Mediator Confidentiality – Conduct and Communications

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1 Introduction

Confidentiality is central to mediation. It is imperative for parties to trust the process. Few mediations will succeed unless the parties can communicate fully and openly without fear of compromising their case before the courts. But how far should mediation confidentiality extend? What if mediation is rendered meaningless by a party’s conduct? Should a mediator remain silent about money laundering activities uncovered in mediation communications?

2 Mediator Confidentiality in the UK

Existing UK law provides a general right to confidentiality for statements made in the course of conciliation. However, this right, an extension of the “without prejudice” rule, is restricted to parties. A mediator may be compelled to give evidence before the court if the parties agree: “A substantial and, to our knowledge, unquestioned line of authority establishes that where a third party [whether official or unofficial, professional or lay] receives information in confidence with a view to conciliation the courts will not compel him to disclose what was said without the parties’ agreement.”

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1 Rush & Tompkins v. GLC [1988] 3 All ER 737, as affirmed in the UK mediation guidelines. Note that for the purposes of this paper conciliation and mediation are taken as equivalents.

2 Some mediators, such as those operating on behalf of ACAS, are granted statutory immunity.

3 Per Bingham MR, in Re D [Minors] [1993] 2 All ER 693.
Parties can attempt to extend confidentiality to the mediator by including a contractual provision in the mediation agreement. Such provisions may be upheld by UK courts⁴, but this should not always be relied upon. In its Green Paper on Alternative Dispute Resolution in Civil and Commercial Law, however, the European Commission stated: "As a rule the third party [the mediator] should not be able to be called as a witness...within the framework of the same dispute if ADR has failed" [paragraph 82]. The same trends are being formalised in the United States as mediator privilege. The Uniform Mediation Act ["UMA"], approved for enactment by the Commissioners on Uniform State Laws in August 2001, provides: "A mediator may refuse to disclose a mediation communication, and may prevent any other person from disclosing a mediation communication of the mediator."⁶

While mediator confidentiality is said to be essential for mediation success, there are clearly legal and public policy reasons for restricting its ambit. Where should the line be drawn? One approach is to distinguish between mediation communications - which generally should remain confidential - and the conduct of parties, which is more suited to court scrutiny. The UMA defines “mediation communications” as “statements that are made orally, through conduct, or in writing or other recorded activity”.⁶ Such communications, which in general are confidential, extend to some types of conduct but only to the extent that it is not intended as an assertion or to inform. Nodding in response to a question is a “communication” but non-verbal conduct such as the fact that a person attended the mediation is not.

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⁴ e.g., Bezant v Ushers Brewers [Bristol County Court], [1997] [unreported]; Instance v Denny Bros Printing Ltd [2000] 05 LS Gaz R 35.

⁵ Section 4(b)(2). This follows a line of cases, the most notable of which was NLRB v Macaluso, 618 F. 2d 51 (9th Cir. 1980), which stated that the public interest in maintaining the perceived and actual impartiality of mediators outweighs the benefits derivable from a given mediator’s testimony.

⁶ Section 2(2).
3 Mediation Conduct

3.1 Conduct of the Parties

Once a UK court has ‘directed’ parties to mediate it will generally impose sanctions on parties who do not attend\(^7\). But to what extent should the courts analyse the [non-assertive] conduct of the parties in failed settlement proceedings? To what extent might a party be penalised for mediating in “bad faith”; for example, exiting the mediation in the first five minutes? Should mediators assist courts in deciding who was to blame for a failed mediation?

Section 2(2) of the UMA states: “There is no justification for making readily observable conduct privileged...One of the primary reasons for making mediation communications privileged is to promote candour, and excluding evidence of a readily observable characteristic is not necessary to promote candour.”

3.1.1 Good faith – The Australian Experience

The Australian courts have considered the question of what is good faith participation. The Australian government has an obligation to negotiate in good faith under s.31(1)(b) of the Native Title Act 1993. When assessing conformity with that duty, the Australian courts look at the “Njamal indicia”, developed by the National Native Title Tribunal\(^8\). These are: (i) unreasonable delay in initiating communications in the first instance; (ii) failure to make proposals in the first place; (iii) the unexplained failure to communicate with the other parties within a reasonable time; (iv) failure to contact one or more of the other parties; (v) failure to follow up a lack of response from the other parties; (vi) failure to attempt to organise a meeting; (vii) failure to take reasonable steps to facilitate and engage in discussions between the parties; (viii) failing to respond to reasonable requests for relevant information within a reasonable time; (ix) stalling negotiations by unexplained delays in responding to correspondence or telephone calls; (x) unnecessary postponement of meetings; (xi) sending negotiators without authority to do more than argue or listen; (xii) refusing to agree on trivial matters, e.g., a

\(^7\) Dunnett v Railtrack [2002] 2 All ER 850.

\(^8\) Mullan Garry Ernest, Njamal People, State of Western Australia, Taylor Johnson – native party title [1996] NNTTA 34.
refusal to incorporate statutory provisions into an agreement; (xiii) shifting position just as agreement seems in sight; (xiv) adopting a rigid non-negotiable position; (xv) failure to make counter proposals; (xvi) unilateral conduct which harms the negotiating process, e.g., issuing inappropriate press releases; (xvii) refusal to sign a written agreement in respect of the negotiation process or otherwise; (xviii) failure to do what a reasonable person would do in the circumstances.

3.1.2 Good Faith - The US experience

US federal and state laws take various approaches to “good faith” in mediation.

In *Gee Gee Nick v Morgan’s Foods Inc*, 270 F.3d 590 (8th Cir. 2001), a defendant who refused to make a written submission and send a representative with authority to settle was held to have acted in “bad faith”: “to require other parties to attend a mediation where the individual who is participating as the corporate representative is so limited, and cannot be affected by the conversation [during the mediation], is to in effect negate that ability of that mediation to in any way function, much less be successful”. In Colorado, “good faith” participation requires the parties to attend the mediation, to submit a confidential statement outlining their positions and to have representatives at the mediation with authority to settle.

The same issue has been considered by the California Supreme Court. In *Foxgate Homeowners’ Association Inc v Bramalea California Inc & anor*, 26 Cal.4th, 1 (2001), a lawyer for one of the parties attended a mediation without his client and without experts. The California Court of Appeal held that a mediator could inform the court not only that the party had disobeyed a court order governing the process, but also that he believed the party had done so intentionally with the purpose of obstructing the court-ordered mediation. California’s Supreme Court disagreed. It held that, absent exceptional circumstances, conduct could not be disclosed by the mediator. It stated, “Other than a report regarding the success of the mediation or lack thereof and findings

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Nesic, Techniques for dealing with unwilling participants in mediation [speech delivered at the CEDR forum, 18 June 2003].
related thereto, reports to the trial court concerning the events, communications, and occurrences during the mediation retain their confidential status.”

3.1.3 Good Faith – The UK Approach

Although the English courts seem generally unwilling to impose a duty of good faith in negotiations, many judges expect “a genuine commitment on both sides to the mediation” which is not a dissimilar standard. Indeed, the rules of some mediation organisations in the UK already impose good faith requirements. If a “good faith” condition were introduced for mediations, the *Njamal* criteria might prove a useful starting point for considering whether to apply this exception to confidentiality. However, these criteria may be too wide and thus open to radically different interpretations.

An alternative might be to oblige a mediator to make a neutral summary of the objective conduct of the parties in a failed mediation and make it available to the court if requested. The summary might include conduct such as failing to make a submission of its case when requested, failing to appear with full authority, abandoning proceedings before listening to the other side’s position or other obstructive conduct. This would be consistent with existing court sanctions for not making meaningful attempts to settle, not attending pre-trial hearings or substandard bundling. It also has some precedent in the UK in the Pre-Action Protocol for Construction and Engineering Disputes. According to the Protocol, any party who attended a pre-action meeting may disclose to the court (a) that the meeting took place, when and who attended; (b) the identity of any party who

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10 See, e.g., Ackner in *Walford v Miles* [1992] 1 All ER 453 “However, the concept of a duty to carry on negotiations in good faith is inherently repugnant to the adversarial position of the parties when involved in negotiations” [at 459].


14 As suggested in “A well-prepared bundle of joy” by District Judge Paul Waterworth [Law Society Gazette 15/10/2002].
refused to attend and the grounds for such refusal; (c) that the meeting did not take place and the reason why not; and (d) any agreements concluded between the parties.

Some states in the US have similar arrangements. In Ohio, the parties must file a report with the court giving details of any agreement reached although without disclosing what was discussed during the mediation. In California, a mediator has to complete a Statement of Agreement or Non-Agreement. This identifies the mediator, the date or dates on which the mediation occurred, the total number of hours spent in the mediation and whether it ended in settlement. If the mediation did not take place, the mediator can either tick a box stating that a party who was ordered to appear at the mediation did not appear, or a box marked “other reason”, without disclosing any confidential information.

A neutral summary requirement should not extend to evaluative feedback, since this could have harmful consequences. For example, a mediator might interpret a party’s lack of ideas or suggestions as intentional stonewalling. “To force [mediators] to give evidence that hurts someone from whom they actively solicited trust [during the mediation] rips the fabric of their work and can threaten their sense of the centre of their professional integrity.” Instead, a standard form could be used which might incorporate specific questions as to the reasons for mediation failure.

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15 This is described in the Protocol as a meeting which may consider whether, and, if so how, the issues might be resolved without recourse to litigation, which would seem to include the mediation process.

16 See also Section 7 UMA “Prohibited Mediator Reports”, the commentary to which is revealing: “The provisions would not allow a mediator to communicate, for example, on whether a particular party engaged in “good faith” negotiation, or to state whether a party had been “the problem” in reaching a settlement. Section 7(b)(1), however, does permit disclosure of particular facts, including attendance and whether a settlement was reached. For example a mediator may report that one party did not attend and another attended only for the first five minutes. States with “good faith” mediation laws or court rules may want to consider the interplay between such laws and this Section of the Act.”

17 Olam v Congress Mortgage Company, 68 F.Supp.2d 1110, 1134 (N.D.Cal. 1999). As Gibson states, “[T]his problem is not unique to mediation; it occurs in any “caring profession” where expert testimony is called upon. A typical example would be a social worker required to testify about the likelihood of abuse having taken place”, see Gibson, Confidentiality in Mediation: A Moral Reassessment, JDR [1992], Vol. 1, 47, footnote 112.
3.2 Conduct of the Mediator

The UMA provides an exception to mediator privilege for the purpose of examining mediator conduct\textsuperscript{18}. This permits the airing of grievances against the mediator and gives the mediator an effective means of defence as well as serving the regulatory function of sifting out incompetent or unethical mediators. Another view is that the conduct of a mediator should never be subject to court scrutiny. \textit{Wagshal v Foster}, 28 F.3d 1249 (D.C. Cir. 1994), established absolute quasi-judicial immunity for mediators\textsuperscript{19}. The court analysed three key considerations. First, the functions of a mediator are comparable to those of a judge: "\textit{the general process of encouraging settlement is a natural, almost inevitable, concomitant of adjudication.}" Second, the nature of the controversy could be so intense that future harassment or intimidation by litigants was a realistic prospect: "\textit{The loser in one forum will frequently seek another, charging the participants in the first with unconstitutional animus.}" Finally, does the system contain safeguards which would justify dispensing with private damage suits to control illegal conduct? It concluded that these safeguards were provided through applications to the judge or, if the mediator might prejudice the judge, by seeking the judge’s disqualification.

Those supporting mediator immunity also argue that parties to a mediation are represented by legal advisers, whose primary responsibility is to protect the interests of their clients. To them, the mediator’s role is to facilitate settlement and their opinions and evaluations are irrelevant. If a mediator is perceived as acting in a biased or unfair way, it is first and foremost the duty of a party’s legal representative to protect his client.

\textsuperscript{18} Section 6(a)(5) UMA provides "\textit{There is no privilege…for a mediation communication that is sought or offered to prove or disprove a claim or complaint of professional misconduct or malpractice filed against a mediator.}"

Mediation Communications

Mediator confidentiality for communications is essential to the success of mediation. But it is not an inviolable principle; there are certain cases where it will be encroached upon, not least in recognition of the public interest a mediator fulfils. One way to approach this might be via a blanket rule with specific exceptions where society’s interest outweighs interest in confidentiality.

4.1 Obligation of the mediator to breach confidentiality

4.1.1 Serious Harm

In the US, the UMA merely permits a breach of mediator confidentiality to prevent death or serious harm. At the state level, however, there is an active duty to disclose certain things, e.g. child abuse and specific and imminent harm. Otherwise, the mediator has a discretion whether to breach privilege and is himself expected to gauge the seriousness of the threat: “The balance which the mediator must determine is the same that any whistleblower must gauge – the utility of his or her product in local and general terms…an agreement…may be in the interests of [the mediator’s] employers -- the disputants – but against the public interest.”

Legal professional privilege in the UK does not attach to any communication that furthers an illegal purpose. Nor does it apply to any fact observed by the lawyer after he has been instructed showing that a crime or fraud has been or is being committed. The statutory exceptions to the “without prejudice” rule might be extended to mediator confidentiality as a matter of public interest. As an independent third party outside the lawyer/client relationship, the mediator may have a public duty to report certain communications, e.g., evidence of threats and blackmail.

20 Tarasoff v Regents of the University of California, 17 Cal. 3d 425 (1976).
Clearly there must be a threshold of seriousness of the communication for any obligation to be triggered, as well as a degree of knowledge by the mediator. An obligation might be triggered by reasonable suspicion of serious crime or serious harm.\(^{23}\)

4.1.2 Financial Crime\(^{24}\)

In the UK, the *Proceeds of Crime Act 2002* ["POCA"] provides that it is an offence for a person to be involved in an arrangement he knows or suspects will facilitate the acquisition, retention, use or control of criminal property by or on behalf of another person.\(^{25}\) This would apply to lawyer and non-lawyer mediators. To avoid committing this offence, a mediator should make an authorised disclosure to an authority such as the police unless, intending to make such a disclosure, he has a “reasonable excuse” not to. The authority then has the power to impose a moratorium on the mediator’s activity and to require the mediator not to tell the parties why [to prevent “tipping off”]. Penalties can range from 6 months and a fine of up to £5,000 on summary conviction to 14 years and an unlimited fine on conviction after indictment.

While the foregoing seems fairly straightforward, a new offence created by section 330 of POCA may present major problems for lawyer-mediators. In the course of a business in the “regulated sector”, a person who has a reasonable suspicion that another is involved in money laundering must report that suspicion [or face the penalties described above]. The Money Laundering Regulations 2003 [the

\(^{23}\) Note that in *Re D [Minors]* [supra] the Court of Appeal found that statements made to a mediator could not be used as evidence unless there were exceptional circumstances such as that the maker in the past has caused or is likely in the future to cause serious harm to the well-being of the child.

\(^{24}\) In addition to allowing disclosures of information to prevent serious physical harm, the UMA, at 6(a)(4), allows an exception to privilege for communications used to plan or commit a crime. It does not cover fraud that does not constitute a crime “because civil cases frequently include allegations of fraud, with varying degrees of merit, and the mediation would appropriately focus on discussion of fraud claims”.

\(^{25}\) Section 328.

\(^{26}\) In our view, mediation confidentiality does not constitute a “reasonable excuse”.

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“Regulations”), which are due to come into force before the end of the year, provide for various regulated, or “relevant”, sectors.

Mediation is not a relevant sector. Providing legal services which involve participation in a financial or real property question is. Is mediation a legal service? If so, is a mediator a professional legal adviser? While mediation may not be a legal service, a lawyer is a legal services provider, so it may be difficult for a lawyer-mediator to argue with confidence that he is not providing a legal service. Many lawyer-mediators consider that, in principle, they will be bound by the regulations. Moreover, while legal professional privilege is an available defence, commentary on similar provisions in an amended EU directive suggests that it does not extend to lawyers when they act as third party intermediaries in mediation. This has led some lawyer-mediators to conclude that they have an absolute requirement under the Regulations to report. In these circumstances, the lawyer-mediator may have to call a halt to a mediation without being able to disclose his reasons. Otherwise, he runs the risk of being guilty of “tipping off”, itself an indictable offence under sections 333 and 334 of POCA.

Does this mean that certain disputes involving, e.g., fraud, cannot be mediated by lawyer-mediators without the risk of committing an offence under POCA? How about a dispute over sums that came from aggressive tax positions or are alleged to be the proceeds of tax evasion prior to informing the relevant tax authorities?

In the US, many states have established victim-offender mediation programs “which have enjoyed great success in misdemeanor, and, increasingly, felony cases”. In addition, statutes in California and Colorado specifically support the mediation of “gang” disputes. Should the UK move in a similar direction, some

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27 These cover mainstream financial activities as well as estate agents, casino operators, insolvency practitioners, tax advisers, accountants, legal service providers and those dealing in goods by way of business to the extent that the activity involves accepting payment in cash of €15,000 or more [article 2(2)].

28 Defined at 330(10) as information communicated or given to the professional legal adviser “(a) by (or by a representative of) a client of his in connection with the giving by the adviser of legal advice to the client, (b) by (or by a representative of) a person seeking legal advice from the adviser, or (c) by a person in connection with legal proceedings or contemplated legal proceedings.” But the section does not apply to information communicated with the intention of furthering a criminal purpose.


30 UMA comments to section 6(b)(1).
lawyer-mediators will decline to become involved whenever the dispute relates to “criminal property”\textsuperscript{31}, which some inevitably will.

There is a need for clarity in this area. Two questions immediately spring to mind. First, paragraph 3(d) of the Regulations and section 38 of the Financial Services and Markets Act 2000 provide for exemptions from the Regulations at the discretion of the Treasury. Why shouldn’t such exemption orders be granted to mediators? Second, parties in a mediation will normally be represented by lawyers who are allowed a limited legal privilege under section 330(10) of POCA. Why shouldn’t that privilege also attach to mediators?

\footnote{\textsuperscript{31} For the purposes of Part 7 of POCA, s.340 defines property as “criminal property if (a) it constitutes a person’s benefit from criminal conduct or it represents such a benefit (in whole or part and whether directly or indirectly), and (b) the alleged offender knows or suspects that it constitutes or represents such a benefit”.
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4.2 Discretion of the mediator to breach confidentiality

4.2.1 Professional ethics

Should a mediator be prevented from reporting other suspected crimes or abuses discovered in the course of mediation? Since mediators perform a public role it seems that their code of ethics should be weighted towards the public interest. Nevertheless, care is needed. It would defeat the object of mediation itself if the process spawned ancillary litigation due to breaches of mediation confidentiality. One answer might be to impose higher qualification barriers for mediators incorporating constructive guidelines.

4.2.2 Breach of professional conduct by solicitors or other professionals

There are situations where a mediator might become aware of a breach of professional conduct by a solicitor [or other professional] involved in the mediation. Due to his public role, one could argue that he should have a discretion to inform the court or the appropriate authority -- a discretion to be exercised with regard to the seriousness of the breach.\(^\text{32}\)

4.2.3 Negligent advice

More controversial would be a discretion for the mediator to inform the court if a party is negligently advised by its legal representative. While this may operate to protect a party’s interests in certain circumstances, such an exception is highly subjective and might taint the mediator’s reputation for impartiality. Where such issues arise they might be dealt with during the mediation process, according to the mediator’s normal methods.

\(^{32}\) See sections 6(a)(6) and 6(c) UMA, which state: "Because of the potential adverse impact on a mediator’s appearance of impartiality, the use of mediator testimony is more guarded." Under the UMA, the mediator cannot be compelled to testify on this issue.
4.3 Discretion of the court to order a breach of confidentiality

4.3.1 Court-instigated scrutiny of settlement

In insolvency proceedings the court reserves the power to veto settlement agreements. Neuberger J has stated, “if the administrators are proposing to take a course which is based on a wrong appreciation of the law and/or is conspicuously unfair to a particular creditor or contractor of the company, then the court can, and in appropriate cases, should be prepared to interfere.” Recently, the Court of Appeal appeared to rely on this principle when it struck out a mediated settlement agreement authorised by the administrators. It also seems to extend to the power of a liquidator to accept a compromise on behalf of a company.

Does the principle extend beyond insolvency cases? Theoretically, court scrutiny might occur in any situation where Consent Orders require final authority from the court, i.e., those not within the limited examples in CPR Part 40.6. Yet formalised procedures are exactly what mediation is intended to counteract. One possible solution would be to extend CPR Part 40.6 to include all Orders that attach a mediated settlement. However, there may be a public interest in court scrutiny of some mediated settlements and a blanket rule might be inappropriate. The court should be able to analyse such agreements where it has ordered mediation or where, in its discretion, there is a valid public interest in doing so, for example, mediations in insolvency proceedings or mediations involving public institutions or minors.

4.3.2 Party-instigated scrutiny of settlement

37 In Boulle and Nesci, Mediation: principles, process, practice [Butterworths 2001], at 507, the authors comment that in some divorce cases the court will vet the agreement in terms of family law norms prior to validating (in the form of a consent order) a mediated agreement.
Parties may claim that an agreement reached as a result of mediation may be invalid or unenforceable as a result of fraud, duress or incapacity. Let us assume, for example, that a settlement was reached on the basis of a misrepresentation by one of the parties that was later uncovered. Would such a claim provide an exception to the general rule?

The UK test for overriding mediator confidentiality would seem to be founded in equity -- is it fair and just to allow a party to rely on mediation material? Smiths Group & anor v Weiss & ors [2002] LTL 22/3/2002, 20. In the US, the UMA provides that settlement agreements may lose privilege where the court finds that the need for the evidence substantially outweighs the interest in protecting confidentiality [following a private hearing]38. A mediator may testify, but only voluntarily39. In Rinaker v Superior Court 62 Cal.App.4th 155 (1998), defendant minors claimed that the plaintiff’s statements during mediation differed from his testimony in court. A breach of confidentiality was permitted as an exercise of the defendants’ “due process” rights to challenge the inconsistency of the witness’s statements40. This involved a preliminary private hearing to determine whether the mediator’s testimony was sufficiently probative.

Where a communication is fundamental to the argument of one of the parties before the court, is there an exception to mediator confidentiality along the lines of US experience? Obviously, this exception should be approached with caution and the US practice of holding a private hearing to assess the evidence is probably advisable.

5 Conclusion

Enshrining mediator confidentiality in law or guidelines would be another step towards the institutionalisation of mediation, the effectiveness of which is its

38 Section 6(b)(2).
39 Section 6(c).
40 Similarly, in a recent High Court case, Savings & Investment Bank Ltd [In Liquidation] v K Fincken [2003] LTL 25/2/2003, Patten J ruled that where someone asserted in unambiguous and unequivocal terms the truth of a particular set of facts that it sought to deny in subsequent proceedings, the without prejudice rule could be avoided on the grounds of unambiguous impropriety.
procedural flexibility. However, if the idea of a “multi-door court house”\textsuperscript{41} is to grow in popularity, the danger of abuses and distortions will grow as well. It is in the interests of dispute resolution as a whole that these questions of mediator confidentiality be addressed at an early stage.

\textsuperscript{41} Willis, Dispute Resolution in Financial Markets: Alternatives to Litigation [1993] 10 JIBL.