AN EVALUATION OF THE CURRENT RULES OF PROFESSIONAL CONDUCT GOVERNING LEGAL REPRESENTATIVES IN MEDIATION IN AUSTRALIA AND THE UNITED STATES AND OF A RANGE OF PROPOSED ALTERNATIVE 'NON-ADVERSARIAL' ETHICS SYSTEMS FOR LAWYERS

Submitted in total fulfilment of the requirements of the degree of

Doctor of Philosophy by Publication

by

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August 2011

EXPLANATORY OVERVIEW AND EXEGESIS

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DECLARATION BY CANDIDATE

This exegesis is submitted to Bond University in fulfilment of the requirements of the degree of Doctor of Philosophy by Publication. The exegesis represents my own original work towards this research degree and contains no material which has been previously submitted for a degree or diploma at this University or any other institution, except where due acknowledge is made.

The exegesis is approximately 60,000 words in length, exclusive of footnotes and bibliography. I have sought and obtained permission from the Higher Degree Research Committee at Bond University to submit an exegesis of this length. In all other respects, the exegesis complies with the stipulations set out for the degree of Doctor of Philosophy by Publication by Bond University, Queensland, Australia.

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Bobette Wolski Date

ACKNOWLEDGMENTS

I wish to thank my supervisor, Emeritus Professor John Farrar (Bond University) for his guidance and support in bringing this project to fruition. I also thank Professor Michael Weir (Associate Dean of Research, Bond University) for his guidance and advice.

My thanks go to Ms Emma Petherick (Research Coordinator, Bond University) who has given so generously of her time to guide me through this process.

Finally, I wish to thank Professors Laurence Boulle and John Wade (Bond University, Dispute Resolution Centre) who have had a profound positive influence on my professional life for almost two decades.

PUBLICATIONS SUBMITTED WITH THE EXEGESIS

The following publications of the candidate are submitted with this exegesis:

1. 'Reform of the Civil Justice System 25 Years Past – (In)Adequate Responses from Law Schools and Professional Associations? (and How Best to Change the Behaviour of Lawyers' (2011) 40 *Common Law World Review* 40-93.

2. *Skills, Ethics and Values for Legal Practice* (Thomson Reuters, 2nd ed, 2009).

3. 'Beyond Mooting: Designing an Advocacy, Ethics and Values Matrix for the Law School Curriculum' (2009) 19 *Legal Education Review* 41-82.

4. 'Reform of the Civil Justice System Two Decades Past – Implications for the Legal Profession and for Law Teachers' (2009) 21 *Bond Law Review* 192-232.

5. 'Why, How and What to Practice: Integrating Skills Teaching and Learning in the Undergraduate Law Curriculum' (2002) 52 *Journal of Legal Education* 287.

6. 'Mediator Settlement Strategies: Winning Friends and Influencing People' (2001) 12 *Australasian Dispute Resolution Journal* 248-262.

7. 'The Model Dispute Resolution Procedure for Australian Workplace Agreements: A Dispute Systems Design Perspective' (1998) 10 *Bond Law Review* 7-38.

8. *The Laws of Australia: Title 13, Dispute Resolution* (1997) Law Book Company Limited, Sydney: Subtitle 13.6 Dispute Systems Design, 3-56.

9. 'Culture, Society and Mediation in China and the West' (1996-97) 3 *Commercial Dispute Resolution Journal* 97-123.

10. 'Voluntariness and Consensuality: Defining Characteristics of Mediation?' (1997) 15 *Australian Bar Review* 213-228.

11. ‘The Role and Limitations of Fisher and Ury’s Model of Interest-based Negotiation in Mediation’ (1994) 5 *Australasian Dispute Resolution Journal* 210-221.

RESEARCH ABSTRACT

Currently, lawyers who represent parties in mediation are governed by the legal profession's general rules of professional conduct which make no specific provision for mediation. A number of influential authors maintain that these rules are inappropriate for, and incompatible with, mediation. They claim that mediation is based on objectives and values that are fundamentally different from those of litigation. They also claim that legal representatives undertake different roles in mediation than those that they undertake in litigation and that those new roles require new professional conduct rules. These authors have called for the promulgation of rules requiring higher standards of disclosure, good faith participation, fair dealing and use of non-adversarial interest-based negotiation. These proposals are considered in this exegesis.

This exegesis challenges the proposition that the legal profession needs new rules to govern the conduct of legal representatives in mediation. It examines and evaluates current rules of professional conduct governing lawyers in Australia and the United States as they apply to a range of ethical issues that confront legal representatives in mediation. Since the rules cannot be considered in isolation from other components of the law of lawyering, the research also examines obligations imposed on lawyers by general law, agreements to mediate (in the case of private mediations) and legislative directives to mediate (in the case of mandatory mediations).

Additionally, the research examines the features, objectives and values of litigation, mediation and unassisted negotiation and the roles undertaken by lawyers in these processes with a view to ascertaining if there are any factors which indicate the need for new rules of conduct or alternatively, the desirability of maintaining existing rule systems.

The research also critiques some of the proposals for new rules. It is argued that the rationale given for these proposals is flawed and that it is neither practical nor desirable to insist on full candour, good faith participation, non-adversarial behaviour and interest-based negotiation in mediation. It is argued instead that the current rules of professional conduct for lawyers are consistent with, and appropriate for, mediation. Together with certain external constraints which may operate on lawyers, the current rules and other components of the law of lawyering provide an adequate check on unethical behaviour in mediation. The current

general rules are also more appropriate than specific rules for application in highly contextual processes such as mediation. They allow lawyers to exercise discretion in relation to matters such as candour, good faith and cooperation, while encouraging adherence to core professional values.

The exegesis concludes with an examination of some of the ethical complexities and problems that have arisen in the practice of collaborative law, a dispute resolution process in which participants explicitly agree to abide by obligations similar to those which proponents for new rules urge upon legal representatives in mediation. Collaborative law raises new ethical dilemmas without necessarily resolving the old ones and may offer some lessons in relation to ethical issues in mediation.

The exegesis integrates, and extends, the research undertaken in a number of my published works. It also makes original contributions to the fields of Alternative Dispute Resolution Ethics and legal professional regulation. There is presently a gap in our understanding of the factors which influence the ethics of legal representatives in mediation. This research will help close the gap. It may also be of assistance to law reform and regulatory agencies in Australia who are presently considering the issue of standards of conduct for participants in mediation and other dispute resolution processes.