

A Protocol for Pre-Suit Mediation of Business Disputes

Arbitration & Mediation

For Business, Technology and
Construction Industries

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In my experience as a mediator for business, technology and construction industry disputes, I've come to appreciate the effectiveness of Pre-Suit mediation. I've summarize some of the key aspects of this approach, and offer a suggested Protocol that can be presented as a roadmap to successful resolution of business disputes.

I start with the basic premise that rational parties will resolve disputes when they have sufficient information to make reasoned decisions. How quickly the parties get to this position determines the value of the process. As mediator, I provide the leadership, and supply the energy to fill the information needs, and make sure the parties communicate to effectively understand each other's positions. This sets the foundation for the parties to evaluate legal risks as well as cost factors, as they become confident to make reasoned concessions to resolve their dispute.

The Protocol for Pre-Suit Mediation is intended to provide advance instruction to the attorneys and principals for what I consider an integrated set of Best Practices to address a complex business dispute at Pre-Suit mediation. I invite Counsel to modify this process to best suit the needs of each particular case.

The stages of my Protocol for Pre-Suit Mediation, along with a discussion of the desired objectives at each of the stage are described below:

I. The Pre-Hearing Conferences.

My standard approach involves Pre-Hearing video conferences with each side, well in advance of the formal video conference Mediation Hearing. This forms the foundation for my future efforts as a problem-solving focused mediator. I must understand the details of the dispute as well as the broader commercial environment of the parties to develop their confidence in my leadership in the search for mutually acceptable conditions necessary to achieve settlement.

To set a tone of transparency, I summarize the results of each of the Pre-Hearing video conferences while carefully respecting confidential information. My objective is to present my understanding of each party's position in such a way that it they are encouraged to understand the logic and rationale of the other, or at least respect the position, without necessarily acquiescing.

Objective: Through the Pre-Hearing conferences, I develop a sense of the barriers to settlement, as well as the opportunities for structuring business solutions that will guide my future

suggestions. I can then focus issues and identify gaps in the necessary information that are interfering with good faith negotiation. The process continues with the necessary exchange of information.

II. Addressing Information and Document Requirements.

During the Pre-Hearing video conferences, I'm in a position to understand the nature and scope of information and document exchange best suited to the dispute and will solicit the cooperation of counsel to coordinate this exchange. I also suggest procedures for following up on any document exchange, assigning responsibilities and establishing suggested time schedules for the exchange. I proactively identify key information that may be available from third parties and suggest ways that the parties can cooperate in making this information available.

This part of the Protocol establishes the mediator's informal yet pivotal role in determining what information should be available to the parties as well as the mechanics of the document exchange phase.

The following actions are illustrative of the creative and proactive approach possible under this stage of the Protocol:

- In Pre-Suit disputes, the mediator's suggestions for document exchange often reflects the level of cooperation expressed by the parties during the Pre-Hearing Conferences. The mediator should be prepared to vary the level of formality of document exchange practices depending on preferences of counsel. Voluminous document requests or electronically stored information may require further management efforts by the mediator to maintain the proportionality of the expected effort to the requirements of a pre-suit mediation. ESI issues at the pre-suit stage may present an opportunity for the parties to cooperate using a jointly retained technical expert.
- If information from non-parties is important, the mediator will seek cooperation from the parties and suggest expedited ways to obtain the information without the need for subpoenas.
- If calculations or summaries of financial information are provided, the mediator will explore the assumptions that may be underlying the calculations and encourage open discussion on the impact of assumptions on the conclusions.
- The mediator may request that the parties prepare new materials for the mediation, such spreadsheets, tabulations, timelines or summaries that present information in ways that improve the understanding of the information.
- If technical or complex issues are pivotal to resolution of the dispute, the mediator may suggest that the parties jointly retain an expert that can provide objective information that will form the foundation for further negotiation. This information is commonly restricted "For Mediation Purposes Only".

- If a party has already retained a consultant or expert, the mediator will explore ways that the consultant's contribution can be shared for purpose of improving the other party's understanding of the consultant's work, without undermining the role of the consultant should the dispute not be settled in mediation.

III. Effective Understanding of Each Party's Position

As the information and document exchange proceeds, the mediator prepares periodic Summaries highlighting the achievements during document and information exchange, perhaps identifying further information needs, as well as listing the issues that required further effort, again managing the process by suggesting responsibilities and schedules.

The mediator will have a sense of the readiness of the parties to engage in negotiation and settlement discussions. In some instances, the mediator feels the stage is set for a productive formal hearing, and the next task is scheduling the formal mediation hearing with the principals and executives.

In other cases, positions remain at extremes. The mediator may be aware of these barriers to settlement that require each side to advance their understanding of the other's positions before risking an ill-timed formal hearing.

The mediator is prepared to continue with this next stage as a Working Session, which is designed for further information exchange and discussion by video conference among the technical or project staffs for both parties. Depending on the role of counsel, this session may be designed as a counsel only conference.

The mediator prepares an Agenda for the Working Session identifying the necessary participants, setting forth the issues to be addressed. There is no pressure to make final decisions, but the parties are encouraged to engage in candid, constructive dialogue. The mediator keeps the Working Session on task, when necessary challenging positions to focus the issues.

The following are illustrative suggestions incorporated into the Agenda for the Working Session:

- A sample data set representative of the class or type of each claim (such as delay claims, contract extra work, unforeseen conditions, etc.) is provided by one party in advance of the Joint Working Session. Documents, exhibits and supporting materials are included, along with disclosure of all calculations and assumptions. The opposing party analyzed the materials and presented their rebuttal of the conclusions presented in the sample data set at the Joint Working

Session. The resulting vigorous technical discussion altered the negotiating positions of the parties.

- One party submitted a binder summarizing a number of discrete claims for money damages with narrative explanation supported by relevant documents. Project staff from the opposing party engaged in productive discussions, resulting in establishing dollar brackets for each party's position on each of the separate claims.
- One party retained a Consultant to perform a technical analysis on the cause of failure of an assembly line structural assembly. The parties agreed to terms under which the Consultant would participate at the Joint Working Session to explain the method of investigation and analysis which was used "For Mediation Purposes Only".
- A Joint Working Session involving a dispute between an owner, architect and a defaulting contractor focused on remediation options, resulting in recommendations on a Scope of Work, quality oversight and conditions for acceptance of work.
- The Agenda for the Working Session included arrangements for conference calls with non-parties that had firsthand information and knowledge important to the dispute.
- The Agenda included a site visit by the staffs of both parties, immediately followed by the Working Session.

The Mediator concludes the session with a Summary, noting progress on settlement of issues. The mediator may recommend adjourning the Working Session if further investigation, analysis or dialogue with the parties is necessary. Otherwise, the next step is the Executive Session.

Objective: The underlying assumption in organizing the Working Session is that when parties understand each other's positions, they are forced to accept the complexity of their common factual scenario, which leads to thoughtful assessment of risk, leading to necessary compromise and concludes with a mutually satisfactory resolution to the dispute.

The Working Session removes the pressure to make decisions and focuses on what needs to be done to get to the Executive Session. The alternative is to move too quickly to the Executive Session with high expectations, only to discover that there are issues that send the parties back to the drawing board. Returning to a failed Executive Session is always problematic. Consider the Working Session a strategy to preemptively avoid the challenge of a failed Executive Session.

IV Executive Session, Negotiation and Settlement

The Executive Session is the formal Mediation Hearing and is reserved for the executives or other decision makers, who complete the negotiation and compromise having the benefit of the extensive technical interaction from the working Session.

Conclusion

Pre-Suit Mediation empowers the parties with flexible and creative approaches to voluntarily resolve their dispute. The purpose of this Protocol is to outline a step by step path that parties can rely upon to guide their mediation journey.

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