Symposium on Critical Issues in Mediation Legislation

The Need For Explicit Privilege

1. Communications in mediation originate in a confidence that the disputant believes will not be disclosed. The inherent nature of compromise and settlement, along with the explicit assurances uniformly provided by mediators and program directors, foster the belief in the parties to that the proceedings are confidential.

2. Confidentiality in mediation is essential, as noted above, to the full and satisfactory maintenance of the relationship between the parties.

3. The community has clearly encouraged the practice of mediation. Community groups, courts, bar associations, and others have been active in the development of programs. The policy of law favoring compromise and settlement of disputes which mediation advances is clear.

4. The injury to mediation that would occur by the disclosure of communications is greater than the benefit gained by the correct disposal of particular litigation. Without confidentiality, the mediation process becomes a house of cards subject to complete disarray by variety of potential disruptions. Thus, many practitioners feel that one well-publicized case of disclosure could deeply taint their efforts. Parties will be more reluctant to enter a process where there is fear it might be used against them in subsequent legal action. Even if they do participate, the caution in negotiating, which the threat of disclosure would require, would, in many instances, render the process a pro forma nullity. A well-publicized case of mediator testimony could forever damage the mediator’s reputation for neutrality and confidentiality.

Referring Principles:

XII.5 - Settlement privilege