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Mediation Matters

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How Confidential Are Mediation Communications?

"Confidentiality is an important feature of the mediation and other alternative dispute resolution processes. Promising participants confidentiality in these proceedings promotes the free flow of information that may result in the settlement of a dispute."[1]

"Were courts to cavalierly set aside confidentiality restrictions on disclosure of communications made in the context of mediation, parties might be less frank and forthcoming during the mediation process or might even limit their use of mediation altogether. These concerns counsel in favor of a presumption against modification of confidentiality provisions of protective orders entered in the context of mediation."[2]

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Not everyone agrees that mediation confidentiality is without risk.[3] It may preclude claims of legal malpractice or inappropriate conduct by the mediator. Nevertheless, when one is contemplating mediation, it is a good idea to consider what confidentiality law will apply.

Confidentiality might be provided by a statute (such as the Uniform Mediation Act[4]), court rule[5] or order, rules of alternative dispute resolution (ADR) providers such as the American Arbitration Association,[6] Judicial Mediation and Arbitration Services[7] and Federal Arbitration Inc.,[8] or by a private agreement. Although mediation confidentiality is generally enforced in many contexts, there are exceptions.[9]

Statute

Where mediation confidentiality is provided by statute, the courts will strictly enforce it. In *Cassel v. Superior Court*,[10] the California Supreme Court applied the confidentiality provisions of § 1119 of the of California Evidence Code to prohibit discovery or introduction into evidence of any communications among a client and his attorneys before and during mediation. Even though excluding evidence may have hampered the client's malpractice case, the court saw no reason to craft a judicial exception on the clear statute. Following *Cassel*, the court of appeals in California held that excluding evidence by reason of the mediation confidentiality statute precluded the plaintiff from proving legal malpractice and the defendant from defending the claim of malpractice during the mediation. Accordingly, the malpractice case was dismissed.[11]

The Oregon Supreme Court reached a different result in *Alfieri v. Solomon*.[12] Applying Oregon's mediation statute, the court held that mediation includes only that part of the process where the mediator was involved and that attorney/client communications did not meet the statutory definition of "mediation communication," even if related to the mediation. Also, once a settlement agreement has been signed, the mediation is considered over, so subsequent attorney/client communications are not considered mediation communications. The allega-

1 *Savage & Assocs. PC v. K&L Gates LLP (In re Teligent Inc.)*, 640 F.3d 53, 57 (2d Cir. 2011) (internal quotations omitted).
2 *Id.* at 59-60.
3 Jeff Kichaven, "Beware the 'Standard Mediation Confidentiality Agreement,'" *Law360* (Dec. 27, 2016).
4 Uniform Mediation Act, *available at* uniformlaws.org/shared/docs/mediation/uma_final_03.pdf (unless otherwise specified, all links in this article were last visited on June 22, 2017).
5 *See, e.g.*, "Model Local Bankruptcy Rules for Mediation," ABI, *available at* abi.org/membership/committees/mediation.
6 *See* Commercial Arbitration Rules and Mediation Procedures, *available at* adr.org/sites/default/files/Commercial%20Rules.pdf.
7 *See* International Mediation Rules, *available at* jamsadr.com/files/Uploads/Documents/JAMS-Rules/JAMS-International-Mediation-Rules.pdf.
8 *See* FedArb Rules for Mediation, *available at* fedarb.com/rules/fedarb-rules/#_Toc178331754.
9 *See* Edward M. Spiro and Judith L. Mogul, "Mediation Confidentiality: Meaningful But Not Absolute," 248 *N.Y.L.J.* 117 (Dec. 18, 2012).
10 51 Cal. 4th 113 (2011).
11 *Biller v. Faber*, 2016 WL 1725185 (Cal. App. 2d Dist. April 27, 2016).
12 358 Or. 383, 365 P.3d 99 (2015).

tions of the ex-client's complaint that disclosed private attorney/client communications was not stricken.

Applying the Uniform Mediation Act as enacted in New Jersey,[13] the rules of court[14] and the rules of evidence,[15] the New Jersey Supreme Court held that both parties waived the statutory confidentiality provisions when the defendant called the mediator as a witness, the plaintiff failed to object and both parties testified as to mediation communications.[16] A retired judge conducted the mediation of a commercial mortgage foreclosure, and an agreement was reached. The defendant's attorney forwarded a letter to the court and the plaintiff's attorney detailing the terms of the settlement. The plaintiff's principal refused to sign a release and discharge of the mortgage, whereupon the defendant moved to enforce the settlement. The motion revealed confidential mediation communications, including a certification by the mediator.

Instead of objecting to the disclosure of privileged communications, the defendant requested discovery and an evidentiary hearing. Depositions of the parties and the mediator were taken, and the trial court held a lengthy evidentiary hearing at which the mediator was called as a witness. When the mediator balked at revealing private discussions at the mediation, both attorneys advised the court that mediation confidentiality had been waived. The trial court found that a settlement agreement had been reached and granted the motion to enforce the settlement. The intermediate appellate court affirmed.[17] The Supreme Court bemoaned the fact that the mediation, which was meant to expeditiously resolve the underlying dispute, had spawned extensive litigation over the purported settlement agreement. Although the Supreme Court affirmed the enforcement of the oral settlement agreement because mediation confidentiality had been waived, it announced a rule that henceforth, all settlement agreements reached at mediation had to be in writing and signed to be enforceable.

Court Rule

In *Beazer East Inc. v. Mead Corp.*,[18] the Third Circuit assigned the case on appeal to mediation pursuant to the Third Circuit's Appellate Mediation Program, Local Appellate Rule (LAR) 33.0, adopted pursuant to Fed. R. App. P. 33. Beazer moved to enforce what it alleged was an oral settlement agreement reached at the mediation. The circuit court made short work of that motion:

> Both [LAR] 33.5 and sound judicial policy compel the conclusion that parties to an appellate mediation session are not bound by anything short of a written settlement. Any other rule would seriously undermine the efficacy of the Appellate Mediation Program by compromising the confidentiality of settlement negotiations.[19]

The Western District of Washington has a local rule providing for mediation, a privilege for all mediation communications, and a requirement that all settlements be reduced to writing.[20] The district court refused to permit any evidence of an alleged settlement reached at mediation because no written settlement agreement was signed under the local rule. The Ninth Circuit affirmed in *Barnett v. Sea Land Service Inc.*[21] While the language of the rule was subject to different interpretations, the circuit court agreed that requiring a signed, written agreement was the best reading of the rule.

Before embarking on mediation, counsel should consider what confidentiality provisions are applicable and what exceptions apply, as well as whether third parties might later seek discovery or evidence of mediation communications.

Court Order

In *Savage & Associates PC v. K&L Gates LLP (In re Teligent Inc.)*,[22] a law firm defending a legal malpractice action sought discovery of mediation communications from its former client and the estate representative regarding settlement of the estate's claim against the client, the debtor's former CEO. The Second Circuit affirmed the decisions of the bankruptcy court[23] and district court[24] denying the law firm's discovery requests. The bankruptcy court had entered mediation orders that contained a confidentiality provision, and the law firm moved to lift the confidentiality of those orders to permit discovery.

The circuit court laid out its test for permitting the discovery of confidential mediation communications. The moving party must demonstrate the following: (1) a special need for the confidential material; (2) a resulting unfairness from lack of discovery; and (3) that the need for the evidence outweighs the interests in maintaining confidentiality. The circuit court treated the mediation orders as protective orders under Rule 26(c)[25] and applied the same rationale that prohibits modification of protective orders absent extraordinary circumstances. Because the law firm failed to prove any of the aforementioned factors, the motion to modify the confidentiality provisions of the mediation orders was denied.

Private Mediations

Parties who voluntarily sign a mediation agreement or use a private ADR provider should be bound by the confidentiality provisions of their agreement or the provider's rules. In *Facebook v. Pacific Northwest Software Inc.*,[26] the Ninth Circuit affirmed the district court's dismissal of a claim that a settlement had been procured by fraudulent valuation of securities contrary to securities regulations. The

13 N.J.S.A. 2A:23C-1 to 13.
14 N.J.R. 1:40 to 1:40-12.
15 N.J.R.E. 519.
16 *Willingboro Mall Ltd. v. 240/242 Franklin Ave. LLC*, 215 N.J. 242, 71 A.3d 888 (2013).
17 421 N.J. Super. 445, 24 A.3d 802 (App. Div. 2011).
18 412 F.3d 429 (3d Cir. 2005), *cert. denied*, 546 U.S. 1091, 126 S. Ct. 1040, 163 L. Ed. 2d 857 (2006).
19 *Id.* at 434.
20 W.D. Wa. L.R. 39.1.
21 875 F.2d 741 (9th Cir. 1989).
22 640 F.3d 53 (2d Cir. 2011).
23 417 B.R. 197 (Bankr. S.D.N.Y. 2009).
24 2010 WL 2034509 (S.D.N.Y. May 13, 2010).
25 Fed. R. Civ. P. 26(c).
26 640 F.3d 1034 (9th Cir. 2011).

parties had engaged a private mediator and at the end of the mediation session signed a short-term sheet that contained a broad confidentiality provision. The Ninth Circuit found that the short-term sheet contained all of the essential terms in order to be enforceable. Furthermore, the term sheet explicitly barred discovery or admission in evidence of any statements made during mediation. The agreement precluded the defendants from introducing any evidence of what was said during mediation, thus their fraud claims had to be dismissed for lack of evidence.

However, what about third parties? May a third party compel disclosure of mediation communications or offer the same in evidence if the third party was not a participant in the private mediation? The same three-part test to overcome mediation confidentiality established in the *Teligent* case applies to mediation conducted under the auspices of a private organization.

In *Dandong v. Pinnacle Performance Ltd.*,[27] plaintiffs engaged in confidential mediation (with other parties not including the defendants) in Singapore before the Financial Industry Disputes Resolution Centre Ltd. (FIDReC). When the defendants sought discovery of material that might have included communications in connection with the FIDReC, mediation plaintiffs sought a protective order. The district court held that the policies cited by the Second Circuit in crafting the narrow exception to mediation confidentiality in a court-authorized mediation also applied to private mediation. The district court pointed out that the Second Circuit in *Teligent* had cited (with approval) two cases involving private mediations: *Sheldone v. Pa. Turnpike Comm.*[28] and *Fields-D'Aspino v. Restaurant Associates Inc.*[29] The court stated, "Because *In re Teligent* applies by its terms to all mediations, is based on policy considerations that have equal force in private mediations, and relies on sources that are about or include private mediations, we agree that the *In re Teligent* test applies to these confidential mediation communications."[30] Thus, the defendant needed to prove a special need for discovery of the mediation communication. Although the magistrate judge had found a special need, the district judge disagreed and reversed.

Rules of Evidence

Rule 408 of the Federal Rules of Evidence (FRE)[31] prohibits admission of statements made during settlement negotiations to prove the validity or amount of a claim. However, discovery of mediation communications is not prohibited, nor is admission for other purposes, such as to prove bias. In addition, FRE 408 does not prevent a third party from discovering mediation communications. For those who value confidentiality in mediation, FRE 408 is inadequate.[32] Parties should look to other sources for more extensive confidentiality such as statutes, court rules, ADR provider organizational rules and a mediation agreement.

Rule 26(b)(1) provides, "Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense."[33] FRE 501[34] provides that the common law governs evidentiary privileges unless provided otherwise by the U.S. Constitution, a federal statute or federal rules. In cases where state law supplies the rule of decision, state law privileges apply. Can a local court rule, the rules of an ADR provider organization or a private agreement create a privilege to exclude evidence of mediation communications otherwise discoverable or admissible? In *Facebook v. Pacific Northwest Software Inc.*, the Ninth Circuit commented, in *dicta*, that "privileges are created by federal common law. *See* Fed. R. Evid. 501. It is doubtful that a district court can augment the list of privileges by local rule."[35]

In a chapter 9 case, a municipality is eligible to be a debtor only if it has negotiated with creditors.[36] Must the municipality reveal confidential mediation communications in order to meet this statutory test for eligibility? The U.S. Bankruptcy Court for the Western District of Missouri answered "no" in *In re Lake Lotawana Community Improvement District*.[37] The Improvement District had engaged in mediation with its bondholders prior to filing its chapter 9 petition. Thereafter in contesting the Improvement District's eligibility for chapter 9 on the grounds of bad-faith negotiations, the bondholders sought production of the Improvement District's mediation statement.

The bankruptcy court found that the mediation statement was prepared in anticipation of litigation and was covered by the attorney work-product privilege under federal common law and Rule 26(b)(3).[38] The bondholders would have to show a substantial need and undue hardship in order to pierce the work-product privilege, and in this case, they did not. The court even conducted an *in camera* review of the mediation statement and found no evidence of bad faith. Furthermore, to the extent that the mediation statement contained the attorney's opinion, the privilege is nearly absolute. Therefore, the Improvement District did not have to produce its mediation statement.

Some courts have found a mediation privilege under federal common law. In *Goodyear Tire & Rubber v. Chiles Power Supply Inc.*,[39] the district court conducted unsuccessful settlement negotiations in a suit between the manufacturer of a heating system and the rubber hose manufacturer. Following a jury verdict in favor of the hose manufacturer, the principal of the heating system defendant revealed to a trade journal that the hose manufacturer had made a proposal during settlement negotiations that could be construed as hush money. The district court enjoined the principal from revealing anything else from the unsuccessful settlement negotiations.

Homeowners who had claims against both the hose and heating system manufacturers intervened to discover statements made during settlement talks and to vacate the court's injunction preventing the principal from making further revelations about the settlement communications. The district court denied the homeowner's motions, holding that the statements made during unsuccessful settlement talks were

27 2012 WL 4793870 (S.D.N.Y. Oct. 9, 2012).
28 104 F. Supp. 2d 511 (W.D. Pa. 2000).
29 39 F. Supp. 2d 412 (S.D.N.Y. 1999).
30 2012 WL 4793870 at *4.
31 Fed. R. Evid. 408.
32 *See* Richard S. Weil, "Is Mediation Confidential in New York?," 248 *N.Y.L.J.* 81 (Oct. 25, 2012).
33 Fed. R. Civ. P. 26(b)(1).
34 Fed. R. Evid. 501.
35 640 F.3d 1034, 1041 (9th Cir. 2011).
36 11 U.S.C. § 109(c)(5)(B).
37 Case No. 16-42357, Doc. 76, Dec. 19, 2016.
38 Fed. R. Civ. P. 26(3)(c).
39 332 F.3d 976 (6th Cir. 2003).

confidential. The homeowners appealed, contending that there was no privilege for settlement discussions where a third party sought discovery that was relevant to its claim. The Sixth Circuit affirmed, stating that "[t]he public policy favoring secret negotiations, combined with the inherent questionability of the truthfulness of any statements made therein, leads us to conclude that a settlement privilege should exist."[40] The Eighth Circuit has not had the occasion to consider whether a mediation privilege should be recognized under FRE 501.[41]

Other courts have declined to adopt a new privilege for mediation. In a patent dispute, the settling parties asked the court to fashion a new evidentiary privilege under Rule 501 for negotiations regarding royalties and damages in patent-infringement disputes. In *In re MSTG Inc*.,[42] the federal circuit went through all the factors for creating a new evidentiary privilege identified by the U.S. Supreme Court in *Jaffee v. Redmond*[43] and found them to be lacking. The court pointed to Rule 26 as permitting the trial court to control discovery and limit disclosure of confidential information on a case-by-case basis. In *In re Gen. Motors Corp. Engine Interchange Litig*.,[44] the Seventh Circuit also reversed the district court, which had denied access to settlement discussions as being irrelevant to the fairness hearing for a class-action settlement. The circuit held that the conduct of the negotiations was relevant to the fairness of the settlement under Fed. R. Civ. P. 23. Apparently, none of the parties asked the courts to recognize a settlement privilege beyond Rule 408, but the circuit could "find no convincing basis for such an objection here."[45]

Conclusion

Before embarking on mediation, counsel should consider what confidentiality provisions are applicable and what exceptions apply, as well as whether third parties might later seek discovery or evidence of mediation communications. If the mediation is in a state that has adopted a mediation statute, the statutory confidentiality provisions and exceptions are straightforward. Where mediation is part of a court program, the court rules should specify the extent of confidentiality. ADR provider organizations have their own rules on confidentiality that will bind the parties, as will contractual provisions for private mediation. In the absence of a statute, the extent to which third parties will be precluded from discovering mediation communications or offering them in evidence will usually depend on the case law in the jurisdiction and the willingness to find a mediation communication privilege. abi

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40 *Id.* at 981.
41 *Gov't of Ghana v. ProEnergy Servs. LLC*, 677 F.3d 340, 344 n.3 (8th Cir. 2012).
42 675 F.3d 1337, 1342-48 (Fed. Cir. 2012).
43 518 U.S. 1, 116 S. Ct. 1923, 135 L. Ed. 2d 337 (1996).
44 594 F.2d 1106, 1124 n.20 (7th Cir. 1979).
45 *Id.*