5 Steps to a More Successful Mediation for Attorneys

JMM JOSEPH MCGEE MEDIATION

WELCOME

Welcome fellow attorneys, and thank you for giving me consideration as a potential mediator in your case. For over twenty-five years I represented Plaintiffs and Defendants in a wide variety of civil cases, many of which were settled through mediation, and some of which were tried to courts, juries and arbitrators.

As litigators, you are well aware of the time, expense and risk involved in a civil trial. Both insurers and Plaintiffs have an interest in avoiding risk, and in saving time and money. Mediation has become the alternative of choice in civil cases, because it is the most efficient and least expensive form of alternative dispute resolution.

Since 2013 I have devoted my full attention to mediating cases in litigation, or pre-litigation. My philosophy is to provide excellent service to Plaintiffs and Defendants and their representatives throughout the mediation process. I am available to discuss any case, and work through the mediation process to help resolve cases and disputes. And of course, the process is always confidential.

As a trial lawyer, I developed a routine for preparing a case for trial that was reproducible in a great variety of different cases. When I wanted to proceed with mediation, I took my trial preparation and re-worked it into a presentation, as though my purpose was to convince the mediator or adjuster of the rightness of my case.

Now, as an experienced mediator, I can see that the purpose and preparation for the best mediation is a little different. Litigation is and must be adversarial. Mediation is collaborative. In mediation two parties have to work together to achieve a mutually beneficial goal; that of settlement.

After serving as the neutral in quite a few mediations, it has been my observation that the steps outlined in this free e-book, if followed, consistently result in better outcomes, both increasing the chance of settlement and increasing the chance of a party settling within a favorable range. And the attorneys who are most prepared get the best results.

I hope you enjoy reading this and find it useful, and thanks for your time.

Sincerely,

Joe

Address: **3025 Brookwood Drive, Edgewood Kentucky 41017**
Email: **joemcgeemediator@gmail.com**
Phone: 513-503-1125

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There are many fine books and courses now on mediation for neutrals, but not nearly enough on mediation for advocates. Attorneys for Plaintiffs, Defendants and insurers in litigation, or pre-litigation need a system to approach mediation. Often as a litigator, I felt like I was feeling my way through the process and not really confident in the way I felt going into a trial where there was a more definite structure. But, there are a few easy steps that, if followed, will make every mediation go smoother and improve the chances for the best result.

People mediate legal cases because they want to avoid risk, save money and save time. Litigation is always risky because no one knows what a judge or jury is going to do with a case until they do it. The sheer use of resources-time and money that it takes to litigate often use up most of the benefit, making litigation increasingly not economic to pursue. Through mediation, we can save time and money and limit risk.

One problem that keeps mediation from being successful in some cases is that attorneys have not done the things that could be done to improve the chances of success. By following these easy steps, the practitioner saves his client's time and money and helps eliminate litigation risk.

Step One

Share information. As you may realize as a practitioner, successful litigation is all about information. The entire civil discovery process is about information. Insurers and self-insured risk management teams must document all pertinent facts before they can receive authority to offer money to settle cases. Plaintiffs in all types of cases want to know the strength of defenses arrayed against them before evaluating the case or making a demand for money.

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Phone: 513-503-1125

A good strategy is to call the opposing counsel early and have a frank discussion about what information each side needs to provide the other, and in what form, before the case can be mediated. This also builds trust, a valuable tool for settlement. The failure to share information creates mistrust. Evasive answers to interrogatories, frequent objections, incomplete production of documents, for example, can result in mistrust and make it harder to negotiate any settlement.

Step Two

Analyze Medical Bills, other Special Damages. Most civil cases have special damages. Each side needs full information on the claimed specials to evaluate the case. Personal injury cases in particular involve medical bills. Other cases may involve construction and engineering costs. In any case, attorneys must have these fully documented and analyzed before mediation in order to achieve the best results.

In Ohio, medical write-offs are admissible in evidence, so both attorneys need to have their analysis of these. The best practice is to share these before mediation and try to reconcile all differences so that the parties are talking about the same thing at mediation.

In every case with special damages, the best practice is to have a full and complete list, with documentation for each and a total going into the mediation.

Step Three

Deciding to share reports of experts and investigators before mediation is less simple and obvious. Sometimes there are reasons to mediate before all of these are fully developed, for example to save money. This is often done, where the other side is comfortable accepting the liability and causation facts without the expert for purposes of the mediation.

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However, there are times when the case would be stronger with the expert disclosure and the chances of a favorable settlement would be enhanced. Sometimes this has to be weighed against a tactical advantage a party could gain by waiting to disclose the expert. There are times when a party has a legitimate reason to wait to see whether the mediation stalls to reveal some item that is work product. The downside to this is that insurance companies generally have a hard time increasing settlement authority very much during mediation proceedings. These are difficult decisions and the expertise of the trial attorney is to figure out what can and cannot be exposed to achieve a mediated settlement.

In all cases where these issues exist, it is best practice to carefully consider these matters before the mediation. Going in without giving careful thought to such issues could result in making a mistake. In mediation, it is often a good idea to discuss such issues with the mediator, knowing he has to keep the information in confidence unless you allow him to disclose it. The mediator should be familiar enough with the type of litigation involved to discuss issues of this type and make recommendations. Remember, though, that you are the advocate, and it is your decision.

Step Four

Fully evaluate the effect of liens. The biggest obstacle to settlement is often liens to third parties that must be negotiated before an accord can be reached. Often lienholders are now included as parties, but even more often they are not. Well before the mediation, the Plaintiff should make a full list of all liens and amounts and contact the lien holders. One should, at a minimum, verify the amount, and get information about who to call should there be a discussion about compromise of the lien at mediation. That person should be contacted and terms of potential compromise should be discussed.

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Some lien holders have a statutory formula, such as workers' compensation and Medicare. Others have company policies they have to follow. These all have to be fully evaluated. If there is a settlement offer, the client always wants to know what will be his net recovery after paying the attorneys and the liens. As his advisor you have to be accurate in answering the question.

Defendants on notice of liens, or dealing with Medicare and Medicaid, must also fully analyze and document the file. Failure to do so can result in additional liability to the company no matter what document the Plaintiff signs. Medicare in particular is risky, as every insurer knows by now. In construction cases, failure to deal with liens can result in additional liability as well.

Step Five

Meet with your client before the mediation date. This may be obvious, but ten minutes before the mediation conference begins is not enough time to establish trust, explore your client's needs and aspirations, and guide his or her expectations toward an achievable result.

It is critical that the client understand his or her case will go to trial if not settled, have a realistic picture of what will probably happen at trial, and understand that the trial will cost money and he or she will be responsible for reimbursing that if there is a Plaintiff's verdict.

The client should also know that there are no guarantees and he or she could get very little or nothing. Defendants should be advised that adverse results, even exceeding available insurance limits are possible.

The client should understand that mediation is an alternative that can eliminate risk and expense, understand the process and that the attorney will be there to guide the client through the process and provide advice.

And of course, the client should know where, when, how to dress and where to park, and other essential details.

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Summary

Many of you already do most of these things. This could be a checklist, to be sure every case is ready to be successfully mediated. Wishing you all continued success.

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