Fanning the Winds of Change: Court Approval of Confidential Settlements and the Virginia Mediation Statute

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Parties in cases that require court approval of settlements often find that the holding of the Virginia Supreme Court in *Shenadoah Publishing House, Inc. v. Fanning*, 235 Va. 253, 368 S.E.2d 253 (1988), poses a significant challenge to any effort to keep a settlement confidential. *Fanning* concluded that judicial records -- including settlement details -- should be open to the public absent some "compelling" circumstance.

What many parties fail to realize is that by mediating their disputes, they can take advantage of the Virginia Mediation Statute and argue in favor of confidentiality under an exception to disclosure carved out by the General Assembly. Although not yet addressed by the Virginia Supreme Court, the current attitude of the Court in favor of Alternative Dispute Resolution ("ADR"), the Virginia trend towards encouraging ADR, and the willingness of lower courts to recognize the mediation exception, all provide litigants with one more reason to consider mediation as an option to litigation.

A. The *Fanning* Decision

In *Fanning*, the plaintiff filed suit for the wrongful death of her husband resulting from the defendant's medical malpractice. The case was ultimately settled. Because it was a wrongful death case, however, the settlement had to be approved by the circuit court under Virginia Code section 8.01-55. On joint motion of the parties, the details of the settlement were sealed by the trial court.

Various media entities subsequently sought access to the terms of the sealed settlement. On appeal to the Virginia Supreme Court, the media entities relied on Code section 17.1-208 (at that time section 17-43) which provides in part: "Except as otherwise provided by law, the records and papers of every circuit court shall be open to inspection by any person."

As the Supreme Court recognized, "*subject to statutory exceptions*, a rebuttable presumption of public access applies in civil proceedings."[1] To overcome this presumption, the party seeking to keep a settlement confidential "bears the burden of establishing an interest so compelling that it cannot be protected reasonably by some measure other than a protective order."[2]

B. The Virginia Mediation Statute

Fanning was handed down on April 22, 1988. Just over two months later, the Virginia mediation statute was enacted, Code section 8.01-581.22. It provides in pertinent part:

> All memoranda, work products and other materials contained in the case files of a mediator or mediation program are confidential. Any communication made in or connection with the mediation, which relates to the controversy being mediated, including screening, intake, and scheduling a mediation, whether made to the mediator, mediation program staff, to a party, or to any other person, is confidential. However, a written mediated agreement signed by the parties shall not be confidential, *unless the parties otherwise agree in writing*.
>
> Confidential materials and communications are not subject to disclosure in discovery or in any judicial or administrative proceeding except … as provided by law or rule.

Thus, section 8.01-581.22 mandates that where the parties to a mediation have reduced to writing their agreement to keep confidential the mediated settlement, the agreement must be honored, except as otherwise provided by law. Alternatively, section 17.1-208 calls for open access to circuit court records, subject to exceptions recognized by the *Fanning* Court. The issue then

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becomes how to interpret these statutes together, a question not yet addressed by the courts in Virginia.[3]

C. Construing the Statutes Together

It is important to put into context the scenario in which any need to reconcile the two statutes would arise: Parties in a case involving the claims of those who cannot speak for themselves successfully mediate those claims and reach a settlement. At least one of the parties (often the defendant) wishes to keep the outcome confidential and makes it a condition of settlement. Plaintiff agrees, the condition is incorporated into a written settlement agreement at the conclusion of the mediation, and the case is resolved. However, pursuant to Virginia statue, those claims must still be submitted to the court for approval.[4]

At first blush, *Fanning* would appear to provide that under section 17.1-243, the settlement cannot be kept confidential. However, *Fanning* did not present a situation where the parties had reached a settlement through means of mediation. Furthermore, *Fanning* was handed down prior to the adoption of the confidentiality provisions of section 8.01-581.22. Indeed, *Fanning* itself recognized that its presumption of openness was subject to "statutory exceptions."[5] Thus, upon closer examination, it becomes clear that *Fanning* does not apply at all.

Instead, the real question is the interplay between sections 17.1-243 and 581.22. It is a well-established rule of statutory construction in Virginia that, where possible, two statutes on a related topic must be construed in such a way as to give effect to both.[6] Here, one statute (section 17.1-208) calls for public access to papers filed in a judicial proceeding, while the other (section 8.01-581.22) calls for the details of confidential mediated settlements to remain confidential in any judicial proceeding. Thus, on their face, the two statutes cannot be reconciled.

In light of this conflict, there are at least two rules of statutory construction that dictate in favor of confidentiality. The first is that where one statute speaks to a subject in a general manner and another deals with a part of the same subject in a more specific way, if they cannot be reconciled, the latter prevails.[7] Here, section 17.1-208 deals with open records generally, whereas section 8.01-581.22 carves out an exception for mediated confidential settlements that require court approval. The second rule of statutory construction in favor of confidentiality is that a later act which is inconsistent with an earlier act, so that the two cannot be reconciled, prevails over the earlier act.[7] Section 17.1-243 (and its predecessors) dates back to the Code of 1919. Section 8.01-581.22 took effect on July 1, 1988, two months after *Fanning* was decided.

Both of these rules of construction grow out of the axiom that when the legislature comes to pass a new law, "it is presumed to act with full knowledge of the law as it stands bearing upon the subject with which it proposes to deal."[9] With regard to sections 17.1-243 and 8.01-581.22, the General Assembly was aware of existing disclosure requirements under section 17.1-243 and *Fanning*, and carved out the exception to disclosure contained in section 8.01-581.22.

Although Virginia does not publish or maintain any legislative history, a compelling argument can be made that -- as a matter of policy -- this and other changes to the Virginia Code were made to promote the use of ADR by the parties. The enactment of section 8.01-581.22 came on the heels of sweeping efforts towards ADR in Virginia to relieve the burden of growing dockets across the Commonwealth.[10] In the two years prior to section 8.01-581.22's enactment, Virginia saw the creation of a Joint Committee on ADR established by the Virginia State Bar, the establishment of Dispute Resolution Centers in Charlottesville and Richmond, the introduction of ADR to Virginia's CLE courses, and the appointment of a 34 member committee by then Chief Justice Harry Carrico to study ways to improve Virginia's judicial system. The committee encouraged the development of alternative dispute resolution processes in the court system and in the community.[11]

Against the backdrop of this trend in favor of ADR, it is reasonable to conclude that the legislature saw fit to encourage ADR's use through legislation such as section 8.01-581.22.[12] Thus, litigants in a dispute that may already be a good candidate for mediation should also weigh the importance of confidentiality as another factor in determining whether ADR is the right course of action.

1. 235 Va. at 258, 368 S.E.2d at 256 (emphasis added).
2. *Id.* at 258-59, 368 S.E.2d at 256.
3. The only substantive application of §8.01-581.22 is found in *Anderson v. Anderson*, 29 Va. App. 673, 514 S.E.2d 369 (1999), where the court of appeals held that a psychologist was acting as a counselor rather than a mediator in a divorce case, and thus his testimony was improperly excluded.
4. Two of the most common examples are a wrongful death case under Va. Code

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