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Representing Clients Effectively in  
Negotiation, Conciliation and Mediation

John Wade  
Bond University, John.Wade@bond.edu.au

# Representing Clients Effectively in Negotiation, Conciliation and Mediation

“Failing to prepare, is preparing to fail.”

## **John Wade\***

Director, Dispute Resolution Centre  
School of Law  
Bond University  
Queensland 4229  
Australia  
[john\\_wade@bond.edu.au](mailto:john_wade@bond.edu.au)  
+61 7 5595 2004

\*Consultant  
Hopgood Ganim  
Lawyers  
Brisbane

## Aim

This paper argues that a major task for lawyers in family disputes, negotiations, conciliation and mediation, is to assist clients make wise decisions in the face of uncertainty. A short preparation model of five humble hypotheses is set out. This model is then applied to a fact scenario as an illustration. Example precedent forms are attached.

## Introduction

Mediation and conciliation are forms of “assisted decision-making” (ADM) or “assisted negotiation” (AN). There are many types of mediation and conciliation.<sup>1</sup> The four most commonly documented being settlement, problem-solving, therapeutic and evaluative. There are of course many other hybrids and cousins including narrative, restorative, humanistic, mindful, intentional, forgiveness, and transformative mediation. One common form of the evaluative type is SIMSNILC mediation (Single Issue Monetised Shuttle No Intake Lawyer Controlled” mediation).<sup>2</sup>

Many lawyers in Australia attend mediations and conciliations weekly, but know only one or two “types”, particularly the comfortable SIMSNILC model prevalent in personal injuries disputes. This limited exposure leads to professional mistakes. Clearly, different clients need different services. It is a responsibility of lawyers to attend different types of mediations and conciliations, increase their stable of service providers, and then to match mediation or conciliation type to client problem.

Mediators are privileged to watch many people negotiate and make decisions. They see the best and the worst. In 1999, one survey of the most employed commercial lawyer-mediators in Australia reported that mediators see the following commonly made mistakes by lawyer representatives:

- Failure to prepare the “right” information
- Overconfident prediction of court outcomes

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<sup>1</sup> In many countries of the world, the terms “mediation” and “conciliation” are used interchangeably. In Australia, NADRAC has attempted to reduce terminological and marketing confusion by describing the two words as follows: “*Mediation* is a process in which the parties to a dispute, with the assistance of a neutral third party (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. *Conciliation* is a process in which the parties to a dispute, with the assistance of a neutral third party (the conciliator), identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement. The conciliator may have an advisory role on the content of the dispute or the outcome of its resolution, but not a determinative role. The conciliator may advise on or determine the process of conciliation whereby resolution is attempted, and may make suggestions for terms of settlement, give expert advice on likely settlement terms, and may actively encourage the participants to reach an agreement.” From NADRAC, *Alternative Dispute Resolution Definitions* (Canberra, 1997) pp 5, 7.

<sup>2</sup> J H Wade, *Mediation – Seven Fundamental Questions* (2001) Särtryck årgång 86 *Svensk Jurist Tidning* 571-577; also found at Bond University Dispute Resolution News <http://www.bond.edu.au/law/centres/drc/newsletter/vol7jan01.pdf>

- Overemphasis on “legal” as compared to “commercial” or personal issues
- Emotional and antagonistic involvement of lawyers
- “Entrapment” – investing too much time and money into the conflict<sup>3</sup>

As failure to prepare “properly” for negotiation and mediation is probably the most commonly documented misdemeanour<sup>4</sup>, this paper will offer a few hints to add to the preparation tool box. Only three things matter in negotiation/mediation – preparation, preparation, preparation.

*“While success in negotiation is affected by how one plays the game, the most important step for success in negotiation is how one gets ready for the game... Although time constraints and work pressures may make it difficult to set aside the time to plan adequately, the problem is that for many of us planning is simply boring and tedious, easily put off in favour of getting into the action quickly.”<sup>5</sup>*

In every negotiation or mediation, it is recommended that lawyers should gradually develop and write out “Five Humble Hypotheses”, and share these with the mediator (and clients and possibly the “opposition”) at least a week before any joint mediation meeting.

Why are these hypotheses “humble”? Because they change and evolve as more facts, factors, and risks emerge. Early certainty usually means early mistakes.

### **What are the Five Humble Hypotheses?**

1. What **goals** does each client have? This is the reverse of “what **risks** does each client have if the conflict continues”?
2. What are the **causes** of this conflict?
3. What **interventions** might be helpful?
4. What **bumps/glitches** are predictable?
5. What **substantive outcomes** are possible/probable?

Lawyers should **prepare** “humble” answers to these five questions and discuss these preliminary answers with the chosen mediator at least a week before any joint mediation meeting. A mediator desperately needs these insights because lawyers have known their clients for far longer than the momentary mediator; and a mediator wants to devise appropriate procedures and interventions, and avoid ambushes. Conversely, when discussing how to structure a mediation meeting with a problem-solving mediator, lawyers and their clients should expect routine, but more colloquial, private “preparation” questions from the mediator. These more colloquial questions from a mediator reflect the five humble hypotheses. For example, Legal Aid mediators in Queensland and Western Australia, who do not have funding for early

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<sup>3</sup> J.H. Wade, *Representing Clients at Mediation and Negotiation* (Queensland: Bond University Dispute Resolution Centre, 2000) 180.

<sup>4</sup> See R. Lewicki et al, *Negotiation* (New York: Irwin, 1999).

<sup>5</sup> *Ibid* Lewicki at 52.

preparation meetings, nevertheless are trained to ask both lawyers and clients some or all of the following “Corridor Intake Questions” in the short minutes before a joint mediation meeting takes place.

### Abbreviated Corridor Intake Questions

1. Why haven’t you been able to settle this by yourselves so far?
2. What would help this conflict to settle today?
3. What would you like me to do to help you both reach an agreement?
4. What risks do you (each) face if you walk out with no agreement?
5. How will you respond to normal patterns of negotiation?

### Humble Hypothesis No 1

What are the **risks** for each party if this conflict does not settle? (What are the goals of each party?)

Failure to prepare a simple written risk analysis for clients is one of the major documented failures of lawyers who negotiate, or attend mediations. There are many possible reasons for this failure, including:<sup>6</sup>

- habit
- too expensive
- unnecessarily scares client
- risk of “losing” client
- creates a dangerous document which may be “leaked”
- not my job
- someone else will do it<sup>7</sup>

A client’s **risk** is the opposite to a client’s **goal**. For example, the risk of delay reflects the goal of speed; the risk of high legal costs reflects the goal of minimising transaction costs; the risk of stress reflects the goal of good health etc. Thus a client’s one page of life, business and legal goals can also reflect his/her balancing life, business and legal risks.

As a feature of negotiation is public rhetoric and deception, it is sometimes difficult to emerge from these (self)-deceptive practices and write out the evolving “risk and goal list”. Can a mediator be trusted with this information? Like all unranked shopping lists (compare s.79 and s.75(2) of the *Family Law Act*), it is also a challenge to place ranking and monetary value on each of a client’s’ goals and risks.

Nevertheless, all skilled negotiators know that these perceived goals and balancing risks will provide the keys to the vast majority of settlements. This is because most

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<sup>6</sup> See J.S. Hammond, R.L. Keeney, H. Raiffa, *Smart Choices – A Practical Guide to Making Better Decisions* (Boston: Harvard Business School Press, 1999); J.H. Wade, “Systematic Risk Analysis for Negotiators and Litigators: How to Help Clients Make Better Decisions” (2001) 13 *Bond Law Review* 462.

<sup>7</sup> Wade *supra* note 6.

clients will jam on “pure” percentages and money. Crossing the monetary gap will depend upon identifying “extra” life goals and risks.

Lawyers tend to advise clients orally or in a letter of the three risks of uncertain out-of-pocket legal costs, uncertain judicial delay; and uncertain judicial behaviour. These are all very important. Nevertheless, as a mediator, I note constantly that the message sent by lawyers is not the message received by clients. On the last risk, namely uncertainty of judicial behaviour, some mediators in Melbourne and Brisbane are now handing the following quote to lawyers **and** clients rendered overconfident by their own rhetoric.

Supreme Court of New South Wales Court of Appeal  
Handley, Sheller and Fitzgerald JJA  
40907/98 - *Studer v Boettcher* [2000] NSWCA 263  
Fitzgerald JA

*[63]...it is often impossible to predict the outcome of litigation with a high degree of confidence. Disagreements on the law occur even in the High Court. An apparently strong case can be lost if evidence is not accepted, and it is often difficult to forecast how a witness will act in the witness-box. Many steps in the curial process involve value judgments, discretionary decisions and other subjective determinations which are inherently unpredictable. Even well-organized, efficient courts cannot routinely produce quick decisions, and appeals further delay finality. Factors personal to a client and any inequality between the client and other parties to the dispute are also potentially material. Litigation is highly stressful for most people and notoriously expensive. An obligation on a litigant to pay the costs of another party in addition to his or her own costs can be financially ruinous. Further, time spent by parties and witnesses in connection with litigation cannot be devoted to other, productive activities. Consideration of a range of competing factors such as these can reasonably lead rational people to different conclusions concerning the best course to follow.*

One helpful reconceptualisation of a lawyer’s and mediator’s task is “to assist clients to make wise decisions in the face of uncertainty”.

## **Humble Hypothesis No 2**

### **What are the Causes of Conflict?**

Before intervening to assist a person involved in conflict, a skilled helper or representative should make some attempt to determine:

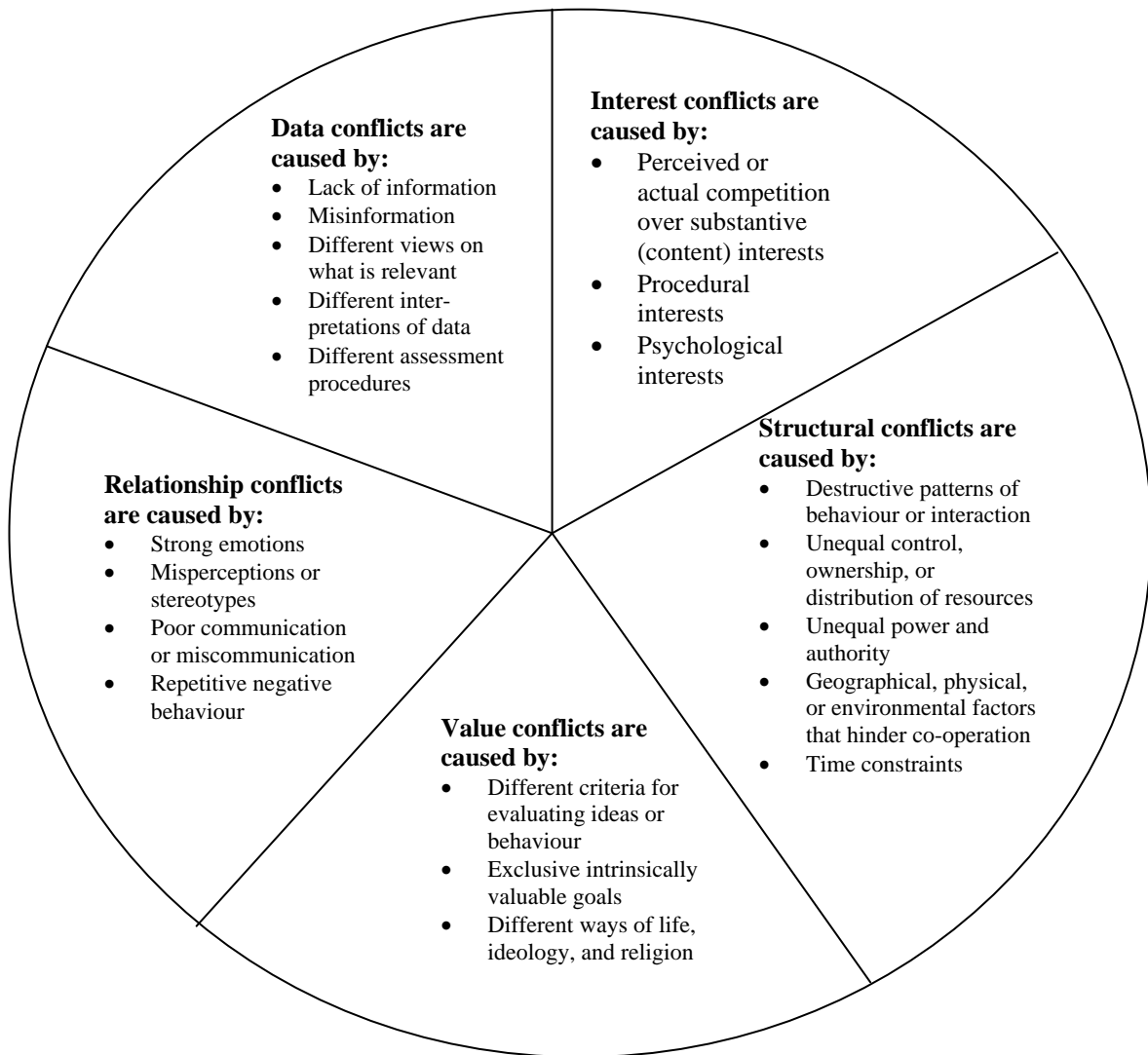
- the causes of the conflict;
- and, the degree of escalation which has occurred.

Wrong diagnosis will inevitably lead to the wrong intervention. As with physical illnesses, a correct diagnosis is needed before appropriate “treatment” or intervention can occur.

There are many helpful models developed to assist in the diagnosis of causes of conflict. One particular favourite is sometimes known as “Moore’s pizza”, or “Moore’s circle of conflict”. This is a diagrammatic representation of the five (often overlapping) causes of conflict developed by Christopher Moore.<sup>8</sup>

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<sup>8</sup> *The Mediation Process: practical strategies for resolving conflict* 2<sup>nd</sup> ed. (San Francisco: Jossey-Bass 2003); see also J. Folberg and A. Milne, *Divorce Mediation: Theory and Practice* (N.Y.: Guilford Press, 1988).



In family disputes, what are three of the most common causes of conflict in your experience?

1	.....
2	.....
3	.....

In my experience, here are some of the common causes of conflict in family disputes, using Moore’s categories above.

**(i) Data or information differences**

Which of the duelling expert lawyers, valuers or doctors is more credible?; What might a judge do in one year’s time?; What promises were made by or to relatives?; How do teenagers normally behave?; There are/are not assets missing; The children do/do not want to see you; You can earn extra income.

**(ii) Communication difficulties**

“Everyone is so upset, we cannot speak without bringing old skeletons out of the closet”; “The messages sent through lawyers’ letters are always misunderstood and inflammatory”; “The message sent is never the message received”; “Everyone talks, talks, talks – but there is no clarity”; “Mary is so upset that she won’t even discuss anything”.

**(iii) Relationship conflicts**

“I cannot be in the same room as her”; “He presses my buttons”; “She/he is a typical female/male”; “Her lawyer is a vicious shark.”; “That second wife is the real problem”.

**(iv) Value differences**

“A second spouse/family is more important than the first”; “Someone who cares for a dying person is a saint”; “Aggressive relatives deserve to be punished”; earning income is more/less valuable than homemaking.

**(v) Structural conflicts**

“We cannot negotiate until we have collected more facts”; “The lawyers keep us apart”; “We do not have the skills/time/venue to communicate clearly”; “The lawyers are giving advice based on different sets of facts – garbage in-garbage out”; “The rich relatives are trying to wear us out”; “The legal system is a lottery”; “My relatives and friends say that I should not give in”; “I think that the lawyers are spinning this out in order to milk the assets”.

**(vi) Interest conflicts**

- **SUBSTANTIVE Interest**  
“There is only one necklace, ring, grand piano, Christmas Day, holiday house, Van Gogh, and we both want it.”
- **PROCEDURAL Interest**
  - “It is outrageous, before even talking to us, (s)he went to see a lawyer”
  - “They want to have a two-hour meeting where the lawyers do the talking!”
  - “They do not answer our letters/phone calls/requests for information”
- **PSYCHOLOGICAL Interest**  
This is perhaps the most common cause of conflict in family disputes. There are many theories which are helpful to gain understanding about what is happening for clients. The “presenting” problem is money, but the “real” problem is the roller-coaster of feelings. Elisabeth Kubler-Ross’ model of “loss” is sometimes helpful.<sup>9</sup>

We all experience “loss” in our lives (loss of mobility, promotion, youthfulness, parents, hair, hope for the future, self-image, children, superannuation etc.) and many

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<sup>9</sup> E. Kubler-Ross, *On Death and Dying* (New York: Basic Books, 1975). M. Evans and M. Tyler-Evans, “Aspects of Grief in Conflict: Re-Visioning Response to Dispute” (2002) 20 *Conflict Res Q* 83.

go randomly through stages of shock, denial, depression, anger, and hopefully acceptance as ways of managing these losses.

“Adjustive dissonance” is the phenomena where one spouse is adjusting to the loss of a spouse, piano, dream, house, sense of importance, at a different rate to another. “Stop wallowing in your grief, Fred, you’ve got to move on”; “But it’s not fair, look what (s)he has done to the children and me”; “(S)he will come back”; “(S)he will come to her/his senses”; “It is a matter of principle that.....”.

At the time of a marital separation, senses of “loss” proliferate, and survivors wander up and down the grieving stages for years. For example, loss of a beloved person; familiar accommodation when the family home must be sold; familiar roles of caring; sense of self-esteem when their share of assets is small; cash-flow; a sense of immortality; last chance to have some capital; last chance to apologise or talk through a difficulty; friends; social acceptance.

These “losses” are manifested in the ubiquitous “it’s a matter of principle”; “I don’t care anymore”; “I can’t believe this has happened”; “she just doesn’t deserve it”; “I want justice”; and hopefully eventually “I want to get on with my life”.

Coupled with the insights from the grieving stages over “loss”, is the helpful literature on “intra-psychic conflict” – or in more popular parlance “baggage”.<sup>10</sup> That is, we all carry baggage or unresolved hurts and losses from the past. When a loss occurs later in our lives, this baggage “resurfaces”, and we and our clients replay the old tune. We pretend that this conflict is about money or furniture and our lawyers place the problem quickly and clumsily into a “legal” category of “contribution”; “economic fault”; “need and ability to pay” under the *Family Law Act*.

For example – “She has always treated me this way”; “You remind me of my father’s behaviour”; “Our family has a history of doing this”; “She has always been the favoured child”; “He was always more focussed on the business/sport/money than upon us”; “I felt like a failure again” etc.

The task of the lawyer is as an expert problem-solver. If we diagnose the wrong **cause**, we will always prescribe the wrong **intervention**.

Even when we diagnose the right **cause** of the conflict, we may still get the **intervention** wrong. But it is still our professional responsibility to try to diagnose the foundational **causes** correctly.

A **settlement** mediator is typically not interested in the causes of the conflict, as (s)he is trying to split the difference between the monetary claims or the overnight stays. An **evaluative** mediator may not be interested in the causes of the conflict as (s)he is trying to guess what a judge might decide and then lower disputants’ expectations. However, a **problem-solving** and **therapeutic** mediator will to a lesser and greater extent, ask clients, tribes and lawyers numerous questions about **causes**.

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<sup>10</sup> eg J.R. Johnston & L.E.G. Campbell, *Impasses of Divorce* (New York: The Free Press, 1988) chs 3-5.

### Illustrative Example of Preparing the Five Humble Hypotheses

In what follows, an example fact scenario is set out (all parties anonymised) and analysed to demonstrate and encourage the use of the “five humble hypotheses”.

#### FACTS

Bob (50 years) and Maude (45 years) were married for 12 years. They have two children aged 14 and 10 years who are in Maude’s care. The first child is Maude’s from a previous marriage, but has been cared for by both Bob and Maude during their marriage.

Their asset pool consists mainly of a farm, a bed-and-breakfast business (five hours drive from the farm), a herd of breeding and racing horses. The pool has an estimated worth of between \$4.7 and \$4.9 million.

Bob has allegedly contributed \$2.1 million to the assets, and Maude \$420,000, from pre-marriage assets and subsequent inheritances from their respective relatives.

If Bob is living at the time, he will inherit a further \$7 million from his mother’s estate in two equal instalments in 3 year’s time, and in 8 year’s time. The trustees of his mother’s estate also have an unfettered discretion to pay Bob and the children the income from this \$7 million over the next 8 years.

The parties separated 8 month’s ago.

Bob is currently staying on the farm; Maude is living at the B and B with the children. The two children do not want to visit the farm as it is allegedly “boring” and “dirty”.

Maude is articulate, bitter and vitriolic. Bob is quiet, disorganised and occasionally angry. There have been a series of aggressive exchanges about how to care for the fifty horses on the farm. Maude and Bob recently had a fist fight when they met to discuss Bob’s contact with the children.

No legal proceedings have been commenced yet. Maude’s lawyers have recommended to her that she apply for partial property orders. Amidst the aggressive exchanges about horses and children, the solicitors have agreed to joint valuations of the assets.

Meanwhile, Bob is living off interest from his mother’s estate; and Maude draws from the partnership accounts each time there is a sale of cattle; and the trustees are paying for school fees.

How could/should you prepare for either a round table negotiation, diplomacy, or for a mediation?

**Five humble hypotheses** (in no particular order):

- (1) What are the **goals** of each party? Conversely, what **risks** exist for each party if the conflict continues?

- (2) **Why** has the dispute not settled already? (What are the **causes** of conflict?)
- (3) What **bumps** could occur at any negotiation/mediation?
- (4) What **interventions** may assist?
- (5) What are possible/probable **outcomes** to this dispute?

**(1) Goals and risks**

What are the **goals** of each party? What **risks** exist for each party if the conflict continues?

In meetings over the phone and in person with the chosen mediator in the weeks before the mediation, Bob and Maude confidentially prepared the following “goal and risk lists” for their respective refrigerator doors.

In no particular order or ranking,  
**Bob's Confidential List** prepared with the mediator.

<b>Risks from Ongoing Conflict</b>	<b>Life Goals</b>	<b>\$ Value to Client</b>
(1) Constant "interference" in business decisions about the farm	↔ (1) To manage the farm well. Many "little" jobs to be done	
(2) Age prematurely	↔ (2) Stay healthy	
(3) Each trying to supervise the other for 8 years	↔ (3) Clean break	
(4) Alienation from children	↔ (4) See children in a comfortable environment (on the farm or elsewhere)	
(5) Aggravate the trustees of his mother's estate by subpoenas etc.	↔ (5) Leave trustees alone to distribute money to Bob and children	
(6) In the litigation lottery, wife may receive mid or high in the percentage range	↔ (6) Pay wife "low" in the percentage range	
(7) Expenses between \$100,000-\$200,000	↔ (7) Minimise legal and valuation costs	
(8) Partial property order, interim escalating fights over horses, children and management decisions for 8 years; disappointment and then appeal	↔ (8) Fix soon	
(9) In three years, half inheritance may arrive. Judge may perceive him as a "deep cash pocket" (under s.75(2))	↔ (9) Fix soon	
(10) A large lump-sum cash payout could require a crippling mortgage, or niggling pressure on the trustees of Bob's mother's estate to lend him money early.	↔ (10) If he has to pay out his wife, to do so in a way which would not cripple the earning capacity of the farm	

In no particular order or ranking,  
**Maude's Confidential List** prepared with the mediator.

Risks from Ongoing Conflict	Life Goals	\$ Value to Client
(1) Gradual deterioration of farm due to mismanagement	↔ (1) Have farm valued at high amount	
(2) Neglect, poor health, and low value of horses	↔ (2) "Rescue" a list of horses from alleged neglect on farm	
(3) Vitriolic exchanges over 8 years with no constructive outcomes	↔ (3) Avoid constant negotiation with Bob about the farm	
(4) \$100,000-\$200,000 predicted costs	↔ (4) Minimise legal costs	
(5) Diminishing cash returns on B and B; cattle and horses	↔ (5) Steady cash flow for herself and children	
(6) No access to trustees; alienation of trustees; less money to children from trustees	↔ (6) Receive regular information from trustees about monetary distributions for the children	
(7) Chaotic contact arrangements and conflict	↔ (7) Stable arrangement for children to visit their father	
(8) Dirty farmhouse → children refuse to visit	↔ (8) Clean farm house so that children are more willing to visit father	
(9) Bob falls asleep at the wheel	↔ (9) Bob drive safely and for short periods of time especially when driving the children	

**(2) Causes and escalation**

Why has the dispute not settled already? What are the **causes** of conflict and how far has the conflict **escalated**?

<b>Data conflicts</b>	<p>Each party</p> <ul style="list-style-type: none"> <li>• has different lists of horses grazing on the farm</li> <li>• calls certain horses by different names</li> <li>• places different values on certain horses</li> <li>• predictably has a different memory of work done on the farm<sup>11</sup></li> <li>• has different interpretations of why the children are reluctant to visit their father on the farm</li> <li>• Each lawyer makes wildly different guesses/estimations on percentage division of these costs.</li> </ul>
<b>Value conflicts</b>	<p>Each party has different values about</p> <ul style="list-style-type: none"> <li>• how horses should be cared for</li> </ul>

<sup>11</sup> See P. McDonald (ed) *Settling Up* (Melbourne: Prentice Hall, 1986), chapter 12 "His and Her Divorce" by Kathleen Funder.

	<ul style="list-style-type: none"> <li>• how clean a farmhouse needs to be</li> <li>• what a history of farm-work and financial contribution is “worth”</li> </ul>
<b>Relationship conflicts</b>	Maude uses labels and constant ridicule to describe and talk with her husband. Bob retreats silently; and occasionally lashes out. He does not respond to enquiries and procrastinates thereby heightening her suspicions. Maude is a detail person; Bob is big picture. Both seem incapable of communicating clearly to the other – a torrent of words, abuse, silences, misunderstandings.
<b>Structural conflicts</b>	<ul style="list-style-type: none"> <li>• Bob is perceived to have resources and time to “wear down” Maude</li> <li>• Control of the outcome of the conflict appears to be in the hands of a perceived disinterested and bureaucratic trustee of Bob’s mother’s estate</li> <li>• If the trustee gives money to the children in the future, this may reduce Maude’s property share.</li> </ul>
<b>Interest conflicts</b>	<ul style="list-style-type: none"> <li>• Both want certain horses</li> <li>• Both want as much money as is possible from the pool</li> <li>• Maude needs recognition and appears to be replaying some hurts from the past</li> <li>• Even if both clients want to settle “quickly”, the lawyers’ interest is to avoid errors and hasten slowly. The division of large estates carries the risks for both client and lawyers of “large” mistakes</li> </ul>

**“Escalation”**. (What psychological changes and sociological changes have taken place so far during the conflict?)<sup>12</sup>

- Violent fist-fight
- Reduction of communication
- Stereotyping of “opposition” as “stupid” and “greedy”
- Employment of lawyers and valuers
- Loss of empathy
- “Blame” perception and language
- Other’s motives are misinterpreted
- Inhibitions against retaliation have been removed
- Assembling “right-thinking” supporters

### (3) Hypotheses on Predictable Hurdles, Bumps and Glitches?

There are a number of predictable bumps which this negotiation might/would encounter. Many of these follow directly from identifying historic causes of conflict and degree of escalation. Once identified, these can be discussed openly between the lawyers and parties (and mediator, if applicable). This practice is not pessimistic, but rather aims to lower expectations, and lead to creative suggestions on how to overcome those hurdles.

<sup>12</sup> See Pruitt and Kim, *Social Conflict* (NY: Random House, 2003)

In this case, before the joint mediation meeting, the parties, mediator and solicitors identified the following predictable hurdles:

- (i) Bob and Maude had an entrenched relationship conflict – she attacked, and he retreated to the farm. This pattern was likely to continue at any negotiation.
- (ii) It is impossible for experts to predict outcomes under s.79 of the *Family Law Act* within a narrower band than 15%.<sup>13</sup>

This band is expanded even further when the case law on property division where an expected future inheritance is necessarily vague.<sup>14</sup>

It was clear that both sets of lawyers had advised their respective clients of this normal wide range (the mediator required this advice to be set out in writing by both lawyers). However it was not clear that their clients had “heard”. Family lawyers and clients constantly recycle the “*oh but, that’s not fair...*” and “*yes but, this is how the system works...*” conversation.<sup>15</sup>

- (iii) There was no history of offers to lower expectations.
- (iv) Predictably, the husband would offer his wife 25%; the wife would ask for 60%, and they would engage in two years of theatrics, threats, lies and bluffs (TTLB), before funding a settlement percentage and package in between those opening “high-soft – low-soft” numbers.
- (v) The two doberman barristers disliked each other.
- (vi) Maude was an intense, organised, detail person; Bob was a laid back, disorganised and big picture person. Opposites seem to attract. Love is blind, marriage is a magnifying glass.
- (vii) Both were unlikely to accept joint valuations for the purposes of negotiation. Surprisingly, they did accept a joint valuation, except for the horses, where Bob obtained a second valuation which was predictably \$300,000 less than that specified by their agreed valuer. This added fuel to Maude’s fire.
- (viii) There were data conflicts about the horses’ values, names, which horses had been sold, and which were not even on the valuer’s list.
- (ix) The uncertainty of prospective inheritance case-law was exacerbated by the factual uncertainty of how much money would the trustee distribute to the two children over the next 8 years. Would generous distributions affect the wife’s claims to extra percentages under s.75(2) of the *Family Law Act*?

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<sup>13</sup> eg see J.H. Wade, “Arbitral Decision-Making in Family Property Disputes – Lotteries, Crystal Balls and Wild Guesses” (2003) 17 *Australian J of Family Law* 224.

<sup>14</sup> *James* (1978) FLC 90-487; *Bonnici* (1992) FLC 92-272; *Burke* (1993) FLC 92-356; *White & Tulloch v White* (1995) FLC 92-640; *Webster* (1998) FLC 92-832; *Figgins* (2002) FLC 93-122; *Wall* (2002) FLC 93-110.

<sup>15</sup> A. Sarat and W. Felstiner, *Divorce Lawyers and Their Clients* (OUP: NY, 1995)

The easiest option for judge and parties seemed to be partial property order, then “wait and see” how trust money would be distributed.

- (x) Parties in conflict are usually more motivated to settle where they have suffered pain. Here, both had incomes, separate accommodation; neither had paid out large conflict fees, or yet suffered the usual expense, humiliations and uncertainties of interim litigation sorties.
- (xi) The large size of the asset pool gave both parties sufficient margin to spend say 2% of the pool in conflict, and still have plenty left over in 3 years’ time.
- (xii) The large asset pool and uncertainty of the case law, probably made both lawyers nervous that the clients may have recriminations about any early settlement. Such “blame” might especially occur in the future if the trustee’s distributions of estate funds was much higher or lower than expected. “Why didn’t you tell me that I could have done better if I had waited???”
- (xiii) How to encourage two busy children to travel for 5 hours each way to visit their father, when they allegedly find the experience “boring”?
- (xiv) How to gain agreed clarity on liabilities for income tax, GST and CGT? Since the separation, record keeping at the farm had deteriorated, and money had allegedly “moved around”.

All these predicted bumps, and others, made it very unlikely that a negotiation or mediation would be able to settle the division of property.

These multiple hurdles to a “complete” settlement do not necessarily preclude the settlement of allegedly “smaller” issues, such as division of horses, valuation of horses, contact with children, and interim support, from being settled. One piece of the jigsaw at a time. In high conflict cases, “success” often needs to be redefined into pieces, and clients encouraged to take small steps.<sup>16</sup>

#### **(4) Planned Interventions**

In the “light” of the perceived **causes** for conflict, and the predicted “**bumps**”, what could/should the lawyers and the mediator plan to do? What big and little interventions may help this family reduce the predictable escalating conflict which lies ahead?

Write out here, at least two steps/procedures/interventions you would plan in order to make the negotiation/mediation “succeed”.

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<sup>16</sup> See Pruitt and Kim, *Social Conflict: Escalation, Stalemate and Settlement* 3<sup>rd</sup> ed (New York: McGraw-Hill, 2003); J.R. Johnson and L.E.G. Campbell, *Impasses of Divorce* (New York: Free Press, 1988). See appendix A for recommended mediator behaviour in “high conflict” families.

<b>Planned Intervention</b>	<b>Reason</b>
eg (1) Obtain joint valuations	(1) Easy for duelling experts to allege widely different values of the farm, B and B, horses.
(2)	(2)
(3)	(3)

Here were the interventions actually planned and implemented by the clients, lawyers and mediator.

<b>Planned Intervention</b>	<b>Reason</b>
(1) Appoint facilitative mediator	(1) High emotion; small issues; clients ramble
(2) Mediator insists on written 3 sentence good-day bad-day <b>ranges</b> on % and costs (ranges to be divided by at least 15%)	(2) Create doubt about “rights”; clarify rhetoric
(3) Mediator meets parties individually; writes confidential life goals and risks lists	(3) Develop trust; change language; reduce rhetoric
(4) One solicitor consulted 6 colleagues who write out diverse predicted ranges (35%-60% for wife)	(4) Create doubt about “rights” and “entitlements” beliefs and language
(5) Mediator asks about preferred seating	(5) Cycles of vitriol; avoid Bob being intimidated; or Maude sniping in public
(6) Joint valuations	(6) Easy for duelling experts to allege wildly different values of farm, B and B, and horses
(7) Ask barristers to either stay away; or sit in separate rooms	(7) Dobermans; bad cops; history of barrister animosity; no apparent use except for drafting; may help in separate rooms to persuade unrealistic clients
(8) Solicitors have court filing fallback well organized	(8) Need to avoid rhetoric; give clients a sense of “progress” if negotiators stonewall
(9) Three rooms for mediation; one for each team; one for different negotiators to meet	(9) Keep barristers isolated; mix the negotiating teams to breakdown stereotypes
(10) Sandwich lunch served	(10) Sustain momentum and

	“wandering around”
(11) Mediator insists on starting negotiation with topics of: (i) dividing horses; (ii) arrangements for children	(11) Mediator has insights from intake meetings. (After intake meetings, the mediator knows “more” than parties OR lawyers!!). Prediction that big property division issue will <b>not</b> settle. Need for small agreements to be in place for the next 2-3 years.
(12) Barrister, solicitor and mediator constantly and humorously(?) talk to wife about her point-scoring vitriol	(12) Wife’s pattern of losing the forest for the trees (plus some intra-psychic hurts)
(13) Wife and husband in separate rooms	(13) An entrenched relationship conflict (tendency to “set one another off”). Husband and his lawyers want separation. Need for intra-team encouragement.
(14) Mediator carries no offers till the last. All offers and discussions from lawyers in presence of one client	(14) Tendency to shoot messenger and for parties to lie to mediator

## 5. Predicted outcomes

What are the possible/probable outcomes to this dispute? Given the previous humble hypotheses on causes of conflict, degree of escalation, and hurdles, here are the pre-mediation humble hypotheses on outcomes: (These mediator hypotheses were labelled and shared with all the parties.)

- A. There will be no early settlement of anything; conflict and litigious sorties will escalate; a partial property settlement will occur in about one year; “final” settlement will occur in about three years – 50% likelihood.
- B. There will be early but shaky settlements about child contact; distribution and valuation of a few valued horses; interim child and spousal support. Otherwise repeat option A – 45% likelihood.
- C. All issues of contention will be settled early, and the property payout for Maude will take place over 3 years, payment secured on the farm – 3% likelihood.
- D. All issues of contention will be settled early, and the lump sum payout to Maude will take place in one or two **quick** instalments – 2% likelihood.

## **Preparation Precedents**

For possible use and adaptation on your word processors, here are three precedents to use when preparing for negotiation or mediation. Depending on your level of trust of the mediator and your client's constituents, these documents can be shown in part or whole to them.

- Negotiation Planning Instrument
- Tabulated Risk Analysis
- What Documents to Consider Preparing for a Mediation

# NEGOTIATION PLANNING INSTRUMENT

**“PROBLEM” DEFINITION – I must negotiate with ..... to solve the following problems.**

(1)	(2)
(3)	(4)

PARTY	GOALS, INTERESTS and PRIORITIES	POSITIONS (SOLUTIONS) 1. INSULT 2. TARGET 3. RESERVA- TION	“PERSUASIVE” PROPOSITIONS and “LEVERS”	APPROACH TO NEGOTIATION	OPENING and CONCESSIONS	CREATIVE OPTIONS/ PACKAGES	“OUTSIDE” ALTERNATIVES (BATNA;WATNA)
<b>OWN SIDE</b>							
<b>OTHER SIDE</b>							

## ***Client Information Sheet – Risk Analysis***

NAME \_\_\_\_\_

Possible risks if conflict continuing to the door of the court (or occasionally even to the Umpire)	Applicable to me <input checked="" type="checkbox"/> / <input type="checkbox"/>	Estimated \$ value Best to worst	Applicable to other disputants	Estimated \$ value Best to worst
1. ....Years of personal stress and uncertainty				
2. ....Years of stress of family members				
3. ....Years of stress on others and my work associates				
4. ....Weeks of absenteeism from work				
5. ....Weeks of lost employee time preparing for court				
6. ....Years of lost concentration and focus at work				
7. Life/business on hold for .....years				
8. Inability to “get on with life” for .....years				
9. Embarrassment and loss of good will when relatives/friends/ business associates are subpoenaed to court				
10. Negative publicity in press or business circles				
11. My lawyer’s fees				
12. My accountant’s fees				
13. My expert witness’s fees				
14. Outcome less than offer on the table				
15. Possible costs order against me				
16. Interest lost on money received later rather than sooner				
17. Loss of control over my life to professionals				
18. Post litigation recriminations against courts, experts and lawyers				

19.Loss of value by court ordered sale/appointment of receiver etc				
20.Lost future goodwill with and “pay backs” by opponents				
21.Cost and repeat of all previous factors if there is an appeal				
<b>ESTIMATED TOTAL of Transaction Costs (best to worst)*</b>		\$		\$
Date _____				
Signed _____ (client)				

NB: These are only rough estimates. All these figures will fluctuate up or down as the conflict develops and as more factors emerge.

## **Documents to Prepare for a “Mediation”, Negotiation or Conciliation**

- 1. Chronology of “relevant” events**
- 2. “Legal” documents (especially for evaluative mediation)**
- 3. List of “things” or goals which are allegedly agreed upon**
- 4. List of emotional, substantive and procedural *goals* of the client in order of priority**
- 5. List of legal issues**
- 6. List of problem solving questions**
- 7. History of offers with dates**
- 8. Good day – bad day legal advice;  
Good day – bad day legal costs (3 sentences)**
- 9. Risk Analysis if conflict continues (cross-referenced to “*goals*” in 4)**
- 10. 5 Humble hypotheses:**
  - a. Risk analysis and client goals**
  - b. Causes of conflict**
  - c. Possible glitches/“challenges”**
  - d. Possible helpful interventions**
  - e. Possible substantive outcomes**

### **Conclusion**

Only three things matter in negotiation and mediation – preparation x 3. Yet skilful preparation is rare both anecdotally and from surveys of mediators and negotiators. This paper has provided encouragement, concepts and precedents which have proved useful in the past. Hopefully, you can add parts of these to your existing repertoire, and thereby improve your skills as a problem-solver, negotiator and diplomat.

## APPENDIX A

**“HIGH CONFLICT” FAMILIES/SITUATIONS:  
CHECKLIST FOR MEDIATORS**

1. Interview separately
2. Interview other professionals; tribal members
3. Develop hypotheses
4. Write out and share hypotheses; planned interventions; and lower expectations
5. *Pay up front*
6. Repeat 3 and 4 constantly
7. Add pre-condition of ongoing counselling
8. Write our *life goals* for each in *lists for fridge*
9. Take *breaks*; bring *friends* (self protection)
10. Make offers in alternative packages
11. Write reports and send to everyone
12. Consider separate *rooms*
13. Draft in great detail; with lawyers present (no reporting back!) – lawyers are in an *impossible* position if they are not present
14. Expect *buyer's remorse*
15. Write in DR clauses in detail (ie expect breakdown of arrangements in Bosnia)
16. Exhaustively get all issues on board; they will “add-on” constantly as settlement nears
17. Volunteer to help lawyers write settlement *letters/offers*  
(←a continued role)

(See the writing and models of Janet Johnson and Kenneth Kressel)

## APPENDIX B

**Actual Outcome of the Bill and Maude Mediation**

Against all predictions, outcome D occurred. Details were agreed about horse division, horse valuation, contact with children, child support, and asset division (Bill 60%: Maude 40%).

Although hindsight may be inaccurate or 20/20 vision, certain “planned” interventions (see previous section of the paper on “interventions”) and serendipity events seemed to be helpful. For example:

- Agreeing to use a single valuer
- Isolating aggressive barristers
- Keeping clients in separate rooms (not the mediator’s normal practice).
- Making nearly all offers face to face with the husband present
- The mediator not carrying offers till the last offer
- Dealing with horse valuation, horse division and child contact first; and as independent agreements to the whole settlement
- Barristers working diligently, co-operatively and ritualistically at the back of each room on drafting initial agreements
- Solicitors who were patient and frank communicators
- One barrister did not want to attend the mediation as he thought that barristers had nothing to add apart from “noise” and aggression. However, he had been asked to attend to “balance” the other barrister.
- The other barrister was initially an opinionated and ignorant bad cop. His initial bluster and pontification gave way after several hours to helpful drafting and reassuring his own client. It is often difficult to decide in retrospect when apparently dysfunctional lawyer behaviour has actually assisted settlement. For example, “if we don’t settle today, I (and you) will have to put up with my own ignorant, theatrical and ballistic barrister for another two years.”
- Constant persuasion of clients to focus on their own life goals, not point scoring
- A steady supply of food and drink served to everyone

- Predictable polite high-soft and low-soft offers of 55% by Maude; and 25% by Bob; followed by despair and feigned walkout; followed eventually by mediator comment “Don’t worry, 25% plus 55% equals 80%. Half of 80% is 40%. My guess is that in 2 years’ time you both will have made many marginal concessions and will reach 40%.” Response in confidence: “How can we do that now?”
- The mediator then discussed with both camps confidentially – “How can either party make an offer of 40% without shifting the bargaining range against themselves?” (a standard negotiation challenge).

### **Conclusion**

Most lawyers and mediators would justifiably hypothesise “no settlement” at an initial negotiation meeting based on such facts. Preparation, mystery, and other factors listed above, dictated otherwise.

### **Post-Script**

The predicted dynamics in this case did not prevent the signing of detailed heads of property agreement and a child support agreement at the mediation. However, for four months thereafter, there were attempts to “add-on” minute adjustments about horses by the wife. There were also delays before orders became final while two sets of tax experts gave confirming advice that no GST complications arose from the division of the partnership. Via the attempted “add-ons”, the predicted relationship conflicts found ongoing (and likely still ongoing) expression.