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KIRK REASONOVER THE CHAIR'S MESSAGE

Joint Roundtable Tackles Cutting Edge Business Torts Topics

The Winter Convention in Miami was a triumph in many ways for the Business Torts Section. In collaboration with the Employment Rights Section and the Financial Securities Analyst Litigation Group, the Section hosted a series of roundtable presentations on the cutting edge topics in business and employment law, specifically protection for whistleblowers, financial planning/retirement cases, and cross-examination techniques in

commercial cases.

PROTECTING WHISTLEBLOWERS

The first session focused on the legal protections afforded to whistleblowers. Whistleblower protections are important for many reasons, and commercial litigators have seen the importance of such protections in various contexts, including recent accounting scandals.

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Kirk Reasonover

A Practical Path Towards Better Mediations

By David Lichter, Aventura, Fla.

While every mediation has a different set of facts and legal arguments, they still share many similarities. This is one of my observations during the last 25 years as a mediator and litigator. And while each mediation has its own course and pace, with no One True Path toward settlement, we can glean helpful information from those common characteristics. What follows are

time-tested ways to improve your chance of reaching settlement based upon the similarities.

BEFORE THE MEDIATION

Some of the information handed to your mediator may be dictated by court order (especially in certain federal courts) or your experience with the particular mediator or a mediator's

specific request. I've always found it useful to have, at a minimum, a copy of the complaint; the answer, especially for the affirmative defenses; a damage analysis, if applicable; and, depending upon the matter, some key documents. A summary of settlement negotiations is also very helpful, as is a summa-

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We've Changed Our Name!



The Association of Trial Lawyers of America (ATLA) is now the American Association for Justice (AAJ).

The new name better reflects our aim to improve the civil justice system and to protect individuals' access to it. AAJ Sections and Litigation Groups will continue to support our plaintiff attorney members in their work to represent those individuals injured by the misconduct or negligence of others.

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ry that conveys information distinct from the Complaint, particularly a document that identifies the strengths and weaknesses.

Contrary to a common belief, speaking to the mediator in advance can be beneficial. Such communication is particularly helpful if one or more of the parties has personal issues or hot buttons of which the mediator should be made aware.

Many lawyers are used to making opening remarks at mediation. If one side chooses to forego those comments, i.e. to avoid overheating the proceedings, I like to be informed in advance to let the other side know. On many occasions, if one party declines to make an opening, the other side will also forego one.

Pre-Mediation Settlement Discussions - I encourage the parties to discuss a settlement before the mediation if they think it makes sense. It is worthwhile to try to narrow the gap before mediating begins. If you have established some type of floor or ceiling on an offer and/or demand as a precondition to mediation, the agreement should be recorded in writing. The parties are sometimes on different pages in a telephone conversation, and I have attended more than one mediation where one side accuses the



David Lichter

other of bad faith resulting from a miscommunication, or deliberate deception, depending upon who you ask, between counsel.

WHO ATTENDS

While court orders often require a person "with authority" to attend, that may not always happen. More precisely, someone with some authority usually attends, but the attendee may need to call "upstairs" for additional authority.

Notify the mediator early on in the day if you believe the other side's representative lacks sufficient authority. The

mediator will then have the opportunity to remind the other side of its obligations, and help the parties avoid allegations of mediating in "bad faith" or violating a court order. Or, even worse, with the parties making real progress at 5:15 p.m., the person with the real authority is without a cell phone and on the golf course. Make sure the defendants have sufficient means to reach the "authority" person after hours.

FORMAT

Consider carefully the type of format you will use in presenting your position.

A PowerPoint presentation? An organized three-ring binder? Video clips? A few comments? Obviously every case is different.

Many studies show that people generally recall facts better with information they see rather than what they hear. This would suggest that a PowerPoint presentation or notebook would be preferable to some unadorned opening remarks. But both of these mediums are subject to overuse.

PowerPoint quickly gets boring. So, the best course is to stick to the main points and save the slides for key video clips, documents or charts. In most cases, you should exclude the narrative

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The Chair's Message cont. from Page 1

Esteemed employment lawyers led and contributed to this discussion: Joseph Ahmad of Houston, Texas; Jonathan Ben-Asher of New York City; Mary Dryovage of San Francisco; Frank Shooster of North Lauderdale, Florida; Washington, D.C.'s Billie Pirner Garde; and Mark Kleiman of Santa Monica, California. The whistleblower session would not have been a success without the valuable contributions of Adele Rapport, the Employment Rights Section chair.

RETIREMENT ISSUES

Next, we followed that session with a presentation dealing with the legal

issues associated with defective advice to retire and the improper handling of retirement assets. The retiree population has grown substantially over the last few decades. The highly relevant roundtable discussion provided insight into a variety of factors that should be considered in assessing whether financial advice and services provided to retired clients were adequate and appropriate. Joseph Peiffer of New Orleans and Daniel Bateman of Gaithersburg, Maryland led this session.

CROSS-EXAMINATION

Finally, we presented a session on cross-examination that focused on advocacy in arbitration. The session included practice tips for handling experts and adverse witnesses and included video-

tapes showing particular cross-examination techniques. We were fortunate to have, Christopher Vernon from Naples, Florida, a veteran of almost 20 years of commercial litigation experience, who provided insight into how to use videotapes in the examination of witnesses and in presenting a case during closing argument.

Based on the feedback, it's fair to conclude that the attendees received a first-rate program, and the panel discussions were a benefit to everyone who attended.

Next up for our Section is the education program we have planned for the Annual Convention in Chicago. The convention is scheduled July 14 - 18, 2007 at the Hyatt Regency. Stay tuned for more details on our program.

Better Mediations cont. from Page 3

descriptions, quotes from statutes or rules, or long case citations.

The same is true for the binder. Although you can add additional paper, tabbed, to make you look very prepared while only spending time on a limited portion of the notebook, the effect of an organized presentation is helpful not only to persuade defense counsel, but to let their client know you take the case seriously and are prepared to go trial.

AT THE MEDIATION

Setting the right tone in a mediation is crucial. Setting the wrong tone will move things in the wrong direction and force the mediator to spend valuable time cleaning up the mess.

There are several ways to get your point across during your opening comments without personally attacking the other side as the Evil Empire. Nor should the opening be a re-reading of your complaint. You can assume that the defendants and, hopefully, the mediator reviewed it. So, hit the high points that describe what the case is really about. It is generally more effective to direct your comments to the person on the other side holding the checkbook than the mediator.

Many lawyers prevent their clients from speaking at mediation. Many good reasons exist for this approach. For example, "my client is an unlikable or lousy witness and I don't want the other side to know." On the other hand, if the client is a nice, elderly widow who can make a good impression without saying the wrong thing, you should allow her to speak. The more sympathetic your client appears, the more money you are likely to recover for your client in settlement.

Your First Demand - Except in the rare instance, your first demand should exclude amounts allocated for punitive damages or attorney's fees. It is clear that for most cases, defendants will vehemently decline to pay a settlement that includes these items. If so, they might as well roll the dice and go to trial.

Including those damages and costs in the first demand will usually anger the other side and start the discussions off on

the wrong foot. Moreover, the response you receive will often be as low in the other direction. Starting somewhere south of your maximum number is a better way to start the process on the right foot.

Strategies - Saving some cards to play during the mediation is the right idea in some instances. But don't get so tied up with your litigation strategy that you refuse to play anything in your hand as the parties begin to move toward each other. You can dole the information out slowly, and this will often encourage the other side to do the same.

While free discovery should never be the sole purpose of any mediation, it is certainly a side benefit that often occurs. Assuming you are comfortable with the way the talks are progressing and you trust your mediator, then play that last card if you have a reasonable belief that it will bridge the gap. It is always harder for the mediator to do his or her job if you deliberately withhold the tools for them to work with in the first instance.

And please, do not give up on the process too early. You can continue talking even as you are loading the car on the way to the courthouse.

MEDIATING MASS ACTIONS

Consider a situation where you represent multiple plaintiffs in a "mass action," as distinguished from a class action, but with the same or similar set of operative facts. It is helpful to address logistics with the mediator, and perhaps the other side, although the mediator can do this for you in advance.

My experience has been that a joint session at the outset works best, where the mediator, counsel, and the parties, introduce themselves if necessary, and then discuss the mediation process generally. If the counsel wish to make some opening remarks, they should generally stick to a review of the facts common to the claims or defenses, and then save the individual particulars for the caucus.

You can decide in advance whether some plaintiffs ought to be grouped together, or determine the order their individual claims should be negotiated. I strongly recommend starting with the easiest-to-settle first, to build a settle-

ment momentum.

Each additional plaintiff added to a group often dramatically increases the amount of time it takes to settle the cases. Therefore, it is important to properly prepare your clients to cool their heels for extended periods of time in multi-party mediations. Get the cell phone numbers of the plaintiffs not currently negotiating and stagger their return, i.e. after lunch or the following day. Call them periodically so they don't return before you are ready for them, so that they feel included and engaged in the process.

While some defendants in multiple plaintiff cases may try to offer a lump-sum monetary settlement, most will retreat once the plaintiffs' counsel raises the potential ethical dilemmas that these offers pose for counsel in dividing settlement proceeds.

THE SETTLEMENT AGREEMENT AND POST-MEDIATION

To the extent possible, try to execute a complete settlement agreement and release at the mediation. This avoids "buyer's remorse" on either side as well as extended lawyer haggling over usually meaningless distinctions. If your client's English is poor, make sure the settlement agreement contains a line at the end in his or her native language that the agreement has been translated and that he/she understands its contents, and require the client to initial next to that paragraph.

Although a case fails to resolve at mediation, an opportunity still exists to settle later. Good mediators will periodically check with you following an unsuccessful mediation to determine whether they can assist in getting the case resolved and will work with both sides to try to bridge the gap. Don't give up!

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Equity-Linked Notes: The Sophisticated Financial Product That May Do More Harm Than Good

By Craig McCann, PhD, CFA, Fairfax, Va.

Equity-linked notes are securities issued by brokerage firms, and they are thinly traded on the AMEX or the NASDAQ similar to shares of common stock. These structured products are difficult to evaluate and monitor, hold high hidden costs, and are illiquid. Yet, sales of equity-linked notes have soared in recent years as brokerage firms have found a retail market for products which were once sold only to sophisticated investors.¹

Brokerage firms that issue equity-linked notes under evocative brand names for sale to retail investors include Bank of America, Bear Stearns, CIBC, Citigroup, Goldman Sachs, JP Morgan, Lehman Brothers, Merrill Lynch, Morgan Stanley, UBS, Wachovia, and Wells Fargo. Brokerage firms make money issuing equity-linked notes because the product they arrange is worth significantly less than the offering price. In addition, the managers of the initial offering receive an underwriting spread or selling concession and trading in the secondary market generates further retail commissions.

Equity-linked notes can be too complex and opaque for retail investors and registered representatives to fully understand. Their complex traits allow equity-linked notes to survive in the marketplace despite their marked inferiority to traditional portfolios of stocks and bonds. The National Association of Securities Dealers has taken notice.

In the current investment environment, investors and brokers are increasingly turning to alternatives to conventional equity and fixed-income investments in search of higher returns or yields. Such products, including ... structured notes ... are often complex or have unique features that may not be fully understood by the retail customers to whom they are frequently offered, or even by the brokers who recommend them. Some appear to



Craig McCann

offer benefits to investors that are already available in the market in the form of less risky, less complicated, or less costly products, prompting concerns about suitability and potential conflicts of interest. [Notice to Members 05-26, page 2.]

TWO BASIC EQUITY-LINKED NOTE STRUCTURES

Some equity-linked notes provide "principal protection" in exchange for limited participation in stock market gains. The securities return the original issue price at maturity plus an additional amount depending on the value of the underlying stock or stock index at maturity.² These notes look similar to combinations of bonds and call options on the stock or stock index linked to the notes. Other equity-linked notes potentially pay "enhanced yield" compared to conventional debt, but they expose investors to the downside in the stock or stock index linked to the notes. These notes are combinations of bonds and naked short put options.

Merrill Lynch's Principal Protected MITTS®

Merrill Lynch's series of S&P 500

Market Index Target-Term Securities, MITTS®, are examples of principal-protected notes. One such note was issued on August 30, 2002 to mature on September 4, 2009. These notes trade on the AMEX under the ticker symbol MKP. Using standard options pricing models we estimate that the notes provided \$8.80 worth of investment value for each \$10 invested at issuance. The difference - \$1.20 or 12 percent - is a good measure of the hidden costs that investors paid at the offering to buy Merrill Lynch's notes.

We also compared the value of the MITTS® note at maturity to a portfolio initially invested 75 percent in stocks and 25 percent risk-free Treasury bonds using Monte Carlo simulations. Under reasonable assumptions, the expected value of the MITTS® note at maturity was \$17.43 and the expected value of the Treasury securities and stock portfolio was \$19.55.

Moreover, investors who bought the MITTS® note in the offering would be worse off 95 percent of the time at maturity than if they had invested in a simple buy-it-and-forget-about-it portfolio of stocks and bonds. Even infrequent rebalancing based on crude rules of thumb increases the probability that the portfolio of stocks and bonds will exceed the value of Merrill Lynch's MITTS® at maturity to 99.5 percent. That is, investors who bought the MITTS® note at issuance are always worse off at maturity than if they had invested in a portfolio of stocks and bonds and rebalanced periodically.

Citigroup's Enhanced Yield Intel-Linked TARGETS®

Citigroup's Targeted Growth Enhanced Term Securities - TARGETS® are examples of enhanced yield notes. Citigroup issued TARGETS® linked to Intel's stock price on February 25, 2005. The notes were issued at a \$10 offering price to mature on February 15, 2008. They trade on the AMEX under the ticker

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symbol TOI. The notes pay a 1.75 percent quarterly coupon but, unlike the Merrill Lynch note above, there is no guarantee that investors will recover their principal. The maturity payment is a function of the sum of the monthly returns to Intel with a 4.5 percent monthly cap and a 12 percent monthly floor.

We estimate that Citigroup's TARGETS® provided investors only \$8.28 worth of investment value per \$10 note at issuance. The difference - \$1.72 or 17.2 percent - is a good measure of the hidden costs investors paid to buy Citigroup's notes in the offering.

We compared the TARGETS® note to a portfolio initially invested 75 percent in Intel stock and 25 percent in risk-free Treasury bonds and never rebalanced. We found that the portfolio of Treasury securities and Intel stock is worth more than the expected value of the TARGETS® note for virtually all levels of Intel's stock price on February 15, 2008.

Investors who bought Citigroup's Intel-linked TARGETS® at issuance would be worse off 94 percent of the time at maturity compared to the buy-it-and-forget-about-it portfolio of stocks and Treasury securities. As with the previous examples, incorporating periodic rebalancing of the Intel stock and bonds portfolio based on simple rules of thumb makes it worth more than Citigroup's Intel-linked TARGETS® 100 percent of the time.

TAXES AND INCOME

In addition to being complicated and costly, equity-linked notes are illiquid, difficult to properly monitor, and their purchasers will suffer from disadvantageous tax treatment.

Trading volume in equity-linked notes is miniscule compared to the stocks or stock indexes to which they are linked. For example, from the issue date of Citigroup's Intel-linked note, Intel has traded an average of 65 million shares per day - more than 7,000 times the average daily trading volume of Citigroup's Intel-linked notes.

The IRS imputes interest income to equity-linked notes even if the note fails

to pay a coupon, meaning investors might need to pay taxes each year out of other resources. The returns on these notes are treated as ordinary income and taxed at current margin income tax rates rather than at the typically lower capital gains rates which would be applied to capital gains on the stock portion of the stock and bonds portfolio.

A sophisticated analysis is required to determine the effective allocation between stocks and bonds in an equity-linked note. Investors who purchase an equity-linked note in any significant amount will therefore be unable to effectively monitor and rebalance their portfolios. Moreover, because of these notes' structure, the asset allocation moves perversely with dictates of prudent portfolio rebalancing.³

REGULATION

Recently, the NASD issued several Notices to Members addressing its concern that structured products are inappropriately being sold to retail investors. These notices - NTM 03-71 *Non-Conventional Investments*, NTM 05-26 *New Products* and NTM 05-59 *Structured Products* - make five basic points.

1) Members must perform due diligence to understand the material features of the structured product. Equity-linked notes are financially equivalent to combinations of bonds and options on the linked stock or stock index. It is relatively straightforward for the issuers and brokerage firms selling these products to model and value these components.

2) Members must perform a "reasonable basis" suitability determination. This first level of suitability analysis focuses on the product and determines whether it could ever be suitable for any investor.

The modeling required for due diligence should allow brokerage firms to determine the value of the equity-linked note at issue and in the secondary market in comparison to the cost of the simpler bond and option components which replicate the payoffs at maturity of the structured product. If after applying its superior market expertise, a brokerage firm determines that a structured product is inferior to existing investment vehicles the firm must not sell the structured prod-

uct.

3) Members must perform client-specific suitability determinations. Structured products that pass the reasonable-basis suitability analysis must then be evaluated on a client-by-client basis for suitability. The risk/return tradeoff embodied in the structured product must be appropriate for the potential investor and the investor must understand the product.

Moreover, analogizing structured products to combinations of stocks or bonds and options, the NASD reminds members that the investor must be sophisticated enough to be able to evaluate and knowingly assume the risks of the option component of the structured product.

4) Members must present fair and balanced disclosures of the material aspects of the structured product. The NASD appears to have been especially concerned that promotional materials would be incomplete and therefore false and misleading - violations of the NASD rules which cannot be cured by statements in an accompanying prospectus or prospectus supplement.

5) Members must train their registered representatives and maintain adequate supervisory procedures. Firms must have written procedures to adequately analyze new products and to ensure that registered representatives are adequately trained to - and in fact do - carefully evaluate the suitability of the new product on a customer-by-customer basis. Written procedures must also be developed to ensure that all sales materials provide a fair and balanced portrayal of the risks and rewards on a structured product.

As previously mentioned, equity-linked notes are complex, opaque, and expensive. Even with the best disclosure materials and the most thoroughly trained and supervised registered representatives, it is unlikely that retail investors will understand the risk-return tradeoff and the costs incurred in some of the complex equity-linked notes and structured products currently being marketed.

Simple portfolios of stocks and bonds can be purchased and periodically rebal-

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anced which always result in more wealth at maturity than an investment at issuance in any of the equity-linked notes that were analyzed. These products add nothing to retail investors' portfolios that cannot already be acquired from investments "already available in the market in the form of less risky, less complicated, or less costly products," and therefore they

fail the "reasonable-basis" suitability requirement for sale to retail investors.

Notes

1 See "An Arcane Investment Hits Main Street: Wall Street Pushes Complex 'Structured Products,' Long Aimed at Institutions, to Individuals" *Wall Street Journal* June 21, 2006, D1 and "Guaranteed to Go Up" *Forbes* November 27, 2006 p. 79-80.

2 The issue price is only 70 percent or 80 percent or less of what the US Treasury guarantees it will return on purely risk free securities held for 5 to 10 years and so this return of principal guarantee should not be oversold. The additional return paid on some equity-linked notes is

a function not only of the increase in the value of the stock or stock index between the issue date and maturity but may also be a function of the particular evolution of the stock price or index level over that time period.

3 See William Reichenstein, "Insured Investment Products: The Reality Behind the Hype," *AALJ Journal*, November 2004, pp. 10-15.

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