

## **Making the Most of the Evaluative Process at a Mediation**

By: Hon. John P. DiBlasi, J.S.C. (Rtd.)

During the course of the private breakout sessions with the parties, the mediator is able to engage in a more candid discussion with counsel with respect to their case and their belief as to its strengths/weaknesses, and how they will likely address the opposing party's case at the time of trial. It also gives the parties the opportunity to disclose information which is being withheld. Quite often the pre-mediation briefs do not contain key arguments or evidence that an attorney believes strengthens or potentially weakens their case. Often critical evidence or legal/factual arguments are withheld for a tactical advantage and are not referenced in the mediation brief or at the joint session. If this is the case, counsel must make clear that the mediator is not to disclose this information. The private session gives you the opportunity to engage in a dialogue with the mediator and answer questions that have arisen from the submission of the briefs and the joint session. A benefit to this dialog is that the mediator may often have insights which the parties have not considered. Mediators will withhold same and refrain from posing questions in the joint session that may adversely affect a party's position.

The opportunity to speak with the client, whether an individual or corporate representative in private session is an excellent opportunity to favorably influence the mediator in giving an evaluation. In a case where the client is an individual, particularly if the client makes a good appearance, this process may be more informative than all of the briefs and the discussions had by counsel. It gives the mediator a significant opportunity to gain some insight as to the type of witness the client will make. This meeting also allows the mediator to gauge the willingness of the client to compromise, the emotional investment of the litigant in the case, and an assessment of the client's understanding of the mediation process and the issues attendant thereto, which all may in some way affect the mediator's evaluation.

The point of the foregoing is not to rush the mediator into giving a premature evaluation of the case before he has developed a complete understanding, to the extent possible, of all of the factors affecting same. It is a rare case where counsel for the parties will agree in whole with the evaluation given by the neutral. As a mediator it is important to stress to the parties that the evaluation is given with due respect to the fact that their view of the case may differ significantly. This is particularly important if counsel chooses to have the client present when the evaluation is given. This is the point in the mediation where diplomacy on the part of the mediator becomes paramount. It is important, whether counsel likes or dislikes the opinion of the mediator, that the opinion be given due consideration. The mediator must be careful not to give the impression that he is taking sides, and the evaluation should be delivered in as neutral and respectful manner as possible. A good mediator will provide counsel an evaluation which specifically cites objective factors supporting same. Counsel should engage in a meaningful discussion with the mediator on the points where they agree as well as disagree.

Finally, asking for the mediator to give an opinion in the presence of all parties is usually a mistake. While on occasion due to the peculiar facts of the case all of the parties may elicit an opinion while in group session, as a general rule this is not effective, and can lead to difficulties in settling the case.

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