Mediation and confidentiality - part 1

Brian H Speers, Solicitor, Mediator and Alva Brangam QC, Barrister & Mediator.

ADR Mediation is part of the civil justice system in Northern Ireland. An increasing number of Rules of Court, Protocols and Practice Directions require parties to actively consider ADR Mediation and there is a clear increase in what has been euphemistically termed "robust judicial encouragement". Under Order 1 Rule 1A, Order 1 Rule 20 and Order 62 Rule 10 of the Rules of the Court of Judicature the Court when dealing with costs applications may require parties to justify a refusal to consider the use of such processes and it is particularly noteworthy that the Clinical Negligence Protocol of 27 February 2009 provides:

> *"Both the plaintiff and the defendant may be required by the court to produce evidence that alternative means of resolving their dispute had been considered. This is likely to involve production to the court of the standard mediation correspondence, a copy of which may be obtained from the Commercial Court website, together with the parties' replies thereto. Different forms of alternative dispute resolution are available and a mediation service is provided by the Law Society of Northern Ireland. Generally the courts take the view that litigation should be a last resort and that claims should not be issued prematurely when a settlement is still being actively explored."*

Some disputing parties choose or prefer ADR Mediation because, in addition to being a swift and flexible means of reaching agreement, it is a private and confidential process. Parties who agree to seek ADR Mediation are reassured because it is a protected forum for exploring practical and often innovative settlement discussions. If required to explain confidentiality a mediator would likely assert that:

(a) it is the result of public policy in preventing or bringing an end to contentious litigation

(b) it is a consequence of the enforcement of the without prejudice rules which attach to genuine settlement negotiations; and

(c) the parties and the mediator have agreed to clothe their managed negotiations with confidentiality as stipulated in the contract which governs their rights, duties and obligations

Common sense and professional experience indicate that if parties and their representatives feel able to discuss matters under the safe umbrella of confidentiality, then they are more inclined to acknowledge not only the strengths of how they see their case but also the doubts, difficulties and uncertainties which they are fearful may come against them if the dispute goes to a judicial or other adjudication of evidence.

During a recent SLS/QUB training courses on Civil & Commercial Mediation some participants raised questions about the limit of the protection of confidentiality in mediation.

This sequence of articles seeks to explore the nature, extent and limitations of this confidentiality. Why are there pragmatic reasons for mediation confidentiality? What is the public policy rationale for preserving confidentiality?

In this first part we consider why confidentiality is important in mediation and its basis in our law. We refer to the provisions of the EU Directive on Mediation and the increased obligation on parties to consider ADR Mediation and we discuss some cases decided in other jurisdictions.

In Part 2 we will consider cases decided in England & Wales, the rationale and implications of some of the proposed provisions of the Mediation Bill presently under discussion in the Republic and the " what and why " of some actual or possible exceptions to public policy or contractually imposed confidentiality.

Why should mediation be "confidential"?

The vital importance of mediation confidentiality is well summarised in the following extract:

> *"The mediator encourages the parties to be candid with the mediator and each other, not just about their willingness to compromise but also and especially about the needs and interests that underlie their positions. As those needs and interests surface, the possibility of finding a satisfactory resolution increases. The parties will be wary and guarded in their communications if they think that the information they reveal may later be used outside of the mediation process to their possible disadvantage. When they have resorted to mediation in an attempt to settle pending or threatened litigation, they will be particularly alert to the possibility that information they reveal to others in mediation may later be used against them by those others in that, or other, litigation. The parties may also be concerned that their communications might be used by other adversaries or potential adversaries, including public authorities, in other present or future conflicts. The possibility of prejudice to legal rights, or of exposure*

to legal liability or prosecution, may not be a party's own concern. Parties may also be concerned that disclosure of information they reveal in the mediation process may prejudice them in commercial dealings or embarrass them in their personal lives. Accordingly, mediation works best if the parties are assured that their discussions with each other and with the mediation will be kept confidential".
(Owen V Gray - "Protecting the Confidentiality of Communications in Mediation" 1998 36 Osgoode Hall Law Journal 667 at 671)

A standard confidentiality clause

Clause 17 of the form of contract used by the Dispute Resolution Service provides that each of the parties and the mediator undertake that:

"(i) Unless they otherwise agree, the mediation shall be conducted in private and they will keep confidential all matters which emerged during the mediation
(ii) To keep confidential all statements and other matters whether oral or written including any settlement agreement relating to the mediation except in so far as disclosure is necessary to implement and enforce such Settlement Agreement:"

There is no Mediation Act in the UK but as a member state we are required to comply with the provisions of Article 7 of the EU Mediation Directive (Directive 2008/52/EC) which relates to mediation in civil and commercial matters. It provides:

"given that mediation is intended to take place in a manner which respects confidentiality member states shall ensure that unless the parties agree otherwise neither mediators nor those involved in the administration of the mediation process shall be compelled to give evidence in civil and commercial judicial proceedings or arbitration regarding information arising out of or in connection with a mediation process except:

(a) Where this is necessary for overriding considerations of public policy of the member state concerned, in particular when required to ensure the protection of the best interests of children or to prevent harm to the physical or psychological integrity of a person; or

(b) Where disclosure of the content of the agreement resulting from mediation is necessary in order to implement or enforce that agreement."

As all lawyers will know, legitimate communications exchanged between parties and their representatives with a view to settling disputes are subject to the protection of what is loosely known as the "without prejudice rule".

The protection of confidentiality

Mediation has by contract and a variety of substantive and evidential rules placed protection of communications at a priority level. It is however clear that the EU Directive, recognises that there may have to be some exceptions. In the above portion of Article 7 of the Directive we have underscored the need for Member States to ensure that the protection of confidentiality surrounds not only what the parties have said to the mediator and permitted to be exchanged with other parties but also seeks to make the mediator a non compellable witness in subsequent disputes.

In Canada mediation can be made mandatory in many cases. Clearly there are differences in cases where parties willingly enter in mediation and where the mediation is the outcome of an Order of a Court. Even allowing for these differences in approach and context, clear instruction may be found in the decision of the Ontario Superior Court on 30 November 2011 in *Johnstone v. Locke, 2011 ONSC 7138 (CanLII)* which dealt with a family custody dispute. In the preparation for the mediation an email was sent setting out terms for custody and parenting time which would be acceptable. Matters did not resolve and there was an attempt to adduce the email as evidence of what one of the parties had agreed. That party objected saying that this was done in the context of endeavouring to resolve matters and in the belief that the mediation process in which they were involved was confidential. The Court upheld that contention and did not permit the disputed email to feature in evidence at the hearing before a Court of the custody issues.

In another recent case from Kansas, the Court of Appeal was prepared to impose sanctions for breach of confidentiality in mediation. In *Hand v Walnut Valley Sailing Club* decided on 4 April 2012 a dispute arose within a members' club. The Plaintiff had written a letter to the Governor of Kansas complaining that a shed owned by his sailing club did not comply with the applicable Disabilities Legislation. After that letter his membership of the Sailing Club was revoked. Mr Hand issued proceedings against his former Club and the Court swiftly ordered the parties to mediate, which they did. No settlement was achieved. Mr Hand then sent an email to 44 Club members disparaging the Club's position and relating all the details of the mediation including what the Mediator said and the amount of the Club's settlement offer. The Club sought a sanction against the continuing Plaintiff in the proceedings. This included the dismissal of lawsuit. The Court agreed and dismissed the case "with prejudice" - which is Kansa-speak for costs - and in so doing the Court explained that Mr Hand's disclosures demonstrated a *"complete disrespect for the confidential mediation process."*

Interestingly the Court said that the need for confidentiality was particularly strong where a mediation programme is mandatory *"because participants are often assured that all discussions and documents relating to the proceeding will be protected from forced disclosure".*

These cases provide interesting views from other jurisdictions about mediation confidentiality. The question for consideration is what are the limits of confidentiality in this jurisdiction?

Part 2 of this Article will appear in the next edition of The Writ.

NB - For details of next Mediation Training Course see page 30.