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Abstract

This article describes a form of 'risk analysis' in the context of negotiation, mediation and 'litigotiation'; and discusses reasons why such an exercise is essential for any negotiator, or for any disputant who is considering ending negotiations, or undertaking litigotiation; and suggests reasons why such documents currently appear to be uncommon in many legal cultures. It also provides examples of the use of risk analysis prior to negotiation and mediation, and precedent forms to assist a client, lawyer or other decision-maker to prepare a risk analysis.

Keywords

risk analysis, mediation, negotiation, litigotiation, alternative dispute resolution

SYSTEMATIC RISK ANALYSIS FOR NEGOTIATORS AND LITIGATORS: HOW TO HELP CLIENTS MAKE BETTER DECISIONS⁺

*By John Wade**

Introduction

This article describes a form of 'risk analysis' in the context of negotiation, mediation and 'litigotiation'¹; and discusses reasons why such an exercise is essential for any negotiator, or for any disputant who is considering ending negotiations, or undertaking litigotiation; and suggests reasons why such documents currently appear to be uncommon in many legal cultures. It also provides examples of the use of risk analysis prior to negotiation and mediation, and precedent forms to assist a client, lawyer or other decision-maker to prepare a risk analysis.

One of the benefits of being a mediator is that a mediator voyeuristically observes negotiation behaviour – of both disputants and sometimes their legal representatives.²

⁺ The topics in this paper are not new. They are dealt with extensively in literature on decision-making and 'counselling'. However, professional practice does not anecdotally live up to the wisdom in this literature. The anonymous case studies used in this article have occurred in a variety of jurisdictions, and details have been altered to prevent identification of the parties involved.

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1 'Litigotiation' is a word invented by Marc Galanter to describe the amalgamation of negotiation and litigation. Very few 'litigated' cases are actually decided by judges. Rather they are abandoned or negotiated to a settlement before reaching 'litigation'. See M Galanter, 'Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know About, our Allegedly Contentious and Litigious Society' (1983) 31 *UCLA Law Review* 4

2 C Menkel-Meadow, 'Lawyer Negotiations: Theories and Realities – What We Learn from Mediation' (1993) 56 *Modern Law Review* 361; J Lande, 'How Will Lawyering and Mediation Practices Transform Each Other?' (1997) 24 *Florida State U L Rev* 839; JH Wade, 'Lawyers and Mediators: What Each Needs to Learn From and About Each Other' (1991) 2 *Australian Dispute Resolution Journal* 159.

In this role as observer, a mediator sees outstanding, average and incompetent negotiators. A recent survey of forty of the most-employed commercial mediators in Australia recorded the following four most commonly observed unhelpful negotiation behaviours by lawyers. Lawyers sometimes became part of the problem, rather than part of a solution for clients. The statistical incidence of these behaviours was not measured – only that the surveyed mediators noted that it was ‘often’.

- A lawyer who has given wildly optimistic advice;
- Concentration on legal questions and missing commercial interests;
- Lawyers who themselves have become antagonistic/emotionally involved;
- ‘Entrapment’ – disputants have invested too much in the conflict.³

One of the essential prerequisites to wise decision-making is to know what alternatives are available, and what are the costs and risks attached to each alternative. It is indeed foolish to negotiate without first carefully cataloguing alternatives and risks.⁴ In the jargon of negotiation, every wise negotiator should attempt to set out in writing his or her WATNA, BATNA and PATNA *before* the negotiations begin.⁵

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.⁶

The writer’s experience as a mediator is that:

- lawyers often only describe the trilogy of legal risks (delay, cost, uncertainty of judicial decision), and omit personal and business consequences;
- lawyers often use vague language such as ‘danger’, ‘no guarantees’, ‘who knows what a judge will do’;
- clients have selective deafness even when risks are described orally;
- lawyers rarely set out risks in precise, one-page written form – but rather use long rambling opinions, or just anecdotal conversations.

This kind of preparation makes it impossible for the client and lawyer to negotiate confidently, or to make a wise life and business decision.

3 JH Wade, *Representing Clients at Mediation and Negotiation* (Bond University Dispute Resolution Centre, 2000) 180.

4 JS Hammond, RL Keeney and H Raiffa, *Smart Choices – A Practical Guide to Making Better Decisions* (1999).

5 R Fisher and W Ury, *Getting to Yes* (1991). WATNA – Worst Alternative to a Negotiated Agreement; BATNA – Best Alternative to a Negotiated Agreement; PATNA – Probable Alternative to a Negotiated Agreement.

6 RJ Lewicki, DM Saunders and JW Minton, *Negotiation* (2000) 52.

What is a Risk Analysis?

A risk analysis is a list of known or guessed (benefits and) detriments which could flow from a particular decision at a particular moment in time. In business language, it is a 'cost-benefit analysis', with particular precision about the 'costs'. In other terminology, it is a listing of the 'pros' and 'cons' of a particular course of action.

One ideal form of a risk analysis includes:

- Writing,
- In familiar language, diagrams and figures,
- A short summary in one page if possible,
- Evolving into several successive versions as more information becomes available to clarify the risks,
- Outcomes expressed in 'good day – bad day' ranges where precision is not possible,
- Inclusion of personal, legal, social and business risks.

Litigation lawyers and their clients are constantly making conscious or subconscious risk-analyses when making decisions about whether to begin negotiation, what settlement offers to make, when to suspend negotiations, when to file a formal claim and with what strategies to pursue a claim.⁷ Case study 1, set out below, illustrates how sometimes a complex co-operative and 'peaceful' process should be replaced by a more aggressive process.

Case Study 1 – When to Switch from Negotiation to Litigious Levers?

A married couple were negotiating about the division of an Australian business and cash held in the USA valued at \$6 million. The husband had contingent debts which, if they ever become payable by him, would eat up all of the assets held in his name. At mediation, the parties negotiated along two different tracks: first in classical positional bargaining⁸, to pay the wife out in cash and houses; and, alternatively, in more of a problem solving fashion to rewrite the disorganised accounts of the family businesses over time, pay out any realised debts, and divide the residue 60/40 to the wife. They agreed twice on the latter course in complex written agreements, which the husband breached immediately. The husband suffered from attention deficit disorder and had a history of marijuana use.

⁷ See D Binder, P Bergman, S Price, *Lawyers as Counsellors* (1991) esp chs 1, 19, 21 (identifying consequences of various alternatives before making a decision).

⁸ 'Positional bargaining' is a label given to a common category of negotiation which exhibits the features of immediately suggesting solutions, hiding information, bluffing, concentrating on monetary solutions, making slow and diminishing concessions, and using a range of predictable tactics.

The repeated breach of the mediated agreements convinced the wife that a complex co-operative solution was not likely to be effective. Accordingly, the wife's lawyer successfully sought interlocutory injunctions to freeze expenditure in the husband's business and seize his passport. These imposed inconveniences led to a phone call from the husband's lawyer, some hasty positional bargaining, and an immediate payout and indemnities to the wife.

Written Risk Analysis – Why So Important?

Set out below are some of the reasons why it can be argued that a written risk analysis is essential for every client who contemplates or insists upon starting or ending negotiations, or embarking upon a litigation or litigotiation path. This will be followed by a list of reasons why provision of such clear documentation of risks attached to continuing a conflict is apparently rare for most lawyers.

It is essential to have a written analysis of the risks which may flow from a failure to settle a conflict because:

- (1) One decision-making adage is 'garbage in, garbage out'. If risks are not progressively defined and listed, clients and lawyers (or other advisers) will make decisions to end or continue negotiation based upon false data and assumptions.
- (2) It is definitely not sufficient for clients to 'give instructions' to end negotiations, or to commence on the litigation pathway. Clients must give 'informed consent'. Informed consent requires:
 - (i) the capacity to consider, reflect and decide
 - (ii) appropriate education and understanding of alternative courses of action
 - (iii) appropriate education and understanding of specific legal, personal and commercial risks attached to each alternative.
- (3) All decision-making processes are fraught with psychological tendencies, towards error particularly if the decision is made at a time of conflict.⁹

Our error-prone capacities as humans have been categorised as 'psychological traps' under such labels as:

- Over-relying on first thoughts : the **ANCHORING TRAP**
- Keeping on keeping on: the **STATUS QUO TRAP**

9 Hammond, Keeney and Raiffa, above n 4; JZ Rubin, DG Pruitt and S Kim, *Social Conflict: Escalation Stalemate and Settlement* (2nd ed, 1994); MH Bazerman and MA Neale, *Negotiating Rationally* (1992); R Hastie and R Dawes, *Rational Choice in an Uncertain World* (2001); Lewicki et al, above n 6, ch 5.

- Protecting earlier choices: the **SUNK-COST TRAP**
- See what you want to see: the **CONFIRMING EVIDENCE TRAP**
- Triggering a premature answer with the wrong question: the **FRAMING TRAP**
- Being too sure of yourself: the **OVERCONFIDENCE TRAP**
- Focusing on dramatic events: the **RECALLABILITY TRAP**
- Neglecting relevant information: the **BASE-RATE TRAP**
- Slanting probabilities and estimates: the being **OVER-CAUTIOUS TRAP**
- Seeing patterns where none exist: the **OUTGUESSING RANDOMNESS TRAP**
- Ridiculing good suggestions: the **REACTIVE DEVALUATION TRAP**.¹⁰

Litigation lawyers can readily identify the names of their own clients and of other lawyers (and sometimes self?) who fit into each of these psychological traps.

If there are already so many subconscious factors pushing us as (conflicted) decision-makers towards error, why add the conscious omission of ‘considering’ predictable risks? Case study 2 illustrates the serious consequences which followed for a client whose lawyers fell into the overconfidence, confirming evidence and framing traps.

Case Study 2 – Failure to Conduct a Risk Analysis and the Framing Trap – Asking the Wrong Question: ‘Who Will Win?’

The writer was asked in one family dispute to attempt to organise a round-table settlement conference. Repeated attempts failed as one set of lawyers appeared overconfident of ‘victory’. An Asian professional couple were involved in escalated conflict allegedly over property; tribal members¹¹ cheered them on; allegations of forgery were made; publicity was distributed by the tribes in the local Asian press; expert lawyers engaged in various interlocutory proceedings; the husband paid his lawyers in advance; the wife owed substantial legal bills; and at the last pre-court negotiation they were still \$40,000 apart. The husband’s lawyers insisted that they would ‘win’ the litigation. They did (momentarily) though the legal and experts’ costs for the husband alone were \$120,000. The husband’s lawyers and supporters rejoiced openly at the ‘victory’.

10 Hammond et al, above n 4, Ch 10. See also G Goodpaster, ‘Rational Decision-Making in Problem-Solving Negotiation: Compromise, Interest Valuation and Cognitive Error’ (1993) 8 *Ohio State Journal of Dispute Resolution* 299.

11 It is a constant challenge to lawyers, mediators, managers and diplomats as to how to include influential ‘outsiders’ or ‘tribal members’ constructively in negotiations. See ‘Unholy Alliances and Tribal Warfare’ in J Johnson and L Campbell (eds), *Impasses of Divorce* (1988) Ch 2.

However, the week after the judgment issued, the 'losing' wife reported her Asian husband to his professional association for closet misconduct as a professional. (As Conan Doyle stated, 'Behind every great fortune, is a great crime.' Or at least some family skeletons). At the disciplinary hearing the husband was 'struck off' (that is lost his license to practise); at age 45 years, he lost a yearly income of over \$400,000 (over the next 20 years, a loss of at least \$8 million); he was humiliated in the Asian and general press; his supporters shunned him. One set of lawyers 'won' the battle and destroyed their client's life. Who conducted a risk analysis for the husband and how often?

Where were the three stark questions on the lawyers' whiteboard?

- How can your professional license be protected?
- How can your high income be sustained?
- How can your respect in your community be maintained?

Case study 3, set out below, provides another sobering example of where it constitutes professional negligence for a lawyer to predict to a client that 'you will win this case'. In the writer's experience, using the word 'win' without express, immediate and written qualification amounts to professional negligence. Clients are not experienced enough to understand the limited meaning of that emotive 'win' word, or the nature of pyrrhic victories.

Case Study 3 – The Sunk-Cost and the Overconfidence Trap

McDonalds, the hamburger producer, conducted 313 days of libel litigation against two demonstrators who had helped to distribute pamphlets in London which detailed alleged misconduct by the chain.¹² McDonalds (at least!), over-relied on first thoughts, kept on keeping on, engaged in group think, misunderstood the nature of 'power', was overconfident, and protected early (bad) choices! Their educational mistakes are now eternally recorded in a website (McSpotlight), book, legend, a video and a musical stage play. McDonalds had partial 'success' in the libel judgment at the price of eight years of international ridicule. McDonalds never collected its multi-million dollars of legal costs, time and opportunity costs; much less the tiny judgment against the two unemployed demonstrators. Additionally, the trial judge found that a number of statements in the pamphlets were true.

Who undertook to write out an early and evolving risk analysis?

- (4) Lawyers, like other skilled helpers, are wise to engage in professional self-protection. When a chosen process turns out to be disappointing for a client,

¹² See J Vidal, *McLibel – Burger Culture on Trial* (1997).

the client may refuse to pay fees, claim damages for negligent advice, bad-mouth the skilled helper, and/or make reports to professional disciplinary committees. Doctors, computer suppliers, manufacturers and lawyers increasingly document a list of risks attached to any chosen process or service as a means of providing documentary (rather than verbal) defence against a raging client.¹³

- (5) A verbal risk analysis is hardly worth the paper it is not written on. This is because all clients hear only a small proportion of what an adviser says; clients hear selectively; the adviser is at risk in a subsequent memory-battle about what was actually said; and without clear writing, the client will convey inaccurate messages about risks to key constituents, relatives and bosses. These 'outsiders' need accurate information in order to influence the visible disputants towards making a wise decision.
- (6) There are some studies which suggest that customers are far less satisfied with litigation lawyers than litigation lawyers believe.¹⁴ That is, as litigation lawyers, we may live in a state of delusion about the level of satisfaction of our customers, particularly once a dispute 'goes to court'.

If surveys show repetitively that clients are so dissatisfied with litigated outcomes, how can lawyers educate them about this reality? How can a lawyer be an effective professional educator, diplomat and doberman? How can a lawyer lower client expectations about possible benefits of continued conflict/litigation/war; and yet emphasise that sometimes aggression, stonewalling or litigation may be wise options?¹⁵ A short written risk analysis is arguably one essential tool for the lawyer as professional educator.

- (7) A written risk analysis can make a client and lawyer powerful during negotiations. Bluffing, lying and pontification are reduced. A client and lawyer team can state, 'We have completed a detailed 16 point risk analysis and tried to assign percentage chances and monetary values to each risk. That list is confidential, but most items on it would already be known to you (for example A, B, C...). We assume/hope that you have a similar written

13 See *Arthur J S Hall & Co v Simons* [1999] 3 WLR 873 (CA); [2000] 3 All ER 673 (House of Lords). Lawyer advocates have no immunity from claims by clients for negligent pursuit or settlement of litigation.

14 For example, J Lande, 'Failing Faith in Litigation? A Survey of Business Lawyers' and Executives' Opinions' (1998) 3 *Harvard Neg L Rev* 1; P McDonald (ed), *Settling Up* (1986) Ch 13; ALRC, *Managing Justice – A Review of the Federal Civil Justice System* Report No 89, (1999) 78-88.

15 For example, see JH Wade, 'Don't Waste Money on Negotiation or Mediation, This Conflict Needs a Judge' (2000) 18 *Mediation Quarterly* 259. Compare the awkward double message delivered daily by medical doctors 'Drugs or surgery may have some benefits but

analysis'; 'Can you suggest some risk we have omitted if we do not reach a settlement today'; 'If our current risk analysis is approximately correct, we believe we know what is the worst that could happen outside this negotiation, and will not be able to go above/below that figure/outcome'; 'If we are wrong, we would be glad for you to give us more information so that we can make a better decision', and so on.

- (8) (Legal) professionals live in a climate which demands transparency, multi-skilling and accountability.

To be employable and retain customers, lawyers (and other professionals) need to be traditional dobermans and drafters; but also wise diplomats, doubt creators and decision-makers.

Apparent Reluctance to Prepare a Written Risk Analysis

If there are so many reasons in favour of writing an initial analysis, then subsequent evolving, risk analyses, for any client who cannot 'settle' a conflict, why are these documents apparently so rare in most legal circles? No doubt there are some individual lawyers who regularly use detailed written risk-analyses of 'no-settlement' (or at least no early settlement). What follows are some possible reasons for rarity (none of which, in the writer's opinion, is particularly convincing).¹⁶

- (1) *Habit.* Creation of such a document has not been part of the systems in law firms, or the habits of many lawyers.
- (2) *No Training.* Lawyers have not been trained to prepare risk-analyses routinely and have few role models from whom to learn. By way of contrast, risk analysis and decision-making courses appear to be a normal part of the curriculum in university business schools.
- (3) *Expense.* To prepare an initial risk analysis, and then one or more amended versions as new information emerges, is yet another expense for a client. A client may be more willing to spend a limited conflict budget on discovering weaknesses in the opposition's arguments, rather than carefully systematising his or her own weaknesses and risks.
- (4) *Repetitive Client Education.* Educating inexperienced clients about the harsh realities of conflict and of the legal system is often an exhausting and expensive

16 Analogous discussions can be found in medical literature about giving 'informed consent' to medical interventions; for example K Cox, *Doctor and Patient: Exploring Clinical Thinking* (2000).

process.¹⁷ Clients need to 'hear' these truths more than once. Lawyers sometimes lecture and debate with inexperienced disputants for months in an attempt to dispel the myths which surround the litigation system. Robert Benjamin has observed that inexperienced litigants sometimes allow the myths of justice, truth, rationality and finality to influence their decision in favour of a litigation path.¹⁸ Some lawyers may too readily (and prematurely) cease this demanding education of clients who do not want to hear.

- (5) *Unnecessary Scare-mongering.* A comprehensive listing of the risks of conflict or litigation may unnecessarily scare some clients. They may react to a three-page list and be unable to see that the vast majority of these risks are inapplicable or statistically unlikely. For example, a list of risks which result from driving a car would be so long and dramatic that some readers would unnecessarily abandon driving forever. The medical profession struggles with this factor whenever legislation requires a comprehensive catalogue of possible side-effects of new drugs or surgery.¹⁹
- (6) *Loss of a Client.* Following from the previous factor, some lawyers need money. They fear the loss of a client if the client hears 'negative' comments from the lawyer. Accordingly, they sell the client too readily what he or she wants, rather than what may be needed.
- (7) *Client is 'Not Ready' to Hear.* Some people in conflict have suffered profound losses – loss of farm, business, reputation, mobility, self-respect, spouse, health, or hope for the future. These losses send them into a normal cycle of grief which may be manifested by shock, denial, bargaining with God, depression or anger.²⁰ People in the early stages of grief (which may last for years) are 'not ready to hear' difficult truths about conflict. Skilled helpers may wait until the aggrieved client emotionally 'moves on' before attempting any detailed risk analysis.
- (8) *Irrational Nature of Human Decision-Making.* A more permanent version of the emotional rollercoaster is the theory that human beings are frequently irrational, and that we have and will always make a 'number' of important

17 A Sarat and W Felstiner, *Divorce Lawyers and Their Clients* (1995); D Binder, P Bergman and S Price, *Lawyers as Counsellors* (1991).

18 R Benjamin, 'Negotiation and Evil: The Sources of Religious and Moral Resistance to the Settlement of Conflicts' (1998) 15 *Mediation Quarterly* 245.

19 M Weir, *Complementary Medicine: Ethics and Law* (2000) 93-101; *Rogers v Whitaker* (1992) 109 ALR 625; *Chappel v Hart* (1998) 156 ALR 517. (It is professional negligence if a patient consents to a medical procedure without also consenting to the risks of even remotely possible side effects.)

20 See E Kubler-Ross, *On Death and Dying* (1969).

decisions based upon irrational factors and feelings.²¹ Many anecdotes about war and litigation indicate unequivocal stupidity on the part of the instigators or promulgators. The decision to 'fight' had little or no possible benefit for any one.²² What persuasive effect will a systematic and rational risk-analysis have on such irrationality? Probably none. Nevertheless, as already mentioned, one side benefit of the cognitive and written exercise may be to help protect a warrior lawyer (or soldier) from subsequent allegations of failure to advise competently. This theory about the irrational nature of (some) decision-making, guarantees long term employment for lawyers, arms-dealers and soldiers, whether as aggressors or defenders.

- (9) *Avoid Creation of Dangerous Documents.* Some lawyers rightly fear that a *documented* list of risks will be 'leaked' to the opposition. A letter, e-mail or fax can be copied by a disgruntled employee, accidentally lost, stolen by a surveillance team or left visible on a table during negotiations or mediation. However, the benefits of clarifying decision-making processes can usually be balanced with the risks of losing 'sensitive' information to the 'opposition'.
- (10) *'Whoops ... Before this Escalates Further, Can we Consider ...'* During an emergency or crisis consultation with a lawyer, there is a predictable tendency to focus on the crisis, and only to consider the systematic risks of ongoing conflict *later*, rather than *earlier*. Lawyers are then sometimes reluctant to deliver later news of risks to an entrenched client who can (rightly?) retort – 'Why did you not tell me this earlier before I spent x dollars....?'; 'Are you losing your nerve in this fight?' Lawyers sometimes rely upon mediators, judges or other expert lawyers to deliver tactfully the belated risk analysis ('bad news') in these cases.
- (11) *Avoid Premature Advice.* Many advisers are wary of giving any advice about risks before more alleged facts and evidence are collected. Of course, all relevant facts are never known before, during or after a trial. Some lawyers wait until the door of the court when a few more facts fall into place – such as the identity of the judge, illness of lawyers or witnesses, documents produced under subpoena – before giving a first or revised risk analysis. Anecdotally, the writer in the role of mediator has found one small but dangerous group of lawyers who allegedly 'represent' inexperienced litigants. These lawyers file claims in the 'insult' zone, and then refuse to give good day-bad day ranges and risks to their naïve clients, using the repetitive excuse, 'we don't have all the facts yet'. In the writer's experience, the deferral of at least a preliminary risk analysis is a dangerous habit for clients because, first, it fosters the delusion that at some time in the distant future *all* the 'relevant' facts will suddenly emerge. This rarely happens. Rather, decision making usually continues in the face of

21 For example, D Kagan, *On the Origins of War* (1995).

22 For example, Vidal, above n 12. Every litigation lawyer has a catalogue of stories about 'insane' claims or litigation.

marginally decreased uncertainty. Secondly, it is ironical that the necessary research project of collecting *some* facts and evidence itself usually escalates conflict due to expense, delay, hostile perceptions and structural changes during that project.²³ That is, a *preliminary* risk analysis needs to include the risks of undertaking a *comprehensive* risk analysis at some later date!

- (12) *Fear of Inaccuracy.* Some lawyers seem to avoid writing out any list of ‘no-settlement’ risks for a client for fear of understating or overstating the dangers. This is a form of perceived self-protection. ‘Put nothing in writing and you can never be proved to be wrong.’
- (13) *Standardised Risk List.* The logical converse of the previous point is that some lawyers, like doctors, are unwilling to prepare pro forma precedents which set out 68 standard risks of a business continuing with unresolved conflict or commencing litigation. Such a standard form may contain ‘truth’, but will rarely be read by a client, does not lead to ‘informed’ client consent, and may give the client the impression that the lawyer lacks competence as a warrior and negotiator, or is trying to avoid responsibility for minimising some of these risks. Nevertheless, such standardised forms may become increasingly common in lawyers’ offices, as they are in medical surgeries and on manufacturers’ labels.
- (14) *Avoid Public Denigration of Courts.* A risk analysis will necessarily itemise in detail the accident prone nature of the court system. The list of criticisms of western court systems is abundant and public – slow, uncertain, error-prone, expensive, stressed judges, judges ignorant of clients’ lives and businesses, tactical gamesmanship by lawyers, client loss of control, translation of conflict into narrow legal and monetised categories, repetitive adjournments, process by attrition, and so forth.²⁴ These repetitive and publicised critiques of courts are well known by litigation lawyers. Their own anecdotal vitriol towards courts usually far exceeds the surveyed and published dissatisfaction. Many lawyers, however, remain wary about cataloguing court and judicial failings in writing for clients. These documents will inevitably get back to the judges. Some sensitive judges may be offended and the lawyer may alienate an ally needed at a later urgent hearing. Thus lawyers tend to tell stories orally to clients about the accident prone nature of the judicial system, rather than record these tales of woe in writing.²⁵

23 For example, Rubin, Pruitt and Kim, above n 9, chs 5-7.

24 ALCR Report No 89, above n 14, 69-97.

25 For example, A Sarat and W Felstiner, *Divorce Lawyers and Their Clients* (1995). (Tape recordings of family lawyers speaking to clients reveal constant oral warnings about the arbitrary and chaotic nature of the court system.)

- (15) *I'm a Lawyer, Not a Counsellor*. Some lawyers take the approach that they will advise only on 'legal' risks, not about personal, community or business risks. Thus they readily state that litigation is delayed, uncertain and expensive (a 'lottery'). However they do not investigate the client's life, goals and business in detail or set out how ongoing (litigious) conflict may impact those 'non-legal' areas – for example, newspaper publicity, perceived employee incompetence, loss of work references, lost opportunities to compete, diversion from work, deterioration in health, exposure of personal or trade secrets and humiliation in a witness box. Such 'commercial' analyses are often left to the client or other more expert advisers. This artificial division between legal and non-legal effects of conflict is conceptually flawed and professionally dangerous.²⁶ Medical doctors have particularly been criticised for an analogous tendency to say, 'I am an expert in disease; I do not discuss illness'. By way of contrast, patients want consideration of their whole life and life goals, not just the 'curing' of a technical disease.²⁷ It is not acceptable for a surgeon to say 'I am an expert cutter; the psychological, economic and injury risks attached to surgery are not my business'. The writer anecdotally meets some lawyers who give a 'legal' risk analysis based on their own expertise and research; and then switch to a brainstorming process with the client to create a second 'commercial' or 'personal' risk analysis. This appears to be a helpful transition and ritual.
- (16) *Hired a Doberman*. There are several variations on the previous reason for certain lawyers being reluctant to provide a written risk analysis. For example, some lawyers say that they have been hired in a specialist role as an aggressor, hired gun, bad cop or doberman. They have not been hired as a diplomat or as a wise decision-maker. It would be patronising to a client to assume uninvited (and non-expert) roles. This view asserts that all the lawyer's intellectual and emotional energy must be directed at discovering 'weaknesses' and doubts in the opposition's position – not listing risks in his or her own client's chosen course of action. No doubting dobermans required. There is no doubt that some lawyers who have adopted this interpretation of their 'bad cop' role, have found long term employment. Others have not.
- (17) *Wise Elder and God-Professional*. One interpretation of the professional-client contract is that the submissive client brings his or her problem to the wise expert for the latter to provide a solution.²⁸ The client wants this contract and wants the expert to make judgments on his or her behalf. The client does not want to be bothered with lists of doubts, risks, options or alternatives. It is clear that there remains a class of clients who still want (at least initially) this god-

26 For example, JH Wade, 'Forever Bargaining in the Shadow of the Law – Who Sells Solid Shadows?' (1998) 12 *Australian Journal of Family Law* 256.

27 For example, K Cox, *Doctor and Patient: Exploring Clinical Thinking* (2000).

28 D Schon, *The Reflective Practitioner; How Professionals Think in Action* (1983).

professional contract, and will shop around until they find the right fixit doctor, dentist, builder or lawyer. Given market forces, some of these god-professionals will be successful. However, particularly as lawyers, they live in increasingly mine-infested territory.²⁹

- (18) *Belated Risk Analyses by Third Parties.* The preceding catalogue suggests reasons why many lawyers do not undertake a systematic and comprehensive written risk analysis early, if ever, for their clients. Accordingly, it sometimes becomes the belated task of a mediator, business adviser or barrister to undertake this task in an attempt to create clarity, and to assist a disputant make a wise decision in the face of inevitable uncertainty. A barrister and a mediator will usually also attempt to protect the initial lawyer from any criticism for failure to prepare such a document earlier – for example, ‘I’m sure that your lawyer will have told you all of this already’; ‘All I am doing is helping you create a list of the many things your lawyer has told you in the past’; ‘Your lawyer has helpfully analysed the legal advantages and dangers, now can you help me understand the commercial dangers if this dispute goes on endlessly?’; ‘Many of these risks have only become apparent recently and you must now re-evaluate in the light of this new information’; ‘Litigation is like war, clients commonly plunge into it in a moment of passion; as the emotions subside, it comes time to evaluate’ and so on.

One of the major reasons that lawyers employ mediators is to ‘beat up’ a client who is not listening to the lawyer’s repetitive written and oral warnings about continuation of conflict or litigation. What follows is an example of a colloquial questionnaire form of risk analysis prepared prior to a mediation.

Case Study 4 – Example Risk Analysis for Jammed Negotiations³⁰

(Typical service provider – customer ‘contractual’ dispute)

A cotton factory owner contracted with an expert factory designer and builder to renovate sections of his mill for \$2million. When the renovations were complete, the owner was disappointed as the promised rate of production did not eventuate until three months thereafter. (The new machinery often did not work during the first three months – the factory experienced repetitive ‘down-time’.) Accordingly the factory owner withheld the last payment of \$250,000 to the renovator. Incensed, the renovator commenced court action in one State (the State of the contract) to recover the last instalment. Predictably, the factory owner cross-claimed, in the State where the factory was actually constructed, for three months of diminished profits, being around \$1million. The entrenched parties and lawyers were required to attend mandatory mediation.

29 For example, M Behm, ‘A Risk Perspective of Managing a Mediated Matter’ (1999) December *Proctor* (Queensland) 27.

30 Wade, above n 3, 62-6.

The 'legal issues' distilled by the mediator during telephone preparation with lawyers and clients were as follows:

Possible Factual and 'Legal' Questions/Issues??

Fact	1. How many minutes of down-time occurred during the relevant period?	<input style="width: 60px; height: 20px;" type="text"/>
Fact	2. What combination of factors caused each down-time?	<input style="width: 60px; height: 20px;" type="text"/>
Fact/ Evidence	3. What expert evidence is available/credible to argue (2)?	<input style="width: 60px; height: 20px;" type="text"/>
Fact	4. Which particular down-time minutes were arguably 'normal' incidents of an overhaul? (eg. compared to other mills around Australia)	<input style="width: 60px; height: 20px;" type="text"/>
Law	5. Who has the joint or individual responsibility to remedy each particular stoppage? In what time frame?	<input style="width: 60px; height: 20px;" type="text"/>
Fact	6. What steps were taken by whom to remedy each down-time?	<input style="width: 60px; height: 20px;" type="text"/>
Law	7. At what minute does each particular down-time become a possible/probable breach of contract?	<input style="width: 60px; height: 20px;" type="text"/>
Law & Fact	8. How should 'loss' be measured for those minutes of down-time in breach?	<input style="width: 60px; height: 20px;" type="text"/>

On the day of the joint mediation meeting between the factory owner and the renovator (which involved two teams with five members each), the mediator met with each team and gave each of the members the following risk-analysis. Each team member was asked to fill in the form and then discuss each risk with fellow team-members.

Business Risk Analysis for Each Participant in Each Team

(1) How far will I and my employees be able to concentrate on new projects over the next x years of conflict?	Attempt to convert to \$
(2) How many days of worktime will I and my employees lose over the next x years preparing for this dispute?	\$
(3) Do I/they have anything better to do?	\$

	Attempt to convert to \$	
(4) How much money, best to worst, will I spend on <ul style="list-style-type: none"> • Lawyers • Duelling witnesses • Duelling experts • Travel Over the next x years?	\$	
(5) How much money, best to worst, will be spent on <i>procedural</i> issues (for example, determining which court has jurisdiction) before we even focus on historic analysis?	\$	
(6) What damage, if any, might flow in my business community by a public hearing during which we each label the other: <ul style="list-style-type: none"> • Impetuous • Deceptive • Incompetent, etc. 	\$	
(7) If war continues for x years and bitterness escalates, how far (if at all) can each of us lose customers from bad-mouthing by the other?	\$	
(8) What are the chances that a judge will understand my industry and how it operates?		
(9) What are the chances that a judge will believe 100% of my version of 'the facts'?		
(10) During years of conflict, what are the chances that a judge will attribute 'fault' 100% to one side, and zero to the other?		
(11) What dynamics will emerge when my colleagues are subpoenaed and cross-examined?		
(12) What pressures will x years of conflict put on our families?		
(13) After x years of historic research, will perceived facts and dynamics be any different at the door-of-the-court? (if so, how)	Yes	
	No	
	Maybe	
(14) Will x years of argument effectively convince either of us that the other is legally or morally 'right'? (back to question 13)	Yes	
	No	
	Maybe	
(15) What are the risks of miscommunication by using letters and legal documents over the next x years?		
(16) If one of us is incensed by the trial judge, what are the chances of an appeal and recycling risks (1)-(14)?		
(17) Other risks???		

Attempt to put best/worst monetary values on each of these risks for you. Then add up best/worst totals.

TOTALS

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The dispute settled at the mediation after 8 hours of sometimes tense communication. **One** of the many factors (as told to the mediator by a legal representative) which removed barriers to settlement was that the written exercise and team discussion refocused the teams on risk management, long term interests beyond just money, moral and legal rights.

Terms of the Settlement (drafted in detail at the mediation)

- (1) Mutually drafted press release for Trade Newspaper about re-establishment of excellent working relationship between parties.
- (2) Signed contract for renovation of another factory.
- (3) Claim for lost profits abandoned.
- (4) Payment to renovator of \$75,000; plus a further \$25,000 for an earlier outstanding debt.
- (5) Agreement to include in any future contracts a security clause for instalment payments.
- (6) Establishment of emergency trouble-shooting phone numbers if/when conflicts arose in the future.

Precedent Risk Analysis³¹

Anecdotally, many (legal) representatives tell mediators that they have 'advised the client about the risks'. However, when mediators ask clients in private about the risks of not settling, the client has heard selectively or not at all, or the client speaks in vague generalities about the high cost of litigation, or unpredictable nature of the behaviour of judges or other decision-makers.

The following are examples of other ways of trying to analyse and communicate ranges of risk. While many variations are possible, it is essential to communicate in writing using lists and multiple specific categories, as opposed to communicating orally using generalised comments such as 'you may lose'; 'there are no guarantees'; 'it depends on who is believed'.

31 Ibid 59-61.

Example 1
Client Information Sheet – Risk Analysis

Name _____

Normal transaction costs of filing a formal court claim and proceeding to the door of the court (or occasionally even to the Umpire)	Applicable to me ✓/×	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 foryears.				
8. Inability to 'get on with life' foryears.				

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. Possible costs order against me.				

Normal transaction costs of filing a formal court claim and proceeding to the door of the court (or occasionally even to the Umpire)	Applicable to me ✓/×	Estimated \$ value Best to worst	Applicable to other disputants	Estimated \$ value Best to worst
15. Interest lost on money received later rather than sooner.				
16. Loss of control over my life to professionals.				
17. Post litigation recriminations against courts, experts and lawyers.				
18. Loss of value by court ordered sale/appointment of receiver etc.				
19. Lost future goodwill with and 'pay backs' by opponents.				
20. Cost and repeat of all previous factors if there is an appeal.				
21. Other?				
22. Other?				
23. Other?				
Estimated Total of Transaction Costs (best to worst)*		\$	No.	\$
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.

* The best-worst transaction cost estimates should be deducted from best to worst BENEFITS of LATE SETTLEMENT (or umpired decision).

Example 2 – Risk Analysis

In a recent family property mediation, the wife drew up the following more specific list of risks attached to ongoing conflict. She ranked the importance of each risk by number, and placed the list on her refrigerator for reflection between sessions.

Risks Attached to Ongoing Conflict?

Rank 0-5	0= unsure 1= small concern 5= big concern
1. 2-3 years of uncertainty.	
2. 2-3 years of sniping; lawyers' letters; miscommunication.	
3. Risk of semi-public documents bad-mouthing each other; or Long term family albums and memories.	
4. Long term sense of bitterness. The lawyers say that 'I had to say those things about you'.	
5. Public gossip for 2-3 years.	
6. Strain on families, grief for boys.	
7. Inability to plan; or spend own \$ for 2-3 years; or to travel; or start business.	
8. Loss of control of life to 'experts'.	
9. \$ paid to lawyers and experts – 2% of the estate.	
10. Spotlight on your super fund with detailed affidavits for tax department to examine.	
11. Judges ignorant of your businesses; random decision-making.	
12. 'Same' settlement forced on you at door-of-court in 2 years' time.	
13. Injury, illness or death before solution emerges	
14. Other?	

Life-Goals Analysis – A Useful Flip-Side of a Risk Analysis

One of the interesting ongoing activities of lawyers, mediators and counsellors who are involved in conflict management, is to swap stories and research on ‘interventions’ used successfully or unsuccessfully with clients.³²

A ‘life-goals analysis’ is a short (preferably one page) written list of a person’s short and long term business, health, financial and emotional goals. The goals are specified by a client, with careful listening and some prompting from a skilled helper, whether mediator, lawyer or counsellor. The writer frequently uses these documents in the capacity of either lawyer or mediator; either early in a consultation, or later when negotiations have jammed.

A ‘life goals analysis’ may be more suitable in some situations than a ‘risk-analysis’. These two analyses are the same except each list is expressed in different language. The former emphasises the glass half full, while the latter may sometimes seem to be referring to the glass half empty.

Use of the ‘life goals analysis’ may find some justification from several psychological studies³³ which suggest that most (not all) people are ‘risk averse’. Therefore, any list should express positively what has already been *gained* by the current offer, not how far the current offer is short of a ‘target’ or perceived ‘entitlement’. This persuasive negotiation or decision-making language may seem obvious, but the writer rarely sees these linguistic transitions being systematically used by lawyers or clients in mediations or negotiations. The linguistic transition from a ‘risk analysis’ to a ‘life goal’ is illustrated by the chart below:

Risks if Conflict Continues		Life Goals?	This Offer?
1. Another 2-3 years of delay.	↔	1. To get on with life	<input type="checkbox"/>
2. Subpoenas and stress for business partners and family.	↔	2. To minimise stress for colleagues and family	<input type="checkbox"/>
3. Legal costs of between \$30 000 – \$40 000.	↔	3. To minimise legal costs	<input type="checkbox"/>

32 For example, G Egan, *The Skilled Helper* (5th ed, 1994); L Boule, *Mediation – Skills and Techniques* (2001); JH Wade, ‘Strategic Interventions Used by Mediators, Facilitators and Conciliators’ (1994) 5 *Australian Dispute Resolution Journal* 292; JH Wade, ‘Tools From a Mediator’s Toolbox: Reflections on Matrimonial Property Disputes’ (1996) 7 *Australian Dispute Resolution Journal* 93.

Risks if Conflict Continues	Life Goals?	This Offer?
4. Loss of control of life and decision-making to lawyers.	↔	4. To regain control of my life <input type="checkbox"/>
5. Delay making a decision to expand a business	↔	5. To diversify my business <input type="checkbox"/>
6. Lose interest on cash for 2 years	↔	6. Receive and invest cash now <input type="checkbox"/>
7. etc	↔	7. etc

To repeat, a number of studies indicate that changing language towards the language in the right column emphasises current gains. New language, brevity and visuals also influence perception. As the majority of people are risk averse, they are more likely to accept an offer made 'late' in negotiations when it is reframed in terms of gains.

Of course, such knowledge of psychology and language (if it is correct!) potentially places considerable power in the hands of negotiators and mediators when working with less experienced negotiators.

In the tool box of interventions, the writer (as mediator) regularly converts a risk analysis into a one page 'life-goal chart' either during separate preparation with each individual disputant, and/or at the last gap in the negotiations, when one or all disputants have become focussed on 'what I have already lost' during the course of the negotiations.³⁴

This mediator (and negotiator) intervention commonly has the following steps in a private meeting where the mediator:

- (i) Acknowledges the client's sense of frustration that he or she is 'giving away too much'.
- (ii) Confirms that the mediator's (and lawyer's) job is to help the client make a wise decision in the face of uncertainty, and to reduce the possibility of future client regrets. For example, it may be a wise decision for the client to end this round

33 RH Mnookin, 'Why Negotiations Fail: An Exploration of Barriers to the Resolution of Conflict' (1993) 8 *Ohio State Journal of Dispute Resolution* 235; Goodpaster, above n 10; and references above n 9.

34 See JH Wade, 'The Last Gap in Negotiations – Why is it Important? How can it be crossed?' (1995) 6 *Australian Dispute Resolution Journal* 93.

of negotiations and to continue the conflict until another (planned) event occurs.

- (iii) Asks the client to brainstorm on a whiteboard a list of life goals (in the client's reframed words); and prompts the client about other possibilities to add to the list. Predictably, a list of multiple life goals emerges (one life goal may be 'To be paid \$1million dollars!'). Set out below is an example of the type of list that commonly emerges in family property disputes.

LIFE GOALS?	THIS OFFER??
➤ To get on with life	
➤ To open a new business	
➤ To invest money	
➤ To stop paying lawyers	
➤ To stay healthy	
➤ To minimise contact with 'x'	
➤ To reduce stress on colleagues	
➤ To take a holiday	
➤ To focus on my work	
➤ To avoid becoming bitter	
➤ To regain 'control' of my life	
➤ To settle 'in the range'	
➤ To reduce risks of paybacks	
To receive [\$540,000]	
Other??	

- (iv) Asks the client to work down the list and tick (or check) the boxes if a life goal is achieved by the current offer. Other boxes are marked with a question mark. Standardly, the client decides that more than 90% of his/her life goals are contained in the current offer! This is a visual surprise.
- (v) Immediately copies the whiteboard 'life goals' and ticks chart to a single hand - printed sheet of paper and gives this to the client to ponder in silence.
- (vi) Asks the client whether he or she would like to continue the negotiation immediately, or take a break to consider the current offer, or immediately meet to call off the jammed negotiations for a time.
- (vii) Gives advice that many clients like to take a break of several days, stick the life-goals sheet on their refrigerator for quiet contemplation and discussion with

influential friends or family³⁵ and phone the mediator back between 7-9pm on a specified day with a process decision – accept the offer, adjourn or resume an agreed process.

- (viii) Tells the other disputant(s) in a separate meeting what process is happening and perhaps repeats a similar confidential ‘life goals’ analysis.

The majority of clients have opted for the refrigerator break, and over 80% have phoned the mediator back on the assigned day with a speech to the effect, ‘In the light of the life goals we listed (and a few more...), and discussions I’ve had with ..., I have decided to cut my losses etc and to accept the offer that was ‘finally’ made.’

Obviously, there are many interesting dynamics occurring during the course of this particular intervention. It is a useful addition to the conflict manager’s toolbox.

Conclusion

This article has set out briefly:

- a description of a risk analysis
- reasons why such documents are essential for professional advisers and their clients in conflict
- some hypothesised reasons why written risk analyses are uncommon in many legal practices
- examples and precedents of risk analyses
- way in which to use a ‘life goals’ list, as a positive flip-side of a risk analysis.

The writer’s hope is that the evolving written risk analysis will become a routine document and process in the offices of professional conflict managers – particularly lawyers, mediators and armed services!

In my opinion, the problems attached to such documents are usually outweighed by the clarity they provide for conflicted clients who are attempting to make wise decisions in the face of ongoing uncertainty.

35 See Johnson and Campbell, above n 11 for discussion of ‘cheer squads’, ‘tribal members’ and influential outsiders.