

Ethics Corner

Knowing What to Say and When

By Maureen Denihan

Very recently the following scenario occurred that drove us to examine the confidentiality protections provided for on the Agreement to Participate in ADR Form, Maryland Confidentiality, Rule 17-105, and the Standards of Conduct for Mediators...as adopted by the Court of Appeals. A synopsis of the actual scenario as it unfolded is provided below as well as our understanding and interpretation of Confidentiality (from all of the above sources).

Case Scenario: In June 2012, litigants participated in mediation for their civil case on their day of trial. The participants did not resolve the case in mediation and proceeded to trial that day. Ten months after the mediation, the defendant's attorney called the ADR Office and requested to speak with the mediator in the civil case. The attorney explained that he had not represented the defendant in the prior civil case, but is now representing the defendant from that civil case as a defendant in a current criminal case. The attorney said that he wanted to ask the mediator if s/he remembered the mediation conversation between the two litigants in the civil case because the plaintiff in that civil case has been called to testify in the current criminal case against his client, the defendant.

The defendant is now being charged with several counts of child molestation in the criminal case. The defendant alleges that the plaintiff in the civil case mediation made a statement to the effect that he knew the allegations of child molestation were falsified. The attorney completed an Application to Inspect Public Records form (DC 34A) at the clerk's office and obtained a copy of the Agreement to Participate in ADR form from the civil case. From that, the attorney acknowledged that the mediation is confidential for the mediator, but he believes the statement made by the plaintiff in the mediation triggered an exception to confidentiality for the mediator.

There are so many rich topics surrounding confidentiality to discuss that we can grow and learn from in this scenario. This should be pretty easy to dissect though, right? In this issue, we'll discuss mediator confidentiality.



CONFIDENTIALITY OF THE MEDIATION, FOR THE MEDIATOR

Having reviewed the file for the civil case, we know that all persons present in the mediation including the mediator, signed the Agreement to Participate in Alternative Dispute Resolution (ADR) Form (fondly referred to as the 'ATP Form' in our office). The ATP Form states the following in paragraph 4:

***CONFIDENTIALITY:** With some exceptions, anything that is said or done during this ADR session will be held in confidence by the ADR practitioner and any neutral observer present at the practitioner's request. The exceptions to confidentiality are: a) evidence of child or elder abuse; b) an act or credible threat of violence; c) anything relevant to a complaint against the ADR practitioner or the District Court of Maryland.*

Paragraph 4 provides that the mediator shall maintain the confidentiality of anything said or done during the mediation, with limited, defined exceptions. The ATP Form does not define a period of time for mediator confidentiality and it is implied that the confidentiality runs for eternity, unless an exception arises.

The Maryland Standards of Conduct for Mediators, Arbitrators and Other ADR Practitioners, as adopted by the Court of Appeals, states a similar rule in Section V, Confidentiality, for mediators, which reads "...a mediator and anyone attending the mediation at the request of the mediator, shall maintain the confidentiality of all mediation communications, which include speech, writing, or conduct made as part of a mediation, including those communications made for the purpose of considering, initiating, continuing, or reconvening a mediation or training a mediator." Further, that same paragraph holds that a mediator may not disclose or be compelled to disclose mediation communications in any judicial, administrative or other proceeding.

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At the time the civil case was mediated, ADR Rules did not exist for the District Court. Although not expressly applicable to ADR proceedings in the District Court at the time¹, a case could be made that former Rule 17-109 governing 'Confidentiality in Mediation' also has a broad application and prohibits a mediator from disclosing a mediation communication² in any judicial, administrative or other proceeding, exceptions excluded. We believe 17-109 is a widely accepted standard for mediator confidentiality in cases referred to mediation, and that the protections in 17-109 should also be applicable to mediations in the District Court. Using either barometer, a mediator may not disclose a mediation communication for any reason (other than what is provided for as an exception), whether for the existing case or a future case.

Even so, the defendant's attorney believed that the plaintiff's statement during the mediation in the civil case invoked an exception to mediator confidentiality (as provided for on the ATP Form), specifically "a) evidence of child or elder abuse." Most of us in the ADR Office respectfully disagree. The statement allegedly made by the plaintiff during the civil mediation did not allege child abuse. In fact, the plaintiff's statement did just the opposite: it alleged the accusations of child abuse were false. We do not believe this to be an exception to confidentiality.

There is no mandatory reporting requirement when a person learns of, or hears, that child abuse allegations were falsified. Indeed it is just the opposite. As outlined in a January 2012 *Ethics Corner* article of this newsletter, Family Law Article § 5-705 **mandates the reporting** of any **suspected child abuse or neglect** by any person³ if that person has reason to believe the child has been subjected to abuse. The Maryland Standards of Conduct (V. Confidentiality) and Maryland Rule 17-105(d) recognize "any disclosure required by law" as a permitted disclosure (exception) to mediator confidentiality. A statement by another that an allegation of child abuse or neglect was falsified is not the same thing. For this reason, we do not believe that such a statement during the mediation in the civil case, would be an exception to mediator confidentiality.

Confidentiality is part of the foundation upon which mediation was built and we believe that mediators are to hold in confidence anything said or done during the mediation, with limited exceptions, in an effort to encourage and support the candor of the participants and the mediation process. For all of these reasons, and in alignment with the Agreement to Participate, the Maryland Standards of Conduct, and Title 17-105, we believe that the mediator should not answer the attorney's questions about what was said or done in the mediation.

However, first thing being first... the mediator must actually be able to remember the mediation, otherwise all of this is a moot point. Either way, the attorney may subpoena a mediator to testify as to what was said or done during a mediation. That, we know, is completely out of our control. How we respond to a subpoena is within our control.

If a mediator is subpoenaed to testify about what was said or done during a mediation that occurred in the District Court Day of Trial ADR Program, we would suggest to proceed as follows. First, give us a call. The mediator may file a 'motion to quash the subpoena' in the court prior to the hearing date. While our office cannot draft a subpoena for you, we can talk with our mediators about what information should be included in a 'motion to quash.' Next, if the mediator is a member of a professional mediator organization and/or a community mediation center, we would recommend that the mediator also contact that organization to talk through next best steps and/or what to include in a motion.

In the event that the 'motion to quash' is denied and the mediator is required (by the subpoena) to testify at the hearing, what would you do? Well, based on what has been discussed earlier in this article we believe a mediator is not obligated to answer questions with respect to what was said or done during the mediation.

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¹ Maryland Rules governing ADR sessions in the District Court, and specifically a Rule that addresses the confidentiality of mediation sessions, became applicable to District Court mediations January 1, 2013.

² A mediation communication in 17-102(h) tracks with the definition in the Maryland Standards of Conduct for Mediators, Arbitrators, and other ADR Practitioners.

³ [any person] other than those listed in § 5-704 which mandates reporting by health practitioners, police officers, educators, or human service workers.



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STATUS

As of the end of February 2013, approximately 50 ADR cases and 20 control cases have been surveyed and observed in the Day of Trial program. The research team has begun observations in Montgomery, Calvert, and Wicomico Counties in addition to ongoing research in Baltimore City. During that time, we've met additional volunteers, court staff, and new program directors. As we start in each new county, we work to tweak our process to each individual courthouse and program. Our team is committed to being as unobtrusive as possible, and we've found that what works well in one courthouse may or may not be unobtrusive in another courthouse.

Over the same time period one hundred family and criminal cases have also been observed in other courts. Observations will continue for approximately one more year, with an eventual goal of observing 200 ADR cases and surveying 100 control cases.

Many volunteers in those counties where we observe have become used to seeing researchers present each time they provide ADR. We would like to extend our sincere

thank you to all volunteers, for both your commitment to the ADR program and your willingness to allow the researchers to observe you. Each ADR provider and session we observe adds valuable data to our growing collection and provides for deeper and more nuanced results. It is our hope that these results offer practical and helpful information to both ADR practitioners and ADR programs.

The ADR Landscape is currently in the draft stage. Once complete, it will be accessible through the research website.

Have questions or feedback to report? See our website at www.marylandADRresearch.org for a history of the project, frequently asked questions, and contact information for all researchers and project leaders.



In a gentle way, you can shake the world." - Gandhi!

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A mediator may cite the Agreement to Participate Confidentiality statement, the Title 17-105 Confidentiality, and/or the Standard of Conduct for Mediators, when "on the witness stand" as to why s/he will not answer questions about the mediation.

But, what if the judge disagrees and orders the mediator to answer the questions? This office recognizes that a mediator may be in 'contempt of court' if they do not answer questions after the judge has ordered a mediator to do so.

Should you answer the questions directed to you, or do you reiterate the Confidentiality Rule in 17-105 and refuse to testify? An additionally challenging question is, would it change your decision if you learned that your testimony might be the only information preventing the individual in question from being prosecuted for the crime alleged? (Keep in the mind the information shared in mediation was that 'the allegations of the crime alleged were falsified').

Have you asked yourself what are you 'risking' by testifying at this point? Are you concerned with protecting the confidentiality of the mediation? What about protecting yourself from an allegation of mediator negligence or mediator misconduct if you did testify to something that is confidential? And further, have you thought about in what scenarios you would 'talk,' aside from an exception to confidentiality? The answer may be that there are no scenarios in which you would breach confidentiality, and/or testify about what was said or done during a mediation other than those listed as exceptions to confidentiality in the Rules. The purpose of raising these questions is not to challenging your response, but to get you thinking about these scenarios. And while we can't plan for everything, the more we think through these situations, the better we understand the decisions we are, or anticipate, making.

JOIN THE CONVERSATION

We want to hear from you! Please share with us your opinion, response, or question(s). And, share with us any scenario you want to see discussed and published in future editions of this newsletter. Share with us at maureen.denihan@mdcourts.gov.

