

NEWSLETTER

MEDIATION: CONFLICT TO COLLABORATION

IS AN OVERLY AGGRESSIVE AND ADVERSARIAL OPENING STATEMENT AT MEDIATION PRODUCTIVE TOWARDS REACHING A RESOLUTION? Part 1 of 2



G. Jeffrey Vernis, Esq.
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Florida Bar Board Certified Civil Trial Lawyer
Vernis & Bowling of Palm Beach, P.A.

Many of us who have participated in mediations have seen it; aggressive opening remarks. You have the goods on the claimant and you want to use it. But is an overly aggressive and adversarial opening statement at mediation productive towards reaching a resolution?

Many attorneys want to show off for their client. They want their clients to see that they are aggressive and will “fight” for them. So they enter mediation enthusiastically aggressive. They present their case in a negative and often hostile tone. They shame the other side for their position. They want to “win” in the opening at mediation. They think this is what their client wants. But, in truth, their clients only want to settle the case.

I have participated in several thousand mediations in many parts of the country. Some simple, some with surprises, some very emotional, some with no authority, some with more than enough authority and some with teams of attorneys representing numerous parties. I have seen so many mediations go off track or even impasse needlessly because one of the attorneys feels compelled to flex their orbicularis oris muscles.

There is no wonder why more and more attorneys are not giving opening presentations. Mediators are spending more time in “pre-mediation” conferences with the parties and skipping the openings. I hear them say

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ANNOUNCEMENTS

Robert C. Bowling and G. Jeffrey Vernis, Managing Partners, were both selected as **Top Lawyers—Insurance Litigation Defense** by the South Florida Legal Guide, (2018 edition)

G. Jeffrey Vernis, Managing Partner, North Palm Beach, has successfully been recertified as a Board Certified Specialist in Civil Trial Law by the Florida Bar. Mr. Vernis was originally certified in 2007, recertified in 2012 and has now been recertified in 2017. Board Certification in Civil Trial law is the highest recognition earned by a Trial Lawyer by the Florida Bar and is held by less than 2% of all licensed Florida Attorneys.

Christopher Blain, Esq. (Tampa, FL) was accepted by the National Board of Trial Advocacy (NBTA) as a Board Certified Civil Trial Attorney. The NBTA has been recognized by the Supreme Court of the United States as having merit in recognizing expertise in lawyers.

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MEDIATION: CONFLICT TO COLLABORATION

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about the openings, “they are too negative,” “too argumentative,” “too much of an attack on the client”. Yes, of course, some counsel are waiving their opening statement to hide something in their case to spring it on the other side or hold it for trial. This generally backfires. Attorneys at mediation are like middle school students, if they have some juicy piece of information they can’t hold it for long.

It is always important to remember the purpose and goal of mediation: TO SETTLE. Unlike trial where the goal is to win, the intended goal in mediation is to use compromise to forge a resolution. As the claims professional or claims counsel, always keep sight of the goal and don’t get distracted by the lure of pounding the other side with issues they most likely understand without using the sledgehammer approach.

Turn the adversaries (your counsel and opposing counsel) into collaborators working together toward your one goal. The claims professional at mediation can accomplish this if it is not happening organically. It frequently happens. Both adversaries cooperate and yes, collaborate to get everyone to see the other side’s position and work towards a mutual goal...resolution.

Openings at mediation can be extremely helpful, effective and motivate people towards settlement. When you are discussing your claim with your counsel before mediation and you are listening to the approach, consider whether the approach is conducive or counterproductive to compromise. You want the opening to be positive, not negative; informative, not antagonistic; respectful, not hostile; well organized, not a rambling rant and always remember your goal...to settle.

This is part one of a two part series on mediation. The next issue will discuss the caucus and how patience and persistence can make the difference.

Mr. Vernis offers CE accredited seminars on mediation and negotiation strategies. If you would like to attend one of Mr. Vernis’ seminars or would like one conducted in your office, please contact Tammy Bouker, National Client Services Director at TBouker@National-Law.com.

CLIENT FEEDBACK

David and his paralegal, Katie, are an absolute pleasure to work with. They not only respond timely, but they provide detailed updates in an exceptionally timely manner as well. David is always willing to answer any questions I may have, and explains everything to me as needed. This is not the only case I have had with them recently, and with each case I have, I look forward to any future ones with them. I have told many of my co-workers how much I enjoy working with them and recommend them to others as much as I can.

— Sara Jarvis, GEICO, referring to David Harmon and Katie Steele (Charlotte, NC)

Thank you for referring this case to Tom. He responded to my questions immediately and gave me great advice. He really went above and beyond to help us out and I think that speaks well of Vernis and Bowling as a whole.

— claims representative at a national TPA, referring to Tom Paradise (Hollywood, FL)

Thanks so much for the excellent counsel. I have come to rely on you in Florida.

— Karon Duncan, ESIS, referring to Andrew Bray (Miami, FL)

Phillip is great! It is nice working with him; any time I call him to discuss this case or any other case that we’re working on together, he makes himself available to speak with me at that moment. I never feel like he’s ignoring me or the file, he communicates as he receives information and takes the time to touch base if there’s been no case activity for a little while. In my role, I “deal with” a lot of attorneys that are impatient, seem over loaded, or have their assistants do the talking for them; working with your firm is the total opposite and I don’t dread having new law suits being assigned to Phillip or your firm.

— Lindsay Curry, Auto-Owners, referring to Phillip Jones (Tampa, FL)

SOUTH CAROLINA LAW UPDATE

SUMMARY JUDGMENT MOTION LIMITS DEFINITION OF ‘RESIDENT RELATIVE’ IN SOUTH CAROLINA



Joseph Bias, Esq.
Vernis & Bowling of Columbia, LLC

Attorneys Laura Robinson and Joseph Bias of our Columbia, South Carolina office were granted a Motion for Summary Judgment in Federal Court in a case where the Plaintiff sought to stack coverage under our client Allstate Insurance Company’s policy as a resident relative.

Plaintiff was involved in an automobile accident, sustaining injuries and medical costs. After obtaining the policy limits from the Defendant’s liability policy, Plaintiff made a claim for underinsured motorist (UIM) benefits under the policy, claiming status as a resident relative of the insured under the policy. Robinson and Bias, arguing for the UIM Defendant, asserted they were entitled to summary judgment in the action because Plaintiff did not qualify as a resident relative of the named insured at the time of the accident.

The named insured testified that she lived and worked in Georgetown, South Carolina. We presented evidence that the Plaintiff enrolled to take a course in Columbia a year prior to the accident and never returned, except for every other weekend. We also presented evidence of the Plaintiff’s employment forms and medical bills listing her address in Columbia, and successfully argued that the Plaintiff made no affirmative steps indicating an intent to return to Georgetown. In addition, Defendants presented evidence that she paid her own bills and did not receive any money from her mother or father. Defendant introduced testimony from the Plaintiff’s deposition where Plaintiff testified that she used the Columbia address on her job application and, while she still had belongings in Georgetown, “what she regularly uses” is in Columbia.

As a result, Defendant argued that the Plaintiff had not presented any evidence that she actually lives under the same roof as the named insured, her mother. Defendant posited that “residency” requires that both the Plaintiff and the named insured live under the same roof, not that Plaintiff merely claims legal residency. As such, we sought a judgment against the Plaintiff.

Plaintiff argued that the policy in question included unmarried dependent children while “temporarily away from home if they intend to resume residing in the household.” Plaintiff maintained that, because she was unable to provide financial assistance to the named insured’s house in Georgetown and relies on the named insured to maintain the residence, she should be considered a dependent under the policy and the law. The Court found that rather than indicating Plaintiff was temporarily away from her mother’s house with the intention to resume residing there, Plaintiff’s failure to financially assist with the house is consistent with the conclusion that she was not a resident of the house and did not intend to resume living in the house in the near future.

The Court noted the factors to be considered when determining whether an individual is a resident of a household for purposes of an insurance policy were if the Plaintiff was living under the same roof, in a close, intimate and informal relationship and the intended duration of the relationship was likely to be substantial. The Court held that the evidence we presented, even when viewed in the light most favorable to the Plaintiff, revealed Plaintiff did not qualify as a resident relative.

The case is Stephanie Jones v. Allstate Fire & Casualty Insurance Co., Civil Action No. 3:16-03069-MGL. We believe this ruling will further define and limit the definition of a “resident relative” in South Carolina and provide a more palatable standard for our clients.

For further information, please feel free to contact Joseph Bias at JBias@SCarolina-Law.com

GET TO KNOW JOSEPH BIAS
Department Managing Attorney, Columbia, SC

Favorite Places:

Chicago and Las Vegas

Favorite Hobby:

Bar Trivia

Favorite Restaurant:

Cowfish Sushi Burger Bar in Charlotte, NC

Favorite TV Show:

The Good Place

Favorite Sports Team:

The Chicago Bulls

Best Thing About Being an Attorney:

Cross Examination

VERDICTS & DISPOSITIONS

John McClurkin (Mobile, AL) (Personal Injury)

successfully defended a week-long jury trial in the case of *Caplan v. Fleet*, pending in Montgomery County, AL Circuit Court. This was a personal injury case with allegations of negligence, wantonness, and trespass, whereby the Plaintiff claimed that the Defendants' wrongful actions caused her to suffer injuries including a heart attack. Specifically, Plaintiff claimed that the Defendants trespassed onto her property on multiple occasions in violation of specific demands from Plaintiff not to do so and despite multiple warnings to Defendants that their actions were causing increased stress, anxiety, and health threats to Plaintiff as she had been suffering from a longtime heart condition. Plaintiff's treating cardiologist testified that in his expert opinion, the Defendants' actions led to the increased stress which triggered Plaintiff's heart attack. On cross-examination, the defense effectively attacked the basis and reliability of the doctor's opinion as to causation. Plaintiff requested a verdict in the range of \$350,000.00 to \$750,000.00.

After a four-day trial and deliberations, the jury returned a verdict of \$1.00. The Court has denied Plaintiff's Motion for a New Trial based on insufficient award. We served an Offer of Judgment one year prior to trial and have now filed a Motion to tax costs in favor of Defendants.



**“...Vernis & Bowling
successfully obtained
summary judgement...”**

Jeffrey Kerley (St. Petersburg, FL) (Workers'

Compensation) prevailed in defending a case before Judge Rosen. The case involved a request for psychiatric care, pain management care, an MRI and payment of attorney's fees and costs. The case was defended on the grounds that the requested treatment was not medically necessary. The case went to an Orthopedic EMA who rendered an opinion favorable to the defense but despite the favorable opinion the claimant decided to take the matter to hearing. The claimant attempted to argue that she was entitled to two IMEs. That request was previously denied by Judge Rosen and the claimant appealed to the 1st DCA resulting in a PCA opinion.

Matthew Bernstein (Deland/Central FL) (Property)

The Plaintiff (a collection company that had purchased a mold assessment company's assignment of benefits in exchange for a second-tier assignment) sued our client, American Integrity, in Seminole County for breach of contract due to American Integrity's alleged failure to pay the mold assessment company's invoice. On December 5, 2017, we successfully argued that American Integrity did not breach the policy as a matter of law. In furtherance of our motion for summary judgment, Mr. Bernstein presented the affidavits of American Integrity's corporate representative, the independent field adjuster, and a professional engineer with GHD, all of which supported American Integrity's decision to deny the claim based upon the policy exclusion of long-term constant and repeated seepage of water. Plaintiff failed to present any counter evidence that the loss was a covered peril. Pursuant to a filed PFS that was rejected by the Plaintiff, we are now in the process of recovering fees and costs.

Matthew Bernstein (Deland/Central FL) (Condo D&O)

Our client, a condominium association, was sued in Osceola County by a LLC that allegedly provided maintenance and marketing services to the association pursuant to an implied or oral contract. The Plaintiff asserted four causes of action against the association (civil theft, breach of an implied or oral contract, intentional interference with a business relationship, and conversion). The amount sought by Plaintiff exceeded \$130,000. Early on, it was revealed that the managing member and sole registered officer of the LLC was also the President of the association's Board of Directors. In July 2017, Mr. Bernstein successfully moved for judgment on the pleadings as to Plaintiff's causes of action for intentional interference and conversion. Earlier this month (January 2018), after obtaining affidavits from other Board members attesting to the lack of financial interest disclosures by the Plaintiff's managing member/Board President and the fact that no Board vote was held approving the alleged contract, Vernis & Bowling successfully obtained summary judgment for the association as to the remaining counts for civil theft and breach of an implied/oral contract. The Court also found Fla. Stat. 718.3025 controlling, which requires all association contracts for maintenance services to be in writing. Pursuant to an attorney's fees provision in the Declaration of Condominium, we will be pursuing fees and costs.

Ramy Elmasri and Adam Davis (Miami, FL) (Condo D&O) were successful in revoking Plaintiff’s counsel’s pro hac vice admission.

A New York attorney represented the Plaintiff, who is a family member in a lawsuit against an Association’s former agents. This attorney’s involvement was essential to the prosecution of this claim by the claimant.

A four (4) hour evidentiary hearing was held in Miami, Miami Dade County, before Judge Reemberto Diaz. The Plaintiff retained two Miami attorneys to defend the New York attorney at the hearing. During the hearing, Adam Davis, Esq. and Ramy Elmasri, Esq called seven (7) Florida attorneys, who testified to the New York attorney’s harassing, disruptive, and unprofessional conduct. The attorneys who testified included Mr. Elmasri and two former, local counsel who withdrew.

They elicited testimony that the New York attorney failed to identify himself as an adverse attorney to the insurance company and intentionally disclosed confidential settlement communications to a third party. In addition, Mr. Elmasri also testified as to outrageous insults and demeaning statements made by opposing counsel about the ethnicity of attorneys involved in the defense of the claim. Lastly, Mr. Elmasri discussed that the New York attorney sent multiple letters to Judges presiding over.

Mr. Elmasri called the Association’s former general counsel, and the attorney who represented the general counsel in a deposition that lasted nearly five and a half hours. The two attorneys testified that the New York attorney spent the majority of the deposition attempting to elicit confidential attorney-client information, over constant objections.

During the course of the hearing, the two-local counsel testified that they withdrew from representing Plaintiff and supervising the New York attorney because they disagreed with the New York attorney’s strategy and handling of the lawsuit. In addition, one local counsel testified that he had to file documents in the Third District Court of Appeal regarding the unauthorized use of his signature block on court documents.

The last two attorneys included the Co-Defendant’s attorney who testified that the New York attorney obtained an improper clerk default and judicial default, and the insurance company’s attorney who testified that he quashed three subpoenas issued in Florida and in New York, and defended a Third District Court of Appeal regarding same.

The New York attorney called only one witness, himself, and testified that the seven attorneys who testified before him were liars and conspirators. In addition, he explained he called the FBI regarding what he believed was extortion from Plaintiff’s former local counsel who requested a retainer to handle appellate proceedings.

Based upon the foregoing, Judge Diaz revoked the New York attorney’s pro hac vice admission. Immediately thereafter Judge Diaz explained to the two Miami attorney’s representing the Plaintiff that they cannot continue to be the mouthpiece of the New York attorney or they will be assisting in the unauthorized practice of law. Judge Diaz required them to argue the next motion as they were now counsel of record. The next motion was Co-Defendant’s Motion to Vacate the roughly \$500,000 Judicial Default. The Motion was granted.

Christopher Blain and Ryan Sainz (Tampa, FL) (Premises Liability)

obtained a defense verdict for WaWa. The matter concerned an alleged slip and fall in a Wawa. Immediately after the fall, the Plaintiff was transported to the hospital and diagnosed with a broken hip and fractured pelvis. As a result of this diagnosis, the Plaintiff underwent emergency total hip replacement surgery. The Plaintiff claimed that she fell shortly after entering. Specifically, she claimed that she fell while walking down the chip aisle. The only other eye witness testimony to this incident was that of an independent witness. This individual provided information that the Plaintiff did not slip. Rather, she sat down on the floor. Despite this conflicting evidence, the Plaintiff was adamant that her version was the only reasonable explanation for her alleged injuries.

During her deposition the Plaintiff testified that she did not know what caused her to fall, she did not see anything on the ground, and only felt a “splash” on her face. However, the Plaintiff did not know where this splash came from. From the outset of this action, it was undisputed that a Wawa employee mopped the floor prior to the Plaintiff entering the store. Both parties retained liability experts to perform examinations of the flooring surface of the subject Wawa.

“...it was undisputed that a Wawa employee mopped the floor prior...”

Verdicts & Dispositions, Continued

Prior to trial, Mr. Blain filed a motion to strike the Plaintiff's liability expert which was granted. As such, Plaintiff entered trial without a liability expert. During trial, the Plaintiff presented testimony of the Plaintiff, 3 Wawa employees and their Orthopedic surgeon. The testimony from the surgeon was undisputed that a fractured hip and fractured pelvis were diagnosed. Furthermore, it was undisputed that the Plaintiff underwent a hip surgery. However, at the close of Plaintiff's case our argument remained that Wawa did not cause this injury or the alleged incident. The Plaintiff herself could not provide any testimony as to what caused her to fall, if there was anything on the ground, any substance on her skin or on her clothing at the time of the fall. In addition, the Wawa employees called by the Plaintiff all testified that there were multiple "wet floor cones" on the ground throughout the area where Plaintiff was found on the ground.

During our case in chief, we called our liability expert who testified that the floor exceeded the industry standard of 0.50 for coefficient friction. This provided information that the floor was not slippery at the time of the incident. Finally, the independent witness and his wife were called to testify. The independent witness testified that as he exited the restroom he witnessed the Plaintiff sit down slowly. At the time of this incident, he was of the belief that the Plaintiff was having a medical episode such as a heart attack. He also testified that he witnessed multiple "wet floor cones" throughout the area

of this incident prior to and at the time he witnessed the Plaintiff go to the ground.

Finally, he testified that he recalled the flooring surface being dry as he went to the bathroom and when he saw the Plaintiff go to the ground. This witnesses' wife also confirmed the presence of the cones as well as the fact that the floor was dry at the time that she observed the Plaintiff on the ground.

At the close of evidence in the Plaintiff's case and our case, a motion for directed verdict was made as to liability and damages. The argument was that Plaintiff failed to present any direct evidence that 1) there was a condition on the ground at the time of this incident, 2) that the condition caused the Plaintiff to fall and 3) that Wawa failed to adequately warn the Plaintiff. The Court was provided with overwhelming amount of case law which held that inference stacking was impermissible when based in circumstantial evidence and when the initial inference was not established to the exclusion of all reasonable inferences. Initially, this motion was denied as to liability but granted as to the issue of future medicals. However, following the close of our case the court reserved ruling on the issue of liability.

During closing argument, the Plaintiff demanded over \$450,000 in damages for past medical, past pain and suffering and future pain and suffering. The jury returned a verdict in under 20 minutes and found no liability on Wawa.❖

“The jury returned a verdict in under 20 minutes and found no liability on Wawa.”

SAVE THE DATE

SAVE THE DATE FOR VERNIS & BOWLING'S 2018 LEGAL SEMINARS:

May 9, Atlanta, GA

August 30, Charlotte, NC

September 13, Tampa, FL

November 14, Dallas, TX

For more information, please click on the Seminars & Events tab on our website, National-Law.com.

STAY UP TO DATE

STAY UP-TO-DATE WITH ALL THINGS VERNIS & BOWLING

Christopher Blain, Esq. (Tampa, FL) was accepted by the National Board of Trial Advocacy (NBTA) as a Board Certified Civil Trial Attorney. The NBTA has been recognized by the Supreme Court of the United States as having merit in recognizing expertise in lawyers.

Attorneys and staff from the firm's **Ft. Myers/SW FL** office participated in the Walk to End Alzheimer's.

Attorneys and staff from the firm's **Pensacola/NW FL** office participated in the 'Pensacola On Bikes' Bike Build.

Deborah Martin, Esq. will be speaking at the 2018 FIFEC (Florida Insurance Fraud Education Committee) Annual Conference in Orlando, FL. Ms. Martin will be presenting with Lt. Dwight Murphy of DIFS, and Fabiola Garcia, Sr. SIU Investigator with Citizens Insurance Company. The topic is "Residential Property Claim Fraud Panel: SIU Investigations and Referrals for 2018".



The Richland Northeast High School team advanced to the State Mock Trial Championship for the first time in seventeen years, under the leadership of **Joseph Bias**, their attorney coach and an alum. Bias, who was selected as South Carolina's Law Related Education Lawyer of the Year for his work with students around the state of South Carolina, has been working with the team for three years. This year, Richland Northeast students received more awards for their performances than any previous year, and were 3-0 in the Regional Competition.

The goal of Mock Trial is to educate students about the basis of our American judicial system and the mechanics of litigation. Joseph Bias is a Department Managing Attorney with the firm's Columbia, South Carolina office.



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