

THE HON T F BATHURST AC

CHIEF JUSTICE OF NEW SOUTH WALES

OFF WITH THE WIG: ISSUES THAT ARISE FOR ADVOCATES WHEN
SWITCHING FROM THE COURTROOM TO THE NEGOTIATING TABLE

AUSTRALIAN DISPUTES CENTRE

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1. Good evening everyone, it is a pleasure to be invited to address you this evening on a topic that will hopefully be relevant to the practice of many of you here today. In our current dispute resolution climate, barristers are increasingly being asked to remove their wigs – and no, hold your horsehair, I am not referring to any court dress controversies that may be going on in other States, I certainly do not wish to enter that fray – apart from relieving oneself from the interminable itch of the barrister’s wig, there are other reasons for shedding the traditional garb, namely, when entering the more informal arenas of dispute resolution. Of course, this talk of formal dress is really just a symbolic reference to the more substantive changes that need to be made when transitioning from the courtroom to the negotiating table and it is those important readjustments that I wish to discuss tonight.
2. Twenty five years ago, when alternative dispute resolution was really just coming on to the scene, Sir Laurence Street was anxious to amend the already entrenched acronym “ADR” so that it read “*additional* dispute resolution” rather than “*alternative* dispute resolution”: “It is not in truth ‘Alternative’” he urged, “It is not in competition with the established judicial system. It is an Additional range of mechanisms within the overall aggregated mechanisms for the resolution of disputes”.¹ Perhaps it is fair to say now that ADR has evolved to the stage not merely of being additional or supplementary but complementary and integrative.
3. With a specific focus on mediation, ADR now has the capacity to intrude at almost every stage of the litigious process. In some jurisdictions, mediation is a compulsory pre-cursor to commencing litigation; for example, in the family law jurisdiction, native title jurisdiction and unfair

* I express thanks to my Research Director, Ms Bronte Lambourne, for her assistance in the preparation of this address.

¹ Sir Laurence Street AC KCMG, “The Language of Alternative Dispute Resolution” (1992) 66 Australian Law Journal 194, 194 citing Sir Laurence Street, (speech delivered at the Chartered Institute of Arbitrators 75th Anniversary Conference, London, 4 October 1990).

dismissal cases under the *Fair Work Act 2009* (Cth). Under the *Civil Dispute Resolution Act 2011* (Cth) parties are required to file a “genuine steps” statement, outlining what steps have been taken, including via ADR, to resolve the dispute before commencing litigation in the Federal Court or the Federal Magistrate’s Court.² In the Supreme Court, informal settlement conferences have been employed in family provision cases where the estate is valued at less than \$500,000 with the aim of settling cases before there has been significant expenditure on court proceedings.

4. Adele Carr has suggested that mediation can and should be used more regularly to resolve interlocutory disputes.³ This is supported by the recent Federal Court Central Practice Note, issued last year, which states that “ADR options should be viewed by the parties not only as a means of possible resolution of the whole dispute, but also as a means of limiting or resolving issues by agreement and of resolving interlocutory disputes.”⁴ Carr cites as an example of how mediation can be used within the litigation process an order directing litigants to mediate to determine the evidence to be adduced at trial.⁵ This is particularly useful in high volume commercial cases which threaten to waylay the courts with indiscriminate reams of documentary evidence.
5. There have recently been proposals for a form of mediation in criminal proceedings in an endeavour to resolve the ever-increasing backlog in the courts. What is effectively plea bargaining has never found much favour in this country compared to, say, the United States, but it will be interesting to see where it leads.
6. Although neither the *Supreme Court Act 1970* (NSW) nor the *Uniform Civil Procedure Rules 2005* (NSW) mandate the taking of any steps to resolve the dispute prior to commencing proceedings, most cases in the Supreme Court are sought to be mediated prior to their being set down for hearing. In 2015, the Supreme Court referred 1070 cases to mediation, with 518 of those referrals being to court-annexed mediation. Fifty one per cent of those cases were settled with a further twenty five per cent still negotiating. Carr has also noted that mediation can even be

² *Civil Dispute Resolution Act 2011* (Cth), ss 4, 6.

³ See Adele Carr, “Broadening the traditional use of mediation to resolve interlocutory issues arising in matters before courts” (2016) 27 *Australasian Dispute Resolution Journal* 10.

⁴ Federal Court of Australia, *Central Practice Note 1 – National Court Framework and Case Management*, 25 October 2016, 9.1.

⁵ Carr, above n 3, 14-5; *Telstra Corporation Ltd v Phone Directories Company Pty Ltd (No 3)* [2014] FCA 949.

used after litigation has resolved the dispute in order to preserve relations and reputations and avoid a further appeal.⁶

7. All this points to a need for advocates not only to appreciate the differences between their role as litigator and as representative in mediation but also to transition smoothly and quickly between the two modes of dispute resolution. As Donna Cooper has repeatedly urged:⁷

“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.”

8. The aim of this speech is to canvass some issues that advocates should keep in mind when moving from litigation to mediation and back again. I want to first discuss the ways in which advocates need to shift gears when moving from a litigation to a mediation terrain, employing different models of advocacy in each setting. I will then move to consider how a lawyer’s ethical duties may manifest themselves differently despite having the same essential content in both venues. Finally, I will discuss the extent to which practitioners are covered by advocate’s immunity from suit when representing clients in mediation, particularly in light of the recent High Court decision in *Attwells v Jackson Lalic Lawyers*⁸ and yesterday’s decision in *Kendirjian v Lepore*.⁹

ADVOCACY MODELS

9. Commentators frequently cite the distinction between adversarialism and non-adversarialism as the key difference between litigation and alternative dispute resolution. Fears that lawyers will “colonise the mediation process”¹⁰ via assertive adversarial tactics have prompted

⁶ Carr, above n 3, 15; see *Pareezer v Coca-Cola Amatil (NSW) Pty Ltd* [2004] NSWSC 825; Coca-Cola Amatil, “Coca-Cola Amatil and Craig Pareezer” (Media Release, 22 March 2006) <https://www.ccamatil.com/-/media/Cca/Corporate/Files/Media-Releases/2006/CCA-and-Craig-Pareezer-220306.ashx>

⁷ Donna Cooper, “Representing clients from courtroom to mediation settings: Switching hats between adversarial advocacy and dispute resolution advocacy” (2014) 25 *Australasian Dispute Resolution Journal* 150, 158; see also Donna Cooper, “Lawyers behaving badly in mediations: Lessons for legal educators” (2014) 25 *Australasian Dispute Resolution Journal* 204, 211; Donna Cooper, “The ‘new advocacy’ and the emergence of lawyer representatives in ADR” (2013) 24 *Australasian Dispute Resolution Journal* 178, 186.

⁸ [2016] HCA 16; (2016) 90 ALJR 572.

⁹ [2017] HCA 13.

¹⁰ Kathy Douglas and Becky Batagol, “The Role of Lawyers in Mediation: Insights from Mediators at Victoria’s Civil and Administrative Tribunal” (2014) 40(3) *Monash University Law Review* 758, 766.

various legal bodies to issue non-binding guidelines outlining the appropriate role for lawyers representing clients in mediation. For instance, the Law Society of New South Wales' "Professional Standards for Legal Practitioners in Mediation" states that the role of a legal practitioner is

*"to participate in a non-adversarial manner. Legal practitioners are not present at mediation as trial 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 practitioner who does not understand the non-adversarial settlement focus of their role and participate appropriately is a direct impediment to the mediation process"*¹¹

Meanwhile, the Law Council of Australia's "Guidelines for Lawyers in Mediations" provides that "mediation is not an adversarial process to determine who is right and wrong. Mediation should be approached as a problem solving exercise." It goes on to highlight that "the skills required for a successful mediation are different to those desirable in advocacy ... a lawyer who adopts a persuasive rather than adversarial or aggressive approach ... is more likely to contribute to a better result".¹²

10. But the dichotomy between adversarial and non-adversarial approaches is not quite as helpful, nor is the reality as antithetical, as it may initially appear. Indeed, a lawyer who "adopts a persuasive rather than adversarial or aggressive approach" is also more likely to succeed in a courtroom than an advocate who trenchantly stands by their weakest arguments and makes no concessions or who bullies their opponent. Bobbette Wolski argues that the fear of lawyer advocates in mediations "is based on misconceptions about the nature of advocacy (and of associated terms such as zeal), and on a fragile distinction between adversarial and non-adversarial behaviour".¹³ In both contexts the object is to persuade, albeit the object of persuasion is different. So what are some more helpful distinctions between a lawyer's advocacy style in court and in mediations?
11. While aggression is unlikely to be appropriate in either context, the tone, demeanour and language adopted in both settings is likely to change.

¹¹ Law Society of New South Wales, "Professional Standards for Legal Practitioners in Mediation" in Dispute Resolution Kit (December 2012) available at <http://www.lawsociety.com.au/cs/groups/public/documents/internetcontent/675694.pdf>

¹² Law Council of Australia, "Guidelines for Lawyers in Mediations" (August 2011) available at http://www.lawcouncil.asn.au/FEDLIT/images/Guidelines_for_lawyers_in_mediations.pdf

¹³ Bobette Wolski, "On Mediation, Legal Representatives and Advocates" (2015) 38(1) *University of New South Wales Law Journal* 5, 8.

For instance, a lawyer may engage in questioning the opposing client in mediation if its aim is to promote full and frank disclosure but they are not going to cross-examine the opposing client with the purpose of eliciting statements beneficial to their client's case.¹⁴ Legalese and legal arguments may also be dropped in favour of more user-friendly terminology that encourages the opposing client to engage and understand.¹⁵

12. Wolski suggests that the distinction critics are really trying to articulate is one between "the competitive tactics thought to be associated with positional negotiation on the one hand, and on the other, the cooperative tactics thought to be associated with interest-based negotiation".¹⁶ This captures another popular conceptual division between litigation and mediation, namely that the former is rights-based while the latter is interests-based. To this end, lawyers acting in mediations should ensure that they have a proper handle not only of the law and their clients' legal prospects but also of "the underlying causes of conflict and of the client's underlying interests".¹⁷ This will be necessary in fuelling creative options for compromise that will be mutually satisfactory to both parties.
13. So, in a mediation setting, lawyers will still seek to persuade but they will adopt a *style* of advocacy that is cooperative rather than competitive and the *content* of their argument will expand to include non-legal interests as well as rights. A third aspect of advocacy that legal practitioners will need to consider is the *role* that they will take in the mediation. As Donna Cooper has highlighted, the role of lawyers in litigation "tends to be fairly fixed".¹⁸ The processes of oral and written argument follow a structured format and while a lawyer takes instructions from their client, they are the sole representative and spokesperson when it comes to trial. In mediation, however, there are a spectrum of roles that a practitioner might adopt and the choice of role will depend on the nature of the dispute, the power dynamics at play, the client's wishes and a host of other factors.
14. Olivia Rundle has famously categorised five ways in which lawyers may participate in mediation.¹⁹ This ranges from the absent advisor, who

¹⁴ Cooper, "Representing clients from courtroom to mediation settings: Switching hats between adversarial advocacy and dispute resolution advocacy", above n 7, 157-8.

¹⁵ See Law Council of Australia, above n 12.

¹⁶ Wolski, above n 13, 38.

¹⁷ Cooper, "Representing clients from courtroom to mediation settings: Switching hats between adversarial advocacy and dispute resolution advocacy", above n 7, 154.

¹⁸ *Ibid* 156.

¹⁹ Olivia Rundle, "A Spectrum of Contributions that Lawyers Can Make to Mediation" (2009) 20 *Australasian Dispute Resolution Journal* 220.

assists the client to prepare but does not attend the mediation, to the advisor observer, who attends the mediation but does not participate, to the expert contributor, who participates but only to the extent of providing the client with legal advice, to the supportive professional participant, who directly participates in concert with the client, and finally, the spokesperson, who speaks for, and negotiates on behalf of, the client. It is only the final model that replicates the lawyer's role in court. It is important that advocates give consideration to these roles before entering mediation so as not to either hijack the process or leave their client insufficiently supported.

15. In light of these distinctions between the style, content and role of advocacy in litigation and mediation, it may well be desirable for junior barristers to undergo training on the skills required for representing clients in mediation and how this differs from the traditional courtroom environment.

ETHICAL DUTIES

16. The second topic I want to consider is the ways in which a lawyer's ethical duties may be fulfilled in the different contexts. It is important to note that despite repeated calls for new or supplementary rules covering lawyers in ADR settings,²⁰ the only binding ethical duties governing advocates in mediation are those that govern them in litigation and indeed in everyday life. That does not mean, however, that the fulfilment of an ethical duty may not manifest itself in different ways. To illustrate the point I will refer to just two examples: the duty to act in the client's best interests and the duty of honesty owed to opponents.
17. The obligation to act in a client's best interests is relatively well-understood in the litigation setting where it is fulfilled by presenting a client's case in the best possible light and where there is no obligation to assist an adversary.²¹ In the mediation setting, however, there are competing considerations that help to shape the duty. First, there is a greater need for cooperation with the opposing party. Acting in the client's best interests does not mean defending their initial or most favourable position at all costs; often the client's best interests will be served by reaching a compromise and avoiding hostility.²²

²⁰ See eg, Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System*, Report No 89 (2000) 296-8.

²¹ Dr Samantha Hardy and Dr Olivia Rundle, *Mediation for Lawyers* (CCH Australia Limited, 2010) 217.

²² *Ibid.*

18. In fact, it will often be the case that acting in the best interests of a client involves exerting some pressure on the client to accept a settlement offer. In *Studer v Boettcher*,²³ a client brought a claim against his solicitor for negligence alleging that he had been pressured into accepting an unfavourable settlement offer. While the solicitor had initially been hopeful of being able to settle the case for a lower amount, once the opponent's evidence came to light in mediation, the solicitor altered his advice. The New South Wales Court of Appeal found that the solicitor had "acted professionally and properly in the interests of the appellant in bringing considerable pressure to bear on [the client] to settle on the best terms then available" and was satisfied that "this was in the [client's] best interests".²⁴
19. That being said, there is a fine line to be drawn between "permissible persuasion and impermissible coercion".²⁵ This brings me to a second consideration that may affect the duty to act in a client's best interests in mediation, namely, the need to allow for party self-determination. Self-determination has been described as the "most fundamental principle of mediation".²⁶ In *Studer v Boettcher*, Justice Fitzgerald explained how this principle interacted with the duty to act in a client's best interests. He stated:
- "Although it is in the public interest for disputes to be compromised whenever practical, a lawyer is not entitled to coerce a client into a compromise which is objectively in the client's best interests ... 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 interests."*²⁷
20. While the legal content and source of the duty remains the same inside and outside the courtroom, the fact that a client has a greater level of personal involvement in mediation can complicate the traditional duty in a situation where the advocate is no longer acting as sole representative.
21. Turning to the duty of honesty owed to opponents, the duty of honesty prohibits a lawyer from knowingly making false statements to an

²³ [2000] NSWCA 263.

²⁴ *Ibid* [53] (Handley JA).

²⁵ *Ibid* [76] (Fitzgerald JA).

²⁶ Wolski, above n 13, 30 citing James J Alfani, "Mediation as a Calling: Addressing the Disconnect between Mediation Ethics and the Practices of Lawyer Mediators" (2008) 49 *South Texas Law Review* 829, 830.

²⁷ [2000] NSWCA 263, [74]-[75].

opponent in relation to a case, including its compromise.²⁸ While the duty does not generally require positive disclosure,²⁹ exceptions lie where the failure to disclose constitutes taking advantage of an obvious error to secure a benefit with no supportable foundation in fact or law;³⁰ where disclosure is required to qualify a statement or avoid a partial truth;³¹ and where disclosure is necessary to correct a statement previously made to an opponent where the practitioner now knows the statement to be false.³²

22. Because of the more informal setting in which mediation takes place, where evidence is not tendered as a formal exhibit and a degree of puff and bluster is customary, if not obligatory, some practitioners are led to believe that the duty of honesty to an opponent does not apply in full force.³³ To the contrary, there may in fact be thought to be a stronger reason for enforcing the duty in mediation settings where “there is no impartial adjudicator to ‘find the truth’ between the opposing assertions”.³⁴
23. The seminal case regarding a practitioner’s duty of honesty to an opponent in mediation is that of *Legal Services Commissioner v Mullins*.³⁵ Mr Mullins represented a quadriplegic client in mediation who was seeking damages from an insurer. Central to the value of the claim were reports which calculated the claimant’s future care needs and their costs, work-life assessment and future earning capacity. A few weeks prior to mediation commencing, the client discovered that he had cancer and began chemotherapy treatment. He asked that his lawyers not disclose this to his opponent unless legally obliged to. Mr Mullins came to the view, on the advice of the instructing solicitor, Mr Garrett, that so long as he did not positively mislead the opponent about his client’s life expectancy, he would not be violating any professional ethical rules.

²⁸ *Legal Profession Uniform Conduct (Barristers) Rules 2015* (Cth), r 49; *Legal Profession Uniform Law Australian Solicitors’ Conduct Rules 2015* (Cth), r 22.1.

²⁹ See Bobette Wolski, “An evaluation of the rules of conduct governing legal representatives in mediation: Challenges for rule drafters and a response to Jim Mason” (2013) 16 *Legal Ethics* 1, 9-12; Bobette Wolski, “The Truth about Honesty and Candour in Mediation: What the Tribunal Left Unsaid in Mullins’ Case” (2012) 36 *Melbourne University Law Review* 706, 716-8.

³⁰ *Legal Profession Uniform Law Australian Solicitors’ Conduct Rules 2015* (Cth) r 30.1, see eg, *Chamberlain v Law Society of Australian Capital Territory* (1993) 43 FCR 148.

³¹ *Lam v Ausintel Investments Australia Pty Ltd* (1989) 97 FLR 458, 475; see also *Legal Practitioners Complaints Committee v Fleming* [2006] WASAT 352, [73].

³² *Legal Profession Uniform Conduct (Barristers) Rules 2015* (Cth) r 50; *Legal Profession Uniform Law Australian Solicitors’ Conduct Rules 2015* (Cth) r 22.2; *Legal Services Commissioner v Mullins* [2006] QLPT 12.

³³ G E Dal Pont, *Lawyers’ Professional Responsibility* (6th ed, Thomson Reuters, 2016) 709 [21.60].

³⁴ *Legal Practitioners Complaints Committee v Fleming* [2006] WASAT 352, [76].

³⁵ [2006] QLPT 12 (*Mullins*).

24. The Queensland Legal Practice Tribunal found that the actions of both Mr Mullins and Mr Garrett constituted professional misconduct and they were fined accordingly.³⁶ While some academic commentary suggests that the outcome in *Mullins* imposes a higher duty of honesty or candour in mediation settings,³⁷ the decision affirms the rule that practitioners are obliged to correct earlier statements they now know to be false.³⁸
25. What this case shows is not that there are different duties applying to advocates in litigation as opposed to mediation but that the same duty may feel more onerous in an informal setting. Advocates should be mindful that the same exacting standards apply to their conduct in mediation and that “the need for ethical decision-making ... transcends the curial process”.³⁹

ADVOCATE’S IMMUNITY

26. But there is another reason why advocates should be particularly scrupulous about their conduct in mediations; this is because advocates in mediation are unlikely to be afforded the same immunity from suit as advocates in litigation. For advocates who are representing their clients across litigation and mediation settings, the question may arise of at what point the immunity drops off. As Chief Justice Mason first articulated, “it would be artificial in the extreme to draw the line at the courtroom door” but “where does one draw the dividing line?”⁴⁰
27. Of course, any examination of the proper bounds of advocate’s immunity begins with a discussion of the High Court judgments in *Giannarelli v Wraith*⁴¹ and *D’Orta-Ekenaike v Victoria Legal Aid*.⁴²
28. In *Giannarelli*, Chief Justice Mason held that “the immunity must extend to work done out of court which leads to a decision affecting the conduct of the case in court”, also approving the test adopted by the New Zealand Court of Appeal in *Rees v Sinclair*, that the line is drawn “where the particular work is so intimately connected with the conduct of the cause in Court that it can fairly be said to be a preliminary decision affecting the way that cause is to be conducted when it comes to a

³⁶ Ibid; Legal Services Commissioner v Garrett [2009] LPT 12.

³⁷ See eg, Hardy and Rundle, above n 21, 223.

³⁸ *Mullins* [2006] QLPT 12 [29]. See Wolski, “The Truth about Honesty and Candour in Mediation: What the Tribunal Left Unsaid in *Mullins’* Case”, above n 29.

³⁹ Gino Dal Pont, “To disclose or not to disclose” (2007) 45 *Law Society Journal* 28, 29.

⁴⁰ *Giannarelli v Wraith* (1988) 165 CLR 543, 559.

⁴¹ (1988) 165 CLR 543 (*Giannarelli*).

⁴² (2005) 223 CLR 1 (*D’Orta-Ekenaike*).

hearing”.⁴³ The majority in *D’Orta-Ekenaike* approved of these formulations.⁴⁴

29. A question that has attracted considerable attention recently, and is relevant to our discussion today, is whether advice or representation provided out of court in the process of settlement or mediation falls within this definition. This question came before us in the New South Wales Court of Appeal in 2014 in the case of *Jackson Lalic Lawyers Pty Ltd v Attwells*.⁴⁵ Attwells was one of three company directors who had guaranteed the company’s indebtedness to a bank. Jackson Lalic Lawyers acted for the guarantors in recovery proceedings brought against them by the bank. The guarantors’ liability was limited to \$1.5 million but the solicitors negotiated a settlement which stipulated that the guarantors pay \$1.75 million and advised the guarantors to sign a consent order which made the full amount of the company’s debt enforceable on the guarantors default, advising that this would have essentially no effect. We determined that, in compliance with the test in *Giannarelli* and *D’Orta-Ekenaike*, advice which led to a case being settled was work done out of court which led to a decision affecting the conduct of the case in court and was thus intimately connected with the conduct of the proceedings.⁴⁶
30. The decision was appealed to the High Court and special leave was granted, but before it could be heard, another case concerning immunity for negligent settlement advice reached the New South Wales Court of Appeal. In *Stillman v Rusbourne*,⁴⁷ Mr Stillman sued the solicitors who had represented him and his company in court-ordered mediation. He claimed that the solicitors had been negligent in their advice and representation in the course of the mediation resulting in settlement terms, effected through a consent judgment, that were excessively disadvantageous and which eventually resulted in the company’s liquidation and Mr Stillman’s bankruptcy.
31. The majority of the Court followed the Court of Appeal decision in *Jackson Lalic* and found that the immunity extended to the circumstances of that case. Justice Basten, however, disagreed. He argued that the touchstone of the immunity was the exercise of judicial power, or more specifically, a judicial determination on the merits.⁴⁸ Where there has been no judicial determination on the merits but merely

⁴³ *Giannarelli* (1988) 165 CLR 543, 560 citing *Rees v Sinclair* [1974] NZLR 180, 187.

⁴⁴ *D’Orta-Ekenaike* (2005) 223 CLR 1, [86] (Gleeson CJ, Gummow, Hayne and Heydon JJ).

⁴⁵ [2014] NSWCA 335 (*Jackson Lalic*).

⁴⁶ *Ibid* [37]-[38] (Bathurst CJ).

⁴⁷ [2015] NSWCA 410 (*Stillman*).

⁴⁸ *Ibid* [8], [20]-[21].

a consent order, he found that the principle of finality which underpins the immunity was not sufficiently engaged, because re-agitating the issues in a consensual settlement agreement does not undermine public confidence in the administration of justice.⁴⁹

32. The High Court decision in *Attwells v Jackson Lalic Lawyers Pty Ltd*⁵⁰ resolved the debate, with the majority of the Court finding that advocate's immunity does not extend to negligent advice provided by a lawyer which leads to a settlement agreement between the parties, even where that agreement is embodied in a consent order. The Court emphasised two relevant distinctions which help to elucidate where the line is to be drawn, albeit still leaving some room for shades of grey.
33. First, as Justice Basten presaged, whether the immunity was engaged or not turned on an understanding of what the principle of finality was truly trying to protect. On the one hand, Justice Gordon, in dissent, found that that "the issue was resolved by understanding that there was a final quelling of the controversy between the parties".⁵¹ On the other hand, the majority held that

*"The immunity is not justified by a general concern that disputes should be brought to an end, but by the specific concern that once a controversy has been finally resolved by the exercise of the judicial power of the State, the controversy should not be reopened by a collateral attack which seeks to demonstrate that the judicial determination was wrong"*⁵²

34. Underlying the majority's understanding of the principle of finality is a concern with protecting public confidence in the judicial officers of the State. But as Justice Nettle raised as a concern, also in dissent, even where parties have consented to orders it may remain "for the court to be satisfied that it is appropriate so to order".⁵³ A challenge to advocate's advice in that context would "involve calling into question the rectitude of the court's order".⁵⁴ The majority expressly acknowledged this situation but stated that it was not necessary to consider such cases in the instant case.⁵⁵
35. A second important distinction that was drawn by the majority was between work that has an intimate connection with the judge's

⁴⁹ Ibid [21].

⁵⁰ [2016] HCA 16; (2016) 90 ALJR 572 (*Attwells*).

⁵¹ Ibid [104].

⁵² Ibid [34].

⁵³ Ibid [68].

⁵⁴ Ibid.

⁵⁵ Ibid [61].

determination of the case and work which has an historical connection.⁵⁶ The majority stated that “[a]dvice to commence proceedings ... advice to cease litigating or to continue litigating does not itself affect the judicial determination of a case”.⁵⁷ That advice to commence proceedings is not covered by advocate’s immunity is a generally uncontroversial proposition, as Justice Gordon stated “[a]dvice of that kind is not work done for the final quelling of a controversy ... [it] starts a controversy”.⁵⁸ The case before the Court also settled the question of whether advice to cease litigating through settlement attracted the immunity, deciding that it did not. However, after *Attwells*, it could have been argued that there was still a degree of controversy as to whether advice to continue litigating attracts the immunity. Indeed, this is what was put forward by the respondent in *Kendirjian v Lepore*,⁵⁹ a judgment that was handed down by the High Court just yesterday.

36. In *Attwells*, the majority thought it would be “difficult to envisage how advice not to settle a case could ever have any bearing on how the case would thereafter be conducted in court, much less how such advice could shape the judicial determination of the case”.⁶⁰ At that stage, the Court’s attention had not been drawn to the 2012 decision of a five judge bench of the New South Wales Court of Appeal in *Donnellan v Woodland*.⁶¹ In that case, while the Court failed to find negligence, it unanimously held that negligent advice concerning an offer of compromise which had “the effect of deciding to continue with proceedings” was “a decision that affect[ed] the conduct of the case in court” and thus attracted the immunity.⁶²
37. Interestingly, Justice Basten in *Stillman*, who found on the same side as the majority in *Attwells* concerning advice to cease litigation, drew a distinction between advice to cease and to continue litigating, no doubt feeling himself bound by *Donnellan*, a case on which he sat. He argued that the point of distinction was that advice to cease litigating “does not affect the conduct of the trial in a practical sense, because there is no trial, whereas [advice to continue litigating does because] the matter proceeds to trial and final judgment”.⁶³

⁵⁶ *Ibid* [46].

⁵⁷ *Ibid* [50].

⁵⁸ *Ibid* [128].

⁵⁹ [2017] HCA 13 (*Kendirjian*).

⁶⁰ *Attwells* [2016] HCA 16; (2016) 90 ALJR 572, [48].

⁶¹ [2012] NSWCA 433.

⁶² *Ibid* [229].

⁶³ *Stillman* [2015] NSWCA 410, [49].

38. In *Kendirjian*, a client brought proceedings against his solicitor and barrister claiming that they had been negligent in their advice relating to a settlement offer. The lawyers had rejected the offer as being too low but had not advised their client of the specific amount of the offer nor had they acted on his express instructions. The Court refused to distinguish the case from *Attwells* or to reopen the decision on that point.⁶⁴ It agreed that the facts were indistinguishable from *Donnellan* but held that the decision in *Donnellan* was inconsistent with what the High Court had decided in *Attwells*.⁶⁵
39. It is worth noting that the proposition has garnered sustained criticism from Justices Nettle and Gordon. In both cases, Justice Nettle was of the opinion that allowing a negligence action for advice not to settle gave rise to the possibility of a challenge to the findings of the court,⁶⁶ in *Kendirjian*, he nevertheless felt himself bound by the decision in *Attwells*.
40. Meanwhile Justice Gordon echoed these concerns,⁶⁷ but also raised another interesting possibility, namely, that in determining a case in which a lawyer has allegedly acted without instructions, the court might first need to consider whether the decision should be set aside before considering advocate's immunity.⁶⁸
41. In any event, it is now clear that "the giving of advice *either* to cease litigating or to continue litigating does not itself affect the judicial determination of a case"⁶⁹ and as such, does not attract immunity. With these successive strong stances against allowing the immunity to extend to situations surrounding settlement, advocates should be put on warning that immunity from suit will not protect them from negligent advice or representation provided at mediations.
42. The confidentiality of mediation communications is also a factor that permeates each of the topics discussed so far. For instance, can an advocate "use mediation confidentiality as a shield to exclude damaging evidence" of their own negligence?⁷⁰ While a party or mediator can claim confidentiality, can a solicitor or barrister rely on the protection of confidentiality in the face of the parties' waiver? Such an outcome may seem perverse, yet the Californian Supreme Court found that it was

⁶⁴ *Kendirjian* [2017] HCA 13, [18].

⁶⁵ *Ibid* [27].

⁶⁶ *Kendirjian* [2017] HCA 13, [5]-[7]; *Attwells* [2016] HCA 16; (2016) 90 ALJR 572, [72].

⁶⁷ *Kendirjian* [2017] HCA 13, [11]; *Attwells* [2016] HCA 16; (2016) 90 ALJR 572, [129].

⁶⁸ *Kendirjian* [2017] HCA 13, [13].

⁶⁹ *Ibid* [32] (emphasis added).

⁷⁰ *Cassel v Superior Court* (2011) 51 Cal 4th 113 (2011), 2.

unavoidable in the face of the plain language of that jurisdiction's statute.⁷¹

43. Similarly, going back to the earlier discussion surrounding the duty of honesty, under what circumstances can a party adduce evidence of communications in mediation to bring a case of misleading or deceptive conduct? In a 2011 Federal Court case, Justice Lander found that an exception to confidentiality in the *Evidence Act 1995* (Cth), and at common law, extended to the situation where the impugned evidence showed that an agreement should be set aside on the grounds of misleading or deceptive conduct,⁷² but it was also conceded that the situation may have been different had the mediation been court-ordered and thus subject to s 53B of the *Federal Court of Australia Act 1976* (Cth) which provides absolute protection for evidence of anything said in mediation.⁷³
44. In NSW, s 30 of the *Civil Procedure Act* has been held to override the *Evidence Act* where the confidentiality of communications in mediation is concerned.⁷⁴ That provision states, in reasonably strong language, that “evidence of anything said or of any admission made in a mediation session is not admissible in any proceeding before any court or any other body”. While Justice Ball in that case noted that common law exceptions existed, he cited the England and Wales Court of Appeal in *Unilever plc v Procter & Gamble Company* which held that such exceptions apply “only to the clearest cases of abuse of a privileged occasion” such as where “the exclusion of the evidence would act as a cloak for perjury, blackmail or other 'unambiguous impropriety’”.⁷⁵
45. Confidentiality is crucial for preserving the efficacy and integrity of mediation but it can produce some thorny issues and the proper extent of its exceptions remains a live question.
46. In a dispute resolution environment where advocates must learn to wear two hats – or wigs, if you will – it is important that they are attuned to the nuances in duties and immunities that apply in each role. I hope that this discussion tonight draws attention to some of those distinctions and ultimately helps to foster a body of well-rounded advocates who can

⁷¹ Ibid.

⁷² *Pihiga Pty Ltd v Roche* (2011) 278 ALR 209, [97], [131].

⁷³ Ibid [114]-[115].

⁷⁴ *Woollahra Municipal Council v Secure Parking Pty Ltd (No 2)* [2015] NSWSC 452, [25]; *Rajski v Tectran Corporation Pty Limited* [2003] NSWSC 476, [16]; *Tony Azzi (Automobiles) Pty Ltd v Volvo Car Australia Pty Ltd* (2007) 71 NSWLR 140, [19].

⁷⁵ *Unilever plc v Procter & Gamble Company* [1999] EWCA Civ 3027, [23].

operate effectively across the increasingly diverse realms of dispute resolution that exist today.