COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

2002-J-0435

FRANCIS LEARY, A/K/A & others

vs.

FATHER JOHN J. GEOGHAN & others.

AMENDED ORDER

Pursuant to G. L. c. 231, § 118, para. 1, Attorney Paul A. Finn ("the mediator"), a non-party engaged by the plaintiffs and a number of the defendants ("the supervisory defendants)[1] to provide dispute resolution services in this litigation, petitions for interlocutory relief from an order of a judge of the Superior Court, denying the mediator's Renewed Motion for a Protective Order.[2] [3] The order requires the mediator to honor a subpoena

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[1] The defendants in question are alleged to have failed to use reasonable care to prevent the sexual abuse of the plaintiffs by another defendant, Father John J. Geoghan.

[2] The order is in the form of an endorsement dated July 31, 2002, and supplemented by a second endorsement, dated August 2, 2002. The first endorsement reads: "On 7/25/02, after reviewing a deposition taken by the defendants of Mitchell Garabedian, the plaintiffs' counsel, I ruled that the defendants had waived any privilege in the mediation process and the communications arising from or related to the mediation were thus not confidential. It

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and appear as a witness at an evidentiary hearing on the plaintiffs' motion to enforce a settlement, which, the plaintiffs contend, was reached with the supervisory defendants at the end of the mediation process.

It is the plaintiffs who wish to call the mediator as a witness in support of their contention that the mediation resulted in a final and binding settlement agreement. They have represented to the motion judge in open court on July 25, 2002,[4] that their sole purpose in calling the mediator is to ask him whether a document that was drafted at the conclusion of the mediation contained all of the terms that the parties wished to

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is the parties who hold the privilege and the right of confidentiality, not the mediator. The plaintiffs have not asserted the privilege, nor do they wish to claim it. The defendant waived it by directly inquiring of Mr. Garabedian about conversations between the mediator, counsel and a representative of [the] diocese. A detailed finding was made on the record on 7/25/02, as previously referenced. Mr. Finn is required to appear for trial."

The second endorsement reads: "8/02/02 - Supplemental Endorse[ment] (also made on record in open court during trial.) At testimony yesterday and today both plaintiffs' counsel (Mr. Garabedian) and defense counsel (Mr. Rogers) have testified re: the mediation process, conversations that took place during mediation, including some where mediator was present. (Objection was lodged by defendants during testimony.)"

[3] The motion also was brought by Attorney Finn's co-mediator, Attorney Sara E. Worley. However, the motion judge's order does not by its terms apply to her, and she has not joined in the petition for interlocutory relief.

[4] A transcript of the July 25, 2002 has been filed and made part of the single justice record.

include in an agreement to settle. The mediator contends that eliciting this testimony would violate G. L. c. 233, § 23C, governing the confidentiality of mediation proceedings.[5]

This statute provides:

> All memoranda, and other work product prepared by a mediator and a mediator's case files shall be confidential and not subject to disclosure in any judicial or administrative proceeding involving any of the parties to any mediation to which such materials apply. Any communication made in the course of and relating to the subject matter of any mediation and which is made in the presence of such mediator by any participant, mediator or other person shall be a confidential communication and not subject to disclosure in any judicial or administrative proceeding; provided, however, that the provisions of this section shall not apply to the mediation of labor disputes.
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> For the purposes of this section a "mediator" shall mean a person not a party to a dispute who enters into a written agreement with the parties to assist them in resolving their disputes and has completed at least thirty hours of training in mediation and who either has four years of professional experience as a mediator or is accountable to a dispute resolution organization which has been in

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[5] At the hearing on the mediator's petition, held before me on August 2, 2002, the mediator also advanced a second argument: that he is protected from testifying by provisions contained in and incorporated into the mediation agreement entered into by him and the parties. The mediator represents that these contractual provisions were considered by the motion judge and that she declined to enforce them; however, the record before me does not indicate when or on what basis this issue was ruled upon. Because the record is so limited, and because the petition and the motion judge's order are directed only at the mediator's statutory claim, I do not address the mediator's contractual argument.

> existence for at least three years or one who has been appointed to mediate by a judicial or governmental body. (Emphasis supplied.)

It is implicit in the motion judge's order that she found preliminarily that the prerequisites for invoking the confidentiality protections of the statute were met: that Attorney Finn qualifies as a "mediator" as defined in the last paragraph of the statute, and that the testimony sought to be elicited from him would involve the disclosure of "communication(s) made in the course of and relating to the subject matter of [the] mediation" and "in the presence of such mediator." There is no basis to disturb those findings.

I therefore address only the motion judge's interpretation of the statute. The judge construed the statute as not establishing an absolute bar to disclosure, but as creating a waivable privilege, belonging solely to the parties to the mediation and capable of being waived explicitly or by conduct. Because she found that the privilege was waived by both the plaintiffs and the supervisory defendants, she concluded that the statute created no impediment to the mediator's testimony.

The mediator claims that the motion judge's decision is legally erroneous and constitutes an abuse of discretion, because the prohibitions contained in the statute are not subject to waiver. Alternatively, he contends that, even if the statutory prohibitions may be waived, the mediator, as well as the parties,

holds the privilege, and there is no finding (nor any basis for finding) that he has waived it. The plaintiffs take the position that the judge's analysis was correct, but that even if the mediator also holds the privilege, he may be found to have waived it in this case because of an interview that he gave to the press, with the consent of counsel for the parties, after the mediation was concluded.[6]

The interpretation of the mediation confidentiality statute is a matter of first impression, which, but for the fact that it arises in the urgent context of a pending hearing, would benefit from thorough appellate consideration in the normal course, perhaps with the assistance of amicus briefs from mediation groups and the trial bar. However, even given the limitations of single justice review, it appears that the motion judge's ruling is legally incorrect and must be vacated.

As mediation has gained popularity as an alternative method of dispute resolution, virtually all States have promulgated statutes or court rules providing for varying degrees of confidentiality in mediation. See generally, A. Kirtley, "The Mediation Privilege's Transition from Theory to Implementation: Designing a Mediation Privilege Standard to Protect Mediation

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[6] The defendants support the mediator's position. In addition, they dispute the judge's ruling that, by their behavior in this litigation, they have waived any privilege created by the statute. That issue is not presented by the mediator's petition and is not before me.

Participants, the Process and the Public Interest," 1995 J. Disp. Resol. 1, 2 & n.6 (Kirtley); P. A. Kentra, "Alternative Dispute Resolution Symposium: Hear No Evil, See No Evil, Speak No Evil: The Intolerable Conflict for Attorney-Mediators Between the Duty to Maintain Mediation Confidentiality and the Duty to Report Fellow Attorney Misconduct," 1997 B.Y.U.L. Rev. 715, 733 (Kentra). The underlying rationale of these statutes and rules is that confidentiality is crucial to the effectiveness of mediation. As one commentator has explained:

> The willingness of mediation parties to 'open up' is essential to the success of the process. The mediation process is purposefully informal to encourage a broad ranging discussion of facts, feelings, issues, underlying interests and possible solutions to the parties' conflict. Mediation's private setting invites parties to speak openly, with complete candor. In addition, mediators often hold private meetings -- 'caucuses' -- with each of the parties. . . . Under such circumstances, mediation parties often reveal personal and business secrets, share deep-seated feelings about others, and make admissions of fact and law. Without adequate legal protection, a party's candor in mediation might well be 'rewarded' by a discovery request or the revelation of mediation information at trial. A principal purpose of the mediation privilege is to provide mediation parties protection against these downside risks of a failed mediation. Participation will diminish if perceptions of confidentiality are not matched by reality. Another critical purpose of the privilege is to maintain the public's perception that individual mediators and the mediation process and neutral and unbiased.

Kirtley, supra at 8-10.

Even before mediation statutes were widely enacted, this rationale was the basis for recognizing a common law mediation privilege in NLRB v. Joseph Macaluso, Inc., 618 F.2d 51 (9th Cir. 1980). Macaluso upheld the revocation of a subpoena that would have required a federal mediator to testify in a proceeding to establish that a final collective bargaining agreement had been reached by the parties. The court concluded that the complete exclusion of mediator testimony was necessary to preserve an effective system of labor mediation.

There are those who have suggested that the need for strict confidentiality may be overstated. See E. D. Green, "A Heretical View of the Mediation Privilege," 2 Ohio St. J. on Disp. Resol. 1 (1986). However, our legislature has enacted a statute that plainly reflects a policy judgment in favor of confidentiality, and it is that statute and that policy judgment that dictates the result here.

Unlike the mediation statutes in some other States, G. L. c. 233, § 23C, confers blanket confidentiality protection on the mediation process, including an explicit prohibition on disclosure in judicial proceedings, without listing any exceptions, other than one for labor mediations, which are governed by a separate statute, G. L. c. 150, § 10A. See Kentra, supra at 734-740 & accompanying notes. Also unlike some other

statutes, G. L. c. 233, § 23C, is silent as to whether confidentiality ever may be waived, and if so, by whom. See Kirtley, supra at 32-33 & accompanying notes.[7] One trial court, when faced with a similarly worded mediation statute, has concluded that a party cannot waive confidentiality and thereby subpoena the records of mediation sessions which he attended. See People v. Snyder, 492 N.Y.S.2d 890, 891-892 (Sup. Ct. 1985). See also, Swatch v. Treat, 41 Mass. App. Ct. 559, 563 (1996) (confidentiality of peer review proceedings persists even if a patient or provider involved with the process "blows the cover of confidentiality").

I conclude that whether or not the parties have chosen to maintain the confidentiality of the mediation, G. L. c. 233, § 23C, does not permit a party to compel the mediator to testify, when to do so would require the mediator to reveal communications made in the course of and relating to the subject matter of the mediation. Compelling such testimony, even if potentially helpful to the motion judge's decision on the merits of the parties' dispute, would conflict with the plain intent of the statute to protect the mediation process and to preserve mediator effectiveness and neutrality.

The order denying the mediator's Renewed Motion for a

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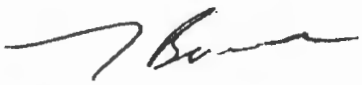
[7] For a different approach, see the Uniform Mediation Act drafted by the National Conference of Commissioners on Uniform States Laws and reprinted at 22 N. Ill. U.L. Rev. 165 (2002).

Protective Order is vacated and a new order shall enter allowing the motion.

By the Court (Cohen, J.),



Assistant Clerk

Entered: August 5, 2002