The Art of Advocacy: Selecting the Right Vintage for the Occasion*

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Abstract

In Australia, Alternative Dispute Resolution (commonly known as ADR) has grown significantly; not merely in the footsteps of its international popularity, but as a frontrunner in a global push for timely and cost effective dispute resolution. No ADR process has done this more so than mediation. It is estimated that 80-90% of civil cases are disposed of pre-trial in Australia.[1] When speaking at the Australian Disputes Centre in 2017, NSW Chief Justice Tom Bathurst, stated that it is "fair to say now that ADR has evolved to the stage not merely of being additional or supplementary but complementary and integrative."[2] His Honour's sentiments have been echoed by South Australia's Chief Justice Chris Kourakis' strategic focus on dispute resolution processes to overhaul civil litigation in South Australia, and further emphasised by Western Australia's Chief Justice Wayne Martin's remarks on the use of mediation before as well as during the litigation context.[3]

As legal professionals, we are increasingly called upon to employ different models of advocacy as we move through the diverse terrains of litigation, mediation, arbitration, expert determination, conciliation and facilitation. We must be ready to shift gears now more so than ever. Faced with an array of soils, grapes, ages and methods for the distillation of advocacy, this paper focuses on selecting a vintage with the right balance of flavours for the parties in the mediation process, to whom effective advocacy needs to be directed.

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[1] Bornali Borah, 'Being the Ladle in the Soup Pot: Working with the Dichotomy of Neutrality and Empowerment in Mediation Practice' *Australasian Dispute Resolution Journal* (2017): 28, 98.

[2] Chief Justice Thomas Bathurst, 'Off with the Wig: Issues That Arise For Advocates When Switching From The Courtroom To The Negotiating Table' (Speech delivered at the Australian Disputes Centre, 30 March 2017) http://www.supremecourt.justice.nsw.gov.au/Documents/Publications/Speeches/2017%20Speeches/Bathurst%20CJ/Bathurst_20170330.pdf.

[3] Chief Justice Wayne Martin, *Address at the 5th International Arbitration Conference*, (Perth, 21 November 2017) <http://www.supremecourt.wa.gov.au/_files/5th%20International%20Arbitration%20Conference%20Martin%20CJ%2021%20Nov%202017.pdf>.

Effective Advocacy starts before the Mediation

The crucial first step for effective advocacy and a successful mediation is preparation.

Preparing oneself with an attitude of willingness - to be flexible, to listen, to respond, to be ready with open questions and to assist in a resolution - is central to the advocate's role.

The advocate assists in fully preparing their clients for the mediation process: deciding who will attend, assisting them in formulating their negotiation strategy, encouraging them to consider possible options for resolution ahead of the mediation, anticipating the likely responses to those options and considering their best and worst alternatives to a negotiated agreement. A first meeting with the client on the morning of the mediation is not conducive to effective advocacy for that client.

As Shurven and Berman-Robinson point out in their practical suggestions on mediation, establishing an appropriate timeframe for the mediation is integral to its success.[4] The advocate will be considering not only the urgency of the issues in dispute, but also their client's emotional preparedness for the mediation.

Beyond knowing the law and forming a view on the legal prospects, lawyers in the mediation setting also need a sound understanding of the underlying causes of conflict and their client's interests, taking every effort to also understand the other parties' interests.

A one-page summary for the client – distilling their negotiation strategy and possible options into a concise *aide memoire* – can help the advocate in guiding their client during the mediation session and assist to mitigate potential confusion and time-wasting. Careful prior consideration of the probable taxation or stamp duty implications and the possible ways of structuring a settlement, and how to efficiently document it on the day, further assists in streamlining the mediation.

Together with preparing their client, the advocate is simultaneously preparing themselves by clarifying the style or styles of advocacy they will use, and their role within the mediation process. A lawyer's careful choice of language will support their clients in understanding what is being said, and help them feel more at ease during the mediation process.

Integral to this preparation is leaving sufficient time for a pre-mediation session with the mediator. Thirty to sixty minutes of you and your client's time in a pre-mediation session can save many hours

[4] Helen Shurven and Clair Berman-Robinson, "Design in Dispute Resolution Practice: Tips and Tools", *Australasian Dispute Resolution Journal* 123 (2017): 28. See the table under the section titled 'Elements of Dispute Resolution Practice: Considerations for Effective Design.'

during the mediation, and make the crucial difference between a successful resolution or an unsuccessful one.

Some lawyers consider that the mediator can say nothing more to their clients than they have already said as the legal representative. However, using the opportunity to meet the mediator before the mediation assists effective negotiations in multiple ways. For example, it can help clients settle their nerves, clarify aspects of the mediation process that they may not have fully integrated into their expectations, and can reinforce the need for their prior preparation. It gives clients the opportunity to consider why and how courteous behaviour is more likely to support an effective and efficient mediation session. It also makes clear the mediator's preferred approach to the mediation process to ensure the parties' prior agreement.

These preliminary discussions are essential to the mediator being able to identify and alleviate possible power imbalances; to assist all parties to be in the best position possible for their meaningful participation. Guided by its cooperative framework, pre-mediation is the client's first step into the mediation setting and is a critical tool in the armoury of the advocate.

An Armoury or the Vintner's Essentials?

The lawyer's approach in the courtroom, in contrast to their advocacy in mediation, has frequently been presented as the dichotomy of adversarialism and non-adversarialism. However, this dichotomy is an over simplification. The Law Council of Australia's "Guidelines for Lawyers in Mediations" discerns that mediation "is not an adversarial process." It further imparts that "the skills required for a successful mediation are different to those desirable in advocacy… a lawyer who adopts a persuasive rather than adversarial or aggressive approach… is more likely to contribute to a better result."[5] This position immediately assumes that adversarialism equates to aggressiveness commonly associated with litigation, whereas mediation is the opposite. However, this dividing line is an inflexible way of approaching dispute resolution. In her 2016 article titled 'On Mediation, Legal Representatives and Advocates' Bobette Wolski's comments that the meaning of 'adversarialism' is unclear and the distinction is fragile without any examples of prototypical behaviour given.[6] Even in litigation, the lawyer who is persuasive (rather than aggressively adversarial) can work towards a better outcome.[7]

[5] Law Council of Australia, "Guidelines for Lawyers in Mediation" (August 2011) ('*LCA Guidelines*') available at http://www.lawcouncil.asn.au/FEDLIT/images/Guidelines_for_laywers_in_mediations.pdf.
[6] Bobette Wolski, "On Mediation, Legal Representatives and Advocates", *UNSW Law Journal* 38 (2015):1, 5.
[7] Bathurst, above n 2, 4.

This dichotomy is artificial – harshly juxtaposing what it means to advocate in a courtroom against advocating in a mediation process in the absence of any precise foundation. Without this overly strict dichotomy, the legal profession can move towards more integrated and adaptable approaches to advocacy that are attentive to the various audiences the advocate seeks to persuade. Thus, there are multiple opportunities for vintages of advocacy to be adopted into one's practice, depending on the range of contextual factors at play. For example, Olivia Rundle, a senior lecturer at the University of Tasmania, and an active founding member of the Australian Dispute Resolution Research Network, has proposed five ways a lawyer might participate in the mediation process:

1. As the absent advisor who assists the client to prepare but does not attend the mediation;
2. The advisor observer who attends the mediation but does not participate;
3. The expert contributor who participates but only to the extent of providing the client with legal advice;
4. The supportive professional participant who directly participates in concert with the client; and
5. The spokesperson who speaks for and negotiates on behalf of the client.[8]

The variety of models put forward by Rundle highlights a more nuanced approach to advocacy that Michael King proposes in his 2009 book *Non-Adversarial Justice*. King perceives adversarialism and non-adversarialism as existing on a continuum, "with most processes combining aspects of adversarial and non-adversarial practice to varying degrees."[9]

What then of the concept of partisanship? The word connotes a notion of strongly advocating for a cause. It does not initially call to mind the impartial setting of a mediation, yet Wolski persuasively argues for the 'partisan advocate.'[10] The view against partisan advocacy regards it as stemming from the traditional idea of an adversarial litigator putting their loyalty to their client above all else, even their ethical duties; lawyers who zealously fight for their client's cause are reduced to amoral gladiators [11] and hired guns.[12] The partisan advocate is thus often seen as inappropriate to the mediation setting where the emphasis is on reaching a mutually satisfactory outcome and not

[8] Olivia Rundle, "A Spectrum of Contributions that Lawyers Can Make to Mediation", *Australasian Dispute Resolution Journal* 20 (2009): 220.
[9] Michael King et al, *Non-adversarial Justice* (Federation Press, 2009) 5.
[10] Wolski, above n 6.
[11] Scott R Peppet, "Lawyers' Bargaining Ethics, Contract, and Collaboration: The End of the Legal Profession and the Beginning of Professional Pluralism", *Iowa Law Review* 90 (2005): 475, 500.
[12] Ted Schneyer, "Some Sympathy for the Hired Gun',Journal of Legal Education 41 (1991): 11. (as suggested by its title, Schneyer was critical of this view).

winning for your client at all costs. The concept of 'zeal' is traditionally associated with a misguided religious fervour which forsakes reason and impartiality. Zeal is often considered incompatible with mediation where the focus is on enabling the benefits of trust, creativity, openness and joint-problem solving.[13]

Wolski, however, defines 'zealous' to combine the concepts of partisanship and passion.[14] Being partisan in one's approach means looking out for the interests of your client. Passion involves effectiveness, creativity, enthusiasm, benevolent effort and attention to detail. From this point of view, the attitude of a zealous, partisan advocate would be acceptable and valuable to a mediation.

How do we usefully include these tenets of 'adversarialism' and 'zealous partisanship' in mediation advocacy? Timothy Pinos provides a succinct definition of advocacy in 'Advocacy Training: Building the Model – A Theoretical Foundation'; "the range of interpersonal, persuasive and preparatory skills, which a lawyer brings to bear upon the promotion of his client's interests in a dispute in or out of court."[15] Advocates take on a range of roles in different contexts to help advance their clients' interests and objectives.

Indeed, as Wolski observed, the LCA guidelines contain two provisions which seem to visualise advocacy in this combined sense:

- Section 1 provides that '[a] lawyer's role in mediation is to assist clients, provide practical and legal advice on the process and on issues raised and offers made, and to assist in drafting terms and conditions of settlement as agreed', and
- Section 6 mentions the need 'to help clients to best present their case.'[16]

The point that Wolski makes is that while the advocate's approach need not be adversarial, it must remain partisan nonetheless. Needless to say, lawyers cannot put aside their client's interests and approach the mediation process as a 'non-partisan' participant, for they are working towards an outcome to advance their client's interests.

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[13] Carrie Menkel-Meadow, 'Ethics in Alternative Dispute Resolution: New Issues, No Answers from the Adversary Conception of Lawyers' Responsibility' (1997) 38 *South Texas Law Review:* 407-430.
[14] Bobette Wolski, 'On Mediation, Legal Representatives and Advocates' *UNSW Law Journal* 38(1) (2015): 1, 34.
[15] Timothy Pinos, 'Advocacy Training: Building the Model – A Theoretical Foundation,' *Journal of Professional Legal Education* 1 (1983): 18.
[16] *LCA Guidelines* ss 1, 6.

Ethical Considerations

As we engage with varied models of advocacy, we must balance the ethical considerations of ADR and legal practice: the duty of honesty, party self-determination and the advocate's immunity.

Duty of Honesty

In the informal setting of mediation, evidence is not tendered as a formal exhibit, and some practitioners might believe that the duty of honesty does not apply in full force. The opposite is truer, in that there is a stronger duty because there is no impartial adjudicator to find the truth between opposing assertions.[17] The case of *Mullins*[18] involved the failure to disclose a quadriplegic client's cancer diagnosis and chemotherapy treatment in an insurance claim to the opponent. It affirmed the rule that practitioners must correct earlier statements now known to be false, and even suggests a higher duty of honesty in mediation settings. As practitioners, the same exacting standards apply to our conduct in mediation.

Confidentiality is intertwined with the duty of honesty. Shurven and Berman-Robinson suggest that legal practitioners consider how to balance information that is confidential and is to be protected, while potentially raising an issue of disclosure to the mediator.[19]

Party Self-Determination

The duty of honesty enables "the most fundamental principle of mediation"[20]; that of self-determination. This turns on the informed consent of parties to the mediation process and its outcomes. Parties must have sufficient information to participate and autonomously make an informed decision. In this way, there is the opportunity for a different quality of justice to be achieved that is responsive to individual needs and reflective of the parties' preferences.[21]

Advocate's Immunity

Advocates in mediation are unlikely to be afforded the same immunity from suit as advocates in litigation.[22] In the 2016 Australian High Court decision of *Attwells v Jackson Lalic Lawyers Pty Ltd,*[23] the majority held that advocate's immunity does not extend to negligent advice provided by a lawyer which leads to a settlement agreement between the parties, even where that agreement is embodied

[17] *Legal Practitioners Complaints Committee v Fleming* [2006] WASAT 352, [76].
[18] *Legal Commissioner v Mullins* [2006] QLPT 12.
[19] Shurven and Berman-Robinson, 'Design in Dispute Resolution Practice: Tips and Tools', above n 4, 124.
[20] Wolski, 'On Mediation, Legal Representatives and Advocates', above n 6, 30.
[21] Robert A Baruch Bush, 'Efficiency and Protection, or Empowerment and Recognition?: The Mediator's Role and Ethical Standards in Mediation' (1989) 41 *Florida Law Review* 253, 257; Laurence Boulle, *Mediation: Principles, Process, Practice* (LexisNexis Butterworths, 3rd ed, 2011) 468.
[22] Bathurst, above n 2, 9.
[23] (2016) 259 CLR 1; [2016] HCA 16.

in a consent order. The reasoning for drawing the line according to the majority was that the immunity was not justified by a general concern that disputes should be brought to an end, but that once a controversy was resolved by judicial power, it should not be reopened by a collateral attack seeking to demonstrate that the judicial determination was wrong.

The narrowing of any advocate's immunity for those engaged in mediations was accentuated by the 2017 High Court decision in *Kendirjian v Lepore,*[24] holding that alleged negligent advice (not to accept an offer that lead to a worse outcome in litigation than the rejected offer) was not protected by an advocate's immunity. What seems clear from the current state of the law is that "the giving of advice either to cease litigating or to continue litigating does not itself affect the judicial determination of a case"[25] and as such, does not attract immunity. Thus, advocates need to be alert that immunity from suit does not protect them from negligent advice or representations made at mediations.

The Advocate's Philosophical Map

To be effective in cooperative mediation, commentators have proposed that advocates modify their standard 'philosophical map'.[26] The standard philosophical map, attributed to Northwestern University's Harris H. Agnew Visiting Professor of Dispute Resolution Leonard Riskin, argues that lawyers are predisposed to resolve disputes through an adversarial, legal rules-based world-view. However, lawyers must be willing to shift beyond this perspective to attend to feelings and ambiguity, outside the comforting certainty of legal methods and solutions. As advocates, we may be cognisant of what our standard 'philosophical map' is but also seek to enrich it by acquiring new knowledge and understanding, engaging with new approaches to negotiation, developing skills associated with active listening, empathising and developing creative problem solving skills.

What is highlighted to us as practitioners, is that ADR processes still mean bringing our whole 'lawyer-self' to the table. We may tone down the adversarial elements as required by the circumstances, but we do not switch it off. This requires us to be light on our feet and shift comfortably into the terrain of mediation, adapting models of advocacy into our practice that suit the context.

Selecting the Right Vintage

As we tailor our approach to advocacy, the importance of persuasion remains. However, the different audience to persuade dramatically changes what constitutes effective advocacy in mediation. In the

[24] (2017) 259 CLR 275; [2017] HCA 13.
[25] Bathurst, above n 2, 13.
[26] Generally, on the concept of a 'standard philosophical map', see Leonard L Riskin, 'Decision making in Mediation: The New Old Grid and the New New Grid System' *Notre Dame Law Review* 79 (2003) 1, 3.

courtroom for civil proceedings, the only audience to persuade is the trial judge or in an appeal, a majority of the appellate judges.[27] Similarly, in a commercial arbitration the audience is the arbitrator or the majority of a panel of arbitrators.

However, in a mediation, the precise audience to be persuaded is both different to, and rather more complex than, the judicial audience in a contested civil court hearing. The most important audience for the advocate to persuade in a mediation is likely to be the opposing party, given that the mediator is not the decision maker. In addition to the opposing party or parties, the legal representatives of any opposing parties constitute another important audience. So too is one's own client, who may require effective advocacy (preferably in preparation but also during the rigours and stresses of mediation) to consider accepting an outcome that he or she might be unhappy with, but quite possibly less unhappy with than after the outcome of a contested hearing. Finally, the mediator, though almost always not the most important audience to persuade, is at least a relevant audience to keep in mind as an advocate; particularly where an evaluative rather than primarily facilitative mediator has been selected.

Shifting gears into the mediation terrain also entails an outfit re-design. As Shurven and Robinson have delineated, effective dispute resolution is like a well-tailored suit: it must fit well.[28] Chief Justice Bathurst (himself a consummate advocate in and out of the courtroom) proposes that advocacy in mediation can be designed around the following helpful distinctions: *style*, *content*, *role*:

> ***Style,*** in advocacy that is cooperative rather than competitive.
>
> ***Content***, in arguments that will expand to include non-legal interests as well as rights. Unlike litigation, in mediation there exists a spectrum of roles that a practitioner might adopt and their choice of role will depend on the nature of the dispute, the power dynamics at play, the client's wishes and a host of other variables.[29]
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> The third factor - '***Role***' **-** may also need to alter depending on the background of each party. For example, user-friendly terminology rather than legal language and arguments may be more encouraging for client engagement in a mediation setting. Dispute resolution

[27] The audience to persuade in a criminal jury trial is a little more complex with the jury usually being the most important audience but the trial judge also important.
[28] Shurven and Berman-Robinson, 'Design in Dispute Resolution Practice: Tips and Tools', above n 4.
[29] Bathurst, above n 2, 5.

practitioners ask questions in the name of full and frank disclosure, rather than in a cross-examination manner to elicit statements to benefit their own client.[30]

Taking Shurven and Berman-Robinson's practical elements we can reasonably anticipate that far more is happening below ground than above. They suggest staying alert to these subjective realities makes the advocate aware of the parties' experience, including their:[31]

- Interests
- Values
- Misunderstandings
- Feelings

Thus, the advocacy approach of a dispute resolution practitioner might well be influenced by differences in the parties' experience or the type of dispute to be resolved.

Will and Family Provision Disputes

For example, there are differences in will or family provision disputes from the usual commercial or personal injury disputes that impact what will be the most suitable advocacy style for mediations in these types of disputes. One difference in such disputes is that there is less usually an insurer involved. This may reduce any need for an evaluative mediator style but increase the need for lawyers participating in the mediation to have educated their clients about the likely "range" of possible court rulings if the matter is not resolved at a mediation. From the perspective of the parties (rather than their lawyers), there are less usually "repeat players" except where a public trustee or professional private trustee company is the executor.

Unlike many other forms of disputes, it is practically more difficult to avoid at least some court involvement in finally resolving many types of will disputes even where the parties do not require the Court to make a contested determination, particularly given the role of State Supreme Courts in granting probate and making family provision orders. So, advocates need to look for solutions that will not be rejected by a judge.

Natural grief, and family dysfunction, will often raise complex psychological as well as legal issues. The family dynamics and risk of will disputes destroying family relationships provide convincing reasons both for ADR, such as mediation being effectively compelled, and for there to be a real focus on maximising the advantages available from having a genuinely neutral facilitator involved. Perhaps

[30] Donna Cooper, 'Representing clients from courtroom to mediation settings: Switching hats between adversarial advocacy and dispute resolution advocacy' (2014) 25 *Australasian Dispute Resolution Journal* 150-158.
[31] Shurven and Berman-Robinson, 'Design in Dispute Resolution Practice: Tips and Tools,' above n 4.

more than other areas of mediation, the arguments for a facilitative rather than evaluative model, and for advocates to try to focus on a problem solving rather than an overly aggressive approach are even stronger when resolving will disputes.

There may be potential, albeit limited, for ongoing relationships. For example, between siblings or the surviving spouse or partner and children, to recover where a matter settles without a contested hearing. Indeed, in at least some "testamentary disputes … disputants have often been living in a harmonious relationship before the testator's death."[32] More generally, for the successful mediation, negotiation or settlement of will disputes "the significant legal, social and psychological factors which are inherent in testamentary disputes need analysis."[33] Yet, lawyers and most mediators are not generally trained psychologists or counsellors or social workers.

In family provision proceedings, the actual parties to the litigation (plaintiff and defendant executors) are not the only potentially interested persons relevant to a mediation. Which parties should attend the mediation session requires careful thought well before the mediation commences, and it assists everyone to know who will be attending before the mediation commences. This is particularly important to consider in will dispute and family provision claim mediations. Our thinking is that it is usually worth erring on the side of including important people in the decision making process, such as a partner who is not an eligible person (entitled to commence family provision proceedings) or an actual litigant, but whose attitude might affect whether or not the mediator will be able to facilitate a settlement. All should be available, even if they are not all actively participating in the mediation. In any event, necessary notices of claim in family provision applications, and notices of proceedings in other will disputes should have been served on all persons who could be adversely affected by a settlement reached a mediation.

More on Practicalities

The mediation process offers the opportunity for a range of practical outcomes in which the advocate's willingness to encourage flexible alternatives is paramount.

We have already noted that the common element that remains essential for effective performance in advocacy – both in the court room and in a mediation – is thorough preparation. The more difficult question is *how much* preparation, particularly to prepare adequately in a cost-efficient way.

[32] Richard Harris, 'The Mediation of Testamentary Disputes'" (1994) 5 *ADRJ Australasian Dispute Resolution Journal* 223.
[33] Ibid.

At a minimum, you will need to access material to evaluate the range of possible results, including if the particular matter is decided by litigation or to better understand the interests and concerns of your client beyond the issue of money. The mediation/negotiation theory terminology; "BATNA" (best alternative to a negotiated agreement), "WATNA" (worst alternative to a negotiated agreement) and "ZOPA" (zone of potential agreement) all reflect matters that should be understood in as realistic a way as possible before the mediation commences.

For example, in will disputes it is important to prepare clients (who usually will not have experienced either contested court hearings or this type of mediation) for the usual stresses of a mediation, whether before a court registrar or a private mediation. It can be a very stressful process for an inexperienced client. Depending on a realistic assessment of BATNA and WATNA, clients may need to be reminded both before and during the mediation that they do not have to reach an agreement they consider to be wholly unsatisfactory. Before the mediation, the role of confidentiality, private sessions with the mediator (and how the mediator's role differs from the judge) and the potential for greater involvement by the client in the mediation process should be clearly explained.

Some other thoughts about preparing the client and, for counsel, the solicitor for the mediation include:

(a) It is always preferable for barristers to meet the solicitor and client before the mediation. Preferably, at least a few days before the mediation so as to give the client sufficient time to think things through ahead of the mediation, and to consider settlement options, as well as any position statements that have been served, and to deal with other issues that need to be worked through before the mediation, including obtaining any tax or accounting advice that might be required.

(b) Outline the mediation process and its differences from the Court process.

(c) Outline to the client the issues in dispute and the way you see the case running before the trial judge, if the matter does not settle. Appreciate that some clients and disputants might have real difficulty in thinking rationally, particularly given other emotional issues relating to will disputes, such as bereavement and anger over past perceived slights by the deceased or other family members.

(d) Raise with the client the question of prospects of success – this may require counsel to communicate beforehand with the solicitor directly to ensure that previous advice given by instructing solicitors is at least taken into consideration before counsel expresses their views. At times it can assist clients to realise the uncertainty of litigation to know that their legal advisers have different views about the likely outcome of different issues.

(e) Raise with the client potential outcomes for the proceedings.

(f) Raise with the client potential outcomes for the mediation.

What about the role of Position Papers?

Opinions vary about their utility but many private mediators like to receive short Position Papers prior to the mediation.

When should they be used?

It is often very useful to prepare a Position Paper, and sometimes to serve it, in advance of the mediation, even if not ordered. In our experience, the Position Paper can in itself lead to a far more favourable outcome at a will dispute mediation than would have been possible in a court hearing or as anticipated for the mediation.

Some experienced practitioners will prepare a position statement, even if one is not required by the mediator. Even though not served, a position statement will assist the mediator in understanding the strengths and weaknesses of both sides, and to assist a practitioner in reality testing their own client.

While a useful mediation Position Paper should be very different from closing written submissions in a court case, it can provide an opportunity to explain briefly in a persuasive, though respectful manner the perceived strengths of your legal case and weaknesses in the other side's position. This can be done far more effectively than trying to make those points in an oral opening where being directly confrontational can derail or at least hinder progress to a mutually agreed outcome.

During the mediation opening session when speaking directly to the other side to persuade them of the overwhelming strength claimed for your case - without the filter of their lawyers - one cannot underestimate the damage of direct confrontation. It is a challenging task to persuade the other party to agree to something that is acceptable to your clients. People do not like to be told in front of others that a judge will not accept their evidence, even if it is true. People do not like to be told they are fraudsters or dishonest, even if they are. So, in open sessions, judge what is appropriate to say and the manner in which to say it. An opening statement that is cast as factually neutral as possible without debating what the parties know are disputed factual and legal issues, can assist in persuading the other parties more than the style of opening statement that might be used at a contested hearing to assist in persuading the judge.

There is scope for a persuasive Position Paper in advance of the mediation to give the other parties time to reflect on the strength of your case before the mediation. A persuasive Position Paper from

the other side can also assist in "reality testing" for your client and perhaps you, if it identifies weaknesses in your case which, despite your proper preparation, you have not factored in adequately.

A persuasive Position Paper can assist your oral opening to be less confrontational and better directed to moving both parties towards a mutual problem solving approach that can increase the chances of a mutually beneficial outcome.

In terms of our "opponent", it might be better to think of the court-used reference by barristers of "my friend" being taken more literally in mediation negotiations. Fisher & Ury make the helpful observation under their heading "There is power in developing a good relation between the people negotiating" in the second edition of their seminal text *Getting to Yes*[34] that "the better your working relationship, the better able each of you is to influence the other" and that "in this sense, negotiation power is not a zero-sum phenomenon." If you do not know your opponent (or "friend") it is worth some effort to take steps that will assist a good working relationship.

Dealing with Difficult Situations and Opponents

When dealing with difficult and unhelpful opponents or mediators what can one do? Here are some brief thoughts:

(a) Wherever possible, stay calm at all times. Sometimes a bit of 'light and shade' may be required, but overall you will achieve more if you remain calm and in control of your emotions.

(b) Create a pause or break – consider whether a break, or a private session with the mediator could assist in changing the tone.

(c) Have a private chat with the mediator.

(d) Have a private chat with the other party.

(e) Separate a problem person from the primary players so that the mediation can move forward.

Dealing with unsatisfactory mediators:

(a) Talk to the mediator about your concerns – can they be addressed in a private conversation?

[34] (Random House, 2nd, 1991) 190. Also recommended reading is the Ury "sequel" *Getting Past No* (Random House, 1991).

(b) If you think the mediator is being too uninvolved or distant, then think of ways to get them involved more. Can they be included in your private session to assist in brainstorming settlement options?

(c) If the mediator is wholly unhelpful for the process (which would be a very uncommon situation), think about ways to work around them in order to keep the negotiations moving forward.

Potential Mediation Derailments

A refusal to consider apologising for prior actions that should not have occurred when an apology might not have cost anything in the ultimate outcome can provide a real roadblock to settlement.

An overly cathartic emotional reaction from a client can derail matters. The catharsis from saying what he or she thinks of the other side may make the client feel good, but can hinder discussion and any realistic prospect of a settlement. One vivid example is a client saying to an aunt who challenged her brother's will leaving everything to a nephew - "*You killed my mother*" (when the client's mother had died after the commencement of proceedings challenging the will, perhaps not helped by their stress). The matter went to a final contested hearing.

Paradoxically, a client not having the opportunity to express their pent up emotions can similarly derail a settlement. *"Why is X so quiet*" an experienced mediator asked counsel at the beginning of the second day of a two day mediation involving multiple parties and interested beneficiaries of a large estate. To counsel, the mediation had seemed to be moving toward a satisfactory settlement for all, yet for what appeared to be irrational reasons it blew up at the end of day two.

Lack of preparation before the mediation, such as agreeing to the valuation of estate assets or a sensible range of values, or in thinking about taxation issues or how to structure any settlement can make an agreement on the day too hard.

In family provision disputes if all eligible claimants are not present at the mediation, problems can arise. If they have not been served as required by the procedures of the applicable court and still have time to make a family provision claim, any settlement can be risky. If representations are made by a family provision claimant during any such mediation to the effect that another eligible claimant who has not participated will not be making a claim, that representation should be expressly incorporated in any short minutes of order. It is also not unheard of for beneficiaries or eligible claimants who have not participated in a mediation (even where duly served) to seek to prevent orders being made to give effect to an agreement reached at a private mediation when the matter comes before the Court for the necessary orders to be made.

A Concluding Thought

Whether the context is that of a commercial, workplace or family dispute, mediation is a flexible process that enables us to take into account cultural or structural inequities, power imbalances, and the relationality of different cultures. As Bornali Borah emphasises, this is what makes the process empowering.[35] In her article, Borah draws attention to the humanising qualities of mediation in its values of self-determination, creating an environment for mutually satisfactory agreements and preserving relationships. Yet, at the same time highlights that we are not in the business of making lasting changes in people's personalities, self-awareness or deep insight. That is what therapy is for.[36]

Ten Commandments of Advocacy in Mediation (*for your consideration*)

I. Prepare yourself

Advocacy begins with an attitude of willingness to move beyond the comforting certainty of a legal rules world-view and to be prepared on multiple levels, such as understanding the underlying causes of the dispute and the parties' interests.

II. Prepare your client

Mediation is a self-determinative process. The client's readiness to negotiate a settlement within the context of the mediation setting is essential to the success of the process.

III. Communicate for persuasion

Tailor your communication skills to the mediation process; active listening, greater use of open questions, summarising for clarity, reframing toxic comments and remaining comfortable with silence.

IV. Manage your personal style

Avoiding legalese, altering your speed and tone to match the background and style of the person you are addressing and highlighting cooperation over competition are all useful tools for building rapport.

V. Zealously advocate (with tact)

Combine non-adversarial and adversarial approaches to respond effectively to what is happening in the mediation session. You are working towards an outcome to advance your client's interests, but in the context of aiming for a win-win resolution.

[35] Bornali Borah 'Being the Ladle in the Soup Pot: Working with the Dichotomy of Neutrality and Empowerment in Mediation Practice' *Australasian Dispute Resolution Journal* (2017) 28, 98, above n 1.
[36] Ibid.

VI. Stay open to possibilities

The advocate's role in mediation is not fixed and depends on a host of contextual factors, including the role their client wants them to adopt. The effective advocate always has a clear strategy, but as new information and new options arise during the mediation process, they stay open to new possibilities for resolution.

VII. Be mindful of the parties' subjective realities

Remain alert to what is happening beneath the surface. The parties' subjective experience - their interests, values, misunderstandings and emotions - will inform their willingness to reach a resolution and on what basis.

VIII. Focus on shared interests

Learning from the past and focusing on the future, the advocate seeks to help their clients' identify shared interests that can create the basis for a resolution.

IX. Generate options for mutual gain

The cooperative setting of mediation means working towards your client's objectives while staying open to generating options that all parties can live with.

X. Be a repeat player (and enjoy)

Mediation offers lawyers an exceptional opportunity to expand and enhance their advocacy skills. Honing particular communication strategies, developing creativity (using both IQ and EQ) and utilising joint-problem solving techniques all help to deliver timely and effective client outcomes. Satisfied clients are great for new business, and new business is great for further developing your Art of Advocacy.

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