

## *A Flexible Protocol for Pre-Suit and Early Stage Mediation in Business Disputes*

*During the course of dealing with different types of disputes, different personalities, negotiating styles, and settlement objectives, I've used strategies and techniques based largely on cooperative negotiating theory to bring the parties back to a comfortable position. When they understand each other's positions, have evaluated legal risks and cost factors, they become more willing to make reasoned concessions to resolve their dispute. Over time, I've organized these productive techniques into a cohesive structure, something I refer to as my Protocol for Pre-Suit and Early Stage disputes.*

*My Protocol is intended to provide advance instruction to the attorneys and principals of what I consider an integrated set of Best Practices for a complex business dispute at Pre-Suit or Early Stage mediation. This Protocol is only a suggestion, integrating the mediator's experience with successful techniques that resolve disputes.*

*The internet provides a convenient platform to convey the ideas and structure of the Protocol. At the earliest inquiry, I refer parties to my website where the Protocol is explained in detailed stages, and supplemented with sample agreements, forms, FAQ's and Case Studies. Much of the mystery of Pre-Suit and Early stage mediation is removed and replaced with a baseline understanding of my suggested Protocol. But this Protocol is not an edict, I'm flexible, and eager to solicit contributions to further customize the approach to suit the needs of the parties at all stages.*

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

### *I. The Pre-Hearing Conference.*

*Through the Pre-Hearing conferences, (referred to as PreMediation) 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 is interfering with good faith negotiation. The process continues with the necessary exchange of information.*

### *II. Addressing Information and Document Requirements.*

*During the Pre-Hearing 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.*

### **III. Joint Working Session– Understanding each other's positions**

*The "Joint Working Session" is designed for information exchange and discussion in a conference room setting among the technical or project staffs for both parties.*

*The mediator prepares an Agenda for the Joint 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 Joint Working Session on task, when necessary challenging positions to focus the issues.*

*The underlying assumption in organizing the Joint 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 and compromise and concludes with a mutually satisfactory resolution to the dispute.*

### **IV Executive Session, Negotiation and Settlement**

*The Executive Session 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 Joint Working Session.*

### **Conclusion**

*Pre-Suit and Early Stage Mediation empower the parties with flexible and creative approaches to voluntarily resolve their dispute. This boundless flexibility can at times result in paralysis, there are too many options, without the roadmap of how the dots could be connected. This is a challenge to the parties and their attorneys, but the greatest challenge is to the leadership of the mediator. The purpose of this Protocol is to outline a step by step path that parties can rely upon to guide their mediation journey.*