PositivelyNeutral

Arbitration and Mediation for Attorneys and Their Business Clients

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# Two Years In: Reflections From the Neutral's Chair

For many years, serving as an arbitrator and mediator was an important adjunct to my business litigator and in-house counsel day jobs. Two years ago, I made a long-contemplated professional transition to full-time service as neutral. There's a narrow window between experience and senility, and I wanted to climb through the window before it closed. (If I didn't make it in time, please tell me.)

As I mark this milestone, I find myself reflecting on what my ADR career—and especially these past two years—have taught me: about dispute resolution, about the parties and counsel who have entrusted their matters to me, and about the profound responsibility that comes with the job.

What follows isn't a checklist or a rulebook. Think of it as a handful of observations from my side of the table—lessons I have learned from talented lawyers and their passionate clients about what actually moves the needle in arbitration and mediation.

## Observation One: Respectful Informality — The Quiet Engine of Effective Advocacy

Arbitration has its own personality. It is less rigid than litigation, but no less serious in its purpose. The best hearings share an unmistakable tone of respectful informality—a blend of professionalism and ease that allows counsel and witnesses to get to the heart of the matter without the procedural tension that is often endemic to courtroom litigation.

This is not politeness for its own sake. Zealous, enthusiastic, and even theatrical advocacy all have their place. But arbitration's informality creates an environment where counsel can engage more directly, where testimony unfolds more naturally, and where the process itself is more efficient.

When advocates embrace this dynamic, the hearing flows. Advocacy often becomes clearer, more focused, and more persuasive. The record develops cleanly, and the proceeding often concludes more quickly than expected. Clients benefit through reduced cost and reduced stress.

***Takeaway:*** Welcome the environment. Respectful informality is not a relaxation of standards. It can be an advocacy tool—one that enhances credibility, efficiency, and client value.

## Observation Two: Arbitration Discovery Concerns Largely Are a Myth

For arbitration proponents who prize efficiency and cost control, limited discovery is precisely the point—a feature, not a bug. Arbitration skeptics—those who believe truth-finding requires more fulsome discovery—critique perceived restrictions they fear will hinder their efforts.

In practice, however, that critique is largely unfounded.

First, when both sides want discovery, they generally get it. Arbitrators rarely override a shared mindset toward discovery, unless it is clearly excessive.

Second, arbitrators have flexibility. Discovery can be tailored to the needs of the case. If counsel can articulate a legitimate need for discovery, they usually will get it.

Third, the rationale for expansive discovery rules in federal and state litigation is to prevent unfair surprise. Yet I cannot recall a single arbitration where counsel was confronted at the hearing with something material they reasonably would have uncovered with open-ended discovery.

***Takeaway*:** Attorneys underrate their own capabilities. They know what matters, and they know how to credibly request it even under narrower arbitration discovery parameters.

## Observation Three: You Will Be Heard

One of the few grounds for vacating an award is denying a party the chance to present its evidence. Arbitrators know this. As a result, they lean toward allowing the record to be built. In arbitration, everyone gets heard.

Savvy advocates understand that objections should be strategic, not reflexive. Unless evidence is unduly prejudicial or threatens to derail the proceeding, most objections gain little and risk looking overly combative.

Let the record come in. Focus your advocacy on why certain evidence should or should not carry weight.

***Takeaway*:** Choose objections with care and trust the process.

## Observation Four: A Well-Crafted Arbitration Provision Will Obviate the Need for Appeals

In debating whether arbitration is fatally flawed due to the lack of meaningful appellate review, consider the following:

First, in small to moderate-sized civil litigation, appeals are not practically viable. For one thing, the additional cost is not warranted. Second, statistically, a large majority of civil litigation appeals fail.

Third, unlike civil litigation—where the judge hearing the case may have limited or no experience with the subject matter—arbitration offers the parties the opportunity to select a subject matter expert. Sure, there is a

risk that an arbitrator will err, but is that risk greater or less than what a litigant can expect in court?

Fourth, in larger business cases—the ones where appeal rights are foremost in the minds of counsel—the parties' arbitration agreement often calls for a panel of arbitrators. Three arbitrators, not one, all experienced in the subject matter, will be considering the dispute. In serving on three-arbitrator panels, I've observed a serious commitment where my colleagues and I debate, test and challenge the evidence and legal arguments presented. The process is serious, thorough, and collaborative.

In effect, empaneling three arbitrators for complex matters serves to front-load the appeal. Instead of a single judge, the parties receive the benefit of three neutrals chosen for their subject matter knowledge, and who, unlike an appellate tribunal, are each deeply engaged in the fact-finding aspect of the dispute.

***Takeaway*:** In larger, complex cases, three-arbitrator panels meaningfully mitigate concerns about appellate review. They provide the parties with rigorous scrutiny without the need for a formal appeal.

## Observation Five: Mediation Is More Art Than Science

Age as much as experience has made me a better mediator. Business owners and executives now see me as a contemporary (or, help me, an elder). Conversations about gym routines and resulting aches and pains are effective foreplay to more challenging discussions about the dispute.

In the mediator's chair, the most powerful tool is listening—really listening—long enough for people to feel heard. Once that happens, good things often happen.

Those good things usually depend on counsel. The best advocates have prepared their clients not just with arguments, but with expectations. They understand that the mediator's job is to help the parties extricate themselves from a problem, not to deliver a verdict. Good lawyers know when to push and when to pause—when to actively engage, and when to let the game come to them.

And no matter how much a party may contextualize their demand or counter with principle, I've learned that most cases don't settle because one side "wins the logic war." They settle because someone finds a way to make the outcome feel fair enough.

***Takeaway*:** In mediation, facts matter, but feelings decide.

## Looking Ahead: The Next Chapter

Cases that settle early often do so because everyone sees roughly the same picture. When a case makes it all the way to a late-stage mediation or an arbitration hearing, it's usually because both sides genuinely believe they're right.

These aren't academic exercises. The business owner who mortgaged everything. The investor whose retirement depends on the outcome. The employee whose career hangs in the balance. Every award affects real people at pivotal moments.

To those who have entrusted me with your disputes: thank you. Your professionalism, creativity, and enthusiastic advocacy have made this work meaningful and joyful. Every lawyer I've worked with—win or lose, settled or not—has contributed to my growth as a neutral.

Special thanks to the talented crew at the American Arbitration Association, whose support allows neutrals to serve with confidence.

I look forward to continuing to share what I learn—both in this newsletter and through the ongoing dialogue that makes our field evolve.

Whether we've worked together on a dispute or you simply read *Positively Neutral* for insight (or as a sleep aid), thank you for being part of that dialogue.

***Takeaway*:** Here's to the next two years, to that window remaining open for years to come—and to the belief that even in conflict, there is always room for clarity, respect, and a little bit of grace.

*Rob Harris is a full-time arbitrator and mediator of commercial and employment disputes, often involving business entities and their owners, senior employees, investors and service providers. He is a member of the National Academy of Distinguished Neutrals, and he is a longstanding panelist for the American Arbitration Association, including participation on its Commercial, Employment, Construction and Consumer panels, and its specialty panels for Large Complex Cases, Mergers and Acquisitions and Joint Ventures.*

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