

Confidentiality in Mediation

By David A. Hoffman

Mediation has become more familiar to lawyers in recent years, as court-connected programs have expanded and private mediation firms have grown. Perhaps the most familiar part of the mediation process is the mediator's introduction, in which he or she explains to the parties and their attorneys that mediation is a voluntary process in which all parties can speak candidly because all communications in a mediation are considered confidential. Some mediators will go on to explain that in Massachusetts the confidentiality of mediation is protected by statute (G.L. ch. 233, § 23C). In many cases, the parties sign an "agreement to mediate" in which they agree that they will not disclose what is said in the mediation, nor will they seek to compel such disclosure by the mediator or the other parties.

In spite of these assurances, however, the promise of confidentiality cannot always be honored. Neither Massachusetts' statute nor the confidentiality provisions of the parties' agreement provides an absolute shield from disclosure, both voluntary and compelled. There are only a few reported decisions in this area of the law because in the vast majority of cases, the parties faithfully honor their promise of confidentiality, and the rest of the world is quite content to let the parties settle their case in private. It is important, however, for mediators and attorneys who participate in mediation to understand both the sources of confidentiality protection and the gaps in that protection.

Consider the following cases:

- Case one: In a mediation of a dispute concerning a family-owned business, the co-owners agree to divide equally any tax liability if their deductions for "business trips" to the Caribbean and Hawaii are disallowed. The IRS subpoenas the mediator and the mediator's notes, seeking disclosure of what the owners said about their deductions.

- Case two: In a divorce mediation, the husband admits in a private session with the mediator that his wife's accusations of physical and psychological abuse are not entirely groundless. Later, the wife is charged with killing her ex-husband. Alleging self-defense, she subpoenas the mediator and the mediator's notes to find out whether her husband ever admitted that he physically abused her.
- Case three: A self-taught mediator assures the parties that the process is confidential. One of the parties is dissatisfied with the results of the mediation and sues the mediator. The mediator's claim of immunity is rejected by the court, and the plaintiff seeks to depose the mediator.

In all three of these cases, there is a substantial possibility that the mediator could be compelled to testify and produce his or her notes, notwithstanding the "confidentiality" of the mediation process. Moreover, the parties themselves could be forced to testify about what they said in the mediation. In order to understand why, it is necessary to review the sources of confidentiality protection.

A. Sources of Protection

In Massachusetts the protection of confidentiality in mediation derives primarily from the following sources:

- (1) The Massachusetts confidentiality statute, Mass. Gen. L. ch. 233, § 23C;
- (2) Confidentiality agreements;
- (3) The Federal Rules of Evidence;
- (4) Common law rules of evidentiary privilege;
- (5) Federal Local Rule 16.4; and
- (6) Ethical codes barring disclosure by the mediator.

(1) Massachusetts Confidentiality Statute

The Massachusetts confidentiality statute, Mass. Gen. L. ch. 233, § 23C, provides that documents exchanged in connection with a mediation and the substance of discussions in a mediation "shall be confidential and shall not be subject to disclosure in any judicial or

administrative proceeding.”¹ The statute bars both access to and the admissibility of the documents and communications exchanged in a mediation. No court has yet ruled on whether the statute prohibits only compelled disclosure (e.g., by subpoena) or also prohibits voluntary disclosure by one of the parties.

In order to qualify for the protection to the statute, the mediation must be conducted by a mediator who meets the statutory definition. One qualifies as a "mediator" for purposes of the statute in one of two ways -- either:

- (a) Appointment by a "judicial or governmental body," or
- (b) Use of a written agreement with the parties, and 30 hours of mediation training, and "either . . . four years of professional experience as a mediator or [accountability to] a dispute resolution organization which has been in existence for at least three years."

The statute leaves open a number of questions.² For example, does "four years of professional experience as a mediator" mean full-time employment as a mediator or four years during which the individual performed some mediation services? If the latter, how much time as a mediator would suffice? Also, since there are currently no certification requirements in

¹ Section 23C provides that:

All memoranda, and other work product prepared by a mediator and a mediator's case files shall be confidential and not subject to disclosure in any judicial or administrative proceeding involving any of the parties to any mediation to which such materials apply. Any communication made in the course of and relating to the subject matter of any mediation and which is made in the presence of such mediator by any participant, mediator or other person shall be a confidential communication and not subject to disclosure in any judicial or administrative proceeding; provided, however, that the provisions of this section shall not apply to the mediation of labor disputes.

For purposes of this section a "mediator" shall mean a person not a party to a dispute who enters into a written agreement with the parties to assist them in resolving their disputes and has completed at least thirty hours of training in mediation and who either has four years of professional experience as a mediator or is accountable to a dispute resolution organization which has been in existence for at least three years or one who has been appointed to mediate by a judicial or governmental body.

² For a general discussion of the statute, see David Matz, The Confidentiality Privilege in Mediation: To Whom Does it Apply?, 5 MASSACHUSETTS FAMILY LAW JOURNAL 33 (July 1987).

Massachusetts for mediators or the training of mediators, what kind of training would satisfy the 30-hour requirement? The legislative history of section 23C does not answer these questions.

To date, there have been no reported appellate decisions construing the provisions of section 23C, but there has been one reported trial court decision, White v. Holton, 1 Mass. L. Rptr. No. 10,216 (November 15, 1993). In White, the Massachusetts Superior Court held that a mediator was not entitled to the protection of the statute because she was serving without a written agreement and did not have thirty hours of training in mediation.³

One of the critical issues for purposes of confidentiality protection is whether § 23C covers criminal proceedings. The broad language of the statute ("any judicial or administrative proceeding") suggests that it does. In addition, there is a reference in the statute which strongly suggests legislative intent to cover criminal proceedings: the statute excludes labor dispute mediations, which are covered by another statute (G.L. c. 150, § 10A). Section 10A has a specific disclaimer of criminal matters.⁴ The absence of any exclusion of criminal matters in § 23C, while at the same time referencing a statute that does contain such an exclusion, again strongly suggests a legislative intent to include criminal proceedings as confidential under the statute.⁵

It is worth noting, however, that even if § 23C prevents state prosecutors from obtaining information from a mediation, federal prosecutors and other governmental authorities might not be similarly barred. The Supremacy Clause of the U.S. Constitution enables federal officials

³ The mediator informed the Court that she had had at least thirty hours of training in "conflict management," but the Court held that mediation is a skill that may or may not be taught as part of conflict management, and therefore she did not meet the statutory definition of "mediator." White v. Holton, 1 Mass. L. Rptr. No. 10,216 (November 15, 1993).

⁴ G.L. c. 150, § 10A provides confidentiality protection for a labor mediator but states: "Nothing herein contained shall apply to any criminal proceedings."

(such as the IRS and the Justice Department) to override the state confidentiality statute and subpoena testimony and documents from a mediation.⁶

For example, in U.S. v. Gullo,⁷ the defendant participated in a mediation of a business dispute. A federal grand jury subpoenaed the records of the mediation in connection with a prosecution for extortionate means of credit collection. The parties to the mediation had signed a confidentiality agreement, and the mediation was conducted pursuant to a state confidentiality statute which (like the Massachusetts statute) provided that the communications and work product of the mediation "are confidential and shall not be subject to disclosure in any judicial or administrative proceeding." The Gullo court held that it was not bound by the New York confidentiality statute but instead was required to determine, pursuant to Federal Rule of Evidence 501, whether federal common law would recognize a "mediation privilege" under the circumstances of that case. Although the Gullo Court held that disclosure was not required because the grand jury already had enough evidence to indict the target, there is a strong suggestion in Gullo that, absent such evidence, the subpoena might have been enforced.

The Massachusetts confidentiality statute is also vulnerable, in both state and federal courts, to efforts by a criminal defendant to subpoena testimony or records necessary for his defense. Criminal defendants have a constitutional right to obtain evidence that is in the hands

⁵ Cf. Russello v. United States, 464 U.S. 16, 23 (1983) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (citation omitted).

⁶ See, e.g., U.S. v. Gullo, 672 F. Supp. 99 (W.D.N.Y. 1987). It is well settled that neither the statutes nor the decisional law of a forum state can control the admissibility of evidence in any phase of a civil or criminal action in federal court, where the principles of common law, as interpreted by the federal courts, govern the nature and scope of evidentiary privileges. See U.S. v. Turner, 497 F.2d 406 (8th Cir. 1974), cert. denied, 423 U.S. 848 (1974).

⁷ 672 F. Supp. 99 (W.D.N.Y. 1987).

of third parties. Again, by virtue of the Supremacy Clause, the criminal defendant's constitutional rights would likely take precedence over the state confidentiality statute.⁸

Of even greater concern to most mediators and parties to mediation is the lack of explicit coverage in the statute for premediation discussions and conferences between the parties outside the presence of the mediator. Of course, the confidentiality of both of these types of discussions could fall within the scope of the evidentiary privilege for "compromise" negotiations or could be protected to some degree by confidentiality agreements.

(2) Confidentiality Agreements

The parties to a mediation often try to keep the proceedings confidential by contract. Most mediation agreements include language to the effect that the proceedings will be confidential and that the mediator, the parties, and all other participants agree not to disclose (or offer as evidence) the substance of those proceedings. Such agreements also usually prohibit the parties from using non-voluntary means -- such as subpoenas, federal or state -- to obtain information about what the other parties may have said to the mediator in a private caucus.

These provisions should be embodied in a written agreement, not only because they are more easily enforced that way but also because, it is necessary (absent judicial or governmental appointment) to have a written mediation agreement in order to enjoy the protection of the Massachusetts confidentiality statute. (Most mediators have forms that they use for such agreements.)

It is important, however, to recognize the limitations of mediation agreements as a form of confidentiality protection. They do not bind non-participant third parties, and therefore a

⁸ See *Davis v. Alaska*, 415 U.S. 308 (1974) (criminal defendant has a sixth amendment right to cross-examine witness about his probation status resulting from delinquency finding, despite state statutory policy of protecting the anonymity of juvenile offenders); *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987) (similar).

confidentiality agreement would not prevent such third parties (or the federal government, unless it was a party to the agreement) from subpoenaing the information exchanged in a mediation.⁹ In addition, enforcement of a mediation agreement might require filing a suit for breach of contract -- a cumbersome and expensive process in which the plaintiff would have the burden of proving monetizable damages arising from the disclosure.

(3) Federal Rules of Evidence

In cases tried in Federal District Court, the Federal Rules of Evidence provide some protection for the confidentiality of mediations. Rule 408 bars the admissibility (but not the discoverability) of settlement discussions, including those that occur in mediation sessions.¹⁰ However, the usefulness of Rule 408 is limited not only by the exceptions in the Rule itself (i.e., the substance of settlement discussions may be admissible for purposes other than establishing liability), but also by the fact that the Rule does not bar disclosure through pretrial discovery.¹¹ Moreover, it is not clear that the Rule covers mediators and their work product.¹²

⁹ See 8 JOHN WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2286, at 528 (J. McNaughton, rev. ed. 1961) ("[n]o pledge of privacy . . . can avail against demand for the truth in a court of justice").

¹⁰ Rule 408 provides that:

Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

¹¹ One court has found that, because of the public policy expressed in Rule 408, a party seeking discovery of the terms of a settlement agreement would have to make a "particularized showing of a likelihood that admissible evidence will be generated" by the requested discovery. *Bottaro v. Hatton Associates*, 96 F.R.D. 158, 158 (E.D.N.Y. 1982).

¹² For a discussion of the limitations of Rule 408 and proposals for a "mediation privilege," see Peter Demuth, Theories for Protecting Mediation, in CONFIDENTIALITY IN MEDIATION: A PRACTITIONER'S GUIDE 155 (American Bar Association, 1984), and Note, Protecting Confidentiality in Mediation, 98 HARV. L. REV. 441 (1984).

The limitations of Rule 408 are illustrated by United States v. Gilbert.¹³ In Gilbert, the defendant entered into a civil consent decree with SEC to resolve certain claims. The consent decree was then offered by the government in its criminal prosecution of Gilbert to show that he was aware of the SEC reporting requirements involved in the decree. The Court noted that the consent decree could not have been offered to show liability but could be offered to show the defendant's state of mind.

In place of a set of rules recognizing specific privileges, Congress adopted the catch-all Fed. R. Evid. 501, which provides, in part:

[T]he privilege of a witness shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State or political subdivision thereof shall be determined in accordance with State law.

Although the need for confidentiality in mediation is widely recognized, there is at this point no widespread recognition of a "mediation privilege." Some commentators have looked upon state confidentiality statutes as tantamount to a privilege, but the broad range of factors the courts must use in determining whether a new privilege should be recognized make Rule 501 a highly unreliable source of protection for confidentiality in mediation.

The case most directly on point is U.S. v. Gullo, which was discussed above. The Gullo Court weighed the four factors determinative of whether a privilege should be recognized:

- (1) the federal government's need for the requested information;
- (2) the importance of the policy sought to be advanced by the privilege;
- (3) any special need for the information sought; and
- (4) the adverse impact on the local policy that would result from nonrecognition of the privilege.

¹³ 668 F.2d 94 (2d Cir. 1981), cert. denied, 102 S. Ct. 2014 (1982).

The Court went on to find that it would recognize the privilege in that case because the federal prosecutor conceded that the grand jury had sufficient information to indict Mr. Gullo even without the requested information. The clear implication of Gullo, however, is that where the subpoenaed information is essential to a prosecution, a federal court may refuse to recognize a mediation privilege.

(4) Common Law Rules of Evidence

The common law rules of evidence that govern proceedings in the state courts of Massachusetts (and other states) limit the admissibility of settlement discussions in the same manner as, but not to the full extent of, Fed. R. Evid. 408. For example, the common law rule does not bar admissibility of statements of fact made in the course of settlement discussions.¹⁴ In addition, like Rule 408, the common law rule governs the admission of evidence but does not bar disclosure through pretrial discovery. The substance of discussions in a mediation might also be subpoenaed by a criminal defendant, whose constitutional right to obtain evidence in his defense may override common law and statutory evidentiary privileges.¹⁵

(5) Federal Local Rule 16.4

The new Local Rules of the Federal District Court for the District of Massachusetts contain a confidentiality provision applicable to mediation. Local Rule 16.4(C)(4)(f) provides that:

Any communication related to the subject matter of the dispute made during the mediation by any participant, mediator, or any other person present at the mediation shall be a confidential communication to the full extent contemplated by Fed. R. Evid. 408. No admission, representation, statement of other confidential communication made in setting up or conducting the proceedings not

¹⁴ See PAUL LIACOS, HANDBOOK OF MASSACHUSETTS EVIDENCE § 4.6 (Mark Brodin and Michael Avery, eds. 1994).

¹⁵ See, e.g., *Davis v. Alaska*, 415 U.S. 1105 (1974).

otherwise discoverable or obtainable shall be admissible as evidence or subject to discovery.

This provision appears to be applicable solely to the mediation of cases pending in Federal District Court. It would likely be an effective bar to discovery by civil litigants in federal court but could not withstand a subpoena from a criminal defendant invoking his or her Sixth Amendment right to evidence necessary for a criminal defense. As a Local Rule of a District Court, it would also probably be ineffective as protection from a subpoena from federal enforcement officials invoking federal statutory authority.¹⁶

(6) Ethical Codes

A final source of protection for confidentiality derives from the mediator's ethical codes, which require confidentiality. For example, the Ethical Standards of Professional Responsibility promulgated by the Society of Professionals in Dispute Resolution (SPIDR) prohibit disclosure of confidences by neutrals. However, the Standards also recognize that confidentiality cannot always be protected:

There may be instances . . . in which confidentiality is not protected. . . . Except in such instances, the neutral must resist all attempts to cause him or her to reveal any information outside the process.¹⁷

B. The Obligation to Disclose

As noted above, there are gaps in the shield of confidentiality in mediation. Moreover, there are certain areas in which mediators may have, or believe they have, a duty to disclose information they obtain in a mediation.

¹⁶ The local rulemaking authority of the District Courts derives from Fed. R. Civ. P. 83, which permits the promulgation of rules that are not inconsistent with federal law.

¹⁷ SPIDR Ethical Standards of Professional Responsibility § 3 (1984).

(1) Commission of a Crime

There is no Massachusetts statute which requires mediators to voluntarily disclose evidence of the commission of a crime. Indeed, the Massachusetts confidentiality statute (G.L. c. 233, § 23C) could reasonably be interpreted as prohibiting such disclosures. However, there is a federal "misprision" statute (18 U.S.C. § 4), which prohibits the concealment of a federal crime. This statute makes it a crime, punishable by a \$500 fine and/or three years imprisonment, to conceal evidence of the commission of a felony. The failure to report such evidence is not a crime in and of itself. But any affirmative act of concealment -- such as destroying the notes from a mediation -- could be considered such an act.

Mediators must also reckon with a potential common law duty to disclose evidence of the planned commission of a crime -- i.e., the mediator might be considered negligent for failing to warn the prospective victim of a threatened future crime. The leading case in this area is Tarasoff v. Regents of the University of California,¹⁸ in which a psychotherapist at the University of California was found negligent when he failed to warn a third party of his patient's threats to murder a student. Some commentators have argued that the duty established in Tarasoff could apply to mediators.¹⁹ Arguably such a duty might apply not only to the planned commission of a crime but also to past conduct, such as child abuse, if the victim suffered harm that might have been prevented if the mediator had reported the abuse. No case to date, however, has held that a mediator has

¹⁸ 118 Cal. Rptr. 129 (1974), on rehearing, 131 Cal. Rptr. 14 (1976).

a common law duty to disclose past criminal activity or anticipated future criminal activity.

(2) Child Abuse and Neglect

The Massachusetts child abuse reporting statute (G.L. ch. 119, § 51A) requires certain classes of people (such as social workers, psychologists, probation officers and others -- but not lawyers or mediators) to report evidence of abuse or neglect. Many mediators believe they are mandated reporters under § 51A, and therefore they tell the parties that they will not keep confidential any information about child abuse. It is not clear, however, whether such mandated reporters are permitted to make such disclosures of information obtained in a mediation, given the strictures of ch. 233, § 23C.

The statute obligates a mandated reporter to act only when she acquires the information in her "professional capacity." Because of that language, it would appear that when a social worker, psychologist, or other mandated reporter acquires evidence of child abuse while serving as a mediator, she is not required to report that evidence, unless her service as a mediator can be reasonably construed to be part of her professional work. Even if the mediator is a mandated reporter and believes that § 51A requires disclosure, the language of § 51A suggests otherwise: the statute provides that several otherwise applicable privileges (such as the patient therapist privilege) do not bar disclosure, but fails to mention ch. 233, § 23C. A reasonable inference from that omission is that mediator confidentiality is an exception.

¹⁹ See John Murphy, In the Wake of Tarasoff: Mediation and the Duty to Disclose, 35 Cath. U.L. Rev. 209 (1985).

(3) Reporting to the Court

In Probate and Family Court, conciliation sessions are conducted by court-employed Family Service Officers. These sessions, which are often described as “mediation” sessions, are not entirely confidential. Indeed, the Family Service Officers are permitted to report to the Court about the sessions in which they participate.²⁰ In other courts, such as the Housing Court (where Housing Specialists mediate summary process cases) and Juvenile Court (where Probation Officers have the statutory authority to mediate CHINS cases²¹), there are no rules preventing disclosure of the substance of the parties’ discussions by the Probation Officer to the Court.

Another form of mandated reporting to the Court is called for in Massachusetts’ hazardous waste statute, G.L. ch. 21E. Under § 4A of that statute, which permits the use of mediation and other forms of ADR, a party is entitled to an award of “litigation costs and reasonable attorneys’ fees” from an opposing party who did participate in dispute resolution “in good faith.” It is difficult to imagine how a party seeking to recover such fees and costs on the basis of an opponent’s failure to participate in a mediation in good faith could avoid disclosing the substance of communication in the mediation.

(4) Open Meeting Laws and FOIA

Municipalities and government agencies often participate in mediations. When they do, their obligations to permit attendance by non-parties and their obligations to

²⁰ See Standards for Probation Officers § 5.03 (dispute intervention function “may require the presentation of a Probation Officer recommendation to the court on unresolved issues”).

²¹ See G.L. c. 119, § 39E.

respond to requests for information under the Massachusetts public records laws and Federal Freedom of Information Act may conflict with duties of confidentiality.

The Massachusetts Legislature recently amended the state open meeting laws to create a limited exception for participation of municipalities in a mediation. G.L. ch. 39, § 23B(9) now permits governmental bodies to participate in a mediation as a closed “executive session” provided that “(a) any decision to participate in mediation shall be made in open meeting session . . . and (b) no action shall be taken by any governmental body with respect to those issues which are the subject of the mediation without deliberation and approval for such action at an open meeting . . .”

While the Massachusetts confidentiality statute might be construed as an exception to state public records requirements, it is not clear whether the statute would bar a federal FOIA request made to a federal agency participating in a mediation, because of the Supremacy Clause.

(5) Common Law Duties to Disclose

When a party to a mediation is a representative of a partnership or corporate entity, the representative may have a duty to report to the other partners or officials of the corporation the substance of the communications made in the course of a mediation. If that is the case, the party signing an agreement to mediate containing a confidentiality provision must have authority to bind those to whom such disclosures are made, and must take steps to assure that anyone receiving information about the mediation faithfully

honors the duty to keep such information confidential. This problem is, in some ways, more of a practical than a legal problem, but it is one that has received little attention.

Suggested Reforms

Several reforms are needed in order to clarify the confidentiality protection given to mediation.

First, the Massachusetts statute should be amended to include explicit exceptions for (a) evidence of abuse or neglect of a minor or other person who is incapable of protecting his/her own interests; (b) evidence that a person poses a danger of physical harm to him/herself or to another person; (c) evidence of the planned commission of a crime; (d) evidence relating to the liability of the mediator himself or herself, offered in a subsequent suit against the mediator; (e) evidence needed by a criminal defendant for his or her defense; (f) information disclosed by the mediator to members of the staff in a mediation program where such disclosure is needed for supervision of the mediator or management of the mediation program; (g) information disclosed by the mediator for research, training, or statistical compilation, provided that such information is adapted by the mediator so as to render anonymous any identifying information; and (h) information which all parties to the mediation agree in writing may be disclosed. Such exceptions, which are similar to provisions adopted in several states, would give the parties in a mediation guidance as to what can be safely disclosed -- at least insofar as state law is concerned.²² The coverage of the statute should also be broadened, to include (a)

²² An additional exception, for evidence relevant to the interpretation or enforcement of an agreement reached in a mediation, would (in my view) open the door too widely to disclosure. A case involving such a disclosure was

discussions conducted by the parties in connection with the mediation when the mediator is not present, and (b) discussions between the parties and the staff of a mediation program concerning the mediation.

Second, similar confidentiality protection should be adopted on a national level. Without such a provision, federal prosecutors and regulators arguably can subpoena otherwise confidential communications from a mediation if the information is needed for them to carry out their duties, because the Supremacy Clause gives them the ability to trump state laws which stand in their way. Unfortunately, such legislation is not yet on the horizon.

Finally, court rules should (a) require probation officers, clerk magistrates and other court personnel who perform mediation services to inform the participants in these sessions in writing that the process is, or is not, confidential and subject to the protection of § 23C; and (b) prohibit inquiries by judges and other court personnel about the substance of communications made in a mediation.

In the meantime, lawyers participating in mediation should (a) recognize that the cloak of confidentiality may not be as broad as the assurances often given by mediators, and (b) advise their clients accordingly. Although the exceptions to the rule of confidentiality are narrow, the consequences of stumbling over those exceptions could be serious.

argued recently before the Virginia Supreme Court. See M. Jacobs, "Case to Test Confidentiality of Mediations," *Wall Street J.*, March 3, 1995, at B16.

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