

MARKETING MEDIATION ETHICALLY: THE CASE OF CONFIDENTIALITY

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I INTRODUCTION

Over the last three decades in Australia mediation has grown in popularity as a constructive, negotiation-based, facilitated, informal dispute resolution process. This growth indicates an increasing awareness of the real benefits of mediation as a positive dispute resolution forum, and a greater appreciation of its potential.¹ As a result, mediation is now used in many dispute jurisdictions, ranging from neighbourhood disputes, to the criminal justice system, to personal injury, family law, commercial, and international matters.

As the use of mediation has developed and the number of mediators has grown, the practice of mediation has turned from what was an arguably adjunct multidisciplinary industry to a respected dispute resolution profession in its own right. Whilst the profession remains unregulated and is still grappling with approaches to issues such as accreditation and professional standards,² the practice of the process of mediation itself has become increasingly sophisticated.

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¹ S L Schwartz 'Mediation: A Magnet for Positive Change' 2003 58(3) *Dispute Resolution Journal* 49, 51 comments that even within the adversarial system, implying influence from the mediation movement, there is a greater emphasis on 'consensus, collaboration and mutual interests.'

² National Alternative Dispute Resolution Advisory Council, *A Framework for ADR Standards – Report to the Commonwealth Attorney-General*, Commonwealth of Australia, ACT, 2001.

Whereas, in the past, some mediators may have felt wedded to formulaic 12 step processes,³ there are now many variations of models of mediation practised in Australia that reflect the emerging confidence of a maturing profession. These models remain, in varying degrees and with different emphases, true to mediation's core fundamental concepts and values; which include, for example, the consensual nature of the mutuality of agreements reached through mediation, the confidential nature of the process, and the absence of authoritative decision-making power on the part of the mediator.⁴

An increased use of mediation in disputes across many conflict contexts, and a higher level of sophistication in the conceptualisation of mediation as a professional practice, create a greater need to market and promote the process appropriately and ethically. Boule, for example, comments that the existence of multiple approaches to mediation in Australia makes it important, from a marketing and consumer perspective, that explanations are clear about what mediation does and does not offer parties.⁵ Mediation marketing information is an important aspect of how parties are educated about mediation.⁶ It is used by parties, therefore, to make informed decisions both about whether or not to participate, and about whether a particular model of mediation is appropriate for their dispute.

This article considers the increasingly important issue of the accurate and ethical marketing of mediation by its practising professionals and service provider organizations. To do this, the article focuses on the notion of confidentiality. First, the article considers ways in which mediation is marketed using the concept of confidentiality, and connections between promotional assertions of confidentiality and mediation theory. Secondly, the reality of confidentiality in mediation is explored, leading to a conclusion that confidentiality is insufficiently assured in the mediation environment to warrant its use in a marketing context (at least without significant explanation and qualification). Thirdly, two key reasons why ethical considerations may be compromised in terms of marketing mediation using confidentiality are considered. And finally, suggestions are made as to how these issues might be overcome in the future in order to protect the integrity of the mediation profession and assure its enhanced development and expansion.

II CONFIDENTIALITY AS A MARKETING TOOL FOR MEDIATION

The marketing of mediation is essentially about 'creating or expanding demand' for the mediation profession's services through the provision of information.⁷ Kotler and

³ J Folberg and A Taylor, *Mediation: A Comprehensive Guide to Resolving Conflicts Without Litigation* (Jossey-Bass Publishers, 1990).

⁴ C Moore, *The Mediation Process: Practical Strategies for Resolving Conflict* (Jossey Bass, 1986) 14. For alternative expression of these same elements see: S Wellik, 'Ethical Standards for Mediation: Embracing Philosophical Method' (1999) 10 *Australasian Dispute Resolution Journal* 257, 258.

⁵ L Boule, *Mediation: Principles, Process, Practice*, (Butterworths, 2nd ed, 2005) 10-11.

⁶ T Altobelli, 'Are You Getting Enough? Marketing Mediation' (1999) 1(9) *The ADR Bulletin* 113 highlights the importance of the educational role for marketing in mediation at 114 commenting: 'Whether we talk about promoting the industry as a whole or marketing the services of individual or collective mediation providers, the first step is to have a plan involving education.'

⁷ H J Gershon and G E Buerstatte, 'The E in Marketing: Ethics in the Age of Misbehaviour' (2003) 48(5) *Journal of Healthcare Management* 292, 292.

Keller identify four key elements to what is known as the ‘marketing mix’.⁸ These are: product, price, promotion and place. The focus of this article is on the promotion aspect of this mix, which includes advertising and public relations. This focus is justified because the mediation profession still seems, in some respects, to be very much in the introductory stage of the marketing product lifecycle.⁹ That is, the profession remains concerned, even with its more recent increased popularity, to continue to enhance public awareness about the process and its benefits through marketing processes.¹⁰

Clearly, the growth and development of mediation as a key contemporary dispute resolution process, is linked, at least to some extent, to effective marketing of the process to date. Potential parties have been convinced by what they have heard about mediation (from intake officers, mediators, and lawyers; or marketing documents, such as brochures, fact sheets or pamphlets) that mediation is a valuable, reliable and effective process. As the discussion below will evidence, confidentiality is a key aspect of mediation that is used to market and promote the process to potential parties.¹¹

For the purposes of this article, we considered written marketing information about mediation from a cross-section of key Australian mediation service providers and agencies,¹² with a focus on what was said about confidentiality.

The ‘Principles of Conduct for Mediators’ of the Institute of Arbitrators and Mediators Australia (IAMA)¹³ say of confidentiality that: ‘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’.¹⁴ Mediate Today’s information on ‘why use mediation’ gives the justification: “The information shared within mediation is private and confidential to the

⁸ P Kotler and K Lane Keller, *Marketing Management* (Pearson Prentice Hall: New Jersey, 12th ed, 2006) 19 and figure 1.4. See also E J McCarthy, *Basic Marketing: A Managerial Approach* (Homewood IL: Irwin, 12th ed, 1996); A W Frey, *Advertising* (Ronald Press, 3rd ed, 1961); W Lazer and E J Kelly, *Managerial Marketing: Perspectives and Viewpoints* (Homewood, rev ed, 1962); and C Lovelock and J Wirtz, *Services Marketing: People, Technology Strategy* (Pearson Prentice Hall, 5th ed, 2004).

⁹ Altobelli, above n6, 113.

¹⁰ Ibid.

¹¹ F Crosbie, ‘Aspects of Confidentiality in Mediation: A matter of Balancing Competing Public Interests’ (1995) 2(1) *Commercial Dispute Resolution Journal* 51, 52

¹² These service providers were: The Dispute Resolution Centres Queensland, the Institute of Arbitrators and Mediators, the Community Justice Centres, NSW, Relationships Australia, the Family Court of Australia, the Queensland Law Society, the Law Society of NSW, the Law Institute of Victoria, Lawyers Engaged in ADR – Association of Dispute Resolvers (LEADR), the Australian Commercial Dispute Centre (ACDC) and Mediate Today. The information was accessed from the internet sites of these service providers and agencies, cited below, as at August 2005.

¹³ The intention of the principles is to serve as a guide for the conduct of mediators, to inform the mediating parties and to promote public confidence in mediation as a process for resolving disputes: Institute of Arbitrators and Mediators Australia, *Principles of Conduct for Mediators*, 1 <<http://www.iama.org.au/docs/medtrconduct.doc>> at August 2005.

¹⁴ Institute of Arbitrators and Mediators Australia, *Principles of Conduct for Mediators*, 2 <<http://www.iama.org.au/docs/medtrconduct.doc>> at August 2005.

extent permitted by law. This provides a forum for open discussions and the opportunity to explore better outcomes.”¹⁵

The Dispute Resolution Centres of Queensland say of confidentiality: ‘Is mediation confidential? Yes. Mediators take an oath of secrecy. Nothing you say in mediation can be repeated by mediators to anyone else, and nothing said during mediation can be used in any legal action.’¹⁶ The Community Justice Centres of NSW state in their Frequently Asked Questions about mediation that ‘All contact with CJs is confidential and is covered by section 28(4) of the *Community Justice Centres Act 1983*’ which maintains that ‘Evidence of anything said or of any admission made in a mediation session is not admissible in any proceedings before any court, tribunal or body.’¹⁷

The Law Society of NSW’s information for the public on mediation provides that: ‘mediation is a voluntary and confidential conference, where all the participants have agreed to attend and to cooperate in good faith to resolve the dispute between them. A mediator appointed by the Law Society of New South Wales assists the parties to discuss, negotiate and achieve a solution. All negotiations during a mediation are non-binding and confidential. Experience has shown that mediation is more effective because it is confidential.’¹⁸ The Law Institute of Victoria’s public information asserts: ‘In contrast to court hearings, arbitration and mediation are conducted in private and the decisions are confidential. Neither the reason for a dispute nor the basis upon which it is resolved need be made public. Confidentiality is the most significant advantage to parties using ADR.’¹⁹

In the family mediation context, Relationships Australia state in their mediation information that one of the roles of the mediator is to ‘maintain the confidentiality of the process.’²⁰ The Family Court of Australia’s information on mediation provides that ‘mediation sessions are privileged. This means that the discussions are private and anything said during the session is not generally given as evidence in Court. There are exceptions in some circumstances including where there is a suspicion or risk of child abuse and where there is violence or threat of violence.’²¹

¹⁵ Mediate Today, *Why Use Mediation* <<http://www.mediate.com.au/mediate.htm>> at August 2005.

¹⁶ Department of Justice and Attorney-General Fact-sheet D4, *Mediation* <<http://www.justice.qld.gov.au/mediation>> at August 2005. Fact-sheet D1 ‘The Dispute Resolution Centre’ states that ‘The Dispute Resolution Centre (DRC) was established by the Queensland Government to provide a free, confidential and impartial mediation service to the community.’: <<http://www.justice.qld.gov.au/mediation/about>> at August 2005.

¹⁷ Lawlink (NSW), Community Justice Centres, *Frequently Asked Questions* <http://www.lawlink.nsw.gov.au/lawlink/Community_Justice_Centres> at August 2005.

¹⁸ The Law Society of NSW, *Fast Answers – What is Mediation* <<http://www.lawsociety.com.au>> at August 2005.

¹⁹ The Law Institute of Victoria, *General Legal Information – Alternative Dispute Resolution* <<http://www.liv.asn.au/public/legalinfo/adr>> at August 2005.

²⁰ Relationships Australia, *Mediation* <<http://www.relationships.com.au/services/mediation>> at August 2005.

²¹ Family Court of Australia, *What is involved in Mediation?* <http://www.familycourt.gov.au/presence/connect/www/home/guide/resolution/mediation/step_resolution_mediation_what> at August 2005.

The Queensland Law Society's information about mediation does not mention confidentiality, however.²² Nor does the Lawyers Engaged in ADR (LEADR) information brochure on mediation, or the Australian Commercial Disputes Centre's brochure.²³

These statements indicate that approaches to using confidentiality to market and promote mediation through information provision about the process vary widely. Clearly, however, assertions about the confidentiality of mediation are quite common and consistent, maintaining that mediation provides the parties with the benefits of a confidential and private handling of their dispute.

The presentation of this concept of confidentiality in mediation is also consistent with mediation theory.²⁴ Indeed, confidentiality is generally taken to be one of the essential theoretical cornerstones of the mediation process,²⁵ with Charlton suggesting that it has now taken on the status of 'an almost holy untouchable tenet',²⁶ and with others agreeing that the notion of confidentiality works to embed in mediation a general framework for the functioning of the process overall.²⁷ Baruch Bush acknowledges that dangers inherent to informal processes such as mediation are offset by the promise of privacy through confidentiality.²⁸

More specifically, mediation theory breaks down confidentiality in mediation into two key understandings. First, the confidential nature of mediation is taken to assure that information introduced or exchanged by parties in the process cannot be used later against a party, for example, in subsequent court proceedings;²⁹ and cannot be otherwise divulged, by another party or the mediator, outside the mediation process. Information includes in this context 'statements or admissions made, documents or notes produced, evidence submitted or details of any agreement reached at mediation.'³⁰ Confidentiality can, on this basis, allow mediation to be marketed as a process that can 'operate in an atmosphere of openness',³¹ giving the parties the confidence and security to disclose information in negotiations that they might otherwise not disclose, and allowing for honest communications without fear of later prejudicial effect.³² If confidentiality were not a key element of the mediation process, parties' legal representatives, for example,

²² Queensland Law Society, *Frequently Asked Questions About Mediation* <http://www.qls.com.au> at August 2005.

²³ LEADR, *Mediation: What Why When ...* <<http://www.leadr.com.au>> at August 2005. ACDC, *How Can I Use ADR? Helping You Decide* <http://www.acdcld.com.au> at August 2005.

²⁴ For a general discussion of confidentiality in mediation see H Astor and C Chinkin, *Dispute Resolution in Australia* (Butterworths, 2nd ed, 2002) 178- 186 and Boulle, above n5, Chapter 15.

²⁵ See P Salmon, 'Why Choose Mediation?' (1996) *New Zealand Law Journal* 7-8, 8; Boulle, above n5 (Butterworths, 1996) 16; V Vann, 'Confidentiality in Court-Sponsored Mediation: Disclose at Your Own Risk?' (1999) 10 *Australian Dispute Resolution Journal* 195-205, 195.

²⁶ R Charlton, *Dispute Resolution Guidebook* (Law Book Company Information Service, 2000) 15.

²⁷ B Codd, 'The Confidential Mediator', (2002) 21(3) *The Arbitrator and Mediator* 35, 39.

²⁸ R A Baruch Bush 'The Dilemmas of Mediation Practice: A Study of Ethical Dilemmas and Policy Implications' (1994) 1 *Journal of Dispute Resolution* 1, 14.

²⁹ Boulle, above n5, 452.

³⁰ L Boulle, 'Case Note', (1992) 3 *Australian Dispute Resolution Journal* 272, 272.

³¹ HA Finlay, 'Family Mediation and the Adversary Process' (1993) 7 *Australian Journal of Family Law* 63, 74.

³² Vann, above n25, 195; and Salmon, above n25, 8. See also V Goldbatt, 'Confidentiality in Mediation' (2000) *New Zealand Law Journal* 392, 392.

‘may properly feel compelled to advise their clients to be cautious rather than forthcoming about their underlying interests and positions.’³³

Confidentiality, in this way, can be said to create opportunities for the candid flow of information, and thereby facilitate the identification of the parties’ real positions, issues and interests.³⁴ With the parties engaging in a free ‘exchange of views about the dispute and the ways in which it might be able to be settled’,³⁵ mediators are also better able to assist them to a mutually agreeable resolution of the dispute.³⁶

A secondary understanding of confidentiality is as a value associated with mediator and party relationships and interaction within the process of mediation itself. That is, where parties meet privately with the mediator and divulge information that they do not wish to have communicated to the other party, they can feel confident that this commitment will be upheld.³⁷ This aspect of confidentiality is perhaps equally as important as the first concept discussed above, to party perceptions of, and trust in, mediation.

Confidentiality, with a strong grounding in theory and an overt presence in information provided to potential parties about the mediation process, can be seen, then, as a key marketing tool for mediation, particularly in terms of presenting the process as a safe and private alternative context for the resolution of disputes. This is critical to attracting parties from all dispute jurisdictions,³⁸ and especially parties who are involved in matters where sensitive personal or commercial information is at the centre of the dispute.³⁹ Confidentiality, therefore, legitimates mediation as an alternative to litigation in providing a process in which the parties’ dealings and revelations can occur in a ‘protected environment’ away from the view of the public.⁴⁰ This is different and special.

However, despite these assurances, and despite the persuasiveness of mediation theory, as the discussion below will evidence, different degrees of confidentiality apply to different situations, and assertions of confidentiality are not concrete or assured in all situations.⁴¹ This has implications for the ethical nature about the heavy reliance on the concept of confidentiality in mediation marketing material. The clearly questionable nature of confidentiality in mediation, discussed below, leads us then to consider why ethical considerations may be compromised in marketing mediation when it comes to the use of confidentiality as a promotional concept.

³³ M Shirley and W Harris, ‘Confidentiality in Court-Annexed Mediation – Fact or Fallacy?’ (1993) 13(6) *Queensland Lawyer* 221, 223.

³⁴ Crosbie, above n11, 53.

³⁵ Salmon, above n25, 8.

³⁶ Moore, above n4, 26. See also, Vann, above n25, 195; Salmon above n25, 8; Shirley and Harris above n33, 223.

³⁷ Boulle, above n30, 272.

³⁸ Crosbie, above n11, 52.

³⁹ See discussion in Astor and Chinkin, above n24, 178-179; and also Goldbatt, above n32, 392, and Codd, above n27, 39.

⁴⁰ Charlton, above n26, 14.

⁴¹ Boulle, above n5, 539-542.

III REALITY CHECKING CONFIDENTIALITY IN MEDIATION

Theory and aspirational notions alone are insufficient bases on which to ground marketing representations about confidentiality in mediation; and a reality check is necessary to ascertain whether what is said of confidentiality in mediation can be borne out by what participants in mediation are likely to experience. In fact, the discussion in this section demonstrates that the reality of mediation is that there are significant practical problems with the notion of confidentiality.⁴² These problems might be said to raise concerns that, essentially, the principle of confidentiality is little more than an ideal of practice that lacks any form of guarantee. Boule, for example, maintains that there are many situations in which confidentiality will not be upheld because of the wishes of the parties, the nature of what was disclosed, countervailing principles and policies, or the orders of a court.⁴³ 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.

A *Protecting Confidentiality in Mediation via Statute*

Some protection of confidentiality in mediation can be found by way of statute. This is the case in relation to many court-annexed mediations. For example, in mediations conducted under the *Supreme Court of Queensland Act, 1991* (Qld), mediators are prevented from disclosing (without consent) information coming to their knowledge during a mediation; although parties are not restricted in a similar way.⁴⁴ Also under that Act, 'evidence of anything done or said, or an admission made at an ADR process is admissible in another civil proceeding only if the parties agree.'⁴⁵ Section 36(2) of the *Dispute Resolution Centres Act, 1990* (Qld) makes similar provision for mediations conducted under the auspices of a Dispute Resolution Centre in Queensland, but this protection is subject to a number of qualifications in s.37.⁴⁶ The *Family Law Act, 1975* (Cth) also provides that evidence of anything said or any admission made in a mediation is not admissible in any court.⁴⁷

⁴² For a recent discussion of legal issues relating to confidentiality in mediation see K Downes and K Rohl 'Confidentiality in Mediation' (2005) 25(4) *Proctor* 41-43. Further, Davies and Clarke acknowledged some time ago that 'preserving the confidentiality of ADR processes is one of the most difficult legal issues facing the ADR movement today': I Davies and G Clarke 'ADR Procedures in the Family Court of Australia' (1991) *Queensland Law Society Journal* 391, 399.

⁴³ Boule, above n5, 539.

⁴⁴ See s.112 of the *Supreme Court of Queensland Act, 1991*. See also, Downes and Rohl, above n42, 42.

⁴⁵ S.114(1) of the *Supreme Court of Queensland Act, 1991*. See also, for example, *Victorian Supreme Court Rules*, Order 50.07 (6); and also, s.110P of the *Supreme Court Act, 1970* (NSW).

⁴⁶ Available at: <http://www.legislation.qld.gov.au/Legislation.htm> (accessed 19 August 2005)

⁴⁷ Section 19N: available at <http://scaleplus.law.gov.au> (accessed 19 August 2005). In *Centacare Central Queensland v G and K* (1998) FLC 92-821, the provision was upheld against an argument that it should be read subject to s.65E, namely that evidence of what was said in counselling or mediation should be given if it was established that it was in the best interests of the child. Astor and Chinkin, above n24 discuss the case at 183. See also, JP McCrory 'Confidentiality in Mediation of Matrimonial Disputes' (1988) 51 *Modern Law Review* 442 and Finlay, above n30 at 74-80.

There is also potential statutory protection of confidentiality to be found in the Commonwealth *Evidence Act*, 1995 which provides that evidence is not to be adduced of communications made or documents prepared in an attempt to negotiate a settlement of a dispute.⁴⁸ However, the Act provides that this privilege does not apply to communications or documents that are relevant to determining liability for costs;⁴⁹ and in *Silver Fox Co Pty Ltd v Lenard's Pty Ltd* this exception was upheld notwithstanding relatively comprehensive confidentiality clauses in an agreement to mediate between the parties.⁵⁰

Statutory protections of confidentiality are limited, and it must be remembered that, in any event, many (arguably even most) mediations in Australia are conducted outside the context of such protections. In situations not covered by statutory provision, two key alternative avenues exist in terms of protecting confidentiality in mediation: the first is by way of contract, and the second is through common law privilege. The discussion here of these two legal approaches to confidentiality leads us into an analysis of the efficacy of assertions of confidentiality in mediation marketing material in the next section of the paper.

B *Protecting Confidentiality in Mediation via Contract*

One of the most common legal mechanisms used to ensure confidentiality in mediation is that of a contractual provision that is part of an agreement to mediate made prior to entering into the process.⁵¹ However, protections of confidentiality through express contract, such as agreements to mediate, have yet to be fully considered by Australian courts.⁵²

The structure and terms of individual agreements to mediate can vary significantly, however most include a confidentiality clause stating something to the effect that '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'.⁵³ Many also include, for example, a clause stating that 'the parties and the mediator will not disclose to anyone not involved in the mediation any information or document given to them during the mediation unless required by law to make such a disclosure or except for the purpose of obtaining professional advice or where the person is within that party's household.'⁵⁴

Despite the potential for confidentiality agreements to protect disclosures made during mediation there are still a number of perceived limitations. Astor and Chinkin maintain

⁴⁸ *Evidence Act* 1995 (Cth) s 131(1).

⁴⁹ *Evidence Act* 1995 (Cth) s 131(1).

⁵⁰ [2004] FCA 1570.

⁵¹ The Queensland Law Society provides a model Mediation Agreement at <http://www.qls.com.au> (accessed 19 August 2005). See also, Salmon, above n25, 8; Charlton, above n26, 246; and R Charlton and M Dewdney, *The Mediator's Handbook: Skills and Strategies for Practitioners*, (LBC Information Service, 2nd ed, 2004) 344 where a model agreement to mediate is provided that contains a confidentiality clause as well as a model confidentiality agreement attachment for advisers and third parties at 338-344.

⁵² Boulle, above n5, 550-551.

⁵³ Council of the Law Institute 'Guidelines for Solicitors Acting as Mediators' (1990) 28(1) *Law Society Journal* 45, 47.

⁵⁴ Charlton and Dewdney, above n51, 340.

a cautious attitude that even where there is a contractual provision for confidentiality, the legal doctrines around the use of these clauses have not been fully tested by the courts and ‘all that seems certain is that confidentiality is complex and cannot be absolute’.⁵⁵

The 2004 case of *789Ten v Westpac Banking Corporation (789Ten)*⁵⁶ illustrates the efficacy of a cautious approach to reliance on confidentiality clauses in agreements to mediate. In *789Ten*, a dispute arose in relation to the potential use in subsequent litigation of information allegedly obtained by the three cross-defendants in the course of a failed attempt to resolve the matter through mediation.⁵⁷ Prior to entering into the mediation, all parties had signed an agreement to mediate, which included relatively extensive confidentiality and privilege clauses.⁵⁸ Clause 11 of the agreement made reference to keeping ‘confidential information’ confidential. Clause 12 of the agreement related to privilege and referred more broadly to, for example, statements and documents. The court interpreted the contract restrictively by first finding that the matter did not fall within cl 12 of the agreement, and then secondly drawing a clear distinction between the protection of ‘information’ and the protection of ‘statements or documents’ in terms of the reading of clause 11.

The end result was that the confidentiality agreement did not work to protect the confidentiality of documents in the mediation. *789Ten* establishes, then, that agreements to mediate cannot be assumed to prevent a later use of information disclosed in mediation, or a later requirement to disclose that information.

There has also been some judicial consideration in Australia of the ability for confidentiality agreements to bind third parties present at the mediation. This issue falls within one of the most fundamental rules of contract law, privity, which requires that only parties to the agreement are bound to comply with its terms. As a result, to ensure the enforceability of a mediation confidentiality agreement, it is considered essential that all parties present at the mediation sign the agreement including the mediator, the parties and their legal advisors and any other witnesses to the mediation proceedings.⁵⁹ Moreover, it has been suggested that good mediator practice should include the execution of a confidentiality agreement by all participants as a separate deed to the mediation agreement to ensure that all parties will be covered by its terms.⁶⁰ The reason for this was highlighted in the recent Queensland decision of *Williamson v Schmidt (Williamson)*.⁶¹

In *Williamson* a legal advisor who acted for one of the parties to a dispute previously settled by mediation, attempted to represent a new third party in a related legal action against the client previously represented at the mediation.⁶² It was argued by the original client that the solicitor should be restrained from acting in the new legal proceedings because the likely use of information gained at the mediation would be in

⁵⁵ Astor and Chinkin, above n24, 180.

⁵⁶ [2004] NSWSC.

⁵⁷ *789Ten V Westpac Banking Corporation* [2004] NSWSC [5].

⁵⁸ *789Ten V Westpac Banking Corporation* [2004] NSWSC [9].

⁵⁹ Codd, above n27, 43.

⁶⁰ Ibid.

⁶¹ [1998] 2 Qd R 317.

⁶² Vann, above n25, 196.

breach of the mediation confidentiality agreement which had been signed by the legal advisor.⁶³ In rejecting this argument, Lee J. considered that the proper construction of the agreement indicated that its terms were only binding on the individual parties to the mediation and not the legal advisor.⁶⁴ As a result, even though the legal advisor had signed the confidentiality agreement, it was only in his capacity as one of the parties' advisors and did not of itself make him bound by the terms of the parties' agreement.⁶⁵

Contractual protections of confidentiality can therefore be seen as somewhat limited, with the courts seeming to err on the side of facilitating the efficacy of litigated proceedings though limiting the scope of effect given to confidentiality clauses. Public policy considerations clearly do not support upholding an agreement that purports to withhold evidence from a court.⁶⁶ The prevailing uncertainty of the legal position in Australia regarding the status of confidentiality agreements, must necessarily compromise confidence in contractual measures to ensure confidentiality in mediation. And whilst it is thought that such agreements will provide better protection for parties to mediation than the protection offered by statute or common law privilege,⁶⁷ such agreements cannot be seen as providing a guarantee of confidentiality by any means.

C *Protecting Confidentiality in Mediation via Common Law Privilege*

In addition to contractual protections of confidentiality, the common law has also recognised to some extent the need to protect the confidentiality of mediation if parties are to be encouraged to attempt to settle their dispute before pursuing litigation.⁶⁸ The seminal statement of this principle was made by the High Court in *Field v Commissioner for Railways for New South Wales*⁶⁹ in relation to pre-trial negotiations, but the principle has been found to be compelling in terms of mediation also. For example, in *AWA Ltd v George Richard Daniels T/A Deloitte Haskins and Sell*, the mediation process was held to be 'somewhat analogous to "without prejudice" discussions between parties...in an attempt to settle litigation'⁷⁰ and consequently without prejudice privilege was said to apply to communications made during mediation.

Essentially the principle enables '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 into evidence subsequently might impose'.⁷¹ As a result, genuine negotiations between the parties with a view to settling the dispute are covered by without prejudice privilege.⁷² This privilege requires that if

⁶³ *Williamson v Schmidt* [1998] 2 Qd R 317, 325 (Lee J).

⁶⁴ *Ibid.*

⁶⁵ *Ibid.*

⁶⁶ H Astor and C Chinkin, *Dispute Resolution in Australia* (Butterworths 1992) 233. (note that this footnote to the old edition has been retained as there is no comparable sentence in the new edition)

⁶⁷ Downes and Rohl, above n42, 43.

⁶⁸ G Dann, 'Confidentiality After Unsuccessful Court-Ordered Mediation: Exemplary or Illusory' (1997) 3(3) *Commercial Dispute Resolution Journal* 212, 212.

⁶⁹ (1955) 99 CLR 285.

⁷⁰ *AWA Ltd v George Richard Daniels T/A Deloitte Haskins and Sell* (Unreported, SC(NSW), Rolfe J, No BC9201994, 18 March 1992).

⁷¹ *Field v Commissioner for Railways for New South Wales* (1955) 99 CLR 285, 291 (Dixon C.J, Webb, Kitto and Taylor JJ).

⁷² Crosbie, above n11, 53.

the negotiations fail, nothing said or obtained in the course of those discussions can be introduced as evidence in any subsequent court proceedings without the consent of both the parties.⁷³

Courts, however, face a difficult balancing act when deciding on the extent to which without prejudice privilege will protect confidentiality in mediation.⁷⁴ The principal tension exists between ‘the importance of confidentiality to the success of the ADR process, on the one hand, and the public interest in ensuring that the court has before it the best possible evidence to enable it to ascertain the truth on the other.’⁷⁵ This tension was expressed by Rolfe J in *AWA Ltd v Daniels* as being ‘if information gleaned at mediation can then be used parties will not agree to mediation for that reason. On the other hand ... if any information given at mediation could not be used as the basis for calling admissible evidence if mediation fails, there would be a sterilizing effect.’⁷⁶

These competing principles create a concern not to provide any blanket confidentiality protection in mediation because there is a concomitant inability to prevent the potential misuse of such protection by mala fides parties.⁷⁷ Boule, for example, argues that ‘there is strength in the pragmatic view that subsequent litigation should not be stifled by an over-rigid approach to mediation confidentiality.’⁷⁸ Consistent with the view of Rolfe J, Boule argues that absurd consequences could result if the courts were prevented from examining evidence about other matters simply because those facts had been disclosed in mediation as this would in effect ‘sterilise’ all manner of information from use in other judicial proceedings.⁷⁹

On the other hand, Crosbie maintains that insincere parties would be less inclined to treat mediation as a ‘fishing expedition’ where there is greater protection afforded to the confidentiality of the ADR process.⁸⁰ That is, by ensuring that all communications within the mediation cannot be introduced in later court proceedings, the ability for parties (who are intent on litigation) to make inappropriate or cynical use of the process can be reduced.⁸¹

Given the complexity surrounding the protection of confidentiality through notions of privilege in mediation, it is not surprising that the courts have been required to consider in detail the various competing principles. The current case law suggests that there are at least some circumstances in which the courts will not be prepared to uphold the ‘without prejudice’ protection afforded to mediation.

A significant judgment on this issue was written by Rogers CJ in the case of *AWA Ltd v George Richard Daniels T/A Deloitte Haskins and Sell*⁸² (AWA) in which it was

⁷³ *Field v Commissioner for Railways for New South Wales* (1955) 99 CLR 285, 291 (Dixon C.J., Webb, Kitto and Taylor JJ).

⁷⁴ Boule, above n30, 273.

⁷⁵ Crosbie, above n11, 52.

⁷⁶ Rolfe J in *AWA Ltd v Daniels*, above n70, 9-10.

⁷⁷ Shirley and Harris, above n33, 222.

⁷⁸ Boule, above n30, 274.

⁷⁹ *Ibid* 273.

⁸⁰ Crosbie, above n11, 53.

⁸¹ *Ibid*.

⁸² (1992) 7 ACSR 463.

necessary to determine the legal status of documents discovered in the course of a failed mediation. The case arose out of an initial action by the plaintiff against their former auditors for breach of a duty and the auditors cross claim against the directors of the plaintiff's company. After several days of trial, the dispute had been referred to mediation and discussions took place on the basis that all matters discussed would be covered by without prejudice privilege. As a result, in the course of the mediation, the defendant auditors had a previous belief confirmed as to the existence of a series of deeds which the plaintiff company had signed indemnifying the directors for any claims against them in negligence. The mediation failed to resolve the dispute and consequently upon the resumption of the original litigation, the defendant auditors attempted to introduce the deeds as evidence. The question before the court was whether or not the deeds discussed in the mediation could be excluded from evidence on the basis that they were covered by the without prejudice privilege attached to the mediation.

In deciding the case Rogers CJ stated that 'it is the essence of successful mediation that the parties should be able to reveal all matters without an apprehension that the disclosure may subsequently be used against them...otherwise, unscrupulous parties could use and abuse the mediation process by treating it as a gigantic, penalty free discovery process'.⁸³ However having acknowledged this, Rogers CJ went on to consider that there were two very strong arguments which lead to the conclusion that the deeds should be admitted.

The first of these was that as a matter of principle, it would be too easy to sterilise otherwise admissible evidence on the basis that it had been considered in the course of mediation, particularly if its consideration was irrelevant to the matters discussed.⁸⁴ The second argument concerned the practical reality that to uphold the absolute privilege of mediation would result in long and costly litigation in order to determine if the party seeking to introduce the evidence was aware of its existence prior to attending the mediation.⁸⁵ As a result, it was held that even though the mediation was conducted on the basis that all matters discussed were covered by without prejudice privilege, the deeds should still be introduced as the auditors had at least some idea of their existence prior to the mediation.

IV QUESTIONING THE ETHICS OF MARKETING MEDIATION USING CONFIDENTIALITY

The above discussion indicates that, whilst marketing information (with the backing of mediation theory) promotes mediation on the basis of confidentiality as a low risk venture with potentially high quality dispute resolution outcomes, the reality is that the efficacy of confidentiality as a foundational tenet of marketing practice can be brought very much into question, and is far from self-evident. Indeed, assurances of confidentiality might be considered in most circumstances to require significant qualification. This section of the article considers the qualified nature of the concept of confidentiality in mediation, in terms of an ethical approach to marketing the process.

⁸³ *AWA Ltd v George Richard Daniels T/A Deloitte Haskins and Sell* (1992) 7 ACSR 463, 468.

⁸⁴ *Ibid.*

⁸⁵ *Ibid.*

In the marketing discipline, there are some who think that ethics have become optional,⁸⁶ and that ‘much of advertising is concerned with making grandiose claims about the trivial.’⁸⁷ A commitment to ethical marketing can be found where there is a focus on ‘what is right or good’,⁸⁸ and where the marketing process avoids lying and cheating.⁸⁹ Ethics in marketing is about ‘what ought to be done’, not what is legally required.⁹⁰ ‘Ethics prompts you to do things even though you don’t have to.’⁹¹ In order to make decisions about what ‘ought to be done’ to be ethical about marketing mediation on the basis of confidentiality, those marketing the process, and the mediation profession, must have their focus firmly fixed on the fair treatment of mediation participants and on maintaining the legitimacy and credibility of mediation as a professional practice.

As Lovelock and Wirtz comment, ‘few aspects of marketing lend themselves so easily to misuse (and even abuse) as advertising, selling and sales promotion.’⁹² If consumers of mediation rely on marketing promises about the benefits of the process, and then become disappointed because their expectations are not met, and if they feel then that they have wasted time, money and effort, then the process of mediation itself and its future might well be jeopardized. For this reason ethical marketing of mediation is imperative. Consequently, where claims about the confidential nature of mediation do not materialise in practice, the process is potentially damaged through a loss of party faith.⁹³

To market mediation ethically requires that the information used in the marketing process is truthful and accurate.⁹⁴ This is because, as was indicated above, marketing information about mediation educates consumers and frames their understandings of the process.⁹⁵ It is therefore the basis on which decisions are made to buy into the process. In our view, in the case of mediation marketing, being truthful and accurate about confidentiality involves providing parties with full and detailed information about the qualified nature of the real operation of the concept.⁹⁶ Anything less fails to market mediation ethically and compromises the legitimacy of mediation.

⁸⁶ Gershon and Buerstatte above n 7, 292.

⁸⁷ C E Hackley, ‘The Meanings of Ethics in and of Advertising’ (1999) 8(1) *Business Ethics: A European Review* 37, 37.

⁸⁸ P H Cunningham ‘The Ethics of Advertising’ in John Phillip Jones (ed), *The Advertising Business* (Sage, 1999) 499, 500.

⁸⁹ J Seglin, ‘Good for Goodness Sake’ (2002) *CFO Magazine* (October) 76, 76.

⁹⁰ Cunningham, above n88, 500. See also for example, I Preston *The Tangled Web They Weave* (University of Wisconsin Press, 1994) who, at 128, asserts that ‘ethics begins only where the law ends.’ Preston also comments that the law ends too soon and is too blunt an instrument to deal with ethical issues: I Preston, *The Great American Blow-Up: Puffery in Advertising and Selling*, (University of Wisconsin Press, 1996).

⁹¹ Preston (1994) above n90.

⁹² Lovelock and Wirtz, above n8, 142.

⁹³ Goldbatt, above n32, 394.

⁹⁴ National Alternative Dispute Resolution Advisory Council, above n2, 110.

⁹⁵ Hackley, above n87, 38.

⁹⁶ See for example, FP Bishop, *The Ethics of Advertising* (Bedford Square, UK; Robert Hale, 1949); G G Brenkert, ‘Ethics in Advertising: The Good, the Bad and the Church’ 17 (Fall) *Journal of Public Policy and Marketing*, 325-331; B Leiser, ‘Beyond Fraud and Deception: The Moral Uses of Advertising’ in Thomas Donaldson and Patricia Werhane (eds), *Ethical Issues in Business* (1979) 59-66; R W Pollay, ‘The Distorted Mirror: Reflections on the Unintended Consequences of Advertising’ (1986) 50 (April) *Journal of Marketing* 18-36; P Santilli, ‘The Informative and

IAMA's 'Principles of Mediation' confirm the importance of honest and accurate information in the marketing of mediation. They state that 'a mediator shall be truthful in advertising and solicitation for mediation. Advertising or any other communication with the public concerning services offered or regarding the education, training, and expertise of the mediator shall be truthful.'⁹⁷ Also, the National Alternative Dispute Resolution Advisory Council's (NADRAC) framework of standards for alternative dispute resolution (ADR) practitioners provides that when an ADR practitioner is advertising their services, they must ensure that the information is accurate and that they do not make exaggerated claims about their materials.⁹⁸

Clearly, however, current marketing information about confidentiality does not provide the level of information required to satisfy what 'ought to be done' if the participants of mediation were indeed to be given truthful and accurate information. Why is this the case? Why is it, when we know that confidentiality is an extremely qualified concept, that this is not made more explicit to parties in mediation marketing processes?

Drumwright and Murphy, writing about approaches of advertising professionals to ethical issues, identify the concepts of 'moral muteness' and 'moral myopia' as ways of explaining a failure to do 'what ought to be done' in marketing contexts.⁹⁹

'Moral muteness'¹⁰⁰ involves failing to recognizably communicate moral concerns when necessary,¹⁰¹ which in the context of this analysis of mediation marketing can be seen as the silence in marketing processes about the complexity and qualified nature of confidentiality. Moral muteness can occur where the focus of marketing involves such a high level of promotion of the process that there is little room left for any acknowledgement of problems or difficult issues.

Therefore, even though mediators, and others who market mediation, may recognize and understand that confidentiality is not assured in mediation, they perhaps choose to remain silent because they are pursuing the perceived greater good of promoting mediation as a positive dispute resolution process. A marketing approach that reflects moral muteness on the issue of confidentiality might be seen as justified because the alternative, of ethically marketing mediation through providing accurate information

Persuasive Functions of Advertising: A Moral Appraisal' (1983) 2 (February) *Journal of Business Ethics* 27-33.

⁹⁷ Institute of Arbitrators and Mediators Australia, *Principles of Conduct for Mediators* (2003) [3] <http://www.iama.org.au/docs/medtrconduct.doc> at August 2005.

⁹⁸ National Alternative Dispute Resolution Advisory Council, above n2, 110. Further, for example, the Queensland Law Society and the Australian Law Council's standards of conduct for solicitors who act as mediators, provide that the mediator is obliged to define mediation in context so that the parties understand the differences between it and other forms of conflict resolution available to them: L Boule, 'Emerging Standards for Lawyer Mediators' (1993) 23(6) *Queensland Law Society Journal* 575, 575, and Law Council 'Guidelines for Solicitors Acting as Mediators' (1990) 28 (1) *Law Society Journal* 45.

⁹⁹ M E Drumwright and P E Murphy, 'How Advertising Practitioners View Ethics: Moral Muteness, Moral Myopia, and Moral Imagination' (2004) 33(2) *Journal of Advertising* 7, 11.

¹⁰⁰ Drumwright and Murphy, above n99, 11, drawing from the work of F B Bird and J A Waters, 'The Moral Muteness of Managers' (1989) 32 (Fall) *California Management Review* 73-88.

¹⁰¹ F B Bird, *The Muted Conscience: Moral Science and Practice of Business Ethics* (Quorum Books, rev ed) 27.

about confidentiality, could be considered ‘bad for business’.¹⁰² In addition, moral muteness might occur in this context because there is a perception that providing full and truthful information about confidentiality will open a Pandora’s Box of potentially harmful effects to perceptions of mediation.¹⁰³

‘Moral myopia’¹⁰⁴ on the other hand is a form of moral blindness that results in the prevention of ‘moral issues coming clearly into focus’.¹⁰⁵ In the context of mediation marketing, this involves marketers of mediation perhaps not wanting to see the true nature of confidentiality, and thus having their moral vision about what ‘ought to be’ said about confidentiality in mediation marketing information distorted. Moral myopia might also be said to arise where marketers are too close to that which they are marketing to be critically reflective and open to what ‘ought to be said’ in order for marketing information to be accurate and truthful, and therefore ethical. This is described by Drumwright and Murphy as ‘going native’.¹⁰⁶ Another incarnation of moral myopia involves opting to remain ignorant about what is truthful in order to avoid having to look into the true difficulties. Drumwright and Murphy name this ‘ostrich syndrome’.¹⁰⁷

There are therefore some possible explanations for why marketing information about confidentiality may fail to rise to the ethical standard of doing ‘what ought to be done’. There is little doubt, however, that significant and detailed information is required to satisfy an ethical marketing of mediation on the basis of confidentiality.

In summary, from a marketing ethics perspective it is perhaps less than desirable to use the concept of confidentiality as a key promotional aspect of mediation; certainly not without providing full information about the qualified nature of the concept in practice. Indeed, the accuracy and legitimacy of some of the assertions made about confidentiality in mediation can be brought into serious question.

We have focussed here on higher ethical consideration in mediation marketing; that is ‘what ought to be done’ in providing truthful and accurate information about mediation as a process and its ‘confidential’ nature. It is not unreasonable, however, that these issues draw us into a level of legal concern about the potentially misleading nature of promoting mediation using confidentiality. Unfortunately, however this issue is outside the scope of this particular article. Interestingly, despite the potential for liability in the context of misrepresentations about mediation, in Australia there are, on the basis of our research, no known cases in which a mediator has been successfully sued.¹⁰⁸ Boule

¹⁰² Drumwright and Murphy, above n99, 15.

¹⁰³ Ibid. Drumwright and Murphy state, the Pandora’s Box syndrome can ‘block reflection and critical thinking.’ Ibid.

¹⁰⁴ Ibid 11.

¹⁰⁵ Ibid.

¹⁰⁶ Ibid 13.

¹⁰⁷ Ibid.

¹⁰⁸ See on the point of mediator liability, for example, A Stickley, ‘Pinning Civil Liability Upon a Mediator: A Lost Cause of Action?’ (1998) 19(3) *Queensland Lawyer* 95-105, and A Lynch, ‘Can I Sue My Mediator? – Finding the Key to Mediator Liability’ (1995) 6 *Australian Dispute Resolution Journal* 113-126.

attributes this to both the existence of statutory immunity for some mediators and the fact that mediation also finds itself positioned away from public scrutiny.¹⁰⁹

V POSSIBLE CHANGES IN APPROACHES TO MARKETING PRACTICE IN MEDIATION

The importance of marketing mediation appropriately and ethically cannot be understated. What does this mean for the development of mediation marketing materials? How is it that moral myopia or moral muteness about ethical issues of confidentiality in mediation might be addressed? Some initial suggestions are made here.

First, the mediation profession must seek out a way to become uniformly committed to the principle of honestly and accurately representing what mediation can realistically offer parties; and the professional mediation environment must support mediation marketers who ensure that they honestly represent the process and discourage those who inaccurately represent the process. Mediation, in its pursuit of professional credibility needs professionals in its ranks who will say no when they see an unethical situation arising in relation to assertions about confidentiality; they will be professionals with moral courage.¹¹⁰

Second, mediation professionals need to be critical and reflective, not only in terms of how mediation is practised, but also in terms of how substantive theoretical issues sit within the practical reality of the mediation room. The mediation profession needs, as Drumwright and Murphy state it, professionals who are 'seeing, talking' professionals.¹¹¹ This article demonstrates the need for reflective approaches in the mediation profession about confidentiality. A reflective approach can be argued as necessary, however, in relation to many other aspects of mediation used also to promote and market the process; for example, consensuality issues in terms of mediated agreements and the neutrality of the mediator.

Third, a more significant dialogue must be created amongst and between practising mediation professionals, as well as with other mediation experts and stakeholders, such as academics and government agencies, about these issues. In this way, the reality of the mediation room will become more accurately reflected in mediation theory. In turn, this will impact on the accuracy and appropriateness of assertions made about mediation in marketing processes.

Fourth, to create the necessary professional environment and to foster and encourage appropriate practitioners, the profession as a whole must focus on education about difficult issues such as these. Mediator training is crucial to creating such practitioners, and mediation academics also can be seen as having a role in encouraging intellectual debate within the profession on these issues.

Fifth, there is a need to emphasise the community element of the mediation profession to better fit the importance of adhering to ethical considerations; that is, a moral

¹⁰⁹ Boulle, above n5, Chapter 14.

¹¹⁰ Drumwright and Murphy, above n99, 17.

¹¹¹ Ibid.

community in which ‘good habits are cultivated and nurtured’.¹¹² To achieve this there is a need for strong leadership within the Australian mediation profession. For example, just as executives in corporations influence the moral corporate cultural environment, mediation’s key practitioners and academics could also be seen as having a significant role in leading the moral environment of the mediation profession.¹¹³

Finally, there is a need for a paradigm shift in terms of how the issue of promoting mediation is perceived and conceptualized. That is, the profession needs to move from what might be considered a propagandistic approach to marketing, to an honest and accurate approach. This shift should naturally follow the developing confidence, credibility and legitimacy of mediation as a dispute resolution profession.

VI CONCLUSION

The focus of this article is on encouraging awareness and debate within the mediation profession about the importance of mediation marketing practice. A grounding hypothesis of the article has been that at its present stage of development in Australia, there continues to be a significant level of rhetoric associated with the promotion of mediation, and that this rhetoric requires exploration and reflection in terms of whether it can be said to compromise the ethical nature of the marketing of mediation, and consequently the process and the profession also.

As the number of mediation service providers grows and as clients are faced with a widening choice of options as to who they choose to facilitate the resolution of their dispute, the marketing of mediation will become more competitive, and the need to ensure that it is practised ethically will become an increasing imperative. In particular, the profession must avoid ‘unsupported claims that create unrealistic expectations’ about mediation.¹¹⁴ A failure adequately to address these issues will mean that parties to mediation, relying on mediation marketing claims, may potentially suffer damage that might be causatively linked to the marketing process.

Mediation is a valuable and legitimate professional practice in its own right. It offers multiple benefits to many parties in different dispute contexts. Marketing mediation accurately will not mean that these parties reject mediation. Rather, our view is that the honest marketing of mediation will more appropriately inform parties in choosing an appropriate process, and as a result the status and standing of mediation will be enhanced.

¹¹² Drumwright and Murphy, above n99, 18 referring to the Aristotelian concept of good community, Aristotle, *Nicomachean Ethics* (New York Macmillan, 1962).

¹¹³ R C Soloman, *Ethics and Excellence* (Oxford University Press, 1992).

¹¹⁴ Gershon and Buerstatte, above n7, 293.