

10 Breakout Session Tips for the Mediator - What You Need to Remember

By: Hon. John P. DiBlasi, J.S.C. (Rtd.)

Do give consideration in advance as to what confidential information will be revealed to the mediator in the breakout session.

Do not attempt to rush the mediator into giving an evaluation of the merits of the case.

Do give the mediator ample opportunity to speak to both sides.

Do not become mired in arguments as to why you will succeed at trial.

Do focus on settlement proposals and possible compromise.

Do not forget the ultimate goal is to settle the case.

Do be patient and understand that the negotiation takes time and moves slowly.

Do not become frustrated if a resolution is not reached quickly and don't abandon the process.

Do remember that the best day to settle the case is today.

Do not become too greedy - pigs get fed, hogs get slaughtered.

Breakout sessions are the first opportunity after the joint session in the mediation process for the attorneys to privately discuss their positions with the mediator. Oftentimes information that was held back during the joint session for tactical reasons will be revealed to the mediator in the breakout sessions. At the same time, much of what was already said during the joint session will be repeated in an attempt to influence the mediator's evaluation of the case. This is a necessary evil of the mediation process based upon the fear that the mediator does not fully comprehend the party's position. The parties need to know that they have been heard by the mediator before he reaches a conclusion as to his evaluation of the case and possible settlement options. They need to know that he has really understood what their positions are. The worst thing a mediator can do is jump to a conclusion with respect to the evaluation of a case. Further, it is to both parties' benefit to give the mediator the time to speak with both sides privately, several times, as it will assist him/her in reaching a more reasoned view of the settlement possibilities and the parties' respective positions. This slowing of the process also lends itself to the parties becoming more accepting of the recommendations of the mediator.

Often the parties in the breakout session become mired in their arguments as to why they would prevail if the matter is not settled and goes to trial. They forget about the ultimate goal which is to settle the case. While it is necessary to ensure that the mediator understands their positions the parties should, in advance of the mediation, prepare their initial settlement proposals and convey those to the mediator. It is best not to wait until the breakout session to start crafting a settlement proposal. Instead, focus on settlement solutions and do not re-hash the merits of the case.

The mediator must engender confidence in the process by slowing it down and taking time. Attorneys may want to shorten the process if a solution is not forthcoming quickly enough. Again it is important and beneficial to both sides to feel that they have been heard, and to consider what the risks are in continuing the litigation from the neutral's perspective. Give the mediator ample time to work the process. Negotiations leading to a shifting of a party's position and acceptance of a compromise takes time.

In many most mediations, it may appear, at the outset, that settlement is an impossibility. It is a mistake to become discouraged by the initial settlement offers. The most difficult cases will settle if adequate time is taken.

Hon. John P. DiBlasi is a retired Justice of the Supreme Court, Westchester County, Commercial Division. He is a member of NAM's (National Arbitration and Mediation) Hearing Officer Panel and is available to arbitrate and mediate cases throughout the United States. For the fourth straight year, Judge DiBlasi was voted the #1 mediator in the United States in the 2017 National Law Journal Annual Reader Rankings Survey. He was also named a National Law Journal 2016 Alternative Dispute Resolution Champion, as part of a select group of only 48 nationwide. Judge DiBlasi was voted one of the Top 10 mediators in the 2016 New York Law Journal Annual Reader Rankings Survey for the seventh year in a row. Additionally, he has been designated a Super Lawyer for the fourth consecutive year (2016, 2015, 2014 & 2013) and he holds an AV Preeminent Peer Rating from Martindale-Hubbell in both Alternative Dispute Resolution and Litigation – a distinction given only to those who possess the highest ethical standards and professional ability.

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