

ON MEDIATION, LEGAL REPRESENTATIVES AND ADVOCATES

BOBETTE WOLSKI*

I INTRODUCTION

Mediation has become an integral part of the civil justice system in Australia.¹ As a consequence, lawyers are frequently called upon to represent their clients in mediation.² Mediation may come about: by private arrangement between the parties; as a result of legislative directive; or as a consequence of

* Associate Professor of Law, Bond University.

The author would like to thank the anonymous referees for helpful feedback on earlier drafts, and *University of New South Wales Law Journal* editorial team.

1 Most courts and tribunals in Australia either encourage or compel the parties to proceedings to attend mediation, sometimes as a prerequisite to commencing litigation. Mediation is also used extensively in many quasi-government institutions in Australia. See Samantha Hardy and Olivia Rundle, *Mediation for Lawyers* (CCH, 2010) 262–75 (the authors list 109 mediation schemes operating in Australia). Similar developments have occurred in other common law jurisdictions, and indeed, in civil law countries. This article draws on case law and literature from a number of jurisdictions for there is a dearth of literature from any one jurisdiction dealing with ‘ADR Ethics’ – a term which has been used to describe a new field of expertise which combines ethics, legal ethics and dispute resolution: see, eg, Phyllis Bernard and Bryant Garth (eds), *Dispute Resolution Ethics: A Comprehensive Guide* (American Bar Association, 2002); Scott R Peppet, ‘ADR Ethics’ (2004) 54 *Journal of Legal Education* 72. For discussion of the position in the United States (‘US’), see Wayne D Brazil, ‘Court ADR 25 Years after Pound: Have We Found a Better Way?’ (2002) 18 *Ohio State Journal on Dispute Resolution* 93, 112; Nancy A Welsh, ‘Stepping Back through the Looking Glass: Real Conversations with Real Disputants about Institutionalized Mediation and Its Value’ (2004) 19 *Ohio State Journal on Dispute Resolution* 573. Welsh observes that mediation ‘is now an integral part of the civil litigation system, used to resolve personal injury, contract, employment, divorce, child custody, and many other civil matters’: at 583. For discussion of the position in Canada, see Deborah Lynn Zutter, ‘Incorporating ADR in Canadian Civil Litigation’ (2001) 13 *Bond Law Review* 445; Julie Macfarlane, ‘Experience of Collaborative Law: Preliminary Results from the Collaborative Lawyering Research Project’ [2004] *Journal of Dispute Resolution* 179. For discussion of the position in the United Kingdom (‘UK’), see Miryana Nestic, ‘Mediation – On the Rise in the United Kingdom?’ (2001) 13 *Bond Law Review* 427. As for developments in countries with a civil law tradition, see Nadja Alexander, *International and Comparative Mediation: Legal Perspectives* (Wolters Kluwer, 2009); Nadja Alexander, ‘What’s Law Got to Do with It? Mapping Modern Mediation Movements in Civil and Common Law Jurisdictions’ (2001) 13 *Bond Law Review* 335.

2 Although lawyers are excluded from the process in some programs, mediation representation has become a significant aspect of legal practice.

court or tribunal initiative.³ Regardless of how it eventuates, lawyers are governed in mediation by ‘the law of lawyering’, a body of law that includes the rules of conduct issued by the professional associations to which lawyers belong. These associations have not promulgated additional or supplementary rules of conduct for mediation practice, leaving legal representatives to be governed by the profession’s generic rules of conduct.⁴ Some law reform agencies⁵ and commentators⁶ have argued that mediation requires its own rules but discussion on the issue has stalled.⁷ A few professional associations in Australia have released non-binding standards and guidelines for legal representatives in mediation.⁸ Although these statements are non-binding, they still have

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- 3 For an account of the legislative position in each Australian jurisdiction, see David Spencer and Michael Brogan, *Mediation Law and Practice* (Cambridge University Press, 2006) 272–304; David Spencer and Samantha Hardy, *Dispute Resolution in Australia: Cases, Commentary and Materials* (Lawbook, 3rd ed, 2014) 707–10.
 - 4 Australia is not alone on this issue. Legal professional associations in the US and in the UK also have not issued rules of conduct for legal representatives in mediation: see generally, Jim Mason, ‘How Might the Adversarial Imperative Be Effectively Tempered in Mediation?’ (2012) 15 *Legal Ethics* 111; 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* 182.
 - 5 For instance, the Australian Law Reform Commission (‘ALRC’) recommended the development of standards of conduct for legal representatives in alternative dispute resolution (‘ADR’) processes in its Managing Justice Report issued in 2000: see Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System*, Report No 89 (2000) 297–8 [3.120] (‘ALRC 89’). More recently, the now defunct National Alternative Dispute Resolution Advisory Council (‘NADRAC’) recommended the statutory imposition of additional conduct obligations on participants, their representatives, and ADR practitioners involved in ADR processes operating within the Australian federal civil justice system: see NADRAC, ‘Maintaining and Enhancing the Integrity of ADR Processes: From Principles to Practice through People’ (Report to the Attorney-General, NADRAC, February 2011) ch 2 (‘*Maintaining and Enhancing the Integrity of ADR Processes Report*’). See also NADRAC’s earlier report: NADRAC, ‘The Resolve to Resolve – Embracing ADR to Improve Access to Justice in the Federal Jurisdiction’ (Report to the Attorney-General, NADRAC, February 2009) sch 2 (‘*The Resolve to Resolve Report*’).
 - 6 In Australia, see Christine Parker and Adrian Evans, *Inside Lawyers’ Ethics* (Cambridge University Press, 2nd ed, 2014) 217–25. See also Ysaiah Ross, *Ethics in Law: Lawyers’ Responsibility and Accountability in Australia* (LexisNexis Butterworths, 5th ed, 2010) 523, who calls for new rules to govern lawyers’ conduct in negotiations. In the US, see Christopher M Fairman, ‘Ethics and Collaborative Lawyering: Why Put Old Hats on New Heads?’ (2003) 18 *Ohio State Journal on Dispute Resolution* 505, 528; Kimberlee K Kovach, ‘Lawyer Ethics Must Keep Pace with Practice: Plurality in Lawyering Roles Demands Diverse and Innovative Ethical Standards’ (2003) 39 *Idaho Law Review* 399, 413–14; Carrie Menkel-Meadow, ‘Ethics in Alternative Dispute Resolution: New Issues, No Answers from the Adversary Conception of Lawyers’ Responsibility’ (1997) 38 *South Texas Law Review* 407, 410. In the UK, see generally Mason, above n 4.
 - 7 With few exceptions, current research on ethics in mediation is concerned with the ethical behaviour of mediators, not with the behaviour of legal representatives for the parties. See, eg, Ellen Waldman (ed), *Mediation Ethics: Cases and Commentaries* (Jossey-Bass, 2011) with all 13 chapters discussing the ‘ethical terrain that mediators are likely to encounter’: at x. There are some notable exceptions: see, eg, Donna Cooper, ‘The “New Advocacy” and the Emergence of Lawyer Representatives in ADR’ (2013) 24 *Australasian Dispute Resolution Journal* 178.
 - 8 See Law Society of New South Wales, *Professional Standards for Legal Practitioners in Mediation* (at December 2012) (‘*NSW Standards*’), contained in Law Society of New South Wales, *Dispute Resolution Kit* (December 2012) <<http://www.lawsociety.com.au/cs/groups/public/documents/internetcontent/>

implications for what is (and what is not) regarded as ethical conduct in mediation.⁹ According to these standards and guidelines, legal representatives should: participate in mediation in good faith;¹⁰ cooperate with mediators;¹¹ refrain from acting as ‘trial advocates’¹² and from using advocacy skills;¹³ and participate in mediation in a non-adversarial manner.¹⁴ The requirements to participate in good faith and to cooperate in mediation have been examined by courts,¹⁵ policymakers,¹⁶ and commentators.¹⁷ The concepts have been widely, although not universally accepted,¹⁸ and are relatively uncontroversial. The remaining two requirements, that is, to refrain from acting as advocates and to participate in mediation in a non-adversarial manner, have not been subject to the same degree of scrutiny. It is with these requirements that this article is principally concerned. The article considers the roles, duties and ethical orientation of lawyers who represent clients in mediation. It is argued that legal representatives must act as ‘partisan advocates’ for their clients in mediation in order to discharge the ethical obligations that they owe to them, and that this role is only limited by the duties that lawyers owe to the administration of justice. Moreover, by acting as partisan advocates and, on occasion, by acting in an ‘adversarial’ manner, lawyers promote the value of party self-determination which underpins mediation.¹⁹

The article is in seven parts. Part II examines the *legal* ethical duties²⁰ owed by lawyers in mediation in Australia.²¹ These duties inform the roles or functions²² that lawyers are required to undertake in mediation (and more generally, in our civil justice system). These roles are identified in Part III. It is argued that lawyers have two primary roles to play within mediation: their role as

675694.pdf>; Law Council of Australia, *Guidelines for Lawyers in Mediation* (at August 2011) (*LCA Guidelines*). Some guidance is offered in the US with respect to unassisted negotiation: see the American Bar Association (*ABA*), *Ethical Guidelines for Settlement Negotiations* (at August 2002), which is also non-binding.

9 Laurence Boule, *Mediation: Principles, Process, Practice* (LexisNexis Butterworths, 3rd ed, 2011) 468.

10 *NSW Standards* ss 5.3, 5.4; *LCA Guidelines* s 2.2.

11 *NSW Standards* s 5.1.

12 *NSW Standards* s 2.3.

13 *LCA Guidelines* s 6.1.

14 *NSW Standards* s 2.3.

15 See below nn 114–15, 120–1.

16 See, eg, NADRAC, *Maintaining and Enhancing the Integrity of ADR Processes Report*, above n 5, 38 [2.6.1].

17 See, eg, below nn 116–23.

18 See, eg, below n 113.

19 See below nn 174–7.

20 This article concerns lawyers’ *legal* ethical obligations as derived from the law of lawyering. There are other sources of ‘ethical expectation’ for lawyers: see, eg, below nn 44–6. They may also draw upon ‘personal ethics’ which they develop through connections with family and social groups, as well as theories of social ethics such as utilitarian ethics: see Parker and Evans, above n 6, 7–10. Consideration of these sources is outside the scope of this article.

21 The article does not consider the position of lawyer mediators.

22 See the dictionary definition of the term ‘role’ as ‘tasks’ or ‘functions’: F G Fowler and H W Fowler, *Pocket Oxford Dictionary of Current English* (Clarendon Press, 1969) 719.

officers of the court and their role as advocates for their clients. Each of the lawyers' primary roles is shaped by the context in which the roles are performed. Amongst the contextual factors which impact the lawyers' roles in mediation are the features, objectives and values of mediation. These aspects of mediation are examined in Part IV.

Part V considers the interrelated questions of whether or not lawyers should refrain from acting as advocates for their clients in mediation (an issue which cannot be considered in isolation from the lawyers' role as officers of the court) and whether or not they should participate in mediation in a non-adversarial manner. The case that has been made against lawyers acting as advocates is first examined. In the author's opinion, it is a case that is based on misconceptions about the nature of 'advocacy' (and of associated terms such as that of 'zeal'), and on a fragile distinction between adversarial and non-adversarial behaviour. The case is then put in favour of lawyers acting as *partisan advocates*, a phrase which should not be confused, or conflated, with that of 'adversarial advocates'. An advocate is defined broadly as a person who supports his or her client's cause.²³ A 'partisan advocate' acts for the benefit of his or her client and no one else. An advocate may have to undertake a range of tasks within mediation to further the interests of his or her client. These tasks, together with some of the skills involved in carrying them out, are identified in Part VI.

The article concludes in Part VII with a recommendation that lawyers' professional bodies reconsider those aspects of their standards and guidelines that refer to advocacy and non-adversarial behaviour. (The rules of conduct also require some adjustment but that is not the focus of this article.)²⁴ Directions for further research and analysis on the topic of mediation and lawyers are identified and a challenge is issued to rule drafters and commentators who seek to direct lawyers to act in a non-adversarial manner. The challenge is to define non-adversarial behaviour with sufficient precision to guide practitioners and to be taken into account by relevant disciplinary bodies if complaints are made against them.

For the purpose of this article, mediation is defined broadly as a form of assisted negotiation in which an acceptable third party, the mediator, undertakes a range of activities to assist the parties involved in a dispute to negotiate an

23 This definition draws upon the dictionary meaning of the term 'advocate' as 'a person who pleads a case on someone else's behalf' and more generally, as a 'supporter': see *ibid* 13.

24 For discussion of issues which require clarification, see 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, 741–2; Cooper, above n 7, 182–4.

agreement.²⁵ The activities undertaken by the mediator fall short of imposing a decision upon the parties. This definition accords with most modern definitions of mediation which ‘contain two common elements: (1) third-party facilitation of dispute settlement, and (2) lack of third-party power to determine the resolution of the dispute.’²⁶ However, it is widely recognised that mediation is an extremely diverse process in practice and that there is no definition which is universally agreed, an issue which is explored further in Part IV.

Throughout the article, the terms ‘lawyer’, ‘legal representative’ and ‘practitioner’ are used interchangeably. In this article, the term ‘opponent’ is often used to refer to the ‘other party’ in mediation. It has been suggested that the term ‘opponent’ is inappropriate in this context.²⁷ The term is preferred in this article because the professional conduct rules use it in important provisions dealing with honesty in communications.²⁸ In fact, one of the standards critiqued in this article uses the term ‘opposing party’.²⁹ In some contexts, the term ‘opponent’ is preferred over the phrase ‘other party’ to make it easier to distinguish them from ‘other parties’ who are not parties to the mediation but nonetheless might be affected by it.

25 For a range of definitions, see Christopher W Moore, *The Mediation Process: Practical Strategies for Resolving Conflict* (Jossey-Bass, 4th ed, 2014) 19–20; Boule, above n 9, 13, 26; NADRAC, *Dispute Resolution Terms: The Use of Terms in (Alternative) Dispute Resolution* (2003). In this article, I have drawn upon literature pertaining to negotiation ethics. For the most part, the authors of this material do not specify whether they are discussing unassisted or assisted negotiation (mediation) or just the former. Nonetheless, the literature is relevant given the widely adopted definition of mediation as a process of assisted or facilitated negotiation. This approach has been adopted by other authors: see, eg, Robert P Burns, ‘Some Ethical Issues Surrounding Mediation’ (2001) 70 *Fordham Law Review* 691, 692.

26 Donald T Weckstein, ‘In Praise of Party Empowerment – And of Mediator Activism’ (1997) 33 *Willamette Law Review* 501, 508 (citations omitted).

27 See, eg, Jonathan R Cohen, ‘Adversaries? Partners? How about Counterparts? On Metaphors in the Practice and Teaching of Negotiation and Dispute Resolution’ (2003) 20 *Conflict Resolution Quarterly* 433, who prefers to use the word ‘counterpart’. It may be that all terminology has its problems. The term ‘counterpart’ seems to imply that there are only two parties, when mediation may be multi-party.

28 See rules governing communications with ‘opponents’ in Law Council of Australia, *Australian Solicitors’ Conduct Rules* (at June 2011) r 22 (‘ASCR’); Australian Bar Association, *Barristers’ Conduct Rules* (at 11 May 2013) r 48 (‘Bar Rules’).

29 *NSW Standards* s 2.3.

II THE DUTIES OF LAWYERS IN MEDIATION

A Sources of Legal Ethical Obligations for Lawyers

When lawyers represent parties in mediation, they are engaged in the practice of the law³⁰ and are governed by the rules of conduct issued by the law societies and bar associations to which they belong.³¹ Each branch of the profession is governed by a single generic or ‘all purpose’ set of rules. Solicitors (and amalgams) are governed by the *Australian Solicitors’ Conduct Rules* (‘*ASCR*’)³² or by the *Model Rules of Professional Conduct and Practice* (or a variant of them) issued by the Law Council of Australia.³³ Barristers are governed by the Australian Bar Association’s *Barristers’ Conduct Rules* (‘*Bar Rules*’)³⁴ or by the Association’s *Model Rules*.³⁵

Lawyers’ professional bodies have not issued additional rules of conduct for legal representatives in mediation. However, they have issued non-binding standards and guidelines. The most prominent of these are the *LCA Guidelines*.³⁶

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- 30 The relevant professional conduct rules for solicitors make clear that representation of clients in mediation is an aspect of legal practice: *ASCR* r 7.2, Glossary of Terms (definitions of ‘matter’ and ‘legal services’). The court has confirmed that solicitors who participate in mediation on behalf of their clients are acting within the scope of their ‘professional work for a client’: see *Secombs v Sadler Design Pty Ltd* [1999] VSC 79, [61], citing *Hawkins v Clayton* (1988) 164 CLR 539, 574. In the case of barristers, the rules of professional conduct to which they are subject explicitly provide that representation of a client in mediation falls within the scope of the work of a barrister: *Bar Rules* r 15(d), 116 (definition of ‘barristers’ work’).
- 31 In fact, law societies and bar associations in Australia do not have sole responsibility for issuing new rules. The rules in several jurisdictions have now been given a statutory foundation and other regulatory bodies, such as the Legal Services Board, are involved in the rule-making process. The process differs between jurisdictions: see G E Dal Pont, *Lawyers’ Professional Responsibility* (Lawbook, 5th ed, 2013) 21–6.
- 32 See Law Council of Australia, *Australian Solicitors’ Conduct Rules 2011 and Commentary* (August 2013) <http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/a-z-docs/SolicitorsConductRulesHandbook_Ver3.pdf>. The Commentary ‘is intended to provide additional information and guidance in understanding how particular Rules might apply in some situations’: at 3. To date, the *ASCR* have been adopted by law societies in South Australia (adopted on 25 July 2011), Queensland (commenced 1 June 2012) and New South Wales: see Law Society of New South Wales, *New South Wales Professional Conduct and Practice Rules 2013* (at 1 January 2014). At the time of writing, the Law Institute of Victoria is set to approve the rules (after they were approved by the Legal Services Board and following a period of public consultation which ended on 20 June 2014). The Law Society Northern Territory is soon to embark on a process of public consultation regarding the *ASCR*. The Western Australia Legal Practice Board also recently updated the professional rules in that State, but the national rules have not been adopted: see *Legal Profession Conduct Rules 2010* (WA).
- 33 Law Council of Australia, *Model Rules of Professional Conduct and Practice* (at 16 March 2002) (‘*Model Rules*’).
- 34 The *Bar Rules* were approved by the Australian Bar Association on 1 February 2010 and last updated on 11 May 2013. They have been adopted in Queensland (effective 23 December 2011), Western Australia (effective 28 May 2012), and New South Wales (6 January 2014).
- 35 Australian Bar Association, *Model Rules* (at 8 December 2002).
- 36 *LCA Guidelines*. The LCA has also released a document for parties in mediations: Law Council of Australia, *Guidelines for Parties in Mediation* (at August 2011).

and *NSW Standards*.³⁷ While the *LCA Guidelines*³⁸ and the relevant provisions of the *NSW Standards*³⁹ are non-binding, they may still have influence on legal practitioners. They may guide practitioners in ‘selecting “best practices” in conditions of uncertainty’.⁴⁰ They may also be taken into account by professional bodies and courts when they are assessing complaints made against legal practitioners.⁴¹ Less formally, the guidelines and standards may be used for educational purposes.⁴²

The parties and their lawyers may accept additional conduct obligations if the mediation takes place pursuant to an agreement to mediate or other dispute resolution clause (for private mediations) or additional obligations may be imposed on them by statute or regulation (in the case of institutional mediations).⁴³

There are other sources of obligations for lawyers. These include contract law, the law of torts, equity, procedural law (such as the *Uniform Civil Procedure Rules 2005* (NSW)), general legislation (such as the Australian Consumer Law), and legislation governing the practice of the law (the Legal Profession legislation in each state and territory).⁴⁴

Various duties are imposed on lawyers from the sources mentioned above. The discussion that follows focuses on the rules of conduct issued by lawyers’

37 *NSW Standards*. The standards were first promulgated in 1993. See also the Law Society of New South Wales, *Charter on Mediation Practice – A Guide to the Rights and Responsibilities of Participants* (at 2008).

38 The *LCA Guidelines* do not impose any additional obligations on legal representatives; nor do they derogate from the usual obligations imposed on them: *LCA Guidelines*, Introductory Note. According to this Note, the guidelines were developed ‘to give assistance to lawyers representing clients in the mediation of civil and commercial disputes’.

39 The *NSW Standards* are for lawyer mediators and legal representatives. They contain both compulsory and ‘guidance-only’ provisions. In the case of legal representatives, only the provision dealing with the confidentiality of mediation is formulated in the language of a rule: see *NSW Standards* s 3.

40 Bobette Wolski, ‘The “New” Limitations of Fisher and Ury’s Model of Interest-Based Negotiation: Not Necessarily the Ethical Alternative’ (2012) 19 *James Cook University Law Review* 127, 137; Boulle, above n 9, 468.

41 Boulle, above n 9, 466. The function of these guidelines goes beyond that of educating practitioners. See discussion by Mary Walker, Chair of the Law Council of Australia’s ADR Committee responsible for formulating the *LCA Guidelines* which were reviewed and updated in 2011: Mary Walker, ‘Guidelines for Lawyers in Mediations’ (2007) 9 *ADR Bulletin* 150, 150.

42 Currently, they appear in leading texts on ethics and professional responsibilities: see, eg, Parker and Evans, above n 6. They also appear in those on mediation and ADR: see, eg, Boulle, above n 9, 294–9; Hardy and Rundle, above n 1, ch 7.

43 Wolski, ‘An Evaluation of the Rules of Conduct Governing Legal Representatives’, above n 4, 185.

44 See *ASCR* r 2.2 (the rules apply in addition to the common law); *Bar Rules* r 10 (the rules ‘are not intended to be a complete or detailed code of conduct for barristers’). There are still more sources (and degrees) of regulation of lawyers’ behaviour in mediation which are not discussed here. For instance, Commonwealth government agencies (and their legal counsel) and family dispute resolution system lawyers are all subject to additional regulation: see respectively *Legal Services Directions 2005* (Cth); *Family Law Act 1975* (Cth) ss 60I, 10F. For a list of Australian federal legislation prescribing conduct obligations in ADR, see generally NADRAC, *Maintaining and Enhancing the Integrity of ADR Processes Report*, above n 5, 117. There is also additional regulation at the state level in Australia: see, eg, Victorian Law Reform Commission, *Civil Justice Review*, Report No 14 (2008) ch 3.

professional bodies for they set minimum standards⁴⁵ that apply to all lawyers,⁴⁶ irrespective of the context in which they practice, and of how mediation comes about.

B Nature and Structure of the Rules of Conduct

The professional conduct rules begin with a series of ‘general’ duties that apply to lawyers in all aspects of their professional life and indeed, even in their personal life.⁴⁷ These duties include mandates such as to refrain from engaging in conduct which might bring the legal profession into disrepute;⁴⁸ to ‘act in the best interests of a client in any matter in which the [practitioner] represents the client’;⁴⁹ and to ‘be honest and courteous in all dealings in the course of legal practice’ (with the *Bar Rules* imposing an obligation to act ‘fairly’ rather than courteously).⁵⁰

The generality of these rules does not diminish their significance. The *ASCR* describe them as fundamental ethical duties, while the *Bar Rules* describe them as ‘[p]rinciples’.⁵¹

There follows a series of specific duties that, for the most part, appear to be categorised according to the entity with whom the lawyer is dealing, such as the court,⁵² the client,⁵³ and other parties (including opponents)⁵⁴ rather than

45 It is widely agreed that these rules set only minimum standards or base levels of conduct rather than ceilings: see, eg, Gino Dal Pont, above n 31, 28–9. In the UK, see Andrew Boon and Jennifer Levin, *The Ethics and Conduct of Lawyers in England and Wales* (Hart Publishing, 2nd ed, 2008) 7. In the US, see Carol Rice Andrews, ‘Highway 101: Lessons in Legal Ethics That We Can Learn on the Road’ (2001) 15 *Georgetown Journal of Legal Ethics* 95.

46 The *ASCR* apply to all solicitors within Australia acting in the manner of a solicitor: *ASCR* r 1.1, Glossary of Terms (definition of ‘solicitor’). See also *Bar Rules* r 2, with one of the purposes of the rules being to provide ‘common and enforceable’ rules. The rules are binding on lawyers ‘but do not have effect to the extent that they are inconsistent with the legal profession legislation or its regulations’: Dal Pont, above n 31, 25.

47 See, eg, *ASCR* r 5.1 (and commentary), which provides that a practitioner must be a ‘fit and proper person’ to practice law and prohibits, among other things, conduct which is likely to bring the profession into disrepute.

48 *ASCR* r 5.1.2; *Bar Rules* r 12(c).

49 *ASCR* r 4.1.1.

50 *ASCR* r 4.1.2; *Bar Rules* r 5(c). Under the 2002 Model Rules, solicitors had to act with honesty, fairness and courtesy towards other practitioners and third parties. See Law Council of Australia, *Model Rules of Professional Conduct and Practice* (at March 2002), statements of general principle preceding ‘relations with other practitioners’ and ‘relations with third parties’. The reference to fairness has been removed from the *ASCR*. Given that solicitors are subject to other general duties, such as an obligation to refrain from conduct which is likely to bring the profession into disrepute (r 5.1.2), absence of the term ‘fairly’ from the *ASCR* is unlikely to give practitioners a licence to act ‘unfairly’.

51 See the headings preceding *ASCR* rr 3–6; *Bar Rules* r 5.

52 *ASCR* rr 17–28, under the heading ‘advocacy and litigation’; *Bar Rules* rr 25–36, 41–7, 56–77.

53 *ASCR* rr 7–16; *Bar Rules* rr 37–40.

54 *ASCR* rr 30–35; *Bar Rules* rr 48–55. The concept of a tripartite system of duties was developed in Wolski, above n 4, 187–8. Like all categorisations, it is an oversimplification. It does not take account of duties owed to collective third parties.

according to the context in which the lawyer is engaged.⁵⁵ Both the general rules and the specific rules apply to legal practitioners in mediation.⁵⁶ While some accommodation has been made for mediation⁵⁷ (which is not at all the same thing as making special provision for mediation), no additional or supplementary rules of conduct have been issued for mediation practice.

Some of the specific duties elaborate upon the general rules. For instance, as mentioned above, there are a number of specific rules dealing with the need for honesty to the court, and to other parties including opponents, as well as to one's clients. It is in the nature of the rules that if a practitioner breaches a specific rule, he or she most likely also breaches one or more of the general rules. For instance, if a practitioner is dishonest to an opponent in mediation, he or she is not only in breach of the specific rule that requires practitioners to deal with each other honestly, he or she is also in breach of the general rule that requires practitioners to be honest in the course of legal practice. The practitioner might also be in breach of a number of other general rules, such as the rule prohibiting lawyers from engaging in conduct that is likely to bring the profession into disrepute.⁵⁸

Many of the rules of conduct, even the more specific rules, are stated at a high level of abstraction or generality. There are also gaps in the rules, as might be expected since it is impossible to pre-empt all of the circumstances that might arise.⁵⁹ For instance, while the rules require lawyers to act in the best interests of their clients, they do not define 'best interests' and they do not lay down a set of prescriptions for how one might go about achieving an outcome which is in the client's best interests. Lawyers are afforded a measure of discretion in deciding how to interpret and apply the rules and fill any gaps.⁶⁰ A number of factors might impact a lawyer's exercise of discretion including the objectives and values of the particular process or processes in which they are taking part.⁶¹

In the discussion that follows, the author suggests how relevant general and specific rules of conduct might apply in mediation. It is not intended to be an exhaustive checklist of all the relevant rules, nor comprehensive coverage of the ethical dilemmas that might arise in mediation. The main purpose of the discussion is to demonstrate the connections between the rules and the roles that legal representatives are required to undertake in mediation.

55 There is one clear exception to this: there are specific rules for practitioners acting as prosecutors: see *ASCR* r 29; *Bar Rules* rr 82–94. In fact, there does appear to be a discrete category of rules for advocacy and litigation. However, the tribunal in *Legal Practitioners Complaints Committee and Fleming* [2006] WASAT 352 [67]–[72] observed that these rules are not confined to litigation.

56 In the course of writing this article, it was suggested that I should distinguish between duties owed by lawyers in general and duties owed by lawyers in mediation. Such a 'distinction' is not reflective of the structure that has been adopted in the rules of conduct.

57 As discussed later, 'court' is defined to include mediations: see below n 80.

58 *ASCR* r 5.1.2; *Bar Rules* r 12(c).

59 See, eg. Boon and Levin, above n 45, 7.

60 Scott R Peppet, 'Lawyers' Bargaining Ethics, Contract, and Collaboration: The End of the Legal Profession and the Beginning of Professional Pluralism' (2005) 90 *Iowa Law Review* 475, 507.

61 Parker and Evans, above n 6, 7.

As might be expected given that mediation cannot take place without some communication between the parties (even if the mediator is the conduit for those communications), and between the parties and the mediator, the rules of conduct requiring honesty are particularly relevant in mediation. As mentioned above, there are a number of specific rules dealing with the need for honesty in one's dealings with the court, and with other parties including opponents. These are discussed in the next section of the article. Wolski has observed that, for the most part, the rules appear to emphasise honesty, rather than candour or openness in communications.⁶² The rules of conduct do not define general terms such as 'honesty'. Wolski argues that honesty is a concept that concerns the accuracy or otherwise of information conveyed, while candour or openness is a concept that concerns 'the sharing of information or, conversely, the withholding of it'.⁶³

C Duties Owed by Legal Representatives in Mediation

1 Duties Owed to the Court and the Administration of Justice

As an aspect of the general duty owed to the court and the administration of justice, lawyers must respect and obey the law including the rules of conduct of the profession.⁶⁴ They must not engage in, or assist, conduct that is illegal or dishonest or otherwise discreditable to a practitioner, prejudicial to the administration of justice⁶⁵ or which might otherwise 'bring the profession into disrepute'.⁶⁶ There is a number of ways in which these rules might be breached in mediation. A practitioner is likely to be in breach if he or she assists a client to negotiate an agreement which perpetrates a fraud against the taxation department. Lawyers are also in breach of these rules if they are dishonest to their opponents by, for instance, not correcting statements which while true at the time they were made, have since become inaccurate, such as in the cases involving Messrs Mullins⁶⁷ and Garratt.⁶⁸

As mentioned earlier, practitioners owe specific duties of honesty to the court. They must not deceive or knowingly or recklessly mislead the court, arguably, on any matter,⁶⁹ and they must correct a misleading statement as soon as possible after they become aware that it is misleading.⁷⁰ Again, these rules might be breached in a number of ways. Often times, agreements reached in mediation must be presented to the court for its approval (as is the case with

62 Wolski, 'The Truth about Honesty and Candour in Mediation', above n 24, 708–9.

63 Ibid 709. These definitions make use of Rubin's 'tightropes' of negotiation: see Jeffrey Z Rubin, 'Negotiation' (1983) 27 *American Behavioral Scientist* 135, 136–7.

64 ASCR r 4.1.5. See also *Bar Rules* r 4(a).

65 ASCR r 5.1.1; *Bar Rules* r 12(b).

66 ASCR r 5.1.2; *Bar Rules* r 12(c).

67 See *Legal Services Commissioner v Mullins* [2006] LPT 12 (23 November 2006).

68 See *Legal Services Commissioner v Garrett* [2009] LPT 12 (1 May 2009).

69 ASCR r 19.1; *Bar Rules* r 26. The previous bar rules prohibited practitioners from misleading the court in relation to 'any matter'. Although this phrase does not appear in the new rules, it is still likely the case that practitioners should never provide the court with inaccurate information 'about any matter'.

70 ASCR r 19.2; *Bar Rules* r 27.

some agreements involving family law matters) or for the purpose of obtaining consent orders where litigation has commenced and the parties have reached a settlement. If a practitioner presents an ‘agreement’ to the court knowing that it does not represent the agreement reached by the parties, the practitioner is misleading the court.⁷¹

As for specific duties of candour owed to the court, a practitioner must inform the court of any relevant binding authorities and legislative provisions of which the practitioner is aware⁷² but as a general rule,⁷³ at least when one’s opponent is also present before the court, the practitioner is not obliged to disclose facts adverse to his or her client’s interests. Nor is the practitioner obliged to ‘correct an error in a statement made to the court by the opponent or any other person’.⁷⁴

Practitioners owe other specific duties to the court and the administration of justice. For instance, they must ensure that litigation is conducted efficiently⁷⁵ and they must use the court process and privilege in a responsible manner.⁷⁶ If a legal practitioner fails to observe a court order to attend mediation, he or she runs the risk of breaching rules of this nature. So, for instance, in *Hopeshore Pty Ltd v Melroad Equipment Pty Ltd*⁷⁷ the court held that a legal representative had acted inconsistently with his duty to assist the court in the management of proceedings involving his client by failing to proceed with mediation as ordered by the court.⁷⁸

In the scenarios mentioned above, it is clear that the duties which are infringed are owed to the court and the administration of justice. It is less clear how mediators are to be treated in this scheme which is predominantly tripartite in nature – in the sense that lawyers owe duties to the court (as personified by a

71 For an interesting case in which counsel misled a settlement judge about the terms of an agreed settlement, see *Re Fee*, 898 P 2d 975 (Ariz, 1995).

72 *ASCR* r 19.6; *Bar Rules* r 31.

73 Legal practitioners owe the court higher standards of candour when seeking any interlocutory relief in an ex parte application: *ASCR* r 19.4; *Bar Rules* r 29. For discussion of the standard of candour owed by them in these circumstances, see *Satz v ACN 069 808 957 Pty Ltd* [2010] NSWSC 365, [55]–[68] (Barrett J).

74 *ASCR* r 19.3.

75 *Bar Rules* rr 56–8.

76 *ASCR* r 21; *Bar Rules* rr 59–67.

77 (2004) 212 ALR 66.

78 *Hopeshore Pty Ltd v Melroad Equipment Pty Ltd* (2004) 212 ALR 66, 76 [34]. In fact, the referral to mediation was made by consent at a directions hearing. The court concluded that the practitioner had taken the view that early mediation was not in his client’s best interests and had acted in a way calculated to defer the mediation: at 76 [35]. The court took the conduct of the legal practitioner into account in determining whether or not to exercise discretion in favour of that practitioner’s client in an application for security for payment of costs (the court dismissed the motion): at 77 [39].

judge, registrar or other court official), third parties (including opponents), and one's own clients.⁷⁹ This issue is discussed further below.

2 Duties Owed to Mediators

The professional conduct rules in most jurisdictions in Australia define 'court' to include 'mediations'.⁸⁰ The meaning of this reference is not clear. As Wolski argues, it could mean mediators and/or the other parties to the mediation, or the mediation process. Wolski suggests that the most obvious interpretation of the definition is that the reference to mediations means 'mediators'. This assertion is based on a number of observations, such as:⁸¹

1. '[T]here are already rules in place governing relations with opponents and other third parties'.⁸² The only 'entity' for whom provision is not otherwise made is the mediator.
2. 'It is difficult to conceive of practitioners owing duties to a process (although clearly, they may owe duties to certain persons, entities or even "the public" involved in, or implicated by, a process)'.⁸³
3. The *Legal Profession Conduct Rules 2010* (WA) define court to include 'a person or body conducting arbitration or mediation or any other form of dispute resolution'.⁸⁴
4. '[T]o the extent that we might look to provisions in other jurisdictions for insights, the *Model Code of Professional Conduct* of the Federation of Law Societies of Canada defines "tribunal" to include "mediator"'.⁸⁵

79 For the purpose of this analysis, I have combined and considered as a single category those rules owed to 'other persons' and other lawyers. I have left out of the analysis those rules dealing with 'law practice management'. There are some structural differences in this regard between jurisdictions. For example, the rules in Victoria are stated to consist of eight categories with the first three comprising the introduction, definitions and general principles of professional conduct: see Law Institute of Victoria, *Professional Conduct and Practice Rules* (at 30 September 2005).

80 The *ASCR* and the *Bar Rules* define 'court' to mean anybody described as such, a range of judicial and statutory tribunals, investigations and inquiries established by statute or a Parliament, Royal Commissions and 'arbitrations and mediations' (with the *ASCR* using the phrase 'an arbitration or mediation or any other form of dispute resolution'): see *ASCR* Glossary of Terms (definition of 'court'); *Bar Rules* r 119 (definition of 'court'). Most jurisdictions have adopted this aspect of the 'model' rules without modification. There is a single exception to be found in the solicitors' rules in WA.

81 Wolski, 'The Truth about Honesty and Candour in Mediation', above n 24, 715–16.

82 *Ibid* 715. See *ASCR* rr 22 (communications with opponents), 30–3 (relations with other solicitors), 34–5 (relations with other persons); *Bar Rules* rr 48–55 (duty to opponent).

83 Wolski, 'The Truth about Honesty and Candour in Mediation', above n 24, 715. Properly conceived, even the duty owed to the court is owed, not to any particular judge, but 'to the larger community which has a vital public interest in the proper administration of justice': D A Ipp, 'Lawyers' Duties to the Court' (1998) 114 *Law Quarterly Review* 63, 63 (footnotes omitted).

84 *Legal Profession Conduct Rules 2010* (WA) r 3 (definition of 'court').

85 Wolski, 'The Truth about Honesty and Candour in Mediation', above n 24, 715, citing Federation of Law Societies of Canada, *Model Code of Professional Conduct* (at 13 December 2011) s 1.1-1 (definition of 'tribunal'). Cf Canadian Bar Association, *Code of Professional Conduct* (2009), which does not include mediations or mediators in the definition of 'court': at xiii.

The issue of whether mediators should be treated as courts or as other parties for the purpose of the rules is an important one for, as a result of the specific rules governing lawyers, they owe different *standards* of honesty and candour depending on who they are dealing with. If mediators are treated as courts, practitioners cannot mislead or deceive them on any matter and arguably this includes matters pertaining to their client's interests, BATNAs,⁸⁶ bottom lines and negotiation strategies.⁸⁷ As discussed below, a less stringent standard of honesty is owed to other parties.

If mediators are treated as courts, practitioners must inform them of relevant binding authorities and legislative provisions of which they (practitioners) are aware.⁸⁸ The rules are silent on whether disclosure must take place in a joint session with everyone present or in a separate session with the mediator. No such duty exists if mediators are treated as 'other parties'. Whether mediators are treated as courts or as other parties for the purpose of the conduct rules, lawyers are under no obligation to convey any other information to mediators – such as information concerning a client's interests, BATNAs, bottom lines and negotiation strategy.

It has been argued elsewhere that mediators should not be treated as courts but rather as 'other parties' for the purpose of the rules, for a number of reasons.⁸⁹ However, this is not a matter which needs to be determined for present purposes. For the purpose of this article, it is assumed that mediators should be treated as courts – an interpretation which places more onerous obligations on practitioners than if mediators were treated as other parties.

This is not the extent of duties owed to mediators. Practitioners owe duties of fairness and courtesy to everyone with whom they engage in the course of legal practice and that includes mediators, but there are no specific rules dealing with fairness and courtesy. It appears that lawyers owe mediators the same *standards* of fairness and of courtesy as they owe to everyone else. In order to avoid repetition, these duties are discussed below in the context of duties owed to 'other parties'.

86 This term is used by Fisher and Ury as an acronym for 'Best Alternative to a Negotiated Agreement': Roger Fisher and William Ury, *Getting to Yes: Negotiating Agreement without Giving In* (Business Books, 2nd ed, 1991) 101.

87 There is some evidence that practitioners understand the prohibition to have this effect. See, eg, the discussion by Bridge who observes that, to avoid misleading mediators, he deliberately refrains from asking his clients 'what they want' and from answering mediator questions about client goals: Campbell Bridge, 'Effective and Ethical Negotiations' (Paper presented at the Alternative Dispute Resolution Committee, New South Wales Bar Association, February 2011) 12 [34].

88 *ASCR* r 19.6; *Bar Rules* r 31.

89 Wolski, 'An Evaluation of the Rules of Conduct Governing Legal Representatives in Mediation', above n 4, 203–5.

3 Duties Owed to Third Parties Including Opponents

As mentioned above, lawyers owe general duties of honesty, fairness and courtesy to third parties, including their opponents.⁹⁰ They are also subject to a number of specific duties as discussed below.

(a) Duties of Honesty and Candour

Practitioners are prohibited from knowingly making false statements to an opponent ‘in relation to the case (including its compromise)’.⁹¹ This provision has particular relevance to mediation. The prohibition appears to apply only to statements of material fact and law⁹² (and not to those that are immaterial or those that do not relate to fact or law).⁹³ Some overstatement and puffing in mediation in relation to a client’s position, values, bottom line and alternatives to settlement appear to be tolerated provided that they do not ‘grossly’ exceed ‘the legitimate assertion of the rights or entitlements of the [practitioner’s] client’.⁹⁴

Legal practitioners have no obligation to share information with an opponent⁹⁵ except in limited circumstances, such as where it is necessary to avoid a partial truth or ‘to correct a statement previously made by the practitioner about a client’s case where the practitioner now knows the statement to be false’.⁹⁶ Nor are lawyers obliged ‘to correct an error on any matter stated to the solicitor by the opponent’⁹⁷ as long as they are not ‘the moving force ... in the other side’s

90 *ASCR* r 4.1.2; *Bar Rules* r 5(c).

91 *ASCR* r 22.1; *Bar Rules* r 48. The term ‘compromise’ is defined in the *ASCR* to include ‘any form of settlement of a case, whether pursuant to a formal offer under the rules or procedure of a court, or otherwise’: *ASCR* Glossary of Terms (definition of ‘compromise’).

92 See, eg, the authorities discussed in Wolski, ‘The Truth about Honesty and Candour in Mediation’, above n 24, 717 nn 53–4.

93 See discussion in Wolski, ‘An Evaluation of the Rules of Conduct Governing Legal Representatives in Mediation’, above n 4, 191; *ibid* 717.

94 *ASCR* r 34.1.1 (emphasis added). It is also noteworthy that the commentary to s 6.2 of the *LCA Guidelines* warns practitioners to ‘be careful of puffing’ but does not prohibit it: *LCA Guidelines* s 6.2(a).

95 There are some exceptions to this general rule that candour is not required. An obligation of candour might be imposed by substantive law, procedural law or specific legislative directive: see Wolski, ‘The Truth about Honesty and Candour in Mediation’, above n 24, 719–24; Wolski, ‘An Evaluation of the Rules of Conduct Governing Legal Representatives in Mediation’, above n 4, 193–4. In the UK, see *Thames Trains Ltd v Adams* [2006] EWHC 3291 (QB), approved in *Thompson v Arnold* [2007] EWHC 1875 (QB).

96 Wolski, ‘An Evaluation of the Rules of Conduct Governing Legal Representatives in Mediation’, above n 4, 194. See *Legal Services Commissioner v Mullins* [2006] LPT 12, discussed in Wolski, ‘The Truth about Honesty and Candour in Mediation’, above n 24. See also *ASCR* r 22.2; *Bar Rules* r 49.

97 Wolski, ‘The Truth about Honesty and Candour in Mediation’, above n 24, 718. See also Wolski, ‘An Evaluation of the Rules of Conduct Governing Legal Representatives in Mediation’, above n 4, 192 and the cases discussed on that page; *ASCR* r 22.3; *Bar Rules* r 50.

misconception’⁹⁸ and that they are ‘scrupulous about not endorsing any misunderstanding’.⁹⁹

(b) Duties of Fairness and Courtesy

Legal representatives owe their opponent general duties of fairness and courtesy. Neither of these general terms is defined in the rules and there are few specific rules which shed light on what is required to discharge the general obligations.¹⁰⁰ Courts in Australia have affirmed that the concept of ‘courtesy’ will be applied and given meaning¹⁰¹ but they have also indicated that the term takes its meaning from the context in which specific behaviour occurs.¹⁰² Thus, only a few general observations about its meaning in mediation can be made. Legal representatives might be expected to act in accordance with general good manners (for example, making eye contact with someone who is speaking to you),¹⁰³ as well as the more formal ‘[c]onventional rules of manners’¹⁰⁴ (such as returning phone calls and answering correspondence promptly).

98 *Legal Practitioners Complaints Committee and Fleming* [2006] WASAT 352 [66]. See also *Chamberlain v Law Society of the Australian Capital Territory* (1993) 43 FCR 148 where the practitioner deliberately took advantage of an obvious error (a misplaced decimal point) in a writ issued against him by the Deputy Commissioner of Taxation and ‘set in train the events and documents which ... led to the entry of the [erroneous] consent judgment’: at 166 (Lockhart J).

99 See authorities discussed in Wolski, ‘The Truth about Honesty and Candour in Mediation’, above n 24, 718; Wolski, ‘An Evaluation of the Rules of Conduct Governing Legal Representatives in Mediation’, above n 4, 192.

100 The rules provide that practitioners must not ‘use tactics that go beyond legitimate advocacy and which are primarily designed to embarrass or frustrate another person’: see *ASCR* r 34.1.3. The commentary which accompanies the rules does not elaborate.

101 *Lander v Council of the Law Society of the Australian Capital Territory* (2009) 231 FLR 399, 419 [43] (Higgins CJ, Gray and Refshauge JJ).

102 In *Lander v Council of the Law Society of the Australian Capital Territory* (2009) 231 FLR 399 (Higgins CJ, Gray and Refshauge JJ), the court applied the general principles prefacing the sections ‘relations with third parties’ and ‘relations with other practitioners’ contained in the *Legal Profession (Solicitors) Rules* of the Australian Capital Territory (‘ACT’) to find that ‘there is an obligation on a practitioner to deal with all persons, practitioners or not, opponents or not, with honesty and fairness’: at 419 [43]. The court also held that ‘the question of courtesy is more difficult to assess. Courtesy connotes politeness. That clearly varies depending on the circumstances’. See also *Legal Practitioners Complaints Committee and Fleming* [2006] WASAT 352 [72]–[73].

103 These aspects of ‘desired’ behaviour may be subject to cultural variation.

104 See Fowler and Fowler, above n 22, 280.

The concept of fairness appears to apply both to the procedure used in mediation and to the outcome of mediation.¹⁰⁵ Arguably lawyers discharge their obligation in relation to process matters by following the ‘reasonable’ guidelines set by mediators.¹⁰⁶ Mediators usually set a number of behavioural guidelines for the conduct of mediation. It is common for mediators to ask the parties to agree that they will not interrupt each other and not denigrate each other, and treat each other in a respectful manner.¹⁰⁷ Lawyers may breach these guidelines and act unfairly (and at the same time, discourteously) if they do not allow their opponent to speak freely, make threats or put their opponent down, for example, by name-calling.¹⁰⁸ Most mediators will intervene to correct inappropriate behaviour of this sort.

As to the outcome of mediation, legal practitioners are not obliged to ensure that a mediated outcome is fair to their opponent,¹⁰⁹ even if their opponent is not legally represented at the mediation.¹¹⁰ However, practitioners should be vigilant to ensure that any agreement reached is not tainted by, and susceptible to later attack on the grounds of, misleading and deceptive conduct, unconscionability, fraud or duress. Nor do legal representatives have an obligation to other parties who are not parties to the mediation but who are nonetheless affected by it unless

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- 105 These two aspects or dimensions of fairness, ie, that of procedural fairness and outcome fairness can be discerned in the literature. See, eg, Stulberg’s discussion of the substantive and procedural dimensions of fairness: Joseph B Stulberg, ‘Fairness and Mediation’ (1998) 13 *Ohio State Journal on Dispute Resolution* 909, 911–16. See also the discussion by Welsh of the criteria used for judging outcome fairness in negotiation: Nancy A Welsh, ‘Perceptions of Fairness’ in Andrea Kupfer Schneider and Christopher Honeyman (eds), *The Negotiator’s Fieldbook* (American Bar Association, 2006) 165, 165. Compare this with the criteria used for judging procedural fairness. Welsh notes that in contrast to outcome fairness, there is ‘striking consistency in the criteria that people use to judge whether a dispute resolution or decision-making process was fair’: at 169. She identifies four particular process elements that heighten perceptions of procedural justice: ‘the opportunity for disputants to express their “voice,”’ assurance that a third party considered what they said, and treatment that is both even-handed and dignified’: Nancy A Welsh, ‘Disputants’ Decision Control in Court-Connected Mediation: A Hollow Promise without Procedural Justice’ [2002] *Journal of Dispute Resolution* 179, 184–5 (citations omitted).
- 106 See Wolski, ‘An Evaluation of the Rules of Conduct Governing Legal Representatives in Mediation’, above n 4, 196. Mediators are given this responsibility in the agreement to mediate (in the case of private mediations) or statutory provisions (in the case of institutional mediations): see, eg, Law Society of New South Wales, *The Agreement to Mediate* <<https://www.lawsociety.com.au/cs/groups/public/documents/internetcontent/026501.pdf>>.
- 107 See, eg, Laurence Boulle and Nadja Alexander, *Mediation: Skills and Techniques* (LexisNexis Butterworths, 2nd ed, 2012) 118; Peter Condliffe, *Conflict Management: A Practical Guide* (LexisNexis Butterworths, 4th ed, 2012) 264; Boulle, above n 9, 236–7.
- 108 See the discussion in Wolski, ‘An Evaluation of the Rules of Conduct Governing Legal Representatives in Mediation’, above n 4, 196.
- 109 Ibid. See also Geoffrey C Hazard Jr, ‘The Lawyer’s Obligation to Be Trustworthy When Dealing with Opposing Parties’ (1981) 33 *South Carolina Law Review* 181, 182.
- 110 See Dal Pont’s discussion on professional duties to unrepresented parties: Dal Pont, above n 31, 719–20. As Dal Pont points out, legal practitioners must take special care to ensure that unrepresented litigants are not unfairly disadvantaged or subject to undue pressure. They should, for instance, take care to speak in plain English. Some law societies have issued ‘guidelines’ for lawyers dealing with self-represented parties: see, eg, Law Society of New South Wales, *Guidelines for Solicitors Dealing with Unrepresented Parties* (at April 2006).

such an obligation is imposed by legislation.¹¹¹ In fact, there is no obligation on legal representatives to ensure a fair outcome for their own clients in mediation. Mediation is premised on party self-determination. The full meaning of this concept is discussed later in the article. For now, it is sufficient to observe that a client may choose to settle on the basis of standards that he or she considers fair and appropriate as opposed to those that the legal representative considers fair and appropriate.

(c) *Duty to Participate in Good Faith*

The professional conduct rules do not impose on legal representatives an explicit obligation to participate in mediation in ‘good faith’. However, lawyers are still bound by their general duties to refrain from conduct that is likely to bring the legal profession into disrepute. Additionally, practitioners might be subject to an express duty to act in good faith or with ‘genuine effort’ if the mediation takes place as a result of court or legislative directive. There has been a proliferation of legislation containing good faith provisions in Australia (and elsewhere).¹¹² Dispute resolution clauses and agreements to mediate also commonly include a good faith provision.¹¹³ While these provisions have had a shaky beginning in Australia,¹¹⁴ there has been strong judicial support for them in recent years.¹¹⁵

111 Family law legislations seem to make the interests of children paramount in all jurisdictions: see, eg, *Family Law Act 1975* (Cth) s 60CA.

112 See, eg, *Civil Procedure Act 2005* (NSW) s 27 (the parties are required to participate in good faith in mediation). We can expect to see more legislation at the federal level which imposes a good faith participation obligation in mediation as NADRAC has recommended that ‘[w]here such a requirement does not already exist, legislation should be introduced which requires participants (disputants and their representatives) in mandatory ADR processes to participate in those processes in good faith’: NADRAC, *Maintaining and Enhancing the Integrity of ADR Processes Report*, above n 5, 38 [2.6.1]. For a discussion on the position in the US, see Wolski, ‘An Evaluation of the Rules of Conduct Governing Legal Representatives in Mediation’, above n 4, 198 nn 128–9.

113 This is not to say that the mediation community has reached consensus regarding the desirability of good faith provisions. For discussion by commentators who caution against adoption of a ‘good faith’ requirement, see Ulrich Boettger, ‘Efficiency versus Party Empowerment – Against a Good-Faith Requirement in Mandatory Mediation’ (2004) 23 *Review of Litigation* 1, 17–18; John Lande, ‘Using Dispute System Design Methods to Promote Good-Faith Participation in Court-Connected Mediation Programs’ (2002) 50 *University of California Los Angeles Law Review* 69, 98–106; Kenneth L Bennight Jr, ‘Enforceable Good Faith Requirements in Mediation Would Be Worse Than the Status Quo’ (1998) 4(3) *Dispute Resolution Magazine* 2, 2.

114 On some occasions, dispute resolution clauses have been struck down on the ground that they were too vague as to the conduct required of the parties: see, eg, Handley JA in a dissenting judgment in *Coal Cliff Collieries Pty Ltd v Sijehama Pty Ltd* (1991) 24 NSWLR 1, 41–2. On other occasions, they have been considered too vague because of perceived tension between self-interest and the maintenance of good faith: see *Elizabeth Bay Developments Pty Ltd v Boral Building Services Pty Ltd* (1995) 36 NSWLR 709, 716 (Giles J). See discussion by Wolski, ‘An Evaluation of the Rules of Conduct Governing Legal Representatives in Mediation’, above n 4, 198–9.

Terms such as ‘good faith’ and ‘genuine effort’ are usually not defined by relevant legislation or contractual provisions. Nonetheless, it is possible to discern some common threads of what the phrases mean from relevant cases and commentaries.¹¹⁶ There appears to be wide agreement that good faith includes some preparation, attendance at the mediation by someone with authority to settle, and some elements of participation such as ‘not summarily and without consideration’¹¹⁷ immediately rejecting what the other party has to say.¹¹⁸

Some guidance on behaviour which is not inconsistent with good faith in mediation is also available from cases and commentaries from Australia and overseas.¹¹⁹ Good faith does not require a party to act against self-interest and it does not require a party to take ‘any step to advance the interests of the other party’.¹²⁰ It does not preclude a party from taking a strong position at the outset and from being reluctant to make concessions.¹²¹ Good faith does not require the parties to engage in total disclosure.¹²² There is no requirement to reveal all of one’s interests, negotiation goals and bottom lines. A lawyer cannot, however, mislead the mediator or his or her opponent about a material fact for it is

- 115 Recently, courts in Australia have been prepared to uphold the validity of these clauses, taking the meaning of the clause from the context in which it is set: see *United Group Rail Services Limited v Rail Corporation (NSW)* (2009) 74 NSWLR 618, 637 [70] (Allsop P with whom Ipp and Macfarlan JJA agreed); *Strzelecki Holdings Pty Ltd v Cable Sands Pty Ltd [No 3]* [2009] WASC 352, [94]–[99]. For a summary of relevant case law, see Tania Sourdin, ‘Good Faith, Bad Faith? Making an Effort in Dispute Resolution’ (2012) 2 *DICTUM – Victoria Law School Journal* 19.
- 116 The debate about the meaning of these terms is likely to continue. As Sourdin notes in relation to good faith, it is ‘likely to be the subject of close attention in the coming years as a result of the inclusion of more “good faith” requirements in various legislative schemes’: Tania Sourdin, *Alternative Dispute Resolution* (Thomson Reuters, 4th ed, 2012) 374. There are a number of matters which require consideration by policy makers. Relevant legislation does not always make clear to whom the duty of good faith is owed (ie, to the other party and/or the mediator). Also, as Sourdin points out, much of the relevant legislation ‘does not set out sanctions or the penalty for a lack of good faith’: Sourdin, ‘Good Faith? Bad Faith?’, above n 115, 21 n 23.
- 117 Kimberlee K Kovach, ‘New Wine Requires New Wineskins: Transforming Lawyer Ethics for Effective Representation in a Non-adversarial Approach to Problem Solving: Mediation’ (2001) 28 *Fordham Urban Law Journal* 935, 964.
- 118 Generally, see Hardy and Rundle, above n 1, 230–1; Wolski, ‘The Truth about Honesty and Candour in Mediation’, above n 24, 725. One of the most well known judicial interpretations of ‘good faith’ in Australia can be found in the case of *Western Australia v Taylor* (1996) 134 FLR 211, 224–5 heard by the National Native Title Tribunal. Member Sumner set out a list of 18 indicia which defined good faith negotiation under the *Native Title Act 1993* (Cth). These indicia are still relied upon: see *Cosmos/Alexander/Western Australia/Mineralogy Pty Ltd* [2009] NNTTA 35, [22]–[26].
- 119 Hardy and Rundle, above n 1, 230; Wolski, ‘The Truth about Honesty and Candour in Mediation’, above n 24, 726–7.
- 120 *United Group Rail Services Limited v Rail Corporation (NSW)* (2009) 74 NSWLR 618, 639 [76] (Allsop P), discussed in Wolski, ‘The Truth about Honesty and Candour in Mediation’, above n 24, 726.
- 121 See *State Bank v Freeman* (Unreported, Supreme Court of New South Wales, Badgery-Parker J, 31 January 1996), discussed in Boulle, above n 9, 629.
- 122 Hardy and Rundle, above n 1, 230; Anne M Burr, ‘Ethics in Negotiation: Does Getting to Yes Require Candor?’ (2001) 56(2) *Dispute Resolution Journal* 10, 13.

recognised that such action (or inaction, where a false statement needs to be corrected) constitutes bad faith.¹²³

(d) *Duty to Cooperate*

Legal representatives are not required under the professional conduct rules to cooperate with their opponents. However, such a duty might be imposed by specific legislation¹²⁴ or by contract.¹²⁵ (Arguably whenever mediation takes place as part of the litigation process, practitioners must maintain some degree of cooperation and collegiality with each other and with the mediator as an aspect of their duty to make responsible use of court process.)¹²⁶

The terms such as ‘cooperation’ and ‘genuine steps’ are generally not defined, although some legislation provides examples of steps ‘that could be taken by a person as part of taking genuine steps to resolve a dispute’.¹²⁷ Nonetheless, commentators believe that the validity of these clauses is likely to be upheld given the ‘strong’ judicial support for the enforceability of clauses containing obligations of good faith.¹²⁸

Regardless of the source of the duty, an obligation to cooperate with one’s opponent does not extend to assisting him or her. For instance, there is no duty to point out weaknesses in the opponent’s case so that he or she might be better prepared for mediation. Such an action would be in clear breach of the lawyer’s obligation to his or her client.¹²⁹ As discussed shortly, the various duties owed by

123 See the discussion in Wolski, ‘The Truth about Honesty and Candour in Mediation’, above n 24, 727. See also *FMG Pilbara Pty Ltd v Cox* (2009) 175 FCR 141, discussed by Sourdin, *Alternative Dispute Resolution*, above n 116, 369. In the US, see Roger L Carter, ‘Oh, Ye of Little [Good] Faith: Questions, Concerns and Commentary on Efforts to Regulate Participant Conduct in Mediations’ [2002] *Journal of Dispute Resolution* 367, 384, 395; Maureen A Weston, ‘Checks on Participant Conduct in Compulsory ADR: Reconciling the Tension in the Need for Good-Faith Participation, Autonomy, and Confidentiality’ (2001) 76 *Indiana Law Journal* 591, 626–7; Boettger, above n 113, 17–18.

124 For example, in Victoria, the parties and their advisers are required to ‘cooperate’ with each other and with the court and to ‘use reasonable endeavours to resolve a dispute by agreement ... by appropriate dispute resolution’: *Civil Procedure Act 2010* (Vic) ss 20, 22. Prospective litigants in the Federal Court of Australia and the Federal Magistrates Court are required to ‘take genuine steps to resolve a dispute’ and to file a ‘genuine steps statement’ at the time of commencing certain civil proceedings: *Civil Dispute Resolution Act 2011* (Cth) ss 4, 6–7. Similar obligations are imposed on parties who wish to commence certain proceedings in the Family Court of Australia: *Family Law Act 1975* (Cth) s 60I; *Family Law Rules 2004* (Cth) r 1.05, sch 1 pt 1 (financial cases), pt 2 (parenting cases).

125 See, eg, the ‘model’ agreement to mediate provided by the Law Society of New South Wales: Law Society of New South Wales, *The Agreement to Mediate*, above n 106, cl 9–10.

126 Wolski, ‘An Evaluation of the Rules of Conduct Governing Legal Representatives in Mediation’, above n 4, 199.

127 *Civil Dispute Resolution Act 2011* (Cth) s 4, discussed in Wolski, ‘An Evaluation of the Rules of Conduct Governing Legal Representatives in Mediation’, above n 4, 199.

128 Boulle, above n 9, 631–2.

129 This follows from the fact that when there is a conflict between duties owed to clients and those owed to opponents, those owed to clients will normally take precedence except where action (or inaction) taken on the client’s behalf also impinges on duties owed to the administration of justice: see *Law Society of New South Wales v Harvey* [1976] 2 NSWLR 154, 170 (Street CJ).

lawyers may sometimes conflict. When there is a conflict between one's duty to an opponent and one's duty to a client, the latter will prevail.¹³⁰

4 *Duties Owed to Clients*

Lawyers are subject to a general duty to act in the best interests of their clients. This duty is framed in slightly different terms for solicitors and for barristers. The *ASCR* provide that it is the solicitor's 'fundamental ethical duty' to 'act in the best interests of a client in any matter in which the solicitor represents the client'¹³¹ and to act with competence and diligence.¹³² The *Bar Rules* provide that a barrister 'must promote and protect fearlessly and by all proper and lawful means the client's best interests to the best of the barrister's skill and diligence'.¹³³

Lawyers also owe their clients a duty of loyalty.¹³⁴ In respect of the particular 'matter' with regard to which a lawyer is engaged,¹³⁵ he or she must be on the client's side and no one else's. Lawyers must avoid a conflict of interest between themselves and clients, and between clients.¹³⁶ Lawyers also owe their clients a duty of confidentiality.¹³⁷

A lawyer must assist his or her client to understand relevant issues and the client's possible rights and obligations, sufficiently to permit the client to give proper instructions and to make informed choices about the conduct of the matter.¹³⁸ Where the matter is contentious, lawyers are subject to a specific obligation to consider settlement and to inform clients about 'the alternatives to fully contested adjudication ... which are reasonably available to the client'.¹³⁹ Lawyers are then obliged to carry out the client's instructions providing they are 'lawful, proper and competent instructions'¹⁴⁰ and to continue to act for the client until such time as the matter is completed. The tasks which might need to be undertaken in mediation to complete the client's instructions are discussed in Part VI.

The legal representative's *legal* obligations in mediation may be summarised as follows:

1. A lawyer should not mislead or deceive a mediator or an opponent (or any other party involved in the mediation).

130 For a statement of this principle, see, eg, the observations by Street CJ: 'There cannot be any doubt that the duty of a solicitor to his client is paramount, and that he must not prefer his or the interest of another to that of his client': *Ibid* 170.

131 *ASCR* r 4.1.1.

132 *ASCR* r 4.1.3.

133 *Bar Rules* r 37.

134 *ASCR* rr 4.1.1, 10–12; *Bar Rules* rr 112–14.

135 The term 'matter' is defined in the *ASCR* as 'any legal service the subject of an engagement': *ASCR* Glossary of Terms (definition of 'matter').

136 *ASCR* rr 10–12; *Bar Rules* r 95.

137 *ASCR* r 9.1; *Bar Rules* rr 108–11. The duty is subject to a number of exceptions: *ASCR* r 9.2.

138 *ASCR* r 7.1; *Bar Rules* r 39.

139 *ASCR* r 7.2.

140 See *ASCR* r 8.1.

2. A lawyer might be obliged to disclose relevant authorities and legislative provisions to mediators. In the absence of guidance in the rules about the 'context' in which such disclosures should be made, practitioners might be wise to make them in separate sessions with the mediator. There is no obligation to disclose other information to mediators.
3. As a general rule, a lawyer does not owe his or her opponent a duty of candour.
4. There is no duty to assist one's opponent in any way, except to the extent necessary to observe other duties such as the duty to cooperate. A lawyer should always treat his or her opponent with fairness and courtesy.
5. A lawyer should cooperate with the mediator and the opponent at least to the extent necessary to observe the mediator's reasonable directions for the conduct of the mediation.

These are the lawyer's minimum legal obligations.

While it has been argued here that there is no obligation of candour on legal representatives in mediation, the success of mediation may depend on the parties being open with one another and with the mediator in relation to some matters. Put another way, there may be good reasons for disclosing more than the minimum amount of information required to be given to discharge obligations under the rules. At some stage of the mediation, if a settlement agreement is to be struck, the parties have to exchange some information about their preferences and priorities and their settlement goals, but that information should be revealed cautiously. Lawyers and clients need to consider carefully how much information to reveal and how much to hold back.¹⁴¹

III A LAWYER'S PRIMARY ROLES (AND PRINCIPLES FOR RESOLVING CONFLICTS OF DUTY)

Two primary roles for lawyers within the civil justice system and the processes comprising that system emerge from the law governing lawyers.¹⁴² These are:

1. The lawyer's role as an officer of the court,¹⁴³ a role which is derived from the duties owed to the administration of justice.

141 See Peter Robinson, 'Contending with Wolves in Sheep's Clothing: A Cautiously Cooperative Approach to Mediation Advocacy' (1998) 50 *Baylor Law Review* 963, who suggests that practitioners take a 'cautiously cooperative approach to mediation'. See also Ross Buckley, 'Adversarial Bargaining: The Neglected Aspect of Negotiation' (2001) 75 *Australian Law Journal* 181, 187–8.

142 Some commentators identify other roles for lawyers, such as their role as prosecutors, defence lawyers, and family lawyers in cases involving children but these are 'specific aspects' of the lawyer's duty to the administration of justice and only concern lawyers who are involved in these specific forms of legal practice: see Dal Pont, above n 31, ch 18.

143 This status is now given a statutory foundation: see, eg, *Legal Profession Act 2004* (NSW) s 33; *Legal Profession Act 2007* (Qld) s 38.

2. The lawyer's role as an advocate for his or her client, a role which is derived from the duties owed to clients.¹⁴⁴ This role is only limited by the lawyer's role as an officer of the court for if there is a conflict between the duties owed to a client and those owed to the administration of justice, the latter must prevail.¹⁴⁵

A lawyer has no specific role to play with respect to third parties including opponents unless legislation such as the *Family Law Act 1975* (Cth) creates such a role.¹⁴⁶ A lawyer will not normally have anything to do with third parties in his or her professional capacity, except when, and then only to the extent necessary, to carry out his or her client's instructions. When the lawyer has dealings with third parties, he or she must observe the duties discussed above. If there is a conflict between the duties owed to a client and the duties owed to a third party, those owed to the client will usually take precedence.¹⁴⁷ There are exceptions to this 'general rule' for prioritising conflicting duties. On some occasions the court has held that a practitioner's actions in securing an agreement and in failing to disclose crucial information to an opponent (such as information that the client in a personal injuries matter had died) were so unfair that the agreement in question should be set aside. Courts have relied on a number of grounds for setting aside agreements reached in negotiation and mediation including breach of contract, breach of the practitioner's common law obligations to the administration of justice and to the court, and breach of the professional conduct rules.¹⁴⁸ In these cases, the lawyer's role as officer of the court trumps the lawyer's role as advocate for his or her client.

But save for these occasions when the lawyer's role as an officer of the court is implicated, the lawyer's fundamental ethical duty is to act in his or her client's best interests. This duty is shaped by the features, objectives and values of the process or processes in which the lawyer acts for the client – in this case, mediation. As explained in the next part, in mediation, a client's interests might be best served by assisting him or her to reach an agreement with the other party.

144 For a definition of 'advocate', see Fowler and Fowler, above n 22, 13.

145 On the primacy of the duty to the court, see *Giannarelli v Wraith* (1988) 165 CLR 543, 556–7 (Mason CJ); *Rondel v Worsley* [1969] 1 AC 191, 227–8 (Lord Reid). See also *ASCR* r 3.1; *Bar Rules* r 5. Generally, see Ipp, above n 83, 103.

146 See, eg, the obligations imposed on advisers of people negotiating the terms of a parenting plan with respect to children: *Family Law Act 1995* (Cth) ss 60D, 63DA.

147 See *Law Society of New South Wales v Harvey* [1976] 2 NSWLR 154, 170 (Street CJ).

148 See, eg, discussion of case law in Charles B Craver, 'Negotiation Ethics: How to Be Deceptive without Being Dishonest/How to Be Assertive without Being Offensive' (1997) 38 *South Texas Law Review* 713, 722.

IV FEATURES, OBJECTIVES AND VALUES OF MEDIATION

Mediation is an extremely diverse process.¹⁴⁹ The definition of mediation given at the outset is not universally agreed¹⁵⁰ and the account which follows would not hold true for every mediation. To the extent possible, the following discussion focuses on generalities or, where that is not possible, discusses some of the differences which may be encountered in mediation practice.

A Features of Mediation

Mediators generally control the process by which the parties converse or negotiate with each other. While there are no fixed rules as to the process used, a sequence of stages can generally be discerned including:¹⁵¹

- an opening statement by the mediator;
- party statements in which the parties, in turn, tell the mediator about their concerns and interests (the parties may raise all matters that they consider important including their emotional needs);
- identification by the mediator of areas of agreement and also of issues that need to be addressed;
- a stage in which the parties confer with each other for the purpose of generating and exploring multiple options and alternatives for settlement;
- a negotiation stage in which the parties may share information and ideas for resolution of the dispute; and
- a stage in which any agreements reached are fine-tuned and finalised.

Parties often engage in direct communication with each other for at least part of the time.¹⁵² Mediators may hold separate meetings with each of the parties at intervals throughout the process.

149 Boulle, above n 9, 13–42; Burns, above n 25, 701; Spencer and Hardy, above n 3, 127–33; John Wade, ‘Current Trends and Models in Dispute Resolution’ (Pt 1) (1998) 9 *Australian Dispute Resolution Journal* 59, 62–4.

150 Boulle, above n 9, 15–25; Spencer and Hardy, above n 3, 134–9.

151 It is common to conceptualise the mediation process as a series of stages. Taylor asserts that: ‘[t]he mediation process ... has universal process stages despite contextual differences’: Alison Taylor, ‘Concepts of Neutrality in Family Mediation: Contexts, Ethics, Influence, and Transformative Process’ (1997) 14 *Mediation Quarterly* 215, 219. See also Elizabeth F Beyer, ‘A Pragmatic Look at Mediation and Collaborative Law as Alternatives to Family Law Litigation’ (2008) 40 *St Mary’s Law Journal* 303, 312. However, the number and purpose of each stage and the terminology used to describe the stages vary between authors. For example, Moore describes the mediation session proper as an eight-stage process: Moore, above n 25, 186. Boulle describes it in 10 stages (with each stage having various sub-stages): Boulle, above n 9, 235–50.

152 See Boulle, above n 9, 29–30 for a discussion of some of the variable features of mediation.

B Objectives and Values of Mediation

Among the objectives claimed for mediation are the following:¹⁵³

- dispute resolution according to standards agreed by the parties (they may defer to legal standards or to any other standards they consider fair and appropriate) using a process the parties consider to be fair;¹⁵⁴
- satisfaction of individual interests or needs;¹⁵⁵
- self-determination and empowerment.¹⁵⁶ Mediation may enhance the parties' ability to resolve future disputes;
- recognition (that is, a greater openness to, and acceptance of, the other party to the dispute);¹⁵⁷
- increased access to a 'higher quality justice'¹⁵⁸ (that is, justice that is responsive to individual needs and reflective of the preferences of the parties);¹⁵⁹ and
- efficiency and effectiveness.¹⁶⁰

Mediation is said to be premised on the following values, where values are important principles or beliefs:

- party participation and autonomy;¹⁶¹
- process fairness;¹⁶²
- satisfaction of individual needs;

- 153 Boulle, above n 9, 91–7; Burns, above n 25, 701; Jay Folberg and Alison Taylor, *Mediation: A Comprehensive Guide to Resolving Conflicts without Litigation* (Jossey-Bass Publishers, 1984) 7–10, 35–6; Peter Adler, Karen Lovaas and Neal Milner, 'The Ideologies of Mediation: The Movement's Own Story' (1988) 10 *Law & Policy* 317, 330–1; Christine B Harrington and Sally Engle Merry, 'Ideological Production: The Making of Community Mediation' (1988) 22 *Law & Society Review* 709, 714–16.
- 154 NADRAC, *Report to the Commonwealth Attorney-General – A Framework for ADR Standards* (Report to the Commonwealth Attorney-General, NADRAC, April 2001) 13; Boulle, above n 9, 91.
- 155 Robert A Baruch Bush and Joseph P Folger, *The Promise of Mediation: Responding to Conflict through Empowerment and Recognition* (Jossey-Bass, 1994) 250; Kovach, 'New Wine Requires New Wineskins', above n 117, 942.
- 156 John Lande, 'How Will Lawyering and Mediation Practices Transform Each Other?' (1997) 24 *Florida State University Law Review* 839, 858–61.
- 157 Bush and Folger, above n 155, 89–91.
- 158 Robert A Baruch Bush, 'Efficiency and Protection, or Empowerment and Recognition?: The Mediator's Role and Ethical Standards in Mediation' (1989) 41 *Florida Law Review* 253, 257; Boulle, above n 9, 92.
- 159 Carrie Menkel-Meadow, 'Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-opted or "The Law of ADR"' (1991) 19 *Florida State University Law Review* 1, 6; Burns, above n 25, 701.
- 160 See Boulle, above n 9, 92–5, for a discussion of the meaning of these two terms. He describes effectiveness primarily in terms of the parties reaching agreement, but notes that there are several dimensions to this objective. It also relates to the durability of the agreement over time and the quality of the settlement outcome (which itself has several dimensions): at 94–5.
- 161 Menkel-Meadow, 'Ethics in Alternative Dispute Resolution', above n 6, 453; Jacqueline M Nolan-Haley, 'Lawyers, Clients, and Mediation' (1998) 73 *Notre Dame Law Review* 1369, 1371; Nancy A Welsh, 'The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?' (2001) 6 *Harvard Negotiation Law Review* 1, 16.
- 162 James J Alfini, 'Mediation as a Calling: Addressing the Disconnect between Mediation Ethics and the Practices of Lawyer Mediators' (2008) 49 *South Texas Law Review* 829, 830.

- self-determination¹⁶³ (promoting ‘subsidiary values of responsibility for choices and dignity of individuals’);¹⁶⁴
- empowerment (that is, giving the parties an increased sense of their own personal efficacy);¹⁶⁵
- joint problem-solving and consensuality of outcome;¹⁶⁶ and
- efficiency.¹⁶⁷

In practice, different mediation schemes and different mediators may focus on different objectives and values. In order to solve some of the definitional problems surrounding mediation and to impose a degree of analytical rigour on a process which is so diverse, different models of mediation have been identified. In Australia, Boule is often credited with identifying four ‘paradigm’ models of mediation, the settlement, facilitative, transformative and evaluative models.¹⁶⁸ Each model ‘has its own theoretical and philosophical premises’.¹⁶⁹ The models differ from each other in a number of other respects including mediation’s objectives and values, and the role and interventions of the mediator.¹⁷⁰ But there are at least three reasons for not overstating the importance of ‘models’. First, while these models are useful for analytical purposes, they are not distinct alternatives to one another¹⁷¹ and they can disguise the extent to which mediators

163 Nolan-Haley, ‘Lawyers, Clients, and Mediation’, above n 161, 1371; Burns, above n 25, 701; Menkel-Meadow, ‘Pursuing Settlement in an Adversary Culture’, above n 159, 6; Welsh, above n 161, 18–19; Julia Ann Gold, ‘ADR through a Cultural Lens: How Cultural Values Shape Our Disputing Processes’ [2005] *Journal of Dispute Resolution* 289, 311.

164 Boule, above n 9, 83.

165 Bush and Folger, above n 155, 85–91. The values of self-determination and empowerment are linked. Mediation is said to foster the value of empowerment in ‘its capacity to encourage the parties to exercise autonomy, choice, and self-determination’: Bush, above n 158, 268.

166 Boule, above n 9, 87–9; Menkel-Meadow, ‘Ethics in Alternative Dispute Resolution’, above n 6, 453.

167 The same factor may be both an objective and a value of mediation: Boule, above n 9, 62.

168 Boule, above n 9, 43–7. Boule’s framework is one of a number of categorisations available. One of the most well known is that of Riskin who classified mediator approaches by way of a grid consisting of two intersecting continuums, and four style quadrants: Leonard L Riskin, ‘Decisionmaking in Mediation: The New Old Grid and the New New Grid System’ (2003) 79 *Notre Dame Law Review* 1, 3. See also, eg, Michal Alberstein who discusses pragmatic, transformative and narrative models of mediation: Michal Alberstein, ‘Forms of Mediation and Law: Cultures of Dispute Resolution’ (2007) 22 *Ohio State Journal on Dispute Resolution* 321, 325–31; Mendel-Meadow who identifies six different models, each with a different focus or intended goal (facilitative, evaluative, transformative, activist, pragmatic and bureaucratic): Carrie Menkel-Meadow, ‘The Many Ways of Mediation: The Transformation of Traditions, Ideologies, Paradigms, and Practices’ (1995) 11 *Negotiation Journal* 217, 228–30.

169 Boule, above n 9, 63.

170 Boule, above n 9, 44–5; Omer Shapira, ‘Joining Forces in Search for Answers: The Use of Therapeutic Jurisprudence in the Realm of Mediation Ethics’ (2008) 8 *Pepperdine Dispute Resolution Law Journal* 243, 244.

171 Boule refers to these categories as archetypal models because they are not so much discrete forms of mediation practice but rather ways of conceptualising the different tendencies in practice: Boule, above n 9, 43. The most heated debate has concerned the appropriateness of ‘evaluative mediation’, where the mediator gives the parties an opinion on the likely outcome of court proceedings. As Riskin argues, evaluating and facilitating are not opposites but two ends of a continuum: Riskin, ‘Decisionmaking in Mediation’, above n 168, 17–18.

may ‘mix’ or ‘blend’ techniques associated with two or more models.¹⁷² Legal representatives must be ready to respond to a wide range of mediator interventions. Second, while the ‘model/s’ of mediation chosen by the mediator will have an impact (perhaps even an enormous impact) on the behaviour of lawyers, the lawyer’s ethical orientation does not change – a lawyer is always a partisan advocate for his or her client. Third, as Boule concludes, ‘[u]ltimately ... mediation values are realised in its application by individual practitioners in particular cases.’¹⁷³ As a result, it is difficult to make generalised statements about the objectives and values of mediation, with perhaps one exception.

Despite the diversity of mediation practice, there is wide agreement that party self-determination is central to all models of mediation. It has been called ‘[t]he controlling principle of mediation’;¹⁷⁴ the driving value behind mediation;¹⁷⁵ ‘the most fundamental principle of mediation’;¹⁷⁶ and the value that ‘grounds every model of mediation’.¹⁷⁷

The essential elements of self-determination are:¹⁷⁸

- active and direct participation by the parties in the process of communication and negotiation;¹⁷⁹
- informed consent on the part of the parties as to both process and outcome.¹⁸⁰ The parties must have sufficient information (including information as to the available alternatives to an offered settlement) to make an informed decision;

172 The use of a variety of models by mediators during a single mediation (or even a single meeting with the parties) is the norm ‘rather than the exception in the mediation of civil legal disputes’: Dwight Golann, ‘Variations in Mediation: How – and Why – Legal Mediators Change Styles in the Course of a Case’ [2000] *Journal of Dispute Resolution* 41, 42. See also Boule, above n 9, 43; Riskin, above n 168, 14–18; Jeffrey W Stempel, ‘The Inevitability of the Eclectic: Liberating ADR from Ideology’ [2000] *Journal of Dispute Resolution* 247, 248. The *Australian National Mediator Standards* provide for a ‘blended process’ which combines techniques from a number of models, eg, facilitative mediation is often combined with evaluative mediation (or advisory mediation) which may involve the provision of expert information and advice including an opinion as to the range of outcomes likely to be handed down by a court: Mediator Standards Board, *National Mediator Accreditation Standards – Practice Standards* (at March 2012) (‘*NMAS Practice Standards*’) ss 2(7), 10(5).

173 Boule, above n 9, 90. See also Macfarlane who asserts that the choice of intervention made by the mediator reflects his or her ‘conception of the values and goals of the mediation process itself’: Julie Macfarlane, ‘Mediating Ethically: The Limits of Codes of Conduct and the Potential of a Reflective Practice Model’ (2002) 40 *Osgoode Hall Law Journal* 49, 51.

174 Nolan-Haley, ‘Lawyers, Clients, and Mediation’, above n 161, 1374.

175 Lela Porter Love, ‘Mediation: The Romantic Days Continue’ (1997) 38 *South Texas Law Review* 735, 739.

176 Alfini, above n 162, 830.

177 Rachael Field, ‘A Mediation Profession in Australia: An Improved Framework for Mediation Ethics’ (2007) 18 *Australasian Dispute Resolution Journal* 178, 181. See also Rachael Field, ‘Rethinking Mediation Ethics: A Contextual Method to Support Party Self-determination’ (2011) 22 *Australasian Dispute Resolution Journal* 8, who argues that the concept of self-determination is ‘relational’ or contextual in that it is affected by a ‘myriad of variables in any given context’: at 15.

178 See Welsh, above n 161, 17–20; Weckstein, above n 26, 530.

179 Welsh, above n 161, 17.

180 Weckstein, above n 26, 530.

- voluntariness by the parties in coming to a decision; and
- absence of coercion on the parties in coming to a decision. The parties must retain the ability to accept or reject any particular outcome.¹⁸¹

Advocates for the parties can play a vital role in supporting self-determination. They can guide and assist their clients in coming to fully informed consensual decisions. It is surprising then that some commentators and professional bodies assert that lawyers should not act as advocates, and especially not as adversarial advocates, for their clients in mediation. These views are discussed next.

V MEDIATION AND ADVOCACY

A The Case against (Zealous Adversarial) Advocacy in Mediation

A number of scholars are critical of the legal profession's general rules of conduct. They maintain that these rules were fashioned with an adversary system of justice in mind,¹⁸² a system in which a lawyer is assigned the role of a 'zealous adversarial advocate'¹⁸³ whose mandate is to 'win' for his or her client at all costs.¹⁸⁴ These authors argue that the zealous adversarial advocate will elevate loyalty to a client above all else and follow the client's every instruction providing the ends sought and the means used are 'arguably lawful'.¹⁸⁵ This lawyer thinks nothing of exploiting a loophole in the law¹⁸⁶ for the benefit of a client even though it may produce an 'unfair' outcome for other parties. According to these critics, this approach to lawyering reduces lawyers to amoral gladiators,¹⁸⁷ amoral technicians,¹⁸⁸ and hired guns.¹⁸⁹

181 See generally Bobette Wolski, 'Mediator Settlement Strategies: Winning Friends and Influencing People' (2001) 12 *Australasian Dispute Resolution Journal* 248; Jacqueline M Nolan-Haley, 'Informed Consent in Mediation: A Guiding Principle for Truly Educated Decisionmaking' (1999) 74 *Notre Dame Law Review* 775, 790–1.

182 Robert C Bordone, 'Fitting the Ethics to the Forum: A Proposal for Process-Enabling Ethical Codes' (2005) 21 *Ohio State Journal on Dispute Resolution* 1, 3; Menkel-Meadow, 'Ethics in Alternative Dispute Resolution', above n 6, 410; Kimberlee K Kovach, 'Good Faith in Mediation – Requested, Recommended, or Required? A New Ethic' (1997) 38 *South Texas Law Review* 575, 619.

183 The expressions 'adversarial advocate' and 'adversarial advocacy' have been used for some time in the literature dealing with legal ethics. It is not altogether clear that these terms can be so easily transposed to mediation ethics: see, eg, Parker and Evans, above n 6, 22–9 and literature referred to therein. See also Daniel Markovits, *A Modern Legal Ethics: Adversary Advocacy in a Democratic Age* (Princeton University Press, 2008) 3–6.

184 David Luban, 'The Adversary System Excuse' in David Luban (ed), *The Good Lawyer: Lawyers' Roles and Lawyers' Ethics* (Rowman & Allanheld, 1984) 83, 90, republished in David Luban, *Legal Ethics and Human Dignity* (Cambridge University Press, 2007) 19, 27.

185 Parker and Evans, above n 6, 25; Peppet, above n 60, 500.

186 Robert W Gordon, 'The Independence of Lawyers' (1988) 68 *Boston University Law Review* 1, 10.

187 Peppet, above n 60, 500.

188 Richard Wasserstrom, 'Lawyers as Professionals: Some Moral Issues' (1975) 5 *Human Rights* 1, 6.

189 Ted Schneyer, 'Some Sympathy for the Hired Gun' (1991) 41 *Journal of Legal Education* 11, 11 (as suggested by its title, Schneyer was critical of this view).

The adversarial advocacy approach to legal practice is considered by some authors to be particularly inappropriate in mediation where the emphasis should be on reaching a mutually satisfactory outcome rather than on winning for one's client at the expense of the 'opponent'. Influential commentator Carrie Menkel-Meadow argues that the 'zeal' associated with adversarial advocacy is incompatible with mediation.¹⁹⁰ Menkel-Meadow uses the term 'zeal' in such a way as to 'high-light the "zealotry" implicated in zeal'.¹⁹¹ She argues that in mediation, the zealous adversarial advocacy approach requires 'zealous conduct where it may be dysfunctional'.¹⁹² She argues further that the values of zeal, client loyalty and partisanship run counter to, and may stifle, the values of trust, creativity, openness and joint problem-solving which ideally underpin mediation.¹⁹³

The most extreme view on mediation and advocacy is expressed by Rutherford who argues that a legal representative should play a neutral non-partisan role in mediation, providing advice to his or her client to help ensure that the mediated agreement is fair rather than attempting to help the client to obtain an advantage over the opposing party.¹⁹⁴ Rutherford opines that '[f]or mediation to succeed as a profession and to reach its highest objectives, advocacy has no place in any part of the process. For outside counsel to advocate a client's interests contradicts the very essence of mediation and can produce inequitable results'.¹⁹⁵ This view is considered to be an extreme one because it suggests that lawyers should abandon what is arguably the second most important mandate that they have within our legal system, that is, to act in the best interests of their client.

The Law Council of Australia and the Law Society of New South Wales have both struggled to come to terms with, and settle on, the form of advocacy – if any

190 Robert P Schuwerk, 'Reflections on Ethics and Mediation' (1997) 38 *South Texas Law Review* 757, 765. Schuwerk was commenting on Menkel-Meadow, 'Ethics in Alternative Dispute Resolution', above n 6, 427.

191 Menkel-Meadow, 'Ethics in Alternative Dispute Resolution', above n 6, 430.

192 *Ibid* 431.

193 *Ibid* 430, 453–4.

194 Mark C Rutherford, 'Lawyers and Divorce Mediation: Designing the Role of "Outside Counsel"' [1986] (12) *Mediation Quarterly* 17, 27–31. See discussion of this view by Jean R Sternlight, 'Lawyers' Representation of Clients in Mediation: Using Economics and Psychology to Structure Advocacy in a Nonadversarial Setting' (1999) 14 *Ohio State Journal on Dispute Resolution* 269, 280. The material from Rutherford is dated but other authors have expressed the view that advocacy is misplaced in mediation: see, eg, Sir Laurence Street, 'Representation at Commercial Mediations' (1992) 3 *Australian Dispute Resolution Journal* 255, 255; Bridget Sordo, 'The Lawyer's Role in Mediation' (1996) 7 *Australian Dispute Resolution Journal* 20, 23–24 (relying on Street's view); Anne Ardagh and Guy Cumes, 'Lawyers and Mediation: Beyond the Adversarial System?' (1998) 9 *Australian Dispute Resolution Journal* 72, 74 (quoting Street); Christine McCarthy, 'Can Leopards Change Their Spots? Litigation and Its Interface with Alternative Dispute Resolution' (2001) 12 *Australasian Dispute Resolution Journal* 35, 45 (quoting Ardagh and Cumes, quoting Street), although McCarthy does not appear to agree in agreement with the view that advocacy is misplaced in mediation. This view can in fact be traced back to Street who was instrumental in the drafting of the *NSW Standards*.

195 Rutherford, above n 194, 27.

– which might be appropriate in mediation. Until recently, it appeared that the Law Society of New South Wales had abandoned entirely the concept of advocacy in mediation, with the *NSW Standards* providing that legal representatives were ‘not present at mediation as advocates’ and that they were ‘a direct impediment’ to the mediation process if they did not understand and observe this direction.¹⁹⁶ In 2012, the *Standards* were amended, and the word ‘trial’ was added as an adjective to the term ‘advocate’. The *Standards* now provide:

Essentially the role of the legal representative [in mediation] is ... [t]o participate in a non-adversarial manner. Legal representatives 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 representative who does not understand and observe this is a direct impediment to the mediation process.¹⁹⁷

It will take some time before the amendment to the *Standards* filters down to popular literature. Currently, the ‘old’ version appears in popular literature on mediation and legal ethics.¹⁹⁸

While the *LCA Guidelines* provide a wide description of the role of lawyers in mediation,¹⁹⁹ they give a very narrow account of the skills that a lawyer might use. The *LCA Guidelines* state that:

The skills required for a successful mediation are different to those desirable in advocacy. It is not the other lawyer or mediator that needs to be convinced; it is the client on the other side of the table. A lawyer who adopts a persuasive rather than adversarial or aggressive approach, and acknowledges the concerns of the other side, is more likely to contribute to a better result.²⁰⁰

For these authors and professional bodies, advocacy is inextricably linked to adversarial behaviour and they argue that it too has no place in mediation. This view has its supporters. For instance, Bowie argues that mediation, by its nature, requires non-adversarial behaviour;²⁰¹ Caputo opines that ‘for mediation to reach its potential, adversarialism should not be invited into the process’;²⁰² and Parker and Evans draw on the *NSW Standards* as a basis for concluding that it is the *duty* of the lawyer ‘[t]o participate in a non-adversarial manner’.²⁰³

These views are challenged in the next section of the article. It is suggested that they rest on misconceptions about the concepts of ‘zeal’ and of ‘advocacy’,

196 This particular standard was amended in December 2012: *NSW Standards* s 2.3.

197 *NSW Standards* s 2.3.

198 See, eg, Boulle who asserts that a lawyer’s role is to ‘participate in a “non-adversarial manner” and not as advocates’ and who speaks of the ‘non-advocatory role expected of lawyers’: Boulle, above n 9, 295; Parker and Evans, above n 6, 223.

199 *LCA Guidelines* s 1.

200 *LCA Guidelines* s 6.1.

201 James M Bowie, ‘Ethical Issues in Construction Mediation: Are There Any Rules?’ (2004) 24(2) *Construction Lawyer* 33, 34.

202 Chiara-Marisa Caputo, ‘Lawyers’ Participation in Mediation’ (2007) 18 *Australasian Dispute Resolution Journal* 84, 89.

203 Parker and Evans, above n 6, 223.

and on fragile (possibly illusory) dichotomies between adversarial and non-adversarial conduct.

B The Case in Favour of (Zealous Adversarial) Advocacy in Mediation

In response to the general criticism of the professional conduct rules, it is argued that the extreme approach said to be embodied in the concept of ‘zealous adversarial advocacy’ has never, and does not now, represent the ethics of the legal profession.²⁰⁴ Lawyers are required to behave ‘with all due fidelity to the court as well as the client’.²⁰⁵ This approach to legal ethics recognises that lawyers ‘behave as officers of the court as well as client advocates’.²⁰⁶

In the discussion which follows, it is suggested that there is room in mediation for advocates, even for ‘zealous adversarial advocates’.

1 On Zeal

The professional conduct rules in Australia have never embraced the concept of zeal. Even if it were otherwise, we need not avoid the concept in order to accommodate mediation practice. While Menkel-Meadow chose to use ‘zeal’ in such a way as to highlight ‘zealotry’,²⁰⁷ other commentators reject this meaning.²⁰⁸ Bernstein argues that it is an error to equate zeal with zealotry.²⁰⁹ She suggests that ‘zeal’ has two elements, a ‘partisan commitment’ to one side and passion.²¹⁰ Partisanship requires a lawyer to look out for the wellbeing of his or her client. It requires a lawyer to be on the client’s side and no one else’s. Depending on the context, it may be necessary for a lawyer to view the other party as an adversary or, at least, to practise with an adversary in mind. But ‘[t]he lawyer who envisions adversaries need not harm them. Self-conscious partisan commitment might lead a lawyer to recommend eschewing a fight and to favour compromise, mediation, or other responses that validate where the adversary is coming from’.²¹¹ Bernstein argues that the second element of zeal, that is, passion, requires effectiveness, creativity, attention to detail, ‘enthusiasm,

204 Rhode outlines both sides of the debate in Deborah L Rhode, ‘An Adversarial Exchange on Adversarial Ethics: Text, Subtext, and Context’ (1991) 41 *Journal of Legal Education* 29. See also Fred C Zacharias and Bruce A Green, ‘Reconceptualizing Advocacy Ethics’ (2005) 74 *George Washington Law Review* 1, 2–4.

205 Zacharias and Green, above n 204, 5.

206 Parker and Evans, above n 6, 28. This approach to legal ethics is referred to as the public interest or responsible lawyering approach: see William H Simon, *The Practice of Justice: A Theory of Lawyers’ Ethics* (Harvard University Press, 1998) 8–9.

207 Menkel-Meadow, ‘Ethics in Alternative Dispute Resolution’, above n 6, 430.

208 Anita Bernstein, ‘The Zeal Shortage’ (2006) 34 *Hofstra Law Review* 1165, 1175–7. She also argues that it is an error to equate zeal with agency, in the sense of lawyers being prepared to do the client’s bidding: at 1177–8.

209 *Ibid* 1175.

210 *Ibid* 1171.

211 *Ibid* 1171–2.

energy, and benevolent effort'.²¹² If Bernstein's views on 'zeal' are accepted, zeal is to be welcomed in mediation.

2 On Advocates and Advocacy

As noted at the outset, an 'advocate' may be defined as 'a person who pleads a case on someone else's behalf'²¹³ and more generally, as a 'supporter'.²¹⁴ In scholarly literature, advocacy is often referred to as 'the art of persuasion'²¹⁵ but even this definition may be too narrow. Pinos asserts that advocacy refers to 'the range of interpersonal, persuasive and preparatory skills which a lawyer brings to bear upon the promotion of his client's interests in a dispute in or out of court'.²¹⁶ Advocacy is not limited to the courtroom and it should not be equated with oral presentations. Advocates undertake a range of roles on behalf of their clients and in many different contexts in order to achieve a predetermined objective.

The advocate's objective in a trial is to persuade 'the decision-maker (judge, magistrate, tribunal member, juror) to accept the propositions advanced by the advocate leading to the success of the advocate's cause' or more accurately, the client's cause.²¹⁷ In mediation, the advocate's objective is to persuade the other party and his or her lawyer that the advocate's proposals for settlement best meet the interests of the parties.²¹⁸ This presupposes that the advocate and the client have identified the interests of the other party and arrived at a proposal that meets those interests tolerably well. Advocates can be creative, and they can engage in joint problem-solving. In a statement which connects zeal and advocacy, Bordone asserts that in unassisted negotiation and in mediation, 'zealous

212 Ibid 1174.

213 Fowler and Fowler, above n 22, 13.

214 Ibid. There is a common misconception that the ALRC distinguished 'advocacy' and 'adversarialism' in its Managing Justice Report: see Australian Law Reform Commission, above n 5. It did not. The Commission noted the importance of drawing a distinction 'between the adversarial system itself and behaviour of lawyers or their clients described as "adversarial"': at 262 [3.41]. According to the ALRC, '[a] common misconception in the adversarial-non adversarial debate is to equate partisanship by lawyers with excessive, adversarial behaviour. It is a common precept of both the common law and civil code systems that a lawyer will be partisan and is required to advocate the case of the client': at 260 [3.34]. The Commission does not criticise 'adversarial behaviour'. It is excessive adversarial behaviour which is the problem: at 262 [3.41].

215 Lord Alexander, 'The Art of Advocacy' (1991) *Bar News – The Journal of the NSW Bar Association* 14, 14. See generally M D Kirby, 'Ten Rules of Appellate Advocacy' (1995) 69 *Australian Law Journal* 965, 974; David Napley, *The Technique of Persuasion* (Sweet and Maxwell, 4th ed, 1991) 1. See also Timothy Pinos, 'Advocacy Training: Building the Model – A Theoretical Foundation' (1983) 1 *Journal of Professional Legal Education* 18, 18; Max Perry, *Hampel on Advocacy: A Practical Guide to Basics* (Leo Cussen Institute, 1996) introduction.

216 Pinos, above n 215, 18. Similar views are expressed by Fiona Boyle et al, *A Practical Guide to Lawyering Skills* (Routledge Cavendish, 2001) 221–2; Marie Fox and Christine Bell, *Learning Legal Skills* (Blackstone Press, 3rd ed, 1999) 194–6.

217 Kirby, above n 215, 965. See also Bordone, above n 182, 23.

218 Robert Angyal points out that an advocate has at least four audiences during various stages of the mediation process: the opposing party; the opposing party's lawyer; the mediator; and one's own client: 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.

advocacy entails identifying the underlying interests of the client and then employing one's skills of listening, creativity, and joint problem-solving to best meet those interests and attain a satisfying and efficient outcome'.²¹⁹

There are some obvious differences in the roles that advocates undertake in mediation as compared to those that they carry out if a matter proceeds to a trial. When preparing for a trial, a lawyer typically prepares a theory of the case, that is, the most plausible explanation for what occurred, whereas they may not do so in mediation.²²⁰ Trial lawyers formally examine and cross-examine witnesses, a task that they might never do in mediation. In mediation, lawyers may place a high priority on identification of the non-legal interests of their own client and of those of the other party, whereas they may not do so in a trial. Nonetheless, an advocate in mediation performs many of the same roles, and uses many of the same skills, as an advocate in litigation. For instance, an advocate will act as an adviser to his or her client whether they are engaged in mediation or in litigation. The advocate is likely to give the client an opinion as to the likely outcome of litigation whether they are preparing for mediation or litigation. In performing these roles, the advocate will use the skills of: research and analysis; fact-finding, selection and use; identification and analysis of relevant legal issues; and effective communication. As Hyman observes, there are 'some precepts that apply with equal force to the accomplishment of good trial advocacy and to the creation of wise agreements'.²²¹ He explains that '[t]hese include the need to pay very close attention to the facts, the ability to listen carefully and well, and a skill in building persuasive conceptual frameworks that characterize the dispute and point to a mutually satisfactory resolution'.²²²

The *LCA Guidelines* contain two provisions which seem to envisage advocacy as conceptualised in this article, namely section 1 (which provides that '[a] lawyer's role in mediation is to assist clients, provide practical and legal advice on the process and on issues raised and offers made, and to assist in drafting terms and conditions of settlement as agreed')²²³ and section 6 (which mentions the need 'to help clients to best present their case').²²⁴ However, section 6.1 raises some matters which, it is suggested, need to be reconsidered. The following points need to be taken into account:

219 Bordone, above n 182, 23. Other authors also support the use of zealous advocacy in mediation: see, eg, Sternlight, above n 194, 291–3; Lawrence Fox, 'Mediation Values and Lawyer Ethics: For the Ethical Lawyer the Latter Trumps the Former' in Phyllis Bernard and Bryant Garth (eds), *Dispute Resolution Ethics: A Comprehensive Guide* (American Bar Association, 2002) 39, 39–41; John W Cooley, *Mediation Advocacy* (National Institute for Trial Advocacy, 2nd ed, 2002) 127; Harold I Abramson, *Mediation Representation: Advocating as a Problem-Solver* (Wolters Kluwer, 3rd ed, 2013) 9.

220 Jonathan M Hyman, 'Trial Advocacy and Methods of Negotiation: Can Good Trial Advocates Be Wise Negotiators?' (1987) 34 *University of California Los Angeles Law Review* 863, 864.

221 Ibid 867.

222 Ibid 867–8.

223 *LCA Guidelines* s 1.

224 *LCA Guidelines* s 6.

- while mediation is a process, advocacy is not;
- as mentioned above, the skills required in mediation have much in common with those used in litigation. It is suggested that the distinction between a trial advocate and other kinds of advocates is fragile (a matter which should also be considered by the drafters of the *NSW Guidelines*);
- a lawyer needs to persuade the other party and his or her lawyer (and possibly the mediator);
- advocacy is not necessarily adversarial in nature (it should never be aggressive)²²⁵ although advocates sometimes use adversarial techniques; and
- as argued below, the use of adversarial techniques does not necessarily change the nature of mediation.

Some authors have scoped out a place for advocacy in mediation through the formulation of new phrases such as ‘settlement advocacy’ and ‘client resolution advocacy’.²²⁶ The essence of the advocate’s role has not changed, despite the change in terminology. Macfarlane observes:

There is no lessening of the lawyer’s responsibility to achieve the best possible outcome for his client in client resolution advocacy. In fact, advocacy as conflict resolution places the constructive and creative promotion of partisan outcomes at the center of the advocate’s role and sees this goal as entirely compatible with working with the other side. In fact, this goal can *only* be achieved by working with the other side. The new lawyer remains just as dedicated to achieving her client’s goals as the warrior or adversarial advocate. What changes is that her primary skill becomes her effectiveness and ability to achieve the best possible negotiated settlement, while she remains prepared to litigate if necessary.²²⁷

While the approach of an advocate is not necessarily adversarial in nature, an advocate must of necessity be partisan in his or her approach. A lawyer cannot put aside his or her client’s interests and approach mediation as a ‘non-partisan’ participant. He or she must work towards an outcome which advances the client’s interests. But this lawyer recognises that often the client’s interests are best served by settlement on terms which are mutually agreed by the parties.

3 *On Adversarial and Non-Adversarial Conduct*

According to the *NSW Standards*, the role of a legal representative in mediation is ‘[t]o participate in a non-adversarial manner’.²²⁸ As noted above, the *LCA Guidelines* suggest that lawyers should not use an adversarial approach.²²⁹

225 I acknowledge that the term ‘aggressive’ is likely to be difficult to define with precision.

226 See, eg, Marilyn A K Scott, ‘Collaborative Law: Dispute Resolution Competencies for the “New Advocacy”’ (2008) 8 *Queensland University of Technology Law and Justice Journal* 213, 227.

227 Julie Macfarlane, ‘The Evolution of the New Lawyer: How Lawyers Are Reshaping the Practice of Law’ [2008] *Journal of Dispute Resolution* 61, 66 (emphasis in original), cited in Wolski, ‘An Evaluation of the Rules of Conduct Governing Legal Representatives in Mediation’, above n 4, 207.

228 *NSW Standards* s 2.3.

229 *LCA Guidelines* s 6.1.

There are at least two problems with these statements. First, the terms ‘adversarial’ and ‘non-adversarial’ lack clarity and precision of meaning. The terms assume a clear dichotomy between adversarial and non-adversarial behaviour where none exists. Second, in many mediations, some adversarial behaviour (assuming that it can be differentiated from non-adversarial behaviour) is both necessary and desirable. These problems are discussed in turn below.

(a) *Lack of Clarity of Terms and Fragile Distinctions*

The terms ‘adversarial’ and ‘non-adversarial’ are not defined in the *NSW Standards* or in the *LCA Guidelines* and no examples of prototypical behaviour are given. These terms are difficult to define with any precision. Some indications of what these terms might signify can be found in the commentary of persons who criticise lawyers’ behaviour in mediation. Lawyers have been criticised for arguing about the law, arguing over positions (that is, specific solutions adopted by a party), making high demands, withholding information, and exaggerating and misleading on settlement points and alternatives to settlement.²³⁰ Presumably behaviour such as this is what the critics mean by ‘adversarial’ behaviour. It has been argued that in mediation, lawyers should focus on interests rather than rights,²³¹ take a ‘non-aggressive’ stance,²³² make moderate demands and reciprocal concessions, and share information. Presumably, this is what the critics have in mind by ‘non-adversarial’ behaviour.²³³ However, the behaviour to which these commentators refer points, not so much to a distinction between adversarial and non-adversarial conduct, as to a distinction 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.²³⁴ It is no surprise then that these same commentators argue that lawyers should use interest-based negotiation in mediation, rather than positional negotiation.²³⁵

It is well recognised in the literature that most negotiations are neither purely positional nor interest-based.²³⁶ They involve combinations and sequences of tactical moves, some of which tend towards the adversarial end of the spectrum

230 See discussion by Wolski, ‘An Evaluation of the Rules of Conduct Governing Legal Representatives in Mediation’, above n 4, 208; Mason, above n 4, 114; Parker and Evans, above n 6, 222.

231 Parker and Evans, above n 6, 222; Caputo, above n 202, 90.

232 Parker and Evans, above n 6, 222.

233 Wolski, ‘An Evaluation of the Rules of Conduct Governing Legal Representatives in Mediation’, above n 4, 208.

234 Gerald B Wetlauffer, ‘The Limits of Integrative Bargaining’ (1996) 85 *Georgetown Law Journal* 369, 370–1.

235 See Walter W Steele Jr, ‘Deceptive Negotiating and High-Toned Morality’ (1986) 39 *Vanderbilt Law Review* 1387, 1403; Parker and Evans, above n 6, 222; Menkel-Meadow, ‘Ethics in Alternative Dispute Resolution’, above n 6, 430, who asserts that mediation is premised on problem-solving negotiation.

236 Raymond A Friedman and Debra L Shapiro, ‘Deception and Mutual Gains Bargaining: Are They Mutually Exclusive?’ (1995) 11 *Negotiation Journal* 243, 244, 247. See also Wolski, ‘An Evaluation of the Rules of Conduct Governing Legal Representatives in Mediation’, above n 4, 209–10 and accompanying references cited therein.

of possible behaviours, and some of which tend towards the non-adversarial end. There are hundreds of tactical moves which ‘exist’ in-between the two extremes. In these ‘in-between’ positions, the distinction between adversarial and non-adversarial conduct is at best fragile.

(b) The Inevitability of Adversarial Behaviour in Mediation

Adversarial behaviour (assuming it can be defined) cannot be isolated from non-adversarial behaviour and it cannot be eliminated. Even Fisher and Ury, who popularised interest-based negotiation, must have contemplated that some competition was inevitable and even ‘wise’ for while they urge negotiators to be soft on the people, they recommend that they are hard on the problem.²³⁷

A number of well known negotiation theorists argue that adversarial conduct is both inevitable and indispensable in negotiation.²³⁸ They argue that competitiveness on substantive issues is necessary ‘to protect and advance the parties’ interests, including their interests in ethical treatment’.²³⁹ Particularly in disputes involving legal rights and obligations, it might be necessary for a party’s representative to: make strong demands; support positions with well-developed legal arguments; refuse to change views without good reasons; and reveal information slowly and sometimes not at all. The goal of this ‘substantive competitiveness’ is ‘to have one’s views about applicable law or practical concerns adopted by the parties as the basis for settlement, and thus, to produce the best outcome consistent with the strength of one’s substantive claims’.²⁴⁰ According to Riskin, ‘[a] prediction of the likely results of adversary processing is necessary for an informed, fully voluntary decision about a mediated solution’.²⁴¹ But an argument in favour of an adversarial posture is not an argument for lying and unfairness – they are ‘not a necessary function of the adversarial posture’.²⁴² The posture ‘requires partisanship, not its excesses’.²⁴³

It is not clear what behaviour constitutes ‘excessive’ adversarial behaviour. Commentators have singled out: table-pounding;²⁴⁴ ‘boisterous behaviour’;²⁴⁵ and

237 Fisher and Ury, above n 86, 39–40. Fisher and Ury are widely considered to have popularised ‘interest-based negotiation’.

238 Robert J Condlin, ‘Bargaining in the Dark: The Normative Incoherence of Lawyer Dispute Bargaining Role’ (1992) 51 *Maryland Law Review* 1, 22.

239 Eleanor Holmes Norton, ‘Bargaining and the Ethic of Process’ (1989) 64 *New York University Law Review* 493, 529.

240 Condlin, above n 238, 22.

241 Leonard L Riskin, ‘Mediation and Lawyers’ (1982) 43 *Ohio State Law Journal* 29, 37. See also Nolan-Haley, ‘Lawyers, Clients, and Mediation’, above n 161, 1385; James H Stark, ‘The Ethics of Mediation Evaluation: Some Troublesome Questions and Tentative Proposals, from an Evaluative Lawyer Mediator’ (1997) 38 *South Texas Law Review* 769, 789.

242 Norton, above n 239, 531.

243 *Ibid.*, quoted in Wolski, ‘An Evaluation of the Rules of Conduct Governing Legal Representatives in Mediation’, above n 4, 210.

244 Fox, above n 219, 41.

245 *Ibid.*

‘out-and-out dishonesty’.²⁴⁶ But as with much of the terminology used to describe negotiation behaviour, a term such as ‘boisterous’ is vague and difficult to define. In an apparent bid to avoid use of the term ‘adversarial’, Cooper recently distinguished between ‘*aggressive adversarial* advocates’,²⁴⁷ a role that she considers inappropriate for legal representatives in mediation, and ‘*assertive dispute resolution* advocates’,²⁴⁸ a role which she considers fitting for mediation practice. However, it is unlikely that use of the word ‘assertive’ would make it any easier for lawyers to sort ethical behaviour from unethical behaviour in mediation. Cooper’s concern was to fit ‘dispute resolution advocacy’ under the umbrella of non-adversarial practice. However, in a testament to the fragility of the distinction between adversarial and non-adversarial conduct, the authors of a popular text on non-adversarial justice opine:

Adversarialism and non-adversarialism are not mutually exclusive. Key non-adversarial developments sit alongside more traditional aspects of the adversarial system. Rather than being mutually exclusive opposites, we prefer to conceive of adversarialism and non-adversarialism as a continuum, a sliding scale upon which various legal processes sit, with most processes combining aspects of adversarial and non-adversarial practice to varying degrees.²⁴⁹

If this observation is accepted, it is not necessary to secure a fixed point on the continuum for mediation. Each mediation will most likely occupy a different point on the continuum as a result of a host of variables such as the philosophy of the organization sponsoring the mediation and the mediator’s perception of its objectives and values. Either way, it is clear that the nature of mediation is not destroyed by adversarial behaviour, such as maintenance of strong positions, presentation of legal arguments and a cautious approach to revealing information. Mediation need not be ‘non-adversarial’ to retain its character as mediation.²⁵⁰

VI THE LAWYER’S ROLES AND ETHICAL ORIENTATION IN MEDIATION

A Lawyering Roles in Mediation

Legal representatives for the parties to disputes have two primary roles to play in mediation – that of officer of the court and that of client advocate. The way in which these roles are executed or carried out is shaped by the features, objectives and values of mediation and in particular, by the need to ensure that clients reach decisions on a voluntary, fully-informed basis. These roles also

246 Sandra S Beckwith and Sherri Goren Slovin, ‘The Collaborative Lawyer as Advocate: A Response’ (2003) 18 *Ohio State Journal on Dispute Resolution* 497, 498.

247 Cooper, above n 7, 183 (emphasis in original).

248 *Ibid* (emphasis in original).

249 Michael King et al, *Non-adversarial Justice* (Federation Press, 2009) 5.

250 Boule, above n 9, 70–1.

depend on a range of contextual variables such as the sophistication of the parties and whether, for example, they are repeat players or first-timers to mediation.

In mediation, the lawyer's role as advocate may require him or her to act as: adviser and counsellor; spokesperson; negotiator; strategic intervener; evaluator and/or risk assessor and agent of reality; and document drafter.²⁵¹ These roles are examined below.

1 Adviser and Counsellor

Clients must be able to make informed decisions about process and outcome. Lawyers should advise them of the nature and purpose of mediation and of its potential benefits and possible disadvantages. Clients must be appraised of their legal rights and obligations, of the legal and non-legal consequences of not reaching an agreement, and of the range of outcomes that are likely if the matter proceeds to trial. All alternatives to settlement should be explored. Lawyers are best placed to give this advice when they see things from the perspective of a partisan advocate. Stark concludes that while the 'adversarial/materialistic perspective' of advocates has been criticised, 'it is precisely the stance of partisanship that causes representative lawyers – advocates – to provide the fullest possible information to their clients'.²⁵²

Clients also need to be prepared for what is expected of them in mediation. Lawyers might discuss with clients the importance of approaching and participating in mediation with an appropriate attitude – one oriented towards cooperative problem-solving. They should discuss and agree upon the roles that each is to undertake in the mediation.

2 Spokesperson

One of the potential benefits of mediation is that it allows the parties direct involvement and participation in the decision-making process. In mediation, legal representatives are expected to relinquish their central speaking role to the client,²⁵³ and to play more of a support role. Lawyers can support clients in a number of ways. They might, for example, help clients to write out their opening statements and practise it with them. However, some clients may be reluctant to speak especially in the early stages of the mediation. While lawyers should encourage clients to speak on their own behalf, they should not force them to take on a role with which they are uncomfortable. As Rundle says in relation to client participation, '[i]f they want to participate, *that preference should be*

251 See, eg, Nolan-Haley, 'Lawyers, Clients, and Mediation', above n 161, 1376–7. Wade identifies 14 different 'roles' in John H Wade, *Representing Clients at Mediation and Negotiation* (Dispute Resolution Centre, Bond University, 2000) 144–67. However, for the most part, the activities mentioned are more in the nature of 'tactics' rather than roles in the sense used here. For instance, the 'good cop/bad cop' routine is one of many 'dirty tricks' discussed by Fisher and Ury, above n 86, ch 8.

252 Stark, above n 241, 793.

253 Nolan-Haley, 'Lawyers, Clients, and Mediation', above n 161, 1375.

supported. On the other hand, disputants who prefer that another person speaks on their behalf should be granted that opportunity'.²⁵⁴

3 *Negotiator*

Lawyers should be prepared for positional and interest-based negotiation and they should be able to move between these two approaches 'depending on the type and stage of negotiation'.²⁵⁵ They will normally formulate position statements; identify the client's interests; assist in identifying the interests of the other side; formulate issues (or problem statements); help set an agenda; help clients to formulate offers and counteroffers; and generate and evaluate options for settlement.²⁵⁶ They should prepare clients to respond to the inevitable bumps and road blocks that occur in mediation. Lawyers must be well versed in a range of techniques to move the negotiation past impasse towards settlement.

4 *Strategic Intervener*

Legal representatives must anticipate and be prepared to respond to a range of interventions which might be made by the other party and their lawyer. They should protect their clients as far as possible from any unfair bargaining advantage the other side may have.²⁵⁷ Most standards of conduct for mediators assume that mediators will make appropriate interventions to address a power imbalance between the parties²⁵⁸ but legal representatives are better placed to do so than mediators (for a mediator must try to preserve at least the appearance of impartiality).

Lawyers might also have to protect clients from mediators. Mediators bring their own values and interests to mediation. They use strategies which influence the content and outcome of the mediation (for example, they may use hypothetical questions and reframing techniques to steer the discussion in a particular direction), and they may use a range of techniques to pressure the parties to settle (for example, they may show signs of impatience and hold long

254 Olivia Rundle, 'Barking Dogs: Lawyer Attitudes towards Direct Disputant Participation in Court-Connected Mediation of General Civil Cases' (2008) 8 *Queensland University of Technology Law and Justice Journal* 77, 80 (emphasis added).

255 Macfarlane, 'The Evolution of the New Lawyer', above n 227, 70. See also Chris Guthrie, 'The Lawyer's Philosophical Map and the Disputant's Perceptual Map: Impediments to Facilitative Mediation and Lawyering' (2001) 6 *Harvard Negotiation Law Review* 145, 180–2.

256 If mediation is chosen by the parties, there are a range of matters which lawyers should attend to by way of preparation such as selecting a mediator and preparing 'intake documents': see Hardy and Rundle, above n 1, 116–24, 129–33.

257 Craig A McEwen, Nancy H Rogers, and Richard J Maiman, 'Bring in the Lawyers: Challenging the Dominant Approaches to Ensuring Fairness in Divorce Mediation' (1995) 79 *Minnesota Law Review* 1317, 1348, 1361.

258 See the *NMAS Practice Standards* s 4.

sessions to wear the parties down).²⁵⁹ Lawyers can manage the ebb and flow of communications and insist on rest breaks and adjournments.

5 Evaluator, Risk Assessor and Agent of Reality

During mediation, legal representatives should advise clients of the consequences (both legal and non-legal) of proposals for settlement and of the pros and cons of settling now and of the risks of not settling. From time to time, they may have to remind clients of the likelihood of success on the merits if the matter proceeds to trial. They might also remind a client that ‘merit’ is only one matter that the client can consider²⁶⁰ and encourage the client to look at broader interests and at their relationship with other involved parties.

Lawyers should assist clients to identify and evaluate their best and worst alternatives to a negotiated agreement.²⁶¹ They must ensure, to the extent possible, that their clients make consensual decisions, with full knowledge of their legal rights and obligations and of the significance and consequences of any agreement reached.

6 Document Drafter

If an agreement is reached, legal representatives must ensure that all contingencies have been considered and provided for. They should assess the agreement for its fairness and enforceability without taking responsibility for the content of the agreement.²⁶² They may have to draft and finalise terms of settlement, ensuring that the agreement reached by the parties is accurately recorded.

B On the Lawyer’s Ethical Orientation and ‘Standard Philosophical Map’

Some commentators argue that lawyers need to modify their standard ‘philosophical map’²⁶³ in order to be effective in interest-based mediation. The concept of the lawyer’s ‘standard philosophical map’ is attributable to Riskin who suggested that lawyers are predisposed to believe that disputants are adversaries and that disputes can be resolved through the application of legal

259 The standards of conduct for mediators prohibit them from coercing the parties to settle: *NMAS Practice Standards* s 2(5); Law Society of New South Wales, *Revised Guidelines for Solicitors Who Act as Mediators* (at 29 July 1993) ss 2.2, 2.3; Queensland Law Society, *Standards of Conduct for Solicitor Mediators* (at 23 September 1998) ss 1.2, 7.1, 7.2. However, the standards do not draw any clear dividing lines between what is, and what is not, ‘coercion’ and what is, and what is not, an appropriate intervention. The standards generally avoid referring to the specific interventions which mediators can make.

260 Fox, above n 219, 45.

261 Fisher and Ury popularised the expressions ‘best’ and ‘worst alternatives to a negotiated agreement’ with the acronyms ‘BATNAs’ and ‘WATNAs’: Fisher and Ury, above n 86, 101–111. BATNAs and WATNAs are the yardsticks against which to measure the acceptability of proposals made in a negotiation.

262 Patricia Hughes, ‘Ethics in Mediation: Which Rules? Whose Rules?’ (2001) 50 *University of New Brunswick Law Journal* 251, 259–60.

263 Caputo, above n 202, 90.

rules. It has been argued that lawyers need to learn to live with feelings and ambiguity rather than with rules of law and the certainty provided through legal methods and solutions.²⁶⁴ The more moderate view, one which recognises the value of the lawyer's 'standard philosophical map' (if indeed there is one), is that lawyers may retain their standard orientation but enrich it²⁶⁵ by acquiring new knowledge and understanding (for example, of the different approaches to negotiation) and by further developing skills such as those associated with active listening, empathising and creative problem-solving.²⁶⁶

But while lawyers may need to acquire new knowledge and develop new skills to be effective in mediation, their primary roles remain the same. Neither roles (as officer of the court and as advocate for one's client) nor duties (for example, the duties owed to the court and the duties owed to a client) have changed with the advent of mediation. At no time does the lawyer's ethical orientation change. Regardless of whether a lawyer is representing a client in mediation or in litigation, he or she must act in the client's best interests, all the while paying due regard to the duties owed to the court and the administration of justice. Sometimes the client's best interests will be served by reaching an agreement in mediation; on other occasions, the client's best interests might be served by progressing in litigation to a trial.

VII CONCLUSION: DIRECTIONS FOR FUTURE RESEARCH AND ANALYSIS

The Law Council of Australia and the Law Society of New South Wales have issued guidelines and standards which seek to give assistance to legal representatives in mediation. In so far as these statements require practitioners to act in good faith and to cooperate with mediators, they are consistent with the rules of conduct of the profession (and with other components of the law of lawyering) and are in line with current trends in legislation and with developments in case law. In so far as these statements suggest that advocacy and adversarial conduct are misplaced in mediation, it is suggested that they are ill-conceived and should be amended.

In the author's opinion, it is not appropriate to ask lawyers to change their ethical orientation from that of a partisan advocate to that of a non-partisan participant. Lawyers cannot change their ethical orientation for they are charged under the rules of conduct of the profession and the general law, to act in the best interests of their clients. In this respect, the *LCA's Guidelines* and the old *NSW Standards* appear to suggest that lawyers should act contrary to the duties imposed by the law of lawyering. As noted above, the *NSW Guidelines* have been

264 Ardagh and Cumes, above n 194, 74. Generally, on the concept of a 'standard philosophical map', see Riskin, 'Decisionmaking in Mediation', above n 168.

265 Guthrie, above n 255, 180.

266 Ibid 182.

amended with the term ‘trial advocates’ now being used instead of ‘advocates’. For the reasons mentioned above, it is submitted that the distinction between trial advocates and other advocates is fuzzy and best avoided. The drafters of the guidelines might consider if it is necessary to refer to ‘advocates’ and ‘advocacy’ at all. In the author’s opinion it is not necessary to do so.

It is not appropriate to require legal representatives in mediation to act in a ‘non-adversarial’ manner. There are many circumstances in which a legal representative will be justified in using adversarial techniques – if by that term we mean relying on legal argument and so on. This is more than likely to be the case in the mediation of legal disputes, that is, those disputes involving legal rights and obligations. This is not to say that behaviour such as yelling, banging tables and slamming doors, and threatening to inflict harm, is justified. But a lawyer will often have occasion to present well-reasoned legal arguments, to make strong demands and to refuse to change views without good reasons, to name but a few techniques which appear to fall under the label of ‘adversarial’. It might be preferable to remove references to adversarial and non-adversarial, at least as adjectives describing lawyer conduct.

It is recommended that section 6.1 of the *LCA’s Guidelines* be reworded along the following lines:

The skills required in mediation have much in common with those used in litigation but whereas the advocate’s objective in litigation is to persuade the decision-maker to accept the propositions advanced by the advocate and to find in favour of the advocate’s client, the advocate’s objective in mediation is to persuade the other party and his or her lawyer that the advocate’s proposals for settlement best meet the interests of the parties. To that end, the advocate will consider solutions that accommodate the interests of other parties as well as those of his or her own client, and help clients to see that solutions, not judgments, may be in their best interests.

Section 2.3 of the *NSW Standards* should also be amended. The following wording is suggested:

The role of the legal representative [in mediation] is to promote informed consent by the client and to advance the interests of the client through joint problem-solving with the other parties to the mediation with a view to reaching an agreement which satisfies as many of the client’s interests and those of the other parties as possible.

If the ultimate aim of mediation is to enable client self-determination and consensual decision-making, there are good reasons for encouraging advocacy and some forms of adversarial behaviour in mediation. Legal representatives can support the value of self-determination in mediation by ensuring that clients have as much information as possible, including information about the likely outcome of a court case. Lawyers can promote informed and voluntary consent by their clients. They do this best from the vantage point of an advocate.

The issues raised in this article require a great deal more research and analysis than has been given to them to date. As more and more lawyers find themselves acting for clients in mediation, it is time to restart stalled discussions

about the ethics of legal representatives in mediation. The following matters might be considered in the future:

1. How do legal representatives for the parties actually behave in mediation? In Australia and in the US, only limited research has been conducted on the nature of lawyers' behaviour in mediation.²⁶⁷
2. How should legal representatives behave in mediation?
3. Does the answer to the last question depend to some extent on the approach adopted by the mediator?²⁶⁸ It has been suggested that the mediator's approach (and in particular, how evaluative the mediator might be) is one of the single most important factors impacting the role undertaken by legal representatives.²⁶⁹
4. What other factors influence the conduct of legal representatives in mediation?
5. Is it necessary and helpful to attempt to distinguish between adversarial and non-adversarial conduct and, if so, why? How is adversarial behaviour to be defined? How is non-adversarial behaviour to be defined? Commentators who argue that legal representatives should act in a 'non-adversarial' way should be able to define the term and to provide examples of desired conduct.
6. Assuming adversarial behaviour can be adequately defined, is all adversarial behaviour inappropriate in mediation? In what circumstances, if any, is a legal representative justified in acting more adversarially rather than less adversarially to protect and further his or her client's interests?
7. What behaviour is considered to be unacceptable in mediation and why?
8. How can we develop a language and a taxonomy which is sophisticated enough to describe the many variations and degrees of behaviour which are possible in mediation?
9. If there is evidence that lawyers 'misbehave' in mediation, how is their behaviour best modified? It is suggested that education plays a dominant role in changing the behaviour of lawyers, although binding rules and non-binding guidelines also have a place.
10. How can legal education support necessary change, if change is necessary?

Undoubtedly, some aspects of the current rules of conduct require clarification. As mentioned earlier, there is uncertainty surrounding the reference to 'mediations' in the definition of court. Are other changes to the current rules

267 For details of relevant studies, see Wolski, 'An Evaluation of the Rules of Conduct Governing Legal Representatives in Mediation', above n 4, 211–2.

268 Ibid 214.

269 Harold Abramson, 'Problem-Solving Advocacy in Mediations: A Model of Client Representation' (2005) 10 *Harvard Negotiation Law Review* 103, 124–5.

necessary to accommodate mediation practice? It is important to note that the current rules do not require legal representatives to act in an adversarial manner. Cooperation and collaboration are not prohibited by the rules. The existing rules enable lawyers to cooperate, collaborate and use joint problem-solving methods, in the appropriate circumstances. This is perfectly consistent with the discharge of duties owed to a client for it will sometimes be in the best interests of the client for a lawyer to act cooperatively.

Any move to change the rules of conduct or to issue new rules so that a lawyer has a duty to collaborate with his or her opponent, rather than to act in the best interests of his or her client, is bound to be met with resistance from lawyers and for good reason. Our system of justice assumes that lawyers are, and will remain, loyal to their clients and that they will act in the best interests of clients. A lawyer who focuses on interests (and disregards positions), makes moderate demands, shares all information, reveals the client's real goals and bottom line, and foregoes a strong legal position and legal argument without good reason, will not have clients for very long. The same goes for a lawyer who assists an unprepared 'opponent'. Lawyers will have failed in their duty to the client and, ultimately, in their duty to the public and to the administration of justice. Legal representation in mediation will have become a liability.