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Bond Dispute Resolution News Volume 12

BOND UNIVERSITY
Dispute Resolution Centre

BOND DISPUTE RESOLUTION NEWS

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Recent Activities of Bond University Dispute Resolution Staff

Laurence Boulle chaired a meeting of the National Alternative Dispute Resolution Advisory Council in Perth on the 13 and 14 June. On 12 June NADRAC held a public forum which was attended by approximately 70 ADR practitioners, court officials and other interested parties. The forum was addressed by the Commonwealth Attorney-General Darryl Williams QC the Chief Justice David Malcolm Western Australian Supreme Court and Professor Laurence Boulle.

At the public forum the Attorney-General launched a recent NADRAC discussion paper on *Terminology in Alternative Dispute Resolution*. This paper discusses a range of issues relating to terms used for old, new and anticipated dispute resolution processes. After public response to the discussion paper a report will be drafted towards the end of 2002.

As part of the public forum a community consultation was conducted by NADRAC members on a range of ADR topics.

For further information on NADRAC activities consult www.nadrac.gov.au

LAURENCE BOULLE

7-9 March	Basic Mediation Course at Bond University, Gold Coast
30-31 May	Mediation Course, Adelaide University
12-14 June	NADRAC Forum, Perth

PAT CAVANAGH

2002	Employed by World Bank to mediate debt disputes in Jakarta, Indonesia

JOHN WADE

21 February	Ten Rules for Successful Hard Bargainers – Advanced Negotiation Seminar NSW Law Society, Sydney
28 February	Risk Analysis in Litigation and Negotiation: "I Wish You Had Told Me Earlier Than This – Advanced Negotiation Seminar NSW Law Society, Sydney
7-9 March	Basic Mediation Course at Bond University, Gold Coast
13 March	How to Negotiate Successfully with Hard Bargainers – Advanced Negotiation Seminar NSW Law Society, Sydney

27 March	Diplomats and Dobermans – 15 Methods to Re-open Hopelessly Deadlocked Negotiations – Advanced Negotiation Seminar NSW Law Society, Sydney
May	ATSIC mediation, Mt Isa
16 May	Leo Cussen Institute Melbourne Seminar Series III – Mediation 7 Fundamental Questions
16, 17, 22 May	Commercial Negotiation Courses for Blake Dawson Waldron
28 May–1 June	Mediation Course, Pepperdine University, Los Angeles, USA (met with Woody Mosten; Randy Lowry, David Cruickshank)
4–8June	Mediation Course, SMU Dallas, USA (director, Tony Picchioni)
7 June	Graduation Address, Dispute Resolution Program, Dallas
9–11 June	Met with Eric Galton and Kim Kovach, University of Texas, Austin. Led class at University of Texas Law School.

BOBETTE WOLSKI

7-9 March	Basic Mediation Course at Bond University, Gold Coast
16-18 May	Trial Advocacy Course for the Office of the Director of Public Prosecutions
13-15 June	Trial Advocacy Course for the Office of the Director of Public Prosecutions

Recent Publications of Bond Dispute Resolution Centre Staff

Bond Law Review Vol 13:2 (forthcoming)
Special Issue: Dispute Resolution
will feature the following –

Bobette Wolski, "Recent Developments in International Commercial Dispute Resolution: Expanding the Options".

John Farrar and Laurence Boulle, "Minority Shareholder Remedies – Shifting Dispute Resolution Paradigms".

Bee Chen Goh, "Remedies in Chinese Dispute Resolution".

John Wade, "Systematic Risk Analysis for Negotiators and Litigators: How to Help Clients Make Better Decisions".

Wolski, B "Why, How and What to Practice; Integrating Skills Teaching and Learning in the Undergraduate Curriculum", forthcoming Journal of Legal Education.

Boulle (Chairman of NADRAC) *Terminology in Alternative Dispute Resolution – Discussion Paper* 2002

Forthcoming Courses in Australia

Bond Courses in 2002				
25-27 July	**Bond Uni**	**Short course – 3 days**	**Basic Mediation Course***	**Boulle, Wade, Wolski**
22-25 August	**Calypso Plaza, Coolangatta**	**Short course – 4 days**	**Advanced Mediation Course***	**Boulle, Wade**
25-27 October	**Melbourne**	**Short course – 3 days**	**Basic Mediation Course, in conjunction with Leo Cussen Institute, Phone (03) 9602 3111 email: dirooney@leocussen.vic.edu.au**	**Boulle, Cavanagh, Wade**
5-7 December	**Gold Coast**	**Short course – 3 days**	**Basic Mediation Course***	**Boulle, Cavanagh, Wade**
*** This course also has a Foundation Family Mediation stream, run in conjunction with AIFLAM (Australian Institute of Family Law Arbitrators and Mediators)**				

Forthcoming Course Presentations Overseas in 2002				
28–29 June	New Zealand	2 day course for LEADR	Advanced Mediation	Boulle Wade
1–2 November, 10-12 December	Hong Kong	Training Mediation Trainers – 5 days	Hong Kong International Arbitration Centre (HKIAC)	Wade

LEO CUSSEN INSTITUTE IN CONJUNCTION WITH BOND UNIVERSITY MELBOURNE 2002

An opportunity not to be missed….

Forrest "Woody" Mosten practices law and mediation in Los Angeles where he has spent the last 20 years building the practice of mediation. He has been an international pioneer in establishing neighbourhood law offices, a client library, client interviewing competitions, a mediation network which operates in 38 states, and mediation training. He has written 3 books on mediation – *Complete Guide to Mediation* (1997), *Unbundling Legal Services* (2000), *Mediation Career Guide* (2001), as well as many articles.

Woody is one of the best known mediators in the USA and is a visiting professor at UCLA. He is a popular speaker in Australia and this is his fourth visit.

8 August	Unbundling Legal Services and Role of Lawyers in the Mediation Process – Forrest Mosten
9 August	Cutting Edge Strategies to Resolve Conflict and Form Relationships in Family Law Matters and Making Mediation Your Day Job: Building a Family Law Mediation Practice – Forrest Mosten

A New Seminar Series on Dispute Resolution Techniques

5.30pm–7.00pm

SERIES III

September	Judicial Involvement in ADR and How Lawyers are Responding – Laurence Boulle
10 October	Common Hurdles to Successful Negotiation and Mediation; and How to Respond to These – John Wade
Cost	$110 per session includes materials
Enquiries:	**Lyn Slade/Dianne Rooney**
Phone	**03) 9602 3111**
Email	**dirooney@leocussen.vic.edu.au**
Venue	**360 Little Bourke Street, Melbourne**

Thoughts and Themes

South Africa

The independence constitution of South Africa included innovative constitutional provision namely section 41(3) which provided as follows which requires the National Parliament to enact legislation to:

> a) establish and provide for structures and institutions to promote and facilitate intergovernmental relations; and
>
> b) provide for appropriate mechanisms and procedures to facilitate settlement of intergovernmental disputes.

While some aspects of intergovernmental regulations have been legislated on there has been no comprehensive legislation that meets the constitutional mandate.

Recently the Constitutional Court in the case of *National Gambling Board v Premier of Kwa Zulu-Natal* 2002 (2) BCLR 156 (cc) criticised the national parliament for its failure to enact this legislation. Partly as a result of this admonition the South African government is currently is preparing a policy paper on intergovernmental dispute resolution which will lead to a policy framework for use by government agencies at the national, state and local levels of government.

The services of Laurence Boulle have been retained by the government to advise in the development of the policy framework, the design of the dispute resolution system, training for those to be involved in the new arrangements. The newsletter will carry future information on developments.

MEDIATION CASE STUDIES

This free newsletter now has over 3000 "subscribers". If you have any ideas how such a wealth of experience could contribute to the field of conflict management, your emailed suggestions would be welcome.

In this field, there is a shortage of helpful "case studies". Set out below is an example of a case study structured under seven headings. These are assembled for Bond Advanced Mediation Courses from real but anonymised mediations conducted in various parts of the world.

We will continue to publish such case studies, duly anonymised. If you wish to contribute please send us a case study or two. You must:

- not exceed one page (390 words)
- follow the structured headings
- anonymise parties and venue.

Thank you

John Wade

MEDIATION CASE STUDY 1 – TEMPLE TROUBLES

Intake:

Bulky file referred from the Supreme Court. Telephone calls to lawyers; then to clients; then separate meetings with each group (no lawyers present).

'Facts' of Dispute:

One pioneering group built a large church/temple (the 'liberals'). More recent members of the temple ('traditionalists') disagreed over absence of headgear and use of chairs in the temple. Disagreements escalated to harsh words, punches, calling the police to the temple. Assault and defamation writs were issued. Subsidiary disputes arose over who was a 'member' eligible to vote; the validity of an hurried election; the use of temple funds by 'liberals' to pay lawyers; the history of which faction members had given more money to the temple; and plans to spend money on a church car park and extensions.

The two factions applied to the Supreme Court for declaratory orders on the validity of elections, appointment of a temporary administrator, and if necessary, sale of the temple.

Causes and stage of conflict:

Initially values (tradition versus modernity); then relationship and name-calling; then loss of trust, suspicion and stereotyping; deep intra-psychic hurts from the past; family tribes in background; data conflicts about 'justice' and judicial behaviour; and the history of conversations and money; matters of principle; few listening skills.

Interventions:

With help of lawyers, the mediator identified the four most influential 'representatives' from each faction; met four times for four hours; drafted problem solving questions; reported in writing after each session; vigorous reframing; strong interruptions to keep on track; constant mini-lectures on past-future and non-denigration.

Outcome:

The eight agreed: to six months 'space' with each faction supervising alternative Sunday services; to money being collected and kept in separate accounts; on an interim management committee on which none of the most conflicted persons would sit; to return and review in six months when heat had died. However, this detailed written agreement was allegedly then vehemently opposed by both sets of constituents (the 'absent tribes').

The mediator then set up a meeting with the whole temple to explain process; and to praise the eight dispirited representatives. The meeting was cancelled after rumours of violence were telephoned to the mediator by the concerned eight. (Case still languishing in court lists).

What might be done differently:

1. Mediator meet initially with whole temple community; explain role; lower expectation; praise representatives; predetermine voting methods in each faction.
2. Perhaps bring a respected traditional priest to sit in as 'observer' to some meetings (to create extra version of reality).
3. More vigorously disbelieve repeated assertions that the 'eight' represented their tribes.

Mediator Settlement Strategies: Winning Friends and Influencing People*

Associate Professor Bobette Wolski°

This article questions the concepts of mediator neutrality and impartiality. Using a process model of mediation as a basis for analysis, the article catalogues a range of strategies used by mediators to pressure parties to settle and to influence the course and outcome of mediations. It also identifies some of the contextual factors that influence mediator choice of strategies. Of necessity, the article discusses possible mediator interests and various sources of mediator power and influence.

Introduction

Although some widely endorsed definitions of mediation would have it otherwise, mediators are neither completely neutral nor impartial. The mandate and primary goal for all mediators is to settle cases. To achieve their goal, mediators use a range of strategies to pressure parties to settle and to influence the course and outcome of mediations. To some extent, mediators encourage outcomes consistent with their own ideas and interests.

This article examines the concepts of mediator neutrality and impartiality, concepts upon which much of the rhetoric of mediation is based.[1] The article begins by defining relevant terms, including those of "neutrality" and "impartiality". It then identifies a number of mediator interests and sources of mediator power and influence. Using a process model of mediation as a basis for analysis, the article proceeds to catalogue a range of strategies used by mediators to settle disputes. It also identifies some of the contextual factors that influence mediator choice of strategies. Consideration is given to the restrictions placed upon mediators by professional standards and codes of conduct. The article concludes by suggesting some directions for future research with respect to mediator settlement strategies.

Neutrality, Impartiality and Definitions of Mediation

The rhetoric concerning mediator neutrality and impartiality is not surprising when some of the most widely endorsed definitions of mediation, such as those of Folberg and Taylor and Christopher Moore, endow mediators with these attributes.[2] Recent definitions seek to accommodate the realities and diversity of mediation practice.[3] For the purpose of this article,

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* This article is based on a paper given by the author at the Australasian Law Teachers' Association Conference held in Vanuatu on 2-4 July, 2001. It complements an earlier article by the author titled "Voluntariness and Consensuality: Defining Characteristics of Mediation?" (1997) 15 *Australian Bar Review* 213.

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1 Much of the rhetoric is also based on the voluntariness and consensuality of mediation. These concepts are discussed in detail in B Wolski, "Voluntariness and Consensuality: Defining Characteristics of Mediation?" (1997) 15 *Australian Bar Review* 213.

2 J Folberg and A Taylor, *Mediation: A Comprehensive Guide to Resolving Conflicts Without Giving In* (1984) Jossey-Bass, San Francisco at 7, and C W Moore, *The Mediation Process: Practical Strategies for Resolving Conflict* (1991) Jossey-Bass, San Francisco at 14.

3 See for example the definitions provided by L Boulle, *Mediation: Principles, Process, Practice* (1996) Butterworths, Sydney at 1; and J M Haynes and S Charlesworth, *The Fundamentals of Family Mediation* (1996) Federation Press, Sydney at 1.

mediation is defined as a process of facilitated negotiation in which a third party, the mediator, undertakes a range of activities to assist parties in dispute to negotiate an agreement, short of imposing a binding decision upon them.[4]

Many of the definitional problems associated with mediation turn on the meaning given to the terms "neutrality" and "impartiality". The terms are imprecise and multi-dimensional. As used here, "neutrality" refers to disinterest in the outcome of the dispute and absence of influence over the outcome. "Impartiality" refers to absence of bias or preference in favour of one or other of the parties. It is also necessary to define the term "independence" for that is the third attribute with which mediators are commonly endowed.[5] The term "independence" is used here to refer to the absence of a prior relationship between the mediator and the disputants. So defined, mediators are usually independent (or at least, they are acceptable to the parties).[6] They also strive to maintain the appearance of impartiality. Not all authors will agree with this view. Boulle regards impartiality as a core requirement in mediation.[7] (Neutrality, he notes, is a less absolute requirement.)[8] By impartiality, Boulle means "an even-handedness, objectivity and fairness towards the parties during the mediation process".[9] It seems that what is really being emphasised is the need to be perceived to be impartial.[10] To meet this requirement, mediators generally introduce themselves in an equal manner, perform equal non-verbals such as handshaking, address the parties in a similar manner, sit an equal distance from each party, maintain equal eye contact, give each of the parties equal air time and so on.[11]

In order to resolve some of the definitional problems that plague mediation theory and practice, including the issue of whether mediators are or should be neutral, Boulle distinguishes between four paradigm models of mediation, the settlement, facilitative, therapeutic and evaluative.[12] In at least one of these models, namely the evaluative model, mediators play a highly interventionist role.[13] They are less interventionist in the facilitative and therapeutic models. While analytical frameworks such as this are extremely useful, they can disguise the extent to which all mediators influence the course and outcome of

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4 P H Gulliver, *Disputes and Negotiations: A Cross-cultural Perspective* (1979) Academic Press, San Diego at 214.

5 Boulle, above note 3, at 10.

6 Moore uses the term "acceptable" in place of "independent": Moore, above note 2, at 14.

7 Boulle, above note 3, at 19-20.

8 Ibid at 20. Boulle defines neutrality with more shades of meaning than I have given it in this article, see Boulle, ibid at 19.

9 Ibid at 19.

10 See, for example, R Charlton and M Dewdney, *The Mediator's Handbook: Skills and Strategies for Practitioners* (1995) LBC Information Services, Sydney at 47 (the authors refer to the need to "avoid perceptions of mediator prejudgment or bias"); L Boulle, *Mediation: Skills and Techniques* (2001) Butterworths, Sydney at 258 (where the author notes that "partiality is as much a matter of party perception as it is of objective behaviour"); K Tracy and A Spradlin, "'Talking Like a Mediator': Conversational Moves of Experienced Divorce Mediators" in J P Folger and T S Jones (eds), *New Directions in Mediation: Communication Research and Perspectives* (1994) SAGE Publications, London at 117-120 (the authors discuss various conversational strategies for establishing "fairness"); and C W Moore, "Mediator Communication and Influence in Conflict Management Interventions: A Practitioner's Reflections on Theory and Practice" also in J P Folger and T S Jones (eds), *New Directions in Mediation: Communication Research and Perspectives* (1994) SAGE Publications, London at 212-213 (Moore discusses ways in which mediators create an *image* of procedural and substantive fairness and impartiality).

11 Moore, ibid at 212-213.

12 Boulle, above note 3, at 28-30.

13 Ibid at 30.

mediations, for almost every process intervention made by a mediator has an effect on substantive outcome.[14]

There is growing recognition that mediators cannot be neutral or impartial (if the latter term means that mediators never have a subjective preference for one or other of the parties or for the preferred outcome of one or other of the parties).[15] Mediators bring their own values and interests to the mediation.[16] They choose behavioural tactics based on the kind of outcome they wish to achieve,[17] that is, an outcome that is consistent with their own values and interests. They utilise a variety of sources of power to do the job that they are charged with doing, namely, with settling cases.

Mediator Interests

Generally, a mediator's primary goal is to achieve agreement between the parties. Mediators may be motivated in their efforts by the desire to promote the common good of society or by the desire to conform to certain norms and standards. They may be motivated by more personal outcomes such as salary, status and reputation; the desire for social approval or the approval of their constituency; or by the need to obtain support for their style of mediation.

Many mediators are influenced by the fact that mediation is the source of their remuneration and future business. Mediation may be a confidential process, "Yet mediators' successes or failures are never private. Indeed, mediators know that a 'second invitation' rests on their effective first performance, and that subsequent invitations rest similarly on continuing successes".[18] Horror stories abound of mediators being struck off an institutional "list" because the institution has a "three strikes and you're out" policy.

Some mediators are into number crunching by virtue of their employment. They may depend (even if indirectly) on government funding and feel pressured to justify requests for funding by quantifying the volume of cases handled.[19] Individual mediators have more basic human desires. They may simply want the process to go more slowly, or more quickly (mediators are almost always under some degree of time pressure).[20]

Mediators "[s]eek to influence the course and outcome of negotiations for a variety of reasons related to their own interests and values".[21] They become parties to the negotiations into

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14 Boulle acknowledges that "process can never be completely separate from substance": ibid at 22.

15 Gulliver, above note 4, at 211.

16 Ibid at 213-217. Silbey also refutes claims to mediator neutrality or disinterest: S S Silbey, "Mediation Mythology" (1993) 9 *Negotiation Journal* 349 at 351.

17 D Shapiro, R Drieghe and J Brett, "Mediator Behavior and the Outcome of Mediation" (1985) 41 *Journal of Social Issues* 101 and S S Silbey and S E Merry, "Mediator Settlement Strategies" (1986) 8 *Law and Policy* 7 at 12.

18 Shapiro, Drieghe and Brett, ibid at 113.

19 It is not unusual for mediators to have "quotas and 'success' rates to fulfil": J Wade, "Current Trends and Models in Dispute Resolution: Part I" (1998) 9 *ADRJ* 59 at 61.

20 C Honeyman, "Patterns of Bias in Mediation" (1985) *Journal of Dispute Resolution* 141 at 147. Mediators frequently operate under mandatory time-restrictions imposed by the service or institution for which they work: Wade, ibid at 61.

21 Gulliver, above note 4, at 203.

which they enter and to some extent encourage outcomes consistent with their own ideas and interests.

> "The mediator may be on the side of the angels, exercising his manipulative influence for the greater good of the community or on behalf of the wronged or the weaker party, or he may be much, even primarily, concerned with his own interests. Either way his assessment of the situation and his choice of strategy and tactics will be affected and may significantly alter the process of negotiation and its outcome."[22]

Mediator Power

The effectiveness of mediator strategies relies to a large degree on the mediator utilising various sources of power and influence. The sources of power and influence available to mediators include:[23]

- Their expertise and knowledge as dispute resolvers with special training and experience in dispute resolution. Mediators convey their knowledge in a variety of ways including the manner in which they describe themselves and the mediation process,[24] their familiarity with that process and their use of specialist language.[25] In addition to using verbal communication, mediators may convey an image of professionalism and expertise through use of symbolic objects such as certificates of mediation training, business cards, and brochures.[26]
- They may claim additional expertise as lawyers, social workers, family workers or other such professionals knowledgeable in relevant law or in relationships.[27]
- They may derive authority from holding a position within or from being associated with a structure such as a court or tribunal.
- They have explicit authority in relation to the procedural aspects of the mediation process.
- They have the real or perceived ability to inflict harm, for example, by withdrawing from the mediation or withholding benefits such as approval (variously referred to as coercive or sanction power) and they have the ability to make a party feel uncomfortable.
- They may claim moral power by appealing to commonly held norms and values.
- Their personal attributes may also be a source of power.

There is even power in the mediator being able to place responsibility for the decision in the laps of the parties.[28]

Moore maintains that mediators usually have "few direct coercive techniques available to influence disputants"[29] because mediation is voluntary (presumably in this context he means

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22 Ibid at 218.

23 Generally see B Mayer, "The Dynamics of Power in Mediation and Negotiation" (1987) 16 *Mediation Quarterly* 75. Also see J H Wade, "Forms of Power in Family Mediation and Negotiation" (1994) 6 *Australian Journal of Family Law* 40; and Charlton and Dewdney, above note 10, at 239-240.

24 Silbey and Merry, above note 17, at 12; and Tracy and Spradlin, above note 10, at 114-116.

25 See H Astor and C M Chinkin, *Dispute Resolution in Australia* (1992) Butterworths, Sydney at 19 where reference is made to CJC mediators as "specialists in mediation ".

26 Moore, above note 10, at 209-212.

27 Silbey and Merry, above note 17, at 12.

28 Astor and Chinkin, above note 25, at 103.

29 Moore, above note 2, at 277. Moore defines coercive influence as "the use of force to change another's opinion or behaviour against his or her will" (at 277).

that the parties have the ability to terminate the process). He goes on to identify several *indirect coercive techniques* such as a mediator's display of impatience or displeasure and the ultimate form of "indirect coercion", to threaten to withdraw or in fact withdraw from the process.[30]

The mediator's most obvious source of power and influence derives from his or her ability to control the process and procedure of mediation.[31] Many so-called procedural interventions have a profound effect on the substantive outcome of the mediation. This calls into question the distinction between process and substance, a distinction which Ingleby maintains is "as illusory and as dangerous as that between means and ends"[32] or possibly as illusory as Moore's distinction between direct and indirect coercive techniques.

Pressure to Settle

> "He has no socially legitimate authority to render a decision. Yet, the mandate for all mediators is to settle cases. The mediator thus faces a dilemma: to settle a case without imposing a decision. The process of mediation, and the role of the mediator in particular, is shaped by the strategies adopted to cope with this tension between the need to settle and the lack of power to do so."[33]

Occasionally a mediator will settle a matter just by being there. However that is rare. Usually, a mediator will have to do more than be just a "good fellow who understands".[34]

All mediations tend to follow a similar process or sequence of action (although the number and terminology used to describe the various stages differ between authors). For this reason, a process model of mediation has been chosen as a basis for illustration in the following sections.

Pre-mediation Conferences

There are at least three preliminary tasks that must be undertaken by mediators before they commence the mediation session itself, namely:

1. Gathering information (as to the nature, causes, and facts of the dispute);
2. Giving information (as to the nature of the mediation process and the roles of the mediator and of the parties); and
3. Gaining the trust of the parties.

Some mediators hold a pre-mediation conference at which they perform these functions; others must perform these tasks during the mediation session itself in a relatively short space of time.[35]

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30 Ibid.

31 Wade identifies ten forms of power that a mediator has in relation to process, see above note 23, at 20-23.

32 R Ingleby, "ADR's Claims 'Unproven' " (1992) 27 *Australian Law News* 7 at 8.

33 Silbey and Merry, above note 17, at 7. Even mediators adhering to a therapeutic model of mediation are trained to reach for agreements, see H H Irving and M Benjamin, "An Evaluation of Process and Outcome in a Private Family Mediation Service " (1992) 10 *Mediation Quarterly* 35.

34 W E Simkin and N A Fidandis, *Mediation and the Dynamics of Collective Bargaining* (2nd edn, 1986) The Bureau of National Affairs Inc., Washington D.C. at 30-31.

The information gathered from the parties (and possibly from other sources, such as the parties' lawyers and significant others) provides an important diagnostic tool for mediators, allowing them to plan their strategic interventions in advance.[36] Mediators may also use the information obtained in preliminary sessions to formulate an agenda for the mediation[37] and a range of possible outcomes.

The information-giving function undertaken by mediators is essentially educational in nature. Mediators may engage in a form of "pre-mediation conditioning"[38] (the word "conditioning" is associated with learned behaviour and can be found in many texts on persuasion). Mediators may congratulate the parties on choosing mediation and highlight the benefits of settling now, as opposed to settling later.[39] They may emphasise the high settlement rate claimed for mediation,[40] and at the same time "make it a practice to alert parties to the possibility that they may be unhappy on settlement because nobody gets 100 per cent their way".[41] This "pre-conditioning may help parties over the last hurdle …should [an] 'unhappiness' impasse arise".[42]

Trust is a necessary condition for third party effectiveness. Mediators gain the parties' trust using a number of the techniques already mentioned. For example they may refer to their expertise and knowledge, highlight their years of experience,[43] and recite their own success rates as a mediator. Mediators reinforce their credentials and the benefits to be gained through mediation during their opening statements.

Mediator's Opening Statement

Mediators generally congratulate the parties for attending and comment on the benefits to be gained by resolution of conflict through mediation. In so doing, they may imply that intelligent, sensible people resolve their problems through mediation, rather than battle. If the mediator succeeds in "bonding" with the parties ("bonding" activities are aimed at fostering the parties' confidence in the mediator's skills and motivations),[44] he or she may also promote in them a sense of letting the mediator down if they do not succeed.

Defining Concerns and Issues

In the process of identifying and reframing the parties' concerns and issues, the mediator can emphasise mutual benefits to be obtained by agreement and may stress the benefits to other affected parties by amicable resolution. Mediators may identify common ground using terms

35 Wade notes that in an era of cost cutting and "more for less", some mediation services have shortened or abandoned pre-mediation preparation: J Wade, "Current Trends and Models in Dispute Resolution: Part II" (1998) 9 *ADRJ* 113 at 125.

36 On the importance of this type of pre-mediation diagnosis, see J Wade, "Tools from a Mediator's Toolbox: Reflections on Matrimonial Property Disputes" (1996) 7 *ADRJ* 93 at 98-100.

37 Some authors recognise predetermination of the agenda as one of the dangers of asking parties for issues statements prior to the mediation conference: Charlton and Dewdney, above note 10, at 58.

38 This is a phrase used by Charlton and Dewdney, ibid at 137.

39 Wade, above note 36, at 101-102.

40 Charlton and Dewdney, above note 10, at 15 and 137.

41 Ibid at 137.

42 Ibid.

43 Ibid at 13. Also see Tracy and Spradlin, above note 10, at 115.

44 K Kressel and D G Pruitt, "Themes in the Mediation of Social Conflict " (1985) 41 *Journal of Social Issues* 179 at 189.

such as "It seems that you both agree it is better for the children if this matter is resolved now without going to court". By implication, if the parties want to be good parents, which they do, they will reach an agreement.

Reality Testing Alternatives

The "fear-of-the alternative factor"[45] can be a powerful modifier of negotiator behaviour. Under the label "reality testing", mediators rely upon and stress alternatives to settlement and hint at the possible negative consequences of failure to agree. If they have a legal background, mediators may point to the risks, costs, and "dire" consequences of litigation. They may even obliquely refer to the probable outcome if the matter was to be litigated. Mediators with a social work or lay background, might stress loss of control, uncertainty of decision, and the adversarial winner-takes-all nature of the proceedings.[46]

Separate Meetings

Separate meetings with the parties offer mediators the greatest opportunity to capitalise on interpersonal bonds with the parties, to push parties to make concessions and to alter parties' perceptions about preferences for particular outcomes. In a separate session, a mediator can be a "Dutch uncle" and explain why it is not in the self-interest of the party concerned to maintain "an obviously unreasonable position".[47] With the other party absent, the appearance of impartiality is not endangered and parties are spared loss of face.

Generating Movement Towards Agreement

Stulberg maintains that the mediator's job is "to press all parties [toward agreement], persistently and relentlessly".[48] To that end, he suggests use of techniques to "psychologically position the parties for agreement".[49] The techniques include appealing to the vanity of the parties, telling them they are sensible and intelligent and capable of reaching agreement, exploiting peer pressure, developing time constraints, highlighting survival, exploiting vulnerabilities, and appealing to "the big picture", that is, the costs of not settling.[50]

Other techniques used by mediators to motivate resistant parties towards decision making and to assist them to cross "the last gap" include:[51]

- Reminding the parties of norms of fairness, reciprocity and equity of exchange.[52] Mediators may first have to "educate" the parties about these negotiation norms.[53]

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45 J M Haynes and G L Haynes, *Mediating Divorce: Casebook of Strategies for Successful Family Negotiations* (1989) Jossey-Bass, San Francisco at 11. Also see Haynes and Charlesworth, above note 3, at 181-184.

46 Silbey and Merry, above note 17, at 13.

47 Haynes and Charlesworth, above note 3, at 68.

48 J B Stulberg, *Taking Charge/Managing Conflict* (1987) D.C.Heath and Company, Mass. at 105.

49 Ibid at 99.

50 Ibid at 99-105.

51 As to the meaning and importance of "the last gap", see J Wade, "The Last Gap in Negotiations - Why is it Important? How can it be Crossed?" (1995) 6 *ADRJ* 93 at 99-103. Also see Boulle, above note 10, at 172-173.

52 J Z Rubin and B R Brown, *The Social Psychology of Bargaining and Negotiation* (1975) Academic Press Inc., San Diego, Cal. at 56.

53 Charlton and Dewdney, above note 10, at 144, and Wade, above note 51, at 103.

- Stressing the interdependence of the parties, the importance of maintaining good relations, and the costs of continued conflict especially the costs to third parties such as children.
- Indicating impatience or disapproval, or even anger.[54]
- Declaring an impasse or threatening to withdraw from the mediation. "Participants will often jump to recover their right to choose for themselves if they fear their loss of choice."[55]
- Confronting the parties, using statements such as "Would you be here if you didn't think mediation was an attractive way to settle?"[56]
- Using personal power to extract an agreement.[57]
- Using silence.[58]
- Holding long sessions that facilitate compromise and wear the parties down.[59]

Persistence and patience have long been considered virtues in those who would be mediators. The list of techniques given above is not exhaustive. Wade lists fifteen techniques for crossing the last gap in negotiations.[60] All mediators have favourites. The outcome of mediation may well depend on which technique the mediator chooses to use. The last technique suggested by Wade, namely "Skilled helper has a Face-saving Tantrum", is particularly appealing.[61]

Influence Over Outcome

"It is...by no means rare for the mediator to have a decided preference for certain outcomes of the dispute"[62] and to "engage in 'arm twisting' in order to persuade reluctant parties to agree to specific proposals".[63] Generally however mediators are more subtle in directing the course of negotiations towards outcomes that they consider acceptable.[64] They more commonly proceed through the positive power of encouraging discussion in certain directions rather than through the negative power of a veto.[65] As illustrated in the discussion that follows, most of the techniques selected by mediators may be justified in terms of procedural interventions.

Defining Concerns and Issues

The process of reframing a dispute in mutually acceptable terms allows the mediator to direct discussion and subsequent negotiations. Mediators launder parties' statements to remove inflammatory content but at the same time, they may reorder the priority or importance of

54 Charlton and Dewdney, ibid at 155.
55 Folberg and Taylor, above note 2, at 58.
56 Charlton and Dewdney, above note 10, at 156.
57 J A Wall and A Lynn, "Mediation: A Current Review" (1993) 37 *Journal of Conflict Resolution* 160 at 165.
58 Charlton and Dewdney, above note 10, at 144 and 239.
59 Wall and Lynn, above note 57, at 168.
60 Wade, above note 51, at 103-111.
61 Ibid at 106 and 111.
62 Kressel and Pruitt, above note 44, at 190.
63 Ibid at 194.
64 Shapiro, Drieghe and Brett, above note 17, at 101.
65 D Greatbatch and R Dingwall, "Selective Facilitation: Some Preliminary Observations on a Strategy Used by Divorce Mediators " (1989) 23 *Law and Society Review* 613 at 617.

content, or deliberately ignore certain content parts of statements.[66] Mediators may elicit chosen information in search of shared values and other commonalities as the basis for an agreement; they may sidestep intractable differences or eliminate some issues altogether.

> "When the problem to be solved is appropriately defined by the mediator...the process moves to the point where the mediator orchestrates the negotiations, determining their form, the order of items to be negotiated, and the amount of concession to be sought from each party."[67]

Option Generation

Most mediators are reluctant to suggest options themselves but they may do so indirectly by citing alternatives proposed by other parties in similar situations or by use of hypothetical questions and conditional "What If's".[68] The magic phrase "what if" is particularly useful to assist the parties to package offers and counteroffers and engage in conditional linked bargaining.[69]

Exploration of Options and Management of the Negotiations

The mediator's procedural functions in managing the negotiations extend to management and control of the agenda including the number of issues, the order for discussion and the coupling and packaging of issues.[70] This alone gives him or her a powerful tool with which to control the outcome of negotiations. In addition, mediators may:

- "Differentially [create] opportunities" to discuss favoured options rather than systematically exploring all possible options.[71]
- Use questioning and suggestions to produce an acceptable focal point or create one (when there is none obvious) by focusing discussion and attention on something between the two current demands of the parties.[72]
- "Suggest new or renewed concentration of focus."[73]
- Disclose to a party that their demands are inconsistent with precedents, trends and societal norms. Mediators can remind parties of community norms or values. The choice of norms, the timing and way in which they are introduced, and the emphasis given can influence the perceptions, preferences and demands of the parties.[74]
- Use time deadlines to force concessions and prevent further exploration of options.

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66 J M Haynes, "Mediation and Therapy: An Alternative View" (1992) 10 *Mediation Quarterly* 21 at 25-26.

67 Haynes and Haynes, above note 45, at 32. Also see Haynes and Charlesworth, above note 3, at 1 and 5.

68 Not all mediators eschew direct suggestion of options and proposals for settlement. See for example R J Lewicki and J A Litterer, *Negotiation* (1985) IRWIN, Homewood, Illinois at 302; Welton et al, "The Role of Caucusing in Community Mediation " (1988) 32 *Journal of Conflict Resolution* 181 at 183; and Stulberg, above note 48, at 87 who sanctions it only as a last resort.

69 Wade, above note 36, at 105, and Boulle, above note 10, at 155.

70 Haynes and Charlesworth, above note 3, at 198.

71 Greatbatch and Dingwall, above note 65, at 636.

72 Gulliver, above note 4, at 168.

73 Ibid at 223.

74 For an example of an instance where a mediator backed a party into a corner by use of moral norms in relation to welfare of children see Greatbatch and Dingwall, above note 65.

Reality Testing

As part of their reality testing functions, mediators can reduce optimism about gaining particular outcomes, raise doubts about the viability of positions and options, and accentuate the rewards (while downplaying the costs) that might flow from particular proposals.[75] The process of creating doubt in the minds of the parties about "the validity and fairness" of their positions actually begins in pre-mediation conferences and at the problem definition stage of mediation, when the mediator identifies the parties' concerns and issues.[76]

Separate Meetings

Separate meetings allow mediators to control "the flow of information" passing between the parties and the substance of their communications.[77] Information can be re-shaped, modified, or omitted altogether. The mediator can also add his or her own interpretations, add new messages, or can offer opinions in a covert manner.[78]

> "If the mediator wishes to bias the conveyed information, the opportunities are manifold. He can filter information, claim to be its source, or distort the conveyed ideas. Likewise, he can deliberately let misunderstandings slip by, or he can receive information but pass along only a portion of it."[79]

Mediators can initiate, elaborate, and discuss proposals with one party, without the other party being present. As noted previously, mediators can push parties to make concessions in separate sessions without parties suffering loss of face, and they can offer reasons for the making of certain concessions without the appearance of bias. Not surprisingly, research indicates that mediators exhibit more freedom to violate the neutrality norms during separate meetings.[80]

Use of Questions

Since "the mediator's primary mode of communication is the question,"[81] use of questions deserves separate mention. Questions may be put in a variety of forms. In addition to using hypothetical questions (to introduce ideas and to create focal points for discussion), mediators may use focusing questions (to steer negotiations in a particular direction) and leading and suggestive questions (to suggest ideas and possible answers).[82] As with advocates in cross-examination of a witness, mediators can get the right answers if they ask the right questions.

It is appropriate to conclude this part of the article with reference to a metaphor used by Boulle to explain mediation and the mediator's role.

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75 J A Wall, "Mediation: An Analysis, Review, and Proposed Research " (1981) 25 *Journal of Conflict Resolution* 157 at 165.

76 Haynes and Charlesworth, above note 3, at 10. Also see Boulle, above note 10, at 157.

77 Silbey and Merry, above note 17, at 14.

78 Gulliver, above note 4, at 227. Also see Wall, above note 75, at 162-163.

79 Wall, ibid at 163.

80 Welton et al, above note 68.

81 Haynes and Charlesworth, above note 3, at 206.

82 Generally on the use of a variety of questions, see Haynes and Charlesworth, ibid at 206-207; Charlton and Dewdney, above note 10, at 177-179, and Boulle, above note 3, at 171-175.

> "The mediator's role is to direct the traffic, like a traffic officer, but the parties will be doing all the driving."[83]

Drivers have little choice but to comply with traffic directions. A traffic officer determines whether drivers stop, go, slow down, speed up, or take a detour. A traffic officer also determines what direction drivers travel in, and sometimes, he or she may even determine their destination.

Mediator Choice of Strategy

The factors that influence mediator choice of strategy are innumerable. Mediator behaviour is an amalgam of inherent attributes and qualities, of learned and intuitive skills and techniques, of past experiences, of cultural and professional influences, and of the circumstances of the parties and the dispute.[84]

Important determinants of the strategies chosen by mediators include:

- The mediator's own personality and style.
- The training received by the mediator. A variety of training is available to want-to-be mediators. Once initiated, mediators tend to show allegiance to the model in which they were trained.
- The cultural background of the mediator and of the parties. "Cultural precepts bar or hinder some strategies and enjoin others."[85]
- The sex of the mediator and of the parties.
- The context in which the mediation takes place, for example, whether it takes place within the context of public policy, commerce, employment or the family.
- The characteristics and expectations of the parties.[86] There is anecdotal evidence that some parties choose their mediator precisely because he or she will give them an opinion on the range of likely outcomes if the matter were to go to court (a characteristic associated with an evaluative model of mediation).[87]
- The terms of any formal agreement to mediate and of any applicable professional standards.
- The institutional or agency setting in which the mediation takes place. A third party may use more interventionist techniques facilitating a mediation conference for the Legal Aid Office than would be the case in a private mediation especially if the mediator is required to make a recommendation as to whether or not funding should continue.
- "[T]he proximity of the dispute to the law"[88] and the existence (or nonexistence) of a judicial alternative if mediation fails to resolve the dispute. Mediation is effected by any

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83 Boulle, above note 10, at 19.

84 See H J Brown and A L Marriott, *ADR Principles and Practice* (1993) Sweet and Maxwell, London at 251; Moore, above note 2, at 30-43; Boulle, above note 3, at 25 and 123; Wade, above note 19, at 64; and Wall, above note 75, at 164. On the effect of culture on choice of strategy, see Wall and Lynn, above note 57, at 169; Gulliver, above note 4, at 220, and B Wolski, "Culture, Society and Mediation in China and the West " (1997) 3 *CDRJ* 97.

85 Gulliver, ibid at 220.

86 Boulle, above note 3, at 25, and Shapiro, Drieghe and Brett, above note 17, at 113.

87 Boulle, ibid at 30.

88 Ibid at 25.

dispute resolution process that preceded it and by the prospect of any process that may follow it.

- The time pressure operating on the parties.

Another important determinant of mediator behaviour, one that requires closer examination, is the kind of outcome the mediator wishes to achieve. Whilst many mediator interventions are made in response to the actions and behaviour of the parties,[89] research indicates that "Mediator behaviour is less reactive and more proactive and systematic than popularly thought".[90] Mediators choose strategies based on the kind of outcome they wish to achieve.[91]

Standards and Accountability

All mediators have the *ability* to influence the substance and outcome of mediations. It also seems that they have an overriding ethical obligation to do so. Professional standards for mediators variously impose upon them duties to help the parties reach a fair and equitable settlement,[92] to raise questions as to the fairness, equity and feasibility of proposed options for settlement,[93] and to ensure consideration of the interests of children and other affected third persons.[94]

In addition to imposing certain obligations upon mediators, various professional standards require mediators to disclose to the parties any prior relationship with any of the parties or any conflict of interest (this goes to the independence of the mediator).[95] The standards are silent with respect to other matters that might be considered relevant to the issue of neutrality.

> "Australian mediator standards do not generally require mediators to disclose to the parties any strong views they may have on the issues to be mediated, for example on domestic violence in matrimonial disputes or on environmental principles in planning disputes. This kind of 'interest' is not yet regarded as a disqualifying factor for mediators."[96]

The relevant standards also require mediators to maintain impartiality towards all parties.[97] According to the Queensland Law Society Standards, impartiality means "freedom from any favouritism or bias in appearance, word or action, and a commitment to assist all parties to a

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89 On the distinction between general or non-contingent mediator interventions and specific or contingent mediator interventions, see Moore, above note 2, at 25-26, and Boulle, above note 10, at 12-13.

90 Shapiro, Drieghe, and Brett, above note 17, at 101. Other authors have observed common patterns in mediator behaviour and strategies, see for example D Kolb, *The Mediators* (1983) MIT Press, Cambridge, Mass.

91 Shapiro, Drieghe and Brett, ibid, and Silbey and Merry, above note 17.

92 Queensland Community Justice Programme Guidelines quoted in Boulle, above note 3, at 243.

93 The Association of Family and Conciliation Courts' Model Standards of Practice for Family and Divorce Mediation, Clauses IIA and III.

94 Ethical Standards of Professional Responsibility for the Society of Professionals in Dispute Resolution quoted in N H Rogers and C A McEwen, *Mediation: Law Policy Practice* (1989 and 1990 Cumulative Supplement) The Lawyers Co-operative Publishing Co., New York at 825-826. Also see L Boulle and M Nesic, *Mediation: Principles, Process, Practice* (2001) Butterworths, London at 439-440 on mediation standards in the United Kingdom.

95 Generally, see Boulle, above note 3, 241.

96 Ibid at 242. At the time of writing this article, NADRAC is expected to release its recommendations on mediator standards.

97 See for example, the Queensland Law Society Standards of Conduct for Solicitor Mediators (s 4.1) and the Law Council of Australia's Ethical Standards for Mediators (December 1996).

dispute as opposed to a single party, but without a commitment to a particular outcome".[98] Boulle notes that

> "Although this formulation of the impartiality requirement is based on the problematic process/content distinction, it serves to remind that *objective standards of impartiality* (emphasis added) are crucial to the development of trust and reliability in the mediator who intervenes in the dispute".[99]

Finally, several standards forbid mediator coercion and prohibit mediators from influencing outcomes by imposing their interpretations of the law or generally by imposing solutions on the parties.[100] The standards recognise that final decisions are to be made by the parties rather than be imposed upon them by the mediator, but they do not draw any clear dividing lines between what is and is not an appropriate intervention, or between what is and is not "coercion". The standards "avoid referring to the specific interventions which mediators can make and contain no reference to the subjective judgments which mediators are obliged to make".[101]

Conclusion

Although some supreme efforts have been made to develop taxonomies of mediator strategies, many issues remain unexplored and under-researched.[102] Future researchers need, for example, to identify and explore:

- Individual mediator strategies and the various combinations, sequences and patterns in which those strategies are used.
- The impact and effectiveness of individual and combination strategies.
- The relationship between strategies and contextual factors that influence mediator choice of strategy.
- The circumstances in which strategies are likely to be most effective.
- The effect and implications of team mediation.
- The type of outcomes achieved when various strategies are used (one would first have to overcome the difficulties involved in measuring outcomes and develop some common evaluation criteria).

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98 Queensland Law Society Standards of Conduct for Solicitor Mediators (s 4.1).

99 Boulle, above note 3, at 242.

100 See for example, the Queensland Law Society Standards of Conduct for Solicitor Mediators (ss 1.2 and 7). Also see the Law Council of Australia's Ethical Standards for Mediators (December 1996) which refers to "uncoerced agreement by the parties ".

101 Boulle, above note 3, at 239.

102 See for example, Kressel and Pruitt, above note 44; Wall, above note 75; and Wall and Lynn, above note 57, at 165. Also see W D Kimsey et al., "The Impact of Mediator Strategic Choices: An Experimental Study" (1994) 12 *Mediation Quarterly* 89 (and the studies referred to therein); and E Kruk, "Practice Issues, Strategies, and Models: The Current State of the Art of Family Mediation" (1998) 36 *FCCR* 195 (and the studies and taxonomies mentioned therein). Also see surveys such as that conducted at the LEADR symposium held at the Gold Coast on 21-22 August, 1999, a workshop of 50 experienced "commercial" mediators (the results of which can be found at the Bond University Dispute Resolution Centre website).

Mediators have for so long referred to themselves as neutral and impartial third parties that they may find it difficult to forego the rhetoric. However, the sooner mediators acknowledge that they can and do exert pressure to settle and that they can and do intervene to effect the substantive outcome of mediations, the sooner the research can continue in earnest. Regardless of which model of mediation they endorse and conform to, all mediators use some of the strategies discussed in this article some of the time, even if "only as a last resort".[103] In the end, mediation may not be about winning friends, but it certainly is about influencing people.

Bonding to Bond

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J H WADE
Director
Bond University Dispute Resolution Centre

[103] See for example, Boulle, above note 3, at 174, on the use of suggestive questions.