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## Why Are Mediation Statements Confidential?

The confidentiality and privilege rules underlying mediation provide many undeniable benefits. What is not obvious, however, is how we got into the habit of sending only confidential mediation statements to the mediator that are not shared with the opposing side. This is most likely due to the fact that when mediation became commonplace in Florida, attorneys necessarily thought to "uphold" the privileges and protections of Chapter 44.401, et. seq (The Mediation Confidentiality and Privilege Act) and, perhaps, assumed that all communication with the mediator must or should be confidential. It need not be, and a fundamental change in our practice is warranted.

In my engagement letters, I strongly encourage the parties to share information before mediation. As a litigator, I want the opportunity to "speak" directly in writing to the opposing client. I encourage all parties to share mediation statements with the opposing side and the mediator. If there is sensitive information that you do not want the other side to see but you want the mediator to know in advance, you can add a paragraph or two in a separate addendum for the mediator's eyes only.

Sharing information provides a unique opportunity to educate the other side (not just the attorney) about the facts and issues and to see the case from your vantage point. Opening session has limitations. Most people cannot absorb more than two or three key points in opening session. Advance communication in writing gives everyone time to study and consider, some time to adjust to new information and,

Brought to you by  
**David W. Henry, Esq.**



Should you have additional  
inquiries, please contact:

**David W. Henry, Esq.**  
Shareholder  
Professional Liability  
Department

Florida Supreme Court  
Certified Civil & Appellate  
Mediator

Member, National Association  
of Distinguished Neutrals

Landmark Center One  
315 E. Robinson Street, Suite  
550  
Orlando, FL 32801  
407.420.4418  
[dwhenry@mdwcg.com](mailto:dwhenry@mdwcg.com)

perhaps, time to modify their expectations.

People learn and remember more by reading than hearing, and you cannot assume the other side knows your case. Maybe the other lawyer does not communicate frequently or often. Maybe the lawyer minimizes the strength of your case or colors the facts to make your client seem unwilling to make a deal. A good mediation statement can diffuse anger and start the bridge building process.

You have to appreciate that a lawyer is a filter. Sharing a statement that can be read by the client eliminates the filter. A pre-mediation letter is a fantastic opportunity to drive home what you want to say. Whether to adopt a cordial and accommodating tone or a more stern, matter-of-fact statement of the case is your call—but take advantage of the opportunity to speak directly to your adversary. The other side may have suspicions about your client's motives that can be dispelled or fears or misperceptions that can be clarified. Advance written communication can deflate some animosity and set the table for mediation on your terms.

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**MARSHALL DENNEHEY  
WARNER COLEMAN & GOGGIN**

ATTORNEYS-AT-LAW

PA NJ DE OH FL NY

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