

## **MANAGING THE PRE-SESSION PROCESS:**

### **Thoughts and Templates**

When crafting your pre-session process and the instructions that will be provided to counsel in advance of the mediation, it may be helpful to answer the following questions:

1. Will the parties be required to submit pre-session statements? If so,
  - a. Should the statements contain specific information?
  - b. Should the statements adhere to a specific format?
  - c. Should the statements be limited as to the number of pages?
  - d. Should the statements be exchanged between/among the parties?
  - e. Should the statements be submitted in a demand/response format?
  - f. How far in advance of the mediation should they be submitted?
  - g. How should they be transmitted (email, hard copy, secure document upload link, etc.)?
  - h. To what extent (if any) do you want to allow counsel to have some input as to what they will submit to you and when?
2. Will I hold a pre-session teleconference? If so,
  - a. What is the purpose of the call? (e.g. planning/logistics, building rapport/setting the tone, addressing substantive issues)
  - b. Related to item a., will I provide a specific agenda, and if so, what is it?
  - c. When will it occur? (e.g. immediately upon scheduling of the session, after the pre-session statements have been submitted – often depends on the answer to item a.)
  - d. Will it be a joint call with all counsel, or would it be better to hold separate calls with each party?
3. Do I have any other special requirements for counsel or the parties in advance of the mediation? (e.g. preparing a class action checklist or settlement checklist/term sheet, requiring in-person attendance of decision makers, etc.)
4. Will there be a joint session? If so, how should counsel prepare for it? (i.e. Will counsel be expected to make opening remarks or be prepared to discuss certain topics in the joint session?)
5. What is the general structure of the mediation session going to be? How/when will I communicate that information to counsel and/or the parties?

Your case manager will automatically send the necessary JAMS administrative information to counsel, including the mediation/confidentiality agreement, engagement agreement, information about document retention, initial requests for deposits, and payment and cancellation policies.

The templates that follow are intended to be incorporated into JAMS form correspondence or sent in conjunction with it to help counsel and the parties prepare for the mediation day. These are simply examples to help give you a place to start and may be used in part, in whole, or not at all to help you set clear expectations in advance of the mediation session.

## TEMPLATE 1

- **NO PRE-SESSION CALL**
- **SUBMISSIONS 7 DAYS IN ADVANCE**
- **NO SPECIFIC MEDIATION STATEMENT REQUIREMENTS**
- **ELECTRONIC SUBMISSIONS ONLY (NO HARD COPIES)**
- **EXCHANGE OF PRE-MED SUBMISSIONS LEFT UP TO THE PARTIES**
- **NO JOINT SESSION**

Dear Counsel:

In preparation for your upcoming mediation, please note the following:

### **SCHEDULING DETAILS**

Your %%HEARINGTYPE with %%PANELIST1 has been scheduled as follows:

DATE: %%DATELIST

PLACE: %%PLACELIST

[JAMS STANDARD ADMINISTRATIVE INFO]

### **SUBMISSIONS**

Please submit any pre-session position statements or other relevant information to [NEUTRAL] by no later than %%WEEKPRIOR. [NEUTRAL] does not have specific requirements as to content or format of pre-session submissions. We suggest that the parties confer and come to an agreement about what they will submit prior to the mediation and whether or not that information will be exchanged.

Please upload your submissions for the case using the link that will be provided in a separate email. If cases are cited, please provide links to or copies of those cases. Once the mediator has reviewed your pre-session submissions, he may contact you individually to follow up.

**A note regarding submissions:** Unless instructed otherwise, [NEUTRAL] will thoroughly review all documents provided to him, and he will bill accordingly. Please feel free to supplement your submission with a cover letter providing guidance on how [NEUTRAL] might best focus and limit his reading.

## TEMPLATE 2

- INDIVIDUAL CALLS IN LIEU OF JOINT CALL
- ELECTRONIC AND PHYSICAL COPIES OF MED STATEMENTS REQUIRED
- FLEXIBLE DUE DATE FOR PRE-MED SUBMISSIONS, USUALLY 7 DAYS PRIOR
- SPECIFIC DIRECTIONS FOR CONTENT OF PRE-MED SUBMISSIONS
- EXCHANGE OF PRE-MED SUBMISSIONS LEFT UP TO THE PARTIES
- ENCOURAGES EARLY PREPARATION OF TERM SHEET

Dear Counsel:

In preparation for your upcoming mediation, please note the following:

### **SCHEDULING DETAILS**

Your %%HEARINGTYPE with %%PANELIST1 has been scheduled as follows:

DATE: %%DATELIST

PLACE: %%PLACELIST

[JAMS STANDARD ADMINISTRATIVE INFO]

### **SUBMISSIONS**

Please provide [NEUTRAL] with your mediation statements by no later than **SUBMISSION DATE**. Plaintiff's mediation statement shall include an itemization of damages and initial demand, and Defendant's mediation statement shall include an initial offer.

[NEUTRAL] recognizes the sensitive nature of this matter and will accommodate the parties' wishes as to whether or not pre-session statements will be shared with the opposing party(ies). We suggest that the parties confer and come to an agreement as to whether or not mediation statements will be exchanged.

Your statements may be uploaded via the link that you will receive in a separate email. Documents uploaded to our secure site are accessible only by the mediator and JAMS staff and will not be provided to the opposing party(ies). If your submission with exhibits is longer than 15 pages, please also send a hard copy to the neutral at **home address or JAMS address**.

**NOTE** that [NEUTRAL] will thoroughly review all materials sent to her and will bill accordingly. Please feel free to supplement your submission with a cover letter providing guidance on how she might best focus and limit her reading.

### **PRE-SESSION CALLS**

Once she has reviewed your submissions, [NEUTRAL] will contact you individually to arrange convenient times to discuss the case prior to the mediation. Some topics she may wish to address include:

1. Mediator's disclosure—Any questions regarding [NEUTRAL'S] professional background or prior involvement with Counsel or Parties
2. Brief overview of the facts
3. Status of the litigation (fact discovery, expert discovery, dispositive motions, trial date)
4. Prior settlement negotiations, if any
5. Issues to be resolved (payment terms, confidentiality, scope of release, etc.)
6. Impediments to settlement (inability to pay, personalities, necessity for other parties such as insurance carriers or lien holders, etc.)
7. Explanation of Mediation process and procedures and questions, if any
8. Identification of Participants at the Mediation Session with sufficient authority to resolve the matter
9. Any other items the Parties wish to discuss.

### **CONSIDERATIONS FOR DOCUMENTING SETTLEMENT**

The attached checklist may be used as a guide. If the parties wish to prepare a term sheet in a different format or that more specifically addresses the issues in this matter, they are welcome. It is important, however, to prepare for a successful resolution so that the parties may avoid post-mediation complications that could derail settlement.

Please feel free to contact me if you have any questions.

Best,

**[PERSONALIZED VERSION OF MORT DENLOW'S SETTLEMENT CHECKLIST AND TERM SHEET INCLUDED WITH CORRESPONDENCE]**

**TEMPLATE 3**  
**(Part 1)**

- **PRE-MED TELECONFERENCE IMMEDIATELY UPON SCHEDULING**
- **ALL OTHER LOGISTICS/PRE-SESSION DIRECTIONS DISCUSSED WITH NEUTRAL AND AGREED TO BY COUNSEL ON TELECONFERENCE**
- **FOLLOW-UP INSTRUCTIONS INCLUDE SPECIFIC DIRECTIONS, INCLUDING PRE-MED SUBMISSION SCHEDULE, CONTENT OF SUBMISSIONS, INSTRUCTIONS FOR TRANSMISSION, ATTENDEES TO BE PRESENT AT THE MED**
- **EXCHANGE OF PRE-MED STATEMENTS LEFT UP TO THE PARTIES**

Dear Counsel:

In preparation for your upcoming mediation, please note the following:

**SCHEDULING DETAILS**

Your %%HEARINGTYPE with %%PANELIST1 has been scheduled as follows:

DATE: %%DATELIST

PLACE: %%PLACELIST

[JAMS STANDARD ADMINISTRATIVE INFO]

**TELECONFERENCE**

Finally, [NEUTRAL] would like to hold a teleconference to discuss preliminary matters. The call is scheduled as follows:

**Day, Date, Year, at Time.**

To participate, please dial **NUMBER** and request the **[NEUTRAL]** conference.

The Agenda for the Call is:

1. Mediator's disclosure—Any questions regarding [NEUTRAL'S] professional background or prior involvement with Counsel or Parties
2. Brief, objective overview of the facts by each Party
3. Status of the litigation (fact discovery, expert discovery, dispositive motions, trial date)
4. Prior settlement negotiations, if any
5. Issues to be resolved (payment terms, confidentiality, scope of release, etc.)

6. Impediments to settlement (inability to pay, personalities, necessity for other parties such as insurance carriers or lien holders, etc.)
7. Due dates for pre-session submissions
8. Explanation of Mediation process and procedures and questions, if any
9. Date(s), start time and location of Mediation Session
10. Identification of Participants at the Mediation Session with sufficient authority to resolve the matter
11. Any other items the Parties wish to discuss.

Please feel free to contact me if you have any questions.

Best,

**TEMPLATE 3**  
**(Part 2)**

Dear Counsel:

As discussed during your teleconference, the schedule and procedure for your upcoming mediation is as follows:

1. **Submission Schedule**: Mediation statements for this matter are due no later than  

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2. **Content of Submissions**: Plaintiff(s) will provide a written itemization of damages and a settlement demand with a brief mediation statement to explain why such a settlement is appropriate, and Defendant(s) will provide a written offer and a brief mediation statement to explain why such a settlement is appropriate. If there is a counterclaim, Counter-plaintiff's statement should also include an itemization of damages and a demand, and Counter-defendant's mediation statement should include an offer. The parties shall also inform [NEUTRAL] as to the status of any prior negotiations. The parties may choose to exchange their mediation statements or submit them confidentially to [NEUTRAL].

**NOTE** that [NEUTRAL] will thoroughly review all materials sent to him and will bill accordingly. Please feel free to supplement your submission with a cover letter providing guidance on how he might best focus and limit his reading.

3. **Instructions for Transmission**: Please upload your submissions using the link that was emailed to you. If your submission, including exhibits, exceeds 15 pages, please also send a hard copy addressed to [NEUTRAL] at [HOME OR JAMS ADDRESS].
4. **Attendance of Parties**: An insured Party shall appear by a representative of the insurer who is authorized to negotiate, and who has *authority to settle the matter up to the limits of the opposing Parties' existing settlement demand*.

An uninsured corporate Party shall appear by a representative authorized to negotiate, and who has *authority to settle the matter up to the amount of the opposing Parties' existing settlement demand or offer*.

Having a Client with authority available by telephone is *not* an acceptable alternative, except under the most extenuating circumstances. Because [NEUTRAL] generally sets aside at least eight hours for each Mediation Conference, it is impossible for a Party who is not present to appreciate the process and the reasons which may justify a change in one's perspective towards settlement.

We look forward to a successful and complete resolution of this case.

**TEMPLATE 4**  
**(Part 1)**

- **PRE-SESSION STATEMENTS 7-10 DAYS IN ADVANCE**
- **EXCHANGE ENCOURAGED BUT LEFT UP TO THE PARTIES**
- **ELECTRONIC AND HARD COPIES OF SUBMISSIONS REQUIRED**
- **PRE-SESSION CALL HELD AFTER SUBMISSIONS ARE MADE**
- **SPECIFIC INSTRUCTIONS AS TO ATTENDANCE OF PARTIES**
- **CLEAR INFORMATION ABOUT WHAT TO EXPECT ON MEDIATION DAY**
- **JOINT SESSION**
- **EARLY PREPARATION OF TERM SHEET ENCOURAGED**

Dear Counsel:

In preparation for your upcoming mediation, please note:

**SCHEDULING DETAILS**

Your %%HEARINGTYPE with %%PANELIST1 has been scheduled as follows:

DATE: %%DATELIST

PLACE: %%PLACELIST

[STANDARD JAMS ADMINISTRATIVE INFO]

**MEDIATION PROCEDURES**

Please review the attached mediation procedures for information about what to expect leading up to and during the mediation session. [SEPARATE ATTACHMENT WITH MEDIATION PROCEDURES INCLUDED WITH CORRESPONDENCE – THE SPECIFIC INSTRUCTIONS ARE OUTLINED BELOW.]

**SUBMISSIONS**

Please submit any pre-session position statements or other relevant information to [NEUTRAL] by no later than **??SubmissionDate**.

[NEUTRAL] prefers that the parties exchange pre-session submissions. Ideally, the Plaintiff will provide a written itemization of damages and a settlement demand with a brief mediation statement to explain why such a settlement is appropriate to Defendant's Counsel and [NEUTRAL]. Defendant will provide a written offer and a brief mediation statement to Plaintiff's Counsel and [NEUTRAL] to explain why such a settlement is appropriate.

However, if the parties agree that they wish to provide confidential mediation statements for the mediator's eyes only, they may do so as long as both parties' statements are submitted by the date referenced above.



Please upload submissions using the link that will be provided in a separate email. Documents uploaded to this link are accessible only by the mediator and JAMS staff and will not be provided to opposing parties.

If your mediation statement with exhibits exceeds 15 pages, please send a hard copy to the mediator addressed as follows:

**[ADDRESS]**

**A note regarding submissions:** Unless instructed otherwise, [NEUTRAL] will thoroughly review all documents provided to him, and he will bill accordingly. Please feel free to supplement your submission with a cover letter providing guidance on how he might best focus and limit his reading.

#### **TELECONFERENCE**

A pre-session teleconference is scheduled for ??CallDate at ??CallTime. To participate, please dial 1-NUMBER, and request the [NEUTRAL] conference.

***If you are not available at the date and time above, please respond to provide alternative availability.***

Sincerely,

[PERSONALIZED VERSION OF MORT DENLOW'S SETTLEMENT CHECKLIST/TERM SHEET INCLUDED WITH CORRESPONDENCE]

[MEDIATION PROCEDURES AS OUTLINED BELOW INCLUDED WITH CORRESPONDENCE]

**TEMPLATE 4**  
**(Part 2)**

**[neutral]**

**Case Manager:**  
**Email:**  
**Phone:**

**MEDIATION PROCEDURES**

The Parties should fully explore and consider settlement at the earliest opportunity. Early consideration of settlement can prevent unnecessary litigation. This allows the Parties to avoid the substantial cost, expenditure of time, and stress that are typically a part of the litigation process. Even for those cases that cannot be resolved through settlement, early consideration of settlement can allow the Parties to better understand the factual and legal nature of their dispute and streamline the issues to be litigated.

Consideration of settlement is a serious matter that requires thorough preparation prior to the Mediation Conference. Set forth below are the procedures [NEUTRAL] will require the Parties to follow and the procedures [NEUTRAL] typically will employ in conducting the Mediation Conference.

**1. ATTENDANCE OF PARTIES REQUIRED.**

**Parties with full and complete settlement authority are required to personally attend the Conference.**

An insured Party shall appear by a representative of the insurer who is authorized to negotiate, and who has *authority to settle the matter up to the limits of the opposing Parties' existing settlement demand*.

An uninsured corporate Party shall appear by a representative authorized to negotiate, and who has *authority to settle the matter up to the amount of the opposing Parties' existing settlement demand or offer*.

Having a Client with authority available by telephone is *not* an acceptable alternative, except under the most extenuating circumstances.\* Because [NEUTRAL] generally sets aside at least eight hours for each Mediation Conference, it is impossible for a Party who is not present to appreciate the process and the reasons which may justify a change in one's perspective towards settlement.

\*The purchase of an airplane ticket is not an extenuating circumstance.

## **2. MEDIATION FORMAT.**

[NEUTRAL] will generally use a mediation format: that is, a joint session with opening presentations by [NEUTRAL] and each Party followed by private caucusing by [NEUTRAL] with each Party. The lawyers and the Party representatives are expected to be fully prepared to participate. All Parties are encouraged to keep an open mind in order to re-assess their previous positions and to discover creative means for resolving the dispute.

## **3. STATEMENTS INADMISSIBLE.**

The Parties are requested to address each other with Courtesy and respect. Parties are encouraged to be frank and open in their discussions. As a result, statements made by any Party during the Mediation Conference are not to be used in discovery and will not be admissible at trial.

## **4. ISSUES TO BE DISCUSSED**

Parties should be prepared to discuss the following at the Mediation Conference:

1. What are your goals in the litigation and what problems would you like to address?
2. What do you understand are the opposing side's goals?
3. What issues (in and outside of this dispute) need to be resolved?
4. What are the strengths and weaknesses of your case?
5. Do you understand the opposing side's view of the case?
6. What is wrong with their perception?
7. What is right with their perception?
8. What are the points of agreement and disagreement between the Parties?  
Factual? Legal? Financial?
9. What are the impediments to settlement?  
Financial? Emotional? Legal?
10. Does settlement or further litigation better enable you to accomplish your goals?
11. Are there possibilities for a creative resolution of the dispute?
12. Do you have adequate information to discuss settlement?
13. If not, how will you obtain sufficient information to make a meaningful settlement discussion possible?

14. Are there outstanding lien holders or third parties who should be invited to participate in the Mediation Conference?

## **5. INVOLVEMENT OF CLIENTS**

Parties and their lead Counsel are expected to appear at the Mediation Conference on the date and time set. For many Clients this will be the first time they will participate in a Mediation Conference. Therefore, prior to the Mediation Conference, Counsel shall provide a copy of these Mediation Procedures to the Client and shall discuss the points contained herein with the Client.

## **6. PREPARE FOR SUCCESS**

In anticipation of a settlement, the Parties should review and be prepared to complete [NEUTRAL'S] Settlement Checklist/Term Sheet at the conclusion of the Mediation Conference. Attached please find the Settlement Checklist/Term Sheet for review.

**Should you have any questions, please contact the Case Manager.**

**We look forward to a complete resolution of this case. Thank you.**