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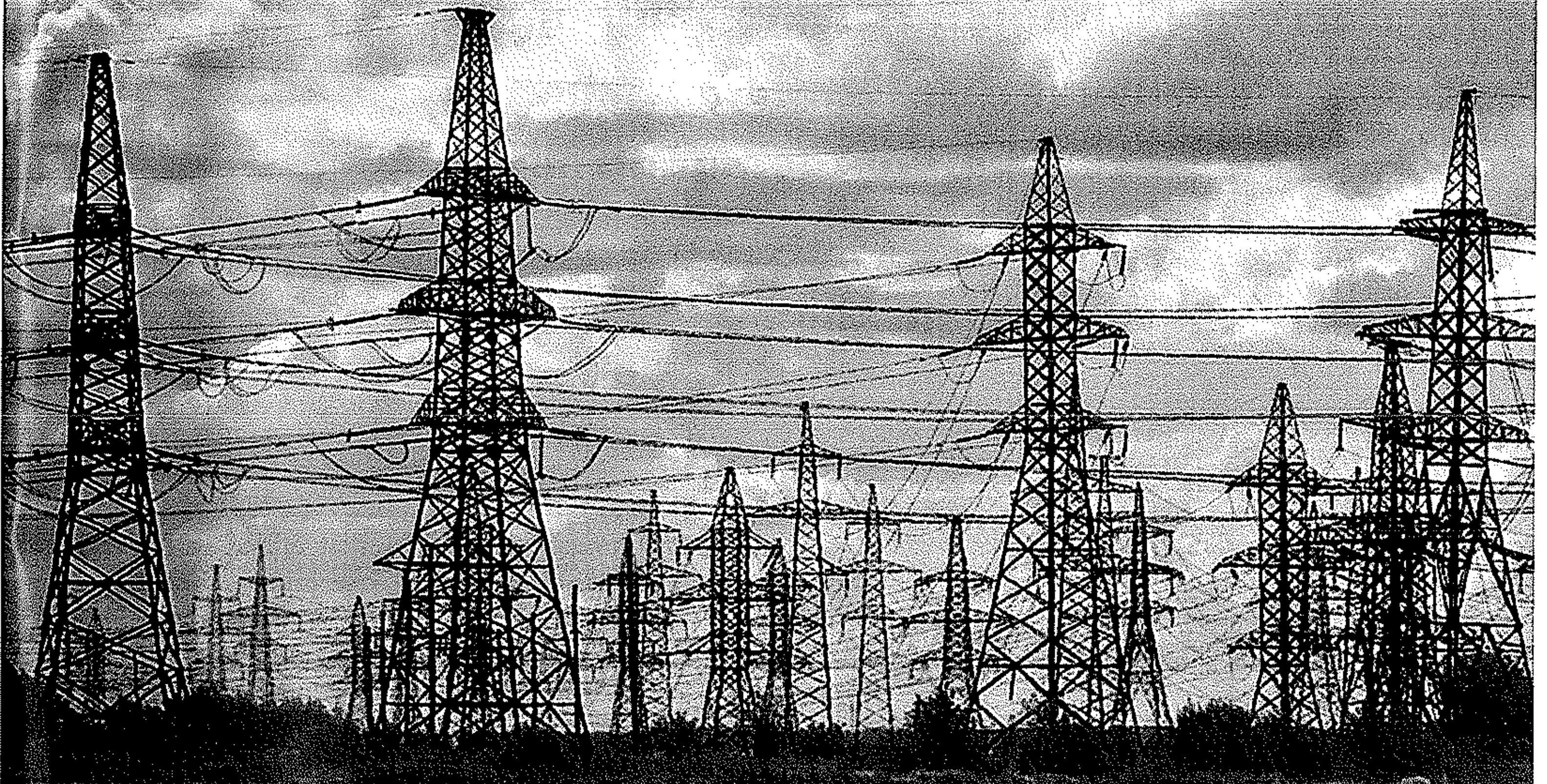

Regulating Energy

PRACTICE TIPS

Confidentiality in Mediation

Mediation is confidential. Well, only to some extent! Whether something is confidential depends upon what is said; when is it said; and by whom it is said. In order to understand the importance of confidentiality and its limitations, it is best to explore confidentiality as it relates to the process of mediation or alternative dispute resolution and then consider when it applies as to the parties themselves. This knowledge will make for more effective mediators and attorneys representing clients in mediation and more fully informed clients.

The first question is what is the source of the protection of confidentiality. It can be by case law, statute, uniform acts, court rules, model rules of the American Bar Association, mediation organizations, an agreement of the parties or what I believe is the developing common law of mediation (for a discussion of the breath of the rules governing mediation see, Moss, *Rules of Mediation Surround Us*, Maryland Bar Journal, May/June 2006).

For example, an early recognition of mediation confidentiality is found in *NLRB v. Joseph Macaluso, Inc.*, 618 F.2d 51 (9th Cir. 1980), which held that the public interest in maintaining the impartiality of federal labor mediators outweighed the benefits to be derived from their testimony about what occurred at a mediation and precluded a mediator from being compelled to testify.

The Maryland Lawyers' Rules of Professional Conduct (hereinafter referred to as the "Maryland Lawyers' Rules") suggest how expansive the source of rules can be by providing in Comment 2 to Rule 2.4 regarding the conduct of lawyer-neutrals that "[i]n performing this role, the lawyer may be subject to court rules or other law that apply either to third-party neutrals generally or to lawyers serving as third-party neutrals." And we may not even know that we are bound by particular rules!

For example, Maryland Rules 17-104(a)(4) and Rule 17-105(a)(2) provide that to be designated by the court to conduct an ADR proceeding, "a person, unless the parties otherwise agree, must...abide by any standards adopted by the Court of Appeals". Noticeably absent from the annotations to the Rules is a reference to what standards have been adopted; however, whether you know it or not, the mediator has agreed to these standards and a participant could enforce them. In fact, in conjunction with adopting Rule 17, the Court of Appeals adopted the Maryland Standards of Conduct for Mediators, Arbitrators, and other ADR Practitioners which cover mediation confidentiality in depth (hereinafter referred to as the "Court Standards")(courts.state.md.us/macro).

In the court context, there are very specific rules regarding confidentiality. Maryland Rule 17-109 establishes the rules for confidentiality in ADR proceedings in most civil actions (see Rule 17-101); and Rule 5- 408 (3) also precludes admission into evidence of mediation conduct or statements regarding the " validity, invalidity or amount of a civil claim" . Many counties implement the Rules on confidentiality through standardized Confidentiality Agreements which mirror Rule 17-109. The Agreements provide the additional protection and benefit that the participants confirm that what is said to the mediator is confidential and the client is put on notice what not to say at trial.

Outside of the court context, whether there is confidentiality will generally depend upon the agreement of the parties that the mediation will be confidential or by their adoption of standards which include confidentiality. The most important source of confidentiality is Standard V of the Maryland Standards of

Conduct for Mediators adopted by the Maryland Mediator Excellence Council (hereinafter referred to as the "Excellence Standards") (courts.state.md.us/macro). Many mediators participate in the Maryland Program for Mediator Excellence or mediate for organizations which have adopted them and are, therefore, subject to the Excellence Standards.

These standards are based upon the Standards of Conduct for Mediators adopted by the American Bar Association Section of Dispute Resolution and other arbitration associations. They surely represent the "best practices" regarding mediation confidentiality. By their terms, they "do not have the force of law until adopted by a regulatory authority." However, there are times when the courts apply guidelines as law. See *Post v. Bregman*, 349 Md. 142 (1998).

Turning now to what is confidential, The Excellence Standards only protect "information", which is never defined. However, a fair definition of a mediation communication which may be protected is to be found in Maryland Rule 17-102-(e): "mediation communication" "means speech, writing, or conduct made as part of a mediation, including communications made for the purpose of considering, initiating, continuing, or reconvening a mediation or retaining a mediator." Thus, what occurs from the inception to the conclusion of the mediation process is potentially confidential.

However there are exceptions: once the parties reduce an agreement to writing which was reached as a result of mediation, the agreement "is not confidential, unless the parties agree in writing otherwise" Rule 17-109(c); and "information otherwise admissible or subject to discovery does not become inadmissible or protected from disclosure solely by reason of its use in mediation" Rule 17-109 (e). A mediation communication can be protected from discovery but merely disclosing something at mediation does not guarantee protection.

Who is Required to Maintain Confidentiality

The persons who are protected by the mediation privilege are, obviously, the parties to the mediation but their protection is not unlimited. If the matter is being litigated, a mediation communication may not be disclosed and disclosure may not be compelled "in any judicial, administrative, or other proceeding." Rule 17-109 (a). But this does not prevent a party from disclosing what occurred at mediation absent an enforceable agreement prohibiting disclosure. However, as we discuss later, the interests of third parties, such as the state or minor children, may supersede the protection otherwise available to participants.

The persons other than parties who are bound not to disclose a mediation statement and the extent of their obligations differ. Rule 17-109 (a) specifies that " except as provided in sections (c) and (d) of this rule, a mediator and any person present or otherwise participating in the mediation at the request of the mediator shall maintain the confidentiality of all mediation communications and may not disclose or be compelled to disclose mediation communication in any judicial, administrative, or other proceeding."

Thus, unlike a party, the mediator and certain participants such as a financial planner, expert, or coach have the duty not to disclose a communication at any time not just in a judicial proceeding. Comment 2 to the Maryland Lawyers' Rules makes it clear that a lawyer when serving as a lawyer-neutral may be subject to confidentiality rules in the Court Standards as well as other ethics rules. Moreover, an attorney may be precluded from disclosing his client's statements at mediation if made privately or under circumstances where they are deemed confidential. Maryland Lawyers' Rule 1.6.

The mediator is not merely passive in this process. The mediator has a duty to protect the entire process (Court Standard VI) and with respect to confidentiality, the mediator is required to be proactive: The comments to Section V of the Court and Excellence Standards on Confidentiality require the mediator to discuss "the parties' expectations concerning confidentiality of the process" at the beginning of the process; and to discuss the expectation of confidentiality of private caucus communications prior to engaging in such sessions; and the Excellence Standards add that the mediator should "promote understanding among the parties of the extent to which the parties will maintain confidentiality of information they obtain in mediation."

But the role of the mediator is even more demanding. This can be seen from a recent decision of the Committee on Mediator Ethical Guidance of the ABA Section of Dispute Resolution dealing with what

a mediator should do when he learns a fact in caucus that may affect the decision of the other party (SODR-2009-2). In this case, an employer who had a dispute with a prior employee regarding taking company records advised the mediator in caucus that it had referred the matter for criminal prosecution. On the one hand, the standards preclude disclosure without consent of confidential communications; and on the other, the standards impose a duty on the mediator to conduct a quality process.

The ruling prohibits disclosure without consent but charges the mediator with either obtaining consent to disclose or indirectly bringing the issue into focus by asking, for example, what risks do you face in the event you do not settle, or if you do not settle, what options are available to you and the employer? In the domestic arena, what if there is a confidential disclosure of a hidden asset in a caucus? That's a simple one – require disclosure or terminate the mediation. But what if the mediator learns about an affair, the transfer of an asset or an interest free loan to a girlfriend. The mediator is required to indirectly raise the consciousness of the other party about the problem but without disclosure. The responsibilities of the mediator in this regard require great skill, understanding of the process and an ability to guide participants in attaining self-determination.

Another side of confidentiality is that there are times when confidential statements may be disclosed. The rules permit disclosure by the mediator: "in addition to any disclosures required by law, a mediator and a party may disclose or report mediation communications to a potential victim or to the appropriate authorities to the extent that they believe it is necessary to help (1) prevent serious bodily harm or death; (2) assert or defend against allegations of mediator misconduct or negligence; or (3) to assert or defend claims for contract rescission (Rule 17-109 (d)). And if a lawyer's conduct in mediation is claimed to be unethical, he may disclose confidential communications of the client under Maryland Rule 1.6 (b) (5). Case summaries regarding mediator confidentiality and malpractice are collated by a project of Professors James Coben and Peter Thompson at Hamline University School of Law Dispute Resolution Institute Law. Hamline.edu/adr/mediation-case-summaries.html

Is there a Mediator Privilege

There is no Maryland case dealing with mediation confidentiality so the issue of whether there is a mediator's privilege is wide open. Even in jurisdictions where there is an express statutory mediator privilege, parties continue to attempt to compel the mediator to testify under claims that there has been an express or implied waiver of the privilege by some conduct of the other party. These efforts generally are unsuccessful: see *Simmons v. Ghaderi*, 187 P. 3rd 934 (2008), holding that unless there is an express waiver or due process is implicated, there is no implied waiver or estoppel exception to statutory confidentiality in mediation; and *Eisendrath v. Super.*

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Ct., 134 Cal. Rptr.716 (2003), holding there was no implied waiver by filing suit which permitted the mediator to be deposed.

This issue has recently been brought into sharp focus in an Eastern Shore case. The Petermanns entered into an agreement with mediator Rob Ketcham in which the mediator agreed to preserve confidentiality and the parties agreed not to call him as a witness. Nevertheless, a dispute arose concerning the parties mediated agreement; the parties waived confidentiality; and the mediator was subpoenaed to testify at a deposition. Over the mediator's objection, the Talbot County Circuit Court entered an order compelling him to testify. The mediator appealed but the case was settled before the Court of Special Appeals acted.

There are no rules automatically applicable to private or front-end mediations. Under the auspices of the Maryland judiciary's Mediation and Conflict Resolution Office, the Maryland Program for Mediation Excellence was established. Their Excellence Council adopted the Excellence Standards. Section AI of Standard V expressly provides that "If the parties to a mediation and the mediator all agree that the mediator may disclose information obtained during the mediation, the mediator may do so." This is equivalent to a mediator privilege. Once in court, Maryland Evidence Rule 5- 408 makes inadmissible certain statements at mediation if the enforcement of an agreement is in issue.

Moreover, in the context of court-appointed ADR, Maryland Rule 17-109 provides that, in general, a mediator "may not disclose or be compelled to disclose mediation communications in any judicial, administrative or other proceeding." The Court Standards adopted by the Court of Appeals to implement Rule 17 reiterate that a mediator may not disclose or be compelled to disclose a mediation communication. The Uniform Mediation Act ("UMA") has been adopted by the District of Columbia and 9 other states other than Maryland. Its rules on confidentiality provide that "A mediator may refuse to disclose a mediation communication, and may prevent any other person from disclosing a mediation communication of the mediator" (Section 4 (b) 2).

Thus, the parties alone cannot waive this privilege without the mediator's consent. New Jersey applied the UMA before it was adopted stating "that the UMA principles, in general, are an appropriate analytical framework for the determination whether [a party] can overcome the mediator's privilege not to testify", *State v. Williams*, 877 A.2d 1258 (2005). `Indeed, New Jersey concluded that to allow a mediator to be compelled to testify "would sabotage the process" and that "If mediation confidentiality is important, the appearance of mediator impartiality is imperative." *Williams, supra*, See also *Lehr v. Afflitto*, 889 A.2d 462 (2006), applying the same rule where both parties waived confidentiality.

ll of the foregoing are part of the common law of mediation and could be drawn upon to develop Maryland's mediation law. The Court of Appeals may have created a mediator privilege through its Rules, Court Standards and Excellence Standards. It does present an anomaly to have one rule for ADR and another for private mediations. Despite all of this, the issue is not free from doubt.

Indeed, under identical circumstances to the *Petermann* case, the Supreme Court of New York, in *Hausinger v. Hausinger*, 842 N.Y.S. 2d 646 (NY 2007), affirmed an order requiring the mediator to be deposed and expressly declined to adopt the mediator privilege in the UMA. *Practice Pointer.* In private mediations, the mediator should include in the agreement that the mediation is subject to the provisions of the Excellence Standards, which may incorporate the mediator's privilege into the process.

Confidentiality Between Parties

So far we have seen that what is said to a mediator or his invitees is protected from discovery and inadmissible in evidence by Rule and the Court and Excellence Standards. But there is no prohibition preventing a party or his invitees from disclosing mediation statements or conduct by any party or his invitees. Historically, communications in the presence of a third party or which are contemplated to be disclosed to a third party are not privileged (admissions to spouse in the presence of a third party are not confidential, *Mulligan v. State*, 6 Md. App. 600 (1969); and there is no attorney-client privilege if a statement is made in contemplation that a third party will learn of it. *Mathews v. State*, 89 Md. App. 488 (1991).

However, in the context of a civil action, Rule 17-109(b) provides that "subject to the provisions of sections

(c) and (d) of this rule, (1) the parties may enter into a written agreement to maintain the confidentiality of all mediation communications and to require any person present or otherwise participating in the mediation at the request of a party to maintain the confidentiality of mediation communications." This Rule should have the force and effect of law, *Isen v. Phoenix Assurance Co.*, 259 Md. 564 (1970); and go a long way to reduce questions concerning the enforceability of a non-disclosure agreement and create confidentiality when a third party such as the attorney for the other side or the mediator is present. But there is no Maryland case expressly holding that a confidentiality agreement for a non-judicial mediation will be enforced.

A mediation confidentiality agreement surely is a form of settlement agreement, and the public policy of encouraging settlements is so strong that a confidentiality agreement should be enforceable and immune from most attacks. *Long. v. State*, 371 Md. 72 (2002).In general, non-disclosure agreements are not against public policy. *General Motors Corporation v. Lahocki*, 286 Md. 714 (1980). Indeed, in the family law field, "a husband and wife may make a valid and enforceable settlement of alimony, support, property rights or personal rights" which are presumptively valid and enforceable under Family Law Article, Section 8-101-(b). *Jackson v. Jackson*, 14 Md. App. 263 (1972).

But the courts have been reluctant to enforce agreements which they believe are unfair to a party or to a third party or are inimical to the interests of the state. For example in *Peddicord et al. v. Franklin*, 270 Md. 164 (1973), the Court of Appeals stated that "[a]n equity court may not by stipulation be deprived of its power to give equitable relief". And Mary Carter agreements which require non-disclosure of settlement terms between some but not all parties were found to be unenforceable because they were "inimical to true adversary process." *General Motors Corporation v. Lahocki, supra.* One can only speculate whether a court would enforce a non-disclosure agreement if it concluded that the rights or interests of a minor child might be harmed by silence.

It is possible to enhance the chances that a party will honor a non-disclosure agreement by including a liquidated damage provision which will impose substantial damages for a breach. However, the courts may not enforce such a provision if the likelihood of substantial damage is not real. *Williard Packaging Co v. Javier*, 169 Md. App.109 (2006). This could be argued if the harm to be protected is to prevent embarrassment, disgrace or obloquy from one's friends, neighbors and business associates. But even if unenforceable, this type of provision has a strong in terrorem effect. In any event, in order to obtain any provision in a mediation agreement, it must be recalled that mediation is a voluntary process and the agreement of all parties is essential. Indeed, in the final analysis, even the Rules recognize that a party may not be required to participate in mediation. Rule 17-103.

Conclusion

Confidentiality is clearly vital to the success of mediation; it surely facilitates the atmosphere needed for an open dialogue which is so essential to parties achieving self-determination. It should be obvious that attorneys and mediators must be familiar with this rubric of confidentiality rules in order to protect the interest of those who participate in mediation. Indeed, it would appear that an attorney requires expertise and a thorough working knowledge of these rules in order to be "competent" under Maryland Lawyers' Rules Rule 1.1, and the mediator should be equally well versed in order to comply with his or her duty to be competent and provide a "quality process" under the Court and Excellence Standards.

By Stephen E. Moss

Mr. Moss is of counsel to the Chevy Chase law firm Delaney McKinney.

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