The Mediation Brief – 10 Ways to Use it to Your Advantage

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

1. Always submit a brief.
2. Use the brief to educate the mediator and your adversary as to your position in advance of the mediation.
3. Use the brief to maximize your use of time and to avoid lengthy arguments during the joint session.
4. Always exchange the brief with your adversary.
5. Exclude from the brief any materials which you believe should be withheld for tactical advantage.
6. Submit an accurate, brief and clear summary of your position.
7. Address the procedural status of the case, the basic facts, and your arguments in support of your position inclusive of an analysis of applicable law.
8. Avoid redundancy in your argument – less is more.
9. Attach those exhibits which are critical to your case.
10. Submit your brief well in advance.

The most precious commodity at any mediation is time. The goal of an attorney in advance of the mediation is to engage in adequate preparation so that the time allotted is used most effectively. In order to ensure this, the preparation process becomes critical. One of the best opportunities to help maximize the use of time and the possibility of settlement is the preparation and submission of an effective brief. The purpose of the brief is twofold. The first is to educate all of the parties in advance of the mediation as to your position. This will save precious time during the joint session which otherwise will become mired in a lengthy oral argument with respect to each party's position. This does not mean that during the joint session that the parties will not engage in a substantial discussion about the merits of the case. The give-and-take during the opening session is an excellent opportunity for the parties to state their positions. However, a brief submitted will make this part of the process far more meaningful as all attending will have a good understanding of your position in advance.

The foregoing leads to the discussion as to whether the brief should be exchanged with the opposing side. I have found that inevitably all of the information contained in "confidential" submissions is ultimately discussed during the opening session. If there is something that, for tactical reasons, the party wishes to hold back, that should be excluded from the brief, and discussed privately with the mediator or, it can be added onto the brief in a separate confidential document that is sent only to the mediator and not the other side. Ultimately, based upon my experiences, it is to your advantage to exchange the brief.

The content of the brief is critically important. It should contain a clear summary of the procedural status, the facts of the case, and an argument with respect to the party's position, inclusive of an analysis of the applicable law. To submit exhibits without a summary does not take advantage of this opportunity to proactively advance the process. A submission which consists solely of exhibits or with little explanation in the summary as to their import gives no insight as to your position.

The summary should be prepared in a fashion which is accurate, brief, and clear. Briefs frequently resemble motion papers I reviewed as a judge. Many are completely redundant and premised upon the assumption that the more an argument is repeated, the more likely it will be accepted. This should be avoided. The brief should be designed to educate both the opposition and the mediator as to the basic principles of your position. Parties should give careful consideration as to what exhibits should be annexed to the brief. Kitchen sink attachments are not useful and should be avoided. Instead, attach those exhibits that are clearly necessary to advance your position and that enable the mediator and your adversary to have a full understanding of same.

Finally, the further in advance the brief is submitted the better for all concerned, as this allows sufficient time for review and consideration.

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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