

**DISCUSSION POINTS FOR SPEAKING WITH YOUR CLIENT  
AND  
OPPOSING COUNSEL ABOUT MEDIATION**

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**1. SPEAKING WITH YOUR CLIENT**

**A. Mediation or arbitration, what is the difference?**

1. No winners and losers
2. No forced settlement
3. Compromise versus hitting a home run
4. Mediators are neutrals
5. Creative settlements versus trial results
6. Identification of unknown issues or interests

**B. Litigation should be the client's last resort**

1. Litigation is lengthy
2. Litigation is expensive
3. Litigation has great potential to be unsatisfying

**C. Benefits of mediation**

1. Control over your own destiny
2. Potential fees savings (memorandum and mediation).
3. Neutralize opposing counsel
4. Possibility to facilitate settlement
5. Risk assessment

6. Mediators as the source of bad news

**D. Counsel's role**

1. Choosing a mediator
2. Counsel's role is not adversarial
3. Less pomp and circumstances than trial
4. BATNA/WATNA

**E. Client's role**

1. Active versus passive
2. Participate in good faith and with an open mind
3. Ability to tell story to a third party

**F. Potential outcomes**

1. Moving forward without the stress of pending litigation
2. No punishment or assignment of fault or blame
3. No apologies

**G. Settlement**

1. Immediate satisfaction
2. Finality

**2. SPEAKING WITH OPPOSING COUNSEL**

**A. Making the first move**

1. Weakness or strength
2. Choosing the mediator
3. Location