

# Can you keep a secret?

## *The nature of confidentiality in mediation*

BY AMANDA BUCKLOW

The issues of confidentiality and the status of without prejudice “communications” in mediation is of great interest to mediators at the moment. The peak in interest arises out of the (perhaps) inevitable satellite litigation in recent months where disclosure of the content of a mediation has been required by the court. The principal cases are *Brown v Rice and Patel and ADR Group* [2007] EWHC 625 (Ch); *Cumbria Waste Management Limited and Lakeland Waste Management Limited v Baines Wilson* [2008] EWHC 786(QB); and *Earl of Malmesbury v Strutt & Parker* [2008] EWHC 424(QB).

I think the litigation is “inevitable” because it is the nature of the legal system in England and Wales that cases will be brought before the courts to “push the boundaries”, and, for the most part, this helps to reconcile the changing world with the need for legislation and regulation to protect the values and beliefs of society. Arguably, it is the duty of lawyers to instigate those challenges in the interests of their clients, even if those interests are not necessarily aligned with the public interest. Some see this as a great advantage of the common law system, principally because the decisions of judges are considered to reflect the values of society at large. They are expected to be our “learned” guardians of consistency and appropriate development of the law. Granted, we don’t always agree with their views however well reasoned!

The main question I raise is: considering recent developments, do we need legislation to provide a special mediator privilege? Suffice to say that where one commentator argues most convincingly for mediator privilege, another argues equally convincingly to leave well alone.

I would like to address confidentiality from the point of view of the context and culture of mediation and how it underpins settlement and serves public policy. I also explore what the consequences might be if we pursue a special mediator privilege, notwithstanding that some of those consequences might be desirable, such as preservation of the right environment for open discussions conducive to finding a settlement. Where there is uncertainty about the nature of confidentiality in mediation, there lies a potential deterrent to its use and that, by itself, is not in keeping with public policy.

Confidentiality in mediation operates in three ways. Firstly, it applies to the fact that the mediation has happened, or will

happen, together with all written information and oral exchanges provided in preparation for, and during, the mediation and any pre-mediation day meetings and telephone calls. These circumstances are all covered by the mediation agreement and therefore by the “without prejudice” rule (except for documents that would be discoverable under Part 31 of the Civil procedure Rules).

Secondly, it applies to all documents and exchanges given to the mediator in private sessions that are confidential between the mediator and the party or parties present (except for documents that would be discoverable under Part 31). The agreement to mediate would cover this in a way something similar to this (from *In the Place of Strife*, [www.mediate.co.uk](http://www.mediate.co.uk)):

- the parties agree that every person involved in the mediation will keep confidential: all information, whether oral, written or otherwise produced for or at the mediation, including terms of any settlement agreement arising from it; and
- provided that nothing in this clause prevents the parties (including the mediator) discussing the mediation with the parties’ professional advisers and / or insurers, or any party or the mediator making disclosure to any relevant authority or person, whether under the Proceeds of Crime Act 2002 and / or under any Regulations relating thereto, if obliged to do so by law”.

You will note that we already have quite a body of exceptions, when you include the eight listed in *Unilever PLC v The Procter and Gamble Company* [2000] WLR 2436, and the occurrence of violence or potential threat of violence which might require the police to be called, with all that would then entail.

Mediators have operated for many years with an understanding of all this (or at least most of it) and at the same time with the concern that one day the issue of confidentiality would be examined and the hitherto “grey areas” emerge for greater scrutiny. We had faith that when judges presided in cases challenging issues arising from a mediation, they would 1) have a very good understanding and appreciation of mediation, of what goes on in a mediation and why mediation is in the public interest, and 2) bend over backwards to pay attention to the consequences of their judgments where their discretion came into play. Having 1 would certainly help with 2. *Brown v Rice and Patel and ADR Group* [2007] EWHC 625 (Ch) was perhaps a real disappointment in this

regard. An inspired approach might have been to send the parties back to the “without prejudice” environment of mediation to sort it out!

There is a third and elemental confidentiality in mediation. This is shaped by many influences which are in no way legalistic. Concurrently, the outcome of the mediation is without doubt determined by the quality of information and the generosity of the contribution given in trust and confidence.

A powerful group of influences are contained in our own beliefs and expectations about what confidentiality means. Our beliefs are informed by our experiences, those of others, our assumptions, and to a greater or lesser degree, by the media. And high profile examples of breaches of confidentiality through loss or theft of personal data, such as HM Revenue and Customs in October 2007, reported in the press, have no doubt affected the perception of confidentiality.

Confidentiality is about control of information. The debate about confidentiality may be more about who has control of the information, and in disputes, the control of information is at the heart of resolution, be that in mediation or litigation. It is also about risks. The control of information should rest with the parties and relaxing control to enhance the chances of an early settlement depends on the trust established between the parties and the mediator. External intervention in or threat to that process should be absolutely minimal.

When parties come to mediation, they should have been well prepared by their legal advisers, and may understandably begin the mediation biased towards the cautious end of disclosure. The responsibility for examining confidentiality and ensuring the parties understand the risks lies firmly with their legal advisers well ahead of the mediation day. If the mediator has been allowed contact with the parties then they will also have been informed about how important it is to be open and generous with information sharing so that settlement options are developed as usefully and comprehensively as possible. There are real risks that the parties will see the mediator’s role in a negative light if it starts to look increasingly like the role of legal adviser. It is essential that the mediator is very clearly distinguished from any legal adviser: how else can they be impartial? (I am an advocate of the “omni-partial” mediation style in which we demonstrate impartiality by being “alongside” all the parties. Otherwise, we risk being too distant and never really build the trust and rapport which is essential to finding a settlement.)

If parties start cautiously then it will be their experience during the mediation that encourages them to take considered risks. They will only take risks if they feel confident and secure. There are a number of important questions which I believe are running in a continuous and unconscious loop in the parties’ minds throughout the mediation:

- do I like and/or respect the mediator?;
- do I trust the mediator?;
- does the mediator appreciate my situation?;

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- is the mediator hearing me?; and
- is the mediator “on my side”?

I also believe that for as long as the answer to those questions is “yes”, then the willingness to disclose information will grow. As the information flow increases, so do the options for settlement. Charles Middleton-Smith, alternative dispute resolution consultant at Hammonds and a senior mediator, recently said: “One of the primary tasks facing any mediator is to provide for parties in conflict a safe place where they may explore possibilities for settlement without fear of consequence. Effective confidentiality provides such a safe place. Where there is doubt as to the effectiveness of confidentiality, then parties’ sense of comfort and confidence, and thus positive thinking, may be compromised.”

I would go even further and say that if a mediator is obliged to start the mediation with a lengthy session on confidentiality, for example by having to enumerate a long list of exceptions and getting everyone to sign their agreement to those, then the tone of the mediation will be sabotaged and mediation as an appropriately protected alternative environment for dispute resolution, will be a hard sell.

We should not forget that disclosing information is an emotional decision based on feelings about the quality of trust. It is also something which happens “in the moment” and with the intention that it will move the discloser into a position of advantage or is at least a step on the road to getting what they need: settlement. Information is traded at least as much as concessions during a negotiation. The negotiation is underpinned by a delicate dance of reciprocity which in turn needs to be carefully choreographed by the mediator for the benefit of all.

I think it is even more important that the final settlement is something that both parties can live with and which is credibly sustainable. To get to that point, mediators need to build and maintain trust, help parties to create choices, assist them in risk assessment (about the settlement and not just the litigation risks) and verify that they understand what they are signing. For their part, their legal advisers need to be “in the detail” and making sure that the terms of settlement are indeed what they were supposed to be. The mediator should not be in the detail: neither at the beginning of the mediation nor at the end.

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