

# THE EDGES OF ORTHODOXY IN MEDIATION – YOU DID WHAT!

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John Wade  
Faculty of Law  
Bond University

In 2008, the American Bar Association published *Final Report – Task Force on Improving Mediation Quality*. Interestingly, the task force ‘[a]fter determining that a national credentialing program was *not* feasible for the current [US] mediation market place’ (compare Australia!), retreated to the less controversial and arguably less difficult topic of ‘factors that define high quality mediation practice.’ (ABA p2).

After interviewing lawyers, repeat users of mediation and mediators themselves, the ABA Task Force placed perceived ‘quality’ into four categories:

- a. **Preparation** by mediator, representatives and parties
- b. Case-by-case **customisation** of mediation process.  
(Complaints about ‘cookie-cutter’ approach; and praise for ‘flexibility as a quality desirable in mediators’ (p12)).
- c. **‘Analytical’ techniques used by the mediator**  
(‘Analytical techniques’ appears to be a euphemism to describe substantive opinions and advice given by mediators with sophisticated subtlety of language, tone and timing (p15-16))
- d. **‘Persistence’ by mediator**  
(quality mediators ‘exert pressure’; work hard when impasses occur; and NB ‘follow up’ all cases which do not settle (p17-18)).

These four categories of ‘quality’ or ‘best practice’, suggest scope for some new tools in every mediator’s/facilitator’s/go-between’s toolbox. For example, one Dallas mediator ‘follows up’ any dispute which does not settle by unrequested presence at court on the day of the hearing. This ghostly be-suited smiling diplomat sits quietly at the back of the court and waves to his clients and their lawyers indicating his interest and availability. His work is not yet complete. He is regularly asked to assist with ongoing negotiations as the court hearing progresses.

The writer finds these less-than-orthodox practices fascinating, while affirming that titillating tales of the fascinating fringe provide no legal relief from the hard work of sustaining competency in the orthodox foundations. Is this an argument for ‘anything goes’, as long as it leads to a signed settlement document?’ No. There are obviously shifting marketplace, ethical and legal limitations on the behaviours of mediators (see annexure A). Nevertheless, there is considerable diversity within the overlapping trilogy of boundaries.

The ABA Report confirms that quality mediators have diverse tools which they attempt to ‘customise’ to certain disputes.

I will show you some of mine, if you will show me some of yours.

## **Ambush auction**

In an orthodox mediation process, a separated couple had *conditionally* agreed to valuations, percentage division (60:40 in favour of wife), child support, and child time. However the last item in their respective packages was “which assets on which side of the ledger?” Both wanted the beloved family country house on their own side of the ledger. Jam/tension/speeches.

The mediator asked, “What would a judge do about the mutually desired house?” Silence. The mediator opined “Well in my experience, there is about a 50% chance that a judge will order the house to be auctioned, with both of you are free to bid” (The lawyers nodded). Then the mediator heard himself say “Well if that is what a judge might do, *what if* we have the auction here and now, and save time and auction costs?” “Exactly how would that auction work?” asked one of the quizzical parties.

“Let’s see ...” said the equally perplexed mediator, and then made up some bidding rules on the run. The most important rule was that any bid could only be on the bidding slip prepared by the mediator; and a bid would be invalid if it contained anything extra than a dollar number.

The auction took place by confidential paper bids; the husband got the house at a high number; the wife’s unsuccessful bid was kept confidential by the mediator-auctioneer.

## **Med-arb-drip**

Two medical specialists who were husband and wife, had separated. The wife, who lived in France, persistently emailed the mediator and said that she was willing to come to Australia to “finalise” their property negotiations. The mediator emailed equally persistently that mediation settlement rates were only about 80%. Therefore, there were no guarantees of “finalisation”; and they should hire an arbitrator, if finalisation was their main goal.

She continued her email bombardment and insisted that the mediator help them and that everything had to be finalised in her one day visit from France.

In a moment of weakness, the mediator emailed that “med-arb” would give them a result in one day. Elated, they both replied “That’s settled then – med-arb it is. Please advise on the process.”

Deflated, the mediator made up a process called “med-arb-drip” on the back of an envelope and emailed it to both parties.

The couple met for a day with the med-arb-drip helper, while their available-by-phone lawyers worked on other files in their respective offices.

The process had the following (pioneering?) steps:

1. 9.30am – negotiate the *value* of the pool of assets
2. 11.00am – if no agreement, the mediator decides the value
3. 11.30am – negotiate the *percentage* division
4. 12.30pm – if no agreement, the mediator decides the percentages.
5. 1.00pm – lunch
6. 2.00pm – negotiate which assets on each *side of the ledger*
7. 3.30pm – if no agreement, the mediator decides which assets on each side of the ledger
8. 4.00pm – the lawyers to be called in to draft the terms of either the agreement, or the arbitral order

(copy of the med-arb-drip agreement actually used is attached as annexure B. I do not recommend this hasty document as a precedent.)

In the actual meeting, the nervous mediator was able to use diagrams to show alternative models and maths of outcomes; and to “foreshadow” his decision at each of the three stages. Luckily, the parties conditionally agreed at each stage to his foreshadowed arbitral decisions, and so a draft agreement was presented to the lawyers. One lawyer arrived, summarised and drafted skilfully on the spot while the other lawyer helpfully added insights over the phone. The med-arb-drip was relieved.

## **The mediator’s detailed recommendation – “I know how to fix this”**

Two partners who owned two fish’n chips shops fell into bitter conflict. Suppliers began to threaten to stop supply unless outstanding debts were paid.

An “orthodox” facilitative mediation was arranged with the standard *presenting* issues of:

1. What is the value of the two businesses?
2. What debts exist?
3. How should debts be paid in the short term? In the long term?
4. How should two shops be managed in the short term?
5. How should businesses be divided?
6. On what time frame?

One lawyer was particularly aggressive about his client's "strong case" and claim to one of the fish shops.

The mediator asked questions and quickly discovered that the confident partner had:

- Moved cash out of the business for eight years.
- Made dubious claims against Centrelink
- Failed to pay employee's superannuation

The presenting issues were altered to –

- "How can the contingent debts be fixed?"
- "How can you both reduce the chances of bankruptcy?"

The parties (in the absence of lawyers) agreed to pay a list of pressing creditors so that the businesses could continue to operate. They jammed bitterly on all other issues.

The confident lawyer phoned and emailed the mediator with abuse for allowing his client to sign the interim "pressing creditors" agreement. The mediator recommended that the confident lawyer check his professional liability insurance as his client had been engaged in so much illegal activity. He apologised and professed ignorance.

The mediator then emailed both lawyers and offered to draft a detailed "recommended settlement" for the now further embittered parties. The mediator diagnosed that the parties (and perhaps their lawyers) were not capable of negotiating on any detail due to vitriol. Both lawyers gratefully accepted.

The mediator drafted his own ideas in detail; two weeks later both nervous lawyers broke their clients' arms, and the exact terms were signed.

## **'Your advice is wrong'**

Two pharmacists lived together for four years. The female applicant requested a property payout. The male offered zero.

Before the mediation, each lawyer was required by the mediator to specify confidentially in writing what was the range advice (good day/bad day) given to his/her client. The female's barrister belatedly wrote out that his range was \$280,000 - \$340,000. The mediator's guesstimate was that her range was zero to \$30,000. Either the barrister was lying or deluded? The mediator had recently completed a case where a lawyer was found guilty of professional negligence for giving optimistic advice, and then halving that advice at the door of the court.

So the mediator phoned the female's lawyer and asked –

- "Has your client been advised in writing of a different range?"
- "Can you explain why the ranges are so wildly different?"
- "Can you help me with any legal authorities which support the high range? I have not been able to find any".

The lawyer was not pleased to be asked these questions. The mediator explained his recent experience of a lawyer paying personally for his over-optimistic advice.

The mediation went ahead with a barrister for the female demonstrating real or mock anger about the mediator's opinion-giving; expressing (mock?) frustration with fact-collection and joint meetings.

It settled (\$50,000 paid to the female). The male had a list of personal and business goals/risks (sick wife; need for time and certainty; start another business etc) which made a premium payment commercially 'wise'.

## Exercise

Now it is your turn to share and show 'n tell your dark secrets.

- a) What less than orthodox tools have you used, or observed, in the mediator's toolbox?

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- b) How did you feel about the use thereof?

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Write out, and interview your neighbour.

## ANNEXURE A

### MODERATE “RISKS” FOR MEDIATORS

#### From (a) Market; (b) Organisations; (c) Law

1. False advertising by mediator (a settlement rate; number of cases).
2. Non-disclosure of perceived bias (eg repeat hirings; insider information) – NB Compare Arbitration ethics.
3. Sloppy basic skills of listening, reframing, summarising, repertoire.
4. Giving “advice” generally (compared alleged “information”?) eg “This is a good settlement...”
5. Giving specific “advice” (compare “opinion”?) eg “a judge would not accept that argument”. Beware missing tax advice!
6. Deeply disturbed people – passed to mediators; blame; negative intimacy; need “special” skills/process.
7. Hints or threats re: suicide; child abuse; crime
8. Requests to mediator to: (a) clarify terms of settlement; (b) “fill-in” oral terms; (c) recall misrepresentations; (d) split “dependent” clauses etc.
9. A mediator is helping with “Life Decisions” and therefore could trespass on monopolies of Business/Psychology/Law (UPB; UPP; UPL), etc.
10. Post-settlement Blues in 50% of cases – blame mediator.
11. Essence of many negotiations is deception, so message-carrying mediator will carry TTLB (theatrics, threats, lies and bluffs); the messenger will be “shot” and will be excluded from “private” discussions.
12. Mediator will be quizzed subtly for leaks.
13. Persistence and pressure late at night (inevitable?) – sometimes duress or undue influence?
14. Danger of Mediator lying/creating dubious risks to pressure settlement.
15. Evaluative mediators particularly blamed for outcome (see 4; 5 & 10).
16. Increasing breed of dual-role mediators (med-recommend; med-arb) face publicity (eg Freedom of Information legislation) and market gossip for “bad decisions” in substance and procedure.
17. Drafting (a high skill!) “When you have a deal, you only have two thirds of a deal”. Therefore drafting mediator will be “filling-in” or “leaving out” one third.

(see further M. Moffitt, “Ten Ways to Get Sued” (2003) 8 *Harvard Neg L Rev* 81)

**ANNEXURE B**

**MED-ARB AGREEMENT**

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**Dated .....**

1. Both parties agree that if they have not reached settlement by 3pm on the day of the mediation, or such other time agreed in writing by the parties, the mediator John Wade is appointed arbitrator under the *Family Law Act* to:
2. Immediately decide on size and value of the pool of assets and the percentage proportions each will receive within the normal range of orders available under the Family Law Act.
3. Based on that initial arbitral decision, the parties will attempt to negotiate the details of the settlement in the following hour, or such time agreed in writing by the parties.
4. If an agreement on details is not reached within that time, the arbitrator will immediately draw up detailed consent orders with the drafting assistance of the wife’s solicitor and both parties agree to sign those consent orders immediately and cooperative in presenting all necessary documents and acts to the Court for finalising the consent orders.
5. If either or both parties do not cooperate in the immediate signing and finalisation of the consent orders within 30 days of the mediation, the parties direct the mediator to take such steps as necessary to register the consent orders as an arbitral award under the *Family Law Act*.
6. The parties agree to equally pay the mediator at \$330 per hour within 7 days of billing for all time expended in making and registering the arbitral award and all incidental activities.
7. The parties request that the arbitrator’s reasons for the award be no longer than 2 pages and that the arbitrator use his discretion on all procedural matters in order to complete the process within one day.
8. Both parties agree that all elements of the arbitrator’s decision and award are not confidential and that they can be used in any court for the purposes of awarding indemnity costs against a non-cooperative party and as evidence of what the parties agreed was appropriate procedure and outcome.

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