COMMENTARY

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Michigan Supreme Court enforces mediation confidentiality

BY LEE HORNBERGER

Tyler v Findling is an important 2021 Michigan Supreme Court decision enforcing mediation confidentiality.

Mediation is an effective tool for resolving disputes. Confidentiality is an important principle of mediation. Mediation can provide a confidential and informal process that serves the parties' interests. All involved with the mediation process, including the advocates, the parties, and other participants should understand the importance of confidentiality. "In a confidential setting, the parties and their lawyers will convey to the mediator much of what they believe is important about the case." J. Anderson Little, "Making Money Talk: How to Mediate Insured Claims and Other Monetary Disputes" (ABA 2007), p. 20. "Maintaining confidentiality is critical to the integrity of the mediation process. Confidentiality encourages candor, allows a full exploration of the issues, and increases the likelihood of settlement. It also minimizes the inappropriate use of mediation as a discovery technique." Douglas E. Noll, "Peacemaking: Practicing at the Intersection of Law and Human Conflict" (Cascadia Publishing House 2003).

There are several sources which impact upon and inform us concerning mediation confidentiality in Michigan. These sources include the State Court Administrative Office (SCAO) Mediator Standards of Conduct (February 1, 2013), the Michigan Court Rules, the parties' contractual agreement to mediate document, the rules of the host forum, and case law.

This article will explore Michigan case law concerning mediation confidentiality.

Findling protects mediation confidentiality

Findling was a defamation case arising from statements made by Attorney Findling, serving as a receiver, to another attorney (Attorney W) before meeting with the mediator to start a court-ordered mediation. Attorney W secretly recorded the statements of Attorney Findling. Attorney Findling made allegedly defamatory statements concerning plaintiff Tyler. This resulted in Tyler bringing a defamation complaint against Findling based upon Findling's statements made at the mediation venue.

Circuit Court Rulings

Asserting mediation confidentiality, the defendant filed motions in limine and motions to strike the allegedly defamatory communication. The Circuit Court granted the motions. Defendant subsequently filed a motion for summary disposition. Defendant argued under MCR 2.116(C)(10), that once the Circuit Court struck the audio recordings and related testimony, there was no material question of fact regarding defamation. The Circuit Court agreed with the defendant and dismissed the defamation case. The basis of the Circuit Court's decision was that the statements were made within a confidential and privileged environment under MCR 2.412. Without the statements, the plaintiff could not prove up defamation.

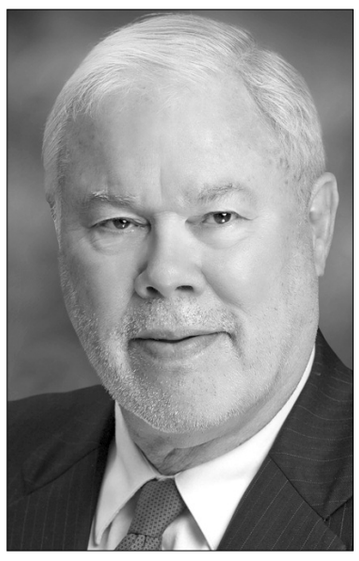
Court of Appeals decision in Tyler v Findling

Tyler appealed the Circuit Court decision dismissing his defamation case to the Court of Appeals. In the Court of Appeals, the plaintiff argued that the Circuit Court was wrong in granting defendant's motion to strike the affidavit concerning the recorded statements and his motion in limine to preclude testimony concerning the statements. The Court of Appeals agreed with the plaintiff and the lower court's decisions on his motions.

According to the Court of Appeals,

1. Findling was a nonparty mediation participant, not a "mediation party,"

2. Findling merely attended the mediation to be informed of the progress of the case,



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3. Findling's statements were made outside the mediation process, and

4. Merely sitting in the room designated for the plaintiff neither made Findling a party plaintiff nor did his presence start the mediation.

Supreme Court decision

The defendant filed an application for leave to appeal to the Supreme Court. The State Bar of Michigan's Alternative Dispute Resolution Section filed an amicus curiae brief in support of defendant's Application for Leave to Appeal. The amicus brief stated, in part, as follows.

"By its terms, the confidentiality protection extends to statements made by all mediation participants … . It is also vitally important to afford confidentiality protections to communications made throughout the mediation process, whether by mediation parties or other participants. … The Court of Appeals' insistence that Findling's statements were not protected from disclosure sets a dangerous precedent because it introduces uncertainty into when mediation participants' statements will be kept confidential as MCR 2.412(C) intends."

The Supreme Court, in an unanimous per curiam opinion, in lieu of granting leave to appeal and without hearing oral argument, held that the Court of Appeals erred when it held that a cause of action for defamation existed based on these communications. The Supreme Court held that these statements were MCR 2.412(B)(2) "mediation communications" and therefore confidential under MCR 2.412(C). According to the Supreme Court, the phrase "mediation communications" is defined broadly to include statements that "occur during the mediation process" and statements that "are made for purposes of … preparing for … a mediation." MCR 2.412(B)(2).

The conversation between Findling and Wright took place in the mediator's designated "plaintiff's room" while parties to the mediation were waiting for the mediation session to start. This conversation was part of the "mediation process." Findling's statements to Wright were made while "preparing for" the mediation session and were within the definition of "mediation communications." The conversation between Findling and Wright concerned the credibility of a witness, which could have affected the decision to settle the case being mediated or go to trial.

The Supreme Court rejected the Court of Appeals' interpretation of the court rule as requiring a mediator to meet with the parties and attorneys before the protections of MCR 2.412(C) become effective.

MCR 2.412(C) generally provides that mediation communications are.

1. confidential,

2. neither discoverable nor admissible in a proceeding, and

3. not to be disclosed to anyone but the "mediation participants."

The confidentiality protections cover "[m]ediation communications." MCR 2.412(C). These communications are not limited to communications made by a "mediation party." The communications extend to, among other things, any statement "made for purposes of … participating in … a mediation." MCR 2.412(B)(2). This includes statements made by a "mediation participant." MCR 2.412 does not require that a "mediation communication" be made by any particular party or participant. All mediation communications made by participants have confidentiality protections. The only exceptions to the confidentiality provision are listed in MCR 2.412(D). None of those exceptions were applicable in the *Tyler* case.

The Supreme Court found that because Findling was acting as a court-appointed receiver with settlement authority with regard to the subject of the mediation, he was a "mediation participant" within the definition found in MCR 2.412(B)(4). The Court of Appeals erred by vacating the Circuit Court's grant of defendants' motion to strike and reversing and remanding the Circuit Court's grant of defendants' motion for summary disposition under MCR 2.116(C)(10). On that basis, the Supreme Court reversed and remanded the case to the trial court, reinstating its dismissal with prejudice.

Findling is applicable to domestic relations mediation because MCR 3.216(H)(9) provides that confidentiality in domestic relations mediation is governed by MCR 2.412.

What if *Tyler v Findling* had been an out-of-court pre-suit mediation and MCR 2.412 did not apply? In such a situation, "The mediator should include a statement concerning the obligations of confidentiality in a written agreement to mediate." Standard V(A)(2), SCAO, Michigan Standards of Conduct for Mediators (effective February 1, 2013).

The SCAO Mediator Standards of Conduct are serious guidelines for those who are conducting mediations under the Michigan Court Rules. These Standards provide concerning confidentiality that, consistent with MCR 2.412, a mediator shall maintain the confidentiality of information acquired by the mediator in the mediation process.

Standard V concerns confidentiality. Standard V provides that the mediator "should"

1. inform the participants of the mediator's obligations regarding confidentiality;

2. discuss with the parties their expectations of confidentiality;

3. discuss confidentiality of private sessions with the parties or the participants prior to those sessions occurring; and

4. include a statement concerning the obligations of confidentiality in a written agreement to mediate.

MCL 691.1557 provides an additional layer of confidentiality for mediations conducted at any of Michigan's Community Dispute Resolution Centers. It provides in relevant part:

"… communications relating to the subject matter of the dispute made during the dispute resolution process by a party, mediator, or other person are confidential and not subject to disclosure in a judicial or administrative proceeding … ."

Prior Michigan appellate decisions concerning mediation confidentiality

Prior to Findling, Michigan appellate courts issued several decisions concerning mediation confidentiality. Those decisions are discussed below.

Detroit Free Press Inc v Detroit, 480 Mich 1079; 744 NW2d 667 (2008), upheld disclosure of a deposition transcript disclosed in mediation where such disclosure was not specifically objected to.

Kitchen v Kitchen, 231 Mich App 15; 585 NW2d 47 (1998), attaching an opponent's mediation summary to a motion for sanctions was improper under confidentiality rule, resulting in motion for summary disposition being stricken.

In *Hanley v Seymour,* unpublished per curiam opinion of the Court of Appeals, issued October 26, 2017 (Docket No. 334400), disclosure of financial information obtained after mediation by a non-party was not a violation of MCR 2.412(C) confidentiality of mediation communications.

The contractual agreement to mediate

In addition to and separately from the Michigan court rules, the parties can put confidentiality language into their Agreement to Mediate. The SCAO Mediator Standards recommends this be done. The confidentiality language in such an Agreement to Mediate might indicate as follows.

2. Confidential Nature of Mediation Proceedings. In order to encourage communications designed to facilitate settlement of disputed claims, the parties agree that all proceedings in connection with this mediation shall be subject to MCR 2.412. This rule provides that anything said or any statement made in the course of the mediation, or any documents prepared for or introduced in the course of the mediation may not be used in any other proceeding, including trial. However, evidence that is otherwise admissible or discoverable shall not be rendered inadmissible or not discoverable as a result of its disclosure or use during the mediation. Evidence that the parties have entered into a written settlement agreement during the course of the mediation may be disclosed and is admissible to the extent necessary to enforce the agreement.

3. Exclusion of Mediator Testimony and Limitation of Liability. The Mediator shall not be subpoenaed or otherwise compelled to testify in any proceeding relating to the subject matter of the mediation and shall not be required to provide a declaration or finding as to any fact or issue relating to the mediation proceedings or the dispute which is the subject of said mediation proceedings. The Mediator and any documents and information in the Mediator's possession will not be subpoenaed in any proceeding and all parties will oppose any effort to have the Mediator or documents subpoenaed. Any party to this Agreement who violates this clause will pay the Mediator's legal fees in opposing such efforts to compel the Mediator's testimony or disclosures of confidential information.

Conclusion

Tyler v Findling is an important decision. *Findling* means that mediation confidentiality is alive and well in Michigan. There is robust protection of statements made by those involved with the mediation endeavor and documents submitted within the mediation process.

Lee Hornberger is an arbitrator and mediator in Traverse City, Michigan. He is a former chair of the Alternative Dispute Resolution Section of the State Bar of Michigan, Editor Emeritus of The Michigan Dispute Resolution Journal, former member of the State Bar's Representative Assembly, former President of the Grand Traverse-Leelanau-Antrim Bar Association, and former Chair of the Traverse City Human Rights Commission. He is a member of the Professional Resolution Experts of Michigan (PREMi), an invitation-only group of Michigan's top mediators, and a Diplomate Member of The National Academy of Distinguished Neutrals. He is a Fellow of the American Bar Foundation. He has received the George Bashara Award from the State Bar's ADR Section in recognition of exemplary service. He has received Hero of ADR Awards from the ADR Section. He is included in The Best Lawyers of America 2018 and 2019 for arbitration, and 2020 to 2022 for arbitration and mediation. He is on the 2016 to 2021 Michigan Super Lawyers lists for alternative dispute resolution. He earned his B.A. and J.D. from the University of Michigan and his LL.M. in Labor Law from Wayne State University.

MY TURN

BY TOM KIRVAN
Legal News

Attack on voting rights threatens our very existence

In 2010 – long before the Russians, Facebook, and American elections seemingly became joined at the hip, Jocelyn Benson published a book titled, "State Secretaries of State: Guardians of the Democratic Process."

It would not become a New York Times best-seller, but the book was hardly written with that goal in mind, according to Benson, who in the fall of 2018 was elected Secretary of State in Michigan, defeating Republican challenger Mary Treder Lang.

The book, which came out two years before Benson was appointed dean of Wayne State University Law School, did serve a higher purpose, illustrating "best practices" from secretaries across the country and how they can work to "advance democracy and election reform." Its scope was given high marks from a range of academics, including Heather Gerken of Yale Law School.

"Benson's book is devoted to the understudied and often underappreciated role that the Secretary of State plays in our election system," Gerken wrote in a review. "Benson had unprecedented access to Secretaries of State across the country, and I can think of no book that canvasses this topic so thoroughly. With its lively and engaging prose, the book is sure to become a seminal work on the subject."

Last spring, just months after the January 6 insurrection at the U.S. Capitol, Benson sounded the alarm bells about an even greater attack, this time directed at limiting voting rights in Michigan – and beyond.

In a joint press conference with a diverse group of state leaders on April 15, Benson declared that dozens of Republican bills introduced in the state Legislature constitute an "anti-democratic, un-American attack" on voting rights.

"Michigan's GOP legislators have joined a national, coordinated, partisan effort based on false information about the 2020 election to attack all citizens' freedom to vote," said Secretary Benson, a graduate of Harvard Law School. "The truth is that the 2020 election was secure, fair, and an accurate reflection of the will of the people, and legislation that seeks to undo the policies that brought about its record-setting turnout and success is anti-American and does harm to every Michigander."

Benson was joined at the press conference by state Rep. Matt Koleszar, the Democratic vice chair of the Michigan House of Representatives Elections and Ethics Committee, and Detroit City Clerk Janice Winfrey. The group banded together as leaders across that nation continued to denounce attempts to restrict voting rights. Nationally, nearly 400 such bills have been introduced in 47 states, according to the Brennan Center for Justice.

Koleszar expressed his concern in frank terms: "Michiganders made their opinion on the expansion of voting rights in the state clear when they overwhelmingly voted in favor of Proposal 3 in 2018. For Michigan Republicans to utilize the disproportionate power they hold due to their gerrymandered districts in an attempt to roll back those rights flies in the face of democracy and our state constitution."

Detroit City Clerk Winfrey, in turn, said: "These bills are an attack on election administrators and our collective democracy. They include countless ill-informed and nefarious measures that will negatively impact our elections and voters. For example, by banning pre-paid return postage on absentee ballot envelopes, the legislation discriminates against low-income citizens and prohibits a practice that I instituted 15 years ago which has continued without issue ever since."

Earlier this month, at an American Bar Association summit on racial equity and social justice issues, the topic of voter suppression efforts drew special attention. Deborah Archer, president of the American Civil Liberties Union, said though voter suppression is "heartbreaking and disgraceful," it also is a "totally predictable" consequence to an "increase in political participation by people of color."

That, in a political nutshell, is at the heart of the most recent campaign to limit access to the ballot box, serving as just one more shameful chapter in a never-ending attempt to subvert the election process.

COMMENTARY PAGE

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