

# NOTICE TO THE BAR

## **AMENDMENTS TO THE NEW JERSEY RULES OF EVIDENCE (TO BE EFFECTIVE JULY 1, 2008)**

Pursuant to N.J.S.A. 2A:84A-35, attached is the Supreme Court's Order of September 17, 2007 amending the New Jersey Rules of Evidence by adopting new Rule 519, "Mediator Privilege." These proposed amendments were presented at a public hearing conducted on May 22, 2007, in accordance with the requirements of N.J.S.A. 2A:84A-34. The January 19, 2007, report of the Supreme Court Committee on the Rules of Evidence, which submitted the proposal acted on by the Court, was previously published for comment as part of the 2004-2007 rules cycle.

The Court's Order notes that the effective date of the amendments is July 1, 2008. The action of the Court is subject to the terms of N.J.S.A. 2A:84A-36.

/s/ Stephen W. Townsend

---

Stephen W. Townsend, Clerk

Dated: September 17, 2007

## **SUPREME COURT OF NEW JERSEY**

It is ORDERED that, pursuant to N.J.S.A. 2A:84-33 and 2A:84-36, the New Jersey Rules of Evidence are amended by the adoption of N.J.R.E. 519 (“Mediator Privilege”), to be effective July 1, 2008.

For the Court,

/s/ Stuart Rabner

Chief Justice

Dated: September 17, 2007

## Rule 519. Mediator Privilege

(a) N.J.S. 2A:23C-4 provides:

a. Except as otherwise provided in section 6 of P.L. 2004, c. 157 (N.J.S. 2A:23C-6), a mediation communication is privileged as provided in subsection b. of this section and shall not be subject to discovery or admissible in evidence in a proceeding unless waived or precluded as provided by section 5 of P.L. 2004, c. 157 (N.J.S. 2A:23C-5).

b. In a proceeding, the following privileges shall apply:

(1) a mediation party may refuse to disclose, and may prevent any other person from disclosing, a mediation communication.

(2) a mediator may refuse to disclose a mediation communication, and may prevent any other person from disclosing a mediation communication of the mediator.

(3) a nonparty participant may refuse to disclose, and may prevent any other person from disclosing, a mediation communication of the nonparty participant.

c. Evidence or information that is otherwise admissible or subject to discovery shall not become inadmissible or protected from discovery solely by reason of its disclosure or use in a mediation.

(b) N.J.S. 2A:23C-5 provides:

a. A privilege under section 4 of P.L. 2004, c. 157 (N.J.S. 2A:23C-4) may be waived in a record or orally during a proceeding if it is expressly waived by all parties to the mediation and:

(1) in the case of the privilege of a mediator, it is expressly waived by the mediator; and

(2) in the case of the privilege of a nonparty participant, it is expressly waived by the nonparty participant.

b. A person who discloses or makes a representation about a mediation communication that prejudices another person in a proceeding is precluded from asserting a privilege under section 4 of P.L. 2004, c. 157 (N.J.S. 2A:23C-4), but only to the extent necessary for the person prejudiced to respond to the representation or disclosure.

c. A person who intentionally uses a mediation to plan, attempt to commit or commit a crime, or to conceal an ongoing crime or ongoing criminal activity is precluded from asserting a privilege under section 4 of P.L. 2004, c. 157 (N.J.S. 2A:23C-4).

(c) N.J.S. 2A:23C-6 provides:

a. There is no privilege under section 4 of P.L. 2004, c. 157 (N.J.S. 2A:23C-4) for a mediation communication that is:

(1) in an agreement evidenced by a record signed by all parties to the agreement;

(2) made during a session of a mediation that is open, or is required by law to be open, to the public;

(3) a threat or statement of a plan to inflict bodily injury or commit a crime;

(4) intentionally used to plan a crime, attempt to commit a crime, or to conceal an ongoing crime or ongoing criminal activity;

(5) sought or offered to prove or disprove a claim or complaint filed against a mediator arising out of a mediation;

(6) except as otherwise provided in subsection c., sought or offered to prove or disprove a claim or complaint of professional misconduct or malpractice filed against a mediation party, nonparty participant, or representative of a party based on conduct occurring during a mediation; or

(7) sought or offered to prove or disprove child abuse or neglect in a proceeding in which the Division of Youth and Family Services in the Department of Human Services is a party, unless the Division of Youth and Family Services participates in the mediation.

b. There is no privilege under section 4 of P.L. 2004, c. 157 (N.J.S. 2A:23C-4) if a court, administrative agency, or arbitrator finds, after a hearing in camera, that the party seeking discovery or the proponent of the evidence has shown that the evidence is not otherwise available, that there is a need for the evidence that substantially outweighs the interest in protecting confidentiality, and that the mediation communication is sought or offered in:

(1) a court proceeding involving a crime as defined in the "New Jersey Code of Criminal Justice," N.J.S. 2C:1-1 et seq.; or

(2) except as otherwise provided in subsection c., a proceeding to prove a claim to rescind or reform or a defense to avoid liability on a contract arising out of the mediation.

c. A mediator may not be compelled to provide evidence of a mediation communication referred to in paragraph (6) of subsection a. or paragraph (2) of subsection b.

d. If a mediation communication is not privileged under subsection a. or b., only the portion of the communication necessary for the application of the exception from nondisclosure may be admitted. Admission of evidence under subsection a. or b. does not render the evidence, or any other mediation communication, discoverable or admissible for any other purpose.

(d) N.J.S. 2A:23C-7 provides:

a. Except as required in subsection b., a mediator may not make a report, assessment, evaluation, recommendation, finding, or other oral or written communication regarding a mediation to a court, administrative agency, or other authority that may make a ruling on the dispute that is the subject of the mediation.

b. A mediator may disclose:

(1) whether the mediation occurred or has terminated, whether a settlement was reached, and attendance; or

(2) a mediation communication as permitted under section 6 of P.L. 2004, c. 157 (N.J.S. 2A:23C-6).

c. A communication made in violation of subsection a. may not be considered by a court, administrative agency, or arbitrator.

(e) N.J.S. 2A:23C-8 provides:

Unless made during a session of a mediation which is open, or is required by law to be open, to the public, mediation communications are confidential to the extent agreed by the parties or provided by other law or rule of this State.

Note: Adopted September 17, 2007 to be effective July 1, 2008.