Stephen M. Benardo
ARC AND AAA MEDIATOR AND ARBITRATOR

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Don't walk out

A GUIDE TO GETTING THE MOST VALUE FROM A MEDIATION, EVEN IF THE CASE WON'T SETTLE

Most plaintiffs' attorneys have had the frustrating experience of appearing for mediation and discovering quickly that the opposing party has no intention of settling – or, at least, no intention of settling reasonably. Maybe the defendant, defense counsel, and/or the carrier have an incorrect or unjustified view of the case and have made an unrealistically low valuation. Maybe it is an early mediation and the defense is taking a shot to see if you and your client will go away cheaply. Maybe it is a court-ordered mediation, and the defense is only showing up because they must.

What if there is no realistic possibility of settlement? Is it still worth participating in the mediation? The answer is a clear "Yes."

If you have already paid for the mediation (or you are committed to doing so), you will not get your money back by leaving or giving up. If it is a pro bono mediation, it is not costing you any money. The only issue is your time, and there are many ways your time can be put to good use; take advantage of opportunities to advance your case that only mediation provides.

Gather valuable intel on your opponent's case – *from your opponent*

The mediator is speaking directly to defense counsel, the defendant or the defendant's corporate representative, the carrier's representative, and/or key witnesses, in a setting where they are more likely to be honest than they will be with you or the court. The defense is going to reveal facts, legal theories, and strategies, much of which you may not be aware of. Defense counsel may also reveal how much he or she really believes in these facts, theories, and strategies, which in turn, reveals how the defense is likely to litigate. This is valuable information you want.

The defense may also give the mediator information that is less apparent and that you would be less likely to learn from other sources. Defense counsel might admit he or she thinks your client is a very good witness. Defense counsel might discuss a key piece of evidence you were not aware of or admit such evidence is missing. That third-party witness who moved out of state? Defense counsel might tell the mediator whether the defense knows where that person is, whether the defense is likely to call that witness, or whether or not that witness is likely to show up at trial. Defense counsel might even tell the mediator that the defendant or the carrier never settles the kind of case you are litigating, or almost always settles, or what triggers the defendant or the carrier to settle.

The mediator is not going to relay this information to you without authority to do so. You would be amazed, though, what information the defense will authorize the mediator to pass along, and even how often the defense *wants* the mediator to pass this information along.

Take advantage of your mediator's opinions

Most mediators are experienced litigators with substantive expertise in the area of law at issue. People have paid a lot of money for their legal opinions over the years, and you and your client may have paid a lot of money to have them mediate your case. Get your money's worth.

There is no other setting but mediation where you will have the opportunity to get such honest and educated opinions and feedback from an experienced and knowledgeable practitioner. Your co-counsel is biased in your favor and may not want to risk upsetting you. Your colleagues and friends know very little about your case, nothing other than what you tell them. Your judge has to maintain neutrality and is ethically constrained as to what he or she can say. Your opposing counsel is biased against you and is spinning the case in the defendant's favor.

The mediator is much more likely to tell it like it is and is happy to talk. Listen to what your mediator has to say about the other side's case and about your case. Ask specific questions. What does the mediator think the chances are of a summary judgment being granted? What does the mediator think about your legal theories? Does the mediator think the defendant is a good witness? Does the mediator think the defense is seriously willing to try the case? What does the mediator know about your judge? You are unlikely to get this information anywhere else.

Get to know your client – and his or her case

Opportunities to spend time with your client are rare. There is the intake process, where you do not really know your client or the case. There is the deposition process, where you are focused on narrow goals and the situation is highly stressful. Maybe you were not the attorney who did the intake or defended your client's deposition.

During mediation, you and your client will be together, in person or virtually, for hours, just talking. Much of this time will be spent with just the two of you. Mediation may be the one chance you get to really know your client as a person, and really get to know your client's case.

Mediation is a chance to learn new facts, evaluate the facts, and determine what kind of a witness your client will make. Mediation may be your best chance to figure out whether it is in your client's best interest to go to trial.

Mediation probably is your best chance to bond with your client and get on the same page as to how to proceed. Whatever direction you go – settlement or trial – and how you get there, you need to make sure your client is on board, and mediation can be your best opportunity to ensure that happens.

Find your opponent's bottom line

A key goal at mediation should be to find out how much the opposing party is willing to pay (or accept), so you can make an informed decision on whether to settle. Finding each side's bottom line is something every mediator is trying to do, and it is information you absolutely want. Not only will the defendant's "best offer" tell you whether you can settle on the day

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of mediation, but it will give you a good idea of whether you can settle shortly thereafter, or at any time during the litigation.

Finding the defendant's best offer at mediation is a key to valuing your case, what you need to do to increase the value of your case, and whether that is even possible. Even when you reject the defendant's best offer at mediation, it will likely inform you and your client as to how to proceed. Is it full steam ahead to trial? Does the case need to be settled as soon as possible before further time and resources are expended? Is it something in between?

Do not leave the mediation before you find out how much the defendant is willing to pay.

You never know, or "Give me cover"

As unlikely as it may seem when the defense makes an insulting offer or states they have no intention of settling above an unreasonable number, the case might just settle for something you and your client are willing to accept. Give the mediator a chance to do what he or she is paid to do. We have all been in mediations that looked like mission impossible first thing in the morning and settled for a good number at the end of the day.

One unfortunate possibility is that during the mediation session you and/or your client realize your case is not what you thought it was, that your client is not practically or emotionally prepared to continue litigating or go to trial, or that there is some other reason why it is not advisable to proceed. You may learn something, or your client may tell you something that dictates that the case must be settled now. If this happens, you need to move the defendant's offer as high as possible before you say yes.

A happier possibility is that continuing to work through a difficult mediation might result in a good mediator's proposal. Most mediators do not like to make a mediator's proposal when the parties are far apart. However, more and more defendants and carriers are coming to mediation *expecting* to reach impasse and positioning for a mediator's proposal that gives them cover to settle the case.

Here is a not-unusual scenario. The defendant's opening offer is $5,000. Hours later, the defendant is at only $20,000, and defense counsel insists authority has almost been reached. The mediator tells defense counsel that the plaintiff is nowhere near this range, so the mediation is probably over, to which defense counsel responds, "What do you think the plaintiff would take to settle the case today?" When the mediator states that the plaintiff is, at a minimum, in six figures, defense counsel responds, "Let us talk about it." (Hmm.) When the private confab is over, defense counsel asks the mediator, "Would you make a mediator's proposal?" to which the mediator responds, "I will if the plaintiff also would like a mediator's proposal and so long as you are clear that the proposal is going to be in the range we just talked about of what the plaintiff might accept." If both sides agree that they want a mediator's proposal, the case is likely to settle, and it will be at a number far higher than the authority the defense postured at.

Set up your attorney fee motion

For those of us who have had the experience of prevailing at trial after a mediation where the defendant refused to make a reasonable offer, or made no offer at all, there are few better feelings in the world. Now, it is time to file your attorney fee motion.

The defense will argue you over-litigated the case, trial was unnecessary, and had the plaintiff just been reasonable, the case would have resolved well before trial. You will argue the defendant was unreasonable and intransigent, leaving the plaintiff no choice but to try the case. The mediation is likely to be an important part of both sides' arguments.

The mediation privilege will prevent either side from presenting to the court "anything said or any admission made" at the mediation. (See Evid. Code, § 1119.) The broad outcome and the behavior of the parties and counsel at the mediation are more of a gray area. While your trial judge is very likely to exclude evidence of what happened at the mediation from trial or consideration on a dispositive motion, the judge may be very interested to know what happened at mediation when ruling on an attorney fee motion.

A statement in your declaration that, "Plaintiff actively participated in a full-day mediation with highly respected mediator Mr. or Ms. So-and-so, but Defendant failed to make an offer commensurate with the value of the case and the result Plaintiff achieved at trial" will go a lot farther with your judge than "Plaintiff stormed out of the mediation after 45 minutes because I didn't like what the defense was saying." Make sure that when the mediation is over you are well-positioned to use the mediation to support your motion for attorney fees.

The bottom line

There are many other ways to get substantial value from mediation. Walking out is not one of them. Stay engaged, and the mediation can be a success, even if there is no settlement.

Editor's Note: This July 2023 issue of *Advocate* includes an excellent article by Jeffrey Krivis, *Responding When the Other Side Doesn't Have Settlement Authority*. It discusses strategies for reaching settlement in the face of an opposing party who has come to mediation with little or no authority.

Stephen M. Benardo has 30 years of experience in litigating employment cases and is now a panel mediator and arbitrator for ARC Alternative Resolution Centers. He is also a panel arbitrator and mediator for the American Arbitration Association (AAA), a panel mediator for the USDC Central District of California, and a Resolve Law LA settlement officer for the Los Angeles County Superior Court. His email is *steve@benardolaw.com*. *https://www.arc4adr.com/stephen_m_benardo.php*.