What Did I Promise?

The Path from Confidentiality to Conspiracy

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It often begins at the beginning, with the Mediator's opening statement. While mediators have learned not to blithely promise that "everything you say here is confidential," many of us still may be writing checks the parties may not be able to cash particularly in the areas of confidentiality, evidentiary exclusion, and privilege.

Following are some of the more poignant phrases of a typical opening statement. Let's parse them to see where the pitfalls lie. Do any sound familiar?

Everything said or done in this room stays in the room. Once something is said or done in front of another party, it is difficult, if not impossible to limit knowledge or use of that information. There seems to be no rule against either repeating statements heard in mediation or using them as a basis for filing discovery, such as a Request for Admissions, based upon information learned in the mediation session. Mediation agreements (as opposed to Settlement Agreements) wherein parties agree to keep everything learned "confidential" are generally too broad to be enforced.

Federal Rule of Evidence 408 protects against admission of settlement negotiations, but excludes discoverable evidence from its protection. Remember also that this rule only applies in the case being negotiated! Parties may be permitted to introduce evidence in collateral cases.

Practice tip: Tell the parties in advance that, if they wish to share anything that could possibly compromise their position, they may be best advised to discuss that information privately with the mediator prior to disclosure. Many mediators introduce this thought in pre-mediation discussions, thus providing parties an opportunity to begin to assess the impact of non-disclosure on the success of the negotiation.

Everything prepared for the purpose of mediation is confidential. Not necessarily! Protection is generally afforded materials prepared exclusively for *and used* in mediation. Mere preparation of materials for mediation may not shield them from disclosure.

Practice tip: This may be addressed in the mediator's letter of engagement(s) scheduling letter or discussed during initial contact with the parties. Parties seem to appreciate mediators who counsel them as to the scope and use of materials prepared for mediation.

Everything prepared during the course of mediation is confidential. Under certain circumstances, disclosure of unlawful conduct during a mediation may make parties (and the mediator) witnesses to admission of a misconduct, or worse, a crime. If so, this could transform documents into evidence including a mediator's notes! Thus enters the specter of conspiracy! While this may seem Orwellian, Title 18, as amended by Sarbanes-Oxley, expands the scope of liability in areas of conspiracy, fraud, false statements, and obstruction of justice sufficiently to warrant at least familiarity with its relevant provisions.

Everything said by a party to the mediator alone will be kept in confidence if the party requests that the information be held in confidence. Many attorney mediators relate that when they are serving as mediators, they are not acting as attorneys thus the rules of professional conduct might not apply. However, the mediator who is also an attorney may face a challenge with regard to disclosures of past misconduct. The mediator is well-advised to review their local rules and decisions on the issues of prior misconduct related during the mediation.

Nothing you say in confidence may be used against you in a court of law. Once again, the attorney mediator may have an obligation to disclose either prior attorney misconduct reported during the mediation or misconduct witnessed during the course of the mediation.

No one may be quoted as to what they say in this mediation and have that quote used against them in a subsequent legal proceeding. The mediator may be required to report misconduct unless the court or statute has conferred upon mediation communications the status of legal privilege. This should not be confused with mere inadmissibility.

The mediator will not report what is said or done in mediation unless ordered by a court. Which court? The catch here is that other courts than those in the mediator's venue may obtain jurisdiction over the matter and thus be able to order disclosure.

Final Practice Tip: Refresh your understanding of the distinction between privilege and exclusion as evidence. In the mediation context, privilege does not exist unless explicitly recognized by the court. Review the Uniform Mediation Act and your applicable Code of Professional Responsibility to determine your practice, if not your obligations, regarding disclosure of prior or intra-mediation misconduct.

Those neutrals practicing in several states would be well-advised to note that there is a lack of uniformity provisions related to mediation privilege and confidentiality. Federal Rule of Evidence 408 does not afford the protection that parties commonly assume. Neither Federal Rule 501 nor the 1998 ADR Act creates a privilege for mediation. There are over 250 statutes that deal with mediation confidentiality. (See UMA Reporter's Notes to Section 2) In cases of federal jurisdiction, local rules should be checked.

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