The Protections and Limits of Confidentiality in Mediation

BY STUART M. WIDMAN

How deep does mediation confidentiality run? Despite recent case law and legislation, the levels of protection aren’t clear. And probably won’t ever be.

Mediation is a process in which a mediator facilitates communication and negotiation between parties to assist them in reaching a voluntary agreement regarding their dispute. Illinois Uniform Mediation Act, referred to here as the UMA, at 710 ILCS 35/2(1). Like any dispute resolution process, mediation occurs through written or oral communications, or nonverbal conduct, that are made for purposes of conveying information about the dispute or parties’ positions regarding the dispute. UMA § 2, 710 ILCS 35/2(2), defining “mediation communications.” The August 2005, Model Standards of Conduct for Mediators, issued by the American Bar Association, the American Arbitration Association, and the Association for Conflict Resolution, instead simply refers to the confidentiality of “information” obtained in or during a mediation.

The general rule is that mediation communications are confidential and privileged against disclosure. That encourages participants to be candid with the mediator in both joint sessions and caucuses so that the mediator can get a full understanding of the nature and extent of the dispute, as well as possible solutions. Confidentiality is recognized as a core attribute of mediation.

There are, however, certain situations or circumstances where the protection against disclosure of mediation communications is trumped by a more important value. The UMA lists some of those in Section 6, 710 ILCS 35/6.

This two-part article discusses four primary areas where the privilege attaching to, or the confidentiality of, mediation communications falls to a higher purpose:

- When necessary for a criminal proceeding;
- When necessary to prove coercion or fraud that led to the mediated settlement;
- In order to establish the existence or terms of a settlement agreement; and
- When necessary to impose sanctions or discipline counsel in connection with a mediation proceeding.

The cases discussed here are offered as examples of the balancing of interests that is undertaken when a party requests that the privilege or confidentiality be ignored. The cases are representative sampling, not the complete inventory on the respective topics. The cases are from many jurisdictions, state and federal,
Mediation Confidentiality

(indicating the broad impact of these confidentiality dilemmas. Not all come from jurisdictions where the UMA has been adopted, and thus some have been decided on other evidentiary grounds. Whether each case might drive the outcome in the reader's jurisdiction will therefore be a function of the statutory scheme in effect, including whether the UMA has been adopted. As of September, the UMA was adopted in the District of Columbia, Illinois, Iowa, Nebraska, New Jersey, Ohio, Utah, Vermont, and Washington. Legislation to adopt the act has been introduced in Connecticut, Massachusetts, Minnesota and New York, Indiana, Maine and New Hampshire have rejected adoption.

This article cites the Illinois UMA, and uses and the language it adopted. The mediation's venue, and the state law applicable to the confidentiality of mediation communications, will heavily determine whether mediation communications are admissible in the circumstances discussed in this article and in Part II next month.

WHEN NECESSARY FOR A CRIMINAL PROCEEDING

It is understandable that disputing parties would not want to publicize their problem in court where the claims and counterclaims could touch upon criminal behavior.

For example, one party's claims may criticize or set forth fraudulent or abusive dealings by the other side with governmental agencies. Similarly, a former employee may be a potential whistleblower, and the former employer may prefer to resolve the employment issue in mediation and avoid, as best as possible, a federal or state criminal investigation.

To what extent, then, would the statements made in those mediations be protected from disclosure if that criminal investigation or case ensued? UMA § 6(b)(1) states that the privilege against disclosure is lost if the evidence is to be used in a court proceeding involving a felony. In In Re Grand Jury Subpoena Dated December 17, 1996, 148 F.3d 487, 493 (5th Cir. 1998), cert. denied, 119 S.Ct. 1336 (1999), the Fifth U.S. Circuit Court of Appeals held that the confidentiality attaching to a Texas mediation "will have to give way to the public interest in the administration of criminal justice."

Although recognizing that Congress sought to protect information relating to mediation sessions "to some extent," the court nevertheless declined to find clear congressional intent to create an evidentiary privilege that protected the information was trumped by the youths' constitutional rights to confront and cross-examine prosecution witnesses. 62 Cal.App. 4th at 165-167.

A more recent decision by the New Jersey Supreme Court has held, however, that UMA confidentiality principles are not substantially outweighed by a criminal defendant's claim of need of the mediation communication for his defense. State of New Jersey v. Williams, 184 N.J. 432, 877 A.2d 1258 (2005).

Williams filed a municipal court complaint against his brother-in-law, alleging harassment through taunting and profanity-laced telephone messages. During a face-to-face confrontation between Williams and his brother-in-law, there was a physical fight and the brother-in-law claimed that Williams used a machete to cut the brother-in-law's wrist.

During a mediation of Williams' complaint, the brother-in-law acknowledged that he had hit Williams in the head with a shovel. After Williams was indicted for aggravated assault and possession of a weapon, Williams sought to have the mediator testify on Williams' self-defense claim.

The New Jersey Supreme Court held that the mediator's testimony was correctly excluded because the mediator's testimony did not outweigh the interests in protecting mediation confidentiality. The Court based its decision in part on its conclusion that evidence of the brother-in-law's use of the shovel was otherwise available.

Although Williams doesn't implicate a larger commercial exposure of the party who wished to use the mediation communication, Williams' exposure was otherwise substantial: He ultimately was convicted of third-degree aggravated assault and sentenced to three years' probation. Since it is conceivable that individual criminal liability could attach to wrongdoing by corporate officers engaged in commercial malfeasance, Williams indicates that exculpatory statements made in a mediation may not be admissible to defend a later criminal proceeding.

A starting point in all mediation communications admissibility analyses is the statute or rule that bars or permits admission, such as the UMA. In permitting the evidence, Grand Jury Subpoena rejected the district court's conclusion that there was a federal mediation privilege.
Some federal district courts have held, however, that there is a federal mediation privilege. In Sheldon, et al. v. Pennsylvania Turnpike Commission, 104 F.Supp. 2d 511 (W.D. Penn. 2000), the court applied Jaffe v. Redmond, 518 U.S. 1, 116 S.Ct. 1923 (1996), in concluding that all four of the relevant factors and standards were met in determining whether a federal evidentiary privilege should be recognized.

In defining the privilege’s contours, however, the court made no exception for disclosures in criminal proceedings, instead making a broad privilege that precluded use "for any purpose . . . in the civil action or in any other proceedings." 104 F.Supp. 2d at 517.

Sheldon also relied upon Folb v. Motion Picture Industry Pension & Health Plans, et al., 16 F.Supp. 2d 1164, 1175 (C.D. Cal. 1998), which, also applying Jaffe, held that "the need for confidentiality and trust between participants in a mediation proceeding is sufficiently imperative to necessitate the creation of some form of privilege." In discussing the outer limits of a federal mediation privilege, Folb noted that it "may be attenuated in necessity in criminal or quasi-criminal cases where the defendant's constitutional rights are at stake." Id. at 1178.

Folb was a discrimination and harassment case, not a criminal matter. But see FDIC v. White, 1999 W.L. 1201793 (N.D. Tex. 1999) (no federal mediation privilege). Thus, even had the Grand Jury Subpoena court recognized a federal mediation privilege, it is still likely that the court would also have carved an exception to the privilege for the use of the mediation communication in a criminal proceeding.

WHEN THERE WAS COERCION OR FRAUD IN REACHING A SETTLEMENT

UMA § 6(b)(2), while not expressing coercion or fraud, states that a mediation communication could be admitted to "prove a claim to rescind or reform or a defense to avoid liability on a contract arising out of the mediation" where the evidence is not otherwise available and there is a need that substantially outweighs the confidentiality protection. 710 ILCS 555/6(b)(2). Typically, where coercion or fraud has been alleged, the requested relief is to rescind the settlement agreement.

Courts addressing this issue are faced with the delicate balancing of the rights to confidentiality versus the need to protect the process of mediation and ensure that it is fair and credible. Condoning fraud or coercion in a mediation will undermine the parties’ expectations of voluntary and non-compulsory outcomes.

Two cases discussing fraud are Princeton Insurance Co. v. Vergano, 883 A.2d 44 (Del. Ch. 2005), and In Re Hillard Develop-ment Corp. v. Griswold, 221 B.R. 282 (S.D. Fla. 1998). In both, the mediation communication was not admitted.

In Princeton, medical malpractice defendants sought rescission of a mediated settlement agreement, alleging fraud by the plaintiff. In her complaint, responses to discovery, deposition, and pre-trial submissions, the plaintiff claimed pain and impairment resulting from allegedly improper surgery performed by the surgeon and the hospital where the surgery was performed. Liability was not disputed, so the key issue was the extent of plaintiff Vergano’s damages. Vergano sought more than $2 million. The malpractice defendants suspected that Vergano was exaggerating the extent of her physical impairment, but nevertheless agreed to pay her $945,000 at the mediation.

The day after the settlement was reached, however, one of the attorneys for one of the malpractice defendants videotaped Vergano dancing at a party. The defendants then reneged on the settlement, claiming that Vergano had defrauded them. They brought another suit seeking the settlement agreement’s rescission.

The defendants also sought leave to call the mediator as a witness to testify about statements made by Vergano and her counsel at the mediation about her pain and impairment. They also wanted to elicit the mediator’s opinions on whether Vergano’s claims were inconsistent with what was captured on the videotape.

The court denied the defendants’ request to have the mediator testify, based upon the parties’ mediation agreement language, which stated that “[e]ach party agrees to make no attempt to compel the mediator’s testimony against the other . . .” 883 A.2d at 63-64. (The Delaware Chancery Court’s vice chancellor’s humiliating rejection of the defendants’ argument included this memorable line: “There was no moral or logical justification for prematurely ending a tree’s life in order to enable that argument to be captured on paper.” 883 A.2d at 63.) The court held that there was no express exception in the mediation agreement that permitted the defendants to introduce the mediator’s testimony, and the court deemed “unconvincing for several reasons” the defendants’ argument that the need to prevent fraud outweighed the public policy interest in enforcing mediation confidentiality.

Although Delaware had not adopted the UMA as of 2005, the court still observed that, even if the UMA applied, the defendants’ need for the mediator’s testimony did not substantially outweigh the interests in protecting confidentiality. Id. at 65. The court noted that the defendants “can prove, through evidence that is not shielded by the confidentiality of the mediation process, the allegedly false statements upon which they supposedly relied in settling with Vergano.” Id. at 66. Accordingly, there was an “absence of necessity for dishonoring the confidentiality of the mediation process.” Id.

In In Re Hillard, the bankruptcy court reluctantly denied the plaintiff’s requested relief from a mediated settlement agreement allegedly induced by fraud. At the hearing, the plaintiff sought to admit statements made to it at the mediation by the defendant’s attorney and designated representative. Those statements led the plaintiff to believe that future legislation would not affect the settlement agreement’s terms and enforceability.

There are different types of coercion—all of which potentially could arise in high-stakes mediated cases.
(continued from previous page)

But as it turned out, the defendant “enacted legislation which effectively cut the guts, the legs and the teeth out of the Settlement Agreement. . . . Throughout these proceedings the Defendant has acted with nothing less than malevolence and ill-will toward the Plaintiff, and the conduct of the Defendant at this stage can best be characterized as bad faith.” 221 B.R. at 283.

Nevertheless, and despite the defendant’s egregious behavior, the court determined, pursuant to a local bankruptcy court rule, that the statements of the defendant’s attorney made at the mediation were inadmissible. The court could not set aside the settlement agreement based on them.

Implicit in the holding is the importance that the court obviously attached to mediation confidentiality. Even balanced against the defendant’s “evil attempt to circumvent what was to be a good faith resolution of the disputes,” the court did not receive into evidence the mediation communications.

In each of the three following cases, all involving claims of coercion or duress, the courts admitted or permitted testimony about the mediation communications that possibly tainted the settlement. These coercion cases each discuss different aspects of the issue—coercion by the mediator, coercion by a party, and duress arising from a party’s own incapacity. Each of these potentially could arise in complicated, high-stakes cases for which mediation might be most useful.

In Vitkis-Valchhne v. Valchhne, 793 So.2d 1094 (4th Dist. Fla. 2001), the court held that in a divorce action, the wife had sufficiently alleged that the neutral acted improperly during the mediation, including by coercing and improperly influencing her to accept settlement. The issue for the court was whether, contrary to established Florida law that the actions of a third party will not suffice to establish duress or coercion, the mediator’s actions are so significantly different that coercion or duress by that third party will support the claim.

In holding that a mediator “is no ordinary third party,” the court concluded that its inherent power to maintain the judicial system’s integrity and processes authorized it to invalidate a court-ordered mediation settlement agreement which had been obtained by such alleged abuse. 793 So.2d at 1099.

Although the court noted that communications during a mediation session are privileged and confidential, the court readily admitted the wife’s testimony about her communications with the mediator and what the mediator said to her. Id. at 1096-1097. The court’s discussion of mediators’ ethical standards, including a specific rule prohibiting coercion, implicitly indicates that the court felt it was more important to protect each party’s right to self-determin-

tion in mediation rather than protect the rule of confidentiality.

In Federal Deposit Insurance Corporation v. White, 1999 W.L. 1201793 (N.D. Tex. 1999), the defendants sought to set aside the mediated settlement agreement on the grounds that the FDIC and its representative coerced the defendants by threatening them with criminal prosecution. The magistrate judge allowed the defendants and their former attorneys to testify about statements made at the mediation based upon the court’s conclusion that there was no mediation privilege under federal law. Not surprisingly, the court cited In Re Grand Jury Subpoena, discussed above. Although the mediation communications were admitted into evidence, the court refused to set aside the settlement agreement, finding that defendants’ coercion claims were not credible.

Finally, in Olam v. Congress Mortgage Company, et al., 68 F.Supp.2d 1110 (N.D. Cal. 1999), the court held that the medi-

Why were mediation communications admitted in three coercion cases, but barred in two fraud cases?

tor should testify about the mediation session, including whether the plaintiff was under economic duress or incapacitated by medical conditions that rendered her incapable of understanding the settlement agreement terms.

The court recognized that California law established a mediator’s privilege. But it then analyzed whether, on balance, there are circumstances which nevertheless should compel the mediator to testify. Relying on Rinaker, supra, the court adopted the two-stage balancing analysis of (1) first determining in an in camera proceeding what the mediation communication testimony would be, and (2) then determining whether the testimony’s importance and benefits outweigh the confidentiality protections. 68 F.Supp. 2d at 1131-1132.

The court concluded that admitting the mediator’s testimony would not pose a real threat to the confidentiality protections because the mediator was being asked to “assess at a more general and impressionistic level her condition and capacities,” not offering her specific words. Id. at 1136.

The court concluded that the mediator’s testimony “would make a contribution of sufficient magnitude to justify the level of harm that using and disclosing the testimony would likely cause,” and therefore the court unsealed the mediator’s in camera testimony.

It is instructive to contrast the two fraud cases—when the mediation communications were not admitted—with the three coercion cases, where the communications were admitted. While there are different rationales for each of the outcomes, it is exactly that lack of a common thread that is unsettling. One would expect little difference in the outcomes where similar bad acts—fraud and coercion—underlie the mediated settlement.

***

In Part II next month, author Stuart Widman analyzes the other two situations where mediation confidentiality privileges may be attacked—where there is a need to establish the existence or terms of a settlement agreement, and when it is necessary to impose sanctions or discipline counsel in connection with a mediation proceeding.
More Mediation Confidentiality Limits: What the Court May Allow In To Establish a Settlement Agreement

Last month, author Stuart Widman introduced mediation confidentiality issues by noting that the protections may be lost in four areas. He analyzed two—when knowledge of the mediation proceedings is needed for criminal proceedings, and when it is necessary to prove that coercion or fraud led to a mediated settlement. In this month’s conclusion, he examines threats to mediation confidentiality because of a need to establish the existence or terms of a settlement agreement, and because of a need to impose sanctions or discipline attorneys in connection with an ADR proceeding.

* * *

BY STUART M. WIDMAN

Under Uniform Mediation Act § 6(a)(1), there is no privilege when the communication is contained in a written settlement agreement signed by all parties. Impliedly, therefore, the privilege arises where the existence or terms of the agreement are strictly verbal. The cases discussing verbal communications try to balance the value of confidentiality against the desire to ensure that the parties get the benefits of the mediation process.

[The UMA references in these articles are to the Illinois Uniform Mediation Act, which has been incorporated into the Illinois Compiled Statutes at 710 ILCS 35/1.] The better mediation practice—for both the parties and the mediator—is to have the parties, before they leave, draft an interim written agreement containing at least an interim agreement containing the most important settlement terms, such as the exchanged consideration (payment or performance); the performance timing; dismissal of claims; releases; and confidentiality.

That interim written agreement should be identified as a binding contract even where the parties plan to draft and sign a more extensive settlement agreement that provides additional detail. The slight additional effort to put the parties' essential settlement terms onto paper is well worth it in order to avoid losing the mediation process efforts.

In Eisenstadt v Superior Court, 109 Cal.App. 4th 351 (2d Dist. 2003), a husband moved to modify his spousal support obligations, which were agreed upon at a mediation. His evidence was conversations he allegedly had with his wife during the mediation—but outside of the sessions with the mediator.

In response, the wife asked that the mediator be deposed, but the husband sought to bar the mediator's deposition and the admission of any communications made during the sessions with the mediator. The court refused to admit the testimony of either the husband or the mediator.

With respect to the husband, the court held that his statements to his wife were made "in the course of" and "for the purpose of" the mediation. As a result, the statements were covered by the broad mediation privilege, even though they occurred outside the mediator's presence. 109 Cal.App. 4th at 364.

Consequently, evidence of those conversations could not be admitted without express waivers from both the husband and wife, which the wife refused to give.

Also, because both parties refused to waive the mediation privilege, the mediator's testimony was deemed nonadmissible.

The Eisenstadt court distinguished Olam v Congress Mortgage Co., et al., 68 F.Supp.2d 1110 (N.D. Cal. 1999), because the Olam mediator was asked to testify on an issue deemed peripheral to the agreement, the participant's competence. [Editor's note: Olam was analyzed last month in Part I, "The Protections and Limits of Confidentiality in Mediation," 24 Alternatives 161 (November 2006).]

On the other hand, the Eisenstadt testimony was specifically about what was said about the agreement terms reached in the mediation.

UMA COMPARISON

Eisenstadt was not based on the UMA, which California had not adopted. But UMA § 2(2) similarly broadly defines a mediation communication as a statement "that occurs during a mediation or is made for purposes of a mediation." Thus, the Eisenstadt decision likely would have been the same even if the UMA applied.

In Vernon v Acton, 732 N.E.2d 805 (S. Ct. Ind. 2000), evidence of an oral mediation settlement agreement, including the mediator's testimony, was deemed inadmissible. The trial and appellate courts had upheld the defendant's motion to enforce the oral mediation settlement agreement, apparently adopting the defendant's assertion that only statements made during the mediation process—but before the actual settlement—were confidential.

In reversing, the Indiana Supreme Court noted that the parties' mediation agreement expressly stated that any statements made during the mediation process were confidential and not admissible.

The court also noted that the Indiana ADR rules provided that "evidence of conduct or statements made in the course of mediation is likewise not admissible." The Court aptly concluded that "an (continued on next page)
exception for oral agreements has a potential to swallow the rule, and, notwithstanding the importance of ensuring the enforceability of mediated agreements, that the goal of maintaining confidentiality is more important in the balancing of rights and benefits.

Notably, Indiana has declined to adopt the UMA, perhaps because its legislature felt that Indiana already has a body of law, such as Vernon, that addresses the balancing of those important rights.

In Few v. Hammack Enterprises Inc., 511 S.E.2d 665 (N.C. 1999), unlike Eisenstadt and Vernon, the testimony and other evidence concerning the mediation settlement conference were admissible for purposes of determining whether a settlement was reached, and the settlement terms.

Although a mediated settlement agreement had been drafted, and the plaintiffs signed it, the defendants refused to sign. When the plaintiffs filed a motion to enforce the settlement agreement, the defendants contended that the plaintiffs were improperly seeking to introduce mediation statements and conduct, in derogation of the statute deeming them inadmissible.

But in permitting both parties to present evidence regarding whether defendants agreed to settle and on what terms, the court narrowly construed the applicable statute as not prohibiting “the admission of the outcome of the mediation settlement conference” in order to determine the existence or terms of the settlement. 511 S.E.2d at 669-670. Few predated the UMA, the final draft of which was not issued until 2001.

**WRITTEN PROTECTIONS**

If a written settlement agreement is admissible, is there also less protection for written mediation submissions? As noted at the outset in Part I last month, a “mediation communication” also includes a written submission or “record.” 710 ILCS 35/2(2), (8).

But UMA § 4(c), addressing privilege against disclosure, states that “evidence or information that is otherwise admissible or subject to discovery does not become inadmissible or protected from discovery solely by reason of its disclosure or use in a mediation.” 710 ILCS 35/4(c).

Two California cases address whether and under what circumstances written submissions in a mediation are discoverable. In Rojas, et al. v. Superior Court, 33 Cal. 4th 407 (S.Ct. Cal. 2004), the California Supreme Court construed the California Evidence Code broadly and held that any materials prepared for the purposes of, in the course of, or pursuant to a mediation are protected from discovery or disclosure.

The Court noted, however, that the facts set forth in other evidence, including witness statements, were not protected, but only the record that is made or prepared specifically for the mediation is protected. The Rojas decision was not based upon the UMA.

A later California decision, Doe One v. Superior Court, 132 Cal.App. 4th 1160 (Cal. App. 2005), also enforced mediation confidentiality and barred the public disclosure of information concerning priests accused of child sexual molestation.

The priests participated in a mediation for which the Archdiocese of Los Angeles prepared and submitted written summaries of its file identifying those priests who had molested children. The priests moved for a protective order barring the Archdiocese's disclosure of those summaries, and the protective order was granted.

Doe One echoed the strong legislative policy set forth in Rojas favoring mediation and the safeguarding of mediation confidentiality. It made no difference that the Archdiocese was trying to release its own records prepared for the mediation, as the court concluded that the Evidence Code prevented the disclosure even by the party who made them. Consistent with UMA § 4(c), however, the Court clearly noted that its decision did not restrict the Archdiocese from releasing to the public the underlying personnel information in its files about the priests. 132 Cal.App. 4th at 1173.

UMA § 2(2) contains the “made for purposes of” language, which is similar to the Rojas language. Thus, the Rojas and Doe One outcomes likely would have been the same even had California adopted and applied the UMA.

**DISCIPLINE OR SANCTIONS**

UMA § 6(a)(6) provides another exception to privilege: where the mediation communication is “offered to prove or disprove a claim or complaint of professional misconduct or malpractice” filed against a party representative and based upon conduct occurring during the mediation.

Thus, in this context also, courts must balance two important values—protecting the confidentiality of mediation commu-
nations versus ensuring that counsel complied with the standards of conduct and ethical strictures.

In In re Daley, 29 S.W.3d 915 (Ct. App. Tex. 2000), involving the mediation of a personal injury suit, the court held that the “procedural issue of attendance” at the mediation of an insurance company’s employee was admissible, and could be considered by the court in determining whether contempt sanctions should be imposed.

Although the Texas Code provided that “all matters, including the conduct and demeanor of the parties and their counsel during the settlement process, are confidential and may never be disclosed to anyone,” the court held that questions of attendance at the mediation did not concern the suit’s underlying subject matter or the manner in which the participants negotiated.

Construing the statute narrowly as restricted to those matters occurring during the settlement process, the court held that it did not bar all evidence regarding everything that occurs at the mediation. The court therefore permitted the deposition of employee Daley on the limited issue of his attendance.

Another attendance case is Foxgate Homeowners Assn. Inc. v. Bramalea California, Inc., et al., 26 Cal. 4th 1, 108 Cal.Rptr. 2d 642 (2000), where the California Supreme Court held that a mediator’s report about sanctionable conduct, along with evidence of statements made during the mediation relating to that conduct, could not be considered in ruling on a sanctions motion.

Despite the court’s order scheduling the mediation and requiring that counsel bring their experts and witnesses, the defendants’ lawyer appeared without his defense experts. The bulk of the mediation was canceled due to the absence of the defendants’ witnesses.

The mediator filed a report with the trial court recounting the defendants’ bad-faith conduct at the mediation and recommending that defendants be sanctioned. 102 Cal.Rptr. 2d at 646-647. Noting the “clear and unambiguous” language of California Evidence Code §§ 1119 and 1121, the Court held that they “unqualifiedly bar [] disclosure of communications made during mediation absent a statutory exception.” Id. at 653.

The appellate court, 78 Cal. App. 4th 653, 92 Cal. Rptr. 2d 916 (2000), therefore, was wrong to create a nonstatutory exception to the confidentiality requirements. That, the California Supreme Court held, was the California Legislature’s purview. 108 Cal. Rptr. 2d at 655. The Court did not construe or apply the UMA as part of its decision.

A different sanctions issue arises where attorneys or parties have improperly disclosed information regarding the mediation. Cases addressing that include In re Anonymous, 283 F.3rd 627 (4th Cir. 2002) (not imposing sanctions upon counsel for disclosing mediation communications to an arbitration panel because the disclosures were made in bad faith or with malice); Paravicino v. Barnett Bank of South Florida, N.A., 690 So.2d 725 (D. Ct. Fla. 1997) (dismissing a plaintiff’s suit against a bank with prejudice after the plaintiff knowingly and willfully made public disclosure of communications in an unsuccessful mediation); and Bernard v. Gates Group Inc., 901 F.Supp. 778 (S.D. N.Y. 1995) (imposing a $2,500 fine against an attorney for willfully and deliberately sending a letter to the judge who referred the matter to mediation, disclosing the settlement offers that had been made during the unsuccessful mediation).

***

In conclusion, there are many tensions created when mediation confidentiality competes with other vital interests that justify disclosure or use of mediation communications. While the Uniform Mediation Act could add some consistency and predictability in judicial decisions on those disputes, few states have adopted it thus far. As a result, outcomes vary between jurisdictions because different evidentiary rules are at the root of the rulings.

Since mediation confidentiality disputes are still relatively new, mediators, counsel and clients can expect fuller development of the case law in this arena over time. Wherever and under whatever statutory scheme they arise, however, the courts will continue to be faced with finding the right balance between core issues of mediation and public policy.

DOI 10.1002/alt.20157
(For bulk reprints of this article, please call (201) 748-8789.)