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Sharing Bad News Can Lead to a Deal

Premediation submittals are helpful. Surprisingly, mediators routinely tell me — and my own experience confirms — that such submissions from counsel are often lacking. We may get one statement or a letter but rarely two. The position statement should be an overview of the case but more about the interests of the parties and not a presentation of every theory or affirmative defense. Mediators need to know the players, the sources of funds, the egos, whether there is insurance coverage, the underlying interests of the parties and the impediments to resolution. Voluminous pleadings and motions are not usually critical reading. The architecture of a deal should be explained, as well as anticipated problems.

For decades, the habit has been for counsel to send confidential statements to the mediator only — not the other side. In my opinion, such statements should also be sent to opposing counsel. After all if you have some "ammunition" you should let the other side digest it. New information at mediation may not be capable of being evaluated and accepted on the fly. But letting bad information "sink in" by sending it in advance might have a sobering effect on expectations. Managing and minimizing expectations is the key to getting a deal done. So do not wait until mediation to give the opponent your choice nuggets of information. Bad news takes time to digest.

It's important to note that mediation statements sent to opposing counsel are considered a mediation communication under the Mediation Confidentiality and Privilege Act (Chapter 44) in Florida, and under analogous state and federal rules in other jurisdictions. One does not have to be

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"in" the actual mediation session to have a privileged mediation communication.

Lawyers may think "surprise" is helpful. That might be useful at trial but not with mediation. It's best to share your premediation submittal at least a week or more prior to the mediation. An early letter to the mediator shared with the opposing side is the best practice. Your letter helps the other side get client control because they can use your letter to explain the argued weaknesses and limitations. In other words, the attorney in receipt of the position statement does not have to be the "bad cop" with his or her own client. Your statement serves as the wake up call. All of this can lead to a shared understanding and consensus about the facts that can lead to a deal — and isn't that the point of mediation in the first place?

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