Maximizing Your Chances of A Successful Securities Mediation

by E. Scott Douglas, Esq., Mediator*

Introduction

This article was written with the securities practitioner in mind. It begins with a section telling you something you already know: that mediation is gaining in popularity and some of the relatively basic reasons why. thereafter, the article sets forth a number of suggestions as to how you, as the representative of either party to the action, can best prepare for and participate in the mediation process.

Why Mediation is On the Upswing

Mediation is playing an increasingly important role in securities litigation. Securities practitioners and broker-dealers have come to recognize that arbitration "ain't what it used to be." Discovery practice has become more involved and expensive. Motion practice has become more prevalent, and more expensive. Merits hearings themselves have become more drawn-out, and you guessed it, more expensive. And, this transition has for the most part taken place during one of the longest bull markets in history (Just wait until the next major correction!). Take those costs and double them, and you have our court system.

Little wonder that mediation has caught on, and in a big way. Over 85% of all mediations result in settlement. It goes without saying that the earlier the mediation is conducted, the more both parties stand to benefit. Broker-dealers are increasingly realizing that they can save substantial fees spent on outside counsel, as well as lost employee productivity by avoiding the increasingly lengthy and contentious arbitration process. Claimants' counsel save on not only the time and cost of litigation, but get paid quicker and can move on to the next matter. In contingency cases, this can be a substantial incentive to claimant's counsel. Where counsel has been retained on an hourly basis, the benefits, of course, flow directly to the parties.

Since the broker-dealers typically have access to much of the information needed to make an early assessment of the case, they are generally in the best position to participate in mediation early in the proceedings. In those cases where mediation is appropriate, it may be in the best interests of the broker-dealer to see to it that the claimant is likewise sufficiently comfortable with his knowledge of the case to meaningfully discuss settlement while the claim is still young. This in turn provides the incentive for the voluntary exchange of information and the build-up of trust between the parties.

Even where the mediation takes place shortly before the arbitration hearing, both sides benefit by maintaining control over the outcome. If, for example, a case has the potential for exceeding the CRD reporting limits, a settlement falling just below the reporting cap may make good business sense from the broker-dealer's standpoint. Allowing a panel of arbitrators to make the decision for you may unnecessarily imperil the broker's permanent record. A large producing broker in particular may not find this risk/reward ratio very palatable. Sometimes discretion is truly the better part of valor.

The point, very simply, is that both sides have risks proceeding to arbitration. Customers' counsel often feel that the broker-dealers are given the benefit of the doubt by conservative arbitration panels who fear the repercussions of rendering large awards against the brokerage firms. Broker-dealer counsel are often heard to complain that too many arbitration panels fall prey to sympathetic claimants. Even the best case can be lost if the party loses his credibility by "gilding the lily" or is impeached by a document he neglected to bring to the attention of counsel.

In summary, there are many advantages to mediation, for both sides. Those mentioned above are but a few. An effective mediator will help the parties get past the posturing, recognize the weaknesses in their respective cases, and hopefully assist in reaching a fair resolution of the case. Adverse publicity is avoided. Business and personal relationships are more likely to be maintained. Creative solutions are possible. And, even if the case doesn't settle in the mediation, you will probably have learned something valuable about your case or that of your opponent, which may lead to a settlement somewhere down the road. As mediation continues to play an increasingly significant role in the resolution of securities disputes, it is therefore more important than ever to understand how to maximize the potential for success in this process.

Suggestions for Preparing for and Participating in Mediation

1. Prepare a Mediation Brief

A mediator can best serve the parties if he is given the necessary information to become familiar with the case, the law, and the relevant issues. In order to avoid wasting everyone's time, provide the mediator with a mediation brief. If the pleadings adequately tell the story, fine. However, you may find it worthwhile to include in a mediation brief items or attachments not already contained in the Statement of Claim or

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Answer. Newspaper articles showing bad press, information such as tax returns or financial suitability information which is best left out of the formal pleadings may be persuasive in mediation.

As we all know, arbitrators are not bound by the rules of evidence. As a result, one would be foolish to rely on the ability to keep even highly questionable matters out of the record. (Panels routinely admit evidence with the explanation that it will be "accorded the weight it deserves.") Besides bringing the mediator up to speed, a mediation brief allows the mediator to concentrate on the key issues and to devote time to thinking how to best resolve the dispute in advance of the mediation. As an added benefit, the exercise of preparing the brief may help the parties to better focus on the strengths and weaknesses of their cases.

2. Prepare and Submit a Profit and Loss Analysis

Damages are typically a major bone of contention in securities customer disputes. In general, this is wasted time and energy. The numbers should be ascertainable, and the parties should be able to agree on them. The sooner you exchange P & L's with the opposition, the sooner you can agree on the correct number and get down to business. Sometimes, in the process of resolving disputes regarding the calculation of damages, one of the parties finds cause to reassess his position. On occasions, a simple mathematical function impedes settlement. By supplying the damage analysis to the mediator prior to the mediation, you also help the mediator form a better understanding of the case and how it might be resolved.

3. Never Sacrifice Your Credibility For the Sake of Advocacy

Trust in the mediator is obviously an important element of any successful mediation. Yet, just as important to the mediator is that you maintain your credibility as a litigant. The mediator relies on the party representatives to be honest and forthright, particularly in private sessions where the other side is not present. A mediator must be trusted to respect those confidences and not to disclose them unless authorized to do so by the parties. While at times counterintuitive, being candid about the weaknesses in your case instills confidence in the mediator. This ultimately benefits the process by reassuring the mediator as to the correctness of his assessment of the claim's settlement value. This in turn helps preserve the integrity of the negotiations, since without such assurance, the mediator is far more likely to take the easy way out (commonly referred to as "splitting the baby").

Of course, even if you decide the time is ripe to disclose certain key information to the other side, any admission or disclosure made in the course of the mediation is protected as a privileged communication under California Evidence Code, section 1152.5 (amended Jan. 1, 1994). Nor can the mediator be compelled to provide testimony regarding the mediation or any information disclosed by the parties.

4. Help the Mediator Expose Your Opponent's Weaknesses

Central to the mediator's ability to bring the parties together is his ability to assist them in recognizing the problems in their respective cases. Help the mediator to slice and dice your opposition. Provide the ammunition if you have it. Do you have some juicy tidbit on your opponent you wish to save for impeachment if the case does not settle? You may choose to let the mediator know about it in confidence (specifically stating that the information is not for disclosure to the opposing party) and rely on him to convey to the other side the appropriate level of concern that this information could cause at the arbitration hearing. (This is a perfect example of a situation where the mediator places great trust in your honesty, since the information you have conveyed cannot be confirmed by the opposition.)

If you are confident in the likelihood that the mediation will succeed in resolving the case, give your impeachment evidence to the mediator and let him determine how and when to maximize its value in settlement negotiations. After all, the other side is probably doing the same thing.

5. Don't Mediate Unless You Are Willing to Compromise

The process of mediation is necessarily one of compromise. While there is always the potential one party will compromise substantially more than the other, it is unrealistic to expect that your opponent will make all of the concessions while you make none. As we all recognize, every case has some settlement value, even if merely nuisance value. If you are coming to the mediation solely in the hope that your opponent will be sufficiently enlightened that he will dismiss the claim voluntarily, you are probably demonstrating unwarranted optimism. If your objective is to avail yourself of the opportunity to size up your opponent's case, that's fine, so long as you don't expect the case to settle. If you genuinely want to settle the case, you must be flexible and willing to compromise to some degree.

6. Fairly Assess the Value of Your Case and Prepare the Principals Accordingly

Before entering into mediation, you will hopefully have done everything in your power to arrive at an accurate assessment of the merits of your case, its strengths as well as weaknesses. Just as importantly, you will have conveyed this information to your client. If you cannot have the client or a fully authorized representative present, it is imperative that you have access to the decision-maker or have sufficient settlement authority in hand to resolve the dispute. Few things cause greater frustration for mediators and opposing counsel than the statement, "My client is on the East Coast and it's too late to reach him today." Resolve these types of problems before the mediation begins.

It is a fact that most major broker-dealers are more accustomed to the realities of litigation than customers,

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for whom this may represent their first experience with the legal system. The mediation process can not only supply the opportunity for the customer to "vent," but also serves to reassure the novice litigant that his claim is being properly evaluated for settlement purposes. If you have not fairly and honestly evaluated the value of the claim going into the mediation, you lessen your chances considerably of reaching a settlement. The chasm may simply be too great for the mediator to bridge.

7. Don't Take Intractable Positions

The surest way to end a mediation is to draw a "line in the sand" and refuse to budge. The mediator needs something to work with. You may find out information at the mediation which could and should cause you to alter your position. Keep an open mind. A good mediator will help the parties find ways around apparent impasses, if you let him.

8. Don't Give Up When the Mediation Ends

It is not unusual that mediation will get the parties most, but not all of the way, towards a settlement. Don't give up. Use whatever momentum was gained at the mediation to propel the discussions further towards resolution. Are there other more creative ways for the parties to reach a settlement? Have all the options been explored? Sometimes the parties leave the mediation session knowing there is room for more movement, but believing that the moment wasn't right for further movement at the mediation. Sometimes, the parties simply become tired or impatient and give up.

Should this occur, taking a couple of days or a week off to cool down or recharge the batteries may provide additional clarity. If the mediator doesn't call you to follow up, and you don't feel direct contact with opposing counsel would send the right signal, then call the mediator and reopen negotiations. If you are concerned about showing weakness in the negotiating process, request that the mediator not disclose that it was you who asked that discussions be resumed. Your opponent will not know that the mediator did not simply follow up on his own initiative. Either way, the mediation may prove a valuable jumping off point for continued negotiations if the parties remain open to further discussion and don't give up.

9. Prepare a Summary Settlement Agreement at the Mediation

In the likely event that your mediation has been successful, take the time to prepare a short form settlement agreement setting forth the key elements of the agreement before you conclude the mediation. A handwritten agreement on note paper will suffice. Have all the parties as well as counsel sign the document. You will find that many subsequent disagreements regarding the terms of the settlement can be avoided by adopting this practice.

Conclusion

The suggestions listed above have proven helpful in reaching resolution in nearly 100% of the mediations the author has participated in as a practitioner. They are by no means the only ways to maximize your chances of a successful mediation, but they certainly are a good start.

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