Creative Solutions in the Commercial Mediation Process

By Hon. John P. DiBlasi J.S.C. (Ret.)

Volume is a great teacher. Nothing could have fully prepared me for the bench even though I tried many cases in private practice and spent a great deal of time in the courthouse. The sheer number of cases and the decisions that had to be made in a day dwarfed any type of previous experience. Much in the same way the sheer number of commercial cases that an active neutral mediates over the years dwarfs the number of cases an attorney could ever mediate in private practice. Volume allows you to see patterns that one would never otherwise be exposed to and creates the ability for the introspective neutral to refine his craft and achieve a successful result. While ultimately one would define a successful result as a settlement, I believe that any mediation that brings the parties significantly closer and narrows the issues in dispute or in fact, leads to the conclusion that the case must be tried, is invaluable. Sitting as a Commercial Division judge given the volume of cases on one's calendar leaves little time for effectively attempting to negotiate a creative resolution in all but the most pressing cases. The beauty of mediating a commercial case is not only the ability of the parties to come together and exchange views, but also for the mediator to assist the parties in crafting creative solutions that are rarely found in the courthouse setting.

Environmental Issues Resolved

When I was a Justice of the Supreme Court overseeing all land use cases in my jurisdiction, I was confronted with a case of epic proportions. One of the largest commercial developments in the history of the venue had been opened in violation of specific environmental conditions imposed by the state. The development was critical to the economic development, if not survival, of a major city due to the sales tax it was expected to generate and the jobs it would create. The Mayor, in what was a political decision, opened the development in contravention of the law which spurred the adjoining communities so affected by the environmental impact to move by Order to Show Cause to close the development. As a Judge, I was now confronted with the prospect of shutting down a project that employed hundreds of people and would generate untold millions in sales tax.

Of the many environmental requirements, the most hotly contested issue was the opening of a secondary access road which would alleviate horrific traffic congestion, create a danger to the public and devalue properties in the surrounding communities. Unfortunately, the State of New York had not completed the required studies for the installation of traffic control devices to allow the opening. I had to put my creative hat on, and directed the mayors of all of the affected municipalities and the County Executive to appear before me to mediate an interim settlement. This would allow the development to remain open for the time being and still be able to address the most immediate environmental concerns.

Sometimes, the obvious solution can be a simple one discovered by a creative neutral (in this case a Supreme Court Justice) that can see beyond the animosity of the parties. Quite simply, I suggested that the city open the secondary access road during business hours and pay the adjoining community for the services of police officers to provide traffic control until the State could complete its process to install permanent traffic control devices which involved a complex system of lights. Development opened, jobs saved and the negative environmental impact avoided. The battle over related issues would continue at a later date. This an extraordinary situation where I, as a Judge stepped into the fray itself to avoid a disaster. I did this on other occasions, as often as I could. However, one person could not possibly solve all of the disputes contained on a court's calendar that at any given time consisted of some 600 cases. This experience taught me the beauty of the mediated settlement and the importance of thinking out of the box in a creative fashion.

Taking this experience with me, and applying it in my position as a full-time neutral, I am able to resolve cases that seem to have no rational chance of being settled. The following are some examples of where a little creativity by the neutral can achieve a positive outcome:

High/Low Approach Worked

There was a hotly contested complex motion for summary judgment containing close issues of law. The decision was decided in favor of the plaintiff denying the motion to dismiss, but both sides were concerned about the cost of a very lengthy trial without having the legal issue decided by an appellate court. The trial judge was not inclined to grant a stay for the purposes of an interlocutory appeal and there was a valid concern that the intermediate appellate court would follow suit. With the assistance of the mediator, the parties were able to agree to a high/low on the case. In other words, if the plaintiff succeeded on the appeal they would get the higher of the two sums. If unsuccessful, the plaintiff would get the lower amount. The parties submitted the agreement in writing to the trial court. Knowing that the case would now be resolved without a trial, the application for a stay for the purposes of appeal was granted. Ultimately, the appeal was decided in the defendant's favor but both sides were pleased with the outcome because they had some certainty as to a result and both saved extraordinary trial costs.

Multiple Claims vs. Bankrupt Corporate Entity

Another matter involved approximately fifty commercial claims against a corporate entity that was insolvent. Fortunately, the company had insurance to cover the losses that were sustained. Unfortunately, while that coverage was in the millions, it was not sufficient to cover the sum total of all the claims. The insurance company had wisely decided to deposit the money into court and let the supervising judge deal with the claims process. I was the agreed upon neutral for the some fifty matters that were pending in the courts.

After several unsuccessful mediations, a meeting was held with the law firms representing claims that had been grouped together. I made the suggestion that, as opposed to a mediation, which would not prove fruitful, the parties should agree to an expedited arbitration process. The way the process would work is that both sides would enter into an agreement where parties acknowledged that they would not be able to recover all their damages. Instead, they would agree to accept an amount based upon the number of parties who opted into the agreement to arbitrate and the arbitrator's determination of relative value.

Approximately forty-five of the fifty parties opted into the agreement as their claims had been mired in endless litigation for five years. The concern among the parties was that court approval was required to pay out the monies. That was allayed by two factors. First, as long as the settlements were reasonable, there was no bar to exhausting the insurance proceeds even if some claimants were left without any funds to collect a judgment from. The arbitration award recommended by a neutral who was a former Commercial Division Justice, gave the court confidence in approving the settlements. Further, all parties were given the option to opt in and warned of the potential that their failure to do so might result in the proceeds being exhausted before their claim was heard in court. I set a strict schedule and within six months 45 mini-arbitrations were held in a streamlined process in person, by submission upon agreement and out of state and internationally by Skype. The decisions were submitted to the court as scheduled. After five years of delay, 45 parties were very happy to recover part of their loss within six months.

Interpretation of Commission Agreement

Finally, oftentimes a mediator can be creative and provide what may be an obvious insight that will foster a settlement that would not have been considered by the parties. In a recent mediated dispute over a multi-million dollar commission between a broker and his former employer that involved securing naming rights, the parties were mired in an acrimonious dispute over the amount of the commission due the broker, and whether the commission agreement was in effect at the time of the signing of the agreement. There were also issues involving the interpretation of the agreement's terms. The naming rights were being purchased by a third party for an amount exceeding forty million dollars. At the time of the mediation, the suit had not yet been filed. It was suggested to the parties that the filing of the suit would generate unwanted publicity and potentially expose the party purchasing the naming rights, to opt out of the contract to which there still was a limited, but valid right. In that event, neither party would be enjoying the benefits of the prospective deal. Viewing things in this new light, cooler heads prevailed and the matter was settled without filing a case in court.

These are just a few of the many examples I can recount that speak volumes about the benefits of mediation in commercial cases. I am convinced that most commercial cases would benefit from parties sitting down face-to-face with an impartial third party to see if they can work out their differences. There is so much to gain when a little creativity is applied and, so little to be lost, when compared to full blown litigation.

*Hon. John P. DiBlasi is a retired Justice of the Supreme Court, Westchester County, Commercial Division. He is a member of NAM's (National Arbitration and Mediation) Hearing Officer Panel **a**nd is available to arbitrate and mediate cases throughout the United States. For the fourth straight year, Judge DiBlasi was voted the #1 mediator in the United States in the 2017 National Law Journal Annual Reader Rankings Survey. He was also named a National Law Journal 2016 Alternative Dispute Resolution Champion, as part of a select group of only 48 nationwide. Judge DiBlasi was voted one of the Top 10 mediators in the 2016 New York Law Journal Annual Reader Rankings Survey for the seventh year in a row. Additionally, he has been designated a Super Lawyer for the fourth consecutive year (2016, 2015, 2014 & 2013) and he holds an AV Preeminent Peer Rating from Martindale-Hubbell in both Alternative Dispute Resolution and Litigation – a distinction given only to those who possess the highest ethical standards and professional ability.*

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