**Discussion Leader: Jerome Rock**

**Scrivener:**

**Pre-mediation Work**

1. Conference calls with attorneys
   1. Introduce your suggestions with the engagement letter/ agreement, lay it out for them in advance. Discuss options and refine the approach at the first conference.
   2. Similar to a Preliminary Hearing in Arbitration; opportunity to include a “Scheduling Order” with time commitments.
   3. Multiple conference calls possible, one early, one approaching Hearing
   4. Focus the issues, what do the attorneys think is important.
   5. Do they want you to be a Problem Solver, taking the initiative to prepare for Mediation?
   6. Make sure to identify the necessary/correct parties for the Hearing
   7. Are there necessary conditions that need to be addressed or satisfied prior to the Hearing (facts, records, calculations, valuations)?
      1. 3-D Negotiation: Powerful Tools to Change the Game in Your Most Important Deals, James A. Lax and James Sebenius. Harvard Program on Negotiation, 2006.
   8. Get agreement on Discovery, what can they agree upon to deliver, forthwith. FRCP Rule 26 standards
      1. All documents submitted with Bates Numbering
      2. Protocol for Early Case Mediation
   9. Agreement on depositions, quantity, duration
      1. Reconvene conference call upon completion of depositions.
   10. Will a Jointly retained expert be of value?
       1. Jointly selected, agreed scope, for meditation purposes only
2. Ex parte calls with attorneys
   1. Let them know this is the way you work, explain your reasoning, this is not Arbitration, and exparte communications are expected in Mediation.
   2. Encourage ex parte at any time
   3. You can be candid with attorneys, they can be candid with you
3. Pre-meetings with parties
   1. Valuable, your introduction to the parties. Explain the process, the structure of Mediation. Trust building.
   2. Size up the principals. How long will you be able to keep the parties in Joint Session?
   3. Saves time during the Hearing, avoid the frustration of being in a conference room waiting for the Mediator to discuss preliminaries with the other side.
   4. Prepare for the Video conference, don’t let it fail technically. Make suggestions on changes for the Hearing.
   5. Sometimes lawyers are protective, not always possible. You’re going to have a challenge at the Hearing.
4. Written submissions or not?
   1. Options aplenty
   2. Agenda Format
   3. List of issues only; fact and legal.
   4. Spreadsheet with issues and numbers
   5. When the Mediator wants/needs one party to listen up
   6. When counsel needs to prepare for their client’s benefit
5. Educating parties and attorneys to get the most out of mediation
   1. Not all parties/attorneys have the same understanding of the process or the same experience.
   2. Don’t overlook the importance of transaction costs, tell them the topic will come up, be prepared with an answer. BATNA exercise submitted in advance
   3. Expanding the Boundaries of the Mediation
   4. Establish the expectation that the case can settle.
      1. Continuing business relations
      2. Non competition agreements going forward
      3. Special Factors, e.g. adverse publicity, confidentiality
      4. Day in court catharsis
      5. Future performance, using the Mediator as the Standing Neutral to monitor future performance.

f.   Pre-mediation homework (e.g. discovery) and planting seeds (e.g. do a cost analysis for litigation)

Planting Seeds.

Definition, what’s the objective -Expand the Boundaries of the Mediation

Combine issues (price relief, duration of contract, other open issues, future contracts, disputes). These ideas need to be discussed with others, well in advance of the Hearing, especially when dealing with companies that have divisions or subsidiaries. You will be raising topics that are new to them.

Is there something other than money?

BATNA exercise and worksheet, bring it up now, prepare, it will be part of the Hearing

Some examples of seeds planted resulting in

Auto suppliers

Real estate developers

[ADR SPOTLIGHT: Improving outcomes in mediation with use of in person pre-hearing conferences in Business Court cases > Oakland County Legal News](https://legalnews.com/oakland/1427243)