

By Jeffrey S. Grubman

## **SECURITIES MEDIATION**

### **I. INTRODUCTION**

Mediation has become a popular forum for resolving claims in the securities arbitration process during the past several years. There are many reasons for this. First, the securities arbitration process often leads to unusual, unexpected and sometimes disturbing results for the parties and attorneys involved. This should not be surprising. Arbitrators receive a fairly limited amount of training from the NASD and NYSE. Nevertheless, they render decisions in cases with complex factual and legal issues. In reaching those decisions, they make difficult evidentiary rulings on objections raised by experienced attorneys. Many of the arbitrators making these decisions have never tried a case and some of them are not even attorneys. Despite the relative lack of training and experience of many arbitrators, they are the most powerful fact-finders in the world. Once an arbitration panel renders a decision, it is final and cannot be appealed.<sup>1</sup>

Virtually every attorney who has represented parties in the securities arbitration process has experienced the feeling of bewilderment upon reviewing an arbitration award. It is not surprising that attorneys would be disappointed by the results of cases, but the regularity with which experienced attorneys cannot figure out how arbitration panels calculated the number set forth in awards is troubling. This apparently is such a concern that the NASD has drafted a rule providing customers the opportunity to request that arbitration panels issue “reasoned awards,” which explain the basis for their decisions. As disappointing as it is for an attorney not to understand the logic or

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<sup>1</sup> There are extremely limited grounds for vacating or modifying an arbitration award.

mathematical computation supporting an arbitration award, it is sometimes devastating for the parties. Consequently, parties to the arbitration process feel that they have little to no control over the process.

Unlike arbitration, the parties in mediation control the process. They get to decide whether to settle. They interact with the mediator throughout the day in an active way, instead of merely answering hostile questions sandwiched between objections. Consequently, the vast majority of clients I have represented in mediation and virtually every participant in the mediations I have conducted as mediator leave the process with a feeling of satisfaction because they know their voices have been heard. To borrow a mediation term of art, they exercise “self-determination” and it makes them feel good. Although parties who settle their cases in mediation are rarely thrilled with the amount of the settlement, they are typically pleased with the process and the way the result was achieved.

Another reason mediation has become popular is that a skilled securities mediator can almost always evaluate a case and help the parties reach a reasonable resolution over the course of a day. Accordingly, a tremendous amount of time, cost and stress can be avoided by mediating disputes between broker dealers and their former customers with seasoned securities mediators.

This chapter will discuss ways that attorneys participating in the securities mediation process can achieve favorable results for their clients in securities mediation. It will examine the following issues: 1) how to raise the issue of mediation with opposing counsel and when to mediate, 2) who to choose as your mediator, 3) how to prepare your client for mediation, 4) how to prepare the mediator in advance of the

mediation, 5) how best to set the groundwork with your opposing counsel in advance of the mediation, 6) who to bring to the mediation, 7) how to interact with the opposing party and counsel during the mediation, and 8) how to interact with the mediator in caucus during the mediation.

## II. **HOW TO RAISE THE ISSUE OF MEDIATION AND WHEN TO MEDIATE**

Before mediation became so common in NASD and NYSE cases, attorneys often believed that raising the issue of mediation with their opposing counsel would be perceived as a sign of weakness. In fact, attorneys sometimes contacted the NASD to mediate cases, but told the NASD mediation coordinator that they did not want the other party to know their client wished to mediate. Accordingly, when faced with this situation, the NASD mediation coordinator would contact both counsel. Rather than state that one party was interested in mediating, the mediation coordinator would state that the NASD had flagged the case as appropriate for mediation.

This convoluted basis for initiating mediation has largely been abandoned because most securities arbitration attorneys now understand that suggesting mediation will not be perceived by their opposing counsel as a sign of weakness. It is irresponsible for an attorney, regardless of whether he or she represents the claimant or the respondent, not to explore settlement before final hearing. When raising the issue of mediation, be direct with your opposing counsel. Tell him or her that you believe in the mediation process, you believe that your client and the opposing party would benefit from hearing the insights of an independent third-party mediator regarding the value of the case, and you (and your opposing counsel) would be doing your client a disservice if you did not explore settlement.

When to mediate should be explored on a case by case basis. Before I became a mediator, I represented brokerage firms for 4 or 5 years and then I represented claimants for 10 years. I began representing claimants before the stock market bubble burst. In those days, I often contacted brokerage firms to explore settlement before filing for arbitration. I had success settling cases before filing in those days. Sometimes I settled the cases in pre-filing mediation and sometimes I settled the cases over the phone. I believe that the vast majority of broker-customer disputes can be settled by experienced attorneys with the assistance of a skilled mediator at any time. The parties can engage in a voluntary exchange of the key documents and then proceed to mediation. Because depositions are not allowed in securities arbitration, little additional discovery will be accomplished in the long, drawn out pre-hearing discovery phase.

When the stock market bubble burst, it became almost impossible for brokerage firms and their attorneys to focus on settling cases pre-filing. It was difficult enough for them to keep track of the cases that were approaching final hearing. However, now that case filings have significantly declined and many of the cases that have been handled by outside counsel during the past 5 years will again be handled by in-house attorneys, many cases can again be resolved before arbitration claims are filed. Instead of being a part of the arbitration process, mediation can (and often should) be a substitute for arbitration. Because most brokerage customers and many brokers wish to vent their grievance, the mediation process gives them that cathartic release without suffering the expense, stress and time involved in arbitrating.

If an arbitration claim has already been filed, I believe that it is productive to raise the issue of mediation at any time. I also believe that there is nothing wrong with

continuing a final hearing in order to mediate. However, in my opinion the most effective time to mediate a case after arbitration has been initiated is 1 to 2 months before the final hearing. At that time, the pressure of the final hearing is facing all parties, yet the parties have not undertaken the expenses of their final hearing preparation. Accordingly, the brokerage firm can use the money they would have otherwise paid their outside counsel towards a settlement.

### III. CHOOSING THE MEDIATOR

I believe that successful mediators are born, not made. What I mean by this is that a successful mediator must have the inherent personality skills to connect early in the process with the parties and make them feel comfortable that they can trust the mediator's evaluation and judgment. The necessary personality skills can just as easily be present with somebody who has a big, strong, outgoing personality as they can be with somebody who is relatively understated. Regardless of personality style, the person must communicate extremely well and make people feel that he or she is honest, competent and trustworthy. One of the things the mediator must communicate clearly is an explanation of the parties' weaknesses. The mediator's personality style will largely dictate how the weaknesses will be communicated.

Regardless of the mediator's personality or style, sophisticated attorneys will know after working with a mediator 1 or 2 times if the mediator is effective. While different personalities and styles work, a mediator must intimately understand both the brokerage business and the securities arbitration process to be effective. Some mediators have represented claimants and respondents for many years and gained the experience that way. Other mediators have gained the necessary experience by serving numerous

times as an arbitrator. Regardless of how the mediator acquired the necessary experience, he or she must understand both the brokerage business and the securities arbitration process. Taking a mediation training course and mediating non-securities cases is not enough. I know from personal experience that there is nothing more frustrating as counsel in a securities mediation than to deal with a mediator who does not understand the brokerage business and the securities arbitration process. I respectfully suggest that you not waste your time with those mediators.

I also believe that you want a securities mediator who is willing to be evaluative in his or her approach. The parties will be hearing one evaluation about their case from their own attorney and usually a completely different evaluation about their case from the other attorney. This can be overwhelming, especially for the claimant. One of the reasons that it is critical for the mediator to establish trust and credibility with the parties is that those parties at some point will likely look to the mediator to tell them the relative value of their case. In my opinion, a mediator must be able to do this in order to be effective. I am evaluative and so is every other good securities mediator I know. A mediator must invest themselves in the process and work extremely hard to get the job done.

Finally, you want a mediator who the other side respects. You should not agree to use a mediator with whom you are not comfortable. However, if your choice is between two acceptable mediators and the other side has suggested one but not the other, go with the one the other side has selected (even if you like the other one slightly more). Your opponent is far more likely to move their position in mediation if a mediator they respect is making the suggestion, rather than a mediator who they find suspect in any way.

#### IV. HOW TO PREPARE YOUR CLIENT FOR MEDIATION

Preparing your client for mediation should not begin the day or week before mediation; it should begin the first time you discuss the case with your client, and each time thereafter. This is true whether you represent the claimant or respondent. Attorneys should always be honest with their clients. When I represented claimants, I lost a few potential securities clients to other attorneys because I was honest about the value of their cases. I viewed this as the price of being an ethical, honest attorney. However, as a result of the way I communicated with my clients, I almost never had a client upset with me when their case was settled.

When preparing for mediation, counsel should always meet with their client in advance of the mediation (not on the day of the mediation). Ideally, counsel should prepare a detailed memorandum analyzing the strengths and weaknesses of the case. The memorandum should address liability and damages and discuss the varying potential results and the approximate likelihoods of each. Certain major brokerage firms now require this before they will permit their counsel to agree to schedule mediation. The client requires time to integrate the salient points before intelligently discussing a settlement range with their counsel.

When meeting with their clients before mediation, counsel should explain the mediation process clearly, including some background about the mediator, the mediator's role, how the mediation will begin, how the caucuses work, etc. This is particularly important for claimants who have never experienced mediation before.<sup>2</sup> Counsel should discuss a potential settlement range with their client prior to the mediation. However,

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<sup>2</sup> I have mediated numerous cases where the claimant did not understand that we were in mediation, not arbitration.

this range must be realistic. Finally, counsel should tell his or her client not to express opinions regarding the acceptability of settlement values in the presence of the mediator. The mediator is constantly watching the client to determine where the client ultimately intends to finish negotiating at the end of the day. While I do not believe that counsel should ever mislead the mediator, there is no reason for a party to let the mediator know before the end of the process where they would like to end up.

It is very important for counsel to tell his or her client that they should keep an open mind throughout the mediation and try not to be emotional. Despite agreeing on a reasonable range to settle the case with their client, counsel should explain that they hold the mediator in high regard and he or she may recommend that the client settle the case outside of the settlement range if the mediator raises issues or arguments that he or she has not considered or given less credit than they deserve.

V. **HOW TO PREPARE THE MEDIATOR IN ADVANCE OF MEDIATION**

The risk of using a bright, experienced, evaluative mediator is that he will make up his mind too early. I have read statistics stating that 90% of jurors decide cases after hearing opening statements. Like jurors, mediators are human beings. Because so many of the cases that have been filed in the past few years are based on similar facts, this increases the human tendency for mediators to determine where a case should be settled early on in the process. I do my very best to resist this temptation, but it is not easy. Accordingly, you should provide the mediator with the pleadings and any important documents in advance of mediation.

I read everything that counsel provides to me before mediation. I start evaluating the case from the minute I begin reading the pleadings and profit and loss statements. I

take the process extremely seriously and like to be well prepared before the mediation session begins. In fact, I have my assistant contact counsel a couple of days before the mediation when I have not received any materials.

Most cases only have a handful of key documents other than the account statements. If these documents help your case, provide them to the mediator before the mediation. If these documents hurt your case but there is a reasonable explanation that will diffuse the significance of the evidence, explain this to the mediator in your mediation statement. The moral of the story is that the mediation begins before the formal mediation session. You should represent your client as effectively as you can throughout the entire process.

VI. **HOW TO INTERACT WITH OPPOSING COUNSEL IN ADVANCE OF THE MEDIATION**

While you and your opposing counsel likely will disagree about many of the underlying issues in the case, you should at least be on the same page regarding the losses in the relevant account(s). I have been forced to spend countless hours in mediation far too many times resolving differences in the profit and loss numbers submitted by claimants and respondents.<sup>3</sup> I would like to report that this has only happened with inexperienced counsel, but it has also happened with experienced counsel. Failing to address discrepancies in the numbers in advance of the mediation puts the mediator in a very difficult situation and decreases the likelihood of a successful result.

There is also nothing wrong with counsel for one of the parties suggesting to opposing counsel that they not be too aggressive in their opening statement because of

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<sup>3</sup> I am not referring to 1 report that starts in the middle of the life of the account and another report that analyzes the entire life of the account. That simply refers to differing damages theories. I am referring to numbers that do not match for the same period.

the personality of their client. Similarly, while I am a big believer in opening statements by counsel in mediation, there are rare occasions when it may make sense for the parties to skip opening statements. It is perfectly appropriate for counsel to discuss these issues in advance of mediation. Opposing counsel should not be enemies. They should be colleagues working together in preparation for a mediation designed to resolve the case for both of their clients.

Finally, before communicating any settlement offers or demands, counsel should make a decision whether they will try to settle the case over the phone or through mediation. If the parties believe that mediation is the way to go, I am of the opinion that all offers should be communicated during the mediation process. I believe that pre-mediation settlement negotiations usually detract from an effective mediation. When one of the parties has compromised his or her client's settlement position in advance of mediation, I have found that the parties get more entrenched in their settlement positions than when there are no pre-mediation negotiations.

Some attorneys believe that their opposing counsel should make an opening demand or offer as a condition of participating in mediation. In my opinion, the only reason to do this is if the attorney feels as if his opposing counsel has not proceeded in good faith at prior mediations. However, even if a case does not settle at mediation, the likelihood is that the attorney will learn a fact that he or she did not know prior to mediation.

## VII. WHO TO BRING TO MEDIATION

I cannot imagine a defense lawyer consenting to a mediation without the claimant present. Nevertheless, it is common for mediations to take place without the broker. If

the brokerage firm has some control of the broker, regardless of whether the broker is named as a respondent, I believe that the broker should attend mediation. First, it lets the claimant and his or her counsel know that the Respondent takes the case seriously. If the broker credibly answers the mediator's questions, it also allows the mediator to tell the claimant and the claimant's attorney that the broker has a reasonable explanation and will make a decent (and maybe good) witness. Claimants' attorneys listen to mediators they respect, especially mediators who have tried these cases and know how to judge how a broker is likely to perform at a final hearing. On the other hand, if a broker fails to attend the mediation, it sends a message to the claimant and his or her attorney that the brokerage firm chose not to bring the broker to mediation because he or she will make a poor witness and they are afraid to subject the broker to the mediator's questioning. This will often cause the claimant and his or her attorney to dig their heels in the sand when the parties start negotiating.

If the defense lawyer believes that the broker may make a poor witness, the mediation is the best opportunity to find out. If the brokerage firm has a business person present with true decision making capacity, it is also a chance for the business person to see first hand how the broker will perform. At least the questioning will take place in the confine of a privileged caucus session. Also, brokers sometimes respond to questioning better than the defense lawyer expects. Why hide the broker? Why not see how the broker performs and adjust the settlement value in part based upon the broker's performance?

Because the parties should remain flexible in their evaluation of the settlement value of the case based upon the events that take place during the mediation (see section

IV above), it is important for the respondent to have somebody with true decision making authority present at the mediation. From the perspective of the mediator and the claimants' counsel, it would be ideal to have the branch office manager or regional manager present at every mediation. However, this is not always practical or necessary. Some brokerage firms provide their in-house attorneys with a fair amount of discretion in exceeding the settlement authority provided to them prior to mediation. In those situations, the in-house attorney usually can adequately play the role of the business person, especially in cases that are not very large.

Finally, counsel should be careful about bringing fact witnesses, expert witnesses, relatives and friends to the mediation. While experts may assist counsel in preparing for mediation, the presence of experts at mediation is often counterproductive. Experts sometimes have their own agenda, including the fact that they earn the vast majority of their compensation on a given case by testifying at final hearing. An experienced securities mediator will rarely benefit from an expert witness. In addition, an expert is just one more opinionated person with whom the mediator must interact.<sup>4</sup>

Claimants sometimes bring relatives and friends for moral support. These extra participants can run the gamut from very helpful to very disruptive. Sometimes a friend or relative is present merely for moral support and will make the claimant feel more comfortable. I have seen this help the process. However, I have also seen relatives (especially adult children) and friends with their own strong feelings about the case that end up hurting the process. It is important for claimants' counsel to determine in advance if the claimant intends to bring someone with them to the mediation. If so, claimants'

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<sup>4</sup> In fairness, I have encountered situations in which experts fairly evaluated the weaknesses for the attorney and client with whom they were working and assisted in reaching resolution.

counsel should speak with that person in advance to determine if the person will be helpful or harmful. If the person will be a deterrent to settlement, claimants' counsel should figure out a way to tell his or her client diplomatically that the person should not come.

#### VIII. **OPENING STATEMENTS IN MEDIATION**

Counsel must accomplish inherently inconsistent objectives in their opening statement in mediation. On the one hand, the purpose of mediation is to settle the case. Therefore, counsel wants to proceed in a conciliatory manner consistent with the spirit of making a deal. On the other hand, the parties are involved in a hotly contested adversarial proceeding (binding arbitration). Therefore, counsel wants to articulate his or her client's position powerfully in a way that demonstrates that he and his client believe strongly in their case.

Some mediators believe that opening statements are too confrontational and therefore inconsistent with the goal of settling the case. While I believe it is appropriate to skip opening statements in a small percentage of cases, I am generally a strong believer in opening statements. Because there are no depositions in arbitration, mediation is the only opportunity before the final hearing for counsel to speak directly to the opposing party. Without that opportunity, each party's view of his opponent's case is filtered through his attorney. Accordingly, communicating your client's view of the case directly to your opponent is one of the most important parts of the mediation process.

It is clear to me that many attorneys do not know how to walk the fine line between being conciliatory and advocating his or her client's position. The most glaring mistake I see attorneys make in opening statements on a regular basis is speaking to the

mediator instead of speaking to the opposing party. The mediator is not a decision maker, and mediation is not a formal process. Regardless of whether you speak directly to the mediator, he or she will hear you. More importantly, failing to speak directly to the opposing party is a tremendous waste of a valuable opportunity to convince your opponent that his case is not as strong as he thinks.

When counsel is making an opening statement in mediation, he should act as if he and the opposing party are the only people in the room. Not only does speaking directly to the opposing party improve one's chance of convincing one's opponent that their case is not as strong as they think, but it also gives counsel the opportunity to be conciliatory. I have seen defense counsel say things like "We are sorry that you have lost money" or "my broker has told me that he thinks you are a good person and he is truly disappointed that we are in this situation." A defense lawyer in one of my mediations recently started his opening statement by telling the claimant that he did not believe all of her assets should have been placed in variable annuities. Similarly, I have seen claimants' counsel make comments in a suitability case like "my client does not think you [the broker] were out to hurt him" or "we do not believe that [the broker} is an evil person." The facts of the case will determine how conciliatory counsel should be. After making these conciliatory opening remarks, counsel should then state that he hopes the opposing party understands that he has a client to represent and they have a different view of the case. Accordingly, it is his job to explain his client's position, but his purpose is not to offend the opposing party. It is my experience that these types of conciliatory opening remarks are very helpful to the mediator in moving the case towards settlement.

In addition, securities arbitration and mediation has moved from being strictly a local practice to a regional/national practice for many. In-house defense counsel are mediating and arbitrating cases throughout the country. Similarly, during the past few years, numerous claimants' law firms have begun advertising and otherwise sourcing cases throughout the country. In delivering opening statements, counsel should therefore be aware of geographical/regional cultural differences. For example, an opening statement that may be viewed as direct, honest communicating in New York City might be viewed as insulting in the Mid-West.

## VIII. THE CAUCUS

### A. Interacting With Your Client During Caucus

The word "counselor" is a particularly appropriate description for the role of an attorney representing his or her client during a mediation caucus. Mediation (especially for the claimant and broker) is a foreign, emotional experience. The claimant does not understand that the respondent will almost always start the negotiations at a number well below what the respondent will ultimately pay to settle the case. Claimants' lawyers should be used to respondents making nominal initial settlement offers, and should also understand that it is where the respondent ends (not begins) that ultimately matters. Nevertheless, it is still frustrating at times for claimants' counsel to hear what they perceive to be a ridiculously low initial settlement offer. However, it is important to the ultimate success of the mediation for the claimant not to have too negative of a reaction to the initial settlement offer. If claimants' counsel expresses his frustration (especially if he is angry) vocally regarding the initial settlement offer, this may cause the claimant to

become more entrenched.<sup>5</sup> Such an emotional reaction by counsel is not good “counseling.”

This is true at every stage of the negotiating portion of the mediation process for both claimant’s and defense counsel. Counsel should never let their opposing counsel’s negotiating style prevent them from acting in her client’s best interest. Counsel should remain unemotional throughout the process. One of the most critical aspects of successful negotiating is demonstrating patience. Sometimes this requires taking a break for a few minutes. Sometimes this requires trying a different approach, such as switching to a bracket.<sup>6</sup> Sometimes this even requires terminating the mediation but leaving the process open. A good mediator will help with different approaches when the process appears to be bogging down. Every mediation is different, and each requires counsel to remain flexible and keep an open mind. Strategy decisions should be made logically and dispassionately, independent of counsel’s frustration with the opponent’s negotiating style or tactics. In fact, it is sometimes necessary to take an action that will help opposing counsel save face. Counsel should have no problem doing this if it assists in reaching a fair and reasonable settlement for her client.

**B. Interacting With The Mediator During Caucus**

First and foremost, counsel should listen and watch the mediator carefully at all times. If you can convince an effective mediator that your client’s case is strong, the mediator will likely help your client achieve a favorable result. Therefore, it is important

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<sup>5</sup> However, as will be discussed below, claimant’s counsel may want to give such a reaction to compel the mediator to respond in a certain way. This is fine as long as claimant’s counsel has told his client in advance that he will do this and not to take it seriously.

<sup>6</sup> A bracket is a conditional move. For example, if the claimant’s last settlement demand was \$500,000 and the respondent’s last offer was \$50,000, one of the parties could suggest that if the claimant decreased his demand to \$300,000 the respondent would increase its offer to \$100,000. By doing this, the parties are “bracketing” their numbers closer together and breaking a roadblock.

to focus on what is interesting the mediator and respond in the most favorable way for your client. Carefully watching and listening to the mediator may also let you know if the mediator is evaluating the case differently than you. If you believe that the mediator is evaluating the case worse for your client than you have, you should address this issue with the mediator (perhaps away from your client) before the mediator solidifies his or her evaluation. If you believe that the mediator is evaluating the case better for your client than you have, it may prompt you to take a less active approach than you otherwise would.

Another reason you should listen carefully to the mediator is that your evaluation of the case should be ongoing. Presumably, you have selected the mediator because you respect his or her evaluation skills. While every good mediator wants to settle cases, quality mediators also honestly evaluate cases. Therefore, if a mediator is evaluating the case differently than you (better or worse), you should listen carefully to the reasons and be flexible enough to reevaluate the settlement value of the case with your client based upon the mediator's reasoning.

Just like you should carefully watch and listen to the mediator, you must understand that the mediator is constantly trying to read the parties and the attorneys. Some attorneys play their cards very close to their vest. Other attorneys are very open with the mediator.<sup>7</sup> Regardless of your style, never forget that the mediator is watching your verbal and non-verbal communication as well as that of your client with an eye towards getting the case resolved.

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<sup>7</sup> For example, I work with some attorneys who will tell me their settlement authority only at the very end of the mediation, if at all. Other attorneys want me to know their authority early on in the process.

You should also understand that mediation is not like a hearing in court where you want to make all of your arguments at once. Mediation is a process that evolves over hours, sometimes many hours. It is fairly common for the negotiations to bog down at some point during the course of mediation. The best way to help the mediator at that time is to give him or her a new fact or piece of evidence. Accordingly, I am of the belief that counsel should not divulge all of his client's good facts or documents during the initial caucus.

You should be honest with the mediator regarding the strengths and weaknesses of your client's case during caucus. This does not mean that you have to overstate the importance of the weaknesses of your client's case. To the contrary, you should attempt to diffuse the weaknesses in your client's case as much as possible. However, if you try to convince an experienced securities mediator that a weakness is not really a weakness, you will likely lose credibility in the mediator's eyes. This ultimately will not benefit your client.

Finally, whether and when to disclose your settlement authority to the mediator is an interesting question. Some of the attorneys I work with will never tell me their settlement authority, even after the case settles. Other attorneys I work with will tell me their settlement authority early on in the process. I do not particularly like to know the parties' settlement authority early on in the process. I like to be evaluative, and knowing one or the other side's settlement authority could conceivably color my evaluation. I also believe that when an attorney discloses his or her settlement authority early on in the process, it reduces the likelihood that the case will get resolved under the settlement authority (in the case of the respondent) or over the settlement authority (in the case of

the claimant). Nevertheless, some attorneys feel comfortable letting me know their settlement authority early on, and I cannot point to any specific examples where knowing the authority ended up resulting in a less favorable settlement for that attorney's client.

IX. **CONCLUSION**

Counsel should be thinking about a proper settlement of his client's case from the moment he is retained and at regular intervals thereafter. Mediation is a wonderful tool to help counsel obtain a fair and reasonable settlement for his client. I hope that the ideas set forth in this chapter will help the securities arbitration practitioner obtain favorable results for their clients in mediation.