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The Dilemma of Balancing the Administration of Justice and the Preservation of Confidentiality in the Mediation Process

Mrinal Vijay*

INTRODUCTION

The courts and the American Arbitration Association (AAA) refer to mediation as a procedure in which communications between the disputants is facilitated by a neutral third party (mediator) to reach a mutually acceptable settlement to the dispute in question.¹ Mediation is gaining momentum as an alternative method to litigation in resolving commercial disputes.² Stamato submits that it has become the most accelerated form of alternative dispute resolution (ADR),³ since litigants are currently concerned with settling disputes without a trial; court claims belong to the last resort.⁴ Private negotiation and settlement of potentially litigated disputes are unequivocally favoured by public policy.⁵ Thus, ADR methods like arbitration and mediation are becoming popular and are

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¹ American Arbitration Association, 'A Guide to Mediation and Arbitration for Business People' (2000)

<<http://www.adr.org>> accessed 3 April 2015; see also, E Stong, 'The Uniform Mediation Act: An Opportunity to Enhance Confidentiality in Business Mediation' (2002) *ADR Currents* 5.

² BE Meyerson, 'Mediation And Arbitration Converge In New California Supreme Court Decision' (2007) *Arizona ADR Forum* 6.

³ L Stamato, 'Dispute Resolution and the Glass Ceiling: Ending Sexual Discrimination at the Top' (2000) 55 (1) *Dispute Resolution Journal* 24.

⁴ AKC Koo, 'Confidentiality of Mediation Communications' (2011) 30 (2) *Civil Justice Quarterly* 193.

⁵ MA Weston, 'Confidentiality's Constitutionality: The Incursion On Judicial Powers To Regulate Party Conduct In Court-Connected Mediation' (2003) 8 (29) *Harvard Negotiation Law Review* 44.

being incorporated into the conventional judicial litigation process.⁶

Regardless of the increasing acceptability of private settlement, it is essentially vital that the disputants who have submitted their arguments in court abide by the judicial procedural standards.⁷ Cornes submits that mediation is not simply 'assisted without prejudice negotiations'; privilege and confidentiality are the key elements of a successful mediation, and the principal reasons for opting for mediation.⁸ This is especially true in commercial mediation because the disputants expect their personal and commercial confidences to remain strictly confidential. Peterson suggests that without mediation's confidential guarantee, no sensible disputants or mediators would make admissions or provide evidence that could be adversarial for them in future litigation (should mediation fail)⁹ and numerous advantages for mediation, which are measured in cost, time, relationship, reputation etc., would prove futile.¹⁰ Mediation is encouraged as a privileged and private process, and confidentiality has been illustrated as a central feature of that process, in comparison with open and accessible tribunal or court proceedings (operating on the public record).¹¹

However, given the globally varied approach towards the issue of confidentiality, arguably mediation confidentiality does not grant complete immunity from disclosure in legal proceedings.¹² In fact, as Koo argues, the 'legal protection for confidentiality in mediation is far from absolute'.¹³ This essay examines the extent to which the law requires the maintenance of confidential relationships in private interests. Particularly, the author explores the balance between preserving confidences and the administration of justice in the public interest, which demands disclosure of all significant information

⁶ KVW Stone, *Private Justice: The Law of Alternative Dispute Resolution* (1st edn Foundation Press 2000) 799.

⁷ SR Cole, 'Managerial Litigants? The Overlooked Problem of Party Autonomy in Dispute Resolution' (2000) 51 *Law Journal* 1199, 1202.

⁸ D Cornes, 'Mediation Privilege and the EU Mediation Directive: An Opportunity?' (2008) 74 *Arbitration* 395.

⁹ M Zamboni, 'Confidentiality in Mediation' (2003) 6(5) *International Arbitration Law Review* 176.

¹⁰ ALH Peterson, 'When Mediation Confidentiality and Substantive Law Clash: An Inquiry into the Impact of *In Re Marriage of Kieturakis* on California's Confidentiality Law' (2007) 8(1) *Pepperdine Dispute Resolution Law Journal* 199.

¹¹ D Spencer, *Essential Dispute Resolution* (2nd edn Cavendish, Australia 2005) 65.

¹² *Paragon Finance Plc (formerly National Home Loans Corp Plc) v Freshfields* [1999] 1 *WLR* 1183 CA at 1188.

¹³ Koo (n 4) 192-203.

required for the unprejudiced disposal of litigation.¹⁴ In doing so, the essay will begin by examining the mediation agreement, then move on to considering the varied approaches towards mediation adopted primarily in the United Kingdom (UK), United States (US), and finally end by exploring a balanced approach between the competing policies of confidentiality and the demands of justice.

I. THE MEDIATION AGREEMENT

An ideal mediation agreement encompasses a non-disclosure duty of all the information produced or transpired in connection with the mediation between the disputants and the mediator.¹⁵ The Chartered Institute of Arbitrators provides that the agreement may also require that in any following litigation, arbitration, or adjudication arising out of the dispute, the disputants will abstain from calling the mediator as a witness,¹⁶ unless the law requires the evidence or there is a serious risk to the life or safety of any person.¹⁷ With respect to confidentiality, Article 9 of the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Conciliation states: 'Unless otherwise agreed by the parties, all information relating to the conciliation proceedings shall be kept confidential, except where disclosure is required under the law or for the purpose of implementation or enforcement of a settlement agreement'.¹⁸

It can be rationalised that the purpose in maintaining confidentiality in mediation is: (1) to promote trust and a guileless proceeding (sometimes underlying interests can be extremely personal and the parties may be hesitant to disclose them); (2) to deter the detrimental effect on the mediator's approach of

¹⁴ *Three Rivers DC v Bank of England (No.4)* [2004] UKHL 48; [2005] 1 AC 610 [28].

¹⁵ Article 12.1-12.2, Practice Guideline 4, Chartered Institute of Arbitrators, 'Mediation Rules' <<https://www.ciarb.org/docs/default-source/practice-guidelines-protocols-and-rules/4-guidelines-on-mediation-rules.pdf?sfvrsn=2>> accessed 9 March 2016.

¹⁶ *ibid* Article 14.1.

¹⁷ Paragraph 9, Practice Guideline 1, Chartered Institute of Arbitrators, 'Mediation Rules' <<https://www.ciarb.org/docs/default-source/practice-guidelines-protocols-and-rules/1-guidelines-on-confidentiality-in-mediation.pdf?sfvrsn=2>> accessed 9 March 2016.

¹⁸ UNCITRAL, 'UNCITRAL Model Law on International Commercial Conciliation with Guide to Enactment and Use' (2002) <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2002Model_conciliation.html> accessed 23 April 2014; see also, Article 8 and Article 10 of UNCITRAL Model Law on International Commercial Conciliation (2002).

a neutral facilitator (compelling a mediator to testify or give evidence will compromise his/her neutral role); (3) to avoid publicity (disputants may avoid publicity to preserve business secrets, sensitivity of the dispute, etc.); and (4) avoid disputants limiting their disclosures, admissions and evidence if it might be used against them in subsequent litigation.¹⁹ Lide suggests that if mediation confidentiality is maintained, it is the most befitting ADR method to resolve commercial disputes, intellectual property and information technology matters.²⁰ However, Bondy argues that the accountability of public bodies is compromised and the scrutiny of outcomes is limited due to confidentiality of mediated settlements.²¹ What confidentiality actually means is often a 'grey area'.²² Symptomatically, in the UK, regardless of whether there is a confidentiality mediation clause, what transpires during mediation can be later admitted as evidence in litigation.²³ Thus, despite the contractual duty of non-disclosure, admissions are not privileged simply because they are made in confidence.²⁴ Australian Courts have not comprehensively considered the confidentiality clauses, but policy facilitates their enforcement.²⁵

Meyerson submits that confidentiality in mediation is ensured by virtue of an agreement that can be enforced through common law, equity, or legislation.²⁶ It is a frequent practice for disputants to sign a mediation agreement with the mediator (e.g. confidentiality provisions is normally found in Australian mediation agreements).²⁷ Confidentiality in mediation is usually contractual and the confidential obligations may be a term of a 'quasi contract, an express term of a written agreement, or an implied duty'.²⁸ Phipps and Toulson suggest that

¹⁹ *Nick v Morgan's Foods Inc.*, 270 F.3d 590, 2001 U.S. App. 23895.

²⁰ EC Lide, 'The Role of Alternative Dispute Resolution in Online Commerce, Intellectual Property and Defamation' [1996] 12 Ohio State Journal on Dispute Resolution 193.

²¹ V Bondy, 'Mediation and Judicial Review- Mind the Research Gap' (2005) Judicial Review 220.

²² A Poole, 'Mediation Case Law: Current Issues' (2008) Scots Law Times (News) 155.

²³ *ibid.*

²⁴ *Santa Fe International Corp v Napier Shipping* [1985] SLT 430, para 13.57 Evidence.

²⁵ *Abriel v Australian Guarantee Corp* [2000] FCA 1198; see also, *789Ten v Westpac Banking Corp* (2004) NSWSC 594; and L Boule, *Mediation: Principles, Process, Practice* (3rd edn, Butterworths UK 2005) 690.

²⁶ Meyerson (n 2) 6.

²⁷ *ibid.*

²⁸ *Farm Assist Ltd (In Liquidation) v Secretary of State for Environment, Food and Rural Affairs (No.2)* [2009] EWHC 1102 (TCC); see also, AA Nolan and M O'Brien, 'Confidentiality In Mediations- A Work In Progress' (4 May 2010) delivered to the Victorian Bar CPD

the disputant-mediator relationship gives rise to the confidentiality duties.²⁹ Law of equity may protect any confidentiality,³⁰ and it is irrelevant whether the duty is a contractually implied term or an equitable duty. Many jurisdictions have adopted legislative provisions to address mediation confidentiality.³¹ The major legislative protection of confidentiality in mediation is given effect through admissibility of evidence provisions.

II. THE "WITHOUT PREJUDICE" RULE

With respect to the probable existence of and desirability for a distinct privilege attaching to mediation, Brown and Marriott submit that 'it remains to be settled conclusively by the courts, if not by the legislation, as to if there is a mediation privilege, including all transpiring communications, whether the mediation concerns civil, commercial, family matters, etc.'³² Phipps and Toulson notes that confidentiality is not a barricade to disclosure of information or evidence in litigation, but the court will only force such disclosure if it is essential for the fair disposal of the case.³³ Nonetheless, the "without prejudice" rule is an exception to the above principle. The "without prejudice" rule's purpose is to exclude all negotiations (oral or written) that are aimed at settlement from being produced as evidence in court (per Lord Griffiths).³⁴ In the UK and Australia written and oral statements made on a "without prejudice" basis whilst mediating towards a settlement of a dispute are inadmissible in a following litigation pertaining to the same issue.³⁵

The "without prejudice" rule is based on a dual rationale as identified by

Program <www.barristers.com.au/secure/downloadfile.asp?fileid=1002479> accessed 13 May 2015.

²⁹ C Phipps and R Toulson, *Confidentiality* (2nd edn, Sweet & Maxwell 2006) para17-001, 293.

³⁰ *Corrs Paveys v Customs (Vic)* (1987) FCR 442 per Gummow J at 442-443; see also, *Australian Football League Ltd v The Age Company Ltd* (2006) 15 VR 419; and *Control Australia v Emtech & Associates* (1980) FLR 184.

³¹ See Section 24A of the Supreme Court Act 1986 of the State of Victoria (Australia).

³² H Brown and A Marriott, *ADR Principles and Practice* (2nd edn, Sweet & Maxwell: London 1999) para 22-079.

³³ Phipps and Toulson (n 29) para 17-001; see also, *British Steel Corporation v Granada Television Ltd* [1981] AC 1096.

³⁴ *Rush & Tompkins Ltd v Greater London Council* [1989] AC 1280 HL at 1300.

³⁵ Boule (n 25) 690.

Oliver LJ in *Cutts v Head*³⁶: public policy of encouraging disputants to negotiate and settle out of court;³⁷ and on the basis of an implied or express agreement between the disputants that their communications made in the course of settlement negotiations should be inadmissible in evidence if litigation arises.³⁸ This allows the disputants to agree impliedly or expressly to adjust the effect of “without prejudice” privilege, either by limiting or expanding its reach (per Robert Walker LJ).³⁹ If there is anything that the parties want to disclose or make public, then it is necessary they include that in the settlement agreement itself. Because while the process is protected, the settlement that arises from it is not. A disclosure to mediator privilege information is not seen as waiving a right to privilege. Also, in an Australian judgement, Young J in *Lukies v Ripley [No. 2]*⁴⁰ held ‘mediation is somewhat analogous to “without prejudice” discussions... [e]xpress or implied admissions made in the course of mediation cannot be disclosed.’⁴¹

Zuckerman submits that policy considerations encourage settlement negotiations and once the disputants have consented to mediate on a “without prejudice” basis, ‘elementary justice expects the law to sustain the agreement that their communications should be privileged and inadmissible.’⁴² Boule classifies five main exceptions to the non-admissibility principles: (1) parties consenting to disclosure; (2) admissibility of mediated agreements; (3) allegations of illegality (4) mediators reporting obligations; and (5) procedural hearings and costs orders.⁴³ Additionally, exceptions suggested by Robert Walker LJ⁴⁴ have been classed in three categories: (1) to support agreements between the parties;⁴⁵ (2) permitting judicial control over the fairness of

settlement agreements;⁴⁶ and (3) distinct privilege analogous to the “without prejudice” rule.⁴⁷

In *Earl of Malmesbury v Strutt & Parker*,⁴⁸ following a mutually decided waiver of privilege by the disputants, the court examined the “without prejudice” evidence and held that a party behaving unreasonably in mediation would be equivalent to a party evading to mediate, thereby risking a cost sanction. Although, it is doubtful that courts will hear evidence as to a party behaving unreasonably, as it will be privileged (except if the privilege has been waived).⁴⁹ Cornes submits that the courts are normally supportive of the privilege in mediation, but the actuality is that attitude is essentially that of looking at “without prejudice” with reference to the common law rules created concerning “without prejudice” negotiations simpliciter.⁵⁰

In relation to witnesses, experts and other interested third parties who may be part of the mediation but not party to the mediating agreement or indeed its requisite confidentiality, it may be necessary for the mediator to ensure that the commitment to confidentiality is ensured by asking them to sign the confidentiality undertaking prior to participating in the process.

Furthermore, Koo submits that legal professional privilege is a prominent safeguard against obligatory disclosures,⁵¹ and offers a complete protection level (per Lord Bingham CJ) unless the disputants waive their privilege (impliedly or expressly).⁵² Legal professional privilege is resolutely recognised in English law as a fundamental human right,⁵³ and it covers document and other communications that arise from legal proceedings or giving or getting advice, so that the parties and mediators can communicate openly and confidently without the fear of enforced disclosure confidential communications. For a document to qualify for the privilege, the dominant purpose of the communication must have

³⁶ *Cutts v Head* [1984] Ch. 290 CA 306.

³⁷ *Rush* (n 34) 1300.

³⁸ *Muller v Linsley & Mortimer* [1996] 1 PNLR 74 CA; see also, *Prudential Assurance Co Ltd v Prudential Insurance Co of America (No.2)* [2003] EWCA Civ 1154.

³⁹ *Unilever plc v The Procter & Gamble Co* [2001] 1 All ER 783; *Reed Executive v Reed Business Formation Ltd* [2004] EWCA (Civ) 887.

⁴⁰ *Lukies v Ripley [No. 2]* (1994) 35 NSWLR 283.

⁴¹ *Daniels v AWA Ltd* (1995) 13 ACLC 614 (CA).

⁴² A Zuckerman, *Zuckerman on Civil Procedure: Principles of Practice* (2nd edn, Sweet & Maxwell: London 2006) para 16.5.

⁴³ Boule (n 25) 563; see also, *Tracy v Bijfield (SCWA) BC9801948*; *Halsey v Milton Keynes General NHS Trust: Steel, Joy & Halliday* [2004] EWCA Civ 576; *Reed* (n 39); *Rajski v Tectran Corp Pty Ltd* [2003] NSWSC 476.

⁴⁴ *Unilever* (n 39).

⁴⁵ *Brown v Rice* [2007] EWHC 625 (Ch); [2008] FSR 3; see also, *Reed* (n 39).

⁴⁶ *Ruttle Plant Hire Ltd v Secretary of State for the Environment, Food and Rural Affairs* [2007] EWHC 2870 (TCC); [2008] 2 All ER (Comm) 264; see also, *Farm Assist* (n 28); *Savings & Investment Bank Ltd (In Liquidation) v Fincken* [2004] 1 All ER 1125; and *Venture Investment Placement Ltd v Hall* [2005] EWHC 1227 (Ch).

⁴⁷ *Rush* (n 34) 1300; and *Muller* (n 38).

⁴⁸ *Earl of Malmesbury v Strutt & Parker* [2008] EWHC 424 QB.

⁴⁹ Cornes (n 8) 402.

⁵⁰ *ibid.*

⁵¹ Koo (n 4) 200.

⁵² *Paragon* (n 12) 1188.

⁵³ The Law Society, 'England and Wales: The Jurisdiction of Choice'

<http://www.lawsociety.org.uk/documents/downloads/jurisdiction_of_choice_brochure.pdf> accessed 2 May 2015.

been to acquire legal advice. But then again, it is for the court to decide whether the main purpose of the communication was legal advice.⁵⁴ It is submitted that there are exceptions to all privileges, and if any illegality is involved then the mediator can disclose the information.⁵⁵ Also, the statutory exclusion to the “without prejudice” privilege can be some apparent public interest; while the privilege is normally absolute, it can be overridden by statute or waived by the disputants: ‘no balancing exercise... has to executed’ (per Lord Scott).⁵⁶

On the other hand, the question of enforcement of a settlement agreement by the court is factual and requires examination of the negotiation process. Contract law is interpreted based on the parties' intentions, and the courts deduce an explicit contract without looking to external contractual evidence.⁵⁷

The courts and the policy-makers have struggled with the tension between the need to develop the facts as to what transpired at the mediation in order to be in a position to analyse claims made under contract law, and the need to preserve the confidentiality of the mediation proceedings. Concern centres on both an identification of the circumstances and the nature of the evidence that should be allowed as to the mediation proceedings, and on the permissible scope of testimony by the mediator.⁵⁸

The permissible scope of testimony by the mediator in preserving mediation confidentiality has been a grave concern. Ideally, a mediator has a duty to protect confidential information and may not be duty-bound to testify in court. Notwithstanding, the position in relation to mediators is inconsistent. Mediators are often compelled to testify in courts. Even if a rule required that a mediator not give evidence in the court, the rule will plausibly fall away. Firstly, the Model Standards of Conduct for Mediators⁵⁹ does not generally prevent

mediators from testifying under legal compulsion, and secondly, a requirement or a subpoena by a judge will trump any rule of any organisation and any voluntary codes of conduct which mediators might sign.

III. COMPARATIVE APPROACHES: US, UK AND AUSTRALIA

Worldwide there is great divergence in the standard of confidentiality to which mediators are held. For example, in Australian courts, mediators have been subpoenaed to testify in courts. In Sweden, Belgium and Italy, lawyers who acted as mediators can invoke confidentiality provisions.⁶⁰ In Germany, an agreement between the parties not to call the mediators as witness will be upheld in the civil courts and also in arbitration.⁶¹ This section will compare the approaches towards confidential mediation privilege in the US and the UK, with some consideration as to the Australian context.

In the United States, many decisions based on government laws and statutes tend to reflect the evolving approach of the judiciary in introducing the “no exceptions” practice on the issue of confidentiality in mediation.⁶² More than a decade ago, in *Rinaker*,⁶³ the courts had to consider whether the significance of the mediator's testimony would compensate the interests and principles that would be damaged if the mediators were duty-bound to testify. The court reasoned that the open court testimony was correct as ‘mediating parties had waived the protection of confidentiality and certainly have requested the court to compel the mediator to testify... If one mediating party were objecting to mediator's testimony, we would be faced with a considerably more complex analysis’.⁶⁴ In this case, the California Court of Appeal said that mediation confidentiality was subordinate to the constitutional right. They waived the right to confidentiality with respect to public policy.

⁵⁴ *Greenough v Gaskell* All ER 767 para 1824-1834.

⁵⁵ *Paragon* (n 12) 1188; *R v Cox and Railton* [1884] 14 QBD 153.

⁵⁶ *Three Rivers* (n 14) para 25.

⁵⁷ E Sussman, 'A brief survey of US case law on enforcing mediation settlement agreements over objections to the existence or validity of such agreements and implications for mediation confidentiality and mediator testimony' (2006) Mediation Committee Newsletter 32, 32.

⁵⁸ *ibid* 35.

⁵⁹ Standard V of the Model Standards of Conduct for Mediators, American Bar Association, American Arbitration Association and Association for Conflict Resolution, 'Model Standards of Conduct for Mediators' (2005)

<<http://www.mediate.com/pdf/ModelStandardsOfConductforMediatorsfinal05.pdf>> accessed 23 April 2015.

⁶⁰ Boule (n 25) 690.

⁶¹ *ibid*.

⁶² M Zamboni, 'Confidentiality in Mediation' (2003) 6 (5) International Arbitration Law Review 175.

⁶³ *Rinaker v Superior Court* 62 Cal.App.4th 155, 74 Cal.Rptr.2d 464 (3d Dist. 1998).

⁶⁴ *ibid*; PR Fisher, 'Changes In Mediation Confidentially' (2001) <http://www.fishermediation.com/library_changes.php> accessed 5 April 2015.

In *Olam v Congress Mortgage Co.*,⁶⁵ the district court relied on its judicial powers to articulate its need to determine whether a statutory mediation privilege should yield to an obligatory need for evidence.⁶⁶ The court contemplated that Section 1119 of California Evidence Code was not absolute, indicating to *Rinaker's* observation of the need for protecting confidentiality to give way to important public-policy issues.⁶⁷ Statutory confidentiality was found to be subject to a judicial balancing of the contesting public policy discussion for confidentiality and the court's necessity to ascertain facts to rule on the dispute.⁶⁸ It was noted that refusing to admit the mediator's testimony could deprive the litigation of evidence required to analyse the claimant's competency contentions.⁶⁹ In this case mediation privilege was subordinate to the administration of justice, thus there was no difficulty in waiving mediation confidentiality as public policy trumped.

Hollenbeck submits that the court applied 'a tortured interpretation' of Section 703.5 California Evidence Code to hold that it could override a mediator's legislatively defined inabilities as a witness.⁷⁰ Section 703.5 California Evidence Code provides that: 'No mediator shall be competent to testify in any subsequent civil proceeding as to any statement, conduct [or] decision occurring at or in conjunction with the proceeding [over which the mediator presided]'. The courts construed that the section obligated an independent duty on the courts to establish whether a mediator's testimony may be rationalised by defending or advancing a conflicting interest of comparable magnitude.⁷¹ In *Olam* it was held that 'in assessing the interests that would be damaged if the mediator were forced to testify or give evidence against the interests that would be threatened if the testimony/evidence were not accessible, the mediator was compelled to testify under the seal by the federal court, analysed the sealed testimony and allowed its disclosure by determining that it was justified by an

prevailing fairness interest.⁷² However, Hollenbeck argues that this 'conclusion was incorrect since courts frequently decide the claim of a likewise situated disputant negotiating a contract without the help of a mediator'.⁷³ Disputants who desire to enforce the settlement without the help of the mediator's testimony are no worse off than if they settled by themselves. Furthermore, Uniform Mediation Act and the Ninth Circuit precedent signify that the required accessibility of evidence/communication does not overrule the confidentiality policy considerations, thus the court should not have compelled the mediator to testify.⁷⁴

On the contrary, in *Foxgate*,⁷⁵ the courts held that there were "no exceptions" to mediation confidentiality (under Section 1119 and 1121 California Evidence Code) where the disputants had urged a public-policy exception.⁷⁶ It was construed that mediation must promote the administration of justice, with concern for maintain the virtue of the trials of those disputes which do not settle, and with further concern for the rights of concerned third parties in following litigation.⁷⁷ The courts upheld the mediation privilege and provided that California statutes unreservedly prohibit admission and consideration of mediation communication in court⁷⁸ and neither a party nor a mediator disclose mediation communications.⁷⁹ The appellate court held that the mediator's report could be considered in this case.⁸⁰ The Supreme Court had a different view and said that the confidentiality had to be respected.⁸¹

Also, in *Princeton Insurance Co.*,⁸² the court refused to admit mediator's testimony in evidence and asserted that it is questionable to posit a more poisonous ways to lessen the confidentiality promise that public policy considers as critical to the efficacy of mediation as enabling the use of a mediator as an

⁷² *ibid* 1132.

⁷³ Hollenbeck (n 70) 19.

⁷⁴ *ibid*.

⁷⁵ *Foxgate Homeowners Association v Bramalea California* (2001) 26 Cal. 4th 1.

⁷⁶ KT Mcivers, 'Behind Closed Doors: The Supreme Court Protects Mediation Confidentiality in Foxgate' (2001) <http://www.mciversandslater.com/behind_closed_doors_article.htm> accessed 6 May 2015.

⁷⁷ MD Marcus, 'Mediation Ethics' <<http://marcusmediation.com>> accessed 17 April 2015.

⁷⁸ California Evidence Code, s 1121.

⁷⁹ Hollenbeck (n 70) 15.

⁸⁰ *Foxgate Homeowners Association v Bramalea California* (2001) 78 Cal. App. 4th 653.

⁸¹ *Foxgate Homeowners Association v Bramalea California* (2001) 108 Cal. Rptr. 2d 642.

⁸² *Princeton Insurance Co v Vergano* 883 A 2d 44 (Del Ch 2005) at 66.

⁶⁵ *Olam v Congress Mortgage Co.* 68 F. Supp. 2d 1110 (N.D. Cal. 1999); see also, *Smith v Smith* 154 FRD 661, 664 (N.D. Tex. 1994); *Allen v Leal*, 27 F. Supp. 2d 945, 947 (S.D. Tex. 1998).

⁶⁶ Weston (n 5) 57.

⁶⁷ C Franklin, 'Mediation's Confidentiality Controversy' <<http://www.dailyjournal.com/cle.cfm?show=CLEDisplayArticle&qVersionID=80&cid=872569&evvid=1>> accessed 6 May 2015.

⁶⁸ Weston (n 5) 54.

⁶⁹ Franklin (n 67).

⁷⁰ K Hollenbeck, 'The Sounds of Silence: Compelling Mediator Testimony in *Olam v. Congress Mortgage Co.*' (2002) 20 (1) Conflict Resolution Quarterly 19.

⁷¹ *Olam* (n 65).

opinion witness against the disputing party.⁸³ Notwithstanding, United States now has a definite stand on the inadmissibility of mediator's testimony in litigation. Yet, as Franklin argues, there is still the risk that public-policy issues may override the confidentiality provisions in mediation under certain circumstances.⁸⁴

In the United Kingdom, normally the courts will not compel mediators to testify in litigation. However, this position was challenged in *Farm Assist Ltd (In Liquidation) v Secretary of State for Environment, Food and Rural Affairs (No 2)*,⁸⁵ where the court held that the "without prejudice" rule would not prevent the mediator giving evidence, as the privilege is only shared among the parties, and if they waived it, the privilege is overruled.⁸⁶ The court reasoned that although a mediator can rightfully rely on the mediation agreement's confidentiality provision, in exceptional circumstances the court could override such rights in the interests of justice and to take all rational steps to generate evidence.⁸⁷ Owing to this, Koo submits that the contractual confidentiality protection is generally not broader than the "without prejudice" rule.⁸⁸ Notwithstanding, it may be the 'groundwork for the court to regulate against production of evidence/communication in mediation, where exclusions to the "without prejudice" principle do not apply or to award an interim injunction restricting a threatened breach of that confidentiality'.⁸⁹

In another line of reasoning, the court noted that compelling the mediator to give evidence or testify would not be contradictory to the mediation agreement, as the agreement was signed to provide mediation confidentiality concerning the underlying 'dispute', and regarded that the 'dispute' in question (economic duress claim) that the court was dealing with, was a separate dispute.⁹⁰ Perhaps in the future, learning the lessons from these cases, mediation agreements could be more explicit in stating that 'confidentiality of witness provisions and evidence extends to the existing and any other connected

dispute'.⁹¹ Although the expectation of such a wording to provide absolute protection will still be futile, a widely drafted clause will carry more legal weight.⁹²

Furthermore, a mediator is obliged to make an authorised disclosure to the authorities such as the police, if the mediator gains information related to financial crimes, whilst mediating, or else the mediator will be guilty of an offence pursuant to Section 328 of the Proceeds of Crime Act 2002. In relation to this, Burnley argues that the scope of mediation would be restricted, as certain disputes like fraud and tax evasion could not be mediated without the risk of the mediator committing an offence.⁹³ Burnley submits that the test for overruling confidentiality in mediation within the UK is founded in equity,⁹⁴ but the fairness of allowing a disputant to rely on communication or evidence is questionable.⁹⁵

Arguably, there is a lack of protection of mediation confidentiality between the parties and the mediator. Savory submits that the *Farm Assist* case⁹⁶ has lifted the mediation confidentiality protection in the UK to a considerable extent, and presently the underlying question is whether there is a need to protect confidentiality by a statutory blanket.⁹⁷ Justice Briggs, a UK High Court judge, concurs with the necessity of a mediation confidentiality privilege, especially in relation to commercial mediation.⁹⁸ Tumbridge submits that the issue is still ongoing, pertaining to a mediator relying on "mediation privilege" and plausibly declining to testify or give evidence even if ordered to do so by the courts.⁹⁹ Although, it is submitted that the possibility of this happening is highly unlikely as the court's ruling or order would trump over any other.

⁹¹ The Wellbeing @ Work Foundation, 'Mediators, Confidentiality and Court Witness Orders'

<<http://www.thewellbeingatworkfoundation.org/news-articles/mediators-confidentiality-and-court-witness-orders>> accessed 26 April 2015.

⁹² *ibid.*

⁹³ R Burnley and G Lascelles, 'Mediator Confidentiality: Conduct and Communications' <http://www.cedr.com/library/articles/Mediator_confidentiality_SJBerwin.pdf> accessed 23 April 2015.

⁹⁴ *ibid.*

⁹⁵ *Smiths Group & Anor v Weiss & Ors* [2002] LTL 22/3/2002 at 20.

⁹⁶ *Farm Assist* (n 28).

⁹⁷ J Savory, 'Confidentiality under threat?' (2010) <<http://www.rapproche.co.uk/2010/02/confidentiality-under-threat/>> accessed 23 April 2015.

⁹⁸ J Briggs, 'Mediation privilege? Procedure & Practice' (2009) 159 (7363) *The New Law Journal* 550.

⁹⁹ Tumbridge (n 86) 146.

⁸³ See also, *Lebr v Afflito* 889 A 2d 462, 474-5 (NJ Super .D 2006).

⁸⁴ Franklin (n 67).

⁸⁵ *Farm Assist* (n 28).

⁸⁶ J Tumbridge, 'Can an Arbitration Clause Survive Encroachment from European law?' (2010) 21 (4) *International Company and Commercial Law Review* 146.

⁸⁷ *ibid.*

⁸⁸ Koo (n 4) 200.

⁸⁹ *Cumbria Waste Management Ltd v Baines Wilson (A Firm)* [2008] BLR 330 para 17.

⁹⁰ Tumbridge (n 86) 146.

In the interest of promoting mediation confidentiality, the policy makers in the European Union legislated the EU Mediation Directive,¹⁰⁰. Article 7 of the EU Mediation Directive provides that ‘a mediator cannot be compelled to provide evidence about what transpired during mediation in following litigation between the parties, with certain exceptions (where the parties mutually agree, where overriding questions of public policy arise and where disclosure of a settlement for the purposes of enforcement).’¹⁰¹

However, Justice Briggs submits that this provision adds nothing at all about the situations in which the mediating disputants other than the mediator may be obligated to produce evidence or communication about what transpired during mediation.¹⁰² Therefore, the courts will further struggle in striking a balance, because pursuant to this directive it is ambiguous as to what might be considered as evidence. Also, Cornes questions that if the disputants agree, will the mediator be obliged to testify or give evidence about what transpired in a personal session with either of the disputant?¹⁰³ The questions remains as to whether Article 7 takes precedence of the initial contractual agreement and how will it be perceived against the standard provision in mediation agreements of making the disputants unable to obligate the mediator to testify or give evidence.¹⁰⁴ Furthermore, the Article 7 exception of “overriding considerations of public policy” is ambiguous and does not provide for the extent of limitations of public policy. Cornes further questions whether “overriding questions of public policy” will include all exceptions to privilege as classed in *Unilever*¹⁰⁵ case.¹⁰⁶ It should be noted that this is improbable because the exemptions in *Cutts v Head*¹⁰⁷ are supposed to be founded on express or implied agreement (rather than overruling public policy).

With respect to the above-cited cases, the inconsistent approach in relation to mediator testimony is evident, with many courts refusing mediator's testimony and many relying on it as a "tie-breaker"¹⁰⁸ between the disputants

testimony.¹⁰⁹ Sussman submits that although mediator's testimony may be imperative, when it is balanced against the significance of confidentiality and weighed in light of the availability of evidence, the balance will frequently tip in confidentiality's favour.¹¹⁰

IV. TOWARDS A BALANCED APPROACH

Poole submits that based on public policy there is a standard principle that mediation communications to settle may be privileged, which may indicate evidence of positions at mediation that may be inadmissible in evidence if they are met with objection (there are exceptions in relation to “without prejudice” communications).¹¹¹ In the UK, there is an exception to the mediation confidentiality where the issue is whether a settled agreement has been achieved or not.¹¹² It has also been suggested that documents produced for/by mediation are privileged, owing to public policy to promote mediation settlements.¹¹³ ‘Whatever the arrangement with respect to evidence's admissibility in court, a confidentiality commitment in mediation will have effect in private law. If mediation aspects are divulged, there may be a redress for contractual breach.’¹¹⁴

Koo argues that the common law protection for confidentiality in mediation is more restrictive than normally perceived, and there is a non-exhaustive list of recognised exceptions or varied interpretation of the disputants' communication.¹¹⁵ Although the absence of an “empirical nexus” between a successful mediation and confidentiality, the ‘EU and US depended upon policy reasons to afford capable protection for confidentiality in mediation in the form of a statutory privilege’.¹¹⁶

Cornes submits that in order to strike a balance, especially in the EU, it is advisable to have mediation privilege regulated by legislation (clear and

¹⁰⁰ Directive (EC) 2008/52 on certain aspects of mediation in civil and commercial matters [2008] OJ L 136.

¹⁰¹ Cornes (n 8) 404.

¹⁰² Briggs (n 98) 550.

¹⁰³ Cornes (n 8) 404.

¹⁰⁴ *ibid*.

¹⁰⁵ *Unilever* (n 39).

¹⁰⁶ Cornes (n 8) 404.

¹⁰⁷ *Cutts v Head* [1984] Ch. 290 CA.

¹⁰⁸ *Barnebei v St Paul Fire & Marine Ins Co*, WL 351754 (Ohio App 5 Dist 2005).

¹⁰⁹ Sussman (n 57) 32-39; see also, *Standard Steel LLC v Buckeye Energy Inc*, 2005 WL 2403636 (WD Pa 2005).

¹¹⁰ *ibid*.

¹¹¹ Poole (n 22) 155.

¹¹² *Brown v Rice* (n 45).

¹¹³ *Aird v Prime Meridian Ltd* [2006] EWCA Civ 1866.

¹¹⁴ *Re a Company* [2005] Ch D, Comm Leases 2006 Apr para 1102, unreported.

¹¹⁵ Koo (n 4) 201.

¹¹⁶ *ibid*; see also, SH Hughes, 'A Closer Look- The Case for a Mediation Confidentiality Privilege Has Not Been Made' (1998) 5 Dispute Resolution Magazine 14.

consistent in its approach), instead of leaving it to develop in common law.¹¹⁷ The Uniform Mediation Act (UMA) in the US provides a considerable functional example and serves to formulate a communication privilege in mediation.¹¹⁸ It has adopted a 'middle-path by promulgating a procedure that safeguards mediation confidentiality'.¹¹⁹ Communications to commence and engage in mediation¹²⁰ are protected, as they are regarded critical for encouraging candour of disputants and public confidence, and for harmonising the private needs for confidentiality against the interests of justice.¹²¹ Privileged communications are protected from mandatory disclosure and are inadmissible as evidence¹²² in following litigation or other adjudicative processes.¹²³ Although the settlement agreements could lose privilege if the requirement for the evidence significantly overrides the interest in safeguarding confidentiality (subsequent to a private hearing¹²⁴ and the mediator may testify voluntarily).¹²⁵ Deason submits that UMA offers a balanced approach in accommodating conflicting policy issues in question and the issues of sustaining mediation confidentiality.¹²⁶ Nonetheless, Cornes submits that UMA has mixed effects and for that reason it is criticised in certain States in the US and appreciated in some.¹²⁷ It can serve as guidance, but not a draft that can be adopted in the UK; however UNCITRAL Model Law (in relation to cross-border commercial mediation) would provide a more ideal model of mediation legislation.¹²⁸

It is important to analyse why there is such a significant need to preserve the confidentiality of the mediation process, in order to understand the concerns on either side of the balancing act. Deason argues that confidentiality encourages communication between the parties and the mediator, thus making a

settlement possible, which might be impossible in ordinary negotiation.¹²⁹ It augments the prospects of settlement, based on the empirical supposition that owing to a confidential and protected negotiating sphere, the disputants will be more forthcoming in their communication and admissions.¹³⁰ This is based on the notion that a legal system would protect the privacy of relations by yielding a privilege from testimony and discovery (eg attorney-client privilege encourages complete and candid communication among attorneys and their clients, thus fostering extensive public interests in the compliance of law and administration of justice).¹³¹ Folberg and Taylor submit that it is an accepted view that confidentiality on the disputants' part is crucial to a successful mediation.¹³² The disputants will be cautious and defensive in their communications if there is an apprehension that their admissions may be later revealed to their possible disadvantage.¹³³ Prejudice in commercial dealings, adverse publicity, free enterprise (disputants right to be evade public scrutiny), due diligence, trade secrets, proprietary information, liberty to brainstorm commercial opportunities, or even embarrassment in personal lives have all been causes of concern in the absence of assurance of confidentiality in mediation.¹³⁴

Confidentiality is also reasoned to be vital for maintaining the mediator's neutrality. If a mediator is compelled to testify or give evidence (regardless of how objective the testimony may possibly be),¹³⁵ the mediator will be perceived as performing contrary to the disputants interests, thereby extinguishing his/her neutrality.¹³⁶ Once a particular mediator has testified or given evidence, it is

¹²⁹ Deason (n 126) 110.

¹³⁰ Zuckerman (n 42) para.16.4; see also, H McIsaac, 'Confidentiality Revisited: California Style' (2001) 39 (4) Family Court Review 405-414; *Beazer East Inc v Mead Corporation*, 412 F 3d 429 (3d Cir 2005); *Thayer v Wells Fargo Bank NA*, 2005 WL 1847174 (Cal App 1 Dist 2005).

¹³¹ *Upjohn Co. v United States*, 449 U.S. 383, 389 (1981); Deason (n 126) 80,

¹³² J Folberg and A Taylor, *Mediation: A Comprehensive Guide to Resolving Conflicts Without Litigation* (1st edn, Jossey-Bass 1984) 264; LR Freedman and ML Prigoff, 'Confidentiality in Mediation: The Need for Protection' (1986) 2 Ohio State Journal on Dispute Resolution 37.

¹³³ OV Gray, 'Protecting the Confidentiality of Communications in Mediation' (1998) 36 (4) Osgoode Hall Law Journal 674.

¹³⁴ *ibid*; see also, Sussman (n 57) 32-39; Boule (n 25) 690.

¹³⁵ PJ Harter, 'Neither Cop Nor Collection Agent: Encouraging Administrative Settlements by Ensuring Mediator Confidentiality' (1989) 41 Administrative Law Review 315, 325.

¹³⁶ Deason (n 126) 82; see also, *NLRB v Joseph Macaluso, Inc.* 618 F.2d 51, 55-56 (9th Cir. 1980).

¹¹⁷ Cornes (n 8) 404.

¹¹⁸ A Britt, 'Are "Confidential" Mediation Proceedings Really Confidential? Will The Uniform Mediation Act Really Keep Mediation Communications Out Of Court In Subsequent Environmental Litigation?' (Juris Doctor Research Paper, Rutgers University: Rutgers School of Law 2003),

¹¹⁹ Sussman (n 57) 36.

¹²⁰ Uniform Mediation Act, s 2(2).

¹²¹ Prefatory Note and Comments to Section 4 Uniform Mediation Act.

¹²² Uniform Mediation Act, s 4(a).

¹²³ *ibid*, s 2(7); Koo (n 4) 201.

¹²⁴ *ibid*, s 6(b)(2).

¹²⁵ *ibid*, s 6(c); Burnley and Lascelles (n 93).

¹²⁶ EE Deason, 'Mediation Confidentiality' (2001) 85 (79) Marquette Law Review 110; see also, Peterson (n 10) 199.

¹²⁷ Cornes (n 8) 405.

¹²⁸ *ibid*.

likely that in future other parties will perceive the mediator to be unreliable and thus be deterred to use his/her services.¹³⁷ Sussman contends that parties will be discouraged to mediate in the absence of trust in mediation, thereby damaging the procedure, since the settlement will not be concluded if the mediator cannot vanquish the disputants' apprehension about confiding in each other (*Foxgate*).¹³⁸ It is therefore submitted that mediation confidentiality is essential to a successful and effective mediation, thereby motivating disputants to mediate. It further avoids the disputants from taking 'tactical advantage' of the evidence transpired during mediation by allowing it in subsequent proceedings.¹³⁹

It can be concurred that there are in fact genuine arguments for maintaining the sanctity of confidentiality in mediation, but there are also other "countervailing policies and principles" with which the above discussed reasons "find an uneasy equilibrium" in establishing the extent of the confidentiality principle (e.g. interest of concerning third parties, environmental interest, systemic discrimination in employment, personal injury, threat, juvenile issues etc).¹⁴⁰

With respect to policy in confidentiality, King et al. suggests that confidentiality is not an 'unqualified attribute', as often assumed.¹⁴¹ Law and policy require limitations to the privileged and confidentiality aspects of mediation and there are augmenting requirements to disclose communications. There are distinct fears about permitting disputants to draw 'rigid cloaks of secrecy' around their settlement and these have led to courts mitigate confidentiality.¹⁴² It is without question that mediation requires striking a balance of contradicting interests between the confidentiality privileges and administering sufficient disclosure. The courts have indeed struggled in fostering alternative dispute resolution and encouraging contractual non-disclosure on the one hand, and on the other, balancing it against public interest which requires that courts have access to evidence/mediator's testimony in the interest of justice. Birke submits that the expansion of institutional mediation

confidentiality protection is not consistent.¹⁴³ The US cases discussed previously (*Olam*¹⁴⁴, *Rinaker*¹⁴⁵ and *Foxgate*¹⁴⁶) have held an evolving approach to confidentiality. Although, *Rojas v Superior Court*¹⁴⁷ is the principal US (California) case that looks at the two different public policies, and attempts to strike a balance between supporting mediation and its requisite confidentiality, and not freezing litigation or upholding illegality. The legislation introduced in California goes further than the Uniform Mediation Act. The scope of the provisions in the California's Rule of Evidence could be difficult to distinguish. Evidence that would otherwise have been inadmissible would not be admitted or protected from disclosure solely by reason of introduction or use of this mediation process. Therefore, it is the balance between those two that determines what falls within the rule and is completely protected, and what falls outside it and therefore cannot claim to be protected solely for the purpose of avoiding court action. *Rojas v Superior Court*¹⁴⁸ presented the crisis that subsists when two public policies clash (established policy which requires the disputants to disclose all relevant mediation communication/evidence and the newer policy of backing mediation confidentiality, so mediation can remain sacrosanct).¹⁴⁹ The Supreme Court held that the policy of confidentiality in mediation communication was absolute and the only exception was evidence expressly specified by the statute. The strict interpretation of mediation confidentiality was also qualified in *Simmons v Gbaderi*,¹⁵⁰ and more recently in *Cassel v Superior Court*,¹⁵¹ which expressly stated that attorney-client communications in mediation was not subject to disclosure.

Kichaven and Lascher submit that a disputant who asserts that evidence was prepared exclusively for mediation, and thus acquires protection against its use by the other disputant, should not be permitted to use that evidence in following trials. Also, that disputant should be obligated to recognise the

¹³⁷ Harter (n 135) 325.

¹³⁸ *Foxgate* (n 75).; Sussman (n 57) 32-39.

¹³⁹ Koo (n 4) 192.

¹⁴⁰ H Astor and C Chinkin, *Dispute Resolution in Australia* (2nd edn LexisNexis Butterworths, Australia, 2002) 377-379.

¹⁴¹ M King, A Freiberg, B Bagatol and R Hyams, *Non-Adversarial Justice* (2nd edn The Federation Press, 2010) 2.

¹⁴² Boule (n 25) 690.

¹⁴³ R Birke, 'Standardising Mediation Confidentiality' (2003) 6 (3) ADR Bulletin 2.

¹⁴⁴ *Olam* (n 65).

¹⁴⁵ *Rinaker* (n 63).

¹⁴⁶ *Foxgate* (n 75).

¹⁴⁷ *Rojas v Superior Court* (2004) 33 Cal.4th 407.

¹⁴⁸ *ibid.*

¹⁴⁹ E van Ginkel, '*Rojas v. Superior Court: The Battle of Two Opposing Public Policies*' (2005) <<http://www.mediate.com/articles/vanGinkelE2.cfm>> accessed 3 May 2015.

¹⁵⁰ *Simmons v Gbaderi* (2008) 44 Cal 4th 570.

¹⁵¹ *Cassel v Superior Court* (2011) 51 Cal. 4th 113.

evidence prepared exclusively for mediation when the evidence is disclosed.¹⁵² Van Ginkel submits that a potential solution to this mediation confidentiality complexion is to amend the concerned legislation in a way that the mediation privilege only identifies evidence that has been labelled 'prepared for mediation' before their introduction in mediation, thus clearly authorising the court to measure the interests of the two competing public policies in following litigation.¹⁵³

It is clear from the above discussion and arguments that confidentiality has at times been waived to protect public policy. Most prominently, *Rojas* and cases preceding it (*Olam*,¹⁵⁴ *Rinaker*¹⁵⁵ and *Foxgate*¹⁵⁶) provide an example in which the courts are presented with the dilemma that arises when the policy requiring the party to disclose all relevant evidence, conflicts the policies supporting mediation confidentiality. In *Foxgate*,¹⁵⁷ the original position was to waive confidentiality in favour of public policy, because it would not have affected the mediation process that much. However, on appeal the Supreme Court held that mediation confidentiality was sacrosanct and it should not be waived for the purposes by the appellate court.

Questions still require answers pertaining to mediation confidentiality and will have to be addressed uniformly in all jurisdictions. Should the extent of protection in mediation confidentiality be contextual? What if mediation is rendered pointless by a party's demeanour? Will it be too extreme to lift the confidentiality veil, when involving children, personal harm, greater good, etc? If yes, what will be the rational extent or limitation of mediation confidentiality? Is it practical to anticipate a full "code of silence" with respect to what transpires in mediation? If a settlement is agreed, should those settlements be qualified to the same enforcement, existence and reformation defences as in other contracts?¹⁵⁸

¹⁵² J Kichaven and WC Lascher, 'Amicus Curiae Brief of Southern California Mediation Association in Support of Petitioners' (2003) <<http://www.jeffkichaven.com/CM/Articles/SCMASRojasBrief.pdf>> accessed 3 May 2015.

¹⁵³ Van Ginkel (n 149).

¹⁵⁴ *Olam* (n 65).

¹⁵⁵ *Rinaker* (n 63).

¹⁵⁶ *Foxgate* (n 75).

¹⁵⁷ *ibid.*

¹⁵⁸ Burnley and Lascelles (n 93).

CONCLUSION

This essay has only grazed the surface of the discussion involving striking a balance between encouraging settlement through the protected process of mediation and ensuring that litigants and the course had adequate access to evidence. In support of the view, the sanctity of the contract supports preserving confidentiality when there is an agreement.¹⁵⁹ If confidentiality is too wide it will sterilise too much evidence, thereby undermining the trial process.¹⁶⁰ On the other hand, if it is too narrow, it will discourage a party engaging in good faith from using mediation, which may have serious implications such as litigation costs, excessive abundance of disputes in courts, thereby slowing the administration of justice for all.

The underlying issue is in drafting a confidentiality clause in a mediation agreement or settlement agreement, which will check whether confidentiality is too wide or too narrow. Although, the courts can invalidate a broadly drafted agreement and may suggest that more evidence should be admitted, Weston submits that absolute confidentiality for mediation (court-connected) is a rational solution, and the intentions of fundamental statutory confidentiality may be achieved by a qualified privilege of confidentiality (constitutional principles making those qualifications implicit).¹⁶¹ Absolute confidentiality might be too intense and may be contradictory to public interests (when the interest of third parties or interested parties may be adversely affected). As opposed to Weston's view, Ginkel submits in concurrence with Pieter Sanders that absolute mediation confidentiality is not a satisfactory solution, despite the fact that it is now the widely accepted approach of the California Supreme Court.¹⁶² Ginkel further suggests that remedies must be found in an adequate mechanism that harmonises two contradicting public policies. However, it is still unclear how the balance could be achieved between the two conflicting public policies, between the need to protect the mediation process and encouraging settlement. Boule argues that confidentiality has lost its appealing characteristic in today's society, which demands transparency and accountability in government and in the legal

¹⁵⁹ Boule (n 25) 669.

¹⁶⁰ *ibid.*

¹⁶¹ Weston (n 5) 30-78.

¹⁶² Van Ginkel (n 149).

system.¹⁶³

Even though many academics, courts and policy makers have acknowledged that mediation confidentiality is ambiguous and evolving in many aspects, nothing consistent has been achieved.¹⁶⁴ A uniform provision concerning the extent of mediation confidentiality and admissibility of evidence should be explicitly drafted in an accepted International Treaty. It should be used as authority and not just as mere guidance in member nations, who often inconsistently interpret provisions. It is now more imperative for the policy makers and courts to achieve the balance between the policy of encouraging confidentiality but not at the risk of stopping litigants or protecting illegal actions through confidentiality.

¹⁶³ Boule (n 25) 669.

¹⁶⁴ Bondy (n 21).