BOND UNIVERSITY
Dispute Resolution Centre

# BOND DISPUTE RESOLUTION NEWS

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# Recent Activities of Bond University Dispute Resolution Centre

**LAURENCE BOULLE**

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| January | With Professor Nico Steytler submitted final draft Guidelines for Intergovernmental Dispute Resolution to South African Department of Constitutional and Provincial Government. |
| 2 February | Meeting of Law Council of Australia ADR Committee. |
| 9 February | Presentation to Native Title Practitioners Workshop Ethics in Native Title Mediation (with Jodhi Rutherford). |
| 16 February | Conciliation Workshop for Residential Tenancies Tribunal, Brisbane (with Nadja Alexander). |
| 17 February | Public facilitation for National Mediator Accreditation Initiative, Canberra and Sydney. |
| 18 February | Public facilitation for National Mediator Accreditation Initiative, Melbourne. |
| | **National Mediator Accreditation Initiative**<br><br>In 2004 the Commonwealth Attorney General's Department made funds available to the National Mediation Conference Pty Ltd Committee for the development of a proposal for a national system of mediator accreditation in Australia.<br><br>Professor Laurence Boulle has been engaged as the consultant to seek and consider written and verbal submissions from organizations, groups and individuals on the proposal for a national system of mediator accreditation, and to write a report for the Attorney General's Department. Professor Boulle is assisted in this task by a Sub-Committee of the National Mediation Conference Committee.<br><br>Details of the initiative and draft proposal can be found on:<br>http://www.mediationconference.com.au/html/Accreditation.html |

**JOHN WADE**

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| 5-6 January | Visit Woody Mosten, mediator, Los Angeles. |

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| 9-13 January | Teach 5 day Mediation and Dispute Resolution course at SMU Dallas Texas, USA. Evaluations |
| 3 February | Welcome Professor Camilla Bernt-Hamre from Norway for one month of research at Bond University |
| 17 March | Negotiation workshop for Theiss Construction, Sydney |
| 20 April | Negotiation workshop for Blake Dawson Waldron, Lawyers, Brisbane |

**BEE CHEN GOH**

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| 20 March | Conducting a Peace Workshop entitled 'Sisters of Peace' for the Bond University Buddhist Society. |
| 2-5 May | Will be co-presenting 'The Mindful & Peaceful Mediator' at the National Mediation Conference, Hobart, Australia. |

**PAT CAVANAGH**

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| March | Negotiation training programs for partners and senior associates at Freehills Lawyers in Melbourne and Sydney. |

# Recent and Forthcoming Publications

## Bee Chen Goh

One chapter on cross cultural negotiation in Honeyman and Schneider eds *The Negotiator's Fieldbook* (ABA forthcoming April 2006)

## John Wade

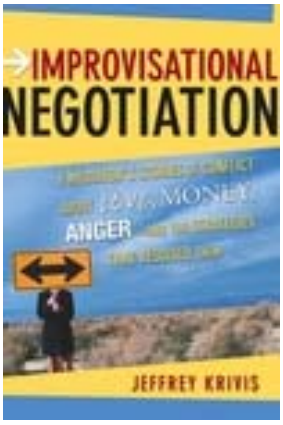
Four chapters on various hurdles in negotiation in Honeyman and Schneider eds *The Negotiator's Fieldbook* (ABA forthcoming April 2006).

## Bobette Wolski

*Legal Skills* (Law Book Company 2006) 606 pages
This is a unique book on the theory and practice of legal skills. It contains chapters on

- Theories behind learning skills
- Hurdles to learning skills
- Client interviewing
- Problem solving
- Legal Research
- Legal Writing
- Dispute Resolution
- Negotiation and Mediation
- Advocacy

It includes a variety of exercises in relation to these topics. The book is particularly relevant to those law schools which have extensive skills training programs.




**Jeff Krivis** has published **Improvisational Negotiation: A Mediator's Stories of Conflict about Love, Money, Anger and the Strategies That Resolved Them** Willey/Jossey Bass published by Wiley/Jossey Bass:

www.improvisationalnegotiation.com

*Improvisational Negotiation* presents an original approach for mediators, negotiators, and other dispute resolution professionals. Drawing on his own experience plus those of his colleagues, Jeffrey Krivis offers the reader dramatic, well-crafted, and highly instructive stories about people in conflict - families, organizations, corporations - and shows how mediated negotiations help them to reach a successful resolution.

Unlike most books on the topic, *Improvisational Negotiation* does not focus on theory, philosophy, or formulaic procedures. The book highlights entertaining true stories that illuminate the skills and tools a good mediator uses to direct a successful negotiation and then asks the questions: What happened? and What strategies can we learn?

# Forthcoming Courses of the Dispute Resolution Centre

| Bond University Short Courses | | | | |
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| **30 March-2 April 2006** | **Melbourne** | **Short course – 4 days** | **Advanced Mediation Course, in conjunction with Leo Cussen Institute. Phone 03 96023111 email: lpd@leocussen.vic.edu.au** | **Boulle, Wade** |
| **6-9 April 2006** | **Gold Coast** | **Short course – 4 days** | **Basic Mediation Course *** | **Boulle, Wade** |
| **27-30 July 2006** | **Marriott Surfers Paradise** | **Short course – 4 days** | **Basic Mediation Course *** | **Boulle, Wade** |
| **21-24 September 2006** | **Sheraton, Noosa** | **Short course – 4 days** | **Advanced Mediation Course** | **Boulle, Wade** |
| **12-15 October 2006** | **Melbourne** | **Short course – 4 days** | **Basic Mediation Course, in conjunction with Leo Cussen Institute. Phone 03 96023111 email: lpd@leocussen.vic.edu.au** | **Boulle, Wade** |
| **30 November - 3 December 2006** | **Gold Coast** | **Short course – 4 days** | **Basic Mediation Course*** | **Boulle, Wade** |
| *** This course also has a Family Mediation stream, run in conjunction with AIFLAM (Australian Institute of Family Law Arbitrators and Mediators)** | | | | |

## 8th National Mediation Conference

national mediation conference

Hotel Grand Chancellor, Hobart, Tasmania

**2 May Registration opens 4.30pm**
**Welcome drinks 5.30pm**

**3-5 May 2006 Conference begins 9.00am**

For information and online registration

www.mediationconference.com.au

The conference places key emphasis on Skills, Practice and innovation and will include areas of discussion such as Family, Courts & Tribunals, Commercial, Workplace and Community.

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We are pleased to announce the **3rd Asia Pacific Mediation Forum Conference**, to be held June 26th – 30th, 2006. This international conference will be convened by the University of the South Pacific and will be held at the University of the South Pacific Suva, **Fiji**.

The conference theme, '*Mediating Cultures in the Pacific and Asia'*, will set the stage for five days of workshops and presentations exploring the diverse ways mediation takes place throughout the varying social and legal systems in the Asia Pacific region.

Three days of the conference program will be comprised of workshops including basic and advanced mediation training and the other days will be reserved for conference presentations exploring theory and practice issues.

Themes for workshops include: *Basic mediation skills, Advanced mediation skills, Cultures of mediation, Assessors of land courts, Councils of chiefs, Designing dispute resolution systems, Mediation and family violence, Gender and mediation, Traditional mediation in Asia Pacific cultures, and Victim Offender Conferencing.*

Themes to be explored though presentations, panel discussions and group dialogues during the conference include: *Frontier conflict management (FCM), Global trends in mediation, Asia Pacific approaches to conflict, Commonality in diversity, Gender and mediation, Mediation education/training, Commerce, industry & labour disputes, Meditation and the courts, Mediation and ombudsmen, Dispute systems design, Mediation in political decision making, Mediation and public policy, and Victim Offender Conferencing.*

Conference participation will build the ever-growing network of practitioners, academics, researchers, policy makers, members of judiciaries, elected officials and students interested in expanding their understanding of alternative dispute resolution principles, practice and implementation.

**Links:**

For full conference information, go to: http://www.usp.ac.fj/apmf

If you would like to suggest another theme, contact the conference executive secretary at: mailto:laura.seurynck@usp.ac.fj

If you would like to offer a workshop or presentations go to: http://www.usp.ac.fj/index.php?id=apmf_call

# Thoughts and Themes

## Tools from a Mediator's tool-box; Reflections on Matrimonial Property Disputes

**Abstract**

This article comments upon eight practices used in matrimonial property mediations or negotiation conferences. These are:

(1) Requiring written ranges of outcomes to be specified before a meeting occurs;

(2) Systematically enlisting the aid of lawyers and valuers by a series of diagnostic questions;

(3) Distinguishing primary and secondary causes of conflict;

(4) The one day model of mediation meeting;

(5) Using a visual aid to identify the possible benefits of early or late settlements;

(6) Standardising issues on a whiteboard;

(7) The use of conditional linked bargaining;

(8) The common scenario of parties stonewalling at alternative ends of the range.

# Tools from a Mediator's tool-box; Reflections on Matrimonial Property Disputes*

***by Professor John Wade***

The writer has been involved in mediating many "matrimonial property" disputes on the east coast of Australia since 1987. This paper offers a reflection on a number of practices which have proved useful in some of these disputes. These comments do not present a magical "how-to-do-it" formula - but are presented in the tradition of mediators sharing ideas. Thereby each of us can pick and choose extra tools for our toolboxes. Most of these ideas can be (and have been) readily extended to conflicts outside the family. Few of these practices are original but rather underline what has come before.

The topics to be discussed are:

1. Preparation - "objective" ranges of outcomes;
2. Preparation - systematic questions to agents;
3. Diagnosis - primary and secondary conflict;
4. One day model of meeting;
5. "Settle now, or settle later" - an ice breaking chart.
6. Standardising issues on the whiteboard.
7. Conditional linked bargaining;
8. Stonewalling at the bottom of the range;

### *Preparation - "objective" ranges of outcomes*

One fundamental role of a lawyer/mediator/negotiator is to move through processes and discussions away from the rhetoric of "fairness" and "unfairness" towards objective criteria[1]. Taped interviews have sometimes indicated how repetitive and cyclical are the discussions between family lawyers and their clients. The lawyer states "This is what *is* likely to happen", to which the client responds, "Oh, that's not fair"[2]. This can be referred to as the objective-subjective cyclical conversation, or the "yes but" – "oh but" cyclical conversation.

Mediators and negotiators can attempt to pre-empt this broken record by requiring that the agent or expert for each disputant defines objectively and in writing a range of possible outcomes in court. Writing is essential as:

(1) Clients tend to hear what advice they want to hear;

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* This paper is adapted from J.H. Wade, "Tools for a Mediator's Toolbox: Reflections on Matrimonial Property Disputes" (1996) 7 *Aust J of Family Law* 68.

1 Fisher & Ury, *Getting to Yes* (London: Business Books, 1991)

2 See A. Sarat & W. Felstiner, "Law and Strategy in the Divorce Lawyer's Office" (1986) 20 *Law & Society Review 93*

(2) Clients and agents often lie or exaggerate to the mediator as a form of positional bargaining;

(3) Writing focuses the expert's mind and (s)he will be careful to give precise advice, particularly if the mediator has substantive expertise in the area of conflict.

A **range** of possible outcomes in court of both financial division and experts' costs is also essential as:

(1) In Australia, it is arguably professional negligence to suggest that a single figure outcome is likely under s. 79 of the *Family Law Act.* The outcome of any matrimonial property case cannot be predicted within a band less than 15% of the asset pool. That is, it is professional negligence to advise "you will get 65% of the asset pool before a judge". Instead, the advice could be "you will get between 60% and 75% of the asset pool on a bad and good day respectively". "Your legal and accountancy costs will be between $13,000 and $18,000 on a good and bad day respectively". Most experienced family lawyers advise on a band of good-day and bad-day outcomes separated by 15% or more.[3]

(2) A range of percentages begins to reduce expectations and create doubt for each of the negotiators weeks before they arrive at the negotiation table.

An example of a letter and annexures requiring this written range prior to mediation is attached to this paper and marked "A".

There are, in the writer's experience, a number of predictable hurdles to this essential objectification of negotiation criteria. These are:

(1) Some lawyers and valuers will feel that they will lose face if an absolute figure has to be revised as a range. They have commenced negotiations in a bullish positional fashion (known as "high-soft") and are now suddenly being asked to shift to a range of possible outcomes.

(2) Some inexperienced lawyers are reluctant to express a range of outcomes as it is easy to claim high or offer low without any specialist insight. To gain specialist insight will involve transaction costs for the client. A specialist family lawyer will need to be consulted and paid for a detailed expert opinion on the range.

(3) With some marriage types, the "shadow of the law" is very mottled. That is, the case law on section 79 of the *Family Law Act* - an equitable property distribution regime - is particularly unpredictable for:

   (a) short marriages (under say 3 years);

   (b) marriages where the asset pool is under about $200,000[4]

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[3] J.H. Wade, "Arbitral Decision-Making in Family Property Disputes – Lotteries, Crystal Balls and Wild Guesses" (2003) 17 *Aust J of Family Law* 224.

[4] Sophy Bordow & Margaret Harrison, "Outcomes of Matrimonial Property Litigation: An Analysis of Family Court Cases" (1994) *Aust J of Family Law* 264 (In 1990 of the 349 judgments of the Family Court of Australia in property cases, an amazing 53.1% involved disputes where assets were valued at below $200,000. A further 29.8% involved disputes where assets were valued between $201,000 and $500,000. The commercial madness of litigation in low value asset cases requires further research).

(c) marriages where one partner is seriously disabled by alcoholism; ill health; nervous breakdown.

In these cases, case law precedents are either scarce or muddled. Accordingly, even the most experienced lawyer will provide a heavily qualified "objective" range, or will expand the range wisely to a 25% gap.

(4) With all marriage types, the provision of an accurate range of outcomes requires current expertise. This is because over the last five years, percentage outcomes in reported property disputes have been shifting gradually in favour of home maker/parents, usually women. This gradual increase in payments from accumulated marriage assets to women has taken place due to Australian studies on the effect of marriage breakdown or violence on women[5]; post divorce poverty[6]; judicial education[7] and case law[8].

All these developments require expertise to give the "correct" or "market" range of likely outcomes. Many clients and lawyers are naturally hesitant to spend precious money on buying news that they don't want to hear anyway. Some males particularly prefer the out-of-date advice of a suburban lawyer rather than the more depressing news that the social contract for males has changed[9].

(5) Some lawyers, when defining the range of property outcomes, consciously or subconsciously shift the percentages in their client's favour as an opening positional bargaining ploy. For example, "I think the range is 60% - 70% but will write a note for the purposes of mediation which states 55% - 65%.

In the writer's experience, "mild" tactical range shift is common, but extremes are less common. Lawyers generally fear loss of face and credibility with the mediator and the other professionals if their advice blatantly fails to define risks. Moreover, a substantively expert mediator will often (in private) require the lawyer to justify his/her range advice on the basis of facts, evidence and case law.

What follows is one set of **basic** guidelines of current percentage ranges in property disputes under the *Family Law Act* for five marriage "types".

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5 Australian Law Reform Commission, *Equality Before the Law: Justice for Women* Report No 69, 1994; N. Seddon, *Domestic Violence in Australia The Legal Response* 2nd ed, (Sydney: Federation, 1993)

6 P. McDonald (ed) *Settling Up: Property and Income Distribution on Divorce in Australia* (Melbourne: Prentice-Hall, 1986); K. Funder, M. Harrison & R. Weston, *Settling Down: Pathways of Parents after Divorce* (Melbourne: AIFS, 1993).

7 In the 1990's, all the judges of the Family Court of Australia have attended numerous workshops on "gender" issues, led particularly by Professors Kathleen Mahoney and David Cruickshank from Canada.

8 *Ferraro and Ferraro* (1993) FLC 92-335 (37% of $12 million asset pool to wife); *Clauson and Clauson* (1995) FLC 92-595 50% of $1.5 million assets to wife; husband had $700,000 pre-marriage assets and $800,000 from his entrepreneurial activities; *Marsh and Marsh* (1994) FLC 92-443 (punitive and exemplary damages against husband for assault upon his wife).

9 "Life" expectations of males have been steadily changed in Australia by compulsory superannuation, increased mid-life redundancies, the *Child Support (Assessment) Act* 1989 (Cth); requirements of lifelong reskilling and education; assertive females; Anti Discrimination legislation; expectations of domestic skills and sensitivity; loss of community etc.

| | MARRIAGE TYPE | RANGE OF OUTCOMES |
|---|---|---|
| (1) | CHILDLESS MARRIAGE; NOT "SHORT"; BOTH EMPLOYED | 50/50 |
| (2) | CHILDREN WITH HOMEMAKER; ASSETS BETWEEN $100,000 - $300,000; PARTNER EMPLOYED[10] | 65-90% TO HOMEMAKER + CHILD SUPPORT |
| (3) | CHILDREN WITH HOMEMAKER; ASSETS BETWEEN $300,000 - $800,000[11] | 55-70% TO HOMEMAKER + CHILD SUPPORT |
| (4) | CHILDREN WITH HOMEMAKER; ASSETS BETWEEN $1 - $5 MILLION; PARTNER EMPLOYED[12] | 50-60% TO HOMEMAKER + CHILD SUPPORT |
| (5) | LONG MARRIAGE WITH ASSETS OVER SAY $5 MILLION (CHILDREN GROWN)[13] | 35-45% TO NON "ENTREPRENEUR" SPOUSE + CHILD SUPPORT |

***Preparation - Systematic Questions to Agents***

One of the repetitive themes of conflict management is the potential conflict of interests between principals and agents[14]. For example, a family lawyer has an interest in having satisfied clients, having clients who do not denigrate their lawyer, telling the truth, being known as a trustworthy person, saving face if a mistake is made, being paid promptly, educating clients about reality, having an orderly work and recreational life, drafting tight and comprehensive settlements, leaving no stone unturned and being respected by "repeat players" such as judges, counsellors and legal colleagues. These interests of the lawyer-agent will often be in conflict with the perceived or actual interests of the client principal. For example, some clients have no interest in telling the truth, preserving the lawyer's reputation, spending money on education or comprehensive settlements, paying bills or the lawyer's peaceful home life.

Mediators can consciously or subconsciously inflame these principal-agent conflicts of interest. For example, a mediator can denigrate valuation or legal costs; or can ask

[10] *Best* (1993) FLC 92-418; *Mitchell* (1995) FLC 92-601; *Foda* (1997) FLC 92-753; *Brandt* (1997) FLC 92-758.
[11] *Waters and Jurek* (1995) FLC 92-635; *Marando* (1997) FLC 92-754.
[12] *Clauson* (1995) FLC 92-595; *Stay* (1997) FLC 92-751; *VJ* (1997) FLC 92-772.
[13] *Ferraro* (1993) FLC 92-335; *Whiteley* (1993) FLC 92-304; *McLay* (1996) FLC 92-667; *JEL and DDF* (2001) FLC 93-075.
[14] Eg. R Mnookin, "Why Negotiations Fail: An Exploration of Barriers to the Resolution of *Conflict (1993) 8 Ohio State J on Dispute Resolution 235*

a lawyer to rubber stamp a mediated agreement; or can fail to allow for the payment of legal fees; or can suggest that thorough asset investigation is costly and unnecessary; or can criticise legal advice as premature or outside the range[15] .

Alternatively, the mediator can attempt to enlist the insights and expertise of each lawyer from the very start of the process. Lawyers usually have profound insights into what are the causes of conflict, why cases have not settled, and what interventions might hasten the resolution of the dispute. What follows is an example of a questionnaire sent by the writer to some lawyers to give notice of the kinds of questions a mediator might ask over the telephone to the lawyer. Once a lawyer has become a repeat user of a mediation service, (s)he does not need this questionnaire as a prompt, but rather quickly offers analysis and suggestions to the mediator as part of the joint problem-solving team[16].

[15] J. Wade, "Lawyers and Mediators: Learning From and About Each Other" (1991) 2 *Australian DR Journal 159.*

[16] On diagnostic problem solving approaches, see J. Wade "In Search of New Conflict Management Processes: Part I" *(1994) Vol 10(2) Australian Family Lawyer 23;* "Part II" *(1995) 10(3) Australian Family Lawyer 16.*

**Some Questions**
**Which a Proposed Mediator**
**May Ask a Professional**

(These questions are also very helpful preparation in a lawyer-lawyer or party-party negotiation)

1. In your opinion, why has this dispute not settled so far?
2. Why should the mediation process be any more successful than lawyer to lawyer or party to party negotiation?
3. What do you think are the causes of this conflict?
4. What would you do to improve the negotiation process between these disputants?
5. What extra facts do you require before a joint negotiation/mediation session occurs?
6. If you were the lawyer for the other side, what extra facts would you require before a joint negotiation/mediation session occurs?
7. What is your client concerned about? Which of these concerns are urgent?
8. What are the legal issues in this dispute?
9. What precise offers have been made and on what dates by each party?
10. What do you think are the time constraints on negotiation/mediation?
11. Who needs to be present at any joint negotiation/mediation meetings? Who should not be present?
12. What documents need to be prepared/submitted/read, by whom? By what deadlines?
13. What authority to settle does each party have? Do you think either party will need to consult someone else before signing a settlement?
14. What are the past patterns of interaction? Give examples. What fears exist about a negotiation/mediation meeting?
15. What do you expect to happen at a facilitated negotiation/mediation session?
16. On a scale of 1 to 10, indicate levels of enthusiasm for the mediation process (I = not enthusiastic; 10 = very enthusiastic) by you? your client? the other disputant? the other professional advisers who are involved?
17. What is your client's:
    (a) Best alternative to a negotiated settlement (BATNA)?
    (b) Worst alternative to a negotiated settlement (WATNA)?
    (c) Probable alternative to a negotiated agreement (PATNA)?
18. Have you provided to your client in less than one page of writing:
    (a) A range of possible outcomes in court from the worst to the best (worst first)?

(b) A range of possible professional out-of-pocket costs if the dispute "goes to court" from worst to best?

(c) A range of best to worst outcomes in relation to delay, publicity, lost opportunity costs, strained business relationships etc.?

19. What other things do you think the facilitator/mediator should know?

### *Diagnosis - Primary and Secondary Conflict*

The writer's experience is that the vast majority of mediations and negotiations are "successful" (in the narrow sense that a long term settlement emerges) due to careful planning, diagnosis and interventions. Some are totally *unsuccessful despite* careful planning, diagnosis and interventions. And some mediations are successful due to total serendipity - negotiations progress in magical and unplanned ways.

Given the anecdotal success of "planned" mediations, it appears to this writer that much turns on the accuracy of initial diagnosis. This trite comment reflects more systematic propositions developed by researchers such as Janet Johnson[17].

Most family property conflicts have primary and secondary causes. The "primary" causes are to do with emotions. These can be analysed by various shifting theories on grief, power, family systems, autism, and enmeshed couples[18]. The secondary causes are more intellectual and cognitive - using Moore's pizza, these may be data or structural causes of conflict[19]. For example, these secondary causes of conflict commonly include:

- inaccurate advice about the range of possible outcomes in court;
- withholding information by one spouse on business, taxation and income records;
- different memories of events during a marriage[20]
- interfering relatives or new families who inflame the dispute in a form of tribal warfare;[21]
- lack of experience and expertise to obtain a range of values for a business;
- vague case-law which thereby provides vague objective guidelines for a range of property percentages.

In the writer's experience, an hypothesis on causes of conflict is essential for "planned" (as compared to serendipity) success. And the key hypothesis usually is about primary, not secondary, causes (though both types of cause will always be present). This is especially so because lawyers as gatekeepers only refer "difficult" cases to mediation. "Difficult" cases are those which do not settle after cognitive,

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17 I. Johnson, D. C. Breunlin, R.C. Schwartz and B. MacKune-Karrer *Transcending the Models of Family Therapy (San* Francisco: Jossey-Bass 1992); C. Moore *The Mediation Process* (San Francisco: Jossey-Bass 1996).K. Kressel, *The Process of Divorce: How Professionals and Couples Negotiate Divorce (New* York: Basic Books, 1985); J.R. Johnston & L.E. Campbell, *Impasses of Divorce* (New York: Macmillan, 1988); J.M. Haynes, *The Fundamentals of Family Mediation* (Albany: State U of NY Press, 1994); J. Folberg, A.L. Milne and P. Salem, *Divorce and Family Mediation* (NY: Guilford, 2004).

18 Ibid Moore at pp 60-61.

19 See P McDonald *Settling Up* supra note 6, chapter 12 on *"His and Her Divorce"*

20 Supra note 2, see the cyclical client-lawyer conversations.

21 J.H. Wade, "Bargaining in the Shadow of the Tribe and Limited Authority to Settle" (2003) 15 *Bond Law Rev.* 115.

rational, persistent, intellectual, educational persuasion about "commercial reality"[22] Mediators are left with difficult "emotional" cases.

A few anecdotal examples of successful hypotheses and interventions are given below together with an example of an unsuccessful hypothesis and intervention.

| **Dispute** | **Mediator Hypothesis on a key "cause" of conflict** | **Successful Intervention** |
|---|---|---|
| A | W could not communicate with H as he was so charming and reasonable; H reinforced her sense of failure as a person. | W agreed to signal mediator whenever she was going to have a tantrum. Mediator called breaks upon the signal being given and W vented privately. |
| B | H could not make a decision. Whenever a settlement loomed, he would retreat to isolation and write long letters re-analysing the marriage. H did not want to cut ties. | Mediator insisted on H's trusted accountant and not-so-trusted but influential father being present. Both excelled at counseling H on figures, and that it was "time" to end it. |
| C | W was overwhelmed by H's slick talking and apparent mastery of figures. She resented what H had done to her life and feared trickery. | Mediator insisted that W's brother, an accountant, be present. Brother and H negotiated well. |
| D | W resented professionals and their advice after years of perceived "abuse" by professionals. | Mediator kept quiet. W proposed settlement which was not based on legal "rights", but on what H could pay. |
| E | W talked uncontrollably and set off a pattern of exasperation in H. She had a storehouse of hurt. | Mediator asked W in private what to do about her overwhelming words. She told him to tell her firmly to "keep quiet". After reality testing her possible loss of face, mediator spoke firmly to her in joint sessions. |
| F | H swore, threatened walkouts, made abusive speeches about the past. | Mediator asked W for her analysis. She advised - "meet before 8am; and ignore his outbursts; he gets worse as the day progresses". It worked! |
| G | W was overconfident of her mathematical abilities. She desperately bent additions to reach a result she wanted which would preserve a fading lifestyle. | Mediator insisted on separate rooms with W's new boyfriend (an accountant) present. He persistently went through the cycle of education. |
| H | W invented facts and law to support her financial claims; W was suspicious of accountant H's ability to manipulate figures. | Lawyers gave structured arguments on each issue. Mediator gave private opinion "ruling" against each of W's arguments; mediator encouraged W to bring her friendly accountant who kept her focused and laughing. |

[22] See Wade, supra note 16 on diagnostic problem solving.

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|---|---|---|
| I | H and his father believed that caravan park business was "theirs" and W just a paid-off employee; conflicting evidence on gifts or loans from father. | Lawyers gave structured arguments; mediator summarized these on whiteboard; W in separate room away from "powerful" H and father; handwritten risk analysis for W to get her across last gap |
| J | W had unrealistic hopes of keeping "dream home". W suspected that real estate agent H had manipulated the value of his business. | Mediator told W that house must be sold; Mediator did aggressive written risk analysis with H about risks for him if the conflict continued. |
| K | Chaotic facts on history of $ contribution to marital assets; both wanted the dream family home in the country. | Mediator drew extensive chart on whiteboard and parties filled in differing figures on $ contribution; mediator acted as auctioneer and auctioned house to highest bidder. |

| **Dispute** | **Mediator Hypothesis** | **Unsuccessful Intervention** |
|---|---|---|
| L | W relied (too) heavily on professional and angry father's advice. "My daughter has been tricked by H who is hiding assets from her". Additionally, the parties' lawyers were personally antagonistic to each other; and the H talked in angry torrents. | Mediator asked W's lawyer to draft 14 key written questions about allegedly "missing" assets and trained H how to answer these questions politely. The antagonistic lawyers agreed to stay away. Result? A total failure as:<br>1. The father wanted revenge; and<br>2. W was not paying her own legal fees; and<br>3. The W did not listen to the H's newly found politeness.<br>(She subsequently went on to court and received two thirds less than the H's offer at the mediation!) Some conflicts need umpires[23] |
| M | Hasty mediation – two wealthy clients engaging in preliminary positional bargaining. Presence of two experienced lawyers would hopefully bring parties into "right" bargaining zone. | Wrong diagnosis and inadequate preparation. H was deeply hurt by his W's affair; H concocted wild figures as he went along (no supporting documents); H's lawyer did not have skill or preparation to advise on good day - bad day outcomes; H's lawyer also good friend of both parties. |

[23] See Wade, supra note 16 on diagnostic problem solving. Also, J.H. Wade, "Don't Waste My Time on Negotiation or Mediation: This Case Needs a Judge. When is Litigation the Right Solution?" (2001) 18 *Mediation Q* 259; D. Luban, "Settlements and the Erosion of the Public Realm" (1995) 83 *Georgetown Law Rev* 2619.

| | | |
|---|---|---|
| N | W had wild expectations of retaining "dream" home; W's relatives were paying her legal costs; W's lawyers not strong enough to tell her good day – bad day outcomes; W not in pain as living in house. | Diagnoses correct! W jammed on her high expectations; and no motivational pain. |
| O | Deep hurt as W had agreed to settlement and then reneged; H violent and wealthy; H was a serial litigant; W has unrealistic hopes of future blissful life; lawyers dislike each other; positional range of offers: 5% - 40% to wife! H still "in love" with W. | Lawyers make presentations on likely "range" of good day – bad day outcomes; W's lawyers have no legal precedents to support "justice" claims; W's lawyers believe own rhetoric; and unable to convey realistic risk analysis to W with high expectations and no power. |

These examples and many others have confirmed for the writer the importance (and perhaps luxury in times of recession justice) of developing a "humble hypothesis about the dispute" before any joint mediation session.

### *One day model of mediation meeting*

One model of timing for a mediation meeting appears to have particular appeal to lawyers. This model was developed by a colleague from Brisbane, Phillip Theobald. Presumably, a number of mediators worldwide have developed a similar pattern.

This arrangement involves the following process:

(1) Discussion over the telephone between the mediator and each of the parties and each of the lawyers about concerns, documents, procedures, why the negotiations are jamming.

(2) By fax and post, the parties exchange summaries, asset charts, chronologies with copies to the mediator, and such other documents as each requests.

(3) Lawyers prepare "good day-bad day" ranges on outcomes and expert's fees for each client and for the mediator and agree to be available on mobile phones for the whole day of the forthcoming mediation.

(4) When (2) and (3) are complete, the mediator meets separately with each party for one hour in the morning on a designated day usually in one of the lawyer's boardrooms.

(5) 11.00am joint meeting begins; lawyers and supporters usually present.

(6) Both parties separately go to lunch at 1pm to consider offers made.

(7) At 2 pm the joint meeting begins again, usually with lawyers present.

(8) If lawyers have "exited", though still accessible on mobile phones, they arrive back at about 4 pm to draw up the agreement. The mediator summarises the day's proceedings in front of all parties; then the parties talk privately with their lawyers; then the parties go for a walk while the lawyers draft the detailed agreement. The parties return, read, amend, and sign the document. (This may not occur until after 8pm.)

The advantages of this model are obvious. It is ritualised and predictable; it minimises billable hours for lawyers; the intensity of negotiations is reduced by regular breaks; it reduces post-settlement recantation; it creates a final agreement by the end of the day; lawyers are in charge of drafting; lawyers are not left with suspicions of what "really happened" during the negotiations; clients have access to expert advice without necessarily having experts sitting in on all the negotiations; the mediator's time and costs are clearly defined; disputants from distant parts of the country can travel, or the mobile mediator can travel, for a single day rendezvous.

The main disadvantages of this model (which can of course be adjusted) are:

(1) The disputants only meet the mediator face to face on one occasion - namely the day of the joint meeting. There are great advantages to early face-to-face meetings by each party with the mediator (eg. trust, familiarity, willingness to telephone, to express concerns, to relax, to feel safe to explore issues of powerlessness, fear or violence).

(2) Often at the morning meetings, one or both parties raise a completely new concern, document or demand. For example, a husband may suddenly produce a fresh valuation; or state that he has not seen the wife's revised list of expenses. This conscious or subconscious tendency to "ambush" the other negotiator with new information then needs to be discussed and options considered. An adjournment of the afternoon joint meeting is a possibility, but often an inflammatory one.

This model is worth adding to the mediator's repertoire for use on the "right" occasion.

### *"Settle now, or Settle later" - an ice breaking chart*

Most of the different process models of mediation and negotiation have common core aims which include creating: a cautiously positive and hopeful environment; clarity (of goals, information, advantages and disadvantages of options); visual images and summaries; a place where people are listened to; and have a sense of personal control.[24] In an attempt to further these aims, the writer has sometimes used the following chart, written on a flip chart, at the beginning of the joint session before the parties give their statements. (On other occasions, it has been used in private sessions.)

[24] See NIDR, *Performance-Based Assessment: A Methodology, for use in Selecting, Training and Evaluating Mediators* (Wisconsin: NIDR, 1995) page 15-16 which identifies five generic types of activity amongst mediators in furtherance of these aims: investigation, empathy, persuasion, invention, distraction.

**Settle now, or Settle later?**

**Possible Benefits of Settling now?**

| | W | H |
|---|---|---|
| 1. Reduction of personal stress | | |
| 2. Reduction of stress on children | | |
| 3. Reduction of stress on others/work associates | | |
| 4. Lost time from employment | | |
| 5. Lost Concentration at Employment | | |
| 6. Life business no longer "on hold" | | |
| 7. Desire to "get on with life" | | |
| 8. Reduction of experts' fees | | |
| 9. Greater degree of control | | |
| 10. Reduce chances of recrimination against experts | | |
| 11. Interest gained on money received sooner | | |
| 12. Avoidance of misunderstandings in correspondence | | |

The use of the chart is preceded by a mediator speech such as "I would like parties to go through an exercise; it has proved helpful in the past; the decision for you is whether you settle now or settle later; very few disputes (3-5% of court filings) actually get an umpire's decision; you should relax because if you don't settle today, you will settle in a year's time at the door of the court; you both need to identify clearly whether there are any benefits to settling sooner rather than later" etc. The mediator then stands and works down the list explaining each item and obtaining a response from each of the disputants. The response is then indicated by a large "Yes" or "No" on the flip chart, or by a ranking of importance by a number between 1 (not important) to 10 (very important). My experience, with one memorable exception, has been that this interchange creates a lot of "yeses" in the room, breaks the ice, and then hangs on the wall as a stark visual reminder of some of the agreed personal and financial risks of late settlement. Naturally, like most communication tools, such a procedure can be overused, or used in the "wrong" cases (as indicated by hypotheses

developed during intake sessions). This kind of **joint** life-goal chart can be converted usefully to confidential **individual** life goal and risk charts.[25]

For example:

| **LIFE GOALS?** | **THIS OFFER??** |
|---|---|
| ➢ To get on with life | ☐ |
| ➢ To open | ☐ |
| ➢ To invest money | ☐ |
| ➢ To stop paying lawyers | ☐ |
| ➢ To stay healthy | ☐ |
| ➢ To minimize contact with "x" | ☐ |
| ➢ To reduce stress on colleagues | ☐ |
| ➢ To take a holiday | ☐ |
| ➢ To focus on my work | ☐ |
| ➢ To avoid becoming bitter | ☐ |
| ➢ To regain "control" of my life | ☐ |
| ➢ To settle "in the range" | ☐ |
| ➢ To reduce risks of paybacks | ☐ |
| ➢ To receive [$540,000] | ☐ |
| ➢ Other?? | ☐ |

Ask the client to work down the list and tick (or check) the boxes if a life goal is achieved by the current offer. Other boxes are marked with a question mark. Standardly, the client decides that more than 90% of his/her life goals are contained in the current offer! This is a visual surprise.[26]

***Standardising issues on the whiteboard***

Conflict in particular areas such as family property or over children tends to raise repetitive questions. The writer's experience is that family property disputes raise only seven questions, and children's disputes only fourteen questions. "Framing" or drafting the right question tends to provide half the answer. Many mediators avoid this difficult drafting task. However, in a model of joint problem solving which

[25] For example charts for risk analysis for clients, see J.H. Wade, "Systematic Risk Analysis for Negotiators and Litigators: But You Never Told Me It Would Be Like This" (2001) 13 *Bond Law Review* 462.

[26] *Ibid* at 481-484.

emphasizes the transition of needs and concerns into question ("issues"), it becomes relatively easy to convert an array of concerns into the seven or fourteen visible questions. The seven property questions are:

1. Is the *list of assets* complete? How can each person be satisfied that the list of assets is substantially complete?

2. What is the range of *values* of each asset?

3. What is the *range of percentages* into which the pool of assets should be divided?

4. Which assets should fall on each *side* of the ledger?

5. With what *timing* should assets be divided?

6. Is the *list of debts* complete and who should pay each debt?

7. Should any *periodic payments* be made? If so, over what period?

The transition of each disputant's statement into reframed concerns and then into questions on the whiteboard becomes predictable. For example:

| | **Disputant Statement** | **Reframed as a Concern** | **Questions on Whiteboard** |
|---|---|---|---|
| 1. | "I don't think he's telling me everything about his assets" | So you're concerned that all the assets may not have been disclosed? | Is the list of assets complete? |
| 2. | "She has the valuer in her pocket - that value is quite unrealistic" | So you don't think that the valuation by Wendy's valuer is either independent or in the ball park? | What is an appropriate range of values for each asset? |
| 3. | "I only want what is fair" | The word "fair" has many meanings. One common need is to receive a share of the assets which is in the range of what a judge would | What is the appropriate range of percentages in this type of marriage? |
| 4. | "I want the grandperson clock - I inherited that from my mother. He can't have | So you would prefer to have that special clock on your side of the ledger. | What assets should fall on each side of the ledger? |
| 5. | "She thinks I'm made of money. There's no way I can suddenly raise that kind of lump sum. The business would collapse" | You're concerned about the timing of any payouts and the negative effect that a single lump sum might have on the business? | On what timing should transfer and payments be made? |
| 6. | "I'm not going to pay those debts! I don't know what she spent the money on – and I've got liabilities of my own" | So you need to identify what debts each of you owe and who should be responsible for the payment of each? | Is the list of debts complete and accurate? Who should pay each debt? |

| | | | |
|---|---|---|---|
| 7. | "He should be paying me maintenance - and he's not paying enough child support. I'm going to have a really difficult time. He's quite irresponsible." | So you would like to discuss what periodic payments should be made for you and the children and for how long they should be made. | What, if any, periodic payments should be made? In the short term? In the long term? |

Basically, every worry, grievance or argument about family property or family maintenance can eventually be "objectified" into one of these seven problem solving questions. The fourteen "standard" children's questions are:

***Time:***

1. How should each child's week be structured?
   How much time should each child spend with his/her Mum and Dad?
   In the short term?
   In the long term?
2. What arrangements should be made for any "special" days?

***Money:***

3. How should financial support for each child be shared?
   In the short term?
   In the long term?

***Children's Lifestyle:***

4. How should children be transported normally from one home to another?
5. With what state of clothing, cleanliness, homework, tiredness and being fed should children move between each parent's house?
6. At present, what special needs, medication, exercise and activities does each child have each week?
7. With which other adults and children should the children associate while with Mum and Dad?

***Communication Channels:***

8. How should children communicate with the absent parent?
9. How should a parent communicate with the absent children?
10. How should parents communicate information or questions relating to the children?
11 As children's needs change, how can these arrangements be reviewed?
12. Is it realistic for the time, money and lifestyle arrangements to be regular and punctual?
13. Can these arrangements have any degree of flexibility? How should this flexibility work?
14. What should each parent do if (s)he thinks the parenting agreement has been broken, or (s)he is upset by the other parent or by a child?

The advantages of knowing the routine problem-solving questions are that every chaotic conversation can be given a structure; disputants can feel "normal" when their

complex interactions is described and visualised as normal; and the mediator can avoid writing inflammatory words on a board. One disadvantage is that the mediator may cease listening and the disputants may feel trivialised if their lives are packaged and summarised too quickly.

### *Conditional Linked Bargaining*

One of the fundamental principles behind interest based bargaining is to attempt to increase the number of issues for discussion. Colloquially, this is known as "expanding the pie" or "increasing the chips on the table". Once there are more issues for discussion, the obvious possibility arises for tradeoffs. In the writer's experience, many lawyers use a style of negotiation which seeks to "get rid of some easy issues" by pushing for quick agreements and just leaving the sticking points on the table. This is sometimes a very effective style of bringing the negotiations to a quick crisis point on the last issue. However, another style of bargaining is often appropriate in family property disputes - this is sometimes known as "conditional linked bargaining". This style seeks to avoid quick unconditional agreements - rather it emphasises that the quick agreements are conditional upon the other issues in the list being decided "satisfactorily" or "appropriately". There is no agreement, until there is total agreement. Thereby both parties are more willing to discuss "what if" possibilities, as they know that they can withdraw any offers without loss of face if subsequent parts of the deal are unsatisfactory.

As mentioned previously, here are the standard seven visualised issues which end up on the whiteboard in many family property disputes.

- Is the list of assets complete?
- What is the range of values for each item?
- What is the range of percentages for division of the pool of assets?
- What specific assets should fall on each side of the ledger?
- On what time schedule should the assets be divided? Is the list of debts accurate?
- How should responsibility for debt repayment be allocated?
- What, if any, periodic payments should be made?

These seven issues can be dealt with one at a time, and progressively "linked" by "what if" hypothetical scenarios constructed by the mediator. The key words in these linkages are "what if", "assuming that", "appropriate" and "reasonable".[27]

For example:

Mediator: "Looking at the first issue on the board, I would like each of you to comment on whether the list of assets is complete".

Jane: "Well it looks okay except that I'm sure Bob owns some more shares in a mining company in Western Australia".

Bob: "I sold those two years ago".

Mediator: "Bob, Jane is obviously concerned about these shares. Could you please elaborate etc... (discussion)

[27] See the amazing reference to these words in William Shakespeare, *As You Like It* (1623) Act V, Scene IV, "Your If is the only peacemaker; much virtue in If".

Mediator: "Jane, you may still have some suspicion that there are more assets than listed. You and your lawyer have to make a strategic choice about how much more time and money to spend going behind the documentation given to you by Bob…..

What if you received an appropriate share of the property in the list - would you be prepared to treat the list as complete?"

Jane: "I'm not happy about it, but my lawyer said I don't have much choice. As long as I receive a fair percentage."

Mediator: "Well, assuming for the moment that the list of assets is complete, let's move on to the second issue on the board - valuations. You have agreed to the valuation figures for eleven items (tick those). For three other assets your lawyers have set out different valuations. Let's start with the house – Bob, can you suggest why these two expert values are so far apart?" (Discussion)

Mediator: "The experts are $300,000 apart on those three items. Let's leave issue two for a moment. We will have to come back to it of course. I'm going to ask you each now to consider issue 3 - percentages.

Jane, what if appropriate valuation figures were reached, what is the range of percentages from best to worst to which you might be entitled according to your legal advisers (spread by at least 10%)".

Jane: "50%-60% in my favour".

Mediator "Bob?"

Bob: "50%-60% in my favour".

Mediator: "So the legal advisers predict a range between 40%-60% with an overlap at 50%?" (diagram on board).

Jane & Bob: "Yes".

Mediator: "Bob, what if the division decided upon was 50/50 and satisfactory results are achieved on the other issues on the board - where would you prefer the valuations to fall?"

Bob: "On my expert's figures, $400,000 for the house; and $800,000 for the business".

Mediator: "Jane, what if you received 50/50 split, and appropriate results to the other issues, would you be prepared to accept valuation figures closer to Bob's experts than your experts?"

Jane: "I might. It depends what happens on the timing and debt questions".

Mediator: "Precisely. We are attempting to gradually link all seven issues but only on the clear understanding that each figure is completely conditional on satisfactory answers to all seven issues".

Mediator: "Jane, what if the assets listed are divided 50/50 on figures close to Bob's valuations, what assets would you like to see on your side of the ledger? - that is, included in your 50%?"

Jane: "Oh, nothing in particular my car, my apartment and the grandfather clock".

Bob: "Not the grandfather clock! You know how special that is to me".

Mediator: "Bob, could you tell me more about this clock etc".

The mediator continues to move slowly through all the issues on the board using these same hypothetical linking methods.

"What if appropriate movement occurred on percentages, what would you prefer in relation to issue 5?" or

"Let's leave the grandfather clock for the moment (we will come back to it). What if satisfactory arrangements were made about the clock, what would you prefer in relation to issue 6?"

Then:

1) The mediator *summarises* the hypothetical framework (with "positive" reference to apparent sticking points eg. "the issues which still need some exploration")

2) Mediator *breaks into private meetings* and develops offers with each party in private, and coaches them how to express the offers. Eg. "If I can keep the grandfather clock until our oldest daughter's 21st birthday, and if the first payment of $100,000 can be made to me within 7 days, then I am prepared to move towards my husband's valuations on the business etc."

***Stonewalling at one End of the Range***

One of the classic roles of a mediator is to encourage disputants to move from extreme positional claims ("I want $200,000" - "my offer is $5,000") to interest based bargaining ("expand the pie") and/or to offers based upon some objective criteria. The latter strategy leads some mediators to insist on each lawyer setting out *in writing* before the mediation, the range of outcomes in court from "good" to "bad"; and the range of expert's fees from "good" to "bad"[28]. These short "advices" are readily given by lawyers experienced in mediation; mediator brinkmanship may be necessary with less experienced lawyers - "The mediation cannot start unless both clients have these advices in their hands and show them to the mediator"; "I want to avoid clients making surprising statements about 'what my lawyer promised me'."

Such objective ranges of outcomes are possible in many conflicts including personal injury, defamation, matrimonial property, breach of contract, insurance and employee dismissal cases. However, one common pattern of negotiation is for the "stronger" party for example, an insurance company - to make a stonewall offer at the bottom of the range and refuse to budge. In many cases, it appears that the weaker or less experienced negotiator will begrudgingly accept the "low" offer. Some mediators systematically pressure or nag at the stronger party in the hope that (s)he will rise above the very bottom of the range.

Inexperienced negotiators are often angry and disappointed with this predictable pattern of negotiations. "I thought mediation was about fairness; this is just blackmail, take it or leave it". Certain insurance companies are known for this predictable style of stonewalling at the bottom of the range in personal injuries conflicts. The writer

[28] Supra discussion at pp 1-2 of this paper.

sees this style of negotiation particularly by males in family property disputes. For example, the range is defined as 60% - 70% in favour of the home making/custodial female (for assets under $500,000); or 60% - 70% in favour of an entrepreneurial male (for assets over $5 million). The male offers 60% or 30% respectively and refuses to budge. Usually the female eventually accepts a figure close to the initial "low" offer.

This pattern of negotiation is often seen as unfair or exploitative by commentators. They refer to the female as the weaker party with the ubiquitous "inequality of bargaining power". Predictably, it is the writer's observation that the dynamics are often far more complex than these simple labels may suggest. No doubt, women may "cave in" because they are exhausted, inexperienced at negotiation games, unable to pay lawyers to continue the games, or do not have the money to tilt an "information imbalance" (eg. about valuation of businesses[29]). By way of contrast, their salary-earning spouse is able to pay lawyers and continue living a reasonable lifestyle. Research is needed on the range of motives for settlements at "low", "mid" or "high" range figures. However, in matrimonial property disputes, women *sometimes* take the low-range figure because:

(1) 65% of marriage separations appear to be initiated by women in Australia[30]. Consequently more women have progressed further down the grieving track than their husbands[31]. The male may have another two years on the emotional roller coaster before he is willing to accept the loss. Accordingly more women want to "get on with their lives" at earlier stages than their husbands. They are willing to pay a financial premium of 5% - 10% to free up capital immediately and "move on".

(2) Arguably, women are often, by nature or nurture, more "relationship oriented" than males. That is, they place a higher value on preserving relationships within a family than upon winning a competition[32]. Paying 5%-10% of an asset pool in an attempt to preserve family goodwill may of course either be interpreted as being a doormat, or as profound long-term wisdom.

(3) Women (or personal injuries' plaintiffs) who take the low range figure may do so with profound insight into the financial and lifestyle benefits of less money now being more value than mid range money later. For example, 60% now is often far better than 65% later as:

    60% can be invested immediately; fewer days are lost from employment while preparing for litigation; disputes with an asset pool of less than $300,000 will eat up 10% of the pool in litigation costs. That is, 60% now is the same as 65% later at the door of the court.

The writer sometimes uses a flip chart at the beginning of a family property mediation, as an icebreaker, but also as a educative tool to try to *clarify* each person's

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29 See McDonald, *Settling Up* supra note 6 at p 211 (wives often felt disadvantaged in the calculation of the value of businesses).

30 P. Jordan, *The Effects of Marital Separation on Men* (Brisbane: Family Court of Australia, 1985)

31 E. Kubler-Ross, *On Death and Dying* (New York: Macmillan, 1969); D. Vaughan, *Uncoupling* (London: Methuen, 1987); C. Ahrons, *The Good Divorce* (Great Britain: Bloomsbury, 1994).

32 See Kressel *supra* note 17; also H. Astor & C. Chinkin, *Dispute Resolution in Australia* (Sydney: Butterworths, 2002) pp 128-133.

respective lifestyle and financial priorities[33]. Some people will readily surrender 5% of assets for strongly held lifestyle values; others (allegedly) place $100 far more highly on their priorities than years of pain for themselves and those around them.

It is essential, in the writer's opinion, that a mediator *clarify the choices* and risks which the allegedly weaker party faces when a stonewall low-range offer is made to him/her and then give space and time for each party to consider those choices and risks. Of course, the best alternative is for the mediator to telephone or interview both parties before the joint session and warn them of routine negotiation patterns with statements such as, "It is normal for one party to offer at the top of the range, and for the other to offer at the bottom of the range. How will you feel *if* and when this normal pattern emerges?"

The disputants' choices at a minimum include:

(1) indicating the intention to make, or actually making, a mid-range counter offer with legal costs consequences attached[34] and requesting a break for the offeree to consider this offer;

(2) leaving the mediation (not a "walk-out") after consulting the mediator and after making a speech about willingness to settle somewhere within the range, not at one end of it;

(3) reverting to negotiation about short term issues (debts, electricity, rates, banking, holidays etc);

(4) weighing up lifestyle priorities in contrast to the possibility of gaining another 5% of the assets, and deciding to accept the "low-range" offer on the table.

These four choices can be expanded into a list of 16 ways of crossing the last gap thereby indicating to both parties that there are many face-saving methods of addressing the stonewall tactic.[35]

Of course, these negotiation strategies and methods are far from infallible.

### *Conclusion*

This paper has set out a number of potential tools for the mediator's tool-box. As reflective practitioners the writer believes that it is a matter of both responsibility and curiosity for mediators to reflect upon their experiences, systematise and share these[36]. Thereby the different cultures of conflict managers can be constantly enriched, and we may learn to tolerate the necessary ambiguities in problem solving techniques and theories.

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33 See "Settle Now, Settle Later" chart *supra* in text at note 24.

34 *Family Law Act* 1975 (Cth) s 117C (one party can make an open offer which if not accepted within the specified reasonable time limit, may lead to a costs order against the person who failed to accept such a reasonable offer).

35 See J. Wade "The Last Gap in Negotiations - Why is it Important? How can it be crossed?" (1995) *6 Aust DRJ* 93.

36 D.A. Kolb, *Learning by Discovery (New* Jersey: Practice-Hall, 1984); C. Menkel-Meadow, "Lawyer Negotiations: Theories and Realities - What We Learn From Mediation" (1993) 56 *Modern L Rev 361.*

**Appendix "A"**

**To:**

Lawyer 1

Lawyer 2

Dear Sir or Madam:

**Re: Bloggs mediation**

I now enclose a copy of documents relating to a possible mediation. These include a mediation contract, costs information, request for chronology and concerns. Would you please request each of your clients to compile and sign these documents and return them by mail to me. It may take them each some time to write the chronology of the relationship.

Could you please ensure that each of your clients have *in writing* from you:

a) A one page table of assets and debts with columns of differing or agreed values;

b) A range of predicted property outcomes in court *in percentages* on a good day and on a bad day.

c) A range of your client's predicted legal accountancy and valuation costs, best to worst, if the dispute proceeded to a defended hearing.

Document (a) - the tables of assets and valuations - is **not** confidential. Documents (b) and (c) are for confidential discussion with me - though many clients immediately or eventually decide to share these documents.

If possible, a copy of documents (a) should be sent to me and documents (b) and (c) should be given to your clients within say the next two weeks. The mediation cannot proceed without this information.

Please advise me of your client's telephone numbers. They should also feel free to telephone me at (07) 5521 2223. I will return calls in the evening if convenient.

Please send me copies of any documents which you think will help me to understand the background and issues.

**To Summarise:**

1. Once I have received the summary chart of assets, liabilities and alternative valuations and your client's 'phone numbers (document (a))
2. I will contact each of your clients by telephone individually, and may decide to meet each individually.
3. If both are comfortable (and all summary documents are accessible), we will go ahead and schedule a joint meeting, which is currently scheduled for Friday, 26 November (at a place to be agreed between us all).

Feel free to telephone to clarify this process or to discuss any concerns.
Yours sincerely,

**Mediator**

P.S. Please confirm by email that each of you are holding $1500 on account for mediation expenses.

**INFORMATION FOR LEGAL PRACTITIONERS AND ACCOUNTANTS ABOUT MEDIATION**

1. ☐ Phone the mediator and encourage the client to telephone the mediator at any time to ask questions or express concerns.

2. ☐ Explain what is a common mediation procedure in order to reduce client anxiety (see attached information sheet).

3. ☐ Show your client a video of a mediation.

4. ☐ Be very careful to use neutral language in any correspondence leading up to the mediation.

5. ☐ Do help your client write out confidentially;
(a) a list of goals and concerns;
(b) which goals or concerns are priorities.

6. ☐ Do not encourage your client to fix rigidly upon a single result. There are always ranges, alternatives and a variety of packaged options.

7. ☐ Do not tell your client to "go along and see what happens"; or "go along and say little/nothing".

8. ☐ Set out in writing for your client what in your current opinion:

   a) is the range of possible results in court, from best to worst (in property disputes, use a range of % separated by 15%);

   (b) is the range of possible legal costs from best to worst in a litigated result.

   The client and the mediator **MUST** have this document in their hands at the mediation and be able to discuss these ranges confidentially with the mediator, or if (s)he chooses, openly. (Clients often have misconceptions about 8(a) and 8(b).

9. ☐ You have a far more thorough understanding of the historical facts of your client and the communication dynamics than the mediator will ever have. The mediator is likely to ask you some of the following questions over the telephone. Please volunteer your insights which invariably help to save time and money.

10. ☐ In property disputes, a standard neutral summary of:

| ASSETS | WIFE'S VALUE | HUSBAND'S VALUE |
|---|---|---|
| **1.** | | |
| **2.** | | |
| **3.** | | |
| **DEBTS** | | |
| **1.** | | |
| **2.** | | |
| **3.** | | |

is always very helpful to minimize data chaos.

11. ☐ Mediation is a client's negotiation. Lawyers will be seated "strategically" at the joint sessions. The mediator will consult with you beforehand concerning when and how you think lawyers should contribute. The mediator values your suggestions on how to organize or change meeting procedures.

12. ☐ Fees. As mediation expenses are usually shared equally, collect a cheque from the client for one half of the estimated expenses before the first joint session.

## AN EXAMPLE OF A COMMON MEDIATION PROCESS

- Someone telephones the mediator and asks for information (eg. about time, costs, bias).
- The mediator talks for a short time, particularly about how the possibility of mediation might be raised tactfully with other disputants.
- The mediator sends out information sheets, contract and forms for completion to specified addresses.
- Each disputant and/or lawyer telephones the mediator again and asks more questions; returns contract and forms.
- The mediator requests permission from lawyers to speak directly to their clients.
- Clients telephone mediator direct and arrange to meet mediator individually.
- **Individual confidential meetings** with each disputant (usually without lawyers though lawyers are welcome to attend), when questions are asked, suitability of mediation considered; dates; need for further documentation; or facts.
- Mediator reports back by telephone to lawyers about individual meeting; further documents needed; planned joint meeting.
- Joint meeting in evening, or day at suitable neutral venue; either with or without lawyers and accountants present. Possible results:

| 1. Disputants return to lawyers with signed "without prejudice" heads of agreements in handwriting OR | 2. Lawyers draft final contract of settlement immediately at the joint session. (MOST COMMON OUTCOME) OR | 3. Mediator immediately drafts a single confidential report sent to both parties describing unresolved issues, and possible alternatives for the future. |
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Mediator telephones to check with disputants and lawyers concerning any stumbling blocks to converting a "without prejudice" agreement into refined and final consent orders or contract.

# Bonding to Bond

If you have any suggestions about this newsletter; *OR* if you or your colleagues would like to be included on, or excluded from receiving this occasional newsletter, **please send us a message** with your email address to:

**Email: drc@bond.edu.au**
**Fax: +61 7 5595 2036**
**Phone: +61 7 5595 2039**
**Dispute Resolution Centre**
**School of Law**
**BOND UNIVERSITY Q 4229**
**AUSTRALIA**

## BACK-ISSUES OF BOND DISPUTE RESOLUTION NEWSLETTER

These are available from our website, namely – http://www.bond.edu.au/law/centres/drc/newsletter.htm and can be read or printed down from there.

**J H WADE**
**Director**
**Bond University Dispute Resolution Centre**