LACHES

OCBA OAKLAND COUNTY BAR ASSOCIATION

January 2008 • Number 504

Feature Article

Mediation Confidentiality: Too Much of a Good Thing?

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In October 2007, the Office of Dispute Resolution of the State Court Administrative Office convened the Dispute Resolution Court Rules Committee to review the rules governing case evaluation and ADR in non-domestic relations cases and recommend amendments to the Supreme Court.

Among the rules up for consideration is MCR 2.411(C)(5), which concerns the confidentiality of mediation communications. While confidentiality is of course essential to effective mediation, there is ample reason to believe that MCR 411(C)(5) is overbroad and requires revision.

During the last 15 or so years, the use of mediation to resolve cases has mushroomed. In many civil cases, mediation is a watershed event, of no less importance than the trial or the hearing on dispositive motions. As mediation assumes a larger position in the legal landscape, cases become increasingly common in which evidence of what occurred during the mediation of a prior case is relevant to the rights of the parties.

Although it is not at all clear that the drafters of MCR 2.411(C)(5) had such cases in mind, the language of the rule can dramatically impact them. As it stands, MCR 2.411(C)(5) is categorical. By its terms, it imposes an absolute bar to the "use" of statements made during mediation in any proceeding aside from the mediation itself, subject only to limited exceptions (e.g., the resolution of a dispute over the mediator's fee). In addition to the proscription on use of such statements, the rule includes a confidentiality requirement that can only be waived by the written consent of all parties to the mediation.

The rule provides:

> (5) Confidentiality. Statements made during the mediation, including statements made in written submissions, may not be used in any other proceedings, including trial. Any communications between the parties or counsel and the mediator relating to a mediation are confidential and shall not be disclosed without the written consent of all parties. This prohibition does not apply to:
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> (a) the report of the mediator under subrule (C)(3),
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> (b) information reasonably required by court personnel to administer and evaluate the mediation program,
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> (c) information necessary for the court to resolve disputes regarding the mediator's fee, or
>
> (d) information necessary for the court to consider issues raised under MCR 2.410(D)(3) [concerning mediator fees].

Few would question that statements made in the mediation of a case should never be available for use by the opposing party to prove his or her position in *that* case. However, should the same ban apply to an attorney who is sued for legal malpractice and needs evidence of what was said at the mediation of the underlying case for his or her defense? Should it apply when mediation-related statements are essential to the interpretation of a settlement agreement reached in a successful mediation? Further, what happens when mediation-related statements are the critical evidence that an insurer needs to defend a coverage case on the grounds that the lion's share of a settlement constitutes uncovered loss or that the settlement was collusive?

As currently drafted, MCR 2.411(C)(5) may lead to arbitrary and harsh results in such cases. Absent agreement by all of the parties to the mediation, evidence that may be essential to the fair adjudication of the parties' rights may not be used. And yet, it is far from apparent that prohibition of the use of mediation communications in such cases is required to fulfill the policy purposes of the rule. Confidentiality is essential to effective mediation so that the parties and the mediator are free to discuss the strengths and weaknesses of the case and the impediments to settlement without fear that such information will be used against them in the case at issue. However, the remote prospect that such information may be disclosed in an unanticipated subsequent case seems unlikely to materially chill participation.

With respect to the arbitrary impact of MCR 2.411(C)(5), it is particularly notable that the rule applies only to cases that are referred by court order to mediation. [See MCR 2.411(A).] While statistics are unavailable, it is no doubt true that a very large percentage of non-domestic mediations are undertaken without a court order. Thus, often by virtue of sheer happenstance, profoundly different results may ensue.[1] Further, in some cases, the requirement of the rule that all parties to the mediation consent to the disclosure of mediation communications may give veto power over the use of evidence to someone who was a party to the underlying mediation, but who has no interest in the subsequent litigation.

Consider the hypothetical case of a lawyer sued for malpractice after his client has lost a large verdict at trial. The lawyer represented the client in the defense of a lawsuit brought by the client's former business partner, whom the client had come to loathe. The client, wealthy enough to afford grudge litigation, drove the lawsuit hoping to wear down his adversary. The lawyer had advised the client that his position was a difficult one. The client, however, heard only what he wanted to hear. After seemingly endless contentious discovery, the court refers the underlying case to mediation. The lawyer is relieved that there is now a respected third party who can persuade the client that it is time to settle. At the mediation, the mediator and the lawyers strongly advise the client to take a reasonable settlement offer made by the other side. While the settlement offer is not what the lawyer had hoped, it would be foolhardy for the client not to take it. Nonetheless, the client chooses not to settle. The trial goes poorly and, ultimately, a judgment is entered for five times the settlement amount.

In the malpractice case, the client testifies at his deposition that he was absolutely prepared to settle the case at the mediation, but the lawyer advised him to reject the offer and go to trial. After the deposition, the mediator advises defense counsel off-the-record that he remembers the case

clearly, and that the lawyer recommended settlement and the client had been intransigent. The lawyer and defense counsel are delighted. Not only can the mediator offer compelling evidence supporting failure to mitigate, comparative negligence and causation defenses, the mediator's testimony will leave the client's credibility in tatters.

Alas, MCR 2.411(C)(5) requires that all parties to the mediation consent in writing to the disclosure of mediation communications. Thus, not only is the consent of the lawyer's former client required, but so is the consent of the plaintiff in the underlying case. Not surprisingly, neither the client nor the underlying plaintiff consent to disclosure.[2]

Without an express waiver, the lawyer is left to argue that his former client has impliedly waived his right to confidentiality because he placed his mediation communications "at issue" by bringing his malpractice lawsuit. With no case directly on point, the trial court concludes that the drafters of the rule must have meant it when they stated that mediation statements "may not be used in any other proceedings" and that the drafters could have included exceptions if they had wished to do so.[3] The court also questions how, even if it were to find that the client had waived his rights by bringing the case, it could find that the plaintiff in the underlying case had waived his right to confidentiality inasmuch as he had never taken any action that placed mediation communications at issue.

In the end, the lawyer finds himself defending a case without the seminal evidence that he or she needs to prevail.

Given the extent to which settlement advice and conduct in settlement negotiations are sources of legal malpractice litigation, the problem presented by the hypothetical case is not so obscure that it should be discounted as collateral damage to be tolerated in light of the utility of a bright-line rule. Indeed, the Uniform Mediation Act,[4] adopted in both Illinois and Ohio, contains a specific exception to the privilege it confers on mediation communications for evidence "sought or offered to prove or disprove a claim or complaint of professional misconduct . . . ."[5]

Further, as suggested above, MCR 2.411(C)(5) sweeps too broadly in other respects. This is particularly true with respect to actions in which a party seeks to enforce or avoid a settlement agreement reached through mediation. As one commentator, Professor Peter Robinson, has stated, a strict mediation confidentiality regime can have the effect of transforming a settlement agreement reached through mediation into a "super contract."[6] While the discussions and circumstances surrounding the formation of a contract have for centuries been considered critical to the adjudication of contract disputes, strict mediation confidentiality can deprive a party of such evidence. With its broad and unbending language, MCR 2.411(C)(5) achieves precisely this result in a case where the opposing party opts not to consent to disclosure.

In his article, Robinson identified scores of cases in which courts have sought to enforce or deny enforcement to mediated agreements.[7] Merely to recite the issues in a few of the cases drives home the absurdity of a rule in which one party is handed veto power over the evidence that the court may consider. Thus, Robinson notes cases in which a scrivener's error results in $600,000 windfall to one party, a party injured in an auto accident settles after having been led to believe that the policy limit was $100,000 when it was actually $1.25 million, one party contended that the agreement reached in mediation was only an agreement to agree and not a binding agreement, etc.[8] Robinson suggests that the existence of such cases, although relatively infrequent, points up the absurdity of a strict confidentiality approach that prevents a court from considering the circumstances surrounding the making of an agreement reached through mediation.

The concerns identified in Robinson's article, like the hypothesized malpractice case discussed above, clearly illustrate the need to revise MCR 2.411(C)(5). At the very least, an exception that permits a court (in the context of the types of cases discussed herein) to balance confidentiality interests against the need for the evidence seems appropriate.

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Footnotes

1 While it is often the case that mediating parties will execute confidentiality agreements at the outset of the mediation, such agreements, unlike 2.411(C)(5), do not in any way bind a court. Courts have repeatedly recognized that confidential settlement agreements are admissible when relevant, irrespective of the confidentiality provisions of the agreement. *See eg, Porter Hayden Company v Bullinger,* 350 Md. 452, 713 A.2d 962 (1998) (citing more than 20 state and federal cases). The analysis supporting this conclusion is readily apparent. The scope of discovery afforded by the Michigan Court Rules encompasses "any matter, *not privileged,* which is relevant to the subject matter . . . ." Of course, an agreement between private parties to keep a matter confidential does not create a privilege. While the Michigan Rules of Evidence and common law recognize privilege as a basis for excluding evidence, there is no evidentiary rule excluding relevant evidence based on a private confidentiality agreement.

2 United States District Court Judge David M. Lawson's standard order of referral to mediation seeks to cure this problem by requiring consent to disclosure only of the party "about whom the information is disclosed."

3 While the author believes *Howe v. Detroit Free Press,* 440 Mich 203, 218-219 (1992), is a case that strongly supports a finding of a waiver under the hypothetical circumstances outlined above, there is no assurance that Michigan's appellate courts would agree. In *Howe,* a plaintiff brought a defamation case in which the contents of a probation report – which would ordinarily be subject to a statutory privilege – were essential to the defense. The Supreme Court concluded that the plaintiff had placed the report at issue and thereby waived the privilege. The Court balanced the importance of the privilege asserted with the defending party's need for the information to construct its most effective defense. The rationale of the *Howe* case seems to compel the conclusion that the client in the hypothetical waived his right to confidentiality by suing his former lawyer. However, the *Howe* case does speak to the rights of the other party to the underlying mediation, where that party has neither expressly consented to the disclosure of mediation communications nor placed the communications at issue. Further, it is not at clear that today's Supreme Court would subordinate the plain language of a court rule to such waiver principles.

4 National Conference of Commissioners on Uniform State Laws, Uniform Mediation Act (2001).

5 The exception, however, which is limited to malpractice claims "based on conduct occurring during a mediation," is unnecessarily narrow, as the hypothetical outline herein points out. Further, the exception is also subject to the limitation that the mediator may not be compelled to testify. This limitation can, without a sufficient policy justification, deprive a jury of the most reliable evidence available in a case.

6 Robinson, *Centuries of Contract Common Law Can't Be All Wrong: Why the UMA's Exception to Mediation Confidentiality in Enforcement Proceedings Should be Embraced and Broadened,* 2003 J. Disp. Res. 135. *See* Coben & Thompson, *Disputing Irony: A Systematic Look at Litigation About Mediation,* 11 Harv. Neg. L. Rev. 43 (2006), for a helpful survey and analysis of all reported cases in which state and federal judges have confronted legal disputes about mediation.

7 *Id.* at 144-149.

8 *Id.*