

THE MEDIATION OF SECURITIES CLASS ACTION SUITS

A PANEL DISCUSSION HOSTED BY THE
BENJAMIN N. CARDOZO SCHOOL OF LAW

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I. INTRODUCTION

On September 27, 2007, a packed Moot Court Room at the Benjamin N. Cardozo School of Law welcomed two prominent JAMS mediators, Judge Daniel Weinstein (Ret.) and Michael Young, Esq., to a symposium on the mediation of securities class actions. Judge Weinstein and Mr. Young were joined by a panel of distinguished practitioners from all sides of the securities class action bar, including plaintiffs' lawyers Max Berger and Sam Rudman, defense lawyers Gregory Markel and Alan Salpeter, and insurance carrier lawyers Mary Jo Barry and Michael Goodstein.

This note introduces a transcript of the event and comments on a number of the subjects discussed. It considers five topics: The timing of mediation, the role of insurance, process related issues, negotiation techniques, and the role of the mediator.

A. Timing

Judge Weinstein started the discussion by asking the panelists to consider the advantages and disadvantages of early mediation. Over the last few years, the "Weinstein Group" has seen the parties to securities class actions initiate mediation at increasingly early stages in litigation. It is not uncommon now to see a case go to mediation soon after a complaint has been filed, before a motion

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to dismiss has been filed or answered, and before a single deposition has been taken. The challenge for parties in an early mediation is that the factual record and legal posture are not as fully developed as they might be if the mediation took place on the courthouse steps. While litigants may find comfort in analyzing a case after the completion of discovery and after the judge has opined on all relevant legal obstacles, doing so may be extremely costly. Litigation can easily cost hundreds of thousands or even millions of dollars a month due to the expense of the preparation of expert reports, litigating motions, and the review and production of documents. It is not uncommon for both sides to have to choose between early settlement in the face of less than perfect information and expensive litigation. This litigation might bring greater visibility to the case, but it also might mean that the defense burns through the available resources in the process.

Litigation has secondary personal consequences as well. Current and former officers from defendant companies are frequently forced to participate in high profile litigation battles. Early settlements not only offer the parties the opportunity to minimize transaction costs, but also protect individuals and their families from the strain of being subjected to litigation. The plaintiff response to this, of course, is that to the extent these officers and directors engaged in fraudulent behavior that ultimately led to a stock drop, it is unlikely that they will find much sympathy for having to endure the litigation.

The challenge that the panelists confronted was how to approach early settlement while balancing the costs of litigation against having to make a risk management decision in the face of less than perfect information. The statistics highlight this difficult decision. For example, Cornerstone Research suggests that the average settlement of a securities class action costs far less than the cumulative cost of trying a securities class action through judgment and appeals.²

² See Cornerstone Research, *Securities Class Action Settlements 2002: A Year in Review*, available at: http://securities.stanford.edu/clearinghouse_research/2002_YIR/2002_yir_settlements.pdf.

In 2002, the majority of cases continued to settle for less than \$10 million. In fact, over [forty] percent of all cases settled for less than \$5 million. Historically, cases settling for less than \$1 million have often been referred to as "nuisance suits," reflecting the fact that they may represent non-meritorious claims that defendants are forced to settle simply to avoid defense costs. In 2002 there was a decline in the percentage of cases settling for less than \$1 million. However, for the same year, we observe that there was an increase in settlements between \$2 and \$3 million, which

While limited and rapidly diminishing resources may often be a motivating factor in early settlement, panelist Michael Goodstein pointed out that without a fully developed record, especially when there is a wide divergence in the analysis of the risks in larger cases with large towers of insurance and solvent companies, the challenges and motivations are different. In other words, when diminishing resources are not driving settlement, the mediator is more likely to have to confront the underlying risk analysis of each of the parties. When there is a wide divergence in views on the value of the case, it is the challenge of the mediator to design a process that allows for an exchange of information and analysis. This exchange may give the parties valuable information that helps to bridge the gap in valuation of the case. For example, with the agreement of the parties, under the mediation privilege the mediator may facilitate a limited document exchange, targeted depositions, expert reports, and independent legal and expert analysis. Trial judges will sometimes accommodate prolonged mediation efforts, especially when the parties are able to report that the mediator is overseeing a process designed to achieve an early resolution.

might also reflect a range that represents potential avoided defense costs; settlements as a proportion of damages generally decline as damages increase.

Id. Litigation costs associated with a securities class action suit have long been recognized as being more expensive than settlement. See S. REP. NO. 104-98 (1995) (the purpose of the Private Securities Litigation Reform Act of 1995 was to curb the abusive and excessive costs of securities litigation. In fact, “[o]ne [Congressional Hearing] witness described the broad discovery requests that resulted in the company producing over 1,500 boxes of documents at an expense of \$1.4 million.”); Jonathan Eisenberg, *Beyond the Basics: Seventy-five Defenses Security Litigators Need to Know*, 62 BUS. LAW. 1281 (2007) (citing a March 2007 independent, bi-partisan Commission report from the U.S. Chamber of Commerce which observed “the level of civil litigation related to the capital markets remains much higher and more expensive in the United States than in Europe or Asia, . . . one of the most dominate criticism of U.S. capital markets is that the heavily litigious environment imposes significant costs disproportionate to its benefits.”) (internal quotations and citations omitted); Joseph A. Grundfest, *Why Disimply?* 108 HARV. L. REV. 727, 742 (1995) (“[A] survey of 533 securities class actions pending at some point between April 1988 and March 1993 found that [f]ully forty percent of the settlements were for less than \$2.5 million, and concluded that [t]his is less than the defendants cost of taking one of these cases to trial.”) (internal quotations and citations omitted); Roberta S. Karmel, *When Should Investor Reliance Be Presumed in Securities Class Actions?*, 63 BUS. LAW. 25 (2007) (citing Grundfest, *supra* note 2, noting that Professor Grundfest “argues that a substantial percentage of settlements of private matters are merely an effort to avoid litigation costs and that therefore the SEC must act to make meritless claims more difficult to pursue”); but see Michael Tu, *Upping the Ante: Securities Class Actions Are Suddenly Going to Trial*, Orrick Practice Paper, available at <http://www.orrick.com/fileupload/648.pdf> (noting that although a jury awarded a verdict of over \$185 million in the 2002 Central District of California *Real Estate Associates* case (*In re Real Estate Assocs. Ltd. P’ship Litig.*, CV-98-7035 (C.D. Cal. Aug. 29, 2002)), the rising average settlement package and that defendants are able to prevail in litigation could make companies reevaluate their decision to settle a case).

There was also unanimous agreement on the value of early mediations, even when such mediations failed to lead immediately to settlements. The panelists agreed that an early mediation gives participants valuable information about how the other side sees the case, provides an opportunity to develop a partnership with the insurance carrier, and can produce discovery that might be valuable in assessing the matter. Panelists Judge Weinstein, Michael Young, and I have written on the subject of viewing mediations as a process that starts when the case comes in the door and ends only at settlement – resisting the urge to define it as a one day affair.³ The panelists also agreed that an early mediation can provide a valuable opportunity to set the initial expectations of the parties, including those of their own clients.

B. Role of Insurance

The introductory note and the transcript of the panel discussion that follows should make it clear that understanding the role of insurance and insurance carriers in a securities class action mediation is critical to achieving a settlement. The dynamic of insurance and the coverage issues that can come into play could fill volumes.⁴ As the panelists suggest, the dynamic between the insured and the insurer can easily become the focus of the mediation, in particular when plaintiff and defendant are in agreement as to a reasonable “ballpark” settlement amount, but are held up by coverage issues between the insurance carriers and insured. Panelist and plaintiff lawyer Sam Rudman comments that one of the major responsibilities of the mediator is to sort out the insurance issues for the defense side. Working through coverage issues, particularly when there may be multiple “towers” of insurance in play, each with numerous layers, sometimes based on different configurations (primary and excess, or percentage contribution), is not easy.

As the panel transcript makes clear, neither the mediator nor any other party to a mediation can ignore the importance of the relationship between insured and insurer. An exploration of the

³ Judge Daniel Weinstein (Ret.), Michael Young, & Jed D. Melnick, *Commentary, The Role of Damages Issues – Post-Dura – In the Mediation of Class Actions*, in 6 MEALEY’S EMERGING SECURITIES LITIGATION (2007).

⁴ See, e.g., WILLIAM E. KNEPPER & DAN A. BAILEY, *LIABILITY OF CORPORATE OFFICERS AND DIRECTORS* (Matthew Bender & Co. 7th ed.) (2002); ALLAN WINDT, *INSURANCE CLAIMS AND DISPUTES: REPRESENTATION OF INSURANCE COMPANIES AND INSURED* (1995).

status of the relationship between the defendant company, its directors and officers, and their insurer is frequently one of the most important duties of the mediator prior to a scheduled day of mediation. This is particularly true early in litigation when the chances are greater that insured and insurer have not yet developed an efficient working relationship.

While a defendant company may have reasons for leaving its carriers out of early negotiations and the preparation for an early mediation, the mediator will inevitably spend a great deal of time recovering from this choice. One of the process questions for a mediator is when to confront this question and how deeply to get involved. We have seen settlements delayed when a defendant company failed to involve its carrier or carriers until the last minute. Whether in the end the defendant companies do better with their carriers and the plaintiffs with this tactic is an open question subject to debate on both sides.

Carriers will generally make themselves available, even with late notice, to participate in a mediation. It is also true that it is difficult to push a carrier to rush to make decisions about whether they will contribute to a settlement. Confronting the question of coordination with a defendant on a pre-mediation status call and intervening when appropriate can sometimes make the difference between a productive and unproductive day of mediation.

While a constructive and productive relationship between insurer and insured may enable an easier day of mediation, it is also true that a great deal of strategy often goes into development of that relationship and its portrayal to the plaintiffs. For example, a defendant company will sometimes tell us that it has intentionally delayed bringing the carrier into the process because the company was concerned that the carrier would use the advance warning to develop coverage defenses. Implicit in this strategy is the belief that in the right case a carrier may move quickly to close an attractive deal, but given enough time might otherwise develop coverage defenses that change the levels at which they were willing to contribute. It is also sometimes the case that the insured and insurer may publicly air their internal disputes, or allow the mediator to share them with the plaintiffs in an effort to manage plaintiffs' expectations. This is not to say that the insured and insurer conflicts are fabricated, rather that they are used strategically to decrease the expectations of plaintiffs who might otherwise believe that the insurance money was readily available. The challenge for the mediator is to balance a healthy respect for the strategy of the parties

with a careful probing of that strategy to see whether some efforts to facilitate the relationship between insured and insurer might lead to a better ultimate outcome for all involved.

In the end, and all the panelists agreed on this point, a defendant company should carefully explore creating a partnership with its insurance carrier. Timely partnerships allow for aggressive defense efforts to settle cases. Successful mediations often result from parties risk analyzing cases in similar ways at given moments or “windows” in time. These windows might be the result of impending rulings from the court, expensive impending discovery, or oral arguments scheduled in the coming weeks. Danger (for everyone involved) comes when a company and carrier are not prepared to move aggressively and miss an opportunity. By the time a new window opens the dynamics in play might present a very different picture for the parties.

C. Role of the Mediator and Process

This introductory note and the accompanying transcript are not a “how to” manual on how to mediate one’s first securities class action. However, numerous practice and process tips came out of the discussion and collective experience of the group. For example, Michael Young sparked an interesting dialogue on how to handle parties when pre-mediation positions make the parties appear hopelessly far apart. In the lead up to the mediation, when one party tells you that its bottom line is “A” and opposing counsel claims its is “Z,” the challenge for the mediator is to balance a frustrating day that could do damage to the process against the possibility of a constructive day and the possibility of settlement. Panelist Mary Jo Berry suggested that regardless of what the parties claim their “positions” are, if they seek mediation, the last thing a mediator should do is call off the mediation. Implicit in this comment is the mediation principle of party self determination as well as the reality that parties will posture, and that often it is only after they have started the mediation and see some progress or have developed trust in the mediator that the posturing starts to melt away.

Whether a party is posturing and thinking about an entirely different settlement or truly believes in his position (though it may change during the course of the process), a mediator needs to tread carefully. The first thing a mediator should do is assiduously avoid

soliciting a “bottom line” or “line in the sand” before the mediation.

Second, the mediator must decide what to do when a party wishes to set conditions or ultimatums for the other party as a condition for participation in the mediation. For instance, one party might demand that the other party agree to a minimum offer, or agree to a certain range for a possible settlement. While there is no easy solution, sometimes the process of working through why these conditions are important to the party can identify issues for the mediator to address. For example, one side may not want their clients to fly in from Europe if it appears that the parties are very far apart, even though they may be more than willing to participate in good faith and see whether progress can be made at a first session without clients. It is the job of the mediator to seek to identify the issues beneath the position of the parties and work to design a process that deals with those issues rather than the postured positions of the parties. It is the job of the mediator to fight through the posturing and find a constructive way to confront the inevitable differences in expectations prior to the mediation.

Another point that a number of the panelists made is that when the parties trust the mediator, they are more likely to break through the “orthodoxy” of negotiation and posturing and candidly share their thoughts about what needs to happen to settle the case. A party must trust that the mediator will not use information about its true position ineptly, which could prejudice its settlement posture.

No discussion of mediation at Cardozo would be complete without broaching the subject of evaluative versus facilitative mediation. Cardozo’s Professor Lela Love has been at the forefront of the scholarly exploration of this subject.⁵ Alan Salpeter com-

⁵ See Lela P. Love & John W. Cooley, *The Intersection of Evaluation by Mediators and Informed Consent: Warning the Unwary*, 21 OHIO ST. J. ON DISP. RESOL. 45 (2005) (discussing the ethical boundaries of mediator opinion-giving and advocating informed consent in mediator evaluation); Lela P. Love & Josh B. Stulberg, *Partnerships and Facilitation Mediators Develop New Skills for Complex Cases*, 9 NO. 3 DISP. RESOL. MAG. 14 (2003) (discussing facilitative skills for practicing mediators); Lela P. Love & James B. Boskey, Debate, *Should Mediators Evaluate?*, 1 CARDOZO ONLINE J. CONF. RESOL. 1 (1997) (debate between Professor Love and Professor Boskey discussing the strengths and weakness of evaluative and facilitative mediation); Lela P. Love, *The Top Ten Reasons Why Mediators Should Not Evaluate*, 24 FLA. ST. U. L. REV. 937 (1997) (discussing how the roles of evaluative mediation are at odds with the roles of facilitative mediation); Kimberlee K. Kovach & Lela P. Love, “Evaluative” Mediation is an Oxymoron, 14 ALT. TO HIGH COST LITIG. 31, 31 (1996) (illustrating some of the pitfalls of evaluative mediation); but see Jeffrey W. Stempel, Symposium, *Beyond Formalism and False Dichotomies: The Need for Institutionalizing a Flexible Concept of the Mediator’s Role*, 24 FLA. ST. U. L. REV. 949,

mented that he relies on the mediator as being more than a purveyor of numbers (something he defines as facilitative mediation) between the parties, and counts on the mediator to help assess the strengths and weakness of the case and appropriate bargaining posture. Michael Goodstein also commented that in every case he has had with Judge Weinstein as a mediator, he has counted on the judge to advise his side on bargaining posture during the mediation. Interestingly enough, what the most successful commercial mediators will tell you is that they recognize all of the dangers Professor Love and others suggest are associated with evaluative mediation, and will tread extremely carefully when and if they act in an evaluative role in a case. Commercial mediators must often carefully balance the fact that in many cases they have been hired to give their opinion, and that the parties on both sides are relying on this to break through impasse, with the age old dilemma that if a party does not like what the mediator has to say, it is likely that the party's trust in the mediator will be lost. This is, of course, an oversimplification of the tension between evaluative and facilitative mediation, and one must consider how that tension might be analyzed in the context of large commercial cases with sophisticated counsel who have chosen a mediator in part because of his or her evaluative judgment, as distinguished from mediation in a community mediation center with unrepresented parties who did not choose their mediator.

The exercise of an evaluative role in mediation can take many different forms. For example, there is a distinction between evaluation in the context of negotiation coaching and evaluation in the context of the underlying merits. The "evaluative" role that Mr. Goodstein refers to is in the context of negotiation coaching and what "moves" a party might make to achieve the best deal, while the "evaluative" role that Mr. Salpeter refers to goes to the underlying merits and what that party's expectations about the "best deal" should be.

One other example of the use of evaluation in a mediation is the "mediator's proposal." In short, at some point the mediator

951 (1997) (noting "the view that mediators act as either facilitators or evaluators represents a triumph of excessively formalist thinking at a time when effective dispute resolution law and policy require a functional approach."); John Bickerman, *Evaluative Mediator Responds*, 14 ALT. TO HIGH COST LITIG. 70 (1996) (rejecting Love's approach and pointing out the benefits of evaluative mediation); Mercédeh Azeredo da Silveira, *Impartiality v. Substantive Neutrality: Is the Mediator Authorized To Provide Legal Advice?*, 62 DISP. RESOL. J. 26 (2007) (suggesting that an evaluative approach is useful as a "last step" before litigation, so that parties can understand how their case is affected by the law).

may decide that rather than continuing negotiations, he or she will make a proposal of what should happen to settle the case. The parties respond independently and confidentially to the mediator whether they agree to or reject the proposal. If either says no, there is no settlement and the rejecting side does not learn what the other side has said. This tool offers the parties a way to perhaps move further than they had planned to move and to “blame it on the judge” but to do so in a safe way, because the other side will never know whether they agreed unless there is a deal. The panelists all agreed that the mediator usually gets one opportunity to make a mediator’s proposal. In other words, if the proposal fails, it is likely that one side or the other (or both) will be disappointed with the mediator’s view of what a settlement should look like and lose confidence in the mediator’s neutrality (or worse yet believe that the mediator is no longer on their “side.”)

There are two common situations in which a mediator may choose to make a proposal. The first is when both parties suggest in private session that they would go to “X” but are not willing to move to that spot as an official negotiation position. The second is when the parties are close to the same number but limited by a lack of authority. The proposal in this situation gives the parties a way out as well as the opportunity to go back to their decision makers, principals, or boards of directors with a proposal that is the product of the mediator’s analysis of the matter. A mediator can present a proposal based on an analysis of the merits of the case or simply claim that it is the most likely number that will serve to settle the case. How the mediator presents the proposal may have an impact on whether the mediator can survive a failed proposal. It is probably more difficult for a mediator to survive a failed mediator’s proposal that was presented as representative of the mediator’s own analysis of the merits and value of the case.

One of the other important process points addressed by the panel was the use of the common session at the start of the mediation. Judge Weinstein lamented that too often the parties waste the opportunity to talk directly to the other side at the start of the mediation – something that would never happen with an opening or closing statement at a trial. The common session may well be the first and last opportunity for each side to talk directly to the insurance carriers, risk managers, and principals on the other side, and to give them an unfiltered explanation as to the risks of the case. Lawyers frequently tell us how disappointed they are that the other side failed to maximize the opening session. This disappointment

highlights the eternal tension for counsel trying to balance maintaining “warrior” credibility with their clients while also pushing them to settle the case if a “reasonable” opportunity presents itself. If counsel wastes the opportunity, and fails to make their best case, opposing counsel might fear pushing their own clients to settle in the face of a weak presentation.

D. Breaking the Orthodoxy of Negotiations

One of the highlights of the panel was the discussion of negotiation strategy. In cases that are largely about “filthy lucre,” with few opportunities for “expanding the pie” parties tend to fall quickly into the traditional trap of making high demands and low offers and taking “baby steps” toward some point between the two. Panelist Greg Markel made clear that he counts on the mediator’s skills, particularly when dealing with sophisticated parties with ingrained ideas about the negotiation “dance,” to cut through the “dance” and move the parties forward, or, as Judge Weinstein suggests, to “Lambada.”

The panelists engaged in an entertaining debate about whether a plaintiff’s traditional opening offer is generally double or triple its true position in the case. Max Berger joked that now that the defense side had caught on, he might start using a higher multiplier. Judge Weinstein often refers, with tongue in cheek, to a speech he likes to give to new mediators entitled “Opening Demands and Offers: How They Ruin My Day.” It is frequently the challenge of the mediator to help parties feel comfortable with alternatives to the typical negotiation process.

While mediators work to find alternatives to negotiation orthodoxy they should be respectful of what motivates the strategic movement of parties in a negotiation. There are many reasons parties may choose to negotiate with careful moves in small increments, such as how settlement numbers contrive to appear at different places on a tower of insurance,⁶ the personalities of the people controlling the “check book,” and the failure of the other party to move in a productive way.

Getting people to break the orthodoxy of negotiations, as articulated above, is no different than the problem solving or impasse

⁶ For example, a middle layer in a tower of insurance may not be prepared to agree to a negotiation move that eats their entire layer. See Jeffrey R. Seul, *Settling Significant Cases*, 79 WASH. L. REV. 881, 908 (2004) (describing possible barriers to settlement).

breaking that mediators have to confront in any mediation. In a securities class action mediation the impasse or problem takes the form of the parties' reluctance to move and signal interest in different settlement numbers than they are posturing. Professor Love asked the panelists whether a role exists for creative problem solving or integrative bargaining. The reality is that the average settlement is a straight cash settlement paid by the named defendant company and directors and officers, funded by insurance and distributed by class counsel to shareholders who have suffered loss. That said, we have seen every variation of settlement, including contributions from the company and individuals, insurance carriers dropping down, the use of warrants or options, and cooperation agreements with the plaintiffs to assist in the prosecution of lawsuits against other defendants. While the negotiations may simply be about dollars, the reality is that these multi-party disputes frequently require "expanding the pie" and a tremendous amount of creativity to achieve. Companies, their insurance carriers, and named individuals frequently must collaborate to achieve settlements.

The panelists discussed three mediator tools and strategies that they have seen used effectively to break impasse in mediations. The first was the concept of getting to a number that "puts the hook in." This refers to the point at which a plaintiff begins to sense that a settlement at a satisfactory number is at hand and is therefore motivated to continue to negotiate (although the concept can apply to both the plaintiff and defense side). Defendants are constantly searching for the lowest number they can find that "puts the hook in" and motivates aggressive movement from the plaintiff.

The second concept was the use of brackets.⁷ We often use brackets to try to cut to the chase in a difficult negotiation. Parties may use brackets hypothetically while still positioned comfortably at "official" numbers. For example, the parties might officially be at 1 and 100, but the defense may suggest that, hypothetically, it would move to thirty if the plaintiff came down to fifty. Parties do not have to accept a bracket, and the plaintiff may respond with his

⁷ For a brief discussion of the practice of brackets, sometimes called conditional offers, see *Mediation Strategies from the Mediator's Point of View*, 1 ASS'N TRIAL LAW. AM. 577 (2005). Under the subsection "Conditional Offers," the author describes how bracketing can help jump start negotiations by helping opposing each party identify settlement numbers that might be acceptable to the other. *See id.*

own hypothetical bracket, suggesting, for example, that he would move to seventy if the defense came up to fifty.

Valuable information is conveyed by the use of brackets. For example, in the hypothetical above, the defendants have learned that the plaintiffs are willing to settle the case for less than seventy, but want more than fifty. Conversely, the plaintiffs now know that the defendants would pay at least thirty, but do not want to pay more than fifty. By strategically trading additional brackets the parties learn additional information about the other side. In the process, the mediator learns valuable information from the parties as he or she discusses alternative brackets with the parties. This information helps guide the mediator's role as a "negotiation coach" in each room. We have gone entire days with parties stationed at the same "official" positions, while making substantial progress entirely through hypothetical traded brackets that eventually led to settlement.

The third concept is that when parties get close to an agreement, they do different things to close a deal than they would, or suggest they would, when they are further apart. Every step that a party takes brings the parties a little bit closer, and therefore has the potential to increase this dynamic. When all else fails, sometimes all the mediator can do is slowly drag the parties closer together and hope that in the process the "hook goes in" and a settlement appears.

E. Conclusion

This introduction to the transcript of the panel discussion that follows was intended to highlight and explore several of the main themes that were discussed during the Panel, including the timing of mediation, the role of insurance, process related issues, negotiation techniques, and the role of the mediator. Cardozo, the Cardozo Journal of Conflict Resolution and Professor Love were gracious hosts, and we look forward to the opportunity to offer such discussions at Cardozo every year.

II. PANEL DISCUSSION

Judge Daniel Weinstein: The purpose of this discussion is bring together the top people representing some of the top folks in dif-

ferent parts of this industry to have an informal discussion on the trends and developments in the area of securities litigation, to provide practice tips that may be useful to others, and to try to suggest some innovative things in our practice that people could pick up on. If the securities class action suit folks who have come today can pick up one or two things that are valuable in your practice or in the cases that you bring, then we will have been successful.

Question 1

Max Berger, I will to start with you – just start with the idea of looking at a broader view, so looking at the landscape out there in securities cases, what do you see happening trend-wise in the world that we are operating?

Mr. Max Berger: Trends – certainly cases and settlements are much larger. The past five years have seen ever increasing settlements. All of the billion dollar settlements have taken place. I suppose it started with the Cendant case in 1998. That remained the only multi-billion dollar settlement for at least a few years. But now, the past several years have seen unthinkably large settlements in the world in which we live. So clearly the stakes were higher. The recent Supreme Court decisions in *Dura*⁸ and *Tellabs*⁹ have changed the landscape somewhat. I realize that many of you are not experts in securities litigation, but proving loss causation, as well as meeting the burden of intent to deceive, is higher for plaintiffs, so the stakes are higher in litigation. To the extent cases have to go to trial, it would be more difficult for plaintiffs to prove their case and to establish their own measure of damages. The large settlements are to a great extent the product of the excesses of the late '90s – the high stock prices that we saw plummeting.

So they're coming to an end, but there's a new generation of cases involving options backdating that is going to fuel a lot more litigation. However, I think we've seen a decline in the number of cases that have been filed in recent years and that trend is, in my view, likely to level off or actually increase. We've seen significantly higher settlement values in our cases. If you average in the mega

⁸ *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336 (2005).

⁹ *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 127 S. Ct. 2499 (2007).

cases, that's likely to go down. Although the stock market's trading pretty high, I think those settlements are going to be getting somewhat smaller over time. The cases are more heavily litigated. So, the stakes are higher and I would say that probably most of the cases that we have handled over the course of the past several years have been mediated. So that's clearly a real difference. They've been mediated by a handful of very experienced securities mediators – Judge Weinstein is certainly at the top of the list.

Mr. Alan Salpeter: Clearly, the number of traditional 10b-5 class actions is way down. There is data out there that I am sure some of the people in this room are familiar with. NERA (National Economic Research Associates), puts out data every year about the number of filings the settlement values. Joe Grunfest does the same thing at Stanford. So there's certainly data out there to clearly show the number of cases or traditional 10b-5 class actions is down. Certainly the number of lawsuits against the major accounting firms is down significantly. I guess one question is, why? My explanation of that would be the interim effect of the criminal and civil side of Enron Cendant. The big settlements, perhaps Milberg's problems, I think may have contributed to fewer filings. Plus there are the scare factors of white collar defendants going to jail and some of these mega settlements that Max mentioned, which I think has sobered up a lot of people. The volatile stock market now will bring about another kind of case – the numbers back dating. I don't see this as the same type of case like the traditional Cendant case or Enron shareholder case. I see those as very different; those are smaller to what I would call "onesy," "twosy" type cases against individual defendants. So I think the number of filings is clearly down. There are different types of cases out there now, including a lot of consumer class actions, but they still have to be mediated or resolved some day. That's sort of my take on the lay of the land.

Judge Weinstein: You want to jump in Michael, take a shot from the insurance world?

Mr. Michael Goodstein: I think what we're seeing is the end of the big cases, the Enrons, the WorldComs. Those cases have now run their course and we are cycling back to a time when we're dealing with the more garden variety securities cases that are more prone to mediation. But these are not billion dollar claims, and which we don't really see much more of on the horizon. I agree that the back

dating stock option claims aren't going to be the new panacea for the plaintiff's bar. These claims are coming in the form of derivative actions with limited value.

Mr. Gregory Markel: I agree with a lot with what has been said, but not everything. I think that a lot of what we are seeing today has more to do with the fact that it is more difficult to plead a securities class action certainly after 1995 when PSLRA started to take effect. When it started to take effect, we were in the middle of a boom. There were a lot of abuses. In the securities class action field, I think, the rate of dismissals has doubled. It's much more difficult for plaintiffs today between the pleading standards in the PSLRA and the *Dura* case. I personally don't think *Tellabs* makes much difference except in Seventh Circuit where I think they just made a mistake in the way they approach it. Otherwise in most places, I think *Tellabs* is the language of the statute. In other places, there are problems coming are in the class certification decisions. So there are some tough decisions in both the Second and Fifth Circuits with respect to getting classes certified – a process that used to be automatic. Although I think it's much tougher to get a case certified, I do think the current level class actions, if you take out some unusual situations, there are 200 cases a year filed for years up until about 2005. They're now running about 130 a year. So you've had a one-third decline in the number of class actions filed per year. I think that's probably around an equilibrium level now given the law that applies. I agree with Alan – I think there's an interim effect; as management has gotten concerned because some executives are going to jail and the very large judgments. Moreover, Sarbanes-Oxley, I think, has had an effect. Now a company's top management has to sign certifications on a regular basis. I think that has an effect of them making sure that when their name is going on the line more often the numbers are going to be right. There is less playing with the gray area, shall we say, in corporations. I do think that the new round of cases – the back dating matters – is nothing like the old round of cases. As Michael said, I do think that we've probably seen the end of an era where there were lots of billion dollar cases. Can we have a giant fraud case next year? Sure, there could be and it could be a billion dollar settlement. But I don't think you'll see a series of them like we had, like Enron, Adelphia, et cetera.

Mr. Sam Rudman: Since the passage of the PSLRA up until about '96, it's very rare you would have Fortune 100 companies in one of

these cases. I can remember Cendant—lawyers with me couldn't believe a top-tier company like that would be involved. Then it happened in waste management and other companies, and by '99 and 2000, cases that were generally in the high tech area, high-flying companies, it's now spread all the way up the chain to the fortunate ten. The answer is most of those companies have been sued or are not ever going to be sued. But the recent slowdown in filings is a direct result – in my personal view – in the decrease in market volatility. Recently, in the last three or four months, you've seen a dramatic increase pointing to an upsurge in filings. As someone who's done a lot of settlements, I can tell you that the biggest difference for me lately is the volatility. Cases where companies happen to be trading at \$20 get bad news, it goes from \$20 to \$18 is one case that might have happened six months ago. \$20 to \$18 – that case isn't big enough for Max or me to do it, even if we think it's a great case. Then that stock goes from \$20 to \$10 today, and now a case gets filed. I think a big challenge that dramatically changes these cases is the volatility and what's at stake. If it's a big damages case, Max or I will put resources into it. Our clients are going to want to do the case. If not, we'll work on the cases that we can. It's not about more or less fraud in the market. These cases are approached by the plaintiffs, a lot of time by the clients using a cost basis analysis. If the case is right, the case is going to get brought. If not, it's not going to get brought. In terms of the pleading standards, when I first started working on these cases, someone once said to me the particulars required in the case depends on the judge. It doesn't matter what the law is, depending on who the judge is. We're in the Fourth Circuit now in a case in front of a judge who has thrown every case in front of him and he's now got an opinion upholding the complaint, even though he has at his disposal twenty cases to dismiss the case. The reason is because if the judge believes there's fraud committed, the complaint is going to stand – except in the Northern District of California.

Mr. Markel: I wanted to comment on one thing you said. It bothers me a little bit. It sounded to me like you're focusing on the amount of damage and the potential gain in the lawsuit as opposed to the conduct. That is troubling to me. It doesn't sound to me that's an efficient way to regulate a market or an economy if what you're doing is not focusing on whether the conduct is bad, but whether there's potential gain.

Mr. Rudman: One of the first questions a client asks is how much did I lose, what are the market losses, is it something worth pursuing. If they haven't lost a lot of money, people might say it's rather inefficient.

Mr. Markel: Yes, but the way you phrased it was not about our clients, you said Max or I won't waste our time on this case.

Mr. Rudman: That's right, in the end. All our contingent cases where the lawyer's interests are lined up with those of clients, the case has to make sense for the client and for the law firm asked to represent the client.

Mr. Markel: But it may not make sense for the economy.

Mr. Rudman: Well, that's different.

Judge Weinstein: Okay, this has the potential to get contentious. Mary Jo Barry, do you have anything that you want to add to this discussion from your vantage point?

Ms. Mary Jo Barry: Without repeating anything, I think Sarbanes-Oxley has had a huge effect, but I'm not sure if it's long term. People's memories fade and they forget about pre-Sarbanes and they forget about the settlement to Enron and WorldCom. I am not sure how much effect that's going to have, whether or not the same thoughts are going to go on down the line. As far as volatility, it's not just overall market volatility. It's also industry volatility. There are years where there are more oil and gas cases. Then years with more bank cases. We had telecom cases. Maybe now it is subprime mortgage that evolves from consumer class action or class action for stocks. So it's the volatility in the overall market. But it's also a particular segment of the industry that gets hit with different reasons economically, which ends up resulting in cases being filed.

Question 2

Judge Weinstein: This was a helpful overview, and we didn't even get into the back dating options cases. We could do a whole panel discussion on just those if we wanted to. The purpose of this was to go through a little bit of what these mediations involve and to talk about some of the decisions that these folks make in bringing them

and in conducting them. An immense amount of commerce is moved in conference rooms during the mediation of securities class actions; it is helpful to have the overview to start to figure out what is going on. My first question related to mediation is, when is a case ready for mediation? When are you telling your clients that a case is ready for mediation and what do you do to get it started? What are your tips for getting it started? When in the securities field is a case ready?

Mr. Salpeter: I don't think you can have a one-size-fits-all answer to the question of when. I think the answer is, it's when you know enough about your case, you and your client know enough about your case, and you and your client know enough about the other side's case. So I think the answer to that is, at least from my point of view, it sort of depends. I don't think you can make a statement. You may know a lot early on because you've done a lot of investigation as you thought a complaint was coming or your client's done a lot of investigation by talking to key witnesses. So by the time the complaint's filed, you know a lot. The other extreme is you may not know very much at all when the complaint hits and you need to do investigation. I hear a plaintiff's lawyer say a lot of times that they don't want to talk until they have documents and they've taken a number of depositions. I never totally accept that. I think it depends on the case. There are certain cases that you can evaluate early on and have a meaningful discussion. I also think one of the most over-cerebrated questions is, who goes first? I've never believed that raising the idea of settlement resolution or mediation really suggests weakness. I think a lot of companies get hung up on the question of who goes first, not just *when*, but *who* goes first. I think you can always raise a subject in a way that doesn't express weakness.

Judge Weinstein: I'm interested in hearing from the carriers on their point of view. Typically, it is the carrier who is paying defense costs and is looked to for the settlement payment, and it is an interesting dilemma in these cases. There are enormous costs. All of the discovery stages are different than in other kinds of litigation. Once the discovery is ordered, it's millions of dollars. There's a complicated economic analysis early in these cases because the cases can't really be settled with the carriers deciding that the case is ripe. So I'd like to hear from the carriers a little bit as to when they think it's ready. We got a few business executives or general counsel who are here, who have to confront the question of

whether a securities case lends itself to early settlement as well as the question of what do we mean by early settlement in the securities world? It's an important decision. Michael, what do you think?

Mr. Goodstein: I think what is interesting is the absence in Alan's answer of any discussion about who was going to pay for this settlement.

Mr. Salpeter: Well, I assumed.

Mr. Goodstein: That's the problem, there's always an assumption that the carrier will pay. But, if we are talking about a typical 10b-5 case where there's no coverage issues and we're trying to negotiate the most reasonable settlement we can, the carrier must be involved at the start. The word "reasonable" is the key word. Securities lawsuits are not one size fits all, but when are all of the parties to the mediation ready to be reasonable? As carrier's counsel, to a large extent, I have to rely on what defense counsel is telling me about what his clients want to do and their evaluation of what the case is and his perception of where the plaintiffs are monetarily. The carrier needs to know early on if the expectations are off the chart on both sides – if the defense thinks "I've got a clear winner" and plaintiffs think they've got a clear winner – there's no point in mediating at all. The question is whether to mediate early and pre-motion dismiss. If we get some documents, do we have a damage analysis? Sure. All of those things are important to quantify the reasonableness of what a settlement should be. But until the parties are ready to be reasonable, there's no point in the mediation.

Judge Weinstein: Do you sometimes initiate it yourself, Michael?

Mr. Goodstein: I will initiate it through defense counsel. I will ask his opinion of what he or she thinks about mediating at a particular time. I won't run around defense counsel and talk to plaintiffs directly.

Judge Weinstein: Max?

Mr. Berger: For whatever reason, it's interesting. I don't think you lose anything by initiating the subject of mediation, but we rarely do. It's generally raised by either the judge or defense counsel, or the insurance carriers in a very large case. Yesterday I got a phone

call directly from the insurance carrier and it was odd, as very often it would be indirect rather than direct. I never have a problem entering into mediation as long as I feel comfortable enough to do that with the facts, my damages, and our position in the case. For example, let's say we know we have a case with a minimum of hundreds of millions, if not billions of dollars in damages, but we have a small company whose stock was trading very high. The company's solvent, but really doesn't have ability to pay issues. That's clearly a case that should be mediated sooner rather than later because you can assume liability in the case or even reasonable liability counts. If it would wipe the company off the face of the earth, nobody's interested in doing that. So we need to focus our attention not on liability, but the company's ability to pay and whether they're being forthcoming on their financial wherewithal and different instruments that could be used as part of the settlement other than cash. So then after mediation, your financial advisors take a much more prominent role; but mediation is clearly the way to go in that kind of situation. Often there are restatements and admitted fraud where old management's thrown out. The company is really on the hook. The company is solvent. It gets to a question of damages and doesn't depend a whole lot on what discovery in the case is. So now we focus on damages and exchanging damage analysis and reports and having to fight over what constitutes damages. You can mediate a case like that as soon as you have a damage analysis done. That's fairly early and easy. Then, of course, you get these cases where defendants want to mediate a pending motion to dismiss, or you have a vast disagreement as to where the truth is. My attitude is always this: If you want to mediate before we have an opportunity to get documents and discovery in the case – discovery, for those of you who don't know, in a securities case, discovery is stayed until defense is sustained by the court. You can't get any discovery. With third party discovery, you can send your investigators out there working and interviewing witnesses, but you can't get any formal discoveries until the case is sustained. But very often, witnesses will approach us to mediate the case when motion to dismiss is pending or before it's made where a complaint has been sustained, but yet it's at the early stages of discovery in the case, and I'll say listen, I'm happy to do it, but you got to assume that we're right on the facts. That's the only thing we can do if we're going into this mediation because we can rely upon – it's like the fox guarding the chicken coop. We can't accept what you're telling us – the documents, evidence and presentations you're going to make – as being the entire issue with-

out being subject to any kind of cross-examination. So, that's the most difficult kind of case to mediate early on; we have a solvent company, large damages, and lots of insurance and disputed facts. So often, that case will have to wait until well into the factual discovery, or sometimes even to summary judgment.

Question 3

Judge Weinstein: Michael?

Mr. Michael Young: I just want to ask counsel at the table, I've had a number of experiences where the case comes to the mediator and it becomes clear early on, that the case was not right for mediation. The question would be whether anybody at the table views as part of the mediator's role prior to the session to try to figure that out or whether we should just be there and play it as it comes. And if the case isn't right, that's fine, and maybe there was miscommunication or a disconnect, or maybe just an effort to take a try.

Mr. Markel: I think the answer to that question is, if you're talking about one day of mediation, you often learn something even if it doesn't work early in the case. In private mediation with a judge, it's different. In private mediation, both parties agreed to go there. There's a reason why somebody wanted to go there. Parties are probably going to learn something about the other side's position and where the case is going to go. So even if a one-day mediation early on fails and even your rates which are well deserved but not inexpensive, but well deserved, you're the best – but in any case, I do think you can learn something and so my view is it often is useful to do an early mediation session. It depends, of course, on the case. One thing each of the panelists says, which is right, one size does not fit all. One of the early things you got to do is learn your case, figure out whether you got a good motion to dismiss. There's nothing you can do that's useful at all in trying to settle the case, in my view, until there's an amended complaint. You don't know what you're dealing with given the structure in the time of a securities class action. You're probably going to be six months into the case before you really know what the case is, then a damage analysis and factual investigation. So you're well into the case before you know the beginning parameters, but at that point, you evaluate whether you got a good motion to dismiss, where you think the

case is likely to go. You talk to your insurance company because the insurance company has got to be a partner with your defense lawyer. You work with them well and keep them informed. In my experience, most insurance companies, including their counsel and the people on this panel who represent insurance companies, if you work with them, they'll work with you. You try to come up with the best solution. If you do not work with them, you'll find yourself having a problem down the road. You try to come up with a strategy. Does it make sense to do an early mediation, based on your preliminary investigation and whether you got a good motion to dismiss? Often it will be useful relatively early to call the judge and have a session to find out what the other side's perception of their case is – find out what Max is thinking. The best way to find out what Max is thinking is to have somebody like Judge Weinstein help you in the process.

Judge Weinstein: Sam, do you agree with Greg's general early mediation even if it's not successful, definitely worth spending the day?

Mr. Rudman: I do. I agree with what Max said, which is the worst part of early mediation from plaintiff's standpoint, defendants like to get in that position and tell you the case is no good, you're wrong about everything. You have to sit there and say listen, just got past the motion, haven't even heard a motion yet, don't have any documents or witnesses to rebut what you're telling me – why did you come to mediation to tell me I don't have a case. Do you want to resolve the case or tell me I don't have a case or make it less than it's worth. But I think it's good because in any negotiation, part of the negotiation is setting expectations and trying to manage the other party's expectations. If you have certain parameters where you think the case is settled where you think it's worth and the client thinks it's worth. And the earlier you get the other side to understand that you can evaluate their thinking, resetting their expectations as to what the case is going to be worth. Many times in a mediation, even an early one, you'll hear I think my case is worth a \$100 million and the other side is saying I think it's a \$10 million case. It's going to take months to get that in and say this is not a \$10 million case, it's going to have to be higher than that up the chain. Often an early mediation session is a good way to get that going.

Mr. Salpeter: One other benefit of early mediation even if it fails, is you get the read of the mediator. You may get it privately or in a joint session, but you get a chance to read the mediator and that can be helpful in terms of managing expectations and talking to the insurance company. I agree the insurance company is the partner in this venture. I assumed that in my earlier comment, of course, we're partners in keeping insurance companies informed and managing their expectations is important. But even a failed early mediation is not necessarily a failure.

Judge Weinstein: We are firm believers in the value of an early mediation, even when that mediation does not lead to a settlement. One of those benefits is the opportunity to manage your client's expectations at an early time in the case. It's an early peek for the lawyer and a great opportunity for the client to hear a little bit of what they will be up against. It's obviously also an early opportunity to speak directly to the other side, the decision makers on the other side. We applaud folks who want to take on an early mediation, especially when one considers the enormous costs of going forward. The fact is, that while the record may not be complete, business people make hard decisions on less than perfect information all the time. I know that those of us in the law want all the facts before we are ready to make a decision, but it's when lawyers and their clients put on business hats that we get these cases done. I think of the insurance industry as a business have reasons to get things done earlier, to take a gamble to put the tourniquet on the case and to do it with less than perfect information. In order to do that – to get the peek – you have to take the chance. Sometimes it's the company pushing, it might be the carriers who have a tower of insurance that is likely to get eroded by the litigation, and of course it might be the plaintiffs who might want to settle early to avoid adverse rulings, bad discovery or forcing defense counsel to eat in fees what could otherwise be used to settle. Our only grievance is that the preparation for the early mediations is very low. Sometimes lawyers just come in and leave it up to the mediator. Or, we'll sometimes get a damage analysis on a billion dollars worth of damages and Cornerstone saying the defendant is owed money. It's in those situations that the carriers will look over at us and ask, "What's going on here, judge, and where do we get some solid economic facts?" So sometimes the greatest challenge is the lack of preparation – often by great lawyers who might prepare for weeks for an important deposition, but put little thought into preparing for the mediation in a meaningful way. If the lawyers sit

down and ask, "What is the basic information we need to evaluate our case and what kind of damage analysis could be prepared for mediation purposes only that might advance the ball," and plan a strategy around those questions, we can have often a meaningful settlement discussion in an early stage. I know it's not perfect, and I know it's going to take some gambling on both sides, but a lot of cases can get settled that way. Does anybody else want to comment?

Ms. Barry: One thing Michael brought up – I did have one situation come up where the plaintiff was willing to mediate and our mediator called up and said "I think you're too far apart," and didn't go forward. I never used that mediator again. But it was really a shame, the case ultimately settled about eight months later after much spending by both sides. It was the mediator, who I think, was believing both sides and not seeing all the body language that was at work. I won't go there, but I'll show up if you pay me. I always look for a mediator's recommendation and what he thinks of the case and where it has weakness and where it might settle. I would be concerned if the mediator made that determination before having the parties in the room.

Mr. Young: That's valid. The way I do it, and most of my colleagues do it, we talk to the parties beforehand and try to get a sense of the dynamics and how the mediation came about and not so much the positions, but where we are in the litigation and what information we need to exchange. The presumption is we always go forward and never take the representations about position as authoritative. But when you do have difficult situations in the beginning, I just wondered whether it's a perception we should have been more active in helping screen the case.

Ms. Barry: Generally speaking, you're dealing with people on both sides who, if they're both willing to mediate, they know it's a possibility to get somewhere or they know that they may have some movement in their position, otherwise they wouldn't be willing to mediate. I think it's the securities class action people who go to mediation. It may not work, but it has some ability to move from their position and get them to negotiate.

Question 4

Judge Weinstein: I'd like to meet those people. How about our favorite subject, opening offers and opening demands? I would like to hear some comments on the philosophy that you apply to making decisions about how to open, not just in early mediations, but in the mediations at any stage. Maybe we should start with the opening from plaintiff's counsel here. Sam or Max, what are your thoughts about opening demands? Do you just do it by instinct? What kind of strategy goes into it? What are you trying to accomplish to opening demand? And is there some science behind it or is it just voodoo?

Mr. Berger: Well, I don't know how it evolved into this, but whatever your opening demand is, the mediator and the other side is going to cut it by fifty percent. It's really weird, if you demand a hundred, that means you'll take fifty, but you'll probably take a little bit less than fifty, you know, if push comes to shove. So it's a silly process because the demands and the offers get skewed —

Mr. Markel: I thought it was a third.

Mr. Salpeter: I thought you cut it in half twice.

Judge Weinstein: So all we need to do is divide your demand in half and take ten percent more off and we got your number, right, Max?

Mr. Berger: That's what you guys do. That's not what's intended.

Mr. Goodstein: So we carriers are right, you're just making this stuff up?

Mr. Berger: Well, carriers were both described as down the middle carriers. So I assume that's fifty percent. I think really, you take the case I like to approach the demands realistically and I like to approach the whole mediation and our position realistically. So I will take a look at my damages. I will try to look at the damages as if they were not just the plaintiff-style damage analysis, but something I could really sort of be very comfortable with. I'll then take a look and go through an analysis in my own mind as to what the liability discounts are, time delay of payment, the class certification issues. If the motion to dismiss hasn't been decided, I have to factor that in as basically a risk factor, including how large the class is.

I take a look at all of those potential discounts and whether there was a restatement; proportional fault, judgment deduction, who am I negotiating with so and so forth. It sounds complicated, but then, to me, it's a very rational process.

Mr. Markel: And then triple?

Mr. Berger: I come up with a number and then I'll double it because you're going to cut it in half.

Judge Weinstein: Let me translate that. Max, you believe that in order to be effective you need to leave yourself considerable room, is that fair?

Mr. Berger: Yes, but you also need to be credible.

Judge Weinstein: Let's leave it at that much and get some comments. Let's see if Greg wants to jump in because this is really important stuff as to where these guys come up with these numbers.

Mr. Markel: I think this is one of the reasons why a very good mediator is very helpful because really, you have no choice in these negotiations. But if your defendant bid is low and the plaintiff bid high because you are going to be pushed to the middle, you have no choice. It sounds like a silly game, but there is no choice, but what you can do is if you have a good mediator, and a mediator you trust, is give the mediator a realistic view of what you think the case might arrange, where the case might be settleable from your standpoint. You can do that pretty early on in the process, but you have to trust both the skill and the tact of the mediator in order to do that. If you do, then the mediation process can get to more realistic levels on both sides relatively quickly and find out if there is a meeting place. The mediators must trust the lawyer and the lawyer's got to trust the mediator to some degree to make that process. One of the things you do in the settlement discussions is avoid. Sometimes you may avoid making a lot of formal bids. When you make a formal bid and you say I'll pay this much or I want this much, you're locked into that number for a long time, maybe forever. If, on the other hand, you informally can get a message across that this is a range that might work, you may not be locked into those numbers if you do it through a mediator, I think.

Mr. Salpeter: I agree with Greg, if you have what I would call an evaluative type mediator, in my world, there's sort of two types: Those that are hung up, in my opinion, too much on the process, you know, the shuttle diplomacy, the back and forth and those who are evaluative and obviously the kind of mediator that Greg is talking about. An evaluative mediator who you trust to tell you realistically, perhaps and most likely in a separate session, here's the way I see it, I read the written presentations, I heard the arguments, I talked to each of you before we met. Yes it's less than perfect information, but here's my take on it. I think you have real damages on liability and great arguments on damages and you can get this offer to under \$50 million and I think Max's demand of \$200 million is way too high. You get honest feedback from the mediator. It can be done without the back and forth. I like the bracketing technique that the mediators use when they say I see this case as coming in this bracket between twenty and fifty. I'm not saying they take fifty or you take twenty, but I see it based on the damage analysis that I looked at in this bracket. It's a good technique and prevents the baby step approach and a lot of the insurance company lawyers and insurance companies like the baby step approach, they don't like putting \$5 million increments on the table.

Mr. Goodstein: A lot of plaintiff's lawyers, for some reason, don't like the bracket approach. That's been my experience, Max.

Mr. Berger: Depends on what it is.

Judge Weinstein: If the bracket is \$3 to \$4 billion, Max doesn't mind it. I'm really interested in the science, what defense people put into their thinking about their opening offer and how much is dictated by what the plaintiff's demand is.

Mr. Salpeter: I think it's more dictated by insurance company, your own client expectations, what message you want to send in to the plaintiff and where you think it's ultimately going to end up. Because yes, you go in – both sides go in with a range in mind and yes, people change. It's like a game plan for a football game, you have the first set of plays ready, but then you adjust based on what the other side is doing. But I think the first offer from the defense is frequently driven by the insurance company, at least in my experience. This is true of the ones I've been in with you and other JAMS mediators. The insurance company has a heavy say in that

first offer and the message sending is a very important part of that first offer.

Mr. Markel: I agree with that, in general, though, I do think there's one other factor – you're working with the insurance company. They're your partner and they have a lot to say in most cases. They have a lot to say not only about what the opening offer is, but also helping you get enough on the table. So you try to settle it, so you get the hook in and have a negotiation as opposed to having an annoying plaintiff's lawyer. With that, I agree with everything else.

Judge Weinstein: In analyzing that we deal with the worry of the defense about mid-points and giving the wrong signal. These reasons often keep the defendant or insurance company from making what they would in a vacuum consider to be a reasonable opening offer, something that sets the arena in which they're willing to negotiate and in the right cases, as Greg says, puts the hook in. Defendants are scared away from that reasonable opening offer by feeling that they must retaliate against a high demand with a low ball offer because otherwise, they'll mislead the plaintiff. I want to know from Mary Jo and Michael Goodstein, whether you feel your duty is to respond to a demand that you see as very high with a low ball offer or are you dictated by putting out what you think is a decent offer given your settlement authority or where you think the case should come in?

Ms. Barry: I'll answer it a couple of ways. Number one, it's usually the insurance carrier who is involved in that first decision because it's usually the insurance carrier's money, plain and simple. Some cases, it's allocated different, but more likely than not, it's the insurance company's money and it really goes to what Greg said, making sure your insurance carrier has knowledge beforehand and understands what the defense counsel's knowledge is. And it also goes to the mediator. If you have a mediator that you've worked with before, you know where he's going. I think carrier and defense counsel should work together. There's nothing worse than talking to the mediator and putting ranges out there the carrier doesn't know about, it'll totally backfire. So talking to the mediator together and letting them know where you're headed and even asking the mediator's advice, letting them know where I'm headed, taking advice on a good place to start given the demand. In most of the cases that I'm involved in, that is how matters usually start. I want the mediator's objective advice. Then my client and I can

prepare based on what we've learned from the defense counsel's first offer. But it differs from case to case. There are some cases that truly mandate a baby steps. Many times it has to do with the mediator, the dynamics of the personalities in the room, initial demands, the facts in the case, and timing.

Question 5

Judge Weinstein: Let me just ask Mike Young one question first. How much do you argue with the plaintiff when they come into a case and put out what you think is an unreasonably high demand? Do you battle with the plaintiff at that point or do you just convey and figure you'll get back to the plaintiff later?

Mr. Young: Well, I'll start by asking what the rationale is and try to have a conversation about some of the factors that Max described earlier. If I think the number is too high, either because I think it represents a misvaluation of the case based on the relevant factors, or because I know enough about the defense perspective to know it's going to be a nonstarter and perhaps alienate the defense, then I will push back and go through why he or she should be lower. If ultimately after we've had that discussion, the plaintiff's counsel says to me thanks, but this is what I'd like to do and if I feel like I've apprised them of what I think the risk is of doing that, then I'm there to do that. But our role is to definitely push back if we think it's a mistake and my usual push is that it has to have a rationale that's credible. It should be at the high end of reasonableness, but it should be at least within that ultimate range of reasonableness.

Mr. Berger: I'd like to see a situation, you almost never see it, you make a demand, there's obviously a very big difference of opinion as to where the case ought to settle. But let's say, hypothetically, I make a demand of a \$100 million and the defense thinks the demand is outrageous. More often than not, you're met with two types of defendant offers – either we can't respond to that offer or we offer \$5 million or some very low number in response to that because they think the demand is way too high. These instead of coming in, instead of talking to the mediator and saying to the mediator, listen, you know, if we can get them to lower that demand to \$50 million, we'll put \$20 million on the table and if you could support that range, then we're prepared to do that. That could re-

ally sort of get the discussions within a more realistic range instead of blowing the entire mediation because everybody is sort of going to their corners and just being extreme. You don't see that very often.

Judge Weinstein: To just comment on what Max said, we are all, for some reason culturally, and negotiations are very cultural, we're kind of tied to this orthodox dance as being the way it's done. So for those of us who try to find different ways of negotiating, look to people who are a little bit tired of the orthodoxy – who “wanna lambada,” or who look to brackets and narrowing rather than spending the day in the bull rushes it's very difficult because of the ingrained orthodoxy. They're just generally much more comfortable in doing the dance. We give a lot of speeches and eyes glaze over when we ask people to make reasonable demands because we want to get out before midnight. We invite plaintiffs to make reasonable demands and defendants to counter with reasonable offers always agree to think it over and then they always end up stuck high and stuck low at the beginning. It's difficult to get away from the safety in capital that either a low offer or high demand gets you when you have to move again. It's tough stuff to do and we keep trying to approach negotiations in different ways, and sometimes people will embrace a different approach, but its very difficult to break out of that orthodoxy.

Mr. Goodstein: Judge, I agree generally with what everybody said on this topic, but what's implicit in this discussion that we skipped over is a very important part of the negotiating process, and that is the selection of the mediator. You have to have a mediator that all the parties trust and somebody that you can go to in the way we're talking about approaching mediators. If hypothetically somebody named Judge Weinstein is my mediator, there isn't a case that I haven't had with him where I ask, “What do you think is the appropriate response to a particular demand,” or, “What do you need to facilitate a settlement,” or, “What is the appropriate number that would bring plaintiffs back into the realm of the ballpark we want to play in?” I can't stress enough the success and failure of the mediation is determined by who you pick.

Mr. Markel: It's a major character. If all you have is a message carrier, someone who is just going to take the bid back and forth, you might as well not have a mediator. On the other hand, we do have a culture that is used to bidding high, bidding low and one of

the great values of a skilled mediator is figuring out, like Judge Weinstein said, how do you get through that? There are formal ways of doing that without being a message carrier that will allow the mediation process, to get cut through that bidding process even if you start very far apart. You get to a settlement, even in some cases where you think it's not going to happen.

Judge Weinstein: Sam, what's your philosophy behind your opening demands?

Mr. Sam Rudman: We immediately assume the opening offer is going to be cut in half and we want to see it coming into at some discount to the fifty-percent mark. But I think the most important thing for the client is to go through what Max described and have a rationale when the mediator asks, What's the number? You give a number and say this is how I arrived at the number. You're not coming from a position of strength when you say this is my number and that's what I want. You have to have a rationale for the basis of it. I go through the same exercise, not as well as Max, looking at the inflection point of the case, where is my weakness, where are my strengths, where are the dollars going to come from to settle the case. Hopefully we don't care about insurance issues or anything like that with the tower insurance because the money's all green, don't make your problems our problems. In one case, a coverage issue held us up for a year on the Scribner's error on the middle of the tower.

Mr. Young: That's interesting because as mediators, we spend a huge amount of time on those issues.

Mr. Rudman: From the plaintiff's side, that's the most useful part, helping the plaintiff's deal with the insurance carrier, helping defendant's people who sold the insurance to actually cough up the money that the company paid for. That's what we see is a huge benefit to the mediation process. In terms of the opening number ultimately at the end of the day, you want to look at where you want to come out.

Question 6

Judge Weinstein: Let's get some quick comments – is the common session useful or just a waste of time?

Mr. Markel: Depends on who is there. If some client is there, it is probably somewhat useful. There are certain cases where you want the client to hear the other side of the story.

Mr. Salpeter: I agree with that. It's important – you don't get to talk to the other side directly during the course of the case and they don't get to talk to your client. However, it ought to be short and to the point. You say what you want to say and move on; nevertheless it's important.

Mr. Berger: I generally think comment sessions are a waste of time. Having a mediation, any mediation, where the parties don't exchange their briefs is generally a waste of time. Briefs and the mediation statement should be exchanged. You could have private sessions with the mediator, but mediation statements should be exchanged so that the parties know exactly where the other side is coming from. The comment sessions that are well-orchestrated, are useful if for example, the parties are particularly difficult and the mediator feels that it's important for the parties to hear verbally what each side has to say. But it should just be very well orchestrated for that purpose.

Judge Weinstein: I have observed that the common session is often a wasted opportunity for the lawyers. A lawyer would never waste the opportunity to talk to the jury about a case, but we often see lawyers fail to put much thought into how they are going to approach the common session. Lawyers need to consider what their strategy is, what they are trying to accomplish, how to present their client in a persuasive and meaningful way, and most importantly listen to the other side with an open mind.

Mr. Goodstein: It always amazes me in the run of the mill cases, not the billion dollar cases, that plaintiff's lawyers don't take the opportunity to make a presentation and talk directly to the carriers whom they want to pay a lot of money to settle their case. They don't come in with a reasonable presentation explaining why their case is strong; rather we tend to see a lot of chest-beating. Keep in mind that what I'm seeing generally is the pleadings, hopefully the mediation statements, but everything else is coming through the filter of defense counsel. The common session is the opportunity to talk to me directly – ninety-nine percent of the time a waste.

Mr. Rudman: We get that from the mediators a lot. You'll hear from the mediator – I know you don't want to make a presenta-

tion, you don't have anything, it's a waste of time, spend a few minutes now, talk directly to the insurance guy. He's hearing from defense counsel. You don't have a case. It's only worth X amount of dollars. Go in, talk to him, let him know what the case is really about. That's going to help me get this case resolved.

Judge Weinstein: I stand by that statement, especially given the number of times I have seen a really good presentation and the effect it has on the principals on the other side and what it can do. A good presentation has the right tone, offers a carrot and a stick, and never loses sight of what the lawyer came to the mediation to accomplish. You're there to see if there's a reasonable settlement in the mix. Simply commanding the mediator to go in the other room and find out if the other side is going to be reasonable – which by the way means agree with me – is not a productive way to start the day. No one is suggesting however that it has to be a day in moot court. The process itself has some wisdom to it. So I suggest to you to try to do it. Let's talk about mediator's proposals, and get some comments on them. We seem to be using them more and more.

Mr. Salpeter: Well, I think they're useful, but I think they're useful only at sort of the end of the process. Let's put it this way: They're most effective at the end of the process because I think, at least in the ones I've been involved in, which is several dozen over the last ten years, is that the mediator sort of gets one bite at a mediator's proposal or recommendation. I think everyone has to feel like you've narrowed the gap and all of the best points for each side have been put on the table, that people have really been asked to the end degree and in order to make the deal, you need a mediator's proposal, but I think if it comes too early, it doesn't work and I think a lot of it depends, as someone else said earlier, on the effectiveness of the mediator, and I think a lot of times, the best mediators kind of signal to each side and get a sense of whether they would buy into the mediator's proposal before they actually make it. I'm not saying it's this explicit, but essentially the mediator is saying if one side is at twenty and one is at fifty, if I recommended X, do you think you could sell it to your client and sort of gives a sense of whether it's going to be the number.

Judge Weinstein: Other comments on mediator's proposals?

Mr. Berger: I think they're very effective, particularly if the mediator is trusted by both sides or is well known for their fairness to both sides. People will listen, clients will listen.

Judge Weinstein: It also gives both sides an opportunity to come off their position or number a bit and blame it on the mediator when working with clients. I found that one of the best things about it is that it provides little opportunity to come off your position in a safe way because an outside neutral force is allowing it. The problem of course is that the number has to have some credibility behind it. You can lose the parties if you don't do it right. We try to test the potential territory for a mediator's proposal in as many different ways as we can. You can't impose it blindly or imperiously with very careful planning and thought. I agree with the observation that you really get one shot at it, so it's not a freebee.

Mr. Salpeter: Do the plaintiff's lawyers at the table think that it gives them cover with the Court at the time the settlement is approved, that it gives sort of a blessing as well?

Mr. Berger: I'm sure both Sam and I would never agree to a settlement that we think would have the slightest bit as not being approved.

Judge Weinstein: Now, you're lawyers, so we know you're giving us an honest answer.

Mr. Salpeter: As plaintiff's lawyer, we know you give us an honest answer.

Mr. Rudman: It helps you with objections to the extent you're going to get it. If there wasn't a good faith arm's length negotiation, you can point to that. I think the biggest benefit of it is it helps you with your client. Judge, we've had cases where you put out mediator's proposal objections, it to lingered and got settled down the road. It's not always the end of the mediation. I think the biggest benefit is cover from your client. Here's this neutral third party who we respect and often settlements takes years – nowadays most of the plaintiffs driving securities cases are institutional investors, Board of Trustees or some kind of Board has to answer to people and they'll say this is what the mediator recommended.

Mr. Young: How important is the rationale for the number?

Mr. Berger: Well, it puts the heat on the mediator. Just like if a plaintiff makes a demand, the mediator has the right to say what is the basis of your demand and similarly with the defendants with an offer. Clearly, when a mediator makes a proposal, it shouldn't be a proposal which is down the middle because that's already very suspect. It's got to take a stand. It can't be neutral. It's got to be on one side or the other or the middle and whatever side it's on, the mediator has to be able to articulate the reasons why he or she arrived at that number so that could, in turn, be conveyed to the clients.

Question 7

Judge Weinstein: When I prepare a mediator's proposal, I often attach a letter to the opposing sides. It's the same number in the mediator's proposal, but the letter is different and I couch the letter for the prospective parties to take to their clients with the reasons why that number makes sense. So if they're looking for a rationale and the reason behind it, they have that available from the mediator and that letter is not given to the other side. I think we wanted to have a little time for some questions. You got such a distinguished panel here and some of you out there may have a few questions that you wanted to ask. I do have a few remaining topics, such as the aftermath of *Dura*. Maybe we should just make a few comments on where that's going. Does anyone have any examples of cases where judges have instructed and juries have decided some of the questions that surround all of the complicated factors in *Dura*. We have rulings on them and some trial court explication. But we really don't know how this will play out a lot of these issues in trial. Any thoughts about the world after *Dura*? We keep getting different permutations and combinations, no matter what they are, of problems that it presents.

Mr. Berger: After *Dura*, every defendant coming into a mediation or otherwise contends that there are no damages under *Dura*. Before *Dura*, the damages could have been billions of dollars. After *Dura*, no damages. I mean it's just *Dura* is being used as a panacea for a lot of basis.

Mr. Rudman: It's very rarely successful if the motion is misphased in the case. So if you're in mediation you got by the motion, you're going to hear how summary judgment, the experts are going to

come down and opine. It had nothing to do with anything. It's only been a handful of summary judgment proceedings. That's kind of been a mixed bag between plaintiffs and the defendants. Pleading matter, it's a real non-issue on an expert basis. It seems like the issues were there before *Dura*. You had those issues any way. So I don't really see much of an impact there. I think the bigger problem for the plaintiff down road is the whole efficient market. Once the plaintiff survives one series of attacks and moves on to the next one, first it was *Ciena*, surviving on that. Then it was loss causation. So now there's going to be no significant market. You'll never get a class.

Mr. Markel: Yes, that's true, there are these issues that keep coming up, but there are more issues to dismissal today than there were ten years ago. And I think classes are going to be a little bit harder to certify. The real case is – you got to be able to survive a motion to dismiss when you have a real case.

Mr. Rudman: I think also part of the dismissals are explained by the fact that we've had a public administration in the last eight years. The judges have changed dramatically. Look what they did to the Third Circuit. It just transformed.

Audience Questions

Audience Question 1: This may be a little bit out of your experience, but I recently had a failed patent mediation in Miami. Looking back at it, I realize that the attorney for one party had made it impossible for me to have any communication with his client, totally dominated the discussions. I'm curious as to in your field, whether you make it a practice of – the client is there, but he's told to keep his mouth shut. So there's no dialogue. The mediator's not able to get a real feel sometimes as to what the real interest is.

Judge Weinstein: Touchy area. Maybe Michael wants to give his observations. I'm always working to get direct contact with the client, even with lawyers that I have great respect for. You want to use the all principals you can in the negotiations themselves, especially after you've gotten that close. It depends a lot on who the lawyer is. You can't just overtly go around the lawyer. But there are ways to suggest it and make it happen. There's been a few

times when I felt a duty to do it when I really felt the lawyer was being improperly restrictive or had his own self-interest in the case.

Mr. Young: That's a different issue, I guess. In terms of just the procedure of the process, I think the mediator just assumes he has the ability to communicate directly with the client in the presence of the attorney, structures the caucus room so you're talking to both the attorney and client. The harder question is when there is that conflict, do you want to take the client out of the room? Do you want to call the client independently of the attorney? Generally I don't do that, but I do think that it's your prerogative. My experience with securities cases is with the institutional clients on the plaintiff's side, they're showing up and more involved with more a part of the process.

Mr. Salpeter: I think the best mediators gain the trust, not only of the lawyers, but of the principals and create over the course of a day or two or more create for themselves the ability to talk directly with those principals. It's an art, a high art, but it's the really best mediators are who able to create that relationship, that communication and that trust to be able to do that.

Audience Question 2: Defense counsel referred to insurance companies or insurance counsel as their partners in mediation. I notice on occasion that the relationship gets a little tense during mediation. I'm wondering perhaps if defendants' counsel or insurance counsel might give examples of what the tensions might be, what's going on in the other room when there's some screaming and pounding.

Mr. Markel: I think your question is a very good one because obviously there are times when the economics for the defendant and the insurance company are different. There are certain times when from the defendant's standpoint, they would be perfectly willing to have the insurance company spend a little more to settle the case and put it behind them. The insurance company obviously wants to settle the case and reasonably so at the lowest possible number that they can settle the case. There is an economic difference between the two. When I was talking about them being partners, I was talking about information because vis-a-vis the plaintiffs, you should be trying to find a way to get the lowest possible number from the plaintiffs. In that sense, you are partners, and the best way to be partners in doing that is to have a good exchange in

communication. But there are different economic incentives between defendants and insurance companies at certain points in time. It does happen and when it does, you hope your relationship is such that you can get to a resolution and one of the things that makes securities litigation mediation so complicated is there are a lot of different interests. Once again, it comes back to having a skilled mediator who understands that give-and-take, and tries to get all those parties find a common ground.

Mr. Salpeter: The specific areas of tension are, where do you open? What's your opening offer? How quickly do you move? What messages do you send? What's the ultimate strategy? What's the ultimate number? All of those areas are potential sources of tension between defense counsel and the insurance company. However, a lot of those tensions can be alleviated by, as Greg said, early and often communication with the insurance company. The first time you meet with the insurance company and discuss the case should not be at the mediation, if that's what's happening, or if you talked to them a couple of days before, then you're going to have more tension. If you've talked with them throughout the case, done periodic reviews for insurance company and their counsel, kept them up to date, had a dialogue going with them, then that's a big tension reducer.

Mr. Goodstein: But at the end of the day, barring coverage issues, Greg is right. The biggest issues is that these are claims made policies. If the insured knows what the universe of claims looks like, they may simply want the carrier to spend every last dollar to settle. Whereas the carrier may be looking to settle for what it views as the reasonable settlement value. So I agree with what Greg and Alan are saying about the sharing of information. I would take it one step further. In order to eliminate that fundamental tension that's going to exist in all of these cases, insured and carries need to get on common ground in advance of the mediation about what the settlement value of the case looks like and if you can't get there, then you really need to use the office of the mediator to help you.

Mr. Berger: The biggest problem we're confronting in mediation these days, particularly in the larger cases where there are significant towers of insurance – someone in that tower decides who should pay. Yet others, both earlier lawyers and later lawyers are willing to kick in something and that is just a disaster.

Mr. Young: That's from the mediator's perspective also.

Mr. Berger: I think that's where it is.

Mr. Markel: It's also a disaster from the different lawyers' standpoint. Typically you find a way to work with most of the responsible insurers and insurance lawyers, and you figure out a way and you get there with the help of the mediators. Every once in a while, you'll run into an insurance company, not one of the top companies usually, but an insurance company that just messes up the settlement process. And it really is just so frustrating to defense lawyers and insurance lawyers as well as the mediator. It's very difficult to deal with somebody in the middle of the tower and just decides they're not going to settle.

Ms. Barry: I would point out that sometimes it's not just the carrier in the middle of the tower who doesn't want to pay, but these days, so often, the towers are made up \$10 million at a time as opposed to what you used to see – \$25 or even \$50 million policies. And it's also goes to condition, they're not in tower form, that almost becomes a mini-mediation among the carriers.

Mr. Markel: It does and what I did say, you and one of your frequent clients are very responsible. I've never had that problem, but there are some situations with different policies or different circumstances in the middle of the tower. I've also seen a few situations where I just think somebody in a specific insurance company has made a decision that they're not going to settle it.

Judge Weinstein: Or that someone has to save something off their policy and sometimes the settlement value contrives to end in a bad spot. It could be right at the end when somebody has to exhaust and that can be a pretty frustrating experience for everybody. But that's part of the world we live in.

Audience Question 3: The assumption in most of the discussion is that the source of cases is often distributive or you're looking for a number in the middle of the opening number. I just wonder if there is any room for creative problem solving, integrative bargaining, business-oriented solutions or things that can be done for the plaintiff group that is satisfying to that group and doesn't cost much, any of those types of things in this world?

Judge Weinstein: Yes. Not as much as we don't often sit around the table and sing Kumbaya and reconcile. I've never seen Sam stand up and say I'm sorry. But, but, there are opportunities from time-to-time for stock deals, warrants, and other creative solutions with companies. In the end, settlements are a reflection of some pretty hard-nosed economic analysis, and the play of personalities and emotions. Although interestingly, with the advent of the pension funds and others becoming more active, there are sometimes factors like getting contributions from individuals and corporate reform that that are really important to them. Sometimes Max and Sam have to go back to clients with something other than just money, but with real returns in the corporate reform, which is sometimes a symbolic or a real contribution from an offending individual. So the human dynamics of it are becoming more prevalent and important, but less so than an employment discrimination suit or traditional intra-business relationship where there's something ongoing between the parties.

Mr. Salpeter: One case that Judge Weinstein mediated is a case where we represented Larry Ellison. Ellison sold a billion dollars worth of Oracle stock about a month before the announcement of the bad news and the stock dropped very sharply and that case was settled by Ellison making a contribution in the name of Oracle for a \$100 million. Now, ultimately, it was rumored that the money was going to go to Harvard, but it actually went to Larry Ellison Medical Foundation which is a legitimate foundation that looks into anti-aging issues. I'm sure it's an interest of Larry's. In any event, we settled the case. Judge Weinstein, I hope you remember it the same way that I'm telling it, we agreed that the company could pay the legal fees; that is, as part of the package that he put together with plaintiff's counsel, the company would pay the fees of \$20-plus million because the company was getting a benefit of the gift was being given in its name. A state court judge in California's San Mateo County, rejected that agreement. So we had to go back to the drawing board; ultimately Larry paid the fees personally. But that was a different kind of settlement, a creative settlement. It was a derivative case. It was not a shareholder class action, but it was different and fun.

Mr. Markel: I agree with both things. In a typical case, it's mostly about the money, but sometimes a smaller case where you have a less than fully solid company and not enough insurance requires a lot of creativity, and I am aware of a case where Judge Weinstein

and Jed had been involved where there's a company that is not in particularly good financial shape, doesn't have enough insurance, there are several competing plaintiffs and a tremendous amount of creativity has gone into trying to settle that case even though there's not a huge amount of money in that case. Some of the smaller cases are harder to settle than the bigger cases for that reason. So there are situations where things other than dollars are used in a settlement process, but they're often not in the biggest of cases where there's plenty of money around.

Judge Weinstein: In the back dating option cases, there's much more of a human dynamic in those. I think that's it, folks. And to this learned panel, we thank you for coming and wish you all a good evening. Thank you.

