Perspectives on mediating class actions and other complex cases

A look at the substantive and technical issues unique to class-action case mediation

By Dave Rudy

In class actions (and virtually all other complex cases), complex logistics create special challenges for both parties and mediator. Advocates for plaintiffs (and defendants, for that matter) have choices which can influence the quality of the complex case, mediation process and even the outcome. Many substantive and technical issues arise which are unique to class-action cases, including, for example, notice and opt-out issues (including whether notice consultants should appear at mediation), coupon settlements, due process issues, mediator's role in certification or fairness hearings, rights of absent class members and mediation confidentiality issues. Discussion of these matters is beyond the scope of this article.

Process decisions

Complex cases almost always present with complex logistics. A class action, for example, often has several plaintiffs' firms, many cases with lead counsel groups and steering committees, etc., (and may have similar complexity on the defense side). Timing of sessions, who appears when, how the mediator's time is divided, how much *intra*-team mediation is required – all these and more decisions face every class-action mediator in the typical case.

Advocates may take one of two approaches toward process decisions:
(1) It's the mediator's problem – my job is to advocate and the mediator's to manage the mediation. I already have my hands full coordinating class representatives' schedules and preparing them for mediation, writing briefs and demand letters, and getting myself and the case ready for the day of mediation. Process is what I pay the mediator for.
(2) If I work with the mediator on logistics and help to think through the process and how to make it run better, the process may run more smoothly and efficiently, to my clients' advantage. I may also get better performance from the mediator, who is now free to focus more on substance and negotiation and less distracted with the whole burden of administrative, managerial or logistical concerns. Indeed, since process decisions may improve or hurt my clients' position in the negotiation, it is better that I participate in them to maximize my clients' best advantage.

What effective trial lawyer does not make frequent "process" decisions in the courtroom, from when to call or conclude with a particular witness to whether or not to object to an objectionable question? Would not the same approach be of benefit during mediation, where the presiding officer will work collaboratively with all sides to ensure a better quality of process? Should advocates really take a "hands-off" approach to process issues when they could impact the quality of both negotiation process and result?

Selecting the mediator

This is not intended as a "rookie" discussion. It is, rather, an invitation to seasoned and successful practitioners to re-examine your mediator selection methodology in complex cases.

The first two questions you ought to answer (the order is irrelevant) are these: **(1) What kind of negotiator am I?** The answer will determine the kind of mediator who will maximize your side of the negotiation.

If you do not like negotiation, are not particularly good at it (you must do an honest self-appraisal on this issue), and prefer to have someone else in control: running strategy, picking settlement targets, determining the timing and sequence of negotiation moves, you may prefer a take-charge (evaluative) mediator who runs the negotiation and acts somewhat independently of your side (and the other sides as well).

If you rate yourself (objectively) a good negotiator, like to negotiate, and especially like to keep control of the process (or at least your side of it), you probably will prefer a more facilitative mediator – one who is willing to strategize alongside you and plan and execute a jointly developed negotiation strategy favorable to your clients. At a minimum, you need a mediator who recognizes that the negotiation belongs to you and your client, *not the mediator*, and who will work under your direction rather than insist that you work under his or hers. [Note: the manner in which a facilitative mediator retains neutrality is by strategizing with all sides equally. Facilitative does not mean "in your pocket" or "carrying your water." It does mean willing to work with you to maximize your negotiation objectives while simultaneously working to maximize the objectives of your opponents.]

The advantages of such a mediator are that s/he will consult with and help to enhance and maximize your negotiation effectiveness; she will work to present your proposals and communications in the best possible light; he will enhance your ability to negotiate in a given context rather than limit it or retard it due to the mediator's conflicting agenda or bureaucratic (or autocratic) pre-suppositions and process-related decisions.

(2) What are the obstacles to resolution in this particular case?

The answer will determine what kind of skill set your mediator needs to have, and whether "subject matter expertise" is a significant criterion in the selection process. You may be surprised at the suggestion that subject matter expertise may be one of the least important considerations in mediator selection. Just as a great trial lawyer can try cases over a wide range of subject matters, an excellent mediator can work in a wide variety of types of litigation. As your (ultimate) job is to persuade judges and juries, the mediator's (ultimate) job is to assist parties in conflict to resolution. In both cases, people skills are usually more important than technical knowledge (although the required people skillset is different in the two professions).

Consider expert witnesses as an example. One can be an exceptional technical "expert" in a field but be unable to explain to others or convince them of a particular position in that field. So, a trial "expert" who is a genius in her field but who has below-average communication skills may not experience the results of her colleague, who lacks some depth in the subject matter but is a great communicator. And a mediator "expert" who knows more about the intricacies of Business & Professions Code section 17200 than about handling people in conflict will often be a bad choice for the case.

This does not mean that complete ignorance of the subject matter is a good qualification for a mediator. S/he must be able to understand the issues, have some knowledge of the subject matter, bring analytical ability to bear on identifying the obstacles to settlement, etc. These skills are not easily employed by one who does not understand the "language" of the case. It does mean that often a "working knowledge" of the field coupled with real mediation skills and experience will be a far better choice than true advanced expertise in the field but little mediation skill or experience.

Depth of "subject matter expertise" may actually be a negative rather than a positive in some situations. There is one category of case where such depth of experience on the mediator's part may become virtually deadly, and one where significant expertise may be a great plus.

Subject matter expertise becomes deadly whenever the mediator uses that expertise to evaluate *your* case in a quasi-decisional way. Take a not-too-hypothetical case where a mediator (not a retired judge, by the way, but a former lawyer) announces to the plaintiff's counsel at the beginning of the mediation, "You have six causes of action in your amended complaint. Four are worthless bull – and I am not going to waste my time on those. We'll focus on the other two." Needless to say, that would be the beginning of a very bad day for the plaintiff's lawyer (and the plaintiff!)

Be careful what you wish for. If you want a strong-willed, highly evaluative mediator to whip your opponent into shape, you may end up as the whippee instead.

Subject matter expertise is extremely helpful, on the other hand, when you confront a situation where your opponent truly is "out of his depth" in the case. S/he thus fails to appreciate the significance of positive evidence or law on your side or the threat of negative evidence or law on your side. Thus, this opposing counsel's evaluation produces a chasm in the negotiation. In other words, this is the case where your opponent (this applies equally to plaintiff or defense counsel) is deficient in the area of law and as a result needs to be set straight on serious factual or legal misconceptions.

But make sure to be careful in concluding that that is your problem. In the experience of this author, this problem actually occurs in a very, very small percentage of (all kinds of) cases. Lawyers, however, perceive or fear that this is a problem in a large percentage of cases. Lawyers think this problem will haunt settlement discussions far more than is actually the case. Where your opponent's ignorance is objectively a problem, a mediator respected as an authority in the field may have a significant beneficial impact on your negotiation (as long as he agrees with you on the important substantive issues).

A subset of this sometimes occurs on the defense side. It is possible that the defense lawyer, who does understand the

case and knows the field well, is having trouble with her own client(s), who may not. Sometimes, the real progress in mediation comes when the knowledgeable mediator can mediate inside the defense team and develop more appreciation of full exposure on that side.

One more point on mediator selection: you should never, as an advocate, abandon the choice of mediator to the opponent. The choice of mediator may be critical to achieving resolution. Even more important, it may be critical to achieving an outstanding resolution. The oft-heard expression: "whoever they want is fine with me, as long as he is minimally competent" should be removed from your lexicon. It assumes that you cannot find a mediator who will both be acceptable to your opponent(s) and do a great job for you. It is prudent to find a provider who not only books and bills mediators but works with parties to bring them the best talent for a particular case. In such cases, there is a high probability that you will end up with a mediator who will work well for all sides. Hold out (even fight) for the mediator who will do the best job for both sides – don't make the mistake of agreeing to the opponent's choice because "they will listen to him." The chances of settlement will increase. Even more, the chances of a beneficial settlement will increase with the right mediator. The wrong mediator, as you probably know from bitter experience, can force a case that should have settled to trial.

What special considerations influence the mediation process?

• Time required. Logistical complexity adds potentially huge increments of time to the process. Bear in mind that in the first four hours of a six-party mediation, apart from greeting, coffee and restroom breaks, the mediator will spend an average of 40 minutes in each room (including yours). More logistically complex cases take much, much longer to mediate. As a former trial lawyer, the author is familiar with the interesting subject of lawyers' time estimates. Make sure you and your clients are prepared for long delays in mediator visits, especially where there are multiple defendants, corporative representatives, insurance representatives, personal counsel, coverage lawyers, etc. in the other rooms.

• You can help think through and streamline the process to minimize adverse impacts from long delays. Would the case profit from a pre-hearing caucus (technically the mediation begins then or earlier by phone), with just your side? With just the other sides? With just the lawyers, to set the agenda for the negotiation? Of course, briefs and pre-mediation conferences and telephone calls are always helpful to expedite the process. But in many cases much more can be done before the actual joint mediation session. In complex cases, thinking through these issues can often help to generate a process and momentum that is tuned up and ready to generate real movement on the actual hearing day(s). Assume, for example, that in a class-action case there are multiple plaintiff counsel from different firms and not all are agreed on a single settlement strategy. One option that is rarely used is to schedule a live (video, conference) session with just the plaintiffs' side as the first session of the mediation. The hope is that by the time the full mediation session occurs, the plaintiff team will be of one mind in how to pursue negotiations. This can shorten the process considerably. Indeed, the alternative to doing this before the defense appears at the hearing is to do it while the defense waits in the other room. This can make for a long, frustrating and difficult day. Although the immediate impact may be felt by the defense, you will undoubtedly not benefit from the other side's frustration throughout the day.

• Give the mediator as much information as will help identify the obstacles to settlement and work on them. Naturally it is important for the mediator to understand your positions on the issues in the lawsuit, both legal and factual. But that is really only a part of what a good mediator needs to help you resolve the case. She needs to know where *you* think the *obstacles* are and why. She needs to identify the problems that are in the way of settlement on *your* side of the case. She needs your best intelligence and reading of the opponent, and what obstacles you know about on their side. She needs to know in candor why you need an effective mediator in the case. Good mediators figure these things out in every case. They must do so to do their job. But it always takes time, and may waste time heading down unproductive rabbit trails and having to change course later. You may not know all of the issues or problems on the other side. But if you share early with the mediator whatever you do know, it always helps the process. If you can't trust the mediator with such information (provided confidentially, of course), you have selected the wrong mediator for the case.

• This is not an exhaustive discussion of a complete list of considerations for complex case mediation. But the hope is that you will add some topics to your pre-mediation checklist, from mediator selection to mediation process logistics. Thinking through these issues will help you to work side-by-side with quality mediators to "win" the negotiation and improve the quality of your mediation advocacy.


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