In a mediation, is it sensible to allow your client to speak?

We are trying to understand how the words "sensible" and "allow your client to speak" can appear in the same sentence. Since the orators of Ancient Athens, advocates have spoken on behalf of others with those others necessarily remaining silent as the advocate performs that sacred task. Granted, the idea of a client paying a lawyer to refrain from speaking will be attractive to some; however, we cannot help but think that non-payment would be equally as effective and therein lies the inevitable demise of our profession.

To fortify our views, we went to a computer connected to the internet and "googled" the word "mediation" only to land on something called "Wikipedia". Given our affinity with all things learned and Ancient Greek-sounding, naturally, we read on. It was a mistake. After a 'disambiguation' box warning us not to confuse mediation with meditation, we learnt that:

"**Mediation** is a dynamic, structured, interactive process where an impartial third party assists disputing parties in resolving conflict through the use of specialized communication and negotiation techniques."

So far, so good.

But then the entry proceeds to state something rather disconcerting:

"All participants in mediation are encouraged to actively participate in the process."

As we said: disconcerting. And not just because of the split infinitive or the circular reference to "participants" being encouraged "to participate", without which essential characteristic one wonders whether they are not in fact "bystanders". It is disconcerting, nay, alarming, because it seems to suggest that the clients should be participating, and "actively".

A thorough reading of the entry, punctuated as it is by insistent demands for the insertion of citations to reliable sources, did not give us any assurance of the wisdom of the advice it dispenses. Indeed, at one point, the entry expressly states that, "[i]n New South Wales, for example, the *Family Law Act 1975 (Cth)* proscribes qualifications for mediators". What is one to make of such an assertion? Is one now simply to be disqualified from speaking by the very fact of being qualified to do so? With court appearances on the decline and ADR on the up, is this something we wish to promote?

Selfish professional aspirations aside, mediation is, for the cynical litigators amongst us, an information gathering exercise should the mediation fail. It is a valuable opportunity to assess the true strengths and weaknesses of the opposing case and, if a potential witness speaks, we will ascertain, very quickly, the best way to cross examine him or her. Enough said.

So, by all means, consider your client's "active participation" in the mediation, but balance this against the potential information which may be conveyed to the other side and over which you have now relinquished control. And if, despite your advice, your client insists on taking some active part in the world of mediation, perhaps encourage him or her to update the Wikipedia page for that subject. Your client could not make it any worse.

In a mediation, if you and the mediator arrive before the other party, is it OK to chat? What are safe subjects to speak about?

What a bonanza this question poses! What rich veins of irreverence and wit may be mined while canvassing a kaleidoscope of banal pre-mediation 'safe' topics of conversation. But instead, we, the Furies, would like to bring to this issue the seriousness and sensitivity it deserves. And so, eschewing our usual flippancy, we answer thus.

Many mediators are former judges who, having spent a long career cloistered in judicial chambers and restrained behind a bench find themselves, one day, suddenly released into normal society. It takes some adjustment. Think Morgan Freeman and Tim Robbins in *The Shawshank Redemption*, but without the sewer crawling.

Mediations are a half-way house where these former judges can re-habituate themselves to face-to-face interaction without the barriers of a bar table, court officer, stenographer, associate and bench to which they have become accustomed. There is the semblance of structure and there are some small 'formalities' but these are not overly stringent. It is a safe space for them to learn to speak, at eye level, to other human beings in civilian clothing and without judgment.

You can do your bit by treating them with the respect and dignity they deserve as they reintegrate into society. But know that there are some rules to follow. Too formal and stilted and saying 'your Honour' instead of 'judge' or their preferred form of address will induce, in them, PTSD-like flash-backs to their time on the bench and stultify the intended informality of the negotiation setting. Too familiar and informal and they will immediately retreat to the mediator's room without venturing to speak to you again unless necessary. Above all, know that they have been institutionalised to be impartial and fair and will be repulsed by you launching into an unprompted ex parte exegesis on the merits of your client's case. Save that for opening session.

Pleasant and professional should be your guide. Anything else, and the former judge's rehabilitation will be set back indefinitely. If all goes well, they can each expect to be a productive member of society for many years to come. That is, until, keeping their promise to Tim Robbins, they look for an oak tree in Buxton, USA, under which they find a cache of money and a note directing them to Zihuatanejo, Mexico where they will spend their final days. . . free, at last.

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