

Confidentiality and Its Exceptions in Mediation

Confidentiality of mediation communications and information is essential to its validity and effectiveness. *In re Teligent, Inc.*, 640 F.3d 53, 57 -58 (2d Cir. 2011). It promotes a candid flow of information that informs the mediator of issues and concerns which, if resolved, could lead to settlement. The August 2005 Model Standards of Conduct for Mediators, issued jointly by the American Bar Association, American Arbitration Association, and Association for Conflict Resolution enshrine confidentiality as an immutable part of the process.

Yet, as with most principles and policies, there are important competing interests that nibble at the edges of confidentiality, creating exceptions. Those are usually statutory exceptions, but they also include judicially-made exceptions that balance the integrity and protections of the mediation process against even weightier needs and interests.

Some of the statutory exceptions include: (i) when disclosure is necessary for criminal prosecution; (ii) when necessary to prove coercion or fraud that led to the mediated settlement; (iii) in order to establish the existence or terms of a settlement agreement; and (iv) when necessary to impose sanctions or to discipline counsel in connection with a mediation proceeding. (See "The Protections and Limits of Confidentiality in Mediation", two-part article in November and December 2006 "Alternatives", published by the CPR International Institute For Conflict Prevention & Resolution.)

A December 2019 decision from the Southern District of New York illustrates the balancing and cautious approach when applying the last of the above-listed exceptions, determining whether sanctions should be imposed upon counsel. *Arthur Usherson v. Bandshell Artist Management*, 2019 WL 6702069 (S.D.N.Y. Dec. 9, 2019).

That case centered on the veracity of statements made by plaintiff's counsel to the court in the wake of a failed mediation. The defendant in the case sought sanctions against plaintiff and its counsel for not properly participating in the mediation. Specifically, defendant said plaintiff and its counsel did not attend "in person" as required by the court's Mediation Referral Order and accompanying Mediation Rules of the Southern District. Those Rules mandate attendance by each party and by the lawyer who is primarily responsible for handling the trial of the case.

There, defendant was only available for the mediation by telephone, and plaintiff's lead counsel sent two associates in his stead. Plaintiff's counsel said the mediator gave advance permission to send the associates and for plaintiff to appear by telephone. Defendant's motion for sanctions disputed both claims, said they were false, and said the mediator would testify to their falsity if permitted.

The court allowed a "limited inquiry" into the communications between plaintiff's counsel and the mediator in order to clarify whether the mediator did, in fact, give the advance permission to depart from the Rules. That exception to the general scope of confidentiality was critical to determine non-compliance with the court's orders and the Rules, as well as assessing if

plaintiff's counsel had committed perjury (his statements to the court were both on the record and in a sworn declaration).

The court deviated from the dome of confidentiality because of "the unique circumstances of this case." Nonetheless, the court "carefully limit[ed] the evidence" which the mediator was to provide, and also proceeded in stages.

First, the mediator was to submit a declaration detailing his communications with plaintiff's counsel, including specifying whether, when and how the mediator gave the alleged permission. (Notably, the opinion did not say what the next steps would be, but it likely included the mediator's in-person testimony if plaintiff challenged the mediator's veracity. The court would decide what the next steps were after reviewing the mediator's declaration.)

That limited disclosure was designed to avoid any discussion about the substantive exchanges at the mediation itself. Indeed, those disclosures looked solely at pre-caucus procedural matters, not the parties' settlement negotiations. That limited incursion, the court opined, was essential to avoid unfairness to defendant and to preserve the integrity of the proceedings before the court and under the Rules. Those interests, coupled with the "careful restrictions" the court set, outweighed the general rule of confidentiality.

Finally, the court set boundaries of public disclosure of the contested proceedings, again striking a balance between the presumptions favoring public access to judicial documents versus the confidentiality bubble. The court concluded that the public has a strong interest in knowing about plaintiff's counsel's truthfulness (he had previously been sanctioned by other courts), and that the considerations against public disclosure were weak.

Thus, redacted versions of the parties' submissions were filed on the public docket, and un-redacted versions were kept under seal. The redactions included any discussions of the parties' conduct at the mediation itself (especially their substantive negotiations) as well as the identity of the mediator and court employees working on the court's mediation program. Other future filings were to be made public, provided they did not contain any of the redacted content.

The case illustrates when and how the policy of mediation confidentiality falls to a higher purpose. But it also underscores how courts must take the smallest bites possible out of the confidentiality shield when a carve-out is warranted. Doing so carefully can preserve confidentiality while still allowing justice to be meted out.

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