

## WHEN PASSIONATE MEDIATORS BECOME QUIET

How far does the obligation to maintain neutrality in mediation extend?

Whether you subscribe to Twitter, Facebook or LinkedIn, to name a few, or the online editions of local and national newspapers, you will have read numerous posts, articles, blogs – and responses – either critical or supportive.

Whether political or social issues, from time to time I have been tempted to respond. I'm not a huge social media user but understand that one should never post on social media in anger – and certainly not after a glass of wine. However, as a mediator I am conscious of the mediator's obligation to maintain neutrality in mediation, so whether that should extend to making opinionated statements on social media or otherwise is debatable.

The National Mediator Accreditation System (NMAS) prescribes the manner in which mediators should conduct themselves in mediation. The following is an extract from the NMAS Practice Standards, perhaps worthy of mention.

"10 Knowledge, skills and ethical principles

10.1 A mediator, consistent with the Approval Standards, must have the knowledge and skills, and an understanding of the ethical principles, outlined below:

(c) ethical principles

(iv) impartiality including the avoidance of conflicts of interest".

What is of concern is whether social media commentary on political, social or other issues in any way conflicts with these principles. Even if not, in the broader sense would such comments impact on the process if a mediator has expressed strong views on an issue and subsequently acts as mediator in a related dispute where there is possible conflict. That could potentially be a problem where the views of a mediator have previously been expressed on social media on a range of issues which might contrast directly with the known views of a party to the mediation.

I would be astonished if any mediator was able to say they have never been involved in a mediation where a party makes a statement which might be in direct conflict with a mediator's social or political views. What then follows is whether that view can be held without it impacting on the quality of the mediation process and without breaching the obligation of impartiality.

In an article on Mediate.com<sup>1</sup> the authors commented: "In order to facilitate dialogue between polarised perspectives, mediators are expected to present themselves as physically, emotionally and intellectually equidistant from either disputant in the mediation". They ask whether neutrality is as relevant as impartiality and whether mediators shouldn't have the "liberty to genuinely demonstrate their true endorsement of value systems of the societies that they live and operate in? The authors note: "Mediators who claim that they can walk into a mediation room with a clean slate are kidding themselves".

The authors do, however, support the mediator's expression of opinion on a public matter but call for "prudence and discernment" as to how their opinion influences their mediation

work. In other words, would sharing of controversial views by a mediator on social media adversely impact workflow from solicitors who have an opposing view?

On a similar topic John Sturrock<sup>2</sup> notes (quoting a passage from a book by Ken Cloke – *Politics, Dialogue and the Evolution of Democracy*): "If you sign a petition, march peacefully, write op-eds, or lobby for your point of view, there is no way anyone who disagrees with the positions you have taken will accept you as a dispute resolution professional they can trust. I promise you that whatever actions we take in our personal lives will be noted". Professor Berne Mayer (referred to in Cloke's book) raises a contrasting question, namely, whether we are "obligated to remain silent . . . in order to maintain our status as credible neutrals" in the face of racism, anti-Semitism, homophobic behaviour and the like.

For example, should a mediator who has a strong but unpublicised conviction that smoking should be banned everywhere be mediating a dispute involving a claim against a cigarette company?

The question one might ask is how far we as mediators should go if we feel compelled to speak out on issues impacting social, political or other issues. Are we able to maintain impartiality in mediation but nevertheless express views not in the general sense "neutral"?

The late British-American author and journalist Christopher Hitchens once noted: "Never be a spectator of unfairness or stupidity. The grave will provide plenty of time for silence".

Should that perhaps be the overarching guide rather than, as Mayer puts it, maintaining our status as so-called "credible neutrals"? ■

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1. Should a Mediator Make a Political Perspective Public by Jonathan Rodrigues, AJ Jawad, November 2020.
2. Mediator Engagement in Politics – and other things we care about (Core Solutions Group) 28 October 2018.

