

Mediation and Advocacy

By David Ash

Litigation is run by the state. Mediation is run by parties. This century, the state has brought mediation into litigation, a move producing tensions of which much has been written. The focus of this article is instead on harmony, on how litigation advocates can draw upon rather than discard their training, to become more effective mediation advocates.

Litigation is the forum through which the state exercises its power to quell disputes, while mediation is a forum through which the parties exercise their right to resolve disputes.¹ In the 21st century, submission to the first forum carries implied consent to the second. The rationales are ideological (a belief in the personal and social value of self-determination) and financial (a belief that mediation saves money for both the state and disputants).

This paper addresses three matters: whether ethical rules binding advocates in litigation bind them in mediation; the interplay (in Australia) of the advocate's immunity and mediation; and advocacy skills in the mediation context. It is helpful first to consider dispute evolution over the last 50 years and within that evolution the unchanged role of the advocate.

Dispute evolution in the last 50 years

In 1906 the American legal scholar and long-time dean of Harvard's Law School Roscoe Pound delivered a speech to the annual convention of the American Bar Association. Its title was "The Causes of Popular Dissatisfaction with the Administration of Justice". In it he said:

The most important and most constant cause of dissatisfaction with all law at all times is to be found in the necessarily mechanical operation of legal rules.

Seventy years later in Minnesota the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice took place. Unsurprisingly it is remembered as the Pound Conference. From it Professor

¹ The importance of the distinction from the judiciary's point of view was strongly reiterated by French CJ, Kiefel, Bell, Gageler & Keane JJ of the High Court of Australia in *Atwells v Jackson Lalic Lawyers* [2016] HCA 16; (2016) 259 CLR 1, [33] & [34].

Frank Sander is credited with coining the phrase “Alternative Dispute Resolution”.

Mediation as a form of ADR was picked up by many common law countries over the following decades:

- ❖ Practically through the work of individuals (most famously in Australia the former chief justice of New South Wales Sir Laurence Street) and organisations (of which LEADR, now known in both New Zealand and Australia as the Resolution Institute, and the Australian Commercial Disputes Centre, now the ADC, are locally the best remembered).
- ❖ Structurally through civil practice reform (primarily Lord Woolf’s Access to Justice Reports which were embedded in the Antipodes via reforms invariably manifested as a wholesale re-issue of civil procedure statutes and court rules).

The change is seminal, but that is all the more reason not to see mediation or ADR generally, in isolation. Since 1976, other changes have radically affected society’s perception of, and advocates’ approaches to, litigation and to disputes in general. For example:

- ❖ The development of administrative law. The premise has not changed: the state makes a decision only reviewable on a question of law. However, the widespread inculcation of procedural fairness has meant that while the process remains investigative, adversarial approaches have become a norm.
- ❖ The separate development of executive determination of previously judicial controversies. The rise and rise of civil tribunals is the exemplar.
- ❖ The renaissance of commercial arbitration. International and supranational arbitration practices are integral to many large commercial practices.
- ❖ There is a recognition of the value of, and implementation of, an idea of community justice.
- ❖ The development of a separate jurisprudence (and for that matter, a separate mediation regime) in the area of family law.

Three less obvious but profound changes:

- ❖ Fewer lawyers in Parliament. In 1964, Sir Robert Menzies, an Australian prime minister who had himself been a great advocate oversaw the retirement of his former master, Sir Owen Dixon, regarded by judicial peers as one of the common law’s greatest judges, and his replacement with Sir Garfield Barwick, one of the common law’s greatest advocates.

- ❖ Less money for the determination of disputes. The public purse is tightening. The current view of the state is that mediation is cheaper than litigation and must by this fact alone be promoted.
- ❖ The supremacy of the corporation as the basic economic unit both globally and locally.

Many advocates in the 21st century may never have a natural person as a client. Natural persons generally bring a moral element to a dispute. Despite social and political attempts to breed a corporate citizen, the statutory frame remains largely amoral. The result is that there may be many different views of a dispute within the legal person. At one extreme, one corporate officer may see a dispute as no more than a chose in action or a contingent liability. At the other, an officer may well have come to own the dispute, unwittingly relying on it to define their own place in a corporate hierarchy.

Whether disputes are something to be quelled or something to be resolved, the very idea of a dispute must be affected in the result. The rise and rise of the corporate client is particularly relevant for two reasons:

- ❖ The more intimate and more urgent environment of the mediation can throw up problems in relation to authorities to settle.
- ❖ In New Zealand and in all the Australian jurisdictions, civil procedure legislation prescribes an overriding objective which binds both courts and parties. The most recent manifestation is rule 1.2 of the High Court Rules 2016 (NZ) which provides that “[t]he objective of these rules is to secure the just, speedy, and inexpensive determination of any proceeding or interlocutory application.” Some of these jurisdictions go further, imposing a duty on parties to pursue this objective, and some go even further in the case of corporations. For example, in New South Wales the duty owed by corporate parties is also owed by persons (including parent companies) who provide financial assistance or other assistance to the corporation or who exercises any control or influence over the corporation’s conduct of the proceedings.² This is a profound qualification to the idea of independence of the corporate person, something hardwired into the practitioner’s way of thinking for well over a century.

The unchanged role of the advocate

Advocacy is often described as the art of persuasion. Thesaurus.com includes in its many synonyms for “persuade”, the terms “cajole”, “coax” and “gain the

² Sections 56(4)(b) and 56(6) Civil Procedure Act 2005 (NSW).

confidence of”. Many may regard the first two as necessary items in the forensic persuader’s toolbox but they are wrong. Sir Owen Dixon had the third synonym squarely in his sights when he described advocacy as tact in action.

Webster’s Dictionary circa 1913 says of tact:

Sensitive mental touch; peculiar skill or faculty; nice perception or discernment; ready power of appreciating and doing what is required by circumstances.

Webster’s Online Dictionary gives:

a keen sense of what to do or say in order to maintain good relations with others or avoid offense

Dixon meant the 1913 version. Dixon, it can be noted in passing, had one of the hardest mediation gigs of the 20th century; he came to the subcontinent pursuant to the United Nation’s Security Council’s 1950 resolution on the Kashmir dispute; the mediation failed, but no mediator before or since has come so close to success.³

In 1837 the founder of Webster’s Dictionary was concerned by his daughter’s news that the spirit of abolition was among her and her sister and wrote:⁴

Eliza, slavery is a great sin & a great calamity—but it is not our sin, though it may prove to be a terrible calamity even to us in the north. But we cannot legally interfere with the south on this subject—& every step which the abolitionists take is tending to defeat their own object. To come to the north to preach & then disturb our peace, when we can legally do nothing to affect their object, is, in my view, highly criminal, & the preachers of abolitionism deserve the penitentiary.

Dealing with children requires tact. The first two sentences provided Eliza & Julia with it. But the last is adversarial persuasion in its most misconceived form, tending to defeat the writer’s object. Later, Abraham Lincoln would be charged with leading the North through a particularly great calamity; his description of tact was “the ability to describe others as they see themselves”.

Locally, there is Sir Paul Hasluck’s remark about Barwick when the latter was Australian Attorney: Unlike other lawyers who told you why you couldn’t do something, Barwick looked for how you could.

In summary, the heading of this section is “The unchanged role of the advocate”: if a practitioner regards forensic advocacy as getting the decision-maker to adopt their client’s point of view, they will have to change their role

³ A G Noorani, The Dixon Plan, Frontline - India’s National Magazine, Oct 12-25 2002, Vol 19(21), www.frontline.in/static/html/fl1921/stories/20021025002508200.htm.

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commons.wikimedia.org/wiki/File:Noah_Webster_letter_to_Eliza_Webster_on_abolitionism_1837.jpg.

when they go to a mediation; if a practitioner regards advocacy as the art of aligning the decision-maker's point of view with their client's interests, they do not change their role. The only difference for an advocate is the identity of the decision-maker. In litigation, it is the judge. In mediation, it is the client and the other party. As for the mediator, they facilitate, they do not decide.

Ethics & mediation

Advocates owe fiduciary and general law duties to their clients, they owe professional obligations to society and its relevant institutions (usually a court), and – more recognised now than in the past – they owe obligations to themselves. The primary written sources for their obligations are usually the profession conduct rules made by the relevant professional association and the civil procedure rules of the relevant court(s).

Professional conduct rules

In New Zealand, the conduct rules provide:⁸

A lawyer assisting a client with the resolution of a dispute must keep the client advised of alternatives to litigation that are reasonably available (unless the lawyer believes on reasonable grounds that the client already has an understanding of those alternatives) to enable the client to make informed decisions regarding the resolution of the dispute.

In Australia, uniform conduct rules are not yet universal. That said, those jurisdictions whose barristers and solicitors have adopted a form of the rules generally have a provision similar in effect to New Zealand's rule.⁹

The application and extent of this rule is not entirely clear. Apart from anything else, a client does not always see a lawyer because they have a dispute. They may see a lawyer about a problem; it is only when the lawyer considers the problem through a legal set of eyes that the potential of a dispute is realised. At what stage does the obligation in the rule arise? And it does not merely arise. It continues. The issue is not only temporal. There is also the issue of the extent to which non-legal matters must be considered. For the practitioner's duty is not confined to legal factors affecting litigation or the alternatives. It may extend to a reasonable assessment of the matter from the client's point of view, a point of

⁸ Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, r 13.4.

⁹ See eg r 7.2 of the Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015 and r 36 of the Barristers Rules (NSW).

view which – it is reasonable to suppose – is not usually a practitioner’s point of view.

In Australia, the absence of an immunity and the rise of plaintiff lawyers targeting professionals makes it likely that the rule is to be litigated sooner rather than later. A advocate who is retained by a client or by another practitioner must consider at the outset and at appropriate intervals whether the obligation to inform has been triggered and whether they have sufficient information to properly discharge the obligation.

Civil procedure rules

Some jurisdictions have little or nothing to say about mediation. Others are more prescriptive. An example of the latter is NSW’s Civil Procedure Act 2005 and its Uniform Civil Procedure Rules which apply to all of the state’s civil courts.

As to the Act, Part 4 is headed “Mediation of proceedings”, and s 25 defines mediation as:

... a structured negotiation process in which the mediator, as a neutral and independent party, assists the parties to a dispute to achieve their own resolution of the dispute.

Note that both the heading and the section make clear that mediation under the *Civil Procedure Act* is within the perimeter of the proceedings; ownership of the dispute is with the state and not with the parties; it is not the parties’ resolution of their own dispute, but the parties’ own resolution of a dispute. Hence also the complementary proposition, that nothing in Pt 4 prevents parties to proceedings “from agreeing to and arranging for mediation of any matter otherwise than as referred to” in Pt 4: see s 34(a). In fact, the very definition of mediation is yet another example of the difficulty in finding language which accommodates two different philosophies and regimes. We are already in “proceedings”, yet we are now informed that there is a separate “process” within.

Part 4 will be engaged if there is an order for referral by the Court: s 26(1). Also, in relation to family provision matters, s 98 of the state’s 2006 Succession Act provides:

(2) Unless the Court, for special reasons, otherwise orders, it must refer an application for a family provision order for mediation before it considers the application.

The question of whether a referral under s 98 of the Succession Act puts in train a mediation under Pt 4 of the court rules generally, has not been determined.

Does it matter whether a mediation falls within Pt 4 of the Civil Procedure Act? Yes. For example, Pt 4 prescribes a number of rules, in particular in relation to

privilege and confidentiality. These rules may not apply to mediations which are not founded upon a referral: see eg *Lewis v Lamb* [2011] NSWSC 873.

As to professional obligations, there are two primary consequences when a mediation falls within Pt 4:

❖ Section 56 provides that

(1) The overriding purpose of this Act and of rules of court, in their application to civil proceedings, is to facilitate the just, quick and cheap resolution of the real issues in the proceedings.

...

(3) A party to civil proceedings is under a duty to assist the court to further the overriding purpose and, to that effect, to participate in the processes of the court and to comply with directions and orders of the court.

(4) [A barrister representing a party in the proceedings...] must not, by their conduct, cause a party to civil proceedings to be put in breach of [that] duty.

...

❖ Section 27 provides that:

It is the duty of each party to proceedings that have been referred for mediation to participate, in good faith, in the mediation.

Even without s 56, it is unlikely that an advocate can avoid an implied duty to assist their client in the discharge of this statutory duty of good faith.

Ethics without context

The courts and professional bodies of the various jurisdictions have a great deal in common and very little by way of substantial difference; each impose on practitioners duties of courage, competence and courtesy. Moreover and everywhere, a legal practitioner is an officer of the court.

But is this similarity enough, for any type of mediation? What of a mediation where one party is in South Australia and the other is in New Zealand? And what of mediations where litigation has not commenced? Are duties to the court present or absent? And to use the example, duties to which court?

There is one other possible source of ethical rules in a mediation, obvious when one considers that mediation is something in the hands of the parties, and that is the parties' own agreement to mediate. But experience suggests that while mediators may sometimes include obligations for parties and their advisors in their agreement with the parties, this is not a common source.

It will be unfortunate if the informality of mediation becomes undermined with undue concern about the unanimity of professional obligations among mediation advocates. Arguably, a contractual obligation on the parties to act in good faith, one that infects the parties' advisers, should be sufficient. However, practitioners should be alert to the possibility of misunderstandings.

Advocate's immunity & mediation

The doctrine of advocate's immunity is a curious case of Trans-Tasman co-operation with an English underlay. In New Zealand in 1974, McCarthy P stated the extent of the protection;¹⁰ the House of Lords approved it in 1980;¹¹ Mason CJ in the High Court of Australia adopted it in 1988;¹² the House of Lords withdrew their adoption in 2002;¹³ in 2005, the High Court of Australia affirmed the position it had taken 15 years earlier;¹⁴ and in 2007, the Supreme Court of New Zealand abandoned the protection, adopting the House of Lords' 2002 withdrawal.¹⁵

The continuation of the immunity in Australia affects mediation although the position has crystallised only recently.

On 16 December 2015, the NSW Court of Appeal determined *Stillman v Rusbourne [2015] NSWCA 410*. The respondent solicitors had acted for the appellant client in civil proceedings which settled at mediation. The client later sued the solicitors. His claim was summarily dismissed and he appealed.

The majority dismissed the appeal. The work done by the respondents fell within orthodox understandings of the advocate's immunity being work that led to a settlement and thus affected the conduct of the case in court: Gleeson JA at [11]; Simpson JA at [19]. While mediation does not, of itself, involve the exercise of judicial power, it is a step in the process towards the exercise of judicial power, which is exercised when judgment is entered.

Justice Basten in dissent found that advocates' immunity is rooted in the fundamental need of the administration of justice for finality of judicial determination of controversies between parties. In the present case, consent orders were entered prior to commencement of a trial, reflecting a settlement reached by the parties out of court; the judicial determination of the controversy

¹⁰ *Rees v Sinclair* [1974] 1 NZLR 180.

¹¹ *Saif Ali v Sydney Mitchell & Co (a Firm)* [1980] AC 198.

¹² *Giannarelli v Wraith* (1988) 165 CLR 543.

¹³ *Arthur JS Hall & Co (a Firm) v Simons* [2002] 1 AC 615.

¹⁴ *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1.

¹⁵ *Lai v Chamberlains* [2007] 2 NZLR 1.

on its merits did not take place. There was no justification for extending advocates' immunity to the conduct of the respondents in the course of the mediation which lead to the settlement: [8]; [17]; [30]; [47].

The effect of that judgment was that an intermediate court in the Australian judicial hierarchy recognised the extension of the immunity from the field of litigation (defined at the start of this article as the forum through which the state exercises its power to quell disputes) to mediation (described at the same place as a forum through which the parties exercise their right to resolve disputes).

However, the effect was brief. On 2 September 2016, three members of the High Court gave judgment to the effect that, with the consent of the parties, special leave was granted, the appeal was allowed and the original application by the defendants was dismissed, with the defendants wearing costs in the three courts.

What happened between 16 December 2015 and 2 September 2016 was that the High Court delivered its reasons in *Attwells v Jackson Lalic Lawyers Pty Ltd*.¹⁶ The Victorian Court of Appeal summarised the effect of the decision in March this year:¹⁷

In Attwells the High Court clarified the scope of the doctrine of the advocate's immunity. The majority (French CJ, Kiefel, Bell, Gageler and Keane JJ) recognised that the foundation of the immunity relates to the exercise of judicial power. The protection afforded by the immunity arises out of the connection between a lawyer's work and the judicial determination of a controversy for which a court is responsible. It does not extend to the compromise or settlement of a proceeding, even where that settlement is recorded in consent orders by a court, because the substantive resolution of the dispute does not involve the exercise of judicial power by a court.

As the most recent appointee to the High Court has observed, the non-extension cuts both ways:¹⁸

In Attwells, a majority of this Court held that the advocates' immunity from suit did not extend to negligent advice which leads to a compromise of litigation by agreement between the parties. As the majority joint judgment explained, by the same reasoning it is difficult to envisage how the immunity could ever extend to advice not to settle a case.

In any event, the reality is that for more than a decade, the immunity has expanded almost without check. And it is just that, an immunity, a right in one class of possible defendants to a claim in tort to call in aid a complete defence not available to other classes. Particularly in the context of a mediation, it is

¹⁶ [2016] HCA 16; (2016) 259 CLR 1.

¹⁷ *Spralja v Bullards* [2017] VSCA 32 (3 March 2017), [46].

¹⁸ *Kendirjian v Lepore* [2017] HCA 13; (2017) 259 CLR 275, Edelman J, [18].

difficult to see how a legal adviser should be immune from suit while, say, an accountant is not.

Before closing this section on the immunity, it is informative to take a look at the pleaded facts in *Stillman* (that is, the as yet untested allegations summarised in the publicly available reasons of the Court of Appeal).

A third party commenced proceedings against a company and a natural person, in relation to rental payments on equipment owned by the third party and used by the company. The company and the person retained lawyers. The proposed defence was that the agreement between the parties was not a lease of equipment, but rather a joint venture agreement in which profits and losses would be shared.

In the negligence action later brought by the person against the lawyers, the allegations were that from mid-2006 to mid-2007, the lawyers' advice had been that there was a sound basis in fact and law to defend the proceedings; that mediation had taken place in July 2007 resulting in unfavourable terms; that in the course of the mediation, the lawyers' advice had changed and the clients had been pressured to accept terms which were excessively disadvantageous; that the terms had included a contingent consent judgment against the clients, not to be entered if a debt repayment plan was met; that the natural person became seriously injured, with the result that neither he nor the company had not been able to meet the plan; and that the company had gone into administration, the natural person had entered bankruptcy, and the trustee in that bankruptcy had subsequently assigned the chose in action comprising the claim against the lawyers to the natural person.

The two allegations as to conduct are the giving of an advice of a sound basis to defend and the changing of that advice during the mediation. Whether or not those allegations will be established in this particular case is irrelevant for current purposes; for the hypothetical respondent practitioner, allegations could be met by establishing that the mediation was duly prepared for in two respects, first, by retesting their own assessment of the defence, and secondly, by prepping the client prior to the mediation about its process, in particular its urgency and intimacy.

Advocacy is the art of aligning the decision-maker's point of view with the client's interests, and that this holds true in mediation even though one of the decision-makers is that client.

Advocacy skills and mediation

What is the skill base necessary for an advocate representing a client at a mediation? Before running through a checklist of matters, a recap:

- ❖ A mediation is where the parties decide, not the judge.
- ❖ A mediator facilitates that process, and is not a decision-maker.
- ❖ If advocacy is tact in action, the art of aligning the decision-maker's point of view with the client's interests, then tact is necessarily addressed to the two decision-makers, the client and the other party.
- ❖ The professional conduct rule set out above and present in many jurisdictions is a continuing obligation.

Much is written about whether advocates contribute to mediation, which is after all a process owned by parties and not by lawyers. In the jargon, mediation empowers parties. An advocate must be a Barwick and give informed advice on how to, not how not to; as one US commentator said, “[d]on’t call me, call my lawyer’ are sometimes the most empowering words imaginable”.¹⁹

The referral

A duty to consider mediation is not a duty to mediate. That said and while it might have had considerable appeal a decade ago, it is probably not sufficient to say judiciously to a judge “My client doesn’t wish to take on the job of resolving the dispute; they want you to do your job and quell it”. The duty of a judge under modern procedural rules is not an unqualified duty to quell. It is a duty to seek the just, speedy and inexpensive *determination* of any proceeding. In the modern era, a quell remains a determination but a determination is less and less often a quell.

Any decision to refer must take into account local rules. Apart from legislation such as the NSW Succession Act referred to above, regard must be had to any court practice note. The orthodox view is that a mediation best occurs before either party has spent significant funds, or after both parties have put their pleadings on, or after both parties have put their evidence on; usually the in between any of these stages holds an information imbalance (or a justifiable apprehension of one, which is as bad). An advocate retained to appear must check the timing of and the basis for the mediation. Is it upon an agreement only? Or is it upon a court order? Are there parameters? If there are (not) parameters, is there anything to be done? In this day and age, the alteration of

¹⁹ Tina Grillo, “The Mediation Alternative: Process Dangers for Women” 100 Yale LJ 1545 (1991), p 1599, cited in Bryan Clark, *Lawyers and Mediation*, 2012, Springer, 115.

consent orders, by consent may be doable by email to an Associate or to the Registrar, copied to the other party.

The mediator

Common complaints – less common these days but still made – are “*The mediator didn’t read the documents / refused to bash the other side’s head / was useless.*”

There are good and bad mediators. There are good and bad judges too. One tried and true weapon in the armoury for dealing with bad judges is a mastery of courtroom procedure. The same is true in mediation. An advocate must understand the process.

Is the mediator truly meant to read documents? Why? What do they need to decide? Won’t information get in the way of their primary business of facilitation?

Is the mediator’s role truly to bash the recalcitrant party’s head? Who decides what is recalcitrant? What does that party then think about the mediator’s neutrality?

While a particular mediator may appear as “useless”, do we know a “useful” one when we see them?

An advocate must understand the process their client has instructed them to appear at. Many people expect that a mediator, especially one who has held high a judicial post, will evaluate and advise the parties.

This is not mediation. It is neutral evaluation.²⁰ Neutral evaluation is a process of assessing a dispute in which the evaluator seeks to identify and limit the issues of fact and law that are in dispute and, by that process, assist the parties to resolve the dispute. Senior counsel are frequently retained by disputing parties for this purpose. It can be highly effective. It may be what the advocate should be seeking. But to repeat, it is not mediation.

That said, a lawyer may be a useful person to mediate. Traits an experienced lawyer can bring to the role of mediator are the ability to be respected and gain the confidence of the parties and the legal representatives; the ability to remain calm; professionalism; keeping confidences; courtesy; an eye for fairness and

²⁰ For an example of a template for this process as distinct from mediation, see www.aat.gov.au/steps-in-a-review/alternative-dispute-resolution/neutral-evaluation-process-model.

even-handedness; and (remembering though that advice is not being given) power.²¹ That said:

- ❖ Seniority as a lawyer is no guarantee of these traits. Some advocates are so inculcated with the idea that adversarial litigation means that one have to be adversarial, that they leave themselves no room to develop their advocacy. The idea is wrong and always was; it is rather like judges believing that they should be judgmental, surely one of the worst qualities a judge can have.
- ❖ Practitioners are familiar with the idea of a person, a senior practitioner or a judge, “commanding” respect. The exercise of uncoupling the ideas of command and respect commends itself.

An advocate should keep a list of five mediators whose contact details they can pass to instructing practitioners and to clients. If the mediation is to occur in a jurisdiction where mediators are accredited, only an accredited mediator should be used.²² Accreditation assumed, the best sources are:

- ❖ The advocate’s own experience.
- ❖ Word of mouth from colleagues.
- ❖ Mediators listed with local professional body or bodies.

It is unlikely that one party would agree to a mediator whose partner or employer or employee represents the other party. What of barristers, who are independent of and often opposed to their chambers colleagues? This is a matter of common sense. A mediator is not a decision-maker, but an appearance of neutrality is as important as neutrality itself. In litigation, the decision-maker has more likely than not come from a chambers environment. In mediation, it is unlikely that either decision-maker has an informed appreciation of the set-up. An advocate may well be comfortable with a mediator who is a barrister the same chambers as the other party’s advocate, but that is not the point; the advocate is not the decision-maker and it is not their choice.

The pre-mediation conference

Time and cost permitting, compliance with the rule means a conference with the client and any instructing practitioner well prior to the mediation and not on the morning. While the client may not be able to be comfortable with the process, they should at least have an idea of what is in store. Apart from such advice

²¹ Drawn from Clark, p 118.

²² At msb.org.au/mediators.

and discussion about the issues of the case – ie the issues which would be live if the matter went to court – the following should be considered:

- ❖ Confirming the venue;
- ❖ Confirming the starting time and – importantly – the finishing time (everyone at the mediation may have a different understanding of this; clarify it as soon as reasonable possible);
- ❖ Walking the client through the likely course the mediation will take, including the likely delay and waiting;
- ❖ Advising the client of the role of the mediator and of what the mediator's role is not;
- ❖ Confirming the costs to date and the likely costs to hearing, for all parties;
- ❖ Confirming that the person attending the mediation has authority to settle;
- ❖ Confirming any history of offers and counteroffers and confirming whether or not any offer or rejection of an offer should be made in the opening; which is a good time for...
- ❖ Asking the client what their own expectations are, reminding them (and oneself) that mediation is the province of the client and the other party, something which should also inform one about one's own role (for example, has the advocate confirmed with the client that they want the advocate to talk in any opening or joint session, or has the advocate just assumed this?); and
- ❖ Noting that litigation is uncertain and preparing the client for the possibility that in the urgency and intimacy of a mediation, at least in private session, the advocate, any instructing practitioner and the client may be expressing different views at different times, and noting that courteous and informed disagreement resolved in private is hardly a novel concept.

A reference to the mediation agreement itself and to the confidentiality undertaking to be signed by all present is useful. Apart from the fact that they should not be regarded as formalities, they as pieces of paper can provide a visual reassurance for the client.

Mediation jargon which may be heard from time to time is BATNA / WATNA, or "best alternative to a negotiated agreement" / "worst alternative to a negotiated agreement".

A good mediator is in the business of getting parties to get a clear idea of what this means for them, and to the extent possible for the other side. Likewise a good advocate must be able to give informed advice on this. An advocate must

be able to remind the client of the weakness in the client's own case and be able to get the client to put themselves in the other party's shoes.

All said and done, the advocate should always keep in mind the client they actually have and reasonably tailor their advice accordingly. Don't overwhelm an unsophisticated client and don't lecture a sophisticated client. Above all, honour the fact that this is their forum for their dispute; the mere process of honouring should increase the advocate's value to the client in the forum.

Position papers

Position papers cause much angst. They shouldn't. A position paper is a short and as best can be neutral – preferably very short and very neutral – document which tells the mediator the facts including the amount in issue; which puts the client's point of view; which acknowledges the other side's point of view; and which proffers, expressly or implicitly, good faith. Mediation is a forum where positions and issues should only be raised if both parties wish to raise them, bearing in mind always that the mediator is not there to determine them.

Other material

Why is anyone sending the mediator material that they almost certainly don't need to read? What is the difficulty in stating in the position paper:

The matter is set for a three-day hearing in two months / The matter is not yet set for hearing but the expectation is three days plus. The pleadings are joined and the affidavit evidence from five witnesses in total has been served. The plaintiff / the defendant does not anticipate trawling through the material or any part of it during the mediation. However, it is available if the mediator wishes to review it prior to the mediation.

As to the advocate's own conduct at the mediation

The advocate should be on time and introduce the client to the mediator. The mediator should be asking the client, as one of the two people who own the forum (and paying the mediator) how they wish to proceed or at the least suggesting how things should proceed, and the advocate and the client should already have worked through possible answers.

Whether the advocate is naturally taciturn or naturally talkative, they must be professional at all times.

They can assume that the other party is taking their measure as the person who will conduct any litigation and will cross-examine them. In and around courts, advocates tend to act collegiately with colleagues. A mediation is not a court; it is a forum which belongs to the client and the other party. Apart from anything else, they are paying the money for it. Talking at length with the other legal

representatives is something the client may misinterpret. As for spending lengthy amounts of time with the mediator, it is not a good look. Judges and barristers used to have morning tea to the exclusion of solicitors and never mind the client. Its time has come and gone. Let it be.

Opening

If the advocate has received instructions to open, they do so. They can address as many people as are in the audience, but they must address only one, and that is the other party. An advocate may regard the task as explaining to the other party why they will lose. It is better to use tact in action. Use language appropriate to and that will be remembered by, the person.

Argument on the issues is unlikely to move anyone, and the advocate should tailor their remarks accordingly. They should be brief.

One thing that pops up from time to time: where one side believes there is a killer point which the other side just doesn't get. The advocate must determine whether it is a killer point and even if it is, whether it is the type of point to be made in this forum at this time. If it is such a point, putting it deftly may well deposit considerable pressure into the other room. And if the point is worth making it is worth making in the opening. A mediator is likely to be reluctant to be a conduit for a piece of legal advice, and merely delivering it lawyer to lawyer is not advocacy in the sense discussed, as it is not being delivered to the relevant decision-maker.

It is worth the advocate recalling at this stage whether the client has instructed them to make or to reject an offer during the opening. Some mediators, especially court-appointed mediators on a tight timeframe, try to extract whether one or other of the parties has an opening offer. Each mediation will have its own dynamic, but the advocate should carry the client's default instructions from the conference.

Private sessions

Private sessions take on a life of their own. The advocate should resist the temptation to be hurried by a mediator.

The advocate should be aware of how the client may perceive any difference of opinion between themselves and any instructing practitioner also present. Differences of opinion are to be expected; whether they are dealt with professionally is a matter for the advocate and the instructing practitioner. In any matter, or at least a matter where greater than usual difficulties are

anticipated, has the advocate discussed with any instructing practitioner the best way for both to discharge separate obligations to the client?

It has already been suggested that the advocate should assume the other party is looking at them to see how they might run the case in court. The advocate should assume that the client is doing the same.

If an offer is with the other side, the private session is an ideal time to update everyone's understanding of the relevance of the professional conduct rule set out above, if it applies.

Meeting with the other side

A mediator may suggest or the other side may request that the legal representatives meet. Provided the client consents, there has to be a good reason for an advocate to refuse to do this.

A mediator may suggest or the other side may request that the parties meet without their representatives. While a matter for the client, the advocate should recognise that a symptom of a severe power imbalance can be one party's belief that there is no imbalance. Even if there is no power imbalance, the advocate and the client must talk things through with the mediator to ensure as best can that there is a level playing field. As a rule of thumb, the advocate must consider advising the client that the mediator be present. If there is a meeting between the parties and if the client reports that there is an outcome, the advocate should immediately confer with the other party's advocate to clarify whether their respective clients hold consistent recollections.

The expression "power imbalance" is peculiarly democratic. One really has to infer that there is something inherently wrong or unfair about one party being less powerful than the other. Be that as it may, it is a useful shorthand for an undoubted truth. Mediation is not a panacea. An under-resourced party in litigation is as under-resourced in the mediation as in any other part of the proceedings. All the more reason to use the mediation as an opportunity. One thing worth remembering: if the other party is an institution who is regularly involved in litigation – a bank or an insurer are the obvious examples – the advocate should not assume that the institution has a singular response to all its litigation. While an institution wants finality in a particular piece of litigation as much as the next party, it is also in the business of managing many pieces of litigation, with the result that the risk of a particular result in a particular case is not a confined risk. An informed and appropriate reference to that contingency can be a significant advantage in mediations.

Dealing with the mediator

The mediator is not determining anything. The mediator is facilitating something in a forum owned by two other people, the parties. The advocate is bound to act in good faith, or at least to carry the client's good faith, but that does not extend to acceding to suggestions that the advocate does not think are in their client's interests. That said, the mediator may be an excellent sounding board. The advocate must not pass up an opportunity to say things to an independent person trained to listen and to listen in confidence.

Terms of settlement

Terms should be in writing. Experience shows that a settlement at mediation should usually be just that, a binding agreement. If there is further detail to be done, so be it, but there should be an agreement. The categories identified by the High Court of Australia in *Masters v Cameron*²⁴ remain a relevant the starting point in both Australia and New Zealand;²⁵ for a recent appellate consideration of the decision, see *Feldman v GNM Australia Ltd [2017] NSWCA 107*.

As to the stage at which the parties need to look at terms, there are two extremes and many things in between. There is the "let's get a figure and everything else will follow" school and the "let's get a frame before we talk about figures". The word "figure[s]" is used because usually although far from always, an amount of money to be paid by one party to the other party is a central if not the only issue.

It is unfortunate to reach a figure only to find an issue about whether judgment should be entered, and embarrassing if a figure is reached and one side is of the view that the figure is the settlement and nothing else is on the table.

The author's preference is for a frame from the outset, no matter how simple the settlement. Put another way, the author's view is that from the outset, a complete offer should be given. Subsequent offers can be to the effect "New figure, same other terms". Mobile phones have cameras. These can be used productively.

A report

²⁴ (1954) 91 CLR 353.

²⁵ *Savvy Vineyards 3552 Ltd v Kakara Estate Ltd [2014] NZSC 121*.

An advocate has a duty to accurately report their appearance at court, up to and including the taking of judgment. The duty may extend to identifying the next step to be taken. The duty is all the more important upon an informal and confidential mediation, whether successful or not. The report may turn out down the track to be the only record.

The report is an appropriate vehicle to record other material matters. The materiality will vary, but possible examples are a chronology of offers and any significant areas of disagreement within private sessions.

The final and not insignificant consideration is who is to tell the court and when. This requires a knowledge and understanding of applicable rules and practice, any direction any court referral, and the attitude of the parties.

Conclusion

Wherever law and mediation are discussed, there is usually much angst about inconsistency and misunderstanding. In particular, there is a concern among mediators – including legally-qualified mediators – that the legal profession and the judiciary are engaged, consciously or unconsciously, in a process of capture; the very things that make mediation what it is are being lost in a process of legalisation.

I think that this can be overstated. Any area of human intercourse is prone to suffer regulation; “the more laws the government produces, the more corrupt the government becomes” is from Tacitus and not some populist politician of today. If the advocate wishes to be involved in the debate, they can. In the meantime, it is sufficient to remember Murray Gleeson’s observation that the rule of law is not the rule of lawyers.

More profound than mere inter-professional rivalry is the development of law in a democratic age. Advocates and judges are administrators of justice, an idea much older than universal suffrage. As we have seen, the domestic court stands at the apex of this ancient system. Mediation – along with all manner of extra-curial species such as community justice, domestic tribunals and international arbitration – does not so much challenge the role of the apex as invite each person involved in litigation to re-examine the edifice.

The idea that disputes in their public form are discrete items of justiciability which fall to be ruled upon by the third arm of government has undergone profound change, some for the good and some for the bad.

An identifiable academy has developed. A standard text is Laurence Boulle’s *Mediation: Principles, Process, Practice*, now in its third edition. Boulle is a

professor at Thomas More Law School in Sydney. Had Catherine of Aragon and Henry VIII been subject to mandatory family dispute resolution, would More have kept his head? Donna Cooper provides some good examples of how not to do things in her recent article “Lawyers behaving badly in mediations: Lessons for legal educators”.²⁶ In it, she picks up Olivia Rundle’s delightful identification of five species of lawyers and discussion of how each can contribute to their client’s cause.²⁷

²⁶ (2014) 25 ADRJ 204, available on Austlii.

²⁷ Olivia Rundle, “A spectrum of contributions that lawyers can make to mediation” (2009) 20 ADRJ 220, available on Austlii. The spectrum is considered in a practical context by Kathy Douglas & Becky Batagol in “The role of lawyers in mediation: insights from mediators at Victoria’s Civil and Administrative Tribunal” (2014) 40(3) MonLR 758, available on Austlii.