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Beware of Waiving the Mediation Communications Privilege

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Special to the Legal

At virtually every mediation, the mediator or counsel advise the clients that mediation communications are privileged, so that parties may feel comfortable in offering concessions or otherwise making statements, as disclosure cannot be compelled in any subsequent proceeding.

Recent submissions in the ADR series in *The Legal*, however, have reflected that the mediation privilege often presents unexpected complications. In two recent articles, I pointed out the greater scope of the mediation privilege in Pennsylvania when compared with Pennsylvania's exclusionary rule relating to compromise negotiations. I also indicated, however, that in a professional malpractice case, the privilege may prevent both plaintiff and defendant from presenting evidence of mediation communications that would support their respective positions. (This was contrasted with New Jersey's Uniform Mediation Act (UMA), in which privilege does not bar the introduction of mediation communications introduced to prove or disprove a claim of professional misconduct (N.J.S.A. 2A:23C-6(6)).)

As a follow-up, last month, in Charles F. Forer's article on mediation privilege ("Getting Away With Fraud During the Mediation Process," November 20), hypothetical attorney Bob learned that there is no privilege in Pennsylvania in an action to enforce or set aside a mediated agreement reached as a result of a fraudulent mediation communication.

Following these articles, I heard from attorney Joseph Grimes, who advised of his involvement in New Jersey cases addressing circumstances in which the



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privilege applicable to mediation communications was found to have been waived by the parties. Those cases reflect that inadvertent waiver may occur in circumstances not specifically discussed in the UMA. They further suggest that in Pennsylvania, where the UMA has not been adopted and waiver is not specifically addressed in statutes, the issue may be even murkier.

The most recent case in New Jersey addressing this issue, *Rutigliano v. Rutigliano*, was decided by the Appellate Division of the Superior Court of New Jersey on October 15.

Rutigliano involved a dispute between two brothers in which Vincent Rutigliano sued his brother, James Rutigliano, claiming that James Rutigliano had fraudulently induced their mother to change her will to leave property to James Rutigliano's two children. The court ordered the parties to attend non-binding mediation pursuant to a New Jersey rule. After a six-and-a-half-hour mediation session, attended by the parties and their counsel, the mediator advised the court that a settlement had been reached, and the court docket was marked accordingly.

Approximately seven days after the mediation session, the plaintiff's attorney sent a letter to the defendant's attorney stating that he did not believe there was

a final meeting of the minds at the mediation session. The defense attorney responded by letter that at the conclusion of the mediation, the mediator had brought the parties together in one conference room at which time all of the terms and conditions were fully discussed. After full disclosure, the parties agreed to the terms before the mediator, shook hands and departed. His letter also set forth the terms of the agreement — the first time they were put in writing.

The defendant's motion to enforce the settlement was opposed by the plaintiff on the ground that no agreement had ever been reduced to writing, and that the mediation privilege should preclude any testimony about what occurred during the mediation and, in particular, any discussion with the mediator at the end of the meeting.

In reviewing this motion, the trial judge determined that he would not allow testimony from the attorneys or from the mediator, but would allow the parties, if they wished, to give limited testimony concerning what happened when the settlement was eventually discussed by the parties with the mediator. The court reasoned that such testimony did not violate the privilege provisions of the UMA because those only apply to matters discussed during the actual mediation where the parties advise the mediator of their respective positions and supporting rationales. The court viewed the later discussions in the conference room, where the mediator had brought the parties together, as being conducted subsequent to the completion of the mediation. Accordingly, while the parties could not testify about what was happening while the case was actually being mediated, they could testify concerning what took place when the terms of the settlement were discussed and finalized at the conclusion of the mediation. (I must

admit to some difficulty in determining whether and when a mediation session has ended, but, for purposes of this article, will ignore that issue.)

The plaintiff refused to testify, claiming that to do so would constitute a waiver of his mediation privilege.

The defendant, however, did testify about the conference, stating that the parties had reached an agreement. He further testified that when the mediator asked the parties whether “it was OK for him to report the fact of the settlement to this court,” both parties told him that this “would be fine” and that neither the parties nor the attorneys who were present objected to this disclosure.

The trial judge’s findings that the testimony of the defendant was credible and that the plaintiff had agreed to the settlement were affirmed by the appellate court.

In affirming, the appellate court relied on *Willingboro Mall v. 240/242 Franklin Ave.*, 421 N.J. Super 445 (App. Div. 2011). There, the court held that the mediated oral settlement terms need not be reduced to writing immediately to be valid under the UMA or Rule 1:40-4, which requires that settlement terms should be in written form. It also found, in the circumstances of that case, that the parties had waived the confidentiality conferred on the proceeding.

Of perhaps greater interest, however, is why the court in *Rutigliano* concluded that the plaintiff had waived the mediation communication privilege.

Unquestionably, the plaintiff had always objected to the defendant, the mediator or either attorney testifying at the hearing concerning the terms of the settlement.

Nonetheless, the court stated, “The plaintiff overlooks the fact that both he and the defendant authorized the mediator to contact the court to advise that the matter had been concluded with a settlement.”

The court concluded, therefore, “that both parties had waived the mediation privilege prior to the plenary hearing when they each consented to permit the mediator to notify the court that the case had been settled. Because each disclosed there was a settlement, there was no bar to either party disclosing the terms of the settlement or, if necessary, going to court to enforce that settlement.”

Applying a contrary rule would, in the court’s view, “mean that a party could complete the mediation, authorize the mediator to notify the court of same, and then use the mediation to prevent enforcement of the settlement.” Once an agreement has been reached, “the court is authorized to determine the terms of the agreement and, if appropriate, enforce those terms.”

The court did note that the UMA and Rule 1:40-4(d) do present obstacles to the enforcement of an oral agreement reached through mediation when the parties do not waive the confidentiality conferred on the proceeding, but that “so long as settlement terms are clear, a writing is not required.” This was particularly true in the instant case where the plaintiff had an opportunity to sign the agreement but chose to leave to tend to a personal matter.

In essence, the court concluded that the parties had waived the mediation privilege by advising the mediator that the matter had settled and that he might so report to the court.

Whether the above-described holdings by the New Jersey appellate court will ultimately reflect New Jersey law should not be viewed as final; in fact, the Supreme Court of New Jersey granted certification in the *Willingboro* case in January and argument is pending.

Nonetheless, the issues presented by these cases should serve as a warning to anyone participating in a mediation who wants to assure that the discussions remain privileged until all aspects of the settlement agreement have been unquestionably resolved. It should be remembered that in *Rutigliano*, an unanticipated oral waiver of the privilege was recognized notwithstanding that the UMA makes reference to an oral waiver “if it is expressly waived by all parties to the mediation.”

It is true that many settlements achieved through mediation are relatively uncomplicated, often involving only the payment of money by a party. Even in such apparently simple cases, however, settlements have occasionally become undone on issues such as (1) public disclosure of the terms of the settlement; (2) the timetable for payment; (3) whether a settlement involving a payout requires the payment of interest on outstanding balances; (4) whether any part of the payout must be escrowed pending satisfaction of other

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conditions; (5) what should be the terms of a nondisparagement clause; (6) the scope of the release; and (7) what sanctions may be imposed for violation of any of the provisions of the release.

In short:

- Don’t proclaim that you have a settlement unless you are absolutely confident that you have agreement on all of the essential issues.

- If the settlement involves several issues that may later be subject to differing interpretations, reduce them to writing in a sufficiently detailed agreement or memorandum of understanding so that a lack of clarity or ambiguity is overcome to the extent possible.

- Do not authorize the mediator to report to the court that the matter has been resolved before you have nailed down all of the critical issues.

Failure to follow these practices may result in an unanticipated court hearing addressing whether a mediated agreement had been reached and the terms of such agreement, when all along a party had assumed that these discussions were privileged. •