

Francis J. Carney

Counsel and Staff:

We've set this case for mediation as below. This will be the only notice of the mediation. By attending the mediation, you agree to the terms of my mediation services as set forth in this email. If you have not mediated with me before, please read this notice carefully.

Date: ?

Time: ?

Place: ?

1. Charges and Payment

My rate is \$300/hour, payable on receipt of my emailed statement. Payment in advance may be required from out-of-state counsel or from lawyers with whom I have not previously worked; I will let you know if this is necessary. Unless you advise otherwise, I will split the bill equally among all the parties. **Note- my bill goes to counsel, not the clients, and it is payable by the lawyers who retain me, not by the client or insurance company.**

2. Mediation Statements.

I'd like a written summary of each party's position, including *selected* relevant records. Please highlight the important parts in the records; please do not require your mediator to go digging on a treasure hunt to find the records or testimony that matter. I like to read the key (*but not all*) deposition transcripts for myself, in four-to-a-page format (or .ptx), with what you consider to be the critical testimony **highlighted**. An easy way to do this is to email me your materials in PDF format, and highlight using the Adobe Acrobat highlighter function.

Mediation statements at a minimum should include:

- A. **Brief summary of the claim.**
- B. **Parties and counsel.**
- C. **Status of the case.** (Where is it filed? Who is the judge? Is discovery finished? Has a trial date been set?)
- D. **Specific allegations and defenses.**
- E. **Damages claimed.**
- F. **Settlement discussions.**

It is unlikely that I will be able to read your statement if I do not receive it by **2:00 pm** on the calendar day before the mediation. (Obviously, in cases with a lot of reading, you will want to get your mediation papers to me earlier.) Please email briefs to fjcad@gmail.com It is also fine if you want to use [DropBox](#) to get your materials to me. I won't need paper copies too. *Note that I can no longer guarantee the security of materials left on my front porch, so I now discourage that.* But if this is unavoidable, my address is [1070 East 600 South in Salt Lake](#) (near Judge High School; S side of 600 South, red brick Tudor). Please do **not** put your materials in my mailbox (the Post Office objects); leave materials on the chair or in the door.

Mediation briefs are always held in confidence, and will not be disclosed to the other side. I don't need you to tell me this. But consider sharing your mediation brief (or part of it) with your opponents; it gives you an excellent chance to educate the opposing lawyers and their clients. (You can always leave confidential information for private communications with me.)

3. Demand.

Plaintiffs usually should have a settlement demand to defendants well before the mediation. Leaving the first demand for the mediation can sometimes make it difficult for a defendant to obtain the necessary authority. But I leave this to your discretion-- sometimes it's better to arrive at an initial number after consultation with me.

Plaintiffs' counsel in PI cases-- *please* have your special damages claim thoroughly worked up and given to the defense well before the mediation. Mediations often fail because brand-new special damages information is presented at the time of the mediation, usually in the form of a claim for additional future medical expenses, a life care plan, or a newly-acquired economic report. The carrier has had no opportunity to evaluate this information, and no opportunity to adjust reserves, if that is necessary.

If you made a prior demand, and intend to go up from that at the mediation, I strongly advise you to forewarn opposing counsel in advance. Raising your demand at the mediation can really hurt in getting the mediation on track.

4. Opening Remarks

In my experience, opening statements by counsel rarely prove to be useful, so we likely won't be doing these. (Talk to me in advance if you think they might help.) We will have a meet-'n-greet when necessary, and also later "interim" sessions with all counsel to hash out problem issues. We will start in private session, usually with the plaintiff's group. Keep in mind that I always explore the warts in both sides' cases in our private sessions, and I do it in a manner and at a time that does not alienate anyone.

5. Personal Injury Claims: Liens and reimbursement claims for medical bills

In PI cases, plaintiffs' counsel should have a clear notion of any reimbursement claims or statutory liens, and consider inviting representatives of third-party lienholders to the mediation-- or at least make them aware of the mediation and try to have them available by phone. Medicaid ([Office of Recovery Services](#)) and [Workers' Compensation](#) representatives will usually attend if asked, and their presence often makes negotiation of liens easier.

Some suggestions for plaintiffs' counsel in personal injury cases:

*Where your client has been treated in a hospital, there might be a hospital lien. All state district courts are required to keep a [hospital lien docket](#). Check it.

*Where your client has had medical bills paid by a private "commercial" insurer, ERISA will generally apply. But you need to understand the distinction between a "fully insured" and a "self-funded" plan in order to understand your options for negotiating with the lienholder.

*It can be tough to ask for a substantial reduction in a Medicaid lien if you have not been in contact with their representatives well before the mediation. Be sure to keep them advised of the status of the case, and carefully review the "Notice of Claim" that Medicaid will issue-- if there are items that you feel are unrelated to the negligence, or would have been incurred anyway, you should discuss this with them before the mediation, and provide the supporting medical records.

*Finally, whenever an injured person has received or will receive Medicare or Medicaid benefits, be cognizant of the regulations that make disbursement of settlement funds by the defendant's carrier unlikely until a written waiver from

the government is received. The insurance companies are rightly concerned about their obligations under the regulations in this area, and they will not ignore them.

6. Medical Malpractice Claims: Collateral Sources and Medical Bills

There are consistent misunderstandings about the collateral source statute in medical malpractice actions, [U.C.A. Sec. 78B-3-405](#), and so I ask that all counsel read the statute carefully, as well as [Wilson v. IHC](#), 2012 UT 43, 289 P.3d 369 (Pars. 31-45). (This case is also instructive on the “billed vs. paid” issue.)

7. Premediation Discussions

There are sometime issues that merit a heads-up and a private discussion with me before the mediation itself. I am always happy to accommodate-- simply call or email. This is perfectly appropriate in the context of mediation; after all, this is not an arbitration, and it is not unusual for a mediator to meet or speak with one side (or both) privately before the mediation in order to get up to speed.

8. Confidentiality

This mediation is being conducted pursuant to the [UTAH UNIFORM MEDIATION ACT, SECTION 78B-10-1 ET SEQ.](#) You agree that all mediation discussions and negotiations are confidential. Unless all parties-- **and I**-- agree otherwise, **nothing** that is said or done in the mediation by anyone, including me, can be used for any other purpose, nor shared with anyone not a party to the mediation, including the trial court. See [U.C.A. Sec. 78B-10-104](#); [Reese v Tingey](#), 177 P.3d 605, 2008 UT 7; [Lyons v Booker](#), 982 P.2d 1142. That includes all things you say to me, and all things I say to you. (In plain English, **don't** try to use my confidential remarks as leverage after a failed mediation.)

9. Mediator's Style

I will read all the materials provided. I will listen carefully to you and your clients, and I don't mind being educated and having my opinions changed. I expect the same courtesy from you-- but I do not expect you to give up your role as an advocate.

10. My Background

Further information on my background is found on my website, www.fjcad.com

Thank you,

Frank Carney

Francis J. Carney

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