



## Alerts

### Modification of Protective Orders to Permit Disclosure of Confidential Materials Must Satisfy Three-Prong Test

May 31, 2011

*Lawyers for the Profession® Alert*

*In re Teligent, Inc.*, \_\_\_ F.3d \_\_\_, 2011 WL 1678401 (2nd Cir. May 5, 2011)

#### Brief Summary

The U.S. Court of Appeals for the Second Circuit affirmed an order denying a motion to lift protective orders that prohibited disclosure of communications made during mediation. The court held that moving party had to satisfy each element of a three-part test: (1) that there was a special need for the confidential material; (2) that there would be resulting unfairness if the documents were not produced; and (3) that the need for the documents outweighed the interest in maintaining confidentiality.

#### Complete Summary

Parties participating in a voluntary mediation agreed to be bound by the terms of protective orders routinely utilized by the bankruptcy court in court-ordered mediations. The protective orders at issue did not address when or if a party could release confidential information related to the mediation. After the mediation, one of the parties sued its former law firm for legal malpractice. The law firm had been invited to participate in the mediation to address the potential malpractice claim but had declined to do so.

During the course of discovery in the malpractice action, the law firm sought from plaintiff former client all documents relating to the mediation and settlement. When the former client produced certain documents, counsel for another mediating party objected. The law firm then moved the original bankruptcy court to lift the confidentiality provisions of the protective orders. The bankruptcy court denied the motion and the district court affirmed.

On appeal, the Second Circuit affirmed and articulated the following three-part test for a moving party to satisfy in order to justify disclosure: (1) there is a special need for the confidential material; (2) unfairness will result if the documents are not produced; and (3) the need for the documents outweighs the interest in maintaining confidentiality. In formulating the test, the court followed the general law requiring extraordinary circumstances to lift or modify a protective order and relied on a range of statutory provisions and court rules

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that protect the confidentiality of mediation communications and govern modification of protective orders, while also recognizing the important policy reasons underlying such protections.

Applying the test, the court found that the law firm had not submitted any evidence to indicate that it had a special need for all of the mediation documents, despite the firm's general assertion that the documents were "critical to issues such as causation, mitigation, and damages." The court noted that the firm had requested all mediation communications rather than making and supporting a more narrowly tailored request. The court also found that the firm had other means available to obtain the information it sought, including interrogatories or depositions, such that the law firm could not claim any resulting unfairness from a lack of document discovery. Finally, the court found that the firm's failure to demonstrate a special need for the mediation communications necessarily led to its inability to show that disclosure outweighed the interest in protecting confidentiality.

## Summary

The Second Circuit has articulated a test that is highly protective of mediation communications subject to protective orders that do not otherwise expressly provide for the terms and conditions of release. Moreover, the decision reflects the exacting standards and high burden that courts may apply to general, undifferentiated requests for discovery.

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