Thoughts on Managing a Multiparty Mediation By Philip S. Cottone

The Controversy

The NASD Mediation Session Advance Sheet listed two claimants followed by the ubiquitous "et al." I didn't think much of it until I called the lawyers for the claimants and respondents individually, as is my custom. There were numerous claimants, each with a separate claim against the same broker-dealer and its registered representatives. All of the claimants had attended a seminar given by the broker-dealer, after which they cashed in all or a portion of their company retirement funds. The claimants had been receiving a fixed return of more than nine percent, but the year was 1999, and the allure of higher returns was difficult to resist with NASDAQ going through the roof. So they pulled their money out and invested with respondents.

The Statement of Claim asserted various claims against the registered representatives and the broker-dealer alleging guaranteed returns, forgery, unsuitability of investments (most claimants were at or near retirement age and have since retired), breach of fiduciary duty, breach of contract and misrepresentation. The Statement of Claim outlined demands exceeding $2,000,000 in the aggregate, and much more if you included punitive damages. And, I was advised that almost all of the claimants were expected to come in person to the mediation!

Pre-Mediation Suggestions

I made two suggestions when I talked with the lawyers on the phone. I suggested an additional mediator, so we could divide the claimants. I also suggested a second day, so we didn't have to handle all claims in a single session. Neither suggestion was acceptable, primarily because of scheduling difficulties and an early arbitration date. I got the impression that although both lawyers had agreed to mediation neither really believed it would be successful. I gave each a pep talk and asked that they send me the documents together with mediation briefs covering the strengths and weaknesses of their cases. The information I subsequently received from counsel showed a disparity in actual losses. The claimants calculated out of pocket losses of over $700,000. The respondent showed total losses of under $500,000, and, of course, pointed to the market drop in early 2000 and thereafter, and the choices made by the claimants, to explain the decline in value in the accounts.

The Challenge

It was incumbent upon me to figure out how to conduct the mediation in a way that would permit me to handle the large crowd effectively and build confidence on both sides. I wanted all attendees to understand fully what was going to take place, and to trust the process and me. I also thought we had to establish a rationale and methodology for eventual settlement because I felt it was unlikely it could be completed in a single mediation session. I concluded that the most important thing for me to do at the mediation was to try to develop a working dialogue and some trust and respect between the lawyers. I knew that was a tall order because both had been somewhat skeptical on the phone. They did not know each other, and I did not know them from prior cases. A history of working with party representatives has often proved helpful in orchestrating a successful mediation. Nonetheless, here I was shooting in the dark, and I crossed my fingers that counsel on both sides would cooperate and work with me to try to arrange a settlement that would be in their clients' best interests.

I decided in advance to divide the claims into three categories, claims under $10,000, claims from $10,000 to $50,000, and claims over $50,000. Before the mediation I prepared a schedule listing the actual loss differences by account between the claimant and respondent numbers. My thinking was to start with the claims under $10,000 initially, and work to obtain stipulations on the monies in and out. I hoped to get agreement account by account in the lowest claim category. If successful, I thought it might build some rapport that would help us on the tougher issues and in the larger cases later.

The Mediation Session

Sure enough on the day of the mediation almost all of the claimants showed up with their lawyers and an expert witness. When the mediation began I crowded everyone into a large hearing room (over 30 people, including the claimants, some family, four lawyers, one expert, two brokers, one senior officer of the respondent, and one observer). I began by slowly and carefully going over my usual opening statement so that everyone understood what we were about, and that it was totally voluntary and confidential. I explained my role as a neutral, their role and expected good conduct, and the process we were going to follow—with joint sessions and individual caucus meetings. When I was through there were some questions, followed by general agreement with the outlined procedure. I tried my best to relax the claimants, many of whom appeared very apprehensive when they arrived. I assured them that absolutely nothing could happen that they didn't want to happen, and, unlike court or arbitration, it was up to them to agree to any settlement. I think they had a reasonably good understanding of what was planned when the opening statement was finished, and were somewhat less apprehensive.

I then asked counsel for the claimants to describe what had happened from his perspective, and followed that by letting the individual claimants who wanted to speak do so. Some took full advantage and most spoke in measured tones and under control, as I requested in the opening statement. Then the respondents had their turn, as well as the registered representatives. After everyone had their say at an opening session that lasted much longer than usual, I escorted the individual claimants to another room. I concluded that the only way we were going to make progress was without the individual claimants present (only their representatives), a departure from usual mediation procedure where the claimants are ordinarily participants for most of the session.

After the individual claimants left, I kept the others together in the joint session to go over my suggestions that we divide the claims into three categories by amount, and start by reconciling differences in out of pocket losses. Both sides agreed with the approach. I also suggested that any understandings reached in the first category of smaller claims would not necessarily establish precedents for dealing with the second and third categories. I felt it was important that we dispose of as many of the smaller claims as possible to reduce the number of people involved, and to make some real progress that we could build upon without holding these smaller claims hostage to larger issues. I also wanted to use the small dollars to try to get settlements that, on a percentage basis, might not be possible with the larger claims.

Building Momentum

The first discussion related to appropriate cut-off dates for each account. We went back and forth (some had closed accounts earlier than others; some still had money on deposit with the respondent; and some had made unsolicited purchases in their accounts), and before too long we were able to reach agreement on the principles that would establish the cut-off dates. We also agreed that these same principles could be applied to the larger accounts because they had nothing to do with money, but to fairness and equity in terms of what the firm should be charged as a beginning point by way of actual losses...temporarily setting aside the question of liability itself. In other words, I suggested that we agree on the actual account loss amounts if we could, and then argue about liability separately. As I had hoped, the lawyers and the business people developed a working dialogue in discussing the dollars invested and withdrawn, in part because it was relatively easy with the small amounts with which we started. The first couple of accounts took a while, but once we established a procedure and hammered out some principles it became easier. We realized that the legal associates for each firm, with the help of the registered representatives who had good records with them, could do the rest essentially by themselves.

Liability questions, of course, were more difficult, and here I separated the parties into two caucus rooms and started the usual work of reviewing the strengths and weaknesses of their respective legal positions. Claimants' counsel eventually came to understand that under the facts of his cases it was unlikely an arbitration panel would award one hundred percent of the losses, no less losses plus costs, and punitive damages, as claimed. I felt it was important that we talk to his clients and provide the reasons why he had reached that conclusion. As agreed, I spoke with all of the claimants as a group, and I answered some questions as well. Claimants' counsel then met privately with his clients, and secured their permission to talk about a settlement at something less than one hundred percent of losses. He and I had earlier discussed the pros and cons of meeting with the claimants individually or as a group, and he felt he could secure their permission to do it primarily as a group to save time, leaving open the possibility that any individual who wanted a personal discussion could have one.

At the same time I was meeting with the respondents to get a feel for where they were going to be able to go, and to help them review their case and their risk if they went to trial on all of these claims. Shuttling back and forth among the three rooms (claimants, claimants' counsel and respondents), and occasionally getting the lawyers for both sides together, we kept trying to come up with a percentage of the out of pocket loss everyone would find agreeable.

The Settlement

It was mid-afternoon and the clock was ticking loudly, but we had made a lot of progress. The registered representatives and the legal associates had continued work on stipulating to out of pocket dollars, and that was coming along well...and we had established that any settlement would be based on something less than one hundred percent of out of pocket losses. Still I had to push things along a little faster now. It seemed to me that we might have a shot at getting agreement on all claims except those that were larger in dollars and involved a greater number of other issues needing resolution. I probed both sides as to whether a settlement of all, or all but the largest, would be possible today. The respondent said, "yes" but the settling claimants who were present wanted to reserve the right to testify for any claimants who did not settle. The respondent would only settle if that testimony was barred, for obvious reasons. Putting that aside for the moment, we were closing in on a number that would do the job for most of the claimants (a fixed percentage settlement amount in excess of 50% of the losses). I suggested we try to resolve the claims at the agreed percentage of loss, except for the larger claims, subject to the lawyers (with my help if necessary on the phone) finishing the review and stipulating to the amount of out of pocket losses in those accounts. Then we could work separately on the large dollar disparity in the bigger cases and negotiate a settlement. The registered representatives believed that the claimants in the larger cases were misinformed

about the number of accounts, and the amounts initially deposited, but they needed office records for verification. If we were able to resolve the larger cases in a few days, the testimony issue would go away, and we would have a settlement of all claims.

By evening, we shook hands on a settlement percentage for all the claims save the largest, but we still needed to do more work on actual loss stipulations for perhaps half of the claims. However, I was confident that the legal associates who had developed a good working relationship at the mediation, would be able to agree on the out of pocket numbers. Within the week it was done. I was kept informed by telephone, and didn't need to resolve any disputes between them. Similarly, both sides were hard at work trying to resolve the issues regarding the last claim. They agreed to the same settlement percentage if the secondary issues could be worked out, and within a week these issues were resolved to everyone's satisfaction. Here I did have to talk with each side by phone to help them get together at the end.

Closing Observations

As is often the case, less on the part of the mediator was more. That is, I don't think we would have made much progress if I had used the traditional mediation model and not seen the critical importance of getting the lawyers to work together cooperatively to build a settlement. What was needed, of course, was counsel who knew what they were doing, and who were interested in getting a result to serve their clients' best interests, not in posturing or positioning themselves for the arbitration. The two senior lawyers and their hard working associates, who took the cue from their bosses, deserve all the credit for getting this done. I was pleased, and very satisfied, to have helped a little bit in their settlement process.

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Additionally, Mr. Cottone serves as an arbitrator for the NASD, NYSE, and has served for JAMS. He was a mediator/arbitrator for the Claims Administrator in *SEC v. Prudential Securities*, handling cases in eastern Pennsylvania and New Jersey. He received an A.B. from Columbia College (1961) and an LL.B. from New York University School of Law (1966). He is a retired member of the New York Bar, and has extensive experience in real estate and securities. He also is a member of the faculty of the Real Estate Institute at the NYU School of Professional and Continuing Education.