# A MEDIATOR'S PLEAS(E)

*By Hon. Richard A. Levie (Ret.)*

As counsel, you have represented clients in hundreds of mediations. You have taken courses in the art (it certainly is not science) of mediation. Perhaps you even have served as a mediator. In your role as an advocate, you know the importance of being able to think like your opponent and to anticipate the reaction, response, next reaction and response and so on. Applying a layperson's understanding of physics – very action will have an opposite reaction (it may or may not be equal but there will be a reaction).

A mediator is placed between the action and reaction – sometimes leading, sometimes following. By thinking about the physics of a mediation and your role in it, you have the ability to maximize the opportunity to use the mediator to assist in reaching a resolution. The key, however, is to understand (and anticipate) the mediator, as well as the other party in the process.

Listed below are one mediator's pleas(e) for counsel to most efficiently use the mediator and mediation to achieve a resolution.

**Pleas(e) #1:** Consider the attitudinal setting of the mediation – confrontational versus conciliatory. Notwithstanding each party's belief (at least as expressed to a client) that it has strong, winning arguments, the reality is that the other party also has arguments. Indeed, the opposing party likely has precisely the same view of the case.

Because the opposing party probably has highly competent counsel and confidence in its position, the likelihood of a settlement-inducing response from the other party to table pounding and bombast is something less than zero. The reality is that a party almost never "caves" in response to a table pounding presentation. More likely, the presenting party will guarantee immediate resistance to settlement and engagement in re-evaluation of one's positions and the process of mediation. While such resistance is not necessarily fatal to reaching a resolution, at a minimum it does prolong the mediation in terms of time and cost to the clients.

Please appreciate the difference between a conciliatory attitude and the chance of conciliation being viewed as a lack of confidence and fear of going to trial most assuredly are in the less than zero category. If a client does not appreciate the attitudinal issues for mediation purposes, consider a pre-mediation phone call or meeting with the mediator. Let the mediator be the message carrier about the importance of attitude in mediation.

One can be conciliatory in tone, word choice and subjects chosen for discussion in ways that do not suggest weakness. Pleas(e) – consider an even toned "matter of fact" presentation of facts and legal positions. Pleas(e) be sensitive to the persons sitting across the table from the presenting party. If the alleged "wrongdoer" or the writer of the contract on which the dispute is based is sitting at the table, be sensitive to their presence and make remarks that are factual "if we need to go forward, it may/will be necessary to prove…." Accusatory statements have no place at a joint session if one wants to make the mediation as productive as possible in the shortest amount of time. Even in the absence of a sudden "you're right" response, such a presentation initiates and fosters an attitude and environment for compromise.

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**Pleas(e) #2:** Regardless of who initiates the call, engage the mediator in a private (attorney to mediator) pre-mediation telephone to discuss the upcoming mediation. Educate the mediator not only on all formal and informal discussions of settlement between the parties/counsel to date, but on the known or suspected "hot button" emotional issues on both sides of the case, including any personnel issues. For example, if the attorney through conversation or experience suspects opposing client has a "client control" issue, discuss this to the mediator. Doing so enables the mediator to better assess the important motivating factors of the parties and avoid unknowingly inflaming a sensitive relationship.

**Pleas(e) #3:** Be creative. You know better than the mediator whether there are non-economic ways that may be related or unrelated to the underlying dispute that have potential use in fashioning a resolution. Consider an antitrust case between an international corporation and a domestic corporation that was settled by the sale of a company owned by one party to the other party in the suit where the company sold had no direct or indirect relationship to the dispute at issue.

**Pleas(e) #4:** Use the mediator effectively. Assuming you have confidence and trust in your mediator, use the mediator to move the dispute toward resolution. Actively seek the mediator's views. In a situation where you believe that your client needs to hear an analysis or evaluation from an objective third person, the open-ended (non leading) question to the mediator asking her/his thoughts on particular subjects can be particularly effective.

As mediators we are here to help the parties. As counsel – please – use us effectively. ■

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