ALTERNATIVE DISPUTE RESOLUTION COMMITTEE
ARBITRATION COMMITTEE
INTERNATIONAL COMMERCIAL DISPUTES COMMITTEE
AND LITIGATION COMMITTEE

MEDIATION CONFIDENTIALITY IN NEW YORK STATE: OVERVIEW OF THE CURRENT REGULATORY AND INSTITUTIONAL LANDSCAPE WITH RECOMMENDATIONS

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Mediation Confidentiality In New York State: Overview of the Current Regulatory and Institutional Landscape with Recommendations

Unlike a number of other states, New York has not adopted a statewide legal framework governing the confidentiality of information and documents shared during a mediation or legislated a specific "mediation privilege." Given this fact, several members of the Alternative Dispute Resolution (ADR) Committee, the Arbitration Committee, the International Commercial Disputes Committee, and the Litigation Committee of the New York City Bar Association formed a subcommittee to examine the scope of the confidentiality protections for mediations conducted in New York and determine what, if any, measures should be taken by mediators and legal practitioners to bolster these protections. The subcommittee has identified these key takeaways, as set forth in more detail in the report that follows:

- Mediators and mediation participants should not assume that all information shared during a mediation is *de facto* confidential.

- Evidentiary rules applicable in state and federal courts in New York which prohibit the use of settlement discussions for certain purposes provide some measure of incidental confidentiality protection for certain mediation-related communications.

- Each of the mediation programs offered through New York State Courts and federal courts in New York has rules requiring confidentiality of the mediation process for the mediation participants.

- Privately administered mediation forums (e.g., AAA, JAMS) also have rules requiring confidentiality of the mediation process to which participating parties agree to be bound.

- Mediations that are not part of a court program or conducted through an administered entity such as AAA or JAMS—that is, truly private mediations—are not governed by any general confidentiality rule and/or standard mediation agreement covering the participants. Thus, mediators and legal practitioners participating in these types of mediations will want to consider entering into a confidentiality agreement at the outset.

- Mediators and legal practitioners participating in court-adjacent or administered mediations may still consider using a confidentiality agreement to supplement confidentiality protections, for example, to cover third parties coming into contact with mediation communications, who are not specifically contemplated by most of these rules.

- Regardless of the existence of a confidentiality agreement governing a mediation, New York courts have allowed the discovery of certain mediation communications in exceptional and narrow circumstances. Also, persons with no connection to the mediation, including government agencies and officials, and litigants in other cases, may have legal rights to issue a compulsory process such as a subpoena to those who participated in the mediation to learn what happened. Parties to a mediation need to be aware of this risk,

although the law governing the parties' rights to resist and the likelihood that a court would enforce the process is beyond the scope of this report.[1]

This report highlights the fragmented nature of New York's legal landscape governing mediation confidentiality. We also recommend steps participants can take to strengthen the confidentiality of information and documents that are shared during mediations that are conducted in New York State.

I. INTRODUCTION

New York State does not have a statewide legal framework within which mediations must be conducted.[2] Nor has it adopted the Uniform Mediation Act[3] which establishes mediation processes as well as a confidentiality privilege for mediation constituents.[4]

In order to identify the rules that govern mediation confidentiality in New York, one has to resort to varying sources. Federal and state evidence rules that govern settlement discussions have been interpreted by courts to apply to mediations. In court-mandated mediations, each court has also adopted its own rules that provide confidentiality protections. Administered mediations conducted outside court programs are subject to the rules of administering institutions. Private mediations are governed by contractually agreed-upon mediation provisions which may or may not incorporate rules from one or more of the institutions that administer mediations. Generally,

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[1] The participants in the mediation may specify by contractual agreement how a participant who is served with a subpoena should react (for example, by giving notice to other participants; objecting; or moving to quash), subject always to any mandatory legal constraints on their action.

[2] In general, mediations in New York State fall in one of three broad categories: (1) Community Dispute Resolution Center ("CDRC") mediations, which operate through a program funded by the New York State Unified Court System and are governed by a New York statute—McKinney's Judiciary Law § 849—and provide free or low-cost mediation services to New York residents who may or may not have an active court case; (2) court mediations, which operate through court programs and are governed by local court rules; and (3) private mediations, which operate either in an unadministered setting or through private providers, in which case they are subject to the provider rules. The statutory scheme establishing CDRCs offers a robust confidentiality protection. *See* McKinney's Judiciary Law § 849-b(6). But as these mediations do not typically involve the types of disputes addressed by this joint subcommittee, we do not include this analysis in this report.

[3] UNIFORM LAW COMMISSION, Uniform Mediation Act (amended 2003). May be accessed at https://www.uniformlaws.org/committees/community-home/librarydocuments?communitykey=45565a5f-0c57-4bba-bbab-fc7de9a59110&LibraryFolderKey=&DefaultView= (All websites last accessed on June 11, 2024).

[4] A number of states, including neighboring New Jersey, have adopted the Uniform Mediation Act. The adoption of this comprehensive framework by other states raises the question whether parties should consider the existence of any statewide framework in choosing the venue for their mediation, and whether it might be worth mediating in a state other than New York on such a basis. However, even if a mediation occurs in a state other than New York, a choice of law analysis would have to be conducted by a New York tribunal before determining whether the law of the state where the mediation was conducted would apply to a controversy in that tribunal. *See, e.g.*, Oasis Med., Inc. v. I-Med Pharma USA Inc., 2023 U.S. Dist. LEXIS 173867, *26-29 (S.D.N.Y. Sept. 1, 2023) (noting that New York does not have a mediation privilege and conducting an extensive choice of law analysis to determine whether the New Jersey mediation privilege would apply to information related to a mediation conducted in New Jersey sought by subpoena in the New York action). The state of the jurisprudence on the choice of law applicable to the mediation privilege is beyond the scope of this report.

in all circumstances, the parties also can contractually agree to follow specific confidentiality protocols suited to their matter.

II. SOURCES OF MEDIATION CONFIDENTIALITY IN NEW YORK

A. Rules of Evidence:

Both New York State and federal evidentiary rules bestow some level of confidentiality on settlement discussions whether they take place during a mediation or not. CPLR §4547 (Compromise and Offers to Compromise) and Federal Rule of Evidence 408 (Compromise Offers and Negotiations) delineate the specific matters that are covered. Each provides that evidence of various statements made during compromise negotiations are inadmissible. Notably, the admissibility of evidence in a court of law is a narrower type of confidentiality than that provided by some of the other sources of confidentiality discussed below, which may prohibit participants from disclosing information altogether.

State Evidentiary Rules:

New York State evidentiary rules do not include any provisions pertaining explicitly to mediation sessions. However, courts have analyzed mediation sessions under CPLR §4547, which pertains to compromise and offers to compromise.[5] CPLR §4547 provides in relevant part:

> Evidence of (a) furnishing, or offering or promising to furnish, or (b) accepting, or offering or promising to accept, any valuable consideration in compromising or attempting to compromise a claim which is disputed as to either validity or amount of damages, *shall be inadmissible as proof of liability for or invalidity of the claim or the amount of damages. Evidence of any conduct or statement made during compromise negotiations shall also be inadmissible.* [Emphasis added.]

Federal Evidentiary Rules:

Federal Rules of Evidence 408 is CPLR §4547's federal counterpart. As with CPLR §4547, courts have applied FRE 408 to mediation settlements. FRE 408(a) provides:

> Evidence of the following is not admissible — on behalf of any party — either to prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction: (1) furnishing, promising, or offering — or accepting, promising to accept, or offering to accept — a valuable consideration in compromising or attempting to compromise the claim; and (2) conduct or a statement made during compromise negotiations about the claim — except when offered in a criminal case and when the negotiations related to a

[5] *See Cusson v The Hillier Group, Inc.*, 172 A.D.3d 1519 (3d Dept. 2019); *City of Newburgh, N.Y. v Hauser*, 126 A.D.3d 926 (2d Dept. 2015); *PRG Brokerage Inc. v Aramarine Brokerage, Inc.*, 107 A.D.3d 559 (1st Dept. 2013).

> claim by a public office in the exercise of its regulatory, investigative, or enforcement authority.[6]

The language of FRE 408 excludes settlement communications both as substantive evidence and impeachment evidence to the extent they are offered to prove or disprove the validity or amount of a disputed claim. The provision explicitly excluding such settlement communications for impeachment purposes was added to the Rule in 2006, and the accompanying advisory notes explain that allowing this sort of evidence would "tend to swallow the exclusionary rule and would impair the public policy of promoting settlements."[7]

FRE 408(b) lists the following exceptions to the exclusionary rule contained in FRE 408(a): "proving a witness's bias or prejudice, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution." However, even in cases that fall under this exception, courts may still find that the information is protected as confidential under one of the other sources of mediation confidentiality discussed below.[8] Courts also have held that "Rule 408 is inapplicable when the claim is based upon some wrong that was committed in the course of the settlement discussions."[9]

B. Court Rules:

NYS District-Wide and Local Court Rules:

There are no common law or statutory confidentiality protections that govern court-mandated mediations in New York. Such mediations are governed by local court rules and any confidentiality agreements that parties enter into separately. These rules vary from court to court and apply solely to mediations held under the auspices of the court to which the rules relate.[10] For instance, Rule 8(a) of the New York County Supreme Court, Commercial Division ADR Rules provides:

> An ADR proceeding in the Program, other than a binding arbitration, shall be confidential and, except as otherwise provided hereafter, any document prepared, or communications made, by parties, their counsel or a Program Neutral for, during, or in connection with the proceeding shall not be disclosed outside its confines by any participant. No party to the proceeding shall, during the action referred to ADR or in any other legal matter, seek to compel production of documents, notes, or other writings prepared for or generated in connection with the ADR proceeding,

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[6] Fed. R. Evid. Rule 408(a).

[7] Fed. R. Evid. Rule 408, Committee Notes—2006 Amendment.

[8] *DeLuca v. Allied Domecq Quick Serv. Rests.*, 2006 US Dist. LEXIS 68328 (E.D.N.Y. 2006) (excluding the relevant statement under the mediation confidentiality agreement after finding that the statement falls under the exception to FRE 408 for claims based upon wrong committed during the course of mediation).

[9] *Id.* at *5-6 quoting *Scott v. Goodman*, 961 F. Supp. 424, 437 (E.D.N.Y. 1997) and citing cases from the D.C. Circuit, Sixth Circuit, 10th Circuit, as well as district courts in Arizona, Illinois and Southern District of New York.

[10] The court rules apply to court-mandated mediations and do not apply to mediations conducted in parallel to the court proceedings if they have not been initiated pursuant to a court order and are not conducted by a court-appointed mediator.

> or the testimony of any other party or the Neutral concerning communications made during the proceeding… Documents and information otherwise discoverable under the Civil Practice Law and Rules shall not be shielded from disclosure merely because they are submitted or referred to in the ADR proceeding…[11]

Mediation confidentiality may also be protected through district-wide rules. For instance, Rule IX(a) of the Ninth Judicial District District-Wide Presumptive Mediation Program Rules protects mediation confidentiality with a provision nearly identical to Rule 8(a) of the New York County Commercial Division Rules.[12]

In a set of recommendations issued in 2019, a Statewide ADR Advisory Committee proposed the promulgation of state-wide rules for the NYS Unified Court System as Part 60 of the Rules of the Chief Judge and Part 160 of the Rules of the Chief Administrative Judge. These ADR rules were adopted effective as of February 13, 2024, and include the following provision:

> Except as otherwise provided herein or as otherwise required by law, all communications, memoranda, and work products made in preparation for, during, or in connection with an ADR process conducted by a mediator or neutral evaluator to whom a dispute is referred pursuant to this Part shall be confidential and not subject to disclosure in any judicial or administrative proceeding.[13]

Federal Court Rules:

The Alternative Dispute Resolution Act of 1998 specifically authorized federal courts to promulgate local court rules protecting mediation confidentiality. The Act provides that "each district court shall, by local rule adopted under section 2071(a), provide for the confidentiality of the alternative dispute resolution processes and to prohibit disclosure of confidential dispute resolution communications."[14] Under this authority, each district court in New York promulgated rules that provide confidentiality protections for mediations conducted through their programs.[15]

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[11] Rules and Procedures of the Alternative Dispute Resolution Program, Rule 8(a). A copy of the New York County Supreme Court, Commercial Division ADR Rules may be accessed at https://www.nycourts.gov/LegacyPDFS/courts/comdiv/ny/PDFs/ADR-rules.pdf.

[12] Ninth Judicial District District-Wide Presumptive Mediation Program Rules, Rule IX(a). A copy of the Ninth Judicial District District-Wide Presumptive Mediation Program Rules may be accessed at https://www.nycourts.gov/LegacyPDFS/courts/9jd/ADR/rules/DISTRICT-WIDE-RULES.pdf.

[13] ADR Rule §160.3(a).

[14] 28 U.S.C. § 652(d).

[15] The Northern District of New York provides a mediation confidentiality protection in Local Rule 83.6(m). A copy of the NDNY Local Rules may be accessed at https://www.nynd.uscourts.gov/sites/nynd/files/local_rules/Local%20Rules%202023_Errata_030923.pdf.
The Eastern District of New York provides a mediation confidentiality protection in Local Civil Rule 83.8(d). A copy of the EDNY Local Civil Rules may be accessed at https://www.nysd.uscourts.gov/sites/default/files/local_rules/2021-10-15%20Joint%20Local%20Rules.pdf.
The Southern District of New York provides a mediation confidentiality protection in Section 2 of its PROCEDURES OF THE MEDIATION PROGRAM FOR THE SOUTHERN DISTRICT OF NEW YORK (given effect through Local Civil Rule

The Second Circuit also promulgated a local rule protecting the confidentiality of mediations conducted under its program. Specifically, Local Rule 33.1(e) provides:

> Information shared during a CAMP [Civil Appeals Mediation Program] proceeding is confidential and is not included in court files or disclosed to the judges of this court except to the extent disclosed by an order entered as a result of a CAMP proceeding. The attorneys and other participants are prohibited from disclosing what is said in a CAMP proceeding to anyone other than clients, principals or co-counsel, and then, only upon receiving due assurance that the recipient will honor confidentiality.[16]

Additionally, parties undergoing mediation through a federal court are typically required to sign confidentiality agreements.[17]

C. Provider Rules:

Domestic Mediation Administering Institutions:

As courts have confidentiality rules that apply to their mediation programs, private mediation providers also have rules and guidelines that provide the confidentiality framework for mediations conducted under their auspices.[18] Below is an overview of the confidentiality rules or guidelines of three major domestic mediation services providers: AAA, JAMS, and CPR.

i. *American Arbitration Association ("AAA")*

The Commercial Mediation Procedures of the AAA set forth provisions regarding confidentiality obligations of mediators and the parties to a mediation.[19] The provision prevents mediators from disclosing "confidential information disclosed to a mediator by the parties or by

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83.9(c)(3)). A copy of the procedures may be accessed at https://www.nysd.uscourts.gov/sites/default/files/pdf/Mediation/Mediation%20Rules%20and%20Procedures/Mediation%20Program%20Procedures%202022.pdf.
The Western District of New York provides a mediation confidentiality protection in Section 5.11(A) of its ALTERNATIVE DISPUTE RESOLUTION PLAN (given effect through WDNY Local Rule 16(a) and *In Re: Alternative Dispute Resolution Plan Standing Order*). A copy of the WDNY ALTERNATIVE DISPUTE RESOLUTION PLAN may be accessed at https://www.nywd.uscourts.gov/sites/nywd/files/ADR%20Committee%20--%20Amended%20ADR%20Plan%20Effective%20Date%201-01-2022%20-%20with%20Signatures.pdf.

[16] A copy of the Second Circuit local rules may be accessed at https://www.ca2.uscourts.gov/clerk/case_filing/rules/pdf/LRs_IOCs_appendices_rev_2022.pdf.

[17] *See*, e.g., SDNY PROCEDURES OF THE MEDIATION PROGRAM FOR THE SOUTHERN DISTRICT OF NEW YORK §2 ("All participants in any mediation shall execute a confidentiality agreement containing the following provisions and provide copies to the mediator and to the other participants before mediation begins.").
A copy of the standard SDNY Mediation Confidentiality Agreement may be accessed at https://www.nysd.uscourts.gov/sites/default/files/pdf/Mediation/Mediation%20Forms/Confidentiality%20Form.8.23.22.pdf.

[18] These provider rules are generally reinforced and given teeth through mediation agreements that contain confidentiality provisions, which will be the subject of the following section.

[19] AMERICAN ARBITRATION ASSOCIATION, COMMERCIAL ARBITRATION RULES AND MEDIATION PROCEDURES (amended 2022), M-10. May be accessed at https://www.adr.org/sites/default/files/Commercial-Rules_Web.pdf.

other participants (witnesses) in the course of the mediation" unless disclosure is required by law or agreed to by the parties.[20] The rules also state that mediators "shall not be compelled" to produce mediation records or to testify regarding the mediation.[21] The parties are also required to "maintain the confidentiality of the mediation" and the parties are prohibited from introducing certain details from the mediation as evidence in any proceeding.[22]

ii. *JAMS (Formerly Judicial Arbitration and Mediation Services)*

JAMS' Mediators Ethics Guidelines[23] set forth the obligations that JAMS mediators have to follow with respect to mediation confidentiality.[24] Guideline IV provides that mediators "should not disclose confidential information" obtained in the course of a mediation unless disclosure is required by law or agreed to by the parties.[25] Guideline IV also provides that the mediator's documents pertaining to the mediation "should be stored in a reasonably secure location and may be destroyed 90 days after the mediation has been completed or sooner if all parties so request or consent."[26] The guidelines further provide that mediators have a responsibility to explain confidentiality rules to the parties, including by notifying them if applicable rules require the mediator to disclose certain information and explaining to the parties "any applicable laws, rules or agreements" that prohibit the parties from disclosing information shared during mediation.[27]

iii. *The International Institute for Conflict Prevention & Resolution ("CPR")*

Section 9 of The CPR Mediation Procedure declares the "entire mediation process" is to be confidential.[28] The Section contains a broad confidentiality provision, stating that the parties and mediator "shall not disclose to any person who is not associated with participants in the process, including any judicial officer, any information regarding the process (including pre-process exchanges and agreements), contents (including written and oral information), settlement terms or outcome of the proceeding" unless disclosure is required by law or agreed to by the parties.[29]

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[20] *Id.*

[21] *Id.*

[22] *Id.*

[23] JAMS' International Mediation Rules will be discussed in the following section.

[24] JAMS, MEDIATOR ETHICS GUIDELINES, Guideline IV. May be accessed at https://www.jamsadr.com/mediators-ethics/.
While the Mediator Ethics Guidelines apply to JAMS mediators, JAMS also requires the parties to sign a Mediation Agreement that includes a confidentiality clause. Such agreements will be discussed at greater length in Section II.C.

[25] *Id.*

[26] *Id.*

[27] *Id.*

[28] THE INTERNATIONAL INSTITUTE FOR CONFLICT PREVENTION & RESOLUTION, CPR MEDIATION PROCEDURE, Procedure 9. May be accessed at https://drs.cpradr.org/rules/mediation/cpr-mediation-procedure.

[29] *Id.*

International Mediation Administering Institutions:

Four of the major providers of mediation services in the international setting have broad confidentiality provisions which protect against disclosure unless disclosure is required by law or is otherwise agreed to by the parties.

iv. *International Center for Dispute Resolution ("ICDR")*

The ICDR rules provide that a mediator may not disclose any confidential information disclosed during the course of a mediation and that a mediator may not be compelled to provide records or testimony in regard to the mediation.[30] Additionally, the ICDR rules require the parties to maintain the confidentiality of the mediation unless they agree otherwise, or if required by law.[31] The ICDR describes the information covered by the its confidentiality rules to include views made with respect to a possible settlement, admissions made by a party in the course of the mediation, proposals or views of the mediator, and the willingness (or lack thereof) to accept a proposal.[32]

v. *International Chamber of Commerce ("ICC")*

The ICC rules provide that its mediations "are private and confidential" and that information shared during a mediation (other than the fact of the mediation taking place) shall not be disclosed unless the parties agree or disclosure is required by law.[33] The ICC expressly prohibits parties from disclosing information such as views expressed by the parties, admissions made by a party, proposals or views of the mediator, and suggestions relating to the acceptance of a proposal.[34] The ICC rules also provide that settlements agreed to through ICC mediations be kept confidential, unless disclosure is required by law or necessary for enforcement.[35]

vi. *JAMS*

The JAMS International Mediation Rules[36] provide that "[a]ll information, records, reports or other documents received by a mediator while serving in that capacity will be confidential" and protects the mediator from being compelled to "divulge such records or to testify or give evidence" regarding the mediation.[37] The rules protect the mediator from being "compelled to divulge such

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[30] ICDR, INTERNATIONAL DISPUTE RESOLUTION PROCEDURES, M-12. May be accessed at https://www.adr.org/sites/default/files/ICDR_Rules_0.pdf.

[31] *Id.*

[32] *Id.*

[33] ICC, MEDIATION RULES, Article 9. May be accessed at https://iccwbo.org/dispute-resolution/dispute-resolution-services/adr/mediation/mediation-rules/.

[34] *Id.* at Article 9(2).

[35] *Id.* at Article 9(1)(b).

[36] These Rules are distinct from the JAMS' Mediators Ethics Guidelines discussed in the previous section.

[37] JAMS, INT'L MEDIATION RULES, Rule 11. Can be accessed at https://www.jamsadr.com/international-mediation-rules/#Application-of-Rules.

records or to testify or give evidence" regarding the mediation.[38] The rules also require the parties to "maintain the confidentiality of the mediation" and prevent the parties from introducing evidence of the following in any proceeding: "(i) views expressed or suggestions or offers made by another party or the mediator in the course of the mediation proceedings; (ii) admissions made by another party in the course of the mediation proceedings relating to the merits of the dispute; or (iii) the fact that another party had or had not indicated a willingness to accept a proposal for settlement."[39] The Rule also provides that "documents or other things otherwise admissible in evidence … will not be rendered inadmissible by reason of their use in the mediation."[40] Rule 12 excludes JAMS or the mediator from liability by reason of its or his/her acting under the Rules.[41]

vii. *London Court of International Arbitration ("LCIA")*

The LCIA rules provide that "mediation[s] shall be confidential."[42] The rules state that "[u]nless agreed among the parties, or required by law, neither the mediator nor the parties may disclose to any person any information regarding the mediation or any settlement terms, or the outcome of the mediation."[43] The LCIA rules also provide that documents produced in relation to the mediation are privileged unless the documents would otherwise be discoverable.[44] Further, the LCIA rules provide that there be "no formal record or transcript of the mediation" and that no "admissions, proposals, or views expressed by the parties or by the mediator" be introduced as evidence in any proceeding.[45]

D. Confidentiality Agreements:

Some court rules require parties in court-mandated mediations to execute a confidentiality agreement. However, neither court rules nor state laws provide any confidentiality protection to mediations conducted outside the auspices of a court program.

For private, administered mediations, providers may require parties to sign the administering institution's standard mediation agreement that includes confidentiality protections.[46] For private, unadministered mediations, parties may agree to confidentiality

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[38] *Id.*

[39] *Id.*

[40] *Id.*

[41] *Id.* at Rule 12.

[42] LCIA, MEDIATION RULES, Article 12.2. May be accessed at https://www.lcia.org/Dispute_Resolution_Services/lcia_mediation_rules_2020.aspx.

[43] *Id.* at Rule 12.3.

[44] *Id.* at Rule 12.4.

[45] *Id.* at Rules 12.5-12.6.

[46] *See* JAMS MEDIATION FORMS & DOCUMENTS, https://www.jamsadr.com/adr-forms/; MEDIATION PROCEDURES OF THE AAA, https://www.adr.org/sites/default/files/Mediation%20Procedures%20of%20the%20American%20Arbitration%20Association%20Oct%2001%2C%202009.pdf.

protections by separately entering into confidentiality agreements between themselves and with the mediator.

III. COURT ENFORCEMENT AND COMMON EXCEPTIONS TO MEDIATION CONFIDENTIALITY

A. New York and Federal Court Enforcement of Court Mediation Rules:

Although there is limited case law, courts readily enforce the mediation confidentiality provisions in their local rules and in confidentiality agreements, with some exceptions. For instance, the New York County Supreme Court stated that "[i]t is the policy of this Court, and specifically of the Commercial Division to maintain the confidentiality of submissions and statements made during mediation proceedings."[47] Similarly, the Second Circuit stated that "[w]e vigorously enforce the confidentiality provisions of our own alternative dispute resolution, the Civil Appeals Management Plan ('CAMP'), because we believe that confidentiality is 'essential' to CAMP's vitality and effectiveness."[48]

The Second Circuit's holding that a confidentiality agreement should be respected in court-ordered mediations was extended to private mediations by the Southern District of New York.[49] The District Judge reasoned that the Circuit had enforced the confidentiality agreement not only because confidentiality had been agreed to and promised, but also because it "promotes the free flow of information that may result in the settlement of a dispute."[50] State courts have generally also upheld confidentiality provisions entered into in private mediations.[51]

Nonetheless, the Second Circuit has allowed a party to defeat mediation confidentiality and force disclosure by satisfying a three-prong test: "[a] party seeking disclosure of confidential mediation communications must demonstrate (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. All three factors are necessary to warrant disclosure of otherwise non-discoverable documents."[52]

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[47] *NYP Holdings, Inc. v. McClier Corp.*, 14 Misc 3d 1232(A) at *5 [NY Sup 2007].

[48] *In re Teligent, Inc.*, 640 F.3d 53, 58 (2d Cir. 2011).

[49] *Accent Delight Int'l Ltd. v. Sotheby's*, 505 F. Supp. 3d 281, 288-89 (S.D.N.Y. 2020) (Furman, J.) (internal quotation marks omitted). This decision declined to follow *Rocky Aspen Mgmt. 204 LLC v. Hanford Holdings LLC*, 394 F. Supp. 3d 461 (S.D.N.Y. 2019) and instead followed the SDNY's previous decision in *Dandong v. Pinnacle Performance Ltd.*, 2012 WL 4793870 (S.D.N.Y. 2012). *Accent Delight* at 285-287. The decision noted that the Second Circuit also applied *Teligent* to a private mediation in a summary order in *In re Tremont Sec. Law, State Law & Ins. Litig.*, 699 F. App'x 8, 15 (2d Cir. 2017). *Accent Delight* at 286.

[50] *Accent Delight*, 505 F. Supp. 3d at 286 (S.D.N.Y. 2020) quoting *Teligent*, 640 F.3d at 57.

[51] *See, e.g, Lynbrook Glass & Architectural Metals, Corp. v Elite Assoc.*, Inc, 238 AD2d 319, 320 [2d Dept 1997] ("As part of their attempt to settle this matter, the parties to the mediation agreed that the report and other similar reports, prepared expressly for the mediation, were to be kept confidential. It was therefore properly held to be protected from disclosure.").

[52] *Teligent.* at 58 (citations omitted).

B. Exceptions to Mediation Confidentiality:

Given New York State's smorgasbord of sources for mediation confidentiality, it is not surprising that the exceptions to mediation confidentiality also are not uniform. The applicability and scope of exceptions vary depending upon the specific confidentiality rules and agreements that apply. The caselaw interpreting these exceptions is extremely limited. Some of the most common exceptions to mediation confidentiality are discussed below.

i. *Preventing Illegality*

Local rules generally carve out illegal conduct from information that is protected by mediation confidentiality provisions. The New York County Supreme Court, Commercial Division Rules state that "[a] Neutral shall disclose to a proper authority information obtained in mediation if required to do so by law or rule or if the Neutral has a reasonable belief that such disclosure will prevent a participant from engaging in an illegal act."[53] Additionally, the Ninth Judicial District Rules state that "[i]f a communication or information constitutes a credible threat of serious and imminent harm, either to the speaker or another person or entity, the appropriate authorities and/or the potential victim may be notified."[54]

ii. *Allegations of Child Abuse*

Another exception to mediation confidentiality is when there are allegations of child abuse.[55]

iii. *Unethical Behavior*

Unethical behavior by an opposing party or by the mediator during the mediation also is generally carved out from mediation confidentiality obligations. The New York County Commercial Division Rules provide that "[a] party, the ADR Coordinator, or the Neutral may report any unethical conduct during the proceeding to a proper authority."[56] Additionally, the Ninth Judicial District Rules provide that "[a] party, counsel to a party, or the Mediator, may report to an appropriate disciplinary body any unprofessional conduct engaged in by the Mediator or counsel to a party."[57] At least one Federal Judge, Jesse Furman of the SDNY, ordered the mediator of a dispute to appear at an evidentiary hearing and testify about counsel's conduct where the court believed there was the possibility of unethical conduct which merited further inquiry.[58]

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[53] Rules and Procedures of the Alternative Dispute Resolution Program, Rule 8(b)(1).

[54] Ninth Judicial District District-Wide Presumptive Mediation Program Rules, Rule IX(b)(v).

[55] *See, e.g.*, Ninth Judicial District District-Wide Presumptive Mediation Program Rules, Rule IX(b)(vi).

[56] Rules and Procedures of the Alternative Dispute Resolution Program, Rule 8(b)(2).

[57] Ninth Judicial District District-Wide Presumptive Mediation Program Rules, Rule IX(b)(vii).

[58] *Usherson v. Bandshell Artist Mgmt*, 2020 U.S. Dist. Lexis 112368 at *20 (SDNY) ("On December 17, 2019, the Court issued an Order scheduling the hearing and directing . . . the Mediator to appear for testimony" at an evidentiary hearing about counsel's conduct and possible sanctions.)

iv. *Collection of Fees*

Another exception to mediation confidentiality provided for in some court rules is for collection of fees. This exception refers to information relating to mediation services for the purpose of collecting unpaid mediator fees. This narrow exception allows mediators to disclose the services rendered so that they can be paid. The New York County Commercial Division Rules state that "the Neutral may make general reference to the fact of services rendered in any action to collect an unpaid fee for services performed under these Rules."[59] Additionally, the Ninth District Rules state that "[t]he Mediator may make general references to the fact of the mediation services rendered in any action to collect an unpaid, authorized fee for services performed under these Rules."[60]

v. *Administrative Details*

Some court rules allow the mediator and parties to inform the court of "administrative details" of the mediation. For instance, the Nassau County Commercial Division Rules state that "to the extent necessary… (ii) the mediator and the parties may communicate with the Court about administrative details of the proceeding."[61] Other local court rules provide exceptions for specific types of administrative details, such as attendance and session information.

The attendance exception refers to a mediator reporting to the court information regarding a party's attendance in mediation sessions. For instance, the Ninth District Rules state that "[w]hether the parties and their counsel attended the initial session will be reported to the court."[62]

The session information exception refers to information such as the number of mediation sessions and dates of mediation sessions. The New York County Commercial Division Rules provide that "[t]he Neutral and the parties may communicate with the ADR Coordinator about administrative details of and the schedule for the proceeding."[63] Additionally, the Ninth District Rules provide that "[t]he Mediator may report to the Court whether the Parties are requesting additional mediation sessions as well as the date of any mediation session."[64]

vi. *Other Exceptions*

Court and provider rules may contain additional exceptions to mediation confidentiality, which may vary from forum to forum. For instance, the proposed statewide ADR rules contain a proposed exception for written agreements signed by parties as a result of mediation and an

[59] Rules and Procedures of the Alternative Dispute Resolution Program, Rule 8(b)(3).

[60] Ninth Judicial District District-Wide Presumptive Mediation Program Rules, Rule IX(b)(viii).

[61] Commercial Division—Nassau County, Rules of the Alternative Dispute Resolution Program, Rule 4. May be accessed at https://ww2.nycourts.gov/courts/comdiv/nassau_ADR_Rules.shtml.

[62] Ninth Judicial District District-Wide Presumptive Mediation Program Rules, Rule IX(b)(i).

[63] Rules and Procedures of the Alternative Dispute Resolution Program, Rule 8(b)(3).

[64] Ninth Judicial District District-Wide Presumptive Mediation Program Rules, Rule IX(b)(ii).

exception for anonymized information provided for research and education.[65] Additionally, parties to a mediation can generally waive confidentiality by mutual agreement.[66]

IV. RECOMMENDATIONS

We highlight below some recommendations for mediators and counsel preparing to conduct a mediation in New York State in light of the current legal mediation confidentiality landscape.[67]

A. For Mediators

We recommend that, at the time the mediation is initiated, mediators bring to mediation counsel's attention the potential benefits of entering into a separate confidentiality agreement in light of the legal landscape in New York State. By merely alerting counsel, mediators can counter some of the misconceptions about confidentiality in mediations and encourage counsel to scrutinize the forum rules—be they court rules for court-mandated mediations or administering institution rules for private, administered mediations.

Second, mediators should flesh out confidentiality protections and related provisions in the mediator agreement to be executed by all parties, their counsel and the mediator. In Appendix 1, we propose certain provisions that mediators can incorporate into their mediator agreements. However, we recommend that these provisions be tailored to ensure they complement any applicable forum rules (court or administering institutions) and, if appropriate, any confidentiality matters that may be specific to the parties and the dispute being mediated. A mediator may want to ensure that the confidentiality provisions are agreed to by the named parties as well as by other persons involved in the mediation or who will be present at the mediation session.

Finally, when opening a mediation session, it is generally worthwhile for mediators to reiterate the importance of confidentiality in mediation and stress the various protections the mediation is afforded. This serves to ensure counsel, the parties themselves and any other attendees are fully aware, and reminded, of the confidentiality obligations that favor the openness that is key to settlement discussions.

B. For Mediation Counsel

As soon as mediation is initiated, mediation counsel should examine the following to assess the scope of any confidentiality provisions included therein:

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[65] Proposed ADR Rules §160.3(b)(2), §160.3(b)(7).

[66] *See, e.g, Hauzinger v. Hauzinger*, 892 N.E.2d 849, 850 (N.Y. 2008) (holding that if a mediation privilege existed under NYS law, the privilege could not be asserted by a party who waived the privilege). Court and provider rules also routinely contain exceptions for waiver.

[67] An issue may arise as to whether the confidentiality rules applicable to a mediation conducted in New York State would be trumped by any different confidentiality rules applicable in the jurisdiction in which the related dispute is heard. That issue is beyond the scope of this report.

1. Any dispute resolution agreement that may have previously been entered into by the parties including any "step clause" that may have been set forth in the parties' contract requiring the parties to participate in a mediation to attempt to resolve their dispute[68];

2. Any applicable forum (court or administering institution) confidentiality rules;

3. Any exceptions to confidentiality noted in 1 or 2 above;

4. The standard mediation agreement that the mediator may propose that the parties enter into in connection with the mediation.

The above would serve to provide counsel with a clear view of the applicable landscape for confidentiality among the parties and, separately, with the mediator. It is important to note that confidentiality protections may indeed be different for the parties as they relate to the mediator than those between the mediating parties themselves.

Once they have scrutinized the above, counsel will be equipped to determine whether it is in the best interest of the parties to enter into a separate confidentiality agreement to cover any additional elements not otherwise covered by the above documents.

Ultimately, counsel will want to ensure that the final agreed-upon confidentiality protections cover the following information:

1. Party disclosure of information shared with the opposing party(ies);

2. Party disclosure of information shared with the mediator;

3. Mediator disclosure of information shared with the parties, their respective counsel and any other persons related to the mediation parties who attend a mediation session or are otherwise privy to sensitive information; and

4. Disclosure by any persons attending or otherwise participating in the mediation process who may be privy to the offers that might be exchanged or to sensitive information that might be shared in the course of the mediation.

To achieve the above, counsel may want to ensure that the parties enter into a separate confidentiality agreement to supplement or fortify the protections afforded by the forum rules and dispute resolution agreement. Such party confidentiality agreement should include (i) provisions that require the parties to ensure that any other third parties who may be privy to mediation information enter into a similar confidentiality agreement and (ii) provisions dealing with liability for any person who violates confidentiality.[69] We should note that we do not favor the mediator

[68] See, e.g., p. 5 of *Compilation of Sample Mediation Clauses, Alternative Dispute Resolution Committee of the New York City Bar Association* at https://www2.nycbar.org/pdf/report/uploads/20073042-CompilationofSampleMediationClausesALTDIS442016.pdf.

[69] We have not suggested specific confidentiality language to be included in a party confidentiality agreement given the various permutations and specificities that any such agreement will necessarily entail. The guidance outlined in

entering into the parties' confidentiality agreement. Instead, as stated above, we believe that the mediator agreement should include provisions regarding confidentiality that are specific to the mediator's role and tailored accordingly.

Further, as noted above,[70] counsel should be aware that non-parties with no connection to the mediation may seek to access mediation-related information through a compulsory process such as a subpoena to a party to the mediation. Counsel should therefore consider adding provisions covering the response by the recipient party. For example, the parties may require notice of receipt of a demand for information to the non-recipient, or may require the party to resist production of the information through legally available means (such as written objections or a motion to quash, as required by applicable procedural rules) to the extent permitted by law.

Finally, we encourage counsel to ensure that their clients and any other persons involved in the mediation have a clear understanding of their confidentiality obligations as soon as the mediation process is initiated and once the various confidentiality agreements are finalized.

Generally, we anticipate that this paper will be made public and encourage mediators, mediation counsel, as well as other mediation constituents to refer to it as needed when preparing for a mediation to be conducted in New York State.

Mediation Privilege Subcommittee
Myrna Barakat Friedman, Chair
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Robert B. Davidson
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this section should serve as a roadmap for counsel to determine how best to address and memorialize the confidentiality protections sought taking into account, among other things, the dispute, the parties involved directly or indirectly in the dispute, the law governing the dispute and any court or administering institution rules.

[70] *See supra*, note 1.

APPENDIX 1: CONFIDENTIALITY PROVISIONS TO BE CONSIDERED FOR INCLUSION IN A MEDIATOR AGREEMENT

I. **Confidentiality**

A. The Parties understand and agree that (i) the Mediation is a confidential process and (ii) they will keep all communications and information forming part of the Mediation in confidence, except that either Party may disclose information that is required to be disclosed by law or for the enforcement of a settlement agreement reached in the Mediation.

B. Statements made by any person and documents produced in the Mediation and not otherwise discoverable shall not be subject to disclosure through discovery or any other process and shall not be admissible into evidence in any context for any purpose including impeaching credibility. Notwithstanding the foregoing, the fact that a document was produced that is not otherwise subject to privilege or protection in the Mediation does not immunize that document from discovery.

C. The Parties agree that the Mediator's statements, work product, memoranda and case file shall be confidential and not subject to disclosure in any judicial, administrative, or private proceeding. The Parties understand and agree that the Mediator has no obligation to create, maintain or preserve any notes, memoranda or work product related to the Mediation. The Parties agree that they will not call the Mediator as a witness for any purpose whatsoever.

D. The Mediator's rights and obligations with respect to disclosure and confidentiality shall be governed by any specific agreement the Mediator has executed as well as standards imposed by statutory, regulatory and case law, and also any applicable professional or institutional rules.

E. If the Mediator or any documents in the Mediator's possession are requested or subpoenaed in any investigation, action, or proceeding, the Mediator will advise the Parties promptly of such request or subpoena, if permitted to do so by law. Once notified of such a request or subpoena, all Parties agree to oppose the Mediator's obligation to respond to the request or subpoena for documents or information about the Mediation. If, notwithstanding the foregoing, either Party subpoenas or requests the Mediator to appear in any investigation, action, or proceeding or requires the production of the Mediator's records, such Party will fully indemnify and hold the Mediator harmless from any costs (including but not limited to attorneys' fees and the customary hourly rate of the Mediator) in connection with the mediator's response to the subpoena or request and/or enforcement of this clause.

F. If a third party subpoenas or requests the Mediator to appear or provide documents or information in connection with any investigation, action, or proceeding, the Parties will fully indemnify and hold the Mediator harmless from any costs (including, but not limited to, attorney's fees and the Mediator's customary hourly rate) in connection with the mediator's response to the subpoena or request, including time spent in court appearances or testimony if the mediator is ordered to appear or to testify.