

Exchanging the Mediation Brief – Is in Your Best Interest?

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

The submission of a well-crafted brief prior to the mediation is an excellent opportunity to give the mediator a real preview of your position in advance. It can be used to educate, persuade, and create a roadmap for settlement negotiations. It is to your benefit to submit same as it will save time at the mediation and create an excellent starting point for the mediator to learn about the facts and issues of law in the case. It will also aid the mediator, at least preliminarily to develop an initial evaluation of the strengths and weaknesses on both sides. The brief can be an important kick start to the negotiation process. For all of these reasons, the briefs should be exchanged with opposing counsel prior to the mediation.

It is this last point that merits discussion. Is it to your advantage to exchange the brief? In the opinion of the author, you are always better served by doing so. It is common to receive briefs with the cautionary words "Confidential - For Your Eyes Only." It almost seems that the mediator has entered the world of James Bond and has become a member of her Majesty's Secret Service. In the majority of cases, there is no need for this, particularly in cases where the parties have completed discovery and/or dispositive motions have been submitted or decided. What often occurs is that the entirety of the contents in the so-called "confidential" mediation brief is discussed openly in the joint session, thereby negating any reason for not exchanging it. In the situation where one side exchanges the brief and the other side does not, feelings of distrust and antagonism arise on the part of the party who did exchange. This is not of benefit to the process and starts things off on the wrong foot at the outset of the mediation.

The reason often put forth by counsel for not exchanging the briefs is usually due to tactical reasons pertaining to information that they do not wish to disclose to their adversary. If counsel possesses information of such significance, it would not be wise to put it in writing under any circumstances. Exchange your brief and convey this information to the mediator privately in the first breakout session with the caveat that it not be divulged to opposing counsel. The ironic aspect of this type of situation is that if this information is of such strategic importance and it cannot be used by the mediator in the course of the negotiations, of what use is it any way? The one scenario where it may be useful is where it is being conveyed to the mediator with the idea that, at some critical juncture, it may be used to overcome the resistance of the other side to compromise. Also, sometimes the parties will seek the opinion of the neutral with respect to the relative merits of withholding or disclosing this information.

Ultimately, most often it is to your benefit to exchange your mediation brief with your adversary. In order to reach a settlement of any case, you are going to have to convey information to your adversary to allow him to justify changing his position and making compromises that would not otherwise be made.

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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