MEDIATOR TESTIMONY---PATCHING THE DOME . . .

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Confidentiality and Non-disclosure of the Mediation proceedings are fundamental concepts that permeate our court annexed Alternative Dispute Resolution process---**Supreme Court Rule 31**.[1] Indeed, Mediation proceedings were supposed to be shielded from disclosure and wrapped in a "Dome" of confidentiality. Unfortunately, Mediators have increasingly found themselves in the middle of post mediation disputes wherein a party has sought to force the Mediator to testify to matters occurring within the Mediation. As a result, the "Dome of Confidentiality" began to leak.

The Supreme Court recently applied a "patch" to the "Dome" by its adoption of new **§ 10(f)** to the **Supreme Court's Rule 31.**[2] And, the Court took a giant stride toward ensuring true Mediation confidentiality.The newly adopted **§ 10(f)** provides:

> Rule 31 Neutrals **shall not** be called as a witness to enforce any terms of the resulting agreement. (emphasis added).

One might observe that this new rule settles the debate surrounding Mediator testimony. Well, . . . **"not exactly"** . . . .

The Dome of Confidentiality

There were always multiple provisions within **Rule 31** that purported to erect a "shield or Dome of confidentiality" around the proceedings and prohibited the Mediator from disclosure of information learned during the proceedings.[3] Indeed, **§10(d) of Rule 31** is the most notable of these prohibitions that appeared to contain a clear shield of confidentiality and prohibited prying information from the Mediator, to wit:

> "Neutrals shall preserve and maintain the confidentiality of all information obtained during Rule a 31 ADR Proceedings and **shall not divulge information obtained by them** during the course of Rule 31 ADR Proceedings without the consent of the parties, **except as otherwise required by law."** (emphasis added).

There is also a statutory prohibition against Mediator testimony within the domestic realm that provides:

> "The Mediator **shall not be compelled to testify** in any proceeding unless all parties to the mediation and the mediator agree in writing."[4]

Lawyer-Mediators have additional confidentiality/non-disclosure prohibitions superimposed upon **Rule 31**.[5] Indeed, the **Rules of Professional Conduct** (**RPC**) equate the confidentiality of information learned during the Mediation session by the lawyer/mediator to that of information learned from a "client".[6] It also protects information that is obtained within the mediation from an individual caucus as client information from disclosure to the other party

parties to the Mediation.[7] Thus, the information learned in the mediation becomes cloaked with the "lawyer-client" privilege against disclosure by the lawyer.

Since the "lawyer-client privilege has been triggered, the lawyer/mediator must resist disclosing client information even to a tribunal (information learned during the mediation).[8] And, it only gets worse for the lawyer/mediator.

These same rules (**RPC)** then seemingly allow the lawyer to disclose the information if so ordered by the Court.[9] However, it is **only** after the lawyer has **consulted** with the client (i.e., party to a mediation) regarding an appeal of the trial court order requiring the disclosure protected client information.[10] Hence, if the lawyer/mediator is unsuccessful at resisting an effort to force disclosure of mediation information, she must advise and consult with the party to the mediation who opposed the disclosure. *[How awkward is that ?]*.

Since the "lawyer-client" privilege has now been incorporated into the "Dome of Mediation", let us briefly consider the application of the law of privilege to this briar patch. Our Rules of Evidence do recognize that privileges against testimony/disclosure of information do exist and are enforceable.[11]

The Commentators list several recognized privileges and appear to draw a fine distinction between a mere declaration of information as "confidential" and the creation of an actual "privilege" against its disclosure.[12] This suggests that labeling mediation proceedings "confidential" may not create an evidentiary " privilege" that precludes testimony by the Mediator. Thus, perhaps the language of **Rule 31** is not strong enough to create a "privilege" that would be recognized under **Evidence Rule 501**. (And, perhaps, the Supreme Court does need to write some more and literally label the Rule 31 confidentiality admonitions a "privilege").

Nonetheless, the late Don Paine opined in his book that a "Mediation Privilege" existed in Tennessee.[13] Hence, a Mediator would violate that privilege by testifying although it appears that it would be limited to Rule 31 mediations.[14] If there is a Mediation Privilege, then how can a Mediator be lawfully forced to violate the privilege by testifying ?

One would think that if these multiple, apparent prohibitions did not create an impenetrable "dome" around a mediation session, then we do not need to write anymore. But alas, those pesky lawyers aided by judges found creative means to pierce the confidentiality shield surrounding mediation. And, the "dome" of confidentiality appeared more a fragile bubble that would burst with the right pin prick rather than an impenetrable dome.

The reason that parties desire the Mediator's testimony is because the Mediator becomes the "tie-breaker". As the disinterested, neutral party by definition, who better than the Mediator to "break the tie" between the parties post-mediation dispute and tilt the scales in favor of one or the other ? And, that is also precisely the reason that Mediators should not be allowed to testify in post mediation proceedings.

In another writing, I observed that forcing the Mediator to testify made the Mediator---a "Snitch". Regardless of whether one agrees with my colorful label, it cannot be denied that

whenever a Mediator testifies, it prejudices one party. Indeed, if the Mediator's testimony is not prejudicial to one party, then why is it relevant or material ?

Under Tennessee's definition of Relevant Evidence, the proffered testimony must tend . . . "to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."[15] the concepts of relevancy and materiality have been merged under the umbrella term---"Relevant Evidence".[16] Thus, in the context of a dispute over the enforcement of a mediated, settlement agreement, the Mediator testimony must tend to make some fact that is "of consequence to the determination" of whether to enforce the mediated agreement more likely than not. Therefore, if the Mediator's testimony is "relevant", then the Mediator by definition will have prejudiced one party. And, the neutrality of the mediator and confidentiality of the mediation have vanished.

One of the weak spots in the "Dome" was the phrase . . . "unless otherwise required by law" found in both **Rule 31** and the **Rules of Professional Conduct**.[17] The author has never understood what this phrase means although the Rules of Professional Conduct suggest that a court order is sufficient to invade the lawyer-client privilege.[18] Indeed, the judge who presided over the **McMahan**[19] post mediation motions wondered aloud from the Bench as to its meaning.

It is difficult to understand how the "otherwise required by law" concept can trump an absolute statutory prohibition in the domestic context that provides the mediator . . . **"shall not be compelled to testify in any proceeding"** . . . .[20] Nonetheless, this seemingly absolute prohibition was cast aside or rather ignored in **McMahan**.[21]

Piercing the Dome . . .

The most notable blow to the prohibition against Mediator testimony came from the Court of Appeals in **McMahan v. McMahan**.[22] John McMahan (a well known trial lawyer) and his wife (the holder of a Masters Degree and a Rule 31 Neutral) were embroiled in an ugly divorce. After a long day of mediation with their counsel at their elbows, they reached a settlement of their issues and it was reduced to 32 hand, written paragraphs with each page initialed or signed by the parties. Within 24 hours, Mrs. McMahan had settlor's remorse because allegedly she was under duress and coerced into signing the agreement by her husband.

The husband filed a motion to enforce the settlement agreement, whereupon all the judges in Hamilton County fled requiring a Chancellor from Knox County to preside over the post mediation fray. The Mediator was subpoenaed by the husband to testify at the Hearing to corroborate the husband's position that the wife did not exhibit any signs of duress or coercion during the mediation.

A subpoena was issued for the Mediator, but no Motion to Quash the subpoena was filed by the Mediator. And, the Mediator took the stand and made no *per se* objection to being called. Although during the Mediator's testimony, there were some confusing efforts to protect confidentiality. Nonetheless, the Mediator testified that she observed no "conduct" by the wife that indicated duress or coercion.

The trial court granted the motion to enforce the settlement agreement and wife appealed to the Court of Appeals. One of the alleged errors was that the trial court allowed the Mediator to testify despite her objection. The Court of Appeals affirmed the trial court's allowance of the mediator testimony observing that it did not reveal confidential statements or "assertive conduct" by the parties.

The Mediator had testified . . . *that wife seemed to understand the parties assets and that she did not recall noticing any confusion on wife's part. She stated that wife appeared to be able to participate fully in the process, and that she did not observe any slurred speech by wife. She further testified that she would not have allowed wife to sign a mediation agreement had she noticed any confusion or incapacity on the wife's part".*[23]

The Court of Appeals held that the issue of **Rule 31** confidentiality was **not** implicated by the mediator's testimony. Indeed, the Court stated:

> *"The mediator in this case was careful not to testify to statements or assertive conduct made by wife. She did not disclose confidential information or attempt to prove liability via conduct or statements made in the course of the mediation (referring to **TRE 408**). We find no error in the trial court's decision to receive the testimony of the mediator in this case".*[24]

The appellate court ultimately agreed with the trial court holding that the mediation agreement was a binding and enforceable contract upon the wife.

Although McMahan reached the correct result (enforcing the Settlement Agreement), the author is of the firm opinion that **McMahan** was analytically flawed for a number of reasons. The most obvious reason is that it was in a divorce mediation and there is a statutory prohibition upon Mediator testimony in the context of divorce mediation, to wit:

> "The Mediator **shall not be compelled** to testify in any proceeding unless all parties to the mediation and the mediator agree in writing." (emphasis added).[25]

This statute clearly applied, but it was neither pleaded nor mentioned anywhere in the Record at the trial or appellate level or the Court of Appeals opinion. There is also the lawyer-client privilege that applies to lawyer/mediators,[26] the Mediator Privilege recognized by Don Paine[27] and the multitude of Rule 31 provisions[28] that would have arguably precluded the testimony of the Mediator, that were neither raised nor discussed. Finally, the discussion of **TENN. R. EVID. 408** missed the mark because it does not address whether the Mediator can be forced to testify.

In reflecting upon whether the Mediator testimony was appropriate in **McMahan**, let us consider a threshold issue --- was it necessary for the trial court to pierce the dome of confidentiality to decide the issue ? For instance, another Rule 31 admonition to the Mediator is that thou shalt not . . . " knowingly assist the parties in reaching an agreement which for reasons such as fraud, duress, overreaching, the absence of bargaining ability, or unconscionability would not be enforceable."[29] Thus, if the mediator perceived that Mrs. McMahan was under duress, she would presumably have stopped the proceeding. Indeed, the

Mediator filed her report with the Court stating . . . " both parties appeared and participated in good faith in the mediation and that the case was settled in the mediation process". [30] Therefore, what information was gained by forcing the Mediator to testify that was not already explicitly stated in the Report ?

An Ethics Advisory Opinion issued by the ADR Commission followed the **McMahan** analysis and stated that a Mediator might testify in a proceeding before the Board of Professional Responsibility regarding the "conduct" of a lawyer during the mediation.[31] The lawyer was accused of leaving the client alone at the Mediation session in order to return to his office and have lunch and prepare for his imminent vacation.

The Opinion affirmed that it would be permissible for the Mediator to testify as to whether the lawyer left the client at the mediation "in order to return to his office to eat a hotdog".[32] The Committee observed that it required "careful calibration to avoid violating Rule 31's prohibition on Mediator testimony and the Mediator must avoid disclosure of "confidential statements or affirmative conduct by the parties".[33] Although the Committee sanctioned such disclosure by the Mediator in that instance, it also appeared to recognize that "information obtained from a party" also included "affirmative conduct" by a party and it was also protected by the "dome" of confidentiality.

After **McMahan**, we knew that the express language of multiple provisions purporting to prohibit Mediator testimony did not insulate the Mediator from being forced to testify**.** Let us explore whether the "patch" (newly adopted **§ 10(f)**) applied by the Supreme Court will seal the puncture inflicted by **McMahan** upon the "dome of confidentiality".

"The Patch"

New **§10(f)** attacks the issue literally "at the water's edge" by the language . . **. "shall not be called as a witness to enforce any terms of the resulting agreement".** That certainly appears to be an absolute prohibition upon Mediator testimony so long as the dispute relates to enforcing the "terms of the resulting agreement".

Even though the precise issue in **McMahan** was alleged coercion and inability of the wife to effectively participate in mediation, it was an attempt to avoid the enforcement of the "terms" of the settlement agreement. Thus, §**10(f)** would prohibit the mediator from testifying under the facts of **McMahan** even if it were "non-assertive conduct" because one party is attempting to enforce the "resulting agreement". And, it may be viewed as a *de facto* overruling of the **McMahan** "non-assertive conduct analysis".

The new rule by its express language will not prohibit mediator testimony regarding the "conduct" of a lawyer at least in the context of an ethical complaint. Hence, the remaining "soft spot" in the Dome may be "conduct" within the Mediation that does not relate to enforcing the terms of a mediated agreement. In that sense, **§ 10(f)** might be considered consistent with the ADR Commission's Ethics Advisory Opinion that the mediator might properly testify regarding a lawyer's conduct within the mediation.[34]

In the Author's view, attempting to differentiate between "statements" and "conduct" by a party in a mediation embroils one in a tangled legal thicket. For instance, "non-verbal conduct" by a party is considered a "statement" if it is intended by the person as an assertion.[35] For instance, would the alleged failure to bargain in "good faith" in a mediation be considered "assertive" or "non-assertive conduct" ? Might the mediator properly testify that one party was unwilling to make an offer of settlement, to consider offers, or make counter-offers because it constituted "conduct" ?

The applicable rules and statutes that specifically purport to shield disclosure are phrased in terms of "information disclosed to the Mediator" or "obtained by the Mediator" in the mediation. [36] However, is the conduct of a party "observed" by the Mediator, "information obtained" in the course of the mediation ?

Allowing testimony by the Mediator that relates to the "conduct" of a lawyer has some logic because we do not wish to shield unethical conduct from exposure. However, the conduct of a party is more problematic because it may trigger the concept of "non-verbal" conduct that rises to the level of a "statement" or "assertive conduct".

One could certainly argue that the language chosen by the Supreme Court suggests that it did not intend to erect an absolute prohibition upon Mediator testimony. If the Supreme Court does not wish to impose an absolute prohibition upon mediator testimony, then the method employed by the divorce statute might serve as a useful model.[37]

This statute contains specific exceptions to otherwise "confidential and privileged" information[38] although it still retains the absolute prohibition upon Mediator testimony.[39] Accordingly, the Supreme Court might modify **Rule 31** to preclude any Mediator testimony EXCEPT in certain defined, limited circumstances. That approach would avoid "parsing" whether the testimony sought to be disgorged from the Mediator is "information" versus "conduct" by specifically identifying what may be extracted from the Mediator.

After The Patch

New **§ 10(f)** to **Rule 31** is a welcome and needed refinement of the rules governing Mediator testimony. And, it clearly insulates the Mediator from testifying in disputes that seek to enforce the terms of mediated agreements. Hence, it will prevent the Mediator from becoming the "Snitch" or Tie-Breaker in those situations.

Nonetheless, it leaves a soft spot in the "dome of confidentiality" because it is not an absolute prohibition upon mediator testimony. New **§ 10 (f)** has told us when the Mediator specifically **cannot** be forced to testify --- it has not told us when the Mediator **can** be forced to testify. Consequently, we are still left to grapple with those situations outside the prohibition of **§10 (f)** and whether the mediator is "otherwise required by law" to testify to information/matters occurring within the mediation despite multiple other provisions that purport to erect the Dome of Confidentiality. But Alas, that dilemma's resolution must abide another day, but it will not go away.

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[1] **TENN. S. CT. R. 31**.
[2] **TENN. S. CT. R. 31**, **§10 (f).**
[3] See **TENN S. CT. R. 31, §§ 5(a); 7; 10(d); & Appendix A, § 7**.
[4] **TCA § 36-4-130(c)**.
[5] **TENN. S. CT. R. 8**, **Rules of Professional Conduct § 2.4 (c)((9)** requiring the Lawyer Acting as a Dispute Resolution Neutral to comply with Rule 31. [Hereafter, "RPC"].
[6] **RPC 2.4(c)(4).**
[7] **RPC 2.4 (5) and RPC 1.6**.
[8] **RPC 1.6(a).**
[9] **RPC 1.6 (c)(2). Comment to [l4b].** "Unless review is sought, however, paragraph **(c)(2)** permits the lawyer to comply with the court's order".
[10] **RPC 1.6(c)(2). Comment to [14b]**. "In the event of an adverse ruling, the lawyer must consult with the client about the possibility of appeal to the extent required by **RPC 1.4**".
[11] **TENN. R. EVID. 501**.
[12] See, Advisory Comments, **TENN. R. EVID. 501**.
[13] **PAINE, TN LAW OF EVIDENCE (5th ed.) § 5.10 [1]**. Paine cites **Rule 31, §7** and **Ledbetter vs. Ledbetter,** 163 S.W.3d 681 (Tenn. 2005) in support of his thesis that a "Mediator Privilege" has been recognized in Tennessee.
(Tenn. 2005) as authority for his conclusion that there is a mediator privilege.
[14] Paine cites **Rule 31, §7** and **Ledbetter vs. Ledbetter,** 163 S.W.3d 681 (Tenn. 2005) in support of his thesis that a "Mediator Privilege" has been recognized in Tennessee.
[15] **TENN. R. EVID. 401.**
[16] **TENN. R. EVID. 401**. See, Advisory Commission Comments. "The materiality concept is found in the words, . . . 'any fact that is of consequence to the determination of the action'. To be relevant, evidence must tend to prove a material issue."
[17] See, **Rule 31 §10(d)** and **RPC 1.6 (c)(2).**
[18] **RPC 1.6 (c)(2). Comment to [l4b].** "Unless review is sought, however, paragraph **(c)(2)** permits the lawyer to comply with the court's order".
[19] **McMahan v. McMahan, 2005 Tenn. App. LEXIS 756, Ct. App. # E2004-03032-COA-R3-CV (December 5, 2005), no perm. app.**
[20] **TCA § 36-4-130(c)**.
[21] **McMahan v. McMahan**. **2005 Tenn. App. LEXIS 756, Ct. App. # E2004-03032-COA-R3-CV (December 5, 2005), no perm. app.**
[22] **McMahan v. McMahan, supra.**
[23] **McMahan** at p. 11.
[24] **Id.**
[25] **TCA § 36-4-130 (c).**
[26] **RPC 2.4 (c)(4).**
[27] **PAINE, TN LAW OF EVIDENCE (5th ed.) § 5.10 [1]**.
[28] See **TENN S. CT. R. 31, §§ 5(a); 7; 10(d); & Appendix A, § 7**,
[29] **Rule 31, § 10(a)(3).**
[30] **McMahan,** at p. 1.

[31] **TENN. ADR COMM. Ethics Advisory Opinion # 2012-0002.**
[32] **Id.**
[33] **Id.**
[34] **ADR COMM. Ethics Advisory Opinion # 2012-0002**.
[35] **TENN. R. EVID. 801 (a)(2).**
[36] **TENN. S.CT. R. 31§ 10(d)** and **TCA § 36-4-130(c)**.
[37] **TCA § 36-4-130(c)**.
[38] **TCA § 36-4-130 (b)(2)-(5)**
[39] **TCA § 36-4-130(c)**.