Representing clients from courtroom to mediation settings: Switching hats between adversarial advocacy and dispute resolution advocacy

Donna Cooper*

In the vast majority of cases legal representation in mediation can provide many advantages for clients. However, in some, progress can be thwarted when lawyers do not understand the goals of the mediation process and their dispute resolution advocacy role. This article will explore some of the similarities and differences between the knowledge and skills that lawyers can draw upon when representing clients in adversarial court hearings as compared with non-adversarial settings, such as in mediations. One key distinction is the different approaches that legal representatives can use to effectively act in the best interests of clients. This article will highlight how an appreciation of such distinctions can assist lawyers to "switch" hats between their adversarial and non-adversarial roles. In particular, an understanding that the duty to promote the best interests of clients in mediation is consistent with a collaborative and problem-solving approach can greatly assist in the resolution process.

INTRODUCTION

Legal representation during mediation can provide many advantages to clients. They can be assisted to prepare and provided with ongoing legal advice and support during the course of negotiations. In the vast majority of mediations, lawyers can enhance the process and contribute to the resolution of disputes. In a minority of cases, progress can be thwarted when they do not understand the goals of the mediation process and how to play an effective dispute resolution advocacy role.

Traditionally lawyers needed to develop the knowledge and skills to represent their clients in adversarial court settings. Today it is common for many lawyers who were previously primarily engaged in litigation to spend the majority of their working week representing their clients in what can be termed "non-adversarial"[1] settings, such as mediations. In this context they have been described as "dispute resolution advocates".[2] This is particularly the case because alternative dispute resolution processes (ADR) are now integrated with courts and tribunals and compulsory pre-filing mediation and orders for mediation have become

*Senior Lecturer, Queensland University of Technology, Law School, Nationally Accredited Mediator (NMAS), Accredited Family Dispute Resolution Practitioner.

[1] Douglas K, "The Teaching of ADR in Australian Law Schools: Promoting Non-Adversarial Practice and Law" (2011) 22 ADRJ 49..

[2] Cooper, D, 'The "new advocacy" and the emergence of lawyer representatives in ADR' (2013) 24 ADRJ 178, at 178.

more common.[3] Consequently, lawyers must also develop the ability to effectively represent their clients in non-adversarial settings.

This article will explore the similarities and differences in the knowledge and skills that lawyers can draw upon when representing their clients in adversarial court hearings as compared to non-adversarial settings, such as in mediations. Although there is much in common, there are some key distinctions which mean that, as Macfarlane has highlighted, modern day lawyers need to have the flexibility to be able to "switch hats"[4] between their adversarial and non-adversarial dispute resolution advocacy roles.[5]

By highlighting these differences lawyers can gain an enhanced understanding of their non-adversarial role. They can also appreciate how the duties they owe, such as the ethical duty to act in the client's best interests, can be achieved in different ways in mediation settings as opposed to in adversarial court hearings.

Terminology

At the outset some clarification is required in relation to the terms "adversarial court settings' and "mediation". In this article when discussing "adversarial court processes" the focus is on adversarial court hearings. It is acknowledged that, prior to a court hearing, litigation lawyers may have engaged in negotiations; pre-filing dispute resolution, such as mediation or conciliation, and/or post-filing dispute resolution processes attached to courts, designed to assist in settlement of the dispute. When representing clients in such preliminary processes lawyers will be engaged in what has been termed "non-adversarial practice"[6]. However this article will focus on the advocacy role of lawyers when engaged in the actual court hearing.

The term "mediation" will refer to the models most often used in legal disputes, being facilitative and evaluative processes.[7] In practice lawyers are often involved in evaluative mediations where, depending on the mediator's practice, legal representatives may make the

[3] Sourdin, T., *Alternative Dispute Resolution* (4th[rd]. ed., Lawbook Co., 2012); Mahoney, K, "Mandatory mediation: A positive development in most cases" (2014) 25 ADRJ 120.
[4] This term is derived from Macfarlane J., *The New Lawyer: How Settlement is Transforming the Practice of Law* (UBC Press, 2008) pp.117-120.
[5] Macfarlane, n4.
[6] Douglas , n1.
[7] Boulle, L, *Mediation: Principles, Process and Practice* (3[rd] ed.,LexisNexis, 2011) pp 44-45.

opening statements and distributive bargaining is often utlised [8] In such settings, negotiations take place in the shadow of the law.[9] This is not just in the commercial sector, but in many areas of law, such as in family law disputes, particularly where lawyers act as the mediators.[10] Facilitative mediation is used in some areas, for example, by community mediators assisting with family cases. In legal disputes a blended model may also be used, where a facilitative model is used in the top triangle exploration phase of the mediation and an evaluative model used in the bottom triangle negotiation stage of the process.

SIMILIARITIES IN THE KNOWLEDGE AND SKILLS THAT ADVERSARIAL AND NON-ADVERSARIAL ADVOCATES HAVE TO DEMONSTRATE

Many lawyers in the course of their working lives will be engaged in representing clients in both adversarial court hearings and non-adversarial contexts. Some knowledge and skills will overlap and some will be distinct to their non-adversarial and adversarial roles. The following are a few of the key areas that can be drawn upon in both roles:

Understanding of the Law and Legal Rights

In both litigation and evaluative mediations lawyers will ensure that their clients understand their legal rights. At the outset lawyers will take detailed instructions to become fully appraised of both the legal issues and their clients' personal situations. After taking instructions, and gathering any necessary information, legal advice can be provided, including as to the likely range of judicial outcomes if a case proceeds to court.[11]

Such initial advice provides clients with an honest assessment of their legal rights and encourages realistic expectations as to the settlement or litigation outcomes that can be

[8] Cavanagh P, "What the Commercial Sector Wants Mediators to Do: The Disconnect between Mediation Theory and Practice" (Paper Presented at Queensland Law Society, ADR Conference, 24 September 2009); Sourdin T, and Balvin N, "Mediation styles and their impact: lesson from the Supreme and County Courts of Victoria Research Project" (2009) 20 *ADRJ* 142 at 144; Rundle O, "Barking Dogs: Lawyers Attitudes Towards Direct Disputant Participation in Court Connected Mediation of General Civil Cases"(2008) 8(1) *Queensland University of Technology Law Journal* 77.

[9] The phrase "in the shadow of the law" was originally used in Mnookin R, and Kornhauser L, "Bargaining in the Shadow of the Law: The Case of Divorce" (1979) 88 *Yale Law Journal* 950.

[10] Cooper D, and Brandon M, "How can family lawyers effectively represent their clients in mediation and conciliation processes?" (2007) 21 *AJFL* 288 at 299.

[11] These have been termed the "boundaries of resolution", Cooper and Brandon, n 10 at 293.

achieved. If clients are hopeful of a result well outside of the expected range, lawyers can work towards these expectations becoming more reasonable. Such advice provides clients with a foundation upon which to make informed decisions when considering offers during mediation. It also assists clients to assess whether it will be worthwhile going to the expense of taking matters to court.

Lawyers now have a duty to advise clients of settlement options before taking a case to court. [12]. The Australian Solicitors Conduct Rules state that:

> A solicitor 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 solicitor 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.[13]

Duties of lawyers to encourage clients to consider settlement are contained in legislative obligations in most areas of Australian law.[14] Consequently trial rates are declining[15] and generally a court hearing in Australia is an option of last resort after all settlement options have been exhausted.

Although a discussion of legal rights is not strictly necessary in the context of facilitative mediations, in practice clients often want to be appraised of their legal rights and what may be a "fair' outcome before participating in mediation and before entering into any agreement.

Understanding of Procedure and Client Roles

When attending a court hearing or mediation, lawyers will be appraised of the process they will be engaged in and of any procedural requirements, such as court rules or the particular model of mediation and the steps in the process. They will also educate their clients about

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[12] Wolski B, *Skills, Ethics and Values for Legal Practice* (Lawbook Co., 2009) pp 71, 77, see also Law Council of Australia, Guidelines for Lawyers in Mediations (August 2011) http://www1.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/a-z-docs/MediationGuidelines.pdf

[13] Australian Solicitors Conduct Rules (1 June 2012), r 7 Relations with Clients, 7.2. Communication of advice. See also Australian Bar Association, Barristers' Conduct Rules, r 15(c) which states that part of a barrister's work is "negotiating for a client with an opponent to compromise a case." Rule 39 states that, "a barrister must seek to assist the client to understand the issues in the case and the client's possible rights and obligations, sufficiently to permit the client to give proper instructions, including instructions in connection with any compromise of the case".

[14] For example *Family Law Rules 2004* (Cth), r 1.08; *Civil Dispute Resolution Act 2011* (Cth). See also Hardy, S, and Rundle, O, *Mediation for Lawyers* (CCH, 2010), pp211-215.

[15] Spencer, D, and Hardy, S, *Dispute Resolution in Australia: Cases, Commentaries and Materials* (3rd ed., Lawbook Co., 2014, pp723-724.

their participation in the process. Clients need to understand the objectives, the steps that will be followed and, perhaps most importantly, what role they will be expected to play.[16]

In a court hearing, a client may be required to give evidence and will need information about the context in which this occurs and the manner in which questions will be asked. In a mediation process (particularly in facilitative mediation), the client will be expected to provide an opening statement, participate in integrative negotiations, and generate settlement options. The client will need to have some time beforehand to prepare for these activities. The parties in a facilitative mediation will need to appreciate that they are expected to play an active role during the session and they will be asked to think of options and solutions.[17] In fact, it is often the party's active participation in the content and outcome of a process that is the key to client satisfaction and perceived "fairness" of the process.[18]

Thorough Preparation and Gathering of Relevant Information

Gathering information relevant to the dispute and having it available on the day of the court hearing or mediation is extremely important. In a litigation context information must be placed before the court in a manner that complies with procedural requirements and the rules of evidence. Information will be contained in written form in court documents and may also be available via evidence obtained by subpoenas. It may also be presented orally via the evidence of the parties and their witnesses and in the form of legal submissions.

In mediation, lawyers and clients need to have organised all information relevant to making an informed decision in relation to settlement. Valuations may need to be obtained for financial disputes or medical reports for personal injury cases. For a family law parenting dispute a lawyer can assist the client organise information relevant to the issues in dispute, such as school holiday dates, public transport timetables, options for age-appropriate

[16] Also the role of the mediator needs to be explained. For example in a facilitative mediation the mediator will be independent, will not give legal advice and will not suggest options or give views about settlement. Sordo, B. "The Lawyer's Role in Mediation" (1996) 7(1) ADRJ 20 at 22.

[17] Bush RAB and Folger J, *The Promise of Mediation: The Transformative Approach to Conflict* (revised ed., Jossey Bass, 2005) pp53-56.

[18] Sourdin, n 3, pp28-29.

parenting schedules, appropriate supervisors and information about the availability and suitability of contact centres.[19]

In both settings lawyers can encourage the other side to ensure that all relevant information they have in their possession is available prior to the mediation. However, a difference is the extent to which both parties can be compelled to produce relevant information if one or both are not willing to voluntarily make it available. For example, if a party is not willing to make full disclosure and participate in "good faith", mediation may not be appropriate at all and court proceedings might be necessary so that orders can be obtained to compel the party to produce the relevant documents.

An Understanding of the Client

In both adversarial and non-adversarial processes legal representatives will need to acquire an understanding of their clients. For example what is the client seeking to achieve in terms of the outcome of the dispute? What is his or her personal and financial situation and will he or she be able to cope with and afford the court process? If oral evidence is required, a party's credibility may become important as well as how the client may perform when giving evidence in the witness box and what sort of impression he or she may make on the judicial officer. Similarly a lawyer preparing for mediation will have an understanding of the background to the dispute and how his or her client may cope with the mediation process. An assessment will need to be made of how articulate the client is and, for example, whether lawyer assistance will be required during the opening statement at the mediation.

Communication Skills

Whether representing clients in court or in mediation, high level communication skills are essential. Lawyers need to be able to listen actively to clients and provide them with clear information and legal advice in plain English. In a court setting lawyers will require effective written communication skills so that court documents are drafted in a clear and concise way, containing all relevant and admissible information. When appearing in court, they need to demonstrate effective oral communication skills so that their submissions are made in a logical fashion and they can respond appropriately to any questions or directions made by the

[19] Cooper, and Brandon, n10 at 299.

judicial officer. In both contexts lawyers can use skills such as paraphrasing, summarising and reframing to gather the necessary information from their clients and to deal with those clients who may be upset or emotional.

Duty to Follow the Client's Instructions

In both processes lawyers have a duty to follow their client's instructions.[20] This duty can cause challenges, particularly where clients may have unrealistic expectations about settlement outcomes. In both contexts lawyers can work with clients to provide them with legal advice and a realistic idea of what outcomes they may achieve if their cases go to court. They can also discuss with clients the benefits of settlement and this will be explored further below in relation to the ethical duty to act in the client's best interests.

In mediation this duty can sometimes conflict with lawyers encouraging clients to take collaborative and problem-solving approaches if clients have not been educated in these strategies. Clients need to be coached as to the goals of mediation and how to engage in integrative negotiations. However, in the end, lawyers have a duty to comply with their clients' instructions, although even if in some cases they may perceive them to be unrealistic.

DIFFERENCES IN THE KNOWLEDGE AND SKILLS THAT NON-ADVERARIAL ADVOCATES ARE REQUIRED TO DEMONSTRATE

As discussed above, whether operating in court or mediation settings, there is a common set of knowledge and skills that lawyers can draw upon. However, there is also a set of knowledge and skills that it could be argued are specifically relevant to non-adversarial advocacy. Lawyers can apply this knowledge when representing clients in mediations and when acting in a non-adversarial capacity, whether in negotiations, conciliations or less adversarial processes. The following are a few of these distinct areas which will be discussed in the context of lawyers representing clients in mediations.

[20] Australian Solicitors Conduct Rules, r 8.1; Barristers' Conduct Rules, r 39; Hardy and Rundle, n14, p216.

Understanding Underlying Interests and the Causes of Conflict

When preparing for mediation it will assist to have an understanding of the underlying causes of conflict[21] and of the client's underlying interests[22]. Lawyers can prepare clients to participate in integrative negotiations in mediation by encouraging them to think about their underlying concerns, needs and interests and some of the possible causes of conflict. The client can be encouraged to consider some suitable options which lie outside his or her legal positions, since remaining entrenched in positions once the session has commenced will usually mean that settlement cannot be achieved.[23]

They can also prepare their clients to engage in collaborative problem-solving. For example, in a family law parenting case one parent's position may be to seek an equal time shared parenting arrangement. Underlying interests may include maintaining a good relationship with the children and to be valued in the parenting role, even after separation. Identifying these interests may assist later with the option generation stage of the process because interests can create a wider range of acceptable options than positions. Also helpful is the provision of relevant social science research, such as the circumstances in which shared parenting arrangements have been shown to be most successful.[24] This information can be used to reality test whether such an arrangement would be practical for the family and in the children's best interests.

Assessment of Power Imbalances

Before organising mediation a discussion needs to take place with the client as to whether there are any factors that could lead to an inequality of bargaining power.[25] In particular, it is important to discover whether there are any power imbalances that may impact to such an extent that the client will be unable to negotiate assertively and effectively with the other party. Circumstances that can impact upon the ability to negotiate include where the client

[21] Moore's "Circle of Conflict" is a useful analysis of the possible causes of conflict in Moore, C, *The Mediation Process: practical strategies for resolving Conflict* (Jossey-Bass, 2003), pp 64-65.

[22] Seriser, I, and Altobelli, T, *Practising Family Law* (3rd ed., Butterworths, , 2012), pp36-50.

[23] Sourdin, n 3, pp226-237.

[24] Fehlberg, B et al, "Legislating for Shared Time Parenting After Separation: A Research Review" (2011) 25(3) *International Journal of Law, Policy and the Family*, 318.

[25] Mayer, B, *The Dynamics of Conflict* (Jossey-Bass, 2012), pp67-91.

has a psychiatric or psychological disorder or physical disability, where there are cultural issues and/or language difficulties.[26] In family disputes the source of an overwhelming power imbalance example might be where there has been a history of (or current) family violence, particularly coercive or controlling violence.[27]

In some cases, concerns as to the level of assertiveness that a client could achieve with a former partner and/or safety concerns may mean that mediation is inappropriate and negotiation between lawyers and litigation are the only suitable options.[28] In some scenarios, it might be appropriate to assess whether power imbalances can be addressed by structuring the dispute resolution process in an appropriate way or by the use of certain strategies. For example, the lawyer can inform the mediator of the relevant issues and history. In turn, the mediator can structure the process in such a way that the power imbalances are minimised, for example, by way of shuttle or telephone link-up so that the parties will have no face to face contact.[29]

In this context the benefits of legal representation in mediation are highlighted. A lawyer can provide support to the less powerful party and assist him or her to participate effectively, put concerns and interests forward and help the party to remain assertive throughout the process.[30]

Understanding the Different Negotiation Models

An understanding of different negotiation models also assists in preparation for and participation in the mediation process. Lawyers can assist their clients to prepare to participate in integrative negotiations, which include interest-based strategies and the use of trade-offs and concessions, termed "logrolling".[31] They also require an understanding of distributive negotiation because this model is often used in the mediation of legal disputes.[32]

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[26] Cooper and Brandon, n10 at 296.
[27] Kelly, J. and Johnson, M, "Differentiation Among Types of Intimate Partner Violence" (2008) 46(3) *Family Court Review* 476. In family law parenting matters there is a legislative requirement for mediators to conduct an Intake and Assess and assess power imbalances and whether a party will be able to freely negotiate, see Family Law (Family Dispute Resolution Practitioner) Regulations 2008(Cth), reg 25(2).

[28] Cooper and Brandon, n10 at 296.
[29] Cooper and Brandon, n10 at 296; Fisher, L and Brandon, M, *Mediating With Families* (3rd ed., Lawbook Co., 2012) pp310-324.
[30] Caputo, C-M, "Lawyers' participation in mediation" (2007) 18 ADRJ, 84 at 90.
[31] Lewicki R.J et al, *negotiation* (6th ed, McGraw Hill Irwin, 2010), pp 71-106.
[32] Lewicki , n31, pp 32-70.

However, it can assist if clients are encouraged to attempt settlement at the outset using integrative negotiation strategies. A discussion of the possible options outside of a clients' initial position will assist with option generation. To be adequately prepared clients will need to gather necessary information to enable them to consider and develop more creative options. This type of knowledge is also important for litigators to discuss with their clients because they will continually be looking to see if settlement can be achieved without the need for a judicial officer to make a decision for the clients.

Understanding the Different Mediation Models

In legal settings there are two key models of mediation that tend to be used : 'advisory' and 'facilitative' processes. Advisory processes are those in which the mediator is not independent of the content of the dispute.[33] He or she can give information and advice as to the range of likely court outcomes if the case proceeds to court and will actively encourage the participants to reach an agreement within this anticipated range. Evaluative mediation falls into this category.[34] This role can be contrasted with that of a facilitative mediator who is more independent, assisting parties to generate their own options and come to a resolution, without offering views about appropriate settlement options. When organising mediation, legal representatives can make an informed choice as to which type of model might be appropriate for a particular client in a particular dispute. For example, high conflict cases that have been unresolved for some time may more likely benefit from an evaluative as opposed to a facilitative mediation model where parties need to be committed to settlement and able to generate their own options and solutions. In contrast, the facilitative model often suits family law parenting cases because it assists parents to come up with their own options and solutions that will be tailor-made to suit both their needs and the best interests of their children.

An Appreciation of The Spectrum of Roles that Lawyers Play in Mediation

In litigation the role of lawyers tends to be fairly fixed. They should present their clients' cases in the best possible light and seek to highlight the negative aspects of the other parties' cases. The adversarial role is clearly defined in that the lawyer will negotiate on the client's

[33] Cooper and Brandon, n10, pp291-292.
[34] Boulle, n7, pp 44-45.

behalf, answer the opposing lawyer's correspondence, draft documents, organise witnesses, organise subpoenas, if needed, and appear in court.

In mediation, the lawyer representative's role is not as distinct. In some forums there is guidance for lawyers as to what role they should play, in others it needs to be negotiated with the client and mediator.[35] Rundle has identified a "spectrum of roles that lawyers may play in mediation" differentiated by their levels of involvement: "absent advisor", "advisor observer", "expert contributor", "supportive professional participant", and "spokesperson".[36] For example, in a facilitative mediation where the client is expected to deliver an opening statement and develop options and solutions it might be appropriate for a lawyer to play the "advisor observer", adopting a fairly neutral role but being available to support the client and provide advice and negotiation assistance in private meetings.[37] In an evaluative mediation, the role of "supportive professional participant" might be suitable, if the mediator requires the parties to provide opening statements, lawyers can then provide support, negotiation assistance and drafting skills, in the event that agreement is reached.[38]

For a client subject to strong power dynamics, such as problems with family violence in a family mediation, it may be appropriate for the lawyer to act as "spokesperson", talking on behalf of the client and taking a very active role.[39] This may be necessary where clients do not feel confident enough to speak on their own behalf and request that the lawyer provide this extra assistance. The appropriate role for lawyers to play will depend on their clients and cases and will need to be negotiated with clients prior to the mediation.

A Conceptual Understanding of how the Ethical Duty to Act in the Best Interests of the Client Operates in Practice

Perhaps the most important difference between adversarial and dispute resolution advocacy is a conceptual understanding of how lawyers can adhere to the ethical duty to act in the best

[35] Hardy and Rundle, n 14, pp 141.
[36] Hardy and Rundle, n 14, pp 143-154; Rundle, O, "A spectrum of contributions that lawyers can make to mediation" (2009) 20 ADRJ 220, pp223-224.
[37] Rundle, n36, pp223-224.
[38] Rundle, n36, pp225-227.
[39] Rundle, n36, 227-228.

interests of their clients.[40] Hardy and Rundle explain that lawyers are, "partisan representatives and owe a duty of loyalty to their clients which includes both an obligation to serve the client's best interests and to avoid any conflict of interest."[41]

This notion of acting in the client's best interests was described by Moynihan J in *Legal Services Commissioner v Baker*:

The lawyer should put the client's interest first and treat the client fairly and in good faith, giving due regard to a client's position of dependence upon the practitioner….[42]

Understanding how the ethical duty to act in the client's best interests operates in practice is fairly clear for adversarial advocates. A lawyer should present a client's case in court in the best possible light and does not have to present evidence that will detract from this case.[43] He or she is not obliged to assist the opposing party's case, apart from complying with the duty to the administration of justice.[44] In court, a lawyer will make submissions on the client's behalf and will seek to convince the court of the strength of the client's position and the weaknesses of the other party's position. Oral evidence can also be elicited in support and the other party and relevant witnesses can be cross-examined to highlight any inadequacies in the other side's case. There will be an emphasis on past conduct and behaviour and there may also be a focus on blame.

How lawyers can adhere to the ethical duty to act in the best interests of their client in mediation is not quite as straightforward.[45]

Assistance is contained in the *Guidelines for Lawyers in Mediations* developed by the Law Council of Australia,[46] which state that lawyers should assist clients to best present their case and take a persuasive and not an adversarial or aggressive approach. The Guidelines also suggest that lawyers should not only help their clients but that they should also assist the mediator:

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

[40] Australian Solicitors Conduct Rules, r 7.2; Barristers' Conduct Rules, r 37.
[41] Hardy and Rundle, n14, pp216-217.
[42] *Legal Services Commission v Baker* [2005] LPT 002 at [22]-[24].
[43] Hardy and Rundle, n14, p217.
[44] Hardy and Rundle, n 14, pp218-226.
[45] Hardy and Rundle, n14, p217.
[46] Law Council of Australia, n 12 at [6.1].

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.[47]

The duty to promote the client's best interests must be balanced with the duty of competence and diligence,[48] and the duty to assist the client to consider settlement.[49]

Consequently lawyers need to adopt a different mindset in mediation. For the process to work best they should come to the table with a collaborative and problem-solving mindset. The goal of mediation is not to "win" and continually justify and advocate in support of the client's initial position. The aim of mediation is for the parties and their lawyers to work together to come up with a resolution that is acceptable to all.[50] This is also relevant where mediation has been ordered by a court and is compulsory.[51] However, throughout the process it is also reasonable for a legal representative to seek to obtain the best possible settlement outcome for the client. Macfarlane described this in terms of: "the goal of the conflict resolution advocate is to persuade the other side to settle - on her clients' best possible terms."[52]

Lawyers acting in mediations need to adopt a different demeanour than they would in a courtroom. For example, they will not be engaging in the type of adversarial behaviour that is appropriate in a courtroom, such as cross-examining the other client across the mediation table. It may be appropriate to engage in questioning if it is aimed at eliciting information to assist with option generation. However, it is contrary to the spirit of the mediation process for a legal representative to act aggressively towards the other party and to ask questions in order to elicit responses in support of the client's views.

In this non-adversarial setting, it can assist if lawyers prepare to be "future focused", having ascertained their client's underlying interests and engaged with them in option generation to

[47] Australian Solicitors Conduct Rules, r 4.1.3; Barristers' Conduct Rules, r 37; Hardy and Rundle, n 14, pp 210-211.
[48] Australian Solicitors Conduct Rules, r 4.1.1 and 7.2; Australian Bar Association, r 15(c) and r 39.
[49] Macfarlane, n4, pp110-111.
[50] McIntosh, M, "A Step Forward – Mandatory Mediations" (2003) 14 ADRJ 280 at 287; Mahoney, n3, p123
[51] Macfarlane , n4 at 110.
[52] Barristers' Conduct, r 39.

come up with possible ways of resolving the dispute. Although there will usually be some time to discuss the history and background to the dispute it will generally not be productive to continually re-visit the past negative behaviours of the other party. Once the parties have had some time to explain the background, the mediator will be seeking to move them forward in the process to focus on collaborative problem-solving for the future.

In both adversarial and non-adversarial processes, lawyers will be seeking to promote their client's best interests but this can be achieved in different ways. In both processes, where appropriate, advising clients to make compromises that move them away from their initial positions to seek resolution is the role of the settlement focused lawyer.

The *Barristers' Conduct Rules* support this notion where they set out:

A barrister must seek to assist the client to understand the issues in the case and the client's possible rights and obligations, sufficiently to permit the client to give proper instructions, including instructions in connection with any compromise of the case.[53]

Conclusion

This discussion has reinforced the importance of lawyers developing knowledge and skills in communication, the causes of conflict, sources of power, a range of negotiation and mediation models and relevant legal and ethical obligations. It has also highlighted the significance of a conceptual understanding of the common cognitive resources they can draw upon in both adversarial court hearings and non-adversarial settings. However, the key to effective dispute resolution advocacy is an appreciation of the fundamental differences between the lawyer's roles in these processes. A key strength for the successful lawyer is the ability to switch hats and transform from adversarial court advocate one day, highlighting the strengths of a client's position, to dispute resolution advocate the following day, participating in collaborative problem-solving and encouraging a client to move away from a position, think creatively and accept compromise.

To effectively represent clients in mediations, lawyers should be aware of the spectrum of roles that that they can adopt, the circumstances in which each may be appropriate and the importance of negotiating the appropriate stance to take with their clients. They also require

[53] Hardy and Rundle, n14; Wolski, n12.

an appreciation of the different strategies that can be adopted to comply with the ethical duty to promote the best interests of their clients in both settings. In particular, that acting in a client's best interests is not inconsistent with encouraging a client to move away from an initial position and engaging in collaborative bargaining. Understanding the benefits of taking a problem-solving approach, in both facilitative and advisory mediation processes, and preparing clients to participate in this spirit, can greatly assist with achieving settlement.

In recent times guidance has been provided for lawyers in relation to their legal and ethical obligations in mediation processes.[54] However, this article has raised the need for heightened clarity in terms of how lawyers can comply with their legal and ethical duties in mediation settings. In the future it would be helpful for these to be embedded in more detail in both the Solicitors' and Barristers' Conduct Rules so that the expectations of lawyers when representing clients in mediation processes have been clearly enunciated.

[54] Hardy and Rundle, n14. Wolski, n12.