



Help or hindrance?

IN VARIOUS WAYS THE INVOLVEMENT OF LAWYERS IN A MEDIATION HAS CLEAR BENEFITS, BUT THE MEDIATOR, PARTIES AND LAWYERS MUST BE AWARE OF POTENTIAL LIMITATIONS. BY JONATHAN KAPLAN

A study¹ that questioned whether or not lawyers were prejudicial to the mediation process in workplace disputes concluded that, save for two exceptions, the presence of lawyers did not significantly affect the outcome of the mediation. The exceptions were:

- that the presence of lawyers reduced the parties' level of satisfaction with the mediator (possibly because if the matter didn't resolve, or a party settled on terms less favourable than they anticipated, the lawyer could always, if criticised by the client, blame the mediator)
- the presence of a lawyer would appear to hinder the level of reconciliation possible between the parties.

By way of example, I mediated a dispute some years ago between two brothers, both represented. At the conclusion of the requested shuttle mediation, which resolved, I requested that the parties (who were in separate breakout rooms) regroup in open session so that I could do my usual closing off. Before one brother Sam (not his real name) could respond, his lawyer said to me that his client did not wish to be present in the same room as his client's sibling "because it was such an acrimonious dispute". Sam excused himself for a bathroom visit and out of the corner of my eye

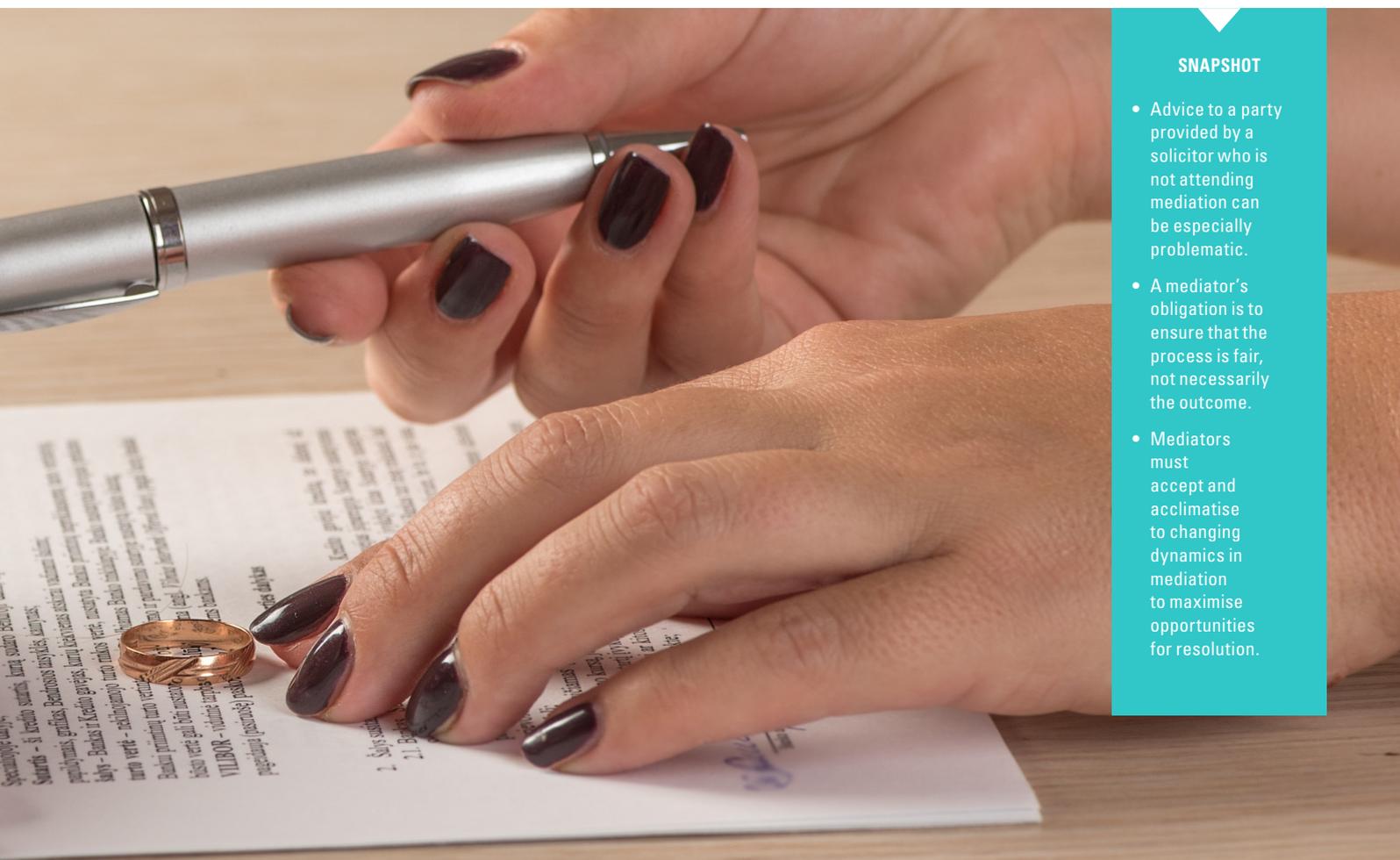
I spotted the two brothers walking towards each other in the corridor. Surprisingly, they extended their arms towards each other, shook hands and hugged. I learned something and I imagine that the lawyer did too about hindering the opportunity for reconciliation.

The above example, where representation had the potential of impacting on reconciliation, may be unusual. Perhaps it's appropriate to examine some instances where parties are unrepresented and to consider some outcomes.

Unrepresented litigants

Most mediations usually arise because of a contractual requirement, a legislative requirement or a court order. Generally the reasons why parties may wish to self-represent are that they think they can do just as well themselves as if they were represented or they are obliged to mediate before a court or tribunal will hear the matter but don't believe the matter will resolve at mediation and therefore don't want to waste limited financial resources.

Whatever the reason, it's always a challenge for mediators



SNAPSHOT

- Advice to a party provided by a solicitor who is not attending mediation can be especially problematic.
- A mediator's obligation is to ensure that the process is fair, not necessarily the outcome.
- Mediators must accept and acclimatise to changing dynamics in mediation to maximise opportunities for resolution.

when both parties self-represent, and this is heightened when only one of the parties is represented, mainly due to the potential imbalance of power.

Quite often mediators find themselves mediating disputes where unrepresented litigants have some difficulty understanding the mediation process and in some instances come from different cultures with different negotiating strategies and sometimes associated language difficulties. Factual and/or legal issues are rarely resolved in mediation, and less so at such a mediation. So, unless a party is represented there is little hope of them being able to evaluate their chances of success in court as against a resolution at mediation. In other words, giving consideration to their BATNA² is a real challenge.

Mediators often hear an unrepresented party say, "The issue is a simple one, I can't lose", or "I know that the judge will favour my version", or even, as I once heard, "The Lord is on my side and will look after me". In these circumstances mediators could find themselves dealing with parties making emotional decisions rather than objective decisions which could potentially be made with the guidance of a solicitor to assist with evaluating

strengths or weaknesses of the case and who may either re-assure the client or dampen their enthusiasm – though guidance provided prior to mediation by a solicitor who is not present at the mediation can be especially problematic.

Non-attending solicitor

I recall two particular mediations attended by unrepresented claimants who were advised and guided by a non-attending solicitor. In the first, both parties were unrepresented in a lease dispute. The landlord had told me in private session that his solicitor had advised him that his claims were rock-solid. As a mediator I was curious given that according to the legislation, as I understood it, a significant portion of the landlord's claim was barred by legislation. To clarify (and without revealing my knowledge of the legislation), I asked the landlord if he could call his solicitor so that I could speak with him, which he did. The solicitor informed me (on speakerphone) that he had not given the landlord the advice that the landlord had conveyed to me and that he had in fact advised him to abandon that specific portion of the claim when negotiating with the tenant. When I ended the

conversation I asked the landlord what he thought of his solicitor's conversation with me and he responded, "He's a criminal lawyer and knows nothing about leases." The matter resolved.

What is instructive is that mediators should not be coy about asking to speak with a party's solicitor when they say that their solicitor has given them advice in support of their case and which they then convey to the mediator and the other party in the mediation. Frequently it emerges that the solicitor gave no such advice, or that the party misunderstood the advice, or in a minority of cases the party is trying to derail the mediation or mislead the mediator and the other party, having never even sought legal advice.

In the second mediation, a conversation with the claimant's solicitor took a different turn. The respondent was represented and after experiencing a good few hours of tough negotiation and being just a few thousand dollars apart, the claimant, who had initially assured me that he had full authority to settle, insisted on calling his solicitor. Notwithstanding my comments below on allowing a party to access sources of advice before agreeing on terms of settlement, I cautioned the claimant that his solicitor had not been present and would not have been able to appreciate what had occurred in the past few hours, but he nevertheless insisted on calling him. I didn't stand in his way. The solicitor suggested to his client that having got that far his "gut feeling" was that the respondent would split the difference, "as that's how these negotiations usually go". I mentioned that the respondent had informed me that it was his final offer and he was ready to walk if it was not accepted. Having accepted his solicitor's advice the claimant asked me to put the proposal suggested by his solicitor. As expected, the respondent walked. I understand that the matter resolved some days later on the basis of the respondent's final offer.

The clear message from this example is that it's dangerous

for a solicitor who is not present in the mediation to provide that kind of advice having not experienced the mood of the negotiation. The mediator must emphasise the dangers of conveying a proposal sought in this manner to the other party.

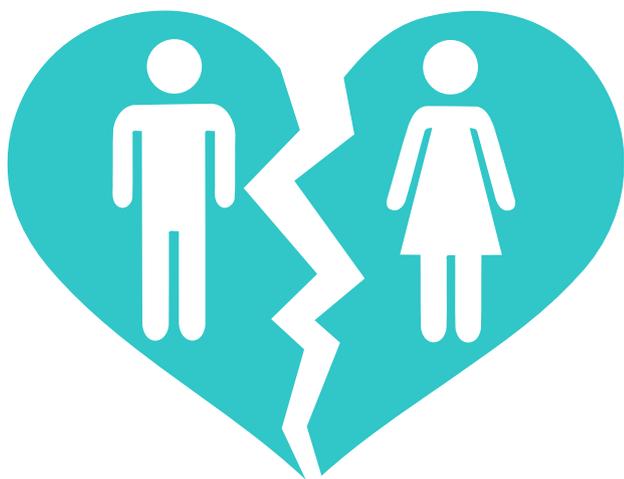
Mediator's role

In Australia, the majority of mediators are accredited under the National Mediator Accreditation System (NMAS) and are bound by the Practice Standards (NMAS Standards). Mediations that are conducted under the facilitative model do not permit the mediator to provide legal advice or decide who is right or wrong. However, under the NMAS Standards a mediator does have an overriding duty to ensure that mediation is conducted in a "fair, equitable and impartial way, without favouritism or bias in act or omission".³ It is the mediator's obligation to ensure that the process is fair and impartial, but not necessarily the outcome, so where one or both parties do not have the legal expertise or the intellectual ability to evaluate the factual disputes or legal issues, the assistance that a mediator can provide is very limited. This is an especially prickly issue where parties have agreed terms of settlement and a mediator is of the view that one of the parties has agreed to particularly prejudicial terms, which they may not otherwise have agreed to had they been aware of legislative changes or more recent case law.

In such circumstances a mediator might offer a party the opportunity to seek legal or other advice before executing terms of settlement. Under the NMAS Standards a mediator must ensure that, so far as practicable, "participants have had sufficient time and opportunity to access sources of advice or information necessary for their decision-making".⁴ This may even involve suggesting that a party obtain professional advice, but not, of course, recommending any particular professional adviser. However, care must be taken to ensure that one's impartiality isn't impugned in any way by pressuring a party to do so. Suggesting an adjournment to enable a party to do so is always an option.

Ignoring some of these issues could expose mediators to criticism (and in some cases even to potential breaches of the NMAS Standards) from an unrepresented party who might not have been "successful" in mediation. To address that risk, some mediators incorporate an acknowledgement by the parties in their mediation agreements that if unrepresented they acknowledge having been afforded the opportunity to have a lawyer or advisor present at the mediation but have declined to do so. Also included would be the right of an unrepresented party to speak with the adviser/s at any stage during the mediation. Should it not be known prior to the mediation that a party attending will be unrepresented, some mediators often seek a similar written acknowledgement prior to commencement of the mediation.

Some of the options and considerations for mediators in





disputes involving either unrepresented parties or where only one of the parties is represented are to:

- propose to a party who has chosen not to be legally represented that if it makes them feel more comfortable they may have a support person accompany them at the mediation, as is permitted under the NMAS Standards
- encourage the legal representative of a represented party to use plain language when presenting arguments and to bear in mind that the other party does not have a legal background
- suggest to a legal representative to treat the unrepresented party as if he or she were a colleague, rather than to aggressively intimidate that party
- actively manage any actual or perceived imbalance of power
- request the parties to prepare a written outline of their dispute prior to the mediation. Some unrepresented parties find it difficult to articulate the issues clearly in mediation and so it is helpful to have their story written down with them at the mediation.

To illustrate how different mediations involving unrepresented parties can be, it might be worthwhile to approach mediations mindful of pre-flight safety announcements before take-off: “Today you are flying in an Airbus A320. Subtly every aircraft is different and you will almost always be in a different seat, so it is important that you pay attention to this safety announcement”. And so it is with mediation. The subtleties in different mediations require mediators to continually adapt to the changing dynamics, and especially so by being flexible where unrepresented parties are involved. Failure to acknowledge this can be disastrous. Bear in mind that the escape route is never the same either, so be well prepared. You won’t impress anyone if you resort to the brace position. ■

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1. “The Negative Impact of Attorneys on Mediation Outcomes”: A Myth or Reality?” by Jean Poitras, Arnaud Stimec, and Jean Francois Roberge, *Negotiation Journal*, 2010. See also Jonathan Kaplan, “What lawyers bring”, *LJI*, April 2015, p78.
2. Best Alternative To a Negotiated Agreement (ie, if the matter did not resolve at mediation, what is the best outcome one might anticipate should the matter, for example, have to be determined in court?).
3. NMAS Practice Standards, para 7.2.
4. NMAS Practice Standards, para 7.6.

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