Click here to return to the Table of Contents

MEDIATION: JUST HOW CONFIDENTIAL IS IT?
An Overview of Reported Decisions

J. Rudy Martin
Myrissa Smith
Jackson Kelly PLLC
Charleston, West Virginia

Introduction

The importance of confidentiality during mediation is recognized by all state jurisdictions as well as by federal jurisdictions. Generally, communications made during a mediation are considered confidential and protected from discovery. Some jurisdictions, however, carve out exceptions to this highly confidential structure. These exceptions create a potential framework of doubt for mediation participants who may hesitate to reveal certain information during the mediation process for fear of later repercussions. Many jurisdictions consider confidential mediation communications as privileged, providing the utmost protection from discovery, similar to an attorney-client privilege. Others view the communications as settlement negotiations protected by the rules of evidence and admissible in later proceedings under circumstances that outweigh the importance of confidentiality. Where courts permit an exception or apply a lower degree of protection, they potentially impair the effectiveness of a valuable process based on confidentiality and candor of the involved parties.

Only three decisions discussing mediation confidentiality which affect the state of West Virginia have been reported. One case has been decided by the West Virginia Supreme Court of Appeals, one by the United States District Court for the Southern District of West Virginia, and the third by the Fourth Circuit Court of Appeals.[1] Because mediation

[1]These three cases will be more fully discussed herein.

confidentiality is an evolving area of law, this article will review reported decisions from other jurisdictions for insight on how West Virginia courts could potentially construe various issues concerning confidentiality that may arise during or after the mediation process.

Section I addresses the confidentiality statutes and rules generally. The case law reviewed and cited in this section represents the general view of most jurisdictions concerning mediation confidentiality without distinguishing between the jurisdictions. Section II discusses distinctions in the way confidentiality statutes and rules are enforced based on whether jurisdictions consider mediation communications confidential on the basis of privilege or because they are considered to be settlement negotiations.[2] Section III highlights the jurisdictions that recognize exceptions to the general rule that confidential mediation communications are not discoverable or admissible in subsequent proceedings. Section IV notes the implications of permitting exceptions to mediation confidentiality.

Section I: Mediation Confidentiality Generally

The legislative intent behind permitting dispute resolution through the mediation process is to provide an alternative forum to the traditional judicial setting. *New York v. Snyder*, 129 Misc. 2d 137, 138 (N.Y. 1985). The success of such an endeavor depends on encouraging parties to take advantage of the availability of alternative dispute resolution methods. *Id.* A key ingredient to promoting the mediation process as an alternative to dispute resolution is the promise of mediation confidentiality. *In re Anonymous*, 283 F.3d, 627, 636 (4th Cir. 2002). Mediation confidentiality is fundamental to the viability of the mediation process because it ensures full, frank, and open participation

[2]Some jurisdictions do not categorize mediation communications as privileged or settlement negotiations.

by the parties. *Id.* This ability to discuss matters in an uninhibited fashion increases the possibility of a satisfactory resolution or simplification of the issues in dispute. *Willis v. McGraw,* 177 F.R.D. 632, 633(S.D. W. Va. 1998); *Schumacker v. Brent,* 2001 Ohio App. Lexis 4498, *4 (Ohio Ct. App. 2001). Without mediation confidentiality, parties will conduct themselves in a "cautious, tight-lipped, non-commital manner more suitable to poker players in a high-stakes game than to adversaries attempting to arrive at the just resolution of a civil dispute."[3] Mediation confidentiality not only encourages candor among the involved parties, it also prevents the process from being used as a discovery tool for attorneys. *Id.*

The majority of mediation confidentiality statutes and rules generally state that mediators and participants in a mediation may not testify as to mediation communications or that communications made pursuant to the mediation process are confidential. The West Virginia Trial Court Rule 25.12 provides an example of such a rule, stressing the mediator's role in maintaining confidentiality. The rule reads in pertinent part:

> A mediator shall maintain and preserve the confidentiality of all mediation proceedings and records. A mediator shall keep confidential from opposing parties information obtained in an individual session unless the party to that session or the party's counsel authorizes disclosure. *A mediator may not be subpoenaed or called to testify or otherwise be subject to process requiring disclosure of confidential information in any proceeding relating to or arising out of the dispute mediated.*

[3] *Team Design v. Gottlieb,* 104 S.W.3d 512, 520 (Tenn. Ct. App. 2002); *Willis,* 177 F.R.D. at 633; *Doe v. State of Nebraska,* 971 F.Supp. 1305, 1307 (D. Neb. 1997); *Foxgate Homeowners' Assoc, Inc. v. Bramalea California Inc.,* 108 Cal. Rptr. 2d 642 (Cal. 2001); *Wilmington Hospitality LLC, v. New Castle County,* 788 A.2d 536, 542 (Del. Ch. 2001).

(emphasis added).[4] To maintain the effectiveness of mediation and the appearance of impartiality, a mediator should not be compelled to testify or to divulge records related to the mediation in any subsequent proceeding or judicial forum. *Thomsen v. Aqua Massage International Inc.*, 721 A.2d 137, 141 (Conn. App. Ct. 1998); *Isaacson v. Isaacson,* 792 A.2d 525 (N.J. Super. Ct. 2002). Additionally, parties should not rely on or introduce as evidence any view expressed with respect to possible settlement, any admission, proposal of the mediator, or any indicated willingness to accept a mediator's proposal in a later court proceeding. *Smith v. Clayton,* 154 F.R.D. 661, 668 (N.D. Tex. 1994).

In addition to expressing the importance of mediators and parties keeping information confidential, other jurisdictions further state that confidential communications are not admissible as evidence in any form by any person present in the mediation. For example, Fourth Circuit Rule 33 provides that information disclosed during a mediation shall be kept confidential by all participants *and attendants* at the mediation conference, prohibiting disclosure of confidential information to judges deciding appeal or to any other person outside the mediation process. *In re Anonymous,* 283 F.3d at 634 (emphasis added). [5]

Mediation Communication - Definition and Scope

Although statutes and court rules vary, jurisdictions similarly define a mediation

---

[4]Most state mediation confidentiality statutes prohibit the use of mediation communications and related testimony instead of expressly stating that a mediator must preserve confidences. *See* N.Y. Jud. Law § 849-b(6); Indiana ADR Rule 2.11; Tex. Civ. Prac. & Rem. Code Ann. § 154.073(a); 42 Pa. Cons. Stat. Ann. § 5949(c); Utah Prof. Conduct Rule 1.12; Ohio Rev. Code Ann. § 2317.023; Neb. Rev. Stat. § 25-2914; Cal. Code. § 1119; Or. Rev. Stat. § 36.222.

[5] *See also In re Reich*, 32 P. 3d at 907 (Ore. Ct. App. 2001)(holding that confidential communications may not be revealed by the mediator nor by any party present during the mediation in any subsequent adjudicatory proceeding); *See also Eisendrath v. Superior Court of Los Angeles County,* 134 Cal. Rptr. 2d 716 (Cal. Ct. App. 2003).

communication as "any communication relating to the subject matter of the resolution made during the resolution process by any participant, mediator, or any other person present at the dispute resolution" including all work product or case files of a mediator. *New York,* 129 Misc.2d at 138; NY Judiciary Law § 849-b(6);*U.S. Fidelity & Guaranty Co. v. Dick Corp.,* 215 F.R.D. 503, 504 (W.D. Pa 2003). This includes written material prepared for the purpose of, in the course of, or pursuant to a mediation session. *Id.*

Ordinarily, mediation is considered to continue after the mediation conference ends, until the dispute has been either dismissed or removed from the mediator. *Id.* As a result, subsequent communications made to the mediator or to a party in connection with the mediation in relation to the controversy being mediated are also protected by confidentiality rules. *Wilmington Hospitality LLC,* 788 A.2d at 542; *Bidwell v. Bidwell,* 21 P.3d 161, 163 (Ore. Ct. App. 2001); *Eisendrath,* 134 Cal. Rptr. 2d 716; *In re Anonymous,* 283 F.3d at 635. These subsequent conversations receive protection even if conducted outside the mediator's presence.[6] *U.S. Fidelity & Guaranty Co.,* 215 F. R. D. at 504. The mere fact that discussions take place subsequently on the same subject, however, does not mean that all related documents and communications are confidential. *Id.* To receive confidential protection, a subsequent discussion must occur or document must be prepared in furtherance of the mediation, which includes communications that further define a settlement, continue a negotiation process, or similar communications that would likely take place during a

[6]Conversations subsequent always receive confidentiality protection, however, in some jurisdictions, the protection is not the same as those communications conducted in the mediator's presence. For example, while Pennsylvania protects information related to the mediation communicated outside the mediator's presence, it finds these communications inadmissible as part of a settlement negotiation and finds those in the mediator's presence inadmissible as privileged information. *U.S. Fidelity & Guaranty Co.,* 215 F.R.D. at 505. This distinction will be addressed in section II.

mediation session. *Id.* at 505.[7]

Additionally, materials created prior to mediation but in preparation of the mediation session are confidential and inadmissible. *Bidwell v. Bidwell*, 21 P.3d 161, 163 (Ore. App. 2001)(holding that letters exploring settlement sent before mediation began but after referral of the case to mediation were protected); *R.R. Donnelley & Sons Co. v. N. Texas Steel Co. Inc.,* 752 N.E.2d 112, 128 (Ind. App. 2001)(finding that a videotape depicting weld strength tests created for a mediation were inadmissible). However, the factual matter of such prepared material may be admissible at trial in the form of pure evidence such as photographs, data, and witness testimony. *R.R. Donnelley & Sons Co.*, 752 N.E.2d at 128.

Section II: Confidential Communications: Privileges versus Settlement Negotiations

Often the extent of protection provided to mediation communications depends on whether a jurisdiction considers the mediation communications protected by a privilege or governed by the rules of evidence that pertain to settlement negotiations. Some rules or statutes, including West Virginia Trial Court Rule 25.12, state that the communications are to be treated as settlement negotiations. Others, including the Fourth Circuit Rule 33, state that mediation communications are privileged. This distinction determines the level of protection accorded to mediation communications. A mediation afforded the protection of a settlement negotiation, is generally governed by the rules of evidence which protect settlement communications as confidential but allow the admission of evidence related to mediation communications in certain circumstances. When mediation communications are

[7] *See also Wilmington Hospitality LLC,* 788 A.2d at 542 (holding that letters sent by parties' counsel in connection with the mediation reflecting the parties' efforts to reach a mediated settlement were considered in furtherance of the mediation).

privileged, attempts to discover or use the material in a later proceeding will be more strictly prohibited, and governed by protective rules similar to those afforded to relationships of an attorney and client, physician and patient, or psychotherapist and patient. Considering mediation communications privileged provides the most protection and better meets the goal of encouraging full and frank participation in mediation sessions. Also, the current trend in the federal courts is to consider mediation communications privileged.

Privileges

Many jurisdictions consider the communications made during a mediation privileged and, therefore, inadmissible for discovery purposes or in future proceedings. [8] "Privileges are based upon the idea that certain societal values are more important than the search for truth." *Smith,* 154 F.R.D. at 688. Courts that follow a blanket mediation privilege often prohibit the disclosure of any mediation communication for any reason absent the consent of all involved parties. Typically, unless the information would lead to criminal acts, privileged information remains confidential independent of extenuating circumstances. *See* Model Rule of Professional Conduct 1.6. United States District Court of West Virginia local rule 16.6(f) provides an example of a rule finding mediation communications privileged and reads as follows:

> [A]ll proceedings of a mediation conference, including any statement made by any party, attorney or other participant, shall be *privileged* and not reported, recorded, placed in evidence, made known to the assigned judicial officer or jury, or construed for any purpose as an admission against interest. No party shall

[8] *Willis*, 177 F.R.D. at 633*; In re RDM Sports Group Inc.,* 277 B.R. 415 (Bankr. ND. Ga. 2002)*; Genoveva Rojas v. L.A. Co. Superior Ct.,* 126 Cal. Rptr. 2d 97, 99 (Cal. Ct. App. 2002);*U.S. Fidelity & Guaranty Co.,* 215 F.R.D. at 504; *Folb v. Motion Picture Industry Pension and Health Plans,* 16 F.Supp.2d 1164 (C.D. Calif. 1998), *aff'd*, 216 F.3d 1082 (9th Cir.); *Sheldone v. PA Turnpike Comm'n,* 104 F.Supp.2d 511 (W.D. Pa. 2000).

> be bound by anything done or said at the mediation conference unless a settlement is reached, in which event the agreement upon a settlement shall be reduced to writing and shall be signed by all parties to the agreement.

(emphasis added); *see also Willis*, 177 F.R.D. at 633(holding that to assure the purposes of Rule 16.6, the court will not involve itself under any circumstances in sorting out disagreements emanating from the mediation process). In *Willis,* the United States District Court for the Southern District of West Virginia, went on to state that this rule, creating a privilege, was crafted to aid in the amicable resolution of civil actions in lieu of going to trial and to reassure parties they would suffer no prejudice as a result of full, frank exchanges of communication during the mediation process. *Willis*, 177 F.R.D. at 633. Providing a guarantee of mediation confidentiality, based on privilege, is the most effective way to encourage discussion of matters in an uninhibited fashion. *Id.* The *Willis* court considered privilege status to be essential to the proper functioning of the mediation process thereby enhancing the possibility of settlement, the simplification of issues, and the resolution of other matters between the parties. *See id.*

The United States Court for the Central District of California in *Folb* applied the analysis used by the United States Supreme Court in *Jaffee v. Redmond,* 518 U.S. 1 (1996), related to a medical privilege, in its analysis of the privileged nature of a mediation communication. *Folb,* 16 F.Supp.2d at 1170 (citing *Jaffee v. Redmond,* 518 U.S. 1 (1996) where the Supreme Court discussed factors to be used in deciding to allow a psychotherapist patient privilege). The *Folb* court held that a mediation privilege applied by analyzing the following four factors:

> (1) whether the asserted privilege is 'rooted in the imperative need for confidence and trust'; (2) whether the privilege would serve public ends; (3) whether the evidentiary detriment caused

> by the exercise of the privilege is modest; and (4) whether the denial of the federal privilege would frustrate a parallel privilege adopted by the states.

Folb, 16 F.Supp. 2d at 1171(citing *Jaffee*, 518 U.S. at 9-13).

In applying these factors, the *Folb* court first decided that mediation confidentiality exists to avoid the discovery of information divulged during and related to the mediation session. *Id.* at 1174. It also exists because the promise of confidentiality encourages the disclosure of sensitive information and participation in the mediation process. *Id.* Second, a "blanket" mediation privilege would serve important public ends by: (1) encouraging prompt resolution of disputes; (2) reducing the costs associated with litigation; and (3) promoting judicial efficiency by minimizing court dockets. *Id.* at 1176. Third, the evidentiary detriment is modest considering most of the information would not be in existence absent the mediation. *Id.* at 1178. Finally, a consistent body of state law has enacted some form of mediation protection. *Id.* at 1179; *see also Sheldone*,104 F.Supp.2d 511(United States District Court for the Western District of Pennsylvania following a similar reasoning). The mediator is not merely an impartial third party, but also must receive and preserve confidences similar to an attorney. *See id; Poly Software Int'l Inc. v. Yu-Su,* 880 F.Supp. 1487 (C.D. Utah 1995). Accordingly, the success of mediation depends on the willingness of parties to disclose intentions, desires, strengths and weaknesses of their case. *Poly Software Int'l Inc.* 880 F.Supp. at 1487.

Following the federal court trend in finding mediation communications privileged, more recently, the Bankruptcy Court in the Northern District of Georgia also applied the reasoning used in *Folb. In re RDM Sports Group Inc.,* 277 B.R. 415 at 431. The United States District Court for the District of Pennsylvania has followed suit and, like the

Western District of the state, has found a federal common law privilege for mediation communications. Shannon P. Duffy, *Mediation Privilege Recognized, Applied in Eastern District Suit*, The Legal Intelligencer (November 17, 2003) (citing unpublished opinion *Chester County Hospital v. Independence Blue Cross* (E.D. Pa. 2003)). It is important to note that many of these jurisdictions also find that the mediation privilege should only protect "communications made to the mediator, between the parties during the mediation, or in preparation for the mediation," and communications made outside the mediator's presence should be protected as a part of a settlement negotiation. *In re RDM Sports Group Inc.,* 277 B.R. 415 at 431; *U. S. Fidelity & Guaranty Co.,* 215 F.R.D. at 504.

Settlement Negotiations

Pursuant to Federal Rule of Evidence 408 and similar state rules, evidence regarding a compromise or attempts to compromise are inadmissible to prove liability of a claim or invalidity of a claim. This same evidence, however, is admissible for other purposes such as proving bias or prejudice of a witness, negating undue delay, or proving an effort to obstruct an investigation or prosecution. Fed. R. Evid. 408. When treated as a settlement negotiation, evidence regarding confidential mediation communications is subject to similar exceptions. *See* W. Va. Trial Ct. Rule 25.12; *Riner v. Newbraugh,* 563 S.E.2d 802, 808 (W. Va. 2002).[9] For example, West Virginia Trial Court Rule 25.12 specifically states that "[m]ediation shall be regarded as confidential settlement negotiations subject to W. Va. R. Evid. 408." Similarly, the Fifth Circuit Court of Appeals in *In re Grand Jury* held that if

[9] *Vernon v. Acton*, 732 N.E.2d 805, 808 (Ind. 2000); *In re Grand Jury Proceedings,* 148 F.3d 487, 489 (5th Cir. 1998); *Smith,* 154 F.R.D. 661at 668 (Texas); *Doe,* 971 F.Supp at 1308 (Nebraska); *Derolph v. State of Ohio*, 758 N.E.2d 1113, 1119 (Ohio 2001); *R.R. Donnelley & Sons Co.,* 752 N.E.2d 112 (Indiana).

confidentiality provisions conflict with other legal requirements, such as certain criminal investigations, the court may consider the issue *in camera* to determine whether the confidential communications or materials are subject to disclosure. *In re Grand Jury Proceedings,* 148 F.3d at 489 (without relying on Rule 408 but expressly refusing to adopt a mediation confidentiality privilege); *see also Smith,* 154 F.R.D. at 668 (permitting *in camera* review for otherwise confidential evidence related to sanctions).

Still other courts use settlement negotiation language in the statute but, unlike Rule 408, find that evidence related to mediation communications is not admissible for any other purposes. *Doe,* 971 F.Supp. at 1308. For example, the Nebraska statute states that although mediation sessions constitute "settlement negotiations," they shall be deemed confidential and inadmissible in evidence for any reason in the trial of the case. *Id.* at 1307; Neb. Rev. Stat. § 25-2914.

Section III: Exceptions to the Confidentiality Rule

The admission of confidential information for other purposes consistent with Federal Rule of Evidence 408 is just one exception to the inadmissibility of confidential mediation communications. Other exceptions include allowing testimony or evidence: a)when not allowing evidence would create a "manifest injustice;" b) when a settlement agreement has been reached; (c) when there is a proceeding for sanctions or bad faith as a result of the mediation; and d) when parties consent to disclosure or there exists evidence presented in mediation that is otherwise discoverable.[10]

Manifest Injustice

[10]The exceptions set forth in Section III are not all inclusive but represent the most common issues discussed in reported decisions.

The United States Court of Appeals for the Fourth Circuit recognized an exception to the requirement of confidentiality if such non-disclosure would result in "manifest unjustice". *In re Anonymous,* 238 F.3d at 637. The court finds that the public interest in protecting the confidentiality of the settlement process must be balanced with countervailing interests such as the right to evidence. *Id.* Applying manifest injustice requires the party seeking disclosure to "demonstrate that the harm caused by non-disclosure will be manifestly greater than the harm caused by disclosure." *Id.* The court in *Anonymous* applied this balancing test to find that it would be manifestly unjust to withhold communications made during mediation from admissibility at an arbitration proceeding involving an attorney client expense dispute because without the information, the dispute could not be resolved. *Id.* Allowing disclosure of the information in this case was not considered unjust, in part, because the parties involved previously agreed to a limited waiver of confidentiality regarding these communications. *Id.*

Ohio has incorporated the exception for manifest injustice in its mediation confidentiality statute.[11] The statute reads in pertinent part:

> A mediation communication is confidential. . . . [T]his section does not apply in the following circumstances: . . . (4) To the disclosure of a mediation communication if a court, after a hearing, determines that the disclosure does not circumvent Evidence Rule 408, that the disclosure is necessary in the particular case *to prevent a manifest injustice*, and that the necessity for disclosure is of sufficient magnitude to outweigh the importance of protecting the general requirement of confidentiality in mediation proceedings.

[11]No other state jurisdiction recognizes a manifest injustice exception. The Fourth Circuit in *In re Anonymous*, is the only federal decision recognizing the exception.

Ohio Rev. Code §2317.023 (emphasis added); *Derolph*, 758 N.E.2d at 1119 (referring a case to mediation and stating the benefits of mediation generally)*; Schumacker,* 2001 Ohio App. Lexis at *4.

In Ohio, manifest injustice is created only where it would be an open and unjust act by the court to not allow the disclosure of confidential information. *Id.* Thus far, the Ohio courts have not held that the necessity for disclosure of a mediation communication outweighs the confidentiality requirement nor that it would be manifestly unjust to exclude confidential information. For example, an Ohio appellate court in *Schumacker*, held that the trial court erred when it allowed testimony concerning mediation discussions on an issue regarding prejudgment interest. *Schumacker,* 2001 Ohio App. Lexis at *4. The court found that this was clearly a violation of the Ohio mediation confidentiality statute and that no manifest injustice would result by precluding this testimony. *Id* at *5. Also, where plaintiffs sought disclosure of a form completed by the mediator containing information related to the nature of the dispute on the basis that disclosure may avoid the possibility of future litigation, the Ohio Supreme Court held that disclosure of the confidential form was not necessary to prevent a manifest injustice. *State Ex Rel. Schneider v. Kreiner,* 699 N.E.2d 83, 88 (Ohio 1998). Attempting to avoid the possibility of litigation by obtaining confidential mediation communications did not comport with the meaning of manifest injustice nor did it create a necessity for disclosure sufficient to outweigh the confidentiality requirement. *Id.*

Settlement Agreements

Once the parties in a mediation have signed a settlement agreement, the reasons for maintaining confidentiality are not as compelling. *Feldman v. Kritch,* 824 So. 2d 274, 277 (Fla. App. 2002). Accordingly, in many jurisdictions, including West Virginia, a

mediator can testify as to whether a settlement agreement was reached by the parties during mediation. *Riner,* 563 S.E.2d at 808*; Feldman*, 824 So.2d at 277; *Few,* 154 F.R.D.661, 668 (N.C. App. 1999). This exception often does not extend to the revelation of any confidential communication, but exists only to support a finding that a settlement agreement was reached. *Riner,* 563 S.E.2d at 809 (mediator's testimony admissible where the parties reached an agreement reduced to writing without obtaining the signature of all parties). In support of this exception, the West Virginia Supreme Court of Appeals cited the court in *Few* which held that a mediator can be compelled to testify or produce evidence to determine whether the parties reached a settlement agreement and may provide further evidence regarding the terms of the agreement. *Id.; see Few,* 511 S.E.2d at 297(deciding whether terms to a revised agreement represented the intent of the parties). However, unlike *Few,* the West Virginia court refused to admit further testimony about the agreement terms. *Riner,* 563 S.E.2d at 809.

Some courts have admitted evidence regarding confidential mediation communications to clarify the terms of a settlement agreement where there is no dispute as to whether a settlement agreement was reached. For example, some jurisdictions permit evidence related to confidential communications where there is a mutual mistake in a mediated settlement agreement. *Feldman,* 824 So.2d 274. The Florida Court of Appeals in *Feldman,* held that where a draftsman does not fulfill the intentions of the parties in an agreement, equity will reform the instrument. *Id.* at 276. The *Feldman* court further held that in such a situation, parties in a mediation, including the mediator, may testify regarding the settlement negotiations. *Id.* Other jurisdictions find that where a settlement agreement is ambiguous, the testimony regarding the position taken by parties to a mediation may be

considered despite the court's rule that mediation communications are confidential. *Cain v. Saunders,* 813 So. 2d 891, 893 (Al. Civ. App. 2001). For example, the court in *Cain* held that settlement agreements are as binding on the parties as any other contract and in reviewing such agreements, courts will consider parol evidence for fraud, accident, mistake or ambiguity as they would in a contractual dispute. *Id.* (reasoning that once a settlement agreement is reached, the policy reasons behind confidential mediation no longer apply). At least one jurisdiction, Oregon, permits the disclosure of confidential mediation communications to any extent necessary in any proceeding to enforce, modify, or set aside a settlement agreement. *In re Reich*, 32 P. 3d at 904.

In many jurisdictions, the settlement agreement must be in writing before otherwise confidential evidence will be admitted. *Vernon,* 732 N.E.2d at 810; *see Willis*, 177 F.R.D. at 633; *see also Feldman,* 824 So. 2d at 277; *Wilmington Hospitality LLC,* 788 A.2d at 542. The Indiana Court in *Vernon* held that where there is no written and signed settlement agreement, it is impossible to litigate over the terms of any purported agreement without substantially breaching the confidentiality of mediation. *Vernon,* 732 N.E.2d at 810 (relying on the West Virginia Supreme Court of Appeals' holding in *Willis* in adopting a bright-line approach refusing to breach the confidentiality of the mediation process); *Wilmington Hospitality LLC,* 788 A.2d at 542 (also citing *Willis*). Pursuant to this holding, to be enforceable, a settlement agreement reached in mediation must be in writing and signed by both parties, whereas, generally, a settlement agreement need not be in writing to be enforced. *Id.* at 809. Otherwise, in Indiana, until reduced to writing and signed, an agreement reached in mediation will be treated as a settlement negotiation protected by Rule 408. *Id.*

Sanctions or Bad Faith

Some courts have held that a mediator may be compelled to testify or produce evidence in proceedings for sanctions related to the mediation. *Few,* 511 S.E.2d at 297*; Smith,* 154 F.R.D. at 668; *Doe,* 971 F.Supp.2d at 1308 (holding that the admission or consideration of evidence related to the parties' settlement proposals is not precluded in a proceeding concerning a motion for sanctions). For example, in Texas, when mediation confidentiality requirements conflict with other legal requirements for disclosure concerning sanctions, the issue may be presented *in camera* for the court to decide whether disclosure is necessary. *Smith,* 154 F.R.D.at 668.

At least one court has expressly ruled against any bad faith or sanction related exceptions to the general rule that a mediator shall not testify regarding mediation communications. *Foxgate Homeowners' Assoc, Inc.,* 108 Cal. Rptr. 2d 642. In *Foxgate,* where a California appellate court ruled that a mediator may reveal confidential mediation communications necessary to place sanctionable conduct in context the Supreme Court of California reversed, holding that the mediator could not testify to the bad faith tactics used during the mediation. *Id.* at 651.[12] Expressing the importance of encouraging mediation and ensuring confidentiality, the California Supreme Court further held that there are no exceptions to mediation confidentiality and any attempts to disclose such information are barred. *Id.* at 653. The only exception to confidentiality recognized by this court is the

[12] Sanctions were sought against a party to the mediation who purposely delayed the mediation process causing the remainder of the mediation sessions to be canceled.

statutory authority of the mediator to report criminal conduct or a waiver by consent of all the parties. [13] *Id.*

Other Exceptions

Many jurisdictions allow a waiver of mediation confidentiality where there is an express consent, in writing, signed by all persons present at the mediation including non-parties and the mediator; no implied waiver will be allowed.[14] A minority of jurisdictions do not even permit express wavier of mediation confidentiality. *Vernon*, 732 N.E.2d 805; *New York,* 129 Misc. 2d at 138 (reasoning that rules of exclusion were drafted to prevent evidence that may unfairly prejudice one of the parties or misdirect the jury's attention).[15]

Most courts also recognize that only confidential mediation communications are protected and that otherwise discoverable materials cannot be submitted in mediation and become confidential. *Bidwell*, 21 P.3d at 163; *Doe*, 971 F.Supp at 1308; *In re RDM Sports Group Inc.,* 277 B.R. 415; *Smith,* 154 F.R.D.at 668. For example, mediation confidentiality generally does not apply to pure evidence such as photographs, data, and witness statements, only to the negotiations, communications, admissions, and discussions designed to reach a resolution of the dispute. *Genoveva Rojas,* 126 Cal. Rptr. 2d at 99 (defining evidence otherwise admissible as pure or factual based evidence).

---

[13]California does provide exceptions where the parties have consented in writing, a settlement agreement has been reached, for disclosure of the mediator's identity, and for categories of pure evidence. *Id;Eisendrath, 134 Cal. Rptr. 2d 716.*

[14]*Eisendrath,* 134 Cal. Rptr. 2d 716; *Poly Software Int'l Inc.* at 1487; *Doe,* 971 F.Supp at 1308; *Derolph*, 758 N.E.2d at1119; *Willis,* 177 F.R.D. at 633; *Foxgate Homeowners' Assoc, Inc.,* 108 Cal. Rptr. 2d 642.

[15]As discussed above, the court in *Anonymous* recognized wavier as only one factor in deciding whether to allow admission of otherwise confidential communications.

Section IV: Implications

Mediation confidentiality is necessary to encourage full frank discussions, facilitate open amicable negotiation, and ensure the success of the mediation process. While all jurisdictions have a rule or statute addressing mediation confidentiality, there are several jurisdictions that recognize exceptions. These exceptions reinforce a lack of candor among the parties, a behavior which rules protecting confidentiality were created to avoid. Permitting exceptions to mediation confidentiality creates the apprehension that information will later become discoverable or admissible in a future proceeding. The mediation process cannot properly function if parties withhold information for fear that they will later be prejudiced by their mediation communications.

Jurisdictions that treat mediation communications as settlement negotiations or provide a manifest injustice exception pose the highest risk of disclosure of otherwise confidential information. As noted above, settlement negotiation communications receive less protection from later disclosure. With regard to the manifest injustice exception, the balancing framework problematically leaves decisions regarding the admissibility of confidential communications open for judicial interpretation.

A more permissive use of confidential mediation communications is especially troubling in West Virginia where the state court recognizes mediation as a settlement negotiation, permitting use of confidential information for several purposes. Additionally, although the District Court for the Southern District of West Virginia has recognized the communications as privileged and strictly enforce this rule, the Fourth Circuit Court of Appeals more recently adopted the "manifest injustice" exception, creating concern. While the current use of this exception is extremely limited, the fact that it exists creates the

possibility that a court will open the door to a broader interpretation of which confidential communications it would be manifestly unjust to withhold. Hopefully, as this area evolves, West Virginia courts will follow those jurisdictions that recognize the value of mediation confidentiality and strongly support application of the confidentiality rules, refusing to adopt exceptions when attorneys argue that such exceptions should apply.

The courts vary on the extent of disclosure allowed for mediation communications involving settlement agreements. It is understandable that a written signed settlement agreement created during mediation becomes an enforceable contractual obligation. However, permitting the disclosure of confidential communications to clarify ambiguous terms and mistakes or to enforce a settlement agreement is problematic. This exception also can chill open discussions and candor among the parties who may be later prejudiced by what they thought were confidential communications. It is encouraging, however, that the West Virginia Supreme Court of Appeals in *Riner* only permitted a mediator to state whether a settlement agreement was reached in mediation and prohibited disclosure of any substantive mediation communications.

An exception for sanctions or bad faith proceedings also creates cause for concern. Although the focus of the disclosure is to punish a specific behavior and not to get otherwise confidential information on the record, such an exception can also erode the confidential off the record status of mediation. At least one commentator has articulated the potential problems posed by an absolute bar to the discovery of mediation communications in a sanction or bad faith context as defined by the California court in *Foxgate*. *See* Jeff Kichaven, *Insurance Bad Faith And Mediation Confidentiality: Critical Policies on a Collision Course,* http://www.irmi.com (March 2004). For instance, in a bad faith claim

against an insurance company where the disputed conduct took place during a mediation, confidential mediation communications may be the only evidence available to support the notion that a bad faith violation occurred. *Id.* Similarly, mediation communications may be necessary to prosecute an attorney accused of malpractice during the mediation or to assert a malpractice claim against the mediator himself. *Id.* The author states that because there is an exception to the attorney-client privilege where an attorney is accused of malpractice, providing a similar exception for proceedings involving the situations set forth above would not be inconsistent with the general position that mediation communications are privileged. *Id.* Arguably, allowing this exception also prevents parties from practicing bad faith or sanctionable conduct in a mediation, knowing that such conduct will not be protected by mediation confidentiality. *See id.* Although it may be possible to draft a rule defining mediation communication to permit certain limited disclosures that focus on sanctionable actions while ultimately protecting confidential information, any permissible use of otherwise confidential information potentially creates a danger to the mediation process. Therefore, where certain exceptions seem reasonable, it is necessary to remember that the importance of confidentiality to the mediation process should outweigh the perceived need to disclose otherwise confidential mediation communications.

Conclusion

The legislative intent underlying statutes and rules regarding confidentiality in mediation will not be achieved unless the parties know that what they disclose in mediation will not be later used to their detriment. *See Foxgate Homeowners' Assoc, Inc.,* 108 Cal. Rptr. 2d 642. Treating mediation communications as privileged information, inadmissible by any person for any reason, best protects the interests of the parties by

encouraging counsel to divulge all pertinent information and helps to ensure the success of the mediation process as an alternative to the judicial forum.