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The Promise of Confidentiality in Mediation: Practitioners' Perceptions

*T. Noble Foster and Selden Prentice**

I. INTRODUCTION

Over the last thirty years, mediation has become a popular form of dispute resolution. Lengthy court delays, the increasing acrimony and expense of litigation, and, as this paper addresses, the promise of confidentiality all have made mediation an attractive alternative.

Recently, however, two published articles have questioned the conventional wisdom that confidentiality in mediation is strictly observed by the parties and protected by the courts. In *Disputing Irony: A Systematic Look at Litigation About Mediation*, James Coben and Peter Thompson, having researched 1,223 state and federal court mediation decisions, noted that “a major surprise from the database is how frequently courts consider evidence of what transpired in mediations.”¹ They referred to these disclosures as indicating a “rather cavalier approach to disclosure of mediation information . . .”² In a separate article, Sarah Cole argued that given this situation, states should draft clear statutes “that indicate that use of mediation communications inconsistent with the statute is sanctionable.”³

In response to these articles, we sought to determine the perceptions of mediation practitioners in our own region, the Seattle/King County area, regarding mediation confidentiality and privilege. This paper presents our findings and addresses the following:

- (1) the scope of confidentiality and privilege under Washington law;⁴
- (2) recent Washington case law addressing evidence of mediation communications;
- (3) a review of Florida’s recent legislation—significantly different from Washington law, and unique among state mediation statutes—which provides for sanctions in the event confidentiality is breached; and
- (4) the perceptions of mediators, attorneys, and judges in the greater Seattle

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1. James R. Coben & Peter S. Thompson, *Disputing Irony: A Systematic Look at Litigation about Mediation*, 11 HARV. NEGOT. L. REV. 43, 48 (2006).

2. *Id.*

3. Sarah Rudolph Cole, *Protecting Confidentiality in Mediation: A Promise Unfulfilled?*, 54 U. KAN. L. REV. 1419, 1448 (2006).

4. Although the question of confidentiality and privilege under federal law is an interesting question, it is beyond the scope of this paper.

area regarding the frequency with which mediation communications are admitted into evidence, or otherwise disclosed; and the opinions of the same group regarding the need for legislation, similar to that found in Florida, that would sanction misuse of mediation communications.⁵

II. CONFIDENTIALITY AND PRIVILEGE UNDER WASHINGTON LAW

One of the hallmarks of mediation is its promise that statements made during the mediation will not be repeated elsewhere. This concept is fundamental to the mediation process because it promotes honest and frank discussions. As some commentators have noted, “[t]he promise of nearly absolute confidentiality empowers the mediator and allows the parties to confide in the mediator without reservation. It is the ability to reveal intimate details and information contrary to one’s own interest that often leads to the settlement of a case.”⁶

This principle—that statements made in mediation will not be repeated—encompasses two related, but distinct concepts: confidentiality and privilege. The principle of confidentiality provides that the parties will not repeat statements made in mediation to those not present at the mediation. The mediation privilege, on the other hand, is a narrower protection which provides that statements made in mediation are not admissible in court proceedings, arbitrations, or legislative hearings.

In 2001, to strengthen the mediation privilege and to provide consistency throughout the nation, a blue-ribbon committee drafted a uniform mediation law—the Uniform Mediation Act (“UMA”)—which the ABA endorsed in 2002, and the Washington Legislature adopted in 2005.⁷ Nine other states have adopted the law as well,⁸ and several others are considering it.⁹

The UMA addresses confidentiality only minimally, by providing that parties may protect confidentiality by agreement.¹⁰ Frequently, at the start of a mediation, parties to the mediation, and those present at the mediation, will sign an “agreement to mediate” promising not to reveal mediation communications to those not present during the mediation.¹¹ Additionally, parties to a mediation may agree through a settlement agreement, signed at the close of a mediation, to main-

5. We approached the survey with no preconceived outcome in mind. In fact, we intentionally avoided any particular hypothesis so as to not influence the responses of our respondents.

6. L. Randolph Lowry & Peter Robinson, *Mediation Confidential: In Three Recent Cases, Courts have Carved out Exceptions to the Rule of Strict Secrecy in Mediation Proceedings*, 24 L.A. LAW. 28, 31 (May 2001).

7. 2005 Wash. Legis. Serv. Ch. 172 (West) (codified as WASH. REV. CODE ANN. Ch. 7.07 (West 2009)). For additional information on the adoption of the UMA, see Alan Kirtley, *The Top 10 Reasons for Adopting the New Uniform Mediation Act in Washington*, 58 WASH. STATE BAR NEWS 18 (Nov. 2004), available at <http://www.wsba.org/media/publications/barnews/2004/nov-04-kirtley.htm> (last visited Apr. 5, 2009).

8. Association for Conflict Resolution, *ACR and the Uniform Mediation Act (UMA)* <http://www.acrnet.org/uma/index.htm> (last modified July 30, 2008) (last visited Apr. 5, 2009).

9. Kirtley, *supra* note 7.

10. The UMA states that “[m]ediation communications are confidential to the extent agreed by the parties or provided by other law or rule of this state.” WASH. REV. CODE § 7.07.070 (2006).

11. A sample agreement to mediate can be found online at <http://umich.edu/~mediate/mediate.htm>.

tain confidentiality regarding the terms of the settlement, or regarding the entire mediation.

The UMA also creates a mediation privilege. The UMA provides that mediation communications are privileged¹² and thus “not subject to discovery or admissible in evidence” unless the privilege has been waived or precluded pursuant to the statute, or is subject to the privilege exceptions provided by the statute.¹³ Communications that are not subject to the privilege include, for example, threats of bodily injury and plans to commit a crime.

This privilege applies in any “proceeding,” defined in the UMA as “(a) A judicial, administrative, arbitral, or other adjudicative process, including related prehearing and posthearing motions, conferences and discovery; or (b) A legislative hearing or similar process.”¹⁴

How do these two principles—confidentiality and privilege—intertwine? Where there has been an *agreement protecting confidentiality*, parties to a mediation may not reveal mediation communications to any party, whether in the context of litigation, or otherwise.¹⁵ If a party violates that agreement, the legal remedy is provided under contract law.¹⁶ Washington law does not impose any additional remedy, beyond breach of contract remedies, for a violation of confidentiality.¹⁷ Where there has been *no agreement protecting confidentiality*, any party to the mediation is free to reveal mediation communications to any person or organization except in the context of subsequent litigation. Essentially, *whether or not there is an agreement protecting confidentiality*, if one party seeks to admit mediation communications into a subsequent legal proceeding, the UMA privilege still applies to prevent the admission, unless the privilege is precluded, waived, or subject to one of the exceptions.¹⁸

III. CONFIDENTIALITY AND PRIVILEGE IN WASHINGTON COURTS

Our review of Washington cases does not reveal the frequent breaches of confidentiality and privilege noted in Coben and Thompson’s article, *Disputing Irony*.¹⁹ Perhaps because mediation confidentiality is established via agreement in Washington, rather than by statute, it is not surprising that we have found no published Washington mediation cases involving breach of confidentiality.

As for the mediation privilege, there are only three recently published Washington cases in which a court has admitted mediation communications. However,

12. The statute defines a mediation communication as:

[A] statement, whether oral or in a record or verbal or nonverbal, that occurs during a mediation or is made for purposes of considering, conducting, participating in, initiating, continuing, or reconvening a mediation or retaining a mediator.

WASH. REV. CODE § 7.07.070(2) (2006).

13. WASH. REV. CODE § 7.07.030 (the privilege itself); WASH. REV. CODE § 7.07.040 (waiver and preclusion of privilege); WASH. REV. CODE § 7.07.050 (exceptions to the privilege).

14. Wash. Rev. Code § 7.07.010(7).

15. WASH. REV. CODE § 7.07.070.

16. *Id.*

17. *Id.*

18. See WASH. REV. CODE §§ 7.07.030-7.07.050.

19. See Coben & Thompson, *supra* note 1.

all three cases were decided pursuant to the UMA's predecessor statute,²⁰ which was less protective of mediation communications than the UMA. These three cases, taken together, do not reveal a pattern inconsistent with the mediation privilege. In *Hoglund v. Meeks*, the Washington Court of Appeals upheld the admission of mediation communications that were submitted in order to prove the existence of an attorney fee-sharing agreement, pursuant to the UMA's predecessor statute.²¹ That statute allowed the admission of evidence "pertain[ing] solely to administrative matters incidental to the mediation proceeding . . ." ²² Thus the admission of that evidence was arguably proper.²³ Note, however, that this exception is not available under the UMA.

Similarly, in *Sharbono v. Universal Underwriters Insurance Co.*, the Washington Court of Appeals upheld the admission of evidence of what occurred in a mediation, holding that the mediation privilege statute did not even apply to the case because none of the conditions necessary for applicability of the statute were present.²⁴ Therefore, the admission of that evidence appears proper.²⁵ In the third case, *Ladiser v. Huff*, also decided prior to the passage of the UMA, the admission of mediation evidence is more questionable.²⁶ In *Ladiser*, a child support case, the appellant argued that the trial court erred in considering mediation communications when it decided whether to award the opposing party her attorney fees.²⁷ Although the court agreed that the mediation evidence did not meet any of the exceptions to the mediation privilege, it nonetheless admitted evidence of mediation communications under Washington Evidence Rule 408, holding that "settlement evidence may be disclosed if it is offered not to prove the amount of the offer, but for another purpose, such as to prove lack of good faith."²⁸ In this particular case, because the evidence was offered for the purpose of proving bad faith, the Washington Court of Appeals held it to be admissible.²⁹ The court's decision in this case to allow Rule 408 to trump the mediation privilege is questionable. Presumably, had the Washington Legislature intended evidence of bad faith in mediation to be admissible, it would have included such an exception in

20. This statute is codified at Section 5.60.070, and applied to mediations pursuant to a referral or an agreement made before Jan. 1, 2006. WASH. REV. CODE § 5.60.070 (2005). Unlike the UMA, the privilege under this predecessor statute was applicable only when there was a court order to mediate, when the parties agreed in writing to mediation, and when the dispute involved a healthcare malpractice claim. *Id.* Under the UMA and the current Washington Mediation Act, the privilege applies when administrative agencies require mediation, the parties agree to the privilege, or when the parties "use as a mediator an individual who holds himself or herself out as a mediator or the mediation is provided by a person that holds itself out as providing mediation." WASH. REV. CODE § 7.07.020. For a more detailed discussion of the differences between the UMA and its predecessor statute in Washington, see Kirtley, *supra* note 7.

21. 170 P.3d 37, 49 (Wash. Ct. App. 2007).

22. WASH. REV. CODE § 5.60.070(1)(f).

23. *Meeks*, 170 P.3d at 49.

24. 161 P.3d 406, 424-25 (Wash. Ct. App. 2007). Under the UMA's predecessor statute, the mediation privilege only applied in certain types of cases. See WASH. REV. CODE § 5.60.070(1); see also *supra*, note 20 and accompanying text.

25. *Sharbono*, 161 P.3d at 425.

26. No. 52858-1-I, 2004 WL 1057852 (Wash. Ct. App. May 10, 2004).

27. *Id.* at *4-*5.

28. *Id.* at *4.

29. *Id.* at *5.

the mediation privilege statute.³⁰ Nonetheless, it should be noted that—in post-decree mediations mandated by a parenting plan—Washington’s Parenting Act allows the admission of evidence “[t]hat a parent used or frustrated the dispute resolution process without good reason for purposes of [ordering an award of attorney fees].”³¹ Thus, although the *Ladiser* court’s reasoning appears improper, its result is consistent with the Parenting Act.³²

Thus, contrary to the findings of Coben and Thompson, Washington case law does not indicate that confidentiality is frequently breached or that the mediation privilege is frequently violated.

IV. CONFIDENTIALITY AND PRIVILEGE IN FLORIDA

It has been said that Florida leads the nation in mediation.³³ In support of this observation, commentators point to Florida’s strict ethical standards, its mediator certification program, and as relates to this article, its recent legislation protecting confidentiality.³⁴ Although Florida’s privilege law is similar to that under the UMA, Florida’s new confidentiality law offers a dramatically different approach. Under this new law, parties may obtain civil remedies for breach of confidentiality, including in situations where the breach of confidentiality occurs outside of court. Specifically, Florida Statute 44.405 provides that:

[A]ll mediation communications shall be confidential [unless the parties agree otherwise or if certain enumerated exceptions apply]. A mediation participant shall not disclose a mediation communication to a person other than another mediation participant or a participant’s counsel³⁵.

Florida Statute 44.406 provides:

Any mediation participant who knowingly and willfully discloses a mediation communication in violation of s. 44.405 shall, upon application by

30. Alan Kirtley, Associate Professor of Law at University of Washington School of Law and who participated in the meetings in which the Uniform Mediation Act was drafted, stated:

A rule of evidence, such as Evidence Rule 408, applies to *available* evidence and controls which available evidence may or may not be admitted. A rule of evidence has no bearing on communications that are unavailable by reason of a privilege. Thus, a rule of evidence cannot trump a privilege. Much less, an exception to a rule of evidence cannot trump the mediation privilege, which is what the *Ladiser* court did. In a sense, the court did the equivalent of allowing the admission of a death bed confession to a priest, which is privileged, using the excited utterance exception to the hearsay rule of evidence.

E-mail interview with Kirtley (Feb. 7, 2009) (on file with authors).

31. WASH. REV. CODE § 26.09.015(3)(a)(i)(C) (West Supp. 2009).

32. One other Washington case allowed the admission of mediation communications. *See* Wash. Pub. Employees Ass’n. v. Wash. Pers. Res. Bd., No. 27280-6-II, 2002 WL 1303418 (Wash. Ct. App. 2002). However the case was pursuant to federal labor law, which in some cases requires the admission of mediation communications to determine whether the parties bargained in good faith.

33. *See* Lisa Bench Nieuwveld, *Florida Continues to Lead the Nation in Mediation*, 81 FLA. B. J. 48 (July-August 2007).

34. *Id.*

35. FLA. STAT. ANN. § 44.405 (West Supp. 2009).

any party to a court of competent jurisdiction, be subject to remedies, including:

- (a) Equitable relief.
- (b) Compensatory damages.
- (c) Attorney's fees, mediator's fees, and costs incurred in the mediation proceeding.
- (d) Reasonable attorney's fees and costs incurred in the application for remedies under this section.³⁶

According to Sharon Press, director of the Florida Dispute Resolution Center, and member of the Florida Supreme Court Committee on Alternative Dispute Resolution Rules and Policy ("the Florida Supreme Court Committee"), the motivating factor behind the new legislation was not that there were frequent breaches of confidentiality in Florida.³⁷ In fact, Ms. Press said this was *not* the case. Rather, the 1997 Florida Court of Appeal decision in *Paranzino v. Barnett Bank of South Florida*³⁸ was a "significant factor" leading to the enactment of this new law.³⁹ In that case, Ms. Paranzino sued her bank, claiming that although she had given the bank \$200,000 in cash toward the purchase of two \$100,000 certificates of deposit, the bank only issued one certificate of deposit, and denied receiving the additional \$100,000.⁴⁰ When the court ordered mediation, the parties signed an agreement to keep the mediation discussions confidential.⁴¹ The parties also agreed to be governed by Chapter 44 of Florida Statutes, which at that time, provided that parties to court-ordered mediation have a "privilege to refuse to disclose and to prevent any person present at the proceeding from disclosing communications made during such proceeding."⁴² Shortly after the mediation concluded, the bank made a settlement offer that Ms. Paranzino then rejected.⁴³ Later, Ms. Paranzino and her daughter disclosed the amount of the offer to the *Miami Herald's Tropic Magazine*, which in turn revealed the bank's offer in a published story regarding the dispute.⁴⁴ Responding to the plaintiff's disclosures to the newspaper, the bank moved to strike the plaintiff's pleadings and asked for sanctions.⁴⁵ The trial court granted the motion, and as a sanction, dismissed the case with prejudice.⁴⁶ On appeal, the Florida Court of Appeal affirmed the dismissal, holding that the plaintiff had "violat[ed] the court-ordered mediation and the confidentiality provision of the Mediation Report and Agreement" and that the plain-

36. FLA. STAT. ANN. § 44.406.

37. Telephone interview with Sharon Press, Director of the Florida Dispute Resolution Center (Apr. 24, 2008) (on file with authors). The Florida Supreme Court Committee is the body that proposed the new legislation.

38. 690 So.2d 725 (Fla. Dist. Ct. App. 1997).

39. Interview with Press, *supra* note 37.

40. *Paranzino*, 690 So.2d at 726.

41. *Id.*

42. *Id.* at 728 (quoting FLA. STAT. ANN. § 44.102(3) (1993)).

43. *Id.* at 726.

44. *Id.*

45. *Id.* at 727.

46. *Id.*

tiff had “disregarded the court’s authority.”⁴⁷ The court rejected the plaintiff’s argument that the confidentiality provisions did not apply because the settlement offer was made after the mediation had reached an impasse.⁴⁸ According to the court, the Mediation Report and Agreement extended the mediation for an additional ten days.⁴⁹ Because the offer was made within that time period, the confidentiality rules still applied.⁵⁰

According to Ms. Press, the Florida Supreme Court Committee decided that, as a result of the *Paranzino* ruling, it was important that those involved in mediation be warned of the consequences of failing to comply with confidentiality provisions.⁵¹ Additionally, because the UMA only minimally addresses a breach of confidentiality that occurs outside of court, the Florida Supreme Court Committee determined that the UMA was lacking, and instead chose to adopt legislation that would sanction such breaches.⁵² Ms. Press has stated that she is not aware of any cases where sanctions under the new statute have been imposed, but she believes that the law works as a deterrent by “putting people on notice of the risks of breaching confidentiality.”⁵³

This legislative response to the problems raised in the *Paranzino* case—that is, judicial authority to impose sanctions for breaches of mediation confidentiality—is perhaps the most extensive law on this subject in the nation.

V. SURVEY RESULTS: WHAT ARE THE VIEWS OF SEATTLE/KING COUNTY MEDIATORS?

Having found Washington case law inconsistent with Coben and Thompson’s findings regarding frequent judicial admissions of mediation communications,⁵⁴ and having learned of Florida’s unique law sanctioning breaches of confidentiality, we then turned to our local mediators to determine their views on these issues.

In 2007 and 2008, we surveyed local mediators, lawyers, and judges to determine their perceptions regarding the frequency with which confidentiality is

47. *Id.*

48. *Id.* at 728.

49. *Id.*

50. *Id.* at 728-29.

51. Interview with Press, *supra* note 37.

52. *Id.*

53. *Id.* Although Florida imposes sanctions for breach of confidentiality even where the breach occurs outside of court, it should be noted that some legal scholars are opposed to the idea of sanctions in this context. Sarah Cole argues that “sanctioning parties for out-of-court use of confidential mediation communications is problematic because non-parties or parties who participate by telephone might not be aware that the law applies to them, and might discuss their mediation communications without realizing the implications in terms of their own liability.” Cole, *supra* note 3, at 108. She also notes that:

Florida’s extension of liability to out-of-court use of mediation communications is unique. The UMA drafters chose not to extend liability in this way. Moreover, no other state imposes liability on parties for out-of-court revelation of mediation communications unless the parties signed a separate confidentiality agreement. The UMA drafters not only refused to impose liability for this type of behavior, but they went further, stating that there may be ‘salutary reasons’ mediation participants might wish to talk about a mediation with family and friends.

Id. (quoting UNIF. MEDIATION ACT § 8 cmt. A, 7A pt. 2 U.L.A. 135 (Supp. 2005) (internal citations omitted)).

54. See Coben & Thompson, *supra* note 1.

breached, and the frequency with which the mediation privilege is violated.⁵⁵ Initially, we asked them to tell us about the number of cases they had participated in, as mediators or as counsel. We also asked how many breaches of confidentiality they were aware of, including breaches committed by a party, lawyer, or mediator.

In addition, we asked whether our respondents would support legislation in Washington State that would authorize court sanctions for breaches of confidentiality, such as the law enacted in Florida.

We surveyed a total of thirty local mediators, judges, and attorneys via e-mail questionnaire, telephone, and personal interviews. Our survey respondents were selected from bar association lists, commercial ADR firm rosters in the region, and from our personal knowledge and acquaintance with fellow practitioners.⁵⁶ Our respondents included those with significant mediation experience as well as those who were relatively new mediators. Their mediation practices included a wide range of issues and different levels of complexity. Among the types of cases reported were: real estate, family law, personal injury, employment, corporate/commercial, environmental, product liability, and construction.

Our respondents were also diverse in terms of their mediation styles, and they used a variety of terms to describe those styles, including: facilitative, intuitive, directive, conciliatory, variable, and shuttle.

The thirty participants in our survey reported that they have handled a combined total of 23,114 mediations. In those cases, only sixty-five breaches of confidentiality (or 0.28%) were reported in our survey.

The majority of our respondents, seventy percent, did *not* favor the adoption of a Florida-style law. Some were very strongly opposed and underscored their position with comments such as:

“I have been mediating cases for over twenty years and have been privileged to be involved in thousands of these. I don’t find breaches of confidentiality to be a problem or an issue. Furthermore, I am unaware of other mediators expressing a concern . . . There certainly isn’t a need for legislation.”

“No. Absolutely, positively, unequivocally NO.”

“Absolutely not. I foresee endless litigation among high-conflict parties on issues of improper disclosures, instead of focusing on the issues they actually need to resolve. The purpose of mediation is to resolve issues. If it fails, the worst that should be said is ‘mediation failed,’ not that it resulted in more lawsuits.”

55. Our survey did not define breach of confidentiality because the question of whether a breach has occurred is determined by the parties’ own Agreement to Mediate. The survey is included, *infra*, in the Appendix of this article.

56. We also worked with the King County Bar Association’s Alternative Dispute Resolution Section to survey its members.

“No—I feel that the Florida statute is too drastic, using a sledgehammer to kill a fly.”

“No . . . this would be ‘the tail wagging the dog’ . . . [T]his might stir things up and create litigation.”

“I think it ain’t broke here, and I’m not very anxious to have another source of contention between the parties where it’s not necessary.”

Based on the results of our survey of mediators and judges in this jurisdiction, we have concluded that most practitioners in Seattle/King County perceive that breaches of confidentiality are very infrequent. The 65 breaches reported by 11 of our survey participants in the course of handling more than 23,000 cases amount to a frequency of occurrence that is less than three-tenths of one percent—a percentage that cannot be construed as significant. Thus, our findings differ markedly from those reported by Coben and Thompson. The reasons for this difference remain to be explored elsewhere, and we do not speculate here on the possible causes. However, we note that our study is based on perceptions of those directly involved in the mediation process, and such perceptions are necessarily subjective. Additionally, our research included mediations that were court-ordered as well as those conducted independent of court proceedings. Therefore, our research differs from that conducted by Coben and Thompson, who based their findings on a review of reported cases already in litigation. Nevertheless, our findings have shown that the view from the practitioners’ perspective in this jurisdiction is very different from that revealed by Coben and Thompson’s nationwide review of judicial opinions, however numerous they may be.

Further, consistent with our primary finding is the determination that seventy percent of our respondents believe that a Florida-style statute is not necessary or desirable. This decisive majority view rejects the proposal in Sarah Cole’s article that legislation is needed to establish statutory authority for courts to issue sanctions for breaches of confidentiality.

VI. CONCLUSION

In addition to our primary conclusions about breaches of confidentiality, we have gained valuable insights from many mediators about the subject of mediation confidentiality and how it should be presented to parties. We offer some of these insights here to invite further discussion and additional research.

As a preliminary matter, mediators should consider asking the parties to sign a written agreement to mediate. Most mediators recommend that an agreement to mediate be used, and that it contain confidentiality provisions. If such an agreement is used, however, the parties and their counsel should consider how broad the confidentiality provisions should be, depending on the needs of the parties. In some cases, the only concern might be the release of a settlement figure.

We have learned from our survey that it is common practice for mediators and counsel to describe mediation to the parties as a process that is “privileged and confidential,” without further explanation of what those terms entail. However, given the complexity of the law regarding confidentiality and privilege, it is our view that the mediator and counsel should explain the process more fully to

the parties, including a review of the exceptions to confidentiality provided in the UMA. Additionally, parties need to understand that the mediator cannot be compelled to testify about mediation communications in a subsequent court proceeding.⁵⁷

As mediation has come into its own, courts and mediators appear to have reached consensus regarding the importance of confidentiality in mediation.⁵⁸ Our research suggests that, in our jurisdiction at least, practitioners perceive that participants in the mediation process can reasonably rely on the promise of confidentiality. Further research is needed, on a national basis, to determine whether confidentiality in mediation is “honored more in the breach” (as reported by Coben and Thompson), or whether most practitioners perceive that it is observed (as we have found). An additional worthwhile inquiry might involve the question of whether there is a discernable trend underway—the trajectory of which might point to the need for corrective action, as suggested by Sarah Cole.

57. WASH. REV. CODE. § 7.07.060 (2005).

58. See, e.g. Foxgate Homeowners Ass’n., Inc. v. Bramalea Cal., Inc., 25 P.3d 1117 (Cal. 2001). Confidentiality is essential to effective mediation [because it] promotes a candid and informal exchange regarding events in the past. . . . This frank exchange is achieved only if participants know that what is said in this mediation will not be used to their detriment through later court proceedings and other adjudicatory processes.

Id. at 1126. See also Wilmington Hospitality L.L.C. v. New Castle County *ex rel.* New Castle Dept. of Land Use, 788 A.2d 536, 541 (Del. Ch. 2001) (“Confidentiality of all communications between the parties or among them and the mediator serves the important public policy of promoting a broad discussion of potential resolutions to the matters being mediated”).

APPENDIX



**Seattle University
Albers School of Business and Economics**

Foster and Prentice* - Mediation Research Paper

Spring 2008

Interview Questions:

1. Name and contact information:
2. Are you a mediator, lawyer who represents parties to mediation, or a judge?
3. How long have you been a practicing mediator (or lawyer representing parties to mediations)?
4. Approximately how many cases have you mediated?
 - a. If a lawyer, how many cases have you handled as a lawyer representing a party to mediation?
 - b. How would you describe your style of mediation?
 - c. If a judge, how many cases have you handled for which the cases had been mediated prior to coming to court?
5. What kinds of cases have you handled? Mark approximate number of each, if possible, and indicate: (S) for state court; (F) for federal court; or (B) for both.

a. Construction	f. Real Estate
b. Breach of contract	g. Corporate
c. Employment	h. Intellectual Property
d. Personal injury	i. Family Law
e. Estate	j. Other
6. Do your agreements to mediate contain language whereby the parties agree to keep all mediation communications confidential and to not reveal any information obtained in the mediation?
7. Do your agreements to mediate provide for liquidated damages for violation of the agreement to maintain confidentiality?

8. Are you aware of any cases in which a party, lawyer or mediator breached confidentiality?

a. If so, in how many cases did this occur?

b. In each case that you can remember, was it a party, lawyer or mediator who breached confidentiality?

c. Was this a violation of privilege (in court violation of confidentiality) or a violation outside of court?

d. For each violation of confidentiality that you remember, what kind of cases was it?

9. Florida law provides in Florida statutes s. 44.405 that “all mediation communications shall be confidential. A mediation participant shall not disclose a mediation communication to a person other than another mediation participant or a participant’s counsel.” Remedy for violation of confidentiality: “Any mediation participant who knowingly and willfully discloses a mediation communication in violation of s. 44.405 shall, upon application by any party to a court of competent jurisdiction, be subject to remedies, including: a) equitable relief, b) compensatory damages, c) attorney’s fees, mediator’s fees, and costs incurred in the mediation proceeding, d) reasonable attorney’s fees and costs incurred in the application for remedies under this section.”

a. Would you support a similar law in Washington?

****Please direct inquires to:***

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