

Confidentiality – a guide for mediators

1 How significant is mediation confidentiality in practice?

Perhaps the most frequently used word during mediation training (at least by CEDR) is “confidential”. Does it deserve such prominence? What different forms does confidentiality take? As part of the CEDR Foundation Innovation Lab project, a group of CEDR mediators has reviewed thinking about its importance, how confidentiality really works in practice and whether any change of approach is needed, with a view to informing and enhancing the practice of both ourselves and our mediator colleagues.

In essence, confidentiality is a concept which governs how a person handles another person’s private information or opinion which they have chosen to disclose. It may be how one party to a dispute or their lawyer handles what has been disclosed by another party. It may be how a neutral handles such information. There is a body of law which gives remedies for breach of confidence, but mediation is not (yet at least) a special case with its own defined set of privileges.

In our view, the paramount purpose of introducing confidentiality into mediation practice is in its creating and preserving a sense of security for the parties during settlement discussions, but in a way that eventually **encourages** mutual disclosure of private information and opinion in order to generate the possibility of settlement. When a mediator emphasises the confidentiality of the mediation process to all at a multi-party joint meeting during a mediation, this is to reassure them that no party will damage their “on-the-record” legal case by what they do or say during the mediation, nor will they seek the “oxygen of publicity”. The mediator wants parties to feel free to be creative, flexible and concessionary with minimal risk. To feel comfortable about behaving in these ways requires a solid sense of security in all participants about the private framework in which discussions occur.

The need for a sense of security is even greater for private unilateral mediator/party meetings. To expect parties to repose confidences in a mediator on such occasions demands a high level of trust from the party and a high level of trustworthiness on the part of the mediator. For a party to open up frankly to a relative stranger who then goes to have private and often unreported conversations with an opponent in litigation is asking a lot. Neutrality and reliability have to be constantly displayed by the mediator to win and retain such trust.

As noted above, the paradox is that settlement is only reached in mediation (and indeed in any settlement discussion) if one party **does** reveal their private views, whether it be a willingness to compromise or to acknowledge a level of risk about their asserted case. Disclosure of such willingness to move may be made first to the mediator, but eventually to the other party, usually in the form of a bid or offer. This is not so much disclosure of information but of a party’s private opinion or evaluation of their own case. We asked ourselves how often confidential **information** has actually been revealed to us in practice within our shared experience as mediators. Our tentative view is that this is relatively rarely done. Even a trusted mediator is never told everything about a party’s case or their willingness to move. This may partly be because there is very little factual information that can be kept private in the English civil justice system, with its “cards-on-the table” approach. Occasionally

we are told (usually in confidence) something pejorative about the other party. Very occasionally information has been given to us that suggests something illegal or potentially fraudulent or oppressive. We will discuss this later. But what is normally disclosed, normally only after some time and even then with reluctance, is one party's willingness to move their position towards the other party. What parties instinctively want to keep secret, perhaps even from a mediator early in the process, is any admission that their case is not perfect, or that there may be appreciable risks attached to achieving their best outcome to the dispute. But this is exactly what they have to do with the mediator – and to be encouraged to do by the mediator - if settlement is to be explored at all.

The way that parties begin to disclose any shift in position is when one party makes a settlement bid to the other (usually with little or no expectation that it will be acceptable until the negotiation dance has proceeded by several more steps). A bid sends a message which encapsulates the bidder's risk-discounted view of the case without having to make formal concessions as to fact or opinion, even off the record. A global offer may well be used to conceal the areas of the case in which the bidder has made provisional concessions. The mediator may have asked and may or may not have been told or permitted to convey how the bid was calculated. Now the recipient of the bid knows that concession has been made, by looking at the number and interpreting the signal contained within it. Conveyance of the bid has generated progress. The bid acts as an invitation to its recipient to bid back, thus signalling in turn any willingness to concede. So mediators use the confidentiality of private conversations with each party to stimulate willingness to send signals of a provisional willingness to find common ground by exchanging bids. Parties will only do so if they believe that such signals will be treated as provisional and non-binding by the other and cannot be used externally unless final agreement is reached.

2 The legal framework of mediation confidentiality

How has confidentiality been set up as an integral component of mediation? This has been done by mobilising four main concepts. The first arises automatically, and the others are created by being incorporated into a formal mediation agreement signed by the parties and the mediator. We look at each of these in turn, and then return to look at the practical implications for parties and mediators at mediations.

(1) Automatic “without prejudice” privilege for all settlement discussions

The law of England and Wales (and most common law jurisdictions but not all other jurisdictions, especially in European civil law) is to the effect that the content of **any** discussions which are held to explore settlement is **automatically** “without prejudice” to each party's “on the record” position. In other words, no offer of settlement or concession made in the course of settlement discussions can be reported to the judge in a later trial if the case goes that far. This prevents one party from asking a judge to take into account the other party's willingness to make an admission during such “off the record” conversations as evidence to support a finding against that party on the admitted issue. Courts are clear that parties must be able to make offers to one another which, if not accepted, remain private, and cannot weaken their “on the record” stance.

This rule applies not only to discussions but also to correspondence, which, if genuinely written to discuss or propose terms of settlement, will be kept from the judge's eyes at trial. But simply to put the label “without prejudice” on a discussion or document does not itself confer such protection on participants if that conversation or correspondence is not **in fact** directed towards possible settlement of a dispute. Conversely, it is not necessary actually to label a discussion or document as “without prejudice” to create protection, so long as the discussion is **in fact** about trying to settle a dispute.

“Without prejudice” is sometimes described as being a form of evidential privilege, meaning that such communications are “privileged” from being revealed to the court,

Yet “without prejudice” privilege is not absolute, and occasionally a judge will hear evidence of what took place on what might have been regarded as a protected occasion. The privilege belongs to the **parties**, so that if **all** the parties involved in settlement discussions or correspondence over a dispute agree to waive or forego that protection, the judge can be told what was said or offered. Note that the mediator has no say on this and has no standing to prevent this happening, as this privilege belongs to the parties alone.

An agreed waiver by all parties is not really an exception to the “without prejudice” rule, but a fresh agreement by the parties. The important question is in what circumstances **one** party can **unilaterally** put before a judge evidence of what the other party said in “without prejudice” discussion or correspondence when the other party objects. The following circumstances represent true exceptions to the rule, which, if established, would enable a judge urged by one party to admit evidence of otherwise privileged material (oral or written) against the wishes of the other party :

- (1) Where there is no actual dispute sufficient to allow the privilege to arise (occasionally arguable in workplace situations before any tribunal proceedings have been initiated)¹;
- (2) Where the other party behaves with what is called “unambiguous impropriety”, amounting to serious misbehaviour such as uttering threats of violence or amounting to blackmail, applying economic duress, or other conduct amounting to a demonstration of serious bad faith²: whether this would cover receipt of evidence as to whether a settlement has been induced by fraud or misrepresentation is not clear;
- (3) To ascertain whether or not a binding settlement has been reached³;
- (4) To cast light on the proper interpretation of the terms of a disputed settlement⁴;
- (5) Where what the other party said or did within the “without prejudice” discussion has been acted on to the significant detriment of the complainant, giving rise to an estoppel which in effect binds the parties⁵.

Besides cases where parties mutually agree to waive privilege, the circumstances in which evidence has been admitted on one party’s instance in relation to mediation confidentiality, despite opposition, mostly fall within (2) and (3) above. The question is whether the existence of such risks to “without prejudice” protection might require a mediator to qualify what is said about the security of information and opinion exchange at the opening joint meeting. However, there is little point in telling the parties that they can agree to waive privilege, especially if they are represented. The risk of a unilaterally induced disclosure is very slight and the danger of unsettling the parties at an early stage is very great. Coupled with the extra protection that may be afforded by contractual confidentiality as discussed below, we are not enthusiastic about saying anything which might de-stabilise the process at made of the existence of rare exceptions for accuracy’s sake.

(2) Contractual confidentiality

So we have seen that the automatic protection of “without prejudice” privilege is not absolute. Can parties and the mediator improve on that protection by specific agreement? It would seem that the

¹ See *BNP Paribas v Mezzotero*

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³ See *Brown v Rice & Patel*

⁴ See *Oceanbulk v TNT*

⁵ See

answer to this is yes, though the extension of protection has not yet been the subject of Court of Appeal or Supreme Court decision. Well-designed mediations have for many years been conducted on the basis of a written mediation agreement signed by the parties, the mediator and the mediation provider. These are drafted so as to give the participants as much protection as possible while engaged in the mediation. These often reaffirm “without prejudice” privilege, albeit unnecessarily in view of its automatic application. They additionally provide that all participants (including the mediator) agree to treat what occurs at and in relation to the mediation as confidential as regards the world at large. Various trial judges have decided that:

- Parties can be restrained by injunction from breaching such a confidentiality obligation;
- The mediator (and probably any mediation provider which signs the mediation agreement) can ask a court to restrain breaches of this obligation by a party, so unlike “without prejudice” privilege, the right to enforce a confidentiality obligation belongs to the mediator as well as the parties;
- Such an obligation will normally prevent a judge from hearing confidential material at any later trial of the same or even differently constituted litigation, although the “interests of justice” may override that protection: control over such disclosure lies not just with the parties but also with the mediator⁶.

The original purpose of importing contractual confidentiality into mediation of commercial cases was to prevent parties (and of course the mediator) from going to the Press about what happened and also to prevent misuse of commercially sensitive information. It is perhaps surprising to find that it might be used to override the normal rule that no relationship of confidence (such as doctor/patient, priest/penitent or journalist/source) can withstand judicial enquiry⁷. The courts are toying with the possible existence of a separate concept of mediation privilege, but no one has quite dared to assert its existence positively yet.

(3) Private meeting confidentiality

Mediators usually contract to treat information given to them by one party during private meetings at a mediation as confidential unless expressly authorised to the contrary by that party. This means that a mediator often knows more about what each party thinks about the strengths and weaknesses of their own case than those parties would ever want to communicate to each other. This is what enables mediators to assist parties in generating momentum and to make progress. During private meetings with each party, the mediator will identify the kind of confidential information that each party needs to hear from the other (normally a risk-discounted bid, but also a general willingness to compromise or a specific piece of information) and then encourage the exchange of messages and bids which reflect each party’s adjusted risk assessment. While it requires a very high level of integrity and skill in the mediator and a very high level of trust being reposed in the mediator by each party, this aspect of the mediation process is fundamental to the mediator’s role and to its success. The mediator who breaches such confidentiality is likely to forfeit party trust for the rest of that mediation and even for their future employability.

This obligation is unilaterally undertaken by the mediator with each party. The parties merely contract to general confidentiality as described in (2) above. Thus if a concession or offer is brought by the mediator from one private meeting to another party, it will be general contractual confidentiality and “without prejudice” privilege that inhibits later disclosure.

⁶ See *Cumbria Waste Management v Bains Wilson and Farm Assist v DEFRA (No.2)*.

⁷ See *Cumbria and Farm Assist (No.2)*

(4) The mediator as compellable witness

If a court decides to admit evidence of what happened at a mediation, there will be a strong temptation for one party to call the mediator to substantiate their case. Such a step will look superficially attractive to the trial judge. Who could be a better objective witness as to what happened and what was said than an avowed neutral participant? Yet that mediator was hired by **both** parties to deliver the mediation process in a neutral way, and will almost certainly have had private discussions with all parties in unilateral meetings in which the trust sought by and reposed in the mediator may well have been relied upon by each party to inform the mediator's thinking. If a mediator is compelled to give evidence of what transpired at a mediation, any party who made confidential disclosures to the mediator and who views disclosure of such evidence as against their interest is likely to feel that their trust in the mediator and in the mediation process has been betrayed.

To minimise this possibility, well-drawn mediation agreements provide that the parties agree not to call the mediator to give evidence about either the dispute or the mediation, and that the mediator will not agree to give evidence. But will the courts uphold such a contracting out from the possibility of giving best evidence relevant to a dispute?

Mediator compellability is the only aspect of mediation confidentiality that has found its way into the EU Mediation Directive (currently only applicable in the UK to mediations of cross-border disputes involving parties from EU States), and even then it has done so in a deficient way. The Directive provides that mediators shall not be called to give evidence in litigation or arbitration except where necessary for public policy reasons, instancing child protection and prevention of physical or psychological harm as possible grounds; or where disclosure is necessary in order to implement or enforce a mediated settlement. However, there is an overriding exception, which is when the parties agree that the mediator is to be called, apparently about any aspect of what happened at the mediation and not limited to the above exceptions. Stricter rules may be introduced by EU States, but the problem in England & Wales is that it is not clear whether our rules are stricter or not, as there is a dearth of senior court authority on this topic.

We have seen above that well-drawn mediation agreements require parties to abjure any right to call a mediator as a witness in later litigation. In *Farm Assist v DEFRA (No.2)*, the judge found that a clause which inhibited parties from calling the mediator to give evidence about the dispute did not prevent the mediator from being required to give evidence about the mediation. Mediation agreements are now usually drawn to cover both possibilities now. The judge was also prepared to order the mediator to give evidence as to whether a Government department had extracted settlement from a commercial company at a mediation through "economic duress". At an earlier stage, both parties had agreed that the mediator could be called, and the judge was prepared to find that "the interests of justice" justified overruling the mediator's right to preserve confidentiality as to the mediation. The case was discontinued before trial, so the mediator was never called, nor has any mediator ever given evidence in an English court to date. But the decision in principle has caused considerable concern to mediators. The "interests of justice" test used by the judge seems to have been satisfied by looking at these through the prism of the parties' private rights. This approach contrasts sharply with the higher standard introduced by the EU Directive with its "public policy" test. So matters remain confused on this rather vital matter.

To provide in a mediation agreement that all parties agree not to call the mediator to give evidence in later litigation, even where they (but not the mediator) consent to do so, appears to deprive the parties of a right to bring best evidence of what happened at the mediation. But it is actually a security measure which protects them from the possibility that their cause might later be damaged by adverse evidence from the mediator as to how they behaved or what they said. It also protects mediators from having their role compromised, to their own detriment, and frees them to work without fear of being called later to explain what has been going on. A mediator, called by one party (not usually both) to buttress someone's case before a judge who will inevitably find for one party against another will find it very hard to retain the appearance of neutrality in the witness box to both parties.

(5) Discussions non-binding unless a written settlement agreement is signed

Finally, mediation agreements almost always provide that nothing will bind any party to a mediation either in settling the whole dispute between the parties or even in part unless such agreed matters are put into writing and signed by the parties. This avoids the fear of any unintended consequence or unwitting agreement arising at the mediation. Again, this is done to maximise the sense of security for parties that they will know for sure whether or not the process has produced any consensus. What little judicial authority on this point seems to support the enforceability of such a contractual term⁸

3 Solving the practical problems of mediation confidentiality

We look now at a number of practical areas where confidentiality issues have arisen in relation to mediations, and offer some thoughts as to how to deal with them.

(1) Confidentiality as to the fact of the mediation taking place and settlement

Being able to assert or admit that a mediation is taking place at all inevitably admits the existence of a dispute, whether or not proceedings are afoot. This can be a matter of great commercial or personal sensitivity, and it must be a matter for all parties to a dispute decide unanimously on the advice of each legal team, with confidentiality being the default position. The mediator and any provider must comply with such an expression of party wishes, however tempting to be able to tell others, before or after the event, that the mediator or provider is or was involved in a high profile mediation. However, parties may well want to tell the court that there is to be a mediation when negotiating directions. If one party wants a mediation and the other does not, no privilege necessarily attaches to such discussions. A provider enlisted to make a mediation happen should not give evidence of one party's reluctance to a court or third party: such material should come from the other party if it exists.

Well-drawn mediation agreements make provision for the fact of the mediation either to be concealed or not. The CEDR Model Agreement default position is that the fact of the mediation (past or future) is **not** confidential, though the fact and terms of settlement **are** confidential. Each case needs consideration as to which approach is preferred, so that the mediation agreement is framed accordingly.

It may be necessary to invite the parties to decide when an unsettled mediation has finished, so as to know whether the mutual confidentiality obligations have ended. Of course any subsequent offer will be automatically "without prejudice" even if the mediation is at an end. There are now provisions introduced by the EU Mediation Directive (again limited to cross-border mediations) which define the

⁸ See *Brown v Rice & Patel*

end of a mediation in the absence of agreement for the purposes of when the suspension of any limitation period expiring during the mediation will end – not something that is likely to trouble mediators and parties very often.

(2) Evidence at trial of offers and conduct on the application of one party

The combination of “without prejudice” privilege and contractual confidentiality will normally prevent evidence of admissions, offers, opinions on evidence given by a party during a mediation being heard by a court trying a later case. But this remains uncertain, as it happened where a judge has chosen to treat the mediation as merely a “without prejudice” meeting, and felt free to hear evidence admitted as an exception to that rule, where there was a doubt about whether an offer had remained open for acceptance after the mediation, acceptance of which would have led to a binding deal⁹, or where the terms of the deal were not clear¹⁰. Such circumstances are perhaps less undermining to the confidential basis of the process, so long as the judge pays due attention to the normal contractual requirement of a written signed settlement for it to be binding. Absence of a signed written agreement (where the mediation agreement required it) ought to be conclusive. The lesson for mediators is **always** to record even a partial agreement or the period open for acceptance of a continued time-limited offer in writing signed by or on behalf of the parties.

This may not protect parties from telling a court what a **mediator** said without clearance or permission from the mediator¹¹, unless the judge is assiduous enough to decline to hear such evidence.

The way a party behaved (reasonably or not) is also excluded from disclosure to a later trial. It should not be possible for a party, against the wishes of the other(s), to assert that they made a reasonable offer and the other unreasonably refused to accept it. The only cases where this has happened to date in England have been where **both** parties waived privilege as to their negotiation positions. In each case, the judge found that one party was reasonable and the other not, and penalised them accordingly, casting serious doubt of the wisdom of waiving privilege in such circumstances. Mediators might helpfully warn parties of this risk if the topic of later waiver arises!¹²

(3) Evidence of misconduct normally likely to vitiate a settlement agreement

This is a tricky area, though very fortunately arising only rarely in practice. The kind of problems that could theoretically arise are:

- Where one party asserts to the other a material fact on which the other relies which later turns out to be an innocent, negligent or fraudulent misrepresentation, and the other party wishes to seek a remedy;
- Where one party exercises economic duress on another party or generates an unconscionable bargain which induces an unwilling settlement that the other party wishes to set aside;
- Where a material fact which alters the basis on which the other party contemplates settlement is concealed;
- Where a transaction might be tainted with illegality, or represent infringement of money-laundering or proceeds of crime legislation.

Parties must decide for themselves (with advice) what is appropriate behaviour for them. Especially in a process in which good faith is somehow expected of people, it would be foolish indeed for a party to try to make a deal based on misrepresentation or non-disclosure. This mirrors the cards-on-the-table litigation system. A party who misrepresented or concealed a material fact would get no

⁹ See *Brown v Rice and Patel*

¹⁰ See *Oceanbulk v TNT Shipping*

¹¹ As happened in *SITA v Wyatt and Maxwell Batley*

¹² See *Chantry Vellacott v Convergence Group and Malmesbury v Strutt and Parker*

sympathy from a court at a later hearing. The only question is whether evidence of the misrepresentation would be admissible if it was made within the confidential arena of a mediation. Good practice suggests that any deal dependent on the truth of certain material facts should recite these facts on the face of the settlement agreement, as there is no doubt that a written settlement which emerges from “without prejudice” discussions is admissible in evidence¹³.

(4) *Private meeting exchanges between mediator and party*

The worrying aspect about private meetings might be whether a party might ever choose to disclose to a third party or the judge what they or the mediator said to each other in the course of a private meeting. But first we should look at how mediators should try to exercise the responsibility they undertake under the mediation agreement to keep the content of such meetings confidential except where authorised to disclose such content. Herein lies the greatest challenge for any mediator, as we know that our job is to encourage and facilitate communication, yet we have signed up to cede control over disclosure to the parties. A mediator should never deliberately convey to one party a signal of a probable willingness in the other party to contemplate change in position without previously having got authority to do so. CEDR training encourages learner mediators to reinforce confidentiality at the beginning of early private meetings with each party, and also whenever a party shows hesitancy about disclosing something potentially useful, as a way of reassuring them of the safety of the process and encouraging them to open up. Experienced mediators, especially when working with parties and advisers experienced in mediation, will be less mechanistic about such things. But reinforcement of the framework at a level which suits the needs of each party with whom we work is essential, recognising that those needs may be very different in each room, one perhaps containing a “one-off” disputant, and the other a seasoned “repeat” litigator. Such a sense of safety is vital to make later disclosure possible.

Mediators undoubtedly influence parties in the way they manage the process, through what they suggest needs to be said or done next, and even in the way they make such suggestions. The strict test should be for a mediator to behave in any private meeting as if the other party were notionally present and available to express a view as to whether their message or case was conveyed accurately by the mediator, and in doing so behaved in a neutral way. This is a demanding standard, but it is one to which mediators should aspire. If a mediator seems to adopt a collusive approach with one party, perhaps thinking that this is required to establish or preserve rapport, that party may take superficial comfort until they begin to doubt whether the mediator can be trusted not to do the same with the other party. Mediators must also anticipate that a party will over-interpret signals given or remarks made when made soon after the mediator has been working in the other room. Use of hypothetical questions at that stage can suggest that what is being asked in theory is actually what the other party actually thinks but has not permitted the mediator to convey. If we make a mistake in handling something confidentially, we must be brave enough to admit it and take responsibility for the adverse reaction of parties.

Turning to another issue relating to private meeting confidentiality, what should a mediator do who becomes aware in a private meeting of a party’s intention to misrepresent a material fact? What if a party confidentially utters a threat amounting to blackmail or intended violence to another party? What if a party discloses a material fact to a mediator, such as having contracted a terminal illness which would materially affect the valuation of the claim if known by the other party?

Of course the mediator should seek to dissuade that party from doing so. If the party wants an illegal threat conveyed, the mediator can challenge the wisdom of doing so, pointing to the “unambiguous

¹³ See *Tomlin v Standard Telephones and Cables*

impropriety” exception to confidentiality, which can even apply where a party threatens insolvency if settlement is not accepted. If the party makes the threat to the mediator alone and is apparently serious (again extremely rare), the mediator must challenge it in private. Ultimately this might justify the mediator’s withdrawal, as it would be wholly inappropriate for a mediator to be in any sense party to a defective deal. If a threat is not acted upon, the mediator may feel able to continue. Well-drawn mediation agreements will exonerate a mediator even from confidentiality obligations where threats to life or limb are made or where illegality is proposed, whether unilaterally or by both parties.

Might one party try at a later trial to find out what was said privately by another party to a mediator? The inquiring party will not know the answer to the question but might embark on an evidential fishing expedition during cross-examination. The mediator will not be at the trial, so it can only be left to the judge to be assiduous enough to challenge such a line of questioning.

(5) The possibility of having to give evidence at a later trial

We have seen above that there is a risk that parties might try to call a mediator and that a judge would permit it. One of our group suggested that if the parties have paid the mediator, and agree to call him (it would have to be by mutual agreement between the parties for this to happen, and it would be surprising if wise parties thought it was a good idea) they should be able to do so. The rest of us felt that the structure had to protect parties from any deficiency in their wisdom over this point, for the good of the process as a whole. There cannot be any doubt that private meeting confidentiality is of enormous benefit in helping parties to reconsider their positions and decide how and when to signal willingness to settle. If the benefits if this were seen to be undermined by the risk of disclosure at a later trial, especially through the evidence of someone who represented that what they were told by each party would be kept secret, parties would revert to positional bargaining and never emerge from it for fear of having any admission of weakness disclosed.

In practical terms, mediators should, we believe, resist any attempt to call them to act as a tie-breaker at a trial where the parties have been foolish enough to allow the judge to hear about what happened during that mediation. It was after all an exploratory settlement event in which the parties engaged expressly on the basis that they would not seek to gain partisan benefit by disclosing what happened in later litigation, especially having consciously forfeited by contract any right to call the mediator who engaged with them on the basis that all mediator/party private conversations would remain private.

It seems from the judge’s approach in *Farm Assist* that destruction of the mediator’s notes (a wise move as soon as it is safe to do so), lapse of time and recollection since the mediation, and the amount of intervening professional and mediation work done since by the mediator will not of themselves save a mediator from being cross-examined by counsel trying to coax recollections about what occurred. We hope that a determined inability to recall what happened will not visit a form of legal martyrdom on any mediator colleague, but our group have expressed willingness to contemplate the consequences of being held in contempt of court process for declining to disclose what happened at a mediation, whether or not the judge regards disclosure as “in the interests of justice”.

It should be added that mediator may theoretically be compellable to disclose material information by other statutory authorities besides the judiciary. These include HM Revenue, liquidators and the Security Services. CEDR is aware that requests of this kind have been made occasionally but are not aware of any successful compulsion which has produced disclosure. We suggest that discarding notes as soon as they are of no immediate use in following up after a mediation is a sensible practice.

(6) *Can a party or mediator who breaks a confidentiality obligation can be sued for damages or any other remedy*

There is no doubt that one party can restrain disclosure of confidential mediation material by injunction, though obviously they have to know that this is threatened in order to be able to try to do so. Mediators and mediation providers have no current track record of intervening to protect the process from such disclosures on the basis that they have an enforceable right to do so. This might conceivably arise. Nor are we aware of any attempt made to claim damages for breach of confidentiality provision. A mediator who breaks private meeting or general mediation confidentiality is theoretically liable to be sued for breach of contract, but damage will be hard to prove. Equally, their mediation career may come to a swift end.

4 Our conclusions as to the significance of mediation confidentiality

We are convinced that confidentiality remains a cornerstone of mediation practice and needs to be observed, protected and delivered carefully so as to help parties open up to each other and to the mediator and indeed to enhance the possibility of settlement without in either case harming their case if settlement does not emerge and adjudication is later required by judge or arbitrator.

Of course we should recognise that private meeting confidentiality is a feature of what the United States would call the “caucus” model of mediation, namely one where the mediator often meets with each party privately during the process. There is a mediation model which is conducted throughout in joint meeting, so that the process would simply be protected by general confidentiality. We as a group consciously choose to deploy private meetings as a very useful tool, and thus accept the obligation to observe the disciplines of private meeting confidentiality, not to make life easy for ourselves (hardly likely with such responsibilities for confidentiality) but for the benefit of the parties. We are thus perpetuating the paradox that the security which confidentiality generates is used to encourage greater openness and more disclosure by parties at the right stage and when they are ready.

The other, perhaps greater, paradox relating to mediation is that its reputation as a highly effective dispute resolution mechanism has perforce been concealed by the need to be confidential over its successes, even when it has achieved mutually acceptable outcomes in many very high profile disputes. Occasionally parties will allow some profile of the process or the fact that mediation has led to settlement will be mentioned, but it is frustrating that the principle at the core of mediation’s success is the very thing that inhibits publicity of that success. Sensible mediators need to become adjusted to the fact that the exercise of their craft is not going to lead to fame for themselves or rapid enhancement of the profile and reputation of the mediation process generally.