

## MARK ZUKOWSKI AUTHORS ARTICLE FOR ARIZONA ATTORNEY MAGAZINE, “CAPITALIZE ON YOUR MEDIATOR’S EXPERTISE TO MAXIMIZE YOUR SETTLEMENTS”

November 8, 2019 | Publications



[Mark Zukowski](#) provides ADR services in all manner of civil and tort claims, including personal injury, construction, insurance,

product liability, HOA, auto, con-tracts, and commercial matters. He received extensive training through the American Arbitration Association (AAA) and the Straus Institute for Dispute Resolution at Pepperdine University. He has handled more than 600 arbitrations and mediations, and received extensive training. Mark has more than 35 years of litigation and trial experience, trying 20 cases to verdict during his career.

One of the most frequent criticisms of mediators is that all they do during mediation is communicate new offers and demands between the parties. If this has been your experience, then you have not learned to tap into your mediator’s full potential during mediation. Here are six practical suggestions to get more out of your mediator and achieve better mediation results.

### 1. Select the Right Mediator

Recognize that the success of your mediation can rise and fall on the mediator you select. You can have the best case, write a strong mediation brief, prepare your client fully, and still fail to settle your case or get the best possible settlement, simply because you didn’t select the right mediator for your case.

Too often lawyers become comfortable using the same mediator or, worse, let the other side select the mediator without giving sufficient thought to the facts of their case. To maximize the opportunity to settle your case at mediation, take the time to properly vet your mediator. The next time you agree to mediate a case answer the following questions: (1) What are the key issues I will be asking the mediator to consider? (2) How well do I know the mediator? (3) What is the mediator’s reputation? (4) How well does the mediator know my opposing counsel? (5) How familiar is the mediator with the subject matter of my case? (6) How familiar is the mediator with my jurisdiction and juries? (7) How well do I think the mediator will communicate and interact with my client? (8) Do I want a mediator who will independently evaluate my case or take a more facilitative approach? (9) Do I know the mediator’s approach to mediation? (10) What other information would I like to know about the mediator, knowing what I know about the unique issues in my case?

Take the time to vet your mediator fully. Selecting the right mediator for your case can mean the difference between a good settlement, or no settlement at all.

### 2. Engage the Mediator Early and Often Before Mediation Begins

How many times have you had the first substantive conversation with your mediator at the start of the mediation? If the answer is more often than not, you are missing a valuable opportunity.

There is no rule against engaging the mediator before your mediation begins. Many mediators will convene a pre-mediation conference with the attorneys to have a preliminary discussion about the case. Take advantage of this opportunity, and don’t stop there. Ask to speak to the mediator *ex parte* before your mediation begins. Good mediators are busy and may not contact each party prior to the mediation. I have never had a mediator—even the busiest ones—refuse to speak with me before mediation. An *ex parte* pre-mediation conference with your mediator can be an effective tool to sway him or her to your side of the case, giving you a significant advantage before mediation begins.

An initial *ex parte* conference with your mediator also can serve as an opportunity to share sensitive issues with the mediator that may derail settlement. Do you have a client with unreasonable expectations? Does the other side have unreasonable expectations? Are there compelling reasons why you do not want to try the case? Is opposing counsel obstructing settlement by his or her conduct? Are there hidden agendas the mediator may not recognize? Your mediator is most likely unaware of these potential impediments to settlement at the outset of your mediation. He or she can waste valuable time during mediation flushing these issues out. Worse, your mediator may never uncover these hidden agendas that can derail a settlement. If you make the mediator aware of

these issues at the outset, he or she will be in a far better position to get your case settled.

When I serve as a mediator, I welcome these ex parte pre-mediation conferences. The more information I can gather before mediation begins, the better I will understand the issues in the case and the dynamics in the room, making it more likely I will do a better job.

### **3. Give Your Mediator the Tools Needed To Advocate Your Case**

Mediators can only do as good a job as the information he or she is provided. I cannot stress enough the importance of writing a thorough mediation brief. If you expect the mediator to advocate your position when meeting with the other side, arm the mediator with the ammunition he or she needs. Mediators are busy, so don't take the easy route by attaching voluminous records to your mediation brief, expecting your mediator to do an exhaustive analysis to find the support for your claims. The better practice is to highlight and attach specific entries in the records that support each of your claims. Not only will this save your mediator valuable time, it also will ensure your mediator is better prepared. Furthermore, it demonstrates to your mediator that you are prepared, which will enhance your credibility with him or her.

You can unintentionally derail your mediation success by focusing only on the strengths of your case and ignoring weaknesses. Your mediator cannot effectively advocate for you with the other side if he or she is not adequately prepared to put your best foot forward on all issues in your case—even the weak ones. Having a candid discussion with your mediator about the weak points in your case will better equip the mediator to provide guidance regarding how best to address those points.

If you are concerned about disclosing too much regarding your case before your mediation begins, I encourage you to submit a separate confidential mediation statement to your mediator. When I mediate cases, I welcome separate confidential mediation statements from the parties. The more information you share with me and the more candid you are, the more effective I can be on your behalf.

### **4. Use the Mediator as a Sounding Board for Your Case**

If you find yourself doing most of the talking during private sessions with your mediator, you are missing out on the opportunity to gain valuable insight from your mediator. Ask your mediator for feedback on the position you are advocating. Would your mediator take a different approach or focus on other issues? How did the other side react to your arguments or settlement offer? Where does your mediator see weaknesses in your case? What does he or she view as the strengths of your case? What does your mediator think is the best way to close the gap between what you are willing to settle the case for and what your opponent is seeking? Does your mediator have any new ideas for how to get the case settled? Often, the less you talk and the more you listen can be the best use of your time with your mediator.

Today, the norm in mediation is to spend little or no time in the same room with the other side. Mediators fear losing control over the mediation when the parties are together. Parties also seem more reluctant to discuss their case with the mediator in the presence of other parties. The consequence, however, of avoiding direct interaction is that it deprives you of the opportunity to gauge first hand how opposing counsel and the parties react to your arguments.

Understanding the lack of firsthand knowledge you will gather if all negotiations take place in private meetings with your mediator, the next best thing you can do is empower your mediator to be your eyes and ears in the other room. Solicit input from your mediator each time he or she returns from meeting with your opponent. What did they focus on? How did they react to your arguments or settlement offers? Are they nearing the end of their rope? What is their appetite to take the case to the mat? The more information you can extract from your mediator regarding his or her communications with the other side, the better you will be able to address them—and the more you will maximize your settlement opportunities.

### **5. Don't Let the Mediator Declare an Impasse Too Soon**

Some mediators, especially inexperienced ones, declare an impasse too soon and end the mediation before settlement is reached. Often this can occur simply because the magical 5:00 p.m. hour is near. No one likes to work late into the night, but the time of day alone should not justify your mediator declaring an impasse too soon.

If your mediator declares an impasse before the case has settled, ask your mediator to first review with you the specific reason(s) why he or she believes there is an insurmountable impasse. Review with your mediator the progress that has been made so far. Narrowing the issues still in dispute can lead to a refocusing that can break the impasse.

A good mediator will look for new ways to break an impasse by soliciting ideas from both parties, or will even propose their own ideas, before declaring an impasse. Getting beyond impasse is what separates the good mediators from the average ones. Before you walk away without a settlement, make certain you clearly understand the specific reason(s) your mediator has declared an impasse and exhaust all options available to you to restart negotiations.

### **6. Case Doesn't Settle at Mediation? Keep the Mediator Engaged**

You may be surprised by the number of cases that settle after an unsuccessful mediation. There are too many reasons to discuss in this article why mediations fail. Sometimes you do just run out of time, or one of the parties has been pushed to the breaking point. Sometimes new information is shared for

---

the first time during the mediation and the other side is not fully prepared to respond to it. Often new terms for settlement need to be evaluated before responding.

Regardless of the specific reason(s) your case did not settle at mediation, I encourage you not to give up. As is often the case, one or both parties just need to step back and re-evaluate their position before reengaging in meaningful settlement negotiations.

Keeping the mediator engaged after an unsuccessful mediation can lead to eventual settlement of your case. Once again, you should explore with the mediator why he or she believes the case did not settle, and ask for their recommendation as to what it may take to get the case settled. Make sure the mediator is continuing to talk to the other party as well. If that fails, consider asking your mediator to provide a proposal for what he or she believes is a fair settlement.

I will let you in on a not-so-secret-secret: Mediators have big egos. We take pride in settling cases. We are eager to advertise our high success rate. And we know that if we do not settle your case, you will likely not ask us to mediate another case.

Take advantage of your mediator's ego and let them continue to work for you to get your case settled.

### **Final Thoughts**

You will achieve better mediation results if you maximize your mediator's full potential. It starts with selecting the best mediator for your case, but it doesn't stop there. Don't wait until the day of your mediation to begin to advocate your position with your mediator. Engage your mediator early and often. Give your mediator the tools he or she needs to effectively advocate your position. Understand how best to utilize your mediator during mediation. Solicit input from your mediator and use him or her as a sounding board. Engage your mediator's experience and consider their suggestions for how best to advocate your case and reach the most favorable settlement possible. Don't accept it too quickly when your mediator declares an impasse. Finally, don't give up if your case did not settle at mediation. Keep your mediator engaged until a settlement is reached.

[To download the article, click here.](#)