

## RECENT DEVELOPMENTS

### *In re Anonymous*\*

#### I. INTRODUCTION

The United States Court of Appeals for the Fourth Circuit recently issued a decision that gives shape to the Court's confidentiality requirement for mediations conducted under its auspices. In *In re Anonymous*,<sup>1</sup> the Court held that three parties to a mediation conference conducted by the Circuit Mediator breached the Court's confidentiality requirement by later disclosing information divulged at the mediation to an arbitration panel.<sup>2</sup>

Two of the parties to the mediation at issue in *Anonymous* were attorneys, one of whom represented the client ("Client") in the mediated dispute. The other attorney merely attended the mediation as Client's "friend."<sup>3</sup> At the end of the mediation, a dispute arose between Client and her attorney regarding litigation expenses. The disputing parties later agreed to resolve the matter through arbitration. The other attorney, Client's "friend," agreed to act as Client's counsel in the expense dispute. All three parties submitted statements to the arbitration panel that disclosed conversations that took place before and after the mediation, as well as certain points contained in the settlement agreement drafted during the mediation. These were the disclosures at issue in *Anonymous*. Although the Court determined that they constituted a breach of the Court's confidentiality requirement for mediations, it tailored its opinion so that certain disclosures relevant to resolving the expense dispute were allowed for consideration by the arbitration panel.

The Court's decision in *Anonymous* is instructive as it strikes a difficult balance between preserving a cornerstone of the mediation process, confidentiality, and allowing access to and use of the confidential information beyond the "mediation room" in the interest of justice.

#### II. FACTS AND PROCEDURAL HISTORY

The issues addressed in *In re Anonymous* arose from a dispute over litigation expenses between an attorney acting as local counsel (the "Local Counsel") and the Client. In 1997, Client retained counsel to initiate a Title

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\* *In re Anonymous*, 283 F.3d 627 (4th Cir. 2002) (per curiam).

<sup>1</sup> *Id.*

<sup>2</sup> *Id.* at 635.

<sup>3</sup> *Id.* at 630 n.3.

VII claim for retaliatory firing and signed a fee agreement to pay attorney's fees as well as all expenses of litigation, out-of-pocket expenses, and court costs.<sup>4</sup> In March 1998, Client's counsel hired Local Counsel to help prepare for Client's trial, but no separate fee agreement was executed between Client and Local Counsel.<sup>5</sup>

The mediation at issue in *Anonymous* occurred in December 2000 after a three-day jury trial involving Client's Title VII claims, upon which the jury found in Client's favor with a substantial monetary award.<sup>6</sup> The district court subsequently reduced the award to comport with Title VII's statutory damages cap.<sup>7</sup> Both the Client and the defendant appealed to the Fourth Circuit, but, prior to obtaining a hearing, they reached a settlement agreement in a mediation conference conducted by the Circuit Mediator.<sup>8</sup> Present at the mediation were the Client, defendant, defendant's two attorneys, Local Counsel, the Circuit Mediator, and a third party.<sup>9</sup> The third party was Client's "friend" (the "Current Counsel") who went on to represent Client in the expense dispute.

At the mediation, the Circuit Mediator clearly explained, and all those in attendance agreed to abide by, the confidentiality provision of Rule 33, the court rule governing mediations.<sup>10</sup> Rule 33 explicitly dictates that all information disclosed during the mediation process must be kept confidential and must not be disclosed to any person outside of the mediation participants.<sup>11</sup>

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<sup>4</sup> *Id.* at 630.

<sup>5</sup> *Id.* at 630-31.

<sup>6</sup> *Id.* at 631.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*; see also 4th Cir. R. 33 (requiring Circuit Mediator to determine whether a mediation conference will assist either the Court or the parties in simplifying, clarifying, or reducing the issues on appeal).

<sup>9</sup> *Anonymous*, 283 F.3d at 631.

<sup>10</sup> *Id.* at 635.

<sup>11</sup> Fourth Circuit Rule 33 states in relevant part:

Information disclosed in the mediation process shall be kept confidential and shall not be disclosed to the judges deciding the appeal or to any other person outside the mediation program participants. Confidentiality is required of all participants in the mediation proceedings. All statements, documents, and discussions in such proceedings shall be kept confidential. The mediator, attorneys, and other participants in the mediation shall not disclose such statements, documents, or discussions without prior approval of the Standing Panel on Attorney Discipline.

*Anonymous*, 283 F.3d at 632 (quoting 4th Cir. R. 33).

The expense dispute between Local Counsel and Client came to light subsequent to the mediation conference but prior to the order of dismissal.<sup>12</sup> Client believed that Local Counsel's share of the settlement proceeds included reimbursement for legal expenses advanced by Local Counsel throughout the course of the litigation.<sup>13</sup> Contrarily, Local Counsel believed that the settlement agreement did not affect Client's obligation to reimburse him for litigation expenses.<sup>14</sup> Client and Local Counsel agreed to resolve their dispute concerning litigation expenses from the settled lawsuit through arbitration.

Acting as Client's counsel, Current Counsel submitted to the arbitration panel a copy of the settlement points of agreement and a statement in which Client described conversations that took place during and after the mediation conference.<sup>15</sup> Based on his presence at the mediation conference, Current Counsel also submitted his own account of discussions that took place during and after the mediation.<sup>16</sup>

Local Counsel also submitted several documents to the arbitration panel, including one that described discussions with Client at the mediation conference.<sup>17</sup> Although Local Counsel had requested and received the consent of the defendant in the Title VII case to disclose these statements, he did not receive the consent of the Circuit Mediator. Local Counsel had informed the Mediator of the expense dispute and had requested her consent to disclose certain statements made during the mediation, but he did not wait for such consent before submitting the documents to the arbitral panel.<sup>18</sup> After submitting these documents, Local Counsel again sought the consent of the Circuit Mediator to disclose matters discussed during the mediation, and he also requested her reply to interrogatories concerning these matters.<sup>19</sup> The Circuit Mediator informed the Fourth Circuit of Local Counsel's request for consent and answers to interrogatories.<sup>20</sup> The Court responded by issuing a standing order that directed Client, Local Counsel, and Current Counsel to appear before the Fourth Circuit Standing Panel on Attorney Discipline to

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<sup>12</sup> *Id.* at 631.

<sup>13</sup> *Id.* at 638.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 631.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 631–32.

<sup>20</sup> *Id.* at 632.

address their submissions to the arbitration panel in breach of Rule 33.<sup>21</sup> In response to this order, the arbitral panel stayed all proceedings connected to the dispute.<sup>22</sup> The Court also requested the Office of the Circuit Mediator to participate in the proceeding as *amicus curiae*.<sup>23</sup>

The issues before the court were the following:

(1) whether Client, Local Counsel, and/or Current Counsel breached the confidentiality provision of Rule 33; (2) whether sanctions were warranted for any breach; (3) whether and under what standard the confidentiality of a mediation may be waived for future disclosures; and (4) whether and under what standard the mediator may divulge information relating to the mediation.<sup>24</sup>

### III. THE COURT'S HOLDING AND REASONING

The Court held that Client, Local Counsel, and Current Counsel each breached the confidentiality required by Rule 33, but it declined to impose sanctions upon them.<sup>25</sup> Although it determined that the parties breached the confidentiality requirement, the Court allowed Client and Local Counsel to make certain disclosures to the arbitration panel, provided the panel agreed to abide by the confidentiality provision of Rule 33 and to limit disclosures to the expense dispute.<sup>26</sup> The Court applied the “manifest injustice” standard in determining that these limited waivers of confidentiality were permissible. Specifically, the Court determined that non-disclosure of the relevant information would result in “manifestly greater harm” than would result from disclosure.<sup>27</sup> This standard was not applied to disclosures made by Current Counsel and requested of the Circuit Mediator, both of whom the Court prohibited from disclosing any information.

#### A. *Parties Breached Confidentiality Provision*

Despite the attempts of both Local Counsel and Current Counsel to qualify their disclosures to the arbitration panel as outside the parameters of

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<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 630.

<sup>25</sup> *Id.* at 640.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 638.

Rule 33's confidentiality requirement, the Fourth Circuit determined that all participants breached the confidentiality of the mediation.<sup>28</sup>

Local Counsel and Current Counsel both argued that their submissions to the arbitration did not involve matters "central to the mediated dispute," and therefore did not constitute a violation of Rule 33's confidentiality requirement.<sup>29</sup> The Court declined to draw such a distinction due to the plain language of Rule 33, which prohibits the disclosure of "all statements, documents and discussions," not just those matters central to the mediated dispute.<sup>30</sup>

The Court also refused to accept the participants' second proffered distinction, which argued that because the disclosures were made to a confidential forum, that is, the arbitration panel, the confidentiality required by Rule 33 had not been breached.<sup>31</sup> The Court refused to accept an exception to Rule 33 for disclosures made to a confidential forum because the plain language of the rule forbids disclosure "to any other person outside the mediation program participants."<sup>32</sup>

In addition to these arguments, the Court also rejected Current Counsel's assertion that because he was not acting as counsel during the mediation conference, and because he was a mere observer and not a party to the mediation, his disclosures did not fall within the scope of Rule 33.<sup>33</sup> The Court again based its determination on an interpretation of the plain language of Rule 33, which states that information disclosed during the mediation "shall not be disclosed by the mediator, counsel or *parties*."<sup>34</sup> The Court held that the term "parties" applies to all participants in the mediation, including mere attendees.<sup>35</sup>

The Court further rejected the participants' due process arguments which maintained that Local Counsel and Counsel would be denied the "right to

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<sup>28</sup> *Id.* at 633.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* (quoting 4th Cir. R. 33).

<sup>31</sup> *Id.* at 633.

<sup>32</sup> *Id.* (quoting 4th Cir. R. 33). In a footnote, the Court recognized circumstances where confidential information revealed during mediation may be divulged to someone outside the mediation participants without obtaining prior consent from the Standing Panel. Examples include cases involving the protection of attorney-client confidentiality where "an attorney is permitted to consult with other employees [in the] law firm and with experts or professionals retained by the law firm to aid in the negotiation or structuring of the settlement." *Id.* at 633 n.10.

<sup>33</sup> *Id.* at 634.

<sup>34</sup> *Id.* (quoting 4th Cir. R. 33) (emphasis added).

<sup>35</sup> *Id.* at 634.

resolve their expense dispute” if their disclosures to the arbitration panel were construed as violations of Rule 33.<sup>36</sup> The Court recognized the substantial state interest in preserving the confidentiality of mediation proceedings, and noted that Rule 33 does not preclude requests for consent to disclosure.<sup>37</sup> Therefore, the Court concluded that Rule 33 only limited the availability and use of information gleaned during the mediation, and that these limits were not substantial or insurmountable obstacles to due process.<sup>38</sup>

Finally, Client and Current Counsel argued that the disclosures were not governed by Rule 33 because they concerned conversations that took place after the mediation had already concluded.<sup>39</sup> The Court rejected this argument, stating that the scope of Rule 33’s confidentiality provision is not limited to the conference itself, but extends until the mediated dispute has been either dismissed or is otherwise removed from the Office of the Circuit Mediator.<sup>40</sup> Although the Rule did not explicitly define the scope and duration of the confidentiality requirement, the Court based its interpretation on the “practical necessity” of the mediation process, in that a “mediated dispute is rarely conclusively resolved during the mediation conference itself.”<sup>41</sup> Although the Fourth Circuit’s interpretation of the scope and duration of Rule 33’s confidentiality requirements seems dogmatically unbending, its further holdings in this case show a willingness to accommodate the will of the parties concerning disclosure of mediation communications.

### B. *Sanctions Not Warranted*

The Court determined that violations of Rule 33 by Client, Current Counsel, and Local Counsel were not sufficiently egregious to warrant sanctions.<sup>42</sup> In assessing whether sanctions are justified in a particular case, the Court weighs the following factors:

- (1) whether the mediator explained the extent of the confidentiality rules, and the clarity of such explanation;
- (2) whether the parties executed a

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<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 635.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 636.

confidentiality agreement; (3) the extent of willfulness or bad faith involved in the breach of confidentiality Rule; (4) the severity or adverse impact of the disclosure on the parties or the case; and (5) the severity or adverse impact of the disclosure on the mediation program.<sup>43</sup>

Although the mediator clearly explained the confidentiality provision of Rule 33 and the settlement agreement signed by Client and Local Counsel provided for confidentiality as to all terms of the agreement, the Court found that violations of the rule were not made in bad faith.<sup>44</sup> At the time of the disclosures, the Court had not previously interpreted the reach of Rule 33.<sup>45</sup> It therefore found reasonable Current Counsel's belief that the Rule did not prohibit his disclosures since he was merely an observer and not technically a "party" to the mediation.<sup>46</sup> In addition, the Court found merit to Local Counsel's belief that his disclosures did not breach confidentiality based on the Model Rules of Professional Conduct, which provided an exception to confidentiality for disclosures of confidential client information where the disclosures are for the purpose of establishing an attorney's right to compensation.<sup>47</sup> Furthermore, because the disclosures were made to a confidential forum, the Court determined that they had no adverse impact on the parties or on the mediation program.<sup>48</sup>

### *C. Limited And Conditional Waiver of Confidentiality Granted*

The Court considered whether or not it should grant a limited waiver of confidentiality to permit the arbitration panel to consider the previously submitted disclosures in order to resolve the expense dispute. It also considered Local Counsel's request for consent to have the Circuit Mediator answer interrogatories he posed to her before commencement of the disciplinary action. The court ultimately granted a limited waiver of confidentiality to Local Counsel and Client to disclose certain material to the arbitration panel. However, the Court directed Current Counsel to retract all documents previously submitted to the arbitration panel in his capacity as a witness to the mediation because acting as both an advocate and a witness on behalf of the Client constituted an ethics violation. Furthermore, the Court

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<sup>43</sup> *Id.* at 635.

<sup>44</sup> *Id.* at 636.

<sup>45</sup> *Id.* at 635.

<sup>46</sup> *Id.* at 635–36. Interestingly, this argument did not pass muster with the Court in its consideration of whether Rule 33 had been violated. *See supra* Part III.A.

<sup>47</sup> *Id.* at 636.

<sup>48</sup> *Id.*

declined to grant consent for the Circuit Mediator to respond to the interrogatories posed by Local Counsel because resolution of the expense dispute was possible without her involvement.

### 1. *Limited Disclosure Granted to Client and Local Counsel*

In consenting to limited disclosures of mediation communications by Client and Local Counsel to the arbitration panel, the Court considered the interests of both parties, as well as those of the mediation program itself. It then applied the “manifest injustice standard” to these interests, determining that manifest injustice would result if Client and Local Counsel could not disclose certain information.

#### a. *Balance of Interests*

The Court recognized the public’s interest in protecting the confidentiality of mediation proceedings, stating that confidentiality is “essential to the integrity and success of the Court’s mediation program.”<sup>49</sup> The Court reasoned that without confidentiality in mediation, parties would not be as candid during the process and that the program could potentially be used as a “discovery tool” for “creative” attorneys.<sup>50</sup>

However, the Court simultaneously recognized that non-disclosure can sometimes have adverse effects on parties who wish to divulge confidential information in later suits, as well as on the public and the justice system in general.<sup>51</sup> The Court recognized the specific concern of a party’s inability to use crucial confidential information as evidence in later proceedings.<sup>52</sup>

#### b. *Manifest Injustice Standard*

Citing the Administrative Dispute Resolution Act,<sup>53</sup> the Court inquired as to whether disclosure of the confidential mediation communications was necessary to prevent “manifest injustice.” This standard requires the party seeking disclosure to show that the harm caused from non-disclosure will be “manifestly greater” than the harm caused by disclosure.<sup>54</sup>

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<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 636.

<sup>51</sup> *Id.* at 637.

<sup>52</sup> *Id.*

<sup>53</sup> Administrative Dispute Resolution Act of 1996, 5 U.S.C. § 574(a)(4)(A) (1998).

<sup>54</sup> *Anonymous*, 283 F.3d at 637.

Both Local Counsel and Client agreed that the expense dispute arose during the mediation conference and that resolution of the dispute depended on disclosure of information related to the mediation.<sup>55</sup> Because the mediation conference was the forum in which the expense dispute arose and because information divulged during the mediation was critical to resolution of the dispute, the Court concluded that non-disclosure could cause substantial harm in the context of the expense dispute.<sup>56</sup> The Court determined that any harm arising from disclosure would be slight since all parties consented to the disclosures, and the disclosures would be made to a non-public, confidential forum.<sup>57</sup>

Because it concluded that non-disclosure of limited and relevant information from the mediation would cause “manifestly greater harm” than disclosure, the court granted conditional consent for Local Counsel and Client to disclose the following limited material:

- (1) conversations that took place during the mediation regarding the expense dispute and their notes, or portions thereof, regarding the settlement negotiations corroborating these conversations; and (2) the settlement agreement and notes regarding the settlement agreement, but only to the extent that these materials explain or relate to the disbursement of the settlement funds.<sup>58</sup>

The consent was conditioned upon the parties obtaining the arbitration panel’s written agreement to abide by the confidentiality provisions of Rule 33.

## *2. Disclosure Denied to Current Counsel and Circuit Mediator*

The Court did not apply the manifest injustice standard to disclosures made by Current Counsel and requested of the Circuit Mediator. Because Current Counsel represented Client in the expense dispute, Rules of Professional Conduct prevented him from simultaneously acting as Client’s witness by submitting his recollection of conversations that took place at the mediation conference. Current Counsel’s submission impermissibly allowed him to act as both a witness and an advocate on Client’s behalf, an action explicitly forbidden by the Rules of Professional Conduct of both Virginia, where the dispute occurred, and Florida, where Current Counsel was licensed

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<sup>55</sup> *Id.* at 638.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

to practice law.<sup>59</sup> The Court did note, however, that if Current Counsel withdrew in the expense dispute from his role as Client's attorney, it would grant consent for his disclosures, subject to the same limitations and conditions set forth for Client and Local Counsel.<sup>60</sup>

As for the Circuit Mediator, who had not at the time of this case made any disclosures to the arbitral panel, the Court determined that resolution of the expense dispute was possible without her or any disclosures she might make. The Court noted that the harm in allowing a mediator to make disclosures in spite of the confidentiality provision in Rule 33 was significantly greater than that posed by Client's and Local Counsel's disclosures.<sup>61</sup>

The court recognized that future parties to mediations could harbor perceptions of bias on the part of the Mediator if she breached confidentiality in this case. It also noted that the overall usefulness of the mediation program could be destroyed if mediators were forced to give evidence against parties whose trust they actively solicited.<sup>62</sup> Given these concerns, the Court stated that it would not consent to the Circuit Mediator's disclosures unless such disclosure was mandated by manifest injustice, was indispensable to resolution of an important subsequent dispute, and would damage the court's mediation program.<sup>63</sup> Because justice could be achieved absent the Mediator's disclosures, and because the disclosures were not essential to resolution of the dispute, the Court declined to consent to such disclosures for fear of the harm they might cause the court's mediation program.

#### IV. CONCLUSION

The Fourth Circuit Court of Appeals' decision in *In re Anonymous* helps define the parameters of the confidentiality requirement of Court Rule 33 pertaining to mediations. The decision confirms the importance of confidentiality in the context of mediation communications, but at the same time demonstrates deference to the will of parties wishing to disclose such communications. By determining that the parties in this case breached the confidentiality requirement, yet tailoring a limited consent to disclose certain confidential information, the Court struck an effective balance between the

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<sup>59</sup> *Id.* at 639 (citing VA. R. PROF'L CONDUCT R. 3.7(a) and FLA. R. PROF'L CONDUCT R. 4-3.7(a)).

<sup>60</sup> *Id.* at 639.

<sup>61</sup> *Id.* at 639-40.

<sup>62</sup> *Id.* at 640.

<sup>63</sup> *Id.*

***IN RE ANONYMOUS***

public interest of preserving confidentiality and the private interest of parties wishing to resolve later disputes.

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