

Seeking an Evaluation from the Mediator and the Pre-Mediation Brief

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

In the majority of cases, the parties to mediation ask the neutral for an evaluation of their case. This will encompass an analysis, inter alia, of the factual allegations, defenses, and issues of law, motion practice/decisions, venue/jury pool, and an evaluation with respect to jury verdict potential. The mediator will be making an assessment of the evidence to be presented and will give an opinion with respect to the credibility of potential witnesses based upon a variety of factors, including but not limited to, interest in the outcome of the proceeding, strength of deposition testimony, and whether such testimony will be supported by documentary and real evidence. It is to your advantage to give careful consideration as to the information provided to the mediator before the session.

The goal of counsel in advance of the mediation should be to educate the neutral as much as is reasonably possible with respect to the status of the litigation, facts of the case, the relative positions of the parties, issues of law, and damages sought. It is to your benefit that the mediator be properly informed prior to the mediation as it will lead to the savings of significant time during the course of the session, a better understanding of your position and allow the mediator to make a reasoned evaluation of the case.

The process of ensuring that the parties will get an informed evaluation begins with the brief submitted prior to the mediation. In any complex matter, the parties should submit a mediation brief to give the mediator an opportunity to analyze the matter before the mediation session. It is to your benefit to submit your brief well in advance of the mediation to give the mediator ample opportunity for review and to consider the arguments of the parties. The brief should contain a summary of the position of the submitting party with respect to the issues in the case. The submission of pleadings, exhibits, motions, decisions of the court and deposition testimony alone without a summary is not an effective way to educate the mediator as to your position which is to your advantage. The brief should incorporate exhibits which are critical to the understanding of the case. The exhibits submitted should be carefully referenced in the summary in the brief itself and relevant portions should be highlighted.

All too often, the briefs submitted prior to mediation are pure advocacy without a balanced reflection upon the potential evidence to be presented if the case were to go to trial. In an attempt to persuade the mediator as to the efficacy of the party's position, the brief becomes unduly lengthy and redundant. It is to counsel's advantage to submit a clear and concise brief which represents a balanced presentation of the facts that not only stresses the strengths of your case, but also acknowledges its defects and addresses them. While it may seem counter-intuitive, this is to your benefit. A balanced brief will enhance your credibility with the mediator. This is similar to the jury selection process wherein a knowledgeable trial attorney will make the jury aware of the problems in their case in advance so to avoid credibility issues as the negative evidence is presented. By the same token, this gives the mediator the opportunity to consider both the strengths and weaknesses of your case and to understand how you are going to address the weaknesses. By doing this, you give the mediator time to consider these issues in advance of the

mediation. Additionally, you gain credibility with the mediator by presenting a fair view of the case and one that is not slanted solely to your side.

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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