



**AMC 2023**

**Session 1**

# **How to Prepare for a Successful Mediation**

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## About the Presenters...

**Emile H. Banks, Jr.**, is founder of Emile Banks & Associates LLC, a trial counsel litigation firm. Mr. Banks has been named Top 10 Attorneys in Wisconsin by Thomsen Reuters Super Lawyer in 2021 and 2022. He is a Fellow of the American College of Trial Lawyers and past President of American Board of Trial Advocates. Mr. Banks is also in two other invitation-only, very select prestigious national legal associations: Litigation Counsel of America and International Association of Barristers. He was named Best of the Best Mediators (2021) and Best of the Best Arbitrators (2022) by Wisconsin Law Journal. In 2015 and 2021 he was named Lawyer of the Year - Insurance Law by Best Lawyers.

**Michael J. Cerjak** is one of the founders of Barton Cerjak, S.C., a litigation boutique in Milwaukee that focuses on a variety of personal injury, civil rights, commercial litigation, and class action matters. Most recently, he has specialized in representing individuals seriously harmed as the result of substandard care, errors, or systemic deficits in nursing homes, prisons, hospitals, and long-term care facilities. Before devoting his practice to representing individuals, families, and closely held businesses, Michael spent years representing large institutions—insurers, large corporations, and governmental entities—in commercial litigation, insurance coverage, civil rights, and personal injury cases. Since joining the plaintiffs' bar, Michael was nominated for and selected to serve on the Wisconsin Association of Justice's Amicus Committee, a group of highly trained trial attorneys who work to present and highlight arguments before the Wisconsin Supreme Court and Wisconsin Court of Appeals in notable cases. He is listed in Best Lawyers in America for his work in Personal Injury Litigation – Plaintiffs, he has been recognized by Super Lawyers as a Rising Star every year since 2012, and Milwaukee Magazine has named him as a Leading Lawyer in Insurance Law. In 2021, he was named a Fellow of the Litigation Counsel of America. Michael received his undergraduate degree in software engineering from Milwaukee School of Engineering with honors and his law degree from Marquette University Law School cum laude.

**Michael P. Crooks** is a shareholder with the firm of von Briesen & Roper, S.C. His main areas of practice are commercial litigation, legal malpractice, medical malpractice, accounting malpractice, insurance defense and coverage issues, bad faith litigation, products liability work, premises liability, defamation suits, breach of contract, personal injury defense and third-party recovery. He also spends about 35% of his time mediating cases. Mike received his B.A. degree, cum laude, from the University of Notre Dame and his J.D. degree, cum laude, from the University of Wisconsin. Since law school, he has lectured for the State Bar's "Building Your Practice" series, for the Wisconsin Judicial College, for the Civil Trial Counsel of Wisconsin on litigation issues and municipal immunity, for the Wisconsin Law School on mediation, discovery practices, and various other litigation related topics for many other groups.

**Mary Lee Ratzel** is a trial lawyer who has tried close to 100 jury trials, the majority of which involved the defense of physicians and health care providers in medical malpractice actions. In addition, she has served on a panel of attorneys as National Counsel defending pharmaceutical and medical products companies in multi-party litigation involving toxic shock syndrome, latex gloves, Phen-Fen, and surgical components. This also included negotiating settlements in over 200 pharmaceutical cases in the State of Wisconsin. Mary Lee has received training in Alternative Dispute Resolution through the American Health Lawyers Association. For the last eighteen years, Mary Lee has been an adjunct professor at Marquette University Law School teaching Advanced Trial Advocacy. She currently also serves as a mediator in litigation matters involving automobiles, product liability, construction, personal injury and property loss cases, while maintaining her law practice in Brookfield, at Ratzel & Associates.

**Christine M. Rice** is a Shareholder and the President of Simpson & Deardorff, S.C. She graduated cum laude with a bachelor's degree in nursing from Carroll College, and after practicing for several years as a registered nurse, she returned to law school and graduated magna cum laude from Marquette University. Ms. Rice practices in all areas of insurance defense, specializing in insurance coverage. Ms. Rice is a member of the State Bar of Wisconsin. She also served on Wisconsin Defense Counsel's Board of Directors from 2014 through 2021 and was President of the organization from 2019-2020.

## **SUCCEEDING IN MEDIATION: AVOIDING THE COMMON FAILURES**

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### **I. Introduction**

Mediation failures are often both predictable and avoidable. Proper timing, good choices, knowledge of the law and expectations are key ingredients to settlements. When one or more go away – the outlook for resolution can diminish quickly. This presentation discusses the common causes of mediation failure and how to avoid them.

### **II. Cases That Work Well for Mediation**

1. Personal injury claims
2. Business disputes/divorces
3. Real estate disputes

4. Family law matters
5. Insurance coverage matters

### **III. Mediation Rules**

1. Formal – See Exhibits attached
2. Non-formal
3. Written
4. Contracts
5. The statutes

### **IV. Common Causes of Mediation Failure**

#### Setting the stage

1. Mediator selection
2. Location
3. The wrong form of ADR (*See Wis. Stat. § 802.12*)
4. Timing: the risk of mediating too early

#### Preparation: Calls and Contacts

5. No clear pre-ADR communications, i.e., no idea if opponent will negotiate in good faith
6. No contact with subrogation carrier before mediation – contact during mediation
  - a. Medicare
  - b. Medicaid
  - c. Made whole
  - d. Future set-asides
  - e. Paternity & other liens
7. Failure to prepare/education client for mediation

8. Wrong decision maker in control – e.g., non-party
9. No one present with authority to settle

#### Knowledge of case

10. Unrealistic lawyer expectations
11. Unrealistic client expectations
12. Insufficient knowledge of area of law, for e.g.
  - a. Admissibility of punitive damages
  - b. Reliance on summary judgment
  - c. Caps and other statutory limitations
  - d. Special problems posed by complex multi-party mediations

#### Insight and Perceptions

13. Failure to perceive risk
14. Lawyer working against mediator
15. Lawyer supporting mediator too much (*See Model Rules for Mediation (ABA), Sections II and III, Mediatorial Impartiality, Conflicts*)
16. No knowledge of judge or jurisdiction, i.e. rural county = low verdict
17. Gaining the parties' trust

#### Law and Legal Practice

18. No knowledge of policy limits/coverage issues;
19. Impact/usefulness of “expert opinions” incorrectly valued
  - a. Permanency
  - b. Economic Loss
  - c. IME's

20. Posturing mediator as expert who opinion/evaluation stays in the case (*see* admissibility restrictions, Wis. Stat. § 904.85)
21. “Real issue” (i.e., what client wants and needs is not addressed)
22. No understanding of litigation cost
23. Mediation roulette: overreliance on strategies and judgment calls vs. facts and law, e.g.
  - a. Strategic bluffs: “settlement talk stops today”
  - b. Assumptions – opposition cannot/will not try  
– opposition unprepared
  - c. Let’s take a chance and ring the bell
  - d. I have better witnesses; reliance on past verdicts
  - e. This jury will be conservative

#### Getting Off Course

24. Outcomes: plaintiff correlates to financial needs, not case value
25. Inappropriate motivations
  - a. Punishment
  - b. Financial ruin

#### When to Quit

26. Failure to recognize a truly “final offer,” i.e. when to say “yes”

#### Concluding Mediation Correctly

27. Wis. Stat. § 807.05

No agreement, stipulation, or consent between the parties or their attorneys, in respect to the proceedings in an action or special proceeding shall be binding unless made in court or during a proceeding conducted under s. 807.13 or 967.08 and entered in the minutes or recorded by the reported, *or made in writing and subscribed by the party to be bound thereby or the party’s attorney.*

**28.** “An oral contract reached by stipulation in the course of court proceedings is unenforceable unless formalized in the way required by sec. 807.05.” *Kocinski v. Home Ins. Co.*, 154 Wis. 2d 56, 67-68, 452 N.W.2d 360 (1990).

**29.** The purpose of this rule is “to prevent disputes and uncertainties as to what was agreed upon.” *Adelmeyer v. Wis. Elec. Power Co.*, 135 Wis. 2d 367, 372, 400 N.W.2d 473 (Ct. App. 1986).

#### No Duty to Mediate In Good Faith

**30.** Wis. Stat. § 802.12, the alternative-dispute-resolution-referral statute, “does not require the parties to participate in settlement efforts in good faith, nor permit the court to sanction or otherwise burden any party for insisting on trial. *Gray v. Eggert*, 2001 WI App 246, ¶ 13, 248 Wis. 2d 99, 635 N.W.2d 667 (*quoting* Eva Soeka & James Fullin, *The New ADR Referral Statute: Resolving Conflicts Outside Wisconsin Courtrooms*, 67 Wis. Law. 12, 15 (1994)).

**31.** It is an error for a court to conclude, based on a settlement offer of zero, that a mediation process was a sham or perfunctory, for purposes of imposing sanctions for failure to comply with a scheduling order. *Gray v. Eggert*, 2001 WI App 246, 248 Wis. 2d 99, 635 N.W.2d 667.

**32.** But see, *Lee v. Geico*, 321 Wis. 2d 698 (Ct. App. 2009), court imposed sanction for not attending mediation with claim representative.