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Duelling experts in ADR

Laurence Boulle
Bond University, Laurence_Boulle@bond.edu.au

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The ADR Bulletin

Experts in mediation

Duelling experts in ADR

Laurence Boulle

Experts and adversarialism

A common feature of litigation is the involvement of dual experts, one or more presenting evidence for each side. A common problem in this system is that *dual experts* often become *duelling experts* — with a non-expert, the judge, having to decide between them.

The dual experts phenomenon is a product of the adversarial nature of the litigation process. Adversarialism entails each party being responsible for conducting the investigation, preparation and presentation of their respective cases. The judge's traditional role is limited to adjudicating on the merits of the two cases presented, not establishing the truth through investigation, fact-finding and calling of witnesses. In many cases the available remedies require the judge to give an either / or verdict based on the evidence and arguments presented.

This system encourages each side to make the best possible case it can, to be as extreme in its presentation as is possible, and to use a range of tactics and arguments to weaken the cause of the other side.

As regards experts, the adversarial system requires each side to engage its own expert, who presents reports and evidence in favour of that side's case. There are three reasons why the experts give contrasting evidence:

1. There may be genuine differences in their observations, evaluations and opinions — and this is the case in many areas, from the creation / evolution issue to the long-term effects of physical injuries.

2. The experts' views may be based on different versions of the facts or on partisan perceptions of events. For example, accountants may have different views of a business because they have been given access to different books of account.

3. The individuals may have been retained because they have established reputations in their areas of expertise and can be expected to behave more as advocates than as experts; for example, 'plaintiff' and 'defendant' doctors in personal injury disputes.

Using experts as third party neutrals

There are many ways in which ADR processes can avoid the syndrome of duelling experts. Some forms of ADR are themselves 'expert' based; for example, *case appraisal*, which in several Australian jurisdictions involves the expert giving an opinion on a limited version of the case. Although this expert opinion is 'non-binding', there can be severe cost penalties for parties who do not do as well at a subsequent trial as is provided for in the indicative opinion. In this model the case appraiser acts as a third expert who renders his or her opinion in the knowledge of the views of the parties' experts.

In *neutral evaluation* there is an attempt to avoid experts altogether by having the neutral evaluator deal directly with the parties. The evaluator is independent of both parties and provides expert information and advice. In a sense he or she 'represents' the interests of both parties, but not in a partisan capacity. However if the opinion of the evaluator is binding on both parties, there is a danger that it might be regarded as arbitration and be subject to the constraints of that dispute resolution process.

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Experts in mediation practice

Here are accounts of ways in which the duelling expert problem has been avoided in mediations in which I have been involved.

The case of the outside engineer

There had been a number of disputes between a developer and a local authority over the years. The developer had been used to a lax application of development application regulations for a long time. He had adopted an aggressive, combative style and tended to get his way. The problems ➢

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➢ began when the local authority appointed a new manager of development who was young, enthusiastic and wanted to do things 'by the book'. A hostile relationship developed between the two and there were a number of hearings on various development applications and related matters in the Land and Environment Court. Eventually one of the longstanding matters was brought to mediation. Progress was made on a number of issues but there was an impasse over a seemingly minor issue; namely, what was regarded as the appropriate depth for sewer lines at a certain point in time. Each side had an expert's opinion on this matter. The parties agreed in principle to engage a neutral engineer to give an opinion which they would both accept. There was no consensus on the identity of the expert, but they agreed on inviting the president of the local chapter of the Institute of Arbitrators to nominate a suitable engineer. They further agreed on what information to provide to the neutral expert and on what access he would have to the parties. Once this issue had been resolved, the mediation continued on other matters.

The case of the collaborative accountants

Legal proceedings were on foot between a father and daughter over the validity of their late wife / mother's will. The usual legal challenges were being brought against the validity of the will. The stakes were high in that the estate had a net value of approximately five million dollars, including family businesses and farms. At the mediation there were some preliminary skirmishes over the validity of the will, but the focus soon shifted to the underlying issue, which was the deterioration in the father-daughter relationship over the years. This was dealt with for a while, after which they reverted to the distribution issue. Now that a breakthrough had been made in the relationship, the parties briefed the accountants to work together on their valuations and other aspects of the business. The accountants spent several hours together outside the mediation room and returned with virtual unanimity on all issues. Some simple trade-offs were possible on the outstanding valuation issues and the parties were able to agree on all matters. While the accountants were collaborating, the parties and mediator continued looking at relationship issues. The lawyers also played a collaborative role in the joint drafting of a complicated Heads of Agreement.

The case of the lawyers as 'parliamentary draftsmen'

There had been a longstanding dispute in a particular industry between the peak employers' association and the main union. The presenting issue at the mediation concerned the meaning of a particular provision in the *Copyright Act*, though there were underlying industrial relation issues arising from new technologies within the industry. The Federal Government initiated the mediation (and paid for it) and the relevant minister agreed to submit to Cabinet any agreed proposal for an amendment to the legislation. This was seen as more politically expedient than Cabinet making the decision on its own. Initially the lawyers acted as duelling experts, with conflicting views of the meaning of the copyright provision and the implications of its amendment. After several mediation meetings all present agreed that it was better for the industry to take hold of this issue rather than submit it to the vagaries of the political process. The lawyers present then engaged in an extensive drafting process, with numerous drafts being provided to the parties for their consideration and refinement. A high degree of consensus was achieved, although at the expense of the original three line clause blowing out to two and a half pages. In the end the matter did not settle because outside forces conspired against it. However the lawyers' collaborative efforts remained on record as a draft model for the future.

Using experts constructively

These case histories illustrate ways in which experts can be used constructively in the mediation process. The flexibility of mediation allows for endless variety in the roles and contributions of experts. Other ways include:

- requesting that experts identify the common ground between them and pinpoint the bases for their differences;
- getting the parties to agree on a third expert and referring the matter out for a binding expert determination;
- conducting a 'mini moot' in which the experts act as witnesses for a short period of time so that each side, and their lawyers, can hear the arguments of the other (here protocols are required to allow some questioning, without resorting to cross-examination);
- in so far as the experts views go to liability, attempting to circumvent the liability issue by making a commercial decision on damages and other aspects of the dispute; and
- allowing the mediator to give a decision on the point of expertise. This idea causes consternation in many mediation ranks. The reality, however, is that mediators are often asked to give a view, and many in practice do so, despite the strictures of their standards and ethical guidelines. This system is sometimes known as *med-arb* or *binding mediation*. It requires some rewriting of the textbooks.

The fact of the matter is that mediation can often be an adversarial encounter, exacerbated by the role of experts. Just calling the system mediation does not reduce adversarialism or the phenomenon of duelling experts. More creative effort and procedural adaptation is required. ●

Laurence Boulle, Professor of Law, Bond University Queensland.

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Contributions to The ADR Law Bulletin for 1999 are welcome.

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Prospect Media Pty Ltd
Editor, Elizabeth McCrone,
Level 1, 71-73 Lithgow St,
St Leonards NSW 2065

or email:
elizabeth@prospectmedia.com.au