Mediation

Chapter 15

Advocacy at Mediation: An Oxymoron or an Essential Skill for the Modern Lawyer?

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1. Advocacy by lawyers at mediation - a double oxymoron?

Mediation focuses on satisfying the interests and needs of the parties to a dispute, rather than vindicating their strict legal entitlements. For this reason, it might be thought oxymoronic - self contradictory - to attribute an advocacy role to lawyers at mediation. On this view, injecting lawyers into the process inevitably would steer the mediation towards dealing with entitlements rather than interests and needs. And, to compound the contradiction, permitting lawyers to engage in advocacy would only reinforce that trend.

The theses of this chapter are:

- it is not an oxymoron to attribute a role to lawyers In mediation.
- Nor is it an oxymoron for lawyers to engage in advocacy at mediation.

Advocacy at mediation, however, is quite different from advocacy in a court, tribunal or arbitration. These forums are adjudicative: They determine disputes brought before them according to the legal entitlements of the parties. By contrast, a mediation is facilitative: The mediator assists the parties to negotiate a resolution of their dispute. While the mediator controls the process of negotiation, he or she has no power to determine the outcome of the process.

For a lawyer representing a client at mediation, advocacy encompasses at least seven tasks:

- Understanding the mediation process and ensuring the client understands the process.
- Understanding the roles that a lawyer can play at mediation and obtaining instructions on which role is to be played.
- Understanding the dispute, the client's interests and needs and what is necessary to at least partially satisfy those interests and needs.
- Assisting the client to seek out lateral resolutions of the dispute that may differ from or supplement the parties' legal entitlements.

- By reference to the client's entitlements, advising the client of the likely best and worst outcomes if the dispute is determined by a court or arbitration.

- Preparing the client for the "*end game*" of mediation, at which a choice has to be made between accepting the certainty of the other party's last offer and the mass of uncertainties inherent in pursuing determination of the dispute by litigation.

- Engaging in appropriate advocacy at the mediation.

2. Understanding the mediation process and ensuring that the client understands it

This chapter is addressed to lawyers preparing to represent clients at mediations at which the mediator will play a facilitative role, not an evaluative role[1]. Different considerations apply if the mediator will play an evaluative role. They are beyond the scope of this chapter.

The first task of a lawyer representing a client at a mediation is to understand the process of mediation and to ensure that the client also understands it.

- Mediation is a structured negotiation assisted by a third-party neutral called a "*mediator*".

- The mediator has no power to impose an outcome on the parties and thus is not an adjudicator like a judge or an arbitrator.

- The mediator does have power to control the mediation process (who talks next and how long; what issues are discussed; whether the parties are together or separated; when to have lunch, *etc.*).

- The mediator thus has power to control the ***process*** but does not control the ***outcome*** of the process. There will only be a resolution of the dispute if the parties agree on it.

- The mediator can and should help the parties work out what issues (factual, legal and emotional) have to be resolved in order to make settlement possible.

- The mediator can and should help the parties work out what each party needs (as distinct from what it says it wants) to satisfy itself with respect to each issue.

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[1]See L. Boulle *Mediation - Principles Process Practice* LexisNexis 2nd ed 2005 pp 44 - 45. In an evaluative mediation, the mediator advises the parties on the likely outcome of disputed questions of fact and law and on the likely overall outcome in a Court, tribunal or arbitration.

- The mediator can and should help the parties to create and explore options for resolving the dispute. The parties are not limited to results that a court, tribunal or arbitrator could order. They are limited only by their imagination, by the practicality and legality of the option being considered, and by whether the parties agree on it.

- A mediator should not give legal advice or advice about the likely outcome of factual disputes. It is more difficult for mediators to be regarded as neutral and impartial if they do these things.

- The mediator can, however, and should "*reality test*" the position taken by a party. This is usually done in a private session, without the other party or parties being present.

- Reality testing usually involves the mediator asking questions designed to direct the party's attention to issues of fact and law that might cause if difficulties if the dispute went to hearing. There is a fine but important line between vigorous reality testing and giving legal advice.

- The mediator can and should help the parties (usually in private) consider how attractive is their best alternative to settling at mediation (usually a successful conclusion to litigation).

- Because the mediator has no power over the substantive outcome of the process, the rules of natural justice do not apply. It is normal practice for the mediator to talk to the parties privately and to be told things by one party that must be kept confidential from the other party or parties.

- Mediations almost always take longer than the parties and their lawyers anticipate, so a wise lawyer will warn clients that they need to be patient. But the client also should be aware that a mediation almost always will take considerably less time than the Court, tribunal or arbitration hearing that may be avoided.

2. Understanding the roles that a lawyer can play at mediation and obtaining instructions on which role is to be played.

A lawyer representing a client whose dispute is to be mediated can play a wide range of roles at the mediation, ranging from non-participation to extremely active involvement. Participative roles themselves range from problem-solving to adversarial.

One writer has identified 14 roles that lawyers representing clients at mediation have been observed to play and has produced a descriptive taxonomy of them[2]:

- Gracious Host
- Kindly Enemy
- Absent Coach
- Point Scorer-Sniper
- Grandstander
- Control Freak
- One-Way Listener
- Passive Observer
- Uncommitted Procrastinator
- Sceptical Critic
- Bad Cop
- Polite Advocate
- Cross Examiner/Note Taker
- Strategic Intervenor.

The pejorative names given to several of the roles indicate that they are not recommended as effective roles. Even when these are eliminated, however, there is a wide range of roles available to lawyers. Explaining each role and when it is appropriate is beyond the scope of this chapter.

Most clients are unaware of the range of possible roles. For this reason, a lawyer should:

- Inform the client of the possible roles that can be played at the mediation.
- Make a recommendation to the client about the role that is likely to be appropriate at the mediation and explain the reasons for the recommendation by reference to the advantages and disadvantages of the recommended role.

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[2] J.H. Wade, *Representing Clients at Mediation and Negotiation*, Dispute Resolution Centre, School of Law, Bond University 2000 pp 140 - 155.

- Obtain instructions from the client on the role to be played.

- Warn the client that, depending what happens at the mediation, it may be appropriate to change roles.

- Inform the client that the lawyer will not change roles during the mediation without obtaining instructions to do so.

3. Understanding the dispute, the client's interests and needs and what is necessary to at least partially satisfy those interests and needs

Lawyers are used to advising their clients of the legal entitlements that arise from a set of facts. Doing this is important for a lawyer representing a client at mediation and is discussed later in this chapter. Representation at mediation, however, requires the lawyer to do more.

The lawyer should try to understand what lies behind the dispute, no matter how often the client tells them that "*It's just about money*" or "*It's not about money; it's a matter of principle*". Many disputes said to be about money have other causes, such as a breakdown of trust. In this case, restoration of trust may make the payment of money unnecessary or at least reduce the amount needed to resolve the dispute. Many disputes said to be about matters of principle can be resolved at least in part by the payment of money.

Delving into what lies behind the dispute does not always come easily to lawyers, because they are trained to discard facts not relevant to the determination of legal entitlements and to disregard the parties' feelings and emotions. It requires persistence and determination. Like most things, it becomes easier with practice.

A lawyer representing a client at mediation also should explore what the client needs in order to resolve the dispute, as distinct from what the lawyer assumes the client wants. For example, the writer was involved in the mediation of a personal injury claim resulting from an accident in which the plaintiff lost part of his left hand. The plaintiff's barrister claimed that he would not settle his claim for less than his full legal entitlement. At mediation, however, it transpired that the plaintiff, who was Spanish born, was content to settle for an amount sufficient to pay for a return trip to Spain. This amount was considerably less than the maximum he might have been awarded by the Court. His lawyer had simply assumed that the plaintiff would only settle for an amount close to the maximum.

4. Assisting the client to seek out lateral resolutions of the dispute that may differ from or supplement the parties' legal entitlements

Lawyers are used to advising their clients of their legal entitlements but are less used to exploring to exploring options for resolution of a dispute beyond those entitlements. In a mediation, however, the parties are not limited to the outcomes that a Court, tribunal or arbitration could order. As noted above, they are limited only

by their imagination, by the practicality and legality of the option being considered, and by whether the parties agree on it.

Once the lawyer understands what lies behind the dispute and what the client needs to resolve the dispute, it often becomes easier to identify lateral solutions. It also helps to understand as much as possible about the client and the opposing client.

Exploring lateral solutions takes time, patience and persistence. The lawyer should explain this to the client and encourage them to set aside sufficient time for a thorough search for lateral solutions to the dispute.

5. By reference to the client's entitlements, advising the client of the likely outcome if the dispute is determined by a court, tribunal or arbitration

Many mediations are conducted in the shadow of the courthouse, in the sense that if the dispute does not settle at mediation or subsequent negotiation, it will be determined by a Court, tribunal or arbitration. The more deeply the dispute is involved in adjudicative proceedings, the deeper the shadow[3].

For this reason, in many mediations the Best Alternative To a Negotiated Agreement ("***BATNA***") for both parties is the result of the adjudicative process: the judgment that would be handed down by a Court or tribunal or the award of an arbitrator. A lawyer representing a client at mediation should advise their client of its likely BATNA, for the very good reason that the client will not be able to evaluate offers made to it at mediation without knowing its alternative.

For example, if a client's likely BATNA is a judgment for damages of $2 million, a settlement offer of $1 million is not very attractive. It would be very different were its BATNA only $1.2 million.

It follows that the lawyer should advise their client of the likely result of pursuing its legal entitlements. Giving thorough advice can involve significant legal costs. For this reason, the lawyer should explain to the client that, as with litigation, they cannot be too prepared, but their time is the client's money.

Because engaging in an adjudicative process requires expenditure of significant legal costs and, usually, involves incurring the risk of having to pay the opponent's legal costs, the lawyer should also advise on the likely costs consequences of the adjudicative process.

Advising the client about its BATNA thus requires an understanding by the lawyer of:

* The legal issues raised by the dispute

* The factual issues raised by the dispute and the factual matrix in which they arise

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[3]Boulle, above n. 1, p 143

* Actual and potential evidence if the dispute goes to court or arbitration hearing

* Knowledge of relevant expert opinion

* The prospects of obtaining/defending against relief

* Enforcement hurdles

* Solicitor-client costs to date, including those of the mediation

* Additional solicitor-client costs of getting to the end of a contested hearing

* Costs payable to the other party (as agreed or assessed) if the client loses at a contested hearing

* Costs recoverable from the other party (as agreed or assessed) if the client wins at a contested hearing.

As well as giving advice to the client about its likely BATNA, it can often be helpful to chart for the client their best and worst outcomes were the dispute to be determined by an adjudicative process. Many defendants do not realise that, because legal costs usually are only recoverable in part (and, in some forums, not at all), the adjudicative process is likely to cost them a significant amount of money even if they are entirely successful in repelling the claims against them.

If, for example, the likely best result for the client is that it will have to spend $50,000 in irrecoverable legal costs in defending itself, it may well be better off agreeing at mediation to pay the plaintiff some or all of this amount if that will induce a settlement.

6. Preparing the client for the "*end game*" of mediation, at which a choice has to be made between accepting the certainty of the other party's last offer and the mass of uncertainties inherent in pursuing determination of the dispute by litigation

Perhaps the most important part of advocacy at mediation is preparing the client for the difficult and critical end stage of mediation.

Mediation is not fun. It is not a refuge for the woolly-minded barrister who would prefer to avoid preparing cross-examination, nor for the client who would prefer not to be cross-examined. It is physically, intellectually and often emotionally exhausting.

Mediation forces the parties to confront their options and to make hard choices between them. Mediation works because this imposes almost unbearable pressure to settle.

The lawyer should warn the client about this. Pressure is easier to resist if it does not come as a surprise. Forewarned is forearmed. Other things being equal, a party better able to resist the pressure to settle will do better than one who is less able.

The lawyer should explain to the client that mediations typically follow a pattern.

- After introductory remarks by the mediator, there will be an initial and often lengthy joint session in which the parties state their positions to the other parties. There may be lots of (often emotional) venting.

- During this period, the parties may seem to be moving away from each other rather than towards each other. They may resile from tentative compromises struck earlier. Warn the client that this is normal and they they should not be alarmed by this process.

- Explain to the client that the initial period usually is followed by a period in which the mediator helps the parties isolate the issues that must be resolved, in which these issues are discussed, and in which options for resolving these issues are canvassed.

- Explain to the client that there probably next will be private sessions in which the mediator, perhaps robustly, will "*reality test*" the strength of your client's factual and legal position. Warn the client that this is normal and that they should not be alarmed by this process.

- Explain to the client that it will probably not be until after the private sessions have run for some time that settlement offers will be made and exchanged. At this point, the parties will probably start moving towards each other.

- As already noted, mediation forces the parties to confront their options and to make hard choices between them. Mediation works because this can impose almost unbearable pressure on parties to settle.

- This point typically comes in the late afternoon when, after an exhausting day of negotiation, the defendant puts an offer, says that this is the final offer, and it probably is or is close to the final offer. (The roles are reversed if the client is a defendant.)

- At this point, the client has a choice between:

  Money that almost literally is on the table. It is there for the taking. It is a certainty. But it is far less than the client hoped to get and perhaps not even enough to pay their legal costs, or to repay the mortgage, or to repay the loan from Aunt Maude to fund the litigation.

  The eventual outcome of the adjudicative proceedings. This is some time, perhaps far, in the future. It is uncertain. It is hedged about with the inevitable lawyers' qualifications ("*I've told you many times that, although your*

prospects are good, no case is unloseable."). It may be much better than the money on the table. But achieving it will incur the distinct, but difficult to quantify, risk of losing the case, getting nothing and bearing both parties' costs. This may lead to bankruptcy/insolvency.

- Mediation works because this point usually is reached after an exhaustive consideration of the merits of the parties' positions and of the options for resolving the dispute, and after exhausting negotiation has narrowed the differences between the parties to the maximum extent apparently possible. In blunt terms: As far as settlement is concerned, this is as good as it is going to get.

- At this point, the client must make a terrible choice between a certainty that is much less than was hoped for, and a mass of uncertainties that eventually may produce a much better result but also carry with them the risk of a much worse result. The choice is difficult because one cannot compare like with like.

- The lawyer no doubt will give the best legal advice possible in the circumstances and remind the client of their BATNA, but only the client can make the ultimate choice.

- If the lawyer has prepared their client for making this terrible choice, they can say at the appropriate time,

  > "*Remember I told you that a time would come during the late afternoon when you would find the pressure to settle almost unbearable? Well, here it is. Don't lose your nerve*. *The other party is feeling the same pressure, or worse.*"

- Many clients will find the pressure to settle unbearable and will want to accept the offer. The lawyer should be prepared for the client to buckle under the pressure of the mediation. If the lawyer has warned the client about the hard choice they have to make, the lawyer can say:

  > "*Hang on a moment. The offer you're proposing to accept [put] gives you less [is much more expensive to you] than your best alternative. Remember I explained that you probably would be better off not settling than accepting less than [paying more than] your best alternative. That reality hasn't changed.*
  >
  > *It's up to you, but I suggest we discuss the offer for a while before you tell the mediator to accept [make] it. How about a coffee/a walk in the park/a smoke/a square meal/a good night's sleep/adjourning the mediation?*"

- The lawyer should be prepared for pressure on the client from the mediator to accept [put] the offer that the lawyer has doubts about. The lawyer should be prepared to help their client resist that pressure. The lawyer's job is to represent their client and to make sure they obtain the best possible settlement, not to enhance the mediator's *"success"* rate.

- Ultimately, of course, it is up to the client whether to put [accept] the offer. Only the client can make the choice. The lawyer should not be surprised if their client ultimately goes well below [above] the "*bottom line*" ["*top dollar*"] that the lawyer was told about in conference before the mediation.

7. Engaging in appropriate advocacy at the mediation

The final element of advocacy at mediation is engaging in appropriate advocacy during the mediation. Advocacy at a mediation is very different from advocacy in a Court, tribunal or arbitration.

In Court, the occasions for advocacy are well-defined: Opening the case and making oral or written addresses to the Court or the jury.

In mediation, by contrast, there are at least six occasions when advocacy can be used:

- Before the mediation starts, in preparing the client for the mediation

- At joint meetings in the mediation

- In meetings with the mediator and the lawyer's client

- In meetings with the mediator and the opposing party's lawyer

- In meetings with the mediator alone

- In meetings with only the lawyer's client present

- Note that some of these occasions may occur repeatedly

- Some occasions may be short; others may stretch into hours.

In an adjudicative process, it is clear who is the audience for the lawyer's advocacy: the determiner of factual and legal issues - the judge or jury, tribunal member or arbitrator. It is very different in a mediation, where the advocate has at least four audiences:

- The opposing party

- The opposing party's lawyer

- The mediator

- The lawyer's own client.

The advocate at mediation himself or herself is an audience. Others present will attempt to persuade him or her of the merits of their (or their client's) position.

One of the challenges to the advocate in mediation is that, in several of these situations, it is necessary to address several audiences simultaneously. Issues that arise include:

- Should a particular audience be targeted?

- Should a technique be selected which is effective for all audiences addressed?

- Should the audiences present be addressed sequentially?

The advocate in court does not have to confront any of these challenges.

The advocate's client at mediation, if properly prepared, will make settlement offers and evaluate settlement offers made to it based partly on the risk of the "*worst-case scenario*". Usually, this is losing in a Court, tribunal or arbitration. On the assumption that the opposing client is doing the same, it may be productive to emphasise the strength of the advocate's client's case and to create doubt about the strength of the opposing case.

Given this, an advocate should not forgo the opportunity to persuade the other client of the merit of their client's case and the weakness of the opposing case. In mediation, it is permissible to address the opposing client directly and the advocate should not forgo the opportunity to do this.

It is obvious that the type of advocacy used in Court is unsuitable for mediation. A different style is called for. Advocacy in mediation must be adapted to the audience and to the type of dispute. It should be clearly and simply expressed, polite and firm.

There is, however, no need to mince words. If credit is in issue in the proceedings and the lawyer's view is that the credibility of the client on the other side of the dispute would not survive cross examination, they should say so. This can be done as part of explaining why the lawyer's client is likely to prevail if the matter goes to hearing.

In mediation, silence can also be employed as an advocacy technique, in order to:

- To express disbelief

- To express agreement

- To express disagreement
- To express lack of comprehension
- To indicate that more should be said
- To encourage the speaker to embellish and perhaps make damaging admissions
- When a response is called for, to encourage the speaker to lose their temper.

8. Conclusion

Advocacy at mediation encompasses the seven tasks discussed in this chapter. Lawyers who undertake these tasks thoroughly can be confident that they have represented their clients at mediation to the best of their abilities.