

## Pre-Suit Mediation Agreement

1

**Designation of Neutral.** The undersigned have agreed to participate in a Mediation by video conference to be conducted by Jerome F. Rock, Esq. (the Mediator) for the purpose of compromising, settling or resolving disputed claims arising out of the matter herein referenced. The parties acknowledge that the Mediator is not acting as an attorney or advocate for any party and that any recommendations or statements by the Mediator do not constitute legal advice by the Mediator. The parties acknowledge that they have been advised to seek and are relying on the advice of their own counsel in connection with any agreement with respect to pre-litigation matters, including tolling statutes of limitations, stand still or protective orders, and arrangements for litigation hold notices, including preservation of Electronically Stored Information (ESI).

The parties therefore agree as follows:

2

**Mediation Proceedings.** This is a voluntary, non-binding Mediation. The purpose of the Mediation is to attempt to compromise, settle or resolve disputed claims between and or among the parties prior to initiation of any litigation proceedings by either party. The Mediator's role is to act as a Neutral party for the purpose of assisting the parties to resolve these claims. Prior, during or after the course of the mediation, the Mediator is authorized to conduct joint and separate communications or conferences with the parties and their counsel; and at the Mediator's discretion, to provide an evaluation of each party's case, if requested, and to make recommendations for settlement.

3

**Confidential Nature of Mediation/Proceedings.** In order to encourage communications designed to facilitate settlement of disputed claims, the parties agree that all proceedings, including all pre-hearing activities in connection with the mediation/facilitation shall be subject to MCR 2.412 of the Michigan Court Rules and MRE 408 of the Michigan Rules of Evidence and FRE 408 as applicable as well as USDC EDM Local Rule 16. These rules generally provide, and the parties specifically agree, that evidence of conduct, anything said, or of any admission made during mediation and/or settlement discussions, or in documents prepared for or introduced during mediation and/or settlement discussions, shall not be admissible in evidence or subject to discovery, and that disclosure of this evidence shall not be compelled in any civil action. The parties are encouraged to use the designation "**For Mediation Purposes Only**" on documents or information submitted in support of this mediation. This designation identifies materials as protected under this agreement and may not be used for any other purpose except as provided herein. Evidence that the parties have entered into a written settlement agreement during the mediation may be disclosed and is admissible to the extent necessary to enforce the settlement.

**Video Conferencing.** Special awareness is necessary to control the video conference environment to maintain the confidentiality of the Mediation Process. We do this by making sure we conduct the video conference without letting unauthorized individuals see or hear portions of the video conference. The following requirements are established to accomplish this objective:

- All parties must be on a secure wi-fi network. You may **not** use public wi-fi for the video conference mediation session, no libraries, Starbucks, etc.
- Your video conference location must be private, free of interruption or interference.
- No one can be present during any portion of the mediation unless their presence is known by all other mediation participants, and that person has signed the Mediation Agreement. The video conference should not be overheard by third parties and you should not permit others to “listen in” without permission. You will be asked to confirm that you’re alone in the video conference.
- Mediation is a confidential process. The video conference mediation cannot be recorded by the Host (Mediator) or anyone else. You may always make personal written notes during the mediation.
- Documents that are displayed at the video conference mediation using the Share Screen function in ZOOM should be designated “For Mediation Purposes Only” and subject to the confidentiality terms of the Mediation Agreement. In preparing for the Share Screen, make sure to check your computer “desktop” to avoid displaying materials not intended to be viewed by the group.



**Confidential Communication with Mediator.** During the course of communicating with the Mediator, if either party has information that is considered too sensitive to present to the other side, you may agree to present this confidential information to the Mediator on a confidential “for mediator’s eyes only” basis, until the time, if at all, that a party is prepared to disclose the information. The Mediator may be able to use this information to facilitate settlement, without disclosing the information.



**Exclusion of Mediator Testimony and Limitation of Liability.** The Neutral shall not be subpoenaed or otherwise compelled to testify in any proceeding relating to the subject matter of the mediation and shall not be required to provide a declaration or finding as to any fact or issue relating to the mediation proceeding or the dispute which is the subject of the mediation proceedings. The Neutral, and any documents and information in his possession will not be subpoenaed in any proceeding and all parties will oppose any effort to have the Neutral or documents subpoenaed and will jointly and severally hold the Neutral harmless from costs associated with asserting this position. The Mediator shall not be liable to any party for any act or omission in connection with the mediation proceedings conducted pursuant to this Agreement.



**Mediator's Services and Compensation.** The parties will compensate the Mediator for the following services at the fixed rate of \$ \_\_\_\_\_ for each party.

The **Mediator’s Protocol for Pre-Suit Mediation of Business Disputes** is attached to this Agreement and outlines the Mediator’ approach to Pre-Suit Mediation, which include the following categories of services.

**a. Mediator’s Administrative & Pre-Hearing Services.** The Mediator’s services include scheduling the video conference mediation hearing, organizing and conducting the Mediation Pre-Hearing Conference, video conferences or telephone calls with counsel, review of briefs and other written materials, and preparation for the mediation hearing, all of which will be billed on a fixed fee basis.

**b. Pre-Hearing Conferences.** For complex matters, the Mediator prefers to meet by video conference with counsel and/or parties before the scheduled Mediation Hearing.

**c. Agenda and Materials for Hearings.** Based on the Mediator's conversations or video conferences with the parties and his understanding of the issues, the Mediator may prepare an Agenda for the Hearing which will be distributed to all parties in advance. Depending on the complexity of the matter, the Mediator may request the parties to prepare supplemental materials, such as time lines, or summary tables that will be used during the Hearing. The Mediator often suggests that counsel modify the conventional approach to Mediation Summaries.

**d. Mediator's Hearing Services.** The Mediator's Services include attendance and participation at the video conference mediation hearing or conference.

**e. Mediator's Post Hearing Services.** At the request of all parties, the Mediator will provide additional services to further the settlement of the matter after the conclusion of the video conferenced mediation hearing. Post Hearing Services will be billed at the rate of \$400 per hour, which will be shared equally by the parties.

**f. Responsibility for Mediator's Fee.** United States District Court for the Eastern District of Michigan, Local Rule 16.3 (h), provides that the attorney or law firm representing a party participating in ADR is directly responsible for fees payable to the Mediator. To the extent consistent with ethical rules, the attorney or law firm may seek reimbursement from the client. The parties agree that matters are not subject to the jurisdiction of the USDC EDM, the attorney or law firm will none the less be responsible for the Mediator's fee. The attorney or law firm should therefore anticipate the obligation for the Mediator's fee, and request advance deposit of the fee from their client. At the conclusion of the Mediation Hearing, the Mediator will provide its Statement for Services at the stated rate, which is due on presentment.



**Conflict of Interest; Disclosures; Waiver.** The parties and their counsel acknowledge and agree that in the Mediator's capacity, he is not acting as an attorney or advocate for any party in connection with the Mediation. The parties and their counsel will disclose to the Mediator, and the Mediator will disclose to each of them all matters that each reasonably believes requires disclosure pursuant to MCR 2.411(B)(4) or other applicable rules.



**Counterpart Execution; Binding on Representatives.** This Agreement may be executed in any number of counterparts which when taken together shall constitute one fully executed Agreement. This Agreement when so executed shall inure to the benefit of and be binding on the undersigned parties as well as their lawyers, respective representatives or other persons they have caused to be present during these mediation proceedings.

As an alternative to signing this Agreement in person, this document may be fully executed by email using the following instructions:

1. The email (with the Mediation Agreement attached) is sent to the recipient (attorney of client).
2. The recipient of the email (attorney or client) will **Forward** the email back to the Mediator at this email address: [JRock@JeromeRockLaw.com](mailto:JRock@JeromeRockLaw.com). The following statement should be typed on the email:

"I, (fill in name of attorney or client ) have read the Attached Mediation Agreement and this Forwarded email serves as my "**signature**" and agreement to be bound by the terms of the Mediation Agreement".

3. The Mediator will "**acknowledge**" the receipt of the Forwarded email, thus completing the "**signature**" process.

Neutral  
Jerome F. Rock (P27317)

\_\_\_\_\_

Date:

In the Pre-Litigation Matter:  
***Case Caption***

Attorney for Party.

\_\_\_\_\_ Date: \_\_\_\_\_

Client:

\_\_\_\_\_ Date: \_\_\_\_\_

Attorney for Party:

\_\_\_\_\_ Date: \_\_\_\_\_

Client:

\_\_\_\_\_ Date: \_\_\_\_\_

***Attachment: A Protocol for Pre-Suit Mediation of Business Disputes***

## ***A Protocol for Pre-Suit Mediation of Business Disputes***

**Arbitration & Mediation**

For Business, Technology and  
Construction Industries

**JEROME F. ROCK**

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.**

**Jerome Rock is an attorney, engineer and former business executive who maintains a practice limited to arbitration and mediation of complex business, technology and construction industry disputes. He is a member of the Commercial, Construction and Large Complex Case Panels for the American Arbitration Association and is a member of the Professional Resolution Experts of Michigan. He has been awarded the AV Preeminent rating, the highest rating for ethical standards and legal ability by Martindale-Hubbell, Super Lawyer in ADR by Thompson Reuters and Top Lawyer by Detroit Business magazine. Information on his approach to ADR, along with references and case studies are available on his website, [www.JeromeRockLaw.com](http://www.JeromeRockLaw.com).**