

# A Mediator's

*As everyone knows, with few exceptions, all cases filed in court, are subject to court-ordered mediation. Follow me as one of the attorneys to share some thoughts about mediation.*

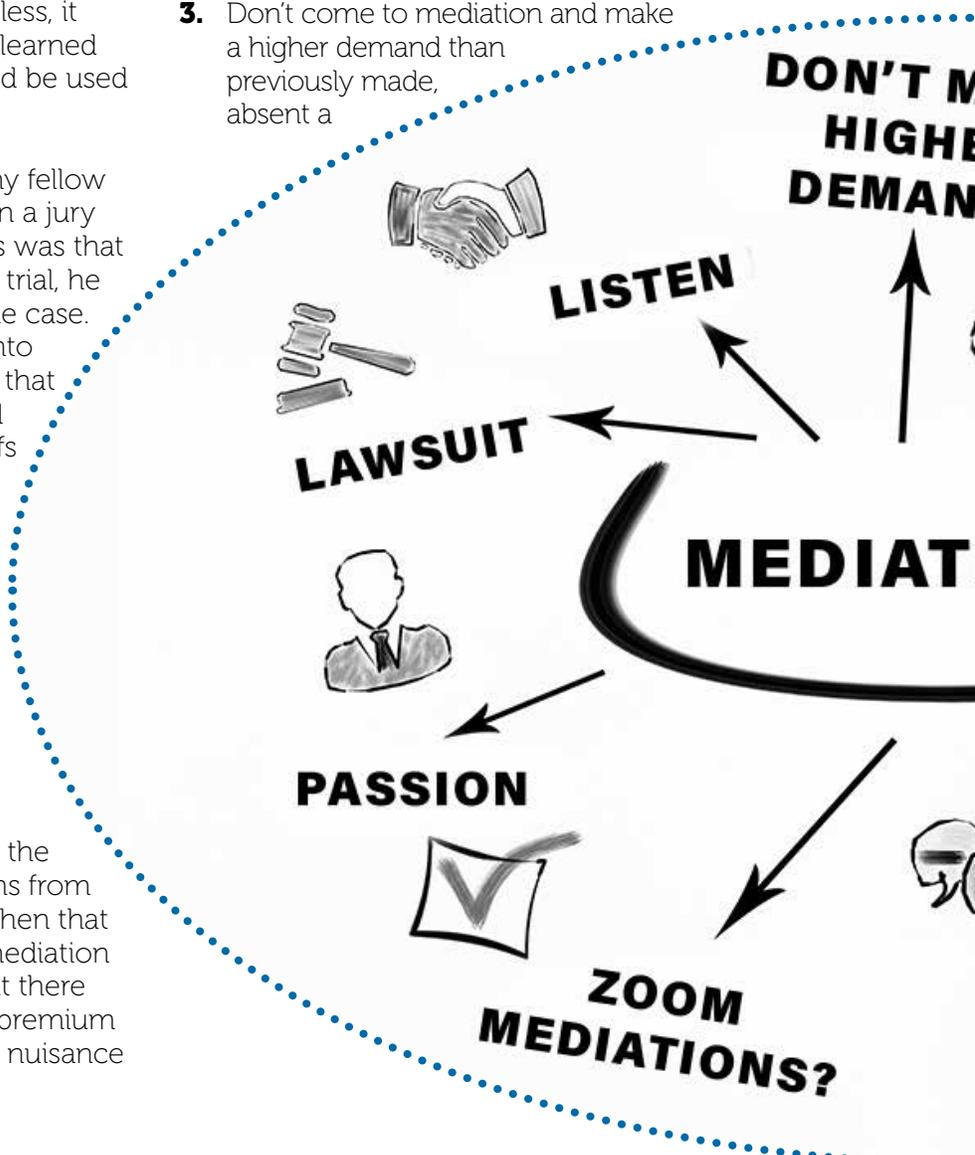
1. It is OK to be passionate about your case. Several years ago, I had the interesting experience of sitting on a jury. When I asked the lawyers how it was that I came to be selected, first as an alternate and then as an actual juror when one of the jurors did not show up, I was told that I was "the lesser of three evils." Nevertheless, it was an eye-opening experience, and I learned something that I believe can and should be used in mediations in the right case.

After we reached our verdict, I asked my fellow jurors for their thoughts after serving on a jury for the first time. One of the comments was that if an attorney is going to take a case to trial, he or she needs to be passionate about the case. I think the same thought carries over into mediation. While there are some cases that might be "passionless," I have mediated several cases in which both the plaintiffs and the defense lawyers showed a real passion for their case. I actually think that made a difference in terms of the amount for which those cases resolved. Again, this is not something that needs to be overdone, but it is something to consider if you have the right case.

2. Set expectations appropriately. One of the greatest obstacles to a successful mediation is when the parties come to the mediation conference with expectations from which they are not willing to budge. When that occurs, the likelihood of a successful mediation diminishes significantly. I recognize that there are those cases which may demand a premium or which may not be worth more than nuisance

value. However, as any good trial lawyer will tell you, any case can be won or lost. Thus, if the attorneys do a good job of setting and controlling expectations, the likelihood of success at mediation rises exponentially.

3. Don't come to mediation and make a higher demand than previously made, absent a



# Thoughts

BY CHRISTOPHER J. DANIELS

ed in South Carolina, whether in state court or federal  
ing a case I mediated not too long ago, I was asked by  
mediation from the mediator's prospective. Here goes:

change in circumstances in your case. If there has been a change leading you to increase your prior demand, communicate this to defense counsel and the insurer before mediation. When a defendant and his carrier are surprised by a much higher demand for the first time at mediation, a defensive tone often sets in, and the mediator has to work that much harder to create an element of trust which will lead to resolution.

4. Expect to be asked difficult questions. If at some point during the mediation conference you are not asked a difficult or tough question—one that may even offend you or your client—I would suggest that perhaps the mediator is not doing his or her job. After all, the mediator's job is to facilitate discussion that leads the parties to objectively evaluate not only the strengths, but also the weaknesses, in their case. As a neutral, the mediator has no interest in how the case is resolved; rather, his or her role is to push and prod a little and to make sure the parties recognize the risk of not taking a little less or paying a little more.

5. What about Zoom mediations? My personal preference continues to be in-person mediations. Nothing can replace person-to-person interaction. However, understanding the times in which we live, Zoom mediations are probably here to stay. If you are participating in a Zoom mediation, my recommendation is to make sure your clients are in front of a camera so the mediator can interact with them. It is frustrating for the mediator if the clients are sitting in their attorney's office, but the mediator does not have the opportunity to see them or speak with them.

6. Terms and Conditions. On occasion, we get to the end of a mediation, a settlement has been reached regarding the amount to be paid, and a dispute subsequently arises as to the other terms, usually over confidentiality or procedure for payoff of a lien. Frankly, these disputes usually get worked out. However, in order to prevent such a scenario from occurring,



let me suggest that very early in the mediation conference, the plaintiff consider requesting from the defense those terms that the defendant insists upon to settle the case. Or, as I have seen recently, have the defendant bring a release that is more detailed than the typical mediation agreement that is executed by the parties when the case gets resolved.

7. Finally, take advantage of your mediator's experience and be willing to listen to a different point of view. Again, the mediator's objective is to help guide discussions that can hopefully lead to a resolution of your case.

**While I realize most attorneys who read these remarks mediate cases regularly, sometimes, a few reminders can be helpful.**



### **CHRISTOPHER J. DANIELS**

Chris is a graduate of Davidson College and the University of South Carolina School of Law. He has been with Nelson Mullins Riley & Scarborough for 35 years and has tried cases his entire career, focusing on product liability, premise liability, and transportation litigation. He also handles commercial and business litigation matters and is a certified mediator in South Carolina. He can be reached at (803) 255-9457.

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