

2013

Good Practice Guide (Bachelor of Laws)

**APPROPRIATE RESPONSES TO LEGAL
ISSUES: ADR**

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Introduction

This Good Practice Guide was commissioned by the Law Associate Deans Network to support the implementation of Threshold Learning Outcome 3(b): Thinking Skills.

The Threshold Learning Outcomes (TLOs) for the Bachelor of Laws were developed in 2010 as part of the Learning and Teaching Academic Standards (LTAS) Project, led by Professors Sally Kift and Mark Israel.¹ TLO 3: Thinking Skills is one of the six TLOs developed for the Bachelor of Laws. All six TLOs are:

TLO 1: Knowledge

TLO 2: Ethics and professional responsibility

TLO 3: Thinking skills

TLO 4: Research skills

TLO 5: Communication and collaboration

TLO 6: Self-management

The TLOs were developed having reference to national and international statements on the competencies, skills and knowledge that graduates of a degree in law should have, as well as to the emerging descriptors of the Australian Qualifications Framework (AQF) for Bachelor Degrees (Level 7) and Bachelor Honours Degrees (Level 8).²

TLO 3(b): Thinking Skills

Graduates of the Bachelor of Laws will be able to:

(a) identify and articulate legal issues,

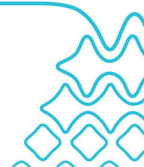
(b) apply legal reasoning and research to generate appropriate responses to legal issues,

(c) engage in critical analysis and make a reasoned choice amongst alternatives, and

(d) think creatively in approaching legal issues and generating appropriate responses.

TLO 3(b) is situated within the context of ‘thinking skills’, identified as one of two broad categories of relevant skills that ought to be developed during the course of a first degree in law. Articulating appropriate responses to legal issues requires students to think creatively in approaching legal tasks, including the capacity to think about characteristically legal issues in non-traditional legal terms. The expression ‘legal reasoning’ normally refers to the abstract, deductive and syllogistic reasoning associated with the case-method that continues to dominate the law school curriculum (Carnegie, 2007; James 2011; James and Field, 2013; Devonshire and Brailsford, 2012), and which tends to frame professional identities in terms of a ‘litigious epistemology’ (MacFarlane, 2008).

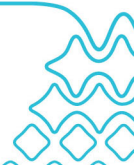
¹ Sally Kift, Mark Israel and Rachael Field, Learning and Teaching Academic Standards Project: Bachelor of Laws Learning & Teaching Academic Standards Statement December 2010, Australian Learning & Teaching Council (December 2010) http://www.altc.edu.au/system/files/altc_standards_LAW_110211.pdf.



This Good Practice Guide supports development of curriculum focussing on 'appropriate responses to legal issues' through use of alternative dispute resolution ('ADR'). It will summarize the key features of ADR through a review of the literature and highlight the nature of 'thinking skills' required by the contemporary law graduate. The discussion identifies some of the weaknesses with traditional legal education and the dominant negotiation and mediation narratives, pointing in particular to a lack of consideration of cultural factors and a tendency to rely on reified and decontextualized theories. Finally, it will discuss some of the key features of a model of reflective practice and the implications of grounding a conception of skills 'training' on an experiential or practice-based epistemology.

Author

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Part 1: Literature review

Alternative or Appropriate Dispute Resolution or ADR refers to a number of processes by which disputes are dealt with outside the traditional model of litigation or adjudication.³ It refers to both private and, increasingly, court-annexed dispute resolution options. The most common forms of ADR are negotiation, mediation and arbitration. The literature is extensive, but the following is illustrative of key texts and approaches.

Nadia Alexander and Jill Howieson, *Negotiation: Strategy, Styles, Skills* (2nd ed, LexisNexis, 2010)

This is an accessible and very helpful introductory student text which sets out in a clear manner the two key approaches to negotiation:

- Positional bargaining typical of adversarialism or rights-based disputing. This is essentially a zero-sum model in which the parties seek to claim as much value as possible from a finite resource: the disputants stake out their positions in their initial pleadings, with the balance of the process to trial being oriented to winning at all costs within the limits imposed by the rules of civil procedure and professional practice. While this type of negotiation has been undermined by the emergence of judicial strategies (typically at the behest of some legislative requirement) that seek to wrest control of pre-trial activities from the parties, it remains a core feature of the 'lawyer's philosophical map'.⁴
- Integrative or distributive negotiation is based on the idea that positions are proxies for underlying interests, whether personal or professional, and the goal of conflict resolution should be to uncover the underlying interests, particularly those that the parties share in order to move them from an antagonistic to a productive response to their disagreement.

The text does a good job of framing distributive principles within a wider pedagogical content of constructivist learning principles, but as with all the texts mentioned in this review other than the Frenkel and Stark text, it imposes on the instructor the obligation of finding her own role-plays, especially those that illustrate core process principles and values in the form of videos.

Jill Waterhouse et al, *Negotiating in the Business Environment: Theory and Practice for all Governance Styles* (Tilde University Press, 2011)

This is a useful text in introducing students to three core practice areas and makes the obvious point that the sort of skills appropriate to one context might undermine one's efficacy in securing one's goals in another. The text is organized around a discussion of negotiating in the context of:

- Bureaucracies or heavily rule-governed and hierarchical institutions. The style appropriate here resonates with traditional conceptions of professional legal identities with the lawyer as expert, and the relationship with client being framed

³ This point requires a caveat that is reflected in terms of the increasing use of ADR methods as an integral component of state sanctioned disputing activities: court-sanctioned, typically acting under the auspices of a statutory instrument. For a discussion of the relationship between civil procedure and ADR: Colbran (2012)

⁴ L Riskin, 'Mediation and Lawyers,' (1982) 43 *Ohio State Law Journal* 29



in terms of command/control, with the lawyer drawing on a body of codified knowledge. This is the model on which legal education is based;

- Markets or contractual relationships implicate the sort of ideas inherent in rational and goal-oriented behaviour characteristic of distributive or zero-sum forms of bargaining. The traditional conception of the ethical practitioner, zealously pursuing her client's legal entitlements at all costs, regardless of the consequences for the other side, appears to incorporate some of the ideas identified in this part of the text;
- Networks emphasise the importance of relationship-building and reflect a number of significant changes in business practices, especially in the outsourcing of activities and therefore the need to develop closer links with different actors. The idea here underscores the importance of collaboration as a core business practice, and gestures in the direction of integrative and participatory forms of negotiation at odds with the bargaining characteristic of adjudication.

The text also contains a useful introductory discussion on the role of technology in shaping negotiation. For a more detailed discussion on this topic and Online Dispute Resolution in general: Macfarlane (2011, chapter 4) and Wahab et al (eds) (2012).

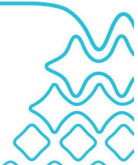
Boullé, L, and Alexander, N, *Mediation: Skills and Techniques* (2nd ed, LexisNexis, 2012)

This is a helpful student text and sets out in clear and accessible language the fundamental skills and techniques required of an individual practising mediation in Australia; that is, it frames its discussion within the wider context of standards governing mediation practice set by the National Alternative Dispute Resolution Advisory Council ('NADRAC'). It covers much the same ground as the Frenkel and Stark text, identifying key communication skills and providing some useful checklists, mediation agreement and other mediator forms. It suffers from the same problem as the Alexander and Howieson's text; to wit, the lack of any role-plays. This problem is alleviated to a certain extent by two valuable DVDs produced by Bond University:

1. Dispute Resolution Centre, *Negotiation Process and Skills – The Bounty* (Bond University, 2006)

This role play provides contrasting approaches to representative negotiation (ie where lawyers are involved in representing the parties, the significance of which is discussed in Hanycz, 2008): evaluative and facilitative, or positional and interest-based. It is useful in demonstrating the impact of different negotiation styles on affecting disputant perception of the process and the extent to which negotiators are apt to accomplish their objectives.

It also points to the role of different expectations of the parties and illustrates, to a degree, the impact of cultural factors in shaping the role of conflict resolution. We often tend to think of culture in terms of different ethnic groups or races, and also tend to stereotype: we expect members of different groups to behave in conformity with our view of a given group. This is problematic in a number of ways, not least is the fact that culture is much more nuanced than this generalized categories would suggest: geography and institutional behaviour can also play a significant role.



2. Dispute Resolution Centre, *Fletcher's Partnership Dispute* (Bond University, 2004)

This is set against the back of a partnership dispute in a small accounting firm and the sort of expectations different disputants organize their understanding/s of the other. It demonstrates the model that Boulle and Alexander (2012) set out in their text, and is particularly helpful in illustrating the role of the mediator in diffusing tensions between the parties, and in framing a constructive response to their dispute once he has elicited, by way of effective and empathetic interviewing skills, their fundamental interests, as well as the ones that they share in common.

There are a number of other useful sources for role plays, and those are cited in the bibliography.

D.N Frenkel and J H Stark, *The Practice of Mediation: A Video-Integrated Text* (2nd ed, Walters Kluwer, 2012)

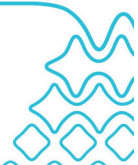
Sets out in a clear and systematic manner the basic features of the facilitative model of mediation, and the principled or interests-based approach to negotiation on which this model of mediation depends.⁵ The text is organized around the role of mediation as an interview, a problem-framing and solving process, thereby encouraging students to develop a number of key communicative skills, including the important one of fact gathering.

Legal education tends to offer few opportunities for developing this fundamental practical skill, focusing instead on a conception of facts as framed within the context of legal narratives; ie in order to support a cause of action in civil litigation or an element to be proven in the context of criminal proceeding. The notion of IRAC as an organizing framework developed at the start of the degree leads students to the view that facts are somehow simply given and thus ignores the central gatekeeping function of lawyers, at the point of initial contact with a client, who typically has only a vague idea of what she needs.

Eliciting factual information does not occur within a vacuum; rather, they are constituted within particular narratives, and those discourses also frame the relationship between lawyer and client. While not directly using the role plays contained in the text, of which there are three covering fairly common scenarios (child custody dispute, disagreement with a tradie and a personal injury action) to develop student interviewing skills, those role plays can be utilized to illustrate different mediator styles, and how the different ways in which one interacts with another can impact on the sort of information disclosed and the manner in which the dispute will be framed and addressed.

The role plays are accessed by a password that is valid for six months, are approximately two hours long and are supported by a full written transcript. They can be viewed in whole or in segments designed to illustrate key process features. Both the transcripts and related videos are integrated into the text thereby giving students an opportunity to explore the relationship between different aspects of the process in relation to the totality of the mediation process. The text is supported by an Instructor's Guide, available for adopters, and provides many useful exercises to engage students. It is particularly valuable for teachers who are new to the subject.

⁵ The text following the literature review discusses different types of mediation and the theories informing different approaches to negotiation in some detail.



One of the problems with this text, and indeed many of the texts addressing interest-based negotiation and facilitative mediation, is the extent to which they fail to discuss the role of cultural factors in shaping the mediation process. Indeed, many tend to assume that the model they elucidate is of universal validity. This is manifestly not the case and useful correctives are found in:

Morgan Brigg and Roland Bleiker (eds), *Mediating Across Difference: Oceanic and Asian Approaches to Conflict Resolution* (University of Hawaii Press, 2011)

This text discusses the extent to which the dominant model of mediation is informed by western values and assumptions. Legal education tends to teach students to operate within a low context culture, and one that is reinforced by the dominant approach to mediation. In other words, the emphasis is on apprehending meaning from words and text. This is contrasted with high context culture or one in which meaning is not derived from the conduct that parties use but from the meanings that the actors bring to a given context. In law, we tend to treat disputing as an event and frame it in self-contained and self-referential terms. Many cultures consider disputing as something that must attend to matters beyond the immediate context of the dispute itself, and if we are to understand what is going on in a mediation we need to address this wider context and the sort of meanings it imports into the mediation process.

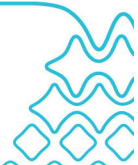
A further and related difference between the way in which different cultures approach disputing is the extent to which many non-Western cultures will spend considerably more time in relationship-building and be less concerned with orienting their activities towards a definite outcome; ie they are less likely to be settlement-focused where settlement is defined in terms of a written agreement specifying the terms that the parties agreed to during the mediation. The latter reflects very much the sort of definite outcomes characterizing adjudication and reflects the sort of modernist assumptions, linear, abstract and goal-oriented ends that inform Western conceptions of disputing processes.

One might also note the different role attributed to the mediator in different cultures. In the West, there is a tendency to favour an impartial facilitator and, in certain circumstances the disputants may ask for an impartial expert. Often, though, many disputes can be settled through interest-based negotiation and facilitative mediation where the impartial third party is a process expert. In other cultures, however, it is not unusual for the mediator to be known to the parties, to be a respected member of the community and who is not expected to assume the role of a third party neutral.

These considerations are important least students be left with the impression that there is, in a multi-cultural society, a single correct way in which to mediate a dispute. Even NADRAC recognizes that in the context of Indigenous disputing processes it is important to acknowledge the role of culture and to accommodate Aboriginal and Torres Strait Islander practices rather than in imposing Western practices.⁶

The 'culture' question is discussed further in Spencer and Hardy (2009, Chapter 12) and LeBaron (2003).

⁶ NADRAC, (2006).



Julie Macfarlane, *The New Lawyer: How Settlement is Transforming the Practice of Law* (Vancouver: UBC Press, 2008)

This is an important text for explaining how changes affecting legal practice, procedure and client expectations are impacting upon the shaping of lawyer's professional identities. It explores the assumptions and values on which the warrior conception of lawyering inherent in adversarialism are embedded within the curriculum and the extent to which the culture of adversarialism is inimical to developing effective practice in the emerging context of a culture of settlement.

It also makes the very important point that there appears to be a growing gap between conceptions of practice as viewed from the perspective of the law school and the realities of practice. Even those who are critical of traditional conceptions of legal education, such as those within the feminist or critical race traditions, tend to frame their critiques at an abstract level rather than in terms of the way/s in which curricular practices shape professional identities and 'intellectual critique continues to coexist with uncritical acceptance of adversarialism as the best approach to conflict resolution.' (p 32)

If the curriculum is driven by a court-centred model of disputing, then adversarialism is bound to be the default position for young practitioners. It is a failure on the part of academics, and on the part of practitioners, to reflect on the assumptions informing practice that Macfarlane sees as standing in the way of developing the dispositions and skills appropriate to future practice. For Macfarlane, the capacity to reflect on one's practices is considered a fundamental skill: to what extent are existing curricular practices consistent with the requirements of future practice? The short answer is that they are not. A capacity to respond to change, to assess the extent to which our assumptions and beliefs assist effective and client-centred practices, in light of the structural factors affecting contemporary practice, is a central concern of the text and reflects the influence of Schon's work on Macfarlane's thinking.

After identifying the structural factors undermining traditional practices, such as the development of a new business model driven by an increasingly pragmatic and cost-conscious client, Macfarlane notes how those factors are reconstituting the lawyer's role in terms of client service. Rather than focusing on the provision of technical legal advice and strategies within the framework of the rules of civil procedure, the new lawyer views herself as a conflict resolution advocate. Instead of defining her role in terms of a rights-based advocate, she acknowledges the importance of drawing on a plurality of tactics appropriate to the particular client's needs and interests.

The emphasis on early settlement, predicated upon the empirical observation that the vast majority of cases will settle in any event long before being placed before a trial judge, imposes an obligation on the lawyer to work more closely with her client than in a purely adversarial regime: in order to identify the most effective strategy for a client, as opposed focusing attention on the lawyer's preferred option, it is necessary to understand all of the client's concerns from the client's point of view. The values of party autonomy and self-determination embodied in the model of mediation common in both private and court-annexed practices in common law jurisdictions reinforces this client-centred focus.

With litigation, the acquisition of information is driven by the sole purpose of furthering the client's legal case: the lawyer is exclusively concerned with information that can support claims advanced in pleadings. The lawyer is an expert and the sort of relationship subsisting with her client is essentially hierarchical in nature. Macfarlane describes this relationship as one that is constructed around an epistemology of



litigation and contrasts it with an epistemology of settlement. In the latter case, the relationship between the lawyer and her client, and the interaction with other parties in a dispute is driven by a conception of knowledge as subservient to furthering the goal of settlement.

A culture of settlement effects a significant change in terms of the way in which one conceptualizes negotiation: it entails a shift from a distributive or value-claiming or positional bargaining characteristic of traditional model of adversarialism, towards an integrative or interest-based or principled form of negotiation in which the goal is as much value creating as it is in claiming value. This re-orientation is reflected in practice as lawyers think about negotiation less in terms of

... gamesmanship around the rules of gamesmanship, and more on the management and tactics of negotiation. The relationship between time spent on procedural steps such as drafting and filing pleadings, preparing and bring motions, and developing negotiation strategy and actual negotiation is reversed ... rather than regarding [negotiation] as a secondary element of other skills ... it is viewed as defining the sort of activities undertaken by a conflict resolution advocate.⁷

A cursory glance at any text used in Australian law schools teaching civil procedure, though, suggests that these changes have yet to be taken on board. This observation aside, the point to be made here, and one that has been noted by other commentators, is that negotiation is not a discrete skill that can be taught and applied regardless of the context. Rather, it is informed by different assumptions and put to different uses that depend crucially upon the context. Hence, a distributive style is concerned with the acquisition of information to serve one's client's goals and to do so at the expense of the other side. It is framed within the context of zero-sum expectations.

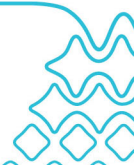
An integrative orientation is informed by collaborative practices and the need to work constructively with the other side in order to identify shared interests capable of supporting an early and mutually agreeable and durable settlement. In critiquing the MacCrate report, for example, Menkel-Meadow⁸ noted how the authors of the Report tended to assume that the skills identified were theory neutral, when in reality they reflected the prejudices of an adversarial mind-set.⁹ Macfarlane's work is predicated upon a similar reflective disposition: what values and attitudes inform our practices, and to what extent are we actually aware of them?

This matters when assessing the efficacy of a mode of thinking in practice (how effective are the skills a lawyer possesses in responding to the needs of clients?) or, more to the point, in assessing the adequacy of curricular practices, and the cultural assumptions informing, but rarely unpacked, informing those practices. There is a wider set of questions here bearing upon the purpose of the law school and its relationship to the profession. In an era when a law degree is becoming increasingly expensive and the chances of securing a traditional career, legal educators should be

⁷ Macfarlane (2008b, at p 69).

⁸ Menkel-Meadow (1994) defends the need to consider the different theoretical formulations, and therefore values and purposes served, by different approaches to skills. MacCrate, she argues, adopts a limited, technical, conception of skills that can be readily reduced to performative criteria. This approach is consistent with the sort of narrow cognitive behaviourism dominating much legal education. Menkel-Meadow's approach, moreover, 'confers' a degree of academic respectability on the teaching of skills: it is not a mindless activity, but one requiring a sophisticated theoretical understanding. As a result, she aligns skills teaching with the traditional goals of the legal academy, while also indicating the value for practice.

⁹ Stuesser (2012) illustrates the point Menkel-Meadow (1994) makes because it treats skills as theoretically unproblematic when, in reality, this is never the case.



giving thought to the extent to which their product is responsive to the needs of future professionals.¹⁰

Part 2: Summary of key points

1. Disputing Processes

ADR processes can be characterised by varying degrees of informality, privacy, and party control over the outcome/s, and they can be conceptualized, in relation to court-centred model of disputing, in terms of the following continuum that moves from fairly informal and private forms of discussion/negotiation, through more structured disputing activities over which the parties continue to exercise control over the outcome of the substantive content of the dispute, but with a third party intervener exercising control over the processes. As discussed elsewhere, the dominant model of mediation in Australia is facilitative rather than determinative: the mediator facilitates a negotiated agreement rather than directing a specific outcome.

In practice, and for a variety of reasons, a facilitative mediator will draw upon evaluative processes: the point here is that mediators will not necessarily stick to a prescribed script as the process is fluid and contingent, therefore requiring, as appropriate, an evaluative approach. This is especially the case in circumstances where the mediator has a degree of expertise and where the parties ask her for an opinion. Indeed, it is sometimes appropriate to give one or both of the parties a reality check

The continuum moves towards determinative processes such as arbitration and adjudication in which a third party (chosen by the parties in the case of arbitration and which processes are conducted in private), after hearing evidence and submissions, determines the dispute. The basic difference between arbitral and curial proceedings lies in the lack of party control over the process, the fact that a judge is less likely to be influenced by non-legal considerations and the public nature of the decision-making processes.

While non-litigious dispute resolution processes were originally framed in terms of an alternative to litigation, they are better characterized in terms of the adjective 'appropriate'. This is because litigation is not necessarily an alternative, but may, in appropriate circumstances, even when disputants seek to resolve their disagreements by less formal techniques, be the preferred strategy.

Indeed, one of the central organizing concepts in mediation, a disputant's BATNA or Best Alternative To a Negotiated Agreement, is framed in terms of the 'shadow of the law'.¹¹ In other words, a party's BATNA provides a framework in which they can assess the value of a negotiated settlement in relation to the costs (emotional and financial) of litigation: it is a bottom line position, albeit one that is not necessarily fixed and can shift during the context of a negotiation in light of changing information, and once reached a party will find litigation the preferable option.

¹⁰ Devonshire and Brailsford (2012) defend an academic view of legal education, rejecting the role of law school as one that should train future practitioners. This view is implied in all introductory undergraduate texts, few of which spend much time at all on ADR and none of which contextualize the study of law in relation to a profession that is undergoing profound structural changes.

¹¹ Mnookin and Kornhauser (1979).



2. The Rationale for, and significance of, the expansion of ADR

The appeal of ADR can be seen as a response to the escalating costs of litigation and a traditional legal system that has become log-jammed.

Policy reasons for the expansion of ADR are related to legitimization concerns: inability of traditional state institutions to deliver timely and cost-effective justice outcomes. A key feature here is the way/s in which the concept of 'justice' has been re-conceptualized in order to embrace a diversity of disputing processes. For the most part though, ADR conceptions of justice continue to be focused on procedural considerations as opposed to substantive or outcome-based notions.

Reconceptualizing the notion of justice from an exclusive focus on formal disputing mechanisms, the courts and administrative tribunals, enables the state to bolster its credibility as an authoritative source of conflict management: it can continue to deliver upon the promise of just, fair, timely and relatively inexpensive mechanisms for resolving disputes. The point being made here is illustrated by the statement on justice by then Attorney General of Victoria, Rob Hulls, and the subsequent operationalization of the principles it contained in shaping the direction taken by the Victorian courts and tribunals

A key exception to the procedural focus of ADR processes is the development of narrative mediation and, to a lesser extent, transformative mediation both of which view the mediation process as serving goals other than simply resolving the immediate dispute between the parties. For the most part, this Guide will focus on facilitative mediation as this is the dominant practice in both private and court-annexed systems of disputing.

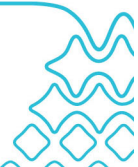
Among the socio-cultural factors suggested accounting for the growth of ADR are:

- A consumer consciousness¹² and correlative concern with value-for-money as well as a concern that individuals have worth, and the fairness of disputing procedures, including their capacity to facilitate participation in decision-making processes that entail outcomes affecting individuals;
- A rights discourse that can be traced to the civil rights movements of the 1960s;
- A decline in deference for traditional authority structures, which can, in turn, be related to access to information made possible by ever-changing communication/technology.

With respect to the growing influence of communication and other technologies, one might point in particular to the recent work of Richard Susskind.¹³ His work provides an important context to understand some of the reasons why the business world has found ADR to be an increasingly attractive option to the costs involved in litigating disputes. It also explains the sort of policy initiatives governments across all jurisdictions have embraced in response to the perceived failures of formal disputing mechanisms. For Susskind, technology, communication platforms, software, and the impact of globalization, (including the influence of a neo-liberal ideology on the

¹² It can be related more widely to a neo-liberal discourse that has permeated all aspects of social and public life over the past 30 years or so (Woolford and Ratner, 2008).

¹³ Susskind (2008, 2012) and http://www.americanbar.org/publications/law_practice_magazine/2013/july-august/tomorrows-lawyers.html provides a an accessible summary of his thesis.



regulatory environment in which the practice of law has traditionally operated¹⁴) is having a profound impact on the business of disputing. This is a business in which the legal profession has long exercised an unchallenged monopoly, and in some ways it is a monopoly that it has continued to exercise as a result of the model of mediation that has asserted hegemony through the instrumentality of NADRAC and its influence on policy makers. More specifically, lawyers are increasingly colonizing the practice of mediation and bringing with them an adversarial mind-set to which the more collaborative aspects of ADR have been required to bend.

The type of factors that mentioned (decline in deference, ascendancy of consumer narratives and discourses of choice, service delivery and emergence of performative criteria by which various stakeholders can evaluate service providers) find expression in the type of justifications offered to participants by mediators in their opening remarks. Litigation is expensive and uncertain in terms of outcomes consistent with disputants' goals, and even where one is confident as to the outcome a court will only be interested in the legal aspects of the dispute.

The focus, then, is on disputant participation and involvement in decision-making processes, and evaluative mechanisms tend to be framed in terms of disputant satisfaction with the process: did the parties believe that the process engaged them, and provided opportunities to be heard. In short, the emphasis is on the extent to which procedural norms facilitate and support dignitary values, of respecting the parties' right to express their voice.¹⁵

From the perspective of business people, the down-side of a law suit includes the following considerations and which, jointly and/or severally, point in favour of ADR processes:

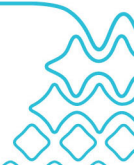
- Litigation is ordinarily conducted in public and commercial parties may not want their disagreements aired for all-and-sundry given the commercial-in-confidence character of many of those relationships;
- It makes little commercial sense to engage in the sort of long-drawn out war of attrition associated with law suits. Indeed, given the rate at which technology drives commercial innovation, the substantive basis on which commercial disputes arise become increasingly stale;
- Even if this wasn't the case, litigation tends to foster toxic business relationships from which it is often difficult to recover: a war attrition is inherent once the parties entrench their positions, and their lawyers set in train the conditions for such a battle as soon as they pull the trigger, as it were, on the decision to litigate and file and serve pleadings;¹⁶
- The post GFC environment has encouraged increasing number of businesses to reconsider the role of litigation in their disputing strategies.

The benefits of ADR have been summarized thus:

¹⁴ For a recent Australian discussion on this subject cf, Mark et al (2012).

¹⁵ Some commentators have pointed to the influence of postmodern discourses in furthering the development of ADR processes, although the sort of aspirations that are held out in furthering difference seems, in light of practice, to be a little over optimistic: cf, Menkel-Meadow (1996).

¹⁶ Although writing in response to the highly publicized Schiavo case in Florida during the 1990s, Bruce Winick has explored the consequences on familial relationships of a failure of lawyers to think outside the litigious box. The points that he makes can be readily analogized to commercial relationships: Winick (2007).



ADR ... processes are designed to provide disputants with procedural options that are appropriate to the dispute. The procedures may be faster, cheaper, less adversarial and more flexible than litigation.¹⁷

3. Definition of, and approaches to negotiation

Negotiation has been defined by Boule (2011, p 117) as:

A process in which two or more parties with some ability to influence each other and without the ability to have their way unilaterally, communicate and interact with a view to make a joint decision on conflicts or problems affecting them. Negotiation involves parties promoting their rights and interests and adjusting their positions and strategies in joint efforts to achieve settlement. While it is possible to describe the general stages of negotiation, parties and circumstances determine what will transpire in the unfolding of each particular negotiation. It is also up to the parties to decide what matters are subject to negotiation and to determine themselves the terms of the negotiated settlement, though agreements which are unlawful or against public policy will be unenforceable. Given the absence of outside decision-makers, settlement is only achieved with the acquiescence of all parties.

Parties may negotiate amongst themselves directly or be represented by lawyers (Hanycz, 2008) who typically approach the task at hand by adopting a variety of styles and strategies, the essence of which is summarized by Ogilvy (2007, p 158):

Legal negotiators ... exhibit two negotiating styles: competitive or cooperative. Likewise, they exhibit two negotiating strategies: adversarial or problem-solving. Effective competitive negotiators may be dominating, forceful, attacking, aggressive, ambitious, clever, honest, perceptive, analytical, convincing and self-controlled. Effective cooperative negotiators tend to be trustworthy, fair, honest, courteous personable, tactful, sincere, perceptive, reasonable, convincing and self-controlled. 'An adversarial strategy supports zero-sum negotiation, in which the gains of one party equal the losses of the other. A 'problem-solving strategy' involves identifying the client's needs, anticipating the needs of the other party, and looking for solutions that accommodate both.

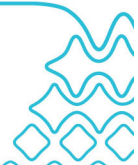
Choices of style and strategy are influenced by factual circumstances, client needs, the personal style of the lawyer, and the style and strategy of her opponent. These behaviours generally surface on a continuum, with some of each style and strategy exhibited by one lawyer in the same negotiation. Lawyers exhibiting these styles and engaging in these strategies must conduct themselves within the boundaries of acceptable professional behaviour. Even the most aggressive advocate must be respectful of an opponent. Even the most cooperative advocate must not concede too much.

Lawyers typically adopt an adversarial or positional approach to bargaining and one that seeks to assert the legal rights of the disputants. It involves each side pursuing their own interests without regard for the interests of other parties and is usually framed in terms of a linear, distributive concession making ... [that assumes the parties are negotiating over finite resources, and the more one party achieves, the less there is for the other ... It often results in the breakdown of parties' relationships [assuming there was one in the first instance] and prevents future constructive interaction.¹⁸

Positional bargaining is contrasted with principled or interest based bargaining (Fisher and Ury, 1981). This is based on the idea that a party's position will always be driven by some underlying interest/s and the objective of negotiation is to probe beneath the visible positions, as expressed in the form of a legal claim, in order to identify what the

¹⁷ Colbran (2012), p 70.

¹⁸ Alexander and Howieson, 2010 at pp 28-30, provide a helpful illustration of the characteristics of distributive/concessionary bargaining.



party is really seeking. The usual example to appear in most texts is that of two parties disagreeing over an orange. They could divide the orange in half, but that may not satisfy the underlying needs of either: compromise is always in a party's best interests. Inquiring into the reasons why each party wants the orange might disclose that one wants to make juice and the other needs the rind for baking a cake.

The central feature of this, integrative, approach to bargaining lies in identifying interests to which the parties attribute different value and trading as between themselves in terms that allow both to obtain maximum value from the resource in relation to their interests and preferences. In essence, a finite resource is expanded so both obtain more than they would if they continue to focus on the orange itself. The key differences between interest and positional bargaining are set out in the following table drawn from Alexander and Howieson (2010, pp 58-59):

	Positional [distributive or value claiming] Negotiation	Interest-Based [integrative or value creating] Negotiation
Strategy Method adopted based on underlying theory; privileges specific forms of knowledge	<ul style="list-style-type: none"> • Outcome focused • Positional • Limits discussion • Evaluative • Impose own solution • Maximize individual gain 	<ul style="list-style-type: none"> • Process focused • Interest based • Explore all interests • Generates/evaluates options • Add value to options and do better than BATNA¹⁹ • Use independent procedural criteria • Identify mutual gains • Creative solutions to meet needs of all parties
Style Preferred behaviours adopted by negotiator, and depend upon negotiator skills	<ul style="list-style-type: none"> • Competitive • Limited communication • Obstructiveness • Power struggle • Coercive 	<ul style="list-style-type: none"> • Cooperative • Effective communication • Shared effort at problem solving • Willingness to accommodate
Tactics Implicates ethical approach taken by negotiator	<ul style="list-style-type: none"> • Extreme opening offers • Disputatious • Claim and counter-claim • Concessionary and compromise 	<ul style="list-style-type: none"> • Flexible • Mutual framing • Describing interests • Generating options to meet needs • Creating trust and good relationships • Clear and accurate communication and sharing information

¹⁹ Best alternative to a negotiated agreement is the party's bottom line: it is the position beyond which they will not be prepared to continue negotiating because they believe that they could do better by proceeding unilaterally. In positional negotiation, a BATNA is likely to be fairly fixed given the tendency for the parties to adopt a definite position; matters are likely to be different in IBN given that, in the course of cooperating/sharing information, brain storming and the like, lower ranked interests, in terms of the value to the party, may entail shifts in the original position and, therefore, less committed or inflexible attitudes towards one's BATNA.



	Positional [distributive or value claiming] Negotiation	Interest-Based [integrative or value creating] Negotiation
Opportunities Benefits	<ul style="list-style-type: none"> • Can be conducted unilaterally • Risk averse and protects own interests • Focused on claiming value • Good in situations of difficult communication, high conflict, lack of any relationship and distrust 	<ul style="list-style-type: none"> • Builds better relationships • Potentially satisfies all interests • Opportunity for mutual gain • Creates value • Establishes basis for future relationships • Fair, satisfying and sustainable relationships
Risks costs	<ul style="list-style-type: none"> • Indifferent to durable relationships • Privileges one-off transactions that involve compromise • Unbalanced and unfulfilling agreements 	<ul style="list-style-type: none"> • Needs commitment from all negotiators • Open to exploitation where there are power imbalances • Time consuming and complex • Difficult in situations of conflict and distrust

Distributive bargaining requires parties adopt a collaborative orientation towards the negotiation and to identify a basis on which they can advance their respective interests without necessarily harming the other. Indeed, the principle of cooperative bargaining assumes that the parties are prepared to attend to the concerns of the other in order to further their own objectives. While this mode implicates collaborative dispositions, it remains very much centred within an individualist framework since it is primarily driven by the desire to further self-interest of the individual disputants and is typically associated with disputes where the parties either have or are interested in developing on-going relationships.

In the context of one-off transactions, common in motor vehicle or other insurance claims, and in consumer transactions, it is much more likely that the parties will default to a distributive idiom. However, it should be noted that positional and interest-based approaches are, in some respects, 'ideal types' and parties will often shift between those positions as they seek to create/claim value during the course of a negotiation. It is possible, in other words, for the parties to identify shared interests even in the context of positional bargaining (Little, 2010).

Alexander and Howieson (2010, pp xxii, 9) adopt a *constructive approach* to negotiation or one that acknowledges that negotiation is both:

- A science or conception of theoretically informed practice based upon a number of principles, processes and skills that can be taught and learnt through practice, typically in the form of simulated learning environments where students are engage in role playing;
- An art or 'a creative and mindful process' that adapts knowledge learnt in ways that are responsive to situations encountered in practice.

A constructive approach recognizes that no one strategy will serve in all cases: negotiation is not an exact science. Rather, a 'constructive negotiator will make conscious [and ethical] choices between the diversity of styles, strategies and skills available' in order to assist the parties in reaching 'successful and sustainable outcomes.'



Since negotiation is not an exact science, successful negotiators are required to *exercise judgment* in determining the ‘appropriate mix of style, strategy and skills to *construct each negotiation in the most successful and ethical manner possible. It involves a process of experiment and reflection, action and adaptation, and the ability to manage ambiguity and reconcile contradictions.*’ (Emphasis added)

The key points to note here are that:

- i. Successful negotiations depend upon the exercise of professional discretion or judgment;
- ii. Negotiations are necessarily different given the mixture of facts and participants; relying on a template approach to this activity is unlikely to be successful. This doesn’t mean to say that propositional knowledge will not be of any assistance; rather, exclusive reliance upon a script is apt to lead one to ignore significant cues disclosed during the unfolding process.
- iii. Reflective practice involves learning from one’s experience, thinking about the motivations and ideas on which your conduct, and that of other parties’, is based. It is a useful heuristic for aiding awareness of theories-in-action and an awareness of the wider context, or values and assumptions, in which negotiation takes place. But, in learning from one’s experience, one is also developing different sort of knowledge: in effect, reflective practice valorises an experiential epistemology and points to the limits inherent in the technical rational model on which much legal education, including skills education²⁰ is based.

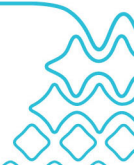
The conception of learning and knowledge embodied in the model of reflective practice is illustrated in the following comments that draw upon the metaphor of improvisation used in jazz. In a complex and rapidly changing business/legal environment

... traditional ways of thinking and acting are no longer appropriate or sufficient ... The business environment is not stable, it is changing at an exponential rate ... under these conditions, negotiators need to be versatile. They need to be able to adapt to changes in governance and environmental context. Negotiators cannot be confined to any single negotiation approach. They must continuously monitor the operating environment and be prepared to adjust accordingly ... Rather than mastering negotiation specifics, *negotiators need to find ways to understand, read, interpret ...* ‘ the context/s in which they operate. ‘Versatility does not just happen. It is developed on the basis of an ability to understand [one’s] own strengths and weaknesses as a negotiator, as well as a willingness to reflect on the negotiation process, and to critically examine it to enhance competency development reflecting on experiences to improve action and professional practice.’ (Waterhouse, 2012: pp 231, 233-34) (emphasis added).

Developing those skills depends not simply on planning: planning can be counterproductive if we rely exclusively on a specific theory.

Regardless of the amount of preparation undertaken it is almost impossible, except in the most basic of transactions, for an entire negotiation process to be fully scripted ... Rather than assuming, a priori, that (i) we know exactly how a process will proceed or (ii) that individuals will always act rationally, it makes more sense to view negotiators *jointly engaged in a process that requires they make sense of activity as it unfolds*; this will typically require departure from scripts and call for improvisation, a notion that is drawn from improvisational jazz [where] musicians continuously practice the underpinning musical chords required for expert performance.

²⁰ Menkel-Meadow (1994, p 606).



With this knowledge and skill in place, [they] come together to react and respond to what is played by other musicians. The musicians do not try to predict what will occur, but rely on their expertise and accept whatever transpires. No-one, musician or audience, knows the outcome or what will occur until the performance is played out ... Like jazz improvisation, negotiators know the moves but the process of social interaction and outcome cannot be definitively known. To effectively improvise requires setting aside habitual ways of thinking and seeing things in fresh ways. It also involves new kinds of presence to the world where presence is about deep listening and being open beyond one's preconceptions and historical ways of making sense. (Waterhouse, 2012: pp 234-35)

The reflective negotiator continuously examines her practice and its impact; s/he will want to know what works and what doesn't in different situations: this cannot be determined in advance by reference to abstract theories, but emerges in the context of emergent and contingent human relationships and understandings that unfold through the process of negotiation.

4. Definition of, and approaches to mediation

Mediation has been defined as

a decision-making process in which the parties are assisted by a third party, the mediator [who is responsible for attempting] to improve the process of decision-making and to assist the parties to reach an outcome to which each of them can assent, without having a binding decision-making function. [Boulle and Alexander, p 13]

Although there are several distinctive forms of mediation, they share a general commitment to creating an environment in which the parties can exercise a degree of control over the outcome of their dispute. The process is generally a response to a failure on the part of the parties to negotiate between themselves, and is widely used in both the private and public sectors,²¹ including, most recently, having been adopted by most courts and tribunals as a pre-requisite to pursuing formal procedures. In order to accomplish this goal, mediators generally adhere to the following approach.

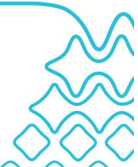
1. An introduction will explain the process to the parties as many are likely to entertain a conception of justice as one shaped by images drawn from popular culture. This includes:

- Defining the limitations on the mediator's role; they are not judges and do not make decisions for the parties, although, depending on the mediator's view of the process, may play a more interventionist or directive role;²²
- Setting out any procedural guidelines, such as the order in which the mediation will proceed, the importance of confidential provisions, concern with bias, lack of coercion and commitment to procedural fairness, the possibility of moving from joint to private sessions;²³

²¹ There is a useful summary, current to late 2009, of about 100 or so mediation schemes in Australia in Hardy and Rundle (2010, pp 262 ff.)

²² The dominant approach to mediation in Australia, and the one incorporated into Standards developed by NADRAC, is facilitative rather than evaluative.

²³ In North America, the term 'caucus' is used to refer to a private session, and those are much more likely to be used by those adopting a directive/evaluative approach; in many respects, this approach to mediation is quite common where lawyers are involved or where the mediator has a particular expertise. There are a number of reasons why a mediator might want to break up a joint session: lack of constructive progress, need to provide parties with a reality check, concern that one of the parties doesn't appear to be responsive as a result of perception of undue influence from the other/s.



- Focusing the parties' attention on the benefits of executing an agreement in order to avoid the uncertainty, delays and costs of litigation;
- Making sure that the parties have understood everything to date.²⁴

2. Story-telling provides an opportunity for the parties to set out their concerns, and this stage typically requires the mediator to engage in a number of strategies such as:

- Empathetic listening, involving hearing the participant's concerns from their perspective. This is a skill not often exhibited by lawyers nor one fostered in the context of the traditional curriculum given its inherent tendency to construct the client's concerns within the categories of the lawyer and the law;
- Summarizing and restating what the mediator heard in terms that seek to remove contentious language and focus on the past;
- Asking questions in order to clarify matters;
- Reframing;
- Reflecting;
- Acknowledging;
- Brainstorming and issue framing, agenda setting and option generation.

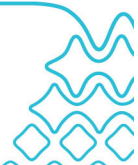
Each of these procedural components appear, on their face, to be fairly innocuous, but some commentators have noted that they raise a number of potential ethical considerations that tend to be ignored in most mediator codes or standards of ethical practice, guidelines that tend to focus, instead, on ethical issues drawn mainly from an adjudicative context (MacFarlane 2008). Similarly, Welsh (2008) and Riskin and Welsh (2007) have noted the significance of the mediator's role in shaping the direction of, and focus of substantive discussions in most mediations that casts doubt on the sort of claims advanced to support this type of dispute resolution process; to wit, the notion of party autonomy and self-determination.²⁵

3. Problem-solving involves the participants in working towards their own resolution once they have identified and ranked their own interests in relation to any shared interests on which a durable settlement might be established. Frenkel and Stark (2012) view problem-solving as one aspect of a model of mediation conceived in terms of an interview; the first part involves the mediator, having heard the parties' narratives probe for additional information, once s/he has elicited 'relevant' factual material the parties' stories will be re-framed in terms of 'shared problems': the rationale for this conceptualization lies in the belief that if the parties can work together on a problem that they have in common, they will shift from competitive to collaborative practices. The final element is persuasion or the role of the mediator in nudging the parties towards an agreement. The extent to which the mediator will engage persuasive strategies will depend upon the mediator's view of the process, as well as the particular stage at which the parties have reached.

4. Resolution normally takes the form of an agreement which constitutes a contractual relationship between the parties and can be cast in terms that reflect the particular circumstances in which the parties find themselves. It is normally 'sold' in terms that emphasise the role of participants in crafting their own agreement rather than having

²⁴ There is an interesting study that notes that many of the procedures associated with the mediation, as well as those leading up to the actual mediation, assume a level of literacy and numeracy that is often not present. This, the authors note, is particularly important given the extent to which mediation has become a mainstay of dispute resolution: Cumming (2005).

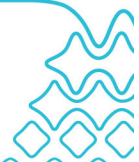
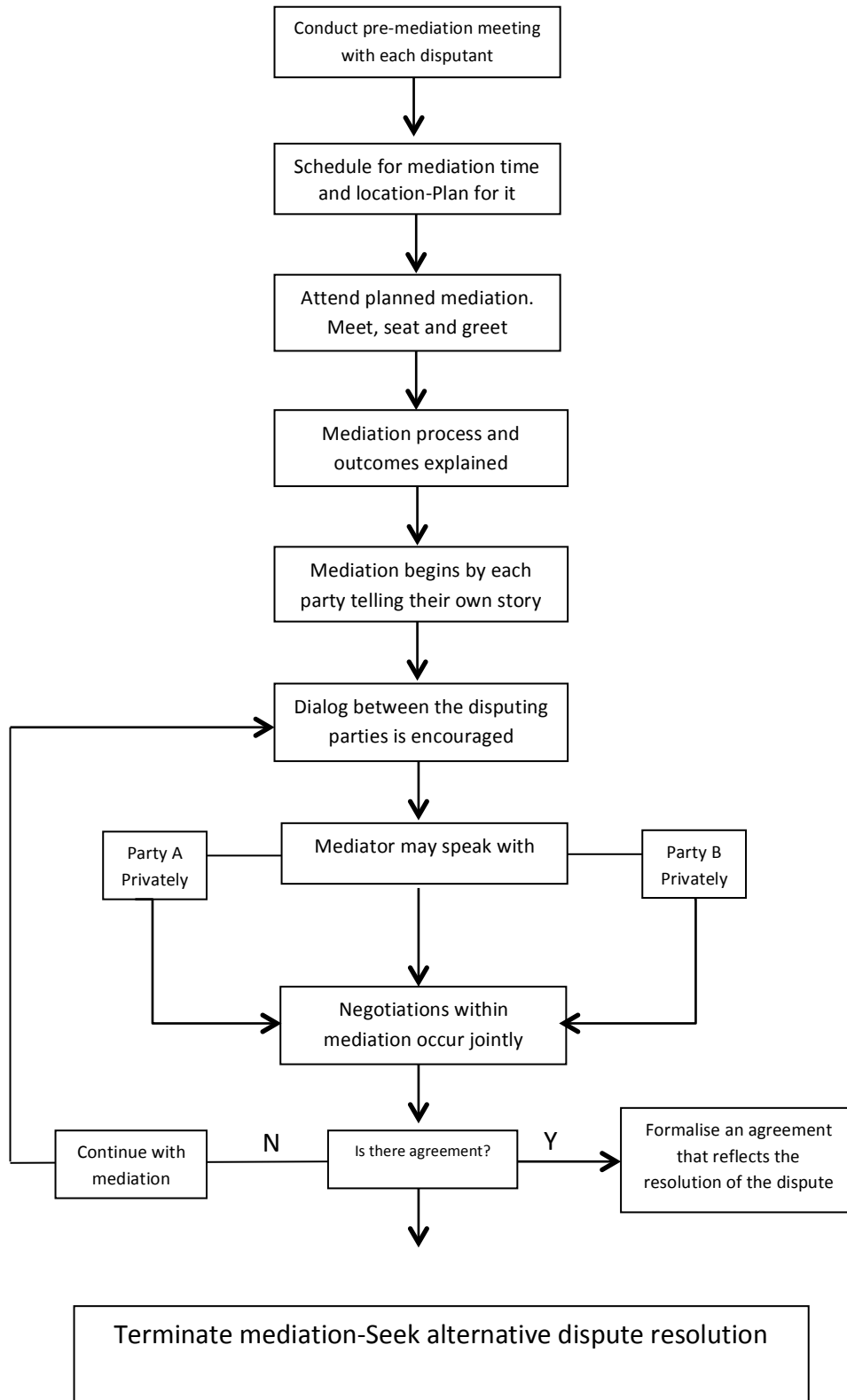
²⁵ The ethical questions and ethical tensions that arise in the context of mediation are discussed in Waldman (2011).



one imposed by an external decision maker who will base her decision on considerations external to the particular context.

The elements of the mediation process are summarized in the following flow chart:

Mediation Process Flowchart



In some respects, mediation comprises a form of facilitated negotiation; this, at least, is the expectation built into NADRAC's *Approval Standards* and their *Practice Standards*. In practice, mediators are likely to deploy a range of strategies along a continuum bounded by a commitment to party autonomy at one pole to a more interventionist/directive. A mediator will often be looking for the best course of action in response to a given set of choices rather than a universally correct response, or one prescribed by a pre-determined script. What will work in one situation is not the same as 'best practice'.

'What works' will depend on the mediator's relationship with the context rather than the mediator drawing upon information developed beyond the context in which problems requiring a response arise. This point matters because it directs attention to the fact that, like negotiation, effective and successful mediation, depends upon awareness that practice is probably more of an art than it is a science. Hardy (2009) notes that:

A good mediator requires more than an understanding of the theoretical process of mediation. Effective mediators are flexible and display competence in 'unique, uncertain and conflicted situations of practice' (Schon) Mediation practice can be described as a form of professional artistry involving a wide range of tacit knowledge, skills ... intuition ... insight ... even improvisation ... There is *rarely a clearly right move* to make at any given stage of the process but a number of alternatives [present themselves] where the notion of *being correct gives way* to broader assessments of value such as aesthetic appeal, originality, usefulness, self-expression [and] creativity ... Accordingly, learning mediation is unlike learning a scientific formula ... (p 386)

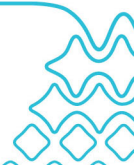
One notes the emphasis on creativity and the fact that while one can describe some of the key principles, processes and techniques commonly used in mediation, there is no substitute for learning by doing and observing others' performance, especially accomplished practitioners. Moreover, the process is context-specific and depends upon the particular configuration of relationships. It is, Hardy continues to note, a *holistic skill*:

... the mediator's various interventions interact with one another and derive their meanings and character from the whole process in which they are embedded. Although the mediation process comprises component parts, the total is not the sum of the smaller parts. (pp 386-7)

In their text, Boulle and Alexander (2012) note that their approach is based upon a widely shared assumption that mediation skills can be taught and 'learned, developed, assessed and improved.' But they also note that students, especially adult learners, will prefer different learning styles and strategies, and that these are not necessarily constant, but will vary from context to context. In particular, people learn: cognitively or by absorbing information and applying it to specific situations; doing or practising skills clinically or, as is more likely the case in Australia, in simulations or role-plays; and visually or by observing others more expert in the activity.

The authors also note a significant limitation in relying upon a written text to teach mediation:

A written text accommodates intellectual activities' and while their text does provide opportunities for student-centred learning by incorporating exercises facilitating reflective learning, it, together with nearly every mediation text or manual with which I am familiar, is severely hampered in its pedagogical aspirations in virtue of the fact that it offers little meaningful practical guidance.



True, the text can, as the authors suggest, be supplemented by observation²⁶ or practice but it would be much more helpful if the text incorporated role plays in the way that Frenkel and Stark (2012) have succeeded in accomplishing to great pedagogical effect.

Notwithstanding the pedagogical virtues of the text, it is limited in one significant respect: it doesn't have a great deal to say about the influence of cultural factors or the role of affect in shaping mediator and participant behaviour. Indeed, it suggests that values and beliefs that touch on individual identities are likely to get in the way of formulating tradable interests. It also implies that negotiation and mediation are discrete activities and, as such, implicitly depends upon a set of cultural assumptions that are represented as universal. This is similar to the approach taken by the seminal text in principled negotiation and facilitative mediation. The seminal text in the field²⁷ is based on the idea that emotions and subjectivities interfere with the task of rational and goal-oriented, or instrumental-focused mediator or negotiator.

While one should attend to emotions, this approach is less concerned with the role of emotional intelligence in constructing understanding, learning and knowledge, than it is in 'separating the people from the problem.' In other words, one should consider the emotional factors that impede rational discussion: once we have addressed emotions we can get down to the primary task at hand. The real problem here is that the people and the problem are one and do not exist as separate entities in the way first generation theorists and practitioners seems to believe.

As Boulle (2011, p 135) notes:

[Much] contemporary mediation ... and ... negotiation is located within a modernist paradigm which emphasises objectivity, neutrality, rationality and scientific base. In Australia, mediation takes place in a value system dominated by individualism, neo-liberalism, competitiveness and economic rationalism, principles which do not always sit easily with mediation's own values of collaboration, empowerment and relational thinking. Issues of power and mutual relations are intrinsic to an understanding of mediation ... but they are largely overlooked in rationalistic benefits of mediation.

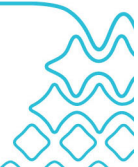
Boulle is making an important point here: our conception of ADR is very much a cultural affair dressed up as a universally valid approach to disputing. Viewed thus, what has been called first generation ADR²⁸ is irredeemably ideological since it is essentially a product of a specific historical moment rather than a universally valid feature of conflict resolution.

It is premised upon a conception of human actors as autonomous agents who are driven solely by rational pursuit of self-interest. First generation conceptions of ADR assume an understanding of conflict that is based upon an epistemology the privileges the individual knower as a rational agent. This conception is reinforced by the tendency for ADR theorists, and legal academics, to draw on cognitive and behavioural educational theories, both of which conceptualize learning in terms of an individual psychological accomplishment.

²⁶ Bond (2004).

²⁷ Fisher and Ury (1981 and 1992).

²⁸ Douglas (2012) summarises the literature on first and second generation ADR, noting the extent to which the latter draws on postmodernist thinking. Avruch and Black (1991) provide a helpful introduction to some of the key themes informing second generational ADR. For the most part, those ideas remain confined to the realm of critique and have not impacted upon dominant, and first generation, narratives underlying NADRAC's work.



As Bernard (2009, p 26) notes:

Standardized negotiation models are grounded in a theory of the mind that holds reason to be conscious, literal, unemotional, disembodied, universal and something that serves our interests. [However,] most of what we understand is not in the words themselves, but in the unconscious understandings that we bring to the words.

Law students exist largely in the world of the mind and taught skills, logical analysis, familiarity with technical words and documents, and the importance of rules.²⁹ This is the world in which curricular practices take root and structure professional identities;³⁰ it is one that is in need of serious revision given the changing realities of professional practice.

5. Qualities expected of a mediator and the role of legal education in developing them

In light of the sort of activities a mediator is expected to initiate and monitor the following skills should be demonstrated by dispute resolution practitioners:

- i. Communicative capabilities [oral and written].
- ii. Cultural competencies would appear to be implicit in a disputant-centred focus: the othering categories characteristic of litigious practice ie ordering a dispute within legal standards as evident from the nature of pleadings, tend to minimize the role of context and difference. But the values informing disputant autonomy and respecting the perspective of the other as the basis on which the type of trust needed to lubricate problem-solving activities would suggest greater need to attend to the 'other' as a real person rather than a legal construction.

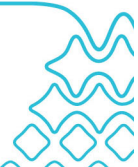
The question of cultural awareness including being aware that we too as lawyers possess a culture, and that from the perspective of others we are in fact 'the other' rather than embodying a universal set of values against which all should comport,³¹ is important in the context of a multi-cultural society. This is particularly so in one in which traditional structures of deference have been eroded and individuals frame relationships through the language of the market. Moreover, the growth in globalization and instantaneous modes of communication³² is bringing us closer to those who were previously very distant. Writing in the context of disputing within Aboriginal communities, Behrendt notes that they need more than the processes common to 'dominant legal structures merely transferred' to them, but that those 'communities should

²⁹ LeBaron and Zumeta (2003, p 469).

³⁰ Nick James and Rachael Field, *The New lawyer* (Wiley, 2012).

³¹ Legal education appears to be little concerned with developing the type of capabilities that foster this mind-set. In particular, there are traditionally few if any courses that encourage law students to think reflectively; they have been concerned with rehearsing the skills required to replicate the status quo founded upon the hegemony of precedential forms of reasoning. Thinking critically within an analytical framework, which has constituted the dominant mode of thinking about legal thinking, as is evident from the structure of every introductory text in the discipline, as well as the only text dealing with the theory of legal education (Kift et al, eds 2011) is not the same as critique framed within a reflective idiom as that requires thinking about why we do what we do, and whose interests are served/elided.

³² This Guide does not deal with the question of Online Dispute Resolution, but attention should be drawn to a recent text that deals with a number of the themes on what is emerging as a key vehicle for delivering 'virtual' forms of ADR: cf, Mohamed Wahab et al (eds) (2012).



be able to implement models in their own communities which recognize traditional cultural values and traditional structures of decision-making.³³

- iii. The notion of empathetic listening might be seen as a bridge between traditional conceptions of understanding of communication and the importance of mediators being aware of difference as a relevant consideration.

There are limits, however, to the extent to which mediators, especially those working in an institutional context (and, in practice, those who work within a market-driven framework of private practice) are going to consider culture and difference: whether working for a public agency or a private entity, outcomes are important, and the influence of performativity tends to divert attention from the sort of factors that might impede mediators concluding a session with a formal agreement.

In particular, there is a tendency to use process and procedural norms in way/s that re-direct attention from the cultural basis on which disputants might differ, and to re-frame their disagreements in terms that reflect or are driven by procedural norms. The aim of mediation is to engage the parties in an activity where they believe that they are directing outputs that respond to their interests. This is true, but the ability to trade requires homogenizing interests and being able to exchange. Deep seated values and commitments cannot be reduced to an exchange relationship.

A question that is not unreasonable to ask is the extent to which legal education fosters the learning environments in which those types of skills can be developed? A related question is the extent to which law school conceptualizes the role of professional practice and the type of competencies it should, in light of that conception, consider appropriate for the curriculum to develop?

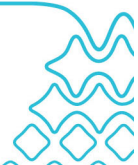
6. Definition of, and approaches to arbitration

Arbitration is a private dispute resolution process, widely used in commercial practice, and normally designed by the parties to best serve their needs.³⁴ It is typically characterized as 'a creature of contract' since no one can be compelled to arbitrate unless they have agreed to do so in advance. While it can be located on the ADR spectrum given it reflects the basic idea of private ordering of dispute resolution characteristic of ADR processes, it, of all those processes, most closely resembles adjudication.

Arbitration is inherently adversarial in nature: the parties will submit arguments and evidence to a neutral third party, the arbitrator, who has the power to issue a binding decision. Like litigation, the process is a 'win-lose' adjudicative process in which a third

³³ Larissa Behrendt, *Aboriginal Dispute Resolution* (Federation Press, 1995), 6, quoted in Colbran p 72. This point has been accepted by NADRAC (2006). The point one should make is that if NADRAC is prepared to recognize the relevance of culture in terms of Aboriginal and Torres Strait Islander communities, then it should really acknowledge the relevance of and impact of cultural difference on disputants more widely. One of the concerns with the type of standardizing tendencies inherent in Codes or Standards (or Best Practices) is that they assume cultural mores and norms that happen to coincide with those of particular groups. This is a significant and often unnoticed problem in the context of client (and student) centred practices, and bears directly on effective practice.

³⁴ For useful summaries: Andrew Stephenson, *The Domestic and international Arbitration Landscape in Australia*, www.claytonutz.com/docs/Domestic_and_International_Arbitration_Sep_2012.pdf; Macfarlane (2011, pp 519 ff.); Spencer and Hardy (2010, pp 303 ff.); Sourdin (2012, pp 170 ff.); Tillett and French (2010, pp 159 ff.).



party imposes a decision that will normally be final. Despite the similarities there are a number of differences between litigation and adjudication, and these are set out in the following table:³⁵

Litigation in Public Court	Arbitration
Public access	Private, contractual process; the parties agree to the terms of the arbitration
Open to the public and matter of public record	Confidential, closed hearings
Single party can institute law suit and require other to participate	Parties must have agreed to use arbitration before required to participate
Formal process with rigid rules, governed by statutes and regulations	Less formal and more flexible
Typically extensive pre-trial motions and hearings on a variety of issues	Much less emphasis on pre-trial hearings
Extensive, rule-bound information-gathering process (discovery)	Discovery limited, less formal
Decisions set precedent	Decisions do not set precedent
Decisions appealable, JR	Appeal rights are limited, mainly to egregious process errors
Time consuming	Intended to be more streamlined
Costs to parties of adjudicator low, transaction costs high	Costs to parties of arbitrator high, transactional costs (theoretically) low
Adjudicator lacks special subject knowledge	Arbitrators usually selected for expertise
Adjudicator applies state law	Law applied, but focus on party determined standards, business practices
Timing and location of proceedings controlled by court	Party control of proceedings, timing
Parties can choose representatives who are lawyers	Parties choose representatives who are not necessarily lawyers
Hearings are formal	Informal proceedings and can be held in conference rooms

Arbitration is mainly used for settling commercial disputes and an arbitration clause will typically be found in contracts, especially in the context of international commercial practice. In Australia, domestic commercial disputes are regulated by state legislation and, for the most part, these are modelled on a principle of uniformity, adopted by a Standing Committee of State Attorneys General in 2010, based upon the 2006 UNCITRAL *Model Law on International Commercial Arbitration*.

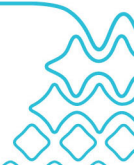
The policy informing the various States' Commercial Arbitration Acts is to minimize judicial intervention in disputes and reflects a correlative commitment to support the finality of arbitral agreements, or 'awards', and the processes on which they are based. To this extent, the provisions in State Commercial Arbitration Acts resemble the principles informing international practice.

The process will be triggered by a clause in a contract that provides that, in the event of a dispute arising under the contract, the matter must be referred to arbitration.

The advantages of arbitration over court determinations include:

- The parties can specify the decision maker who will likely be an expert in the field;

³⁵ Arthur Pearlstein, 'Arbitration' in MacFarlane (2011, pp 519 ff.).



- Finality of the decision – the recent legislative changes, ie limit the circumstances in which a party can seek recourse to a court;
- The proceedings are conducted in privacy, thereby protecting commercial-in-confidence;
- Parties can determine procedure and are not subject to the same evidential strictures in court;
- Relatively inexpensive and expeditious in comparison to adjudication.

A variation on the model discussed above is a process that combines, in a *hybrid process*, set out in the contractual clauses regulating conflict resolution between the parties, mediation and arbitration: *Med-Arb*. As Spencer and Hardy (2010, p 336) note:

... the rationale for this type of system is to give the parties the greatest opportunity to resolve disputes before committing to the large amount of time and money that will be utilised in litigation. This process combines the informality and party control associated with mediation, with the adjudicative functions of arbitration, thereby giving the parties an opportunity to direct a settlement while affording the advantages accruing to finality of an award.

But Med-Arb is not without its disadvantages, such as party reluctance to share information with a mediator that they know may eventually become their arbitrator or indeed, given the positional stance that parties typically during arbitration, they may be as reluctant to share information with the other participants given that this might disclose positions of weakness to be taken advantage of at a later time (ibid, pp 336-9).

Part 3: ADR and the Curriculum

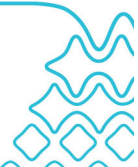
1. Locating ADR in the curriculum

Should ADR be taught as a stand-alone course or integrated into substantive/doctrinal parts of the curriculum? The answer depends on how one conceives of the purpose of legal education. Assuming that most students want a good job from their degree, then one of the purposes of law school should be equipping them with the skills that they will need for their careers despite, or more likely because, most won't follow the sort of career trajectory the curriculum has traditionally served.

Even those who do practise law will require very different skill set to those associated with adversarialism for reasons that were discussed earlier: contemporary practice is changing at a rate of knots and the gap between the reality of practice and law school's image of practice, as conveyed by curricular practices, is increasingly widening. Lande and Sternlight,³⁶ for example, note that:

To be effective, [lawyers] must be more than legal analysts and litigation advocates, considering that less than five per cent of cases filed go to trial in many jurisdictions, and that many tasks that lawyers work on do not even result in the filing of litigation. Lawyers need to understand their clients' interests, tailor the dispute resolution process accordingly and often resolve matters through negotiation, mediation and arbitration. To be effective in negotiation and mediation ... [practitioners] *cannot rely merely* on their abilities to make legal arguments and interpret cases and statutes.

³⁶ Lande and Sternlight, (2010).



This does not mean that traditional legal skills are no longer required: rather, it means that the ability to interpret legal materials and advance legal arguments for their client might be necessary but hardly

*sufficient for effective and competent practice of law. Lawyers should be both legal advocates and problem solvers for their clients [and assist] their clients consider their legal options in the broader context of their more general goals and interests. Lawyers should ... be prepared to help clients consider economic, reputational, psychological, moral and justice implications of alternative courses of action, as appropriate.*³⁷

2. What skills does a contemporary practitioner require?

The answer to this question should drive curricular practices and provides a justification for integrating ADR throughout the law degree. In general, the following are relevant to all forms of legal practice:³⁸

- i. Interviewing requires good interpersonal skills in order to elicit relevant information from clients and construct the rapport/trust on which effective working relationship/s depend, and which a focus on early settlement pre-supposes. But good interpersonal skills would appear to require more than knowledge of psychology in order to be effective: competent interviewing also requires the type of cultural awareness (class, as well as ethnicity and race) identified by a number of commentators.³⁹
- ii. Counselling clients on their options requires an ability to identify legal and non-legal responses to problems; indeed, it includes the ability to frame problems in terms that give effect to client's concerns rather than frame in terms of lawyer's categories. This skill implies a different type of professional relationship to the one implicitly endorsed in the traditional law school classroom, and it also pre-supposes the type of relational competencies embodied in effective interviewing.
- iii. Process-selection advisor requires the lawyer be aware of the different options available and respond to the specific demands of the specific case with which she is addressing. That awareness also assumes that lawyer is aware of different conceptions of conflict and appropriate cultural responses.
- iv. Negotiation is a central aspect of all professional practice, but there is more than one version and one ought to be aware of different theories and the extent to which they interact with other aspects of professional identity. A litigious mindset is pre-disposed towards thinking about negotiation in terms of a distributive or zero-sum outcome (and related conception of the sort of relationships and dynamics informing those interactions; ie they are framed in terms of categories that only admit of either/or outcomes), and that way of thinking is very different from the integrative and collaborative practices fostered by mediators' standards.
- v. Advocacy is required in all dispute resolution forums, but the type of advocacy skills will vary and, as Waterhouse⁴⁰ notes in the context of negotiation, attempting to apply a model in one context to a very different one is unlikely to assist client. But this is precisely what is assumed by linking advocacy with a litigious disposition and epistemology. However, the zealous pursuit of a client's interests 'might be' appropriate in litigation, but since lawyers are increasingly

³⁷ Ibid, p 261.

³⁸ Ibid pp 261-2.

³⁹ Menkel-Meadow (1996); Piomelli (2006); Smyth (2009).

⁴⁰ Waterhouse et al (2012).



exhorted to foster settlement, the values and skills associated with that type of advocacy are actively unhelpful in a context foregrounding integrative bargaining.

- vi. 'Transactional problem-solver' describes the role lawyers play in developing different options, and advising on their respective merits, as well as drafting agreements, rules and other types of documents to give effect to a client's wishes.⁴¹

3. Limitations inherent in traditional curricular practices

As the *Carnegie Report* noted (2007, p 28), the pre-occupation with appellate case law prevented law schools from providing an adequate apprenticeship of identity and, instead, leaves students with the impression that the task of lawyers is limited to winning an appellate case; an impression that is reinforced by focusing on mooting as the primary practical skill to be acquired before graduation. 'This focus sends the implicit message that appellate case law is "real law" and more important than other parts of the curriculum.'

The litigious image of lawyering conveyed as a result of the curriculum's preoccupation with substantive law is reinforced by a conception of skills training as something that is taught in a stand-alone course. This because it conveys the 'false impression that ADR approaches and other lawyering skills are truly separable from legal analysis [and suggests] that a particular legal dispute can either be handled exclusively through litigation or exclusively through a form of ADR.'⁴²

The point is emphasised a little later:⁴³

... merely offering additional skills courses is not sufficient to improve students' lawyering capabilities. Rather it is important to integrate such instruction throughout the curriculum because reinforcing the messages about various competencies in multiple places is likely to increase the educational impact on students ...

Even in a subject such as civil procedure where one would have thought, in light of the importance of this activity to state practices, more emphasis might be given to ADR, the overriding tendency is to privilege the litigious aspects of the discipline.⁴⁴

Civil procedure, in contrast to ADR is also treated as an 'academic discipline' or one that contains a prescribed body of knowledge that students are required to learn and apply in specific, usually instrumental and technocratic ways. This subject reinforces the type of gladiatorial and adversarial values roundly criticised elsewhere for limiting the capacity of lawyers, as gate-keepers to the legal system, to think in terms that might best serve their client's interests.

Litigation is not always the appropriate response,⁴⁵ but weighting a procedural course to curial-driven forms of disputing simply reinforces the adversarial values embodied in

⁴¹ For a good recent account of the role of skills in developing transactional competencies of Bradlow and Finkelstein (2013).

⁴² Lande and Sternlight, (2010 p 268).

⁴³ Ibid p 277.

⁴⁴ Sternlight, (2004).

⁴⁵ One of the inhibiting factors here is that hegemonic disputing processes, including the version of mediation promoted by NADRAC, conceptualises justice in terms of procedural norms and values. That view is buttressed by conceptions of legality that privilege the general and abstract, rather than the particular and the concrete; ie human relationships are mediated through legal categories and those limit the relevance of the particular or specific human needs



all other substantive subjects. That is to say, doctrinal courses are all focused on courts, usually appellate courts and hence convey the message, usually implicit as it is never addressed as such, that litigation is the normal default mechanism for resolving disputes.⁴⁶ This litigious epistemology is the unspoken assumption in the following comment from the ALRC's review of the Federal Civil Litigation System:

Most lawyers are not litigators. There is nevertheless a pervading consciousness in legal practice that litigation is the possible conclusion of any contract,⁴⁷ trust, deed of conveyance drawn up or any legal advice tendered. The attitude of the lawyer is one of precaution and anticipation of litigation.

One response to this claim is that many commercial contracts are more likely than not to contain an ADR provision setting out what procedures will be followed in the event of a breakdown in the parties' relationships. Those agreements need to be negotiated and as such require a different set of skills to those of trial lawyer.

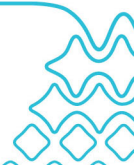
As such, the attitude of a lawyer who is capable of drawing upon a plurality of dispute resolution strategies is likely to be more imaginative and responsive to the particular needs and interests of her clients rather than simply framing the client's needs in terms of her categories. As indicated in the reference to Susskind's work, the practice of law is changing significantly and lawyers are, in an increasingly competitive market, having to respond very differently to client needs.

Law schools need to recognize this fact because as things stand curricular practices continue to foster a conception of professionalism that is very much at odds with the changing realities of professional practice. Effective and efficient practice requires awareness of the skills addressed in this guide and, more specifically, the reflective dispositions required of students and practitioners to assess the extent to which their practices, and the values and attitudes, or culture, on which those practices are based are consistent with the demands of a changing workplace.

and interests that drive disputes. But one might also indict the hubris of the modern law school, located as it is in a research-based university and one that privileges the rational and exhibits a condescending attitude towards practice-based knowledge. This preference for theoretical knowledge is manifest in the sort of knowledge that counts, as well as the sort of learning legal education privileges.

⁴⁶ The point is made in by Winick (2007) when discussing the nature of the role of the lawyers involved in the Schiavo litigation in inhibiting an early resolution of the dispute. At one point at a fairly early stage in the dispute, Maria's parents offered their estranged son-in-law an outcome that would have avoided the toxic litigation that subsequently followed. Winick notes that the lawyer involved appeared to simply ignore the offer, and he suggests that if it wasn't deliberate, as such, then it was certainly as a result of a particular mind-set; what Riskin (1982) has called the lawyers' 'philosophic mind-set' or what Macfarlane (2008) characterises as a litigious epistemology or a conception of knowledge that exists awaiting to be applied to a particular problem; indeed, this conception leads to the construction of problems in a specific way, through legal categories, and implicates a different understanding of the lawyer's role to that informed by an epistemology grounded in a culture of settlement.

⁴⁷ Quoted in Colbran (2012, at p 73).



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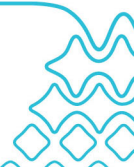
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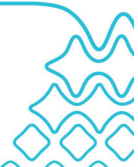
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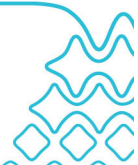
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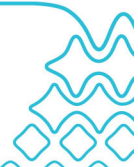
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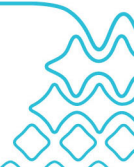
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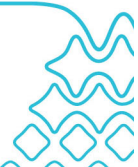
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