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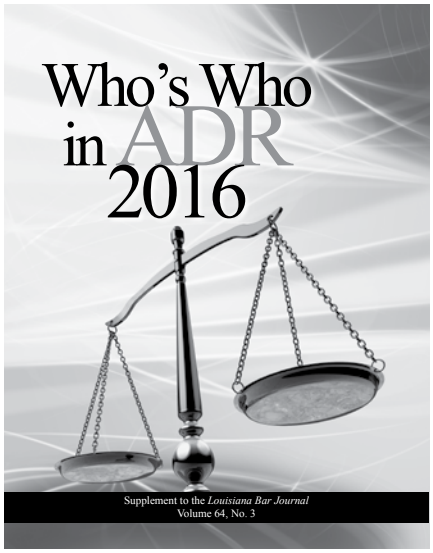

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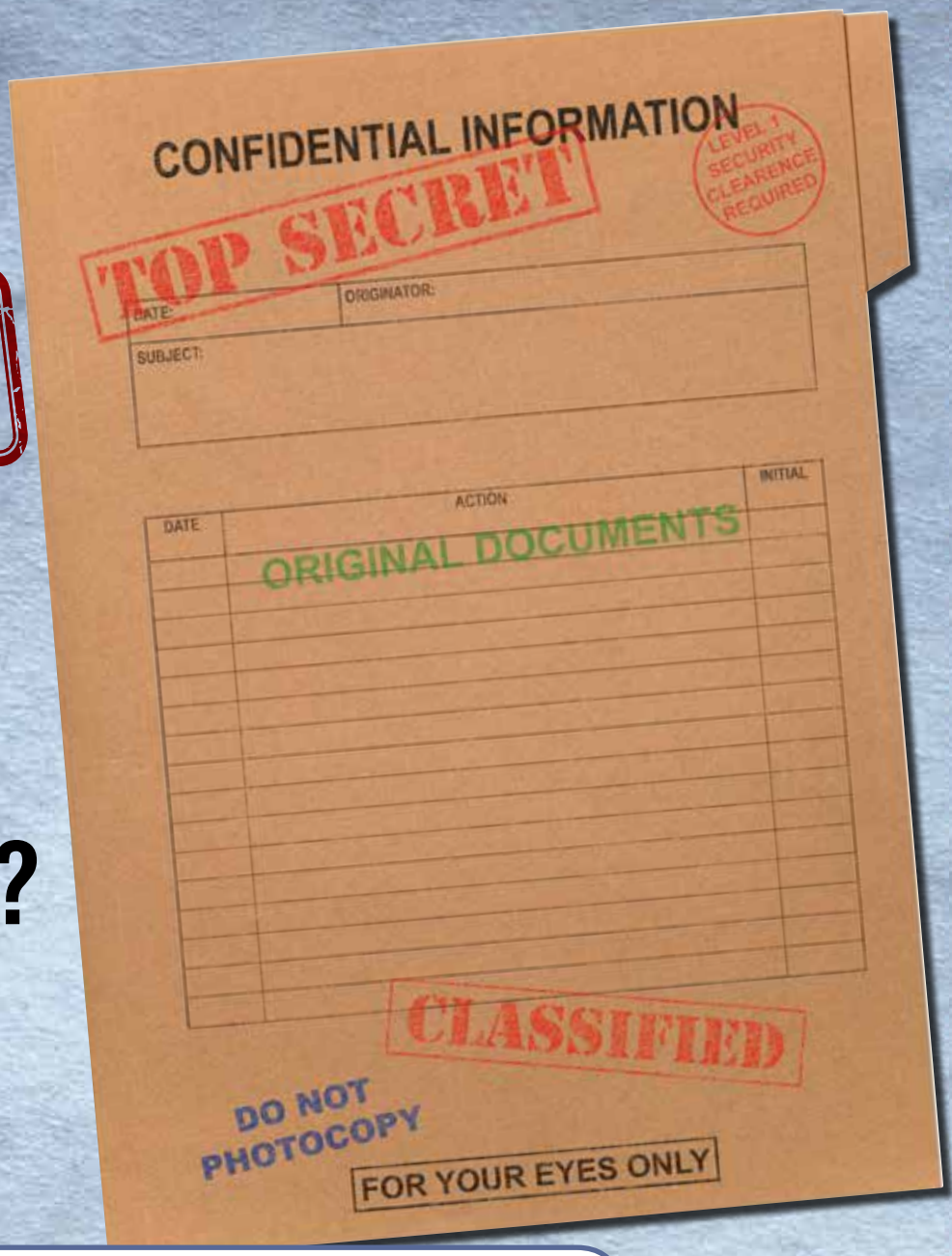
HOW CONFIDENTIAL IS YOUR MEDIATION?



By Lara E. White

The need for confidentiality in mediation proceedings is understood and appreciated by most attorneys, clients and mediators. Confidentiality allows participants to speak freely, creates an atmosphere of trust among the parties and the mediator, and opens the lines of communication without the concern of future disclosure. But just how confidential is your mediation and the written and verbal communications that take place related to it? This article provides an overview of current Louisiana and federal law addressing this issue in civil litigation and suggestions for ensuring your next mediation is as confidential and protected as you need it to be.

Louisiana State and Federal Law

Every state has a statute or rule protecting mediation communications from disclosure to different degrees. The Louisiana Mediation Act[1] (the Mediation Act) includes a confidentiality provision that applies whether or not the mediation is conducted pursuant to it.[2] The confidentiality language states that "all oral and written communications and records made during mediation . . . are not subject to disclosure, and may not be used as evidence in any judicial or administrative proceeding."[3] This confidentiality provision, however, is not absolute. Several exceptions to this provision provide for limited disclosure of information in certain circumstances: (1) if pursuant to a court's order, the mediator may report on whether the parties appeared at the mediation and if they reached a settlement; (2) to support a motion for sanctions for noncompliance with the court's order to mediate; and (3) to determine the meaning or enforceability of the settlement agreement reached during mediation in order to prevent fraud or manifest injustice.[4]

In addition, the Mediation Act makes clear that this confidentiality protection does not extend to evidence that is discoverable or otherwise admissible if the evidence is "based on proof independent of any communication or record made in mediation."[5] Furthermore, if the mediation confidentiality protection conflicts with other disclosure requirements, a court may review the relevant information in camera to determine whether it is subject to disclosure or whether it warrants a protective order.[6] Finally, the parties and the mediator may waive confidentiality under the Mediation Act if everyone agrees to the waiver in writing.[7]

The Mediation Act does not define many terms used, such as what is included in mediation "communications," or what is encompassed by the phrase "during mediation." The Act does not address when a mediation officially begins or when it ends. This leaves open for argument the scope of confidentiality protection provided and whether information or communications related to the mediation, but exchanged before or after the actual mediation session occurs, is included.

One Louisiana state court noted that the "during mediation" language created an issue regarding the scope of the confidentiality protection. In *Broussard v. Brown's Furniture of Lafayette, Inc.*, the Louisiana 3rd Circuit Court of Appeal refused to apply the Mediation Act's confidentiality provision to strike a receipt and release of claims executed after the mediation had concluded.[8] The court did affirm the trial court's decision to strike evidence of the mediation agreement itself under the Mediation Act, finding the trial court did not err in refusing to consider it as extrinsic evidence.[9] However, the court distinguished the subsequent receipt and release, noting that the confidentiality provision of the Mediation Act "provides that 'all written and oral communications and records' made during a mediation are exempt from disclosure except in specific circumstances. Those circumstances are not present here. The receipt and release was executed after the mediation, so the statute does not even arguably apply."[10]

Two federal courts in Louisiana have looked at the exceptions to the confidentiality rule in the Mediation Act.[11] In *Cleveland Constr., Inc. v. Whitehouse Hotel Ltd. P'ship*,[12] U.S. Magistrate Judge Joseph C. Wilkinson, Jr., of the Eastern District of Louisiana, determined disclosure of a settlement agreement was not barred by the Mediation Act.[13] The court first noted that the Mediation Act only applies to "all oral and written communications made during mediation" and that the party seeking a protective order for a prior settlement agreement between the parties had "not borne its burden of showing specifically, rather than making a conclusory statement, that the settlement agreement falls within this definition."[14] Next, the court noted that "the Mediation Act does not impose an absolute bar against discovery of documents otherwise protected by its provisions."[15] Because the court found the document was subject to disclosure as the confidentiality protections conflicted with other legal requirements for disclosure of the information, it ordered the settlement agreement to be produced subject to a protective order.[16]

In contrast, another federal court applied the Mediation Act confidentiality provisions strictly, even after reviewing the exceptions, based on the fact there was no clear waiver. In *Thrasher v. Metropolitan Property and Cas. Ins. Co.*,[17] Judge James T. Trimble, Jr. granted the defendant's motion in limine to exclude evidence of oral or written communications made during mediation because the plaintiff had presented no evidence of waiver of the confidentiality provision.[18] The plaintiff had argued the defendant's request was overly broad in excluding the evidence, as the plaintiff did not intend to introduce "evidence specifically regarding the mediation and settlement negotiations," but rather wanted to provide evidence "that defendant's behavior and conduct during mediation of the claim constituted further violation of defendant's affirmative duties under Louisiana law."[19] The court did not find that these mediation communications fell within the confidentiality exceptions.

Although the 5th Circuit Court of Appeals has refused to recognize a federal mediation privilege,[20] Louisiana federal district courts each have a nearly identical local rule addressing confidentiality in alternative dispute resolution conducted pursuant to these local rules, including mediation.[21] In the U.S. District Court for the Eastern District of Louisiana, Local Rule 16.3.1 provides, in pertinent part, that, "All alternative dispute resolution proceedings are confidential." The Middle District of Louisiana Local Rule 16(b) provides, "All alternative dispute resolution proceedings shall be confidential." Finally, the Western District of Louisiana Local Rule 16.3.1 provides, "All ADR proceedings shall be confidential."

Only one federal court has applied a local rule in a published opinion to date. In *Benson v. Rosenthal*, U.S. Magistrate Judge Joseph C. Wilkinson, Jr., of the Eastern District of Louisiana, noted that the court "encouraged and endorsed" the private mediation efforts of the parties.[22] The court further found the confidentiality provision of Local Rule 16.3.1 to be "unequivocal."[23] Therefore, after an in-

camera review of certain materials withheld from production, the court ruled that because they were produced and exchanged for use in mediation, they were protected from discovery, and plaintiff's motion to compel was denied as to these documents.[24] It should be noted that the documents did not indicate on their face that they were produced as part of the mediation, but, rather, an affidavit submitted with the materials established this fact.[25]

In addition to the Louisiana Mediation Act and Louisiana Federal Rules of Court, parties also may rely on Louisiana Code of Evidence art. 408[26] and Federal Rule of Evidence 408[27] to protect settlement negotiations and offers to compromise conducted during mediation from discovery. Under both rules, offers or promises to compromise a claim are not admissible to prove liability, including any statement or admissions of fact made during settlement negotiations.[28] Exceptions exist under both rules when the evidence is sought to be admitted for another purpose.[29] No specific rule, statute or agreement is needed for Rule 408 to apply to a mediation.

Practical Considerations

The mediator and the parties should discuss confidentiality issues before the mediation begins so that everyone understands and agrees on the scope of the protection, no one is misled, and the mediation process is not damaged. Like most statutes, the protections provided by the Louisiana Mediation Act are limited. As the confidentiality protections provided by statutes and rules are qualified, and the exceptions and terms are often vague and undefined, they may not be sufficient for the parties' interests and needs.

Due to the uncertainty, parties may choose to contract for confidentiality protection beyond what is provided by statute and rules.[30] The parties may want to: (1) define the scope of when the mediation process officially begins and ends; (2) agree on what documents will be included within the mediation confidentiality provisions; and (3) consider including on each document produced in mediation a notation that it is subject to the confidentiality agreement. Many private mediation providers include confidentiality statements in their rules or agreements, which should be carefully reviewed and considered.

Finally, it can be unclear which state's laws apply to a mediation confidentiality issue. A situation may arise where a statement made in mediation in one state may be sought in another state, information from a state court mediation may be sought in federal court, or the mediation sessions could take place electronically, by telephone conference or over the Internet, where the parties and the mediator are not located in the same state. By also including a choice of law provision in the mediation agreement, one can hopefully avoid a conflict down the road.

FOOTNOTES

1. La. R.S. 9:4101, *et seq*. The Louisiana Mediation Act went into effect on Jan. 1, 1998, and applies to all civil cases pending in state court or filed on or after that date. "The purpose of the Act is to provide encouragement and support for the use of mediation to promote settlement of legal disputes." Hon. Max N. Tobias, Jr. *et al.*, La. Prac. Civ. Pretrial § 15:76 (Thomson Reuters 2015-2016 ed.).
2. La. R.S. 9:4112.
3. *Id*. at 9:4112(A).
4. *Id*. at 9.4112(B)(1).
5. *Id*. at 9:4112(C).
6. *Id*. at 9:4112(D).
7. *Id*. at 9:4112(E).
8. Broussard v. Brown's Furniture of Lafayette, Inc., 128 So.3d 640, 641 n.1 (La. App. 3 Cir. 2013), *writ denied*, 138 So.3d 605 (La. 2014).
9. *Id*. at 641 and 644.
10. *Id*. at 641 n.1.
11. Federal courts will usually apply relevant state law when hearing a diversity claim under Fed. R. Evid. 501 (unless the disputed evidence involves the amount-in-controversy requirement under 28 U.S.C.A. § 1332(a)). Federal courts will apply federal law if there is federal question jurisdiction or the matter involves both pendant state and federal law claims. Sarah R. Cole *et al.*, 1 Mediation: Law, Policy and Practice § 8.3 (Thomson Reuters 2016).
12. Cleveland Constr., Inc. v. Whitehouse Hotel Ltd. P'ship, No. Civ.A. 01-2666 (E.D. La. Feb. 25, 2004), 2004 WL 385052.
13. *Id.* at *2.
14. *Id.*
15. *Id.*
16. *Id.*
17. Thrasher v. Metro. Property and Cas. Ins. Co., No. Civ.A. 06-2317 (W.D. La. Dec. 18, 2007), 2007 WL 4553605.
18. *Id*. at *2.
19. *Id*. at *1 & *2.
20. In re Grand Jury Subpoena Dated Dec. 17, 1996, 148 F.3d 487, 49 Fed. R. Evid. Serv. 1308 (5 Cir. 1998). *See also,* Solorzano v. Shell Chemical Co., 83 Fair Empl. Prac. Cas. (BNA) 1481, 2000 WL 1145766 (E.D. La. 2000) (rejecting the creation of a federal ombudsman privilege); Smith v. Smith, 154 F.R.D. 661 (N.D. Tex. 1994). For more information on the federal mediation privilege, see Sarah R. Cole *et al.*, 1 Mediation: Law, Policy and Practice § 8:18 (Thomson Reuters 2016).
21. The Alternative Dispute Resolution Act of 1998 required federal courts to adopt a local rule to protect ADR program confidentiality. 5 U.S.C. § 574 (2000).
22. Benson v. Rosenthal, No. Civ. A. 15-782 (E.D. La. May 25, 2016), 2016 WL 3001129, *9.
23. *Id*.
24. *Id*. at *1 & *9.
25. *Id*. at *9.
26. La. C.E. art. 408 (A).
27. Fed. R. Evid. 408.
28. La. C.E. art. 408 (A) and Fed. R. Evid. 408.
29. *Id*.
30. Of course, confidentiality can never be 100 percent absolute, as certain information disclosed at mediation is required to be reported based on the law or the code of ethics. "Examples of matters that must or should be disclosed under applicable circumstances include: child abuse, La. R.S. 14:403; elder abuse, La. R.S. 14:403.2; possession, manufacture or distribution of drugs or alcohol on school campuses, La. R.S. 14:403.1; certain burn injuries or wounds to control arson, La. R.S. 14:403.4; knowledge that a person intends to commit a crime that is likely to result in reasonably certain death or substantial bodily harm, La. Rules Prof. Conduct Rule 1.6; and attorney misconduct, La. Rules of Prof. Conduct Rule 8.3." Hon. Max N. Tobias, Jr. *et al.*, La. Prac. Civ. Pretrial § 15:71 (Thomson Reuters 2015-2016 ed.).

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