

CAN THREE-MEDIATORS PANELS RESOLVE IMPOSSIBLE DISPUTES?

© M. SCOTT DONAHEY AND SANDRA A. SELLERS

Donahey is an arbitrator and mediator emphasizing technology disputes and a partner of the firm Tomlinson Zisko LLP in Palo Alto, Calif. Sellers is president of Technology Mediation Services in McLean, Va., and a mediator with Washington's Bickerman Dispute Resolution Group. This article appeared at Vol. 19, No. 7, *Alternatives* 71 (Feb. 2001)

A year ago, we served together on a panel of three mediators to mediate a software development contract dispute worth several million dollars. None of the mediators previously had participated on such a panel. Though initially uncertain as to the process and usefulness of a three-mediator panel, we came to believe that the advantages of this type of mediation led to the resolution of a seemingly impossible dispute.

Like many contracts, this agreement contained an alternative dispute resolution clause in which any dispute would be referred to mediation under the mediation procedures of the CPR Institute for Dispute Resolution, which publishes *Alternatives*. Unlike most ADR clauses, however, this agreement specified the use of three mediators--each side chose one mediator, and the two party-appointed mediators chose a third mediator.

How did this unusual ADR provision arise? The counsel indicated that in a draft of the contract, one of the parties had suggested an arbitration clause using three arbitrators. The other party had a negative arbitration experience and would not agree to arbitration, but would agree to mediation, so the parties compromised with an ADR clause that specified three mediators.

CONDUCTING THE MEDIATION

Planning: When the third mediator had been selected, the mediators held a conference

call. It was determined that the mediator who was the joint selection of the two party-appointed mediators should act as "chair" of the panel, which convened for the mediation session in January 2000. Since none of the group had been involved in a three-mediator procedure, nor knew anyone who had, the first order of business was to determine how this strange structure should function.

The chair asked the two party-appointed mediators how they saw themselves. The chair asked whether they considered themselves typical "neutral" mediators or if they saw themselves in any respect as an advocate or representative of the party who had appointed each of them. Both mediators felt strongly that they were and would conduct themselves strictly as neutrals.

The mediators agreed that they would convene a conference call with counsel to discuss the mediation's logistics and the submissions they wanted to receive in advance. They agreed to ask the parties: 1) to submit jointly the contract at issue and other related documents; 2) to exchange a short position statement; and 3) to submit unilaterally a confidential mediation statement.

It was agreed that the parties would be asked to include in the confidential statement three alternative outcomes with which each would be satisfied. The mediators did this despite the understanding, based on conversations that the two party mediators had with their respective clients and counsel, that only money was at issue, and that there was no possibility of any continuing relationship. In doing so, the panel wanted to encourage the parties to begin to think "outside the envelope."

In the conference call that followed with all mediators and counsel, the logistics were

discussed, including the time and place of the mediation. The chair led the discussion and presented the agreed-upon requests, but the party-appointed mediators participated freely, and pointed out items that the chair had overlooked.

The panel made it clear to the parties that all mediators were acting as neutrals and that the sole aim was to assist the parties in reaching a satisfactory solution. The three mediators also made it clear that the panel expected each party to come with a client representative who had full settlement authority.

When the panel asked the parties to submit three alternative solutions, one counsel expressed great skepticism, stated that the parties could no longer work together, and that only the amount of money that was to change hands was at issue. Upon further encouragement from the mediators, counsel for both parties agreed to attempt to meet this request.

The day before the mediation was to begin, the three mediators met to discuss what they had learned from a review of the submissions and the mediation procedure to be followed. Initially, the panel considered whether there was some way to exploit the make-up of the mediation panel in conducting the mediation. It was suggested that following the initial joint session, each party-appointed mediator might meet with his or her client group, with the chair joining in later individual sessions. This was rejected, because the panel feared that the clients might tend to see the party-appointed mediators as their representatives and advocates, which we were seeking to avoid.

After much discussion, it was agreed that the full panel would participate not only in the joint session, but in the separate caucuses as well, so that the parties were always dealing with all three mediators. All mediators would hear the unfiltered views and emotions of the parties.

The Session: The chair convened the session. He described the mediation process and ground rules for the parties and counsel. He indicated that, in light of the excellent written submissions, the mediators felt no need for formal opening statements, but asked the parties if they had anything they wished to say before breaking into caucus groups.

Both parties indicated their nonlawyer representatives wanted to address the mediators. There followed a series of point-counterpoint presentations and questions by the mediators, until it appeared to the mediators that nothing new was forthcoming. At that time, the mediators determined to caucus with the parties independently.

As the caucuses evolved, the mediator who had been appointed by the party with whom the mediator panel was meeting began to take the lead in presenting the other party's position and in exploring potential solutions. It became apparent to the mediators that each party placed special trust in the mediator it had appointed and regarded the chair as a "super neutral," whose independent views they often solicited. The three-mediator format enabled one of the mediators to take on a more direct and evaluative role, while the other mediators continued to approach the mediation from a facilitative posture.

When it became clear to the mediators that an evaluation by the mediators would be necessary if a settlement was to be reached, the chair went first in presenting the evaluation, and the mediator appointed by the party went last. This permitted the delivery of negative evaluation of the party's position, followed by a softening of the blow.

The Settlement: As we neared an agreement in principle, a roadblock emerged. One of the parties had come to the mediation with limited authority, and full authority resided in

individuals located in a time zone six hours ahead of that in which the mediation was being conducted. Again, one of the mediators was free to be aggressively confrontational about getting authority, while the other two mediators maintained a conciliatory posture.

The party without complete authority agreed to recommend settlement. As it was already Saturday where the representatives with authority were located, it was finally agreed that the terms would be recommended by the representatives present, and that the party seeking approval must communicate final approval or rejection by noon Monday.

The mediators reduced the essential terms to writing, including a statement that the party representatives who were present recommended settlement according to the terms memorialized. This agreement was signed by the parties, their counsel, and the mediators. Before noon on the following Monday, the mediators were notified that the settlement had been approved.

THE ADVANTAGES

- *Ability to adopt different persona at different stages of the mediation.*

The mediators had no preconceived ideas of their respective roles. Interestingly, the roles changed as the mediation progressed.

During the storytelling and brainstorming phase, each mediator actively questioned each party. The party-appointed mediators seemed to take the biggest role in questioning the "opposing" party's representatives, in an effort to search for possible solutions.

In the settlement phase, the mediator appointed by the party with whom the mediators currently were caucusing presented the proposal from the opposing party, and took the lead in offering thoughts or suggestions. The so-called chair added his thoughts next, followed last by

the mediator appointed by the opposing party.

Near the end of the mediation, with settlement near, the party-appointed mediators began to play "good cop/bad cop"--aggressively pushing their "own" parties, and assuming a softer, conciliatory tone with the "opposing" party. The chair continued to play the role of the "super neutral," offering opinions and making suggestions in support of the party-appointed mediators.

When either party asked the mediators for an evaluation, the chair led, followed by the mediator appointed by the opposing party, saving the party's own neutral for last. This enabled the party's neutral to either soften the blow or reinforce the other mediators' views, allowing no room for the parties' misinterpretation.

Though every mediator changes hats throughout the various stages of mediation, The panel believed that having different persons to play different roles was extremely helpful in convincing these entrenched parties to settle.

- *The opinions of three mediators had more impact than one opinion.*

As noted above, each mediator gave the parties a brief evaluation concerning substantive legal questions, as well as the range of the value of the monetary settlement. Interestingly, the mediators agreed on most issues, though for different reasons. The mediators strongly believe that the collective opinion of three mediators--independently reached and expressed--was more persuasive than any one opinion, and probably convinced the parties that settlement was the best option.

- *Three heads are more creative than one.*

With different experiences and perspectives, the three mediators collectively were more

creative than one mediator. Though the parties ended with a monetary settlement, the mediators delved into many other possible settlement options, playing off of questions or ideas raised by another mediator.

- *Splitting the mediation duties was less strenuous.*

Finally, the long, continuous sessions were less exhausting to each mediator because three mediators split the roles and the time as spokesperson. The panel members were able to stay fresher, which permitted all three to remain creative and patient, particularly when the settlement may have been lost due to one party's lack of full settlement authority.

THE DISADVANTAGES

We identified only two disadvantages to using a three-mediator panel. It took longer to select three mediators and coordinate schedules (due in part to the Thanksgiving and Christmas holidays). Nevertheless, the mediation was completed within 60 days of the parties' invocation of the contract's ADR provisions.

The expense to the parties, of course, was greater with three mediators than with one. Each party paid directly the mediator chosen by them; the parties split the fees and expenses of the third mediator.

CONCLUSION

At the mediation's conclusion, both parties indicated that they initially had expected the mediation to fail, and believed the three-mediator panel was extremely helpful in reaching a successful outcome.

Though the extra expense and initial difficulty in coordinating schedules may not be worth the use of a three-mediator-panel in many disputes, it could prove to be the best method

to resolve some disputes that previously were considered impossible to settle.