



## Gun litigation

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## The ins and outs of multiparty mediations

One of the most challenging aspects of mediating multiparty disputes is the allocation of liability and contribution by each defendant. Typically this is encountered in construction disputes, class actions, mass torts, and in some catastrophic injury and wrongful death cases.

Unfortunately, defendants in multiparty cases often overlook whether or not their own contribution amount is the right decision in light of the risk presented by the plaintiff's case and/or the cross claims alleged. Instead, each defendant will display a laser-like focus on tracking how much the other defendants are contributing to the overall settlement.

Many defense lawyers and claims professionals can become obsessed with maximizing allocation and contribution, rather than resolving litigation for their client or insured.

On the one hand, multiparty disputes are not necessarily more difficult to mediate. The same problems encountered in two party disputes can confound multiparty mediations such as poor communication, asymmetries of information, lack of creativity, widely divergent evaluations of risk, and emotional attachments to what one side or another perceives as unfair.

For example, a small business dispute between two parties (hopefully not siblings) who feel betrayed can be

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**TRUEMAN**  
Commentary



exponentially more difficult to resolve than "complex" multiparty disputes.

Extensive preparation is critical in every mediation but even more so when multiple parties are involved. Mediators and lawyers should take advantage of what time is available before the mediation session so that all participants can begin to consider their options and develop their settlement strategies.

Defense counsel and insurance carriers often need information to come to the table with authority within policy limits – although this is not always the case as many carriers and defense teams recognize the efficiency of early resolution. Encourage the parties to review release language ahead of time as it can uncover sticking points better addressed early on.

Mediators can begin to build the interpersonal road to resolution in advance by meeting with key players in person or virtually. What do the parties need to see and hear? Take care as to how those messages get communi-

cated. Do any of the participants have a decent rapport? If so, note it as an alliance or an asset in the conflict dynamic because it will probably come in handy later on.

Who will need to save face and how will that happen? Never discount this basic human need. How might the money flow? The mediator (and perhaps other participants) should draft a flowchart of how the parties are related to each other by way of claims, defenses, indemnity, coverage issues or limits, etc.

In multiparty disputes, mediators need to take control and lead the parties through the process. The flexibility and adaptability of the mediator cannot be overstated. Participants need to know what to expect. Numerous joint and private discussions will occur. If the mediation will have any chance of success, participants need to buy into the process.

Mediation engagement letters must clarify which parties are paying for the mediation and how they will share the costs, including payment for continued mediation after some parties have settled but others remain. In an effort to avoid disputes over allocation of the mediation fee, an even split among all parties should be assumed at the outset.

On a case-by-case basis, consider how to handle coverage issues involving separate counsel who may not be

named in the lawsuit but whose participation is essential in order to determine how much money is available to resolve the case. Similarly, smaller players who have marginal roles in the case may want to pay a smaller percentage of the mediation fee.

Consider co-mediation when numerous parties are involved. The main claims can be negotiated with one mediator while lower level third-party claims are negotiated with another. This increases efficiency, making mediation even more attractive to clients who are paying the bills.

Parties can save time and money when the process moves along and everyone stays in the game throughout, as opposed to the frustration of "wasting" the day all alone in a conference room or on Zoom.

Regardless of how complex or simple the underlying factual details may be, every effort must be made to organize, discern and lead the parties through a multiparty mediation. Everyone should have a plan.

But, as stated earlier, adaptability is key. "Blessed are the flexible for they won't get bent out of shape."

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