Mediation Redux: Now More than Ever

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It has been ten years since the Securities Arbitration Commentator dedicated an entire issue to mediation: Tackling Obstacles to Mediation of Broker/Client Disputes was published in May 1994 and included the Defense Counsel's Perspective by Ted Krebsbach and the Claimant's Counsel's Perspective by Roger Dietz. Both of these seasoned practitioners in securities mediation noted that, although mediation of securities disputes had gained some favor, efforts to increase the use of mediation had met with limited success.[1]

Now a decade plus later, does the mediation landscape look much different? We have witnessed the incredible run up of the markets through the spring of 2000, and the tortuous and only in hindsight inevitable decline back to the mean. Claims follow the markets. Thus, we are now working through the end of the tech-wreck and correction claims that peaked in 2002 and 2003, and are only recently evidencing a slow down in filings.[2] Still, there are over 4000 new claims filed each year.

The theme of this year's program, "taking responsibility" leads almost inevitably to one conclusion: some sharing of the loss by the parties in a securities dispute. Mediation of securities disputes provides parties with a voluntary, less adversarial and less formal process that should lead to a resolution in less time and for less money. Since

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[1] See 6 Sec. Arb. Commentator, Vol. 4 , at 1-7 (1994).

[2] Arbitration filings at the NASD from January 1 through March 31, 2006 reflect an 11 percent decrease from the comparable period one year earlier. See NASD's the Neutral Corner, April 2006 at 5. Filings at the NYSE share a similar decrease.

mediation is voluntary and non-binding, the parties are free to withdraw from mediation at any time. [3]

A high percentage of securities claims would benefit from the mediation process. I submit the following ten suggestions to increase the use and effectiveness of mediation.

1. Mediate early — experienced in-house counsel should be able to evaluate their claims by the time they submit the answer. Claimant's counsel should also know enough to realistically evaluate the claim. Without large expenditure of time and money, this is the time post-filing when the customers and the firms can receive the most economic benefit from early evaluation and resolution. Early mediation provides the parties with the opportunity to resolve the claims before incurring significant outside counsel fees, before the parties positions become to hardened, and before the protagonists have changed jobs. From the Claimant's perspective, early closure is most likely better that late closure, assuming the settlement value of the claims are in the same range. At a minimum, early mediation also helps focus issues and allows the parties to see their weaknesses realistically.
2. Client involvement — mediation provides the parties with the chance to see the other side and hear the claims or defenses first hand. It is an effective way to manage expectations from counsel's perspective. From the claimant's side, counsel often needs the mediation to provide a neutral and unvarnished view as to why the claims are not worth the damage numbers sought. From the respondent's

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[3] See generally Katsoris, Roadmap to Securities ADR, 11 Fordham J. Corp. L. & Fin. 476-78 (2006). Other leading articles on the topic are J. Boyd Page et al., The Role of Mediation and Early Evaluation in Facilitating Settlement Negotiations, PLI/Sec/Arb., Vol 2: Course Handbook Series No. B-899, at 60 (1995); Roger M. Dietz, Understanding Function, Use of Mediation, N.Y.L.J., Apr. 12, 1999; Joel E. Davidson, The Case for Mandatory Mediation of Securities Disputes, Sec. Arb. Commentator, Dec. 1998; Joel Davidson and Romaine L. Garner, Mediation: The Best Surprise is No Surprise, ABA Section of Litigation, Securities News, Vol. 7, No 3, Fall 1997. For the emerging use of mediations of international securities disputes, see Roger M. Dietz, International Securities Mediation, New York City Bar Securities Arbitration & Mediation Hot Topics 2006 at 170 (May 2006).

view, often the branch manager or broker will not face the holes in the defense until a face-to-face mediation. Better at that time than on the eve of – or still worse at – the actual hearing.

3. Prepare for the mediation—too many practitioners just "show up" with a brief opening statement and expect to let the game play out on its own inertia. The more prepared you are, the more effective you will be in controlling the process to your client's advantage. Mediation gives the parties real opportunity to impress the other side with the claims or defenses. If you are not prepared, the settlement range widens instead of narrows.
4. Mediation is not war—it is a business meeting to probe mutually acceptable settlements. Due to the confidentiality strictures of the process, mediation can and should lead to frank discussions of a parties' strengths and weaknesses. At worst, even if no settlement is reached, you should learn and see enough at a mediation to fine tune your trial strategy and hone your themes or defenses.
5. When to go to mediation—virtually all disputes except those with clearly no merit could benefit from mediation. The other limited scenarios where mediation may not be the appropriate course involves using mediation for delay (bad-faith), going to mediation unprepared or without authority, or cases in which you can settle directly with your adversary. Otherwise, mediation is predominately a win-win scenario for both parties.
6. What style of mediator—the rule of thumb for the respondents was always the stronger you evaluate your case, the more evaluative you want the mediator to be. We often put too much stock on the evaluation/facilitative monikers, and each mediation is so unique that the labels are not as important as we think. That said, experienced practitioners do expect and are receptive to the true evaluation of a neutral and experienced mediator in answering the most simple but nuanced question—what is the case worth in front of the assigned arbitration panel, this set of lawyers, these witnesses and the facts of the case. We know all the industry statistics of what has come before. We don't know the particular magical

chemistry of how our case will play out—will the claimant make it through cross, will the broker be liked and believed? Will the quiet arbitrator crumpled in tweed on the far left suddenly ask the killer question that sends all sides home reeling? A good mediator can bring order, or at least a good test run to the random chances of an arbitration proceeding. In short, when you mediate, you take the arbitrary out of arbitration.

7. The vast majority of mediations end in settlement.[4] There is objectively a "fair range" to resolve most disputes. The parties control the process. Rationality can be mutual. And adverse publicity in the public domain is awarded in mediation.
8. Mediation is far less costly than arbitration. Those savings alone are often enough to bridge the gap in effecting a settlement as opposed to spending more time and resources and eventually leaving your fate and control to a panel of arbitrators.
9. Management support is essential—why not have an institutionalized presumption of mediation unless responsible staff give a compelling reason why mediation is inappropriate. As noted above, the benefits of mediation vastly outweigh the downsides and mediation is appropriate in all but a few limited circumstances. The most compelling argument for mediation is simply that it works. That is why, although filings of securities claims are down, the use of mediation to resolve these disputes is up.
10. Mediation without mediators—experienced practitioners should have one finely tuned expertise—to evaluate cases. Mediators see it from a broader perspective, but also use similar matrices to ultimately form an opinion on what a case should settle for. Roll up your sleeves with your adversary and see if you can resolve it on your own. The SAC award base is there as a guide to set parameters. It can be done.

Conclusion

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[4] Industry statistics indicate that 80 to 90 percent of mediated claims settle. Only ten percent of NASD filings, however, utilize the NASD's formal mediation program.

The theme of this year's program—taking responsibility—fits particularly well with the concept of mediation. The parties control the process and take responsibility for the outcome of the dispute. Mediation provides the parties with a neutral and less adversarial avenue to resolve their claims fairly, efficiently and economically. Its use is and should be on the rise.

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