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. See the White Paper section at my Website for a discussion on PreMediation as a Best Practice.

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. The 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 tor 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.

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[Complete Article Published as ADR SPOTLIGHT in the Oakland County Legal News, contains examples and references to Case Studies]

In my experience as a neutral in business, technology and construction industry disputes, I've come to appreciate the effectiveness of Pre-Suit and Early Stage mediation. As a former business executive, I understand the value of minimizing disruption to business operations. If a dispute arises out of a business transaction, typically the parties have already negotiated many terms of the initial deal. However, their ability to negotiate a resolution to the dispute may be thwarted. There is strong incentive to try one last effort to avoid the litigation trap, particularly when they sense that the other party may share the desire. Clients want to be the "alternative" in the dispute resolution process to maintain control of their problem. The principals are all in, even if they're not entirely clear of the details of their commitment.

But most business disputes also have a layer of legal rights and responsibilities that must be acknowledged, and if not managed in proper proportions, can overwhelm and undermine the process.

Dealing with lawyers in Pre-Suit and Early Stage disputes is as important as dealing with their clients. The lawyers' instinct is that they don't want to lose control in an undefined process with vague rules and may therefore be cautious and reserved. Pre-Suit mediation doesn't have any of the "Rules" that are the stock in trade of the litigation attorney, and Early stage mediation puts the "Rules" on hold pending the mediation process. Mediation Procedures are published by ADR service organizations, such as the American Arbitration Association and the International Institute for Conflict Prevention and Resolution (CPR), but these procedures are open ended and of limited utility to lawyers. Lawyers have clients to "protect", but there is uncertainty as to how to exercise that responsivity in these early stages. Sometimes lawyers experience is an unstated, but underlying anxiety, about abdicating their responsibility in a yet undefined process.

As a result, the mediator's initiative in suggesting options, or flexible or creative arrangements is often met with caution. The mediator's creativity can even be viewed as unorthodox and treated suspiciously. Without the commitment or at least acquiescence of the lawyers, the creative process is stalled, frustrated, or undermined.

If the mediator is experienced, many of the lawyers' concerns can be anticipated and addressed during an introductory telephone call, discussing the legal issues, the status of discovery, exploring settlement positions as well as preferences on mediation summaries or briefs. Retainer letters and

mediation agreements may provide additional administrative instructions, and collectively, these guidelines supplement the Lawyers' own "Rules".

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.

Attorneys are comfortable with Protocols, some written, some to be learned through practice. Many judges issue their courtroom protocols, setting forth their preferences and requirements for given conditions. 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:

IV. The Pre-Hearing Conference.

My standard approach, whenever practical, involves an in-person Pre-Hearing conference with each side, well in advance of the formal 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 the Pre-Hearing 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.[1]

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 is interfering with good faith negotiation. The process continues with the necessary exchange of information.

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

- *To remove the time pressure of discovery cut off schedules for early stage disputes where litigation is pending, the scheduling order and status of discovery must be considered. The mediator can take the initiative to contact the Judge's Case Manager or clerk to extend schedules so that the attorneys, if necessary, will have sufficient opportunity to complete their formal discovery activities.*
- *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.*

[1] I described the value of this Pre-Hearing conference format for Business Court cases in an earlier ADR SPOTLIGHT column, July 1, 2016.

- *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 and expert that can provide objective information that will form the foundation for further negotiation.*
- *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.*

VI. Joint Working Session– Understanding each other's positions

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 meeting. In other cases, positions remain at extremes and the mediator is aware of the 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 of the Protocol, what I characterize as the "Joint Working Session", which 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. The 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 following are illustrative suggestions incorporated into the Agenda for the Joint 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 "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 Joint Working Session.*

The Mediator concludes the session with a Summary, noting progress on settlement of issues. The mediator may recommend adjourning the Joint 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 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.

The Joint 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 Joint Working Session a strategy to preemptively avoid the challenge of a failed Executive Session.

IV Executive Session, Negotiation and Settlement

The Executive Session is reserved tor 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.