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Mediation & confidentiality

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Abstract
Mediation continues to be an ever-growing faction of the legal community with the introduction of more legislation requiring parties to attempt to solve disputes outside of the courtroom. While it is generally accepted that mediation is a confidential process, the rules of confidentiality in Australia and internationally are not so black and white. This paper is broken into four sections to determine why there is a need for confidentiality, when disclosure is required by law and what the general rules of confidentiality are in relation to mediators, mediation, and legal practitioners in Australia as well as an international comparison with the United States of America. Ultimately, through the extrapolation of these topics, it will be shown that while the current rules of confidentiality attempt to equally protect the rights of all parties, this often results in an individual's access to justice being inhibited.

Keywords
disputes, rules of confidentiality, Australia, United States

MEDIATION & CONFIDENTIALITY

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INTRODUCTION

In a world becoming ever more litigious, the need for alternative forms of dispute resolution became increasingly popular in the late Twentieth Century.[1] Alternative dispute resolution is a process where 'the parties [become] active players in [resolving] the dispute, identifying their needs and generating creative options that lead to an outcome [which parties can] themselves craft and implement'.[2] Both in Australia and internationally, mediation, a form of alternative dispute resolution, is becoming more commonplace in the legal environment. Mediation is 'a decision making process in which the parties are assisted by a third party, the mediator [who] attempts to improve the process of decision making and to assist the parties to reach an outcome to which each of them can assent.'[3] It is generally accepted that mediations are confidential.[4] Absolute confidentiality however, does not necessarily result in improved access to justice. Consequently, the rules of confidentiality in Australia are not black and white.[5]

This paper will be broken into four parts in order to determine whether the current rules of confidentiality for mediators, legal practitioners and the mediation as a whole, inhibit access to justice for some parties. Firstly, this essay will discuss the current rules of mediation in Australia regarding when disclosure is allowed, required or prohibited. The same considerations will also be explored in relation to legal practitioners and the mediation as a whole. Mediation is a worldwide phenomenon, however, the rules differ quite distinctly in many jurisdictions. This essay will therefore also consider the current rules of disclosure in the United States of America. Through the extrapolation of these topics, it will be shown that while the current rules relating to mediation attempt to equally protect the rights of all parties, this often results in an individual's access to justice being inhibited.

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1 Albert Fiadjoe, '*Alternative Dispute Resolution: A Developing World Perspective'* (Cavendish Publishing, 2004), 75.

2 Trischa Mann (ed), *Oxford Australian Law Dictionary* (Oxford University Press, 2010), 30.

3 Laurence Boulle, '*Mediation: Principles, Process, Practice*' (LexisNexis Butterworths, 3rd ed, 2011), 13.

4 Mieke Brandon and Leigh Robertson, *Conflict and Dispute Resolution: A Guide for Practice* (Oxford University Press, 2007), 41; Stephen E. Moss, 'Confidentiality in Mediation' (2010) 43 *Maryland Bar Journal* 55, 61.

5 Bar Association of Queensland, *Barristers' Conduct Rules* at 11 December 2011; Queensland Law Society, *Australian Solicitors Conduct Rules* at 1 June 2012.

I MEDIATORS: WHEN IS DISCLOSURE ALLOWED, REQUIRED OR PROHIBITED?

In Queensland, there is no single document containing all the rules relating to mediation. The rules consequently, are not black and white and are often open for interpretation. Guidelines relating to the confidentiality of mediations in Queensland can be found in a number of documents including: the *Barristers' Conduct Rules,*[6] the *Australian Solicitors Conduct Rules*,[7] the *Civil Proceedings Act,*[8] the *Evidence Act,*[9] the *Australian National Mediator Standards,*[10] and the *Standards of Conduct for Solicitor Mediators,*[11] as well as the common law.[12] While a mediator has an obligation to advise parties of the extent and limits to which their mediation will be confidential,[13] the scope of confidentiality is often also defined within the agreement to mediate and any settlement agreements.

1 *Why do we Need Confidentiality?*

One of the trademark elements of mediation is the guarantee of confidentiality.[14] This security is essential as it promotes full and frank disclosure by the parties and honesty during negotiations and discussions between the parties and with the mediator.[15] In fact, 'the promise of nearly "absolute confidentiality" empowers the mediator and allows the parties to confide in the mediator without reservation. It is the ability to reveal intimate details and information contrary to one's own interest that often leads to the settlement of a case'.[16] Consequently, confidentiality is an imperative part of mediation for the following eight reasons.

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6 Bar Association of Queensland, *Barristers' Conduct Rules* at 11 December 2011.

7 Queensland Law Society, *Australian Solicitors Conduct Rules* at 1 June 2012.

8 *Civil Proceedings Act 2011* (Qld).

9 *Evidence Act 1995* (Cth).

10 Australian National Mediator Standards, *Practice Standards* at 1 January 2008.

11 Queensland Law Society, *Standards of Conduct for Solicitor Mediators* at 23 September 1998.

12 *Williamson v Schmidt* [1997] 2 Qd.R 317.

13 Bar Association of Queensland, *Barristers' Conduct Rules* at 11 December 2011; Queensland Law Society, *Australian Solicitors Conduct Rules* at 1 June 2012.

14 T. Noble Foster and Selden Prentice, 'The Promise of Confidentiality in Mediation: Practitioners' Perceptions' [2009] *Journal of Dispute Resolution* 163, 171.

15 Ibid.

16 Ibid, 164 citing L. Randolph Lowry and Peter Robinson, 'Mediation Confidential: In Three Recent Cases, Courts have Carved out Expectations to the Rule of Strict Secrecy in Mediation Proceedings' (2001) 24 *Los Angeles Law* 28, 31.

1.1 *To Strengthen Levels of Trust During Mediation*

At the beginning of any mediation, it is guaranteed that a mediator will make an opening statement.[17] Included in this statement will be the scope of confidentiality both in the mediation itself and in private sessions.[18] This beginning statement assists parties in opening the lines of communication and the development of rapport between the parties and mediator. It is generally considered that confidentiality will increase the levels of trust and confidence between the parties and mediators.[19] Parties who are involved in the mediation process are often already particularly vulnerable.[20] If an individual cannot guarantee the confidentiality of their disclosures and cannot trust the mediator will not disclose private information to another party, the potential effectiveness of mediation will quickly diminish.[21]

1.2 *To Increase Confidence in the Impartiality of the Mediator*

Secondly, confidentiality in mediation is needed to increase confidence in the impartiality of the mediator.[22] As human beings we are all naturally subject to bias. Participants in a mediation want to ensure that any such bias is limited to the greatest extent possible. Confidentiality allows parties to be 'confident that the mediator will not take sides regardless of what happens'.[23] Consequently, 'parties will feel free to confess the less appealing aspects of their situation'.[24] This openness and vulnerability is vital to assist the mediator in facilitating the progression of the mediation even without disclosing the information.

1.3 *To Increase the Integrity of the Mediation*

Thirdly, threats of mediator disclosure can cast doubt over the integrity of the process as a whole.[25] If mediators breach the concept of confidentiality by revealing information to other parties it may call into question the validity and integrity of the entire process, including the impartiality of the mediator. The case of *In re Marriage of Kieturakis,*[26] persuasively identifies that 'confidentiality

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17 Australian National Mediator Standards, *Practice Standards* at 1 January 2008.

18 Bruce Pardy and Charles Pou, 'Confidentiality' in Ellen Waldman (eds) *Mediation Ethics* (Jossey-Bass, 2011), 55.

19 Ibid citing E. Deason, 'The Need for Trust as a Justification for Confidentiality in Mediation: A Cross-Disciplinary Approach' (2006) 54 *University of Kansas Law Review* 1387.

20 Pardy, above n 18.

21 Ibid.

22 Ibid.

23 Ibid 230.

24 Ibid.

25 Ibid.

26 138 Cal App 4th 56 (1st App Dist 2006).

and neutrality are the life and breadth of mediation. … To require testimony of a mediator is to require that the mediator take sides in a dispute. … If a mediator takes sides, it is a breach of trust and makes a lie of the promises that are made by mediation'.[27]

1.4 *To Provide a Private as Opposed to Public Forum*

One of the greatest incentives for parties to consider mediation as an alternative to litigation is that it is conducted solely in the private as opposed to the public forum.[28] This means that a dispute can be settled without any public record of the claim. This benefit is a direct result of the mediation process being confidential. The confidentiality of the mediation process is a strong enticement for many businesses, where the negative connotations of a long protracted legal battle, not to mention the expense, would be bad for their public reputation or corporate social responsibility.[29]

1.5 *To Beseech Full and Frank Disclosure*

Many of the previous reasons that explore the need for confidentiality in mediation mainly aim to ensure that there is openness and honesty between the parties in mediation.[30] As such, the concept of confidentiality improves the full and frank disclosure of praties during mediation.[31] This idea is explored further in the case of *The Marriage of Kieturakis,*[32] where the court stated, 'a party must be guaranteed that statements made by him or her will not be admissible in a later action, for without this guarantee the party will never speak frankly and honestly'.[33] Without full and frank disclosure it may be impossible for the parties to reach agreement.[34]

1.6 *To Allow the Power to Remain with the Parties*

It is well established in family law that parties will be more satisfied and more likely to comply with orders, which they have had a hand in drafting as opposed to those, which have been mandated by a Judge. This principle is not limited solely to family law and can in fact be applied to any mediated dispute.[35] In litigation, whether trial by Judge or jury, choosing to mediate the settlement

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27 Pardy, above n 18, 231 citing *In re Marriage of Kieturakis,* 138 Cal App 4th 56, 68 (1st App Dist 2006).

28 Rachael Field and Neal Wood, 'Marketing Mediation Ethically: The Case of Confidentiality' (2005) 5(2) *Queensland University of Technology Law and Justice Journal* 143, 152.

29 Ibid.

30 Pardy, above n 18.

31 Note, 'Protecting Confidentiality in Mediation' (1984) 98(2) *Harvard Law Review* 441, 455.

32 138 Cal App 4th 56 (1st App Dist 2006).

33 Pardy, above n 18, 231 citing *In re Marriage of Kieturakis,* 138 Cal App 4th 56, 68 (1st App Dist 2006).

34 Harvard Law Review, above n 31, 445.

35 Ibid.

outcome, rather than rolling the dice in court, allows a party to retain power and contribute to the development of the final decision.

1.7 *To Release Parties from the Strict Confines of the Rules of Law*

The rules of law are narrow and limited, the outcomes even more so.[36] To make a claim a party must first have a recognisable cause of action, the elements of which must then all be proven to the required standard. Even in a court of equity, a party may still be unable to get a desired or satisfactory outcome. As mediations are confidential and not a part of the public forum they are consequently not bound by the strict confines of the rules of law.[37] While a mediation agreement, which is abhorrently unfair, or blatantly illegal, will not be enforced if breached, the confidential nature of a mediation allows parties greater scope to determine an appropriate solution to the dispute.[38]

1.8 *To Allow for the Preservation of Ongoing Relationships*

Finally, whether the dispute involves familial relationships or an ongoing business partnership, mediation, as opposed to litigation allows for the preservation of these ongoing relationships.[39] In a court hearing, to build up your own case it is imperative that you tear apart and poke holes in the arguments of the other side. Whereas, the confidential aspect of mediation gives parties the opportunity to acknowledge the 'less appealing aspects of their situation,'[40] and negotiate from a positive mindset as opposed to the negative connotations which are associated with litigation.[41]

II WHAT ARE THE RULES OF CONFIDENTIALITY?

As previously mentioned, the rules of confidentiality are not contained within a single document.[42] However, the main sources are: the *Barristers' Conduct Rules*,[43] *Australian Solicitors Conduct*

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36 Ibid.

37 Ibid.

38 Ibid.

39 Ibid.

40 Pardy, above n 18, 230.

41 Harvard Law Review, above n 31, 448.

42 Bar Association of Queensland, *Barristers' Conduct Rules* at 11 December 2011; Queensland Law Society, *Australian Solicitors Conduct Rules* at 1 June 2012; *Civil Proceedings Act 2011* (Qld); *Evidence Act 1995* (Cth); Australian National Mediator Standards, *Practice Standards* at 1 January 2008; Queensland Law Society, *Standards of Conduct for Solicitor Mediators* at 23 September 1998; *Williamson v Schmidt* [1997] 2 Qd.R 317, 388.

43 Bar Association of Queensland, *Barristers' Conduct Rules* at 11 December 2011.

Rules,[44] and the *National Mediators Standards*.[45] All these guidelines essentially state that the confidentiality of the parties must be kept, except where allowed by law.[46] Whilst there may be a plethora of different guidelines in relation to the rules of mediation, they all incorrectly assume that a mediator will be either a legal practitioner or accredited under the National Mediator Standards. However, unlike in other professions, such as law and psychology, there is currently no single governing board of mediators. Accordingly, any individual can conduct a mediation and is under no obligation to be bound by any of the aforementioned guidelines. In such a situation where a mediator does not belong to any regulatory body, it becomes nigh on impossible to enforce ethical standards. Although in practice, the majority of mediators in Queensland are either legal practitioners or nationally accredited mediators, the copious guidelines and lack of governing body not only creates confusion as to the rules, but also leaves open a sizeable loophole for abuse.

Rules of mediation confidentiality may also be found at a federal level, under the *Evidence Act.*[47] Section 131(1) states that any evidence of '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 a document that has been prepared'[48] is inadmissible. A list of exceptions to this rule can be found in s 131(2).[49] These include, but are not limited to the following: communication in furtherance of fraud or other offence,[50] where the parties expressly or implied agree for confidentiality to be waived[51] or where evidence relates to the determination of a costs order.[52] At a State level, rules of mediation confidentiality were previously contained in ss 112 – 114 of the *Supreme Court of Queensland Act.*[53] However, this legislation has now, in part, been repealed. New rules of ADR confidentiality are now contained under ss 52 – 54 of the Queensland *Civil Proceedings Act.*[54] Under penalty of up to a $5500 fine, section 54(1) states that 'an ADR convenor must not, without reasonable excuse, disclose information coming to the ADR convenor's knowledge during an ADR process.'[55] Similarly, s 53(1) of the *Civil Proceedings Act*[56] states that

44 Queensland Law Society, *Australian Solicitors Conduct Rules* at 1 June 2012.

45 Australian National Mediator Standards, *Practice Standards* at 1 January 2008.

46 Ibid.

47 *Evidence Act 1995* (Cth).

48 Ibid s 131(1).

49 Ibid s 131(2).

50 Ibid s 131(2)(j).

51 Ibid s 131(2)(c).

52 Ibid s 131(2)(h).

53 *Supreme Court of Queensland Act 1991* (Qld).

54 *Civil Proceedings Act 2011* (Qld).

55 Ibid s 54(1).

56 Ibid s 53(1).

'evidence of anything done or said, or an admission made, at an ADR process about the dispute, is admissible at the trial of the dispute or in another dispute or in another civil proceeding before the court or elsewhere, only if all parties to the dispute agree.'[57] This section of the State legislation essentially establishes mediation confidentiality and concludes that all parties to the dispute must agree in order for this right to be waived.

2 *When Must a Mediator Disclose*

In Queensland, as previously mentioned, the rules which dictate when a mediator may disclose confidential information are governed by a number of guidelines, including: the *Barristers' Conduct Rules,* [58] the *Australian Solicitors Conduct Rules,* [59] and the *National Accreditation Mediator Standards.* [60] Under s 6(1)(c) of the *National Accreditation Mediator Standards,* [61] a mediator is obliged to respect confidentiality and 'shall not voluntarily disclose to anyone who is not a party to the mediation any information obtained except when required to do so by law.'[62] Similarly, r 108 of the *Barristers' Conduct Rules,*[63] states that 'a barrister must not disclose (except as compelled by law) or use in any way confidential information obtained by the barrister in the course of practice.'[64] Finally, under the r 9 of the *Australian Solicitors Conduct Rules*[65] a 'solicitor must not disclose information which is confidential to a client … [unless] the solicitor is permitted or is compelled by the law to disclose.' [66] While, mediators may also disclose confidential information with the consent of both parties, it is interesting that there is no positive obligation on mediators to report instances of abuse or violence. In comparison, many jurisdictions in the United States have statutory requirements imposing obligations on mediators to report in specific circumstances.[67] Finding balance, so as provide the best access to justice for all parties in relation to mediation confidentiality, is difficult. On one hand confidentiality is an integral part of mediation. On the other hand, whether it is the abuse of a child, threats of violence, mediator malpractice or coercion, to protect the interests and allow access to justice for these individuals, discretion as opposed to "absolute confidentiality" is required.

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57 Ibid.

58 Bar Association of Queensland, *Barristers' Conduct Rules* at 11 December 2011.

59 Queensland Law Society, *Australian Solicitors Conduct Rules* at 1 June 2012.

60 Australian National Mediator Standards, *Practice Standards* at 1 January 2008.

61 Ibid.

62 Ibid s 6(1)(c).

63 Bar Association of Queensland, *Barristers' Conduct Rules* at 11 December 2011.

64 Ibid r 108.

65 Queensland Law Society, *Australian Solicitors Conduct Rules* at 1 June 2012.

66 Ibid r 9.

67 *California Evidence Code* (1997).

2.1 *'The Mediation': Are Admissions Made By Parties During Mediation Confidential?*

As previously discussed, in Australia, under the *Barristers' Conduct Rules,*[68] the *Australian Solicitors Conduct Rules,*[69] and the *National Accreditation Mediator Standards,*[70] confidentiality is the cornerstone of mediation and as such is generally protected. Unless the law compels a party, or if all parties, including the mediator, agree to waive confidentiality, the mediation and communications prepared in preparation for the mediation will remain confidential. However, there is a notable caveat to this rule which was established through two Australian cases, namely: the New South Wales case of *AWA Ltd v Daniels*[71] and the Queensland Supreme Court decision of *Williamson v Schmidt.*[72] The case of *Williamson v Schmidt*[73] considered the obligation a solicitor has to keep their clients' confidences, and whether a stricter interpretation of this rule should be applied in relation to mediation.[74] Applying the decision of Rolfe, J in *AWA Ltd v Daniels,*[75] the Supreme Court of Queensland concluded that there is no need for a narrower interpretation. Stating instead:

> 'that the plaintiff in the District Court action is entitled to prove if it can be admissible evidence, subject to any without prejudice considerations, the existence of any fact or matter disclosed at the mediation proceedings, although the plaintiff cannot lead in evidence, in those later proceedings, anything done or said or any admission made at the mediation proceedings. There are several substantial reasons why this should be so and these have been outlined in the above extracts of the judgments'.[76]

Consequently, following the decision in *Williamson v Schmidt,*[77] whilst direct evidence from a mediation is still inadmissible, if a fact can be proven through another source, even if one only went looking for the source as a result of information gleaned from the mediation, then the resulting evidence would be admissible in a court of law.[78]

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68 Bar Association of Queensland, *Barristers' Conduct Rules* at 11 December 2011.

69 Queensland Law Society, *Australian Solicitors Conduct Rules* at 1 June 2012.

70 Australian National Mediator Standards, *Practice Standards* at 1 January 2008.

71 (1992) 7 ACSR 463.

72 [1997] 2 Qd.R 317.

73 Ibid.

74 Michael Pryles, 'Mediation Confidentiality in Subsequent Proceedings' (Paper presented at ICCA Conference, Beijing, May 2004).

75 (1992) 7 ACSR 463.

76 Pryles, above n 74, 22 – 23 citing *AWA Ltd v Daniels* (1992) 7 ACSR 463.

77 (1992) 7 ACSR 463.

78 Pryles, above n 74.

III RULES OF DISCLOSURE ON AN INTERNATIONAL PERSPECTIVE

3 *Comparative Analysis on Rules of Disclosure*

In Australia, while the rules of confidentiality in mediation are governed by individual jurisdictions, they all generally share the same common elements.[79] Whilst, the rules of confidentiality in the United States, from one side of the country to the other, are polar opposites.[80] One of the main problems in any area of law is the vast number of competing bodies which can create applicable rules. From case law, to uniform acts, to individual mediation organisations, each entity can recognise different rules in relation to mediation confidentiality. These rules can then be modified, amended or completely ignored by individual mediation agreements.[81] According to the Maryland Bar Association, the rules of mediation confidentiality are so complex that one must first be an expert in order to merely be competent.[82] In the United States, the concept of mediation confidentially first emerged in the 1980 case of *NLRB v Joseph Macaluso, Inc.*[83] In this case the Ninth Circuit Court of Appeal concluded, for public policy reasons, that public interest in neutrality, prohibited a mediator form being forced to testify in any future litigation.[84] From this initial decision, the rules of mediation confidentiality across the United States began to fragment. In States such as California, Texas and Ohio, the rules of "absolute confidentiality" are enforced.[85] Conversely, States such as Connecticut and Wisconsin allow judicial discretion whereby mediation confidentiality may be pierced where the interest of justice outweighs the need for confidentiality.[86] The level of mediation confidentiality in the United States can usually be classified into one of three categories, namely: 'blanket confidentiality, … near absolute or enumerated confidentiality, … or

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79 Bar Association of Queensland, ***Barristers' Conduct Rules*** at 11 December 2011; Queensland Law Society, *Australian Solicitors Conduct Rules* at 1 June 2012.

80 Sarah Williams, 'Confidentiality in Mediation: Is It Encouraging Good Mediation or Bad Conduct?' (2005) 1 *Journal of Dispute Resolution* 209, 212.

81 Moss, above n 4.

82 Ibid.

83 618 F.2d 51 (9th Cir. 1980).

84 Moss, above n 4, citing *NLRB v Joseph Macaluso, Inc.,* 618 F.2d 51 (9th Cir. 1980).

85 Michael E. Brown and Nicholas C. Duggan, 'Mediation as Malpractice: The Effect of California Mediation Confidentiality Statutes' (2012) 79(1) *Defence Counsel Journal* 94, 101.

86 Ibid.

qualified confidentiality.'[87] A single jurisdiction with such vastly differing rules allows for analysis of the benefits and limitations of each to be assessed whilst reducing the number of other variables. However, due to word limitations, this essay cannot begin to explore confidentiality in all 50 States, but instead will consider a State for each of the three different levels of confidentiality, namely: California, Maryland and Wisconsin.

3.1 *California: "Absolute Confidentiality"*

Following the principle of "absolute confidentiality," the State of California has some of the most bizarre rules relating to mediation confidentiality. States that employ these rules allow zero disclosure of any mediation communication.[88] This is enforced in California, through the *Evidence Code*[89] which provides that 'no evidence of anything said or any admission made for the purpose of, in the course of, or pursuant to, a mediation or mediation consultation is admissible or subject to discovery.' [90] Prima facie this section of the *Evidence Code* provides a great definition of confidentiality. However, the courts' strict interpretation of the rule has resulted in a less than desired effect.

While California is still considered a State of "absolute confidentiality" in relation to mediation, its impracticality has become increasingly apparent over the past decade. As a consequence, a number of very minor limitations to the confidentiality rules have developed at common law. In the case of *Rinaker v Superior Court of San Joaquin County*[91] the California Court of Appeal considered whether the protection of a minor's constitutional right to due process was more important than mediation confidentiality. In this case the court held that confidentiality must concede so as to protect a juveniles Fourteenth Amendment[92] right to due process. In this case the victim and defendant had participated in mediation prior to the criminal trial. As a result of this ruling the defendant was able to use testimony from the hearing, which would have otherwise been inadmissible under § 1119 of the *Evidence Code*, 'to impeach the accuser at trial.'[93] In 2007, the Appeals Court further expanded upon the case of *Rinaker v Superior Court of San Joaquin County*[94]

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87 Williams, above n 80, 216 citing Maureen A. Weston, 'Confidentiality's Constitutionality: The Incursion on Judicial Powers to Regulate Party Conduct in Court-Connected Mediation' (2003) 8 *Harvard Negotiation Law Review* 29, 49.

88 Williams, above n 80, 216.

89 *California Evidence Code* § 1119 (1997).

90 Brown, above n 85 citing *California Evidence Code* § 1119(a) (1997).

91 74 Cal Rptr 2d 464 (Cal Ct App 1998).

92 *United States Constitution* amend XIV.

93 *Rinaker v Superior Court of San Joaquin County,* 74 Cal Rptr 2d 464, 466 (Cal Ct App 1998).

94 Ibid.

in the decision of *Wimsatt v Superior Court.*[95] In this case the Court of Appeal again acknowledged the need to protect a juvenile offender's constitutional right to due process.[96] Notably, the court also extended the ruling so that a mediator may be compelled to give evidence at a criminal trial. In this case a mediator gave evidence to show that the alleged victim had substantially changed their story between the mediation and trial. These two Court of Appeal decisions establish that although the State of California may apply the rules of "absolute confidentiality," in the criminal jurisdiction, for public policy reasons the rights of the accused to receive a fair trial are of greater importance.

In the 1999 case of *Olam v Congress Mortgage Co,*[97] the California Appeals Court considered whether there were any exceptions to mediation confidentiality where a mediator could be bound to give evidence during litigation.[98] In this case, the plaintiff was attempting to establish that they had been under duress when signing the mediation agreement. In order to prove this fact the plaintiff required the testimony of the mediator.[99] The Federal Court held that, 'in order to promote fairness, the mediator must testify concerning the agreement reached during mediation.'[100] The case appears to be the beginning of California breaking away from the strict application of "absolute confidentiality." The application of public policy reasoning to promote fairness is however, in direct contravention of the *California Evidence Code*.[101] It is imperative to note that in this case both parties chose to waive confidentiality.[102] As a result, the case of *Olam v Congress Mortgage Co*[103] is consequently continually distinguished on this basis,[104] and was eventually overturned in the Californian Supreme Court case of *Foxgate Homeowners' Association Inc v Bramalea California Inc.*[105]

The aforementioned cases established the potential for the State of California to become one of "enumerated" rather than "absolute confidentiality." However, the following three cases, decided in 2001, 2004 and 2011, instead pull California's common law back in line with the concept of "absolute confidentiality," with limited exceptions only in relation to an individual's constitutional

95 152 Cal App 4th 137 (Cal Ct App 2007).

96 *United States Constitution* amend XIV.

97 68 F Supp 2d 1110 (ND Cal 1999).

98 Williams, above n 80.

99 Ibid.

100 Ibid, 218 citing *Olam v Congress Mortgage Co,* 68 F Supp 2d 1110, 1128 (ND Cal 1999).

101 *California Evidence Code* § 1119 (1997).

102 *Olam v Congress Mortgage Co,* 68 F Supp 2d 1110 (ND Cal 1999).

103 68 F Supp 2d 1110 (ND Cal 1999).

104 Pryles, above n 74.

105 25 P 3d 1117 (Cal 2001).

rights in the criminal jurisdiction.[106] In the case of *Foxgate Homeowners' Association Inc v Bramalea California Inc,*[107] the Supreme Court of California again considered whether § 1119 of the *California Evidence Code*[108] allowed for any exceptions to "absolute confidentiality" in mediation.[109] In this case the mediator, who happened to be a retired judge, filed a report with the court following mediation detailing one parties failure to mediate in good faith and recommending that a costs order be made.[110] The Court of Appeal originally held that there was an exception whereby a mediator could give evidence as to a party's intention to mediate in bad faith, however, this ruling was quickly overturned by the Supreme Court.[111] The Superior Court made a number of holdings in the case of *Foxgate Homeowners' Association Inc v Bramalea California Inc,*[112] including: 'that confidentiality is necessary because parties must know information exchanged will not be used against them later in court',[113] and 'that a mediator may not violate confidentiality by reporting to the court about the conduct of mediation participants.'[114] This case reaffirmed what is considered one of the main principles of mediation that confidentiality is imperative for parties to make full and frank disclosures and negotiate in good faith. Without a guarantee that any information disclosed will remain confidential, mediation will become even more ineffective than litigation as at the very least in litigation, a Judge's decision is legally binding.

In the case of *Rojas v Superior Court of Los Angeles County,*[115] the Supreme Court again overturned the decision of the California Court of Appeal. In this case, the Supreme Court had to consider whether physical evidence was protected under the confidentiality limitations in the *California Evidence Code*.[116] Reaffirming the Californian Supreme Court's decision in *Foxgate Homeowners' Association Inc v Bramalea California Inc,*[117] it was emphasised that:

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[106] *Rinaker v Superior Court of San Joaquin County,* 74 Cal Rptr 2d 464 (Cal Ct App 1998); *Wimsatt v Superior Court,* 152 Cal App 4th 137 (Cal Ct App 2007).

[107] 25 P 3d 1117 (Cal 2001).

[108] *California Evidence Code* § 1119 (1997).

[109] Pryles, above n 74.

[110] Ibid.

[111] Ibid.

[112] 25 P 3d 1117 (Cal 2001).

[113] Sarah Rudolph Cole, 'Protecting Confidentiality in Mediation: A Promise Unfulfilled?' (2005) 54 *Kansas Law Review* 1419, 1420 citing *Foxgate Homeowners' Association Inc v Bramalea California Inc,* 25 P 3d 1117, 1126 (Cal 2001).

[114] Cole, above 113, 1455 citing *Foxgate Homeowners' Association Inc v Bramalea California Inc,* 25 P 3d 1117, 1119 (Cal 2001).

[115] 93 P 3d 260 (Cal 2004).

[116] *California Evidence Code* § 1119 (1997).

[117] 25 P 3d 1117 (Cal 2001).

> 'confidentiality is essential to effective mediation' because it 'promote[s] a candid and informal exchange regarding events in the past. ... This frank exchange is achieved only if the participants know that what is said in the mediation will not be used to their detriment through later court proceedings and other adjudicatory processes.'[118]

Consequently, applying the rule of "absolute confidentiality" for public policy reasons, the Supreme Court again overturned the decision of the Court of Appeal holding that mediation privilege, under the *California Evidence Code* extends even to physical evidence.[119]

Finally, one of the most recent Californian cases which has considered the issue of "absolute confidentiality" is that of *Cassel v Superior Court.*[120] While this case originated in the trial courts of California, with the plaintiff alleging breach of fiduciary duty, fraud, malpractice and breach of contract, it quickly proceeded to mediation.[121] After 14 hours of mediation the plaintiff is now claiming that his own attorneys coerced and harassed him to prevent him from signing a $1.25 million mediation agreement.[122] In the current case, the plaintiff is suing his previous attorneys for malpractice and attempting to use evidence from the mediation to establish the elements. The Court of Appeal originally ruled in favour of creating a new exception to "absolute confidentiality". However, on appeal, the Supreme Court of California did not acquiesce.[123] The Supreme Court reversed the decision as a result of:

> 'a professed inability to permit a judicial exception to the plain language of the California Code of Evidence. The court reasoned that judicial exceptions to statutes are only permitted where due process rights are implicated or where literal application of a statute would produce absurd results.'[124]

As a result of this ruling, the plaintiff was unable to make a claim against his attorneys for malpractice unless they consented to waive confidentiality. Prima facie this would appear to be an "absurd result". However, the Supreme Court of California, through recent decisions, has shown their resolve to read "absolute confidentiality" in the strictest sense and interpret any new

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[118] *Rojas v Superior Court of Los Angeles County,* 93 P 3d 260, 265 (Cal 2004) citing *Foxgate Homeowners' Association Inc v Bramalea California Inc,* 25 P 3d 1117 (Cal 2001).

[119] Ibid.

[120] 244 P 3d 1080 (Cal 2011).

[121] Brown, above n 85, 95 citing *Cassel v Superior Court*, 244 P 3d 1090, 1085 (Cal 2011).

[122] Ibid.

[123] Ibid.

[124] *Cassel v Superior Court,* 244 P 3d 1080, 1086 - 1088 (Cal 2011).

exceptions very narrowly. The Supreme Court of California also noted that the *California Evidence Code*[125] did not preclude parties from agreeing on what limits of confidentiality they will be bound before mediation. This wavier is drafted into an agreement to mediate. Interestingly, this is already a common practice in Australia for private mediations.[126]

It is interesting to note through the development of the Californian common law regarding mediation confidentiality, that *Rinaker v Superior Court of San Joaquin County,*[127] *Wimsatt v Superior Court,*[128] *Olam v Congress Mortgage Co,*[129] and even the early decisions of *Foxgate Homeowners' Association Inc v Bramalea California Inc,*[130] *Rojas v Superior Court of Los Angeles County,*[131] and *Cassel v Superior Court*[132] were all decided by the California Court of Appeal. While the California Supreme Court overturned the latter three cases on appeal, the lower courts have continued to show a desire to expand the limitations of confidentiality. However, as the Supreme Court have repeatedly noted, their job is limited to the interpretation of the rules, as they have been drafted by the Legislature. The *California Evidence Code*[133] has been drafted in such unambiguous language that any future expansion of the limitations must come from the Legislative rather than the Judicial branch of Government.[134]

3.2 *Maryland: "Enumerated Confidentiality"*

The State of Maryland is an example of the second category of confidentiality. Enumerated confidentiality is similar to absolute confidentiality with one main difference; there are exceptions to the rule. In Maryland, the rules of confidentiality are composed of the Maryland Lawyers' Rules of Professional Conduct, Maryland Standards of Conduct for Mediators, the *Uniform Mediation Act* and the common law.[135] However, these rules only apply to those already bound by the legal code of conduct and of course can be modified by any individual mediation agreement. To add insult to injury, the rules in relation to court ordered and private mediation are different.[136] Generally, in

[125] *California Evidence Code* § 1119 (1997).
[126] Peter Condliffe, '*Conflict Management: A Practical Guide'* (LexisNexis Butterworths, 4th ed, 2012).
[127] 74 Cal Rptr 2d 464 (Cal Ct App 1998)
[128] 152 Cal App 4th 137 (Cal Ct App 2007).
[129] 68 F Supp 2d 1110 (ND Cal 1999).
[130] 25 P 3d 1117 (Cal 2001).
[131] 93 P 3d 260 (Cal 2004).
[132] 244 P 3d 1080 (Cal 2011).
[133] *California Evidence Code* § 1119 (1997).
[134] Williams, above n 80.
[135] Moss, above n 4.
[136] Ibid.

Maryland, court ordered mediations attract very similar rules of confidentiality as in Queensland. The Maryland Lawyers' Rules of Professional Conduct,[137] although may be contracted out of by parties, prohibit 'admission into evidence of mediation conduct or statements regarding the validity, individuality or amount of a civil claim.'[138] The rules specifically define what is confidential in rule 17-102(e) [139] as any 'speech, writing or conduct made as part of a mediation, including communication made for the purpose of considering, initiating, continuing or reconvening a mediation or retaining a mediator.'[140] This definition of confidential material is very broad and is essentially all encompassing. Consequently, to limit levels of exploitation, the rules also place certain limitations on confidentiality as well as defining specific circumstances where disclosure is allowed.

In order to prevent abuse, the rules state that evidence, which is admissible under another rule of law, does not become inadmissible merely because it is disclosed during mediation.[141] Without this caveat, parties would be able to mediate in bad faith for the sole purpose of making certain evidence inadmissible. However, there are also situations where disclosure of information obtained during confidential mediation is in the best interest of a party. Under the rules of professional conduct there are three circumstances where a mediator may disclose confidential information, including: 'to prevent serious bodily harm or death, assert or defend against allegations of mediator misconduct or negligence, or to assert or defend claims for contract recession.'[142] Notably, unlike Queensland mediator guidelines,[143] the Maryland professional conduct rules do not specifically identify child abuse as a limit to confidentiality. Nevertheless, the rules also allow the disclosure of evidence to any relevant authority or victim as otherwise allowed or compelled by law.[144] While this rule would clearly allow the disclosure of child abuse it also initially appears to be contrary to the overarching concept that mediation is confidential and a mediator cannot be compelled to give evidence. However, the Maryland Lawyers' Rules of Professional Conduct in fact limit these disclosures to relevant regulatory authorities and potential victims. This exception does not allow mediators to be compelled to give evidence in a court of law.[145] While not discussed further in this essay due to the

[137] *Maryland Lawyers' Rules of Professional Conduct* rr 5-408(3), 17-104(a)(4), 17-105(a)(2) & 17-109.

[138] Moss, above n 4.

[139] *Maryland Lawyers' Rules of Professional Conduct* r 17-102(e).

[140] Moss, above n 4, 56.

[141] *Maryland Lawyers' Rules of Professional Conduct* r 17-109(e); Moss, above n 4, 61.

[142] Moss, above n 4, 57; *Maryland Lawyers' Rules of Professional Conduct* r 17-109(d).

[143] Bar Association of Queensland, *Barristers' Conduct Rules* at 11 December 2011; Queensland Law Society, *Australian Solicitors Conduct Rules* at 1 June 2012.

[144] Moss, above n 4, 56.

[145] Ibid.

aforementioned limitations, this rule still results in the following problem: can a mediator be required by law to disclose information revealed in mediation about fraud, insider trading or breach of directors duties? Mediation is often a compelling alternative for large corporations as it is not a part of the public forum,[146] but if a mediator has a duty, or even just the ability, to report such indiscretions, the incentive of the process begins to wane.

In Maryland, the rules in relation to private mediation are found under the *Uniform Mediation Act*.[147] 'A mediator may refuse to disclose a mediation communication and may prevent any other person from disclosing a mediation communication of the mediator.'[148] This rule establishes the principle that parties cannot waive confidentiality without the consent of the mediator. As a consequence, this also limits the potential for accidental waivers. In court ordered mediation, applicable confidentially rules can be modified. Conversely, in Maryland there is no precedent which directly allows for confidentiality agreements in private mediation to be enforced.[149] However, except in circumstances where the agreement has been grossly unfair,[150] courts in Maryland have allowed similar settlement agreements,[151] non-disclosure agreements[152] and family law agreements[153] to be enforced.

Overall, the Maryland Lawyers' Rules of Professional Conduct are a good example of balancing the competing interests in relation to disclosure and confidentiality. However, Maryland, like all other jurisdictions this paper has considered, makes the assumption that mediators will be solicitors, barristers or attorneys and thus already bound by an ethical code. While in practice this may be the case, it leaves a very large loophole open for abuse.

3.3 *Wisconsin: "Qualified Confidentiality"*

Finally, Wisconsin is an example of the third type of mediation confidentiality. Qualified confidentiality provides 'mediation confidentiality but expressly [recognises] judicial discretion to order disclosure in individual cases where needed to prevent a manifest injustice or to enforce court orders.'[154] Wisconsin, like Maryland applies the *Uniform Mediation Act*,[155] however, a separate

[146] *State v Williams,* 877 A 2d 1258 (2005).
[147] *Uniform Mediation Act* 1999.
[148] Ibid § 4(b)(2).
[149] Moss, above n 4.
[150] *Peddicord et al v Franklin,* 270 Md 164 (1973).
[151] *Long v State*, 371 Md. 72 (2002).
[152] *General Motors Corporation v Lahocki,* 286 Md 714 (1980).
[153] *Jackson v Jackson*, 14 Md App 263 (1972).
[154] Williams, above n 80 citing Weston, above n 87, 49.
[155] *Uniform Mediation Act*.

statute also specifically recognises judicial discretion in this regard.[156] The *Wisconsin Statute* permits disclosure 'if necessary to prevent a manifest injustice of sufficient magnitude to outweigh the importance of protecting the principle of confidentiality in mediation proceedings generally.'[157] While the use of discretion may bring with it the potential for individual bias, it also allows for each case to be considered based on its own individual merits rather than from a public policy or "floodgate" perspective.

3.4 *Other Important Factors*

There are two other notable factors about mediation confidentiality in the United States which should be mentioned. Firstly, the American Bar Association Section of Dispute Resolution has drafted Standards of Conduct for Mediators which represent the minimum standards. However, the American Bar Association has itself recognised that the Standards are essentially a toothless tiger. Until an individual State implements the rules, they 'do not have the force of law.'[158] However, the case of *Post v Bregman*[159] created scope at common law for the guidelines to be applied by the courts. Secondly, legal professional privilege is a well-entrenched rule of law that 'in the course of acting for a client, communications (oral and written) between a lawyer and the client are confidential and privileged from disclosure.'[160] Based on this principle, some jurisdictions in the United States, such as California, have created mediator privilege.[161] While there have been numerous attempts to overturn this privilege, or argue that it has been waived in cases such as *Simmons v Ghaderi*[162] and *Eisendrath v. Super Ct*[163] these arguments have been mostly unsuccessful.[164] On the other hand, other jurisdictions, such as Maryland, do not have rules expressly enforcing mediator privilege; however, the confidentiality of mediation can be waived if all parties and the mediator agree.[165]

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[156] *Wisconsin Statute* § 904.085(4)(3) (2001).
[157] Ibid; Williams, above n 80, 217.
[158] Moss, above n 4, 56.
[159] 349 Md. 142 (1998).
[160] Mann, above n 2, 351.
[161] Moss, above n 4, 58.
[162] 187 P 3rd 934 (2008).
[163] 134 Cal Rptr 716 (2003).
[164] Moss, above n 4, 57.
[165] Moss, above n 4, 58.

IV CONCLUSION

Confidentiality is a well engrained element of the mediation process. 'A party must be guaranteed that statements made … will not be admissible in a later action, for without this guarantee the party will never speak frankly and honestly.'[166] Mediation is a worldwide phenomenon, however, the rules differ quite distinctly from one jurisdiction to another. Consequently, protecting the interests of all parties requires an intricate balancing act. Accordingly, neither "absolute justice" nor "qualified confidentiality" presents the best solution. While the current laws in Queensland recognise exceptions to confidentiality, there are still some cases which have resulted in parties being left with no option after suffering a wrong. Consequently, the current rules of confidentiality for mediators, legal practitioners and the mediation as a whole, allow for greater access to justice for some parties. However, the failure of the system to be governed by a single body with a single set of all-encompassing rules, as well as the failure to recognise certain exceptions to confidentiality, such as legal practitioner malpractice, results in some parties' access to justice being completely inhibited.

[166] Pardy, above n 18, 231 citing *In re Marriage of Kieturakis,* 138 Cal App 4th 56, 68 (1st App Dist 2006).