

## **10 TIPS From The Mediator – Gaining a Client’s Acceptance**

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

- ❖ Prepare the client for the mediation much in the way you prepare them for trial.
- ❖ Consider how you will manage their expectations.
- ❖ Give them a realistic analysis of the strengths and weaknesses of their case in advance.
- ❖ Discuss the mediation process in detail.
- ❖ Explain the mediator’s background and role.
- ❖ Do not rush the process.
- ❖ Make sure your client has an opportunity to be heard.
- ❖ Discuss the objective factors that support accepting a settlement.
- ❖ Have your client sign the settlement agreement.
- ❖ Discuss the progress made if the case does not settle.

All clients are emotionally invested in their case. The process of slowly gaining an objective understanding of the strengths and weaknesses of their case will lead to a compromise and ultimately to a settlement.

The process of gaining the client’s acceptance of a compromise begins with the preparation for the mediation. The preparation of the client for the mediation should be similar to the process that one would engage in for trial. Doing a run through of what will be asked of the client if the case goes to trial, makes the entire process much more realistic for them with respect to the risks. The preparation process should include a detailed explanation of how the mediation will be conducted.

Counsel should consider how they will manage their client’s expectations during the negotiation process. The weaknesses of their case and the risks of trial should be explained to the client early on in the process. Further, the client should be advised that the ADR process is not a win lose proposition in the event that the case does not settle.

In all likelihood, you will want the mediator to speak to your client about the merits of the case. The experience and the background of the mediator should be explained to the client prior to the mediation session. You cannot expect the client to seriously consider the recommendations of the mediator if he knows nothing about the neutral’s background. To like accord, the mediator’s role should be explained in detail. It should be made clear that the

mediator is not there to decide the case, but to assist the parties in the negotiations and to discuss the risk/reward aspect of each party's case.

In advance of the mediation, a decision must be made as to whether the client will be present at the joint session. Do not assume that they will be. The practice varies from state to state. If counsel wishes that the client be present, it can be a precondition to the mediation itself. Prepare the client for what they may hear at the joint presentation and if the client has a strong reaction, consider whether they should attend.

During the breakout sessions, the mediator will have an opportunity to speak to the client and develop a better understanding of the case and the client's position. Careful consideration should be given to the issues you want discussed. If an evaluation is sought, it should be explained to the client in advance that the mediator is going to discuss the risks versus the benefits of continuing with the litigation.

In obtaining the acceptance of risk and compromise by your client, the process must proceed prudently. Both counsel and the mediator, in discussing a settlement with the client, should do so in a manner that is clear and presents the objective factors that mitigate towards the client accepting a settlement. Make sure the client has an opportunity to be heard.

If a settlement agreement is reached, it should always be reduced to writing and signed by the client. When the case does not settle, counsel, with the help of the mediator, can review what has been accomplished and the next steps that will be taken in attempting to reach settlement post mediation.

In summary, gradual acceptance leads to compromise and, ultimately, settlement.

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*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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