10 Mistakes to Avoid at Mediation – Improving the Odds for a Resolution

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

Under the best of circumstances, mediation may not result in the resolution of a litigated dispute. This may be as a result of factors which are not under the control of the parties. However, mediations are often negatively affected by basic mistakes involving factors that are within the parties' control. While many of the following points may seem simple, I have seen even experienced attorneys make these mistakes.

1. Failure to submit a brief prior to the mediation.

This is an excellent opportunity to inform both the mediator and your adversary of your position. It will save time at the mediation and facilitate negotiations.

2. No discussions with your adversary have taken place prior to the mediation.

Some preliminary discussion with your adversary regarding the parameters of the negotiations should take place beforehand. This may often encompass preliminary settlement demands and/or offers which will give some shape to the mediation and avoid surprise.

3. A demand or offer that has been made prior to the mediation is changed.

This can doom a mediation from the outset. Parties cannot negotiate against a moving target. It is simply bad faith to make a settlement demand or offer prior to the time of the mediation and change it on the day thereof. This obviously breeds distrust and poisons the negotiation process.

4. The client is not present at the mediation.

Often the party with the authority to settle the case does not appear at the mediation. This can create a lack of trust with respect to the ability of counsel to negotiate with authority to settle the case and thereby impede the negotiation process.

5. The client has not been properly prepared for the mediation process.

What is common knowledge to the attorneys with respect to the mediation process is usually alien to the client. Clients may not fully understand the negotiating process. The client can become easily frustrated by the back and forth negotiations and become less willing to compromise.

6. The parties refuse to speak to each other face-to-face.

Many times, due to animosity that has arisen out of the litigation process, counsel and/or their clients do not wish to speak to one another face-to-face. This is a mistake as the opportunity to explain one's position is an integral part of the mediation process.

7. A party refuses to respond to a demand or offer.

The mediation process is usually one of give-and-take. Even if you feel that the offer or demand is "insulting," it is important that some response be given albeit in the form of a nominal compromise. A refusal to negotiate at all may end the process.

8. After a settlement has been reached, a party seeks to impose new conditions that have never been discussed.

This will almost certainly cause a failure of the process. It is simply not good faith to withhold conditions that are a part of the settlement until an agreement with respect to its major terms has been reached.

9. Counsel agrees to a settlement without the client's understanding or consent.

The client should be completely engaged in the process at all times and made aware of all the negotiations. Counsel must be sure that they have their client's consent before they agree to a settlement.

10. The parties refuse the opportunity to reconvene in the event of an impasse.

Many times it appears that there is absolutely no way a case may be settled. It is all too common that, out of frustration, the parties' reject the mediator's invitation to re-convene for a joint session. This additional meeting frequently results in the impasse being overcome.

Ultimately the "basics" (as they say in baseball) can make or break the player or the game.

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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