

# **PREPARING FOR MEDIATION**

**James L Knoll**

**1. Barriers to dispute resolution. The mediation process progresses when negotiators are determined to be effective and collaborative. Recognizing the following barriers to resolution (identified by Joe Epstein) enable that forward motion. The ten barriers are:**

- A. Inadequate Planning and Preparation;**
- B. First Impressions and Perceptions;**
- C. Grief;**
- D. Distrust;**
- E. Failure to Listen and Communicate;**
- F. Failure to Focus on Underlying Interests;**
- G. Bias and errors in Perception, Overconfidence, and Wrong Baselines;**
- H. Reactive evaluation;**
- I. Misunderstanding the Risk Analysis;**
- J. Failure to give Opponents Respect and Dignity.**

**2. When to mediate:**

- The right time varies.**
- When do you have enough information? A major appliance manufacturer decided that it had 80% of the needed information after it had completed its basic investigation and always attempted to resolve its disputes early.**

- Consider your client's needs.**
- Consider discussing with the mediator and, possibly, opposing counsel.**
- Legal issues should be identified for all parties and, perhaps, resolved.**
- All parties need the crucial information early enough to ensure the decision makers have an opportunity to evaluate it. Mediation Day surprises can block resolution**
- Do you need a mediator?**

### **3. Selection of the mediator:**

- Needs of your client - Training and Style of mediators varies.**
- Do you need a Mediator who understands the areas of law or issues involved in the case?**
- Do you want a facilitative or evaluative mediator?**
- Consider the mediator proposed by the other side, that mediator likely is respected in the other room.**
- Ask the Mediator for references, if needed.**

### **4. Mediation briefs:**

- Prepare the mediator.**
- Mediation briefs usually include:**
  - . A brief factual background.**
  - . Discussion of important issues of law and fact.**
  - . Status of the case and your client's expectations.**
  - . Summary of negotiations between the parties.**

- . Discussion of the strengths and weaknesses of your case and the needs of your client.**

- . Be brief.**

- . Attach important documents key to your case and that are discussed in the brief.**

- . Advise the mediator of any special needs of your client.**

- Consider sharing your brief with the other party except for the confidential parts.**

## **5. Preparing your client for the mediation:**

- Explain the process and the case.**

- Explore your client's real and perceived needs.**

- Explore the opposing parties' interests.**

- Explain the risks and costs of going to trial.**

- Communicate with your client about the case, the risks and your analysis.**

- If there are multiple parties, is it possible / advisable to settle with one or more if a global settlement cannot be obtained.**

- Advise your client that the mediator will likely test your client's position and give the client an opportunity to do something other than what the client came prepared to do.**

- Who should be present at the mediation, who will be of help, who will be a hindrance?**

- . Plaintiff, spouse, parent, etc?**

- . Defendant, an informed decision maker with real authority and access to more, if needed.**

- . Insurance representatives, house counsel, coverage counsel.**

**-The client is the decision maker.**

**6. Preparing for the Mediation:**

- Understand your client's needs and weaknesses.**
- Understand your client's case.**
- Have you shared discoverable information that adds value to your case with the other side; have you done it timely so the other side has had time to understand it?**

**7. Explain the mediation process to your client:**

- Joint sessions and what they entail. Should you discourage the mediator from having a joint session?**
  - . Statements by the attorneys or parties.**
  - . Questions by one attorney to another, by one attorney to a client.**
  - . Use of visual aids.**

**-Caucuses:**

- . Allow the client to participate.**
- . Exploring the risks and rewards of the mediation and / or going to trial including costs and wear and tear on your client.**

**8. Upon reaching an agreement, be prepared to reduce the terms to a “mediated agreement” with a more formal document to follow.**

- Should the mediator be the arbitor of any dispute over the terms of the formal agreement?**
- All unique terms should be identified.**

**-Signatures of all settling parties and their attorneys.**