

Confidentiality in mediation: a legal analysis

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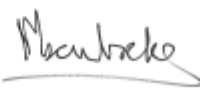
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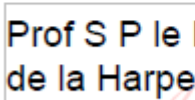
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ABSTRACT

Mediation is well-established as a way in which parties settle disputes worldwide. Although mediation has not grown in South Africa to the extent that it has in countries like Australia and the United States of America, the potential for growth is immense. One of the crucial elements of mediation is confidentiality and the promise of confidentiality is offered to all parties involved in mediation. Confidentiality should be an integral part of mediation but many questions still remain as to exactly how, and to what extent it should be applied during mediation.

Those are the issues this study aims to address. It strives to provide a legal analysis of confidentiality in mediation (or mediation confidentiality—the two terms are used interchangeably in this study). In order to do provide a legal analysis, the elements of mediation as well as the nature and scope of mediation are discussed. Particular emphasis is placed on confidentiality and a study of the legal sources of mediation was undertaken in an attempt to fully grasp the legal position of confidentiality in mediation. The agreement to mediate (the contract) is used as the starting point and the common law aspects of the without prejudice principle and legal professional privilege are also discussed. The application of these principles, the role of public policy and the interests of justice are considered. The exceptions to the application of these principles with regard to mediation confidentiality are also studied and expounded upon in this study. Additionally, existing legislation with regard to confidentiality in mediation is also explored in order to provide more clarity.

The study proposes that South Africa, as a country which is still very much finding its way with regard to mediation confidentiality, can learn from countries such as the United States of America and Australia. The insight gained from this study can help to craft a satisfactory manner in which to deal with mediation confidentiality in South Africa. Since there is a great deal of uncertainty regarding the legal position of confidentiality in mediation in

South Africa, the study also considers mediation confidentiality in other spheres such as the state of California (United States of America) and the state of New South Wales (Australia). In California a very strict, narrow and literal approach to mediation confidentiality is followed, while in New South Wales a more balanced approach is followed. Hopefully this study will be instrumental in assisting to offer a meaningful legal analysis of mediation.

Keywords:

Confidentiality; mediation; common law; contract; without prejudice; legislation; exceptions; public policy; interests of justice; California; New South Wales; Evidence Code; Evidence Act; Uniform Mediation Act; Court-annexed rules.

OPSOMMING

Mediasie is wêreldwyd 'n gevestigde en populêre alternatief vir partye om geskille te besleg. Alhoewel mediasie in Suid-Afrika nie teen dieselfde tempo gegroei het as wat die geval in die Verenigde State van Amerika of Australië is nie, toon dit tog baie potensiaal vir groei. Een van die kritiese elemente van mediasie is die handhawing van vertroulikheid t.o.v. die inligting wat gedurende mediasie gedeel word. Hierdie belofte van die handhawing van vertroulikheid word aan alle partye wat betrokke is by mediasie, gemaak. Alhoewel vertroulikheid 'n integrale deel van mediasie behoort te wees, is daar nog baie vrae rondom hierdie aspek, veral t.o.v. hoe en tot watter mate vertroulikheid tydens mediasie toegepas behoort te word.

Hierdie studie poog om daardie vrae te beantwoord en streef daarna om 'n regsanalise van die handhawing van vertroulikheid tydens mediasie te verskaf. Gevolglik word die aard, reikwydte en elemente van mediasie bespreek. Spesifieke klem word op vertroulikheid geplaas, en die studie van die regsbronne waaruit vertroulikheid spruit word ook ondersoek. Die ooreenkoms om te medieer word as wegspring gebruik en die gemenerereg beginsels van sonder benadeling van regte en regspriviligie word ook toegelig. Die toepassing van hierdie beginsels en die rol van publieke belang en die belange van geregtigheid word onder die loep geneem. Die uitsonderings t.o.v. vertroulikheid tydens mediasie word ook ontgin, en bestaande wetgewing wat die handhawing van vertroulikheid tydens mediasie reguleer, word ontleed om meer duidelikheid na vore te bring.

Hierdie studie stel voor dat 'n land soos Suid-Afrika, wat relatief onervare is t.o.v. die regulering en toepassing van vertroulikheid tydens mediasie, kan kers opsteek by lande soos die Verenigde State van Amerika en Australië in 'n poging om self 'n manier te vind om hierdie belangrike aspek van mediasie te hanteer. Gevolglik weens hierdie onsekerheid rondom vertroulikheid tydens mediasie, oorweeg hierdie studie ook hoe die staat van Kalifornië (Verenigde state van Amerika) en Nieu-Suid Wallis (Australië) vertroulikheid tydens

mediasie hanteer. In Kalifornië blyk die benadering baie eng en letterlik te wees, terwyl Nieu-Suid Wallis 'n meer gematigde en gebalanseerde benadering volg. Hopelik sal hierdie studie daarin sal slaag om 'n duidelike regsanalise van die kwessie van die handhawing van vertroulikheid tydens mediasie daar te stel.

Sleutelwoorde:

Vertroulikheid; mediasie; gemenereg; sonder benadeling van regte; regspriviligie; publieke belang; belange van geregtigheid; Kalifornië; Nieu-Suid Wallis; Uniform Mediation Act; Evidence Code.

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LIST OF ABBREVIATIONS

ACT	Australian Capital Territories
ADR	Alternative Dispute Resolution
AHRLJ	African Human rights Law Journal
ALR	Australian Law Reports
App Div	Appellate Division
BALR	Butterworths' Arbitration Law Reports
Buffalo LR	Buffalo Law Review
Cal App	California Appellate Court
Cal	California
Cardozo J Conflict Resol	Cardozo Journal of Conflict Resolution
CC	Constitutional Court
CCMA	Commission for Conciliation, Mediation and Arbitration
CD Cal	Court for Central District of California
CDRA	Civil Dispute Resolution Act
CLR	Commonwealth Law Reports
CPA	Civil Procedure Act
CPD	Cape Provisional Division
CTH	Commonwealth
DISAC	Dispute Settlement Accreditation Council
EJCL	Electronic Journal of Comparative Law
EU	European Union
EWHC	England and Wales High Court
FCA	Federal Court of Appeal

FCAFC (Aus)	Federal Court of Australia – Full Court
Fed R Evid	Federal Rules of Evidence
Georgia LR	Georgia Law Review
GoN	Government Notice
HARLJ	Harvard Law Review
Harv Negot LR	Harvard Negotiation Law Review
HCA	High Court Australia
IAMA	Institute of Arbitrators and Mediators Australia
ICCA	International Council for Commercial Arbitration
J Legal Prof	Journal of Legal Professionals
LEADR	Lawyers Engaged in Alternative Dispute Resolution
LRA	Labour Relations Act
Melbourne	Melbourne University Law Review
NADRAC	National Alternative Dispute Resolution Advisory Council
ND Cal	Court for Northern District California
NJ Super	New Jersey Superior Court
NSW	New South Wales
NSWCA	New South Wales Court of Appeals
NSWLR	New South Wales Law Review
NSWR	New South Wales Reports
NSWSC	New South Wales Supreme Court
NT	Northern Territories
Ohio St J Disp Resolve	Ohio State Journal on Dispute Resolution
QCA	Queensland Court of Appeal

QD R	Queensland Reports
QDC	Queensland District Court
QUTLJJ	Queensland University Technology Law and Justice Journal
SAJBL	South African Journal of Business Law
SALJ	South African Law Journal
SCA	Supreme Court of Appeal
T Jefferson LR	Thomas Jefferson Law Review
TAS	Tasmania
T	Transvaal Provincial Division
TPD	Transvaal Provincial Division
TSAR	Tydskrif vir Suid-Afrikaanse Reg
U Kan LR	University of Kansas Law Review
UC Davis LR	University of California Davis Law Review
UKHL	United Kingdom House of Lords
UMA	Uniform Mediations Act
USA	United States of America
VA	Virginia
VSC	Victoria Supreme Court
W Va LR	West Virginia Law Review
WASC	Western Australia Supreme Court
WCC	Workers' Compensation cases
W	Witwatersrand Local Division
WLD	Witwatersrand Law Division
WYO	Wyoming

ZACC	South Africa Constitutional Court
ZALC	South Africa Labour Court
ZASCA	South Africa Supreme Court of Appeal
ZAWCHC	South Africa Western Cape Court of Appeal

CHAPTER 1

Introduction

1.1 Background

Mediation is not new to society, or to dispute resolution. In fact, mediation has been practised for centuries in various societies, often in less structured and more informal settings than which is currently the case. In the Netherlands mediation was practised as far back as the 16th century by the so-called *Leidse Vredemakers* (Leyden Peacemakers)¹ while mediation has been actively practiced outside Europe and America for decades.

China has a long historical tradition of mediation² while in India villagers have, and still do, use a system called the *Panchayat* system.³ This system allows for respected village elders to assist the resolution of community disputes. Before British occupation, Indian businessmen used *mahajans* (impartial and respected members of the community) to resolve their disputes in an informal manner which involved a combination of arbitration and mediation.⁴

South Africa, and Africa for that matter, shares in this rich history and tradition of mediation. Murithi and Murphy Ives⁵ refer to *lekgotla* which involves the whole community in mediation and reconciliation. The *lekgotla* is a council of elders, or the king or chief, which mediates and often strongly relies on the principles of *ubuntu* which emphasizes principles of "reciprocity, inclusivity and a sense of shared destiny between people".⁶

Mediation has literally been with us for centuries. However, during the 20th century mediation came to the court rooms, the board meetings and the consultation rooms. Mediation became a major instrument for settling disputes

¹ De Roo and Jagtenberg 2002 *EJCL* 128.

² Houzhi 2009 *Asia Pacific LR* 32.

³ Xavier 2006 *Journal of Public Law & Policy* 275.

⁴ Xavier 2006 *Journal of Public Law & Policy* 275.

⁵ Murithi and Ives 2007 *Africa Mediators' Retreat* 79.

⁶ Murithi and Ives 2007 *Africa Mediators' Retreat* 79.

and resolving issues, not just informally, but in a formal, structured, regulated context as well. Today in the US, "mediation is the most frequently used process in both state and federal courts".⁷ Europe offers various examples of the growth and popularity of mediation where countries such as France, England, Italy, Denmark, Austria, Croatia and Hungary — to name a few all practice and utilize mediation.⁸ Additionally, The European Union adopted a Mediation Directive in 2008, which "aims to build trust in the process of mediation within the EU "and also highlights the reasons for selecting mediation above litigation.⁹ Formally and informally, mediation has become a permanent fixture in the legal landscape.

1.2 Problem statement

In South Africa formal regulated mediation¹⁰ is not as well-established as it is in other countries such as the United States of America and Australia. The process is not that popular yet and the regulation of mediation still has a long way to go. South Africa does not possess the legislation or case law that above-mentioned countries have when it comes to mediation, and the usage of mediation does not seem to be growing at the rate that it has in Australia, and is definitely not as well-established as in the United States of America.¹¹

However, even in countries such as the United States of America and Australia, despite their rich history of legislation and regulation of mediation the aspect of mediation confidentiality (which is the focus of this study) still causes some confusion and uncertainty.

Media confidentiality refers to the confidentiality that is attached to the communications that emanate from mediation. It refers to the notion that

⁷ Nolan-Haley 2006 *Cardozo Journal of Conflict Resolution* 70.

⁸ Houzhi *Asia Pacific LR* 32.

⁹ Libralex Date unknown <http://www.libralex.com/publications/the-impact-of-the-EU-mediation-directive>.

¹⁰ This is compared to indigenous mediation which has been operational for centuries, but which does not feature confidentiality as a crucial element.

¹¹ Brand 2017 <https://www.businesslive.co.za/bd/opinion/2017-08-02-sa-ripe-for-alternative-dispute-resolution-to-take-root/>; Rycroft 2009 *Africa Centre for Dispute Settlement Newsletter Quarterly* 2.

information that is seen as private cannot be disclosed in a public domain.¹² It is a moot point that confidentiality is seen as one of the pillars of mediation¹³, however there is still a great deal of uncertainty about exactly how mediation confidentiality should be regulated and applied in law. It is therefore imperative to conduct a legal analysis as to the nature and application of mediation confidentiality in order to bring more clarity in this matter.

Coben and Thompson did research involving 1223 state and federal mediation decisions in The United States, and came to the startling conclusion that courts often consider evidence that has been disclosed during mediation. They refer to a cavalier attitude of courts to mediation.¹⁴ Cole argues that states should be more pro-active and draft legislation brings about more clarity as to mediation confidentiality.¹⁵

In Australia the situation is very similar. Boule points out that despite the fact that often assurances of mediation confidentiality are made to the prospective parties involved in mediation, different degrees of confidentiality are applied to different situations, and these assurances of confidentiality are not absolute and concrete.¹⁶

Nolan and O'Brien state that in Australia there is "a need for clarity and reform of the law on the issues of confidentiality and admissibility".¹⁷ This calls for a closer inspection or evaluation, at least, of the legal principles which regulate mediation confidentiality.

This study will firstly consider the situation in South Africa regarding mediation confidentiality. However, it seems prudent, since other countries such as Australia and The United States of America have a far larger body of work (and more experience) with regard to mediation confidentiality than South Africa,

¹² Chukwuemerie 2007 *AHRLJ* 133.

¹³ Salmon 1996 *New Zealand Law Journal* 7-8.

¹⁴ Coben and Thompson 2006 *Harv Negot LR* 43, 48.

¹⁵ Cole 2006 *U Kan LR* 1419, 1448.

¹⁶ Boule 2005 *Mediation: Principles, Process, Practice* 539-542.

¹⁷ Nolan and O'Brien 2010 <http://barristers.com.au/wp-content/uploads/2012/03/confidentialityinmediationjune2010.pdf>.

that examples of the application of the mediation confidentiality by these countries should also be evaluated.

In the United States of America the state of California has a very definite, strict and narrow application of mediation confidentiality, while New South Wales (a state in Australia) tends to follow a less restrictive approach. These two states provide different approaches to mediation confidentiality and a topic such as mediation confidentiality needs to be considered from different perspectives. The manner in which these two constituencies deal with mediation confidentiality will be discussed and the situation in South Africa regarding the very same issue (formal regulated mediation excluding indigenous mediation) will also be considered in an attempt to provide more clarity regarding mediation confidentiality.

Mediation confidentiality is an essential part of mediation and rightly so, but the manner in which it is applied seems to be problematic. There seems to be an extremely narrow and strict application of mediation confidentiality (as is the case in California) or a less restrictive approach as is the case in New South Wales. Additionally despite years of mediation practice and a vast body of legislation and case law in the United States of America and Australia, the application of mediation confidentiality is still shrouded in uncertainty.

Therefore the main objective of this study is to offer a legal analysis of mediation confidentiality and determine which legal principles regulate mediation confidentiality.

The position in South Africa will be researched and compared to that of California and New South Wales. The latter two jurisdictions have more experience and a vast array of regulations with regard to mediation confidentiality, unlike South Africa.

In South Africa mediation confidentiality has not yet been comprehensively considered by the courts and there is also only a small body of legislation and legal analysis available with regard to mediation confidentiality. Therefore it

could be helpful when considering the South African position to also consider the legal position of mediation confidentiality in California and New South Wales.

1.3 Mediation – definition and elements

Mediation has no set definition, there are a myriad of definitions in literature regarding mediation. Therefore it is no surprise that in South Africa, mediation is not conclusively defined. In The *Court Annexed Mediation rules* it is referred to as:

... mediation means the process by which a mediator assists the parties in actual or potential litigation to resolve the dispute between them by facilitating discussions between the parties, assisting them in identifying issues, clarifying priorities, exploring areas of compromise and generating options in an attempt to resolve the dispute;¹⁸

A scholar, such as Chau, describes mediation as:¹⁹

... a voluntary, non-confrontational, informal, private, and nonbinding dispute resolution process in which an impartial and independent person, called a mediator, helps the parties to try to reach a settlement by avoiding time-consuming and costly litigation/arbitration

From these definitions it can be gleaned that a few essential elements. Mediation is a process which is structured, yet informal. The parties voluntarily participate in this process and the process is non-binding, non-adversarial and confidential. It is facilitated by a third party who should be neutral, impartial and capable. The aim of the whole process is, primarily, to facilitate the creation, by the disputing parties, of a mutually acceptable and voluntary agreement that resolves the dispute between them.

1.3.1 Essential elements of mediation

The essential elements of mediation seem to be: party self-determination, neutrality of the mediator, voluntary participation and resolution, and confidentiality.

¹⁸ Reg 73 in GN R183 in GG 37448 of 18 March 2014.

¹⁹ Chau 2007 *Journal of Professional Issues in Engineering Education and Practice* 43.

There is general consensus amongst mediators that party self-determination is mediation's guiding principle,²⁰ and that this is "one value that distinguishes mediation from other dispute resolution processes". In The *Model Standard of Conduct for Mediators* (used in the United States of America) Standard I, it indicates that this principle of self-determination for all parties should form the basis of mediation.²¹

The neutrality stems from the fact that the mediator, who guides the whole process, must be neutral and remain as such throughout the process. The mediator must be trusted by both parties and exhibit certain negotiation skills which he or she applies to help the parties identify their needs and achieve their goals.²² The mediator's main function is to facilitate, not dictate, and neutrality by the mediator is essential.

Mediation offers each party an opportunity to determine and create an agreement that they both could submit to and agree upon. They have the final say in the manner and way in which a possible resolution is reached. The process remains a voluntary one, in the sense that a party may withdraw from the process if it decides so.

Confidentiality as an essential element of mediation is the focus of this study. There is no doubt that in a Western style mediation process confidentiality is central.

1.4 Confidentiality

Confidentiality is one of the key elements (and "selling points") of mediation. As mediation is a non-adversarial process and voluntary, there will be definite fears and concerns by participants in mediation, that if the issue of confidentiality is not properly administered and regulated and subsequent litigation follows, they might find themselves in a compromising position.

²⁰ Alfani 2008 *South Texas LR* 833.

²¹ *Model Standard Conduct for Moderators* (2005).

²² Hoffmann and Zeffertt *Law of Evidence* 269.

Chukwuemerie²³ refers to confidentiality as a principle that ensures that private information is not disclosed in a public domain, which in essence is what confidentiality entails. It refers to information that is seen as private and not public, information that the different party or parties specifically want to keep confidential. Williams²⁴ indicates that if proceedings are seen as confidential, the term implies that information disclosed during the proceedings may not be disclosed to an outsider without the consent of the other party involved in the proceedings. This entails and implies that these communications have a certain protection, and one can understand that there would be an expectation from the parties that the information that they have disclosed, will remain confidential.

Confidentiality makes provision for the fact that the parties to mediation will not disclose statements made in mediation to those not present at the mediation. This should not be confused with a mediation privilege, which offers a narrower protection which entails that statements made in mediation will not be admissible in court proceedings, arbitrations, or legislative hearings.²⁵

Salmon²⁶ sees it as one of the cornerstones of the mediation process, while Charlton²⁷ calls it a "holy untouchable tenet". Confidentiality affords parties the opportunity to negotiate and share information in a protected environment away from public scrutiny, something a court trial can't do.²⁸ It is also vital to the whole mediation process — since in order for a mediator to help parties to find solutions to their issues, disputes and problems, there needs to be a constant flow of information, which will not happen if parties are consistently worried whether the information that they divulge will be used against them at a later

²³ Chukwuemerie 2007 *AHRLJ* 133.

²⁴ Williams "South Africa" 336.

²⁵ Foster and Prentice 2009 *Journal of Dispute Resolution* 163-174.

²⁶ Salmon 1996 *New Zealand Law Journal* 7-8.

²⁷ Charlton *Dispute Resolution Guidebook* 15.

²⁸ Charlton *Dispute Resolution Guidebook* 14.

stage.²⁹ Confidentiality during mediation is needed in order to build trust and to help assist the parties in moving towards agreements and solutions.

The parties to mediation expect confidentiality to be part and parcel of mediation. This expectation of mediation confidentiality is central in all mediation. The more pertinent question, however, is: To which extent and degree should confidentiality be enforced in mediation? Should complete mediation confidentiality be allowed? Or should conditional confidentiality be considered? This would mean that in principle, confidentiality is attached to mediation, but certain conditions or situations might render confidentiality non-applicable or partially applicable obviously linked to certain conditions or principles that are applied. Should exceptions to mediation confidentiality be allowed? And how are these exceptions defined and applied? On which basis will the application of mediation confidentiality be determined? In other words — how should it be regulated?

The Australian author, Laurence Boulle³⁰ makes it clear that there are degrees of confidentiality which are applied to different situations, and, more importantly maybe, assumptions and assertions of confidentiality are not necessarily concrete or guaranteed in all situations. The implications for confidentiality in mediation³¹ are huge and obvious.

It would be unethical and short-sighted to solemnly promise participants complete confidentiality during mediation, if this promise cannot be kept. Additionally, is a form of blanket confidentiality in the best interests of the legal system and society at large in any case? Is complete confidentiality the route to follow?

One can think of various situations where there could be a case for divulging that which transpired during mediation and not to adhere to absolute confidentiality. Criminal activities would be the obvious example, but what if a

²⁹ Crosbie 1995 *Commercial Dispute Resolution Journal* 51-52.

³⁰ Boulle *Mediation: Principles, Process, Practice* 539-542.

³¹ The phrase "confidentiality in mediation" and "mediation confidentiality" will be used interchangeably in this text.

party to mediation afterwards is not happy with the agreement and felt that he or she was bullied into an agreement by the mediator? How else can it be determined if the mediator acted appropriately and professionally if the mediation process — its content and everything that transpired during the process — is not evaluated? This means confidentiality must make way for the interest of justice, or the perceived interest of justice. However, as already indicated, confidentiality during mediation must be a priority for obvious reasons. So how do we regulate confidentiality during mediation?

That is the essence of this study. Confidentiality in mediation is a given, absolute confidentiality is not. The latter implies ironclad protection against any disclosure of information exchanged during mediation, the former not. This implies that there must be ways and means in which to determine to which extent confidentiality is attached and applied to mediation. In order to do this, the regulation of mediation has to be explored. The latter would be able to provide more clarity in the quest for the sensible, effective and just application of mediation confidentiality. This balancing act — between the need for mediation confidentiality and the need to consider when mediation confidentiality should not be enforced, is the question that this study attempts to answer.

1.5 The parties to the mediation

It is essential to take a closer look at the relationships between the various parties involved in mediation, before the sources of mediation confidentiality are explored. Firstly there is the relationship between the two disputing parties, then there is the relationship between the parties and the mediator, thirdly the relationship between the parties involved in the mediation and third outside parties and lastly the legal counsel representing the parties. This is especially important in future litigation, should mediation fail.

Field and Wood³² state that confidentiality in mediation "can be seen then to be either reliant on the goodwill of the parties (and this goodwill can dissolve readily when mediation is not successful), or, ironically, dependent on legal protections for its practical efficacy",³³ a slippery slope indeed. However, they find statutory protections of confidentiality to be limited, and, add "many (arguably even most) mediations in Australia are conducted outside the context of such protections".³⁴

Cole,³⁵ an American author, questions the extent of the protection of confidentiality in mediation and suggests it might be "a promise unfulfilled". Davies and Clarke acknowledged, quite a while back, that "preserving the confidentiality of ADR processes is one of the most difficult legal issues facing the ADR movement today"³⁶ and not everyone is convinced that a lot has changed in this regard. Downes and Rohl³⁷ state that maintenance of confidentiality in mediation "depends on relatively insecure legal protections".

If legislation then in itself is not sufficient, it might be prudent to additionally consider alternative avenues which can also be followed and explored in terms of protecting confidentiality in mediation—contract and common law privilege as Field and Wood suggest.³⁸

1.6 The South African position

The settlement of the Dutch in the Cape in 1652 brought with it the idea of western dispute resolution, which preferred adjudicative outcomes above consensual ones, with the formal Roman Dutch legal system being firmly established as the basis of the South African legal system. Despite this, mediation in the traditional African communities continued.

³² Field and Wood 2005 *QUTLJ* 149.

³³ Field and Wood 2005 *QUTLJ* 149.

³⁴ Field and Wood 2005 *QUTLJ* 150.

³⁵ Cole 2005 *U Kan LR* 1419.

³⁶ Davies and Clarke 1991 *Queensland Law Society Journal* 399.

³⁷ Downes and Rohl 2005 *Proctor* 41.

³⁸ Field and Wood 2005 *QUTLJ* 150.

The English colonial era saw the courts being used as the main method and manner in which disputes were adjudicated, which also assisted in reiterating the adversarial character of the Roman Dutch Law. Arbitration was also used during this time, but basically reflected very similar results to adjudication.

After independence in 1961 legislation further entrenched the use of courts for dispute resolution, with the Roman Dutch Law ruling the roost. Alternative dispute resolution (ADR) received little attention during this time, with arbitration the exception, but mediation was still limited to usage by traditional African communities.

Today, mediation has managed to find a place in dispute resolution in South Africa, and has basically developed into two different branches. The one is the development of Western law (in this case predominantly English law) and the other is indigenous law. *The Court Annexed Rules* dealing with mediation, promulgated in May 2014, as well as the usage of contract law clearly indicate that mediation has followed the example of the rules of the English law, while the indigenous law shows a more communal character with mediation taking place in public, with confidentiality not really a significant element of the process.

This study will focus on the development of the Western law of mediation as it relates to confidentiality. Confidentiality does not play a crucial role in indigenous mediation law, and therefore the focus will be the Western law of mediation.

1.7 Legal sources for the regulation of mediation

The regulation of mediation can only be explored if one considers the sources (in law) for this regulation. What must be considered when trying to find an effective and just manner?

The three main sources of law for the regulation of mediation in South Africa are: common law, legislation and contract or agreement. These sources will offer guidelines as to the manner and way in which confidentiality during mediation should be regulated and approached.

1.8 Common law

1.8.1 Common law principles

As the common law on mediation in South Africa did not develop much through the years it is not easy to establish what the legal position is. Mediation is nevertheless, on a consensual basis, often practised in South Africa. In order to determine what confidentiality in South Africa entails or ought to entail it is necessary to look at other instances where confidentiality is regulated, also by the common law.

1.8.1.1 Contract

Feehily³⁹ sees a contract as one of the oldest ways in which to protect confidentiality in mediation. This calls for all parties, including the mediator, to agree to a confidentiality agreement, in which they typically undertake to keep information which is disclosed during mediation confidential.⁴⁰

However, reliance on contractual confidentiality provisions, as are often found in mediation agreements, can be problematic, and it may not offer the parties the protection that they seek. This will be the case if public policy calls for these provisions to be judged as unenforceable. However, in the absence of other legal provisions, a contract might offer some guarantees of confidentiality.⁴¹

1.8.1.2 Right to a fair trial

Section 35(3) of the *Constitution of South Africa* 108 of 1996⁴² clearly states that every person has the right to fair trial. This does not exclude the possibility to resolve disputes through alternative dispute methods like mediation. The notion of a fair trial is of course linked with the common law notion that a

³⁹ Feehily 2015 *TSAR* 532.

⁴⁰ Feehily 2015 *TSAR* 532.

⁴⁰ Law Society of New South Wales Date unknown <https://www.lawsociety.com.au/cs/groups/public/documents/internetcontent/026501.pdf>.

⁴¹ Feehily 2015 *TSAR* 532.

⁴² Section 35(3) of the *Constitution of the Republic of South Africa*, 1996.

person must get the opportunity to state his or her case, and in a fair manner. This entails a vast array of assumptions and principles with the direct implication that fairness and reasonableness will dictate and guide the litigation process. This may also apply to confidentiality in mediation, and the way in which it is regulated. It could influence the extent and scope of confidentiality in mediation.

1.8.1.3 Boni mores

The *boni mores* principle has its roots in common law as adopted from Roman and Dutch law.⁴³ It refers to the fact that actions, decisions and policy should not be *contra boni mores*—thus "contrary to the legal conventions of the community or inconsistent with public policy".⁴⁴ The *boni mores* principle could surely be one of the guiding common law principles which will assist the regulation of confidentiality in mediation. It could for instance be that confidentiality in mediation cannot be used to interfere with the criminal law taking its course.

1.8.1.4 Without prejudice principle

The without prejudice principle which has been developed in the common law can be a good starting point to help to establish the nature and scope of confidentiality during mediation.⁴⁵ For an extensive period, parties have been encouraged to make use of this common law principle to try and foster resolving disputes. The CCMA Rules, rule 16 specifically, also endorses this and states:⁴⁶

Conciliation proceedings are private and confidential and are conducted on a without prejudice basis. No person may refer to anything said at conciliation proceedings during any subsequent proceedings, unless the parties agree in writing.

⁴³ Neethling, Potgieter and Visser *Law of Delict* 36-40.

⁴⁴ Strode 2015 *SAJBL* 22.

⁴⁵ Brown and Marriott *ADR: Principles and Practice* 497-498.

⁴⁶ Rule 16 in GN R1448 in GG 25515 of 10 October 2003.

The specific words "without prejudice" mean that there should be no prejudice evident as to the rights of the parties involved.⁴⁷ This principle finds its foundation in public policy, with the distinct idea to encourage openness and frankness in discussions, negotiations and settlements.⁴⁸ Mediation falls within this category, since the aim of parties is to openly and freely communicate and negotiate in an attempt to settle disputes. Korobkin⁴⁹ puts it eloquently when he refers to rules and principles that deal with the idea of without prejudice as clear attempts to prohibit disputants from using settlement discussions as an instrument to gain some advantage when it comes to litigation. In mediation it would be exactly the same.

1.9 Litigation: Discovery

Discovery is a well-known feature in litigation. It is a process that aims to ensure a fair trial since parties are expected to make available all relevant information to the relevant parties. Vos⁵⁰ points out that relevance is the yardstick by which discovery is measured, and all:⁵¹

... relevant documents, even if they are confidential, must be discovered, save for privileged documents which are protected from disclosure.

He refers to the *Crown Cork & Seal Co v Rheem South Africa (Pty) Ltd*⁵² which provides some helpful and judicious principles to regulate the discovery of confidential documents.⁵³ Ultimately he suggests that parties should consider placing certain limitations and restrictions on confidential documents when it comes to the process of discovery, using the Cork case as a guideline.

⁴⁷ Hoffmann and Zeffertt *Law of Evidence* 155.

⁴⁸ Rycroft 2013 *SALJ* 202.

⁴⁹ Korobkin "The role of law in settlement" 269.

⁵⁰ Vos 2008 *Without Prejudice* 59.

⁵¹ Vos 2008 *Without Prejudice* 59.

⁵² 1980 3 SA 1093 (W).

⁵³ Vos 2008 *Without Prejudice* 59.

The Court Annexed Mediation Rules⁵⁴ provide that confidentiality in mediation does not limit the duty to discover in litigation proceedings.

Mediation discussions, written and oral communications, any draft resolutions, and any unsigned mediated agreements shall not be admissible in any court proceeding, unless such information is discoverable in terms of the normal rules of court.

1.10 Legal professional privilege

An obvious common law protection measure that can be applied to confidentiality in mediation is the legal professional privilege.⁵⁵ This privilege covers documents and other communication that stems from legal proceedings or from the process of dispensing legal advice.⁵⁶ This aims to ensure that clients and lawyers can communicate freely and unrestrictedly, which is of course one of the main aims of mediation as well.

One should keep in mind that there are various different relationships at play in mediation. There are the obvious relationships between the parties themselves as well as relationship between the parties and the mediator, to name a few. The question can be asked: Should there not be a mediator's privilege, similar to the one an attorney enjoys when it comes to his or her clients? Should the guidelines that are followed when dealing with attorney-client privilege not also be utilised when it comes to confidentiality in mediation?

1.11 Statutory provisions

In South Africa, mediation in general, is not regulated by legislation and the Court Annexed Mediation Rules cursorily deals with confidentiality. The position in South Africa is far from clear. Very few reported cases exist which deal with the principles of mediation in South Africa. It does however, form part of the landscape of the law. According to Joubert the South African government, by 2012, had passed more than 40 statutes which contained mediation

⁵⁴ Reg 73 in GN R183 in GG 37448 of 18 March 2014.

⁵⁵ Feehily 2015 *TSAR* 532.

⁵⁶ Lewis *Legal Ethics* 291-299.

provisions,⁵⁷ such as the *Children's Amendment Act* no 41 of 2007,⁵⁸ the *Labour Relations Act* 66 of 1995⁵⁹ and the *Restitution of Land Rights Act* 22 of 1994.⁶⁰ However, there is currently no statute that regulates the commercial mediation process.⁶¹

In view of the scarcity of information in South Africa on the legal principles of confidentiality in mediation, it will be worthwhile to look at the position in other jurisdictions.

1.12 The position in California

California has an extensive history and vast experience with mediation, specifically confidentiality in mediation. It has extensive regulatory provisions⁶² dealing with confidentiality. The approach that California follows, however, seems to be narrowly construed.⁶³ California has not of yet, accepted the *Uniform Mediation Act*.⁶⁴ This Act was introduced in order to achieve more uniformity and clarity as to the process of mediation in the United States of America, and many scholars feel that California should consider adopting this legislation to ensure a more balanced approach to mediation. Still, their approach to this issue could be valuable for South Africa.

In researching the position in California the common law on confidentiality in mediation, the use of contracts to regulate confidentiality in mediation and the regulatory provisions will be investigated.

⁵⁷ Joubert 2012 <http://www.mediate.com/articles/Joubertj1.cfm>.

⁵⁸ *Children's Act* 38 of 2005. S 110 of the Act requires health professionals, and a host of other people who regularly work with children, to report cases where children have been abused, or are in need of care or protection.

⁵⁹ Section 126(3) of the *Labour Relation Act* 66 of 1995.

⁶⁰ Section 13(4) of the *Restitution Land Rights Act* 22 of 1994.

⁶¹ Feehily 2015 *TSAR* 722.

⁶² Such as *California's Evidence Code* specifically ss 1119 and 1120.

⁶³ *Rojas v Superior Court for the State of California, County of Los Angeles* 2004 33 Cal 4th 407.

⁶⁴ *Uniform Mediation Act* of 2003.

1.13 The position in New South Wales

Australia is a well-known centre for mediation. Its courts have on numerous occasions dealt with issues of confidentiality in mediation. The basis of mediation is also often the law of contract. Many states in Australia also have legislation that specifically deals with confidentiality in mediation. For the purposes of this study, the position in New South Wales will be researched⁶⁵ since the latter seems to have dealt with confidentiality in mediation extensively.

In researching the position in California the common law on confidentiality in mediation, the use of contracts to regulate confidentiality in mediation and the regulatory provisions will be investigated. California has consistently interpreted the issue of confidentiality in mediation very literally which has often been criticised heavily, while the approach in New South Wales seems to be trying to create a balance between the need for confidentiality in mediation and other needs such as adherence of public policy and serving the interests of justice.

1.14 Conclusion

It is clear that the issue of mediation confidentiality is not a simple one. There is an obvious necessary and well-established need for mediation confidentiality, yet absolute mediation confidentiality seems a bridge too far. However, should the protection and regulation of confidentiality during mediation rather be exercised in a narrow, constructed manner (not absolutely but fairly rigid) or should it be dealt with in a more relaxed less rigid and restrictive manner?

If confidentiality is not properly protected during mediation, the latter will surely suffer. Yet, if it is shrouded in absolute protection, public policy and interests may not be served, and one ventures to say, not the goals of mediation either.

Which legal principles should be considered when trying to ascertain an effective and just manner in which to apply mediation confidentiality? How

⁶⁵ *Evidence Act 25 of 1995*. S 131 of New South Wales specifically deals with confidentiality in mediation. See also *Civil Procedure Act of 2005 of New South Wales*, s 30 specifically.

should these principles be applied? These are all questions to consider when dealing with mediation confidentiality?

The second chapter will deal with a general exposition of confidentiality in mediation, and the third chapter will specifically look at the South African context of mediation confidentiality. The fourth chapter will focus on the United States of America and indicate how mediation confidentiality is dealt with, especially in the state of California. The fifth chapter will discuss the Australian position with special reference to New South Wales, and the sixth chapter will be a reflective chapter where a reflection is given on mediation confidentiality in general and also how the three different constituencies deal with this crucial aspect of mediation. The last chapter offers a short conclusion to this study.

CHAPTER 2

The scope, nature and need for confidentiality

2.1 Introduction

Confidentiality forms one of the pillars of mediation. When disputants or parties to mediation submit themselves to mediation, the promise of confidentiality is offered, explicitly as well as tacitly. The question is to what extent can this promise be upheld? One can even, if you want to be facetious, ask if this promise should be made at all. It is prudent to first have a look at the consideration of mediation as a way in which to settle a dispute, and then consider the role confidentiality plays in this process.

2.2 When should mediation be considered as a possibility?

It is important to understand that mediation is one of many possible ways in which to address a dispute. Mediation is not the only, and also not always the best option to resolve a dispute.⁶⁶ The context and the situation must be considered before one declares that mediation is the way forward.

The resolution of disputes will depend on a variety of different factors. These factors, according to Moore⁶⁷ will be how adversarial the process is; the degree of coercion involved; the level of formality of the procedures; the degree of privacy afforded to the parties; the quality and aim of the outcomes of the resolution of the dispute, and lastly, the influence of third parties.

It is a moot point that mediation takes place within a certain context and environment. According to Dunne and Wall⁶⁸ when one considers the context of mediation then this context consists of four segments: conflict type, culture,

⁶⁶ It does seem to be the most popular in many countries.

⁶⁷ Moore *The mediation process* 64.

⁶⁸ Wall and Dunne 2012 *Negotiation Journal* 218.

country and mediation institutions. This context has a definite influence on mediation.⁶⁹

The type of conflict basically refers to two different aspects: the conflict skills of the disputants and the fact that the disputants will still have a relationship afterwards (e.g. divorced parents with children) or not (e.g. buyer and seller).⁷⁰ The fact that disputants will or will not be involved in a relationship after mediation, will obviously play a part in the way the mediator handles the situation. If disputant will still be involved in a relationship, then the mediator will aim to build an amicable relationship between disputants, and if it is not the case, different strategies might be followed. Additionally, disputants with poor conflict skills will receive more advice and assistance from mediators.⁷¹

According to Wall and Dunne, who studied the mediation literature of the first part of this century:

...the culture of a society dictates not only *how* mediators will behave but also *who* will become a mediator.⁷²

They believe that the culture of a country, or group, plays a significant role in mediation. Lastly they indicate that the institution that offers the mediation (and its philosophy regarding mediation) also plays a part in creating and influencing the context of mediation.⁷³ It would therefore be short-sighted and unwise not to consider the context and background of mediation in general, and specifically of the said mediation.

If one then turns to mediation itself, there are definite factors to consider. Due to the specific nature of mediation, and how the process works and what it aims

⁶⁹ Wall and Dunne 2012 *Negotiation Journal* 218.

⁷⁰ Wall and Dunne 2012 *Negotiation Journal* 220-221.

⁷¹ Wall and Dunne 2012 *Negotiation Journal* 221.

⁷² Wall and Dunne 2012 *Negotiation Journal* 222.

⁷³ Wall and Dunne 2012 *Negotiation Journal* 224.

to achieve, it would be obvious that certain disputes would lend themselves more readily to mediation as a form of resolution than others do.⁷⁴

Mediation will be more effective in certain situations than others. The context and nature of the dispute should be considered before mediation is undertaken. The position of the disputants (emotionally and from a legal perspective) should be considered, and one must never underestimate the role that the mediator has to play in mediation.

Moore⁷⁵ sees mediation as a process of dispute resolution where a third party (mediator) assists the disputants, so that they can ultimately reach a voluntary and mutually acceptable agreement. In order to achieve this, the mediator has specific functions and tasks that he or she must fulfil. Typically these would be the enhancement of communications between the disputants; helping the disputants to identify and understand each other's needs, interests and thus, in the process, build productive and effective relationships. The mediator aims to achieve this by using effective problem-solving strategies and negotiation procedures.⁷⁶

This places an enormous responsibility on the mediator. Not everyone will necessarily agree with Moore's belief that the mediator should actively fulfil all the functions that are listed above, but no one cannot disagree that the role of the mediator is of vital importance in mediation. The fact is that disputants have entered into mediation because they are unable to resolve the dispute between themselves; they need a third party to assist (or were told they needed one if the mediation is mandatory). The role that this third party fulfils will be crucial for the outcome of the mediation.

⁷⁴ Moore *The mediation process* 17. He suggests that mediation will be applicable if: there is poor communication between disputants, a lack of trust, preconceived notions, strong emotional perceptions regarding the dispute and the other parties, a lack of progress and an inability to reach an agreement without additional help from a third party, amongst other aspects. If these are the conditions are the prevalent ones when disputants enter into mediation, one can imagine a mediator would have tough task ahead of himself or herself.

⁷⁵ Moore *The mediation process* 24.

⁷⁶ Moore *The mediation process* 24.

2.3 The parties involved in mediation

2.3.1 The disputants

The disputants are the parties that are involved in the dispute. They take centre stage during mediation. There is a wide range of different contexts that could be applicable. Mediation involves a myriad of different parties and different situations. The disputants could have been spouses - or might still be - friends, business partners or former business partners, or it could be employers and employees who form part of the mediation. It could be individuals, groups, companies or businesses that make use of this process of mediation.

Research has also shown that mediation is especially effective in the sense that it can help to avoid disputes escalating into drawn-out, costly affairs.⁷⁷ This, of course, implies that mediation should be undertaken fairly early on in the dispute. Often by the time that the disputants eventually engage in mediation, the conflict has become so intense and emotional, and the different disputants have developed such fixed beliefs and assumptions about each other, that mediation often fails.⁷⁸ It is clear that if the relationship between the disputants regresses, the chances of a successful mediation decrease. If the relationship between the disputants has reached a stage where distrust and fixed ideas (especially negative ones) dominate the relationship, the perception of confidentiality, and confidentiality itself, will suffer.

However, Moore⁷⁹ also suggests that mediation is often the best option when disputants cannot find a way forward on their own; when they are stuck in pre-conceived ideas, when high levels of emotions influence their perceptions; and poor communication exists between the disputants. Many would feel that at such a stage, mediation might be quite a tall order, but Moore seems to regard

⁷⁷ Bennett "Experiencing Mediation from the Disputants' Perspective" 171.

⁷⁸ Harlos "Preferences for Mediating Personal Harassment at Work: A Theory-Driven Approach" 9-13.

⁷⁹ Moore *The mediation process* 17.

the mediator as an extremely vital cog in the mediation machine, one that does far more than just listens and guides.⁸⁰

It is also important to note that most disputants enter mediation with certain outcomes in mind.⁸¹ This just goes to show that all parties involved in mediation, especially the mediators, should have a clear understanding of the nature, scope and challenge of mediation. They should carefully consider the context of dispute, the parties involved, and the strategy which should be followed. Moore is therefore absolutely correct if he views the mediator as a critical party in the mediation process.

When the parties agree to mediate, they usually sign an agreement to mediate, which more often than not, includes a clause that refers to the confidentiality of the information that will be disclosed. Any party is of course entitled to waive confidentiality if they should choose to do so. Often parties draw up an agreement that indicates specifically which information is confidential, and they show their commitment to this by signing such an agreement. All of this is done, one would trust, in good faith.⁸²

One should also not lose sight of the fact that mediation is voluntary (and often non-binding) and a disputant can easily just withdraw from the whole process. Bearing this in mind, even if a disputant enters mediation in good faith with the intent to reach an agreement with the other disputant, the fact remains that this might never happen. The disputant might have entered the mediation process with high hopes, but the reality is that the matter could still end up being litigated.

⁸⁰ Moore *The mediation process* 24-25. He expects mediators to assist in building effective and healthy relationships between disputants, improve communication and create greater understanding between disputants of each other's needs and interests. This is certainly what mediators in practice often strive for and sometimes achieve, but it remains a challenging task.

⁸¹ Wall and Dunne 2012 *Negotiation Journal* 229.

⁸² Dawkins 2014 *Journal of Business Ethics* 286. The principle of good faith is taken from the Latin term *bona fides* and refers to an honest and sincere effort.

The relationship between disputants during mediation is dynamic and potentially complex. If disputants enter mediation with an open mind and the relationship between the parties is not one of distrust or deep-seated dislike, if there is a real desire to seek a possible solution to their dispute; they will most probably disclose information fairly freely and openly. They will trust the process, or at least give it a fair chance, and they will expect the same from the other side as well as the mediator.

However, conversely, if a disputant (or mediator) does not mediate in good faith and is not seriously seeking a solution to their dispute, mediation will most probably fail. By that time, however, information has been disclosed and confidentiality will be part and parcel of the whole issue. In a way it reminds one of an ante-nuptial contract – when it is drawn up everyone hopes the day will not come that it has to be enforced, but if that day does arrive, everyone involved hopes that the agreement will protect them and not leave them in a vulnerable and undesirable position.

This places the issue of confidentiality, and the perception that disputants have regarding confidentiality in mediation, in a sensitive position, which implies that proper and sensible regulation of this aspect of mediation is essential.

2.3.2 The mediator

The mediator is the neutral and impartial third party that is involved in mediation. The role of the mediator is crucial in this matter, since he or she is there to primarily assist the parties in aiming to reach a settlement. This must be done in an independent and impartial manner. It implies that the mediator does not choose sides, or treat one party more favourably than the other party, or compromise his or her neutrality in any manner or way. The disputants expect from the mediator, as Exon⁸³ states: "freedom from favouritism, bias or prejudice".

⁸³ Exon 2008 *University of Florida State LR 577*, 583.

Thus, in order for the mediator to fulfil his or her role effectively, the mediator must gain the trust of the parties involved. Moore⁸⁴ seems to suggest that the mediator tries to "create an atmosphere of trust and cooperation" during the course of the mediation process.

Lovenheim goes as far as to state that "the absolute requirement of confidentiality places on the mediator the same pressures that a priest has regarding confession and a lawyer has with a client".⁸⁵ If one considers that such a relationship, between priest and confessor or lawyer and client, are all very clearly regulated and protected by statute and case law, then this statement by Lovenheim carries additional weight.

It places the issue of trust in the centre of mediation, which again relates to confidentiality.

In essence a mediator asks disputants to trust him or her. They are expected to entrust the mediator, firstly with the actual information that is disclosed during mediation. Secondly, they also have to trust the mediator's skills and application of these skills during the mediation process. Above all, they need to trust that the mediator will, in good faith, use his or her skills to, in a neutral and open-minded way⁸⁶ facilitate dialogue between the parties which will, hopefully, lead to the creation of an agreement between the disputants, one which the disputants have drafted and agreed upon.

Marshall did research in Australia where she interviewed experienced mediators and focussed on the issue of impartiality during mediation.⁸⁷ She found that mediators experienced stress when it came to the responsibility they have to balance power relationships during mediation. Mediators were also acutely aware of the fact that if they favour a party above another, or abuse their

⁸⁴ Moore *The mediation process* 161.

⁸⁵ Lovenheim and Guerin *Mediate don't litigate* 34.

⁸⁶ Weinstein *Mediation in the workplace: a guide for training, practice and administration* 68-69 points out that a mediator should strive to be impartial at all times and that this position of impartiality forms part of the uniqueness of mediation.

⁸⁷ Marshall 2010 *ADR Bulletin Bond University DRC* 1761.

power, it can lead to injustice.⁸⁸ This clearly indicates a realization from mediators as to the importance of remaining impartial and thus assisting in establishing trust in mediation.

Nolan-Haley⁸⁹ cites the abuse of confidentiality as one of the ways in which lawyers, when they act as mediators, derail the mediation process and deliberately so. She goes on to explain that the assumption exists that if:

... parties' communications are protected from public disclosure, they are more willing to engage in open discussions that will lead to the settlement of their disputes.⁹⁰

Some lawyers, however, use these mediation opportunities to gain some insight into the strategies of opponents at trial,⁹¹ or use it as fishing expeditions in order to gain valuable information without any real intention to reach an agreement during mediation.⁹² This is absolutely contrary to the whole idea of mediation and specifically the use of confidentiality during mediation.

Nolan-Haley⁹³ goes further and states that an even more malignant issue is the intentional abuse of confidential communications which have been disclosed during mediation, by some lawyers. She states that it is not surprising that there is a definite "disconnectedness between problem-solving theories of mediation advocacy and legal mediation practice".⁹⁴ The reason for this is simply because mediation has a problem-solving culture as opposed to lawyers who come from an adversarial background and training and often still have this adversarial mentality when they mediate, which causes an obvious clash.⁹⁵

If disputants do not experience a mediator as being neutral and impartial and thus mediating in good faith, the mediation is inevitably doomed. A mediator that fails to be impartial, neutral and act in good faith, adds to the erosion of

⁸⁸ Marshall 2008 *QUTLJ* 180-181.

⁸⁹ Nolan-Haley 2012 *Harvard Negot LR* 82.

⁹⁰ Nolan-Haley 2012 *Harvard Negot LR* 82.

⁹¹ Relis *Perceptions in litigation and mediation* 232.

⁹² Macfarlane 2002 *Journal of Dispute Resolution* 287.

⁹³ Nolan-Haley 2012 *Harvard Negot LR* 82.

⁹⁴ Nolan-Haley 2012 *Harvard Negot LR* 83.

⁹⁵ Nolan-Haley 2012 *Harvard Negot LR* 83.

trust in the whole process of mediation which will be detrimental to the process.⁹⁶ Additionally what it also does is that it then strengthens the calls for a strict, narrow application of confidentiality, which might not always be in the best interest of the disputants, justice or the legal system.

A mediator that feels the trust relationship is the most important aspect of the mediation process might tend to put a very high premium on this and will guard this aspect fiercely, while a mediator who feels that the trust relationship is of less importance than the actual information obtained and disclosed during mediation, will do the opposite.

If you are a mediator that is results-orientated, you might lean towards viewing the information as being more important, because that can be used to move closer and quicker towards an agreement. Or, depending on the information that is obtained, a mediator might feel that the specific information that has been disclosed needs to be disclosed to parties outside of the mediation, because that would be in the best public interest. This would of course immediately have a direct impact on confidentiality. Others might feel the trust aspect is the absolute cornerstone of good and acceptable mediation and would thus prefer very stringent regulations when it comes to confidentiality in mediation.

2.3.3 Outside parties (Third parties)

Mediation doesn't simply involve the mediator and the disputants, often third parties are also involved, or at least have an interest in the matter. Confidentiality will therefore also involve them. These third parties can range from legal advisors, social workers and other stakeholders to people directly involved in the dispute (e.g. children in a custody matter).

The nature and scope of confidentiality can have a definite effect on third parties. This can be seen if one considers the view of Altobelli and Bryant (as

⁹⁶ Hung 2002 *ADR Bulletin* 45.

expressed above).⁹⁷ It appears that in Australia the rules and legislation regarding confidentiality in mediation, do not necessarily serve the best interests of the child (thus a third party) which makes the issue of confidentiality even more intriguing.⁹⁸

When parties undertake mediation they most probably understand that the information they disclose will remain confidential amongst the parties which form part of the attempt to resolve the dispute (which includes the mediator), but the effect and importance of confidentiality can also, and often does, have an effect on third parties.

Third parties could of course also be present during mediation (friends, family members, attorneys) and the confidentiality will then involve them to an even greater degree.⁹⁹

The extent to which confidentiality applies to these parties may also differ. In commercial mediation we often find interested third parties who do not form part of the mediation, but who have a definite interest in the matter. Emery¹⁰⁰ uses commercial mediation that takes place during foreclosure proceedings as a good example of this. Here an authoritative body which does not form part of the mediation might have a specific interest in the matter, although they are not directly involved. The *Uniform Mediation Act* (hereafter *UMA*) which is used by most states in the United States of America specifically indicates that a mediator:

... cannot disclose mediation communications to any authoritative body that may render a decision about the dispute with very limited exceptions¹⁰¹

The scope or reach of confidentiality in this case is thus very specific and certainly seems to exclude interested third parties, such as authoritative bodies.

⁹⁷ Altobelli and Bryant "Has confidentiality in Family Dispute Resolution reached its use by date?" 2.

⁹⁸ Altobelli and Bryant "Has confidentiality in Family Dispute Resolution reached its use by date?" 2.

⁹⁹ Emery, Rowen and Dinescu 2014 *Family Process* 504.

¹⁰⁰ Emery, Rowen and Dinescu 2014 *Family Process* 505.

¹⁰¹ Section 7 of the *UMA*.

Additionally the act goes on to state that a mediator may only indicate attendance, if mediation has taken place, and an agreement has been reached, but he or she may not disclose the content of this agreement.¹⁰² Section 8 of the UMA¹⁰³ specifically indicates that "mediation communications are confidential to the extent agreed by the parties or provided by other law or rule of this State". So if a state has accepted the UMA then it would regulate mediation confidentiality according to the Act, if not then the state law on mediation will be used.

This will of course be challenged by such interested third parties if they seem fit. This is exactly what Altobelli and Bryant¹⁰⁴ refer to when they state that Australian legislation and rules do not seem to protect the best interests of the child when it comes to confidentiality in mediation, especially in instances such as family violence. This just goes to show that the scope of confidentiality can reach beyond actual parties who are involved in mediation (disputants and mediator). The application and regulation of confidentiality must therefore regard third parties as well – and since regulation will also be applicable to third parties.

2.4 Different models of mediation

The different models used by mediators during mediation can also have an effect on confidentiality. Leonard Riskin is seen as the leading figure in American mediation, when it comes to gaining a better understanding of the different methods of mediation. He designed a grid highlighting mediator orientations, and this grid consists of mediation approaches, or orientations if you wish, which have become universally known as facilitative mediation and evaluative mediation.¹⁰⁵

¹⁰² Section 7 of the *UMA*.

¹⁰³ Section 8 of the *UMA*.

¹⁰⁴ Altobelli and Bryant "Has confidentiality in Family Dispute Resolution reached its use by date?" 2.

¹⁰⁵ Riskin 1996 *Harvard Negot LR* 50-51.

These two models or approaches basically focus on different aspects. A "rights-based" approach concentrates on the legal rights of the parties, and aims to meet the relevant legal criteria with regard to a dispute, consistent with resolutions in a more traditional court setting. This approach will favour evaluative mediation. An "interest-based" approach aims at the fostering of the underlying interests of the parties and therefore offers broader solutions and here a mediator would rather use a facilitative approach. Different approaches can therefore lead to different results.¹⁰⁶ Recently a third option – transformative mediation – has also been added.¹⁰⁷

2.4.1 Evaluative and facilitative mediation

In this approach to mediation, mediators take an active role when leading the mediation. It has been described as an approach:

... establishing an expectation that the mediator will make assessments about the conflict as well as its resolution and communicate those assessments to the parties.¹⁰⁸

Due to this approach, mediators who follow this course tend to fulfil a very active role during mediation.¹⁰⁹ The danger lies in the fact that this type of approach makes a few profound assumptions. The first one seems to be that mediators can make appropriate and meaningful assumptions about the legal issues and merits involved in the matter. Secondly, because they are able to do that, they can successfully establish the facts related to the case (they are thus fact-finders) since that is essential if you want to be able to make a meaningful assumption about the court's decision in a specific legal matter.¹¹⁰ Proponents of

¹⁰⁶ McCullan 2017 <https://www.jamsinternational.com/blog/facilitative-vs-evaluative-mediation>.

¹⁰⁷ Bush and Folger *The promise of mediation* 43. Here the focus is more on empowerment of the parties.

¹⁰⁸ Folberg, Milne and Salem *Divorce and family mediation models* 73.

¹⁰⁹ Rubinson 2016 *Cardozo J Conflict Resol* 878. This involves predicting the strength of case, possible outcomes of the case and assessments regarding agreements and possible resolutions.

¹¹⁰ Rubinson 2016 *Cardozo J Conflict Resol* 878-879.

this method praise it for its effectiveness and the fact that it decreases the time spent in dialogue, and it arrives at an agreement in a speedier manner.¹¹¹

Facilitative mediators follow a different path during mediation. They are of the opinion that the participants (disputants) are in the best position to determine the issues that are in dispute, and they are also in the best position to construct their own solutions or agreements on how to deal with these issues.¹¹²

Riskin¹¹³ states that:

The facilitative mediator assumes that his principal mission is to enhance and clarify communications between the parties in order to help them decide what to do.

Proponents of the method are forward-looking (more interested in the future than the past) and thus tend to seek "to set aside the dominance of legal norms in conventional, litigation based views of conflict resolution".¹¹⁴ This approach focuses more on relationship-building than rules and regulations, as opposed to evaluative mediation, which seems to focus more on issues and its legal merits, in order to come to a speedy agreement.

2.4.2 Transformative mediation

Here the mediator takes an even less active role than during facilitative mediation. The mediator aims to get the parties to focus on empowerment and recognition.¹¹⁵ This involves a restoration of the value and worth of the participants as well as empathy for the situation and each other.¹¹⁶ It is not settlement-driven, it is more about the transformation of the interaction between the participants, and a resolution is just a by-product.¹¹⁷

¹¹¹ Folberg, Milne and Salem *Divorce and family mediation models* 77.

¹¹² Riskin 1996 *Harvard Negot LR* 32-34.

¹¹³ Riskin 1996 *Harvard Negot LR* 24.

¹¹⁴ Rubinson 2016 *Cardozo J Conflict Resol* 880.

¹¹⁵ Bush and Folger *The promise of mediation* 22-23.

¹¹⁶ Bush and Folger *The promise of mediation* 22-23.

¹¹⁷ Rubinson 2016 *Cardozo J Conflict Resol* 881.

2.5 How important is trust in mediation?

The concept of trust is a wide, far-reaching one has been described as "ubiquitous, complex, multi-faceted phenomenon that is in need of deeper study".¹¹⁸

The scope of this study does not allow an in-depth analysis of the complex issue of trust, but there are a few aspects that need to be highlighted.

If one considers the definition of mediation (and there are many) then one has to acknowledge that trust plays an integral part in the whole process of mediation.

Moore¹¹⁹ describes mediation as:

Mediation is generally defined as the intervention in a negotiation or a conflict of an acceptable third party who has limited or no authoritative decision-making power but who assists the involved parties in voluntarily reaching a mutually acceptable settlement of issues in dispute. In addition to addressing substantive issues, mediation may also establish or strengthen relationships of trust and respect between parties or terminate relationships in a manner that minimizes costs and psychological harm.

This definition, of course, has various aspects and elements to it, but it goes without saying that trust features prominently. If one considers Moore's definition, it is laden with the element of trust. In this definition Moore indicates that mediation entails that the mediator assists the parties in trying to reach an agreement, addresses substantive issues and even aims to strengthen relationships - all of these seem to infer great levels of trust.

Mediation basically asks parties involved in a dispute to circumvent litigation (or at least first attempt mediation) and trust mediation to assist them in reaching an agreement. Due to the nature of mediation, this agreement will only be reached if parties are willing to disclose important and often potentially

¹¹⁸ Parkhe, Miller and Stewart 2000 *The Academy of Management Review* 10, 11.

¹¹⁹ Moore *The Mediation process* 15.

damaging information, in order to reach an agreement that they are comfortable with.

If the parties reach this agreement, with the guidance of the mediator, then the added advantage is of course that a great level of self-determination has been achieved – the parties had the definitive say in their own matters – not the court or a tribunal or another similar forum.

The flipside is of course that the process is voluntary, unlike litigation, so if a party should choose to withdraw, no agreement is reached and the process has failed. Additionally the matter could still end up being litigated (and often does) which has its own challenges. The parties will now obviously be concerned about the information that they have divulged during mediation and there could be a nagging question lingering in their minds – how much of what I've said during mediation will now be used against me by my opponent during litigation?

This speaks directly to trust, because the level of trust that the participants had, or have in mediation, in the specific mediation process that they have been part of, will definitely determine their level of fear and vulnerability. If they trust the mediation process and feel that the information that they have divulged will be protected, then they will not fear a backlash during litigation, if not, obviously they will.

Salem¹²⁰ states that one of the first things a mediator does is to try and gain, and maintain one would think, parties' trust during mediation. This would suggest the importance of trust in mediation, as well as the fact that it is an on-going process, and a delicate and sensitive one.¹²¹ It is also important to realize that different degrees of trust can operate in a situation, and that these degrees of trust can vary during the course of mediation. Participants in mediation might

¹²⁰ Salem 2003 <http://www.beyondintractability.org/essay/trust-mediation>. See also Bultena, Ramser and Tilker *Southern Journal of Business and Ethics* 66 which sees establishing trust as "... the first vital foundational step in successful mediation ..., without which, mediation will fail".

¹²¹ See Burr 2002 *Dispute Resolution Journal* 70 who points out that if mediation wants to promote peace-keeping and assist to solve problems, then it is dependent on the fact that trust exists between participants in the process.

initially trust the mediator but if something transpires during mediation that has an influence on that trust, it would have a direct impact on the degree of trust that the parties exhibit.

A survey that involved feedback from more than thirty experienced mediators indicated that more than seventy five percent of these mediators saw their ability to develop a relationship that involved understanding, empathy and trust with the parties that they were dealing with, as the most important ingredient in successful mediation.¹²²

Salem¹²³ emphasizes the paramount importance of trust in mediation, and indicates that high trust levels equate a greater openness and willingness from parties to share information and to engage in meaningful communication during mediation. Higher trust levels also lead to an environment that is more conducive to the drafting and acceptance of agreements between parties. It is also important to note that Salem¹²⁴ states that the trust levels are usually the lowest when mediation is initiated, which means that the mediator has to work at improving (or even establishing) the trust levels, and maintaining these - if they are high - from the outset of mediation until the completion of the process.

This translates to the fact that the participants in mediation (the disputants) must have a certain level, and one would venture to say a fairly high one, of trust in the mediation process and the mediator that heads up this process. Also keep in mind this is a voluntary process, so participants can withdraw at any stage, unlike litigation, and if a party, or both parties for that matter, have a serious concern surrounding the mediation process or the ability or neutrality of the mediator, they are most likely to withdraw from the mediation process.

It is thus in the interest of mediation at large to promote trust in the mediation process and a large part of that trust will centre in confidentiality – will the information that a participant divulge in mediation remain confidential ? Will all

¹²² Goldberg 2005 *Negotiation Journal* 365,366.

¹²³ Salem 1993 *Negotiation Journal* 309.

¹²⁴ Salem 1993 *Negotiation Journal* 310.

of it remain confidential or only parts of it? What does the promise of confidentiality which mediators so readily offer to participants, actually entail? What guides and regulates this promise?

Some suggest that this level of trust should be at such a high level that parties must have the knowledge and assurance that the mediator will not testify on his or her own accord, even when being compelled to do so.¹²⁵ This seems to reflect a definite similarity to the idea of an attorney-client and doctor-patient privilege (a legal professional privilege) but does offer its own challenges.

2.6 What is confidentiality?

Black¹²⁶ explains privileged communications as those communications which have been made by certain parties within the confines of a protected relationship, and that these communications are protected from forced disclosure.

Chukwuemerie¹²⁷ refers to confidentiality as a principle that ensures that private information is not disclosed in a public domain, which in essence is what confidentiality entails. It refers to information that is seen as private and not public, information that the different party or parties specifically want to keep confidential. Williams¹²⁸ indicates that if proceedings are seen as confidential, the term implies that information disclosed during the proceedings (Williams specifically refers to arbitration but it obviously refers to proceedings in general) may not be disclosed to an outsider without the consent of the other party involved in the proceedings. This entails and implies that these communications have a certain protection, and one can understand that there would be an expectation from the parties that the information that they have disclosed, will remain confidential.

¹²⁵ Anon 1984 *Harvard LR* 446.

¹²⁶ Black *Black's Law Dictionary* 1979.

¹²⁷ Chukwuemerie 2007 *AHRLJ* 133.

¹²⁸ Williams "South Africa" 336.

2.6.1 *The need for confidentiality in mediation*

Confidentiality is one of the key elements of mediation. Due to the nature of mediation, as pointed out in the previous chapter, confidentiality will be a crucial component of the process of mediation. Confidentiality will always be an integral part of the mediation process, about this there is no question, the more pertinent question is how do we find apply and regulate the whole issue of confidentiality when it comes to mediation?

Salmon¹²⁹ sees confidentiality as one of the cornerstones of the mediation process, while Charlton¹³⁰ calls it a "holy untouchable tenet". Confidentiality affords parties the opportunity to negotiate and share information in a protected environment away from public scrutiny, something most court trials can't do.¹³¹ As Cohen¹³² points out, parties will more readily speak freely and make certain admissions, if an assurance of confidentiality has been given.

It is also vital to the whole mediation process – since in order for a mediator to help parties to find solutions to their issues, disputes and problems, there needs to be a constant flow of information, which will not happen if parties are consistently worried whether the information that they divulge will be used against them at a later stage.¹³³ Confidentiality during mediation is needed in order to build trust and to help assist the parties in moving towards agreements and solutions.

The fact that mediation often does not follow the litigation model in the sense that it is not predominantly rights-based, but rather aims at a solution that can work for both parties, and not just the fixation on rights, assists in getting

¹²⁹ Salmon 1996 *New Zealand Law Journal* 7-8.

¹³⁰ Charlton *Dispute Resolution Guidebook* 15.

¹³¹ Cohen 2013 *Florida LR* 14.

¹³² Cohen 2013 *Florida LR* 14.

¹³³ Crosbie 1995 *Commercial Dispute Resolution Journal* 51-52.

disputants to open up and disclose confidential information. Harkavy¹³⁴ suggests that mediation:

... provides a comfortable forum for all parties and thus is more likely to facilitate a workable resolution to a dispute than a more adversarial process involving rights adjudicated in a formal setting under a fixed set of rules.

This means that as long as disputants do not focus excessively on a rights-based approach and embrace the idea of seeking a solution instead of the adversarial route of litigation, disclosure of information (all information) will also flow more freely.

One would then, logically, infer from this, that when the disputants are willing to mediate in good faith, and they are genuinely seeking a resolution to their dispute, they would be more willing to disclose confidential information. They will also be more forthright in sharing information, despite the fact that they are engaging with an opponent. If they do not trust the process of mediation, or the other party's intentions during mediation, and the relationship has reached high levels of distrust (which remain high during mediation), they will think twice before sharing confidential information, despite assurances that information during mediation will remain confidential.

Confidentiality is one of the key elements (and "selling points") of mediation and since the latter is a non-adversarial process and voluntary, there will be definite fears and concerns by participants in mediation that if the issue of confidentiality is not properly administered and regulated and subsequent litigation follows, they might find themselves in a compromising position.

The settlement of a case is often achieved if parties display the ability to disclose intimate details and information which might be contrary to their own interests, and therefore confidentiality becomes exceptionally important during mediation.¹³⁵

¹³⁴ Harkavy 1999 *Wake Forest Law Review* 156.

¹³⁵ Lowry and Robinson 2001 *Los Angeles Lawyer* 28, 31.

It is therefore critical that parties that are involved in mediation need the assurance that confidentiality in mediation is taken seriously and the protection of such confidentiality becomes crucial.

2.6.2 Confidentiality in mediation

We have briefly discussed confidentiality and mediation. Confidentiality is thus a well-known and accepted concept in law and it plays a crucial part in mediation. It is important to grasp the nature of confidentiality in mediation, and the context within which it takes place.

According to Gibson¹³⁶ confidentiality in mediation has at its heart two aspects – the first has to do with information obtained during mediation, and the second one with a "special relationship of trust between the mediator and disputants".¹³⁷

This places two very important, but possible conflicting aspects of mediation next to each other. The information gained or obtained during mediation is obviously on the one end of the scale, while the trust relationship between the mediator and the disputants will be on the other end of the scale. Which one is more important? Should the trust relationship be paramount or should the actual information which has been disclosed be regarded as the most important aspect? This could become a very thorny issue for the mediator especially, but of course, also for the disputants.

2.6.3 Public policy

A concept such as confidentiality which rests on the premise of protection of information, will always find itself in the sphere of public policy. Public policy cries out for that which is in the best interests of the public,¹³⁸ and having access to relevant information will certainly be in the best interests of the public.

¹³⁶ Gibson 1992 *Journal of Dispute Resolution* 27.

¹³⁷ Gibson 1992 *Journal of Dispute Resolution* 27.

¹³⁸ *Boni mores* (good morals) is a common law principle that pertains to that which is fair and just as seen by society.

Additionally, there is abundant legislation in South Africa to suggest that a flow of relevant and pertinent information is of utmost importance. The *Promotion of Access to Information Act 2* of 2000 states as its objective:¹³⁹

... to give effect to the constitutional right of access to any information held by the State and any information that is held by another person and that is required for the exercise or protection of any rights;

Section 32(1) of the *Constitution of the Republic of South Africa Act 108* of 1996 (the Constitution) sees this access to relevant information as a fundamental and essential right and offers:¹⁴⁰

... everyone the right of access provides that everyone has the right of access to records or/and information held by the state and any information held by another person and that is required for the exercise or protection of any rights.

Confidentiality in mediation will, however, have to consider the *boni mores* of the public with regard to its regulation and application in law. Society's view of what is fair and just when it comes to the sharing of information must be incorporated in how we deal with confidentiality in mediation.

How should this be applied to mediation? Just as it is in the public interest that there is access to relevant information and that everyone has the right to a fair trial,¹⁴¹ which would include access to all relevant information, it is also in the interests of the public and that of justice, that participants to mediation are offered a certain level of protection when it comes to confidential information, and therein lies the challenge.

2.7 Contract

Feehily¹⁴² sees a contract as one of the oldest ways in which to protect confidentiality in mediation. This calls for all parties, including the mediator, to agree to a confidentiality agreement, in which parties to the mediation typically

¹³⁹ *Promotion of Access to Information Act 2* of 2000.

¹⁴⁰ *Constitution of the Republic of South Africa*, 1996.

¹⁴¹ Section 34 of the Constitution.

¹⁴² Feehily 2015 *TSAR* 532.

undertake to keep information which is disclosed during mediation, confidential.¹⁴³

Confidentiality agreements are seen as legally binding contracts that prohibit the disclosure of information.¹⁴⁴ Such contracts can protect a vast array of different aspects such as anonymity, trade secrets, arbitration and mediation proceedings, and settlement agreements to name a few.¹⁴⁵ These contracts are then specifically entered into by parties at mediation in order to ensure the non-disclosure of certain information.

The rationale behind this seems quite obvious. The parties involved want protection and an assurance that that which they will share during mediation, will not be used against them in future, and from a mediation perspective, such assurances should help to promote honesty and a greater degree of willingness to actively seek a settlement.

Usually before the mediation starts, the parties will enter into a mediation agreement. The disputants will sign such an agreement, and the latter would, typically, cover issues such as confidentiality, the mediator's fees and even indicate the without prejudice nature of the process.¹⁴⁶

Boulle and Nestic¹⁴⁷ also suggest that the agreement should cover aspects such as: what type of information will be covered by the agreement; exceptions, which individuals can claim confidentiality and against whom this confidentiality can be claimed as well as the obligations of the mediator with regard to the information that has been obtained during the mediation.

¹⁴³ Feehily 2015 *TSAR* 532.

¹⁴³ Law Society of New South Wales Date unknown <https://www.lawsociety.com.au/cs/groups/public/documents/internetcontent/026501.pdf>.

¹⁴⁴ Gilles 1995 *Buffalo LR* 43. See also Alfini and Galton *ADR Personalities and Practice Tips* 236 which indicates that parties to a mediation may use a contract as a means by which to establish confidentiality.

¹⁴⁵ Doré 1999 *Notre Dame LR* 283, 286, noting that courts permit confidentiality agreements to encourage parties to settle.

¹⁴⁶ Stit *Mediation: a practical guide* 45.

¹⁴⁷ Boulle and Nestic *Mediation Principles, Process, Practice* 500-501.

In the United States of America, when it comes to mediated agreements, where there is an absence of mediation confidentiality, the law of contract and the principles of contract law, are often applied.¹⁴⁸ In Germany, once a mediated agreement has been reached, with the help of a certified mediator, it takes on the legal nature of a private contract.¹⁴⁹ This contract is then enforceable and the respective party can then sue the other party.¹⁵⁰

The question then arises: should the principles of contract law then be used in order to determine the legal position of confidentiality in mediation? Robinson¹⁵¹ suggests that an "unfettered application of contract law" will go a long way in dealing with the issue of confidentiality in mediation. He states that the law of contracts contains the collection of requirements that define when a commitment achieves the level of legal enforceability.¹⁵²

He goes on to list some of these requirements such as: the formation of an agreement, the voiding of agreements and the declaration of the unenforceability of agreements; determination of performance and non-performance.¹⁵³ He feels these principles used in contract law can just as well be applied to mediation.¹⁵⁴ One has to keep in mind that he focuses on the mediated agreement specifically, and not so much on the agreement to mediation, but the latter remains an agreement, and thus *per se* a contract.

Robinson goes on to explain that with contracts the court looks at the totality of the circumstances to resolve issues that arise from an agreement, and the same should be done with issues arising from mediation.¹⁵⁵ This will refer to all circumstances that surround the agreement.¹⁵⁶ He believes that such an

¹⁴⁸ Robinson 2003 *Journal of Dispute Resolution* 148.

¹⁴⁹ Wiking *The enforcement and setting aside of mediation settlement agreements* 13.

¹⁵⁰ Wiking *The enforcement and setting aside of mediation settlement agreements* 14.

¹⁵¹ Robinson 2003 *Journal of Dispute Resolution* 148.

¹⁵² Robinson 2003 *Journal of Dispute Resolution* 148.

¹⁵³ Robinson 2003 *Journal of Dispute Resolution* 148-149.

¹⁵⁴ Robinson 2003: *Journal of Dispute Resolution* 149.

¹⁵⁵ Robinson 2003 *Journal of Dispute Resolution* 149-150.

¹⁵⁶ Robinson 2003 *Journal of Dispute Resolution* 150 – this will include aspects such as level of education, level of input of the different parties, if the parties actually read and understood the agreement before signing it, previous agreements that might be relevant.

unfettered application of contract law is necessary in order to avoid absurd result in mediated agreements, because of the very strict application of mediation confidentiality as is found in states like California. Such an approach will assist in "meaningful piercing of mediation confidentiality" which is essential in order to improve the mediation process and avoid absurd results in mediation.¹⁵⁷

The court is, however, faced with a problem if it simply applies the principles of contract when dealing with mediation confidentiality, because competing interests are at stake.¹⁵⁸ Deacon¹⁵⁹ points out that the court's need to examine an agreement reached during mediation can almost completely undermine the whole idea of confidentiality.

2.8 Legal professional privilege

Confidentiality and privilege are often confused. Although these doctrines are very similar, there are differences. It is important to first look at exactly what the doctrine of legal professional privilege entails.

The doctrine of legal professional privilege is an accepted and established idea in our legal system. It basically refers to the communications between a lawyer and his or her clients, it protects communications:

... between a lawyer and client aimed at obtaining legal advice in contemplation of pending or actual litigation; between a lawyer and its client and other third parties aimed at obtaining legal advice also in contemplation of pending or actual litigation; of confidential nature between a lawyer and its client in seeking legal advice (the privilege does not extend to other parties) and of a confidential nature between the client's lawyers in seeking legal advice (the privilege does not extend to other parties).¹⁶⁰

The information is seen as privileged if the communications have been made in:

¹⁵⁷ Robinson 2003 *Journal of Dispute Resolution* 173.

¹⁵⁸ Deason 2005 *UC Davis LR* 35.

¹⁵⁹ Deason 2005 *UC Davis LR* 42.

¹⁶⁰ Stassen 2006 *The Accountant* 24.

... confidence; for the purpose of legal advice or litigation and to attain a lawful end to a matter.¹⁶¹

Legal professional privilege has a common law foundation and, as mentioned before deals with communications made for the purpose of litigation (initially) and subsequently expanded to include all communications that serves the purpose to give or receive legal advice.¹⁶²

The Appellate Division referred to this doctrine of legal professional privilege as a fundamental and critical right which is absolutely crucial in the maintenance of the effective functioning of the legal system in South Africa.¹⁶³ In South Africa the doctrine of legal professional privilege is "recognized as a legal right as opposed to a mere rule of evidence"¹⁶⁴ which imbues it with substantial authority in our law.

2.8.1 The underlying rationale for legal professional privilege

Lord Hoffmann explained the underlying rationale of this doctrine as a:¹⁶⁵

... fundamental human right long established in the common law. It is a necessary corollary of the right of any person to obtain skilled advice about the law. Such advice cannot be effectively obtained unless the client is able to put all the facts before the adviser without fear that they may afterwards be disclosed and used to his prejudice.

A similar approach was followed by the Full Federal Court of Australia in the matter of *Stewart v Australian Crime Commission*,¹⁶⁶ when the court showed its approval of the judgment of the High Court of Australia in *Grant v Downs*¹⁶⁷ where the court stated that:

¹⁶¹ Stassen 2006 *The Accountant* 24.

¹⁶² In the matter of *United Tobacco Companies (South) Ltd v International Tobacco Co (SA) Ltd* 1953 1 SA 66 (T) the court stated that privilege will apply if there is a likelihood of litigation, not just a possibility.

¹⁶³ *S v Safatsa* 1988 1 SA 868 (A).

¹⁶⁴ Molver and Marais 2010 *Without Prejudice* 48.

¹⁶⁵ *Morgan Grenfell and Co Ltd v Special Commissioner of Income Tax* UKHL 21 (2002).

¹⁶⁶ *Stewart v Australian Crime Commission* FCAFC 151 (2012).

¹⁶⁷ *Grant v Downs* [1976] HCA 63; 135 CLR (1976).

The rationale of this head of privilege, according to traditional doctrine, is that it promotes the public interest because it assists and enhances the administration of justice by facilitating the representation of clients by legal advisers, the law being a complex and complicated discipline. This it does by keeping secret their communications, thereby inducing the client to retain the solicitor and seek his advice, and encouraging the client to make a full and frank disclosure of the relevant circumstances to the solicitor. The existence of the privilege reflects, to the extent to which it is accorded, the paramountcy of this public interest over a more general public interest, that which requires that in the interests of fair trial litigation should be conducted on the footing that all relevant documentary evidence is available. As a head of privilege legal professional privilege is so firmly entrenched in the law that it is not to be exorcised by judicial decision.¹⁶⁸

This indicates clearly that the rationale behind legal professional privilege is to serve the public. It is essential for the legal profession as well as the public at large that the latter can approach a legal advisor and in an open and honest manner, discuss his or her legal issues with this professional. To achieve this, there must be a firm and entrenched promise of privilege with regard to communications between these different parties when it comes to legal matters, and it is in the interest of a client to be able to have full and frank discussion with his or lawyers.¹⁶⁹

Furthermore, the doctrine of privilege also helps with the promotion of justice since it aids in assisting clients and lawyers when it comes to legal representation. If one considers that the legal discipline, or legal system, is a complex and intricate one, then it would be in the interest of the public to ensure that members of the public have a fair and proper opportunity to obtain legal representation, and should not be left to their own devices.

Privilege also assists here, since it helps to safeguard the public against self-incrimination for instance, and helps to attempt to ensure a fair trial. An opportunity has now been created for a client to be offered the best possible assistance in legal matters by his or her legal representative, because they have been granted the protection of legal professional privilege and can openly and

¹⁶⁸ *Grant v Downs* [1976] HCA 63; (1976) 135 CLR 674 para 685.

¹⁶⁹ Mosupa 2013 *Without Prejudice* 48.

frankly discuss their legal issues with their legal representatives and have a legal professional there to assist them.

The Constitution is very clear in section 35(3) that a person should be afforded a fair trial and legal representation, even if he can't afford the latter.¹⁷⁰ This implies that legal representation is seen as a fundamental right to all persons and the reasons for this seem obvious. The doctrine of legal professional privilege will assist in achieving this fundamental constitutional right. One could put it all in a nutshell and state that this doctrine promotes the values of the Constitution as indicated in section 39.¹⁷¹

The competing interest¹⁷² to this, which is also public of course, is the wish to disclose all relevant information in order to facilitate an investigation or court proceeding (which is also essential in trying to obtain a fair trial). If one refers to a fair and free trial, which one would assume will be one of the main objectives of a legal system, then it would be in the interest of the public that all relevant information reaches the courtroom, and that legal professional privilege is not used as an excuse to impede such an objective. This of course can, and does, sometimes lead to a clash of competing interests.

So, the view worldwide, including in South Africa, seems to be that the doctrine of privilege has now been firmly established as an issue of substantive law and not merely a rule of evidence.¹⁷³

In the light of this it is quite understandable that legal professional privilege has become more than just a rule of evidence, but has risen to the level of being

¹⁷⁰ Section 35.

¹⁷¹ Section 39(1)(a) – the guarantee of legal representation speaks to equality, freedom and human dignity. It states that every person has this basic right to be represented by a person(s) that are legally qualified and that can assist them when they face the daunting world of the legal system. This right basically enhances the idea that legal representation ensures at least, that a fair trial is a possibility (there are obviously lots of other factors that influence the determination of a fair trial) since the person is afforded the services of a qualified, and hopefully, knowledgeable, person and is not left at his or her own mercy.

¹⁷² Mosupa 2013 *Without Prejudice* 48.

¹⁷³ Mosupa 2013 *Without Prejudice* 48. Importantly in *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* 2002 HCA 49 213 CLR 54 the Australian High Court stated that the privilege is not merely a rule of evidence that is only applicable to discovery, inspection and giving of evidence.

substantive law. It is firmly entrenched in legal systems worldwide, and this has been affirmed in case law on numerous occasions.

Privilege and confidentiality is, however, not the same. They share certain similarities, but they do not have the same legal standing and effect. Legal professional privilege is an established part of substantive law and any court, forum or tribunal honours this, and are very reluctant to breach this holy tenet of substantive law. Confidentiality does not enjoy the same protection.

Both privilege and confidentiality have the same fundamental grounding – communications between counsel and client must and should be protected – but legal professional privilege has a greater level of protection.

2.9 Without Prejudice

The without prejudice principle is well-established in our law. In the case of *Lynn & Main Incorporated v Naidoo and Naidoo*¹⁷⁴ it was stated:

Now, as a general rule, negotiations between parties, whether oral or written, which are undertaken with a view to a settlement of their disputes or differences, are privileged from disclosure. This is so, whether there are express stipulations that they shall be without prejudice or not.

Zeffertt *et al*¹⁷⁵ clearly indicates that a statement which forms part of genuine negotiations for the compromise of a dispute is inadmissible as privileged. This is so, irrespective of whether or not the words "without prejudice" have been used. In *Venmop 275 (Pty) Ltd v Cleverlad Projects (Pty) Ltd*¹⁷⁶ it was stated that there are two essential requirements that must be met if the without prejudice principle can successfully be claimed.

¹⁷⁴ *Lynn & Main Incorporated v Naidoo and Naidoo* 2005 10259/04 para 22. See *Millward v Glaser* 1950 3 SA 547 (W).

¹⁷⁵ Zeffertt *et al* *The South African Law of Evidence* 703.

¹⁷⁶ In *Venmop 275 (Pty) Ltd v Cleverlad Projects (Pty) Ltd* 2014/14286 para 20.

First is the existence of the dispute. Secondly, is that the statement is part of negotiations for the settlement or compromise of such a dispute.¹⁷⁷

This, of course, implies that not all communications can be excluded from admissibility if parties simply attach a without prejudice note to it, and that it is not applicable to all communications. Furthermore, there are exceptions to the acceptance of the without prejudice principle to communications.

In *Absa Bank v Hammer e Group*¹⁷⁸ the judge clearly referred to the fact that there are exceptions to the application of the without prejudice principle in communications. If disputants use this principle during the process of trying to reach a settlement (and it has been done successfully and in an acceptable manner) the implication is that they reserve the right to revert back to their original position, should the settlement not be accepted and litigation then follows.¹⁷⁹

2.10 Legislation

The regulation of confidentiality in mediation will also heavily rely on legislation. The common law position together with legislation will form the backbone of the regulation of mediation.

In The United States of America, which follows a federal system, the federal position will of course also be considered as well when it comes to the regulation of confidentiality in mediation. Here the *Federal Rules of Evidence*,¹⁸⁰ specifically *Rule 408* is considered, but the federal common law application of the mediation privilege as found in *Federal Rule of Evidence 501* seemed to be

¹⁷⁷ *Venmop 275 (Pty) Ltd v Cleverlad Projects (Pty) Ltd* 2014/14286 para 20. See *Millward v Glaser* 1950 3 SA 547 (W) para 554; *Gcabashe v Nene* 1975 3 SA 912 (D) para 914E; *Jili v SA Eagle Ins Co Ltd* 1995 3 SA 269 (N) para 275B; *Lynn & Main Inc v Naidoo* 2006 1 SA 59 (N) paras 22, 65.

¹⁷⁸ *Absa Bank v Hammer e Group* 205/14) 2015 43 (ZASCA) para 13 – in this specific case it involved the admission of insolvency, but it can cover a range of other exceptions such as

¹⁷⁹ Co-parenting 2015 https://www.coparenting.co.za/article.php?art_id=176.

¹⁸⁰ *Federal Rules of Evidence* Rule 408.

one that is most often followed by courts.¹⁸¹ The *Uniform Mediation Act*¹⁸² was promulgated in 2003 specifically to aim to bring more uniformity to dealing with confidentiality in mediation. The act which offers significant strides in the process to bring more clarity regarding mediation, and together with the relevant state laws regulate confidentiality in mediation. Most states have not accepted the *UMA* and still rely heavily on their own state legislation when it comes to the regulation of confidentiality in mediation.¹⁸³ California is one of the states that has not accepted the *UMA*. In California the *California Evidence Code*¹⁸⁴ is predominantly used to deal with confidentiality in mediation.

In Australia, a federal system is also used and the Commonwealth (federal) legislation plays a significant part in the regulation of confidentiality in mediation together with the relevant state law (New South Wales in this research work). Legislation such as the *Federal Court of Australia Act 1976*,¹⁸⁵ *Civil Procedure Act 2005 (NSW)*,¹⁸⁶ the *Evidence Act 1995 (NSW)*,¹⁸⁷ *Australian Solicitors Conduct Rules*,¹⁸⁸ *Australian National Mediator Standards, Practice Standards* and the Australian Bar Association's *Barristers' Conduct Rules*¹⁸⁹ serve as guidelines.

In South Africa, *Court-Annexed Mediation Rules*¹⁹⁰ seem to lead the way when it comes to mediation confidentiality as contained in legislation. There are other pieces of legislation that refer to mediation such as the *National Credit Act* and the *National Environmental Management Act*¹⁹¹ to name a few, but these acts

¹⁸¹ *Jaffee v Redmond* 518 US (1) 1996 seems to be the landmark case in this matter.

¹⁸² *Uniform Mediation Act* 2003.

¹⁸³ California has not accepted the *UMA* and is thus an example of this.

¹⁸⁴ California Evidence Code.

¹⁸⁵ *Federal Court of Australia Act* 1976.

¹⁸⁶ *Civil Procedure Act* 2005.

¹⁸⁷ *Evidence Act* 1995 (NSW).

¹⁸⁸ Section 6(1)(c) of the National Accreditation Mediator Standards.

¹⁸⁹ *Australian Solicitors Conduct Rules June 2012* Australian National Mediator Standards, *Practice Standards January 2008* *Barristers' Conduct Rules* May 2013, the latter has been adopted in New South Wales in June 2014. Also see Wolski 2015 *UNSWLJ* 6.

¹⁹⁰ G 37448 RG 10151 GoN 183 of 18 March 2014 (*Court-Annexed Mediation Rules*).

¹⁹¹ Section 134 of the *National Credit Act* 34 of 2005 and also found in the *National Environmental Management Act* 107 of 1998.

refer to it in a generic manner and does not specify how mediation should take place.

2.11 Conclusion

There is no doubt that mediation offers a viable alternative to litigation and its worldwide success bears testimony to this. Mediation does, however, have its own unique format and procedure and individual characteristics.

Mediation is voluntary; it allows parties to shape their own agreements under the guidance of a neutral, impartial third party (mediator) who facilitates the process and it promises confidentiality to the participants of the mediation. Parties to a mediation have this expectation of confidentiality with regard to mediation and rightly so.

If the regulation of confidentiality is then acknowledged in mediation, the logical question would be: to which extent can and should mediation confidentiality be regulated? In order to answer this question one has to look at the basis for mediation confidentiality, and here we deal with common law, legislation and case law. Common law subscribes to public policy and the interests of justice which should be considered when dealing with mediation confidentiality, but here is also the agreement to mediate (the contract) which has to be scrutinized. The without prejudice principle which features in settlement negotiations (of which mediation is one) and which is often mentioned in legislation regarding mediation confidentiality, as well as in agreements to mediate, will also feature prominently in a discussion on the regulation of mediation confidentiality. The question of the applicability of a legal professional privilege also comes to the fore, and naturally legislation will be all-important when mediation confidentiality is considered.

This chapter looked at the nature, purpose and characteristics of mediation, with specific emphasis on mediation. The sources for the application of mediation confidentiality were also considered and how these relate to the regulation of mediation.

These aspects will now be considered, discussed and applied with regard to South Africa, the state of New South Wales (Australia) and the state of California (The United States of America).

CHAPTER 3

The legal basis for confidentiality in mediation in South Africa

3.1 Introduction

Mediation has grown significantly in South Africa in the past few years. It has been used increasingly in dealing with disputes.¹⁹² Regulation of mediation in South Africa has also seen significant growth with more and more pieces of legislation being passed to deal with this matter.¹⁹³ Despite this growth South Africa still lags behind many other countries when it comes to the regulation of mediation. Confidentiality, seen as one of the pillars of mediation, also suffers from this lack of regulation.

In this chapter, the aim is to determine the legal basis for confidentiality in mediation in South Africa and explore the legal position that confidentiality in mediation in South Africa enjoys. As mentioned previously confidentiality in mediation in the South African legal landscape has not really been developed by Roman Dutch or English law in the 19th and 20th century. The development has only recently come by means of the development of common law and other sources including foreign jurisdiction's law.

One thus has to turn to the various sources of law and from these sources try to construct a possible regulatory framework for mediation in South Africa, especially with regard to the issue of confidentiality which is the focus of this dissertation. Common law and legislation would be the first sources to consider, with specific regard to the contract as the basis for confidentiality as well as legal professional privilege, the without prejudice principle, public policy, discovery and legislation. All these sources of law will be discussed in this

¹⁹² Wakefield 2014 https://www.fanews.co.za/article/legal-affairs/10/general/1120/mediation-increasingly-preferred-over-litigation/15909_

¹⁹³ Brand, Steadman and Todd *Commercial Mediation* 92-98. In 2014 there had been more than 50 different pieces of legislation dealing with mediation.

chapter in an attempt to get more clarity on the legal basis of confidentiality in mediation in South Africa.

3.2 Common law

3.2.1 Contract

The reality is that in practice, mediation usually occurs in terms of the contract or agreement to mediate that has been signed by the parties to the mediation. A contract is often seen as one of the most established ways in which to regulate confidentiality in mediation,¹⁹⁴ although it has not really been used by South African courts as a basis for confidentiality.¹⁹⁵

Before one looks at examples of standard agreements to mediate that are used in South Africa, we remind ourselves of the basic principles of contract law and the interpretation of contracts. As mentioned in a previous chapter: the *essentialia* of a contract determines the classification of a contract, the *naturalia* are the terms that emanate from the contract and the *incidentalia* refer to additional terms and conditions that parties would wish to add to the contract.

The agreement to mediate has not really developed to such a stage that the agreement as such can be seen as a separate, developed and acknowledged contract such as a sale agreement, or contract of employment. It could be argued that, specifically in Western law (not indigenous law); confidentiality can be seen as one of the essential terms (conditions) of an agreement to mediate. It is seen as one of the cornerstones of mediation¹⁹⁶ and all the standard agreements to mediate that are popular and are used in South Africa, contain a confidentiality clause.¹⁹⁷ It is possible that the parties can agree between themselves to specifically demarcate certain information as confidential (such a clause would then tend to be classified as *incidentalia*), keeping in mind that it will still be subject to acceptable exceptions.

¹⁹⁴ Feehily 2015 *TSAR* 532.

¹⁹⁵ Feehily 2015 *TSAR* 532.

¹⁹⁶ See 127 above.

¹⁹⁷ See all the examples listed in this chapter of standard mediation agreements.

The interpretation of a contract in South African law has also moved towards an on-going process and is not as clearly compartmentalized into different stages as in the past. Interpretation now leans towards being a unified exercise, with fewer distinctive stages than in the past, and thus incorporates various aspects. These factors include aspects such as: the literal meaning, context as well as the surrounding circumstances in which the document actually was created.¹⁹⁸

Additionally, the intention of the parties should also be considered¹⁹⁹ as well as the application of public policy.²⁰⁰ The latter will consider aspects such as reasonableness, the good moral values of society, and parties contracting in good faith.²⁰¹ If contracts, or clauses in contracts, do not adhere to these principles, they can be seen as illegal and unenforceable.

3.2.1.1 Confidentiality in standard mediation agreements used in South Africa

The Association of Arbitrators (Southern Africa) was formed in 1979 with the aim to create an organisation which will promote arbitration and provide the community with a body of ADR specialists. The Association assists arbitrators to effectively and efficiently fulfil their duties and foster sound principles and effective execution of ADR processes.²⁰² Their website offers an example of an agreement to mediate²⁰³ in which the following is stated under the heading *Confidentiality and Without Prejudice Status*:

11. Every person involved in the Mediation:

- 11.1 Will keep confidential all information arising out of or in connection with the Mediation, including the fact and terms of any settlement, the fact that the Mediation is to take place or has taken place unless disclosure is required by law to implement or to enforce terms of settlement; and

¹⁹⁸ *Bothma Batho Transport v S Bothma & Seuns Transport* 2013 ZASCA 176.

¹⁹⁹ *NEF v Standard Bank* 203 ZASCA para 24.

²⁰⁰ Bhana, Bonthuys and Nortje *Student's guide to the Law of Contract* 137.

²⁰¹ Bhana, Bonthuys and Nortje *Student's guide to the Law of Contract* 141. See *Barkhuizen v Napier* 2007 5 SA 323 (CC) para 80.

²⁰² Association of Arbitrators (Southern Africa) 2014 <http://www.arbitrators.co.za/about-us/>.

²⁰³ Association of Arbitrators (Southern Africa) 2014 http://arbitrators.co.za/wp-content/uploads/2014/10/aoa_agreement_to_mediate.pdf_

12. Where a Party privately discloses to the Mediator any information in confidence before, during or after the Mediation, the Mediator will not disclose that information to any other Party or person without the consent of the Party disclosing it, unless required by law to make disclosure.
13. The Parties will not call the Mediator as a witness, nor require the Mediator to produce in evidence any records or notes relating to the Mediation, in any litigation, arbitration or other formal process arising from or in connection with their dispute and the Mediation; nor will the Mediator act or agree to act as a witness, expert, arbitrator or consultant in any such process

This agreement seems to call for complete confidentiality except if "disclosure is required by law to implement or to enforce terms of the settlement"²⁰⁴ or information is "otherwise disclosable in law".²⁰⁵

The Court-annexed Mediation Rules which govern court-based mediation in Magistrate's courts in South Africa states something very similar when it says that all communication and any:

... unsigned mediated agreements shall not be admissible in any court proceeding, unless such information is discoverable in terms of the normal rules of court.²⁰⁶

The Africa ADR (Arbitration Mediation Conciliation) is an organisation which specializes in ADR processes. They classify themselves as a dispute resolution authority that focuses on the administration of authority and that operates as a neutral, independent and non-profit organisation.²⁰⁷ It operates internationally as well as locally and offers a wide range of administrative services.²⁰⁸ According to their website they are endorsed by the Johannesburg Bar, the Cape Bar, The Pretoria Bar and leading law firms such as Bowman Gilfillan Inc., DLA Cliffe Dekker Hofmeyr Inc. and Webber Wentzel, among others.²⁰⁹ In its mediation procedure and agreement document, the organisation also refers to confidentiality. The agreement states:

²⁰⁴ 11.1 of the agreement.

²⁰⁵ 11.2 of the agreement.

²⁰⁶ 12.2 of *Court-Annexed Mediation Rules* G 37448 RG 10151 GoN 183 of 18 March 2014.

²⁰⁷ Africa ADR Date unknown http://www.africaadr.com/index.php?a=r/home/2_

²⁰⁸ Africa ADR Date unknown http://www.africaadr.com/index.php?a=r/home/2_

²⁰⁹ Africa ADR Date unknown http://www.africaadr.com/index.php?a=r/home/2_

Confidentiality

6. Each Party to the Mediation and all persons attending the Mediation will be bound by the confidentiality provisions of the Procedure (paragraphs 16–20).

Paragraphs 16-20 contain the following stipulations:²¹⁰

Confidentiality and other matters

16. Every person involved in the Mediation will keep confidential and not use for any collateral or ulterior purpose all information (whether given orally, in writing or otherwise) arising out of, or in connection with, the Mediation, including the fact of any settlement and its terms, save for the fact that the mediation is to take place or has taken place.
17. All information (whether oral, in writing or otherwise) arising out of, or in connection with, the Mediation will be without prejudice, privileged and not admissible as evidence or disclosable in any current or subsequent litigation or other proceedings whatsoever. This does not apply to any information, which would in any event have been admissible or disclosable in any such proceedings.
18. The Mediator will not disclose to any other Party any information given to him by a Party in confidence without the express consent of that Party.

Paragraphs 16–18 shall not apply if, and to the extent that:

19.
 - all Parties consent to the disclosure; or
 - the Mediator is required by law to make disclosure; or
 - the Mediator reasonably considers that there is a serious risk of significant harm to the life or safety of any person if the information in question is not disclosed; or
 - the Mediator reasonably considers that there is a serious risk of his/her being subject to criminal proceedings unless the information in question is disclosed.
20. None of the Parties to the Mediation Agreement will call the Mediator or Africa ADR (or any employee, consultant, officer or representative of Africa ADR) as a witness, consultant, arbitrator or expert in any litigation or other proceedings whatsoever arising from, or in connection with, the matters in issue in the Mediation. The Mediator and Africa ADR will not voluntarily act in any such capacity without the written agreement of all the Parties.

The Dispute Settlement Accreditation Council (hereafter DISAC), launched in 2010, provides professional accreditation to mediators.²¹¹ On its website it also has a document which is named *Mediation Accreditation Standards*, which has

²¹⁰ Africa ADR Date unknown http://www.africaadr.com/index.php?a=r/home//10_

²¹¹ DISAC 2014 http://disac.co.za/?page_id=3414.

as its main objective to offer mediators the opportunity to be accredited. It aims to establish national professional accreditation standards in South Africa for dispute settlement practitioners.²¹²

DISAC subscribes to the code of professional conduct as prescribed by the International Mediation Institute²¹³ and the latter also deals with confidentiality. DISAC specifically mentions that mediators who have been accredited with them, agree to subject themselves to the professional code of conduct of the International Mediation Institute.²¹⁴ The code discusses confidentiality and indicates that all information which is shared during mediation will be regarded as confidential, even the fact that the mediation is being held²¹⁵ but the code does allow for certain exceptions to confidentiality.

3.2.1.2 Exceptions to confidentiality as found in standard mediation agreements

The exceptions found in agreements and the conduct codes, are the common ones,²¹⁶ but it is also mentioned that information that has entered the public domain (but not due to the mediator's disclosure) will not be seen as confidential.²¹⁷ The code makes provision for a mediator to share confidential information if he or she consults an Accredited Service Provider (ASP) regarding

²¹² DISAC 2014 <http://disac.co.za/wp-content/uploads/2014/12/>.

²¹³ DISAC 2014 http://disac.co.za/?page_id=3514.

²¹⁴ DISAC 2014 http://disac.co.za/?page_id=3514.

²¹⁵ DISAC 2014 http://disac.co.za/wp-content/uploads/2014/12/DiSAC_Code-of-Professional-Conduct-for-Mediators.pdf. See 4.1.1 of the code.

²¹⁶ DISAC 2014 http://disac.co.za/wp-content/uploads/2014/12/DiSAC_Code-of-Professional-Conduct-for-Mediators.pdf. See 4.1.1 and 4.4 of the code: the exceptions cover the duty to disclose if compelled by law, or a court of law, or it is felt that disclosure will prevent death or serious physical harm, and also, if mediators need to defend themselves against any possible charges of liability. The mediator may also not testify on behalf of a specific party and it also recognizes the parties' right to release the mediator from the restriction of confidentiality if they should feel they want to do this.

²¹⁷ DISAC 2014 <http://disac.co.za/wp-content/uploads/2014/12/DiSAC-Code-of-Professional-Conduct-for-Mediators.pdf>. See 4.1.1 of the code.

a moral or ethical dilemma when it comes to mediation.²¹⁸ The recipients of such information, the ASP, should keep this information confidential as well.²¹⁹

An interesting regulation is found at 4.2 in the code²²⁰ which specifically places a duty on a mediator to discuss confidentiality with the different parties before or at the start of the mediation. The aim of this is to get consent from the parties as to any "communication or practice by the mediator that involves the disclosure of confidential information".²²¹ This places the mediator in an interesting, albeit potentially difficult situation. To which extent should the mediator explain confidentiality? Should the mediator draw the parties' attention to the fact that certain information exchanged during mediation might still be subject to disclosure at a later stage? Should all the possible scenarios be explained to the parties?

The agreement also specifically states that:²²²

... the mediator cannot be called to testify as a witness, consultant, arbitrator or expert in any litigation or other proceedings whatsoever arising from, or in connection with, the matters in issue in the Mediation. The Mediator and Africa ADR will not voluntarily act in any such capacity without the written agreement of all the Parties.

Although such a clause is understandable and aims to enhance confidentiality even further, one has to ask if this could not possibly, in certain circumstances, be seen as *contra boni mores*? There could be situations and instances where the mediator's testimony is needed and called for in order to satisfy the good and moral standards of society.²²³ This could then render this specific clause

²¹⁸ DISAC 2014 <http://disac.co.za/wp-content/uploads/2014/12/DiSAC-Code-of-Professional-Conduct-for-Mediators.pdf>. See 4.1.1 and 5.1 of the code.

²¹⁹ DISAC 2014 <http://disac.co.za/wp-content/uploads/2014/12/DiSAC-Code-of-Professional-Conduct-for-Mediators.pdf>. See 4.1.1 and 5.1 of the code.

²²⁰ DISAC 2014 <http://disac.co.za/wp-content/uploads/2014/12/DiSAC-Mediation-Accreditation-Standards-VERSION-1.pdf>.

²²¹ DISAC 2014 <http://disac.co.za/wp-content/uploads/2014/12/DiSAC-Mediation-Accreditation-Standards-VERSION-1.pdf>.

²²² Africa ADR <http://www.africaadr.com/index.php?a=r/home//10>. See paragraph 20 of the agreement.

²²³ Instances of parties in mediation being bullied, coerced, placed under duress by either the mediator or the other party and the mediators fails to address this during mediation, spring to mind as examples of the moral standards of society being compromised.

unenforceable. The other question in relation to this is if a party claims that coercion, or duress or a lack of objectivity were evident during the mediation proceedings, will the mere claim of such conduct be acceptable to call the mediator to testify and thus lift the veil of confidentiality?

3.2.2 Application of confidentiality

3.2.2.1 Disclosure in terms of the law

These types of agreements which seem to be the popular ones being used in mediation in South Africa, all acknowledge the need and importance of confidentiality and that information divulged during mediation cannot be used by opposing parties in subsequent legal proceedings. The agreements also refer to allowing disclosure if required by law, which one would think refers to references such as, can be found in section 110 of the *Children's Act* which mandates a wide range of professionals to report the abuse of a child if they suspect such abuse.²²⁴ These provisions are totally understandable, and commendable.

The first aspect, the fact that information which is required by law to be disclosed can be used in future legal proceedings does however offer a potential pitfall for parties to mediation. This provision implies that complete confidentiality is not assured by these standard clauses of confidentiality that are found in these agreements. Certain legislation and the common law place a positive duty on a person to report certain crimes for instance, and a confidentiality clause in a contract will not escape these obligations.²²⁵

Additionally the Association of Arbitrators (Southern Africa) in their standard agreement to mediate leaves room for disclosure of information (information

²²⁴ *Children's Act* 38 of 2005. The Act lists a wide range of professionals and other concerned parties which are subject to this mandatory reporting, and although mediators are not specifically included in the list, it is definitely implied that the mediation profession would be considered as also being subject to this provision.

²²⁵ *Children's Act* 38 of 2005. Is an example of such legislation as well as common law principles such as *mori bones*.

that is essentially confidential) if it helps: "to enforce terms of settlement"²²⁶ which opens the door even wider for the dispensation of information that has transpired during mediation.

Would this mean that the signed agreement that the parties enter after a successful mediation process can then be scrutinised by a third party? This will most probably happen if one of the parties feels that the settlement is not being honoured and they want it to be enforced. That will mean the settlement will become part of a further legal proceeding. A party to the mediation can also feel that it is not satisfied, in hindsight, with the manner in which the settlement has been drafted or the content of the settlement.²²⁷ This can lead to the mediator being expected to testify regarding the mediation, both its content and the manner in which the mediation was conducted.²²⁸

3.2.2.2 Disclosable in law

The exception, which all these agreements refer to, is that if the information is disclosable in law, thus it would have been discovered in the normal course of the utilisation of the normal rules of law; the information would not be seen as confidential. This means that the rules regarding discovery, as found in our law, will be applicable. Parties, therefore, cannot assume that if they deem information as confidential, then it would automatically be regarded as confidential – the rules of discovery will be applied. If it then transpires that the information would have been discoverable if the rules of discovery are applied, the information will not be deemed as confidential.

The definitive yardstick for discovery is relevance.²²⁹ *Crown Cork 7 Seal Co Inc. v Rheem South Africa (Pty) Ltd*²³⁰ offers some useful principles in the matter of

²²⁶ 11.1 of the agreement.

²²⁷ A party could feel that they have been coerced into accept the settlement, or have agreed while under duress and pressure from the other party or possibly the mediator.

²²⁸ This, despite the fact that all the agreements mentioned above specifically prohibit any party to call the mediator to testify, in a subsequent legal proceeding, what has transpired during the mediation.

²²⁹ Vos 2008 *Without Prejudice* 59.

²³⁰ *Crown Cork 7 Seal Co Inc v Rheem South Africa (Pty) Ltd* 1980 3 SA 1093 (W).

discovery. This case illuminated the task of the court to balance the right to protect confidential information from abuse by others as opposed to the need to ensure that litigants can present their cases unhindered.²³¹ The case emphasised the fact that these two rights should be balanced.²³² The protection of confidential information is an established right in terms of litigation and offers a party the assurance that certain information can remain confidential and cannot be used against them in litigation. This right can, however, not be absolute.

In the *Crown* case the court was afforded this very same opportunity when it was stated that the court has the discretion to:

... impose appropriate limits when satisfied that there is a real danger that if this is not done an unlawful appropriation of [confidential information] will be made possible merely because there is litigation in progress and because the litigants are entitled to see documents to which they would not otherwise have lawful access.²³³

This means that South African courts also have a wide discretion as far as ordering and limiting inspection of confidential information.²³⁴ The court must exercise this balancing act, and the wide discretion it has been given in this matter puts the court in the position to do just this. In 2010 Rule 23 of *The Magistrates' Courts* rules deals with discovery, and this rule was to provide additional scope for discovery in an attempt to align it with the practice in High Court.²³⁵

3.2.2.3 What if the contract is silent with regard to confidentiality?

A further question one has to ask is—what if the contract is silent on the issue of confidentiality? In South African law we find express terms to a contract,

²³¹ *Crown Cork 7 Seal Co Inc v Rheem South Africa (Pty) Ltd* 1980 3 SA 1093 (W). S 35(3) of the *Constitution of the Republic of South Africa* will almost be applicable here.

²³² *Crown Cork 7 Seal Co Inc v Rheem South Africa (Pty) Ltd* 1980 3 SA 1093 (W).

²³³ Paragraph 1100A-B of the *Crown* case.

²³⁴ Vos 2008 *Without Prejudice* 59; Rule 35(7) of the High Court specifically empowers the court with a specific discretion to order compliance in the case of non-compliance when it comes to the duty to discover and to make relevant information available.

²³⁵ Pillay and Zaal 2011 *SALJ* 634.

legal incidents (which are implied by law), tacit terms and implied terms.²³⁶ If a contract is silent on a term it could fall into one of the last two categories.

Tacit terms refer to terms that are implied or grasped without it actually being stated, and parties understand that these terms form part of their agreement.²³⁷ The parties thus had a common expectation regarding these terms, but just never expressed these in speech or writing.²³⁸ The test for this is subjective since the terms are derived from the intention of the parties at the time of the conclusion of the agreement.²³⁹

Implied terms, on the other hand, has an objective test, often referred to as the officious bystander²⁴⁰ test. Implied terms would be:²⁴¹

... a logical extension of a contract to provide for matters which the parties had not considered, but they would have agreed to the term had their attention been drawn thereto at the time when they concluded the contract.

If an agreement to mediate does not specifically, expressly or through a legal incident refer to a confidentiality clause, the nature and purpose of the mediation process will still be sufficient to by, either implication or tacitly, make confidentiality applicable to the mediation process.

If one considers the fact that mediation is an attempt, by parties, to reach an agreement regarding a dispute in order to avoid litigation, by openly and frankly discussing the matter with the guidance of a third neutral person, then confidentiality is tacitly present. Alternatively, it can also be seen as to be implied. Again, given the nature and purpose of mediation, confidentiality would be a logical extension of the agreement to mediate, and thus an implied term of the agreement.

²³⁶ Cornelius 2006 *Stell LR* 499-501.

²³⁷ Cornelius 2006 *Stell LR* 500.

²³⁸ Cornelius 2006 *Stell LR* 500.

²³⁹ Cornelius 2006 *Stell LR* 500.

²⁴⁰ The English case of *Reigate v Union Manufacturing Co (Ramsbottom)* 1918 1 KB 592 aptly described it as terms which reasonable parties in the same circumstances would have agreed to be applicable.

²⁴¹ Cornelius 2006 *Stell LR* 501.

As Feehily²⁴² has indicated, South African courts have not yet considered a contract as the basis for the regulation of confidentiality in mediation in South Africa, which is problematic, but it is clear that there are some limitations in this regard as well.

3.3 Legal professional privilege

3.3.1 The objectives of legal professional privilege

As mentioned before, the doctrine of a legal professional privilege is considered as a fundamental right necessary for the proper functioning of the legal system²⁴³ and seen as a substantive²⁴⁴ rule that protects certain information against disclosure. This was endorsed in the judgment delivered in *Thint (Pty) Ltd v National Director of Public Prosecutions*.²⁴⁵

Legal professional privilege has a common law foundation and deals with communications made for the purpose of litigation and also includes information that constitutes the giving and receiving of legal advice.²⁴⁶ The aim of the privilege is to facilitate open and frank discussions between a legal professional and his or her client in the interest of justice.²⁴⁷ It serves a public interest since it allows the general public to discuss legal issues (which can be complicated and complex) with a legal professional openly and frankly which will facilitate the dispersion of informed legal advice which would be to the benefit of the public.²⁴⁸

Wagner and Brett point out that it is an essential part of the South African legal system, which relies heavily on "the freedom of communication between legal

²⁴² Feehily 2015 *TSAR* 532.

²⁴³ Solomon 2013 *Without Prejudice* 50.

²⁴⁴ *S v Safatsa* 1988 1 SA 868 (A).

²⁴⁵ *Thint (Pty) Ltd v National Director of Public Prosecutions* 2007 ZASCA 138; [2007] SCA 138 (RSA); [2008] 1 All SA 229 (SCA).

²⁴⁶ Mosupa 2013 *Without Prejudice* 48.

²⁴⁷ Mosupa 2013 *Without Prejudice* 48. In deciding whether a communication is privileged, a court will have regard to the competing tension between a citizen's right to speak freely with its legal representative and the public's right to all the evidence of the matter in dispute.

²⁴⁸ *Grant v Downs* 1976 HCA 63; 135 CLR 674.

practitioners and their clients".²⁴⁹ This privilege is seen as a fundamental right and protects clients and legal professionals against self-incrimination and helps to ensure proper functioning of the legal system.²⁵⁰ It is, however, not an unqualified right. The privilege can only be exercised by the legal professional or the parties which sought the advice, if the said information which has been submitted to a legal advisor, was done with the purpose to obtain legal advice, with pending or contemplated litigation existing when the communication was created.²⁵¹ In terms of the doctrine, certain requirements have to be met to qualify for such privilege and the doctrine must be contextualised.²⁵²

The right can also be limited, as can be seen from the recent matter of *South African Airways Soc v BDFM Publishers (Pty) Ltd* where the court stated that it is a necessary right in order to protect the South African adversarial system, but it can be limited and is not absolute.²⁵³ It is also very important to understand that the right must be contextualised, as pointed out in *A Company and Two Others v The Commissioner for the South African Revenue Services*.²⁵⁴

3.3.2 *The discretion of the court in the application of legal professional privilege*

The court therefore has discretion to decide whether a communication is privileged, and it has to balance the tension between the right to speak freely to

²⁴⁹ Wagner and Brett 2016 *De Rebus* 22.

²⁵⁰ Solomon 2013 *Without Prejudice* 50.

²⁵¹ Solomon 2013 *Without Prejudice* 50.

²⁵² *A Company v Commissioner for the South African Revenue Services* (16360/2013) [2014] ZAWCHC 33; 2014 4 SA 549 (WCC).

The case indicates that the legal advisor must have been:

- (a) Acting in a professional capacity at the time;
- (b) should have been consulted in confidence;
- (c) the communication should have occurred with the purpose of legal advice;
- (d) the privilege must have been claimed in order to exercise the privilege.

²⁵³ *South African Airways Soc v BDFM Publishers (Pty) Ltd* 2016 2 SA 561 (GJ), [2016] 1 ALL SA 860 (GJ) the court found that the right is a 'negative right' which renders legal advice that has been given to a client by a legal professional practitioner, inadmissible as evidence, however, the right cannot be used against all and sundry in order to protect it from involuntary disclosure. It can be limited in certain instances.

²⁵⁴ *A Company v Commissioner for the South African Revenue Services* (16360/2013) [2014] ZAWCHC 33; 2014 4 SA 549 (WCC) (17 March 2014).

your legal representative, and the competing right on the other hand – the public's right to all the evidence of the dispute.²⁵⁵

If one considers the criteria as mentioned here above, and applies it to mediation, some issues arise. The first aspect mentioned the fact that the legal professional had to act in a professional capacity in order to claim the privilege already raises questions. In the case between *Mohamed v President of the Republic of South Africa*²⁵⁶ it was held that the legal professional privilege can also be claimed by for instance, legal salaried advisors working for the government as was the case here, thus not just attorneys practicing for themselves, which does extend the scope of persons who can claim legal professional privilege, but it still seems to limit it to legal advisors and professionals.

3.3.3 *Can a mediator claim legal professional privilege?*

Currently South Africa does not have specific statutory prescriptions for the accreditation of mediators or mediation training as such.²⁵⁷ Legal professionals do have to have certain tertiary requirements and be accepted to practice after having completed certain examinations and complied with certain criteria. For jurists these requirements are statutory in nature and are regulated by the *Legal Practice Act*.²⁵⁸

Mediators do not have similar legislation that regulates their accreditation and practice.²⁵⁹ A person can be a mediator and practice as one without having been registered or accredited as a mediator. This seriously questions if they can be seen as legal professionals or even professionals. Based on judgments such as the *Prudential* case mediators do not qualify to claim legal professional privilege.

²⁵⁵ Phelan 2014 *Queensland Law Society Report* 1.

²⁵⁶ *Mohamed v President of the Republic of South Africa* (CCT 17/01) [2001] ZACC 18; 2001 3 SA 893 (CC); 2001 7 BCLR 685 (CC) (28 May 2001).

²⁵⁷ Schonewille and Euwema *Mastering Mediation Education* 50.

²⁵⁸ *Legal Practice Act* 24 of 2014.

²⁵⁹ This is not only true for jurists, but also professionals in financial and medical fields.

The second aspect refers to the fact the communications should have been divulged in an attempt to gain legal advice for a pending or existing matter of litigation. If one considers the role and function of a mediator, it does seem to indicate that a mediator, within the context of mediation, does not dispense legal advice *per se*. Even if one considers that a mediator might at times offer legal advice during mediation, it is definitely not in the same manner as a legal professional would do it. A mediator will during the course of mediation explain some legal principles such as the entire procedure of mediation, but that does not constitute legal advice as seen by the principle of legal professional privilege.

Mediation is about a mediator (neutral third party) facilitating conversations and meetings between parties who have a dispute – the mediator's main purpose is not dispensing legal advice, while the attorney has to do exactly that. The mediator aims to get parties to jointly reach an agreement, while an attorney's main aim is to ensure his or her client walks away with the best possible result. The attorney is also not a neutral third party, he or she serves his or her client and has the client's interests at heart, unlike a mediator who has to show equal concern and care for both parties.²⁶⁰

The second part of this aspect involves the claiming of the legal professional privilege and its successful application only if it involves the actual litigation or the contemplation of litigation. The legal position on this was affirmed in the matter between *The Competition Commissioner of South Africa v Arcelormittal South Africa Limited & 3 Others*.²⁶¹ In this case the court stated that in order to claim legal professional privilege with regard to communications (in this case it referred to specific documents), the document (or communication) must have been produced with the specific contemplation of litigation in mind, as well as at

²⁶⁰ Van Dokkum 2012 http://www.academia.edu/6391951/MediationPrivilege-what_are_we_really_talking_about_-_Part_1.

²⁶¹ *Competition Commissioner of South Africa v Arcelormittal South Africa Limited & 3 Others* [2013] ZASCA 84.

the insistence of the litigant²⁶² The privilege will also be extended to third parties if litigation has been contemplated. In other words, the communications with third parties will also be privileged.²⁶³

Parties who enter into mediation are involved in a dispute, a dispute that can lead to litigation if mediation will prove to be ineffective, but does this imply that litigation has been contemplated by the parties?

The third aspect refers to the fact that in order to claim privilege the communications should have occurred with the express notion that it is being done in confidence, it is thus confidential. It is important to understand that for the communications to rely on confidentiality, the intention must have been there for it to be confidential in order to enjoy the privilege.²⁶⁴ The mediation process is confidential by nature and by agreement, so communications exchanged during this process will be done with the understanding that confidentiality is expected and claimed.

The last aspect, that the privilege must be claimed, refers to the fact the privilege belongs to the client and must be claimed by him or her. His or her legal representative can of course claim it on their behalf as well, but it is vital that it must be claimed.²⁶⁵

As mentioned before, a crucial aspect regarding claiming legal professional privilege is context. It is vital to then look at the context of a situation if one considers the application of legal professional privilege.²⁶⁶

If one considers the application of the four requirements for legal professional privilege as found in South African law, mediators do not seem to qualify for

²⁶² *Competition Commissioner of South Africa v Arcelormittal South Africa Limited & 3 Others* [2013] ZASCA 84.

²⁶³ Hoffmann and Zeffertt *Law of Evidence* 259.

²⁶⁴ Wagner and Brett 2016 *De Rebus* 22.

²⁶⁵ Wagner and Brett 2016 *De Rebus* 22.

²⁶⁶ *Thint (Pty) Ltd v National Director* 2007 ZASCA 138; [2007] SCA 138 (RSA); [2008] 1 All SA 229 (SCA confirms this).

legal professional privilege and can therefore not claim it when engaging in mediation.

The South African position, regarding a legal professional privilege for mediators, is similar. The context within which a legal professional, typically the attorney-client situation, operates as opposed to a mediator during mediation reinforces the notion that mediators cannot simply claim legal professional privilege. The difference in methodologies, styles and focus between a mediator when dealing with information divulged during, or as a result of mediation, and that of a legal professional during consultation, leads one to conclude that to simply extend the same legal professional privilege that an attorney has to a mediator might be problematic. Currently the mediation profession in South Africa does not enjoy such a privilege. If the profession would want such a privilege, the context and requirements applicable to the granting of a legal professional privilege would have to be considered.

Yet, mediators seem to enjoy other privileges as far as confidentiality is concerned. If one considers the position of the mediator during mediation (with regard to confidentiality) then most mediation agreements place the mediator in a position where he or she has definite privileges. Consider the following from a standard mediation agreement as proposed by Africa ADR (Arbitration Mediation Conciliation) who enjoys widespread recognition in South Africa.²⁶⁷

20. None of the Parties to the Mediation Agreement will call the Mediator or Africa ADR (or any employee, consultant, officer or representative of Africa ADR) as a witness, consultant, arbitrator or expert in any litigation or other proceedings whatsoever arising from, or in connection with, the matters in issue in the Mediation. The Mediator and Africa ADR will not voluntarily act in any such capacity without the written agreement of all the Parties.

This paragraph specifically exempts mediators from being part of further litigation in the matter that they had mediated. They enjoy a privilege of not

²⁶⁷ Africa ADR Date unknown <http://www.africaadr.com/index.php?a=r/home/2>. The Organisation indicates on its website that it enjoys the recognition and support of the Johannesburg Bar, the Pretoria Bar and the Cape Town Bar as well as that of many leading law firms in South Africa.

having to testify or divulge any information with regard to the mediation. The parties (all of them) further specifically agree to see the whole mediation process as confidential (the information exchanged that is) and cannot use the information arising from the mediation for any "collateral or ulterior purpose".²⁶⁸ This privilege seems to be a contractual one though and not a legal professional privilege.

3.3.4 *In camera proceedings*

Another aspect to possibly consider is the issue of in camera proceedings. In section 138(1) of the *Labour Relations* it is stated:²⁶⁹

The commissioner may conduct the arbitration in a manner that the commissioner considers appropriate in order to determine the dispute fairly and quickly, but must deal with the substantial merits of the dispute with the minimum of legal formalities.

The Commission for Conciliation, Mediation and Arbitration (CCMA) Practice Manual on Arbitrations; specifically clause 12.8, also refers to this and indicates that arbitrations can be conducted in camera and this must be done and in accordance with the "three tier approach".²⁷⁰ This refers to the first stage where the employer should in an objective manner lay a foundation for the reasons why he or she fears to testify in public. They basically explain why they are fearful to testify in the open and offer objective evidence.²⁷¹ If this is accepted, the witness (employer/employee) will give evidence in camera where her or she will give their version (which is subjective of course) and supply subjective evidence of his or her fear and feelings of intimidation.²⁷² The third stage concludes the process and here the witness gives evidence regarding the merits of the case and the evidence involved in the case, and this is done "in

²⁶⁸ Africa ADR Date unknown <http://www.africaadr.com/index.php?a=r/home/10> Paragraph 16 of the agreement.

²⁶⁹ Section 138(1) of the *Labour Relations Act* 66 of 1995 (LRA).

²⁷⁰ Preston 2017 <http://www.labourguide.co.za/most-recent/2080-inspecting-in-camera-evidence-a-process-for-dealing-with-fearful-witnesses>.

²⁷¹ Preston 2017 <http://www.labourguide.co.za/most-recent/2080-inspecting-in-camera-evidence-a-process-for-dealing-with-fearful-witnesses>.

²⁷² Preston 2017 <http://www.labourguide.co.za/most-recent/2080-inspecting-in-camera-evidence-a-process-for-dealing-with-fearful-witnesses>.

camera".²⁷³ In *NUMSA obo Goliath v Shelco Shelving*²⁷⁴ this position was affirmed, but it was added that the right to cross-examination should not be curbed if the evidence is given "in camera".²⁷⁵

If evidence can be collected "in camera" in arbitration (it can also be applicable in litigation in criminal law matters).²⁷⁶ Evidence obtained during "in camera" proceedings is seen as confidential evidence. The communications that form part of the in camera hearing, is not available to the public or even other parties to the dispute.²⁷⁷

Can parties to mediation also request for proceedings to be conducted "in camera"? The basis to have proceedings conducted "in camera" is that the need to conduct proceedings "in camera" outweighs the necessity and importance of the public having access to the proceedings and information that transpired during the "in camera" proceedings.²⁷⁸ One would assume considerations such as fear for intimidation or for actual harm to the party requesting the proceedings to be "in camera" would be some of the main reasons for such a request, which then begs the question: why carry on with mediation in any case? Be that as it may, for parties to a mediation to succeed with a request for "in camera" proceedings, they will have to supply just cause for the proceedings to be conducted "in camera", or alternatively they can call for a separate session with the mediator, thus excluding the other party for that specific session, something which is fairly common in mediation and is referred to as caucusing.²⁷⁹

Insisting on having mediation proceedings "in camera" will have to pass the test of public interest and is the decision then left up to the mediator to decide if the

²⁷³ Preston 2017 <http://www.labourguide.co.za/most-recent/2080-inspecting-in-camera-evidence-a-process-for-dealing-with-fearful-witnesses>.

²⁷⁴ *NUMSA obo Goliath v Shelco Shelving* (2003) 5 BALR 587 (CCMA).

²⁷⁵ *NUMSA obo Goliath v Shelco Shelving* (2003) 5 BALR 587 (CCMA).

²⁷⁶ Section 153(2) of the *Criminal Procedure Act*.

²⁷⁷ Sections 153 and 154 of the *Criminal Procedure Act*.

²⁷⁸ As can be seen in s 153 of the *Criminal Procedure Act*.

²⁷⁹ Israel 2010 <http://www.mediate.com/articles/israelL13.cfm>.

application should be successful? It is difficult to see that the principles regarding "in camera" proceedings are applicable to mediation.

3.4 The position of a party's legal representative during mediation

The position of a party's legal representative during mediation is another aspect to consider. Would a party's legal representative be able to rely on legal professional privilege if he or she takes part in mediation or is present during mediation? If mediation fails it often leads to litigation and if the legal representative had been present during the mediation, and litigation ensues after the failed mediation, the communications that have been divulged during the mediation becomes an important issue. Can the legal representative and his or her client then claim legal privilege with regard to the mediation?

If one considers the first element of legal professional privilege, it can be argued that the legal representative would be acting in his or her professional capacity during mediation (this is if he or she does not actually facilitate the mediation). What else would his or her reason be for attending mediation?

The second aspect refers to the fact that the legal representative must have been consulted in confidence — does this take place during mediation? The process of mediation as such carries with it the expectation of confidentiality, but confidentiality is not the same as legal professional privilege. If the parties wanted to claim legal professional privilege they will not divulge information when other parties — i.e. the mediator and the other party which may also have his or her representative are present. The party and his or her legal representative could then just have had a meeting in private during which the party divulges information that he or she sees as confidential to the legal representative, and the latter responds with legal advice. If the legal representative calls for a private consultation with his or her client during the mediation, similar to a caucus that the mediator uses during mediation, then that segment of the mediation can possibly be seen as being subject to legal professional privilege.

The third aspect - the communications should have occurred with the purpose of legal advice – is an aspect that could possibly be applicable during mediation. Why else would a legal representative join his or her client during mediation? He or she is there to listen and offer legal advice on possible legal positions and on specific proposals or proposed agreements that might be suggested during the mediation, and even draft documents for the parties to use.²⁸⁰ The legal representative can do this during the joint mediation session, or request to speak to his or her client in private and then offer their legal advice.

The last element of legal professional privilege involves the actual claiming of the privilege. This does not happen when the parties discuss issues in a joint session with their legal representatives and the mediator. It could be if the legal representative asks for a private consultation with his or her client that the communication that is shared during such a consultation, could be seen as an action that exercises the claiming of the privilege.

It is of vital importance when it comes to legal professional privilege, that the context of the situation is taken into consideration.²⁸¹ This together with the different elements that form part of mediation must be used to determine if legal professional privilege is applicable in the specific situation. If this is done it seems that if legal professional privilege cannot be claimed during mediation unless the legal representative specifically requests to consult with his or her client in private during the mediation, similar to a caucus. In such a case the privilege might be relied upon, because it seems to involve all the relevant elements necessary to claim legal professional privilege. However, the parties relying on the privilege would have to prove if and why it is applicable. The more appropriate principle to rely on would be the without prejudice principle.

²⁸⁰ Lang 2010 <http://www.mediate.com/articles/langlawyerrole.cfm>

²⁸¹ *A company and Two Others v The Commissioner for the South African Revenue Services* 2013.

3.5 Without prejudice

3.5.1 Application and objective of the without prejudice principle

The without prejudice principle is a well-established rule in South Africa. *Patlansky v Patlansky*²⁸² already dealt with it a century ago. The premise of the rule lies in the fact that with the consent of the parties and due to public policy, it will be beneficial if people, in an attempt to settle disputes, will be able to negotiate and communicate without fear that what they said during these negotiations be used against them if negotiations fail and the dispute lingers on.²⁸³

It is important to realize that the without prejudice principle does not generate general confidentiality, it is a rule which is applied in order to exclude privileged evidence from further litigation, and it is subject to certain exceptions.²⁸⁴ It is an effective way in which to protect communications, exchanged in an attempt to settle a matter, should settlement not be reached.²⁸⁵

In *Jili v South African Eagle Insurance Co Ltd*²⁸⁶ it was stated that:

No conclusive legal significance attaches to the phrase 'without prejudice'. The mere fact that a communication carries that phrase does not *per se* confer upon it the privilege against disclosure, for example where there exists no dispute between the parties or it does not form part of a genuine attempt at settlement ... nor is a communication unadorned by that phrase always admissible in evidence, for it will be protected from disclosure if it forms part of settlement negotiations.²⁸⁷

It is therefore important to note that by using the words "without prejudice" with regard to communications, it does not mean that this automatically renders

²⁸² 1917 WLD 10.

²⁸³ *Kapeller v Rondalia Versekeringskorporasie van Suid-Afrika Beperk* 1964 4 SA 722 and *Naidoo v Marine & Trade Insurance Company Ltd* 1979 3 SA 666 (A) at 677.

²⁸⁴ Allen 2015 https://www.cedr.com/articles/?item=Guidance-on-recent-case-law-for-media-tors_

²⁸⁵ Allen 2015 https://www.cedr.com/articles/?item=Guidance-on-recent-case-law-for-media-tors_

²⁸⁶ 1995 3 SA 269 (N).

²⁸⁷ *Jili v South African Eagle Insurance Co Ltd* 1995 3 SA 269 (N) para 275C.

the communications inadmissible as evidence or protected from disclosure.²⁸⁸ The party that claims the privilege has the onus to prove it²⁸⁹ and partial disclosure of privileged information could lead to withdrawal of the protection in its entirety.²⁹⁰

Conversely even if the words "without prejudice" do not appear on a document or were not expressly attached to communications (the principle covers written and oral communication), the communications and information can still be seen as being covered by the "without prejudice" principle.²⁹¹ The crucial distinction is that the communications that have been exchanged must "not be wholly unconnected with the matter" (the matter in issue) for it to be protected by the without prejudice principle, unrelated (to the matter in dispute) and irrelevant admissions and communications will not be protected by the without prejudice principle.²⁹² The communications must also have been part of *bona fide* negotiations in an attempt to settle a dispute.²⁹³ If a settlement is reached, the negotiations which led to the settlement the evidence regarding the negotiations as well as the settlement will be admissible. This is based on the fact that the foundation for the non-disclosure has now fallen away.²⁹⁴

3.5.1.1 Without prejudice principle in mediation

The without prejudice principle has been developed in order to encourage open and frank discussions between parties with the aim of possible settlement. This means that the parties enjoy some sort of safeguard against the usage of the communications and information against them should the negotiations and attempt at settlement fail.²⁹⁵ The principle will, and does, find a natural home in

²⁸⁸ *Brauer v Markaw* 1946 TPD 344 para 350.

²⁸⁹ *Waterhouse v Shields* 1924 CPD 155.

²⁹⁰ *NUMSA v John Thompson Africa* C 402/99 200 ZALC 25 para 3; *Msimang v Durban City Council* 1972 4 333 para 338E-F.

²⁹¹ *Patlansky v Patlansky* 1917 WLD 10.

²⁹² *Erasmus v Pienaar* 1984 4 SA 9 (T) at 30C-E; *Patlansky v Patlansky* 1917 WLD 10.

²⁹³ *Brauer v Markaw* 1946 TPD 344; *Henley v Henley* 955 P 202; *Millward v Glaser* 950 3 All SA 99 (W).

²⁹⁴ *Gcabashe v Nene* 1975 4 All SA 204 (D).

²⁹⁵ Van Dokkum 2012 http://www.academia.edu/6391951/Mediation_Privilege-_what_are_we_really_talking_about_-_Part_1.

mediation, since the latter aims to facilitate settlement and open and frank discussions in order to try to achieve this.

This is indeed the case. The standard mediation agreement will typically also refer to the fact that the without prejudice principle is applicable in mediation.²⁹⁶ The Court-Annexed Mediation Rules published in 2014, under the heading *Confidentiality* (12.1) also clearly states that the mediation process is considered as a process which is covered by the without prejudice principle.²⁹⁷ Practitioners also convey this very same message to their clients when they discuss the possibility and potential of mediation.²⁹⁸ In *Waste-Tech (Pty) Ltd v Van Zyl and Glanville* this principle was reiterated and it was made clear that communications that have been undertaken during general mediation proceedings will enjoy protection.²⁹⁹ There is therefore no doubt that the without prejudice principle will hold sway during mediation. The standard mediation agreement also contains a similar provision.³⁰⁰

This seems to link with the idea that the parties, who are involved in mediation, must take part in this process in good faith. This leads to the question — what if they don't? Can the without privilege principle then not be invoked anymore?

It is also important that the parties involved in the mediation should display a genuine attempt at a settlement, because if the latter does not happen, the protection that the without prejudice principle gives parties can be questioned and might even be found to not be applicable. To prove the latter might be a challenge but it is not beyond the realms of possibilities. It would then call for

²⁹⁶ Africa ADR para 17 of the agreement, which is typical of the type of agreements used for mediation in South Africa <http://www.africaadr.com/index.php?a=r/home//10>.

²⁹⁷ 12.1 of *Court-Annexed Mediation Rules* G 37448 RG 10151 GoN 183, 18 March 2014. See also the standard agreement to mediate of the *Association of Arbitrators (Southern Africa)* which also acknowledges the same principle.

²⁹⁸ Adriaans Attorneys 2016 http://adriaansattorneys.com/page/blog/?blog_post_id=59/.

²⁹⁹ *Waste-Tech (Pty) Ltd v Van Zyl and Glanville* 2002 1 SA 841 (E).

³⁰⁰ AASA 2014 http://arbitrators.co.za/wp-content/uploads/2014/10/aoa_agreement_to_mediate.pdf. See paragraph 11 of the mediation agreement of the Arbitrators Association of Southern Africa Also see paragraph 17 of the mediation agreement that the Africa ADR (Arbitration Mediation Conciliation) organisation uses at <http://www.africaadr.com/index.php?a=r/home//10>.

an investigation into the events, conduct and actions that took place during mediation which would again of course raise issues regarding confidentiality.

3.5.1.2 Exceptions to the without prejudice principle

However, as mentioned in the previous chapter, there are exceptions to the without prejudice principle as clearly shown by *KLD Residential CC v Empire Earth Investments 17 (Pty) Ltd*.³⁰¹ Specific examples are mentioned such as: legislation that is consistent with the Constitution; allegations of a compromised settlement; and the existence of a threat, to name a few.³⁰²

An important aspect to note is that the judgment in the above-mentioned case clearly highlighted the issue of public policy and indicated that public policy as such can dictate when it comes to the application of the without prejudice principle. The judge also added that such a list of exceptions is not exhaustive, which seems to indicate that the application of public policy (and how it relates to a case) can generate more exceptions than the listed ones.³⁰³

Allen also refers to instances (he refers to it as "broad circumstances") where, on request of one of the parties, the judge can give an order for privileged information to be divulged.³⁰⁴ This will be where a party asserts that an agreement was reached, although there might not physically be a formal agreement as required by the mediation agreement, or where a party asserts that the agreement ought to be set aside for some reason, such as fraud, duress or material misinterpretation.³⁰⁵ A party can also claim that the record of such a settlement agreement is incorrect and should be corrected, or that the

³⁰¹ *KLD Residential CC v Empire Earth Investments 17 (Pty) Ltd* (1135/2016) 2017 ZASCA 98; [2017] 3 All SA 739 (SCA); 2017 6 SA 55 (SCA) (6 July 2017).

³⁰² *KLD Residential CC v Empire Earth Investments 17 (Pty) Ltd* (1135/2016) 2017 ZASCA 98; [2017] 3 All SA 739 (SCA); 2017 6 SA 55 (SCA) (6 July 2017) paras 31, 32, 34.

³⁰³ *KLD Residential CC v Empire Earth Investments 17 (Pty) Ltd* (1135/2016) 2017 ZASCA 98; [2017] 3 All SA 739 (SCA); 2017 6 SA 55 (SCA) (6 July 2017).

³⁰⁴ Allen 2015 <https://www.cedr.com/articles/?item=Guidance-on-recent-case-law-for-media-tors>.

³⁰⁵ Allen 2015 <https://www.cedr.com/articles/?item=Guidance-on-recent-case-law-for-media-tors>.

³⁰⁵ Allen 2015 <https://www.cedr.com/articles/?item=Guidance-on-recent-case-law-for-media-tors>.

mediation content must be admitted into evidence in order to properly understand and interpret the agreement.³⁰⁶

In *Jili*³⁰⁷ the court stated that a without prejudice offer which has been made during settlement negotiations, will be deemed to be inadmissible by the party which had made this offer, but could be admissible if it could be instrumental in determining if an offer of settlement was made at all.³⁰⁸ The judge can then decide that these circumstances justify the admittance of privileged evidence and information (the mediation content) into subsequent litigation procedures.³⁰⁹

The above is applicable to the parties involved in the mediation but there are instances where a third party which has not been part of the mediation discussions, might also want the mediation content to be disclosed.³¹⁰ The court can then consider such a request by a third party to disclose mediation content, although (the third party) has not been part of the mediation process. The third party based on its genuine interest as to determine on which basis the discussions during mediation led to a settlement, will do this by "seeking disclosure against a non-party in the subsequent proceedings or even by trying to call the mediator as a witness".³¹¹

³⁰⁶ Allen 2015 <https://www.cedr.com/articles/?item=Guidance-on-recent-case-law-for-mediators>.

³⁰⁷ *Jili v South African Eagle Insurance Co Ltd* 1995 3 SA 269 (N) 275B-G.

³⁰⁸ *Jili v South African Eagle Insurance Co Ltd* 1995 3 SA 269 (N) 275B-G.

³⁰⁹ *Oceanbulk Shipping v TMT* [2010] UKSC 44 but also *Chartbrook v Persimmon Homes* [2011] UKHL 38 and *Mason v Walton-on-Thames Charity* [2010] EWHC 1688 (Ch) and [2011] EWCA Civ1732.

³¹⁰ Allen 2015 <https://www.cedr.com/articles/?item=Guidance-on-recent-case-law-for-mediators>. The examples Allen refer to seem to be connected to evaluations, terms of settlement etc that trustees, liquidators and the like often require in order to ascertain certain information.

³¹¹ Allen 2015 <https://www.cedr.com/articles/?item=Guidance-on-recent-case-law-for-mediators>.

The court will then consider balance the need to protect the privacy of settlement discussions against the court's need and duty to deal with disputes by using all the relevant material.³¹²

Theofilopoulos describes it aptly when she indicates that it is a decision that has to be made between "the aspect of the public interest which reflects the requirements of administration of justice" and if that aspect "outweighs the aspect of the interest which is against disclosure."³¹³ If the former is seen as more important, the request for disclosure will be acceded to. If not, the request for disclosure will be denied. It will be a question of investigating the factual circumstances of the specific case by the court, in order to assist with this decision.³¹⁴

In 2003 the Springbok rugby squad held a training camp, which later became known as Kamp Staalraad. During this camp a security company (the respondent) obtained certain images of the players, some very private images, and wanted to publish them via a DVD which they had compiled of the camp. They were planning to sell the images to the public. Several players approached the court to seek an interdict to prohibit the security company from doing this.³¹⁵

In his judgment, Rabie indicated that when balancing the rights between disclosing private information and the individual's right not to have that information disclosed, the following will have to be considered: reference to the surrounding circumstances of the specific matter, other factors such as the position of the person in society, the newsworthiness of the facts that are revealed etc., and the court's view of the *boni mores* of the society.³¹⁶

³¹² Allen 2015 <https://www.cedr.com/articles/?item=Guidance-on-recent-case-law-for-media-tors>.

³¹³ Theofilopoulos 2012 *SALJ* 640.

³¹⁴ Theofilopoulos 2012 *SALJ* 640.

³¹⁵ Neethling 2014 *Litnet Akademies* 27.

³¹⁶ *Greeff v Protection 4U h/a Protect International* 2012 6 SA 393 (GNP) para 408A-E.

Although this matter specifically refers to disclosing private information in a public domain, and in this case information of publically well-known figures, it underlines the importance of balancing the rights of the individual against those of the public when it comes to disclosure of information. The court does this by considering the circumstances of the relevant matter and the *boni mores* of society.

In a matter that involved a sequestration matter, *ABSA Bank Limited v Chopdat*³¹⁷ the judge ruled that public policy would call for admittance to insolvency to be allowed as evidence, even if it was "made on a privileged occasion".³¹⁸ In other words public policy, in this case, trumped private interest. The court decided, despite the fact that usually such communications would be seen as privileged (it was made "on a privileged occasion" as the court refers to it),³¹⁹ public policy and thus the interests of the public and the legal convictions of the public (*boni mores*), dictate that the without prejudice principle should not be applied to this specific communication and it should not be afforded status as a privileged document. This is an excellent example of the balancing of the interests of the public against the interest of the individual. On the one hand there was the protection of the communication (in this case an admittance of insolvency) and on the other hand, that which would serve to honour public policy (admittance into evidence of the specific admission of insolvency even though it was done during a privileged occasion). The court considered the specific situation and determined that public policy called for disclosure of the information. The court has to exercise this discretion carefully and thoughtfully though, since the consideration of these rights, calls for a fine balancing act.

Another aspect to consider is the issue of the right to a fair trial as contained in section 35 of the Constitution.³²⁰ As can be seen from *S v Safatsa*,³²¹ the issue

³¹⁷ *ABSA Bank Limited v Chopdat* 2000 JOL 6563 (W).

³¹⁸ *ABSA Bank Limited v Chopdat* 2000 JOL 6563 (W) para 12. This was confirmed in *Lynn & Main Inc v Naidoo* 2005 JOL 15372 (N).

³¹⁹ *ABSA Bank Limited v Chopdat* 2000 JOL 6563 (W) para 12.

³²⁰ *Constitution of the Republic of South Africa*, 1996. See also *S v Shabalala* 1995 2 SACR 761 (CC).

³²¹ *S v Safatsa* 1988 1 SA 868 (A).

of privilege is closely associated with the constitutional right to a fair trial. The court often has to resolve this matter by balancing the "potential for harm (and whether it can be mitigated) against the accused's right to a fair trial".³²² Depending on the court's decision, the information could be divulged or will remain privileged.

3.6 Procedures for applying the without prejudice principle

If parties then rely on the without prejudice principle in mediation, which they invariably do, and there is a request for this information to be disclosed, either by one of the parties or by a third party, the court will have to follow certain procedures.

Firstly, it will have to consider if the without prejudice principle applies to the matter at hand, in other words are the requirements that the without prejudice principle calls for met in the specific case. In the case of mediation this will most certainly be the case. Then the court must apply the principles for claiming the application of the without prejudice principle to the specific situation at hand. For instance, although mediation relies on the without prejudice principle, the court could, if it considers the surrounding circumstances of a matter, determine that a party did not negotiate in good faith with the aim to try and settle the matter, and thus did not adhere to the principles of the without prejudice principle and cannot rely on it in the given situation.

Secondly, the court should determine if an exception to the without prejudice principle does not apply in the matter. There are obvious exceptions, some contained in legislation, but the list is not exhaustive. It is possible that new exceptions could be added since we work with the dynamic field of law.

If the court then finds that there are no exceptions that apply, it should consider the balancing of the rights of the individual and the public, in the form of public policy or interest. This entails the issue of the legal convictions of society (*mori bones*) and rights such as contained in section 34 of the Constitution (the right

³²² Whitear-Nel 2010 SAJCJ267.

of access to a fair, impartial and public hearing before a court) and section 35(3) (i) the right to adduce and challenge evidence in a fair trial.³²³

Mediation takes place with the without prejudice principle firmly in place, but the demands of public policy (together with the obvious noted exceptions) can override the without prejudice principle in mediation.

It is important, however, for parties to understand although the without prejudice principle is definitely applicable to mediation, and is seen as an integral part of the mediation process, it can be found not to be applicable in certain cases.

3.7 Legislation

3.7.1 Court-Annexed Rules for Mediation

It has been mentioned that there are more than 50 pieces of legislation providing for the use of mediation in South Africa. The *Court-Annexed Rules for Mediation*³²⁴ acknowledge the confidentiality of mediation communications and the without prejudice principle, but makes provision for disclosure of information that would be "discoverable in terms of the normal rules of court".³²⁵

This is very much the same as the standard agreements to mediate that are used in practice.³²⁶ It incorporates the exceptions to confidentiality as well³²⁷ and specifically states that the mediator cannot be called to testify regarding what has transpired during mediation.³²⁸ It also acknowledges the without prejudice principle of mediation,³²⁹ but it also states that a mediated agreement

³²³ *Constitution of the Republic of South Africa*, 1996.

³²⁴ G 37448 RG 10151 GoN 183 of 18 March 2014.

³²⁵ 12.2 of *Court-Annexed Mediation Rules* G 37448 RG 10151 GoN 183 of 18 March 2014.

³²⁶ See 201 and 208 above.

³²⁷ 12.3 of *Court-Annexed Mediation Rules* G 37448 RG 10151 GoN 183, This refers to the mediator's responsibility to break confidentiality if he or she feels that another person might be in danger of harm.

³²⁸ 12.3 of *Court-Annexed Mediation Rules* G 37448 RG 10151 GoN 183.

³²⁹ 12.1 of *Court-Annexed Mediation Rules* G 37448 RG 10151 GoN 183.

is considered an exception to the confidentiality principle.³³⁰ It means that a mediated agreement will be exempted from confidentiality. This will refer to a signed mediated agreement, since 12.2 specifically indicates that an unsigned mediated agreement will be regarded as confidential and cannot be used in further court proceedings.³³¹ The reason for this seems to be that the rules allow for a party to submit a proposed agreement to their legal representatives for legal advice before signing it, and additionally regard a signed mediation agreement as enforceable. The signed settlement can be used by a party to obtain judgment in terms of section 58 of the *Magistrate's Court Act* 32 of 1944.³³²

Where does this leave confidentiality, and specifically the parties' expectation of confidentiality? It does not promise complete confidentiality, or even complete confidentiality bar the report of illegal activities (as can be found with legal professional privilege) or possible harm to others (which one would consider as part of the *mori bones* of society). It leaves the door open for mediation communications to be disclosed at a later stage if they would have been discoverable in terms of the normal rules of the court. Additionally, the mediator cannot be called to testify with regard to the content and the manner in which the mediation was conducted.

If a party feels that it have been placed under duress, or have been unduly influenced, coerced, or even threatened during the mediation, can this be investigated, and if so, how? They can rely on the mediated agreement to show possible examples of the above-mentioned factors and issues since the mediated agreement is exempted from confidentiality, but they cannot call the mediator to come and testify about his or her conduct during the mediation, or what transpired during mediation. This offers mediator protection, which many

³³⁰ 12.2 of *Court-Annexed Mediation Rules* G 37448 RG 10151 GoN 183.

³³¹ 12.2 of *Court-Annexed Mediation Rules* G 37448 RG 10151 GoN 183.

³³² Form Med-14 (Rule 82) para 3 of *Court-Annexed Mediation Rules* G 37448 RG 10151 GoN 183.

of them feel they desperately need, but it does also in many ways exempt mediators from much-needed scrutiny, supervision and accountability.³³³

3.7.2 The State's position during mediation

There are various pieces of legislation that provide for mediation. The legislation then specifically regulates the process of mediation as it pertains to the specific legislation. It is therefore important to study each piece of legislation and then evaluate its effect on confidentiality. It is not the purpose of this study to dissect each and every piece of legislation regarding mediation that is found in South African legislation, but it would be prudent to briefly discuss some important aspects.

It is vitally important to consider the nature and context of the mediation process.³³⁴ An aspect that one must consider at the outset is to determine whether the state is a party to such a mediation provision, as opposed to a situation where the mediation involves only private individuals.

An example (there are many) of state involvement in mediation would be the *Municipal Supply Chain Management Regulations*.³³⁵ Regulation 50 specifically deals with disputes, objections, complaints and queries, and 50(1) states:

- (1) The supply chain management policy of a municipality or municipal entity must provide for the appointment by the accounting officer of an independent and impartial person not directly involved in the supply chain management processes of the municipality or municipal entity –
 - (a) to assist in the resolution of disputes between the municipality or municipal entity and other persons regarding –
 - (i) any decisions or actions taken by the municipality or municipal entity in the implementation of its supply chain management system; or
 - (ii) any matter arising from a contract awarded in the course of its supply chain management system; or

³³³ Hinshaw 2015 *Harv Negot LR* 218 highlights the need for the regulation of mediators in order to protect consumers and in order to weed out the bad apples in the field of mediation, and thus protect the name and integrity of mediation.

³³⁴ See *A Company and Two Others v The Commissioner for the South African Revenue Services* 2013

³³⁵ Regulation 50 of the Municipal Supply Chain Management Regulations GN 868 in GG 27636 of 30 May 2005.

(b) to deal with objections, complaints or queries regarding any such decisions or actions or any matters arising from such contract.³³⁶

These regulations deal with municipalities (thus state organs) and the process of dealing with supply chain management. The regulations also deal with the awarding of contracts and matters arising from the process of awarding such contracts, together with questions and disputes that emanate from matters that involved such contracts.³³⁷

This process cannot be seen as one merely between individuals; it involves the state and individuals and therefore should be open to public scrutiny, in the interest of public policy and good governance.

So, if there is a dispute regarding the manner in which a municipality has awarded a contract to a party, and this is referred to mediation (as provided for by the Regulations) then confidentiality would have to succumb to public policy and principles of good governance. The public has an interest in the matter and transparency is essential.

Section 217 of the Constitution provides for government to contract for goods and services in a manner which is fair, equitable, transparent, competitive and cost-effective.³³⁸ If there is dispute as to if the awarding of contracts by the government has been fair or transparent, or every cost-effective, then this information, and the information emanating from the subsequent dispute, should not be shrouded in confidentiality because this would be against public policy and even unconstitutional. In a similar manner when a dispute is mediated as to gain permission to develop or be involved in a listed activity - such as what we find in *The National Environmental Management Act 107 of 1998*³³⁹ — the public in general has an interest in such a matter, and confidentiality in such a case might be problematic.

³³⁶ Regulation 50(1) of the Municipal Supply Chain Management Regulations.

³³⁷ See Regulation 50(1) of the Municipal Supply Chain Management Regulations.

³³⁸ Section 217 of the *Constitution of the Republic of South Africa*.

³³⁹ *National Environmental Management Act 107 of 1998*.

There is a difference when the dispute involves private parties, since the need for confidentiality might be more acute during mediation between private parties, than it would be if the state is one of the parties in the mediation. Section 134 of the *National Credit Act* also calls for various ADR processes which includes mediation.³⁴⁰ However, this mediation will mostly involve disputes between private parties and confidentiality will be applied during mediation such as this. If the state mediates in the role of a commercial entity, then confidentiality might apply, but if it functions as an administrative decision maker (such as is the case with the examples above regarding the *Municipal Supply Chain Management Regulations* and the *National Environmental Management Act*), the actions and decisions of the state will have to be open to scrutiny and review by the public. It is therefore imperative that each and every case is considered with its specific context in mind, in order to determine the position of confidentiality in that specific case.

3.8 Public policy

Morek³⁴¹ points out that the "overriding interest of public policy"³⁴² can be seen as both the most challenging, but also the most needed exception to confidentiality.³⁴³ He calls for the need to balance the importance and necessity of confidentiality against the needs of public security and safety and the most important interests of individuals.³⁴⁴ Confidentiality must be weighed against the needs of public safety and security, and the protection of the most vital interests of individuals. This offers a strong argument for exceptions to confidentiality as well as the fact that confidentiality, as with any other right, should be weighed up against other competing rights.³⁴⁵ If a mediator's testimony can shed some light on what transpired during mediation, in order to resolve issues of public policy, then the mediator should not be allowed to hide behind the veil of confidentiality and his or her position as neutral. Conversely

³⁴⁰ *National Credit Act* 34 of 2005.

³⁴¹ Morek 2013 *ERA Forum* 431.

³⁴² Morek 2013 *ERA Forum* 432.

³⁴³ Morek 2013 *ERA Forum* 432.

³⁴⁴ Morek 2013 *ERA Forum* 432.

³⁴⁵ Section 36 of the *Constitution of the Republic of South Africa* will also be applicable.

the mediation process should remain a vehicle for parties to openly and honestly aim to reach a settlement, with the mediator not persistently anxious about possible legal consequences because he or she is trying to fulfil their functions and roles as mediators.

The classical way in which mediation has initially been exercised displayed a lack of formality, which has led to an increased effort to regulate and institutionalise it.³⁴⁶ On the other hand, as Nussbaum suggests, mediation, which is in essence a more informal process than litigation should not be burdened by such a load of legal obligations that it becomes a vehicle by which participants' behaviour is controlled.³⁴⁷ In South Africa we are still in the process of developing legislation and legal principles regarding mediation, and therefore still need to chart a way forward in order for mediation to be effectively regulated in our country.

The regulation of the confidentiality of mediation in South Africa seems to indicate that confidentiality in mediation is important, acknowledged and needs to be adhered to. There are obvious exceptions to this, such as unlawful activities and possible harm to parties and the concluded mediated agreement, and the subjection to discoverability. On the other hand the mediators are protected since they cannot be called to testify, which again leads towards a stricter application of confidentiality.

The contract as a basis for confidentiality has not been tested by South African courts as yet, and it would be helpful if this could happen sooner than later. If parties to a contract lend confidentiality to certain information, how will courts weigh this up against the rules of discoverability for instance?

A legal professional privilege for mediators is not applicable in South Africa currently. It is also not going to happen soon, since it does not seem to be the trend that other countries, and specifically countries which show a high degree of sophistication and development when it comes to the regulation of

³⁴⁶ Nussbaum 2016 *Utah LR* 395.

³⁴⁷ Nussbaum 2016 *Utah LR* 395.

confidentiality in mediation, have adopted this privilege for mediators. It is also debatable if this is indeed desirable.

Confidentiality is also subject to the public policy and the *boni mores* of society. This aspect plays a major part in the application of the without prejudice principle which is one of the cornerstones of confidentiality in mediation.

3.9 Conclusion

Legislation on mediation in South Africa is still very limited. Reference to mediation is made in various pieces of legislation, but South Africa does not have an overarching act in place, an act that aims at clarifying mediation and working towards more uniformity and clarity regarding mediation, but it might be time to work towards such a concept.

There still seems to be a lack of clarity regarding the application of mediation confidentiality in South Africa. — maybe case law will be the ultimate judge as to the effectiveness and acceptability of the manner in which confidentiality is regulated in South Africa.

CHAPTER 4

Confidentiality in mediation: the position in California

4.1 Introduction

The United States of America has a rich history and culture of mediation. Mediation is the most frequently used ADR process in the United States of America and has received admirably judicial support.³⁴⁸ All fifty states in the United States of America have legislation in place to deal with confidentiality in mediation communication. The *UMA* was promulgated in 2003 and has confidentiality as a focal point.³⁴⁹

When the regulation of confidentiality in mediation is evaluated there are various legal sources that can be used. The *UMA* can be used (if the state has accepted it as part of their legislation), court rules or court orders³⁵⁰ can be used, the specific state's statutes or alternative dispute resolution providers such as the *American Arbitration Association* rules or private agreements can also be used.³⁵¹ Added to this of course, is also the possibility of using federal legislation, if it proves to be a federal matter.

4.2 The American legal system

The United States of America follows federalism, which means that they do not have a single, unified court system such as Great Britain or France, or South Africa, but there are in effect 51 court systems – the federal court system as well as the court systems of each of the 50 states.³⁵² This leads to a difference between the federal court and the state courts, as well as differences among the 50 state courts.³⁵³ Additionally each state's substantive law is unique to that state; therefore the interpretation of such law will also be unique to each

³⁴⁸ Nolan-Haley 2014 *Cardozo Journal of Conflict Resolution* 281.

³⁴⁹ Deason 2005 *U Kan LR* 1389.

³⁵⁰ For example Model Rules that govern the specific legal field.

³⁵¹ Lyons 2017 *American Bankruptcy Institute Journal* 36-37, 67-69.

³⁵² Calvi and Coleman *American law and legal systems* 47.

³⁵³ Calvi and Coleman *American law and legal systems* 47.

state.³⁵⁴ This means that uniformity becomes extremely difficult and a matter such as confidentiality in mediation will also suffer this same fate. Oberman³⁵⁵ indicates that in the United States of America there is still a clear lack of uniformity with regard to confidentiality protection provisions between state and federal laws, among states, and even within different localities within a state.

Each state thus has its own mediation legislation³⁵⁶ and there is also the overarching legislation of the federal court. Deason³⁵⁷ indicates that to determine which law is applicable to mediation confidentiality is a daunting task. State mediation laws show great disparities and variation so, that which is protected in one state, might not be protected in another.³⁵⁸ To add to this, the choice between applying state law or applying federal law also comes into the equation.³⁵⁹

In order to determine the applicable law that should be used if one deals with mediation confidentiality, the rule is that if the rule of decision is federal, the court should consider federal common law, and if the rule of decision is state then the court should apply state law of privilege.³⁶⁰ In the case that there are mixed claims, federal and state, courts seem to prefer using the federal law of privilege.³⁶¹ In a state case, the state statutes and rules offer a definitive answer to the application of the mediation privilege, and since all states have their own statutes and rules regarding mediation privilege these are simply

³⁵⁴ Calvi and Coleman *American law and legal systems* 47.

³⁵⁵ Oberman 2012 *Ohio St J on Disp Resol* 541.

³⁵⁶ Oberman 2012 *Ohio St J on Disp Resol* 546.

³⁵⁷ Deason 2001 *Marquette LR* 95.

³⁵⁸ Deason 2001 *Marquette LR* 96.

³⁵⁹ Deason 2001 *Marquette LR* 97. This is especially difficult according to Deason because mediation confidentiality seems to involve both issues of substance and procedure.

³⁶⁰ Deason 2001 *Marquette LR* 97. See Federal Rule of Evidence 501, which indicates that "in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness ... shall be determined in accordance with State law." In the Californian case of *Olam v Congress Mortgage Co* the court did exactly this and determined that the mediation confidentiality provisions of the state of California (state law) should apply, since the central issue was whether "the parties entered an enforceable contract at the close of the mediation session" and the judge rightly stated that, "[t]hat is a question of contract law — and there is no general federal law of contracts." *Olam v Congress Mortgage Co* 68 F Supp 2d 1110, 1124-25 (ND Cal 1999) para 1119. So the rule of decision in the matter is the deciding factor.

³⁶¹ Deason 2001 *Marquette LR* 97.

applied in state cases.³⁶² In federal courts it becomes a more complex issue and most federal courts seem to turn to the federal common law application of mediation privilege as found in *Federal Rule of Evidence* 501.

4.3 Expectations of confidentiality in mediation on state and federal level

At federal level, the Federal Rules of evidence as contained in Rules 501 and 403, offers a common law application of the mediation privilege. This clearly indicates that at federal level there is a definite expectation of confidentiality when it comes to mediation. The state of California itself recognizes the confidentiality of mediation communications in Standard V of the *Standards of Practice for California mediators*.³⁶³ This standard states that:

[a] mediator shall maintain the confidentiality of all information obtained by the mediator in mediation, unless otherwise agreed to by the parties or required by applicable law.³⁶⁴

The *Evidence Code of California* sections 115-1128 deal with confidentiality in settlement negotiations and these sections clearly treasure confidentiality in such situations (of which mediation is an example) and various California cases bear witness to this.³⁶⁵

The federal mediation privilege as contained in *Federal Rule of Evidence* 501 is a common law application of mediation privilege and the *Jaffe* case is the yardstick by which a court decides if a federal mediation privilege is applicable.³⁶⁶ In this case, four factors were highlighted which should be

³⁶² Shopp 2010 *Pennsylvania Bar Association Quarterly* 125 124.

³⁶³ American Bar Association 2007 https://www.americanbar.org/content/dam/aba/migrated/2011_build/dispute_resolution/model_standards_conduct_april2007.authcheckdam.pdf. These Standards of Practice offer guidance to mediators, but unless a court adopts it or any other regulatory authority does the same, it does not have the force of law.

³⁶⁴ California Dispute Resolution Council Date unknown <http://www.cdrc.net/adr-practice/mediator-standards/>. Case law such as *Johnson v Land O'Lakes Inc* 181 FRD 388 (ND Iowa 1998) (a federal case) and *Simmons v Ghaderi* (2008) 44 Cal 4th 570, 187 P 3d 934 (a Californian state case) reinforce this idea – so it is applicable on federal and state level.

³⁶⁵ California Evidence Code ss 1115-1128 and *Cassel v Superior Court* (Wasserman, Comden, Casselman & Pearson, LLP) (1/13/11) 51 Cal 4th 113.

³⁶⁶ Shopp 2010 *Pennsylvania Bar Association Quarterly* 125.

considered.³⁶⁷ These factors are: to determine if the privilege is an absolute need for confidence and trust; if it serves the public interests; it must be determined if the detriment that the privilege causes, as far as evidence goes, is modest and the court must consider if the denial of a federal privilege by the court does not frustrate the application of a similar privilege in state courts.

The application of the federal mediation privilege was dealt with in *Sheldone v Pennsylvania Turnpike Commission*.³⁶⁸ The court decided that a federal mediation privilege should be recognized, since confidentiality is imperative in mediation.³⁶⁹ It was also emphasised that state statutes and local rules (in this case it referred to the state of Pennsylvania) also offered a mediation privilege in order to ensure confidentiality.³⁷⁰ The court went further and indicated that almost all states have a mediation privilege in place and the promise of confidentiality at state level would have very little effect and purpose if it is not endorsed on federal level.³⁷¹ The court then went ahead and applied the factors as listed in *Jaffee* and determined that a federal mediation privilege was indeed applicable in this case.³⁷² The majority of federal courts seem to have adopted a similar approach as the one in *Sheldone* when determining if a federal mediation privilege is applicable.³⁷³

As previously stated, all fifty states in the United States of America have legislation in place to deal with confidentiality in mediation communication. The *UMA* specifically has mediation privilege as a focal point.³⁷⁴ The idea was to try and achieve more uniformity with the *UMA*.³⁷⁵ This piece of legislation has at its centrepiece, mediation privilege, and thus deals with confidentiality in some

³⁶⁷ *Jaffee v Redmond* 518 US (1) (1996). See *Folb v Motion Picture Indus Pension & Health Plans* 16 F Supp 2d para 1171 where the federal mediation privilege was also dealt with.

³⁶⁸ *Sheldone v Pennsylvania Turnpike Commission* 104 F Supp 2d 511, 513 (WD Pa 2000).

³⁶⁹ Shopp 2010 *Pennsylvania Bar Association Quarterly* 126.

³⁷⁰ Shopp 2010 *Pennsylvania Bar Association Quarterly* 126.

³⁷¹ *Sheldone v Pennsylvania Turnpike Commission* 104 F Supp 2d 511 (WD Pa 2000) at 515.

³⁷² Shopp 2010 *Pennsylvania Bar Association Quarterly* 126.

³⁷³ *Folb v Motion Picture Industry Pension & Health Plans* 16 F Supp 2d 1164 (CD Cal 1998); *Chester Co Hospital v Independence Blue Cross* 2003 US Dist LEXIS 25214 (ED Pa 2003).

³⁷⁴ Deason 2005 *U Kan LR* 1396.

³⁷⁵ *Uniform Mediation Act* 2003.

detail.³⁷⁶ The Act has brought greater clarity and uniformity, although most states have not incorporated it into their mediation legislation.³⁷⁷ This means that most states still predominantly rely on their own mediation legislation, which complicates matters.

The practical reality of all of this is that in state cases the court relies on the state statutes and rules that govern confidentiality in mediation, as well as the *UMA*, if the state has indeed adopted the *UMA*. If it is a federal matter (or even a mixture of state and federal) then the courts seem to favour the common law application of the federal mediation privilege as contained in *Federal Rule of Evidence* 501 (as applied in *Jaffe*).

4.4 Contract

The obligations to confidentiality often originate from voluntary agreements or undertakings to respect designated information.³⁷⁸ This can take the form of an oral undertaking, a confidentiality agreement, or an agreement that contains a confidentiality clause.³⁷⁹ This agreement will then form the basis of the regulation of the confidentiality and is legally binding.³⁸⁰ In mediation this will mean that parties undertake by means of a contract to keep whatever occurred during mediation confidential.³⁸¹ Many see the mediation agreement as a primary source of confidentiality.³⁸² The *UMA* stipulates (in section 8) that unless:

... subject to the Open Meetings Act or the Freedom of Information Act, mediation communications are confidential to the extent agreed by the parties or provided by other law or rule of this state.

³⁷⁶ Deason 2005 *U Kan LR* 1387.

³⁷⁷ By 2015 only 12 of the 50 states had adopted the *UMA* in order to regulate confidentiality in mediation. See Deason 2015 *Dispute Resolution Magazine* 32.

³⁷⁸ Hartzog 2012 *Georgia LR* 672.

³⁷⁹ Hartzog 2012 *Georgia LR* 672.

³⁸⁰ Hartzog 2012 *Georgia LR* 672. Examples of such agreements can be found in arbitration, mediation and to protect trade secrets. See Doré 1999 *Notre Dame LR* 283, 286.

³⁸¹ Alfini and McCabe 2001 *Arkansas LR* 174.

³⁸² Morek 2013 *ERA Forum* 429. A document such as the European Code of Conduct for Mediators (point 3.1) reiterates this by indicating that the mediator should ensure that understood and have agreed about the terms and conditions of the agreement. Also see Cohen 2013 *Florida LR* 14.

This seems to indicate that in the absence of a mediation confidentiality agreement, there may be no limitation on disclosure of confidential information in states which have adopted the *UMA*. The agreement to mediate then becomes important, since confidential information will then be protected by such an agreement, and contract law will govern such an agreement.³⁸³

The advantage of such agreements lies in the fact that the court can rely on these agreements in order to protect certain information by virtue of the obligation of confidentiality that has been created by the agreement.³⁸⁴ The agreement to mediate also establishes the ground rules for the mediation.³⁸⁵ Additionally the parties can adapt their contract or agreement to suit their respective positions as far as confidentiality within the agreement goes.³⁸⁶

Robinson claims that when it comes to the enforcement of mediated settlements then "an unfettered application of contract law is desirable"³⁸⁷ and many feel this application can similarly be used when dealing with agreements to mediate.

Yet research in the United States of America has shown that mediation participants are rarely successful when they oppose the enforcement of mediated settlement if they rely on traditional contract principles.³⁸⁸ This together with other concerns and reservations have meant that many feel a contract does not offer sufficient protection against the disclosure of confidential information.

Deason refers to the fact that the law of contracts and the confidentiality requirements for mediation often compete. This happens especially when the traditional principles of contract law call for the disclosure of certain information

³⁸³ Frisbie 2012 *Chicago Daily Law Bulletin* 47.

³⁸⁴ Hartzog 2012 *Georgia LR* 657.

³⁸⁵ Hyde 1984 *Mediation Juvenile & Family Court Journal* 59. The parties can therefore agree to tailor certain requirements and obligations to suit their situation.

³⁸⁶ Wiking *The enforcement and setting aside of mediation settlement agreements* 66.

³⁸⁷ Robinson 2003 *Journal of Dispute Resolution* 173.

³⁸⁸ Coben and Thompson 2006 *Harv Negot LR* 73-89.

which can then clash with confidentiality.³⁸⁹ Weller³⁹⁰ refers to the strict manner in which certain states and certain statutes regulate confidentiality (he refers specifically to California amongst others). This, he states, will lead to parties finding themselves unable to rely on certain contractual defences such as duress, fraud or undue influence, since in order to prove these they will have to obtain evidence as to what happened at the mediation, which (because of the strict application of mediation confidentiality) they might fail to obtain.³⁹¹ Subsequently the application of the principles of contract law might not always be sufficient.

Harvard³⁹² also questions the validity of the contracts being able to restrict and curb evidence. The argument is that to allow a party to rely on a contract in order to classify certain information as confidential, could potentially be against public policy.³⁹³ Additionally he also indicates that a contract can only be binding on the parties that entered into it, and therefore the contract cannot preclude other non-contracting parties from using the evidence.³⁹⁴

4.5 Legal professional privilege

The attorney-client privilege is seen as a fundamental and well-established element of the American legal system.³⁹⁵ The US law recognises the sanctity of communications between attorneys and clients and will normally protect such communications from disclosure to third parties under the policy of attorney-client privilege.³⁹⁶ The Supreme Court endorsed the fact that the essential

³⁸⁹ Deason 2005 *UC Davis LR* 37-38.

³⁹⁰ Weller 1992 *The Judges Journal* 16.

³⁹¹ Weller 1992 *The Judges Journal* 16.

³⁹² JSTOR 1984 www.jstor.org/stable/1340844 (450).

³⁹³ *Cronk v State* 100 Misc 2d 680, 686, 420 NY S 2d 113, 117-18 (Ct Cl 1979; also *Garden State Plaza Corp v SS Kresge Co* 78 NJ Super 485, 500-03 x89 A 2d 448, 456-58 (App Div). In the latter case the court disapproved of Wigmore's position (which states that such a contract is enforceable) and the court maintained that the parol evidence rule also covers access to evidence of negotiations.

³⁹⁴ JSTOR 1984 www.jstor.org/stable/1340844 Harvard 1984:451.

³⁹⁵ *Upjohn Co v United States* 449 US 383, 389 (1981) which indicated that this privilege is the oldest evidentiary privilege and that it is imperative in enhancing broader public interests in the practice of law and administration.

³⁹⁶ Eckman 2011 <http://www.inta.org/INTABulletin/Pages/Attorney-ClientPrivilegeUnderUSLaw.aspx>.

purpose of the attorney-client privilege is to promote open and honest discussions between attorneys and their clients, in order to protect the wider public interests when dealing with law and the administration of justice.³⁹⁷ The underlying reason is that clients will be less open to disclosure of information if they have a constant fear that the information that they have divulged will be used against them at a later stage. The other side of the coin is that failure to properly disclose can limit an attorney's ability to consult with his or her client, and attorneys will run the risks of not being able to offer the best and most comprehensive advice.³⁹⁸ Eckman comments that the privilege in the USA tends to stretch further than in other countries and it provides a safe harbour for clients and attorneys.³⁹⁹ The privilege operates in both directions—information from client to attorney, but also includes the advice the attorney offers the client.⁴⁰⁰

The *Federal Rule of Civil Procedure* 26, *Federal Rule of Criminal Procedure* 16 and *Federal Rules of Evidence* 501 and 502 govern the application of the attorney-client privilege in federal courts.⁴⁰¹ Additionally *The Model Rules for Professional Conduct* (which governs lawyers and jurists) in 1.6 reiterates the existence and application of this privilege and states that:

[a] lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b)⁴⁰²

Each of the 50 states has also developed their own rules regarding attorney-client privilege and they can differ from each other.⁴⁰³ In California under the

³⁹⁷ *Upjohn Co v United States* 449 US 383, 389 (1981).

³⁹⁸ Eckman 2011 <http://www.inta.org/INTABulletin/Pages/Attorney-ClientPrivilegeUnderUSLaw.aspx>.

³⁹⁹ Eckman 2011 <http://www.inta.org/INTABulletin/Pages/Attorney-ClientPrivilegeUnderUSLaw.aspx>.

⁴⁰⁰ Eckman 2011 <http://www.inta.org/INTABulletin/Pages/Attorney-ClientPrivilegeUnderUSLaw.aspx>.

⁴⁰¹ Federal Rule of Civil Procedure Federal Rule of Criminal Procedure and Federal Rules of Evidence.

⁴⁰² Model Rules of Prof'l Conduct Rule 1.6 (2003).

⁴⁰³ Reinhard Murphy-Johnson and Dowd 2017 <https://gettingthedealthrough.com/area/86/jurisdiction/23/legal-privilege-professional-secrecy-2017-united-states/>.

California Evidence Code and the *Rules of Professional Conduct* a client has a right to attorney-client confidentiality.⁴⁰⁴ The attorney and client can both lay claim to this privilege, but only the client, as holder of the privilege, is in a position to waive it.⁴⁰⁵

4.5.1 *What does the attorney-client privilege entail?*

A definition of the attorney-client privilege refers to a situation where legal advice of any kind is sought from a professional legal adviser in his (or her) professional capacity as legal adviser, and the communications that emanated from this, which has been made in confidence by the client, are permanently protected from disclosure by (the client) or by the legal adviser, with the exception of the waiver of the protection.⁴⁰⁶ The client is the holder of this privilege, and therefore the client is the one that can waive this right when it comes to the attorney–client privilege.

The privilege entails four elements: communication made between the privileged persons, in confidence and for the purposes of obtaining, or seeking or providing legal assistance to the client.⁴⁰⁷

It must first be established if an attorney-client relationship exists, and this is seen as a matter of fact that can be established by looking at the situation and the context of each case.⁴⁰⁸ It must also be established if this was done in confidence, and if the intention is to disclose this information to third parties as well. If the latter was the intention it would not be seen as confidential information.⁴⁰⁹ The "circumstances surrounding the communication" and the "nature of the services sought by the client" will usually be the two predominant factors that will be utilised to ascertain if the client has satisfied this element of

⁴⁰⁴ California Evidence Code 952, 954 and California Rules of Professional Conduct R 3-100 (2015).

⁴⁰⁵ California Evidence Code 953-955.

⁴⁰⁶ Wigmore *Evidence in Trials at Common Law* Section 2292 554.

⁴⁰⁷ Wigmore *Evidence in Trials at Common Law* Section 2292 554.

⁴⁰⁸ *United States v Witmer* 835 F Supp 208, 223 (MD Pa 1993).

⁴⁰⁹ *United States v Rockwell Int'l* 897 F 2nd 1255, 1265 (3rd Circuit 1990).

the attorney-client privilege.⁴¹⁰ It must also be determined if the confidentiality indeed has been maintained⁴¹¹ which could be quite a complex issue.

The third aspect refers to the fact that communications can only be protected by this privilege if the client's communications were primarily aimed at obtaining legal assistance from the attorney. This does not necessarily mean the client must have specifically asked for legal advice,⁴¹² the predominant purpose of the communications must however have been the seeking of legal advice.⁴¹³

If the attorney-client privilege has been exercised it remains intact unless the client waives it.⁴¹⁴ Courts in the United States also seem to favour the approach that the party that claims privilege carries the burden of proving the basic elements of privilege. Once privilege has been established the opposing party must prove that there is a *prima facie* case to indicate that the privilege has been waived.

The *California Evidence Code* explains the nature of the attorney-client privilege in section 954 which states that:⁴¹⁵

... the client, whether or not a party, has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between client and lawyer.

This refers to communication which should have been made between the privileged persons, in confidence and for the purposes of obtaining, or seeking or providing legal assistance to the client.⁴¹⁶

In California section 952 of *California Evidence Code* goes further and explains what is meant by "confidential communication" between client and attorney:⁴¹⁷

⁴¹⁰ Epstein *The Attorney-client privilege* 234 (where it is stated that the relevant question is what "function the attorney is performing when the communication is made").

⁴¹¹ *Scott Paper Company v United States* 943 F Supp 489, 499-500 (ED Pa 1996).

⁴¹² Epstein *The Attorney-client privilege* 325, 329-330

⁴¹³ Epstein *The Attorney-client privilege* 325, 339-340. Courts seem to take quite a wide-ranging view when it comes to determining what is seen as legal advice.

⁴¹⁴ *Martin v Valley Bank National Bank* 140 FDR 291, 306 (FDNY 1993).

⁴¹⁵ California Evidence Code Section 954.

⁴¹⁶ See 405 above.

...information transmitted between a client and his or her lawyer in the course of that relationship and in confidence by a means which, so far as the client is aware, discloses the information to no third persons other than those who are present to further the interest of the client in the consultation or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the lawyer is consulted, and includes a legal opinion formed and the advice given by the lawyer in the course of that relationship.

This refers basically to "information which is not and cannot be known to the general public and information relevant to the attorney client relationship".⁴¹⁸ The information must have emanated from the relationship between the attorney and client as within the context of the professional relationship between the two. It must also have been done with the specific intention to obtain legal advice and assistance.⁴¹⁹ Information discovered during the ordinary course of discovery will not be covered by the privilege.

The privilege is there to protect the client's privacy and autonomy, but should not be used as an excuse to obstruct access and admissibility of evidence, and therefore Wigmore⁴²⁰ states that the privilege should be "strictly confined within the narrowest possible limits consistent with the logic of its principle." The application of the privilege should therefore be used in such a way that it is consistent with the logical principle as to why it has been used—to protect the client's privacy and autonomy, and not have as its main aim to rob the court, and the public for that matter, of relevant and admissible evidence in the pursuit of justice.

⁴¹⁷ California Evidence Code Section 952.

⁴¹⁸ Marcum and Campbell 2015 *J Legal Prof* 202.

⁴¹⁹ Price 1998 *Duke Law Review* 865.

⁴²⁰ Wigmore *Wigmore on evidence* Section 2291 554.

4.5.2 Exceptions to the attorney-client privilege

As section 952 points out, there are exceptions to the application of this privilege. The first obvious one is if the client gives consent for the information to be divulged. In *McClure v Thompson*⁴²¹ the court indicated that:

First, a lawyer may reveal confidential information if the client consents after consultation.

A lawyer may also disclose information to a third party to the:

... extent the lawyer reasonably believes necessary to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm.⁴²²

The attorney-client privilege also cannot be used to protect client communications if these communications constitute the seeking of counsel in order to contemplate or further on-going criminal or fraudulent conduct.⁴²³ In certain situations the courts have acknowledged the fact that American courts began to recognize that, in certain instances there is a need for an attorney to defend himself or herself, and this can serve as a justification for disclosure of confidential communication.⁴²⁴ A disclosure by an attorney in order to advance the client's interests or with the client's consent, will also be acceptable,⁴²⁵ as well as disclosure when required by law or the court and disclosure in order to prevent death or serious bodily harm will also be seen as an exception to the attorney-client privilege.⁴²⁶

It is very important to note that in California the legislature has the authority and mandate to craft exceptions to the attorney-client privilege. This was

⁴²¹ *McClure v Thompson* 323 F 3d 1233 (9th Cir 2003) see para 1242 of this case. Also see California Rules of Professional Conduct R 3-100.

⁴²² *McClure v Thompson* 323 F 3d 1233 (9th Cir 2003) para 1242.

⁴²³ *United States v Zolin* 109 S Ct 2619, 2626 (1989).

⁴²⁴ *Wigmore* *Wigmore on evidence* Section 2327 638.

⁴²⁵ *Stockton Theaters Inc v Palermo* (3rd Dist 1953) 121 Cal App 2d 616, 264 P 2d 74.

⁴²⁶ *Tarasoff v Regents of University of California* (1976) 17 Cal 3d 425, 131 Cal Rptr 14, 551 P 2d 334.

confirmed in the matter between Costco Wholesale Corp. v Superior Court when the court stated:⁴²⁷

Although exercise of the privilege may occasionally result in the suppression of relevant evidence, the Legislature of this state has determined that these concerns are outweighed by the importance of preserving confidentiality in the attorney client relationship. As this court has stated: The privilege is given on grounds of public policy in the belief that the benefits derived therefrom justify the risk that unjust decisions may sometimes result from the suppression of relevant evidence.

This decision by the court clearly underlines the strict and fairly narrow application of the attorney-client privilege in California, which is not necessarily the case in other states. The court actually admitted that sometimes relevant evidence might be suppressed, and there is a risk of "unjust decisions" because of this narrow approach. The courts held that the benefits gained from this application of the attorney-client privilege, outweigh the risk of unjust decisions. The rationale for this approach is public policy.⁴²⁸

This approach has led to many critics referring to California — the biggest jurisdiction in the United States of America — of applying rules that enforce silence even in:

the face of likely deadly harm that does not result from criminal conduct, financial injury from fraud even where the lawyer has unintentionally assisted it, and managerial exploitation of constituents of a corporate client.⁴²⁹

4.6 Without prejudice principle in California

In American law, as in many other countries, public policy prefers settlement of disputes in order to avoid litigation and it is well-documented that these types of settlements are favoured and will be enforced where possible.⁴³⁰ Therefore,

⁴²⁷ *Costco Wholesale Corp v Superior Court* 47 Cal 4th 725, 731 (2009) citing *Mitchell v Superior Court* 37 Cal 3d 591, 599-600 (1984).

⁴²⁸ *Costco Wholesale Corp v Superior Court* 47 Cal 4th 725, 731 (2009) citing *Mitchell v Superior Court* 37 Cal 3d 591, 599-600 (1984).

⁴²⁹ California Rules of Professional Conduct R 3-100, 3-600 (C) (2015).

⁴³⁰ *Haderlie v Sondgeroth* 866 P 2d 703 (Wyo 1993); *In re Air Safety Int'l LC* 326 BR 883; *Stamie E Lyttle Co v County of Hanover* 231 Va 21(Va 1986).

the evidence of settlement offers and negotiations are protected from usage at subsequent litigation on federal and state level.

The term "without prejudice" is often used by opposing counsel during their discussions and communications pertaining to a possible settlement. This is precautionary and in order to negotiate "without fear that tentative positions will be taken as definitive".⁴³¹ The rationale is that the application of such a rule will enhance the possibility of settlement, which is, as mentioned above, in the interest of public policy. At federal level Rule 408 of the *Federal Rules of Evidence* formalises this and declares that:

- (a) Prohibited Uses. Evidence of the following is not admissible — on behalf of any party — either to prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction:
 - (1) furnishing, promising, or offering — or accepting, promising to accept, or offering to accept — a valuable consideration in compromising or attempting to compromise the claim; and
 - (2) conduct or a statement made during compromise negotiations about the claim — except when offered in a criminal case and when the negotiations related to a claim by a public office in the exercise of its regulatory, investigative, or enforcement authority.
- (b) Exceptions. The court may admit this evidence for another purpose, such as proving a witness's bias or prejudice, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

Mediation would fall under this, since it can be construed as negotiations which often turn into offers and are then finalized through a settlement agreement. The rule offers protection if a disputed claim exists, and will apply to communications that transpired during the negotiations and attempt at settlement.⁴³² Two principles will ensure exclusion of settlement-related evidence. Parties often undertake settlement offers in an attempt to settle the matter and have a desire to make peace or to avoid costs in the specific matter. This means that often some of the evidence is considered irrelevant or at least inadmissible, since it could relate to various reasons that actually have nothing

⁴³¹ Mellinkoff *Mellinkoff's Dictionary of American Legal Usage* 692.

⁴³² Brazil 1988 *The Hastings LJ* 960.

to do with the merits of the case.⁴³³ Secondly, and more importantly, it is to "promote the amicable resolution of lawsuits".⁴³⁴ This rationale is described by The Sixth Circuit Court of Appeals in *Goodyear Tire & Rubber Co. v Chiles Power Supply, Inc.*⁴³⁵ when it stated:

There exists a strong public interest in favor of secrecy of matters discussed by parties during settlement negotiations. This is true whether settlement negotiations are done under the auspices of the court or informally between the parties. The ability to negotiate and settle a case without trial fosters a more efficient, more cost-effective, and significantly less burdened judicial system. In order for settlement talks to be effective, parties must feel uninhibited in their communications. Parties are unlikely to propose the types of compromises that most effectively lead to settlement unless they are confident that their proposed solutions cannot be used on cross examination, under the ruse of 'impeachment evidence', by some future third party. . . . Without a privilege, parties would more often forego negotiations for the relative formality of trial. Then, the entire negotiation process collapses upon itself, and the judicial efficiency it fosters is lost.

It is important to note that the rule includes communications as well as materials which have been prepared including material prepared in an attempt to reach a settlement.⁴³⁶ However, Rule 408 may apply with regard to evidence of any settlement, or "evidence of any statements of fact or conduct that are made during settlement negotiations".⁴³⁷ It will not be applicable to "documents or records that were not created for settlement purposes are not covered by Rule 408, even if they happen to be exchanged during settlement negotiations."⁴³⁸

⁴³³ Burns 2013 <http://apps.americanbar.org/litigation/committees/businessstorts/articles/summer2013-0713-admissibility-of-settlement-related-evidence-at-trial.html>.

⁴³⁴ Burns 2013 <http://apps.americanbar.org/litigation/committees/businessstorts/articles/summer2013-0713-admissibility-of-settlement-related-evidence-at-trial.html>. See *Affiliated Mfrs Inc v Aluminum Co of Am Inc* 56 F 3d 521, 526 (3d Cir 1995) ("The policy behind Rule 408 is to encourage freedom of discussion with regard to compromise").

⁴³⁵ *Goodyear Tire & Rubber Co v Chiles Power Supply Inc* 332 F 3d 976, 980 (6th Cir 2003) This was reiterated by the District Court in Minnesota in *United States v Reserve Mining Co* when the court stated that "the purpose for the privilege surrounding offers of compromise is to encourage free and frank discussion with a view toward settling the dispute."

⁴³⁶ Villa 2005 *Ethics and Privilege* 122.

⁴³⁷ Burns 2013 <http://apps.americanbar.org/litigation/committees/businessstorts/articles/summer2013-0713-admissibility-of-settlement-related-evidence-at-trial.html>.

⁴³⁸ Burns 2013 <http://apps.americanbar.org/litigation/committees/businessstorts/articles/summer2013-0713-admissibility-of-settlement-related-evidence-at-trial.html>.

Additionally, it is vital to remember that Rule 408 can only be applied to exclude admission of evidence if it relates to a "disputed" claim, i.e. there must have been a dispute between the parties when the evidence was created.⁴³⁹ Many lawyers think that this excludes all evidence of settlement offers and negotiations at subsequent trials, but they are mistaken. A disputed claim must exist at the time of the creation of evidence for Rule 408's exclusion to be applied.⁴⁴⁰ Brazil highlights this very issue when he states that the main reason why it cannot be assumed with any certainty that communication will be protected by this rule, is seated in the fact that the court might "construe narrowly the threshold requirements that there is a "claim" and that it is 'disputed'.⁴⁴¹

This is reiterated by Villa which also underlines the fact that there is no clear consensus as to when a claim is disputed or at what point "compromise negotiations is reached in order for the privilege to be claimed".⁴⁴² Snider and Ellins⁴⁴³ agree with this and point out that it is difficult to determine the exact circumstances that will call for the application of this protection as afforded by Rule 408. Therefore the application of the rule is far from certain or predictable, which means, ironically, it often inhibits the very conduct that it is actually supposed to promote.⁴⁴⁴

Rule 408 prohibits the use of settlement evidence when it serves:⁴⁴⁵

- (1) to prove or disprove the validity or amount of a disputed claim or
- (2) to impeach by a prior inconsistent statement.

The rule does, however, allow the court to admit settlement-evidence for "another purpose".⁴⁴⁶ This leaves jurists with a lot of possibilities to explore in this regard, and adds to the uncertainty of the application of this rule.

⁴³⁹ *Weems v Tyson Foods Inc* 665 F 3d 958, 965 (8th Cir 2011).

⁴⁴⁰ Burns 2013 <http://apps.americanbar.org/litigation/committees/businessstorts/articles/summer2013-0713-admissibility-of-settlement-related-evidence-at-trial.html>.

⁴⁴¹ Brazil 1988 *The Hastings LJ* 966.

⁴⁴² Villa 2005 *Ethics and Privilege* 122.

⁴⁴³ Villa 2005 *Ethics and Privilege* 122.

⁴⁴⁴ Villa 2005 *Ethics and Privilege* 122.

⁴⁴⁵ Rule 408 Federal Rules of Evidence.

In the case where the evidence is seen as admissible for "some other reason than to prove the weakness of party's claim or defense",⁴⁴⁷ it will read together with Rule 403 which states:⁴⁴⁸

... although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issue, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

In other words the probative value of the evidence will be weighed up against the prejudicial effect it has, or possible can have, and then the court will make a decision after having weighed up these two competing interests against each other.⁴⁴⁹

This means Rule 408 only provides protection against admissibility of evidence which stems from attempted settlements or negotiations, if a dispute had already surfaced between the parties when the evidence was offered or created. The evidence must help to prove the liability of the claim, or the validity of the claim or the invalidity of the amount.⁴⁵⁰ If the evidence is then seen as admissible for some other reasons than to indicate the weakness of the party's claim or defense, Rule 403 would be used (probative value vs prejudicial effect) to determine if the evidence can be admitted, even if it was divulged during settlement. The evidence can then be excluded, even if relevant, if its probative value is substantially outweighed by all the instances that are mentioned in Rule 403.⁴⁵¹ Brazil is of the opinion that Rule 408 provides very weak protection for parties, as "there are so many conceivable for which settlement communications might be applicable".⁴⁵²

The common law approach deems all statements of fact made during settlement as admissible, unless the statement "was so connected with the

⁴⁴⁶ Burns 2013 <http://apps.americanbar.org/litigation/committees/businessstorts/articles/summer2013-0713-admissibility-of-settlement-related-evidence-at-trial.html>.

⁴⁴⁷ Snider and Ellins 2006 *Corporate Privileges and Confidential Information* 12-5.

⁴⁴⁸ Rule 403 of Federal Rules of Evidence.

⁴⁴⁹ Snider and Ellins 2006 *Corporate Privileges and Confidential Information* 12-4.

⁴⁵⁰ Snider and Ellins 2006 *Corporate Privileges and Confidential Information* 12-4.

⁴⁵¹ See 446.

⁴⁵² Brazil 1988 *The Hastings LJ* 966.

settlement offer as to be inseparable from it"⁴⁵³ or if it was clearly stated that the statement is hypothetical in nature or it has been made without prejudice.⁴⁵⁴

4.7 Legislation

4.7.1 Federal law

The federal perspective on mediation confidentiality is based on the common law rule that the public is entitled to everyone's evidence and the idea that testimonial privileges are not favoured.⁴⁵⁵ It is important to realise that there is:

... no federal statute, rule of procedure, or rule of evidence that expressly recognizes or provides confidentiality protection for communications during or in connection with a mediation.⁴⁵⁶

Rule 408 of the *Federal Rules of Evidence* is the only rule that offers explicit protection for settlement discussions and states that: "conduct or statements made in compromise negotiations regarding the claim"⁴⁵⁷ will be inadmissible with regard to proving liability. Basically this then provides a standard of proof (in order to determine the liability or invalidity of a claim) and the rule relies heavily on relevancy in its application.⁴⁵⁸ The rule wants to encourage the settlement of disputes⁴⁵⁹ and avoid the effect that potential disclosure might be hampered by the fear of jeopardizing one's case if the matter is not settled.⁴⁶⁰ It is essential that it is understood that Rule 408(a) will only apply to the admissibility of evidence at a trial and will not be applicable to the discovery of settlement negotiations or settlement terms.⁴⁶¹ Additionally Rule 408(b) clearly indicates that exclusion of evidence is not allowed if the "offer and compromise"

⁴⁵³ Snider and Ellins 2006 *Corporate Privileges and Confidential Information* 12-4.

⁴⁵⁴ McLaughlin and Berger *Weinstein's Federal Evidence* 1997; Rule 408.03 (1).

⁴⁵⁵ See *Jaffe v Redmond* 518 US 1 7 (1996).

⁴⁵⁶ Callahan 2013 *Pepperdine Dispute Resolution Journal* 80.

⁴⁵⁷ *Fed R Evid* 408(b)(1)–(2).

⁴⁵⁸ Callahan 2013 *Pepperdine Dispute Resolution Journal* 80

⁴⁵⁹ *Josephs v Pac Bell* 443 F 3d 1050 1064 (9th Cir 2006).

⁴⁶⁰ *Molina v Lexmark Int'l Inc* No CV 08-04796 MMM (FMx), 2008 WL 4447678 at *11-12 (CD Cal Sept 30 2008).

⁴⁶¹ *Fed R Evid* 408(a).

evidence is being offered for a purpose that is not expressly prohibited by Rule 408(a).⁴⁶²

Rule 408 focuses on offers of compromise and the discussions and negotiations that are involved in such offers. However, it does not offer protection to communications that were shared before negotiations or exchange of information that parties might have done through a mediator.⁴⁶³

The only other rule that deals with confidentiality protection in federal cases is Rule 501. The rule places the holder of a recognized privilege in a position to exercise this privilege in order to prevent others from disclosing these protected communications.⁴⁶⁴ It also and also gives the holder of the right the right to refuse to produce evidence that is otherwise relevant.⁴⁶⁵

In *Facebook, Inc. v Pac. Nw. Software, Inc*⁴⁶⁶ (a Californian case) it was stated that:

A local rule, like any court order, can impose a duty of confidentiality as to any aspect of litigation, including mediation. . . . But privileges are created by federal common law.

This then reiterated the fact that a privilege is created by federal common law and cannot be supplemented by local courts.

Up to this point there have only been two cases in the Central District of California that have recognised a federal mediation privilege as a way in which to protect communications made during formal mediation. These are *Folb v*

⁴⁶² *Fed R Evid* 408(b). These exclusions include evidence of settlement and compromise negotiations submitted in order to (1) to prove bias or prejudice on the part of a witness; (2) to prove that an alleged wrong was committed during the negotiations (e.g., libel, assault, unfair labor practice, etc.); (3) to negate a claim of undue delay; or (4) to prove obstruction of a criminal investigation or prosecution.

⁴⁶³ *Fed R Evid* 408.

⁴⁶⁴ *Fed R Evid* 501.

⁴⁶⁵ *Fed R Evid* 501.

⁴⁶⁶ *Facebook Inc v Pac Nw Software Inc* 640 F 3d 1034 1040-41 (9th Cir 2011).

Motion Picture Industry Pension & Health Plan (a reported case) and *Molina v Lexmark International* (a 2008 unreported case).⁴⁶⁷

4.7.1.1 *Folb v Motion Picture Industry Pension & Health Plan*

The case involved, Folb who claimed that he had been dismissed by the defendant because of whistle-blowing, while the employer (the defendant) claimed Folb had been dismissed because he had sexually harassed a former employee Vasquez.⁴⁶⁸ In order to substantiate his claims, Folb insisted that the mediation briefs and the correspondence that was related to the settlement negotiations between the defendant and Vasquez, should be allowed into evidence. This would reveal that during the mediation, the former employer (defendant) had actually indicated that they believed Folb had not harassed Vasquez.⁴⁶⁹

The court agreed that Folb had a right to discovery regarding settlement negotiations conducted after mediation, but decided that a federal common law mediation privilege protected the mediation briefs from discovery.⁴⁷⁰ The court specifically indicated that the privilege applied only to "communications between parties who agreed in writing to participate in a confidential mediation with a neutral third party".⁴⁷¹ Therefore, the communication between the mediator and the parties during mediation are protected, and should be protected, but did admit that subsequent negotiations between the parties, however, are not protected even if they contain information that has initially been disclosed in the mediation.⁴⁷²

⁴⁶⁷ *Folb v Motion Picture Indus Pension & Health Plans* 16 F Supp 2d 1164 (CD Cal 1998); *Molina v Lexmark International* 2008 WL 4447678.

⁴⁶⁸ *Folb v Motion Picture Indus Pension & Health Plans* 16 F Supp 2d 1164 (CD Cal 1998) para 1164.

⁴⁶⁹ *Folb v Motion Picture Indus Pension & Health Plans* 16 F Supp 2d 1164 (CD Cal 1998) para 1166-1667.

⁴⁷⁰ *Folb v Motion Picture Indus Pension & Health Plans* 16 F Supp 2d 1164 (CD Cal 1998) para 1167.

⁴⁷¹ *Folb v Motion Picture Indus Pension & Health Plans* 16 F Supp 2d 1164 (CD Cal 1998) para 1180.

⁴⁷² *Folb v Motion Picture Indus Pension & Health Plans* para 1167.

4.7.1.2 *Molina v Lexmark International*

This class action case involved a dispute surrounding the amount of a claim between Molina (a former employee of Lexmark) and the latter. In *Folb* the issue revolved around a third party who was not a part of the mediation. In *Folb* the issue was the discovery of mediation-related communications for the usage of this information in a different and subsequent legal proceeding, but in *Molina* this was not the case.⁴⁷³ Molina had to do with communications during a mediation between disputants' counsel with regard to a certain amount (which was disputed) and brought before the court the issue of a duty of confidentiality which existed between the parties who called for them to keep their mediation discussions confidential.⁴⁷⁴

Folb dealt with an evidentiary privilege (the federal mediation privilege) while *Molina* dealt with the duty to confidentiality. This distinction between a privilege and a duty of confidentiality, opened up the opportunity to the court to use Rule 408 of the *Federal Rules of Evidence* as reference point for evaluating and analysing Lexmark's confidentiality claim rather than referring to *Folb*.⁴⁷⁵

The court, using Rule 408, noted that "parties to a mediation generally have a duty to keep their discussions confidential," but concluded that this duty does not prevent the use of mediation discussions for the limited purpose such as the establishment of a disputed amount, in order to determine if a federal court had jurisdiction in the matter, which was indeed the case in *Molina*.⁴⁷⁶

The decisions in *Facebook* and *Molina* and *Folb* seem to suggest that scope and extent of confidentiality protections in federal court matters may depend on:⁴⁷⁷

- (a) the label used to describe the parties' facilitated settlement efforts,

⁴⁷³ *Molina v Lexmark International* 2008 WL 4447678 para 8.

⁴⁷⁴ *Molina v Lexmark International* 2008 WL 4447678 para 10-11.

⁴⁷⁵ *Molina v Lexmark International* 2008 WL 4447678 para 11.

⁴⁷⁶ *Molina v Lexmark International* 2008 WL 4447678 para 12.

⁴⁷⁷ *Fed R Evid* 501. See *Olam v Cong Mortg Co* 68 F Supp 2d 1110, 1124-25 (ND Cal 1999). *Molina v Lexmark Int'l Inc* No CV 08-04796 MMM (FMx), 2008 WL 4447678 para 6 (CD Cal Sept 30 2008).

- (b) who is seeking to disclose or compel disclosure, and
- (c) the purpose or use of the information.

The court will then, based on the facts of each case, look at how the parties labelled their facilitated settlement efforts, who is the party that is seeking the disclosure (parties involved in the settlement efforts or possibly a third party that was not involved) and what the purpose of the usage of the information is (in *Folb* it was in order to provide material evidence in a dismissal case, and in *Molina* to determine a disputed amount).

The federal mediation privilege will be applicable in federal matters and its application will be determined on a case-to-case basis when the court regards the facts in each case and consider the aspects, mentioned above — how the parties label their facilitated settlement efforts, which party(ies) seeks the disclosure of the information and the purpose of the usage of such information.

As mentioned before, the starting point would be the common law rule that the public has the right to everyone's evidence and the fact that testimonial privileges are not favoured. The court will use this as a foundation when it applies all the aspects mentioned above in their determination of the usage of the federal mediation privilege.

4.8 Regulation of confidentiality in mediation at state level in California

The regulation of confidentiality in mediation at state level in California, has gained a lot of attention. California displays a very strict interpretation of the mediation confidentiality and its legislation showcases this.

4.8.1 The Evidence Code of California

California has not accepted the UMA into its legislative framework and relies on the *Evidence Code of California*, especially sections 1119-1226, to govern confidentiality of mediation proceedings. *Evidence Code of California* section 1119 clearly disallows disclosure of:

- (a) anything said or any admission made for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation;
- (b) any writing prepared for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation; and
- (c) all communications, negotiations, or settlement discussions by and between participants in the course of a mediation or a mediation consultation.

This includes evidence of anything said or admission made during mediation,⁴⁷⁸ or writing prepared for mediation or with the purpose of being part of mediation, or pursuant thereto;⁴⁷⁹ or "all communications, negotiations, or settlement discussions by and between participants in the course of a mediation or a mediation consultation"⁴⁸⁰ - all of this shall be seen as confidential and not subject to discovery.⁴⁸¹

Section 1120 declares that information which is outside mediation and admissible and subject to discovery, will not lose that status if it is introduced into mediation.⁴⁸² Section 1121 only allows a mediator to report that an agreement has been reached but does not allow the mediator to comment on the conduct of the parties during the mediation unless if the law or a court forces it to, unless of course, all the parties to the mediation waives the confidentiality.⁴⁸³ Section 1222 specifically states that information obtained during a mediation, or in preparation for a mediation, can be admitted if all parties expressly agree to it, either in writing or orally (the latter must be in accordance with section 1118).

This means that the confidentiality that is attached to information that has been shared during mediation, or in preparation for mediation can only be waived by all the parties to the mediation, unlike the attorney-client privilege which can be waived by the client.

⁴⁷⁸ California Evidence Code Section 1119 (a).

⁴⁷⁹ California Evidence Code Section 1119 (b).

⁴⁸⁰ California Evidence Code Section 1119 (c).

⁴⁸¹ California Evidence Code Section 1119 (a-c).

⁴⁸² California Evidence Code Section 1120.

⁴⁸³ California Evidence Code Section 1121.

Section 1123 allows for the admissibility of a written settlement agreement subject to certain conditions.⁴⁸⁴ Section 1125 clearly indicates the conditions that must be met to indicate that mediation has ended, and section 1126 declares that:

... anything said, any admission made, or any writing that is inadmissible, protected from disclosure, and confidential under this chapter before a mediation ends, shall remain inadmissible, protected from disclosure, and confidential to the same extent after the mediation ends.⁴⁸⁵

This attaches "permanent confidentiality" to mediation proceedings according to California law and allows for a very strict and narrow application of confidentiality when it comes to mediation.

The Supreme Court of California has on various occasions clearly stated that "any" and "all" provisions of section 1119 are to be interpreted quite literally and made it clear that the scope of protection intended by the statute is unqualified, clear, absolute, and is not subject to judicially crafted exceptions or limitations.⁴⁸⁶ Cases which have been brought before the Supreme Court of California, where the scope of the protection that section 1119 offers had to be evaluated, reflected an extreme and narrow approach in this matter by the Supreme court.⁴⁸⁷

⁴⁸⁴ California Evidence Code Section 1121. These refer to specific indication of this in the agreement; and that the agreement is binding, or the parties have expressly agreed to waive the confidentiality, or the agreement is used to illustrate fraud, duress, or illegality that is specifically relevant and applicable to an issue in dispute.

⁴⁸⁵ California Evidence Code Section 1121.

⁴⁸⁶ *Foxgate Homeowners' Assn v Bramalea California Inc* (2001) 26 Cal 4th 1 15 in which the California's Supreme Court confirmed that all communications and writings associated with mediation will be deemed as to be confidential and not subject to disclosure if express statutory exception is absent.

⁴⁸⁷ See *Cassel v Superior Court* 244 P 3d 1080 (Cal 2011) where the plaintiff, sued his former attorneys for legal malpractice, breach of fiduciary duty, fraud, and breach of contract, all of which was related to the conduct and actions of his attorneys during mediation. The California Supreme Court interpreted the mediation confidentiality statutes strictly and refused to deviate from this, and thus construct a judicial exception, which meant all the information from the mediation was seen as inadmissible.

4.8.2 Application of mediation confidentiality in *Cassel*

In 2011, in the matter *Cassel v Superior Court*⁴⁸⁸ the Supreme Court of California decided that the policy which underlies mediation confidentiality is more important, and worthy of more protection than the ability of a party to a mediation to take his or her attorney to court for alleged professional negligence. By mediation confidentiality it referred to all communications that relate to the mediation – before and during the mediation—and even if it occurred without the mediator being present. The court emphatically stated:⁴⁸⁹

We must apply the plain terms of the mediation confidentiality statutes to the facts of this case unless such a result would violate due process, or would lead to absurd results that clearly undermine the statutory purpose. No situation that extreme arises here. Hence, the statutes' terms must govern, even though they may compromise petitioner's ability to prove his claim of legal malpractice.

The court in this matter characterized the mediation privilege as "clear and absolute".⁴⁹⁰ This was similar to the Supreme court's decisions in *Rojas v Superior Court*,⁴⁹¹ and *Foxgate Homeowners' Assoc v Bramalea California, Inc.*⁴⁹² In these cases the California Supreme Court held that the communications that originate in the course of mediation, are to be treated as confidential and are absolutely inadmissible in further proceedings, based on the fact that they was created during mediation. The Supreme Court also rejected all attempts by appellate courts to craft judicial exceptions to mediation confidentiality.⁴⁹³

This application, as favoured by the California Supreme court has received harsh criticism. The court in *Wimsatt v Superior Court*⁴⁹⁴ has described it as leading to

⁴⁸⁸ *Cassel v Superior Court* (2011) 51 Cal.4th 113.

⁴⁸⁹ *Cassel v Superior Court* para 119.

⁴⁹⁰ Mills 2014 https://apps.calbar.ca.gov/mcleselfstudy/mcle_home.aspx?testID=81.

⁴⁹¹ *Rojas v Superior Court* 33 Cal. 4th 407 (2004).

⁴⁹² *Foxgate Homeowners' Assoc v Bramalea California Inc* 26 Cal 4th 1 (2001). Also more recently *Amis v Greenberg Traurig LLP* (2015) 235 Cal App 4th 331 which quoted, and followed, *Cassel* in its judgment.

⁴⁹³ Basner and Chivers 2015 <https://www.law.com/therecorder/almID/1202744344099/?slreturn=20180208164628>.

⁴⁹⁴ *Wimsatt v Superior Court* 152 Cal App 4th 137, 164 (2007).

'harsh and inequitable consequences'. Zitrin⁴⁹⁵ points out that the failure of the court to allow any exceptions to mediation confidentiality can lead to "serious unintended consequences" as was the case in *Cassel*. Zitrin feels exceptions as catered for in the *UMA* make sense and should be incorporated in the *California Mediation Act* in order to avoid a repeat of *Cassel*.⁴⁹⁶ This has led to a strong movement to amend the statute to incorporate exceptions to the mediation confidentiality in California and the matter has been referred to the *California Law Revision Committee* but no changes have been effected as yet.⁴⁹⁷

It is clear that since the promulgation of the statutes which govern mediation, California courts have applied the plain language of the mediation confidentiality statutes in a very strict manner to the cases that they have judged.⁴⁹⁸ Mediation confidentiality has been favoured, as indicated by the legislature's policy, although it does sometimes mean that "some behaviour during mediation would go unpunished".⁴⁹⁹ The California Supreme Court has maintained this policy, determining that courts may not craft judicial exceptions to the statutes, unless the result of persistently applying this policy violates due process or leads to absurd results that undermine the statutory purpose.⁵⁰⁰

⁴⁹⁵ Zitrin 2013 <https://uchastings.edu/news/articles/2013/10/zitrin-mediation-confidentiality.php>.

⁴⁹⁶ Zitrin 2013 <https://uchastings.edu/news/articles/2013/10/zitrin-mediation-confidentiality.php>.

⁴⁹⁷ Callahan 2017 <http://www.callahanadr.com/wp-content/uploads/2017/03/March-Statutory-Exceptions-to-Mediation-Confidentiality.pdf>. In June 2017 the California Law Revision Commission (the "Commission") published its Tentative Recommendation, which deals the issue of mediation confidentiality and the misconduct and malpractice of attorneys in the state of California. In this publication the Commission suggests adding a new s 1120.5 to the Evidence Code which would basically remove the existing legal protections in order to subpoena participants to the mediation to disclose information that is relevant to a disciplinary matter such as malpractice and misconduct by legal practitioners and mediators with regard to mediation. However, these just remain recommendations at the time of writing. See Carr 2017 http://www.plaintiffmagazine.com/images/issues/2017/08-august/reprints/Carr_Protecting-against-attorney-malpractice-and-misconduct-at-mediation_at-what-cost_Plaintiff-magazine.pdf.

⁴⁹⁸ Brand 2015 *T Jefferson LR* 377.

⁴⁹⁹ Foxgate 1128.

⁵⁰⁰ Cassel at 1084 "We must apply the plain terms of the mediation confidentiality statutes to the facts of this case unless such a result would violate due process, or would lead to absurd results that clearly undermine the statutory purpose."

But herein lies the problem. As Cassel showed, the persistent application of this policy can lead to absurd results. In Cassel's case, the evidence as to the obvious malpractice of attorneys during mediation was barred from being used since the Supreme Court applied the statutes with regard to mediation confidentiality so literally and strictly.⁵⁰¹

Wykoff states that California follows the principle of "absolute confidentiality," with some of the most "bizarre rules relating to mediation confidentiality "and this allows for almost zero disclosure of any mediation communication.⁵⁰²

The lower courts of California have on numerous occasions indicated their desire to expand the limitations of mediation confidentiality and thus move away from absolute confidentiality.⁵⁰³ The Supreme Court has repeatedly overruled this approach and emphasised that their task is to limit the interpretation of the rules. This results in a strict application which invariably leads to almost absolute confidentiality since the *California Evidence Code* has been drafted in such unambiguous language. The Supreme Court has repeatedly reiterated that it is the and that is the job of the legislature, not the judicial branch, to expand these limitations.⁵⁰⁴

The California Supreme court in *Rojas* stated that:⁵⁰⁵

... 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.

⁵⁰¹ Kichaven 2017 *Alternatives to the High Cost of Litigation* 97-110. The absurd result of the Cassel judgment has led to the California legislature considering a legal malpractice exception to mediation confidentiality, thus seemingly admitting that the Cassel decision was flawed.

⁵⁰² Wykoff 2016 *Bond University Student Law Review* 10.

⁵⁰³ See *Olam v Cong. Mortg. Co* 68 F. Supp. 2d 1110, 1124-25 (N.D. Cal. 1999); *Rojas v Superior Court of Los Angeles County* 93 P 3d 260, 265 (Cal 2004); *Foxgate Homeowners'Association Inc v Bramalea California Inc* 25 P 3d 1117 (Cal 2001); *Cassel v Superior Court* (2011) 51 Cal 4th 113.

⁵⁰⁴ Williams 2005 *Journal of Dispute Resolution* 209, 212.

⁵⁰⁵ *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).

The adherence to "absolute confidentiality" based on public policy has been the argument that The California Supreme court has been following continuously. But if this leads to the absurd results as best illustrated in Cassel, is "absolute confidentiality" really serving public policy? Is this not more detrimental than beneficial for mediation? And doesn't this approach fly right in the face of the federal approach on mediation confidentiality which is based on the common law rule that the public is entitled to everyone's evidence and the idea that testimonial privileges are not favoured?

4.9 Conclusion

In the United States of America mediation confidentiality is acknowledged and protected on federal as well as state level. The *UMA* has been an attempt at bringing greater certainty and conformity to mediation confidentiality in the United States of America. Unfortunately less than a third of all states have adopted this piece of legislation. California has not adopted the *UMA* and follows a very strict narrow and literal application of the mediation confidentiality which has led to some absurd results. This approach has elevated mediation confidentiality to a position where it is almost impossible to breach. Such an approach does not serve the interests of justice or the objectives of mediation.

CHAPTER 5

Confidentiality in mediation: the position in Australia

5.1 Introduction

Mediation, which includes confidentiality in mediation, is popular in Australia and well regulated. Mediation has also often been dealt with by the Australian courts. In this chapter I will discuss the legal system as it pertains to mediation in Australia. The focus will be on the regulation of confidentiality in mediation. This will be discussed under the headings contract, legal professional privilege, without prejudice and applicable legislation that deals with confidentiality in mediation. Emphasis will be placed on the state of New South Wales.

5.2 Popularity of mediation in Australia

Australia, like many other common law jurisdictions, shows a strong "judicial preference of settlement above litigation".⁵⁰⁶ It is therefore not a surprise that Australia has become one of the frontrunners when it comes to mediation. Kowalski describes the growth of mediation in Australia as phenomenal.⁵⁰⁷ In 2015, according to Chia, the ADR industry in Australia had a forecasted annual growth of 5.7% for 2015, with projected annual growth of 6.5 % for the five years from 2016 onwards.⁵⁰⁸ The success of mediation in a state such as New South Wales is evident as can be seen by the number of cases that the Supreme Court of New South Wales referred to mediation. During 2010 and 2011 the Court referred a total of 933 family disputes to court-annexed mediation of which 531 (56.9%) were settled by means of mediation.⁵⁰⁹

Kawalski points out that Australian legislation is rife with mediation regulations, statutes and rules, and courts cater for mediation as well, and that it forms an

⁵⁰⁶ Cameron "National reports Australia" 198.

⁵⁰⁷ Kawalski 2009 <http://www.jok.com.au/publications/mediation-in-australia>.

⁵⁰⁸ Chia 2015 *Alternative Dispute Resolution Services in Australia* 4; IBIS World Industry Report OD 4116.

⁵⁰⁹ Bergin "The Objectives, Scope and Focus of Mediation Legislation in Australia" 9.

integral part of the legal landscape in Australia.⁵¹⁰ Especially in the 1990's mediation took off in Australia. Initiatives such as the establishment of the National Alternative Dispute Resolution Advisory Council (*NADRAC*), which was created in order to enhance and foster the expansion and growth of alternatives to court action in civil matters, had a major influence.⁵¹¹ An *Alternate Dispute Resolution* process, of which mediation is one, has become part and parcel of the civil justice system in Australia.⁵¹²

This is also reflected on a federal level with the promulgation of the *Civil Dispute Resolution Act 2011*(Cth) (CDRA) on 1 August 2011.⁵¹³ The objective of this Act is:⁵¹⁴

... to ensure that, as far as possible, people take genuine steps to resolve disputes before certain civil proceedings are instituted

Section 6 of the CDRA calls for applicants which institute civil proceedings to file a "genuine steps statement" with their application. This statement must indicate⁵¹⁵ either the steps that have been taken to resolve the dispute or show why no steps were taken at all. The *Federal Court Rules* of 2011 prescribe the use of this statement,⁵¹⁶ and although failure to comply will not necessarily invalidate an application to commence proceedings or halt the proceedings, the court will take it into account when awarding costs and "in performing functions or exercising powers in relation to civil proceedings".⁵¹⁷

⁵¹⁰ Kalowski 2009 <http://www.jok.com.au/publications/mediation-in-australia>.

⁵¹¹ Batagol 2013 <https://adrresearch.net/2013/11/12/dumb-decision-the-closure-of-nadrac/> NADRAC played a pivotal part in creating the National Mediator Accreditation Scheme and the Mediator Standards Board which have assisted in developing quality standards for mediation practice and has gone a long way in helping to make mediation more professional, which have been beneficial for thousands of Australians in using mediation to resolve their disputes. Unfortunately it was abolished in 2013 and its functions moved to resort under the into the federal Attorney-General's Department.

⁵¹² Noone and Ojelabi 2014 *Washington University Journal of Law and Policy* 149.

⁵¹³ *Civil Dispute Resolution Act 2011* (Cth) (CDRA).

⁵¹⁴ Section 3 of the Act.

⁵¹⁵ Section 6(2) of the Act.

⁵¹⁶ *Federal Court Rules* of 2011 Rule 5.03. This entails that the applicant's statement must be served on the respondent which must then file his or her own genuine steps statement.

⁵¹⁷ Sections 10(2) and 11-12 of *CDRA*.

In the matter between *Superior IP International Pty Ltd v Ahearn Fox Patent and Trade Mark Attorneys* it was specifically stated that a statement that clearly indicates that genuine steps have been undertaken by the parties to settle the dispute before litigation proceedings commence, which the court indicated occurs upon service of the statutory demand, should be filed by the parties in accordance with the *CDRA*.⁵¹⁸ This is a clear indication of the necessity to actively utilise the ADR process before turning to the court, and highlights the importance of ADR processes such as mediation.

This applies to all proceedings that are brought before the Federal Courts and the Federal Magistrates Courts in Australia. This "genuine steps statement" which the Act calls for is an obvious attempt to force parties to consider using ADR processes in order to settle disputes before going to court. Not all states have accepted this Act as part of their legislative framework, but as mentioned, it is applicable at federal level.⁵¹⁹

Various judgments in courts in New South Wales have reiterated the usefulness, necessity and advantages of mediation.⁵²⁰ The overwhelming number of cases of mediation in Australia is voluntary, but legislation has also been passed that make it compulsory to, in certain circumstances mediate.⁵²¹

As Justice P A Bergin Chief Judge in Equity of the Supreme Court of New South Wales pointed out, governments throughout Australia are obviously committed to the process of mediation as well as other ADR mechanisms and processes.⁵²² It is therefore no surprise that mediation in Australia is popular and receives

⁵¹⁸ *Superior IP International Pty Ltd v Ahearn Fox Patent and Trade Mark Attorneys (No 2)* [2012] FCA 977.

⁵¹⁹ McDonald, Simmons and Van den Bok 2013 <http://www.mondaq.com/australia/x/224466/court+procedure/Part+2A+go+away+Repeal+of+the+prelitigation+protocols+under+the+Civil+Procedure+Act+2005+NSW>. New South Wales and Victoria, specifically initially accepted it, but has subsequently repealed it.

⁵²⁰ *Idoport Pty Ltd v National Idoport Pty Ltd v National Australia Bank Ltd (No 21)* [2001] NSWSC 427, [29]–[30]; *Remuneration Planning Corporation Pty Ltd v Fitton* [2001] NSWSC 1208 [3]; *Browning v Crowley* [2004] NSWSC 128 [5].

⁵²¹ Section 26 of the *Civil Procedure Act 2005* in New South Wales, but other states have also followed suit. See s 53A of the *Federal Court of Australia Act 1976*, s 48(2)(c) of the *Civil Procedure Act 2010* of Victoria for instance.

⁵²² Bergin "The Objectives, Scope and Focus of Mediation Legislation in Australia" 3.

support in government as well as private spheres. The growth of mediation, and the extensive regulation and legislation linked to mediation, clearly echo this.

5.3 The Australian legal system

The Australian legal system can prove to be complicated, and before the regulation of confidentiality in mediation is further expounded on, a clearer understanding of the Australian legal system should be obtained.

Australia is a parliamentary democracy. In 1901 the *Australian Constitution* established a federal system of government for Australia.⁵²³ The Commonwealth of Australia ('Australia') forms a federated constitutional monarchy with power shared between the federal government (also known as the Australian or Commonwealth government) and the states and territories.⁵²⁴ This system distributes powers between the national government (the Commonwealth) and six states (also referred to as territories).⁵²⁵ The Constitution determines and defines the boundaries between the Commonwealth and the states with regard to the legislative powers of each. Australia follows a common law system, as inherited from England, with the major sources of law being case law and legislation.⁵²⁶

The Australian Constitution (Commonwealth of *Australia Constitution Act 1900* (IMP)) regulates and establishes the structure, powers and responsibilities of the three branches of the federal government (legislature, judiciary and executive) as well as governs the relationship between the state and the federal governments.⁵²⁷ The Australian legal system consists of one federal system and

⁵²³ Australian National University Date unknown <http://libguides.anu.edu.au/c.php?g=634887&p=4547083>.

⁵²⁴ Legal Research Guide Australia Date unknown <https://www.loc.gov/law/help/legal-research-guide/australia.php>.

⁵²⁵ Australian National University Date unknown <http://libguides.anu.edu.au/c.php?g=634887&p=4547083>. The six states are: New South Wales, Queensland, South Australia, Tasmania, Victoria and Western Australia, and we also find three self-governing territories - Australian Capital Territory, Northern Territory, and Norfolk Island.

⁵²⁶ Australian National University Date unknown <http://libguides.anu.edu.au/c.php?g=634887&p=4547083>.

⁵²⁷ Legal Research Guide Australia Date unknown <https://www.loc.gov/law/help/legal-research-guide/australia.php>.

eight legal systems that function in the eight different states or territories.⁵²⁸ These territories all have a legislative (law-making) executive (implements laws) and a judiciary (interprets and applies laws) branch.⁵²⁹ States are allowed to make laws on any area (excluding imposing duties of customs and excise, or raising defence forces) without the permission and consent of the Commonwealth Parliament, as long as these areas do not fall within the areas mentioned in section 51 of the Constitution. Should these laws be in conflict with a Commonwealth law, it will be regarded as invalid.⁵³⁰

There are two branches when it comes to Australian courts: The Federal Branch and the State or Territories Branch.⁵³¹ The Federal court and the courts in these states and territories are separate and independent, but the Federal High Court of Australia remains the highest and most superior court in Australia.⁵³² Each state has a supreme court (the highest court in that state, bar the Federal High Court) and then also other intermediate and lower courts.⁵³³

5.3.1 Federal jurisdiction and the jurisdiction of the Federal Court

An Australian court's jurisdiction is exercised either by federal jurisdiction or state or territorial jurisdiction.⁵³⁴ Federal jurisdiction entails the right to exercise the judicial power of the Commonwealth, while state or territorial jurisdiction entails the right to exercise the judicial power of a state or territory.⁵³⁵ This means that federal courts can only exercise federal jurisdiction and not state or

⁵²⁸ Akpet 2011 *Ankara Bar Review* 74.

⁵²⁹ Akpet 2011 *Ankara Bar Review* 74.

⁵³⁰ Section 51 of the *Australia Constitution Act* 1900. General areas of state law will include education, health, roads, and criminal law.

⁵³¹ Akpet 2011 *Ankara Bar Review* 85.

⁵³² The High Court is the final court of appeal in Australia and has authority to decide appeals on cases with regard to State matters (e.g. the interpretation of State criminal laws) and also has the authority to decide disputes which involve the interpretation of the Constitution. See Legal Research Guide Australia Date unknown <https://www.loc.gov/law/help/legal-research-guide/australia.php>.

⁵³³ Akpet 2011 *Ankara Bar Review* 85-88.

⁵³⁴ Allsop 2007 <http://www.fedcourt.gov.au/digital-law-library/judges-speeches/chief-justice-allsop/allsop-cj-200710>.

⁵³⁵ Allsop 2007 <http://www.fedcourt.gov.au/digital-law-library/judges-speeches/chief-justice-allsop/allsop-cj-200710>.

territorial jurisdiction, State courts, can exercise federal jurisdiction, "unless a federal statute confers jurisdiction exclusively in the Federal Court".⁵³⁶

*In Rizeq v Western Australia*⁵³⁷ the High court indicated that federal jurisdiction refers to the authority to adjudicate, which is derived from the Commonwealth Constitution and laws. It is different to State jurisdiction, which of course, is the authority to adjudicate derived from State constitutions and laws. However, jurisdiction will be derived from the source of the authority and subsequently the resolution of a dispute within federal jurisdiction may involve the application of both Commonwealth law and State law.⁵³⁸

It is important to distinguish between federal jurisdiction and jurisdiction of the Federal court.⁵³⁹ Allsop points out that the word jurisdiction is generic and refers to the authority to adjudicate which is depended on the court's presence without a certain territory or area (thus geographical) or specific subject matter.⁵⁴⁰

Allsop goes on to explain that:

Federal jurisdiction is the authority to adjudicate derived from the *Commonwealth* Constitution and *Commonwealth* laws; State jurisdiction is the authority to adjudicate derived from the *State* constitutions and *State* laws.⁵⁴¹

So the constitution gives the Commonwealth Parliament (Australian Parliament) legislative power (by means of sections 75, 76 and 77(i)) to define the jurisdiction of the Federal Court, which is done with specific reference to the matters dealt with in ss 75 and 76, additionally it can make that jurisdiction exclusive and it can invest a state court with federal jurisdiction.⁵⁴²

However, the Federal Court's jurisdiction (not federal jurisdiction that can also be given to State court) is a different matter. In this regard, a significant step

⁵³⁶ Allsop "Federal Jurisdiction and the jurisdiction of the Federal Court of Australia" 2.

⁵³⁷ *Rizeq v Western Australia* [2017] HCA 23.

⁵³⁸ *Rizeq v Western Australia* [2017] HCA 23.

⁵³⁹ Allsop "Federal Jurisdiction and the jurisdiction of the Federal Court of Australia" 2.

⁵⁴⁰ Allsop "Federal Jurisdiction and the jurisdiction of the Federal Court of Australia" 3.

⁵⁴¹ Allsop "Federal Jurisdiction and the jurisdiction of the Federal Court of Australia" 3.

⁵⁴² *Australia Constitution Act* 1900 ss 75, 76, 77(i)-iii).

was taken in 1997 with the promulgation of section 39B(1A), especially subsection 39B(1A)(c), of the *Judiciary Act*.⁵⁴³ Section 39B (1A)(c) states: (own emphasis)

Leaving aside criminal matters, the Federal Court is vested with jurisdiction:

- in any matter;
- arising under any laws of the Commonwealth Parliament.

In other words in any matter that arises under any law of the Commonwealth Parliament will attract the Federal Court's jurisdiction.⁵⁴⁴

So section 39B(1A)(b) of this act, confers the Federal Court with jurisdiction to decide Constitutional questions and controversies,⁵⁴⁵ while section 39B(1A)(c) clothes the Federal Court with jurisdiction to judge any matter arising from any laws made by Parliament.⁵⁴⁶ This means that a federal court can have jurisdiction (authority to decide) on any matter arising from laws made by the Parliament (Federal or Commonwealth Government) as well as constitutional issues and disputes. This means the Federal Court has since 1997, become a court of general federal civil jurisdiction, and will have jurisdiction in any matter where the Commonwealth Parliament is part of a dispute.⁵⁴⁷

Allsop explains it succinctly when he outlines the steps to be taken in order to determine whether the federal court has jurisdiction in a matter:⁵⁴⁸

- (a) First, identify the controversy and its limits.
- (b) Secondly, identify the federal element or connection therein.
- (c) Thirdly, having identified the federal element or connection and the matter or controversy, assess whether there is a question arising under a federal

⁵⁴³ Allsop "Federal Jurisdiction and the jurisdiction of the Federal Court of Australia" 9.

⁵⁴⁴ Allsop has a lengthy discussion about what exactly is meant with "matter" and "arising under " and cites various court cases to discuss this, but this research work does not have the luxury to delved deeper into such a discussion.

⁵⁴⁵ Section 39B(1A)(b) of *Judiciary Act*.

⁵⁴⁶ Section 39B(1A)(c) of *Judiciary Act*.

⁵⁴⁷ Allsop 2007 <http://www.fedcourt.gov.au/digital-law-library/judges-speeches/chief-justice-allsop/allsop-cj-200710>.

⁵⁴⁸ Allsop 2007 <http://www.fedcourt.gov.au/digital-law-library/judges-speeches/chief-justice-allsop/allsop-cj-200710>.

law in the sense discussed earlier or whether for some other reason the Court has jurisdiction.

Section 39(2) of the *Judiciary Act* has clothed State courts with federal jurisdiction in specified categories of matters, and they can exercise this federal jurisdiction. This means that State laws can apply as valid in a federal jurisdiction as long as it does not clash with Commonwealth laws.⁵⁴⁹ State parliaments do not have the authority to enact laws which add to or detract from federal jurisdiction, or tell a court in which circumstances it may exercise federal jurisdiction.⁵⁵⁰

Allsop goes on to explain that sections 79 and 80 of the *Judiciary Act* deal with the application of laws when any court in Australia exercises federal jurisdiction.⁵⁵¹ This means that a court, whether it be federal or a state court, hears a case under the auspices of the Commonwealth, (Australian national government). The obvious question that follows is which laws will apply?⁵⁵²

5.3.2 *The application of federal and state law*

In any court (be it state or federal) which exercises federal jurisdiction it is necessary to first determine whether any law (State statute or common law) is not applicable to the resolution of the dispute, since an applicable law of the Commonwealth exists.⁵⁵³ Sections 79 and 80 of the *Judiciary Act* deal with the application of laws.⁵⁵⁴ They state: (emphasis added)

s 79 State or Territory laws to govern where applicable

The laws of each State or Territory, including the laws relating to procedure, evidence, and the competency of witnesses, shall, except as otherwise provided by the Constitution or the laws of the Commonwealth, be binding on all Courts

⁵⁴⁹ *Rizeq v Western Australia* [2017] HCA 23.

⁵⁵⁰ *Rizeq v Western Australia* [2017] HCA 23.

⁵⁵¹ Allsop 2007 <http://www.fedcourt.gov.au/digital-law-library/judges-speeches/chief-justice-allsop/allsop-cj-200710>.

⁵⁵² Allsop 2007 <http://www.fedcourt.gov.au/digital-law-library/judges-speeches/chief-justice-allsop/allsop-cj-200710>.

⁵⁵³ Allsop 2007 <http://www.fedcourt.gov.au/digital-law-library/judges-speeches/chief-justice-allsop/allsop-cj-200710>.

⁵⁵⁴ Sections 79 and 80 of the *Judiciary Act*.

exercising federal jurisdiction in that State or Territory in all cases to which they are applicable.

s 80 Common law to govern

So far as the laws of the Commonwealth are not applicable or so far as their provisions are insufficient to carry them into effect, or to provide adequate remedies or punishment, the common law in Australia as modified by the Constitution and by the statute law in force in the State or Territory in which the Court in which the jurisdiction is exercised is held shall, so far as it is applicable and not inconsistent with the Constitution and the laws of the Commonwealth, govern all Courts exercising federal jurisdiction in the exercise of their jurisdiction in civil and criminal matters.

The traditional approach has been to first consult section 79 and then look towards Australian common law,⁵⁵⁵ as referred to in section 80.⁵⁵⁶ Others favour the approach of first consulting the common law of Australia as amended by a statute of the State or Territory in which the court is residing. Then section 79 would be used to pick up any other State or Territory statute *which is relevant to the matter*.⁵⁵⁷

Section 39 directs a state court to use federal jurisdiction (but not necessarily federal law)⁵⁵⁸ in a matter where the Commonwealth is a party, while sections 79 and 80 instruct the State court "to apply the laws referred to in those sections whenever the Commonwealth is a party".⁵⁵⁹ Zines goes on to explain that if "... there is no contrary rule in the Constitution or the laws of the Commonwealth," then "the common law and the State law of the forum" must be used.⁵⁶⁰ This means that legislation and the application of the law may differ from state to state.⁵⁶¹

⁵⁵⁵ The High Court has, on numerous occasions made it abundantly clear Australia has a single common law. See *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 523; *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503, *GPAO* 196 CLR 553.

⁵⁵⁶ Allsop 2007 <http://www.fedcourt.gov.au/digital-law-library/judges-speeches/chief-justice-allsop/allsop-cj-200710>.

⁵⁵⁷ Allsop 2007 <http://www.fedcourt.gov.au/digital-law-library/judges-speeches/chief-justice-allsop/allsop-cj-200710>. See *Mewett* 191 CLR paras 526, 554.

⁵⁵⁸ *Rizeq v Western Australia* [2017] HCA 23.

⁵⁵⁹ Zines 2008 *The High Court and the Constitution* 509.

⁵⁶⁰ Zines 2008 *The High Court and the Constitution* 508. Australia only recognizes one common law which is applicable to all states. See *Lange v Australian Broadcasting Corp* 1997) 189 CLR 520.

⁵⁶¹ Hanks 2012 *UNSW University of New South Wales Law Journal* 944.

How does all of this relate to and apply to the regulation of confidentiality in mediation in New South Wales? The issue of confidentiality in mediation does seem to be confusing.⁵⁶² Bergin, when referring to the regulation of mediation, says that "The law in this area is a rather unruly patchwork"⁵⁶³ which, coming from a chief judge of the Supreme court of New South Wales, is reason for concern. Nolan and O'Brien point out there is "a need for clarity and reform of the law on the issues of confidentiality and admissibility".⁵⁶⁴

The position regarding the admissibility of communications which forms part of mediation, when it comes to the application of state or federal law, is the following: if an ADR process is undertaken before litigation then section 131 of the *Evidence Act* will apply, this section will also apply if proceedings have been issued and then the parties engage in an ADR process such as mediation.⁵⁶⁵ If, however, proceedings are issued in a Federal Court and the court orders mediation, section 53B of the *Federal Court of Australia Act* applies, in other words federal law.⁵⁶⁶

If proceedings are issued in the Supreme or County Courts and the parties are ordered to mediation a case conference, then section 131 of the *Evidence Act* in all probability does not apply, and the Rules of The Court will also curb and limit the evidence that might be used.⁵⁶⁷ It seems as if court-ordered mediation is not covered by section 131 of the *Evidence Act* in Australia⁵⁶⁸ although this is not explicitly stated in the Act.

⁵⁶² Nolan and O'Brien 2010 <http://barristers.com.au/wp-content/uploads/2012/03/confidentialityinmediationjune2010.pdf>. They admit there are no easy answers to this.

⁵⁶³ Bergin "The Objectives, Scope and Focus of Mediation Legislation in Australia" 8.

⁵⁶⁴ Nolan and O'Brien 2010 <http://barristers.com.au/wp-content/uploads/2012/03/confidentialityinmediationjune2010.pdf>.

⁵⁶⁵ Nolan and O'Brien 2010 <http://barristers.com.au/wp-content/uploads/2012/03/confidentialityinmediationjune2010.pdf>.

⁵⁶⁶ Nolan and O'Brien 2010 <http://barristers.com.au/wp-content/uploads/2012/03/confidentialityinmediationjune2010.pdf>.

⁵⁶⁷ Nolan and O'Brien 2010 <http://barristers.com.au/wp-content/uploads/2012/03/confidentialityinmediationjune2010.pdf>.

⁵⁶⁸ *Pinot Nominees Pty Ltd v Deputy Commissioner of Taxation* (2009) FCA 1508. In this case it was decided that when it comes to court-ordered mediation s 53B of *The Federal Court Act of Australia* applies to mediation and s 131 of the *Evidence Act* applies to other without prejudice negotiations that occurred between the parties. See para 30 of this case.

5.4 Expectations of confidentiality

There is a definite expectation of confidentiality in mediation when it comes to the Australian legal landscape. In *Farm Assist Limited (In liquidation) v Secretary of State Environment, Food and Rural Affairs*,⁵⁶⁹ the judge succinctly set out the position as to confidentiality:

Confidentiality: The proceedings are confidential both as between the parties and as between the parties and the mediator. As a result even if the parties agree that matters can be referred to outside the mediation, the mediator can enforce the confidentiality provision. The court will generally uphold that confidentiality but where it is necessary in the interests of justice for evidence to be given of confidential matters, the Courts will order or permit that evidence to be given or produced.

This clearly reinforces the idea that in mediation there is an expectation of confidentiality and that the courts will generally honour this.⁵⁷⁰ This common law position is reinforced by legislation and professional standards and principles in the legal profession. *The Principles of Conduct for Mediators' of the Institute of Arbitrators and Mediators Australia* (IAMA)⁵⁷¹ add to the expectation of confidentiality in mediation, when it states that parties to mediation have reasonable expectations of confidentiality:⁵⁷²

The reasonable expectations of the parties with regard to confidentiality shall be met by the mediator. The parties' expectations of confidentiality depend on the circumstances of the mediation and any agreements they may make. The mediator shall not disclose any matter that a party expects to be confidential unless given permission by all parties or unless required by law or public policy.

⁵⁶⁹ *Farm Assist Limited (In liquidation) v Secretary of State Environment, Food and Rural Affairs* [2008] EWHC 3079 (TCC) – this case was decided by the *Technology and Construction Court*, which is part of the High Court of the United Kingdom, and has been cited in various Australian cases.

⁵⁷⁰ In *Lewis v Nortex Pty Ltd* [2002] NSWSC 1245 specifically indicated that this includes formal mediation.

⁵⁷¹ In 2014 the IAMA (Institute of Arbitrators and Mediators Australia) joined forces with LEADR to form the Resolution Institute, which started operating on 1 January 2015, as a non-profit organisation with more than 4,000 members in Australia, New Zealand and the Asia Pacific region. See Resolution Institute 2017 <https://www.resolution.institute/about-us/about>.

⁵⁷² Institute of Arbitrators and Mediators Australia 2003 <http://www.iama.org.au/docs/medtrconduct.doc>.

It is clear that this expectation of confidentiality must be fostered and deliberately applied by the mediator. In accordance with *Barristers' Conduct Rules*, *The Australian Solicitors Conduct Rules* and the *National Accreditation Mediator Standards*⁵⁷³ confidentiality is seen as a pillar of mediation and thus enjoys regulation, and the expectation that parties have of confidentiality being regarded as crucial during mediation, is reiterated by these rules and standards. As mentioned in *The Principles of Conduct* this reasonable expectation of confidentiality during mediation can also be reflected in the agreements between the parties when it comes to mediation.

According to section 6(1)(c) of the *National Accreditation Mediator Standards* a mediator must "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".⁵⁷⁴ Rule 9 of the *Australian Solicitors Conduct Rules* states that 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".⁵⁷⁵

These rules and guidelines basically all indicate that media confidentiality should be honoured, except where disclosure of the mediation communications is allowed by law or if the law places a duty on parties to disclose of mediation communications.⁵⁷⁶ This expectation of confidentiality in mediation is also found in agreements to mediate (contracts) and also relates to the without prejudice principle, legal professional privilege and legislative instruments, such as federal and state statutes that also foster this expectation.

5.5 Contract

Often the basis of confidentiality is found in the contract that the parties conclude (i.e. the agreement to mediate). This is the case despite legislation,

⁵⁷³ *Australian National Mediator Standards* 2008; *Australian Solicitors Conduct Rules* at 1 June 2012; *Barristers' Conduct Rules* at 11 December 2011.

⁵⁷⁴ Section 6(1)(c) *National Accreditation Mediator Standards*.

⁵⁷⁵ *Australian Solicitors Conduct Rules* rule 9.

⁵⁷⁶ Wykoff 2016 *Bond University Student Law Review* 6.

since the agreement between the parties (to mediate) remains central to the issue. It is therefore important to look at the principles of Australian contract law and how these principles and application of these principles relate to confidentiality in mediation.

Contract law in Australia is predominantly regulated by the "common law", as taken from England, but there has also been further development of contract law in Australia itself. There is an increasing legislative influence which supplements the common law application of contract law.⁵⁷⁷ Clarke points out that there are five elements to a contract and lists them as follows:⁵⁷⁸

formation dealing with the requirements for making a valid contract

scope and content dealing with identifying contractual terms and their scope

avoidance dealing with how a party may avoid performing an otherwise valid contract (this overlaps with consumer law)

performance and termination dealing with what is required to fully perform a contract and the other circumstances that might bring a contract to an end (including breach)

remedies setting out the damages and other remedies that might be available to a contracting party as a result of a breach of contract by the other party.

Nolan and O'Brien⁵⁷⁹ point out that "the source of confidentiality in ADR processes is usually based in contract. They then refer to confidential obligations that may take the form of the following:⁵⁸⁰

- (i) an express term of a written agreement;
- (ii) an implied duty; or
- (iii) a term of a "quasi contract".

⁵⁷⁷ Clarke 2016 <https://www.australiancontractlaw.com/>. Such additional statutes would in New South Wales specifically would be: *Competition and Consumer Act 2010* (Cth); *Sale of Goods Act 1923* (NSW); *Contracts Review Act 1980* (NSW); *Civil Liability Act 2002* (NSW).

⁵⁷⁸ Clarke 2010 www.australiancontractlaw.com/law.html.

⁵⁷⁹ Nolan and O'Brien 2010. <http://barristers.com.au/wp-content/uploads/2012/03/confidentialityinmediationjune2010.pdf>.

⁵⁸⁰ Nolan and O'Brien 2010 <http://barristers.com.au/wp-content/uploads/2012/03/confidentialityinmediationjune2010.pdf>. These obligations Contractual obligations of confidence voluntarily assumed by parties to mediation, their representatives, and the mediator, under the usual terms of a mediation agreement.

The express terms will be found in a written agreement, the implied duty is created when a mediator and parties enter into mediation, even without a written agreement and the "quasi contract" refers to mandatory mediation, as found within a statutory framework, as will then be applied to all mediation that is undertaken pursuant to this statutory framework.⁵⁸¹

5.5.1 Confidentiality in the mediation agreement

A standard agreement to mediate (which parties enter into) deals with confidentiality. The agreement will display certain contractual obligations regarding confidentiality that parties commit themselves to on a voluntary basis. The parties to mediation, their representatives, and the mediator, will usually be the parties bound by such an agreement.⁵⁸²

Therefore often agreements to mediate also include clauses such as:⁵⁸³

... all parties agree not to require the mediator to give any evidence or to produce documents in any subsequent legal proceedings concerning the issues to be mediated upon. This does not relate to confidentiality of all aspects only the subsequent legal proceedings.

The New South Wales Bar Association supplies a standard mediation agreement form which is a good example of a mediation agreement. It has a provision which obliges the parties and the mediator not to disclose:

'any information or documents provided to them in the course of or for the purposes of the mediation to anyone not involved in the mediation' unless authorised by the disclosing party.⁵⁸⁴

The parties will then sign a confidentiality agreement (this is a prescribed form) by anyone attending the mediation (such as a party's representative). This form contains an undertaking that the information obtained from the mediation will only be used for the purpose of mediation, unless the parties (all parties) give

⁵⁸¹ Nolan and O'Brien 2010 <http://barristers.com.au/wp-content/uploads/2012/03/confidentialityinmediationjune2010.pdf>.

⁵⁸² Bergin "The Objectives, Scope and Focus of Mediation Legislation in Australia" 9.

⁵⁸³ Council of the Law Institute "Guidelines for Solicitors Acting as Mediators" 1990 *Law Society Journal* 45 at 47.

⁵⁸⁴ NSW Bar Association *Mediation Agreement* 3 Nov 2012 cl 19.

written consent to the contrary. This places a clear responsibility on the parties when it comes to confidentiality in mediation, as well as offers some safeguard against the disclosure of communications which occurred during mediation.⁵⁸⁵

Such a confidentiality provision in a mediation agreement "will be enforceable like any other contractual term".⁵⁸⁶ The particular contract together with applicable legislation and other legal principles that govern confidentiality in mediation will be applicable.⁵⁸⁷ Any party to the mediation can enforce such a provision,⁵⁸⁸ and the courts will in general offer their support to enforce these confidentiality provisions, unless it is in the interests of justice not to do so.⁵⁸⁹

Arthur⁵⁹⁰ points out that it is very important, for the mediator's sake, that a formal agreement is drafted and signed by the parties in the mediation, in order to:

... provide for his or her immunity which will not automatically be provided for unless the mediation is court ordered. If the mediation is court ordered, then, in Australia, there are various provisions which give the mediator the same immunity from suit as a judge enjoys; and to precisely demark the obligations of the parties and the mediator insofar as confidentiality and other matters (rate and deposit of fees) are concerned.

The mediation agreement will typically make provision for both the mediator and the parties not to disclose to any person (other than professional advisers of the parties, as far as the mediation goes) information exchanged during the mediation without the prior written consent of the parties, unless, this is demanded by law. A separate confidentiality agreement for non-parties who are present during the mediation will usually also be included. This is of great help

⁵⁸⁵ Bergin "The Objectives, Scope and Focus of Mediation Legislation in Australia" 13.

⁵⁸⁶ Arthur 2015 *Australian ADR Bulletin* 91.

⁵⁸⁷ *Worth Recycling Pty Ltd v Waste Recycling and Processing Pty Ltd* [2009] NSWCA 354; BC 200909905 para 24.

⁵⁸⁸ *Australian Football League v Age Co Ltd* (2006) 15 VR 419; [2006] SVC 308; BC 200606690.

⁵⁸⁹ *Farm Assist Ltd (in liquidation) v Secretary of State for the Environment, Food and Rural Affairs (No 2)* [2009] BLR 399.

⁵⁹⁰ Arthur 2015 *Australian ADR Bulletin* 92.

even if a settlement is not reached, since in Australia an agreement to negotiate might be legally enforced if it is clearly expressed.⁵⁹¹

The following is an example of such a confidentiality clause in an agreement to mediate as is commonly used and endorsed by the *New South Wales Law Society*.⁵⁹²

6. Confidentiality

- 6.1 The mediator shall not voluntarily disclose information obtained during the mediation process without the prior consent of all parties.
- 6.2 The obligations of a solicitor relating to confidentiality as between solicitor and client shall apply as between the mediator and the participants.
- 6.3 If subpoenaed or otherwise notified or requested to testify, the mediator shall inform the remaining participants immediately.
- 6.4 Information received by the mediator in private session shall not be revealed to the other parties without prior permission from the party from whom the information was received.
- 6.5 The mediator shall, prior to entering into the mediation process, obtain all parties' agreement not to require the mediator to give evidence or to produce documents in any subsequent legal proceedings concerning the issues to be mediated upon.
- 6.6 The mediator shall inform the parties that, in general, communications between them, and between them and the mediator, during the preliminary conference and the mediation, are agreed to be confidential. In general, they cannot be used as evidence in the event that the matter does not settle at the mediation and goes to a court hearing. The mediator shall also inform the parties that they should consult their legal representatives if they want a more detailed statement of the position or if they have any specific questions about it.
- 6.7 The mediator shall render anonymous all identifying information when materials are used for research or training purposes.
- 6.8 The mediator shall maintain confidentiality in the storage and disposal of records.
- 6.9 The mediator shall determine from the parties whether they are required to make available a copy of the agreement reached and to whom. This should be documented in the Agreement to Mediate and/or the final agreement.

⁵⁹¹ *Australian Securities and Investments Commission v Fortescue Metals Group Ltd* (2011) 274 ALR731; (2011) 81 ACSR 563; [2011] FCAFC 19; BC 201100543 para 121–123.

⁵⁹² New South Wales Law Society 2008 <https://www.lawsociety.com.au/cs/groups/public/documents/internetcontent/026438.pdf>.

These all seem fairly standard, except for 6.2 which does create a question or two. It states:⁵⁹³

The obligations of a solicitor relating to confidentiality as between solicitor and client shall apply as between the mediator and the participants.

This indicates that the mediator and the parties in die mediation have the obligation, to deal with confidentiality in mediation in the same manner that a solicitor (legal professional person) and a client must deal with a legal professional privilege. Such a contract then incorporates this privilege, and utilises a privilege similar to a legal professional privilege.

As previously mentioned, in New South Wales, only court-ordered mediation offers statutory protection to the mediator, which leaves the mediator only relying on contractual protection, which might have limited usefulness.⁵⁹⁴

5.5.2 Criticism of contractual agreement's protection of confidentiality

Many believe that contractual protections of confidentiality are somewhat limited⁵⁹⁵ with Wolski,⁵⁹⁶ suggesting that contract law systems as found in Australia do not offer a good fit for mediation.⁵⁹⁷

The reasoning behind this is that in order to establish contract formation in mediation, parties have to prove quite a few aspects such as—proving that the negotiations were balanced and thus free from undue influence, possible coercion or fraud, which normally do not form part of contract formation and are notoriously difficult to prove.⁵⁹⁸ This will often be difficult to prove, since the parties, or a party, can claim that these aspects are covered by confidentiality.

⁵⁹³ New South Wales Law Society 2008 <https://www.lawsociety.com.au/cs/groups/public/documents/internetcontent/026438.pdf>.

⁵⁹⁴ Bergin "The Objectives, Scope and Focus of Mediation Legislation in Australia" 13.

⁵⁹⁵ Field and Wood 2005 *QUTLJ* 151.

⁵⁹⁶ Wolski 2014 *Contemporary Asia Arbitration Journal* 873.

⁵⁹⁷ Wolski 2014 *Contemporary Asia Arbitration Journal* 87. She holds the position of an associate professor of law at Bond University and specialises in civil procedure, international dispute settlement, mediation, advocacy and a range of other dispute resolution topics and spent 1991-2007 as a practicing mediator in Australia.

⁵⁹⁸ Payne 1986 *Ohio St J on Disp Resol* 405.

How can it be determined if negotiations were balanced and free from undue influence, for example, if there is limited access to the content of the mediation? How can it be proved by a party that a mediator coerced him or her into committing themselves to an agreement reached during mediation, if the mediator is not called to testify about what transpired during the mediation?

Additionally traditional contract defences, especially those of duress, undue influence and unfairness will also have to be altered to incorporate the role of the mediator⁵⁹⁹ and misconduct by the mediator. The mediator has the potential to influence the parties. The parties are often guided by the mediator, as a matter of fact often that is the primary role of a mediator, and the opportunity and possibility of coercion and undue influence by the mediator, is very real in mediation.

Weller⁶⁰⁰ points out that in traditional contract law, mutual assent is an essential element and this calls for "arm's length bargaining"⁶⁰¹ which is often compromised due to the fact that in mediation the mediator can often be seen as one of the bargaining parties. Weller bases this on the fact that a mediator guides discussions, often decides when the parties can talk to each other, when a private "caucus" should be held and often even decides which matters the parties will discuss.⁶⁰² He argues that by doing so the mediator is no longer a neutral party, and the question can be raised has the settlement (agreement) been negotiated at "arms' length"? If the mediator helped to draft the agreement (which often happens in mediation) between the parties (the mediated agreement or settlement), is he or she still a neutral party? If the mediator rephrased issues and decides to postpone the discussion of certain issues. Wolski echoes this sentiment in the sense that she refers to the fact that

⁵⁹⁹ Thompson 2003-2004 *Ohio State Journal on Dispute Resolution* 528-539. This is problematic on various levels since the role of the mediator is not always clear.

⁶⁰⁰ Weller 1992 *Judges' Journal* 13.

⁶⁰¹ Weller 1992 *Judges' Journal* 14.

⁶⁰² Weller 1992 *Judges' Journal* 14.

there is no real agreement amongst the role players in mediation as to what is the exact and proper role of the mediator.⁶⁰³

Therefore to adapt these defences will be no small task.⁶⁰⁴ An example of such an adaptation would be Weller's suggestion that a party should be able to bring a motion to request the court to deny the enforcement of a mediated agreement, if the judge can ascertain that a party "possessed dominant expertise at the time that the agreement was created"⁶⁰⁵ or the party bringing the motion "alleges having misunderstood his or her legal rights and the judge finds that the terms of the agreement reflect such a misunderstanding",⁶⁰⁶ or alternatively " the party bringing the motion alleges that he or she did not understand the meaning or ramifications of the agreement and the judge finds that such lack of understanding is consistent with the lack of expertise of the party".⁶⁰⁷

It still means that mediation confidentiality will be compromised. The mediator will have to testify, the content of the mediation will be reviewed and the conduct of the parties during mediation will also be scrutinised. This can lead to information that has been disclosed during mediation, and which has been considered to be confidential by the parties to be disclosed at a later stage outside the ambit of mediation and which many could see as being to the detriment of mediation. It potentially places the mediator in a vulnerable position and might even let parties think twice before committing to mediation.

On the other hand, if the mediation can never be revisited, and confidentiality enjoys such an absolute protection, it will be to the detriment of justice and the parties involved as well, because mediation will then basically be subjected to

⁶⁰³ Wolski 2014 *Contemporary Asia Arbitration Journal* 94.

⁶⁰⁴ Thompson 2003-2004 *Ohio State Journal on Dispute Resolution* 531-533.

⁶⁰⁵ Weller 1992 *Judges' Journal* 39.

⁶⁰⁶ Weller 1992 *Judges' Journal* 39.

⁶⁰⁷ Weller 1992 *Judges' Journal* 39.

very limited review,⁶⁰⁸ which opens up more abuse and lack of public scrutiny. Rogers⁶⁰⁹ suggests there should be a balancing act between the:

... type and magnitude of harm from compelling the mediator to testify against the harm that would result if the mediator's testimony were not accessible in an enforcement proceeding.

In other words a form of application of public policy, and the court must use its discretion in each matter.

However, if a mediator takes part in private mediations in Australia he or she will do so, and should do so, based on an agreement to mediate. This agreement will then have certain contractual obligations that the parties can then rely on, since they will not receive additional statutory protection as would be the case in mediation that has been referred by the court.

5.6 Legal professional privilege

Legal professional privilege is a principle of substantive law⁶¹⁰ which empowers a person to prevent the disclosure of information or the production of documents to a third party, even when it would otherwise have been required to do so.⁶¹¹ It is acknowledged as a "fundamental and general principle of the common law"⁶¹² and in Australia carries statutory force on both a federal and state level.⁶¹³

Legal professional privilege is attached to confidential communications that emanate between clients and lawyers, if these communications were made with the dominant purpose of offering and receiving legal advice, or for the use in

⁶⁰⁸ Review is here used to refer to the court's jurisdiction to set aside an agreement on certain grounds.

⁶⁰⁹ Rogers 2004 *W Va LR* 331.

⁶¹⁰ *Attorney-General for the Northern Territory v Maurice* (1986) 161 CLR 475 para 490.

⁶¹¹ *Australian Law Reform Commission, Privilege in Perspective: Client Legal Privilege in Federal Investigations* Report No 107(2008) 3.1.

⁶¹² *Baker v Campbell* (1983) 153 CLR 52, 116-17; *Attorney-General for the Northern Territory v Maurice* (1986) 161 CLR paras 475 490.

⁶¹³ The nature of the statutory force that it carries on both these levels will be discussed further below.

existing or anticipated litigation.⁶¹⁴ The rationale behind this finds its place in the belief that such a privilege will enhance the administration of justice by developing trust and honesty in the lawyer-client relationship and is echoed by *Baker v Campbell*,⁶¹⁵ which stated:

to ensure that the client can consult his lawyer with freedom and candour, it being thought that if the privilege did not exist a man would not venture to consult any skilful person, or would only dare to tell...half his case

In order to establish legal professional privilege three elements must be satisfied:

- (a) communications must have been exchanged between the client and the client's legal adviser;
- (b) the prominent feature of these communications must have been to obtain legal advice or for actual litigation purposes and
- (c) these communications must have been confidential.⁶¹⁶

If the above-mentioned elements have been satisfied, legal professional privilege has been established.

5.6.1 Categories of legal professional privilege

In Australia, there are basically two categories of legal professional privilege and the first one refers to:⁶¹⁷

... confidential communications between a client and his legal adviser and documents brought into existence for the sole purpose of legal proceedings.

⁶¹⁴ Tully 2014 *Bar News* 24.

⁶¹⁵ *Baker v Campbell* (1983) 153 CLR 52 para 66. Also see *Attorney-General for the Northern Territory v Maurice* [1986] HCA 80; (1986) 161 CLR 475 487; *Waterford v Commonwealth* (an Australian case) which confirms this and which also refer to the necessity to guarantee proper administration of justice by protecting the freedom of the consultation between a client and their legal advisor.

⁶¹⁶ *Baker v Campbell* (1983).

⁶¹⁷ Hodgson 2011 http://ebc44.com/wp-content/uploads/2017/06/Hodgson_24_March_2011.pdf.

The first category ensures that a person can be confident to obtain legal advice without the fear of being prejudiced or being subject to subsequent disclosure of confidential communication.⁶¹⁸ This privilege is not just applicable to communications made:

... in the course of or in anticipation of litigation, but extends generally to confidential communications between a client and his legal adviser for the purpose of obtaining or giving legal advice.⁶¹⁹

The second category deals with documents that have been created and the purpose of these documents. In *Esso Australia Resources Ltd v Federal Commissioner of Taxation*⁶²⁰ the majority of the High Court in New South Wales decided that regarding common law, in order to determine if a document will have legal professional privilege attached thereto, the dominant purpose test rather than the sole purpose test, which had previously been used, will be applicable. If the court determines that the dominant purpose of the document which has been created was to gain legal advice or for advice in legal proceedings, the legal professional privilege will be afforded to such documents.⁶²¹

In *Samenic Ltd (formerly Hoyts Cinemas Ltd) v APM Group (Aust) Pty Ltd*⁶²² this test was thoroughly discussed and applied by the court. It will always remain a question of fact in each case, and the court dealt with it as such in this case as well. The court indicated that "dominant" refers to the most influential purpose of the document, the dominant, main purpose of the document, or documents, when it comes to legal professional privilege.⁶²³ The best way to determine this would be to try and ascertain what was the intended purpose of the document, which means a document that has been brought into existence during the ordinary course of business, will not qualify for privilege. The court also

⁶¹⁸ Hodgson 2011 http://ebc44.com/wp-content/uploads/2017/06/Hodgson_24_March_2011.pdf.

⁶¹⁹ *Baker v Campbell* (1983) para 116.

⁶²⁰ *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49 t.

⁶²¹ Hodgson 2011 http://ebc44.com/wp-content/uploads/2017/06/Hodgson_24_March_2011.pdf.

⁶²² *Samenic Ltd (formerly Hoyts Cinemas Ltd) v APM Group (Aust) Pty Ltd* [2011] VSC 194.

⁶²³ *Samenic Ltd (formerly Hoyts Cinemas Ltd) v APM Group (Aust) Pty Ltd* [2011] VSC 194.

reiterated that documents are not privileged "merely because one of their intended destinations is the desk of a lawyer".⁶²⁴ The Court looks at the relationship that has been created between a lawyer and the parties involved, and if a relationship of privilege has been established. Based on this relationship and the purpose of the document privilege is evaluated. This will be the case on both federal level and in New South Wales, on state level.⁶²⁵

In a Full Federal Court decision in *Pratt Holdings Ply Ltd v The Commissioner of Taxation*⁶²⁶ the court held that legal professional privilege will also extend to communications with third parties (parties other than agents). These communications must have been made with the dominant purpose to gain legal advice where no actual or anticipated litigation exists. However, there are certain limitations such as: the third party must be involved or have been directed to prepare communication by or on behalf of the client; and it excludes commercial advice. The privilege will not be applicable simply because the communication has been provided to a lawyer, and the client must not be guilty of dealing with the communication in a way that is inconsistent with the dominant purpose.⁶²⁷

Legal advice or litigation privilege can also be afforded to statements or documents which are made or produced in mediation.⁶²⁸ If such documents are disclosed to the mediator, or other third parties, during the course of the negotiation, it will not result in the privilege being waived.⁶²⁹

⁶²⁴ *Samenic Ltd (formerly Hoyts Cinemas Ltd) v APM Group (Aust) Pty Ltd* [2011] VSC 194.

⁶²⁵ In Federal jurisdictions and in New South Wales, the dominant purpose test is used to determine the existence of legal professional privilege is determined by the dominant as opposed to sole purpose test ss 118 and 119 of the *Evidence Act* (Cth) and the *Evidence Act* 1995 (NSW) also confirm this.

⁶²⁶ *Pratt Holdings Ply Ltd v The Commissioner of Taxation* (2004) 207 ALR 217; (2004) FCAFC 122.

⁶²⁷ *Pratt Holdings Ply Ltd v The Commissioner of Taxation* (2004) 207 ALR 217; (2004) FCAFC 122.

⁶²⁸ Bergin "The Objectives, Scope and Focus of Mediation Legislation in Australia" 16.

⁶²⁹ Bergin "The Objectives, Scope and Focus of Mediation Legislation in Australia" 16.

5.6.2 Statutory regulation of legal professional privilege

5.6.2.1 Federal level

The doctrine has statutory force according to the *Uniform Evidence Acts*,⁶³⁰ both the *Federal Act* (Cth) as well as the state act (NSW). The federal act, *Uniform Evidence Act 1995* (Cth) in sections 118 and 119 state the following:

- 118 Evidence is not to be adduced if, on objection by the client, the court finds that the adducing of evidence would result in the disclosure of:
- (a) a confidential communication made between the client and a lawyer; or
 - (b) a confidential communication made between 2 or more lawyers acting for the client; or
 - (c) the contents of a confidential document (whether delivered or not) prepared by the client, lawyer or another person;
 - (d) for the dominant purpose of the lawyer, or one or more of the lawyers, providing legal advice to the client.
- 119 Evidence is not to be adduced if, on objection by the client, the court finds that the adducing of evidence would result in the disclosure of:
- (a) a confidential communication between the client and another person, or between a lawyer acting for the client and another person, that was made; or
 - (b) the contents of a confidential document (whether delivered or not) that was prepared; for the dominant purpose of the client being provided with professional legal services relating to an Australian or overseas proceeding (including the proceeding before the court), or an anticipated or pending Australian or overseas proceeding, in which the client is or may be, or was or might have been, a party.

It is important to note that these sections only apply "to the adducing of evidence in the relevant proceedings".⁶³¹ Examples of these are: "processes under which documents are produced (such as discovery and subpoenas)".⁶³² Additionally, the common law doctrine of legal professional privilege will then apply in all other circumstances, this means—for instance—that during pre-trial proceedings the common law application of legal professional privilege will be

⁶³⁰ *Evidence Act 1995* (Cth); *Evidence Act 1995* (NSW); *Evidence Act 2001* (Tas); *Evidence Act 2004* (NT).

⁶³¹ Gilmour Date unknown www.fedcourt.gov.au/digital-law-library/judges-speeches/.../Gilmour-J-20120313.rtf.

⁶³² Gilmour Date unknown www.fedcourt.gov.au/digital-law-library/judges-speeches/.../Gilmour-J-20120313.rtf.

applicable, while the statutory application (through the *Evidence Acts*) will be applicable during processes where documents are produced.⁶³³

5.6.2.2 State level—Evidence Act (NSW)

Sections 118 and 119 of the *Evidence Act* (NSW) afford legal professional privilege to legal advice (section 118) and section 119 establishes a litigation privilege.⁶³⁴ The privilege referred to in section 118 refers to barring the disclosure of:⁶³⁵

- (a) a confidential communication made between the client and a lawyer; or
- (b) a confidential communication made between two or more lawyers acting for the client; or
- (c) the contents of a confidential document (whether delivered or not) prepared by the client or the lawyer;
for the dominant purpose of the lawyer, or one or more of the lawyers, providing legal advice to the client.

While section 119 protects:⁶³⁶

...confidential communications between a client and another person, or a lawyer acting for a client and another person, or the contents of a confidential document that was prepared for the dominant purpose of a client being provided with legal services related to an Australian or overseas proceeding or anticipated proceeding in which the client is or may be a party.

This section thus deals with professional legal advice given in a current or pending legal matter and enforces the idea of legal professional privilege.

5.7 Legal professional privilege during mediation

If a lawyer represents a client during mediation, the lawyer enters into a lawyer–client relationship and practises law.⁶³⁷ Rule 116 of the *Barristers' Rules*

⁶³³ Gilmour Date unknown www.fedcourt.gov.au/digital-law-library/judges-speeches/.../Gilmour-J-20120313.rtf.

⁶³⁴ Sections 118 and 119 of the *Evidence Act* (NSW).

⁶³⁵ Section 118 of the *Evidence Act*.

⁶³⁶ Section 119 of the *Evidence Act*.

⁶³⁷ *Barristers' Rules Rule 15(d)*, which explicitly indicates that representing a client during mediation is regarded as part of the scope of a lawyer's work.

contains the word "court" but this has been expanded to include mediations.⁶³⁸ The Law Society of New South Wales published *Professional Standards for Legal Representatives in Mediation* in January 2008, and this offers guidelines for legal professionals as to their conduct during mediation.⁶³⁹

In mediation legal professionals do not have a duty to disclose documents or information which has a valid claim to privilege. Legal professional privilege is one of these valid claims,⁶⁴⁰ and therefore this will include most communications that occur between a lawyer and his or her client while they are preparing for mediation, be it as advice or as part of litigation.⁶⁴¹ Similarly it will also be subject to the exceptions to legal professional privilege.

Two Australian cases further expounded on this matter. The *Williamson v Schmidt* case had to examine the duty a solicitor has to keep their clients' confidences, and whether this rule should be applied in a stricter manner when it comes to mediation.⁶⁴² The court relied on the judgment in *AWA Ltd v Daniels (New South Wales)*⁶⁴³ and decided 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.

So, direct evidence emanating from mediation is inadmissible, but if that similar fact or claim can be proved by using a different source than the mediation, even if the discovery of that source was due to information obtained during

⁶³⁸ Wolski 2012 *Melbourne ULR* 722.

⁶³⁹ New South Wales Law Society 2008 <https://www.lawsociety.com.au/cs/groups/public/documents/internetcontent/026438.pdf>.

⁶⁴⁰ *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49 confirmed that legal professional privilege offers confidential communications that have been exchanged between lawyers and clients protection against disclosure, as well as communications made between lawyers, clients and third parties if the dominant purpose of these communications was done while seeking or providing legal advice to be used in, or related to, existing or reasonably anticipated legal proceedings.

⁶⁴¹ Wolski 2012 *Melbourne ULR* 723.

⁶⁴² *Williamson v Schmidt* [1997] 2 Qd.R 317, 388.

⁶⁴³ *AWA Ltd v Daniels (New South Wales)* 7 ACSR 463 1992 (unreported).

mediation, the evidence obtained in such a way would be admissible.⁶⁴⁴ A party is entitled to try and prove if evidence is admissible, even evidence obtained during mediation, and if the party can successfully do so, by proving that the information was gleaned from a different source than the mediation (even if that source was obtained during the mediation), it can be seen as admissible in a subsequent legal proceeding. This then makes it clear that although legal professional privilege is applicable in mediation, it does not necessarily render all communication exchanged during mediation inadmissible in subsequent proceedings.

Legal professional privilege is applicable to mediation, on both federal and state level. If a legal professional assists his or her client during mediation, the legal professional can claim this privilege since he or she is acting within the scope of their work as a lawyer, assuming they are dispensing or obtaining legal advice (that could even mean that the privilege extends to third parties if the lawyer is in the process of obtaining legal advice from a third party regarding his or her client's case).

The legal professional privilege can be waived by the client, and there are circumstances and situations where it will not be applicable. Communications exchanged during mediation can be disclosed at a later stage if that information is obtained through a different source (similar to discovery) or one of the exceptions to legal professional privilege, as discussed above, might also be applicable if the specific matter is examined. The privilege is not absolute.

5.7.1 Exceptions to legal professional privilege

5.7.1.1 Common law exceptions

Legal professional privilege belongs to the client, and only the client can waive this privilege, be it expressly or by implication.⁶⁴⁵ To determine if the legal

⁶⁴⁴ Pyles "Mediation Confidentiality in Subsequent Proceedings" np

⁶⁴⁵ Hodgson 2011 http://ebc44.com/wp-content/uploads/2017/06/Hodgson_24_March_2011.pdf.

professional privilege has been waived, the court considers the conduct of the client (the holder of the privilege) and determines if the conduct of the client is inconsistent with the maintenance of the confidentiality which the privilege protects, while also considering fairness, but not using the latter as an overriding principle.⁶⁴⁶

The privilege will not apply to communications that abuse or further abuse statutory power, or to commission or further the commission of an offence or fraud.⁶⁴⁷ Other exceptions to this privilege are: information given to a legal professional who furthers a crime, to commit fraud,⁶⁴⁸ or actions for "illegal or improper purposes" or for "trickery" and "shams". Communications from other advisers, not a legal professional, are not privileged,⁶⁴⁹ nor documents created unilaterally by:

... expert witness such as working notes, field notes and the witness's own drafts of his or her report generally do not attract privilege because they are not in the nature of, and would not expose, confidential communications.⁶⁵⁰

5.7.1.2 Statutory exceptions

Section 122 of the *Evidence Act* (NSW) details statutory exceptions to the legal profession privilege. Sections 122(2)-(6) list these expectations and they centred on the following: if a party has acted inconsistent with keeping the legal professional privilege intact, in other words they have not consistently treated the information as confidential, and then they can't persist in claiming the privilege.⁶⁵¹ Then the exception will additionally, if a client has knowingly and willingly disclosed the confidential information, or has consented to it being

⁶⁴⁶ *Mann v Carnell* (1999) 201 CLR 1 13.

⁶⁴⁷ *R v Bell; Ex parte Lees* [1980] HCA 26; (1980) 146 CLR 141 3; *Attorney-General (NT) v Kearney* [1985] HCA 60; (1985) 158 CLR 50.

⁶⁴⁸ *Equuscorp Pty Ltd v Glengallan Investments Pty Ltd* (2004) 218 CLR 471.

⁶⁴⁹ *Sarah C Getty Trust* [1985] QB 956.

⁶⁵⁰ Hill Date unknown <https://www.mcw.com.au/content/Document/Papers/General%20Overview%20of%20Principals%20and%20How%20to%20Apply%20Them1.pdf>.

⁶⁵¹ Section 122(2) of the *Evidence Act* (NSW). This would be similar to the common law exception that applies the same principle.

disclosed, then information will not be seen as being confidential anymore.⁶⁵² Section 122(4)(5) expound further on the matter and give guidelines as to when, even if the client has willingly and knowingly disclosed information, it can still enjoy the legal professional privilege.⁶⁵³

5.8 Without prejudice

The without prejudice principle applies to virtually all ADR processes in Australia, and definitely to mediation as well.⁶⁵⁴ Public policy is the driving force for this application since the idea is to provide parties with a way in which they can settle their own disputes and possibly avoid litigation.⁶⁵⁵

In the case of *Field v Commissioner for Railways (NSW)*⁶⁵⁶ the High Court stated:

As a matter of policy the law has long excluded from evidence admissions by words or conduct made by parties in the course of negotiations to settle litigation. The purpose is to enable parties engaged in an attempt to compromise litigation to communicate with one another freely and without the embarrassment which the liability of their communications to be put in evidence subsequently might impose upon them. The law relieves them of this embarrassment so that their negotiations to avoid litigation or to settle it may go on unhampered.

In *Rodgers v Rodgers*⁶⁵⁷ the High Court reinforced the principle that evidence that is subject to the without prejudice principle will be protected in subsequent proceedings. It specifically stated:

⁶⁵² Section 122(3)(a-b) of the *Evidence Act* (NSW).

⁶⁵³ Section 122(4)-(5) of the *Evidence Act* (NSW). These involve information disclosed as a confidential communication or in preparation of a confidential document; or disclosed under duress; or deception; or when compelled by law; or when the legal professional provides legal services on the same matter to another client; or to a party with a common interest in the matter. See ss 122(5)(a)(i-iv), (b), (c).

⁶⁵⁴ Nolan and O'Brien 2010 <http://barristers.com.au/wp-content/uploads/2012/03/confidentialityinmediationjune2010.pdf>. See also Gobbo, Byrne and Heydon *Cross on Evidence* paras 11, 38; Buzzard, May and Howard *Phipson on Evidence* para 679ff; *Rodgers v Rodgers* (1964) 114 CLR 608; *AWA Ltd v Daniels t/a Deloitte Haskins and Sells* (1992) 7 ACSR, a decision by the New South Wales Supreme Court (Commercial Division). This is the case in New South Wales on state and federal level and is based on common law.

⁶⁵⁵ Boule *Mediation: Principles, Process, Practice* 540.

⁶⁵⁶ (1955) 99 CLR 285 para 291.

⁶⁵⁷ *Rodgers v Rodgers* (1964) 114 CLR 608.

... who contemplate such proceedings, should be able to negotiate with a view to reconciliation or as to what financial provision should be made for one party freely and without fear that, failing agreement, what is said or done by them may later be used in evidence is, in our view, not open to question.

However, the protection is only afforded to communication that is reasonable to be seen as a result of the negotiations.⁶⁵⁸ In *Field* (New South Wales High Court) the plaintiff shared certain details with a medical officer. The court determined that these communications did not exhibit any proper connection with the settlement process or its purpose, and were therefore not privileged.⁶⁵⁹ This led the court in *Village Nine Network & Ors v Mercantile Mutual* (a Queensland Court of Appeal case) to warn advisors that, based on the *Field* case, if the privilege only covers admissions, and in such a limited manner such as the *Field* case indicates, it leaves them exceptionally vulnerable as to the disclosure of communications during attempts to settle.⁶⁶⁰

Additionally, the without prejudice principle can also not be applied if that similar fact or claim can be proved by using a different source than the mediation. A New South Wales Supreme Court case *AWA Ltd v Daniels*⁶⁶¹ decided this, and it was confirmed by the Queensland Supreme Court decision of *Williamson v Schmidt*.⁶⁶² In *AWA Ltd v Daniels*⁶⁶³ the court found that objective evidence will not necessarily be excluded just because a party learnt of the relevant facts during mediation. In other words that source (which was divulged during mediation) can be used to obtain information and evidence to use in a subsequent legal proceeding. *AWA Ltd v Daniels*⁶⁶⁴ thus reiterated the fact that if evidence is obtainable in another manner than by citing mediation, it can be admissible, which clearly refers to the principles of discovery. The mediation itself can of course not be used as a source.

⁶⁵⁸ *Field v Commissioner for Railways (NSW)* [1957] HCA 92.

⁶⁵⁹ *Field v Commissioner for Railways (NSW)*. This is the position in a federal and state matter.

⁶⁶⁰ *Village Nine Network & Ors v Mercantile Mutual* QCA 276

⁶⁶¹ *AWA Ltd v Daniels* 7 ACSR (1992) para 463.

⁶⁶² *AWA Ltd v Daniels* 7 ACSR (1992) para 463. *Williamson v Schmidt* [1997] 2 Qd R 317, 388.

⁶⁶³ *AWA Ltd v Daniels* 7 ACSR (1992).

⁶⁶⁴ *AWA Ltd v Daniels* 7 ACSR (1992).

It must also be kept in mind that information is not considered confidential when it enters the public domain, as held by *Heinemann Publishers Australia Pty Ltd*.⁶⁶⁵ the rationale behind this is that confidentiality has lost its purpose when it entered the public domain.

The without prejudice principle is only applicable and relevant to court proceedings and functions between the parties, as such the mediator cannot lay claim to it.⁶⁶⁶ Mediation is thus covered by the without prejudice principle and only the parties can waive this privilege.⁶⁶⁷

5.8.1 Exceptions to the without prejudice principle

The without prejudice principle is applicable to mediation, both on a state level and at federal level. Since one of the aims of mediation is for parties to negotiate without fear of prejudice, which is the very same basic premise of the without prejudice principle as confirmed by the New South Wales High Court decision in *Field v Commissioner for Railways (NSW)*,⁶⁶⁸ the privilege finds a natural home in mediation.

It is however, not to say that communications will be afforded this privilege by merely referring to it as being "without prejudice", or assuming because it was disclosed during mediation it will automatically enjoy the without prejudice principle. The communication must have resulted from the negotiations or settlement process in order to be afforded the without prejudice principle. However, in the very same *Field* case the New South Wales High Court indicates that communications which do not exhibit any proper connection with the settlement process or its purpose, were not considered as privileged, as Mr Field

⁶⁶⁵ *Heinemann Publishers Australia Pty Ltd* (1987) 8 NSWLR para 341, 374. If a party wilfully discloses confidential information and it reaches the public domain, the party could of course be liable for damages.

⁶⁶⁶ *Farm Assist Limited (In liquidation) v Secretary of State Environment, Food and Rural Affairs* [2009] EWHC 1102.

⁶⁶⁷ *Farm Assist Limited (In liquidation) v Secretary of State Environment, Food and Rural Affairs* para 44. This is applicable on both federal and state level.

⁶⁶⁸ *Field v Commissioner for Railways (NSW)*.

found out to his dismay. This means that certain communication shared during mediation might not be privileged.

Boulle suggests that there are five main exclusions to the non-admissibility principles with regard to the without prejudice principle.⁶⁶⁹ These are when:

- (a) the parties give consent for disclosure to take place
- (b) mediated agreements – courts in Australia seem to accept the fact that a mediated agreement by the parties is by definition, a waiver from the parties as to the confidentiality of the document (the mediated agreement) because the parties can produce such a document to the Court to request the court to enforce it.⁶⁷⁰
- (c) Allegations of fraud and/or criminality;⁶⁷¹
- (d) Mediators reporting obligations;
- (e) Costs orders and procedural hearings.

In New South Wales information, which formed part of mediation, can also be used in subsequent legal proceedings, if a party obtains it from another source, a source outside mediation, even if the party got to know of the source because of mediation.⁶⁷² Information also loses its confidentiality privilege if it becomes part of the public domain as decided in the New South Wales decision of *Heinemann Publishers Australia Pty Ltd*.⁶⁷³

In New South Wales, on both federal and state level, there are various exceptions that apply to the without privilege principle.⁶⁷⁴ Many feel however, that this principle often causes essential and relevant evidence to be barred from being used in subsequent legal proceedings. They feel the list of exceptions is limited and legislation, as provided by section 53B of the *Federal*

⁶⁶⁹ Boulle *Mediation: Principles, Process, Practice* 558-571.

⁶⁷⁰ Nolan and O'Brien 2010 <http://barristers.com.au/wp-content/uploads/2012/03/confidentialityinmediationjune2010.pdf>; *Al-Hakim v Monash University* Beach J (1999) BC990826; *Thompson v Macedon Ranges Shire Council* [1999] VSC 338; *Brodham v Edsoncome* (2000) QDC 313; *Barry v City West Water Limited* [2002] FCA 1214; Boulle *Mediation: Principles, Process, Practice* 558-599.

⁶⁷¹ *NSW Supreme Court Act* 1970 s 110Q(c) specifically the application of the exception "if there are reasonable grounds to believe that the disclosure is necessary to prevent or minimise the danger of injury to any person or damage to any property".

⁶⁷² The NSW High Court confirmed this in *AWA Ltd v Daniels*.

⁶⁷³ *Heinemann Publishers Australia Pty Ltd*.

⁶⁷⁴ See 666-670.

Court of Australia Act, section 131(1) of the *Evidence Act* 1995 (Cth) (at federal level) and *Evidence Act* 1995 (NSW), specifically section 131, (at state level) fail to maintain a balance between the competing public interests of protecting the integrity of ADR processes such as mediation, and avoiding injustice by allowing relevant evidence taken from these ADR processes, to be used in subsequent legal proceedings.⁶⁷⁵

Other exceptions have also been applied such as: situations where, if the communication or information would have been inadmissible due to the without prejudice principle it would have led to the court being misled⁶⁷⁶ (a New South Wales state decision); or that a settlement was indeed reached and ought to be rescinded or set aside based on alleged misrepresentation,⁶⁷⁷ (a federal judgment) oppression⁶⁷⁸ or unconscionable conduct⁶⁷⁹ (a New South Wales Supreme Court decision); or even where a party has sued his or her solicitors with regard to their conduct and actions during mediation.⁶⁸⁰

5.9 Legislation

In Australia the law governing and regulating confidentiality in mediation are not contained in a single document.⁶⁸¹ Bergin calls the legislation that deals with mediation confidentiality "a rather unruly patchwork"⁶⁸² while Boule bemoans the fact that legislation, court orders and dispute resolution clauses in Australia do not always deal with "mediation confidentiality and its exceptions in comprehensive, consistent and complementary ways".⁶⁸³

⁶⁷⁵ *Court of Australia Act, Evidence Act (Cth and NSW)*.

⁶⁷⁶ *Pitts v Adney* [1961] NSW 535.

⁶⁷⁷ *Pihiga Pty Ltd v Roche* (2011) 278 ALR 209, 225–6 [97]–[108].

⁶⁷⁸ *Pittorino v Meynert* [2002] WASC 76.

⁶⁷⁹ *Abriel v Australian Guarantee Corporation Limited* [2000] FCA 1198; *Commonwealth Development Bank of Australia Pty Limited v Cassegrain* [2002] NSWSC 965.

⁶⁸⁰ *Tapoohi v Lewenberg (No 2)* [2003] VSC 410.

⁶⁸¹ Wykoff 2016 *Bond University Student Law Review* 2 indicates that there is no single document which contains all the rules that relate to mediation, which means that these rules are often very open for interpretation. She also complains about the fact that there is at this stage in Australia no single governing board of mediators which is not conducive to more uniformity in the application of the rules or to enforce discipline among mediators.

⁶⁸² Bergin "The Objectives, Scope and Focus of Mediation Legislation in Australia" 8.

⁶⁸³ Boule *Mediation: Principles, Process, Practice* 672.

Others also feel that there is no justification for these multiple schemes associated with regard to the admissibility of that which transpires during ADR processes, and have called for one regime to codify the admissibility of things said or done at all structured ADR processes, in order to bring more clarity on both a federal and at state level.⁶⁸⁴

The main sources which deal with mediation confidentiality in New South Wales are: the *Federal Court of Australia Act 1976*;⁶⁸⁵ *Civil Procedure Act 2005*⁶⁸⁶ (NSW); the *Evidence Act 1995* (NSW);⁶⁸⁷ *Australian Solicitors Conduct Rules*,⁶⁸⁸ *Australian National Mediator Standards, Practice Standards* and the Australian Bar Association's *Barristers' Conduct Rules*.⁶⁸⁹

If the mediation is sanctioned by a Federal Court, sections 53A and 53B of the *Federal Court of Australia Act 1976* (Cth) will apply, and 53B clearly offers protection to confidentiality in mediation. In New South Wales if the matter is not a federal matter (and it has been court-referred) the *Civil Procedure Act* and the *Evidence Act 1995* (NSW) will apply, together with the rules⁶⁹⁰ and standards⁶⁹¹ as indicated above.⁶⁹²

⁶⁸⁴ Nolan and O'Brien 2010 <http://barristers.com.au/wp-content/uploads/2012/03/confidentialityinmediationjune2010.pdf>.

⁶⁸⁵ *Federal Court of Australia Act 1976*.

⁶⁸⁶ *Civil Procedure Act 2005*.

⁶⁸⁷ *Evidence Act 1995* (NSW).

⁶⁸⁸ Section 6(1)(c) of the *National Accreditation Mediator Standards*.

⁶⁸⁹ *Australian Solicitors Conduct Rules* June 2012; *Australian National Mediator Standards, Practice Standards* January 2008; *Barristers' Conduct Rules* May 2013; the latter has been adopted in New South Wales in June 2014, Wolski 2015 *UNSWLJ* 6.

⁶⁹⁰ The *Australian Solicitors Conduct Rules* apply to all Australian solicitors *including* Australian-registered foreign lawyers who act as solicitors. The rules help to solicitors to act ethically and apply in addition to common law, and breach of these rules can lead to disciplinary action. See *Australian Solicitors Conduct Rules* 1.1, 2.1-2.3. Similarly the *Barristers' Rules (Legal Profession Uniform Conduct (Barristers') Rules* and apply to barristers practising in the participatory jurisdiction, (for purposes of this study it will be New South Wales) even if they are from a different jurisdiction, and barristers employed by the Crown or who holds a statutory office. See Rule 6 of *Barristers' Rules* Rule 6.

⁶⁹¹ Standards are not seen as legal documents as such, unless governments referenced these standards in legislation, then they become mandatory, therefore they can be seen as guidelines. See Standards Australia http://www.standards.org.au/StandardsDevelopment/What_is_a_Standard/Pages/Standards-and-the-Law.aspx.

⁶⁹² Section 131 specifically deals with the issue of confidentiality. See also the *Evidence Act 1995* (NSW).

5.9.1 Legislation of confidentiality in mediation at federal level

The expectation of confidentiality in mediation is echoed at the federal level by section 53A *Federal Court of Australia Act* clothes a judge with the authority to order the parties to mediate. Section 53B provides for the following:

Evidence of anything said, or of any admission made, at a conference conducted by a mediator in the course of mediating anything referred under section 53A is not admissible:

- (a) in any court (whether exercising federal jurisdiction or not); or
- (b) in any proceedings before a person authorised by a law of the Commonwealth or of a State or Territory, or by the consent of the parties, to hear evidence.

Many argue that the Act seems to apply the exceptions to confidentiality in mediation narrower than it is done on state level. The reading of this section only seems to apply to court-referred mediations, mediations sanctioned by the court, which seems to be narrower than section 131 of the *Evidence Act*.⁶⁹³

Furthermore in *Pinot Nominees Pty Ltd v Federal Commissioner of Taxation*⁶⁹⁴ the Federal Court of Australia decided that if the mediation is conducted under section 53 of the *Federal Court of Australia Act*, then evidence of offers which were made at the mediation was not admissible.⁶⁹⁵

5.9.2 Legislation of confidentiality in mediation at state level

5.9.2.1 Civil Procedure Act (NSW)

The state of New South Wales also adopted a legislative definition of "mediation" in the *Civil Procedure Act 2005* (NSW) (CPA) and it reads as follows:

⁶⁹³ However this is not the case in all states – for instance Victoria follows this, but not New South Wales.

⁶⁹⁴ *Pinot Nominees Pty Ltd v Federal Commissioner of Taxation* (2009) FCA 1508.

⁶⁹⁵ A view also expressed in *Forsyth v Sinclair* BC201005509.

... a structured negotiation process in which the mediator, as a neutral and independent party, assists the parties to a dispute to achieve their own resolution of the dispute.⁶⁹⁶

As far as confidentiality goes with regard to the *Civil Procedure Act*,⁶⁹⁷ it clearly renders inadmissible in any proceedings before any court or other body, evidence of anything said or of any admission made in a court-ordered mediation and any document prepared for the purposes of, in the course of, or as a result of a court-ordered mediation.

In New South Wales as far as court-ordered mediations goes the mediator and the parties involved in mediation are immune from a defamation suit in respect of oral statements in a mediation session or documents or other material sent or produced to a mediator or to the court for the purpose of a mediation session,⁶⁹⁸ similar to that of a judicial officer,⁶⁹⁹ the mediator cannot disclose information gathered during mediation, bar a few exceptions.⁷⁰⁰

Bergin refers to a statutory mediation privilege, contained in section 30(4) of the *Civil Procedure Act* (NSW) that protects communications made, and documents prepared in the course of a mediation session; or alternatively communication that have been engaged in for the dominant purpose of providing legal advice or in the genuine pursuit of a negotiated settlement of the complete dispute or even only parts of the dispute.⁷⁰¹

However, the statutory protection for the mediator (and for the parties) does not extend to private mediation, but is only applicable to court-referred mediation.⁷⁰² As far as private mediation is concerned, Bergin states that the only protection available to the mediator is contractual protection, which he

⁶⁹⁶ Section 25 of the *Civil Procedure Act* 2005.

⁶⁹⁷ Sections 30(4)(a) and (b) of the *Civil Procedure Act*.

⁶⁹⁸ *Civil Procedure Act* 2005 (NSW) s 30(2).

⁶⁹⁹ *Civil Procedure Act* 2005 (NSW) s 33.

⁷⁰⁰ *Civil Procedure Act* 2005 (NSW) s 31. See also the *Evidence Act* 1995 (NSW) s 131(2)(a-k) for a list of exceptions to confidentiality with regard to settlement negotiations, which would also be applicable to mediation.

⁷⁰¹ Section 30(4) of *Civil Procedure Act* 2005.

⁷⁰² Bergin "The Objectives, Scope and Focus of Mediation Legislation in Australia" 10.

admits has limited scope.⁷⁰³ Bergin indicates that although these agreements, with their specific confidentiality clauses, offer contractual protection and complement rules of admission of evidence, they will not on their own "prevent mediation communications from being discovered or subpoenaed".⁷⁰⁴

He therefore suggests that practitioners should be aware of this fact, and should consider obtaining a court order that indicates that the matter should be referred for mediation, in order to attain the more comprehensive protection that court-referred mediation enjoys and the statutory protections it also qualifies for.⁷⁰⁵

Court-referred mediation has statutory protection, private mediation does not, and therefore Bergin suggests that mediators should be aware of this and strengthen their protection by seeking a court order which refers the matter to mediation.⁷⁰⁶ However, in private mediation, common law principles can still be utilised such as without prejudice, common law exceptions to confidentiality etc., but it can be overruled by the court based on public policy and the interests of justice.

This clear distinction between the protections of mediation confidentiality when it comes to private mediation as opposed to court-referred mediation, as found in New South Wales, is significant. It is obviously an attempt to encourage mediation and one that practitioners and mediators should use to ensure enhanced protection.

This is an important distinction since in court-referred mediation in New South Wales, parties and the mediator are offered more comprehensive protection, while when it comes to private mediation, the contractual protection is the only protection for the mediator and the parties. There is no legal professional

⁷⁰³ Bergin "The Objectives, Scope and Focus of Mediation Legislation in Australia" 10.

⁷⁰⁴ Bergin "The Objectives, Scope and Focus of Mediation Legislation in Australia" 10.

⁷⁰⁵ Bergin "The Objectives, Scope and Focus of Mediation Legislation in Australia" 10.

⁷⁰⁶ Bergin "The Objectives, Scope and Focus of Mediation Legislation in Australia" 10. In *Silver Fox Co v Lenard's (No 3)* [2004] FCA 1570 the court allowed evidence of certain negotiations carried out in a mediation even though a mediation agreement between the parties contained contrary provisions.

privilege for the mediator available. This means that the mediator does not enjoy a mediator's privilege, like a lawyer has a legal professional privilege.

So, when it comes to court-referred mediation a mediator enjoys similar protection than a judicial officer, the mediator and the parties enjoy additional statutory protection and as, 6.2 points out, a privilege similar to the legal professional privilege is invoked.

5.9.2.2 The Evidence Act (NSW)

The *Evidence Act* 1995 (NSW), section 131 specifically, indicates that mediation is seen as confidential and parties are barred from adducing evidence that stems from communications, or documents which have been produced in connection with an attempt to negotiate a settlement.⁷⁰⁷

Section 131 of the *Evidence Act* of New South Wales states that:⁷⁰⁸

Exclusion of evidence of settlement negotiations

- (1) Evidence is not to be adduced of:
 - (a) a communication that is made between persons in dispute, or between one or more persons in dispute and a third party, in connection with an attempt to negotiate a settlement of the dispute; or
 - (b) a document (whether delivered or not) that has been prepared in connection with an attempt to negotiate a settlement of a dispute.

This is similar to the *Civil Procedure Act* and reinforces the common law position. In New South Wales at state level, these two pieces of legislation acknowledge mediation and offers it the protection against disclosure at subsequent legal proceedings. This means that as far as the rules, standards and legislation are concerned; confidentiality in mediation is acknowledged and protected. However, as is the case in common law, there are also exceptions to this, instances where confidentiality will not be upheld.

⁷⁰⁷ Section 131 of the *Evidence Act* 1995 (NSW).

⁷⁰⁸ Section 131 of the *Evidence Act* 1995 (NSW).

5.10 Exceptions to confidentiality in mediation

As is the case with most legal applications, rules and principles, exceptions to the application of the principle exist. Confidentiality in mediation is no exception to this. The obvious exception to confidentiality in mediation is when the parties to the mediation waive this right to confidentiality. It is important to note that this waiver cannot be unilateral and must be done after consent by all the parties to the mediation.⁷⁰⁹

Another exception to confidentiality in mediation is when an agreement has been reached during mediation and the court needs to adduce evidence from such an agreement to settle a dispute.⁷¹⁰ Other exceptions to confidentiality will be instances where the law forces a party to disclose information that occurred during mediation, or "where there have been:

... allegations of fraud or serious misconduct in the process there are grounds for admitting evidence of what transpired in the mediation and the courts may suspend confidentiality for this purpose.⁷¹¹

If this is not applicable then "the mediation and communications prepared in preparation for the mediation will remain confidential."

5.10.1 The Federal Court Act of Australia

This act provides a narrower exception to admissibility of evidence at mediations as can be seen by section 53B which indicates that:

53B Admissions made to mediators

Evidence of anything said, or of any admission made, at a conference conducted by a mediator in the course of mediating anything referred under section 53A is not admissible:

- (a) in any court (whether exercising federal jurisdiction or not); or
- (b) in any proceedings before a person authorised by a law of the Commonwealth or of a State or Territory or by the consent of the parties to hear evidence.

⁷⁰⁹ Boule *Mediation: Principles, Process, Practice* 558.

⁷¹⁰ *Al-Hakim v Monash University* [1999] VSC 511.

⁷¹¹ Boule *Mediation: Principles, Process, Practice* 561.

This section then makes it clear that any communications made to a mediator during mediation is inadmissible (the obvious exceptions aside)⁷¹² in any court or any subsequent proceeding by a person authorised to hear evidence.⁷¹³ This seems to offer solid and wide-ranging protection to confidentiality in mediation on a federal level.⁷¹⁴ However, the *Supreme Court Act*⁷¹⁵ puts a slightly different spin on it when it indicates that:

... no evidence shall be admitted at the hearing of the proceeding of anything said or done by any person at the mediation.

Does this mean then exclude "any proceeding" since it refers to "hearing of the proceeding".

5.10.2 *The Evidence Act (Cth and NSW)*

Here the exceptions to confidentiality are numerous and definitely not as strict and narrow as is the case with the *Federal Act*. Section 131(2) of the *Evidence Act*⁷¹⁶ offers exceptions to confidentiality in mediation. It indicates that there will be an exception to confidentiality in mediation in the following instances if:

- (2) Subsection (1) does not apply if:
 - (a) the persons in dispute consent to the evidence being adduced in the proceeding concerned or, if any of those persons has tendered the communication or document in evidence in another Australian or overseas proceeding, all the other persons so consent; or
 - (b) the substance of the evidence has been disclosed with the express or implied consent of all the persons in dispute; or
 - (c) the substance of the evidence has been partly disclosed with the express or implied consent of the persons in dispute, and full disclosure of the evidence is reasonably necessary to enable a proper

⁷¹² Here we refer to aspects such as furtherance of a crime, or placing someone's life in danger, or an obligation to report mistreatment and abuse.

⁷¹³ Section 53(B) of *Federal Court Act of Australia*. This is why many suggest parties to mediation should ensure that the mediation is court-referred or court-ordered since that will provide more statutory protection.

⁷¹⁴ *The Supreme Court Rule* seem to echo this when it states and only admits evidence of communications or conduct by any person at the mediation if the parties who have attended the mediation consent to his in writing. See 50.07(6).

⁷¹⁵ Section 24A which bears the heading Mediation.

⁷¹⁶ Section 131(2) of the *Evidence Act* (Cth and NSW).

- understanding of the other evidence that has already been adduced;
or
- (d) the communication or document included a statement to the effect that it was not to be treated as confidential; or
 - (e) the evidence tends to contradict or to qualify evidence that has already been admitted about the course of an attempt to settle the dispute; or
 - (f) the proceeding in which it is sought to adduce the evidence is a proceeding to enforce an agreement between the persons in dispute to settle the dispute, or a proceeding in which the making of such an agreement is in issue; or
 - (g) evidence that has been adduced in the proceeding, or an inference from evidence that has been adduced in the proceeding, is likely to mislead the court unless evidence of the communication or document is adduced to contradict or to qualify that evidence; or
 - (h) the communication or document is relevant to determining liability for costs; or
 - (i) making the communication, or preparing the document, affects a right of a person; or
 - (j) the communication was made, or the document was prepared, in furtherance of the commission of a fraud or an offence or the commission of an act that renders a person liable to a civil penalty; or
 - (i) making the communication, or preparing the document, affects a right of a person; or
 - (j) the communication was made, or the document was prepared, in furtherance of the commission of a fraud or an offence or the commission of an act that renders a person liable to a civil penalty; or
 - (k) one of the persons in dispute, or an employee or agent of such a person, knew or ought reasonably to have known that the communication was made, or the document was prepared, in furtherance of a deliberate abuse of a power.

Some feel that the exceptions of section 131(2) offer a broader scope than the ordinary common law exceptions,⁷¹⁷ since, amongst others, it allows for the mediator to be called in certain instances to testify regarding what transpired during mediation. They find section 131(2)(i) "making the communication or preparing the document affects a right of a person"⁷¹⁸ particularly perturbing.⁷¹⁹ They argue that this would encompass all mediation in theory, since "legal and

⁷¹⁷ Nolan and O'Brien 2010 <http://barristers.com.au/wp-content/uploads/2012/03/confidentialityinmediationjune2010.pdf>.

⁷¹⁸ Section 131(2)(i).

⁷¹⁹ Nolan and O'Brien 2010 <http://barristers.com.au/wp-content/uploads/2012/03/confidentialityinmediationjune2010.pdf>.

equitable rights are always compromised",⁷²⁰ and in theory this could open a potential Pandora's Box as far as the admissibility of all communications divulged during mediation.⁷²¹

A party to a mediation can then insist that communications during mediation should be disclosed at subsequent proceedings, since what transpired at mediation has affected the right of that person, or even a third party. This offers a huge window of opportunity for this, since to prove that a right has been affected, might be quite simple and is definitely very far-reaching. This is quite broad—especially if the court chooses to interpret it in such a manner.

A court can decide that the communications made during mediation affects the right of a person (which will not be much of a stretch)—it might order the communication to be presented as evidence.⁷²²

The other issue is that there is no indication of the extent of the "effect"—would a minor "effect" be acceptable? If a person's right has been affected in a minor way, he or she might then successfully argue that the competing right of confidentiality in mediation (which enjoys protection and is seen as paramount in ADR processes) will have to make way for this "affection" of the said right. In principle any individual's right have to be acknowledged and honoured, but the manner in which this section refers to this, is problematic and could be detrimental to mediation confidentiality.

Additionally section 135 of the same *Evidence Act* offers the Court a general discretion to exclude evidence based on the following:⁷²³

The Court may refuse to admit evidence if its probative value is substantially outweighed by the danger that the evidence might:

⁷²⁰ Nolan and O'Brien 2010 <http://barristers.com.au/wp-content/uploads/2012/03/confidentialityinmediationjune2010.pdf>.

⁷²¹ Nolan and O'Brien 2010 <http://barristers.com.au/wp-content/uploads/2012/03/confidentialityinmediationjune2010.pdf>. They do admit these provisions have been interpreted in a narrow manner thus far. See *Glass v Demarco* (1999) FCA 482 [10]; *ASCIAC v Australian Secured and Managed Mortgages Pty Ltd* (2008) FCA 753 at [33].

⁷²² This will can also be read in conjunction with s 135 of the *Evidence Act*, which is discussed below.

⁷²³ Section 135 of the *Evidence Act*.

- (a) be unfairly prejudicial to a party; or
- (b) be misleading or confusing; or
- (c) cause or result in undue waste of time.

This gives the court an even wider discretion as to the admissibility of communication made during mediation. If the interest of justice calls for it the court has the discretion to balance the probative value of the evidence against the potential prejudice admission of the evidence could carry. If the court feels the probative value of the evidence weighs more than possible prejudice or possible confusion, the evidence can cause, it will allow disclosure of the evidence even if it was made during mediation, if not it will bar disclosure of such information.

So currently in Federal Court, ACT courts, New South Wales, Tasmanian and Victorian courts, section 131 of the *Evidence Act 1995 (Cth)* provides:⁷²⁴

... a statutory framework for admissibility of communications given at, and documents prepared for, voluntarily organised mediations, even to the extent of overriding confidentiality clauses in a mediation agreement.

So parties who voluntarily (not court-referred mediation) undertook mediation can find that communications made during mediation can be admitted as evidence in these courts, even if they had agreed for these communications not to be admitted, as long as these communications were not connected to an attempt to negotiate a settlement.⁷²⁵

5.10.3 The Civil Procedure Act 2005 (NSW)

This act in sections 29⁷²⁶ and 31 deals with exceptions to disclosure of confidential information, and indicates that:

⁷²⁴ Gordon 2017 http://www.hearsay.org.au/index.php?option=com_content&task=view&id=1210&Itemid=4.

⁷²⁵ Gordon 2017 http://www.hearsay.org.au/index.php?option=com_content&task=view&id=1210&Itemid=4.

⁷²⁶ Section 29 specifically allows the court to call any party to the mediation, mediator included, to testify as to the fact that an agreement has been reached and what the substance of such an agreement entails.

...where the person from whom the information was obtained consents; where the mediator is called to give *limited evidence* as to the fact that an agreement has been reached and as to the substance of it; information disclosed in connection with the administration or execution of the Part of the *Civil Procedure Act* dealing with mediation — which has been held to allow the mediator to express a view on the utility of continuing mediation; or where there are reasonable grounds to believe the disclosure is necessary to minimise or prevent the danger of injury to any person or damage to any property.⁷²⁷

These sections therefore allow for limited exceptions where communications that occurred during mediation can be admissible in further proceedings.⁷²⁸ This will be the case when a settlement in court-ordered mediation has been reached and the substance of such an agreement needs to be viewed. Sections 30-31 of the Act also provide for the allowance of specified disclosures by the mediator in certain circumstances.⁷²⁹ These include, but are not limited to aspects such as: communications which aid and abets fraud or other offence, where evidence is applicable to the determination of a costs order.⁷³⁰

Additionally the Act also refers to other exceptions such as: communication that promotes fraud or any other offence, where confidentiality has been waived, expressly or by implication or where evidence that relates to a cost order must be divulged.⁷³¹

In *Farm Assist Limited (In liquidation) v Secretary of State Environment*,⁷³² the court also referred to the interests of justice as an aspect that might cause confidentiality to be discarded in certain instances.

Confidentiality: The proceedings are confidential both as between the parties and as between the parties and the mediator. As a result even if the parties agree that matters can be referred to outside the mediation, the mediator can enforce the confidentiality provision. The court will generally uphold that confidentiality but where it is necessary in the interests of justice for evidence

⁷²⁷ *Civil Procedure Act* 2005 (NSW) s 31(a), ss 31(b), 29(2), s 31(b), s 31(d), *Rajski v Tectran Corporation Pty Ltd* [2003] NSWSC 477 [11] (Palmer J).

⁷²⁸ Section 29 of *Civil Procedure Act* 2005 (NSW).

⁷²⁹ Sections 30-31 *Civil Procedure Act* 2005 (NSW).

⁷³⁰ Sections 30-31 *Civil Procedure Act* 2005 (NSW).

⁷³¹ Sections 30-31 *Civil Procedure Act* 2005 (NSW).

⁷³² *Farm Assist Limited (In liquidation) v Secretary of State Environment, Food and Rural Affairs* [2009] EWHC 1102 para 44.

to be given of confidential matters, the Courts will order or permit that evidence to be given or produced.

These concerns seem to be based in public policy weighing up the probative value of the evidence and the possible dangerous results that the admittance of the evidence can cause.

Does this mean communication divulged during mediation can be disclosed if the probative value is not outweighed by the danger that exists that the evidence might be unfair, prejudicial, misleading, confusing or cause an undue waste of time? It seems to be the case. If this is read in conjunction with section 131(2)(i) then the communications seem to have an even greater chance of being admitted.

If one considers these pieces of legislation that deal with the admissibility of evidence when it comes to mediation, and thus *per se* confidentiality, it is clear that all of them endorse the confidentiality in mediation at state and federal level. Exceptions are obviously also applicable and in some instances such as sections 131(2) and 135 of the *Evidence Act*, together with sections 29 and 31 of the *Civil Procedure Act*. These exceptions could open a door for a wider scope of admissibility of communications and actions that took place during mediation, which could, if applied in a wider sense as has been the case up to now in Australia, be to the detriment of confidentiality in mediation. On the other hand, one does not want evidence to disappear into a "evidentiary black hole" as Limbury calls it, and in the end cause the regulation of confidentiality to have unintended and unacceptable results for the practice of law in Australia.⁷³³ This calls for a fine balancing act.

5.11 Evidentiary "black holes"

Limburg⁷³⁴ refers to an evidentiary "black hole" which is created in certain circumstances, due to certain legislation which encourages mediation, but actually sometimes prevents justice because it creates these "evidentiary black

⁷³³ Limbury 2012 *University of New South Wales Law Journal* 915

⁷³⁴ Limbury 2012 *University of New South Wales Law Journal* 915.

holes". Important evidence is then prohibited from being used in a matter, since legislation or common law applications to confidentiality bar this evidence from being used.⁷³⁵ He refers to "a 'blanket prohibition' approach to admissibility exemplified in section 53B of the *Federal Court of Australia Act* ⁷³⁶ and the 'limited list of exceptions' approach of the Evidence acts and other legislation"⁷³⁷ and suggests these should be replaced in order to enable judges to:⁷³⁸

... strike the right balance between competing public interests by continuing, where appropriate, to protect the integrity of mediation and other ADR processes while at the same time avoiding injustice by granting leave, where appropriate, to introduce evidence of what happened.

This has also been recommended by NADRAC which urged the Commonwealth Attorney-General to liaise with state and territory counterparts in order to encourage them to seriously consider the introduction of uniform admissibility provisions across Australia.⁷³⁹ This has not happened, and NADRAC has been disbanded in 2013 which put paid to such ideas. Limbury feels that the key aspect in this matter should be the balance between public interest in the relevant evidence reaching the court room, while still protecting the integrity of mediation, and specifically as it relates to confidentiality, and it is clear that he feels a lack of uniformity in this matter, is seriously hampering justice.⁷⁴⁰

5.12 Conclusion

There is a clear expectation of confidentiality in mediation in Australia, on both a federal and state level. This expectation is endorsed by common law and legislation and case law. It is based on confidentiality clauses found in mediation agreements, on the legal professional privilege, the without prejudice principle

⁷³⁵ Limbury 2012 *University of New South Wales Law Journal* 915.

⁷³⁶ He specifically refers to *Federal Court Act* ss 53(A) and (B) which entails that the court can order parties to mediate and the communication that emanates from that mediation cannot be divulged, s 53(B), which means the common law exceptions are rendered moot, which can open up an definite "evidentiary black hole" as he refers to it. *Federal Court of Australia Act* 1976.

⁷³⁷ Limbury 2012 *University of New South Wales Law Journal* 927.

⁷³⁸ Limbury 2012 *University of New South Wales Law Journal* 927.

⁷³⁹ Limbury 2012 *University of New South Wales Law Journal* 927.

⁷⁴⁰ Limbury 2012 *University of New South Wales Law Journal* 927.

the codification of confidentiality in mediation in legislation such as: The *Federal Court Act*, the *Evidence Act* (Cth and NSW) and the *Civil Procedure Act* (NSW). There are exceptions to the maintenance of confidentiality of communications as well — in common law and legislation.

However, the matter of confidentiality in mediation is far from clear and Bergin refers to the law in this area as "a rather unruly patchwork",⁷⁴¹ a lot of uncertainty and confusion seem to inhibit this area of law.

Matters are further complicated because of the fact that firstly it has to be decided if a court is clothed with federal jurisdiction or state jurisdiction, and then a decision must be made as to if federal or state law will be applicable in a matter. Sections 39, 77 and 78 of the *Judiciary Act* seem to govern these decisions.

As far as the statutory protection goes with regard to confidentiality in mediation, in New South Wales, specifically, court-referred mediation receives more statutory protection than private mediation, and the *Federal Court of Australia Act* (section 53); the *Evidence Act* (Cth and NSW) (sections 131 and 135) and the *Civil Procedure Act* (section 30) all apply to the regulation of confidentiality in disputes. These seem to provide wide-ranging protection (especially section 53B of *the Federal Court Act of Australia*) while section 131 of the *Evidence Act* does offer a less iron-clad protection, especially if interpreted narrowly.

Private mediation, in New South Wales does not have the comfort of statutory protection and must mainly rely on contractual clauses for confidentiality (which seem to offer limited protection) but can call on common law exceptions. The latter relies heavily on public policy and the interests of justice in order to determine if communications should be seen as confidential.

Some critics complain that the statutory protection offered (especially on federal level) to confidentiality in mediation often causes "evidentiary black holes", and

⁷⁴¹ Bergin "The Objectives, Scope and Focus of Mediation Legislation in Australia" 10.

the call for a more balanced approach — one that fosters confidentiality in mediation, yet does not hinder the sound functioning of the legal profession and the distribution of justice through the legal system.

This, once again, comes down to an attempt to balance the age-old issue of the court being entitled to all the evidence and the necessity of confidentiality in a process such as mediation. Mediation aims to promote open and frank discussions with legal professionals and mediators in an attempt to settle a matter and for that a certain degree of confidentiality is needed — the question remains: where do we draw the line?

CHAPTER 6

Mediation confidentiality: Where do we stand?

6.1 Introduction

Mediation has grown phenomenally during the past decade or two and has established itself as a feasible and effective alternative for litigation in certain situations and instances. The fact that mediation adds value to the legal landscape is beyond doubt. In the United States of America a third of all disputes are dealt with by using mediation and in Australia mediation is growing at a robust rate.⁷⁴² Australia has shown a marked increase in the use of mediation, with an annual growth of 6.5 % forecasted for the five years from 2016 onwards.⁷⁴³ South Africa has not seen such remarkable growth when it comes to the usage of mediation, but there is no doubt that the potential for the use of mediation in South Africa is immense.

The regulation of mediation, and specifically the regulation of confidentiality in mediation, is definitely not a straightforward matter. All fifty states in the United States of America have promulgated legislation regarding mediation (of which confidentiality in mediation forms a crucial part) and the *UMA* was promulgated and specifically has mediation privilege as a focal point.⁷⁴⁴

However, as Oberman⁷⁴⁵ points out, in the United States of America there is still a definite lack of uniformity with regard to confidentiality, protection provisions between state and federal laws, among states, and even within different localities within a state. This is after decades of public and private usage of mediation in the United States of America.⁷⁴⁶ This also seems to be the case in

⁷⁴² Chia Sebastian February 2015. *Alternative Dispute Resolution Services in Australia* :4 IBIS World Industry Report OD4116.

⁷⁴³ Chia Sebastian February 2015. *Alternative Dispute Resolution Services in Australia* :4 IBIS World Industry Report OD4116.

⁷⁴⁴ *The Uniform Mediation Act* 2003.

⁷⁴⁵ Oberman 2012 *Ohio St J on Disp Resol* 541.

⁷⁴⁶ Nolan and O'Brien 2010 <http://barristers.com.au/wp-content/uploads/2012/03/confidentialityinmediationjune2010.pdf>. They admit there are no easy answers to this.

Australia, where Bergin, a chief judge of the Supreme Court of New South Wales referred to the issue of confidentiality in mediation and indicated that "The law in this area is a rather unruly patchwork."⁷⁴⁷ and Nolan and O'Brien underline this when they state that there is "a need for clarity and reform of the law on the issues of confidentiality and admissibility".⁷⁴⁸ In South Africa, where the regulation of confidentiality in mediation lags behind the United States of America and Australia, there seems to be even less guidance.

Confidentiality is seen as one of the cornerstones of mediation. It is essential that the proper regulation of this vital element of mediation takes place. Confidentiality is needed to offer parties to mediation the opportunity to openly and frankly discuss their disputes and find possible solutions to these disputes. Parties need to know and understand that there is a level of protection when they enter into mediation, based on the well-established principle, found in common law, legislation and case law, that when there is an attempt to resolve a dispute, parties should be given protection and have the freedom to openly and frankly engage in discussions and communications in an attempt to resolve their disputes.⁷⁴⁹

Mediation is an attempt at settlement of issues and should also enjoy the protection that is referred to in *Field v Commissioner*.⁷⁵⁰ However, this protection should prove to be balanced. As much as confidentiality in mediation is necessary in order to encourage open and frank discussion, it would also be a sad day if mediation offers such iron clad protection that it sterilises evidence and creates "evidentiary black holes", as Limbury calls it, as seems to be the case in California.⁷⁵¹

⁷⁴⁷ Bergin "The Objectives, Scope and Focus of Mediation Legislation in Australia" 8.

⁷⁴⁸ Nolan and O'Brien 2010 <http://barristers.com.au/wp-content/uploads/2012/03/confidentialityinmediationjune2010.pdf>.

⁷⁴⁹ *Field v Commissioner for Railways (NSW)* (1955) 99 CLR 285 para 291.

⁷⁵⁰ *Field v Commissioner for Railways (NSW)* (1955) 99 CLR 285 para 291

⁷⁵¹ *Cassel v Superior Court* (2011) 51 Cal 4th 113; *Foxgate Homeowners' Assn v Bramalea California Inc* (2001) 26 Cal 4th 1, 15.

What then forms the legal basis for confidentiality in mediation and the regulation of this aspect? Common law, case law and legislation are at the core of this.

6.2 Contract

A contract is considered one of the established ways in which to regulate confidentiality in mediation.⁷⁵² An agreement to mediate between parties acts as a contract and the parties basically commit themselves to mediation based on the obligations, regulations and terms of the agreement.

These mediation agreements seem to have a fairly standard format and a confidentiality clause is almost always found in these agreements. The content and extent of these clauses differ, but in general they seem to indicate that the communications that exchanged during mediation is deemed as confidential and will not be divulged. The parties can of course specifically indicate which information is confidential and add other terms to the contract which also deal with confidentiality, if they feel it is necessary and if they are not comfortable with the content and terms of a standard mediation agreement.

This places the mediator in a very important position in the process of mediation. DISAC's Mediation Accreditation Standards to which all of their affiliated members must adhere, at 4.2 in the code⁷⁵³ explicitly places a duty on a mediator to discuss confidentiality with the different parties before or at the start of the mediation. This seems to be in an attempt to ensure consent for the different parties as to any "communication or practice by the mediator that involves the disclosure of confidential information".⁷⁵⁴ This becomes very relevant in a situation, as mentioned above if there are concerns from parties as to what exactly entails confidentiality as stated in an agreement to mediate and this might call for some extensive and specialised legal knowledge, which all

⁷⁵² Feehily 2015 *TSAR* 532.

⁷⁵³ DISAC <http://disac.co.za/wp-content/uploads/2014/12/DiSAC-Mediation-Accreditation-Standards-VERSION-1.pdf>.

⁷⁵⁴ DISAC <http://disac.co.za/wp-content/uploads/2014/12/DiSAC-Mediation-Accreditation-Standards-VERSION-1.pdf>.

mediators might not have. It might therefore be prudent that parties to mediation either get their legal representatives to draft their own agreement to mediate, or at least let their legal representatives carefully peruse such an agreement before they parties commit to mediation.

It is important for parties to also realize that if they draft an agreement to mediate, it is not to say that the agreement would be immune to any scrutiny from outside parties, in other words the agreement will always, and on every occasion, be enforced as is. A court, tribunal or other forum can declare an agreement to mediate unenforceable in certain circumstances.

The obvious application here would be if the contract does not conform to the basic tents of contract law. However, in the South African context the interpretation of contracts has also evolved in recent times⁷⁵⁵ and the process of interpreting contracts has evolved into an exercise involving aspects such as: the literal meaning, context and well as the surrounding circumstances in which the document actually was created.⁷⁵⁶

Therefore, if an agreement to mediate exhibits aspects or clauses that are deemed to be against public policy, it can lead to the agreement being declared unenforceable. Let's take the example where parties to an agreement to mediate insert a clause that states that all the information exchanged and divulged during mediation will be absolutely confidential and the mediator will be held legally liable if he or she divulges any information regarding the mediation under any circumstances. If the mediator divulges information to a third party based on his or her strong conviction that someone has been harmed or the furtherance of a crime has been committed (and this knowledge the mediator gained during mediation) then this clause, based on public policy and legislation will not be enforced. This means the contract is not beyond reproach, it still has to adhere to the law and public policy and the interests of justice.

⁷⁵⁵ *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk Barkhuizen v Napier* 2007 5 SA 323 (CC) para 80.

⁷⁵⁶ *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk.*

In South Africa, like many other countries, parties often make use of a standard agreement to mediate. There are various examples of such agreements and The Association of Arbitrators (Southern Africa) offers a good example of such an agreement.⁷⁵⁷ The agreement instructs all persons involved in the mediation to regard the information that is disclosed during mediation as confidential, unless "disclosure is allowed by law to implement or to enforce terms of a settlement".⁷⁵⁸

This seems to offer comprehensive protection,⁷⁵⁹ but the exceptions (as stated above) open the door even wider for the dispensation of information that has transpired during mediation.

This means that the standard mediation agreement will not guarantee absolute confidentiality, but leave room for exceptions. The exception that refers to disclosures that must occur as required by law is standard and quite understandable. Legislation such as section 110 of the *Children's Act*⁷⁶⁰ calls for a wide range of professionals (of which some will definitely be involved in mediation) to report the abuse of a child if they suspect such abuse, and this is necessary.

However, the fact that information exchanged during mediation can be disclosed at a later stage, if it is subject to disclosure in law, is a different kettle of fish. This means information which would have been discovered using the normal rules of law and during the normal course of such a process, will not be covered by confidentiality. The *proviso* is that the disclosure must be necessary in order to implement or enforce terms of the settlement. This does narrow the scope for disclosure.

⁷⁵⁷ AASA 2014 http://arbitrators.co.za/wp-content/uploads/2014/10/aoa_agreement_to_mediate.pdf.

⁷⁵⁸ AASA 2014 http://arbitrators.co.za/wp-content/uploads/2014/10/aoa_agreement_to_mediate.pdf.

⁷⁵⁹ Clause 13 of the agreement also indicates that a mediator cannot be called to testify on what transpired during the mediation.

⁷⁶⁰ *Children's Act* 41 of 2007.

However, the fact that information from the mediation can also be used to "enforce the terms of the settlement" means that the mediation can be revisited and some of the information can lose its claim to confidentiality. It seems to restrict it to the terms of the agreement. What if a party to an agreement that was drafted during mediation, refuses to honour the terms because they claim that they agreed to these terms but it was done under coercion, or the other party deliberately withheld certain vital information or misled the other party during mediation?⁷⁶¹ This could lead to all information that was exchanged during the entire mediation to be revisited. Contract as the foundation and basis for the regulation of confidentiality in mediation, has not yet been dealt with by South African courts, which still leaves a lot of question unanswered.⁷⁶²

In the United States of America it is common for parties to use a contract as a means by which they commit themselves to keep mediation proceedings confidential.⁷⁶³ Many see the mediation agreement as a primary source of confidentiality⁷⁶⁴ and regard the agreement to mediate as the prime instrument which will indicate the parties' intentions and obligations as far as confidentiality in mediation is concerned.⁷⁶⁵ There is then a document that can bind parties to regard certain information as confidential and the parties to the agreement can also tailor their mediation agreement to suit their needs.⁷⁶⁶ Australia is no

⁷⁶¹ *Facebook Inc; Mark ü Zuckerberg v ConnectU Inc* Slip Op No 09-15021 (9th Cir April 11, 2011). This famous saga involving the Winklevoss Twins and Mark Zuckerberg, founder of Facebook, is a case in point. The parties reached an agreement in mediation, but the Twins refused to honour the agreement afterwards, since they alleged that Zuckerberg misled them as to the value of the Facebook shares (during mediation) and therefore the agreement was not binding. The Ninth Circuit Court of Appeals found in favour of Zuckerberg, stating that the confidentiality provision in the mediation agreement was binding and therefore the Winklevoss twins could not introduce evidence of discussion that took place during the mediation, and also indicated that the agreement reached in mediation was enforceable. This was heard in California, however, a state notorious for its strict adherence to confidentiality in mediation.

⁷⁶² Feehily 2015 *TSAR* 532.

⁷⁶³ Alfini and McCabe 2001 *Arkansas LR* 174.

⁷⁶⁴ Morek 2013 *ERA Forum* 429.

⁷⁶⁵ Frisbie 2012 *Chicago Daily Law Bulletin* 47.

⁷⁶⁶ Hartzog 2012 *Georgia LR* 657; Hyde 1984 *Mediation Juvenile & Family Court Journal* 57.

different and the mediation agreement is often seen as the basis of the commitment to confidentiality by the parties.⁷⁶⁷

A confidentiality clause in a mediation agreement will be regarded as enforceable by the courts,⁷⁶⁸ but the relevant legislation and other appropriate legal principles which regulate confidentiality in mediation will also be applied.⁷⁶⁹ Such a clause can be enforced⁷⁷⁰ and courts will consider it, but if the interests of justice trump such an interpretation, the provision will not be enforced.⁷⁷¹

If one considers an example of a standard agreement to mediate as endorsed by *The New South Wales Law Society*⁷⁷² it seems to be similar to the ones used by mediators worldwide. However, the New South Wales example does have an interesting clause when it states:⁷⁷³

The obligations of a solicitor relating to confidentiality as between solicitor and client shall apply as between the mediator and the participants.

This seems to place a mediator on the same level as an attorney when he or she is being consulted by his or her client, and invokes the legal professional privilege that is usually reserved for attorneys or other professionals. Such a clause then seems to enshrine the mediator with a specific privilege, likened to that an attorney enjoys, yet the mediator is not regarded as a professional.⁷⁷⁴

It is difficult to see that if a mediator claims the same legal professional privilege than an attorney or solicitor claims, that he or she would be successful in court with such a claim, even if the agreement to mediate clothes him or her with

⁷⁶⁷ Nolan and O'Brien 2010 <http://barristers.com.au/wp-content/uploads/2012/03/confidentialityinmediationjune2010.pdf>.

⁷⁶⁸ Arthur 2015 *Australian ADR Bulletin* 91.

⁷⁶⁹ *Worth Recycling Pty Ltd v Waste Recycling and Processing Pty Ltd* [2009] NSWCA 354; BC200909905 at [24].

⁷⁷⁰ *Australian Football League v Age Co Ltd* (2006) 15 VR 419; [2006] SVC 308; BC200606690

⁷⁷¹ *Farm Assist Ltd (in liquidation) v Secretary of State for the Environment, Food and Rural Affairs (No 2)* [2009] BLR 399.

⁷⁷² See at 90 in Chapter 5.

⁷⁷³ Law Society of New South Wales 2008 <http://www.lawsociety.com.au/idc/groups/public/documents/internetcontent/026438.pdf>

⁷⁷⁴ Doyle 2017 <http://www.doylesolutions.com.au/how-to-become-a-mediator-in-australia/>. Basically anyone can act as mediator and practice as one in Australia, you do not have to be accredited or officially or professionally qualified, unlike lawyers or solicitors.

such protection. It is therefore not a great surprise that Chief Judge Bergin indicates that a contract provides limited protection as far as confidentiality in mediation is concerned.⁷⁷⁵ He admits that such agreements offer some protection but on its own it will not necessarily prevent subsequent discovery of mediation communications.⁷⁷⁶

6.2.1 Criticism of the contract as a basis for mediation confidentiality

Australia and The United States of America have a richer history of dealing with confidentiality in mediation based on a contractual basis than South Africa. Both American and Australian authors alike level criticism at using the contract as a basis for mediation confidentiality. Some feel it has limited usage,⁷⁷⁷ others feel it is not suited to the nature and process of mediation.⁷⁷⁸

The argument is that some of the aspects that needed to be addressed to determine if a contract has been formed when it comes to mediation, are difficult to prove within the context of mediation. These would be such as the fact that negotiations were balanced and not subject to undue influence, possible coercion or fraud. The well-known and traditional principles of contract law and the obligations when it comes to confidentiality often compete, since the disclosure of information is one of the main aspects of traditional contract law, while confidentiality guards against this very same principle.⁷⁷⁹

The role of the mediator also complicates matters, since as Weller indicates, the mediator can often be seen as one of the bargaining parties⁷⁸⁰ — it is the mediator that guides discussions, that calls for private "caucuses", and that often helps to draft an agreement. This brings into question the aspect of

⁷⁷⁵ Bergin "The Objectives, Scope and Focus of Mediation Legislation in Australia" 10

⁷⁷⁶ Bergin "The Objectives, Scope and Focus of Mediation Legislation in Australia" 10.

⁷⁷⁷ Field and Wood 2005 *QUTLJ* 151.

⁷⁷⁸ Wolski 2014 *Contemporary Asia Arbitration Journal* 87.

⁷⁷⁹ Deason 2001 *Marquette LR* 37-38.

⁷⁸⁰ Weller 1992 *Judges' Journal* 14.

bargaining at "arm's length"⁷⁸¹ which is a critical element in traditional contract law in order to ensure mutual assent.⁷⁸²

An important aspect that should also be considered is that a contract can only bind the parties that entered into it, which means if parties to mediation rely on the contract as the basis for confidentiality, such an agreement will not bind third parties that were not parties to the contract, and the latter can use the evidence.⁷⁸³

As mentioned before, even though a contract can contain confidentiality clauses these can be declared unenforceable by courts if the court feels that it is against the public policy. The courts might decide that access to evidence and submission of such evidence trumps the contracting parties' right to confidentiality since public policy and the interests of justice dictate this.

In South Africa, although there is no case law that has dealt with confidentiality in mediation as contained in a contract, cases such as *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* has clearly indicated that in South African law when it comes to the interpretation of a contract, public policy will play a prominent part.⁷⁸⁴

Both in the United States of America and Australia there have been cases in which the demands of public policy outweighed the enforcement of a confidentiality clause as found in an agreement. This meant that the disclosure of mediation communications occurred in subsequent proceedings, although the parties thought this information was confidential (based on their agreement to mediate) and would remain as such.⁷⁸⁵

One can understand that a contract can be seen as the basis for confidentiality in mediation. The parties that enter into mediation firstly have to agree to do

⁷⁸¹ Weller 1992 *Judges' Journal* 14.

⁷⁸² Weller 1992 *Judges' Journal* 14.

⁷⁸³ JSTOR Harvard 1984 <http://www.jstor.org/stable/1340844>.

⁷⁸⁴ *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* .

⁷⁸⁵ *Cronk v State* 100 Misc 2d 680, 686, 420 NYS 2d 113, 117-18 (Ct Cl 1979); also *Garden State Plaza Corp v SS Kresge Co* 78 NJ Super 485, 500-03, 89 A 2d 448, 456-58 (App Div).

so, in other words contract to do so, which they do through a written agreement or even an oral one. In mediation across the world, parties are expected to contractually commit to mediation, and without such a commitment, mediation will not take place. So the contract will be the starting point.

It does however, not seem to offer substantial protection with regard to confidentiality in mediation since a confidentiality clause can be rendered unenforceable by virtue of public policy or the interest of justice. There is also a concern that mediation and the traditional aspects of contract law do not mesh, and mediation's heavy reliance on confidentiality when it comes to information and communications, is contrary to some of the basic tenets of contract law.

This would mean that although parties entered into an agreement which catered for confidentiality in mediation, the agreement could not be enforced if other legal principles are regarded as being more important. The protection that the contract offers, loses its value and parties to the mediation are left vulnerable.

Additionally a contract also does not bind third parties. This potentially means that a third party can call for the disclosure of the information exchanged during mediation and if the parties only rely on a contract (agreement) there might be very little they could do to prohibit this information from being disclosed to a third party.

6.3 Legal professional privilege

The concept of a legal professional privilege is hailed as a fundamental right and a substantive rule⁷⁸⁶ which helps to ensure the effective functioning of the legal system⁷⁸⁷ and a rule that protects certain information against disclosure.⁷⁸⁸ It stems from common law and deals with communications made for the purpose

⁷⁸⁶ *S v Safatsa* 1988.

⁷⁸⁷ Solomon 2013 *Without prejudice* 50.

⁷⁸⁸ *Thint (Pty) Ltd v National Director and Others*.

of litigation and information that entails the distribution and acceptance of legal advice.⁷⁸⁹ It can be limited and, very importantly, needs to be contextualised.⁷⁹⁰

Legal professional privilege can only be claimed if it meets four requirements: it must be exercised by a legal professional or the parties who seek the legal advice; the advice was sought, or distributed with the purpose to obtain or dispense legal advice; while considering litigation or pending litigation and all of this must have been done on a confidential basis.⁷⁹¹

The mediation context might be the first hurdle that parties to mediation must overcome in order to claim legal professional privilege. One can contest that both mediation and the sharing of communication between an attorney and his or her client has as its heart the idea to encourage open and frank discussions without the fear of these communications being used at a later stage in subsequent proceedings. In that sense the context is the same, but if one looks a bit deeper there are obvious differences between the two processes.

The mediation context revolves around the idea of offering an opportunity to attempt to settle the dispute with the mediator acting as a neutral, while the attorney-client situation is about a client receiving legal advice with regard to his or her situation (from an attorney who is not impartial) and does not constitute an attempt to settle a matter.

Additionally, a mediator's function is not to dispense legal advice (unlike an attorney) and cannot be seen as a professional, as opposed to an attorney who has to have certain professional qualifications and clearance from the relevant professional bodies in order to practice law.

South Africa, nor California, nor New South Wales afford a mediator a privilege that is akin to a legal professional privilege. However, California (which, of the three, has the most committed adherence to confidentiality in mediation) by

⁷⁸⁹ Mosupa 2013 *Without Prejudice* 48.

⁷⁹⁰ *South African Airways Soc v BDFM Publishers (Pty) Ltd; A company and Two Others v The Commissioner for the South African Revenue Services*.

⁷⁹¹ Solomon 2013 *Without prejudice* 50.

virtue of the *California Evidence Code* Section 703.5, has crafted legislation that bars mediators in general to testify as to what transpired during mediation.⁷⁹²

In *Olam* Judge Brazil stipulated that this mediator privilege that the California legislation gives to the mediator is one that is independent from the mediation confidentiality afforded to parties during mediation.⁷⁹³ Therefore, even if the parties had waived mediation privilege, the court must still independently determine if a mediator should be forced to testify or not regardless of whether the mediator objects to this or not, since section 703.5 affords the mediator a privilege independent of the mediation privilege.⁷⁹⁴ This is not a mediator's privilege on the same level as a legal professional privilege, but it goes a long way towards it.

The New South Wales Law Society offers an example of a standard mediation agreement which does have a reference to the obligations of a mediator and the participants in the mediation being similar to the obligations that a solicitor and its client enjoys, however this is not backed up by common law or New South Wales legislation and practice.⁷⁹⁵

6.4 Without prejudice

The without prejudice principle is reiterated in mediation agreements, legislation regarding mediation and in common law. This rule focuses on the idea that if parties attempt to settle a dispute, it is necessary to create a situation where they can communicate without fear, that what they divulge, will be used against

⁷⁹² *California Evidence Code* Section 703.5.

⁷⁹³ *Olam* 1999 at 1130.

⁷⁹⁴ *Olam* 1999 at 1130. Brazil used a two-stage balancing approach which consists of the first stage where the evidence of the mediator is first considered, either in camera or under sealed conditions, and then, once the court has the evidence; it decides if the admission of the evidence will help to serve justice and would promote fairness. In this case the judge decided the mediator's evidence would serve such a purpose, and would also enhance the objects of the legislature of California as far as the whole idea of confidentiality goes. See para 1136.

⁷⁹⁵ As a matter of fact Chief Justice Bergin (a NSW Supreme Court judge) indicates that private mediation in NSW can only rely on contractual protection, and court-referred mediation must look towards the *Federal Court of Australia Act* 1976; *Civil Procedure Act* 2005 (NSW); the *Evidence Act* 1995 (NSW and Cth) for protection with regard to confidentiality in mediation.

them at a later stage.⁷⁹⁶ Applying the without prejudice principle helps to achieve this since parties consent to this before negotiations and settlement talks start, and public policy also demands this privilege to be used when there is an attempt to settle a matter.

Mediation discussions is seen to occur with the without prejudice principle firmly intact. In South Africa, when it comes to confidentiality, the *Court-Annexed Mediation Rules* clearly indicate that the mediation process is seen as a process that is covered by this rule, and this is also found in the standard mediation agreement and South African case law.⁷⁹⁷

However, the rule does not generate general confidentiality; it is there to be used to ensure that privileged evidence is excluded from further litigation, and it is also subject to certain exceptions — so it is not automatically attached to information and communications by simply slapping on the words "without prejudice".⁷⁹⁸

The court has a duty to balance the aspect of public interest with regard to the administration of justice and the reasons offered why disclosure should not take place. This will often involve an investigation as to the factual circumstances in the particular case.⁷⁹⁹ In the South African case of *ABSA Bank Limited v Chopdat*,⁸⁰⁰ the court clearly explained that even if communication occurred in a situation that is seen as privileged (of which mediation is an example of course) public policy – the interests of the public and the legal convictions of the public (*boni mores*)—can determine that the without prejudice principle should

⁷⁹⁶ *Kapeller v Rondalia Versekeringskorporasie van Suid-Afrika Beperk* 1964 4 SA 722 (?) and *Naidoo v Marine & Trade Insurance Company Ltd* 1979 3 SA 666 (A) para 677.

⁷⁹⁷ 12.1 of Court-Annexed Mediation Rules G 37448 RG 10151 GoN 183 of 18 March 2014. The standard agreement to mediate as used by many reiterates this e.g. the *Association of Arbitrators (Southern Africa)* and South African case law agrees. See *Waste-Tech (Pty) Ltd v Van Zyl and Glanville* 2002 1 SA 841 (E).

⁷⁹⁸ *Brauer v Markaw* 1946 TPD 344 para 350.

⁷⁹⁹ Theophilopoulos 2012 *SALJ* 640.

⁸⁰⁰ *BSA Bank Limited v Chopdat* [2000] JOL 6563 (W).

not be applied, and the communication should therefore not enjoy the status of being privileged.⁸⁰¹

Therefore, in South Africa, even if a mediation agreement and legislation state that mediation took place with the without prejudice principle intact, this can be overruled by a court if the latter decides that applying the without prejudice principle would be against the interest of justice, public policy or the legal convictions of the society.

In the United States of America federal Rule 408 of the *Federal Rules of Evidence* deals with this and offers evidence related to any settlement, or "evidence of any statements of fact or conduct that are made during settlement negotiations",⁸⁰² the protection of being privileged, but does caution that. It will not be applicable to "documents or records that were not created for settlement purposes are not covered by Rule 408, even if they happen to be exchanged during settlement negotiations".⁸⁰³

The application of Rule 408 is not, however, that straightforward. The Rule also implies that the rule can only successfully be applied to exclude admission of evidence if it actually relates to a "disputed" claim, i.e. the dispute between the parties must have existed at the time when the evidence in question was created.⁸⁰⁴

This has led to a lack of clear consensus when it comes to the application of the rule,⁸⁰⁵ and if a court narrowly construes the thresholds to determine a claim

⁸⁰¹ The right to a fair trial as indicated by s 35 of the Constitution is often also a consideration in addition to the public policy and public interest. This right can possibly be seen as being part of the interest of justice – it is interest of justice that ever individual is entitled to a fair trial and a fair trial implies all hte relevant evidence must be presented.

⁸⁰² Burns 2013 <http://apps.americanbar.org/litigation/committees/businessstorts/articles/summer2013-0713-admissibility-of-settlement-related-evidence-at-trial.html>.

⁸⁰³ Burns 2013 <http://apps.americanbar.org/litigation/committees/businessstorts/articles/summer2013-0713-admissibility-of-settlement-related-evidence-at-trial.html>.

⁸⁰⁴ *Weems v Tyson Foods Inc* 665 F 3d 958, 965 (8th Cir 2011).

⁸⁰⁵ Villa 2005 *Ethics and Privilege* 122. He indicates that often it is difficult to determine exactly at which point negotiations which involve a compromise is reached in order for the privilege to be claimed.

and if this claim is indeed disputed; Rule 408 will not offer protection to communications that form part of settlement negotiations.⁸⁰⁶

If it is decided that a disputed claim existed at the time of the negotiations then Rule 408 will be applied and evidence will be barred from usage if it is used to prove or disprove the validity of a claim or if it is used in order to impeach a party by using a prior inconsistent statement drawn from the negotiations.⁸⁰⁷ However, the court can decide to allow evidence from a settlement attempt to be introduced as evidence for "another purpose".⁸⁰⁸

If it is found that the evidence is admissible for "some other reason than to prove the weakness of party's claim or defense",⁸⁰⁹ Rule 403 must be used together with rule 408.⁸¹⁰ Rule 403 determines that even relevant evidence can be excluded if its:

... probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issue, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.⁸¹¹

So at Federal level for evidence for settlement negotiations to be barred from being used in further and future proceedings, the court must be satisfied that a disputed claim existed at time of the evidence being created. Evidence from these negotiations will not be used to prove the validity of a claim or for impeachment purposes, but the evidence can be introduced for "another reason" which the court finds this reason acceptable.

Rule 408 should then to be read together with Rule 403, and the latter states that even relevant evidence can be barred from being admitted if its probative value is outweighed by the aspects mentioned in Rule 403. This seems to create the situation where Rule 408 provides fairly weak protection to parties, and

⁸⁰⁶ Brazil 1988 *The Hastings LJ* 960.

⁸⁰⁷ Rule 408 *Federal Rules of Evidence*.

⁸⁰⁸ Burns 2013 American Bar Association <http://apps.americanbar.org/litigation/committees/businesstorts/articles/summer2013-0713-admissibility-of-settlement-related-evidence-at-trial.html>.

⁸⁰⁹ Snider and Howard *Corporate Privileges and Confidential Information* 12-5.

⁸¹⁰ Rule 403 of *Federal Rules of Evidence*.

⁸¹¹ Rule 403 of *Federal Rules of Evidence*.

Brazil echoes this when he states: "there are so many conceivable for which settlement communications might be applicable".

In California the standard mediation agreement contains reference to the without prejudice principle. Typically it would contain a clause such as:⁸¹²

All statements made during the Mediation Proceeding are confidential settlement discussions, are made without prejudice to any Participant's legal or strategic position, and are non-discoverable and inadmissible for any purpose in any later legal or administrative proceeding. However, for clarity, evidence that is otherwise admissible or discoverable shall not be rendered inadmissible or non-discoverable as a result of its disclosure or use during Mediation Proceedings.

This clearly underlines the without prejudice principle, but leaves room for subsequent disclosure if disclosure is "otherwise admissible or discoverable", very similar to the South African and New South Wales situation. However, the same agreement states that the confidentiality agreement is subject to the *California Evidence Code* and should be:⁸¹³

Consistent with and in recognition of California Evidence Code sections 703.5 and 1115 through 1128, the Participants agree as follows:

After which it lists all the different clauses the Participants agree to, including the one on without prejudice (as shown above). So the without prejudice principle applies, and can be overruled if evidence is otherwise admissible or discoverable, but only if consistent with the California Evidence Code which is notoriously stringent when it comes to confidentiality in mediation.

In New South Wales the High Court reiterates that the without prejudice principle has a place in mediation in *Field v Commissioner for Railways (NSW)*⁸¹⁴ and only the parties can waive this privilege.⁸¹⁵

⁸¹² Cook Law Firm Date unknown https://cooklawfirm.la/pdfs/Confidentiality_Agreement.pdf.

⁸¹³ Cook Law Firm Date unknown https://cooklawfirm.la/pdfs/Confidentiality_Agreement.pdf.

⁸¹⁴ (1955) 99 CLR 285 para 291 In *Farm Assist Limited (In liquidation) v Secretary of State Environment, Food and Rural Affairs* para 44 the court made it clear that only the parties can waive this privilege. This is applicable on both federal and state level.

⁸¹⁵ *Farm Assist Limited (In liquidation) v Secretary of State Environment, Food and Rural Affairs* para 44. This is applicable on both federal and state level.

However in the same case the court stressed the fact that it must be proved that the communications that is claimed to be covered by the without prejudice principle, has to have a clear link with the settlement process or its purpose. This is applicable at federal and at state level.

Additionally, in New South Wales even if information formed part of mediation, this information can be divulged at subsequent proceedings if a party gathers this information from another source, a source which does not form part of mediation, even if this external source was revealed during mediation.⁸¹⁶ Another New South Wales decision *Heinemann Publishers Australia Pty Ltd*⁸¹⁷ determined that information can lose its tag of confidentiality if this information enters the public domain.

6.4.1 Exceptions to the without prejudice principle

As mentioned in the second chapter, there are exceptions to the without prejudice principle as clearly shown by the South African case of *KLD Residential CC v Empire Earth Investments 17 (Pty) Ltd*.⁸¹⁸ In the judgment of this case, the very important issue of public policy was dealt with, and it was decided that public policy as such can be decisive with regard to the application of the without prejudice principle. Additionally it was also indicated that the list of exceptions is not an exhaustive one.

According to Boule (who is an Australian author) there are five main exclusions to the non-admissibility principles with regard to the without prejudice principle.⁸¹⁹ These are when:

- (a) the parties give consent for disclosure to take place
- (b) mediated agreements – courts in Australia seem to accept the fact that a mediated agreement by the parties is by definition, a waiver from the parties as to the confidentiality of the document (the mediated

⁸¹⁶ *AWA Ltd v Daniels*.

⁸¹⁷ *Heinemann Publishers Australia Pty Ltd*.

⁸¹⁸ *KLD Residential CC v Empire Earth Investments 17 (Pty) Ltd*. This case highlighted a few of these. See para 31, 32, 34 of this case.

⁸¹⁹ Boule *Mediation: Principles, Process, Practice* 558-571.

agreement) because the parties can produce such a document to the Court to request the court to enforce it.⁸²⁰

- (c) Allegations of fraud and/or criminality;⁸²¹
- (d) Mediators reporting obligations;
- (e) Costs orders and procedural hearings.

Obviously this is not an exhaustive list and other exceptions have also been used in subsequent court decisions in Australia. These include barring the evidence based on the without prejudice principle would have led to the court being misled⁸²² (a New South Wales state decision); settlement which had been reached ought to be rescinded or set aside based on alleged misrepresentation,⁸²³ (a federal judgment) oppression⁸²⁴ or unconscionable conduct⁸²⁵ (a New South Wales Supreme Court decision) and even where a party has sued his or her solicitors with regard to their conduct and actions during mediation.⁸²⁶

6.5 Legislation

In South Africa there are more than 50 pieces of legalisation dealing with mediation, but often the references to mediation have to do with the option of mediation when it comes to disputes. Legislation that exclusively deals with mediation, such as the UMA (USA) together with all the different states' mediation legislation, is not abundant in South Africa.

The Court-Annexed Rules for Mediation promulgated in 2014 is most probably the best example of legislation that exclusively deals with mediation in South

⁸²⁰ Nolan and O'Brien 2010 <http://barristers.com.au/wp-content/uploads/2012/03/confidentialityinmediationjune2010.pdf>. *Al-Hakim v Monash University* Beach J (1999) BC990826; *Thompson v Macedon Ranges Shire Council* [1999] VSC 338; *Brodham v Edsoncome* (2000) QDC 313; *Barry v City West Water Limited* [2002] FCA 1214.

⁸²¹ The *NSW Supreme Court Act* 1970 s 110Q(c) specifically the application of the exception if "if there are reasonable grounds to believe that the disclosure is necessary to prevent or minimise the danger of injury to any person or damage to any property".

⁸²² *Pitts v Adney* [1961] NSW 535.

⁸²³ *Pihiga Pty Ltd v Roche* (2011) 278 ALR 209, 225–6 [97]–[108].

⁸²⁴ *Pittorino v Meynert* [2002] WASC 76.

⁸²⁵ *Abriel v Australian Guarantee Corporation Limited* [2000] FCA 1198; *Commonwealth Development Bank of Australia Pty Limited v Cassegrain* [2002] NSWSC 965.

⁸²⁶ *Tapoohi v Lewenberg (No 2)* [2003] VSC 410.

Africa. In this piece of legislation the confidentiality of mediation is specifically highlighted and it acknowledges the confidentiality of mediation communication and the without prejudice principle, but makes provision for disclosure of information that would be "discoverable in terms of the normal rules of court".⁸²⁷

This places mediation in the position where information which has been divulged during the mediation can find its way to other subsequent legal proceedings if the normal rules of discovery are followed. Relevance is the touchstone for discovery. The *Crown Cork 7 Seal Co Inc. v Rheem South Africa (Pty) Ltd*⁸²⁸ is a case which contains useful principles with the regard to discovery. In this matter the court highlighted the court's duty to balance the right to protect confidential information from abuse, versus the need to ensure that litigants can present their cases in an untrammelled manner.⁸²⁹ South African courts have a wide discretion as far as instructing inspection of confidential information, or limiting such inspection is concerned. .⁸³⁰

In The United States of America there is ample legislation regarding mediation. On a federal level, Rule 408 of the *Federal Rules of Evidence* offers explicit protection for settlement discussions (mediation forms part of such discussions) and it states that: "conduct or statements made in compromise negotiations regarding the claim"⁸³¹ are inadmissible with regard to proving liability and the rule when applied leans heavily on the application of relevancy.⁸³² The rule only applies to evidence at a trial and not the discovery at a trial and will not be applicable to the discovery of settlement negotiations or settlement terms.⁸³³ Additionally it also does not offer protection to communications that were

⁸²⁷ 12.2 of *Court-Annexed Mediation Rules* G 37448 RG 10151 GoN 183, 18 Mar 2014.

⁸²⁸ *Crown Cork 7 Seal Co Inc v Rheem South Africa (Pty) Ltd* 1980 3 SA 1093 (W).

⁸²⁹ *Crown Cork 7 Seal Co Inc v Rheem South Africa (Pty) Ltd* 1980 3 SA 1093 (W).

⁸³⁰ Vos 2008 *Without Prejudice* 59; Rule 35(7) of the High Court specifically empowers the court with a specific discretion to order compliance in the case of non-compliance when it comes to the duty to discover and to make relevant information available. The Magistrates' Court has followed suit.

⁸³¹ *Federal Rules of Evidence* 408(b)(1)–(2).

⁸³² Callahan 2013 *Pepperdine Dispute Resolution Journal* 80.

⁸³³ *Federal Rules of Evidence* 408(a).

shared before negotiations or exchange of information that parties might have done through a mediator.⁸³⁴ Rule 501 is also used with regard to disclosure of protected communications, and the holder of this privilege can exercise this privilege⁸³⁵ as well as refuse to produce evidence that is otherwise relevant.⁸³⁶

Two cases in California *Folb v Motion Picture Industry Pension & Health Plan* (a reported case) and *Molina v Lexmark International* deal with the federal mediation privilege. Their judgments in these cases seem to reflect that the court determines the specific label that the parties use to describe their settlement efforts. This together with the parties' facilitated settlement efforts; the consideration of exactly who is requesting disclosure or opposing disclosure and what is the exact purpose or use of the information, are all considered when casting a judgment.

This calls for a case-to-case analysis of these factors and applying them to each case in order to decide if the federal mediation privilege and to what extent it applies, if any.

At state level, California legislation regarding confidentiality is governed by sections 1115-1128 of the *Evidence Code of California*, since the state of California has not accepted the UMA. *Evidence Code* Section 1119 specifically is very clear about the fact that the code clearly disallows disclosure of anything said; admissions; writing; communications; negotiations; or settlement discussions by and between participants in the course of mediation or a mediation consultation.⁸³⁷

Section 1120 declares information that is not part of mediation as admissible and subject to discovery,⁸³⁸ while section 1121 restricts the mediator to only indicate if an agreement has been reached by the parties and not as to their

⁸³⁴ *Federal Rules of Evidence* 408.

⁸³⁵ *Federal Rules of Evidence* 501.

⁸³⁶ *Federal Rules of Evidence* 501.

⁸³⁷ *California Evidence Code* Section 1119 (a-c).

⁸³⁸ *California Evidence Code* Section 1120.

conduct during mediation (unless forced so by law).⁸³⁹ Section 1222 allows the admission of information from a mediation to be introduced at further proceedings if all the parties agree to this.⁸⁴⁰ Section 1126 also makes it clear that the information divulged during mediation will remain inadmissible after the mediation has ended (section 1125 details when this is the case).⁸⁴¹

The Supreme Court of California has on numerous occasions made it abundantly clear that "any" and "all" provisions of section 1119 are to be interpreted quite literally. They reiterated that the scope of protection intended by the statute is unqualified, clear, absolute, and is not subject to judicially crafted exceptions or limitations.⁸⁴² The Supreme Court of California has utilised a very narrow approach with regard to the interpretation of section 1119.⁸⁴³

This has elicited harsh criticism. Since California has not endorsed the *UMA* (which allows for a less strict approach to confidentiality in mediation)⁸⁴⁴ but has stuck to the narrow interpretation of sections 115-1128 (and specifically 1119) one can't help but feel that this approach to mediation confidentiality is too narrow. In *Wimsatt v Superior Court*,⁸⁴⁵ the court describes this approach as leading to 'harsh and inequitable consequences',⁸⁴⁶ while Zitrin specifically criticises this approach for failing to allow virtually any exceptions to mediation

⁸³⁹ *California Evidence Code* Section 1121.

⁸⁴⁰ *California Evidence Code* Section 1122.

⁸⁴¹ *California Evidence Code* Sections 1125, 1126.

⁸⁴² *Foxgate Homeowners' Assn v Bramalea California Inc* (2001) 26 Cal 4th 1, 15 in which the California's Supreme Court confirmed that all communications and writings associated with mediation will be deemed as to be confidential and not subject to disclosure if express statutory exception is absent. Also see *Cassel v Superior Court* 244 P.3d 1080 (Cal. 2011).

⁸⁴³ See *Cassel v Superior Court* 244 P.3d 1080 (Cal. 2011) where the plaintiff, sued his former attorneys for legal malpractice, breach of fiduciary duty, fraud, and breach of contract, all of which was related to the conduct and actions of his attorneys during mediation. The California Supreme Court interpreted the mediation confidentiality statutes strictly and refused to deviate from this, and thus construct a judicial exception, which meant all the information from the mediation was seen as inadmissible.

⁸⁴⁴ Many feel adoption by all states of the *Uniform Mediation Act* will lead to a greater increase in predictability when it comes to mediation confidentiality. See Deason 2002 *Ohio St J on Disp Resol* 314-315.

⁸⁴⁵ *Wimsatt v Superior Court* 152 Cal App 4th 137, 164 (2007).

⁸⁴⁶ Zitrin 2013 <https://uchastings.edu/news/articles/2013/10/zitrin-mediation-confidentiality.php>.

confidentiality, and points out that it can lead to "serious unintended consequences" as was the case in *Cassel*.⁸⁴⁷

The irony deepens if one considers the court's comments in *Cassel* in para 1084:

We must apply the plain terms of the mediation confidentiality statutes to the facts of this case unless such a result would violate due process, or would lead to absurd results that clearly undermine the statutory purpose.

The very manner in which this same court dealt with the mediation confidentiality did indeed lead to absurd results. Yet, nearly a decade after the *Cassel* decision not much has changed in California with regard to the way courts - especially the Supreme Court – and the narrow interpretation of mediation confidentiality is still being favoured.

In New South Wales the main legislation that is used to deal with mediation confidentiality is the – *Federal Court of Australia Act 1976*,⁸⁴⁸ *Uniform Evidence Act 1995* (Cth); *Evidence Act* (NSW),⁸⁴⁹ *Civil Procedure Act 2005* (NSW)⁸⁵⁰ with the Australian Solicitors Conduct Rules,⁸⁵¹ Australian National Mediator Standards, Practice Standards and the Australian Bar Association's Barristers' Conduct Rules, additionally also being utilised.⁸⁵²

Section 53A and B of the *Federal Court of Australia Act* state if the mediation is sanctioned by a Federal Court, sections 53A and 53B of the *Federal Court of Australia Act 1976* (Cth) will apply. Section 53B offers very specific protection to confidentiality in mediation. If the matter is not a federal matter (and it has

⁸⁴⁷ Zitrin 2013 <https://uchastings.edu/news/articles/2013/10/zittrin-mediation-confidentiality.php>.

⁸⁴⁸ *Federal Court of Australia Act 1976*.

⁸⁴⁹ *Uniform Evidence Act 1995* (Cth); *Evidence Act* (NSW).

⁸⁵⁰ *Civil Procedure Act*.

⁸⁵¹ Section 6(1)(c) of the *National Accreditation Mediator Standards*.

⁸⁵² Australian Solicitors Conduct Rules June 2012, Australian National Mediator Standards, Practice Standards January 2008 Barristers' Conduct Rules May 2013, the latter has been adopted in New South Wales in June 2014; see Wolski 2015 *UNSWLJ* 6.

been court-referred) the Civil Procedure Act and The Evidence Act 1995 (NSW) will apply, together with the rules and standards as indicated above.⁸⁵³

Section 30 of the *Civil Procedure Act* deals with confidentiality with regard to mediation and acknowledges it, but does provide for exceptions in sections 29 and 31,⁸⁵⁴ which deal with exceptions to disclosure of confidential information. These exceptions are fairly narrow and mostly involve aspects such as: communication which aid and abets fraud or other offence, where evidence is applicable to the determination of a costs order.⁸⁵⁵ Additionally according to the act, the court can also call a mediator to testify in order to determine if a settlement, in court-ordered mediation, has been reached and the essence and substance of such an agreement needs to be verified.⁸⁵⁶

Section 131 of the *Evidence Act* (Cth and NSW) acknowledges mediation confidentiality but allows for exceptions as well.⁸⁵⁷ Some feel these exceptions are quite broad, especially one such as section 131(2)(i) which indicates an exception to mediation confidentiality can be applicable if "(i) making the communication, or preparing the document, affects a right of a person". It will not be difficult to prove that communication can affect the right of a person. Additionally section 135 gives the court the discretion to balance the probative value of the evidence against the possible prejudicial nature that the evidence might have, and then make a decision if the communications for mediation might be admitted as evidence.

However, in New South Wales these statutory protections can only be claimed by parties who are engaged in court-ordered or court-referred mediation, not the private mediation. The latter only has the protection of contractual provisions for confidentiality.⁸⁵⁸

⁸⁵³ Section 131 specifically deals with the issue of confidentiality. See also the *Evidence Act* 1995 (NSW).

⁸⁵⁴ *Civil Procedure Act*.

⁸⁵⁵ Sections 131(2)(j), 131(2)(c), 131(2)(h).

⁸⁵⁶ Sections 29 and 31 of the *Civil Procedure Act*.

⁸⁵⁷ Section 131 of the *Evidence Act*.

⁸⁵⁸ Bergin "The Objectives, Scope and Focus of Mediation Legislation in Australia" 10.

6.6 Conclusion

Confidentiality is one of the cornerstones of mediation, and rightly so. For parties to fashion and shape their own agreements with regard to a dispute, calls for a certain level of certainty with regard to the confidentiality. Parties should not consistently be worried about the fact that the information which they divulge during mediation, can come back to haunt them at subsequent legal proceedings.

Protection of information exchanged during settlement negotiations is well-established in common law, legislation and case law in South Africa, California and NSW. The more pertinent question is: To which extent should this happen?

This is where a balanced view is suggested. The way the state of California deals with mediation confidentiality is too narrow and often seems to be to the detriment of the interests of justice, and undermines the objectives of mediation. The New South Wales approach seems more balanced, although there are also questions of relevant evidence being excluded at times, and there is also the issue of the difference in treatment of private and public mediation. South Africa seems to have leant towards the Australian model with mediation confidentiality being honoured, but leaving room for communications that transpired during mediation to be discovered at a later stage by means of the ordinary rules of discovery.

The agreement to mediate (the contract) does provide a basis to build on. The fact that parties to the mediation agree to mediate should be the starting point when one considers mediation confidentiality. However, typical law of contract principles do not always translate well into a mediation context. The legal professional privilege is not quite applicable to mediation, at least not in the same manner as the attorney-client legal professional privilege, and none of the above-mentioned constituencies have such a mediator's privilege in place. Therefore mediation confidentiality cannot rely on claiming legal professional privilege as a basis for mediation confidentiality.

The without prejudice principle is part and parcel of settlement negotiations and is central in mediation as well. Public policy and the interests of justice do however have to be considered when the without prejudice principle is applied, and if it should be applied.

Legislation with regard to mediation abounds and NSW has various state and federal statutes that it uses to regulate mediation, as does California with South Africa lagging behind in this regard. The interpretation of the legislation is of course the main concern NSW has a less narrow and strict approach to it and allows for more judicially crafted exceptions to mediation, as does South Africa, while California in its application of mediation legislation is almost dogmatic and does not waver from the strict interpretation of legislation.

Maybe the answer lies closer to the common law approach—public policy and the interests of justice. When one has to decide if communications or information that has been divulged during mediation should be disclosed, the yardstick should be public policy and the interests of justice. In its decision, the court should balance the interest of justice and public policy as contained in the *boni mores* of society.

The probative value of the evidence should be measured against the interests of justice and public policy.

If one then considers a typical case where parties entered into mediation and the mediation failed and one of the parties would want to use this information in a subsequent legal proceeding, one would consider the fact that settlement negotiations such as mediation is considered to be privileged (those are the *boni mores* of the society in this example) and it also serves the interests of justice that parties which aim to settle a dispute should be given the protection to do so and not have to fear that this will leave them unnecessarily vulnerable.

However, if information from the mediation assists in serving the interests of justice, then it should be disclosed (of course to balance these rights in a

sensible and equitable manner will always being a challenge) even though mediation features confidentiality as a crucial element.

Let us consider the Cassel case. Here we seem to have a clear example of attorney malpractice, coercion and misconduct. Public policy and the interests of justice call for the information and communications stemming from the mediation to be disclosed and admitted as evidence in order to properly investigate Cassell's claims. Attorney misconduct, coercion and malpractice are serious issues, especially since clients exhibit a large degree of trust in legal professionals and mediators and, additionally, mediation encourages them to do so. Yet, due to the narrow (or narrow-minded one should say) manner in which the California Supreme Court deals with mediation confidentiality, the interests of justice and the *boni mores* of society are not being served. The latter, if balanced against the strict interpretation of Californian legislation would surely have triumphed in the case of Cassel — and is that not one of the main aims of law, and even mediation?

Similarly, if parties commit to an agreement to mediate they are free to exactly demarcate why information or communications are confidential. If one of the parties, or even a third party, then calls for some (or all) of this information to be disclosed, then again one can use public policy and the interests of justice as a yardstick and balance these two aspects against the call for the disclosure of the information divulged during mediation. Yes, it does mean parties to mediation are not assured of absolute confidentiality, but that has never been the aim of mediation (absolute confidentiality) and it is not feasible in any case. It does mean mediation confidentiality is subject to scrutiny by a court or a similar forum, but this is needed and in the interest of justice and in line with public policy — as it should be.

CHAPTER 7

Conclusion

This study set out to look at the regulation of confidentiality in mediation. The aim was to discuss confidentiality in mediation and how this crucial aspect of mediation should be regulated. There is no doubt that confidentiality is a crucial and inevitable part of mediation, and rightly so. Mediation offers parties to a dispute the opportunity to make a genuine attempt at settling the dispute. In order to do this, parties must enjoy a level of protection when it comes to that information and communications that they share during mediation. This is a position that is reiterated by common law, legislation and case law.

Does it need to be regulated? And if so, how would this protection be regulated? The common law position endorses this with an agreement to mediate and the without prejudice principle leads the way in this regard. Legislation helps to make the picture even clearer, and case law will further assist in the application of this regulation of mediation confidentiality.

In the United States of America there is ample legislation both on federal and state level with regard to mediation confidentiality, such as *The Federal Rules of Evidence*, the *UMA* and state legislation.⁸⁵⁹ The state of California, which was part of the focus of this study, interprets mediation confidentiality in a very strict and literal manner and allows for very little leeway. This approach sometimes causes for unintended results with regard to mediation confidentiality, results that can border on the absurd and not be conducive to the promotion of mediation or justice.⁸⁶⁰

In New South Wales, legislation acknowledges the need for mediation confidentiality and offers exceptions to the protection as well as a less strict and literal approach than found in California. There is, however, more statutory

⁸⁵⁹ *Federal Rules of Evidence Uniform Mediation Act* and various state legislation (each state has mediation legislation).

⁸⁶⁰ See *Cassel v Supreme Court*.

protection afforded to court-referred mediation than private mediation, which is a bit of an anomaly. The latter is to the detriment of private mediation in New South Wales, which is a concern. Still, New South Wales offers a better balance between the need for the court to have access to all relevant evidence and the need for the protection of confidentiality information stemming from mediation than California does.

In South Africa there is an acknowledgement of the need for mediation confidentiality, but very limited legislation exists to regulate this crucial aspect of mediation. There is a need to construct legislation that specifically deals with mediation confidentiality, similar to the *UMA* in the United States of America.

However, the common law approach to an issue like mediation confidentiality seems to offer a sensible, practical and just way in which to deal with mediation confidentiality. This approach calls for the importance of public policy (the *boni mores* of society) and the interests of justice to be balance with the need for confidentiality in mediation.

Confidentiality in mediation is needed; it is in the interest of justice and public policy. It is essential and needed for mediation to flourish and achieve its objectives. However, to place mediation confidentiality in a position (as California does) where mediation confidentiality is regulated and applied in such a manner that relevant evidence seldom reaches the court and disappears into an "evidentiary black hole"⁸⁶¹ as Limbury calls it, does not seem to be the answer.

In conclusion, the agreement to mediate that the parties sign is the starting point for mediation confidentiality. Such an agreement does not however, seem to deal with mediation confidentiality in a satisfactory manner, proper and clear legislation and a sensible application of common law principles should be added to ensure that a more balanced and complete approach to the application of mediation confidentiality is achieved in South Africa.

⁸⁶¹ Limbury 2012 *University of New South Wales Law Journal* 927.

It is therefore suggested that in South Africa legislation with regard to mediation confidentiality should be expanded and it should provide for relevant exceptions to application of the confidentiality in mediation as is done in all legislation worldwide. However, the use of the common law approach which relies heavily on the importance of public policy and the interests of justice as guiding principles when it comes to confidentiality mediation should be promoted. Courts should strive to balance the need for the common law approach against the need to ensure protection to parties who engage in mediation. Case law should be used to practically apply this approach and shed even more light on this complex issue. This should allow for a sensible, practical and just manner in which mediation confidentiality can be regulated and applied in South Africa.

BIBLIOGRAPHY

Literature

Akpet 2011 *Ankara Bar Review*

Akpet KO "The Australian Legal System: The Legal profession and the judiciary" 2011 *Ankara Bar Review* 72-94

Alfini 2008 *South Texas Law Review*

Alfini JJ "Mediation as a calling: Addressing the disconnect between mediation ethics and the practises of lawyer mediators" 2008 *South Texas Law Review* 829-839

Alfini and Galton (eds) *ADR Personalities and Practice Tips*

Alfini JJ and Galton ER (eds) *ADR Personalities and Practice Tips* (ABA Publishing, Section of Dispute Resolution Washington DC 1998)

Alfini and McCabe 2001 *Arkansas Law Review*

Alfini JJ and McCabe CG "Mediating in the Shadow of the Court room: A study of emerging case law" 2001 *Arkansas Law Review* 171-206

Allsop "Federal Jurisdiction and the jurisdiction of the Federal Court of Australia"

Allsop J "Federal Jurisdiction and the jurisdiction of the Federal Court of Australia" Paper by Justice James Allsop Given to NSW Bar Association 21 October 2003 (Revised)

Altobelli and Bryant "Has confidentiality in Family Dispute Resolution reached its use by date?"

Altobelli T and Bryant D "Has confidentiality in Family Dispute Resolution reached its use by date?" (49th annual AFCC (Association of Family and Conciliation Courts) of conference 6-9 June 2012 Chicago) 1-28

Arthur 2015 *Australian Alternative Dispute Resolution Bulletin*

Arthur JK "Confidentiality and privilege in mediation" 2015 *Australian Alternative Dispute Resolution Bulletin* 91

Australian Law Reform Commission (ALRC Report 115) March 2011 *Managing discovery: Discovery of Documents in Federal Courts* 1-380

Australian Law Reform Commission (ALRC Report 115) March 2011 *Managing discovery: Discovery of Documents in Federal Courts* 1-380

Australian Law Reform Commission (ALRC Report 89) 2000 *Managing Justice: A Review of the Civil Justice System* 1-928

Australian Law Reform Commission (ALRC Report 89) 2000 *Managing Justice: A Review of the Civil Justice System* 1-928

Australian Law Reform Commission (ALRC Report No 107) 2008 *Privilege in Perspective: Client Legal Privilege in Federal Investigations* 3.1

Australian Law Reform Commission (ALRC Report No 107) 2008 *Privilege in Perspective: Client Legal Privilege in Federal Investigations* 3.1

Bennett "Experiencing Mediation from the Disputants' Perspective"

Bennett A "Experiencing Mediation from the Disputants' Perspective" in Saundry R, Latreille P and Ashman I (eds) *Reframing Resolution* (Palgrave Macmillan UK 2016) 171-190

Bergin PA "The Objectives, Scope and Focus of Mediation Legislation in Australia Mediate First"

Bergin PA "The Objectives, Scope and Focus of Mediation Legislation in Australia" "Mediate First" Conference Hong Kong International Arbitration Centre and The Hong Kong Mediation Council (Hong Kong 11 May 2012) 1-27

Bhana, Bonthuys and Nortje *Student's guide to the Law of Contract*

Bhana D, Bonthuys E and Nortje M *Student's guide to the Law of Contract*
3rd ed (Juta Cape Town 2013)

Black *Black's Law Dictionary*

Black HC *Black's Law Dictionary* 5th ed (West Publishing Eagan Minnesota
1981)

Boulle and Nesic *Mediation Principles, Process, Practice*

Boulle L and Nesic M *Mediation Principles, Process, Practice* 3rd ed
(LexisNexis UK 2001)

Boulle *Mediation: Principles, Process, Practice*

Boulle L *Mediation: Principles, Process, Practice* 2nd ed (LexisNexis Durban
2005)

Brand, Steadman and Todd *Commercial Mediation*

Brand J, Steadman F and Todd C *Commercial Mediation: A user's guide*
2nd ed (Juta Cape Town 2016)

Brand 2015 *Thomas Jefferson Law Review*

Brand S "Caution to Clients: California's Mediation Confidentiality Statutes
Protect Attorneys from Legal Malpractice Claims Arising out of Mediation"
2015 *Thomas Jefferson Law Review* 369-404

Brazil 1988 *The Hastings Law Journal*

Brazil WD "Protecting the Confidentiality of Settlement Negotiations" 1988
The Hastings Law Journal 955-1030

Brown and Marriott *ADR: principles and practice*

Brown HJ and Marriott AL *ADR: principles and practice* 3rd ed (Sweet and Maxwell London 2011)

Bultena, Ramser and Tilker 2010 *Southern Journal of Business and Ethics*

Bultena C, Ramser C and Tilker K "Fighting Futility: Tools for Mediation Success" 2010 *Southern Journal of Business and Ethics* 64-74

Burr 2002 *Dispute Resolution Journal*

Burr AM "Confidentiality in Mediation Communications: A Privilege Worth Protecting" 2002 *Dispute Resolution Journal* 64-74

Bush and Folger *The promise of mediation*

Bush RAB and Folger JP *The promise of mediation: the transformative approach to conflict* 2nd ed (Jossey-Bass Publishers San Francisco 2004)

Buzzard, May and Howard *Phipson on Evidence*

Buzzard JH, May R and Howard MN *Phipson on Evidence* 12th ed (Sweet & Maxwell London 1976)

Callahan 2013 *Pepperdine Dispute Resolution Journal*

Callahan R "Mediation Confidentiality: For California Litigants, Why Should Mediation Confidentiality be a Function of the Court in Which the Litigation is Pending?" 2013 *Pepperdine Dispute Resolution Journal* 63-96

Calvi and Coleman *American law and legal systems*

Calvi JV and Coleman S *American law and legal systems* 8th ed (Routledge New York 2016)

Cameron "National reports Australia"

Cameron C "National reports Australia" in– Hodges C, Vogenauer S and Tulibacka M (eds) *The Costs and Funding of Civil Litigation: A Comparative Perspective* (Hart publishing Oxford and Oregon , Portland 2010) 195-216

Charlton *Dispute Resolution Guidebook*

Charlton R *Dispute Resolution Guidebook* 1st ed (Thompson Legal and Regulatory Limited Sydney 2000)

Chau 2007 *Journal of Professional Issues in Engineering Education and Practice*

Chau KW "Insight into Resolving Construction Disputes by Mediation/Adjudication in Hong Kong" 2007 *Journal of Professional Issues in Engineering Education and Practice* 143-47

Chia *Alternative Dispute Resolution Services in Australia*

Chia Sebastian February 2015. Alternative Dispute Resolution Services in Australia :4 IBIS World Industry Report OD4116.

Chukwuemerie 2007 *AHRLJ*

Chukwuemerie AI "Arbitration and Human Rights in Africa" 2007 *African Human Rights Law Journal* 103-141

Coben and Thompson 2006 *Harv Negot LR*

Coben JR and Thompson PN "Disputing Irony: A Systematic Look at Litigation About Mediation" 2006 *Harvard Negotiation Law Review* 73-89

Cohen *Florida LR*

Cohen MS "The Mediation Privilege" 2013 *Florida Law Review* 14-32

Cole 2006 *U Kan LR*

Cole SR "Protecting Confidentiality in Mediation: A Promise Unfulfilled?" 2006 *University of Kansas Law Review* 1419-1448

Cornelius 2006 *Stell LR*

Cornelius S "The Unexpressed terms of a contract" 2006 *Stellenbosch Law Review* 494-504

Council of the Law Institute 1990 *Law Society Journal*

Council of the Law Institute 45-54

Crosbie 1995 *Commercial Dispute Resolution Journal*

Crosbie F "Aspects of Confidentiality in Mediation: A Matter of Balancing Competing Public Interests" 1995 *Commercial Dispute Resolution Journal* 51-52

Davies and Clarke 1991 *Queensland Law Society Journal*

Davies I and Clarke G "ADR Procedures in the Family Court of Australia" 1991 *Queensland Law Society Journal* 391-406

Dawkins 2014 *Journal of Business Ethics*

Dawkins CE "The principle of good faith: Toward substantive stakeholder engagement" 2014 *Journal of Business Ethics* 283-295

De Roo and Jagtenberg 2002 *EJCL*

De Roo A and Jagtenberg R "Mediation in the Netherlands: Past – Present – Future" 2002 *Electronic Journal of Comparative Law* 127-145

Deason 2002 *Ohio St J on Disp Resol*

Deason 2002 *Ohio St J on Disp Resol* "Predictable Mediation Confidentiality in the U.S. Federal System," 239-319

Deason 2005 *University of California Davis Law Review*

Deason E "Enforcing Mediated Settlement Agreements: Contract Law Collides With Confidentiality" 2005 *University of California Davis Law Review* 33-60

Deason 2015 *Dispute Resolution Magazine*

Deason EE "Enforcement of Settlement Agreements in International Commercial Mediation: A New Legal Framework?" 2015 *Dispute Resolution Magazine* 32-38

Deason 2005 *U Kan LR*

Deason EE "The need for trust as justification for confidentiality: A cross-disciplinary approach" 2005 *The University of Kansas Law Review* 1387-1418

Deason 2001 *Marquette Law Review*

Deason EE "The Quest for uniformity in mediation confidentiality: foolish consistency or crucial predictability?" 2001 *Marquette Law Review* 79-111

Doré *Notre Dame Law Review*

Doré LK "Secrecy by Consent: The Use and Limits of Confidentiality in the Pursuit of Settlement" 1999 *Notre Dame Law Review* 284-402

Downes and Rohl 2005 *Proctor*

Downes K and Rohl K "Confidentiality in Mediation" 2005 *Proctor* 41-43

Emery, Rowen and Dinescu 2014 *Family Process*

Emery RE, Rowen J and Dinescu D "New roles for family therapists in the courts: An overview with a focus on custody dispute resolution" 2014 *Family Process* 500-515

Epstein *The Attorney-client privilege*

Epstein ES *The Attorney-client privilege and the work-product doctrine* 6th ed (American Bar Association Chicago 2007)

Exon 2007 *University of South Florida Law Review*

Exon SN "The Effects that Mediator Styles Impose on Neutrality and Impartiality Requirements of Mediation" 2007 *University of South Florida Law Review* 577-620

Feehily (Part 1) 2015 *TSAR*

Feehily R "Confidentiality in commercial mediation: a fine balance (part 1)" 2015 *TSAR* 516-536

Feehily (Part 2) 2015 *TSAR*

Feehily R "Confidentiality in commercial mediation: a fine balance (part 2)" 2015 *TSAR* 719-737

Field and Wood 2005 *QUTLJJ*

Field R and Wood N "Marketing Mediation Ethically: The Case of Confidentiality" 2005 *Queensland University of Technology and Law Justice Journal* 143-159 *QUTLJJ*

Folberg, Milne and Salem *Divorce and family mediation models*

Folberg J, Milne AM and Salem P *Divorce and family mediation models* (Guildford Press New York 2004)

Foster and Prentice 2009 *Journal of Dispute Resolution*

Foster TN and Prentice S "Promise of confidentiality in mediation: The Practitioners' Perceptions" 2009 *Journal of Dispute Resolution* 163-174

Frisbie 2012 *Chicago Daily Law Bulletin*

Frisbie TF "What your client should know about mediation confidentiality"
2012 *Chicago Daily Law Bulletin* 147

Gibson 1992 *Journal of Dispute Resolution*

Gibson K "Confidentiality in mediation; a moral reassessment" 1992
Journal of Dispute Resolution 25-66

Gilles 1995 *Buffalo LR*

Gilles S "Promises Betrayed: Breach of Confidence as a Remedy for
Invasions of Privacy" 1995 *Buffalo Law Review* 1-84

Gobbo, Byrne and Heydon *Cross on Evidence*

Gobbo JA, Byrne D and Heydon JD *Cross on Evidence* 2nd Australian ed
(Butterworths Sydney 1979)

Goldberg 2005 *Negotiation Journal*

Goldberg SB "The Secrets of Successful Mediators" 2005 *Negotiation
Journal* 365-376

Hanks 2012 *UNSWLJ*

Hanks M "Perspectives on Mandatory Mediation" 2012 *University of New
South Wales Law Journal* 929-95

Harkavy 1999 *Wake Forest Law Review*

Harkavy JP "Privatizing Workplace Justice: The Advent of Mediation in
Resolving Sexual Harassment Disputes" 1999 *Wake Forest Law Review*
156-163

Harlos "Preferences for Mediating Personal Harassment at Work"

Harlos K "Preferences for Mediating Personal Harassment at Work: A
Theory-Driven Approach" 17th IACM 17 th Annual International

Conference of the Association of Conflict Management (6-9 June 2004
Pittsburgh) 1-22

Hartzog 2012 *Georgia LR*

Hartzog W "Chain-link Confidentiality" 2012 *Georgia Law Review* 657-704

Hinshaw 2016 *Harv Negot LR*

Hinshaw A "Regulating mediators" 2016 *Harvard Negotiation Law Review*
163-219

Hodges, Vogenauar and Tulibacka (eds) *The Costs and Funding of Civil
Litigation*

Hodges C, Vogenauar S and Tulibacka M (eds) *The Costs and Funding of
Civil Litigation: A Comparative Perspective* (Hart Publishing Oxford 2010)

Hoffmann and Zeffertt *Law of Evidence*

Hoffmann LH and Zeffertt DT *The South African Law of Evidence* 2nd ed
(LexisNexis Durban 2010)

Houzhi 2009 *Asia Pacific Law Review*

Houzhi T "Mediation is Developing Around the World" 2009 *Asia Pacific
Law Review* 31-37

Hung 2002 *ADR Bulletin*

Hung H "Neutrality and Impartiality in mediation" 2002 *ADR Bulletin* 45-48

Hyde 1984 *Mediation Juvenile & Family Court Journal*

Hyde LM "Mediation" 1984 *Mediation Juvenile & Family Court Journal* 57-
72

Kichaven 2017 *Alternatives to the High Cost of Litigation*

Kichaven J "A California Correction? Legislature Will Consider Allowing Attorney Malpractice Proof from Mediation" 2017 *Alternatives to the High Cost of Litigation* 97-110

Korobkin "The role of law in settlement"

Korobkin R "The role of law in settlement" in Moffitt ML and Bordone RC (eds) *The Handbook of Dispute Resolution* (Jossey-Boss New York 2005) 254–276

Lewis *Legal Ethics*

Lewis EAL *Legal Ethics: A Guide to Professional Conduct for South African Attorneys* (Juta Cape Town 1982)

Limbury 2012 *UNSWLJ*

Limbury AM "Should mediation be an evidentiary 'Black Hole'?" 2012 *University of New South Wales Law Journal* 914-928

Lovenheim and Guerin *Mediate don't litigate*

Lovenheim P and Guerin L *Mediate don't litigate: Strategies for successful mediation* (Nolo Press Berkeley California 2004)

Lowry and Robinson 2001 *Los Angeles Lawyer*

Lowry RL and Robinson P "Mediation Confidential: In Three Recent Cases, Courts have Carved out Expectations to the Rule of Strict Secrecy in Mediation Proceedings" 2001 *Los Angeles Lawyer* 28-31

Lyons 2017 *American Bankruptcy Institute Journal*

Lyons RT "How confidential are mediation communications?" 2017 *American Bankruptcy Institute Journal* 36-37, 67-69

Macfarlane 2002 *Journal of Dispute Resolution*

Macfarlane J "Culture Change - A Tale of Two Cities and Mandatory Court-Connected Mediation" 2002 *Journal of Dispute Resolution* 241-323

Magnus "The wider world: Australia"

Magnus U "The wider world: Australia" in Hopt KJ and Steffek F (eds) in *Mediation: Principles and Regulation in Comparative Perspective* (Oxford University Press Oxford 2012)

Marshall 2008 *QUTLJJ*

Marshall P "Political Competence and the Mediator: A New Strategy for Managing Complexity and Stress" 2008 *Queensland University of Technology Law and Justice Journal* 176-193

Marshall 2010 *ADR Bulletin of Bond University DRC*

Marshall P "The 'Partial' Mediator: Balancing Ideology and the Reality" 2010 *ADR Bulletin of Bond University DRC* 1761

McLaughlin and Berger *Weinstein's Federal Evidence*

McLaughlin MA and Berger JB *Weinstein's Federal Evidence* 2nd ed (M Bender New York 2010)

Mellinkoff *Mellinkoff's Dictionary of American Legal Usage*

Mellinkoff D *Mellinkoff's Dictionary of American Legal Usage* (Wiff and Stock Publishers Eugene Oregon 1992)

Molver and Marais 2010 *Without Prejudice*

Molver A and Marais J 2010 "Precious privilege: the law" *Without Prejudice* 48

Moore *The mediation process*

Moore CW *The mediation process: Practical strategies for resolving conflict*
4th (John Wiley & Sons New Jersey 2014)

Morek 2013 *ERA Forum*

Morek R "Nihil silentio utilius: confidentiality in mediation and its legal
safeguards in the EU Member States" 2013 *ERA Forum* 421-435

Mosupa 2013 *Without Prejudice*

Mosupa F "SARS rejects pleas to extend legal professional privilege to tax
practitioners: tax" 2013 *Without Prejudice* 47-49

Murithi and Ives 2007 *Africa Mediators' Retreat*

Murithi T and Ives PM "Under the Acacia Mediation and the dilemma of
inclusion" 2007 *Africa Mediators' Retreat* 77-86

Neethling 2014 *Litnet Akademies*

Neethling J 'Vonnisbespreking: 'n Dogmatiese verkenning van die reg op
privaatheid kry verdere erkenning in die regspraak Greef v Protection 4U
h/a Protect International 2012 6 SA 393 (GNP)" 2014 *Litnet Akademies 'n
Joernaal vir die Geesteswetenskappe, Natuurwetenskappe, Regte en
Godsdienstwetenskappe* 27-39

Neethling, Potgieter and Visser *Law of Delict*

Neethling J, Potgieter J and Visser PJ *Law of Delict* 5th ed (LexisNexis
Durban 2006)

Nolan-Haley 2015 *Cardozo J Conflict Resol*

Nolan-Haley J "Mediation: The best and the worst of Times" 2015 *Cardozo
Journal of Conflict Resolution* 731-740 *Cardozo J Conflict Resol*

Nolan-Haley 2012 *Harv Negot LR*

Nolan-Haley J "Mediation: The 'New Arbitration'" 2012 *Harvard Negotiation Law Review* 61-95

Nolan-Haley 2006 *Cardozo J Conflict Resol*

Nolan-Haley J "Self-Determination in International Mediation: Some Preliminary Reflections" 2006 *Cardozo Journal of Conflict Resolution* 277-288

Noone and Ojelabi 2014 *Washington University Journal of Law and Policy*

Noone MA and Ojelabi LA "Ethical Challenges for Mediators around the Globe: An Australian Perspective" 2014 *Washington University Journal of Law and Policy* 145-193

NSW Bar Association *Mediation Agreement* Nov 2012

NSW Bar Association *Mediation Agreement* Nov 2012

Nussbaum L 2016 "Mediation as regulation expanding state governance over private disputes" 2016 *Utah Law Review* 361-415

Nussbaum L 2016 "Mediation as regulation expanding state governance over private disputes" 2016 *Utah Law Review* 361-415

Oberman 2012 *Ohio St J on Disp Resol*

Oberman S "Confidentiality in Mediation: An Application of the Right to Privacy" 2012 *Ohio State Journal on Dispute Resolution* 539-640

Parkhe, Miller and Stewart 2000 *The Academy of Management Review*

Parkhe A, Miller T and Stewart R "The structure of optimal trust: a comment and some extensions" 2000 *The Academy of Management Review* 10-11

Payne 1986 *Ohio St J on Disp Resol*

Payne CC "Enforceability of Mediated Agreements" 1986 *Ohio State Journal on Dispute Resolution* 395-412

Phelan 2014 *Queensland Law Society Report*

Phelan D "Legal Professional Privilege – what is it?" 2014 *Queensland Law Society Report* 1

Pillay and Zaal 2011 *South African Law Journal*

Pillay R and Zaal FN "Protecting Parties from Ambush: Some Recommendations on Discovery in Children's Court Litigation" 2011 *South African Law Journal* 632-642

Pryles "Mediation Confidentiality in Subsequent Proceedings"

Pryles M "Mediation Confidentiality in Subsequent Proceedings" (Paper presented at International Council of Commercial Arbitration Conference, Beijing, May 2004)

Relis *Perceptions in litigation and mediation*

Relis T *Perceptions in litigation and mediation: Lawyers, Defendants, Plaintiffs, and Gendered parties* 1st ed (Cambridge University Press New York 2009)

Riskin 1996 *Harv Negot LR*

Riskin LL "Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed" 1996 *Harvard Negotiation Law Review* 8-51

Robinson 2003 *Journal of Dispute Resolution*

Robinson P "Centuries of Contract Common Law Can't Be All Wrong: Why the UMA's Exception to Mediation Confidentiality in Enforcement

Proceedings Should Be Embraced and Broadened" 2003 *Journal of Dispute Resolution* 36-173

Rogers 2004 *W Va LR*

Rogers J "S Riner v Newbraugh: The Role of Mediator Testimony in the Enforcement of Mediated Agreements" 2004 *West Virginia Law Review* 330-352

Rubinson *Cardozo J Conflict Resol*

Rubinson P 2016 "Of grids and gatekeepers: The socioeconomics of mediation" *Cardozo Journal for Conflict Resolution* 873-907

Rycroft 2013 *SALJ*

Rycroft A "Settlement and the law" 2013 *South African Law Journal* 187-209

Rycroft 2009 *Africa Centre for Dispute Settlement Newsletter Quarterly Newsletter*

Rycroft A "Why is mediation not taking root in South Africa" 2009 *Africa Centre for Dispute Settlement Newsletter Quarterly Newsletter* 2-5

Salem 1993 *Negotiation Journal*

Salem P "A critique of Western conflict resolution from a non-Western perspective" 1993 *Negotiation Journal* 290-384

Salmon 1996 *New Zealand Law Journal*

Salmon P "Why Choose Mediation?" 1996 *New Zealand Law Journal* 7-8

Saundry, Latreille and Ashman *Reframing Resolution*

Saundry R, Latreille P and Ashman I *Reframing Resolution: Innovation and Change in the Management of Workplace Conflict* 1st ed (Palgrave Macmillan London 2016)

Schonewille and Euwema (eds) *Mastering Mediation Education*

Schonewille F and Euwema M (eds) *Mastering Mediation Education* (Maklu Publishers Antwerpen 2012)

Shopp 2010 *Pennsylvania Bar Association Quarterly*

Shopp J "Mediation: Confidentiality and Privilege" 2010 *Pennsylvania Bar Association Quarterly* 123-131

Snider and Ellins *Corporate Privileges and Confidential Information*

Snider JG and Ellins HA *Corporate Privileges and Confidential Information* (Law Journal Press New York 2006)

Solomon 2013 *Without Prejudice*

Solomon K "The parameters of the litigation privilege" 2013 *Without prejudice* 49-50

Stassen 2006 *The Accountant*

Stassen P "Understanding legal privilege" 2006 *The Accountant* 24-25

Stit *Mediation: a practical guide*

Stit AJ *Mediation: a practical guide* 2nd ed (Cavendish Publishing London 2004)

Strode, Toohey and Singh 2015 *SAJBL*

Strode AE, Toohey J and Singh P "Boni mores and consent for child research in South Africa" 2015 *South African Journal of Bioethics and Law* 22-25

Theophilopoulos 2012 *SALJ*

Theophilopoulos C "State privilege, protection of information and legal proceedings" 2012 *South African Law Journal* 637-651 *SALJ*

Thompson 2003 *Ohio State Journal on Dispute Resolution*

Thompson PN "Enforcing Rights Generated In Court-Connected Mediation - Tension Between the Aspirations of a Private Facilitative Process and the Reality of Public Adversarial Justice" 2003 *Ohio State Journal on Dispute Resolution* 528-539

Tully 2014 *Bar News*

Tully S "Legal professional privilege and national security" 2014 *Bar News* 24-25

Villa 2005 *Ethics and Privilege*

Villa JK "The settlement privilege: fact or fiction?" 2005 *Ethics and Privilege* 122-125

Vos 2008 *Without Prejudice*

Vos A "Relevance in discovery: the law source" 2008 *Without Prejudice* 59-60

Wagner and Brett 2016 *De Rebus*

Wagner K and Brett C "I heard it through the grapevine: the difference between legal professional privilege and confidentiality" 2016 *De Rebus* 22

Wall and Dunne 2012 *Negotiation Journal*

Wall JA and Dunne TC "Mediation Research: A Current Review" 2012 *Negotiation Journal* 217-244

Weinstein *Mediation in the workplace*

Weinstein RJ *Mediation in the workplace: A guide for training, practice and administration* 1st ed (Quorum Books Westpoint Connecticut 2001)

Weller 1992 *Judges' Journal*

Weller S "Court Enforcement of Mediation Agreements: Should Contract Law Be Applied?" 1992 *Judges' Journal* 13-40

Whitear-Nel 2010 *SAJCJ*

Whitear-Nel N "The right of an accused to access to evidence in the possession of the state before trial: a discussion of S v Rowand 2009 (2) SACR 450 (W): comments" 2010 *South African Journal of Criminal Justice* 263-268

Wigmore *Evidence in Trials at Common Law*

Wigmore JH *Evidence in Trials at Common Law* 4th ed (Little Brown 1985)

Wiking The enforcement and setting aside of mediation settlement agreements

Wiking F *The enforcement and setting aside of mediation settlement agreements: A comparison between German and international commercial mediation* (LLM-mini-dissertation University of Cape Town 2015)

Williams 2005 *Journal of Dispute Resolution*

Williams S "Confidentiality in Mediation: Is It Encouraging Good Mediation or Bad Conduct?" 2005 *Journal of Dispute Resolution* 209-225

Williams "South Africa"

Williams S 'South Africa' in Rowley JW (ed) *Arbitration World: Jurisdictional Comparisons* 2nd ed (European Lawyer Reference 2006) 329-344

Wolski 2014 *Contemporary Asia Arbitration Journal*

Wolski B "Enforcing mediated settlements (MSAs): Critical questions for future research" 2014 *Contemporary Asia Arbitration Journal* 87-118

Wolski 2015 *UNSWLJ*

Wolski B "On Mediation, legal representatives and a advocates" 2015 *University of New South Law Journal* 1-43 - *UNSWLJ*

Wolski 2012 *Melbourne ULR*

Wolski B "The truth about honesty and candour in mediation: what the tribunal left unsaid in Mullins' case" 2012 *Melbourne University Law Review* 706-742

Wykoff 2016 *Bond University Student Law Review*

Wykoff A "Mediation and confidentiality" 2016 *Bond University Student Law Review* 1-18

Xavier 2006 *Journal of Public Law & Policy*

Xavier A "Mediation: It's origin and growth in India" 2006 *Journal of Public Law & Policy* 275-282

Zines *The High Court and the Constitution*

Zines L *The High Court and the Constitution* 5th ed (The Federation Press Annandale NSW 2008)

Case law (South Africa)

A Company v Commissioner for the South African Revenue Services (16360/2013) [2014] ZAWCHC 33; 2014 4 SA 549 (WCC)

ABSA Bank Limited v Chopdat [2000] JOL 6563 (W)

Absa Bank v Hammerle Group (205/14) [2015] ZASCA 43

Barkhuizen v Napier 2007 5 SA 323 (CC)

Bothma Batho Transport v S Bothma & Seun Transport (802/2012) [2013] ZASCA 176 (28 November 2013)

Brauer v Markaw 1946 TPD 344

Crown Cork 7 Seal Co Inc v Rheem South Africa (Pty) Ltd 1980 3 SA 1093 (W)

Erasmus v Pienaar 1984 4 SA 9 (T)

Gcabashe v Nene 1975 4 All SA 204 (D)

Greeff v Protection 4U h/a Protect International 2012 6 SA 393 (GNP)

Henley v Henley 1955 P 202

Jili v South African Eagle Insurance Co Ltd 1995 3 SA 269 (N)

Kapeller v Rondalia Versekeringskorporasie van Suid-Afrika Beperk 1964 4 SA 722

KLD Residential CC v Empire Earth Investments 17 (Pty) Ltd (1135/2016) [2017] ZASCA 98; [2017] 3 All SA 739 (SCA); 2017 6 SA 55 (SCA) (6 July 2017)

Lynn & Main Inc v Naidoo [2005] JOL 15372 (N)

Millward v Glaser 1950 3 SA 547 [W]

Mohamed v President of the Republic of South Africa (CCT 17/01) [2001] ZACC 18; 2001 3 SA 893 (CC); 2001 7 BCLR 685 (CC) (28 May 2001)

Msimang v Durban City Council 1972 4 SA 333 (D)

Naidoo v Marine & Trade Insurance Company Ltd 1979 3 SA 666 (A)

NEF v Standard Bank 203 ZASCA

NUMSA obo Goliath v Shelco Shelving 2003 5 BALR 587 (CCMA)

NUMSA v John Thompson Africa C 402/99 200 ZALC 25

Patlansky v Patlansky 1917 WLD 10

S v Safatsa 1988 1 SA 868 (A)

S v Shabalala 1995 2 SACR 761 (CC)

South African Airways Soc v BDFM Publishers (Pty) Ltd 2016 2 SA 561 (GJ);
[2016] 1 ALL SA 860 (GJ)

The Competition Commissioner of South Africa v Arcelormittal South Africa Limited & 3 Others [2013] ZASCA 84)

Thint (Pty) Ltd v National Director of Public Prosecutions (671/06) [2007] ZASCA 138; [2007] SCA 138 (RSA); [2008] 1 All SA 229 (SCA)

United Tobacco Companies (South) Ltd v International Tobacco Co (SA) Ltd 1953 1 SA 66 (T)

Venmop 275 (Pty) Ltd v Cleverlad Projects (Pty) Ltd (2014/14286) [2015] ZAGPJHC 176; 2016 1 SA 78 (GJ) (3 August 2015)

Waste-Tech (Pty) Ltd v Van Zyl and Glanville 2002 1 SA 841 (E)

Waterhouse v Shields 1924 CPD 155

Case law (International)

Abriel v Australian Guarantee Corporation Limited [2000] FCA 1198

Affiliated Mfrs Inc v Aluminum Co of Am Inc 56 F 3d 521 (3d Cir 1995)

Air Safety Int'l LC 326 BR 883

Al-Hakim v Monash University Beach J (1999) BC990826

Amis v Greenberg Traurig LLP (2015) 235 Cal App 4th 331

ASCIAC v Australian Secured and Managed Mortgages Pty Ltd (2008) FCA 753

Attorney-General (NT) v Kearney [1985] HCA 60; (1985) 158 CLR 50

Attorney-General for the Northern Territory v Maurice (1986) 161 CLR 475

Australian Football League v Age Co Ltd (2006) 15 VR 419; [2006] SVC 308;
BC200606690

Australian Securities and Investments Commission v Fortescue Metals Group Ltd
(2011) 274 ALR 731; (2011) 81 ACSR 563; [2011] FCAFC 19; BC201100543

AWA Ltd v Daniels 7 ACSR 463 1992 (unreported)

Baker v Campbell (1983) 153 CLR 52

Bank of Australia Pty Limited v Cassegrain [2002] NSWSC 965

Barry v City West Water Limited [2002] FCA 1214

Brodham v Edsoncome (2000) QDC 313

Browning v Crowley [2004] NSWSC 128 [5]

Cassel v Superior Court (2011) 51 Cal 4th 113

Chartbrook v Persimmon Homes [2011] UKHL 38

Chester Co Hospital v Independence Blue Cross 2003 US Dist LEXIS 25214 (ED Pa 2003)

Commonwealth Development Bank of Australia Pty Limited v Cassegrain [2002] NSWSC 965

Costco Wholesale Corp v Superior Court 47 Cal 4th 725 (2009)

Cronk v State 100 Misc 2d 680 686 420 NYS 2d 113 (Ct Cl 1979)

Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission (2002) HCA 49, (2002) 213 CLR

Equuscorp Pty Ltd v Glengallan Investments Pty Ltd (2004) 218 CLR 471

Esso Australia Resources Ltd v Federal Commissioner of Taxation (1999) 201 CLR 49

Facebook Inc v Pac Nw Software Inc 640 F 3d 1034 (9th Cir 2011)

Farm Assist Limited (In liquidation) v Secretary of State Environment, Food and Rural Affairs [2008] EWHC 3079 (TCC)

Farm Assist Ltd (in liquidation) v Secretary of State for the Environment, Food and Rural Affairs (No 2) [2009] BLR 399

Field v Commissioner for Railways for New South Wales (1955) 99 CLR 285 (1955) 99 CLR 285

Folb v Motion Picture Indus. Pension & Health Plans 16 F Supp 2d 1164 (CD Cal 1998)

Forsyth v Sinclair BC201005509

Foxgate Homeowners' Assn v Bramalea California Inc (2001) 26 Cal 4th 1

Garden State Plaza Corp v SS Kresge Co 78 NJ Super 485 x89 A 2d 448 (App Div)

Glass v Demarco (1999) FCA 482 [10]

Goodyear Tire & Rubber Co v Chiles Power Supply Inc 332 F 3d 976 (6th Cir 2003)

Grant v Downs [1976] HCA 63; (1976) 135 CLR 674

Haderlie v Sondgeroth 866 P 2d 703 (Wyo 1993)

Heinemann Publishers Australia Pty Ltd (1987) 8 NSWLR

Idoport Pty Ltd v National Idoport Pty Ltd v National Australia Bank Ltd (No 21) [2001] NSWSC 427 [29]–[30]

Jaffee v Redmond 518 US (1) (1996)

John Pfeiffer Pty Ltd v Rogerson (2000) 203 CLR 503

Johnson v Land O'Lakes Inc 181 FRD 388 (ND Iowa 1998)

Josephs v Pac Bell 443 F 3d 1050 (9th Cir 2006)

Lange v Australian Broadcasting Corp 1997) 189 CLR 520

Lewis v Nortex Pty Ltd [2002] NSWSC 1245

Mann v Carnell (1999) 201 CLR 1 13

Martin v Valley Bank National Bank 140 FDR 291 (FDNY 1993)

Mason v Walton-on-Thames Charity [2010] EWHC 1688 (Ch) and [2011] EWCA Civ 1732

McClure v Thompson 323 F 3d 1233 (9th Cir 2003)'

Mewett 191 CLR

Mitchell v Superior Court 37 Cal 3d 591 (1984)

Molina v Lexmark Int'l Inc No CV 08-04796 MMM (FMx) 2008 WL 44476782 (CD Cal Sept 30 2008)

Morgan Grenfell and Co Ltd v Special Commissioner of Income Tax [2002] UKHL 21

Oceanbulk Shipping v TMT [2010] UKSC 44

Olam v Cong. Mortg Co 68 F Supp 2d 1110 (ND Cal 1999)

Pihiga Pty Ltd v Roche (2011) 278 ALR 209

Pinot Nominees Pty Ltd v Deputy Commissioner of Taxation (2009) FCA 1508

Pittorino v Meynert [2002] WASC 76

Pitts v Adney [1961] NSW 535

Pratt Holdings Ply Ltd v The Commissioner of Taxation (2004) 207 ALR 217; (2004) FCAFC 122

Prudential plc R (on the application of) v Special Commissioner for Income Tax and Another January 2013 UKSC

R v Bell; Ex parte Lees [1980] HCA 26; (1980) 146 CLR 141

Rajski v Tectran Corporation Pty Ltd [2003] NSWSC 477

Re Sarah C Getty Trust [1985] QB 956

Reigate v Union Manufacturing Co (Ramsbottom) 1918 1 KB 592

Remuneration Planning Corporation Pty Ltd v Fitton. [2001] NSWSC 1208 [3]

Rizeq v Western Australia [2017] HCA 23

Rodgers v Rodgers (1964) 114 CLR 608

Rojas v Superior Court for the State of California, County of Los Angeles 2004 33 Cal 4th 407

Samenic Ltd (formerly Hoyts Cinemas Ltd) v APM Group (Aust) Pty Ltd [2011] VSC 194

Scott Paper Company v United States 943 F Supp 489 (ED Pa 1996)

Sheldone v Pennsylvania Turnpike Commission 104 F Supp 2d 511 (WD Pa 2000)

Silver Fox Co v Lenard's (No 3) [2004] FCA 1570

Simmons v Ghaderi (2008) 44 Cal 4th 570 187 P 3d 934

Stamie E Lyttle Co v County of Hanover 231 Va 21 (Va 1986)

Stewart v Australian Crime Commission [2012] FCAFC 151

Stockton Theaters Inc v Palermo (3rd Dist 1953) 121 Cal App 2d 616, 264 P 2d 74

Superior IP International Pty Ltd v Ahearn Fox Patent and Trade Mark Attorneys (No 2) [2012] FCA 977

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

Tarasoff v Regents of University of California (1976) 17 Cal 3d 425, 131 Cal Rptr 14 551 P 2d 334

The Facebook, Inc.; Mark ü Zuckerberg v ConnectU Inc Slip Op No 09-15021 (9th Cir April 11 2011)

Thompson v Macedon Ranges Shire Council [1999] VSC 338

United States v Rockwel Int'l 897 F 2nd 1255 (3rd Circuit 1990)

United States v Witmer 835 F Supp 208 (MD Pa 1993)

United States v Zolin 109 S Ct 2619 (1989)

Upjohn Co. v United States, 449 U.S. 383, 389 (1981)

Village Nine Network & Ors v Mercantile Mutual 1999 QCA 276 *Wasserman, Comden, Casselman & Pearson LLP* (1/13/11) 51 Cal 4th 113

Weems v Tyson Foods Inc 665 F 3d 958 (8th Cir 2011)

Williamson v Schmidt [1997] 2 Qd R 317

Worth Recycling Pty Ltd v Waste Recycling and Processing Pty Ltd [2009] NSWCA 354; BC200909905

Legislation (South Africa)

Children's Act 38 of 2005

Constitution of the Republic of South Africa, 1996
Criminal Procedure Act 51 of 1977
Labour Relation Act 66 of 1995
Legal Practice Act 24 of 2014
Magistrate's Court Act 32 of 1944
National Credit Act 34 of 2005
National Environmental Management Act 107 of 1998
Promotion of Access to Information Act 2 of 2000
Restitution Land Rights Act 22 of 1994

International instruments

Australia Constitution Act, 1900
Australian National Mediator Standards Practice Standards, January 2008
Australian Solicitors Conduct Rules, 2012
Australian Solicitors Conduct Rules, June 2012
Barristers' Conduct Rules, May 2013
California Evidence Code
California Rules of Professional Conduct (2015)
California Rules of Professional Conduct, 2015
Civil Dispute Resolution Act, 2011 (Cth) (CDRA)
Civil Liability Act 2002 (NSW)
Civil Procedure Act 2005 (Cth)
Civil Procedure Act 2005 (NSW)
Civil Procedure Act 2005 (NSW)
Civil Procedure Act, 2005 (NSW)
Civil Procedure Act, 2010

Competition and Consumer Act, 2010 (Cth)
Contracts Review Act, 1980 (NSW)
European Code of Conduct for Mediators
Evidence Act 25 of 1995 (NSW)
Evidence Act, 1995 (Cth)
Evidence Act, 1995 (NSW)
Evidence Act, 2001 (Tas)
Evidence Act, 2004 (NT)
Federal Court of Australia Act, 1976
Federal Court Rules, 2011
Federal Rule of Civil Procedure
Federal Rule of Criminal Procedure
Federal Rules of Evidence
Judiciary Act, 1903
Model Rules of Prof'l Conduct Rule, 2003
Model Standard Conduct for Moderators (2005)
National Accreditation Mediator Standards
NSW Supreme Court Act, 1970
Practice Standards, January 2008
Sale of Goods Act, 1923 (NSW)
Supreme Court Rules
Uniform Evidence Act, 1995 (Cth)
Uniform Mediation Act, 2003

Government publications

G 37448 RG 10151 GoN 183 of 18 March 2014 (*Court-annexed Mediation Rules*)

GNR1448 in GG 25515 of 10 October 2003

Reg 73 in GN R 183 in GG 37448 of 18 March 2014

Regulation 50 of the Municipal Supply Chain Management Regulations GN 868

Internet sources

Adraans Attorneys 2016 *Mediation could save you significant costs in litigation!*
http://adriaansattorneys.com/page/blog/?blog_post_id=59 accessed 4 July 2017

Adraans Attorneys 22 November 2016 *Mediation could save you significant costs in litigation!* http://adriaansattorneys.com/page/blog/?blog_post_id=59 accessed 4 July 2017

Africa ADR Date unknown <http://www.africaadr.com/index.php?a=r/home//10>

Africa ADR Date unknown *Mediation Procedure and agreement* <http://www.africaadr.com/index.php?a=r/home//10> accessed 16 June 2017

Africa ADR Date unknown <http://www.africaadr.com/index.php?a=r/home/2>

Africa ADR Date unknown *More about Africa ADR* <http://www.africaadr.com/index.php?a=r/home/2> accessed 16 June 2017

Allen Tony 2015 <https://www.cedr.com/articles/?item=Guidance-on-recent-case-law-for-mediators>

Allen Tony 2015 *Guidance on recent case-law for mediators* <https://www.cedr.com/articles/?item=Guidance-on-recent-case-law-for-mediators> accessed 28 August 2017

Allsop 2007 <http://www.fedcourt.gov.au/digital-law-library/judges-speeches/chief-justice-allsop/allsop-cj-200710>

Allsop J 2007 *Federal Court of Australia An Introduction to the Jurisdiction of the Federal Court of Australia* <http://www.fedcourt.gov.au/digital-law-library/judges-speeches/chief-justice-allsop/allsop-cj-200710>

American Bar Association 2017 https://www.americanbar.org/content/dam/aba/migrated/2011_build/dispute_resolution/model_standards_conduct_april2007.authcheckdam.pdf

American Bar Association 2017 *Model Standards of Contract* https://www.americanbar.org/content/dam/aba/migrated/2011_build/dispute_resolution/model_standards_conduct_april2007.authcheckdam.pdf accessed 4 January 2018

Association of Arbitrators of Southern Africa 2014 <http://www.arbitrators.co.za/about-us/>

Association of Arbitrators of Southern Africa 2014 *Welcome to the Association of Arbitrators* <http://www.arbitrators.co.za/about-us/> accessed 20 June 2017

Association of Arbitrators of Southern Africa Date unknown http://arbitrators.co.za/wp-content/uploads/2014/10/aoa_agreement_to_mediate.pdf

Association of Arbitrators of Southern Africa Date unknown *Agreement to mediate* http://arbitrators.co.za/wp-content/uploads/2014/10/aoa_agreement_to_mediate.pdf accessed 17 June 2017

Australian National University Date unknown <http://libguides.anu.edu.au/c.php?g=634887&p=4547083> accessed 8 November 2017

Australian National University Date unknown *The Australian legal system* <http://libguides.anu.edu.au/c.php?g=634887&p=4547083> accessed 8 November 2017

Basner and Chivers 2015 <https://www.law.com/therecorder/almID/1202744344099/#ixzz3v62hrQcc>The Recorder

Basner and Chivers 2015 *The Clock is ticking on Mediation Confidentiality* <https://www.law.com/therecorder/almID/1202744344099/#ixzz3v62hrQcc> The Recorder accessed 23 March 2016.

Batagol 2013 <https://adrresearch.net/2013/11/12/dumb-decision-the-closure-of-nadrac/> accessed 7 November 2017

Batagol B 2013 *The Australian Dispute Resolution Research Network Dumb decision – the closure of NADRAC* <https://adrresearch.net/2013/11/12/dumb-decision-the-closure-of-nadrac/> accessed 7 November 2017

Brand 2017 <https://www.businesslive.co.za/bd/opinion/2017-08-02-sa-ripe-for-alternative-dispute-resolution-to-take-root/>

Brand J 2017 *SA ripe for Alternative Dispute Resolution to take root Business Day* <https://www.businesslive.co.za/bd/opinion/2017-08-02-sa-ripe-for-alternative-dispute-resolution-to-take-root/> accessed 20 December 2017

Burns 2013 <http://apps.americanbar.org/litigation/committees/businessstorts/articles/summer2013-0713-admissibility-of-settlement-related-evidence-at-trial.html>

Burns GE 2013 *Admissibility of Settlement-Related Evidence at Trial* <http://apps.americanbar.org/litigation/committees/businessstorts/articles/summer2013-0713-admissibility-of-settlement-related-evidence-at-trial.html> accessed 4 November 2017

California Dispute Resolution Council Date unknown <http://www.cdrc.net/adr-practice/mediator-standards/>

California Dispute Resolution Council Date unknown *Standards of Practice for California mediators* <http://www.cdrc.net/adr-practice/mediator-standards/> accessed 4 November 2017

Callahan 2017 <http://www.callahanadr.com/wp-content/uploads/2017/03/March-Statutory-Exceptions-to-Mediation-Confidentiality.pdf>

Callahan R 2017 *Statutory Exceptions to Mediation Confidentiality Moving Forward ADR Developments* <http://www.callahanadr.com/wp-content/uploads/2017/03/March-Statutory-Exceptions-to-Mediation-Confidentiality.pdf>

content/uploads/2017/03/March-Statutory-Exceptions-to-Mediation-Confidentiality.pdf accessed 5 November 2017

Carr 2017 http://www.plaintiffmagazine.com/images/issues/2017/08-august/reprints/Carr_Protecting-against-attorney-malpractice-and-misconduct-at-mediation_at-what-cost_Plaintiff-magazine.pdf

Carr F 2017 *Protecting against Attorney Malpractice and Misconduct at Mediation – at what cost?* The Plaintiff Magazine http://www.plaintiffmagazine.com/images/issues/2017/08-august/reprints/Carr_Protecting-against-attorney-malpractice-and-misconduct-at-mediation_at-what-cost_Plaintiff-magazine.pdf accessed 15 December 2017

Clarke 2010 <https://www.australiancontractlaw.com/law.html>

Clarke J 2010 *Overview of Australian contract law ACL – Australian contract law* <https://www.australiancontractlaw.com/law.html> accessed 1 December 2017

Clarke 2016 <https://www.australiancontractlaw.com/>

Clarke J 2016 *Australian Contract and Consumer Law ACL – Australian contract law* <https://www.australiancontractlaw.com/> accessed 1 December 2017

Cooks Law Firm Date unknown https://cooklawfirm.la/pdfs/Confidentiality_Agreement.pdf

Cooks Law Firm Date unknown *Cook Mediation – Mediation confidentiality agreement* https://cooklawfirm.la/pdfs/Confidentiality_Agreement.pdf accessed 14 February 2018

Co-parenting 2015 https://www.coparenting.co.za/article.php?art_id=176

Co-parenting April 2015 *Without prejudice – what does it mean?*
https://www.coparenting.co.za/article.php?art_id=176 accessed 30
October 2016

Dalien 2012 <http://www.corrs.com.au/thinking/insights/new-rules-on-discovery-should-be-applauded/> Corrs Chambers Westgarth lawyers

Dalien I 2012 *New Rules in Discovery should be applauded*
<http://www.corrs.com.au/thinking/insights/new-rules-on-discovery-should-be-applauded/> Corrs Chambers Westgarth lawyers accessed 16 August
2017

DISAC 2014 http://disac.co.za/?page_id=3414

DISAC 2014 *Practice standards* http://disac.co.za/?page_id=3414 accessed
21 June 2017

DISAC 2014 <http://disac.co.za/wp-content/uploads/2014/12/DiSAC-Code-of-Professional-Conduct-for-Mediators.pdf>

DISAC 2014 *Professional conduct for mediators* <http://disac.co.za/wp-content/uploads/2014/12/DiSAC-Code-of-Professional-Conduct-for-Mediators.pdf> accessed 18 June 2017

DISAC 2014 <http://disac.co.za/wp-content/uploads/2014/12/>

DISAC 2014 *Code of professional Conduct for Mediator*
<http://disac.co.za/wp-content/uploads/2014/12/> accessed 21 June 2017

DISAC 2014 http://disac.co.za/?page_id=3514

DISAC 2014 *Practice standards* http://disac.co.za/?page_id=3514 accessed
21 June 2017

Doyle 2017 <http://www.doylesolutions.com.au/how-to-become-a-mediator-in-australia/> Doyle Solutions

Doyle A 2017 *How to become a mediator in Australia*
<http://www.doylesolutions.com.au/how-to-become-a-mediator-in-australia/>Doyle Solutions accessed 12 February 2018

Eckman 2011 <https://www.beyondintractability.org/About-CIC>

Eckman EM 2011 *Attorney-Client Privilege Under US Law* The Intabulletin Beyond Intractability. Conflict Information Consortium, University of Colorado, Boulder <https://www.beyondintractability.org/About-CIC> accessed 10 April 2017

Gilmour Date unknown www.fedcourt.gov.au/digital-law-library/judges-speeches/.../Gilmour-J-20120313.rtf

Gilmour J Date unknown *Federal Court of Australia. Legal Professional Privilege: Current Issues and Latest Developments*
www.fedcourt.gov.au/digital-law-library/judges-speeches/.../Gilmour-J-20120313.rtf accessed 12 July 2017

Gordon 2017 http://www.hearsay.org.au/index.php?option=com_content&task=view&id=1210&Itemid=4

Gordon J 2017 *Admissibility of Communications Made in a Queensland Mediation* Hearsay The Journal of The Bar Association of Queensland
http://www.hearsay.org.au/index.php?option=com_content&task=view&id=1210&Itemid=4 accessed 16 February 2018

Hill 2013 <https://www.mcw.com.au/content/Document/Papers/General%20Overview%20of%20Principals%20and%20How%20to%20Apply%20Them1.pdf>

Hill A 2013 *Privilege: General Overview of Principles and How to Apply Them* Legalwise seminars <https://www.mcw.com.au/content/Document/Papers/General%20Overview%20of%20Principals%20and%20How%20to%20Apply%20Them1.pdf> accessed 12 December 2017

Hodgson 2011 http://ebc44.com/wp-content/uploads/2017/06/Hodgson_24_March_2011.pdf

Hodgson T 2011 *An examination of the leading cases in relation to implied waiver of legal professional privilege* Edmund Barton Chambers http://ebc44.com/wp-content/uploads/2017/06/Hodgson_24_March_2011.pdf accessed 12 September 2017

Institute of Arbitrators and Mediators Australia 2003 <http://www.iama.org.au/docs/medtrconduct.doc>.

Institute of Arbitrators and Mediators Australia 2003 *Principles of Conduct for Mediators* <http://www.iama.org.au/docs/medtrconduct.doc> accessed 9 June 2017

Israel January 2010 <http://www.mediate.com/articles/israelL13.cfm> Mediate.com mediateeverything

Israel L January 2010 *To caucus or not to caucus – that is the question* <http://www.mediate.com/articles/israelL13.cfm> Mediate.com mediateeverything accessed 12 August 2017

Joubert March 2012 <http://www.mediate.com/articles/Joubertj1.cfm> Mediate.com Everythingmediation

Joubert J March 2012 *Embedding mediation in South African justice* <http://www.mediate.com/articles/Joubertj1.cfm> Mediate.com Everythingmediation accessed 2 March 2017

JSTOR 1984 Harvard Law Review <http://www.jstor.org/stable/1340844>

JSTOR 1984 Protecting Confidentiality in Mediation 1984 Harvard Law Review 441–459 <http://www.jstor.org/stable/1340844> accessed 12 January 2018.

Lang 2010 <http://www.mediate.com/articles/langlawyerrole.cfm> Mediate.com mediate everything

Lang M October 2010 *From advocate to Advisor: The role of the Lawyer during mediation* <http://www.mediate.com/articles/langlawyerrole.cfm> Mediate.com mediate everything accessed 20 September 2017

Law Society of New South Wales Date unknown <https://www.lawsociety.com.au/cs/groups/public/documents/internetcontent/026501.pdf>

Law Society of New South Wales Date unknown *Agreement to mediate* <https://www.lawsociety.com.au/cs/groups/public/documents/internetcontent/026501.pdf> accessed 5 April 2017

Legal Research Guide Date unknown <https://www.loc.gov/law/help/legal-research-guide/australia.php>

Legal Research Guide Date unknown *Australia Introduction to Australia's Legal system* <https://www.loc.gov/law/help/legal-research-guide/australia.php> accessed 4 February 2017.

Libralex date unknown <http://www.libralex.com/publications/the-impact-of-the-EU-mediation-directive>

Libralex date unknown *The impact of the EU mediation directives* <http://www.libralex.com/publications/the-impact-of-the-EU-mediation-directive> accessed 15 April 2016

McCullan P 2017 <https://www.jamsinternational.com/blog/facilitative-vs-evaluative-mediation> JAMS International ADR blog

McCullan P 2017 *Facilitative vs Evaluative mediation* <https://www.jamsinternational.com/blog/facilitative-vs-evaluative-mediation> JAMS International ADR blog accessed 13 February 2018

McDonald, Simmons and Van den Bok 2013
<http://www.mondaq.com/australia/x/224466/court+procedure/Part+2A+go+away+Repeal+of+the+prelitigation+protocols+under+the+Civil+Procedure+Act+2005+NSW>

McDonald S, Simmons K and Van den Bok E 2013 *Australia: Part 2A - go away! Repeal of the pre-litigation protocols under the Civil Procedure Act 2005* (NSW)

<http://www.mondaq.com/australia/x/224466/court+procedure/Part+2A+go+away+Repeal+of+the+prelitigation+protocols+under+the+Civil+Procedure+Act+2005+NSW> accessed 17 April 2017.

Mills 2014 https://apps.calbar.ca.gov/mcleselfstudy/mcle_home.aspx?testID=81
California Bar Association

Mills WK 2014 *So you think you know the "mediation privilege"?*
https://apps.calbar.ca.gov/mcleselfstudy/mcle_home.aspx?testID=81
California Bar Association accessed 5 November 2017

New South Wales Law Society January 2008 <https://www.lawsociety.com.au/cs/groups/public/documents/internetcontent/026438.pdf>

New South Wales Law Society January 2008 *New South Wales Law Society Mediation and Evaluation Information Kit* <https://www.lawsociety.com.au/cs/groups/public/documents/internetcontent/026438.pdf> accessed 5 October 2017

Nolan and O'Brien 2010 <http://barristers.com.au/wp-content/uploads/2012/03/confidentialityinmediationjune2010.pdf>.Barristers.com.au

Nolan A and O'Brien M May 2010 *Confidentiality in mediation proceedings*
<http://barristers.com.au/wp-content/uploads/2012/03/confidentialityinmediationjune2010.pdf>.Barristers.com.au accessed 12 June 2017

Nolan and O'Brien 2010 <http://barristers.com.au/wp-content/uploads/2012/03/confidentialityinmediationjune2010.pdf>

Nolan AA and O'Brien M 2010 *Confidentiality in Mediations: A Work in Progress* <http://barristers.com.au/wp-content/uploads/2012/03/confidentialityinmediationjune2010.pdf> accessed 14 May 2017

Preston N Date unknown <http://www.labourguide.co.za/most-recent/2080-inspecting-in-camera-evidence-a-process-for-dealing-with-fearful-witnesses>

Preston N Date unknown *Inspecting "in camera" evidence – a process in dealing with fearful witnesses* *The South African Labour Guide* <http://www.labourguide.co.za/most-recent/2080-inspecting-in-camera-evidence-a-process-for-dealing-with-fearful-witnesses> accessed 24 August 2017

Reinhard, Murphy-Johnson and Dowd 2017 <https://gettingthedealthrough.com/area/86/jurisdiction/23/legal-privilege-professional-secrecy-2017-united-states/>

Reinhard MT, Murphy-Johnson DE and Dowd S 2017 *Legal privilege and Professional Secrecy* <https://gettingthedealthrough.com/area/86/jurisdiction/23/legal-privilege-professional-secrecy-2017-united-states/> accessed 23 November 2016.

Resolution Institute 2017 <https://www.resolution.institute/about-us/about>

Resolution Institute 2017 *About us* <https://www.resolution.institute/about-us/about> accessed 15 December 2017

Salem R 2003 <http://www.beyondintractability.org/essay/trust-mediation>

Salem R 2003 *Trust in Mediation* <http://www.beyondintractability.org/essay/trust-mediation> accessed 6 March 2017.

Standards Australia 2017 http://www.standards.org.au/StandardsDevelopment/What_is_a_Standard/Pages/Standards-and-the-Law.aspx

Standards Australia 2017 *Standards and the Law* http://www.standards.org.au/StandardsDevelopment/What_is_a_Standard/Pages/Standards-and-the-Law.aspx accessed 14 December 2017

Van Dokkum 2012 http://www.academia.edu/6391951/Mediation_Privilege_-_what_are_we_really_talking_about_-_Part_1

Van Dokkum N 2012 "Mediation privilege: what are we really talking about?" *Irish Law times* 4 http://www.academia.edu/6391951/Mediation_Privilege_-_what_are_we_really_talking_about_-_Part_1 accessed 27 October 2016.

Wakefield 2014 <https://www.fanews.co.za/article/legal-affairs/10/general/1120/mediation-increasingly-preferred-over-litigation/15909> FA News

Wakefield Y 2014 *Mediation increasingly preferred above litigation* <https://www.fanews.co.za/article/legal-affairs/10/general/1120/mediation-increasingly-preferred-over-litigation/15909> FA News accessed 12 November 2016

Zitrin 2013 <https://uchastings.edu/news/articles/2013/10/zitrin-mediation-confidentiality.php>

Zitrin R 2013 *We need exceptions to mediation confidentiality* UC Hastings College of the Law San Francisco <https://uchastings.edu/news/articles/2013/10/zitrin-mediation-confidentiality.php> accessed 4 November 2017