As Alternative Dispute Resolution ("ADR") rides a growing wave of interest in Singapore, it is gradually becoming a crucial feature of our legal system. Every lawyer may eventually be required, at some point, to advise and represent his client at mediation. What makes a good mediation advocate and how does mediation advocacy differ from trial advocacy? This article provides some guidance from the Bench's perspective.

Mediation Advocacy for Civil Disputes in the Subordinate Courts: Perspectives from the Bench

Introduction

The New Lawyer: How Settlement is Transforming the Practice of Law by Julie MacFarlane was reviewed in the May issue of the *Law Gazette*, in conjunction with the introduction of "Presumption of ADR" for civil disputes in the Subordinate Courts. MacFarlane describes the emergence of a new advocacy focusing on holistic problem-solving. The reviewer posed a series of pertinent questions for the Singapore legal profession, "[W]e are all familiar with the popular notion of litigation lawyers as rights warriors. But the litigation lawyer as a conflict resolver? Is he or she an imaginary character or an emerging reality?"

We suggest that the litigator fulfilling the role of conflict resolver can and should be a growing reality within Singapore. There are, admittedly, challenges posed by the long-standing adversarial culture within the legal profession. Even lawyers who would like to act differently may feel pressured to reciprocate the adversarial approach used by others. Notwithstanding this tradition, it is evident that a "litigation first, negotiation later" model is not always appropriate. The increasing popularity of Alternative Dispute Resolution ("ADR") processes in many jurisdictions may also be indicative of litigants' growing desire to have greater control and personal involvement in resolving their disputes. Further, other modes of advocacy have emerged that treat litigation as one of many other modes of conflict resolution. Lawyers have now devised "planned early negotiation processes" to separate the negotiation and litigation processes.[1] In view of all these developments, the crucial question confronting the legal profession is whether we should retain a litigation-centric model or adopt a more holistic mode of advocacy.

In this article, we explore an advocacy model in which negotiation is attempted first before litigation. We also share our views on how lawyers can make use of ADR processes to assist them in negotiation. We will focus particularly on how the mediation process can be best harnessed to meet the parties' needs.

Assessing the Case with the Client

Before deciding on the most suitable ADR process, the lawyer has to analyse the case together with the client and develop a settlement strategy that meets the client's goals. Lawyers are probably accustomed to conducting this initial exercise with their clients. A comprehensive case assessment aimed at resolving the conflict holistically should include more than legal advice. In this connection, reference can be made to an early assessment toolkit designed by the International Institute of Conflict Prevention and Resolution.[2] This toolkit highlights several crucial steps such as identifying the main concerns of the parties, conducting a cost/benefit analysis, determining a possible settlement range and establishing a settlement strategy.

Choosing the Mode of Dispute Resolution

The parties could attempt unassisted negotiation before commencing legal action. Without prejudice meetings could be arranged between the parties and their representatives, or with the assistance of lawyers.

Once a civil action has already been commenced in the Subordinate Courts, the following modes of assisted negotiation may be considered:

1. Mediation in the Courts' Primary Dispute Resolution Centre ("PDRC") or the Singapore Mediation Centre;

2. Neutral Evaluation in PDRC; or

3. Law Society Arbitration Scheme.

The Subordinate Courts encourage all parties to consider using these modes of dispute resolution at an early stage of the proceedings. Since 28 May 2012, all cases in which a Defence has been filed (except motor accident and personal injury cases) will be called for pre-trial conferences ("PTC") six months after the Writ has been filed.[3] The principal aim of this PTC is to discuss ADR options. Where a summons for directions ("SFD") application has been filed before this time, the parties will not be called for a PTC. Prior to this PTC or SFD, the ADR Form has to be completed by all the parties, to: (i) certify that the benefits of ADR have been discussed between lawyer and client; and (ii) indicate their decision concerning ADR. At the PTC or SFD, all cases will be referred for ADR as a matter of course unless one or more parties opt out of ADR. The ADR Form provides clients with information on each mode of dispute resolution and how to choose the most suitable mode.

The diagram below provides guidance on how to choose a suitable mode of dispute resolution:

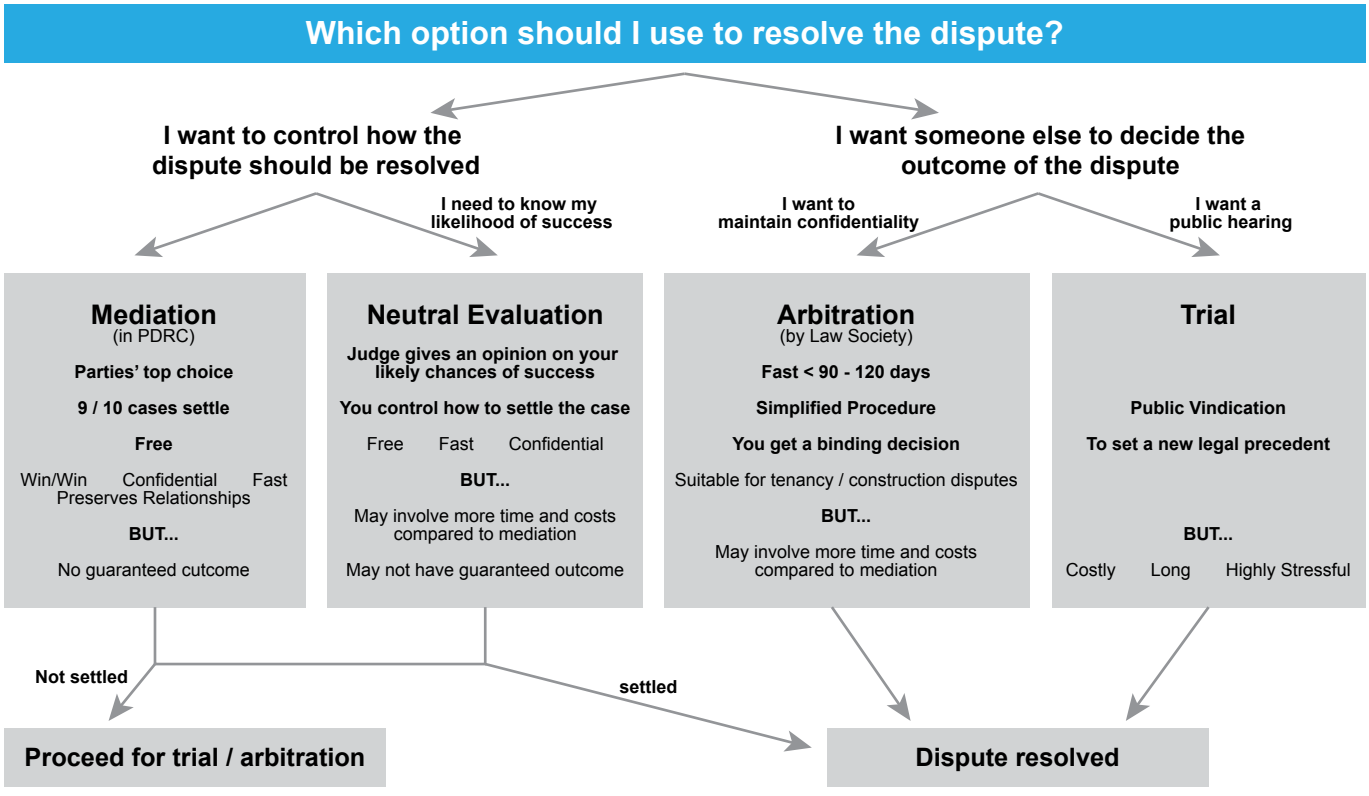
An earlier article in the *Law Gazette* explained the different ADR options more thoroughly.[4] More information on all these options is also provided on PDRC's website, at http://www.subcourts.gov.sg, under "Civil Justice Division – Court Dispute Resolution/Mediation", and Law Society's website at http://www.lawsociety.org.sg/lsas/.

Mediation Advocacy

Given the popularity of mediation,[5] the rest of this article focuses on how a lawyer can obtain the best results for his client at mediation at PDRC.

Mediation advocacy differs radically from trial advocacy because the objectives of mediation and litigation are different.[6]

Mediation	Litigation
Joint problem solving	Adversarial focus
Focus on future solutions	Determining fault based on the past
Deals with legal and non-legal issues	Deals only with legal issues
Advocate needs to persuade ALL parties	Advocate needs to only persuade the Judge
Advocate has to work together with the Neutral	Neutral only has to be persuaded



In litigation, each party strives to persuade a neutral Judge that his contentions are right. This approach leads to exaggeration and escalation of the dispute. This is the antithesis of mediation advocacy, which focuses on an appreciation of mutual interests, reconciliation and joint problem solving.

In view of these differences, the role of the lawyer is drastically different in mediation than in a trial. Many commentators assert that in order to represent clients effectively at mediation, lawyers need to adopt "mediation advocacy".[7] As one author puts it, "the advocate partners with the mediator in creating productive working relationships without losing sight of getting what the client wants".[8] Adopting positional tactics will not advance the mediation, and will do little in establishing credibility with the mediator. For instance, while the lawyer may emphasise the strength of his client's case at the start of the mediation, it does not help to repeatedly highlight the merits of the case, constantly rebut the other party's points and aggravate the mutual hostility between the parties. In addition, being antagonistic towards the opposing party and counsel is usually unproductive. The lawyer also does not assist by focusing merely on his client's legal positions when it is more important for the parties to have a broader conversation about their respective concerns. [9] In short, the mediation advocate has to exercise a much wider set of skills and focus on a broader spectrum of issues than in litigation. We elaborate below on some of these crucial skills.

Preparation for Mediation

How should a lawyer prepare for mediation in PDRC? The following checklist may serve as a guide:[10]

Context Setting

Prepare client to adopt the right expectations for mediation

1. **Explain the mediation process**.
   A key part of preparation is to guide the client on what to expect from the mediation and what attitudes to adopt. The lawyer could go through the ADR Form with the client or a video produced by PDRC in order to explain the mediation process.[11] It is particularly important for the client to understand that the outcome of mediation is decided by the parties themselves, and not the mediator.

2. **Guide client on mindset to adopt for mediation**.
   The client has to come to mediation with an attitude of openness and respect for the other party. This will make it easier for the mediator to facilitate a fruitful conversation between the parties about their needs and possible solutions.

3. **Role of the lawyer**.
   The lawyer should explain how his primary role in mediation is not to advance his client's case on its merits. Instead, he would help the client **communicate** his needs, **facilitate negotiation** with the opposing party and **assess possible solutions**.

Analyse the client's case

1. **Issues in dispute and client's position**.
   This involves the usual factual and legal analysis of the case with the client.

2. **Client's underlying concerns**.
   It is essential that the lawyer also helps the client discern the underlying concerns that have prompted the legal case. A client's motivations for seeking a legal remedy could include maintaining a business, preventing financial loss, protecting one's reputation or a desire for appreciation. **The lawyer has to assist the client in analysing his needs, as a settlement arrived at mediation must ultimately satisfy these concerns**.

Analyse opposing party's case

1. **Opposing party's position**.

2. **Opposing party's underlying concerns**.
   It is equally important to discern the opponent's likely interests. The parties' common concerns may then be evident, and lead to creating a settlement that satisfies all the parties.

Discuss likely outcome at trial

There has to be an honest assessment of whether litigation is a better outcome than arriving at a settlement. The lawyer should explore with the client the best and worst case scenarios of litigation, taking into account the cost of litigation.

Discuss possible solutions

It is good practice to brainstorm for possible ways (including non-monetary options) to settle the dispute.

Practical Issues

Negotiation strategy

1. **What should be the opening offer**?
   After thinking through the issues above, the lawyer and client should be able to determine a possible range of settlement outcomes. An opening offer should be based on the client's concerns and best estimation of your client's chances of success at trial. An opening offer should also be credible – one that will not be perceived as insulting, and will continue to keep the opponent engaged in the negotiation dance. Be prepared to provide a justification for the offer.[12]

2. **What documents have to be exchanged**?
   Discovery may not be completed at the time of the mediation. If certain key information is necessary for a more productive mediation, you may consider having limited exchange of documents with the opponent on a "without prejudice" basis.

3. **Who should attend the mediation**?
   The client's representative should have the authority to settle the dispute. If the representative has to consult another person to obtain the final mandate to settle, the client should ensure that this person is contactable during the mediation. During mediation, the representative takes a more active role than the lawyer in speaking. He should preferably be a capable spokesperson who is confident enough to negotiate directly with the other party.[13]

Submit opening statement at least two working days before mediation

The format for the opening statement has been prescribed in the Practice Directions.[14]

Be punctual for mediation

Meet the client at least 15 minutes before the mediation. This gives time for the parties to settle into the Court setting and clear any queries. Mediation can also begin on time. It is not acceptable for counsel to be late for mediation, as it not only shows disrespect for the Court and the parties, but calls into question the sincerity of the party in resolving the dispute.[15]

PDRC's Mediation Process

Counsel ought to be familiar with the mediation process conducted in the PDRC in order to prepare their clients adequately for mediation.[16] The general structure of a mediation conducted in the PDRC is as follows:

1. Preliminary meeting with counsel.

2. Joint session:
   a. Mediator's Opening Statement; and

   b. Party Presentation, Agreement on Issues and Negotiation.

3. Private meetings.

4. Final Joint Session.

The role of and/or recommended practices for counsel in each of the abovementioned stages will be elaborated below.

Preliminary Session with Counsel

Where parties are represented, the mediator would usually meet counsel alone before the joint session. Counsel should use this preliminary session to achieve the following:

1. **Build rapport with the mediator**.
   It is critical at the outset for the advocate to communicate an intention to buy into the process and work with the mediator to broker a settlement. A lawyer who takes an overly aggressive stance during this preliminary session only serves to signal to the mediator that that lawyer either has a poor understanding of the mediation process and settlement dynamics, or is a likely obstruction to settlement. In either event, the lawyer loses credibility.[17]

2. **Case presentation**.
   Counsel would usually give a brief presentation of his client's case with the aid of the opening statements. It is useful to narrow the scope of dispute by highlighting areas of agreement and disagreement.

3. **Give the mediator a sense of the underlying dynamics between the parties and key concerns of the parties**.
   At the start of the mediation and **in the absence of their clients**, counsel may be expected to have more freedom to share with the mediator about the personalities, the negotiations thus far, the underlying dynamics (eg, degree of tension between the parties and causes of such tensions) and the concerns of the parties. This information will make the mediator more perceptive to sensitive areas and allow the mediator to adopt the most effective strategies.

   Counsel could also take this opportunity to give their joint input on potential solutions. Counsel may make a strategic choice to inform the mediators what their current offers are (and yet withhold information on the exact range client is prepared to settle).[18]

4. **Discuss and clarify structure of mediation process**.
   Counsel may also use the preliminary session to propose the best way to conduct the mediation, such as the sequencing of joint and private sessions.

Joint Session

During the first joint session, the mediator will deliver his opening statement with all parties present. The primary purposes of the opening statement are to allow the mediator to set the tone for the mediation and to explain the mediation process.

After the mediator delivers his opening statement, he will invite the respective parties to share their perspective on the dispute in the presence of the other. Each party will have a chance to speak on the various issues at hand. This part of the initial joint session is crucial for: (i) each party to hear and understand each other's perspective; and (ii) the mediator to gain an understanding of the overall situation and the personalities involved. During this first joint session, counsel should:

1. **Allow their clients to speak for themselves as far as possible**.
   It is an opportunity for the client to build rapport with the mediator because they have not interacted before, and to communicate directly with the other party.[19] The critical question for client and lawyer is how to make the

best pitch to the other party. The tone of the opening pitch should strike a balance between an interest in settlement and a willingness to litigate.[20] Mediation is an interactive process where the communication of feelings, verbally, and by body language, can convey sincerity. Client presentations, when well delivered, give the opponent an opportunity of appreciating how the other party perceives the situation.[21]

2. **Support and guide the client during the client's opening presentation**.
   If the client has missed out any important point, chip in at the end of the client's presentation.[22] Counsel should **not** regurgitate the pleadings.

3. **Refrain from interrupting the other party or adopting a combative approach**.[23]

4. **Listen carefully to the underlying concerns of the other party**.
   Counsel should work together with the mediator to search for potential areas of mutual interests and agreement. The following approach is useful in this regard: (i) **Ask why**. The lawyer has to put himself in the other party's shoes and ask why he would be taking a particular negotiating position. What could be the desires, concerns, fears and hopes behind it? (ii) **Ask why not**. Again, the lawyer has to put himself in the other party's shoes and ask why he has not embraced his client's negotiating position. What desires, concerns, fears and hopes are precluding it? Are they legitimate and if not, what can the lawyer do or say to help the other party see that they are not legitimate? If they are legitimate, what can the lawyer advise his client, to modify the negotiating position so that the other party's needs and interests can be better satisfied?[24] It is particularly useful if counsel is able to help their client understand the other party's view by re-framing the other party's views using neutral language.

5. **Help clients brainstorm for possible solutions that meet the parties' needs**.
   Parties may be ready during the joint session to suggest various options, or they may choose to discuss this privately with the mediator. Counsel should make a strategic decision on whether options should be suggested in the presence of all parties at the joint session, or only after checking with the client at the private session and discussing with the mediator ways to convey the offer.

   Counsel can assist their clients in converting the identified interests into options, preferably for the mutual gain of each party. Counsel should aid the mediator by employing the following common techniques:
   a. Separate the **people** from the **problem**. Counsel ought to encourage parties to suspend their personal animosities and instead focus on their common problem at hand.[25] Set the problem aside from the egos and the personalities and thereafter, work with the mediator and the other party/counsel to attack the problem.

   b. Focus on **interests**, not **positions**. Parties should be helped to move from being entrenched in their positions to exploring whether and how their interests are better served.[26]

   c. Invent **options** for mutual gain, where the mediator can lead a process for parties to consider possibilities for settlement which might better promote their interests.[27]

   d. Work on **objective criteria** to substantiate a solution, rather than subjective or emotional bases by parties.[28]

Private Meetings

This part of the mediation process involves the mediator meeting each party and his/her lawyer in separate sessions. The private meeting has three purposes, namely: (i) to discover the parties' attitudes, interests and motivations which they may not be prepared to share at joint sessions; (ii) to explore options and the litigation alternative in the absence of the other party; and (iii) to coach the parties and prepare them for subsequent joint sessions.

Counsel is expected to fully contribute to the generation of solutions.[29] Clients are likely to face crucial decisions during this time and may experience inner tensions as they consider settlement or its alternative. Counsel ought to understand the underlying dynamics and provide constructive advice to facilitate a considered decision by the client. In a private meeting, counsel ought to:

1. **Help to generate more options for the clients to consider**.
   Counsel should be careful not to reject new settlement options too quickly. It is not uncommon for clients to disclose new interests or change their priorities in the course of mediation. A settlement that once was unworkable may, with time, become acceptable.[30]

2. **Analyse the advantages and disadvantages of the options on the table in comparison with the possible outcome at trial**.

This is a good opportunity to work with the mediator to have an honest discussion of whether a trial will meet the client's needs. The mediator may ask parties to consider their **best** and **worst** case scenarios of litigation, taking into account the cost of litigation and consider whether settling the case is more preferable.[31]The client has to weigh any options put forward in the mediation in light of his concerns and the likely outcome at trial.

3. **Help the client to make reasonable offers to facilitate settlement**.
   However, counsel should ensure that the client does not disclose to the other party more than what he set out to do. At the end of each private session with the mediator, state clearly to the mediator what can or cannot be disclosed to the other party.[32]

4. **Work together with the mediator to achieve optimal results**.
   Counsel may use a variety of methods to work together with the mediator:
   a. Counsel should demonstrate that her client's initial offer is reasonable. The mediator will be more willing and able to get the results the lawyer wants if she believes the lawyer's position is reasonable and supported by objective criteria.[33]

   b. The advocate and client may want to share sensitive information about the details of the dispute and possible outcomes.[34] Information is power. Counsel need to consider when to release and when to withhold such information.

   c. The advocate and the client need to think through how they want to convey settlement possibilities to the other party. For example, the mediator is an excellent conduit through which creative but potentially risky solutions can be communicated. Often, information conveyed by an opposing counsel is met with suspicion and hostility. The mediator is neutral and viewed as neutral so having him/her relay your client's proposals to the other party usually comes across better. Further, the mediator may package the proposal in a more objective manner to the other side.[35]

5. **Provide emotional support to the client who may be facing difficult decisions**.

6. **Help to coach his client on what to say to facilitate settlement at later joint sessions**.

It is good practice for counsel to use the "down time" – when the mediator is meeting with the other party – to review the position with his client and consider various options. During this time, counsel should also consider with the client any new information the mediator may have conveyed that suggests new settlement options.[36]

Joint Session Concluding the Mediation

Where there is a settlement, counsel must check that no terms are omitted and that the settlement is both viable and enforceable. Care is needed as any failure to comply with the settlement terms by any party entitles the other party to enforce the settlement as a Court order without the necessity of another hearing.[37] In this respect, he should work with his counterpart to ensure that the terms are drafted with clarity, **covers all the agreed items** and includes potential contingencies. He should check that his client understands all the terms, their implications and that his client agrees to them.

If the parties cannot resolve their dispute *via* mediation, the case simply proceeds to trial before another Judge who was not involved in the mediation. In that event, counsel should be prepared to discuss with the PDRC Judge the next steps and/or directions to be given to bring the matter to trial.

Conclusion

This article has set out the essential differences between mediation advocacy and adversarial advocacy. The failure to appreciate these differences can hinder settlement or result in an agreement that is less than optimal for the client. Lawyers, who have been trained and primarily

practise as litigators, must be conscious of the effects of the adversarial model and be vigilant that they do not operate subconsciously out of it during mediation.

As ADR develops and becomes increasingly entrenched in our justice system, **every** lawyer, at some point, may be required to represent his clients at mediation. It is hoped that this article provides a meaningful guide for lawyers on mediation advocacy.

- **District Judge Dorcas Quek**
- **District Judge Kenneth Choo***

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Notes

1 One such process is the collaborative model of lawyering, in which lawyers represent each party in negotiating an agreement. If the parties eventually decide to litigate, the collaborative lawyers will withdraw from the case and the parties will hire separate counsel for litigation. See John Lande, *Lawyering with Planned Early Negotiation: How You Can Get Good Results for Clients and Make Money* (American Bar Association Section of Dispute Resolution, 2011), Chapter 1.

2 Available online at http://www.cpradr.org/Portals/0/Home/CPRECAToolkit2010.pdf.

3 See Practice Direction No 1 of 2012 on the Subordinate Courts' website at http://www.subcourts.gov.sg under "Legislation and Directions". More information on this change is also available at under "Civil Justice Division – Court Dispute Resolution/Mediation".

4 Dorcas Quek and Seah Chi-Ling, "Finding the Appropriate Mode of Dispute Resolution in the Subordinate Courts: Introducing Neutral Evaluation in the Subordinate Courts", *Singapore Law Gazette* 21 (November 2011), available at http://www.subccourts.gov.sg, under "Civil Justice Division, Court Dispute Resolution/Mediation".

5 Mediation has been shown in many jurisdictions to be the most popular option for resolution of disputes. See Donna Stienstra and Elizabeth Plapinger, *ADR and Settlement in the Federal District Courts: A Sourcebook for Judges and Lawyers* (Federal Judicial Center and CPR Institution for Dispute Resolution, 1996) p 4, noting that mediation has emerged as the primary ADR process in US Federal District Courts.

6 See James K.L. Lawrence, *Mediation Advocacy: Partnering with the Mediator,* 15 Ohio State Journal on Dispute Resolution 425, pp 426-427.

7 Marcus Stone, *Representing Clients in Mediation*, (Butterworths, 1998), pp 95 -97. See also, Michael Lewis, *Advocacy in Mediation: One Mediator's View,* ABA Dispute Resolution Magazine, 2:3, Fall 1995, 7; and James K.L. Lawrence, *supra* note 6 p 431.

8 See James K.L. Lawrence, *supra* note 6, p 431.

9 See Marcus Stone, *supra* note 7, pp 95-96.

10 Eric van Ginkel, *Mediation Advocacy: Preparing for Successful Mediations*, Presentation at the 83rd Annual Meeting of the State Bar of California, 24 Sept 2010, available at http://www.businessadr.com/EvG/Preparing_for_Successful_Mediations.html; See Michael Lewis,, *supra* note 7, p 7; and International Institute of Conflict Prevention and Resolution, Corporate Early Case Assessment Toolkit, *supra* note 2.

11 The video and other online information on mediation are available at http://www.subcourts.gov.sg under "Civil Justice Division – Court Dispute Resolution/Mediation".

12 For more tips on making the first offer within the Zone of Possible Agreement, see Deepak Malhotra and Max H. Bazerman, *Negotiation Genius: How to Overcome Obstacles and Achieve Brilliant Results and the Bargaining Table and Beyond* (Bantam Books, 2008), Chapter 1.

13 Jeffrey G. Kichaven and Vicki Stone, *Preparing for Mediation* 18 Litigation 40 ABA (1991-1992).

14 Paragraph 25F and Form 9J of the Subordinate Courts Practice Directions, available at http://www.subcourts.gov.sg under "Legislation and Directions". More information is also available at the Subordinate Courts' website under "Civil Justice Division – Court Dispute Resolution/Mediation".

15 See Angelina Hing, "Dos and Don'ts for Mediation", *Singapore Law Gazette*, May 2010 (7).

16 This practice is equally applicable to mediation at the Singapore Mediation Centre. See George Lim Teong Jin, "The Role of Lawyers in Mediation – A Singapore Perspective", *Singapore Law Gazette*, September 2000 (2)

17 See James K.L. Lawrence, *supra* note 6, pp 430-431.

18 See above, *supra* note 12, on deciding on a suitable opening offer.

19 *Ibid,* p 438.

20 See Michael Lewis, *supra* note 7, p 7.

21 See Marcus Stone, *supra* note 7, p 162.

22 See George Lim Teong Jin, *supra* note 16.

23 For an in-depth coverage of the competitive and co-operative advocacy techniques available within a mediation and suggestions for when to use them, see Peter Robinson, "Contending With Wolves in Sheep's Clothing: A Cautiously Cooperative Approach to Mediation Advocacy", 50 *Baylor Law Review*, p 963. See also Kimberlee K. Kovach, *Mediation, Principles and Practice* (West Publishing Co, St Paul, Minn, 1994), p 89.

24 Fisher, Ury & Patton, *Getting to Yes: Negotiating Agreement Without Giving In* (2nd Ed), p 44.

25 *Ibid*, pp 37-39.

26 *Ibid*, pp 40-55.

27 *Ibid*, pp 70-76.

28 *Ibid*, pp 82-92.

29 The mediation process is a fluid model. The **optioning** techniques identified in the earlier section on "Joint Session" may be employed in this step as well, insofar as the parties are in the process of generating options.

30 See Michael Lewis, *supra* note 7, p 8.

31 See Fisher, Ury & Patton, *supra* note 24, pp 99-105.

32 See George Lim Teong Jin, *supra* note 16.

33 See James K.L. Lawrence, *supra* note 6, p 438.

34 See Michael Lewis, *supra* note 7, p 8.

35 See George Lim Teong Jin, *supra* note16. See also James K.L. Lawrence, *supra* note 6, p 441 for more techniques in partnering with the mediator.

36 See Michael Lewis, *supra* note 7, p 8.

37 See the Court of Appeal's seminal decision of *Lock Han Chng Jonathan v Goh Jessiline* [2008] 2 SLR(R) 455.