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THE IMPORTANCE OF CONFIDENTIALITY FOR THE VITALITY OF MEDIATION

In recent years, mediation has grown in popularity as a form of alternative dispute resolution. The mediation process has many benefits, one of which is confidentiality. The expectation of confidentiality promotes the use of mediation by providing parties with certainty that they will be able to earnestly discuss settlement without the risk of valuable information being disclosed to anyone not privy to the mediation. See Michael P. Carbone, *Confidentiality Revisited*, MEDAIATE.COM (June 2014), <http://www.mediate.com/articles/CarboneMbl20140613.cfm>. Several recent cases across the United States have indicated that confidentiality rules are effectively ensuring that mediation will remain the preferred form of alternative dispute resolution, but some cases suggest otherwise.

A recent ruling by a Florida Federal District Court suggests that violations of mediation confidentiality rules lack a remedy. In *Procaps SA v. Patheon Inc.*, 12-24356 (S.D. Dist. Fla. 10/22/14), plaintiff, Procaps, filed a motion to compel return to mediation, which defendant, Patheon, opposed. In its opposition, Patheon alluded to several aspects of the parties' previous confidential mediation by stating: there was a "monumental gap" at mediation; Procaps refused to "close the gap" during or after mediation; Procaps made "over the top" settlement offers; Patheon made a counteroffer to Procaps' settlement offer; Procaps refused to disclose a "rule of reason theory" to Patheon; and Procaps' counsel made no good faith effort to settle. Based on these statements, Procaps filed a motion to strike defendant's opposition alleging that Patheon breached Florida's mediation confidentiality rules. See S.D. Fla. L.R. 16.2(g)(2). Procaps argued that the court should strike Patheon's opposition or, alternatively, that Procaps should also be able to disclose confidential information from the mediation.

The court first held that the statements referring to the "monumental gap," Procaps' refusal to "close the gap," and Procaps' lack of good faith were "relatively harmless" because they were responsive to the motion to compel return to mediation and "sufficiently generic to not constitute a violation of the confidentiality rule." It noted that a party should, "at least to some limited degree," be able to mention that the previous mediation did not succeed due to considerable differences.

Next, Patheon revealed in its opposition that Procap's settlement demand was based on an expert's opinion that the venture would have generated billions of dollars in revenues and that Procaps "has no rule of reason theory, as evidenced by its refusal to disclose one to Patheon." The court found that these statements "did in fact go a tad too far" and that the statements were in violation of Florida's mediation confidentiality rules; however, the court opined that allowing the disclosures in this case would not be significant enough to "chill" mediation. The court further stated that the severity of Procap's suggested remedies—to strike Patheon's opposition or to allow Procaps to also disclose confidential information—were "disproportionate" to Patheon's technical violations. Ultimately, the court denied Procap's motion to strike defendant's opposition.

On the other hand, in *American Environmental Group, LTD. v. H.M. Miller Construction Co.*, 2014-Ohio-4681 (Ohio Ct. App. Oct. 23, 2014), a recent case from Ohio, the court demonstrated that confidentiality rules are successful in protecting mediation materials from disclosure. The city of Fremont, Ohio and H.M. Miller Construction Company (H.M. Miller) participated in a series of mediations to settle claims based on a construction project. Another

party to the litigation, American Environmental Group (AEG), was invited to attend the mediation but declined to do so. At the final mediation, Fremont and H.M. Miller settled their dispute. AEG subsequently filed suit against H.M. Miller and issued subpoenas duces tecum to Fremont seeking documents from the Fremont-H.M. Miller mediation. H.M. Miller filed a motion to quash subpoenas, or, in the alternative, a motion for a protective order against AEG alleging that the documents were confidential mediation communications, which are privileged under Ohio's Uniform Mediation Act. *See* OHIO REV. CODE §§ 2710.01–2710.10 (Westlaw 2015).

The trial court denied H.M. Miller's motion to quash, as well as the motion for protective order, stating that the issue was "not yet justiciable" and that the documents must be disclosed. The disclosure was strictly limited to AEG's counsel, and, once the documents were received, the defendants could then "file another motion for a protective order to prevent plaintiff from using privileged mediation communications in discovery or at trial and to 'claw back' any such communications." On appeal, the Ohio Court of Appeals reversed the trial court's ruling stating that "the trial court abused its discretion in ordering the release of all the requested documents, including those that fall within the ambit of a mediation communication."

The court first found that there was evidence in the record that the documents were protected under Ohio's Uniform Mediation Act. AEG took the position that it was entitled to view the documents for three reasons: it was a party to the mediation through H.M. Miller, it was invited to attend the mediation, and its claims were compromised at the mediation. Ruling that none of these arguments qualified as a valid exception to Ohio's Uniform Mediation Act, the court held that requiring disclosure was improper. Furthermore, the trial court's solution to limit disclosure to only AEG's counsel and to have the defendants "claw back" the confidential documents violated Ohio's Uniform Mediation Act.

The court specifically noted the importance of mediation's confidentiality stating that it is "critical to the success of mediation." The court opined that disregarding confidentiality rules "threatens the vitality of mediation," and held that when there are confidential mediation communications, a trial court should not order their release.

These cases illustrate that while the degree of disclosure may impact a court's enforcement of the confidential nature of mediation conferences, overall, confidentiality rules are an effective way to promote the continued vitality of mediation.

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