# The Importance of Keeping Mediators' Statements Confidential

*By: Eric D. Green, Natasha C. Lisman and Jeffrey C. Stern*
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Lawyers, judges, mediators, and parties should be concerned over one aspect of the decision in a recent bad-faith settlement case, Massachusetts Port Authority v. Employers Insurance of Wausau, Lawyers Weekly No. 01-387-04, reported in the January 10, 2005 edition of this paper. Among other grounds for denying the insurer's motion for summary judgment, the Superior Court cited statements that had been made by three mediators, former judges James Lynch, Robert Steadman, and Lawrence Shubow, during three separate mediations in the course of the underlying litigation. We take no position on the merits of the case or on whether there were sufficient other grounds to support the Court's ruling. Our concern is about the introduction of the mediators' statements, which in our view poses a serious threat to the integrity and effectiveness of mediation as a method of dispute resolution.

While it is not clear from the Court's opinion exactly how the mediators' statements were introduced or if either party participated in their disclosure, it does not matter for reasons of public policy. G.L.c. 233, sec. 23C clearly provides that all communications made in the course of and relating to the subject matter of any mediation, including statements by the mediator, are confidential and not subject to disclosure in any judicial or administrative proceeding. This statute reflects and promotes the value of mediation as a highly beneficial form of dispute resolution and reinforces the public policy choice in favor of voluntary, informal out of court dispute resolution. Mediation offers the parties fair, private, cost-effective, speedy, and creative dispute resolution and empowers them to take responsibility for managing and resolving their own disputes. At its best, it reorders their relationship, transforms their attitudes towards the subject of the conflict, and teaches them how to resolve disputes in better ways in the future. Mediation also assists the courts, oftentimes struggling with enormous case loads and backlogs, by providing a mechanism for voluntary or court-connected dispute resolution without the need for the full adjudicatory process.

But as lawyers, judges, legislatures, scholars and parties acknowledge, confidentiality of mediation is essential for its success. Settlement requires that the parties and the mediator be free to engage in candid, unbridled discussions about the case without fear that something they say in mediation can later be used in a subsequent proceeding. To permit such subsequent use, as was done in the MassPort case, will cast a deadly chill and severely impair the mediation process and all its important benefits. Without assurances that the mediation process is risk free and confidential (except where all the parties and the mediator agree on disclosure), mediation will either not be used at all or all the participants will behave in a manner that will render it ineffective. Parties and lawyers will hold back and resort to the posturing and uncompromising adversarial positions that mark the litigation process, while mediators – as, we are informed, has begun already to happen - will refrain from expressing any views on the

settlement value or merits of a case, which can be a very useful tool in a mediator's toolbox.

The meaning of G.L. c. 233, sec. 23C and the importance of faithfully adhering to it were recognized by the Appeals Court in 2002, in the Father Geoghan civil cases. Stressing that "confidentiality is crucial to the effectiveness of mediation" and that "our legislature has enacted a statute that plainly reflects a policy judgment in favor of confidentiality," a single justice of the Appeals Court held that "section 23C confers blanket confidentiality protection on the mediation process" and, therefore, required that a subpoena directed to mediator Paul A. Finn in those cases be quashed.

The admission and use of the three mediators' statements in the MassPort case are likewise inimical to Section 23C and its underlying policy and, if permitted to stand unchallenged and uncorrected, could lead to long-lasting damage to a vital instrument of policy and justice – the unhampered and confident use of private means of dispute resolution such as mediation.

The courts of the Commonwealth need to enforce Section 23C's blanket prohibition on the use of mediation statements, especially a mediator's candid evaluation, notwithstanding the temptations in any particular case to cite them as evidence of bad faith, good faith or for impeachment. The advocates in a case or the court will be motivated in the short run to use such statements as relevant, probative evidence on the matters in dispute. But it is the very essence of the law of privilege that common law and statutory privileges (such as 23C) exist because the long term public policy goals reflected in the privilege outweigh the short term gains that use of the evidence in the specific case may yield. These long-term public policy goals trump the usual rules of evidence, but it requires an abiding commitment to guiding principles to prevent the erosion of important systematic values by the expediencies presented in the immediate case.

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