Representing Multiple Claimants at Mediation

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Envision a situation in which you have been selected to represent a group of claimants in a securities investment dispute. Each member of the group had purchased a particular stock after attending a seminar put on by a local investment advisor/CPA team. Part of your pitch to the group was that your good relationship with the broker-dealer and its counsel leads you to believe that Respondents will agree to an early mediation. This is attractive to your new clients because many of them do not have a stomach for protracted litigation, and all of them would like to get whatever amount of compensation is rightfully coming to them and get on with their lives.

All of the claimants had executed standard customer agreements and are therefore required to arbitrate their claims. All had invested in the same stock touted by the same broker, which had lost a substantial portion of its value in a short period of time. The broker-dealer made a market in the particular stock, and your preliminary investigation indicates there might be a valid claim for negligence against both the broker and the firm.

After you sign up the individual claimants, you contact the broker-dealer's counsel. He checks with his people. They will agree to an early mediation. In fact, he even encourages you to hold off filing the Statement of Claim until after the mediation. You smell blood, speculating that he wants to avoid

regulatory inquiry. Neither statutes of limitation nor eligibility deadlines are an issue, so you do away with the tolling agreement. You start to make arrangements for the mediation.

Setting the Stage for Mediation

You have now agreed on a mediator, and have booked two consecutive days for the mediation. Your damage analysis is complete, with separate calculations for each of your clients. One of the main issues is suitability, and your expert has recommended that you prepare a suitability summary for each individual. This turns out to be a very useful tool, because you immediately realize that their suitability profiles are quite different. Some are sophisticated investors, others are novices. A few are wealthy and have substantial assets outside the account in question. Within the account itself, some are well diversified, others have serious over-concentration claims.

Representing multiple claimants has an obvious advantage in cost saving and sharing of information. However, a number of other considerations should be considered. Here are some thoughts on issues to consider, including tips from some leading securities practitioners:

Prepare client fee agreements which are tailored to the multi-party case. A veteran of a number of successful multi-claimant mediations, Michael Donahue of Donahue, Mesereau & Leids finds that a detailed retention agreement is crucial to resolving multi-claimant cases. "You have concerns in these types of matters not found in single-claimant actions," says Donahue. "For instance, we have the clients expressly waive the attorney-client privilege as to information we may wish to obtain or share among others in the group. Second, we insist on an agreement up front as to how any lump-sum settlement or award will be split up. If you don't take care of this at the outset, what was an easy issue to resolve in the abstract becomes a very difficult issue when actual dollars are at stake."

Be prepared to settle claims individually, rather than as a group. A lump sum settlement may not always be appropriate or forthcoming from the respondents. Significantly, unless your clients have agreed in advance to a formula for allocation, serious conflict of interest issues arise. According to claimants' counsel William F. Davis, splitting up money can raise nettlesome problems and conflicts, particularly when there is not enough to go around. "With firms that are not financially solid, this can be a tremendous problem. Settling early may get you money from a firm that has gone out of business by the time you would have received an arbitration award. The unfortunate reality is that there may not be enough money to get what your client's deserve, and you may have conflicts in making recommendations with respect to clients in differing circumstances and with respect to allocations."

Prepare a mediation brief with the intent it be provided to the opposition along with your damage analyses well in advance of the mediation hearing. A detailed Statement of Claim may do. The objective: They must know you are to be taken seriously. It is important to both your clients and the opposition that you appear well prepared and serious about your case. Whether or not you have filed a Statement of Claim, this is your opportunity to demonstrate that you have conducted an initial investigation and will be a formidable opponent if the case doesn't settle immediately. In addition, mutual exchange of P & Ls often allows the parties to reach agreement on the numbers, saving valuable mediation time. Claimants' counsel Philip Aidikoff advises to do your homework at the outset. "We prepare a Statement of Claim in every case, along with a P & L. We have the clients review it for accuracy. I'll then send the Statement of Claim to my opposition before filing it, to see if there is any interest in discussing settlement before we even incur a filing fee. Sometimes it works, sometimes it doesn't."

Work with, rather than against, opposing counsel. If you are to settle the multi-claimant case in mediation, you need your opponent to work with you, rather than against you. Mediation is one place where the old saying, "You get more ants with honey than vinegar" generally holds true. The logistics of a multi-party

mediation require cooperation and a degree of trust. One method is to have everyone together initially for the opening joint session and initial caucus. Then, depending on the agreed protocol, keep only a few claimants at the mediation and allow the rest to be on phone standby. Enlist the mediator's assistance in making the best assessment at the mediation of how to most effectively structure the conference.

Agree to a voluntary exchange of documents. Both sides, if they are truly motivated to resolve their differences early, should be willing to make a reasonable exchange of documents whose production would be required in any event. Try to anticipate issues and avoid impediments caused by the lack of necessary information. Neither side wants the mediation to stall because of the perceived need for additional discovery. Because of the potential volume of discovery in multi-party cases, cooperation is again the key to short-cutting the normal process. Everen Securities' in-house counsel Bruce Lewitas says that he often agrees to an informal document production as a prelude to early mediation. "It saves us time and money in the long run. We have no motive to run the other side around on documents to which they are clearly entitled, and which they would get anyway. In most cases, if the mediation is to succeed, everyone needs to have a comfort level that they have enough information to resolve the claim.

Avoid excessive posturing before the mediation begins. Accept on faith that the opposition is here to do business. Otherwise, they probably would not have agreed to pay half of the mediator's fee. Attempts to create "floors" or "ceilings" for settlement negotiations in advance of mediation generally do more harm than good and may kill the mediation altogether.

Prepare your clients. Not only should you fully explain the mediation process to them, you must also prepare them for their respective roles at the hearing. If you mean for them to be seen and not heard, make this clear to them, and explain that at least in joint session, you will do the talking. If you anticipate that the mediator will want to ask questions of your clients in the individual caucus sessions, prepare them for the issues they may be asked to address. Assess your strongest and weakest witnesses and plan your strategy accordingly.

Avoid creating unreasonable expectations of recovery. Your clients must understand that one of the important aspects of early mediation is compromise. According to attorney Mark R. Wietstock of Rogers, Sheffield & Herman, a firm which frequently represents claimants in securities litigation, there is a *quid pro quo* for the cost savings and sharing of resources when representing a group: That is, the group must often sacrifice something individually for the whole. This can raise problems, even where the group is comprised of family or close friends. In small damage cases, the consolidated claim may be the only practical way to seek redress, requiring some give and take on the part of the individuals. The clients must understand these principles going in to mediation if the process is to succeed.

Ascertain your clients' needs as well as your own. Remember that this may be the individuals' only chance to tell their story to a neutral party if the case settles at mediation. Some may need to vent. Others may approach this as purely a business decision. Knowing one from the other in advance of the mediation may be critical to achieving a settlement. If you have the client who needs badly to vent, have him do so in front of the mediator only, in individual caucus. Echoing a common concern, claimants' counsel Michael Friedman of Pasadena says a balance must be reached. "If the case doesn't settle, I don't want this to be their opportunity for free discovery." From your perspective, determine as best you can if client control may be an issue. If so, try to make sure those you perceive as potential problem clients attend the mediation in person. There is often no substitute for hearing a dose of reality from a mediator in order to bring the difficult client aboard.

Make sure your clients understand that each of their cases constitutes a separate claim for settlement purposes. Each person must

separately be prepared to decide at the mediation if the claim should be settled at the price offered. If certain individuals want to stick together for settlement purposes, that is their decision. Not yours.

Anticipate that by the very nature of their claims, certain individuals will present higher priority settlement figures than others. Be prepared for the fact that Respondents may attempt to pick off the strongest claimants, leaving the weaker claims to resolve later. This process may in and of itself lessen the value of the remaining claims. If you have elderly or physically ailing clients, both sides may choose to make those individuals a priority.

Foresee issues of confidentiality. Most broker-dealers routinely insist on confidentiality clauses in their settlement agreements. Consider that if all your clients don't settle, you may wish to have some of those who did settle testify as witnesses. Anticipate how this will play out and discuss the ramifications with your clients.

Rather than try to ascertain in advance the settlement value of each claim, instruct your clients that they should approach mediation with an open mind. Avoid the temptation to establish the dollar value of your clients' claims before getting to the mediation. Instead, participate with the mediator in the valuation and negotiation process. Once you and the mediator are convinced that the opponent has put forth their best and last offer, ***only then and not before*** should you and your clients decide whether to accept the figure or reject it and go forward. In this fashion, you take pressure off of yourself to evaluate individual and group claims, and let the mediator assist in placing the ultimate decision where it belongs: with each individual claimant.

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