

Mediation Advocacy

What role has good advocacy in mediations?

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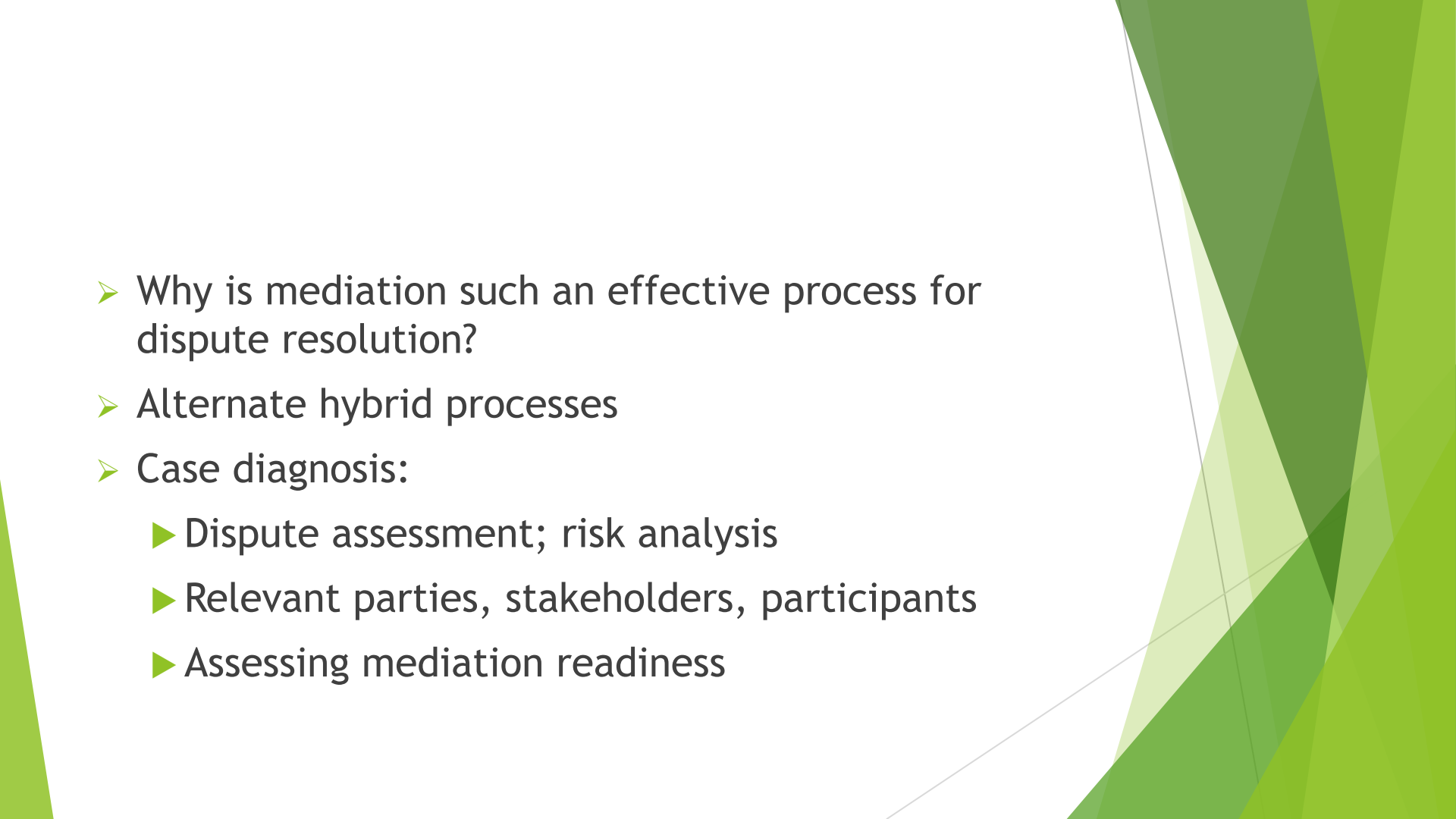
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**Role for the advocate in choosing
mediation as appropriate**

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- Why is mediation such an effective process for dispute resolution?
 - Alternate hybrid processes
 - Case diagnosis:
 - ▶ Dispute assessment; risk analysis
 - ▶ Relevant parties, stakeholders, participants
 - ▶ Assessing mediation readiness

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Role of the advocate in choosing an appropriate mediation (and mediator)

- ▶ Applicable law (mediation agreement?)
- ▶ Applicable process (court connected?)
- ▶ Mediator selection process:
 - ▶ style? (evaluative, transformative, facilitative, hybrid forms, co-mediation, joint sessions)
 - ▶ who?
 - ▶ how?

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Role of the advocate in scoping a mediated outcome

The advocate and their client

- ▶ Advising on prospects/SWOT analysis
- ▶ Confidentiality/privacy/attendees
- ▶ Establishing mandates/authorities to settle
- ▶ Information strategy:
 - ▶ What information to share, when, and with whom?
 - ▶ Revealing interests and options - when and how?

The advocate, the mediator and the opposing party

- ▶ Position Paper?
 - ▶ Tell the story?
 - ▶ Statement of Interests v statement of Position?
 - ▶ Commercial or party specific considerations?
 - ▶ Submissions on points of law?
- ▶ Preparing an opening statement?
- ▶ Anticipating the mediator(s) role and conduct

Role of the advocate at the mediation

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Presenting

- ▶ Combative?
- ▶ Argumentative?
- ▶ Explanatory?
- ▶ Expressive?
- ▶ Persuasive?

Enhancing

- ▶ Client expectation management
- ▶ Reality testing
- ▶ Understanding:
 - ▶ emotional issues
 - ▶ social issues
 - ▶ cultural issues

Generating

- ▶ Creating and prioritising interests and options
- ▶ Formulating and responding to first offers
- ▶ Establishing
 - ▶ mutually acceptable norms
 - ▶ reference criteria for evaluation of offers

Exploring

- ▶ Distinguishing positions from interests
- ▶ Negotiating strategies and techniques
- ▶ Identifying, analysing and dealing with impasses
- ▶ Breaking deadlocks

Overcoming

- ▶ Inconsistent negotiation styles
 - ▶ distributive (adversarial) approach
 - ▶ problem-solving (interest-based) approach
- ▶ Unexpected surprises
- ▶ Fatigue
- ▶ Confirmation bias

Managing


- ▶ Setbacks/threatened walk outs
- ▶ Formulating and responding to final offers
- ▶ Incomplete and partial settlements
- ▶ Parallel judicial, administrative, arbitral proceedings
- ▶ Final procedural options, hybrids and proposals

Completing

- ▶ Formalities
- ▶ Contingent documentation
- ▶ Compliance
- ▶ Recognition
- ▶ Enforcement

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Ongoing challenges for the advocate

- 
- ▶ Is mediation merely a dress rehearsal for trial?
 - ▶ How to use the mediator most effectively?
 - ▶ Ethical conduct: Is it ever appropriate to lie to the mediator?
 - ▶ When should the client advocate (and not you)?
 - ▶ Is there a tactical role for apology in mediation?
 - ▶ Should expert/lay witnesses attend? How best to use them?

- ▶ First offers: high- or low-ball and where will they get you?
- ▶ How best to “return serve” when such offers are made?
- ▶ Maintaining credibility - how will your offer/response style impact this?
- ▶ Playing tough/scare tactics/threatening to walk out - what to do/react?

Reference material

- ▶ *Mediation Representation: Advocating as a Problem Solver* (3rd edition) by Harold L. Abramson
- ▶ *Mediation Advocacy* (NITA, 2nd edition, 2002) by John W. Cooley
- ▶ *Mediation Advocacy* (Nova Law and Finance, 2nd edition, 2010) by A Goodman
- ▶ *Getting to Yes: Negotiating Agreement Without Giving In* (Penguin Books, 3rd ed, 2011) by Roger Fisher, William Ury and Bruce Patton
- ▶ *Beyond Smart: Lawyering with Emotional Intelligence* (ABA Publishing, 2017) by Ronda Muir
- ▶ International Mediation Institute, *Competency Criteria for Mediation Advocates/Advisors* (2013)



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