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Mediators, Expand Your Tool Kit In Complex Litigation

Law360, New York (June 06, 2013, 12:18 PM ET) -- Mediators must expand their tool kit when attempting to mediate a class action or multidistrict litigation case. There are, of course, no "typical" complex litigation cases. Each is unique. But a mediator needs to recognize the special issues involved in these cases.

James M. Rosenbaum

Class actions reflect changing styles of litigation since the enactment of the Federal Rules of Civil Procedure, which are governed by Rule 23. State class actions, now severely limited — but not eliminated — by the Class Action Fairness Act (CAFA), fall under each state's own civil procedural rules. CAFA significantly limits the ability to prosecute class actions in state courts to those situations where the conduct complained of, its effects and participants are primarily located in one state.

MDL cases are a separate kind of multiparty proceeding. Where, in class actions, all parties are in the same lawsuit, in an MDL, all cases remain separately viable and officially located in their "home" districts but are administrated by a single judge, often far removed from their original filing location for pretrial purposes.

Complex litigation cases often possess an increased level of complexity from their very inception. Rule 23(g)(1) requires that the presiding judge approve selection of the class's lead counsel, particularly calling out counsel's experience in such cases. In practice, this usually means counsel must be able to demonstrate prior experience. The net result yields a practitioner who has participated in many complex or class action cases.

At the same time, however, experience shows the experienced plaintiffs' counsel will often have been opposed by similarly experienced defending lawyers — and these lawyers may well have previously litigated against each other. Such match-ups of "repeat players" can add their own level of complexity.

A second level of complexity can be introduced by "follow-on" cases once an original case has been filed. Follow-on cases can complicate resolution of the primary case either because they can lead to multiple recoveries, or they may engender variant rulings by different judges and courts.

Multiple filings can also complicate matters when the various jurisdictions have conflicting rules on issues such as consumer fraud claims, punitive damages, "tort reform" or differing rules on the availability and amount of attorneys' fees.

Early resolution of disputes is particularly difficult in class action cases. This is principally because in order to approve a proposed class settlement, the presiding judge must make an independent assessment and find the settlement is "full, fair and adequate." In making this decision, the court sits as the protector and near-representative of absent class members. It is difficult to make this finding absent a full record, which is usually only available after discovery.

Class actions are subject to Rule 12 motions for judgment on the pleadings as well as Rule 56 motions for summary judgment. Class actions, however, also have another threshold: the motion for class certification. To achieve class certification, the Court must find that Rule 23's standards for numerosity, commonality, typicality and competence of counsel have been satisfied. Recent changes in the law allow an interlocutory appeal of this decision.

As is to be expected, a case which has been certified as a class action and either sustained on appeal, or for which no such appeal has been taken, usually has a greater settlement value for plaintiffs and is, correspondingly, more expensive to the defense. The same is true, of course, for cases which have successfully cleared Rule 12 and 56 challenges.

A presiding judge's approval of a proposed class settlement does not automatically conclude the case. Class approval decisions are subject to appellate review and over the past few years, courts of appeal have not been reluctant to disapprove proposed settlements.

Large settlements can confound the resolution of class action or MDL cases, particularly in the case of publicly traded companies. These corporations have securities trading disclosure requirements, which complicate settlement. If the settlement sum or terms are financially "material," they must be disclosed to the markets through SEC filings. These cases can require complex confidentiality arrangements between counsel, even binding represented parties, until the settlement terms are publicly disclosed.

Negotiation and resolution of plaintiffs' counsel fees can be among the most difficult questions, turning the divide between plaintiffs' and defendants' counsel from a split into a chasm. To an extent, this is understandable: For a paying defendant, one dollar paid is like every other, whether applied to damages or to fees.

The problem arises from the ethical conflict between plaintiffs' recovery and their lawyers' fees. The lawyers' first obligation is to their clients, but this does not diminish their need to make a living and seek reimbursement for sums they may have advanced to finance the case. This contrasts to the defendants and their counsel who simply see a net sum to be paid. These disparate world views can create a possible minefield.

The divide can be bridged, but doing so requires great delicacy. There are many possible ways to do it: Defendants may offer a single lump sum to be divided as plaintiffs may choose; the parties may negotiate damages first, setting fees aside until a later time.

There may be parallel damages and fee negotiations, or after settling damages, defendants may offer a maximum fee they will pay without dispute and leave the actual fee award to the presiding judge. Here, they agree that if the judge does not exceed their maximal sum, they will not contest the fee determination.

There are cases where the parties agree on a total acceptable sum, leaving the damages and fees split to the mediator's discretion. The possible ways of overcoming this speed bump in the resolution process are endless, and hybrid solutions abound.

Assuming the parties are able to agree to a resolution of these difficulties, attention should be paid to "clean up" issues. Among these are the method and costs of notice to class members or the MDL plaintiffs and costs of settlement administration. A mediator who attends to these issues, while the parties are in a negotiating mood, serves the parties well.

Since most of the individual class or MDL plaintiffs are not present for the case's proceedings and the negotiation process, it is essential that they be given adequate notice of a prospective settlement. They need to learn the proposed settlement terms and how it affects them and their rights. They also need to learn how to avail themselves of the settlement — or how to opt out of it.

The means and form of this notice have come under increased scrutiny in recent years as critics and judges have become more concerned about fundamental fairness to parties "represented" by far-removed counsel. In an electronic age, where email and web-based information have almost supplanted traditional newspapers, a "tombstone" advertisement in a national paper just doesn't cut it. And the typical "to read the full terms of this settlement, you may visit the office of the clerk of Blank Court and examine the pleadings" will not suffice.

As a result, the mediator and the parties do well to negotiate and set out and resolve these issues as part of their settlement. Will notice be given by a letter? By website? Will there be a listing of FAQs? Will there be a plain-language notice sent by registered mail? How will owners of shares held by brokerage firms be handled? Will individual parties have access either by themselves or by their own counsel to class counsel?

These questions — as well as: Who will pay for these services and administration of fund or benefit distributions? — are best dealt with as part of the case-resolution process. The parties should also clearly establish whether these costs are in addition to, or encompassed in, the sum the defendants are paying for the overall settlement.

All of these issues can and should be resolved. But it is clear that the resolution of class actions or MDL cases can present a number of challenges. These challenges call for the utmost in the negotiator's skill and understanding of these interesting and difficult cases. Each case is different, but a successful solution of these problems confers a great benefit upon the parties.

--By Hon. James M. Rosenbaum

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