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State of Franklin v. Butler

February 2006

FRANKLIN UNIFORM MEDIATION ACT

SECTION 2. DEFINITIONS. In this Act:

(a) "Mediation" means a process in which a mediator facilitates communication and negotiation between parties to assist them in reaching a voluntary agreement regarding their dispute.

(b) "Mediation communication" means a statement, whether oral or in a record, or verbal or nonverbal, that occurs during a mediation or is made for purposes of considering, conducting, participating in, initiating, continuing, or reconvening a mediation or retaining a mediator.

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(g) "Proceeding" means:

(1) a judicial, administrative, arbitral, or other adjudicative process, including related pre-hearing and post-hearing motions, conferences, and discovery; or

(2) a legislative hearing or similar process.

(h) "Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

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SECTION 3. SCOPE. This Act applies to a mediation in which:

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(b) the mediation parties and the mediator agree to mediate in a record that demonstrates an expectation that mediation communications will be privileged against disclosure; or

(c) the mediation parties use as a mediator an individual who holds himself or herself out as a mediator.

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SECTION 4. PRIVILEGE AGAINST DISCLOSURE; ADMISSIBILITY; DISCOVERY.

(a) Except as otherwise provided in Section 6, a mediation communication is privileged as provided in subsection (b) and is not subject to discovery or admissible in evidence in a proceeding unless waived. . . .

(b) In a proceeding, the following privileges apply:

(1) A mediation party may refuse to disclose, and may prevent any other person from disclosing, a mediation communication.

(2) A mediator may refuse to disclose a mediation communication, and may prevent any other person from disclosing a mediation communication of the mediator.

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SECTION 6. EXCEPTIONS TO PRIVILEGE.

(a) There is no privilege under Section 4 for a mediation communication that is:

(1) in an agreement evidenced by a record signed by all parties to the agreement;

(2) available to the public under the Freedom of Information Act or made during a session of a mediation which is open, or is required by law to be open, to the public;

(3) a threat or statement of a plan to inflict bodily injury or commit a crime of violence;

(4) intentionally used to plan a crime, attempt to commit or commit a crime, or to conceal an ongoing crime or ongoing criminal activity;

(5) sought or offered to prove or disprove a claim or complaint of professional misconduct or malpractice filed against a mediator;

(6) sought or offered to prove or disprove a claim or complaint of professional misconduct or malpractice filed against a mediation party, nonparty participant, or representative of a party based on conduct occurring during a mediation; or,

(7) sought or offered to prove or disprove abuse, neglect, abandonment, or exploitation in a proceeding in which a child or adult protective services agency is a party, unless the case is referred by a court to mediation and a public agency participates.

(b) There is no privilege under Section 4 if a court, administrative agency, or arbitrator finds, after a hearing *in camera,* that the party seeking discovery or the proponent of the evidence has shown that the evidence is not otherwise available, that there is a need for the evidence that substantially outweighs the interest in protecting confidentiality, and that the mediation communication is sought or offered in:

(1) a court proceeding involving a felony or misdemeanor; . . . .

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(d) If a mediation communication is not privileged under subsection (a) or (b), only the portion of the communication necessary for the application of the exception from nondisclosure may be admitted. Admission of evidence under subsection (a) or (b) does not render the evidence, or any other mediation communication, discoverable or admissible for any other purpose.

Rinaker v. Superior Court of San Joaquin County
Columbia Court of Appeal (2004)

This case arises from a criminal proceeding in which Chris Goodman was charged by the State of Columbia with committing vandalism, a misdemeanor, for allegedly throwing rocks at Art Torres's car. Under a pilot mediation program, the court and the prosecutor referred Goodman and Torres to mediation conducted by petitioner Kristen Rinaker, a volunteer mediator affiliated with the Mediation Center of San Joaquin County. When mediation proved unsuccessful, the case was set for trial.

Goodman claimed that, during the mediation, Torres admitted that he did not actually see who threw the rocks at his car. Goodman and the mediator were present when Torres made the statement. If Torres should testify otherwise on direct examination, Goodman seeks to call Rinaker, the mediator, to testify that Torres made the statement that he did not see who threw the rocks. Goodman argues that his right to due process of law and a fair trial would be compromised if Rinaker were not compelled to testify.

Upon receipt of a subpoena from Goodman's attorney, Rinaker moved to quash, arguing that statements made during the mediation were privileged under the Columbia Uniform Mediation Act (CUMA). Without a hearing, the trial court rejected Rinaker's motion, ordering her to testify. Instead of testifying, she filed this emergency review petition as permitted under Columbia law.

CUMA creates a privilege for mediators but the privilege is not absolute. For example, there are exceptions to the privilege for threats to inflict bodily injury or to plan a crime. CUMA § 6(a)(3), (a)(4). These exceptions prevent parties from misusing the confidentiality protection of mediation to plan harm or a criminal act. However, neither of these exceptions relates to *past* activities.

CUMA § 6(b) addresses another exception to the privilege. Where the proponent of the evidence alleges that the mediator's testimony is relevant in a criminal matter, § 6(b) provides that the court is to hold an *in camera* hearing (a hearing in the judge's chambers, closed to the public and the parties) where the court determines, among other things, whether the evidence is not otherwise available and whether the need for the evidence substantially outweighs the interest in protecting mediation confidentiality.[1]

1 Since CUMA's adoption in 2003, the Columbia Supreme Court has yet to determine precisely what showing must be made by the proponent of the evidence to establish that a statement falls within one of the § 6(a) exceptions to the mediation privilege. Generally, however, once a proponent alleges that the evidence is relevant, the content of the communication at issue (e.g., the party has threatened the other party) will suffice to place it within, or exclude it from, one of the § 6(a) exceptions. It is only when a proponent argues that the mediation privilege is overcome pursuant to § 6(b) that a court must hold the *in camera* hearing and balance the competing interests of mediation confidentiality against the need for the evidence in a criminal proceeding.

Here, we are persuaded that the trial court erred in failing to hold an *in camera* hearing to weigh the constitutionally based claim of need against the statutory privilege and determine whether Goodman can establish that Rinaker's testimony is necessary to vindicate his constitutional rights. An *in camera* hearing maintains mediation confidentiality while the court considers factors bearing upon the constitutional rights implicated.

Therefore, in response to Rinaker's assertion of the mediaton privilege, the trial court should have held an *in camera* hearing under § 6(b) of CUMA, first determining whether Rinaker was in fact competent to testify regarding the statement. If she denies that Torres made the inconsistent statement, or does not recall whether he made such a statement and the court finds her credible, that would eliminate the need for Rinaker to testify in open court.

Second, assuming that during the *in camera* hearing Rinaker acknowledges that she heard Torres make the inconsistent statement, the court can assess the statement's probative value, that is, whether the statement has a tendency to make the consequential fact or proposition (here, that Torres did not see who threw the rocks) more probable or less probable than it would be without the evidence. Mediation proceedings are not conducted under oath, do not follow traditional rules of evidence and are not limited to developing the facts. Parties are often encouraged to offer their subjective perceptions of events or to respond to hypothetical situations. Statements may be hyperbole instead of credible, specific assertions of fact. Even if the content of a mediation could be reconstructed with perfect accuracy, its relationship to truth would be uncertain. Thus, the court should determine how well the mediator recalls the discussions and how probative is the mediator's recollection.

Third, during the *in camera* hearing, the court may be able to determine whether the evidence sought by Goodman can be introduced without breaching the confidentiality of mediation. If, for example, the court concluded that Rinaker's testimony would be cumulative to other evidence reasonably available to Goodman (through other witnesses), her testimony would be unnecessary.

Finally, assuming that in the *in camera* hearing the court finds that the mediator's evidence is competent, probative, and not otherwise available, the court must then balance several competing policies to determine which will prevail. Confidentiality is critical to mediation. Without confidentiality, mediations would be subject to all kinds of manipulation and abuse. Parties do not testify under oath in mediation. They may exaggerate, use angry words, or suggest impossible options to share their point of view. They would be shocked to learn that, having been encouraged to be honest, their statements made in mediation could be used against them in a court of law. The very atmosphere that serves to promote resolution in mediation would become a trap for the unwary if the confidentiality of mediation communications were easily cast aside whenever a mediator is subpoenaed. Warnings

would need to be given; protections would need to be devised. Parties would need the advice of counsel to participate in mediations. The costs and complexity of the mediation process might soon rival those of litigation, nullifying one of the major advantages of mediation.

On the other hand, there are the competing goals of protecting the constitutional rights of criminal defendants, preventing perjury, and preserving the integrity of the truth-seeking process of trial. Where a defendant's constitutional right to a fair trial is implicated, it is essential that the defendant be permitted to present exculpatory evidence to the court. In such cases, the interest in promoting settlements must yield to the interest in protecting the constitutional rights of criminal defendants.

In conclusion, the decision of the trial court is reversed and the matter is remanded with instructions to the trial court to conduct an *in camera* hearing as provided by CUMA and as consistent with this opinion**.**

Retail Store Employees Union Local 79 v. National Labor Relations Board
United States Court of Appeals (15th Cir. 2004)

The single issue on appeal is whether an agency erred by refusing to subpoena a mediator to testify concerning what was said during mediation sessions at which she was present.

Marie Daly, an experienced labor mediator, mediated a dispute between the Retail Store Employees Union Local 79 (Union) and Discount Stores of America, Inc. (Company). Both parties agree that at the end of the final session, two of four issues were resolved. The Union claims that the remaining two issues were also resolved, while the Company maintains that the Union agreed to leave these two issues unresolved. The Union has petitioned the National Labor Relations Board (NLRB) to enforce a settlement that includes all four issues.

In an effort to support its version of the facts, the Company requested that the NLRB obtain the testimony of Mediator Daly concerning the last bargaining session, but the NLRB refused to subpoena Daly.

On the one hand, we are faced with the NLRB's longstanding policy of refusing to call mediators to testify. Its policy assumes that mediators, if they are to maintain the appearance of neutrality essential to successful performance of their task, must not testify about the bargaining sessions they mediate.

On the other hand, this case presents a classic illustration of the fundamental principle of American law that the trier of fact is entitled to every person's evidence. Here, the trier of fact is faced with directly conflicting testimony from two adverse sources, and a third objective source is capable of presenting evidence that would, in all probability, resolve the dispute by revealing the truth. Under such circumstances, the NLRB can refuse to subpoena Daly to testify only if the policy underlying exclusion of her testimony transcends the need to place all relevant evidence before the trier of fact. Thus, we are required to balance two important, but competing, interests.

We conclude that the public interest in maintaining the perceived and actual impartiality of mediators does outweigh the benefits derivable from Daly's testimony. The success of mediation requires that mediators maintain a reputation for impartiality and integrity. Labor and management or other interested parties participating in mediation must be assured that information disclosed to mediators will not subsequently be divulged, either voluntarily or because of compulsion. Parties to mediation conferences must feel free to talk without any fear that the mediator may subsequently make disclosures as a witness in some other proceeding.

If mediators were permitted or required to testify about their activities, or if the production of notes or reports of their activities could be required, not even the strictest adherence to purely factual matters would prevent the evidence from favoring or seeming to favor one side or the other. The inevitable result would be that the usefulness of the mediation process in settling future disputes would be seriously impaired, if not destroyed.

Second, neither party would speak candidly at mediation sessions, knowing that the mediator might be called to testify. Without that assurance of candor, the mediator would be unable to meaningfully explore the issues and available means of resolution with the parties. The parties would speak in guarded language, unwilling to reveal their true interests and options. The result would be that matters that should be privately resolved through mediation will not be. The public would suffer because of the time and costs involved in litigating disputes that should have been resolved.

Our holding today is limited to the facts before us and is based on the long history of mediation in the labor union context, the sophistication of the parties, the subject matter of this litigation, and the absence of any compelling public health or safety issues. We could envision a situation where public policy would lead us to a contrary result, but this is not such a case.

The decision of the NLRB refusing to subpoena Daly to testify is affirmed.