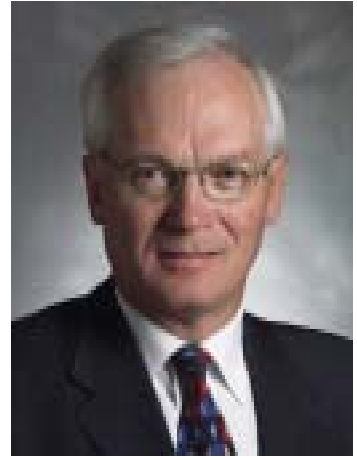


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# MEDIATION MINUTE

One of the keys to a successful mediation is preparation. So how does a lawyer prepare for a mediation and, perhaps even more importantly, how does the lawyer prepare the client? While every case is unique and the approach to each mediation should be carefully considered there are some general principles that can be applied in every case. This article will address two aspects of preparation: interest identification and creative problem solving.

As legal counsel you should review the pleadings, documents and the history of negotiations, if any, well in advance of the mediation. The identification of the key legal issues is critical. However, of equal importance in a mediation is the identification of the interests of the parties. What is the client's view of the dispute? What are the client's objectives? Be attuned to the fact that the client may have different concerns over and above the pure legal issues. Be sensitive to the emotional impact of the dispute on the client. Listen not only to what the client says but how they say it. Be aware of non-verbal clues and body language. Often, these non-verbal clues can be very powerful indicators of hot button issues and emotional barriers to an effective settlement. What is important to the client in the dispute may be quite different from the bare legal issues.

In addition, broadly consider what you or your client really know about the other party. What would you like to know? Do you really know what motivates them in the dispute? Develop some open-ended questions to ask of the other side to explore some of these areas. If you and your client are genuinely interested in learning more about the opposing side's view of the dispute, the likelihood of reaching a settlement is greatly

improved. This is not an examination for discovery or cross-examination at trial. A mediation is a confidential and without prejudice process. Ask questions which allow the other side to explain their position, their feelings, their motivations.

To resolve the dispute the parties should be encouraged to engage in creative problem solving. This process may involve the disclosure of certain facts or information not previously disclosed but which may open up opportunities for a successful resolution of the dispute. The lawyer should engage the client in a mediation role play to review certain contentious issues and how the client might respond to those issues. Consider a variety of settlement positions and be open to alternatives that do not necessarily or solely involve the payment of money. What does your client have that the other side wants? What does the other side have that your client wants? Are there non-monetary benefits that your client would like to receive or would be prepared to offer to resolve the dispute? Don't be afraid to be creative and brainstorm with your client. This will likely be good practise for both of you and will be invaluable once you attend the actual mediation. The better that you are able to prepare yourself and your client for the mediation, the better the ultimate result.

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