

**CONFIDENTIALITY AND ADR:
PROTECTING THE PRIVACY OF THE PROCEEDINGS**

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Introduction

With increasing frequency, clients are looking to a variety of alternative dispute resolution ("ADR") techniques to resolve litigation matters, and for the most part, with good reason. ADR can be cheaper than litigation, proceed to a conclusion more quickly, and afford the participants greater control over all aspects of the process by which their conflicts are resolved. In providing these benefits, ADR also offers clients one other advantage over litigation that many find attractive: ADR is most often accomplished in a private setting, not a public forum. Thus, ADR provides an opportunity to keep the process of resolving a dispute confidential.

While ADR is usually a private process, neither clients nor their lawyers should be misled. The confidentiality of ADR proceedings is not guaranteed. However, there are some legal principles upon which ADR participants can rely to maximize the probability that information generated or exchanged during the course of ADR will be protected from future use or disclosure.

Protective Orders

Perhaps the best means to assure confidentiality is to seek a protective order against the disclosure of information relating to an ADR proceeding. Frequently, parties undertake ADR only after a lawsuit has already been filed, either on their own initiative or with the prompting of the court. When a dispute is already in litigation, the parties can seek the court's assistance to protect the confidentiality of ADR proceedings by making a joint motion for protective order. In their motion, the parties can ask the court to direct (a) that discovery shall be stayed against the ADR participants who are attempting to compromise and resolve the litigation; (b) that the participants may exchange information or documents in the course of the ADR process without waiving applicable privileges; and (c) that the parties may prepare written materials or make oral statements during the ADR process that shall be not be subject to discovery or admissible in any future proceeding for any purpose.

In Pennsylvania, both federal and state courts have the power to enter such orders.

Federal Rule of Civil Procedure 26(c) gives the district court the discretion to enter protective orders, and the district courts will generally grant an application for a protective order upon a showing of good cause. See Miles v. Boeing Company, 154 F.R.D. 112, 114 (E.D. Pa. 1994). Moreover, under Federal Rule of Civil Procedure 16(c), district courts have the power to “take appropriate action[] with respect to . . . settlement and the use of special procedures to assist in resolving the dispute.” See F.R.C.P. 16(c)(7). An order protecting the confidentiality of ADR proceedings fits nicely within these rules, for it will aid the parties in either resolving entirely or at least narrowing the dispute with the minimum expenditure of judicial and private resources.

Like its federal courts, Pennsylvania’s state courts also have the power to enter appropriate protective orders. Under Pennsylvania Rule of Civil Procedure 4012, state courts “may make any order which justice requires” for “good cause shown.” See Pa. R.C.P. 4012(a). As part of this power, the state courts have the express authority to stay discovery, to prohibit inquiry into specified matters, and to protect the confidentiality of designated information. See Pa. R.C.P. 4012(a)(2), (4), and (7)-(9). Thus, state procedural rules, like their federal counterparts, offer ADR participants an opportunity to obtain the courts’ protection over the confidentiality of ADR efforts.

Confidentiality Agreements

In addition to seeking a protective order, ADR participants can, and should, also attempt to protect the privacy of their proceedings by entering into a confidentiality agreement. In their agreement, the participants can place whatever limitations on the use of information or documents from the ADR process that they deem appropriate. While such agreements may be binding on those who execute them, ADR participants should be aware that the protection which they afford may not be complete. Specifically, courts may allow third-parties to obtain information otherwise protected by confidentiality agreements on the grounds that third-parties are not bound by limitations to which they have not agreed. In deciding whether to allow third-parties such access, courts may balance the third-parties' need for the information and the public interest in open proceedings against the policy objectives fostered by protecting the reasonable confidentiality expectations of ADR participants. See, e.g., Haworth, Inc. v. Steelcase, Inc., 12 F.3d 1090, 1093 (Fed. Cir. 1993) (denying access to documents subject to confidentiality agreement after concluding that public access interests should not override ADR agreement which fosters strong public policies in favor of judicial economy and private resolution of disputes).

Confidentiality Statutes and Privileges

Finally, even in the absence of a protective order or a confidentiality agreement, ADR participants may also be able to protect the confidentiality of an ADR process on statutory or privilege grounds. Pennsylvania recently enacted a statute which provides that "all mediation communications and mediation documents are privileged." See 42 Pa. C.S.A. § 5949(a). The new statute defines "mediation" broadly as "the deliberate and knowing use of a third person by disputing parties to help them reach a resolution of their dispute." See 42 Pa. C.S.A. § 5949(c). With certain specified exceptions--including, most importantly, an exclusion for documents that existed independent of a mediation--the Pennsylvania statute prohibits from discovery or use as evidence all communications made and documents prepared to further the mediation process. See

42 Pa. C.S.A. §§ 5949(a)-(b). Thus, the new statute provides significant confidentiality protections for ADR proceedings in Pennsylvania.

The privilege created by the new Pennsylvania mediation statute is not the only one that ADR participants might invoke. In addition, ADR participants can often assert that the privilege that attaches to settlement or compromise negotiations also protects the confidentiality of some of their communications.

Under both state and federal law, offers to compromise are not admissible in subsequent proceedings as evidence of what is rightfully due or whether liability exists. See, e.g., Rochester Machine Corp. v. Mulach Steel Corp., 498 Pa. 545, 549, 449 A.2d 1366, 1368 (1982) (applying Pennsylvania law); Affiliated Manufacturers, Inc. v. Aluminum Co. of America, 56 F.3d 521, 526 (3d Cir. 1995) (applying federal evidentiary rules); see also 42 Pa. C.S.A. § 6141 (providing that settlement agreements shall not be admissible evidence); Fed. R. Evid. 408 (providing that offers to compromise are not admissible to prove the amount of a claim or its validity). Accordingly, ADR participants might protect from future use or disclosure some of their communications to the extent that they can be characterized as offers of compromise or settlement. However, it must be noted that the privilege which attaches to compromise or settlement offers is rather limited, and most importantly, does not extend to protect distinct admissions of fact that are conveyed in an offer to compromise a lawsuit. See Rochester Machine Corp., 498 Pa. at 551, 449 A.2d at 1369; Fed. R. Evid. 408. Thus, because the protection afforded by the privilege relating to compromise negotiations is incomplete, ADR participants should not rely upon the privilege as the principal means of protecting the confidentiality of their proceedings.

Conclusion

Confidentiality is among the many potential benefits that ADR offers to those who invoke it as a means for resolving disputes. To maximize the probability that the confidentiality of ADR proceedings will be secured, ADR participants can utilize a variety of legal tools. These

include seeking protective orders, entering into confidentiality agreements, and invoking applicable statutes and privileges. While none of these measures can guarantee that information generated or exchanged during the course of resolving a dispute will never be subsequently used or disclosed, they certainly afford a greater likelihood of confidentiality than litigation, the most public of all ways to resolve a conflict.