

# **Best Practice Newsletter**

## **Volume 1, Issue 3**

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## **Introduction to Mediation Checklist**

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This edition of **BEST PRACTICE** is devoted to assisting the attorney in preparing for the mediation. The importance of proper preparation prior to the mediation cannot be stressed enough. One cannot expect to simply show up and hammer out a settlement without doing the groundwork. Like so many things in life, what you get out of your mediation will be directly proportional to the effort expended. To lay the foundation for a successful mediation, counsel needs to be familiar with the factual and legal issues that frame the dispute. Counsel also needs to make sure that all relevant resources are at his/her fingertip when the mediation begins.

While every case will have unique aspects, The “Mediation Checklist” can be used as a guide for the entire mediation process. The checklist divides the mediation into six parts, starting with site-selection and concluding with post-mediation wrap-up. The Mediation Checklist may be downloaded and modified to custom fit your needs.

The first section concerns location and participants. In this section counsel can anticipate the needs of the client and the specifics of the mediation venue. All of the pertinent data regarding the participants will be available in one place.

The second and third sections of the checklist will help the user prepare their own arguments and identify issues that the other side may raise. Identifying and preparing for issues before they are raised will pay dividends by making the client feel comfortable and the other side mindful of the seriousness with which you take the case.

The fourth section deals with settlement considerations. This section is intended to assist counsel in evaluating the case as well as determining what the anticipated costs of trial and likely damage verdicts might be. Counsel would be well advised to evaluate both monetary and non-monetary concerns. This section reminds counsel to discuss with the client both settlement authority and the anticipated first offer and or demand to be made.

The fifth and sixth sections deal with the actual mediation and post mediation issues. Keep a journal of the mediation proceedings and the offers and demands to determine trends and where the other party is heading. In the event that the mediation fails, the journal will help counsel identify key issues that may come up at trial and positions that need additional work before trial.

## **Detailed Explanation of Mediation Checklist**

The purpose of this checklist is to assist counsel in preparing for mediation. Preparation is paramount! Proper preparation assures that results will meet expectations.

The Checklist can be broken down into the following sections:

Section I - Site Selection, Participants, and Status

Section II - Your Case

Section III - The Other Side

Section IV - Settlement Considerations

Section V - Matters Discussed in the Mediation Session

Section VI - Post-Mediation Activities

### **Section I - Site Selection**

1. Location:
  - a. Selecting the appropriate site for the mediation is a critical first step. Always make sure that your site has enough space and the proper equipment to accommodate the needs of the parties. Consider the psychological impact of the site on the parties. Try to ensure that the site is neutral and convenient to both parties.
2. Parties:
  - a. It is essential that the ultimate decision-makers attend the mediation. Both sides should have representatives at the mediation who have authority to settle. At the very least, settlement authority must be available by phone. See however, *Nick vs. Morgan's Foods, Inc.* 99 F.Supp. 2d 1056 (E.D. Mo. 2000) affirmed by *Nick v. Morgan's Foods, Inc.*, 270 F.3d 590 (8th Cir. Mo. 2001).
3. Other Important Contacts:
  - a. The Mediator-Counsel should be certain that the mediator is well trained and experienced. Counsel should be aware of the mediator's style.
  - b. If there is a possibility that a structured settlement will be offered during the mediation, then a deferred payment specialist should be available, if not present.
  - c. If medicals will be disputed and it is possible to have a doctor on call, this may be an effective tool to use during the mediation.
  - d. Medical Liens and Worker's Compensation Liens can prevent settlement. Having the lien holder representatives on call can make the difference between settling and going to trial.
  - e. Miscellaneous-Witnesses who can clear up a complicated issue, family members, trusted friends-all can help facilitate a settlement. Most should be willing to participate if it means that they can avoid appearing at trial. Follow up in writing with those individuals that you want to have on call and provide them with the time and date of the mediation and make sure you have their phone number.

4. Case Status:
  - a. Always be aware of case status. If the statute of limitations is going to run out on Thursday, then don't worry about Friday's mediation. Look to your pleadings and make sure that the court proceedings are proper. Check to make sure that you have properly joined any third parties. You can always announce any recent changes in your opening statement at the mediation. If there is a mistake in the pleadings that you will be correcting, be sure to mention this in your opening statement.

## **Section II - Your Case**

1. Liability Issues should be raised, examined, and a position prepared based on a fair and reasonable interpretation of the facts.
2. Evidence: Identify and determine the importance of all documents and evidence that is to be discussed during the mediation session. Copies of important evidence should be prepared IN ADVANCE for the other party to review.
  - a. Consider if your client has given any prior statements
  - b. Does the official police report favor one side or another?
  - c. Are depositions and medical records catalogued and copied
  - d. Highlight the significant portions of pertinent documents. This showing of preparation will do more than simply save time, it will also indicate to the other side and your client that you are taking the mediation seriously.
3. Itemization of Specials: Settlements are often based on the amount of specials, although no one likes to admit it.

## **Section III - The Other Side**

Strengths & Weaknesses: Listing the strengths and weakness of each side is an essential part of mediation preparation.

## **Section IV - Settlement Considerations**

1. Prior to the Mediation:
  - a. Get the documents that you need and send the documents that the other side has requested. No insurance company will make a settlement offer unless there is documentation in their file. Make sure that the other side receives your documentation with sufficient time to review it.
2. Determining the Value of the Case
  - a. To make as accurate an estimate of the claim as possible, one must consider all of the legal and factual issues that would arise at trial. Consult with colleagues to arrive at a good estimate. By grounding yourself in the economic reality of the claim, you are better equipped to advise your client and challenge the other side.
3. Review the history of prior offers and demands in the case up to this point. If no offers or demands have been made, try to ascertain why.

4. Before entering the mediation session, explain to your client how the process will work. Counsel them about what they should expect, and consult with them to find out what issues (monetary and non-monetary) they consider the most important. Non-monetary concerns often hinder settlement, and need to be discussed thoroughly. Talk to your client about the settlement authority that you will require. If you are having serious problems with a client, consult with the mediator prior to the mediation to let them know that a problem exists. The mediator might be able to make helpful adjustments.
5. Make certain that you and your client agree as to the first number to offer at mediation.
6. After all of the pre-mediation work has been completed, prepare your opening statement.

#### **Section V - Matters Discussed in the Mediation Session**

1. Keep a "diary" of the mediation. Study the trends in the demand/offer cycles and see if a pattern emerges. See if you can ascertain where the other side is heading. Keeping detailed notes may help you identify previously unconsidered issues.
2. Make sure that the mediator follows your instructions throughout the negotiation. If you ever feel that the mediator is not following your instructions, immediately ask them to explain why he/she is not doing so.
3. Keep track of the offers and demands during the negotiation.

#### **Section VI - Post Mediation Considerations**

1. If the case settles, then good practice dictates that the parties sign a settlement agreement
2. If the case fails to settle, review the alternatives available, including the use of other ADR techniques, before you go to court.

## MEDIATION CHECKLIST

(This document prepared in anticipation of mediation)

### I Section I-Mediation Site

a Location	Client
Time & Date	Phone
ADA Compliant/Special Needs Identified	E-mail
Audio/Visual Equipment Needed	Fax
Meeting Confirmed	Address

### b Parties

Party (PI/Df)	Party (PI/Df)
Attorney/Adjuster	Attorney/Adjuster
Party (PI/Df)	Party (PI/Df)
Attorney/Adjuster	Attorney/Adjuster

### c Other Contacts

Mediator	Phone
Experience	Fax
Style	Address
Training	E-mail
Have You Spoken With the Mediator?	Sent Requested Information to the Mediator?
Expert (PI/Df)	Expert (PI/Df)
Opinion	Opinion

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Expert (PI/Df)

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Expert (PI/Df)

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Opinion

---

Opinion

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Provider

---

Provider

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Bill Amount

---

Bill Amount

---

Lien Amount

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Lien Amount

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Contact Name and Number

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Contact Name and Number

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Provider

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Provider

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Bill Amount

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Bill Amount

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Lien Amount

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Lien Amount

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Contact Name and Number

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Contact Name and Number

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Lien (W/C)

---

Structured Settlement Expert (PI/Df)

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Contact Name and Number

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Contact Name and Number

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Other

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Other

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Contact Name and Number

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Contact Name and Number

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d **Case Status**

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Statute of Limitations

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Date Filed

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Petition

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Venue

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Answer

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Venue

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3rd Party Claim

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Important Motions

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Brief Statement of Case-Theme

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II **Section II-Your Case**

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b **Evidence Summary**

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Statement PI

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Statement Df

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Statement Wtns

---

Police Report

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Photos of Injuries

---

Photos of Damage

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Interrogatory PI

---

Interrogatory Df

---

Deposition PI

---

Deposition Df

---

Expert (PI/Df)

---

Expert (PI/Df)

---

Economist

---

Other

---

Voc/Rehab

---

**Liability Issues**

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1 3

---

2 4

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c **Itemization of Damages**

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<b>Item</b>	<b>Amount</b>	<b>Comments</b>
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---

Total Doctors

---

Total Hospital(s)

---

Other Medical

---

Chiropractic

---

Medical Subtotal

---

Past Wage Loss

---



Future Wage Loss

Property Damage

Other Damage/Loss/Pain&Suffering

**TOTAL**

**Evaluation of Issues**

Strengths

Concerns

1

1

2

2

3

3

4

4

**III Section III-The Other Side**

a Strengths

Weaknesses

1

1

2

2

3

3

4

4

**Section IV-Settlement Considerations**

a What needs to be done before the mediation:

Sent documents to the other side

1

2

Obtained documents from the other side

1

2

Obtain following information from the other side

1

2

Case Law

Important Statute(s)

b Jury Verdict Range (Venue Specific) Most Likely Award  
Average Low Average High  
Settlement Brochure  
Jury Verdict Reports  
History of offers and Demands

**Your Costs:**

**Their Costs**

Cost to Date

Cost to Date

Cost Through Trial

Cost Through Trial

Total Anticipated Costs

Total Anticipated Costs

c History of Offers and Demands:

Offer

Demand

Date

Comment

Schedule Client for Conference

Settlement Authority Amount:

In Writing: Y/N

d Client Issues Regarding Settlement

Non-Monetary Concerns/Demands

e First Offer/Demand to be made at Session:

f **Opening Statement (attached)**

**Section V-Matters Discussed In the Mediation Session**

V

a	Issues Raised During the Session	Issues Not Previously Considered
	1	1
	2	2
	3	3
	4	4

b Special Instructions to the Mediator  
 Response from the Other Side

c **Offers & Demands Made During the Session**

Offer	Demand	Time

**Section VI-Post Mediation Activities**

VI

Settlement Concluded Y/N  
 Special conditions and amount

a	<b>Written Agreement Signed?</b>	Y/N
b	Alternatives: Arbitration	Other
	Continue Mediation Y/N	New Date
	Reason(s) Continued	