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Herding cats

SUCCESSFUL MULTI-PARTY MEDIATIONS

A multi-party case has an exponential increase in complexity over the two-party dispute. As one friend of ours has said, "Two parties is four headaches, three parties is nine headaches, four parties is 16 headaches, etc." From our personal experience, the following may be helpful to counsel and neutrals, alike.

Allow plenty of time for process setup

Let's assume that the main reason parties' counsel hires a mediator is to sort out a process that will give the discussions a structure leading to settlement. First, the mediator needs to understand what kind of a multi-party case it is. Multi plaintiff? Multi defendant? Both? Different types of cases call for different processes, and the more parties involved, the more process design and orchestration may be necessary.

For the mediator, there is no substitute for understanding the dispute and its interrelationship of issues, disputants, and retained lawyers. This knowledge will help the mediator ask better questions, ensure all necessary parties are included, and all insurance issues are being addressed (e.g., coverage, time on risk, indemnity obligations). The mediator will be better prepared if, in addition to normal preparation, the mediator takes extra time to meet (preferably in person or by video conference) with the parties' counsel, together and separately, to understand their perspective issues. Of course, the mediator mediates from the first contact with counsel by building trust and confidence.

Venue must be agreed upon – specifically whether the mediation will take place in person or on a virtual platform. Other factors driving venue are confidentiality governing the mediation and rules and statutes that may or may not affect the mediation. For example, attorneys practicing in California state courts may be accustomed to California's Evidence Code protecting mediation, but as soon as the mediation is virtual, and people may be joining from other jurisdictions, those rules may change. Additionally, concerns regarding other people being off-camera should be discussed and rules set.

Good mediators will have a multitude of breakout rooms available for individual and group discussions, as well as breakout rooms for each party. And, if the mediation is to be virtual, then pre-mediation communications on the platform will allow comfort to the participants when the time comes for the actual mediation.

Expect to have a heavier hand

In designing the process, the mediator has to be proactive and directive. For example, setting a mediation date should not happen until the mediator works with the parties through preliminary issues. Once the mediator determines the many interests represented, people should be grouped according to issues. Then, one or more spokespersons should be established for each viewpoint. Next, it can be helpful to sort people and consider having separate meetings, by their role – lawyers, experts, and parties.

The mediator may want to meet alone with experts, lawyers, parties, or some combination of them in smaller sub-meetings before the full mediation. The mediator needs to create structure, issue by issue, building consensus with the parties and their lawyers, as to each piece of the structure. The likelihood of complex fact patterns and claims may require preliminary informational meetings. This is necessarily a slow but critical process that can take months, and it is important to patiently manage people's expectations.

The mediator may have a personal style that is more facilitative than evaluative, but we believe that an evaluative style is usually more helpful in a multi-party case, especially when it comes to the process and structure. If a mediator is uncomfortable with a directive or evaluative approach, the mediator could suggest to the parties that they see the mediator as someone who will give them expanded resources. There is no substitute for talking with the lawyers about it since they have been living with the case. Their ideas for resolution can be very helpful; get their insights and build on their creativity. Experts can also contribute to structuring the process or resolution of the matter.

The mediator's role in multi-party cases takes on that of a case manager, not unlike a judge holding case-management conferences. The mediator generally sets dates and expectations for preparedness, exchange of information (informally or limiting discovery in hotly litigated cases), and who shall attend each session. This is true not only in advance of the first all-hands mediation but also after each successive mediation session. Therefore, set a schedule that all parties agree to. If a party is resistant to setting aside more than a day or two at the outset, the mediator will have to schedule additional time down the road, which risks losing momentum.

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The mediator must demonstrate strong process leadership and hold people accountable (whether that is accomplished by facilitating a consensus or directing with accountability). The mediator is expected to recognize and raise issues that the parties may not be thinking about, such as taxation (past or future) in a business case and recommending advanced and on-call consultations.

The "shadow of the black robe"

While we know a mediator has no power to order parties to do anything, mediators do benefit from what we call the "shadow of the black robe." This aura results from being at the head of a long table and leading or conducting the process. Thus, parties will generally follow a mediator's direction, especially when it comes to shaping the process.

An important caution is the merging of different neutral roles or ADR processes with the mediation. For example, in California, special experts are court-appointed and are expected to report to the judge with recommendations; however, a mediator is specifically prohibited from speaking to the judge, so a neutral cannot serve in both roles without a specific case management order from a judge.

Mediator preparation

The process of a multi-party mediation differs from a routine two-party mediation, perhaps mostly in required preparation. Thus, arranging multi-party mediations may require multiple contacts with counsel, individually and collectively, to learn and build consensus around structure, process, insurance issues, multiple days, attendees (sometimes insurance-only and/or expert-only days are important), witness scheduling, briefing procedures (sometimes staggering submissions are better), and more.

It is helpful to request the parties to prepare and share detailed briefs, giving historical and factual background (ideally in a chronology, to help the mediator sort through the events) and the law, of course. Also ask counsel to include the history of settlement discussions (to ensure that they all share the same recollection), special complexities that the multi-party element may present, and areas where they think experts may be helpful. If the briefs and supporting materials are lengthy, a very short summary may be requested. Another consideration is staggering brief submissions, rather than having them all come in at the same time.

When appropriate, request a "for mediator's eyes only" brief that addresses specific challenges to settlement, settlement strategies (potential configurations or structures of a settlement), party personalities, client representatives likely to be helpful or most difficult, the history between the parties, financial obstacles, and other helpful information.

At some point in advance of the hearing, the mediator should separately discuss important non-monetary terms, confidential thoughts on obstacles to settlement, who among the clients and/or client representatives are likely to be helpful or most difficult, and where bridges can be built to fashion an agreement. The mediator should preview the ground rules and goals for the opening session and any anticipated joint sessions. The mediator should consider visiting the parties' websites, a useful tool in learning how each party presents itself to the public.

Helping the parties prepare

In a multi-party case, make sure that counsel has pre-mediation meetings with their clients and with the mediator. In one class action wage and hour case, for example, the employees had different job descriptions and arguably different rights in the eventual settlement amount. Plaintiffs' counsel met with his clients and all agreed that if an employee did not come to the mediation, that person gave her/his proxy to those who did. The group also reached an agreement that a two-thirds vote would be sufficient to agree to a binding allocation among class members. Using this technique ahead of time eliminates the last-minute holdout and gives the class counsel permission to negotiate the best overall deal. Of course, the same is true in non-class multiple plaintiff cases – plaintiff 's counsel should meet with his/her clients and agree to an allocation formula based upon their merits, or perhaps grouping similarly situated or impacted plaintiffs into two to three categories, with different shares of a settlement.

On the defense side, it may be helpful to have a defense-only meeting after the plaintiff has fully laid out their case. For example, in a construction defect case, at a defense-only meeting (or even subcontractors only), the mediator can develop an allocation formula by working on insurance and coverage issues, before again meeting with the plaintiff.

Another idea to help with allocation is to get each party to anonymously offer an allocation formula, then share among them the proposed allocations. Or, the mediator can ask each defendant to leave itself out and allocate liability only among the others. Although in one case we mediated with a rock band, we asked them to determine what percentage each of the four of them contributed to the overall success of the group, and the total of the four averages came to 180%! Either way, leave plenty of time for the parties to complete these tasks as they will increase the efficiency of the mediator's process.

Have a settlement agreement ready

In a multi-party mediation, there will likely be complex issues requiring documentation in the settlement agreement. The risk of a complex, multi-party settlement going sideways between the mediation and the time it gets documented and signed afterward is great, considering the number of parties and issues involved. Therefore, it is recommended that a settlement agreement with pre-negotiated terms be ready for signatures when final terms are reached at the mediation.

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Lastly, the allocation of mediation fees should be predetermined and not negotiated during settlement negotiations. Failure to do so can put the mediator in conflict with the parties. Additionally, unlike two-party mediations, in multi-party matters, the mediator is doing more work toward a settlement out of sight of the parties. Fees can be divided between a group of parties (multiple plaintiffs pay 50% and the single defendant pays 50%), or by size/exposure (owner pays 33%, the general contractor pays 33%, and all subcontractors together pay a total of 33%), or simply by parties (five parties each pay 20%). Thus, it is important that everyone knows and agrees to the ground rules going in.

Prioritize – have the right players on hand

In consultation with the parties and their lawyers, figure out in which order to negotiate the issues. In private caucuses, the mediator should learn how to talk about each issue and therefore be more effective in joint sessions. The mediator may first want to have a joint session with just the lawyers, or a session with some or all of the experts. What are the considerations for deciding in what order to tackle things?

Sometimes, a hierarchy or tiers will suggest themselves. Other times, if the parties look sideways, they can create useful alliances. Sometimes, defendants can reach an agreement on the total amount to offer but cannot agree to allocation of defendant responsibility. The preparation techniques mentioned above can smooth allocation issues. The mediator can facilitate a discussion on whether responsibility is allocated based on liability, ability to pay, willingness to pay, and the role of insurance carrier(s).

Looking sideways with multiple parties on the same side can also hinder a settlement. With multiple-defendant cases, it is common for parties to take a position that says, "I don't want to pay more than so-and-so." With several of these comparative positions, settlement can be complex. A useful technique is to isolate each defendant and focus on the amount they are considering as a percentage of the entire settlement. Then, ask if that percentage is acceptable. Getting them to "face forward," rather than looking sideways, can help them see the big picture and move toward settlement.

When groups are large, have the groups meet in advance and elect or appoint a smaller constituency to participate, with their proxy, in the actual mediation. With homeowner associations, for example, this can sort itself out easily by having board members speak for the HOA (assuming that it's not a case of the association against the board). In one case with a large orchestra in dispute with its board, we agreed in advance that the board would send six people to the mediation, and the orchestra would elect 10, and that each representative group should have individuals who represent each of the varied viewpoints from within each larger group. In other words, the 10 from the orchestra represented the variety of opinions that the orchestra held so that no perspective was eliminated at this pre-mediation stage. It is usually important to have the most impassioned and vocal people in the smaller, representative group unless they would be a disturbance to the larger mediation process.

Grouping of issues is also helpful. In cases with a long list of monetary issues (e.g., construction defects), it can be efficient to agree on what the handful of most significant issues are, and negotiate a formula to agree to extrapolate from those issues. For example, if there are 40 issues, but five to seven of them represent 80% of the claimed damages, agree to work through those issues first and use those percentages of allocation to apply to the final settlement amount.

It is also helpful to group non-monetary issues, such as a list of complaints by faculty members or nurses against administration or management. In those cases, identify the major issues. Thereafter, design a process by which smaller issues can be addressed, such as by a smaller number of constituents in a subsequent mediation or have the plaintiffs agree that if there is a satisfactory agreement on the major issues, they will let go of the smaller issues.

Preventing mayhem in the joint session

The mediator needs to set and enforce ground rules. For example, state at the onset that there will be no name-calling, and participants will be allowed to talk uninterrupted for x minutes. It is important to remind everyone that aside from being interdependent (each needing the others' consent before they can get what they came for), everyone must appreciate their professional distance and decorum.

It is important to establish the process and the order in which people will speak (and always vet in advance whether anyone is going to put on a full-blown presentation, PowerPoint, for example). One way is to order the parties to present one at a time, usually allowing for rebuttal. If there are a limited number of issues, then another way is to go issue by issue, hearing from each party on each issue before moving to the next. Another technique is to have all participants put their names into a hat and draw them out one by one to equalize participation.

The mediator can begin by suggesting a structure (which they have vetted in advance) on some topic and get an agreement on it. Additionally, emphasize that all parties are working on the problem, whether in separate rooms or jointly.

Managing expectations/building alliances

Managing expectations and building alliances are especially important in a multi-party case. It is simply mathematical: In a two-party case, each party generally spends 50% of their time with the mediator, and an equal amount of time with the mediator gone; in a six-party case, each party generally gets about 16% of the time with the mediator, spending the overwhelming majority of

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their time alone, as the mediator makes the rounds.

It is important to ensure that all participants understand the process, and check-in from time to time, even if just to say the group has not been forgotten. It's also important to optimize the time each party spends with the mediator. There is less time for idle chit-chat, venting, or repeatedly rehashing the facts. To expedite the process, the mediator may want to have only the lawyers in a caucus at some point to move things forward for efficiency, to propose larger concessions, or simply to expedite the negotiations.

Alliances are useful in crafting settlements. In a dispute among family members, for example, after a party has had a chance to vent, the mediator might ask to whom among their siblings a party feels closest. Then, the mediator can start with those two individuals and later reach out to other siblings once the mediator has an agreement between them. The mediator also might help the parties to agree on some broad "family principles" which the parties can treat as ground rules.

When a mediator needs to create rapport, hierarchies should not be emphasized. Instead, consider emphasizing a flat organization by putting all plaintiffs in one room and all defendants in another.

Ethical issues

Some ethical issues for a mediator arise when several parties take a side against or isolate one party. It is present where conspiring parties agree to freeze out one party and begin discussing settlement around them or leaving them out of a global settlement; they then instruct the mediator that these negotiations are confidential, and the mediator is not to tell that singled-out party. When it comes to issues like this, the mediator's best response is to ask the parties what they would like the mediator to say if the isolated party asks the mediator what is going on, or if the others are ganging up on them. A mediator cannot allow parties to place the mediator into a conflict situation. A mediator who agrees to lie to a party is not ethical. A similar ethical issue occurs when parties in attendance contemplate a settlement that excludes others not in attendance.

Crafting the resolution

Some mediators have game plans for resolution. No matter the specific tactics the mediator uses, the mediator can float ideas to the parties. If they do not like the mediator's idea, ask them to generate a few of their own.

When crafting a solution, a group effort builds a consensus on the framework. The mediator can take the lead, provided they bring the parties' counsel along, betting buy-in on each step. Or, the mediator can facilitate discussions between the parties, eliciting ideas on how to structure a settlement. We recommend the mediator lead from what we call the middle of the pack – effectively walking with the parties to formulate the resolution. Where the settlement structure comes from is less important than assuring all parties are on board.

With multiple parties, it is important to "mark off the progress," as interim agreements are reached. Because multi-party mediations often require multiple sessions over weeks or months, the mediator should send an email to the parties after each mediation session summarizing progress made and articulating expectations for future sessions (limited discovery or exchange, or meeting with experts or tax advisors, etc.). In this way, multi-party commercial cases can resemble divorce mediations, where sometimes much work gets done between sessions.

Give your mediator feedback

While it is dangerous for a mediator to be too far out in front of the parties (leading or directing and letting them follow), the danger is greater in a multi-party case, as parties frequently talk to each other outside of the mediator's presence. And, because of the deference that comes with that shadow of the black robe, mediation participants tend not to tell the mediator when they do not agree.

In multi-party cases, the mediator and varied counsel need to have open and candid communications. Each side asks questions and offers suggestions about the mediation progress. Such communications allow counsel to offer feedback, guidance, and recommendations. Inviting discussions often yields results that lead to the desired outcome – a mutually satisfying process and a global settlement.

In closing, multi-party mediations require more front-loading, process building, advance planning, and organization than a typical two-party case. Heightened diligence and communication between the mediator, counsel, and parties are necessary to achieve a successful mediation.

United States Magistrate Judge Louise LaMothe's ADR experience spans almost 30 years. Her unique part-time judicial position allows her to maintain her private ADR practice where it does not conflict with her official duties. From her base in Santa Barbara, this former large-firm litigator has mediated or arbitrated over 1,000 cases. She serves on the American Arbitration Association's commercial, employment, international, class action and large complex case panels. She is a Fellow of the College of Commercial Arbitrators and the Chartered Institute of Arbitrators, as well as an International Mediation Institute-certified mediator. She can be reached at lalamothe@dispute-solutions.com.

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