

Partnership for Good Governance

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Ensurance of confidentiality of Alternative Dispute Resolution (ADR) procedures

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The Need for Confidentiality in ADR

- Confidentiality in ADR is an important condition for **effective dispute settlement** and **protection of the interests of the parties** to the dispute.
- Confidentiality in ADR recognized world-wide. However, the levels of confidentiality, what information is confidential and how it should be protected vary.
- Often a mediator has the **duty to ensure confidentiality** in mediation and information revealed in mediation shall not be used in the court.

The Main Questions

- What information is confidential?
- Are there any exceptions to protection of confidential information?
- Who is responsible to ensure confidentiality?
- How confidentiality should be protected?

Confidentialiy in the Documents of the CoE

- **Discussions in mediation are confidential** and may not be used subsequently, except with the agreement of the parties or in those cases allowed by national law (Council of Europe Recommendation No. R (98) 1 of the Committee of Ministers to Member States on Family Mediation).
- **Information** on the mediation process is **confidential** and may not be used subsequently, unless agreed by the parties or allowed by national law (Council of Europe Recommendation Rec (2002)10 of the Committee of Ministers to member States on mediation in civil matters).

Confidentialiy in the Documents of the CoE

Taking due note that as a general standard **all information associated with the mediation is confidential**, mediation providers should **take all reasonable steps to protect** the level of confidentiality stipulated by the relevant laws and rules and/or agreed by the parties (European Commission For the Efficiency of Justice, European Code of Conduct for Mediation Providers, 2018).

Protection of Confidentiality in the EU law

- EU law regulates the basic aspects of mediation.
- Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters OJ L 136.
- The objective of this Directive is to **facilitate access to alternative dispute resolution** and to **promote the amicable settlement of disputes** by encouraging the use of mediation and by ensuring a balanced relationship between mediation and judicial proceedings.

Confidentiality in the Directive on Mediation

1. Given that mediation is intended to take place in a **manner which respects confidentiality**, Member States shall ensure that, unless the parties agree otherwise, **neither mediators nor those involved in the administration of the mediation process shall be compelled to give evidence in civil and commercial judicial proceedings or arbitration regarding information arising out of or in connection with a mediation process**, except:

- (a) where this is necessary for overriding considerations of public policy of the Member State concerned, in particular when required to ensure the protection of the best interests of children or to prevent harm to the physical or psychological integrity of a person; or
- (b) where disclosure of the content of the agreement resulting from mediation is necessary in order to implement or enforce that agreement.

Article 7(1) of the Directive on Mediation

Confidentiality in Mediation in Lithuania

Unless otherwise agreed by the parties to the dispute, the parties to the dispute, the mediators and the administrators of the mediation **services shall keep confidential all mediation and related information**, except for information necessary to confirm or enforce the mediation agreement and non-disclosure when it is necessary to safeguard the best interests of the child or to prevent harm to the health or life of a natural person.

The mediator **may not disclose confidential information** entrusted to him by one party to the dispute to another party to the dispute without the permission of the party to the dispute who entrusted the information.

Article 17(1-2) of the Law on the Law on Conciliation of Civil Disputes of the Republic of Lithuania

Protection of Confidentiality in the US

Confidentiality is an important feature of the mediation and other alternative dispute resolution processes. Promising participants confidentiality in these proceedings "**promotes the free flow of information that may result in the settlement of a dispute,**"and protecting the **integrity of alternative dispute resolution generally** (US Court of Appeals, Second Circuit. In re Teligent, Inc., 640 F.3d 53, 57-58 (2d Cir. 2011)).

Protection of Confidentiality in the US

Exceptions when confidential information could be revealed in the US case law:

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 (US Court of Appeals, Second Circuit. In re Teligent, Inc., 640 F.3d 53, 57-58 (2d Cir. 2011).

Protection of confidential information

- A mediator should inform the parties about confidentiality of information, what is the scope of protection of confidential information.
- A mediator should inform the parties that they can agree on the level of protection of confidential information (what information should be regarded as confidential).
- A mediator should ensure that the place of mediation allows to protect confidential information.

Possible Answers

- As a general rule, all information in mediation is regarded as confidential, unless parties agree otherwise.
- Exceptions to protection of confidential information shall be established in the law. It often relates to protection of public interests.
- A mediator and the parties are responsible for protection of confidential information.
- A mediator shall take care of protection of confidential information.