Class Action Mediation

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There comes a time in many class actions when the parties agree to mediate. The mediation of class actions, whether pre-certification or post-certification, is more complicated than the mediation of individual cases. For one thing, unlike an individual mediation, where the goal is to arrive at a settlement that generally remains private between the settling parties, the goal of mediating a class action is to achieve a settlement that will gain court approval after public notice, sometimes over the objections of interested parties. Also, while named plaintiffs actively participate in most individual mediations, they rarely attend class action mediations, instead relying on their counsel to negotiate the terms of the settlement and obtain their approval later in the process. And while individual mediations commonly take one day or less, it often takes multiple mediation sessions to hammer out the many complexities inherent in class action settlements.

The special nature of class actions thus adds a layer of considerations that do not apply to individual mediations. The following are some practical tips for attorneys attempting to navigate these challenging shoals.

1. **Find the right time to mediate (and there may be no single right time).** In all cases, whether class or individual, the choice of timing can be important. In all cases, it is important to consider whether the mediation should take place before discovery has begun, before it has been completed, or after its completion. Parties considering summary judgment motions also need to decide whether to mediate before or after the motion is filed, heard or decided. Class actions present an additional choice: should the mediation precede or follow a decision on class certification? There is no single right answer to this question, and a number of factors generally bear on it. First, there is the likely cost, both in delay and expense, of waiting until the class certification motion has been briefed, heard and decided. Second, there is the change in relative bargaining power that occurs after the court allows or denies a class certification motion. A party that thinks it is likely to prevail on class certification may prefer to play out the process before mediating, while a party that thinks it will lose the motion may want to settle before the court decides it. In cases where there are experienced class action attorneys on both sides, it may not matter when to mediate because they each will know how to take the class certification risks into account in negotiating the settlement, and they also may have confidence that the other side will weigh the risks appropriately as well. In any event, careful consideration should be given to where mediation best fits in the sequence of litigation events for the particular case.

2. **Choose the right mediator**. Not all mediators have class action experience. While the lack of such experience should not be a disqualifier, the procedural peculiarities and complexities of class settlements make it a significant factor to consider in selecting a mediator. Other important characteristics for class action mediators are experience resolving or adjudicating complex business disputes, a general understanding of the business implications of substantial settlements and of corporate decision-making processes, and the ability to stay organized with respect to complicated settlement proposals. Also, if a settlement is reached, the settling parties may want the mediator to submit a declaration to the court extolling the virtues of the settlement and the arms-length nature of the negotiations. This likelihood places a premium on

choosing a mediator who has significant experience in the class action arena and who enjoys a reputation for fairness and candor with the tribunal.

3. **Don't waste time arguing the case.** This is not to say that discussions about the merits or about the likelihood of class certification have no role in class mediations; they do. But oral presentations should not occupy the same amount of time as they do in individual mediations. Formal arguments by lawyers are generally presented in two ways at mediation: in the written submissions the parties exchange and provide to the mediator, and in an oral presentation during a joint session at the outset of the mediation, usually with parties present. There are three audiences each party wants to reach in the joint session: the mediator, opposing counsel, and the opposing counsel's client, who ordinarily is the ultimate decision-maker. What sets class mediations apart is that, while named plaintiffs ultimately need to understand and make decisions with respect to any settlement reached, they will rely heavily on class counsel to negotiate the settlement and protect absent class members, and often do not attend the mediation sessions. That leaves only the mediator and opposing counsel as the target audiences for formal presentations, but they will already know your arguments before the mediation begins. It likely will be necessary to remind them of your arguments as negotiations progress, and to reinforce your positions in your separate meetings with the mediator, but time spent needlessly arguing your case at a formal joint session is time taken away from more pressing matters and can be counter-productive.

4. **Understand the drivers.** Few areas of law practice are more polarized than class actions. The plaintiffs' bar believes that it represents the forces of goodness and light and that defendants represent the forces of evil and darkness. Corporate defendants and their counsel believe the opposite. The prejudices participants bring with them to the mediation can present significant obstacles to finding the common ground necessary to arrive at settlement. While a good mediator will help the parties get past their blind spots, good lawyers will also try to understand what drives the other side. Rightly or wrongly, defendants generally assume that plaintiffs' class action counsel are interested only in their fee. Regardless of whether that perception reflects reality in any given case, mediating defense counsel should allow for the possibility that plaintiffs' counsel truly are attempting to achieve a fair settlement for absent class members. Plaintiffs' counsel, for their part, often assume that defendants are interested only in striking the most financially advantageous settlement possible, regardless of its fairness to class members. But there may be a host of incentives for corporate defendants to settle the class actions brought against them including, for example, avoiding negative publicity, putting wasteful and expensive litigation behind them, and avoiding the risk of a large judgment. Plaintiffs' counsel will be most effective if they try to understand the drivers that have brought the defendant to the table so that they can work towards crafting a settlement that in-house counsel, who most often will be present at the mediation, can take back to his or her management with a realistic expectation of having it accepted.

5. **Anticipate objections.** If you are able to arrive at a class settlement, you will need to have it approved by the trial court, and if there are objectors, possibly by an appellate court. It takes a lot of time and money to get from the mediation to final approval of the settlement, and the last thing you want is to have the settlement rejected after all those resources have been spent. It is therefore important to enter the mediation with a good understanding, both from experience and from familiarity with precedent, about what objections the settlement might invite so that you can structure the settlement to avoid them. You also will need to stay attuned to potential objections as you entertain new proposals from the other party or the mediator. Careful attention to such issues as the value provided to absent class members, the manner in which settlement funds will be distributed, the reasonableness of named plaintiffs' service fees and

class counsel's attorneys' fees, the appropriateness of reverter or *cy pres* relief for any residual funds after class distributions are made, and the quality and manner of notice and procedural rights afforded absent class members can help you craft a settlement that will survive objectors' challenges. One of the positive attributes of class mediation is that all parties share the goal of gaining court approval, so all should be pulling in the same direction when it comes to anticipating and defusing potential objections.

6. **Be patient.** Class settlements are complicated. To achieve fairness, some settlements may involve various levels of relief to take into account differences among categories of class members. It can take many hours to come to agreement on class relief, even before wading into the treacherous waters of attorneys' fees. Although settling the case on the first day of mediation may be the goal, it is seldom achieved. Often, the first day of mediation can be spent doing little more than setting the table for the more substantive bargaining that will take place in future sessions. It is best to enter the mediation expecting to make a modicum of progress on the first day, with the understanding that additional formal sessions or informal communications likely will be necessary to reach a deal.

7. **Be prepared to end the mediation.** As with any case, the ability to settle will depend on the reasonableness and flexibility of all parties. If your opponent is unreasonable, be prepared to walk out. I don't say that lightly. If you have committed to mediate, you have committed to negotiate in good faith. You owe it to your client and to all concerned to work long and hard to bridge the gap that separates the parties. But you also owe it to your client not to be held hostage to unreasonable demands. If the goal is to achieve a fair settlement, it should be fair to all constituents: named plaintiffs, absent class members and defendants.

8. **Write it down.** If the mediation produces a settlement, ask the mediator to help you prepare a term sheet outlining its key provisions before the mediation adjourns. A term sheet can prevent disputes as the parties prepare the formal settlement agreement, and keeping the mediator involved can help eliminate disputes before they have a chance to fester and potentially derail the settlement.

Mediating a class action is a specialized skill that requires great sensitivity to a variety of interests, including the interests of persons who are not in the room. Lawyers engaging in class mediation need to bring to the table an equal variety of qualities and skills, including advocacy, diplomacy, perspicacity, foresight and patience. Attention to the practical considerations addressed in this paper should help you and your clients achieve mediation's goal of converting hard-fought war into global peace.

If you would like more information about our class action mediation services, or have a question or concern about any litigation or class action matter, please contact Pierce Atwood partner Don Frederico at 617.488.8141.

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