Holly Stein Sollod

Partner
303.295.8085
Denver
hsteinsollod@hollandhart.com

Tips for Successful Mediation of Broker-Dealer/Customer Claims

Tips for Successful Mediation of Broker-Dealer/Customer Claims

Insight — 5/20/2008 12:00:00 AM

Early on in the securities arbitration process, the parties should consider whether to mediate their dispute. This article discusses the factors to consider in deciding whether to mediate and the steps to take towards a successful mediation.

Should You Mediate?

In its most basic form, mediation is "coached" negotiation or non-binding negotiation in which a trained experienced and independent neutral helps the parties reach a mutually acceptable resolution of their dispute. The mediator does not impose his or her value on the case. Mediation can reduce lawyer fees and minimize the risk of an adverse judgment in an arbitration. Most mediations last only a day, with possible follow-up by telephone if needed. A trained mediator meets with one side and then the other, trying to reach a compromise. In the process, the mediator may shares his or her view of the parties' potential exposure, but more often, a good mediator merely raises doubts as to the possible outcome.

Aside from those generalities, the actual process varies from case to case and with the mediator's style. Both sides have a common incentive to mediate—uncertainty. Predicting whether the arbitration panel will find that 100% of the fault lies with the broker or the customer is impossible. And even if the customer has a strong case, the amount of recoverable damages is unpredictable. The parties often bring widely differing ideas to the table about the "value" of the case. A mediator can bring some reality to the mix, creating doubt in both parties' minds.

Most importantly, mediation is voluntary and neither side must accept an unwanted resolution. The arbitration process can proceed during the mediation, unless the parties agree otherwise and is only terminated if a settlement is reached. The mediator focuses the parties on the consequences of not settling, diffuses hostility, and helps the parties assess the strengths and weaknesses of their positions.

Finally, there is something about the process that works far better than conducting settlement negotiations without a neutral mediator. It may be the sense of control that mediation affords the parties, as they control the process, scheduling, costs and the outcome of the dispute.

At What Stage Should You Mediate?

Parties can mediate before a formal filing of a claim or pleading in arbitration. Mediation can also be started at any stage of the arbitration process. The parties can choose to mediate concurrently with the arbitration process. Many lawyers and the their clients take the position that mediation should occur as close to the date of the arbitration as possible to create the most pressure on the parties. However, there are many circumstances in which this approach fails. Brokerage firms are keenly aware of the cost of fighting a serious arbitration claim. The ability to save expert and legal fees by settling early factors into the amount firms will ultimately offer in settlement. Therefore, mediating early in the process may increase the funds available for settlement.

How to Chose The Right Mediator

Arbitration forums provide their own mediation program to public customers, member firms and associated persons. All parties must agree to the selection of the mediator before he or she is assigned to a case. The parties may agree to use a non-FINRA or non-AAA mediator. There are private mediators who charge $1,000 a day and those that charge $250 a day. The amount a mediator charges does not always reflect his or her skills as a mediator. The best mediators are good listeners, are patient and are non-judgmental. They make the parties feel heard; do not rush things; and show respect for the participants. Mediators come with many different styles. Finding a mediator that specializes in securities law and industry practices is recommended.

How to Prepare for the Mediation

The mediator will ask for information to help him or her understand the issues and the positions and interests of the parties. A confidential mediation letter is usually also requested by the mediator. This mediation letter is an important document for the mediator. Some mediators ask the parties to set forth the major case strengths and weaknesses and any prior settlement negotiations between the parties. Materials are kept confidential by the mediator unless the parties instruct otherwise. Mediators can also contact the parties to learn more about the case prior to the session.

Tips for the Mediation

First, expect the mediation to last all day. The mediator will usually ask to see all the parties and counsel in one room at the start of the mediation, where he or she will provide introductory remarks that may include items such as the mediator's style of mediating, and a brief explanation of the process he or she intends to follow throughout the day.

Second, skip the opening statements. Practitioners and mediators disagree on the value of opening statements. Some claim you should never waive opening statements since it allows you to talk to the other party directly. Often this is the first time clients hear the opposing side's arguments, so it serves to educate the parties as to the other side of the story. Others argue that opening statements only serve to harden the positions of the parties and make compromise more difficult. One very

skilled mediator advises that opening statements often make his job harder since they can create defensiveness preventing the customer from engaging in the process. In any event, if permitted, an opening statements in a mediation should not resemble an opening statement in court. Advocates should not try to persuade the other side that they are wrong. Rather, the parties should present a willingness to compromise.

Third, let your clients do the talking. In customer dispute mediations, the mediator will ask the brokerage firm, the broker and their counsel to go to a separate room while the mediator remains with the customer and its counsel. From the defense's perspective, it may seem that the mediator spends more time with the customer. However, for the customer, the mediation is the first time they get to talk about their claims to a neutral third party. Customers need to vent their frustration and discuss their claims. They can be emotional or angry, and often feel shame at having lost money. For many, the mediation is a major life event.

Good mediators spend enough time in each room asking questions and listening. In this way, the mediator develops a feel for the credibility, likeability and honesty of the customer. But more importantly, a good mediator spends time getting to know the customer, so that in the end, the customer feels that his or her factual allegations were fully heard and understood. Counsel for the customer will then apply the law to the facts in response to follow-up questions by the mediator.

Fourth, be prepared to address new evidence. Often the parties learn new information during the mediation which requires analysis and thought. Counsel must be prepared to address new facts and remain flexible to adjust their mindset during the bargaining process.

Fifth, bring the right decision-maker to the mediation. Because new facts may enter the picture at the mediation, counsel must have the decision-maker in the room or available by phone. Once the mediator finishes this initial meeting with the customer and counsel, he or she will engage the brokerage firm, the broker and their counsel. Most brokerage firms also bring a "business person" to the mediation. The branch manager may also attend to discuss any issues of supervision that may be involved in the case. Once again the mediator will "interview" the broker or branch manager involved about their facts.

Sixth, prepare to be patient. From that session on, the mediator will conduct "shuttle diplomacy" between the rooms engaging each side in a confidential discussion regarding the issues and the strengths and weaknesses in both sides' positions. At some point the mediator will seek a demand or offer to start the negotiation of a settlement figure to be communicated to the other side. That initial demand may take a long time and the best offers may not be made until late in the day. The mediator will bring the offers and counter-offers to the parties, usually along with some rationale provided by the parties. While it often seems impossible to bridge the gap between offer and demand, especially at the beginning of a mediation day, the process works.

Seventh, let the principals talk to each other. At some point in the day, if negotiations stall, the mediator may suggest a direct meeting between the principals. The mediator's job is to facilitate the negotiation, reminding the parties of the risk of pursuing the case to hearing and award. The process takes time and often lasts into the late afternoon or evening. If a settlement is not reached during the mediation, the mediator often continues to work with counsel after the mediation.

Eighth, get the agreement in writing. There is case law in Colorado that if a deal reached in mediation is not put in writing, it is not enforceable. So, if a settlement is reached, a written settlement agreement will be needed. Skilled mediators advise counsel to bring a draft settlement agreement, as complete as possible, to the mediation. If that is not possible, a simple memorandum of understanding of essential terms will be drafted and signed at the close of the mediation. The mediator may also retain authority to decide any disputes that arise from the drafting of the settlement language.

Conclusion

Statistics from various sources claim that 80% of the cases submitted to the mediation settle. Experts attribute this success rate to the parties' control over the process, costs and outcome. Whatever the reason, when the parties are motivated and the mediator is skilled, the process works.

Holly Stein Sollod is a partner at Holland & Hart LLP, Denver, Colorado and is Chair of its Securities Litigation, Government Investigations and White Collar Crime Practice Group. Holland & Hart, LLP is the largest law firm in the Mountain West with 14 offices in seven states, including Colorado, Idaho, Montana, Wyoming, Utah, New Mexico, Nevada and Washington D.C.
