

The secrets of confidentiality

The concept of confidentiality in mediation is complex and a written agreement is important; misunderstanding what is confidential and what is not can have serious consequences

By David Gordon

Touted as an advantage in mediation, confidentiality is a readily accepted tenet. But what does confidentiality mean? Sure, it has a prima facie definition, but are there exceptions? Nuances? Limits?

Let's start at the beginning. Many mediators tell parties that everything said in mediation is confidential. Of course, some jurisdictions have laws and court rules that create an evidentiary privilege between mediators and their clients. If no legislation, court rule, or caselaw recognizing a mediation privilege exists, what is the basis for telling parties that confidentiality will be respected? That is where your confidentiality agreement comes in.

If it is a better fit for your locale, your agreement can specify that client communications will be kept private unless legally required to reveal them. The confidentiality agreement serves to protect the mediator just as much as the clients. Parties can be contractually bound to agree not to call mediators as witnesses and can be obligated to be responsible for the time and costs of a mediator resisting a subpoena.

A professional mediator will have all parties sign a confidentiality agreement. Does your confidentiality agreement describe confidentiality? Does your agreement outline circumstances in which information discussed in mediation may be brought into court if mediation fails? Surely your confidentiality agreement outlines consequences for breach of confidentiality or serving the mediator with a subpoena that may result in the loss of money and time. In some jurisdictions, mediators are specifically exempted from civil process requiring the disclosure of any matter discussed during the mediation proceedings.[1]

When mediation fails and you find yourself in court

As much as we would like to believe mediation is a better, pragmatic alternative to litigation, sometimes mediation fails and a dispute lands in court. Not long ago, I found myself in the position of being able to watch the result of a failed mediation between neighbors. I had been meeting with a Nevada justice of the peace when he mentioned that after our meeting he was conducting a hearing on a case that he had ordered to mediation, but the parties had failed to reach an agreement. I asked to sit in and was invited because it was open court.

The parties were neighbors who each had a home on either side of a lot and house that had been abandoned. Neighbor A was upset that neighbor B had planted sunflowers on the abandoned property in an attempt to improve his own view. Neighbor B was upset with neighbor A because he had observed neighbor A on the property picking up trash and possibly taking items out of the abandoned house. It seemed as if both parties were agitated by the efforts of each other to keep up the appearance of the abandoned property and make efforts to prevent the fall of property values in the neighborhood.

The judge confirmed with the parties that they had attempted mediation but had failed to reach an agreement. The parties acknowledged that was the situation and each complained of the unreasonable demands of the other. The judge then explained that each party had filed for an extended protection order against the other, an action that has no filing fee in the jurisdiction of this case. He also told the parties that if he ordered protection orders, there would be serious consequences for violations and the consequences would be handled by law enforcement officers, rather than the courts. The judge allowed the parties to tell their stories, which involved a lot of outrage about photographing and videoing each other on the abandoned property. At different points in the lead-up to mediation there had been alleged threats by each on the life of the other, and profane name-calling.

"But that was discussed in mediation and it's confidential"

It became clear that Neighbor A had been calling the municipal code enforcement department regarding Neighbor B watering the sunflowers on days that were not designated for watering. This furthered the conflict because Neighbor B had printouts of emails from code enforcement detailing the number of times Neighbor A had called them, and Neighbor A was outraged because he said he had been told he could make the reports anonymously. Neighbor A went on to declare that this had been discussed in mediation and was supposed to be confidential. There may have been an opportunity at this point for the judge to explain that confidentiality has its limits and is unable to protect information that may be admissible through other means.

Of course, to discuss in detail the limits of confidentiality in mediation, the

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judge would have access to, or knowledge of the confidentiality agreement applicable to the mediation. There appeared to be some hostility among the previous tenants of the abandoned property, Neighbor A, and Neighbor B, related to possible drug use and even low-level trafficking by those tenants. The judge asked the parties if they agreed with his characterization that the neighbors were each concerned with what the other was doing on a property that neither had a reason or right to be on, and the parties confirmed that summary. The judge also established that the abandoned property had subsequently been purchased by an investment group and was expected to be rented out to new tenants.

The judge listened patiently and gave the hearing almost exactly an hour. He maintained control of his courtroom when the parties had brief outbursts or reactions. I cannot stress enough how patiently, calmly, and professionally the judge conducted himself. At the end of an hour, with the parties repeating the same points of contention, the judge said he was ready to act on their requests.

"Mind your own business!"

He explained that they had each asked for extended protection orders against the other. The judge cautioned that a protection order is not a one-size-fits all solution, and he said that he would not be granting one order for a single party, and that left him with the option of getting agreement from the neighbors that they could de-escalate their conflict and proceed with minding their own business, or he would grant both protection orders, resulting in what he described as a Berlin Wall between them. He detailed that the orders would be no-contact orders, and they could not engage in discussion, would be prohibited from photographing or videoing each other, or posting anything online related to the case or parties. The judge went on to explain that violation of the protection order would result in an arrest and felony charge, which would result in a possible appearance in a general jurisdiction court, and the certainty of hiring an attorney at significant cost. The judge reiterated that up to this point neither party had had to pay to file with the court and neither party had yet engaged an attorney.

Both neighbors consulted with their spouses/partners who had come to provide support. And in the end, both parties agreed they wanted the judge to issue extended (one year in duration) protection orders.

As a mediator, watching this proceeding seemed to strike me as a particularly valuable glimpse into the future for mediations that were unable to reach resolution. Lessons for a mediator to put into use from this experience include:

- Parties to the type of mediation described in this article could be informed that consequences of not reaching an agreement could include the issuance of non-contact orders that could open the door for violations to result in possible serious criminal charges (depending on the jurisdiction).
- There will be parties ordered to mediation that will comply with the order but never have any intention of finding agreement.
- While the mediation is confidential, that does not preclude documentary evidence that has been disclosed in mediation from being used in court proceedings if the information is otherwise discoverable. Parties, especially self-represented litigants, may not understand that distinction, and a mediator can leverage that to make sure that parties know such information can become part of the record in a courtroom. Self-represented litigants (SRLs) must have a full understanding of confidentiality requirements and limits.
- The scope of confidentiality should be clearly defined and agreed upon.
- There may be duties to report abuse, threats to life, malpractice (including mediator malpractice).[2]
- Communications between mediators and attorneys, mental health professionals, and experts can be confidential, but an understanding among all concerned must be established.

Caucusing and confidentiality

Caucus arrangements bring another dimension to confidentiality. Mediators and parties may agree to reveal nothing said in caucus or may agree that everything in caucus is available to be shared unless otherwise specified. This should be confirmed before caucus starts and again when parties rejoin joint sessions – always. The goal here is shared understanding, and that is necessary for any mediated settlement.

Another consideration regarding confidentiality is that if public agencies are acting as either parties or mediators, protection of disclosures may be limited by laws that compel public access.[3]

The concept of confidentiality in mediation is complex. Some mediators may elect to avoid use of the word confidentiality altogether, including in the mediation agreement, and will ask for the parties' agreement on keeping communications private.[4] Still, whether referred to as confidentiality or as private communications, the limits on what can be discussed can be among the most powerful tools a mediator can bring to bear. By allowing a benevolent gesture or apology to be offered within the confines of confidentiality, significant progress can be achieved toward satisfying the real needs of certain parties.[5]

Regardless of the mediator's experience and understanding of the terms of confidentiality, unless parties in a mediation share that understanding at a significant level, assumptions will lead to disagreement and acrimony and may result in the inability to reach an agreement, or heightened emotions if returned to the courtroom.

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officer in the US Navy where he served in submarines under the Mediterranean, at a field station on Turkey's Black Sea shore, in the arctic with the Canadian military, and other less hospitable places.

Endnotes:

[1] Nevada Revised Statutes: NRS 48.109 Closure of meeting held to further resolution of dispute; exclusion of admission, representation or statement made during mediation proceedings; confidentiality of matter discussed during mediation proceeding.

[A] A meeting held to further the resolution of a dispute may be closed at the discretion of the mediator.

[B] The proceedings of the mediation session must be regarded as settlement negotiations, and no admission, representation or statement made during the session, not otherwise discoverable or obtainable, is admissible as evidence or subject to discovery.

[C] A mediator is not subject to civil process requiring the disclosure of any matter discussed during the mediation proceedings.

[2] *Mediation Confidentiality: A Malpractice Exception or Not?*, Nancy Neal Yeend and Stephen Gizzi, Plaintiff Magazine, October 2013

[3] *Alternative Dispute Resolution*, 4th Edition, Jay Grenig

[4] *The Art of Mediation*, Second Edition, Mark D. Bennett and Scott Hughes

[5] *Alternative Dispute Practice Guide*, December 2021 Update, Bette J. Roth, Randall W. Wulff, and Charles A. Cooper



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