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9-28-2010

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Recommended Citation
John Wade. (2010) "Preparing for mediation and negotiation in succession disputes" Paper to be presented at the British Columbia annual succession conference. Vancouver, Canada.Sep. 2010.

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PREPARING FOR MEDIATION AND NEGOTIATION IN SUCCESSION DISPUTES

John Wade*

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Aim

This paper argues that a major task for lawyers in succession disputes, negotiations and mediations is to assist clients make wise decisions in the face of uncertainty. This requires preparation. A short preparation model of five humble hypotheses is set out. Normally, these should be discussed with any mediator well before a mediation takes place. Example precedent preparation forms are attached.

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29/07/2010

Introduction

Mediation is a form of "assisted decision-making" (ADM) or "assisted negotiation" (AN). There are many types of mediation, 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 evaluative form is SIMSNILC mediation ("Single Issue Monetised Shuttle No Intake Lawyer Controlled" mediation).[1]

Many lawyers in Australia attend mediations 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, increase their stable of service providers, and then to match mediation 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
- 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[2]

As failure to prepare "properly" for negotiation and mediation is probably the most commonly documented misdemeanour[3], this paper will offer a few hints to add to the

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[1] 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

[2] J.H. Wade, *Representing Clients at Mediation and Negotiation* (Queensland: Bond University Dispute Resolution Centre, 2000) 180.

[3] See R. Lewicki et al, *Negotiation* (New York: Irwin, 1999).

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 use planning is simply boring and tedious, easily put off in favour of getting into the action quickly."*[4]

In every negotiation or mediation, 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?

- What are the **causes** of this conflict?
- What **interventions** might be helpful?
- What **bumps/glitches** are predictable?
- What **substantive outcomes** are possible/probable?
- What **risks** if the conflict continues? (This is the reverse of "What **goals** does each client probably have?")

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,

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[4] *Ibid* Lewicki at 52.

private “preparation” questions from the mediator. These more colloquial questions from a mediator hide the five humble hypotheses. For example, Legal Aid mediators in Queensland, who do not have funding for early 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

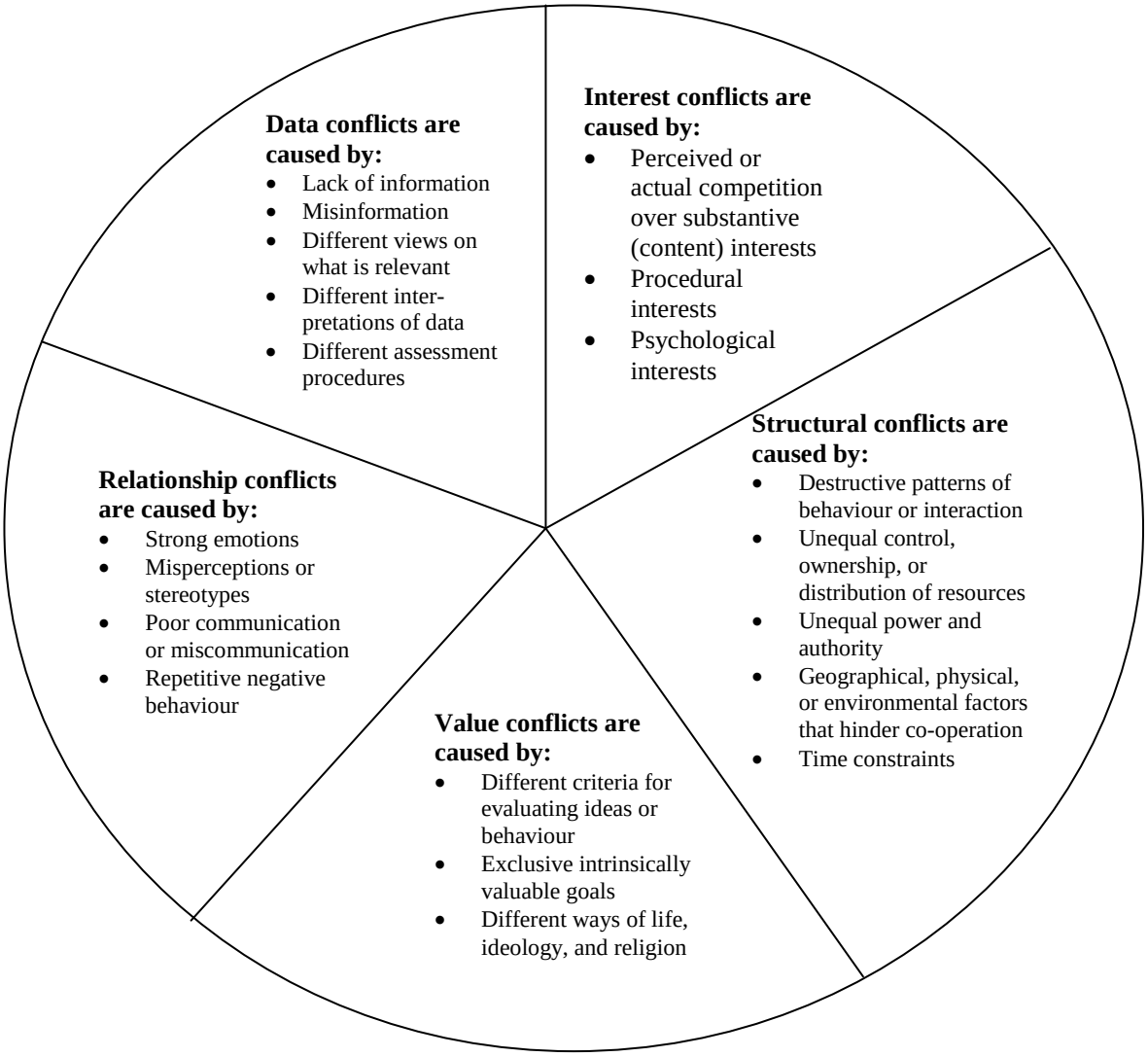
1. Why haven’t you been able to settle this by yourselves so far?
2. What would help this conflict to settle today?
3. What would you like me to do to help you both reach an agreement?
4. What risks do you (each) face if you walk out with no agreement?
5. How will you respond to normal patterns of negotiation?

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:

1. the causes of the conflict.
2. 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 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 (*The Mediation Process: practical strategies for resolving conflict* 2nd ed. San Francisco: Jossey-Bass Publishers 1996).



In succession disputes, what are three of the most common causes of conflict?

1 ……..

2 ……..

3 ……..

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

(i) Data or information differences

Did the testator have capacity?; 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?; What events actually occurred on the day the will was allegedly signed?

(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"; "They are greedy, unscrupulous, rich kids"; "Their lawyer is a vicious shark."; "That second wife is the real problem".

(iv) Value differences

"Parents should treat all their children equally not just favour the sick/unemployed/drug addicted"; "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" etc.

(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/executors are spinning this out in order to milk the estate".

(vi) Interest conflicts

- SUBSTANTIVE Interest

  "There is only one necklace, ring, grand piano, 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 succession 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.[5]

We all experience "loss" in our lives (loss of mobility, promotion, parents, hair, hope for the future, self-image, children, superannuation etc.) and many 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 relative is adjusting to the loss of a parent, piano, dream, house, sense of importance, at a different rate to another. "Stop wallowing in your grief, Fred, you've got to move on". "It's alright for you Jane, I was much closer to dad than you were, living off in your penthouse at the Gold Coast."

At the time of a death, senses of "loss" proliferate, and survivors wander up and down the grieving stages for years. For example, survivors "lose" a beloved person; familiar accommodation when the family home must be sold; familiar roles of caring; hopes of inheriting a particular item; sense of self-esteem when their share of an estate is small; cash-flow; a sense of immortality (next-cab-off-the-rank); last chance to have some capital; last chance to apologise or talk through a difficulty.

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[5] E. Kubler-Ross, *On Death and Dying* (New York: Basic Books, 1975). See also R. Harris, "The Mediation of Testamentary Disputes" (1994) 5 *Australian Dispute Resolution Journal* 222.

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”.[6] 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 clumsily into a “legal” category of testamentary capacity or family provision.

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”; “Dad and Bill were always more focussed on the business/sport/money than upon us” 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. 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**.

[6] eg J.R. Johnston & L.E.G. Campbell, *Impasses of Divorce* (New York: The Free Press, 1988) chs 3-5.

Example Case Scenario

Read the following summary of general facts, and of an interview with Dave. Attempt to develop your first three humble hypotheses on "causes" and "interventions" and "glitches" ready to answer the mediator's questions to you:

- "Why do you think that this dispute has not settled?"
- "What suggestions do you have to make the mediation proceed successfully? (What would you do in my shoes as a mediator?)"
- "On your past experience, what dynamics, bumps, hurdles, glitches could occur at the mediation which we should be prepared for?"

Gold Coast Apartment Inheritance

Preliminary "Facts"

An 80 year old widower, Bill, met one of his childhood friends, Mary, aged 77 on a holiday. They corresponded for a while and then Bill asked Mary to "move north" to live with him on the Gold Coast. She sold her house in Sydney and moved into his luxury high-rise apartment on the Gold Coast. Bill's three adult children: Dave and Peter, both medical practitioners, and Joanne a high-rise manager, and their families did not approve.

Bill gave mixed messages to Mary saying that he found his children aggressive; and yet to his children saying that he found Mary "pushy" and had to keep her placated. Bill became ill and Mary cared for him for the last two years of his life. Just before his death Bill telephoned his solicitor and said he was worried about conflict in his family. He allegedly asked his solicitor to draft two documents - first, a will leaving Mary a life tenancy in his apartment; and secondly, a 9 year lease to Mary over his apartment. Bill became very ill; on his return from a stay in hospital, Mary telephoned the solicitor who quickly brought around the two prepared documents. Bill signed both with the apartment managers as witnesses.

The next day Bill was rushed to hospital again. Dave, Joanne and spouses entered his apartment, threatened Mary, took various items of furniture, and the signed will "disappeared".

Mary telephoned Bill's solicitor who rushed to the apartment and harsh words were exchanged with the two adult children. Mary was taken to hospital in a state of shock. While she was at hospital and unknown to her, Bill died. She was not invited to the funeral.

Mary returned to Bill's apartment, changed the locks and has been there for 18 months since his death. She is now 81 years of age.

Since Bill's death:

1. Mary has applied for probate of the "missing" will;
2. The two sons are opposing that application on the grounds of Bill's lack of mental capacity;
3. The two sons have filed in the Supreme Court to have Mary evicted and for a declaration that the nine year lease document and "last" will are invalid;
4. The three children have refused to return any furniture; Mary says some items are hers brought from Sydney; some are gifts to her from Bill;
5. There are vastly different versions of Bill's attitudes towards the various disputants in the 2 years before his death;
6. The apartment manager, who has a criminal record, has allegedly been harassing Mary by entering her apartment without authorisation (allegedly at the request of the three adult children);
7. Mary is under substantial financial pressure as her son in Sydney is a defendant in litigation over a guarantee;
8. Mary's health is poor; and she can only walk a short distance. She only has one good friend in Queensland, Jill, a young accountant who lives nearby;
9. Joanne despises Mary and allegedly punched Mary on the "furniture removal" night;
10. Son David, who is administering is father's estate is exhausted by the warfare, paying bills on the apartment and his own health is suffering. However, he is still very angry about "this woman", and his father's foolishness;
11. Son Peter is a high flying entrepreneurial doctor in Sydney who yearns to use his deceased father's apartment as a holiday pad.

A Supreme Court judge has looked at the bulging file of allegations and gladly sent it off for mandatory mediation.

As a lawyer, your interview of adult son Dave produces the following notes and insights.

Dave's Interview - Second layer of "facts".

1. Very stressed; quiet and occasionally angry.
2. "My *wife* is worried about my health..."
3. "This *woman* is an awful woman..."
4. "I am constantly reminded of her presence in my father's unit by accounts; repair bills; maintenance".
5. "My father did not like her - he told me so..."
6. "We are not giving back any furniture - our childhood memories".
7. "My sister Joanne must be kept away; she gets hysterical".
8. "We cannot settle without my brother Peter's approval; he is a skilful businessman; he tends to judge me for not handling this whole thing better".
9. "Since we suggested my Dad was incapable of understanding the will, the solicitor for Mary, before whom he signed the will and lease, has dug his heels in and said that we are saying that he is incompetent".
10. "I think we have her on the run as she is under financial pressure."

Gold Coast Apartment Inheritance

(1) What are the possible causes of conflict? (classify each one if possible using Moore's pizza)?

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(2) What possible helpful preparation and **interventions** for a successful mediation or negotiation?

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(3) What glitches/dynamics do you predict at the mediation/negotiation meeting?

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Humble Hypothesis No 5

What are the risks if this conflict does not settle?

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.[7]

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 rendered overconfident by their own rhetoric **and** to their clients.

[7] 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.

> 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 make wise decisions in the face of uncertainty".

Preparation – Risk Analysis

Much more could be discussed and has been analysed elsewhere, on the fifth humble hypothesis – What are the risks/fallbacks if the conflict continues?[8]

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.

[8] See Wade *supra* note 8 and references therein.

NEGOTIATION PLANNING INSTRUMENT

PARTY	POSITIONS (SOLUTIONS)	INTERESTS and PRIORITIES	DOUBTS,LEGAL and OTHER FACTORS	APPROACH TO NEG-OTIATION	OPENING and TACTICS	CREATIVE OPTIONS/ PACKAGES	"OUTSIDE" ALTERNATIVES (BATNA;WATNA)
OWN SIDE							
OTHER SIDE							

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 ☑/☒	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				
ESTIMATED TOTAL of Transaction Costs (best to worst)*		$		$

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"

1. **Chronology of "relevant" events**
2. **"Legal" documents (especially for evaluative mediation)**
3. **List of "things" or goals which are 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. **Causes of conflict**
    b. **Possible helpful interventions**
    c. **Possible glitches/"challenges"**
    d. **Possible substantive outcomes**
    e. **Repeat 9**

Conclusion

Only three things matter in (succession) 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.