

POTENTIAL LIMITS TO ATTORNEY-CLIENT CONFIDENTIALITY IN MEDIATION

On December 10, 2015, the Oregon Supreme Court decided a case of first impression regarding mediation confidentiality. In *Alfieri v. Solomon*, the court was faced with interpreting Oregon's mediation statutes to determine whether a client could introduce evidence of attorney conduct during mediation in an attorney malpractice action against that attorney. *Alfieri v. Solomon*, 358 Ore. 383 (2015). The trial court held that some of the plaintiff's allegations relied on confidential information revealed during mediation and were therefore stricken from the complaint. This resulted in the dismissal of the action. Essentially, the Oregon Supreme Court evaluated current jurisprudence, created a new rule, and applied it to the case at bar. The new rule is an interpretation and definition of the terms "mediation" and "mediation communication," as well as, limiting "mediation communications" so as to exclude attorney-client communications.

Alfieri v. Solomon arose from an employment discrimination and retaliation case that was settled after mediation when Solomon, the attorney in the mediated case, urged his client, Alfieri, to accept a settlement offer that had been presented by the mediator during mediation. Here, the plaintiff's complaint of legal malpractice relied on facts that included terms of the confidential settlement agreement and communications made during the mediation process, including the mediator's proposal, his attorney's conduct during mediation, and the attorney-client communications between the plaintiff and his attorney regarding the mediation. The attorney/defendant moved that all allegations based on those facts be stricken as confidential under Oregon mediation statutes. The trial court struck the allegations by applying a broad interpretation of the definition of "mediation communications" as provided by the Oregon statute, which states that all "mediation communications" are confidential. The complaint was dismissed.

The Court of Appeals reversed in part and distinguished between attorney-client communications made during mediation and those made after mediation. The Court of Appeals held that only those attorney-client communications made during mediation were "mediation communications" and subject to confidentiality.

The Oregon Supreme Court fully reversed the trial court's decision by holding that the definition of "mediation communication" is a communication that occurs either "during an actual mediation in which a mediator is present and directly involved, or else outside such proceedings but relat[ing] to the substance of the dispute and its resolution process, and with the added limitation that the communication must be one made between certain identified persons – the mediator, the parties, their agent, or anyone else present – and not one made to a person other than those identified in the statute." Nor can a communication between a client and his attorney, made before or after the actual mediation proceedings be a "mediation communication."

This definition is much more limited than the plain language of the Oregon mediation statute. Oregon Revised Statute 36.110(7)(a) states that "'Mediation communication' means: (a) All communications that are made, in the course of or in connection with a mediation, to a mediator, a mediation program or a party to, or any other person present at, the mediation proceedings."

With this recent ruling, it poses an interesting question for Louisiana's mediation and confidentiality expectations. The Louisiana Mediation Act, La. R.S. 9:4101, et seq. does not

define “mediation communications.” La. R.S. 9:4112 provides for a default rule for waivable confidentiality in limited circumstances. The language of La. R.S. 9:4112(A) clearly states "all oral and written communications and records made during a mediation, whether or not conducted under this Chapter...may not be used as evidence in any judicial or administrative proceeding." While the vast majority mediations in Louisiana occur outside the purview of the Louisiana Mediation Act, the confidentiality provision still applies. The statute further goes on to allow for these communications to be used for three exceptions: reports made to the court about whether or not the parties appeared and reached a settlement, noncompliance with a court order for mediation, and to prevent fraud or manifest injustice. In issues where confidentiality violates compliance with other legal requirements for disclosure, a judge may review the records and determine whether or not disclosure is necessary. Lastly, if the mediator and all parties agree in writing, confidentiality may be waived.

In a case similar to the *Alfieri* case, *Cleveland Construction v. Whitehouse Hotel Limited Partnership*, Judge Wilkinson determined that "the Mediation Act does not impose an absolute bar against discovery of documents otherwise protected by its provision. Cleveland Constr., Inc. v. Whitehouse Hotel L.P., 2004 U.S. Dist. LEXIS 3058 (E.D. La. Feb. 25, 2004). The statute provides that, if it conflicts with other legal requirements for disclosure of communications or materials, the issue of confidentiality may be presented to the court having jurisdiction of the proceedings to determine whether, under the circumstances, the information is subject to disclosure. La. Rev. Stat. § 9:4112(D).

Due to the confidentiality exceptions in our statute and by the fact that the Louisiana Mediation Act does not expressly address communications that occur as a result of a mediation conference before or after the actual mediation conference is conducted, a Louisiana client in a similar circumstance might be able to have confidentiality waived in order to sue his attorney for malpractice. The attorney would likely not waive his right to confidentiality in writing, but the client could possibly have a judge review the mediation and determine whether or not information would be subject to disclosure, as was the case in *Cleveland Construction*.

Submitted by Leona Scoular, Michelle Kornblith, and Genevieve Leslie, law students of LSU's Paul M. Hebert Law Center and Student Mediators in LSU's Civil Mediation Clinic, under the supervision of Paul W. Breaux, LSU Adjunct Clinical Professor and LSBA Alternative Dispute Resolution Section Immediate Past Chair, 16643 S. Fulwar Skipwith Road, Baton Rouge, Louisiana.