National Regulatory Service
2006 Compliance Conference
October 6, 2006

Securities Mediation: An Alternate Path to Claims Resolution

by:

Peter E. Cooper
LAWRENCE, KAMIN, SAUNDERS & UHLENHOP, L.L.C.
Chicago, Illinois

NATIONAL REGULATORY SERVICE

Securities Mediation: An Alternate Path to Claims Resolution

By: Peter E. Cooper, Esq.[1]
Lawrence, Kamin, Saunders & Uhlenhop, L.L.C.
Chicago, Illinois

INTRODUCTION

In 2004, securities customers filed over 9000 arbitration claims with the NASD Dispute Resolution and the New York Stock Exchange. Although 2003 and 2004 represent the high-water mark for securities arbitrations, a broker-dealer must anticipate that it will regularly be sued by disgruntled customers. Accordingly, a firm must establish and maintain a protocol for quickly and efficiently resolving customer complaints, including customer disputes.

Since 1987, when the U.S. Supreme Court upheld the validity of pre-dispute agreements to arbitrate in *Shearson/American Express v. McMahon*, *482 U.S. 220 (1987)*, virtually every broker-dealer has incorporated pre-dispute arbitration provisions into its customer agreements. The industry has recognized that arbitration, as an alternate method of dispute resolution, is more efficient, more convenient, quicker and less expensive than traditional court proceedings. Yet, even with these advantages, arbitration can prove to be costly and time-consuming, and the results frequently are unpredictable. This has led to a rise in the use of mediation to resolve securities disputes.

I. What is Mediation?

The NASD describes mediation as "an informal, voluntary process in which an impartial person, trained in facilitation and negotiation techniques, helps the parties reach a mutually acceptable resolution. What distinguishes mediation from other forms of dispute resolution – principally, arbitration and litigation – is that the mediator does not impose a solution but rather works with the parties to create their own solution."[2] Mediation is non-binding. The emphasis is on fashioning a solution satisfactory to all. Even if the parties cannot fully negotiate an acceptable settlement, they may still benefit from the process by narrowing the issues to be arbitrated or litigated.

While both mediation and arbitration are forms of alternative dispute resolution, they vary significantly:

Mediation	**Arbitration**
• Expedited negotiation.	• Adjudication.
• Parties control the outcome.	• Arbitrators control the outcome.
• Mediator has no power to decide;	• Arbitrator is given power to decide;

settlement only with party approval.	final and binding decision.
• Exchange of information is voluntary and is often limited. Parties exchange information that will assist in reaching a resolution.	• Extensive discovery is required in accordance with arbitration procedures.
• Mediator helps the parties define and understand the issues and each side's interest.	• Arbitrator listens to facts and evidence and renders an award.
• Parties vent feelings, tell story, engage in creative problem-solving.	• Parties present case, testify under oath.
• Process is informal. Parties are active participants.	• Process is formal. Attorneys control party participation.
• Joint and private meetings between individual parties and their counsel.	• Evidentiary hearings. No private communication with the arbitrator.
• Outcome based on needs of parties.	• Decision based on facts, evidence, and law.
• Result is mutually satisfactory – A relationship may be maintained or created.	• Result is win/lose award – Relationships are often lost.
• Low cost.	• More expensive than mediation, but less expensive than traditional litigation.
• Private and confidential.	• Private (but decisions are publicly available). [3]

In short, arbitration provides for expedited and efficient *claim adjudication*; mediation offers *negotiated claim settlement*.

II. Decision to Mediate

As mediation is a process for obtaining a negotiated solution, the primary question is not whether to mediate but whether to *settle* the dispute. It makes no sense for a party to consider mediating a case if the party would not be willing to settle; likewise, it is foolish to mediate with an opponent who is not prepared to compromise. While mediation provides a process and mechanism for obtaining compromise and settlement, it does not substitute for willingness to compromise.

There are very good reasons why people routinely prefer to litigate or arbitrate rather than to negotiate a settlement. An arbitration or trial fulfills – or parties believe it fulfills – various "needs" that are usually absent in a negotiated compromise: a sense of vindication, a sense of empowerment, a desire to be heard publicly, and a desire for the particular dispute to receive the stamp of legitimacy.[4] One commentator has noted:

> Aggrieved litigants seek vindication, and further, they seek public vindication. That is to say, they want their "day in court," no matter what it costs. Perhaps they will not really achieve vindication, but there is always the chance that they might, and they see a trial as the best chance they have of achieving it. People do not necessarily approach their conflicts in purely rational terms; they have strong emotional interests to satisfy, and a deep human desire to be proven right. They want to win, and they want someone else to lose. They want forever after to be able to tell themselves, their family and friends, that they won their case. They want bragging rights. People will pay a high price for this, and will bear not only the cost of the litigation, but also the risk of losing, in order to attempt it.[5]

In addition to these ethereal justifications, there are frequently more pragmatic reasons to continue to litigate. On occasion, a party simply cannot afford to settle. A claimant, whose matter is being handled on a contingent basis, may need to recover all of her claimed damages. A small respondent may not have the resources to pay a judgment or a negotiated settlement. A broker faced with a series of related cases may decline to settle any, lest the settlement encourage a whole, new round of claims. In these circumstances, the financial realities of a party may drive its disinclination to settle.

At the same time, notwithstanding the relative strengths of a party's position, some cases cry out for settlement and mediation. The most obvious example is where the amount in controversy does not justify the risk and cost of continued litigation. In these circumstances, the primary goal of mediation may be to resolve the case, even if the client has to pay the entire amount (as a respondent) or to walk away with nothing (as a claimant). The author knows of numerous instances where a claimant's counsel has reduced or even waived its fees just to be rid of an unprofitable suit.

Significantly, virtually every broker-dealer performs at least an informal cost/benefit analysis with respect to every dispute. Some firms employ a formal evaluation process to determine which, if any, claims they are willing to settle and their exposure should they fail to settle. Frequently, firms wish to assure that a settlement falls below the reporting thresholds for NYSE and NASD. Yet, essentially, this goes to the issue of whether to settle, not whether to mediate.

If mediation is just a different forum for settlement negotiations, why mediate at all? Why not simply direct counsel to negotiate a settlement on her own and save the mediation expenses? In fact, the majority of settlements of customer claims *are* achieved without formal mediation. Nevertheless, mediation provides a unique arena to bring parties together to encourage that compromise. In addition, a trained mediator has specialized skills and training that enable him to assist the parties in bridging some of

their distances and recognizing alternative solutions. Finally, a well-performed mediation offers some of the characteristics of litigation – a sense of vindication and opportunity to be heard – that motivate many litigants to commence lawsuits or arbitrations in the first place.

III. When to Mediate

As one of the primary motivations for mediation is to reduce litigation expense, it makes sense to mediate as soon as practicable. What is practicable, however, varies with each case. A prematurely conducted mediation will likely prove fruitless and may harden the parties' negotiating positions.

Some commentators have argued that broker-dealers, in particular, should seek to mediate early in a case. "Without large expenditures 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."[6] Indeed, some claimant's attorneys have gone so far as to demand mediation prior to the filing of the arbitration claim, using the proposed statement of claim as a mediation summary.

Yet, relatively few of these "immediate" mediations prove successful. First, if a claim could be resolved without the filing of an answer or just after the filing of a response, chances are it could have been resolved in the customer complaint stage. As most arbitration proceedings are commenced only after the customer and/or his attorney has complained to the broker-dealer, it is unlikely that a securities firm will immediately reverse its prior rejection of a claim upon the filing of an arbitration. Second, a claimant files an arbitration claim because he is highly motivated to do so. At the time the claimant solicits an attorney to represent him and shares his tale of woe in the attorney's office, the claimant is manifestly convinced of the "rightness" of his position. An effective advocate will be able to organize and present the claimant's grievance in a compelling statement of claim. Indeed, the claimant's attorney will likely calculate the claimant's losses at a number higher than the claimant initially anticipated, and add on demands for interest, punitive damages, and attorney's fees. Thus, by the time the statement of claim is filed, a claimant will view his complaint to be compelling and sizeable.

By the same token, a respondent rarely sees the potential merit of a claimant's complaint when it first receives the statement of claim. Working with its own counsel, a respondent helps to formulate a defense and to articulate its own version of the relevant events. Thus, the respondent's answer bears little resemblance to the statement of claim. Frequently, where a claimant has seen short-term account losses, a respondent will recognize long-term investment gain. Where a claimant thinks the broker controlled the account, the broker believes that the claimant made all investment decisions. Thus, early in the arbitration, each party so firmly believes its position that neither is likely to be willing to negotiate or compromise.

Instead, cases generally are ripe for settlement only when both parties have had an opportunity to more closely examine their own positions and the relative merits of their opponents. Each party must have the information it needs to *evaluate* the case for settlement. This does not mean that the sides need to have completed disclosure or exhausted all third-party discovery. It does suggest, however, that each party should examine appropriate account documents to understand not only the strengths of its position, but the weaknesses, as well. This information and evaluation must be shared by the attorneys with the client if the client is to have a reasonable expectation of the outcome of the proceedings and a clear recognition of potential weaknesses in its position. Parties negotiate in order to eliminate or control risk; if one believes that there is no risk, there is no incentive to bargain.

Likewise, a precondition to a successful mediation is a shared perception of damage calculations or at least a common understanding of damage theories. The parties should be able to agree as to the approximate net out-of-pocket loss or at least to the range of damages. To that end, regardless of the damage theory, each party should prepare and provide damage theories and figures to its opponent in advance of the mediation.

IV. Mediator Selection

Although selection of the right mediator will not guarantee a successful mediation, selection of the wrong mediator will doom any negotiation before its start. Understanding mediator qualifications and mediation styles is essential to achieving a successful outcome.

A. Mediation Style

As the art of mediation has matured over the past few decades, mediators have come to employ three primary styles and techniques to bring about compromise and settlement: facilitative mediation; evaluative mediation; and transformative mediation. While any particular mediator may apply aspects of each style during the course of a mediation, most mediators have a predominant style that will color the proceedings.

1. Facilitative Mediation

Modern mediation technique finds its origins in facilitative mediation. As first developed in the 1960s and 70s, facilitative mediation structures a process to assist the parties in reaching a mutually agreeable resolution.[7] The mediator asks questions; validates and normalizes parties' points of view; searches for interests underneath the positions taken by parties; and assists the parties in finding and analyzing options for resolution. The facilitative mediator primarily holds joint sessions with all parties present so that the parties can hear each other's points of view, but will hold caucuses regularly. This type of mediation attempts to have the parties be the major influence on decisions, rather than the parties' attorneys. The facilitative mediator usually refrains

from making recommendations to the parties or giving his or her own advice or opinion as to the outcome of the case.[8]

2. Evaluative Mediation

Evaluative mediation aids the parties in reaching resolution by assisting the parties in understanding the strengths and weaknesses of their cases, assessing possible ranges of damages, and predicting how an arbitration panel might act. Indeed, some evaluative mediators go so far as to make an assessment of a "fair" resolution of the dispute, and then use their offices and efforts to convince each party to accept their analysis.

Whereas a facilitative mediator focuses on employing a process that each party will deem fair and constructive, an evaluative mediator is concerned with the legal rights of the parties in the dispute, and evaluates a case based on legal concepts of fairness.[9] Although an evaluative mediator will conduct an initial joint session, she will shuttle between the parties in separate meetings to assist each side to evaluate its legal position and the costs of continued arbitration against the benefits of gaining certainty and limiting costs in mediation. In addition to structuring the process, the evaluative mediator seeks to influence the outcome of mediation.

3. Transformative Mediation

Recently, some mediators have begun to employ a third mediation style – transformative mediation – to resolve disputes. Transformative mediation is based on the values of "empowerment" of each of the parties as much as possible, and "recognition" by each of the parties of the other parties' needs, interests, values and points of view. Mediators believe that transformative mediation may potentially "transform" parties and their relationships during the course of mediation.[10] Because the relationship between a securities claimant and broker-dealer frequently has been severed prior to commencement of the arbitration, transformative mediation has little applicability in resolving these commercial disputes.

4. Which style should you choose?

Although both facilitative and evaluative mediators can be successful in resolving securities disputes, experience shows that an effective mediator must have the ability to evaluate the parties' competing claims and convey to each party the relative strengths and weaknesses of its case. As noted above, each party enters the arbitration process confident in the factual and legal correctness of its position. Over time, with the disclosure of less favorable information and the cooling of passions, a party may be willing to consider settling its claim for less than the relief demanded in its complaint or answer. An evaluative mediator is uniquely able to leverage a party's concerns about risk in bringing about a settlement.

Similarly, one of the primary motivations for mediation is obtaining a neutral evaluation of the relative merits of a party's position. A claimant, in particular, may develop unrealistic expectations as to a case's merits and the value of any recovery. The claimant's attorneys, perhaps having oversold a case in the first place, frequently cannot reign in a party's inflated expectations. A qualified mediator is positioned to help a party recalibrate its expectations and requirements.

Nevertheless, evaluative mediation has its limits, particularly in cases having little factual or legal merit. In those cases, the mediator's assessment of the likely outcome and damages may have little impact. Generally, a respondent will reject the suggestion that the case has more than a token chance of success or damages and a claimant will stiffen at the assessment that his chance of success is negligible. Instead, the mediator must foster an environment of compromise, in which each party is willing to accept an economic settlement with which it may not genuinely agree.

B. Other Mediator Selection Factors

1. Subject Matter Expertise

Be certain that your mediator has experience in securities disputes. Industry regulation and experience, while familiar to members of the industry itself, are unknown to most individuals and laypeople. A mediator needs to know not only how to read and understand account documents, but what information to look for in the first place.

2. Experience

An increase in demand for mediation has brought an increase in the number of mediators. Like most skills or professions, mediation facilitation requires practical experience to improve. Look for a mediator who has an extensive track record.

3. Success Ratio

Every mediator should be willing to disclose his or her success ratio. These ratios vary widely and indicate a mediator's commitment to the process and willingness to push the parties to settle. Remember: A mediator's only stake in the mediation process is achieving a settlement. He or she should show flexibility and persistence, including a willingness to follow-up with the parties, in order to accomplish that.

4. Claimant's Preference

As one of the purposes of mediation is to provide a party with a frank assessment of its claims and theories, each party must be confident in the mediator's judgment. To that end, defer to the claimant's preference for mediator, where possible. If a claimant's counsel has had a prior positive experience with a mediator, he is more likely to accredit the mediator's assessment and recommendation.

5. Geographic Location

Geography matters. Each state has unique laws and regulations that may affect the outcome. In particular, a mediator facilitating a settlement of a California and Florida dispute should be specifically aware of each state's rules on settlement and mediation, as well as the states' distinct laws on attorneys' fees and liability.

6. Cost

Mediation fees vary substantially, depending on the forum and the mediator. Generally, a mediator sets her own fee, usually on an hourly or *per diem* basis. Do not be intimidated by a rate that appears to be high if the mediator has an established history of success. While you may pay a higher than expected mediation fee, you may be able to avoid substantially greater arbitration expenses. Mediation expenses are generally split between the parties. Even if the respondent intends to assume the full mediation costs after a successful negotiation, it is essential that a claimant initially bear a proportionate share of the expense in conducting the mediation. A claimant who has prepaid thousands of dollars in advance of the mediation has a stake in the mediation's success.

V. Preparation

Preparation for mediation can be divided into three separate categories: evaluation and analysis of the case; preparation for the mediation session; and preparation of the mediator. Although less formal than arbitration, mediation still requires a participant to have completed its homework to be successful. In particular, a party should resist the temptation to treat the mediation session as an extension of informal settlement discussions. Preparation can place the party in a superior position to press its theories and to secure concessions from the other side.

A. Evaluation and Analysis

A party should not enter mediation without having first conducted a candid evaluation of the documents, witnesses, and legal theories that are likely to be pursued at arbitration. Though a broker-dealer may have denied the claimant's assertions in its answer, it must delve into these allegations in advance of the mediation. Do the documents support the registered representative's story concerning the securities purchase? Has the claimant produced account statements from other broker-dealers that support the broker's position? Do the firm's compliance or supervisory reports tend to support or negate the claim? Pay particular attention to each party's damage analysis. These damage calculations will likely bracket the settlement negotiations, setting an upper limit for the claimant's recovery. A respondent must understand the claimant's basis for assessing loss, and, where possible, devise counter-arguments and exceptions to those calculations.

This is also the time to assess the key witnesses in the case. In most arbitrations, the registered representative will be one of the primary witnesses for both sides. A

broker-dealer should carefully consider whether the representative will be able to testify candidly and convincingly at hearing. If the broker's story will not survive at trial, the respondent should factor the lack of credibility in preparing for mediation. By the same token, a registered representative may provide confident and forceful explanations for activities in a claimant's account, and the respondent may wish to exploit that confidence and credibility in preparing for mediation.

B. Preparation for Mediation

After the analysis and evaluation described above, a respondent must begin the process of preparing for the mediation session. In addition to the information and documents that will be supplied to the mediator (discussed below), each party must consider its strategy for the negotiation.

As with the arbitration, the parties should prepare a basic theme for the mediation, and that theme should color and influence both the information conveyed during the mediation and the manner in which it is conveyed. During this stage of preparation, a respondent should identify who will attend the mediation and prepare those people in the same manner as it would prepare a witness for a deposition or trial. Generally, presenting the registered representative who handled the account buttresses a respondent's position. It indicates that the respondent is not concerned that the representative will be unpresentable at hearing; it also suggests to the mediator that the respondent is confident in its case. At the same time, a respondent should expect a mediator to engage and question any party representative or witness that a respondent brings to the mediation. Accordingly, a respondent should work with all participants to prepare them to answer the mediator's questions.

A respondent should also gather the key documents it intends to use at the mediation. Although the process does not entail formal offers of evidence, documents may reinforce a party's position and illuminate weaknesses in a claimant's case. For example, in a case involving allegations of unauthorized trading, confirmations indicating that orders are unsolicited will buttress the respondent's position. Similarly, account statements that suggest substantial account activity and fluctuation in value may undercut a claimant's assertion of ignorance.

Further, a respondent should prepare damage assessments and documents for use at the mediation. Clear and straightforward damage reports may be the single, most useful document at a mediation. Ultimately, a mediator will attempt to assess the potential exposure for each party and will utilize the parties' analyses in completing that assessment. Thus, the calculation should include the respondent's assessment and net out-of-pocket loss and alternative calculations of loss or damages, where appropriate.

Finally, a party and its counsel should set ground rules for the conduct of the mediation between themselves. Counsel should clearly explain the mediation process, including information on the mediator and how the mediation sessions and caucuses will proceed. Counsel and the broker should orchestrate who will respond to the mediator's inquiries and how to react to statements and positions by the mediator and claimant.

C. Preparation of the Mediator

A mediator commonly begins attempting to learn about the case from the moment he is engaged for the mediation. In addition to reviewing the statement of claim and answer, a mediator will likely ask each party to prepare a mediation statement that summarizes the party's case, highlights the party's strengths, discloses known weaknesses, and sets forth a calculation of damages. A mediator may also request key documents.

Some mediators contact the parties' counsel, either collectively or individually, to discuss the case before the first session. In these circumstances, a mediator frequently will explain his method for conducting the mediation, reveal his initial reaction to the information supplied by the advocates, and solicit from each party additional information to use in mediation.

An essential objective for each party in this pre-mediation stage is establishing credibility with the mediator and cementing a reputation for candor and reliability. As noted, a mediator may request additional information prior to commencement of the mediation; failure to produce the requested information or documents will indicate to the mediator that a party is either unreliable or unresponsive. If a party does determine that it will not disclose this information or documents in advance of the mediation session, it still must acknowledge the mediator's request and offer the rationale for not producing the requested information.

In summary, the process of mediation begins well before the first mediation session. Careful preparation can significantly augment a party's position.

VI. Opening Joint Session

Virtually all mediations commence with an opening joint session with all parties and counsel present. At the outset, a mediator generally will review the mediation process and the mediator's goals and objectives for the mediation session. Likely, the mediator will highlight the statistical success of mediation (over 80% of NASD mediations result in settlement) and touch upon the risks and costs of continuing to pursue an arbitration. The mediator will emphasize the confidential nature of the process and secure from each party a pledge not to subpoena the mediator or her notes should mediation break down. With the conclusion of his introductory remarks, a mediator will permit each party to make an opening statement.

The opening statement in mediation is a unique opportunity to speak directly to the claimant. Indeed, one mistake that many counsel make is to target their opening statements to the mediator; the appropriate recipient for the statement is not the mediator but the opposing party. Generally during litigation and arbitration, messages and information must be communicated to a party's counsel, who may then modify or comment upon the communication when informing his client. This opening statement is an opportunity to address a claimant without her attorneys acting as filter.

An opening statement should have a three-fold affect. First, it should create an atmosphere of reconciliation and good will necessary to secure a compromise. Second, it should reveal the respondent's preparation and knowledge of the details of the case. Finally, it must convey commitment and determination by the respondent both in the mediation and in the arbitration should the negotiation fail.

Thus, at the outset, respondent's opening should be conciliatory. Respondent's advocate should acknowledge the concerns that claimant or its counsel made in its own opening, and express sympathy and understanding (where appropriate) for a party's loss. It should note that respondent specifically desires to bring peace to the parties' relationship and reach a compromise. At the end of that conciliation, however, it is essential that the respondent re-emphasize its position that the losses were not the respondent's fault and/or claimant bears substantial responsibility for the actions in her account.

During its opening statement, the claimant will probably have given a factual summary of the case it intends to present. Respondent's counsel similarly should offer a recitation of the facts of the case, highlighting the key points but revealing a knowledge of the details of the case, including the relevant documents. Likewise, an effective opening should at least address a claimant's assertion of damages. Frequently, the only calculation of damages a claimant has seen prior to the mediation is her attorney's demand in the statement of claim. A respondent's attorney should make clear that the respondent does not agree with the calculation and offer a different figure in its place.

While the respondent's attorney should acknowledge that the respondent is at mediation in an attempt to resolve the dispute before the parties expend additional resources and time in preparing for arbitration, counsel must emphasize that the respondent is prepared to proceed through arbitration if negotiations fail.

An opening statement should end as it begins – with a renewal of a conciliatory tone and an offer of compromise, but an echo of the respondent's willingness to take a matter to hearing if the parties are not able to settle.

VII. Initial Break-out Sessions

After the initial joint meeting and opening statements, the mediator will separate the parties and begin individualized caucuses, generally starting with the claimant. It is in this first caucus with the claimant that many of the emotional "needs" discussed above are met.

A claimant frequently comes to mediation not only with a financial loss, but with a need to have someone hear his complaint and vindicate his position. In the initial caucus, a trained mediator can offer a claimant the acknowledgement and sympathy he needs, without suggesting that a claim has particular merit or that the claimant's sentiments are entirely justified. Indeed, a mediator may help the claimant to understand the respondent's viewpoint and to recognize that whatever happened was not malicious or intentional.

Experience shows that the opening joint session and subsequent initial caucus provide an extraordinary catharsis for many claimants. Hearing her attorney confront the respondent in the joint session affords her with a sense of empowerment; voicing her complaints to an apparently neutral and sympathetic mediator provides her with a sense of public vindication. Having received these intangible, emotional benefits, a claimant is better able to address the purely rational and economic aspects of her claims.

After permitting the claimant to vent his anger and frustration while he explains his grievance, an evaluative mediator will begin to test some of the claimant's theories and explore potential weaknesses in a claimant's argument. Thus, for example, if a claimant insists that transactions were unauthorized, a mediator may press as to when the claimant learned of the transactions and what did he do once he learned about them. Likewise, if a claimant insists that the recommendation of a variable annuity contract was unsuitable, a mediator may ask a claimant to highlight what made the investment improper.

A mediator may solicit an initial demand from the claimant at this time, but will likely leave the claimant to consider some of the issues they have discussed. Frequently, the mediator will assign a party "homework" – a request that the party calculate an alternative theory of damages or cut out certain securities from the damages calculation. This serves to keep the party engaged, even during the subsequent session with respondent, and helps introduce the claimant to the concept that she should be prepared to reduce her claim.

The initial caucus with a respondent follows a similar, thought not identical, pattern. Because a respondent usually has less at stake emotionally, the mediator is likely to focus more on the practical realities of the arbitration, including the cost of continued litigation and risk of loss, rather than affirming the legitimacy of the

respondent's position. Indeed, frequently a mediator's first words to the respondent during the caucus are how sympathetic and credible she finds the claimant.

It is essential to establish the party's credibility during this initial break-out session. Though in subsequent caucuses the attorney may be the respondent's sole spokesman, during this initial caucus the respondent must validate the truthfulness and candor of its witnesses. Let the mediator know that the respondent is not afraid to allow its broker to testify, and that the firm believes the broker's explanation to be both plausible and true. The firm representative should convey that the firm is prepared to attempt to resolve the dispute, but that it remains secure in its legal position and prepared to the matter to hearing.

The initial caucus may also present an opportunity to utilize some of the documents that the respondent has brought along. For example, in a typical suitability case, a claimant may assert that she was unfamiliar with a security and/or unwilling to assume the risk of that investment. Documentary evidence of the prior or subsequent purchase of that security at a different broker-dealer will undercut that argument. Phone logs, brokers' notes, and correspondence may all erode a claimant's explanation of the account investments. Most significantly, these documents arm the mediator for his subsequent caucuses with the claimant.

Generally, toward the end of the initial respondent's session, the mediator will attempt to solicit an offer or convey a demand. If the parties previously have engaged in settlement discussions, any new demand or offer likely will pick-up where prior settlement discussions left off. If the parties have not exchanged settlement numbers, the mediator will work with each party in formulating a demand or offer.

What and how much to offer in settlement depends, in large part, on the claimant's actions. If the claimant has made a demand that the respondent and mediator believe is meaningful, the respondent should be prepared to make a similarly significant proposal. The best settlement proposals are tied to objective rationale, such as 25% of the loss in a particular security. That permits the mediator to present the respondent's settlement proposal as an extension of its position on liability. On the other hand, if a claimant's demand merely restates the demand in the statement of claim or indicates an unreasonable assessment of the case, a respondent should not make a significant counter-proposal. The mediator should be able to indicate whether he believes the claimant's proposal is in good faith. Let the mediator suggest a range of responses.

VIII. Subsequent Caucuses

While the initial party caucuses may be the most critical for creating the atmosphere for settlement, the subsequent meetings determine whether the mediation will succeed. A mediator should use these sessions to create momentum toward

settlement by refocusing the parties on areas of agreement, risk analysis and the transmittal of reasonable offers.[11] How a party adjusts its subsequent offers depends in part on the mediation goal. If the goal is to settle at any price, movement in settlement position should be more reactive with an eye toward keeping the opponent at the table. By contrast, if the goal is to settle, but only at the right price, the moves should be calculated to convey a target settlement price.

One of the advantages of mediation is the opportunity to explore alternative relief not available in court or arbitration. During the caucuses, parties should discuss with mediator alternative methods for resolving the parties' conflict. If a party desires to pursue such alternate relief, it may seek the mediator's assistance in broaching it with the opposing party. Indeed, through mediation, a party may be able to secure a substantial non-economic benefit at comparatively low cost.

A respondent must not let a clock dictate the advisability of a settlement. That is not to suggest that a party should not compromise and negotiate during the course of the day. Rather, it is a reminder that a party should not make a bad settlement merely to have something to show for a hard day's work.

First, a mediation does not have to conclude at the end of a single day. Mediators will frequently schedule multi-day negotiations for particularly complex or cumbersome cases. Even though the parties have concluded scheduled face-to-face mediation, a committed mediator may continue to work with the parties in order to achieve a settlement. Sometimes the passage of time has cooled one side's passions or the occurrence of an intervening event has affected a party's objectives.

Second, the purpose of mediation is to assist the parties in negotiating a settlement that satisfactorily resolves the dispute. A hastily concluded agreement may end the claim, but deters a party from being willing to settle in the future. In the most extreme cases, a party may simply renege on an unpalatable compromise. While it is not unusual for each side to suffer some "buyer's remorse," such regret is far more common where a party feels rushed into the settlement.

IX. Agreement

Once the parties have reached agreement, the mediator may wish to bring the sides together in a final joint meeting. During that session, the mediator will confirm the material terms of the agreement and solicit each party's assent. Some mediators prefer to prepare a short memorandum of understanding that summarizes the material terms of the agreement and to have each party sign the memorandum. Most broker-dealers desire to memorialize a settlement in a formal settlement and release agreement that includes certain essential terms. Accordingly, a respondent must confirm that any settlement agreement is final and enforceable only upon the execution of the formal settlement documents.

CONCLUSION

Securities disputes are economic problems warranting economic solutions. Though a respondent may believe its actions to have been beyond reproach, it should evaluate the decisional risk it faces in arbitration and the attorneys' fees and expenses it will likely incur. Accordingly, a rational broker, even for a matter in which it bears minimal blame or risk, should consider the possibility of compromise and settlement almost from the day it receives the claim. Mediation provides a process and forum for encouraging settlement and compromise, and, when exploited correctly, can dramatically reduce litigation costs at the same time as it secures a favorable negotiated outcome.

---

[1] Mr. Cooper is a member of the bars of the states of Illinois and of New York and is a Member of Lawrence, Kamin, Saunders & Uhlenhop, L.L.C., Chicago, Illinois.
[2] http://www.nasd.com/ArbitrationMediation/Mediation/MediationAnAlternatePath/index.htm
[3] *Id.*
[4] C. Parselle, *The Satisfactions Of Litigation*, http://mediate.com/articles/parselle10.cfm.
[5] *Id.*
[6] J. D. Yellen & E. W. Larkin, *Mediation Redux: Now More Than Ever Suggestions for Practitioners*, 2006 Securities Arbitration (PLI 2006).
[7] Z. Zumeta, *Styles of Mediation: Facilitative, Evaluative, and Transformative Mediation*, http://mediate.com/articles/zumeta.cfm.
[8] *Id.*
[9] *Id.*
[10] *Id.*
[11] J. Abrams, *Winning in Securities Mediation: Effective Advocacy for Success*, 2006 Securities Arbitration (PLI 2006)