Off With The Wig:
Issues That Arise For Advocates When Switching
From the Courtroom To The Negotiating Table

By Alex Ho and Amanda Huynh

On Thursday, 30 March 2017, the Australian Disputes Centre ("ADC") was proud to invite the Honourable Chief Justice of New South Wales, Tom F Bathurst AC to address an audience of reputed barristers, legal practitioners and mediators from different areas of dispute resolution in Australia on several issues that advocates face when moving from the courtroom to the negotiating table. In the Australian legal system's current climate where there is a growing emphasis on alternative dispute resolution processes, the role of an advocate is increasingly surpassing the traditional responsibilities required in the courtroom. As the Chief Justice proclaimed, "*barristers are increasingly being asked to remove their wigs…when entering the more informal arenas of dispute resolution*" and must consider their role as advocates as well as their ethical duty as lawyers in a different light when transitioning between the courtroom and negotiation table. The shift from litigation to mediation has inevitably generated conflicting questions, requiring advocates to adopt different models of advocacy, reconsider their ethical duties as lawyers despite hearing the same content in both forums and examine the extent to which practitioners are protected by advocate's immunity in both venues.

The night was chaired by Mr Michael Talbot, Immediate Past Chairman of the ADC, with the Honourable David Clarke MLC, member of the Legislative Council and Parliamentary Secretary of Justice, opening the seminar. In his address, he reinforced the government's continued support towards alternative dispute resolution forums as a fundamental part of the dispute resolution processes carried out with courts and tribunals. He also introduced the Department of Justice's "Civil Justice Strategy", on which more is to be announced later this year, that aims to create a system of civil justice which is fast, fair, accessible, and helps people resolve disputes as early as possible. The Hon. David Clarke additionally congratulated the ADC on their continued work in advancing the practice and quality of dispute resolution services, including mediation, conciliation, and arbitration in Australia and overseas.

The Chief Justice began his address restating ADC co-founder, the Honourable Sir Laurence Street's reference to the acronym "ADR" as "additional dispute resolution" in comparison to the entrenched acronym of "alternative dispute resolution". The Chief Justice described ADR as a process that is not in competition with or additional and supplementary to the existing judicial system, but complementary and integral to our legal system with the "*capacity to intrude at almost every stage of the litigious process*". Interestingly, in 2015, the Supreme Court of Australia referred 1070 cases to mediation, with 518 of these cases being referred to court-annexed mediation. The statistics support

the Chief Justice's remarks, as 51% of the cases referred to mediation by the Supreme Court in 2015 were settled at mediation or within 7 to 14 days after the mediation, and a further 25% still being negotiated.

The Chief Justice further referred to the common misconception and dichotomy between litigation and alternative dispute resolution as solely an adversarial and non-adversarial distinction. However, as His Honour further clarified, a lawyer is more likely to achieve a positive result in the courtroom when being persuasive as opposed to utilising an aggressive and adversarial approach. In both contexts, the object of litigation and mediation is to persuade, however the lawyer's tone, demeanour and language may change throughout either forum. This includes cross-examining a party in mediation for full and frank disclosure, not only for statements beneficial to their client's case, and moving from a positional to an interest-based negotiation with reference to non-legal interests as well. Whilst a lawyer is the sole representative for their client in litigation, this role may change in mediation depending on the factors in play, such as the nature of the dispute, power dynamics and the client's wishes. Here, the Chief Justice referred to Olivia Rundle's five models that a lawyer can adopt when participating in mediation, being the absent advisor, the advisor observer, the expert contributor, the supportive professional participant, or the spokesperson. His Honour noted that only the final model is adopted by lawyers in the courtroom, and emphasised the importance for junior and senior barristers to undergo training and acquire the skills required when representing clients in mediation and how this differs from the traditional courtroom environment.

Furthermore, the Chief Justice explored a lawyer's ethical duties within the alternative dispute resolution setting, whereby, in mediation, acting in the client's best interests may not mean defending their initial position at all costs, but rather, it may be to reach a compromise and accept the settlement offer within appropriate circumstances. The Chief Justice also discussed the advocate's immunity in a mediation setting with reference to several cases. From these cases and the discussion within them, the giving of advice either to cease or to continue litigation does not itself affect the case's judicial determination and, thus, does not attract immunity. The Chief Justice stated that advocates should be warned that immunity from suit will not protect them from negligent advice or representation at mediations.

The Honourable Chief Justice Tom F Bathurst AC's seminar address can be best summed up with reference to Donna Cooper's quote: a successful lawyer must be able to "*switch hats and transform from adversarial court advocate one day, highlight the strengths of a client's position, to dispute resolution advocate the following day, participating in collaborative problem-solving and encouraging a client to move away from a position, think creatively and accept compromise*". Ultimately, in order to foster a body of well-rounded advocates who can seamlessly transition between the courtroom and negotiation table, advocates must learn to wear two hats – or wigs.

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Alex Ho

Alex Ho is in his final year of a Bachelor of Law and Bachelor of Commerce (Finance) degree at the University of New South Wales. As an intern at the ADC, Alex appreciates the benefits of ADR and, and is particularly interested in learning about how mediation and ADR processes can be better utilised to resolve disputes in a more cost effective and timely manner.

Amanda Huynh

Amanda Huynh is in her final year of a Bachelor of Arts-Psychology and Bachelor of Laws degree at Macquarie University. Amanda has recently returned from monitoring the Extraordinary Chambers in the Courts of Cambodia, and is now particularly interested in learning about the techniques employed in alternative dispute mechanisms.