

Confidentiality: The Illusion and the Reality— Affirmative Steps for Lawyers and Mediators to Help Safeguard Their Mediation Communications

By Elayne E. Greenberg

The Emerging Problem

Confidentiality is one promise of mediation that is increasingly broken, even though judges, lawyers and mediators frequently extol the sacredness of mediation confidentiality as a primary benefit for considering mediation as a settlement forum. We observe that legal challenges to any aspect of the mediation have caused judges to scrutinize mediation communications in a way that renders mediation confidentiality vulnerable at a minimum and violated at the worst.¹ We are finding it a chronic challenge to decipher the precise and appropriate boundaries of mediation confidentiality.² Moreover, we are increasingly discomfited to see that even unsuccessful legal challenges to mediation might compel disclosure of what would otherwise have remained confidential mediation communications.³



In one such case, *In re. A.T. Reynolds & Sons*, the mediator disclosed mediation communications to help the Court assess whether a party who had been directed to participate in a court-ordered bankruptcy mediation had, in fact, participated in good faith or was actually in contempt of the court order. Reading the facts of the case, we learn that ordering an unwilling party to mediation, sustaining an ongoing contentious relationship between the mediator and the unwilling attorney, and authorizing a mediator to report to the court about that attorney's good faith behavior all contributed to the fiasco that ensued and rendered mediation confidentiality an illusion in that case. Even though the District Court ultimately found that the Bankruptcy court had abused its discretion when it held the mediation party in contempt,⁴ confidential mediation communications were made public, and there was no way to make those mediation communications confidential again. Beyond the legal analysis of the case, the *Reynolds* case illuminates problematic issues with the mediation structure and the relationship between the mediator and party that if addressed prophylactically by either the mediator or one of the attorneys might have preserved the confidentiality of the mediation.

With the luxurious benefit of hindsight, I was among the many mediators who questioned how the *Reynolds* debacle could have been prevented. Is there a greater danger in ordering mediation-resistant parties to participate in mediation? Is there value in having parties select mediators they are comfortable working with instead of

imposing a mediator on the parties? If the mediator and parties are unable to establish a collaborative, working relationship, should the mediation proceed anyway or be discontinued? How should mediators in court-connected or administrative-annexed programs balance their commitments of confidentiality to the parties with their reporting obligations to the court? And, for purposes of this column, how might we as lawyers and mediators do a more effective job of protecting mediation confidentiality?

Yet, it wasn't until two recent media triggers magnified how mediation confidentiality is not even within the public's ken that I was prompted to finally write this long, percolating column. Just this past December, while the nation was reeling from the seemingly unfathomable massacre at Sandy Hook Elementary School, we were sobered as professionals to hear the mediator who had mediated the divorce of the gunman's family in 2009 disclose to the media details about what transpired in the gunman's parents' divorce mediation.⁵ How could that be? Doesn't mediation remain confidential forever? Then, in the second week of January, both my assistant Jean Nolan and members of Maria Volpe's listserv were troubled by a new reality television show that has two lawyer/mediators openly discussing their mediation clients during their hair salon visit.⁶ Those television viewers, otherwise unfamiliar with mediation, would surely believe that mediation confidentiality is the illusion, not the reality. Is that the message about mediation confidentiality that we as a profession want conveyed to the public?

Taking a meta perspective from this parade of confidentiality horrors, I suggest a prophylactic approach that attorneys and mediators should observe to honor and safeguard the parties' and mediator's expectations of confidentiality. As grounding for this discussion, I first review the relevant ethical guidelines for mediation confidentiality. Then, I offer specific recommendations that are likely to minimize the legal challenges that compromise mediation confidentiality.

The Ethical Parameters and Purpose of Confidentiality

Ethically, mediation shall be confidential unless the parties, mediator or governing institution contract otherwise. The ABA Model Standards of Conduct for Mediators Standard V (A) on Confidentiality provides that, "A mediator shall maintain the confidentiality of all information obtained by the mediator in mediation, unless otherwise agreed to by the parties or required by applicable law."⁷ Relevant to this column's discussion, Standard V

(D) further clarifies, “Depending on the circumstance of a mediation, the parties may have varying expectation regarding confidentiality that a mediation should address. The parties may make their own rules with respect to confidentiality, or the accepted practice of an individual mediator or institution may dictate a particular set of expectations.”⁸ Moreover, Standard V (C) requires, “A mediator shall promote understanding among the parties of the extent to which the parties will maintain confidentiality of information they obtain in mediation.”⁹ Thus, mediators have an affirmative obligation to ensure that parties understand how they will maintain the confidentiality they have agreed upon.

As the mediator works with the parties to harmonize their expectations of confidentiality in mediation, the mediator also needs to inform the parties of any exceptions to confidentiality, such as the mediator’s other ethical reporting obligations. For example, if the mediation was referred as part of a court-connected or administrative agency annexed program, Standard V (A) (2) provides, “A mediator should not communicate to any non-participant information about how the parties acted in the mediation. A mediator may report, if required, whether parties appeared at a scheduled mediation and whether or not the parties reached a resolution.”¹⁰ In another example, Part 1200 Rules of Responsibility, Rule 8.3 requires a lawyer/mediator to report lawyer misconduct that “raises a substantial question as to the lawyer’s honesty, trustworthiness or fitness as a lawyer.”¹¹

At times, a mediator’s own expectation of mediation confidentiality may or may not comport with the parties’ expectation. Granting the mediator discretion whether or not to disclose a mediation communication, Standard V (A) (1) guides, “If the parties to a mediation agree that the mediator may disclose information obtained during the mediation, the mediator may do so.”¹² By way of illustration, if both parties to a mediation are in court offering contrasting accounts of what was finally agreed upon in their mediation, and they now want the mediator to become the arbiter of truth and testify about what was actually agreed upon in mediation, the mediator has the option of testifying, unless otherwise court compelled. Some mediators may opt to testify, believing mediation is about party self-determination, and the parties have opted on their own for the mediator to testify. Other mediators may question whether both parties are truly exercising self-determination and wonder whether, in fact, one party’s desire to compel mediation communications compelled the other party to go along with the idea, motivated solely by the fear of being considered the “less truthful” party. Still other mediators may decide against testifying, believing that confidentiality is such an essential part of mediation and should not be revisited down the road once the parties have initially contracted for mediation confidentiality. All are ethical courses of conduct.

Underlying the ethics, let’s not forget that the purpose of mediation confidentiality is to promote candid discussion of the dispute and a freer exploration of settlement options without fear that these discussions will be publicly disclosed or used against mediation participants as evidence in a court proceeding.¹³ In practice, mediation confidentiality is a requisite protection that frees mediation parties and their attorneys to shift their conflict discourse from the positional, combative communications that are de rigeur of litigation to the more interest-based, collaborative discourse that is valued in mediation. For those attorneys who are reluctant to embrace the more collaborative advocacy appropriate in mediation for fear that they will put their client at a disadvantage if mediation fails, mediation confidentiality provides some reassurance.

Recommended Prophylactic Steps

Although there is no way to completely immunize mediations from legal challenge and protect mediation communications from compelled disclosure, there are ways to strengthen the integrity of the mediation process to minimize the likelihood of its occurrence.

- 1. To the extent possible, from the beginning of the mediation and continuing throughout the mediation, parties and their attorneys should be encouraged to voluntarily participate and work with the mediator to shape a collaborative process that promotes party self-determination rather than force those into mediation who have no desire to mediate.**

Parties are less likely to challenge a mediated agreement and compel the disclosure of mediation communications if parties are encouraged to help shape the mediation process. As part of party self-determination, parties and attorneys should actively decide whether they even want to participate in mediation. If they are ordered by the court or opt to at least give mediation a try, then parties and their attorneys should be involved in selecting which mediator they would prefer to work with and providing input about how the mediation should proceed.

However, mediation is not for everybody. If a party who remains resistant to mediation is forced into mediation against his will, he may continue to find ways to undermine the mediation process. In the scenario that we are trying to avoid, he may ultimately challenge the mediation and any resulting agreement.

- 2. The Confidentiality Agreement should be a customized, negotiated process, not just a boiler platform form that is mindlessly signed.**

The Agreement to Mediate also known as the Mediation Confidentiality Agreement is a welcomed opportunity for the mediator and the parties’ to clarify and harmonize everyone’s expectations of confidentiality. Exploring the what if’s, clarifying industry norms and concerns

surrounding confidentiality, deciding how to engage with media inquiries, discussing the mediator's ethical obligations, and understanding the limits of the law all help frame a realistic discussion about mediation confidentiality and invite all mediation parties to develop a realistic confidentiality agreement for their particular dispute.

3. Heed red flags. A decision to try mediation does not necessarily mean a commitment to resolve the dispute in mediation.

Parties who have agreed to try mediation sometimes rethink that decision. Parties should be allowed to drop out of mediation, without being coerced into continuing. For example, if personal conflicts develop between one of the parties and the mediator, all should consider whether it is possible to continue or better to discontinue the mediation. Mediation is about creating a mediation process where the parties and mediator have a working relationship, in which they attack the dispute at hand, not each other. It might be a worthwhile approach for all to pass on mediation, rather than suffer through a possible legal challenge by the disgruntled participant to the mediation later on that might potentially compromise mediation confidentiality

4. When parties have reached the agreement-making phase of mediation, the mediator should provide a flexible process that allows parties adequate time to make informed decisions in a way that honors each party's idiosyncratic decision-making process.

The agreement process should allow all participants adequate time to think, consult with helpful experts, assess the feasibility of the proposed agreements, and make suggested revisions before the finalizing agreement. Research shows that parties are likely to honor agreements that they shape.

5. Parties opting to participate in mediation should also have the option of having independent attorneys to help them in mediation.

Mediations in which the parties are pro se such as in divorce mediations may be particularly vulnerable to challenge about a party's informed consent and capacity to participate in the mediation. Attorneys who represent clients in mediation help their clients make informed decisions by not only providing legal guidance, but by clarifying and strengthening the roles of clients, attorneys and mediator. The St. John's OSHA Whistleblower Mediation Advocacy Clinic is one paradigm of how a law school clinic program provides pro se parties legal representation in OSHA Whistleblower mediations.

Conclusion

As a professional group, we may all have different perspectives about the proper bounds of mediation confidentiality. Some may view it as an absolute that should be honored except in clearly defined, limited

circumstances. Still others may view it as a contract term to be both negotiated and reconsidered depending on the circumstances. For those mediators and attorneys who believe that confidentiality is one of the central tenets of mediation, then greater attention needs to be given to incorporating practices that are likely to preserve your confidentiality expectations. Experience teaches us that mediation communications have a greater likelihood of remaining confidential if the ensuing mediation satisfies the mediation and confidentiality expectations of all the participants. A strengthened mediation structure that promotes party self-determination and a well-thought-out confidentiality agreement are essential steps that contribute to safeguarding those expectations and withstanding future legal challenges to mediation.

Endnotes

1. See, e.g., *In re Teligent*, 640 F. 3d 53 (2011); *Rutigliano v. Rutigliano*, 2012 WL 4855864 (N.J. Super. A.D.).
2. See, e.g., *The Uniform Mediation Act and Mediation in New York*, NYSBA's Committee on ADR (Nov. 1, 2002), <http://www.nysba.org/AM/Template.cfm?Section=Home&template=/CM/ContentDisplay.cfm&ContentID=2725> last visited on 1.22.13 at 2:09 P.M. Although the UMA is about mediation privilege, there are so many exceptions to the privilege that it remains unclear precisely which communications are protected.
3. See, e.g., *In re A.T. Reynolds & Sons, INC., d/b/a Leisure Times Spring Water*, 2011 W. L. 1044566 (S.D.N.Y.).
4. *Id.*
5. Connecticut School Shooting Update: Divorce mediator says Nancy Lanza didn't like to leave son Adam alone (December 17, 2012 3:58 PM), http://www.cbsnews.com/8301-504083_162-57559629-504083/connecticut-school-shooting-update-divorce-mediator-says-nancy-lanza-didnt-like-to-leave-son-adam-alone/ last visited on 1/22/13 at 1:52 P.M.
6. Discussion on Maria Volpe's listserve on January 14, 2013 about a new half hour reality show, "Staten Island Law," on OWN in which the mediators publicly talk about the specifics of their mediation. New York City Dispute Resolution Listserve (NYC-DR@LISTSERVER.JJAY.CUNY.EDU).
7. Model Standards of Conduct for Mediators, Standard V (A)(2005).
8. *Id.* at Standard V (D).
9. *Id.* at Standard V (C).
10. *Id.* at Standard V (A) (2).
11. Part 1200 RULE 8.3: Reporting Professional Misconduct
(a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation.
12. Model Standards, *supra* note 7 at Standard V (A) (1).
13. Information that is otherwise discoverable does not receive mediation confidentiality protection.

Elayne E. Greenberg is the Assistant Dean for Dispute Resolution Programs, Professor of Legal Practice and Director of the Hugh L. Carey Center for Dispute Resolution at St. John's University School of Law. She can be reached at greenbee@stjohns.edu.