

PositivelyNeutral™

Arbitration and Mediation for Attorneys and Their Business Clients



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Experienced attorneys appreciate that there are benefits to mediation even when the case does not settle. Clients, however, do not always understand that. A client unfamiliar with the process may question whether an “unsuccessful” mediation was a waste of time. You can avoid an unpleasant client conversation by providing a bit of pre-mediation education.

Here are a few talking points:

“Mediation enables me—your attorney—to get a better understanding of the full factual context of the dispute.”

The information received during mediation provides a fuller perspective of the subtleties. Adversaries—both parties and attorneys—often are eager to elaborate on their perceptions of the strength of their case (and the weakness of yours), as they seek to substantiate their settlement positions.

Even if the dispute does not settle, you and your client, having benefited from this “free discovery,” will leave the mediation armed with new information that will help you assess the relative merits of the opposition’s assertions, identify important follow-up topics for review, and provide guidance for preparing the examination of witnesses at trial. The information gained in mediation better equips you to champion your client’s position.

“As your attorney, I want to seize every opportunity to size up the other side.”

While deposing adversarial parties provides visibility into their credibility and knowledge, the witnesses—well-prepared by their attorney—are likely to be guarded and minimally responsive. The more open-ended exchange that often occurs at mediation provides greater insight, enabling you to assess how an adversarial party will present to a judge or jury. You will be able to evaluate the party's likeability, reasonableness, and knowledge.

And let's not forget about your opposing attorney. Mediation will enable you to assess the experience and presentation skills of your counterpart, and whether he or she has a full grasp of the key facts and legal issues, better positioning you for trial.

"You are my client, and I love you, but I still want to see how you behave in public."

It is risky to judge the strength of your client's case based on what you have been told in the private confines of your conference room. Road testing the information provided by your client can be eye opening.

Mediation enables you to evaluate your client's version against the adversary's alternative scenario. Seemingly rock-solid descriptions provided by your client may prove porous during a back-and-forth mediation discussion. Also, since likeability and credibility are relative, you will benefit from the opportunity to assess how your client comes across in comparison to the adverse party.

Observing your client when confronted with push back is eye opening. Cases that seemed black and white develop shades of gray. (Indeed, it is that uncertainty that drives disputes toward settlement.) But if there is no settlement, you will leave the mediation better prepared to address newly discovered weaknesses at trial.

"There will be other opportunities to settle the dispute; the mediation is a beginning, not the end."

To avoid your client leaving mediation disappointed that no settlement was reached, you should explain that mediation almost always opens the door to further discussion. Especially in today's technology connected world, mediation has become more of an ongoing process and less of a one-day event. A persistent mediator will ensure there are follow up discussions, either by phone or Zoom.

You will bring to subsequent discussions the knowledge gained from the mediation. With a deeper understanding of the facts and how the parties are

likely to come across at trial, you can better advise your client as to the appropriate contours for settlement.

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