

## Mediation confidentiality; ADR rules review coming

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By Andrea Ciobanu

When the *Horner v. Carter* appellate decision was published, many were astonished at the thought that mediation would not be confidential. To support their position, the Indiana Court of Appeals cited to the Uniform Mediation Act which permits disclosure in certain, limited circumstances. The problem with that cite is that only 11 states have adopted the UMA, and Indiana is not one of them. Furthermore, the UMA has additional procedural safeguards in place in the limited circumstances when statements made during the course of mediation could later be divulged.



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In reaction to that concern, the Alternative Dispute Resolution Section of the Indiana State Bar Association and the Indiana Association of Mediators joined forces and authored a joint amicus brief that requested transfer to clarify this issue. Happily, transfer was granted, and the Indiana Supreme Court has upheld the sanctity of confidentiality in mediations.

In our oral argument, the amici requested that the Indiana Supreme Court issue a clear opinion in which the sanctity of ADR Rule 2.11 is upheld and that there are no exceptions to the confidentiality of mediations as set forth in our current rules. The Indiana Supreme Court questioned the amici during oral argument as to why this was so important when we argued the language was “unnecessary dicta” in our amicus brief. The amici responded that they did not want any confusion with the appellate decision since the opinion contained language that would lend itself to opening the door for piercing the confidentiality of mediations whether it was deemed dicta or not. The amici further requested an opinion containing clear language upholding the confidentiality of mediations so that the appellate language was not adopted in the Indiana Supreme Court’s opinion.

The Indiana Supreme Court did just so. Chief Justice Brent Dickson’s opinion stated, “In *Vernon v. Acton*, we held that the mediation confidentiality provisions of our ADR Rules ‘extend to and include oral settlement agreements undertaken or reached in mediation. Until reduced to writing and signed by the parties, mediation settlement agreements must be considered as compromise settlement negotiations . . .’” 732 N.E. 2d 805, 810 (Ind. 2000). The opinion further stated, “Evidence of conduct or statements made in compromise negotiations or mediation is not admissible except when offered for a purpose other than ‘to prove liability for invalidity of the claim or its amount.’” A.D.R. 2.11 (incorporating Evid. R. 408); see also *Gast v. Hall*, 858 N.E. 2d 154, 161 (Ind. Ct. App. 2006), trans. denied.

The Indiana Supreme Court disagreed with the Court of Appeals that the “husband’s statements made

during the course of mediation could be admitted as extrinsic evidence to aid in the construction of an ambiguous agreement.” The Supreme Court held that “Indiana judicial policy strongly urges the amicable resolution of disputes and thus embraces a robust policy of confidentiality of conduct and statements made during negotiation and mediation.” The Indiana Supreme Court further concluded that the “benefits of compromise settlement agreements outweigh the risks that such policy may on occasion impede access to otherwise admissible evidence on an issue.”

The Indiana Supreme Court reiterated in its opinion that Indiana has not adopted the UMA. They also acknowledged that the two amici organizations have further worked to create a task force to review the rules for Alternative Dispute Resolution (now formally recognized by the court). The Indiana ADR rules have not been thoroughly reviewed for over 20 years. It will be the goal of the task force to review all the Alternative Dispute Resolution Rules, not just ADR 2.11, and determine where any modifications may be necessary.

The ADR Task Force had its first meeting on March 26, 2013. Judge David Avery of Allen Superior Court is chair of the task force. Other voting members include: Amy Applegate of Bloomington, Judge Elaine Brown of the Indiana Court of Appeals, Patrick Brown of Zionsville, Stephen Cohen of Munster, Andrea Ciobanu of Indianapolis, Magistrate Nanette Raduenz of Lake Superior Court 3, Steven Spence of Indianapolis, and Kim Van Valer of Franklin. Additional liaisons include Judge L. Mark Bailey of the Indiana Court of Appeals, Rebecca Billick of Bloomington, Judge Mark Loyd of Johnson Circuit Court, Julia Orzeske of the Indiana Commission for Continuing Legal Education, and Ann Thrasher of Zionsville.

As such, stay tuned for the review of the ADR rules! Also, please feel free to contact any member of the task force if you have any issues that should be considered during this rules review.

Additionally, there will be a roundtable discussion at the Indiana State Bar Association’s Solo and Small Firm Conference June 6-8, 2013, in French Lick, Ind. It will be lead by Pat Brown, immediate past chair of the ISBA ADR Section, and Mark Loyd, chair of the ADR Committee of the Indiana Judicial Conference, and will gather additional insights of potential necessary modifications or other important issues pertaining to our ADR rules. This is truly a group effort and we thank you for your support!•

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