

Chicago Daily Law Bulletin®

Volume 159, No. 147

What your client needs to know about mediation confidentiality

Mediation sessions frequently begin with the mediator giving an opening statement and saying something like, "Mediation is a confidential process. Nothing you say today will leave this room and I will not voluntarily testify about what happens in mediation."

The mediator may also mention a few exceptions and explain how confidentiality will be handled when the mediator meets privately with each side in caucus. Confidentiality can be somewhat complex, however, and when preparing clients for mediation, counsel should provide a full explanation of what to expect as to admissibility of evidence in future court proceedings and explore client desires and obligations regarding communicating with anyone outside the mediation process. In advising the client, counsel must consider statutory authority, court rules, case law and the confidentiality provisions in any agreement to mediate or separate confidentiality agreement.

In Illinois, both privilege and confidentiality, which are distinct but intertwined concepts, are governed by the Uniform Mediation Act (UMA), 710 ILCS 35/1, et seq. The UMA provisions are primarily concerned with privilege and provide that mediation communications (defined very broadly to include even nonverbal communications and statements made for purposes of "considering" mediation) cannot be used in future adjudicative proceedings such as trials, arbitrations and legislative hearings.

This privilege achieves the primary UMA goal of encouraging parties to speak with full candor at mediation without fear that their statements will later be used in court as admissions. The privilege, however, may be waived or precluded under the statute in a number of circumstances.

For example, if a party discloses a mediation communication that prejudices someone else, that person can respond. The UMA also contains a number of exceptions

to privilege such as when communications relate to threats of bodily injury, plans to commit a crime, a public mediation, professional misconduct — by the attorneys or mediator — or abuse, neglect, abandonment or exploitation of a child or disabled adult.

Additionally, the privilege may not apply if the case involves either a felony or litigation over the settlement agreement and a court, agency or arbitrator determines that evidence is not otherwise available. Given the number of ways in which the privilege may not apply, counsel should alert the client prior to mediation that such exceptions exist. A client should also understand that, as provided in the UMA, evidence does not become inadmissible just because it is used at mediation.

The UMA provides much less guidance as to the concept of confidentiality, leaving it primarily to contract law. Section 8 of the UMA provides only that, "Unless subject to the Open Meetings Act or the Freedom of Information Act, mediation communications are confidential to the extent agreed by the parties or provided by other law or rule of this state."

Pursuant to the authority in Illinois Supreme Court Rule 99, which allows each judicial circuit to set up a mediation program, many circuits in Illinois have adopted such rules. While the Illinois local court rules also address mediation confidentiality, they do so in a patchwork manner, often blending privilege and confidentiality, and many just refer back to the UMA.

For example, Cook County Circuit Court's Rule 20.07 pertaining to the Law Division mediation program provides that "All oral and written communications with the mediator at any time, other than executed settlement agreements, shall be deemed confidential and privileged in accordance with the provisions of the Uniform Mediation Act." The rule goes on to set forth exceptions in slightly different language than the UMA, such as for a threat of "serious imminent harm" rather than of



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"bodily injury." The rule also states that the reporting party may testify or report only the necessary information to the appropriate authorities.

County court Rule 21.07 regarding the Chancery Division mediation program also addresses mediation confidentiality, but refers to the UMA. Thus, in a mediation governed by either the Cook County Law or Chancery Division rules, as the UMA is invoked as to confidentiality (with a few minor changes in the Law Division rule) and the UMA refers to the agreement of the parties, the ability to share mediation communications with family, advisers or even the media is governed by the agreement to mediate and/or separate confidentiality agreements signed

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by parties and other participants at the mediation.

It should be noted however, that if it is a case mediated by the Center for Conflict Resolution, the Illinois Not-For-Profit Dispute Resolution Center Act, 710 ILCS 20/1 et seq., provides a different confidentiality rule. The act's Section 20/6 provides for privilege and goes on to state that, "Any communication made during the resolution process by any participant, mediator or any other person present at the mediation shall be confidential."

Counsel should ensure, therefore, that confidentiality is addressed in a written agreement. Many of the local court rules include form agreements to mediate as well as stand-alone confidentiality agreements to be signed by all participants, including nonparties. Counsel should review the topic of confidentiality obligations well ahead of the mediation with the client.

If a client wants to be able to discuss the mediation with family members or corporate supervisors, there will be time to negotiate a provision in the agreement. At a minimum, counsel should highlight any obligation to keep the entire matter confidential. Cases in other states demonstrate that consequences for breaching confidentiality can go beyond contract damages and include dismissal of a claim.

It may also be prudent to specify in the agreement to mediate that the UMA will govern in case any choice of law questions arise.

Party self-determination is an important tenet of mediation. A well-prepared client will arrive at the mediation session understanding the mediation privilege and exceptions and having made an informed choice as to the extent of the confidentiality of the process as to third parties.

When the mediator discusses privilege and confidentiality in his or her opening statement, the client will feel comfortable and will be able to focus on resolving the case in a manner that meets his or her needs.