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CHIEF JUSTICE OF NEW SOUTH WALES
AUSTRALIAN DISPUTES CENTRE
REMARKS ON 35TH ANNIVERSARY OF MEDIATION TRAINING
PROGRAM
JANUARY 2021*

1. It is my pleasure to commemorate the 35th anniversary of the Australian Disputes Centre Mediation Training Program. I would like to begin by congratulating the Australian Disputes Centre on this significant anniversary and its many accomplishments including training generations of mediators and cementing the success of mediation in Australia. I am pleased but unsurprised at the significant interest in this anniversary training program as exemplified by the demand for the Centre to run a second program later in January.
2. I would like to begin by acknowledging the traditional custodians on the land on which all meet and work. I work and live on the land of the Gadigal people and pay my respects to their elders, past, present and emerging. I extend that respect to Aboriginal and Torres Strait Islander peoples listening today. I particularly acknowledge the importance of First Nations' mediators and the Australian Disputes Centre's First Nations' Mediation Panel to providing culturally appropriate and community-led dispute resolution. I recognise the many injustices that Aboriginal and Torres Strait Islander peoples have

*I express my thanks to my Research Director, Ms Jessica Elliott, for her assistance in the preparation of this address. This address was pre-recorded on 17 December 2020 and shown in January 2021.

suffered at the hands of our traditional justice system. In my opinion, mediation, particularly where it is led by an Aboriginal and Torres Strait Islander mediator offers a unique opportunity to directly and actively involve Australia's First Nations peoples in the flexible resolution of disputes away from the rigidity and historical legacy of the courts.

3. This training program marks 35 years to the month since Sir Laurence Street, my predecessor as Chief Justice, conducted the first mediation training program in January 1986. The year prior to this, Sir Laurence recommended the New South Wales Government establish the Australian Commercial Disputes Centre (now known as the Australian Disputes Centre) to develop non-adversarial dispute resolution in Australia.¹ The Centre was subsequently established in 1986.
4. At the time, alternative dispute resolution was only just gaining prominence in Australia. Sir Laurence Street has quite rightly been called the pioneer of mediation in Australia",² and the "Godfather of ADR" in recognition of his spearheading of mediation as a legitimate and valuable dispute resolution process in Australia.³
5. 35 years later, mediation has firmly established itself as a critical and valued method of dispute resolution in Australia. The popularity and success of mediation, whether court-ordered or consensual, in Australia is proof that the

¹ David Spencer and Michael Brogan, *Mediation Law and Practice* (Cambridge University Press 2007) 377.

² P A Bergin, 'The Right Balance Between Trial and Mediation: Visions, Experiences and Proposals' (Speech, Aula Magna, Court of Cassation, 19 October 2012) 2
<<http://138.25.65.17/au/journals/NSWJSchol/2012/38.pdf>>.

³ Rashda Rana, 'How International Commercial Arbitration has Influenced the Growth of ADR in Asia' (2014) 1 *Alternative Dispute Resolution Bulletin* 116.

adversarial model is not always best suited, or best-suited as the first step in the dispute resolution process.

6. In light of the success of mediation, there is a marked need to train highly-proficient and culturally competent mediators and lawyers capable of assisting, not impeding, parties to reach a consensus. The role of the Australian Disputes Centre in providing this ongoing training and mediation accreditation is crucial to the present and future success of mediation in Australia.
7. I have been asked today to say a few words on two topics: first, advocacy in mediation and secondly, the management of lawyers by the mediator.

Advocacy in mediation

8. Turning to the first topic of advocacy in mediation. Some think that the term 'advocacy in mediation' is at best misleading, and at worst, oxymoronic. For example, Sir Laurence himself stated that "[l]egal advisers are not present as advocates" in mediation.⁴ In my opinion, advocacy in mediation is not misleading. It's not oxymoronic. It's different.
9. I remember when mediation rose in prominence just after I made silk, mediation was seen as a sign of weakness. The object of an advocate was seen as purely to push their client's case as much as possible as you would in Court. I joke sometimes that I wasn't very good at mediation. That was true for almost all barristers at the time. But we came to learn.

⁴ Laurence Street, 'Representation at commercial mediations' (1992) 3 *Australian Dispute Resolution Journal* 255, 255

10. In my opinion, it is important to remember that advocacy in mediation is fundamentally different to advocacy in a court, tribunal or arbitration. Why is it so different? The focus and objectives of advocacy in mediation distinguish it from the advocacy you see in the courtroom.
11. Advocacy in the courtroom, tribunal or arbitration is directed to the adversarial system. The advocacy is therefore neatly aimed at persuading the judge, tribunal member or arbitral panel. Advocacy in mediation, on the other hand, is directed at finding consensus. The audience of such advocacy is less clearly defined than in an adversarial setting.⁵ In mediation, advocacy is directed at convincing the other side, and more specifically, at the client on the other side, and your own client to agree.
12. Furthermore, in my opinion, there is a real skill in mediation advocacy that promotes consensus whilst not putting any client, their lawyer or the mediator off-side. It is a fine balancing act and requires highly developed advocacy skills to do successfully.
13. There is also a subtle art of advocacy in mediation that is directed at the mediator. This advocacy should persuade the mediator that you are there to assist the process and assist *both* parties reach consensus, rather than single-mindedly promote an outcome favourable to your client. Advocacy that leaves the mediator feeling that the lawyer is there exclusively to assist your client, rather than assist the process, will put the mediator off-side.
14. It is difficult to formulate a set of principles for successful advocacy in mediation. As with advocacy in an adversarial setting, different advocates will

⁵ Robert Angyal, 'Advocacy at Mediation: An Oxymoron or an Essential Skill for the Modern Lawyer?' in Michael Legg (ed), *The Future of Dispute Resolution* (LexisNexis Butterworths, 2013) 143, 151.

achieve their objectives in different ways. Successful advocacy in mediation will always depend on the conflict, the mediator, and, most importantly, the other party. Furthermore, unlike in court where there are neatly defined and established opportunities for advocacy, the opportunities for advocacy in mediation are much more fluid and varied. A lawyer in a mediation may adopt any number of advocacy roles and may oscillate between these roles depending upon what is most appropriate at the particular stage of the mediation.⁶

Emotions and mediation: an under-valued dimension of advocacy

15. Much of the focus on advocacy in mediation is on enhancing the technical skills of lawyers and improving their understanding of the differences between mediation and adversarial methods of dispute resolution. In my opinion, more emphasis should be given to what I think is an under-valued dimension of successful advocacy in mediation: emotional intelligence.

16. Emotional intelligence, sometimes known as 'EQ' or 'EI', is undoubtedly important to advocacy in any setting. However, in my opinion, it is more important to advocacy in mediation than in an adversarial context. Emotions are an important and almost ever-present feature of mediation.⁷

17. First off, it is of course crucial that the mediator is finely attuned to the emotional dynamics underlying a dispute. This can be as simple as 'A hates

⁶ See e.g. Olivia Rundle, 'A Spectrum of Contributions that Lawyers can make to Mediation' (2009) 20(4) *Australasian Dispute Resolution Journal* 220.

⁷ James Duffy, 'Empathy, Neutrality and Emotional Intelligence: A Balancing Act for the Emotional Einstein' (2010) *QUT Law & Justice Journal* 44, 57.

B', or much more complex. It has been stated that "that to gain a full understanding of the nature of the conflict ... mediators must attend to the emotional triggers that influenced how the disputants recognized and defined the conflict and which ...[patterns of behaviour] they invoked".⁸

18. However, I think the same can be said about lawyers. Whilst the importance of mediators being attuned to the emotional dynamics in the mediation room is well-recognised, I think it is essential that lawyers involved in mediation also demonstrate emotional intelligence. Emotional intelligence is seen as encompassing four main areas: perceiving, understanding, using and managing emotions.⁹ An emotionally intelligent advocate understands and engages with the emotions underlying the conflict and assists clients to manage their emotional connection.

19. Emotional intelligence is a skill that is neglected in legal education and practice. I think that this is regrettable. One commentator notes that "delving into what lies behind the dispute does not always come easily to lawyers, because they are trained to discard facts not relevant to the determination of legal entitlements and to disregard the parties' feelings and emotions".¹⁰ As lawyers, we like to think that we operate in the realm of rationality, untarnished by emotions. However, in reality, emotions drive many conflicts.

⁸ Tricia Jones and Bodtker, 'Mediating with Heart in Mind: Addressing Emotion in Mediation Practice' (2001) 17 *Negotiation Journal* 217, 223.

⁹ John D Mayer and Peter Salovey, 'What is Emotional Intelligence?' in Peter Salovey and David J Sluyter (eds), *Emotional Development and Emotional Intelligence: Educational Implications* (Basic Books, 1997) 3, 10. See further Michael S King, 'Restorative Justice, Therapeutic Jurisprudence and the Rise of Emotionally Intelligent Justice' (2008) 32 *Melbourne University Law Journal* 1096.

¹⁰ Angyal (n 5) 146.

The work of lawyers is centred around people and their relationships, interests and actions, which are almost always influenced by emotions.

20. It is easy to think that advocacy grounded in emotional intelligence may only be important in community-based mediations, for example those involving individuals and families. However, in my experience, even in large-scale commercial mediations concerning a dispute simply about the amount of money passing from 'company A' to 'company B', it is surprising the extent to which the representatives of the company become emotionally involved. Additionally, it is not only the clients that become emotionally invested in a matter. Many lawyers representing clients in mediation can also easily become emotionally involved in dispute, particularly after spending significant amount of time preparing and considering a matter. , both the clients and the lawyers can become emotionally invested in the process and ultimate outcome of the mediation.

21. To be successful advocates, lawyers must recognise that the other client and their lawyer, and their own client, will almost always have a lot of emotion geared towards the dispute. Emotions are a part of people's psyche. They are inherent in the situations, elements and impacts of the conflicts that lead to mediation.¹¹ When clients and their lawyers sit down at the mediation table, whether they are dragged there or not, they will inevitably come to it with a whole range of emotions.

22. How does emotional intelligence help in advocacy? I think it is important for two reasons. First, it is often crucial to illuminating what truly lies behind the

¹¹ Kathy Douglas and Clare Coburn 'Attitude and Response to Emotion in Dispute Resolution: The Experience of Mediators' (2014) 16 *Flinders Law Journal* 111, 116.

dispute. An emotionally intelligent advocate may dig deeper below the superficial causes for a dispute and uncover other causes grounded in deep-seated emotions. Unaddressed emotional needs can be a significant barrier to consensus. When people are “freed from the burden of unexpressed emotions ... [they] will become more likely to work on the problem”.¹²

23. Secondly, for lawyers involved in mediation, managing emotions during the mediation is crucial to reaching a consensus. An emotionally intelligent lawyer will be able to recognise the emotions surfacing during a mediation and encourage clients to move beyond these emotions and look at the conflict and possible solutions rationally. This is a subtle skill that can be a powerful and crucial influence in facilitating agreement. Furthermore, an emotionally intelligent advocate will ensure that they do not unwittingly intensify the emotions underlying the conflict or present at the mediation table. It is for these two reasons that I think that emotional intelligence is an essential, yet under-valued, component of successful advocacy in mediation.

Mediator managing lawyers

24. I will finally conclude with a few of my thoughts on the mediator managing lawyers.

25. Firstly, I think it is essential that the mediator makes it clear to lawyers that they are not the process; they are there to *assist* in the process. Many have raised concerns about lawyers trying to “take control” of mediation or hijack

¹² M Barsky, ‘Emotional Needs and Dysfunctional Communication as Blocks to Mediation’ (1983) 1(2) *Mediation Quarterly* 55, 57 citing in part R Fisher and W Ury (eds), *Getting to Yes: Negotiating Agreement Without Giving In* (Penguin Books, 2nd ed, 1991) 31-2.

the process altogether.¹³ For example, some argue that the presence of lawyers in a mediation can ‘silence’ the parties,¹⁴ whilst others note that lawyers, in particular barristers, can “find it difficult to let go of the leadership role” they typically hold in the courtroom and forget that “[t]hey are not the central figure at mediation as they are in court” and that “[t]he hard work is not done by them – it is done by the client”.¹⁵

26. In my opinion, lawyers that obstruct, rather than assist the mediation process are likely to do this from a lack of training and understanding about mediation, rather than a desire to deliberately hijack the mediation. This highlights the need for lawyers to have a clear understanding of mediation, how it differs from adversarial methods of dispute resolution and, most importantly, how they can assist rather than obstruct the process.

27. It is up to the mediator to ensure that the lawyer has a clear understanding of his or her role in the particular mediation. It is useful for the mediator to set clear expectations at the outset as to what is expected of the lawyer in the particular mediation process.¹⁶ Additionally, if the mediator feels that the lawyer has lost sight of their role during the course of the mediation, the mediator should remind lawyers that they are there to assist the parties reach consensus. This may be useful where the mediator feels that the lawyer is

¹³ See generally Brian Clark, *Lawyers and Mediation* (Springer, 2012); Micheline Dewdney, ‘Party, Mediator and Lawyer Driven Problems and Ways of Avoiding Them (2006) 17(4) *Australasian Dispute Resolution Journal* 200; Max Kimber, ‘Have lawyers hijacked the promise of mediation?’ (Speech, Australian Disputes Centre, 18 May 2017) at 79..

¹⁴ Tania Sourdin, *Alternative Dispute Resolution* (Thomson Reuters, 4th ed, 2012) 94.

¹⁵ Stephen Walker, *Mediation Advocacy: Representing and Advising Clients in Mediation* (Bloomsbury Professional, 2nd ed, 2018) 25.

¹⁶ Olivia Rundle, ‘Lawyer’s participation in mediation and professional ethical disposition’ (2015) 18(1) *Legal Ethics* 46, 49.

speaking down to the parties or the mediator or speaking in a way that may convince a jury but is unlikely to promote agreement.

28. Secondly, the mediator should keep control of lawyers in the room. This can take a variety of forms. It is perfectly acceptable for the mediator to interrupt lawyers to ensure that the mediation continues to evolve and does not stagnate for example by advising that the position papers have already been read. The mediator may also wish to speak to clients directly.
29. Having said that, I think it's important for the emotionally intelligent mediator to bear in mind that the lawyers probably have some emotional intelligence too. Most of us do, and if you put them down too much it's likely to be conveyed back to them by the client. It is just as bad for a lawyer to say to their client that 'this mediator is against us' as it is for a barrister to say to a client in the courtroom, 'the judge is against us'. It does not help, and it does not promote consensus. That's why I think whether one looks at it from the side of the lawyers or the side of the mediator, it is very important for them all to recognise that the crucial thing is that their object is to work together to achieve a consensus and not against each other.

Conclusion

30. I would like to conclude by once again congratulating the Australian Disputes Centre on the 35th anniversary of its mediation training program. This is a significant occasion for the Centre and the mediation community in Australia. I look forward to the ongoing success of the Centre and many more

anniversaries to come. I trust that all participants will find the remainder of the program informative and insightful.