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Mediation: Know whom you're persuading

You've got a case headed to mediation — so what can you do to make sure that process is a success for your client? Here's a few tips, straight from a former judge-turned-mediator:

- Prepare a memo that you can give your opponent. Mediators read wonderful, persuasive memos. But persuading the mediator doesn't get the deal done. Use those persuasion skills to show your opponent what he's up against.

That fabulous fact or argument you want to spring at trial? If you don't use it in your mediation memo, the chances are 98 percent that no one will ever hear it, since less than 2 percent of cases are ever tried.

If you do have something really confidential, write a separate confidential note to the mediator.

- Use a simple timeline. Mediators spend hours culling dates from voluminous submissions, something jurors won't do.

Usually there are three to five key dates or times. It's not so much the particular date: It's the sequence of the dates and the intervals between them.

Seeing them in a simple timeline clarifies your argument and drives it home. Please keep your timeline neat. One with 30 or 50 dates and complex call-outs dilutes your case. You can always include other, also simple, sub-timelines.

- Know the liens. Be sure the

plaintiff has them and be sure someone establishes communication with the lienholders before the mediation.

What a waste of time to reach a tentative deal and then wait months to see what happens with the liens.

- Use diagrams and other visuals. It takes a paragraph to describe a simple car accident when it can be shown so clearly and simply in a diagram.

Photos of cars, scars, hardware, Google Maps aerial shots, Facebook pages, key chart entries, electrocardiogram tracing and other demonstrative materials — many of which are readily available on the web — can be very persuasive and show that you have prepared for trial.

- Wrap it up nicely. Rather than handing over all the medical bills, medical records or deposition transcripts, you should summarize, quote or paraphrase them. Attach only the few key entries or pages if you have to.

Bring the rest to the mediation or have someone ready to e-mail them in case there's disagreement over what's in them.

- Attach actual cases. Highlight the key portions if there is an issue of law in controversy.

- Speak up. It's OK to tell the mediator what you want. If you want to give an opening statement or you don't want to give an opening statement — tell your mediator. Mediators work for you. We don't always know what you want if you don't tell us.

MEDIATION CIRCUS



**MICHAEL
R. PANTER**

Hon. Michael R. Panter (Ret.) is a senior mediator at ADR Systems of America LLC. He previously served in the Law, Family and Municipal Divisions of the Circuit Court of Cook County. He was a trial lawyer for thirty years and loves mustard. Share responses and comments at mikepanter.com.

- Have the ultimate decision-maker ready. It's best if they're present. Telephone availability is OK, but there is no substitute for boots on the ground. It lets the adjuster, partner or supervisor see and smell the scene. It lets the other side see your commitment and, very importantly, it lets the mediator talk to and listen to the person who has to say "yes" to get a done deal.

- Bring the actual releases, stipulations and dismissal orders. If a deal is made, everyone should sign everything needed to finalize it.

- Make a demand. (If you're the plaintiff.) If you can't say what you want, how will you get it?

- Review insurance coverage and tenders well in advance. If there's an issue, let everyone

know. If necessary, bring coverage counsel to the mediation. Likewise, if the workers' compensation case is open, comp attorneys may need to attend.

- Don't get mad or insulted. (Or at least don't show it.) Years of litigation build up strong emotions. Working through those emotions is usually necessary to get a deal.

- Don't try to circumvent opposing counsel. You shouldn't insist the mediator speak directly with the opposing party in order to get around that party's lawyer. How would you like that done to you?

- Be willing to offer money. Don't refuse to offer just because you think it won't settle the case. You never know. People can change their minds over the coming days, weeks and months.

- Review the jury instructions. Be prepared to cite the ones that help your case. Make sure you know the ones that can hurt your case (e.g., the premises instructions if you're the plaintiff or the aggravation instruction for the defense.)

- Try to understand your opponents' positions. What do they really want? Why? If you were in the same position, what would you think?

- Don't give up. Even if the case didn't settle that day, lay the groundwork for further discussion. Identify a checkpoint (like an upcoming deposition or ruling) to talk again and tell your mediator how he or she can help you in the future.