Mediation vs. Courtroom Advocacy

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MEDIATION vs. COURTROOM ADVOCACY

I know a small number of civil advocates who very rarely attend a mediation. Apart from this very small number, the mediation process is likely to be a process in which civil advocates regularly become involved. For disputes in the following areas, mediation is likely to be a compulsory precursor to commencing litigation:

- ACC
- Care of Children
- Telecommunication services
- Financial services such as insurance and banking
- Human rights
- Tenancy issues
- Employment relations.

A number of dispute resolution clauses provide for the parties to attempt mediation as a first step in the dispute resolution process. There are also a large number of civil disputes in which parties attend a mediation to endeavour to settle their dispute in order to avoid the cost and risks of litigation.

Rule 13.4 of the Conduct and Client Care Rules requires lawyers assisting clients with the resolution of a dispute to keep the client advised of alternatives to litigation that are reasonably available to enable the client to make informed decisions about the resolution of the dispute.

All this points to a need for advocates to appreciate the differences between their role as litigator and their role as representative in a mediation and to develop both sets of skills.

Important but not different skills

A number of the mediation texts contain tips for mediation advocates such as:

- Be prepared
- Be professional
- Use temperate language

- Be credible.

This is all good advice for mediation advocates. However, in my view this advice equally applies to litigation. Therefore, although these skills are important, they are not the focus of this paper.

Making a difference in mediations

The focus of this paper is the differences between litigation and mediation. It has been said litigation is like fighting a formal duel: a process governed by customs and rules where the opponents fight each other directly in an attempt to secure an outright victory.[1] Mediation is more akin to wrestling: opponents embrace each other at close quarters in a less formal, more improvised and more intense form of combat. From my experience, this is a good description of the processes.

Some of the differences that I identify between the two processes are:

Litigation	Mediation
Independent decision-maker	Parties make the decisions
Minimal role for client	Primary role for client
Determining fault based on the past	Focus on present and future solutions
Rights based	Interests focused
Focused listening skills	Open and active listening skills
Minor concessions only	Compromise very likely
Judge documents the outcome	Counsel documents the outcome

The decision-maker

In litigation the judge is the sole decision maker. All effort is placed on persuading the judge to find in favour of your client. In a court hearing the parties ask counsel to speak for them and for a neutral person to decide the case. In contrast, the role of a mediator is to create favourable conditions for the parties' decision-making, not to be the person making any decisions. Mediators usually will not decide disputes or any issue in dispute and cannot

[1] JAMS International, *Effective Mediation Advocacy* at 4.

impose an outcome upon the parties. Mediators facilitate the parties' negotiations and encourage the parties to settle. As an independent chair of proceedings the mediator establishes the rules for constructive negotiation.

The litigation focus on striving to persuade a neutral Judge that the client's position is right can lead to positional tactics. Such tactics can be unhelpful at mediation. While counsel may emphasise the strength of her client's case at the start of a mediation, it may not help to continually and repeatedly highlight the merits of the client's case, rebut the other points and aggravate the mutual hostility which probably already exists between the parties.

Legal arguments may be dropped in favour of more user-friendly technology that encourages the opposing client to engage and understand.[2] Counsel should avoid cross-examining the other party. It is valid to probe the opposing party's strengths and witnesses but greater subtlety is required than in litigation.

This doesn't mean making points to the mediator is completely wasted. Counsel should be able to demonstrate to the mediator that her client's position is reasonable. The mediator is likely to be more willing to support a position that is seen as reasonable. It can also be useful to prime the mediator with arguments and documents that can be used convincingly to reduce expectations in private sessions with the other side. However ultimately the person to be persuaded in mediation is the other party, not the mediator.

Role of the client

In litigation the role of the client is usually to provide evidence and instructions to counsel. Usually clients do not sit with counsel, so giving instructions is restricted to the breaks or the beginning or end of the court day. The judge is in control of the court process and counsel are the biggest participants in it. Unlike court, the parties participate directly in the mediation and in the decision-making regarding their own dispute. The parties are the decision-makers and are empowered to make decisions in the context of a mediation.

The extent to which a client wishes to be involved in the mediation process varies from client to client. Counsel needs to be sensitive to this, while encouraging the client to participate in the process as fully as possible. Counsel needs to prepare his client for a mediation – explain the process, guide the client on what to expect from a mediation and how to get the most out of it.

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[2] T F Bathurst AC "Off With The Wig: Issues That Arise For Advocates When Switching From The Courtroom To The Negotiating Table" Australian Disputes Centre at [11].

Counsel needs to make a conscious effort to communicate with and obtain thoughts from his client(s) throughout mediation. Mediations can be long and arduous for clients. Counsel needs to be attuned to the client's needs and to provide support when required. This includes providing emotional support if a client is facing difficult decisions. It also includes realising when a client needs a break or when tea/coffee/food is desirable.

Present and future focused

The vast majority of litigation is concerned with establishing the facts of an event or relationship leading to a dispute and applying the correct legal principles to those facts. The objective of mediation is to resolve a dispute using a process considered by the parties to be fair which achieves acceptable lasting outcomes.[3] The focus is on what the parties can do now or in the future to resolve their dispute and move on.

One of the tasks of counsel in a mediation is to help identify the future alternatives to achieving a settlement. Reference is frequently made to the terms BATNA ("Best Alternative to a Negotiated Agreement") and WATNA ("Worst Alternative to a Negotiated Agreement"). These terms have been adopted to explain the importance of understanding the alternatives to settlement.[4] More useful is the client's MLATNA ("Most Likely Alterantive to a Negotiated Agreement").

The technical language should not disguise the nature of the task. All that is required is to develop the parameters of alternative outcomes and the most likely outcome. It is impossible to make a wise decision about whether to accept a negotiated agreement unless you know what the alternatives are. These alternatives are worked out by developing a list of options or actions that might be taken if no agreement is reached. Following the options or actions through to their conclusions will identify the best and worst outcomes and the most likely outcome.

Counsel should explore with the client the best and worse case scenarios of litigation, taking into account the costs and time frames. The BATNA, WATNA and MLATNA will include likely trial outcomes but also other factors personal to the client, e.g. aggravation and lost productivity associated with going to trial, effect on relationships. A good awareness of a client's BATNA, WATNA and MLATNA provides a useful guide to decision making throughout a mediation.

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3 Boulle, Goldblatt, Green *Mediation Principle,s Process, Practice* (2nd ed Lexis Nexis Wellington 2008), at 53.

4 Fisher and Ury *Getting to Yes: Negotiating Agremeent Without Giving In* (Penguin Books New York 1983).

Interests compared to rights

A popular benefit attributed to mediation is that it is able to take into account parties' interests rather than simply focusing on their legal rights. Litigation deals with the facts only in so far as they relate to legal issues. Mediation deals with legal and non-legal issues. Anything of significance to the parties can be dealt with in a mediation.

To this end counsel acting in mediations should ensure that they have a proper handle not only of the law and the client's prospects in a hearing, but also of the underlying causes of conflict and the client's underlying concerns and interests. This will be necessary in creating and analysing options for compromise that will be satisfactory to both parties.

Time should be spent analysing not only your client's interests and concerns but also the opposing party's underlying concerns. Discovering what the other side wants is crucial for developing mutually beneficial agreements. What is important to the other side? Why is your counterpart willing to negotiate? What does the other side bring to the table?[5]

Counsel should work with the mediator to search for potential areas of mutual interests and agreement. Help to brainstorm solutions that meet the parties' needs. This can occur during joint sessions or privately with the mediator. Even in mediations solely concerning the payment of money, options may be explored that would not be available by a judgment, such as payment over time with security.

Listening skills

Counsel listens with a particular focus in court. During evidence counsel is listening for facts that are particularly useful or harmful to her own case or the other side's case. When the judge speaks counsel hangs on every word to glean any idea of what the judge may be thinking in order to be in the best position to influence that thinking. During submissions, counsel listens to the other side's submissions purely with a view to criticising them.

Different listening skills are required in a mediation. Open and active listening is a skill to be deployed at mediation. Because the opposing party is the decision-maker, counsel is listening to anything that is said by the other side that may assist in providing options for settlement. Counsel is trying to understand the other side's position as much as possible in order to generate mutually satisfactory outcomes. Mediation is an interactive process and

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[5] John Patrick Dolan, "How to Prepare for Any Negotiation Session" in American Arbitration Association, *Handbook on Mediation* (2nd ed Juris Net LLC 2010).

understanding thoughts and feelings that are communicated verbally and by body language is a valuable skill.

Compromise

Acting in the client's best interests does not mean defending their initial or most favourable position at all costs. Often the client's best interests will be served by reaching a compromise.[6] That is not to say counsel is entitled to coerce a client into a compromise. However, it is the role of counsel to assist a client to make informed and free choice between compromising litigation and for that purpose to assess what is in the client's own best interests.[7]

Mediations are confidential and without prejudice so parties can feel free to make concessions and compromises, which are more likely to lead to resolution of a dispute. While counsel may make reasonable concessions during litigation, such concessions are unlikely to be in the nature of those made at mediation.

Counsel analyse the advantages and disadvantages of options on the table in comparison with possible outcomes at trial. There has to be an honest assessment of whether litigation is a better outcome than arriving at a settlement. Options need to be analysed against the client's BATNA, WATNA and MLATNA to know when compromises should be made.

Documenting the outcome

An important role of counsel at mediation is to document the outcome. Counsel need to be prepared for this in advance, usually by having a draft settlement agreement prepared beforehand. The sigh of relief that is breathed when an agreement is reached in principle at mediation is deceptive. In order to do the very best job for your client it is necessary to document that agreement in such a way that it remains enforceable. Although the parties may have done most of their work when the agreement is reached, counsel still has an important (and often time consuming) task to perform in recording the agreement.

Counsel will need to work together to ensure terms are drafted with clarity, cover all the agreed items and include all potential contingencies. Counsel needs to ensure all relevant terms are included in a settlement agreement and that the settlement is viable and enforceable. Counsel should check his client understands all the terms, their implications and that the client agrees to them.

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6 T F Bathurst AC "Off With The Wig: Issues That Arise For Advocates When Switching From The Courtroom To The Negotiating Table" Australian Disputes Centre at [17].

7 *Studer v Boettcher* [2007] NSWCA 263 at [74] – [75].

Conclusion

Litigation and mediation are different processes. While some of the skills that help to make counsel effective in these processes overlap, some are different. It is easy to jeopardise a client's prospects of achieving a lasting settlement by not appreciating the differences in the processes. Similar to court, counsel needs to prepare properly for mediation, including preparing her client who has a much greater role to play. For mediations, preparation should include not only analysing the strengths and weaknesses of the client's case but also thinking about the client's interests and concerns, options for settlement and alternatives to settlement. An adversarial aggressive approach to the mediation and the opposing party is less conducive to settlement than a collaborative co-operative attitude. Technical competence in documenting any settlement is also essential.