

MEDIATION

Ethics Confidentiality & Privilege

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Presenter

- Dominique Hogan-Doran is a barrister and accredited commercial mediator based in Sydney. She is a first class honours graduate of Sydney and Oxford universities and has been a member of the NSW Bar since 1995.
- Dominique's practice areas include complex commercial disputes, corporations matters, financial & prudential regulatory investigations & enforcement, professional negligence & discipline, property (including strata and IP) disputes, wills & estates litigation, and statutory commissions of inquiry in particular ICAC.

OVERVIEW: ROLE OF LEGAL REPRESENTATIVE

- Assist clients **understand** mediation process
- Give practical and legal **advice** to navigate
- Effective **advocacy** in settlement negotiations
- Assist **drafting** terms of settlement
- Be ever **mindful** of relevant statute, legal duties and ethical concepts involved

THE ROAD TO MEDIATION

- Dispute resolution clause
- Parties elect to mediate
- Court referred mediation

DISPUTE RESOLUTION CLAUSES

- Ensure any dispute resolution agreement is sufficiently certain
- Unenforceable where merely be 'an agreement to agree'

DISPUTE RESOLUTION CLAUSES

WTE Co-generation and Visy Energy Pty Limited v RCR Energy Pty Limited & Anor [2013] VSC 314

- Clause: *in event parties have not resolved the dispute, then a senior executive representing each of the parties must meet to attempt to resolve the dispute or to agree on methods of doing so.*
- Held (Vickery J): unenforceable - no process prescribed to determine which option was to be pursued.
- Clause must set out the process or model to be employed in a manner which does not leave this to further agreement.

COURT REFERRAL

- **Civil Procedure Act 2005 (NSW)** - section 26
- **Federal Court of Australia Act 1976 (Cth)** – s 53A (arbitration, mediation and alternative dispute resolution processes)
- **Farm Debt Mediation Act 1994 (NSW)**

MEDIATION AGREEMENT

- Define ambit of dispute & its parties
- Exclusions and limitations
- Confidentiality & role of third parties
- Mediation fees apportionment and responsibility
- Limitations on liability of mediator

ETHICAL DUTIES IN MEDIATION

NSW Professional Conduct and Practice Rules 2013 (Solicitors' Rules)

*3 Paramount duty to the court and the
administration of justice*

*3.1 A solicitor's duty to the court and the
administration of justice is paramount and prevails to
the extent of inconsistency with any other duty.*

ETHICS IN MEDIATION

ETHICAL DUTIES IN MEDIATION

Hopeshore Pty Ltd v Melroad Equipment Pty Ltd [2004] FCA 1445

- Failed to proceed with mediation as ordered by court
- Held: Legal representative's conduct was inconsistent with duty to assist court in management of proceedings

ETHICAL DUTIES IN MEDIATION

NSW Professional Conduct and Practice Rules 2013 (Solicitors' Rules)

4 Other fundamental ethical duties

4.1 A lawyer must also:

*4.1.1 Act in the **best interests of a client** in any matter in which the solicitor represents the client;*

*4.1.2 be **honest** and courteous in **all dealings** in the course of legal practice;*

(cont'd)

4.1.3 *deliver legal services **competently, diligently** and as **promptly** as reasonably possible;*

4.1.4 ***avoid any compromise to their integrity and professional independence; and***

4.1.5 ***comply with these Rules and law.***

ETHICAL DUTIES IN MEDIATION

Studer v Boettcher [2000] NSWCA 263

- At mediation Studer agreed to pay Koenig \$100,000
- Studer later regretted decision sued solicitor
- NSWCA: satisfied solicitor acted with due care & skill
- Solicitor had placed considerable pressure on Studer but it found that did so in the best interests of client
- Fitzgerald JA: *solicitor must not coerce a client into settlement*

ETHICAL DUTIES IN MEDIATION

Cassar v Pendergast & Anor [2010] VSC 559

- Similar allegations made about a solicitor as in *Studer v Boettcher*
- Case demonstrates importance of detailed contemporaneous file notes
- May be proof that client made decision freely

ETHICAL DUTIES OF LEGAL REPRESENTATIVES IN MEDIATION

NSW Professional Conduct and Practice Rules 2013 (Solicitors' Rules)

5 Dishonest and disreputable conduct

*5.1 A solicitor **must not** engage in conduct, in the course of practice or otherwise, which **demonstrates** that the solicitor is **not** a fit and proper person to practice law, or which is **likely** to a **material** degree to:*

*5.1.1 be **prejudicial** to, or **diminish** the public confidence in, the **administration** of justice, or*

*5.1.2 **bring the profession into disrepute.***

ETHICAL DUTIES IN MEDIATION

- Be aware of distinction between misrepresentation and mere 'puffing'
- Making false statements may be unethical
- An omission can be rendered misleading

ETHICAL DUTIES OF LEGAL REPRESENTATIVES IN MEDIATION

- **Legal Services Commissioner v Mullins [2006] LPT 012**
- Barrister did not reveal important development re client's health & life expectancy in mediation
- Insurer later learned of health issue and sued to recover sum it had paid out.
- Barrister charged before Legal Practice Tribunal with professional misconduct

- The conduct rules relevant to Mullins imposed a duty to correct false statements in relation to a matter that is being litigated
- But the rules did not suggest the same expectation was cast on a lawyer negotiating a commercial transaction other than a settlement

- Not a case of mere silence or non-disclosure
- Failure to correct statements that were known to be incorrect
- Issue could have been avoided if Mullins had withdrawn the medical reports containing the incorrect information regarding life expectancy

ETHICAL DUTIES IN MEDIATION

Misleading or deceptive conduct

- Section 18 of Australian Consumer Law applies during mediation
- Misleading or deceptive conduct provisions cannot be excluded by mediation agreement
- A statement made without reasonable grounds about a future matter is misleading
- Avoid using language which is definitive where there is a risk of being misleading

ETHICAL DUTIES IN MEDIATION

Legal Practitioners Complaints Committee v Fleming [2006] WASAT 352

- Solicitor found to have engaged in dishonest and unfair conduct
- Negotiations concerning a covenant not to challenge a will
- Solicitor gave impression that will was enforceable
- The will was an informal will

ETHICAL DUTIES IN MEDIATION

Quad Consulting Pty Ltd v David R Bleakley & Associates (1990) 98 ALR 659

- Applicant claimed respondent engaged in misleading or deceptive conduct in WP negotiations
- Applicant wished to adduce notes from meeting as evidence
- Respondent applied to have subpoena set aside
- Hill J: the section relating to misleading or deceptive conduct was not to be *“rendered nugatory by permitting a party to hide behind the fact that his or her conduct occurred during the course of without prejudice negotiations”*

ETHICAL DUTIES IN MEDIATION

- **Law Council of Australia's Guidelines for Lawyers in Mediation**
- Requires lawyers and clients to **act in good faith**
 - “honest and genuine approach to the task .. Carries with it an honest and genuine commitment to the bargain .. And to the process of negotiation for the designated purpose” *United Group Rail Services v Rail Corporation* [2009] NSWCA 177 per Allsop P

CONFIDENTIALITY

CONFIDENTIALITY IN MEDIATION

- Confidentiality may be useful tool:
 - Reduces anxiety
 - Builds trust
 - Allows open and honest flow of information
 - Reduces likelihood of ‘fishing expeditions’
- Does not stop people indirectly using information from mediation in litigation strategy

CONFIDENTIALITY

Sources of confidentiality

- Statute
- Common Law/equity
- Contract

CONFIDENTIALITY

Levels of confidentiality

- Privacy of mediation process – general public excluded
- Non-disclosure by mediator of one party's information to other involved parties
- Non-disclosure to third parties to mediation
- Inadmissibility of information from mediation in court proceedings

CONFIDENTIALITY: STATUTE

- Civil Procedure Act 2005 (NSW)
- Federal Court of Australia Act 1976 (Cth)
- Evidence Act 1995 (NSW)

Other:

- Retail Leases Act 1994 (NSW)
- Farm Debt Mediation Act 1994 (NSW)

CONFIDENTIALITY: RELEVANT STATUTE

Retail Leases Act 1994 (NSW)

Section 69 - Any statement or admission made in the course of the mediation of a retail tenancy dispute or other dispute or matter referred to in section 65 (1) (a1) pursuant to arrangements made by the Registrar under this Part is not admissible at a hearing of a claim under Division 3 or in any other legal proceeding.

Farm Debt Mediation Act 1994 (NSW)

Section 15 - Confidentiality of mediation sessions

(1) Evidence of anything said or admitted during a mediation session and a document prepared for the purposes of, in the course of or pursuant to, a mediation session are not admissible in any proceedings in a court or before a person or body authorised to hear and receive evidence.

CONFIDENTIALITY: EQUITY

- Obligation of confidence in equity
- Three elements:
 - Information must have necessary quality of confidence
 - Information must be imparted in circumstances importing an obligation of confidence
 - For breach, must be unauthorised use or threatened use of the information

CONFIDENTIALITY: COMMON LAW

- WP Rule is not absolute
- Does not protect all communications
- Evidence of offers or admissions made during honest attempts to reach settlements is inadmissible in proceedings relating to same matter
- Applies to mediating parties
- Attaches to written and oral statements

- *Without Prejudice Privilege may not extend to:*
- Statements made in circumstances that are not party of settlement negotiations
- Statements made in connection with misleading, deceptive or tortious conduct
- Where it is relevant to prove that settlement was reached in mediation
- Where court would be misled without admission of evidence
- Where a party takes action against his/her legal representative in relation to their conduct during mediation

CONFIDENTIALITY: CONTRACT

789Ten v Westpac [2004] NSWSC 594

- Court considered meaning and implications of confidentiality and privilege term
- Favoured restrictive interpretation
- Distinction between statements and documents generated during mediation and the information contained within them
- Court held privilege did not apply to the latter

AWA v Daniels (1992) 7 ACSR 463

- Proceedings against auditors for alleged failure to audit correctly
- Mediation was ordered but unsuccessful
- AWA disclosed existence of document providing for full indemnity for directors involved
- During subsequent litigation, other party wished to obtain copy of indemnity document
- AWA argued without prejudice doctrine protected document

- Rolfe J held indemnity deed could be adduced
- *They seek to prove, by admissible evidence, a fact to which reference was made at mediation not by reference to the statement but to the factual material which sourced the statement. A finding to the contrary would mean that irrespective of relevance to issues the statement at mediation made the factual material upon which it was based immune from subsequent consideration by the Court.*
- Rogers CJ reached similar conclusion
- Document could have been discovered because auditors knew about it before proceedings

Pihiga Pty Ltd v Roche [2011] FCA 240

- Lander J rejected application by respondent for injunction to prevent evidence of mediation communications and documents being admitted
- Relief granted upon without prejudice privilege and the mediation agreement
- Lander J found that the CL without prejudice rule does not prevent evidence being adduced where the applicant claims that a concluded compromise agreement was reached but that they were misled

- Where without prejudice privilege is lost because of CL exceptions, it cannot be maintained under the mediation agreement
- Party is not allowed to avoid the consequences of the Competition and Consumer Act 2010 by attempting to rely upon an exclusionary provision in contract.

Evidence Act 1995 (NSW)

Section 131 Exclusion of evidence of settlement negotiations

- (1) Evidence is not to be adduced of:
 - (a) a communication that is made between persons in dispute, or between one or more persons in dispute and a third party in connection with an attempt to negotiate a settlement of the dispute, or
 - (b) a document that has been prepared in connection with an attempt to negotiate a settlement of a dispute.

Silver Fox Company Pty Ltd v Lenard's Pty Ltd [2004] FCA 1570

- s 131 designed to ensure the course of negotiations are not adduced into evidence for the purpose of influencing the outcome of primary matters in issue.
- Court admitted evidence of mediation agreement which contained several confidentiality clauses.
- Held to fall within exception to inadmissibility in s 131(2)(h).
- Exception applies to situations where documents are used to determine liability for costs.

Azzi v Volvo Car Australia Pty Ltd (2007) 71 NSWLR 140

- Court noted that “while the *Evidence Act* contains a general provision excluding evidence of settlement negotiations, with an exception to that general exclusion where the negotiations are relevant to costs, the *Civil Procedure Act*, s 30(4), is a more specific provision directed specifically to negotiations in a mediation session, excluding evidence of such negotiations, without any corresponding exception. When it applies, the later and more specific provision prevails over the more general one.”

Pinot Nominees Pty Ltd v Commissioner of Taxation [2009] FCA 1508

- Interaction between admissibility provisions
- Question as to admissibility of offers of compromise exchanged during court referred mediation
- One party wished to admit evidence of exchange in relation to costs
- Court held s 53B prevented admission of the evidence because mediation was court referred under s 53A Federal Court Act.
- Court held that party could rely on offer of compromise made in a without prejudice letter sent to the other party after mediation

CONFIDENTIALITY: SAMPLE CONTRACT

- Common for mediator and parties to sign mediation agreement
- Usually include term to prevent disclosure of information and documents to third parties
- Drafted broadly to protect information
- Parties may agree on matters to which confidentiality does not apply

Phillip Street Mediation – Precedent Agreement

Confidentiality of the Mediation

28. The participants will not disclose to anyone not involved in the Mediation any information or document given to them for the purposes of the Mediation or during the Mediation unless the Parties have agreed to disclosure to that person and that person has signed a confidentiality agreement in the form attached to this agreement.

29. The participants agree that subject to Clauses 38 to 41, the following will be privileged and will not be disclosed in, or be the subject of a subpoena to give evidence or to produce documents, in any arbitral, administrative or judicial proceedings in respect of the Dispute:

- a. any settlement proposal whether made by a party or the Mediator;*
- b. the willingness of a party to consider any such proposal;*

c. any statement, admission or concession made by a party

d. any statement or document made by the Mediator;

e. any information prepared for the Mediation.

30. Each party shall ensure that any person who attends the Mediation on their behalf (other than a party or legal representative signing this agreement) signs a confidentiality agreement in the form attached to this agreement.

Settlement of the Dispute

38. If agreement is reached at the Mediation, the terms of the agreement must be written down and signed by the Parties before they leave the Mediation.

39. Unless the Parties otherwise agree in writing the resolution of the Dispute is not binding until a settlement agreement has been signed by the Parties or their legal representatives.

Enforcement of the Settlement Agreement

40. Any party will be at liberty:

- a. to enforce the terms of a settlement agreement; and***
- b. in any enforcement proceedings to adduce evidence of the settlement agreement including evidence from any other person engaged in the Mediation.***

41. The Mediator is not required and will not be subpoenaed to give evidence in any proceedings, including proceedings to enforce a settlement.

Each of the undersigned undertakes to the Parties and the Mediator:

*a. to keep confidential to themselves and any persons to whom by reason of the terms of their employment or any contract of insurance they may properly communicate it, all information disclosed during the Mediation including the preliminary steps (**confidential information**);*

b. not to act contrary to the undertaking in sub-paragraph (a) unless compelled by law to do so or with the consent of the Party who disclosed the confidential information;

c. not to use confidential information for a purpose other than the Mediation.

Each of the undersigned undertakes to the Parties and to the Mediator that the following will be privileged and will not be disclosed in or relied upon or be the subject of any subpoena to give evidence or to produce documents in any arbitral or judicial proceedings between the Parties to the Mediation:

- a. any settlement proposal whether made by a party or the Mediator;*
- b. the willingness of a party to consider any such proposal;*
- c. any statement, admission or concession made by a party*
- d. any statement or document made by the Mediator;*
- e. any information prepared for the Mediation.*

Farm Assist Limited (In Liq.) v Secretary of State for the Environment Food & Rural Affairs [2009] EWHC 1102

- Mediator attempted to avoid giving evidence on basis of the terms of the mediation agreement.
- Court will “*generally uphold confidentiality but where it is in the interests of justice for evidence to be given of confidential matters, the Courts will order that evidence to be given or produced*”.
- Parties may waive without prejudice privilege

DON'T FORGET THE MEDIATOR

ETHICAL DUTIES OF MEDIATORS

- Be aware of mediators duties
- No Australian legislation specifically regulating the duties and liabilities of mediators
- Law Council of Australia - Ethical Guidelines for Mediators (see over)

S 53B FCAA - Admissions made to mediators

Evidence of anything said, or of any admission made, at a conference conducted by a mediator in the course of mediating anything referred under section 53A is not admissible:

- (a) in any court (whether exercising federal jurisdiction or not); or
- (b) in any proceedings before a person authorised by a law of the Commonwealth or of a State or Territory, or by the consent of the parties, to hear evidence

Mediator's Ethical Duties

- Promote uncoerced agreement by the parties through communication and understanding
- Avoid partiality or prejudice
- Disclose actual and potential conflicts of interest
- Do not mediate unless mediator has necessary competence
- Maintain confidentiality

Mediator's Ethical Duties

- Terminate mediation if party is abusing the process or no reasonable prospect of success
- Encourage parties to continue mediation until enforceability issues are addressed and recorded terms of settlements in writing
- Do not engage in misleading or deceptive publicity
- Do not make false or misleading statements
- Disclose fees to the parties

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