



# BOND DISPUTE RESOLUTION NEWS

V o l u m e 4 . A p r i l 2 0 0 0

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## New Book

### Representing Clients at Mediation and Negotiation

By J H Wade (April, 2000, 285pp)

As mediators, members of the Bond Dispute Resolution Centre go through agony and ecstasy when “representatives” attend at their mediations. Often these representatives are lawyers.

Sometimes the representatives demonstrate great skill; other times they do not. These repeated experiences led us to develop a course for representatives at mediation and negotiation.

This book, finished this month, reflects the shape of the course. It is filled with information and exercises and checklists for those who regularly attend mediations and negotiations.

An extract is set out below; followed by an order form if you would like to purchase a copy!!

#### ***4.28 Catalogue of Representatives' Roles at Mediation and Negotiation Meetings***

To repeat, there are many possible roles for representatives (and clients) at the actual mediation meetings. Which roles are chosen or stumbled upon depends upon many variables including time available; money available; the type of mediation process chosen; the habits of the mediator and all parties present; the knowledge, skills and flexibility of the mediator and of all parties present.

It will require many systematic research projects: (1) to create some useful categories or taxonomies of roles of representatives; (2) to predict which representative roles are more likely to be helpful in which kinds of conflicts.

This research is essential so that theory can inform practice. At the moment, practitioners do the best we can based upon anecdotes about what apparently “worked” or “did not work”.

Here are some stereotypically observed roles of (mainly legal) representatives at mediation. Obviously, no-one perfectly fits any stereotype, and various hybrids exist.

At the end of this section, you will be asked from your experience, to try to add at least *two* new or hybrid categories of representatives to this list.

- Gracious Host
- Kindly Enemy
- Absent Coach
- Point scorer-sniper
- Grandstander
- Control Freak
- One-way listener
- Passive observer
- Uncommitted Procrastinator
- Sceptical Critic
- Bad Cop
- Polite Advocate
- Cross examiner: note taker
- Strategic Intervenor





**Absent Coach**

The absent coach is the (lawyer) representative who consciously decides to create some degree of distance between himself/herself and the actual mediation meeting. In some places, this is becoming a culturally common role for lawyers, even where the dispute involves large amounts of money. In the preparation stage with the mediator, one or both of the lawyers makes a process suggestion to the mediator such as:

- “I think that we as (legal) representatives have become part of the problem; I’d prefer to stay away from the actual mediation meeting.”
- “There are a lot of bad vibes between the lawyers which are getting in the way.”
- “My client is a capable communicator, has been to several mediations before, and she has also read books and watched videos on various mediation processes.”
- “I will always be available on my mobile phone.”
- “I have prepared a statement of problem-solving issues as we see them; and also done a risk analysis for my client.”
- “We have got into the habit of staying away unless there are some special complications.”
- “We will come around to hear about the agreement, and then to draft its terms as soon as a settlement is reached.”
- “I would like to attend the mediation for just the first hour and make a statement on how I see the legal issues and risks.”
- (To the mediator) “I think it would be worthwhile for you to go for a walk with the clients by themselves. If both are agreeable, we will wait here.”

For what kinds of conflicts do you want a representative who is the “absent coach”? What are your goals with such behaviours?

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Set out at least 3 possible responses if the representative, or client for the “opposition” appears to fit the above description.

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**Point Scorer-Sniper**

The role of point scorer-sniper as representative, appears particularly among lawyers who spend a lot of time in a courtroom. It is a form of reactive advocacy.

The sniper, consciously or habitually, attempts to undermine any statement made by the opposition. (S)he is fast thinking and speaking.

- “What you just said is not consistent with.....”
- “That principle is outdated.....”
- “You seem to be changing your story.....”
- “I have a document/video/audio tape which suggests quite the contrary.....”

(S)he attempts to create doubt in the room by a persistent barrage of short comments and ambushes; and also attempts to keep the opposition constantly “on the back foot”.

Occasionally, an habitual point-scorer-sniper uses this strategy as a smokescreen for lack of preparation, laziness or cutting costs of preparation.

For what kinds of conflicts do you want a representative who is the “point scorer-sniper”? What are your goals with such behaviours?

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Set out at least 3 possible responses if the representative, or client for the “opposition” appears to fit the above description.

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**Grandstander**

The grandstanding representative is a close cousin to the point scorer-sniper. (S)he makes lengthy speeches about the merits of the client’s position, the client’s determination not to go below the ubiquitous “bottom line”, and about the flaws in character and arguments of the “opposition”.

However, the grandstander pontificates in advocacy fashion for the following dominant set of rarely articulated motives:

1. “I am being paid a lot of money to be here, and I need to justify my fees.”
2. “My client has an entrenched expectation that (legal) representatives should be aggressive bulldogs. I must fulfil that expectation in order to preserve my reputation, get paid and avoid any blame for the inevitably disappointing settlement which is about to follow.”
3. “I must stay in the role of aggressive advocate so that if a settlement does not eventuate, I have consistently been seen as an aggressive doubt-creator.”
4. “The client still believes that the mediator is a decision-maker and my job is to convince the mediator in a court-room style of presentation.”

Experienced mediators are acutely aware of the interests of representatives (as compared to interests of the clients) and that some leeway is necessary for limited pantomime and pontification.

<p>For what kinds of conflicts do you want a representative who is the “grandstander”? What are your goals with such behaviours?</p> <p>.....</p> <p>.....</p> <p>.....</p> <p>.....</p> <p>.....</p> <p>.....</p> <p>.....</p> <p>Set out at least 3 possible responses if the representative, or client for the “opposition” appears to fit the above description.</p> <p>1. ....</p> <p>.....</p> <p>2. ....</p> <p>.....</p> <p>3. ....</p> <p>.....</p>
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**One way Listener**

A close relative of the “control freak”, is the one-way listener. This representative usually begins the mediation or negotiation with a statement like:

- “I’ve come here to listen.”
- “I didn’t call this meeting, but I willingly came here to hear what you’ve got to say.”
- “I’m open to hear any offers you want to make.”

This role recycles a traditional positional bargaining style of “never-make-the first-offer-and-halve-or-double-whatever-they-say”. It avoids making any disclosures of information, avoids preparation and expense, and has a whiff of self-righteousness to mask predictable stonewalling.

This one-way listening role also has a self-fulfilling prophecy. The party who eventually speaks is prompted by the routine to make an extreme offer which proves to the “listening” representative and client that the offeror is (as predicted) unreasonable, greedy or out-of-control. Alternatively, the party who speaks in desperation may make a dangerous reasonable offer without having obtained any concession or movement from the smug “listener”.

<p>For what kinds of conflicts do you want a representative who is a “one way listener”? What are your goals with such behaviours?</p> <p>.....</p> <p>.....</p>
<p>.....</p> <p>.....</p> <p>.....</p>
<p>.....</p> <p>Set out at least 3 possible responses if the representative, or client for the “opposition” appears to fit the above description.</p> <p>1. ....</p> <p>.....</p> <p>2. ....</p> <p>.....</p> <p>3. ....</p> <p>.....</p>

**The Disorganised Loafer**

The disorganised loafer is also a close cousin to the one-way listener. (S)he is a representative who by habit is lazy in his/her preparation. The alleged shifting facts and evidence are not summarised into neat one-page charts; rather there is vast documentation, generalisation and paper shifting. Nor are possible ranges of outcomes reduced to single sentences; rather extreme figures plucked from the air and recited as starting and finishing points. Nor is the range of outcomes explained by precedent and/or mathematics; rather by the inflammatory self righteous rhetoric of “justice”, “rights” and “reasonableness”. The disorganised loafer vaguely hopes for a quick “commercial” settlement based on chaotic information. If a quick settlement does not eventuate, someone else can work on detail of alleged facts, evidence and objective criteria later.

For what kinds of conflicts do you want a representative who is a “disorganised loafer”? What are your goals with such behaviours?

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Set out at least 3 possible responses if the representative, or client for the “opposition” appears to fit the above description.

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**Polite Advocate**

As foreshadowed in the previous bad-cop role, a “polite advocate” representative is one who uses modified language to emphasise the alleged strengths of his/her client’s position, and the alleged weaknesses of the position taken by the “opposition”.

One model of the polite advocate avoids interruption (eg. “Could I have the opportunity later to make some comments? Thank you.”); separates hostility from personality (eg. “If I put on my courtroom hat, I would make three responses.”; “As you know, I have a responsibility to advise my client on the strengths and weaknesses of her situation....”); is a careful listener (“In response to each of the six issues raised by Bill, I would like to make brief comments; first...”; “Could you repeat X, I’m not sure I have understood...”); quickly acknowledges any area of agreement, and is willing to identify weaknesses in his/her own arguments (“I readily concede that you will have responses to our first two arguments; and that we will both have difficulty establishing exactly what happened that day at the mill.”).

The roles of bad-cop ranging right through to polite advocate, can all be effective, or totally ineffective in achieving the goal of a settlement, or a mutually satisfactory settlement.

For representatives, it is essential that they have at least one version of the “bad-cop” ranging through to “polite advocate” routine prepared in their repertoires. It remains a difficult diagnostic question of when and how to play that role.

<p>For what kinds of conflicts do you want a representative who is a “polite advocate”? What are your goals with such behaviours?</p> <p>.....</p> <p>.....</p> <p>.....</p>
<p>Set out at least 3 possible responses if the representative, or client for the “opposition” appears to fit the above description.</p> <p>1. ....</p> <p>.....</p> <p>2. ....</p> <p>.....</p> <p>3. ....</p> <p>.....</p>

**Cross-examiner: note-taker**

The representative who is a cross-examiner and note-taker exhibits some or all of the following behaviours.

(S)he writes furiously whenever the client members of the “opposition” are talking; asks clarifying questions (“Could you elaborate upon that please?”; “I’d like to know more about...?”); asks questions which are particularly about facts and evidence (“How much profit do you say was lost last year?” “How would you prove that?” “For how many minutes did that particular machine stop working?” etc.); and particularly asks probing or challenging questions designed to establish inconsistency (“How can you say that when your previous evidence....?”; “Are you changing your mind about...?”; “I have a document here which says...., how do you explain this apparent inconsistency?”, etc.).

The cross-examiner:note-taker representative may be behaving in his manner for many reasons including:

- habit
- knows no other communication skills when relating to perceived “opposition”
- is trying to clarify any doubts for his/her client in relation to alleged facts, evidence and credibility so that (s)he can be given a more realistic risk analysis
- has no intention of settling anything today, but is using the meeting to prepare for future litigious sorties by gaining insight into the inconsistencies in alleged facts and evidence, and weaknesses in emotion, finances or demeanour (sometimes labelled as a “fishing” expedition).

As a mediator, I have sometimes held separate meetings with lawyer representatives and asked them to switch out of their cross-examining roles, as I perceived these to be unhelpful. With few exceptions, the lawyers have been skilled at switching to another style which, as mediator, I suggested would be more productive.

For what kinds of conflicts do you want a representative who is a “cross-examiner:note-taker”? What are your goals with such behaviours?

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Set out at least 3 possible responses if the representative, or client for the "opposition" appears to fit the above description.

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**Strategic Intervenor**

The representative as "strategic intervenor" is most obviously acting as a quasi-mediator. (S)he is both reflecting and anticipating the process interventions of the mediator.

Thus the strategic intervenor representative will exhibit some of the following behaviours:

- approaches the mediator before a joint session and asks "If I see something that might help the process, is it appropriate if I mention it to you?" (tactfully negotiating "control" and ego minefields)
- asks for a break to talk to clients
- reframes toxic attacks; rambling speeches; interests behind quick solutions
- expands solutions into a series of problem-solving questions
- asks permission to interrupt
- summarises arguments and offers pithily
- diverts ramblers back to basic questions
- asks "what if...?" questions
- suggests to the mediator, publicly or privately, changes to process (eg. more or less client talk; moving to new questions when stuck; more or less representative talk; more or less mediator opinion/talk/process direction).

This writer as mediator works with an increasing number of lawyer representatives who strike a balance between acting as very skilful "strategic intervenors", polite advocates and passive listeners.



Type Name -
Description

For your information set out below is the table of contents of -

## **Representing Clients at Mediation and Negotiation**

**By J H Wade (April, 2000, 285pp)**

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## Recent Activities of Bond University Dispute Resolution Staff

### **General Workshops**

3-5 December 1999	Basic Mediation Course led by Profs Boulle, Cavanagh & Wade
2-4 March 2000	Basic Mediation Course and Foundation Family Mediation Course, run in conjunction with AIFLAM led by Profs Boulle, Cavanagh & Wade

#### **LAURENCE BOULLE**

(1) In his capacity as Chairman of NADRAC (National ADR Advisory Committee) has prepared a Discussion Paper *The Development of Standards for ADR*.

The paper is available on the NADRAC website – [www.nadrac.gov.au](http://www.nadrac.gov.au)

(2) Is delivering a keynote address on *Standards for ADR* at the 5<sup>th</sup> National Mediation Conference in Brisbane 17-19 May 2000.

#### **PAT CAVANAGH**

Pat has been very busy:

(1) Presenting workshops on “10 Common Mistakes of Commercial Negotiators and How to Avoid Them” at a variety of venues around Australia.

(2) Acting as mediator for a variety of disputes about estates, contracts and franchises.

#### **JOHN WADE**

(1) From January-April 2000 has completed a course book on *Representing Clients in Mediation and Negotiation*. (See Extract and Table of Contents earlier in Newsletter.)

(2) Has written a paper on “Arbitration in Matrimonial Property Disputes” – which is a hot topic in Australia due to impending amendments to the Australian *Family Law Act*.

(3) Will be teaching a variety of mediation and advanced mediation courses:

- 22-24 May: Advanced Mediation – Southern Methodist University, Texas
- 1 June: Arbitration – AFCC Conference, New Orleans
- 5-15 June: Mediation – Vermont Law School
- 26-30 June: Mediation – Pepperdine Law School
- 13-15 July: Mediation for Judges, Pensacola, Alabama
- 21 July: Advanced Mediation Skills, London UK

**BOBETTE WOLSKI**

In April, Bobette was awarded the Butterworths Prize for teaching excellence in 1999 at Bond Law School.

## Forthcoming Courses

### Bond Courses

4, 5-7 May	Melbourne	Short Course 1+3 days	Negotiation+ Basic Mediation Court in conjunction with Victorian Bar Association	Wade, Cavanagh & Boule
14-15 May	Brisbane	Short Course 2 days	Representing Clients at Mediation and Negotiation	Wade, Cavanagh & Boule
29 May-1 June	Bond University	Workshop 4 day	Analytic Interviewing *	USA presenters Newberry, Frank, Voznik & Stubbs
5-8 June	Bond University	Workshop 4 day	Analytic Interviewing *	USA presenters Newberry, Frank, Voznik & Stubbs
1-3 July	Sydney	Short Course 3 day	Basic Mediation Course and Foundation Family Mediation Course, run in conjunction with AIFLAM	Cavanagh
4-6 August	Bond University	Short Course 3 day	Basic Mediation Court and Foundation Family Mediation Course , run in conjunction with AIFLAM	Wade, Cavanagh & Boule
24-27 August	Sheraton, Noosa, Queensland	Short Course 4 day	Advanced Mediator Skills and Techniques, run in conjunction with AIFLAM	Wade, Cavanagh & Boule
8-9 September	Bond University	Short Course 2 day	Representing Clients at Mediation and Negotiation	Wade, Cavanagh & Boule

\* **The Centre for Applied Psychology and Criminology**, Bond University, Gold Coast Queensland Australia is pleased to present, *Analytic Interviewing*, a well known interviewing course developed in the USA.

#### What is Analytic Interviewing?

- AI is an interviewing technique taught at the Bureau of Alcohol Tobacco and Firearms Academy located at the Federal Law Enforcement Training Centre (FLETC) in Georgia, USA and a range of other centres. It is one of the most highly recognised and sought after courses among American law enforcement agencies.
- AI is an analytical approach to interviewing and interrogation. It uses a combination of methodologies including verbal cuing, deception detection, memory enhancement and non-verbal communication.

What are the benefits of Analytic Interviewing?

- detecting deception
- gathering the right, specific information
- motivating the individual to tell the truth
- enabling individuals to communicate with others
- allowing interviewers to understand human information processing

What are the aims of the Analytic Interviewing training course?

- to provide information to participants about an effective, unique and groundbreaking interviewing technique, incorporating research from world renowned human deception and non-verbal communication expert, Dr Paul Ekman
- to familiarise participants with the principles and practices of Analytic Interviewing, ultimately enabling the individual to enhance their abilities and successes during interviews and/or interrogations

Who will benefit from the Analytic Interviewing training course?

Interviewing, or purposive conversations, are common in most fields of human endeavour and this training course is designed for:

- law enforcement agents
- intelligence agents
- other government agents
- lawyers and para legal staff
- managers
- human resource personnel
- investigators
- counsellors
- academics
- journalists

Registration Details

Registration is \$750.00 for the 4 day course; \$600.00 for Bond students; \$600.00 for three or more participants from the same organisation. It includes all training sessions, morning and afternoon teas as well as a copy of the detailed training manual.

Please contact Robyn Lincoln or Wayne Petherick, Criminology, School of Humanities and Social Sciences, Bond University, Gold Coast Qld, 4229; Phone (07) 5595 2659 or (07) 5595 2672 or email [rlincoln@bond.edu.au](mailto:rlincoln@bond.edu.au).

The July Basic Mediation course is being held in Sydney and piggybacks with The 9<sup>th</sup> National Family Law Conference being held at the Westin Hotel, Sydney.

**Please phone: +61 7 5595 2039 to request registration forms from The Administrator, Bond University Dispute Resolution Centre, School of Law, Bond University Q 4229; fax: +61 7 5595 2036; email: [drc@bond.edu.au](mailto:drc@bond.edu.au)**

### **Melbourne Workshops**

Members of the Dispute Resolution Centre have been invited by the Leo Cussen Institute in Melbourne to run 4 evening workshops on *Advanced Negotiation Techniques*

<b>Date</b>	<b>Topic</b>	<b>Speaker</b>
Monday 8 May	<i>The 10 Most Common Mistakes of Commercial Negotiators and How to Avoid Them</i>	Prof Pat Cavanagh
Thursday 15 June	<i>Sino – Western Negotiating Styles – 10 Traps to Avoid</i>	Prof Bee Chen Goh
Thursday 13 July	<i>“Is that allowed?” Ethics in Negotiation</i>	Prof Pat Cavanagh
Thursday 17 August	<i>How to Cross the Last Gap in Negotiations – 16 Strategies</i>	Prof John Wade

Contact Leo Cussen to register. Phone 03 96023111

Email: [drooney@leocussen.vic.edu.au](mailto:drooney@leocussen.vic.edu.au) – Fax: 03 9670 3242

### **Breakfast Seminars**

Members of the Dispute Resolution Centre are also conducting breakfast seminars with the Queensland Law Society

<b>Seminar</b>	<b>Topic</b>	<b>Lecturer</b>	<b>Date</b>
4	“Don’t waste my Time on Negotiation or Mediation, this Case needs a Judge”: When is Litigation the Right Solution?	Professor John Wade	Brisbane Wednesday 17 May
5	“You can’t do that!” – Ethics in Negotiation	Professor Pat Cavanagh	Brisbane Wednesday 21 June

**Venue:** Brisbane: *The Brisbane Club* Edinburgh Room, Lvl 4, 241 Adelaide Street.

For further information phone (07) 3842 5822 or (07) 3842 5905.

## **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 e.mail address to:

**Email:** [DRC@bond.edu.au](mailto: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 will be transferred to 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**