Why the New York City Bar Association Report on the State of Mediation Confidentiality in New York Is Required Reading

By Cassandra Porsch and John Siffert

In June 2024, the New York City Bar Association issued a report entitled "Mediation Confidentiality in New York State: Overview of the Current Regulatory and Institutional Landscape and Subcommittee Recommendations," which revealed the gaps in New York State's rules on mediation confidentiality.[1] Given the increased use of court-mandated and private mediation, the report contains significant findings for mediation participants, including mediators, counsel and parties. The report challenges the belief that communications and information shared at mediation sessions are confidential and can be protected from disclosure or later use. By revealing these weaknesses, the report paves the way for further consideration of ways to protect confidentiality as an essential pillar of mediation.

Background

Litigants increasingly find that courts are referring lawsuits to be mediated pursuant to a court-mandated mediation program. In 2022, the New York State court system reported referring 12,000 cases to mediation.[2] This does not account for disputes where the parties voluntarily engage a private mediator or are contractually required to mediate under the aegis of an institution such as the American Arbitration Association or JAMS. Indeed, mediation has become a preferred method for resolution of business differences, and it is often now mandated in contract provisions known as "step clauses" that call for a mediation before either side can commence an arbitration or lawsuit.[3]

Despite parties' preference for or willingness to mediate, and despite the increasing use of court-mandated mediation programs that reduce the courts' dockets, New York State has not adopted the Uniform Mediation Act that was promulgated over 20 years ago.[4] The Uniform Mediation Act establishes a "blocking privilege" which provides recourse for the parties, their lawyers, non-parties and mediators to protect "communications" exchanged during the course of a mediation session, against each other and other participants, including third-party witnesses.[5] The act also codifies the enforceability of parties' confidentiality agreements with respect to mediation.[6]

Even though New York has not adopted the Uniform Mediation Act, many mistakenly assume that New York court-ordered or private mediations assure the same level of confidentiality as a legislated mediation privilege would provide. Indeed, mediation training regularly includes teaching new mediators to give assurances that nothing that occurs during a mediation may be repeated.[7] Many attorneys may assume that communications made as part of settlement efforts are protected because evidentiary rules restrict the use of settlement discussions or offers.[8]

In fact, there are several degrees of daylight between the protection afforded by specific evidentiary rules, a general privilege, and a statutory recognition of confidentiality. Because New York has no statutorily granted mediation privilege or codified confidentiality protection pertaining to mediation-related communications, unless they take further action, those who participate in mediations governed by New York law are subject to the limited protection of evidentiary restrictions and a patchwork of different confidentiality rules depending on the forum in which they are mediating.

The Report

The need for the recommendations was animated by the realization that mediation practitioners were unaware that New York mediations were not subject to a comprehensive set of confidentiality rules. Consequently, members of several committees of the New York City Bar Association, including the ADR Committee, the Arbitration Committee, the International Commercial Disputes Committee, and the Litigation Committee formed a Mediation Confidentiality Subcommit-

tee to examine the misconceptions, research the protections that do exist, and explore potential approaches to supplement the existing rules and laws. The topics are addressed in the report.

Levels of Confidentiality

There are three levels of protection for mediation-related communications that exist in different jurisdictions. The most circumscribed level of protection is available under evidentiary rules concerning the admissibility of "compromise offers." In New York, these exist under Federal Rules of Evidence 408 and N.Y. Civil Practice Laws and Rules 4547. F.R.E. 408 provides that evidence of compromise of a claim and conduct or statements made during negotiations to compromise a claim, are "inadmissible to prove or disprove the validity or amount of a claim." CPLR 4547 provides similarly that offers to compromise or "evidence of any conduct or statement made during compromise negotiations" are "inadmissible as proof of liability for or invalidity of the claim or the amount of damages." Notably, these only protect settlement discussions to the extent that they are offered into evidence for the specific purpose of proving that a claim is valid and is worth a certain sum. Courts can, and have, allowed such information to be disclosed and used for other purposes.[9]

The second level of confidentiality afforded to mediation-related communications is a mediation privilege. As litigation practitioners know, information may be subject to discovery even if it may ultimately not be admissible as evidence.[10] A mediation privilege would apply in legal proceedings and would bar discovery of mediation-related communications, regardless of whether such communications otherwise would be admissible into evidence. The mediation privilege places mediation-related communications in the same protected category as the attorney-client privilege, the doctor-patient privilege and the spousal privilege, warranting withholding of such communications and requiring that they be addressed on a privilege log. The critical aspect of the mediation privilege is that it provides the potential to protect privileged communications to the parties, counsel, third-party participants, and the mediator. The problem is that New York has not adopted a statute or rule creating a mediation privilege, and no court decision has established a mediation privilege in New York.

The broadest level of confidentiality that may be granted with respect to mediation-related communications is the statutory recognition of the right of parties to contract for general confidentiality. Since evidentiary use restrictions and privileges are applicable only in legal proceedings and parties may wish to keep their communications confidential vis à vis the whole world, a statutory provision such as the one in the Uniform Mediation Act providing that "mediation communications are confidential to the extent agreed by the parties" creates the obligation for courts to honor and enforce private agreements to keep mediation communications confidential (subject, of course, to other statutory exceptions).[11]

The Report's Findings

The report finds that because New York has no statewide law granting a mediation privilege or governing mediation confidentiality, the confidentiality protections afforded to the participants in a mediation are highly fragmented depending on the forum of any given mediation. The evidentiary rules prohibiting the use of settlement discussions in certain contexts are the only statutory provisions affording some measure of confidentiality protections. Thus, mediators and mediation participants may not assume that all information shared during a mediation is *de facto* confidential.

Mediations conducted in the state and federal courts in New York are all governed by some set of confidentiality rules specific to their particular court-annexed program. Privately administered mediation forums such as AAA and JAMS also have rules requiring confidentiality to which participating parties agree to be bound. However, these rules may bind the participants to the mediation but not third parties who come into contact with mediation-related communications. Private mediations that are not part of a court program or conducted through an administered entity are not governed by any general confidentiality rule and/or standard mediation agreement covering the participants. The report suggests that in private mediations, the mediators and legal practitioners should consider entering into their own drafted confidentiality agreement. The report also notes that the rules in court-annexed mediations and administered mediations are not uniform; consequently, the report suggests that the participants should determine the advisability of entering into a confidentiality agreement to supplement whatever protections are offered by the respective rules.

The topics that participants should ensure are covered between applicable confidentiality rules and any supplemental agreements are (1) party disclosure of information shared with the opposing party; (2) party disclosure of information shared with the mediator; (3) mediator disclosure of information shared with the parties, their respective counsel and any other persons related to the mediation parties who attend a mediation session or are otherwise privy to sensitive information; and (4) disclosure by any persons attending or otherwise participating in the mediation process.

The report also suggests including additional provisions that broaden the confidentiality of the mediation. Among the report's recommendations are that the parties require other third parties who may be privy to mediation information

to sign a confidentiality agreement; that the parties address the liability and remedy for breach of confidentiality; and that the parties be notified in advance of any disclosure or third-party request that would entail disclosure, whether by subpoena or other compulsory process. Finally, the report recommends that mediators enter into their own confidentiality agreement with the parties that is specific to the mediator's role and tailored accordingly. For example, mediator confidentiality agreements may contain a provision that the parties agree not to call the mediator as a witness for any purpose or otherwise seek the mediator's work product in discovery, and further that the parties will indemnify the mediator if the mediator is required to respond to or formally resist information requests from third parties.

Conclusion

Mediation unquestionably has become an integral adjunct to our judicial system, and confidentiality is an essential ingredient to the successful conduct of mediations. The New York City Bar Association's "Mediation Confidentiality in New York State" provides an excellent survey of the state of confidentiality protections in mediations in New York and is an important guide for practitioners to consult before commencing a mediation.

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Endnotes

1. The report is available at: https://www.nycbar.org/reports/mediation-confidentiality-in-new-york-state/.
2. *See* Anthony Cannataro et al*, State of Our Judiciary*, New York State Unified Court System, Feb. 28, 2023, https://www.nycourts.gov/whatsnew/pdf/23_SOJ-Speech.pdf at p. 4.
3. *See* Myrna Barakat Friedman, *Dispute Prevention: An Overlooked Risk Management Tool*, NYLJ May 28, 2024.
4. Uniform Law Commission, Uniform Mediation Act (amended 2003). May be accessed at https://www.uniformlaws.org/committees/community-home/librarydocuments?communitykey=45565a5f-0c57-4bba-bbab-fc7de9a59110&LibraryFolderKey=&DefaultView= (All websites last accessed on June 11, 2024).
5. UMA § 5 and Comment.
6. UMA § 8.
7. 7 *See, e.g.,* CIArb Mediation Training & Assessment Virtual Training Materials 2021.
8. *See* Federal Rules of Evidence 408 and N.Y. Civil Practice Laws and Rules § 4547.
9. *See, e.g., Faulkner v. Arista Records LLC*, 797 F. Supp. 2d 299, 313 (S.D.N.Y. 2011) (settlement communications were deemed admissible evidence where they were offered to show that the defendant had made an offer to pay so as to restart the running of the statute of limitations on a breach of contract claim, with the court finding that the issue of whether the statute of limitations had run was separate from trying to prove the validity of the contractual obligation to begin with or what amount was owed).
10. *See* Fed. R. Civ. P. 26(b)(1) noting that "[i]nformation within [the] scope of discovery need not be admissible in evidence to be discoverable."
11. While one may query why this provision is needed given that courts are already tasked with enforcing contracts, as a public policy matter, parties generally may not contract to keep information from a court. This provision gives both parties and courts wishing to enforce private confidentiality agreements more support, rather than requiring them to fish for common law principles or general concepts of protecting the mediation process to promote settlements. As discussed in the report, in New York, where there is no statutory provision akin to Section 8 of the UMA, there is little case law on the enforceability of such private contracts, though the case law that does exist tends to support the enforcement of such agreements, with exceptions. Thus, even in jurisdictions such as New York, having such agreements is still better than not having them.