Managing Client Expectations
Overview

1. The importance of communication and some statistics re complaints & notifications
2. Screening considerations / client profiling
3. Tips and tools applicable from the first consultation
4. Provision of comprehensive & strategic legal advice – what, when, how
5. Preparation for resolution
6. What neuroscience is teaching us about key drivers of social behavior
   And how we act in the face of stress and conflict
7. Mindfulness around resolution of the matter and the solicitor role
8. The importance of looking after yourself
9. About the Author

Karen Stott, Solicitor and NMAS Mediator

- Karen Stott is a sole legal practitioner with over 20 years of litigation experience before becoming a full-time mediator in 2016.

- For the first 10 years of her career, Karen acted for injured plaintiffs, including the establishment of a successful medical negligence practice in 2000 operating on a contingent basis and without recourse to advertising.

- From 2007, Karen then acted at partnership and consultant level in 2 Sydney CBD mid tier law firms for 6+ years, representing various state government departments and commercial insurers in areas such as education, police, roads, health, occupier’s liability and professional liability.

- From 2013 to 2016 Karen acted for approx. 150 insulation industry clients in the 2014 Home Insulation Program Royal Commission, which led to high level consultation with Ministers of the Commonwealth regarding a payment scheme, sourcing of litigation funding and launching of a class action against the Commonwealth.
The take-home message of this paper:

To get the best outcome for your client:

➤ Manage their expectations from the very first point of contact.

➤ Conduct yourself with empathy and professionalism, so that your earn and maintain their confidence and respect.

➤ Be mindful of your own health and wellbeing.

This paper looks at some practical tools to help with this, and some wider issues associated with practice management.

Why is this so important? The outcomes include that your client will:

• Value you and respect your advice.

• Follow your advice – which you need them to do even when it is not what they want to hear.

• They will feel their own autonomy in the process and be accepting / content / happy with the outcome.

• They won’t complain about you or challenge your legal fees.

• You will feel in control of your life and your career and get pride & satisfaction from it – we all want to feel like we are good at what we do and to get the feedback from our clients that we have genuinely helped them.

And at the end of the day: although you will ideally regard your job and career as a vocation, it is important that your sense of identity and fulfillment comes from your life outside work.

“Healthy people think better and make better decisions”
- Tristan Jepson Memorial Foundation, Australia. (tjmf.org.au)
The Basics of Good Communication and Representation

Effective and respectful communication is a non-negotiable.

The Legal Services Commissioner Annual Report 2016/2017 notes the following:

As has been the case for a number of years, more complaints were lodged in relation to family and de-facto law matters in this reporting year than any other area of law. Complaints in relation to personal injuries, and probate, wills or family provision claims are also common.

The most commonly made complaint was negligence, followed by poor communication and then overcharging. (P6)…

Our role

In many cases this year our Mediation and Investigation Officers were able to supply additional information to complainants that had not previously been made available to them by their lawyers. Whilst the provision of additional information may not always resolve all of the complainant’s concerns, it can assist their understanding of why events may have occurred.

As noted above, again this year a not insignificant number of consumer matters related to a perceived failure of communication. In some instances a client may have unreasonable expectations of the level of contact they will have with their lawyer, in other instances lawyers fail to provide a basic level of communication or fail to properly explain events to their clients. (P9)

LawCover’s 2017 Annual Report re Notifications data is also notable in relation to litigated matters:

It is interesting and perhaps not surprising that most notifications to LawCover for 2016/2017 (22%) were with respect to litigated matters. I think it serves to emphasize the importance of good communication and managing client expectations – and particularly “the gamble of litigation” itself.

That is, an adverse litigious outcome may be “par for the course” and not indicative per se, of solicitor negligence. After all, there are so many factors outside the parties’ control when a litigated matter proceeds to hearing, (touched on later).

If a substantial portion of notifications and complaints in litigated matters have COMMUNICATION issues rather than NEGLIGENCE at the heart of it – then this is something that:

- Should have been preventable; and

- May well occur again if the solicitor in issue has an approach to communication that is lacking.
### Percentage of notifications – area of practice

The following table presents the percentage of notifications by area of practice for the 2016–17 year with comparisons to prior years.

<table>
<thead>
<tr>
<th>Area of Practice</th>
<th>% of Total notifications</th>
<th>% of Total notifications</th>
<th>% of Total notifications</th>
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<tbody>
<tr>
<td>General Commercial</td>
<td>11</td>
<td>9</td>
<td>9</td>
</tr>
<tr>
<td>Sale &amp; Purchase of Business</td>
<td>2</td>
<td>3</td>
<td>2</td>
</tr>
<tr>
<td>Conveyancing</td>
<td>25</td>
<td>21</td>
<td>21</td>
</tr>
<tr>
<td>Leases</td>
<td>5</td>
<td>3</td>
<td>4</td>
</tr>
<tr>
<td>Mortgages &amp; Commercial Borrowing</td>
<td>3</td>
<td>4</td>
<td>6</td>
</tr>
<tr>
<td>Tort &amp; Workers Compensation</td>
<td>5</td>
<td>4</td>
<td>4</td>
</tr>
<tr>
<td>Out of Time Personal Injury</td>
<td>3</td>
<td>6</td>
<td>5</td>
</tr>
<tr>
<td>Out of Time - Other</td>
<td>2</td>
<td>2</td>
<td>2</td>
</tr>
<tr>
<td>Litigation</td>
<td>22</td>
<td>19</td>
<td>21</td>
</tr>
<tr>
<td>Matrimonial</td>
<td>7</td>
<td>10</td>
<td>9</td>
</tr>
<tr>
<td>Probate and Wills</td>
<td>9</td>
<td>10</td>
<td>10</td>
</tr>
<tr>
<td>Others*</td>
<td>6</td>
<td>9</td>
<td>8</td>
</tr>
<tr>
<td></td>
<td>100%</td>
<td>100%</td>
<td>100%</td>
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</tbody>
</table>

*Includes criminal, immigration, defamation and revenue

We continue to monitor emerging trends in claims and circumstances and, where appropriate, target areas of concern through risk analysis and targeted claims prevention strategies.

*(LawCover Annual Report 2017 at page 14)*
Tips and Tools Starting From the First Consultation

- Your client’s first impressions - why did your client choose you?
- Establishing rapport, trust and managing expectations
- Active listening and taking instructions at the first consultation
- Client screening
- Provision of strategic and comprehensive advice

Why did your client choose you?

Your reputation and public profile – what message are you sending and can you live up to it?
- referral
- internet search / website
- advertising

Expectations of clients may vary in accordance with how they came to see you in the first place.

How often do you review your firm’s website? How familiar with it are you?
Have you had a look at the websites of your colleagues / competitors?

Be mindful of any specific undertakings or conditions published on your website and also the tone it may set for a client’s expectations.

Thinks of the juxtaposing images on the cover of this paper:

From the outset and at all times, the aim should be to provide a “client experience” that makes them feel supported yet autonomous – and NOT like they feel stressed, alien to the process, out of control and exposed to danger.

Establishing rapport, trust and managing expectations from the get-go:

- Screen your client properly first (if acting contingently)
- Understanding what their objectives are
- Provision of a comprehensive advice at various key stages, including:
  - at the start of the matter / investigation stage
  - at the completion of an investigation / commencement of proceedings
  - before undertaking any settlement negotiations
Be mindful of your client’s emotional state and any associated complicating factors. Put yourself in their shoes.

Active listening and taking instructions at the first consultation

- **ALWAYS** begin by asking the client what they wish to achieve from the claim generally.

  *(Monetary compensation, professional discipline, apology, changed practice so that the same misadventure does not happen again, etc)*

- Provide your client with advice regarding whether / to what extent their expectations are reasonable.

  *This essentially involves assessing the strengths, weaknesses, opportunities, and threats (SWOT analysis) of the client’s case – in generic terms at the first consultation stage and in real terms prior to obtaining instructions on negotiations for settlement.*

- Re monetary damages: The best alternative solution should be discussed, as well as the worst-case scenario – *(in writing and in person)*.

Some common sense advice from fact sheets provided by the Office of the Legal Services Commissioner:

Suggested questions for a client to ask their lawyer at the initial consultation:

What else should I ask the lawyer about?

As well as asking about likely costs and the chance of success, you should ask the lawyer about how he or she will keep you informed about your matter.

Communication is the key to a successful professional relationship with your lawyer.

At the outset, ask:

- when you can expect progress reports
- how long the case is likely to take
- how often you should phone the lawyer and who else to contact if the lawyer is unavailable
- if the lawyer will charge for all phone calls
- who else will be working on your matter
And about Settlement:

**How do I know if I should settle?**

Solicitors and barristers who are experienced in the relevant area of law will advise their clients about the strength of their case, the risks they might face if the case goes to a hearing, and the range of compensation or orders that the court is likely to award or make after a hearing.

Even highly skilled, experienced lawyers cannot always make accurate predictions about what a court will decide because there are too many factors beyond their control. However, clients should consider their lawyer’s advice carefully before making any decision about settlement — even if that advice is disappointing.

The lawyer has a duty to offer objective advice about the prospects of success and the appropriateness of a settlement offer, but cannot make the final decision for the client. In the end, it is up to the client to decide whether to settle or to go ahead with court action. Lawyers should not apply undue pressure on a client to settle but can cease to act for a client who refuses to accept their professional advice.

(Fact Sheets re “Hiring a Lawyer” and “Settlement” – olsc.nsw.gov.au/factsheet)

**Checklist Tool of why a matter may not settle – (client profiling)**

The checklist (below) is a useful tool which I have come to use as an aid during mediations, as the day unfolds. It assists me in deciding how much pressure / intervention to use with the parties in the course of their negotiations, before I’m willing to concede that a deadlock has been reached and that the mediation should be called to a close.

These checklist items may also double as useful considerations when screening new clients (in relation to contingency fee-based matters) and in understanding the various conscious or subconscious motivations of your client that need to be managed.

<table>
<thead>
<tr>
<th>Resource: Checklist Tool of why a matter may not settle</th>
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<tbody>
<tr>
<td><strong>Consideration? Yes / No</strong></td>
</tr>
<tr>
<td>1. Need an administrative declaration.</td>
</tr>
<tr>
<td>2. Cut and dried bulk cases.</td>
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<tr>
<td>3. Need to shift responsibility elsewhere.</td>
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<tr>
<td>4. Demonstration of effort: “I won’t give in without a fight”.</td>
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<tr>
<td>5. Indeterminate results; uncertain rules.</td>
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<td>7. Preservation of a tough commercial reputation.</td>
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<tr>
<td>8. Need to control precedent and “the law”.</td>
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<tr>
<td>9. Need to award responsibility for difficult ethical or policy decisions.</td>
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<tr>
<td>10. False expectations of one or both parties.</td>
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</tbody>
</table>
11. Entrenched judicial power over certain social issues.
12. The Tribunal as theatre.
14. Disputes where one or both parties are not paying for the process.
15. High conflict about low resources.
16. Adjustive dissonance (each party is adjusting emotionally to loss at different rates).
17. Negative intimacy - one (or both) parties’ meaning to life consists of continuing the conflict.
18. Risk preference – one party enjoys a gamble.
21. Hanging on to life-meaning values.
22. One or both of the parties are lawless renegades.

TOTAL:  YES /      NO /

Note:
• Any checklist is only an educational and diagnostic guide.
• Less than 10% of conflicts which enter a lawyer’s office actually reach a final judicial decision.
• Occasionally conflicts with only 1 “YES” from the above will reach a Judge.
• Many conflicts with 10 or more “YES” answers nevertheless reach a negotiated settlement after years of stalemate.

2-way communication, advising comprehensively, and preparation:

A comprehensive WRITTEN advice should address the following items:

Checklist:

• onus of proof
• legal elements to be proven
• facts in issue
• expert evidence obtained (“warts and all”)
• expert evidence served by the defence
• prospects of success
• range of potential damages – (low, high, most realistic)
• re damages for non-economic loss: reference to any legal precedents are
helpful

- legal costs – (party/party and solicitor/client)
- statutory reimbursement obligations (HIC, Centrelink, private health, NDIS*, etc)
- explanation of ALL deductions applicable before calculation of net figure from any settlement / damages award
- risks of taking the matter to trial
- considerations in relation to the law regarding offers of compromise (explain the risks of getting on the wrong side of an offer of compromise)
- reference to solicitor/client contingency costs agreement and client requirement to follow legal advice

*Note: “The NDIS: Advice on Compensation Recovery”, by Bill Madden, LSJ NSW December 2016

Of course an advice covering all of these issues needs to be in writing!

These are all of the issues that your client needs to be aware of and understand, before they can provide meaningful instructions on settlement or proceeding to trial.

No-one could possibly digest and retain such detailed information if only given verbally.

Preparation of Your Client for Resolution
– managing expectations well ahead of the event

The key is in managing client expectations at every step of the way (ie from initial instructions) and in thorough, mindful preparation for resolution.

Key issues:

- Provide a comprehensive, updated advice to the client well in advance
- Explain the process and what it can achieve
- Understand what other issues are important to the client in resolving the case (ie aside from monetary compensation / completion of a document or transaction) and
➢ Take the necessary steps to try to achieve this (eg at mediation – an expression of regret, empathy, and/or an apology from the other side)

**An updated advice** - Make sure that you have provided a comprehensive advice to your client (which addresses the merits of the various opportunities as well as risks and worst case scenario) well ahead of the resolution.

DON'T leave such issues to the day of the resolution or soon beforehand, and risk your client showing up in a state of stress and panic and not being able to provide meaningful instructions.

**Explain the proposed resolution process** – to empower your client in knowing what to expect and to be able to make the most of the process.

**Trial Risk**

As referred to previously, LawCover’s notifications re litigated matters for 2016/2017 (22%) and the Legal Service Commissioner’s complaints experience with respect to communication issues are worth noting.

Given that so much is outside the parties’ control when a litigated matter proceeds to hearing – it suggests that a lot of complaints and expected claims could be prevented with good communication.

For litigated matters and **trial risk**, do you advise your clients of these things – in writing – AND: well enough in advance to make the most of any ADR opportunities?

**A Settlement saves the parties from the worst-case scenario of having to take the matter to Trial in Court:**

<table>
<thead>
<tr>
<th>Time</th>
<th>Financial Cost</th>
</tr>
</thead>
<tbody>
<tr>
<td>- Waiting a further period of weeks, months or even years until the case is listed for hearing;</td>
<td>- Legal costs of investigating and preparing the matter, including solicitors, barristers and expert witness reports;</td>
</tr>
<tr>
<td>- Factual witness recollections become more imprecise with the passage of time since the incident in dispute;</td>
<td>- Further legal costs involved in the intensive preparation of the matter for hearing – including the proofing of witnesses, preparation of statements, obtaining further expert evidence, etc</td>
</tr>
<tr>
<td>- The extent of the damage can often worsen in the absence of financial and emotional remedies that a settlement of the case can bring.</td>
<td>- Further legal costs again for every day that the matter runs in Court, as well as personal costs involved in attending Court every day, (accommodation, travel, childcare, time off work etc);</td>
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<tr>
<td></td>
<td>- Additional costs in considering the Trial Judge’s judgement and any</td>
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<tr>
<td><strong>Formality</strong></td>
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<tr>
<td>- A hearing is a very formal and rigid process in terms of set and limited sitting times every day;</td>
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<tr>
<td>- The requirement to comply with Court etiquette such as dress code, rising on entry and exit from the Court by the Judge, bowing to the Judge on entry and exit from the Courtroom, how to address the Judge, no eating or drinking in court, etc;</td>
<td></td>
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<tr>
<td>- The rules of evidence that apply at Trial mean that questioning and evidence may be objected to and interrupts the smooth running of argument.</td>
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</table>

<table>
<thead>
<tr>
<th><strong>Stress Factors</strong></th>
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<tbody>
<tr>
<td>- Rumination over the grounds of the dispute;</td>
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<tr>
<td>- Being subjected to public court proceedings and possible media interest;</td>
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<tr>
<td>- Giving evidence under oath in the witness box at Trial in a way that best explains what happened and what the consequences have been;</td>
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<tr>
<td>- Being cross examined by the other side’s barrister in Court, risking your evidence and credibility being called into question or even criticised by the Court;</td>
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<tr>
<td>- The emotional roller-coaster of ruminating over how each day’s evidence has played out in Court, trying to anticipate whether the Judge is favouring your case or not and hoping that tomorrow’s evidence will improve your position;</td>
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<tr>
<td>- Worry for what the future holds if the case is lost.</td>
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<table>
<thead>
<tr>
<th><strong>Lack of Control</strong></th>
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<tbody>
<tr>
<td>- By the time the matter goes to Trial, it is a judge who will be ruling in favour of one party or the other; someone has to lose;</td>
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</tr>
<tr>
<td>- Despite the best preparation, Court proceedings can often be a “gamble” in that you may draw an “unfavourable” Judge, witnesses don’t perform as well as anticipated, interlocutory disputes may result in important evidence being excluded or the case adjourned, -------- as well as the risk of losing the case.</td>
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</tbody>
</table>
Prepare for what else is important 
eg RE some personal injury litigation - the importance of an “apology”

One of the greatest advantages of mediation compared to a public trial is privacy. The rules of confidentiality that attach to mediation allow the parties to negotiate in an open, safe, and honest environment as there is no public scrutiny. This is conducive to parties being prepared and able to provide confidential apologies and concessions.

Lawyers should not underscore the importance of a genuine and constructively - conveyed acknowledgment of suffering, apology, and/or any other concession, on the attitude of the parties to the dispute and in turn, their attitude to the negotiations.

*It is helpful if the plaintiff’s lawyer obtains from their client beforehand, regarding whether such an acknowledgement is desired or indeed expected during the course of the mediation, as well as the specifics of how that acknowledgement should be conveyed.*

Likewise, it is helpful if the defendant’s lawyer explores with their client in advance of the mediation:

- the willingness to offer an apology or acknowledgment of suffering, including the nature and substance of any such proposal and the outcome that the client anticipates to achieve in making it;

- offers support and advice on the specific content of how an apology may be conveyed without the risk of being regarded as an admission of liability (unless appropriate to do so);

- discusses with the client who is the most appropriate person to convey that apology or acknowledgement; and

- assists the client to convey the same at mediation in a constructive way, including consideration of “who, what, when and where” – to ensure as far as possible that the expectations of the client (and the anticipated expectations of the plaintiff) correspond and coincide.

This will avoid the perilous situation whereby one party offers an apology that is deemed wholly inadequate, or which fails properly to address the relevant issues, or is in relation to an issue which was not that anticipated by the other.

It is also very constructive for the plaintiff to be informed, in the course of any expression of regret, the steps that have been or are being taken to prevent a recurrence of the subject incident. For defendants: keep in mind that this is important information within the knowledge of the defendant party but not necessarily known to the plaintiff.
It should also be mentioned here that an “apology” does not equate to an admission of liability. In the vast majority of cases, liability cannot be established (or conceded) without expert evidence addressing each of the legal elements of the case required to be proven.

The significance of an apology is not limited to personal injury matters:


“Perhaps the most powerful form of acknowledgement is an apology. This is a lesson we all learn as children. If you say the magic words, “I’m sorry”, you can continue playing the game. Unfortunately, it is a lesson we often forget as adults.

Take the Columbia law professor who put the following question to his contracts class:

“Seller promises Buyer to deliver widgets at the rate of 1,000 per month. The first two deliveries are perfect. However, in the third month, Seller delivers only 990 widgets. Buyer becomes so incensed that he rejects deliveries and refuses to pay for the widgets already delivered. If you were Seller, what would you say?”

The professor was looking for a discussion of the various common law theories that would, as he put it, “allow Seller to crush Buyer.”

He looked around the room for a volunteer, but found none.

“As is so often the case with first year students”, he reported, “I found that they were all either writing in their notebooks, or inspecting their shoes. There was, however, one eager face, that of an 8 year old son of one of my students. He was in class because his mother couldn’t find a sitter. Suddenly he raised his hand…. “OK” I said, ‘What would you say if you were the seller?’

‘I’d say, I’m sorry’ “

As the child seemed to know instinctively, “crushing” an opponent is not the right answer. We often overlook the simple power of an apology.

The buyer was outraged because he felt wronged. What such a person most often wants is the recognition that he has been wronged. Only when that acknowledgement has been made will he feel safe in negotiating. An apology thus creates the conditions for a constructive resolution of the dispute.

Your apology need not be meek, nor an act of self-blame. To a disgruntled customer, you could say, “I’m sorry you’ve had this problem. You’re one of my


2 “Conflict: The Role of Self-Esteem, Reputation and Social Status Protection”, by Rachel

Karen Stott BA. LLB. Solicitor and Nationally Accredited Mediator (NMAS)
Liability limited by a scheme approved under the Professional Standards Legislation
favourite customers and the last person I’d want to see unhappy. What can we do to make it up to you?“

Even if your opponent is primarily responsible for the mess you are in, consider apologizing for your share. Your bold gesture can set in motion a process of reconciliation in which he apologizes for his share.”

**Settlement Negotiations – Important strategies for getting the best outcome**

- Mindfulness of the client’s needs & importance of emotional calm
- Mindfulness of the solicitor’s role
- Principled v Positional Bargaining
- Negotiating with credibility

**Mindfulness of the client’s needs and understanding the importance of emotional calm**

A calm state of mind is important for rational thought.

The neuroscience behind why is plentiful; however the bottom line is that in order to get meaningful instructions from your client on the day of the Mediation, which will often involve complex legal, economic and emotional issues to be considered and weighed:

- your best bet of getting those instructions is when your client is calm; and
- instructions whilst your client is anxious, aggressive, upset etc may not be given at all or may be contra-indicated with reference to your advice.

**Important Strategies at Mediation:**

- Make sure that you have provided a comprehensive advice to your client (which addresses the merits of the various opportunities as well as risks and worst case scenario) well ahead of the Mediation.

  DON’T leave such issues to the day of the Mediation or soon beforehand, and risk your client showing up in a state of stress and panic and not being able to provide meaningful instructions.

- Meet as a team beforehand and arrive at the mediation venue together.

- “Reassure the Patient“ as and when necessary.

- Demonstrate confidence, empathy and professionalism.
Be mindful of the following key drivers of social behavior, to maximize the chances of “success” at the mediation:

- Status
- Certainty
- Autonomy
- Familiarity / a sense of belonging
- Fairness

**Seven basic principles of neuroscience to help understand conflict:**

A very basic understanding of how the brain works during conflict will help you look after your client on Mediation day and navigate them through what is likely to be a stressful process for them, as follows.

1. **The “primitive brain” trumps the “smart brain”:** The limbic system in our brain helps us to make sense of the world and is wired to ensure safety first and foremost. Depending on the input, the limbic system will either:

   - activate the protective response (primitive brain) – eg fight or flight, disassociation; OR
   - enable the use of higher cognitive functions (smart brain) – logic, reasoning, etc.

2. **Mediation is stressful but your client needs to be able to use their smart brain:** In many threatening situations posed by the individual's environment (ie in the case of attendance at mediation) – we need full use of the “smart brain” to best manage such situations however this is compromised when the limbic system has activated the primitive responses to the threat (fight or flight).

   “Our protective response is fast, unconscious, incredibly powerful and also, when triggered by today’s first world stressors that are primarily psychological and interpersonal in nature: counter-productive.

   As a result, constructive communication shuts down, factual information flow ceases and is replaced by often erroneous assumptions, protective and escape behaviours interfere with collaborative skills and stress hormones inhibit the capacity for creating problem-solving.

   Resolving a conflict situation at this stage is much more difficult with the brain regions needed to do so effectively offline”.²

² “Conflict: The Role of Self-Esteem, Reputation and Social Status Protection”, by Rachel King, February 2017, Linked-In.
3. **The brain under perceived threat shoots first and asks questions later:** The brain’s limbic system is lightning quick – in that it is wired to “shoot first and ask questions later”. If in doubt about the input, (eg friend or foe?) it will first be regarded as a threat (ie of danger, pain, etc).

   o Meeting someone unknown (eg even the Mediator) may generate an automatic fear response based on primal reflexes or the individual’s own previous experiences.

   o The fear of uncertain pain is more dominant than acting on certain reward.

   o Information is key: Risk (informed decision) is less threatening than ambiguity (missing information).

   *Hence the importance of provision of a comprehensive written legal advice well in advance of mediation; and explain the mediation process.*

4. **Calming the brain will maintain or re-engage the smart brain:** In circumstances of perceived emotional threat, where problem-solving skills are needed more than the “flight or flight” response, it is important to **down regulate** – to **calm the brain** so that cognitive function - reason and rationalization are restored. The individual needs to feel safe and secure.

5. **The brain is always trying to predict:** The brain is a prediction machine and rapid screening / relevance detector – and is always trying to predict: both consciously and subconsciously³.

   I cnduo’t bveiee that I culod uesdtannard what I was rdnaieg. Unisg the icndeblire pweor of the human mind, aocdcrnig to rseecrah, it dseno’t mttaire in what oderr the iterets in a wrod are, the olny irpoamtnt tihng is that the frsit and lsat ltteer be in the rhgit pclae.

6. **Social stimuli is as powerful as physical stimuli** - the brain reacts the same way to emotional pain as it does to physical pain. Accordingly, if Fairness is a reward, Unfairness is like acute pain.

(Using medical imaging techniques to record brain activity in 2009, researchers were surprised to find that experiencing social pain such as exclusion, unfair treatment and negative social comparison activated the same neural networks as did experiencing physical pain).\(^4\)

Likewise, they found that the brain uses the same neural networks to process social pleasure as it does physical pleasures.

Accordingly, an increase in status is similar in strength and impact to a financial windfall.\(^5\)

*Such considerations may provide a valuable insight into your client’s / the parties’ drivers for conflict, and the importance of an apology / authentic engagement with the other side to address issues of status, autonomy, fairness and familiarity.*

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A sense of autonomy is key, because autonomy = certainty.

- The brain likes to be able to predict and have a say in the future.
- When a stressor is controllable, the protective response (of the primitive brain) is inhibited from activation.

Mindfulness of the solicitor role

Having regard for the considerations set out above, be mindful of your role at the Mediation in advance of attending and participating in the process.

The best role for the lawyer to adopt during the private sessions at mediation is that of ‘Expert Contributor’. A good lawyer will:

- Adopt a problem-solving approach rather than an adversarial approach at mediation;
- Work with their client, not for them, to achieve a solution;
- Be well-prepared, quick to react to changing perceptions and expectations from their client, and bring reason and calmness to clients who are totally overwhelmed by the whole mediation experience;
- Encourage instructions from their client to start the mediation with genuine and realistic offers in order to maintain good faith.

The importance of a respectful and harmonious relationship with your professional colleagues

Even the Harvard Program on Negotiation advocates:

“At the negotiation table, what’s the best way to uncover your negotiation counterpart’s hidden interests? Build a relationship in negotiation by asking questions, then listening carefully. Even if you’ve decided to make the first offer and are ready with a number of alternatives, always open by asking and listening to assess interests. Note that if your style of listening isn’t sufficiently empathetic, it won’t elicit honest responses.

A relationship in negotiation is a perceived connection that can be psychological, economic, political, or personal; whatever its basis, wise leaders, like skilled negotiators, work to foster a strong connection because effective leadership depends on it.”

More on the value of effective communication, from Fisher & Ury:

**Communication, active listening, interest-based rather than positional bargaining - both in preparation and on the day of resolution:**

The purpose of negotiating is to serve your interests.

The chances of that happening increase when you communicate those interests, because:

- The other side may not know what your interests are; and you may not know theirs.
- Your assumptions may be wrong.
- One or both of you may be focusing on past grievances instead of on future concerns. Or you may not even be listening to each other.
- If you want the other side to take your interests into account, explain to them what those interests are.
- You will satisfy your interests better if you talk about where you would like to go, rather than where you have come from. Instead of arguing with the other side about alleged past rights or breaches, talk about what you want to have happen in the future – and WHY – that is, based on your interests.
- Negotiating hard for your interests does not mean being closed to the other side’s point of view. Quite the contrary. You can hardly expect the other side to listen to your interests and discuss the options you suggest if you don’t take their interests into account and show yourself to be open to their suggestions.
- Successful negotiation requires being both firm AND open.

**And so, principled (as opposed to positional) bargaining is the clever way.**

William Ury, “Getting Past No – Negotiating with Difficult People”,
Looking After Yourself

The Hierarchy of Human Needs – (Maslow)

"Healthy people think better and make better decisions”
- Tristan Jepson Memorial Foundation, Australia. (tjmf.org.au)

According to the Tristan Jepson Memorial Foundation website:

- 33% of lawyers and 20% of barristers suffer disability and distress due to depression; they do not seek help and self medicate with alcohol.
- Alcohol abuse in legal profession is extremely concerning
- High rate of suicide and suicidal ideation among lawyers
- Law students and young lawyers most vulnerable
- 80% of disciplinary matters involving lawyers have an underlying mental health issue

About the Foundation:

The Tristan Jepson Memorial Foundation is an independent, charitable organisation.

The Foundation’s objective is to decrease work related psychological ill-health in the legal community and to promote workplace psychological health and safety.

Since its beginnings in August 2008, the Foundation has been at the forefront of building greater awareness of depression and anxiety across all areas of the legal fraternity.
We continue to improve education and build effective models of support which focus on mental health wellbeing within the legal education system and the legal profession.

The Foundation has established itself as a reference point and facilitator of information and research in the area of depression and anxiety in the legal profession.

Our purpose is to be an independent “hub” to support initiatives within the legal profession that aim to decrease the distress, disability and causes of depression and anxiety in the legal profession.

The Foundation released the Workplace Wellbeing: Best Practice Guidelines to which more than 180 legal workplaces in Australia and overseas have become signatories. The guidelines have also crossed professional boundaries with three healthcare workplaces choosing to become signatories.

The Foundation provides resources and links to current national and international research, initiatives and learning related to workplace psychological safety and wellbeing.

The rationale for the Guidelines includes:

**Healthy people think better and make better decisions:**

- good for people
- good for business
- good for mental health
- **WIN WIN** for all

**Healthy People:**

- are more productive and efficient
- make fewer errors
- engage in discretionary and pro-social behaviour-less bullying, harassment
- reduce costs- less turnover, recruitment, insurance premiums, stress leave, claims
- retain-corporate knowledge, expertise and experience
- reduce stress to managers

**Healthy people:**

have new ideas

- are able to adapt to changes
- are the **KEY** to innovation

The Guidelines aim to: create a workplace where ALL staff feel….

1. Organisational culture: **there is trust honesty and fairness**
2. Psychological and social support: **supported and able to get help when needed**
3. Clear leadership and expectations: **they know what to do in their work as well as how their efforts contribute to the overall goals of the organisation.**
4. Civility and respect: **they are treated with respect and courtesy**
5. Psychological competencies and requirements: **they have a good job fit**
6. Growth and development: they are encouraged and supported to develop personally and professionally
7. Recognition and reward: they are acknowledged appropriately in a timely manner and appreciated appropriately for the work they do
8. Good involvement and influence by staff: they are included in discussions about their work and are able to participate in how decisions are made.
9. Workload management: they are given the time and resources necessary to complete their work successfully
10. Engagement: their work is meaningful
11. Balance: they have choices and opportunities for flexible working arrangements to accommodate their work, family and personal priorities.
12. Psychological protection: it is safe to speak up and that appropriate action will be taken and protection provided
13. Protection of physical safety: their physical safety is protected

Summary AIM of the GUIDELINES is to:

- To prevent injury
- create a psychologically safe and healthy workplace
- provide a framework for change
- sustain ongoing improvement

And to end on a positive note:

Why it is so important to take a holiday:

“The harder you work, the less you earn. Your best ideas will come out to play...not to work” - Daniel Priestley

Well, thank you author Daniel Priestley! Of course, we already know this; the importance of a holiday to rest, recuperate and re-charge. But sometimes it helps to be reminded.

Too busy? Can’t afford a trip away?

Here are some more words of wisdom (not mine) that assuaged your conscience and helped to re-frame your outlook, hopefully for the long term. I’ve quoted a lot from Mr Priestley’s chapter here because I think it is so compelling:

“In the modern economy, hard work is not a competitive advantage anymore; everyone works hard…

…the difference between the successful people on the planet is not Functionality; it’s Vitality. Functionality is about performing a task well, whereas Vitality is about doing it joyfully.

In the last ten years we have seen machines and systems replace a whole lot of Functionality in the work place; however we are a long, long way from seeing the first machine that can compete with raw human Vitality.

If you look at top earners, they don’t consider what they do to be work. They are playing a game that they love, and they make sure it stays fun. They exude a level of vitality for what they do because they love it, and they get good at it too.

The minute you begin to feel yourself “working hard” as opposed to “playing a challenging game”, it’s time to take a break.

Disappear for a week, get some sun, read up on your favourite role models, explore fresh ideas and spend time with people who are “in the zone”. More than anything, reconnect with your humanity. Beneath your desire to have a great home, a snappy wardrobe and some money in the bank is a part of you that longs to make a difference as well. Getting in touch with this part of you will give you a broadband connection to your Vitality.”

Looking back on my own career low points, the common theme is that it can feel like misery and drudgery when you’ve been working round the clock on that endless list of tasks and deadlines; when good sleep, exercise and diet fall down or off the list of personal priorities, and it feels like you’re struggling to get through the working week to the next weekend.

This is dangerous territory for a number of reasons, one being that you can be prone to errors of professional judgement and frank mistakes.

And if you do this: no-one will thank you or even excuse you – least of all your clients or your boss, for whom you have been working so hard. Worse still: you could lose your client/s as well as your job.
And to prevent your “client's experience” from feeling one of disenfranchisement, try to avoid them being on the receiving end of your stressed and exhausted worst self, for 2 very simple reasons:

1. Trying to service your client while your own work-life spirit level is badly out of balance, might get a result that’s “good enough” but, don’t you and your client want more than that? What if your client expects more than that?

2. A mediocre or even poor outcome, client experience, client relationship, when you are capable of excellence across the board – is beneath you. So nurture your ability, your vitality.

The same applies to the way you behave towards your colleagues and opponents, in terms of your manner and approach.

I know that’s all easier said than done, but the wisdom in Daniel Priestley’s words have direct relevance here:

“From a place of Vitality all the work comes easily, the ideas flow freely and the money comes in more effortlessly. A week of play will do more for your career or business than a week of work. An hour of inspiration is worth more than a week of drudging on.

Success isn’t about engaging in a struggle; it is about getting into the flow.”

Finally, Priestley speaks of “reading up on your favourite role models”. That’s not just a throw away line. It is so incredibly helpful and important to look to role models for some real perspective and inspiration. Here are some of mine:

Turia Pitt: [www.turiapitt.com](http://www.turiapitt.com)
Also check out Turia’s “Mindset Magic” E-Book and “School of Champions” course, I cannot recommend them highly enough.

[Child soldier, refugee, man of hope](https://www.dengadut.com)
[Songs of a War Boy: My Story](https://www.youtube.com/watch?v=buA3tsGnp2s)
I have been registered as a nationally accredited mediator (NMAS) with the Resolution Institute, since April 2016.

I am a registered sole legal practitioner with the Law Society of NSW and am admitted as a practitioner with the NSW Supreme Court and the High Court of Australia. I have over 20 years of post admission experience (from 1996), mainly as a health law / personal injury / professional liability litigation lawyer.

In 2016, I commenced full-time practice as a solicitor mediator and have received appointments in the following areas:

- Medical negligence;
- Historic carer abuse;
- Personal injury matters generally, incl motor accidents, worker injury, public liability;
- Solicitor negligence;
- Family provisions;
- Commercial litigation;
- Workplace relations.

As a solicitor, I do not accept instructions to act in legal matters involving any of these abovementioned areas of law, so that I can maintain my neutrality as a mediator. Despite not having acted as a medical negligence lawyer since 2015, I was “recommended” in the Doyles “Best Lawyers” Guide 2016 in the area of medical law, selected by peer recognition.

My mediations practice includes:

- repeat instructions from a number of plaintiff law firms, defendant law firms and insurers;
- mediation appointments by Court Order of the District Court of New South Wales;
- Court-appointed mediator of the ACT Magistrates Court.

I publish articles and deliver CPD (continuing practice development) seminars on a regular basis to a wide range of stakeholder groups on such issues as:

- Mediating personal injury claims and Personal Injury Mediation Handbook
- How to get the most effective result at mediation
• The importance of managing client expectations
• What motivates a plaintiff in litigation and understanding the plaintiff mindset
• Open Disclosure in healthcare
• Mediation Handbook for Workplace issues

Professional Philosophy:

My approach has always been to first listen carefully to my client’s story and what they wish to achieve. I would advise about the reasonableness of their expectations and their various options. I would then work with my client to formulate a practical and achievable management strategy that they can count on; managing expectations in a way that inspires confidence in the outcome.

Having represented parties on both sides, I have a unique appreciation of what each side usually bring to a dispute and its attempted resolution in terms of principles, values, bargaining styles, fears and concerns, and desired outcomes.

I have always been a strong and committed believer in the effectiveness of mediation as the best way to resolve a dispute - both in terms of cost effectiveness and for its ability to bring "closure" in an holistic sense; in a way that simply isn’t possible with a settlement by correspondence or by taking the matter to trial.

I bring my experience and lessons learned as a litigator, to my practice as a mediator.

I am inspired by what neuroscience can teach us about how we as humans behave in conflict mode – the key drivers of social behaviors being Status, Certainty, Autonomy, Familiarity / a sense of belonging, and Fairness; and that:

• **Social stimuli is as powerful as physical stimuli** - the brain reacts the same way to emotional pain is it does to physical pain. Accordingly, if Fairness is a reward, Unfairness is like acute pain.

• Utilising medical imaging techniques to record brain activity in 2009, researchers were surprised to find that experiencing social pain such as exclusion, unfair treatment and negative social comparison activated the same neural networks as did experiencing physical pain.

• Likewise, they found that **the brain uses the same neural networks to process social pleasure as it does physical pleasures**. Accordingly, an increase in status is similar in strength and impact to a financial windfall.

Such considerations may provide a valuable insight into the parties’ drivers for conflict, and the importance of an apology / authentic engagement with the other side to address issues of status, autonomy, fairness and familiarity.
Karen Stott BA. LLB. Solicitor and Nationally Accredited Mediator (NMAS)
Liability limited by a scheme approved under the Professional Standards Legislation

I am driven to learn more about, apply and master important communication techniques that can repair the damage caused by conflicts and restore harmony – ie to bring about a negotiated settlement.

Areas of legal expertise over the past 20 years:

- Medical negligence litigation, representing both plaintiffs and defendants
- Representation in Coronial Inquests
- Representation of both sides in disciplinary complaints management before the NSW HCCC and AHPRA nationally
- NSW and AHPRA regulatory advice and practice of registered healthcare providers
- Professional liability and liability of government agencies
- Corporate risk management
- Workplace relations

Qualifications:

- Bachelor of Arts and Bachelor of Laws, 1994
- Admitted to Practise in the Supreme Court of NSW, 1996
- Admitted to Practise in the High Court of Australia, 2001
- Law Society NSW Unrestricted Practising Certificate, 2004
- Nationally Accredited Mediator (NMAS), Resolution Institute, 2016

Legal practice has included at Partnership level in both small and mid-tier Sydney firms, representing individual claimants and their families, as well as corporate and government clients.

Career Highlights:

- Going out on my own in 2016 as a full-time Mediator, with all of the challenges and rewards that it brings
- Representation of 73 - 150 insulation industry client businesses before the 2014 Royal Commission into the Home Insulation Program
- High level government consultation regarding the implementation of the HIP Royal Commission’s recommendations (including a national press conference with Senator Xenophon on 4 February 2016) and management of a class action in its investigation stages
- Being successful in securing litigation funding for a class action so that our HIP clients could have a choice regarding the government’s payment scheme or a shot at compensation reflective of their actual business losses, and launching the class action in the Supreme Court of Victoria in August 2016 after nearly 3 years of solid work
- Representation of numerous NSW government agencies re professional liability, 2006-2013
Ministerial appointment as an inaugural board member to AHPRA (Australian Health Practitioner Regulation Agency), involving the transition from the state-based to national registration scheme for registered healthcare practitioners, 2009 to 2012

Flying in medical evacuation helicopters in Canada and the USA and interviewing medivac executive and staff interviews for assessment and reporting on enterprise risk management and safety culture, 2006

Representation of the family in a Coronial Inquest and subsequent legal proceedings in circumstances where the mother died in avoidable circumstances from the consequences of an epidural abscess following the birth of her son at a Sydney private hospital, as well as failure of follow-up care by her country GP and country public hospitals. This tragic case received national attention through ABC 7.30 Report and Australian Story, 2005: “The Colours of Caroline”

Establishment of a health law practice at Sydney firm McLaughlin & Riordan in 2000, without recourse to media advertising, that practice continuing today, after having left the firm in 2005

**Community Service and Honorary Appointments:**

I am a 10 year long service patrolling member of the North Bondi Surf Life Saving Club. I have served on the Club's Board of management as Honorary Secretary for a number of years previously, and am presently the Club’s Honorary Legal Officer.

In 2016 I set up the Club’s first pro-bono legal panel, approaching a number of law firms in strategic areas to support the Club as and when specialist legal issues arise, such as

- Corporate governance issues
- drafting and advising on commercial contracts, (eg with service providers and sponsors)
- management of commercial disputes
- management of member misconduct, grievance processes and disciplinary panels
- implementation of the Club’s Constitution
- employment and independent sub-contractor issues, including with respect to the Club’s inaugural employment of a General Manager and Functions Manager
- public and professional liability, eg with respect to life saving activities and event management
- occupational health and safety
- bequests
- working with children and child protection obligations
- intellectual property, eg with respect to Club name, logos, fundraising events, merchandise, etc
- liquor licencing and functions management (both within the Club and to the private third parties, and the public)