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SPECIAL REPORT

Practice Pointers for General Mediation

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Mediation is the art of balancing interests. Although no template for guaranteed success exists for use in a mediation, certain experience-based suggestions can be offered as practice pointers.

Pre-Mediation Issues

1. Timing of mediation. Mediating early often translates to financial savings, which singularly may increase the prospect of resolution. Another reason to consider early mediation is that the information and strategies learned at a single day of mediation will often aid in the planning of future or further discovery and strategy if the mediation does not resolve.

2. Preparation for mediation. Preparing for mediation should be virtually equivalent to preparation for trial if the probabilities for success are to be maximized.

3. Managing client expectations. The chances of successful resolution are substantially diminished if the lawyer does not properly manage the expectations of his or her client in advance of the mediation.

Opening Statements

1. Who to address. The parties control the outcome. Therefore, opening statements should not be addressed only to the mediator or opposing counsel, but to the adverse party. When there are multiple representatives of a party, speak to all of them because the real decision-maker may not be apparent.

When addressing the adverse party, utilize a conversational tone of voice and everyday words. Be professional, respectful, use eye contact and avoid an intensity that could cause discomfort with your audience.

2. What to say. Often, there may not be adequate time to address each and every issue in a mediation. Attempt to look at the overall picture. Don't become obsessed with the minutiae, losing sight of more sensible objectives available in the bigger picture.

3. The client—to speak or not to speak? Allowing a client to speak in opening session can have a huge impact on the likelihood of settlement. A lawyer should carefully prepare his or her client for the opening session and provide the client with an opportunity to speak. The client should understand ahead of time which topics to be addressed so that the client feels they have contributed to the mediation process.

4. Visual aids. Visuals, such as a timeline, video or enlarged photos, are one of the most beneficial tools a lawyer can use in the opening session.

5. Money demands or offers. While the discussion of money or the history of settlement negotiations in the opening session is not advisable, each side should be

informed of the initial demand of the other so that counsel may prepare their clients.

Private Caucuses

1. The importance of the client's role. The client must feel that he or she has had an opportunity to be heard at the mediation or the client may become inflexible throughout the duration of the mediation. Additionally, a client may often have interests in settling a dispute against his or her lawyer's recommendation that only become known through private caucus discussions at mediation.

2. Who should be present. As lawyers repeatedly hear from mediators, the person with the decision-making ability and authority needs to be physically present at mediation. This necessity often may require the lawyer to have more than one client representative at the mediation.

3. Insurance coverage issues. Frequently in mediations, the parties have commercial general liability polices under which a defense is being provided with a reservation of rights by the carrier. The lawyer defending the insured party represents the party, but is paid by the insurance carrier and therefore cannot provide coverage advice to the party. A lawyer at mediation with an insurance company representative should be as certain as possible prior to the mediation that the representative possesses the authority to make offers.

4. Strength and weakness analysis. The most important work of the mediator in private caucuses is to focus the attention of the lawyer and his or her client on the strengths and weaknesses in the dispute. If risk and doubt about the success of the party in the dispute are not present, the dispute will most likely not be settled.

5. Don't pull punches or sugar coat. It is never a good idea to soft-pedal bothersome issues. The client is paying for the advice and counsel of his or her lawyer relative to the dispute, and he or she should be provided the good news along with the bad.

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6. Show and tell. In private caucus, the lawyer often discloses information to the mediator on the condition that the mediator maintain all as confidential. The lawyer must analyze whether the confidential information is nonetheless discoverable and, if so, evaluate whether allowing the mediator to use that information is advisable. This assessment should be weighed against the advantages the party may obtain by allowing the mediator to convey information the lawyer perceives as a particular weakness in the opposing party's case.

7. Using the guidance of the mediator. While a mediator serves as a neutral, it does not mean that the mediator cannot assist a party in evaluating the effect of information that a lawyer instructs the mediator to convey. If the lawyer has confidence in the mediator, the lawyer should consider relying on the skill, training and assistance of the mediator in analyzing negotiation issues and in determining how best to present them.

Closing the Deal

1. Client preparation. Prior to mediation, part of the mediation advocacy of the lawyer should be to explain the mediation process to his or her client and the method and manner in which negotiations occur during the mediation. Clients should also be prepared for the types of settlements that can be used.

2. Settlement agreements. Lawyers should consider the ramifications of the multitude of issues associated with the settlement of disputes prior to the mediation, raise them during the mediation process, and deal with them in the settlement agreement. If these matters are not carefully addressed at the beginning of and during the mediation, the resolution can be easily imperiled.

William B. Short Jr. is highly regarded for his ability to resolve complex construction disputes involving commercial, industrial, and residential projects. Since 1987, he has frequently served as a court-appointed or party-selected arbitrator and mediator. Mr. Short spent more than four decades building a litigation and transactional practice, developing a reputation as one of the top construction attorneys in Texas.