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Forever bargaining in the shadow of the
law - Who sells solid shadows? (Who
advises what, how and when?)

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Forever Bargaining in the Shadow of the Law -- Who sells solid shadows? (Who advises what, how and when?)

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Introduction

Mediators, lawyers and other skilled helpers normally exhort disputants to obtain “independent legal advice” before or after entering into negotiations. This article attempts to demystify and catalogue the concept of “legal advice” particularly in family disputes. Such a catalogue of information and advice quickly raises a series of questions:

- How much of this information and advice is actually made available at present?
- How much information is necessary or helpful?
- In what manner, form and language should such advice be given?
- By whom should such advice be given?
- How much of this information is within the competence of a single professional work group (such as lawyers or counsellors)?
- On what timing should such advice be given?

The article concludes that all these questions need ongoing research. Meanwhile, the sources, forms and price of (legal) advice should be creatively diversified in Australia in order to meet the needs of large numbers of disputants who enter into negotiation or mediation “in the shadow of the law”. This is a challenge for creative lawyers, counsellors, mediators and other skilled helpers who seek to prepare clients for negotiation or mediation.

“Legal advice”

Nodding “group think” sometimes prevails around the meaning of an over-used word until someone asks: “What does that concept mean?”. For example, “confidential”, “legal”, “advice”, “rights”, “mediation”, “therapy”, “impartial”, “neutral”, “informal”, “fast”, “economic”, “non-directive” and “power”.

What is this “legal advice” which is supposed to be so important to provide a structure for negotiation or mediation? In a broad sense, “advice” could cover any communication in relation to an event. More narrowly, tenuous distinctions can be made between advice, opinion and information. “Advice” can be described as a recommendation to act in a certain way. An “opinion” is a less forceful recommendation which reflects the speaker’s preference with an acknowledgement that the listener may have other priorities. “Information” involves no express recommendation but is rather an attempt to convey some truth or data. (For example, “there are four ways to value superannuation”; “businesses can be valued in three different ways”; “children are often anxious after parental separation”). It is often difficult to distinguish between these three concepts -- for example, categories of “information” often contain implied advice that there are no more options. Nevertheless, the threefold distinction provides useful working concepts.

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Just as “advice” is slippery in meaning, the word “legal” is even more of a weasel-word. It has many broad and narrow possible meanings. At its broadest, it is any advice which happens to come from the mouth of a person called a “lawyer”. Lawyers are supposed to know something about everything and everything about something -- thus the range of topics emanating from a lawyer’s advisory mouth is potentially endless. A narrower description of “legal advice” is a commentary on how rules, customs, risks, procedures and side-effects of an official system of regulations might impact upon a particular set of facts.

This latter description of “legal advice” does not mean that it is either accurate or organised. The few studies done of language used by experienced family lawyers when talking to clients suggest that their conversational advice is particularly disorganised and anecdotal.¹ Moreover, there is clearly no sociologically standard content or even “core” content which comes from the mouths, pens or word processors of lawyers by which “legal advice” can be measured. What is said by family lawyers to their clients varies according to the “type” or classification of lawyer -- bomber, gladiator, advocate, counsellor, undertaker, journeyman.² Rather, it is likely that the substantive and procedural advice given by a whole range of professionals -- accountants, therapists, mediators, professional negotiators, lawyers -- differs and yet overlaps.

This is symptomatic of the current discussion as to whether law is a discipline. Does lawyering have any unique knowledge and skills? What do the many sub-cultures of lawyers do? Are all traditional legal tasks now being competently performed by other workers -- for example, accountants?³ Without attempting to address these current interesting questions, I suggest for the purposes of this article the distinction between “legal advice” and “advice” is often, though not always, unhelpful and confusing. Lawyers, as expert problem-solvers, give expert advice on a range of topics which may differ only marginally to the advice given by a range of other advice-giving problem-solving experts.⁴ Obviously this proposition raises further questions about the traditional monopoly which one institutionalised workgroup has claimed over the giving of “legal advice.” What follows is a categorisation of the kinds of (legal) advice which are potentially very relevant to negotiating (in the shadow of the formal and informal legal process).

Advice about: (what)

- Time and possible delay;
- out-of-pocket expenses;

¹ See for example, A Sarat and W Felstiner, *Divorce Lawyers and Their Clients*, New York, Oxford University Press, 1995; K Kressel, *The Process of Divorce -- How Professionals and Couples Negotiate Settlements*, New York, Basic Books, 1985; A Sarat and W Felstiner, “Law and Strategy in the Divorce Lawyers’ Office” *Law & Society Rev*, vol 20, 1986, p 93; J Griffiths “What Do Dutch Lawyers Actually Do In Divorce Cases?”, *Law & Society Rev*, 1986, p 135.

² K Kressel et al, “Professional Intervention in Divorce: the Views of Lawyers, Psychotherapists and Clergy”, *Journal of Divorce*, vol 2, 1978, p 119; K Kressel et al, “A Provisional Typology of Lawyer Attitudes towards Divorce Practice”, *Law and Human Behaviour*, vol 7, 1983, p 31; K Kressel, A Hochberg and T S Meth, “A Provisional Typology of Lawyer Attitudes Towards Divorce Practice -- Gladiators, Advocates, Counsellors and Journeymen”, *Law and Human Behaviour*, vol 7, 1984, p 20.

³ For example, an accounting firm is now the largest “law” firm in Europe. On the loss of lawyers’ monopoly over conflict and transaction management, and on the debate on the meaning of “law” as an area of work, see D Weisbrot, *The Changing Nature of Australian Legal Practice: Some Implications for Education and Practical Training Providers*, 1993 APLEC Conference; R Abel, “The Decline of Professionalism”, *Modern L Rev*, vol 49, 1986, p 1; W Twining, *Law in Context*, Oxford, Clarendon Press, 1997, esp Chs 9-12; 14-15.

⁴ See the McRate Report, *Legal Education and Professional Development -- An Educational Continuum*, Chicago, ABA, 1992.

- ranges and risks;
- “rules”;
- multiple versions of “rules”:
- folklore;
- settlement law;
- street law;
- local law;
- systematised law;
- trial judge law;
- emerging law;
- appellate judge law;
- beyond the reported cases -- a study of the behaviour of decision makers;
- creating doubt; weighing up strengths and weaknesses;
- side-effects of conflict;
- normal dynamics in the process of negotiation.

Each of these kinds of (legal) advice will be considered in more detail in what follows.

Time and possible delay

An expert adviser can give “guesstimates” concerning best to worst times to:

- set up sequential negotiations or a mediation;
- file court documents in a particular court;
- obtain evidence of alleged facts such as valuations, a therapist’s report, an accountant’s taxation analysis;
- reach a preliminary administrative appearance before a court, mandatory court-ordered mediation, or a short interim trial;
- jump the queue on the basis of alleged urgency;
- forum shop for a “faster” court;
- run a trial hearing;
- avoid adjournments;
- file a notice of appeal;
- wait for an appeal hearing;
- effect enforcement of a court order.

Obviously, some of these time guesses require high degrees of experience on the part of the expert adviser to be even approximately “accurate”. As ever, experts sometimes differ dramatically in their time guesses, and their guesses about queue jumping.

Out-of-pocket expenses

The phrase “out of pocket” is used in an attempt to distinguish immediately quantifiable and visible cash expenses from a list of less visible, but important side effects of ongoing conflict such as trauma, stress, distraction from work, publicity, and embarrassment to associates.⁵ An expert adviser can give estimates on cash accounts that will be rendered upon a disputant by a variety of workers. These include accounts for:

- hours worked by lawyers, accountants, valuers, therapists, medical doctors. court filing fees;
- search fees to discover ownership of land, companies, shares;
- copying fees for court records, transcripts, income tax returns, school reports.

Like medical treatment for cancer, out-of-pocket cost guesses necessarily vary as new facts and twists occur.

Ranges and risks

Many clients seek quick (and hopefully inexpensive) advice on “the bottom line”; or, what will a judge do?; or, how do courts deal with this kind of case?; or, what are my chances of winning, or losing?

Frustratingly for some clients, almost all expert advisers will not give quick and simple answers to these common questions. Like predicting the outcome of a horserace or sporting event, the (legal) expert’s advice is hedged, qualified, and is dispersed with phrases such as “normally”, “all things being equal”, “prima facie”, “on a good day”, “on a bad day”, “on the other hand”, “my preliminary view”; “you have a 50/50 chance”; “it all depends”; “there is no certainty”; “litigation is a lottery”; “judges are arbitrary and random”. It appears that family law experts, by self accrediting oral anecdotes, seek to convince their clients that judicial decisions are arbitrary, error prone, unpredictable and dangerous.⁶ “Litigation is brain surgery with an axe.”

Out of this maze of wise uncertainty and foolish waffle, what is helpful advice? Arguably, good advice or guesses for a rational, problem solving client on substantive judicial outcomes sets out three concepts:

- a catalogue of reasonably predictable outcomes;
- predictable bad outcomes and predictable good outcomes (together with a range of side-effects);
- a mid-range compromise judicial outcome.

⁵ See later under “side effects” at pp 16-18.

⁶ See Sarat and Felstiner, n 1 above.

Catalogue or range of substantive outcomes

This part of an advice sets out a clear catalogue of options used by judges in a jurisdiction if and when decisions are made. This statement once again emphasises substantive options as decision-makers have a wide range of popular procedural options such as deferral, adjournment, referral to another professional (“shunting”), filling in some more forms, going to the back of the queue, or go away and settle the matter. For example, when dividing a house a judge may make at least five kinds of substantive orders:

- defer sale and give a right of occupation to one person;
- order the house to be sold and the net proceeds divided between 50-70 per cent to the wife;
- order the transfer of the house to the husband upon his payment to the wife of 50-70 per cent of its value immediately or over time secured by mortgage;
- order the transfer of the house to the wife upon her payment to the husband of 30-50 per cent of its value, immediately or over time secured by mortgage;
- order that a portion of the house be held in trust for adult children who have contributed to their parents’ wealth.⁷

Predictable bad outcome and predictable good outcome

The catalogue of outcomes necessarily indicates a good day -- bad day range of possibility or probabilities. In the writer’s experience, it is normal practice to tell clients the predictable bad outcome first, as after a client hears the predictable good outcome, he or she often suffers from selective deafness. Predictable bad and good outcomes are similar, but not identical, to Fisher and Ury’s well known concepts of WATNA (Worst Alternative to a Negotiated Agreement) and BATNA (Best Alternative to a Negotiated Agreement).⁸ In the writer’s experience, the words “worst” and “best” have encouraged enthusiastic and positional bargaining legal advisers to give ranges from total disaster to fantasyland without attaching percentage predictions to these extremes. For example:

- “You may die this afternoon, or you may live until you are 110.”
- “You may get no assets and be bankrupted; or you may receive 70 per cent of the assets.”
- “You may never see the children again; or you may be their full time custodian.”

Some terminology and education is required to encourage advisers to identify realistic ranges which are within probability rather than possibility. And when extreme best-worst fantasy-horror ranges are identified (as is sometimes necessary), their improbability is identified.

Take the simplified gender-stereotypical example of a traditional Australian separating couple where a wife is unemployed and caring for two young children; with husband in a demanding “absentee” and well paid career; and the assets accumulated during the marriage are valued at

⁷ For example, Family Law Act 1975 (Cth) s 79(1); *In the Marriage of Krotofil* (1980) 6 Fam LR 725; FLC 90-909; *In the Marriage of Randle* (1987) 11 Fam LR 753; FLC 91-828; *Dougherty v Dougherty* (1987) 11 Fam LR 577; FLC 91-823 (property awards under the Family Law Act to adult children).

⁸ Fisher and Ury, *Getting to Yes*, Century, London, 1981; W Ury, *Getting Past No*, Century, London, 1991.

less than \$ 300,000. On a good day the wife would receive from a judge between 70-85 per cent of the asset pool; on a fantasyland day she would receive 100 per cent;⁹ on a bad day she would receive between 60-70 per cent; and on a “worst” horror day she would receive 50-55 per cent.

A simpler example is possible with division of child time between mum’s house and dad’s house. On a good day the working father will have contact with his children every second extended weekend (for example Friday to Monday; or Thursday to Sunday); plus one evening meal together each week; plus regular telephone contact; plus half the school holidays. On a bad day, the working father will have contact every second weekend and three weeks of holidays each year. On a horror day, he would have contact only during one day of the weekend; and on a fantasy (ordered) outcome, the children would spend alternative weeks with each parent.

Probable judicial outcome on a version of the facts

Somewhere between good and bad judicial outcomes for each disputant lies a narrower band of more statistically probable outcomes. These are sometimes known as PATNAS -- probable alternatives to a negotiated settlement. Judges are notorious for splitting the difference or finding a position between the claims of both parties, or allowing both disputants to “win” something.¹⁰ Expert advice will identify this judicial tendency, particularly in family disputes where judges are wary of embittering most disputants by letting either leave the court as a total loser.

More statistical research needs to be done over hundreds of family conflicts to measure how often settlement or judicial orders fall in between initial offers or claims. In the writer’s experience, a very common negotiated family property swap is for a wife to agree to move towards her husband’s alleged valuations of their business, in return for the husband’s agreement to move towards the wife’s percentages. Both (eventually) give a little to get a little.

Advice about rules

One of the narrow perceptions of “legal” advice is that it is a summary of the rules or principles which judges apply in the few disputes which actually do not settle. This mechanistic view of slot machine jurisprudence assumes that known facts are dropped through known rules and voila -- the result appears.

This view of the “law”, although misleading, is an important one. Expert legal advisers are able to set out a list of rules or precedents which “normally” apply to a given set of facts. However, substantive rules or precedents do not provide a sufficiently clear shadow for negotiation because:

- (i) they are only the *beginning* of predicting outcomes; and,
- (ii) every rule is subject to reinterpretation and exceptions.

William Twining and David Miers have helpfully categorised 35 standard methods of creating doubt about the meaning of an allegedly clear rule.¹¹ Creating doubt around the meaning of a rule is very easy when the rule is general: “best interest of a child” or “equitable division of property”. It is more difficult when the rule is very specific; for example, “any property purchased after 19 September 1985 is potentially subject to capital gains tax”. Family law, and in-

⁹ For example, *In the Marriage of Best* (1993) 16 Fam LR 937; FLC 92-418 (homemaker wife received 100 per cent of visible asset pool in situation where husband had high earning capacity).

¹⁰ See the classical, dense article of V Aubert, “Competition and dissensus: two types of conflict and conflict resolution”, *Conflict Resolution*, vol VII, p 26.

¹¹ William Twining and David Miers, *How to Do Things with Rules*, London, Weidenfeld and Nicolson, 1991, Ch 6.

creasingly other areas of legal regulation, are replete with vague rules and discretions relatively untouched by shopping lists of ubiquitous discretionary “factors”.¹²

In *Hill v Van Erp*, Gummow J commented upon the need for legal rules to provide a degree of certainty:

The primary task of the courts is to quell controversy, not only as to matters of fact, but by appropriate development of principle. The goal must be that, so far as practicable, the rights of litigants, individual, corporate, or governmental, may be ascertained, and the correlative liabilities accepted, by reference to criteria of some specificity and without recourse to the courts at trial, let alone appellate, level. The expansion of statutory regimes which operate upon private rights by reference to broadly expressed curial powers plainly impedes the attainment of such objectives.¹³

Multiple versions of “rules”

What rules apply to give at least a framework for the negotiation or resolution of a dispute? Apart from a rule found in a statute, there are a number of other overlapping and influential guidelines including folklore, settlement law, street law, local law, text book law, trial judge law, emerging law and appellate judge law.

Folklore is the powerful (and often erroneous) gossip which influences many clients to settle. For example “Women always get the children”; “farms will not be ordered to be sold”; “property is usually divided equally”; “men keep their superannuation”. The transaction costs associated with dragging an entrenched disputant off his/her version of folklore, means that folklore often gives a better net result than a long negotiation over another version of “rights” or “law”.

Settlement law consists of guidelines developed by experienced lawyers to provide a framework for negotiation. Settlement law has a life of its own and may resist judicial precedent particularly if precedents are inconsistent, vague or offend common commercial understanding. For example, despite formal precedents in law reports, common settlement guidelines around Australia suggest: inclusion of current superannuation values in the pool of assets; inclusion of current superannuation values in the pool of assets less notional 15 per cent income tax after the first tax free zone of \$ 90,000; allowing approximate realisation costs to be deducted from the value of property; allowing national capital gains tax to be deducted from the value of property.¹⁴

Street law consists of a range of strategic and manipulative behaviours which may well increase bargaining power and leverage. For example, staying in a house and pressuring the other party to leave first;¹⁵ hanging on to the care of children; alleging violence and quickly obtaining a restraining order from a magistrate; emptying bank accounts; hiding or “losing” information which might assist in valuing a business; in small asset cases, making a low offer and stonewalling. These “street” principles of fear, force and fraud are well known by experienced lawyers and by some repeat clients.¹⁶

¹² For example, in Australia, see the Family Law Act 1975 (Cth) for familiar statutory shopping list of factors attached to property division (ss 79, 75(2)); spousal maintenance (s 75(2)); parenting arrangements (s 68F).

¹³ (1997) 71 ALJR 487 at 526, 527. See also J B Kelly “The Best Interests of the Child -- A concept in Search of Meaning” *Family and Conciliation Courts Rev*, vol 35, 1997, p 377.

¹⁴ Cf the vague “rules” emanating from case law on this topic -- *In the Marriage of Rothwell* (1993) 18 Fam LR 454; (1994) FLC 92-511 (uncertainty over whether a notional capital gains tax debt can be deducted from the value of an asset).

¹⁵ For example, P McDonald, *Settling Up*, Melbourne, Prentice-Hall, 1986 -- systematic survey indicated that the spouse who stays in the home does “better” than a similar person who leaves first.

¹⁶ See “Trend Analysis: the ‘Changed Landscape’ of Divorce Practice as an Ethical Minefield”, *Family Law Re-*

Local law consists of powerful influences which apply and within legal cultures in particular areas. Again, local law is sometimes immune to centralised precedent even though the Family Law Act is a national act.¹⁷ For example, judges and settlement lawyers apply different percentage division of property according to the price of rehousing in a particular area in Australia. In some suburban and country areas of Australia, lawyers, locals and judges are reluctant to award homemakers (usually women) more than 60 per cent of the pool of assets; or to order the sale of farms; to award predominant caring responsibilities of children to males; or to leave a homemaker without ownership of a modest home. A city slicker lawyer enters these local jurisdictions at his/her peril.

Systematic law consists of the attempts of a commentator to systematise a “wilderness of single instances” of reported and unreported judicial decisions. Most lawyers and clients do not have the time and money to spend researching the vast meanderings of judicial writing in order to make educated guesses about possible future patterns of judicial behaviour. Instead they hope that a learned commentator will reduce the maze to a few manageable guidelines. What follows is an illustration by the author to provide a beginning of patterns of judicial behaviour at least as recorded in reported case law in relation to the division of matrimonial property in 1998 in Australia.

(1998) **Beginning “Guidelines” to Property Division under s 79 of the Family Law Act?**

- | | | |
|----|--|-------------------------------------|
| 1. | Childless marriage; not “short”; both employed | 50/50 |
| 2. | Children with homemaker; assets between \$ 100,000-\$ 300,000; partner employed | 65-95% to homemaker + child support |
| | <i>In the Marriage of Best</i> (1993) 16 Fam LR 937; FLC 92-418; <i>In the Marriage of Mitchell</i> (1995) 19 Fam LR 44; FLC 92-601; <i>In the Marriage of Foda</i> (1997) 21 Fam LR 653; FLC 92-753; <i>In the Marriage of Brandt</i> (1997) 22 Fam LR 97; FLC 92-758 | |
| 3. | Children with homemaker; assets between \$ 300,000-\$ 800,000 | 55-70% to homemaker + child support |
| | <i>In the Marriage of Waters and Jurek</i> (1995) 20 Fam LR 190; FLC 92-635; 126 FLR 311; <i>In the Marriage of Marando</i> (1997) 21 Fam LR 841; FLC 92-754 | |
| 4. | Children with homemaker; assets between \$ 1-5 million; partner employed | 50-60% to homemaker |
| 5. | Long marriage with assets over say \$ 5 million (children grown) | 38-45% to non-entrepreneur spouse |
| | <i>In the Marriage of Ferraro</i> (1993) 16 Fam LR 1; FLC 92-335; <i>In the Marriage of McLay</i> (1996) 20 Fam LR 239; FLC 92-667 | |

porter, vol 3 no 3, 1977, monograph no 26, 19 July 1977; J H Wade “The Professional Status of Family Law Practice in Australia”, *University of NSW LJ*, vol 8, 1985, p 183.

¹⁷ Compare *In the Marriage of Lee Steere* (1985) 10 Fam LR 431; FLC 91-626 (the Full Court held that there was no exception to national property division principles for local farmers in Western Australia).

Trial judge law is made up of the guidelines surrounding particular judicial personalities and evidenced by gossip, reported and unreported decisions. Trial judges are generally influenced by the reputation and skills of trial lawyers; a desire to avoid being overruled on appeal; a need to encourage settlements wherever possible;¹⁸ a tendency to give everyone something by middle-of-the-roadism; caution about making policy leaps. More particularly, different personalities of umpires are more or less interested or disturbed by detailed facts, detailed affidavits, marital “fault”, litigants-in-person, women’s, men’s or children’s interests, long hearings, lengthy cross-examination, unprepared lawyers, reports of certain experts, evidence of legal costs and so on. Clearly, expert lawyers and witnesses are employed because they have insider knowledge of the predilections and personalities of registrars and trial judges.¹⁹

Emerging law is made up of trends or directions in which trial judge law is moving. This anticipatory direction will eventually have a flow-on effect to most of the other rules and guidelines mentioned above. Emerging law is found in the hints dropped by judges in their written judgments (and at dinner parties); in the critiques of judge-made law found repetitively in law journals; in the papers delivered to and by judges at learned conferences; in the seminars conducted by visiting overseas judges and teachers (the power of foreign anecdote and research -- “men and women from Mars”); in what is perceived to be politically correct; and in the research of social scientists which identifies repetitive patterns of facts and injustice (for example, female poverty, violence in the home, paternal absence from children, non-payment of child maintenance, undervaluation of superannuation and small businesses, customer satisfaction with service from lawyers, judges, counsellors and mediators). By serendipity or good judgement, a disputant may enter the arena of negotiation or arbitral decision at a moment when emerging law crystallises (either to his or her gain or loss). For example, in recent years judicial action and reaction has gradually or suddenly developed tortious damage awards for battered spouses and children;²⁰ increased percentage property awards for homemakers in wealthy families;²¹ and more importantly for homemakers in middle class and poor families;²² confusingly modified a custodian’s freedom to relocate away from a contact parent;²³ and more frequent separate legal representation for children.²⁴ Once again, it requires a level of expertise and luck to catch the wave of emerging law as it peaks.

Appellate judge law is found in the principles to be extracted from the pages of written reasoning emanating from appeal courts. These guidelines are often influenced by common “manage-

¹⁸ For a remarkable list of common methods used by judges to pressure a settlement see J A Wall et al, “Should Judges Grease the Slow Wheels of Justice? A Survey on the Effectiveness of Judicial Mediation Techniques”, *Am J of Trial Advocacy*, vol 83, 1984; M Galcinter and M Cahill, “Most Cases Settle: Judicial Promotion and Regulation of Settlements”, *Stanford L Rev*, vol 46, 1994, p 1339; D A Ipp, “Judicial Intervention in the Trial Process” (1995) 69 *ALJ*, vol 69, 1995, p 365; J Resnik, “Whose Judgement? Vacating Judgments, Preferences for Settlement, And the Role of Adjudication at the Close of the Twentieth Century” *UCLA Law Rev*, vol 41, 1994, p 1471.

¹⁹ See Sarat and Felstiner n 1 above for illustrations of the emphasis by family lawyers on insider knowledge.

²⁰ *In the Marriage of Marsh* (1994) 17 Fam LR 289; FLC 92-443; *Re Q* (1994) 18 Fam LR 442; (1995) FLC 92-565 (\$ 100,000 damages against father for assault on daughter); Family Law Council, *Financial Remedies for Violence in Families*, 1998; J Behrens and K Bolas, “Violence and the Family Court: Cross-Vested Claims for Compensation”, (1997) 11 *AJFL*, p 164.

²¹ For example, *In the Marriage of Ferraro* (1993) 16 Fam LR 1; FLC 92-335 (37.5 per cent of \$ 11m to homemaker); *In the Marriage of McLay* (1996) 20 Fam LR 239; FLC 92-667 (40 per cent of \$ 16m to homemaker).

²² For example, *In the Marriage of Best* (1993) 16 Fam LR 937; FLC 92-418 (100 per cent to homemaker and mother -- wife of a lawyer); *In the Marriage of Mitchell* (1995) 19 Fam LR 44; FLC 92-601 (over 90 per cent to wife of lawyer). Lawyers are at risk when they litigate their personal conflicts!

²³ For example, *B and B: Family Law Reform Act 1995* (1997) 21 Fam LR 676; FLC 92-755; *In the Marriage of R* (1998) 23 Fam LR 456; FLC 92-820 (mother of four denied request to relocate in Scotland); R Kaspiew, “B and B and the Family Law Reform Act”, (1998) 12 *AJFL*, p 69.

²⁴ For example, *Re K* (1994) 17 Fam LR 537; FLC 92-461.

rial” pressures such as a willingness to discuss policy openly; by a desire to minimise the number of appeals; to divert and anticipate criticism from the many vociferous lobby groups interested in family conflict and family welfare; to create a degree of uniformity of approach across a multi-cultural nation; to balance tradition and change.

Many negotiations are immune from the principles of appellate judge law. The disputants do not have the energy or funds to employ expert lawyers, let alone go to an umpire, and even less to reach an appellate body.

Beyond the case law -- a study of the behaviour of decision makers

Expert family lawyers focus heavily upon insider knowledge, gossip and anecdotal stories about patterns of behaviour of individual judges.²⁵ These principles or patterns are rarely recorded in books or systematically studied in law schools. They are usually more important than the doctrinal rules assembled and packaged from judicial self reflections and found in esoteric reported cases.²⁶

Aubert has noted that the nature of any conflict is dramatically altered as soon as a third party -- such as a boss, umpire or judge -- is introduced.²⁷ This is because the judge’s interest adds to the layers of complexity of the already escalated dispute. A judge or umpire has an interest (often different to the disputants’ interests) in:

- (1) Managing the logistics, expense and attempted objectivity of discovering a single historical version of facts (whereas the disputants may not be interested in such historical research).
- (2) Deciding the conflict consistently with decision-making patterns of the past (one version of fairness). Conversely, the disputants themselves may have no interest at all in a bureaucratic need for consistency.
- (3) Avoiding a floodgate of further claims. Bosses and judges are not usually looking for business and have an administrative need to shorten the queue at their doors.
- (4) Avoiding any perception of being biased, or having pre-judged the dispute. This leads to a strong tendency to “split the difference”, “middle-of-the-roadism”, or “always make sure that everyone walks away with something”. This decision-making tendency is often contrary to the disputants’ desire to “win”, to see “justice” done, and to make the courtroom or boss’s office a terrifying venue for perceived wrongdoers, (that is, people other than me).

Understanding these four third party dynamics is arguably an essential part of “legal” advice. These dynamics are expanded in what follows to indicate common interests of decision makers, together with a colloquial expression which reflects such an interest. More comprehensively, some examples of behavioural principles extracted from anecdotal observation of (judicial) decision makers are as follows:

- (1) Go away -- sort it out yourself.

²⁵ For example, see Sarat and Felstiner, n 1 above.

²⁶ “A case is the written memorandum of a dispute or controversy between persons, telling with varying degrees of completeness and of accuracy, what happened, what of each of the parties did about it, what some supposedly impartial judge or other tribunal did in the way of bringing the dispute or controversy to a supposed end, and the avowed reasons of the judge or tribunal for doing what was done” -- adapted from W Twining, *Law in Context*, Oxford, Clarendon Press, 1997, p 226.

²⁷ See Aubert, n 10 above.

- (2) Go away -- I might get it wrong.
- (3) Go away -- I'm too busy; join the queue.
- (4) Go away -- come back when you have more information.
- (5) "Shunting" -- I'll refer you to someone else.
- (6) First I'll consult with the influential -- come back later.
- (7) Middle-of-the roadism -- I'll split the difference.
- (8) Any decision must not create a floodgate for the future.
- (9) Any decision must be consistent with past decisions.
- (10) I'll make a quick decision -- but don't confuse me with litanies of facts.
- (11) I'll make a quick decision if I trust this supplicant from past experience.
- (12) I'll make a quick decision if the paperwork looks satisfactory.

"Go away -- sort it out yourselves"

This common response of decision makers reflects multiple concerns and interests of the decision makers including:

- The disputants need to learn some decision-making skills; there will be many similar crises in their future relationship which will need such skills. They must not become dependent on an outsider.
- The disputants know many more "facts" than the decision-maker ever will. They are far better qualified to craft their own solution.
- The decision-maker is busy and under resourced.
- Legal categories and remedies are very narrow.
- This dispute needs a broader definition of the problem, and more a creative range of possible remedies than are available in a courtroom.

"Go away -- I might get it wrong"

This conscious or subconscious response of a judge reflects all of the interests and concerns mentioned in the first "go away" response.

Go away -- I'm too busy; join the queue"

A constant game which supplicants play before bosses or judges is to allege a crisis. This appearance or reality of urgency arguably justifies queue jumping. All bureaucrats understand this game and have strong interests:

- not to alienate disputants who have been waiting patiently in the queue;
- to discourage a floodgate of queue jumpers;
- to manage the organisation with a degree of routine -- not constant crisis management;
- to give alleged crisis cases a heavy onus of proof and a short moment in time to identify whether they really are crisis cases;

- then to give “real” crisis cases a short hearing, rough justice or a holding pattern of the status quo until their turn comes up in the longer queue;²⁸
- to encourage many alleged or real crises to “resolve” themselves or go into a holding pattern. The passage of time then hopefully enables the cooling of emotions, avoidance, lumping of the grievance or “door of the court” deals.

“Go away -- come back when you have more information”

This response of judges (or any decision maker) reflects many of the interests already mentioned, and additionally:

- As courts are arguably under resourced, it is a more cost effective division of labour for the disputant to collect and categorise information, rather than bring chaotic data into a courtroom to be “sorted” through by a judge via a labour intensive and expensive process.
- The very process whereby disputants are required to collect and categorise information will lead to some disputes settling, or being abandoned. Factual clarity means that some “rights” are weakened (for example a “right” to maintenance; to more property; to more time with a child).

“Go away -- I will refer you to someone else”²⁹

Judges (and other managers) are aware that:

- Other experts are likely to diagnose the causes of conflict and suitable interventions more accurately than in an arbitral setting. This applies particularly in family law where the complexity of disputes over children leads to mandatory reference to counselling, mandatory appointment of children’s representatives and mandatory completion of a home study by an expert witness.
- Other experts cost less than court proceedings (both to the parties and to shrinking court budgets). Disputants often have a fantasyland image of what a court can do to resolve a conflict between people in an ongoing relationship.
- There are a large number of “routine” disputes which can be handled effectively by mandatory mediation or case appraisal³⁰ thereby leaving decision makers with more time to handle difficult cases in the queue.
- Obviously this bureaucratic habit of avoiding decisions by referring disputants to committees or other people will encourage customers to bypass the bureaucrat.

²⁸ For example, *In the Marriage of Cilento* (1980) FLC 6 Fam LR 35; 90-847 (short term “crisis” children’s orders should hold the status quo unless danger of harm to the children can be proved). P A Doolan, “Cilento and Cilento Revisited -- In the Best Interests of the Child?”, (1996) 10 *AJFL*, p 86; A Rowlands, “Status Quo, not Always Fair Procedure in Interim Residence Matters”, *Law Soc J (NSW)*, April 1998, p 52.

²⁹ This process is sometimes referred to as “shunting”: see Australian Law Reform Commission, *Contempt and Family Law*, DP 24, 1985 pp 11-12.

³⁰ For example, see Supreme Court of Queensland Act 1991 (Qld) ss 100A-100Y. In some jurisdictions, a pattern of referring disputes from court lists to private arbitration has emerged; see S Davidson, “Court-Annexed Arbitration in the Sydney District Court”, *Aust J DR*, 1995, p 195. Whether such cultural referral or diversion practices will emerge in family property disputes is unclear: see Family Law Act 1975 (Cth) ss19D-19 Q (provisions for use of arbitration in family property and spousal maintenance disputes).

First I'll consult with the influential -- come back later

This is a wise practice in management. However, for some judges it leads to a long delay between a hearing and delivering a written outcome. Meanwhile they have been consulting with senior colleagues on how to write the judgment.

Middle-of-the-roadism

Decision makers have an anecdotally common tendency to either split the difference between two claims or to give both disputants something.³¹ For example, in matrimonial property disputes, a husband will be awarded his low valuations and a wife her claimed high percentage; a husband will “win” his claimed percentage, but have to pay all his own legal costs and interim spousal maintenance. In children’s disputes, a wife will be permitted to relocate with the children, but will be ordered to contribute to their travel expenses to visit their father; a father will gain more visitation or contact time, and in return will be ordered to pay higher child support for private school fees.

Commercial litigation is replete with similar anecdotes. These patterns of judicial and arbitral behaviour need systematic research. The interests of decision-makers who adopt middle-of-the-roadism include:

- Reduction of the risk of totally alienating one disputant who loses everything. Everyone has a psychological sense of leaving with some small degree of success.
- It replicates common patterns of negotiation which lawyers and disputants understand -- namely “if you give a little, you get a little”.
- It reduces the likelihood of a successful appeal as a decision in-the-middle, is less likely to be outside the range of probable outcomes.³²
- It reflects a rough guess at one measure of justice, as disputants commonly calculate what is a likely market or precedent-directed outcome and then make ambit claims on either side of that figure. Splitting the ambit claims tends to move both disputants back towards a figure which their lawyers advised them anyhow as a likely “objective” range.

Any decision must not create a floodgate for the future

This floodgate factor is a profound influence in the thinking of decision makers and judges. “If I give you an X, then many other people will clamour at my door for an X.” The X factor could be a car, computer, native title, late night out, damages for smoking, promotion, reduction of child support, legal aid, damages for assault etc. Judges and decision-makers usually do not have either the time or resources to deal with a flood of novel claims.

Negotiators need to be well aware that if their claim includes something novel, or which risks floodgate in subsequent decisions, then their claim, both inside and outside the negotiation room may be very weak. In response to the floodgate interest, wise negotiators often attempt to convince everyone that the outcome arises out of such unique, never-to-be-repeated facts, and/or will be oh-so confidential so that the risks of floods of subsequent claims are reduced. Decision-makers are occasionally convinced by these arguments.

³¹ See Aubert, n 10 above.

³² *House v the King* (1936) 55 CLR 499; *In the Marriage of Norbis* (1984) 9 Fam LR 385; FLC 91-543.

Any decision must be consistent with past decisions

Another strong interest of a decision maker or judge is to make decisions consistently with the past. This enables an organisation to:

- have a measure of control over unruly “Lone Ranger” judges or managers (“you must follow established policy”).
- dissuade large numbers of *past* disputants from emerging again disgruntled that the new policy was not applied to them. “We have enough new customers without resurrecting the old ones.”
- reflect one measure of “justice” -- namely consistency -- in its decision making.
- avoid the resource intensive exercise of reconsidering what is an appropriate policy balance in every new dispute which occurs.

Negotiators need to understand this pressure towards conservatism before readily putting their lives in the hands of an umpire in the hope of receiving an out-of-the-ordinary decision.

I'll make a quick decision -- but don't confuse me with litanies of facts.

For a disputant, the detail of the dispute is often important. However, a decision maker wants to convert the impassioned detail into a bland category: “This is a traditional marriage with an asset pool of between \$ 350,00 and \$ 400,000”; “This is a relocation case where the custodial mother has a job offer and relatives in another city.”

The conflict details are unique for the individual disputants, but are part of a routine daily grind for the decision maker. (“For you, this is your life; for the judge, it's just another standard dispute in his/her long list.”) Thus mandatory short written summaries of conflicts, required either by courts or mediators³³ can be very powerful to transform the conflict from the particular to the general; from chaos to category; from boisterous to banal; from impassioned to impersonal.

I'll make a quick decision if I trust this supplicant from past experience

Judges and decision makers are more likely to believe a story, take a risk, and make a quick decision if the supplicant standing before them is a trusted and respected person. Experienced lawyers, valuers or counsellors who appear regularly before a particular judge (or manager) have a valuable but fragile ongoing relationship which greatly enhances their credibility. Many other litigants and lawyers are non-repeat players before a particular judge. The judge has no particular reason to trust their version of history, or their problem-solving skills.

Therefore, the reputation of a skilled helper is of profound interest to a judge or manager if any quick remedies are to be awarded. Similarly, a skilled helper has a strong personal interest in cultivating his or her capital value and credibility by being scrupulously honest, clear and organised before a decision maker. This personal interest may be in conflict with a client's interest to stretch the facts, push ambit claims, and hide evidence.

³³ See appendix to this article for an example of a mandatory pre-mediation summary of assets, values, concerns, arguments, and history of offers. Order 24 of the Family Law Rules requires each disputant to summarise their financial position on a two-page form and deliver copies to the registrar and to the other disputant before personally attending a conciliation conference.

I'll make a quick decision if the paperwork looks satisfactory

There are a number of obvious managerial interests behind forms being filled in accurately. They include:

- Sloppy forms suggest lack of experience by the disputants or their “helpers”. This may imply other mistakes.
- -- Similarly, inaccurate forms suggest undue haste and possible mistakes elsewhere in the facts, evidence, arguments, options or conclusions presented to the court.
- Inaccurate forms cause extra work for the resource stretched umpire who must elicit extra information, and possibly endure the wrath of the cost-cutting court administrator.
- The safest option for an umpire is to slow down the decision making process (for example by an adjournment) until the forms are filled in accurately. Once again a negotiator needs to be aware of the relative expertise of form fillers and wordsmiths before falling back too quickly upon the option of “I’ll take you to court”, or more subtly, “We seem to be sliding towards ‘let’s leave it to the umpire’”.

Creating doubt: weighing up strengths and weaknesses

It appears to be commonplace for disputants to have either undue confidence or lack of confidence in the statistical chances of “success” by negotiation, contentious tactics or before a decision maker.

Accordingly before commencing negotiation, it is very helpful to have an expert outsider to raise *routine* strengths and weaknesses of:

- **Alleged facts** -- “the children don’t like their mother”; “the business is only worth \$ 100,000”; “I lost \$ 53,000 because of her assault on me”.
- **Evidence** -- “tell me how you are going to convince anyone of those allegations”.
- **Alleged rules** -- “the courts will not let children see a parent like him”; “capital gains tax is deductible from this business”; “homemakers in middle class traditional marriages receive more than 65 per cent of net assets”.
- **Routine arguments** -- “we will argue that she has the capacity to work; that she gave up a career; that the children will flourish living with grandparents; that her standard of living should not be affected.” (For every argument there is a standard set of counter-arguments.)
- **Proposed negotiation strategies** -- for example, “we will bring along my mother; we will drown them in paper; we will insist on our bottom line; we will explain how reasonable our proposal is; we will threaten him with bankruptcy etc.”
- **Proposed solutions** -- “my solution is for the children to stay with me every Christmas; for the children to visit whenever they want; for me to have the cash while he has the business, for him to pay all their university expenses etc.” That is, an expert adviser needs to be a devil’s advocate, and to conduct a trial negotiation or a shadow negotiation, thereby bringing unrealistic expectations (either unduly pessimistic or optimistic) down to earth. As so few disputes reach umpires, “legal” advice should

arguably concentrate on the main game -- that is, educating and creating doubt about normal negotiation behaviour.³⁴

Side effects of conflict

Many disputants, and advisers, appear to be blithely content with receiving information about the range of out of pocket expenses which may be payable to experts called “lawyers” if a dispute continues over time through various stages of the legal process. This is the only side effect of conflict which is expressly identified. This is analogous to identifying a medical doctor’s fees for brain surgery -- with no catalogue of other possible or probable side effects of brain surgery. The medical profession is increasingly facing the administrative and risk management burden of giving fully documented information of possible side effects of surgery to patients, before a patient can be deemed to “consent”. It is likely that this development will extend to the treatment of conflict by other kinds of experts.

The writer sometimes uses the following confidential “Progressive Transaction Cost Analysis” sheet with each of the disputants when preparing for a mediation. It is a rough and ready way to help all parties focus on possible side effects and transaction costs of continued conflict.

³⁴ See later discussion in text above n 36 on information about negotiation process and dynamics.

PROGRESSIVE TRANSACTION COST ANALYSIS

NAME _____

Normal transaction costs of filing a formal court claim and proceeding to the door of the court (or occasionally even to the Um-pire)	Applicable to me <input checked="" type="checkbox"/> or <input type="checkbox"/>	Estimated \$ value Best to worst	Applicable to other dis-putants <input checked="" type="checkbox"/> or <input type="checkbox"/>	Estimated \$ value Best to worst
1.Years of personal stress and un-certainty	r			
2.Years of stress of family members	r			
3.Years of stress on others and my work associates	r			
4.Weeks of absenteeism from work	r			
5.Weeks of lost employee time pre-paring for court	r			
6.Years of lost concentration and focus at work	r			
7. Life/business on hold foryears	r			
8. Inability to “get on with life” foryears	r			
9. Embarrassment and loss of good will when relatives/friends/ business associates are subpoenaed to court	r			
10. Negative publicity in press or business circles	r			
11. My lawyer’s fees	r			
12. My accountant’s fees	r			
13. My expert witness’s fees	r			
14. Possible costs order against me	r			
15. Interest lost on money received later rather than sooner	r			
16. Loss of control over my life to profes-sionals	r			
17. Post litigation recriminations against courts, experts and lawyers	r			
18. Loss of value by court ordered sale/appointment of receiver etc	r			
19. Lost future goodwill with and “pay backs” by opponents	r			

20. Cost and repeat of all previous factors if there is an appeal	r			
ESTIMATED TOTAL of Transaction Costs (best to worst)*		\$	No.	\$
Date _____				
Signed _____ (client)				

Normal dynamics in the process of negotiation

There are many standard dynamics in the process of negotiation which are very helpful for negotiators to know about. Some lawyers routinely incorporate some information and advice about these dynamics when “advising” clients.

This information and advice may include:

- Who should “open” the negotiations?
- With what kind of opening offer? High/soft or low/soft? Reasonable or firm? Or problem solving?
- What language should be used? What venue? Who should or should not be present?
- -- What style of negotiation would be emphasised? Positional or problem solving?
- When should negotiation styles be changed?
- How much time and money should be spent on negotiation before switching to some other intervention?
- What are the standard strategies and hurdles faced in most negotiations?³⁵
- What standard strategies can and should be used against perceived strategic behaviour?
- When the last gap or the last gap in negotiations is reached, what can and should be done?³⁶
- How can “duelling experts” (for example lawyers, doctors, counsellors, valuers) be avoided? How can “duelling experts” be managed once their conflicting views have become entrenched?³⁷

³⁵ For example, lying and exaggeration, bluffs and threats, stonewalling, stalling, non-disclosure, add-ons, obscurantist behaviour about facts or rules -- see generally, W Ury *Getting Past No*, 1991; R J Lewicki et al, *Negotiation*, 2nd ed, Boston, Irwin, 1994, Chs 3, 6.

³⁶ See J H Wade, “The Last Gap in Negotiations -- Why is it Important? How can it be Crossed?”, *Aust Dispute Res J*, vol 6, 1995, p 93.

³⁷ “Duelling experts syndrome” is a common pattern of strategic behaviour which tends to escalate, rather than resolve conflict. Each disputant employs a different expert (lawyer, valuer, engineer, psychologist), tells different stories to each expert, expressly or implied hints at the advice he or she wants to hear from the expert, and then the expert, in order to assist positional bargaining strategies or ensure future employment, tells the client what he or she wants to hear (without sufficient qualifications on this advice). The professional egos of the experts then make it difficult for either expert to change his/her advice. See R E Cooper, “Federal Court expert usage guidelines”, (1997-98) 16 *ABR*, p 203.

- What are the interests of skilled helpers? (for example to be paid; to gain reputation with future clients; to do a worthwhile job; to preserve reputation with officials).³⁸
- How can the interests of skilled helpers and clients be served at the same time?³⁹

Summary on the content (the what) of (legal) advice

The first part of this paper has attempted to summarise the many possible layers of “advice” which ideally would be helpful to prepare for negotiation or mediation. The next section will consider briefly the manner or style of delivery of such advice, and how accessible is such complex advice.

Forms and styles of delivery of advice (the “how”)

Obviously, an advice or opinion does not only consist of “verbal content”. The message is also communicated in a setting, with timing, qualification, glee or reluctance, empathy or disinterest, body language, volume, repetition.

What follows are examples of a few “styles” of delivery of advice, opinion or information.

- (1) **No** “I cannot give you any legal advice as that is not my role; and my opinion will certainly alienate one or both of you. You both have expert advisers who have far more intimate knowledge of the facts than I do.” “I cannot give you legal advice as first that is contrary to the mediation code of ethics; and secondly, such behaviour voids my insurance policy.”
- (2) **Information** “In my experience, people in your position have a number of standard solutions they consider -- would you like to hear these, or see these up on the board?”
- (3) **“Innocent” question** “Have you considered stamp duties; capital gains tax; current delays; the recent case of *Smith v Bloggs*? What are the children feeling?”
- (4) **I’m available if pushed** “Of course I have an opinion on this, but it is not my role to give you that opinion.” “Sometimes if both parties push me towards the end of our meeting for my opinion, I can be persuaded to give it; but normally I’ll be evasive.”
- (5) **Narrowing the field** “You have identified a number of problems with those two options, and I tend to agree with your observations.”
- (6) **Raising gentle doubts** “I am an outsider, but as an outsider, I would have some difficulties with these arguments/outcomes.” “That’s a long bow”; “that’s novel” (raise eyebrows). “Your lawyers have both come up with very creative arguments here, but in my experience the courts aren’t very interested in creative arguments.” “I have not seen those arguments produce an outcome at that level.” “If I were a judge looking at this collection of information and arguments, my immediate response would be to:

³⁸ Note a perverse potential interest of some young lawyers: “Because litigators rarely win or lose cases, they derive job satisfaction by recasting minor discovery disputes as titanic struggles. Younger lawyers, convinced that their future careers may hinge on how tough they seem while conducting discovery, may conclude that it is more important to look and sound ferocious than to act cooperatively, even if all that huffing and puffing does not help (and sometimes harms) their cases. While unpleasant at first, nastiness, like chewing tobacco, becomes a habit . . . without guidance as to appropriate conduct from their elders, either at the firm or on the bench, it is easy for young lawyers not only to stay mired in contumacious, morally immature conduct, but to actually enjoy it.” Per Yablon, “Stupid lawyer tricks: An essay on discovery abuse”, *Columbia Law Rev*, vol 96, 1996, p 1618 at 1640

³⁹ See R Mnookin, “Why Negotiations Fail: An Exploration of Barriers to the Resolution of Conflict”, *Ohio St J of DR*, vol 8, 1993, p 235 at 242 ff.

- (a) be impatient; be confused by the detail;
 - (b) look for a number somewhere between the two solicitors/two experts;
 - (c) discount everything each of you say by 50 per cent;
 - (d) send you away for a third expert valuation;
 - (e) give you each something, so that no one walks away with nothing;
 - (f) be very impressed with the clarity of that expert's report/opinion."
- (7) **Strong advice** "Those arguments (that outcome) do not have a snowball's chance in hell." "An outcome at that level would be entirely contrary to the current judicial predictions/current case law." "No doubt that is a standard ambit claim to kick off the negotiations, but the result will be nowhere near that figure."

Access to advice

The next part of this article will consider:

- What impediments exist to obtaining access to sophisticated and complete advice?
- What sources are available to obtain any kind of advice -- partial, basic or comprehensive?

Impediments to sophisticated advice

The previous section on "what is (legal) advice?" indicates the many complex layers of advice which can potentially be given before a negotiation or mediation. In most situations, only titbits of this advice are given and received. Why? Probably because such complex advice is neither wanted, available or comprehensible.

Complex advice not wanted

- Some clients (people), do not want to know about complexity. They come to a professional adviser (dentist, doctor, lawyer, builder) and say in effect "tell me what to do; I'll do anything you recommend; don't tell me about multiple options". This personality type is searching for the god professional rather than a facilitative problem solver.⁴⁰
- Some clients do not want to invest time or money into obtaining and absorbing complex advice. "Tell me what to do, I need to get on with my business."
- Some clients do not want advice on particular topics -- particularly negotiation strategies and emotional or transaction costs of conflict. They believe (usually falsely) that these topics are not relevant to them.⁴¹

⁴⁰ See D Schon, *The Reflective Practitioner*, New York, Basic Books, 1983.

⁴¹ For example, see J Wade "Tools from a Mediator's Toolbox: Reflections on Matrimonial Property Disputes", *Aust DRJ*, vol 7, 1996, p 93; "Lawyers and Mediators: Learning from and about each other", *Aust DRJ*, vol 2, 1991, p 159; P Jordan; "Ten Years On -- the Effects of Marital Separation on Men", (1997) 11 *AJFL*, p 133; *The Effects of Marital Separation on Men*, Family Court of Australia, Brisbane, 1985.

Complex advice not available

Even if a client wants complex advice in order to be an informed negotiator, in the writer's experience, it is rare for such a level of advice to be available. This is at least because:

- Very few lawyers are trained in law schools to engage in problem definition and problem solving at anything beyond a very basic level.⁴²
- Anecdotally, it appears that only a few specialist lawyers give or know how to give written systematic advice which substantially reflects the layers of complexity mentioned in this article.⁴³
- More systematic studies of family lawyer behaviours suggest that the dominant culture of advice giving involves random storytelling about the accident prone nature of litigation.⁴⁴
- Some lawyers are reluctant to reduce oral advice to detailed writing due to expense, or fear of legal liability to clients, or loss of face to expert peers.
- Even where a group of professionals give problem solving advice, they may not be accessible to particular clients due to expense, and/or geographical isolation, or client unawareness of the different behaviours of expert advisers.
- Some lawyers are reluctant to give detailed advice "early" in a conflict as many pieces of relevant data will only emerge as the conflict escalates and is transformed. For example, how persistent and determined is each disputant (a key piece of data missing at the beginning of most disputes)?; what negotiation strategies will be used?; which of the duelling experts such as therapists or valuers has more clout?; how much honest and cooperative disclosure of information will occur?
- Some clients present "chaotic data" to their advisers. Moreover, for a number of reasons they are resistant to ordering the chaos. Therefore, like medical practitioners, lawyers are reluctant to give any premature prognosis until more information has been collected and organised.

Complex advice not comprehensible

Even if complex advice is both wanted, and is available, it may not be comprehensible to the client. This occurs for a variety of reasons including:

- Some educational theorists suggest that as learners we tend to have different learning styles by nature or nurture.⁴⁵ Such clients learn best by story, lecture, reading, watch-

⁴² See now the gradually blossoming "skills" movement in Canada, New Zealand, UK and Australia and to a lesser extent in the USA. See the McCrate Report, n 4 above. J Webb and C Maughan (eds), *Teaching Lawyers' Skills*, London, Butterworths, 1996; N Gold, K Mackie and W Twining, *Learning Lawyers' Skills*, London, Butterworths, 1989; and generally, "skills" book series, for example R MacDonald and D McGill, *Drafting*, Sydney, Butterworths, 1997; M LeBrun and R Johnstone, *The Quiet Revolution*, North Ryde, Law Book Company, 1994; J H Wade "Legal Skills Training: Some Thoughts on Terminology and Ongoing Challenges", *Legal Ed Rev*, vol 5, 1994, p 173. In the USA, Canada and Australia, access by some law students to clinics has given the opportunity to develop problem solving skills by random or systematic experience.

⁴³ See appendix for a helpful example derived from advices given to the writer in preparation for a mediation.

⁴⁴ For example, Sarat and Felstiner, n 1 above. One study in Australia has recorded over 90 per cent satisfaction rate by clients in relation to services rendered by their family lawyers; see P McDonald (ed), *Settling Up*, Melbourne, Prentice-Hall, 1986, pp 242-5.

⁴⁵ R Hyman and B Rosoff, "Matching Learning and teaching Styles: The Jug and What's in it", pp 178-87 in H Clarizio et al (eds), *Contemporary Issues in Educational Psychology*, New York, Random House, 1987.

ing video tapes, doing, chatting or asking questions.

The vast majority of family lawyers “teach” by the culturally popular method of repetitively talking and writing letters. They do not attempt to match educational method with the tested learning style of each client.⁴⁶

- Learning something complex necessarily takes time and repetition. Some clients do not have the patience, emotional resources or finances to absorb repetitively what is being taught, and then to apply that absorbed wisdom in the negotiation process.
- Following from the previous point, many clients who are seeking advice after a family separation are themselves on the emotional rollercoaster. At such a time, a useful rule of thumb is that clients hear one word in every five of advice given. Coupled with this is the phenomena of “selective deafness”, whereby some distressed clients hear only what they want to hear (such as the good news) and effectively screen out qualifications, exceptions and context (the bad news). That is, complex advice may be accurate as it leaves the mouth of the adviser, but inaccurate by the time it enters the ears of the advisee.⁴⁷ n48
- Adding to the previous comments, the layers of complete advice which are arguably necessary prerequisites to negotiation, can readily move from colloquial to technical language. That is, certain key concepts or jargon (“grief”; “ambit claims”; “add-ons”; “the last gap”; “matrimonial property”; “matrimonial debts”; “judicial overload” etc) will reflect expert knowledge which may slide by the understanding of even inquiring and attentive clients.
- The message sent is not necessarily the message received. This is because lawyers’ messages harshly shatter clients’ preconceptions of “justice”, “fairness” and “equity”. Most clients have a preconception that negotiations, and if necessary an umpire, will deliver a certain vision of fairness (on their understanding of “fairness”). Clients initially resist the repetitious drone of lawyer talk that the system is an error prone lottery which only delivers a statistical chance of “justice” (as defined by the client), and always with considerable side effects.⁴⁸
- Finally, advice giving lawyers do not only have the interest of educating clients. They also are concerned about self protection against the occasional conflict junkie, negatively intimate client. Accordingly, the pearls of wise advice are sometimes lost in a myriad of qualifications to the effect “litigation is brain surgery with an axe, and anything could happen (and I’m not liable if it does)”.

⁴⁶ Compare the pioneering work of family lawyers such as Lowell Halverson in Seattle. Lowell requires each new client to undertake a Myers-Briggs personality test and makes the results of his own Myers-Briggs test available to each client. See L Halverson and J W Kydd, *Divorce in Washington -- A Humane Approach*, Washington, Eagle House, 1990.

⁴⁷ See Elizabeth Kubler-Ross, *On Death and Dying*, New York, MacMillan, 1969; G Talevski, “Problems and Principles for Conflict Resolution in the Area of Post-Separation Conflict”, *Aust DRJ*, vol 4, 1993, p 75; A Milne, “The Nature of Divorce Disputes”, Ch 2 in J Folberg and A Milne (eds), *Divorce Mediation -- Theory and Practice*, New York, Guilford, 1988.

⁴⁸ Sarat and Felstiner, n 1 above. See also R D Benjamin, “Negotiation and Evil: The Stories of Religious and Moral Resistance to the Settlement of Conflicts”, *Mediation Q*, vol 15, 1998, p 245. Benjamin develops the themes that clients cling to the cultural myths of rationality (facts are accessible and decision making is based on facts and logic); justice (decision makers are dispassionate, unstressed, wise elders who carefully weigh up rational propositions); and finality (a judicial decision will end the conflict).

From whom can competent advice be obtained in preparation for negotiation or mediation (the “who”)?

There are a number of sources for information and advice before, during or after negotiation. All of these are currently in use in Australia and will continue to be used in many jurisdictions. Fluctuating ethical codes of various professional monopolies will suggest that some of these sources of advice should be encouraged, prohibited or treated with caution. Nevertheless, culture, habit and economics will probably ensure that all these sources of information and advice will continue to be used. “I can’t afford any lawyer, let alone a specialist lawyer”; “I’ll ask my friend what to do”; “I know what I want, I don’t need any advice”; “I always go to Legal Aid officers for help” “We’ll both go to our local lawyer together and she’ll sort it out”.

At a time when the roles of traditional workgroups such as lawyers, mediators, accountants and counsellors are in flux, codes of ethics should perhaps distinguish between standards with labels such as “interim”, “long term”, “aspirational” and “improbable/impossible”; or grades 1-5.

The following are categories of potential sources and timing of advice and information:

- competent independent helpers;
- expert independent helpers;
- mooted model;
- single expert helper;
- mediator or facilitator;
- competing interests influencing advice giving by mediators;
- group information sessions;
- do-it-yourself (DIY) books, videos, internet;
- folklore and gossip;
- court annexed settlement adviser;
- post-settlement check up:
- by helpers;
- by a court official.

Competent independent helpers

This is a familiar model. Each disputant is required (by ethical codes or legal rules) or recommended to obtain advice from independent “lawyers”. The lawyers are not necessarily experts in the field, but are able to give general advice about ranges, risks and transaction costs.

Of course, apart from the self serving motive of preserving existing work monopolies, there is no persuasive argument why the competent helper needs the label “lawyer”. There are other professional groups whose training, accountability, ethical codes and experience make them at least competent to give advice about negotiation process, pitfalls, common outcomes, judicial behaviour, and transaction costs. These include accountants, therapists and psychologists, particularly if they have regular contact with court process as expert witnesses -- for example, in areas of business valuation, business survival and children’s development.

Even in areas of finance and property, non-lawyer professionals can be trained to know basic property division principles, and to identify danger areas and symptoms which indicate the need for specialist advice. Many disputants remain suspicious of lawyers' ethical codes which require two or more independent lawyers -- one to give separate advice to each disputant. The codes appear to embody economic self interest of double payment to a particular workgroup.

Expert independent helpers

Where expertise is accessible, in the flesh or over the telephone or internet, each party can obtain independent advice from "expert" helpers. In Australia, this expertise is increasingly available, (at a price), due to the proliferation of boutique law firms and specialist accreditation schemes. In the writer's opinion, this model represents an ideal. It is a sophisticated task to give accurate and helpful advice to people in conflict. Expertise developed by training, accountability, collegiality, and repetition is likely to reduce the error rate in professional advice. Annexed to the end of this paper is an example of an expert family lawyer's summary of advice prepared for one party to a mediation.

Mooting model (a mock trial)

The writer when acting as a mediator sometimes employs a "mooting model" when working with two expert and independent lawyers (or accountants). This involves requesting the two lawyers to attend at the beginning of the joint meeting and role play the standard arguments and evidence which would be presented in court. One lawyer speaks for about ten minutes; the other responds for ten minutes; and the opening speaker has two minutes to reply. Then there is a time for questioning the lawyers for clarification. In my experience, this clarification is a very powerful performance embodying "legal advice" in a theatrical form.

The lawyers are excellent advocates; the clients realise that for every argument, there is an equal and opposite argument; the lawyers earn their fees; the clients' image of the opposing lawyer as a monster is shattered by his or her clarity and balance ("doubt" is created -- an essential element of all legal advice and all settlements); and the lawyers often immediately leave the joint meeting with the assurance that they are available on mobile phones and will return anyway in four hours' time to advise and draft the settlement.

Single expert helper

Both disputants could go to a single expert -- a lawyer, accountant or therapist -- who provides information and advice in joint sessions. This overt model is contrary to many codes of ethics for lawyers: one can be a lawyer for a party, but not for a dispute.

Nevertheless, this formal prohibition is circumvented by a number of routine strategies including:

- Only one disputant personally interviews the expert lawyer whose written advice is then given to all parties to provide a framework for negotiation.
- Only one disputant personally interviews the expert lawyer, but the other is allowed to sit at the back of the room, listen to all advice given, and indirectly ask questions.
- Both parties fill in forms setting out the history of the dispute and what each wants. This "common" document is sent to an expert lawyer with a request for a written fixed price opinion which provides the foundation for negotiations. This is a form of case appraisal or early neutral evaluation (ENE). To this distance model can be added

conference telephone calls, or personal appearances of the disputants before the appraiser so that he or she can ask some more questions in order to clarify facts and options. In the writer's opinion, there is both a need and a market for a standard form, fixed price, on-the-papers preliminary early neutral evaluation.⁴⁹

- Various models of case appraisal have great scope for skilful and economic development. An element of mediation can be added to the process in both property and children's disputes. This is sometimes labelled as "Medene".
- Both disputant's obtain information and advice from a single expert who is not a "lawyer" -- such as an accountant, or a therapist. This oral or preferably written advice is used to provide a range or framework of process and substantive outcome (unconstrained by lawyer ethical codes prohibiting one lawyer for two disputants).

Mediator, conciliator or facilitator

As already mentioned, it appears that many mediator contracts, and of mediator codes of ethics prohibit the provision of "legal advice" by a mediator. However, anecdotally, it is clear that many, and perhaps the majority of, "successful" mediators give some subtle forms of "legal" information, opinion and advice in some cases. (However the timing and form of such advice is complex. It is not a simple question of giving or not giving advice.)

There is a well documented tension for any professional helper in both practice and in ethical codes between listening and giving advice; between encouraging the client to make decisions, and taking over the decision making process.

Some ethical codes for mediators are silent on the question of "legal advice". Examples of other varying standards are:

- **Community Justice Program (Qld)**, *Code of Ethics* ("At no time will a mediator offer legal advice to parties in dispute").
- **Law Institute of Victoria**, *Mediation Code of Practice*, August 1991, (4.5.1: "Unless so agreed, the mediator will not communicate about the merits of any dispute with the professional advisers, other than formal matters of procedure, costs or timetable.").
- **Victoria Law Foundation**, *Draft Mediation Standards*, 1993, (cl 4.11: "The mediator should not make any comments as to the possible orders which a court would make.").
- **Law Society of ACT**, *Mediation Guidelines*, (cl 4.2 d: "...the mediator may make suggestions for the parties to consider as alternative ways of resolving problems").
- **Colorado Council of Mediation Organisations**, *Code of Professional Conduct*, 1982; and Christopher Moore, *The Mediation Process*, San Francisco, Jossey-Bass, 1996, Code of Professional Conduct, p 303 ("At no time shall a mediator offer legal advice to parties in dispute.").
- **ABA Standards of Practice for Lawyer Mediators in Family Disputes 1984 Standard VI**
The mediator has a continuing duty to advise each of the mediation participants to obtain legal review prior to reaching any agreement.

⁴⁹ For example, see J H Wade, "New and Recycled Services by Family Lawyers -- Responding to a World of Change", (1997) 11 *AJFL*, p 68 at 78-9; F S Mosten, *The Complete guide to Mediation*, Chicago, ABA, 1997.

Each of the mediation participants should have independent legal counsel before reaching final agreement. At the beginning of the mediation process, the mediator should inform the participants that each should employ independent legal counsel for advice at the beginning of the process and that the independent legal counsel should be utilised throughout the process and before the participants have reached any accord to which they have made an emotional commitment. In order to promote the integrity of the process, the mediator shall not refer either of the participants to any particular lawyers. When an attorney referral is requested, the parties should be referred to a Bar Association List if available. In the absence of such a list, the mediator may only provide a list of qualified law attorneys in the community.

Any memo of understanding or proposed agreement which is prepared in the mediation process, should be separately reviewed by independent counsel for each participant before it is signed. While a mediator cannot insist that each participant have separate counsel, they should be discouraged from signing any agreement which has not been so reviewed. If the participants, or either of them, choose to proceed without independent counsel, the mediator shall warn them of any risk involved in not being represented, including, where appropriate, the possibility that the agreement they submit to a court may be rejected as unreasonable in light of both parties legal rights or may not be finding on them.

- **Divorce and Family Mediation Standards of Practice, Chicago, ABA, 1986**
Standard IV C

“The mediator may define the legal issues, but shall not direct the decision of the mediation participants based upon the mediator’s interpretation of the law as applied to the facts of the situation. The mediator shall endeavour to assure that the participants have a sufficient understanding of appropriate statutory and case law as well as local judicial tradition, before reaching an agreement by recommending to the participants that they obtain independent legal representation during the process.”

Commentary

The need for independent legal advice should be stressed throughout the process. This is not to say that the lawyer mediator is precluded from providing the participants with information about laws or the legal process, or even the potential parameters surrounding how an issue might be decided. Although the giving of specific advice dealing with a specific problem is prohibited, providing general legal information is permitted by this standard. Providing this general information however should be viewed as a supplement to the particularised foundation developed by each participant in private consultation with his or her independent legal counsel. In addition, at the end of the process, attorneys should be available to review what has been worked out by the participants and to ensure that they have a legally binding agreement.

Standard VI

The mediator has a continuing duty to advise each of the mediation participants to obtain legal review prior to reaching any agreement.

Standard Via

Each of the mediation participants should have independent legal counsel before reaching final agreement. At the beginning of the mediation process, the mediator should inform the participants that each should employ independent legal counsel for advice at the beginning of the process and that the independent legal counsel should be utilised throughout the process, and before the participants have reached any ac-

cord to which they have made an emotional commitment. In order to promote the integrity of the process, the mediator shall not refer either of the participants to any particular lawyers. When an attorney referral is requested, the parties should be referred to a bar association list if available. In the absence of such a list, the mediator may only provide a list of qualified family law attorneys in the community.

• **Standards for Private and Public Mediators in the State of Hawaii, Hawaii, the Judiciary, 1986 Clause V11**

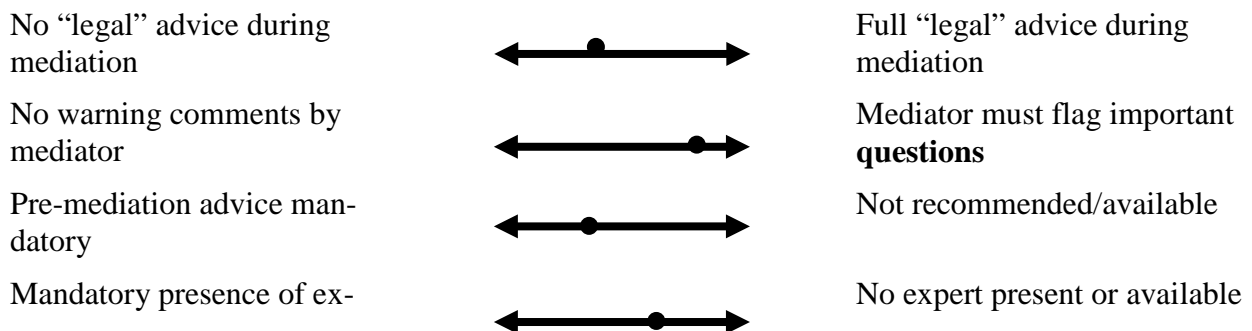
Professional Advice

1. Independent Advice and Information
A mediator shall encourage and assist the participants to obtain independent expert information and advice when such is needed to reach an informed agreement or to protect the rights of a participant. A mediator may give information only in those areas where qualified by training or experience and only with the caution that disputants are encouraged to seek independent advice and counsel on the matters at hand.
 2. Independent Counsel
When a mediator suspects that the outcome of a mediation may potentially affect rights or obligations, the mediator shall advise participants to seek independent advice to resolving the issues in a formal agreement.
- **Law Society of NSW Charter on Mediation Practice, 1997, December NSW Law Soc J, p 68.**
“The mediator will not give legal advice, nor give professional or other advice.”
 - **Family Law Act 1975 (Cth); regulation 64(d)** “[a mediator] must not provide legal advice (except about procedural matters) to any of the parties.”⁵⁰

There are no simple answers to finding balance between these two roles. Neither role can be totally abdicated. Some surveys of mediation clients have also reflected this tension. Where mediators consciously adopt a “client-centred” or non-advice giving facilitative model of mediation, a small minority of clients have complained that they needed or expected more advice and professional direction.⁵¹

Set out below is an abacus which depicts both the variations in practice and in ethical codes in relation to advice giving in mediation. The abacus beads can be moved backwards and forwards to represent a variety of intermediate positions between the two extremes depicted. (The beads are positioned randomly in the diagram below).








Abacus of Practice and Ethics in Relation to Advice-Giving in Mediation



⁵⁰ See J Wade, “Family Mediation -- A Premature Monopoly in Australia?”, (1997) 11 *AJFL*, p 286.

⁵¹ For example, L Moloney et al, *Federally Funded Family Mediation in Sydney -- Outcomes, Costs and Client Satisfaction*, Canberra, AGPS, 1996.

pert at mediation

Extensive pre-mediation information mandatory		No recommended/available
No advice early in mediation		Advice at any time
Advice on “process”		Advice on “process” and “substance”
“Advice” only if mediator is an expert		“Advice” by any mediator
Mandatory post-mediation cooling off		No cooling off
Mandatory post-mediation expert advice		No post mediation expert advice
No drafting by mediator		Detailed drafting by mediator

That is, prohibitory ethical codes are clearly not in step with the variations of successful mediator practices in relation to the subtleties of giving professional advice, opinion and information. Such aspirational naiveté may be a convenient fiction to attempt to placate or preserve traditional professional monopolies in times of dramatic social change. Additionally, such prohibition may be a paper attempt to absolve mediation organisations from professional liability, onerous training and specialist accreditation responsibilities. Alternatively, in the writer’s view, advocating no blatant professional advice is an excellent starting point when training neophyte mediators who may need to unlearn years of directive advice giving habits. That is, the “no professional advice” prohibition has a vital educational as well as ethical or economic foundation.

Robert Baruch Bush has commented on some of the ethical tensions as a mediator decides whether or not to express some version of advice, information or opinion.

[T]he questions here parallel those regarding therapeutic advice. Should the mediator express his professional legal judgment to one or both parties? Should he do so only if he qualifies it as a mere personal opinion, not a professional judgment? Or should he always refrain from expressing his own opinion, no matter how it is framed, even if he believes that one party is universally ignoring or giving up important legally protected rights? Does it matter whether or not the affected party has a lawyer? (If the affected party already has a lawyer, this raises a separate dilemma)

The concerns to be balanced also parallel those mentioned above. Expressing the expert opinion risks undermining self determination and compromising impartiality. Additionally, expressing legal opinions in mediation runs the risk of alienating the practicing Bar, losing their support for mediation and exposing oneself to legal disciplinary action. Refraining from expressing opinions, however, risks complicity in an agreement that compromises someone’s legal rights. (If the mediator tries to avoid this dilemma by saying nothing but discontinuing the mediation, this simply shifts the problem to the non-directiveness dilemma). The same is true for therapeutic advice giving.⁵²

⁵² Robert A Baruch Bush, *The Dilemmas of Mediation Practice: A study of Ethical Dilemmas and Policy Implications*, NIDR, 1992 at p 24.

Accordingly, disputants may choose an expert single advice giving mediator, or co-mediation team, including two types of “substantive” expertise -- for example, lawyer and child development expert;⁵³ lawyer and accountant.

Alternatively, mediators may acquire successive levels of accreditation in basic issues of valuation, property division, taxation, child development and grief counselling. Such basic understanding may enable the mediator to raise a red flag if and when a danger zone occurs, which requires an adjournment for expert advice.⁵⁴

Competing interests influencing advice giving by mediators

Predictably, there is a diverse range of interests to balance on the question on what advice should mediators give? To repeat, it is not possible to be an “adviceless mediator, conciliator or facilitator”. All mediators give some advice.

The interests to balance when proscribing that advice include as follows:

- (1) How can a degree of peace be preserved over traditional professional boundaries? Lawyers, therapists, valuers and engineers tend to suggest jealously that knowledge within their traditional boundaries should be given only by their own paid up, official members. Thus mediators are criticised by counsellors for discussing child development, by lawyers for suggesting ranges of property division, and by valuers for commenting upon methods to value small businesses.
- (2) Even for those who acknowledge that the rate of social change has rendered traditional professional monopolies fragile or shattered, there may be benefits in nominalism. That is, a fiction that categories of advice will be delegated to specialists (counsellors, lawyers, valuers), may provide a convenient placebo to traditionalists, while new professional or expert configurations slowly evolve.
- (3) Organisations which employ mediators naturally want to reduce exposure to legal liability for comments made by mediators: for example, “this is the way you value a small business”; “the child is in no danger”, “a judge will not vary child support in these circumstances”. Accordingly, these organisations want to restrict the range of advice which a mediator should give.
- (4) Following from the previous point, mediators want to emphasis to clients that they do not have the competency, let alone expertise, to give advice on many complex topics. The clients’ misunderstanding is thereby reduced, gatekeepers have mediator roles clarified, and client satisfaction is enhanced.
- (5) Neophyte mediators are notorious for sliding back into a role in which they feel comfortable -- for example, to lawyer or counsellor. For lawyers particularly, this involves reverting quickly to a heavy dose of advice giving about rules, customs, risks and transac-

⁵³ The cross-gender, cross-disciplinary co-mediation model has been very successfully used in Australia in family disputes in private practice, Legal Aid conferencing and court annexed models between 1990 and about 1995. However, the perceived “expense” of two mediators has encouraged gradual reversion to single mediator models being more prevalent. See S Bordow and J Gibson, *Evaluation of the Family court Mediation Service, Family court of Australia, Research Report No 12*, 1994; L Moloney and T Fisher et al, *Federally Funded Family Mediation in Melbourne: Outcomes, Costs and Client Satisfaction*, Canberra, AGPS, 1995; *Managing Differences: Federally Funded Family Mediation in Sydney: Outcomes, Costs and Client Satisfaction*, Canberra, AGPS, 1996; *Legal Aid and Family Services, Research/Evaluation of Family Mediation Practice and the Issue of Violence*, Canberra, AGPS, 1996; J Wade “Four Evaluation Studies of Family Mediation Services in Australia” (1997) 11 *AJFL*, p 343.

⁵⁴ For example, *Performance-Based Assessment: A Methodology for Use in Selecting, Training and evaluating Mediators*, NIDR, 1995, p 25 “Substantive knowledge can be specified at several levels.”

tion costs. In order to learn a counter-intuitive new problem solving process, kindergarten mediators must be kept away from advice giving. Advice giving is an easy way to avoid the pain and insecurity which is associated with learning problem solving mediation.

In the writer's experience as a mediation trainer, many lawyers, judges and some counsellors have consciously or subconsciously resisted modifying the timing and form of their advice giving habits while acting as mediators. Almost universally, they have become unsuccessful in the marketplace as mediators.

It is likely that future studies of the microbehaviour of successful mediators will demonstrate that after a process obsessed limited apprenticeship for say two years, successful mediators can and do give many forms of advice.

- (6) There are a number of theories on how "skilled helpers" as a generic class, assist clients.⁵⁵ It is suggested that a skilled helper's advice will be listened to once that helper has established trust. Trust is established commonly by the passage of time and by outstanding listening skills. That is, effective advice can rarely be given *early* in a relationship.⁵⁶
- (7) Another interest, in favour of giving some form of advice during mediation, is sometimes known as the "wilderness factor". It is the financial reality for many impoverished clients that no competent alternative sources of advice are available. This is sometimes coupled with a client's emotional exhaustion which follows from being "sent away" from one skilled helper in search of another. A mediator may experience a momentary glow of ethical righteousness when referring a client away to obtain independent specialised advice. However, the demoralised client may go away in silent despair.
- (8) Another complicating factor, is that some mediators are not only skilled in the process of managing negotiations, but are also substantively competent or expert in some area; for example, child development or matrimonial property law. Clients may employ such multi-skilled mediators for the express reason of wanting guidance as well as self determination.⁵⁷ Some mediators include express clauses in their contracts indicating that they will give extensive expert advice if they consider it to be helpful.⁵⁸
- (9) There appears to be an assumption among clients, mediators and ethical codes that advice on certain topics is high risk, and on others is low risk. Accordingly, high risk topics need to be addressed by experts; low risk can be addressed by anyone. What is a high risk or low risk topic is a value choice which will differ from person to person. Nevertheless, a common presumption is that money topics have a higher risk of "loss" than procedural or lifestyle topics. For example, alleged high risk topics include valuing businesses or pensions; estimating legal costs; predicting judicial behaviour about property division; estimating tax liability.

Compare alleged low risk topics, which include: how to open negotiations; how children react to conflict; how to word an offer; the emotional side effects of conflict.

Obviously, this ranking could be reversed!

⁵⁵ For example, see G Egan, *The Skilled Helper -- A Problem-Management Approach to Helping*, 5th ed, California, Brooks/Cole, 1994.

⁵⁶ See *ibid* Egan.

⁵⁷ J Wade, "My Mediator Must be a QC", *Aust DRJ*, 1994, p 161.

⁵⁸ For example, F Mosten, n 49 above, "Mediation agreement", at p 47 cl 4.

(10) As the mediation industry develops over the next twenty years, it is likely that levels of formalised accreditation will emerge. That is, mediators will pass progressive tests of both process competence or expertise; and substantive competence or expertise. An expanded advice-giving role becomes more acceptable with escalating formal or informal expertise.

Group information sessions

Another source of legal information and advice comes from meetings of groups of inquirers led by process and substantive experts. These leaders can be individuals or teams drawn from lawyers, valuers, accountants, and therapists. The meetings are organised on a regular basis by individuals⁵⁹ or weekly by court officials.⁶⁰ Group information sessions have the potential benefits of professional presentation, accountability, reduced expense (most are free, or for a nominal cost to cover printing and refreshments); attendees being able to choose their own level of involvement and sharing of common experiences.

Do-it-yourself (DIY) books, videos and internet

There is a vast array of self help literature in many areas of conflict management, particularly conflict within families. Perhaps it is symptomatic of the increasing inaccessibility of legal services to the middle class. However, the extent to which literature is used is unclear.⁶¹ Likewise, there are a number of outstanding videos available which provide models of process and indirect advice. These self help books and videos offer at least basic information on process and outcomes. This may be all the disputants can afford before commencing serious negotiation.⁶²

Folklore and Gossip

Some people choose to use folklore and gossip as the framework for negotiation. For example -- “women always have the care of children for most of the time”; “property is divided equally”; “visitation or access is every second weekend and one half of the school holidays”.

There is a strange wisdom in using folklore as the basis for negotiation -- namely:

- The legal advice costs nothing.
- It has self fulfilling normalcy and community approval.
- Enforcement and variation costs are likely to be minimal.

The transaction costs of arguing exceptions to folklore are so high that the net settlement often equates to worse than folklore. For example, consider property cases under \$ 200,000. A spouse who wants more than 50 per cent will often spend 10 per cent of the pool of assets for attrition strategies and experts' fees. Thus she “wins” 60 per cent and receives a net of 50 per cent.

⁵⁹ For example, lawyers Rick Jones and Michael Small in South-East Queensland, Australia.

⁶⁰ For example, Family Law Rules (Aust) Order 24, r 5(2) states that “[a] party to proceedings who is ordered to attend an information session must attend the information session in person.”

⁶¹ See ALRC, *Review of the adversarial system of litigation -- rethinking family law proceedings*, IP22, 1997, Ch 11 “The Litigant in Person”; ABA, *Self-Representation in Divorce Cases*, Chicago, ABA, 1993; ABA, *Responding to the Needs of the Self Represented Divorce Litigant*, Chicago, ABA, 1994; R Hunter, “Litigants in Person”, *Aust J of Fam L*, vol 12, 1998, p 171; I Ricci, *Mom’s House, Dad’s House*, New York, MacMillan, 1980; see Mosten n 49 above, pp 401-407, for a catalogue of self help books on family law.

⁶² For example, videos such as *In the marriage of Pappas Brown*, University of Melbourne, 1991; *Mediation Training Tapes*, Queensland, Bond University; Queensland Law Society, *Divorce and Family Law; Children: the Experts on Divorce*, Salt Lake City, Family Connections, 1995.

Likewise, a father who fights for “extra” visitation time beyond the folklore norm, may engender sufficient financial expenditure and residual family bitterness that the extra time “won” soon will be lost due to subtle paybacks, child absences and boredom on visitation or contact days.

Court annexed settlement adviser

Where disputants are in a court list, it is common to require them to appear before an officer of the court who encourages negotiation by giving indications of what a judge would probably do in a dispute such as this. These meetings are sometimes described as conciliation conferences, or settlement or evaluative mediations.⁶³

Depending upon the reputation of the court registrar, his or her advice may have a powerful effect upon clients who have not been given, or have not heard similar statements from their own lawyers. By way of analogy, a respected court-appointed expert witness will have a profound effect upon negotiations when his or her written report becomes accessible to the parties. In family disputes in Australia, such court appointed experts are particularly visible in the form of counsellors who prepare home-studies in residency disputes⁶⁴ and separate legal representatives who are appointed in a limited number of disputes to represent a child.⁶⁵ The “advice” of such experienced officers of the court tends to focus the attention of disputing parents on what will be a likely judicial outcome.

Post-settlement check-up⁶⁶

Just as disputants are normally encouraged to obtain independent skilled advice *before* and *during* a negotiation, likewise they are almost always exhorted to do likewise immediately after a “successful” negotiation. Once again, these exhortations may be resisted as some clients are emotionally and financially exhausted.

Nevertheless, post-settlement expert advice is particularly helpful:

- To identify key areas which have been missed -- such as fall-back arrangements if children cannot be collected on time; methods of communication in future crises; default payments and security of money is not paid on time; payment of income tax, capital gains tax, costs of transferring houses, cars or shares.
- To convert broad heads of agreement into detailed language.
- To test whether promises made can be realistically kept -- for example, teenagers will always visit on time; children will always telephone the absent parent; child support will always be paid regardless of employment; both parties will co-operatively work together in a business.
- To fill in the complex forms which in family law disputes are necessary to enable a moral agreement to be registered as a “legally enforceable” agreement.

⁶³ For example, Family Law Act 1975 (Cth) requires “Order 24 conferences” where court registrars preside over mandatory meetings between disputants and their lawyers. Registrars encourage settlement by giving advice on costs, delays, ranges, uncertainty, judicial behaviour. See also common practice of mandatory or voluntary conferences before registrars of state Supreme Courts and Federal Courts: ALRC, *Review of the Adversarial System of Litigation -- Issues Paper 20*, 1997, p 82.

⁶⁴ Family Law Act 1975 (Cth) s 62G.

⁶⁵ Family Law Act, s 68L.

⁶⁶ See Mosten, n 49 above, Ch 17 “Lawyer Review of the Mediated Agreement.”

- To confirm that the terms of the agreement are “within the range” of orders which a judge might make in a similar set of circumstances. (Thereby mitigating the “post-settlement blues.”)
- To give disputants realistic expectations about finality of agreements. That is, certain clauses (for example financial) should be “final” whereas agreements about children will probably have to be negotiated every year.
- To reduce any post-settlement tendency of clients to blame just one professional helper (for example a mediator or counsellor) for the terms of a settlement. (“My counsellor/lawyer/accountant is also to blame!”)

In a number of “commercial” areas of conflict, a negotiated settlement once reduced to writing and signed, is binding as a contract. However, in many areas of conflict, including family, succession, environmental and human rights, the signed settlement is legislatively not “binding” until approved by a judicial officer. The officer has a supervisory role to ensure that the terms of the settlement are “in the range” and that “real” consent was given by all parties to the deal.⁶⁷

An unknown number of poor and middle class disputants just put their morally binding agreements in a drawer. These people do bother with the expense and delays of converting agreements into a much higher degree of “bindingness” by obtaining a judicial stamp of approval.

For those who want an added degree of effect to their agreements, they certainly bargain in the shadow of predicted judicial behaviour and advice at the time of the rubber, or not so rubber stamp, approval. In the writer’s anecdotal experience this supervisory shadow provides a moderate lever against negotiators who begin with wild ambit claims.

However, there are a number of pressures on judges not to investigate settlements too closely. These include judicial work overload; respect if experienced lawyers submit the agreements; necessary latitude for the complex (and unknown) motives for disputants reaching settlement; knowledge that it is demoralising for exhausted disputants after years of negotiating to be told to go away and start again; and understanding that a supervisor only ever hears a limited number of “relevant” facts which the disputants choose to disclose.⁶⁸

However, the natural tendency to delegate the heavy workload of checking settlements to less-than-“judicial”-officers, has some constitutional and policy limitations in Australia. In *Harris v Caladine*⁶⁹ a narrow majority of the High court, reflecting competing interests in this area, held that less-than-judicial officers could only exercise the delegated powers of Federal judges if:

- (1) they carefully consider the facts and law before making a consent order (no rubber stamping); and
- (2) their decisions are subject to a degree of supervision and review as of right by a “real” tenured judge. Sighs of relief were heard around Australia by hard pressed judges, and by cost-cutting court managers.

⁶⁷ For example, under the Family Law Act 1975 (Cth) many settlements are rewritten as “consent orders” about property (s 79); about spousal maintenance (s 74); about child residences and contact (s 65 D); and occasionally as formal and relatively final maintenance agreements about finances (s 87).

⁶⁸ Under some legislation, there is an attempt to compel disclosure by requiring disputants who settle to hand up complex factual affidavits to the supervising official. This expensive prerequisite inevitably needs to be balanced with other interests such as speed, cost reduction and minimising the post-settlement blues. For example, Family Law Act 1975 (Aust) O 14, r 3 (5) (requirement for sworn disclosure dispensed with where both parties are represented by lawyers).

⁶⁹ (1991) 14 Fam LR 593; FLC 92-217.

Conclusion

This article has set out in a lengthy catalogue the kinds of information and advice which are potentially very helpful to disputants who are preparing for (family) negotiation or mediation. This process may have demystified (or mystified) the unhelpful concept of “legal advice”. Certainly, the phrase “legal advice” hides more than it reveals. Any blithe exhortation “to give or not to give (legal) advice” is too shallow and vague to be helpful.

Predictably, once any concept of “expert advice” (legal, medical, therapeutic, building, accounting) is unpackaged into layers of meaning, it raises a range of questions. These are questions dealing both with what is happening, and what ought to happen. All these questions are inherently interesting, and also need ongoing research.

Meanwhile, (to repeat the introduction to this paper), the sources, forms and price of “off-the-top-of-the-head”, or considered (legal) advice should be creatively diversified in Australia and elsewhere in order to meet the needs of large numbers of disputants who enter into negotiation or mediation “in the shadow of the law”. This is a challenge for creative lawyers, counsellors, mediators, accountants and other skilled helpers who seek to prepare clients for negotiation or mediation.

Appendix

Summarising information for negotiations or mediation -- an illustration⁷⁰

Legal advisers are experts at:

- (1) collecting information;
- (2) summarising information.

However, it is very common in negotiations and mediations for clients:

- (1) To have chaotic data.
- (2) Only to “hear” from their expert advisers what they want to hear (selective deafness). That is, only one word in five of oral advice is heard.
- (3) To talk about “rights”, justice and “fairness”. No doubt these are important concepts. However, clients often do not have those concepts translated and summarised into more tangible concepts such as “range” and “risks” and “transaction costs”.

In the writer’s experience, many clients come to negotiation or mediation suffering from chaotic data, selective deafness and fairness talk. Some lawyers excel at summarising data and combating these problems.

Other lawyers have great difficulty summarising data. Perhaps this is because:

- The dispute is too complex to summarise.
- The lawyers are trying to cut costs attached to preparing a summary.
- The lawyers are too busy.
- The lawyer has not seen an illustration of how data can be summarised.

Set out below is an example of a four page summary of information in a family property dispute prepared for a mediator. The writer is grateful to a number of lawyers in Brisbane, Canberra and Sydney who have submitted pithy and jargon free summaries of disputes when preparing for mediations or negotiations. This may be of use as a precedent. It should be emphasised that apart from this form of pre-negotiation summary, there is a number of other forms available to help in the preparation for negotiations.⁷¹

Smith -- proposed property mediation

Overview of facts, offers, concerns and legal advice for mediator from wife’s lawyers

Summary of marriage

- Married 1965;
- separated 1993;
- three adult and independent children aged 29, 27 and 24 years;
- husband aged 63;

⁷⁰ Professor J H Wade, School of Law, Bond University, Gold Coast, Queensland 4229, Australia.

⁷¹ For example, see “Progressive Transaction cost Analysis” diagram in text at n 34 of this article.

- wife aged 61;
- both healthy;
- both in full time careers as engineers;
- separate accommodation;
- asset pool between \$ 1.9-2.3 million.

Chart of assets and liabilities

	Wife's value	Husband's value
(1) 13 Davis Street, Fairfield (joint title)	\$ 590,000	\$ 460,000
(2) Furniture and Antiques in Davis Street (formal valuation)	71,000	71,000
(3) 11 Smith Street, Dairyville (wife)	211,000	250,000
(4) 4 Surf Parade, Oceanville (wife)	140,000	145,000
(5) Vacant block of land at Noosa (husband)	400,000	220,000
(6) Husband's Mazda 629	24,000	16,000
(7) Wife's Ford Escort	14,000	13,500
(8) Furniture in Smith Street and Surf Parade	?	?
(9) Husband's superannuation: current value \$ 637,000, less 15% tax (541,450), multiplied by 28/32	473,768	473,768
(10) (cont') Wife's superannuation: current value \$ 147,000, less 15% tax (124,950), multiplied by 28/32	109,331	109,331
(11) Cash in husband's Westpac account at date of separation	11,231	11,231
(12) Cash in wife's Westpac account at date of separation	4,910	4,910
(13) Husband's share portfolio at date of separation	257,211	236,914
GROSS TOTAL	\$ 2,306,451	\$ 2,061,654

"Special factors"

- (1) Wife received inheritance of \$ 200,000 in 1979 and bought two investment houses (Smith St, Dairyville and Surf Parade, Oceanville)
- (2) Husband received inheritance of \$ 70,000 in 1985 invested in BHP shares.
- (3) Husband's superannuation has doubled in value since separation due to a promotion.

- (4) There is a debate whether a potential capital gains tax liability can be deducted from the value of a block of land at Noosa.

Liabilities

	Wife's value	Husband's value
(1) ANZ credit card debt at date of separation	\$ 4,723	\$ 2,315
(2) Capital gains tax payable on Noosa land	0	estimated 70,000
(3) Current mortgage debt on 4 Surf Street to Westpac Bank	52,321	52,321
TOTAL LIABILITES	\$ 57,044	\$ 124,636
NET VALUE OF ASSESTS	\$ 2,249,407	\$ 1,937,018

Our understanding of history of offers

- **1 October 1995:** husband offered 35 per cent; no response from wife;
- **4 February 1996:** meeting with lawyers; husabnd offered 40 per cent; wife wanted 60 per cent;
- **11 October 1996:** meeting with registrar; husband offered 48 per cent plus some antiques; wife wanted 55% plus different antiques.

Wife's current concerns and interests

- To receive a fair percentage.
- To minimise unnecessary costs.
- To have an appropriate value on the home.
- To receive certain antiques (list attached with low valuations from a jointly paid valuer).
- To establish better communications with adult sons and relatives.

Smith -- This page is confidential for the mediator

(may be released at an appropriate time with consent of client and mediator)

Current legal advice

With an asset pool of between \$ 1.9-2.3 million, in our opinion and the opinion of counsel, Mrs Smith would receive in court between 50 per cent on a "bad" day, and 55 per cent on a "good" day.

The "costs" of getting to court are:

- a) a current delay of between 10-15 months;

b) legal and accounting fees between \$ 30,000-\$ 50,000. That is, her transaction costs are somewhere between 1.3 per cent - 2.2 per cent of the asset pool on her values. Mr Smith's transaction costs will probably be for similar amounts.

Mrs Smith will argue for a higher percentage due to:

- (1) her inheritance of \$ 200,000 in 1979;
- (2) her lower salary than Mr Smith.

Mr Smith will no doubt attempt to balance those arguments by:

- (1) his 1985 inheritance of \$ 70,000;
- (2) his larger increase in superannuation since separation (which we will say was predominantly "earned" by him before separation);
- (3) the alleged capital gains tax debt on the Noosa block of land (which debt we say cannot be deducted under current case law if he proposes to retain that block of land).