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MEDIATOR ROUNDTABLE

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Earning a Premium Settlement at Mediation

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Many lawyers in FINRA arbitration cases consider the arbitration hearing to be the main event in the case, where the real hard work and preparation comes in. However, most cases never go to hearing – they are settled, usually at mediation. Approaching mediation with the same intensity as if case were going to hearing offers a critical opportunity to effectively advocate for your clients and obtain a premium result.

Yet some attorneys treat mediation as a casual event, putting little effort into strategy and preparation. Briefs are often superficial, consisting of unsupported allegations and conclusions, and client expectations unmanaged. This leaves Respondents with limited information when calculating settlement value, resulting in a mismatch of the parties' expectations. This scenario can make for a challenging day of mediation.

The good news is that by taking a few steps to approach mediation strategically, drafting a Power Mediation Brief (more on that below), and engaging in the mediation process with diligence and professionalism, you can achieve a more favorable settlement.

Creating Settlement Value

How does a Broker-Dealer (BD) firm prioritize which cases to settle, and which cases are worth settling at a premium? As a former Managing Director of a major BD, there are several factors that justify a rich settlement:

1. Where the broker/firm conduct is problematic.
2. When there is potential regulatory or PR exposure.
3. Where the Claimants are particularly sympathetic.
4. When Claimants' counsel is perceived as capable of ringing the bell at hearing.

BDs are among the most highly regulated businesses in the country. They answer not only to FINRA and the SEC, but often to banking regulators who are highly focused on risk controls. BDs also depend on their reputation of being trustworthy and providing sound advice to their clients. Big arbitration losses raise red flags with regulators, are embarrassing to the firm and to the lawyer handling the case, and often result in inquiries from senior executives – not good for the lawyer's reputation. By focusing on and leveraging a combination of these factors in your mediation preparation, you can increase the settlement value of your case.

Playing Your Hand

Mediation is generally the time to put your cards on the table. This is when you should give opposing counsel the information they need to explain to their clients why the case is problematic and should be settled. *It is also critical to provide that detail far in advance of the mediation to allow Respondents to factor it into their request for settlement authority, i.e. at least two weeks before the mediation*. While some attorneys strategically withhold certain information to surprise their opponents at hearing, consider whether that information has more value at mediation where the case is more likely to be resolved.

Timing - When to Mediate

What is the best time to mediate? Soon after the case is filed when costs and expenses are low? After discovery? On the eve of the arbitration hearing? All can be good inflection points. There are key requirements to facilitate settlement that are common in all cases, including the following:

- The parties have sufficient information to make an informed decision on liability and settlement value.
- There is some time pressure or urgency to settle.
- The parties perceive settlement as preferable to the risk of an adverse award.

As you would expect, most cases do indeed settle shortly before the hearing. This makes sense as all the above boxes are checked: Discovery is complete, the impending hearing has costs and consequences, and in most cases, there is risk of a loss. But this is hardly efficient given the cost of getting to this point.

Consider another option: an early mediation where the parties voluntarily exchange enough key discovery to make the mediation productive, while staying further litigation costs. With less expended by each side in fees and costs, there is more room to compromise. Granted, it can take a lot of convincing to persuade some Respondents to mediate in the early stages of litigation, some do recognize the efficiency and value of removing a problematic case from their docket early on. It is certainly worth a try and can be an economic home run if successful.

In-Person or Online

Before the Pandemic, 90% of mediations occurred in-person. Now the number is closer to 16%. This is a dramatic shift that will continue to necessitate changes in the way mediations are approached and even their outcomes.

There are a host of reasons for the shift to online mediations, including convenience, lower cost to the parties, and accessibility. Lawyers have accepted and adapted to online legal proceedings, including depositions, hearings, and obviously mediations. But which is more effective in achieving resolution and maximizing the settlement amount? These are open questions, as the confidential nature of mediation

doesn't lend itself to gathering these statistics. Anecdotal evidence suggests, however, that settlement rates are roughly comparable for online v. in-person mediations. Settlement amounts are more difficult to compare. So here are some things to consider:

In-person mediations are more formal. For the client, they are an event like going to a hearing. The client gets dressed up and travels to the mediation site, where their opponents are stationed in a nearby conference room. There is a physical and emotional aspect of sitting at the table beside their lawyer and discussing their case with the mediator. That has an impact on clients and can make them more pliable. It allows the mediator to make a personal connection and work his or her magic. This may be particularly important with clients who are strong-willed or have unrealistic expectations. If your case warrants the time and expense, and one side or the other would benefit from in-person interactions with the mediator, this may be your best option.

On-line mediations are certainly more convenient for you and your clients. There is no travel, no potentially uncomfortable lobby interactions with opposing parties, fewer cancellations due to illness or Covid exposure, parties can use their downtime more effectively, and there is less invested if you fear that the other side is not serious. There is also more opportunity for remote parties such as claims adjustors to participate, which may facilitate a full consensus of decision makers.

If you decide to participate remotely, here are a few tips:

- Be prepared to screen share important documents such as the damage analysis, key evidence, case law or FINRA rules, and recent awards.
- Determine if you want your clients with you in your office to facilitate private communications.
- Ensure a professional appearance and background for you and your clients.
- Have access to DocuSign for executing the settlement agreement.
- Make sure your clients have their computer and Zoom software up to date to avoid connection issues

In the end, this decision comes down to your assessment of case-dependent factors: Decide if your client will benefit from the in-person format sufficient to warrant the time and expense.

Power Mediation Briefs

The mediation brief is a powerful tool to persuade not only the mediator, but more importantly Respondents, that your case is worth a premium. This is likely the one time in the mediation process that you can speak directly to the opposing party (including the ultimate decision makers) in your own words to convey the legal and factual strength of

your case and demonstrate why it warrants the premium you are seeking. This would be a missed opportunity if your brief is kept confidential and only shared with the mediator.

Most mediators recommend sharing your brief. Persuading the mediator is only half the battle, as they are not the ones who can write you a settlement check. Instead, it is incumbent on both you *and* the mediator to persuade Respondents that your case has significant value. You can achieve this by demonstrating to Respondents in writing the strength of Claimant's case, the monetary, regulatory and/or PR exposure for Respondents, and that you are prepared to present a powerful case at hearing. If there is confidential information that you would like to share with the mediator, send it in a separate email or discuss it at your pre-mediation call.

From experience I can confirm that a well-drafted, factually detailed and persuasive mediation brief can influence Respondents' perceived settlement value of a case. If your brief arrives well before the mediation, be assured that it will be forwarded to the ultimate decision makers to support a request for settlement authority. *This is where the Power Mediation Brief pays off*.

What you should avoid are canned regurgitations of the Statement of Claim, containing unsupported allegations and conclusions. Counsel should also avoid excessive "document dumps" which require the reader to sift through hundreds of pages to find relevant information. Such briefs are counterproductive, telegraphing that counsel has little invested in the case or is less than diligent. Not a good look, and unlikely to convey that your case should be taken seriously.

So, what does a Power Mediation Brief look like? It is a well-written, thorough, balanced and well supported brief that at minimum includes the following:

- A profile of Claimants and their investment goals and experience.
- A narrative of the broker-client relationship.
- A timeline of events.
- Excerpts from key documents.
- A thorough liability analysis including relevant case law.
- A detailed damage analysis clearly detailing the securities at issue, damage theories and assumptions.
- A statement of how the investment losses have impacted Claimants' lives.
- The broker's disciplinary history.
- Relevant BD disciplinary history.
- The potential regulatory implications for Respondents (as mentioned above, some firms are bank or S&L holding companies subject to Fed or other banking regulations).
- Prior awards in similar cases.
- Recent awards you have won for your clients.

- A discussion of case challenges and how they will be overcome (don't hide from this one).

The Power Mediation Brief should not include:

- Unsupported allegations or conclusions.
- Inflammatory language.
- Personal attacks villainizing the broker or the BD (more on that below).

Remember, for the brief to be persuasive, it must be credible and give the Respondents reason to be concerned and come to the table with real money.

Pre-Mediation Call

Every mediation should be preceded by a one-on-one call with the mediator. This is where the mediation actually begins. Ideally this call occurs after you submit your mediation brief and before the mediation. It's your chance to bring the mediator up to speed on your view of the case, and to discuss confidential information omitted from your shared brief. This may include discussions of your clients' expectations and any obstacles that you see to settlement. Be sure to explain to the mediator why your case should settle for a premium. If your mediator does not schedule a pre-mediation call, then request one.

Play Nice – It Pays

A very successful plaintiff securities class action lawyer once told me that he is always friendly, respectful and accommodating to his opposing counsel not just because he is a professional, but because it's in his best interest: "I'm asking the other side to write a big check, which is hard for them to do if they feel insulted or disrespected." Perhaps some lawyers think that being difficult or overaggressive will make their opponent fear them and result in a bigger settlement. A display of competence and professionalism will fair far better than intimidation.

The basics of "playing nice" as they apply to mediation are simple:

- Be courteous, respectful and cooperative with opposing counsel throughout the process.
- Be especially respectful to the parties (who may be stressed) during the mediation and help diffuse animosity.
- Avoid any personal attacks or disparagement.
- Listen attentively when the opposing side is speaking, even if you disagree with what they are saying.

Keep in mind that your goal is to have the Respondents write you a big check. That goal is more achievable when Respondents and their counsel feel respected.

Circulate a Draft Settlement Agreement Before the Mediation

There are several good reasons to circulate a draft settlement agreement in advance of the mediation. First, it ensures that all critical settlement terms are discussed during the mediation, avoiding last minute surprises. Second, it hastens the process of documenting the settlement at the end of the day, when the parties are often tired. It also provides an opportunity for an early point of agreement. Finally, it shows that you are serious about settlement and prepared to make it happen. If the mediation is remote, make sure that you and your client have access to DocuSign to execute the settlement agreement before the mediation concludes.

Post Mediation Discussions

Not all cases settle at mediation. Sometimes the parties need more information on certain transactions, need to get more settlement authority, or simply need time to readjust their expectations. Cases that don't settle at mediation often settle shortly thereafter. If the case doesn't settle on the day of the mediation, leave off on a good note, and exude optimism that the progress has been made and the parties will eventually come to agreement. Also, make sure to discuss next steps with your mediator – will the mediator continue reaching out to counsel, and when? Are one or both sides going to exchange certain information or take other steps before resuming negotiations, formally or informally? Avoid leaving the mediation without a game plan for keeping the case moving toward settlement. A dedicated mediator can help you get there, even after the mediation itself.

Conclusion

Treating mediation as the "main event" in a securities arbitration case will pay off for you and your clients. Consider your strategy, prepare and *timely serve* a Power Mediation Brief, and approach opposing counsel with respect, and you will position yourself for a favorable result at mediation.

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