Improving Your Mediation Experience: Practical Tips and Suggestions

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While securities mediations deal with different facts and arguments, they nevertheless share many similarities. That, at least, has been my observation over the years as a mediator and practitioner. And while each mediation has its own course and pace, with no *One True Path* toward settlement, helpful information can be gleaned from their common characteristics. What follows are time-tested ways to improve your chance of reaching settlement in a securities arbitration mediation, based on those similarities.

Things to Consider Before Filing the Statement of Claim

Does it make a difference for purposes of mediation who gets named in the arbitration Statement of Claim? Perhaps. There has been a lot of chatter since the NASD's revised expungement rule became effective that naming a broker or other potential respondents (i.e., a branch manager) might hamper the mediation process since those respondents would have a much harder time getting themselves expunged. It's clear the NASD is taking the expungement process seriously and that, as a result, they are harder to come by. It also seems logical that naming a broker or branch manager isn't going to win you any friends at the broker dealer (at least if they are still employed); the named party, if present at the mediation, may be more intransigent as a result.

I haven't seen any real evidence that naming the broker or others has hampered the settlement process. That being said, I certainly haven't seen any evidence that naming a broker or a branch manager helps get cases settled. As a result, while there may be strategic reasons for naming a broker or others (perhaps if the broker has left the firm and is an independent source from whom you can or may need to collect, or if you simply want to have the broker's activities become a matter of record), I see no good reason to name a broker or others in management, at least for purposes of mediation. Besides, they could hire separate counsel, bringing them to the mediation and making settlement all the more difficult (since those attorneys will, naturally, want their opinions heard).

Prior to the Mediation

What To Give Your Mediator And Some Thoughts On Preparation

Some of what you give your mediator may be driven by your experience with the particular mediator or a mediator's specific request. I've always found it useful to have, at a

minimum, a copy of the Statement of Claim, the Answer (at least if it is a narrative Answer and doesn't simply deny everything), a damage analysis and, depending upon the matter, some key documents. A summary of settlement negotiations (if any) is also very helpful, as is a summary that tells me something different from the Statement of Claim.

Simply dumping some home-generated numbers on the mediator or the other side may not be the best way to proceed, however. Nor can you necessarily rely on your in-house numbers cruncher or outside expert to always get it right. At a minimum, check your damages analysis before the mediation. I have had a number of mediations where one side or the other was embarrassed to discover that their numbers were wrong. The side in control of the numbers usually enjoys a decided bargaining advantage. Needless to say, explaining such glitches to your client is difficult at best.

In most mediations, "the numbers are what the numbers are." Ideally, both sides could save time and money if they agreed in advance on retaining <u>one</u> expert if a simple profit and loss statement is all that's needed. But the ideal is not the reality, unfortunately. If you want your expert to run a few scenarios you'd rather review first to see how they look, using one expert is obviously out of the question. That doesn't mean, however, that you should play *hide-the-ball* with the other side until the mediation. At a minimum, consider exchanging profit and loss statements with the other side to make sure you're on the same page before the mediation begins. That way you will avoid wasting time arguing with the other side about what the "true" numbers are. If your numbers don't agree, in advance of the mediation, take a look at the time parameters each side is using. The difference in starting and ending dates for the analyses accounts for many discrepancies.

Run the numbers from different perspectives. This may involve several different analyses. These can include: (a) looking at performance during different time periods, (b) comparing your client's account performance to different indices, or (c) using a model portfolio. The *Principia Pro* or *Morningstar Portfolio* comparisons are particularly helpful. These compare your client's portfolio to a selected index (often, but not always the S&P and/or some blended benchmark). They also compare its sector holdings on a percentage basis with that index (i.e., how much technology your client has compared with an index) and measure the volatility (i.e., standard deviation) or risk of your client's portfolio against a selected index. Depending on the particular case, doing a "if it ain't broke don't fix it analysis" (i.e., what would have happened if the broker had never touched the portfolio) can be very helpful.

There's nothing wrong with talking to the mediator in advance of the mediation session. Indeed, communications should be encouraged by the mediator. This is particularly helpful if one or more of the parties has some personal issues or hot buttons of which the mediator should be aware. In the Southeast (where I primarily mediate) counsel are generally accustomed to making some opening remarks. If one side chooses to forego those comments, I like to be informed in advance to let the other side know. As often as not, once one party decides not to do an opening, the other side won't either.

<u>Pre-Mediation Settlement Discussions</u>

Parties should have pre-mediation settlement discussions if they think it makes sense. There's nothing wrong with trying to narrow the gap before you begin mediating. If you've established some type of floor or ceiling on an offer and/or demand as a precondition to mediation, put that floor or ceiling in writing. People are not always on the same page when on the telephone. I've been at more than one mediation where one side or the

other made accusations of bad faith resulting from a miscommunication (or deliberate deception, depending on who you ask) between counsel.

Who Attends

Broker? If you are not going to bring all of your clients when there are several claimants involved (which is often unnecessary if the number of real decision-makers is limited), make sure you check with the other side to avoid any initial problems. This is usually a non-issue if this item is discussed in advance of the mediation conference. For example, if you think the broker is important to have at the mediation (and I usually prefer his or her presence so I can question the broker), ask the other side to bring the broker. They may not accede to your request, but I have seen it happen on a number of occasions.

Format? Consider the format you'll use in presenting your position. PowerPoint? An organized three ring binder? A few comments and nothing more? Obviously, every case is different. Studies show that people remember better the things they *see* rather than things they *hear*. This would suggest that a PowerPoint presentation or notebook would be preferable to some unadorned opening remarks. But both of these mediums are subject to overuse, however. PowerPoint quickly gets boring, so I suggest you stick to your main points and save the slides for key documents or charts, and not narrative descriptions, quotes from the NASD Manual or long case citations. The same is true for the binder, although you can add additional paper (tabbed) to make you look very prepared while only spending time on a limited number of the tabs. I think the effect of an organized presentation is helpful not only to persuade respondents' counsel, but to let their client know you take the case seriously and are ready to go to the arbitration hearing.

At the Mediation

Beginning

Setting the right tone is critical. Setting the wrong tone will move things in the wrong direction and force the mediator to spend valuable time cleaning up your mess. There are plenty of ways to get your point across during your opening comments that don't include personally attacking the broker or the broker-dealer as the Evil Empire. Nor should the opening be a re-reading of your Statement of Claim; you can assume that the respondents and, hopefully, the mediator have read it, so hit the high points of what the case is really about. It's generally more effective, in my view, to direct your comments to the person on the other side holding the checkbook than the mediator.

A lot of lawyers do not let their clients speak at mediation. There are often many good reasons for this (such as "My client is an unlikeable or lousy witness and I don't want the other side to know"). On the other hand, if you have a nice widow who will make a good impression without screwing things up, you should have her speak. The more sympathetic your client appears, the more money you are likely to get to settle.

Your First Demand

Except in the rare instance, your first demand should not include amounts allocated for punitive damages or attorney's fees. It's clear that for most cases, respondents aren't ever going to pay a settlement that includes these items (since they might as well go to arbitration). Putting them in your first demand usually just makes the other side defensive and gets things off on the wrong foot. Moreover, the response you receive will often be as low in the other direction. Starting somewhere south of your maximum number is a good way to get the process off on the right foot.

Strategies

There's nothing wrong with saving some cards to play during the mediation. But don't get so bound up with litigation strategy that you refuse to play *anything* in your hand as the parties begin to move toward each other. You can dole the information out slowly; this will often encourage the other side to do the same.

While "free discovery" should never be the sole purpose of any mediation, it's certainly a side benefit that often occurs. Assuming you're comfortable with the way things are progressing and you trust your mediator, then play that last card if you have a reasonable belief that it will bridge the gap. It's always harder for mediators to do their job if you don't give them the tools to work with. And *please* don't give up on the process too early. You can keep talking even as you load the car and drive to the arbitration hearing.

The Settlement Agreement

To the extent possible, try to execute a complete settlement agreement and release *at the mediation.* This avoids "buyer's remorse" on either side as well as extended lawyer haggling over what in the final analysis are usually meaningless distinctions. If your client's English is poor, make sure the settlement agreement contains a line at the end in his or her native language that the agreement has been translated and that he/she understands its contents. Then have your client initial his/her name next to that paragraph.

Post-Mediation

The fact that a matter does not resolve at mediation doesn't mean it won't settle later. Good mediators will periodically check with you following an unsuccessful mediation to see if they can do anything to help get the case resolved and will work with both sides to try and bridge the gap. Don't give up!