Note on mediation

In the present company I do not need to preach to the converted. But have I to share this with you. I have just stepped out of court in a bruising trial before an experienced judge and a very difficult opponent. During the course of the trial I had to wonder at the statement that cross-examination is the best forensic tool known to man. This litigious encounter again demonstrated to me both the need for mediation and the difficulty of getting there.

There is massive pressure to litigate from those who brief us. Clients, themselves, having taken the step to go and see an attorney and advocate, want legal action to be taken, and are not interested in being side-tracked, once they have made up their minds to litigate. As a member of the Bar I am briefed and the client and attorney expects of me to engage in battle - mediation is often irreconcilable with what is required from us as litigators. From the very first consultation the whole process is aimed at fortifying the litigious position - I build up the case and any suggestion on my part to settle or mediate would be met with suspicion and, ultimately, a vote of no confidence. Litigation (and costs) thrive in this environment and, in the result, has led to much criticism, often from the clients themselves, once they have been through the whole process.

To borrow from the leader of the English Bar, we live in a rapidly changing world and we, the Bar, will have to adapt to this changing landscape if we are going to survive. The Cape Bar believes that we should meet these challenges and

understand the impact they may have on the profession, and to be proactive, rather than reactive in our approach.

Part of this changing landscape is mediation and the impact it is having on the profession. The Bar thus created a sub-committee and since a small team and I wrote a report on alternative dispute resolution appointed me the chair to that committee. It is in that capacity that and I am here today.

We appreciate the fact that the popularity of mediation is on the increase, both locally and abroad - as a Small Claims Court Commissioner, I was recently also asked to refer the matter before me to mediation.

We see our principal role as that of litigators but, ultimately we must also give advice and assist, also the litigious, to a resolution of their disputes in an efficient and inexpensive manner. In some jurisdictions there is an obligation to advise on mediation and sometimes mediation is built into the trial process and enforced by cost sanctions.

So we find ourselves in somewhat of a dilemma - we know that mediation may often result in an outcome superior to litigation from a client's own perspective - but how do we get there?

At the Bar we have conducted some seminars to enlighten members as to mediation and the role it plays in dispute resolution.

Some (not yet many) of our members have undergone training and qualified as “accredited” mediators. They have, as yet, seen little return on their investment. So we have mediators on-tap and they should be able to offer quality mediation services.

We have approached both the city council and the provincial government and offered our services and we have had some interest from that quarter.

After meeting with the judges of our division, and in conjunction with the Law Society, we have submitted proposed amendments to the pre-trial conference process to better cater for mediation. In this regard it would be useful to be assisted by the judiciary who are sometimes in a far better position than we are to point parties and litigators to mediation.

We have also created the presence of mediation on our website where our members who offer services as mediators and their accreditation are published. And finally, we are in the process of drafting ethical rules to guide our members in their practice as mediators – there are difficult issues which require to be addressed early on, and we are working on that document.

I thank you.

SVEN OLIVIER