ADR Advocacy *continued*

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should recognize the need for flexibility in the mediation sessions and should be prepared to reevaluate in light of new information received and the mediator's suggestions.

10. Prepare a Draft Settlement Agreement. Mediators will insist, at the very least, that upon reaching a mutually acceptable resolution, the parties enter into a binding term sheet on all key issues.

This document is essential for avoiding a subsequent disagreement about the settlement terms, and to avoid the possibility of later remorse. Most neutrals ask mediation advocates to bring a settlement agreement draft covering the key economic and non-economic issues that need to be addressed in the event the dispute is settled in mediation.

Perhaps motivated by a feeling that the dispute is not likely to settle in a mediation session, many advocates don't follow this instruction. As a consequence, at considerable expense, advocates often spend hours drafting a term sheet after achieving an agreement in principle at the end of the day.

At this point, advocates and their clients often find themselves tired and unprepared, find that they are without important information or key documents, and overlook key non-economic issues. Drafting an agreement at the outset is valuable for preparing the final term sheet. It also is another vehicle through which client and counsel can articulate and review the client's direct and collateral goals and interests before entering the mediation.

* * *

Preparing for mediation requires an approach vastly different from the path an advocate takes when preparing for a deposition or trial. At the same time, mediation advocates can maximize the potential for successful outcomes by employing the same level of dedication and professionalism as when preparing for trial.

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ADR Skills

In Multi-Dimensional Mediation, Open Communications Take Many Paths, Through People and Technology

BY PAUL E. MASON

Q: What is multi-dimensional mediation?

A: Multi-dimensional mediation goes beyond the usual concept of multiparty mediation, although it can and often does include more than one party. As the term suggests, multi-dimensional mediation involves mediating beyond the normal two-party scenario where many other factors come into play.

These can include any of the following: more than one party; several entities participating in the mediation whether formal parties or not; attorneys acting as parties; a large number of mediation participants; employment of co-mediators, assistant mediators or experts consulting with the mediator; different media used to conduct the mediation; participants coming from different countries, cultural and negotiating traditions; use of more than one language for the mediation, and more than one organization involved in administrative aspects of the mediation.

Q: Is it really possible for a mediator to juggle all these balls at the same time?

A: Yes, although the mediator needs to keep his or her eye on all the balls, and not drop the most important one, which is getting the parties on the right track to settlement.

Q: How have these cases turned out?

A: This author has mediated at least four of them, and acted as counsel in another one. All turned out successfully. Although the total number of such mediations is not large, the cases were all complex and high value.

The first one was an environmental dispute for about $50 million between a state attorney general's office and eight multinational oil companies in a sharp conflict over responsibility for an underground gasoline plume that polluted groundwater in a residential area.

The second was an international commercial dispute over reinsurance coverage for a public bid bond on an Argentine government contract, worth about $5 million.

The third was an international dispute in the energy sector, where a Brazilian executive's performance bonuses were tied to renegotiating energy project financing for his

The author is a neutral on panels at the International Chamber of Commerce, the International Centre for Dispute Resolution, the World Intellectual Property Organization, and the CPR Institute, which publishes *Alternatives*. He focuses on mediating complex high-value international cases. He is a consultant at the Miami-based international law firm Diaz Reus, and Rio de Janeiro-based Bastos-Tigre, Coelho da Rocha e Lopes. He is former Latin American Legal Director, in-house, for Digital Equipment, Oracle, and 3Com/Palm. This article is expanded and updated from a version that was posted in the International Practice column at www.cpradr.org in November.

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company, which was owned at the time by a large multinational energy company.

The fourth was an international business conflict involving post-M&A environmental and tax liabilities of a Brazilian oil company that was sold by its Brazilian owners to a multinational oil company. The case was valued at about $3 million.

The most recent was another international business dispute between Central American companies over insurance and reinsurance coverage for business interruption flowing from damage to energy-producing equipment. This one had claims of about $6 million.

Q: What were the multi-dimensional aspects of each of these cases?

A: The attorney general case had nine parties. The Argentine public bid bond case had seven participants on one side and just two on the other, and I mediated it in both English and Spanish.

The Brazilian post-M&A case likewise had unbalanced numbers of participants, with six on one side and three on the other; I mediated that one in both Portuguese and English.

The Central American case had 11 participants from six countries and six different companies, not all of whom were formally named in the claim. We conducted that mediation in both English and Spanish.

Q: You have mentioned at the outset the factors that make these experiences interesting or unusual. Can we briefly touch on each, beginning with the first one: How do a large number of participants alter the mediation dynamics?

A: It is important to note that the number of participants as a dynamic-influencing factor is separate from the number of formal mediation parties.

With numerous participants, the main concern is ensuring meaningful dialogue—as opposed to cacophonous "multi-logue" There are various ways to do this, and in this situation the mediator has to be aware of this challenge from the outset.

Another thing to bear in mind is the need to remind all these people of their duty to keep the mediation confidential. This is easier to accomplish with one or two people on each side.

Q: What about the second factor—different roles of various participants?

It is key to immediately note and match the participants' respective levels and areas of responsibility to ensure there can be meaningful dialogue. For instance, if one party sends its executive vice president, finance director, and general counsel, but the other party sends a purely technical delegation, chances for meaningful exchange and agreement are not great.

The mediator needs to keep a keen eye on the participants' identity and mediate a match even before the formal mediation session begins.

A Q & A On Expansive ADR

The new terminology: Multi-dimensional mediation.

What is it? ADR beyond multiple participants, signaling input from a variety of party and nonparty sources.

What's it for? The big ones: cases with high stakes, across borders. Major skills sets needed to handle these cases.

Q: And what about that third factor, attorneys acting as clients?

This usually depends on the status of the conflict. If it comes from a case already filed in court or even arbitration, you have a greater chance of seeing attorneys come into the mediation to do the negotiating. This is what happened in the attorney general case, where all the oil companies were represented by their GCs or senior litigation attorneys.

With all due respect, since this author also is an attorney, one danger here is that with attorneys only, the mediation can fall into the trap of arguing over legal points only without sufficiently exploring underlying client interests.

Q: Speaking of attorneys, have you mediated cases with an attorney on one side only?

A: Yes. The attorney on one side was outside counsel accompanied by the chairman of the board and an executive vice president of her client. The other side had executives of insurance and reinsurance companies, who of course understood the basic legal concepts by trade. One came from London with a European LL.M. although he was not a practicing attorney. In this scenario, there was some legal posturing by the parties—as there almost always is—but we were able to go beyond that and settle the case.

Q: What about balancing the numbers if one party brings just a few people but the other side wants to bring a delegation?

A: This is primarily a matter for each party to decide. It is preferable not to exclude participants based on numbers alone, because one never knows before a mediation session how an individual may contribute.

Some parties may perceive a difference in numbers as a power equation out of balance. Others may see it as a challenge. In most cases there may be several participants on one side but only one or two with authority to make the final decisions.

Q: How do physical/logistical arrangements change with many participants?

A: The recent Central American mediation provides a good example. There were 11 participants. The mediation facility had only the usual long rectangular tables aligned in the typical "U" pattern, really more suitable for an arbitration than a mediation. So we rented a smaller round table to fit only the decision-makers on each side and myself as mediator. We put the round table in the middle of the "U" for the joint sessions, and also used it for the decisive mini-sessions with only these executives when it came time to see where the rubber met the road. It worked very well.

Another example is comfort vs. discomfort as a stimulus to settle. In the attorney general case, the morning sessions were held in the attorney general's personal office with a gorgeous coastline view. But he had to use it in the afternoon, so we were relegated to the law library, which was being remodeled. Boxes and books were all over the place, and it was a bit dusty. A quick settlement followed.

A further dimension of this is when you have more than one organization involved in the mediation administration. This can happen when the case is filed with one ADR group but the space for the mediation is rented from a different ADR organization, for example.

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ADR Skills *continued*

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Sometimes this is necessary but adds administrative overhead to coordinate. Best is to have a good assistant available for this purpose.

Q: What about using co-mediators, assistant mediators or experts?

A: In complex cases, the mediator may need to use one or more of these.

Co-mediators are usually best used when different disciplines are brought into the mediation, such as family cases where a lawyer acts as co-mediator with a family counselor or psychologist.

It can be suggested in business cases as well, especially those where the dispute has a highly technical component. The Central American mediation contained a large technical component regarding the energy equipment's condition, so a technical expert was retained rather than assistant mediator. The expert helped frame a helpful set of technical questions in Spanish which we sent out to each party before the mediation session to help understand and frame the precise issues to resolve.

But it is necessary to understand the motive and basis for asking for co-mediators. For example, in a multimillion dollar energy co-mediation involving parties from the United Kingdom and Brazil, the parties' lawyers insisted that each side pick "their own" mediator in a procedure similar to one selecting party-appointed arbitrators. There, each side was asking the mediator to "protect" its own interests.

Q: You refer to "different media for the mediation." What do you mean by this?

A: Almost all mediations are conducted in person in real time. But in today's globalized computerized world there are other options available in case in-person meetings aren't possible. This can happen because of scheduling conflicts and, for international mediations, difficulties in obtaining travel visas.

In the Brazilian energy executive case, we could not get all the executives together at the same time. So we took a leap of faith and tried videoconferencing because the cost of the technology had fallen steeply while video quality had risen sharply. We had sites in New York, another U.S. city, and São Paulo, Brazil.

While some principles and things do cut across and through cultural lines, negotiating styles by and large do not. And negotiation is really at the heart of mediation.

There were a number of technical and privacy issues to overcome, but we did it and settled the case. It reportedly was the first international commercial mediation where videoconferencing was used successfully.

For further information, see a chapter written by the author in the upcoming book, "International Commercial Arbitration Practice in the 21st Century," (Horacio Grigera-Naón and Paul E. Mason, Co-Editors, Lexis-Nexis books, expected early 2010).

Q: You mentioned mediator's strategies that avoid getting bogged down with so many people participating.

A: There are a number of these. One is the small round table approach noted earlier. Another is having something at the session to keep the others busy when they are not needed, such as wireless Internet access for E-mails. Another involves giving time deadlines to speak, especially after the initial venting stage so as to avoid running overtime and risking losing the settlement when people need to catch flights home. And when people start to repeat their points, it is helpful to remind them that this is not necessary.

Q: What about the language and locale issue in international mediations?

A: As in many mediations, circumstances may change from the time the initial request is filed until the mediation session actually occurs.

In one case, the original request was quite pointed and rigid—the parties specifically asked for mediation to be conducted in Central America in Spanish. But in researching the laws of the Central American country involved, the relevant mediation law had several problems and exclusions. So we moved the mediation to Miami.

Although the parties had originally asked for Spanish only, late in the game one of them brought a key decision-maker from Europe who did not speak Spanish. So we decided to let each person speak in the language they were most comfortable with, holding more of the mediation in English to accommodate the European executive. We asked each one if they could understand English well, but readily agreed to having those preferring Spanish to use it in order to express their thoughts and feelings more accurately.

If language is an issue in your mediation, carefully poll each side's participants' list about their respective language abilities and preferences well before the mediation session begins.

Q: Finally, how do you address multiple cultural presences in the mediation?

A: A colleague says that this author is a cultural relativist, as opposed to a believer, in universality of principles when it comes to mediation. True. While some principles and things do cut across and through cultural lines, negotiating styles by and large do not. And negotiation is really at the heart of mediation.

In the recent Central American mediation, one side was very crisp and decisive but far less flexible. The other side was slower, indirect, flexible and elliptical. When the first side grew impatient with the other side's lack of direction, this author counseled patience because that is the way things are done in that particular part of the world.

Likewise, when the indirect side asked whether the other side would accept a much larger offer than had been put forth previously, the author cautioned not to insult the offerees, and to consider the lack of flexibility that is characteristic of that area's negotiating style.

In short, while not revealing any specific negotiating information to either party without the other party's consent, I compared with each one the general parameters of their and the other side's respective negotiating styles. This seemed to help each side be more realistic about what they could accomplish, and drive them both toward a settlement.

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