



Mediating the class-action case

A look at the process and substance of class-action mediation, and plaintiffs' intra-team disputes

BY DAVE RUDY

Process and Substance

Normally in civil litigation, the mediator will not concern himself with the *substance* of the deal.¹ That is to say, the mediator's role does not typically extend to approving the substantive terms on which the parties decide to resolve their dispute. The mediator's primary responsibility is to guard and tend the *process* of mediation. The only factor (relevant to the present analysis) which typically crosses the line between *substance* and *process* is the *durability*² of a settlement. Although *durability* is mostly a *process* concern, the line is not bright, and often it is an issue of *substance* as well.

Durability is a critical concern in every class-action settlement. These settlements bind the rights and obligations of absent participants (class members), raise serious due process concerns (far broader than the mechanics of notice), present detailed issues with respect to the defendant(s)' obtaining of complete peace, and are subject to scrutiny and analysis by the trial judge and potentially appellate justices.

As every class-action lawyer knows, it is unproductive to spend hours or days arriving at a hard-fought settlement which is later rejected by the trial court. In addition, Defendants are especially concerned with the breadth and finality of the resulting peace. The more durable the settlement, the more desirable it is to the class-action defendant. Therefore, considerations of *durability* are extremely

Author's note:

In a previous *Plaintiff* article (January, 2013) I discussed general considerations in selecting mediators in complex and class-action cases. This article examines the subject further, including scrutiny of mediator qualifications in class-action cases. In addition, I examine strategies for addressing intra-team squabbles on the Plaintiffs' side in class-actions cases.

None of the suggestions made in this article is intended to be dogmatic or preclusive. The purpose is to encourage practitioners to analyze these issues more deeply as part of their mediation preparation.

important to both sides in class-action settlement negotiation.

All of this points to the need for a well-qualified class-action mediator. A durable settlement is much better facilitated by a mediator who understands what *durability* means in a class-action settlement, and tends the process with an eye firmly fixed on settlement issues and how they relate to process.³ A matter as basic as *when* to raise particular settlement issues can be critical to the conclusion of the case.⁴ Here are some other considerations that an experienced class action mediator will bring into focus:

- Should non-monetary or monetary terms be discussed first?
- How detailed does the MOU or "deal sheet" need to be to prevent a deal from blowing up during the proposed class settlement agreement drafting phase?

- How and when should attorneys' fees be discussed?
- What issues might foreseeable objectors/intervenor raise?
- Will the current proposal(s) regarding notice and class-wide release likely pass muster with the Judge?⁵

Experience in class actions vs. "subject matter"

This author contends that subject matter experience, while desirable, is not nearly as important as *process* experience. There is a difference between a mediator experienced in class-action lawsuits and one with expertise in the "subject matter." For example, imagine a section 17200 case in which your opponent proposes as the neutral an experienced wage and hour litigator who is a novice mediator. The wage and hour lawyer's class-action experience is relevant to knowledge of class-action settlement issues, what the court might be interested in knowing when considering whether to approve the settlement and related matters. So the lawyer's class-action experience constitutes some qualification as against another who has no experience with class actions of any kind. The fact that her experience is in a different class-action field should not disqualify her from consideration for this assignment.⁶

The problem, rather, is the proposed neutral's lack of experience in managing the *very* complex logistics of the class-action mediation. One might think that having attended many class-action mediations, it is relatively easy to transfer that experience to the mediator's role. In fact,



whereas the mediator may be engaged in virtually linear conversation in any given room, the totality of all rooms is far more complex and typically far from linear. In addition to managing each of those conversations, the mediator is focused on the time of day, overall progress, timing with respect to injection of issues, what the terms and conditions of settlement will look like, and a dozen other matters, all the while dealing with one curve ball after another disrupting the flow. The point is not that it takes a certain kind of genius to be a mediator, but rather that experience in the role of mediator is important: there is no substitute for time on the firing line and experience in successfully keeping all the balls in the air simultaneously.

Precisely because the mediation will present manifold unexpected challenges, the wiser course is to have an experienced class-action mediator in place.

All of this suggests that the best class-action mediator choice is one with substantial experience in mediating class actions, who is expert in complex case logistics, and who has sufficient subject-matter expertise to be able to work effectively and credibly with the parties and counsel in getting the matter resolved.

Intra-team⁷ disputes: Plaintiff

Even the slightest familiarity with class actions will include some familiarity with intra-team disputes on the Plaintiffs' side.⁸ Issues in contention may range from professional disagreements about how to plead or proceed with the lawsuit(s) to disputes over lead counsel assignments, "copycatting" and division of attorneys' fees.

The potential disputes cover such a wide range of topics or particular instances that it is unproductive to try to catalog them. Instead, let us consider some suggestions with respect to their best resolution.

First, it is axiomatic in order to be most effective and successful, any negotiator must not be burdened with collateral

issues that impede her ability to focus on the negotiation. In other words, the Plaintiffs' lawyer should be able to bring to bear all her attention and skill on only one front: negotiation of the best resolution of the dispute with the opponent. Dividing resources between intra-Plaintiffs disputes and the main dispute with defendant(s) should be avoided wherever possible.⁹

A threshold issue may compound the challenges to pre-mediation resolution of differences among Plaintiffs' law firms. Counsel do not want to waste time and money trying to resolve issues which may become mooted in the event that settlement between Plaintiffs and Defendant(s) fails.

There are at least two reasons why this threshold issue should not stand in the way. First, it is worth the extra time and effort to eliminate this obstacle because of the damage that intra-Plaintiff disputes can do to the strength of the Plaintiffs' negotiating position. Second, even if the action(s) is not settled at this mediation session, it will be very productive as the litigation or settlement process proceeds. It is important to establish good communication among multiple Plaintiffs' counsel, get them working together, and generally agreed on overall strategy. Chances are it will be well worth the effort to build bridges and solve problems on the Plaintiffs' legal team even absent a settlement at that juncture.

If counsel are unable to resolve differences prior to contacting the mediator, some early mediator intervention is highly advisable. Counsel should be strongly urged by the mediator to meet and address plaintiff-side issues *only* for one-half day or more in advance of the full mediation session. It does not strengthen the Plaintiffs' hand in the coming negotiation to have time and energy flowing into intra-team disputes. It also does not bode well for the success of the mediation day if much of the early mediation session is consumed by plaintiff-only matters that do not involve (but may fortify) the defense. It is a momentum-

killer whenever one party must sit for a lengthy period while the opponent resolves intra-team conflicts.

Even if Plaintiffs' counsel are unable or unwilling to meet prior to the main mediation session, the mediator should initiate the conversation and raise the issue(s) with each of the counsel prior to the mediation session. This pre-mediation or "advance" work is required in virtually every logistically complex case; in class actions, it is indispensable. The more work done on these kinds of issues prior to the mediation session, the more likely resolution is to occur on the appointed day(s). Mediators should do whatever they can to raise issues about any incipient plaintiff-side (or defense-side for that matter) conflicts and do what they can to resolve them outside (and preferably before) the main mediation session(s). Advocates should hold the mediator's feet to the fire to make sure that this pre-mediation activity actually occurs and that the mediator follows up as needed.

In many types of cases, the defense may be pleased to see conflict on the Plaintiffs' side (among counsel or between counsel and party). In the class action, however, the opposite is as likely. Class-action defendants are motivated by the peace that a settlement will achieve. Internecine warfare on the opponent team may tend to make the defense more nervous than happy.¹⁰ The defense is also aware that settling one case and forcing the other Plaintiffs and counsel into an objector role may not present the best posture for court approval of the settlement. That, in turn, calls *durability* of settlement into question, and such a posture is therefore undesirable for both sides as previously discussed.

There are many ways to resolve such disputes on the Plaintiffs' side. Counsel may do so without assistance prior to mediation. The mediator may assist them to resolution of these issues, working by telephone and/or separate session. If no conclusive agreement can be reached, then an interim agreement on matters



JANUARY 2015

affecting the negotiation should be attempted, covering subjects such as:

- Who is authorized by the group to negotiate with the other side;
- What are the key terms on which all can agree (including ranges of acceptable positions on amount of settlement and other key issues);
- What information (if any) about the intra-team disputes should be communicated to the opponent (there probably needs to be some such communication, because these issues inevitably will have implications for settlement documentation as well as for the terms and conditions of settlement);
- Alternate means of resolving any remaining issues (use of arbitrator or Special Master, further mediation after a deal has been reached with the defense, submission of some issues on a disputed basis to the judge as part of the settlement approval process, etc.); and
- Any other subjects necessary to provide a framework that allows the negotiation to proceed while preserving the disputed positions.

Each of these approaches provides the benefit of removing the intra-Plaintiff team disputes at least temporarily, so that the main negotiation can proceed without interruption. Thus, Plaintiffs' counsel maximize chances of a settlement on terms more favorable to the side otherwise

weakened by the conflict, keep momentum going in the main negotiation, and put to the side issues that compromise the strength of Plaintiffs' negotiating position.



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Endnotes

¹ A notable exception (not relevant here) would be the special case where one or more parties are unrepresented and misrepresentations of law lead an unrepresented party to an unrealistic view of the strength or weakness of their legal position. In such a case, the essential fairness of the process itself – which is the mediator's responsibility – may quickly be called into question.

² Let us adopt a working definition, for purposes of this analysis. *Durability* means the likelihood that a settlement will actually be able to be implemented and survive such that the dispute (at least as much as is settled) is truly put to rest by the settlement agreement. Obviously, to the extent that a settlement is unlikely to be approved by the Court, it is not durable.

³ The undersigned, and undoubtedly many of the readers of this article, has been involved in a number of class action settlement processes where the non-monetary negotiation was far more critical, difficult and time-consuming than negotiating the principal settlement sum.

⁴ This is *not* to say that class-action attorneys need a mediator to tell them what to place on their settlement list of issues. Rather, the point is that an experienced class-action mediator understands these issues, sees them coming and can be very helpful to experienced counsel in two ways: developing the *recipe* for the settlement process itself (typically unique to each case); and in *mediating* the timing and expression of various issues to make the process work at its best.

⁵ This is not an exhaustive list, but these are some considerations in which the running of the process may affect the likelihood of settlement, and surely affect the efficiency and ease of the settlement process.

⁶ Of course, wage and hour experience is not entirely the same as section 17200 experience, but the differences are not so pronounced as to make the wage and hour lawyer's experience lack value in a section 17200 case.

⁷ The term "team" can be a misnomer, when there are intervenors, issues of "piling on," etc. One consideration for mediation logistics is having ample space into which to separate pieces of the Plaintiff side.

⁸ There is a host of issues that can arise on the defendants' side of the case as well, many involving similar professional disputes concerning how the action should be litigated, conflicts among defendants, etc. This analysis focuses on Plaintiff-side issues only.

⁹ It is not uncommon in this writer's experience for such disputes to have been resolved prior to mediation. Watching the course of settlement negotiations where this is not the case quickly convinces any observer that the former course is far more effective than the latter. On the other hand, disputes on Plaintiffs' side can also operate to add leverage and/or value to a class settlement, to the extent that the defense is made aware of them to Plaintiffs' tactical advantage.

¹⁰ Of course, this is a generalization, and like all generalizations, needs to be taken critically in any particular case.









