Confidentiality Counts

What Happens in Mediation Stays in Mediation

By Daniel R. Cofran, J.D

Mediation works because everything said or done in mediation is confidential. Confidentiality provides a "safe" environment for the parties to speak frankly and openly with a mediator, and even each other, without fear of "being bitten" at trial in the event the case does not settle.

This is part of the long-settled rule of law that settlement discussions are not admissible at trial.

The Rule

Most states by statute make mediation confidential.

In Kansas, "All verbal or written information transmitted between any party to a dispute and a neutral person [mediator] shall be deemed confidential communications. No . . . statement made in the proceeding shall be admissible as evidence . . . . A neutral person [the mediator] shall not be subject to process [a subpoena] requiring the disclosure of any matter discussed during the proceedings . . . ." K.S.A. Sec. 60-452a.

Missouri is similar. "[M]ediation proceedings shall be regarded as settlement negotiations. Any communication relating to the subject matter of the dispute . . . made during the resolution process by any participant . . . shall be a confidential communication. No . . . statement made in setting up or conducting such proceedings . . . shall be admissible as evidence." Sec. 435.014(2), R.S.Mo. (2000), and Mo.Sup.Ct. Rule 17.06.

Unlike Kansas, however, a Missouri mediator is not immune to a subpoena unless the parties have a written mediation agreement. Sec. 435.014(1) R.S.Mo. (2000).

Be careful. While the Kansas statute technically protects "all

information," the Missouri statute is limited to "subject matter relating to the subject matter of dispute." Accordingly, in a Missouri mediation a party making defamatory statement about a third party totally unrelated to the dispute could be sued by the third party.

The Exceptions

Different states have different exceptions to confidentiality, ranging from no exceptions to many. It can be confusing.

There are five exceptions under the Kansas statute: evidence of an ongoing crime or fraud; an expression of an intent to commit a crime or fraud in the future; evidence of an ethical violation by the mediator; or threats of physical violence to a party, his or her family member, the mediator, or court personnel with an apparent intent to carry it out. K.S.A. Sec. 60-452a(b).

In addition, appointed mediators are "mandated reporters" under Kansas child abuse laws and *must* report suspected harm to a child by physical, mental or emotional abuse or neglect or sexual abuse in domestic cases. K.S.A. Sec. 38-2223(a)(1)(D).

Missouri, on the other hand, provides no exceptions to confidentiality . . . not even child abuse. Mediators under Missouri's child abuse statute are "permissive" reporters. The Missouri statute states any person "may" report child abuse or neglect if he or she "has reasonable cause to suspect" that "a child has been or may subjected to abuse or neglect." Sec. 210.115.5, R.S.Mo. (2000).

In addition, in the event mediation succeeds and the parties enter into a written settlement agreement but one party then balks, the confidentiality bar does not prevent suing to enforce the agreement. Missouri and Kansas statutes are silent on this, but once an agreement is concluded the mediation is over and contract law controls.

Put It in Writing

Mediation parties shouldn't have to guess what is and is not confidential under state law. This can be avoided with a written mediation agreement spelling out exceptions to confidentiality, listing other procedures governing the mediation and stating what state's law otherwise will control the mediation.

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