

CONFIDENTIALITY IN MEDIATION: CREATING A SAFE SPACE

A cornerstone of mediation as an approach towards dispute resolution is the understanding that the process is considered confidential. Why is this important? Essentially, it is the fact that the parties can freely discuss the merits of their case, without the fear that their position will be undermined, that permit the mediation process to help parties ultimately settle their claims. In that the mediation process is confidential and the environment in which the discussions are held are therefore considered safe, create the opportunity for parties to honestly address their underlying motivations regarding the dispute, their anxieties regarding their risks and their considerations for settlement. Without a comfort of such confidentiality regarding those discussions, mediation would cease to be an effective tool for dispute resolution.

It is important to understand the context for why these mediations discussions are confidential. Certainly, the easiest way to approach this issue is recognizing that in both under federal and state law settlement discussions between parties are protected communications. Certainly, as the law understands and supports, parties in a dispute would never entertain settlement or compromise discussions if those conversations were admissible and could be used against them to demonstrate weakness in their claims or demands. As such, these communications, once identified as such, essentially remain privileged in order to motivate parties to participate in open dialogue for resolution without the fear of illustrating any offers to a judge or jury as an admission regarding the relative strength or weakness of that party's case.

The same logic applies to the confidentiality that exists in the mediation process and is a central ingredient in the trust relationship that is developed between the mediator and the participating parties. It is only by a party believing that not only is their effort at compromise confidential, but that their discussions with the mediator are confidential, that a party can recognize and freely accept the inevitable reality that lawsuits are expensive, time consuming, emotionally challenging and, ultimately, come with no guarantees of success. Once those honest elements are considered, again with the protection of confidentiality, can parties truly move towards the necessary steps of potential resolution.

The best starting point to establish that comfort of confidentiality is in the mediation agreement itself. It is within the terms of that agreement, where the parties can acknowledge and agree that their discussions will remain confidential, including the restriction against calling the mediator as a witness in any proceeding arising from the mediation. The mediation agreement should highlight as well that the confidentiality shall extend outside of the mediation itself, especially in those circumstances where a settlement is not reached during the mediation and the mediator continues to facilitate discussions with the parties afterwards.

In addition to the confidentiality within the mediation process itself is the specific issues of confidentiality that arise during caucus discussions which occur only between one party and the mediator. Generally, it is understood that these conversations are themselves confidential, unless permission is given by the party for the mediator to disclose certain elements of the conversation. Sometimes these shared bits of information that are carried by the mediator between the parties can be the key points that help motivate the resolution of a case. Again, the sense of trustworthiness between the parties and the mediator can permit a higher level of open dialogue. Often times it is the comfort of

confidentiality where a party, otherwise stagnant in their resolve about their position in a case, can feel free to be more flexible and creative in order to reach a solution to the conflict.

Certainly, there are exceptions to this shield of confidentiality in mediations. Although generally conversations and information disclosed during mediations are privileged, the confidentiality protections do not apply if a party makes a threat against another party or person concerning physical harm or property damage, or if information concerning the commission of a crime. Additionally, the confidentiality can be waived if a claim is asserted by a party against a mediator alleging professional misconduct. In such a case the mediator reserves the right to defend itself by relying on information provided during the mediation process that otherwise would remain confidential.

At the end of the day, mediation as an alternative dispute resolution process can only work when the parties participate in good faith and come to the mediation to seek common ground. The shield or privilege of confidentiality during the process absolutely contributes to the potential success of the endeavor. A mediator that offers the comfort and trust of this confidential process will inevitably succeed as compared to a mediation environment where such a safe space has not been created.

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