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BOND UNIVERSITY
Dispute Resolution Centre

BOND DISPUTE RESOLUTION NEWS

Volume 3 • November 1999

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Recommended Reading & Websites
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Recommended Reading & Websites

Recent Activities of Bond University Dispute Resolution Staff

General Workshops

13-14,16-18 Sept	*Advanced Commercial Negotiation* (Laws 779) – Postgraduate 5 day course. Instructor Assoc Prof Pat Cavanagh
23-26 Sept	*Negotiation + Basic Mediation Course* in conjunction with Victorian Bar Association led by Profs Boulle, Cavanagh & Wade

ROSS BUCKLEY

Ross is teaching between September – December 1999 at Northwestern Law School in Chicago. His e-mails indicate that this is a delightful experience.

PAT CAVANAGH

4 September	Conflict Resolution Workshop for the Gold Coast Bahai Community
6 September	One day Negotiation Workshop for Suncorp Insurance held in Brisbane
15 September	*Ten Common Mistakes of Legal Negotiators* held for Queensland Law Society Breakfast Seminars – with a record attendance of 130
1 October	Lectured on *Ten Common Mistakes of Legal Negotiators* for Central Queensland Law Conference held at Yeppoon
16 October	Speech to Nerang State High School on Contract Law

JOHN WADE

5-7 November Begins a program in Auckland, New Zealand to train a team of judges to become mediation trainers of fellow judges in the Family and District Courts.

Recent Publications of Bond Dispute Resolution Centre Staff

John Wade

1. "Reinventing the Pyramid: A Process for Teaching and Learning in Mediation Courses" (forthcoming) (2000) *Family and Conciliation Quarterly*.
2. "Expending the Concept of 'Legal' knowledge (yet again): Some Strategies for Re-opening Deadlocked Negotiations" (forthcoming) (2000) Feb, *Aust J of Dispute Resolution*.
3. "Writing Theses and Reports: An Acronym for Structure, TCAGONARM (forthcoming) (1999) *Bond Uni LRev*

Forthcoming Courses

Bond Courses

3-5 December	Sheraton, Noosa	Short Course - 3 day	Basic Mediation Course	Wade, Cavanagh, Boulle
2-5 March 2000	Bond University	Short Course – 3 day	Basic Mediation Course and Foundation Family Mediation Course, run in conjunction with AIFLAM	Wade, Cavanagh, Boulle
28-29 April	Bondi Beach, Sydney	Short Course – 2 day	Advanced – Representing Clients: Common Mistakes in Mediation and How to Avoid Them	Wade, Cavanagh, Boulle

Register now for the next *Basic Mediation* Workshop to be held in December at Sheraton Noosa - experience the unique combination of beach culture, café society and world class hospitality.
Please phone +61 7 5595 2039 with your *credit card* details or send your registration to The Administrator, Bond University Dispute Resolution Centre, School of Law, Bond University Q 4229

STAY TUNED FOR NEXT YEAR'S ACTIVITIES

Thoughts and Themes

Reflections on Conflicts – Lessons Learned

The following is a summary of a very interesting survey. Please open to read the more detailed results attached to this newsletter.

WHAT SKILLS AND ATTRIBUTES DO EXPERIENCED MEDIATORS POSSESS?

Ian Hanger, QC, on behalf of LEADR, invited fifty experienced Australian "commercial" mediators to a two-day workshop on 21-22 August 1999 at the Gold Coast, Queensland, Australia. This elite gathering was facilitated by six Queensland teachers in the field of dispute resolution (Professors Gay Clarke, Iyla Davies, Nadja Alexander, Laurence Boulle, Pat Cavanagh and John Wade). Participants were requested to complete a questionnaire prepared by John Wade during the first day of activities.

The answers to these questions from 41 attendees are attached.

SUMMARY OF RESULTS

This exercise is one of many attempts to collect from the self-perceptions and recollections of expert mediators, what they do in their work. The results emphasise both the *commonalities* and *diversities* of successful mediation and conflict management practice.

However, eight of the self perceived practices emphasised by the majority of these respected and expert mediators are summarised briefly below. (The vast majority of these experts were also practising senior lawyers.)

(1) Preparation and preparation meetings

The economy and simplicity of arriving at a joint mediation meeting "to see what happens" has apparently been discarded by most of this group. More detail is needed on what kinds of pre-mediation education, meetings, written summaries and coaching of clients is occurring.

(2) Whiteboards and visuals

Surprisingly, the majority use whiteboards and flip charts to record questions, goals and brainstorm solutions. Such communication devices are often (falsely it appears) presumed to be preferred by environmental, family and community mediators – not "big money" mediators. This reflects a remarkable expansion of the communication repetoire of lawyer-mediators.

(3) Reframing and summarising

The strong emphasis in most Australian mediation training courses on the micro-skills of reframing and summarising is apparently justified.

(4) Relaxing, and letting the process work

This is a fascinating theme emanating from this group of renowned mediators. “I have learned not to work so hard, but rather to hand over to the parties and the process.”

(5) Let the clients speak more than the lawyers

Once again, this group of experts shatter some stereotypes which prevail amongst less experienced (and less employed) mediators, at least in Australia. The attempts to give more control to clients, rather than to skilled helpers, needs further research. It is also relevant to a debate which is currently raging in the U.S.A. about the apparent domination of air-space by legal representatives during mediations.

(6) Where possible, sustain the joint meeting

Although diversity of process is a key theme, the majority of these mediators also emphasise that the more experienced they become, the more they try to keep clients in joint meetings. This development raises a challenge to a widespread practice of some (less experienced?) mediators who routinely separate all disputants soon after opening statements are made.

(7) Listening skills

An overwhelming emphasis of good practice and of what has been learned in the school of hard knocks by this group is --- listen, listen, listen. There is magic in the air.

This virtual unanimity raises challenges for training in the micro-skills of listening both at law school and in mediation courses.

(8) Persistence and patience

Predictably, these two qualities, along with the skill of listening, are seen as the core requirements of mediator competence (far beyond any others mentioned in the survey).

These qualities raise predictable questions for administrators who attempt to set up mediation programs which have rigid and short meeting times.

Conclusion

The results of this quick survey were surprising and were not predicted by the writer. The stereotypes of skills and process sometimes attached to big dollar commercial mediators were undermined. The (self-perceived) skills

and processes of the majority of this expert Australian group have clearly incorporated many features of "classical", facilitative or problem-solving (and even transformative) mediation.

This preliminary conclusion obviously requires continued mediation research to verify what mediation models and micro-skills are being used by the most "marketable" mediators; and which conflicts are being "matched" to each of these models.

Professor John Wade
Director
Dispute Resolution Centre

Thanks to Jane Hobler and Cheryl Hensel for assembling and deciphering the questionnaires.

Written Diagnostic Reports by Mediators

Successful organisational mediators and consultants have been accustomed for decades to add a "reporting" step into the classical mediation process. After identifying, interviewing and surveying in writing all the important parties (often an exhausting and expensive process!), these mediators draft a report which sets out, for example:

- areas of apparent agreement
- problem solving and personal questions which need to be addressed
- anonymous quotes describing perceived problems
- possible future processes

The *diagnostic* report does not go as far as recommending a particular *substantive* outcome. However, if the participants know exactly what service they are buying, a "medene" report – mediation followed by early neutral evaluation – can be a helpful intervention.

Nevertheless even a diagnostic process report may be a bombshell, for it will inevitably reinterpret "blame" and shatter some self-images.

The mediator may quickly lose his/her job; or make enemies within the organisation. There are many skills to be learned concerning:

- How to contract clearly that this controversial diagnosis will take place?
- Initially to whom should the draft report be summarised orally?
- To whom should a written draft report be shown for shock-reduction and for possible modification?
- What confidentiality attaches to the draft report?
- What language should the report use – direct quotes of disputants or paraphrased concepts?

- To whom should the final report be released? (no more confidentiality at that point!)
- Should the report attempt to preserve its legal "mediation" confidential status?
- How to risk manage for defamation etc?
- How to assemble post-report meetings to discuss its impact, and whether to continue the mediation process? (see particularly the work of Speed Leas dealing with church conflict)

Apart from organisational conflicts, the writer has often used diagnostic reports as part of his contracted process in *other* kinds of conflicts with fewer participants. This is particularly so where the disputants reach an impasse and are unwilling for the moment to continue the negotiation/mediation.

Anecdotally, lawyers and disputants have been encouraged by these diagnostic reports which:

- Clarify chaos
- Provide a framework of options for the next step
- Can avoid high expenditure and frustration of future inappropriate interventions
- Turns a "failed" negotiation session into a perception of (painful) progress
- Provide a clear document to reflect upon; rather than conflicting memories of tense spoken words
- Provide a powerful re-interpretation of history which divides the cheerleaders and tribes behind the immediate disputants.

Organisational mediators have a great deal to teach us concerning risk management and benefits of this diagnostic reporting stage. The challenge for other mediators (once again) is to add this tool to the tool-box and offer clear written reports for the "right" cases.

Set out below is an example of a diagnositc report in a "failed" business dissolution/matrimonial property mediation. (Dates, places and parties have been anonymised)

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5 February 1996

To Joy Johnson and David Johnson

And To Lawyer A and Lawyer B

Dear Sir/Ms

Re: Johnson Mediation – Without Prejudice; Mediation Report

I met with Joy and David Johnson for a hasty mediation on Saturday 1 February in the mediation room at Smith and Bloggs in Brisbane.

This report, based on *joint information* shared in joint sessions (not on private information in separate sessions), may provide some structure for future negotiations.

The respective lawyers provided me with helpful and extensive documentation and summaries of legal issues. The mediation was triggered by the crisis of a hearing potentially occurring on Friday 7 February. This haste led to two hurdles in the mediation meeting:

1. **Insufficient intake time** with Joy and David. Thereby no proper diagnosis of the causes of conflict was possible; nor practice on how negotiations normally develop; nor possible arrangements for supporters at the meeting.
2. **Last minute data**, namely Joy's valuation of the business emerged on the night before the mediation, thereby creating a sense of "ambush" and absence of a short agreed summary on why two expert valuers were so far apart.

Nevertheless, in the first two hours of the meeting Joy and David communicated well by speaking through the mediator and on occasions directly to each other.

A. Joy and David **agreed** that:

1. They wanted the best for the business and its employees
   - in short term
   - in long term
2. Some partial agreement about the repetitive conflict between them on the business premises would be desirable if complete agreement was not.
3. They were not healthy for one another
4. Their entrenched patterns of communication were destructive
5. The prepared list of assets and liabilities was:
   a) **complete**;
   b) meaning of certain terms was clarified;
   c) list of reflected agreed approximate valuations except for the
   - share holding (over $2 million apart)
   - wine and watch collection
   - trailer
6. Joy was too tired to buy out and run the business herself
7. David would readily sell the business to Joy at her valuer's valuation.

B. Joy and David together listed the following **risks** in joint discussion if settlement is not achieved between them quickly:

1. Undoubtedly the performance of the business will suffer
2. The best staff will leave in any atmosphere of conflict

3. Plans to restructure the business will be put on hold
4. Neither will be able to get on with their lives
5. Suspicions will be fostered (exist already) that the business was "running dead" to lower values. This must lead to conflict on site, futile interim litigious sorties to "manage the business properly"; and further diminution of value of the business
6. Health will suffer
7. The children will vicariously experience tension and sadness
8. The alleged uniqueness of the case will lead to it being reported and bound in black in vitriolic splendour – not a desirable long-term memory for the family.
9. As the super mum and super worker facts are allegedly unique, it is a lottery what a judge will do
10. Unique facts, vitriolic evidence, duelling experts and abundant wealth increase the likelihood of appeal – a further 12 months of delay
11. Legal and valuation costs are only a minor risk in such a large estate
12. Loss of personal control of decisions to professional experts
13. As the valuers are so far apart, they will become entrenched in their views. One or both MUST be wrong. Yet Joy and David will pay for the debate between them before a bemused judge.
14. A judge cannot split the difference between expert valuations. One must be found to be wrong.
15. A judge could not possible be educated in the complexities of their industry
16. A predictable result would be that neither will take the business at the other's valuation; therefore a forced sale would be ordered by the court with the result that:
    - Vultures will gather
    - Price will drop below lowest valuation
    - Employees will jump ship
    - Large commissions will be payable to auctioneers and managers
    - David and Joy will divide the metaphorical ashes
17. They would write further one-sided affidavits which would inflame the dispute, and damage personal credibility before a judge who "has heard this all before".

C. **Whiteboard questions**

David and Joy articulated a number of concerns and goals which were translated into the following agenda of questions of the whiteboard. The aim was, in normal negotiation style, to move up and down the list and create a series of packaged offers to one another.

1. Is the current list of assets **complete**?
2. How to determine an appropriate **value** for each item on list?
3. What **percentage** division of the assets – on good day/ bad day?

4. What items or assets on each **side of ledger**?
5. What **timing** for division?
6. **What periodic** payments – if any?
7. **What debts** exist? How should these be paid?
8. What partial agreements if any are possible in interim?
9. How can the business be preserved and flourish
   – in short term?
   – in long term?
10. How should
    – franking credits
    – Joy's mother's estate
    Be taken into account?
11. How should any payouts be funded?
12. How far is clean break desirable or achievable?
13. How can continuity of Joy's income be funded?
14. What post-settlement restrictions, if any, on each working in related industries?

D. **Duelling Expert Valuers**

Joy and David agreed that they had employed two expert valuers who had provided them with a predictable problem, rather than a solution.

They considered and wrote out the following standard strategies for clients to respond to duelling valuers:

1. **Sell** on a time limited schedule – both free to bid
2. Require both experts to **write** a jointly drafted and jointly signed two-page simple explanation of why they are so different
3. Require both experts to sit and **explain** and be questioned at a joint meeting to help them understand why such differences
4. Employ a third valuer to give an **opinion**
5. Brief a third valuer to give a decision either on which number is "closer" OR on another number altogether
6. Leave to a **judge** to guess on his/her limited expertise and evidence
7. Flip a coin
8. Trade – "what if I accepted a number closer to your valuation, would you be prepared to…."
9. Split the difference

E. **Conclusion**

At the offer stage of the mediation, while attempting to package offers, it became clear to the mediator that there was too much grief over loss of family, betrayal, potential loss of career and loss of friends for applied communication and normal negotiation to take place. In hindsight, and in my opinion, these deep-seated feelings need to be addressed by time, pain and grief counselling

before helpful negotiation is possible. The mediator estimated that the monetary gap between Joy and David would be around $1 million. But this gap widened steadily as the negotiations were not about money. Superficially, one could say that the negotiations jammed on:

- Valuations
- %
- clean break versus ongoing leasing arrangement

Unfortunately, my guessed diagnosis is that unless important emotional passages occur, this conflict may need a severe intensification of pain, and/or a judge to crunch a predictable (and as Joy and David agreed, disastrous) and forced decision upon the business and the parties.

F. **Ray of Sunshine?**

In my opinion, IF

1. The important grieving process and sense of loss can be worked through with professional assistance; and
2. Mutual pain intensifies around the devaluing business, departing employees, health failure and interim litigious sorties (see generally risk analysis assembled by Joy and David); and
3. The valuers can prepare a jointly signed two-page statement in simple language explaining why their opinions are so far apart; and
4. A short joint case appraisal can be obtained to indicate the percentage range in a "marriage-type" like this one.

THEN it may be worth organising another well-structured negotiation/mediation after intake.

I hope that this report is of some assistance along the rocky road of settlement between David and Joy.

Joy, David, lawyers or valuers – please do not hesitate to phone me to discuss any of this.

Yours sincerely

John Wade

Bonding to Bond

If you have any suggestions about this newsletter; *OR* if you or your colleagues would like to be included on, or excluded from receiving this occasional newsletter, **please send us a message** with your e.mail address to:

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These will be transferred to our website, namely – http://www.bond.edu.au/law/centres/drc/newsletter.htm and can be read or printed down from there.

J H WADE
Director
Bond University Dispute Resolution Centre