Mediation and advocacy

By David Ash[1]

Litigation is run by the state. Mediation is run by parties. This century, the state has brought mediation into the litigation process, a move which has produced inconsistencies and tensions of which much has been written. This paper focuses on something else, on how barristers can in fact draw upon their training in litigation to become more effective advocates in mediation. It is based upon a talk given by the author at the Bar Association on 28 June 2017.

Litigation is the forum through which the state exercises its power to quell disputes. Mediation is the forum through which the parties exercise their right to resolve disputes. In 21st century New South Wales, submission to the first forum carries an implied consent to the second. The key rationales are self-determination and a belief that if mediation is successful, the parties are satisfied and the state saves money.

This paper addresses five things:

- By way of a short overview:
  - Dispute evolution in the last 50 years;
  - The unchanged role of the advocate; and
- In greater detail:
  - Advocate's immunity & mediation;
  - Ethics & mediation;
  - Advocacy skills relevant to mediation.

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 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:

- Informally through the work of individuals (most famously in NSW Sir Laurence Street) and organisations (of which LEADR, now the Resolution Institute, and the Australian Commercial Disputes Centre, now the ADC, are locally the best remembered);
- Formally through civil practice reform (in Anglo-Australian parlance, Lord Woolf's Access to Justice Reports which were embedded in the Antipodes via NSW's *Civil Procedure Act 2005* and its cognates in other States and Territories).

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 practitioners' 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, particularly at a state level where constitutional constraints are less marked, of executive determination of previously judicial controversies. The rise and rise of NCAT is the obvious example.
- 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 barristers in Parliament. In 1964, a prime minister who had himself been one of Australia's great advocates oversaw the retirement of his former master, regarded by judicial peers as one of the common law's greatest judges, and his replacement with 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 barristers in the 21st century may never have a natural person as a client. Natural persons generally bring a moral element to a dispute. The statutory frame of the corporation is amoral. This produces a range of new outlooks. For one corporate officer, a dispute may be no more than a chose in action or a contingent liability. Another may have come to own the dispute, unwittingly relying on the dispute to define their own place in the corporation's hierarchy.

Whether we see disputes as something to be quelled or as 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:

- In litigation, a notice of appearance filed by and continuing instructions from, a solicitor provide a line of communication which usually frees the barrister from inquiring into any authority to settle. The more intimate and more urgent environment of the mediation can throw up problems in relation to authority to settle, if not foreseen and anticipated beforehand.
- We shall shortly see that s 56 of the Civil Procedure Act covers court-ordered mediations. Section 56 not only impose duties on clients and their legal advisers. It also provides a profound qualification to the idea of the independence of the corporate person, something hardwired into our way of thinking for well over a century. Because in the case of a corporate client, a duty 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.

The unchanged role of the advocate

Advocacy is often described as the art of persuasion. Thesarus.com includes in its many synonyms for 'persuade', the terms 'cajole', 'coax' and 'gain the confidence of'. Many may regard the first two as necessary items in the forensic persuader's toolbox but I think that they are wrong. I think 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 first and I agree. Dixon, I note 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.[2]

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:[3]

> 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 to my mind, the last is adversarial persuasion in its most misconceived form, tending – with no small irony – to defeat the writer's object. Later, Abraham Lincoln would be charged with leading the North through that great calamity; his description of tact was 'the ability to describe others as they see themselves'.

Locally, we can recall Sir Paul Hasluck's remark about Barwick when the latter was 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 you regard forensic advocacy as getting the decision-maker to adopt your client's point of view, when you go to a mediation you will have to change your role. If you regard advocacy as the art of aligning the decision-maker's point of view with your client's interests, then 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.

Advocate's immunity & mediation

On 16 December 2015, the 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 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].

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*.[4] The Victorian Court of Appeal summarised the effect of the decision in March this year:[5]

> 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:[6]

> 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.

Finality is fundamental to our judicial system: autrefois acquit; res judicata; Anshun; the list goes on. It may be useful to see the different jurisprudence as an attempt to evolve and extend the idea to include a party-owned resolution which was the subject of dissent and ultimately rejection, a rejection in which the orthodoxy of judicial ownership reasserted itself.

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 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, I look at the pleaded facts in Stillman. I am considering only 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 your client's interests, and that this holds true in mediation even though one of the decision-makers is that client.

Ethics & mediation

Barristers owe fiduciary and general law duties to their clients, they owe professional obligations to society and its relevant institutions (usually a court), obligations which include

procedural fairness, and – more recognised now than in the past – they owe obligations to themselves.

In New South Wales, the primary written sources for these obligations are two:

- The *Legal Profession Uniform Conduct (Barristers) Rules 2015* made by the Legal Services Council; and
- The Civil Procedure Act.

The Barristers Rules

Rules of particular relevance:

- The Rules are made in the belief that barristers owe their paramount duty to the administration of justice and that barristers owe duties to the courts, to their clients and to their barrister and solicitor colleagues: Rules 4(a) and 4(c).
- Barristers' work includes representing a client in a mediation: Rule 11(d).
- A barrister has an overriding duty to the court to act with independence in the interests of the administration of justice: Rule 23.
- Under 'Duty to the client', Rule 36 provides:

  A barrister must inform the client or the instructing solicitor about the alternatives to fully contested adjudication of the case which are reasonably available to the client, unless the barrister believes on reasonable grounds that the client already has such an understanding of those alternatives as to permit the client to make decisions about the client's best interests in relation to the litigation.

Unless the context requires otherwise, 'court' is defined when used in the Rules to include mediations: Rule 125. I have already suggested that litigation – the state-sponsored regime of dispute quelling – and mediation – the private process of resolution – do not sit side-by-side with easily categorised comfort. It will not come as a surprise that this is so in the ethics arena. We shall shortly see that most mediations which we as barristers engage in, are mediations in the course of litigation already commenced in a traditional court. If that is so, there can be no issue that the duty to that court remains overriding and rule 125 does not operate to carve out or to impose some kind of subordinate or collateral duty to 'a mediation' whenever a generalised 'duty to the court' is spelt out.

More difficult is Rule 36. A brief arrives. It identifies a dispute between the client and another person and provides copes documents and statements. It seeks an advice. It is otherwise silent. Is this a 'case' to which the obligation in Rule 36 applies? If not, at what stage is there such a case? Put in the context of the premise for the rule, at what stage is 'fully contested adjudication' a living thing which founds the basis for an alternative?

The difficulty is not only temporal. There is also the issue of the extent to which non-legal matters must be considered. For the barrister's duty under this rule appears not to be confined to legal factors affecting a fully contested adjudication or the alternatives. It extends to a reasonable assessment of the matter from the client's point of view, a point of view which – it is reasonable to suppose – is not usually a lawyer's point of view.

The absence of an immunity and the rise of plaintiff lawyers targeting professionals makes it likely that Rule 36 is to be litigated sooner rather than later, in particular the words 'best interests in relation to the litigation'. A barrister who receives a brief must consider at the outset and at appropriate intervals whether the obligation to inform has been triggered and whether the barrister has sufficient information to properly discharge the obligation.

The Civil Procedure 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 Act remains in 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 which has previously been brought into the state's aegis. 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).

I observe in passing that 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. The pedant can reflect on this and go nowhere; I recommend reflection on the common root verb 'procedere', to 'go forward', and to do so in each case.

Part 4 will be engaged if there is an order for referral by the Court: s 26(1). If you are briefed to appear in a mediation, it is prudent to determine whether or not the mediation is a court-referred mediation.

In relation to family provision matters, s 98 of the *Succession Act 2006 (NSW)* 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.

My uninformed view is that a Court making a reference under s 98 of the *Succession Act* is putting in train a mediation falling within Pt 4 of the Civil Procedure Act, but you may wish to reflect on this if it arises in a brief held by you.

So 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*.

Importantly, there is the power of the court to determine questions about compromises and settlements. Section 73 gives a general power, but specifically does not limit the jurisdiction 'that the court may otherwise have in relation to the determination of' any question: s 73(2). Section 29 is in Pt 4 and provides:

> (1) The court may make orders to give effect to any agreement or arrangement arising out of a mediation session.
>
> (2) On any application for an order under this section, any party may call evidence, including evidence from the mediator and any other person engaged in the mediation, as to the fact that an agreement or arrangement has been reached and as to the substance of the agreement or arrangement.
>
> (3) This Part does not affect the enforceability of any other agreement or arrangement that may be made, whether or not arising out of a mediation session, in relation to the matters the subject of a mediation session.

As I read the sections, any rules of evidence including privilege which apply to a court determining questions under s 73 do not apply to an application for an order under s 29.

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 in a court-ordered mediation can avoid an implied duty to assist their client in the discharge of this statutory duty of good faith.

Advocacy skills relevant to 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 your client's interests, then your tact is necessarily addressed to the two decision-makers, your client and the other party.
- Rule 36 is a continuing obligation : from no later after accepting a brief to appear at a mediation to no earlier than its end (whether by settlement or abandonment), you must be satisfied that you are continuing to inform the client or the instructing solicitor about the alternatives to fully contested adjudication of the case which are reasonably available to the client, unless you believe on reasonable grounds that the client already has such an understanding of those alternatives as to permit the client to make decisions about the client's best interests in relation to the litigation.

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. If you are briefed to appear at a mediation, 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".[7] Anyone can define compromise in terms of each party losing. Instead, try considering in terms of advocacy as tact in action. You may find that the advocate's role in compromise involves understanding why one party's point of principle is simply unintelligible to the other party.

The referral

A duty to consider mediation is not a duty to mediate. That said, 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'. While each case will be different, your essential argument is founded on either s 56 or s 27: either an order will not give effect to the overriding purpose or an order has no or little prospect of allowing the parties to achieve their own resolution of the dispute. Note that s 98 of the Succession Act is founded on a different discretion, a higher bar presumptively in favour of the process. Finally, note that a duty to consider mediation is ongoing.

In the Supreme Court, read Practice Note SC Gen 6. Paragraphs 5 to 8 explain:

> 5. Part 4 of the CPA permits the Court at any stage of the proceedings, by order, to refer parties to mediation where, in the opinion of the Court, mediation appears appropriate. The Court's power does not depend on the consent of the parties, or of any of the parties.
>
> 6. It is not the intention of the Court that mediation will be ordered in all proceedings.
>
> 7. The parties themselves may, at any time, agree to mediation, nominate a mediator and request the Court to make the appropriate orders.
>
> 8. The Court may consider ordering mediation on the motion of a party, or on referral by a registrar, or on the Court's own motion. Where mediation is ordered, the parties will usually agree on the person to be the mediator. If they do not:

- the Court may select the mediator to be appointed or may appoint the mediator pursuant to the Joint Protocol set out in this Practice Note;
- the Court may refer the proceedings to a registrar or other officer of the Court certified by the Chief Justice as a mediator to meet with the parties to discuss mediation and report back to the Court with a recommendation as to whether the proceedings are suitable for mediation; or
- the Court may decide against ordering mediation.

Compare paragraph 8.3 of the District Court's Practice Note DC (Civil) No 1:

> Matters allocated a hearing date will generally be referred to mediation unless the parties can satisfy the Court that mediation is not appropriate.

Paragraph 8 of the Local Court Practice Note Civ 1 provides for mediation. However, query whether it would usually be appropriate having regard to quantum. The Land & Environment Court practice notes make detailed references to mediation which must be tailored to the particular type of proceeding.

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; this is not rocket science; (usually) any other stage holds an information imbalance (or a justifiable apprehension of one, which is as bad). You should 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 you should do? In this day and age, the alteration of 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. Understand the process:

- Is the mediator 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 the bashed 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?

You must understand the process your client has instructed you 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.[8] 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 and retired judges are frequently retained by disputing parties for this purpose. It can be highly effective. It may be what you 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; and an eye for fairness and even-handedness.[9] I note in passing two separate things:

- Seniority as a lawyer is no guarantor of these traits. Some of us are so inculcated with the idea that adversarial litigation means that you have to be adversarial, that we leave ourselves no room to develop our advocacy. The idea is wrong and probably always was; it is rather like judges believing that they should be judgmental, surely one of the worst qualities a judge can have?
- We as lawyers are familiar with the idea of a person, a senior practitioner or a judge, 'commanding' respect. Try the exercise of uncoupling the ideas of command and respect.

A barrister should keep a list of five mediators whose contact details they can pass to instructing solicitors. Only use an accredited mediator.[10] Examples of sources:

- Your own experience.
- Word of mouth.
- Mediators listed with the bar.[11]
- Accredited members of chambers.

The last is to be used with 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.

The pre-mediation conference

Time and cost permitting, compliance with r 36 means a conference with the client and the instructing solicitor 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 and discussion about the issues of the case – ie the issues which would be live if the matter went to court – you should consider:

- 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 yourself) that mediation is the province of the client and the other party, something which should also inform you about your role (for example, have you courteously and professionally confirmed with the client that they want you to talk in any opening or joint session, or have you 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, you, the instructing solicitor 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.

I think 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 can as pieces of paper provide a visual reassurance for the client.

Mediation jargon which you may hear 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. You 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.

I have spent some time on the pre-mediation conference. However, you should always keep in mind the client you actually have and reasonably tailor your 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 your 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 your client's point of

view; which acknowledges the other side's point of view; and which proffers, expressly or implicitly, good faith. My own view is that 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 are you 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 hearing in [xxx] for three days // 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 your own conduct at the mediation

Be on time. I think everyone should endeavour to be there 15 minutes early and I think you should be the one to introduce the client and the rest of you to the mediator. The mediator should be asking your client, as one of the two people who own the forum (and who are paying the mediator) how they wish to proceed or at the least suggesting how things should proceed, and you and your client should already have worked out whether you yourself are contributing from this stage.

Whether you are naturally taciturn or naturally talkative, you should appear professional at all times.

Assume that the other party is taking your measure as the person who will conduct any litigation and will cross-examine them. If you come across as someone the other party would rather not face, you have improved your client's position.

In and around courts, we tend to act collegiately with our 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 your client may misinterpret. As for spending lengthy amounts of time with the mediator, my view is that this 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 you have instructions to open, you do so. You can address as many people as are your audience, but you must address only one, and that is the other party. You may regard your task as explaining why they will lose. I suggest instead that you use tact in action. You must use language appropriate to and that will be remembered by, the person.

Argument on the issues is unlikely to move anyone, and you should tailor your remarks accordingly. You should be brief. There is one thing that pops up from time to time: where your team believes there is a killer point which the other side just doesn't get. You 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 we have discussed, as it is not being delivered to the (relevant) decision-maker.

It is worth recalling at this stage whether your client is making or rejecting an offer, through you at 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 I think you should carry your client's default instructions from the conference.

Private sessions

Private sessions take on a life of their own. Resist the temptation to be hurried by a mediator.

I have suggested that you assume the other party is looking at you to see how you might run the case in court. Assume that the client is doing the same.

Mediations are urgent and intimate environments and the number of closed doors behind which consensus can be got are limited. Be aware of how your client may perceive any difference of opinion between yourself and your instructing solicitor. If another professional adviser such as an accountant is present, be aware of how you may test their advice in front of the client. Differences of opinion can be expected; whether they are dealt with professionally is a matter for you and other advisers. In any matter, or at least a matter where greater than usual difficulties are anticipated, have you discussed with your instructing solicitor the best way for both of you to discharge your separate obligations to the client?

If an offer is with the other side, the private session is an ideal time to update your understanding of the applicability of r 36.

Meeting the other legal representatives

A mediator may suggest that the legal representatives meet. I think you need a good reason not to do this. What is there to lose? As to whether you should seek your client's permission or at

least advise them, I leave this for you. My own view is that you should.

A mediator may suggest that the parties meet without legal representatives. This is a deeply individual thing and I can give no firm rule. Ultimately and of course it is a matter for the client, but I do caution 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 lawyer in me is reluctant to advise the client that they should settle without referring back to me. In any event, you and the client should talk things through with the mediator. Maybe you should urge that the mediator be present. If there is a meeting between the parties and if your client reports that there is an outcome, the legal representatives should immediately confer with or without the mediator to clarify whether their respective clients hold consistent recollections.

And while we are dealing with power imbalances…

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 – do not assume that the institution has a singular response to all its litigation. I spoke earlier about the importance of finality in our legal system. But 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 often make up for all the imbalance in the world. By the bye, no competent institution simplistically regards itself as the deep-pocketed litigant who will succeed come what may. Apart from anything else, the first thing a competent institution is doing is assessing who is funding a plaintiff: is it the plaintiff's own money, or a contingency arrangement, or a deep-pocketed parent, or a litigation funder? If an institutional defendant is competently assessing power imbalance, a plaintiff should be doing so as well.

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. If you carry your client's instructions within the forum, you are bound to act in good faith, or at the least carry your client's good faith, but that does not extend to acceding to suggestions that you do not think are in your client's interests.

That said, the mediator may be an excellent sounding board. Don't pass up an opportunity to say things to an independent person trained to listen and to listen in confidence. Don't expect an advice, though.

Terms of settlement

Terms should be in writing. Experience tells us 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. For the latest from the Court of Appeal on *Masters v Cameron*, you should look at *Feldman v GNM Australia Ltd* [2017] NSWCA 107. And don't forget the other pitfall in rushed settlements: have the parties in fact accorded or satisfied or both or neither?

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'. I use the word 'figure[s]' 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.

My own preference is for a frame from the outset, no matter how simple the settlement. From the outset, give a complete offer. Subsequent offers can be to the effect 'New figure, same other terms'. Mobile phones have cameras. Your instructing solicitor or someone should use them.

Refer again to my discussion of ss 29 and 73 above.

If the matter doesn't settle, so be it. There should be a clear understanding of where the matter stands. If there is an open offer, the offer and any other relevant matters should be confirmed in writing by the instructing solicitor as soon as possible. I think a useful attitude is to work out what the next set of directions should be to progress the matter to hearing; litigation, like death, can focus the mind.

In any event

Uniform Civil Procedure Rules r 20.7 provides:

> Within 7 days after the conclusion of the last mediation session, the mediator must advise the court of the following:
>
> - the time and date the first mediation session commenced, and

- the time and date the last mediation session concluded.

With private mediators, this can be forgotten or ignored, as the assumption is that it is left to the parties. The assumption is usually well-founded but the parties and the mediator should understand who is doing what.

A report

An advocate has a duty to accurately report to their instructing solicitor 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. Your 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.

Conclusion

Wherever law and mediation are discussed, there is 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.

If this is true, it can be overstated. Any area of human intercourse is prone to regulation; it is Tacitus and not some fleeting populist who first observed the more laws a government produces, the more corrupt it becomes. Preaching is for preachers, it is sufficient for the practitioner 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. Barristers 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, NCAT and international arbitration – does not so much challenge the role of the apex as invite each of us 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 of Australian learning has developed. A standard text is Laurence Boulle's *Mediation: Principles, Process, Practice*, now in its third edition. Boulle is a professor at ACU's Thomas More Law School. 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'.[12] 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.[13] Each of these sources is valuable, although the starting point in a given jurisdiction must always be its rules, so you can understand in what particular way it has chosen to embrace this valuable but still newfangled tool.

Endnotes

1 David Ash is a mediator and barrister practising from Frederick Jordan Chambers in Sydney. He is happy to receive written comments and queries about the paper addressed to d.ash@fjc.net.au.

2 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.

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

4 [2016] HCA 16; (2016) 331 ALR 1.

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

6 *Kendirjian v Lepore* [2017] HCA 13, Edelman J, [18].

7 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.

8 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.

9 Drawn from Clark, p 118.

10 At msb.org.au/mediators.

11 nswbar.asn.au/briefing-barristers/adr/baradr.

12 (2014) 25 ADRJ 204, available on Austlii.

13 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.