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Outside Counsel

Is Your Mediation Confidential?

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A keystone to the mediation process is the assumption that all that takes place will be held confidential. This means that communications between each party and the mediator, respectively, will not be shared with the other side without permission of the disclosing party. Confidentiality encourages full candor in disclosures to the mediator, including in written submissions. Then if the mediation fails, the parties are assured that none of their disclosures can be used against them in ongoing litigation.

But what about third parties? Does confidentiality in a mediation protect against required disclosures to a third party? No doubt, many participants in a mediation presume that a confidentiality agreement that is entered into before the mediation will protect against all disclosures, to participants and to non-participants alike. Over the last few years, at least one well-reasoned decision by Magistrate Judge Gabriel W. Gorenstein in the Southern District of New York, *Rocky Aspen Management 204 v. Hanford Holdings*, 394 F. Supp. 3d 461 (S.D.N.Y. 2019), has raised questions whether such disclosures will be protected against non-parties if the mediation is other than court-ordered. A subsequent decision in the same district by District Court Judge Jesse Furman, *Accent Delight International v. Sotheby's* (S.D.N.Y. December 2020), rejected this narrow approach and ruled that the standard set out by the U.S. Court of Appeals for the Second Circuit in *In re Teligent*, 640 F.3d 53 (2d Cir. 2011), should apply to privately convened mediations as well.

This judicial disagreement, combined with the absence of a standardized mediation provision regarding confidentiality across multiple jurisdictions, raises an important concern for those participating in privately convened mediations. How good are confidentiality protections and what further steps can be taken to assure confidentiality, especially as against third parties? The critical point to underscore is that in the absence of national rulemaking, participants in mediations must be aware of the risk of non-confidentiality.

To outline the scope of the problem, it is helpful to discuss the differences between mediation in existing court proceedings and private mediations, not court-ordered. In the former, mediations are accorded confidentiality by court order, by Rule 408, Federal Rules of Evidence,

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and in state cases often by state rule, e.g., in New York by CPLR 4547. As of March 2021, there are 13 jurisdictions that have adopted the Uniform Mediation Act, which also creates a mediation privilege for confidentiality of all mediation proceedings (with a few appropriate exceptions, e.g. "intentionally used to plan a crime, attempt to commit or commit a crime, or to conceal an ongoing crime or ongoing criminal activity."). These jurisdictions are Hawaii, Idaho, South Dakota, Vermont, Utah, Ohio, Washington, New Jersey, Iowa, Illinois, Nebraska, the District of Columbia and Georgia.

An important distinction must be made between discovery of information about a mediation and the attempt to use such information in a court proceeding. The Federal Rules and many state rules prohibit the introduction into evidence of mediation proceedings. They do not necessarily prohibit discovery into such matters. However, discovery requests of confidential mediations will be subjected to the three-part "heightened standard of need" test announced in *In re Teligent*: A party seeking disclosure of mediation information concerning others must show: (1) a special need for the confidential material; (2) resulting unfairness from a lack of discovery; and (3) the need for the evidence outweighs the interest in maintaining confidentiality." See *Accent Delight*, supra.

In the case of private mediations, absent state or federal rule, there is no available assurance of confidentiality against discovery requests of third parties, even if the mediation was conducted under a confidentiality agreement. It is in this situation that

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Magistrate Judge Gorenstein ruled there was no protection, and District Judge Furman ruled that the *TelIigent* protections are available. Not addressed by either of these decisions is whether the confidentiality agreement in a private mediation will bar discovery of a settlement agreement that results from the mediation.

So, the question presents itself, "what should the conscientious professional or party do to deal with this situation?"

The simplest answer would be to make sure that there is an existing litigation to conduct the mediation and thereby to assure that it is under the protection of court order. The parties should make sure that the mediation is conducted under confidentiality terms "so-ordered" by the court.

However, to undertake mediation only in existing litigation would undercut the real practical and societal benefit of conducting mediation before litigation ensues. After all, if parties are forced to commence litigation, there are associated real costs in legal and filing fees, the strains of hardened positions and excessive claims, as well as the threat of publicity about the claims. Prelitigation mediations are sensible, practical, frequently the option of sophisticated potential litigants, and should be encouraged.

It follows that any private mediation should be conducted under as careful and thorough a mediation agreement as possible. There should be stringent confidentiality protections for all submissions and a requirement that all documents, including digital copies, be discarded at the conclusion of the mediation. This may not provide full protection against a discovery request made by a third party after the mediation has concluded, but it will at least minimize the information available for discovery.

Parties also should consider in advance of making submissions

to the mediator how likely is it that a third party will be interested in what transpires. If the dispute is a single breach of contract situation where meaning, intent or damages are at issue, it is unlikely that the mediation submission will be a target for future discovery. By contrast, if the issues concern policies of one party, e.g., in the employment arena, there may be a greater likelihood that a third party will seek discovery of mediation materials sometime in the future. In this situation, the party should exercise care in deciding how much information, what type of information, and the format of any proposed communication it chooses to share with the mediator.

Similarly, care should be exercised in the use of summary or illustrative exhibits specifically prepared for the mediation. In the same vein, whether expert reports or narratives will be presented must be carefully evaluated against the risk that such information will be the subject of future discovery in an unrelated proceeding.

But whatever caution is employed in the mediation process, a participant must not lose sight of this critical consideration: If a mediation will succeed, each participant must be able to share with the mediator a candid assessment of the strengths and weaknesses of its position and of its flexibility to negotiate a settlement. In short, the private mediation should not be driven by the concern that information disclosed during the process will create future risks in unrelated matters.

There remains the issue of confidentiality of a settlement agreement reached in a mediation. It is commonplace for such agreements to provide a confidentiality provision against disclosure to third parties. Once again, such agreements are not immune from discovery requests in third party litigation. As made clear in *In re Teligent* and its progeny, requests for production of confidential settlement agreements will be subjected to the three-prong test generally required for mediation materials. The uncertainty as to whether the heightened standard will be applied to settlements reached in a private mediation cannot be ignored. Perhaps the best approach in such situations is to avoid recitals or admissions in the settlement agreement and to minimize the provisions included, or alternatively to make the recitals so specific that they cannot be of value to others in unrelated matters.

The private mediation should not be driven by the concern that information disclosed during the process will create future risks in unrelated matters.

The Uniform Mediation Act embodies a thoughtful balancing of competing interests in confidentiality and the circumstances where there should be exceptions to confidentiality. Adoption of the Act by a majority of jurisdictions, or federal legislation, would further the mediation process and thereby further the interests of our dispute resolution systems.