



Practice Guideline 1: Confidentiality in Mediation

These Guidelines are based on the Good Practices in Confidentiality adopted in Dublin, on 7-10 September 2007, by the UIA Forum of Mediation Centres.

These Guidelines complement, and should be read in conjunction with, the Mediation Rules of the Chartered Institute of Arbitrators, in particular Rule 12, which provides:

12. Confidentiality

Save as required or permitted by law:

- 12.1 the Institute, the parties, their representatives, their advisors and the mediator(s) shall keep confidential all information (whether given orally, in writing or otherwise) produced for, or arising out of or in connection with, the mediation passing between any of the participants and between any of them and the mediator made for the purposes of the mediation, including the fact that the mediation is taking place or has taken place. Each party shall be responsible for ensuring that all of its representatives and advisors are bound by appropriate undertakings of confidentiality and shall take appropriate measures to limit the dissemination of any information relating to the mediation only to those persons as may be required for the purposes of the mediation;
- 12.2 unless the parties otherwise agree in writing, confidentiality under this Rule 12 also extends to the existence and content of any settlement agreement except to the extent that disclosure is necessary for its implementation or enforcement; and
- 12.3 no document or other communication that would be admissible in evidence in any court, arbitral or adjudication proceeding shall be rendered inadmissible by reason only of its disclosure in the course of and for the purposes of the mediation.

In these Guidelines, “party” and “parties” shall include their representatives, advisers and any other person joining the parties during the mediation proceedings.

1. The mediator’s duty to protect the confidentiality of the mediation proceedings commences with the first communication to the mediator, is continuous in nature, and does not expire upon the termination, for whatever reason, of the mediation under Rule 11. The mediator’s duty extends to all information relating to the mediation proceedings, even indirectly, such as previous invitations and/or negotiations leading to mediation, terms of the agreement to mediate, appointment of mediators and performance, or non performance, of the settlement agreement. All records, reports, or other documents received by a mediator, as well as all notes taken by the mediator during, with reference to, or for the purposes of, the mediation should be returned to the parties or kept secure until no longer needed for any purpose relating to the mediation and then destroyed.
2. If the mediator believes that the confidentiality of the mediation proceedings may be jeopardised or in doubt based upon the agreement of the parties, or lack thereof, potential conflict between laws from different jurisdictions relating to mediation confidentiality, or for any other reason, the mediator should communicate such belief to the parties, prior to the mediation, and let the parties determine whether or not they wish to proceed. Should the parties so decide, the mediator should use best efforts to cause the parties to enter into an agreement, prior to mediation, dealing with confidentiality in mediation, including any exceptions to confidentiality.
3. Prior to the commencement of the mediation, and no later than the mediator’s opening statement, the mediator should endeavour to ensure that the parties fully understand and agree to the process and ground rules of the mediation, their roles in the mediation process, the mediator’s role, and their respective obligations relating to confidentiality.
4. If a party objects to a person participating in or attending the mediation proceedings on grounds of protection of confidentiality and another party insists that that person should remain, the mediator should leave the decision as to whether to proceed in the mediation to the objecting party.
5. Unless expressly authorised by the disclosing party, the mediator should not communicate to another party information disclosed in confidence to the mediator.

6. The mediator's obligation of confidentiality applies not only to oral or written communications but to any action, demeanour or body language of a party which might give indications of the confidential position, feelings, beliefs or perceptions of such party.

7. A mediator is under no duty to identify for the parties which statements made or documents used by the parties in the mediation are to be considered confidential.

8. As part of the general obligation of confidentiality, a mediator should not disclose to the media any information relating to the mediation proceedings, including their existence, outcome or termination. If so requested by all parties to the mediation, the mediator may deal with the media but should not be considered to be under a duty to do so. In such event, the mediator should obtain express and joint instructions from all the parties as to the extent to which the mediator is authorised to communicate with the media and the specific information authorised to be disclosed, possibly in the form of a written media release.

9. A mediator should take all reasonable steps to ensure that the mediator is not required to give documentary or oral evidence in legal proceedings, or otherwise to make disclosure, of anything relating to mediation proceedings, even if authorised by all parties thereto, unless: -
the evidence or disclosure is required by law; or

the mediator reasonably considers that the life or safety of any person is or may be at serious risk; or

refusal to testify would result in criminal proceedings against the mediator; or

the evidence or disclosure is necessary to respond to a grievance or claim of malpractice against the mediator arising out of the mediation in question.