



OADC OUTLOOK

A Publication of the Oklahoma Association of Defense Counsel

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Submissions should be sent to Skoshi Heron
at: Skoshi@GoBaker.com
Skoshi Heron
PO Box 5445
Edmond, OK 73083
Telecopier: 405-415-7366

President's Message

by Jeremy Brown

By the time this Newsletter reaches your desk, we will be within sixty (60) days of the Annual Meeting in Las Colinas! Members have been working hard to bring what I think will be a great program for OADC members. You will have the opportunity to hear from three sitting State District Judges, one sitting United States District Judge, and one retired State District Judge. We will also have Mr. Travis Pickens, the Oklahoma Bar Association Ethics Counsel, to provide for us that one hour of always needed, yet ever elusive, ethics credit. In addition, we will have presentations on current technology issues involving exhibits in the courtroom and how you can investigate even further those parties opposing you who use social networking, like Facebook, to gain ever needed information for trial.

Then, on Friday night I hope you will join us for the President's Reception. It will be a casual atmosphere with a beach party theme. Although I now hail from Chickasha, I spent much of my life in the Carolinas. We will have a Carolina Boil, or "low country Boil" as native Carolinians call it, with crab, shrimp, and all the trimmings. (For those of you who may not like seafood, we will make sure you are taken care of as well.) Such celebrations are only for friends in the Carolinas – and that is exactly why I invite all of you to join us!

While the OADC Summer Meeting is perhaps the best way to get involved in OADC, I want to encourage our members to stay involved in the other legal professional associations. For instance, do not hesitate to get involved with other defense organizations - such as DRI. Grady Parker has outlined in this newsletter ways you can get involved with DRI. Through your involvement, perhaps at some point you can follow in the steps of Burt Johnson, DRI President in 1979, and the 2010 DRI President - Cary Hiltgen. As President for the "Voice of the Defense Bar", Cary is continuing the charge of a strong defense bar and tackling major issues within our judicial system, such as issues involving diversity, involvement of women in our legal system, the role of an independent judiciary, and the importance of jury trials and jury service. He maintains a regular blog for DRI at www.dri.org, and I encourage you to follow along during his year as DRI President. Under Cary's watch, DRI continues to develop and has for the first time established a permanent, standing, substantive committee for "Women in the Law" - I trust many of our members will take advantage of that new standing committee in DRI.

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What Happens At Mediation Does Not Necessarily Stay at Mediation

Amy R. Steele

Pierce Couch Hendrickson Baysinger & Green, LLP
Oklahoma City, Oklahoma

Anyone who has ever attended a mediation has heard the mediator assure the parties that what happens during the mediation process is confidential and cannot be used or shared outside the mediation. The mediator's statements give the parties the same assurance provided by the Las Vegas tourism board – "What happens here, stays here." Often, those involved in mediation have heard these assurances so many times that they internalize the mediator's words, and the parties trust that the participants hold the mediation process and disclosures in confidence. However, the assurances are overstated, and there are a number of incidents where courts allow the sharing of information disclosed during the mediation or settlement negotiation process and allow a party to use the communications against the party making the original disclosure.

Governing Provisions:

Most states provide some type of protection for information exchanged in the mediation process. According to the Uniform Mediation Act, 2003 J. Disp. Resol. 1, *10, there are over 250 different state statutes which differ in the definition of mediation, subject matter of the dispute, scope of protection, exceptions, and whether the mediation take place in court, community program, or private setting.

Generally, there are two purported protective provisions governing the use of information obtained during mediation or settlement discussions. One provision, such as Federal Rule of Evidence Rule 408, falls within the evidentiary code and prohibits the use of information exchanged during compromise or offers to compromise "to prove liability for, invalidity of, or amount of claim that was disputed as to validity or amount, or to impeach," but allows the disclosure of information for another purpose such as "proving a witnesses's bias or prejudice; negating a contention of undue delay; and proving an effort to obstruct a criminal investigation or prosecution."

The other provision governing the use of information obtained during mediation or settlement discussions is located within the Uniform Mediation Act which is explicitly designed to "provide a privilege that assures confidentiality in legal proceedings." 2003 J. Disp. Resol. 1, *5. The Uniform Mediation Act characterizes the disclosure of mediation communications as a privilege, like the attorney-client or doctor-patient privilege, so that the party, mediator, or nonparty participant can refuse to disclose or prevent other people from disclosing mediation communications that are not otherwise admissible or subject to discovery. However, Section 6 of the Uniform Mediation Act also provides exceptions to the privilege for

communications such as those that are (1) in the agreement signed by the parties; (2) available to the public under an open records act; (3) a threat to inflict bodily injury or commit violence; (4) intentionally used to plan, attempt to commit or commit a crime, or conceal an ongoing crime; (5) needed to prove or disprove malpractice; or (6) evidence of abuse or neglect.

Examples of Disclosed Mediation Communications:

Courts across the country have scrutinized mediation communications to determine the appropriateness of disclosure of mediation communications outside of the mediation context. As expected, Courts allow the use of mediation communications to demonstrate the existence of a settlement agreement, especially if the agreement limits the scope or amount of claims. *Cyberco Holdings, Inc. v. Con-Way Transp. Services, Inc.*, 159 P.3d 359 (Or. App. 2007). A party can also use the settlement agreement to demonstrate the other party's intent with respect to the scope of the release or to prove/disprove the agreement's breach. *Coakley & Williams v. Structural Concrete Equip.*, 973 F.2d 349 (4th Cir. 1992). Courts have also allowed the introduction of a settlement agreement when used to establish an accord and satisfaction. *Union River Assoc. v. Budman*, 850 A.2d 334 (Me. 2004). The introduction of mediation communications is also permissible to show stipulations reached between the parties. *Union River Associates v. Budman*, 850 A.2d 334 (Me. 2004).

Further, the disclosure of mediation communications that constitute a threat of bodily harm or retaliation for failing to settle may be admissible. *Uforma/ Shelby Bus. Forms, Inc. v. NLRB*, 111 F.3d 1284 (6th Cir. 1997). Similarly, fraudulent statements committed during settlement negotiations may be subject to disclosure. *See, generally*, comments to FRE 408. Examples of fraudulent disclosure include claiming not to have insurance when a policy actually exists or making a known factual misrepresentation in order to achieve a settlement. Generally, the misrepresentation must be sufficiently material that it would be a basis for reforming or avoiding liability under the settlement.

Mediation communications are also admissible to establish notice. The notice can include an awareness of legal obligations (e.g., duties under federal labor laws), prior knowledge of an employee's behavior, or to prove that the defendant was on notice that subsequent similar conduct was wrongful. *Brandy v. Wal-Mart Stores, Inc.*, 455 F.Supp.2d 157 (E.D.N.Y. 2006).

Moreover, courts allow the introduction of mediation communications to explain the absence of a former party to the lawsuit or demonstrate the potential bias of parties who were previously adversaries and may now be motivated to downplay one another's fault. *Langness v. Fencil Urethane Systems, Inc.*, 667 N.W.2d 596 (N.D. 2003); *Hyman & Armstrong, P.S.C. v. Gunderson*, 279 S.W.3d 93 (Ky. 2003). Courts permit mediation communications to avoid juror confusion but what constitutes juror confusion is generally vague and nondescript. *See, e.g., Atwell v. RHIS, Inc.*, 974 A.2d 148 (Del. 2009); *Smith v. Kaufman*, 67 P.3d 1161 (Wyo. 2003).

Courts have allowed the introduction of a settlement agreement to prove that the statute of limitations began again by the written acknowledgment of debt. *U.S. v. J.R. LaPointe & Sons, Inc.*, 950 F.Supp.21 (D. Me. 1996). Further, the courts have permitted the use of mediation communications to demonstrate an employer's interpretation of a collective bargaining agreement. *Alexander v. City of Evansville, Indiana*, 120 F.3d 723 (7th Cir. 1997).

Insurers must recognize that insureds often use mediation communications, especially a failure to settle or refusal to negotiate fairly, to support their claim for insurer's bad faith. *Athey v. Farmers Ins. Exchange*, 234 F.3d 357 (8th Cir. 2000). An insured may also try to present evidence of an insurer's failure to attend mediation with a proper evaluation or acting improperly during settlement discussions by, for example, engaging in conduct during mediation that shows a desire to place the insurer's interest above the insured's or attending the mediation with the apparent desire to only settle claims against the insurer and not those claims against the insured.

Generally, expressions of factual statements do not fall within the mediation confidentiality/privilege and can be used or disclosed outside of the mediation setting. However, courts have recognized an exception and protected facts that a party presents as being hypothetical, expressly stated as being presented without prejudice, or inseparably connected with the offer of settlement so that the admission cannot be understood without reading the two together. *Pyne v Jamaica Nutrition Holdings, Ltd.*, 497 A.2d 118 (D.C. 1985).

Practical Considerations on the Offensive:

Given the wide range of incidents in which courts may allow the use of mediation communication, parties should not be afraid to use the communication to their advantage. Of course, a party must demonstrate a compelling reason for the communication's introduction, but if the use extends past merely trying to establish liability, the court will probably allow the communication.

Since courts, like many mediation participants are so accustomed to thinking that mediation communications are forbidden ground, the brief should begin with advising the court that there are exceptions to the mediation statutes.

Then, it will be important to outline for the court that there are compelling reasons for allowing the communication. The most difficult task will probably be finding a conclusive way to demonstrate to the court the exact specifications of the communication sought to be used. Since there usually are no records to the proceedings and mediators will not want to jeopardize their mediation practice by providing testimony of party representations, evidence of the communication may need to be provided by obtaining and providing the court with a copy of the other side's presentation slides, an Affidavit from the client representative in attendance, or, if necessary, an Order requesting an evidentiary hearing with testimony from the mediator. Counsel must be careful that they do not become a witness such that ethical and evidentiary rules prevent them from serving as counsel.

Practical Considerations on the Defensive:

Since there is strong public policy for protecting mediation disclosures to promote candor and resolve cases through alternative dispute resolution, a party can protect mediation communications through a number of mechanisms. For example, while most settlement agreements contain a provision that the settlement will remain confidential (with the required consideration, if required by the jurisdiction), the parties should consider expanding the agreement to address specific concerns relating to how the settlement will be used if only some of the parties settle or that the parties agree there is no "juror confusion" resulting from the settlement. Of course, the court likely will not enforce a confidentiality agreement if a party wishes to disclose mediation communications relating to fraud or threats, but the agreement can provide protection against many of the other permissive disclosures.

Similarly, the party objecting to the disclosure can object on the basis that that the party seeking the disclosure does not have sufficient, admissible evidence to prove the communication. Allegations of misrepresentations must be material misrepresentations, and the party claiming the misrepresentation must show they only entered into the settlement because of the material misrepresentations, a high burden to force the other party to meet. Alternatively, incorporating all mediation communications within the confines of a Protective Order may also help protect communications an opposing party may seek to disclose under the guise of juror confusion or notice.

Conclusion

Mediation participants must be careful not to fall into the trap of assuming mediation communications are as protected as the events of your best friend's bachelor party in Las Vegas. There are a number of surprising circumstances where courts allow the sharing of information disclosed during the mediation or settlement negotiation process, and participants should be prepared to use the disclosure or protection of such communications to their advantage.



DRI—*The Voice of the Defense Bar* is an international membership organization of attorneys defending the interests of business and individuals in civil litigation. DRI provides professional information to its members through educational seminars, publications and other member services. It is also a forum for exchanging ideas on current issues of importance to defense lawyers and corporations. Here are some of the many benefits you will enjoy as a DRI member:

Opportunities to earn CLE through more than 20 annual live seminars held in major cities or via webconferences at special member rates

- One year subscription to *For The Defense*, our premier monthly magazine
- Weekly copy of *The Voice*, DRI's eNewsletter, contains timely news and information important to defense attorneys
- Join substantive law and practice area committees
- DRI's Annual Meeting, its flagship event which offers blockbuster CLE, numerous business meetings, installation of new DRI leadership, and abundant networking opportunities
- Members-only Expert Witness Database including more than 65,000 plaintiff experts
- DRI Online provides searchable access to past issues of *For The Defense*, course materials and committee newsletters
- Opportunities to network with attorneys from around the world
- **www.dri.org**—DRI's interactive website makes it easy to register for DRI events, purchase publications, join substantive law committees, update your member profile and much more
- *Amicus* briefs on issues of importance to the national defense bar
- Multiple opportunities for personal and professional development through participation in DRI leadership roles

Visit www.dri.org or call 312.795.1101 for more information or to join!

DRI delivers resources to build your practice

OADC Summer Meeting

Agenda and Continuing Legal Education

Guest Speakers

Thursday, June 17 (3 hours CLE; including 1 hour of Ethics)

1:30 - 2:20	Social Ethics
2:20 - 2:30	<i>Break</i>
2:30 - 3:20	Judges' Panel on Briefing Issues
3:20 - 3:30	<i>Break</i>
3:30 - 4:20	Judges' Panel on Hrg/Trial Issues
5:30 - 6:30	Reception

Travis A. Pickens, Ethics Counsel,
Oklahoma Bar Association

Hon. Vicki L. Robertson, District Judge,
Oklahoma County

Hon. Robin J. Cauthron, United States
District Judge, Western District of Oklahoma

Friday, June 18 (3 hours CLE)

7:45 - 8:45	Continental Breakfast
8:00 - 8:30	Board Meeting
8:30 - 8:50	Legislative Update
8:50 - 9:00	Break
9:00 - 9:50	From Foam Boards to the Future
9:50 - 10:00	<i>Break</i>
10:00 - 11:20	Electronic Social Networking
1:00	Golf
6:30 - 7:00	President's Reception
7:00 - 9:00	President's Dinner

Hon. Richard Van Dyck, District Judge,
Grady County

Hon. Mark Campbell, District Judge,
Bryan County

J. Michael Gasset, Retired District Judge,
Tulsa County

Pete G. Serrata, III, Derryberry & Naifeh, LLP

Janice Paulk, Litigation Consultants, LLC

Jennifer R. Aufricht, Thompson, Coe,
Cousins & Irons, LLP

**Find the registration form at:
WWW.OADC.ORG**

DRI Report

H. Grady Parker, Jr., Oklahoma DRI Representative

Also, do not hesitate to get involved with legal associations closer to home, such as our own Bar Association. One of our leaders in OADC is Angela Ailes-Bahm. On March 2, Angela and I attended the Oklahoma Bar Association Legislative Day at the State Capital. I want to thank Angela for her involvement in that day as she was very effective in conversing with our state legislators the concerns and issues that we felt OADC membership may have on certain issues and bills. You too can get involved with the OBA by looking to join committees and enlarge the sphere of influence OADC members have.

Again, be sure to turn in that registration form for the OADC Summer Meeting and do it before June 1, to get the ever important savings! We think this will be a meeting you will not want to miss! Remember, our organization is only as strong as those involved, and I want to encourage you to continue to get involved in OADC and other organizations to make OADC a more effective and stronger organization.

As of the end of March 2010, Oklahoma's DRI membership was 392. Since Cary Hiltgen is the current DRI President and Kevin Driskill is the current Southwest Regional Director, we are trying to increase our membership numbers in an effort to show our support. I would encourage those of you who are not members of DRI to join. If you are a member of DRI, I would ask that you encourage others in your firm to join. There are DRI membership specials available to young lawyers and lawyers who have not previously been a member. Please contact me for membership information or an application form.

This year the DRI Annual Meeting is in San Diego at the San Diego Hotel and Marina. The Annual Meeting is from October 20th through October 24th. The Blockbuster speakers will feature Marcus Luttrell and Soledad O'Brien. Mr. Luttrell is a Navy Seal, lone survivor and compelling author. Ms. O'Brien is a CNN Special Correspondent and powerful advocate of mentoring young people. In addition, DRI has made special arrangements for us to tour the USS Midway. There you will be able to see 25 restored aircraft, over 60 exhibits and walk in the footsteps of over 225,000 Midway sailors who served our country. You can register online at www.dri.org.

Finally, DRI has a number of practice specific seminars scheduled throughout the year. These seminars always feature speakers who are well recognized in their area of practice and are held in great locations. I would encourage each of you to take advantage of a DRI seminar.

