

2-1-1999

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## Recommended Citation

Creelman, Michael (1999) "Mediators' notes of the mediation - a mediator's protective device," *ADR Bulletin*: Vol. 1: No. 8, Article 2.  
Available at: <http://epublications.bond.edu.au/adr/vol1/iss8/2>

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## Legal practice in ADR

## Mediators' notes of the mediation — a mediator's protective device

*Michael Creelman*

'It should be remembered that everything that is said at a mediation is not privileged and may not be made without prejudice, despite legislation protecting confidentiality in mediations.'

A practice appears to have been built up, at least from anecdotal evidence, of mediators destroying their notes following mediation. It is submitted that this practice could eventually be the downfall of those particular mediators.

A mediator may be a compellable witness in legal proceedings brought subsequent to the mediation. Such a situation could occur when a party to a settlement agreement is attempting to enforce the agreement. Further, a mediator may be sued for negligence, breach of fiduciary duty and breach of contract. Other situations may arise where a party to a mediation may require evidence from the mediator as to what took place at the mediation. It should be remembered that everything that is said at a mediation is not privileged and may not be made without prejudice, despite legislation protecting confidentiality in mediations.<sup>1</sup> A mediator's notes would provide a permanent record of what took place at the mediation.

In *Standards for Court Connected Mediation in Victoria*,<sup>2</sup> under the heading 'Termination of Mediation', provision is made for the mediator to file his or her notes in a sealed envelope with the court. Para 6.5 provides as follows:

The mediator may file at court in a sealed envelope any notes made during the course of the mediation. The notes shall remain confidential. They shall not be released to the parties and may only be released to the mediator if the mediation is reconvened or the mediator requires them for the purposes of legal proceedings to which the mediator is a party.

Certain benefits can be available to a mediator who keeps notes of the mediation, some of which are identified below.

### Objective record

A mediator's notes are a permanent

record of the mediation and are taken by the mediator who is, or should be, impartial and at arm's length from the participants to the mediation. The mediator is not tainted by emotion or subjective bias and therefore the mediator's notes are likely to be a very important objective record of the proceedings at the mediation.

### Evidence to refresh memory

If a mediator were compelled to give evidence about what took place at the mediation, the mediator's notes could be used by the mediator to refresh his or her memory under the evidentiary rule that notes can be used by a witness to refresh the witness's memory if they are a record of events that are taken at the time of the event or shortly thereafter. The notes must always be a contemporaneous record made substantially at the time of the occurrence or shortly thereafter.<sup>3</sup>

### Professional indemnity insurance

When a practising lawyer acts as a mediator he or she is prima facie covered by professional indemnity insurance for any acts, errors or omissions which may take place at the mediation. If a mediator destroys his or her notes of the mediation, the destruction may prejudice the mediator's professional indemnity insurer. Under the provisions of s 54 of the *Insurance Contracts Act 1984* (Cth), an insurer's liability may be reduced if its interests are prejudiced, or the insurer may refuse to pay a claim where the act of the insured could reasonably be regarded as being capable of causing or contributing to a loss in respect of which insurance cover is provided by the insurance contract. As a consequence, the mediator might find him or herself without ➤



➤ professional indemnity insurance or, at best, limited professional indemnity insurance, should a claim for breach of contract, breach of fiduciary duty, negligence, misleading and deceptive conduct or some other cause of action be brought against the mediator by a disgruntled participant at mediation.

The exposure to liability is of course reduced where a statute extends full indemnity against civil liability to a mediator. The *Courts (Mediation and Arbitration) Act 1994* (Cth) extends the same immunity to mediators and arbitrators as is offered to judges.<sup>4</sup>

There are probably a number of mediators who self-insure for professional indemnity insurance. These mediators may not be lawyers or, if they are, they are probably practising exclusively as mediators. Presumably they have also reduced their exposure from potential financial loss by not having any assets in their own names.

**Self incrimination**

While a mediator's notes may be exculpatory of any act or omission of a mediator, in some instances the mediator's notes may also prove to be an inculpatory weapon working to strike the mediator down. If a mediator's notes disclose matters which showed that the mediator may have breached a fiduciary duty of a participant to the mediation — for example, the notes disclosed that the mediator had imparted confidential information to a participant without the consent of the party imparting that confidential information to the mediator — the mediator's notes may go to prove a breach of fiduciary duty by the mediator. No doubt this is one of the reasons why some mediators choose to destroy their notes.

**Intention of the parties**

The mediator's notes could be used in evidence to prove the intention of the parties at mediation. In particular, the terms of settlement may not be clear to all parties, particularly as time passes. The case of *Knight v Truss-Michaelis*<sup>5</sup> concerned an application in chambers by

the plaintiff for an order of discovery against the Legal Aid Office of Queensland (LAO) to produce all books, records, files and notes in the possession of the LAO with respect to a settlement conference which took place between the plaintiff and the defendants previously. The settlement conference arose out of previous proceedings in which both parties had, or had applied for, legal aid. A solicitor was appointed to conduct the settlement conference and following completion of the conference, gave his notes to the LAO. The plaintiff was alleging that there was a concluded settlement to the prior suit and that the solicitor's notes at the conference were relevant to proving a compromise. The judge allowed discovery of the solicitor's notes despite the submission by the LAO that the discovery would 'strike at the very heart of the mediation system introduced in order to resolve disputes'. The learned judge was of the opinion that the documentation held by the LAO was not privileged:

The mediation system is designed to achieve resolution ... In the event of such a resolution it may be necessary to revert to other evidence to explain the intention of the parties who have signed the written (settlement) agreement. Consequently, all the documentation produced at the conference may be relevant and discoverable.<sup>6</sup>

The submission by the LAO that discovery would 'strike at the very heart of the mediation system' was, with respect, a misguided submission, although it would have been a relevant argument had a settlement not been reached. As a settlement *had* been reached, it was then incumbent upon the judge to order discovery. Just as disputants should be encouraged to settle their disputes without litigation, equally, where a settlement has been reached, the disputants should not be able to hide behind the cloak of confidentiality so as to restrict performance of the settlement terms.

The mediator's notes in this instance were an invaluable forensic piece of evidence in proving that a settlement was reached. ➤

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'It will not be long before a professional indemnity insurer denies indemnity for a claim made on the basis that the mediator prejudiced the position of the insurer by not taking any, or any proper, notes, or by destroying notes.'

### Compulsory note-taking

➤ The issue as to whether mediators should be compelled to take notes of what takes place at their mediations is still to be debated. Has the time perhaps come when mediators should be compelled to take notes? It will not be long before a professional indemnity insurer denies indemnity for a claim made on the basis that the mediator prejudiced the position of the insurer by not taking any, or any proper, notes, or by destroying notes. The practice of destroying notes should therefore be reviewed by each and every mediator.

It may also be incumbent upon participants to a mediation to insist that the mediator take notes and place those notes on the court file (or other safe place) following mediation. Where litigation is not on foot, the notes could be placed in safe custody for a period of time (say six years) before they were then destroyed. If a mediator offers him or herself to act as a mediator for free, the mediator should not be concerned about keeping notes of the mediation.

Mediators should not fear having to give evidence as to what took place at the mediation. Of course, there is a cost to the mediator in giving evidence. Further, the mediator may wish to be represented by counsel. There is nothing preventing a mediator — except perhaps market competition — from specifying in the mediation agreement that any party who calls a mediator to give evidence should pay for the mediator's time and costs.

### Conclusion

Mediators should reflect carefully on their policy of destruction of the notes taken at mediation, particularly if they want to ensure continued cover by professional indemnity insurers. The mediator's notes could subsequently prove useful both for the participants to the mediation and to the mediator. ●

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### Endnotes

1. For example, s 110P *Supreme Court Act 1970* (NSW); s 53B *Farm Debt Mediation Act 1994* (NSW).

2. Victorian Law Reform Commission and the Attorney General's Law Advisory Committee in May 1994, drafted by Dr RS Ingleby.

3. *Jones v Stroud* (1825) 2 C & B 196.

4. Section 53C. Other examples include *Community Justices Centre Act 1983* (NSW), s 27, *Dispute Resolution Centre Act 1990* (Qld), s 5(2) and *Evidence Act* (Vic), s 21N.

5. Unreported, District Court of Queensland, Pratt CDJ, 14 April 1993.

6. Above at 6.

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