Mediation Proceedings: Cloaked in Confidence?

By Chris Candon and David McGrath

More than 80 percent of mediated disputes settle. One of the reasons mediation works so well is that participants rely on and benefit from the confidential nature of the process.

Confidentiality promotes settlement discussions through an open sharing of information. Without confidentiality, parties may fear that information gained during or arising out of the mediation will later be exploited or used in court. Are parties and their counsel right in their belief that such information will be regarded as sacrosanct and absolutely protected from disclosure?

Problems and questions arise. Suppose, for example, that parties to a civil dispute in New Hampshire mediated (unsuccessfully) the matter before suit was filed. Further, assume that during litigation one party sought production of a relevant document that the other party shared during mediation. Suppose also that the document did not appear during production and subsequent efforts to obtain the document without involving the court failed. May the party seeking production of that document alert the court that she knows it exists because she saw it during the mediation?

Mediation happens behind closed doors, but parties and mediators must rely on rules and customized agreements to ensure that information doesn't come out later.

Or, more simply, may a party use information from the mediation he believes demonstrates that the parties reached a settlement? Might the mediator be subpoenaed to testify about whether he or she believed at the time of the mediation that the parties reached a binding agreement on all material terms?

In New Hampshire, the state courts have developed different mediation programs, and different rules, so the answer to these questions may depend on which court rules apply or, if the mediation was not tethered to a pending court action, to what confidentially rules the parties agreed.

Each of the courts has established guidelines and/or rules that treat as confidential the information shared during mediation. Under Supreme Court Rule 12-A(11), "mediation proceedings and information relating to those proceedings shall be confidential." The rule further provides that "[s]tatements made and documents prepared by a party, attorney, or other participant in aid of such proceeding shall be privileged and shall not be disclosed to any court or arbitrator or construed for any purpose as an admission against interest. Mediation proceedings under this rule are deemed settlement conferences consistent with the Rules of Evidence."

The rule prohibits parties from introducing into evidence, in any subsequent proceeding, "the fact that there was a mediation or any other material concerning the conduct of the mediation except as required by the Rules of Professional Conduct or the [ABA Model Standards of Conduct for Mediators]." The Standards of Conduct provide, in relevant part: "…If the parties to mediation agree that the mediator may disclose information obtained during the mediation, the mediator

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How to Avoid Vague Agreement Terms that Can Lead to Future Litigation

By Stacey Pawlik

A child leaves her orthodontist visit and is greeted by both of her divorced parents. Both parents believe that, pursuant to the wording of their parenting agreement, they have parenting time with the child after the appointment. The dispute escalates and the police are called. An officer asks the child which parent she wants to leave with. When the child choses her father, her mother becomes so loud the police ask her to leave. Imagine how this felt for the child.

Now add public scrutiny. This child was one of eight born to Jon and Kate Gosselin, of "Jon & Kate Plus Eight" fame. Long after their 2009 divorce, they are still battling out the day-to-day details of their parenting agreement, much like non-reality star parents across the nation.

In the Gosselins' case, the local district attorney concluded that the parenting plan language was "sufficiently vague to interpret who was supposed to actually have [parenting time that day]." The authorities referred the Gosselins back to court for clarity on the issue.

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The Gosselins fell into a far too common situation – the peril of the vague agreement. Despite our best efforts as attorneys, we cannot predict every life event or interpretation dispute that will arise in the decades following the creation of settlement agreements. We can, however, create agreements that are clear, concise, and written to convey the parties' actual agreements and intentions within the four corners of their documents.

What follows are a few tips on avoiding vague language, to make sure your clients get the benefit of their bargain.

Define Terms

As attorneys, we seek to define ambiguous terms for our clients. But we have all had a client who insisted that both he or she and the other party completely understood what a particular phrase meant, or that they would work out between themselves any issues that arose. Either out of exhaustion from the process or a desire to believe in future cooperation, your client truly believed this theory would work. In reality, you know to expect a phone call or email when that theory fails, in which your client demands to know why you let them agree to that language in the first place.

To avoid that situation completely, define any terms that are open to multiple interpretations. Take the time to get to the root of what the parties really want out of that provision and re-phrase it if necessary.

Take the term "discipline" in a parenting plan, for example. Let's say the parents come to an agreement in mediation that only the biological parents will be allowed to discipline their children. This begs the question, what does "discipline" mean, practically speaking? Does it mean verbal discipline? Placing a child in

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may do so." Additionally, those Standards instruct: "A mediator may report, if required, whether parties appeared at a scheduled mediation and whether or not the parties reached a resolution."

Similarly, under Superior Court Rule 32 (Inadmissibility of Alternative Dispute Resolution Proceedings), "ADR proceedings and information relating to those proceedings shall be confidential unless otherwise agreed in writing by all parties and all counsel." Like the Supreme Court rule, "Statements made and documents prepared by a party, attorney, or other participant in aid of such proceeding shall be privileged and shall not be disclosed to any court or arbitrator or construed for any purpose as an admission against interest. All ADR proceedings are deemed settlement conferences consistent with the Superior Court Rules and Rules of Evidence." The Superior Court rule explicitly recognizes, however, that the fact and the terms of any settlement agreement "may be admissible in a further proceeding to enforce same."

The New Hampshire Circuit Court – Family Division – does not have a specific rule governing confidentiality in mediation. However, family mediators certified pursuant to NH RSA 328-C:9 are bound by those statutory rules, including that, "[n]o certified family mediator shall be subpoenaed by any court of competent jurisdiction in this state to disclose any information received from any client unless the privilege is waived by all parties to the family mediation case."

The New Hampshire Circuit Court District Division – Small Claims Actions – does have an applicable governing rule. Rule 4.12 (d) provides that "[a]ny communication made during the mediation which relates to the controversy mediated, whether made to the mediator or a party, or to any other person present at the mediation is confidential. Information, evidence or the admission of any party shall not be disclosed or used in any subsequent proceeding."

It is clear that the answers to the questions posed above are situation-dependent. The simplest and safest way to proceed is for the parties to develop a customized confidentiality provision establishing ground rules governing disclosure of information shared during and arising out of the mediation. It is best that the mediator assume responsibility for ensuring that this occurs.

The ABA Model Standards of Conduct for Mediators requires mediators to set the framework for the treatment of confidential information in mediation: "A mediator shall promote understanding among the parties of the extent to which the parties will maintain confidentiality of information they obtain in a mediation," and those same Standards specifically permit parties to "make their own rules with respect to confidentiality."

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time-out? Telling a child they are wrong? What happens when a biological parent isn't around? Either the term should be clearly defined, or it should be removed to make way for more precise terms that encompass the parties' actual understanding and agreement.

Be Specific

Use as many dates, times and deadlines as possible. Take this phrase, for example: "Each parent shall have the option to spend two weeks of summer vacation with the child." When does that vacation begin? When does it end? Are the weeks allowed to be consecutive? What happens when it overlaps with the other parent's time? The more specific the days, times, and limits of each provision, the less confusing the schedules will be in the future.

Use Consistent Terms

If a specific term is used in one part of the agreement, use it consistently throughout the agreement. For instance, let's say the parties to your agreement defined the term "vacation" in the beginning of the parenting plan. Check to make sure that all other vacations encompassing that definition are written as "vacation," not holiday week or otherwise. The parents should be able to refer back to the defined terms when they run into trouble in the future.

Avoid using "as the parents agree" in place of a specific term.

The parents' draft of their parenting plan listed their Thanksgiving schedule as "as the parents agree." Would you put it in their parenting plan? It really depends on the couple and the age of the children. Safer language would provide a date by which the parents have to decide on the specific Thanksgiving plans each year. Even safer would be to list specific parenting times and days in the plan as a fallback in case they do not agree in the future.

Wherever possible, avoid leaving important recurring decisions up in the air. The parenting plan is what remains when all communication breaks down. The more specific it is, the better.

The best intentions and even the greatest legal minds will never prevent 100 percent of disagreements stemming from legal documents. If for no other reason than no person can anticipate every single outcome spanning decades of exchanges, appointments, extra-curricular activities, and so on. But by utilizing the above techniques in your mediations and negotiations, you can make every effort to ensure that your clients, their children, and the court if necessary, can look to their agreements to gain clarity in the future.

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