

**HERE COME THE JUDGES—May 19, 2017**

**Five Mediation Tips—by John M. Lewis**

- (1) **Prepare the Client for Compromise**—Mediation does not work without compromise. A party should not expect to achieve total victory. Each side must listen to all the other sides, and be able to consider all the other positions. Mediation often involves a strong element of emotion, and it is often difficult for parties to hear what they don't want to hear. Nonetheless, empathy is key. Success through mediation means that a compromise resolution of some sort has been achieved, with no one walking out feeling totally vindicated. The need to compromise certainly should inform the conduct of the lawyers. They should be firm and clear in taking positions, but avoid being too contentious. They should be courteous and work to further settlement possibilities.
- (2) **Key Participants Should Attend**—Decision-makers should seek to be physically present at the mediation session or sessions. It is best to have insurance adjusters physically there, although they are often only accessible by telephone. I have often found it helpful for a party's spouse, or adult child, or parent, or trusted friend, to be physically present, both to provide moral support and to offer helpful assistance in working out a resolution.
- (3) **Prepare and Assist the Mediator**—Having selected a good mediator for the case, each side should take the time to make sure that, as the process moves forward, the mediator gains a good understanding of the issues, with their particular difficulties and challenges, including *DeBenedetto* circumstances. To be effective, a mediator needs to obtain a fair appreciation of the strengths and weaknesses of each side's case. A mediation summary is very useful to educate the mediator. A lawyer should use the joint opening session, and the give-and-take later private sessions, to make sure the mediator fully appreciates her/his client's side, and clearly sees the weaknesses of the other position or positions. The lawyers should assist the mediator in the good

use of negotiating approaches most amenable to achieving a good resolution, including bracketing and the floating of a settlement number.

**(4) Be On Top of Lien/Subrogation Issues**—Settlement may not occur because a lien or subrogation issue has not been sufficiently addressed. These issues may sometimes be frustrating, involving at times the need to deal with difficult bureaucratic positions. However, the lawyers should deal with lien and subrogation issues so that they do not unnecessarily block a resolution.

**(5) Patience Is Key**—Prepare the client to be patient, to be willing to go through a process that may take some time, hit temporary roadblocks, require substantial give-and-take, and be very frustrating and anxiety-provoking. As a mediator, I often start by talking about the difficulties of the process. I encourage everyone to take deep breaths, to hang in there for so long as there is some prospect of succeeding. I take breaks when necessary; I talk of less difficult, perhaps non-economic matters if they exist; I do everything I can to foster a good problem-solving, settlement-oriented environment; and I remain optimistic that we will find some way of overcoming the obstacles and arrive at an acceptable resolution. In my introductory remarks when we are all together, I often say that mediation is like putting yourself in a dentist's chair: you go through short term pain or discomfort, but you endure this because, in the end, you expect to obtain long-term relief—and most of the time you get this long-term relief.