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MEDIATING A FINRA SECURITIES CASE: A PRACTICAL GUIDE

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I. INTRODUCTION

I have been an NASD – FINRA arbitrator for more than thirty years, and a mediator in the securities area for as long as we have had a program. I thought it might be useful to prepare what I am calling a "practical guide" to FINRA mediation with some helpful hints about what has worked for me over the years.

The framework for this article will be the *ABA Task Force on Improving Mediation Quality,*[1] which is the best simple summary I have seen of what makes for a successful mediation, stated in four principal sections of the report as *preparation*, *customization*, *analytical assistance* and *perseverance.* Understanding and performing these four crucial tasks will surely make for a high-quality mediation. This article is an effort to explain and illustrate how one mediator understands and defines those tasks in the context of a FINRA securities case.

II. PREPARATION

A case is initiated by a call from a lawyer or from the FINRA Mediation Supervisor inquiring about availability and dates. When we talk with counsel either I or my assistant advises that my practice is to schedule a private, confidential call with all the lawyers a couple of weeks before the mediation to talk about the case. Attached to this article is a checklist of subjects I usually cover in the Pre-Mediation Phone Call. Also, when my office contacts counsel to set up the calls they ask for a copy of the pleadings so I can read them prior to the first call.

I call no earlier than about ten days to two weeks before the mediation because I do not want to confuse the facts of the case with others I have scheduled. I have also found that calling too early is not productive because often counsel has not met with the client, has not reviewed the file, or is still putting it together so the call has to be re-scheduled. I try to talk to the senior lawyer on the case together with any associate(s) working with them. I take notes on the call and review them when I prep for the mediation. I find the conversation to be much more useful than a pre-mediation memo which is often just a regurgitation of the pleadings and is a one way conversation. On the phone I can ask questions and probe matters counsel might not want to put in a memo.

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1. ABA Section of Dispute Resolution, *Task Force on Improving Mediation Quality Final Report, April 2006 – March 2007,* available at http://www.abanet.org/dch/committe/cfj?com=DR020600.

Depending on the nature of the claim, I usually request copies of new account forms filed by the customer with the firm; any profit and loss statement(s) that have been prepared; any notes, correspondence and E mails between the firm and customer about matters relevant to the case; phone and computer access records if unauthorized trading is a count; copies of account forms and sample account statements from other firms where the claimant has or had accounts; the broker's CRD record; any firm exception reports generated; and other documents that will be probative. It is critical to find out where they are on discovery to assure yourself they will have the information they need to make a judgment about the case. If there is some document either side has requested and does not yet have which I agree is important, I will try to help them get it from the other side before the mediation.

This preparation is absolutely critical to the ultimate success of the mediation. I do not want documents exchanged or given to me at the mediation because I need time to digest them and reflect on their value so I can come to the mediation with a realistic view of the evidence that will be introduced if it goes to arbitration. I try to review all the documents no later than the weekend before to develop an initial plan for the mediation. If the numbers produced by both sides vary I will try to identify why, and, if it is not a difference in basic assumptions (e.g., dates used; actual results versus well managed account assumptions) and the numbers vary substantially, I may get counsel together on a second pre-mediation conference call to reconcile the differences...or we might agree to spend the first half hour at the mediation after the opening session doing that. It is important that we agree going in on the NOP, or net out of pocket loss – what actually happened in the account, so we can focus at the mediation on liability: who, if anyone, is at fault for what happened. I don't want to waste precious time at the mediation doing arithmetical calculations that could have been done in advance. We need to concentrate at the mediation on why it happened, and the consequences that flow from that.

III. CUSTOMIZATION

Once you mediate for a few years, you realize every case is really different because the people are different and the factual setting and circumstances are different. This is true even when you regularly see the same type of disputes. In FINRA securities cases, for example, I often see suitability issues, churning, breach of fiduciary duty and failure to supervise allegations, but the facts come in all different packages, as do the parties. As a result, it is critical to figure out the unique features of each particular

case and to understand what is driving the individual parties. That way I can tailor what is done to make sure I respond properly to the case before me, not some similar case I did last week.

It starts with the phone calls to the lawyers. One of the things I want to learn in the calls is the nature of the relationships that have developed between and among counsel. Sometimes parties on one side are separately represented and I want to know about the dynamics on both sides of the table as well between claimants and respondents. Will I have to mediate issues between parties on one side in addition to the case in chief? How are they getting along; what are the tension points, if any, and do I have to worry about their conduct when they are with each other? Have they developed mutual respect, and can I use that to help get us together during the mediation? I want to find out about the relationship between the parties as well. Is there a great deal of personal animosity or not? Will they be able to sit in a room together, and will they be able to interact with civility to each other without a disturbance while one side is presenting its case in a joint opening? These are things I must find out to be able to customize the mediation to the particular circumstances of the case.

In the pre-mediation call I always ask counsel for their ideas about how the mediation should be conducted, starting with whether or not there should be a joint opening session. I encourage the use of joint openings even though it has fallen out of favor these days, especially in certain parts of the country. A myth has developed that they are always a waste of time and dangerous, but I do not agree with that. Certainly in some cases they should not be used, but it depends on the circumstances. Whether we are using a joint opening or not, when we begin I usually like to convene the parties in the same room for my own opening to get some important information to them about what we are trying to accomplish and how, and to try to develop a unity of purpose. Of course if I have concluded from talking to counsel that even putting them in the same room together is a risk I will not do that, and will give them the introductory information they need in the informal session before the mediation starts, or in the first caucus.

A. Mediator's Opening

I always start with disclosures, and describe any relationships I have had with counsel or the parties on both sides. Given the rather small FINRA securities bar, I usually have worked with counsel on both sides before. I check my records prior to the mediation and tell them how often because I want everyone in the room to know and

have the opportunity to object. This will not be news to counsel because I will have told them on the phone of all prior relationships, but I want to say it again on the record – so to speak. The parties are entitled to know and, if I don't tell them and it comes out later, it may cause one side or the other to believe I have a hidden agenda, and may impede the mediation at best and cause my recusal at worst. I then often congratulate them for being there, and tell them how voluntary mediation like this usually works, and give them the statistics, which currently show a success rate over 80% for FINRA mediation. At the beginning, I am trying to build a positive attitude all around and get everyone working together, less as adversaries for today than as people trying to accomplish a shared objective. I want them to know we can do it together if they really want to, and that it usually works!

In one way or another I say you may have differences about what happened and whether one side is entitled to redress or not, but for today we have a common purpose, to shape a settlement acceptable to both sides ourselves and not leave it to a panel of arbitrators who will make a decision that either side may or may not like and that usually cannot be appealed. Today, I tell them, we want to eliminate the risk, cost and anguish of a trial and get this matter resolved so everyone can get on with their lives.

I also cover briefly my background as an arbitrator and mediator so they have some sense of how I can help them get together. Other important subjects are that the session is totally voluntary and confidential (both in terms of disclosure to others not present and in regard to what I discuss with them privately) and that our object today is to sign a written agreement, whether a "two-pager" that contemplates a more formal agreement will be executed in the future, or the final agreement itself if counsel has it with them on a computer. I like to review my rates and tell them the amount of time and expenses I have incurred at that point; what is going to happen today and what is expected of them in terms of participation and behavior. I explain my role as a neutral facilitator and what those words mean. I state that it is important they keep an open mind, listen to the other side and learn, so they can make a judgment that is in their best interest later in the day when they have all the information. I remind them that they should not base their decision on yesterday's incomplete understanding of the case before they sat down with the other side and with a professional mediator to review it and analyze their strengths and weaknesses.

Lastly, I preview some things that might happen during the day so they are not concerned about them when they happen: that I will undoubtedly spend more time with one side than the other because it usually works out that way; that I may get the lawyers alone together from time to time, or talk to one or another lawyer privately; and, if the lawyers are too busy fighting with each other, I may meet privately just with the parties to work out a settlement (with the permission of counsel, of course). In other words I tell them that, whatever I do, I am working in their mutual interest to try to accomplish their settlement objective and they should let me have control of what we do and how we do it. I ask that they trust me, and trust the process, and tell them it usually works out.

I am not a believer in reading canned openings because it gets things off on the wrong foot. I don't want the parties to think this is some pro-forma exercise in which we are engaged and that we are going to go through the motions according to some pre-set procedure that is cast in stone. Rather I want to talk to them, and listen to them, and customize the mediation to these parties and this controversy. Yes, there are some things that must be covered in the opening and I have noted the major subjects above, but how you do it is all important. You want both parties and counsel to know you understand their situation and are yourself personally engaged with them today so you can help them get it resolved. Reading a formulaic opening does not adequately convey that message. You can start the night before with your usual written opening or bullet point outline but annotate it and say to yourself what message do I want to give these people under these circumstances.

B. Party Openings or Not?

My default is to have each side briefly summarize its case at the joint opening session unless there is a good reason not to do it. I ask the lawyers not to go on too long, and not just to read the pleadings but to cover the key points they want the parties on the other side to hear. I ask them to be conversational and not too adversarial because this is not the day for table-pounding but for solving a mutual problem. It is their opportunity to talk reasonably to their adversaries and may be the first time some of the principals have heard their arguments.

I like joint openings because it personalizes the conflict so each side can see there are real people with differing points of view across the table. It forces each side to listen to the opposing point of view

and stop hiding behind their lawyers, and gets them more directly involved in what is happening. They will be the ultimate decision makers after all, and they need to be part of the process, and the sooner the better. Also, it is good to start off by letting the parties see their lawyers advocating for their position. Later in the day, I may well be leaning on counsel to help me get a client down from the stratosphere, or up to an amount we need to get the matter settled. The goodwill built up earlier in the day when he was championing his client's case might be needed. I also like the idea of each party staking out his position at the beginning so the first time each side hears it is from the other, not from me. Then when we go to caucus and I am reinforcing the opposite point of view, the party I am with has a better understanding of what I am doing, just amplifying a position I didn't originate.

I also often suggest counsel let their clients participate in the opening to some extent. The lawyers are usually telling me on the phone about all the positive attributes of their client(s) so I suggest they show them off at the joint opening, even if it is only to have them answer some rehearsed questions. That way the other side can see what they are up against, and active participation helps get the clients more involved in the process. It also might be appropriate for the respondent to express regret for what happened, and to mention they are there in good faith to try to get the matter resolved. In my experience, counsel agrees to have their clients speak in probably less than half the cases because most are afraid of what they might say. But I encourage it nonetheless because I think it is helpful.

Joint openings are not always in order. Where there is a risk that counsel or the parties will get so upset at each other that tempers will flare and little will be accomplished, joint openings can be detrimental, not helpful. This is something to explore in the pre-mediation calls when you can get a good sense of how counsel is getting along, and what animosity may exist between the parties. Then you can make a reasonable judgment in discussion with counsel about whether to hold openings or not. I am not persuaded by an argument that says we all know the cases on both sides and there is no point wasting time in a joint opening session so let's get right to caucus. As I have noted above, there are some good, constructive reasons for having joint openings and I need to be persuaded that, in this instance, those objectives will not be accomplished and openings are not a good idea before I agree not to have them.

Customization is the key ... what will work here? Not, I always do it this way. There is no right way in all cases. One size does not fit all.

IV. THE MEDIATION

A. Getting Started

The day of the mediation, I try to get there at least a half hour before it is scheduled to start to check out the rooms, get a lunch menu from which we can order, and have a few minutes to visit with the parties to meet them and re-assure them about what is going to take place. I also want to chat with counsel about any open issues from my document review and perhaps to get permission to show something to the other side which I believe would be helpful for them to see. I also want to get an impression of any lawyers I don't know, and give them the opportunity to size me up as well in an informal setting before we get down to business. Sometimes I will get all counsel together to agree on something: who gets what rooms; that I will pay for lunch for all and put it on my bill and divide it however the bill is divided; that after reviewing the numbers on both sides I noticed differences in amounts I consider to be minor, so I suggest we stipulate on an NOP of a certain number for mediation purposes only, and so on. These informal, spontaneous sessions are useful to me because it shows me how counsel relates to each other as well as how they react to non-threatening situations. This guides me later in the day when I have to make a decision about whether or not to get them together privately to break an impasse, or to discuss a particular issue. I am learning all the time, about the issues and about the people, so I can customize my approach to the situation. The day of the mediation there is a lot to do so it is important to get there early.

After the joint opening, I usually start in caucus with the Claimant because s/he brought the action and often require more time than the Respondent. But, like everything else, that is not true in every case. Sometimes I need to start with Respondent to clarify something, to give him an assignment to get information I need that may require calling the firm, or whatever. Again, no hard and fast rules. But it is usually a first caucus with Claimant, and that first time I want to find out what is on their minds. I focus on the parties; what was their reaction to what they heard at the opening session; if they took notes, what were they writing down that we should talk about. I am listening and learning primarily at this point, and using

open-ended questions to get the information I need. In all cases I have prepared a list of questions I want answered (preparation, again) and issues I want to cover with both sides, but I get into it easily in the first caucus and generally let them talk about what they want with some gentle guidance. My principal objective at this session is to make them comfortable with me, build trust, and eventually get down to it without rushing. But I will not leave before I have answers to the questions I had outlined, and without an opening offer. Only in very rare instances will I leave any caucus without an offer. After all, that is what it is about ultimately, and I want to start the process as soon as I can. I also want to find out if there is anything other than money that should be part of the discussion and final settlement. Sometimes, but not often, I may feel they are not ready to get serious about an offer and forcing one will produce the wrong number and the wrong way to start the negotiation. In those rare instances, I will pass on a number in the first round. That is not something I usually want to do because it just delays the start of the end game.

I believe the Claimant should make the first offer because, again, s/he brought the case. Usually the Respondent just has Statement of Claim numbers with interest, attorney's fees and perhaps even punitive damages added and it has no bearing on the numbers we will talk about at the mediation. I think the Claimant should put her best foot forward and come up with an offer that shows she is serious about a compromise but one that doesn't undermine her negotiating position. I will talk about how a gesture usually begets a gesture, and how, if she is forthcoming with the first offer, that equips me to get a better response than if she had just taken a token amount off the Statement of Claim demand. I will have a number in mind and, if asked, I may suggest a range. If Claimant gives me a number I think is out of order and will get us started on the wrong foot, I will push back and ask what response s/he thinks that will get from the other side and what attitude it will probably elicit. How well I know the lawyer and how confident I am about the relationship I am building with the client will partially determine how much I push back, and how assertive I get.

B. Analytical Assistance

By now I am sure some of you are shocked ... this is not the facilitative model you learned in training. You might think a mediator should be no more than a messenger here, and should just bring the numbers back and forth and not intrude by being evaluative and

influencing the offers and counter-offers. I disagree. The focus groups conducted by the ABA Task Force on Mediation Quality showed fairly conclusively that despite the reservations by some mediators themselves, most counsel want and expect what the report calls analytical assistance from the mediator. (*See* pp. 14-17). In my view it starts with the first offer, which is very important and in many ways can set the tone for the mediation. So, I will speak up when I must to try to influence the number to get started in what I think is the right range. I am careful to express my opinion on this and other matters respectfully, and to make sure the parties and counsel understand that the final decision is theirs and I will be comfortable with that even if I disagree. It is, after all, their mediation, not mine, and while I may have an opinion I know reasonable people may disagree. Counsel has his own experience and may see something differently than I do, and also may be taking a position for a reason that he is not sharing with me. I assure them that once they make a decision I do become their messenger and will do my best to advocate their point of view.

I try to listen carefully to how they are reacting to my assertiveness, both what they are saying and how they are acting. I take my cue from that. If they are comfortable with my moving from a purely facilitative to a more evaluative model and my feel is that it is not compromising our relationship and they understand what I am doing, I will press on. If not, I will back off somewhat. It is a fine line, and experience helps. Sometimes it takes some time before they trust you enough to let you give an opinion that may be contrary to theirs and not react negatively because they recognize it for what it is – another piece of information they can use or not. It has nothing to do with me, my neutrality, objectivity or anything like that, but has everything to do with them because they are paying me to help them understand better where they are and what they should do. My considered opinion should have some value as they decide what is in their best interests.

This analytical assistance applies as well to arguments counsel might make to advance the case which I think are questionable. I might ask if it was argued ten times how many times it would be won, to try to get an admission that it would be less than fifty percent, or perhaps even much less. If they ask what I think and I suspect it is closer to one out of ten or less, I will say that. But I will be careful to point out that is what I believe a panel will do, which is very different than my saying I believe it is fair, or right, or proper. I don't make those judgments, and my views in that respect are immaterial. I will

have covered that in the opening, and I repeat it here, by pointing out that my role is to act as a neutral facilitator, not a decider; that I am not a judge or arbitrator in this case, and it is not up to me to decide what *should* happen but just to give them the benefit of my experience in trying to figure out what a panel will do if it hears the same evidence I have heard.

This is not the facilitative model where a neutral never gives opinions and just probes different points of view by asking open-ended questions and tries to help the parties themselves come to a conclusion rather than giving them a view of his or her own. This article is not the place to have a philosophical debate over the virtues of different mediation styles, but, in my experience in FINRA mediation, the ABA Task Force Report conclusions are absolutely accurate and the overwhelming sentiment among the bar is for the mediator to express his views and render analytical assistance at some point and under the right circumstances. In fact, in most cases I believe it is why I am hired. I have been a securities arbitrator since 1976 (starting with the NASD), a mediator since the program began almost twenty years ago, and active on the disciplinary side of the business as Chair of the District Business Conduct Committee in the 1980s and of the National Business Conduct Committee when I was on the NASD Board of Governors after that. Counsel usually want to hear my opinion, whether they end up agreeing with it or not. The ABA Task Force Report notes that "Complaints about 'potted plant' mediators were ubiquitous," (p. 17) and that is consistent with my personal experience in commercial arbitration.

Are there risks to such an evaluative approach? Absolutely. Parties can believe when you are disagreeing with their point of view that you are favoring the other side and are no longer neutral and can no longer fairly serve as a mediator. I try to dispel that by distinguishing between what I think should be, which is irrelevant, and what I think a panel will do, which is very relevant. I say being neutral, which I am and they can bank on it, does not mean I am always going to agree with them. Nor should they want me to because I think a big part of my job is giving them a good idea about the risk they run if they go forward with a trial in the dispute as opposed to settling, their BATNA, if you will. Counsel usually wants to hear that even if he does not agree (in public at least) with me.

Analytical assistance is controversial to be sure. I believe it is appropriate and expected in most FINRA mediations and in many commercial mediations, especially where counsel retains a particular

neutral in part because they value that mediator's opinion in the matter at hand. There are many other kinds of mediation, however, where such an approach is absolutely not appropriate, but they are not the subject of this article.

V. CLOSING THE DEAL - PERSISTENCE

That great philosopher Yogi supposedly said "It ain't over till it's over," and that is very true of mediations. There is no such thing as impasse because all that means is there is more work to do. There are times the parties are stuck and need a kick start to get back on track. It is up to the ingenuity and perseverance of the mediator to get them going again. This is not the place to cover how to break impasse (I don't even like the word), but it can be done as long as the parties really want to settle and the mediator maintains enough energy in the room to keep them at it so it can be accomplished. Where the parties don't want to settle and there is some compelling reason for one side or the other to go to trial (rare, but it happens), it is up to the mediator to realize that and call it a day. Otherwise, he must continue to be the cheerleader for settlement and keep the parties talking so it can get done.

Most FINRA mediations involving a few parties settle in one day (multiparty cases obviously take longer). Sometimes that can't happen perhaps because one side needs more information about something, or the parties have reached the point of exhaustion and just can't get it finished that first day. Then it is up to the mediator to talk to counsel and get permission to follow up, and to figure out the best way to do it; when and with whom. Every case is different and in some you can schedule calls for the following day or two if you and counsel are free. In others, you have to wait a few days for something to happen, or for things to cool down a bit. If you keep at it and the parties continue to talk to you, the probability is you will get it done if you persevere.

Preparation, customization, analytical assistance, and perseverance ... the keys to a successful mediation.

PRE-MEDIATION TELEPHONE CALL OUTLINE

A. Introduction

1. Advise that practice is to talk with all the lawyers before the mediation, and review subjects to be covered on the call....say one hour +/-.

2. Confidentiality, regarding conversations and documents submitted.
3. Disclosures, if any, about relationships with parties or counsel.
4. If new, confirm he has PSC website address and/or CV and ask about his practice specialties and experience.
5. If pro-se, explain disadvantages and ground rules –send special agreement.
6. Confirm if private mediation or through provider.
7. Discuss Mediation Submission Agreement and retainer if private.

B. The Case

1. Tell me about the case – key issues as you see them.
2. Tell me about your client(s):
   a. if individual - age; education; sophistication in subject matter (i.e. securities, real estate, etc); financial profile.
   b. if company, brief history; names and backgrounds of principals.
   c. for all: lawyer's history and relationship with client, if any previously; relationships between parties.
3. Tell me about the opposing party and counsel – see above for parties, and explore relationship between and among parties; for lawyers, explore any previous encounters and the status of the current relationship.
4. Explore counsel's current opinions on strengths and weaknesses of both sides.
5. Inquire about obstacles to settlement and whether there are any special circumstances that may impact settlement.
6. Any settlement discussions? If so, when; who initiated; specific offers and counters, and the time frame.
7. Status of discovery? Do you need anything by way of documents you have not gotten to make a proper evaluation of the case? Does the other side? What have they requested you are not giving?
8. What is trial date? How much time reserved?

9. Mediation Memo: not required, because this call substitutes for it (and in my experience Mediation memos are often not very helpful and are often just a regurgitation of the Complaint or Statement of Claim). But if you are going to prepare one for yourself or for your client, please send me a copy.

10. Documents: review list of documents identified when counsel was talking about the case and the key issues. Review lists of usual docs by subject matter. Inquire about documents in the trial that may be useful, like motions, briefs, rulings of the court. Ask about experts, and expert reports, as well as damage analyses.

C. The Mediation

1. Describe usual procedure...PSC to open with disclosures, discussion of ground rules for session, confidentiality, fees, etc. Discuss joint opening session or not...see if any reasons not to have one. Unless there is a reason, sell it...and urge client participation if counsel is comfortable with that, and advise you will make same request of other side. Get counsel input and OK. Describe ground rules for joint session presentations.

2. Object to sign off on an agreement at the end. Final, if possible, but if not, my two page "Heads of Agreement" in which the lawyers will fill in the blanks. Send copy if requested.

D. Conclusion

1. Anything else we should talk about...anything else that I should know?

2. Think of your client's real interests and how best to serve them.

3. Think of creative options to settlement.

4. Make sure your client knows that mediation resolves the case forever, but usually on a basis that both parties are a little unhappy with the result.

5. I may call you if I have some additional questions after I receive your documents.

6. Confirm the start time, place, and date of the mediation.

7. **"I look forward to working with you. Thanks for the time."**