WINNING SETTLEMENT STRATEGIES

Program Materials 2012

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FOREWORD

The Institute is especially grateful to our outstanding Seminar Chairperson, Houston D. Smith, III, for providing the necessary leadership, organization and supervision that has brought this program into a reality. Indeed a debt of gratitude is particularly due our articulate and knowledgeable faculty without whose untiring efforts and dedication in the preparation of papers and in appearing on the program as speakers, this program would not have been possible. Their names are listed on the program at page iv of this book and their contributions to the success of this seminar are immeasurable.

I would be remiss if I did not extend a special thanks to each of you who are attending this seminar and for whom the program was planned. All of us hope your attendance will be most beneficial as well as enjoyable. Your comments and suggestions are always welcome.

January, 2012

Lawrence F. Jones
Executive Director
Institute of Continuing Legal Education in Georgia
<table>
<thead>
<tr>
<th>Time</th>
<th>Event</th>
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<td>WELCOME AND PROGRAM OVERVIEW</td>
<td>Houston D. Smith, III</td>
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<td>8:30</td>
<td>WINNING MEDIATION STRATEGIES AND TACTICS</td>
<td>Peter A. Law, Law &amp; Moran, Atlanta</td>
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<td>A VIEW FROM THE BENCH</td>
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<td>BREAK</td>
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<td>SETTLING WORKERS COMPENSATION CASES</td>
<td>Thomas L. Holder, Long &amp; Holder LLP, Atlanta</td>
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<td>DOG BITES AND CASES INVOLVING ANIMALS</td>
<td>Claudine S. Wilkins, Wilkins Law, Alpharetta</td>
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<td>David N. Lefkowitz, The Lefkowitz Firm LLC, Atlanta and Athens</td>
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<td>MAXIMIZING DAMAGES IN PERSONAL INJURY CASES</td>
<td>Michael L. Werner, Werner &amp; Associates LLC, Atlanta</td>
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<td>THE MOST COMMON MEDIATION MISTAKES</td>
<td>M. Gino Brogdon, Sr., Pope, McGlamry, Kilpatrick, Morrison &amp; Norwood, LLP, Atlanta</td>
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</table>
Table of Contents

<table>
<thead>
<tr>
<th>Page</th>
<th>Chapter</th>
</tr>
</thead>
<tbody>
<tr>
<td>iii</td>
<td></td>
</tr>
<tr>
<td>iv</td>
<td></td>
</tr>
<tr>
<td>1–8</td>
<td>01</td>
</tr>
<tr>
<td>1–8</td>
<td>02</td>
</tr>
<tr>
<td>1–13</td>
<td>03</td>
</tr>
<tr>
<td>1–16</td>
<td>05</td>
</tr>
<tr>
<td>1–3</td>
<td>06</td>
</tr>
<tr>
<td>1–19</td>
<td>07</td>
</tr>
<tr>
<td>1</td>
<td></td>
</tr>
<tr>
<td>4</td>
<td></td>
</tr>
<tr>
<td>5</td>
<td></td>
</tr>
</tbody>
</table>

Foreword ....................................................................................................................................iii

Program Schedule .....................................................................................................................iv

Winning Mediation Strategies and Tactics ................................................................. 1–8 01
Peter A. Law

How To Be a Better Lawyer ...................................................................................... 1–8 02
Ronnie Joe Lane

The Settlement Process ......................................................................................... 1–13 03
Thomas L. Holder

Why Do Lawyers Get Sued for Malpractice?
A Guide to Avoiding Malpractice and Ethics Complaints ......................... 1–16 05
David N. Lefkowitz

Maximizing Settlement Value ................................................................................ 1–3 06
Michael L. Werner

Most Common Mistakes in Mediation ............................................................... 1–19 07
M. Gino Brogdon, Sr.

Appendix:
The Institute of Continuing Legal Education in Georgia ......................... 1
ICLE Information ......................................................................................... 4
Errata Sheet ........................................................................................... 5
WINNING SETTLEMENT STRATEGIES

WINNING MEDIATION STRATEGIES AND TACTICS

Peter A. Law
Law & Moran
Atlanta, Georgia
I. INTRODUCTION.

Mediations are perhaps the most productive and efficient method of resolving cases. Since the average jury trial requires days in court and twice that amount of time in preparation, a mediation can literally save the lawyer, client, and judiciary hundreds of hours of time, as well as the risk associated with a jury trial or arbitration. As such, increasing the chances for a successful resolution at mediation will literally add years to your quality of life as a lawyer. Having mediated close to 200 cases as both a plaintiff’s and defense lawyer, we have found the following strategies will increase your chances for success.

II. PRE-MEDIATION DEMANDS AND PREPARATION.

Being prepared for mediation is an essential step toward a successful mediation. Being prepared does not mean “over the top” power point presentations or inefficient use of preparation time. Being prepared for mediation starts with a well-planned demand long before the mediation, in order to see if the parties are on the same page or whether there is a chance both sides can get in the same ballpark on the final settlement amount. On many occasions, the defense lawyer has called us after receipt of the demand and indicated the insurance company or defendant is simply not prepared to discuss the numbers in our range. That provides an opportunity for us to position the case in a way that justifies our evaluation, rather than attend a mediation where nothing productive gets done and we incur wasted time, energy and expense. Hence, always send or request a demand well before the mediation.

Preparation will also include knowing the strengths and weaknesses of your file. Reviewing the entire file, including liability and damages, is essential for a proper mediation. Remember that you will be spending the entire day with opposing counsel and your client, and you should be the master of your facts. Moreover, rather than spending the day doing nothing,
use it to review every detail of the file with the client. This will often show the client the voluminous amount of work you have done, as well as help you focus the case throughout the day, not only aiding your evaluation of the case, but also preparing you if the case does not settle.

III. PICK THE RIGHT MEDIATOR.

Picking the right mediator is often overlooked in mediation, and all mediators are not the same. A mediator who spent his legal career handling construction disputes may not be the best neutral for a wrongful death trucking case. Likewise, whether the mediator has previously represented the insurance company or one of the parties may or may not be a consideration. Most times, we waive such conflicts, but it is your client’s ultimate right to waive the conflict.

We prefer mediators who have tried a significant number of cases. The nature of our practice includes evaluating what a jury will do, and that requires a mediator who has spoken to many jurors after both winning and losing cases. If a mediator has not been around a courthouse frequently, how would he know what a jury might do? Further, a well seasoned trial mediator or judge will often have anecdotal stories that will not only influence your client on the pros and cons of any position or the case overall, but hopefully influence counsel as well.

IV. PREPARE THE MEDIATOR.

We always provide the mediator with a copy of the complaint and demand prior to the mediation. This allows the mediator to ask for helpful information and be aware of our basic allegations. Since you have already provided the complaint and demand to the other side, there is no conflict or concern regarding attorney-client privilege or other matters you wish to keep confidential. Having a well-informed mediator is certainly beneficial for both sides to help narrow the issues and make productive use of the actual mediation time.
V. BE READY FOR TRIAL.

There is obviously a benefit to early mediation in order to save time, energy and expense. In this situation, you should give your opposing side a corresponding “reduction” in the settlement evaluation that fairly reflects the early elimination of risk and expense. As an attorney, when we mediate cases very early in the case, we are often able to pass on the savings directly to the client and the opposing side by reducing attorney’s fees and/or saving expenses if warranted and appropriate. However, it is rare that a significant case can be evaluated early on, and it is more typical for both sides to have fully discovered the case.

If you are mediating a mature case, you should have some idea of your trial proof and presentation. Since we handle primarily injury and death cases, we have usually deposed the treating physician for use-in-evidence at trial or the medical examiner. For example, knowing whether there are periods of conscious pain and suffering for an estate-based death claim is a significant consideration for case value. Without knowing what the medical examiner or eyewitnesses will say, how can one be prepared to evaluate the case? A deposition usually eliminates opposing interpretations of what a witness “might” say at trial.

We also bring standard materials to every mediation. Things such as the 1949 mortality table, the medical expenses, the lien information for medical expenses, and the internal case expenses are basic materials you should have at every mediation. Knowing the client’s future prognosis for medical needs, as well as the available insurance and collectability of a judgment, is crucial.

VI. PREPARE YOUR CLIENT BEFORE THE MEDIATION.

We meet with our clients about 30 minutes before every mediation to discuss the pros and cons and tell them what to expect throughout the day. One thing I tell every client is not to
become overly “intoxicated” with their case during the opening statements when I am discussing
their strengths. I also tell them not to become overly concerned when I am pointing out their
weaknesses and complimenting the defense lawyer’s skill. This all goes back to the fact that we,
as lawyers, are evaluating risks at mediation, and the clients, as well as counsel, need to keep an
open mind to changing their evaluation. I often use the example of a stock broker advising an
imaginary client: if the stock broker was telling the investor to invest all his eggs in one basket or
one stock, hopefully that person would ask questions and make an informed decision. A
mediation is no different. It is a day for your client to ask questions of their lawyer, the mediator
and opposing counsel to make an informed decision as to whether it is best to settle or go to trial.
Most clients will look to the lawyer for advice, but in the end it is the client’s decision, and he or
she needs to make an informed decision based upon all the information.

VII. BE NICE.

When I was a defense lawyer, the lawyers that came to mediation and complimented me
for the job I did on behalf of the insurance company usually set a tone for me to be more
amenable to settlement. The lawyers that pounded the table and told us how they were going to
“beat us” usually were met with resistance when we went into our private room, creating an
over-adversarial atmosphere in which everyone in the room wanted to prove themselves and
defend their position.

It is advisable in any mediation to recognize your strengths and weaknesses. Ignoring the
other side’s positions and strengths will only create an unrealistic result for you and your client.

VIII. BE CREATIVE.

We often start the mediation settlement amount with the number stated in our demand
and move accordingly. Do not become overly concerned with the opposition’s first or second
offer. We have often become very creative in settling cases. Of course, the level of sophistication of the opposing side will affect how we mediate. If traditional back and forth numbers are not working well, employ what is called a “bracketing” approach. When you bracket, you propose a hypothetical series of moves as part of your offer. For example, if you were currently offering to settle a case for $200.00, but had room to move to $150.00 and opposing counsel was currently offering $100.00, you may reduce the hard number by $10.00 to $190.00. At the same time, you would also offer a bracket indicating that your client would drop to $170.00 if the opposing side would come to $130.00. The obvious midpoint of those two numbers is $150.00, and that is clearly telegraphed by your midpoint.

Seasoned mediators will often telegraph midpoints and then negotiate the midpoint of both plaintiffs and defendants’ brackets seeing several moves into the future like a chess match. Do not be afraid to negotiate repeatedly back and forth with brackets, always reducing your midpoint along the way. However, be clear not to give false statements with your brackets and be clear not to read too far into the other bracket unless you have been informed that their bracket has meaning. Most people who negotiate in brackets will not tell you it is a real bracket unless they absolutely mean it. The basic goal is to try to get both sides to make significant jumps to reduce the overall gap between the two parties. We often negotiate simultaneously with a firm number and also with a bracket in the event the other side wants to break out of the bracketing or not engage in the brackets at all.

There are other ways to be creative. In one mediation, we were suing a retailer and the parties came to a $25,000.00 impasse toward the end of the day. Rather than adjourn the mediation, I convinced the retailer to throw in a large screen television, DVD player and $500.00 worth of store credit to buy movies or video games for my client. I did not take a fee on these
items, and the client was very pleased. Both sides felt like this was a win-win proposition that bridged the gap and got the case settled.

In another commercial vehicle case, the defense team did an excellent job in recreating the collision and supporting their position that the defendant was not at fault. In that case, the defendants had purchased an exact replica pickup truck that my client had been driving and used it to make a video of why they did not think the collision occurred in the manner alleged. However, as part of the demonstration, they did not crash the pickup truck, but rather put it in storage in order to show the jury. Throughout the mediation, my client kept lamenting how he loved his pickup truck and could not find another. Toward the end of the day when it looked like the case would not settle, we proposed that the insurance company simply turn over title to the pickup truck in addition to the cash payment. My client was pleased to leave with a replacement truck, and the insurance company was very happy that they were able to bridge the gap in the settlement negotiations, as well as unload the pickup truck they had purchased for their demonstration.

There are other terms you should be aware of, such as a mediator’s proposal. If there appears to be an impasse, the mediator can recommend a number to both sides, and each party has a certain amount of days or weeks after the mediation to decide whether they want to accept it. Many times the mediators will not disclose how the other side responded unless both sides accept it. Thus, if you said yes to the mediator’s proposal at a later date, you would not know if the other side actually said yes unless they accepted the offer also. This is an effective method that we have employed for numerous cases, especially where the insurance adjuster must wait to get more authority from the home office.
IX. **PREPARE A DEAL SHEET.**

If it looks like the case is going to settle, prepare a very basic deal sheet as you are closing the final gap in the settlement amount. Typical terms include whether confidentiality is required, indemnity, whether a structure is permitted, how long until the funds are received, and how liens will be handled. Many times, we often indicate that a general release with agreed upon terms will be executed to formalize the deal, but more importantly, that the mediator will resolve disputes between the parties over the general terms. This saves time on a motions practice and permits prompt resolution of the basics of the agreement.

X. **LIVE TO FIGHT ANOTHER DAY.**

If it looks like a mediation is not going to settle for a traditional cash payment, do not be afraid to be creative and plan for the next mediation. Leave yourself plenty of room to continue the negotiations and recognize that things may need to be done to later bridge the gap at a second mediation. We have mediated cases two, three, and even four times to get the case settled.

A high-low proposal may also be a good mediation strategy if it looks like a case will not settle. Be prepared to lock in the terms at the mediation, which typically include considerations of when the money is to be paid, if any grounds will be permitted for an appeal or post-trial motion, and what to do in the event of a hung jury (mistrial).

XI. **DO NOT BE AFRAID TO BRING IN SOMEONE FOR MEDIATION.**

We are often brought in just for mediation, to monitor the process and evaluate the case. Many times we have an association deal that we will assist in the case if the mediation fails, doing a staggered fee approach. Bringing in a mediation “specialist” seems to be an increasingly valuable tool for the average practitioner. Typically it is just someone who has tried and
mediated a lot of cases that will know how to negotiate and stretch the other side to the best possible recovery.

XII. CONCLUSION.

Many lawyers think that proposing mediation is a sign of weakness. To the contrary, we feel that we try so many cases that mediating a case is a sign of strength. If you are willing to try a jury trial, both sides know it, and it will be reflected in your mediation recovery. The lawyers who have a reputation for trying cases often get the benefit of the doubt and make better recoveries at mediation as a result thereof. Though trying cases is fun, it is also stressful and carries with it great risk. A mediation can eliminate those risks, as well as allow the average practitioner to enjoy more quality time with his or her family and friends by not constantly preparing for trial, but rather obtaining full justice for their client while saving expense and time.
HOW TO BE A BETTER LAWYER

(An outline of things to do and not to do)

Submitted by Ronnie Joe Lane, Judge of Superior Courts of the Pataula Judicial Circuit, PO Box 636, Donalsonville, GA 39845

Ethics is what you must do or be disbarred.
Professionalism is what you should do, even when no one is looking.
What is the essence of being a professional lawyer?
Be nice. It's all about respect, courtesy, and being civil.
Golden Rule (not how you would want to be treated, but how you would want your children treated)

In O.C.G.A. § 15-19-4 Special duties for attorneys are enumerated:

It is the duty of attorneys at law

(1) To maintain the respect due to courts of justice and judicial officers;
(2) To employ, for the purpose of maintaining the causes confided to them, such means only as are consistent with truth and never to seek to mislead the judges or juries by any artifice or false statement of the law;
(3) To maintain inviolate the confidence and, at every peril to themselves, to preserve the secrets of their clients;
(4) To abstain from all offensive personalities and to advance no fact prejudicial to the honor or reputation of a party or a witness unless required by the justice of the cause with which they are charged;
(5) To encourage neither the commencement nor the continuance of an action or proceeding from any motives of passion or interest; and
(6) Never to reject, for a consideration personal to themselves, the cause of the defenseless or oppressed.

This law is not some esoteric statement of what we should hope to achieve. It is a clear statement of what is required of attorneys by law and it is violated daily by attorneys throughout our great state.

Be in the right place and be on time (be early if you need set up time)
Be ready, not just being there, but be prepared
Pre-Mark exhibits and exchange them before you begin- Give judge a copy
If you are not prepared, ready, and on time, you are being unprofessional and you are showing disrespect for the court, opposing counsel, and the jurors.
Know the court rules (USCR, State Ct Rules, Fed Rules, Rules of Evid.)
Follow those rules
Be nice to everyone (jurors, fellow attorneys, witnesses, other Court personnel, and to the public).
Never be arrogant or obnoxious.
Never act like your time is more important than anyone else
Be reasonable. If you are not reasonable, even reasonable lawyers will begin to treat you unreasonably. Reasonable judges will begin to award unreasonably
high attorneys fees against you and your unreasonable client. Don’t tell me it is not you, but it is just your client that is being so unreasonable. Make your client be reasonable or fire your client.

You must discipline yourself to fire problem clients regularly. If it is complicated and a lot of it, bring me a loose leaf notebook. In it you should organize & outline your motion.

Don’t wade through files in court looking for things you say support your motion. Have them ready and pre-marked. Hand me a copy of all of them when you begin. Serve all of them on the other lawyer at one time. Don’t make me wade through your stuff back in my office looking for things you say support your motion.

Make a list of the relief you are seeking and give it to me. If you settle part of the case, strike it off you list.

Use Power Point Presentations, print a copy, and leave it with me. Help me help you and help the jurors help you.

Make copies of cases you cite to me in your argument. Highlight important points in those cases. Make copies for the judge of the portions of the discovery, depositions, interrogatories and answers, etc. that justify the relief you are seeking.

Use charts, pictures & diagrams – a picture really is worth a thousand words. A 30 page financial report cannot be understood by most judges or jurors. Judges are just like jurors. We want to hear the simple truth of your case.

Ask yourself, what does the judge need to see and hear to understand the simple truth of my case and agree with me? Don’t overdo it. Don’t go to far. Don’t tell me anything 3 times.

Don’t hide that simple truth from the judge or jurors in a bunch of useless stuff. Answer the questions asked by the judge. If I ask a question, it is because I want the answer to that question. Don’t dodge the question. Be candid – tell me the simple truth about your case (note the word simple). If you dodge my question, I will assume had you answered it, the answer would have hurt your case. A truthful answer may hurt you less that what I think the answer is when you do not answer.

Ask for a status conference if you cannot get the other attorney to act right. Examples: problems with discovery, scheduling, unique evidentiary issues, but don’t bother me unless you have first really tied to resolve your dispute with opposing counsel. Document you efforts to resolve the problem with the other lawyer. That will make clear to the judge who the problem attorney is and will support a claim for attorneys fees.

Judges are only human and unprofessional conduct by you can affect the outcome of your client’s case.

Know how to handle Similar Transactions. Pre-trial Orders - just do them! It is clear to me that in many cases doing the pre-trial order is the first time the lawyers have even talked to each other about the case, much less actually tried to settle it.

Charges: Get a current pattern charge book and use it. If you over-reach on the charges you request, and I foolishly give them, you may win the jury trial and get your verdict reversed on appeal. Use the pattern charge before you do your own, mess them up, and get your verdict reversed. Request only charges you really need. In most cases there are usually only 5 or 6 charges you really need. If you give me 30, I will not know which ones you really want. Lawyers generally do a very poor job on charges, either by asking for none or
too many.
In criminal cases, I usually get none. In civil cases, I get too many and they appear to
have been old ones used in others cases not adjusted to the particular facts and
circumstances of the case being tried.

Do not waist time: Come in early if you have matters to be heard before the Jurors
comes in.
Give the Court warning about issues that need to be heard.
Don’t come in at 9 AM with jurors waiting and tell me there are a few matters that have
to be heard.
Jurors are voters and judges are elected by those voters. If you waist my time, I will
not like it.
If you waist jury time, I really will not like it.
That is one of the most frequent mistakes I see new and old lawyers make.

Voir Dire: Don’t start off the trial by boring the jurors and the judge with unneeded
irrelevant voir dire questions.
Ask open-ended questions that give you information about the jurors.
Ask if they know the parties and witnesses.
Ask fewer, more meaningful questions.
How do you feel about  (central issue of your case or defense)?
When you ask a question, listen to the answer.
Go to the meat of the case or your defense.
Don’t chit-chat with the jurors during voir dire.
Don’t try to ingratiate yourself to the jurors – studies show it doesn’t work and it makes
the judge ill at you.
Thank jurors for their service but only once.
Have help writing the jurors answers, so you can make or respond to Batson-
McCollum-JEB motions.
Know the 3 steps of a Batson type objection.

Opening Statements: Do not use notes.
If you can’t tell the jurors your clients story and what you want, without notes, you are
not ready.
10 to 15 minutes is usually enough for most cases.
Just tell the jurors what happened and what you want.
Don’t waste time talking about procedure, it’s a stall and the jurors already know that
from watching television.
They want to know what happened, so tell them.
Always tell jurors what you want them to do.
Don’t overdo details.
Jurors are used to very short sound bites.
Paint a picture for the jurors but do it with a “broad brush”.
Use visual aids, flip-charts, Power Point, etc. they are all helpful.
Don’t argue your case.
This draws valid objections, you lose concentration, your train of thought, momentum
and possibly the jurors.
Presentation of Evidence: Gary Christy suggested the most effective way to try cases is the simplify you case, reduce the case to 2 or 3 simple truths. Simple truths that you can prove and that if proved, will make the jurors agree with you, no matter what the other side does.

Gary said it should appear as though you are dancing with the witnesses, but you must be leading.

Be as nice as the witness will let you be and be nicer to old people and children. Go straight to the simple truths of your case, stick to those simple truths and never let them go.

Truth really is simple and is, therefore, easy to speak and easy to explain. Technical details and business transactions may be complex, but truth is simple. At least, this is the assumption that we all follow in our everyday lives. A complex story about why a job was not done makes us wonder if a simpler explanation is out there but not provided. When we try to make up our minds about matters outside of our expertise such as, international politics, we shy away from the complex realities and gravitate toward simple explanations that sit well with our expectations.

Too often jurors are discussed as some kind of unique species, so it is a point worth making: Jurors are just like all other people. And just like most people, they believe that truth is simple – and if it is not articulated simply, then they will doubt it. The principle of simplicity works in conjunction with the belief that “the truth is out there,” ready to be perceived and described. This principle applies to all aspects of trial practice. Witnesses that hesitate, search for words, avoid giving direct answers, or, worst of all, start questioning the meaning of words do not convey the simple truth. Instead, they convey the difficult time they have with the truth or, at least, this is how it looks to the jury. Because, like most people, jurors feel that while it is easy to tell the truth, it is not so easy to hide it. If the message is hard to articulate, it is less likely to be perceived as true, and certainly it will not be persuasive.

The same is true for the closing and opening statements. A story that digresses into long explanations, that begs jurors to take context into account, to look beyond appearances and not to be swayed by the other side’s rhetoric, is complex. Make your points and your story simple and let the other side try to explain why your simple statements should be dismissed in favor of more complex realities. If you can do that, if you can shift the burden of explanation to the other side and you’ve won. So, simplify, simplify and then simplify some more. Then your simple truth will begin to shine and guide the jurors to your verdict.

Don’t over-try the case.
If you insist on riding a horse to death, at least get off your dead horse!
Know your objective with each witness.
Your objective should be, or relate to, one of your simple truths.
There is no need to go beyond the simple truths of your case.
Get it and sit down.
Prepare for direct and cross.
Know what you want to get out of each witness, get it, and sit down.
Know how to impeach the witness with prior statements.
Have their statements in a separate witness file for each witness.
List what you want that witness to say, what evidence you need that witness to testify about and know where that evidence is, have it pre-marked and you should have already given it to opposing counsel to examine.
Best practice is to pre-mark all exhibits and give a copy of all of them to counsel and to the judge.
Review prior statements of the your witnesses with your witness and sometimes the other sides witnesses (when you like their statement).
Review your witnesses’ prior statements with them so your witnesses cannot be impeached with their own prior statements!
Know how to let dumb, unprepared witnesses refresh their recollection.
Object to questions and state legal grounds only.
Make out your case with evidence, not with speaking objections.
Do not argue to, or with, opposing counsel.
Argue to the judge -Don’t argue with the judge, and especially do not argue with the judge in the presence of the jurors – You will lose and the jurors will know you are losing.
Argument is the wrong word to describe what you are doing— you are trying to convince the judge or jurors that you are right.
Do not object needlessly even if you are technically correct.
Know your case. Does it hurt your case? If not, don’t object?
Present your evidence so all of the jurors can see it, hear it, touch, feel, smell and taste it.
Your witness should explain why certain evidence is not there (fingerprints, DNA, etc.)
Anticipate your weaknesses. Have your witness explain why no finger print evidence, no DNA, no weapon, etc. is presented – weather condition (raining); lost, etc.
Go over minor details, but only if necessary.
Keep it short and simple.
Remember the jurors are your audience.
Use the laser pointer-do not stand between your exhibit and the jurors.
It’s your case – not mine. (I just brought the jurors in for you, to see if you can convince them your client is right.)
They are your jurors – not mine.
Set up the courtroom before, not during court. (Get Ready)
Provide accurate demonstrative exhibits. If you do not, you will look stupid, unprepared, or worse, dishonest and that you are tying to trick the jurors.
When using tapes, provide transcripts to the jurors.
When using recordings, set it up by a witness explaining what it is, who is speaking on it, etc.
When using video depositions or tapes, edit out objectionable portions. This must be done way before trial, agreed upon by counsel, or ruled on by the court. It takes too much time to do it during trial.
Be intuitive and creative all during the time you work on your case and write down
those thoughts and put them in your trial notebook.

**Closing**

**Closing:** Time is limited! Felony - 1 hour; Capital felony (even if death not sought) - 2 hours. Extra time is mandatory, if requested by use of magic words from the code. (See code Sections at the end of this paper).

Never waive any part of closing. (If you have the right, open and close)

Federal rules limit final closing to rebuttal only - GA does not

Focus on the simple truths of your case.

Use demonstrative evidence.

When using charts, enlarge them, bigger is better. The jurors must be able to see and hear.

When arguing charges, enlarge them for easy viewing. (Get permission to use a blow up of the charge)

Paraphrase if judge will not let you read law verbatim from the chart.

Try to anticipate and answer questions the jurors might have.

Tell the jurors why particular evidence is important.

Tell the jurors what you want from them.

Use analogies to explain the circumstantial evidence.

Explain any weaknesses in your case, but only one time

If something is hard to explain, say it -- Plainly -- Slowly -- Make eye contact.

Be nice to everyone in sight.

Don’t say how good the other lawyer is or how inexperienced you are.

Don’t apologize for being a lawyer.

You are part of a respectable profession.

Without lawyers, our system of government will not work.

Stop using lawyer talk. Talk to the jurors like you talk to your friends, not like you write in briefs or when drafting a contract.

Jurors either will not understand you, or conclude you think you are better than them.

Never use the word “jury”. Jurors are individuals who must individually decide your clients case. You do not want a team, mob, or group to do that work and make those decisions.

Love the law, or sell real estate, insurance, or used cars.

Read the caselaw every day from now until the day you die.

Get high speed internet at home and if you don’t have time to read the cases decided today, read them tonight. You cannot wait and read a weeks worth of cases at one sitting. Ones mind can absorb only what ones behind can endure.

Start a Trial Notebook with index of things you may need to know during trials and motion hearings. (Why keep looking up the same thing?)

As you read cases, copy and paste to your Trial Notebook

Use a portable data storage device for your Trial Notebook

Take reference books with you to all trials and hearings.

Cell phones-turn off the ringer-get text messaging and tell your secretary to use it for messages you really need to get.

It’s all about respect, courtesy, and civility.

Jurors will respect you and the system, if you respect them.

Don’t treat the jurors like idiots.

Don’t ask the same questions repeatedly.
Don’t ask dumb questions.
Use time lines, charts, visual aids, and power point when appropriate. (they are needed in almost every case)
Use visual aids as much as possible.
Have any visual aids and all your stuff set up and ready.
Limit the number of witnesses used to prove the same point.
Ask only relevant questions.
Run your case like a business meeting. (Concise and effective)
Conflict letters (rule says do them and do them as soon as you know you have a conflict.)
Most lawyers don’t do them promptly.
Set up and use your own online calendar!
Serve copy of pleadings, letters, etc. on other lawyers and pro se parties and show service on your documents.
When you do not, you are saying to the judge that either you don’t know the rules, don’t follow the rules, or worse, that you are unethical and trying to slip something by the other side.
Work on your bad cases or get rid of them.
Sign your name where it can be read. There is not advantage to having an illegible signature.
Do not wear hard-heeled noisy shoes on hard floors.

What are my final words? **BE NICE!**

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**Interesting Code Sections and Uniform Superior Court Rules**

**Rule 4.1. Prohibition on ex parte communications.**

Except as authorized by law or by rule, judges shall neither initiate nor consider ex parte communications by interested parties or their attorneys concerning a pending proceeding.

**Rule 4.2. Entry of appearance and pleadings.**

No attorney shall appear in that capacity before a superior court until the attorney has entered an appearance by filing a signed entry of appearance form or by filing a signed pleading in a pending action. An entry of appearance and all pleadings shall state:

1. the style and number of the case;
2. the identity of the party for whom the appearance is made; and
3. the name, assigned state bar number, and current office address and telephone number of the attorney.

The filing of any pleading shall contain the information required by this paragraph and shall constitute an appearance by the person(s) signing such pleading, unless otherwise specified by the court. The filing of a signed entry of appearance alone shall not be a substitute for the filing of an answer or any other required pleading. The filing of an indictment or accusation shall constitute an entry of appearance by the district attorney.

Any attorney who has been admitted to practice in this state but who fails to maintain active membership in good standing in the State Bar of Georgia and who
makes or files any appearance or pleading in a superior court of this state while not in good standing shall be subject to the contempt powers of the court.

Within forty eight hours after being retained, an attorney shall mail to the court and opposing counsel or file with the court the entry of his appearance in the pending matter. Failure to timely file shall not prohibit the appearance and representation by said counsel.

Rule 4.6. To notify of representation.

In any matter pending in a superior court, promptly upon agreeing to represent any client, the new attorney shall notify the appropriate calendar clerk in writing (and, in criminal actions, the district attorney; and, in civil actions the opposing attorney(s) of the fact of such representation, the name of the client, the name and number of the action, the attorneys firm name, office address and telephone number.

Each such attorney shall notify the calendar clerk (and, in criminal actions, the district attorney; and, in civil actions, the opposing attorney(s) immediately upon any change of representation, name, address or telephone number.

Rule 36.4. Signatures.

All judgments, orders, pleadings and other documents shall bear the signature of the responsible attorney or party who prepared the document, with the preparer's name, proper address and telephone number typed or printed underneath.

§ 17-8-74. Extension of time, when allowed

If, before argument begins, counsel on either side applies to the court for an extension of the time prescribed for argument and states in his place or on oath, in the discretion of the court, that he cannot do the case justice within the time prescribed and that it will require for that purpose additional time, stating how much additional time will be necessary, the court shall grant such extension of time as may seem reasonable and proper, provided that the extension of time granted in misdemeanor cases or cases brought up from inferior judicatories shall not exceed 30 minutes.

§ 9-10-181. Extension of time, when allowed

If counsel on either side, before argument begins, applies to the court for extension of the time prescribed for argument and states in his place or on oath, in the discretion of the court, that he or they cannot do the case justice within the time prescribed and that it will require for that purpose additional time, stating how much additional time will be necessary, the court shall grant such extension of time as may seem reasonable and proper.
THE SETTLEMENT PROCESS

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This paper will discuss a number of the items that must be taken into consideration when trying to settle a workers’ compensation case. Over the past 25 years, it has become more difficult to evaluate workers’ compensation cases to reach adequate and reasonable settlement agreements. The intent of this paper is to provide guidance as to some of the items that need to be evaluated before a workers’ compensation case can be settled.

A. Determining the Settlement Range

A variety of factors are to be taken into account when determining the settlement range in a case. The first and most basic factor is the average weekly wage (“AWW”). The average weekly wage serves as the basis for the settlement evaluation, as the average weekly wage must be known in order to value the case. The average weekly wage must be determined in order to calculate the employee’s workers’ compensation benefits, including Temporary Total and Partial Disability benefits, as well as a Permanent Partial Disability benefits. The settlement evaluation will then include the sum of past due and potential future income benefits, as well as any outstanding and potential future medical bills.

1. Calculating the Average Weekly Wage

In Georgia, the average weekly wage of the employee forms the basis of the benefits to which the injured worker is entitled. Generally, this is the average wage for “substantially the whole” of 13 weeks prior to the date of injury. If employed for less than “substantially the whole” of 13 weeks, the wage of a similarly situated employee will be the standard. If there is no similarly situated employee, the full time weekly
wages of the employee will be used. The issue in determining benefits under this code section is under what circumstances has an injured worker been determined to work “substantially the whole of 13 weeks immediately preceding the injury.” O.C.G.A.§ 34-9-260.

In addition, Board Rule 260 states that the computation of wages shall also include the reasonable value of food, housing and other benefits furnished by the employer without charge to the employee, which constitute a financial benefit to the employee and are capable of pecuniary calculation. Also, unless something indicates to the contrary, a normal workweek is five days, the normal workday is eight hours, and the employee’s daily wage is one fifth of the weekly pay. Fractional parts of the day should be credited proportionally in computing the daily wage. For example, the daily wage of a 5 ½ day worker is the weekly wage divided by 5.5.

Finally, if the employee has similar concurrent employment, the wages paid by all similar concurrent employers shall be included in calculating the average weekly wage. So if the employee works for employer A and B, and is injured and disabled while working for employer A, the employee’s average weekly wage is calculated using the wages of both employers.

For injuries occurring after July 1, 2007, the highest maximum rate an individual can receive is $500.00 per week. The rate for temporary total disability benefits (which people are generally referring to when they say they are receiving workers’ compensation benefits) is 2/3 of the average weekly wage. Thus, a person who is making $750.00 or more will be eligible for the maximum of $500 per week.

As a practical matter, it is very important that claimants’ lawyers are sensitive to average weekly wage issues. In my experience, anything outside of the norm of 13 weeks of work prior to the date of injury presents an opportunity for error. Thus, there is an opportunity for an increase in benefits and possible attorney’s fees.

2. PPD-Permanent Impairment Disability Benefits

Permanent partial disability benefits are covered in O.C.G.A.§34-9-263. Under this code section, "permanent partial disability" means disability partial in character but
permanent in quality, resulting from loss or loss of use of body members or from the partial loss of use of the employee's body.

In cases of permanent partial disability, the employer shall pay weekly income benefits to the employee according to the schedule included within this Code section without regard to whether the employee has suffered an economic loss as a result of the injury, except as provided. It is important to note that income benefits due under O.C.G.A.§34-9-263 (PPD) are not payable so long as the employee is entitled to benefits under O.C.G.A. §34-9-261 and §34-9-262 (TTD and TPD). In other words, as long as injured workers are receiving either temporary total disability or temporary partial disability benefits, they are not eligible to receive permanent partial disability benefits. The benefits can only begin to be paid once the entitlement to lost wage benefits has expired.

Subject to the maximum and minimum limitations on weekly income benefits outlined in O.C.G.A. §34-9-261, PPD benefits are calculated using two-thirds of the employee's average weekly wage, times the number of weeks determined by the percentage of bodily loss:

Bodily Loss Maximum Weeks:

(1) Arm 225 weeks
(2) Leg 225 weeks
(3) Hand 160 weeks
(4) Foot 135 weeks
(5) Thumb 60 weeks
(6) Index finger 40 weeks
(7) Middle finger 5 weeks
(8) Ring finger 30 weeks
(9) Little finger 25 weeks
(10) Great toe 30 weeks
(11) Any toe other than the great toe 20 weeks
(12) Loss of hearing, traumatic,
   One ear 75 weeks
   Both ears 150 weeks
(13) Loss of vision of one eye 150 weeks
(14) Disability to the body as a whole 300 weeks

Impairment ratings are based upon Guides to the Evaluation of Permanent Impairment, fifth edition, published by the American Medical Association. So, for example, an injury to the body as a whole generates 300 weeks of benefits. If a person gets a 10% impairment rating to the back, he would then be entitled to 30 weeks of benefits. If the injured employee had been receiving $500.00 per week, he will then be eligible for $15,000.00 in PPD benefits ($500.00 times 30 weeks). Unlike temporary total disability (TTD) and temporary partial disability (TPD) benefits, which are payable due to loss of wages, permanent partial disability (PPD) benefits are paid specifically because of the injury itself.

Although Board Rule 263 indicates that the employer/insurer shall commence payment of permanent partial disability benefits not later than 21 days after knowledge of a rating, it has been my experience that this is not usually enforced. Generally, once a permanent partial disability rating has been established, an employer/insurer is more interested in settling the entire case than merely paying out the PPD rating.

We usually obtain the PPD rating by sending the treating physician a letter with a questionnaire attached. We find that the doctors are generally amenable to writing in a number, signing and returning our form to us. Although some doctors do charge for a rating, particularly if they need to do research to determine what it is, we generally get them for free.

It is important to note that a permanent partial disability must in fact be “permanent”. Georgia courts have held that an injured worker must have reached maximum medical improvement before being able to receive permanent partial disability

When a physician gives equivalent ratings, the physician takes a rating to one part of the body and converts it to a percentage rating to the body as a whole. In Georgia, the cases are clear that the disability that should be used is that which provides the highest number of weeks of benefits to the injured worker, *Holcombe v. Fireman’s Fund Insurance Company*, 103 Ga. App. 587 (1960); *United Parcel Services v. Outlaw*, 190 Ga. App. 840 (1989).

Additionally, when an injured worker has a prior permanent impairment rating, the prior percentage of disability must be subtracted from the percentage of disability given to the injured worker after the subsequent injury to accurately calculate the rating for the new injury. *Dunn v. Hartford Accident Indemnity Company*, 81 Ga. App. 283 (1950); *Metro Interiors, Inc. v. Cox*, 218 Ga. App. (1995).

One interesting aspect of PPD benefits is the effect of the recovery of PPD benefits on the statute of limitations. In the case of *Mickens v. Western Probation Detention Center*, 244 Ga. App. 268 (2000), PPD benefits under O.C.G.A. § 34-9-263 were determined to be income benefits for the purpose of the statute and PPD benefits extended the change of condition statute of limitations under O.C.G.A. § 34-9-82.

3. **Medical Expenses**

An important part of determining settlement range is in calculating out of pocket medical expenses the claimant has incurred as well as potential future medical expenses. The amount each side may allocate for medical can vary widely. Generally each side will allocate more for medical in a compensable as opposed to a controverted case. Calculating future medical is a rather tricky proposition, as it is very often simply speculation. Also, so many factors can come into play, such as the claimant’s diagnosis, as well as and potentially differing treatment recommendations provided by competing experts. Generally, the value of future medical expenses is developed by each attorney based on their prior experience in handling workers’ compensation claims and thus their
knowledge of the cost of certain procedures. Certainly, counsel for the employer can work with the claims adjuster in calculating the cost of potential future medical expenses.

Nowadays, Medicare Set Aside Trusts ("MSAs") are often created to set aside monies for payment of anticipated future medical expenses. In cases where the employee is a Medicare beneficiary or there is a reasonable expectation of the employee becoming a Medicare beneficiary, it is a good idea to advise the insurance carrier of the interest in settlement early so that they can begin work on the MSA evaluation. MSAs are not required if the settlement is for less than for $250,000 and it does not appear as though the injured worker will be Medicare eligible within the next 30 months. I have had some experience with some carriers who do not mandate a MSA if the settlement is for less than $25,000 and others who want them in all situations. Unfortunately for the injured worker, he is basically at the mercy of the employer/insurer.

Insurers are now generally waiting for approval of MSAs by the Center for Medicare and Medicaid Services ("CMS") before actually settling cases. I currently have a case in which the proposed MSA was for $370,000. CMS came back and said that the MSA should be for $940,000, primarily because Gould & Lamb, who prepared the MSA only included one year of prescription drugs, while CMS said that my client would have to take them for the remaining 43 years of his life. It is now unclear what is going to happen to the $260,000 settlement. This is, obviously, disappointing to all parties.

B. Types of Settlements

1. No Liability Agreements

Under O.C.G.A. § 34-9-15 (b), the State Board may approve agreed upon settlements which conclude that no workers’ compensation benefits are due. The State Board retains jurisdiction to enforce such agreements. O.C.G.A. § 34-9-15 (b) Once a settlement is approved by the State Board, it represents a final resolution of all claims described. Id. No further review or modification of the settlement is possible, and no subsequent award may be issued by the State Board. Id. If payments are not made within 20 days, the Board may assess a penalty of 20 percent.
2. Liability Agreements

Under State Board Rule 15(b), settlements in which the employer/insurer accept liability for the claim shall include a statement of material disagreements between parties and a statement that the claimant’s compensable medical expenses have been or will be paid by the employer/insurer. If a period of future compensable (“open”) medical treatment is included in the settlement, the stipulation must state the duration of treatment allowed, the limitations on authorized treating providers, and the limitations on referrals and treatment, if any. Board Rule 15(b) The stipulation shall also state that the parties will petition the State Board for a change in physician if the named physician is unable to render services and the parties cannot agree on a change of physician. Id. If a period of future compensable (“open”) medical treatment is not included in the settlement, the stipulation shall contain an explanation of why such provision is not necessary. Id.

3. Structured Settlements

Structured settlements are rarely necessary in workers’ compensation claims. When they are required, it occasionally involves the situation where the employee is either incapable of managing the settlement proceeds or there is danger of the proceeds being squandered by family members or friends. Another situation is where a large monetary figure is agreed on by the parties to settle the claim in exchange for allowing the employer/insurer to purchase an annuity. This ultimately puts more money in the employee’s pockets while allowing the employer/insurer to pay less money up front than they otherwise would have.

C. Settlement Agreements

A large majority of litigated workers’ compensation claims in Georgia will settle at some point. Whether that point is early in a claim or after many years of benefits, the settlement will memorialized by a “Stipulation and Agreement,” which must comply with State Board requirements and receive approval from the State Board before it is valid. Once a fair settlement is reached, the properly drafted stipulation protects both parties
from further uncertainty and expense. The State Board not only allows settlement of
claims, but the language of the applicable statutes actually encourages it.

Most settlement stipulations are fairly simple contracts which state the facts of the
claim, the contentions of the parties and the terms of the settlement. The claimant agrees
to waive all further eligibility for workers’ compensation benefits to which he may be
entitled in consideration for a specific payment. Settlement stipulations which contain
formal defects may be rejected by the State Board and/or returned to the filing party so
that the defects may be cured.

Defense counsel almost always prepares the settlement stipulation which is then
approved and executed by the claimant and his attorney, if any. When a claimant is
represented by counsel, the State Board’s determination of the fairness of the settlement
is usually little more than a formality and in most cases the settlement stipulation is
simply rubber stamped by the Board. Unrepresented claimants who choose to settle their
claim by stipulation may invoke closer scrutiny by the State Board to confirm that the
terms of the settlement meet the standards of fairness required by O.C.G.A. § 34-9-15(a).

1. What Should be Included?

O.C.G.A.§34-9-15(a) and the corresponding Board Rule 15 include general rules
regarding settlement of claims, noting the amount of compensation, time and manner of
payment must be in accordance with the workers’ compensation statutes. Employers
must be given notice of proposed settlements by insurers and no settlement is binding
without State Board approval. If there exists a dispute as to material issues in a claim,
and the parties to the claim agree to a fair settlement of the issues, the State Board shall
approve the settlement. Once a settlement is approved by the State Board, it represents a
final resolution of all claims described, so no further review or modification of the
settlement is possible, and no subsequent award may be issued by the State Board.

Under Board Rule 15, the party submitting the stipulation shall file the original
with a copy for each party to the agreement; or if filing electronically, file one original
and no copies. At the top page of each stipulation list the names, addresses, and
telephone numbers of all parties to the agreement, the ICMS Board claim number(s) of
the employee, the dates of accident covered by the agreement where a Board file has been created by a Form WC-1 or Form WC-14, the names and addresses of all attorneys with a designation of which parties they represent, and the Federal tax identification number of the employee's attorney. Board Rule 15 For dates of accident where a Board file has not been created but covered by the stipulation, such dates of accident shall only be listed in the body of the agreement. Id.

The submitting party must attach a copy of the Form WC-1 for each date of accident covered by the settlement as well as a copy of the fee contract of counsel for the employee/claimant. Id. In a liability settlement, the most recent medical report or summary which describes the medical condition of the employee, must be attached. Id. The medical note should include a very brief statement of the surgical history, if any, if that history is not already specified within the stipulation. Id. The entire medical record should NOT be attached. Id. When submitting a stipulation for approval by electronic mail, the stipulation must be submitted separately from supporting documentation. Id.

Approval of a stipulation may be sent by electronic mail to the parties and attorneys of record. Id. Whenever electronic transmission is not available, approval will be sent by mail. Id. For all stipulations, at the top of the first page of the stipulation, the first five inches shall be left blank for the approval stamp. Id. All stipulations shall be limited to no more than 25 pages, including supporting documents, unless prior approval is given by the Board or the Settlement Division. Id.

The insurer shall certify in the settlement stipulation that it sent a copy of the proposed settlement to the employer prior to any party having signed it. Board Rule 15(c) Unless the claimant’s attorney fee contract and the settlement stipulation provide otherwise, the proceeds of the approved settlement shall be sent directly to the claimant. Board Rule 15(e) If an attorney fee is to be paid, the stipulation must state the amount of the fee and itemize all expenses to be reimbursed. Id.

Any stipulation providing for a structured settlement to be paid by a third party must contain a provision that the employer/insurer remain liable for payment if the third party defaults or fails to pay. Board Rule 15(d) A final completed WC-4 for each
covered date of accident shall be filed with any settlement stipulation in which the parties agree that no workers’ compensation benefits are due (a “no-liability stipulation”). Board Rule 15(f)

Stipulations which contain waivers or releases of causes of action over which the State Board has no jurisdiction will not be approved. Board Rule 15(g) Lump sum settlements may be prorated over the life expectancy of the claimant. The claimant’s actual weekly compensation rate and the maximum weekly compensation rate are irrelevant to the proration. The prorated compensation rate controls, and becomes the rate for the claim, but it shall not exceed the statutory maximum for the date of accident.

2. Period of Time for Which Benefits are Paid

Temporary Total Disability Benefits or TTD

O.C.G.A.§34-9-261. These benefits are for reimbursement of lost wages. The employee is entitled to two thirds of his average weekly wage, up to a maximum of $500.00 per week. Under O.C.G.A. §34-9-260, the average weekly wage is based on the employee’s average wages for the thirteen weeks prior to the date of injury. If the employee did not work a full thirteen weeks prior to the injury, the wages of a comparable employee are used. If there is no comparable employee, the actual wages of the employee will be used. In the case of TTD, Unless the employee is declared catastrophically injured, the employee is eligible for 400 weeks of benefits from the date of injury.

Temporary Total Disability Benefits or TTD

O.C.G.A. §34-9-262. The employee is eligible for TPD when the disability to work is “partial in character and temporary in quality.” These benefits are for reimbursement of lost wages when an employee has recovered sufficiently to return to work but is not earning as much as he was prior to his injury, either because he is working fewer hours or because his wage has been reduced. The calculation of TPD is somewhat more complicated than that of TTD. TPD is calculated by determining two thirds of the difference between the pre-injury and post-injury average weekly wage, not
to exceed $334.00 per week. An injured worker is eligible for temporary partial disability benefits for up to 350 weeks from the date of his injury.

3. Critical Language

All settlements submitted to the State Board, both liability and no liability, should contain language that takes into account Federal Law which allows Social Security Disability benefits to be offset by workers’ compensation benefits. This is frequently referred to as “Hartman” language.

D. Pitfalls to Avoid When Settling Cases

A common complication to the settlement of claims involves third parties who have an interest, or a potential interest, in the claim. For example, if a claimant was represented by more than one attorney, the State Board may have a notice of a fee lien asserted by the former attorney(s). Any attorney who asserts a right to fees from the settlement proceeds must settle the lien prior to submittal of the settlement stipulation or it will be rejected. This can be avoided by adding the attorney as a signatory to the settlement stipulation and directing the apportionment of fees within the language of the stipulation or attaching a document to the stipulation itself confirming resolution of the lien. If a claimant owes past-due support payments to a spouse or child, the State Board may also have notice of those liens in the claim file. If so, the lien must be satisfied or settled with the consent of the filing party (often the Child Support Enforcement Section of the Georgia Department of Human Resources) prior to approval of the settlement.

Third parties can also cause problems when there interest is not due to a lien, but rather their relationship to the claimant. It is vital that the claimant bring with them to mediation anyone from whom they will seek guidance regarding the final settlement number, whether relatives or friends. I actually attended a mediation where the claimant brought her preacher for counsel. Too often, however, these third parties do not get involved until the end of the negotiations. As a result, they have not been privy to the
discussions which have helped facilitate the progress of the settlement up to that point. Consequently, they can completely derail the negotiations right at the end.

Claimants with more serious injuries often apply for Social Security Disability (SSD) benefits. As discussed above, the entitlement or reasonable expectation of entitlement to Medicare drastically affects settlement of a workers’ compensation claim. If the parties have not planned ahead an obtained an MSA when necessary, the finalization of the settlement will be stalled. Alternatively, if the parties proceed with settlement in a case where an MSA was necessary but not obtained, it could subject all of the parties to future liability. Hence, it is always a good idea to thoroughly evaluate whether the federal government has a potential interest in the claim.

Finally, the parties should only agree to mediate a claim that they are all genuinely interested in settling. It is not worth wasting anyone’s time if everyone is not on board because settlement is completely voluntary and requires good faith negotiation and willingness to compromise. Occasionally mediations fail due to unreasonable expectations by the employee or the refusal or inability to reasonably evaluate the value of the claim by the employer/insurer; however, the vast majority settle and the State Board has had outstanding success with mediations through its Alternative Dispute Unit and private mediators.

It is unfortunate but, occasionally, in contested cases one of the parties, often the employer/insurer, will propose a settlement mediation to avoid or delay a hearing. Therefore, it is always important to know the other party’s intentions and evaluate whether it is worth participating in mediation as opposed to going forward with the hearing, especially in “all issues” cases. On the other hand, mediation is almost always a good idea in an accepted compensable claim in which the employee’s medical condition has stabilized. Mediation can facilitate settlement and closure of the claim which in turn allows the employee to move on with his life and the employer/insurer to close their file.

E. Post-Settlement Issues

Failure to make a timely payment pursuant to a settlement agreement does happen on occasion. Fortunately, in large part due to the potential twenty percent penalty the
Board may impose, this is not a tremendous problem. When it does happen it is not usually due to any nefarious reason, but rather simply the result of a simple mistake on the part of the insurer.

Medicare Set Asides can cause problems after a case has settled if the MSA was not calculated prior to the settlement and then turns out to be much higher than the parties expected. This is becoming more and more common, as the economy has resulted in a tighter federal budget and the Center for Medicare and Medicaid Services goes out of its way to insure they will not get hit with the cost of a workers’ compensation claim. Once again, this problem is easily avoided by obtaining an MSA prior to settlement negotiations.
WHY DO LAWYERS GET SUED FOR MALPRACTICE?
A GUIDE TO AVOIDING MALPRACTICE AND ETHICS COMPLAINTS

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David Lefkowitz graduated from Columbia University with a B.A. in 1985 and earned his J.D. from Emory University School of Law in 1988. The Lefkowitz Firm, LLC, represents individuals and corporations in their claims for legal malpractice (legal negligence) and similar claims such as breach of fiduciary duty; misconduct by officers or shareholders in closely held businesses; trustee misconduct; executor misconduct and ethical misconduct by attorneys and other fiduciaries. David has offices in Atlanta and Athens.
Avoiding claims for legal malpractice and ethical violations requires more than merely following the law and exercising the appropriate standard of care. While meeting those criteria likely would allow you to prevail at a trial, it is important for an attorney to understand how to keep a client from contemplating such a claim, let alone threatening one or filing one.

Most legal malpractice claims (and awards) are not related to an attorney’s knowledge of the law. Instead, most claims arise out of a large group of administrative-type errors, including a failure to screen clients properly, monitor deadlines, analyze conflict issues, communicate effectively with clients, etc. The process of avoiding malpractice claims begins before you enter into an attorney-client relationship and continues after the relationship ends.

**Choosing Clients**

Choose your clients carefully. You can avoid a claim for legal malpractice by considering a few factors, including: (a) the client’s experience with prior attorneys—has the client threatened or pursued legal action or filed a bar complaint against a former attorney? (b) the client’s motives and goals—can you achieve those goals for your client? Does the client seek revenge or some other remedy that you either cannot or are prohibited from achieving? (c) the client’s use of alcohol or drugs—will this impair the judgment of the client? (d) the client’s financial condition, including bankruptcy or outstanding judgments—can the client afford to pay the fees which will be incurred during the representation? You always want to avoid a potential dispute over fees, as discussed below; (e) the client’s prior legal problems—does the client have a criminal record (including felonies, which may impact credibility at trial)?
Formalize

Formalize your attorney-client relationship. You should have a written agreement with your client regarding the representation. If you are using an engagement letter, it should be signed by the client. All the terms of the representation should be disclosed in the agreement, including the scope of the representation, the fees that will be charged, whether a retainer is required, etc. The fee agreement should specifically discuss the hourly rate to be charged by each attorney (or other professional working on the matter, such as a legal assistant) or other form of fee, such as a contingency fee. Any plaintiff attorney’s contingency fee should be accurately described in the fee agreement, be it a form used for many clients or an engagement letter. For instance, does the fee vest upon the agreement to settle with the opposing party or upon the receipt of the settlement proceeds? Under Georgia law, you can protect yourself from the possibility that a client, in attempt to deny you your contingency fee, may discharge you after settlement offers have been made. In Morrow v. Stewart, 197 Ga. App. 689, 399 S.E. 280 (1990), the Court of Appeals approved of (and enforced) the following language from an attorney-client contingency fee contract:

“I understand that I may dismiss my attorney at anytime, for any reason, upon written notice to him and payment of unpaid expenses and services rendered to the date of the receipt of such notice; payment to be based upon time devoted to my case at any hourly rate of $80.00 per hour, or the applicable percentage of fee due him under the terms of this agreement of any offers which have been made by any adversary or collateral party, whichever is greater.”
You should also contemplate whether you want your fee arrangement to reference the possibility that an appeal may be filed and whether you will charge an additional fee or whether such work included in the contingency? Note that Georgia Rule of Professional Conduct 1.5 requires that a contingency fee be in writing and shall state the method by which the fee is to be determined, including the percentages, whether interest will be charged, etc.

Expenses that will be billed to the client should be discussed in the fee contract. This is true whether the expenses will be billed (and paid for) each month or whether the attorney is paying the expenses and expects to be reimbursed from the expected recovery. In a contingency fee context, the client should be informed that he will be responsible for the expenses of litigation even if there is no recovery. If the attorney is going to charge interest on the funds that are used for out-of-pocket expenses, the interest rate should be clearly set forth in the contract. The contract should also be clear as to whether the expenses will be paid out of the client’s portion of the settlement proceeds or from the top, before the attorney and client’s portions are determined.

If an attorney will be billing by the hour, the contract should clearly set forth the frequency of the billing and when the client will be expected to pay the bill. The monthly statement is an excellent opportunity to describe to the client the work that is being performed, not only for purposes of asking to be paid, but for purposes of making sure the client knows that you are toiling for him. If an attorney performs any work for a prospective client, but ultimately decides not to enter into a formal attorney-client relationship, the attorney should send a nonengagement letter. A nonengagement letter protects the attorney from a
subsequent claim that the client expected certain work to be performed. A nonengagement letter may not be practical for every situation in which an attorney converses with an individual with regard to prospective representation, but there are certain situations in which the failure to send a nonengagement letter can lead to disaster. One situation occurs when an attorney charges a fee for a consultation regarding the merits of a particular case. For instance, consider the situation in which a family member of a resident of a nursing home hires an attorney to review medical records, consult with an expert witness, conduct research and do whatever else is necessary to determine whether a valid claim for medical malpractice exists. Should the attorney decide that no such claim exists (or, perhaps, that a claim does exist, but it is not a claim which his firm will handle), the attorney should send a nonengagement letter to the prospective client stating that the firm will not be representing the client and providing any information which the client may need, particularly the date when the applicable statute of limitations will expire. The letter should suggest that the client consult with another attorney as soon as practicable.

Should an attorney find himself in a situation in which he has been engaged and later decides to withdraw, a disengagement letter should be sent to the client. This letter may discuss the reason why the attorney-client relationship is ending, whether the attorney will work with/consult with subsequent counsel, and whether any additional attorney’s fees are owed. The attorney should confirm that the client receives a written notice of the disengagement. This means that the letter should be sent by certified mail (or some other means such that the client’s receipt of the letter can be confirmed).
While this information will be helpful to the client, the written confirmation that the client is aware of the disengagement may be extremely important to the attorney. There have been several legal malpractice cases arising out of the running of the statute of limitations, followed by the client suing the attorney. The attorney claims that he had withdrawn and told the client that he would not be filing suit, and the client claims that he had no such knowledge of a withdrawal and expected that suit would be filed in a timely manner. Why risk this he said-she said? Document the withdrawal.

One final point: Do not wait until the statute of limitations is about to expire to decide to withdraw. It is not uncommon for an attorney to agree to review a file when there are several months remaining before the statute of limitations (or other filing deadline) will expire. Given the lack of an imminent deadline, the file is placed on the back burner. As the deadline for filing approaches, the attorney decides, for some reason, that he does not want to handle the case after-all. If the attorney withdraws at such a late date that the client cannot find substitute counsel, he is inviting a claim for legal malpractice. The duty to withdraw in an appropriate manner is particularly important in a complicated case. It is not reasonable to expect that you can tell a client you decided not to take her medical malpractice case three days before the statute expires, leaving the client without counsel and without much opportunity to find counsel.

**Impressions**

Impressions are extremely important. Malpractice actions are not filed for every error or every negligent act. Developing a rapport with your client may not
prevent malpractice, but it can assist in preventing malpractice claims. If a client values the attorney-client relationship, it might outweigh the perceived value of a malpractice claim. Always avoid the impression that you are being neglectful. Georgia ethical rules require that an attorney keep a client reasonably informed about a matter. This is a minimum threshold, and in emotional cases, such as those involving divorce or child custody issues, additional communication is helpful. An attorney should provide the client with the impression that the legal matter is being given the attention that it requires. This is best handled through quality communication. This communication can take many forms, including effective billing (in which the work performed is itemized), phone calls to the client, letters to the client and sending copies of pleadings to the client. See section entitled “Communicate,” below.

**Expectations**

Preparing quality documents, meeting deadlines and understanding the law are obvious ways to avoid malpractice claims. In certain areas of law, however, it is inevitable that a client will be disappointed from time-to-time. This is particularly true in cases in which there is a trial: one party is going to lose. In addition, legal matters such as divorce and criminal cases are rife with emotion and disappointment, sometimes misdirected at the attorney. It is important that the client understand the difference between losing and substandard representation. This potential for confusion on the part of the client should be addressed from the beginning of an attorney-client relationship through its conclusion.
One important way for an attorney to avoid having a disappointed client (and thus one who might pursue a legal malpractice claim) is to set realistic expectations. Many clients will have some expectations upon entering the attorney-client relationship. However, most clients form their expectations regarding the outcome of a legal matter based on conversations with their lawyer. An attorney should avoid the temptation to set unreasonably high expectations during the initial interview process (when the lawyer knows that the prospective client may be choosing between several attorneys). Of course, you should never give the client the idea that you are guaranteeing a successful result.

An attorney who has had no experience with legal malpractice might be surprised to learn that many clients who call for a consultation with regard to a prospective legal malpractice claim think that their attorney was “paid off” by the opposing attorney or party. Why would a client feel like he has been “sold out?” This feeling is often caused by the failure of the attorney to meet the expectations he has helped to set. If you tell your client (or prospective client) that his claim is worth $100,000, and it ultimately settles for $5,000, you have some explaining to do. However, if you keep the client informed as to the status of the matter you are handling, and you promptly let the client know of any important developments, you can continue to manage the expectations of your client throughout the representation. By doing so, the chances of surprise and bitter disappointment are reduced.

**Communicate**

It is not possible to overstate the importance of effective communication with your client. Clients’ phone calls should be returned promptly. If the
primary attorney handling the file cannot return the call, then another attorney at
the firm, a legal assistant or a legal secretary should return the call. When clients
feel that they are being treated as unimportant, it is inevitable that they will feel
that their case is not being handled zealously. A less than favorable conclusion to
the case will be blamed on this perceived lack of attention.

Communicating with a client is not only a good way to keep attorney-client
relations healthy; there is an affirmative ethical duty to keep clients apprised of
the status of their case. Georgia Rule of Professional Conduct 1.4 is entitled
“Communication” and reads as follows:

A lawyer shall explain a matter to the extent reasonably necessary to permit the
client to make informed decisions regarding the representation, shall keep the
client reasonably informed about the status of matters and shall promptly comply
with reasonable requests for information. The maximum penalty for a violation of
this Rule is a public reprimand.

This ethical rule can become a problem when the attorney knows, or
suspects, that he has made a mistake in the course of representing the client. The
attorney may feel that he can repair the error and will therefore decide not to tell
the client that their case is in peril. This decision can rise to the level of fraud in a
subsequent legal malpractice lawsuit, and is not worth the risk. Tell the clients
the good, the bad and the ugly. It’s often a difficult task, but the alternative is
unacceptable: the client sues you for hiding the error from him. Additionally,
hiding the error can extend the statute of limitations, as certain types of fraud will
toll the statute of limitations until such time as the client knew, or reasonably
should have known, of the fraud. Furthermore, it should be noted that fraud
committed after the negligence can support a claim for punitive damages, even if
no monetary damages were caused by such fraudulent concealment. The Court of Appeals has held that such behavior constitutes a breach of fiduciary duty, which can give rise to punitive damages. (Holmes v. Drucker, 201 Ga. App. 687 (1991)).

Keep Yourself Apprised of the Status of a Case

In addition to keeping your client apprised of the status of his case, the attorney has a duty to keep himself apprised of the status. This may seem self-evident, but attorneys can be held liable for the failure to diligently follow the status of their cases. In Hipple v. Brick, 202 Ga. App. 571 (1992), a client sued his lawyer for failure to protect his right of appeal in the prior action. In the underlying case, the client had a $39,000 judgment against him. The attorney then moved for judgment notwithstanding the verdict or, in the alternative, a new trial. When the court denied the motion 13 months later, the attorney did not receive notice of the entry of the order. After 35 days had expired, the attorney learned of the order in a telephone call from opposing counsel. At that point, the 30-day filing period for a notice of appeal had expired, and the attorney took no action to resurrect the case (such as filing a motion to set aside the judgment in order to gain a new 30-day period, under O.C.G.A. § 9-11-60 (d)). The client’s malpractice claim was predicated on attorney Hipple's alleged negligence in failing to monitor the status of the case and timely to inform Brick of the order so that an appeal could have been taken. Attorney Hipple claimed he was entitled to summary judgment on the theory that, as a matter of law, he breached no duty to his client in relying on the court and the mail to provide notification to him of entry of the court's order on the motions, as it is standard practice for attorneys
to do so. The Court of Appeals held that O.C.G.A. §15-6-21 does not relieve an attorney from keeping informed of the progress of a client’s case. (O.C.G.A. §15-6-21(c) places a duty on the judge to file his or her decision on a motion for new trial with the clerk of the court in which the cases are pending and to notify the attorney or attorneys of the losing party of his or her decision.) According to the Court of Appeals, the attorney has a separate and independent duty that arises from the contract with the client. Therefore, even if the trial court had failed to send the notice, it would not have relieved the attorney of his obligation to check for over one year. The Court of Appeals noted that in Bragg v. Bragg, 225 Ga. 494, 496 (1969), the Georgia Supreme Court had held that, “[i]t is fundamental that it is the duty of counsel who have cases pending in court to keep themselves informed as to the progress of the cases so that they may take whatever actions may be necessary to protect the interests of their clients.”

**Explain the meaning of Legal Documents to Clients**

The general understanding of Georgia law is that if a client signs a document, he is held to have understood it and is subsequently bound by it. However, there are reported cases in which a lawyer presented a document to his client for signature and was subsequently sued because of the legal ramifications of the language. For instance, in Little v. Middleton, 198 Ga. App. 393 (1991), the defendant attorney had represented a client in a personal injury case arising out of a car accident. The case settled against the tortfeasor for his $25,000 liability limits. The release agreement released the tortfeasor and his “heirs, executors, administrators, agents and assigns, and all other persons, firms or corporations
liable or who might be claimed to be liable....” The injured driver’s own underinsured insurance carrier subsequently refused to pay the plaintiff based on her execution of the release. The plaintiff then sued her attorney for legal malpractice, based on her attorney’s failure to read her policy to determine whether there was UM insurance, the failure to properly pursue the UM claim, and the failure to advise her as to the legal effect of the release on her UM claim. The attorney filed a motion for summary judgment asserting that the language of the release was clear, that the client should have understood it and that the client was thus barred from suing him for any misunderstanding regarding the effects of the release. The trial court granted the motion for summary judgment. However, the Court of Appeals reversed, holding that a question of fact existed as to whether the legal effect of the release posed to the plaintiff “a legal technicality that she was unequipped to appreciate as a non-lawyer.” Id. at 395. The Georgia Supreme Court granted cert., but subsequently vacated cert. after briefs were filed and the Supreme Court heard oral argument. The practical effect of Little is that an attorney must explain the meaning of documents that are presented to a client for signature. While the need to explain language varies depending on the sophistication and education of the client, the safe approach is to explain language, including boilerplate that attorneys see on a daily basis.

Fee Disputes

At least 25% of all legal malpractice claims arise out of fee disputes (some claim it is as high as 75%). If you file a suit against a client for fees, any claim for legal malpractice becomes a compulsory counterclaim, and an invitation to be sued. When you apply for errors and omissions coverage, you likely will be asked whether you have sued a client for legal fees within the past year. You are asked this question because insurance companies know that fee disputes are a common
cause for legal malpractice claims (legitimate or not) to be filed. You are entitled to be paid for the legal services you provide. But when deciding to file suit, file a lien, etc., keep in mind that your client may file a counterclaim that will cost you time and money. You will have to pay your deductible on your policy, and your insurance premiums likely will rise. You may suffer from bad publicity or damage to your reputation. Make sure that the decision to sue a client is made with an understanding of the professional and financial risks. Consider ADR as an option.

As you likely know, Georgia law currently allows you to put a clause in your attorney-client fee agreement which limits the time within which a client may object to an invoice. You can further limit the client’s right to object by requiring that the objection be in writing. As the law currently is enforced, the client’s failure to object within the specified time period will forever bar the client from objecting to the invoice. Typical language used in a fee agreement reads as follows: “Your failure to object in writing to any bill within thirty (30) days of the date of each such bill shall constitute a waiver on your part of the right to challenge the charges made for legal services and expenses on each billing statement.” In *Loveless v. Sun Steel* 206 Ga. App. 247, 424 S.E.2d 887 (1992), the Court of Appeals addressed a situation in which an attorney sued for unpaid legal fees. The former client contended that he had verbally complained about the fees, and further, that he and the attorney had an understanding that the fees would only be due under certain circumstances. The Court of Appeals held that the written contact was binding and that any ‘understanding’ would constitute parol evidence and be inadmissible within the context of a dispute regarding a written attorney-client fee agreement.

In contrast to the above, Georgia law does not allow an attorney to contractually limit the time in which a client may complain about legal
malpractice (ie: the statute of limitations for legal malpractice claim is 4 years (or maybe six, if you had a written fee contract), and an attorney may not decrease that time frame by contractually limiting the time for a complaint to 30-days or some other time similar to the above Loveless time limit.) It seems contradictory that a client can be limited to the amount of time within which she may complain about substandard legal work vis-à-vis the invoices, but may not be limited to the amount of time she may complain about substandard work in the context of a legal malpractice claim. That is a topic for an entire paper. My best advice is: be careful when you attempt to limit your client’s rights/remedies, as it can easily be construed as your placing your own interests ahead of your client’s interests.

**File Materials**

Attorneys often hesitate to turn over their file materials to clients, particularly clients who have not paid their bills or are threatening to file suit. Attorneys have a statutory lien on clients' papers and money in their possession, and they "may retain the papers until the claims are satisfied." O.C.G.A. §15-19-14 (a). However, Formal Advisory Opinion of the State Bar of Georgia No. 87-5, states that an attorney “may not to the prejudice of a client withhold the client's papers or properties upon withdrawal from representation as security for unpaid fees.”

In *Swift, Currie, McGhee & Hiers v. Henry*, 276 Ga. 571 (2003), the Georgia Supreme Court phrased the issue as follows: “Boiled down to its essence, the question is this: Does a document created by an attorney in the course of representing a client belong to the attorney or the client?”

The answer fell squarely on the side of the client and relied up the above-referenced Formal Advisory Opinion:
“An attorney's fiduciary relationship with a client depends, in large measure, upon full, candid disclosure. That relationship would be impaired if attorneys withheld any and all documents from their clients without good cause, especially where the documents were created at the client's behest. See State Bar of Georgia, Formal Advisory Opinion No. 87-5 (September 26, 1988) (attorney may not, to the prejudice of client, withhold client's papers as security for unpaid fees).”

(Id. at 573)

What is “good cause?” The Supreme Court held that good cause to refuse to turn over the documents “would arise where disclosure would violate an attorney's duty to a third party. Good cause might also be shown where the document assesses the client himself, or includes "tentative preliminary impressions of the legal or factual issues presented in the representation, recorded primarily for the purpose of giving internal direction to facilitate performance of the legal services entailed in that representation." (Id.)

Missing from the Court’s definition of good cause was “the client hasn’t paid his bill.”

Most clients can make an argument that your retention of their files is causing them damage. The better choice is not to give the appearance that you are holding the file hostage.

**Bar Complaints**

If a client has filed a Bar Complaint against you, hire counsel to respond. There are many defenses that may cause the State Bar to dismiss a complaint at the first stage. It is not uncommon for a Bar Complaint that has no merit on its face to become a serious matter because the responding attorney says too much, or the wrong thing, in the initial response. Hire someone who is experienced in
these matters. It can save you a lot of stress, and in the worst-case scenario, it can save your license.

Meeting deadlines, filing appropriate pleadings and understanding the law are obvious ways to avoid malpractice claims. In certain areas of law, however, it is inevitable that a client will be disappointed from time-to-time. This is particularly true in cases in which there is a trial: one party is going to lose. It is important that the client understand the difference between losing and substandard representation. This potential for confusion on the part of the client should be addressed from the beginning of an attorney-client relationship through its conclusion.
MAXIMIZING SETTLEMENT VALUE

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Maximizing Settlement Value

I. Know Your Case

A) Strengths;
B) Weaknesses;
C) Liability; and
D) Damages.
   a. Extent
   b. Preexisting.

Don't take your clients word on it.
Get all medical records.
Get Tax returns.
Go to the scene of the wreck.
Talk to witnesses.

II. Pre-suit Settlements

II A) Small case→photographs, demonstrative evidence, time lines, bills.

Photographs
  1) Scars;
  2) Damage to automobile;
  3) Hospital stay;
  4) X-rays or other radiographs.

Demonstrative Evidence
  1) Epidurals;
  2) Cranial Bolt;
  3) Diagrams;
  4) Models.

Time Line
  1) All treatments/ therapy;
  2) Gaps in treatment;
  3) Show progression of healing, Ex. Wheelchair→Walker→crutches→Cane→Walking

II B) Large Case
  1) File or Not to File?
  2) Answer one Question: Do I have more to hide than the defendant?
  3) If yes, Try To Settle.
  4) If not, do not hesitate and FILE SUIT!
However, even if you do have facts that may be harmful to your case, try to get as much information that is discoverable from the other side before discussing settlement.

Example:
1) Logs;
2) Bills of Laden;
3) Gasoline Receipts;
4) Cell Phone Records.

Remember, One hand washes the other.

III. Post-Suit Settlements

III A) Prior any settlement discussions, ask yourself whether or not all questions been answered.

1) Medical narratives;
2) Depositions;
3) Affidavits;
4) Experts
   a. Economists;
   b. Reconstruction
   c. Vocational;
   d. Physicians, etc….

Photographs
1) Scars;
2) Damage to automobile;
3) Hospital stay;
4) X-rays or other radiographs.

Demonstrative Evidence
1) Epidurals;
2) Crainial Bolt;
3) Diagrams;
4) Models.

Time Line
1) All treatments/ therapy;
2) Gaps in treatment;
3) Show progression of healing. Ex. Wheelchair→Walker→crutches→Cane→Walking
III B) Previous Verdicts
   1) Similar Cases;
   2) Personal Verdicts.

III C) Venue

III D) Likability/Sympathy Factor:
   1) Plaintiff;
   2) Defendant

III E) Mediation
   1) Is your case ripe to mediate?
   2) Believe in your case.
   3) Be nice.
   4) Don’t be afraid to walk out of the mediation.

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MOST COMMON MISTAKES IN MEDIATION

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Mediation is the most popular dispute resolution tool in civil litigation nationwide. The main reason for such broad appeal is the benefits mediation offers. Summed up, mediation is efficient. Mediation costs a fraction of most jury trials and provides resolution much sooner. Another advantage of mediation is that it allows the parties to be the architects of the resolution of the dispute, which will generally provide mutually satisfactory outcomes. Mediation also gives the parties the ability to tailor their settlement to their particular situation. Because of this greater degree of control and predictability in the outcome, parties who have reached their own agreement(s) in mediation are also more likely to follow through and comply with its terms, than those whose resolutions have been imposed by a third party decision-maker.

Conversely, a jury trial forces the parties to place their litigation hopes and aspirations in the hands of twelve strangers. More often than not, jurors are ill equipped to resolve the case in a manner providing more satisfaction to both sides as could be achieved in mediation. Time constraints and overrun court dockets push time management to the top of many judges’ lists of concerns regarding jury trials. The result is that many judges desperately attempt to balance scarce time management against the
litigants’ rights to a fair, well run trial. Depending on the judge’s and the lawyers’ skill and experience as well as many other factors affecting the civil docket, juries are often left with too little time to consider too little evidence with insufficient understanding of the legal framework. This worrisome and oft-unavoidable combination of hurdles greatly compromises the jury’s ability to do true justice.

These challenges facing juries and litigants often produce unpredictable verdicts and, at times, simply the wrong result. The chance of an aberrant verdict prompts litigants to mediate cases in numbers never seen ever before. This migration to mediation highlights the great importance of proper preparation, presentation and negotiation in the mediation process.

What follows is by no means an exhaustive list of potential roadblocks to successful mediation, but is an examination of the some of the most common missteps made by lawyers and litigants during the mediation process. Each item can easily be read as advice to lawyers and clients, as well as to mediators. Although mistakes are being discussed, it may be that in mediation more so than in other pursuits, there are times when what would usually be a mistake is instead an opportunity. As in all pursuits, mistakes are to be expected. The lawyer intent on making no mistakes or avoiding criticism may be too cautious to create and use this effective alternative dispute resolution tool. The primary purpose is to continue the conversation and efforts devoted to improve the mediation process and, ultimately, the results which lawyers can achieve for their clients.
Savvy real estate gurus often chant that the most important factors in their business are “location, location and location.” Similarly, preparation, preparation and preparation are the most important factors in mediation. Oddly, many lawyers still view mediation and extensive preparation for the same as wasteful and unnecessary. Others approach mediation with skepticism and treat it as simply an opportunity for one party to steal a pretrial peek at his opponents’ case.1 Still others simply submit the case to mediation with the intention to work through the issues during the mediation. While some parties enter mediation in bad faith, most cherish the opportunity to settle the case and take the process seriously. However seriously the parties and counsel approach this amazing process, the parties have little chance of getting maximum results absent proper preparation of the case before the mediation and effective presentation of the same during the mediation. Failure in this regard greatly reduces the chances of settlement and compromises the settlement amount.

FAILURE TO PREPARE THE CASE

“Salvation and Damnation live in the details. If you don’t get in there, you are damned. If you do, then you are saved.” Boz (1961)

1 This skepticism is neither fluff nor misplaced. Unfortunately some litigants use the mediation process as a tool to simply obtain additional discovery. Others enter mediation with woefully too little money to settle the case while leading the plaintiff to believe that adequate money will be offered to settle the case. These approaches are admittedly wasteful and, unfortunately, are not uncommon.
Much like an attempt at a kiss on the first date, timing of mediation is everything. Many mediations are properly engaged before completion of key depositions, dispositive court rulings and other important events in litigation. The uncertainty prompts parties to settle rather than risk an adverse outcome that guarantees a marked disadvantage at trial. While there are no quick and dirty answers to when a case should be mediated, it is certain that counsel should know as much as there is to know about the case before mediation has commenced. Too often counsel enter the mediation process leaving crucial questions unanswered or, worse yet, decide to save expense and forego depositions, document discovery or other items which leave holes in the case. This drastically affects the value of the case and the leverage in the mediation.

For example, where a lawyer chooses to use a doctor’s narrative to address causation instead of deposing the doctor, the opponent argues at mediation that the subject doctor will say more that matters in the narrative or will testify differently if deposed. The opponent uses the unanswered questions as leverage in gaining an advantage in settlement negotiations. Further, many insurance adjusters consider use of narratives or many decisions to forego deposing crucial witnesses as incompetence or a sign that the plaintiff will not take the case to trial. Either way the settlement value of the case likely suffers. It is imperative that counsel
invest the time and money into the case to communicate competence and confidence in the trial of the case.²

Another example is where discovery has closed and counsel has allowed the case to sit stale or has not completed the items necessary to maximize a verdict if the case went to trial. These items include expert selection, document retrieval and expert analysis of crucial evidence. Such lack of case preparation is usually painfully apparent in the opening mediation session and early in caucus as the mediator struggles to understand the facts and issues in the case. If correction of these deficiencies would require a continuance of the trial, a motion to reopen discovery or other professional courtesy of counsel or the court, the opponent uses this disadvantage to negotiate a modest settlement. Certainly the resultant peculiar litigation predicament deprives the plaintiff of the leverage needed to maximize the settlement value at mediation.

Many will find this final example to be unbelievable. Most will find this example unacceptable. Too often certain lawyers simply take their client’s word that the client had no prior auto accidents, similar injuries/surgeries, treatments, diagnoses or, criminal history. The lawyer presents medical records from the date of the accident and proclaims his

² This is not a criticism of the use of medical narratives. It is adequate and effective in many cases to use narratives rather than incur the expense of medical depositions. However, especially in cases with significant injuries, insurance companies often view the use of medical narratives as reflective of the lawyer’s lack of skill and/or lack of commitment to obtaining maximum results for the client.
client’s pristine history in the opening session. Ordinarily the defense lawyer waits until the caucus and presents the mediator with multiple prior injuries, claims and lawsuits. He also shows certified copies of felony convictions. Embarrassed, the plaintiff’s lawyer tucks his trial tail between his legs and settles the case for a fraction of the amounts expected. If certain pertinent facts were accessible before the mediation, this result is unacceptable.3

It is imperative that counsel learn everything there is to know about the client before the mediation. This includes prior work history, medical history, criminal history, education history and claims history. Knowledge in this regard and addressing the same during the mediation will instill in the insurance adjuster confidence that the plaintiff’s counsel has a firm handle on the pertinent issues in the case. This ensures that the settlement value of the case does not suffer unnecessarily.

For most lawyers, preparation for the mediation is a given. These lawyers review the right depositions, documents and other evidence to familiarize themselves with the strengths and weaknesses of the case. Some however rest satisfied with a general understanding of the case without understanding the details and nuances of the case. These evidentiary and factual nooks and crannies are the essence of the strengths and weaknesses in the case and harbor the keys to success and failure.

3 The vast majority of lawyers never commit these transgressions. The disturbing reality is that some mishandle cases in this fashion. One lawyer guilty in this regard is too many where the client’s one bite at the apple hangs in the balance.
Counsel must explore these areas and be well prepared to address the good bad and the ugly at the mediation. Ethics require quality preparation and performance and the client deserves the complete commitment of her counsel to achieving maximum value at mediation.

FAILURE TO PREPARE THE CLIENT FOR MEDIATION

“A smart man listens carefully to the sounds that offend his ears.” Boz (1961)

Participation in mediation is a virgin experience for most plaintiffs. Many are unsure as to whether the process will be adversarial, how long it will last, what to wear, what to say or even whether the parties will be in the same room. These unknowns raise avoidable anxiety and likely complicate the client’s settlement decisions. Clients are more comfortable with more information and thus more likely to make good decisions when they understand the nuts and bolts of the mediation process. These include where people sit in the group opening session, who gets to speak, whether the client will be questioned and the tedious nature of the caucus portion of the mediation. These concerns can and should certainly be explained before the mediation begins.

The most glaring gap in client preparation is the lawyer’s failure to prime the client for hearing the opponent’s comments and observations which criticize and directly blame the client for soft spots in the case. Skillful mediators often open the mediation by cautioning the parties...
against taking personal offense to opposing positions taken in the mediation process. This should be done by counsel before the client ever sets foot in the mediation room.

Without proper pre-mediation preparation, clients hear defenses which blame the plaintiff for her own injuries, accuse her of feigning injury, doctor shopping, exaggerating her case and many other sins. Some plaintiffs choke on their responsive outrage which hinders their ability to make and negotiate good business decisions. Counsel should always prepare the client for hearing the worst of facts and positions paraded by the defense. Counsel should also encourage the client to make smart business decisions regarding settlement, despite the emotional fever prompted by the defense posture in the mediation. Experienced mediators often urge parties to make decisions that make sense rather than those that feel good.

Counsel should also prepare the client before mediation by discussing the strengths and weaknesses of opposition’s position, as well as the strengths and weaknesses in their own position. Risk factors should be discussed very thoroughly with counsel, and a client should understand these risks before the mediation begins. This is a good time to begin seriously considering solutions, both monetary and non-monetary, and how far one can stretch to settle the dispute. Do not wait until the

4 Counsel should prepare her client to make settlement decisions which are good business decisions rather than those which feel right or seem fair.
mediation to start thinking about these critical points; by then, it will be too late.

Counsel should also prepare the plaintiff for posturing by her own lawyer. Integral to the negotiation process, most lawyers make statements regarding case value and strength and take positions calculated to maximize settlement outcomes. These valuations and statements include high initial settlement demands, evaluations of crucial evidence as well as heightened predictions regarding jury verdict range. “The jury will give a ten million dollar verdict!” says the lawyer. This statement is intended to further convince the adjuster about the substantial value of the case. The plaintiff is also listening and is vulnerable to becoming committed to those numbers. The danger sets in when the plaintiff believes these numbers becomes hardened on her position regarding settlement.

Counsel must prepare the client for the realistic settlement and verdict ranges and prepare the client to not take too seriously statements and maneuvers in mediation to enhance the ultimate settlement amount.

FAILURE TO PREPARE THE MEDIATOR

“The gods cannot answer those who choose not to pray.” Boz (1961)

It’s a familiar ritual: the parties have agreed (or have been ordered) to mediate and a mediation session to be attended by parties is set for weeks out. Nothing else happens until the session, when the mediator spends time in caucus learning about facts and feelings while the other side anxiously waits, wondering what is happening and whether this will prove to be worthwhile or simply a waste of time.
In this scenario, too much has been left until the day of the actual session. Several opportunities have been missed. Mediators are most effective when the mediator has the best understanding of the case and the job of preparing the mediator rests squarely on counsel’s shoulders. The most common tools to educate and prepare the mediator include a pre-mediation statement and educating the mediator during the caucus potion of the mediation.

Regardless of the size of the case, counsel should send a pre-mediation statement except in very limited circumstances. This allows the mediator to start the mediation with a grasp of the legal and factual issues in the case as well as an understanding of the parties’ settlement history and posture. The mediator undoubtedly will do a better and more cost-effective job in the mediation if she has time to consider and study the case before the mediator begins. This is especially true in cases involving complex legal, medical, business or construction issues. Understandably, many lawyers harbor concerns about cost and forego a pre-mediation statement. However the mediator has less time to learn and understand the nuances in the case when the parties are anxiously waiting for the mediator’s attention in their respective rooms. There simply is no downside to preparing the mediator before the mediation commences.

The foregoing pre-mediation statement is an effective tool where the statement addresses every element of the plaintiff’s claims as well as any viable defenses. An incomplete, inaccurate or misleading pre-mediation statement does more harm to the process than good. Too often lawyers
submit a pre-mediation statement which generally introduces the mediator to the issues but neglects to address important defenses or inadequately addresses disputed areas of the case. Equally troubling, some counsel provide woefully incomplete statements, damages assessment, or causation evidence in the pre-mediation statement thereby misleading the mediator and ensuring an avoidable hiccup in the settlement negotiation. This same lack of understanding or organization shines through to the defense and the adjuster and dilutes any concern that the case would be competently prosecuted. There is no substitute for careful gathering, consideration and organization of the mediation documents and pertinent testimony.

The most underutilized opportunity to educate the mediator is the easiest and simplest one. Most mediators welcome a pre-mediation conference in person or by phone. Oddly, many litigants hardly ever take advantage of these opportunities. Such a meeting is especially important where peculiar or difficult relationships exist between counsel and her client or between the opposing lawyers. Difficult clients, lofty expectations, mistrust between lawyer and client, or strained relations between opposing counsel often stall or threaten a mediation before it begins if the mediator has not been adequately warned and prepared to handle the same. Most skilled mediators have strategies and techniques to lessen the impact of these factors on the effort to resolve the case. Ultimately, a well-prepared mediator can give the parties the best opportunity to settle the case.

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5 This can also be accomplished via email.
This advice goes both ways, as the mediator should also be as active as possible before the mediation session to insure that the parties and the mediator have necessary information for effective settlement negotiations.

FAILURE TO PREPARE THE ADJUSTER FOR SETTLEMENT

“He who preaches to the choir suffers when the plate is passed.” Boz (1961)

From the plaintiff’s perspective at mediation, the insurance adjuster is the most important person in the room. The adjuster holds the purse strings and thus the keys to the resolution of the case. Perhaps all plaintiff’s lawyers would agree that it is imperative to capture the attention and concern of the insurance adjuster regarding the strength of the case. Virtually all would also agree that the case will not settle if the adjuster is not concerned or impressed with the strength of the plaintiff’s case. Despite these truths, many lawyers either neglect or completely ignore the insurance adjuster at mediation during the initial presentation.

More than any other cited mediation mistake, lawyers present the case to the opposing counsel or to the mediator rather than to the insurance adjuster. These lawyers actually never even look in the adjuster’s direction when addressing the most salient parts of their case. Whether by power point, summary or in dramatic closing argument style, many lawyers spend the group mediation session presenting the slides, photos, deposition(s) testimony and other file materials to the mediator. Admittedly, habits are hard to break in that lawyers are accustomed to presenting the case to a
judge. However, it is clear that the mediator has much less ultimate power regarding settlement than does the insurance adjuster. This is especially true where defense counsel may have presented the adjuster with a sanitized version of the case which led the adjuster to conclude that the case was defensible or not a significant concern for trial. The plaintiff’s presentation may be the only realistic review of the case and may change the adjuster’s opinion of the case. This cannot be done if the adjuster is left out of the mediation presentation and the settlement conversation. The onus rests on plaintiff’s counsel to convince the adjuster that the case has real merit. This cannot be done unless the presenting lawyer makes the adjuster his audience.

A second common mistake is lawyers’ refusal to either provide a mediation statement to the defense or the decision to make little or no presentation of the case during the general session of the mediation. As acknowledged earlier, some lawyers approach mediation with noted anxiety because of concerns it simply provides a free peek at the plaintiff’s case. While this is a legitimate concern, it is markedly exaggerated in that most folks on both sides participate in mediation because both sides want to settle. Other lawyers are concerns that a full blown mediation presentation would prematurely and unnecessarily reveal trial strategies and evidence which has its highest and best value upon revelation at trial.

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6 This is especially tempting where the mediator is a former judge.
This is a legitimate concern that must be handled carefully as weighted against a true opportunity to settle the case.

A common scenario is best examined from the defense perspective. The defense has performed surveillance on the plaintiff who claims to have a debilitating back injury. The surveillance tape shows the plaintiff chopping wood and roller skating. The plaintiff has testified that he never chopped wood or engaged in any other physical activity because of constant pain and the debilitating injury. The defense holds the surveillance tape as work product, anticipating revealing the same when the parties reach an impasse in the mediation. The defense does not mention this tape in the opening mediation statement with hopes of breaking an impasse later. When the negotiations stall later in the mediation, the defense faces a dilemma as to whether to reveal the tape with hopes to shake loose a settlement or to suspend the mediation and impeach the plaintiff with the tape at trial and obtain a defense verdict. These choices are in-the-moment judgment calls with no ready answers.

For the most part, plaintiff’s counsel cannot afford to forego making a full presentation to the defense in mediation if settlement is in the best interests of the plaintiff. It is also an important opportunity to correct any misstatements or misrepresentations made by defense counsel regarding the issues and crucial evidence in the case. Ethically counsel is bound to

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7 This is not to imply that defense counsel would intentionally misstate aspects of the case. However, plaintiffs and defendants
maximize the opportunity if the same serves the client’s best interests. This does not mean that plaintiff’s counsel should give the case away or unnecessarily reveal precious trial strategies. However, many insurance adjusters have little perspective on the plaintiff’s view of the case except for a full-bodied presentation of the case at mediation. The risk that the defense would glean the plaintiff’s trial strategy is outweighed by the benefit that the plaintiff’s presentation at mediation will change the adjuster’s opinion regarding the strength and value of the case. Even more, most good lawyers prepare the case such that there are very few real secrets. Thus, a full blown dissection of the major components of the case bears little risk of losing a trial advantage.

FAILURE TO “HEAR” THE OTHER SIDE

“A wise old owl sat in an oak. The more he [listened], the less he spoke; The less he spoke, the more he [listened]. Why aren’t we like that wise old bird.” Mother Goose

There is a real difference between “listening to” and “hearing” what the other party is saying at mediation. Although this seems like a simple concept, this is much more difficult after emotions and personal stake become involved. The following scenario illustrates the “listening to” versus “hearing” concept:

The couple at the table next to mine were arguing, but I was trying not to pay attention and I don’t know what was said. I heard them, but I wasn’t listening.

usually see the same set of facts in different ways. The adjuster may not have heard the plaintiff’s view of the facts until mediation.
You probably know how you feel about the dispute and what problems you think need to be resolved. You could probably describe how the other person has acted and how their behavior has affected this dispute. And, you could probably name all of your client’s most important issues in the dispute. All of that is good because you will need to discuss these things in mediation. But, it is likely that you know a lot less about how the opponent has been affected by the dispute and how they see it. In fact, many people make the mistake of assuming that the other person wants them to be miserable, is not bothered by the conflict, or even enjoys it. This is almost never true! Most people engage in conflict because they have genuinely different interests, expectations, information, or values. Consider how you and your client would answer the following questions:

- How does the other person feel about the dispute?
- How would they define the problem(s) that need to be resolved?
- How would they describe my behavior in this dispute?
- How has my behavior in the dispute affected the other party?
- What are most the most important issues to the other party?

If confidently answer the above questions is not an option, you have just discovered a potentially important clue for unlocking a successful settlement of the dispute. Although one might believe that understanding and solving the other person’s problem is “the other person’s problem,” there is a flaw with that belief: The concerns of the other person are part of
the conflict to your client’s case. If those concerns aren’t really understood from their point of view, you cannot do anything to address them. And if you can’t address them, the conflict will remain unresolved. Try to understand the problems expressed by the other party exactly as they see them. This does not mean you have to agree with what the other person says or abandon your own concerns. It only means you must understand their concerns.

To accomplish this during the mediation will require “listening to” and not just “hearing” what the other person says. While it may be difficult to listen to a point of view with which is completely opposing to yours, what is said may reveal important and helpful information for you and your client.

SOME OTHER THINGS TO AVOID

“If you do what you’ve always done, you’ll get what you always got.”

Mark Twain

- Try not to minimize the other side’s feelings about the dispute

- Do not make negative judgments about what the other person has said, even if you believe what the person has said deserves a negative judgment (e.g., “These are just a bunch of lame excuses.”)
- Do not misrepresent or omit relevant facts; This can damage trust immeasurably if the other person catches - or even suspects - you are doing this

- Be respectful; Do not speak in a condescending or sarcastic way to the other person, make offensive or hostile non-verbal expressions (e.g., rolling the eyes, loud sighs, bouts of laughter, groaning when the other party speaks)

- Do not walk in making demands; Demands usually cause further resistance

CONCLUSION

“When all has been said and done, there’s nothing left to do or say.”
Shaquille O’Neal

Mediation is a premium opportunity to resolve most cases in a manner that serves the interests of all parties. It is both a form and continuation of negotiation. All gain certainty. All gain closure. All avoid risk. All rest in the satisfaction of being the architects of the resolution. The ability to negotiate well is a core skill of a successful litigator. Counsel should treat this special opportunity with utmost care and appropriate
attention. Such attention requires adequate preparation and will yield maximum settlement results.

With gratitude,

M.G.B.

2011

gino@ginobrogdon.com
APPENDIX
The State Bar of Georgia and the Law Schools of The University of Georgia, Emory University and Mercer University established the Institute of Continuing Legal Education in Georgia in August 1965. In 1984, Georgia State University College of Law was added to the consortium, and in 2005, John Marshall Law School was added. The purpose of the Institute is to provide an outstanding continuing legal education program so that members of the legal profession are afforded a means of enhancing their skills and keeping abreast of developments of the law. The Institute is governed by a Board of Trustees composed of twenty-eight members consisting of the Immediate Past President, the President, the President-elect, the Secretary, and the Treasurer, all of the State Bar of Georgia; the President, President-elect and the Immediate Past President of the Young Lawyers Division; nine members to be appointed by the President of the State Bar of Georgia, each for a term of three years (the President has three appointments each year); two representatives of each of the participating law schools; and the Immediate Past Chairperson of the Institute. The Immediate Past President of the State Bar of Georgia serves as Chairperson of the Board of Trustees of the Institute.

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• Every “active” attorney in Georgia must attend 12 “approved” CLE hours of instruction annually, with one of the CLE hours being in the area of legal ethics and one of the CLE hours being in the area of professionalism. Furthermore, any attorney who appears as sole or lead counsel in the Superior or State Courts of Georgia in any contested civil case or in the trial of a criminal case in 1990 or in any subsequent calendar year, must complete for such year a minimum of three hours of continuing legal education activity in the area of trial practice. These trial practice hours are included in, and not in addition to, the 12 hour requirement. ICLE is an “accredited” provider of “approved” CLE instruction.

• Excess creditable CLE hours (i.e., over 12) earned in one CY may be carried over into the next succeeding CY. Excess ethics and professionalism credits may be carried over for two years. Excess trial practice hours may be carried over for one year.

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• The Commission on Continuing Lawyer Competency staff will mail a prescribed affidavit form to each active attorney at the end of the year. The form will show the CLE courses attended and the number of credit hours that are entered in the Bar records. Each attorney will swear or affirm that the CLE credits claimed on the affidavit were ACTUALLY ATTENDED. Attorneys who are late attending or have to leave a seminar for a period of time will have to strike the CLE hours shown on the affidavit and enter the hours actually attended and claimed; or inform the ICLE staff at the seminar to reduce the hours in the ICLE records before transmitting the credit hours in the ICLE record!

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