DOI: https://www.doi.org/10.36719/2663-4619/65/420-422

Nijat Marif Jafarov
Baku State University
master
nijat.jafarov@yahoo.com

THE PRINCIPLE OF CONFIDENTIALITY IN MEDIATION AND "RIGHT TO PRIVACY"

Summary

Confidentiality is an innate principle of mediation, by which it is understood that all information generated during the process is protected and its disclosure cannot cause negative or damaging effects on the parties. This principle is present in mediation mainly to give security to the parties, who, knowing that what is dealt with in the process is protected by confidentiality, approach an arrangement with greater freedom and security that everything that is discussed.

Although mediation is advertised as protecting the privacy of the parties, the exploration of the underpinnings of confidentiality in the right to privacy is sorely neglected. If most parties prefer keeping everything said in mediation private, then mediation offers a rare opportunity to exercise the right to privacy. Parties may assert their right to privacy in mediation in relation to both the government, and, within limits, other citizens. This article will discuss the confidentiality principle of mediation as an application of the right to privacy.

Key words: *alternative dispute resolution, mediation, confidentiality, right to privacy*

Introduction

In order to establish confidentiality in mediation as an application [15; p. 234] of the right to privacy, [1; p. 464] we must revisit the battle to define and protect some areas of life as private. In western world, Justice Marshall's frequently cited opinion that there exists "a sphere of private autonomy which government is bound to respect," [8] refers to a long struggle in England and other parts of Europe to establish rights that a monarch or state could not deny or destroy. The quintessential statement of American democracy, the Declaration of Independence, declares that: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness."

The European colonists may have embraced ideas considered revolutionary in 1776, but they did not invent them. They were referencing hundreds of years of European class antagonism codified in the Magna Carta and Charta de Foresta. English history is rife with uprisings in protest against the monarchy's attempts to return to its pre-Magna Carta and Charter of The Forest powers. Those truths that were self-evident to the early colonists-then applicable only to white male property owners- are today often seen as dispensable for the sake of security and safety, luxuries we think we can no longer afford. It is a significant occasion indeed, when we are offered the opportunity to exercise such precious rights in mediation.

The existence of privacy rights in ADR processes, both in relation to the state and in relation to other parties (even members of a family), is the basis for "offering confidentiality" in mediation. Protection of a "sphere of private autonomy" is extolled as a reason to engage in mediation. Privacy is in place when agreeing to mediate. Various aspects of the right to privacy are present in mediation as they are in court, such as: protection from invasion by the government through search and seizure, the right not to incriminate oneself, the right to be free of invasion into one's personal affairs by other citizens, and the freedom to make decisions about intimate relationships, about children, and/or about our bodies. The rights of privacy that would be in place in a court room also apply in mediation and should receive the same protection. Unlike a courtroom, however, if mediators probe for information that goes beyond the bounds of relevancy, [4; p. 723] the parties themselves must determine what to disclose [4; p. 722]. How can parties in mediation determine what is and is not relevant? What is required to be disclosed by the parties prior to and during mediation? What may parties discuss outside the mediation? [11] These questions are confronted in mediation every day by separating couples, corporations and consumers, employers and employees, landlords and tenants, etc., often without benefit of legal counsel or an understanding of the legal parameters of the mediation process.

Having a right to privacy in mediation does not mean that maintaining confidentiality is always in the best interests of all the parties, or of society in general [14; p. 2221]. While corporations, in the hopes of

preventing public disclosure of damaging information, have a long history of preferring private negotiation to the public arena of the court, it does not necessarily follow that consumers or employees benefit from pre-dispute clauses that preempt their access to the courts [7; p. 600]. Alternative Dispute Resolution (ADR) processes that claim to provide court reform by "informalizing" justice [10; p. 6] blur the distinctions between what is public and what is private [9; p. 579-580]. Information that the public is entitled to know [1; p. 429] is exchanged behind closed doors. In such informal processes, parties are left to decide what is private and what must be disclosed, often without benefit of legal counsel.

Despite agreement that there are areas into which government may not tread, vast differences exist among scholars in defining which areas are public and which are private. Liberals subscribe to the view that sexuality, marriage, and family, are private while conservatives see the economy as private. In mediation, determining what is public and what is private references both the constitutional protections of privacy from government intrusion and the tort protection from intrusion by other people. Parties in some states have the option to decide whether to maintain or waive confidentiality in relation to the court. A signed agreement to mediate is used by most mediators, prior to mediation, to spell out the responsibilities and requirements of parties and mediators. These agreements are contracts which purpose it is to address the intention of all parties to negotiate in good faith, and to clarify confidentiality in relation to the court and other people. While the right to consult an attorney is generally assumed or specifically mentioned in agreements to mediate, parties can also stipulate other advisors with whom they may discuss what occurs during the mediation. Parties should be free to seek advice and counsel, not only from attorneys, but also from financial advisors, counselors, or members of their support network, whose guidance would help them gain necessary information and perspective to make better decisions. The tort aspect of privacy requires that parties name those from whom they wish to seek information, advice, and support. Once the parties have named their consultants in the agreement to mediate, discussing the mediation with anyone else becomes a breach of contract.

During divorce mediation, couples are attempting to reestablish separate lives as individuals. What is private and what is public (what is "public" becomes what must be shared with the other partner) particularly in joint custody arrangements, becomes a constitutional tightrope. Parents have a right to know where their child is and with whom, to know the child's health and safety are maintained. At the same time, separating couples again become individual entities with equal rights, including the right to keep personal information private. While the couple relationship ends upon divorce (or separation in unmarried couples), the parenting relationship usually continues. Children walk a constitutional tightrope as they shuttle between two environments ("homes"), attempting to figure out what they can and can not say to each parent, potentially withholding more and more information if the level of conflict between the parents remains high. The state also has a prominent role in divorce and custody issues under the doctrine of parens patriae. While some may think of the family as a sphere of private life and decision making, the state has long maintained its right to regulate behavior of family members and to override parents' decisions through social welfare agencies and the courts. Use of standards that cannot be quantified, such as the best interests of the child, give government agencies enormous power over families.

Defining Privacy. Western legal systems have wrestled with the right to privacy for over one hundred years. In 1890 the Harvard Law Review published The Right to Privacy [12] by Samuel D. Warren and Louis D. Brandeis, a milestone in the development of privacy law. Warren and Brandeis felt compelled to write their article in the context of enormous technological changes in photography and printing [6]. The article addressed the tort concept of privacy: what protections do we have from invasion into our private sphere by others? They asserted that the law had evolved from recognizing "corporeal property" to "incorporeal rights" from which "there opened the wide realm of intangible property, in the products and processes of the mind, as works of literature and art, goodwill, trade secrets, and trademarks." The authors cited Judge Cooley's phrase, "the right 'to be let alone'" as the basis for their argument. Warren and Brandeis saw the existing law of defamation as inadequate, as it pertained only to material injuries. Their claim was that the "individual is entitled to decide whether that which is his shall be given to the public." Ultimately, they went beyond the analogy to property, naming a principle of "inviolate personality." Warren and Brandeis' 1890 article continues to be a reference point for case law, legislation, and legal scholarship in attempting to define and clarify the nature of tort privacy [2; p. 962].

In the early twentieth century, Roscoe Pound took an approach similar to the Europeans: a breach of privacy was an insult to one's honor, a principle going back to Greek and Roman law. In Europe the principle applied only to persons of elevated status; the middle and working classes were not considered to have any honor to defend [5; p. 1165-66]. European privacy law has evolved to grant all persons the respect and

dignity that were once held only by the wealthy and well-born. Although in the U.S. the definition of privacy as "inviolate personality" adopted by Warren and Brandeis overshadowed the European definition of insult, Pound's perspective is entirely applicable to mediation. Many participants come into mediation because they feel their honor has been impugned. Mediation can offer an opportunity for parties to express recognition of a wrong committed and to make amends. Most mediators have witnessed the power of apology in resolving disputes.

American privacy law has gone in two directions, one dealing with protection from invasion by the state, [3] the other from invasion by other people. [13] Some scholars maintain that without the protection of privacy, all human relationships are vulnerable, arguing that protection from unwanted intrusion by others is "the very essence of freedom and dignity." [2; p. 974] Each of us has the right to choose our confidants and closest allies. We depend upon the character and promise of those people in whom we confide, to hold what we have said in confidence. Without such safeguards, we might be loath to share ourselves with anyone. Thus, a most basic human right is to be found in controlling information about ourselves, to decide with whom we share personal information. These principles are in many ways discordant with the confidentiality agreements parties are required to make in mediation, not with trusted confidants, but with their adversaries.

Conclusion

To conclude we have to note that the autonomy to make decisions about what information we share and with whom, is a critical element of self-determination in mediation. Thus, the right to privacy in mediation is exercised by parties if they understand the consequences of their choices and can weigh the risks [16] against the benefits of sharing information, as they endeavor to make informed decisions.

References

1. Arthur R. Miller, Confidentiality, Protective Orders, and Public Access in the Courts, 105 HARv. L. REv. 428, (1991)
2. Edward J. Bloustein, Privacy As An Aspect of Human Dignity: An Answer To Dean Prosser, 39 N.Y.U. L. REv. 962, 973 (1964)
3. Ellen Alderman & Caroline Kennedy, The Right To Privacy, XV-Xvi (1995)
4. George Pavlich, The Power of Community Mediation: Government and Formation of Self-Identity, 30 LAw & Soc'Y REV. 707, 711 (1996)
5. James Q. Whitman, The Two Western Cultures of Privacy: Dignity Versus Liberty, 113 YALE L.J. 1151, 1183 (2004)
6. Ken Gormley, One Hundred Years of Privacy, 1992 Wis. L. REv. 1335, 1419 (1992)
7. Maureen A. Weston, Confidentiality's Constitutionality: The Incursion on Judicial Powers to Regulate Party Conduct in Court-Connected Mediation, 8 HARV. NEGOT. L. REv. 29, 33 (2003)
8. Pruneyard Shopping Center v. Robins, 447 U.S. 74, 93 (1980) (Marshall, J., concurring)
9. Richard C. Reuben, Public Justice: Toward A State Action Theory of Alternative Dispute Resolution, 85 CAL. L. REV. 577, 580 (1997)
10. Richard L. Abel, Introduction to THE POLITICS OF INFORMAL JUSTICE, VOLUME 1: THE AMERICAN EXPERIENCE (Richard L. Abel. Ed., 1982)
11. Sam Jackson, What Is Confidential In Virginia Now?", Virginia Mediation Network Conference Packet 13 (October, 2002)
12. Samuel D. Warren & Louis D. Brandeis, The Right To Privacy, 4 HARv. L. REV. 193, 193 (1890).
13. Stanley J. Benn, Privacy, Freedom and Respect for Persons, in PRIVACY, 24 (J. Roland Pennock & John W. Chapman, eds.) (1971)
14. Thomas S. Leatherbury & Mark A. Cover, Keeping Public Mediation Public: Exploring the Conflict Between Confidential Mediation and Open Government, 46 SMU L. REv. (1993)
15. Tom Gerety, Redefining Privacy, 12 HARV. C.R.-C.L. L. REv. 233 n.3 (1977)
16. W. A. Parent, Privacy, Morality and the Law, 12 PHIL. & PUB. AFF. 269, 276 (1983)

Rəyçi: h.ü.f.d. R. Mirzəyev

Göndərilib: 18.04.2021 Qəbul edilib: 21.04.2021