

# Kluwer Mediation Blog

## A Mediator's Dilemma

John Sturrock (Core Solutions Group) · Saturday, December 29th, 2018

### **The Dilemma:**

At an initial private meeting with a lawyer and his lay client in a mediation, it became obvious to the mediator that he had previously mediated in a matter which was related to the present dispute, the outcome of which was not known to the present parties. In the mediator's view, it had no direct bearing on the present mediation and presented no direct conflict of interest.

However, the mediator felt that the parties needed to be aware of the fact of his involvement, not least because a claim might result from resolution of the present matter which would be directed against insurers who had been involved in the earlier matter. He was concerned about how the insurers might react to his involvement in both matters. He was bound by the confidentiality provisions of the mediation agreement in the earlier matter not to disclose his involvement in that earlier matter.

He was aware that his unilateral withdrawal from the present matter without explanation would, for a number of reasons, be a serious blow to the lay clients.

### **What happened:**

The mediator spoke privately to the lawyers and explained only that he had had some involvement "in a related matter". The lawyer whose client had a potential claim against insurers was concerned about the possibility that the mediator's involvement (as he inferred) in both matters might be used by the insurers as a reason not to meet the latest claim.

The mediator sought unsuccessfully to contact the lawyer who had acted for the insurers in the first matter. He then contacted the claims manager of the insurers in that matter (who was known to him). He explained a "hypothetical situation" to the claims manager, who (a) authorised the mediator to disclose his involvement in the earlier matter to those in the present matter and (b) offered to speak directly to the lawyer with a potential claim arising from the present matter.

The mediator conveyed this information to the lawyers and the communication referred to in (b) was apparently made. Both lawyers subsequently confirmed that they had no concerns about proceeding with the mediation. The mediator had not spoken to the clients about any of this and agreed with the lawyers that he would explain privately to each client in the presence of their lawyer that he had had some involvement "in a related matter". Having done so, he left the clients and lawyers to discuss the situation privately. Both lawyers subsequently confirmed that their

clients had no concern about proceeding. The matter was then closed and the mediation proceeded.

*(Incidentally, at a time when matters were uncertain, the mediator had taken steps to arrange for a colleague to take over from him if necessary.)*

What had the mediator missed? Why was the mediator still cautious when speaking to the clients?

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