

The Paralegal's Mediation Checklist: How to Prepare Your Attorney for Action

IAJ Webinar Series

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Plaintiff Pre-Mediation Checklist

Before Mediation is Calendared

(used by attorney and assistant)

<p>Does client consent to mediate?</p> <p><input type="checkbox"/> Yes</p>
<p>Talk with opposing counsel:</p> <p><input type="checkbox"/> Agree on attendees?</p> <p><input type="checkbox"/> Agree on mediator fee split?</p> <p><input type="checkbox"/> Agree on date(s)/time/place?</p> <p><input type="checkbox"/> Agree on mediator to hire?</p> <p><input type="checkbox"/> Agree on who will book mediator?</p>
<p>Is mediator officially booked?</p> <p><input type="checkbox"/> Yes</p>
<p>Has pre-mediation letter been mailed to client?</p> <p><input type="checkbox"/> Yes</p>
<p>Has pre-mediation letter been mailed to opposing counsel?</p> <p><input type="checkbox"/> Yes</p>

One Week Before Mediation

(used by attorney or assistant)

<p>Confirm all unpaid bills and subrogation amounts:</p> <p><input type="checkbox"/> All outstanding balances confirmed by phone call?</p> <p><input type="checkbox"/> All subrogation amounts confirmed in writing?</p> <p><input type="checkbox"/> Contact info collected for all lien holders who may be open to compromise?</p>
<p>Get final client approval for:</p> <p><input type="checkbox"/> Medical expense summary</p> <p><input type="checkbox"/> Future medicals calculation</p> <p><input type="checkbox"/> Lost earnings calculation</p> <p><input type="checkbox"/> Future earning loss calculation</p> <p><input type="checkbox"/> Initial demand amount</p>
<p>Has pre-mediation letter been mailed to mediator?</p> <p><input type="checkbox"/> Yes</p>

Day Before Mediation

(used by attorney or assistant)

<p>Pack for mediation:</p> <p><input type="checkbox"/> Correspondence file</p> <p><input type="checkbox"/> Pleadings file</p> <p><input type="checkbox"/> Deposition transcripts</p> <p><input type="checkbox"/> Expert reports</p> <p><input type="checkbox"/> Key exhibits/photos</p> <p><input type="checkbox"/> Complete set of medical records (with summary or index)</p> <p><input type="checkbox"/> Medical expense summary (with copy for each party)</p> <p><input type="checkbox"/> Lien holder contact information</p> <p><input type="checkbox"/> Itemization of current litigation expenses</p>
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CLIENT NAME
CLIENT ADDRESS

RE: Your Case

Dear CLIENT:

As you know, we have agreed to participate in a mediation to see if your case can settle. The mediation has been scheduled and the mediator has been hired. I am sending you this letter outlining the details of the mediation so that you know what to expect.

WHEN:

The mediation is scheduled for INSERT DATE. I would like you to arrive at INSERT TIME. We will not know in advance when exactly it will be over so please make the necessary arrangements to be at the mediation for the entire day.

WHERE:

The mediation is scheduled to take place at INSERT LOCATION. The address is INSERT ADDRESS. I have attached DIRECTIONS.

WHAT:

As we discussed, mediation provides the best opportunity to settle your case without going to trial. It is not a trial and the mediator will not make an official decision about who wins or how much your case is worth. The mediator simply brings everyone together in a meeting to explore whether it is possible for a compromise to be reached. Because both sides are agreeing to work on the case at the same time, most mediations - but not all - end with a settlement.

WHO:

Both sides have agreed to hire INSERT MEDIATOR NAME to serve as the mediator for your case. INSERT MEDIATOR NAME is one of the most experienced mediators in the state of Iowa and is someone who I both trust and respect. Both sides have agreed to split INSERT MEDIATOR NAME's fee equally so HE/SHE can be neutral and not favor either side.

I want to give you some idea of who will be participating in the mediation. Obviously, you and I will be there. The attorney for the other side, INSERT OPPOSING COUNSEL NAME, will also be there. It is possible that INSERT DEFENDANT NAME or a representative from INSERT DEFENDANT INSURANCE COMPANY NAME will also be there.

CLIENT NAME

DATE

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WHO (continued):

Sometimes my clients want to bring a family member or friend to the mediation with them. In my experience, that can lead to problems. Please call me beforehand if you are considering bringing someone with you to the mediation.

HOW:

My clients often have questions about how the mediation process works. While the specific steps are up to the mediator, here is an outline of how the process usually works:

1. You and I meet privately to discuss any last-minute questions or concerns
2. All of the attendees meet face-to-face in a conference room with the mediator
3. The mediator does introductions and explains the ground rules for the process
4. The mediator asks me to make some opening remarks about your case
5. The mediator asks the other side's attorney to make some opening remarks about their case - don't be surprised if they point out what they believe to be the "weaknesses" in your case - it is part of the process and actually helps us
6. You and I go to one private room and the other side goes to a different private room
7. The mediator goes back and forth between each private room bringing:
 - a. Facts and arguments that each side wants the other side to know about
 - b. Settlement demands from us and settlement offers from the other side
8. The back and forth will continue until a settlement is reached or the mediator becomes certain that a settlement is not possible because the sides are too far apart
9. If a settlement is reached, the attendees come back together in a conference room to sign a settlement agreement

As you can see, this process allows plenty of time for the two of us to talk in private before you will have to make any decisions about your case.

WHY:

My clients often ask why it is worthwhile to go through a mediation. Here - in my opinion are the three biggest reasons:

1. It is the most efficient way to find out the absolute highest amount of money that you can get for your case without going to trial. In my experience, defendants rarely settle for more than their final offer at the end of a mediation. Finding out this number will allow you to make an educated decision about whether you want to take the risk of going to trial.
2. It is an opportunity for you to get a neutral second opinion from an experienced Iowa attorney (the mediator) about the strengths and weaknesses of your case.
3. If your case does not settle, it gives us insight into the tactics and arguments the other side will use to attack your case at trial.

CLIENT NAME

DATE

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YOUR ROLE IN THE MEDIATION:

What You Should Wear:

Just like at a deposition, you will be evaluated by the other side to see if you will make a good appearance if we go to trial. Dress like you are going to an event where you want to show respect and get respect. I often suggest that my clients dress for a mediation like they are going to church or attending a job interview. You don't necessarily have to wear a business suit (slacks will work) but it is important to avoid wearing casual clothing or flashy jewelry.

What You Should Be Prepared to Say:

I will be doing most - if not all - of the talking to the mediator and the other side. If I want you to say something to the group, we will talk about it before the mediation begins.

The other side will only pay a fair settlement amount if they are convinced that you are willing to go to trial. Therefore, it is important that you NEVER say things like "I just want to get this over" or "I don't want to go to trial." You can certainly feel those things, but you should only say those things when we are alone.

What You Should Be Prepared to Do:

- Keep a poker face whenever the mediator or the other side is present
- Hear a first settlement demand from our side that is much too high
- Hear an first settlement offer from the other side that is much too low
- Remember my job is to be your advocate whenever the mediator or the other side is present and be your legal advisor when we are alone - that means I may be saying different things in different settings (what you hear when we are alone is what I really think about your case)

I will be contacting you shortly before the mediation to finalize the information that I will present at the mediation. In the meantime, please give me a call if you have any questions about this letter.

Sincerely yours,

ATTORNEY NAME



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OPPOSING COUNSEL NAME
OPPOSING COUNSEL ADDRESS

RE: INSERT CASE NAME

Dear OPPOSING COUNSEL NAME:

This will confirm that we have agreed to participate in a mediation in this case. I am writing this letter to make sure that we are on the same page on a number of issues:

WHEN & WHERE:

The mediation in this case is scheduled for INSERT DATE. Our opening session with the mediator is scheduled to begin at INSERT TIME. The mediation is scheduled to take place at INSERT LOCATION at INSERT ADDRESS.

MEDIATOR:

We have agreed to hire INSERT MEDIATOR NAME. We have agreed that the mediator's fee will be paid INSERT MEDIATOR FEE SPLIT DETAILS.

ATTENDEES:

Both my client and I plan on attending the mediation. It is my understanding that you will be attending with a representative from your client's insurance company who has actual authority to settle this case. If an insurance company representative will not be attending in person or if you intend to bring your client to the mediation, please contact me immediately.

OFFERS INVOLVING STRUCTURED SETTLEMENTS OR ANNUITIES:

If you feel the need to make an offer in the form of a structured settlement or an annuity during the mediation, please provide me notice ten (10) business days before the mediation so I can arrange for an independent structured settlement broker to be present on my client's behalf. Without such notice, we will not consider or respond to an offer involving a structured settlement or annuity.

REQUESTS FOR CONFIDENTIALITY CLAUSES IN SETTLEMENT AGREEMENTS:

I am familiar with the Rodman IRS case suggesting that there can be adverse tax consequences to entering into a settlement with a confidentiality clause. I will not recommend that my client consider or respond to an offer involving a confidentiality clause without a written guarantee that my client will suffer no adverse tax consequences.

OPPOSING COUNSEL NAME

DATE

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CURRENT STATUS OF NEGOTIATIONS:

Just so that there is no confusion at mediation, it is my understanding that the following settlement demands and offers have been made in this case to date:

- INSERT DEMAND
- INSERT OFFER

If you have a different understanding of how settlement negotiations have gone in this case, please contact me before the mediation.

I look forward to working with you to settle this case. In the meantime, please give me a call if you have any questions about this letter.

Sincerely yours,

ATTORNEY NAME



CONFIDENTIAL
FOR MEDIATION PURPOSES ONLY

MEDIATOR
MEDIATOR ADDRESS

RE: CASE NAME

Dear MEDIATOR:

Please let this letter serve as our pre-mediation statement on behalf of CLIENT NAME.

BACKGROUND:

This is a case involving:

- WHO:
- WHAT:
- WHEN:
- WHERE:
- WHY:
- HOW:

LIABILITY:

Summarize evidence on issue of liability

- Identify whether liability is being seriously contested by defendant
- Identify any comparative fault issues (check discovery responses)
- Identify any novel legal issues related to liability
 - Affirmative defenses (check defendant answer)
 - Immunity issues

CAUSATION:

Summarize evidence on the issue of causation

- Identify any potentially relevant pre-incident medical issues
- Identify any potentially relevant post-incident medical issues
- Identify any novel legal issues related to causation
 - Eggshell plaintiff
 - Aggravation of pre-existing condition
 - Lost chance of survival

MEDIATOR NAME

DATE

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DAMAGES:

Summarize evidence on the issue of damages

- Identify injuries
- Identify items of damage sought and amounts sought
 - Past medical expenses
 - Identify paid medical expenses
 - Identify outstanding medical bills
 - Future medical expenses
 - Identify type of treatment
 - Provide brief calculations of cost of future treatment
 - Past lost earnings
 - Provide brief calculations supporting lost earnings claim
 - Loss of future earning capacity
 - Provide brief calculations supporting future lost earnings claim
 - Loss of Function
 - Identify any permanent impairment ratings
 - Identify any permanent restrictions
 - Pain and Suffering
 - Loss of Consortium
 - Punitive Damages
 - Other Types of Damages

ATTACHMENTS:

Attached please find the following:

- (do not include more than 10-15 pages of attachments in most cases)

SUBROGATION INTERESTS:

Identify any issues with:

- ERISA
- Medicare (approval or set-aside necessary?)
- Medicaid
- Workers' Compensation

STAGE OF LITIGATION:

- Is case filed?
- What discovery is done?
- What discovery is left to be done?
- When is trial date?

MEDIATOR NAME

DATE

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MEDIATION PARTICIPANTS:

It is my understanding that the following people will be attending the mediation:

- Identify parties, insurance representatives and counsel

PRE-MEDIATION NEGOTIATIONS:

- Demands
- Offers

Thank you for your time. I look forward to working with you next week on INSERT DATE at INSERT TIME at INSERT MEDIATION LOCATION.

Sincerely yours,

ATTORNEY NAME