New York Law Journal
SERVING THE BENCH AND BAR SINCE 1888
WWW.NYLJ.COM
An ALM Publication
VOLUME 248—NO. 117
TUESDAY, DECEMBER 18, 2012

SOUTHERN DISTRICT CIVIL PRACTICE ROUNDUP

Expert Analysis

Mediation Confidentiality: Meaningful but Not Absolute

By **Edward M. Spiro** And **Judith L. Mogul**

Mediation, which offers the promise of a fair and efficient mechanism for resolving thorny disputes, often requires that parties disclose information they would not disclose in litigation. And parties often do so quite freely, under the assumption that such information is and will remain confidential. To encourage full participation and cooperation in mediation, the Local Rules of the U.S. District Court for the Southern District of New York, like many forms of private mediation, provide broad assurances that "[t]he entire mediation process shall be confidential."[1]

While the promise of confidentiality for mediation materials is broad, it is not sacrosanct. Judges have struggled with defining when and under what circumstances a third party may obtain discovery of mediation materials. With guidance from the Second Circuit's 2011 opinion in *In re Teligent*,[2] Southern District Judge Leonard Sand recently issued a decision in *Dandong v. Pinnacle Performance*[3] clarifying that a third party must show extraordinary need, and one that outweighs the strong public interest in preserving a mediation's presumed confidentiality, in order to obtain disclosure of mediation materials. *In re Teligent* and *Dandong* set a high hurdle for the party seeking mediation material to overcome, but the prudent lawyer shepherding his or her client through mediation should be wary of this contingency, particularly where third-party interest in the mediation materials can be anticipated.

'In re Teligent's' Standard

In its decision in *In re Teligent*, the U.S. Court of Appeals for the Second Circuit drew from its standard for determining whether to modify a protective order in articulating the standard to be applied in considering an application by a third party for disclosure of mediation materials. In that case, the estate of a bankrupt company, Teligent, its former CEO, Alex Mandl, and others, had engaged in a mediation in which they agreed to be bound by the terms of the standard protective orders employed by the Bankruptcy Court of the Southern District of New York in court-ordered mediation. Those orders imposed limitations on the disclosure of information related to the mediation, without guidance on the circumstances under which a party to the mediation might be entitled to release such information.

Following the mediation, the parties reached a settlement, one aspect of which required Mandl to sue his former lawyers for malpractice and to remit to the bankruptcy estate 50 percent of any amounts he recovered in that action. During discovery in the subsequent malpractice action, the defendant law firm sought from Mandl all mediation and settlement communications and, after counsel for the estate objected, sought an order from the bankruptcy court lifting the confidentiality restrictions so that Mandl could provide the requested materials. The law firm argued that the documents sought were "critical to issues such as causation, mitigation, and damages."[4] The bankruptcy court denied the motion on the grounds that the law firm had not shown a compelling need for the documents,[5] and the district court affirmed.[6]

On appeal to the Second Circuit, the panel started from the presumption that "[c]onfidentiality is an important feature of…mediation" as it "promotes the free flow of information."[7] The court observed that it "vigorously enforce[s] the confidentiality provisions of [its] own alternative dispute resolution" program, expressing the belief that confidentiality is "essential to [its] vitality and effectiveness."[8]

Drawing from a number of sources, the Second Circuit found a presumption against modification of confidentiality provisions contained in protective orders entered in the context of mediation. It articulated a three-pronged test a movant must meet to obtain mediation material: "(1) a special need for the confidential material, (2) resulting unfairness from a lack of discovery, and (3) that the need for the evidence outweighs the interest in maintaining confidentiality. All three factors are necessary to warrant disclosure of otherwise non-discoverable documents."[9] The panel derived this test from the Second Circuit test for modifying a protective order entered pursuant to Federal Rule of Civil Procedure 26(c), permitting modification only "if an 'extraordinary circumstance' or 'compelling need' warrants the requested modification."[10] The court also drew heavily upon the Uniform Mediation Act, the Administrative Dispute Resolution Act of 1996,[11] and the Administrative Dispute Resolution Act of 1998,[12] all of which emphasize that disclosure of mediation communication should be allowed only in limited circumstances.

The panel made short work of the law firm's arguments in favor of disclosure. As to the first prong—a showing of special or compelling need—it found that the firm had made a blanket request to lift the confidentiality provisions without submitting evidence of special need for any specific communication. The firm failed to meet the second prong—resulting unfairness through a lack of discovery—because the information it sought was available through other means, such as interrogatories and depositions. Finally, because it failed to demonstrate a special need for the communications, the firm could not show that its need outweighed the interest of maintaining confidentiality.[13]

In upholding the lower courts' denial of the motion to lift the confidentiality protections, the Second Circuit concluded that "[w]ere courts to cavalierly set aside confidentiality restric-

While the promise of confidentiality for mediation materials is broad, it is not sacrosanct.

EDWARD M. SPIRO *and* JUDITH L. MOGUL *are principals of Morvillo, Abramowitz, Grand, Iason, Anello & Bohrer, both concentrating in commercial litigation and co-authors of "Civil Practice in the Southern District of New York," 2d Ed. (Thomson West 2011).* PETER JANOWSKI, *an associate at the firm, assisted in the preparation of this article.*

tions on disclosure of communications made in the context of mediation, parties might be less frank and forthcoming during the mediation process or might even limit their use of mediation altogether."[14]

'Special Need' Requirement

Dandong is the first reported case in the Southern District of New York to apply the *In re Teligent* test to a third-party request for mediation materials and to give substance to the requirement that the requesting party demonstrate a "special need" for the materials sought.[15] The plaintiffs in *Dandong* were investors who were allegedly defrauded in their purchase of certain notes created by the defendants and sold to plaintiffs through distributors.

Prior to bringing an action in the Southern District of New York, some of the plaintiffs engaged in confidential mediation with the distributors before the Financial Industry Disputes Resolution Centre in Singapore. After defendants requested discovery which the plaintiffs believed required disclosure of confidential mediation documents, the plaintiffs sought a protective order to block disclosure of such documents and to prevent the defendants from asking any questions at depositions regarding the mediation.[16]

Magistrate Judge Gabriel Gorenstein granted the protective order but exempted from that order certain categories of information, including plaintiffs' own statements about their basis for investing in the notes and the materials on which they relied, which he ordered be produced to defendants.[17] In directing disclosure of some mediation-related documents, Gorenstein accepted the defendants' argument that they needed those statements for impeachment purposes. He recognized that discovery of impeachment material ordinarily does not qualify as a special need, but drew a distinction between "extrinsic" and "intrinsic" impeachment material, finding that need for the latter was qualified as "special" for purposes of the *In re Teligent* test.

He reasoned that, in contrast to "extrinsic" information not related to the underlying dispute that would tend to discredit a witness, the statements regarding the plaintiffs' basis for investing and reliance sought here were "intrinsic" because they related directly to the "very issue" of the case. Gorenstein concluded that such information gave rise to a "special need" for disclosure under the first prong of the *In re Teligent* test.[18]

On appeal challenging that aspect of Gorenstein's order, Judge Leonard Sand first considered whether the *In re Teligent* test should have even been applied in light of the fact that *In re Teligent* concerned modification of confidentiality provisions contained in a court order, whereas the mediation in *Dandong* was purely private. He concluded, as had Gorenstein below, that *In re Teligent* governed, explaining that "[t]he Second Circuit's policy basis for the test applies with as much force to private mediations as it does to court-sponsored mediations."[19] Sand further noted the Second Circuit had relied upon authority relating to both public and private mediations in formulating its test for permitting disclosure of confidential mediation materials.

Turning to application of the *In re Teligent* test, Sand agreed with the plaintiffs that the "need" for impeachment was not sufficiently strong to pass *In re Teligent's* "special need" test. Sand recognized that the Second Circuit derived the test for disclosure of confidential mediation materials to a third party from the test for modifying a protective order. To obtain modification of a protective order, the movant must show "improvidence in the grant of the order or some extraordinary circumstance or compelling need."[20] Sand reasoned that, like the "compelling need" in that context, a "special need" in the context of lifting confidentiality protections for mediation materials must be "a high threshold to overturn a presumption of confidentiality."[21]

On the question of whether the need for impeachment evidence constitutes a special need, Sand found that although the need for impeachment evidence qualified as a "particularized need" it did not rise to the level of the "very high bar" of a "special need." After citing cases permitting the use of grand jury testimony, settlement, or arbitration materials based on particularized need, Sand accepted that the defendants had stated a particularized or specific need for impeachment evidence, but held that such a need was not special or compelling. He found that the circumstances presented here were not extraordinary, noting that when some but not all parties to a dispute enter mediation, the non-mediating parties predictably may want access to the mediation materials for impeachment purposes. He concluded that permitting disclosure of mediation materials in those circumstances would "discourage plaintiffs from entering into mediation with any defendants."[22] Finding no "special need" under *In re Teligent*, Judge Sand held that denial of the protective order with respect to plaintiffs' statements in the mediation was erroneous.

Although Sand was clear that use of mediation materials for impeachment does not rise to the level of a special or compelling need, he did not provide examples of circumstances that might rise to that level. The Administrative Dispute Resolution Act of 1996, relied upon by *In re Teligent* as one source in support of its three-part test, sheds some light on what courts might find sufficiently powerful to qualify as a "special need." That law, governing federal administrative agency alternative dispute resolution, prohibits disclosure of mediation communications absent a showing of exceptional circumstances, such as when non-disclosure would result in manifest injustice, help establish a violation of law, or prevent harm to the public health or safety.[23]

Conclusion

Recognizing the important role mediation plays in resolving litigation at all levels of complexity, courts within the Second Circuit have long fostered policies of encouraging—sometimes requiring—mediation and protecting its confidentiality. *Dandong* illustrates that the *In re Teligent* test puts teeth in that policy by imposing a heavy burden on those seeking discovery of mediation communications. But that burden, while heavy, is not insurmountable and because it turns on the circumstances and arguments of the non-party to the mediation, rather than on the terms of the confidentiality agreement or order governing the mediation, there is little parties to a mediation can do to guard against later disclosure should a non-participant manage to show compelling need. Lawyers preparing for mediation should thus be alert to the risk that a third party may seek access to their mediation materials and proceed with appropriate caution depending on the degree of that risk.

1. S.D.N.Y. Local R. 83.9(l).
2. 640 F.3d 53, 58 (2d Cir. 2011) (Pooler, J.).
3. 2012 WL 4793870 (S.D.N.Y. Oct. 9, 2012) (Sand, J.).
4. *In re Teligent*, 640 F.3d at 56.
5. *In re Teligent*, 417 B.R. 197 (Bankr. S.D.N.Y. 2009) (Bernstein, Bankr. C.J.).
6. *In re Teligent Servs.*, 2010 WL 2034509 (S.D.N.Y. May 13, 2010) (Castel, J.)
7. *In re Teligent*, 640 F.3d at 57.
8. Id. at 58.
9. Id. (internal citations omitted).
10. *FDIC v. Ernst & Ernst*, 677 F.2d 230, 232 (2d Cir. 1982) (per curiam) (quoting *Martindell v. Int'l Tel. & Tel.*, 594 F.2d 291, 296 (2d Cir. 1979)); see also *SEC v. TheStreet.com*, 273 F.3d 222, 229 (2d Cir. 2001).
11. 5 U.S.C. §§571 et seq.
12. 28 U.S.C. §§651 et seq.
13. *In re Teligent*, 640 F.3d at 59.
14. Id. at 59–60.
15. The rule had been applied once before. See *Avocent Redmond v. Raritan Am.,* 2011 WL 4790545 (S.D.N.Y. Sept. 26, 2011) (Castel, J.)
16. *Dandong*, 2012 WL 4793870, at *1.
17. Id. at *2 (internal citations omitted). The other unprotected categories to which the plaintiffs did not object were (1) settlement amounts and the release language in the final settlement agreements, and (2) any documents submitted to mediation that existed independent of the mediation. Id.
18. Id.
19. Id. at *4.
20. *In re Teligent*, 640 F.3d at 59 (quoting *TheStreet.com*, 273 F.3d at 229).
21. *Dandong*, 2012 WL 4793870, at *5.
22. Id. at *6.
23. 5 U.S.C. §574(b)(5).