

Mediation Confidentiality
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by

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Kent L. Brown, Comment, Confidentiality in Mediation: Status and Implications, 1991 J. Disp. Resol. 307 (1991).

Greg Dillard, The Future of Mediation Confidentiality in Texas: Shedding Light on a Murky Situation, 21 Rev. Litig. 137 (2002).

Lawrence Freedman & Michael Prigoff, Confidentiality in Mediation: The Need for Protection, 2 Ohio St. J. on Disp. Resol. 37 (1986).

Kirkpatrick, Should Mediators Have a Confidentiality Privilege?, 9 Mediation Q. 85 (1985).

Kimberlee K. Kovach, Mediation: Principles and Practice (3rd Ed.) 2004 (Chapter 11).

Irene Stanley Said, Comment, The Mediator's Dilemma: The Legal Requirements Exception to Confidentiality Under the Texas ADR Statute, 36 S. Tex. L. Rev. (1995).

Brian D. Shannon, Confidentiality of Texas Mediations: Ruminations on Some Thorny Problems, 32 Tex. Tech L. Rev. 77 (2000).

Edward F. Sherman, Confidentiality in ADR Proceedings: Policy Issues Arising from the Texas Experience, 38 S. Tex. L. Rev. 541 (1997).

Williams v. State, 770 S.W.2d 948 (Tex. App.—Houston [1st Dist.] 1989, no writ hist.). Statement made during mediation suggested one of the participants engaged in theft. He was later convicted of theft. Court held that evidence of theft from mediation, prior to arrest, cannot be considered because such statements are confidential and not subject to disclosure.

Smith v. Smith, 154 F.R.D. 661 (N.D. Tex. 1994). Mediator was subpoenaed to testify in a federal lawsuit concerning allegations of fraud in connection with the mediated settlement of a state court lawsuit. Even though parties waived confidentiality and requested that the mediator testify, court held that mediator could not be compelled to testify pursuant to Texas ADR statute.

Hansen v. Sullivan, 886 S.W.2d 467 (Tex. App.—Houston [1st Dist.] 1994, no writ hist.). Court held that sanctions were inappropriate when a party refused to attend a mediation.

Hur v. City of Mesquite, 893 S.W.2d 227 (Tex. App.—Amarillo 1995, writ denied). Texas ADR statute does not prevent a party from bringing a lawsuit for breach of a mediated settlement agreement. City attorney made representation at mediation that he had authority to settle the case, but at end of mediation, stated that the agreement would have to be approved by city council. City never paid. Plaintiff sued for breach of oral settlement agreement and implied warranty of authority of agent to settle. CoA stated that 154.053(c) doesn't prevent a party from bringing suit for breach of contract arising out of mediation.

Cadle Co. v. Castle, 913 S.W.2d 627 (Tex. App.—Dallas 1995, writ denied). Signatory to settlement agreement attempted to withdraw consent. Court of Appeals ruled that a court could not use the mediated settlement agreement as a judgment in the face of an objection by one of the signatories.

Randle v. Mid Gulf, Inc., No. 14-95-01292-CV (Tex. App.—Houston [14th Dist.] Aug. 8, 1996) (not designated for publication). Party claimed MSA was signed under duress and therefore, void. At mediation, party complained of fatigue and chest pains, mediator said can't leave until a settlement was reached. Court allowed evidence of duress, given that the other side was seeking specific performance of the MSA.

In re: Grand Jury Proceedings, U.S. v. Moczygemba, 148 F.3d 487 (5th Cir. 1998), *cert. denied*, 526 U.S. 104 (1999). Potential evidence of criminal wrongdoing was presented at mediation. That evidence was later presented to a grand jury. Court held that because of the secrecy of grand jury proceedings, the confidentiality of the mediation will not be severely compromised by disclosure of information to a grand jury, unless an indictment is returned. Then, the information may become public, but the interest in mediation confidentiality is outweighed by the public administration of criminal justice.

Allen v. Leal, 27 F. Supp. 2d 945 (S.D. Tex. 1998). Party alleged the mediator forced her and husband to settling the case and had misled them. Court did not enforce mediation confidentiality because allegations of mediator coercion or bullying required court to evaluate the validity of the settlement.

In re Acceptance Ins. Co., 33 S.W.3d 443 (Tex. App.—Fort Worth 2000, orig. proceeding). Trial court conducted hearing to determine if insurance representative had authority, pursuant to court order, to settle for policy limits. Court of appeals held that the trial court erred in allowing inquiry into matters that were confidential under Texas ADR statute, including whether representative had cell phone present and called her supervisor and what they discussed.

In re Daley, 29 S.W.3d 915, 917 (Tex. App.—Beaumont 2000, orig. proceeding). Whether a party attended mediation, or had permission to leave, may be the subject of discovery because attendance does not concern the "subject matter" of the dispute or the "manner in which the participants negotiated."

FDIC v. White, 76 F.Supp.2d 736 (N.D. Tex. 2000). After FDIC obtained trial victory, court referred the case to post-judgment mediation, where it settled. Whites then repudiated the MSA, claiming FDIC threatened criminal prosecution if civil matter wasn't resolved to FDIC's satisfaction. Court held that confidentiality did not preclude challenging the MSA that was obtained by duress.

In re Learjet, Inc., 59 S.W.3d 842, 847 (Tex. App.—Texarkana 2001, no pet.). Videotaped witness statements, played during mediation to present factual information to the opposing parties, were

discoverable because the “mediation activities did not provide a blanket protection for all such material.”

Avary v. Bank of America, 72 S.W.3d 779 (Tex. App.–Dallas 2002, pet. denied). Court allowed discovery relating to a wrongful death claim. After settlement, guardian sued executor for breach of fiduciary duty, fraud, negligence, and conspiracy. Court noted that its holding was limited, but “where a claim is based on a new and independent tort committed in the course of the mediation proceedings, and that tort encompasses a duty to disclose, section 154.073 does not bar discovery of the claim” when the trial judge finds disclosure is warranted.

Alford v. Bryant, 137 S.W.3d 916 (Tex. App.–Dallas 2004, no pet.). A client sued her attorney for professional malpractice related to a mediated settlement agreement. The only issue not settled at mediation (attorneys’ fees) was not resolved in the client’s favor at trial, so she sued her attorney for malpractice—a new and independent cause of action that occurred during mediation—because of the alleged failure of her attorney to disclose the risks and benefits of settlement. Because the attorney and the client disputed whether the risks of not settling were disclosed, the tie-breaker was the mediator, who was present during those conversations. The court of appeals held that the trial court erred in not allowing the mediator to testify. Because the client was seeking relief, the evidence sought was outcome determinative, and there was no other method for the attorney to obtain the needed evidence, the mediator should have been allowed to testify. The court of appeals held that the “offensive use doctrine” applies to the ADR statute.

Rabe v. Dillard’s, Inc., 214 S.W.3d 767 (Tex. App.–Dallas 2007, no pet.). Participant claimed the MSA was entered into because of a threat made by counsel at mediation. Court rejected claim of duress, holding that communications during mediation are privileged.

Knapp v. Wilson N. Jones Mem’l Hosp., 281 S.W.3d 161 (Tex. App.–Dallas 2009, no pet.). An employee sought to discover documents from an arbitration between his employer and his employer’s auditor. The employee claimed that the testimony of the employer at the arbitration may have been inconsistent with later testimony but the inability to discover such evidence prevented him from impeaching witnesses. Holding that § 154.073 does not create a “blanket of confidentiality, nor is it so broad as to bar all evidence regarding everything that occurs at arbitration from being presented to the trial court”, the court allowed materials used as part of an arbitration to be used at a later trial.

In re Empire Pipeline Corp., No. 05-10-01044-CV (Tex. App.–Dallas Sept. 15, 2010). Parties attended mediation and signed MSA. A party later moved to vacate the agreement, alleging invalidity because of duress and fraud. One of the parties sought a deposition with document production, including notes and drafts from the mediation. Court concluded that trial court erred in compelling testimony and discovery relating to “notes or drafts or documents given to the mediator”. There was no new or independent tort, therefore, Avary’s exception was not applicable.

Bethlehem Sch. Dist. v. Zhou, No. 09-03493 (E.D. Pa. July 23, 2010). Parent requested due process hearings and three mediations through district’s Office of Dispute Resolution. At one of the mediations, District alleged Zhou’s intention was to drive up costs for district so that District would agree to pay for her two children to attend private school. Zhou also requested that District pay for translation services for later hearings, even though she never requested them for earlier hearings. Court ruled that the mediation confidentiality privilege (“discussions that occur in mediation shall be confidential and not be used in any subsequent due process hearing or civil proceeding”) was not applicable. Allowing the

confidentiality privilege, the purpose of which is to encourage compromise and resolution, would not foster “public good.” While the confidentiality of mediation is “important”, the statement about driving up the costs of litigation does not “evidence an intent to mediate or resolve the dispute.” Such statements are not inadmissible under the mediation privilege.

Cassell v. Superior Ct., No. S178914 (Cal. Jan. 13, 2011). Post-mediation and signing of MSA, party sued his attorneys for malpractice, breach of fiduciary duty, fraud, and breach of contract, alleging he received bad advice and was coerced into settlement by the attorneys, resulting in a settlement for a lower amount than he told his attorney he would accept and for less than case was worth. California Supreme Court held that private communications between an attorney and client related to mediation remain confidential, even in a lawsuit between the two because the statute says “all communications... by and between participants in the course of a mediation...shall remain confidential”.

Warner v. Calvert, 258 P.3d 1125 (N.M. Ct. App. Feb. 9, 2011). Parties mediated a dispute, determining during the mediation that additional information was needed for settlement evaluation. The parties entered into a contract to hire an expert to perform a valuation for a second settlement conference. The case did not settle. One of the parties filed a motion to appoint the valuation expert as an expert witness and to use her report at trial. Court of Appeals held that the New Mexico Mediation Procedures Act limits the disclosure of mediation communications; it does not impose limitations upon nonparty participants. The valuation expert was a nonparty participant and could be designated as a trial expert. However, the valuation report was a “mediation communication” because it was prepared for the purpose of considering settlement. This report was not an underlying document that was otherwise admissible and cannot be used at trial.

Hand v. Walnut Valley Sailing Club, No. 10-1296-SAC, 2011 U.S. Dist. LEXIS 80465 (U.S. Dist. Kan. July 20, 2011). After mediation, plaintiff emailed members of club providing specific details about the mediation, including settlement offers, what the mediator said, the defendant’s response to offers, and the number of attorneys representing the defendant. Defendant moved to dismiss the lawsuit as a sanction for plaintiff’s disclosure of confidential information. Finding that confidentiality is “paramount to the success of a mediation program because it encourages candor between the participants and prevents them from using mediation as a discovery tool,” and that the breach of confidentiality caused interference with the judicial process, the court dismissed the lawsuit with prejudice.