

Court Upholds Mediation Confidentiality in Key Civil Case

By Justin Kelly, ADRWorld.com

(1.27.2006) A New Jersey appeals court late last week gave a big boost to the confidentiality of mediation communications, ruling that a mediator is prohibited from testifying in subsequent proceedings without an express waiver from all the parties under the Uniform Mediation Act (UMA) and state rules.

The Superior Court of New Jersey, Appellate Division on Jan. 19 said the state has a strong policy in favor of protecting mediation communications from disclosure, holding and a need for testimony did not outweigh the need to maintain mediation confidentiality according to the parameters of the UMA's balancing test (*Karin Lehr v. John Afflitto* , No. A-6992-03T2).

The ruling means that the UMA's confidentiality protections will stand in both civil and criminal cases, observers say. The New Jersey Supreme Court last year found that a criminal's right to testimony does not automatically outweigh the importance of maintaining the confidentiality of mediation communications (*State of New Jersey v. Carl Williams*, No. A-61-04, 7/28/2005).

Hanan Isaacs, a lawyer and mediator in Princeton, said the ruling is a "major pronouncement by a well respected appellate court" and predicted that it "will not be overturned."

According to Isaacs, the court "recognized good policy" and supported the notion that "mediation is not an ancillary proceeding to litigation" but a separate proceeding protected by its own rules and policy.

The policy of New Jersey is "not to let mediation information into a court proceeding," and the court provided in its ruling that "there is a limit to what lawyers and court are allowed to know" about what went on in a mediation, he suggested.

Robert Margulies, a lawyer and mediator with Margulies, Wind & Herrington in Jersey City, said, "I think this demonstrates how much the courts understand and are aware that mediation is a different process."

The ruling shows that courts have decided "not to be antagonistic to mediation but rather to uphold the process," Margulies said.

"Sometimes odd facts make good law," he added.

Isaacs said New Jersey "now has a standard of practice that mediators and parties need to have an agreement in writing outlining the confidentiality protections" before any proceeding begins, he suggested. Agreements should provide parties, courts, third parties, and lawyers with a clear understanding of the parties' intentions with regard to confidentiality, he added.

The case arose from a divorce proceeding between Karin Lehr and John Afflitto that was referred to mediation, where the parties allegedly reached a final settlement. The mediator, Sanford Kahan, sent a letter to the parties outlining the settlement and the three issues that remained unresolved, but Afflitto countered that he was rejecting the settlement.

The court nevertheless approved the divorce, but Afflitto appealed, arguing that there was no settlement and the court erred when it used the mediator's letter, which was protected from disclosure by the court's confidentiality rules. The UMA was not yet law in New Jersey.

The appeals court, without addressing the mediation confidentiality argument, remanded the case back for hearing to determine whether a settlement had been reached by the parties. During the hearing, the mediator was called to testify by Lehr's counsel. He testified that his letter was not a settlement agreement, but the court found the parties had agreed to the settlement.

The appeals court said at the outset of its review that the subpoenaing of the mediator and his testifying are "troubling," as the confidentiality of mediation proceedings "is a matter of great public and systemic importance."

"Underpinning the success of mediation in our court system is the assurance that what is said and done during the mediation process will remain confidential, unless there is an express waiver by all parties or unless the need for disclosure is so great that it substantially outweighs the need for confidentiality," the court noted.

The appeals court said New Jersey has a number of rules or laws governing mediation confidentiality, and although the case arose before the UMA became law, its "analytical framework" is appropriate for examining whether to pierce the privilege and allow the use of mediation communications in a subsequent proceeding.

Rule 1:40-4 provides that no mediation communication may be used in a subsequent proceeding and mediators are prohibiting from testifying in subsequent proceedings.

The UMA provides a privilege for parties, third party participants, and mediators to refuse to disclose and prevent others from disclosing mediation communications unless all agree in writing to a waiver or a court finds that the need for the information substantially outweighs the need to protect the communications.

The appeals court said the New Jersey Supreme Court in *Williams* held that as a general rule mediators are prevented from testifying in court proceeding related to the mediated case.

That court reasoned that confidentiality is central to encouraging parties to participate in mediation with an expectation that nothing they say would later be used against them in court and having a mediator later testify would damage the process and bring into question the mediator's impartiality, the appeals court noted.

"Applying these principles and guidelines, we conclude that since there was no express waiver of the confidentiality provisions of R. 1:40-4(c), the trial court erred in permitting Kahan to testify at the Harrington hearing," it said.

The appeals court then turned to the UMA for guidance and found that again there was no justification for allowing the mediator to testify.

According to the appeals court, "when balancing the need for the mediator's testimony with the interest in confidentiality, it is clear that the need for Kahan's testimony did not substantially outweigh the private and public interests in protecting confidentiality."

The court said the "advent of mediation and other alternative dispute resolution methods as tools to assist parties in resolving their disputes as early as possible and with the least amount of financial and emotional strain is an admirable and worthwhile effort of the court system."

"Ultimately, however, in an adversarial system with limited resources, the success of mediation is dependent on the good faith, reasonableness and willingness of the litigants to participate," the appeals court noted.