

# Lawyers' Participation in Mediation: Facilitation Tool or Obstacle to Conflict Resolution?

Sabrine Malki-Butcher<sup>1</sup>

---

## Abstract

*This article undertakes a critical analysis of lawyers' participation in the mediation process to determine its impact on the performance of the mediators' mission. It postulates that lawyers can be an obstacle to mediation due to negative behaviour patterns and a winning mindset they have acquired in their practice. On the other hand, it argues that lawyers can contribute to the success of a mediation through the empowerment of their clients but also through their cooperative attitude towards the mediator. The article concludes that mediation remains a real challenge for lawyers as this process reveals the mutation that the legal profession is undergoing nowadays.*

‘Look, we're big people and we can settle the darn thing, what do we need a third party for and why do our clients have to be there?’<sup>2</sup> said a lawyer to a proposal to settle the dispute between his or her client and another party through mediation.

This consideration summarises the state of mind of a number of lawyers who, even today, still do not understand the mediation process and therefore reject it. Undoubtedly, this rejection is the result of a certain tension between the practice of judicial dispute resolution and the philosophy on which mediation is based. Indeed, lawyers are facing an opposition between judicial resolution, which is part of a 'truth-finding' process, and mediation, which is oriented towards a 'problem-solving' process.

In such situations, lawyers may fall back on practices acquired through their experiences and training in the legal sphere, often to the great despair of mediators. Indeed, lawyers confronted with mediation are thrown into a new environment with different behavioural norms and desired outcomes.

---

<sup>1</sup> Sabine Malki-Butcher is a conciliator at the Energy and Water Ombudsman of Victoria ('EWOV') and holds a Masters degree of Commercial Law from the University of Melbourne. She was awarded the Franck Pinkerton Scholarship for Global Commercial Contract Law in 2019. She is also a French lawyer admitted to the Paris Bar specialising in commercial litigation.

<sup>2</sup> Julie MacFarlane, *The new lawyer: how settlement is transforming the practice of law* (Vancouver UBC Press, 2008) ch 3.

However, mediation is increasingly a solution presented by the courts themselves. As a result, lawyers are frequently called upon to participate in mediation. In response to this phenomenon, the lawyer must learn to adapt and embrace a role that promotes the success of mediation, a role that can vary from a simple silent presence to an active participation.

The purpose of my analysis is not to give a general overview of the lawyer's role and responsibilities in the mediation process, this topic being already largely covered by many professional Standards and Guidelines.<sup>3</sup> Noting the opposition between the lawyer's traditional function and his or her adaptation to more 'modern' dispute resolution techniques, this analysis tends to assess the lawyer's impact during mediation in order to determine to what extent the performance of the mediator's mission may be facilitated or on the contrary, is made more challenging.

To what extent is it easier, or alternatively, more difficult for the mediator to resolve a conflict when the parties are legally represented? Are lawyers inimical to the process or can they become partners in the process?

In the first part, I will analyse the factors that make the participation of a lawyer more difficult for the mediator to manage. To this end, I will study the practices resulting from the judicial resolution of conflicts that lawyers are used to perform and that they tend to transpose to the mediation framework. I will then examine the role of the lawyer's personality traits that have been shaped by the practice of their profession over the years and that can be detrimental to mediation. In the second part, I will analyse the factors that make lawyers contribute to the success of a mediation through their intervention for their clients, but also through their cooperative attitude towards the mediator.

## **The Lawyer as an Obstacle to Mediation**

Lawyers can be an obstacle to mediation because of the 'bad' habits and winning mindset they have acquired while practicing.

## **On the Professional Practice of the Lawyer**

### **The Adversarial System Opposed to Mediation**

Undoubtedly, one of the main characteristics of the judicial system lies in its adversarial system in which the lawyer must 'direct the proceedings, control the evidence and questions to witnesses, to

---

<sup>3</sup> See for example the Law Society of New South Wales' Professional Standards for Legal Representatives in a Mediation, the Law Council's Guidelines for Lawyers in Mediation; NSW Law Society's Mediation and Evaluation Kit.

paint a 'black and white picture' for the judge/umpire to decide which party wins and which party loses'.<sup>4</sup>

It is this system, which focuses on the interests of one party<sup>5</sup>, that dominates the resolution of disputes and has left its mark on the practice of the legal profession. Thus, lawyers have learned to master the adversarial system and often don't feel the need to challenge it. However, there is clearly an opposition between the adversarial system that guides the lawyer's professional practice and the non-adversarial system that characterises the practice of mediation.

Indeed, mediation is a non-adversarial procedure because its purpose is to find a solution that will be accepted by the parties rather than to encourage the victory of one party at the expense of another. In addition, the dispute is resolved by the parties themselves and not by a neutral third party.<sup>6</sup> The mediator is not a judge to be convinced, but a person who is there to help the parties communicate in order to find a solution to their dispute.<sup>7</sup> Moreover, adjudication and mediation are part of different social ideals, with mediation appearing to be beneficial to society as a whole, while the values of adjudication are only based on the individual benefit.<sup>8</sup>

It can even be argued that lawyers really experience a 'systems shock' because their professional practice is marked by the adversarial system and it is then very difficult for them to detach themselves from it, to the detriment of the effectiveness of mediation. This difficulty for the lawyer to get out of this adversarial scheme is even more pronounced when it comes to a 'court-annexed mediation' because lawyers then tend to consider mediation as a simple step in the trial.<sup>9</sup> Worse, mediation may be considered by the lawyer as a 'gigantic, penalty free, discovery process', or even a tactic to save time during the trial.<sup>10</sup>

By taking an adversarial view of mediation, the lawyer clearly creates an obstacle to the success of mediation. Indeed, the 'Zealous adversarial Advocate'<sup>11</sup> will only focus on promoting his or her client's interests to the detriment of the interests of the other party.

---

4 Anne Bihancov, 'Legal representation in mediation: Effective or counter-productive? Practical tips and tricks from mediators to legal representatives' (2017) 36(1) *the arbitrator & mediator* 16–17.

5 Chiara-Marisa Caputo, 'Lawyers' participation in mediation' (2007) 18(2) *Australasian Dispute Resolution Journal* 84–85.

6 Jean R. Sternlight, 'Lawyers' Representation of Clients in Mediation: Using Economics and Psychology to Structure Advocacy in a Non adversarial Setting' (1999) 14(2) *Ohio State Journal On Dispute Resolution* 269–279.

<sup>7</sup> Bihancov (above n 4).

<sup>8</sup> Caputo (above n 5).

<sup>9</sup> Ibid 87.

<sup>10</sup> Ibid 84, 88.

<sup>11</sup> Donna Cooper, 'Lawyers behaving badly in mediations: lessons for legal educators' 25(4) *Australasian Dispute Resolution Journal* 204, 207.

Finally, since the mediator acts in one way and the lawyer in another, the parties may find themselves confused and mediation may then appear to the parties as an unnecessary process that they cannot be satisfied with.<sup>12</sup>

## **The Difficulty in Moving Away from a Legal Argument**

Case after case, the lawyer is often governed by the concern to build a legal framework around a specific situation. Indeed, it can be very difficult, if not counter-natural for a lawyer not to resolve a conflict strictly on the basis of legal arguments<sup>13</sup>.

The superiority of rights-based conflict resolution is taught in law school and is reinforced in practice by the judicial community<sup>14</sup>. Therefore, the lawyer tends to think that this reasoning is the only effective way to resolve a conflict and will reject any other form of reasoning.<sup>15</sup> According to this model, the source of the conflict is 'objective' and cannot be compromised.<sup>16</sup>

It is true that in my own professional practice, I have often asked myself why I should deviate from this legal reasoning when this is what I have been trained to do and what my client expects from me. My client is waiting for me to tell them that they are right and not that we can find a solution that can accommodate everyone.

Thus, the lawyers' attachment to the search for a solution to a conflict through the presentation of legal arguments is incompatible with the philosophy of mediation, which requires the parties to show flexibility, imagination and thinking outside the box in order to find a solution.<sup>17</sup> Focusing on a rights-based analysis means assuming that the essential moral principle on which all conflicts are based is understood in terms of true or false rather than feasible or wise.<sup>18</sup>

By remaining focused on the legal arguments, the lawyer only makes the dispute even more complex for the parties. In addition, the discussion will focus on arguments that are necessarily part of the disagreement. This kind of reasoning prevents the scope of solutions from being broadened

---

<sup>12</sup> Jean Poitras, Arnaud Stimec and Jean-François Roberge, 'The negative impact of attorneys on mediation outcomes: a myth or a reality?' (2010) 26(1) *Negotiation Journal* 9, 12.

<sup>13</sup> Bihancov (above n 7).

<sup>14</sup> MacFarlane (above n 2).

<sup>15</sup> Ibid.

<sup>16</sup> Ibid.

<sup>17</sup> Ibid.

<sup>18</sup> Ibid.

by excluding any solutions related to psychological and emotional needs such as apology and acknowledgments.

## **Inadequate Training of Lawyers**

Mediation is far from the adversarial model, which is the almost exclusive model taught in law schools. Indeed, most legal trainings have remained entrenched in an outdated model that no longer corresponds to what society expects from a lawyer nowadays. A lawyer is expected to have different roles such as that of:

collaborators (a multidisciplinary approach); evaluators (evaluating the effectiveness of legal services and being willing to develop more user-friendly services, self-help assistance); and as strategic facilitators (facilitating opportunities for non-lawyer community stakeholders to be heard and negotiating solutions to issues).<sup>19</sup>

This gap in the training of lawyers has the effect of extending the mediation time for the mediator.<sup>20</sup> This creates an additional problem for the mediator, who must therefore educate the parties and their legal representatives during the mediation on their respective roles and what is expected of them. For example, if a lawyer does not know his or her role during mediation, he or she may indirectly force the mediator to act on behalf of the client in order to restore the balance of power.<sup>21</sup>

## **A Fundamental Lack of Understanding of Mediation**

The lawyer who does not understand the dynamics and more generally, the philosophy of the mediation process will contribute to its failure.<sup>22</sup> It is widely known that not all lawyers have yet assimilated the philosophy of mediation and the principles that follow.

Indeed, in a mediation, the mediator will always take the time during introductory remarks to introduce themselves and explain the course of the mediation procedure, the different stages, as well as the role of the different parties. However, it is not unusual for the lawyer to interrupt the mediator in the performance of their duties during this phase in order to present a draft agreement as a basis for the negotiations.<sup>23</sup> In my opinion, this behaviour is the consequence of lawyers not understanding the

---

<sup>19</sup> Lillian Corbin, Paula Baron and Judy Gutman, 'ADR zealots, adjudicative romantics and everything in between: lawyers in mediations' (2015) 38(2) *University of New South Wales Law Journal* 492, 501.

<sup>20</sup> Poitras, Stimec and Roberge (above n 12) 9, 11.

<sup>21</sup> Cooper (above n 11) 204, 209.

<sup>22</sup> Ibid 204.

<sup>23</sup> Cooper (above n 21) 206.

grounds justifying the respect of a particular mediation procedure, which consequently does not allow the mediator to do his or her work.

One of the practices that prevents the mediator from doing his or her work is also when the lawyer asks that the parties be separated in different rooms for fear that the discussions will be virulent and not constructive. This shows that the lawyer does not understand the benefits of the direct interaction between the parties.<sup>24</sup>

An example from Western Australia that illustrates this behaviour is the observation by local court staff that more than 75% of mediations take place in the presence of lawyers only, with parties not having to attend.<sup>25</sup> As for those who had the chance to attend, more than half complained that their lawyer had taken control of the mediation for them.<sup>26</sup> However, to do so is to neglect the participation of a party which is one of the pillars of mediation. It is the source of the parties' empowerment and gives strength to the future agreement. Thus, it can be seen that some lawyers do not understand the philosophy of mediation and its guiding principles, which can be an obstacle to its success.

The practice of the legal profession thus demonstrates that there is a real misunderstanding of the guiding principles of mediation by legal representatives. This misunderstanding being most often associated with a philosophy and personality which naturally rejects mediation as an effective means of resolving a dispute.

## **On the Lawyer's Personality**

### **Values Different from Mediation**

The lawyer's personality generally reveals values that are quite different from the qualities normally required in mediation. Certainly, there are many codes of conduct for lawyers to guide them in their relationships with other lawyers, courts, and their clients. These codes are intended to be valuable guides for lawyers to ensure that they behave appropriately in all circumstances. However, a distinction must be made between the conduct that a lawyer must engage in under these rules and the conduct that the lawyer actually engages in.<sup>27</sup>

Indeed, like any other individual, a lawyer's personal values are shaped by his or her education and

---

<sup>24</sup> Ibid.

<sup>25</sup> Jill Howieson, 'Procedural Justice in Civil Court Mediation: Exploring the Instrumental and Non-instrumental Processes' (2002) 9 (2) *Murdoch University Electronic Journal of Law*, 128.

<sup>26</sup> Ibid 87.

<sup>27</sup> MacFarlane (above n 2) ch 2.

personal experiences. However, studies have shown that law school reveals societal stereotypes attached to the lawyer's image by emphasising the knowledge of substantive law and procedure or mooted skills to the detriment of professional ethical awareness and sensitivity.<sup>28</sup> Having spent nearly nine years studying in various law schools, I can observe that law school aims to develop in its students a spirit of competitiveness, combativeness, extreme rigor and a strategic spirit. Qualities such as the ability to listen, and empathy are qualities that legal education does not seek to develop, even though they appear to be essential in the mediation process.

In addition to legal education, it is undeniable that our personal experiences, those faced when dealing with clients, colleagues, and family, shape our values and principles. However, in light of the experience I have had in various law firms, I realise that the values taught in law schools persist and are even exacerbated in professional practice.

### **An Image to Be Preserved for The Client**

Lawyers are victims of a populist societal stereotype that expects them to be 'argumentative, pedantic and unyielding'.<sup>29</sup> Lawyers may then feel pressure to fit this stereotype, generally thinking that this is what their clients expect from them, even during mediation. This behaviour can easily make the mediation process more complicated.

Indeed, lawyers who do not want to lose face in front of their clients will be a bad negotiator, inflexible on certain points that they will consider important for their clients and will underestimate the underlying interests at stake in the mediation process.<sup>30</sup>

Moreover, since the lawyer/client relationship is based on a financial relationship, it is possible that lawyers may want their clients to ascertain at all costs the effectiveness of their presence in order to give the impression of a service provided.

Unfortunately, this consideration can guide behaviour in mediation. A 'rivalry' between the mediator and the lawyer may then arise, the latter wanting to prove that he or she played the main role in settling the dispute.<sup>31</sup> The mediator's role could then be diminished in the eyes of the parties.

---

<sup>28</sup> Ibid.

<sup>29</sup> MacFarlane (above n 2).

<sup>30</sup> Cooper (above n 11) 204, 209.

<sup>31</sup> Poitras, Stimec and Roberge (above n 12).

## **A Personality That Dominates the Client**

For most lawyers, representing their clients means speaking in their place, even if it may require them to completely dominate the conversation during mediation. Indeed, a study conducted by Olivia Rundle involved 42 lawyers who practised in the mediation program attached to the Supreme Court of Tasmania showed that most lawyers consider advocacy as a fundamental part of their work and think that clients pay them to speak for them.<sup>32</sup>

This phenomenon has been described by Dewdney as 'the legal take-over', the lawyer who does not consult his or her client and occupies the discussion alone, without instructions from his or her client.<sup>33</sup> One of the concrete examples can be the case of a lawyer making the opening statement instead of allowing his or her client to perform this function.<sup>34</sup> He or she will then force the mediator to intervene in order to clarify the roles of everyone.

In that case, there is a risk for the lawyer to overshadow his or her client, whose voice will only be heard in accordance with the lawyer's strategy. This is especially true for a 'naïve' client for whom it is the first case. The lawyer can then give his or her client the image of an expert who will fix the problem using the law.<sup>35</sup>

However, a lawyer who dominates mediation to the detriment of the direct participation of the client will neglect the real interests and needs of the client.<sup>36</sup> This practice clearly goes against the principle of empowerment and self-determination of the parties, values that are essential to the success of mediation.<sup>37</sup>

## **An Offensive Character in the Pursuit of Victory**

As we have seen previously, in professional practice, the lawyer is attached to the adversarial system. This logic is contrary to the one developed by mediation, which consists in identifying the interests of both parties in order to find an optimal solution for all.<sup>38</sup> However, by joining this system, the lawyer adopts a binary vision of the dispute resolution, a win-lose logic that has developed an attraction for victory.

In this sense, Daicoff finds that:

---

<sup>32</sup> Corbin, Baron and Gutman (above n 19) 492, 507.

<sup>33</sup> Cooper (above n 30).

<sup>34</sup> Ibid 210.

<sup>35</sup> MacFarlane (above n 2).

<sup>36</sup> Sternlight (above n 6) 269, 274.

<sup>37</sup> Caputo (above n 5).

<sup>38</sup> Ibid.



[l]awyers appear to be more competitive, aggressive, and achievement-oriented, and overwhelmingly Thinkers (instead of Feelers), as compared to the general population'. Lawyers are therefore 'Thinkers' in reference to the Myers-Briggs Type Indicator ('MBIT') which makes the difference between 'thinking' ([p]ersons who prefer thinking decide impersonally on the basis of logical consequences) and 'feeling' ('Individuals who prefer feeling rely on judgments that are based on personal and social values').<sup>39</sup>

I think this problem is the result of the lawyer's perception of a successful mediation. For the lawyer, the success of mediation is linked to the content of the agreement, which must be more favourable for his or her client than for the other party, while for the parties, success is linked to the feeling of satisfaction they may feel.<sup>40</sup> Theorists have argued that because of this mentality, the presence of a lawyer at a mediation is likely to reduce settlement rates.<sup>41</sup>

## **The Lawyer, a Facilitator Tool for the Success of the Mediation Process**

Lawyers may contribute to the success of a mediation through their intervention for their clients, but also through their cooperative attitude towards the mediator.

## **A Client Empowered and Protected**

### **An Advised Client**

Mediation is very often something new for the parties. It may then be difficult for a party to calmly initiate mediation alone, as they may be afraid to proceed blindly without knowing where to go or how to behave. This is where the lawyer's advisory role can be valuable for a successful mediation. Indeed, lawyers can give valuable advice to their clients, whether in the pre-mediation phase or during the mediation.

Thus, before mediation, they can explain the mediation process and the mediator's role, advise on the financial costs, strategic risks and legal implications of undertaking mediation.<sup>42</sup> They can thus inform their clients of the procedure so that he or she can prepare for the opportunity to address the mediator in private.<sup>43</sup> Lawyers can also assist at preliminary conferences in drafting position papers requested by mediators and in preparing clients to participate personally in mediation.<sup>44</sup> They can also assist clients

---

<sup>39</sup> Corbin, Baron and Gutman (above n 19) 492, 507.

<sup>40</sup> Olivia Rundle, 'Are we here to resolve our problem or just to reach a financial settlement?' (2017) 141 *Precedent* 12, 14.

<sup>41</sup> Poitras, Stimec and Roberge (above n 12) 11.

<sup>42</sup> Laurence Boule, *Mediation: Principle, Process, Practice*, (LexisNexis Butterworths Australia, 3<sup>rd</sup> ed, 2011) ch 8.

<sup>43</sup> Michael Lang, From Advocate to Advisor: The Role of The Lawyer in Mediation, October 2010, <https://www.mediate.com/articles/langlawyerrole.cfm>, last accessed 10 August 2020.

<sup>44</sup> Boule (above n 42).

identify needs, interests and priorities, discuss ways of achieving them and consider likely interests and tactics of the other side and how to accommodate them.<sup>45</sup>

Lawyers can also advise and assist their clients during mediation. A lawyer can provide clear and concise information. For example, lawyers may help to summarise the other party's arguments to their clients to show that they listened to the other party and to ensure that their clients have understood.<sup>46</sup> The presence of lawyers also allows the parties to make a considered and reasoned decision thanks to the advice provided by them.<sup>47</sup> The parties can then be satisfied and feel that the most satisfactory solution has been found.

Thanks to the presence of lawyers, it is easier for the parties to have a concrete vision of the solutions they propose and their advantages compared to a procedure before the court.<sup>48</sup> In the context of a complex case, it can be very useful for the parties (and the mediator) to have direct access to their legal counsel in order to move the discussion forward, not to remain blocked because of questions.<sup>49</sup>

Finally, the presence of lawyers allows the mediator to conduct the mediation process without being tempted to advise the parties.<sup>50</sup> Therefore, lawyers help the mediator to remain neutral.

## **A Client Encouraged to Express Themselves**

Lawyers can be a communication tool for a successful exchange between the parties. Indeed, lawyers are there to ensure that their clients express themselves correctly and that everyone understands them.<sup>51</sup> In this way, lawyers help to clarify their clients' point of view and avoid any confusion that I believe is a major source of conflict. They can also have a positive attitude towards their clients and encourage them to discuss and participate.<sup>52</sup> It is even encouraged to prepare the client to speak so that they feel heard and will help to find a solution.<sup>53</sup>

Furthermore, the presence of the lawyer reduces the risk that a party will feel powerless or dominated and will not dare to express his or her point of view.<sup>54</sup> For example, it has been said that due to the

---

<sup>45</sup> Ibid.

<sup>46</sup> Bihancov (above n 4) 16, 21.

<sup>47</sup> Corbin, Baron and Gutman (above n 19) 492, 499.

<sup>48</sup> Caputo (above n 5) 84, 90.

<sup>49</sup> Jo Edwards, Amanda Sandys and Jamie Gaw, 'Working with solicitors in mediation: a mediator's perspective' (2018) 48 *Family Law* 92, 94.

<sup>50</sup> 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, 777.

<sup>51</sup> Caputo (above n 5).

<sup>52</sup> Ibid.

<sup>53</sup> Anne (above n 4) 16, 20.

<sup>54</sup> Caputo above (above n 5) 84, 89.

increasing use of mandatory mediation in cases that sometimes should not be found in mediation, the imbalance between the parties is becoming more and more apparent and the lawyer makes it possible to provide this necessary balance in mediation. This is true in family cases where domestic violence has not been detected. The mediator will then find themselves in a delicate situation because intervening on behalf of a party could jeopardise their neutrality. The lawyer is then of great help to the weak party who would otherwise have difficulty making his or her voice heard.<sup>55</sup>

## Assistance in Decision-Making

Lawyers can be very supportive during the decision-making process.<sup>56</sup> Indeed, making a decision alone is never easy and when a client feels supported, they will have more courage to move forward. So, the lawyer can be a decisive tool to help a party reach a decision.

Indeed, in the period of pre-mediation, the lawyer can prepare their client for mediation, put them in a collaborative state of mind in order to find solutions. For this, the lawyer can prepare the client and psychologically condition them to overcome deadlocks and change their point of view.<sup>57</sup>

With a lawyer at their side, the client feels reassured and does not move forward blindly. They have more confidence in making proposals knowing that they will be able to discuss the risks and benefits of the proposition in private with their lawyer.<sup>58</sup> In fact, some mediators have expressed a positive opinion that a lawyer should be present during mediation to help the parties be more realistic in their negotiations.<sup>59</sup> In addition, the lawyer can also serve as an example to their client by being cooperative and supportive in the search for a solution, thus facilitating the success of a mediation.<sup>60</sup>

## A Protection of Vulnerable Parties

The presence of the lawyer at a mediation allows the respect of the principle of fairness, especially in cases where one party to the mediation is more vulnerable than the other.

Indeed, in my experience, it is rare for two parties to a conflict to find themselves in the same position of strength. In such cases, vulnerable parties may expect the lawyer to protect their fundamental rights. I am thinking in particular of racial, gender or socio-economic differences that should not disadvantage

---

<sup>55</sup> Ibid 89-90.

<sup>56</sup> Michael Lang, *From Advocate to Advisor: The Role of The Lawyer in Mediation*, (October 2010) Mediate <<https://www.mediate.com/articles/langlawyerrole.cfm>> last accessed 10 August 2020.

<sup>57</sup> Elayne E Greenberg, 'Starting Here, Starting Now: Using the Lawyer as Impasse-Breaker During the Pre-Mediation Phase' Research Paper No. 1916919, St. John's Legal Studies, 1 July 2011) 10.

<sup>58</sup> Lang (above n 56)

<sup>59</sup> Boulle (above n 42).

<sup>60</sup> Lang (above n 56).

a party to a conflict. In this way, the lawyer can help to ensure that the universal principles of equality, non-discrimination and fairness are respected.<sup>61</sup>

In addition, the lawyer may protect their client who may feel compelled to give in to pressure or intimidation to accept an agreement that they would find unfair, something that the mediator can hardly detect. The Victorian Civil and Administrative Tribunal ('VCAT') mediators actually reported that it was easier for them 'to carry out their mediation mission if the parties had the help and protection of partisan advisers – the lawyers'.<sup>62</sup>

## **A Cooperative Attitude Towards the Mediator**

### **A Transparent Information Exchange**

Lawyers are usually the first point of contact to which a party turn in order to end a dispute. Therefore, lawyers have a deep knowledge of the case and know their clients. They can be very useful to the work of the mediator in that they can share information that will help them in their work. For example, lawyers of both parties may work together to produce the joint mission statement for the mediator in order to highlight the main issues in the dispute and facilitate the mediator's work.<sup>63</sup>

On the other hand, the mediator has the possibility to ask the lawyers for a kind of memo stating the strengths and weaknesses of their clients, the worst-case and the best-case outcome, should it proceed to trial, the cost of the dispute in case of failure of the mediation, as well as a list of the main issues in the dispute.<sup>64</sup>

Lawyers can also help the mediator to find their way through the documentation by systematising the documents needed for the mediation.<sup>65</sup> This will help the mediator to identify the paperwork in order to save time and making it to understand the ins and outs of the case.

### **A Constructive Attitude During Mediation**

If lawyers adopt a constructive attitude during the mediation, they can help the mediator to carry out their mission and thus obtain a solution to the dispute. Indeed, research conducted in 2008 by Helen Rhoades et al has shown that lawyers can be collaborative, particularly when they share complementary

---

<sup>61</sup> MacFarlane (above n 2) ch 7.

<sup>62</sup> Douglas and Batagol (above n 50) 758, 783. <sup>63</sup> Edwards, Sandys and Gaw (above n 49). <sup>64</sup> Boule (above n 42) ch 10.

<sup>65</sup> Ibid.

skills, expertise and show respect for the work of all the people involved.<sup>66</sup> According to one study, it is when lawyers act as an expert contributor (ie participates in mediation by sharing their expertise) that they are most appreciated by VCAT mediators.<sup>67</sup>

A constructive attitude from the lawyer could be exemplified by a lawyer who discusses with the mediator and the parties to move the discussion forward, whether it is on a legal or non-legal topic.<sup>68</sup> The lawyer can then provide expertise and add a certain value to the discussion.<sup>69</sup>

The lawyer's constructive attitude towards the mediator can also be illustrated by a lawyer who guides a client through the discussion so that they quickly get to the essential elements of resolving the dispute.<sup>70</sup> Indeed, a lawyer can more easily understand time management during mediation, while a party will be more inclined to detach him or herself from the time that passes to be heard, even if it means focusing on details that are insignificant for the progress of the mediation. The time of mediation has an impact on the productivity of a discussion, which is one of the reasons why the mediator sets an agenda. The lawyer will therefore be able to help the mediator to respect their agenda.

## **Help in Making the Agreement a Reality**

The presence of lawyers during mediation makes it easier to reach an agreement between the parties. Indeed, the mediator can count on the collaboration of lawyers to immediately draft the consent order.<sup>71</sup> They can also help to draft the settlement agreement.<sup>72</sup>

The fact that lawyers are present also prevents the parties from having to validate the agreement after mediation, during which time a party may change its mind and no longer agree.<sup>73</sup>

In addition, during discussions, the lawyer will be able to clearly explain what will happen in court if an agreement is not reached at the end of the mediation.<sup>74</sup> I believe that this presentation can have a very significant deterrent effect and make the parties realise that it is in their interest to use mediation to find a solution to the dispute.

---

<sup>66</sup> Douglas and Batagol (above n 50) 758, 767.

<sup>67</sup> Ibid 778.

<sup>68</sup> Bihancov (above n 4) 16, 20.

<sup>69</sup> Douglas and Batagol (above n 50) 758, 781.

<sup>70</sup> Bihancov (above n 4) 16, 24.

<sup>71</sup> Edwards, Sandys and Gaw (above n 49).

<sup>72</sup> Boulle (above n 42) ch 8.

<sup>73</sup> Corbin, Baron and Gutman (above n 47).

<sup>74</sup> Boulle (above n 42).

Finally, by sharing their experience, lawyers will also be able to ensure that the agreement is 'workable, comprehensive and enforceable'.<sup>75</sup>

### **Assisting in the Identification of Risks in Order to Anticipate Potential Obstacles**

The lawyer can help the mediator to identify the parameters of the conflict that may constitute obstacles during the mediation.<sup>76</sup> This involves the lawyer working with the mediator to help identify and analyse dead ends in order to overcome them. The lawyer can help the mediator determine whether the conflict is at an impasse because of the values, relationships, data, interests, or structure of the conflict.<sup>77</sup>

Practically speaking, lawyers can help the mediator to overcome any possible deadlocks that may arise during the mediation by informing him or her via the briefing paper of their analysis of the conflict and the strategies they intend to adopt in order to overcome them.<sup>78</sup>

In this respect, I think that the support the lawyer provides to the mediator greatly facilitates the amicable resolution of the dispute. Indeed, the lawyer as a professional experienced in the practice of conflict resolution through the courts can provide the mediator with an analytical capacity and expertise to fight, with the mediator, against the obstacles to the success of mediation.

### **Conclusion**

Undeniably, lawyers can be a real ally for the mediator. Thanks to the trusting relationship they can maintain with their clients, and by adopting an attitude that encourages inter-professional collaboration with the mediator, lawyers can be a real asset for the success of a mediation. However, mediation remains a real challenge for lawyers. It requires lawyers to adopt a new perception of their profession, to know how to move away from certain systems and values traditionally taught and practised that can constitute obstacles to the success of a mediation.

On the whole, mediation reveals the mutation that the legal profession is undergoing nowadays, which must open its eyes to the importance of soft skills in the resolution of disputes.

---

<sup>75</sup> Samantha Hardy and Olivia Rundle, *Mediation for Lawyers*, (CCH, 2010), Ch 8.

<sup>76</sup> Greenberg (above n 58) 3.

<sup>77</sup> Ibid.

<sup>78</sup> Ibid.