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Scott H. Hughes
University of New Mexico

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A Closer Look

The case for a mediation confidentiality privilege still has not been made

By Scott H. Hughes

Consider the case of the manipulating minister:

At a small women's college, a minister with the campus ministry seduces a naive young coed into a sexual relationship. When she attempts to break off the relationship, the minister responds with harassment. She subsequently sinks into a deep depression and drops out after her first semester. Several months later, she confides in her sister, who promptly relays the sordid tale to their mother.

The family's attorney files suit and commences discovery, from which she learns about an earlier incident involving the same minister while at the college's sister institution. Finding that the previous dispute had been settled through mediation, the attorney issues a subpoena for the mediator and his notes. During a caucus with the mediator, it seems, the minister stated that his supervisors had been aware of his illicit urges for some time. The mediator, joined by the church and the minister, seeks to quash the subpoena by asserting the privilege contained in the state mediation act.¹

Does the need to encourage settlement outweigh the victim's rights to this information? I think not.

Over the past two decades we have witnessed a vast proliferation of mediation statutes throughout the United States, many of which contain privileges shielding the mediator and/or the parties from the disclosure of events that take place during mediation, thus shrouding mediation proceedings in a veil of secrecy.² Recently, the American Bar Association Section of Dispute Resolu-

tion and the National Conference of Commissioners on Uniform State Laws began the process of drafting a uniform mediation privilege that the organizations hope will be adopted by all states for all mediations. (See related article, page 4.)

Before rushing to create another privilege that may preclude the law's traditional right to "every person's evidence," we should take at least one more close look at the social and legal cost of such a privilege. If that important step is taken, it will become apparent that the benefit of the mediation privilege does not justify its cost.

There is no empirical evidence to support the need for a mediation privilege.

'Greater good' argument flawed

Mediation confidentiality, proponents assert, is inextricably interwoven into the very fabric of mediation and is fundamental to the success of the process. The discussions that take place during mediation often range far beyond the core of the dispute, revealing interests and concerns that may not come out during a more adversarial process.³

Within this far-ranging discussion, parties may reveal secrets that they might not otherwise disclose in a normal negotiation. A lack of confidentiality would squelch discussion and further curtail the parties' ability to engage in creative and interest-based problem solving, thus greatly impeding possible settlement, so the argument goes. For these reasons, the loss of evidence

caused by the privilege is justified by the greater goodness the privilege creates in the settlements that occur.

The mediation community has reflexively parroted this argument without serious questioning, apart from an important 1986 article by Professor Eric Green.⁴ Assuming that a connection exists between the rapid growth of mediation and the widespread enactment of mediation statutes, the growth of mediation alone does not support mediation privileges.

To begin with, it should be noted that there is almost no empirical support for mediation privileges. For example, no data exists to show a difference in growth rates or overall use of mediation services between jurisdictions with privileges and those without such protections, or from within any jurisdiction before and after the creation of a privilege.

Moreover, there is no empirical work to demonstrate a connection between privileges and the ultimate success of mediation. Although, parties may have an expectation of privacy, no showing has been made that fulfilling this expectation is crucial to the outcome of mediation.

Finally, in order to understand what benefits might be derived from mediation privileges, it is crucial to put mediation in its proper context. Most studies indicate that when compared to traditional settlement practices in litigation, overall settlement rates for mediation are only marginally higher, if at all. Therefore, it appears that mediation settles cases that already would be negotiated to settlement, rather than relieving court dockets to any significant degree. Mediation, at most, may settle cases differently and earlier than negotiation, but overall, whether this is in fact occurs and what societal good is derived therefrom is far from certain.

Scott H. Hughes is a law professor and director of clinical programs at the University of Alabama School of Law. He can be reached at shughes@law.ua.edu. © Scott H. Hughes.

On the other hand, to assess the overall value of mediation privileges, it is important to weigh any gains that would be attributable to mediation against their cost.

Privileges sacrifice potentially important evidence for subsequent legal proceedings and restrict public access to information that may be necessary to a democratic society.⁵ Of course, finely detailed exceptions to a mediation privilege could be crafted that would help overcome many problems. However, numerous exceptions could well lead to an unpredictable privilege that would be more detrimental than no privilege at all. Privileges containing many exceptions may generate false expectations which could be dashed during subsequent litigation, whereas mediation without privileges establishes a clear rule discouraging expectations and subsequent litigation.

A mediation privilege would sacrifice evidence that may be important for subsequent legal proceedings, and restrict public access to information that might be necessary to a democratic society.

Consider, too, among those costs the degree to which a privilege condones lying during a mediation. Although some lying in negotiation is tolerated, if not assumed and expected, most find some forms of lying in negotiation intolerable. This is complicated by the fact that we, as a society, have not reached a consensus on the dividing line between permissible and impermissible lying in negotiation. Privileges in mediation moot this point, however, sanctioning almost any form of lying by prohibiting any examination of the circumstances and the conduct of the parties to a mediation.

Now, let us examine conflicts that arise internally between the parties to mediation to measure the loss of potentially important evidence for subsequent legal proceedings. In particular, mediation privileges preclude examina-

tion of the baseline issues of offer, acceptance, and consideration, and the traditional equitable defenses of duress, illegality, incapacity, undue influence, misrepresentation, mutual mistake and unconscionability (substantive and procedural).

Consider the case of the negligent neutral: Late in the mediation, the mediator, in an attempt to avoid a possible impasse, renders an opinion about an issue of tax law to two squabbling partners who are trying to split up their business. Exhausted after hours of work and eager to reach any kind of deal, they rely on the advice dramatically shifting the monetary factors in the subsequent contract. Unfortunately, the mediator is wrong. After the parties perform the agreement and divide their business, the parties learn the truth. The party on the poorer end of the advice sues to void the agreement under the theory of mutual mistake of the law.⁶

Although parties have a right to contract and the right to make silly mistakes, basic precepts of contract law consistently demonstrate that this right is not absolute.

In the case of the negligent neutral, a mediation privilege would prohibit any inquiry into the deliberation of the parties while, under normal contract law, the agreement would likely be set aside. Courts must be free to examine the contract formation to determine if the parties have complied with basic principles of contract law and, if compliance is not found, set the contract aside. Mediation privileges represent nothing less than an abrogation of centuries of common law.

An argument may be made that the prosecution of a lawsuit on a mediation agreement for breach or specific performance would constitute a waiver of the privilege. This is analogous to the waiver of the attorney/client privilege in a malpractice claim brought against an

attorney. However, the application of the principal in the mediation setting is by no means clear. Further, many settlement agreements may be fully performed before any error is discovered, thus requiring no offensive use of litigation – and, therefore, no waiver of the privilege – by the party who will be unjustly enriched. The case of the negligent neutral is just such a case. The picture is further clouded if the mediator holds and may assert the privilege or if the statute is cast in terms of confidentiality that cannot be waived.

Proponents of privileges suggest that the problem of the negligent neutral can be overcome if the parties ensure that any determinative assertions are placed in the recitals of the mediation settlement. This may solve the problem of mistake for some, but does nothing for less sophisticated disputants. Further, this solution fails to address the other contract-related issues such as duress and unconscionability, a point which becomes particularly cogent when mediation involves women, minorities, individuals with disabilities, the elderly, the poor and other traditionally disempowered individuals and groups, especially when such disputants are undergoing the stress and uncertainty of conflict.

Consider the case of the disputant in duress: During a mediation, one party complains of chest pains and fatigue only to be told by the mediator that he cannot leave the mediation session until a settlement has been reached. The disputant subsequently signs a settlement, but tries to have it set aside during a subsequent action for specific performance. The adverse party contends that the mediation privilege prohibits an examination of the communications that took place during mediation preventing the assertion of such a defense.⁷ Mediation privileges would foreclose disputants from raising this or many other contract defenses.

Next, let us examine conflicts that arise externally, that is between the players in mediation – both disputants and mediators – and third parties or institutions.

Consider the case of the procrastinating plaintiff's attorney: At a final pre-trial conference, plaintiff's attorney suggests mediation and defense counsel

skeptically agrees. The court then continues the trial date. Three weeks later the parties meet in the mediator's office to mediate. After six hours of mediation the parties have not made any substantial progress. Totally frustrated, defense counsel declares the process dead and gathers her file. As she wheels from the table and ushers her clients to the door, she grumbles over her shoulder, "If you weren't going to make any concessions, why did you ask for mediation?"

"Because I needed the continuance," responds the obviously tired and disheveled attorney under his breath. The door to your conference room swivels shut, defense counsel oblivious to the remark. You, the mediator, however, heard it quite clearly. Under the ethical guidelines applicable to attorneys, this abuse of the process must be reported. However, the mediation statute contains a general privilege without an exception that applies to attorney misconduct.

Should the procrastinating plaintiff's lawyer be reported? Is settlement of the manipulating minister's case so valuable that it overcomes the victim's right to this evidence? Does mediation create so much goodness that it overcomes the need of the bench and bar to regulate the courts and police its practitioners? Unfortunately, mediation privileges hide misconduct such as this behind closed doors, forever, and prevents victimized third parties from obtaining evidence that would otherwise be available to them.

A subcategory of external disputes exists that involves cases of past conduct that may have future impact. Consider the case of the concealing combatants: Late one afternoon after several days of intensive mediation between a chemical company and a multinational waste treatment company involving claims of breach of contract and specific performance, a representative of the waste treatment company reveals information about some dumping of toxic waste water. The chemical company is aware of the situation, but sees the matter as strictly peripheral to the negotiations. You help mediate a settlement a few days later.

Ten years later, after an alarmingly

large number of childhood illnesses, a group of homeowners file suit against both companies. The morning that you read about the lawsuit in the paper, you are served with a subpoena duces tecum. One of the key issues, it seems, will be the exact location of the dumping of the toxic waste. Your assistant retrieves the file and, after 30 minutes of review, you find the notes about the toxic waste water. You have no separate memory, but there, in your handwriting, is the location of the dumping. The plaintiffs'

A mediation privilege would foreclose disputants from raising contractual defenses to the enforcement of a mediation agreement.

homes are built on the same soil. The enabling statute for the mediation has a privilege section. What do you do?⁸

Although this is a past incident, it certainly has future impact. Does the value of mediation settlement outweigh society's right to this information?

While considering all of these questions, it is important to remember that no empirical data exists that connects the success of mediation with the availability of a confidentiality privilege. There has been no showing that the parties come to mediation with an expectation of privacy or that it is necessary for mediation to work at its fullest potential in most cases. As such, the central justification for a privilege is merely an assumption. Until such an empirical connection can be made, the arguments in favor of mediation privileges should not overcome the historical presumption favoring the availability of "every person's evidence."

Endnotes

¹. The inspiration for this story can be found at Goldberg, et. al., DISPUTE RESOLUTION:

NEGOTIATION, MEDIATION, AND OTHER PROCESSES 190 (1992).

². A distinction exists between confidentiality created by contract, evidentiary privileges and confidentiality created by statute. Confidentiality that arises from a contractual agreement is generally binding upon the parties to the contract, but will not defeat discovery requests brought by third parties. Privilege, on the other hand, represents the freedom from disclosure in a court or administrative tribunal. Privileges are not automatic, but must be asserted by a holder of the privilege and may be waived, either intentionally or inadvertently. On the other hand, statutorily created confidentiality may arise automatically and does not require an assertion and may not be waived under any circumstances. Unfortunately, the legislative use of these terms has often strayed from these definitions. Often, what might be characterized as a privilege has been labeled confidentiality and vice versa. This paper advocates against both privileges and statutorily created confidentiality.

³. Alan Kirtley, *The Mediation Privilege's Transition from Theory to Implementation: Designing a Mediation Privilege Standard to Protect Mediation Participants, the Process and the Public Interest*, 1993 J. OF DISP. RESOL. 1, 9.

⁴. Eric Galton, *A Heretical View of the Mediation Privilege*, 2 OHIO ST. J. ON DISP. RESOL. 1 (1986).

⁵. Goldberg, *supra*, note 1, at 179.

⁶. *Future Plastics v. Ware Shoals Plastics*, 407 F.2d 1042 (4th Cir. 1969).

⁷. *Randle v. Mid Gulf, Inc.*, No. 14-95-01292, 1996 WL 447954, (Tex. App.-Hous. (14 Dist.) Aug. 8, 1996). The court found that a party, "cannot argue that the mediation communications are confidential as to [the] duress defense while, at the same time, sue for specific performance of the mediation agreement." However, it refused to have the decision published and, therefore, the case cannot be cited as authority. This appears to be the first case of its kind to deal with contract defenses arising out of mediation agreements.

⁸. Space does not allow consideration of issues surrounding the ability of prosecutors and defense counsel to pierce the mediation veil in search of evidence. In *People v. Snyder*, 492 N.Y.S. 2d 890 (1985), the court quashed the prosecutor's subpoena after the defense seemingly opened the door by referring to the mediation during opening statement. This decision was based on a statute providing for absolute confidentiality with no right of waiver. There do not appear to be any cases from the defendant's point of view. One might question whether a mediation privilege should overcome the defendant's constitutional rights of confrontation. See, e.g., *Davis v. Alaska*, 415 U.S. 308 (1974) (Juvenile records protected by confidentiality provision will bow to defendant's rights).