Using Mediation in the Wider Context – ClArb Mediation Symposium

PANEL DEBATE
A Debate on Ethics
Stephen Tester (Chair), Jon Lang and Patrick Farrell (Panellists)

Stephen Tester. I am the first of two super subs for this session. To my right is Jon Lang. Jon has been a full-time mediator since May 2005, when he moved to the dark side – or the bright side – depending on your attitude. To my left is Patrick Farrell, who is a dispute-resolution partner at Norton Rose, specialising in aviation. The topic of ethics is one that is dear to everybody's heart. Everyone believes that they are ethical, and that everybody else isn't. I am going to ask Jon to start by talking on his topic, which is the pet mediator; he will explain what that means in a second. Then I will ask Patrick to tell us some war stories, or at least one. I also have a few other topics that will keep us going before we end the session.

Jon Lang. Let me start off by talking about repeat work. As professionals, we all love repeat clients and repeat work, because in many ways it's the acid test of true success: people coming back for more. We all dream of repeat work, but I just wonder whether there comes a point in time where the dream can turn into a bit of a nightmare. I have in mind the words of Lord Falconer from this morning, where he said the real advantage of having a neutral third party is that they are neutral and have no particular side to impress. I just wonder whether that is put at risk to a degree if you have a mediator that is regarded by others as the in-house pet mediator of a particular law firm, of a particular partner in a law firm or of an actual underlying client.

So let's paint an overall picture: Mr Mediator comes up to the reception area of the law firm and introduces himself to the first party, and then he walks over the other party, who says, 'Hi, nice to see you again. I hope this mediation doesn't go on all night like the last one we did together the other week'. That is a nightmare scenario, but actually it can happen. The mediator doesn't need to look around to gage the expression of the first party to know that they will be looking at him and thinking, What on earth have we done? He's a friend of theirs – he's their mate.

The question raised for these comments is, are there issues that mediators should ensure are disclosed between the parties before the mediator arrives at the mediation. I think it's essentially a matter for the parties, but in the absence of disclosure, is the mediator under any duty to talk to the parties about what he's done in the past? I've been speaking to litigation lawyers and fellow mediators, and I've been looking at some of the codes of conduct of mediation service providers. What I found strange was that the codes of conduct I've seen and the service providers I've spoken to are all fairly consistent in their approach. If there's anything that puts at risk impartiality, neutrality, or independence, it has to be disclosed, and there is a degree of harmony between the various codes of ethics that you see. There's also a degree of harmony between the litigators who appoint mediators. Their general view is, it shouldn't matter at all; this is not a quasi-judicial process, so they like to appoint mediators that they know, as mediation is inherently an uncertain process and they want to appoint a tried and trusted mediator to make it less chancy. However, they will always say when they appoint a mediator, 'This mediator is known to us," or "We've used this mediator in the past' – not that it should make a difference, but if it doesn't come up until the mediation, it could cause embarrassment, and they want to avoid that. So they do usually disclose, although they all emphasise that it shouldn't make a difference. I think there's a difference for mediators who have previously acted for underlying parties as opposed to those who have previously acted for law firms and law firm partners.

Mediators that I have spoken to have a range of views. It is quite interesting in that some won't bother to disclose anything at all because, they say, it's essentially a matter for the parties to sort out, although I've certainly seen correspondence where questions are asked about the number of times I had mediated for an underlying client before, but this is an exception of the rule. Some mediators will disclose a prior mediation if they get permission from the party that they've undertaken for that party. Some will say it depends on the size; for example, with a huge international conglomerate it may be no big issue, but if it's a small economic entity then yes, they might actually speak to that party and their lawyers and this might bring about a disclosure. Arbitrators have a slightly different approach to it all. Yes, they start off with neutrality and independence, but they start to drill down a bit beyond that, and I'm thinking of the IBA traffic light system (IBA Guidelines on Conflicts of Interest in International Arbitration: Approved 22 May 2004). The orange indication refers to previous involvement as an arbitrator, and the guidelines state that if you have sat as an arbitrator on more than two occasions, this is something that must be disclosed. If there is a relationship between your law firm and one of the parties, this is also something that must be disclosed.

However, the mediator codes of ethics I've looked at don't descend to this level of detail. I wonder whether that's because of the nature of the mediator's role being non-adjudicative or because we just haven't thought about it yet because of our profession is so fragmented. The position of judges is that they do recuse themselves if there is any doubt as to their impartiality, and we saw that with the Pinochet case and Lord Hoffman (Pinochet, Re [1999] UKHL 52 (15 January 1999)) and his links with amnesty international. The mere fact that the judge has found against a party is not enough for the judge to recuse himself; there needs to be something more. Mediators and disclosure: is it something that we should or shouldn't do? Should we even worry about, since it's not an issue. What about that scenario in the reception room? The mediator is going to have a lot of work to do to make up lost ground. If the mediator tries to backtrack from this sort of greeting, he may just make it worse. If he pretends there has been no past involvement with the other side, it will look bad if this comes out later. What can a mediator do to favour one side or the other? There is a potential economic advantage for the mediator not to upset or annoy the party who he thinks he will get more work from in the future. That would be an extreme position. The lawyers I have spoken to have said that if they thought a mediator was backing off from doing his job, they wouldn't touch him with a barge pole. So the view I've been getting is that if lawyers suspect a mediator is not playing it straight, they would leave and would never ever retain that mediator again. It is all about perception.

It has been stated that if you are in doubt, you should disclose. There is a comment from Lord Goff in a case where there was an adjudicator acting as a mediator and then flipping back to being an adjudicator. Like an Arb-Med.
Lord Goff said in R v Gough ((1993) 2 WLR 883), 'bias is such an insidious thing that even though a person in good faith may believe that he was acting impartially his mind may unconsciously be affected by bias'. If there is a case for disclosure, I don't think you can leave it up to the mediators. You may form the view of wondering how anyone can think you're bias considering the work you do. The whole essence of mediation is that you work in secret, behind closed doors. Isn't it perverse to speak about the impressions you give? It's all cloaks and daggers, isn't it?

We hear improbable things in mediation, and we are not there to police it. But, if there is a suspicion, and if that suspicion is going to impede progress, then you can suggest that there are ways and means of dealing with things. I've found that getting people back together and taking uncharacteristically careful notes of what's being said usually gets people back on track if they're over-egging it. As it's a closed environment, there is nothing you can do with the notes; people hate any sort of record being made that's not 100% true. In case there is any doubt, if you had been told something that you know is a lie and you're asked to pass it on, the answer is no. There is no shadow of a doubt that, in such a situation, your

professional indemnity insurers would not be very happy. There's been a recent case where a mediator was sued for passing on a valuation for a piece of art work that someone relied on. I think people give themselves differing degrees of latitude depending on what they are talking about. If they are talking about their intention to pursue the other party to the ends of the earth and joining every single officer of the company tomorrow if there's no deal done. You might expect that is not going to happen tomorrow even though they are saying that it could. There are other instances when people shouldn't give themselves any latitude whatsoever, such as saying that they have a witness statement from Employee A if they haven't really. However, I think you have to be quite careful if there is an assumption on the side of the party who asked you to pass on information. You must tell them if you decide not to pass anything on, otherwise they might assume that you have actually passed it on. Timing can be important, but you shouldn't have a party assuming you've passed something on when in fact you haven't.

Patrick Farrell. If a mediator makes a mistake, I would expect them to confess immediately to the parties that a mistake has happened. Then the parties can form a view together with the clients as to what to do; maybe we could carry on, but maybe we couldn't. I would be very uncomfortable if I found out later in the process that there had been a mistake, or that something had been misrepresented or disclosed wrongly in confidence. I would be very uncomfortable if we had carried on not knowing that these mistakes occurred. In litigation, if something goes wrong, we tell the client immediately – that is what we are trained to do. I would expect the mediator to do the same. It may be the case that the mistake isn't so bad and we can work around it.

MEDIATOR ETHICS - repeat clients
Jon Lang, mediator*

Prologue

It's Monday morning. A big day for two businesses. They have been slogging it out in the courts but have agreed to mediate. Both parties have arrived early. They have acknowledged one another and embarked on some small talk but are now in their 'corners' of the reception area of one side's law firm (the home team). The other side (the away team) have been reassured by their lawyers that these days, no one feels it necessary to select a neutral venue. Its all about who has capacity, the best in-house catering and administrative support. The away team is shortly joined by its lawyers. The home team is waiting for their lawyers to descend from their offices and show them and everyone else into their respective rooms. The home team are a bit more relaxed – they have been round the block on mediation before. The away team hasn't, although their lawyers have done a good job in telling them what to expect.

The mediator walks in. He introduces himself to the first group he comes to – the away team. They tell him the other side are here and nod towards them. The mediator walks over. "Morning Mr Mediator, nice to see you again. Hope this one doesn't go through the night like the last one! Ho Ho Ho!" The mediator doesn't need to look at the expressions on the faces of the away team. He knows this is a bad start. He knows there are going to be awkward questions asked of the away team's lawyers as soon as they enter the privacy of their own party room. He knows he has work to do!

Repeat work

Solicitors like to use mediators on a repeat basis because they see it as an advantage, not in a partisan sense, but as a way of reducing uncertainty in an inherently uncertain process. The risk that a mediation fails simply because the process has not been managed properly can be reduced. If they can appoint a mediator who they know can run the process

effectively, who can work well with a wide range of parties and who achieves settlements more often than not, they are off to a good start. And of course mediators, like all other professionals, love (and dream of) repeat work because it is the true acid test of success. But is there a point at which the 'repeat' relationship, be it between mediator/lawyer, mediator/law firm or mediator/party could become more of a nightmare than a dream, unless disclosed during the appointment process?

What do we see in other fields of dispute resolution?

Arbitrators

In the arbitration field, it is generally accepted that when the relationship between a party or law firm crosses a certain line, disclosure should be made. Take the IBA's traffic light system. At paragraph 3 of Part II of the IBA Guidelines on Conflicts of Interest in International Arbitration (2004), it is said

> *The Orange List is a non-exhaustive enumeration of specific situations which (depending on the facts of a given case) in the eyes of the parties may give rise to justifiable doubts as to the arbitrator's impartiality or independence. The Orange List thus reflects situations that would fall under General Standard 3(a), so that the arbitrator has a duty to disclose such situations. In all these situations, the parties are deemed to have accepted the arbitrator if, after disclosure, no timely objection is made. (General Standard 4(a)).*

One of the many situations described in the Orange list is:

> *The arbitrator has within the past three years been appointed as arbitrator on two or more occasions by one of the parties or an affiliate of one of the parties.*

Another is:

> *The arbitrator's law firm is currently rendering services to one of the parties or to an affiliate of one of the parties ……[without creating a significant commercial relationship and without the involvement of the arbitrator.]*

Thus in these and many other situations, it is suggested by the IBA guidelines that arbitrators have a duty to disclose.

Judges and recusal

The fact that a judge has found against a party on a previous occasion does not of itself substantiate an objection to the judge sitting in a subsequent matter, even if the judge had been critical of that party in the earlier case, although if there is any room for doubt, (as to whether the judge could be bias and unable to apply an objective mind to the later case), that doubt should be resolved in favour of recusal. (Drury v BBC [2007] All ER).

The reason why doubt should be resolved in favour of recusal is probably two-fold.

First, there is the issue of appearance or apparent bias, nicely illustrated by the Pinochet case, where it was said that links between Lord Hoffmann and Amnesty International were such as to give the *appearance* that he might have been biased against Pinochet. Lord Browne-Wilkinson, in dealing with the question of apparent bias, referred to the famous words of Lord Hewart in Rex v. Sussex Justices, Ex parte McCarthy [1924] K.B. 256, 259), *'Justice should not only be done, but should manifestly and undoubtedly be seen to be done'*.

Secondly, self-respecting dispute resolution professionals do not generally believe, (absent extreme circumstances), that they could be capable of bias. But as Lord Goff in R v Gough [1993] UKHL 1 (20 May 1993) commented, *'bias is such an insidious thing that, even though a person may in good faith believe that he was acting impartially, his mind may unconsciously be affected by bias...'.* (R v Gough was referred to extensively in Judge Humphrey Lloyd QC's decision in Glencot Development and Design v Ben Barrett & Son [2001] All ER (D) 384 (Feb), a case about an adjudicator acting as a mediator during the adjudication proceedings and which was the subject of an article by the writer entitled 'Med-Arb – an English Perspective'.[1])

As for mediators….

We would all agree that judges or arbitrators, making as they do decisions which permanently affect people's rights, must be ever conscious of the appearance of bias and take steps to head off any potential problems once an award or judgment is made or given. They disclose or recuse themselves.

But mediators don't make decisions. They help parties arrive at their own settlements. They do so in an environment characterised by secret meetings using techniques and strategies far removed from the procedures and processes that categorise judicial or quasi-judicial proceedings. Parties do not know what the mediator is up to for much of the time. So is there any point in worrying about such matters as appearance of bias, neutrality, impartiality etc, when for much of the time the mediator is locked in a room with one party to the exclusion of the other, having secret discussions? Who knows how a mediator may be influenced, consciously or sub-consciously, by what he hears about how badly the bunch in the other room have behaved, allegations that that other bunch are unlikely to even hear made, let alone have a chance of addressing?

But it is precisely because mediators work in such an environment, an environment where, unlike judicial or quasi-judicial proceedings, mediator behaviour cannot be viewed or measured because no one sees it in its entirety, that they must function to the highest ethical standards (and be trusted by the parties without any shadow of a doubt).

The problem is, whilst all mediators would agree that they should subscribe to the highest ethical standards, no-one knows what that means, and from the albeit limited research the writer has carried out for the purposes of this Mediation Symposium, there is certainly no common view (among mediators at least) as to the issue of repeat work and disclosure. But given the fragmented nature of the mediation market, that should not be too surprising!

Ethics

Typically professional ethics are encapsulated in a set of standards adopted by a professional community, usually in the form of a code of conduct. Whilst not always black and white, they provide the boundaries within which professionals should function. Whilst mediators have no universal code, there is a high degree of similarity between the various codes that do exist. Some that the writer has looked at seem to draw a distinction between acting again as a neutral for a party (generally ok) and acting in some other capacity e.g. advisor, (usually not ok). Generally, they do not require disclosure of repeat instructions (as the IBA traffic-light system does), although all codes require the mediator to act fairly, etc. For instance, IMI's Code of Conduct provides that *'Mediators will not accept an appointment without first disclosing anything within their knowledge that may, or may be seen to,*

1 http://www.jonlang.com/pdf/Article%20-%20Mediation%20Arbitrationl.pdf

materially affect their independence neutrality or impartiality.' In the case of the CIArb, paragraph 6.2 of the 'Practice Guideline 4:Mediation Rules' provides *'If, following appointment, a mediator becomes aware of any circumstances that may create a reasonable perception of bias, partiality or lack of neutrality, the mediator shall immediately so inform the parties and, where the mediator was appointed by the Institute, shall also immediately so inform the Institute. If any party objects to the continued services of the mediator, the mediator shall be disqualified.'* This generally reflects the CIArb Code of Conduct, in particular Rule 3 (conflicts of interest), which states *'Both before and throughout the dispute resolution process, a member shall disclose all interests, relationships and matters likely to affect the member's independence or impartiality or which might reasonably be perceived as likely to do so'.*

So, as things stand, it looks like it is left up to the mediator to exercise their judgement as to whether past involvement with one side or the other is a matter that '*may create a reasonable perception of bias, partiality or lack of neutrality….'* But as Lord Goff in R v Gough [1993] UKHL 1 (20 May 1993) commented, *'bias is such an insidious thing…'* should it really be left up to the mediator to decide if there is a risk of them being seen to be bias, or should there be a rule that requires disclosure of any past involvement with one of the parties or their advisors, regardless?

What do mediators think? Colleagues I have spoken to have taken differing approaches. Some disclose past involvement, some don't unless specifically asked. Generally, past involvement with a party is regarded as requiring more thought than past involvement with a lawyer or law firm, particularly where the repeat underlying client is a small economic entity as opposed to a large corporation. But there are varying approaches! (Of course, permission is required from the party concerned before any disclosure of past involvement can be made).

As for lawyers I have spoken to, they all say broadly the same thing – mediating for the same law firm or underlying client should not be an issue, but could easily become an issue, rightly or wrongly, if not disclosed up front (or at least the opportunity for questions to be asked afforded). For this reason, it is the practice among many solicitors, that when proposing mediators they say, if it be the case, that those mediators proposed are known to them or that they have used them in the past. It is then up to the other side to ask questions. Despite this practice, most solicitors agree that it is implicit, when they propose a mediator, that they have some pre-existing knowledge of them.

Disclosure (of what)?

If there were to be a rule similar to the IBA traffic-light system requiring disclosure based on past involvement with a party or advisor, regardless of whether there was a risk of any bias, lack of neutrality etc, what would be caught?

Should a mediator, for instance, be required to disclose:

a) that he has been appointed by the same *lawyer* on one (or two, or five) or more occasions in the past one (or two, or five) years

b) that he has been appointed by the same *law firm* on one (or two, or five) or more occasions in the past one (or two, or five) years

c) that he has been appointed by the same *lawyer* on behalf of the same *client* on one (or two, or five) or more occasions in the past one (or two, or five) years

d) that he has been appointed by the same *law firm* on behalf of the same *client* on one (or two, or five) or more occasions in the past one (or two, or five) years

Other possible areas that might give rise to considerations of disclosure are where the mediator:

e) was a *former partner* of one of the law firms involved

f) that he is a member of a chambers which receives a large amount of work from one of the law firms involved

g) has recently run a course for one of the law firms involved on effective representation of clients at mediation (with tips on how to get the best out of the mediator and process)

h) has had a pre-mediation meeting with one side, as opposed to a telephone conversation, in the run up to the mediation

In practice

The reality is that most of the time, any issues of concern will have been brought to the surface during the appointment process. The writer has certainly seen correspondence between solicitors asking very specific questions about the number of mediations, if any, conducted by him in the past for an underlying client. But in the absence of such information being disclosed by others during the appointment process, is it simply a matter of *caveat emptor*, or should the mediator have a duty to disclose past involvement with a lawyer, law firm or party (or cause a disclosure to be made by the law firm or party), regardless of any concern on the mediator's part as to his ability (or perceived ability) to act properly.

Mediators should of course ask themselves on every potential appointment whether there is anything that needs to disclosed. In the absence of a universal code or other yardstick against which to consider that question though, it is always going to be a matter of individual choice. However, what should perhaps be borne in mind is that the solicitors the writer has spoken to, whilst acknowledging that having acted previously as a mediator for one of the lawyers, law firm or party, should not be an issue, they all agree it could become an issue and put the process at risk if not disclosed, precisely the situation the solicitor proposing his tried and tested mediator was trying to avoid!

So, some observations.

Mediators must be trusted. They have a limited amount of time in which to build trust. In the example above, the mediator might have done ten mediations for the home team, or one. It wouldn't matter – the away team would be left a little uncomfortable. Would they believe, for instance, that the mediator might not push the home team so hard on reality testing, or not take the time to fully understand and properly articulate their (the away team's) position on a particular point, for fear of upsetting the home team and putting at risk the economic benefit of further repeat work? Probably not. That may be a little extreme. But would they be left feeling uneasy? Probably yes, and the mediator would have plenty to do to make up lost ground. He could do it, but why run the risk of doing anything that may compromise the success of the mediation?

As already mentioned a few times now, solicitors like to retain mediators they have worked with in the past to increase the chances of settlement (reducing uncertainty that an unknown mediator might bring to the process). If non-disclosure in fact reduces the chances of

settlement, because that which was not disclosed becomes known at some point during the mediation and causes, at worst, mistrust and at best unease, no-one is going to be happy. And the position can in fact get a lot worse if disclosure is not made. Again, take the example above. The mediator walks over to the home team. They are discreet. They do not acknowledge they have met the mediator before. The mediator does the same. He may only have a vague recollection anyway. Later, the away team finds out the mediator and home team have met before! A throw away remark perhaps at a small joint meeting between the two lead negotiators that the mediator is chairing. It might appear in these circumstances that the mediator and home team have conspired in some charade!Prior involvement of a mediator with one of the appointing lawyers or law firm is to be expected. It is perhaps implicit in a mediator's nomination and is often expressly mentioned.

Closing Thoughts

Prior involvement with an underlying party is perhaps not so expected (but of course happens). But does that really mean that mediators should routinely check and ensure that the 'right' disclosures have been made? Is it not permissible for mediators to assume that those considering appointing them ask of each other questions on matters that might be of importance to them or their client? In many cases, parties will not care at all whether a mediator has been appointed by their opponent before. Indeed, in specialist areas, often that is not just the expectation, but the attraction! (Of course, in matters where a mediator perceives there to be a true conflict, assumptions are not good enough. But we are talking about matters of impression here, not true conflicts). However, in some cases, past involvement with a mediator might be significant and, if not disclosed but later revealed, could upset the process. In those cases, a mediator might, before the day of mediation, think about discussing the issue with the solicitors representing the party with whom there has been prior involvement and, where it is felt appropriate and consent is given, to disclose that involvement to the other party.

Jon Lang is a full-time independent commercial mediator and immediate past chair of the Mediation Committee of the International Bar Association.
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