

Questions for Mediators to Help Clients Assess Likely Court Outcomes

Mediators generally discuss these questions with lawyers and/or clients in private sessions (aka caucuses). Before asking these questions, mediators should ask about the facts in the case and [parties' interests](#).

- Parties use different methods to resolve cases like yours. In some cases, the parties start with extreme positions and make a series of counteroffers. Sometimes they use other methods such as focusing on parties' interests or their perceptions of fairness. What are you trying to accomplish and what do you think would be the best way to negotiate your case?
- Research shows that many parties and lawyers are overly optimistic and so they get worse results at trial than they could have settled for. Several studies have found that in 80-90% of trials, one side got a worse result than the other side's last offer.¹ I assume that you don't want to spend more time and money in your case to go to trial and then get a worse result than you could get in mediation, is that right?
- Part of the problem is that there are so many uncertainties in trial that it's impossible to be certain what the result would be. If you tried this case 100 times, you wouldn't get the same result every time. The outcomes would cluster around the average, but some would be much higher than the average and some would be much lower. I assume that you want to make the most realistic possible assessment of the likely outcome in court, is that right?
- To win at trial, you would need to establish certain facts and defeat the other side's arguments. You may be virtually certain that you can convince a judge or jury about some issues and much less certain about others. Which elements of your case do you think that there is some risk of losing? This might be because of the way the law is interpreted or the availability and strength of the evidence supporting your argument.
- Realistically, what is the percentage probability that the judge or jury would decide against you on XYZ issue?

¹RANDALL L. KISER, BEYOND RIGHT AND WRONG: THE POWER OF EFFECTIVE DECISION MAKING FOR ATTORNEYS AND CLIENTS 42-47 (2010); Samuel R. Gross & Kent D. Syverud, [Don't Try: Civil Jury Verdicts in a System Geared to Settlement](#), 44 UCLA L. Rev. 1, 42-43 (1996); Randall L. Kiser, Martin A. Asher & Blakeley B. McShane, [Let's Not Make a Deal: An Empirical Study of Decision Making in Unsuccessful Settlement Negotiations](#), 5 J. EMPIRICAL LEG. STUD. 551, 566-67 (2008); Jeffrey J. Rachlinski, [Gains and Losses and the Psychology of Litigation](#), 70 S. CAL. L. REV. 113, 154 (1996).

- [Alternatively:] Realistically, do you think that there is a low, medium, or high probability that the judge or jury would decide against you on XYZ issue?
- Parties in this kind of case often struggle to prove XYZ. In your case, do you think that you might have a problem with this issue? What do you think that the other side will argue about XYZ? How do you plan to address that?
- At trial, many judges or juries would have questions about XYZ. What makes you think that the judge or jury will see this issue the same way that you do?
- How sure are you about your assumptions about what would happen in court? How could you increase your confidence that you would win?

If you think that it might be helpful to express your views about some of these questions, you might ask the following questions.

- Would you like to hear my opinion about any of the issues in your case?
- Would you like to hear my assessment of the strengths and weaknesses of your case? [If so:] I think that you have a strong case on ABC issues but you have a real risk of losing at trial on DEF issues because XYZ. What do you think about that?
- I think that the additional legal fees and costs to go to trial may be significantly more than you estimate, possibly being as much as XYZ. What do you think about that?
- I think that if you go to trial, the process may harm your interests more than you expect because XYZ. What do you think about that?
- Would you like some suggestions about how you might respond to the other side's last offer?

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