

D. Limitations on Confidentiality

ABI Journal
September 2022

Leslie A. Berkoff
Moritt Hock & Hamroff LLP
New York

John G. Loughnane
Nutter McClennen & Fish LLP
Boston

Confidentiality is a core component of, and integral to, the mediation process. Parties entering into mediation reasonably expect that communications and disclosures will be treated as confidential to the fullest extent permissible under applicable law. Protection and fulfillment of that expectation is thus important, as is understanding limitations on confidentiality in the mediation context.

Of course, not every mediation is successful. In some small number of instances, unfortunately, participants committed to a litigation strategy may attempt to seek discovery of documents or discussions obtained or exchanged during a prior mediation in furtherance of continued litigation.

A prudent mediator understands this risk and will take steps to promote and ensure the confidentiality of the mediation process. Moreover, parties to a mediation, and the mediator, should consider the issue of confidentiality prior to sharing information or making any disclosures in contemplation of a mediation, both during the process itself and after the conclusion of the mediation.

As discussed in a recent article,¹ there is no national rule that provides any certainty of confidentiality. Rather, parties must ensure that applicable rules governing the mediation provide such protection or reach a similar result through court approval of a consensual agreement governing the process from start to finish. In addition, recently amended Local Rule 9019-5(d) of the Local Rules of the U.S. Bankruptcy Court for the District of Delaware (effective Feb. 1, 2022) provides an example of a local rule promoting confidentiality.²

The lack of a national standard for ensuring confidentiality stands in contrast to the protection afforded ordinary settlement communications pursuant to Rule 408 of the Federal Rules of Evidence, as made applicable to bankruptcy proceedings by Rule 9017 of the Federal Rules of Bankruptcy Procedure. The confidentiality rule governing settlement communications under Rule 408 is generally well understood and provides effective guidance in protecting against the admissibility of communications focused on settlement.³

This article first discusses issues arising in two Delaware cases (both arising prior to the recent rule amendment) to demonstrate how courts have grappled with limitations on confidentiality. It then suggests some strategies for improving confidentiality given the absence of a comprehensive national rule.

¹ Tyler Layne, “Mediation Privilege and Confidentiality: New Local Rules and the Need for National Guidance,” *XLI ABI Journal* 5, 42-43, May 2022, available at abi.org/abi-journal, and also in this publication.

² *Id.*

³ The recently amended Delaware rule specifically provides that Federal Rule of Evidence 408 applies “[t]o the fullest extent applicable ... to the mediation conference and any communications with the mediator related thereto.”