i. Index

Towards a new ethical framework for a legal profession in transition?
European Conference
Universiteit Gent
25 – 26 October 2001

Session 1 – New traits for lawyers in a changing legal services market

Lawyers and mediation

ADR: a new field of legal practice

by Piet A. Wackie Eysten, The Hague
and John M. Bosnak, Arnhem

1. ADR. GENERAL REMARKS

Alternative methods of conflict resolution aim at reaching an optimal solution for all parties concerned, rather than "winning the battle" at the other party's cost.

The origins of ADR are to be found in the USA. In common law jurisdictions ADR has developed very rapidly. In the US ADR is offered by various organisations, such as the American Arbitration Association (AAA) and the Institute for Dispute Resolution, which was established in 1979 by the Centre for Public Resources (CPR). The CPR-institute has established a registry of some 900 major companies who have undertaken to explore the possibilities of settling disputes through ADR before litigating.

In the UK the Centre for Dispute Resolution (CEDR) has successfully launched mediation and other forms of ADR. The new Civil Procedure Rules (CPR), in force as of 26 April 1999, based on Lord Woolf's report 'Access to Justice', enable the courts to stay proceedings to encourage alternative dispute resolution. At case management conferences the parties are required to state whether the question of ADR has been discussed. The judge is entitled to suspend the proceedings at any time to give the parties a chance to try and settle their dispute through ADR.

During the last few years the concept of ADR has further developed on the continent of Europe as well. Legislation has been enacted in France, Germany, Belgium and some other countries. The European Commission too recognises the importance of alternative dispute resolution. In April of this year the Commission issued a Recommendation "on the principles for out-of-court bodies involved in the consensual resolution of consumer disputes" along with a Communication on "widening consumer access to alternative dispute resolution". It identifies four principles that should be

guaranteed: (a) impartiality of those responsible for the procedure; (b) transparency, (c) effectiveness, and (d) fairness of the procedure.

Although the scope of this Recommendation is limited to consumer disputes the basic principles of the ADR procedure set out therein are of great value for ADR in general and may well be instrumental in bringing about a common European concept of alternative dispute resolution methods and procedures.

2. RECENT DEVELOPMENTS IN THE NETHERLANDS

The *Stichting Netherlands Mediation Institute* (NMI) became operational in the course of 1995. NMI is an independent organisation which aims at stimulating the broadest possible use of ADR. It has played an important role in creating awareness for new types of ADR, especially mediation. NMI has developed criteria for training and educational programmes for mediators and quality standards. It has initiated a set of professional rules and a systems of disciplinary proceedings for mediators, certified with the NMI.

ACB Conflict management Centre for Industry and Commerce was established in 1998. Many Dutch organisations felt the need for an independent mediation organisation that focuses entirely on the needs of the business environment and assures high quality standards. ACB was established under the auspices of the Confederation of Netherlands Industry and Employers (VNO-NCW). The active involvement of VNO-NCW clearly illustrates the interest businessmen take in this new development. ACB is a joint initiative of some large companies and representatives from the legal professions. It is a not-for-profit organisation that stimulates businesses to use mediation as a management tool.

In 1995 the *Netherlands Arbitration Institute* published its "Minitrage" Rules, a Dutch form of minitrial, whereby disputes are dealt with by the parties in front of a committee of three, consisting of Executive Officers at a high level in each of the companies that are parties in the dispute, presided over by a neutral chairman.

In 1996 an Advisory Committee was installed by the Minister of Justice. The task of this "ADR Platform" was to advise the Ministry of Justice with regard to 'strategic policy decisions' to be taken concerning new forms of dispute resolution both on their own merits and with a view to reducing the growing demand for judicial remedies.

The Dutch government takes a great interest in the development of ADR. One of the recommendations in the final report of the ADR Platform was that experiments be undertaken with court-annexed mediation. This was

followed up by the Government in a Policy Statement which identified four principal objectives:

(a) deformalising dispute resolution,
(b) ensuring efficient dispute resolution,
(c) creating multiform access to the law with a greater degree of responsibility for the parties themselves,
(d) decreasing the case load for the judiciary.

On the basis of this government policy a court-annexed mediation pilot project was launched. At the end of 2003 the project will be evaluated. Depending on the results further initiatives will be taken.

3. THE ACTUAL MEDIATION PROCESS

The process is non-binding, informal, and conducted under strict confidentiality. Either party can opt out at any stage of the proceedings. Once a settlement is reached that settlement is a binding agreement, but before that stage the mediation takes place on a purely voluntary basis. There is no coercion whatever to proceed with mediation. There may be an obligation to enter into mediation by virtue of a mediation clause in a contract. Some contracts provide that mediation or conciliation should be attempted before arbitration or litigation may be initiated.

ADR is characteristically informal. The most striking informality is the possibility that the mediator speaks with each of the parties separately: the "caucus". This is an enervating concept to seasoned traditional litigants, who unconditionally believe in the principle of "audite et alteram partem". And admittedly, it is important that the mediator maintains a perfect balance between the parties. If he talks to the claimant in private, he should also talk with the defendant. The "caucus" is perhaps the clearest sign that mediation is essentially different from court proceedings.

A mediation process typically consists of four stages:

I. Introduction mediator and parties
Presentation of case by parties
Summary by mediator
Calendar for further sessions

II. Collecting facts and data
Experts, witnesses

III. Explore and develop alternative solutions
Analyse options

IV. Select best solution

Write down and execute settlement agreement.

4. PERSONAL QUALITIES OF THE MEDIATOR, EDUCATION AND TRAINING

A frequently asked question is what talents are needed to be an effective mediator and whether or not one can be taught to be a mediator. Since the whole idea of ADR is based on an interest-based form of negotiating (as opposed to position-based) it is the primary task of the mediator to uncover the real interests of the parties. The mediator therefore needs to be a good listener.

Further, the mediator must have a good sense of fairness and equity. He must be able to weigh the justified and less justified interests and desires of both parties, taking into account their personal, social and legal situations.

It can be useful for a mediator to be a lawyer, but it is not necessary. Matters of substantive law can always be dealt with by experts who can be called in. The mediator will then have to rely on external advise.

These qualities can be enhanced by training. Even for the most talented mediator it will be useful if he is made aware of what he is doing, in terms of communication, negotiating techniques etc. The best way to develop one's abilities as a mediator is the actual practice of it. All the best educational programmes devote a lot of time to play-acting in mock mediations. Another way to gain experience is co-mediating, i.e. doing a real mediation side by side with an experienced mediator.

5. THE ROLE OF THE LAWYER IN MEDIATION

The phenomenon of mediation poses some new ethical question which the lawyer has to address. Some of them will be briefly highlighted here, without any assumption to completeness, concerning the question raised and even less with respect to the suggested answers.

5.1 THE LAWYER AS LEGAL COUNSEL IN MEDIATION

Although it is of the very essence of mediation that disputes are not solved by legal argument, the law is inevitably relevant and important. Most cases are bargained in the shadow of the law. The law and legal positions and arguments influence negotiations. Predictions are made about what would happen in court should the parties opt to litigate. The law allows them to assess the opportunities and risks involved.

What role lawyers have in mediation depends to a large extent on the style of negotiations. Lawyers play a leading role in negotiations based on

expectations of the opportunities and risks of litigation, but much less in negotiations that focus on the parties' underlying interests. It is therefore a logical consequence that the lawyer's role becomes less important as the mediation proceeds successfully. In the beginning it will be perceived as important that the positions of both parties are clearly defined. But as the mediation proceeds the parties themselves will play a larger role, they want to come out of the process with a done deal. This is a major difference with traditional litigation where the litigation lawyer remains in charge until the end.
Nevertheless, counsel can play an important role as coach and trusted advisor to his client.

Legal skills are appropriate in any case when it comes to laying down the settlement in writing. Needless to say that this document must be drawn up in a legally correct way for, if all is well, it will form the basis for what is hoped to be a longstanding relationship between the parties.
Counselling clients in mediation requires a different frame of mind then the attitude, common in litigation: cooperative versus adversarial.

An ethical problem with a simple solution is the question, what a lawyer should advise his client, when litigation appears to be more profitable for the lawyer, mediation for the client. Advising the clients to litigate in such cases is to be considered a professional error as it is not in the client's but in the lawyer's interest. Most lawyers who have become familiar with mediation do not see this as a dilemma. Counselling a client through a successful mediation ensures client's satisfaction, which is not only rewarding professionally, but also ensures future business.

7. THE LAWYER AS MEDIATOR

This is not the place to go into the discussion, whether a lawyer is better equipped to become a mediator then other professionals. However, there is one aspect in which the mediating lawyer, admitted to the Bar has an advantage over the mediator who is not such a lawyer: the issue of confidentiality.
We highlight this matter, as confidentiality is of the essence in mediation.

8. CONFIDENTIALITY

Confidentiality is of the essence in Mediation[1].

[1] Brazil, Magistrate J. in *Olam* (quoting from a recent decision by the California Court of Appeal re Rinaker): *first, I acknowledge squarely that a decision to require a mediator to give evidence, even in camera or under seal, about what*

The involved parties would not be inclined to communicate freely if they risk that whatever they may have stated in Mediation will be held against them at a later stage.
In the Netherlands, such confidentiality will go a long way, but (as yet) most probably not all the way[2].

There are two sides to confidentiality: the *duty of secrecy* - and *privilege*, the right (sometimes: duty) to decline to give evidence.
Many professions have a duty of secrecy, few have privilege.

The first aspect, secrecy, is enshrined in article 272 of our Penal Code; the article threatens with punishment anybody:

> *who willfully infringes any secret of which he knows, or can reasonably be presumed to know, that he is obliged to keep, on the basis on his office, profession or statutory provision ... .*

Although few criminal actions have arisen from this article there is one judgment by the Netherlands Supreme Court[3] in which it was held that *article 272 Criminal Code only applies to those offices and professions which by their*

---

occurred during a mediation threatens values underlying the mediation privileges. As the Rinaker Court suggested, the California legislator adopted these privileges in the belief that without the promise of confidentiality it would be appreciably more difficult to achieve the goals of mediation programs. ... Construing an earlier version of the mediation privilege statute, the same court of appeal had opined a few years before that without assurances of confidentiality "some litigant [would be deterred] from participating freely and openly in mediation". That court also quoted approvingly the suggestion from a practice guide that "[c]onfidentiality is absolutely essential to mediation," in part because without it "parties would be reluctant to make the kind of concessions and admission that pave the way to settlement".

[2] For an overall view on the topic in the Netherlands, see Wisselink, *Beroepsgeheim, Ambtsgeheim en Verschoningsrecht*, tweede druk 1997, W.E.J. Tjeenk Willink, Deventer.

[3] HR 06.12.1955, NJ 1956, 52 (HR stands for Hoge Raad, the Dutch Supreme Court, which hears cases in civil and criminal matters after appeal. Like the French Cour de Cassation and the German Bundesgerichtshof, it can only decide on points of law on the basis of the facts as established in the appellate instances. NJ stands voor "Nederlandse Jurisprudentie", the weekly magazine in which almost all judgments of the Hoge Raad and the Benelux Court appear, as well as a selection of the judgments of the Court of Justice of the European Union, the European Court for Human Rights and the Dutch lower courts as far as criminal and civil matters are concerned.

nature[4]*, therefore regardless of any specific duty to secrecy, be it imposed or contractual, impose such duties upon those holding such offices at practicing such professions.*

As Mediation imposes by its nature upon the Mediator, a duty of secrecy, it can be argued that this provision also covers Mediators if their activities can be considered as "professional" - which means that the neighbor's incidental intervention in a neighborhood dispute does not qualify.

A criterion for such professionalism could be found in the fact, that the Mediator is registered with the Nederlands Mediation Instituut (the Dutch Mediation Institute). This is the body where a Mediator can register after having fulfilled certain minimum training requirements. After such registration he is bound by professional rules concerning impartiality, confidentiality and other professional and ethical standards.

The rules of conduct of the NMI have the following confidentiality clauses:

1. *The Mediator does not involve third parties in the Mediation and does not provide information to third parties about the Mediation, except with permission of the parties.*
2. *The Mediator must impose the duty of secrecy in written form on all third parties he involves in or informs about the Mediation.*

The standard Mediation contract which the NMI-Mediator is expected to enter into with his clients has a confidentiality clause which binds parties to the confidentiality rules as laid down in the NMI-Mediation Regulations. These rules prohibit parties and the Mediator to disclose information to third parties (including judges and arbitrators) about the Mediation in the broadest sense. Also, parties bind themselves to never summon one of the participants to the Mediation to appear as a witness. Finally, the rules bind the Mediator to confidentiality vis à vis the other party concerning information obtained by him in caucus, except when agreed otherwise.

This whole set of rules, however, will not hold against a third party, not bound to these contractual obligations. The only instrument to counter such an attack on the Mediation's confidentiality is professional Privilege.

Privilege.

[4] Underlining by the author.

In the Netherlands, as in most other countries, everybody is obliged to testify as a witness in criminal and civil matters. The same holds true for many professionals who have a duty of secrecy.
In order to make professional secrecy really effective it must therefore be complemented by professional privilege.
For a long time only the four so-called "classic" privileged professions were *subject to* privilege: the advocate/procureur; the civil law notary, the doctor and the clergy person. (Employees of those privileged officials and professionals are also secrecy- and privilege-bound). Recently other professions were, by case law, added to this list, as we will see further on.
Object of privilege can only be such information and knowledge which is confided by the client to the professional or acquired by the professional through his client or concerning him *in the course of his specific professional activities*. However, whether information is privileged according to this definition, is for the professional himself to decide.
In a recent decision concerning privilege of a civil law notary, the Supreme Court held[5]:
the notary's privilege covers such facts and circumstances which have been confided to him as such, i.e. as a civil law notary. As only the civil law notary can make an exact assessment whether certain facts or circumstances are covered by his privilege or not, this assessment should principally be left to the civil law notary's discretion. The judge must accept that the notary must invoke privilege as long as he is in reasonable doubt whether revealing information could take place without disclosing what should remain confidential[6].

Recently, accountants, tax consultants, police officers, company lawyers and bankers have been denied privilege. On the other hand, case law has granted privilege to legal aid lawyers, tax authorities, nurses, probation officers and, interestingly, journalists. The latter category does not have a formal professional duty of secrecy; to the contrary: their duty is to inform the general public.

In the development of its case law the Supreme Court constantly navigates between the fundamental right of a citizen to safely confide his secrets to a trusted person, and the fundamental necessity to discover the truth.

[5] HR 18.12.1998, RvdW 1999/2c.

Intermezzo I: confidentiality, privilege and the journalist.

The assignment of privilege to a journalist can be considered a landmark decision of our Supreme Court[7]. It is based on the fundamental right of freedom of the press, which might be in jeopardy if a journalist be obliged to disclose his source. The decision was given in the wake of the *Goodwin*-decision of the European Court of Human Rights[8].
The case was as follows. Mr. William Goodwin, a British journalist, was notified by a source from which he had received information regularly about the negative financial situation of Tetra Limited. After endeavors by Goodwin to verify this news with Tetra, the latter was granted a Court order[9] restraining publication of the information concerned. This information was suspected to be based on a draft of Tetra's confidential business plan of which a copy was very recently purloined.
A week later, also at Tetra's request, the Court ordered Goodwin to produce his notes on the relevant telephone conversation and to divulge the identity of his source on the grounds that this was necessary "in the interests of justice" pursuant to section 10 of Contempt of Court Act 1981:

> *No Court may require a person to disclose, nor is a person guilty of contempt of Court for refusing to disclose the source of information contained in the publication for which he is responsible, unless it is established to the satisfaction of the Court that disclosure is necessary in the interests of justice or national security or for the prevention of disorder or crime.*

The Court of Appeal and the House of Lords upheld the Court order, relying on the exception of the "interests of justice". After the House's rejection of the appeal the High Court fined Goodwin to the amount of £ 5,000.-- for Contempt of Court.
Goodwin complained against the fine before the Commission for Human Rights, stating that the Disclosure Order requiring him to reveal the identity of his source and the fine imposed upon him for having refused to do so, constituted a

---

[6] Dutch civil procedural law does not provide for hearings "in camera" or "under seal".
[7] HR 10.05.1996, NJ 1996, 568.
[8] 27.03.1996, Rep. 1996-II, case no. 16/1994/463/544, accessible via www.dhcour.int/eng/judgments.htm
[9] 07.11.1989, by Mr. Justice Hoffmann of the High Court of Justice (Chancery Division).

violation of Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms, which reads:

> 1. *Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. ...*
> 2. *The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penal-ties as are prescribed by law and are necessary in a democratic society in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection or health of minors, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or from maintaining the authority and impartiality of the judiciary ...*

The Commission for Human Rights held, that the complaint was well-founded and the case was then brought before the European Court of Human Rights. The Court found that the measures constituted an interference with the applicant's right to freedom of expression as guaranteed by §1 of Article 10 and it had therefore to examine, whether the interference was justified under §2 of Article 10. The Court held that section 10 of the Contempt of Court Act 1981 was a sound enough basis to mark the interference as "prescribed by law". Also, the Court held that the interference pursued of legitimate aim: to protect Tetra's rights. However, the Court held that the interference pursued a legitimate aim was not necessary in a democratic society:

> *39. The Court recalls that freedom of expression constitutes one of the essential foundations of a democratic society and that the safeguards to be afforded to the press are of particular importance ... .*
> *Protection of journalistic sources is one of the basic conditions for press freedom, as is reflected in the laws and the professional codes of conduct in a number of Contracting States and is affirmed in several international instruments on journalistic freedoms . ...*
> *Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest. As a result the vital public-watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information may be adversely effected.*

> *Having regard to the importance of the protection of journalistic sources for press freedom in a democratic society and the potentially chilling-effect an order of source disclosure has on the exercise of that freedom, such a measure cannot be compatible with article 10 of the Convention, unless it is justified by an overriding requirement of public interest.*

Such "overriding requirement" was not found in the matter at hand.
The Court held, that the interim injunction which had earlier been granted to the company restraining not only the applicant himself but also the publishers of his newspaper from publishing any information was already a measure, strong enough to protect Tetra's interests.
This being so, in the Court's opinion, insofar as the disclosure order merely served to reinforce the injunction, the additional restriction on freedom of expression which it entailed was not supported by sufficient reasons for the purposes of §2 of Article 10 of the Convention.

Confidentiality, privilege and the Mediator.

Extrapolation to Mediation leads to the following conclusions.
If the confidential character of Mediation becomes a matter of public interest with such overriding importance that it can be compared with a fundamental right as freedom of the press or freedom of expression, the line of the Supreme Court's decisions leaves room for professional privilege for the Mediator.
For the survival of Mediation such development is crucial because without privilege, the future of Mediation is bleak.
However, to ensure this future and to have it enshrined in case law, there is still a lot to be done in order to comply with the standards, which the judiciary will certainly set before opening up the privilege to the profession.
A guideline to these requirements can be found in the Supreme Court decision[10] denying privilege to tax consultants; it held:

1. *The proposed grounds for cassation pose the question whether the tax consultant is entitled, in his capacity as such, to the right to decline to give evidence before the Court.*

[10] HR 06.05.1986, NJ 1986, 814.

2. *It must be emphasized, that this right of refusal to testify, as an exception to the rule that everybody is bound to testify in Court, is only attributed to a limited group of persons who are bound to secrecy concerning all which has been confided to them in their professional capacity. The social function of such persons brings with it that, in their specific case, the general interest that truth must emerge should yield to the common interest that everybody must be able to turn to them in freedom, in order to obtain assistance and advice without fear of disclosure of what was discussed. Such persons are the advocate and the civil law notary because of their duty as providers of legal assistance. This duty brings with it, that anyone must be able to retain his services freely and without fear for divulging what was discussed and written.*

3. *The question arises, whether a tax consultant, who also can be considered a provider of legal assistance, can be granted the privilege. In order to answer this question it is of importance to note, that in the Netherlands legal assistance can basically be provided by everyone and that in practice this assistance is indeed provided by all sorts of persons, be it independent or employed by an organisation. Entitling all such persons to privilege, would be at variance with the exceptional character of privilege as mentioned above. Generally - save exceptional cases like the one admitted in .....*(follows the Court's decision attributing privilege to the legal aid lawyer) *other providers of legal aid than the advocate and the civil law notary must therefore be denied privilege.*

4. *There is also no reason to make an exception in the case of the tax consultant. It should be taken into account, that the group of tax consultants is not homogeneous and that there is no legal provision prohibiting that everybody can be active as tax consultant. It is also important to note, that there is no statutory system of legal aid in which the tax consultant is assigned the task which makes it necessary that a person in need of legal aid must turn to him for the protection of his legal interests. Under these circumstances the tax consultant cannot be considered to be counted amongst the limited group of trusted persons entitled to privilege.*

This quotation illustrates the fundamental problem: as long as there are no guarantees to professional quality, as long as "Mediation" is not properly defined

and as long as everybody can call himself a Mediator, the risk of abuse will prevent development of privilege.
A meeting of Mafiosi and their consiglieri, planning a "professional" scheme, might be labeled "Mediation" and thus be exempted from scrutiny by law.

It is therefore of great importance that NMI is presently active establishing further professional standards of quality, together with a Disciplinary Board, entitled to take proper measures against malpractice by NMI-registered Mediators.
In an environment of wider acceptance of dispute settlement through Mediation and after further development of professional standards and qualification rules a judge may in a future instance entitle a NMI-registered Mediator to privilege.

Intermezzo II: The advocate as Mediator.

I will revert to this after a few remarks on the confidentiality rules of the "Advocaat en procureur", the Dutch terms equivalent to advocate (or attorney-at-law) and for procurator *litis*.

Rule of conduct of the Dutch Bar Association number 6 reads as follows:

1. *The advocate is bound to secrecy; he has to keep silence about particulars of matters at his hands, the person of his client and the nature and size of the latter's interests.*
   ....
5. *If an advocate has made a pledge of confidentiality to the opposite party or if this confidentiality ensues from the nature of his relationship with such party, the advocate also maintains this confidentiality vis à vis his client.*

For the time being, the advocate-Mediator seems to have an advantage over his colleague-Mediators as a privileged professional - that is: if the Court will accept, that the advocate is *performing his professional duties* when acting as a Mediator.
As mentioned above, this is the narrow scope, within which the advocate is privileged. As at present there are different opinions about the question, whether this is the case. Mr[11] L.H.A.J.M. Quant, practicing lawyer and presently holding the Professorial Chair on Legal Practice at Amsterdam University[12], tends to make a difference between the advocate, solely guarding and monitoring the Mediation process; and on the other hand, the advocate appointed as Mediator on the basis of his special experience and legal expertise. The first category, in the opinion of Professor Quant, is not entitled to privilege, for his activities are comparable to those of a judge or an arbitrator who do not enjoy the benefit of privilege. The advocate-Mediator in the second category is appointed in his capacity as advocate, so under certain circumstances privilege can be justified.

[11] Another digression: Mr does not mean "mister" in Dutch. It is more or less the equivalent to "LLM". This Dutch title is the only surviving remnant in the world of the mediaeval title *Magister Utriusque Iuris*: master of both laws, i.e. canonical and worldly. The title is especially impractical for ladies with a Dutch law degree, visiting English-speaking countries.
[12] Tijdschrift voor Mediation (the Dutch Mediation Quarterly Magazine) 1997, 2, page 24.

There is a third category, according to Quant, in which the advocate is entrusted by both parties to lead them to a just solution, which is predominantly the case in divorce matters, and where privilege is entirely justified.
The Dutch Order of Advocates, on the other hand, is of the opinion that Mediation must be considered as an advocate's normal professional activity[13].
The same holds true for Germany, where the Rechtsanwalt's (attorney's) Professional Rules provide that Mediation is part of an attorney's professional activities.
Professor Quant's opinion is also opposed by mr H.F. Doeleman, President of the Dutch Society of Mediation Advocates[14]. I share his view. Prof. Quant's distinctions between the advocate performing three separate functions is to academical. In practice, it is impossible to make such distinctions and it is therefore that privilege should be assigned to the Mediator-advocate. Whether he *does* invoke his privilege in specific cases is his own responsibility, which is in line with the present case law in this matter (see the Supreme Court's decision concerning the civil law notary's privilege cited above).
It should also be noted that in 1985 the Disciplinary Court of Appeal considered a complaint justified against an advocate who served as an intermediary between two clients contracting with one another and who did not invoke his privilege, when he was called to testify about what was confided to him in a caucus-like situation[15].

I hasten to add that although an advocate is privileged, this does not necessarily qualify him as the better Mediator. I agree with mr Doeleman who concludes that the fact that a person is an advocate does not necessarily say anything about his qualities as a Mediator.

Conclusion.

The two topics which are at the center of this article can be summarized as follows: in order to ensure confidentiality the Mediator should be granted a legal privilege.
However, I add that establishing a Mediator - client privilege based on national law will not suffice. Legal provisions safeguarding professional secrecy in

[13] Advocatenblad (the Dutch Order of Advocate's bi-weekly magazine) 1995, p. 706.
[14] *Praktisch Opgelost, mediation als methode voor conflicthantering*, 1997 SDU, p. 117.
[15] Hof van Discipline 18.03.1985, Advocatenblad 1986, p. 251.

country A can be thwarted by lack of such provisions in country B[16]. This would unfairly disadvantage Mediators (and, for that matter, Mediation) in that particular country.

It is therefore necessary that Mediation should be subject of an international Convention in which, among other matters[17], the Mediator's confidentiality and privilege will be laid down.
International organizations like UIA, IBA and others could take the initiative to stimulate bodies such as Uncitral, The Hague Convention and/or Unidroit to draft such an international Mediation Convention.

6. TO CONCLUDE

Can we do without courts and without arbitrators henceforth? Of course not. There will always be commercial and other disputes that cannot be dealt with in a satisfactory way through ADR or where the advantages that can theoretically be achieved are not relevant, for instance where there is no future relationship. Neither does ADR seem to be an appropriate alternative where a principal point of law must be decided. But this does not alter the fact that in many cases ADR can be beneficial. This can particularly be the case in international commercial relations, where differences in legal systems and cultures may form a handicap in legal proceedings, be it in an international court of law or in arbitration. In the international context the informality of the ADR-process is one of its many advantages.
In this contribution we wanted to show that ADR holds many challenges for lawyers in a changing legal services market, be it as counsel for mediating parties or as mediators.

-o-

[16] For the United States read for country: State.
[17] Like, for instance questions of private international law like applicable law and recognition and enforcement of mediated settlement agreements.