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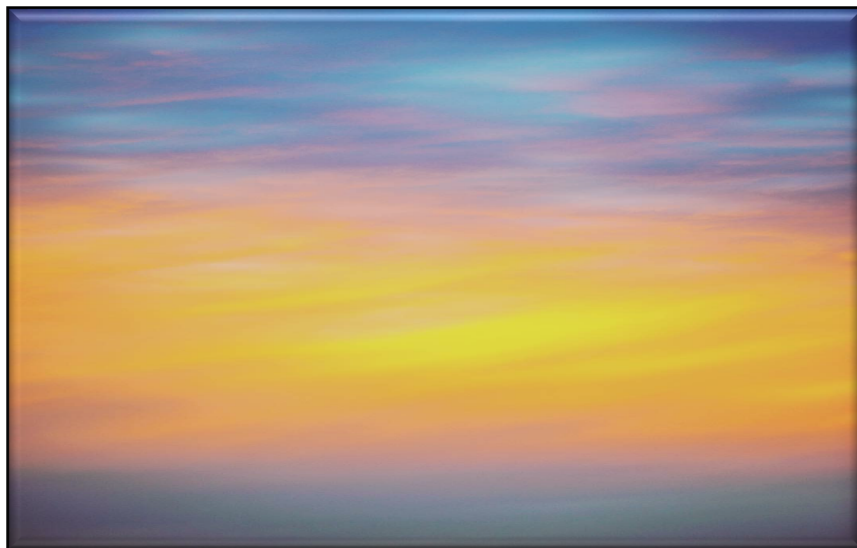
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Mediation:

Understanding What Motivates a Plaintiff
and
How to Negotiate the Best Result
for Your Client



Note re Legal Professional Uniform Continuing Professional Development (Solicitors) Rules 2015: This Seminar Paper complies with the compulsory topic of Professional Skills and also touches briefly on Practice Management & Business Skills.

If this particular educational activity is relevant to your immediate or long term needs in relation to your professional development and practice of the law, then you should claim one “unit” for each hour of attendance, refreshment breaks not included.

The take-home message:

Mediation is a powerful tool to achieve a resolution of your client's dispute on best possible terms, both in an economic and holistic sense.

However, it doesn't just eventually happen, on the day.

For the most effective results:

- understand and manage your client's expectations from the start of the matter,
- prepare yourself and your client for attending the mediation, and
- be mindful of the process on the day.

Early Mediation of certain matters, and the joint opening of Mediations generally, are 2 valuable opportunities for defendants to achieve cost-effective settlements.

It is also my view that these opportunities are presently under utilized.

Overview

1. What is Mediation?
2. Why cases should settle at mediation and why they may not
3. Why a Plaintiff contacts a lawyer
4. Advice given to Plaintiff lawyers regarding Effective Preparation
 - Client Preparation – managing expectations
 - Solicitor Preparation – getting your house in order
5. On the Day – important strategies
 - Mindfulness of a Plaintiff's needs & the importance of emotional calm
 - Mediation from the Plaintiff's perspective
 - The importance of Opening Statements
 - Mindfulness of the solicitor's role
 - Principled v Positional Bargaining
 - Tips for Negotiating with Credibility

Closing commentary: Why Mediations are often successful where Informal Settlement Conferences are not

Introduction - What is Mediation?

"Mediation" as you might know it, can take various forms, including facilitative, therapeutic, transformative, or evaluative models.

For example¹:

- **Mediation** is a process in which the participants to a dispute, with the assistance of the mediator, identify the disputed issues, develop options, consider alternatives and endeavor to reach an agreement. The mediator has no advisory or determinative role in regard to the content of the dispute or the outcome of its resolution, but may advise on or determine the process of mediation whereby resolution is attempted. Mediation may be undertaken voluntarily, under a court order, or subject to an existing contractual agreement.
- **Early neutral evaluation** is a process in which the participants to a dispute present, at an early stage in attempting to resolve the dispute, arguments and evidence to a dispute resolution practitioner. That practitioner makes a determination on the key issues in dispute, and most effective means of resolving the dispute, without determining the facts. (Note that the NSW Law Society offers an Early Neutral Evaluation service).
- **Evaluative mediation** is where the mediator, as well as facilitating the negotiations between the participants, also evaluates the merits of the dispute and provides suggestions as to its resolution. Note: evaluative mediation may be seen as a contradiction in terms since it is inconsistent with the NADRAC definition of mediation.
- **Family Dispute Resolution** is conducted by an independent practitioner to assist people affected, or likely to be affected by separation or divorce, to manage and resolve some or all issues arising between them without going to court. A legal definition can be found in the Family Law Act 1975. The term "family dispute resolution" is an umbrella term that covers many different sorts of ADR processes, including mediation and conciliation.
- **Restorative, victim-offender, community accountability conferencing** – are processes which aim to steer an offender away from the formal criminal justice (or disciplinary) system and refer him/her to a conference with the victim, others affected by the offence, family members and/or other support people. The mediator may be part of the criminal justice system or an independent person.

Mediation of civil litigated claims (eg personal injury and commercial matters), is essentially a "facilitated negotiation", which involves an initial joint session with the parties and then "shuttle" style negotiations between the parties' legal representatives through the mediator, addressing essentially the same issues that will be before the Court.

¹ From NADRAC Glossary of Terms, (National Alternative Dispute Resolution Advisory Council)

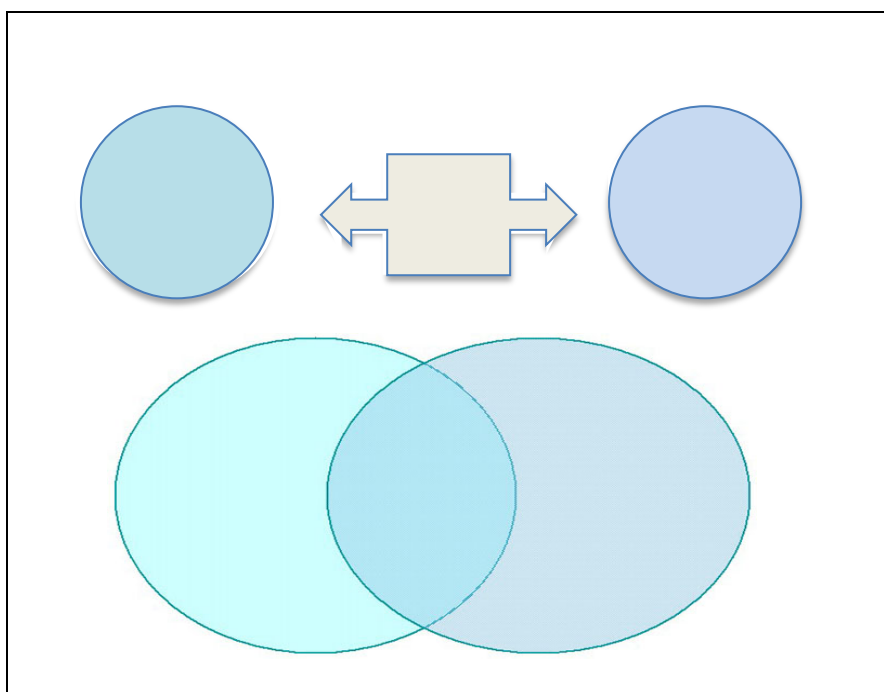
Depending on the parties and their choice of mediator, this type of mediation can involve varying degrees of intervention (ie in terms of evaluation of the merits of the dispute and suggestions as to resolution) by the mediator who, in the strict sense of the definition, ought in fact be “neutral”.

There is a significant amount of dialogue emerging on the concept of “neutrality” of the mediator role and what that does or should mean, exactly. One commentator makes the suggestion that:

...perhaps instead of aligning neutrality with a mediator who never intervenes, it may best be to hold mediators’ interventions to standards of “non partisan fairness or impartiality” instead. For example, weighing, as an objective third party, whether an intervention would make sense to “facilitate a productive dialogue by encouraging or even coaching reticent or inarticulate parties”, to promote a generally more just proceeding.²

Although there is a national accreditation system, Mediation is not subject to regulation and this has likely enabled an evolution of different styles in the litigation space – in line with market demand, perhaps.

Consider why a case should settle at mediation and why it may not



² “Nearly Neutral: A Mediator’s Best Bet”, By Amanda Selvarajah, The Australian Dispute Resolution Research Network, posted 8 Feb 2017, <https://adrresearch.net>

Cases should settle because both sides understand the respective strengths and weaknesses and potential value (range) and wish to reach a compromise reflective of this; ie **for something in the range**.

If the case doesn't settle it is likely because one or both parties have unreasonable expectations; and/or someone is not willing to compromise.

It is an important role and function of the Mediator to try to get the parties to "shift" towards a willingness to compromise, if they do not already come to the mediation in this frame of mind.

The mediator only gets 1 day, at best, to attempt to do this. The parties' legal representatives have an important ongoing relationship with their clients from the commencement of the matter.

Accordingly, solicitor preparation and also preparation of the client for mediation and management of expectations regarding the outcome of their case, is critical.

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

The checklist below is something I came across on the internet whilst researching something else... It is actually a very 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).

Resource: Checklist Tool of why a matter may not settle

Consideration? Yes / No

1. Need an administrative declaration.
2. Cut and dried bulk cases.
3. Need to shift responsibility elsewhere.
4. **Demonstration of effort: "I won't give in without a fight".**
5. Indeterminate results; uncertain rules.
6. **Settlement offers wildly divergent.**
7. Preservation of a tough commercial reputation.
8. **Need to control precedent and "the law".**
9. Need to award responsibility for difficult ethical or policy decisions.
10. **False expectations of one or both parties.**
11. Entrenched judicial power over certain social issues.
12. The Tribunal as theatre.
13. Bluffing and playing chicken.

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.
19. Benefits of delay.
20. Expert helpers actually make the conflict worse.
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.

Why a Plaintiff Contacts a Lawyer

Having acted predominately for plaintiffs in medico-legal litigation from 1995 to 2005, I have experienced first hand, the common reasons why patients consult a lawyer in the first place. (Claimants in other types of personal injury incidents are likely to be of a similar mindset).

I believe there are 5 main reasons why aggrieved patients and their families seek medico-legal advice:

1. When there was a complication with their medical treatment, no explanation was provided and there was no opportunity to ask questions.
2. The patient felt they had nowhere else to turn for answers, for understanding or for assistance. There may even be the perception (real or imagined) of a cover-up.
3. No apology or expression of empathy or regret, was offered.
4. The patient and their family do not want the same event to happen to anyone else.
5. The patient's complications of treatment have caused a serious adverse impact on their life, including their livelihood, earning capacity and enjoyment of life and they require financial support in respect of this.

In all but the last example, Open Disclosure where any medical complication has occurred, should be able to achieve an effective resolution of issues, (providing no or only minimal damage has been suffered), if performed in a professional and genuine way.

Open Disclosure is the open discussion with (the) patient, their family, carers and other support persons, of incidents that result in harm to a patient while receiving health care. - Avant Mutual Group

I believe that many disciplinary complaints to HCCC and AHPRA and many litigated claims could be avoided if all healthcare providers embrace open disclosure and undertake the process in a genuine manner.

Relatively speaking, it costs nothing to show genuine empathy, to offer an apology or an expression of regret and to accept responsibility for resolving an issue with a constructive outcome in mind.

A case in point – (and there are countless others like them):

A patient suffered an unexpected complication of a minor surgical procedure and was frightened when she woke up in ICU following emergency surgery and recalled the commotion of having been wheeled back to theatre with lots of people around. Her husband was not there because he had not been notified.

The patient's gynaecologist who performed the initial procedure made a comment to her in words to the following effect: *"What happened was an associated risk of the procedure but in 30 years nothing like this has never happened to me"*.

That doctor's explanation and account for the complication which had occurred was viewed by the patient as self-serving and unreliable.

To make matters worse: the patient felt further let down upon consulting her referring GP 8 weeks after the event. The specialist had reported on the procedure but with no mention of the complication which had occurred. Not surprisingly, the patient felt that her specialist had tried to play down or cover up the incident and she was particularly upset because she felt the lack of information reported to her GP was to the detriment of her recovery and general health.

Two years later, the patient came to see me for medico-legal advice because she was **still angry** about her specialist's response to the complication and she wanted **reliable answers** to what had occurred.

The independent expert evidence was supportive of a claim for negligent technique causing the complication; however the legal value of the claim was modest and the patient was not driven by the prospect of monetary compensation in seeking my advice. She simply wanted answers that her specialist did not provide in an appropriate manner at the time, and answers that I could not provide without the benefit of an expert opinion.

Furthermore, I believe that the legal claim could have been settled shortly after the issue of a letter of demand, by way of Mediation, which would have enabled the patient to communicate her emotions and anger at the feeling that her specialist had prioritised her good record and professional reputation over her patient's right to know. If the patient's perception had been misguided, early mediation (given that Open Disclosure had not occurred) could have afforded her the opportunity to resolve these issues in a positive way.

Preparation for Mediation or Settlement

I reiterate the point of cases settling at Mediation because both parties are prepared and know the respective merits of the case and range of damages potentially applicable. An important function of the Mediator is to achieve a shift in attitude in any of the parties is they are not willing to compromise.

To give that the greatest chances of success on the day, it really does put the emphasis on the parties' legal teams in preparing the matter and their clients' expectations – from the get go.

Issues advocated to Plaintiff lawyers regarding Client Preparation – managing expectations well ahead of mediation:

- Screen your client properly first (if acting contingently)
- Provision of a comprehensive advice re prospects of success and range of damages 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
- Advice to address costs etc – as per "Smythe Order", 42.32 UCPR
- Explain the mediation process – (Resource: Mediation Booklet)

From 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).*

Provision of a comprehensive WRITTEN advice addressing 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 December 2016

Advice re costs etc – as per "Smythe Orders", Regulation 42.32 UCPR:

At any stage of proceedings, the court may order a party's legal representative to serve on the party:

(a) a notice that specifies:

- (i) an estimate of the largest amount (inclusive of costs) for which judgment is likely to be given if the party is successful, and
- (ii) an estimate of the largest amount (by way of costs) that the party may be ordered to pay if the party is unsuccessful, or

(b) a notice that specifies:

- (i) an estimate of the best outcome that the party is likely to achieve if the party is successful, and
- (ii) an estimate of the worst outcome that the party is likely to undergo if the party is unsuccessful.

Solicitor Preparation for Mediation - The Position Paper and Mediation Brief

The Mediation Brief does not require the same content as though you were briefing counsel in the matter generally. For the most part, reproduction of source factual records such as medical records, financial documents and the like – will not be necessary.

That said, the Mediation Brief should include all material that you / the parties want the Mediator to be aware of, for the purpose of the discussions and negotiations.

As a minimum, this should include:

- Statement of Claim and Defence
- Statement of Particulars / Damages Statements
- Expert reports exchanged between the parties
- Any other material of particular relevance to the issues in dispute, such as “Calderbank letters”, key correspondence, etc

The common sense approach is for the parties to prepare a joint Mediation Brief and to have some dialogue beforehand regarding which party will volunteer to do this and what documentation should be included.

A joint brief does not mean that the parties need to agree on its contents. The brief should include what the parties want the Mediator to know. This may include information / documentation that one party wants the Mediator to know on a confidential basis, which should be indicated as such or provided to the Mediator separately beforehand or on the day.

The Position Paper should state:

- the client’s legal position,
- the grounds relied upon to support this position, and
- the contested and uncontested facts for each of these grounds.
- Additionally and importantly, the document should conclude by noting the client’s willingness to negotiate and discuss possible solutions in good faith.

There are varying approaches to the ideal length of a position paper. One approach is that 1-2 pages is appropriate as the position paper should be ‘punchy’.

Another approach is that a more lengthy position paper may be useful to provide a comprehensive overview of the issues referred to above, particularly if there is a complex argument on the facts, a detailed factual history relevant to the issues in dispute or to set the context, a complex debate between the experts on a matter of duty or causation, a lengthy interlocutory history, etc.

A lengthy position paper may obviate the need to otherwise include copious source documentation in the mediation brief. It may also serve the additional purposes of:

- setting out the full legal position of the case for the benefit and satisfaction of the party you are representing – to see how their case is understood by you and represented to the other side in this context; and
- setting out the full legal position and the client's case at its strongest, to the other side – enabling a more congenial approach to be taken when delivering a verbal address to the other side during the initial joint opening at Mediation; to demonstrate the spirit of compromise.

Client Preparation – managing expectations well ahead of mediation:

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

(Resource: Mediation Booklet – available in hard copy or on my website: ADRmediation.com.au)

Client Preparation – managing expectations well ahead of Mediation:

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:

As suggested by William Ury, co-author of the staple negotiation book: "Getting to Yes", in his sequel: "Getting Past No – Negotiating with Difficult People"³:

"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 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."

³ William Ury, "Getting Past No – Negotiating with Difficult People", pp42-43, Random House Business Books, 2012

Mediation Day – important strategies

- Mindfulness of the plaintiff's needs & importance of emotional calm
- Mediation from the plaintiff's perspective
- Importance of the Opening Statements
- Mindfulness of the solicitor's role
- Principled v Positional Bargaining
- Negotiating with credibility

Mindfulness of the plaintiff'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 for the plaintiff's legal team to obtain meaningful instructions from their client on the day of the Mediation, which will often involve complex legal, economic and emotional issues to be considered and weighed:

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

Important Strategies for Defendant Parties at Mediation:

- Demonstrate respect, 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 a plaintiff lawyer look after their client on Mediation day and navigate them through what is likely to be a stressful process for them; and will also help a defendant party be mindful of the most constructive manner in which to behave, to achieve an optimal outcome, 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**
 - it will 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”.⁴
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).

⁴ “Conflict: The Role of Self-Esteem, Reputation and Social Status Protection”, by Rachel King, February 2017, Linked-In.

- Meeting someone unknown (eg even the Mediator) may generate an automatic fear response based on primal reflexes or the individual's own previous experiences.
- The fear of uncertain pain is more dominant than acting on certain reward.
- 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 subconsciously⁵.

I cnduo't bvliee that I culod aulacly uesdtannard what I was rdnaieg. Unisg the icndeblire pweor of the human mind, aocdcnig to rseecrah, it dseno't mttare in what oderr the lterets in a wrod are, the olny irpoamtnt tihng is that the frsit and lsat ltteer be in the rhgit pclae.

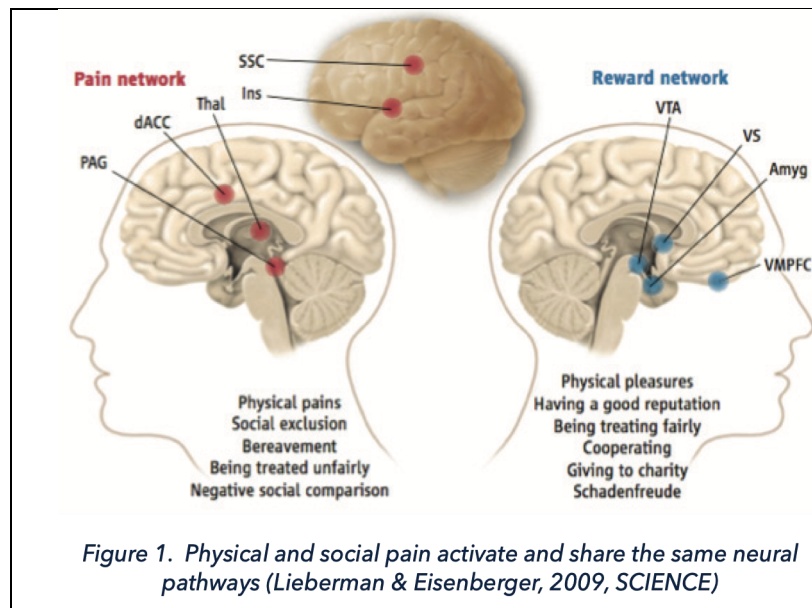
6. **Social stimuli is as powerful as physical stimuli** - the brain reacts the same way to emotional pain as it does to physical pain. Accordingly, if Fairness is a reward, Unfairness is like acute pain.

(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).⁶

⁵ Source: D Radecki, Neuroleadership Institute, referred to in: "Neurobiology Applied to Mediation", by Bogacz, Lack & Glasner, 6th Mediation Competition, International Chamber of Commerce, 9 February 2011.

⁶ Izuma, K. (2012). The social neuroscience of reputation. Neuroscience Research, 72, 283-286.

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.⁷

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.

7. **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.

⁷ Izuma et al, 2008, referred to in: "Neurobiology Applied to Mediation", by Bogacz, Lack & Glasner, op cit.

Ways in which Mediators can encourage the parties to “down regulate” from fight or flight mode so that they can focus their attention on rational thought and re-framing the dispute in a constructive way: ⁸

- Minimize perceptions of danger – (a warm and friendly approach);
- Recognise Mediation as part of a social process – allow time for the building of relations between the parties;
- Through **active listening** and repeating back to the parties what the mediator has heard them say – this encourages the parties to be more objective in how they perceive the issues / dispute;
- By **exploring with the parties, their feelings** in relation to the issues / dispute, and reframing what is heard in a constructive, positive way – fosters empathy, helps the parties to feel heard and understood and also helps the parties to focus on similar rather than opposite characteristics; feeling like they have more in common and are therefore not so diametrically opposed;
- By **challenging the parties’ cognitive biases**; encouraging the parties to put themselves in the position of the other; guiding the parties to focus on the future rather than being stuck on the past – helps the parties come to a more accurate view of the situation and be willing to move towards a resolution;
- To allow optimal decision-making and cognitive assessments of possible rewards;
- To **encourage a co-operative approach** by the parties to the mediation; as though the parties are joint problem solvers or judges writing a joint judgement – this approach is more likely to be successful once the mediator interventions referred to above have been utilized with a constructive result.

Also note my views and observations in relation to Why Mediations are often successful where Informal Settlement Conferences are not **as referred to at the end of this paper.**

⁸ “What can Mediators do to Help Parties Overcome Their Biases?” by Catherine Brys, Strathclyde University UK, 3 February 2017; <http://kluwermediationblog.com/author/catherine-brys> and “Neurobiology Applied to Mediation”, by Bogacz, Lack & Glasner, op cit.

On the Day

Mediation from the Plaintiff's Perspective

From the defence team's view point, mediation may be seen as an inconvenient, uncomfortable and expensive day of being faced with an often angry or emotional plaintiff, as well as the plaintiff's family and legal team; and then sitting around all day, trading offers.

It's amazing how exhausted you can feel at the end of a day's mediation when all you've been doing is sitting in a boardroom, drinking cups of tea & coffee and looking forward to lunch!

But if there are 3 most important tips as a defendant's representative, on how to get a successful outcome at mediation, they might be these:

1. *No matter your opinion or experience of mediation, never under estimate its importance for the plaintiff, its potential effectiveness in resolving the claim and how your behavior can influence the outcome.*
2. *The way each and every member of the defence team handles themselves at mediation is noticed and has important consequences. (The same goes for the plaintiff's own team!)*
3. *Understanding the position, needs and objectives of the other side – and thinking about what you can do to address those, is THE KEY to being able to get a good result.*

Mediation from a plaintiff's perspective:

- Often, the plaintiff will be the only non lawyer in the room, and will be feeling a complex array of stressful emotions, - anger, self pity, intimidation, anxiety, worry for what their future holds..... - what else would YOU expect?
- The plaintiff and their family will be acutely aware of everyone else's behavior throughout the entire day – (even before the mediation commences) and will feel alien to the process and possibly towards the mediator as well.

What do you think an injured plaintiff and their family feel, when they arrive at the mediation premises and see the collegiate atmosphere as the lawyers on both sides chat with the mediator and while they help themselves to cups of coffee before the formalities commence? Keep any informal conversing low key, brief and respectful. Anecdotes can be enjoyed elsewhere. Don't allow an innocent act of thoughtlessness before the mediation begins, to create a feeling on the part of the plaintiff and their family feel that there is an "us" and "them" division between themselves and the rest of the lawyers.

- Mediation is the closest the plaintiff will come to "having their day in Court" and provides an important sense of occasion, and validation of their grievance.

Sir Laurence Street, (former Chief Justice of the NSW Supreme Court and a pioneer of

Mediations in the 1990's) was wonderful in providing a sense of occasion at his mediations and most plaintiffs did not even know or appreciate his stellar career background. It was because he treated plaintiffs with such sensitivity, warmth and respect. The Mediator has a very important role to play in this regard.

- Never under-estimate the importance placed on an apology. An apology is not an admission of liability. An apology or an expression of regret does not need to be conveyed during the opening. I have never met a single plaintiff who did not genuinely value this as highly as settling the case itself.
- Hand-in-hand with the psychology around an apology, is being addressed in a sensitive manner and being treated with a manner of respect and contrition.
- Never under-estimate the terror felt by the plaintiff at the prospect of having to take their claim to trial and the consequences of losing the claim. Many plaintiffs come to mediation with a determination to settle.
- What happens during the break-out sessions in the plaintiff's camp? Reality testing the plaintiff regarding their options if the matter does and does not settle. That includes talking about the worst case scenario. For example:
 - *If I settle the case now, what do I get in my pocket?*
 - *Will that be enough to buy the house I need for my child's wheelchair accessibility?*
 - *Who will look after my disabled child when I die?*
 - *What happens next if we can't settle today?*
 - *How much longer will it take to get a hearing date?*
 - *What will the legal costs be by the time the matter goes to trial?*
 - *How much more will it cost to take the matter to trial?*
 - *If we lose the case what will the other side's costs be?*
 - *If we lose the case will the other side take my house?*
 - *Please explain again what happens if we win the case but the judge awards less than the defendant's settlement offer?*

On the Day

The Importance of the Opening Statements

Opening Statements are critical as they provide the parties with insight into where the other party is coming from and set the tone of the mediation for the day ahead.

Like the written Position Paper, an Opening Statement should most importantly:

- address the matters that are most important to the client, (ie not necessarily limited to legal issues); and
- acknowledge the client's willingness to negotiate and participate in the process in good faith.

Who should speak?

In my experience and opinion, opening statements are usually always much more effective when the parties themselves (or a suitable representative of the defendant party/ies) speak during this process.

It may help a plaintiff to feel supported in expressing their emotions; and likewise it may help a defendant party to listen respectfully and without taking personally (in the case of agents of the defendant) the brunt of the plaintiff's emotions, by considering that:

The magical power of mediation lies in the ability of the process, (most usually at the time of the opening statements), to allow parties to feel truly heard. The opening is an important opportunity for all parties to experience the true nature and value of really being listened to.

A party who feels heard can rarely sustain that anger for any length of time: the concentrated listening process at Opening can go a long way to defusing the anger because each come away from that process feeling thoroughly and empathically heard.

Paul Randolph, "The Psychology of Conflict – Mediating in a Diverse World", (Bloomsbury 2016)

The handling of emotions should be discussed beforehand, particularly in cases of death or serious injury.

The opening is equally an important opportunity for the defendant party/ies to express their position. There may be little more validating or gratifying to a speaker than to have such close attention paid (by everyone in attendance at the mediation, being the key stakeholders in the matter) to what has been said.

Also, speaking during this process should not necessarily be limited to the parties' barristers. Solicitors who have had the day-to-day carriage of the matter for a significant period of time are often able to make a worthwhile contribution.

The importance of active and demonstrated listening

When the respective opening statements are being delivered, it is important for the other party to listen respectfully and attentively.

- If the parties and their legal representatives demonstrate that they are listening, (rather than rehearsing in their minds what they are going to say when it is their turn to speak), you / your side is more likely to be listened to in return.
- Active listening which is demonstrated to the other side is critical to breaking the downward cycle of the parties repeating their positions to each other (and becoming more polarised in doing so) simply because they don't think that their point has been heard or understood by the other party.
- Listening to, understanding and acknowledging the other side's point of view is not a concession; it is not the same as agreeing with it.

Even the Harvard Program on Negotiation advocates⁹:

"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."

⁹ "The Importance of Relationships in Negotiation", by Jeswald Salacuse, Harvard Law School Program on Negotiation, Daily Blog 14 March 2017

Mindfulness of the solicitor role

Maximising Your Effectiveness at Mediation:

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.

Both in Preparation and On the Day of Mediation

Principled v Positional Bargaining

The relevance of this school of thought re Negotiation is that a plaintiff's compensation claim is rarely driven by the goal of maximum monetary compensation alone.

Advice for plaintiff lawyers: Ascertain the plaintiff's expectations well ahead of Mediation / settlement negotiations – and communicate these to the defence so that proper preparations can be made on the other side to meet the plaintiff's expectations as far as possible.

Principled v Positional Bargaining

Arguing over positions produces unwise outcomes, is inefficient and also endangers an ongoing relationship.

In principled bargaining, however: the participants are joint problem solvers; and the goal is a wise outcome reached efficiently and with good will; an outcome that fulfills the parties' interests.

Resource: "Getting to Yes – Negotiating an Agreement Without Giving In" by Fisher and Ury, (Updated, Random House Business Books 2012)

This book and school of thought is all about the wisdom and utility of bargaining over interests and not positions.

A simple yet effective example: 2 chefs arguing over a lemon:

They agree to split the lemon in half. If they had communicated effectively, they would have realised that one wanted the lemon for the juice and the other for the rind – and they each could have negotiated the use of the entire lemon.

Successful outcomes through principled bargaining are best achieved when the parties focus on separate and common interests, rather than positions; and generate and ultimately agree on options for resolution, by:

- exploring interests and options for achieving them through effective communication
- considering how the other party sees it – and taking that into account when considering the options for resolving the problem
- avoid having a bottom line – are open to alternatives that achieve their interests

The value of communication:

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.

Negotiating with Credibility

The Opening Pitch:

There is no magic formula for calculating an opening offer or counter-offer. The initial offer should achieve two goals:

1. it must be high / low enough to leave the party with sufficient room to make concessions and still arrive at an acceptable settlement figure;

BUT

2. it should not be so high / low that it causes the other side to disengage immediately.

The most effective negotiation strategy involves encouraging instructions from the client to start the mediation with genuine and realistic offers in order to maintain good faith.

Commencement with unrealistically high or low offers will inevitably result in an unrealistic counter-offer from the other party or worse still: a walk-out.

Mediations with multiple parties' legal teams in attendance are too time-consuming to arrange, expensive and stressful for the clients in attendance, to result in an early cessation because of an unco-operative approach right at the start. Cessation without settlement should only occur when there is a genuine deadlock after having attempted to negotiate in good faith.

Tips for establishing credibility:

- Provide a break down of the components of the offer, and
 - (for plaintiffs: be ready to do the same with respect to legal costs);
 - for complex damages claims, a template of components of the offer (consistent with the solicitor advice to client, eg in accordance with the "high" / "low" range as an opening position), may be useful;
 - use of a template for conveying offers in suitable matters (eg catastrophic injury claims) may be useful in demonstrating damages items that are "concrete" and those which are negotiable.
- The more expert and factual evidence served in support of the claim / defence prior to the Mediation, the better.
- References to relevant legal precedents may also be very effective

- Alternatively: do your research and be aware of any adverse legal precedents / judgements on similar matters and be prepared to demonstrate how such judgements are distinguishable from your client's matter, if raised by the other side.

Don't reveal your client's bottom line to the Mediator until necessary:

Some counsel in my experience don't wish to know what their client's bottom line is. They feel they can do a better job maximising a result from the other side without this knowledge.

I agree with this approach with respect to my role as Mediator as well.

As the parties get closer to an agreement, be wary of exposing plaintiff's bottom line to the mediator, too soon. Once you tell the mediator your bottom line, the mediator may subconsciously or otherwise, begin to explore how much higher / lower the party will really go. By exposing the bottom line too soon, a party may possibly risk losing its negotiating leverage.

On the Day

Saving face when there is a potential deadlock:

The phrase: "this is our final offer" has enormous significance in terms of the credibility of the legal representative who says it. If the parties negotiate to impasse, the mediator may consider whether it is appropriate to make a proposal to the parties regarding settlement.

The mediator's proposal is a number selected by the mediator which is intended to push both parties beyond where they have been willing to go. If both parties agree to the mediator's proposal, a settlement is achieved in a way that preserves the integrity of the legal representatives and their clients if they have already issued / conveyed instructions regarding their respective final offers.

In closing:

3 Reasons why Mediations are often successful where Informal Settlement Conferences are not

Legal representatives may often be divided over whether to agree to the added expense and logistics of a Mediation, in the belief that the same outcome may be achieved by holding an Informal Settlement Conference ("ISC") instead.

The upside of an ISC is that they are easier to organise, fewer diaries to co-ordinate, will usually only run for a few hours and may not need the same space in terms of venue and logistics.

BUT:

ISC's still cost our clients real money in terms of intensive preparation beforehand, counsels' attendance and often the clients' attendance, as well as the inconvenience and/or stress caused those clients in attendance.

Many ISC's don't achieve a settlement. In my view, this may be attributed to the following factors:

- there's less emphasis to attend an ISC with a genuine willingness to compromise;
- ISC's may be seen as an opportunity to settle on certain terms only, as a "try on".

This may be particularly so if there is no looming trial deadline and plenty of time to continue to prepare the case and/or hold out for "a better result" when the parties try again next time.

For that reason, a common approach is not to allow clients to attend an ISC for fear it will afford the opposition some tactical advantage. For example, a concern that the opposition may mainly be trying to size the other up re how the parties themselves and/or key factual witnesses are likely to perform in the witness box.

**Why can Mediation make the difference in achieving a settlement?
Here are 3 compelling reasons:**



1. A Vessel on a Mission Needs a Skipper

An ISC has no one taking charge. Indeed if someone does, it may play further into the adversarial process and in this regard, is unlikely to be constructive for the purposes of settlement.

A Mediator plays an instrumental role in navigating the process in a skilled, fair and constructive way. A Mediator chairs and guides the parties through the process with the objective of serving all of the parties jointly and each of them separately.

A Mediator's role as skipper can support and protect the parties on their destination towards an amicable settlement by:

- Providing the very structure for the process
- Ensuring procedural fairness
- Managing any power imbalances which may or may not be associated with an ISC depending on the attendees
- Managing any potential deadlocks
- Supporting the legal teams by inspiring the trust of their clients in their lawyers to give difficult instructions required to settle

For example:

- By acknowledging the skill & experience of the legal teams;
- By encouraging the clients to listen to their legal advice; and
- By reality testing the clients on their positions and alternatives (which may serve to reinforce advice and concepts already explained by their lawyers, or indeed encourage them to ask their lawyers more questions that are needed to be asked before they are prepared to provide instructions on settlement).

These are no small issues.

Yet there is no-one in this role at an Informal Settlement Conference.

2. Everyone Acknowledges the Benefits of a Good Detox!

A Mediator is a trained professional in conflict management who is dedicated in this role to chairing and guiding the communications and negotiations in a constructive way.

The Mediator serves as a buffer against the parties' basic human instinctive stress reactions to being situated in the presence of their opponents. The Mediator's role is to help manage and "down regulate" the heightened emotional states of the parties by creating and maintaining a social environment of safety and respect, where direct contact is constructive. Such an environment is important to enable the parties to make decisions and give instructions based on the rationality of the situation and not be a slave to their emotions.

The Mediator's very presence and demonstration of respect for the parties serves to mirror and validate each party on a fundamental level. At the same time, it addresses the psychological issues that are stimulated by interpersonal conflict – the human need for validation, stability, predictability, fairness, and the value of the sense of self.

A Mediator's role in re-framing and de-toxifying the adversarial nature of the dispute during the course of negotiations is what makes the crucial difference in the parties being able to reach a settlement.

The ability of the Mediator to provide a zone of objectivity and safety within the midst of the conflict enables wildly polarizing allegations and offers to be exchanged in a way that allows the parties to posture, to express and advocate for their positions without leading to a walk-out or loss of face when those parties end up compromising on seemingly concrete demands.

A Mediator is there to support the parties themselves, by engaging with them, by taking the time to understand what is important to them, and being mindful and considerate of the parties who are often under a great deal of stress and are apprehensive about the dispute and the Mediation process itself.

An incredibly effective aspect of the Mediator's role is to facilitate the parties to be and to feel heard and understood, so that there can be a functional shifting from the past towards a focus on the present and the future – and an agreed outcome

This is often where Informal Settlement Conference's are crucially lacking.

3. Authentic Engagement

In my view, the greatest reason why Mediations make all the difference to settlement is because at an ISC there is no sense of occasion; no real engagement between the parties themselves. It's only about the number\$ and a mere exchange of offers often may not be enough to resolve a dispute.

Even though civil proceedings are about monetary compensation, all legal representatives know that it's always about something, often so much more, than money. A mediation is often the crucial difference in facilitating authentic engagement that ticks all of the boxes and enables a compromise to be negotiated.

A Mediator provides much needed structure to the negotiations, by facilitating the joint opening in a constructive way, setting the tone and opening up the channels of communication for the day ahead. The Mediator provides the parties with an opportunity to engage and communicate with one another, to be heard about their drivers for conflict and their desired outcomes. The joint opening provides a much needed sense of occasion to those parties who are seeking "closure" on something greater than a monetary settlement.

The most fundamental aspect of the mediator's objective is to secure an attitude shift on the part of one or more of the parties. Without this, the

parties are likely to remain in the same entrenched positions as when they entered the conflict, creating little prospect of settling their dispute.

An attitude shift and a genuine preparedness to compromise without seeing compromise as a sign of weakness – is not possible to achieve without the authentic engagement of the parties. This often isn't addressed at an ISC yet it is fundamental to settlement.

The difference between reaching an impasse at ISC v Mediation

Of course, the parties may reach an impasse because their positions are simply too far apart. This is a disappointing outcome for the parties. Yet in many ways, it is a valid goal of Mediation: everyone finally knows the real – not the theoretical – alternatives that must now be pursued. It may not be until the parties have reached this point, that they are prepared to be truly receptive to the Mediator's efforts and suggestions – which may result in an amicable settlement after all, with saving of face for all.

If not settled on the day, reaching an impasse after best attempts at Mediation may often lead to settlement thereafter owing to the fresh insight and adjusted expectations that emerge when the dust has settled.

The parties have a much more genuine and accurate idea of the compromises that may need to be made in order to negotiate a settlement on the most favourable terms following Mediation.

It is unlikely that the same degree of insight could be gleaned in the course of a failed ISC; and so there is a risk that any settlement thereafter, whilst positive in itself, may not be based on the most optimal information.

These factors may be worth considering on the next occasion when you or your client may be contemplating an Informal Settlement Conference. It is arguable that the perceived costs savings of an ISC do not outweigh the benefits of a Mediation.

About the Author:

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 20 years of post admission experience, (mainly as a health law / personal injury / government liability – roads, education, health, police / professional liability litigation lawyer).

Having represented both plaintiffs and defendants at Partnership level throughout my litigation career, I have an understanding and empathy around the values, attitudes and negotiation styles that each side tend to bring with them to a dispute.

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

Medical negligence / personal injury; / Solicitor negligence; /

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.

In my mediations practice, I receive repeat instructions from a number of plaintiff law firms, defendant law firms and insurers, including the NSW Treasury Managed Fund and its panel firms, including the Crown Solicitor's Office.

I have also received a number of appointments by Court Order of the District Court of New South Wales.

In March 2017 I was appointed to the Australian Capital Territory Magistrates Court Mediator's Panel – a panel of six mediators from a field of 80 expressions of interest.

Re the NSW Law Society's Mediators Panel: expressions of interest are only open for submission once every two years, the next opening being in September 2017. I am otherwise eligible for appointment to this panel.



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