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January 1, 2004

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John Wade, *Bond University*

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Dueling Experts in Mediation and Negotiation: How to Respond When Eager Expensive Entrenched Expert Egos Escalate Enmity

John Wade

Director, Dispute Resolution Centre
School of Law
Bond University
Queensland 4229
Australia

jwade@staff.bond.edu.au

+61 7 5595 2004

Dueling Experts in Mediation and Negotiation: How to Respond to Dueling Experts' Syndrome

There are a number of normal hurdles which are presented to negotiators and mediators. Dueling experts is one of these predictable hurdles. This concept is described, and a routine process in response is set out – normalizing, reframing, and turning this barrier into a standard problem-solving question such as, "What can be done about the current differing views of the experts?" Twelve standard responses to this question (each with inevitable advantages and disadvantages) are systematized for mediators and negotiators to learn and possibly "add value" to any negotiation.

Introduction

A common cause of conflict is missing information or data perceived to be inaccurate. One response to data conflict involves the employment of two or more alleged experts to support the opinions of each party to the conflict. One definition of an "expert" is "a person who has special skill or knowledge in some particular field".[1] These alleged experts may be medical doctors, engineers, lawyers, valuers, builders, accountants or psychologists – to name a few. Experts who are asked to give opinions frequently give diverse opinions on causes, values, and predicted futures. Disputants are often astounded that two experts can be "so far apart".

One positive side of employing experts is that they may be able to reduce data conflicts. Many data conflicts are settled due to the dispassionate opinions of one or more alleged experts about history, causation or the future. What caused the concrete to crack? What degree of pain the injury will cause in the future? How much is the corner store worth? What is a judge likely to decide in two years' time? How much will the repairs cost? How much profit will the business lose over the next ten years due to X?

However, there is a darker side to the practice of seeking expert opinions in order to settle conflict.[2] This problematic side often emerges as the conflict escalates. Instead of being part of the solution, the alleged experts become part of the problem for the clients, and for the mediator or facilitators. Writers have labeled this common phenomenon as "dueling experts' syndrome".[3] Mediators and professional negotiators become voyeuristic observers of the darker sides of expert assistance.

Dueling Experts' Syndrome

This syndrome involves some or all of the following patterns of behaviour: each disputant employs a different expert ("**ours is the best in the field**"); each disputant hires an expert who has a reputation for favouring that disputant's preferred outcome ("**reputational partiality**" eg a plaintiff's doctor); tells different stories to their own expert ("**garbage in, garbage out**"); expressly or impliedly hints at the advice she wants from the expert ("**remember who is paying you**").The experts initially do not consult with each other ("**delusionary isolation**"); the expert, in order to curry favour and ensure future employment from a repeat player, tells the client in writing what (s)he wants to hear ("**you get what you pay for**"); the written overconfident report does not set out either a clear list of factual presumptions made, or the details of the terms of the expert's employment instructions ("**garbage in, garbage out**" again), or a clear list of alternative interpretations, or a range from best to worst of alternative "legitimate" views in the field ("**delusionary certainty**"); the report is long, rambling and sometimes incomprehensible to the average citizen ("**mysterious complexity**"); each expert is instructed not to show draft reports to the other ("**no early doubts or compromises**").

Once the over-confident (versions of the) expert reports are published, each expert defends his/her version with increasing verbal intensity and insult in order to preserve reputation, ego ("**now it is personal**"), future employment, even up old scores and does what is expected as a snarling doberman ("**this is our opening offer**"). The disputants then invest large amounts of time and

money to resolve a personal conflict between the two experts as a pre-requisite to resolving their own conflict.

There are other fascinating psychological and economic dynamics to dueling experts' syndrome, particularly when the dueling experts know each other well, enjoy the game, and carry personal baggage from frequent past encounters. More troubling is the repeated pattern whereby many experts, who advocate a particular view, actually begin both to believe in and emotionally support their own view.[4]

Wayne Brazil has commented:

"*It is commonly believed by many litigators that to simply turn over all the relevant data to a consultant expert is to flirt with disaster: namely, the possibility that your expert will reach a negative conclusion about the role of your client. To reduce the chances of such an eventuality, many litigators carefully control the flow of information to their consultants. Their hope is that the expert will form a positive opinion, will identify with the attorney's client, and will develop an ego investment in the positive conclusion that the attorney wants reached. Thereafter, the attorney may feed the expert some negative data about the client's conduct in order prepare the expert to withstand cross-examination. By the time the expert receives the bulk of the negative information (at least so goes the litigator's theory of manipulation), he has so heavily identified with the client's position and has invested so much of his own professional ego in his positive opinion that all his impulses are in the direction of defending rather that reevaluating that opinion. Thus the lawyer hopes to capitalize on the expert's relatively predictable reactions to cognitive dissonance.*"[5]

The Dynamics of Negotiation and Experts

The normal dynamics of negotiation add additional complexity to, and justification for, dueling experts' syndrome. Firstly, dueling experts know consciously or subconsciously that they are part of a predictable process. It is well known by negotiation, research, anecdote and mythology that exaggerated claims usually achieve better number outcomes than moderate claims. Therefore, if an expert report is both over-confident and near to the "insult zone", then it will usually achieve a better outcome for their clients, than if the report is balanced, qualified and closer to "the truth" or the settlement zone.[6]

Where an expert produces a "moderate" report, then this shifts the bargaining range considerably in favour of the other expert who has produced an extreme report.[7]

Secondly, an enthusiastic dueling expert provides a useful "bad cop" for the ubiquitous good cop – bad cop negotiation routine. "Deal with the pleasant client, or else we will have to hand this dispute over to our rabid (lawyers, valuers, psychologists, doctors, engineers, etc)". As one CEO whispered to me during a mediation "Can we go outside and talk? We will never get anywhere with all those people arguing their theories" (nodding towards a group of entrenched expert engineers and lawyers). Whereupon the two CEOs and the mediator went for a long walk and settled the dispute under a gum tree. In that case, were the dueling experts being efficient or inefficient?

Thirdly, well-known experts who produce long reports may be a useful part of a strategy of attrition to wear out the other disputants. Those other disputants then feel obliged to keep spending on opposing, well-known and highly priced experts in order to create doubt by appearing credible, argumentative, persistent and willing to respond with reactive attrition.

Once again, such apparently dysfunctional routines by dueling experts may sometimes become functional. These are important negotiation dynamics for negotiators and mediators to

recognize and try to respond to constructively, even if we do not always approve of these sometimes tiresome, expensive, self-serving and inflammatory routines.[8]

How Can Negotiators and Mediators Respond to Dueling Experts?

Let us assume that the "problem" of dueling experts has already arisen. That is, as conflict managers we are not here considering the important question of how to avoid or minimize pre-emptively the dynamics of dueling experts. That pre-emptive question will continue to be a major item for law reform agencies and for negotiation tacticians in the future. The writer's preference is for the roadblock of dueling experts to be anticipated by smart conflict managers. Anticipation can then lead to a number of preventive tactics. That is the subject for a future paper.

As the majority of conflicts are settled or abandoned, mediators and lawyers are often left with the "hard cases", or escalated disputes. This residue often has attracted the dynamics of dueling experts, such as doctors, lawyers or accountants, who are "far apart". What can a negotiator, lawyer or mediator do in these cases?

There are two major conceptual responses to this question. First, reframe the expert? conflict into a problem for the negotiators to address co-operatively; and secondly, help the negotiators to identify systematically and then evaluate options to resolve the expert dilemma. We shall consider each of these in turn.

Reframing the Conflict

Preparation meetings

Where a mediator or professional negotiator is able to have preparation meetings with individual disputants in person, by email (email preparation is particularly useful in multi-party disputes to reduce expense, mediator exhaustion and to demonstrate transparent conversations), or over the phone, this provides the ideal time to identify any dueling experts, define the problem of

experts in conflict, lower expectations, and begin to foreshadow the "normal" range of responses to dueling experts. Examples of "preparatory" mediator's language include:

- "So your valuers have come up with preliminary opinions which are miles apart? What can you both do about that?"
- "What will you do at the mediation when predictably each lawyer says 'I'm right'; 'No, I'm right'? Will they just blah-blah at each other? How much time should be allocate to the 'I'm right, you're wrong' routine?"
- "From what you say, the engineers' initial reports are on different planets? Is that correct? In my experience, you cannot expect one or both to say suddenly 'Oops, I am wrong'."
- "What can you do about the differing medical reports? Flip a coin? Split the difference? I don't want the mediation meeting to be a waste of time for you both."

More specifically, when confronted with a standard hurdle in negotiations, mediators and negotiators are often taught to go through the following three steps.

Step 1 – When in Doubt, Reframe or Summarise

In joint or separate meetings, the first thing that mediators (and many other skilled helpers) are taught to do is to put a new or old name humbly on what is happening.[9]

One meaning of "reframing" is to take an existing feeling or perspective, and put this into a new set of words, images or metaphors. Reframing has many potential benefits, including giving new vocabulary, creating doubt and providing a new set of spectacles with which to view an old problem. New perspectives may create changed negotiation behaviour.

For example, the problem here might be reframed as, "You both believe that your experts are right, and yet they are so far apart"; "How is it that two experts can come to such different conclusions?"; "Your experts seem to have left you with a problem"; "Expert one says that the grass is blue, and expert two says that the grass is yellow – is that correct?"

Step 2 – Convert the Standard Problem into Standard Problem-Solving Questions

Orthodox problem-solving and decision-making literature emphasizes that "the right question is half the answer".[10] Creating non-judgmental problem solving questions is a distinct step from initial reframing and summarizing. Many negotiators and mediators stumble at, or sidestep, this difficult linguistic task.

The standard hurdle of dueling experts can routinely be converted into standard problem-solving questions on flip-charts or whiteboards in words such as:

- How to respond to conflicted expert opinions?
- What do others do when confronted by differing experts?
- How to solve (y)our problem of dueling experts?
- What can be done about differing (legal) opinions?
- How can (y)our two experts be so far apart?

Step 3 – Brainstorm Non-Judgmentally the (Standard) Range of Options

In the writer's experience as a mediator, it is very helpful to disputants to realise that their conflict or "problem" is normal, that thousands before them have experienced the same situation, and that the same thousands of disputants have brainstormed through a list of optional solutions, and found one which is at least "satisfactory" to both.

Ideally, this list of options should be extracted slowly and put on a flip chart arising out of the suggestions of the disputants. Visible charts can promote clarity and ownership. Prompts may be used such as: "What do you do when two plumbers suggest opposite solutions to a roof leak?" "How have other businesses handled such conflicting advice?" These prompts can become more directive: "I'm not suggesting that you should do this, but I have had clients who asked the conflicted experts to write a joint report explaining how two experts could be so far apart. Should I add that to the list of possibilities?" "Would you like me to write up some of the 12 ways I have

seen clients respond to this common problem? You may have other ideas also." "Of the 12 methods we have recorded on the board, which have you seen used most often? If you wish, I can circle the three that I have seen people like you use most often."

Helping the Disputants to Identify and Evaluate Options to Respond to Dueling Experts

Here are twelve common responses to the problem of dueling experts. It is worthwhile memorising some or all of these, together with the advantages and disadvantages of each. Thereby a mediator, lawyer or other skilled helper can "add value" to the decision-making process of clients. There may be other responses or hybrids of the twelve options which follow. To assist the writer's frail memory, these twelve options and the preliminary problem solving questions have been printed on wallet sized cards and distributed widely where he teaches and practices as a mediator. These, and other problem solving cue-cards, are produced strategically and ostentatiously by certain smiling lawyers during mediations.

It should be emphasized that, in any dispute, several of these responses can be tried. They are not exclusive. Some of these listed solutions will be so unsatisfactory to one or more of the disputants, that the range of options may be narrowed quickly.

(1) Try to Convince – "Mine is Better Than Yours"; "I'm Right, You're Wrong"

(2) Experts Jointly Explain Why Differences Exist

(3) Each Expert Answers a Written List of Questions

(4) Experts Write a Jointly Signed Explanation of Differences

(5) Third Advisory Expert Attends the Mediation or Negotiation

(6) Third Expert Writes a Non-Binding Opinion

(7) Third Expert Writes a Binding Decision

(8) Create Doubt By Introducing New or Hypothetical Facts

(9) Split the Difference

(10) Trade Chips

(11) Toss a coin

(12) Refer the Decision to a Judge

Each of these possible responses will now be considered in more detail.

(1) Try to Convince – "Mine Is Better Than Yours"

This first predictable response involves the disputants and their respective experts attempting to create doubt for the other side in a joint meeting, perhaps preceded by a written exchange of questions or assertions. Each party orally points out the strengths in their own expert's reports and opinions, and the weaknesses in the others' reports and opinions. A mediator can structure a question and answer time period for each of the experts and/or the disputants. Sometimes the questions can be put in writing by one or more of the parties ahead of the meeting; or asked through the mediator, in order to reduce ambushes and aggressive cross-examination.

This procedure has many potential benefits – clarification, reducing garbage in – garbage out decision-making, and witnessing the skills of each expert when questioned. It is a systematic form of creating doubt and new information to assist better decision-making.

However, these debates have the obvious potential to degenerate quickly into attempts to publicly humiliate, and can lead to entrenchment of existing views, hiding information, and expert strutting. Experts, once scarred by such meetings, may be reluctant to face further semi-public batterings unless protected by clear procedures and a strong mediator as chairperson. Some judges, arbitrators and mediators adapt this type of meeting by excluding clients, and just convening a "conference of experts", in the hope of reducing loss of face. Like all interventions, this has both advantages and disadvantages.

(2) Experts Jointly Explain to the Disputants Why Differences Exist

This second response is different in emphasis than the first. However, both overlap and may happen simultaneously.

The predominant goal is not for each expert to justify why (s)he is "right", and the other is "wrong". Rather, each expert tries to explain visually, orally and in simple language to everyone present, how each conclusion was formed and therefore why they are so different.

Obviously, this has the same potential benefits and detriments as the first response.

The writer has seen this response used effectively where groups of accountants have sat around the table and attempted to explain to everyone present why their valuations of businesses were so disparate. The clients have appreciated having underlying assumptions of each expert clarified, and hearing that valuation methods involve discretionary factors. In this way, posturing certainty was reduced to create realistic uncertainty.

The predictable traps observed at these meetings have been that the experts slide quickly into professional jargon, speed of language and thought, and become defensive during questioning. All of these may be remedied by a mediator's use of visuals, reframing, strategic ignorance, admonitions and triangulation.[11]

(3) Each Expert Answers a List of Written Questions

The third response is to negotiate a procedural agreement whereby each disputant agrees to send a written list of question to the "opponent's" experts who are instructed to respond with written answers within an agreed time period. The cost of the written answers is usually borne by (s)he who asks for them.

There are some obvious benefits to this process including clarification, creating of doubt (for all sides), avoidance of hostile public cross-examination, considered responses and saving of face. Some of these benefits may be absent in relation to the first two responses.

(4) Experts Write a Jointly Signed Explanation

This fourth response to dueling experts is potentially one of the most helpful. This usually requires pre-mediation or pre-negotiation meetings between a mediator and each of the parties where the mediator identifies the dueling expert hurdle and engages in soft or hard brinkmanship.

- "I do not want to waste your time and money by convening a meeting where we listen to experts making speeches"
- "Do you predict that either of your experts will back down at a public meeting?"
- "How can you help your experts to save face?"
- "I don't know about you, but I cannot understand these 52 pages of contradictory opinions. Who can decipher that maze for us all in words of one syllable?"
- "What if you both instruct your experts to sit in a room together for two hours and write out no more than two pages in point form explaining why their reports are so different?"
- "Of course, they would both have to sign those two pages or else we will end up with two more contradictory reports." etc.

If persuaded, the disputants each employs his/her own expert for a fixed period of time (say 3 hours), to sit in a room with the other expert; and write a "no more than two page document"; explaining in simple language and dot point form; why their conclusions are different; and most importantly, **both** experts must sign that single explanation. The temptation is always to create two more documents and two new explanations of " why I am right and (s)he is wrong".

This response to dueling experts is also reflected in rules of court in many jurisdictions. Judges as decision-makers, like disputants as decision-makers, want to reduce the confusing garbage

in.[12] The fact that many judges use this response, can assist mediators or negotiators to apply pressure – “If a judge is going to order a short joint report, why not do it now?”

If this response is potentially so helpful during negotiations or mediation, then anecdotally why is it apparently so uncommon in some places? Here are some observed and hypothesized reasons for resistance by various parties to the dispute to use this response:

- The joint report may divide the unity of a negotiating team. A key member, namely the expert, may create doubt publicly for his/her own team.
- An expert who admits to complexity and uncertainty will no longer be an effective “bad cop” in an accepted negotiation routine (and may not be hired again).
- The two (or more) experts may not have the skills to write such a short and simple report.
- The two experts may insist on writing two more reports to prove why their first reports were “correct”.
- The joint report costs more money.
- Clients must be assertive in order to order experts (particularly lawyers) to do what they want. The experts can legitimately respond:

  ”This process may lead to some dangerous concessions, which will undermine the litigation if we need to proceed to court.”(This comment reflects an ongoing and legitimate tension between competition and co-operation in any negotiation or conflict management).
- The jointly signed report may lead to a loss of reputation - ”Why didn’t you make this clear previously?”

(5) Third Advisory Expert Attends the Mediation or Negotiation

This response to dueling experts involves both disputants agreeing that they need help, selecting a trusted “extra” expert from a list, or based on a recommendation, and agreeing on how to share payment for this person. Additionally, the parties may agree: that neither disputant will talk to

the advisory expert privately; what telephone calls and inquiries can be made, and documents read by the advisory expert; how many meetings will the advisory expert attend; what oral comments are sought from the advisor and whether or not (s)he should write a final joint report.

The writer has seen this response to dueling experts used very successfully in mediations involving disputes:

- about the effectiveness of renovations of a factory where an advisory engineering expert was imported from New Zealand to sit in on the mediation;
- about the valuation of retirement benefits where an advisory litigation accountant sat in on mediation and answered numerous questions;
- about the valuation of a business where an advisory taxation lawyer attended several mediation sessions and commented on potential tax liabilities;
- about a child's responses to parental move-away where a child psychologist attended a mediation and commented on conflicting reports.

The advisory expert should normally define his/her role and limit liability carefully in writing. For example, the written contract could restrict his/her role to that of a "commentator" using "limited" information and state that each party is relying on his/her own expert's advice. Otherwise both disputants may turn on the advisor later and declare "but at the mediation/negotiation you told us…..".

A skilled and gracious oral commentary by an extra expert, particularly if the commentary suggests "ranges" of possible outcomes, may avoid loss of face for the dueling experts. This intervention may also allow the experts to resume bad-cop warfare untouched by diplomacy, if that round of mediation or negotiation is unsuccessful.[13]

(6) Third Expert Writes a Non-Binding Opinion

This sixth response to dueling experts is analogous to the previous option, except that the advisory expert is contracted to write a written report explaining differences, and recommending possible solutions.

The disputants usually record in this agreed process that neither will be bound by the opinion; that both are free to produce the opinion in later litigation; and that both are free to rely on their own experts if they wish.

The downsides of this response include increasing costs for the provision of a written report; wariness of professionals about publicly criticizing work of colleagues in documents; numerous reservations in the written report based on the ubiquitous proposition "I do not have all the facts"; and the tendency to split the difference between the existing dueling experts' reports.

(7) Third Expert Writes a Binding Decision

This seventh response to dueling experts involves the disputants agreeing to a specified process whereby a named third expert will decide the issue being debated by the dueling experts.

The disputants may wish to define the process as an "arbitration" so that the decision is registrable in a court.[14] Alternatively, the disputants can each agree in a written contract to be bound by the expert's decision (eg relating to valuation; cause of injury; extent of damages). In this latter case, if the "loser" in the third expert's report breaks the contract and decides to litigate, (s)he then runs a substantial risk that a judge may confirm the third expert's report, and make a costs order against the now "double loser".

Many third party experts will prefer a form of arbitration as this substantially reduces any risk of liability for professional negligence while making the binding decision.

Most mediators and negotiators have been involved in successful referrals to binding decisions by third parties. This process has many advantages, including privacy. Arbitration also provides nervous middle managers, CEOs, and governments with a third party to "blame" for the outcome when they are reluctant to take personal responsibility for a negotiated outcome.[15]

However, it should be repeated that this arbitral response to dueling experts also has a litany of well documented disadvantages, such as: loss of control of the outcome; risk of detrimental outcome; delay and expense; cloning the disadvantages of litigation; tendency of arbitrators to split the difference[16]; lengthy negotiation and documentation concerning what is an appropriate arbitral process[17]

(8) Create Doubt by Introducing New or Hypothetical Facts

This eighth response is common, and is often combined with other responses to dueling experts.

A mediator (or negotiator) identifies a number of factual, evidentiary or "rule" assumptions which apparently provide the building blocks for each expert's opinion. These foundations may helpfully emerge if and when each expert "attacks" the other's report as "wrong". A mediator can then gently and systematically go through this list of assumed facts and ask each expert in turn, first privately and then after rehearsal again in joint sessions – "What if the following new fact was accepted by a judge, would your existing opinions need any updating or variation?"[18]

This process of suggesting new hypothetical facts, has potential benefits of:

- allowing one or both experts to change their opinions without openly admitting any mistake;
- demonstrating that expert opinions will need to be updated regularly as new "facts" emerge (that is, creates doubt);
- enabling experts to remain aggressively confident of their initial reports "so long as no new facts emerge";

- echoing the reality that judicial and historical fact-“finding” or fact -“reconstruction” is a hit-and-miss process. In the words of the legal realists, “facts are guesses”.[19]

Therefore, hypothesizing new or even surprising “facts” or inferences is not an unrealistic decision-making routine.

(9) Split the Difference

A very common method of managing the real or fake war between dueling experts is to split the difference between those experts. Obviously, this downstream negotiation practice encourages the upstream practice of hiring dueling experts! That is, hiring an extreme expert drags a subsequent split the difference outcome in your favour.

- “What if, only for the purposes of today’s negotiation, we take the middle figure between the two valuers?”
- “What if we assume for the moment that a judge may award some damages rather than the all or nothing damages predicted by the two lawyers?”

For some disputants, this option of splitting the difference is frustrating as it appears to reward the blatant tactic of generating “false” reports. It also appears to punish further the person who has spent time and money to generate what is perceived to be a more balanced expert report. Nevertheless, the anecdotally frequent use or suggestion of splitting the difference, suggests that negotiators and mediators need to be ready to manage this frustration.

Splitting the difference between experts is a common outcome in certain types of disputes. For example, in the writer’s experience in matrimonial property disputes, lawyers routinely prepare for mediations and negotiations a single page summarizing the list of assets and alleged values of each asset. It is common for the right hand side of this summary to have three columns—namely “husband’s value”, “wife’s value”, and “mean” or “average value”. The average value column

gently prophesises a possible or probable outcome of dueling valuations, at least in poor and middle class families.

(10) Trade Chips

This tenth response to dueling experts is the standard negotiation behaviour of trading chips: "If I was prepared to accept (or move towards) your expert's opinion, would you be prepared to give me X?"

Sometimes this strategy may produce a similar substantive result to splitting the difference between the experts. Nevertheless, it may be more psychologically satisfying for one or more disputants who has personal priorities about which element of the packaged outcome is most important. The writer has frequently seen this kind of "trade" eventually take place in matrimonial property negotiations and mediations. Husbands often want their dueling expert's valuation of a business to prevail in order to placate business partners, to control future possible tax assessments, or because they have personal insights into the history of the business. Accordingly, the husband eventually is persuaded to make an offer to his wife as follows:

"If I was prepared to move towards your percentage, would you be prepared to move towards my expert's valuation of the business?"

To which eventually comes the predictable response from his wife: "As a matter of principle, yes… but what do you mean by 'move towards'?"

(11) Toss a coin

Another possible, and more startling, method to resolve dueling experts is for the disputants to use chance. For example, they can toss a coin and the "winner's" expert prevails.

Ironically, this use of chance has a number of benefits:

- Chance symbolically fulfils the lawyer's comments to their clients that litigation is a "lottery", or "brain surgery with an axe".
- It saves face and egos for the dueling experts.
- Chance provides an instant and cheap outcome
- Chance avoids the battle of wills and tactics over expert reports whereby one of the disputants feels that (s)he has "lost".
- It enables negotiators to return to head office or to constituents with a definite result, for which in one sense, the coin is responsible.
- Some negotiators are already accustomed to toss a coin on occasion to resolve other deadlocks, such as the last gap in negotiations.[20]

Obviously, such an arbitrary and uncontrollable method as coin tossing may be very unattractive to a risk adverse negotiator, or where the experts are far apart. Nevertheless, merely listing "toss a coin" as a possible solution is so shocking to some disputants, that they search more diligently for a more acceptable option from the rest of the list.

(12) Refer the Decision to a Judge

The twelfth response to dueling experts is analogous to the previously-mentioned possibility of consensually appointing an arbitrator. However, this twelfth option can be elected consensually or imposed unilaterally when all other options (momentarily) are unacceptable. Additionally, the third person decision-maker is assigned by the state, rather than personally chosen like an arbitrator.

However, judges also may decide to choose one or more of the responses set out above, before they accept the buck being passed to them. For example, ordering the experts to confer and submit a single report explaining why they are at odds seems to be an increasingly popular judicial response in Australia and the United Kingdom.

Once the use of a tax-payer funded decision-maker is the "chosen" response, then all the advantages and disadvantages of litigation are also chosen. There is a vast and growing literature on the advantages and disadvantages of litigation.[21]

More specifically, there is a large body of rules and policy which judges attempt to balance when deciding upon which of two or more dueling experts should be given more credibility.[22]

The vastness of the judicial and legislative rules concerning dueling experts is both cause and effect of the uncertainty, expense, and delay attached to this last option – namely "We'll leave it to the judicial lottery"; or more subtly, " Of course, you can always leave it to a judge to decide which parts of each expert's report are acceptable".

Paralysis by Analysis?

Having "objectified" dueling experts' syndrome into a standard question, and having created a visual list of "normal" responses to this question, what next? The writer has found that one helpful procedure is to give each disputant the list of options they have created (with some prompting), and give them time to prioritise their preferred and less preferred options. This enables a clarified resumption of negotiations and decision-making. The ubiquitous presence of their own list of options on a flip-chart helps the mediator, experts and the parties to categorise, with some grimaces, silences and humour, their subsequent reversions to rhetoric, threats, lies and bluffs.

As with all problem-solving exercises, this analysis of possible responses to dueling experts may stun and shock inexperienced negotiators in such areas as personal injury, family, workplace, discrimination, estate and environmental conflict. Their search for "justice", slow progress through grief, and the words or silence of their lawyers, may not have prepared less experienced disputants emotionally for such a routine and mechanized list of options.

Nevertheless, in the writer's opinion, disputants should be introduced to these realistic options as early as they, or their constituents have ears to hear. If professional advisers are

concerned about later client recriminations concerning money and time "wasted" on dueling experts and about uninformed consent, then the options should be expressed in writing.[23]

If the preferred versions of "justice" are not available in the vast majority of conflicts, then disputants need to know what lies ahead. They need to be prepared gradually to make wise choices from the routine menus available. Such mechanistic rationality, even when conveyed with skill and compassion, may not be heard, at least the first hundred times.[24]

Questions for Further Study

The catalogue of responses to dueling experts set out in this article begs further questions:

- What other responses or hybrid responses exist to be added to the catalogue?
- What responses are being used most or least frequently in different areas of conflict and negotiations?
- What are the possible causes for use or not of each of these responses – habit, etiquette, culture, ignorance, fear, conformity, lack or presence of skills and so on?
- What evidence, if any, can be collected to measure and predict the rate of "success" of each response?

Conclusion

There are a number of "normal" hurdles which are faced by negotiators and mediators. Dueling experts is one of these.[25] Ideally, wise negotiators, lawyers and conflict managers should anticipate dueling experts' syndrome and act preventively. However, more commonly mediators and negotiators will be required to react to what has already occurred.

This article has attempted to give negotiators and mediators confidence by normalizing this hurdle, reframing, and turning the barrier into a standard problem-solving question such as, "What

can be done about the current differing views of the experts?" Finally, twelve possible standard responses to this question have been systematised. No doubt, there are hybrid and other responses which need to be added to this list. Disputants can then discuss which of the twelve standard responses, or hybrids, they prefer, or do not prefer, and in what order of priority.

This article has also illustrated a routine process to approach a variety of common raging dragons which emerge repetitively in the caves of conflict, negotiation and mediation.[26] Learning the process and responses can add confidence and tools to the skilled helper's toolbox.

APPENDIX A

Standard Hurdles and Glitches Which Mediators and Negotiators Encounter Routinely

What responses are available to each standard hurdle?

- Dueling Experts
- Influential outsiders
- Lack of authority to settle
- Insult zone offers
- Unwillingness to make offers
- High emotion
- Personal attacks/sniping
- Data chaos
- No risk analysis or goal definition
- Overconfident negotiator
- Poor preparation
- Unwillingness to come to negotiation/mediation
- Emerging unfair agreement
- Lying
- Hiding information
- Undue emphasis on legal issues
- “Decision Traps” such as reactive devaluation
- Overwhelmed negotiator
- Unhelpful mediator
- Last minute add-ons
- Last gap
- Post settlement regrets
- Post settlement drafting jams
- Non-performance of agreements
- Ending “unsuccessful” meetings

ENDNOTES

[1] *The Macquarie Dictionary*, 1982, 628.

[2] Egan, G. *The Skilled Helper*, 5th ed. California: Brooks/ Cole, 1994 systematically identifies the "shadow side" of each strategy to "help" clients solve their problems.

[3] Wade, J.H. *Representing Clients at Mediation and Negotiation*, Queensland: Bond University, 2000, 3. See an earlier reference to this term in Transformation Management Services, *Medical Panels* (A report for the WorkCover Authority of New South Wales, 1995), 39.

[4] See Festinger, L. *A Theory of Cognitive Dissonance*, Evanston, 1ll: Row, Peterson, 1957. Festinger identified the tendency of most human beings to attempt to bring behaviour, emotions and beliefs into a degree of harmony, and conversely, to avoid personal "dissonance" or disharmony in these three areas. Lawyers' letters and expert reports are behaviours which tend to drag the writers' emotions and beliefs into line with the rhetoric.

[5] Brazil, W.D. "The Attorney as Victim: Towards More Candour About the Psychological Price Tag of Litigation Practice" 3 *Journal of the Legal Profession*, 1978-79, 107, 109

[6] See Lewicki, R. et al. *Negotiation*, ch.3. The tradition of beginning negotiations just inside the "insult zone" is being challenged by a variety of legislation. For example, the *Legal Profession Act 1987* (NSW), s.198J imposes a duty upon lawyers not to make a claim or defence of a claim for damages unless these have "reasonable prospects of success". See Beaumont, N. "What are Reasonable Prospects of Success" *Law Soc Journal (NSW)* 2002, 40, 42 for an attempt to interpret "reasonable" as "not fanciful".

[7] *Ibid*.

[8] Predictably, judges and legislators wrestle continually with these standard tactical uses of "experts". See Australian Law Reform Commission (ALRC) *Managing Justice: A Review of the Federal Civil Justice System* (Report no. 89) 2000, 418-436; ALRC, *Review of the Federal Civil Justice System* (DP 62) 1999, ch. 13; Cooper, R.E. 1997-98 "Federal Court Expert Witness Guidelines" *Australian Bar Review*, 1997-98, 16, 203. The Australian Federal Court has published *Guidelines for Expert Witnesses* (1998). These guidelines include provision that:

- an expert witness is not an advocate for a party
- the expert witness's paramount duty is to the Court and not to the person retaining the expert
- all instructions, whether in writing or oral, should be attached to the expert report, or summarised in it.

See also the influential guidelines in *The Ikarian Reefer[1993]* 2 Lloyds Rep 68, 81-82; [1995] 1 Lloyds Rep 455, 496; Freckelton, I. and Selby, H. *The Expert Evidence: Law Practice, Procedure and Advocacy* North Ryde, NSW: Lawbook Co, 2002; *Expert Evidence in Family Law*, North Ryde, NSW: Lawbook Co, 1999.

[9] Boulle L. *Mediation Skills and Techniques*, Butterworths: Sydney, 2001 at 129ff

[10] eg Hammond, J.S., Keeney, R.S. and Raiffa, H. *Smart Choices- A Practical Guide to Making Better Decisions*, Boston: Harvard Business School Press, 1999.

[11] One meaning of "triangulation" involves asking or insisting that the disputants speak to the mediator /facilitator/chairperson rather that to each other. The mediator can then summarize or reframe what has been said. This may change the speaker's tone, speed and complexity, especially if the mediator strategically or genuinely alleges ignorance.

"Triangulation" has other meanings including where one negotiator attempts to forge an alliance with the mediator against another negotiator.

[12] ALRC, *Managing Justice supra* note 8 at 424 states "(C)ritics assert that the present use of expert evidence---- does not assist judges and other decision makers to understand, and often clouds issues".

[13] Mosten, F.S. *The Complete Guide to Mediation.* Chicago: ABA, 1997, 296-297 describes a "confidential mini-evaluation" which is an oral and confidential opinion on a possible range of outcomes by an expert. This avoids some of the risks of written reports by an expert.

[14] *See Commercial Arbitration Acts* in each state of Australia; *Family Law Act* 1975 (Cth) ss 19D,19E; Wade, J.H. "Arbitration of Matrimonial Property Disputes", 1999, *Bond Law Review* 11, 395.

[15] See Wade, J.H. "Don't Waste My Time on Negotiation and Mediation: This Dispute Needs a Judge" *Mediation Quarterly*, 2001, 18 at 259, 263, 265.

[16] The tendency of arbitrators to split the difference between experts may be controlled by use of final-offer or "baseball" arbitration. See Murray, J.S., Rau, A.S. and Sherman, E.F. *Arbitration*, New York: Foundation Press, 1996, 240-245.

[17] See Wade *supra* note 14 at 408-409, 432

[18] The words "what if…", "assuming that…", or "if…" are fundamental for any successful negotiator, mediator, decision-maker or communicator. See the remarkable reference to this in William Shakespeare, 1623. *As You Like It.* Act V, Scene IV, "Your If is the only peacemaker; much virtue in If".

[19] Eg Frank, J. "Facts are Guesses", ch 3 and "The 'Fight' Theory versus the 'Truth' Theory" in ch 6 of *Courts on Trial*; 1949; Twining, W. "Taking Facts Seriously", *Journal of Legal Education*, 1984, 34, 22.

[20] Wade, J.H. "The Last Gap in Negotiations-Why is it Important? How can it be Crossed?" *Australian Dispute Resolution Journal*, 1995, 6, 93

[21] eg ALRC, *Managing Justice supra* note 8; Luban, D. "Settlements and the Erosion of the Public Realm" *Georgetown Law Re*view 2619; Davies, G.L. "Fairness in a Predominantly Adversarial System", ch 7 of Stacey, H. and Lavarch, M. (eds) 1999. *Beyond the Adversarial System*; Wade *supra* note 15.

[22] See Freckelton and Selby *supra* note 8.

[23] See Wade, J.H. "Risk Analysis in Mediation and Negotiation; How to Help Clients Make Better Decisions" 13 *Bond Law Review*, 2001, 13, 462.

[24] eg See Hammond, J.S., Keeney, R.L. and Raiffa, H. *Smart Choices-A Practical Guide to Making Better Decisions*. Boston: Harvard Business School Press; 1999; Sarat, A. and Felstiner, W. *Divorce Lawyers and Their Clients*. New York: OUP, 1995. Sarat and Felstiner recorded many conversations between lawyers and clients whereby lawyers attempt to lower client expectations and teach them by repetitious stories how the legal system "really" operates.

[25] Obviously, it is possible to systematise reactive and preventive responses to other standard hurdles in negotiation and mediation including influential outsiders, lack of authority to settle, requests for apology, ending an "unsuccessful" meeting, strong emotions, and extreme offers. Two other predictable glitches, namely the last gap in negotiations and failure to complete a written risk analysis, are discussed in Wade, J.H. "The Last Gap in Negotiations—Why is it important? How can it be Crossed?" *Australian Dispute Resolution Journal*, 1995, 6, 92; and "Systematic Risk Analysis for Negotiators and Litigators: How to Help Clients Make Better Decisions", *Bond Law Review*, 2001, 13, 462. A more comprehensive list of "Standard Hurdles and Glitches which Mediators and Negotiators Encounter Routinely" is set out in Appendix A to this paper.

[26] *Ibid*, see Appendix A.

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John Wade is professor and current director of the Dispute Resolution Center at Bond University in Queensland, Australia. He works as a mediator and teacher at various universities in USA and Asia. *OMIT AUTHOR DESCRIPTION AS SEPARATE DESCRIPTION WAS SENT TO TRISH JONES???