

Kluwer Mediation Blog

Should Cab Rank Rule apply to mediators?

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What is Cab Rank Rule?

The Four Bars (namely, England and Wales, Ireland, Northern Ireland and Scotland) have recently issued a joint statement on the cab rank rule. According to the statement, the cab rank rule mandates barristers not to *discriminate between clients, and that they must take on any case provided that it is within their competence and they are available and appropriately remunerated*. Besides, the Four Bars re-affirm in their statement their commitment to the cab rank rule because it:-

- promotes access to justice;
- recognises that it is for the judges and juries to decide and to judge, and that passing judgment is not the role of advocates;
- imposes an obligation on the independent referral bar to accept work even from those with whom they profoundly disagree, and of whom they profoundly disapprove;
- means the role and duty of barristers is and is only, to advise, and then to represent, always subject to their duties to the court.

Those who are interested to know more about the cab rank rule may wish to read the learned article “[The origins and development of the Cab Rank Rule for Barristers in England and Wales](#)” by Andrew Watson.

What this blog is not about

This blog post does not seek to discuss (1) whether a barrister-mediator should be bound by the cab rank rule in accepting or refusing mediation briefs; (2) whether cab rank rule applies to solicitors; and (3) how the cab rank rule operates (with or without modification) in some other common law jurisdictions (e.g. Singapore and New Zealand) where there is only one branch of legal professionals – solicitors and advocates or solicitors and barristers.

Are mediators subject to cab rank rule now?

Mediators are from all walks of life and many of them are not lawyers let alone barristers. It appears that cab rank rule or the spirit of it has not been referred to or incorporated into the professional conduct codes of most, if not all, of the mediation organisations, whether local or international.

From a self-interest perspective, is it unwise on the part of a practising mediator to consider the question – “should the cab rank rule apply to mediators?” which may limit one’s freedom to pick and choose cases?

Why should mediators consider cab rank rule?

As a person dedicated to promoting mediation, I am inclined to think that if mediators do not let the mediation service users and those who refer cases to them understand under what circumstances a mediator may refuse appointments, the mediation service users and/or their agents may in the long run have less confidence in mediation because they will think that mediators may accept or refuse appointments at their pleasure. Any perception of lack of transparency towards a profession on the part of the public could eventually affect the general image and development of that profession.

Mediators should not turn down appointments because (1) they promote access to justice by offering the disputing parties an alternative/appropriate dispute resolution process which has the benefit of saving the parties’ time and expenses; (2) mediators see themselves as neutral third parties and they should not and must not discriminate between parties themselves as well as their causes; (3) mediators are facilitators, process managers and communication experts rather than advocates or decision makers and thus, professional mediators will not allow their own values affect their professional performance in mediation; and (4) there is hardly any issue of competence for mediators are the process experts and their primary competence is to assist the parties to communicate and negotiate whereas the subject matter of the dispute can be learned by better preparation and where applicable with the assistance of the parties and/or their legal or professional representatives.

Given the above, mediators and in particular those who do not perceive the mediation practice as a secondary occupation ought to accept as many appointments as possible subject to the agreement on fees and dates (i.e. availability) only.

Being a mediator with some years of actual practising experience, I would like to share that it is sometimes tempting to turn down appointments when one feels that the legal representatives of a party are known to be aggressive and uncooperative. My answer to such concerns is that it is the

parties who need our mediation services and a mediator should not turn down cases solely because he/she is not keen to work with a particular lawyer or law firm. Moreover, if those not-very-nice lawyers keep coming back to the mediator with cases for their clients, that probably means that they may not think too negatively about the mediator or there are good reasons justifying the engagement of his/her services.

It is also occasionally tempting to stay away from high profile politically sensitive cases as many mediators may not want to be involved in politics or dealing with those with political powers. If a mediator sees the mediation practice as a service rather than a means of earning a living, the concern may not be an actual one because mediation is of a confidential nature and so long as the mediator is not keen to tell others that (1) a political sensitive case is being handled and/or (2) there is or is not a settlement, the politically oriented dispute itself is no different from other cases. If one does not have a devil in mind, there is no devil at all. Besides, if a mediator has no desire to leave the mediation profession with a view to entering into politics, he/she should not feel under pressure when dealing with cases with political dimensions.

One may say that a mediator should consider not acting further when there is conflict of interest or potential conflict of interest. Conflict of interest is a challenging topic. However, the role of a mediator is neutral and impartial. The issue of conflict of interest or potential conflict of interest should be left to the parties and their legal representatives. Disclosure of previous dealings with a party or parties on the part of the mediator is of utmost importance but the decision to be involved in the proposed case on the part of a mediator should be in the hands of the parties.

Conclusion

Cab rank rule applies to barristers but not mediators. Although cab rank rule does not apply to mediators, mediators should appreciate the wisdom behind such a rule and are advised to go through a careful thinking process before deciding not to take up an appointment. Mediators should feel less concerned about their personal interest when deciding to accept or refuse an appointment as mediation is a service. On a personal level, I shall bear cab rank rule in mind and treat it as my good practice guideline. As a mediation mentor and trainer, I encourage my mentees, students and readers of this blog post to know more about the cab rank rule and consider whether they should also take the rule as their good practice guideline.

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