Addressing Legal Issues with the Mediator and Timing in Seeking an Evaluation

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

Many cases that come to mediation involve novel questions of law. Invariably, there will be a dispute as to the proper law applicable to the case and the interpretation of appellate decisions that impact upon same. It is common for parties in the context of their pre-mediation brief to cite case law with a summarization of the issues and the ruling of the court along with the formal citation. It is useful for the parties to cite the case law in the context of their brief. However, their interpretation of same is all too often misleading as the view proffered represents the attempt to advance a specific position. The better practice that will enhance your credibility with the mediator, which is to your advantage, is to make a balanced presentation. It is therefore extremely helpful to provide copies of the key cases to the mediator. The opportunity for the mediator to read the decisions and make his own determination with respect to the facts of the case, issues presented, applicability, and the court's decision and rationale, leads to a better understanding by the neutral of the case law. Again, the goal is to assist the mediator in coming to a well-informed evaluation which ultimately will be to your benefit. In the same way that the narrative in the brief should be balanced, if there is opposing authority, those cases should be submitted and also be distinguished in the brief.

Attorneys, in an attempt to influence the mediator's view of a case, may often refer to jury verdicts on claims asserted in similar cases. Of greater significance are appellate court decisions which address the issue of what causes of action are sustainable and what an appropriate award would be.

At some point during the mediation, one or both of the parties typically will ask the mediator for an evaluation of the case in terms of the strengths and weaknesses as they relate to a potential verdict after trial. Quite often, parties seek such an evaluation immediately after the joint session has been held. Even assuming the mediator has been properly educated on the facts and issues in the case prior to the time of the session, there is nothing like sitting face-to-face to be able to ask questions in private session. This will give life to the submissions, allow the mediator to develop a far better understanding of your case and give you an opportunity to advocate your position. It is therefore not useful for counsel to request an opinion prematurely at the outset of the mediation. The better practice is to give the mediator an opportunity to speak privately with the parties so as to gain a better understanding of their position, even if this takes several rounds with each side to render an opinion.

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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