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Bond Dispute Resolution News Volume 1

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**BOND DISPUTE
RESOLUTION
NEWS**

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This occasional newsletter has seven headings:

Recommended Reading & Websites		Recent Activities of Bond University Dispute Resolution Centre Staff		Recent Publications of Bond Dispute Resolution Centre Staff	
Forthcoming Courses	Thoughts & Themes	Reflections on Conflicts – Lessons Learned		Bonding to Bond	

BOND UNIVERSITY was ranked the top university in Australia in the Faculties of Law, Business Management, Accounting, Communication and Journalism - National Graduate Surveys, 1996, 1997. **TRIFECTA!!** For the third year in a row Bond University Law School has been declared the best teaching law school in Australia. (*CEQ National Survey of 1998 Graduates, May 1999*) (Bond also topped accounting, business, computing science, communications and psychology).

Recommended Reading and Web Sites

The literature in the field of dispute resolution and conflict management is destroying many forests. (Conflict managers creating conflict)

We are all overwhelmed with these waves of interdisciplinary insights.

We will try to share just a few gems which we have stumbled upon.

(1) The Alternative Newsletter

Editor James B. Boskey, Seton Hall Law School, 1 Newark Centre, Newark, NJ 07102-5210, Phone 973-642-8811; Fax 973-642-8546; Website <http://mediate.com/tan>; Email mistofoles@aol.com or tan@mediate.com.

This miracle quarterly newsletter is a must for anyone in the dispute resolution field. Usually over 60 pages long for a mere \$15US per year. A bargain.

James Boskey summarises cases; conferences; articles; books; legislation from around the world, with a strong US emphasis. When does he sleep? He expresses clear opinions on whether material is basic, banal, sophisticated or cutting-edge. This reader has been able to select quickly the most significant recent books and articles from the avalanche of materials. Order this bargain now before James Boskey expires or the product is franchised to a commercial publisher.

(2) Rubin Pruitt and Kim Social Conflict – Escalation, Stalemate and Conflict (New York: McGraw-Hill, 1994) 2nd edition.

This **small** book is a gem. It was written by three social psychologists.

The book provides clear and foundational analysis of the nature of destructive and constructive conflict; what are the causes of conflict; how the genie escapes from the bottle as conflict

escalates; how stalemates occur; how stalemates are slowly broken by a variety of interventions including time, negotiation and mediation.

This reader found almost every paragraph of the book led to a “eureka” insight into a conflict in which he had been involved as a mediator or lawyer. This book should be mandatory reading for all law students, litigators, employers and ambassadors.

Do not be daunted by occasional fresh language. Some new terminology is necessary to give shorthand descriptions of normal dynamics in the evolution and dissipation of conflict.

One possible weakness of the book is its use of literary illustrations when many tangible examples of conflict may have connected the books insightful concepts to daily life more effectively. Like all good theoretical books, this one is helpful to practitioners in the trenches.

Yet another foundational must-read for those in the field of dispute resolution. Available at Bond Uni Bookshop: bub@onthenet.com.au

Recent Activities of Bond University Dispute Resolution Staff

General DRC Workshops

- 4 - 6 March Short Course on Mediation on Bond campus with Professors Laurence Boulle, Pat Cavanagh and John Wade and coaches John Hertzberg, Jenny Felton, Shanna Quinn
- 11-13 March Mediation Workshop for Victoria Civil and Administrative Tribunal, Melbourne with Professors Laurence Boulle, Pat Cavanagh and John Wade
- 6 - 8 May Short Course on Mediation at Noosa Sheraton with Professors Laurence Boulle, Pat Cavanagh and John Wade and coaches Mieke Brandon, Ross McSwann, Rick Jones, Shanna Quinn and Ray Rinaudo.

LAURENCE BOULLE

- 18-19 February Chaired Council Meeting of National Alternative Dispute Resolution Advisory Council, Federal Court, Sydney
- 12-14 April Conducted mediation training workshop for Mediate Today, Sydney
- 17 April Presented paper to Mediation students, Faculty of Law, University of Southern Cross, Lismore, NSW
- 22 April Presented paper on “Trends in Dispute Resolution: Where are we heading?” At ACCC conference on The Management of Disputes Involving the Commonwealth: Is litigation always the answer?, Canberra

PAT CAVANAGH

- 11 & 18 May CLE program for Phillips Fox in-house training

18 May Conducted Negotiation Skills Training for Qld Regional Police Commissioners who will be negotiating with National Teams in preparation for pre-Olympic Training

BEE CHEN GOH

23-27 September Delivered guest lectures on 'Negotiating with the Chinese, with a focus on the Chinese Legal System' and 'Chinese Legal Thinking', and appeared as a special guest speaker dealing with cross-cultural issues for the Erasmus class on European Economic Law on 'Procurement', at the Faculty of Law, University of Bergen.

30 November Visited the Faculty of Law, University of Copenhagen, Denmark and initiated mutual interests in dispute resolution issues with faculty teaching DR courses.

December 2, 1998 Presented a paper on 'Negotiating in Asia: Cross-cultural Relations in Business Transactions' for the Petroleum Law Conference organised by the Norwegian Petroleum Board, in Os (near Bergen), Norway.

JOHN WADE

4 February National CCH Board meeting in Sydney to discuss "The future of Legal Publishing"

22 February Visited Law Faculty, University of British Columbia to discuss training.

25-28 February Presented paper on "Re-inventing the Pyramid: A process for Teaching and Learning in Mediation Courses" at the Western Justice Centre, Pasadena, California at a conference on teaching teachers

24 March Led workshop at Parliament House, Sydney on "Conflict Management at the 2000 Olympics"

23 April Workshop at the Australian Tax Office on "Capital Gains Tax and Family Property"

US VISIT 22 May – 15 July

BOBETTE WOLSKI

10,11 & 13,14 February Conducted Postgraduate Intensive Course in Trial Advocacy, Bond University.

Forthcoming Courses

For dispute resolution courses worldwide, see the excellent compilation in James Boskey's quarterly newsletter – Website <http://mediate.com/tan>; Editor James B. Boskey, Seton Hall Law School, 1

Bond Courses

May 27–29 May 31– June 2	Bond University	Postgraduate - 6 day	Negotiation (Laws 761)
30 June-1 July and 3-4 July	Bond University	Postgraduate - 5 day	Appellate Advocacy (Laws 792)
23-25 July	Bondi Beach, Sydney	Short course – 3 day	Foundational Family Mediation Workshop run in conjunction with AIFLAM
12-14 August	Bond University	Short course - 3 day	Basic Mediation Course, and Foundation Family Mediation Course, run in conjunction with AIFLAM
26-29 August	Couran Cove, South Stradbroke Island	Short course - 4 day	Advanced Mediation Course, run in conjunction with AIFLAM
13 September	Bond University	Postgraduate - 14 week	Mediation (Laws 762)
6-11 September	Bond University	Short Course - 5 day and Postgraduate	Theory and Skills of Family Mediation (Laws 789) (satisfies regulations under the <i>Family Law Act</i>)
13,14,16-18 Sept	Bond University	Postgraduate – 5 day	Advanced Commercial Negotiation (Laws 779)
24-26 September	Daylesford, Victoria	Short Course - 3 day	Basic Mediation Course, and Foundation Family Mediation Course, run in conjunction with AIFLAM
15-17 October	Melbourne	Short Course - 3 day	Family Arbitration
3-5 December	Noosa, Sheraton	Short Course - 3 day	Basic Mediation Course (run in conjunction with AIFLAM)

STOP PRESS!!

A Workshop entitled *Commercial Negotiation Strategies for Personal Injury Lawyers* will be held in Brisbane in August with Pat Cavanagh. Please contact 07 55952039 for more details.

FEEDBACK FROM BOND WORKSHOPS

The May mediation course at the Sheraton Noosa received high praise from participants “Use of a range of facilitators supported my interest and learning style” “Enjoyed varied styles of teaching mediums” “This course was very good. It combined theoretical and practical aspects well.” So delightful was the venue, that we are planning to return to the Noosa Sheraton for 3-5 December 1999 course. Tell your friends!

Recent Publications of Bond Dispute Resolution Staff

Laurence Boulle

Laurence Boulle *Mediation: Principles, Process, Practice* (Canadian edition, with K Kelly), Toronto, Canada (1999)

General Editor of Volumes 1.5, 1.6 and 1.7 of *ADR Bulletin*, Prospect Media, Sydney

Ross Buckley

Ross Buckley (with Nadja Spiegel and Bernadette Rogers), “Negotiation – Theory and Techniques”, (Sydney: Butterworths, 1998) I-ix, 1-212. The Butterworths skills series, in which this is one of four books, was a category winner in the 1998 Australian Awards for Excellence in Educational Publishing.

Bee Chen Goh

Goh Bee Chen, *Negotiating With The Chinese*, (Dartmouth Publishing Company: Aldershot, UK, 1996)

John Wade

“Forever Bargaining in the Shadow of the Law – Who Sells Solid Shadows? (Who advises what, how and when?)” (1998) 12 *Aust J of Family Law* 256-296

Papers completed and submitted for Publication

1. “Writing Theses and Reports: An Acronym for Structure in the Wilderness: TCAGONARM”
2. “Re-inventing the Pyramid: A Process for Teaching and Learning in Mediation Courses” (forthcoming *Mediation Quarterly*)
3. “Expanding the Concept of ‘Legal’ Knowledge (yet again): Some Strategies for Re-opening Deadlocked Negotiations”
4. “Which Conflicts need Judges? Which Conflicts need Filing? Diagnostic Check-Lists.”

Bobette Wolski

“The Model Dispute Resolution Procedure for Australian Workplace Agreements: A Dispute Systems Design Perspective” (1998) 10 *Bond LR* 7-38

Thoughts and Themes - Common Questions

At dispute resolution courses worldwide participants often express concerns and anxieties. We have rephrased these below into standard problem solving questions. In an idle moment, try to answer some of these questions.

Standard Important Questions Which Arise During a Mediation or Conflict Management Course

- ◆ What *variations* are available in the mediation process?
- ◆ What conflicts probably need an *umpire*?
- ◆ How to deal with “emotional” clients?
- ◆ How to deal with background “tribes”?
- ◆ How to deal with “duelling experts”?

- ◆ What are the pressures upon and interests of brokers to mediation services?
- ◆ What post-settlement hiccups are predictable?
- ◆ How to respond to post-settlement hiccups?
- ◆ What strategies are available when people become jammed?
- ◆ How to deal with data chaos?
- ◆ How to respond to “inequality of bargaining power”?
- ◆ What should a mediator do if a settlement appears to be unfair, or out of “the range”?
- ◆ What cultural adaptations may be necessary to skills and process for cross cultural mediations?
- ◆ How can mediation services be marketed effectively?
- ◆ How can I make money out of mediator?
- ◆ What measures of “success” can and should be used to compare mediation to other conflict management services?
- ◆ What micro-skills do successful mediators use?
- ◆ How to diagnose which process for which conflicts?

Quiz

Every new area of specialty develops its own language which both facilitates and hinders learning. Set out below is a quiz on fundamental concepts in dispute resolution. (This is used in Bond Advanced Courses.) Try your hand at these.

The answers will be provided in the next Bond newsletter.

NEGOTIATION AND MEDIATION

CONCEPTUAL AND TERMINOLOGICAL SELF-TEST

DESCRIBE THE FOLLOWING CONCEPTS:

- 1) High soft/low soft
- 2) Reasonable firm
- 3) Adjustive dissonance
- 4) “Lumping it”
- 5) Conflict analysis
- 6) Intra-psychic conflict

- 7) Tribal conflict
- 8) Entrapment
- 9) Dehumanisation
- 10) Deindividuation
- 11) Good cop-bad-cop routine
- 12) Add ons
- 13) Satisfaction triangle
- 14) Negative intimacy
- 15) Positional and interest-based negotiation
- 16) Structural conflict
- 17) Value conflict
- 18) Data conflict
- 19) Duelling Experts Syndrome
- 20) Settlement mediation
- 21) Problem-solving mediation
- 22) Post-settlement blues
- 23) Cognitive dissonance
- 24) Tool-box of interventions
- 25) Creating doubt

Reflections on Conflicts – Case Studies

At Bond University we have collected a stock of systematised reflections on conflicts, particularly mediations, from around Australia and elsewhere. We will gradually publish some of these as time, scattered geography, altered facts and changed names ensure anonymity. Any similarity to a conflict in which you have been involved merely reflects the generic similarity of human conflicts.

The conflict management industry definitely needs more “precedents” and shared systematic wisdom.

These case studies will be set out in the short structured fashion illustrated below in order to prevent the reflections expending to books. (Thanks to the many Bond instructors, coaches, course participants and others who have contributed these case studies over the last ten years.)

CASE STUDY NO. 1 – FEUDING BENEFICIARIES

INTAKE:

Settlement Week at Courts meant that many cases listed for hearing were referred to mediation.

FACTS:

A contested will. The widow from a second marriage had been appointed as the sole executrix and major beneficiary in a modest estate. A small legacy had been left to one child from the first marriage. Separate court actions had been commenced:

- 1) By the first wife to set aside the will, and for an order that all property be left to her, under an alleged verbal agreement to this effect made at the time of her divorce;
- 2) By the 2 children of the former marriage, who claimed to have built up their father's estate over many years by working in the family hotel business after school and on weekends.

The child, who had received the small legacy had a large young family, and was in desperate financial straits. The second child had a serious illness, no dependants and was comfortably off. There was considerable bitterness between the 2 families. The children of the executor (from an earlier marriage) urged their mother not to give in to what they saw as unreasonable demands.

CAUSES OF CONFLICT:

- The deceased had not seen any of his first family since his remarriage and the first family blamed the executrix for this.
- The executrix and her family regarded the first family as opportunists who had failed to accept their father's wishes.
- The executrix had stirred up the first family by denying them the family photo album and some medals. At the end of proceedings, I was told this had motivated them to commence their actions.

INTERVENTIONS:

- Caucusing became absolutely essential because of the bitterness between the parties, and offers were relayed from room to room.
- Both parties had to be reminded of the alternative to settlement viz that all the estate would be used to pay legal costs.

CRITICAL ISSUES:

The first family had to decide on their internal priorities, and this happened when one child said she would defer to the others. Eventually they worked out their own internal division of any reasonable offer made. The executrix was terrified of giving evidence in court. She had to balance what her late husband really wanted and what was fair.

OUTCOME:

Settlement was achieved with the first wife dropping her claim and the well off child largely deferring to the obvious needs of the other, for whom a generous provision was made. All of the parties were to have their costs paid out of the estate.

WHAT WENT WELL:

Caucusing, and very supportive and understanding lawyers for the parties. Ascertaining the real concerns of the parties.

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CASE STUDY NO. 2 - HARDWORKING SON

INTAKE:

A mediation order was made by a Case Management Registrar as part of the Court's case management program. The matter was referred to me for mediation.

FACTS:

By his will the deceased, a farmer, left his estate of approximately \$2.2 million to his 7 children. The children had all grown up in difficult conditions as the father had been very careful with his money. At the time of death, the deceased was survived by 6 of his children, all of whom were middle aged or older and not particularly well off, and the child of one of his sons who had died some years earlier. Pursuant to the will each would receive around \$320,000. One of the children brought an Inheritance Act claim, alleging that over a great number of years he had worked on the farm for little or no money and had thereby made a far greater contribution to the increase in the value of the estate than any of his siblings. The plaintiff claimed that a just and wise testator would have left him more than a 1/7 share of the estate. The plaintiff's siblings disputed that the plaintiff had done more than they had, saying that each of them had done their bit for their father and the farm.

CAUSES OF CONFLICT:

A feeling on the part of the plaintiff that he had never been paid properly nor had received any other recognition from his father and his siblings for the work that he had done on the farm over a number of years.

CRITICAL ISSUES:

- 1) The considerable degree of ill-feeling between the siblings caused in part by the plaintiff's feeling that he had always been told what to do by his siblings, and in part by allegations made by the plaintiff in supporting affidavits that his siblings found very hurtful.
- 2) The plaintiff had incurred considerable costs (in part because in his supporting affidavits he had detailed his dealings with his father over a great many years). These costs were far more than those incurred by the defendants who were reluctant to have the estate pay for what were seen to be unreasonable amounts.

Interventions:

- 1) Asking the parties to approach the matter on a commercial basis (thereby putting to one side the ill-feeling they have towards each other).
- 2) Direct discussion between the plaintiff and one of his siblings (in the absence of the remaining siblings and lawyers).

- 3) Having the siblings formulate a settlement proposal couched not in terms of a variation being made to the will, but rather as a payment to the plaintiff for past wages (which would be more palatable to the siblings and satisfy the plaintiff's underlying needs).
- 4) Reality testing

OUTCOME:

The matter could not be resolved. The difference between the parties ultimately was one of costs. The plaintiff wanted \$x plus costs and the defendants would only offer \$x inclusive of costs. Settlement discussions ultimately broke down when the plaintiff refused to change his position further, saying that he had been pushed around by his siblings all his life and he wasn't going to take it any more.

WHAT WENT WELL:

The parties were prepared to modify the quite firm positions that they had adopted at the start of the mediation and were willing to spend quite a lot of time trying to resolve the matter.

WHAT COULD HAVE BEEN DONE DIFFERENTLY:

More time should have been spent on trying to resolve the underlying differences between the parties.

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Bonding To Bond

If you have any suggestions about this newsletter;

OR if you would like to be included on, or excluded from this occasional newsletter, **please send us a message** with your e.mail address to:

1. Email: DRC@bond.edu.au
2. Fax: 07 5595 2036
3. Phone: 07 5595 2039
4. Dispute Resolution Centre
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Please encourage colleagues to do likewise!

BACK-ISSUES OF BOND DRC NEWSLETTERS

These will be transferred to our website, namely <http://www.bond.edu.au/law/centres/drc>, and can be read or reprinted down from there.

J H WADE

Director

Bond University Dispute Resolution Centre