April 2001

Bond Dispute Resolution News Volume 8

BOND UNIVERSITY
Dispute Resolution Centre

BOND DISPUTE RESOLUTION NEWS

Volume 8 • April 2001

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Recent Activities of Bond University Dispute Resolution Staff

LAURENCE BOULLE

11-13 February	Conducted 3 day mediation workshop for the Adelaide University Continuing Professional Development program with Margie Ross a legal practitioner in Adelaide.
13,14 March	Chaired a two day meeting of the National Alternative Dispute Advisory Council in Adelaide where the future direction of ADR standards in Australia was discussed. He also addressed a public forum of ADR practitioners on the prospects for ADR standards.
29 March	Book Launch – *Mediation Skills and Techniques* was launched by Sir Laurence Street at the premises of Resolve Advisors, Sydney and attended by approximately 40 guests.

PAT CAVANAGH

May 2001	**Associate Professor Pat Cavanagh** begins a 12 month contract in Jakarta as Senior Case Appraiser and Mediator. This involves resolving disputes between syndicated banks and businesses over debts ranging between $10 and $100 million (US). Pat's position is supported by the World Bank.

JOHN WADE

February 2001	**Professor John Wade**; Ormond College, Melbourne, Australian Christian Lawyers Convention, *Peacemakers and Troublemakers – an Awkward Balance for Citizens, Lawyers and Christians.*
21 March	CLE Breakfast in Brisbane. "Diplomats and Dobermans: 15 Methods to Re-Open Hopelessly Jammed Negotiations"
12 April	Workshop for Judges of the Supreme Court in Queensland "Has Mediation Been Too Successful?"

COURSES

15-17 March **Bond University**	*Basic Mediation Course*. Professor John Wade, Professor Laurence Boulle and Assistant Professor Bobette Wolski taught this popular course with the assistance of 10 coaches and 31 participants.

Recent Publications of Bond Dispute Resolution Centre Staff

The Centre is pleased to announce the publication of two new books by Laurence Boulle, foundation director of the Centre.

The first book is *Mediation Principles Process Practice* (UK edition) Butterworths, London, 2001, 617pp. This book has been co-authored by Miryana Nesic a solicitor, ADR consultant and registered mediator in the UK. It is an updated adaptation and rewriting of the original Australian edition. Part 1 takes account of new theoretical developments in mediation and ADR and Part 3 reflects contemporary mediation practice in the United Kingdom. It describes and analyses the very extensive mediation developments which have occurred in the UK since the Woolf Report in 1999. It includes survey material on mediation usage by English law firms and reference to evolving mediation practices such as on-line dispute resolution services. It includes appendices on mediation organisations in the UK and on useful websites for practitioners and academics.

Enquiries about the book can be made with Butterworths, London.

The second book *Mediation Skills and Techniques* Butterworths, Sydney, 2001, 352pp, has been authored by Laurence Boulle as part of the award winning Butterworths Legal Skills Series. As the title implies the book deals with the process of mediation and the skills and techniques of mediators. It is essentially a 'how to' publication, although references are provided in each chapter to relevant literature in the particular field. There are three areas of particular focus: the role of the mediator in creating a favourable climate for problem solving, the analysis and diagnosis of the dispute in terms of conflict theory, and the role of the mediator as facilitator of the parties' negotiations. The final chapter deals with the difficult challenge of developing a mediation practice. Each chapter concludes by identifying three important issues in the preceding text and a list of questions for classroom discussion or self study. Reference is made to individual case studies and anecdotes from mediation practice.

Enquiries about the book can be made with Butterworths, Sydney.

For further information on these and other publications contact the

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Forthcoming Courses in Australia

Bond Courses in 2001

19-21 April	**Perth**	**Short course – 3 days**	**Family Arbitration, Enquiries: Law Council, Elizabeth Marburg 02 6247 3788**	**AIFLAM**
18-19 May	**Sydney**	**Short course – 2 days**	**Representing Clients at Mediation and Negotiation, in conjunction with the NSW Bar**	**Wade, Cavanagh**
3-5 August	**Melbourne**	**Short course – 3 days**	**Basic Mediation Course, in conjunction with Leo Cussen Institute. Phone 03 96023111, email: dirooney@leocussen.vic.edu.au**	**Boulle Cavanagh Wade**
16-19 August	**Sheraton, Noosa**	**Short course – 4 days**	**Advanced Mediation Course**	**Wade Boulle**
11-13 October	**Canberra**	**Short course – 3 days**	**Family Arbitration, Enquiries: Law Council, Elizabeth Marburg Phone: 02 6247 3788**	**AIFLAM**
6-8 December	**Marriott, Gold Coast**	**Short course – 3 days**	**Basic Mediation Course**	**Wade Boulle Cavanagh**

REPRESENTING CLIENTS AT MEDIATION

The Dispute Resolution Centre has been invited to lead a course for Sydney barristers on "Representing Clients at Mediation and Negotiation" in Sydney on 18, 19 May 2001.

The course text will be John Wade's *Representing Clients at Mediation and Negotiation*. To purchase a copy of the book please email drc@bond.edu.au or post your order with cheque or credit card details (Australian residents $55.00 (inc GST & postage) or overseas residents $50 US (as converted to A$) including postage) to –

The Administrator, Dispute Resolution Centre, Bond University Q 4229 Australia

Advanced Commercial Negotiation Seminar Series 2001
5.30pm–7.00pm

SERIES I
Law Society of NSW
170 Phillip Street
SYDNEY NSW 2000

2 August	Pat Cavanagh – *Ten Most Common Mistakes of Commercial Negotiators and How to Avoid Them*
20 September	John Wade – *"Don't Waste Your Time on Negotiation or Mediation: This Case Needs a Judge"*
19 October	Pat Cavanagh – *"But You Can't Do That!" Are there any Ethical Constraints in Negotiation?*
8 November	John Wade – *How to Cross the Last Gap in Negotiations; Sixteen Methods*

SERIES II
Leo Cussen Institute
360 Little Bourke Street
MELBOURNE VIC 3000

26 July	Pat Cavanagh – *Ten Rules for Successful Hard Bargainers*
23 August	John Wade – *Risk Analysis in Litigation and Negotiation: "I Wish You Had Told Me Earlier Than This"*
18 October	Pat Cavanagh – *How to Negotiate Successfully with Hard Bargainers*
15 November	John Wade – *Diplomats and Dobermans – 15 Methods to Re-open Hopelessly Deadlocked Negotiations*

Forthcoming Courses in Indonesia, USA and UK

10-12 May	**Mediation course for Indonesian Arbitrators in Jakarta.**
	Professor John Wade will lead the following five courses in USA and UK:
29 May-2 June	**Mediation course at Pepperdine University, Los Angeles**
5-14 June	**Mediation course at Vermont Law School**
18-23 June	**Mediation course at Southern Methodist University, Texas**
27 June	**Advanced Mediation Workshop, CEDR, London**
29-30 June	**Basic and Advanced Mediation Workshops, Family Mediation Association, London**
2-3 July	**(Wimbledon Tennis course)**

Thoughts and Themes

Examples of Problem-Solving Questions

When a representative specialises in the negotiation and resolution of particular kinds of conflict, (s)he can become expert at the difficult task of turning client concerns into **problem-solving** questions. This is a vital but difficult skill required by all expert problem-solvers. Multiple clear, short, detoxified and mutually acceptable questions provide an ideal agenda, and provide "multiple bargaining chips".

Set out below are examples in particular specialised areas of creating helpful problem-solving questions.

Workers Compensation Problem Solving Questions

Where a person claims compensation from an insurer due to a work-related injury, the presenting issues are often deceptively simple:

1. Was the injury *caused* by the incident at work?
2. How much money should be paid as compensation for that injury?

However, mediators who work regularly with thousands of workplace injury claims, suggest that the disputants have repetitive concerns, which can be translated into the following seventeen repetitive problem-solving questions.

1. How can we ensure appropriate income for...?
2. How can we obtain adequate/independent medical opinion?
3. How can we ensure satisfactory future medical examinations?
4. How can "x" recover her/his status?
5. How to avoid precedent in this matter?
6. How can timely/prompt payment be ensured?
7. How do we establish that the injury is work-related?
8. How can the insurer justify the outcome back in the office?
9. How can parties feel safe from any adverse consequences as a result of this outcome?
10. How to avoid repetition of similar incidents in future?
11. How can we settle while minimising the effect on insurance premiums?
12. How can "x" be covered for future medical costs?
13. How can "x's" health be improved?
14. How can "x's" quality of life be improved?
15. What are "x's" future job options? (Short/long term)
16. How can the insurer/employer business relationship be maintained?
17. How can we ensure productive communication between the insurer and ...?

(David Bryson of Victorian Workcover originally developed a version of these questions)

Family Law Problem Solving Questions

The writer's extensive experience in matrimonial property disputes raises only seven questions, and children's disputes only fourteen questions. Thus in a model of joint problem

solving which tries to convert needs and concerns into question ("issues"), it becomes relatively easy to convert an array of concerns into the seven or fourteen visible questions. The seven property questions are:

1. Is the *list of assets* complete?
2. What is the *range of values* of each asset?
3. What is the *range of percentages* into which the pool of assets should be divided?
4. Which assets should fall on each *side* of the ledger?
5. With what *timing* should assets be divided?
6. Is the *list of debts* complete and who should pay each debt?
7. Should any *periodic payments* be made? If so, over what period?

The transition of each disputant's statement into reframed concerns and then into questions on the whiteboard becomes predictable. For example:

	Disputant Statement	**Reframed as a Concern**	**Questions on Whiteboard**
1.	"I don't think he's telling me everything about his assets"	So you're concerned that all the assets may not have been disclosed?	Is the list of assets complete?
2.	"She has the value in her pocket – that value is quite unrealistic"	So you don't think that the valuation by Wendy's valuer is either independent or in the ball park?	What is an appropriate range of values for each asset?
3.	"I only want what is fair"	The word "fair" has many meanings. One common need is to receive a share of the assets which are in the range of what a judge would do.	What is the appropriate range of percentages in this type of marriage?
4.	"I want the grandperson clock – I inherited that from my mother. He can't have it"	So you would prefer to have that special clock on your side of the ledger.	What assets should fall on each side of the ledger?
5.	"She thinks I'm made of money. There's no way I can suddenly raise that kind of lump sum. The business would collapse"	You're concerned about the timing of any payouts and the negative effect that a single lump sum might have on the business?	On what timing should transfer and payments be made?
6.	"I'm not going to pay those debts! I don't know what she spent the money on – and I've got liabilities of my own"	So you need to identify what debts each of you owe and who should be responsible for the payment of each?	Is the list of debts complete and accurate? Who should pay each debt?
7.	"He should be paying me maintenance – and he's not paying enough child support. I'm going to have a really difficult	So you would like to discuss what periodic payments should be made for you and the children and for how long they	What, if any, periodic payments should be made? • In the short term?

	time. He's quite irresponsible.	should be made.	• In the long term?

Basically, every worry, grievance or argument about family property or family maintenance can eventually be "objectified" into one of these seven problem solving questions.

The fourteen "standard" children's questions are:

Time:

1. How should each child's week be structured?
   How much time should each child spend with his/her Mum and Dad?
   In the short term?
   In the long term?
2. What arrangements should be made for any "special" days?

Money:

3. How should financial support for each child be shared?
   In the short term?
   In the long term?

Children's Lifestyle:

4. How should children be transported normally from one home to another?
5. With what state of clothing, cleanliness, homework, tiredness and being fed should children move between each parent's house?
6. At present, what special needs, medication, exercise and activities does each child have each week?
7. With which other adults and children should the children associate while with Mum and Dad?

Communication Channels:

8. How should children communicate with the absent parent?
9. How should a parent communicate with the absent children?
10. How should parents communicate information or questions relating to the children?
11. As children's needs change, how can these arrangements be reviewed?
12. Is it realistic for the time, money and lifestyle arrangements to be regular and punctual?
13. Can these arrangements have any degree of flexibility? How should this flexibility work?
14. What should each parent do if (s)he thinks the parenting agreement has been broken, or (s)he is upset by the other parent or by a child?

The advantages of knowing the routine problem solving questions are that every chaotic conversation can be given a structure; disputants can feel "normal" when their complex interactions are described and visualised as normal and the mediator can avoid writing inflammatory words on a board. A disadvantage is that the mediator may cease listening; and the disputants may feel trivialised if their lives are stereotyped and summarised too quickly.

(from J H Wade, "Tools from a Mediator's Tool-Box; Reflections on Matrimonial Property Disputes" (1996) 7 *Aust D R Journal* 93)

Select an area of conflict with which you have repetitive contact. The area is .....disputes. Then attempt to set out (1) common client statements/goals or concerns; and (2) each statement rephrased into a problem-solving question. Wherever possible, begin the question with the words "How", or "What".

Client Statement	Possible Problem Solving Question
Eg (1) "the club members will not agree to a low payout figure"	(1) "How can any proposed solution be sold to club members?"

My Mediator Must be an Experienced Advocate-Lawyer

Why do so many lawyers and/or their client disputants only want to employ mediators who are lawyers, (especially retired judges) who are expert in the substantive area of dispute and in the *process* of high pressure negotiation (and yet relatively inexpert in various mediation processes and skills)?

1. The first reason is that some disputants and/or their professional representatives do not yet understand the various brands of mediation and facilitation. They believe (perhaps correctly) that (this) mediation will involve the mediator giving legal information ("There are four ways in which the courts are approaching this kind of problem") and legal advice ("This is what will probably happen if you go to court"). Additionally they may not understand the difference between being an expert in managing a *process* of conflict and negotiation, and being an expert in a *substantive* area of "legal" procedures, tactics and rules.

   Of course, some trade union members of the legal profession have not gone out of their way to explain the process-substance distinction, or that mediation has many forms. Customer misunderstanding may direct customer traffic towards lawyers. However, this is a particularly shortsighted money-generating strategy and reflects the historical failure of lawyers to research, define and refine those things which we can do very well.

2. Secondly, there is an increasing tendency in Australian and other societies for mediation schemes to be set up with minimum funding, strict time constraints, minimal training, supervision and debriefing of mediators, with strong institutional and funding pressure to reach "settlement". The aggressive, interventionist or "rhino" mediator (among the many various attempts to categorise mediation processes, Laurence Boulle at Bond University has developed the categories of "turtle", "emu" and "rhino") is well suited to this recession driven model. The rhino mediator needs a working knowledge of "litigotiation" and judicial behaviour patterns so that he or she can push the disputants into the appropriate range of settlement options quickly. Such aggressive pushing may particularly be taking place in private sessions with each of the disputants, as a vigorous form of "reality testing". There an advocate-mediator with actual or fictional insider knowledge, can role-play judicial attitudes and behaviour in an attempt to unsettle entrenched or misinformed disputants. This role is particularly sought after by legal representatives whose clients are not heeding their "good" advice.

3. Thirdly, we all tend to feel comfortable with our own kind. A legal representative of a disputant will tend to feel comfortable with a legally "expert" mediator in the hope that she or he will:

   - Use the same language or jargon (conversely will not use "strange" language or concepts);
   - Be accustomed to a negotiation framework such as lawyers use. (For example, in personal injury cases, "What is the quantum of damage? Past and future? Out of pocket expenses? Pain and suffering? Past and future economic loss? Range of liability apportionment?)

4. Fourthly, an expert "legal" mediator will hopefully be aware of all the loose ends which need to be tied up before a settlement is complete (for example, capital gains tax, indemnities for past tax liabilities; potential liability to pay stamp duty; securing payments in case of default and so on). Such awareness allows the mediator to flag such issues for

discussion and avoid "swiss cheese settlement", or multiple expensive and frustrating future meetings to "tie up loose ends".

5. Fifthly, a legally expert mediator is particularly skilled at the last stage of any mediation, namely drafting and fine tuning agreements. The lawyer representatives naturally are reassured to have such an expert drafter and wordsmith around to assist in this last stage of the mediation. They are effectively employing a multi-skilled person and getting many skills for a single price.
6. The sixth reason follows naturally from the last two. A dispute necessarily involves the interests of disputants and their legal representatives. (A dispute is rarely about what it seems to be about.) A lawyer-mediator, having walked in the shoes of the lawyer representatives, existentially understands the sometimes sensitive interests of the legal representatives. They know and trust that the lawyer mediator will tactfully ensure satisfaction of these – or at least will not be ignorant or disrespectful of these lawyer interests. For example, the interests of the legal representatives include:
    - Minimal denigration of lawyers;
    - Satisfied customers who will refer future clients to the lawyers;
    - Saving face if historic legal advice has turned out to be less than prophetic;
    - A settlement which envisages or agrees upon payment of legal fees;
    - A settlement which acknowledges the hard work of the lawyers, so that client hostility for a "disappointing" settlement is not redirected at professional helpers; even in the form of a professional negligence claim.
7. Seventh, an expert lawyer mediator, even without being a "rhino", is potentially able to:
    - Challenge factual suppositions
    - Challenge unrealistic options more effectively than a non-expert. Such challenges or "reality testing" can take place in face-saving private sessions. Most importantly such challenges can be directed gently and in collegial fashion towards legal representatives who are working on shaky data or hampered by ignorance or personal involvement in the conflict. For example, an expert can quickly raise doubts by asking questions concerning court delays, the range of legal costs, the credibility of competing witnesses, time available to judges and future potential frustration in complex "behavioural" agreements.
8. Eighth, some legal representatives are seeking a degree of personal protection from their clients by settling under the supervision of "an expert". They make an assumption that the expert will not allow the disputants to settle outside a broad range of "reasonable" outcomes. Thereby a settlement under the mantle or supervision of "an expert" is much less likely to be classified as professionally negligent, or to be set aside on grounds of unconscionability by a court made up of peer experts.
9. Ninth, lawyers are bound by codes of ethics (as lawyers). Also lawyer representatives know that they will have an ongoing relationship with a lawyer mediator via contact in "legal circles". Therefore lawyer mediators may be constrained to "act properly" by habit, the market, gossip and blacklisting among lawyers, ongoing "legal" contacts and accountability to law societies.

(Adapted from J H Wade, "My Mediator Must be a QC" (1994) *Aust D R J 161-163)*

Reflections on Conflicts – Lessons Learned

The next newsletter will contain a case study from a single line shuttle mediation between farmers and an insurance adjuster. Why is this lawyer-dominated model of mediation so popular? What are its advantages and disadvantages?

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 are available from 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
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