

## **Pre-Litigation Mediations: Tips & Tricks**

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## **SAVE TIME & MONEY: BE SUCCESSFUL AT PRESUIT MEDIATIONS**

### **I. *The Benefits of Presuit Mediation vs. Litigation:***

When compared to litigation, the benefits of presuit mediation are many and varied. These benefits include the following:

- ▶ Mediation can resolve a dispute between parties expeditiously, often during a mediation session lasting only 3-5 hours, and can usually be scheduled within a few weeks. Litigation can last a year or more.
- ▶ The costs of mediation are relatively inexpensive, often less than the cost of taking one or two depositions. Sometimes, the opposing insurance company is even willing to pay 100% of the mediation costs, instead of splitting it.
- ▶ Mediation allows the parties to resolve their dispute amicably and with much less stress than litigation. This is particularly important in cases involving families, businesses and similar cases where the parties need to maintain an ongoing relationship.
- ▶ Unlike litigation, when many things often become a matter of public record, disputes resolved through mediation can remain private. Specifically, all matters discussed at mediation are confidential by statute, rule of evidence and/or agreement, and the terms of the settlement can remain confidential if the parties so desire.
- ▶ At mediation, the mediator often helps the parties formulate creative solutions to the dispute, thereby providing remedies not otherwise available through litigation. For example, instead of being limited to money judgments, injunctions and similar remedies provided by law in litigation, the parties can resolve their dispute - through mediation - by trading or dividing property, providing services, providing payment over time, making an apology, etc.

- ▶ Since the ultimate decision-making authority rests with the parties, they control the outcome of their own case- thereby increasing the likelihood the settlement will be complied with. On the other hand, in litigation, the parties must accept a decision made by an unknown judge or jury - thereby increasing the likelihood of a default.

## II. ***Tips for Success at Presuit Mediations:***

To maximize success at presuit mediations, consideration should be given to the following:

- ▶ By far, the most important consideration is to mediate your case at the right time. Sometimes mediations can be unsuccessful when they occur too early, such as when the plaintiff in a personal injury case has not yet reached MMI or more generally, when one or both of the parties have insufficient information or documentation to properly evaluate the case. Sometimes, they occur too late, although that is usually after a case has moved into litigation and the parties have spent so much money they have significantly reduced their chances of negotiating a favorable settlement. Bottomline: timing must be considered to make sure that the case is mediated as soon as possible after all the necessary information is available for all parties to negotiate from fully informed positions.
- ▶ Prior to mediation:
  - 1) Decide on whether or not it is crucial that something be completed before meaningful negotiations can take place (i.e. accident reconstruction reports, final reports from key treating physicians, vocational rehabilitation reports, life care plans, economist reports, business evaluations, etc.);
  - 2) Provide all pertinent information and document to the opposing adjuster/counsel so they too can complete their evaluations;

- 3) Discuss the strengths and weaknesses of the case with your client, as well as likely verdict or judgment ranges;
  - 4) Discuss the costs and delays of filing suit with your client (i.e. net now vs. net later; their involvement in litigation; etc.);
  - 5) If relevant, discuss tax ramifications of settlement, if any, with an accountant;
  - 6) Discuss with your client anticipated settlement terms, such as confidentiality, as well as desired settlement terms, such as letters of reference, etc.; and
  - 7) Decide with your client the financial outcome you wish to achieve and then formulate a negotiation strategy to best obtain that result. However, do not “draw a line in the sand” with your client that you may later regret. A healthy negotiation involves a give-and-take process.
- ▶ Select the best mediator for your case. Consider: geographic location, gender, personality, mediation style, substantive knowledge, mediation training, impartiality, experience and success rate, level of patience, opposing party’s willingness to listen to him/her, tenacity and willingness to follow up with post-mediation discussions and negotiations.
  - ▶ To make the parties feel at ease, choose a neutral location for the mediation (i.e. mediator’s office, hotel conference rooms, etc.). I also would strongly recommend you consider a video conference mediation via Zoom, which I have found to be highly effective.
  - ▶ Provide your mediator a concise mediation summary (5-15 pages), with pertinent exhibits (less than 100 pages), several days prior to the scheduled mediation. This summary should outline for the mediator the salient facts, applicable law, issues to be resolved and negotiations, if any, to date. Consider whether or not it would be helpful to give the

opposing adjuster/counsel a copy of your summary.

- ▶ Decide on whether or not to convey a pre-mediation demand or offer to the opposing adjuster/counsel. It is sometimes requested and it may help set an appropriate reserve on the claim file.
- ▶ Make sure all appropriate individuals attend the mediation, including any necessary parties, corporate representatives, insurance adjusters, attorneys, etc. This should also include any person important to the decision-making process, such as a spouse or partner of a party.
- ▶ At mediation, be prepared and willing to exchange meaningful information and documentation. In other words, bring your complete file with you!
- ▶ Plaintiff's counsel should come to mediation prepared to advise his/her client as to all unpaid attorney fees and costs to date, unpaid medical bills (if applicable), all lien amounts - negotiated or not (if applicable), estimated future attorney fees and costs, etc.
- ▶ At the mediation, start the negotiations at an appropriate number (not ridiculously high or too low). During the negotiation, don't discuss demands and offers in front of the mediator and certainly don't tell the mediator your client's bottom line until the appropriate time. It is usually unwise to quickly give the other side an ultimatum. However, it is also equally ineffective to "nickel and dime" the other side. Be willing to negotiate and compromise. Although most mediations take 3-5 hours, slower is always better. Often times, it is wise to ask the mediator for negotiation suggestions. Remember, "compromise" is the equitable distribution of dissatisfaction!
- ▶ Consider settlement options by thinking "outside the box" (i.e. in personal injury cases, consider structured settlements; in business disputes, consider products or services instead of money; in employment cases, consider

re-employment, an apology, letters of reference; etc.).

- ▶ If it looks like the negotiation process is quickly approaching an impasse, ask the mediator if he/she has any creative suggestions for getting beyond an impasse. Suggestions include confidential discussions on realistic bottom line settlement numbers, bracketing, a Mediator's Settlement Proposal, etc. Listen to his/her recommendations. Certainly, if you have any suggestions, do not hesitate to express them. Also, if it is becoming apparent that the entire case cannot be resolved, be prepared to explore the possibility of resolving certain portions of the matter or perhaps simplifying some of the issues, in an effort to make the remaining dispute less expensive and time consuming for litigation. Things to discuss include: stipulating as to liability or limitations on types of damages; negotiating a high/low agreement; etc.
  
- ▶ If resolution is achieved, it is crucial that the mediator prepares a comprehensive written Settlement Agreement (See sample form attached), which is signed by all parties and counsel. See *Kluver v. PPL Montana, LLC*, 368 Mont. 101, 293 P.3d 817 (2012).
  
- ▶ If necessary, consider adjourning until important missing information can be obtained, such as final reports from physicians and other relevant experts. Discuss when to reset mediation prior to initiating litigation.

**SETTLEMENT AGREEMENT**

IT IS HEREBY STIPULATED AND AGREED between the parties that this matter is completely resolved upon the following terms and conditions:

1. \_\_\_\_\_ shall pay to \_\_\_\_\_ the total sum of \$ \_\_\_\_\_ in full and final settlement of this case. This sum shall be payable within \_\_\_\_\_ days of today's date.

2. Each party shall be responsible for his/her/its own attorney fees, if any, and costs incurred in this matter. Notwithstanding the foregoing, if either party is required to take action to enforce or interpret this Settlement Agreement, the prevailing party in such action shall be entitled to an award of his/her/its reasonable attorney fees and costs.

3. A usual and customary MDTL General Release shall be executed by \_\_\_\_\_ releasing any and all claims against \_\_\_\_\_.

4. This Stipulation and Settlement Agreement is entered into by the parties with their full knowledge and consent. There have been no other promises made to any party which are not contained in this agreement.

5. \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_.

DATED this \_\_\_\_\_ day of \_\_\_\_\_, 2021.

\_\_\_\_\_  
Plaintiff

By: \_\_\_\_\_  
ABC Insurance Company

\_\_\_\_\_, Esq.  
Attorney for Plaintiff

\_\_\_\_\_, Esq.  
Attorney for ABC Insurance Company

\_\_\_\_\_  
Settlement Master/Mediator-  
, Esq.