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To keep or not to keep – is that really the question?

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Issues in ADR practice

To keep or not to keep – is that really the question?

Scott Pettersson

One of the many divides of practice in mediation is what the mediator does with the information garnered during a mediation. While reference is made here to mediation, the matters raised also apply to other dispute resolution processes. Traditionally there have been two views:

- The mediator destroys all documents and notes associated with the mediation.
- The mediator keeps all documents and notes associated with the mediation.

In this brief article I consider what these options mean, and also the hybrid used by some practitioners, which is to keep some of the material but destroy the majority. It is axiomatic that this impacts on the concept of confidentiality, but only so far as documentation extends. There are of course many additional issues regarding confidentiality in mediation, one of the more intriguing being whether the fact that there is a mediation scheduled, or a mediation has occurred, is of itself confidential.

To keep

By keeping the materials and documents associated with the mediation it allows the mediator, in the event that they are called on by the parties or the court, to confirm actions, documents and allegations. This applies equally in the event that the parties request the mediator to provide further assistance where they seek to re-mediate or to clarify an outcome from the previous mediation.

Some mediators follow this practice, believing that it will allow them to better defend their conduct during the mediation in the event that they are

subject to litigation, either as a defendant or a witness, in a subsequent court action. Mediators that follow this practice must consider a number of issues. Some spring readily to mind and others may occur to those reading this article.

- **How much cost and space is associated with storage?** If each mediation amounts to about one lever arch file a busy mediator could rapidly fill their storage capacity.
- **What is suitable storage?** It may be that the documents the mediator holds are commercially sensitive. What standard of secure storage should be maintained for such documents? Is allowing the overflow to be stored in the garage suitable? Does liability potentially raise its head if the documents are lost or stolen from a location which is 'insecure'.

By keeping the materials and documents associated with the mediation it allows the mediator, in the event that they are called on by the parties or the court, to confirm actions, documents and allegations.

- **Have the parties consented to the storage?** Does the mediation agreement cover the retention of the material?
- **How long are they to be retained?** If the mediator stores the documents associated with the mediation, when can they destroy them and do they then require the permission of the parties?
- **What is 'destroying'?** It may be, as proposed above, that the documents or notes are commercially sensitive. Therefore these may, in the eyes of 'the reasonable man', require a particular method of destruction. They may also require notification to the parties who hold rights in that material. Is it more effective for the mediator to return the material to the

Not to keep

By destroying the documents and materials gathered as part of the mediation process and the mediator's notes, it is perceived that the mediator is better positioned regarding keeping the confidences of the parties disclosed in the mediation. However, by selecting this option, if joined as a party to litigation the mediator will have to rely on recollection rather than refer to actual contemporaneous notes and associated documents that informed the actions and comments made.

Some additional questions arise for the 'non-keeping' practitioners. For example:

- **What is it exactly that they do not keep?** Do they destroy the copies or drafts of the heads of agreement that may have been signed at the end of the mediation? Do they destroy the mediation agreement?



person owning the rights with a note stating that they have made no copies?

- **Whose property is it anyway?** Does it become an obligation on the dispute resolver to determine who holds the rights in the material? Is it possible that the rights may vest in a third party that is not a party to the mediation? Can the obligations of duty of care extend to non-parties to a mediation?
- **Are there statutory obligations?** If a public authority is a party to mediation they may have obligations pursuant to various state, federal and local government laws or procedures regarding archiving or destroying information.

The doctrine of partial destruction

While this doctrine may sound like a credo from bomber command in a war, it is actually a proposal that certain agreed and pre-identified material be retained. Practitioners who use this method have adjusted their mediation agreements to identify specifically for retention certain documents that may be created in association with the mediation. To avoid the pitfalls

surrounding ‘informed consent’, the modifications include:

- **A list of the documents to be retained** The most common documents retained are the mediation agreement, the heads of agreement or final agreement documents, and any feedback or quality assurance review document associated with the mediator’s or association’s practice.
- **How are the documents to be physically stored?** In secure storage, a locked filing cabinet, a commercial storage facility, as an electronic image, or the like?
- **How long will the documents be stored?** It may not be useful to place the obligation on one’s heirs and assigns to retain these documents into the future. In any event, after a reasonable period they will be of little or no benefit to the parties or the mediator.
- **How will the documents be destroyed?** By fire, shredding, use of a commercial secure document disposal company.
- **Does the destruction have to be confirmed in writing and to whom?** It may be useful for no notice to be provided, but it may be good practice to ensure that it is clear in the agreement that the documents will be

destroyed without recourse to the parties.

- **Documents excluded from destruction** It may be considered to be best practice not to destroy the mediation agreement that will contain the indemnities and waivers for the mediator.

Conclusion

What may have been in the past a simple matter of preference appears on reflection to be a matter worth significant and measured consideration. There has not been a lot of research published on this, nor does it appear to have been extensively canvassed in recent conferences, colloquiums or the like.

While there does not appear to be an industry standard that represents best practice it would be wise to ensure that whatever path you elect to follow in your personal practice that it be clearly enunciated to the parties and agreed. Plainly this is more effective if it is recorded in writing as part of the mediation agreement. ●

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