

# CO-MEDIATION

## A Success Story at Chicago's Rush Medical Center

By Richard Blatt

Max Brown

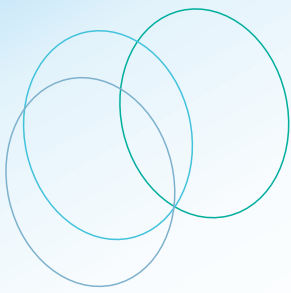
Hon. Jerome Lerner

### Introduction

Alternative Dispute Resolution (ADR) processes can be extremely flexible, and they need not fit traditional approaches. This is especially true in private mediation, where the parties can come together to seek resolution of their disputes in informal, creative, and even unorthodox ways. These are often referred to as “hybrid” ADR processes. As these hybrid methods are seen to be successful, they become more widely used, and one hybrid method that is gaining an increased following is co-mediation.

Basically, co-mediation is a method in which more than one mediator is engaged in a single matter. There can be two, or even more mediators, depending upon what the parties decide is appropriate. While its most frequent application currently is found in court-annexed domestic law disputes, co-mediation is often used in complex commercial disputes, which may involve interdisciplinary issues, and the mediators are selected because of their expertise in these disciplines. Since it is rare to find a single mediator with a variety of commercial disciplines at his or her command, the employment of two or more mediators in a complex matter can be very useful. Such disputes, whatever the subject matter, may involve many related claims or cross-claims or even many parties, and the mediation process can be tailored to fit the needs of the case.

In the tort context, co-mediation can be very useful when the main issues of the dispute are not necessarily factual, but arise because of the perceived biases of the parties' counsel or the perceived biases of a sole mediator. This situation often arises in medical malpractice disputes, when the plaintiff's counsel and the defense counsel may, for example, sharply disagree on the value of a case and may ultimately wish to turn to an unbiased mediator for an evaluation. A mediator who is unbiased may actually be very difficult to find in the medical malpractice arena, as those who might be called upon to act in this evaluative capacity might often be perceived to have pro-plaintiff or pro-defendant sympathies and therefore be unsuited to the role.



## **The Rush Medical Center and its Successful Co-Mediation Program**

Some years ago the co-authors of this article, Max Brown, who is the Vice President and General Counsel of Rush Medical Center in Chicago, and the Hon. Jerome Lerner, a retired Judge of the Circuit Court of Cook County, Illinois who had pioneered many ADR programs for the Illinois courts, became concerned about this problem. They studied ways to address through mediation the spiraling litigation costs, delays and unpredictable trial results that are associated with medical malpractice litigation in the Chicago metropolitan area.

Historically, the use of private ADR in the medical malpractice arena in Cook County, Illinois was nearly non-existent, and it was felt that the medical malpractice bar was, at best, indifferent and, at worst, hostile to the use of ADR. Nevertheless, they concluded that a voluntary co-mediation program could be effectively applied to the task of fairly and efficiently resolving medical practice suits against Rush Medical Center, which is one of the major teaching hospitals in the United States.

The voluntary program that they developed with their colleagues at Rush and with their colleagues at the bar, was initiated in 1995 and has become known as the "Rush Model." The program directly addresses the perceptions of bias of both the plaintiffs' medical malpractice bar and of the defense bar. While the parties can, if they choose to do so, enter an evaluative mediation with a sole mediator who is a retired judge selected by the plaintiff, this aspect of the program has not been widely used in practice. On the other hand, the Rush co-mediation program has been highly successful.

### **How does it work?**

#### **Experienced Trial Attorneys from Both Sides of the Bar are Selected by the Plaintiff as Co-Mediators**

The key element in the success of the Rush co-mediation program is the panel of lawyers from which the co-mediators are chosen. These lawyers are experienced and well-respected medical malpractice counsel from both the local plaintiff and defense trial bars. The reasoning behind this approach is that a lawyer who mainly handles plaintiffs' medical malpractice cases will be paired with a lawyer who primarily defends such cases, as co-mediators. Mediation of a case by co-mediators, who usually approach medical malpractice claims from opposing points of view, clearly promotes the parties' trust in the integrity of the process. As an inducement for plaintiffs and their counsel to participate in the voluntary program, plaintiffs are given the opportunity to choose both the plaintiffs' attorney co-mediator and the defense attorney co-mediator.

#### **Mediator Qualifications and Required Mediator Training**

The use of highly experienced and well-regarded trial counsel as mediators has contributed greatly to the success of the Rush program. The mediators' specialized knowledge of the medical subject matter,

their familiarity with relevant evidentiary issues, and their deep experience of medical malpractice litigation have resulted in efficiently conducted conferences, to the extent that most mediations under the Rush program are successfully concluded within a single day. Moreover, the professional reputations of the mediators have served to instill confidence not only in the mediators' analyses of the claims but also in the integrity of the ultimate resolutions of the claims. Even when claims are not resolved, the participants in the process have consistently expressed positive comments and appreciation for being able to use the Rush program.

Of course, the mediation skills of the mediators are extremely important, especially in evaluative mediations, where the mediator or mediators are requested to provide an evaluation of the case to the parties. Accordingly, all mediators in the Rush program are required to undergo periodic mediator training. This training is provided by Rush, often under the joint auspices of a local law school.

### **The Mediation Agreement**

The Mediation Agreement that is used by the parties is simple and straightforward and promotes advance understanding of the mediation process. The parties' experience with the Agreement has been positive, and it has basically eliminated the need for negotiations on the conventional housekeeping points that it addresses. The Agreement calls for a streamlined process, including the early exchange of pre-mediation submissions and brief presentations by each side at the initial mediation conference followed by caucuses. Importantly, it provides for a neutral forum with expenses to be shared equally by both sides. It assures confidentiality as well as finality.

### **Cost Effectiveness**

Among the early hospital-based mediation programs to be established in the United States, the Rush program also serves as an alternative to the use of

commercial ADR providers. Although Rush does not view itself as being in competition with these providers, the Rush Model is able to offer to plaintiff participants very competitive cost features if they elect to use the Rush program. Indeed, Rush has provided, and continues to offer, free consulting services to not-for-profit hospitals and other health care institutions in the Chicago metropolitan area and to hospitals in other states to enable them to establish effective ADR systems of their own.

### **A Record of Success**

The Rush program has resolved in excess of 90 major medical malpractice claims, achieving a success rate in excess of 80%. This program has been recognized nationally by leading ADR entities as an innovative and effective method of resolving medical malpractice claims. Two bills have been introduced in Congress recommending the Rush program as a model to be replicated by health care institutions. The present Governor of Pennsylvania has also recommended the Rush program as one to be replicated by the hospitals of that State.

### **Replicating the Rush Model**

The reason for the success of the Rush program is quite simple. Through the co-mediation process, people have ventured out of their traditional litigation roles and have worked cooperatively to resolve disputes. There is no question but that the success of the program can be traced back to the support of the local trial bar; that is, a willingness on the part of the plaintiffs' bar to put aside the perceived self-serving motives of Rush for establishing the program in the first place, and a willingness on the part of the defense bar to overcome the fear that the program would result in the diminishment of billable hours and profits. But the main reasons why the Rush program has succeeded are, again, the quality of the mediators and the fairness with which they have considered the matters before them.

**A detailed description of the Rush program may be obtained in Chapter 18 of the Illinois Institute of Continuing Legal Education's 2001 Alternative Dispute Resolution practice handbook.**

#### **Authors' Note.**

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