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Alternative Dispute Resolution

Mediation Communications Are Protected, to a Point

How the mediation privilege impacts attempts to enforce oral settlement agreements allegedly reached in a private session

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Consistent with New Jersey's strong public policy favoring the settlement of disputes through the use of ADR procedures, courts and parties are increasingly turning to mediation with the goal of resolving disputes in a more efficient and less adversarial manner. In order to encourage candor in mediation proceedings, New Jersey has adopted a broad and robust mediation privilege that protects against the disclosure of mediation communications in later legal proceedings. However, the privilege is not absolute and can be waived, so it is important for practitioners to understand how the privilege operates, how the privilege can be waived and what steps can be taken to prevent the disclosure of mediation communications. This article offers a brief primer on these issues and examines how the mediation privilege impacts attempts to enforce alleged oral settlement agreements reached at mediation.

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Statutory Framework

In New Jersey, mediation communications are protected from disclosure by both Rule 1:40(c) and the more comprehensive Uniform Mediation Act (UMA), N.J.S.A. 2A:23C-1 to -13. The UMA provides that, unless a statutory exception applies (N.J.S.A. 2A:23-6), the following privileges apply to mediation communications:

> (1) a mediation party may refuse to disclose, and may prevent any other person from disclosing, a mediation communication;
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> (2) a mediator may refuse to disclose a mediation communication, and may prevent any other person from disclosing a mediation communication of the mediator; and
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> (3) a nonparty participant may refuse to disclose, and may prevent any other person from disclosing, a mediation communication of the nonparty participant.

N.J.S.A. 2A:23C-4. Thus, the UMA provides a party with the power to block disclosure of a mediation communication by another party, the mediator and a nonparty participant, whereas the mediator and nonparty participants may only block disclosure of their own communications.

The UMA allows the mediation privilege to be waived upon the consent of all parties, but any such waiver must "be express and either recorded through a writing or electronic record or made orally during specified types of proceedings …. The rationale for requiring explicit waiver is to safeguard against the possibility of inadvertent waiver." Nat'l Conference of Commr's of Unif. State Laws, Uniform Mediation Act, § 5 cmt.1 (2003). However, even if the parties expressly agree to waive the mediation privilege, that waiver applies *only* to the parties' mediation communications; mediators may block the disclosure of their own mediation communications, including through the testimony and evidence provided by others, even if the parties consent. Id. § 4 cmt 4.

Enforcement of Oral Settlement Agreements Reached at Mediation

Disputes concerning the application and waiver of the mediation privilege often arise out of claims that an oral set-

tlement agreement was reached at mediation. Although New Jersey courts tend to strictly construe the mediation privilege, out of a recognition that "[t]he issue of confidentiality of mediation proceedings is a matter of great public and systemic importance," *Lehr v. Afflitto*, 382 N.J. Super. 376, 391 (App. Div. 2006), two recent Appellate Division cases indicate that the state's public policy in favor of enforcing settlement agreements may be stronger than its policy favoring the confidentiality of mediation proceedings.

In *Willingboro Mall v. 240/242 Franklin Ave*, 421 N.J. Super. 445 (App. Div. 2011), cert. granted, 209 N.J. 97 (2012), the defendant claimed that the parties reached an oral settlement agreement at mediation and moved to enforce the agreement after the plaintiff refused to consummate it. Although the parties had not yet expressly waived the mediation privilege, the defendants submitted certifications of both counsel and the mediator in support of their motion to enforce the alleged oral agreement. But rather than object to what appears to have been a plain breach of the mediation privilege by both defense counsel and the mediator, the plaintiff argued that the alleged oral agreement was unenforceable as a result of Rule 1:40-4(i)'s requirement that settlement agreements reached at a mediation be "reduced to writing." The plaintiff further argued that it was entitled to discovery from the mediator to support its claim that any settlement agreement was unenforceable because it was achieved through coercion and deceit.

Thereafter, the mediator was deposed and separately examined during the course of a four-day hearing concerning the enforceability of the alleged oral agreement. The trial court enforced the oral settlement agreement, and the Appellate Division affirmed, holding that while the mediation privilege will typically "present obstacles to enforcement of an oral agreement reached through mediation when the parties do not waive the confidentiality conferred on the proceeding," that was not the case before it. The panel concluded that with the plaintiff "having waived the confidentiality normally afforded to such proceedings, the [trial court properly] proceeded in the normal course to determine whether the parties had reached a settlement."

The Appellate Division also addressed the issue of waiver of the mediation privilege in the context of an alleged oral settlement agreement in *Rutigliano v. Rutigliano*, No. A-2797-11T1, 2012 N.J. Super. LEXIS 2319 (App. Div. Oct. 15, 2012). There, the trial court directed the parties to participate in nonbinding mediation, after which the mediator advised the court that a settlement had been reached. As a result, the trial court marked the case as closed. However, at or about that same time, plaintiff's counsel sent a letter to defendant's counsel stating that the plaintiff did not believe that a final settlement agreement had been reached at the mediation. The defendant moved to enforce the alleged oral settlement agreement and, in response, the plaintiff argued both that "the parties had never entered into a written settlement agreement and neither party should be able to present testimony concerning what happened during the mediation session."

While the court declined to hear testimony from counsel or the mediator, the trial court ruled that the parties could offer limited testimony "concerning what took place when the terms of the settlement were discussed and finalized at the conclusion of the mediation." The defendant testified, but the plaintiff refused, stating that "if he did so, this might be construed as a waiver of his right to maintain the confidentiality of what occurred during the mediation." The trial court enforced the oral settlement agreement, and the Appellate Division affirmed, concluding that:

> [B]oth parties waived the mediation privilege prior to the plenary hearing when they each consented to permit the mediator to notify the court the case had been settled. Because each disclosed there was a settlement, there was no bar to either party disclosing the terms of that settlement or, if necessary, going to court to enforce that settlement.

Although the Appellate Division's opinion in *Rutigliano* is unpublished, and thus not precedential, the court's finding that the privilege can be waived merely by advising the court that the mediation resulted in a settlement agreement should give counsel great pause.

Lessons Learned

What lessons can be learned from the Appellate Division's decisions in *Willingboro* and *Rutigliano*? First, when faced with a motion to enforce an alleged oral settlement agreement reached during the course of a mediation, counsel should immediately argue that it would be impossible for the trial court to resolve any factual disputes regarding whether the parties actually reached an agreement or the terms of the alleged agreement without violating the mediation privilege.

Second, if the court rejects such an argument, counsel should fully participate in any evidentiary hearings and avail themselves of the opportunity to present evidence to the court after making clear that, by so participating, they do not intend to waive any argument that the mediation privilege prohibits the court from allowing the disclosure of such information.

Third, prior to participating in a mediation session, counsel should insist on an agreement among all participants that: (a) there will be no binding settlement agreement until such an agreement is reduced to a signed writing; (b) a settlement agreement may only be reported to the court following the execution of a signed written agreement; and (c) all participants must be given advance notice of another participant's intention to disclose mediation communications, so as to allow the other participants sufficient time to object to any such disclosure.

The Supreme Court of New Jersey may soon provide additional clarity on the issue of the enforceability of oral settlement agreements arising from mediation. The court granted certification in *Willingboro* and heard argument on Feb.

27. The appellants asked, among other things, that the court adopt a rule that such oral settlement agreements are per se unenforceable given Rule 1:40-4(i)'s requirement that settlement agreements reached in a mediation "be reduced to writing." But comments by the justices suggest they may be unwilling to adopt such a bright-line rule. However, regardless of how the court rules, following the steps set forth above is not overly cumbersome and will provide additional protection against a claim of an alleged oral settlement agreement arising out of a mediation. ■