and problem solving.

Finally I would suggest something that I have touched upon already: unity. As a co-mediator you are part of a team. You are in each session together and you meet with the parties in separate sessions together. There may of course be exceptions to this, as mediation benefits from the ability to be flexible in line with the needs of the parties. What you do need to be aware of is the avoidance of any situation in which either mediator is seen as biased or as an advocate of one party.

How do I take these lessons and apply them to situations in which I am an advocate, not a mediator?

Just as co-mediators behave like a team, a client and representative face similar challenges to ensure the same. Meeting with your client and establishing rapport is an important ingredient for team unity. The respect and relationship that develops can provide the opportunity for both to partake in

valuable preparation for mediation. Understanding boundaries, direction and structuring your approach can prove to be the key to resolution, with the cautionary note NOT to become too structured and positional. Apart from following the lead of the co-mediators, you can role-model for your client *how* to partake in dynamic, creative and joint problem solving.

Other ways in which you can learn from the above and apply it to your role as advocate for one party in a co-mediation are included below, and are particularly prevalent at the preparation stage:

- The starting point is to shift your client's mental paradigm from one that focuses on concepts such as victory, success and winning. Each of these ideas has an unattractive bedfellow: defeat, failure and loss. One wrong move can mean the difference between which of these becomes your client's reality. To achieve this, focus not on what your client *wants* to achieve, but understand what their *needs, goals* and *objectives* are.
- Remember that a successful negotiation will focus on the same principles that mediation focuses on. It is not a case of who gets the bigger piece of the cake, but a question of how you can work with the other party to make the cake bigger so that each person gets enough to eat.
- The mediators will ask questions that focus on understanding needs, goals and objectives, in order to shift the focus to problem solving — based on the needs and goals of both parties. There is no reason why you cannot prepare yourself and your client for negotiation in the same way. Understanding what your client needs to achieve and what they require in order to make this happen are vital steps towards a successful negotiation.
- Once you have been able to identify your client's underlying needs, goals and objectives, flip the coin and look at the situation from the point of view of the other person. What do you know about them? What are they likely to demand during negotiation? What might they need to achieve for the future and how do they need you to help them get there? What are their possible needs and goals?



- You can complete this preparation with your client and really display your willingness to mediate an outcome by taking your client's thinking to the next step. Ask yourself and your client 'If you need to achieve A, B, and C and the other party potentially needs to achieve D, E, and F, what options might be created to meet each of these needs?' Just as the mediators will be doing, you are getting your client to think laterally, and you are preparing them to arrive at the mediation with a number of possible strategies that take both sides into account.
- Preparing in the above manner can be staggeringly effective. Instead of keeping the other party on guard, you and your client will be presenting your willingness to take their point of view into account, rather than showing a desire to do battle. Essentially, you are giving them no reason to remain on guard. Co-mediators will prepare in a similar way and will work to define their roles in the mediation. You can do the same.
- Prepare yourself and your client to be active listeners. Once you are at the mediation table, bear in mind that what you have thought of as possible needs of the other party may not in fact be their actual needs, or perhaps you have identified a couple of needs, yet there may be others to listen to and digest.
- You can achieve the above by inviting the other party to tell your client how they see the problem. Follow this by giving them the space to express their concerns. Ask them clarifying questions when appropriate and summarise what you have heard them say to you. This latter tool is a great way to show that you have heard what was said and also to clarify meaning. Be clear again whether it is you or your client that is doing this, and provide your client with as much space to participate as possible.
- Following this your client will have their chance to express their concerns. Even more importantly, you have the opportunity to maintain and build on the positive forum you have created by preparing your client to do this in a particular way. Work on asserting

concerns in a way that is not filled with statements of blame or overuse of the word 'you'. The other party is likely to raise a defensive barrier towards such statements and in effect nothing positive will be achieved. However, if your client expresses themselves in a way that can be digested by the other party, then both parties can look at a common problem.

- In encouraging the team approach that co-mediators strive for, you and your client can encourage the other party to assist you in formulating an agenda, so that it is clear that you want to look at both sides of the problem and create a collaborative environment. You can do this at the mediation meeting or you might even do this via email before the meeting. Even then it is useful to think of the language that you use and the way that the other person will perceive your request.
- Following the lead of the co-mediators, you can role-play behaviour for your client and the other person. You can do this by using conciliatory language, sticking to your commitments, being clear in your goals and inviting the other party to be clear about their own goals.
- You and your client can create building blocks for harmonious negotiations by acknowledging the perspective of the other party. This does not mean that you have to be insincere or apologetic. What I am referring to is an acknowledgement of what the other person has expressed to you. This can be achieved with a statement like:

I hadn't realised that you were so angered by this ...

I can see that you are saying ...

Your concern is ...

It seems that you feel/you perceive ...

Bear in mind that whether in preparation or during the mediation, you can assist your client to employ the same tools and tips that the two mediators may use, in order to ensure that the mediation has the best possible chance of resulting in resolution. Ultimately, the goal of mediation is for each party to collaborate in designing a unique solution that meets both parties'

needs, bearing in mind their other alternatives. The goal of the mediators is to assist the parties through this process. Your role as an advocate, in borrowing from the mediator's approach, can expedite resolution and create the foundations for future dealings and relationships.

How might the co-mediation model benefit me and my client?

There are a number of ways in which both you and your client may benefit from the co-mediation model. As a legal adviser you might take early steps in assessing whether your client and the other party have a dispute that might be suited to co-mediation, or you could contact a mediator and ask for their feedback on this pre-procedural issue.

Once in the mediation you and your client may find benefit in the following ways, some of which have been touched upon previously:

- the chance for building trust and establishing rapport is greatly increased as you and your client may feel a natural connection with at least one of the two mediators;
- you and your client benefit from the advantage of a combined set of skills, which may both complement and enhance each mediator's skill set and benefit the process as a whole;
- there is a better check on any potential bias or shortcoming that one mediator may have;
- the co-mediators can role-model problem-solving behaviour in a way that assists both yourself and your client;
- the mediators can represent the diversities between your client and the other party (for example, gender, ethnicity, religion, age, etc).

Conclusion

No two people are alike, and so, when you add to the mediation table two or more parties, their advisers and any other person connected with the decision-making process, you will find a melting pot of ideas, attitudes and focus.

In many circumstances, this diversity can benefit from the co-mediation model, the idea being not to add to the differences at the table, but to reflect the



differences and make parties as comfortable and confident as possible with the process. Co-mediation can provide the variety, flexibility and integrated approach that make mediation such an attractive option for people in the first place.

This is particularly so in matters involving different dynamics such as age, gender, ethnicity and cultural background. In such circumstances the co-mediation model can add a dynamic flow to the negotiations that may potentially be obstructed by a singular approach.

As a mediator you can bring something very positive to the process just by being different to your co-mediator. Age, gender, ethnicity, education and background are just some of the criteria that may come into play.

Essentially, once you are mediating in this format, it is important to embrace the team unity approach and to prepare well with your co-mediator. Structure without rigidity is essential, as well as trust, respect and understanding boundaries.

As an advocate preparing a client for mediation, you can borrow and learn from the co-mediation approach. This is true not only of preparing your own roles, structure and boundaries, but also in developing trust and respect as a team.

In addition, you can role-play the conciliatory behaviour and communication skills for your client that a mediator role models. This kind of approach, and focus on needs-based negotiations, can greatly expedite resolution, as well as create an environment conducive to future relationships, whether they be of a personal or commercial nature.

Even before you enter the process with your client, you can work together to identify whether or not the dispute would benefit from a co-mediated approach. Not all disputes will, but with thought and preparation you can assist your client to enter the most suitable process for their dispute. ●

Bianca Keys is an accredited mediator and the Mediation Specialist for The Accord Group <www.accordgroup.com.au>. Bianca can be contacted at <biancakeys@accordgroup.com.au>