Confidentiality In Mediation: A Privilege "Work in Process"

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"Everything that is said here today is confidential and cannot be used in your law suit. I cannot be called to testify in your case about what any party tells me. Further, I will keep confidential anything you tell me in a separate caucus that you do not want me to disclose to the other party. These rules are established by law and are a part of the mediation contract that we signed this morning."

We have all heard these words or something similar at the beginning of every mediation. Parties and neutrals rely on assurances of confidentiality in order to conduct effective mediations, and it is hard to imagine a process that would succeed without them. This paper will review the legal sources of confidentiality in mediation, exceptions, non-exceptions and some surprising unresolved questions regarding the mediation/mediator communication privilege.

I. Sources of Mediation Confidentiality and Privilege – Georgia

A. Common Law – The Courts At Work

1. ***Byrd v State,*** 367 S.E.2d 300, 186 Ga.App. 446 (1988). In a criminal case the defendant and victim participated in a mediation at the Atlanta Justice Center and worked out a civil settlement. Defendant failed to comply with agreement reached at mediation and was later indicted. Evidence of Defendant's mediated agreement to pay victim $800 was admitted as an admission. The Court reversed the conviction based on admission of the mediated settlement. Important points of the decision include:

- the Court noted that "Mediation is not statutorily provided for"

- admission of ADR effort at criminal trial "eliminates its usefulness"
- the Court notes the policy to encourage settlements and that confidentiality is essential to ADR
- no Miranda type warnings were given regarding mediation statements
- the Court distinguishes authority holding that a privately negotiated agreement not instigated by a Court *was* admissible
- this case is cited as common law basis for mediation privilege in Georgia

Query: Does the common law protection only apply to court related or instigated mediation?

2. ***Wilson v. Wilson***, 282 Ga. 728 (2007). The Wilson case involved a divorce pending in Coweta County, which had a court-annexed mediation program. Parties were ordered to mediation with mediator assigned by the local circuit administrator, but through counsel they informed the court that they needed "more discovery" before the mediation. Subsequently, they picked a private mediator not on the county list (but registered with the Ga. Office of Dispute Resolution) and participated in a nine-hour mediation without counsel present. The parties signed a mediation agreement stating that all communications in the mediation were confidential. Settlement was reached, and the mediator prepared a Memorandum of Understanding. The husband later rejected the MOU and refused to sign the final agreement claiming that he suffered from depression and complications of medication during the mediation. The wife moved to enforce settlement. The Court conducted a hearing, called the mediator to testify about the capacity of the parties (over objection of the husband) and entered judgment on the MOU. The Supreme Court affirmed making several interesting holdings/findings:

- the parties were participating in the Circuit ADR program (and were subject to rules of the program) even though they did not inform the Circuit ADR Administrator of what they were doing, picked a mediator not on the circuit list, and ignored several of the program rules (the Court found that participation in the Circuit program lent integrity to the process)
- the Court held that when a Court refers a matter to mediation, the Court has an interest in and responsibility for the integrity of the mediation process
- the Court assumed that the mediator's mental impressions of the parties was confidential, citing comments to §2(2) of the 2001 Uniform Mediation Act (see reference below)
- the Court found that the mediator was the only witness of the husband's competency
- the Court relied on (and adopted?) §6(2) of the 2001 Uniform Mediation Act (not in force in Georgia and not adopted by the Ga. Commission on Dispute Resolution) holding that it was proper for the mediator to testify as to the husband's competency ("party seeking discovery or the proponent of the evidence has shown that the evidence is not otherwise available that there is a need for the evidence that substantially outweighs the interest in protecting confidentiality")
- the Court suggested that better trial court procedure would have been in camera testimony of mediator

Note: It is questionable whether §6(2) of the Uniform Act applies in this circumstance.

Query: Is the Uniform Mediation Act now the law in Georgia?

Query: Would the result have been the same in a completely private mediation where the Court did not have (?) responsibility for the integrity of the process?

3. ***Thomas et al v. Phillips et al***, 524 S.E.2d 298, 240 Ga.App. 600 (1997). Apparently peace broke out temporarily in a private home construction arbitration case that morphed into a mediation with settlement subject to a to-be-drafted written agreement. A dispute arose regarding confidentiality and non-disparagement (apparently the homeowners placed a high value on being able to publicly disparage the contractor or vice-versa) and one party moved to enforce the settlement. The case makes reference to the arbitrator/mediator's unsuccessful testimony at (presumably) a summary judgment hearing to the effect that settlement had in fact been reached. The Court noted that the parties had agreed to confidentiality when the arbitration became a mediation but did not discuss why that testimony would have been allowed in the face of that agreement.

B. Statutes – The Legislature Acts!

1. O. C. G. A. §24-3-37. Pre-Revised Evidence Code - What Admissions Not Proper Evidence. Prior to the effective date of the new evidence code (January 1, 2013), the only general statutory protection from admissibility afforded statements made in mediation was the exclusion of certain admissions pursuant to O.C.G.A. §24-3-37. That provision made admissions obtained by constraint, fraud, "drunkenness induced for the purpose" of obtaining admissions or "propositions made with a view to compromise" not proper evidence. (Thus placing the statutory basis for

excluding offers of settlement and compromise on the same intellectual and public policy footing as drunkenness induced for the purpose of obtaining admissions.)

Note: No specific reference to a mediation privilege.

2. O.C.G.A. 24-4-408. Effective as of January 1, 2013, the legislature has directly addressed the problem of the necessity to protect settlement discussions and mediation communications from admission into evidence. The new code section bears quoting in its entirety:

§ 24-4-408. Compromise and offers to compromise

(a) Except as provided in Code Section 9-11-68, evidence of:

(1) Furnishing, offering, or promising to furnish; or

(2) Accepting, offering, or promising to accept

a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount shall not be admissible to prove liability for or invalidity of any claim or its amount.

(b) Evidence of conduct or statements made in compromise negotiations or mediation shall not be admissible.

(c) This Code section shall not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations or mediation. This Code section shall not require exclusion of evidence offered for another purpose, including, but not limited to, proving bias or prejudice of a witness, negating a contention of undue delay or abuse of process, or proving an effort to obstruct a criminal investigation or prosecution.

Subsection (a) of the statute, true to the title of the code section, deals with offers of compromise and settlement. The only caution that the language begs is the specific reference to claims that are "disputed" either as to validity or amount. The "validity or amount" qualifier would seem to expand the scope to include virtually any litigated claim but a cautious practitioner will be sure to include some statement in settlement

correspondence to the effect that "all claims that are the subject of this offer are disputed as to either validity or amount" or similar catch-all language.

Subsection (b) is a model of drafting simplicity and clarity. Neither conduct nor statements made in mediation shall be admissible. There is no qualification regarding court ordered mediation process, no limiting definition regarding what is or is not a mediation, no requirement that the mediation be conducted by a registered neutral and both conduct (the ***Wilson*** issue) and oral communications are covered. Q.E.D.

Subsection (c), however, proves the rule that what the legislature giveth, the legislature taketh away. Excepted from the straight forward protection of mediation communications are:

- evidence otherwise discoverable merely because it is presented in the course of compromise negotiations or mediation;
- evidence offered for another purpose, including, but not limited to, proving bias or prejudice of a witness;
- evidence offered to proving bias or prejudice of a witness;
- evidence negating a contention of undue delay or abuse of process;
- evidence offered to prove an effort to obstruct a criminal investigation or prosecution.

The first exception begs the question presented in ***In Re RDM Sports Group, Inc.***, 277 B.R. 415 (N.D.Ga. 2002). In that case several groups of creditors attended a mediation with a trustee in an attempt to settle claims. One of the groups made a mediation presentation that included an analysis of claims and potential outcomes. After the presenting group settled, a non-settling group attempted to obtain the mediation

presentation materials, an effort that the Trustee and the presenting group claimed were protected by privilege. Relying on the U. S. Supreme Court's landmark holding in *Jaffee v. Redmond* (holding that Federal Rule of Evidence 501 authorized the courts to recognize evidentiary and testamentary privileges), the Bankruptcy Court found a mediation privilege to exist and refused to compel production of the mediation materials based on that privilege.

Query: What effect will the "otherwise discoverable merely because presented in mediation qualification have on admissibility of mediation presentation materials?

Perhaps the most disturbing exception relates to evidence that might be offered to prove the bias or prejudice of a witness.

Query: Is there any party that is not a biased and prejudiced witness?

The "not excluding" provision relating to evidence negating a contention of undue delay or abuse of process raises the question, "What?"

Query: What?

Finally, one must wonder what mediation communications might ever be offered to prove an effort to obstruct a criminal investigation.

Query: *Byrd v. State?*

3. O.C.G.A.§ 12-10-100 (What could have been.) The Southern States Energy Compact is a treaty between Alabama, Florida, Georgia regarding use of the Apalachicola and Flint Rivers). The statue provides for mediation of disputes and, in Article XIII, provides interesting confidentiality provisions relating to resolution of public policy issues:

- mediator to keep all information obtained confidential
- *parties* required to keep confidential all information obtained in mediation confidential, *including* view expressed by any other party regarding settlement, proposals made and views expressed by the mediator and the fact that any party had been willing or unwilling to accept a proposal

  Note: The compact also provided that all meetings of the compact commission will be public.

  Query: Would the specific confidentiality imposed on parties be useful in all mediations?

  Note: The Compact is noted as an example of mediation privilege that has been codified in Georgia. See also O.C.G.A. §12-10-110 (compact between Alabama and Georgia relating to the Coosa and Tallapoosa rivers that contains a similar provision); O.C.G.A. §36-6-171 (mediation of removal, relocation or adjustment to utility facilities); Rule 100 of the Board of Workers' Compensation (mediation of Workers' Comp. claims with confidentiality provision).

Note: None of these code sections were referenced in O.C.G.A. 24-4-408.

4. O.C.G.A.§ 24-4-416. The "Doctors Only" Healing Exclusion. The healing effect of an apology or similar expression of is well known in mediation. Members of the healing professions now have "belt and suspenders" evidentiary protection assuring that such expressions, including when stated in mediation, will not be admissible in evidence:

§ 24-4-416. Conduct of health care providers in civil proceedings

(a) As used in this Code section, the term "health care provider" means any person licensed under Chapter 9, 10A, 11, 11A, 26, 28, 30, 33, 34, 35, 39, or 44 of

Title 43 or any hospital, nursing home, home health agency, institution, or medical facility licensed or defined under Chapter 7 of Title 31. The term shall also include any corporation, professional corporation, partnership, limited liability company, limited liability partnership, authority, or other entity comprised of such health care providers.

(b) In any claim or civil proceeding brought by or on behalf of a patient allegedly experiencing an unanticipated outcome of medical care, any and all statements, affirmations, gestures, activities, or conduct expressing regret, apology, sympathy, commiseration, condolence, compassion, mistake, error, or a general sense of benevolence which is made by a health care provider or an employee or agent of a health care provider to the patient, a relative of the patient, or a representative of the patient and which relates to the unanticipated outcome shall be inadmissible as evidence and shall not constitute an admission of liability or an admission against interest.

C. Court Rule

1. Alternate Dispute Resolution Rules. The Alternate Dispute Resolution Rules (the "ADR Rules") are promulgated by the Supreme Court at the recommendation of the Georgia Commission on Alternate Dispute Resolution (the "Commission") created by the Court in 1993. The Commission administers the Georgia Office of Dispute Resolution that maintains a registration program for neutrals and coordinates with local Courts in the creation of court-annexed ADR programs. (See Appendix A to the ADR Rules). Rule VII of the ADR Rules deals with Confidentiality of ADR processes. Rule VII is both typical and remarkable in several respects:

- confidentiality under the Rules *only applies to court-annexed or court-referred ADR*
- confidentiality includes ENE, arbitration and intake information and extends to "program staff" as well as mediation participants
- settlement agreements are not subject to confidentiality

- documents "generated in connection with" ADR proceedings are not subject to discovery (except for settlement agreements or memoranda) ("otherwise discoverable" materials also excepted)
- neutrals and observers may not be subpoenaed to testify
- neutrals' notes or records not subject to discovery
- notes and records of court ADR program not subject to discovery *in cases that are ordered or referred by a Court*
- exceptions to confidentiality include threats if violence to self or others, child abuse (based on mediator belief) – Rules do NOT suspend any reporting obligation of neutral
- confidentiality waived as necessary to defend legal or disciplinary claim against neutral

Query: Confidentiality in non-court annexed or court ordered programs?

2. Commission Ethical Standards for Neutrals. In addition to the Rules, the Commission has adopted ethical standards applicable to "mediators serving court programs in Georgia." (see Rules, Appendix C). The standards and Commentary include:

- requirement that neutrals protect the confidentiality of the mediation process
- statement that "Confidentiality is the attribute of the mediation process which promotes candor and full disclosure. Without the protection of confidentiality, parties would be unwilling to communicate freely, and the discussion necessary to resolve disputes would be seriously curtailed."

Note: commentary examples will be discussed during the presentation

D. Contract. In addition to confidentiality created (or not created) by common law decision, Court rule, or statute, parties contract for confidentiality of mediation proceedings at the outset of almost every mediation. (See, for example, the standard Henning Mediation Contract, attached) As discussed above, there is public policy that would tend to support the enforcement of such contracts. On the other hand, Georgia Courts have not directly addressed the question of the enforceability (and any exceptions to enforceability) of the purported evidentiary privilege created by a mediation contract. A sample of related decisions indicates that the issue might not be as straightforward as might be assumed:

- ***Unami v Roshan***, 659 S.E.2d 724, 290 Ga.App 317 (2008). Court holds that confidentiality provision of a settlement contract was void as a matter of public policy where parties agreed to conceal debt from third party to whom they owed contractual duty of disclosure.
- ***Camp v. Eichelkraut***, 539 S.E.2d 588, 246 Ga.App. 275 (2000). Parties cannot contract to keep confidential matters that are "arguably" criminal in the face of an official investigation.

Query: "Arguably" standard?

- ***Savannah College of Art & Design v. School of Visual Arts***, 515 S.E.2d 370, 270 Ga. 791 (1999). Court protected the confidentiality of a settlement agreement filed under seal in a motion to enforce the confidentiality provision of the settlement agreement. Standard used was Uniform Superior Court Rule 21.4.

Note: Strong defense by Justice Fletcher arguing in favor of right of public access to court records.

- ***Barger v. Garden Way***, 499 S.E.2d 737, 231 Ga.App. 723 (1998). Defendant entered into confidential settlement agreements with numerous parties in product liability claims, and many such agreements had been incorporated into confidentiality orders of other courts. Plaintiff sought identity of those parties. Citing O.C.G.A. § 24-1-2 (evidence code – object of all legal investigation is truth) and O.C.G.A. § 9-11-26(b)(1) (parties entitled to discovery of all non-privileged matters relevant to case), the Court held that "a provision that a party to a confidential settlement agreement may nevertheless testify or otherwise comply with a subpoena, court order or applicable law is an implicit term in such a confidential settlement agreement." Disclosure was thus required.

Query: Same rationale applicable to mediator? Parties to mediation?

II. Sources of Mediation Confidentiality and Privilege – Selected Federal Citations

1. <u>Federal Rule Of Evidence 408</u>. Compromise and offers to compromise are not admissible in evidence, and the rule generally applies to communications in mediation. Although commonly thought of as absolute, the rule has surprising limitations and exceptions:

- only applies to claim(s) disputed as to either validity or amount
- applies to conduct or statements made in compromise negotiations
- does *not* require exclusion of evidence otherwise discoverable *"merely because"* it was presented in compromise negotiations

Note: The "can't game the process" caveat to the "I know what I know" exception.

- does *not* exclude admissibility for evidence offered for "another purpose" (specific examples: proving bias or prejudice of a witness, negating contention of undue delay, proving effort to obstruct criminal investigation or prosecution)

Query: What? Proving bias or prejudice?

2. 28 U.S.C. § 652. In 1998, Congress adopted Chapter 44 of title 28 (Judiciary and Judicial Procedure) titled "Alternate Dispute Resolution." The Title deals both with mediation and arbitration. Generally, the District Courts are authorized to adopt ADR rules under the framework outlined by Congress. Chapter 44 generally provides default rules until local Districts act. Section 652, titled "Jurisdiction," includes a provision relating to confidentiality.

Specifically, 28 U.S.C. § 652(d) provides that all rules adopted by District Courts shall "provide for the confidentiality of the alternate dispute resolution processes" and "prohibit disclosure of confidential dispute resolution communications."

Note: Broad language includes reference to dispute resolution "communications" similar to the Uniform Act.

3. Court Created via *Jaffee v. Redomond*. See discussion of *In Re RDM Sports Group, Inc.*, 277 B.R. 415 (N.D.Ga. 2002) above.

4. Local Court Rules.

(a) Northern District. Pursuant to 28 U.S.C. § 652, the District Court for the Northern District of Georgia has adopted LR 16.7 which broadly deals with

an ADR program for civil cases. The rule acknowledges and applies to ADR processes that are court-annexed *and* programs that are not court-annexed. The rule includes the following provisions relating to confidentiality:

- *all* ADR proceedings are treated as settlement negotiations under the Georgia and Federal evidence rules (LR 16.7 B.(3))
- no record to be made of ADR proceedings (LR 16.7 B.(3))
- ADR neutrals are *disqualified* from appearing as witness, consultant, attorney or expert in any pending or future action relating to the dispute (LR 16.7 B.(3))
- ADR conferences to be "private" – persons other than parties and neutrals may attend only with permission of all litigants and the neutral (LR 16.7 I.(1))
- if requested, neutral must keep confidential information obtained in separate caucuses with litigants or counsel, parties and counsel responsible for clearly indicating information to be kept confidential (LR 16.7 I.(4))
- neutral "shall" obtain agreement of confidentiality signed by parties and counsel, agreement will state that all statements made during ADR process may not be used as evidence in any subsequent proceeding (only exception is ENE Report requested by Judge in the order to participate in the ENE process) (LR 16.7 I.(5))

Note: Consult LR 16.7 to see how ADR should be handled by a court. (Author's humble opinion.)

(b) Middle District. LR 16.2, Middle District of Georgia deals only with court annexed arbitration.

(c) Southern District. Pursuant to 28 U.S.C. § 652, the District Court for the Southern District of Georgia has adopted LR 16.7 which, like the Northern District rule, deals with several ADR procedures in civil cases. With regard to confidentiality, the rule provides:

- at the beginning of mediation, the neutral is required to explain several matters relating to mediation, including "the conditions under which communications will be held in confidence," "the inadmissibility of negotiating statements and offers at trial," and "the fact that the Court will not permit parties in other litigations to conduct discovery regarding the mediation" (LR 16.7.5(e)(vi), (vii) and (ix))
- without mutual consent of the parties, all communications in the mediation conference and the results thereof are confidential and shall not be discoverable or admissible in any proceeding and shall not be reported to any judicial officer exercising jurisdiction of the case while the case is pending (LR 16.8)

Note: The Southern District rules are comprehensive but differ in many procedural respects from the Northern District rules.

4. 11th Circuit Rules. The 11th Circuit has adopted Rule 33-1 entitled "Kinard Mediation Center." The rule provides, among other things, for referral of matters on appeal to mediation.

- requests for mediation are not disclosed to opposing parties
- communications made during the mediation "and any subsequent communications related thereto" shall be confidential and not disclosed in any

briefs or in argument before the court (no brief or argument may even mention the Kinard Mediation Center)

- written mediation statements required by the court will not be disclosed by the neutral to other parties and the papers will not become a part of the court file

III. Sources of Confidentiality and Privilege – Other

A. <u>ABA Model Rules Standards</u>. The ABA Model Standards of Conduct for Mediators were first adopted in 1994 and revised as of August 2005. Standard V states the neutral's obligations regarding confidentiality, which include the following points:

- mediator to maintain confidentiality of "all information obtained by the mediator" unless agreed by the parties or "required by applicable law"
- mediator may not communicate to any *non-participant* "how" parties acted, may report attendance

Query: Whither accountability for the "good faith" requirement?

- information obtained in private session may not be disclosed without consent
- mediator has affirmative duty to promote understanding regarding confidentiality
- parties may make their own rules regarding confidentiality
- "accepted practices of an individual mediator or institution may dictate a particular set of expectations"

Query: What?

B. Uniform Mediation Act. In 1994, the National Conference of Commissioners on Uniform State Laws adopted a Uniform Mediation Act. The Act was modified to its current form by the Commission in 2001. It has not been adopted by the

Georgia Legislature or the Georgia Commission on Dispute Resolution but has been held to be authoritative by the Georgia Supreme Court (although see the discussion of ***Wilson v. Wilson*** above) and is therefore included for consideration here. Significant provisions relating to confidentiality include:

- definition of "mediation" not limited to court annexed or ordered process but does not apply to collective bargaining, mediation conducted by a judge, or school mediations
- "mediation communication" defined to include verbal and non-verbal "statements" during mediation, reconvening, or employing mediator
- includes statements of non-parties who participate in mediation
- "mediation communications" are "privileged" and "not subject to discovery or admissible in evidence" unless covered by an exception
- mediators, parties and non-party participants may refuse to disclose and *may prevent another* from disclosing "mediation communications"
- exceptions include agreement of parties; available to public under open records acts; threat of harm, commit crime or ongoing commission of crime or violence; necessary for defense of malpractice claim against mediator; necessary to prove abuse, neglect or exploitation of a child