

Best Practice: Pre-Hearing Conference - the Gateway to Extraordinary Results



When the circumstances warrant, I suggest a video conference meeting with counsel and principals for each side well before the scheduled Mediation Hearing. I realize this effort may not be the usual mediation format, but through experience and positive feedback from prior cases, I have standardized the **Pre- Hearing Conference** as the foundation for successful resolution for business, technology and construction industry disputes. I categorize the Pre-Hearing conference as the **Gateway to Extraordinary Results** because this early engagement with each party gives the Mediator a full slate of options and suggestions that can be timely incorporated into the plan for resolution of the dispute.

The following topics break out the various parts of this model, and demonstrate the importance of early and timely interaction with the parties before there has been a commitment to costly litigation strategy that may preclude what would otherwise be wise and prudent business decision making.

- **Mediator Role as Process Leader.** Mediators are experienced and trained to support a productive discussion exploring alternative dispute resolution techniques or processes that best match to the special conditions of the case. The term “Process Leader” or “Dispute Resolution Advisor” has been used to emphasize the advisory or consulting role of the mediator in recommending or selecting the appropriate ADR process for each matter. I encourage counsel to review a comprehensive Checklist of important issues and strategies that should be considered as part of the design of the mediation process, and to share this with their clients. This Checklist is available on the Mediator’s website.
- **Mediator Insight.** During the Pre-Hearing Conference, as Mediator, I develop a sense of the party’s legal position, as well as their business, negotiating and settlement objectives. The opportunity to clarify key issues and identify “gaps” or disconnects (factual or legal) between the two parties permits the Mediator to focus Pre-Hearing efforts efficiently. Hopefully, the Mediator can elicit candor on which issues or terms are key to achieving a settlement.

Mediators often face the challenge of “**Confirmation Bias**”, where each party interprets information or facts in a way that confirms their own position, while giving disproportionate consideration to conflicting information or alternative possibilities. This effect can also contribute to “overconfidence” that can improperly strengthen beliefs in

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the face of contrary evidence and creates an inability to logically evaluate the risk associated with the opposite side of an argument. If these issues are identified and addressed early during the Pre-Hearing conference, the Mediator can mitigate the deeply entrenched beliefs and extreme disagreements, paving the path for negotiation and compromise.

- **Mediator as Problem Solver.** My background as an engineer and former business executive reinforce my role as problem solver in Mediation. I am comfortable asking probing or challenging questions, suggesting strategies, making recommendations and exploring options.

I have suggested Two-Step Hearings, where the first session is designed for information exchange and discussion in a video conference room setting among the technical or project staffs for both parties, and the follow-on session is reserved for the executives who complete the negotiation and compromise having the benefit of the extensive technical interaction.

When technical or factual issues can benefit from experts, I have found it effective for the parties to share the cost of a jointly retained expert to be used "For Mediation Purposes Only". I have assisted in identifying and selecting the expert, agreeing on the scope of the investigation and using this as the foundation for negotiation during the Mediation Process.

As Mediator, I also explore interest-based factors such as existing or prospective business relations and the chance to resolve disputes that may be outside the scope of the current litigation, referred to as "expanding the boundaries" of the settlement discussions.

With the cooperation of the parties, the Mediator can act as a discovery facilitator, exchanging requests for information, maintaining schedules and resolving pre-hearing issues. Because the Pre-Hearing conference is conducted in advance of the formal Hearing, the Mediator can suggest options for compromise or settlement, or advance "trial balloons". The parties then have sufficient time to evaluate and react to these suggestions before the Hearing. These new ideas are often key parts of the mediated settlement.

- **Building the Relationship of Trust.** This Pre-Hearing session is an important first step in establishing a relationship of trust and reinforces the client's expectation that the Mediator will be diligent in assisting the parties as they arrive at the fair resolution to the dispute. I have found that if both parties are confident with me as the Neutral, their commitment to the Process is significantly enhanced, thereby improving the likelihood of an acceptable settlement.

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- **Encouraging Discussion and Enforcing Decorum.** There are times when one side will feel intimidated by the strong or assertive personality of the other party or their attorney and prefer to avoid face to face contact even at a video conference Hearing. Anger or feelings of breach of trust may also prompt the reaction to avoid personal contact, even if the contact is virtual.

An equally powerful factor that sometimes undermines a productive Mediation Hearing, is an attorney's preference for "caucus only" mediation sessions. The "caucus only" format requires each party to tell the Mediator their demand and expect the Mediator to relay this message convincingly to the other side. This shuttle back and forth is often a poor substitute for direct communication and undermines the perceived neutrality of the Mediator.

Based on my meeting with parties during the Pre-Hearing conferences, I often suggest that the formal Mediation Hearing use the "Joint Session" format, where all participants meet "face to face" in the same video conference. I am forceful in maintaining this dignified and safe conference room environment. When it is necessary, the parties can confer with their counsel in the private Break-Out Rooms.

- **Providing Principals with the Day in Court catharsis.** In mediation it is sometimes important to give a party the opportunity to fully vent their position, display their anger, their commitment to fairness, etc., their "day in court" catharsis. A party may genuinely want to issue an apology or explain the reason for their behavior or conduct. At the other end of the spectrum, an apology or sincere expression of regret may be an important component of a mutually agreeable resolution to the dispute. Likely, this is the closest a Principal will ever come to the drama of a courtroom like situation. I can deal with this anxiety and assure the principals that I will strictly enforce ground rules and maintain professional decorum during any face to face encounter. In a sense I agree to protect the principal from the discomfort of the necessary interface, and thereby build on that relationship of Trust that then permits the mediation process to continue.
- **Tangible Return on Best Practice.** There is an immediate return on your investment in the Pre-Hearing Conference; at the least, the time you spend in the actual Hearing can be substantially reduced, and you and your client are much better prepared to achieve your Mediation objectives. The Pre-Hearing conference also eliminates the frustration of waiting impatiently in separate conference rooms while the Mediator receives initial briefings with the other side. At the start of the Hearing, the parties, counsel and the

Mediator are prepared and more likely to feel comfortable to engage in substantive discussions in a timely and efficient manner.