

**ROLES AND RESPONSIBILITIES OF LAWYERS IN
MEDIATION**

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Advice Concerning Alternative Dispute Resolution

1. Writing in 1998, David Spencer, law lecturer in Alternative Dispute Resolution ('ADR') and other fields, and author, concluded:

'A lawyer's duty is to advise the client of all available options to resolve the dispute – not just the litigious option'²

Attitudes tending towards such a proposition had been earlier expressed.

2. In 1987, this comment was made in the Law Institute Journal:

'It is now incumbent for the lawyer to stop shopping just in the corner shop, where only litigation is available, and to take clients through the shopping centres, where a whole range of ADR techniques are available.'³

3. The Law Council of Australia in August 1989⁴ published a Policy on ADR:

'(1) Lawyers, recognising that the interests of their clients are paramount, should take an active part in preventing disputes from arising. To this end, they should assist their clients who are about to enter upon commercial or other relationships to put in place, whenever appropriate, machinery which is aimed at preventing disputes from arising and, where disputes nevertheless do arise, to procure resolution of them as soon as possible otherwise than by litigation ...

(4) Lawyers should recognise that methods of resolving disputes otherwise than by means of litigation may be pursued productively before and even during the course of formal court or arbitral proceedings.

(5) Lawyers, recognising that special skills are required to identify and participate in alternative methods of dispute resolution, should acquire and regularly enhance those skills through appropriate training, such as in principled negotiation, mediation, conciliation and arbitration.'

4. In 1989 de Jersey J (now CJ) of the Queensland Supreme Court commented on the phenomenon of ADR⁵:

¹ Of Nigel Bowen Chambers, 9/169 Phillip St, Sydney and Chairman NSW Chapter of the Institute of Arbitrators & Mediators Australia (IAMA). This paper was the subject of a CPD Forum presentation at the NSW Chapter of IAMA on 4 April 2007 at its Dispute Resolution Centre (DRC) Level 9, 52 Phillip Street Sydney.

² Spencer, *Liability of Lawyers to Advise on Alternative Dispute Resolution Options* (1998) 9 Australian Dispute Resolution Journal 292 at 301.

³ GB Robertson *The Lawyers Role in Commercial ADR* (1987) Law Institute Journal 1148 cited in Spencer n. 2.

'The legal profession and the courts would be foolish to ignore this phenomenon. It is still new here, and a continuing exuberant scepticism may not be a bad thing. But the phenomenon should be promoting the profession to earlier active attention to negotiation, and the courts to more streamlined case management.'

At the Australian Bar Association conference in 1990 he sounded a warning to lawyers who did not embrace ADR:

*'Lawyers who plough on in the traditional way do so at their peril. The peril is that they will lose their clients. They will end up with dissatisfied clients. Word will get around. They will be perceived to be interested principally in large fees. I think that a clear-sighted recognition of the ADR trend is important to the future of the Bar.'*⁶

5. Together with benefits to disputants such as expedition and privacy, the cost of litigation is a principal factor warranting the pursuit of ADR. Dr Warren Pengilley in 1990 cited comments by Mr Jarndyce in Charles Dickens' *Bleak House* to illustrate dramatically the need which he perceived thus for ADR:

*'The Lawyers have twisted it into such a state of bedevilment that the original merits of the case have long disappeared from the face of the earth. It's about a Will, and the trusts under a Will – or it was, once. It's about nothing but Costs now. We are always appearing, and disappearing, and swearing, and interrogating, and filing, and cross filing, and arguing, and sealing, and motioning, and referring, and reporting, and revolving about the Lord Chancellor and all his satellites, and equitably waltzing ourselves off to dusty death. It's about Costs. That's the great question. All the rest, by some extraordinary means, has melted away.'*⁷

6. The financial risk to clients of litigation was recently put with Gallic flair in an article published⁸ by Hammond and Hausmann, Lawyers of Paris, on the signing of two mediation charters under the aegis of the *Académie de Médiation*:

'As pragmatic and client focused practitioners we know that a trial is not necessarily the right answer. Ambrose Bierce once said that litigation is a machine which you go into as a pig and come out of as a sausage! The statement is slightly unfair and sometimes one has no choice but to litigate; however the

⁴ As to the then ADR progress in the community, it might also be remembered that in 1987 the Australian Commercial Disputes Centre was set up, and that in 1989 that Sir Laurence Street commenced his career as a Commercial Mediator and ADR consultant.

⁵ 63 Australian Law Journal 69 at 71

⁶ Cited in Spencer *n. 2*.

⁷ (1990) 1 ADJR 81. These considerations are all the more pertinent in these days of compulsory cost estimates and Court attitudes such as expressed by Cole J in *Skinner & Edwards (Builders) Pty Ltd v Australian Telecommunications Corporation* (1992) 27 NSWLR 567 at 571: *'The court expects parties in commercial litigation ... to act in a sensible commercial fashion. That imposes upon the parties an obligation to consider the ultimate financial outcome of litigating or compromising a dispute ... The expectation that the court has that parties will act sensibly imposes a very heavy duty indeed upon legal advisors, both barristers and solicitors. They have, in my view, an obligation to advise the clients of the likely duration, inconvenience and cost of litigation upon alternatives of success, qualified success or loss'*.

⁸ The article is by Antoine Adeline dated 20 March 2007 and published through the firm's website.

message remains: over-indulgence on this type of charcuterie can seriously damage your business' financial health.'

7. The obligation of lawyers to advise clients of ADR options has been entrenched since 2000 in the professional rules of practice approved by the Law Council of Australia e.g. rule 17A of the NSW Bar Association Rules:

*'A barrister must inform the client or the instructing solicitor about the alternatives to fully contested adjudication of the case which are reasonably available to the client, unless the barrister believes on reasonable grounds that the client already has such an understanding of those alternatives as to permit the client to make decisions about the client's best interests in relation to the litigation.'*⁹

8. As to the extent of the responsibilities of lawyers to advise clients on ADR, when Spencer said *'A lawyer's duty is to advise the client on all the available options to resolve this dispute – not just the litigious option'*, he cited a United States commentary as to the meaning of *advise*:

*'It would not (in our opinion) be proper to say to any client in any case something like, 'I don't care what kind of case it is, ADR is for sissies'. To advise means to offer judgment – competently, and in the best interests of the client. It would not satisfy any reasonable interpretation of the Rules to 'advise' by merely mentioning the words and dismissing the whole idea.'*¹⁰

9. Perhaps this need not be said, but any advice has to be based on an adequate knowledge of the ADR processes, especially mediation. Robert Angyal S.C., the Chairman of the NSW Bar Association's Mediation Committee, said in a paper presented to barristers on 28 March 2007:

'... you cannot effectively represent a client at mediation without understanding what mediation is (and is not) and, most importantly, why it is a very effective process for resolving disputes. If you do not understand these things, you will not know what you should seek to achieve in representing a client, let alone how to accomplish your objectives.'

Compulsory Mediation?

10. Apart from the issue of any need for mediation, one of the first questions on mediation which a lawyer may be asked to deal with is whether there must be a mediation. This may involve issues whether a mediation clause is enforceable (or how to draft an enforceable mediation agreement) or whether there could be a Court ordered mediation.

⁹ See also NSW Law Society Rule A.17A.

¹⁰ Spencer n. 2. at 301. Sir Laurence Street expressed a similar sentiment in 1997 (*Mediation and the Judicial Institution* 71 ALJ 794 at 796) – ... *there is still a deeply rooted belief, particularly amongst older lawyers, that mediation is simply a*

While there are far more cases to similar effect concerning expert determination clauses¹¹, an agreement to mediate is enforceable in principle, if the conduct required thereby of the parties for participation in the process is sufficiently certain¹². Under the *Civil Procedure Act 2005*, a Court may, by order, refer any proceedings, or part thereof, for mediation and may do so with or without the consent of the parties¹³

Preparation for and Participation in Mediation

11. A lawyer's pre-mediation responsibilities are well summarised in the NSW Law Society's *Mediation and Evaluation Kit*¹⁴:

'Preparing Clients for Mediation

The legal adviser's role in preparing clients for mediation includes:

- *Explaining the process, including the mediator's neutral role (See Law Society Mediation Model).*
- *Assisting clients to identify their needs, interests and issues. (As well as the legal issues, the legal advisor should explore with the client why an issue has arisen and what kind of things he or she would like to see happen. This is often wider than just the legal issues and assists in generating options).*
- *If necessary, assisting clients to prepare their opening statement and issues paper.*
- *Discussing the issues that would be considered by the court and the range of possible outcomes.*
- *Assisting the client in thinking through options for resolution that may be wider than those remedies available in a court. Ensure the client has information about the feasibility of options prior to the mediation commencing.*

settlement conference with some frills on it. This involves an attitude of adversarial negotiation: Balstad, What do litigants really want? Comparing and evaluating adversarial negotiation and ADR (2005) 16 ADJR 244.

¹¹ Well covered by Campbell, *Final and binding expert determination and discretion to stay proceedings* (2004) 20 Building and Construction Law 388.

¹² *Hooper Bailie Associated Ltd v Natcon Group Pty Ltd* (1992) 28 NSWLR 194; *Aiton Australia Pty Ltd v Transfield Pty Ltd* [1994] NSWSC, 153 FLR 236, 16 BCL 70, noted by Spencer 11 ADJR 5; *Computershare Ltd v Perpetual Registrars Ltd (No.2)* [2002] VSC 233. Enforcement is achieved by a stay of litigation, not specific performance. Suggestions of ouster of the Courts jurisdiction have been rejected: see Campbell n.11 at 392, *Raguz v Sullivan* (2000) 50 NSWLR 236 at [47] and [48] and *Straits Exploration (Australia) Pty Ltd v Murchison United NL* (2005) WAR 187. See below, *Good Faith and Negotiation*.

¹³ Ss 25-34 and UCPR 20.1 to 20.7. The considerations which a Court may take into account in making a compulsory reference to mediation are broad: annotations in *Ritchie's Uniform Civil Procedure Act NSW* to s 26 and *Azmin Firoz Daya v CNA Reinsurance Co Ltd* [2004] NSWSC 795.

¹⁴ Redfern, *Capturing the magic – preparation* (2004) 15 ADJR 119 also examines in a comprehensive way how a lawyer for a party can prepare for a mediation. In March 2007 the Law Council of Australia issued *Guidelines for Lawyers in Mediation* and as to preparation clause 5 entreats lawyers to look *beyond the legal issues and consider the dispute in a broader, practical and commercial context* and specifies four particular tasks: *undertaking a risk analysis and linking risks to the client's interests; explaining the nature of mediation; identifying interests and developing strategies to achieve final outcomes.*

- *Discussing ways to achieve the client's desired outcomes, or priorities.*
- *Discussing the likely reaction of the other party and ways to overcome any objections.*
- *Explaining the nature of a 'without prejudice' and confidential discussion.*
- *Explaining that the mediator will not be deciding the matter and that the settlement decision must be their own.*
- *Advising of the legal costs incurred to date and likely to be incurred if the matter does not settle.*

It is recommended that the above check list be explored with clients prior to the mediation, whether or not a preliminary conference is held.'

12. The same Law Society publication also well summarises the lawyer's role during the mediation:

'Essentially the role of the legal adviser is:

1. *To assist clients during the course of the mediation.*
2. *To discuss with the mediator, with the other party's legal representative and with clients such legal and evidentiary, or practical and personal matters as the mediator may raise or the clients might wish. (It is likely that once the client has heard the other party's version, the legal adviser may need to take further instructions from his/her client and perhaps review the legal advice).*
3. *To participate in a non-adversarial manner. Legal advisers are not present at mediation as advocates, or for the purpose of participating in an adversarial court room style contest with each other, still less with the opposing party. A legal adviser who does not understand and observe this is a direct impediment to the mediation process.*
4. *To prepare the terms of settlement or heads of agreement in accordance with the settlement reached at the end of the mediation for signature by the parties before they leave if appropriate or in accordance with any time table that is agreed for completion of that task.'*

It goes on to specify these mediation standards for a lawyer:

'A legal representative should:

- (a) *cooperate with the mediator;*
- (b) *extend professional courtesies to both the mediator and other legal representatives;*
- (c) *act in good faith and advise their client of the obligation to act in good faith;*
- (d) *withdraw from acting when the client gives instructions or acts in a manner that indicates bad faith;*

(e) *act by word or deed in such manner as not to incite or condone a party to break the law.*'

13. The Law Council of Australia's *Guidelines for Lawyers in Mediation* issued in March 2007 speaks thus of a lawyer's role at the mediation:

- *'Mediation is not an adversarial process to determine who is right and who is wrong, Mediation should be approached as a problem-solving exercise. A lawyer's role is to help clients to best present their case and assist clients and the mediator by giving practical and legal advice and support.*
- *The skills required for a successful mediation are different to those desirable in advocacy. It is not the other lawyer or mediator that needs to be convinced; it is the client on the other side of the table. A lawyer who adopts a persuasive rather than adversarial or aggressive approach, and acknowledges the concerns of the other side, is more likely to contribute to a better result.*
- *A primary aspect of a lawyer's role is to help formulate offers, assess the practicality/reasonableness of offers made by other parties and assist in drafting settlement terms and conditions.'*

14. The wise counsel of such instructions¹⁵ is not always followed by lawyers. Recently, lawyer mediators Micheline Dewdney and Ruth Charlton¹⁶ have, separately, expressed concern about lawyers' behaviour at mediations. In an article published in the *Alternative Dispute Resolution Journal* last year, Micheline Dewdney spoke of '*lawyer-driven problems*' in mediations¹⁷ and commented:

'The legal take-over

The process can be hijacked by the legal representatives who change a cooperative problem-solving operation into an adversarial court-room style contest.

The lawyers do not give their clients the opportunity to play an active part in the mediation, eg the clients do not make the opening statement.

When barristers as well as solicitors are present, they tend to take over the whole mediation process and may sabotage the role of the mediator, eg by making frequent requests to negotiate in the absence of the mediator and/or the parties. The mediator can provide balance by providing for additional sessions with the parties in the absence of the legal representatives.

This problem can be avoided by dealing explicitly with the role of legal representatives at the preliminary conference ...

¹⁵ See also Sordo, *The Lawyers Role in Mediation* (1996) 7 ADRJ 20.

¹⁶ Authors of *The Mediator's Handbook*; Ruth Charlton is the editor of ADRJ and Micheline Dewdney was formerly a co-editor, and is now special editorial consultant, of it.

¹⁷ *Party, mediator and lawyer-driven problems and ways of avoiding them* (2006) 17 ADRJ 200 at 206-7.

Lawyers sometimes tend to continue to use legal jargon, eg 'I put it to you'. Lawyers may also be unable to resist cross-examining the other party.

Some lawyers continue to need to be the centre of attraction, and cannot resist continuing to adopt the role of advocate instead of encouraging their client to play a more active role in the mediation.

A number of difficulties are faced in adhering strictly to the adversarial legal approach. The adversarial legal approach encourages legal representatives to focus on a win/lose outcome rather than a consensual one. Lawyers also adopt a far more active role in negotiations, similar to the one adopted in litigation, rather than encouraging their clients to do so. There is also a tendency to focus on legal principles instead of encouraging an outcome based on the parties' mutual satisfaction.'

'The passive legal representative

Very occasionally, a lawyer attempts to play or assumes a somewhat passive role in the mediation session. When this occurs, warning bells should sound as mentioned earlier in the example of bad faith participation.'

15. In an article published in the February 2007 number of the NSW Law Society Journal, entitled *Whose mediation is this anyway?*, Ruth Charlton noted the preference of some lawyers for a *shuttle method* of mediation:

'The shuttle method usually involves separating the parties as soon as preliminaries have been dispensed with. The mediation then meets separately with each party and/or lawyer, moving backwards and forwards between them conveying opinions, responses and offers. Some mediators themselves prefer this format, particularly if there is an unedifying tension about the prospects of having to manage two teams of people in the same room at the same time. Other mediators are reluctant to acknowledge that such a system is actually mediation. Rather, it is described as a settlement conference, a different process which, some maintain, does not sit well with the mediation philosophy of empowerment of the parties.'

She explained the different approaches further:

'(Classic mediation model) training emphasises the parties' central roles and encourages face-to-face communication in an open forum, with all issues explored before utilising a private session. Such an adviser is relaxed about the client's central involvement. There can be an appreciation that the client needs to have their 'day in mediation' just as in other circumstances a party needs to have their day in court.

However, the other adviser may feel more comfortable with the settlement conference or the shuttle style which curtails the clients' full participation. There can be a desire to get the preliminaries over with as soon as possible and retreat to the breakout room. Pressure can be put on the mediator to abandon a preferred way of proceeding and move into a series of private meetings.'

16. Earlier comments, in a 1998 article¹⁸, were also not favourable to lawyers' participation in mediation:

'Dissatisfaction with present legal processes and pressure from courts, government and the private sector for reform of the adversarial legal system have encouraged Australian lawyers to embrace mediation. The movement of lawyers into mediation may be seen as a desire to meet a change in demand and to control a perceived expanding area of legal services. The problem with lawyers moving into this area is that they bring their legal 'baggage' with them, that is, their adversarial legal culture. Conflict is managed by lawyers within the domain of the law as they perceive it and as they have their clients understand it. In lawyers' education and management of disputes there is little or no recognition of parties' underlying needs and how these might be satisfied outside legal norms. Asking lawyers to practise facilitative mediation is anomalous without a radical change in legal education, philosophy, training and development of skills. Lawyers' concerns are with facts and certainty; from this follows a legal solution to the dispute. Mediation's focus is with feelings and ambiguity; and from the drawing out of feelings and perceptions comes resolutions to the conflict. If lawyers are to be mediators and/or to participate as lawyers in mediation sessions, a lessening of emphasis on legal methods and solutions is necessary ...

... Mediation is the maximisation of the client's interests and needs as identified by the client, not the orchestrated presentation of a case by a lawyer on behalf of a client. There may be a conflict of interest between the lawyer's duty to a client and their duty to allow the free operation of a genuine mediation process. Sir Laurence Street has observed that lawyers who do not understand that their role is not one of advocacy are 'a direct impediment to the mediation process.'

Good Faith and Negotiation

17. Good faith in the mediation context¹⁹ warrants some particular comment. Participation in good faith is central to the ADR process and not uncommonly it is expressly stipulated for in the mediation agreement, such as:

*'Each party recognises that the prospects of success in the mediation are essentially dependent on both parties negotiating in good faith towards achieving a resolution of the dispute.'*²⁰

18. *Aiton Australia Pty Ltd v Transfield Pty Ltd*²¹, a decision of Einstein J in 1999, is instructive as to the function and ambit of such a *good faith* obligation. That case

¹⁸ Ardagh and Cumes, *Lawyers and Mediation: Beyond the Adversarial System* (1998) 9 ADRJ 72 at 73-4

¹⁹ It is of current significance in the general contractual context e.g. McDougall J *The Implied Duty of Good Faith in Australian Contract Law* (2006) 108 Australian Construction Law Newsletter 28 and note in particular the reference at 36 to authorities on contracts to cooperate and negotiate in good faith: *Coal Cliff Collieries Pty Ltd v Sijehama Pty Ltd* (1991) 24 NSWLR 1 and *Australis Media Holdings Pty Ltd v Telstra Corporation* (1998) 43 NSWLR 104; also Dixon, *Can the common law obligation of good faith be contractually excluded?* (2007) 35 Australian Business Law Review 110.

²⁰ Clause 10 of Sir Laurence Street's mediation agreement in *Mediation a Practical Outline* 5th edn 2003. For Court-referred mediations, s. 27 of the CP Act provides that *'It is the duty of each party to proceedings that have been referred to mediation to participate, in good faith, in the mediation'*.

²¹ [1999] NSWSC 996, 153 FLR 236, 16 BCL 70, noted by Spencer 11 ADRJ 5.

concerned a dispute over a construction project the contract for which included a dispute resolution clause:

'(Transfield) and (Aiton) shall make diligent and good faith efforts to resolve all Disputes in accordance with the provisions of this Section 28.1 [General] before either party commences mediation, legal action or the expert Resolution Process, as the case may be.

...

The Designated Officers shall meet in person and each shall afford sufficient time for such meeting (or daily consecutive meetings) as will provide a good faith, thorough exploration and attempt to resolve the issues. If the Dispute remains unresolved 5 Business Days following such last meeting, the Designated Officers shall meet at least once again within 5 Business Days thereafter in a further good faith attempt to resolve the Dispute.

28.2 Mediation

...

(h) The Parties agree to use all reasonable endeavours in good faith to expeditiously resolve the Dispute by mediation ...'

Transfield sought a stay of litigation which Aiton had instituted, on the basis that those dispute resolution procedures had to be followed before the litigation could be prosecuted. Einstein J canvassed numerous cases and writings on *good faith* to determine whether that concept had sufficiently certain meaning to be enforced. Those cases included *Elizabeth Bay Developments Pty Ltd v Boral Building Services Pty Ltd*²² where Giles J (as he then was) held that a mediation agreement whereby parties committed themselves to attempt in good faith to negotiate towards achieving a settlement of a dispute was not sufficiently certain to be give effect. While Einstein J concluded that the dispute resolution agreement before him was unenforceable because it failed to specify certain procedural matters, he disagreed with aspects of the *Elizabeth Bay* decision in particular and said²³:

*'It is clear that a tension may exist between negotiation from a position of self-interest and the maintenance of good faith in attempting to settle disputes. However, maintenance of good faith in a negotiating process is not inconsistent with having regard to self-interest ...'*²⁴

²² (1995) 36 NSWLR 709.

²³ At [83].

²⁴ See too Parke, *Lawyers as Negotiators: Time for a Code of Ethics?* (1993) 4 ADRJ 216 and Taylor S.C. *Negotiations and Settlements – Obligations, Risks and Practicalities.* (2002) 22 Aust Bar Rev 1 at 9-12.

He commented further²⁵:

'To my mind, but without being exhaustive, the essential or core content of an obligation to negotiate or mediate in good faith may be expressed in the following terms:

(1) to undertake to subject oneself to the process of negotiation or mediation (which must be sufficiently precisely defined by the agreement to be certain and hence enforceable).

(2) to undertake in subjecting oneself to that process, to have an open mind in the sense of:

(a) a willingness to consider such options for the resolution of the dispute as may be propounded by the opposing party or by the mediator, as appropriate.

(b) a willingness to give consideration to putting forward options for the resolution of the dispute.

Subject only to these undertakings, the obligations of a party who contracts to negotiate or mediate in good faith, do not oblige nor require the party:

(a) to act for or on behalf of or in the interest of the other party;

(b) to act otherwise than by having regard to self-interest.'

19. Gleeson CJ had previously spoken to similar effect of that last comment by Einstein J, in *Lam v Austintel Investments Australia Pty Ltd* (1989) 97 FLR 458 at 475:

'Where parties are dealing at arms' length in a commercial situation in which they have conflicting interests it will often be the case that one party will be aware of information which, if known to the other, would or might cause the other party to take a different negotiation stance. This does not in itself impose any obligation on the first party to bring the information to the attention of the other party, and failure to do so would not, without more, ordinarily be regarded as dishonesty or even sharp practice. It would normally only be if there were an obligation of full disclosure that a different result would follow. That could occur, for example, by reason of some feature of the relationship between the parties, or because previous communications between them gave rise to a duty to add to or correct earlier information.'

An example of an *obligation of full disclosure* as referred to by Gleeson CJ, is given in *Williams v Commonwealth Bank of Australia*²⁶ where the use by one party at a mediation of an unsigned statement by a person who had refused to sign it because the person felt that it was incomplete, was capable of constituting a representation that the

²⁵ At [156]; in *Western Australia v Taylor* (1996) 134 FLR 211 a member of the National Native Title Tribunal dealt with the negotiation in good faith at 218-225 and presented at 224-5 a helpful summary of indicia of Government good faith negotiation.

²⁶ [1999] NSWCA 345 at [112]-[125].

statement presented evidence the witness was likely to give and as such would be misleading or deceptive. One of the authorities cited by the Court of Appeal in this context was a statement by Burchett J in *Poseidon Ltd v Adelaide Petroleum NL* (1991) 105 ALR 25 at 16:

'I do not think it has ever been suggested that s52 strikes at the traditional secretiveness and obliquity of the bargaining process. Traditional bargaining may be hard, without being in the statutory sense misleading or deceptive. No one expects all the cards to be on the table. But the bargaining process is not therefore to be seen as a licence to deceive.'

20. Commercial toughness consistent with self-interest may be available to parties in mediations or negotiations generally but a liberty of such an extent is not available to legal practitioners because of professional ethical obligations. A decision last year of the Queensland Legal Practice Tribunal²⁷ highlights this. In those proceedings, the Legal Services Commissioner contended that the respondent, a barrister, was guilty of professional misconduct in connection with negotiations for the compromise of a claim for compensation for personal injuries. Essentially, the complaint was that the respondent knowingly misled an insurer and its lawyer about his client's life expectancy. The client had been rendered a quadriplegic in a motor vehicle accident in April 2001 and brought a claim for damages. Components in the damages claimed were items such as future economic loss and future medical and home care, that were based on the client's life expectancy. They were claimed and quantified on the basis of medical opinion that the injuries sustained in the accident had reduced the client's life expectancy by 20% of that of a normal man of his age. A mediation to attempt to negotiate a compromise of the client's claim was arranged for 19 September 2003. Shortly prior to the mediation, the respondent was informed by the client in conference that he had just been diagnosed (no earlier than 1 September 2003) with cancer, that multiple secondary cancers had been located in his body, that the primary cancer had not been located, that he was under the treatment of a cancer specialist and that he was to receive chemotherapy treatment (*the cancer facts*). The *Motor Accident Insurance Act 1994* mandated disclosure to the insurers of any *significant change in ... medical condition* within a month of the client becoming aware of the change *i.e.* by 1 October 2003. The barrister's preliminary view was that the cancer facts had to be disclosed to the insurer before the mediation and that the mediation was likely to be adjourned so that the insurer could investigate the issues and he so informed the client. Afterwards,

²⁷ *Legal Services Commissioner v Mullins* [2006] LPT 012, 23 November 2006.

the client gave instructions that he did not wish to reveal the cancer facts unless he was legally obliged to do so and that he wished the mediation to proceed because he wanted his claim resolved. The barrister conducted some research and spoke to senior counsel about his situation. He came to resile from his initial impression that the cancer facts should be disclosed and instead to form the view that as long as he and the solicitors did not positively mislead the insurer and its lawyer about the client's life expectancy they would not be violating any professional ethical rules. The mediation proceeded accordingly and the claim was settled. Had the insurer been informed of the cancer facts, it would have not agreed to the compromise. The Tribunal referred to authorities on the legal and equitable obligations of disclosure and learned writings, particularly in the United States, about the candour and accuracy to be expected of lawyers in negotiation. Reference also was made to Bar Association rules:

'51. A barrister must not knowingly make a false statement to the opponent in relation to the case (including its compromise).

'52. A barrister must take all necessary steps to correct any false statement unknowingly made by the barrister to the opponent as soon as possible after the barrister becomes aware that the statement was false.'

The Tribunal expressed the view that by the continued use in the mediation of reports predating the cancer facts and recognising of the significance of those facts for the validity of a life expectancy assumption, the barrister intentionally deceived the insurer and its adviser about the accuracy of the assumption, intending that the insurer would be influenced by that discredited assumption to compromise the claim, as happened. The Tribunal expressed a conclusion that:

'the fraudulent deception that the barrister practised on (the insurer) and (its adviser) involved such a substantial departure from the standard of conduct to be expected of legal practitioners of good repute and competency as to constitute professional misconduct.'

Penalties of public reprimand, a fine of \$20,000 and an order for costs were imposed.

Other Risks for Lawyers

21. Two other comparatively recent cases highlight risks of damages claims faced by lawyers in respect of mediations: first, by a lawyer acting for parties and secondly, by a

lawyer acting as mediator. *Studer v Boettcher*²⁸ deals with the former situation and *Tapoohi v Lewenberg*²⁹, the latter.

22. In *Studer v Boettcher* the plaintiff sued his solicitor in contract and tort, alleging that he had been induced to make a compromise agreement after a 10 hour mediation during the Law Society's Settlement Week in 1991³⁰. He claimed that if the proceedings the subject of the mediation and the ultimate agreement had proceeded to judgment he would have achieved a better outcome. Young J dismissed the action and an appeal to the Court of Appeal was unsuccessful, as was a special leave to appeal application to the High Court. In the Court of Appeal, Handley JA summarised the outcome³¹:

'... I am satisfied that the respondent acted with proper care and skill during the mediation, and that his advice to the appellant to settle on the best terms then available was good advice. Moreover he acted professionally and properly in the interests of the appellant in bringing considerable pressure to bear on him to settle on the best terms then available and I am satisfied that this was in the appellant's best interests.'

23. Fitzgerald JA's judgment contains some helpful guidance to lawyers in the sort of situation that the defendant solicitor was in in that case. First³², he pointed out that:

'Advice to compromise is not negligent merely because a court subsequently considers a more favourable outcome would or might have been obtained if the original dispute had been litigated to judgment (or a more favourable compromise would or might have become available later).'

Secondly, he commented³³:

'A lawyer's advice to a client to make or reject an available compromise is commonly not concerned only with the client's rights, obligations and hopes. Usually, other matters must also be considered. For example, it is often impossible to predict the outcome of litigation with a high degree of confidence. Disagreements on the law occur even in the High Court. An apparently strong case can be lost if evidence is not accepted, and it is often difficult to forecast how a witness will act in the witness-box. Many steps in the curial process involve value judgments, discretionary decisions and other subjective determinations which are inherently unpredictable. Even well-organised, efficient courts cannot

²⁸ At first instance [1998] NSWSC 524; on appeal [2000] NSWCA 263; and in the High Court (special leave refused) 14 December 2001, 5298/2000.

²⁹ *Tapoohi v Lewenberg (No. 2)* [2003] VSC 410. The first *Tapoohi* decision [2003] VSC 379 related to discontinuance of proceedings against other defendants.

³⁰ As well as blaming legal advisers over a compromise mediation agreement, proceedings are also taken by disgruntled parties from time to time set to aside the agreement and/or to oppose its enforcement. eg. *Williams v Commonwealth Bank of Australia n. 25*; *Abriel v Australian Guarantee Corporation Ltd* [2001] FCA 165; *Abriel v Bennett* [2003] NSWCA 323; *Abriel v Rothman* [2004] NSWCA 40; and *Abriel v Levitt* [2004] NSWCA 258; *National Australia Bank v Freeman* [2000] QSC 295; *Barry v City West Water Ltd* [2002] FCA 1214; *Pittorino v Meynert* [2002] WASC 76.

³¹ At [53].

³² At [62].

³³ At [63].

routinely produce quick decisions, and appeals further delay finality. Factors personal to a client and any inequality between the client and other parties to the dispute are also potentially material. Litigation is highly stressful for most people and notoriously expensive. An obligation on a litigant to pay the costs of another party in addition to his or her own costs can be financially ruinous. Further, time spent by parties and witnesses in connection with litigation cannot be devoted to other, productive activities. Consideration of a range of competing factors such as these can reasonably lead rational people to different conclusions concerning the best course to follow. Advice to compromise based on a variety of considerations is not negligent if a person exercising and professing to have a legal practitioner's special skills could reasonably have given that advice ...'

And thirdly, with reference to authorities including *Harvey v Phillips* in the High Court³⁴ he said³⁵:

'Although it is in the public interest for disputes to be compromised wherever practical ... a lawyer is not entitled to coerce a client into a compromise which is objectively in the client's best interest, at least where the client alone must bear the consequence of the decision.'

and

'Broadly, and not exhaustively, a legal practitioner should assist a client to make an informed and free choice between compromise and litigation, and, for that purpose, to assess what is in his or her own best interest. The respective advantages and disadvantages of the courses which are open should be explained. The lawyer is entitled, and if requested by the client obliged, to give his or her opinion and to explain the basis of that opinion in terms which the client can understand. The lawyer is also entitled to seek to persuade, but not to coerce, the client to accept and act on that opinion in the client's interest. The advice given and any attempted persuasion undertaken by the lawyer must be devoid of self-interest. Further, when the client alone must bear the consequences, he or she is entitled to make the final decision.'

24. *Tapoohi*, in terms of judgments thus far published, is a case which has not been finally disposed of. What it has decided at this point is that a claim pleaded as follows in contract and/or negligence against a mediator³⁶ is viable, at least to the extent that it should not be disposed of in the mediator's favour at an interlocutory stage:

'That the mediator would –

- (a) exercise all the due care and skill of a senior barrister specialising in commercial litigation and related matters;*
- (b) exercise all the due care and skill of a senior expert mediator;*
- (c) reasonably protect the interests of the Parties;*

³⁴ (1956) 95 CLR 235, esp. at 242 dealing with the authority of counsel to sign terms of settlement.

³⁵ At [74] and [75].

³⁶ The proceedings involved a claim by the dissatisfied party against the solicitors and it was the solicitors who, as defendants, joined their counsel at the mediation and the mediator as third parties in the proceedings, seeking contribution or indemnity from them. The claims against the solicitors and counsel were not dealt with in this hearing.

- (d) *not act in a manner patently contrary to the interest of the Parties, or any of them;*
- (e) *act impartially as between the Parties;*
- (f) *carry out his instructions from the Parties by all proper means;*

and further or alternatively

- (g) *not coerce or induce the Parties into settling the Earlier Proceeding when, at the relevant time or times, there was a real and substantial risk that settlement would be contrary to the interest of the Parties, or any of them.'*

25. There may not have been a formal mediation agreement in that case. Such an agreement would normally include an exemption from liability clause such as, for example, appears in the Law Society's suggested mediation agreement:

'The mediator will not be liable to a party for any act or omission in the performance of the mediator's obligations under this agreement unless the act or omission is fraudulent.'

Interestingly, it has been recently suggested that such a clause could not protect a lawyer acting as a mediator:

*'... it is unlikely the courts would support immunity for a lawyer acting as a mediator. The courts could see this as abrogating their role within the justice system and would not support an immunity that prevents them from having the final say on disputes. As a result, the validity of these exclusion clauses in the agreements to mediate between lawyers and the parties is most uncertain.'*³⁷

I question the validity of that suggestion. It is basic to the process that a mediator who follows a traditional mediation model will not advise either party nor impose a decision on the parties. Such a mediator who is a lawyer does not act, whether as a lawyer or otherwise, for either party. That person's relevant status is that of mediator, not lawyer.

Nevertheless, two further comments should be made. First, the matter of mediator immunity was specifically raised in the discussion paper *The Development of Standards for ADR* issued in 2000 by the National Alternative Dispute Resolution Advisory Council (NADRAC)³⁸, but that was more in the context of statutory immunity and any common law immunity, rather than contractual immunity. Secondly, any exclusion clause in a mediation agreement will be closely construed in respect of the extent of the immunities which it gives to the mediator³⁹.

³⁷ Noone, *Lawyers as mediators: More responsibility?* (2006) 17 ADRJ 96 at 103.

³⁸ Discussed in Carroll, *Mediation Immunity in Australia* (2001) 23 The Sydney Law Review 185.

³⁹ Jesser, *Mediator - not legal adviser* (2003) 14 ADRJ 211 at 218-221.

26. Principal complaints in *Tapoohi* against the mediator were to the effect that he allegedly drafted the Terms of Settlement and allegedly insisted that the parties execute it without opportunity being afforded to them for specialised taxation advice. This situation reinforces the sense in the caution expressed in the Ethical Standards for Mediators of the Law Council of Australia:

'The mediator ought to be cautious about direct involvement in drafting the terms of settlement as their involvement in drafting may be construed as providing legal advice.'

Note also these comments to the same end⁴⁰:

'Lawyers may be excluded from the actual mediation session in most instances, but it is wrong to say they are excluded from the mediation process. Indeed mediators should encourage the disputants to seek legal review of a proposed mediation agreement before the parties sign it ... The reviewing solicitor can ensure the parties have considered all the relevant issues which may be appropriate to the dispute; that any proposed agreement accurately states their understanding of what the agreement really is; whether there are other alternatives which may be more appropriate and whether or not their client is being treated fairly.'

27. Dealing with problems arising between parties and/or their legal advisers can involve significant issues of confidentiality and, basically, evidence about events that occurred at a mediation is inadmissible unless consented to by all involved⁴¹. Lawyers acting for mediating parties should always be alert to cover (if the mediation agreement does not already do so) in the agreement recording the result of the mediation, any publicity to be given to the mediation result and /or the agreement whether in relation to any subsequent enforcement proceedings or for information of interested parties.⁴² These are

⁴⁰ Clarke and Davies, *Mediation – When is it not an appropriate resolution process?* (1992) 3 ADRJ 70.

⁴¹ e.g. *Gain v CBA* (1997) 42 NSWLR 252 at 256 and 265-6; the existence of a distinct mediation privilege over the without prejudice rule is doubtful in England: *Brown v Rice* [2007] EWHC 625 (Ch); see n. 41 below.

⁴² Perhaps to emphasise the importance of this stage of the mediation, it is referred to as *Crafting the Agreement* (emphasis added) in the Institute of Arbitrators and Mediators Australia publication *The Practitioner's Certificate in Mediation Course Handbook*. Apart from enforcement of, and challenges to, mediation compromise agreements, other proceedings in which it has been sought in Court to overcome the confidentiality of a mediation have included a claim of misleading or deceptive conduct *Quad Consulting Pty Ltd v David R Bleakley & Associates Pty Ltd* (1990) 98 ALR 659; an application for costs in litigation with reference to settlement offers made at a failed mediation *The Silver Fox Company Pty Ltd v Lenard's Pty Ltd (No. 3)* [2004] FCA 1570, (2004) 214 ALR 621 and *Azzi v Volvo Car Australia Pty Ltd* [2007] NSWSC 375; an application for amendment of pleadings in litigation with reference to notice of the proposed amendment allegedly given at a failed mediation *Ingot Capital Investments Pty Ltd v Macquarie Equity Capital Markets Pty Ltd* [2004] NSWSC 1091; and an application for rectification of a deed purporting to record the result of a mediation *Hurworth Nominees Pty Ltd v ANZ Banking Group Ltd* [2006] NSWSC 1278. See also annotations to s. 30 of the *Civil Procedure Act* in *Ritchie's Uniform Civil Procedure NSW, AWA v Daniels* (1992) 7 ASCR 463 noted 18 ADRJ 69, *789Ten Pty Ltd v Westpac* [2004] NSWSC 594 and *Owners Corporation Strata Plan 62285 v Betona Corporation (NSW) Pty Ltd* [2006] NSWSC 216. Costs should be provided for in the agreement recording agreement in a successful mediation and Courts will be reluctant subsequently to deal with the issue of costs when litigation has been settled at mediation: *Sanders v Constantine* [2006] NSWSC 534.

important aspects and need to be written into the mediation agreement and/or the compromise agreement.⁴³

Final Remarks

28. On a note of warning to lawyers, I suggest that they should be alert to a growing awareness within the general community of ADR and some concomitant preparedness by disputants to deal with ADR without the assistance of lawyers. Such a situation is, for example, reflected in the general guidance broadcast in Australian Standard AS 4608-2004 *Dispute Management Systems* and its predecessor AS 4608-1999 *Guide for the Prevention, Handling and Resolution of Disputes*⁴⁴. This standard should have a place in the litigation lawyer's book-case but I suspect that it rarely does. As its title suggests, it is a comprehensive manual for dealing with disputes at all their stages and, obviously, the handling of disputes is, very much, work for lawyers. That there are attitudes within the community which are not fully favourable to the role of lawyers in ADR is demonstrated for example by this comment in a 1998 article⁴⁵:

'Lawyers should, at the very least, not have a monopoly on dispute resolution services. There are other helping professions and dispute resolution services which involve different non-legal skills which can be applied at different times or stages of a dispute. The existence of other dispute resolution services prevents the exclusive domination of the field by lawyers and provides an alternative beyond the adversarial system.'

I do not agree with any suggestion that lawyers monopolise mediation. For example, in March 2007 the NSW Chapter of IAMA had 128 accredited mediator members, of whom only 40 were lawyers. Nevertheless, in my opinion, lawyers should be actively working at securing even greater involvement in ADR, but that work should, however, include more attention to training and education. To be metaphorical (indeed, to mix metaphors), ADR represents for lawyers not just fruit on the sideboard but is a significant slice for them within the pie of professional work.

29. As concluding words, and to emphasise the importance which ADR has achieved, I leave you with closing remarks of the Hon. Tony Fitzgerald AC QC when he launched

⁴³ For example:

'If a settlement is reached at the Mediation, the terms of the settlement shall be written down as an agreement and signed by the Parties before either Party leaves the Mediation. Notwithstanding any other provision in this Agreement, a Party will be at liberty to enforce the terms of any such settlement agreement by Court proceedings.'

⁴⁴ Subject of article by Lancken (2001) 12 ADRJ 27.

⁴⁵ Ardagh & Cumes, n. 17 above.

the IAMA *Practitioner's Certificate in Mediation Handbook* in its current edition at the DRC on 5 February 2006:

'The ever-increasing use of mediation to resolve disputes is the most revolutionary change to the legal system during my 40 years in the law. I have now embraced mediation with the zeal of a convert ...'