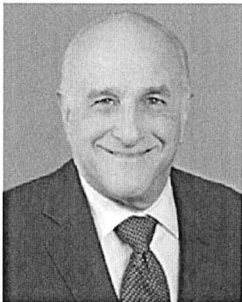


**From:** Leonard Levy <llevy@lenlevymediate.com>  
**Sent:** Monday, September 18, 2023 3:30 PM  
**To:** 'Laurie Harrold'; info sgvlawyer.org  
**Subject:** FW: September 21 MCLE Presentation to the Eastern Bar Association: Mediating Multi-Party Cases  
**Attachments:** Leonard Levy Presentation Mediating Multi-Party Cases.docx; Mediating Multi Party Cases 6.22.23.pptx  
**Follow Up Flag:** Follow up  
**Flag Status:** Flagged

Hi Laurie and John,  
I am making some edits to the PowerPoint for Thursday's presentation, and will forward them to you tomorrow.

Also confirming that we are still on for Thursday, via Zoom.

All the best,  
Len



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**Eastern Bar Association  
MCLE Presentation  
September 21, 2023**

**Mediating Multi-Party Cases**

Although Multi-Party mediations are, in many respects no different than two party mediations, they have many unique characteristics which require awareness of those characteristics, as well as planning and execution to avoid those pitfalls that might otherwise derail a mediation. This presentation will focus on the planning and structure of cases involving multiple parties, suggested approaches, as well as anticipating and overcoming obstacles to resolution.

**Leonard Levy**

Len Levy is a full-time mediator and arbitrator with ADR Services, Inc., mediating and arbitrating matters in a variety of areas, including personal injury, mass tort, employment, business disputes, insurance, construction, real estate, and commercial law. Len's practice as a neutral draws upon his 23 years of experience as a mediator and arbitrator as well as his background as a litigator for almost 30 years, handling complex litigation matters. He is also an Adjunct Professor of Law at Loyola Law School, where for the last 13 years he has been teaching a course on negotiations, and currently hosts a podcast "Masters of Dispute Resolution."

# Mediating Multi-Party Cases

Presented by: Leonard S. Levy, Esq.  
Mediator and Arbitrator  
ADR Services, Inc.



**Commercial mediation commonly involves multiple parties**

- i. Construction**
- ii. Mass tort**
- iii. Environmental**
- iv. Business Litigation involving multiple business partners, shareholder disputes, etc.**
- v. Bankruptcy proceedings have multiple creditors**

# Approaches to Multi-Party Mediation

## A. Coalition Bargaining

Coalitions or bargaining alliances bargain with each other.

- a. Common in construction mediation, such as groups of subcontractors with competing interests such as collecting contract balances from a contractor.
- b. Parties' tactics can be competitive, cooperative, problem solving or more commonly a combination of tactics.

## B. Holistic Bargaining

Everyone negotiates together to identify a proposal or package of proposals that satisfies the parties' interests.

- a. Generally, a cooperative or problem-solving approach works best.
- b. Logrolling may be needed to resolve multiple issues.

## Areas of Focus

- 1. Planning and Structure**
- 2. Mediation Tools available**
- 3. Anticipating the need for creativity when normal tools do not seem to work**

## Planning and Structure

**Execute a mediation/confidentiality agreement**

- i. Especially important because you are likely to be dealing with participants from outside of California;**
- ii. Makes clear what law relating to confidentiality and the conduct of mediation will apply**
- iii. Makes it clear who is responsible to pay your fees and how billing will take place.**

## Planning and Structure

**Review the materials submitted to you.**

- i. Do there appear to be claims of parties that can be negotiated at the same time?**
- ii. Pre mediation demands and offers may suggest lumping claims together even when negotiation of individual claims negotiation is required**



# Planning and Structure

## Identify the parties and contact counsel for a preliminary discussion about:

- i. Nature of dispute including core issues in contention
- ii. Number of Parties
- iii. Briefs and documentation to be provided mediator
  1. How extensive
  2. When
- iv. Information exchanged (past and future) between the parties
- v. Logistical problems to address
  1. Notification of client and extent of participation in mediation process of client;
  2. Consents needed;
  3. Who will be present at the mediation
  4. Who has authority to authorize settlement in amount of settlement demands and will that person be present at the mediation?
  5. Whether there is a need for settlement of individual claims or lump sum
  6. Related cases (e.g. parallel class actions; other mass tort cases)

## Planning and Structure

- **Insurance**
  - Carriers' expressed position on claim
  - Tender of defense status
  - Coverage counsel involved?

## Scheduling Mediation Sessions

How much time will be required?

Parties/counsel will typically have discussed this, even before contacting you or your case manager, but provide your input based on the complexity of issues to be agreed upon, number of parties, and the logistical demands of the mediation.

## Scheduling Mediation Sessions

**Even those mediators who typically use joint sessions, those will be rare unless there is a particular reason:**

- 1. A party wishing to present a video or expert evaluation in an opening session;**
- 2. A site visit, sometimes presented by an expert.**

## Scheduling Mediation Sessions

Meet separately with each participant or parties with common interests to discuss:

1. Their interests
2. Their expectations of how the mediation process will work (i.e. Carriers wishing to be present in caucuses with insureds)
3. Your approach to the mediation process
4. Room Pairings
  - a. Who will be in each room?
    - i. Insurance carriers?
    - ii. Similarly situated parties such as subcontractors

## Scheduling Mediation Sessions

- ▶ Prepare a suggested schedule for the mediation sessions
- ▶ Discuss with counsel, who are likely to have their own ideas of the order in which issues might be most effectively addressed
- ▶ Analyze who should attend to effectively address the issues

# Scheduling Mediation Sessions

Anticipate potential problems.

1. Parties' and/or carriers' valuations in different universes.
2. Coverage issues and their effect
3. Disagreement between insurance carriers
  - a. For different defendants
  - b. For the same defendant related to
    - i. date of occurrence versus policy effective dates,
    - ii. primary excess policies and exhaustion
4. Carrier desire to be in on conversations with insured.

## Conducting the Mediation Session

- ▶ **Make all parties aware of when they will be seeing you and what you will be doing.**



## Conducting the Mediation Session

- ▶ **Meet with those participants that will assist in determining apparent issues to be addressed and narrowing issues**

## Conducting the Mediation Session

### ► Explore with counsel:

1. **Whether any particular issue(s) need to be addressed in order to move forward toward resolution before addressing other issues; and**
2. **How best to address the issue(s).**

## Conducting the Mediation Session

**If individual settlements need to be negotiated Look for ways of negotiating multiple parties with similar interests, injuries, or valuations simultaneously.**

### Example

- i. 100 plaintiffs. Demands for 25 of them are \$100,000, 50 of them are \$75,000 and the balance of the claims \$25,000.
- ii. Opening Defense offers for the \$100,00 plaintiffs on 15 of the plaintiffs' claims are \$15,000, and 10 of the plaintiffs' claims are \$10,000. Opportunity to negotiate the 25 claims on 2 tracks, because while each party disagrees on valuation, they do seem to hold the view that 15 claims have equal value.

## Conducting the Mediation Session

If a lump sum settlement is to be negotiated be aware that a conflict issue might exist if a settlement includes the attorney determining how much each client recovers from the settlement in a mass tort case for example.

Settlement structures as in a class action settlement can be useful:

- 1. Negotiating criteria for each plaintiff obtaining damages;**
- 2. Negotiating a point system;**
- 3. Having a third-party administrator involved.**
- 4. Establishing a means of distributing proceeds**
- 5. Providing for issues related to minors**
- 6. Providing for issues related to liens (Medi-Cal, etc.)**

# Conducting the Mediation Session: Other Considerations

- ▶ Need to communicate with multiple parties outside of formal sessions
- ▶ Using the results of a mock trial
- ▶ Insurance issues:
  - ▶ Coverage
  - ▶ Defense
- ▶ Adjusters' need to justify settlement
- ▶ Authority

# Conclusion

1. Mediating multi-party claims requires more planning than bilateral mediation but remains fundamentally a facilitated negotiation;
2. Identifying potential obstacles requires that, as mediators, we engage in planning, including interacting with counsel to more fully understand the parties' interests, including those of any insurance companies involved to a greater degree than in a bilateral mediation;
3. While the logistics might at first glance appear daunting, for those with a working knowledge of the fundamentals of mediation process, those obstacles can be overcome.

# Thank you!

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