



THE EFFECTIVE USE OF FINANCIAL EXPERTS IN MEDIATION

BY DENNIS S. MEDICA & JEROME F. WEISS

JERRY

During the course of a mediation career that has spanned over 20 years and 2000 plus disputes, I have noticed that many lawyers — too many — have a hard time with numbers. In fact, it is so challenging to them that this issue has found its way into my top three pieces of mediation advice for lawyers: “Bring somebody to mediation who knows numbers”.

Instead of adequate preparation, dispute representatives too often come to mediation with a set position and expectation without necessary flexibility to consider or create other options. What they have is “what they have” and what it is “is what it is”.

The result is that opponents too easily find each other in a *yes it is/no it isn't* “argument clinic” a la *Monty Python* where a false impasse is arrived at unnecessarily. We fall into traps that short circuit why we are there, which is to solve a problem: traps like binary thinking of win/lose, right wrong; story-telling and narrative position traps; the trap of oversimplifying that which is complicated, including core financial issues.

Over time, this all caused my thinking to turn to how we might better inform various aspects of dispute resolution including formulating meaningful offers and demands rather than playing a game of *Pin the Tail on the Value Donkey*; how we might monetize intangible virtues of resolution such as certainty and control; how we might take set, even intractable positions of valuation and find the agility necessary to reach accord.

That’s where Dennis comes in.

DENNIS

Being involved as a neutral financial expert in several mediations, I have found that early

engagement of a financial expert provides for an objective analysis of both parties’ positions to help project a realistic outcome. An expert can provide the parties with a realistic, unbiased opinion on the financial aspects of the case. In addition, the expert can pinpoint major areas of dispute between the parties, which can facilitate productive brainstorming to explore viable options for both parties to consider in reaching a successful resolution.

A financial expert can also help moderate the tone of a mediation by presenting data and explaining facts in a germane way with an air of objectivity. As a result, the expert can help neutralize the parties’ stances by showing that a good faith difference of opinion exists on certain financial issues and facts in the case. This can have a calming influence over the entire process and help the parties find potential agreement on the scope and magnitude of the numbers involved in the dispute.

Potentially critical to a settlement, a financial expert can help craft creative solutions. When a lump sum payment to settle a dispute is not feasible due to cash flow constraints or working capital requirements, a financial expert can provide alternative approaches such as a multiyear payout, and/or an assignment of an account/note receivable. These arrangements can help soften the blow of a significant payout, making settlement more probable. Typically in these arrangements, the financial expert will be asked to prepare an operating cash flow analysis and/or minimum working capital analysis to help convince the opposing party that no other option would be financially practical.

The expert can also help the parties and the mediator troubleshoot potential solutions proposed during the mediation process, some of which may present operational or

other challenges that may not be evident. The expert can also suggest approaches that have worked in other cases.

JERRY

Disputants — and lawyers — can become over-conditioned to the fight and its limited choices of win and lose, where even a “winner” doesn’t feel like one. There are other ways. Nevertheless, bringing disputants and their counsel toward alternatives is made more challenging by our promoting definitions of success that are based on the binary model and where resolution comes to be defined in a wrong-headed manner by the lawyer’s adage that *the sign of a good settlement is where everyone’s unhappy*. Who came up with that one anyhow? And what kind of negative message is that to be sending to clients?

In many disputes re-defining the goal of the negotiated or mediated resolution is in large measure our challenge: getting beyond caricature, informing resolution, considering concept when we are used to using numbers as weapons, helping people make wise decisions that focus on a problem-solving mindset and not hand-to-hand combat.

This transition in mindset — from conflict to resolution — may necessitate involving people “beyond our pay grade” in order to bring new thinking and information to what may be impasse or a stagnant process.

Case Example I

This dispute involved a class action by union retirees against a former employer. They sought restoration of their retiree health benefits under collective bargaining and insurance agreements. We had a federal

District Court Judge in Chicago breathing down necks and ruling that an

appropriate remedy needed to be found by a hard deadline.

I consulted Dennis because I sensed an early and false impasse that needed to be avoided. The Defendant — an aging company in an aging industry — claimed an inability to pay anything. Of course, the Plaintiffs were highly skeptical of such an assertion given years of litigation and a lot of mistrust. I persuaded both sides to involve a neutral financial expert to help a neutral process so that they could be better informed by hard facts and data instead of mistrust and anecdotes.

Dennis analyzed years of financial statements of the company, including budgets and a major fixed asset acquisition. He looked at accounts receivable/payable aging reports and various loan agreements. He ultimately came up with what he thought was the maximum potential disbursement possible for settlement of the claim and an analysis of funding the settlement through debt financing and whether such financing was viable.

Dennis was able to validate in very specific manner a substantial decline in cash flow, limitations on working capital surplus, variables in profitability and replacement cost of aging manufacturing equipment. In so doing, he credibly presented information that allowed the Plaintiffs to make concessions that would have been impossible for them to reach in a continuing litigation process that would have only further diminished the value of the deal for them. Dennis helped the parties avoid falling victim to a saying I frequently use: “There’s a difference between a deal and a price and if you hang out too long on the latter, you will in some way lose the advantage of the former.”

The parties reached a deal. The judge was pleased ... I think.

DENNIS

Case Example II

I found my engagement as a neutral financial expert in a recent matter contributed uniquely to a settlement of the dispute. The matter involved very combative parties embroiled in a business divorce and covered various issues, including the valuation of a 5% ownership interest of a shipbuilder. The sale of the ownership interest was in relation to a forced liquidation due to an alleged wrongful termination of the minority

shareholder.

As mediator in the case, Jerry contacted me to see if I was able to assist him and the disputing parties analyze the claimed values of the 5% interest and help contribute to a settlement in the case. Since the parties had been posturing their positions aggressively in the case, both were somewhat apprehensive to have a neutral financial expert “pull back the veil” on the numbers. With some hesitation but optimism, both parties agreed to engage me to assist them and the mediator on the numbers.

Upon initial review, my task seemed daunting. The disputed values of the 5% interest were \$14.3 million and \$20.4 million. My initial focus was to attempt to find common ground, which did exist. Although the parties disagreed on the value of the 5% interest; both parties generally agreed on the approach to be used in calculating the value. In addition, both parties agreed value should be calculated as a multiple of earnings (EBITDA) with consideration for debt. Both parties also agreed that EBITDA multiples of 7, 8 and 9 should be considered in the valuation.

Although these commonalities were encouraging, the parties strongly disagreed on the EBITDA amount in the valuation calculation. The Defendant used a trailing 12-month EBITDA of \$52.8 million and subtracted debt to arrive at a value of \$14.3 million. The Plaintiff used an EBITDA of \$75.5 million which included various adjustments and deducted debt in its calculation resulting in a value of \$20.4 million.

In addition to preparing a valuation report, I participated at the mediation via phone at the request of the parties. Both sides asked numerous questions which provided me the encouragement that we were making progress. My valuation primarily used the approach of the Plaintiff with some modifications which included a 40% marketability discount to arrive at \$15.2 million to \$15.7 million for 5% ownership interest. The matter settled after some additional intense diplomacy.

DENNIS & JERRY

We both feel that parties and their lawyers need to be cautious about binary mindsets and instead, there should be more focus on collaboration and problem-solving mindsets. This includes concentration on meaningful numbers in an informed and meaningful manner. Where possible, engaging a neutral financial expert to assist in bringing more meaning to the numbers can lead to a more durable and sustainable resolution.



OVER 25 YEARS OF
PERSONAL INJURY,
MEDICAL MALPRACTICE,
AND AUTO / TRUCKING
CASES

216.223.7535
ROBENALTLAW.COM



Jerry founded MediationInc. and is the first lawyer in Cleveland to have dedicated his practice entirely to mediation He has written and lectured extensively about mediation throughout the United States and internationally Jerry is also an adjunct Professor of Law at Case Western Reserve University School of Law where he co-teaches Mediation Representation: Theory, Principle and Practice. He may be reached at mediator@mediationresolve.com or (216) 589-9995.



Dennis founded Medica, LLC, a boutique accounting firm focusing on forensic accounting, fraud investigations and litigation support. He has served as a financial expert in numerous disputes and has testified in criminal and civil matters in federal and state courts throughout the United States. Dennis is also an adjunct professor at Cleveland State University where he teaches fraud examination. Dennis is a CPA, Certified Fraud Examiner and also serves as a FINRA arbitrator. He may be reached at dmedica@medicacpa.com or (216) 357-2646.