South Carolina Bar
Continuing Legal Education Division

2026 SC BAR CONVENTION

Senior Lawyers Division

"South Carolina-From the Revolution to the 21st Century "

Friday, January 23

SC Supreme Court Commission on CLE Course No. 260140

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250-year Anniversary of July 2, 1776

Bill Davies

No Materials Available

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Lawyers: How to Set and Honor Boundaries– a Path to Wellness

Tara Simkins

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Total Reform "Passed" and Pending

The Honorable Shane Massey

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Mediation Best Practices and Ethics

Neal Dickert
The Honorable Costa Pleicones
The Honorable James Lockemy
&
The Honorable Lisa Kinon

Tips for a Successful Mediation

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1. **Preparation.** Mediation obviously does not require the same level of preparation as a trial or hearing, but too many lawyers see their role as somewhat passive. I know Woody Allen said that 90% of life is about showing up, but representing a client at a mediation involves a lot more than just showing up. Knowing your client's case and the issues that can arise may be critical. You need to be prepared to respond to challenges from the other party or parties. If you are involved in representation of a plaintiff in a personal injury claim and you have not provided the defense attorney the most recent medical evaluation or an update of the medical bills, you may be wasting time to mediate. Any experience personal injury lawyer knows that insurers do evaluations at multiple levels and some times, over extended time periods. Frequently evaluations involve multiple tiers of adjusters and claims representatives. Any recommendation of surgery or letters from treaters that reflect substantial disability or limitations or show a likelihood of surgery or other extensive treatment that has not been provided to the insurer will most assuredly not be a component of any last minute re-evaluation. Some claims representatives who attend mediations can revise authority upward, but in most cases, the person at the mediation has supervising agents who may control the ultimate call on whether or not the case is resolved. Make sure every pertinent document and report is provided to your opposing in time for it to be inputted into case evaluation.

2. **Manage Client Expectations.** Every case is different and representing an insured in a personal injury case where tiers of evaluators have determined your authority is different from handling a divorce case for a client angry at the other spouse. In every mediation, you will likely learn some fact or critical issue that you did not know before the mediation. While you may be able to prepare your client for a range of possible outcomes, do not allow your client to become entrenched in a position. Your evaluation of a case may change as

a result of matters disclosed during mediation. Do not box yourself in or try to "guarantee an outcome" for a client that may not be realistic or achievable.

3. **Watch your language.** We lawyers are used to a language of our trade. We use the term settlement all the time, and it generally has a positive connotation. Our clients are generally not comfortable with the legal world and our language. Settlement in the real world means giving up or throwing in the towel. It means going to the grocery store hoping to buy steak and settling for hot dogs. I like to use the term resolution and try to avoid use of the term settlement.

4. **Be Honest with the Mediator but do not reveal too much.** Mediators generally do not want to know (at least not at the outset) what your authority is. There usually comes a time when that may be necessary, but that is late in the process. When you tell a mediator your authority, you may be placing that person in a difficult position should the other side ask the mediator point blank, what your authority is.

5. **Give the mediator a summary in advance.** In most cases, a short succinct one or two page letter outlining your position is usually quite helpful for the mediator to review before the actual mediation session. If the case is a relatively minor wreck case where liability is not seriously disputed, there may be no need to send information in advance. If you do send something, do not send copies of every medical bill in a personal injury case, or every email communication between the parties (or lawyers),or every brief that has been filed on critical legal issues. Frequently, lawyers tend to take a shotgun approach and send more than is necessary. I am reminded of the quote from Mark Twain where he said in a letter, "I apologize for the length of the letter, but I did not have time to write a short one." It takes time to put together a short, succinct statement of a case. It is time well spent. Do not send forty pages the night before a mediation and expect a mediator to digest it before the session.

6. **Do not string the mediator along only to make an abrupt stop.** While I do not usually want to know a party's authority, I do not want to be put out on a limb and be left hanging. Most mediators with experience can usually read where a party may be headed in a case. Occasionally, one might misread a party's intentions. I almost always ask any party to give me a heads up once that party is down to one or two more moves. No one wants to be in a position

of expecting a party to come up with another $50,000 when they only have $5000 or $10,000.

7. **Do Not hesitate to ask for a mediator's help.** All of us have had difficult clients who are not realistic with case evaluations. There seems to be a degree of expectation within the general public that personal injury cases are a way for one to become rich. We all know that big verdicts and settlements do not generate large recoveries without substantial, and frequently, life altering damages. When a lawyer attempts to convince his or her client that the client has unrealistic expectations, there can be a risk that the client may lose confidence in the lawyer. Most mediators are willing to step in and try to give a client a dose of reality. Do not hesitate to take a mediator aside and ask for assistance with an intransigent client.

8. **Timing of Disclosures.** There are strategic decisions that need to be made in mediations. Situations may arise where you need to decide whether to reveal potentially damaging information to your opponent, not knowing whether it will result in bringing about a resolution or have the effect of simply revealing information that might be effective at trial through surprise. The key here is knowing your case, eliciting the mediators help in reading the other party and deciding whether the risk of revelation will pay off or compromise your ability to effectively try your case, should the case not resolve.

9. **Don't Forget that you cannot unring a bell.** Most of us as lawyers or mediators have walked into a mediation where the parties have exchanged formally or informally ideas for a possible resolution. Once a number is put out by plaintiff or defendant, it is likely the other side fixes that number in concrete. We also all know that as cases progress and expenses increase, valuations change. The problem is that that new valuation is not passed along to the other side. The typical situation is where a plaintiff's lawyer tells defense attorney that he or she thinks his case can settle for $50,000. When the mediation begins, the Plaintiff's attorney tells the defendant, **for the first time,** that because of this or that, the demand is now $100,000. We all know what happens. You spend half of the day trying to get back to the starting line. If you are faced with this situation, it may be perfectly legitimate, but bring the other party along with your thinking. Springing a change of position on the other side at the beginning of the mediation may sink any chances of a resolution.

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