ADR in legal education: Evaluating a teaching and learning innovation

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A film about the mediation process, The Scholarship Dispute, was incorporated into the teaching and learning program of the first-year compulsory law subject Dispute Resolution in 2012 at La Trobe University Law School. This article describes and reports on two studies evaluating the teaching and learning effect of the film.

INTRODUCTION

This article begins by describing the professional and educational contexts that constructed the need for the DVD The Scholarship Dispute, and explains the reasons underpinning its development. The focus of the article then shifts to the film itself, particularly its effectiveness as a teaching tool for students of mediation. The article details two evaluative studies on the film, and reports on their findings relating to how useful and effective the film is as a resource to enhance students’ learning about the facilitative mediation process. The Human Ethics Committee of La Trobe University Faculty of Business Economics and Law approved both studies referred to in this article.

PROFESSIONAL CONTEXT

Despite the pressures on lawyers brought about by the reality of the “billable hour” borne out of the need to generate income from the legal work that they perform, lawyers’ primary duties are to the administration of justice and to their clients. These duties require lawyers to have a range of skills. Scott described several key skills required of lawyers in the 21st century:

[...]

The quotation underscores the lawyer’s role as communicator, dispute resolution facilitator, and conflict resolution advocate and needs to be contextualised in the contemporary Australian model of justice where the role of lawyers has several perspectives. Lawyers, in their client advocate role, negotiate settlements of disputes as champions of their clients’ legal positions. Whilst the duty of lawyers to advocate their clients’ viewpoints and act in their clients’ best interests is irrefutable, lawyers also have a responsibility to act as officers of the court in furtherance of the integrity of the...
legal process. The legal practitioner’s duty to put the client’s case in its most favourable light is tempered by the practitioner’s higher duty to the court, which requires the practitioner to exercise forensic judgment independently.6

Even though the adversarial model of justice is protected by the Australian Constitution, non-determinative paradigms of justice have developed and thrived in most Australian jurisdictions over the last 30 years to the extent that alternative dispute resolution (ADR), and in particular mediation,7 are now mainstream within the legal system. The ramifications of this practice-based change on legal education are significant and far-reaching. Effective communication skills form part of the lawyer’s skill set in most applications of legal practice, from client interviewing to legal practice in the adversarial adjudicative model. Nevertheless, the twinning of experiential learning in the ADR environment and the acquisition of oral communication skills cannot be denied.

Moreover, legal education now involves teaching law students skills that will enable them to understand and practise a range of conflict resolution skills. The Threshold Learning Outcomes (TLOs) adopted by the Australian Learning and Teaching Council8 endorse this professional direction. In fact, it is argued that contemporary legal practice privileges a non-adversarial model of lawyering rather than the traditional sporting contest described by Roscoe Pound. Julie Macfarlane recounted an evocative anecdote by a hotel waiter to a lawyer as follows:

You’re giving a speech about lawyers and conflict resolution?

Huh? I don’t usually connect lawyers with conflict resolution.10

The scenario depicts both the popular view of lawyers as positional adversarial advocates, and also underlines the change in the reality of modern legal practice where many lawyers act as conflict resolution facilitators, both when they represent their clients in ADR processes, and also when they act in the role of mediator.

A cynic may attribute the changes in legal practice to lawyers’ appreciation of the reality check that burgeoning costs and inefficiencies of the justice system may lead to “the end of lawyers”.11 Lawyers may well recognise that ADR is a “growth industry”, one they want to own and control, thereby enhancing their power and earning capacity. Hence, in order for lawyers to survive and flourish, a “change” that takes into account the frugalities of market forces is necessary. Perhaps this is the reason why lawyers embrace ADR practice.

The combined effect of the “the vanishing trial”12 phenomenon and the meteoric rise and acceptance of ADR constitutes fertile ground for the emergence of the “new lawyer”,13 the collaborative problem-solver and dispute resolution facilitator. This article situates best legal practice within the discourse described above.

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6 See, for example, Professional Conduct and Practice Rules 2005 (Vic), rr 12.1, 14.1.
7 National Alternative Dispute Advisory Committee (NADRAC), Dispute Resolution Terms (2003) defines “mediation” as a “process in which the parties to a dispute, with the assistance of a dispute resolution practitioner (the mediator), identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement. The mediator has no advisory or determinative role in regard to the content of the dispute or the outcome of its resolution, but may advise on or determine the process of mediation whereby resolution is attempted.”
8 Now known as the Office of Teaching and Learning.
10 Macfarlane, n 3, p 1
13 Macfarlane, n 3, p 1.
LINKING EDUCATION AND PRACTICE

Current thinking supports the need to maintain a balance between academic scholarship and practical training. The recent American Bar Association Task Force Report on the Future of Legal Education whilst acknowledging that law curricula have been updated to include more experiential training, argues for the scales of law teaching to be tipped even further towards up-skilling students for professional legal practice and that these skills should be the focus of exams that monitor admission to legal practice.

ADR is now taught (both in terms of theory and practice) in many law schools throughout Australia, with La Trobe University Law School being the first to incorporate this field of study as a core stand alone subject in its law curriculum. Mediation is the focus of the La Trobe Law School subject Dispute Resolution, which is delivered by a weekly one-hour, face-to-face lecture and weekly smaller group teaching, being a two-hour seminar with class sizes ranging from 20 to 25 students. The theoretical dimensions of conflict, litigation and several ADR processes in the context of ethical legal practice are examined in the lecture component of the subject. The mediation process is the focus of the subject, both from a theoretical and a practical perspective. The seminar classes focus on experiential teaching and learning using a range of exercises and role-plays that challenge students to participate in communication, negotiation and mediation macro and micro skills acquisition. Despite the “hands on” structure of the seminar classes, students and teachers in the subject felt there was a teaching and learning gap. Whilst textbooks and academic articles detail the mediation process and set out the necessary practical skills that are required in each stage of the process, the need for a film illustrating the mediation process was clear. The case for a visual presentation of a skills-based process was compelling, and gained traction from the fact that mediations are conducted in private. By contrast, court-based litigation is subject to public scrutiny. This being so, law students can attend various courts and tribunals, and see court adjudication – the “law in action”. This experience is not open to law students undertaking mediation training.

THE FILM

In 2012, a DVD, The Scholarship Dispute, was incorporated into the teaching and learning program of the subject. This article reports on two studies that evaluate the educational utility of the DVD in developing an understanding of theory and practice in mediation and the perceptions of learners themselves of its value and limitations.

The Scholarship Dispute film comprises a semi-scripted role-play scenario depicting a mediation, and showcasing the various stages of the facilitative co-mediation model. Each stage of the model is introduced, explained and then demonstrated. The film can be viewed as a whole, or segmented into discrete stages. A hard copy Learning Guide accompanies the DVD, which provides questions on each stage of the mediation process, and also general discussion questions.

Situated and practice-based learning

The description of the development of a DVD such as The Scholarship Dispute should be considered in a broader context of educational theory, educational technologies and professional practice-based learning. The literature reveals very few evaluations of visual aids in ADR and specifically mediation education, however there is a wealth of literature pointing to the value of educational technologies which encourage active engagement with learning.

ADR and mediation – and legal education more generally – is an area of study which requires learners to engage with a series of abstract concepts which must be organised and related in particular ways, as exemplified by the specific relationship of the functions and nature of, for example, mediation: the differences and relationships of mediation to formal court proceedings, and (as noted

15 NADRAC, Teaching Alternative Dispute Resolution in Australian Law Schools (November 2012). For details of the La Trobe Law Teaching and Learning Program in Dispute Resolution, see Gutman and Riddle, n 9 at 190.
16 See Gutman and Riddle, n 9.
above) the multifaceted duties of legal practitioners. However, knowledge of ADR and mediation is particularly challenging to acquire without observation of and active participation in mediation practices. Many educators have noted the importance of situating learning within practice since the work of Brown, Collins and Duguid \( ^{17} \) compared the limited nature of abstract learning, with deeper learning associated with activities requiring learners to apply the knowledge to a given situation.

Many educational theorists have since extended this “situationist” approach to learning in employing educational technologies such as videos, multimedia and online learning to provide “authentic learning” opportunities, with practice as a key to constructing understanding in context.

Too often, learning materials or environments are stripped of contextual relevance. Learners are required to acquire facts and rules that have no direct relevance or meaning to them because they are not related to anything the learner is interested in or needs to know. \( ^{18} \) Over the years, there has been a groundswell of criticism targeted at legal education based on the dissonance of law studies with legal practice; for example, the American Bar Association Task Force Report on the Future of Legal Education referred to above.

Working more specifically on professional practice-based learning \( ^{19} \) further emphasises the importance of practice in professional contexts, with some recent authors espousing a “sociomaterial” understanding and complaining of the under-theorised nature of practice-based learning. \( ^{20} \) Despite the emphasis on doing, practice-based learning is not exclusively a matter of acting out real world scenarios within a physical environment; it also involves text, photographs or pictures, video, or interactive computer-based learning materials which aim to bridge gaps between theory and practice.

**EVALUATION OF THE DVD**

Two evaluation methods were used to gather information about the strength of *The Scholarship Dispute* in enhancing learning about the mediation process. The subjects for Evaluation 1 were students who had completed the subject *Dispute Resolution* in 2012. The subjects for Evaluation 2 were students who were enrolled in the law program at La Trobe University but had not yet undertaken the subject *Dispute Resolution*.

**Evaluation 1**

*The Scholarship Dispute* was immersed into the teaching and learning program of the subject *Dispute Resolution* from 2012. The DVD was shown to students in class and it was also loaded as digital video segments on the Learning Management System (LMS) \( ^{21} \) for self access. By providing students with the resource of the DVD and accompanying written teaching and learning materials, the authors hoped to advance the students’ knowledge and understanding of the facilitative co-mediation process, in particular, skills-based teaching and learning, focusing on communication, negotiation and process-based skills required of mediators practising the facilitative model. Students were then asked to evaluate the subject and two questions related to the DVD were included in the mandatory university student subject-evaluation questionnaire.

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\( ^{21} \) The LMS is an online learning environment that allows students to locate learning materials and activities related to students’ studies from any location with internet access.
Evaluation 2

The authors also undertook an empirical study to evaluate the effectiveness of the DVD in enhancing student understanding about mediation. This was done with a different set of students who were enrolled in the first year law program, and had not seen the DVD. These students were not enrolled in the Dispute Resolution subject.

Methodology and results of Evaluation 1 and 2

Evaluation 1: Student evaluation of the subject in which the DVD was used as a learning resource

As an element of the university’s academic quality assurance system, feedback from students on aspects that directly affect student learning and success in the subject is sought at the end of the semester. In the Dispute Resolution subject, 21 question items were evaluated by students who undertook the subject at both the main campus (city based) and at a regional campus. Included in the 21 items were two that related specifically to the impact of the DVD on students’ learning in the subject. These items were:

Item 1: The use of the DVD “The Scholarship Dispute” in this subject contributes to my learning.

Item 2: The online version of the DVD entitled The Scholarship Dispute available on the Learning Management System contributes to my learning for this subject.

Students evaluated the items on a five point Likert Scale ranging from “always” to “never”. The responses for the two items are shown in Tables 1 and 2.

### TABLE 1 Response feedback for Item 1, The use of the DVD

<table>
<thead>
<tr>
<th></th>
<th>City campus</th>
<th>Regional campus</th>
</tr>
</thead>
<tbody>
<tr>
<td>Number of enrolled students</td>
<td>319</td>
<td>21</td>
</tr>
<tr>
<td>Overall response rate to the survey</td>
<td>35.7%</td>
<td>85.7%</td>
</tr>
<tr>
<td>Total respondents who completed the survey</td>
<td>114</td>
<td>18</td>
</tr>
<tr>
<td>Respondents for Item 1</td>
<td>113</td>
<td>18</td>
</tr>
<tr>
<td>Mean for Item 1 (based on a 5-point Likert scale)</td>
<td>4.4</td>
<td>4.4</td>
</tr>
<tr>
<td>Standard Deviation for Item 1</td>
<td>0.9</td>
<td>0.7</td>
</tr>
<tr>
<td>Median for Item 1</td>
<td>5.0</td>
<td>4.5</td>
</tr>
</tbody>
</table>

### TABLE 2 Response feedback for Item 2, The online version of the DVD

<table>
<thead>
<tr>
<th></th>
<th>City campus</th>
<th>Regional campus</th>
</tr>
</thead>
<tbody>
<tr>
<td>Number of enrolled students</td>
<td>319</td>
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<td>85.7%</td>
</tr>
<tr>
<td>Total respondents who completed the survey</td>
<td>114</td>
<td>18</td>
</tr>
<tr>
<td>Respondents for Item 2</td>
<td>113</td>
<td>18</td>
</tr>
<tr>
<td>Mean for Item 2 (based on a 5-point Likert scale)</td>
<td>4.3</td>
<td>4.1</td>
</tr>
<tr>
<td>Standard Deviation for Item 2</td>
<td>1.1</td>
<td>1.0</td>
</tr>
<tr>
<td>Median for Item 2</td>
<td>5.0</td>
<td>4.0</td>
</tr>
</tbody>
</table>
Results of Evaluation 1

Overall, the students in Evaluation 1 indicated, by ranking each response above a 4 on the Likert scale, that the DVD was a positive contribution to their learning in the subject Dispute Resolution. The study did not extend to a comparison between city campus and regional campus responses.

Evaluation 2: The empirical study

In addition to the student evaluation described above, an empirical study was carried out with subject students who had not yet seen the DVD in class and were not enrolled in the Dispute Resolution subject.

The questions under investigation in this study can be divided into evidence of learning about mediation as a result of the DVD and the student perceptions of their learning as a result of viewing the DVD. Thus the authors have formulated the broad research questions as:

- What evidence can we find that students learn from using The Scholarship Dispute DVD? That is, how can we characterise the sophistication of student descriptions of mediation before and after having viewed the DVD?
- How can we characterise student perceptions of their own learning from the DVD? In what ways do students believe the DVD assists their learning, and in what ways could the DVD be improved?

Methodology for Evaluation 2

Data collected for the study consist of audio recordings and transcripts of 10 semi-structured student interviews with five students in semester 2, 2012. Students were recruited from a first-year law subject at La Trobe University Law School. The subject was chosen because it is taught in the semester prior to the one in which the subject Dispute Resolution is taught. This ensures that participants had not already seen the DVD in class and had not been assessed on this material. Each student was interviewed both before viewing the DVD, and then again after having viewed the DVD. Four of the post-interviews were conducted on a different day from the DVD viewing, and one was conducted on the same day as a matter of convenience for the participant. Four of the five participants were female and one was male.

The four core questions posed to students in the first interview are listed below.

1. What is mediation?
2. What is the role of the mediator?
3. Who determines the outcome of the process?
4. What are the hallmarks of a “good” mediation?

In the second interview, following viewing the DVD, the researchers again asked the same four questions, but also added the following two questions:

5. What if anything about the DVD assisted you in your understanding of mediation?
6. How could the DVD be improved to assist you further in your learning?

This qualitative analytical framework drew upon grounded theory coding techniques in social science. The interviews were transcribed and then imported into qualitative analysis software TAMS Analyzer for coding and qualitative analysis. The subject matter expert coded all student responses into broad levels of sophistication of understanding, much as if they had been graded in an assessment. The Structure of the Observed Learning Outcomes (SOLO) Taxonomy was used to code student responses.

The SOLO Taxonomy is based on the notion that as students learn about a concept their understanding of the particular concept increases in sophistication. This sophistication has two dimensions, a qualitative and a quantitative dimension. The quantitative dimension relates to the amount of detail that is remembered. However, as the level of understanding increases the details

become more integrated into a structural pattern. In this way the learning increases qualitatively. The SOLO Taxonomy is structured in such a way that allows student responses to be analysed or categorised along five levels of complexity.

The uni and multi-structural levels describe the quantitative dimension. At these levels the students may identify, describe and classify. At the relational and the multi-structural levels, the conceptual restructuring or integration of the components or the qualitative dimensions are described, and the student may compare, analyse or relate. At the final level, the extended abstract level, the level of understanding is used to generalise to a new area. At this level, the learner may hypothesise, reflect and extend the learning to what has been presented in class.

It is useful to present a brief summary description of the SOLO Taxonomy and how this was used to grade student responses to the four core questions.

**TABLE 3 Prototypical competencies from the SOLO Taxonomy**

<table>
<thead>
<tr>
<th>SOLO Level</th>
<th>SOLO Level Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Pre-structural (Level 1)</td>
<td>Misses the point.</td>
</tr>
<tr>
<td></td>
<td>No evidence of relevant understanding.</td>
</tr>
<tr>
<td>Uni-structural (Level 2)</td>
<td>Identifies one or two components or aspects by name and makes obvious connections.</td>
</tr>
<tr>
<td>Quantitative level</td>
<td></td>
</tr>
<tr>
<td>Multi-structural (Level 3)</td>
<td>The amount of detail around an issue has increased. The student understands and</td>
</tr>
<tr>
<td>Quantitative level</td>
<td>describes or lists several components but does not as yet relate them to the system.</td>
</tr>
<tr>
<td></td>
<td>The understanding of each component is still discrete.</td>
</tr>
<tr>
<td>Relational (Level 4)</td>
<td>Understands and describes several components. Compares and contrasts the components or</td>
</tr>
<tr>
<td>Quantitative level</td>
<td>analyses, applies or relates and integrates the components to the whole system or to</td>
</tr>
<tr>
<td></td>
<td>familiar problems.</td>
</tr>
<tr>
<td>Extended abstract (Level 5)</td>
<td>Understanding is used to generalise to a new area beyond what has been taught in class.</td>
</tr>
<tr>
<td>Quantitative level</td>
<td>They may question or criticise conventional practices</td>
</tr>
</tbody>
</table>

**Results for Evaluation 2**

Most of the student responses to the four core questions before the DVD was viewed were judged to be at SOLO pre-structural (Level 1) or uni-structural (Level 2) levels, and approximately a quarter of the responses at the multi-structural level (Level 3). There were no responses at the relational level (Level 4) or extended abstract (Level 5). After viewing the DVD, the responses were judged at the multi-structural (Level 3) and relational levels (Level 4). The spread was almost even across the two Levels. No responses were judged to be at the extended abstract level (Level 5).

The responses to core questions 1 and 2 “What is mediation?” and “What is the role of the mediator?” had the greatest observed shift in the level of sophistication of students’ understanding. The frequency of responses judged to be at SOLO uni-structural shifted to SOLO multi-structural.

There was a slight shift in the sophistication of the responses for core question 3, “Who determines the outcome of the process?” The frequency of responses judged to be at SOLO uni-structural shifted slightly to SOLO multi-structural.

There was no change in the sophistication of the responses for question 4, “What are the hallmarks of good mediation?” The sophistication of the responses were fairly evenly spread between SOLO uni-structural and multi-structural levels before and after viewing the DVD.

Excerpts from one of the four students interview responses before viewing the DVD and after viewing the DVD are presented to demonstrate the effect of the DVD on enhancing the ability to express the complexities of mediation.
Before viewing the DVD, the response by student 4 to core question two, “What is the role of the mediator?” was judged to be multi-structural. The student demonstrates their understanding by mentioning a range of detail and describes or lists several components but does not as yet compare or contrast the components, nor relate these to dispute resolution as a whole system.

To allow both sides to hear their point of view and then to guide them to an end of process whereby they’re both reasonably happy and that might include conciliation on both parts as well, both of the warring parties.

They summarise, I mean, that’s part of the process, they use listening skills such as feeding back to the people, you know, what they said so they have clarification in terms of listening skills. They are always neutral, and always should be neutral, and non-judgemental.

After viewing the DVD, the response by the same student was more sophisticated and some aspects of the response were judged to be at Level 4 or relational on the SOLO Taxonomy, yet with some understanding still at Level 3.

The student describes, compares, contrasts and integrates the components into an overall structure. The response also exemplifies and relates the components to the dispute resolution system as a whole. It is not yet at the extended abstract level because the student does not hypothesise, reflect and extend their learning. For students to engage in this level of thinking, it may require a counter example or a greater knowledge of the law than students have in first year.

SOLO 4

I’d say that they keep the discussion out of the argument field and into the objective field regarding, you know, their problems and also they assist each party to pay respect to the other party as well. So, you know, they allow each party time to put their point of view across and they reflect back what that is and then go on to working out issues that need to be discussed and then they give them time to discuss that. They also given them time, in this model, to – which I really liked and I hadn’t heard before, that they give them time – each individual time – and then with their agreement bring back what they want to bring back to the table as well.

... 

SOLO 3

Yeah. So, I really like the idea of that individual fleshing out of what the real problems were and then, as I said, with their agreement bring back those things that need to be discussed – those issues that need to be discussed.

In addition to the four core questions, students were also prompted in the second interview to reflect on whether and how The Scholarship Dispute DVD assisted their learning, for example, by enhancing their understanding of the process of mediation. Student 3 gave the following response:

I think, the fact is, like, I didn’t understand the steps of mediation, like, exactly what happened, where it actually broke down, like, each party listens to one another and then they define what each party wants and they break down the issues and they sort of, meet halfway, whereas I wasn’t exactly sure how that occurred. So, like, it was broken down into stages and how, I think, that they actually showed sort of, yeah, the process, the general aspect of writing down each stage and each party explaining themselves, that I wasn’t really sure about beforehand.

There were also other comments that indicated that the DVD content enhanced the students’ conceptual understanding of the role of the mediator in the context of the process of mediation. For example, student 1 responded:

I think it kind of transformed my idea of what I thought mediation was. I didn’t realise it was sort of a specific schedule to follow. I thought that the parties just sat down with a third person and discussed, but I think that to have, like, the agenda and the goals and things like that was very helpful, which helped my understanding. And, I think also I didn’t realise the importance of the role of the mediator, I thought that they kind of just sat there to observe what was being discussed, but they really led the discussion, which is good for both parties to come to the agreement that they did.

Students elaborated further by stating that the DVD was very informative and thoroughly well managed and things were explained in an easy to understand way. Two students added that they had retained quite a lot of the information as a result of watching the DVD. It gave them a much better
understanding of each part of the mediation process and the role of the mediator. Students also appreciated the way that the words came up for each sequenced process, which assisted in providing a cue for the part of the process that was being shown. One student self-identified as an aural learner but indicated that they would have also taken notes while watching the DVD. One student indicated that they would like to watch the DVD again when they undertake the Dispute Resolution subject.

**Future directions**

In Evaluation 2, the subject students were asked to reflect on how The Scholarship Dispute could be improved. Three comments were made in relation to the improvement of the DVD. Two comments related to the length of the DVD, and that it could possibly be made a little more concise. The third comment suggested that mediation could be compared to other forms of ADR and suggested that presenting similarities and differences between the various processes could be useful.

**CONCLUSION**

The results from both studies – the subject evaluation and the empirical study – indicate that the film The Scholarship Dispute assists students in their learning about the mediation process. Importantly, students’ understanding improves not only from a qualitative perspective in the amount of detail students remember, but also by way of integrating the information into a holistic understanding. The results from both studies endorse the notion that authentic, situated and practice-based teaching and learning techniques are effective. Secondly, the results show that films that demonstrate “real life”, practice-based scenarios are useful teaching tools. Notably, the results provide evidence to support the proposition that the film The Scholarship Dispute is a useful device in spearheading the professional, practice-based context described in this article.