ADR and the Legal Profession

By The Hon P A Bergin SC

When I attended my first course in Mediation in the early 1990s with the now late Professor Frank Sander of Harvard University (known as 'the father' in this field of endeavour in the USA) which was conducted in Sydney and promoted by the NSW Bar Association, the topic of 'ADR and the Legal Profession' would probably not have been in the offing.

The professional environment at that time in respect of ADR, in particular in relation to mediation, was very different. It was only a few years after the late Sir Laurence Street AC KCMG QC had retired as Chief Justice of the Supreme Court of New South Wales who advocated tirelessly for the use of dispute resolution mechanisms additional to litigation. And it was only a few years before a new statutory power was given to the Supreme Court to refer matters to mediation irrespective of the consent of the parties.[1]

When this power was enacted, it caused consternation in the profession. BW Walker SC and AS Bell, of counsel, as the learned President of the NSW Court of Appeal was in the year 2000, expressed the joint opinion that this change was 'radical' and 'most undesirable as a matter of principle'. It was argued that a 'forced process of mediation' had the potential to erode respect for the rule of law especially if the power to order compulsory mediation was exercised frequently. The joint opinion went even further with the following observations:

> *It is not difficult to suppose that the power will be exercised frequently in times of pressure on courts institutionally to 'up their productivity', whatever this is meant to mean, and on judges individually, to deliver judgments expeditiously. Citizens may legitimately wonder about the importance of the rule of law in this State if, before they can have their disputes determined by a Judge of the Supreme Court according to law, they may be required to explore compromises which … will not be based upon an application of law to the facts of the case as determined by the Court.*[2]

The profession's concern in relation to non-consensual mediation proved to be without foundation. Very few mediations were referred without the consent of the parties mainly because of the cultural change that occurred thereafter in which the profession embraced the mediation process.

Twenty years later we are in a very different environment.

The mechanisms for dispute resolution other than through the Courts have expanded exponentially and there is an ingrained culture within the legal community and an expectation in the community at large that these mechanisms will be utilised either in preference to litigation or at least before any litigation is commenced or before it is finalised.

This expansion has created new opportunities for the profession. Practitioners are now engaged in a wide range of activities including arbitration, mediation (and sometimes a combination of both 'arb-med-arb'), expert determination, facilitation, and dispute resolution boards in contractual settings. Members of the profession may be engaged either as the lawyer advising the client in such processes or as the arbitrator or mediator or facilitator.

The range of different skills that must be deployed by lawyers in dispute resolution has recently been described with exquisite clarity by Chief Justice Bathurst AC in two very interesting and entertaining papers highlighting the distinctions between the style, content and role of advocacy in the litigation environment compared to the alternative dispute resolution environment.[3] I recommend them to even the most experienced practitioners.

I thought I would attempt to tame this rather unruly topic by tethering it to the core of our existence as members of this fine profession.

One of the greater comforts for a member of the profession conducting litigation is the existence and recognition of the lawyer's paramount duty to the Court. I see that the language of the Uniform Conduct Rules has changed, at least for barristers, such that it refers to the "paramount duty to the administration of justice" and an "overriding duty to the court to act with independence in the interests of the administration of justice" Without wishing to parse and tease these aspects of the Rules, it remains to be said that the comfort of the existence of these duties cannot be overstated.

Let me give you an example. In a complex commercial cause, the client had completed giving evidence-in-chief and was in cross-examination. Subpoenaed documents finally arrived after being delayed and overnight access was granted to them which on a careful reading indicated that the evidence that the client had given was, to use a neutral term, 'incorrect'. A claim had been made on oath that there had been a loss suffered by reason of monies being exchanged at a particular time at a particular international rate of exchange. The documents demonstrated without doubt, inconsistently with documents that the client had produced, that there had been no such exchange at that time. When confronted with the documents in conference the following morning the client said "but we are the only ones who know". The ease with which a barrister can react to such an improper suggestion to keep it quiet is because of the existence and knowledge of the paramount duty to the Court. There was no alternative but to advise the Court of the true position.

This is a stark example of the community brushing up against an incorruptible institution. However, it is only incorruptible if the members of the profession are strong and compliant to their oaths and/or declarations as officers of the Court.

If a course other than the one taken were to be adopted we would all lose; the integrity of the administration of justice would be compromised because a lawyer would have acquiesced in misleading the Court; the respect for the administration of justice would have been compromised because the client would know that the system could be manipulated by dishonest conduct; the lawyer loses because of the compromised professional integrity; and the community loses because the integrity of the system on which it relies has been eroded.

The implicit trust between the Bench and the profession in this setting is at the centre of the maintenance of judicial independence and the integrity of the administration of justice. Obviously in conducting litigation the practitioner is a pivotal part of that administration

Let us now move into the alternative dispute resolution environment.

The *Legal Profession Uniform Law NSW* provides that the *Legal Profession Conduct Rules* may include provisions with respect to what legal practitioners must do or refrain from doing in order to: uphold their duty to the courts and the administration of justice and promoting and protecting the interests of their clients. In the former regard the Rules may relate to (a) advocacy; (b) obeying and upholding the law; (c) maintaining professional independence; and (d) maintaining the integrity of the legal profession. In the latter regard the Rules may relate to (a) client confidentiality; (b) informing clients about reasonably available alternatives to fully contested adjudication of cases; and (c) the avoidance of conflict of interest.

Since 2016 the *Conduct Rules* have recognised and provided that the work of barristers includes "representing a client in or conducting a mediation or arbitration or other method of alternative dispute resolution" and "carrying out work properly incidental" to that work.[4]

The legal practitioner must ensure not to knowingly make a false or misleading statement to an opponent in relation to a case including its compromise.[5] There is no express reference to a duty to a mediator or arbitrator in this regard.[6]

Take for example a private mediation in which there is no Court order referring the matter to mediation. Let us assume that the parties have moved into mediation consensually in the absence of any litigious process. The mediation in this example is not one that could reasonably be described as being part of the 'administration of justice'. The parties, the barristers, solicitors and the mediator find themselves in a commercial setting seeking to reach an outcome (a commercial deal) in a process that has nothing to do with justice, albeit that the representatives are officers of the Court.

The parties have likely signed a mediation agreement in which they promise to attend and negotiate 'in good faith'. We should not weary ourselves this evening in discussing the ambit of such a phenomenon other than to accept that it includes acting 'honestly'.

Although a mediation may not be connected to any litigation or Court process at the time it is conducted, the legal practitioner is expected to act ethically in dealings with both the opponent and the mediator. Although this is not in the realm of conduct affecting one's duty to the Court in the litigious sense; a lawyer whose conduct is otherwise than ethical brings disrepute not only on the individual lawyer but also on the legal profession generally. This has a knock-on effect because of the pivotal role the profession plays in the administration of justice.

Judges and Courts cannot know what goes on in the chambers of barristers and offices of solicitors or in mediations or arbitrations (at least those that are not subject to curial challenge). However, the expectation is that once your oath, affirmation or declaration is made on admission as a legal practitioner the Judges of the Courts can be comfortable knowing that what is going on in those chambers, offices, mediations and arbitrations is ethical conduct.

Once lawyers enter the alternative dispute resolution arena they do so with the concomitant ethical obligations and duties that are a hallmark of their membership of the legal profession.

Mediation statistics are published by Courts, professional bodies and by practitioners including as to how many mediations take place in a particular period and in some instances, whether matters settled at or soon after the mediation.

One matter that is not the subject of the statistics is the time taken in the mediations. Let us assume, consistently with some of the published statistics that 35% to 40% of those cases referred to mediation do not settle. They are cases in which additional cost has been incurred with the necessity of still going to trial. The reasons for a matter not being resolved at mediation are many and varied.

Take for example a party who presents a position paper in a Mediation indicating that they attend in good faith in the hope of reaching a settlement knowing that they have no intention (or capacity) of offering anything more than $100,000 in a suit in which costs of the other party are known to be $250,000 and in which the other party is claiming damages of $3.5 million. Assume also that there is no alternative to a money outcome – in other words there is no prospect of finding or reaching a different solution than payment of money. That party presents as polite and willing to take part in the negotiation process by which it makes a first offer of $50,000 and then soon reaches its plimsoll line of $100,000.

Can one simply infer that the unwillingness to pay more than $100,000 being only a proportion of the other party's costs, is unreasonable lacking in good faith?

I think it would be very difficult to suggest that there was a total lack of good faith in that circumstance because there is some offer being made, albeit that it may present as rather paltry and inappropriate to the party to whom it is made.

On the other hand, to spend a day listening to debate knowing that there will be no movement from that $100,000, when a communication to the other party that the only money available is no more than $100,000 could have avoided the extra cost of mediation. This may be more of a 'good faith' approach than attending a mediation with these limitations.

It would seem far better for counsel and/or solicitors to indicate to their opponent that the position is that the only money available is $X and that for reasons the solicitor or barrister cannot provide, it is not possible to offer any further monies than $X. Such frank disclosures may mean that the parties are not burdened with the process of mediation and its attendant costs.

It would also seem to be a far better process than having the parties spend a day or the best part of the day exploring the arid land of offer and counter offer which one party knows is not within the realm of the other party's expectations.

Let me say something about the new world of facilitation. From the legal profession's point of view commercial parties are more often including clauses in their contracts pursuant to which disputes are dealt with in a process of escalation to a point where an independent party deals with the dispute at an executive level. This is not a process pursuant to which the commercial parties are bound by some opinion or determination. It is different from an expert determination. It is merely bringing in a person who may be able to guide the contracting parties to a more functional arrangement where there is dysfunction in the performance of the contract.

There is then the alternative mechanism of expert determination. Clauses for this alternative are often found in complex commercial contracts and/or construction contracts. It is usual that such processes can be dealt with swiftly and relatively cheaply. For example, the parties may take differing views of the effect of a particular clause in the contract and may, on a set of assumed or agreed facts, ask an expert to determine the meaning in the circumstances in which the parties find themselves. However, such determinations are not limited to this process. Some contracts include a process by which the parties can file evidence and submissions with an expert for the purpose of determining questions as to whether certain events have occurred and if so whether those events result in compensation being paid to one or other of the parties. The sensitivity of the parties to ensure that the person making the determination acts as an expert and not as an arbitrator is usually written into the contract to ensure that the legislation applying to arbitrations does not apply to this process. This is mainly to avoid challenges to the validity of the determination.

Those who represent a party in such a process have no different obligations from when acting for a party to litigation, other than the fact that there is no Court involved. A person who acts as an expert in such process would be entitled to have expectations that the lawyers representing those parties in respect of whom the determination is to be made would be complying with their obligations as lawyers such that reliance can be placed upon those lawyers to ensure that the expert is not misled.

Let me now deal with arbitration. Much has been written recently about the competing attractiveness of arbitration compared to litigation. Both processes have been maligned by those trying to promote one or other. An arbitrator has no power to force a party to comply with directions, albeit that some steps can be taken to entice the party to comply. Whereas the Court in the administration of justice and the management of cases with the use of public funds has an obligation to ensure that the process is cost efficient and effective. Lawyers have a statutory obligation to ensure the process is cost effective and to ensure their clients comply with the Court's directions.

In arbitrations it is expected that lawyers will conduct themselves ethically without the supervisory overlay of the courts. This environment is slightly different to mediation by reason of the 'supervisory' capacity of Courts under the various statutes that allow challenges to be made to arbitral awards. However, the observations that I have made about the consequences of unethical conduct in a Court process apply equally to the arbitration environment.

There have been instances in which it has been necessary for the Courts to assess the conduct of a legal practitioner in a mediation.[7] Just like the example that I gave at the outset of the need to correct the record when the Court is misled, the same position applies in a mediation, expert determination and in an arbitration. As Bathurst CJ said "the same duty may feel more onerous in an informal setting".[8]

Why would that be so?

In the mediation setting it in part arises out of its structure including the private sessions and discussions that the lawyers and clients have with the mediator; and even more so if the client meets with the opposing client in the presence of the mediator without the lawyers. These are settings in which multiple duties arise, not the least of which are: the lawyers' duties not to mislead the mediator; the mediator's duty to ensure that any private session with opposing parties, without the presence of a lawyer is conducted fairly; the lawyers and clients' duties of confidentiality to the opposing lawyers and clients; and the mediator's duties of confidentiality to those lawyers and parties. These are serious obligations some of which are ongoing and binding the mediator to those parties and lawyers.

In some of those sessions the party and/or the parties' lawyers will be taking the mediator into their confidence; providing information that is not to be published to the other party. This technique is used by some in the hope of arming the mediator with knowledge to facilitate a strategy that may bring the parties closer to a consensus. However, this is where the burden on the lawyers to ensure that the mediator is not misled (and the duty on the Mediator to ensure that a party is not misled) is in sharp focus.

In the litigious process the Judge is quite removed from the parties. Unlike in the mediation process, there are no layers of duties of secrecy developing between the parties and the Judge. The Court is a far more comfortable environment in which the lawyer's duty is more easily identifiable. That gulf between the Bar Table and the Bench purifies the process and gives it that essential attribute of transparency. Whereas the mingling of the duties and obligations of each of those present at a Mediation conducted in secrecy may lull one into complacency to duty as the search for a good outcome or deal is pursued by the parties, the lawyers and the Mediator. This is where the burden of duty on the lawyers may, as Bathurst CJ said, feel more onerous. However, notwithstanding the comparative informality of the mediation process, it is essential that lawyers representing parties at mediations and lawyers acting as Mediators keep their ethical obligations close to the surface of consciousness.

These are not simply private affairs. Once lawyers enter the alternative dispute resolution arena they do so with the concomitant ethical obligations and duties that are a hallmark of their membership of the legal profession.

In the alternative dispute resolution environment, it is the legal practitioners on whom the Courts and the community depend to ensure that that each mechanism is used ethically and honestly. It is the members of the profession who ensure that the integrity of the legal profession and ultimately the administration of justice remains intact. It is no small task as these mechanisms grow in popularity. BN

ENDNOTES

1 Paper first presented for a NSW Bar Association and NSW Law Society Joint Seminar ADR and the Legal Profession 20 March 2019 S 110 Supreme Act 1970.

2 B Walker SC and AS Bell, 'Justice According to Compulsory Mediation', *Bar News*, Spring 2000, 7. 15

3 'Off with the wig: issues that arise for advocates when switching from the courtroom to the negotiating table' 30 March 2017 Australian Disputes Centre; Perspectives on ADR and Future Trends ADR Masterclass 2018 Making ADR work in a #Fakenews World 11 August 2018.

4 Rule 11(d) and (g).

5 Rule 49 (Barristers); Rule 22.1 (Soliciors)

6 Although the Law Council of Australia is said to have extended the definition of 'court' to mediation and arbitration in its Model Rules of Professional Conduct and Practice in March 2002, this is not a publication that can presently be accessed on its website.

7 *Legal Services Commissioner v Mullins* [2006] QLPT 12

8 'Off with the wig: issues that arise for advocates when switching from the courtroom to the negotiating table' 30 March 2017 par 25.