

Mediating mass-action cases

A mediator in mass actions must balance logistical coordination, legal complexity and, often, intense emotions

By Debra Bogaards

Managing mass actions effectively as a mediator involves unique challenges. There is a trend of class actions moving into mass actions, so the field is growing. Mass actions simply are lawsuits involving large groups of plaintiffs against one or more defendants. A mediator in mass actions must balance logistical coordination, legal complexity and, often, intense emotions. The goal is to resolve the matter efficiently without prolonged litigation.

Mass actions most often include fire cases, PAGA employment, multiunit habitability and environmental exposure. In fire cases involving personal injury, everyone is affected differently by smoke inhalation and burns, both in terms of physical injury (or death) and emotional distress. There may also be environmental exposure such as contamination from firefighting chemicals, pollution from smoke (or asbestos or plastics) as well as soil and water contamination. There are also property-damage fire cases, involving one's home and personal property inside of the home.

In multiunit habitability cases in large developments, there often is exposure to toxic mold, sewage spillage, cockroaches, rodents, flooding and other deplorable conditions. Tenants may react to the exposure to mold, resulting in increased asthma and other health-related symptoms. There may be doctor's visits for treatment of those symptoms. There may be photographs or videos of the mold, sewage, cockroaches and rodents, flooding, etc. The property manager should have emailed notice by the tenant, inspections and repairs.

Choosing your mediator

Naturally, you will want to select a mediator with experience in complex litigation or mass torts. Hopefully, one with skills involving structure, organization and momentum. Think numbers, charts, timelines and matrixes. The mediator should have credibility with all sides. (The mediator's "credibility as an influencer comes from people's perceptions of four things: your [mediator's] authority, knowledge and competence derived from real-world experience and trustworthiness.") (G. Richard Shell, Bargaining for advantage, (2018, 3rd edition) p. 8.)

Lastly, the mediator should possess the ability to handle both legal and emotional dynamics.

My best advice is to select your mediator (and experts) early. Perhaps when you first get the mass action, on either side, start thinking about selection of the mediator. Why? Because a strong mediator can help you (1) coordinate and communicate with lead counsel or steering committees for plaintiffs and defendants, (2) the mediator will hold multiple individual confidential sessions with different plaintiff groups, defense teams and insurance carriers, and (3) the

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mediator will schedule Zoom status conferences or regular check-ins with counsel to monitor progress, facilitate informal discovery, and adjust mediation date(s), as needed.

After selecting your mediator, set a mediation date(s) sufficiently far enough out (three to six months or more) to gather the necessary documents and information so the defense will be able to review that data, evaluate the cases, and set reserves. This process usually involves Zoom check-ins and good coordination. In my experience, there are often reasonable delays on both sides in the exchange of this data, so again, a strong mediator can greatly assist in maintaining momentum.

One word about momentum and delays. Sometimes, counsel can get rather upset and wound up if they wrongly perceive the delay as being purely manipulative or tactical. They may throw the equivalent of a tantrum (you know, nasty emails, threats and bullying behavior). The mediator's role is to listen to the counsel who feels aggrieved and resolve the dispute. The mediator is the one to make sure everyone's back on track and the case is moving forward.

Management of documents and information

Your selected mediator will act as an informal discovery referee in terms of assisting the parties in managing documents. The mediator will facilitate the secure exchange of medical records, testimonial evidence and expert reports.

Testimonials may be useful on occasion. As the mediator, I have assisted the parties in scheduling testimonials to be conducted by counsel on Zoom of the heads of households in a large 500-person habitability mediation. In rare cases, where plaintiff's counsel has little or no evidence, save for a few photos, testimonials are the best option to obtain information directly from the plaintiffs as to liability (mold and non-mold issues) and damages. And another benefit is that counsel can assess witness credibility. The testimonials were informal and limited to 15-20 minutes each, so, more efficient than a deposition both in terms of time and cost. The Zoom testimonials of the heads of households were conducted with both plaintiffs and defense counsel present on weekends due to the work schedules of the families involved. The dates for the testimonials were determined during regular Zoom check-ins between the mediator and both sides. By having the mediator involved even in the scheduling, both sides kept moving forward and reasonable adjustments in the scheduling were made.

In addition, the parties should identify key legal and factual issues. The mediator can facilitate discussion of, and agreement to, a timeline, essential facts and assumptions. It is helpful to pin down these significant facts at the outset. All of these facts will affect the evaluation of plaintiffs' damages for settlement purposes. Lastly, the mediator can facilitate the use of case management software for filings, communications and case inventories.

Planning the format of the mediation

A young associate from a prominent defense firm called me to schedule a mass action mediation for two full days, about 60 days out. He gave me a short summary of the mass action. I asked him why he wanted two consecutive dates for mediation, and he didn't have a solid idea. It was at that point that I realized we needed to have a focused and substantive discussion of the format of the mediation. In the end, we determined that we needed phased mediation as well as certain days for individual sessions with the large group of defense attorneys, insurance coverage attorneys and the claims representatives. We also needed to plug in regular Zoom check-in sessions before the mediation with plaintiffs' counsel and lead defense counsel to make sure the exchange of information, documents, and testimonials were on track.

Phased mediation

A phased mediation – legal issues and damages – breaks the mediation into stages.

Since there are often multiple plaintiffs with divergent claims, the mediator may assist with selecting representative cases to *test* settlement values and guide resolution of the remaining claims. These are often referred to as *bellwether cases*. This test of settlement values in representative cases is very important for the defense so the insurance carriers will be able to set reserves. For example, the mediator can help the defense value the exposure by dividing the plaintiffs into those with the most significant damages, the most minor damages, and those in between. Thus, the mediator can use the data and sample cases to assist with the estimate of damage. In contrast, plaintiff's counsel usually wants to treat all plaintiffs the same. However, it's often necessary for the defense to start out with settling individual plaintiffs' claims in these groups, before eventually moving to a global or set amount per plaintiff settlement.

Plaintiffs' counsel may find it helpful to understand that for the defense, it's like herding cats. Coverage counsel may need to address covered and non-covered aspects of the claims. There may be one insurance company for certain covered years, and another insurance company for other years. (In one recent mass action, a few days before the mediation hearing, a coverage counsel was brought in. After reviewing his new file, he realized that his insurance company only covered a couple of years, and he brought in another insurance company the night before the mediation. Even with careful pre-mediation planning, it happens.)

With so many different voices in the defense room, grouping together bellwether cases is optimal for all. And the mediator must build trust slowly, especially with groups in the defense room that feel marginalized or unheard.

Structured days

There may need to be individual sessions with each group. I find that individual Zoom sessions are invaluable.

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In a recent mass action, there was at least one Zoom session with the defense group, followed by individual telephone calls with key defense attorneys. There were a couple of problematic defense attorneys who were potentially derailing a settlement, so I scheduled individual Zoom sessions to build rapport (schmoozing) and earn their trust.

As I teach my negotiation students at UC Law SF in the Center for Negotiation and Dispute Resolution, schmoozing, or more precisely, building rapport, leads to trust. "With trust, deals get done. Without it, deals are harder to negotiate, more difficult to implement, and more vulnerable to changing circumstances."(F2) (G. Richard Shell, Bargaining for advantage, (2018, 3rd edition) p. 58.)

During the mediation

Usually, opening sessions are not used as they may inflame both sides. Besides, as the mediator, I have worked with all counsel during the regular check-ins, so an introductory discussion of the case is not needed. If possible, however, it's helpful to have at least the first day of mediation in person. Counsel can greet each other in the morning over bagels and a schmear in the common area. Sometimes, during the day as the mediation progresses, it may be a good idea to bring one side into the other side's room to discuss key points. I have even hosted dinner with both sides' lead counsel to build rapport and trust in a multi-day mediation.

So, instead of opening sessions, private caucuses are utilized to explore facts, legal strengths and weaknesses, as well as the interests of each side. In each caucus, the goal is to discuss settlement ranges and the evaluation of damages. Typically, the lead counsel has already provided these settlement numbers to their group in advance of the mediation in a comprehensive pre-mediation report. This will assist in managing expectations.

Some parties may require subgroup negotiations. The mediator may also need to have discussions regarding lien resolution, subrogation claims and insurance involvement.

There are settlement models that may help the parties to explore creative solutions such as matrix settlements (depending upon the severity of the injury or exposure), common fund (pool of money distributed among plaintiffs by a third party of court) and tiered agreements (different levels of agreement.)

Documenting the settlement and follow up

The parties may want to execute a Memorandum of Understanding (M.O.U.) or term sheet. This should include procedures for allocating funds as well as any confidentiality and liquidated damages terms. There may be judicial approval if the class is certified.

In sum, mass actions take a strong mediator who can herd cats, deal with difficult personalities, organize and structure the case and keep momentum. My best advice is to select your mediator early on and establish a good working relationship with your opposing counsel. You are in it to win it, but you will be working with the mediator and opposing counsel for a while.



Bogaards

Debra Bogaards is a full-time neutral with ADR Services, Inc. *Her cases have included a high seven-figure employment settlement with a well-known social-media company, high seven-figure settlements in mass habitability actions, a seven-figure products liability settlement, as well as many sexual abuse, personal injury, and other employment cases. She is also an adjunct professor at UC Law SF in the Center for Negotiation and Dispute Resolution. Ms. Bogaards earned her B.S. degree from U.C. Berkeley's Haas School of Business in accounting and finance. After law school, she started her 42-year legal career in asbestos litigation, before pivoting to insurance defense and later, her plaintiffs' practice. She has a first-hand understanding of mass actions and the use of matrixes in settlement from her earliest days as a trial attorney. She uses her appreciation of numbers and her experience with asbestos in her mediations involving mass actions.*

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