**PLI Securities Program**

# Securities Arbitration in the Market Meltdown Era: Achieving Fairness in Perception and Reality

**August 12, 2009**

## Making the Mediation Fair for All:

What Should the Parties Expect from their Mediator?[1]

By Joan Stearns Johnsen[2]

What are the expectations of advocates in mediation regarding the conduct of their mediators? Are they being unrealistic in their demands? Should your mediator be able to get you your adversary's highest/lowest number? Fairness is a relative concept. Different people approach fairness differently in terms of result as well as process. What are some of the issues, and what is one mediator's perspective?

- Your mediator has to treat both sides equally. He or she will be constrained from serving as your exclusive agent.
- One of the main "selling points" of mediation is that it permits the parties to control the outcome, whereas arbitration does not. That distinction should be preserved and not sacrificed in favor of a result.
- Confidentiality is essential to the process of mediation. However this privilege belongs to the parties.

Our views of mediation continue to evolve. As users of the process become more sophisticated, they can appreciate the nuances of how this profession is practiced. This article identifies some issues relating to fairness of the process from the standpoint of the practitioner, the mediator, and the parties.

---

[1] The author reserves all subsequent publication rights.

[2] Joan Stearns Johnsen has been mediating cases throughout the county for fourteen years and was among the first mediators on FINRA's (NASD) panel of mediators. She has successfully settled over seven hundred cases. Ms Johnsen also has been an arbitrator for over twenty years. For more information, please contact Ms. Johnsen at JSJohnsen@JSJmediations.com.

**PLI Securities Program**

# Securities Arbitration in the Market Meltdown Era: Achieving Fairness in Perception and Reality

**August 12, 2009**

## Making the Mediation Fair for All:

What Should the Parties Expect from their Mediator?[3]

By Joan Stearns Johnsen[4]

### I. Introduction

In examining fairness in mediation, the perspective is usually an objective examination of the appropriate conduct of counsel serving as advocates in mediation. For example, ABA Opinion 06-439 addresses the distinction between puffing and posturing about one's negotiation position, which is acceptable, and misrepresenting facts to one's adversary, which is not. [5]The other major focus of ethical rules, usually applied to mediators, is confidentiality.

Mediators generally are required to maintain the confidentiality of information that is entrusted to them by the parties, and they are prevented from testifying about what

---

[3] The author reserves all subsequent publication rights.

[4]Joan Stearns Johnsen has been mediating cases throughout the county for fourteen years and was among the first mediators on FINRA's (NASD) panel of mediators. She has successfully settled over seven hundred cases. Ms Johnsen also has been an arbitrator for over twenty years. For more information, please contact Ms. Johnsen at JSJohnsen@JSJmediations.com.

[5]ABA Formal Opinion 06-439, (April 12, 2006)
Lawyer's Obligation of Truthfulness When Representing a Client in Negotiation: Application to Caucused Mediation,
http://74.125.47.132/search?q=cache:U8FBwSP63PYJ:meetings.abanet.org/webupload/commupload/DR018000/sitesofinterest_files/Formal_Opinion_on_06-439.pdf+ABA+Opinion+06-439&cd=1&hl=en&ct=clnk&gl=us

transpires in mediation. However, can there ever be any exceptions to this rule of confidentiality? Mediators are required to act fairly and impartially, but what does this mean? What can the parties and their lawyers expect from the mediator? Can you expect your mediator to work as hard as he or she can to get you your adversary's bottom line? Should you ask your mediator what your next offer or demand should be? What are the ethical obligations of the Mediator? What can the Parties fairly expect from their Mediator?

In the area of mediation fairness and ethics, it is difficult to find bright lines and opinions may differ. I have been a practicing Neutral for fourteen years, and often feel that I must resist the Parties' usually innocent requests to do what I believe brings me too close to the ethical line. As a neutral, nothing matters more than treating both sides equally and fairly. It is less clear as to how one accomplishes this. Mediators vary in their approaches. There are often no right or wrong answers in the area of fairness and ethics and there are few rules to provide guidance. This article will examine those expectations and the issue of fairness from the perspective of the mediator. What follows is one Mediator's approach. In no way do I wish to suggest that this is the only fair approach or the only ethical approach.

## II. The Mediator Is Not Your Exclusive Agent

What does a lawyer look for in a Mediator? Fairness? Impartiality? Intelligence? Subject matter expertise? Process skills? I believe the answer is all of the above. For me, the guiding principle that helps me maintain fairness and impartiality is to always remember that agency principles do not apply except to the extent that I can equally serve the interests of both sides.

That may sound obvious, but it can be more complex in its application. For example, parties frequently ask me about the demeanor in the other room. They ask me who is doing most of the negotiating. They ask me questions such as what is driving this in the

other room. They even ask me whether or not I know where the other side ultimately is willing to go. They want to know whether they have gotten the other side's "Best Number" or "Bottom Line." I even encounter lawyers so brazen as to demand no less of me than to do no less than to accomplish that on their behalf. For example, they demand that I "run in there and get their best number." I am told that how I accomplished that is basically my own problem. Or they may inform me "this is where I am willing to go, I don't care how you get me there."

Each time I get one of these questions or a lawyer attempts to place me in this position, my guiding principle is always, would you like me to do that for them? Would you want me to answer that question about what is going on in this room if the other side asked the same question? Would you want me to tell them that you are merely posturing, and I know that you are willing to go much higher/lower and just to hang tough? Do you want me to tell them that the client is willing to settle at no matter what, but that the lawyer is counseling tough tactics? Do you want me to tell them that what is driving the dispute is pure greed or pure emotion or whatever? And most importantly, how exactly is it that I am supposed to get you their best number and at the same time get them your best number?

If a Mediator may be permitted a brief vent, I have always found it particularly troubling that some lawyers judge their mediator not on how the mediation was conducted, nor on whether or not the mediation settles, but on the actual number the "*mediator got for them*." I find it troubling that some lawyers see no problem with their showing up unprepared, and yet find it perfectly appropriate to spend the day doing unrelated work and expect the result to be the number they promised their client before arriving at the mediation. Lawyers with this attitude do not see any problem with sitting back passively while trying to delegate the responsibility for negotiating on their behalf to me.

Remember the concerns about the need for lawyers if mediation became accepted? Remember how you worried that you, the lawyer, would become unnecessary? I hope that debate is over. There is much counsel can do both in terms of preparation and

mediation advocacy. A lawyer skilled in mediation advocacy and negotiation technique will be much more effective in achieving a favorable result for their client than the lawyer who lacks those skills. The better negotiator gets the better deal.

That is not intended to suggest that mediator just carries numbers back and forth. That is not true. There is much I do to facilitate the negotiation. Besides engaging in aggressive risk analysis, I help the parties manage the negotiation. I begin this process with the pre-mediation conversations through to the signing of the agreement. I take responsibility for keeping the parties negotiating in a constructive manner. I keep the parties at the table. In order to accomplish this: I counsel; I teach; I advise; I explain; I warn; I calm; I encourage. I cajole; I protect; I diffuse; I mediate. I manage the negotiation. I manage how quickly or slowly parties move towards one another. I counsel against outrageous opening numbers or the insulting fractional response. I try to prevent you from shooting yourself in the foot by telling you the impact I believe your negotiating strategy will have on the other side. I help you to understand the message you are sending. I stop short of conducting your negotiation for you. I let the Parties determine the result.

In terms of how this is accomplished, parties often ask me what their next number should be. I don't believe it is appropriate for me to "negotiate on both sides of the table." I believe this goes beyond advising the parties on how to conduct their negotiation. I generally resist picking the number, although I do not have a problem providing guidance that will help you pick it.

Out of fairness to your own client, you should arrive at the mediation prepared with more than your "bottom line." You should have some idea of where you think the other side is going. You should have some idea at least of what your opening demand or offer is likely to be. Why are parties unprepared when I ask for their first number? Did you not know this was coming? These long discussions especially at the very beginning of the mediation, slow the process and cost everyone money. When parties do this, I imagine they had expected me act as their surrogate in the negotiation.

In my opening statement to my mediations, I tell parties that the difference between arbitration and mediation is the parties' ability to control the result. I sincerely believe that. I believe that in order to be fair to the parties, I must always remember that even though I am in a position to influence the result, the parties live with the consequences and should therefore be permitted to control it.

I do work for you. But I work for your adversary too. You can ask me anything you want, but I may have to turn you down. For me, anything is fair if it could be applied equally to both sides. I will manage the negotiation, but do not expect me to get you their best number. That is your job.

**III. Parties Should Be Permitted to Control The Outcome**

Just to clarify, the difference between "Risk Analysis" and "Evaluation is that Risk Analysis involves identifying different legal theories as well as the different versions of the facts. In risk analysis, mediators analyze the testimony of the witnesses as well as possible interpretations of documentary evidence. Evaluation is giving the parties an opinion as to what should or will happen based on the mediator's experience and expertise. I believe that risk analysis stops short of making a prediction of what will happen. Instead, the discussion is about possible and even likely outcomes. It should never involve a legal opinion. In fact, in at least one jurisdiction it is improper for a mediator to give legal advice even if framed as a question.[6]

I personally do not see what the value is to the parties of an evaluation or legal opinion. As anyone who has ever litigated knows, litigation is full of surprises. In fact the only thing that is predictable is that there are likely to be some surprises. I do not believe in evaluation because even if the one giving the evaluation is highly skilled and experienced, predicting results at either an arbitration hearing or a trial is to me like predicting where the Dow will be in six months. Economists can make skilled and

[4] http://flcourts.org/gen_public/adr/MEAC%20Opionions/advice%20opinions.shtml

informed predictions founded on years of education and experience. They cannot, however, predict the future any more than a mediator can.

I have heard many lawyers talk about how the value of mediation is getting a neutral opinion to help persuade their client. I do not believe that this is the most effective way to communicate with your client. I also do not believe that such an approach is fair to your client. I believe most people prefer to make an informed decision regarding matters that have an impact on their life. In the case of the client who wants you to decide for them, be careful. In the morning, when they wake up with sellers/buyers remorse, they may blame you for that decision you made on their behalf. Those clients in particular should be allowed to reach the conclusion through risk analysis. In risk analysis, the mediator can indirectly help the parties to see the warts of their case. The object of risk analysis is to help the parties to have a more objective view of their litigation risks. I believe that the impact on the party of this approach is longer lasting than is pressuring someone with the weight of a "learned evaluation."

I believe the mediator is crossing the line when he or she presses too hard about what will happen. I also believe that, anything that rises to the level of manipulation including frightening parties, exploiting their insecurities, or threatening or browbeating, while effective, is unfair to the parties. It also is a disservice to the process.

It is unfair for you to expect me to scare or bully your client for you. I do not think this is an appropriate mediation strategy, even though it would be fairly easy to do and can be accomplished fairly expeditiously. While it would much easier and quicker to manipulate the parties into settling--bullying and threatening the parties is a proven way to achieve settlement-- in my opinion, neither manipulation nor threats and bullying serve your client's best interests. While I am proud of my record of achieving settlements for my clients, I believe it is always a party's case, not mine. I do not believe achieving settlement is more important than the party's right to self-determination. Parties tend to act in their own best self-interest. I have found the best and fairest way to settle a case is

by helping parties understand why it is in their interest to settle. This approach is at least as effective, if not more, than bullying and threatening.

A mediator who is selected because of their position of respect and authority is in a position to exploit that position and to present their opinion as if there were some sort of certainty. It is like a broker selling a stock. They should give the client the pros and cons and allow the customer to decide. They should never guarantee a result nor pressure their client. In my opinion, under no circumstances is it appropriate to elevate the need to reach a settlement over the right of the parties to self-determination.

**IV Confidentiality**

By all accounts, one of the benefits of the mediation process is confidentiality. There is the confidentiality that attaches to information given to the mediator in private caucus with the understanding that it will not be revealed to the other side as well as the confidentiality or privilege that attaches to the entire proceeding. This confidentiality or privilege is that which attaches to a settlement conference pursuant to Rule 408 of the Federal Rules of Civil Procedure. Confidentiality is also an essential element of the ABA Model Rules, and the Uniform Mediation Act. Most mediators also include confidentiality provisions in their Agreements to Mediate executed prior to the mediation.

Confidentiality is essential to the process. It encourages the parties to speak freely with one another without the fear that what they say will come back to haunt them should the mediation not result in a settlement and should the parties find themselves back in litigation. Parties also should feel confident that they can speak candidly with their mediator on private caucus without fear of the mediator disclosing that information to their adversary. In most instances, the major ethical concern of mediations concerns the need to maintain the confidentiality of the proceedings.

Much has been written about the power of the apology and the face–to-face exchange that under ordinary circumstances might be discouraged by litigation counsel. With the

proceedings treated as confidential, these exchanges are more likely to take place. Without the protection of confidentiality and privilege, there would be a chilling effect on the candor that may be essential to resolving a dispute.

Although this protection of privilege is largely taken as an absolute, there is a recent New York cases that some believe may have made some inroads into the blanket of confidentiality. This case is a marital dispute, Hauzinger v. Hauzinger.[7] In Hauzinger, the Plaintiff husband executed a waiver releasing the mediator from maintaining confidentiality. The wife also sought to require the mediator to testify regarding disclosures made during the course of the mediation. The mediator tried to quash the subpoena and avoid testifying claiming a qualified privilege existed pursuant to CPLR 3101 (b). In this case, the mediation agreement also contained a provision allowing the disclosure of documents and permitting the mediator to speak with counsel for either party provided both parties consented. Under this set of facts, the court required the mediator to testify regarding the substance of the mediation.

There has been much discussion about this decision and its impact on the confidentiality of mediations and the protection to be afforded mediators. There has been much wringing of hands as to whether parties can ever again feel safe that their disclosures will be protected. While there may be extraordinary circumstances where confidential information may not remain confidential, I do not understand the uproar over the facts of this particular case.

I believe that if the parties agree that the proceedings are not confidential, and if the agreement provides for such a mutual waiver, then there are no interests remaining to protect and the mediator should be free to testify.

This is not to say that I would at any time like to face having to testify. Furthermore, I never keep any notes or documents from my mediations. This, no doubt, would impair my ability to testify. But I believe the privilege attaches to the parties. I believe the

[7] 43 A.D.3d 1289 (NY 2007).

parties should have the right to waive their privilege. As long as both parties agree, I would think that I would have an obligation to disclose my recollections of the mediation.

## V. Conclusion

The area of fairness is always a difficult one. I believe my clients have a right to expect me to treat them fairly and impartially. Occasionally, parties and their lawyers do not understand that by treating them fairly, I cannot treat them better than I treat their adversary--this includes parties who use me regularly, or parties with whom I may agree. In my mediations, the parties frequently tell me that all they seek in terms of result is "fairness." My response is **whose** concept of fairness are you seeking? Yours? Mine? Your adversary's? The Arbitration Panel's? I always try to treat the parties equally, and to let them ultimately control their own result. Any discussion of fairness often leaves more questions than it answers. There is more than one "right" answer to these questions.