

## PART V — ETHICS IN ALTERNATIVE DISPUTE RESOLUTION

### 1 INTRODUCTION

#### 1.1 *Common Ethical Issues*

Ethical issues arising in alternative dispute resolution ('ADR') processes are less capable of clear articulation than those arising in a litigious context. There are several reasons for this: primarily, they are newer and less developed areas of legal practice; secondarily, the issues confronting ADR specialists are extremely broad. A practitioner will face different ethical issues depending on their role in dispute resolution.

Legal advisors are faced with the challenge of adjusting to a new, non-litigious role. As such, the 'fight or settle' decision is frequently an issue. Litigation poses risks for the client (and is a financially and emotionally costly, extended process), but stands to make the lawyer (in many circumstances) more money than successful ADR. On the other hand, settlement is quick and produces finality (but is less profitable). How should lawyers go about assessing the merits of ADR and advising clients on the relative suitability of ADR and litigation?

Another issue concerns authority to settle: is any agreement reached by the lawyer when acting as agent for a client binding upon that client? What if the lawyer exceeds the client's instructions?

Ethical issues can arise in two ways for practitioners:

- As *representatives* of parties in ADR (eg, negotiation, mediation, arbitration, etc)
- As *facilitators or practitioners* of ADR (eg, mediators, arbitrators, etc)

Issues for representatives:

- Lying and misrepresentation
- Posturing and pressuring tactics
- Advising the client
- Acting as agent for settlement
- Confidentiality and disclosure

Issues for facilitators:

- Conflicts of interest and prior relationships with parties
- Neutrality and impartiality
- Fairness of process and of the agreement
- Duty of care
- Confidentiality and disclosure

#### 1.2 *Professional Conduct Requirements*

Formal rules don't offer nearly as much advice to ADR practitioners as practicing lawyers. In part, this is due to the difficulty of developing universal standards for ADR: at present, there is no single, uniform standard of conduct.

## 1 ADR Guidelines

The National Alternative Dispute Resolution Advisory Council ('NADRAC') guidelines represent 'best practice' standards, but aren't legally binding upon practitioners. They are more targeted at arbitrators and facilitators than representatives themselves (though they could be adjusted for that context).

The NADRAC standards are a good starting point for ADR facilitators (and can be adapted for representatives). See further <http://www.nadrac.gov.au/adr/HTML/knowledge.html>. Pertinent extracts:

### 20. Promoting services accurately

[deals with advertising, service disclosure and avoiding the appearance of impropriety]

### 21. Ensuring effective participation by parties

The practitioner may need to ensure that the parties are given the opportunity to have their say.

In facilitative ADR it is important that the practitioner be aware of those cases in which it would not be appropriate for the parties to participate in an ADR process, or to do so only with special adaptations to the process. A practitioner may need to consider whether any action is required of them in the following situations:

- The parties lack an adequate level of understanding of the issues and implications of the possible outcomes;
- The parties lack sufficient time to assess any proposed outcome;
- There is the possibility of undue practitioner influence;
- The process is inappropriate to resolve the parties' dispute;
- The physical safety of the parties, practitioner or third parties has been or may be at risk;
- Strategies which are quite inconsistent with the ADR process are being pursued by one or other of the parties;
- A party has undertaken the ADR process in order to gather information to be used in furtherance of the dispute;
- Where one or more parties is unable to participate and negotiate effectively in the process;
- A significant power imbalance between the parties is likely to prejudice the outcome for one of the parties;
- The parties are not willing to participate in good faith.

The practitioner may then consider implementing one or more of the following:

- An interpreter, support person, adviser, representative or advocate;
- Technical assistance, information or expert advice;
- Adjournment;
- Termination of the process or referral to another process.

## 22. Eliciting information

The ADR practitioner may need to consider issues such as:

- Whether an ADR practitioner can contradict a party (eg, by physical evidence or prior inconsistent statement);
- Whether there is any scope for discrediting a party before their colleagues (on the same side of the dispute) in order to verify the relevant facts;
- The kinds of information that may only be raised for discussion in private sessions;
- Whether recommendations or decisions may be restricted to agreed issues in dispute, or may be open to other related issues as well.

## 23. Managing continuing or termination of the process

... Terminating an ADR process is a responsibility the ADR practitioner has to both parties. ... the ADR practitioner may need to consider whether to:

- Discourage the parties from abandoning the process when the practitioner believes settlement is possible;
- Abandon (or threaten to abandon) the process in order to induce agreement;
- Try to restrict the number or scope of settlement options by reference to similar case experience, expert intellectual knowledge or legal principles.

## 24. Exhibiting lack of bias

ADR practitioners need to demonstrate independence and lack of personal interest in the outcome so that they approach the subject matter of the dispute with an open mind, free of preconceptions or predisposition towards either of the parties. ... 'neutrality' requires that the ADR practitioner disclose to all parties:

- Any existing or prior relationship or contact between the ADR practitioner and any party;
- Any interest in the outcome of the particular dispute;
- The basis for the calculation of all fees...;
- Any likelihood of present or future conflicts of interest;
- Personal values, experience or knowledge of the ADR practitioner which might substantially affect their capacity to act impartially. ... the practitioner must also decide whether they should withdraw, or, with the express permission of all parties, continue.

## 25. Maintaining impartiality

While neutrality is a question of interest, impartiality is more a matter of behaviour. It relates to the retention of the confidence of the parties based on their perception that they are treated fairly by the ADR practitioner throughout the process. ... Impartiality requires the ADR practitioner to:

- Conduct the process in a fair and even-handed way;
- Generally treat the parties equally (eg, session time);
- Not accept advances, offers or gifts from parties;
- Give advice and allow representation, support or assistance equally to parties;
- Ensure they do not communicate noticeably different degrees of warmth, friendliness or acceptance when dealing with individual parties;
- Organise the venue, times and seating in a way which suits all parties.

## 26. Maintaining confidentiality

Some ADR processes are considered to be essentially private (eg, mediation) ... It is important that the practitioner and parties ... have ... a clear and common understanding of the extent ... and the limits of confidentiality. Confidentiality may require an ADR practitioner to:

- Not disclose information provided by one of the parties in an ADR session to the other party...;
- Not disclose information about the dispute to third parties, subject to any common law, contractual or statutory requirements. However, in all cases the ADR practitioner should make clear to the parties the limits on disclosing information that apply...

## 27. Ensuring appropriate outcomes

... an ADR practitioner may need to consider or get advice on whether:

- The interests of third parties are appropriately protected, or at least not unnecessarily or unjustifiably threatened;
- The outcome, particularly in determinative ADR, is fair as between the parties;
- A decision..., is one which a reasonable person could have made in the circumstances;
- An agreement condones an illegal activity;
- An agreement is legally void or voidable;
- A decision..., is legally valid;
- Any advice, agreement or decision does not involve unlawful or unjustifiable discrimination.

## 2 Professional Conduct Standards in ADR

Lawyer codes of conduct such as the Professional Conduct and Practice Rules revolve around litigation and adversarial advocacy, so there is not much emphasis on the pre-litigation stages (including ADR).

The Professional Conduct and Practice Rules stipulate a requirement that lawyers must advise about the availability of ADR procedures (PCPR 12.2A); however, they do not impose specific standards of practice for lawyers engaged in ADR.

See especially PCPR rules 1, 18.1, 28, 30. Lawyers must also inform their client about the availability of ADR (PCPR 12.2A).

Interestingly enough, there has been a proliferation of proposed standards for ADR. The suggested standards would apply to participants generally. (See further Astor & Chinkin in at PM235.) In short, however, there is little authoritative and comprehensive guidance.

### 3 *Legislation and General Law Standards in Negotiation*

Several broad standards exist in the form of Commonwealth legislation generally binding upon practitioners: the *Trade Practices Act 1974* (Cth) and state *Fair Trading Acts* set minimum standards of professional conduct. The effect of these Acts is to preclude unconscionable tactics in negotiation which would lead to rescission of the settlement contract.

See especially:

- Misleading and deceptive conduct contrary to s 52 of the *Trade Practices Act*, state legislation and general principles of law;
- Unconscionable conduct contrary so ss 51AA, 51AB or 51AC of the *Trade Practices Act*, or common law unconscionability, duress or undue influence; and
- Case law dealing with practitioners' authority to settle and duty of care to clients.

### 4 *Good Faith in Mediation*

Parties have an obligation to participate in mediation in good faith (*Gannon v Turner* (1997)). This is far from a settled area, but there is increasing recognition of a duty to participate in good faith (especially where the mediation is ordered by a court or prior agreement). The content of this duty is unclear, but it seems to entail approaching the session with an open mind and being prepared to consider any options put forward.

Possible indicia of good faith:

- Preparing for the mediation;
- Considering the other party's interests;
- Attending with all relevant parties;
- Engaging in an open and frank discussion of their interests and objectives;
- Not lying or misleading the other party;
- Demonstrating interest in the other side;
- Explaining reasonable grounds for rejection of an offer; and
- For lawyers, this means allowing the client to participate fully.

#### ***Gannon v Turner* (1997):**

##### Facts

- Court ordered mediation
- P's barrister arrived late and produced reports that had not previously been disclosed
- He did not explain P's requests when prompted and refused to elaborate

##### Decision

- The barrister did not negotiate in good faith
- Simply going into the mediation in order to get information that will advance the litigation is insufficient

#### 4 Professional Conduct Standards in Mediation

Both mediators and parties have obligations of confidentiality (see below). Mediators have a duty of care towards participants (see below). Mediators must resolve conflicts of interest (see further Astor and Chinkin at PM237).

### 1.3 Four Ethical Approaches

The appropriate ethic follows from an understanding of the role of the lawyer:

- Should an ADR practitioner zealously represent their client's interests or solve their clients' (as well as society's) problems?
- Does a practitioner have a duty to ensure the honesty and fairness of the ADR process?
- Should they adopt principled rather than adversarial bargaining strategies?

We now consider how four traditional ethical approaches would answer these questions.

#### 1 Adversarial Advocate

The traditional rules embody the ethical assumptions of an adversarial advocate. However, these may be contrasted with ADR guidelines, which encourage openness and flexibility. See, eg, NADRAC guideline 22, which calls for sharing of information between parties and open communication. This doesn't harmonise particularly well with the traditional rules, which mandate secrecy in the absence of client consent. In many cases, ADR guidelines and PCPR or other traditional rules are in conflict.

Adversarial advocacy does not *fit* with ADR processes, and it is not appropriate. Bargaining is principled and not positional, accommodating and not inflexible, cooperative and not diametrically opposed. More people than lawyers are involved in ADR. Individuals don't need protection against the state apparatus. Adversarial advocacy is at odds with the methodology of principled negotiation and mediation.

#### 2 Responsible Lawyer

According to Parker, '[l]awyers owe some duty to act in good faith towards the procedures, at least, if not the opposing party'. Traditional adversarial advocacy and responsible lawyering approaches are thus fundamentally incompatible with the cooperative modalities of ADR. This is best evidenced by the opposition between traditional principles dealing with conflicts of interest and confidentiality, and those preferred by ADR guidelines.

That said, there is no reason why broader standards of conduct from the general law ought not to apply to ADR processes. These standards ensure, to a degree, that ADR works (ADR inherently incorporates such principles as good faith and the ethics of care).

#### 3 Moral Activist

A moral activist might suggest that private resolution of public problems is contrary to public interest. Disclosure through litigation benefits third parties and the public interest, whereas ADR takes place behind closed doors.

Restorative justice requires that all parties be involved in the settlement process. ADR involves (indeed, works best with) only a small number of parties. Third parties are inevitably absent from resolution proceedings.

Substantive fairness: ADR takes insufficient steps to ensure the justiciability of the outcome. The result may be unjust or against broader ethical principles.

These issues hinge upon the following questions:

- Should practitioners be concerned about whether ADR processes are fair and allow for effective participation by all parties?
- Should they be concerned about whether the outcomes decided in ADR processes are fair as between the parties, and whether the interests of third parties (including the public interest) are appropriately recognised and protected?

#### 4 *Ethics of Care*

The ethics of care seem to fit well with how ADR processes are supposed to work, particularly in light of the standard of good faith imposed upon many participants.

See further Wills (PM), Menkel-Meadow's suggested principles (PM153).

## 2 NEGOTIATION ETHICS

### 2.1 *Lying in Negotiation*

Lying takes several forms in negotiation:

- Exceeding your client's instructions
- Misrepresenting your client's instructions
- Not passing on or misrepresenting a settlement offer
- Misrepresenting the facts or the law
- Distorting the facts or the law
- Taking advantage of the other party's misunderstanding of the facts or the law

There are several (mostly practical) arguments in favour of such conduct:

- May be seen as part of the 'rules of the game'
  - It's expected, everyone does it, it's part of the system
  - Telling the truth may not be reciprocated by the other party
  - A 'soft' approach to business ethics may place one side at an unnecessary disadvantage
- It is an efficient way to achieve a desired outcome to the extent that it is not discovered
  - But if discovered, the effort required to correct and make up for the lie will normally far exceed the financial and practical cost of telling the truth
- It can equalise a power differential between the parties
- It can give a short-term advantage in some circumstances
  - However, a negotiator can only benefit if the lie is not discovered
- People are not obliged to disclose all information

However, there are also (practical and ethical) arguments against lying:

- It is only beneficial to the liar if it is not discovered
  - The ethical value of truthfulness is not necessarily a constraint on the economic outcome negotiations – it can be a practical way to ensure long-term profitability and strengthen relationships
- When discovered, it damages relationships
  - The lie carries a risk to the negotiator: it damages the negotiating framework, destroys trust, increases hostility, and weakens the long-term relationship between the parties
  - In many negotiations, maintaining or enhancing the relationships is as important as achieving financial goals (indeed, that is often why negotiation is chosen over litigation)
  - The negotiator may end up in a much worse position than had he or she originally told the truth
- Even if not discovered, maintaining the lie can be difficult
  - It is unlikely that the unethical negotiator will never be discovered
- Business is, far from amoral, an ethics in itself
  - Lying is unethical in business
- Cost to the individual: internal moral conflict
  - Lying damages self-respect and self-worth
  - Wills: human nature is such that negotiators want to act in a fair, honest and ethical way while still meeting their objective of obtaining the best outcome for their client



- It results in less durable agreements: agreements may collapse if the lie is discovered
  - Indeed, mutually beneficial behaviour is self-replicating and can have long-term economic and social benefits for both parties
- It can damage a practitioner's professional reputation
  - Indeed, a reputation for truthfulness and fair dealing can be a source of power in negotiations, in which trust may be engendered more easily and cooperation with the other party quickly attained
  - The reputation of both parties will be enhanced in the marketplace by truthfulness and honesty
- Disciplinary action can be incurred in some circumstances

The benefits of lying should be weighed against the risks by asking, "How much is the difference in outcome worth to you? Will the unfair result be durable? What damage might the unfair result cause to this or other relationships? Will your conscience bother you?" According to Wills,<sup>1</sup> these questions indicate that deception can undermine efficiency by diminishing trust and cooperation. The full cost of a lie should be considered before making it.

Avoiding direct misrepresentation can be a useful tactic in negotiations; however, it can be somewhat obvious when employed:

Q: "Are you willing to settle for \$50 000?"

A1 (avoiding): "We think that a fairer settlement would begin at \$80 000"

A2 (lying): "No" [contrary to client instructions]

There are several degrees of lie, and some are of a materially different deceptive quality than others. If, in response to the above question, the following answer was given, it may not be a direct misrepresentation of the client's instruction, however, it may induce in the other party an assumption that your instructions are to achieve an \$80 000 settlement:

Q: "What is your bottom line?"

A (misrepresenting): "A fair outcome would be something like \$80 000"

Thus, according to Fisher and Ury, less than full disclosure is not the same as deception. They believe that consciously misleading others as to pertinent facts or beliefs is not the same as merely failing to fully disclose these matters. Good negotiation does not require total disclosure. For this reason, experienced negotiators often do not want to know a definite reserve price.

The following advice of Lord Forte ought also to be considered:

*I've said to him that he must have complete integrity in everything he does. I don't mean not robbing people of money; that's basic. Integrity in his thoughts, in his complete approach to life ... I have said to him: Look, you must be able to go into any room anywhere in the world and know there'll be no one there who can point a finger at you and say, 'That man did me down'.<sup>2</sup>*

## 2.2 Correcting Mistaken Assumptions

The other parties may make mistaken assumptions for various reasons. It may be an obvious inference from the facts; it may be an unreasonable inference or guess; it may have been caused by something another practitioner or party falsely stated or misrepresented.

<sup>1</sup> Wills at 52.

<sup>2</sup> Edward de Bono, *Tactics* (1989) 236.

*Example: A and B sign a contract which A wants to rescind. The night after signing, but before delivering copies of the signed documents to B, A's factory burnt down, destroying the documents. B now relies on the contract. Does A reveal that they signed the contract to B?*

In the above example, B is likely to assume that the documents were destroyed before being signed. There is, in such a circumstance, no possibility of being caught. The practical arguments thus seem to outweigh the ethical arguments, particularly since the assumption was induced through no representation of A.

### **2.3 Acting Against Client Interests**

Should you act on instructions when they are unwise and unlikely to further your client's best interests?

*Example: the client instructs the practitioner to be highly oppositional and not to concede to any of their demands, however slight. In the circumstances, this is not the most effective strategy.*

In general, issues such as these may be dealt with by remembering that the client wants outcomes. The lawyer, however, controls the process. The situation is akin to a mechanic fixing a car, or a computer technician diagnosing a computer: the end user just wants a working system, and the expert is in both cases responsible for the details (which spare parts are required, which distributor should be used, how much it is necessary to pay) required to obtain it.

The challenge for an ADR practitioner is to effectively balance process with outcome in a way that doesn't disadvantage the client. The extent to which the outcome may be compromised for compliance with the client's process requirements is unclear, but I suggest it should remain relatively low.

### **2.4 Delay as a Negotiating Tactic**

- Should you use delay as a negotiating tactic?

### **2.5 Strategic Advice**

- Should you advise your client on the weaknesses of their case?

### **2.6 Good Faith**

The Law Reform Commission made the following recommendations:

**Recommendation 19.** The Law Council of Australia should ensure that national model professional practice rules provide guidance ... on expected standards of conduct and practice... Where practitioners negotiate on behalf of a client, the rules should require that **practitioners act in 'good faith'**. ... The commentary also should emphasise the practitioner's obligation to inform the client of every offer of settlement from the opposing party and to obtain explicit approval from the client before communicating an offer or acceptance to an opposing

party.

The Law Reform Commission suggests holding practitioners to a standard of good faith participation in ADR processes:

**Recommendation 20.** The Law Council of Australia should ensure that national model professional practice rules include provisions relevant to the practice of lawyer-neutrals in ADR processes and lawyers acting for clients participating in ADR processes and should include a rule **requiring practitioners to participate in ‘good faith’ when representing clients** participating in such processes.

### 3 MEDIATION ETHICS

#### 3.1 Introduction

Two classes of ethical issue can arise in mediation: the first relate to practice issues (objective and definable dimensions of the mediation process),<sup>3</sup> for example:

- Confidentiality
- Disclosure of costs
- Explaining the process to participants
- Conflicts of interest
- Retainment of independent advice

The second includes more nebulous and subjective matters relating to mediator behaviour. These issues generally relate to neutrality, fairness and impartiality.

Neutrality and fairness are the most important ethical issues. Other issues, such as conflicts of interest, may be viewed in terms of the threat they pose to neutrality.

#### 3.2 Established Guidelines

The American Arbitration Association maintains a series of suggested practice standards for arbitrators; similar guidelines might be thought to exist in relation to mediators, who should:<sup>4</sup>

- Uphold the integrity and fairness of the process;
- Disclose any interest or relationship likely to affect (or appear to affect) impartiality;
- Avoid impropriety or the appearance of impropriety;
- Conduct the proceedings fairly and diligently;
- Make decisions in a just, independent and deliberate manner; and
- Be faithful to their relationship of trust and confidence with participants.

#### 3.3 Ethical Issues for Mediators

##### 1 Liability in Negligence

Mediators appear to owe a duty of care to parties in a mediation and are potentially liable in negligence (*Tapoohi v Lewenberg (No 2)*).

#### ***Tapoohi v Lewenberg (No 2)* [2003] VSC 410:**

##### Facts

- T is involved in a business dispute; both parties are represented

<sup>3</sup> Greg Walker, 'Training Mediators: Teaching About Ethical Obligations' (1988) 19 *Mediation Quarterly* 33, 35.

<sup>4</sup> David Standen, 'Ethics and Professional Conduct in the Practice of Commercial Arbitration' (1995) 13 *The Arbitrator* 231, 240.

- After many hours of mediation with L, a settlement is reached late at night (after the parties' lawyers had left)
- However, the settlement is not explicit about the issue of taxation
- The plaintiff argues that:
  - The mediator has contractual obligations to both parties
  - The mediator owes a duty of care to both parties
  - The mediator caused damage through his negligent conduct of the mediation

#### Issue

- Could the mediator be liable to the plaintiff in negligence or breach of contract?

#### Reasoning

- Since *Perre v Apand*, the law of negligence is uncertain in respect of pure economic loss so it cannot be concluded with any certainty that the mediator owed no duty of care at all to the parties in the mediation
- The mediator was only retained to act as a neutral in the mediation and her duties did not include advising the parties, who were qualified to protect their own interests and had their own legal representatives
  - The mediator certainly owes no duty to protect the interests of a party to the mediation, and is therefore not in breach of contract or liable in tort in that respect
  - '[I]n no sense, absent some specific agreement, can it be said that a mediator acts for a party in the sense that a lawyer acts for a client. .. The mediator is required to stand back from this conflict, to assist the parties to resolve it; it is not to promote the interests of one party perhaps to the disadvantage of the other. This is, essentially, the role of the lawyer acting for that party.'
- It is not 'uncontrovertible' that the solicitors' claims against the mediator are unarguable because of statutory immunity under the *Supreme Court Act 1986* (Vic) s 27A as a party to whom a proceeding is referred
  - There is also no analogous immunity for mediators at common law

#### Decision

- Habersberger J refuses to strike out the statement of claim

## 2 Conflicts of Interest

Mediators must also avoid conflicts of interest. This may include:

- A prior relationship with any of the parties, their legal counsel or relevant third parties;
- Any current relationship between a mediator and a party, their representative or associate (whether pecuniary, familial or otherwise); and
- Having previously been a client, social worker or mediator for any of the parties, or had any business or social contact with any of the parties or their representatives.

Problematically, because certain types of cases are routinely referred to mediation, there emerges 'a regular core of respondents' in mediations. This presents two problems: first, the plaintiffs are inexperienced in the process relative to the responding parties; second, the mediator may have had prior contact with the respondent and may generalise or make unconscious comparisons between the present case and similar past cases.

Completely avoiding conflicts of interest may be impossible, especially in rural or small legal communities. Where a conflict arises, it must be disclosed:

- If the mediator has been freely chosen by the parties, it may be sufficient to reveal the conflict of interest and allow the parties to choose whether to continue or go elsewhere;
- Where the mediator is court-appointed, the 'element of compulsion' present may mean that another mediator must be chosen (since parties are incapable of freely choosing).

To maintain neutrality, a mediator must withdraw if the mediator (or any of the parties) believes that the mediator's background, personal experiences or relationships would prejudice the mediator's impartiality.<sup>5</sup>

There are concerns in the mediation community that mediators are not always as neutral as they could be. Accusations have been made of systemic bias in relation to certain disputes (see, eg, *State Bank v Freeman*). However, no mediator can be entirely neutral: values and deep-rooted assumptions about people and the world will always influence their treatment of parties and reaction to their stories. Nevertheless, the mediator — being the guardian of the process' fairness — must do their best to ensure objectivity where possible.

### 3 *Fairness of the Resulting Settlement*

One of the tensions in mediation lies in finding a balance between impartiality and fairness. Mediation is inherently self-determinative, and is arguably the 'first and fundamental principle of mediation'. However, it does have limits and these limits should be enforced by the mediator. Examples:

- Where the resulting agreement would be illegal or unenforceable;
- Where one of the parties is threatened with violence; and, more controversially,
- Where, as a result of violence or incapacity, one of the parties is unable to negotiate a fair agreement or to ensure compliance after the mediation.

The generally accepted standard is that mediators 'do their best' to ensure that parties make a free and informed decision about whether to settle, supported by independent legal or other advice where needed. In this way, that independent person (eg, the party's lawyer) is responsible for ensuring fairness and not the mediator.

However, such a standard does not address the interests of third parties, who may be unjustly disadvantaged by an agreement (eg, children as by an agreement between their parents). This is arguably a failing of mediation as an ADR process: it fails to explicitly accommodate the broader interests of parties unrepresented at the mediation.

### 4 *Prioritising Interests of First and Third Parties*

Mayer suggests that mediators should support the process of mediation, rather than the parties to it.<sup>6</sup> Mediation cannot rectify basic structural inequalities of power, so mediators should simply aim to ensure the integrity of the mediation process without violating the interests of the community of interested but unrepresented parties. However, this may mean that mediation is not appropriate in all circumstances.

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<sup>5</sup> Astor and Chinkin at 228.

<sup>6</sup> Bernard Mayer, 'The Dynamics of Power in Mediation and Negotiation' (1987) 16 *Mediation Quarterly* 75, 83.

This issue highlights the tension between the integrity of the mediation process and the interests of unrepresented parties — between justice according to formal processes and broader justiciability. More generally, it highlights the tension between ethics *interior* and *reactive* to law (such as adversarial or responsible advocacy) and ethics *exterior* to and *critical* of law (such as moral activism and ethics of care).

The issue of third party rights is most effectively illustrated by the situation where the confidentiality of mediation must be compromised to protect the safety or welfare of a vulnerable third party. Mayer would probably suggest that the mediator must not compromise the integrity of the mediation process. Astor and Chinkin may argue that such a mediator has a responsibility to protect the interests of a vulnerable third party. Clearly, the issue of one of degree and warrants further exploration.

### 3.4 **Ethical Issues for Counsel**

The Law Institute of Victoria rules require solicitors to ‘understand ADR processes and, in particular, mediation’ in order to determine and advise about whether ADR would be in client’s best interests. Lawyers play an important role before, during and after mediation (see above 4.8).

### 3.5 **Confidentiality**

**Issue:** When can mediation proceedings be disclosed?

Reasons for confidentiality:

- Encourages parties to use and engage fully with ADR processes
  - Enhances willingness to reveal information and put options forward, since parties will be more likely to disclose pertinent facts and open up to discussions if they know that they will be protected from future litigation on the basis of things said and done
  - Parties may want to protect private business details from scrutiny or regulatory attention
- Prevents ‘fishing expeditions’ (where a party mediates solely to obtain information)
- Protects mediators (by ensuring the contents of the mediation can’t be used as evidence)

In short, as Bingham MR notes:

*[I]t is plain that the parties will not make admissions or conciliatory gestures, or dilute their claims, or venture out of their entrenched positions unless they can be confident that their concessions and admissions cannot be used as weapons against them if conciliation fails and full-blooded litigation follows.<sup>7</sup>*

Reasons against confidentiality:

- Can endanger third parties’ interests
  - Confidentiality prevents public acknowledgement or notice of wrongdoing
  - It means that no settlement precedent is provided for other parties to use as an external standard in their negotiations
- Stops investigation of mediator misconduct

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<sup>7</sup> *Re D (Minors) (Conciliation: Disclosure of Information)* [1993] 2 WLR 721, 724.

- See, eg, *Freeman v NSW Rural Assistance Authority*, in which the mediator was alleged to place the party under duress but, as Badgery-Parker J noted, the court was prevented from examining the contents of the mediation
- Hinders criminal investigations
- Discourages parties discussing the mediation with non-legal advisers
- ‘Sterilises’ evidence from use in proceedings
  - Parties could deliberately disclose damaging documents and other facts that they would not want to be raised against them in subsequent litigation

### 3.5.1 General Rule

**Rule:** mediation proceedings are not guaranteed absolute confidentiality.

ADR processes can be made ‘confidential’ by statute, the rules of the court which ordered it, or by a prior contract or resulting settlement agreement. However, whether a given mediation is actually confidential will depend on the specific rules of the relevant court, or the presence of other documents or governing legislation. For example, the *Federal Court Act 1976* s 53B probably does not extend to evidentiary documents tendered at a negotiation.

Disclosure can also be ordered in some circumstances — even where what is sought is protected by statute or contract. Whether disclosure is possible depends upon:

- What is sought to be protected;
  - Eg, that settlement was reached, the terms of settlement, documents disclosed during the mediation, statements or notes made or taken by parties, witnesses or the mediator
- Who is seeking the information and for what purpose; and
  - Eg, a party to the mediation for subsequent litigation between the same parties, a third party affected by the settlement, a government official or agency, or a business competitor
- Who is being asked to provide the information.
  - Eg, the mediator, the parties, witnesses, the mediation organisation

### 3.5.2 Court-Ordered ADR

Look at the statute creating the court which ordered the mediation. Confidentiality depends on the statute or rules of court. The extent of confidentiality is thus a question of statutory interpretation.

For example, the *Federal Court Act 1976* (Cth) s 53B provides that:

Evidence of anything said, or of any admission made, at a conference conducted by an approved mediator acting as such a mediator, is not admissible:

- (a) in any court... or
- (b) in any proceedings.



However, evidence may still be called in some circumstances:

- *Hart Vicki v Kuna Rodney & Ors* [1999] VCAT 626, McKenzie DP — where it is unclear if an agreement was reached at mediation, evidence will be called

The Victoria Supreme Court Rules order 50.07(6) provides that:

[N]o evidence shall be admitted of anything said or done by any person at the mediation.  
[However, the parties may agree otherwise in writing.]

### 3.5.3 Voluntary ADR

Standard ‘without prejudice’ rules apply to voluntary settlements. Where the information sought would have been otherwise discoverable outside the mediation, use in an ADR process will not render it privileged. Evidence may also be used to interpret or determine the unconscionability of an agreement reached. Confidentiality may not apply in criminal cases at all.

If a non-disclosure agreement was made or incorporated as a term to the settlement agreement, it will generally be enforced. However, it does not bind third parties who may have acquired information from the mediation. Courts have also indicated that confidentiality is complex and cannot be absolute (see, eg, *Re D (Minors)*). Lawyers should therefore inform their clients that there may be limitations on the extent to which their statements will be protected as confidential, and that the precise extent of these limits remains uncertain.

Courts generally respect the confidentiality of mediation, and may protect its proceedings from accidental disclosure (*Carter Holt v Sunnex*).

#### ***Carter Holt Harvey Forests v Sunnex Logging* [2001] 3 NZLR 343:**

##### Facts

- Lawyers previously involved in a confidential mediation for one party now seek to act for a different party against the same defendant in litigation

##### Reasoning

- Per Thomas, Keith Blanchard, Tipping and McGrath JJ:
  - The risk of conscious or unconscious disclosure is too great

##### Decision

- The lawyers cannot act against their former client

Where a party seeks to rescind their settlement agreement on some basis, evidence of the parties’ conduct in the mediation may be reviewed (*National Australia Bank v Freeman*).

**National Australia Bank Ltd v Freeman [2000] QSC 295:**Facts

- Freeman claims that he suffers from a mental disturbance
- He appeared to have accepted the agreement, but now seeks to have it set aside on that basis

Issue

- Can the agreement be set aside on the basis of undue influence or unconscionability?

Reasoning

- Ambrose J:
  - Where a party seeks to set aside a mediation agreement for unconscionability or incapacity, the Court will review:
    - Medical evidence
    - Recollections of the mediator and other parties
    - The party's conduct following mediation
  - The Court is very reluctant to set the agreement aside
  - His incapacity must have been *highly* evident to all parties

If the mediator is sued, evidence of the mediation in question will need to be called (*Tapoohi v Lewenberg*).

**Tapoohi v Lewenberg & Ors (No 2) [2003] VSC 410:**Reasoning

- Habersberger J:
  - Where an action is brought against the mediator, detailed evidence of the mediator's and parties' conduct will be considered to determine negligence

Disclosure might also be ordered if the communications are criminal or tortious or if the disclosure would prevent the Court being misled. Conduct contrary to the *Trade Practices Act 1974* (Cth) (especially ss 51–2) also might not be protected.

Finally, if there is doubt about whether a binding agreement was actually reached at the mediation, the Court will have to examine the precise conduct engaged in during its course.<sup>8</sup> In such circumstances it would be impossible to determine whether settlement occurred without undermining confidentiality. This situation could be avoided by the mediator requiring a written statement of the agreed outcome.

In all other circumstances, it seems clear that common law privilege may apply to protect 'without prejudice' communications made in negotiations and mediations. Any disclosure made in such circumstances is limited and made for the purpose of negotiation. To require disclosure would be contrary to the public interest in that it would undermine the

<sup>8</sup> See *WJ Green & Co Pty Ltd v Wilden Pty Ltd* (1997) (Unreported, Supreme Court of Western Australia, 24 April 1997).

willingness of disputants to participate in ADR and thereby reduce the prospects of successfully resolving disputes.

Summary:

- Where mediation is court-ordered, confidentiality is determined by that Court's statute
- Where mediation is not court ordered, courts will enforce confidentiality agreements to some extent
- However, mediation proceedings are not completely confidential and may be examined in some circumstances
  - Negligence proceedings (*Tapoohi v Lewenberg*)
  - Vitiating the settlement agreement (*National Australia Bank v Freeman*)
- Mediators should be aware of the circumstances in which evidence disclosed in mediation and evidence of the proceedings can be called