



United States Department of Agriculture

FAX COVER SHEET

To:

Fax #: 2025011836

Date: 03/23/15 01:59:05 PM

Re:

Pages (Including cover): 37

Second attachments per request for **(b) (6) Privacy**

Glenda Bommersbach
Program Technician
Richland County FSA
1687 Bypass Rd
Wahpeton, ND 58075
Phone: 701-642-9231 ext 104
Fax: 855-813-7554
Email: Glenda.Bommersbach@nd.usda.gov

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NORTH DAKOTA
DEPARTMENT OF AGRICULTURE
STATE CAPITOL
600 E BOULEVARD AVE DEPT 602
BISMARCK ND 58505-0020

April 27, 2011

University of North Dakota
Conflict Resolution Center
Attn: Kristine Paranica, Director
314 Cambridge, STOP 8009
Grand Forks, ND 58202-8009

Dear Ms. Paranica:

The North Dakota Mediation Service has received a request for mediation services from:

(b) (6) Privacy

Mooreton ND 58061
(b) (6) Privacy

The **(b) (6) Privacy** have been retained by the following attorney to assist them in the mediation process.

Zenas Baer
Zenas Baer Law Office
PO Box 249
Hawley MN 56549
(218) 483-3372

They have requested mediation with the North Dakota Department of Agriculture's Pesticide, Feed and Fertilizer Division regarding a pesticide violation investigation. We have contacted the Pesticide, Feed and Fertilizer Division about **(b) (6) Privacy**'s request and they have agreed to participate in mediation. The contact person for the Pesticide, Feed and Fertilizer Division regarding this mediation is:

Jim Gray
ND Department of Agriculture
600 E Boulevard Ave., Dept. 602
Bismarck ND 58505-0020
(701) 328-1505

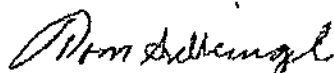
Page 2

Ms. Paronica
April 27, 2011
Page two

Under the terms of our contract with the Conflict Resolution Center, please assign a mediator to this case and move forward with the mediation process.

If you have any questions, please feel free to call me at 701-328-2061.

Sincerely,



Tom Silbermagel
Administrator

Junkert, Ken S.

From: Silbernagel, Tom J.
Sent: Thursday, April 28, 2011 8:19 AM
To: Gray, Jim A.
Cc: Christman, Bob J.; Junkert, Ken S.; Nelson, Betty L.
Subject: (b) (6) Privacy Mediation
Attachments: (b) (6) Privacy Med..pdf

Jim,

UND Conflict Resolution Center has been contracted to do the (b) (6) Privacy mediation. A copy of our assignment letter to them is attached. You are listed as the contact person for Ag Department. You will notice from the letter that the (b) (6) Privacy s are being assisted by an attorney. If you want Charles C. or someone else to attend the mediation or attend it with you just let UND know when you are contacted. You will be given a chance to evaluate this process upon its completion.

Please contact me if you have questions.

Tom

Tom Silbernagel, Administrator
ND AG Mediation Service
ND Dept. of Agriculture
Phone 701-328-2061
Fax 701-328- 2240
tsilbern@nd.gov

Junkert, Ken S.

From: Gray, Jim A.
Sent: Sunday, May 01, 2011 6:54 PM
To: Silbernagel, Tom J.
Cc: Christman, Bob J.; Junkert, Ken S.
Subject: RE: (b) (6) Privacy Mediation

Tom:

I did visit with Charles Carvell about this issue. He is willing to accompany me to the mediation. Also, since (b) (6) Privacy is bringing legal counsel, Charles suggested a requirement that (b) (6) Privacy sign a document stating clearly that anything discussed at the mediation cannot be used in a legal proceeding against the department or another party.

Jim Gray
Pesticide, Feed and Fertilizer Division Director
North Dakota Department of Agriculture
600 E. Boulevard Ave., Dept. 602
Bismarck, ND 58505-0020
Office: 701-328-1505
Mobile: 701-220-1645
Fax: 701-328-4567

From: Silbernagel, Tom J.
Sent: Thursday, April 28, 2011 8:19 AM
To: Gray, Jim A.
Cc: Christman, Bob J.; Junkert, Ken S.; Nelson, Betty L.
Subject: (b) (6) Privacy Mediation

Jim,

UND Conflict Resolution Center has been contracted to do the (b) (6) Privacy mediation. A copy of our assignment letter to them is attached. You are listed as the contact person for Ag Department. You will notice from the letter that the (b) (6) Privacy's are being assisted by an attorney. If you want Charles C. or someone else to attend the mediation or attend it with you just let UND know when you are contacted. You will be given a chance to evaluate this process upon its completion.

Please contact me if you have questions.

Tom

Tom Silbernagel, Administrator
ND AG Mediation Service
ND Dept. of Agriculture
Phone 701-328-2061
Fax 701-328- 2240
tsilbern@nd.gov

Junkert, Ken S.

From: Silbernagel, Tom J.
Sent: Monday, May 02, 2011 8:48 AM
To: Junkert, Ken S.
Subject: RE: (b) (6) Privacy Mediation

Ken

We do not have a document but NDCC 6-09.10-10 states in part "information created , collected , and maintained by the agricultural mediation service in the course of any of any formal or informal mediation is confidential and is not subject to the open records requirements of section 44-04-18. Such information may be released only upon written consent of all parties to the mediation or pursuant to an order issued by the court upon a showing of good cause." I am not sure if this would address Jims concerns or not.

Information from a mediation has be subpoenaed by the courts before and to my knowledge the AG's office has been able to quash the subpoena every time.

Tom

Tom Silbernagel, Administrator
ND AG Mediation Service
ND Dept. of Agriculture
Phone 701-328-2061
Fax 701-328- 2240
tsilbern@nd.gov

From: Junkert, Ken S.
Sent: Monday, May 02, 2011 7:49 AM
To: Silbernagel, Tom J.
Subject: FW: (b) (6) Privacy Mediation

Tom,

Do you have a document as suggested?

Kenneth S. Junkert

Administrative Services Division Director
North Dakota Department of Agriculture
Business phone: 701-328-4756
Business fax: 701-328-4567
kjunkert@nd.gov

From: Gray, Jim A.
Sent: Sunday, May 01, 2011 6:54 PM
To: Silbernagel, Tom J.
Cc: Christman, Bob J.; Junkert, Ken S.
Subject: RE: (b) (6) Privacy Mediation

Tom:

Gray, Jim A.

From: Carvell, Charles M.
Sent: Monday, May 09, 2011 4:41 PM
To: Silbernagel, Tom J.
Cc: Gray, Jim A.
Subject: mediation confidentiality
Attachments: Confidentiality.Memorandum.May.2011.docx; 74 nd law rev. 45.1998.rtf

Tom,

Attached is a memo on the subject. The memo refers to a law review article that is also attached.

Charles

Memorandum

To: Tom Silbernagel, N.D. Ag Mediation Service
From: Charles Carvell, Asst. Att'y General
Re: Confidentiality of Mediation Sessions
Date: May 9, 2011

You asked that I look at the confidentiality provision in Chapter 6-9.10, that is, Section 6-09.10-10. You said that you thought that the statute gives confidentiality status to all that occurs in a mediation session unless a court orders otherwise. After I expressed some doubt about the provision's breadth, you asked that I research the issue.

Section 6-09.10-10 states:

6-09.10-10. Mediation - Open records and meetings exception.

Information created, collected, and maintained by the agricultural mediation service in the course of any formal or informal mediation is confidential and is not subject to the open records requirements of section 44-04-18. Such information may be released only upon written consent of all parties to the mediation or pursuant to an order issued by the court upon a showing of good cause. All mediation meetings and meetings involving the board, staff, negotiators, or mediators wherein the finances of specific farmers, creditors, and others are discussed, are confidential, closed meetings and are not subject to the open meetings requirements of section 44-04-19.

The provision has three sentences. The last one doesn't address confidentiality among the participants to a mediation session, but rather addresses the state's broad "open meeting" law. Even though the sentence is irrelevant to your question I want to draw it to your attention because you may want to consider asking the legislature to amend it. It states that "meetings involving the board, staff, negotiators, or mediators wherein the finances of specific farmers, creditors, and other are discussed" are not subject to the open meetings law. But while it is clear that the sessions are closed where "the finances of specific farmers, creditors, and others are discussed," what about a session like the one coming up involving (b) (6) Privacy that doesn't have anything to do with finances? There is a real question whether the third sentence can be read to close mediation sessions not involving finances, and perhaps a significant concern for you in light of the 2011 Legislature's expansion of the kind of mediation work done by your agency.

As for the first two sentences of Section 6-09.10-10, they do address confidentiality of records but the scope of the confidentiality provided isn't too broad. It is confined to what mediators may have "created" or "collected" and to what they "maintain[.]" I believe that Jim Gray's concern—which led to the questions you asked me—is with statements that mediation participants make during a mediation session. In particular,

are those statements confidential? Can one participant take what another participant said, or even what the mediator said, and talk about it at coffee downtown? Can he tell his lawyer about what was said, and can the lawyer use it in litigation to, for example, develop litigation strategy, support a claim in a complaint, as ammunition for cross-examination, or as the basis for a discovery request?

Looking just at Section 6-09.10-10, it is probable that such information is not confidential. There isn't anything in the statute that address statements made by mediation participants. The confidentiality provision is confined to protecting "[i]nformation created, collected, and maintained by the agricultural mediation service."

But Section 6-09.10-10 isn't the only place to look for legal support to keep confidential what occurs in a mediation session. The Century Code has a general statute on the subject. It states:

31-04-11. Mediation - Inadmissibility of evidence - Exception. When persons agree to conduct and participate in a mediation for the purpose of compromising, settling, or resolving a dispute, evidence of anything said or of any admission made in the course of the mediation is inadmissible as evidence and disclosure may not be compelled in any subsequent civil proceeding except as provided in this section. This section does not limit the compulsion nor the admissibility of evidence if:

1. The evidence relates to a crime, civil fraud, or a violation under the Uniform Juvenile Court Act;
2. The evidence relates to a breach of duty by the mediator;
3. The validity of the mediated agreement is in issue; or
4. All persons who conducted or otherwise participated in the mediation consent to disclosure.

While this statute has four exceptions, they wouldn't seem to have much applicability to our situation. As for the substance of this statute, it doesn't make information acquired in mediation or statements made in mediation confidential, but rather it makes them "inadmissible as evidence." There is a marked difference between confidential information and information that is inadmissible evidence. Even so, the fact that this statute makes inadmissible information acquired in a mediation, may largely put to rest concerns that led to the question you asked me. I don't, however, mean to imply that Section 31-04-11 is ironclad. It has been described as "a decent mediation confidentiality statute which provides some protection to mediation participants," but it "is not flawless." Daniel R. Conrad, *Confidentiality Protection in Mediation: Methods and Potential Problems in North Dakota*, 74 N.D. Law Rev. 45, 59 (1998).

North Dakota also has a rule of evidence, Rule 408, that protects statements made during efforts to settle a dispute. I won't quote the entire rule, but its most pertinent part states: "Evidence of conduct or statements made in compromise negotiations is . . . not admissible." Like Section 31-04-11, Rule 408, doesn't make such statements

confidential, "just" inadmissible. And the rule has exceptions. "Settlement evidence may be admissible for other purposes, such as proving bias or prejudice of a witness, or proving an effort to obstruct a criminal investigation or prosecution." *E.g.*, *City of Bismarck v. Mariner Constr., Inc.*, 2006 ND 108, ¶ 22, 714 N.W.2d 484.

Courts will generally interpret Section 31-04-11 and Rule 408 liberally to promote the reason for their existence, that is to encourage settlement. It is an "important" public policy in North Dakota to encourage "open and frank discussions during settlement negotiations." *Schlossman & Gunkelman v. Tallman*, 1999 ND 89, ¶ 24, 593 N.W.2d 374. "Rule 408 . . . furthers a well-recognized public policy encouraging out-of-court compromise and settlement of disputed claims to avoid costly and time-consuming litigation." *Mariner Constr., Inc.*, 2006 ND 108, at ¶ 22.

In sum, even if Section 6-09.10-10 doesn't go as far in giving confidential status to statements made in mediation as you thought it did, North Dakota law has other protections that largely do what you thought Section 6-09.10-10 did on its own.

The subject of confidentiality in mediation is discussed in the law review article cited above. The article is enclosed with this memo should you want to read it. It is a short article and gives a decent summary of the subject. It includes a discussion confidentiality contracts.

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74 North Dakota Law Review 45

North Dakota Law Review
1998

Viewpoints

CONFIDENTIALITY PROTECTION IN MEDIATION: METHODS AND POTENTIAL PROBLEMS IN NORTH DAKOTA

Daniel R. Conrad

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I. INTRODUCTION

The overcrowding of court dockets and the time consuming process of litigation have led to the increased popularity of alternative methods of dispute resolution. One such alternative method is mediation. Mediation differs greatly from litigation in that the parties themselves structure a way to settle their dispute with the aid of a "mediator," a neutral third party who guides the disputants through their own settlement negotiations.¹ Mediation has generally proven to be more cost effective and less time consuming than litigation.²

One problem that has plagued the movement toward the use of mediation is the scope of the confidentiality in mediation proceedings.³ Although most would agree that some form of confidentiality is necessary and desirable in mediation proceedings, there is little agreement on the scope of confidentiality that should be provided.⁴ It is clear, however, that for mediation to be successful, there must be a free flow of information between the parties.⁵ By assuring that information disclosed during a mediation session will remain confidential and will not be used later against the parties, the flow of information will be enhanced.⁶ Furthermore, guarantees of confidentiality facilitate an atmosphere of fairness and trust between the parties and the mediator, which is essential to an effective mediation.⁷

This article will provide an overview of the different methods that have been utilized to insure that some form of confidentiality exists in mediation proceedings. This article will then discuss these various types of protection under North Dakota law, focusing primarily on the protection offered by section 31-04-11 of the North Dakota Century Code.⁸

II. METHODS OF ASSURING CONFIDENTIALITY IN MEDIATION SESSIONS

Because some level of confidentiality is necessary for mediation to be successful, various methods of protecting confidentiality in mediation have developed. Those forms include: private

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contracts, common law rules of privilege, evidentiary rules, and mediation confidentiality statutes.

A. CONFIDENTIALITY CONTRACTS

The first method by which parties have tried to assure that mediation proceedings will remain confidential is by contract. The contracts are intended to prevent the parties from disclosing certain information *47 discovered during the mediation.⁹ However, enforcement of confidentiality contracts can be problematic.¹⁰ For instance, when evidence is sought by a nonparty to the agreement, the agreement is generally not binding on the nonparty, and can be viewed as an attempt to suppress evidence.¹¹ The agreement is normally held to be against public policy in those cases and void.¹² Thus, contractual agreements in mediation proceedings to protect confidentiality are generally not very effective because they do not apply to non-parties to the contract.

Private agreements may also be problematic when enforcement is sought between parties to the agreement. The agreements may not serve as an effective deterrent because the remedy is defined by contract law, and actual damages may be difficult to prove.¹³ Furthermore, courts may find that without legislation supporting the use of confidentiality agreements, such agreements are void as against public policy even when it is the parties of the contract seeking enforcement.¹⁴ Therefore, private agreements do not appear to be the most effective method of protecting confidentiality in mediation.

B. EVIDENTIARY RULES

Other possible sources of confidentiality protection for parties in mediation are federal and state rules of evidence.¹⁵ At a minimum, mediation discussions receive the same amount of confidentiality protection in subsequent litigation as traditional settlement negotiations.¹⁶ The protection is derived from Rule 408 of the Federal Rules of Evidence or its state equivalent even though Rule 408 does not expressly state that mediated settlements are covered.¹⁷ Rule 408 of the Federal Rules of Evidence states:

*48 Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible.¹⁸

"At common law, *only* offers of compromise or settlement were inadmissible to prove liability or amount of the claim in subsequent litigation."¹⁹ Statements other than the offer could be admitted.²⁰ Furthermore, the offer itself could be admitted to prove bias or to impeach a witness.²¹ Rule 408 broadens the common law protection by making inadmissible the conduct and statements surrounding the settlement.²² Rule 408 was passed to encourage settlement and exclude evidence related to a compromise because that evidence is normally of low probative value.²³

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Rule 408 is subject to some key exceptions. First, the rule does not protect evidence related to the mediation if it is to be used for "another purpose," such as proving bias.²⁴ Second, Rule 408 does not address the discoverability of such negotiations.²⁵ Thus, a mediation may be vulnerable to a discovery request in later litigation even if the information could not be used during trial under Rule 408.²⁶ Third, Rule 408 only addresses issues that are in dispute; therefore, items not in dispute, such as the payment schedule, may be admissible.²⁷ Finally, Rule 408 attaches to the information rather than the people involved in a mediation. Hence, a mediator who is subpoenaed to appear in subsequent litigation cannot use Rule 408 as protection to quash the subpoena.²⁸ Therefore, Rule 408 and its state equivalents do not appear to provide adequate confidentiality protection for mediation sessions by themselves.

*49 C. COMMON LAW PRIVILEGE

Courts on occasion have found, absent a statutory privilege, that information brought out during mediation is privileged under common law.²⁹ A privilege is different from Rule 408 protection because the right to claim a privilege belongs to the parties to the mediation, and thus can be raised even if the parties to the mediation are not parties in the subsequent litigation.³⁰ Furthermore, the privilege not only protects the information from being brought out in litigation, but it may also protect the information from discovery requests.³¹ Courts generally apply a four-part test when confronted with the issue of common law privilege:

(1) The communications must originate in *confidence* that they will not be disclosed. (2) This element of *confidentiality must be essential* to the full and satisfactory maintenance of the relation between the parties. (3) The *relation* must be one which in the opinion of the community ought to be *sedulously fostered*. (4) The *injury* that would inure to the relation by the disclosure of the communications must be *greater than the benefit* thereby gained for the correct disposal of litigation.³²

This four-part Wigmore test, as it is often called, was cited favorably by the court in *N.L.R.B. v. Joseph Macaluso, Inc.*³³ In *Macaluso*, the court held that exclusion of testimony by a mediator "is necessary to the preservation of an effective system of labor mediation," which in turn is vitally important to the economic health of the nation.³⁴ Therefore, the court found that the mediation was entitled to a privilege under the Wigmore balancing test.³⁵ However, the common law privilege is not the most effective method of keeping mediation confidential because courts are not always willing to recognize it, thereby making confidentiality uncertain when parties enter mediation.³⁶

*50 The Eighth Circuit Court of Appeals recently addressed the issue of an "ombudsman privilege" in workplace mediation sessions.³⁷ The Eighth Circuit refused to recognize a common law privilege over mediation sessions conducted by ombudsman in the workplace.³⁸ The court reasoned that the proponent of the privilege failed to overcome the significant burden of showing that the proposed privilege served a public good that outweighed the principle of ascertaining the truth by all rational means.³⁹ The conservative approach taken by the Eighth Circuit exemplifies the uncertainty associated with common law privileges.

D. STATUTORY PROTECTION

Most states provide some statutory or evidentiary protection for confidentiality of events that

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transpire during mediation sessions.⁴⁰ These jurisdictions have concluded that public policy requires the encouragement of confidential communications within the special mediation ⁵¹ relationship, without which the relationship would be ineffective.⁴¹ The mediation relationship is viewed as having sufficient social importance to justify some incidental sacrifice of sources of facts needed in the litigation of claims.⁴²

Although the goal of each of the states in promulgating a confidentiality statute or evidentiary rule for mediation was likely similar, the resulting provisions are dramatically different in scope, content, and operation.⁴³ These differences reflect the "difficulty of creating a rule which strikes the proper balance between mediation's need for confidentiality and the public's interest in access to certain types of information."⁴⁴ Some of the differences include: 1) protection only for mediations that take place in certain mediation facilities, such as statutorily created community dispute resolution centers;⁴⁵ 2) protection only for those subjects relating to or arising out of the "matter in dispute;"⁴⁶ and 3) evidentiary protection in subsequent litigation only, with no protection from discovery.⁴⁷ Some states, however, have promulgated statutes which provide a blanket protection by stating that anything that transpires during mediation will be deemed confidential and will be suppressed.⁴⁸ Confidentiality statutes appear to be the soundest method of protecting confidentiality in mediation sessions because of the predictable protection a thorough statute can provide.⁴⁹

III. CONFIDENTIALITY PROTECTION IN NORTH DAKOTA

In North Dakota, there are basically three methods by which confidentiality in mediation may be protected. Those methods include: private confidentiality agreements; Rule 408 of the North Dakota Rules ⁵² of Evidence;⁵⁰ and section 31-04-11 of the North Dakota Century Code.⁵¹

A. CONFIDENTIALITY CONTRACTS

There is no case law in North Dakota discussing the validity of private confidentiality contracts. However, there is evidence of the use of confidentiality contracts, as well as an indication that remedies for breach are governed by the principles of contract law.⁵² In his testimony before the House Judiciary Committee on S.B. 2308, Michael Liffrig, a practicing mediator, stated that he "has all clients sign a form at the beginning of services which states that they will not subpoena him or will not compel any writings or documents during mediation to any civil action."⁵³ Liffrig went on to state that statutory protection would make confidentiality more certain than the use of private agreements because a breach would no longer be solely an issue of contract law.⁵⁴ Because the courts have yet to address the validity of confidentiality contracts in North Dakota, parties to mediation proceedings would be wise to be leery of their effectiveness.

B. RULE 408

Under Rule 408 of the North Dakota Rules of Evidence, offers of compromise are generally not admissible to prove "liability, nonliability, or the amount of a claim."⁵⁵ Rule 408 of the North Dakota Rules of Evidence was patterned after its federal equivalent, and "extends the exclusionary treatment not only to offers of compromise, but also to completed compromises when offered against the compromiser."⁵⁶ Furthermore, Rule 408 extends to evidence of settlements between litigants and third parties.⁵⁷ The objective of Rule 408 is to encourage out-of-court compromise and settlement of disputes so as to "obviate ⁵³ the need for costly and

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time-consuming litigation.”⁵⁸ However, while Rule 408 does exclude evidence of settlement if offered to prove liability or nonliability or the amount of the claim, it does not protect settlement evidence for other purposes such as proving bias or prejudice of a witness.⁵⁹ Additionally, the question of whether to allow in evidence of settlement is within the discretion of the trial court.⁶⁰

As a safeguard of confidentiality, Rule 408 of the North Dakota Rules of Evidence suffers. Although it serves well in protecting a mediating party in subsequent litigation when another party attempts to bring into evidence the mediation discussions to prove liability or nonliability, it is useless when the information is used for other purposes. Furthermore, Rule 408 does not protect parties who have mediated their dispute from discovery requests in subsequent litigation. Additionally, whether a litigating party is attempting to bring in information about mediation discussions for “another purpose” is a hazy area subject to the discretion of the trial court. Because it is uncertain how a court would rule in a given instance, parties should be insecure about confidentiality when entering mediation with only Rule 408 on their side.

C. STATUTORY PROTECTION

Because of the uncertain protection offered by private confidentiality agreements and Rule 408, the North Dakota Legislature, in 1989, promulgated section 31-04-11 of the North Dakota Century Code to protect the confidentiality of mediation sessions. Section 31-04-11 states:

When persons agree to conduct and participate in a mediation for the purpose of compromising, settling, or resolving a dispute, evidence of anything said or of any admission made in the course of the mediation is inadmissible as evidence and disclosure may not be compelled in any subsequent civil proceeding except as provided in this section. This section does not limit the compulsion nor the admissibility of evidence if:

1. The evidence relates to a crime, civil fraud, or a violation under the Uniform Juvenile Court Act;

2. The evidence relates to a breach of duty by the mediator;

3. The validity of the mediated agreement is in issue; or

- *54 4. All persons who conducted or otherwise participated in the mediation consent to disclosure.⁶¹

Section 31-04-11 was patterned after California law as it stood in 1989, and was passed to “take [the] fear out of the mediation process.”⁶²

Currently, there is no case law in North Dakota interpreting the scope of the protection provided by section 31-04-11. Recently, however, the North Dakota Supreme Court analyzed the scope of protection offered by a similar statute in *Holum v. Trinity Medical Center*.⁶³ In *Holum*, the court analyzed the scope of the medical peer review privilege statute.⁶⁴ In doing so, the court indicated how it might interpret other statutory evidentiary restrictions such as section 31-04-11.⁶⁵

In *Holum*, the court initially noted that under Rule 501 of the North Dakota Rules of Evidence,

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no privilege may exist unless it is provided for by constitution, statute, or rule.⁶⁶ The court also noted that “evidentiary privileges must be narrowly construed because they are in “⁵⁵ derogation of the search for truth.”⁶⁷ However, according to the court, the rule of narrow construction is to be balanced against the “cardinal rule of statutory construction, which requires that the interpretation must be consistent with the legislative intent and done in a manner which will accomplish the policy goals and objectives of the statute.”⁶⁸ The court found that policy arguments in favor of a broad privilege were unpersuasive and noted that policy arguments are for the legislature.⁶⁹ Instead, the court held that the intent of the legislature must be determined from a strict reading of the statutory language and a court should not “disregard the letter of the statute under the pretext of pursuing its spirit.”⁷⁰ The court further noted that even though most states had enacted similar peer review statutes and had case law broadly interpreting the privilege, those decisions were of little persuasive authority because of the lack of uniformity in the wording of the different state provisions.⁷¹

The court’s analysis in *Holum* provides a good example of how a North Dakota court would likely interpret section 31-04-11.⁷² Like peer review privilege statutes, mediation privilege and confidentiality statutes lack uniformity among the states.⁷³ Because of the lack of uniformity, court decisions interpreting these types of statutes in other states provide little guidance.⁷⁴ Therefore, a strict reading of the language of section 31-04-11 is the key to determining the scope of its protection.

*⁵⁶ The language of section 31-04-11 reveals a lot about its scope and the potential problems which could arise with its application. The first potential problem is defining what type of statute was intended when the legislature passed section 31-04-11. Specifically, it is not clear from the language, or the legislative history, whether section 31-04-11 creates a rule of privilege or merely a statutory rule of inadmissibility.⁷⁵ The difference is significant. If a privilege was intended, then presumably, statements falling within the scope of the statute’s protection are not discoverable.⁷⁶ Conversely, if section 31-04-11 is merely an evidentiary rule, then information within the scope of section 31-04-11 may be discoverable.

The placement of section 31-04-11 in chapter 31-04 outlining the general rules on judicial proof, rather than in chapter 31-01, pertaining to witness rights and privileges, supports the proposition that section 31-04-11 was not intended to create a privilege. On the other hand, an argument could be made that the language of section 31-04-11 preventing compelled disclosure of anything said in a mediation session in subsequent civil proceedings prevents discovery, thus creating a privilege. However, given the approach of the court in *Holum*, it is quite possible that a court would narrowly construe that language to restrict subpoena power only, and not find a privilege.⁷⁷ This potential problem would be best dealt with by specifically stating in the statute that information which is not admissible is likewise not discoverable.⁷⁸ Clarification of this potential problem in section 31-04-11 would no doubt add more certainty to the question of confidentiality in mediation sessions in North Dakota.⁷⁹

*⁵⁷ A second potential problem with the application of section 31-04-11 pertains to the definitions of key terms. For instance, it is unclear whether the term “mediation” includes all formal and informal methods of dispute resolution, or merely includes formal mediation

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sessions with certified mediators or judges.⁸⁰ Another definition problem arises from the phrase "evidence of anything said or of any admission made in the course of the mediation."⁸¹ First, it is unclear whether statements made leading up to the actual mediation session are covered. In light of the court's analysis in *Holum*, it is likely that such statements are not protected.⁸² Second, the statute does not have an exception for otherwise admissible items of evidence which are discussed during the mediation session.⁸³ Yet another potential definition problem arises from the phrase "subsequent civil proceeding."⁸⁴ It is not clear from this language whether administrative proceedings are covered.⁸⁵ Although a statute can never be free from ambiguity, no matter how thorough, clear definitions of these key concepts would be beneficial in promoting the use of mediation in North Dakota.

A third potential problem with the application of section 31-04-11 is that it does not provide a rule of confidentiality.⁸⁶ Although the legislative history seems to indicate that confidentiality was on the minds of the legislators during committee hearings, nowhere in the statute is confidentiality mentioned.⁸⁷ Based on the court's analysis in *Holum*, a duty on the part of the mediation participants and the mediator to refrain from disclosing information obtained during the mediation session to *58 third parties would be difficult to find in section 31-04-11.⁸⁸ If the legislature intended that information disclosed during mediation be confidential as well as inadmissible, then a separate provision regarding confidentiality should be added.⁸⁹

A fourth potential problem with the application of section 31-04-11 is the lack of a rule prohibiting the mediator from giving testimony. Rule 605 of the North Dakota Rules of Evidence provides that a judge is not competent to testify in cases over which he or she is presiding.⁹⁰ Such a rule with regard to mediators would promote the mediator's neutrality and give a greater sense of security to the mediating parties.⁹¹

A final potential problem, which was raised in the committee hearings prior to the passage of section 31-04-11, is that no matter what type of protection the State of North Dakota erects over mediation proceedings, the federal government is not prevented from administratively subpoenaing mediation records or transcripts.⁹² Because that is the case, disputants who enter mediation may have a false sense of security concerning the confidentiality of the proceedings if the Internal Revenue Service or another federal agency comes knocking.⁹³

IV. CONCLUSION

Alternative dispute resolution, and especially mediation, has become one of the fastest growing areas of the law. Mediation has been uniformly recognized as a litigation alternative that not only saves disputants time and money, but also permits them to work together to settle *59 disputes and remain amicable afterward. North Dakota, like many other states, has taken affirmative steps to promote the use of mediation. Overall, section 31-04-11 of the North Dakota Century Code is an example of a decent mediation confidentiality statute which provides some protection to mediation participants. However, as section 31-04-11 approaches its tenth year in existence, its flaws have yet to be fleshed out by the courts. Based upon case law and legislative actions in other states, such as California, and the actions of our own legislation with regard to other statutory privileges, it would appear that section 31-04-11 is not flawless. Therefore, if motivating disputants to utilize mediation is the policy objective of section 31-04-11, then the legislature should address its potential problems before the courts get a hold of it.

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Footnotes

- a1 Law Clerk to the Honorable Rodney S. Webb, Chief Judge, United States District Court for the District of North Dakota, J.D., University of North Dakota, 1996.
- 1 See, e.g., Kent L. Brown, Comment, *Confidentiality in Mediation: Status and Implications*, 1991 J. DISP. RESOL. 307, 308-09 (1991). One commentator referred to the mediation process as one of "hash[ing] it out" with each other rather than "thrash[ing] it out" against each other. See Christopher H. Macturk, Note, *Confidentiality in Mediation: The Best Protection Has Exceptions*, 19 AM. J. TRIAL ADVOC. 411, 434 (1995).
- 2 See, e.g., Lawrence R. Freedman & Michael L. Prigoff, *Confidentiality in Mediation: The Need for Protection*, 2 OHIO ST. J. ON DISP. RESOL. 37 (1986).
- 3 See, e.g., Kevin Gibson, *Confidentiality in Mediation: A Moral Reassessment*, 1992 J. DISP. RESOL. 25 (1992) (discussing the problem of confidentiality in mediation and the arguments for and against an absolute privilege); see also Peter N. Thompson, *Confidentiality, Competency and Confusion: The Uncertain Promise of the Mediation Privilege in Minnesota*, 18 HAMLINE J. PUB. L. & POL'Y 329 (1997).
- 4 See Michael L. Prigoff, *Toward Candor or Chaos: The Case of Confidentiality in Mediation*, 12 SETON HALL LEGIS. J. 1, 1 (1988); Jonathan M. Hyman, *The Model Mediator Confidentiality Rule: A Commentary*, 12 SETON HALL LEGIS. J. 17, 30 (1988).
- 5 See Macturk, *supra* note 1, at 415 (citing *Lake Utopia Paper Ltd. v. Connelly Containers, Inc.*, 608 F.2d 928, 930 (2d Cir. 1979); *People v. Snyder*, 492 N.Y.S.2d 890, 891 (N.Y. App. Div. 1985)); see also Michael A. Perino, *Drifting Mediation Privileges: Lessons From the Civil Justice Reform Act*, 26 SETON HALL L. REV. 1, 6 (1995) (citing Robert H. Mnookin, *Why Negotiations Fail: An Exploration of Barriers to the Resolution of Conflict*, 8 OHIO ST. J. DISP. RESOL. 235, 248 (1993)). Because mediation requires parties to come to their own settlement under the guidance of a neutral third party, the mediator has no decision making power and cannot coerce parties into being open and forthright. See *Local 808, Bldg. Maintenance, Serv. & R.R. Workers v. National Mediation Bd.*, 888 F.2d 1428, 1436 (D.C. Cir. 1989) (noting that mediation is an art form that relies heavily on powers of persuasion rather than coercion and adjudication). Unless the parties to a mediation are assured of some form of confidentiality, they will not have the motivation to fully participate in the process and make open and frank disclosures to other disputants and the mediator. *Lake Utopia Paper*, 608 F.2d at 930. As one commentator noted:
 [F]or the process to work, it is essential for the mediator to encourage the parties to discuss candidly with her all of the relevant issues, especially those that may be impeding settlement. To help the parties resolve their dispute, the mediator must be able to evaluate the parties' real motives and interests. The mediation process involves drawing out of the parties a list of all relevant issues and encouraging compromise and accommodation. The mediator's ability to assure that facts conveyed to her will remain confidential aids this process. Indeed, ... mediation becomes 'impossible if the parties [are] constantly looking over their shoulders.'
 Perino, *supra*, at 6 (citing Lawrence R. Freedman & Michael L. Prigoff, *Confidentiality in Mediation: The Need for Protection*, 2 OHIO ST. J. DISP. RESOL. 37, 38 (1986)); see also Alan Kirtley, *The Mediation Privilege's Transition from Theory to Implementation: Designing a Mediation Privilege Standard to Protect Mediation Participants. The Process and the Public Interest*, 1995 J. DISP. RESOL. 1, 8-10 (1995).
- 6 See, e.g., Brown, *supra* note 1, at 310.
- 7 See *N.L.R.B. v. Joseph Macaluso, Inc.*, 618 F.2d 51, 54 (9th Cir. 1980); *Royal Caribbean Corp. v. Modesto*, 614 So. 2d 517, 519 (Fla. Dist. Ct. App. 1992). In *Macaluso*, the court noted that the parties involved in mediation sessions must have the confidence that information disclosed will not subsequently be divulged, voluntarily or by compulsion. *Macaluso*, 618 F.2d at 53-56. The court went on to note that: "[T]he complete exclusion of mediator testimony is necessary to the preservation of an effective system of labor mediation, and ... labor mediation is essential to continued industrial stability, a public interest sufficiently great to outweigh the interest in obtaining every person's evidence." *Id.* at 56.

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- 8 N.D. CENT. CODE § 31-04-11 (1996).
- 9 See Macturk, *supra* note 1, at 417-18; Joshua P. Rosenberg, *Keeping the Lid on Confidentiality: Mediation Privilege and Conflict of Laws*, 10 OHIO ST. J. ON DISP. RESOL. 157, 165 (1994); Eric R. Max, *Confidentiality in Environmental Mediation*, 2 N.Y.U. ENVTL. L.J. 210, 215-16 (1993).
- 10 See Macturk, *supra* note 1, at 417-18.
- 11 See Rosenberg, *supra* note 9, at 166; see also *Grumman Aerospace Corp. v. Titanium Metals Corp.*, 91 F.R.D. 84, 87-88 (E.D.N.Y. 1981). In *Grumman*, the court held that parties should not be permitted to contract privately for confidentiality of documents, which would prohibit others from obtaining relevant materials in the course of litigation. *Id.* The court therefore held that a party to a confidentiality agreement had to comply with a discovery request made by a nonparty to the agreement. *Id.*
- 12 Rosenberg, *supra* note 9, at 166; see also Macturk, *supra* note 1, at 417-18 (citing *United States v. Kentucky Util. Co.*, 927 F.2d 252 (6th Cir. 1991)).
- 13 See Rosenberg, *supra* note 9, at 166.
- 14 See Macturk, *supra* note 1, at 417 (citing Brown, *supra* note 1, at 318; Freedman & Prigoff, *supra* note 2, at 41; OKLA. STAT. ANN. tit. 12, Ch. 37, App. C (West 1990) (pertaining to confidentiality contracts)).
- 15 See FED. R. EVID. 408; N.D.R. EVID. 408.
- 16 Max, *supra* note 9, at 214.
- 17 See FED. R. EVID. 408; see also N.D.R. EVID. 408.
- 18 FED. R. EVID. 408.
- 19 Macturk, *supra* note 1, at 418; see also Brown, *supra* note 1, at 312.
- 20 Macturk, *supra* note 1, at 418.
- 21 *Id.*
- 22 FED. R. EVID. 408.
- 23 Macturk, *supra* note 1, at 418 (noting that evidence of settlements is normally not probative because the parties may be motivated by achieving peace rather than admitting liability).
- 24 FED. R. EVID. 408; see also *Freidus v. First Nat'l. Bank of Council Bluffs*, 928 F.2d 793, 794-95 (8th Cir. 1991); Max, *supra* note 9, at 215.

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25 See FED. R. EVID. 408.

26 Max, *supra* note 9, at 215.

27 *Id.*

28 *See id.*

29 *See* Rosenberg, *supra* note 9, at 161-62; Macturk, *supra* note 1, at 420; Brown, *supra* note 1, at 315.

30 *See* Macturk, *supra* note 1, at 420. Macturk notes that "[t]he privilege may be raised by or on behalf of anyone who holds it," as opposed to an evidentiary objection, like Rule 408, which must be raised by a party to the litigation." *Id.* (quoting NANCY H. ROGERS & CRAIG A MCEWEN, *MEDIATION: LAW, POLICY, PRACTICE* § 9:04 (2d ed. 1994)).

31 *See id.*; *see also* FED. R. CIV. P. 26(b).

32 J. WIGMORE, *WIGMORE ON EVIDENCE* § 2285 (1961) (emphasis original); *United States v. Nixon*, 418 U.S. 683, 710-13 (1974) (dealing with executive privilege and balancing the general privilege of confidential presidential communications against the specific need for evidence in a pending criminal trial); *United States v. Gullo*, 672 F. Supp. 99, 103-04 (W.D.N.Y. 1987) (applying a similar four part test in federal courts).

33 618 F.2d 51, 54 (9th Cir. 1980).

34 *N.L.R.B. v. Joseph Macaluso Inc.*, 618 F.2d 51, 56 (9th Cir. 1980).

35 *See id.*

36 *See* *State v. Castellano*, 460 So. 2d 480, 481 (Fla. Dist. Ct. App. 1984) (holding that privileges are not creatures of judicial decisions); *People v. Sanders*, 457 N.E.2d 1241, 1245 (Ill. 1983) (holding that expansion and creation of privileges should be left to the legislature), *In re Parkway Manor Healthcare Ctr.*, 448 N.W.2d 116, 121 (Minn. Ct. App. 1989) (noting that there is a longstanding judicial hostility toward evidentiary privileges).

37 *See* *Carman v. McDonnell Douglas Corp.*, 114 F.3d 790, 792 (8th Cir. 1997). An "ombudsman" in that case referred to "an employee outside of the corporate chain of command whose job is to investigate and mediate workplace disputes [T]he corporate ombudsman purports to be an independent and neutral party who promises strict confidentiality to all employees and is bound by the Code of Ethics of the Corporate Ombudsman Association." *Id.* at 792-93.

38 *Id.* at 794-95.

39 *Id.* at 793. The court noted that new common law privileges are not created lightly. *Id.* Further, the court held that a corporate ombudsman is able to promise confidentiality and maintain neutrality without the existence of a privilege. *Id.* at 793-94. The possibility of later use of the information brought out in a mediated settlement in later civil litigation was not enough to justify the

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creation of a new privilege. *See id.* at 793.

- 40 *See* Kirtley, *supra* note 5, at 2-4; *see also* ROGERS & MCEWEN, *supra* note 30, at 204 (listing, by scope and jurisdiction, selected confidentiality legislation). State statutes dealing generally with mediation proceedings include the following: ARIZ. REV. STAT. ANN. § 12-2238 (1994); CAL. EVID. CODE §§ 1115-28 (West Supp. 1998); COLO. REV. STAT. § 13-22-307 (1997); FLA. STAT. ANN. § 44.102 (West Supp. 1996) (court ordered mediation), § 90.501 (West 1988) (the general privilege rule of evidence), and § 455.2235 (West Supp. 1998) (establishing rules governing mediation); 710 ILL. COMP. ANN. STAT. 20/6 (West 1992); IOWA CODE ANN. § 679.12 (West 1987); MASS. GEN. LAWS ANN. ch. 233, § 23C (West 1985); MINN. STAT. ANN. § 595.02 (West 1988 & Supp. 1998); MO. ANN. STAT. § 435.014 (West 1992); MONT. CODE ANN. § 26-1-811 (1997); NEB. REV. STAT. § 25-2914 (1995); NEV. REV. STAT. § 48.109 (1996); N.D. CENT. CODE § 31-04-11 (1996); OHIO REV. CODE ANN. § 2317.02(H) (Anderson 1995); OKLA. STAT. ANN. tit. 12, § 1805 (West 1993); OR. REV. STAT. § 36.220 (1997); R.I. GEN. LAWS § 9-19-44 (1997); TEX. CIV. PRAC. & REM. CODE ANN. § 154.073 (West 1996); UTAH CODE ANN. § 78-31b-7 (1996); VA. CODE ANN. § 8.01-581.22 (Michie 1992); WASH. REV. CODE ANN. § 5.60.070 (West 1995); WIS. STAT. ANN. § 904.085 (West Supp. 1997); WYO. STAT. § 1-43-103 (Michie 1997). Furthermore, many states have promulgated privilege statutes for specific areas such as divorce or child custody mediation. *See, e.g.*, MINN. STAT. ANN. § 583.26 (West 1988 & Supp. 1998) (farm mediation); N.D. CENT. CODE § 14-09.1-06 (1997) (child custody). Several model statutes have been proposed as well. *See* Jonathan M. Hyman, *The Model Mediator Confidentiality Rule: A Commentary*, 12 SETON HALL LEGIS. J. 17, 71-73 (1988). Also, the American Bar Association Standing Committee on Dispute Resolution drafted a model provision for presentation to the ABA House of Delegates, but it has never been adopted. *Id.* at 65-70. *See also* Thompson, *supra* note 3, at 372-75 (outlining a proposed statute for Minnesota).
- 41 *See* Ryan v. Garcia, 33 Cal. Rptr. 2d 158, 160-61 (Cal. Ct. App. 1994) (noting that public policy is to promote mediation as a preferable alternative to litigation by providing confidentiality); *see also* Kirtley, *supra* note 5, at 15.
- 42 Kirtley, *supra* note 5, at 15.
- 43 *See supra* note 40.
- 44 Kirtley, *supra* note 5, at 4.
- 45 *See* 710 ILL. COMP. A NN. STAT. 20/6 (West 1993); IOWA CODE ANN. § 679.12 (West 1987); N.Y. JUD. LAW § 849-b (McKinney 1992).
- 46 *See, e.g.*, MASS. GEN. ANN. LAWS ANN. ch. 233, § 23C (West 1986); MICH. COMP. LAWS ANN. § 691.1557 (West Supp. 1997); N.Y. JUD. LAW § 849-b(6) (McKinney 1992); OR. REV. STAT. § 36.220 (1996); TEX. CIV. PRAC. & REM. CODE ANN. § 154.073(b) (West 1997); VA. CODE ANN. § 8.01-581.22 (Michie 1992).
- 47 *See, e.g.*, OHIO REV. CODE ANN. § 2317.02 (Anderson 1995).
- 48 *See, e.g.*, NEV. REV. STAT. ANN. § 48.109 (Michie 1993) (containing an exception for otherwise discoverable and admissible evidence).
- 49 However, statutory protection is not without its problems, especially in multi-state litigation, due to the disparity between states' confidentiality provisions. *See, e.g.*, Max, *supra* note 9 (discussing the problems associated with confidentiality in multi-state, multi-party environmental litigation); Rosenberg, *supra* note 9 (discussing the problems with state confidentiality statutes and multi-state litigation).

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- 76 Rule 26(b) of the North Dakota Rules of Civil Procedure provides that: "Parties may obtain discovery regarding any matter, *not privileged*, which is relevant to the subject matter involved in the pending action." N.D. R. CIV. PRO. 26(b); *see also* Thompson, *supra* note 3, at 340-41 (discussing the effect of information being privileged).
- 77 *Holum*, 544 N.W.2d at 152-57.
- 78 Section 1119 of the California Evidence Code, after which section 31-04-11 of the North Dakota Century Code was patterned, was amended in 1993 to include a prohibition against discovery of the mediation information. CAL. EVID. CODE § 1119 (West Supp. 1998). The current version of Section 1119 reads in part: "Except as otherwise provided in this section, evidence of anything said or of any admission made in the course of the mediation is not admissible in evidence or subject to discovery." *See id.*
Furthermore, North Dakota's current medical peer review privilege specifically provides for protection from discovery. N.D. CENT. CODE § 23-34-03 (Supp. 1997). Section 23-34-03 provides: "Peer review records are privileged and are not subject to subpoena or discovery or introduction into evidence in any civil or administrative action." N.D. CENT. CODE § 23-34-03; *see also* N.D. CENT. CODE § 14-09.1-06 (1997) (pertaining to mediation in contested child custody proceedings).
- 79 It is interesting to note that the appeal in *Holum* resulted from a conflict over this issue. *Holum*, 544 N.W.2d at 151-52. Specifically, the parties disagreed over whether section 23-02.1-08 made certain items privileged, thereby protecting those items from discovery requests. *Id.*
- 80 N.D. CENT. CODE § 31-04-11. *See Hearings on S. 2308 Before the North Dakota Senate Judiciary Comm.*, Mar. 15, 1989 (noting concern over the definition of "mediation"). *See also* CAL. EVID. CODE § 1115 (1997) (defining mediation and mediator).
- 81 N.D. CENT. CODE § 31-04-11.
- 82 *See Holum*, 544 N.W.2d at 152-57. This potential problem has been cured in California by legislative amendment. Section 1119 of the California Evidence Code amended section 1152 in 1997 to provide that "evidence of anything said or any admission made for the purpose of or, in the course of, or pursuant to, a mediation or mediation consultation is [not] admissible." *See Law Revision Commission Comments*, CAL. EVID. CODE § 1119 (1997).
- 83 *See* N.D. CENT. CODE § 31-04-11. This potential problem has also been remedied in California by legislative amendment. *See* CAL. EVID. CODE § 1120 (West Supp. 1998). Section 1120 of the California Evidence Code specifically addresses the problem of otherwise admissible evidence. *Id.*
- 84 N.D. CENT. CODE § 31-04-11.
- 85 North Dakota's medical peer review privilege statute specifically provides for protection in administrative proceedings. N.D. CENT. CODE § 23-34-03. California has also remedied this potential problem through legislative amendment. Section 1119 of the California Evidence Code provides that information obtained during a mediation session shall not be admissible or subject to discovery "in any arbitration, administrative adjudication, civil action, or other noncriminal proceeding in which, pursuant to law, testimony can be compelled to be given." CAL. EVID. CODE § 1119.
- 86 *See* N.D. CENT. CODE § 31-04-11.
- 87 *See* Minutes of Committee hearings for S.B. 2308, 1989 N.D. Laws ch. 408, § 1.

I just spoke with BND. The mediator will only allow witnesses at the mediation event that are technical experts or a direct party to the disagreement. Other parties may attend only if both sides agree. Heitkamp would like Senator Dotzenrod to be there but that can happen only if the Ag Department agrees. I am told Dotzenrod would not take part in the mediation but would like be there as an observer.

Tom

Tom Silbernagel, Administrator
ND AG Mediation Service
ND Dept. of Agriculture
Phone 701-328-2061
Fax 701-328- 2240
tsilbern@nd.gov

From: Junkert, Ken S.
Sent: Monday, June 13, 2011 8:44 AM
To: Gray, Jim A.; Christman, Bob J.
Subject: (b) (6) Privacy Concerns

Bob and Jim,

I have asked Tom to contact the UND Conflict Center and get an update. (b) (6) Privacy is not able to just invite whomever he wants to the mediation session. The notion that he can invite legislators to "pressure" the department will not be allowed. The mediator will only allow witnesses at the mediation event that are technical experts or a direct party to the disagreement.

Much more later...

Kenneth S. Junkert
Administrative Services Division Director
North Dakota Department of Agriculture
Business phone: 701-328-4756
Business fax: 701-328-4567
kjunkert@nd.gov

I did visit with Charles Carvell about this issue. He is willing to accompany me to the mediation. Also, since (b) (6) Privacy is bringing legal counsel, Charles suggested a requirement that (b) (6) Privacy sign a document stating clearly that anything discussed at the mediation cannot be used in a legal proceeding against the department or another party.

Jim Gray
Pesticide, Feed and Fertilizer Division Director
North Dakota Department of Agriculture
600 E. Boulevard Ave., Dept. 602
Bismarck, ND 58505-0020
Office: 701-328-1505
Mobile: 701-220-1645
Fax: 701-328-4567

From: Silbernagel, Tom J.
Sent: Thursday, April 28, 2011 8:19 AM
To: Gray, Jim A.
Cc: Christman, Bob J.; Junkert, Ken S.; Nelson, Betty L.
Subject: (b) (6) Privacy Mediation

Jim,

UND Conflict Resolution Center has been contracted to do the (b) (6) Privacy mediation. A copy of our assignment letter to them is attached. You are listed as the contact person for Ag Department. You will notice from the letter that the (b) (6) Privacy are being assisted by an attorney. If you want Charles C. or someone else to attend the mediation or attend it with you just let UND know when you are contacted. You will be given a chance to evaluate this process upon its completion.

Please contact me if you have questions.

Tom

Tom Silbernagel, Administrator
ND AG Mediation Service
ND Dept. of Agriculture
Phone 701-328-2061
Fax 701-328- 2240
tsilberh@nd.gov

Junkert, Ken S.

From: Silbernagel, Tom J.
Sent: Thursday, April 28, 2011 8:19 AM
To: Gray, Jim A.
Cc: Christman, Bob J.; Junkert, Ken S.; Nelson, Betty L.
Subject: (b) (6) Privacy Mediation
Attachments: (b) (6) Privacy Med..pdf

Jim,

UND Conflict Resolution Center has been contracted to do the (b) (6) Privacy mediation. A copy of our assignment letter to them is attached. You are listed as the contact person for Ag Department. You will notice from the letter that the (b) (6) Privacy are being assisted by an attorney. If you want Charles C. or someone else to attend the mediation or attend it with you just let UND know when you are contacted. You will be given a chance to evaluate this process upon its completion.

Please contact me if you have questions.

Tom

Tom Silbernagel, Administrator
ND AG Mediation Service
ND Dept. of Agriculture
Phone 701-328-2061
Fax 701-328-2240
tsilbern@nd.gov

Junkert, Ken S.

From: Silbernagel, Tom J.
Sent: Monday, May 02, 2011 8:48 AM
To: Junkert, Ken S.
Subject: RE: (b) (6) Privacy Mediation

Ken

We do not have a document but NDCC 6-09.10-10 states in part "information created , collected , and maintained by the agricultural mediation service in the course of any of any formal or informal mediation is confidential and is not subject to the open records requirements of section 44-04-18. Such information may be released only upon written consent of all parties to the mediation or pursuant to an order issued by the court upon a showing of good cause." I am not sure if this would address Jims concerns or not.

Information from a mediation has be subpoenaed by the courts before and to my knowledge the AG's office has been able to quash the subpoena every time.

Tom

Tom Silbernagel, Administrator
ND AS Mediation Service
ND Dept. of Agriculture
Phone 701-328-2061
Fax 701-328- 2240
tsilbern@nd.gov

From: Junkert, Ken S.
Sent: Monday, May 02, 2011 7:49 AM
To: Silbernagel, Tom J.
Subject: FW: (b) (6) Privacy Mediation

Tom,

Do you have a document as suggested?

Kenneth S. Junkert
Administrative Services Division Director
North Dakota Department of Agriculture
Business phone: 701-328-4756
Business fax: 701-328-4587
kjunkert@nd.gov

From: Gray, Jim A.
Sent: Sunday, May 01, 2011 6:54 PM
To: Silbernagel, Tom J.
Cc: Christman, Bob J.; Junkert, Ken S.
Subject: RE: (b) (6) Privacy Mediation

Tom:

Gray, Jim A.

From: Carvell, Charles M.
Sent: Monday, May 09, 2011 4:41 PM
To: Silbernagel, Tom J.
Cc: Gray, Jim A.
Subject: mediation confidentiality
Attachments: Confidentiality.Memorandum,May.2011.docx; 74 nd law rev. 45.1998.rtf

Tom,

Attached is a memo on the subject. The memo refers to a law review article that is also attached.

Charles

Memorandum

To: Tom Silbernagel, N.D. Ag Mediation Service
From: Charles Carvell, Asst. Att'y General
Re: Confidentiality of Mediation Sessions
Date: May 9, 2011

You asked that I look at the confidentiality provision in Chapter 6-9.10, that is, Section 6-09.10-10. You said that you thought that the statute gives confidentiality status to all that occurs in a mediation session unless a court orders otherwise. After I expressed some doubt about the provision's breadth, you asked that I research the issue.

Section 6-09.10-10 states:

6-09.10-10. Mediation - Open records and meetings exception.

Information created, collected, and maintained by the agricultural mediation service in the course of any formal or informal mediation is confidential and is not subject to the open records requirements of section 44-04-18. Such information may be released only upon written consent of all parties to the mediation or pursuant to an order issued by the court upon a showing of good cause. All mediation meetings and meetings involving the board, staff, negotiators, or mediators wherein the finances of specific farmers, creditors, and others are discussed, are confidential, closed meetings and are not subject to the open meetings requirements of section 44-04-19.

The provision has three sentences. The last one doesn't address confidentiality among the participants to a mediation session, but rather addresses the state's broad "open meeting" law. Even though the sentence is irrelevant to your question I want to draw it to your attention because you may want to consider asking the legislature to amend it. It states that "meetings involving the board, staff, negotiators, or mediators wherein the finances of specific farmers, creditors, and other are discussed" are not subject to the open meetings law. ~~But while it is clear that the sessions are closed where "the finances of specific farmers, creditors, and others are discussed," what about a session like the one coming up involving (b) (6) Privacy that doesn't have anything to do with finances?~~ There is a real question whether the third sentence can be read to close mediation sessions not involving finances, and perhaps a significant concern for you in light of the 2011 Legislature's expansion of the kind of mediation work done by your agency.

As for the first two sentences of Section 6-09.10-10, they do address confidentiality of records but the scope of the confidentiality provided isn't too broad. It is confined to what mediators may have "created" or "collected" and to what they "maintain[.]" I believe that Jim Gray's concern—which led to the questions you asked me—is with statements that mediation participants make during a mediation session. In particular,