Advocacy Skills in Commercial Mediation

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1. Advocacy in the context of mediation is advocacy in how you conduct the mediation and more particularly when negotiating.
2. Negotiation is a process of two or more parties co-operating to achieve a single outcome.
3. Mediation is negotiation assisted by a neutral third party – a mediator ie mediation is a facilitated negotiation.
4. Today we are not talking about negotiation techniques outside the context of mediation. Today we are talking about negotiation techniques in the context of a mediation of a commercial dispute.
5. Mediation requires a very different mindset from litigation. In mediation the parties are attempting to jointly solve a problem.
6. Litigation involves two or more parties adopting positions as part of each party seeking a different result and often a result which is substantially different from the result sought by the opponent.

7. As lawyers we have been taught and by experience, we have honed our skills in how to conduct litigation.

8. As part of our training, we are taught the skills of advocacy and that advocacy is the art of persuasion.

9. In litigation, that persuasion is focused upon the decision-maker - a judge.

10. Advocacy in the context of a mediation is a very different and much more nuanced skill than advocacy in the context of litigation.

11. In litigation you are attempting to persuade the decision-maker to one particular result and seeking to persuade that decision-maker to not accept what the opponent is seeking.

12. By contrast in mediations advocacy skills are used to persuade the following participants:

- **The Mediator**

  Although the mediator is not a decision-maker nevertheless it is an important negotiation technique to seek to persuade the mediator of the strength of your client's position and the weakness of the opposing party's position. Why? Mediators are human beings. If a mediator is more persuaded to your client's position it is only human nature that to an extent this will be reflected in the way in which the mediator conducts the mediation.

  This persuasion of the mediator begins with the intake session, then continues with your Position Paper and the joint session. In private sessions with the mediator, you can continue to build rapport with the mediator seeking input and guidance from the mediator as to the negotiation process.

  Although the mediator is (usually) not providing advice as to the legal issues involved in the dispute and although the mediator cannot pass on to you what the mediator has been told confidentially in the course of the mediation by your opponent you should seek input from the mediator before conveying offers. On occasions the mediator will seek to prevent you from making an offer which will unnecessarily provoke your opponent. The mediator might suggest at particular stages of the mediation that you make particular offers. Remember the mediator has been inside your opponent's room and advice as to the negotiation process will to an extent reflect what the mediator has been told by your opponents and the mediator's reading of what has been said.

  The mediator will also have had the advantage of observing body language in the other room and the power dynamics. Are the lawyers really running the mediation as opposed to the client? Who amongst the client's representatives is the true decision-maker?

  As early as the intake session and certainly during private sessions in the course of the mediation you can take the opportunity to inform the mediator of potential

roadblocks in the decision-making process on your side. If there is some division in your client's team as to the negotiation process, you might decide to confidentially inform the mediator of this so that if problems arise in the decision-making process the mediator is ready for it and is not taken by surprise.

Remember of course that the mediator is also observing the body language and power-dynamics in your room. I suggest that you do not try to stop your client from showing genuine emotions – such as anger and frustration. If the matter settles, the client will miss the opportunity of telling the client's story in court. Let the client talk, let the client tell the mediator the client's story.

- **The opposing lawyers**

  The role of the Position Paper and its importance in commercial mediations cannot be overstated. In litigation outlines of argument are directed towards persuading the decision-maker - the judge. In mediations Position Papers are directed towards educating the mediator (and to an extent persuading that mediator) but also crucially to persuading in a succinct way your opponents as to the strengths of your client's case and the weaknesses in their client's case.

  The Position Paper is an important part of the negotiation process in a mediation. Do not use emotive terms in your Position Paper. Such conduct will only hinder the negotiation process. Criticise ideas not individuals. Sometimes it can be difficult for lawyers to take off their litigation hat and to put on their mediation hat.

  The Position Paper for a mediation should make (when appropriate) concessions. If the legal issues are particularly complex acknowledge this. Telling your opponent in a complex commercial dispute that you are plainly right, and they are plainly wrong will not assist the process. You need to be balanced. It is not as if a decision-maker is going to act upon your Position Paper. Its function in a mediation is to help guide the parties to a settlement.

  You have nothing to lose by stating in the Position Paper that although your client's prospects are as set out in it nevertheless you client is aware of the uncertainties of litigation and has come to the mediation to settle the matter on reasonable commercial terms. This is not a sign of weakness. It does not convey the message that your client is prepared to move substantially on its position. The message as to the extent to which your client is prepared to move will be conveyed by the offers made at the mediation. Further the oral presentation in a joint session is yet a further opportunity to persuade your legal opponents (and the opposing party).

- **The opposing client and in particular the client's decision-maker**

  The mediation process provides a unique opportunity to attempt to directly persuade or at least educate and explain issues to the opposing client as part of the negotiation process. Ideally you should provide your Position Paper to the other side some time before the mediation so that (hopefully) it is provided or at least

discussed with the opposing client. Unfortunately, this rarely occurs. As discussed already the joint session is another opportunity to persuade or at least educate the opposing client as to your client's position. Naturally in the joint session you want to convey to the opposing client (and lawyers) the strength of your client's position and to the extent that you can (without being unnecessarily aggressive) the weaknesses in the opposing position. If you are calm and polite but forthright and confident in your demeanor that will assist the negotiation process. The joint session is not a debate.

You need to carefully monitor the mood in the room. Clients (yours and the opposing client) sometimes think in terms of who won the joint session. You should not speak as if just addressing the opposing lawyers – eg. "We all know the legal issues and facts as they are set out in the pleadings, and I will not repeat them here". Highlight and put focus on your best points. Very importantly if you feel that your opponent has created some damage by a good point you should try and address it by a reply. It is not a court hearing – the mediator will allow you to make a point in reply when such an opportunity might have been lost in a court hearing.

Notwithstanding everything I have said so far there will be occasions where in your client's interests you need to be particularly direct and blunt in terms of the strength of your client's position and the weakness of the opposing party's position.

Sometimes of course your client's position will be weak. Do not bluster - that is a dead give-away that you know how weak your client's position is. You just need to keep your "game face" on and follow your negotiation plan.

The joint session is also an opportunity to go beyond the parties' positions and to talk about the parties' respective interests. The shape of a settlement can be discussed. Do you anticipate a money only settlement or another form of settlement or perhaps a combination of payment of money and other terms?

As the mediation progresses you can continue to use the mediator to convey your client's position and the interests of the parties when the mediator is in private session with the opposing lawyers and client.

Learning Negotiation Techniques

13. Only approximately 5% of matters filed in the court registries in Queensland proceed to trial and then often these matters go on appeal. Therefore, a commercial litigator will be spending a lot of time preparing for a trial which has only a small chance of running.

14. In contrast to this about 100% of commercial litigation matters in Queensland will go to mediation.

15. Hence the obvious need for training lawyers in how best to mediate and in particular advocacy through developing negotiation skills.

16. Many of you will have attended advocacy workshops as part of developing your skills in litigation.

17. Some of you will have attended the training which is required to be undertaken to become an accredited mediator and other mediation training. But few lawyers (once they have undertaken initial mediation training) have attended mediation workshops on an ongoing basis to develop their negotiation skills.

18. I can say however that training of current law students in negotiation skills is occurring in Queensland. Not long ago I sat as part of a panel judging the grand final of a mediation competition conducted by the University of Queensland Law Students Society.

19. Each team of two (one being the client and one being the lawyer) attended before a mediator. The parties were given facts identified as common facts ie the facts known to each party. Further each party was provided with confidential facts being facts only known to that party being facts which could be used and to the extent the party decided divulged during the course of the mediation. The common facts and these two confidential factual summaries were also provided to the mediator.

20. The competition was a simulated mediation over a period of about one hour 15 mins. There was an opening by the mediator and then the competitors engaged in a joint session and then the negotiation process. This was done across the table. There was a time-out involving each side speaking to the mediator privately followed by further negotiation.

21. The students were third year law students. The level of presentation and their knowledge of negotiation techniques and how to utilise them was very high.

22. Litigation (advancing positions) and mediation (facilitated negotiation) exist side by side. As I have attempted to outline above mediation by negotiation is not a soft version of litigation. It is a very different skill and a skill that you should continue to develop if you intend to represent your clients' interests in the best and most effective way.

23. Fight hard in the litigation and at the same time negotiate co-operatively and effectively in the mediation. We all know what winning litigation means. There are two placegetters in litigation – the winner and the loser. However, to conduct mediation with a view to winning is unlikely to succeed. To achieve a settlement requires co-operation and compromise. To quote Trey Bergman (a United States based mediator): *Thinking about winning a mediation is like thinking about winning a marriage.*

24. You will have heard about the mediation process resulting in a win/win for the participants. Personally, I have always found this term irritating and I never use it with clients – even if (inevitably) they are more tolerant than me. But acknowledging that it can be of some assistance to give such tags by way of guidance as to how to approach mediation I set out below different approaches with their tags:

    - Collaborating (I win/you win) – I prefer this to "win / win"

- Competing (I win/you lose)
- Compromising (I win/lose some you win/lose some)

25. I think that the compromising approach in most commercial disputes is the most effective and realistic approach.

26. The fact that nearly all litigation matters are resolved in mediation of course does not mean that parties should not litigate hard. The better you have prepared in the litigation and the stronger your client's position appears to be will have a direct effect upon the way in which you can negotiate in a mediation.

Some Advocacy / Negotiation Techniques

27. Primarily, how well you negotiate in a mediation will depend on the steps you have taken to get ready for the mediation.

    (1) Just as in litigation representing your clients effectively depends upon hard work and preparation. Think of the work you put into preparing for a one-day trial. Why would you not prepare for a one-day mediation adopting a similar approach to the level of work required. At trial you are seeking the best outcome for your client. In a mediation you are seeking the best outcome for your client. In both, you are opposed by lawyers who are seeking the best outcome for their client. Treat the mediation process seriously and with respect.

    (2) Ascertain your BATNA or Best Alternative to a Negotiated Settlement. I discuss BATNA in detail later in this presentation.

    (3) Fully explain to your client the mediation process well before the mediation. Your client should not be hearing things about the process for the first time from the mediator at the beginning of the mediation. Your client needs "to own" the process and have confidence in it. Involve your client in the development of your mediation plan or strategy. "*People will support what they help create*". (Trey Bergman)

    (4) The negotiation plan should not be a vague plan based only on your "bottom line" or "top line". To attend a mediation with only a "bottom line" / "top line" means that you will be reacting to what the other party does in the negotiation rather than controlling the negotiation by having a proactive plan. If possible, decide in advance what your first two to three offers will be. This prevents emotional reactive responses to offers made by the other party which you and your client regard as unreasonable.

    (5) Mediation is consensual – i.e. Both sides have agreed to attend but are not required to stay. Using charm will help to lubricate the process hopefully towards an agreement. Aggression, blaming, attacking individuals rather than positions and grandstanding do not assist in the resolution of any negotiation. How many times have you thought when you encounter such behaviour that the lawyer on the other side appears to be performing to impress his own client rather than acting in a way to assist the negotiation process?

(6) Use emotional intelligence especially during the joint session. Yes even lawyers have it! In other words engage in active listening and pick up on non-verbal body language eg. Crossed arms, rolling of eyes, frowning, barely suppressed anger. Deal with angry interruptions. If the other side is upset or angry you need if possible, to deal with it. There will be a reason for it. To simply regard the reaction as overly emotional or irrational will not help your client. Perhaps acknowledge the reaction (if it is obvious) and seek an explanation. Be prepared to agree with your opponents when they are right. Just because the dispute is a commercial dispute does not mean that everyone will act in a controlled and rational way. Acknowledge emotions. Sometimes if emotions run high during a joint session ask for a break so that emotions can cool.

(7) Be patient. Be adaptable. Be prepared to stay. Let the process work. If the process needs to be adjourned to increase the prospects of settlement agree to an adjournment. In commercial disputes it is not unusual that the first mediation does not result in a settlement. This is not failure. It is simply part of the process.

(8) Crucially always have a planned goal and a strategy as to how to achieve it. Determine to the extent that you can what is most important to your client in terms of a result and what your client will ultimately be prepared to give away – ie prioritise your client's interests. Assess to the extent that you can the opposing client's interests. The mediation is not all about what your client wants. What does the opposing client want? What can you do to address this while still doing the best for your client?

BATNA

1. These letters stand for Best Alternative To a Negotiated Agreement, a concept first discussed by Roger Fisher and William Ury in their 1981 book entitled *Getting to Yes: Negotiating without Giving In* (and in their second edition when Bruce Patton also became an author published in 1991).

2. It is crucial before you decide to go to mediation to analyse your best possible outcome, your worst possible outcome and the most likely outcome – your probability BATNA.

3. Of course, your assessment of your BATNA will vary over time as you learn more about your case and the opposing party's case. It is a process which should be undertaken on an ongoing basis throughout the litigation and should not be a process only undertaken as part of the mediation process. You should always be in a position to be able to inform your client of their BATNA. In litigation mediation is inevitable. Therefore, you should always have focus on the BATNA. This will assist you to decide when to mediate and how to mediate.

4. When negotiating in a mediation, you need to know what your client will be giving away (ie the likely result at trial) if the matter settles. This of course in commercial litigation is often

a difficult matter to assess. You are attempting to predict the most likely outcome of the litigation process after the conclusion of a trial and possibly an appeal.

5. As a starting point, to enable you to properly ascertain your client's BATNA you usually need to have taken into account the following:

    - Advice as to prospects including the prospects of any counterclaim succeeding.
    - If relevant, the expert reports which have been exchanged.

6. This is not to say that parties cannot and should not mediate very early in their dispute. It is becoming increasingly common for parties to mediate prior to the commencement of litigation. Provisions requiring this in commercial contracts have become quite common. Settlements reached early are settlements reached taking into account primarily the commercial interests of the parties and the anticipated costs of litigation and the time that will be taken to litigate. These early mediations including mediations early in the litigation process should not be discouraged however due to the fact that you as lawyers are unable to determine a reasonably certain BATNA it is unusual for complex commercial disputes to resolve at these early stages.

7. Unless you have done your best to identify your BATNA before a mediation you might at the mediation reject a deal you should have accepted or accept one that you should not have accepted.

8. In identifying your BATNA you should undertake the following process:

    - assess your client's best-case result in the litigation
    - attribute, a percentage likelihood to that best case scenario occurring
    - assess your client's worst-case result
    - attribute a percentage likelihood to that worst case scenario occurring
    - take into account the costs that your client has incurred to date
    - take into account the likely length of a trial (and possible appeal)
    - calculate the likely future cost of conducting the litigation up until the completion of a trial and the likely recoverable costs should your client win at trial (the usual rule of thumb is about two-thirds of actuals)
    - knowing what you know about the opposing party's position in the litigation attempt to identify that opposing party's BATNA
    - calculate as best as you can the zone of potential agreement (ZOPA)
    - If offers have been made before the mediation you will also need to factor in the possible costs consequences of such offers.

USING YOU BATNA

9. Having conducted the above process, you will be in a position to recommend a goal to your client in terms of the settlement your client can reasonably aim to obtain at the mediation. Your client might not accept this advice but at least it will have been provided.

10. In commercial dispute mediations the negotiations often occur between parties which are corporations and not individuals. However, it is individuals who negotiate on behalf of the competing corporations.

11. As part of your preparation for the negotiation at the mediation you should ascertain as much as you can about not just the opposing corporation but the individual or individuals likely to attend the mediation. Likewise, you should ascertain as best as you can such background in terms of the lawyers who will attend on the other side at the mediation.

12. To the extent that there is any concern as to the commercial worth of an opposing party you should conduct relevant property and solvency searches.

13. If you are going to assert at the mediation as a strong negotiation point that your client is of no or little worth you should come to the mediation armed with evidence to substantiate that. Be very careful in such a situation that you only make such a representation if you have fully investigated it and have concluded that it is correct – do not just accept what your client tells you.

14. Be aware that the corporation opposing you and the individual representing it at the mediation might have different BATNAS. If the individual decision-maker representing the opposing party is a mid-level manager, that person will naturally have in mind how they perform at the mediation and how that will be perceived by those higher up the chain in their organisation.

15. It is crucial that you ascertain before the mediation begins that one of your client's representatives has authority to settle and that the opposing party's decision-maker has authority to settle.

16. A mediator will always want to know who the decision-maker is for each party. A mediator will focus attention on that person. It is important to remember as lawyers that a mediation is not a dispute between the legal representatives of each party, it is a dispute between the parties which the individuals representing the parties are trying to resolve. It is the parties' mediation not yours.

17. Having ascertained your BATNA and in particular your ZOPA you should come to the mediation with a strategy. This usually involves having worked out at least your first 2 to 3 offers.

18. Lawyers and their clients often say in a negotiation that they are not prepared to bid against themselves i.e., if they have made what they consider to be a reasonable offer

and, in their view, the other side is being unreasonable. Their view is that they should not make another offer bidding against their previous reasonable offer until and unless the other party makes a better offer. This approach can lead to a stalemate which can be difficult to overcome in a mediation.

19. In my view, to adopt such a strategy is usually a mistake. If you have worked out your BATNA and you have a range of possible settlement in mind you should in effect, be bidding against yourself. In other words, bearing in mind the goal which your client wishes to achieve you can work out in advance the offers you are to make. Your bids are planned bids towards the goal you are seeking to achieve.

20. Using this proactive negotiation technique sometimes throws the other party. You are not being reactive to what they know are unreasonable early offers and instead you simply and calmly advance your client's negotiation seemingly bidding against yourself but in reality, following a preconceived plan. Be in control and be seen to be in control.

21. Having worked out your ZOPA and your end goal i.e., what lawyers and clients refer to as their walk-away position, recognise the need for flexibility as to this walk away position. Be creative and not a set-piece player. You might learn things from the other side for the first time during the mediation. You might learn things from you client for the first time during the mediation. This new knowledge might require a reassessment of what should be your client's goal in the mediation.