Workshop on

Confidentiality and The Right to Privacy

3.5 hours

The parties' decision to maintain or waive confidentiality in mediation is an exercise of self-determination. Based on informed consent, the decision to participate in mediation and the decisions about confidentiality are significant examples of self-determination. Mediators must explain and insure that all parties have the capacity to understand the legal issues regarding confidentiality, prior to signing the agreement to mediate.

Informing parties of the legal issues regarding confidentiality in mediation is analogous to reading those arrested their "Miranda rights." It is essential that mediators understand the limitations of confidentiality and inform the parties. In mediation parties have a rare opportunity to control information by keeping what is said, private. However, many mediators assume there are guarantees of confidentiality that may not hold up under scrutiny, nor is it always in the parties' interests. This workshop explores the legal complexities of confidentiality in mediation in relation to invasion of privacy by 1) other people and 2) the government, as rooted in four constitutional amendments:

- Amendment I - free speech/the right of the public to know
- Amendment IV - the right to be left alone
- Amendment V - granting protection from incriminating oneself
- Amendment XIV - liberty right to make individual and family decisions

The protection of a right to privacy in the Constitution is a long contested concept. The word privacy does not appear in the U.S. Constitution. In 1890, in an article in the Harvard Law Review, Louis Brandeis and Samuel Warren defined a personal right to privacy as a property right, under tort law. This right, which they named as "inviolate personality" has evolved in statute and common law to protect individuals from invasion by other citizens. Thus confidentiality in mediation, functions in the context of both the constitutional and common law rights of privacy as well as tort law protections. There is ongoing debate between those arguing for a confidentiality "privilege" to encourage parties to disclose all relevant information, and those who believe the right to hear "every person's evidence," takes precedence. If a dispute is not settled in mediation or if a third party who has not agreed to confidentiality wishes the information, it is difficult to predict what will be protected under current statutes. Confidentiality is subject to federal and state laws that may override it through rules of evidence, and legislation such as the USA PATRIOT Act.

As an application of the right to privacy, confidentiality gives parties the choice to keep what is said private from the court, and requires parties (who are adversaries), to keep confidentiality in relation to everyone else (the public). Confidentiality in mediation appears to offer the right of privacy regarding control of information about oneself and the right to make autonomous decisions. Standards of Ethics for Mediators require mediators to determine that parties have the capacity to understand their choices and to make decisions in their own best interests. Without informed consent there is no self-determination.

The workshop will provide information to assist mediators in fulfilling their responsibilities to support the parties' self-determination.

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