

## Outside Counsel

## Expert Analysis

# Is Mediation Confidential in New York?

Confidentiality is often regarded as a critical element in mediation. It allows participants to speak frankly without fear that their statements and admissions will be used against them if a case goes to trial.

But in New York, mediation is not always confidential. No statutes assure confidentiality. Some courts have rules that protect it, others do not. Private mediation agreements vary in their terms. The few court decisions that have implicated mediation confidentiality provide no clear guidance for attorneys.

“Mediation confidentiality” is not self-defining. It may include statements such as one or more of the following:

1. Statements, admissions and/or conduct in the course of mediation are not subject to discovery and are inadmissible in evidence if the case being mediated goes to trial.

2. Statements, admissions and/or conduct in the course of mediation are not subject to discovery and are inadmissible in any legal proceeding.

3. Statements, admissions and/or conduct in the course of mediation cannot be disclosed to a third party.

4. Documents created solely for the mediation are inadmissible and not subject to discovery.

5. The mediator cannot be called to testify or produce his or her notes.

6. The mediator cannot make reports to a court or must make certain reports.

### Sources of Confidentiality

**Statutes.** No federal or New York statute

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creates a mediation privilege or guarantees confidentiality, with the single exception of McKinney’s Judiciary Law §849-b, which prohibits disclosure of a mediator’s writings and files, but applies only to community dispute resolution centers, not courts. Ten states and the District of Columbia have enacted the Uniform Mediation Act, which has a mediation privilege, and California has a confidentiality statute. To date, New York has not adopted the UMA.

Both federal and New York laws recognize a privilege for settlement negotiations. However, the privileges are limited. Rule 408 of the Federal Rules of Evidence, and CPLR section 4547 make conduct and statements made during compromise negotiations inadmissible when offered to prove liability or damages. However, both statutes expressly allow them into evidence when offered for any other purpose and do not bar discovery.

**Court Rules.** Courts that have established mediation programs generally adopt rules that protect confidentiality to varying degrees. The Southern District rule says: “The entire mediation process shall be confidential. The parties and the mediator shall not disclose information regarding the process, including settlement terms, to the assigned Judge or to third persons unless all parties agree or the assigned Judge orders in connection

with a judicial settlement conference... persons authorized by the Court to administer or evaluate the mediation program shall have access to information and documents necessary to do so.... The mediation process shall be treated as a compromise negotiation for purposes of the Federal Rules of Evidence and state rules of evidence.” (Southern District Local Rule 83.9(1).)

The Eastern District offers greater protection to confidential statements and documents. It requires parties and their attorneys to sign an agreement before mediation begins that (1) makes all written and oral communications during mediation confidential and prohibits their disclosure or use for any purpose unrelated to the mediation, unless the parties otherwise agree; (2) prohibits calling the mediator as a witness or subpoenaing the mediator’s notes, unless in a proceeding related to the mediator’s alleged misconduct; (3) bans from court files all documents generated by the mediation process; (4) prohibits reports to the court about what transpired in mediation without the written consent of all parties; and (5) prohibits discovery of all confidential information. (Eastern District Local Rule 83.8(d).)

While 28 U.S.C. §652(d) authorizes federal courts to create their own confidentiality rules, there is no New York statute permitting state courts to adopt such rules. Nevertheless, several New York state courts have done so.

The Commercial Division of the New York County Supreme Court is one. Rule 6 of its “Rules of the Alternative Dispute Resolution Program” provides that (1) nothing that occurs in mediation shall be disclosed outside the mediation proceed-

ing, except as provided in the rule, (2) neither the mediator, the parties or their attorneys shall disclose any communications, documents prepared for the mediation or notes of the proceeding; (3) no party shall seek to compel production of mediation documents in that action or any other legal proceeding; (4) no party shall seek to compel the testimony of any other party or the mediator concerning mediation communications, including whether the parties agreed to settle the matter; and (6) documents and information otherwise discoverable under the CPLR shall not be shielded from disclosure because they are submitted or referred to in the mediation. Before the mediation begins, counsel on behalf of the parties must sign a form certifying that they have read and will comply with these rules.

The New York City Family Court has a mediation program. Its program description states that “Mediation is a...confidential process” without further explication. The Westchester County Supreme Court has a matrimonial mediation pilot project that features a detailed confidentiality rule that bars discovery or disclosure of all oral, written, or other communications made during the course of the mediation by any party, mediator or any other person present in any current or future judicial or administrative proceeding. The rule also prohibits providing details of the mediation to the judge, except in certain circumstances.

In the Appellate Division, First Department, the attorneys in charge of the appeal may be required to participate in a pre-argument conference, which is akin to mediation. While the Pre-Argument Conference Program says the “conference is a confidential proceeding,” no further explanation is provided. Even the court’s rule establishing pre-argument conferences, 22 NYCRR §600.17, says nothing about confidentiality. In appeals from judgments, confidentiality may not matter because the court will make its decision on the trial record. But if the appeal is interlocutory, or if the Appellate Division sends the case back to the trial court for further proceedings, confidentiality remains a concern.

Some courts that have confidentiality rules permit exceptions for reports to the court or other authorities. For example, Rule 6(c) of the Commercial Division requires the mediator to report informa-

tion whose disclosure would prevent a participant from engaging in an illegal act, including one likely to result in death or serious bodily injury. In the First Department, Rule 600.17(h) permits sanctions against an attorney “who fails to demonstrate good faith during the pre-argument process,” which impliedly permits the mediator and opposing counsel to report alleged “bad faith.”

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**Contracts.** Private mediation providers, such as JAMS, AAA, FINRA and NAM, and individual mediators have rules and contracts that protect confidentiality. Their terms vary. The JAMS mediation agreement states, “All statements made during the course of the mediation are privileged settlement discussions...and are inadmissible for any purpose in any legal proceeding...[they] will not be disclosed to third parties except persons associated with the participants in the process, and are privileged and inadmissible for any purposes, including impeachment, under Rule 408 of the Federal Rules of Evidence and any applicable federal or state statute, rule or common law provisions.”

AAA Rule M-10 is less comprehensive. Subject to applicable law or the parties’ agreement, it requires mediators not to divulge confidential information and documents; and prohibits requiring the mediator to testify or produce records in any proceeding. It also prohibits parties from offering evidence in any proceeding of the following: views expressed about settlement, admissions, proposals or views expressed by the mediator or a party’s willingness to accept the mediator’s settlement proposal.

The FINRA (Financial Industry Regulatory Authority) mediation submission agreement prohibits the parties and the mediator from disclosing or offering in evidence opinions, suggestions, proposals, offers or admissions in any legal proceeding, unless authorized in writing by the parties or required by applicable law [which “applicable law”

is not specified].

NAM Comprehensive Rule 51 states that the “parties agree not to rely upon or introduce as evidence in any subsequent arbitral or judicial proceeding” views expressed about settlement, admissions and mediators’ proposals. The rule does not say directly such evidence is inadmissible or cover all statements made in mediation, nor does it mention documents prepared for the mediation. Also, it is not clear whether “subsequent” includes the case being mediated.

### Court Decisions

Very few New York federal and state court decisions address mediation confidentiality. Some are inconsistent; a number simply ignore confidentiality.

When a party or counsel fails to attend a court-ordered mediation, confidentiality rules probably do not bar evidence of non-attendance. Such evidence does not involve a “communication.” In *Johnson v. Webb*, 740 N.Y.S.2d 892 (2002), the Third Department affirmed sanctions awarded in a visitation proceeding against a party who failed to attend three court-ordered mediation sessions. The order was based on the testimony of the parties at a fact-finding hearing. The Third Department did not mention confidentiality and did not mention whether any court rule mandated attendance at mediation.

But confidentiality rules do affect evidence of what transpired at the mediation. In *re A. T. Reynolds & Sons*, 452 B.R. 374 (S.D.N.Y. 2011), addressed the proper interpretation of General Order M-390 of the Bankruptcy Court for the Southern District of New York. It requires the mediator to report to the court any willful failure to attend or to participate in the mediation in good faith. Based on the mediator’s report, the Bankruptcy Court sanctioned a party for failing to participate in good faith by (1) failing to send a representative with sufficient settlement authority, (2) entering the mediation with a “no pay” position rather than engaging in risk analysis; and (3) demanding, prior to the mediation, that it be confined to specific topics.

The District Court rejected the Bankruptcy Court’s subjective test of good faith because it required testimony about the content of mediation. The court held that “confidentiality considerations preclude a court from inquiring into the level of a

party's participation in mandatory, court-ordered mediation, i.e., the extent to which a party discusses the issues, listens to opposing viewpoints and analyzes its liability." Instead, the court adopted an objective test of good faith. It held that a party satisfies the good faith requirement if it attends the mediation, provides pre-mediation memoranda and produces organizational representatives with sufficient settlement authority.

Proving and enforcing mediated settlement agreements have also been a source of litigation. Well-drafted settlement agreements provide that the agreements are admissible in evidence as an exception to confidentiality in order to enforce them. But may a party use confidential information to prove an oral agreement? And when a party claims to have signed a mediated agreement as a result of fraud, duress or mistake, do rules concerning mediation confidentiality permit the court to admit evidence of what occurred during the mediation?

*Delyanis v. Dyna-Empire*, 465 F.Supp.2d 170 (E.D.N.Y. 2006), applying New York state law, held that a settlement agreement reached in mediation, but not signed, was enforceable. The mediator had drafted a handwritten document with the agreed terms, but it stated that the document was not meant to be binding. Later, when the mediator asked whether he could notify the court that the case had been settled, the plaintiff's lawyer answered affirmatively. The plaintiff refused to sign the settlement, and the defendants sought to enforce it. The court agreed to do so, based on the lawyer's statement. In reaching this decision, the court apparently heard evidence about what transpired during the mediation without facing the issue of whether it was admissible.

*Stoll v. Port Authority*, 701 N.Y.S.2d 430 (1st Dept. 2000), also involved the enforcement of a settlement agreement negotiated by counsel in mediation, which plaintiff refused to sign. The court held that the attorney had settlement authority because the mediator had instructed counsel to come to the mediation with full settlement authority. The court apparently permitted, without comment, the attorneys' declarations of what occurred in the mediation.

Even when a written, mediated settlement agreement is otherwise enforceable, a party may attempt to prevent its

enforcement by claiming that her agreement was procured by fraud, coercion or duress during the mediation process. Under these circumstances, a court must decide whether to permit exceptions to the rule of mediation confidentiality.

In *Chitkara v. New York Telephone*, 45 Fed.Appx. 53 (2d Cir. 2002) the plaintiff resisted the enforcement of a settlement agreement he had signed, claiming the mediator had harangued and pressured him to sign it and had, in addition, made a material misrepresentation of fact. The District Court, in rejecting this argument, relied on affidavits from the plaintiff and defense counsel about what occurred during the mediation. The U.S. Court of Appeals for the Second Circuit affirmed. Neither the Second Circuit, nor apparently the District Court, said anything about mediation confidentiality.

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Mediation agreements that spell out what is confidential and how it is protected are the best approach; court rules are generally less comprehensive; both are subject to court interpretations and applications.

In a state court case, a party to a divorce sought to subpoena the mediator to testify about the circumstances surrounding the execution of a mediated separation agreement. The mediator, citing the confidentiality agreement the parties signed, moved to quash the subpoena. The Supreme Court refused to do so; the Appellate Division, Fourth Department, agreed, holding that the mediator's testimony was required in order for the court to fulfill its duty to determine whether the terms of the agreement were fair and reasonable, *Hauzinger v. Hauzinger*, 43 AD3d 1289 (4th Dept. 2007). The Court of Appeals unanimously affirmed, finding that the confidentiality agreement permitted disclosure if both parties consented, which they had, 10 NY3d 923(2008).

In *re Teligent*, 640 F.3d 53, 57-58 (2d Cir. 2011), addressed a party's request for disclosure of confidential mediation statements. The parties agreed to mediate their case under the terms of the Southern District Bankruptcy Court standard protective order, which imposes limitations on the disclosure of mediation information. After

mediating, the parties reached a settlement agreement. Subsequently, the plaintiff sued his former law firm for malpractice. The firm filed a motion to lift the confidentiality provisions of the protective order so it could obtain discovery of documents leading up to the settlement agreement, "including all mediation and settlement communications."

The Second Circuit, noting that the Bankruptcy Court protective order provided no guidance on the circumstances under which disclosure of confidential mediation information could be compelled, held that disclosure may be permitted when the party seeking it demonstrates "(1) a special need for the confidential material, (2) resulting unfairness from a lack of discovery, and (3) that the need for the evidence outweighs the interest in maintaining confidentiality." In formulating this rule, the Second Circuit relied on the Uniform Mediation Act (which has not been enacted in New York), the Administrative Dispute Resolution Act of 1996, and the Administrative Dispute Resolution Act of 1998. The court held that the law firm failed to satisfy any of these three prongs.

### Conclusion

There is no ironclad way to guarantee mediation confidentiality. Mediation agreements that spell out what is confidential and how it is protected are the best approach; court rules are generally less comprehensive; both are subject to court interpretations and applications.

There are several practical ways to protect confidentiality: disclosing confidential information to the mediator only in private caucuses; labeling documents "Confidential: Prepared for Use in Mediation Only"; and incorporating the elements of confidentiality in settlement agreements, with an exception for enforcement. It may be possible to enter private mediation agreements in court-annexed mediations where parties believe the court's rules are insufficient. No court rules permit this, but none prohibit it, either.