

Any meaningful discussion of advocacy in the mediation process should begin with a recognition of the fundamental tension that exists between the two concepts. Mediation involves negotiation, conciliation and compromise between parties who have become adverse because of a controversy or dispute. Advocacy, by contrast, seems to be the antithesis of resolution through compromise, insofar as it is premised on notions of "winning" the battle of persuasion between adversaries on important issues such as responsibility and entitlement.

The tension between mediation and advocacy can become a positive force in the evaluative phase of mediation if the parties and their counsel use effective advocacy techniques, mixed with common sense and good judgment, to focus the participants on the key issues, engender constructive dialogue and bring realistic expectations to the bargaining table. Mediation advocacy is "effective" when it raises the parties' awareness of the benefits of settlement and the risk and cost consequences of impasse and failure.

The evaluative phase of mediation usually occurs prior to the private caucus negotiation sessions. During this phase, the parties and the mediator typically consider issues relating to claimed entitlements, the risk and cost factors each side faces, as well as monetary issues pertaining to the worth of the case. The mediator assists the parties in assessing their respective positions, claims and demands (*i.e.*, entitlements), and attempts to establish a realistic range for negotiation of the monetary issues and

SOME GUIDELINES FOR EFFECTIVE ADVOCACY IN MEDIATION

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reasonable settlement goals. Party advocacy can play an important role in setting the proper tone for constructive evaluation of these issues.

While concepts of responsibility, liability, duty and obligation are terms of advocacy used to establish entitlements, an effective advocate develops, with the client, the legal and factual logic behind the client's demands. Together, lawyer and client should address the key "jugular" issues that drive the dispute, presenting the client's "best case" in the light most favorable to its position. This provides the mediator with an analysis of the case that can be used to work on the entitlement issues with the parties in private caucus sessions.

Mediation should be viewed as an opportunity for the parties to "test" the reasonableness of their settlement expectations and goals. An effective advocate causes the client to recon-

sider the cost and risk factors in the case and adjust expectations concerning monetary value before committing to the litigation process, where the risk/reward analysis can change dramatically as the uncertainties of the litigation unfold. By more accurately identifying legitimate items of cost and damages, eliminating speculation, more correctly gauging levels of direct and indirect financial impact, and preparing a more useful comparative risk/reward analysis, the parties are able to move through the mediation with a more accurate case valuation and more realistic financial goals.

All counsel should strive to improve their advocacy skills in the mediation context. Several pointers are set forth below. ■

Mediation is a process that produces results only if it is treated with the seriousness it deserves. The parties and their counsel must treat the mediation as serious business. The potential for a successful resolution through mediation will be enhanced if the parties and their counsel follow these advocacy guidelines.

BE PREPARED

The need for serious preparation for mediation should never become lost in the informal and sometimes casual nature of the process. Poor preparation most often leads to either a poor settlement or no settlement at all. Serious preparation involves:

- (a) defining the "jugular" issues;
- (b) developing the logic and arguments to support the merits of the client's positions;
- (c) establishing the "value" of the client's case and what the settlement goals should be;
- (d) preparing a negotiation strategy to achieve settlement goals, includ-