Complex Confidentiality Issues in Mediation

by Lee Gelman

This article addresses the confidentiality section in Colorado's Dispute Resolution Act. It discusses how advocates and dispute resolution professionals can be aware of the difficulties that arise in its application.

The foundation of any dispute resolution proceeding is confidence in its privacy and confidentiality. The Colorado Dispute Resolution Act (CDRA or Act)[1] provides that, subject to only four narrow situations, no party or the mediator can be compelled to disclose information concerning any mediation communication, and no such communication is admissible in any judicial or administrative proceeding.[2] This simple prohibition is fine for a simple case, but can be unworkable in complex dispute resolution proceedings or when evidence is sought in a proceeding collateral to the dispute, including attorney malpractice and misconduct.

Statutory Application of Confidentiality

CDRA was promulgated in 1983 and has received only a minor makeover since enactment. The key section for purposes of this article provides as follows:

> Any party or the mediator or mediation organization in a mediation service proceeding or a dispute resolution proceeding shall not voluntarily disclose or through discovery or compulsory process be required to disclose any information concerning any mediation communication or any communication provided in confidence to the mediator or a mediation organization. . . . Any mediation communication that is disclosed in violation of this section shall not be admitted into evidence in any judicial or administrative proceeding.[3]

There is no easy interpretation of this paragraph. On its face, this confidentiality appears to apply only to mediations and not to other forms of alternative dispute resolution (ADR). This is so even though it adds the undefined phrase "dispute resolution proceeding." What is defined is "dispute resolution program," which is given the exact same meaning as "mediator services" to include any process of settlement discussions "with a mediator." Even assuming that "dispute resolution programs" include other forms of ADR, the confidentiality section again limits itself to only communications with mediators.

Delving deeper, CDRA's applicability section states that it applies to all "mediation services" or "dispute resolution programs," whether conducted through the Office of Dispute Resolution or through a mediator or mediation organization.[4] The Act then separately defines each of the other ADR processes: mediation, arbitration, early neutral evaluation, med-arb, mini-trials, multi-door courthouse concepts, settlement conferences, special masters, and summary jury trials.[5]

"Mediator" is broadly defined: "A trained individual who assists disputants to reach a mutually acceptable resolution of their disputes by identifying and evaluating alternatives." This definition is broad enough to cover any neutral in any nonbinding ADR process, which would include all the defined forms of ADR in the Act, with the exception of arbitration,[6] some types of summary jury trials, and special master referrals.

Thus, a mediator is broadly defined as a trained neutral in nonbinding proceedings.[7] Unfortunately, there are no cases on point that apply CDRA to these other forms of ADR. Because the Act appears to cover forms of ADR in addition to mediation, all references to mediation and mediator in this article include all other forms of nonbinding ADR. In practice, this is easily remedied in the parties' agreement to enter into a particular form of ADR by adopting CDRA's confidentiality provision.

Protected Communication

CDRA protects disclosure of "any information concerning any mediation communication or any communication provided in confidence to the mediator."[8] The most logical read is that "provided in confidence to the mediator" modifies only communication and not

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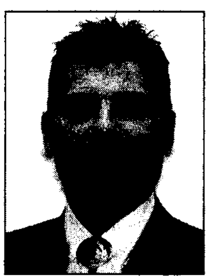

About the Author

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the phrase mediation communication. This is because "mediation communication" is defined in the Act and includes "any oral or written communication prepared or expressed for the purposes of, in the course of, or pursuant to, any mediation services proceeding."[9] This broad definition covers all materials provided to the mediator, as well as those not provided to the mediator but generated in furtherance of the mediation. Therefore, any communication provided "in confidence" to the mediator in the second phrase would be redundant or at least more limited than the defined phrase. Courts are loathe to interpret a phrase in a statute that effectively negates its application.

With this broad inclusive language, it is easier to see what is not given confidential protection than what is protected. Confidentiality does not extend to communication and documents generated outside the dispute resolution process.[10] Rather, it covers only communications made in furtherance of the process.[11] When interpreting confidentiality, courts so far have focused on the timing of the communication in relation to the mediator, as opposed to the nature of the communication itself, which is discussed below under "Enforcement of Settlement Agreements."

Practitioners are also warned that, unlike the attorney–client privilege, CDRA confidentiality is afforded to the parties and to the mediator, and each one may enforce the privilege. Furthermore, by defining "party" as any mediation participant other than the neutral, confidentiality therefore extends to attorneys, as well as anyone else attending the mediation—family, friends, confidants, and experts.[12]

Finally, CDRA prohibits disclosure in any judicial or administrative proceeding without regard to the nature or purpose of those proceedings. Accordingly, this protection is much broader than evidence rule 408's paltry protection of settlement discussions that are inadmissible only as to liability, validity, or amount of a claim, or to impeach a witness with a prior inconsistent statement.[13]

Exceptions to Confidentiality

CDRA provides several exemptions[14] to confidentiality. There are also several common law exemptions.

Crime/Safety

Any participant and the neutral may disclose confidential communications that reveal the intent of anyone to commit a felony, inflict bodily harm, or threaten the safety of a child under the age of 18. Disclosure is not mandatory but should be done not just for the obvious safety issues, but also because CDRA does not provide neutrals (or lawyers) immunity from liability to an injured participant or third party just because of the confidentiality provision. Moreover, the consequences of physical injury usually outweigh any potential liability to the neutral or participant for breaching a mediation communication.

Mediator Liability

CDRA does protect mediators from negligence lawsuits in a back-door fashion by allowing disclosure of confidential communications only in an action alleging willful or wanton misconduct by the neutral. Therefore, a malpractice claim against a neutral requires at least the allegation of impropriety above a simple breach of duty or the case is subject to dismissal.

Waiver

Unlike the attorney–client privilege that is held exclusively by the client, CDRA provides that the parties to the mediation, as well as the mediator, must each consent to waive confidentiality. This is quite straightforward, with the possible exception that, as discussed above, a party is not limited to the disputants, but includes their attorneys, experts, family, and others who attend the mediation. Strictly applied, each of these participants would have to consent to waive confidentiality. In practice, it is rare that all disputants agree to waive confidentiality. Mediators are especially unlikely to join in the waiver, because doing so would subject them to discovery and to testimony.[15] The fallback is to agree to the waiver, provided the parties limit the waiver to a specific proceeding and that they agree not to call the mediator as a witness.

Enforcement of Settlement Agreements

The most common attack on confidentiality is when one party attempts to enforce an unsigned settlement agreement allegedly reached in mediation. Because any document created in the mediation is accorded confidentiality, CDRA provides a specific exemption for settlement agreements. Any agreement reached:

> upon request of the parties shall be reduced to writing and approved by the parties and their attorneys, if any. If reduced to writing and signed by the parties,[16] the agreement may be presented to the court by any party or their attorneys, if any, as a stipulation and, if approved by the court, shall be enforceable as an order of the court.[17]

The Colorado Supreme Court in the consolidated case of *Yeakle v. Andrews*[18] addressed the enforcement of two unsigned settlement agreements. The Court held that CDRA's requirement for a mutually signed agreement is not the exclusive mechanism to enforce a settlement agreement because CDRA does not abrogate common law principles of contract formation. Therefore, an unsigned settlement agreement can be enforced under common contract law. For the two settlements before the *Yeakle* Court, where an unsigned document is negotiated during the mediation, it is unenforceable and confidentiality prohibits testimony otherwise.[19] However, where the parties negotiated an unsigned document after or outside the mediation, confidentiality did not apply to those communications and the document was therefore admissible and enforceable.

Critical, then, is whether any settlement communication between the parties is made "pursuant to," "for the purposes of," or "in the course of" the mediation, or "at the behest of" the mediator. If so, that communication is inadmissible.[20] However, when the parties engage in discussions without the mediator, even if those discussions springboard from the mediation, they may be admissible.[21]

This does not mean that unsigned documents negotiated only during the mediation are unenforceable. The U.S. District Court for the District of Colorado has ruled admissible and enforceable under common law a mediation settlement agreement orally read into the record at the conclusion of the mediation in open court by the attorneys, as well as the court conducting an inquiry similar to entry of a plea. As a practical matter, the mediation had concluded and this ruling was therefore consistent with *Yaekle*.[22]

Care should be taken for the reverse of enforcement—an attack on a signed settlement agreement reached in ADR. Because common law now applies to settlement agreements, an argument can be made that a signed agreement is nonetheless unenforceable due to contract formation issues of fraud, duress, and competence. Rarely do these grounds ever apply on the merits, but should a hearing result, the benefits afforded by the settlement may be negated.[23]

Expert Witnesses

If an expert testifies at an ADR proceding and that expert hears otherwise unknown information and relies on that information in formulating his or her opinion, the expert and his or her report may be subject to attack. This could result in the dismissal of the expert and possible loss of a case. The options are: (1) to limit participation to consulting-only experts, (2) to limit expert attendance to making a presentation, (3) to be hyper-vigilant on what the expert relies on in formulating an opinion, or (4) to agree to a mutual waiver of confidentiality (signed by all participants and the neutral) related to certain issues and facts for those experts.

Bad Faith

It is not uncommon that a disgruntled attorney or party complains to the judge that the other side did not negotiate in good faith at the mediation. This might occur where the court orders the parties to participate "in good faith" and the opponent alleges counsel is in contempt of court for improper conduct. Similarly, it happens where the court orders the parties to have "settlement authority" at the mediation and one party argues that opposing counsel's refusal to exceed his or her bottom line was because counsel did not have adequate authority. Another scenario arises when, during the course of the mediation, additional facts or witnesses are first identified that were not disclosed during discovery and the opponent complains to the court to reopen discovery or to preclude the evidence. Of course, because of the confidentiality mandate, it should be impossible for any party to prove any of this conduct, because the proof is inadmissible. Nonetheless, these complaints occur and courts often consider the matter on the merits despite confidentiality.

In *Halaby, McCrea & Cross v. Hoffman*,[24] the Colorado Supreme Court overturned a sanction against a law firm for alleged failure to act in good faith in a settlement conference. The Court overturned the sanction on the merits, addressing the settlement conference communications without any regard to confidentiality or CDRA. This may be because the sanction was issued by a settlement judge appointed to conduct a "court settlement conference" pursuant to CRCP 121, § 1-17.[25] Such settlement conferences have their own confidentiality rule, which prohibits only disclosure to the presiding judge.[26] Given the inclusion of settlement conference in CDRA, attorneys should take steps to ensure that the presiding judge or the settlement judge adopt CDRA, or that a private neutral is engaged.

Disqualification of Counsel or the Judge

Assume that, during a mediation session, information comes to light that may require one of the lawyers to withdraw on ethical grounds, or that the judge should be disqualified from the case. If there is disagreement, it may be difficult to get these facts before the court until further discovery is conducted, or even impossible if discovery is closed. This is probably the situation contemplated in CDRA that allows for disclosure when required by another statute.

Collateral Attack

The final attack on confidentiality is the most unusual but has the greatest potential consequence to the legal profession. Collateral attacks on confidentiality arise any time a participant in the mediation attempts to disclose confidential information in proceedings other than the one involving these disputants. These include: malpractice lawsuits alleging poor performance in the ADR proceeding, ethical complaints and investigations related to attorney conduct in the mediation, non-parties seeking disclosure of confidential information in related cases, and the constitutional right to a fair trial in criminal matters.[27]

In each situation, CDRA's bar to disclosure in "any judicial or administrative proceeding" should stop the action immediately. This was not the case, however, in a well-known case to the mediation bar, *Cassel v. Superior Court*.[28] The California Supreme Court allowed disclosure of mediation communications that formed the basis of a legal malpractice case. The Court reasoned that the claimed communication occurred between the lawyer and his client during a break in the mediation without the mediator or any other party present, and revealed nothing said or done at the mediation. The *Cassel* Court compartmentalized each step in the mediation, thereby treating as separate and unrelated client counseling with and without the mediator. Weighing heavily on the Court was the notion that attorneys should not be immune from malpractice liability while engaging in mediation. This is so especially because mediation has become an almost universal obligation in civil litigation and often is the only significant work attorneys perform in a case that settles.

The *Cassel* Court also reasoned that a client and his or her attorney operate as a single participant in the mediation and, therefore, the client has the power, as in any malpractice case, to waive the attorney–client privilege. The Court went on to address the public policy that mediation is meant to facilitate communications between disputants and not between client and attorney.

A similar situation could arise in ethical complaints before regulation counsel. Again, while the prohibition in CDRA applies to administrative proceedings, regulation counsel would likely interpret their duty of attorney policing as higher than the policy concerns in CDRA. Although there are no reported Colorado cases on point, counsel is wise to add to mediation notes the concurrent private conversation with clients.

Constitutional Protections

When a mediation participant is later prosecuted in a criminal matter based on the same allegations at issue in the mediation, concerns over Constitutional protections come into play. In another California case, *Rinaker v. Superior Court*, a mediator was required to testify concerning impeachable and exculpatory statements made by the complainant during the mediation.[29] In *Rinaker*, several juveniles allegedly damaged the complainant's property and agreed to a community-based mediation of the matter. During the mediation, the complainant admitted that he could not identify who damaged his property. The juveniles sought the testimony of the mediator to impeach the complainant in the subsequent juvenile delinquency proceedings. Even though the juvenile proceedings were civil in nature, the court held that mediation confidentiality "must yield if it conflicts with the minors' constitutional right to effective impeachment of an adverse witness."[30]

Attack by Others

Finally, there are many situations where mediation confidentiality can come under attack from non-participants, such as: non-parties at fault who later find themselves in a contribution action, indemnitees seeking indemnity from indemnitors, insurance coverage and bad-faith actions, insurers' seeking subrogation of settlement payments, and insurers seeking reinsurance benefits. In each of these scenarios, mediation communications are often sought not because the underlying facts cannot be learned or do not exist elsewhere, but because that information exists in a readily available and therefore cheap form. However, because the underlying facts are available without violating mediation confidentiality, it is less likely that a court would parse the temporal and participant portions of the mediation process to find an opening for disclosure.

Practice Notes

The best place to clarify and strengthen confidentiality in ADR proceedings is to provide the following in the ADR agreement and before starting the proceeding:

- Applicability: Provide that CDRA applies to the proceeding as modified in the agreement.
- Waiver: Provide that only the clients, their lawyers, and the neutral are needed to waive confidentiality, and that no other participant's signature is required.
- Experts: If testifying experts must be at the mediation, bind the experts to confidentiality but provide that either they cannot rely on anything learned at the mediation proceeding in formulating their opinion, or allow reliance in only certain areas.
- Settlement enforcement: In the settlement agreement or memorandum of understanding, provide that the parties entered in the agreement without duress and with full authority and competence.
- Communications: Provide that all discussions at the mediation session—whether with or without the mediator, and whether with or without any opposing party—are still mediation communications to be afforded confidentiality.
- Documents generated in or for the mediation: Decide whether the documents should be maintained or destroyed after the mediation.
- Mediator's notes: Provide that the mediator is not required to save any notes of the mediation session.

➢ Mediators: Never waive confidentiality, and provide that it will not be waived under any circumstances. If any waiver is later given, be sure it is just to allow the parties to testify, and not the mediator.

Conclusion

The issues discussed in this article are important regardless of whether one is the neutral, the party, or the advocate. It is never safe to assume that simple cases require only simple mediation agreements. Simple cases can be more contentious than complex cases, and the litigants and their counsel might be less experienced with the nuances of mediation confidentiality. It is the responsibility of the mediator to adequately inform the parties of the confines of confidentiality, and for the attorneys to address any case-specific concerns either before the mediation begins or as those issues arise.

Notes

1. CRS §§ 13-22-301 *et seq.*

2. Federal courts are behind the states in enacting confidentiality in ADR. Federal law provides that, until nationwide rules are adopted, local rules must "provide for the confidentiality of the alternative dispute resolution processes and to prohibit disclosure of confidential dispute resolution communications." 28 USC § 651(d). The U.S. District Court for the District of Colorado provides that:

> A party or the magistrate judge in an alternative dispute resolution proceeding shall not voluntarily disclose or through discovery or compulsory process be required to disclose any information concerning any communication provided in confidence to the magistrate judge in connection with the alternative dispute resolution proceeding.

D.C.COLO.LCivR 16.6(e). This applies only to ADR before a magistrate. Nonetheless, Colorado's federal bench has relied on CDRA in a diversity case and would probably refer to it in federal question cases. *See GSL of ILL, LLC v. Kroskob*, No. 11-cv-00939-WYD-KMT (D.Colo. Jan. 12, 2012).

3. CRS § 13-22-307.

4. CRS § 13-22-312.

5. CRS § 13-22-302.

6. Agreements to arbitrate are governed by the Colorado Uniform Arbitration Act (CUAA). CRS §§ 13-22-201 *et seq.* However, the CUAA does not have a confidentiality provision other than protective orders. *See* CRS § 13-22-217(5).

7. Notably, Colorado has no licensing or training requirements for mediators, although there is continuing discussion regarding the wisdom of legislative action to require licensing. Easy to include would be attorneys and any individual who has taken a class on mediation or dispute resolution. Individuals with no training but who are working mediators would probably satisfy this requirement with on-the-job training. No reported cases deal with the question of a mediator who is not "trained" per the Act; that is, could a party take discovery or elicit testimony concerning the mediator's training? This is doubtful if at least one party reasonably expected confidentiality and either tacitly approved the mediator's training, or was unaware of the lack of training.

8. CRS § 13-22-307(2).

9. *See Yaekle v. Andrews*, 195 P.3d 1101 (Colo. 2008), discussed in the "Enforcement of Settlement Agreements" section.

10. Prior existing documents are never covered by the Act's confidentiality. The Act does prevent cloaking otherwise discoverable documents as inadmissible:

> Nothing in this section shall prevent the discovery or admissibility of any evidence that is otherwise discoverable, merely because the evidence was presented in the course of a mediation service proceeding or dispute resolution proceeding.

CRS § 13-22-307(4).

11. *Yaekle*, 195 P.3d at 1109.

12. CDRA provides that ADR proceedings "may" be closed at the discretion of the neutral. The authority to close the mediation is imperative to maintaining confidentiality. The authority is not limited to just making the process private, but also to empowering the mediator to prohibit audio or video recording of the meetings, excluding witnesses, and dismissing confidants and friends invited by a party when such persons are harmful to a successful resolution. Caution is needed in exercising this power so as not alienate either party. Interestingly, the statute does not provide this power to the parties or their counsel. In practice, all mediations are closed unless explicitly opened and then only by consent of the parties and the mediator.

13. CRCP 408. This rule generally allows admissibility when offered for any purpose other than liability, validity, or amount of claim.

14. CDRA also contains a general provision allowing disclosure of confidential communications when "required by statute to be made public." No further guidance is provided and no Colorado case has addressed this section. *But see infra* note 22.

15. There is no implied waiver of confidentiality. *GLN Compliance Group, Inc. v. Aviation Manual Solutions, LLC*, 203 P.3d 595 (Colo.App. 2008). *But see infra* note 22 and accompanying text.

16. The use of the conjunctive indicates that, if present, the attorneys must approve the settlement but need not sign the settlement per the second clause. In practice, many mediators prefer that the parties sign the settlement agreement, but oftentimes only the attorneys are present and sign on their client's behalf. There does not appear to be any reason a court would not enforce the settlement in such a circumstance despite the Act's insistence, especially in light of *Yaekle*.

17. CRS § 13-22-308.

18. *Yaekle*, 195 P.3d 1101.

19. The testimony of the mediator and attorneys is inadmissible to prove the existence of a final, unsigned settlement agreement. *GLN*, 203 P.3d at 597.

20. *Yaekle*, 195 P.3d at 1110-11.

21. For example, when the parties' agreement on essential terms can be inferred from their conduct or oral statements. *I.M.A., Inc. v. Rocky Mountain Airways, Inc.*, 713 P.2d 882, 888 (Colo. 1987).

22. Arguably the situation would have been more difficult if the mediator had participated in or was the sole orator in placing the agreement on the record, thereby making the oral disclosure a part of the mediation and thereby confidential under *Yaekle*. Nonetheless, enforcement would still be warranted because the mediator's disclosure in open court of the terms of the settlement agreement with the consent of the parties would constitute an implied waiver of confidentiality.

23. The Uniform Mediation Act, which has not been adopted in Colorado, exempts from confidentiality mediation communications in proceedings to prove a claim to rescind, reform, or avoid a mediated settlement. *See* National Conference of Commissioners on Uniform State Laws, Uniform Mediation Act § 6(b)(2).

24. *Halaby, McCrea & Cross v. Hoffman*, 831 P.2d 902 (Colo. 1992).

25. CRCP 121, § 1-17 provides that any party may request a "court settlement conference" to be conducted by any available judge other than the assigned judge.

26. *Id.* CRCP 121, § 1-17 states:

> All discussions at the settlement conference shall remain confidential and shall not be disclosed to the judge who presides at trial. Statements at the settlement conference shall not be admissible evidence for any purpose in any other proceeding.

27. *See supra* note 14. Rights of an accused may be one of CDRA's exceptions to confidentiality when the communication is "required by statute to be made public." CRS § 13-22-307(2)(c).

28. *Cassel v. Superior Court*, 244 P.3d 1080 (Cal. 2009).

29. *Rinaker v. Superior Court*, 62 Cal.App.4th 155 (1998).

30. *Id.* at 165. ■