

Effective Negotiations in Complex, Multi-Party Cases



By: Michael Hodgson

Why an Experienced Class Action Mediator is Essential for Successful Negotiations

Introduction

One of the most significant challenges facing parties in class actions, collective actions, and other multi-party complex litigation is determining an effective way to compromise and settle the claims of the dispute. Timing, format, scope, and even monetary considerations all serve as barriers to ending the litigation process.

For a Defendant, this can mean years of continued, expensive litigation, which can make it difficult to leverage resources for expansion, sell a business, or engage in significant changes that involve serious financial considerations.

For a Plaintiff, this can involve years of delay in an employment dispute and prevent him or her from fully moving on from their former employment.

And because class actions take much longer to prosecute and defend than a typical dispute between two parties, both Plaintiffs and Defendants oftentimes question when, if ever, the case will be over.

If all parties, including the mediator, are unfamiliar with resolving these cases, the litigants risk out-of-control litigation expenses, anxiety about an uncertain future, and, occasionally, frustration with the entire court system. Choosing the right mediator, one with specialized experience in class actions, collective actions, and complex multi-party litigation, can have a positive, profound impact on a lawyer's relationship with his or her client.

How Are Class Mediations Different from Single-Party Mediations?

The skilled multi-party mediator knows that the biggest differences between class action mediations and mediations involving disputes between parties in "typical" lawsuits are twofold:

- The size and scope of the lawsuit, and necessarily, the risk to both the Defendant(s) and to the class; and
- The dynamics affecting the decision-making process during the settlement discussions.

In most cases, skilled mediators with significant class action and collective action experience can make the difference between whether complex litigation is successfully resolved or puts the parties on a track that portends years of expensive discovery, motion practice, depositions, and trial preparation.

Scope of the Lawsuit

In class action and collective action lawsuits, one or more individuals (or other types of groups), called named plaintiffs or representative plaintiffs, bring a lawsuit against a defendant, not only on their own behalf, but also on behalf of everyone affected by the policies and/or practices from which the claims arise.

A named plaintiff, by rule, and with court approval, can represent their own interests and the interests of other individuals who are in the same position. This positional placement is key – only a plaintiff who is similarly situated to others may represent or be represented by another individual.

The practical effect is that class actions typically involve hundreds, thousands, and sometimes hundreds of thousands of individuals, who are all represented by a single individual, or a small group of named plaintiffs.

Because of the highly technical nature of the class action litigation process, the named plaintiffs normally rely upon their attorneys for analysis more than in a typical attorney/client relationship. The lawyers are responsible for case management, carefully deciding which claims to bring and which arguments to make, as well as determining an efficient way to evaluate the nature and amount of damages suffered by the group as a whole.

Attorney/Plaintiff Dynamics in a Class Action

In practice, there is a distinct difference in the relationship between the lawyer and the named plaintiff(s) compared to a traditional one-on-one lawyer/client relationship: the named plaintiffs are typically only knowledgeable about their own individual situation.

The lawyers are therefore responsible for “seeing the forest through the trees” and understanding the broader implications for the group.

In class action litigation, experienced lawyers will only assert claims that are co-extensive with a large group. For example, in cases involving issues about employee pay, a plaintiff who first seeks a lawyer may have been paid incorrectly and may have been sexually harassed at work. The lawyer in that case may structure the lawsuits as two separate matters – one lawsuit about the pay issues and a second about the workplace conduct (or, in many cases, refer one of the cases to another lawyer for separate representation).

The lawyer’s skill in structuring the claims to assert will oftentimes determine whether a case can be brought as a class or collective action or must continue on an individual basis.

Once the case has been structured as a class action, lawyers will analyze thousands of documents and copious amounts of electronic information to determine how, and to what extent, the class has been affected.

There is, therefore, an informational imbalance between the lawyer and the client. Because of this information dynamic, named plaintiffs typically rely on their lawyers for case evaluation and advice on whether to agree to settle the claims for everyone. This is critical to understanding the difference between a class action mediation and traditional mediation.

The Mediation Process

In class-action mediations, named plaintiffs, when in attendance, often have a much more limited role in the negotiation process. Named Plaintiffs are required, by rule, to look out for the interests of everyone.

This quasi-fiduciary role means the named Plaintiff must rely more heavily on the attorney for evaluations of whether settlement offers are acceptable or should be rejected.

The lawyer's role in the negotiation process diverges somewhat as well: ensuring their clients receive sound, strategic advice; understanding the risks and opportunities to the group; and helping the named plaintiff make informed decisions about settlement.

Necessarily then, on the day (or days) of the mediation, the class action mediator speaks more directly with the lawyers in the room. Discussions may range from issues of fact and damages to the strength of damage modeling and overall case evaluation, requiring a more direct lawyer-to-mediator interaction.

Additional considerations, such as claims administration, settlement durability, procedural and timing considerations, and the scope and nature of available releases, arise in ways that don't occur in a traditional one-on-one settlement negotiation.

The class action mediator understands the balance between helping lawyers give the client agency during the case and discussing highly technical strategic issues to empower everyone to make informed decisions.

Why an Experienced Class Action Mediator is Imperative

The highly particularized nature of class actions requires all negotiators to consider a wealth of issues and factors that must be addressed if the case is to be resolved by the parties rather than through trial.

To begin with, the "language" of the class action settlement invokes strategic considerations that are absent in non-class cases.

For example, class action settlements almost always mandate third-party review and approval by the trier of fact. Understanding this requirement, as well as the dynamics between the parties and the trier of fact, will materially improve the chances of success of proffered settlements.

And in class-action settlements, it is rare that the resolution can be achieved by simply signing a contract and making payments. There are myriad administrative issues that must be addressed and planned to ensure the case is fully adjudicated and concluded at the conclusion of the settlement.

Beyond those examples, a host of more nuanced issues arise in a class action settlement that must be carefully considered when negotiating the resolution of the case.

The mediator serves as the neutral party who can explain and discuss issues with the parties in a way that helps them be confident there is no bias or gamesmanship, thereby enabling them to engage in “fair play.”

More importantly, perhaps, if the parties are open to it, the class action mediator can serve as an observer who has a “checklist” of issues that should be discussed at the mediation to aid the parties in resolving the dispute.

If the mediator understands the intrinsic nature of the class action or collective action process (and even the difference between the two), he or she can ask questions of the parties in ways that might be an important consideration of how a case should be resolved.

Finally, time spent in mediation won’t be wasted on miscommunication or misunderstanding, because the mediator can quickly navigate the information exchange between the parties and understand nuances, facilitating a better outcome.

Conclusion

A class action mediator is oftentimes the difference between a successful negotiation and the prospect of years of continued, protracted litigation.

By guiding the parties to consider the complicated, nuanced aspects of settling high-stakes employment, consumer, securities, mass tort, and similar lawsuits, the class action mediator serves the parties in ways unique to the settlement process that may otherwise be unavailable.

If you find yourself in this type of situation, finding the right kind of mediator will ultimately benefit both you and your client.

About the Author

Michael Hodgson has litigated and mediated hundreds of class action and collective action lawsuits for over 20 years. He brings a wealth of experience in complex litigation settlements, including wage and hour law and class and collective actions, giving the parties the best opportunities for resolution that serves all sides.

When not practicing law, Mike enjoys spending time with his family and volunteering with the area’s youth through Scouting America.

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