

Winning in Securities Mediation: Effective Advocacy for Success

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Parties to a conflict share something in common ... the dispute. Resolving a problem requires the disputants to take some ownership of the problem. Taking responsibility for the dispute, and taking responsibility for the resolution, is the key to a successful mediation.

Every client wants a favorable resolution. The advocate must shepherd the dispute through the appropriate processes to get the best result. He must manage expectations. She must honestly evaluate the risks and costs. Finally, the client must be prepared to keep an open mind and then make an informed decision. The alternative, of course, is to let a panel of neutrals issue a binding award (and the client is not likely to be wholly satisfied with the result). A happy client, with a favorable resolution, is always a good source for new business.

In considering mediation, it is important to address four pivotal questions:

1. Does the client want to settle the dispute? It is easy to sabotage the process but a strong mediator will make that difficult. The dynamics of mediation often propel the parties towards agreement. Is the client ready to take responsibility for resolving the problem?
2. Does the party have sufficient information to intelligently assess risk and evaluate settlement options? The best time for mediation is after *enough* information has been revealed, while there is still time to save some money by not uncovering every rock.
3. Will there be a decision-maker at the mediation? The participants must have authority to negotiate and reach a binding agreement.
4. Is everyone (advocate and client) prepared to make an honest evaluation and analysis of the dispute and the proposals for resolution? Mediation requires a hard look at the case. Even if it does not result in a settlement, it is rare for the participants to not learn more about the issues, the perspectives and paradigms, and the interests involved.

If the answers are yes, the parties are ready for mediation. Equally important in mediation advocacy are the three *Ps*: preparation, presentation, and persuasion. This article outlines how to prepare for mediation, how to present a case in mediation, and suggestions about the art of persuasion.

There are ways to dramatically improve your chances of winning in mediation. The forum is unique. It is not a “one size fits all” process. From beginning to end, the process requires preparation, discernment, persuasion, communication, and negotiation skills. *Being selective about your mediator is the first place to start.*

Things to look for in a securities mediator:

1. Understanding of securities issues

A good securities mediator must be able to grasp the concepts, speak the language, and communicate clearly. This is not the time to teach a CLE to the mediator. Securities law is a specialized field so the mediator should have some specialized experience. He should understand the nature of trades, general claims in securities disputes, and be familiar with how these matters tend to resolve in arbitration or settlement.

2. Experience on arbitration panels

Your mediator needs be able to relate some understanding of what actually happens before panels (real world experience). Green may look good on money but a green securities mediator is unlikely to garner the respect of the advocates on matters relating to what a panel might do. She must have been around the proverbial block. Sitting on arbitration panels conveys a greater sense of perspective. Acting as Chair is akin to having a former judge as your mediator. But this type of experience, by itself, is not enough.

3. Good process skills

Just knowing a lot about the subject matter or issuing awards does not, ipso facto, qualify someone to mediate. He should have attended or presented mediation training classes, be actively engaged in a busy mediation practice, and have experience mediating securities disputes. Among the specific skills to look for:

- a. Good listening
- b. Good analysis
- c. Good communication
- d. Good backbone – some spine and willingness to show it, especially in the face of untenable arguments. If an assertion is clearly ridiculous, it is better for the party to hear it in a private setting where it can be factored into settlement analysis. *It is a disservice to let stupidity go unchallenged.*

4. Willingness to be evaluative and decisive

In a purely unscientific survey, the majority of claimant and respondent counsel indicate a strong preference for a mediator who speaks his mind, even if they do not necessarily agree with the conclusions. Sometimes a third party's assessment is just what is needed for the client to accept a realistic settlement. But what is the appropriate role of the mediator? To help parties settle cases and to do what it takes to achieve that goal. There is a natural continuum from being purely facilitative to being wholly evaluative. You probably don't want to go with the extremes.

It is important to distinguish a mediator from a neutral case evaluator. The latter does not require any specific process skills, just an understanding of the issues and a directive sense of evaluative judgment. Evaluating a claim is not settling a claim. It takes mediation process skills, good communication, clear understanding, patience, and negotiation finesse to bring about a settlement. In short, while many profess to want evaluation, they unfairly discount the importance of facilitative process skills. A good securities mediator needs both, and to use those skills with discretion and proper timing.

I like to start in a facilitative fashion and, once I have garnered the trust and confidence of both sides, where appropriate, I begin to disclose in private session my evaluation on key issues, *only* if it would help move the parties toward settlement. The advocates respect decisiveness, not a wishy-washy approach. While there are many "truths" and perspectives, experience offers some guidance as to how claims and fact patterns will play out before a panel. It takes familiarity with arbitration to give informed and credible opinions. Often the advocates ask that straight truth be spoken to their clients. They need help in communicating the reality of the case, especially when over time the client has either *exaggerated* the value or *discounted* the risks.

5. Experience with the Mediator

Unlike in arbitration, where you probably do not want the arbitrator favored by the other side, the exact opposite might be true in mediation. A mediator who has worked with opposing counsel knows how to create movement with that side. Unless there is a clear bias concern, the other's choice of mediator may be right for the case. Conduct your own due diligence, but do not reject the other's choice out of hand. Consider developing a rapport with the mediator from the outset. It is a good idea to contact the mediator before making your choice (no ex parte problems here).

Priming the Pump Before the Session – Feeding Information to the Mediator

While the target of persuasion in mediation is the other side (*i.e.*, you are convincing them that the case is worth more or less, depending upon your point of view), getting the mediator on board early is a good idea. Do this verbally and in writing.

Call the mediator early to introduce your case. Give him the 10-minute story, not the full-length play. Focus on highpoints. Follow the conversation with a short position statement. The paper should address the facts, legal arguments, specific damage calculations, and nature of prior settlement discussions. Attach the Statement of Claim and Response, Executive Summary of expert reports, and anything else that you would like the Mediator to review before the session but use discretion – sending copies of all your banker boxes is not required and ill advised.

Prepare Your Client Before Mediation

Spend time with the client explaining the mediation process. Help the client feel comfortable with the nature of the proceedings and the objectives. Prepare the client for the possibility that your “lawyering” style may change because the goal is to reach a settlement. Let them know that your demeanor and approach may be different in mediation than at the hearing. The goal is to reach agreement, not to eviscerate your opponent. It makes little sense to adopt the stance of examining a hostile witness when you are trying to reach a settlement with the other side.

Plan a negotiating strategy together. This may be the last step in the case and the client needs to be as prepared as if going to final hearing. Both client and counsel need to be well versed in all nuances of the case. Some firms teach clients how to advocate for themselves. This can be a great educational opportunity for the client.

The negotiation strategy should be flexible because new information and risk factors are often revealed or presented in a new light. Try to plan for negotiation in stages. Determine, for example, what movement would be appropriate in response to movement from the other party. The mediator can facilitate the negotiations but the parties remain in control of the negotiation. Do not abdicate authority to the mediator.

Preparation and Analysis

Spend time analyzing the case from different perspectives using the following outline. A seasoned mediator will be exploring these areas before and during the mediation.

Checklist:

- 1) Prepare a brief yet comprehensive summary of the case. Determine the general theme. What is the story that will be told? Identify the disputed

and undisputed issues of fact and law. Quantify the various damage models. Anticipate what the other might say.

- 2) Summarize the other party's case with the same approach.
- 3) Identify the strengths and weaknesses of the client's case.
- 4) Identify the strengths and weaknesses of the other party's case.
- 5) Identify the client's interests. Look for expressed interests, obvious but unexpressed interests, and hidden interests or motivations.
- 6) Identify the interests (expressed, and hidden) of the other party.
- 7) Review the consequences of failing to reach an agreement. What might happen if there were no agreement and the case proceeded to arbitration? What is the composition of the panel? What is the range of probable outcomes? Try to ascribe some numerical probability. How many days have been reserved for hearing? Will it finish? What are the expected fees and costs (including the cost of lost opportunities)? Do some "reality testing" with the client.
- 8) What is the relationship between the parties? Are there any past or current business dealings? Is there a desire for a future relationship? Can anything be done to improve or preserve the relationship?
- 9) What is the relationship between the advocates? Can anything be done to improve that relationship in terms of substance or process?
- 10) How effective is the communications between the parties and counsel? What can be done to improve communication?
- 11) What is the history of settlement negotiations? What are the obstacles to settlement? Does the client's representative have authority to settle the dispute? Is there someone higher up the food chain available by phone? What can be done to get authority to settle? Does the other party's representative have similar authority?
- 12) What external standards could be applied to the options to frame them as fair and legitimate in the eyes of all concerned parties? If a settlement is objectively fair, it is more likely to endure.

- 13) What proposals for settlement are the client willing to make? What proposals is the other party willing to consider? Review all negotiation activity to date. Plan a fluid and flexible negotiation strategy.

Presentation and Strategy

Once you have organized your thoughts in preparation, your focus can shift to presentation and strategy. Prepare a confidential mediation booklet, similar to a settlement brochure, for the client and the mediator. The booklet should be relatively brief and concise, tabbed with sections to show your summary of the case, liability analysis, and summary of damages.

Send materials for the mediator to review at least five days before the session. Consider the advantages and disadvantages of delivering a separate settlement brochure (without confidential information) to the other party before the mediation. Sending materials to the other party may cause the other party to think about the realities of the case before the mediation begins.

Ensure that the client's representative will be present for the entire mediation (reserve the full day) and that the party has full authority to settle the case (not just a "bottom line"). Be sure others who may have bearing on the decision are available, at least by telephone, on the day of the mediation.

At the Mediation – Joint Session

The best advocates use this opportunity to address the other party directly, this being perhaps the only time to actually do so. The advocate speaks in a clear calm direct manner. She is always respectful. At the outset, she expresses a desire to reach a solution. Following the "carrot," she carefully and methodically picks apart her opponent's case, accentuating the risks for the other side. Her points are well reasoned. By acknowledging legitimate concerns, she makes her case more credible because she is not overselling. At the conclusion, she again indicates her desire to help both sides achieve a settlement. It is the classic sandwich technique – bad news (the risk) sandwiched between positive affirming statements. The other side likes her because she develops rapport, respects her because she firmly advocates her client's position, and works with her to get the case settled.

Strategic Use of Opening Statements

The target of persuasion is not the mediator. The one who must find your arguments convincing is the party who must compromise their claim (or defense). Therefore, it makes sense to address your remarks to the other party. Your task is to convince the other that it is in that party's interest to reach agreement. The other party needs to change

his or her perception of the risk-reward ratios. Your task is to help the other party see the case through a different lens.

Politely demonstrate that you mean business, that you will take this “all the way” if you must, but let them know that you are here in good faith to negotiate a fair settlement. This is not the place for grandstanding but it *is* an opportunity to communicate. Keep your objective in mind – to negotiate in a manner that will ultimately lead to both parties agreeing upon a resolution. Be direct, concise, and clear.

Cover only the key points -- do not be distracted by subsidiary issues that, in all likelihood, will never be resolved. Acknowledge obvious weaknesses or concerns – the rest of what you say will seem more credible if you are blatantly honest in your assessment. Your “reasonableness” will score points with the other side and the rest of what you say will carry more weight.

As the other side speaks, listen! Consider different perspectives with an open-mind, even as you advocate. When the opposing party or counsel has completed their presentation, ask open-ended questions to clarify any matters. Practice active listening skills (an excellent beginning is to restate what the other said to show you fully *understand*—although not necessarily agree—with the other’s point of view). Communicate to the other side that you understand their interests. There is a difference between understanding and agreeing. The simple technique of active listening can diffuse tension and make others more amenable to agreement. If you can articulate their perspective (and do so in their presence), you are closer to achieving a meaningful settlement.

Consider allowing your party to speak on his/her own behalf, especially with someone who would make a good impression before the panel. This showcases the ability of the party to tell their story. Moreover, it is a cathartic experience for the party to relate their story directly to the other side, without filters or interruptions. It involves the party in the mediation process and thereby creates “ownership” of the dispute and ultimate resolution. Here the issue of taking responsibility takes center stage.

People learn through various modalities. Some process information more effectively in written form (readers), others verbally (listeners), and some through tactile experience (hands-on). Many have a balanced portfolio of adaptive learning skills. Therefore, it makes sense to engage all of the senses when making your point, if you want the other to “get it.” Don’t get obsessed with one particular mode of communication (some cringe at the overuse of PowerPoint presentations). It is best to mix it up – speak some, show a little paper, project a presentation, write on a whiteboard or flip-chart, pass around a chart. Graphics and other visual aids make for a more interesting (and attention-getting) presentation. You will keep the interest high and score some points at the same time.

Do not end a joint session presentation by making a “non-negotiable bottom-line” proposal; throwing down a gauntlet is counterproductive. Leave room for negotiation in

private caucuses. It is much better to end on a positive note and leave the hard work of negotiating for later.

First Caucus

This is primarily an “information-gathering” session by the mediator and the parties will have the opportunity to “vent” in this private setting. Let the party speak freely. Once someone has been heard, he or she is more attuned to letting go of the conflict. It’s as if the dispute were being held tightly in a fist and by speaking, slowly the fingers begin to open the hand. If you stifle the urge to speak (and be heard), they will clench and cling to the conflict.

Confirm that the mediator will maintain confidences. The essence of mediation is confidentiality. To speak freely in front of the mediator and your client, you must know that it is a “safe zone.”

Be candid and honest with the mediator. A mediator can help if he knows your negotiating strategy. This is how you like to negotiate, not “your best number.” It is important to analyze information throughout the mediation process so as not to get stuck in non-negotiable place. In situations where one side shared their “wish list” or expectations for the outcome, that side was more likely to come close to if not within their target range.

Be prepared for a thorough analysis of the case—from your perspective as well as the perspective of the other party. *Information is power.* Even when mediation does not result in an immediate settlement, the benefits of thorough analysis are immeasurable. You will be better prepared for hearing because you can anticipate arguments and respond effectively. You have a better sense of what makes sense to a third-party, and what does not. Your client may need to hear some “reality” as conveyed by the mediator. Use him.

Be ready to analyze the arbitration alternative, the consequences of failing to reach agreement. Who are the panel members and what is their experience. Have you examined their award history? What would be most compelling and least compelling about your case? Estimate cost and expenses, likelihood of recovery, range of probable outcomes, and other aspects associated with continued conflict.

Brainstorm settlement options, from the realistic to the ridiculous and sublime. Let your creativity run wild. It may produce some interesting ideas. If you relax into the mediation process, your thinking will be clear and you can better manage your end of the negotiation. Don’t lose your cool, unless you are doing it for show in front of the other side (not always a skillful tactic).

Begin the negotiation process in the caucus. Ask your mediator lots of questions. He may not be able to give you answers but keep probing. We learn as much from what is unsaid as from what is said. It is helpful to start the negotiations with a meaningful proposal, tied to some objective standard. Some mediators do not request demands/offers until the second caucus. If you wait, at least share with the mediator in confidence some target zones (zones of probable agreement – ZOPA). A ZOPA is a way of trying to define an area of agreement that will work for both sides.

Opening demands/offers are just that—an opening, a beginning, not an end point. A good proposal is supported by objective criteria or legitimate standards that the mediator is then authorized to disclose. It can be explained with reference to a rational basis or formula (not just a feeling). With every offer, it is helpful to consider what response you believe the proposal will elicit in the other party, and whether it will further the negotiation. Utilize standard measures – for damages and percentage likelihoods.

Subsequent Caucuses

The mediator will use these sessions to create momentum toward settlement by refocusing the parties on: previous areas of agreement, their underlying interests, the underlying interests of the other party, option analysis, risk analysis and transmittal of reasonable proposals. Use the mediator to learn more about the other party’s view of the case and to communicate strength to the opposing party.

I make extensive use of the attorney’s caucus – pulling the attorney out of the room to meet privately with the mediator. Everyone has a perspective that deserves to be respected and I want to hear from counsel, outside the presence of his client, what she believes would be beneficial to move the process forward. A separate attorney-mediator caucus can help build rapport and enlist the mediator in posturing the next move, perhaps even strategizing on how to approach the client with certain ideas.

As the day progresses, be willing to listen to different points of view. Consider the information transmitted from the other side. Take what you will and leave the rest. You are learning more about the case and the strategies. As appropriate, allow the new information to influence your risk analysis/settlement parameters. For this reason, do not be frozen (or allow your client to be set) on any negotiating “drop dead” numbers before the mediation. You avoid this dilemma by talking in ranges (not specifics) and remaining open and flexible.

Use the mediator as a sounding board for “reality testing” and to “float” settlement proposals. Listen carefully to what is being communicated and what is not. Testing the waters will provide useful information on what the other party needs in an agreement. Speculate on the terms under which each party would be willing to settle.

Do not withhold your best evidence from the mediator even if you think it should not be disclosed to the other side. The mediator may offer advice on the best use of that information. If you are committed to settlement, full disclosure will impact the other party's evaluation. Information may be disclosed to the mediator confidentially, with authority to make certain disclosures only in broad general terms.

Consider the use of bracketing as a negotiating tool. I use bracketing to help the parties project targets (a range) for the settlement. One side indicates a willingness to go to a specific number premised upon the other going to a defined point. The offer is conditioned upon the other side moving to a certain number (a conditional offer). If the other side is willing to move there, and the condition is fulfilled, the bracket has been achieved and the range between the last two numbers has narrowed.

The conditional offer moves the parties into a narrower settlement zone, making progress and producing momentum. It broadcasts or projects a willingness to move to a certain point (generally a more generous number and achieved faster than the traditional offer/counter-offer route) but it requires assent from the other side. In this negotiation dance, it takes two to tango. Some parties are uncomfortable with the speed or the distance covered with this approach, but it is worthy of serious consideration as a negotiator.

The mediator may give you assignments to work on between caucuses. You may be asked to explore the risk analysis in further detail and generate additional options for settlement that have not yet been proposed to the other side. As the caucus sessions continue, the mediator will build the momentum and assist in clarifying the common ground. Sometimes, the mediator will recommend a joint session to hammer out details.

Closure (post agreement)

The mediator may recall the parties to the joint session format if they have been in caucus to summarize essential terms of the agreement. Each participant should be asked if the mediator's summary was accurate and whether they agree that the matter has been settled.

Ask yourself - Have all bases been covered—are there any loose ends? Do you have a binding and enforceable settlement? Who will prepare the final documents—when and how will it be transmitted? What will happen if something breaks down in the post-mediation phase? How and under what circumstances should the mediator be brought into the discussions?

In order to avoid unanticipated problems occasionally created by “settlement remorse,” it is good mediator practice to have the attorneys/representatives and the parties sign a memorandum of essential terms if more detailed memorization is deferred because of the constraints of time or technology. While not always practical, it is best to have final

settlement documents executed at the conclusion of the mediation. Some advocates carry their form agreements on computer to the mediation so the signing can take place on the spot. Sometimes a memorandum of understanding is used to establish the framework for the final papers. Let the mediator stay involved until completion.

Some advocates report that the settlement rate in securities mediation is higher than in general commercial mediation. This may be attributed to a better understanding and analysis by advocates on both sides, and a more general understanding of what panels do with certain types of cases. There is a higher degree of predictability with panels as opposed to juries.

Final remarks

Owning the problem (taking responsibility for it) is critical. When both sides can see how they contributed to the problem, it is easier to find a way out of the rabbit hole. We see this in mediation every day. Both sides share different perspectives on similar facts. They interpret events differently. Both imbue meaning to a set of circumstances. But oftentimes the other does not share (and cannot conceive) the same meaning. They cannot understand how anyone could see things differently. The mediator begins the process of opening their eyes to seeing differently. Despite the differences with the other side, it is important to recall that they both share a common problem. *It is the conflict that keeps them locked together in an uncomfortable embrace.*

As the mediation progresses, the parties and advocates are called upon to engage in serious risk analysis. Both sides need to see clearly what lies ahead in the absence of an agreement – an arbitration set in motion by the parties. The parties negotiate in the face of the alternative, and the picture of that alternative is not terribly attractive.

Sci-fi fans might say there are two distinct time lines in the future (we will settle or we will arbitrate) and so we look first at what might happen without agreement. Therein lies the risk, the expense, the fear and uncertainty. As the great writer Frank Herbert said, “Fear is the mind-killer.” Mediators focus on the “FUD” factor – fear, uncertainty, and doubt. *Needless to say, few want to hang out with that trilogy.* But, once the groundwork has been set for the uncertain times ahead, the mediator begins shifting focus to the timeline that the parties can *actually* control if they take responsibility. The focus becomes what the parties need to end the conflict on their own terms. Suddenly ownership of the resolution plays a larger role. First the dispute is out of control, in someone else’s hands (the panel). Now the resolution is entirely up to the parties. They, in essence, must take responsibility.

In the end, human beings will do what they perceive to be in their best interests. The expert mediator can help guide both sides to a vision of settlement that is more attractive than the uncertainty of the alternative (the arbitration hearing). Through proper

preparation, presentation, and persuasion, you can deliver the results that your client wants – a favorable resolution.

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