Mediator Confidentiality Promises Carry Serious Risks

By **Jeff Kichaven**

Jeff Kichaven

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.

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.[1]

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.[2]

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.[3]

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?"

Jeff Kichaven is an independent mediator with a nationwide practice. He specializes in insurance, intellectual property and professional liability matters.

[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_definition/.