No fraud exception to confidentiality in mediation

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In a recent case out of Massachusetts involving the mediation of a construction dispute, a state appeals court refused to create a fraud exception to the Uniform Mediation Act's strong confidentiality and privilege provisions, which are designed to keep most mediation communications out of court. In *ZVI Construction Company, LLC v. Franklin Levy* (2016) 90 Mass App. Ct. 412, a contractor was suing the law firm that represented a restaurant ownership group at a mediation where the owners had agreed to pay the contractor a settlement of $250,000. The contractor was suing the law firm for, among other things, fraud, conversion, conspiracy and breach of an escrow agreement.

The restaurant failed to pay the promised $250,000 once it received that amount from an unrelated settlement with one of the partners of the ownership group. Instead, the restaurant owners used the money to make payroll and pay several legal bills, including to the defendant law firm. The money was disbursed from the defendant law firm's IOLTA account per the directions of the restaurant owners. Soon thereafter the restaurant filed for bankruptcy.

The jilted contractor wanted to introduce disputed evidence that the defendant law firm stated at the mediation that it would pay the settlement proceeds directly to the contractor. But none of the key allegations in the complaint were corroborated by the settlement agreement executed at the conclusion of the mediation. Moreover, in addition to the strong confidentiality protection of the UMA, the parties' mediation agreement had strict confidentiality language that prohibited all mediation communications from being used outside the mediation.

The court rejected the contractor's arguments after considering the confidentiality agreement, the lack of a fraud exception in the UMA, and the committee comments to the UMA that explained how a fraud exception was considered and rejected. It is important to note, however, that the UMA does include several confidentiality exceptions, including for threats of violence, planning a crime, creating a public record and others.

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The lesson from this case is to make sure that the payment provisions are crystal clear in a settlement agreement, especially if the defendant is on shaky financial ground and even more so if the payment is contingent upon the defendant receiving a large lump sum from a third party.