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JUSTICE

## Confidentiality and creativity in mediation

**Confidentiality is one of the fundamental principles of mediation in alternative dispute resolution. Judicial proceedings require compliance with the *inter partes* principle, evidential discovery and, very often, public hearings.**

Individuals or corporations unable to settle disputes through negotiation traditionally turn to the courts for a decision. A desire to settle a dispute confidentially is one of the factors that may lead them to consider mediation rather than litigation. What is covered by mediation confidentiality? Anything said during mediation is confidential: nothing may be disclosed to a person who was not present during mediation; documents exchanged during mediation cannot be used in subsequent litigation if the parties fail to reach a negotiated settlement via mediation. If a mediator considers it appropriate during mediation, he may invite either party to a private meeting with or without its lawyer or the other party. Such a meeting may also be called at the request of a party or its lawyer. Anything said during such private meetings remains confidential

unless otherwise agreed by the person concerned. Any agreement reached may remain oral or be the subject of a contract. The parties usually leave any compromise to be drafted by their lawyers. A court-appointed mediator may not disclose to the court any information on the holding of meetings, the conduct of the parties or the terms of any agreement reached. The mediator's role is restricted to informing the court after mediation whether or not any agreement was concluded. The parties may jointly waive confidentiality and submit all or part of their agreement for the court's approval and render it enforceable.

### **Effect of the confidentiality principle**

The confidentiality principle frees communication, under the control of the mediator who manages and guides the process. The mediation location becomes an environment of trust. The parties explain their positions, express their feelings and decipher the points that are directly or indirectly connected with the dispute. Such freedom of expression enables the parties

to take a fresh look at the dispute and manage it comprehensively, including underlying and less evident factors that have nourished and sometimes prolonged the conflict. Trust and dialogue engender more effective negotiations in an atmosphere of mutual respect, enabling the parties to reach an original, practical, detailed and complete agreement, fully adapted to the circumstances, with the assistance of their respective lawyers, who ensure that their solution complies with the law. Confidential mediation promotes a particular atmosphere that encourages freedom of expression, enabling the parties to negotiate creative solutions to end all aspects of their dispute. Confidential mediation is therefore particularly suitable not only for private disputes (inheritance, neighbor disputes, etc.) but also in business law: major disagreements among shareholders, conflicts between directors, supplier/customer disputes, commercial leases, non-performance of trade contracts, stock transfers, asset and liability guarantees, etc.

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