

MEDIATION MATERIALS – Privileged or not?

Materials prepared for mediation may not be subject to the privilege.¹ For example, a court has held that a series of videotaped interviews presented during a mediation were discoverable.² In that case, an aircraft purchaser had filed a breach of contract action against an aircraft manufacturer. The plaintiff claimed the aircraft's cabin temperature controls did not meet specifications. At a mediation of the case, the manufacturer presented a series of videotaped statements from witnesses to buttress their arguments. After the mediation was unsuccessful, the Plaintiff moved to compel discovery of the unedited videotapes. The manufacturer unsuccessfully resisted claiming that they were protected under the attorney-client and mediation privilege. The Court of Appeals, however, ruled that the tapes contained unprivileged witness statements and ordered them produced.

The tapes contained potentially embarrassing sidebar discussions between the attorneys and the witnesses and reflected that the presentation was stopped and started to allow the witnesses to rehearse their testimony.

Similarly, courts have held communications made during an alternative dispute resolution session were not protected from discovery.³ The confidentiality provision of statute precluding disclosure of all matters relating to mediation is restricted to those matters occurring during the settlement process.⁴ Statutory provision mandating confidentiality of certain records and communications in mediation is not so broad as to bar all evidence regarding everything that occurs at mediation from being presented in the trial court, and rather than a blanket confidentiality rule for participants, the statute renders confidential only a communication relating to the subject matter of any civil or criminal dispute made by a participant in an alternative dispute resolution (ADR) procedure.

¹ Generally, mediation materials are considered confidential. See **TX CIV PRAC & REM § 154.073 § 154.073. Confidentiality of Certain Records And Communications**

(a) Except as provided by Subsections (c), (d), (e), and (f), a communication relating to the subject matter of any civil or criminal dispute made by a participant in an alternative dispute resolution procedure, whether before or after the institution of formal judicial proceedings, is confidential, is not subject to disclosure, and may not be used as evidence against the participant in any judicial or administrative proceeding.

²*In re Learjet Inc.*, 2001 WL 1439997 (Texarkana 2001).

³ See *Avary ex rel. Estates of Bourgeois v. Bank of America, N.A.*, 2002 WL 442064 (Tex.App. – Dallas 2002, no writ) and see *In re Acceptance Ins. Co.*, 33 S.W.3d 443 (Tex. App. – Fort Worth 2000, no writ).

⁴ *In re Daley*, 29 S.W.3d 915 (Tex.App. – Beaumont 2000, no writ)