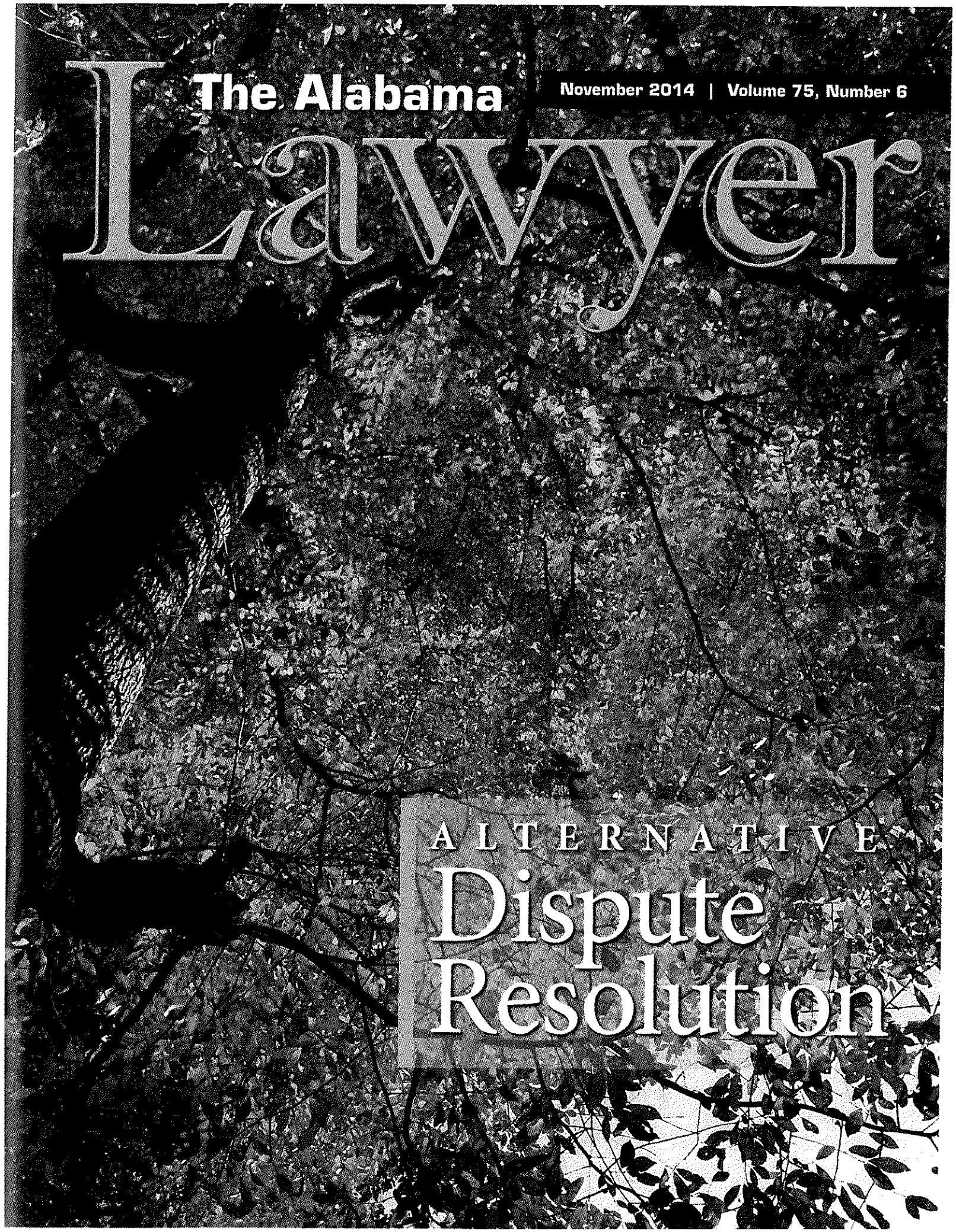
The Alabama Lawyer

November 2014 | Volume 75, Number 6



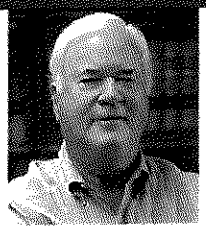
ALTERNATIVE Dispute Resolution

CONTRIBUTORS

Shawn T. Alves is a member of Stone, Granade & Crosby PC. He graduated from the University of the South, with honors, and from the University of Alabama School of Law, magna cum laude. He was a Hugo Black Scholar and is a member of the Order of the Coif. Alves served as president of the Baldwin County Bar Association.

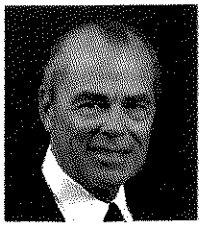
Samuel N. Crosby has practiced with the Baldwin County firm of Stone, Granade & Crosby PC for 36 years, and has been mediating cases for 20 years. He graduated from the University of Virginia with academic distinction and from the University of Alabama School of Law, where he currently serves as a director of the Law School Foundation. He is retired from the United States Naval Reserve JAG Corps. Crosby is a past president of the Alabama State Bar and a recipient of the Chief Justice's Outstanding Leadership Award, the Albritton Pro Bono Leadership Award and the Howell T. Heflin Honor and Integrity Award. His practice includes civil litigation and mediation.


Adams


Baxley


Beasley


Carr


Cunningham


Haney

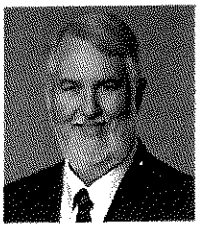

Jones


Miller


Prince

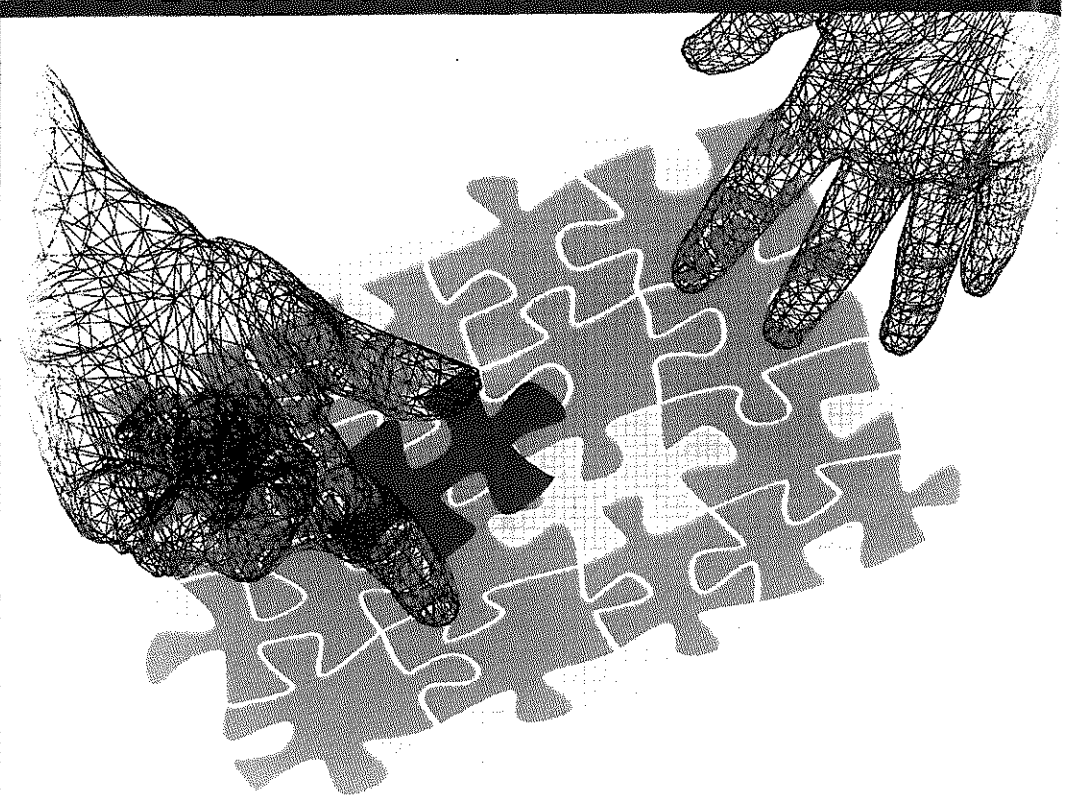

Segall


Simon


Stephens


Sydnor


Vowell



Perspectives on Mediation from Top Attorneys

By Samuel N. Crosby and Shawn T. Alves

Some of Alabama's top litigators and mediators shared their thoughts and advice about mediation. The contributors are:

Cassandra W. Adams, Birmingham
Wade H. Baxley, Dothan
Jere L. Beasley, Montgomery
Charles F. Carr, Daphne
Robert T. Cunningham, Mobile
F. Michael Haney, Gadsden
G. Douglas Jones, Birmingham
M. Kathleen Miller, Mobile
Robert F. Prince, Tuscaloosa
Bobby Segall, Montgomery
Kenneth O. Simon, Birmingham
H. Harold Stephens, Huntsville
Marda W. Sydnor, Birmingham
Hon. J. Scott Vowell, Birmingham

Contributors were asked to briefly respond to three questions:

1. What is the key to your success in mediation?

ADAMS: I don't give up. It's difficult for anyone, in any situation, to decide to face a problem. Once someone takes the substantial step of deciding to work toward resolution, I work feverishly to find ways to help them resolve the issues. By honoring the parties' decision to try and resolve their dispute through mediation, I am reminded of their courage and that we all are gifted with the ability to appropriately manage our conflict.

BAXLEY: I find that the key is to have patience with the parties and try to convince them that settlement of this litigation at this stage is in their best interest.

I also emphasize that there are substantial risks in taking this case to trial whether the party is a plaintiff or a defendant. That always seems to get their attention. Of course, the real key is having parties and attorneys who are willing to compromise their respective positions to reach a fair and reasonable settlement.

BEASLEY: In the cases that have settled in mediation–and that includes cases settled after the actual session ended–it was usually because of the strength of the plaintiff's case. I have never settled a weak case in mediation. Frankly, I have had to develop more patience in order to cope with the mediation process and that has helped me. The mediator has a tremendous effect on cases settling and it takes a special talent to bring opposing views into accord and bring about a satisfactory resolution of a case.

CARR: I genuinely want my case to settle as soon as possible. Maybe all defense lawyers are the same way but if not it creates a subtle deterrent to succeed at mediation.

CUNNINGHAM: Do not prepare the case for mediation. Prepare the case for trial. Only when you are fully prepared for trial can you expect a successful result in mediation.

HANEY: I believe the key to success in mediation depends very much on the type of case. Where the principal issue is how much it's going to take to resolve a personal injury claim, I think it is very important to have clients with defined goals, but realistic expectations. In other cases that do not simply involve payment, creativity and thinking outside of the box are probably most important.

JONES: The same as the keys to success at trial: preparation. Mediation is simply a different form of putting your client's best foot forward. You have to know the facts and the law that pertains to your case in order to both present your client's side of the dispute and to rebut what you hear from the other side. In addition to preparation, lawyers have to remember the purpose of mediation–not winning as you would at trial but reaching a settlement that is fair for your client. With that, I think that during the mediation lawyers often have to make certain decisions that might be somewhat risky to send a very clear message that you are serious, and reasonable, about getting the case resolved without appearing weak.

MILLER: A good mediator–one who relates well to people and who has trial experience

PRINCE: Managing the expectations of my client, taking seriously the workup and *presentation* of the case at mediation and not assuming I know the other party's valuation, authority or what any particular bid means. Many times bracket invitations have proved to be useful in breaking up "log jams."

SEGALL: First, write a persuasive and reasonably thorough confidential mediation statement. It's important that the mediator fully understand your client's position and arguments, so that he or she can more knowingly discuss your client's position with the opposing side. Secondly, although mediators often counsel against opening statements, I believe a well-planned opening can be key to a successful mediation. It's a lawyer's opportunity to speak directly to the opposing decision-maker. The secret is to persuasively–and with sincerity–state your client's position while remaining conciliatory and avoiding offense. The goal is for the opposing decision-maker to understand that your side has more merit than anticipated and that you will present your side convincingly, and in a likable manner, to the jury. It's a delicate balance, but if successfully negotiated will set a favorable tone for the entire mediation.

SIMON: From a mediator's perspective, I experience the most success when I propose a specific figure to settle the case. Yet, out of respect for the parties' right to self-determination, I suggest a specific figure only under the right circumstances. I don't make a mediator's proposal unless the parties are bogged down and look to me for leadership and direction. I formulate the proposal only after evaluating the facts, strengths and weaknesses of the case, gauging the respective attitudes of the parties regarding settlement generally and anticipating their likely responses to the proposed figure.

STEPHENS: I think that I am perceived by both sides as someone who will work diligently to assist the parties in reaching a successful resolution. The other key to success is to be able to successfully mediate some difficult cases for attorneys and let word of mouth become a good source for referrals.

SYDNOR: Preparation. Since I am defending primarily personal injury cases, by the time I am ready to mediate, I have taken the depositions of the plaintiff and any fact witnesses, I have the plaintiff's full medical history and specific numbers regarding plaintiff's claimed injuries and damages and I either have depositions of the treating physicians or know whether they will relate the injury to the subject accident. If it is a case involving experts, I like to be sure their depositions have been taken before I'm ready to mediate. I spend a lot of time evaluating the case. I run the facts by my law partners and attorneys in the county where the case is pending. I talk to plaintiff's counsel to be sure I understand his or her evaluation of the case. Prior to the mediation, I send relevant materials for the mediator so that he or she can be fully prepared on the facts. Once the mediation starts, I am patient. I have a goal and I work toward it. If a plaintiff has high expectations in a case that is not meritorious of high dollars, I like to negotiate slowly to give the mediator time to help the plaintiff get used to lower numbers. If I have some information that is damaging to the plaintiff's case, for example prior treatment where the plaintiff claimed none at the deposition, I hold it until the parties are within striking distance of settlement. It can close a substantial gap if the plaintiff has not been honest with counsel. I choose mediators who will prepare, have trial experience and will share their opinions with both sides without becoming an advocate for one side or the other. I don't reveal my authority to the mediator unless I need to toward the end, but I also don't misrepresent my client's position. I don't reveal everything to the

mediator because I'm still an advocate. However, I think it's important to be honest and candid with the mediator. It's important that the mediator know you as someone who is honest when you affirmatively represent a position of your client. I don't like drawing lines in the dirt. I don't say that's all I can pay unless I know my client will never pay more.

VOWELL: Success in mediation is more than being able to reach a global settlement of the legal dispute. Mediation can be deemed successful if the process narrows the gap between the plaintiff's demand and the defendant's offer. Mediation can be just one more step in progressing to an ultimate settlement. It can also succeed when it helps define and narrow the issues to be tried. The parties and their counsel should leave feeling that the process has been fair and that they have been heard. They often have a sense of satisfaction even if the case is not settled and I think that can be called success.

A case is more likely to be settled through mediation when the parties voluntarily with a commitment that they will make a good faith effort to settle the case. Often, where mediation is the result of a sua sponte court order or of a standing order requiring that all cases be mediated–when the parties are not committed to the process–it just adds another layer of delay and expense for the parties and accomplishes very little.

It is important for the mediator to allow the parties to reach their own solution to the dispute. The successful mediator finds a balance between being a facilitator and an evaluator. The parties are generally more pleased when the outcome is the result of their reaching an agreement, rather than one which is imposed by the mediator.

I firmly believe in the mediation process. It helps our overburdened trial courts and can result in a speedy and fair disposition of a case. It enables the litigants to conclude their case with a sense that they have been treated fairly and that our system works.

2. At what point in a case is mediation appropriate, and when do you encourage or discourage it?

ADAMS: Any point in a case is appropriate for mediation, but the earlier the better.

BAXLEY: Mediation is more appropriate when the parties have conducted some pretrial discovery and both sides know the strong and weak points of their side of the case. I discourage mediation if the attorneys cannot explain those points to me unless it is a case involving undisputed facts and simple legal issues.

BEASLEY: No case should go to mediation before pretrial discovery is complete and, on occasion, it is better that motions for summary judgment be disposed of first. In many of our cases there is no need for a motion of that sort. As a rule, I don't encourage mediation and prefer that the trial judge or defense lawyer make that decision. Nor do I discourage mediation, even though in certain cases it is a waste of time.

CARR: I want to mediate a case prior to suit being filed. I have one client who has worked with me to mediate 14 out of 16 cases he has sent me and successfully resolved them before suit was filed.

CUNNINGHAM: Mediation is most appropriate after the case is fully prepared for trial. It is a fact of legal life which I neither encourage nor discourage. Having been around long before it existed, though, I see it being used far too often as a poor substitute for going to the mat for your client in the courtroom.

HANEY: For mediation to have any chance of success, both sides have to have adequate information to understand the position of the other side. I encourage mediation when I believe that the other side has complete information and expresses an interest in resolving the case.

JONES: There isn't a one-size-fits-all for this. I talk to my client about mediation as early as possible, regardless of whether I am representing the plaintiff or the defendant, because, to some extent, the client's attitude will dictate when the time is right. Litigation is often such an emotional issue that clients often have to warm up to the idea of a resolution that by the very definition of settlement is short of total victory. Aside from the client's attitude, the facts and circumstances of the case will guide the mediation process. In many cases, a considerable amount of discovery has to take place just to frame the issues and, with others, not so much. A party who is footing the bill for the litigation has to understand that the mediation process can cut litigation costs substantially which can factor into settlement negotiations.

MILLER: It depends on the case–as early as the parties have a good understanding of what the evidence is likely to be at trial.

PRINCE: It is appropriate after all parties know the important facts, contentions and defenses necessary to make a meaningful evaluation (usually after substantive discovery). From a plaintiff's perspective, the closer mediation is to the trial date, the greater the likelihood of success. I discourage mediation based on a cost-benefit analysis when the parties' expressed valuations are too far apart.

SEGALL: Mediations generally are most successful after enough discovery has been completed for the lawyers to understand the other side's case, but while sufficient discovery expense can still be avoided by settlement. I encourage mediation when the other side wants to mediate, and I believe the case ought to settle. I sometimes encourage it when I fear the opposing decision-maker may not be hearing the problems with his or her case. I may encourage it when I believe my side is weak, and I think a good mediator might help resolve the case.

SIMON: Experience shows that mediation has the greatest chance of success after discovery is complete and the key

motions have been decided. Moreover, there are earlier points in the case when mediation should be encouraged, such as before significant attorney fees and expenses are incurred. Empirical research shows that in certain situations the uncertainty created by pending dispositive motions can have a salutary effect on settlement discussions. Nonetheless, mediation seems to have a much lower chance of success when it is the result of a mandatory court order, when the parties are waiting for key rulings and before they have sufficient information to properly evaluate the case.

STEPHENS: The decision about when to mediate is very important but has to be made on a case-by-case basis. I have seen many instances of pre-suit mediation prove successful. If a lawsuit has been filed, it is often helpful for at least the parties to have been deposed prior to going to mediation but certainly not always the case.

SYDNOR: I prefer to mediate after full discovery has been conducted and both sides are operating from a position of knowledge. I encourage mediation well prior to trial. I don't like to mediate too close to trial because by the time I'm getting ready for trial, I don't want to be thinking about case settlement. Negotiating a settlement and trial preparations are two different mindsets. I encourage mediation when the demand is high enough to justify the expense of it and I think the parties would benefit from the process. I discourage mediation in cases that attorneys should be able to settle between themselves.

VOWELL: The point in a case when mediation is appropriate depends on the case. If the facts are not seriously in dispute, it may be worthwhile to mediate before the parties invest time and money in discovery and trial preparation. On the other hand, if the facts are complex and disputed, the lawyers need to learn more about their case before they can comfortably advise the client as to the settlement value of the case. In those cases, it is often better to wait until the case has progressed to the summary judgment stage or near the trial date. The case has to ripen.

3. How do you prepare a client for a mediation session?

ADAMS: I explain the mediation process from beginning to end. Then I encourage my client to participate in the mediation by telling their own story. I also spend a lot of time before the mediation, managing my client's expectations,

which requires being straightforward about the strength of their case.

BAXLEY: I prepare a client for mediation just like I would for a deposition. I clearly explain to them that we are not trying the case before the mediator and that the mediator is not a judge who is making a final decision. I encourage a client to be rational and reasonable when meeting with the mediator and to try and impress the mediator so that he/she will advise the opposing party that my client will be an effective witness for our side of the case if this matter goes to trial.

BEASLEY: I always tell a client to be prepared for lots of waiting and to be patient. I also go through what I expect the client to hear from the mediator and the defense lawyer during the process. I tell the client not to be discouraged if the first offer is a "low-ball" offer, which, in all too many mediations, is the norm, and that it may take some time to get the last offer from the defense. I have always thought mediations would be more successful if first offers were more reasonable. I suppose the same could be said if a demand from our side is outrageously high. I try really hard to make sure the client knows that the mediator is not a judge and will not be making any rulings. I believe that the mediator can only be effective if he or she understands our case and that includes the strengths and the weaknesses. If the mediator doesn't understand the nature of a products case, for example, it will be most difficult for that person to comprehend the technical aspects of such a case. Fortunately, most mediators work hard at their task and that makes the mediations at least bearable when they don't work out.

CARR: I try to teach them to be as open as possible, and I trust the mediator.

CUNNINGHAM: I tell them that most defendants do not have enough sense to pay what their case is really worth, so we should listen politely, but be prepared to go to trial. Sometimes I am wrong.

HANEY: I always emphasize that they will likely be very disappointed with the first offer. I explain that it is the last offer, and not the first, that matters. I also explain that we have to remember that our goal at mediation is to settle the case in a manner that is acceptable to us and not to "beat" the other side.

JONES: The client should help the lawyer prepare, first and foremost. To do that, though, the lawyer has to convince the client to look at the good, the bad and the ugly. Emphasize the strengths but appreciate the weaknesses. The client has to be made to understand that he or she cannot be represented the way they deserve unless the lawyer knows all of the facts. And the lawyer has to get the client to understand the settlement process–the role of the mediator, the role of the lawyers and that the ultimate outcome of a successful mediation is likely to be less than what the client had hoped–but the lawyer for the opposing party is telling their client the same thing. If the client understands that standing on principle is not really part of this process, then the odds are that the mediation will be successful and the case gets resolved.

MILLER: I talk with our client about listening and trying to learn about the strengths and weaknesses of the other party's case and about the weaknesses of their position. My husband, Charlie Fleming, recommends telling your client that you will be overplaying the strengths of the client's case during the mediation and that they should not listen to you!

PRINCE: I explain the "bargaining" process in detail and try to eliminate the chances of any spontaneous reactions from my client to the mediator's comments–offers or otherwise. I compare the usually day-long process to a marathon *vis-à-vis* a sprint, and I try not to overplay the chance of the mediation being successful. I remind my client he or she will be judged by the opposing attorney and adjuster in terms of jury appeal, so I discourage any extremes in dress or appearance. I remind them that it usually pays to be nice because "sugar attracts more flies than vinegar."

SEGALL: I explain the process, the strengths and weaknesses of both sides of the case and the pros and cons of settling. I also discuss what might be a reasonable settlement of the case. I try to prepare my client to understand that settlement requires compromise.

SIMON: Clients are best prepared for mediation when they have a realistic picture of all sides' positions, a clear-eyed assessment of the rigors and uncertainties of trial and an informed view of likely outcomes. Clients need to be aware of the economic costs already incurred and likely to be incurred in the future. They should understand how the negotiation process works, what is and isn't achievable and the need for flexibility throughout the settlement process. Clients also benefit enormously from discussions regarding settlement goals, strategy and tactics, and how success should be defined at the conclusion of the process.

STEPHENS: I always try to confer preferably in a face-to-face meeting in advance of a mediation with my client to review the case's strengths and weaknesses. I think this needs to be a very candid and frank assessment of the case and should include a discussion of key issues related to the matter from both sides' perspective. I also encourage my clients to approach mediation with a positive but open mind as opposed to having lines drawn in the sand prior to the commencement of mediation.

SYDNOR: Since I generally represent large corporations, I often do not have a live person with me at the mediation. Instead, I keep them informed by phone about what's going on. They are prepared for the mediation since I'm required to report and give my analysis weeks prior to the mediation. The more information they have about the case, the better equipped they are to evaluate it. When I do have a corporate representative present, I encourage them to do more listening than talking. I like positive, forward progress and I try to maintain control of that if I can.

We hope some of the counsel given by these litigators and mediators will be helpful in your daily law practice. | AL