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Stephen Lancken

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Confidentiality in ADR

The responsibility of the neutral in respect of mediation confidentiality*

Steve Lancken

There are many cases in which the confidential or privileged nature of communications in mediation is discussed and the protections offered by them are analysed.

One of the earliest examples, regarding privilege, is *AWA Ltd v Daniels (t/a Deloitte Haskins and Sells)* (1992) 7 ACSR 463, decisions of Rolfe J and Rogers CJ (Commercial Division). More recently in one of the many *Rajski*[1] cases Palmer J of the New South Wales Supreme Court confirmed the confidential nature of mediation, refusing to take into evidence correspondence and communications with the mediator Geoff Charlton to determine whether it was worthwhile that a mediation continue.

Mediation promises

Mediators emphasise the promise that parties make to each other and to the mediator to keep confidential the discussions that occur at mediation. After the *AWA* case, and on the advice offered at a seminar by a senior practitioner, I began to say to disputants, if they asked about the scope of the confidentiality of the mediation process, that the confidentiality promise was made *to the extent that the law allows* the process to be kept confidential. By this circular advice I felt that I was protecting myself from giving advice and not misrepresenting the legal position.

I am often confronted by questions such as 'What if they choose not to keep their promise?' or 'I know I cannot trust them (the other party). As soon as this is over I know that they will tell everyone so what is the use of such a clause?' Typically this sort of comment is made by a landlord about her tenant or a banker about his customer.

I am also often in the situation where people at the mediation must report back to managers, the board, auditors, spouses or partners about the outcome of the mediation, or about what happened at it.

Rather than offer a meaningless line about the law, my practice has changed so as to recognise and articulate limits to the confidentiality of the process and get on with it. I hope and pray that the parties to the mediation respect the spirit of the confidentiality promise that they make in the agreement. I cannot guarantee it!

Should I be so casual? Is confidentiality such an important part of the process that I should take more care? Or is the reality of the legal and commercial framework in which lawyer mediators conduct their practice such that the promise of confidentiality is just that – a promise neither enforced nor enforceable by any meaningful remedy?

Back to basics

It may be useful to go back to basics to understand why confidentiality in without prejudice discussions and hence mediation is important to the parties and for the process.

First we should recognise that confidentiality and privilege are not the same thing. Privilege protects a communication being used in evidence, either as an admission or against the interest of the party making the communication. Confidentiality is a promise not to disclose information to another party.

The reasons that we offer (and parties seek) confidentiality in mediation are in some respects the same reasons that are offered for protecting 'without prejudice' settlement discussions, namely:

- The law encourages settlement discussions and will therefore discourage the use *in evidence* of offers, ideas or settlement discussions as this may discourage the settlement discussions taking place at all.
- Parties should be able to have discussions, especially regarding the resolution of a dispute, without the fear that their words will be later used against them in court. This allows people to relax and be creative, a vital element in mediation.
- The court does not want to interfere with a process of the parties to settle conflict.
- What happened in mediation is of no relevance to the dispute itself. If the court investigates the discussions in a mediation process there is the risk that mediation will provide the parties with 'another battleground' to pursue the dispute. This was the fear of Palmer J in the *Rajski* case referred to above.[2]
- Notions of 'good faith' seem to be challenged by the suggestion that a party would go squealing to the court about what was said in a settlement discussion.
- Lawyers and other advisors would not assist the parties if they thought that what they were uttering could be used as admission against the interests of their clients.
- As Fisher and Ury tell us in *Getting to Yes*,[3] brainstorming is better if ideas cannot be commitments to which the parties are bound.
- The very act of apology, sometimes so important to move a relationship forward, could, before the introduction of the *Civil Liability Act 2002* (NSW), be considered an admission. Without the protection of confidentiality no apology would ever be given (refer to the position of Prime Minister John Howard in regard to the 'Stolen Generation').
- In a negotiated settlement parties are often concerned that a precedent NOT be created by a compromise settlement.

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Mediators have learned to accept and believe that confidentiality is one of the cornerstones of mediation practice *and* in many instances that it is vital to 'success'. In private caucus we promise that no matter what we are told we will not tell the other party. No matter what!

Exceptions to confidentiality

Is confidentiality so important that it is protected by the courts and the law at any cost (as mediators may hope)? If exceptions prove the rule, there are enough exceptions to suggest that confidentiality is a rule of importance.

Here are some of the exceptions that I have discovered.

- The result of a mediation is not confidential. There are many cases especially in regard to the (NSW) *Farm Debt Mediation Act 1994* such as *ANZ v Ciavarella* (2002) NSWSC 1186, 13 December 2002.
- Confidences can be broken by consent of the parties. (Is the mediator entitled to the benefit of this exception?) See for instance s 131(2)(a) of the *Evidence Act* (see below).
- If there are 'reasonable grounds to believe that the disclosure is necessary to prevent or minimise the danger of injury to any person or damage to any property' ((NSW) *Supreme Court Act 1970* s 110Q(c).
- If an offence is disclosed. The criminal statutes require this of us no matter what our agreement says.
- If the information is otherwise available then there is no restriction on the admissibility of the evidence (*AWA v Daniels*, above), that is, privilege in a pre-existing document or communication cannot be created by mediation if the privilege did not already exist.
- On an application for costs (see the English cases of *Leicester Circuits Limited v Coates Brothers Plc* [2003] EWCA Civ 333 and *Susan Dunnett v Railtrack Plc* (unreported, Court of Appeal, 22 February 2002).
- If a fraud is committed or alleged.
- Perhaps there is an exception if there is an allegation of mediator or party duress or excessive pressure to settle: see for instance *Dahlenburg v Dahlenburg* (unreported, Supreme Court of New South Wales, No 2605, 24 July 1996). There is no explanation in the judgment of how the evidence was adduced or if confidentiality was raised or waived and there was a great deal of evidence of what was said and not said at the mediation. See also *Tahoopi v Lewenberg & Ors (No 2)* [2003] VSC 410.

There may be other possible exceptions:

- If a lawyer in the mediation is incompetent or dishonest.
- If there is a claim that an agreement reached at mediation is liable to be set aside under such legislation as the (NSW) *Contracts Review Act 1980*, or even the (Cth) *Trade Practices Act 1974*, in such sections as those that deal with 'unconscionable conduct and unfair contracts'.
- If a mediator is incompetent or dishonest.

In California there is soon to be a strong test of the Evidence Code # 1119 (see below) in the case of *Rojas v Coffin*.[4] It is expected that the Court will give an opinion as to whether there are any exceptions to that section of the Code. In earlier cases it was suggested that there are exceptions implied at law to the broad confidentiality protection given by the section, such as the right of a minor to defend him or her self against allegations by impeaching an accuser or the issue of whether a party was 'competent' during a mediation. I understand that the Californian equivalent of LEADR has sought to intervene in the case.

Remedies

The law will enforce by injunction a promise to keep a confidence. Is there any value in such a remedy? By definition no one will know of a breach of confidence until after the disclosure, usually too late in terms of protecting the beneficiary of the promise. Damages may be appropriate if it is possible to quantify them.

Although problematic, the courts have used such remedies in regard to breach of patent cases although not, as far as is known, in regard to mediation.

In discussions with experienced mediators I have asked how they

would respond to occurrences in mediation such as:

- An agreement between parties to commit a crime
- An agreement to stay silent about (or 'cover up') a danger
- An agreement to stay silent about (or cover up) facts that may assist a third party in litigation
- Lawyer incompetence that threatened to damage a client
- Mediator incompetence that threatened to cause damage.

The responses vary. All want to know more to understand the exact circumstances. I think the reason for this is that even though there is a growing body of legal decision and legislation relating to confidentiality and privilege, the really tough issues in this respect are ethical rather than legal problems. When confronted with ethical issues each mediator has their own process for making what are very personal judgements.

Conclusion

Even after this discussion I am not sure how important confidentiality is or if in some circumstances that I would feel bound to protect it. When is it 'OK' for a mediator to breach confidentiality or is it never 'OK'?

How do we protect confidences in the face of a court order, such as a subpoena, to appear and give evidence?

Perhaps one answer is that given by one of our colleagues when asked to give evidence in the Supreme Court. That mediator made a little speech to the judge letting her know of the promise to protect confidentiality and then going on to say that the mediator remembered nothing of what happened at the particular mediation. Of course, technically, the mediator was 'compellable' to give evidence notwithstanding promises made in a mediation agreement. I wonder if the mediator's answer would have been the same if real injustice was likely to occur if the mediator remained silent.

I have no legal precedent or scientific basis for my next conclusion, but I think that it is correct. The first (or as some say the only) rule of mediation still applies: *Above all else …do no harm*. If mediation is to be interest based and not rights based then this mantra has some attraction. Where protection of confidentiality is likely to cause harm then a mediator may be entitled, and even obliged, to disclose the confidential information.

The difficult questions for the mediator are:

- What is harm?
- Is harm likely to be caused in this case?

If this sounds indecisive then perhaps I can save myself with the help of Bertand Russell who said:

> The whole problem with the world is that fools and fanatics are always so certain of themselves, but wiser people are so full of doubts.

It is a mediator's responsibility to remain wise and go forward with resolve, despite fears and doubts. Dealing with confidentiality in mediation is not easy, it is important.

Precedents and resources

- Most mediators and arbitrators have a clause in their mediation agreements similar to my own which reads:

CONFIDENTIALITY AND PRIVILEGE

1. *The Mediator and the parties and all persons brought into the mediation … will not disclose and will not seek to rely on or introduce as evidence in arbitration or Court proceedings ..... any of the following:*
   - *1.1 exchanges whether oral or documentary …….*
   - *1.2 views expressed or suggestions or proposals made by the Mediator ……,*
   - *1.3 admissions made ……*
   - *1.4 the fact that any party has indicated willingness to accept any proposal for settlement made by the Mediator or by any party,*

   or
   - *1.5 notes or statements made ……..*

Such clauses are intended to proscribe a regime that protects the 'confidentiality' of the communications that make up the mediation process.

The (NSW) *Supreme Court Act 1970* offers mediators and the parties protection from the disclosure of their settlement discussions in the following terms [emphasis added]:

Section 110P Privilege

(1) In this section, 'mediation session' or 'neutral evaluation session' includes any steps taken in the course of making arrangements for the session or in the course of the follow-up of a session.

(2) Subject to subsection (3), the same privilege with respect to defamation as exists with respect to judicial proceedings and a document produced in judicial proceedings exists with respect to:
   - (a) a mediation session or neutral evaluation session, or
   - (b) a document or other material sent to or produced to a mediator or evaluator, or sent to or produced at the Court or the registry of the Court, for the purpose of enabling a mediation session or neutral evaluation session to be arranged.

(3) The privilege conferred by subsection (2) only extends to a publication made:
   - (a) at a mediation session or neutral evaluation session, or
   - (b) as provided by subsection (2)(b), or
   - (c) as provided in section 110Q.

(4) Evidence of **anything said** or of any admission made in a mediation session or neutral evaluation session is not admissible in any proceedings before any court, tribunal or body.

(5) A document prepared for the purposes of, or in the course of, or as a result of, a mediation session or neutral evaluation session, or any copy of such a document, is not admissible in evidence in any proceedings before any court, tribunal or body.

(6) Subsections (4) and (5) do not apply with respect to any evidence or document:
   - (a) if the persons in attendance at, or **identified** during, the mediation session or neutral evaluation session and, in the case of a document, all

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persons identified in the document, consent to the admission of the evidence or document, or

(b) in proceedings instituted with respect to any act or omission in connection with which a disclosure has been made under section 110Q(c).

Section 110Q Secrecy

A mediator or evaluator **may disclose** information obtained in connection with the administration or execution of this Part only in any one or more of the following circumstances:

(a) with the consent of the person from whom the information was obtained,

(b) in connection with the administration or execution of this Part,

(c) if there are reasonable grounds to believe that the disclosure is necessary to prevent or minimise the danger of injury to any person or damage to any property,

(d) if the disclosure is reasonably required for the purpose of referring any party or parties to a mediation session or neutral evaluation session to any person, agency, organisation or other body and the disclosure is made with the consent of the parties to the mediation session or neutral evaluation session for the purpose of aiding in the resolution of a dispute between those parties or assisting the parties in any other manner,

(e) in accordance with a requirement imposed by or under a law of the State (other than a requirement imposed by a subpoena or other compulsory process) or the Commonwealth.

The law has long protected the 'without prejudice' nature of settlement discussions. That protection found its way into the *Evidence Act* in s 131.

Section 131 Exclusion of evidence of settlement negotiations

(1) Evidence is not to be adduced of:

(a) a communication that is made between persons in dispute, or between one or more persons in dispute and a third party, in connection with an attempt to negotiate a settlement of the dispute, or

(b) a document (whether delivered or not) that has been prepared in connection with an attempt to negotiate a settlement of a dispute.

(2) Subsection (1) does not apply if:

(a) the persons in dispute consent to the evidence being adduced in the proceeding concerned or, if any of those persons has tendered the communication or document in evidence in another Australian or overseas proceeding, all the other persons so consent, or

(b) the substance of the evidence has been disclosed with the express or implied consent of all the persons in dispute, or

(c) the substance of the evidence has been partly disclosed with the express or implied consent of the persons in dispute, and full disclosure of the evidence is reasonably necessary to enable a proper understanding of the other evidence that has already been adduced, or

(d) the communication or document included a statement to the effect that it was not to be treated as confidential, or

(e) the evidence tends to contradict or to qualify evidence that has already been admitted about the course of an attempt to settle the dispute, or

(f) the proceeding in which it is sought to adduce the evidence is a proceeding to enforce an agreement between the persons in dispute to settle the dispute, or a proceeding in which the making of such an agreement is in issue, or

(g) evidence that has been adduced in the proceeding, or an

inference from evidence that has been adduced in the proceeding, is likely to mislead the court unless evidence of the communication or document is adduced to contradict or to qualify that evidence, or

(h) the communication or document is relevant to determining liability for costs, or

(i) making the communication, or preparing the document, affects a right of a person, or

(j) the communication was made, or the document was prepared, in furtherance of the commission of a fraud or an offence or the commission of an act that renders a person liable to a civil penalty, or

(k) one of the persons in dispute, or an employee or agent of such a person, knew or ought reasonably to have known that the communication was made, or the document was prepared, in furtherance of a deliberate abuse of a power.

(3) For the purposes of subsection (2)(j), if commission of the fraud, offence or act is a fact in issue and there are reasonable grounds for finding that:

(a) the fraud, offence or act was committed, and

(b) a communication was made or document prepared in furtherance of the commission of the fraud, offence or act,

the court may find that the communication was so made or the document so prepared.

(4) For the purposes of subsection (2)(k), if:

(a) the abuse of power is a fact in issue, and

(b) there are reasonable grounds for finding that a communication was made or document prepared in furtherance of the abuse of power,

the court may find that the communication was so made or the document was so prepared.

(5) In this section:

(a) a reference to a dispute is a reference to a dispute of a kind in respect of which relief may be given in an Australian or overseas proceeding, and

(b) a reference to an attempt to negotiate the settlement of a dispute does not include a reference to an attempt to negotiate the settlement of a criminal proceeding or an anticipated criminal proceeding, and

(c) a reference to a communication made by a person in dispute includes a reference to a communication made by an employee or agent of such a person, and

(d) a reference to the consent of a person in dispute includes a reference to the consent of an employee or agent of such a person, being an employee or agent who is authorised so to consent, and

(e) a reference to commission of an act includes a reference to a failure to act.

(6) In this section:

'power' means a power conferred by or under an Australian law.

In other jurisdictions mediation has been offered the protection of *confidentiality* by statute. For example, Evidence Code # 1119 (California) says:

(c) All communications, negotiations, or settlement discussions by and between participants in the course of a mediation, or in a mediation consultation shall remain confidential.

The confidentiality and privilege that the process affords is valuable for a number of reasons. In 1995 the Law Reform Commission discussed this issue in its *Review of the adversarial system of litigation ADR — its role in federal dispute resolution* an extract from which discussion follows. The full text of the discussion can be found on the web site of the Commission at <www.alrc.gov.au>.

Without prejudice privilege

6.37 The common law traditionally has recognised that statements made on a 'without prejudice' basis during genuine negotiations to settle a dispute are privileged and cannot be put in evidence in subsequent proceedings without the consent of both parties.[69] The usual limitations to privilege apply, such that communications will not be privileged if the communication was to further criminal or tortious conduct.[70]

6.38 The privilege may attach to communications in the absence of formal proceedings between the parties regarding the dispute and may therefore apply to a mediation or other ADR process whether or not related litigation is on foot.[71] However, on one view the common law privilege only applies to a communication relied on as an admission.[72]

6.39 A number of decisions have extended the scope of the 'without prejudice' privilege.[73] In *Lukies v Ripley (No 2)* the NSW Supreme Court held that a conference conducted to settle only one aspect of a dispute attracts the privilege.[74] In the AWA litigation[75] it was confirmed that the 'without prejudice' privilege can apply to mediation.

6.40 Section 131(1) of the *Evidence Act 1995* (Cth) codifies the 'without prejudice' privilege. It provides that evidence may not be adduced in court of a communication made between persons in dispute, or between one or more persons in dispute and a third party, in connection with an attempt to negotiate a settlement of the dispute.[76] Documents prepared in connection with the negotiations are also not admissible.

6.41 There are a number of exceptions to this rule such as where the parties directly or impliedly consent to the admission,[77] where the communication or document is relevant to determining liability for costs[78] or where making the communication or preparation of the document affects a right of a person.[79] Examples of communications or documents affecting a right of a person are defamatory

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utterances, threats, a contractual offer and misleading or deceptive conduct within the terms of s 52 of the *Trade Practices Act 1974* (Cth). There are also obligations under criminal legislation such as the *Crimes Act 1900* (NSW) that may require disclosure.[80]

6.42 It is not yet clear how some of these exemptions will affect the confidentiality of settlement negotiations for the purposes of subsequent litigation and whether s 131 of the *Crimes Act 1900* (NSW) applies to communications and documents made or prepared in connection with an attempt to settle part of a dispute.[81] The Law Society of New South Wales and the Law Institute of Victoria have noted that there is a lack of certainty about the extent to which courts will protect communications made in mediation.[82] ●

Steve Lancken is the Australian Principal of the Trillium Group, an international ADR consultancy and can be contacted at steve@resolvingmatters.com

Endnotes

* The issues raised in this article were first discussed at the LEADR Advanced Mediation Workshop, Sydney 2003. The final thoughts owe much to the discussion that I had with my colleagues at that conference.

1. See *Rajski & Anor v Tectran Corporation Limited and Ors* (2003) NSWSC (26 May 2003).
2. Above note 1, at para 23.
3. Fisher R and Ury W, *Getting to Yes*, Arrow Books, London, 1987.
4. *Rojas v Superior Court (Coffin)* (2002), Cal App 4th [No B158391, 2nd dist, div 7, 10 October 2002].