

# **Association of Attorney-Mediators**

## ***Webinar - Confidentiality in the Age of Online Mediations: Points to Ponder*** **July 30, 2020**

On July 30, 2020, from 11:30 a.m. to 12:45 p.m., the Association of Attorney Mediators will be presenting a webinar during which a moderator and four panelists will discuss the issues of confidentiality and discoverability that come with conducting mediations on platforms such as Zoom, with participants often in different states with different laws that govern mediation confidentiality.

The panelists and moderator are from across the United States, as will be the attendees. The following panel members will discuss the enforceability of Confidentiality Agreements, the conflicts of laws principles that arise with multi-state mediations, the potential liability for confidentiality breaches of which mediators must be aware, and other salient issues.

Panelists will be Danielle Hargrove, Jeff Kichaven, Jean Lawler and Michael Leech.

Panel will be moderated by AAM President, Jimmy Lawson.

### **Agenda**

11:30-11:35: Welcome and Introduction of Panel  
Jimmy Lawson, Moderator

11:35-11:45: Brief synopsis of the substance of Kichaven's articles  
Jeff Kichaven, Panelist

11:45-12:45 Discussion of mediation confidentiality.  
Various questions will be asked of the panel for discussion

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## Association of Attorney-Mediators

### Webinar - Confidentiality in the Age of Online Mediations: Points to Ponder Speakers and Panelists – July 30, 2020



**Danielle L. Hargrove** is a United States Air Force Veteran with over 28 years of extensive experience as an attorney advising in all aspects of labor and employment law, including compliance with state and federal employment laws, regulations, and resolving business and public policy disputes. Ms. Hargrove has actively mediated since 1995 and began arbitrating in 2002. She is on the rosters of the American Arbitration Association (“AAA”), Resolute Systems, Inc., Conflict Solutions of Texas, ADR Panel of the Boston Law Collaborative, LLC, FINRA and served for many years on the United States Postal Service roster of mediators. She has been selected for the Regional Texas and Oklahoma Arbitration panel for the Internal Revenue Service and the National Treasury Employees Union (NTEU), as well as the between the NTEU and US Customs and Border Protection. She is also on the rosters of neutrals for the National Mediation Board (railroad and airline matters) and the Federal Mediation and Conciliation Service hearing (cases across the United States and across diverse industries, including school districts, police and fire departments). Ms. Hargrove also serves on the Dallas Area Rapid Transit Trial Board as a Hearing Examiner and as a Texas Property Tax Appraiser.

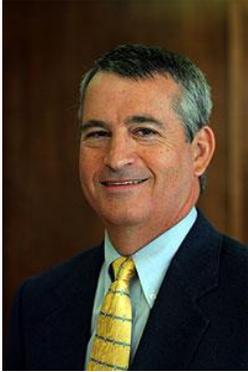
She is a past officer of the State Bar of Texas Dispute Resolution Section and past Chair of the ABA ADR Section Forum for Diversity of the Profession. She currently serves on the Boards of the Association of Attorney-Mediators, National Association of Railroad Referees and Texas Labor Management Conference.

**Jeff Kichaven** is “Ranked in Chambers (USA) 2020” as one of the country’s top mediators. “Who’s Who Legal” lists him as a “Global Elite Thought Leader” in mediation, one of only five in the USA and 20 in the world. He is an Honors Graduate of Harvard Law School and a Phi Beta Kappa Graduate of the University of California, Berkeley, and an elected member of the American Law Institute.



Based in Southern CA, **Jean Lawler** has mediated numerous matters involving commercial, insurance, civil and ADA litigation, at both the trial and appellate levels, involving a wide range of issues. She has extensive experience in conducting online, virtual mediations, having to date mediated 50+ matters online during the Covid-19 pandemic. A lawyer for 40+ years, Ms. Lawler was in private practice for 37 of those year, allowing her as a mediator to quickly understand and simplify the challenges of complex litigation. Her legal experience has been diverse and international - ranging from insurance coverage/bad faith, tort, business, professional liability and complex commercial litigation, to ADA litigation and evolving risks such as data breach, cyber & privacy liability. When in practice she represented corporations, professionals, non-profits, individuals, and insurers in a broad range of matters, at trial and on appeal. Having served as Managing Partner of her former law firm, she is well versed in business issues. At times she also chaired the firm’s Insurance Law, Cyber & Privacy Law, International Law, and Business & Real Estate Transactions practice groups. Ms. Lawler has a deep knowledge of the insurance

industry, insurance policies and the various risks they insure (primary, excess, reinsurance, program, surplus lines, London Market and international insurers). She is honored to be a Fellow and Founding Regent of the American College of Coverage Counsel and a Past President of both the FDCC and of the Insuralex Global Insurance Lawyers Group (Chambers-Band 1). She presently serves on the Board of the Association of Attorney-Mediators.



**James D. "Jimmy" Lawson** has owned his own practice, James D. Lawson, P.C., located in Lakeland (Shelby County), Tennessee since March, 2013. His law practice emphasizes construction law, construction litigation, insurance defense and issues of insurance coverage, along with alternative dispute resolution services. Prior to obtaining his license to practice law in Tennessee, he was an associate (1986-1993) and a partner (1993-2008) at Hilburn, Calhoun, Harper, Pruniski & Calhoun, Ltd., in North Little Rock, Arkansas. After moving to Memphis, he was associated with the Law Offices of William M. Jeter, PLLC, in Memphis, Tennessee (July, 2008-February, 2013). He left the Jeter Firm in 2013 to focus his practice on mediation. Over his thirty-four (34) year career as an attorney, Jimmy has handled a wide variety of civil cases, representing plaintiffs and defendants, in state and federal courts throughout Arkansas and Tennessee.

He has been associated with Hamlin Dispute Resolution, LLC, based in Little Rock, Arkansas, since May, 2012, and regularly mediates civil cases of all varieties throughout Arkansas and western Tennessee. In October, 2016, he obtained his certification as a family law mediator in Arkansas and has been mediating in that field as well for the last four years. He is a frequent speaker on the topic of mediation for the Arkansas Bar Association, the Pulaski County (Arkansas) Bar Association, and the Arkansas Alternative Dispute Resolution Commission, and he has contributed his time to assist with mediation courses that are offered by the University of Arkansas School of Law (Fayetteville, AR) and the Bowen School of Law at UALR (Little Rock, AR). Jimmy resides in Lakeland, Tennessee with his wife, Vicki. He has been a member of AAM since 2012.

**Michael Leech** is a full-time attorney-mediator and arbitrator. Mike is a past AAM President and recipient of AAM's Steve Brutsche' Award. He has conducted hundreds of civil case mediations involving employment and commercial disputes. He has offices in Philadelphia and in Chicago, where he practiced in employment law and commercial litigation for over 30 years and was a partner at Hinshaw & Culbertson. Mike co-authored the legal treatise Holloway & Leech, Employment Termination: Rights & Remedies (BNA 1985; 2d ed. 1992; Supp. 2002). He's a distinguished fellow in the International Academy of Mediators and a fellow of the College of Labor & Employment Lawyers. He is a member of the American Law Institute. Mike received his B.A. (1973) and J.D. (1976) from the University of Virginia.



# Mediator Confidentiality Promises Carry Serious Risks

By **Jeff Kichaven**

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Law360 (July 20, 2020, 4:35 PM EDT) -- The purpose of this article is to explain some reasons why mediators might decide not to promise people that their mediations are confidential. Someday, that promise will result in a mediator being on the wrong end of a serious malpractice case. The consequences could be severe. You don't want to be that mediator.



Jeff Kichaven

In the COVID-19 era, the risk has increased. Mediation has gone online. More cases involve participants in multiple states. The choice of which state's confidentiality or privilege law should apply is less obvious.

The result? A court adjudicating a confidentiality claim has more discretion to pick and choose the evidence law of a state that allows mediation-related evidence to be admitted — regardless of whether the mediator has promised or the participants have agreed to keep that evidence confidential. If a court does so after a mediator has promised confidentiality, that mediator has a problem.

Analytically, here's the vice of mediation confidentiality agreements in a nutshell: The promise of confidentiality is not a promise a mediator has the power to keep. The only people who can keep (or not keep) that promise are judges ruling on later motions to compel document production or testimony regarding what happened in that mediation. And sometimes, those judges don't come through.

A recent [Law360 guest article](#) I co-authored with professor Teresa Frisbie and law student Tyler Codina proved this. All we had to do was examine the 2017 decision in *Larson v. Larson* from the [U.S. Court of Appeals for the Tenth Circuit](#).<sup>[1]</sup>

In *Larson*, the parties mediated in Colorado, a state with strong mediation confidentiality protection. On top of that, they signed a confidentiality agreement. In a later proceeding in Wyoming, some parties to the Colorado mediation sought discovery of another party's mediation PowerPoint. The Tenth Circuit affirmed a lower court's decision to disregard the Colorado confidentiality statute on which the parties presumably relied, disregard the confidentiality agreement the mediator provided, and ordered production.

Critically for our purpose, the mediator's promise of confidentiality, in the confidentiality agreement he provided, made no difference. The result could easily be the same in other states, such as New York.<sup>[2]</sup>

The confidentiality agreement on which the *Larson* mediator procured everyone's signatures probably had a paragraph something like this oft-copied passage:

In order to promote communication among the parties, counsel and the mediator and to facilitate settlement of the dispute, each of the undersigned agrees that the entire mediation process is confidential. All statements made during the course of the mediation are privileged settlement discussions, and are made without prejudice to any party's legal position, and are inadmissible for any purpose in any legal proceeding. These offers, promises, conduct and statements (a) will not be disclosed to third parties except persons associated with the participants in the process, and (b) are privileged and inadmissible for any purposes, including impeachment, under Rule 408 of the Federal Rules of Evidence and any applicable federal or state statute, rule or common law provisions.<sup>[3]</sup>

When a mediator plunks that contract under people's noses and gets them to sign it as a condition of proceeding with the mediation, it's hard to deny the mediator is responsible for the promises that contract contains.

When a later court, in another state, breaks the mediator's promise, refuses to enforce that contract, and orders document production or testimony regarding what happened in the prior mediation, what ills could befall the responsible mediator? And, are the benefits of making the confidentiality promise worth the risks? My conclusion is that the ills are serious, and the risk outweighs the minimal benefits the confidentiality promise provides.

First, the ills.

Assume the mediator obtains signatures on a confidentiality agreement in a case where private, even embarrassing, information is disclosed in reliance on the promise of confidentiality. Examples might include an intellectual property case where profitability information is disclosed, or a sexual harassment case where personal misconduct is disclosed.

Next, assume a breach of contract case in another state to which the profitability information is relevant, or a wrongful termination case in another state to which the personal misconduct is relevant. Finally, assume that the courts of those other states compel document production or testimony regarding what happened in the prior mediation, as happened in Larson and could well happen again, and the documents or testimony adversely affect the outcomes of those cases.

What claims could be asserted against the mediator whose promise of confidentiality was broken?

Could the mediator be liable for negligent misrepresentation? Consider this statement of the elements of that tort:

The elements of negligent misrepresentation are: (1) the representation is made by a defendant in the course of his business, or in a transaction in which he has a pecuniary interest; (2) the defendant supplies 'false information' for the guidance of others in their business; (3) the defendant did not exercise reasonable care or competence in obtaining or communicating the information; and (4) the plaintiff suffers pecuniary loss by justifiably relying on the representation.[4]

The shoe seems to fit. The mediator made a representation of confidentiality in the course of his business, it was false, the representation guided others in their business negotiations, the mediator was not competent in communicating information which was, after all, false, and the plaintiff suffered pecuniary loss from having to disclose the information.

What about a claim for breach of contract? The elements of the claim are familiar:

To prevail on a cause of action for breach of contract, the plaintiff must prove (1) the contract, (2) the plaintiff's performance of the contract or excuse for nonperformance, (3) the defendant's breach, and (4) the resulting damage to the plaintiff.[5]

This shoe seems to fit, too. The confidentiality agreement is the contract, the plaintiff mediated and disclosed sensitive information, the mediator did not secure its confidentiality, and the plaintiff was damaged. Mustn't that mediator bear responsibility?

Would there also be claims for garden-variety negligence and malpractice? Almost certainly, but with a twist.

Yes, there would be a claim styled "mediator malpractice." As a twist, there would likely also be a claim styled "legal malpractice," because the confidentiality agreement is a contract that affects the legal rights of other people, and to draft or even select that contract is the practice of law, according to the ABA Task Force on the Model Definition of the Practice of Law:

(c) A person is presumed to be practicing law when engaging in any of the following conduct on behalf of another:

...

(2) Selecting, drafting, or completing legal documents or agreements that affect the legal rights of a person;[6]

What will happen when this lawsuit is filed? Sure, the mediator might get lucky, dodge the bullet, and get a defense verdict. But who wants to risk being the mediator with the lump in their throat and the acid churning in their stomach while the jury mulls it over?

Even if this mediator survives the civil justice system, there could be more problems afoot. In a worst-case scenario, a state bar disciplinary system could also take note. The confidentiality agreement, with its promise that future courts will honor the confidentiality promise, could violate the [American Bar Association's](#) Model Rule of Professional Conduct 7.1. Consider the California statement of and comment to this rule:

Rule 7.1, California Rules of Professional Conduct, Approved by the Supreme Court, Effective November 1, 2018:

(a) A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the communication considered as a whole not materially misleading.

Comment [2] A communication that contains an express guarantee or warranty of the result of a particular representation is a false or misleading communication under this rule.

The confidentiality agreement guarantees or warrants that future courts will keep the mediator's confidentiality promise. Under Comment [2], that's false or misleading, and violates Rule 7.1.

Why do I raise these issues? I acknowledge that, in any individual case, the likelihood is small that things will go so horribly wrong. Yet given enough time and enough cases, it will happen. History can be our guide.

I graduated from law school in 1980. In the early years of my practice, there were virtually no appellate cases regarding arbitration or arbitrators. Then, as the number and types of arbitrations grew, that changed. Now, it seems that barely a month goes by without some important court deciding some important case regarding some important aspect of arbitration. As time goes on, my bet is that mediation follows the same path.

I don't want to be the mediator whose conduct is the subject of a lawsuit or disciplinary proceeding. I also don't want the shame of disserving mediation participants by inducing a degree of candor from them that they later come to regret. That's why I never promise anyone that any particular mediation privilege or confidentiality rule or statute, or any particular degree of mediation privilege or confidentiality, will apply.

Do I lose any benefits by not making a confidentiality promise? I don't think so. In the commercial cases I mediate, I don't think people are all that candid, whether or not they think the process is confidential. They are instead cagey and strategic about what they do and do not disclose. I can't remember the last time someone in a mediation voluntarily bared their soul and disclosed a negative or harmful fact or case of which the other side was unaware.

Yes, people have to deal with negative or harmful facts and cases when the other side presents them; but that's different than volunteering whatever is negative or harmful. Lawyers in mediation are still fiduciaries to their clients, with duties of undivided loyalty. They can't ethically disclose things that might prejudice their clients in the negotiation. It's risky. Once negative information is disclosed to a mediator, there is a chance the mediator will leak that information to the other side, even if only unconsciously through body language, facial expression, or tone of voice.

So, the risks of a mediator's confidentiality promise are real, the benefits are not. To the mediators who will persist in promising confidentiality, you've got to ask yourself one question: "Do I feel lucky?"

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[1] [Larson v. Larson](#) , 687 Fed.Appx. 695 (10th Cir. 2017).

[2] Compare [Matter of the People of the State of New York v. PriceWaterhouseCoopers](#) , 2017 NY Slip Op. 04071, 150 AD 3d 578, May 23, 2017.

[3] <https://www.jamsadr.com/adr-forms/>, Mediation Agreement.

[4] [Henry Schein v. Stromboe](#) , 102 S.W.3d 675, 686 (Tex. 2002).

[5] [Richman v. Hartley](#) , (2014) 224 Cal.App.4th 1182, 1186 [169 Cal.Rptr.3d 475].

[6] American Bar Association Task Force on the Model Definition of the Practice of Law, Definition Of The Practice Of Law, Draft (9/18/02), [https://www.americanbar.org/groups/professional\\_responsibility/task\\_force\\_model\\_definition\\_practice\\_law/model\\_definition](https://www.americanbar.org/groups/professional_responsibility/task_force_model_definition_practice_law/model_definition)

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# What You Say In Online Mediation May Be Discoverable

By **Jeff Kichaven, Teresa Frisbie and Tyler Codina**

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Law360 (June 30, 2020, 5:09 PM EDT) -- You cannot promise your clients their online mediation is confidential. What you say in an online mediation may be discoverable. And there may not be anything you can do about it.

The problem has always been that, if your mediation takes place in State 1, whose laws protect mediation confidentiality, and what you say in that mediation is relevant to a lawsuit in State 2, whose laws do not protect mediation confidentiality, the courts of State 2 may apply their own evidence laws and order you to testify.

Now, the problem is worse. When you mediate commercial cases online, participants may be in different states. This makes it more difficult to say where the mediation actually takes place. If only some of the participants in your mediation are in State 1, the courts of State 2 have even greater discretion to disregard the laws of State 1.

The idea that online mediations — or any mediations, really — are confidential is therefore a myth. Let's prove it.

Our saga begins on the prairie with Larson v. Larson,[1] a sibling rivalry between Army Larson and Arla Harris, on the one hand, and Charles Larson, on



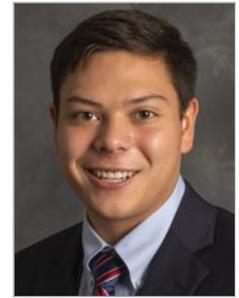
Jeff Kichaven



Teresa Frisbie

the other. They were fighting over various family assets.

The lawsuit was in Wyoming. They mediated in Colorado, face to face. Their mediation agreement said, "All communications, whether oral or written, made in the course of the mediation process ... are confidential by this agreement and the Colorado Dispute Resolution Act."



Tyler Codina

At the end of their mediation, they signed "basic terms of settlement," but then could not agree on final documentation. Back in Wyoming, Army Larson and Arla Harris moved to enforce the term sheet. They sought production of a PowerPoint Charles Larson used at the mediation in Denver. The magistrate judge allowed discovery and admission of the PowerPoint. The [U.S. Court of Appeals for the Tenth Circuit](#) reviewed for abuse of discretion. [2]

There was a true conflict of laws. Colorado privileges these documents, while Wyoming expressly allows discovery of confidential mediation communications when a party seeks judicial enforcement of a purported mediated settlement agreement.[3] There was also their mediation agreement.

The Tenth Circuit didn't care:

Although Wyoming's choice of law rules state that "the law of the state chosen by the parties to govern their contractual rights and duties will apply [citations omitted]," this general rule was overridden by the longstanding principle that Wyoming courts will "not apply another jurisdiction's law 'when it is contrary to the law, public policy, or general interests of Wyoming's citizens. [citations omitted]'" Therefore, the magistrate judge applied Wyoming law and allowed discovery of the presentation.

We conclude the magistrate judge did not err in his decision.[4]

While this disregard of Colorado's more protective law might surprise or even shock you, it might not bother those of you who don't see a realistic possibility that what happens in your mediation could later become relevant to a lawsuit in Wyoming. But Larson is hardly an outlier.

Let's take our saga to the Big Apple. As recently as 2017, New York courts used similar choice-of-law analysis to compel disclosure of material seemingly privileged under the laws of another state. And it's much more possible that what you say in your mediation could become relevant to a lawsuit in New York.

The key case is Matter of People of the State of New York v. PriceWaterhouseCoopers LLP.[5]

There, then-Attorney General Eric Schneiderman sought to compel [Exxon Mobil Corp.](#) and [PwC](#) to comply with a subpoena to PwC in connection with New York's climate change suit against Exxon. The Appellate Division affirmed an order granting a petition to compel production of documents.

PwC and Exxon contended that communications between them took place in Texas, Texas protects those communications from discovery under an accountant-client privilege (New York has no such privilege), and under the "balancing test" of the Second Restatement of Conflict of Laws, Texas privilege law should apply to protect those documents from discovery.

The Appellate Division didn't care, either:

We reject Exxon's argument that an interest-balancing analysis is required to decide which state's choice of law should govern the evidentiary privilege. Our current case law requires that when we are deciding privilege issues, we apply the law of the place where the evidence will be introduced at trial, or the place where the discovery proceeding is located.

A remarkable result, especially considering that New York's "current case law" hardly required it, and in fact seemed to the contrary.

Just one year before, New York law was synthesized by the chief judge of the [U.S. District Court for the Southern District of Ohio](#), Judge Edmund A. Sargus Jr., in [Wilmington Trust Co. v. AEP Generating Co.](#):<sup>[6]</sup>

Under New York's choice of law principles, the governing law is that "of the jurisdiction which, because of its relationship or contact with the occurrence or the parties, has the greatest concern with the specific issue raised in the litigation."<sup>[7]</sup> New York courts "apply an interest-balancing test to determine which state has the greatest interest in applying its law."<sup>[8]</sup> "In cases requiring a choice of privilege law, the interest analysis usually has led New York courts to apply the law of the jurisdiction in which the assertedly privileged communications were made."<sup>[9]</sup>

Since some New York courts are willing to swim against the current and disregard another state's accountant-client privilege, even when the assertedly privileged communications were made in that state, does that mean they will also disregard another state's mediation privilege? At least one case points in that direction.

In *Hauzinger v. Hauzinger*,<sup>[10]</sup> a divorce action, Carl Vahl served as mediator. After the mediation, Aurela Hauzinger subpoenaed Vahl to produce records and to testify in a proceeding to determine whether the terms of the Hauzingers' separation agreement "were fair and reasonable at the time of the making of the agreement." Vahl moved to quash the subpoena on grounds, among others, that the Hauzingers had signed a confidentiality agreement. The trial court refused to quash the subpoena, and the Appellate Division affirmed, notwithstanding the confidentiality agreement that the Hauzingers had signed.

In 2008, the New York Court of Appeals issued its memorandum opinion,<sup>[11]</sup> affirming the Appellate Division. The Court of Appeals conveniently noted something the Appellate Division did not — that both spouses had waived whatever confidentiality attended their mediation. Therefore, Vahl was required to produce documents and testify. But the larger issue of New York courts' insensitivity to mediation confidentiality, as demonstrated by the Appellate Division, remains an open question.

While PwC and Hauzinger seem result-oriented, New York courts' hunger to get all relevant evidence before them is not all bad. Society needs courts to get decisions right. And in order to get decisions right, courts want to consider all evidence relevant to those decisions. That's why the general rule everywhere is that all relevant evidence is admissible. (In New York, it's Evidence Rule 4.01.) A corollary of that rule, as the [U.S. Supreme Court](#) held in *United States v. Euge*, obliges everyone who has relevant evidence to testify:

The scope of the "testimonial" or evidentiary duty imposed by common law statute has traditionally been interpreted as an expansive duty limited principally by relevance and privilege. As this court described the contours of the duty in *United States v. Bryan*, 339 U. S. 323, 331 (1950): "[P]ersons summoned as witnesses by common authority have certain minimum duties and obligations which are necessary concessions to the public interest in the orderly operation of legislative and judicial machinery ... We have often iterated the importance of this public duty, which every person within the jurisdiction of the Government is bound to perform when properly summoned."

While the Court recognized that certain exceptions would be upheld, the "primary assumption" was that a summoned party must "give what testimony one is capable of giving" absent an exemption "grounded in a substantial individual interest which has been found, through centuries of experience, to outweigh the public interest in the search for truth." [12]

How do mediation privileges of other states stand up in New York under this standard, "a substantial individual interest which has been found, through centuries of experience, to outweigh the public interest in the search for truth"?

Not well.

Centuries of experience? The Uniform Mediation Act was approved by the [National Conference of Commissioners on Uniform State Laws](#) in 2001. In almost 20 years, only 11 states and the District of Columbia have adopted it. The last state to adopt it was Hawaii in 2013. It has been introduced as legislation in only two other states — Georgia and Massachusetts. [13]

While some other states, such as California, have mediation confidentiality laws more protective than the Uniform Mediation Act, [14] New York has only minimal statutory protection for mediation confidentiality. New York's Civil Practice Law and Rule 4547 makes settlement negotiations inadmissible solely "as proof of liability for or invalidity of the claim or the amount of damages." It is therefore consistent with New York policy for New York courts to be inclined to disregard the more protective mediation confidentiality laws of other states.

Would it help to seek confidentiality protection in New York under federal law, rather than the law of another state? No.

Beyond the minimal protections of Rule 408 of the Federal Rules of Evidence (which generally parallels CPLR 4547), there is no federal mediation privilege. There isn't even much of a

settlement privilege in federal law:

Did you know there is a settlement privilege? Not many do, primarily because few courts have adopted the privilege. The Sixth Circuit adopted a federal common-law settlement privilege in [Goodyear Tire & Rubber Co. v. Chiles Power Supply, Inc.](#), 332 F.3d 976 (CA6 2003), but other courts reject the Goodyear decision. See, e.g., *In re MSTG Inc.*, 675 F.3d 1337 (Fed. Cir. 2012); *Matsushita Elect. Indust. Co. v. Mediatek, Inc.*, 2007 WL 963975 (N.D. Cal. 2007).[15]

The [U.S. Court of Appeals for the Federal Circuit](#) stated plainly that a settlement privilege does not outweigh the public interest in the search for truth:

[W]hile there is clearly an important public interest in favoring the compromise and settlement of disputes, disputes are routinely settled without the benefit of a settlement privilege. It is thus clear that an across-the-board recognition of a broad settlement negotiation privilege is not necessary to achieve settlement.[16]

So here is the key conclusion: It is easier to ask a New York court to apply *Lego* as described in *Wilmington Trust* rather than *PwC*, and use the evidence law of a more protective state to keep your mediation confidential, if the "assertedly privileged communications" were made in that other state. Even then, though, a New York court might order disclosure.

When you mediate online, with participants in different states, it's harder to show where their mediation communications were "made." If even one mediation participant was in New York or another less protective state, then even under *Lego*, the chances a New York court will order disclosure increase.

The lesson, therefore, is this: Don't assure your clients any mediation is confidential. Be wary of mediation agreements that promise the law of any more protective state will apply. Nobody can guarantee that result.

However, do assure your clients mediation is still valuable. Your clients can still participate actively and meaningfully, with unparalleled opportunities for collaboration and teamwork between clients and lawyers.

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[1] 687 Fed.Appx. 695, 706 (10th Cir. 2017).

[2] Slip Op. at 18.

[3] Slip Op. at 19.

[4] Slip op. at 20.

[5] 2017 NY Slip Op. 04071, 150 AD 3d 578, May 23, 2017.

[6] Case No. 2:13-cv-1213, SD Ohio 2016, slip op. at 6

[7] [Lego v. Stratos Lightwave Inc.](#) , 224 F.R.D. 576, 578 (S.D.N.Y. 2004).

[8] [Condit v. Dunne](#) , 225 F.R.D. 100, 107 (S.D.N.Y. 2004).

[9] Lego, 224 F.R.D. at 579.

[10] 43 A.D. 3d 1289, 842 N.Y.S. 2d 646 (4th Dep't 2007), aff'd, 10 N.Y. 3d 923, 862 N.Y.S. 2d 456, 892 N.E. 2d 849 (2008).

[11] [http://www.nycourts.gov/reporter/3dseries/2008/2008\\_05781.htm](http://www.nycourts.gov/reporter/3dseries/2008/2008_05781.htm).

[12] [United States v. Euge](#) , 444 US 707, 712-13 (1980) ([IRS](#) empowered to compel handwriting exemplars under its subpoena power).

[13] <https://www.uniformlaws.org/committees/community-home?communitykey=45565a5f-0c57-4bba-bbab-fc7de9a59110&tab=groupdetails>.

[14] Cal.Ev.C. 1115 et. seq.

[15] <https://presnellonprivileges.com/2015/02/10/important-lessons-about-the-settlement-privilege/>.

[16] [In re: MSTG Inc.](#) , 675 F.3d 1337, 1345 (Fed.Cir. 2012).

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# Nix Your Mediator's Prospective Waiver of Liability

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Excellence in mediation requires considerable skill. It also requires that the mediator use those skills in service of values consistent with the values of clients. When selecting, reviewing, or comparing mediators, it's important to pay equal attention to the mediators' values as well as their skills.

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Mediation How should an IRMI subscriber go about selecting a mediator? Sure, there are some stock questions about a mediator's prior experience and training. A mediator has to have a track record and demonstrated skill. We all know that. But for the IRMI reader, there are some other, and special, inquiries as well. You want a mediator who shares your basic values. Fortunately, there are some easy ways to tell.

## Prospective Waiver of Liability

A good start is the mediator's "confidentiality agreement." The forms used by many mediators across the country are pretty similar, having been borrowed back and forth from each other. And they contain some surprising statements that have nothing to do with confidentiality. Most particularly, look out for this sentence:

All parties agree that the mediator has no liability for any act or omission in connection with the mediation.

This statement—a "prospective waiver of liability"—demonstrates that the mediator does not share the IRMI subscriber's basic values. Let's be clear about exactly what this sentence means. Unvarnished, here it is:

Dear Mediation Participants:

In the unlikely event that I commit malpractice that causes you financial damage—and even though I carry malpractice insurance so that you can be compensated without causing me to suffer financial ruin—it is personally important to me that you *do not* receive that compensation.

IRMI subscribers, and most Americans for that matter, believe that nobody is above the law. The bedrock role of this value in American society is well-summarized in this Wikipedia entry:

The [Rule of Law](#), in its most basic form, is the principle that no one is above the law. [Thomas Paine](#) stated in his pamphlet [Common Sense](#) (1776): 'For as in absolute governments the king is law, so in free countries the law ought to be king; and there ought to be no other.'

Even Paris Hilton gets it. Consider her [comments](#) during her 2007 imprisonment/probation debacle:

No one is above the law. I surely am not. I do not expect to be treated better than anyone else who violated probation. However, my hope is that I will not be treated worse.

Yet a mediator's "prospective waiver of liability" is precisely the mediator's effort to place herself above the law if her conduct falls below the standard of care and proximately causes damage. If that happens—unlikely though it may be—why should the mediator not be held accountable? If anything goes that far amiss during the mediation, you want a mediator you can hold accountable and from whom (or whose insurer) you can receive compensation.

## Liability Waivers and Professional and Public Policy

If an IRMI subscriber who practices law in California tried to impose a "prospective waiver of liability" on his clients, that lawyer would be subject to professional discipline by the State Bar for unethical conduct. Rule 3-400 (A) of the California Rules of Professional Conduct provides:

3-400. Limiting Liability to Client.

A [member](#) shall not:

(A) Contract with a client prospectively limiting the [member's](#) liability to the client for the member's professional malpractice; ...

Elsewhere in the country, lawyers' attempts to impose prospective waivers of liability on clients are disfavored. Compare, Rule 1.8(h)(1), ABA Model Rules of Professional Conduct:

A lawyer shall not make an agreement prospectively limiting the lawyer's liability to the client unless the client is independently represented in making the agreement.

In our society's other great learned profession—medicine—public policy prohibits physicians and hospitals from seeking prospective waivers of liability as a condition of treatment. *Tunkl v. Regents of the University of California*, 60 Cal. 2d 92 (1963).

These prohibitions reflect what the California Supreme Court just last year called "(t)he traditional skepticism concerning agreements designed to release liability for future torts." *City of Santa Barbara v. Superior Court*, 41 Cal. 4th 747 (2007), slip op. at 8. Rather, the "public policies underlying our tort system" require that:

as a general matter, we seek to maintain or reinforce a reasonable standard of care in community life and require wrongdoers—not the community at large—to provide appropriate recompense to injured parties.

*Id.*, slip op. at 7.

This is consistent with the important national public policies that have always been behind tort litigation:

Negligence rules both regulate misconduct and protect against harm caused by that misconduct. For example, tort liability for negligence has the effect, and to a degree the purpose, of regulating a defendant's future conduct.

It is a policy of negligence law to allow a person to recover for an injury that was proximately caused by another's duty of reasonable care.

Observation: The policy reason supporting a cause of action for negligence is to discourage or encourage specific types of behavior by one party for the benefit of another party....

[57A Am. Jur. 2d, Negligence section 1.]

Worse, most mediators are lawyers, and many are still active members of their respective state bars. If practicing law in California, Rule 3-400(A) would bar them from imposing prospective waivers of liability on their law-practice clients. Of course, when mediating rather than practicing law, 3-400(A) does not apply to their conduct. But, by imposing such waivers when mediating, these lawyers are announcing to the world that they have voluntarily lowered their own ethical standards when they change hats from law practice to mediation practice. And, by agreeing to such waivers, litigators are announcing that they have just settled for a professional who adheres to ethical standards less stringent than their own.

Still worse, many mediators' prospective waivers of liability are flat-out unlawful. They purport to release responsibility for "any act or omission," the intentional as well as the negligent. California Civil Code section 1668—unchanged since its adoption in 1872—does not allow this overreaching:

All contracts which have for their object, directly or indirectly, to exempt any one from responsibility for his [or her] own fraud, or willful injury to the person or property of another, or violation of the law, whether willful or negligent, are against the policy of the law.

Finally, many of these prospective waivers of liability are preceded by a statement that they are imposed "in order to promote communication among the parties and the mediator and to facilitate settlement of the dispute...." In fact, just the opposite should be true. Much of the success of mediation depends on confidential, caucus communications

between counsel and the mediator. The effectiveness of the communication is said to depend on its candor, and its candor is said to depend on its confidentiality. What policy best promotes that confidentiality? A policy that lets the mediator know that there are consequences if the confidentiality is breached—the very antithesis of the result of a prospective waiver of liability.

The prospective waiver of liability is a misguided effort at risk management by mediators. It lets mediators off the hook from performing ethically and even competently. It is doubly insensitive in light of the reach of the mediation confidentiality statutes such as the California Evidence Code section 1115 *et seq.*, which precludes introduction of evidence of malpractice that takes place in a mediation, and thus functions as the equivalent of an immunity statute. Compare, *Wimsatt v. Superior Court*, 152 Cal. App. 4th 137 (2007) and especially Justice Aldrich's critique of the statute, slip op. at 30-32. Regrettably, mediators may not even need a prospective waiver of liability to let themselves off of the hook of competence.

## Conclusion

On superficial review, a prospective waiver of liability looks like a pretty good thing to have, so it has survived, reflexively but not thoughtfully, from generation to generation of mediators' form documents. This should not be allowed to continue. Insurers—who employ both litigators and mediators—could stop tolerating prospective waivers of liability from mediators, just as, I am sure, they do not grant prospective waivers of liability to law firms.

Hold your mediators to the same standards as you hold your lawyers, and let the litigators who serve you know of this insistence. & When you require mediators to stand behind the quality of their work, the quality of the services you receive from mediators can only improve.

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