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# Confidentiality in Mediation

Jaime Alison Lee & Carl Giesler

*Paranzino v. Barnett Bank*, 690 So. 2d 725 (Fla. Dist. Ct. App. 1997); and *Bernard v. Galen Group*, 901 F. Supp. 778 (S.D.N.Y. 1995).

As mediation has become a more widely practiced method of dispute resolution, many jurisdictions have enacted rules<sup>1</sup> forbidding participants to divulge information discussed during the mediation.<sup>2</sup> Two recent cases, *Paranzino v. Barnett Bank*<sup>3</sup> and *Bernard v. Galen Group*,<sup>4</sup> are among the first to deal with the enforcement of such rules by judicial sanction. In both cases, participants in judicially-required mediations were severely sanctioned for breaching confidentiality in violation of mediation rules and/or court orders.

This case comment will argue that strong judicial commitment to confidentiality is critical to the success of the mediation process as a means of dispute resolution. However, it also will argue that severe sanctions such as those imposed in *Bernard* and *Paranzino* are an inappropriate means of compelling confidentiality, unless they are applied within a framework of carefully deliberated and well-crafted rules that fully address the issue's complexity. Valid exceptions to

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1. See 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*, J. DISP. RESOL. 1 (1995); Kent L. Brown, Comment, *Confidentiality in Mediation, Status and Implications*, J. DISP. RESOL. 307, 307 (1991); Lawrence Freedman, *Confidentiality a Closer Look*, in ABA SPECIAL COMMITTEE ON DISPUTE RESOLUTION, CONFIDENTIALITY IN MEDIATION: A PRACTITIONER'S GUIDE 47, 49 (Lawrence Freedman et al. eds., 1995). See, e.g., ARIZ. REV. STAT. ANN. §§ 12-2238 (1994) (general), and 25-381.16 (1994) (divorce); CAL. CIV. PROC. CODE § 1297.371 (West Supp. 1994) (international commercial disputes); CAL. EVID. CODE § 1152.2 (West Supp. 1994) (general); FLA. STAT. ANN. §§ 44.101(3) (West Supp. 1994) (family), 44.102 (West Supp. 1994) (court-ordered mediation).

2. These mandates expand on the confidentiality protections given to the mediation process by both common law admissibility doctrine and by state and federal rules of evidence. See, e.g., *Byrd v. State*, 367 S.E.2d 300 (Ga. App. Ct. 1998) (holding that party's admissions during a court-mandated mediation were not admissible during subsequent trial on grounds of public policy); FED. R. EVID. 408 (dealing with "Compromises and Offers to Compromise").

3. 690 So. 2d 725 (Fla. Dist. Ct. App. 1997)

4. 901 F. Supp. 778 (S.D.N.Y. 1995)

the confidentiality rule may exist; rulemakers, whether judicial or legislative, must weigh their policy implications and provide participants in advance with clear rules as to how they will be handled. Otherwise, participants will receive overbroad assurances of confidentiality, raising their expectations and simultaneously disappointing them as the rules fall to inevitable challenges and breach. Contrary to their intent, strict enforcement of broad guarantees of confidentiality will undermine participants' confidence in confidentiality rules and ultimately jeopardize the integrity of the mediation process.

### I. THE FACTS OF *PARANZINO*

In *Paranzino*, Victoria Paranzino sued Barnett Bank for breach of contract.<sup>5</sup> She alleged that she went to a Barnett branch with \$200,000 in cash to purchase two \$100,000 certificates of deposit, but that Barnett issued her only one \$100,000 certificate despite her transmittal of \$200,000 to the bank's teller.<sup>6</sup>

Pending litigation, the parties attended court-ordered mediation.<sup>7</sup> Subsequent to the mediation, the bank offered to settle.<sup>8</sup> Paranzino rejected the proposal.<sup>9</sup> Though the parties signed a written agreement binding them to confidentiality, about five months after the proffered settlement Paranzino, her daughter, and her attorney divulged to the *Miami Herald* their view of the case.<sup>10</sup> They related not only their version of the facts but also the specific terms of Barnett's settlement offer.<sup>11</sup>

Following the publication of the Paranzino's account in the *Herald*, the bank moved to strike Paranzino's pleadings and to impose sanctions, on the ground that Paranzino breached the court-ordered confidentiality clause of the mediation agreement signed by the participants.<sup>12</sup> The trial court granted both requests, dismissing the case with prejudice, the severest possible sanction.<sup>13</sup>

In sustaining the striking of plaintiff's pleadings as well as the dismissal, the appellate court determined that by disclosing details of the mediation proceedings, Paranzino had "disregarded the court's

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5. See 690 So. 2d at 726.

6. See *id.*

7. See *id.*

8. See *id.*

9. See 690 So. 2d at 726.

10. See *id.* at 726-27.

11. See *id.*

12. See *id.* at 727.

13. See 690 So. 2d at 727.

authority."<sup>14</sup> The signed mediation agreement and the rules referenced therein mandated confidentiality.<sup>15</sup>

The appellate court also determined that the trial court exercised proper discretion in dismissing the case with prejudice.<sup>16</sup> It reasoned that "[i]f the trial court were to allow this willful and deliberate conduct to go unchecked, continued behavior in this vein could have a chilling effect upon the mediation process."<sup>17</sup> Adopting the strict language cited in other Florida cases, the court stated firmly that "[w]here the parties do not effectuate a settlement agreement . . . *the confidentiality afforded to parties must remain inviolate.*"<sup>18</sup>

## II. THE FACTS OF *BERNARD*

In *Bernard*, Peter Bernard and the other plaintiffs sued for a preliminary injunction and the appointment of a receiver in a patent, copyright, and trademark suit.<sup>19</sup> Despite the plaintiffs' objections, the trial judge referred the case to mediation.<sup>20</sup> The parties were informed of the confidential nature of the proceedings via the written notice of selection of a mediator, by at least one court order, and by the mediator himself.<sup>21</sup>

Shortly after the mediation commenced, the parties related conflicting accounts of the mediation through unsolicited letters to the judge. The plaintiffs' lead counsel, Donald Cornwell, accused the defendants of "fail[ing] to make any serious settlement offer," making the mediation as "a very expensive waste of time."<sup>22</sup> The defendants responded that "they ha[d] offered more than is justified or reasonable and have done everything they can to resolve the matter" and requested that the judge "keep the mediation process open."<sup>23</sup>

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14. *See id.*

15. *See id.* (referencing FLA. STAT. ch. 44.102(3) and FLA. R. CIV. P. 1.73).

16. *See id.* at 729.

17. 690 So. 2d at 729.

18. *Id.* at 728 (emphasis added) (citing *Gordon v. Royal Caribbean Cruises Ltd.*, 641 So. 2d 515, 517 (Fla. 3d DCA 1994)). *See also*, *Royal Caribbean v. Modesto*, 614 So. 2d 517 (Fla. 3d DCA 1992); *Hudson v. Hudson*, 600 So. 2d 7 (Fla. 4th DCA 1992). All of these cases involve participants who disclosed proposed settlement terms because they erroneously thought the settlement was final, although they were not in writing or signed as required by the court and therefore did not meet the standard permitting for disclosure.

19. 901 F. Supp. at 780.

20. *See id.*

21. *See id.*

22. *Id.* at 781.

23. 901 F. Supp. at 781.

In a subsequent letter to the judge, Cornwell argued that the defendants' claim "that they have attempted in good faith to settle" constituted "an outrageous attempt to mislead the court."<sup>24</sup> Cornwell then asserted that the defendant's characterization of the process compelled the plaintiffs to "embroil the Court in the details of the parties' settlement discussions . . . in order to set the record straight."<sup>25</sup> Accordingly, he divulged to the judge details of the mediation process, including the specific terms of settlement offers proposed by both the defendants and the plaintiffs.<sup>26</sup>

Upon learning of Cornwell's detailed disclosures, the defendants' counsel requested sanctions for violating the confidentiality mandated by the court order and the mediation provisions.<sup>27</sup> In defense, Cornwell argued that the defendants "opened the door" by "[choosing] to inform the Court about the mediation process in violation of this Order and deliberately misrepresented the parties' respective settlement positions to the Court."<sup>28</sup> Furthermore, he claimed, he "had no choice, in view of the defendants' letters to the Court, but to disclose 'exactly what the status of the [settlement] discussions were.'"<sup>29</sup>

Judge Denny Chin disagreed. He found that the defendants had made no statements that "opened the door" to discussions of the mediation communications.<sup>30</sup> Moreover, the judge determined that Cornwell's claim that he "had no choice" but to breach confidentiality was unjustified, as he could have objected to the defendants' characterizations of the mediation without divulging specific details about the settlement amounts, a disclosure that directly violated the court order of confidentiality.<sup>31</sup>

Accordingly, Judge Chin levied a fine of \$2,500 against Cornwell.<sup>32</sup> Adopting the language of the Second Circuit, he reasoned that "if participants cannot rely on the confidential treatment of everything that transpires during [mediations] then counsel of necessity will feel constrained to conduct themselves in a cautious, tight-lipped, non-committal manner more suitable to poker players in a high-stakes game than to adversaries attempting to arrive at a just

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24. *Id.*

25. *Id.* at 781-82.

26. *See id.* at 782.

27. *See* 901 F. Supp. at 782.

28. *Id.* at 782-83.

29. *See id.*

30. *See id.* at 782.

31. *See* 901 F. Supp. at 783.

32. *See id.* at 785.

resolution of a civil dispute."<sup>33</sup> In applying this analogy to the mediation process of his own jurisdiction, Judge Chin noted that "[p]articipants in the Mediation Program rely on the understanding that all matters discussed during the mediation process will be kept confidential, and the breach of the applicable confidentiality provisions threatens the integrity of the entire Program."<sup>34</sup>

### III. A STRONG COMMITMENT TO CONFIDENTIALITY: JUSTIFIED BOTH ON THE FACTS AND IN THEORY

*Paranzino* and *Bernard* show that courts are willing to use their strongest judicial powers to preserve the confidentiality of the mediation process, an approach supported by the facts of the cases and also by a central tenet of mediation theory: that the process inherently requires a substantial guarantee of confidentiality to be effective.

Based on the facts, the participants were appropriately penalized for blatantly ignoring their obligations to keep confidentiality. In both cases, the sanctioned participants questioned whether they were bound to confidentiality at all, despite clear evidence that they had given meaningful consent to their duties of confidentiality. In *Paranzino*, the parties executed and signed a "Mediation Report and Agreement," which forbid them to "disclose any discussions" and which also referenced the appropriate state statutes and rule of civil procedure that more thoroughly delineated the confidentiality requirements.<sup>35</sup> In *Bernard*, the mediator orally told the participants of their responsibility, and the court also issued two written orders clearly stating: "The entire mediation process is confidential. The parties and the Mediator may not disclose information regarding the process, the settlement terms, to the court or to third parties unless all parties otherwise agree."<sup>36</sup> However, the sanctioned counsel in *Bernard* admitted that he simply "didn't pay attention to" the court order.<sup>37</sup> In light of these facts, the courts rejected both parties' claims of ignorance and found their breaches to be willful and deliberate.<sup>38</sup> Disturbed by the parties' failure to consider both the importance of confidentiality and the court's authority to regulate their

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33. *Id.* at 784 (quoting *Lake Utopia Paper Ltd. v. Connelly Containers, Inc.*, 608 F.2d 928, 930 (2nd Cir. 1979)).

34. *Id.* at 784.

35. *See* 901 F. Supp. at 783.

36. *Id.* at 780.

37. *Id.* at 782.

38. *See id.* at 784; 690 So. 2d at 728-29 (affirming trial court finding).

actions in the proceedings, both courts took appropriately powerful steps to deter similar breaches of confidentiality.

The need for strong deterrence is based on the premise that mediation will not be effective if participants are not assured of a substantial guarantee of confidentiality.<sup>39</sup> As the *Paranzino* court recognized, allowing breaches of confidentiality to go "unchecked" would have a "chilling effect upon the mediation process."<sup>40</sup> There are at least two ways in which confidentiality plays a critical role in the mediation process: it affords the parties the freedom to participate fully by protecting both general communications and specific settlement offers from disclosure to either the courts or to third parties, and it also protects the integrity of the mediator's role in the process.

It is crucial that parties feel free from fear of disclosure of mediation communications to either the court or to third parties.<sup>41</sup> Mediation asks its participants to identify the full range of their interests and encourages them to explore many ways to meet these interests.<sup>42</sup> Fully assessing these interests and options often means divulging to the mediator and/or to the other participant sensitive personal information and emotional attitudes towards others.<sup>43</sup> It might include revealing sensitive business information, or making statements of fact or law.<sup>44</sup> The breadth of a participant's revelations of such information, and thus the success of the mediation in addressing them, clearly depends upon the degree of protection that participants have against disclosure.<sup>45</sup> Parties without adequate protection against disclosure will choose not to mediate, or, if ordered to mediate by a court, will be less forthright.<sup>46</sup> As the *Bernard* court noted, participants in non-confidential mediation proceedings "will . . . conduct

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39. See generally, Bruce A. Biltman, *Mediation in Florida: The Newly Emerging Case Law*, 70 FLA. B.J. 44 (1996); Lawrence R. Freedman & Michael L. Prigoff, *Confidentiality in Mediation: The Need for Protection*, 2 OHIO ST. J. DISP. RESOL. 37 (1986); Kirtley, *supra* note 1; Christopher H. Macturk, Note, *Confidentiality in Mediation: The Best Protection Has Exceptions*, 19 AM. J. TRIAL ADVOC. 411 (1995); Note, *Protecting Confidentiality In Mediation*, 98 HARV. L. REV. 441 (1984).

40. 690 So. 2d at 729.

41. See Kirtley, *supra* note 1, at 9-11; Macturk, *supra* note 39, at 415, 416; Note, *supra* note 39, at 444-45.

42. See Kirtley, *supra* note 1, at 9; Freedman & Prigoff, *supra* note 39, at 38; Macturk, *supra* note 39, at 415; Note, *supra* note 39, at 445.

43. See Freedman & Prigoff, *supra* note 39, at 38; Kirtley, *supra* note 1, at 9.

44. See Freedman & Prigoff, *supra* note 39, at 38; Kirtley, *supra* note 1, at 9.

45. See Freedman & Prigoff, *supra* note 39, at 38; Macturk, *supra* note 39, at 415.

46. See Biltman, *supra* note 39, at 50; Freedman & Prigoff, *supra* note 39, at 38; Kirtley, *supra* note 1, at 17; Macturk, *supra* note 39, at 415; Note, *supra* note 39, at 445.

themselves in a cautious, tight-lipped, non-committal manner more suitable to poker players . . . ."<sup>47</sup>

Not only do participants require protection against personal embarrassment from potential disclosure to third parties or the public; they also require assurances that mediation communications will not disadvantage them in future court proceedings.<sup>48</sup> For example, in *Bernard*, the sanctioned disclosures were not made publicly but to the presiding judge.<sup>49</sup> Participants require assurances that the mediation process, as an alternative to formal adjudication, will not be abused as a means of introducing evidence and information that otherwise would be undiscoverable or inadmissible in court.

In addition to general mediation communications, specific settlement terms (whether merely proposed or accepted) also deserve protection. Disclosing the terms of an offer, or even the fact that an offer is made, might be damaging to participants if used as an example of "proof" of wrongdoing,<sup>50</sup> if perceived as an admission of guilt, or if used as a comparative value on which similar judgments might be based in the future.<sup>51</sup> For example, such disclosure of settlement terms was sanctioned in *Paranzino*, where a newspaper printed the settlement terms and statements claiming that "the bank *would not have made the offer unless it felt its case were shaky*. . . . [the bank] handled the transaction badly, and . . . the bank's lawyer knows it . . . ."<sup>52</sup> Such attempts to use mediation communications as evidence of wrongdoing or to "try the case in public" must be prevented to avoid chilling the possibilities of settlement.

Secondly, confidentiality is critical to the effectiveness of the mediator.<sup>53</sup> Mediators must be perceived as and act as neutrals, actors whose personal opinions are irrelevant to the process.<sup>54</sup> The appearance of neutrality is substantively damaged if the mediator can be called on to testify, either formally or informally, about the substance

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47. 901 F. Supp. at 40.

48. See Biltman, *supra* note 39, at 50; Freedman & Prigoff, *supra* note 39, at 38; Kirtley, *supra* note 1, at 9-10; Macturk, *supra* note 39, at 416.

49. See 901 F. Supp. at 782.

50. See Note, *supra* note 39, at 447-50.

51. This includes future judgments either decided within the legal system or made outside the courtroom, as in future mediations or less formal settings.

52. 690 So. 2d at 727.

53. See Freedman & Prigoff, *supra* note 39, at 38; Kirtley, *supra* note 1, at 8; Macturk, *supra* note 39, at 416; Note, *supra* note 39, at 444-46, 456.

54. See Freedman & Prigoff, *supra* note 39, at 38; Kirtley, *supra* note 1, at 10, 30-32; Macturk, *supra* note 39, at 416; Note, *supra* note 39, at 446.

of the mediation, or about her opinion of the mediation or of the parties.<sup>55</sup> “Both the appearance and the reality of the mediator’s neutrality are essential to generating the climate of trust necessary for effective mediation.”<sup>56</sup>

In sum, the courts in *Paranzino* and *Bernard* are justified in that the participants flagrantly disregarded their specified duties of confidentiality, duties that are critical to the integrity of the mediation process. Broad confidentiality rules promote a critical degree of candor among the participants by shielding against the inappropriate use of mediation information. Without strong confidentiality provisions and appropriate enforcement, parties’ candor will diminish as lax enforcement repeatedly guts legal promises of confidentiality.

#### IV. CASES ALSO ILLUSTRATE THE NEED FOR CAREFULLY DRAFTED RULES AND EXCEPTIONS

Although the *Paranzino* and *Bernard* courts deserve praise for taking strong stands on confidentiality, the bluntness of their formulas may in fact counteract their intent. Severe sanctions and strict confidentiality rules fail to account for the complexity of the role of confidentiality in mediation, and overlook potentially valid exceptions to the rule. Situations that might merit exceptions to confidentiality include, for example, where participants allege mediator misconduct or other complaints about the process itself; where past or possible future crimes are disclosed; and where the enforcement of mediated agreements calls for parol evidence. Overbroad rules that fail to address such situations not only reflect a lack of thoughtful policy; they might in fact induce breach. Participants who do have valid exceptions are constrained from addressing them by overbroad mandates of confidentiality, and they might then turn to breach as the only remedy for their concerns. The circumstances of *Bernard* are suggestive of one such scenario, where the participants appear to have been motivated to breach, at least in part, by an inability to otherwise overcome what they perceived to be a critical flaw in the mediation process (namely, bad-faith participation by the adverse parties). Furthermore, even though it is often acceptable to carve out exceptions to rules after-the-fact in judicial opinions, this means of

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55. See James M. Assey, Jr., *Mum's the Word on Mediation: Confidentiality and Snyder-Falkinham v. Stockburger*, 9 GEO. J. LEGAL ETHICS 991, 997 (1996); Freedman & Prigoff, *supra* note 39, at 38; Kirtley, *supra* note 1, at 10, 30-32; Macturk, *supra* note 39, at 416; Note, *supra* note 39, at 445-6.

56. Note, *supra* note 39, at 445.

rule-refinement is wholly inappropriate for rules about confidentiality in mediation. For these reasons, broadly sweeping confidentiality rules which are intended to strengthen the principle and bolster the mediation process might in fact weaken both.

#### A. *Exceptions May Exist*

A number of exceptions have support in other literature and/or have been implemented in various jurisdictions by statute, court rule, or judicial opinion. Only a few will be mentioned here to provide examples of the range of concerns, but their policy considerations will not be considered.

One example of a well-established exception is where participants challenge the integrity of the mediation process itself, and need to refer to records or communications to support claims of misconduct or injustice occurring in the mediation under the veil of confidentiality. In these instances, mediation arrangements might have the taint of fraud, unfairness, or ambiguity; mediators might act in a biased fashion.<sup>57</sup> Several jurisdictions have provided for such exceptions.<sup>58</sup> In another example, confidentiality in mediation is used to prevent discovery in subsequent court proceedings — an inappropriate application of the rule.<sup>59</sup> A third possible exception is allowing use of mediation communications or settlement agreements as parol evidence for enforcement.<sup>60</sup> Participants may need to refer not only to written agreements to mediate, but also to communications or to settlement agreements, in order to prove the understandings they reached or for

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57. See *McKinlay v. McKinlay*, 648 So. 2d 806 (Fla. 1st DCA 1995) (holding that an exception is appropriate to determine whether settlement was signed under duress); Freedman & Prigoff, *supra* note 39, at 43; Kirtley, *supra* note 1, at 49-52; Note, *supra* note 39, at 452.

58. See e.g., Biltman, *supra* note 39, at 51 (referencing *McKinlay*, *supra* note 57); Maturck, *supra* note 39, at 433 (describing Colorado exception for mediator discipline), Kirtley, *supra* note 1, at 44 and n.303 (referencing Colorado, Florida, Utah, and federal rules for mediator misconduct).

59. See Freedman & Prigoff, *supra* note 39, at 44; Kirtley, *supra* note 1, at 39-41. See also, FLA. STAT. ch. 44.201 (governing mediations of the Citizen Dispute Settlement Centers and specifying that where information discussed in mediations would otherwise be discoverable in court proceedings, the confidentiality rule will not hinder normal discovery proceedings); Maturck, *supra* note 39, at 432 (describing Wyoming's discovery provision, ensuring that mediation is not effectively transformed into a burial place for parties' unfavorable evidence).

60. See Kirtley, *supra* note 1, at 42-44; Maturck, *supra* note 39, at 429; Note, *supra* note 39, at 452-54. See, e.g., *Snyder-Falkinham v. Stockburger*, 249 Va. 376, 457 S.E.2d 36 (1995).

other purposes.<sup>61</sup> This type of exception also has been written into a number of confidentiality rules.<sup>62</sup> As a fourth example, rulemakers have granted mediators or participants the freedom, or perhaps even the obligation, to reveal admissions of past crimes or to disclose credible threats to cause physical harm, damage property, or otherwise commit a crime.<sup>63</sup> Several jurisdictions have taken the position that mediation should not serve as a shield for criminal acts.<sup>64</sup>

Such policy considerations and many others certainly may weigh in favor of limited disclosure and deserve careful deliberation by the appropriate rule-making body.

### B. *Rules that Fail to Address Exceptions Might Encourage Breach*

Where confidentiality rules fail to address such exceptions, the rules may in fact encourage breach. One way in which this may occur is with parties who sense that their situation may be a valid exception to the rule, but who are forbidden by confidentiality to assess whether their situation does qualify for an exception with the assistance of the appropriate actors. Such parties may become frustrated or confused by the confidentiality rule, and see breach as their only recourse. While the outcome of *Bernard* is justified on its specific facts, the case is nevertheless suggestive of how overbroad confidentiality rules might in this way encourage breach.<sup>65</sup>

In *Bernard*, participants' only formal notice of their confidentiality duties consisted of court orders that failed to address any potential exceptions, aside from consent. The court orders simply stated: "[T]he entire mediation process is confidential. The parties and the Mediator *may not disclose information regarding the process, including settlement terms, to the court or to third parties* unless all parties otherwise agree."<sup>66</sup> However, the breaching party in *Bernard* thought that he had a legitimate concern about the adverse party's bad-faith participation, so detrimental to the mediation process that

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61. See Biltman, *supra* note 39, at 51-52; Kirtley, *supra* note 1, at 42-44; Note, *supra* note 39, at 452-54.

62. See FLA. STAT. ch. 90.408; Macturk, *supra* note 39, at 429, 432.

63. See Biltman, *supra* note 39, at 31; Freedman & Prigoff, *supra* note 39, at 44; Kirtley, *supra* note 1, at 43-48.

64. See FLA. STAT. ch. 10.08 (creating exceptions for child abuse); Freedman & Prigoff, *supra* note 39, at 44; Macturk, *supra* note 39, at 432, 438.

65. This is in contrast to *Paranzino*, where the breach does not appear to be motivated by such frustration. In addition, the participants in that case were formally advised of Florida rules explaining two exceptions to confidentiality that had been deliberated through a legitimate rulemaking process. See 690 So. 2d at 726.

66. 910 F. Supp. at 780 (emphasis added).

he was unwilling to travel from out-of-state for further sessions.<sup>67</sup> Frustrated further by the representations of good-faith that were made by the adverse parties, the breaching participant felt he “had no choice” but to breach this rule in order to prove, through disclosure “exactly what the status of the [settlement] discussions were.”<sup>68</sup>

While in *Bernard* the court properly rejected this claim for other reasons, the *Bernard* facts are suggestive of a situation where a participant might be induced to breach overbroad confidentiality rules. It can be difficult to prove bad faith<sup>69</sup> or other participant misconduct without disclosing some information about the mediation, and it appears that the parties in *Bernard* had no guidance as to how to lodge such a complaint without breaching confidentiality.<sup>70</sup> Under such circumstances, it is reasonable that participants might truly think that there is “no choice” but to breach. If the rule appears overly broad, and if the party thinks she has a valid exception to the rule yet has no guidance as to how to remedy her situation within the confines of the rule, she may see breach as the only way to assert or assess her right to an exception.

*Bernard* suggests one way in which broadly stated rules, intended to give strong support to confidentiality rules, might backfire and encourage breach. Such breaches can be avoided if rules explicitly address potential exceptions, or, at minimum, if the rules provide a way for participants to discuss their concerns without breaking confidentiality.

### C. *Creating Exceptions Through Post Hoc Common Law Rulemaking Is Inappropriate for Confidentiality Rules*

Traditionally, overbroad rules or laws are subject to refinement through the judicial process by which case-by-case evaluations adjust the rules to make appropriate exceptions. However, in the case of mediation confidentiality, this means of addressing exceptions is wholly inappropriate in that it inherently contradicts the principle of confidentiality.

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67. *See id.* at 781-82.

68. *Id.* at 782.

69. For a discussion on implementing a bad-faith exception, see Kirtley, *supra* note 1, at 49-51.

70. The only guidance given to the participants appears to be the vaguely worded court order and the Guide to the Court's Civil Justice Expense and Delay Reduction Plan, which was relied upon by the *Bernard* court in crafting its court order on confidentiality, although it is entirely unclear whether it covers any exceptions or whether the parties were referred to it or given access to it. *See* 901 F. Supp. at 779-80.

Overbroad confidentiality rules, like any other overbroad rules, are susceptible to judicially-created exceptions being carved out after the fact—after mediation is over. The difficulty is that broad assurances explicitly establish high expectations of confidentiality, but these expectations are also likely to be scuttled as participants challenge the rules, either informally as in *Bernard* or formally via the post hoc judicial exception-making process. The danger of contravening expectations in this way is that participants will conclude that the initial assurances of confidentiality had no substantive meaning, and may question the integrity of the entire process. This is substantially damaging to mediation because, for the reasons explained above, the success of the mediation depends to a great extent on how much faith participants have in the assurance confidentiality when they *enter* the process; repeated violations of parties' expectations will decrease the public's faith in the mediation process. Thus, exceptions must not only be clearly stated, but their creation should not be left to traditional post hoc judicial deliberation.

Substantively, potential exceptions deserve thoughtful analysis as to their policy ramifications; structurally, they are critical to the integrity of the mediation process. At a minimum, rules should provide some means by which participants safely may address their concerns about confidentiality and possible exceptions. Otherwise, participants will challenge the rule (either formally or informally) and will violate the expectations it created, jeopardizing the public's faith in confidentiality and thus in mediation.

## V. SUMMARY

Although a strong commitment to confidentiality on the part of the judiciary is appropriate and essential to the success of mediation, hard-line rules might be inadequate to address the complexity of confidentiality rules and the need for exceptions. While judicial orders may encourage participants to take confidentiality seriously by speaking in plain language and with conviction, such simplistic orders cannot serve as a proxy for a full and well-developed body of regulation. Clearly, egregious breaches such as those in *Paranzino* and *Bernard* require strong deterrence. But such strict adherence to confidentiality is not always appropriate, and exceptions must be considered as a matter of good policy-making. Furthermore, overly strict confidentiality rules might in fact induce breach when parties feel they have no other means of asserting or assessing their entitlement

to an exception. Feeble guarantees of confidentiality and lax enforcement clearly deter full participation in the mediation process; overbroad rules and enforcement may have a similar effect.

Clear, pre-established rules that address concerns about exceptions are especially critical because post hoc exception-making counteracts one of the central goals of mediation confidentiality—assuring freedom from fear of disclosure when participants enter the process. In cases where courts craft exceptions after the fact, they defeat the initial guarantees of confidentiality, jeopardizing the integrity of the rules. By imposing oversimple confidentiality rules that ignore possible exceptions, courts that intend to promote mediation and strengthen its foundations may well end up weakening the public's confidence in the process.