The Art of Advocacy in Mediation[1]

By Ian Davidson SC

In Australia, Alternative Dispute Resolution, or ADR as is the often used acronym, has grown markedly not merely in the footsteps of its international popularity, but as a frontrunner in a global emphasis on timely and cost effective dispute resolution, and no ADR process more so than mediation. It is estimated that 80–90 per cent of civil cases are disposed of pre-trial in Australia.[2] When speaking at the Australian Disputes Centre in 2017, the NSW Chief Justice the Hon Tom Bathurst AC 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.'[3] His Honour's sentiments have been echoed by South Australia's Chief Justice the Hon Chris Kourakis' strategic focus on dispute resolution processes to overhaul civil litigation and emphasised by then Western Australia's Chief Justice the Hon Wayne Martin AC's remarks on the use of mediation before as well as during the litigation context.[4]

For NSW (indeed Australian) barristers engaged in civil litigation mediation is now effectively almost always compulsory before there will be a final hearing and all superior courts in Australia possess a statutory power to order the mediation of a proceeding, with or without the consent of the parties.[5]

As practising advocates, counsel 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 gear, more so now 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.

Effective advocacy starts before the mediation

The crucial first step for any effective advocacy, including in any 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 role of the advocate.

'Mediation is not an adversarial process to determine who is right and who is wrong'.

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.[6] The advocate will be considering not only the urgency of the issues in dispute but also their clients' 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 the 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 go a long way to mitigating potential confusion and time-wasting. Careful consideration in advance of the probable taxation or stamp duty implications and the possible ways of structuring a settlement, and how most efficiently to 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 feeling more at ease during the mediation process.

Integral to this preparatory work is leaving sufficient time for a pre-mediation session with the mediator. Thirty minutes to an hour of your, and ideally your client's, time in a pre-mediation session can save many hours during the mediation and make the difference between a resolution and no resolution.

Some lawyers consider that the mediator can say no-more to their clients than they have already said as the legal representative. However, using the opportunity to meet the mediator before the mediation session 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. Where clients have not met the mediator in a formal pre-mediation session before the mediation day, some time spent with the mediator on the mediation day before formal sessions commence can often be useful.

These preliminary discussions are moreover essential to the mediator in

identifying and alleviating 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 across the threshold 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 vis a vis their advocacy in mediation has oft been presented as the dichotomy of adversarialism and non-adversarialism. However, that suggested dichotomy may be an oversimplification. The Law Council of Australia's current and useful Guidelines for Lawyers in Mediations (LCA Guidelines) comment that 'Mediation is not an adversarial process to determine who is right and who is wrong'. The August 2011 LCA guidelines had, more starkly and perhaps controversially, also suggested that 'the skills required for a successful mediation are different to those desirable in advocacy'. This less nuanced suggestion has been omitted in the LCA Guidelines. However, the updated LCA Guidelines, no doubt correctly, continue to note that 'a lawyer who adopts a persuasive rather than adversarial or aggressive approach… is more likely to contribute to a better result.'[7]

This position that mediation is not an adversarial process arguably still insinuates that adversarialism equates to aggressiveness which relates to 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.[8] Even in traditional litigation the lawyer who is persuasive, rather than aggressively adversarial, can work towards a better outcome.[9]

It may be that this suggested dichotomy is somewhat artificial, harshly juxtaposing what it means to advocate in a courtroom against advocating in a mediation process, without 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

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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.[10]

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*, where he perceived adversarialism and non-adversarialism existing on a continuum, 'with most processes combining aspects of adversarial and non-adversarial practice to varying degrees.'[11]

What then of the concept of partisanship? The word connotes a notion of strongly advocating for a cause. It perhaps does not call to mind the impartial setting of a mediation, yet Wolski persuasively argues for the 'partisan advocate'.[12] The view against partisan advocacy perceives it to stem 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 [13] and hired guns.[14] 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 winning for your client at all costs. The concept of 'zeal', is traditionally associated with an almost religious fervour, at the expense of reason and impartiality, and is similarly regarded as incompatible with mediation where the focus is on enabling the benefits of trust, creativity, openness and joint-problem solving.[15]

However, Wolski defines 'zealous' to combine the concepts of partisanship and passion.[16] 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? Picking up the succinct definition of advocacy offered by Timothy Pinos in 'Advocacy Training: Building the Model – A Theoretical Foundation' that advocacy is '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.'[17] The advocate is thus taking 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'.[18]

The point that Wolski makes is that while the advocate's approach does not have to be adversarial, they have to remain partisan. Needless to say, a lawyer 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 the client's interests.

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, self-determination and advocate's immunity.

Duty of honesty

In the informal setting of mediation, evidence is not tendered as a formal exhibit, and some practitioners (though hopefully no counsel) might believe that the duty of honesty does not apply in full force. However, the opposite is truer, in that there is a stronger duty because there is no impartial adjudicator to find the truth between opposing assertions.[19]

The case of *Mullin*[20] 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 counsel, 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.[21]

Party self-determination

The duty of honesty enables 'the most fundamental principle of mediation'[22] that of self-determination, which turns on the informed consent of parties to the mediation process and its outcomes. Thus, they 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.[23]

Advocate's immunity

Advocates in mediation are unlikely to be afforded the same immunity from suit as advocates in litigation.[24] In the 2016 Australian High Court decision of *Attwells v Jackson Lalic Lawyers Pty Ltd*[25] 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 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*,[26] holding that alleged negligent advice – not to accept an offer that leads 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'[27] 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 provided at mediations.

The Advocates' Philosophical Map

To be effective in cooperative mediation, commentators have proposed that advocates modify their standard 'philosophical map'[28]. 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 then 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 alternative dispute resolution processes still mean bringing our whole lawyer self to the table. We may tone down the adversarial element 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 courtroom, in most civil proceedings, the only audience to persuade is the trial judge or in an appeal, a majority of the appellate judges.[29] 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 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 Berman-Robinson have delineated, effective dispute resolution is like a well-tailored suit: it must fit well.[30] 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 factors.[31]

The third factor '**Role**' may also need to alter depending on the background of each party. For example, user-friendly terminology rather than legalese and legal arguments may be more encouraging for client-engagement in a mediation setting. Dispute resolution 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.[32]

Taking Shurven and Berman-Robinson's practical elements we can reasonably anticipate that far more is happening below ground than above. Staying alert to these subjective realities they suggest the advocate is cognisant of the parties' experience, including their:[33]

- 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 various types 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 will or family provision 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 usually fewer 'repeat' players except where a public trustee or professional private trustee company is the executor.

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.

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 in making family provision orders. So advocates need to look for solutions that will not be rejected by a judge.

Natural grief, and family dysfunctionality, often will raise complex psychological issues as well as legal. 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 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 (even if 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'[34]. More generally, for the successful mediation, negotiation or settlement conferences of will disputes 'the significant legal, social and psychological factors which are inherent in testamentary disputes need analysis'[35]. 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. What parties should attend the mediation session requires careful thought well before the mediation begins 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. My own 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 or 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 on persons who could be adversely affected by a settlement reached at a mediation, should have been served.

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 central to their role.

I have already noted that the common element that remains essential for effective performance in advocacy in both 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.

At a minimum you will need to access material to evaluate the range of possible results, if the particular matter is decided by litigation, and to 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 is feasible 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, particularly (but not only) 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 view as 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 the other disputants might have real difficulty in thinking rationally, particularly given other emotional issues relating to will disputes, including 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 (perhaps more bullish or less realistic) 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 my experience, the Position Paper can of itself lead to a far more favourable outcome at a will dispute mediation than would have been possible in a court hearing or anticipated for the mediation.

Some experienced practitioners will prepare a position statement, even though not required by the mediator and even though not served, both to assist them in understanding the strengths and weaknesses of both sides and to assist them 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 way, the perceived strengths of your legal case and highlight weaknesses in the other side's position far more effectively than trying to make those points in an oral opening when 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 potential 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 that is true. People do not like to be told they are fraudsters or dishonest. Even if they are. So in the 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 many 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*[36] 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.

Mediations Potentially Derailed?

Only a few of many available examples of what can go wrong and derail mediations are next briefly noted.

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 might make the client feel good but can hinder discussion and any realistic prospect of a settlement. One vivid example is a party saying to an aunt – who challenged her brother's will leaving everything to that party, his nephew – '*You killed my mother*' (when the party'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 failing to take steps to enable agreement about the valuation of estate assets or at least a sensible range of values, or in forgetting to think beforehand 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. BN

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?

(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.

Ten Commandments of Advocacy in Mediation (at least final thoughts *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.

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 focussing 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 counsel who embrace its potential and challenges 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 and instructing solicitors help with obtaining new briefs and therefore new opportunities for further developing your Art of Advocacy.

ENDNOTES

1 Based on, and updated from, papers '*The Art of Advocacy: Selecting the Right Vintage for the Occasion*' jointly presented at the Law Society of South Australia Forum on 15 February 2018 and for Bench TV on 11 April 2018 by Ian Davidson SC and Deborah Lockhart, CEO, Australian Disputes Centre.

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

3 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. This important address is also available at [2017] (Spring) *Bar News* at pp 22-28.

4 Former 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.

5 See McNamara, 'Mandatory and quasi-mandatory mediation' (2019) 47 *Australian Bar Review* 215 for a summary of State and Territory provisions (and arguments for and against mediation being made effectively obligatory which arguments are not here addressed, though I consider the author underestimates the extent, at least in NSW civil litigation, the ubiquity of mediation processes has already been accepted by the profession). See also Davidson 'Issues with the use of ADR in will disputes' (2018) 45 *Australian Bar Review* 1 which includes a discussion of NSW mediation provisions. (The 15 March 2010 version of Practice Note SC Gen 6 referred to in that article has been replaced by the same numbered Practice Note that was issued and commenced on 9 March 2018.)

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

7 Law Council of Australia, 'Guidelines for Lawyers in Mediation' (Updated Version April 2018) ('*LCA Guidelines*') available at https://www.lawcouncil.asn.au/docs/8444fbc1-34d8-e911-9400-005056be13b5/Guidelines%20for%20Lawyers%20in%20Mediations_Final%202018.pdf.

8 Bobette Wolski, 'On Mediation, Legal Representatives and Advocates' (2015) 38 UNSW *Law Journal* 1, 5.

9 Bathurst, above n 3, 4.

10 Olivia Rundle, 'A Spectrum of Contributions that Lawyers Can Make to Mediation' (2009) 20 *Australasian Dispute Resolution Journal* 220.

11 Michael King et al, *Non-adversarial Justice* (Federation Press, 2009) 5.

12 Wolski, above n 6.

13 Scott R Peppet, 'Lawyers' Bargaining Ethics, Contract, and Collaboration: The End of the Legal Profession and the Beginning of Professional Pluralism' (2005) 90 *Iowa Law Review* 475, 500.

14 Ted Schneyer, 'Some Sympathy for the Hired Gun' (1991) 41 *Journal of Legal Education* 11, 11 (as suggested by its title, Schneyer was critical of this view).

15 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.

16 Bobette Wolski, 'On Mediation, Legal Representatives and Advocates' (2015) 38 *UNSW Law Journal* 1, 34.

17 Timothy Pinos, 'Advocacy Training: Building the Model – A Theoretical Foundation' (1983) 1 *Journal of Professional Legal Education* 18, 18.

18 *LCA Guidelines* ss 1, 6. Though Wolski's comments were based on the August 2011 LCA guidelines, those comments continue in the updated LCA Guidelines.

19 *Legal Practitioners Complaints Committee v Fleming* [2006] WASAT 352, [76].

20 *Legal Commissioner v Mullins* [2006] QLPT 12.

21 Shurven and Berman-Robinson, 'Design in Dispute Resolution Practice: Tips and Tools', above n 4, 124.

22 Wolski, 'On Mediation, Legal Representatives and Advocates', above n 6, 30.

23 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.

24 Bathurst, above n 3, 9.

25 (2016) 259 CLR 1; [2016] HCA 16.

26 (2017) 259 CLR 275;[2017] HCA 13.

27 Bathurst, above n 3, 13.

28 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' (2003) 79 *Notre Dame Law Review* 1, 3.

29 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.

30 Shurven and Berman-Robinson, 'Design in Dispute Resolution Practice: Tips and Tools', above n 4.

31 Bathurst, above n 3, 5.

32 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.

33 Shurven and Berman-Robinson, 'Design in Dispute Resolution Practice: Tips and Tools', above n 4.

34 Richard Harris, 'The Mediation of Testamentary Disputes' (1994) 5 ADRJ 222 at 223.

35 Ibid.

36 2nd ed 1991, Random House at 190. Also recommended reading is the Ury *'sequel' Getting Past No* (also 1991 Random House).