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Is Your Dispute Resolution Process Truly Confidential?

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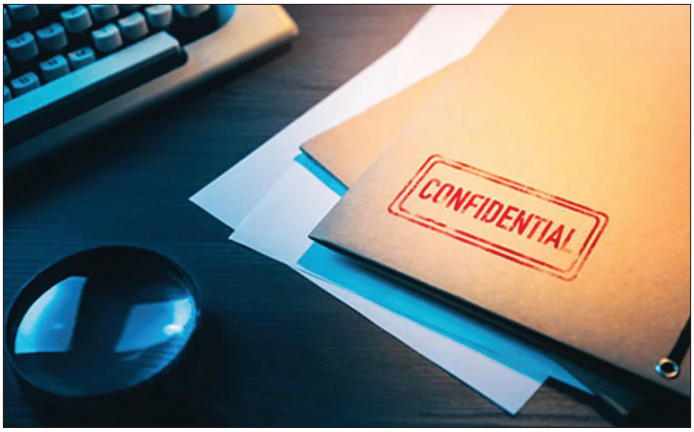
Alternative dispute resolution has many advantages over traditional litigation, including reduced costs, expedited timelines and streamlined processes. However, one of the oft-touted reasons parties choose a form of alternative dispute resolution is to prevent the underlying dispute, negotiations, and potential the settlement from being exposed to the public eye. While it is reasonable to assume that mediation and arbitration are in large part confidential, it would be wholly unreasonable to expect unfettered confidentiality across the board. Rather, it is incumbent upon the participants to take appropriate steps to create and enhance available protections, as well as to be aware of existing limitations or potential risks associated with these processes. Absent precautions, a misguided presumption of confidentiality may result in missed opportunities to provide some additional protections along the way. Moreover, failure to understand the true limitations of confidentiality can lead to misunderstandings between counselors and their clients, as well as set unreasonable client expectations.

Between the two traditional forums of dispute resolution, i.e., arbitration and mediation, there are some variations in what is automatically accepted or recognized as confidential and which form of dispute



resolution may have a better chance of being maintained as confidential throughout the entirety of the process. Each of these processes will be addressed separately herein.

Mediation is a consensual process generally entered into by agreement of the parties, either based upon the provisions of the underlying contract, or in light of a party agreement reached at the outset of a dispute. At times, mediation may be a path chosen subsequent to the commencement of litigation or as a result of court order or directives. Thus, other than a referring order or a docket entry denoting a matter has gone to mediation, there is often nothing in the public forum reflecting that a dispute exists and/or that the parties are mediating that dispute. Moreover, even if a matter has gone to mediation subsequent to litigation, nothing exchanged during

the mediation process will ever be filed on the public docket. Therefore, other than a "bare bones" report filed by the mediator as to the general outcome of the mediation, often times nothing else is ever filed with a court. At most, the parties may choose to conclude the litigation with court approval of a settlement agreement reached during mediation, which the parties can control the content of minimizing what will be on the public docket. As a result, only limited pieces of the dispute will be available for public viewing.

Given that mediation is often consensual, it is more malleable and allows the parties to build into an agreement an understanding of what will be considered confidential and how information, disclosure, and documents will be treated, both during the process and subsequently, in the event that the dispute does not resolve. Ideally, the agreement should be "blessed" by a governing court (if the matter is already in litigation) in order to ensure that the agreement not only has teeth but also, for reasons identified below, to facilitate future court recognition of the incorporated confidentiality provisions in the event of a disagreement among the parties. Regardless, the initial starting point for the parties in considering what will be confidential, in the event the matter does not resolve, should be the rules of the governing courts.

At the outset of any matter, it is important to understand that there is no national standard on confidentiality within the state court system. There is, however, some uniformity within the frderal court system. Regardless, neither system provides broad protection against the admissibility of settlement communications or disclosures. For this reason, I often include in my mediation agreements a statement that, notwithstanding the intent of the parties and the specificity of the agreement, no one can promise that communications and disclosures made during the process will not be ordered by a court or other tribunal of competent jurisdiction to be disclosed or used as evidence in a proceeding at some time in the future.

The Uniform Mediation Act (UMA), approved by the National Conference of Commissioners on Uniform State Laws in 2001, binds all parties to the agreement, including the mediator, and provides that verbal or non-verbal statements or disclosures made during a mediation or for the purposes of participating in a mediation are confidential unless waived. Unif. Mediation Act (Unif. L. Comm'n 2001). Currently, the UMA has only been approved by 13 states and the District of Columbia.

There are exceptions to the confidentiality provisions contained in the UMA. For example, communications made to prove or disprove a claim of misconduct by parties, including the mediator, or to enforce the agreement arising from the mediation itself if signed by all parties, are not protected under the UMA and may be disclosed. Id. In addition, if a party demonstrates that it cannot obtain the evidence from any other source and can prove that public policy outweighs the need to keep private, a court may require disclosure. Lastly, some states have their own independent laws specifically providing for broader mediation confidentiality protections, i.e., California. Other states, such as New York, provide only minimal protections under their state court rules, i.e., CPLR 4547.

Turning to federal law, Rule 408 of the Federal Rules of Evidence (FRE) does not provide any broader or greater relief for parties. In fact, the rule is often a bit more limited than parties realize, as it does not cover everything that is said during a settlement conference or session. Rather, FRE 408 only prevents parties from using an offer to accept consideration or the promise of consideration, as well as conduct or statements made during negotiations about a claim "to prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction." Fed. R. Evid. 408(a). Although, that same information can be utilized for other purposes, such as "proving a witness's bias or prejudice, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation

or prosecution." Fed. R. Evid. 408(b). While several federal courts have recognized a federal mediation privilege rooted in FRE 408, there is no broadly recognized federal mediation privilege. See *Lake Utopia Paper v. Connelly Containers,* 608 F.2d 928 (2d Cir. 1979). Further, certain courts have local rules specifically identifying the ability to compel discovery of information conveyed during mediation. See *In re Boy Scouts of America & Delaware BSA,*No. 20-10343-LSS (Bankr. D. Del. 2021) (addressing local Delaware Bankruptcy Court Rules and limitations contained therein).

In arbitration, additional complications often arise as there may be information on the docket pre or post arbitration. It is not uncommon for litigation to be commenced and then stayed upon the granting of a motion to compel arbitration. Alternatively, at the conclusion of an arbitration, filings with a court will be necessary if an award needs to be confirmed. Of course, just like in mediation, there cannot be any guarantee that information disclosed during this process will not end up in the public eye. Arbitrators and provider organizations running the arbitration process are bound to keep the existence of a dispute, anything exchanged during the dispute, as well as any resulting award confidential. However, these restrictions do not apply to the parties. Under most providers' rules and even the Federal Arbitration Act, absent an agreement between the parties, either in the provisions of underlying contract giving rise to the dispute or a subsequent confidentiality agreement entered into between the parties, nothing requires confidentiality as a matter of right.

As noted, at the end of the process in a subsequent action brought to confirm an award, notwithstanding the existence of a confidentiality agreement, there are very limited exceptions as to what will become part of the public docket. Courts rarely grant motions to seal. In fact, courts routinely find that a party seeking to confirm or enforce an award have no legitimate expectation of privacy as the judicial process is a public process by its nature. In a recent Delaware case *Soligenix v. Emergent Product Development Gaithersburg,* 289 A.3d 667 (Del. Ch. 2023), which addressed objections to redacted materials in the context of a motion to confirm an award, the court held that notwithstanding the parties' confidentiality agreement, all materials were to be publicly filed because judicial proceedings should be open to the public.

The court further reasoned that it was not a party to the confidentiality agreement and could not be bound by it, and that this agreement did not state that any judgment entered upon the award by the court would also be confidential. (Query whether if the confidentiality agreement had contained such language would this have altered the court's determination?).

In sum, parties seeking to utilize dispute resolution as a means to achieve a more economically streamlined result should go in with eyes wide open. Parties will benefit from spending time carefully drafting agreements to be as broad and fulsome as possible and at each stage of these processes consider what they can do to retain and protect confidentiality. Most importantly, no promises of complete confidentiality should be made to clients—as it is simply never the case in either mediation or arbitration. Rather, a more controlled, and confined process is within reach, provided that counsel are paying attention to the details and are on top of the changing landscape and different rules along the way.

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