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Sounding the Depths of Wisconsin's Mediation Privilege

The primary goal of mediation is to reach a settlement; nearly as important is conveying information during mediation in such a way that Wisconsin's mediation privilege protects the communications.

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Although Wisconsin's privilege for mediation communications has been on the books since January 1994, many lawyers remain unacquainted with this unique and central aspect of alternative dispute resolution (ADR) practice in the state.[1] Given how common mediations have become in a wide range of civil disputes, failing to properly understand the contours of this privilege could result in counsel running hard aground on discovery and evidentiary hazards when navigating in or around prior settlement activities. Fortunately, recent decisions have clarified when the privilege applies and enable lawyers to more confidently chart their strategic course in these waters to avoid running afoul of the rule.

Privilege's Purpose: Promoting Prompt Resolution of Disputes Through Broad Grant of Confidentiality

The mediation privilege encourages parties to voluntarily settle disputes by protecting the confidentiality of all communications "made or presented" by anyone participating in a *mediation* – the latter, a term broadly defined to include any statutory, contractual, or court-referred process for facilitating the resolution of disputes, other than binding arbitration or appraisal.[2] The privilege furthers this goal not only by making such communications inadmissible in evidence but also by prohibiting any discovery or compulsory process directed at them – including, but not limited to, subpoenaing a mediator to comment on what transpired at a mediation.[3]

As reflected in the Judicial Council's accompanying note, the thought is that parties will be more disposed to engage in frank and constructive exchanges during mediations if they do not have to fear that what they have said there could be used against them if the dispute is not resolved and ends up being litigated.[4]

The extent of the privilege is limited by three exceptions that apply generally:

- Evidence otherwise discovered(although presented during mediation);

- Written agreement (between parties resulting from mediation); and
- Judicial override (in action or proceeding "distinct from dispute" mediated; after *in camera* hearing, court may admit evidence when necessary to prevent "manifest injustice" of sufficient magnitude to outweigh privilege's confidentiality interests).[5]

Understanding the limits of these three exceptions is essential to avoid strategic navigational errors that could either sink a case or cost the lawyer dearly in trying to salvage it.

Privilege No Bermuda Triangle: Unprivileged Evidence Remains So Post-mediation

The evidence-otherwise-discovered exception reflects a well-recognized principle in privilege law, namely that a person cannot cast a cloak of secrecy over information simply by funneling it through a protected channel – whether by telling one's lawyer something (as with the attorney-client privilege) or by presenting it during a mediation.[6] As long as there is a reasonably clear record to establish that the evidence came to light outside of mediation, counsel should experience smooth sailing in either pursuing discovery regarding the evidence or presenting it at trial.

The exceptions that arguably present the greatest potential for misadventure are the written agreement and judicial-override ones, as evidenced by surveying the evidentiary shipwreck that recently doomed the plaintiff's claim in *Doe v. Archdiocese of Milwaukee*.[7]

No Fraud-in-inducement Bailout Permitted: Contractual Remedies Only

Doe arose out of the Archdiocese of Milwaukee's long-running and costly Chapter 11 bankruptcy case associated with priest-abuse claims. In 2007, four years before the Archdiocese filed its petition for relief in bankruptcy court, the claimant, referred to as "John Doe" (aka Claimant A-282), had participated in a voluntary mediation program established by the Archdiocese and settled his abuse claims for $80,000. However, like 86 other individuals who also asserted claims against the Archdiocese in the bankruptcy case (accounting for almost 15 percent of all claims), Doe contended that the Archdiocese had fraudulently induced him to settle his claims for far less than they were worth.

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Doe was among the former students of St. John's School for the Deaf in Milwaukee who were abused by Father Lawrence Murphy while attending the institution. The 2007 mediation resulted in a written settlement agreement and mutual release, signed by Doe and a representative of the Archdiocese, which, most prominently, purported to resolve any and all claims that Doe had against the Archdiocese arising from Murphy's abuse in exchange for the payment mentioned above.

When the Archdiocese moved for summary judgment on Doe's claim based on the release contained in the parties' 2007 settlement agreement, Doe responded by seeking to introduce affidavit testimony about various misrepresentations that he claimed Archdiocese representatives had made in connection with the 2007 mediation that had persuaded him to accept $80,000 to settle his abuse claims.

Among the material inducements purportedly made was that Doe was receiving the maximum amount that the Archdiocese could pay, and that the amount was in line with what other claimants were receiving. Actually, others received substantially more. Doe also asserted that he did not understand the extent of the Archdiocese's knowledge of Murphy's past history of abusing children, which the Archdiocese withheld during the mediation and only later came to light.

The bankruptcy court initially ruled that Doe could introduce evidence of what he claimed the Archdiocese representatives said (or failed to say) during the mediation in 2007, finding that the pre-litigation settlement was a dispute distinct from the bankruptcy case, and that admitting the evidence was necessary to prevent a manifest injustice against Claimant A-282 under the judicial-override exception.

In response to this ruling, the Archdiocese subpoenaed the mediator who had presided over the 2007 mediation, contending that his testimony was essential to defend the Archdiocese from Doe's assertions because the mediator had been the only disinterested participant. When the mediator moved to quash the subpoena, the Archdiocese persuaded the bankruptcy court to reconsider and reverse its decision to admit the disputed mediation communications. Excluding the communications left Doe without evidence to support his fraudulent-inducement claim, so the bankruptcy court felt duty bound to enforce the release in the parties' written settlement agreement, granted the Archdiocese summary judgment, and

entered an order disallowing Doe's claim – decisions the district court upheld in rather summary fashion.[8]

> While the court acknowledged that it might seem unjust to bar someone from recovering if he or she was, in fact, fraudulently induced into signing a settlement agreement, it felt constrained to apply the law as written.

In surveying existing precedent on the mediation privilege, the Seventh Circuit Court of Appeals commented on the dearth of guidance from Wisconsin courts on what constitutes a distinct dispute.[9] The court additionally observed that Wisconsin's law was unique in conditioning its judicial-override exception on first making such a finding (thereby negating the potential benefit of looking for guidance from other jurisdictions). Resorting to the "plain meaning" of the law (consistent with Wisconsin law on statutory interpretation), the court noted that the dictionary definitions of dispute lacked any reference to a particular "claim" and referred more generally to a "disagreement or quarrel" or "conflict or controversy."

In rejecting Doe's position that the disputes were distinct, the Seventh Circuit pointed to the common subject matter underlying both the mediation and the bankruptcy-case claim. Both implicated the same parties and required showing that the Archdiocese was responsible for the abuse that Murphy had inflicted on Doe. Moreover, as Doe's counsel had conceded at oral argument, the damages that Doe was seeking in his bankruptcy-case claim were identical to those addressed by the mediation (that is, compensation for Murphy's sexual abuse).

Accordingly, echoing the lower court's rulings, the Seventh Circuit held that the dispute mediated was not distinct from the bankruptcy-case claim, and, therefore, the judicial-override exception did not afford Doe a viable path around the rule's evidentiary bar.

The Seventh Circuit additionally found that permitting Doe to overturn the 2007 settlement agreement would frustrate the privilege's stated purpose of encouraging prompt resolution of disputes through mediation by maintaining confidentiality.[10]

The Seventh Circuit recognized that, in such circumstances, Wisconsin's mediation privilege limits a party's remedies to those available under contract law. In this way, the court pointed out, Wisconsin's privilege varies markedly from privileges in states that have adopted the Uniform Mediation Act (UMA), which "contains an express exception allowing a party to admit evidence of mediation communications for the purpose of 'prov[ing] a claim to rescind or reform or a defense to avoid liability on a contract arising out of the mediation.'"[11] While the court acknowledged that it might seem unjust to bar someone from recovering if he or she was, in fact, fraudulently induced into signing a settlement agreement, it felt constrained to apply the law as written. Accordingly, the court upheld the disallowance of Doe's claim and entry of summary judgment.[12]

Recent *Doe* Reckoning in Eastern District: Not Strictly Limited to Same Parties

In *Gronik v. Balthasar*,[13] the U.S. District Court for the Eastern District of Wisconsin relied on *Doe* in concluding that it would be improper to permit an insurer discovery related to a mediation involving other parties.

The plaintiffs had sued their homeowner's insurer to recover damages under their policy, and the court consolidated the case with another one the plaintiffs had against the party from whom they had purchased their home. The current and former owners of the home successfully mediated their dispute, and the insurer sought to use the amounts that the plaintiffs obtained from the prior owners through an "equitable set-off" counterclaim to reduce the amounts owed to the plaintiffs under the policy. The court dismissed the insurer's counterclaim on the pleadings, finding no support for such a claim under Wisconsin law. That ruling mooted several discovery motions.

However, the court nevertheless said that it would have harpooned the insurer's attempt to obtain discovery related to the mediation, which it found to constitute a single dispute because it "turn[ed] on the same underlying events" in the consolidated action.[14]

Meet Our Contributors

What's the most bizarre case that you've ever worked on?

As a fledgling associate, I was tasked with responding, on behalf of Fox Broadcasting, to a pro se complaint filed in the Eastern District titled *Saini v. United Nations, et al*. As an initial matter, one might ask how my firm (or any other Wisconsin firm) could have cleared a conflicts check to undertake the matter since every citizen of Wisconsin was named a defendant – along with multitudes of others spanning the globe. But I digress; on to the merits.

One can get a sense of just how bizarre this case was from these opening allegations: "I have been electronically 'bugged' for the past four (4) years by the U.S. government, by U.S. TV and radio networks, and TV networks in G-7 nations (Canada, France, Germany, Italy, Japan, and the U.K.), their governments, and all law enforcement departments all over the U.S. and major European nations. My privacy has been invaded to the extent that world leaders and citizens can view me naked in my bathroom or sitting on the toilet."

However, my work on this fanciful case proved to be short lived. When I called the clerk's office and provided the docket number to determine the judge assigned to the case, there was a pregnant pause, followed by the query, "Is that the United Nations case?" "Why yes," I responded. I then learned that Judge Randa had already dismissed the case *sua sponte,* having found the allegations to be "delusional."

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Points for Avoiding Hazards While Navigating Around the Mediation Privilege

The decisions in *Doe* and *Gronik* bring the contours of the mediation privilege into clearer focus in a number of key respects. In particular, Wisconsin lawyers should conspicuously record the following three points in their practice handbooks as navigational aids to avoid the kind of strategic shipwreck that befell the losing parties in those cases.

Take Pains to Carefully Document All Material Points in Resulting Agreement. The channel clearest of any potential mediation-privilege hazards to navigation relates to what the parties agree to, *in writing*, as part of the mediation. *Doe* makes crystal clear that parties to a mediated settlement agreement will not be heard to vary or avoid written documents by interjecting other written or oral communications from the mediation – whether by the mediator or by other participants (including counsel and other party representatives).[15]

Thus, if a term or provision is later deemed to be vague or the terms undesirable, *no one* who participated in the mediation can be forced or will be allowed to provide evidence disclosed solely as part of the mediation process to advance their cause. The practical wisdom embodied in the saying "get it in writing" has ready application here. It is the surest way to avoid running hard aground on an unexpected evidentiary or discovery bar.

Closely associated is ensuring that the lawyer carefully documents the nature of the dispute being addressed by a mediation – even if no settlement results. Thus, if a court is asked to determine whether the mediated dispute extends to a later action or proceeding, there will be hard documentary evidence to point to instead of resorting to a swearing contest over the participants' varying recollections of events.

At the end of a mediation, parties will often sign short-form agreements, which purport to capture the essential terms while recognizing that more details will be addressed by a later, more comprehensive agreement. Lawyers should be aware of the danger that a hard-won bargain can be lost if the short-form agreement does not specify key terms, such as confidentiality. A party might find itself drawing a short straw, if the other side moves to enforce a short-form agreement should an impasse be reached over such details and argues that it would not have accepted the agreement if the opposing party had insisted on the contested provision during the mediation proper.

Do Not Look to Mediator to Provide Lifeline if Stormy Weather Erupts. In stark contrast to written agreements, trying to chart one's strategic course through use of a mediator to either confirm or refute one's position on the merits of a dispute presents the channel most fraught with peril. Just as in *Doe*, courts will be reluctant to discourage mediators from serving as neutrals by subjecting them to discovery or testimonial burdens in instances in which one of the parties seeks either to undo a mediated agreement, whether because of settlor's remorse or a legitimate claim of fraudulent inducements, or to secure clarity on an unsubstantiated detail (such as requiring confidentiality or indemnification for particular third-party claims).

Moreover, parties who might be tempted to subpoena mediators should be aware that a common area of coverage in professional liability policies for mediators is for litigation costs associated with contesting subpoenas just like the one the Archdiocese tried to use in *Doe*.

The Privilege Provides an Unyielding and Unforgiving Bar to All Mediation-unique Communications by Any Participants Beyond Written Agreement. Yet another channel that should be viewed as one of last resort due to its uncertain boundaries is the one through which the communications of all participants in a mediation flow. *Any* participant who provided information that is outside the boundary of a written agreement may resist giving discovery or testimony regarding it on the basis of the mediation privilege.

Surveying *Doe* shows two parties that prevailed in asserting the privilege, namely the Archdiocese and the mediator, while the party seeking to use the evidence to buoy his case ran hard aground on the rule's unyielding bar. There can be considerable costs associated with protecting any privilege, and the mediation privilege is by no means self-executing. Yet when the privilege applies, it creates an

impenetrable barrier to any discovery, much less admissibility, of communications that take place during a mediation among the participants – unless, of course, the dispute implicating the communication is truly distinct.

If the parties are the same and the claims revolve around the same subject matter, attempting to chart one's strategic course by relying on mediation communications is to secure passage on a doomed evidentiary vessel. And even if the parties are different, the way is not certain, as *Gronik* illustrates.

Unless the action or proceeding is clearly distinct (where the relevancy of the evidence already runs the risk of being attenuated), one cannot hope to successfully argue that it would be manifestly unjust not to permit the evidence to be developed or presented.

Charting Out Illustrative Situations Involving Distinct Disputes

Notwithstanding the expansive grant of confidentiality that Wisconsin's mediation privilege provides, there are unquestionably boundaries that can be identified with reasonable confidence. The following two claims are examples of areas that counsel and courts might confidently plot as comfortably within the distinct dispute channel of permissible evidentiary use.

Example A: Legal Malpractice Claim. A party aggrieved by the way in which its counsel has handled a mediation could potentially resort to mediation communications to support a legal malpractice claim. Such a claim not only would involve different parties, but also would not require disturbing any written agreement by the parties that may have resulted from the mediation.

Stated otherwise, permitting a party to use evidence of mediation-related communications in such a setting would not upset the finality of settlements or serve to chill parties' willingness to participate in the mediation process. Even so, the aggrieved party would need to successfully run the "manifest injustice" gauntlet. In such a case, though, one would expect a court to be aware that absent providing an exception for such claims, the privilege would effectively immunize incompetent or unethical mediation counsel – hardly a path likely to promote public confidence in mediating disputes.

Example B: Breach-of-contract Claim Against Mediator. Using similar logic, one might plausibly seek to use mediation-related communications in the event that a party learned after settling a dispute at mediation that the other party may have gained an unfair advantage because of an undisclosed personal relationship with the purported neutral. Before mediating a dispute, mediators are required to disclose any current or former relationship with any of the participants that might cause a reasonable individual to question the mediator's impartiality.[16] Public confidence in the mediation process is best served by ensuring that mediators are truly neutral and strive to avoid any appearance of a conflict of interest.

As such, if a complaining party has a colorable claim that the mediator who presided over its mediation breached the underlying mediation agreement by failing to disclose information about prior dealings or relationships that a reasonable person would likely consider to be material to deciding whether or not to participate in the mediation, a compelling argument could be made that it would be manifestly unjust not to grant an exception to the privilege.[17] Otherwise, the court would be immunizing mediators from such an unethical practice.[18]

Conclusion

Wisconsin's unique mediation privilege places a premium on the finality of written settlement agreements. It also affords considerable protection to mediators against intrusions into the confidentiality of the mediation process. While one might question the fairness of barring a mediation participant from a remedy for a fraudulently induced settlement that is the fruit of a mediation, counsel armed with the knowledge that such a channel is blocked can more surely chart out what is necessary to avoid strategic shipwreck by ensuring that material points are reduced to writing with care. The privilege otherwise ensures that the waters surrounding mediation communications remain largely murky and unnavigable, as the law intends to promote the prompt resolution of disputes.

Endnotes

[1] SCO 93-03, 179 Wis. 2d xv (creating Wis. Stat. § 904.085 , effective Jan. 1, 1994).

[2] Wis. Stat. § 904.085 (1)-(2).

[3] Wis. Stat. § 904.085 (3).

[4] Wis. Stat. § 904.085 , Judicial Council Note-1993 ("The purpose of the rule is to encourage the parties to explore facilitated settlement of disputes without fear that their claims or defenses will be compromised if mediation fails and the dispute is later litigated.").

[5] Wis. Stat. § 904.085 (4)(a), (c), (e). Two additional exceptions are limited to narrowly tailored specific situations (that is, stipulated investigations by mediator under family court services and mediators' reports of child abuse or nonidentifying data). *See* Wis. Stat.

§ 904.085(4)(b), (d).

[6] *See Dyer v. Blackhawk Leather LLC*, 2008 WI App 128, ¶ 16, 313 Wis. 2d 803, 758 N.W.2d 167 (2008) ("'Otherwise discovered' … quite obviously means 'discovered outside of mediation,' not 'discovered outside the bounds of formal civil discovery.' By its terms, [Wis. Stat. section] 904.085(4)(c) is intended to prevent a party from making pre-existing, unprivileged information privileged, simply by communicating in the course of a mediation.").

[7] 772 F.3d 437 (7th Cir. 2014).

[8] *See generally Doe v. Archdiocese of Milwaukee (In re Archdiocese of Milwaukee)*, No. 13-C-419, 2013 WL 5739016 (E.D. Wis. Oct. 22, 2013).

[9] *Doe,* 772 F.3d at 441 (discussing *David B. v. Stephanie C.S. (In re Paternity of Emily C.B.)*, No. 02-2604, 2004 WL 240227 (Wis. Ct. App. Feb. 11, 2004) (unpublished limited precedent opinion)). The *Emily C.B.* court, although finding the "manifest injustice" exception applied (thereby upholding use of a tape of a mediation from a civil dispute between one parent and an older daughter over a car to be used in a family court placement dispute between both parents to show the one parent's propensity for anger), did not comment on the distinct-dispute requirement.

[10] *Doe*, 772 F.3d at 442.

[11] *Id.* at 442-43 (quoting UMA, The National Conference of Commissioners on Uniform State Laws, § 6(b)(2), www.uniformlaws.org/Act.aspx?title=Mediation%20Act (last visited Oct. 30, 2014)). The states numbered among those that have adopted the UMA include, most notably, Illinois. *See* 710 ILCS §§ 35/1-35/99.

[12] *Doe*, 772 F.3d at 443.

[13] 118 F. Supp. 3d 1106 (E.D. Wis. 2015).

[14] *Gronik*, 118 F. Supp. 3d at 1110 (discussing Wis. Stat. § 904.085 (3)(a) and (4)(e) and citing *Doe*, 772 F.3d at 441-42).

[15] *See* Wis. Stat. § 904.085 (2)(c) (defining "party" as "a participant in mediation, personally or by an attorney, guardian, guardian ad litem or other representative, regardless of whether such person is a party to an action or proceeding whose resolution is attempted through mediation").

[16] *See, e.g., CEATS Inc. v. Cont'l Airlines Inc.,* 755 F.3d 1356, 1362-63 (Fed. Cir. 2014), *cert. denied,* 135 S. Ct. 1549 (2015) (discussing mediator's neutrality requirements in keeping with ABA model standards of conduct for mediators and rules governing recusal of judges).

[17] A colorable claim could be made that in such circumstances the mediator would, at a minimum, have breached the duty of good faith and fair dealing, which the law implies in every contract. *See Beidel v. Sideline Software Inc.,* 2013 WI 563, ¶¶ 27-28, 48 Wis. 2d 360, 842 N.W.2d 240 (discussing court's decision in *Chayka v. Santini*, 47 Wis. 2d 102, 107 & n.7, 176 N.W.2d 561 (1970)).

[18] In *CEATS Inc.,* the Federal Circuit Court of Appeals noted that the public's confidence in the mediation process would be undermined by its "failure to put greater teeth" in a mediator's breach of his disclosure obligations when it nevertheless upheld the finality of an adverse jury verdict in a patent dispute in which a court-appointed mediator had failed to disclose his extensive relationship with a defense firm that represented some of the accused infringers. *CEATS Inc.*, 755 F.3d at 1367. In that appeal, the losing party unsuccessfully sought relief from the resulting judgment based on the unethical conduct of the mediator, who had presided over numerous mediation sessions during the course of the lawsuit.