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 Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

5 Benefits Of Using A Financial Expert At Mediation

Law360, New York (October 27, 2016, 11:09 AM EDT) -- In the right cases, having a financial expert participate in the mediation process can help put the parties on a path toward a cost-effective, early resolution. The high cost of litigation has increased the pressure on businesses, employers and individual parties to save money by reaching an early resolution of their cases. As a result, many parties are making a front-end investment by inviting experts to participate directly in the mediation process during the early stages of a case.



Anthony Rospert

Having an expert's input during mediation can be particularly valuable in business cases involving complex financial disputes, complicated damage calculations, valuation issues or forensic accounting. A financial expert can help isolate and clarify critical financial issues in the case, identify missing information, serve as a calming influence, temper expectations and offer innovative solutions to help achieve a settlement. The effective use of a financial expert during mediation can enhance the chances of efficiently resolving a complicated financial case.

This article explores the role of financial experts in mediation and highlights the benefits they can bring to the mediation process.

Assist in Pre-Mediation Assessment

Financial experts are in a unique position to offer pre-mediation assistance to the parties and their legal counsel. When preparing for mediation, engaging an expert early in the process can yield significant benefits. For example, choosing the right mediator is often the most crucial factor in ensuring a successful mediation. A financial expert can assist in the mediator selection process by providing information on previous experience with potential mediators and identifying mediator expertise and experience profiles that suit the particular needs of a case.



Dennis Medica

During the pre-mediation assessment, a financial expert can also objectively analyze your client's position and the opposing party's position to project a realistic outcome. An expert can provide your client with a realistic, unbiased opinion on the financial aspects of the case and support your legal evaluation of the case as you head into the mediation process. In addition, the expert can pinpoint major areas of dispute between the parties prior to the mediation, which can facilitate productive brainstorming to explore a number of viable options for your client to consider to reach a successful resolution.

Simplify the Issues

An expert can assist in clarifying the facts in dispute, helping the parties and the mediator better understand the financial issues central to the case. Financial experts have the ability to bring the two sides closer together by helping isolate key facts and eliminate satellite issues. More importantly, an expert can identify areas where the parties can agree on the facts. By finding common ground, the parties can increase the likelihood of resolving the dispute. From an advocacy standpoint, an expert can guide you on using summary charts, graphs and other demonstratives to make a streamlined, effective presentation on the financial issues to the other

side and the mediator in a joint session or caucus.

During caucus sessions, a financial expert can help solicit new information from the opposing party and prepare counterarguments that rebut the financial assumptions underlying the other side's position and settlement posture. An expert also can clarify complex financial issues and address disputed calculations with the mediator in caucus sessions. Thus, a financial expert can be both a teacher and a storyteller by helping the parties focus the mediation on the critical facts of the case.

Maintain Focus on the Facts

A financial expert can help moderate the tone of a mediation by presenting data and explaining facts in a germane way with an air of objectivity. This has the added benefit of taking your client out of the spotlight. As a result, the expert can bring credibility to your client's position, helping 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.

In many cases, emotions run high during certain points in the mediation when the parties' positions become polarized. An expert can help defuse these situations by leading the parties, and perhaps the mediator, to refocus attention on the financial implications of the dispute.

If the mediation reaches an impasse, the expert can also provide an incentive to continue pursuing a settlement by demonstrating to the other side his or her effectiveness as a testifying expert and ability to persuade the mediator (and potentially a judge or jury if the mediation does not reach a resolution) on the strength of your position.

Establish a Realistic Bargaining Zone

Engaging a financial expert early in the mediation process can temper any unrealistic expectations about the value of the case and provide a reality check for your client. The expert's analysis can also help the parties set brackets for potential damages/losses and ranges of value to assist in achieving an expedited settlement. In addition, the expert can provide an objective perspective in real time during the mediation process by evaluating proposals presented during the course of shuttle diplomacy. The expert can also serve as an intermediary between the client and the mediator to help resolve difficult financial issues that may be impeding a settlement. Accordingly, the financial expert can bring a level of composure to the mediation process by focusing on the numbers necessary to achieve a resolution.

Offer Innovative Solutions

A financial expert can also 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 account and/or note receivables. 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 other 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.

Potential Risks

The use of a financial expert at mediation can present some risks, notably the possible waiver of confidentiality and the chance that the expert's work product could be discoverable if the matter does not settle. There are ways to avoid the potential waiver of confidentiality of your expert's work product. First, carefully prevent your financial expert from reviewing mediation statements and using information obtained at mediation in any future reports or testimony by providing only

the underlying documents supporting your client's mediation position, and by limiting the expert's presence at the mediation. Additionally, all information provided to the expert and their work product should be labeled "for settlement purposes" and protected by the operative mediation confidentiality statute.

While most mediation statutes protect mediation communications from disclosure at trial or otherwise, documents an expert creates for the mediation might be prohibited from use at trial as well. Many of the confidentiality issues can be worked out in advance. Indeed, you can stipulate with the other side that expert materials submitted as part of the mediation are intended for exclusive use in mediation and may not be used in additional proceedings. Thus, it is advisable that you inform the opposing party and the mediator that you intend to bring an expert to the mediation.

Conclusion

A financial expert can provide significant value during the mediation process. Fully engaging one early in a dispute and related mediation can lead to a more vetted and reasoned resolution that will be acceptable to both parties. While there are many benefits to using a financial expert in mediation, there also are some risks, but they can be mitigated through thoughtful planning and clear communication with all parties involved.

—By Anthony Rospert and Dennis Medica

Tony Rospert is a litigation partner in Thompson Hine LLP's Cleveland, Ohio, office.

Dennis Medica is a forensic accountant and managing director of Medica LLC, an accounting firm specializing in financial analysis in complex business disputes, and fraud and forensic accounting investigations.

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