

Confidentiality and Privilege

1. Purpose

These Guidelines establish a streamlined framework defining how confidentiality and privilege operate when a dispute transitions fluidly from mediation to binding arbitration within a single, unified process. By eliminating procedural ambiguity and providing fast-tracked mechanisms for handling sensitive information, these Guidelines directly supplement and enhance the Praxis Forum Rules on the Efficient Conduct of Proceedings in Domestic and International Arbitration.

2. Principles of Confidentiality

- **2.1 Mediation Phase:** All communications, settlement proposals, and documents prepared exclusively for the mediation remain strictly confidential and privileged. They shall not be disclosed to third parties or introduced as evidence in any subsequent proceedings.
- **2.2 Arbitration Phase:** While the arbitration remains private, the strict confidentiality of the mediation phase is modified to the extent necessary to establish the official evidentiary record required for a binding award.
- **2.3 Consent to Transition:** By participating in this process, the parties explicitly acknowledge and consent that the same neutral individual will serve in two distinct capacities: first as a mediation facilitator, and subsequently as an arbitral decision-maker.

3. The Status of Privilege

- **3.1 Without-Prejudice Privilege:** All communications, documents, and negotiations occurring within the mediation phase are governed by without-prejudice and settlement privileges. No such communication shall be admissible for any purpose, including as an admission against interest, in the subsequent arbitration phase.

- **3.2 Impartiality Safeguards:** To preserve impartiality, the neutral is strictly prohibited from utilizing information acquired solely during the mediation phase when determining the arbitral award. Only evidence independently compiled and formally admitted into the arbitration record may form the basis of the award.
- **3.3 Inquisitorial Powers:** The arbitrator's inquisitorial or fact-finding powers shall be constrained by, and subject to, all applicable legal privileges. The exercise of these powers shall not compel the disclosure of communications protected by solicitor-client, attorney-client, or mediation privilege.

4. Information Barrier Options

To manage the fluid movement between dispute phases, the process shall adopt one of two structural models. The models outlined below establish the boundaries of permitted information flow, ex parte communication rules, and the strict limits of the arbitral record. The selection of the applicable model constitutes a fundamental contractual term of the proceedings and dictates the corresponding scope of the parties' procedural waivers.

4.1 Model A: The Single Neutral (Med-Arb)

- **4.1.1 Continuity of Neutral:** A single neutral individual shall be empowered to act as mediator and, if necessary, subsequently as sole arbitrator.
- **4.1.2 Caucus Information:** The parties agree that the neutral may receive confidential disclosures during separate, private mediation caucuses without the obligation to disclose such communications to the opposing party during the mediation phase.
- **4.1.3 Strict Segregation of Evidence:** The arbitral record shall consist strictly of evidence properly introduced and subjected to cross-examination or rebuttal within the arbitration phase. Information acquired solely during private mediation caucuses is inadmissible and shall not form the basis of any interim or final arbitral award.

- **4.1.4 Irrevocable Bias Waiver:** As a condition of entering this process, the parties shall execute an irrevocable waiver. The parties expressly waive any right to appeal, vacate, or resist enforcement of the arbitral award on the grounds that the arbitrator's knowledge of mediation-phase disclosures constitutes apprehension of bias, a conflict of interest, or a violation of due process.

4.2 Model B: Separate Co-Neutrals (Shadow Arbitrator)

- **4.2.1 Separation of Neutrals:** The unified process shall utilize two independent neutral individuals: one designated exclusively as the mediator, and the other designated exclusively as the arbitrator.
- **4.2.2 Shadow Arbitrator Jurisdiction:** The mediator shall retain exclusive jurisdiction over the settlement phase. The shadow arbitrator shall have no involvement in the mediation and shall only exercise active jurisdiction over the dispute if the mediation phase fails to achieve a full settlement.
- **4.2.3 Prohibition on Information Sharing:** A total information barrier shall exist between the co-neutrals. The mediator shall not share, directly or indirectly, any ex parte caucus information, settlement offers, or behavioral impressions with the arbitrator.
- **4.2.4 Exclusivity of the Arbitral Record:** To ensure a pure record, the arbitrator shall remain entirely uninfluenced by the mediation process. The final arbitral award shall be based solely upon the formal record developed during the inquisitorial arbitration phase.

5. Inquisitorial Authority and the Preservation of Privilege

- **5.1 Active Fact-Finding:** During the arbitration phase, the arbitrator shall possess active, inquisitorial powers to independently question witnesses, call experts, and request the production of specific documents or categories of records.

- **5.2 Limits on Disclosure:** While parties must comply with the arbitrator's investigative directives, they retain the right to withhold any information or documents protected by recognized legal professional privileges, including solicitor-client or attorney-client privilege.
- **5.3 Independent Admissibility of Mediation Disclosures:** The settlement privilege protecting the mediation phase applies strictly to communications, offers, and admissions made for the purpose of negotiation. It does not extend to pre-existing, non-privileged documents. The arbitrator retains the authority to compel the production of such underlying documents for the formal arbitral record, irrespective of their prior disclosure during mediation¹.

6. Exceptions to Confidentiality and Privilege

Confidentiality and privilege under these Guidelines are robust but not absolute. They are pierced exclusively under the following narrow statutory and public interest exceptions:

- **6.1 Imminent Criminal Acts:** Confidentiality is overridden if a party makes a clear threat of imminent bodily harm or reveals an ongoing or planned criminal offense that poses a risk to life or safety.
- **6.2 Protection of Vulnerable Persons:** Any disclosure indicating the abuse, neglect, or exploitation of a minor or vulnerable adult overrides all confidentiality protections and mandates immediate statutory reporting.
- **6.3 Statutory Reporting Obligation:** The process shall not be used to shield or facilitate criminal activity. Confidentiality obligations yield where disclosure is mandated by applicable anti-money laundering, counter-terrorist financing, or specialized criminal statutes.

¹ **Discovery of Pre-Existing Materials:** If the arbitrator becomes aware of a material, pre-existing document first referenced during the mediation phase, the arbitrator may order its formal production. The fact that a document was disclosed or discussed during mediation shall not immunize it from discovery or admissibility in the arbitration phase, provided it is otherwise discoverable under these Rules.

- **6.4 Proving or Enforcing a Settlement:** Settlement privilege is waived strictly to the extent necessary to prove the existence, terms, or validity of a binding settlement agreement concluded during the mediation phase.
- **6.5 Prior Independent Existence:** The protections of this process do not apply to any document that existed independently prior to the mediation phase. A party cannot convert an otherwise discoverable document into privileged material simply by introducing or presenting it first during a mediation session.

7. Streamlined Exception Procedures and Timelines

To prevent procedural stagnation and ensure rapid dispute resolution, any claim to pierce confidentiality or privilege shall be processed under an expedited schedule. When an exception is raised, the neutral and the parties must strictly execute their duties within the designated operational windows. The underlying time-counting principles prioritize speed alongside due process. Consequently, while these rules model their timelines on standard federal frameworks, the calculation of any period under seven (7) days shall be dynamically adapted to exclude weekends and public holidays according to the specific nature, context, and jurisdictional reality of the arbitration, to provide realistic opportunities for emergency judicial recourse.

- **7.1 Immediate Emergency Disclosure and Suspension:** If an exception involves an imminent threat of bodily harm or a flagrant, active criminal offense, the neutral shall bypass all standard timelines and immediately report the threat to the appropriate law enforcement or regulatory authorities within one (1) hour. For non-imminent exceptions, the neutral shall formally suspend all proceedings within one (1) business day to evaluate the claim.
- **7.2 Service of Notice of Intent:** Within two (2) business days of ordering a procedural stay, the neutral shall serve a written Notice of Intent to Disclose upon all parties, identifying the precise exception invoked and the specific materials at risk of disclosure.
- **7.3 Interlocutory Submissions:** The parties shall have five (5) business days from receipt of the notice to deliver written submissions to the neutral objecting to, or supporting, the proposed disclosure.

- **7.4 In-Camera Adjudication and Severability:** Within three (3) business days following submissions, the neutral shall conduct an in-camera review of the contested materials. The neutral shall strictly apply the principle of severability, redacting any material not directly subject to the exception, and issue a formal written procedural order.
- **7.5 Stay of Execution for Judicial Recourse:** Any procedural order piercing confidentiality shall be automatically stayed for five (5) business days. This stay allows an aggrieved party an absolute window to apply for an emergency stay, protective order, or interlocutory injunction before a court of competent jurisdiction at the seat of the arbitration, or pursuant to applicable local rules of civil procedure.
- **7.6 Calculation of Time:** All periods under seven (7) days specified in this Section shall be calculated by excluding Saturdays, Sundays, and official public or statutory holidays observed at the seat of the arbitration

8. Remedies and Sanctions for Non-Compliance

To maintain the integrity of this unified process and prevent tactical delays or unauthorized disclosures, the commitments to confidentiality, privilege, and expedited timelines must be strictly enforceable. Accordingly, this Section establishes the specific procedural, evidentiary, and financial consequences triggered by a party's default or breach, granting the neutral the necessary authority to preserve the fairness and efficiency of the proceedings.

- **8.1 Waiver by Procedural Default:** If a party fails to deliver written submissions within the strict five (5) business day window specified in Section 7.3, that party shall be deemed to have irrevocably waived their right to object to the proposed disclosure, and the neutral may proceed to issue the procedural order immediately.
- **8.2 Material Breach of Confidentiality:** Any unauthorized disclosure of confidential mediation materials or non-public arbitral records by a party, their counsel, or their representatives shall constitute a material breach of these Guidelines.

- **8.3 Powers of the Neutral:** Upon finding that a breach of confidentiality or a procedural timeline has occurred, the neutral shall have the authority to order appropriate remedies, including but not limited to:
 - **8.3.1 Adverse Inferences:** Drawing adverse inferences against the breaching party regarding the facts tied to the leaked or withheld information.
 - **8.3.2 Exclusion of Evidence:** Striking the improperly disclosed or withheld material from the arbitral record.
 - **8.3.3 Cost Awards:** Awarding immediate interlocutory costs, including reasonable legal fees and the neutral's fees, incurred as a result of the breach.
 - **8.4 Independent Right to Damaged Parties:** The provisions of this Section do not restrict an aggrieved party from seeking emergency injunctive relief or pursuing independent claims for damages resulting from a breach of confidentiality before a court of competent jurisdiction.

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