

Confidentiality in Mediation: The Need for Protection

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Since new paradigms are born from old ones, they ordinarily incorporate much of the vocabulary and apparatus, both conceptual and manipulative, that the traditional paradigm had previously employed. But they seldom employ these borrowed elements in quite the traditional way. Within the new paradigm, old terms, concepts and experiments fall into new relationships one with the other. The inevitable result is what we must call, though the term is not quite right, a misunderstanding between the two competing schools. Thomas S. Kuhn¹

Mediation and other alternative methods for dispute resolution have made great progress in the past decade toward occupying a significant role in relation to, and sometimes in lieu of, the traditional legal/judicial system. One by-product of the emergence of these methods has been the conflict between the new alternatives, the values they seek to promote, and the interests protected by the traditional justice system. One of the prime examples of this conflict is the desire for confidentiality in mediation and the justice system's emphasis on consideration of all available evidence.

It is incumbent upon those of us advocating the development of alternatives to develop a clear and cogent policy which seeks to balance and accommodate these competing interests, while ultimately allowing salutary innovations, such as mediation, to flourish. The best way to achieve this policy is through thoughtfully crafted legislation or court rule.

This Note will seek to show why such a policy is necessary. It will examine why confidentiality is so important to mediation and will then demonstrate the need for a statute or rule to guarantee confidentiality. For purposes of this short Note, the focus here will be on non-profit community mediation.

CONFIDENTIALITY: A VITAL INGREDIENT²

Confidentiality is vital to mediation for a number of reasons:

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1. THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* 149 (1970).

2. See generally, N. ROGERS & R. SALEM, *STUDENT'S GUIDE TO MEDIATION AND THE LAW* (To be published in 1987, Matthew Bender); Note, *Protecting Confidentiality in Mediation*, 98 HARV. L. REV. 441 (1985); Freedman, *Confidentiality: A Closer Look*, in *MEDIATION AND THE LAW: WILL REASON PREVAIL?*, ABA Special Comm. on Dispute Resolution, 68 (1983).

Effective mediation requires candor. A mediator, not having coercive power, helps parties reach agreements by identifying issues, exploring possible bases for agreement, encouraging parties to accommodate each others' interests, and uncovering the underlying causes of conflict. Mediators must be able to draw out baseline positions and interests which would be impossible if the parties were constantly looking over their shoulders. Mediation often reveals deep-seated feelings on sensitive issues. Compromise negotiations often require the admission of facts which disputants would never otherwise concede. Confidentiality insures that parties will voluntarily enter the process and further enables them to participate effectively and successfully.

Fairness to the disputants requires confidentiality. The safeguards present in legal proceedings, qualified counsel and specific rules of evidence and procedure, for example, are absent in mediation. In mediation, unlike the traditional justice system, parties often make communications without the expectation that they will later be bound by them. Subsequent use of information generated at these proceedings could therefore be unfairly prejudicial, particularly if one party is more sophisticated than the other. Mediation thus could be used as a discovery device against legally naive persons if the mediation communications were not inadmissible in subsequent judicial actions. This is particularly important where a mediation program is affiliated with an entity of the legal system, such as a prosecutor's office.

The mediator must remain neutral in fact and in perception. The potential of the mediator to be an adversary in a subsequent legal proceeding would curtail the disputants' freedom to confide during the mediation. Court testimony by a mediator, no matter how carefully presented, will inevitably be characterized so as to favor one side or the other. This would destroy a mediator's efficacy as an impartial broker.

Privacy is an incentive for many to choose mediation. Whether it be protection of trade secrets or simply a disinclination to "air one's dirty laundry" in the neighborhood, the option presented by the mediator to settle disputes quietly and informally is often a primary motivator for parties choosing this process.

Mediators, and mediation programs, need protection against distraction and harassment. Fledging community programs need all of their limited resources for the "business at hand." Frequent subpoenas can encumber staff time, and dissuade volunteers from participating as mediators. Proper evaluation of programs requires adequate record keeping. Many programs, uncertain as to whether records would be protected absent statutory protection, routinely destroy them as a confidentiality device.

Thus, a number of reasons exist which explain why confidentiality

is so important to mediation. The Ethics Committee of the Society of Professionals in Dispute Resolution recognized this when they noted that the "integrity of the dispute resolution process requires that the neutral maintain confidentiality."³

Preserving the confidentiality of mediation proceedings remains one of the most compelling issues facing the field today. Yet, as paramount as it may seem, this issue remains a vexing one.

Confidentiality in mediation is fundamentally at odds with a system of law favoring consideration of all relevant evidence. A rule of privilege such as that which we are discussing here shuts out probative evidence, and thus obstructs the truth in order to protect some other interest or policy. Courts are therefore very reluctant to find such privileges.

This tension between confidentiality in mediation and the search for evidence in adjudication has given rise to a number of attempts to pierce confidentiality. Courts have come down on different sides of the issue for a variety of reasons,⁴ and as a result, the majority of commentators have declared that the current grounds of protecting confidentiality in mediation are uncertain.⁵

We favor a statutory provision or court rule guaranteeing the confidentiality of mediation in appropriate circumstances. The fundamental tension between mediation and adjudication, and the current uncertain legal status of confidentiality, require the clear statement of law and policy which is afforded by a statute or rule.

Provisions of this type have been enacted in a number of states during the past six years.⁶ They typically insulate all written and oral communications in a mediation proceeding from subsequent disclosure in a legal proceeding, and often provide immunity from subpoena to the mediator. Some statutes make exceptions to the general rule of confidentiality, for example, bringing an action against a mediator.

Recently, some commentators, such as Professor Eric Green, have questioned the wisdom of any legislation on confidentiality. Those who argue against legislation on confidentiality maintain that blanket mediation privileges are unnecessary, unjustified, and counterproductive. They assert that adequate protection may be found under current law and no empirical data exists to support special protection. These commentators also note the difficulty in formulating a blanket provision

3. Hay, Carnevale, & Sinicropi, *Professionalization: Selected Ethical Issues in Dispute Resolution*, 9 JUST. SYS. J. 228, 230 (1984). Courts and legislatures have long recognized the need for protecting confidentiality in labor mediation. See, e.g., CONN. GEN. STAT. ANN. § 31-100 (West 1972).

4. See N. ROGERS, *supra* note 2.

5. See N. ROGERS, *supra* note 2; Freedman, *supra* note 2.

6. See, e.g., N.Y. JUD. LAW § 849-b(6) (Consol. 1983); OKLA. STAT. ANN. TIT. 12, § 1805 (West Supp. 1985); COLO. REV. STAT. § 13-22-307 (Supp. 1985); CAL. CIV. PROC. CODE § 1747 (West 1982).

covering all forms of alternative dispute resolution in every subject area. Perhaps most importantly, they argue that the rights of third parties could be severely harmed unless a confidentiality privilege is carefully construed and delimited. The following is a breakdown of these arguments and an examination of each point *seriatim*.

THE NEED FOR EXPLICIT PRIVILEGE

Current law does not adequately protect confidentiality.⁷ Aside from those jurisdictions where a specific privilege has been enacted, three sources of law can aid in protecting confidentiality in mediation. They are evidentiary exclusions, discovery limitations, and agreements of confidentiality.

The general thrust of the common law and rules regarding compromise and settlement would seem to protect mediation. However, the exceptions are so numerous that they almost swallow the rule as applied to mediation.

Under common law, statements of fact made during compromise and settlement negotiations are admissible into evidence in subsequent litigation, unless carefully worded or framed.⁸ Thus, the common law rule provides little help to a freewheeling mediation session.

Many jurisdictions have adopted Rule 408 of the Federal Rules of Evidence, which strengthens the common law rule by barring evidence of conduct or statements in compromise discussions. However, the protection afforded by Rule 408 is nevertheless severely limited. Rule 408 provides no protection when the validity or amount of a civil claim is not in dispute. For a large number of mediations involving family, neighborhood or minor criminal issues, Rule 408 would not apply.

Rule 408 affords no protection when the evidence from a mediation proceeding is offered in subsequent litigation to prove or disprove anything other than liability or validity of the claim or its amount. Bias, negating undue delay, and obstruction are three exceptions explicitly mentioned in the Rule - a variety of others have been recognized by courts.⁹

Rule 408 is inapplicable in administrative or legislative hearings and in jurisdictions where it has not been enacted. It provides no protection against public disclosure of information revealed in mediation. Perhaps most importantly, the Rule only affects parties to subsequent litigation: mediation participants who are not parties to the litigation cannot raise an objection to the introduction of otherwise confidential communications

7. See *supra*, note 2. See generally Restivo and Mangus, *ADR: Confidential Problem-Solving or Every Man's Evidence*, in CONFIDENTIALITY IN MEDIATION: A PRACTITIONER'S GUIDE, ABA Special Comm. on Dispute Resolution, 143, 146 (1985).

8. See Freedman, *supra* note 2, at 73; see also Sanderson v. Barkman, 272 Mich. 179, 261 N.W. 291 (1935).

9. See N. ROGERS, *supra* note 2.

under the Rule. Thus, current law does not adequately prevent the introduction of information from mediation proceedings into evidence in subsequent litigation.

The law regarding discovery provides less certainty in assuring that mediation proceedings will be kept out of attorneys' files in preparation for subsequent litigation. Here, the general rule calls for disclosure, and only under limited exceptions can the information be withheld.¹⁰

Discovery may be allowed for a broader class of materials than would be admissible in evidence.¹¹ Any relevant information *which may lead to* admissible evidence is discoverable. Courts have held that discovery rules such as Rule 26 of the Federal Rules of Civil Procedure should be construed broadly and liberally.¹² The court has inherent power to quash a subpoena but a party seeking to do so has a particularly heavy burden.¹³ This latter decision involves a case by case balancing of the discovering party's need for the information versus the harm caused by disclosure.¹⁴

In many situations, disputants agree at the outset of mediation that nothing said will be subsequently disclosed. These agreements are persuasive as to the parties' intent. However, courts may not uniformly uphold such agreements.

Agreements to suppress evidence are generally void as against public policy.¹⁵ Further, an agreement not to disclose does nothing to prevent a non-party to the agreement from seeking or disclosing information. It has been said that "no pledge of privacy . . . can avail against demand for the truth in a court of justice."¹⁶

The limited empirical data available suggests that a privilege is needed. Those arguing against a confidentiality privilege claim that no data is available supporting the necessity for a privilege.

Due to the nature of community mediation and the fact that it has developed in a relatively brief time, there is not a great deal of reported case law directly on point.¹⁷ There are, however, a variety of reported cases construing the applicable rules described above in settlement discussions, activities which are arguably similar to mediation. No clear

10. See FED. R. CIV. P. 26; see also *Schlagenhauf v. Holder*, 379 U.S. 104 (1964).

11. FED. R. CIV. P. 26.

12. See *Schlagenhauf v. Holder*, *supra* note 9.

13. *Broome v. Simon*, 255 F. Supp. 434 (W.D. La. 1966); *In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation*, 669 F.2d 620 (10th Cir. 1982).

14. FED. R. CIV. P. 26(c); *DeLong Corp. v. Lucas*, 138 F. Supp. 805 (S.D. N.Y. 1956).

15. See N. ROGERS, *supra* note 2; *Protecting Confidentiality in Mediation*, *supra* note 2, at 451.

16. 8 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2286, at 528 (1964).

17. Community mediation often involves small disputes. If these cases go to courts, the small amount often in controversy precludes the efficacy of appeal. Often, therefore, court decisions on confidentiality are unreported lower court holdings.

pattern of protection of confidentiality has emerged.¹⁸

For those few reported cases where the confidentiality of community mediation has been challenged, confidentiality has primarily been upheld.¹⁹ However, these decisions have rested on a hodgepodge of different legal underpinnings depending on the arguments made and the situation presented.²⁰ Recent surveys of mediation program directors suggest a growing number of unreported cases where mediations have been subpoenaed.

Fifty-two mediation programs recently responded to a legal issues survey sent by the American Bar Association, Standing Committee on Dispute Resolution in September, 1986.²¹ Nine programs reported that an attempt had been made to seek the revelation in a court or other proceeding of information discussed in a dispute resolution proceeding. In seven instances, the information was not disclosed.

The argument is made that mediation is conducted everywhere without a privilege and it has not really suffered. This argument is flawed by the fact that most mediation is now done under the assumption that communications are privileged under the law, even if they really are not privileged.²²

Thus, in many programs, the perception of a privilege is perpetuated, even when not necessarily supported by law. This suggests that it is difficult to compare jurisdictions where no legal privilege exists to those where one does exist. A party to a mediation who believes the proceedings are confidential is less likely to challenge its confidentiality than one who does not share such a belief.

This widespread perception of protection underscores the need to enact a privilege in order to match reality with belief. Otherwise, a

18. See N. ROGERS, *supra* note 2.

19. See *ADR: Confidential Problem-Solving or Every Man's Evidence*, *supra* note 7.
20. *Id.*

21. The following questions were included on a survey which was sent, with a cover letter, to the 288 community mediation programs listed in DISPUTE RESOLUTION PROGRAM DIRECTORY, 1986-87, ABA Special Comm. on Dispute Resolution (1986).

Are your dispute resolution proceedings confidential: If so, what procedures are used to guarantee confidentiality? Do the parties and the mediator sign forms agreeing to maintain confidentiality? Does legislation exist guaranteeing confidentiality?

Have any attempts been made to seek the revelation in a court or other proceeding of information discussed in a dispute resolution proceeding? If so, what was the outcome? If a judicial opinion regarding confidentiality of dispute resolution proceedings was rendered, please enclose a copy or indicate a citation for reference.

In your opinion, is legislation dealing with the legal issues discussed above necessary and/or desirable? If it is, how should such legislation be structured?

A summary report and analysis of the survey is now in progress. It should be noted that not all the programs responded to the survey, so the results are, to some degree, incomplete.

22. *Id.*

successful effort to disclose information considered confidential undermines not only the atmosphere of candor necessary to attract disputants to the process, but also impairs the credibility of the program.

A confidentiality provision can be crafted with appropriate exceptions and flexibility to mitigate the disutilities of a blanket privilege. Professor Green, among others, says it is difficult to draft a statute. We agree. However, this difficulty does not override the need for a privilege where mediation is so vital to the effective functioning of our dispute settlement system and confidentiality is so important to mediation. Some of the potential problems of a mediation privilege include unfairness, an aura of suspicion, concealment of criminal acts, and general harm to third parties.

Of course, some of these disutilities are possible absent a specific statutory privilege. In fact, a well-drafted statute may be able to prevent or mitigate some harms which might otherwise occur without a statute.

A specific exception to a general confidentiality provision allowing for evaluation of programs would help alleviate any aura of suspicion about private mediation. Exceptions mandating use of confidential information in actions against the mediator would assure redress against abuses of the process.

While excluding evidence from cases because of a mediation privilege would undoubtedly cause some unfairness, it would be just as likely that some unfairness would result in situations where confidential information is later used against an unwary participant in mediation. The real question is whether, in the long term, the benefits of a privilege outweigh the harm in individual cases.

Traditional privilege analysis sums up many of these issues into four elements.²³ As applied to mediation, the traditional test is as follows:

1. Communications in mediation originate in a confidence that the disputant believes will not be disclosed. The inherent nature of compromise and settlement, along with the explicit assurances uniformly provided by mediators and program directors, foster the belief in the parties to that the proceedings are confidential.
2. Confidentiality in mediation is essential, as noted above, to the full and satisfactory maintenance of the relationship between the parties.
3. The community has clearly encouraged the practice of mediation. Community groups, courts, bar associations, and others have been active in the development of programs. The policy of law favoring compromise and settlement of disputes which mediation advances is clear.
4. The injury to mediation that would occur by the disclosure of

23. See J. WIGMORE, *supra* note 16, § 2285.

communications is greater than the benefit gained by the correct disposal of particular litigation. Without confidentiality, the mediation process becomes a house of cards subject to complete disarray by a variety of potential disruptions. Thus, many practitioners feel that one well-publicized case of disclosure could deeply taint their efforts. Parties will be more reluctant to enter a process where there is fear that it might be used against them in subsequent legal action. Even if they do participate, the caution in negotiating, which the threat of disclosure would require, would, in many instances, render the process a *pro forma* nullity. A well-publicized case of mediator testimony could forever damage the mediator's reputation for neutrality and confidentiality.

Further, confidentiality of mediation is not necessarily a bar to correct disposal of litigation. The information generated in a mediation proceeding is generated for the purpose of that proceeding, and would not exist but for the settlement attempt. If the information is otherwise discoverable, then it can be presented in subsequent litigation.²⁴ Thus mediation could not be used to shield otherwise relevant and admissible evidence. In addition, if the mediation itself becomes the subject of litigation, such as a suit against the mediator, then clearly this information could be introduced into evidence. Both of the above circumstances could be handled through exceptions to a general privilege.

Other potential harms of a blanket mediation privilege exist which should be addressed through appropriate exceptions. When child abuse, or other illegal acts, are revealed in mediation, strict confidentiality should not be enforced. A clear and well-developed statement of policy through exceptions to a blanket privilege can address this issue as well as other issues of heightened public concern. Currently, a variety of approaches to this particular problem exist. Thus, many practitioners involved are either confused or adopt narrow perspectives in this area.

Few mediation programs keep all information secret, regardless of its nature. Some programs authorize reporting evidence of crime in certain circumstances, others require reporting of such incidents in all cases. Many of these decisions are made by program directors on an *ad hoc* basis. A statutory exception to a confidentiality privilege could be a vital aid in guiding mediators and courts and in delineating a consistent policy based on thoughtful research and input of all relevant individuals and groups.

Clearly, it would be hard to draft a statute with these exceptions properly and carefully delineated. We particularly appreciate the problem of the breadth of alternative dispute resolution and would recommend

24. This has been the approach taken where confidentiality has been provided by statute. See, e.g., FLA. STAT. ANN. § 44.101 (West Supp. 1986).

tailoring protection to specific dispute resolution processes and subjects, such as community mediation. Issues regarding the reporting of crimes in an otherwise confidential relation have been vexing the legal profession for the past few years. Nevertheless, the task is not impossible, and we are impressed with the efforts of the *Journal* staff in drafting the models proposed in this issue.

CONCLUSION

Where mediators seek agreements, judicial institutions seek verdicts. A mediator's tool is revelation of real positions and interests. Courts simply seek the facts. Mediation thrives on confidentiality, while adjudication requires public disclosure of all evidence.

While the growth of mediation in relation to formal justice has been void of great controversy, the fundamental differences between the two systems and the values they promote will impart a continuing tension in their relationship. Confidentiality represents one of those points of tension.

We believe that accommodating the balance between mediation's need for confidentiality and the law's search for evidence is best accomplished through a statute or rule. Such a provision, through the encouragement of a consistent and reasoned accommodation of the interests of both systems, can lead to the best result in this ongoing relationship—and a goal shared by both processes—harmony.

... Practicing in different worlds, the two groups of scientists see different things when they look from the same point in the same direction. ... Both are looking at the world, and what they look at has not changed. But in some areas they see different things, and they see them in different relations one to the other. That is why a law that cannot even be demonstrated to one group of scientists may occasionally seem intuitively obvious to another. ..."
Thomas S. Kuhn²⁵

25. THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* 150-52 (1970).

