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BOND UNIVERSITY
Dispute Resolution Centre

BOND DISPUTE RESOLUTION NEWS

Volume 6 • October 2000

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Forthcoming Courses

Bond Courses

30- Nov–2 Dec	Marriott, Gold Coast	Short Course – 3 days	Basic Mediation Course and Foundation Family Mediation Course in conjunction with AIFLAM	Cavanagh, Boulle & Wade
16 & 17 February 2001	Sydney (with NSW Bar)	Short Course – 2 days	Representing Clients at Mediation and Negotiation	Wade, Boulle & Cavanagh
9–11 March 2001	Melbourne	Short course – 3 days	Basic Mediation Course	Boulle & Cavanagh & Wade
15–17 March 2001	Bond University	Short course – 3 days	Basic Mediation Course and Foundation Family Mediation Course in conjunction with AIFLAM	Boulle, Cavanagh & Wade
27 April 2001	Bond University	One day intensive	Effective Commercial Negotiation Strategies	Cavanagh

Please phone +61 7 5595 2039 for enquiries or send your registration to The Administrator, Bond University Dispute Resolution Centre, School of Law, Bond University Q 4229 email – drc@bond.edu.au

JOINT VENTURE PROGRAM
BOND UNIVERSITY AND LEO CUSSEN INSTITUTE
360 Little Bourke Street, Melbourne Victoria. Phone 03 9602 3111
Thursday 26 October 5.30–7.30pm: *Don't Waste My Time on Negotiation or Mediation – This Case Needs a Judge* presented by Professor John Wade

Recent Activities of Bond University Dispute Resolution Staff

General Workshops

24-27 August	Advanced Mediation Course led by Profs Boulle, Cavanagh & Wade, Sheraton Noosa

PAT CAVANAGH

10-13 June	Vancouver National Mediation Conference, presented Ten Common Mistakes of Commercial Negotiators.
7 & 8 July	Presenter at National Negotiation Conference, University of Wollongong NSW and Judge at International Negotiation Competition.
9 July	Negotiation Presentation to Land Management Group, Queensland Government.
10 July	Mediation presentation to Bar Practice Course, University of Queensland.
13 July	Third Seminar in A Series on Advanced Negotiation Techniques at Leo Cussen Institute, Melbourne – *Is That allowed? …ethics in negotiation.*
22 August	First of four in-house evening seminars for McCullough Robertson Solicitors, Brisbane.
2 & 8 September	Two one day presentations on negotiation and management skills to Ove Arup Engineers, Brisbane.
17, 24 & 28 September	Kemayan Advanced Tertiary College, Kuala Lumpar, Singapore & Hong Kong. Legal training for Senior Commercial Executives - Ten Common Mistakes of Commercial Negotiators.
26 September	Presentation to Ove Arup Engineers Hong Kong.

JOHN WADE

May – July	Taught 3-5 day basic and advanced mediation courses at SMU, Dallas, Texas; Vermont Law School; Pepperdine Law School; judicial training college, Gulf Shores, Alabama, and led workshops at AFCC Conference, New Orleans; Family Mediators Association, London; Pennington, London; CEDR, London.
17 August	Fourth presentation in a Series on Advanced Negotiation Techniques at Leo Cussen Institute, Melbourne – *How to Cross the Last Gap in Negotiations: 16 strategies.*
20 August	Bond – Queensland Law Society Breakfast series in Brisbane – "Systematic Risk Analysis for Negotiators and Litigators: But you never told me it would be like this". (copy of paper in this newsletter)

LAURENCE BOULLE

26 July Met with Indonesian visitors to the Dispute Resolution Centre at Bond. Mr Efendi Manurung from the Indonesian Board of Arbitration and Mr Benny Gosly from the Jakarta Initiative Task Force were in Australia as part of an ADR pilot project conducted by the Attorney-General's Department. Mas Achmad Santose of the Indonesian Centre for Environmental Law also attended under the auspices of the International Legal Services Advisory Council

NADRAC – MEDIATION STANDARDS

Laurence Boulle has been involved in the major initiative of the National Alternative Dispute Resolution Advisory Council on the development of standards for ADR. NADRAC issued a discussion paper in March 2000 and conducted a series of public forums on the paper throughout Australia. Approximately 250 people attended nine public forums in all States and Territories. The consolidated views of those present at the forum will be available to the ADR community in Australia. NADRAC has received approximately 50 written submissions on its paper. Because of the importance of these contributions they are to be consolidated into a separate report which will be available in hard copy and on the NADRAC website. In the meantime the standards committee of NADRAC is drafting its report on standards for approval by the full Council. The report will be submitted to the Federal Attorney General in the first half of 2001. It is expected to contain a framework for the ongoing development of standards and ethics for all forms of ADR in Australia.

The discussion paper on standards and all other NADRAC reports can be found on the NADRAC website. (http://nadrac.gov.au/aghome/advisory/nadrac/nadrac.htm)

VISITOR TO BOND

Professor Bengt Lindell of Uppsala University, Sweden recently visited the Dispute Resolution Centre for 2 weeks of research and attending some post graduate classes at the Bond School of Law. Bengt has recently published the first book in Sweden on mediation.

Recent Publications of Bond Dispute Resolution Centre Staff

The teaching staff at the Dispute Resolution Centre at Bond University have published over two hundred books and articles on conflict management and a variety of legal topics. A selected list of these publications are set out at the following website.

http://www.bond.edu.au/law/centres/drc/publications.htm

At a recent CLE seminar John Wade presented the following paper on the topic of "Risk Analysis in Negotiation and Mediation".

Systematic Risk Analysis for Negotiators and Litigators: But You Never Told Me It Would Be Like This!

[#]

Professor John Wade[*]

Outline

This paper will set out:

- What is a written risk analysis
- Reasons why such a document is essential for any negotiator, or for any disputant who is considering ending negotiations, or undertaking "litigotiation"
- Reasons why such documents currently appear to be uncommon in many legal cultures
- Examples of the use of risk analysis prior to negotiation and mediation
- Precedent forms to assist a client or lawyer to prepare a risk analysis

What is a risk analysis?

A risk analysis is a list of known or guessed (benefits and) detriments which could flow from a particular decision. In business language, it is a "cost-benefit analysis", with particular precision about the "costs". In other terminology, it is a listing of the "pros" and "cons" of a particular course of action.

One ideal form of a risk analysis includes:

- Writing
- In familiar language, diagrams and figures
- A short summary in one page if possible

[#] The topics in this paper are not new. They are dealt with extensively in literature on decision-making and "counselling". However, professional practice anecdotally does not live up to the wisdom in this literature.

[*] Director of Dispute Resolution Centre, School of Law, Bond University, Gold Coast Queensland, Australia 4213; email john_wade@bond.edu.au; website http://www.bond.edu.au/law/centres/index

- Evolving in several successive versions as more information becomes available to clarify the risks
- Outcomes expressed in "good day – bad day" ranges where precision is not possible
- Inclusion of personal, legal, social and business risks

Litigation lawyers and their clients are constantly making conscious or subconscious risk-analyses when making decisions whether to begin negotiation, what settlement offers to make, when to suspend negotiations, when to file a formal claim with what strategies to pursue a claim.[1]

Introduction

One of the benefits of being a mediator is that a mediator voyeuristically observes negotiation behaviour – of both disputants and sometimes their legal representatives.[2]

In this role as observer, a mediator sees outstanding, journeyman and incompetent negotiators. A recent survey of forty of the most-employed commercial mediators in Australia recorded the following four most commonly observed unhelpful negotiation or problem solving behaviour by lawyers. That is, lawyers sometimes became part of the problem, rather than part of a solution for clients. The statistical incidence of these behaviours was not measured – only that it was "often".

'
- A lawyer who has given widely optimistic advice
- Concentration on legal questions and missing commercial interests
- Lawyers who themselves have become antagonistic/emotionally involved
- "Entrapment" – disputants have invested too much in the conflict '[3]

One of the essential prerequisites to wise decision-making is to know what alternatives are available, and what are the costs and risks attached to each alternative. It is indeed a fool who negotiates without first carefully cataloguing alternatives and risks.[4]

In the jargon of negotiation, every wise negotiator should attempt to set out in writing his/her WATNA, BATNA and PATNA **before** the negotiations begin.[5]

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[1] See D. Binder, P. Bergman, S. Price, *Lawyers as Counsellors* (St Paul: West 1991) esp. chs 1, 19, 21 (identifying consequences of various alternatives before making a decision).

[2] C. Menkel-Meadow, "Lawyer Negotiations: Theories and Realities – What We Learn from Mediation" (1993) 56 *Modern L. Rev.* 361; J. Lande, "Law Will Lawyering and Mediation Practices Transform Each Other?" (1997) 24 *Florida State U. L. Rev*. 839; J.H. Wade, "Lawyers and Mediators: What Each Needs to Learn From and About Each Other" (1991) 2 *Aust. Dispute Res. J*. 159.

[3] J.H. Wade, *Representing Clients at Mediation and Negotiation* (Bond University Dispute Resolution Centre, 2000), p 180.

[4] J.S. Hammond, R.L. Keeney and H. Raiffa, Smart Choices – *A Practical Guide to Making Better Decisions* (Boston: Harvard Business School Press, 1999).

[5] R. Fisher and W. Ury, *Getting to Yes* (Boston: Mass: Houghton Muffin, 1991).
WATNA – Worst Alternative to a Negotiated Agreement; BATNA – Best Alternative to a Negotiated Agreement; PATNA – Probable Alternative to a Negotiated Agreement.

The writer's experience as a mediator is that:

- lawyers often describe legal risks (delay, cost, uncertainty of judicial decision) only, and omit personal and business consequences
- lawyers often use vague language such as "danger", "no guarantees"; "who knows what a judge will do"
- clients have selective deafness even when risks are described orally
- lawyers rarely set out risks in precise, one-page written form – but rather use long rambling opinions, or just anecdotal conversations.

This kind of preparation makes it impossible for the client and lawyer to negotiate confidentially, or to make a wise life and business decision.

Written Risk Analysis – Why So Important?

Set out below are some of the reasons why it can be argued that a written risk analysis is essential for every client who contemplates or insists upon starting or ending negotiations, or upon a litigation or "litigotiation" path. This will be followed by a list of reasons why such clear documentation of risks attached to continuing a conflict is apparently rare for most lawyers.

It is essential to have a written analysis of the risks which may flow from a failure to settle a conflict because:

(1) One decision-making adage is "garbage in, garbage out". If risks are not progressively defined and listed, clients and lawyers (or other advisers) will make decisions to end or continue negotiation based upon false data and assumptions.

(2) It is definitely not sufficient for clients to "give instructions" to end negotiations, or to commence on the litigation pathway. Clients must give "informed consent". Informed consent requires:

   (i) the capacity to consider, reflect and decide
   (ii) appropriate education and understanding of alternative courses of action
   (iii) appropriate education and understanding of specific legal, personal and commercial risks attached to each alternative.

(3) All decision-making processes are fraught with psychological tendencies towards error particularly if the decision is made at a time of conflict.[6]

   Our error-prone capacities as humans have been categorised as "psychological traps" under such labels as:

   - Overrelying on first thoughts : the **ANCHORING** TRAP
   - Keeping on keeping on: the **STATUS QUO** TRAP

[6] *Smart Choices* supra note 2; J.Z. Rubin, D.G. Pruitt & S. Kim, *Social Conflict: Escalation Stalemate and Settlement*, 2nd ed. (New York: McGraw Hill, 1994).

- Protecting earlier choices: the **SUNK-COST** TRAP
- See what you want to see: the **CONFIRMING EVIDENCE** TRAP
- Triggering a premature answer with the wrong question: the **FRAMING** TRAP
- Being too sure of yourself: the **OVERCONFIDENCE** TRAP
- Focusing on dramatic events: the **RECALLABILITY** TRAP
- Neglecting relevant information: the **BASE-RATE** TRAP
- Slanting probabilities and estimates: the being **OVER-CAUTIOUS** TRAP
- Seeing patterns where non exist: the **OUTGUESSING RANDOMNESS** TRAP
- Ridiculing good suggestions: the **REACTIVE DEVALUATION** TRAP [7]

Litigation lawyers can readily identify the names of their own clients and of other lawyers (and sometimes self?) who fit into each of these psychological traps.

If there are already so many subconscious factors pushing us as (conflicted) decision-makers towards error, why add the conscious omission of "considering" predictable risks?

(4) Lawyers, like other skilled helpers, are wise to engage in professional self-protection. When a chosen process turns out to be disappointing for a client, then those clients may refuse to pay fees, claim damages for negligent advice, bad-mouth the skilled helper, and/or make reports to professional disciplinary committees. Doctors, computer suppliers, manufacturers and lawyers increasingly document a list of risks attached to any chosen process or service as a means of documentary (rather than verbal) defence against a raging client.

(5) A verbal risk analysis is hardly worth the paper it is not written on. This is because all clients hear only a small proportion of what an adviser says; clients hear selectively; the adviser is at risk in a subsequent memory-battle on what was actually said; and without clear writing, the client will convey inaccurate messages about risks to key constituents, relatives and bosses. These "outsiders" need accurate information in order to influence the visible disputants towards a wise decision.

(6) There are some studies which suggest that customers are far less satisfied with litigation lawyers than litigation lawyers believe.[8] That is, as litigation

[7] *Smart Choices* supra note 2, Ch.10. See also G. Goodpaster "Rational Decision-Making in Problem-Solving Negotiation: Compromise, Interest Valuation and Cognitive Error" (1993) 8 *Ohio St.J. on Dispute Res.* 299.

[8] eg J. Lande, "Failing Faith in Litigation? A Survey of Business Lawyers' and Executives' Opinions" (1998) 3 *Harvard Neg. L. Rev.* 1; P. McDonald (ed) Settling Up (Sydney: Prentice-Hall, 1986) Ch 13; ALRC, *Managing Justice – A Review of the Federal Civil Justice System* Report No 89, 1999, pp 78-88.

lawyers, we live in a state of delusion about the level of satisfaction of our customers, particularly once a dispute "goes to court".

This suggests that one response may be for lawyers to continue to search for creative ways to deliver the familiar but awkward double message. That is, lower client expectations about the possible benefits of continued conflict/litigation/war; and yet emphasise that sometimes aggression, stone-walling or litigation ("non-settlement") may be necessary pain.[9]

(7) A written risk analysis can make a client and lawyer powerful during negotiations. Bluffing, lying and pontification are reduced. A client can state "We have completed a detailed 16 point risk analysis and tried to assign percentage chances and monetary values to each risk. That list is confidential, but most items on it would already be known to you (for example A, B, C…). We assume/hope that you have a similar written analysis"; "Can you suggest some risk we have omitted if we do not reach a settlement today"; "If our current risk analysis is approximately correct, we believe we know what is the worst that could happen outside this negotiation, and will not be able to go above/below that figure/outcome"; "If we are wrong, we would be glad for you to give us more information so that we can make a better decision" etc.

(8) (Legal) professionals live in a climate which demands transparency, multi-skilling and accountability.

To be employable and retain customers we need to be traditional dobermans and drafters; but also wise diplomats, doubt creators and decision-makers.

Apparent Reluctance to Prepare a Written Risk Analysis

If there are so many reasons in favour of writing one or more risk analyses for any client who cannot "settle" a conflict, why are these documents apparently so rare in most legal circles? No doubt there are some individual lawyers and corners of legal culture who regularly use detailed written risk-analyses of "no-settlement". What follows are some possible reasons for rarity (none of which, in the writer's opinion, is particularly convincing).[10]

(1) **Habit.** Creation of such a document has not been part of the systems in law firms, or the habits of many lawyers.

(2) **No Training.** Lawyers have not been trained to prepare risk-analyses routinely and have few role models to learn from. By way of contrast, risk analysis and decision-making courses appear to be a normal part of the curriculum in university business schools.

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[9] eg See J.H. Wade, "Don't Waste Money on Negotiation or Mediation, This Conflict Needs a Judge" 2000 *Mediation Quarterly*, forthcoming.
Compare the awkward double message delivered daily by medical doctors "Drugs or surgery may have some benefits but ……."

[10] Analogous discussions can be found in abundant medical literature which addresses the ideal and tensions of patients giving "informed consent" to medical interventions; eg. K. Cox, *Doctor and Patient: Exploring Clinical Thinking* (Sydney: Uni of NSW Press, 2000).

(3) **Expense.** To prepare an initial risk analysis, and then subsequent amended versions as new information emerges, is yet another expense for a client. A client may be more willing to spend a limited conflict budget on discovering weaknesses in the opposition's arguments, rather than carefully systematising his/her own weaknesses and risks.

(4) **Repetitive client Education.** Educating inexperienced clients about the harsh realities of conflict and of the legal system is often an exhausting and expensive process.[11]

Lawyers sometimes lecture and debate with inexperienced disputants for months in an attempt to dispel the myths which surround the litigotiation system. Robert Benjamin has observed that inexperienced litigants sometimes allow the myths of justice, truth, rationality and finality to influence their decision in favour of a litigation path.[12]

Some lawyers may too readily cease this demanding education of clients who do not want to hear.

(5) **Unnecessary Scare-mongering.** A comprehensive listing of the risks of conflict or litigation may unnecessarily scare some clients. They may react to a three-page list and be unable to see that the vast majority of these risks are inapplicable or statistically unlikely. For example, a list of risks which result from driving a car would be so long and dramatic that some readers would unnecessarily abandon driving forever. The medical profession struggles with this factor whenever legislation requires a comprehensive catalogue of possible side-effects of new drugs or surgery.[13]

(6) **Loss of a Client.** Following from the previous factor, some lawyers need money. They fear the loss of a client if the client hears "negative" comments from the lawyer.

Accordingly, they sell the client too readily what (s)he wants, rather than what may be needed.

(7) **Client is "not ready" to hear.** Following the previous two factors, some people in conflict have suffered profound losses – loss of farm, business, reputation, mobility, self-respect, spouse, health, or hope for the future. These losses send them into a normal cycle of grief which may be manifested by shock, denial, bargaining with God, depression or anger.[14]

People in the early stages of grief (which may last for years) are "not ready to

[11] A. Sarat and W. Felstiner, *Divorce Lawyers and Their Clients* (New York: OUP, 1995); D. Binder, P. Bergman & S. Price, *Lawyers as Counsellors* (1991).
[12] R. Benjamin, "Negotiation and Evil: The Sources of Religious and Moral Resistance to the Settlement of Conflicts" (1998) 15 *Mediation Q*, 245.
[13] M. Weir, *Complementary Medicine: Ethics and Law* (Brisbane: Prometheus, 2000) pp 93-101; *Rogers v Whitaker* (1992) 109 ALR 625; *Chappel v Hart* (1998) 156 ALR 517 (It is professional negligence if a patient consents to a medical procedure without also consenting to even remotely possible side effects.)
[14] See E. Kubler-Ross, *On Death and Dying* (Macmillan, 1969).

hear" difficult truths about conflict. Skilled helpers may wait until the aggrieved client emotionally "moves on" before attempting any detailed risk analysis.

(8) **Irrational Nature of Human Decision-Making.** A more permanent version of the emotional rollercoaster is the theory that human beings are frequently irrational, and that we have and will always make a "number" of important decisions based upon irrational factors and feelings.[15]

Many anecdotes about war and litigation indicate unequivocal stupidity on the part of the instigators, or promulgators. The decision to "fight" had little or no possible benefit for any one.[16]

What persuasive effect will a systematic and rational risk-analysis have on such irrationality? Probably none.

Nevertheless, one side benefit of the cognitive exercise may be to help protect a warrior lawyer (or soldier) from subsequent allegations of failure to advise competently.

This theory about the irrational nature of (some) decision-making, guarantees long term employment for lawyers, arms-dealers and soldiers, whether as aggressors or defenders.

(9) **Avoid Creation of Dangerous Documents.** Some lawyers rightly fear that a *documented* list of risks will be "leaked" to the opposition. A letter, e-mail or fax can be copied by a disgruntled employee, accidently lost, stolen by a surveillance team, or left visible on a table during negotiations or mediation.

However, the benefits of clarifying decision-making processes can usually be balanced with the risks of losing "sensitive" information to the "opposition".

(10) **"Woops … Before this Escalates Further, Can we Consider …"** During an emergency or crisis consultation with a lawyer, there is a predictable tendency to focus on the crisis, and only to consider the systematic risks of ongoing conflict *later*, rather than *earlier*. Lawyers are then sometimes reluctant to deliver later news of risks to an entrenched client who can (rightly?) retort – "Why did you not tell me this earlier before I spent *x* dollars….?"; "Are you losing your nerve in this fight?"

Lawyers sometimes rely upon mediators, judges or other expert lawyers to deliver tactfully the belated risk analysis ("bad news") in these cases.

(11) **Avoid Premature Advice.** Many advisers are wary of giving any advice about risks before more alleged facts and evidence are collected. Of course, all relevant facts are never known before, during or after a trial. Some lawyers wait until the door of the court when a few more facts fall into place – such as the identity of the judge, illness of lawyers or witnesses, documents produced under

[15] eg D. Kagan, *On the Origins of War* (Doubleday, 1995).
[16] eg J. Vidal, *McLibel: Burger Culture on Trial* (London: Macmillan, 1997). Every litigation lawyer has a catalogue of stories about "insane" claims or litigation.

subpoena – before giving a first or revised risk analysis.

The deferral of at least a preliminary risk analysis is a dangerous habit as ironically the process of collecting facts and evidence usually escalates conflict. Working towards creating a comprehensive risk analysis is itself a risk.

(12) **Fear of inaccuracy.** Some lawyers seem to avoid writing out any list of "no-settlement" risks for a client for fear of understating or overstating the dangers. This is a form of perceived self-protection. "Put nothing in writing and you can never be proved to be wrong."

(13) **Standardised Risk List.** The logical converse of the previous point is that some lawyers, like doctors, are unwilling to prepare pro forma precedents which set out 68 standard risks of a business continuing with unresolved conflict or commencing litigation. Such a standard form may contain "truth", but will rarely be read by a client, does not lead to "informed" client consent, and may give the client the impression that the lawyer lacks competence as a warrior and negotiator: or is trying to avoid responsibility for minimising some of these risks.

Nevertheless, such forms may become increasingly common in lawyers' offices, as they are in medical surgeries, and on manufacturer's labels.

(14) **Avoid public denigration of courts.** A risk analysis will necessarily itemise in detail the accident prone nature of the court system. The criticism of Western court systems is abundant and public – slow, uncertain, error-prone, expensive, stressed judges, judges ignorant of clients' lives and businesses, tactical gamesmanship by lawyers, client loss of control, translation of conflict into narrow legal and monetised categories, repetitive adjournments, process by attrition etc.etc.[17]

These repetitive and publicised critiques of courts are well known by litigation lawyers. Their own anecdotal vitriol towards courts usually far exceeds the surveyed and published dissatisfaction.

However, many lawyers remain wary about cataloguing court and judicial failings in writing for clients. These documents will inevitably get back to the judges. Some judges, living in isolation, may be offended and the lawyer may alienate an ally needed at a later urgent hearing.

Thus lawyers tend to tell stories to clients about the accident prone nature of the judicial system, rather than record these tales of woe in writing.[18]

(15) **I'm a lawyer, not a counsellor.** Some lawyers take the approach that they will advise only on "legal" risks, not about personal community or business risks.

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[17] Australian Law Reform Commission, *Managing Justice – A Review of the Federal Civil Justice System* Report No. 89; 1999 pp 69-97.

[18] eg A. Sarat & W. Felstiner, *Divorce Lawyers and Their Clients* (New York: OUP 1995). (Tape recordings of family lawyers speaking to clients reveal constant oral warnings about the arbitrary and chaotic nature of the court system.)

Thus they readily state that litigation is delayed, uncertain and expensive (a "lottery").

However they do not investigate the client's life, goals and business in detail or set out how ongoing (litigious) conflict may impact those "non-legal" areas – eg. newspaper publicity, perceived incompetence, loss of work references, lost opportunities to compete, diversion from work, deterioration in health, exposure of personal or trade secrets, humiliation in a witness box etc. Such "commercial" analyses are left to the client or other more expert advisers.

This artificial division between legal and non-legal effects of conflict is conceptually flawed and professionally dangerous.[19]

Medical doctors have particularly been criticised for an analogous tendency to say, "I am an expert in disease; I do not discuss illness". By way of contrast, patients want consideration of their whole life and life goals; not just the "curing" of a technical disease.[20] It is not acceptable for a surgeon to say "I am an expert cutter; the psychological, economic and injury risks attached to surgery are not my business".

The writer anecdotally meets some lawyers who give a "legal" risk analysis based on their own expertise and research; and then switch to a brainstorming process with the client to create a second "commercial" or "personal" risk analysis.

(16) **Hired a Doberman.** There are several variations on the previous reason for certain lawyers being reluctant to provide a written risk analysis. For example, some lawyers say that they have been hired in a specialist role as an aggressor, hired gun, bad cop or doberman. They have not been hired as a diplomat or as a wise decision-maker. It would be patronising to a client to assume uninvited (and non-expert) roles.

This interpretation continues by saying that all the lawyer's intellectual and emotional energy must be directed at discovering "weaknesses" and doubts in the opposition's position – not listing risks in his/her own client's chosen course of action. No doubting dobermans required.

There is no doubt that some lawyers who have adopted this interpretation of their "bad cop" role, have found long term employment. Others have not.

(17) **Wise elder and god-professional.** One interpretation of the professional-client contract is that the submissive client brings his/her problem to the wise expert for the expert to provide a solution.[21]

The client wants this contract and wants the expert to make judgments on his/her behalf. The client does not want to be bothered with lists of doubts,

[19] eg J.H. Wade, "Forever Bargaining in the Shadow of the Law – Who Sells Solid Shadows? (1998) 12 *Aust. J. of Fam. L*. 256.
[20] eg K. Cox, *Doctor and Patient: Exploring Clinical Thinking* (Sydney: Uni of NSW Press, 2000).
[21] D. Schon, *The Reflective Practitioner; How Professionals Think in Action* (Harper Collins, 1983).

risks, options or alternatives. It is clear that there remains a class of clients who still want (at least initially) this god-professional contract, and will shop around until they find the right fixit doctor, dentist, builder or lawyer.

Given market forces some of these god-professionals will be successful. However, particularly as lawyers, they live in increasingly mine-infested territory.[22]

(18) **Belated Risk Analyses by Third Parties.** The preceding catalogue suggests reasons why many lawyers do not undertake a systematic and comprehensive written risk analysis early, if ever, for their clients. Accordingly, it sometimes becomes the belated task of a mediator, business adviser or barrister to undertake this task in an attempt to create clarity, and to assist a disputant make a wise decision in the face of inevitable uncertainty. A barrister and a mediator will usually also attempt to protect the initial lawyer from any criticism for failure to prepare such a document earlier – eg. "I'm sure that your lawyer will have told ;you all of this already"; "All I am doing is helping you create a list of the many things your lawyer has told you in the past"; "Your lawyer has helpfully analysed the legal advantages and dangers, now can you help me understand the commercial dangers if this dispute goes on endlessly?"; "Many of these risks have only become apparent recently and you must now re-evaluate in the light of this new information"; "Litigation is like war, clients commonly plunge into it in a moment of passion; as the emotions subside, it comes time to evaluate" etc etc.

One of the major reasons that lawyers employ mediators is to "beat up" a client who is not listening to the lawyer's repetitive written and oral warnings about continuation of conflict or litigation. What follows is an example of a colloquial questionnaire form of risk analysis given to all team members prior to a mediation.

Example Risk Analysis[23]

(Typical service provider – customer "contractual" dispute)

A cotton factory owner contracted with an expert factory designer and builder to renovate sections of his mill for $2million. When the renovations were complete, the owner was disappointed as the promised rate of production did not eventuate until three months thereafter. (The new machinery often did not work during the first three months – the factory experienced repetitive "down-time".) Accordingly the factory owner withheld the last payment of $250,000 to the renovator. Incensed, the renovator commenced court action in one state (the state of the contract) to recover the last instalment. Predictably, the factory owner cross-claimed, in the state where the factory was actually constructed, for three months of diminished profits, being around

[22] eg M. Behm, "A Risk Perspective of Managing a Mediated Matter" (1999) December *Proctor* (Queensland) 27.
[23] J.H. Wade, *Representing Clients at Mediation and Negotiation* (Bond University Dispute Resolution Centre, 2000), pp 62-66.

$1million. The entrenched parties and lawyers were required to attend mandatory mediation.

The "legal issues" distilled by the mediator during telephone preparation with lawyers and clients were as follows:

POSSIBLE FACTUAL AND "LEGAL" QUESTIONS/ISSUES??

FACT	1. How many minutes of down-time occurred during the relevant period?	☐
FACT	2. What combination of factors caused each down-time?	☐
FACT/ EVIDENCE	3. What expert evidence is available/credible to argue (2)?	☐
FACT	4. Which particular down-time minutes were arguably "normal" incidents of an overhaul? (eg. compared to other mills around Australia)	☐
LAW	5. Who has the joint or individual responsibility to remedy each particular stoppage? In what time frame?	☐
FACT	6. What steps were taken by whom to remedy each down-time?	☐
LAW	7. At what minute does each particular down-time become a possible/probable breach of contract?	☐
LAW & FACT	8. How should "loss" be measured for those minutes of down-time in breach?	☐

On the day of the joint mediation meeting (which involved two teams with 5 members each), the mediator met with each team and gave each of the members the following risk-analysis. Each team member was asked to fill in the form and then discuss each risk with fellow team-members.

Business Risk Analysis for Each Participant

(1) How far will I and my employees be able to concentrate on new projects over the next x years of conflict? $

(2) How many days of worktime will I and my employees lose over the next x years preparing for this dispute? $

(3) Do I/they have anything better to do? $

(4) How much money, best to worst, will I spend on

- Lawyers $
- Duelling witnesses $
- Duelling experts $
- Travel $

Over the next x years?

(5) How much money, best to worst, will be spent on *procedural* issues (eg. which court), before we even focus on historic analysis? $

(6) What damage, if any, might flow in my business community by a public hearing during which we each label the other:

- Impetuous $
- Deceptive
- Incompetent, etc.

(7) If war continues for x years and bitterness escalates, how far (if at all) can each of us lose customers from bad-mouthing by the other? $

(8) What are the chances that a judge will understand my industry and how it operates?

(9) What are the chances that a judge will believe 100% of my version of "the facts"?

(10) During years of conflict, what are the chances that a judge will attribute "fault" 100% to one side, and zero to the other?

(11) What dynamics will emerge when my colleagues are subpoenaed and cross-examined?

(12) What pressures will x years of conflict put on our families?

(13) After x years of historic research, will perceived facts and dynamics be any different at the door-of-the-court? (if so, how) Yes No

	Maybe	
(14) Will x years of argument effectively convince either of us that the other is legally or morally "right"? (back to question 13)	Yes	☐
	No	☐
	Maybe	☐
(15) What are the risks of miscommunication by using letters and legal documents over the next x years?		☐
(16) If one of us in incensed by the trial judge, what chances of an appeal and recycling risks (1)-(14)?		☐
(17) Other risks???		☐

ATTEMPT TO PUT BEST/WORST MONETARY VALUES ON EACH OF THESE RISKS FOR YOU. THEN ADD UP BEST/WORST TOTALS.

TOTALS	☐	☐

The dispute settled at the mediation after 8 hours of sometimes tense communication. **One** of the many factors (as told to the mediator by a legal representative) which removed barriers to settlement was that the written exercise and team discussion refocussed the teams on risk management, long term interests beyond just money, moral and legal rights.

TERMS OF THE SETTLEMENT (drafted in detail at the mediation)

(1) Mutually drafted press release for Trade Newspaper about re-establishment of excellent working relationship between parties.

(2) Signed contract for renovation of another factory.

(3) Claim for lost profits abandoned.

(4) Payment to renovator of $75,000; plus a further $25,000 for an earlier outstanding debt.

(5) Agreement to include in any future contracts a security clause for instalment payments.

(6) Establishment of emergency trouble-shooting phone numbers if/when conflicts arose in the future.

4.8 Risk Analysis Exercise

You are a legal representative or a mediator. The manager of a huge shopping mall comes to see you and asks for your advice as a recent attempt to negotiate with a tenant has been unsuccessful. The manager is puzzled at the tenant's unreasonable behaviour as all the legal rights and power seem to be on the landlord's side.

The lessee is a specialist retailer in the lessor's shopping mall. The lessee alleges that its recent downturn in profits has been caused by repair work done by the lessor to the pavement outside the lessee's shop. Allegedly, this repair work diverted customers walking in the mall. The lessee has had a history of conflict with the lessor's managers and has now left the mall and terminated his lease. He is now unemployed. The lessee initially claimed $100,000 damages and the lessor offered nothing.

The lessor has clear documentary evidence to show that the three shops adjoining the lessee's shop actually had increases in profits during the repair work.

The lessee's manager is the brother-in-law of the founder of the franchise of similar stores that exist across the country.

The Retail Shop Leases Tribunal ordered the disputants to mandatory mediation. They had one quick meeting where the lessee reduced his offer to $50,000; and the lessor increased her offer to $5,000.

Prepare a two-column risk analysis if a settlement is not reached.

(i) Use a whiteboard or a large sheet of paper and draw up two columns of possible risks – one for the landlord and one for the tenant, if the dispute does not settle.

(ii) Then in the light of that analysis, advise the manager of possible procedural options.

RISKS IF SETTLEMENT DO NOT OCCUR			
FOR SHOPPING MALL	$ VALUE	FOR FORMER LESSEE	$ VALUE
		1.	
		2.	
		3.	
		4.	
Etc.		Etc.	

1. Why are written risk analyses apparently so uncommon amongst (legal) representatives before negotiations and mediations? Give at least 5 reasons.

……
……
……
……
……

2. What could be done to make written risk analyses a more common feature of decision making/mediation in times of conflict? Give at least 5 changes that would be necessary.

(1) ……

(2) ……

(3) ……

(4) ……

(5) ……

(See generally J S Hammond, R L Keeney and H Raiffa, *Smart Choices* 1999)

Precedent Risk Analysis[24]

What follows is an example form of risk analysis which can be used or adapted. Many variations on this are possible – though writing, lists and multiple specific categories (as compared to oral, literary and generalised risks – "you may lose"; "there are no guarantees"; "it depends who is believed") are essential.

Anecdotally, many (legal) representatives tell mediators that they have "advised the client about the risks". However, when mediators ask clients in private about the risks of not settling, the client has heard selectively or not at all, or the client speaks in vague generalities about the high cost of litigation, or unpredictable nature of the behaviour of judges or other decision-makers.

Following is an example of another way of trying to analyse and communicate ranges of risk. (This chart has a more dramatic and analogous "avoidance" chart illustrated at 3.7.)

[24] J.H. Wade, *Representing Clients at Mediation and Negotiation* (Bond University Dispute Resolution Centre, 2000), pp 59-61.

4.6 *Client Information Sheet* – Risk Analysis

NAME _____

Normal transaction costs of filing a formal court claim and proceeding to the door of the court (or occasionally even to the Umpire)	Applicable to me ✓ / ✗	Estimated $ value Best to worst	Applicable to other disputants	Estimated $ value Best to worst
1. …….Years of personal stress and uncertainty				
2. …….Years of stress of family members				
3. …….Years of stress on others and my work associates				
4. …….Weeks of absenteeism from work				
5. …….Weeks of lost employee time preparing for court				
6. …….Years of lost concentration and focus at work				
7. Life/business on hold for …….years				
8. Inability to "get on with life" for …….years				
9. Embarrassment and loss of good will when relatives/friends/ business associates are subpoenaed to court				
10.Negative publicity in press or business circles				
11.My lawyer's fees				
12.My accountant's fees				
13.My expert witness's fees				
14.Possible costs order against me				

15.Interest lost on money received later rather than sooner				
16.Loss of control over my life to professionals				
17.Post litigation recriminations against courts, experts and lawyers				
18.Loss of value by court ordered sale/appointment of receiver etc				
19.Lost future goodwill with and "pay backs" by opponents				
20.Cost and repeat of all previous factors if there is an appeal				
ESTIMATED TOTAL of Transaction Costs (best to worst)*		$	No.	$

Date _____

Signed _____
(client)

NB: These are only rough estimates. All these figures will fluctuate up or down as the conflict develops and as more factors emerge.

* The best-worst transaction cost estimates should be deducted from best to worst BENEFITS of LATE SETTLEMENT (or umpired decision).

Conclusion

This paper has set out briefly:

- a description of a risk analysis
- reasons why such documents are essential for professional advisers and their clients in conflict
- some hypothesised reasons why written risk analyses are uncommon in many legal practices
- examples and precedents of risk analyses.

The writer's hope is that the evolving written risk analysis will become a routine document in the offices of professional conflict managers – particularly lawyers and mediators (and armed services!).

The problems attached to such documents are in my opinion, usually outweighed by the clarity they provide for conflicted clients attempting to make wise decisions in the face of ongoing uncertainty.

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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BACK-ISSUES OF BOND DISPUTE RESOLUTION NEWSLETTER

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.

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Director
Bond University Dispute Resolution Centre