“Don’t waste my time on negotiation and mediation, this dispute needs a judge.” which conflicts need judges? which conflicts need filing?

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“Don’t Waste My Time on Negotiation and Mediation. This Dispute Needs a Judge.” Which Conflicts Need Judges? Which Conflicts Need Filing?”

SUMMARY
This article contains two parts. First, there is a framework aimed to encourage lawyers and other conflict managers to be overtly analytical when deciding which interventions may or may not be helpful in a particular conflict. Secondly, to illustrate this analytical framework, there are two lists of factors or diagnostic indicators which suggest that certain conflicts probably need the decision of an umpire or judge; and that certain other conflicts probably need written claims to be filed in a court or tribunal. This article does not attempt to create lists of factors which indicate the suitability of many other processes such as early neutral evaluation, problem-solving mediation, or arbitration.¹

INTRODUCTION
It is common for politicians to exhort the public “don’t go to court”; and “settle your disputes outside the court system”⁰. These exhortations contain a platitudinous wisdom which echo centuries of similar advice.³ Additionally, lawyers and judges are anecdotally reluctant to prescribe litigation for their own conflicts. “I could never afford my own services”; “I know what a lottery the litigation process is”. Practitioners with insider knowledge of a system tend to be very cautious about prescribing their own medicine. Moreover, there is now at least sixty years of anecdotal and systematic published critiques of courts, lawyers and their servant law schools.

In the writer’s opinion, this constant denigration of lawyers, courts and law schools is an essential, ongoing process to make comfortable monopolies more accountable. However, there is also the danger of throwing the baby out with the bath water. Many helpful professional analogies can be found for conflict managers by studying the recent history of the medical profession.⁴

The medical profession is perhaps twenty years ahead of us as lawyers when trying to address major professional themes such as client education; prevention rather than

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¹ For prototype checklists of indicators for many different kinds of conflict resolution processes, see J. H. Wade “In Search of New Conflict Management Processes – the Lawyer as Macro and Micro Diagnostic Problem Solver: Parts I and II” (1995) 10(2) Australian Family Lawyer 23; 10(3) 16.

² There are some double standards in these exhortations as it appears that government agencies are major users of the court systems eg: Australia Law Reform Commission, Review of the Adversarial System of Litigation p 25, June 1998, pp 161 – 162. Compare also the daily abusive, theatrical and personal attacks of politicians upon each other, which fall somewhat short of providing public role models in problem solving skills.

³ Eg: Matthew chapter 5: verses 25 – 26 “settle matters quickly with your adversary who is taking you to court. Do it while you are still with him on the way, or he may hand you over to the Judge....” See also C. Dickens, Bleak House.

reaction; wariness of false diagnoses; co-operative interdisciplinary practices; expansion of the catalogue of interventions; (eg: physiotherapy, acupuncture, diet change); informed consent; interviewing techniques; accreditation of specialists; bulk billing; quantitative and qualitative research of outcomes; (reluctant) recognition of new professions and monopolies; lengthy analysis of causes before treatment; institutionalised apprenticeships; public training and service venues.\footnote{This is not an attempt to glorify the medical profession which is also struggling with constant change occurring in many traditional working groups – eg: M Walton, \textit{The Trouble with Medicine} (St Leonards; Allen & Unwin, 1998)}

The medical profession has been criticised particularly for over-use of two “treatments”, namely surgery and drugs. Nevertheless, surgery and drugs remain essential interventions to be used cautiously after careful diagnosis of cause and prediction of side-effects. Likewise, judicial decision and filing court proceedings, will always remain as essential interventions to be used in a limited number of conflicts after careful diagnosis of causes of conflicts and prediction of side-effects of litigious intervention.

\textbf{CONSCIOUS ANALYSIS}

Problem-solving professionals encourage others to be transparent, accountable and conscious of the theories and presumptions we develop to “help” clients in conflict.\footnote{eg: C. Moore, \textit{The Mediation Process} (San Francisco: Jossey-Bass, 1996).} The alternative is for conflict managers and lawyers to operate upon their clients based on subconscious theories and inarticulate presumptions. Obviously, this is a dangerous practice as in medicine and conflict management, yesterday’s orthodoxy is today’s heresy (and tomorrow’s professional negligence). Professional decision making may be based on intuition (“I feel like you need brain surgery/litigation”); tradition (“We normally cut/issue proceedings”); accident (“You’ve walked into a doctor’s/lawyer’s office and this is what we do”); first impression (“We don’t need any further facts, x-rays or interdisciplinary insights”); anecdotal success (“I usually “succeed” doing it this way”); convenience and expense (“We have an accessible surgery/local court available”); ignorance (“There may be other alternatives, but I’m not sure what they are”) client directions (“I want you to cut/prescribe/sue”) to name but a few underlying presumptions.

Christopher Moore has set out a helpful process of analysis for conflict managers to make decision-making processes visible and accountable. The following diagram illustrates that process:
CLIENT – SKILLED HELPER INTERACTION

1. Presenting Symptoms
2. Diagnosis of Causes
3. Range of Possible Interventions
4. Weigh Up Possible/Probable Side Effects
5. Choose Intervention
6. Implement Intervention
7. Monitor Effect and Side-effects
8. SPECIALIST INPUT
9. Exit
SMORGASBORD OR TAXONOMY OF INTERVENTIONS

Before a particular drug is prescribed, we expect a doctor to know about the extensive range of drugs which are available. Likewise, before a conflict intervention is prescribed, we expect a skilled conflict manager to at least know about a large repertoire of possible interventions even though (s)he may only be competent or skilled in a few. This catalogue is vast, and expanding.

One rarely taught but vital professional “intervention” is of course, various forms of doing nothing. Strategically “doing nothing” is an important option in many conflicts to manage the conflict “constructively”. Like all strategies, inaction can be used by both oppressor and saint.

As the work of conflict manager (lawyers, diplomats, bosses, parents, teachers, mediators, counsellors, therapists) is studied and systematised, the catalogue of profound and blunt interventions is becoming like an encyclopaedia of biological species (“expertise is the art of making fine distinctions”). A vital question thereby arises. Where in the already overcrowded lifetime educational curricula of the above conflict managers will the encyclopaedia, catalogue, range, or taxonomy of conflict inventions be situated? Lost on the fringes?

In the second part of this paper, two broad interventions, well known to lawyers, will be taken from the encyclopaedia. These are obtaining a judicial decision and filing a formal claim. Obviously, there are many sub-varieties or methods of doing these two things. Then an attempt will be made to develop a list of factors or symptoms which indicate that each of these two interventions may be “necessary” to move the conflict towards “resolution”.

The weasel words “necessary” and “resolution” in the previous sentence hide a number of important presumptions of value and fact. For example, filing a claim in court may cause sufficient financial inconvenience to a stonewalling defendant so that at last (s)he agrees to communicate with the plaintiff by letter. This communication may lead to an agreement to pay the plaintiff a monetary sum. Thus in one sense only, filing appears to be “necessary” to effect a “settlement”. However, such common fact scenarios beg many questions – Was filing “necessary”? Would the dispute have “settled” anyway by the mere effluxion of time? Would more sophisticated or unsophisticated interventions have re-opened communications and led to payment? Which ones? At what cost? Pursued for how long? Is an agreed monetary payment a “good enough” settlement? Were more mutually helpful or deeper “resolutions” or outcomes available such as restored business dealings; mutual praise; helpful publicity: discounted future transactions; interest-free loans; larger payments structured over time or in a tax efficient manner etc?

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9 See generally Rubin, Pruitt & Kim, Social Conflict (1994); B. Bunker & J. Rubin, Conflict, Cooperation and Justice (San Francisco: Jossey-Bass, 1995)

10 J. Vidal, McLibel-Burger Culture on Trial (Macmillan: London, 1977) Vigorous litigation by McDonalds against impoverished demonstrators for defamation was a dramatic failure.

These vital questions will always undermine any venture to create a rough checklist of factors which indicate a certain treatment. The checklists are too simple as:
(1) Clients have different goals and different meanings of “success”;
(2) Other treatments may achieve one of the desired meanings of “success” better than the indicated treatment;
(3) The indicated treatment may have a range of obvious or hidden side-effects which affect the achievement of “success”.

Nevertheless, as long as these reservations are emphasised, a checklist has the potential benefits of:

- Educating clients about possible reasons for their own choices;
- Surfacing hidden and sometimes false assumptions behind traditional practices;
- Justifying difficult choices when lawyers and other conflict managers are criticised for “aggression”, or “adversarial behaviour”;
- Avoiding spending client time, money and frustration on pursuing other interventions. It is especially important for negotiators and mediators to decide when further negotiations are a waste of time (for the moment).

The writer has sometimes asked clients to tick (check) the checklists set out at the back of the paper when deciding which step to take next. This has apparently proved very helpful for some of those clients to clarify reasons for making a difficult decision.

This article does not attempt to address several topics which follow after a client has made a process decision, whether it be to file or to arrange an evaluative mediation. For example, how can other members of a team be persuaded that the indicated process should be pursued? How can the “opposition” be persuaded that the indicated process is the most suitable?

**INDICATORS THAT A JUDICIAL DECISION WILL PROBABLY BE NECESSARY**

1) **Need for an administrative declaration**

In some situations, society has an interest in a judge or umpire checking on the propriety of consensual arrangements – such as a divorce decree, probate of a will or a consent order for property distribution under the Family Law Act. The last case is symptomatic of a trend to reduce the workload on the courts of checking even agreements embodied in orders. If the consenting parties both have (minimal?) independent legal advice, then the consent orders will be “checked” based upon limited factual data given to the court.13

More dramatically, consensual settlements of certain disputes may legislatively require vigorous checking by an officer of the state to ensure that certain sensitive interests have not been overlooked in the settlement. For example, settlements of mass torts, injuries to young children, claims against polluting industries and racial discrimination in employment disputes may have mandated judicial supervision.

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2) Cut and dried bulk cases

In a similar vein to the need for a state official or umpire to make routine administrative declarations, there is a need for such an officer to make routine default judgments against debtors who have not paid after “service” of an official (court) document. Thereby “court” provides a ritualised public occasion to encourage a degree of honesty and factual clarity by aggrieved claimants before another person’s freedom or property is taken away. The routine nature of these virtual rubber-stamping processes, means that they will often be delegated to a junior and lower-cost umpire.

3) Need to shift responsibility elsewhere

For some disputants, a settlement requires a compromise or a loss of some important interest. That loss may be too hard to bear and they may prefer to have a scapegoat to blame – namely a judge or umpire. The judge can be blamed before neighbours, associates and relatives for being “biased” “stupid” or “uncaring”, even when the result was entirely predictable. Examples of the phenomenon occur when employed non-custodians contest interim custody disputes with unemployed long term custodians; or when a middle manager whose job is under review keeps his/her company on the litigation track for fear of being held responsible for settlement figures.

4) Demonstration of Effort – “I won’t give in without a fight”.

The previous reason needed an umpire’s result; demonstration of effort requires the umpiring process in order to show to self and others that “I tried hard”; “I did not give in easily”; “I was not walked over”. Examples of this include tenants or farmers who battle the last ejectment action and are escorted from the premises by police officers; or tragic parents who fight for custody orders over long trials in order (allegedly) to demonstrate to their children that “they did not give them up easily”; and again middle managers or senior managers who fight contract disputes to the last order so as to impress employers or the board that they “tried valiantly against great odds”. Therefore the speaker seeks to fight, lodge appeals, complain to the media and bloody the nose of the opponent before a predictable umpire’s decision emerges. Having caused aggravation to the other person, there is either an element of revenge, or creation of a self and public image of a “plucky little battler”.

5) Indeterminate result; uncertain rules

When judicial or umpiring precedents have not developed around a particularly kind of dispute, then there are no objective criteria to assist negotiations. The shadow of the law is mottled. Some less risk-averse clients may then “have a go” in the judicial lottery; others more risk averse will have no interest in creating precedents for future disputants and risking a poor outcome. In New South Wales the De Facto Relationship Act 1984 offered, and perhaps still offers, little certainty of outcome in property disputes for many types of couples due to conflicting judicial views on the aims of the Act. Thus it has provided a positive disincentive to poor and middle class couples to claim, let alone proceed further to actually obtain, any umpire’s decision. A similar comment can be made about the Contracts Review Act 1980 (NSW).

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nineteen years it has generated only occasional precedents on the meaning of an “unconscionable” contract and what remedies might flow from a finding of unconscionability.

Conversely, the uncertainty of precedent in these situations sometimes encourages risk-takers to engage in speculative claims and a litigious path. (Again, some of these “indicators” are particularly ambivalent and unhelpful when viewed in isolation.)

6) Settlement offers too divergent

A common cultural pattern of negotiation is known as “positional bargaining”. Each disputant makes an extreme claim knowing the normal response will be to ignore the initial claim and move by increments towards some intermediate “solution”. In the words of Marc Galanter:

“The master pattern of American disputing is one in which there is actual or threatened invocation of an authoritative decision-maker. This is countered by a threat of protracted or hard-fought resistance, leading to a negotiated or mediated settlement often in the ante-room of the adjudicative forum”.

The rules of positional bargaining are well known by repeat players such as insurance companies, motor car vendors and some lawyers. However for inexperienced disputants, the game can be inflammatory: “How dare she ask for so much money”, “I told you (s)he is entirely unrealistic/unreasonable/greedy/unbalanced”. Tragically, some lawyers who role play righteousness for allegedly righteous claimants, find it difficult to step out of the game and advise clients of realistic outcomes. Simulated righteous anger readily becomes righteous anger for those unaccustomed to game playing and debriefing of self.

Thus the positional bargaining strategy can leave claimants stranded at two extremes – each stuck in distant “insult” zones. One or both refuses to lose face by moving substantially into the settlement zone. Alternatively, they may play the usual game of incrementally creeping away from the two extremes towards an intermediate position. However, the last increment provides a daunting final loss of face having “given up so much already”. Inexperienced disputants who fall into this trap are particularly found among personal injury, sexual harassment, family property, estate division and anti-discrimination claimants. (Like symptoms of illness, it should be emphasised again that this factor alone is equivocal. Most successful negotiations and mediations also begin with one or more disputants making offers in the “insult” zones.)

7) Preservation of a tough commercial reputation

Some commercial organisations want to be known as tough operators in order to intimidate present and future customers into compliance with contractual terms. They develop this reputation by imposing a litigious form of extended publicised suffering upon selected miscreants. The umpired result is often not as important as the publicised pain inflicted by the umpiring process upon the person allegedly in breach. Examples of this need for an umpiring process can be found in the construction

industry, and commonly among movie distributors who pursue copyright breaches with a relentless and expensive determination. To repeat, these “hardball” organisations do not really care if they “lose” a number of court cases because these losses are considered to be necessary investments in a reputation as a fearless (and perhaps crazy) litigator. (“Don’t get into a fight with X – settle quickly – did you hear what X did to Y?”) Supposedly, this reputation will reduce the delinquency rate among future clients, and will enhance quick and favourable settlements in future disputes. (Conversely, this reputation may backfire and scare away future business).

8) Need to control precedent and “the law”
Some large organisations need to control, as far as possible, the outcome of disputes so that each publicised outcome does not open a floodgate of claims. Even the terms of a private and confidential settlement will eventually leak out and potentially encourage other claimants. Recent examples of this phenomenon have included banks contesting claims that kitchen table guarantees are void for unconscionability, or that customers were encouraged to borrow money at favourable interest rates from overseas; and chemical companies contesting thousands of claims that contraceptives or other products were or are dangerous; and governments opposing claims by aboriginal people for compensation for historical exploitation.

9) Need to avoid responsibility for difficult ethical or policy decisions
There are a number of recurrent situations where administrative decision-makers or politicians do not want to bear the responsibility and criticism for certain difficult policy decisions. Politicians sometimes shift decisions on issues such as daylight saving back to the electorate in the form of a referendum. Alternatively, decisions can be shifted to the courts on issues such as when is abortion “legal”; whether a particular forest should be destroyed by logging or by a dam; whether native interests in a particular piece of land should prevail over certain commercial interests; or whether a particular book or film is to be prohibited as racist or pornographic.

It is not worth losing a job or political office over controversial public dispute when responsibility for such hot topics can be shifted to an independent body.

10) Entrenched judicial power over certain social issues
An extension of the previous factor occurs in certain countries such as the USA and Canada, where a Supreme Court is empowered to make decisions to balance major social values in conflict, often pursuant to an entrenched Bill of Rights. Thereby, a diet of litigation is inevitable. This occurs where:

- A court at the top of the judicial hierarchy in any country or jurisdiction
- has entrenched constitutional power (or even limited statutory power) to make and revisit decisions concerning major social values such as race, education, gender, freedom of speech, religion, and association, disability, abortion, gun control, health care, legal assistance, or refugee status
- and is willing and able (given limited court resources) to hear disputes which establish precedent on such issues.

Overtly legislating by such superior courts provides a public theatre for airing and deciding polarized debates. The judicial wing of government mandatorily becomes a
dramatic venue for achieving social change and is sometimes more accessible, independent and responsive than parliament or the legislature.

11) False expectations of one or both disputants

It is relatively common for one or both disputants to have false expectations about the likely umpiring process, and the likely or range of possible results. A major role of competent lawyers is to attempt to educate the clients about likely court process and outcomes.  

However the educational process is a cyclical dance which takes time, creativity, repetition and persistence on the part of a lawyer or other helping professional. As a lawyer, it is easy to give the advice which a client wants to hear – such as “Don’t worry, the truth will come out in court”. “You’ll have a chance to speak in court”; “Your position will be vindicated before a judge”; “You’ll receive at least $140,000”; “She has no chance of obtaining access/an injunction”.

Many negotiations fail because a lawyer has prematurely given, or a client has heard, a confident prediction of bottom line outcome. The lawyer then has left no room for him/her to alter the prediction as more facts emerge. At the door of the court, barristers or mediators often have to work creatively to find ways for over-confident legal advice to be withdrawn with a minimum of loss of face.

The writer sees anecdotally an increasing number of lawyers who, after some reflection, express clearly in writing to clients on a single page, their estimates of legal costs from best to worst, and of umpired outcomes from best to worst with considerable margins between the best and worst.

12) The tribunal as theatre

There are some disputes where one or both disputants (or the “tribes”) want to use the court or tribunal process for publicity and as a form of theatre. The outcome is only a secondary goal to the search for publicity. A settlement is unattractive as a public stage would be lost. The media are primed to attend and feed on the conflict. Even legal costs may be relatively cheap compared to buying television time or space in newspapers. Examples of this kind of theatrical litigation include defendants charged for naked bathing, smoking marijuana, organising abortion clinics, vandalising abortion or birth control clinics; or disputes between slum landlords and tenants, managers and unions, loggers and environmentalists, and hospitals and “injured” patients. Some lawyers also want the publicity attached to such litigation so that their performance as advocates attracts new customers.

13) Bluffing and playing chicken

Where positional bargaining the dominant style of negotiating, a further consequence is the common use of bluffs, threats and playing chicken. Where everyone knows the game, these strategies are not taken seriously and after several rounds of (sometimes expensive) posturing, both parties move into the settlement zone. However, sometimes a player loses sight of the goal and makes threats (“If you don’t…. within


21 days, I will immediately …”) which have to be carried through either to save face, or because one or both parties begin to believe their own rhetoric.

14) Disputes where one or both disputants are not paying for the process

A tribunal or court is a consumer item — if it is free, it will tend to be valued less and used more. Thus the use of umpires will rise as the cost of use drops.

Similarly, a conflict is a likely candidate for an umpired decision, if a relatively uninformed third party is paying for the legal costs of one of the disputants. The disputant thereby has no pressure to settle at all until an excellent offer emerges. Examples include legal aid funding one or both parties in a dispute allegedly about custody of a child; or a parent paying for family property litigation in behalf of a married child; or a distant European or Japanese corporation paying for a local dispute.

15) High conflict about low resources

Research in the USA has tentatively suggested that where parties have a history of high personal conflict over relatively small resources, then negotiation and most varieties of mediation will often not be successful.18

For example, some separating couples have extended conflict over low value property, or details about visits with children; neighbours may engage in extended disputes about fences, trees or dogs; and home owners and builders may fight for years over $2,000 for repairs.

It may be that the extended conflict is both causal and symptomatic of inability to negotiate; that low resources offer little loss and minimal gain so “who cares”; and that the costs of conflict can be denied or avoided by being paid by bodies such as Legal Aid, Community Justice Centres, the Social Security Department and/or unemployment insurance.

Such disputes arguably need to be diagnosed early and directed towards a bullying style of mediation, med-arb or an umpire.

16) Adjustive dissonance

Elizabeth Kubler-Ross developed a model of stages of grieving through which many people pass after experiencing a loss. 19

The losses may be of a business, farm, dream for the future, relative, marriage relationship, reputation, physical agility, or self image. Such events commonly lead to stages of shock, denial, bargaining, depression, anger and hopefully, eventually acceptance of loss reflected by such statements as “I want to get on with my life”; “I’ve had enough”; “I want to look to the future now”.

Commonly, in marriage breakdowns, one party (normally the wife), has moved through the grieving process years before the husband has done so. Thus, when the actual physical separation occurs, the husband is devastated and angry —made worse by the fact that the wife appears so resolute and collected. They are in “adjustive dissonance”.20

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20 See P Jordan, The Effects of Marital Separation on Men, Family Court of Australia, Brisbane, 1985
Negotiations about money or children are constantly sidetracked by the wash of grief: (S)he can’t do this”; “It’s a matter or principle”; “(S)he’s ruining everything”.

It often takes about two years to work through the grief process so that focussed negotiations can take place – but in the meantime one party may have filed an application in court and the umpire may have decided.

17) Negative intimacy

After interviewing some clients involved in conflict, it sometimes becomes apparent that the conflict provides a meaning to life to certain disputants. They are “intimate” with the dispute. Therefore settlement of any kind means a loss of meaning to their lives. Isolina Ricci has labelled this concept as “negative intimacy”. Examples include crusaders against the medical profession, males, females, the legal profession, Catholics, Serbs, Communists, my ex-wife, or my ex-husband.

Well-meaning “settlement officers” (lawyers, mediators, counsellors) are grist for the mill for such “resentniks” who yearn to have highly conflicted conferences and mediations with the person they love to hate. Although destined for the courtroom, mere court orders will do nothing to quench the need for future conflict.

18) Risk preference

Some people, by nature or nurture, are risk averse and will generally choose a negotiated bird in the hand over a chance of an umpired two in the bush. However, others are gamblers by nature or nurture, and are relaxed with the possibility of gain or loss before an umpire. Litigation is no more than a bet on a horse, though the willingness to make the bet may decrease if the risk exceeds say 20 to 1.

Conflict with a risk-preferring disputant may slide inexorably towards an umpire even though the risk-avoider makes objectively “mid range” offers to settle. Particular examples of this phenomenon include plaintiffs hoping for a lottery win in personal injury cases; cases involving children, wealthy defendants, or multi-national corporations as defendants; and defamation or discrimination cases. The investment of say $40,000.00 in the plaintiff’s legal expenses may be worth the range of chances of verdicts between a possible zero and above the offered $50,000.00.

By using questioning protocols, intake workers may be able to flag the gambler, openly put him/her on the fast litigation track, and avoid the expense of structured negotiation.

19) Benefits of delay

In some cases, an umpire’s decision is consciously preferred as it provides for one party the longest period of delay before a change in the status quo is or may be required. The long delay has a range of dramatic benefits. For example, a debtor may be able to avoid repaying an unsecured debt for several years and thereby secure a low interest loan from the creditor; a partner may enjoy rent-free occupation of a house for several years before the inevitability of a judicially ordered sale. Examples proliferate of where full blown litigation buys time and valuable status quo.

20) Expert helpers as exacerbators of disputes

There are a certain number of disputes which are pushed towards an umpire because of the psychological needs of the “experts” called by the disputants to “help”. The

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original conflict between the disputants becomes subsidiary to the needs of involved professionals.

Such a psychological need to “win” should be distinguished from the commonly alleged financial need of certain professionals to generate derivative income from “milking” the dispute.

Lawyers also have an interest in running a conflict right through to judicial determination where:

- They need to practice their own advocacy skills (like brain surgeons need practice). In an era of high rates of settlement, many lawyers know that their advocacy skills in certain kinds of conflicts or courts are becoming rusty.
- They need the media publicity of a newsworthy trial in order to attract more clients, or open doors for promotion to judicial or political office, or perhaps hasten glorious retirements.

The above reasons are of course classic illustrations of actual or perceived conflict of interest between the principal client and the agent lawyer. 22

21) Hanging on to life-meaning values

Sometimes to “settle”, will involve the volitional surrender of a value which provides a substantial meaning to life for the disputant and/or his/her community. Such a chosen surrender would cause loss of personal meaning and/or loss of face in the community. It is essential that such a loss be caused by an umpire or judge, rather than by a personal “betrayal” of a cause. For example, strongly-held values about abortion, pollution, freedom of speech, freedom of religion, democracy or a consultative style of management may make compromise of the values by any agreement a form of self-betrayal. The solution must be imposed by a third party umpire, and thereby personal meaning, consistency and “integrity” are preserved. In some cases, personal martyrdom at the hands of a judge or committee is essential, rather than recantation.

22) Lawless renegade

There is a category of individuals who regards themselves as completely outside the constraints of the legal system or of dominant social values. They may have status as outlaws, or be totally self-centred individuals. Victims usually avoid them or respond with threats and violence. However, non-violent victims may choose to resort to court orders and enforcement by “forceful” search, seizure, Registrar’s signature of transfers, bankruptcy, imprisonment or deportation.

Examples of lawless (and often violent) renegades are some street gangs; parents who kidnap children; entrepreneurs who seize assets and flee overseas; traumatised males who engage in a scorched earth policy by destroying assets and bashing family members; racketeers; some noisy neighbours; and some cross cultural disputes. All

forms of negotiation, threats and court process are useless in these cases (and are seen as signs of weakness). Force alone (perhaps legitimised by a court order) speaks, but often with tragic side effects, to those less accustomed to the violent culture.

Moreover, a “successful” court order often does not end the conflict. The street-smart renegade has a plethora of strategies to both disobey and extract revenge.

**INDICATORS THAT FILING A FORMAL CLAIM WILL PROBABLY BE “NECESSARY”**

Filing a formal claim in a court, tribunal or complaints body must be distinguished from obtaining a “final” judicial decision. Over 90% of the former are settled or abandoned before the latter occurs. Once again, the colloquial phrase “you’ll need to go to court” or “you’ll need your day in court” is too vague to be a helpful diagnosis.23 “Litigation” or “litigotiation”, must be distinguished from “adjudication”.24

The following situations are indicators that filing a formal claim is arguably “necessary” in order to move a conflict towards constructive “resolution”.

1) **An emergency response to self-help**

It is common during a conflict for one party to engage in a sudden act of self help which involves a grab of resources or power. For example, a warehouse is emptied; locks are changed to a business; children are snatched; employees are excluded from a workplace; a heritage house or forest is demolished; a play, book or song is released; a parent is bashed.

It is often wise to file immediately against the self-helper in order:

- To attempt to restore the status quo of power and resources so that the aggrieved is not bargaining from a position of weakness;
- To introduce the jurisdiction of a court which rarely looks favourably on violent self help. Thus the court will tend to react harshly to future acts of self-help which tend to escalate conflict towards violence.
- To appear self righteous rather than react as a vigilante.
- To publicise the acts of a bully or self-helper.

2) **To get into a queue**

There is a marketing irony that long court waiting lists tend to beget even longer waiting lists.

A wise corporation or individual who successfully negotiates 98% of conflicts to a settlement, still wants to be prepared in relation to the 2% which do not settle. If a

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23 See Appendix A for a critique of the ubiquitous phrase “My client needs his/her day in court”.

24 See previous discussion in text following note 11 for the difficult value judgements and factual guesses behind the concepts of “necessary” and “resolutions”. The writer thanks members of the Family Law Council who brainstormed some of the following categories at a meeting in Canberra in 1998.
disputant “waits and sees” which conflicts fall within the 2%, and only then files a formal claim, there may be a further 2 – 3 year wait before a judge can actually decide those conflicts. If court queues are short, the wait-and-see practice involves no substantial prejudice. If court queues are already long, it may be wiser to file and not wait-and-see the outcome of negotiations. At least then the fall back position is closer to realization and acts as a lever to encourage settlement.

3) **Sanctioned deadlines for exchange of information**

A recurrent impediment to negotiated agreements is factual uncertainty for one or more disputants. Yet requests for information from another disputant are routinely met with stonewalling, incomplete disclosure, half-truths and hostility.

Such standard behaviour encourages filing of a formal court claim. This is because extensive duties of mandatory sworn disclosure attach to all named disputants once a claim is filed. The duty to disclose all relevant documents and to answer written requests for further and better particulars is also imposed with deadlines and escalating court sanctions.

Clarifying data by such mandatory and sworn procedures may temporarily escalate tension, but also will often provide sufficient information to reduce suspicion, provide a foundation for decision-making and encourage settlement.

4) **To gain information from a third party by subpoena**

There are many people apart from the disputants who have access to key information which will assist each disputant to decide whether to settle and on what terms. These include banks, relatives, government departments, hospitals and employers. These “third parties” are typically reluctant to “get involved” in disputes due to expense, inconvenience, and strained relationships with the disputants.

However, once a court application is filed, information can be extracted from reluctant third parties by the threat of, or actual issuing of, a subpoena. In the USA, this information gathering exercise is further assisted by witnesses and disputants being required to answer questions orally (depositions) after a formal claim has been commenced.

Once again, this is a vital collateral function of filing which sometimes is essential to facilitating negotiations and allaying suspicion about missing facts.

5) **Negotiations are jammed**

Negotiations may jam for many reasons. As a stalemate lengthens, the disputant who is seeking change will look for pressures and levers to edge the status quo disputant off his/her perch of stonewalling. Filing a claim is one strategy which may transfer some power to a weaker negotiating party.25

6) **Reduction of cost of endless negotiations**

Exhortations to continue negotiations or mediation come at the price of professional fees, absence from work, frustration and suspicion of being manipulated.

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25 For many other strategies to re-open stalemates, see Rubin, Pruitt & Kim, *Social Conflict* (New York: McGraw Hill, 1994); Wade, Supra note 12.
At some point, a disputant who is seeking change from an employer, bank, spouse, trading partner or governmental agency, should weigh up the side effects and transaction costs of apparently endless negotiation meetings.

Filing a claim may be a less expensive and less frustrating intervention. Thereby notice is given that power arrangements may be changed at a court hearing date in the future.

7) To compel face-to-face meetings in corridors of courts at interlocutory hearings

One collateral benefit of filing a formal claim is that disputants can make urgent applications to a court to resolve incidental disputes such as over freezing bank accounts, disclosing particular documents and timing of sale of a business.

These quick sorties have hidden benefits of requiring disputants to sit and face each other in the uncomfortable corridors of a court; of shifting busy lawyers out of their offices and also sitting idle in court waiting rooms; of forcing busy lawyers to read and summarise facts, evidence and rules and thereby make more realistic assessments of ranges and risks; of inconveniencing disputants by absence from work, stress and high fees of experts.

Thus anecdotally, many interlocutory proceedings are filed with these incidental settlement benefits primarily in mind, rather than any real concentration on the judicial outcome of the sortie.

8) Negotiations need a schedule due to procrastination

It is common for negotiations to reach a stalemate. The person who is seeking change becomes frustrated by the inactivity and stonewalling of the person who is more content with the status quo. The status quo may be current employment conditions; pollution of a river; unpaid cost of repairing a motor vehicle; occupation of a house or factory; bearing ongoing losses in a recently purchased business; non-payment of child support; control of financial records.

The procrastinator may be in a state of delusion or denial about past or forthcoming losses, and be emotionally resistant to the even discussing the topic of change.

In these common circumstances, the person seeking change can file a formal claim with the express intention of placing the negotiation process on a schedule. There is no desire to “reach a judge”. However, court process imposes a series of organised meetings and information exchange. Thereby the status quo person can no longer consciously stonewall, procrastinate or hide his/her head in the sand.

The writer in the last five years has commonly sent or received letters (in his capacity as a lawyer rather than as a mediator) which include sentences such as “We propose to file an application in X Court in the next week and serve it upon you. We do not do so in order to inflame the dispute or with any expectation that this dispute will actually reach a court hearing. However, in our experience, the rules of court impose a helpful series of procedures and deadlines which will assist to keep our negotiations on track…..”

9) An ultimate deadline at the door of the court

Following from the previous point, court process ultimately imposes a dramatic deadline on any procrastination, incompetence, bumbling, wallowing in grief, and disorganisation present during negotiation.
In the last week, and more particularly the last hour, before a final hearing before a judge, many key events occur which tend to trigger settlements. For example, the identity of the judge becomes known, witnesses change their stories, new reports emerge from duelling experts, witnesses are ill, lawyers give flick-passes, lawyers insist on payment in advance, parties sense a growing loss of control to professionals, lawyers lower expectations by dire prophecies of erratic judicial behaviour, awkward confrontations take place in corridors, lawyers fear loss reputation in the hostile courtroom, key organisational bosses are inconvenienced by subpoenas to attend court, the over-listing of cases suggests that the case will be adjourned and all the expense of preparation will be lost.

These powerful dynamics at the door-of-the-court dramatically tend suddenly to re-invigorate stalled negotiations.

10) To gain sworn clarity on claims, counter-claims and “facts”

Apart from obtaining mandatory disclosure of documents, the filing process also has the potential for producing some clarity on what each disputant is claiming. Oral negotiations are sometimes hampered by vagueness of claims or wild ambit claims.

At the time of filing, there are constraints such as completing sworn forms truthfully, and of being wary of costs orders against wild claims. These may provide some clarity to negotiate “in the range”.

11) An attempt to intimidate

Some disputants, particularly repeat players, may use filing as an attempt to scare the defendant who is unfamiliar with the court process. Such a routine attempt may be made regardless of the merits of the claim.

Stories of intimidation as the sole motivation for filing, cause law reformers to look for methods to control such behaviour.

12) An imposition of inconvenience, expense and paper shuffling on a procrastinator

This is a more sophisticated version of the previous reason for filing in a court. Many negotiators who on the side of the status quo, hold the considerable power of inertia and stonewalling. By doing nothing, they can wear out the other disputant who is seeking change.

Filing may begin to undermine the inert strategy of the apparently more powerful disputant. He or she must miss a day of work to attend at the first court return date; often spend money on a lawyer; spend time and money collecting and preparing documents which are necessary to mount an organised defence or counter-claim.

This gradually escalating pain eventually tends to re-open negotiations.

13) Inclusion of new outsiders (lawyers) who bring fresh perspective

Once a conflict continues over a period of time, standard patterns of psychological and structural change usually occur which are hurdles to a negotiated settlement. For example, the other disputant is dehumanised (“a fascist”; a “greenie”; a “pig”);
deindividualised (“Management”; “union”; “woman”, the “opposition”); thereby inhibitions against retaliation are removed. A supportive cheer-squad or “tribe” is schooled; feelings are constructed to reinforce that the other is at least “at fault” and usually also a “bad”, “greedy”, “stupid” or “ruthless” person. “Win”, “lose” language and beliefs are promoted. Communication is reduced with the enemy; key facts which do not fit belief systems are ignored; empathy disappears; reactive devaluation sets in; and even conciliatory behaviour or kindness is interpreted as manipulative or weak. These psychological changes provide interesting challenges to those who attempt to reconstruct helpful communication and negotiation. The changes mean that the disputants are trapped with neither the motivation or skills to make wise decisions.

One potential benefit of filing is that both disputants may employ lawyers, and even competent lawyers. These expert outsiders to the history of conflict bring persistent educative roles which disturb the belief systems, emotions and behaviours of the disputants. Lawyers try to educate by letter, story, persistence, fees, threats, videos and oral advice that there are other versions of “reality”.

14) Provision of time and ritual to allow grieving

Many disputants are in conflict over a recently experienced “loss” of some kind – for example, loss of a business, farm, spouse, parent, job, child, health, mobility or dreams for the future. In order to cope with the grief, the loser may be so angry that (s)he wants to react immediately with violent self help (eg: snatching money, children, assets, taxes; defaming employers, doctors or banks); or so depressed, that (s)he wants to give up completely (“the bank can have the farm”; “my wife can have the house and children”). 27 Filing a claim in court is one strategy used by lawyers to prevent their own grieving clients acting precipitously – either towards violent self help or giving up. The delays in the court system then may provide therapeutic procrastination during which clients can pass through their various stages of grief and hopefully emerge capable of wiser decisions before the hearing date arrives.

15) Demonstration of seriousness

Some repeat-players in the world of conflict (eg. banks, government departments, insurance companies, small businesses) have developed a practice of ignoring customer complaints unless and until they are served with a court document. Anecdotally, it is perceived that most complainants will give up if ignored; that some complainants are just making a speculative request; that shrinking organisational budgets have led to the closure of any complaints department; and that a complainant is only really serious if (s)he goes to the trouble of preparing and filing a court document. Such organisations hardly reflect modern themes of customer service. Nevertheless, if that remains the culture of any organisation, then filing remains an essential key to open serious negotiations.

16) Incorporation of an extensive code of lawyer ethics during a conflict

Conflicted individuals or tribes may engage in a range of warlike strategies including violence, blackmail, intimidation, seizure, hiding documents and assets, lying, stonewalling, setting false trails, and destroying assets. It has already been mentioned under the first heading of this catalogue that filing in court provides the benefit of access to emergency remedies such as injunctions, or orders to disclose information.

27 There are many models of how we tend to cope with loss – eg: see E. Kubler-Ross, On Death and Dying (1969); R. S. Weiss Marital Separation (1975)
Additionally, if filing leads to some or all of the disputants employing lawyers, then a new code of ethics is added to the culture of fear, force and fraud. No doubt, there is a traditional debate amongst lawyers whether litigation is more about “fight” or “truth”. Nevertheless, most lawyers, once involved in a conflict, will insist that the negotiations or “war” be conducted by clients according to ethical codes of local bars and law societies.

The presence of lawyers (induced by filing) inserts some standards of honesty and non-violence into the negotiation which otherwise might be missing.

17) **Strategic advantage to be the applicant**

Sometimes, there are considerable strategic advantages to being an applicant in a court process, rather than waiting until someone else in the conflict files, and makes you a defendant.

For example, an applicant can:

- Choose which jurisdiction or country in which to commence the claim (a huge advantage);
- Choose which court allegedly has the best or worst judges; or fastest or slowest waiting lists; mandatory or non-mandatory mediation; the highest or lowest filing fees;
- Choose which courts are friendly or not to litigants – in-person;
- Choose which court is closest to (or most distant from) his/her home, witnesses and friends;
- Trigger the accumulation of interest on certain debts only by filing a claim;
- Choose which court uses the most or least technical language;
- Choose which court has the best rapport with local police, or immigration or other officials;
- Define what the dispute is allegedly about;
- Make the issues in dispute clear or confusing;
- Choose a court which will or will not hear multiple federal and state legal issues
- Choose a court which has or does not have efficient connections with counsellors, case appraisers and expert witnesses;
- Choose a court where an appeal is more or less difficult.

To repeat, it may be strategically vital in a conflict to be filer rather than filee.

18) **Work habits of particular lawyers**

Just as some businesses have a cultural habit of not negotiating until served with court process, conversely some plaintiff’s lawyers do not bother with the expense of negotiations until they have filed a claim in court.

This habit seems to serve the perceived cost-effective handling of large numbers of clients, in areas of conflict such as debt-collection or personal injuries.
A single lawyer and secretary can handle hundreds of clients on a standard conveyor-belt process of filing, swapping experts reports, then settling upon “the going settlement rates” at a single meeting such as a mandatory mediation or at the door of the court.

Anecdotally, it is very difficult to persuade these lawyers to invest in a pre-filing custom-built negotiation when the post-filing conveyor belt habit is so familiar (and “successful”).

19) Lack of skills to communicate or negotiate

Some lawyers and/or clients feel very uncomfortable with face-to-face or even shuttle negotiation. They fear they will be beaten or tricked during negotiation, or that they will lose face to a “smarter” opposition.

Clients may be so angry or inarticulate that lawyers keep them away from negotiations out of fear that the client will inflame the dispute, give away valuable information or be overwhelmed.

Meanwhile, filing and shifting paper avoids these uncomfortable negotiations which can be handled later by another expert in negotiations – a barrister, trial lawyer or mediator – at the door-of-the-court.

20) Access to a court settlement conference or mandatory mediation/counselling

An increasing number of court lists lead to mandatory reference to some form of counselling, education sessions, mediation, settlement conferences or case appraisal. These mandatory services are, ironically, often a (or the) real benefit of filing in court.

This is because:

- Many disputants are reluctant to attend counselling or education sessions. They ignorantly perceive that emotions have nothing to do with conflict, or that they have nothing to learn, or that attendance at such events is a sign of weakness. The mandatory (and no-cost or low-cost) nature of these events can overcome this ignorance.

- Mandatory settlement conferences or evaluative mediations are conducted by court officers or registrars. Some of these officers are highly respected by lawyers, and are steeped in knowledge about what is the “going settlement rate” in specialist areas of conflict. This means that the Registrar can assist a lawyer to educate his/her reluctant client; can educate disorganised, non-expert and fantasyland lawyers; can order full disclosure of facts where this is delaying settlement; has substantial clout with the lawyers as repeat players who will need to ask for favours from the Registrar in the future; and can make disputants sit waiting in inhospitable court corridors thereby encouraging settlement negotiations.

- There are four well-known reasons why disputants are reluctant to attend interest-based negotiations or mediation, namely loss of information, loss of position, loss of image and lack of negotiation skills. All but the first of these are overcome by the mandatory nature of court-referred mediation.

- Court referred mediation gives lawyers the sense that the Court is looking over their shoulders. There is subtle pressure to negotiate skilfully and co-operate in the
process particularly if as there is a statutory requirement that the mediator report back by ticking a box as to whether each party negotiated “in good faith”.  

- Finally, private counselling, mediation and case appraisal services must be paid for. There are still some court referred services which are low-cost or no-cost as they are subsidised by court filing fees, or by the taxpayer.

21) **Filer wants publicity**

A person who files in a court may be seeking publicity to promote a particular social change. Front page news may motivate a well-known citizen or corporation to silence the critics by a privately or publicly negotiated settlement. The conflict-hungry media are always looking for stories of perceived injustice and crusades for change. This publicity may be cheaper and more effective than buying advertisements or political lobbyists. Thus filing may be particularly attractive to grievants concerning medical negligence, native title, institutional abuse of children, manufacture of defective consumer goods, environmental destruction, abortion, racist or sexist behaviour in organisations.

Of course, the other person who may want publicity is the lawyer acting for one of the disputants. Filing in newsworthy conflicts will attract media attention, interviews and photographs for the lawyers, and ultimately more clients.

22) **Symbolic step for a downtrodden person**

There are many individuals or groups of people who have been treated badly over long periods of time. For example, included are particular members of the following groups – miners, children, native people, females who have been violently victimised, underpaid factory workers, victims of sexual abuse, mentally disabled and powerful hierarchical organisations.

As downtrodden individuals become aware that their treatment is neither normal or right behaviour they sometimes need to file a formal claim rather than just request a meeting for negotiations. This is a symbolic transition from making yet another request to the powerful “oppressor” to demanding “rights” in accordance with rules. This may be part of personal recovery from being systematically exploited and amount to a clear personal statement “I will never be a doormat to you (or anyone else) again”.

23) **To avoid loss of a claim due to limitation period or death**

There are many legal claims which can only be made within a strict time limit from the occurrence of an event. Thus it is essential for a vigilant lawyer to insist that a client file a formal claim if (s) he is anywhere close to the limitation period. Clients

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28 Case Law is emerging steadily on the meaning of “good faith”; see Gain v. Commonwealth Bank of Australia” (1997) 42 NSWLR 252; (farm debt negotiation); Western Australia v. Taylor (1998) 134 FLR 211 (checklist of factors which are necessary to negotiate in “good faith” under the Native Title Act 1993 (Cth)); C. J. Boge, “Does the Trade Practices Act Impose a Duty to Negotiate in Good Faith? (1998) 6 Trade Practices LJ 4

29 Felstiner, Abel & Sarat, “The Emergence and Transformation of Disputes: Naming Blaming and Claiming” (1980 - 81) 15 Law & Society Rev. 631 (increasing awareness levels lead people with grievances to name, blame and claim); see also M. Galanter, “Reading the Landscape of Disputes: What We Know and Don’t Know (And Think We Know) About Our Allegedly Contentious and Litigious Society” (1983) 31 UCLA L. Rev. 4
are apt to forget advice, hope that negotiations will be successful and procrastinate. Inaction leaves the lawyer with a time bomb of accusations from a disappointed client when the limitation period passes by.

Similarly, a considerable number of legal claims evaporate if the applicant dies before filing.\textsuperscript{30} With an ageing population, this puts considerable pressure on older or unwell clients to file as soon as the conflict breaks out. Thereby they preserve their legal claim for their estate if their death precedes a successfully negotiated outcome.

24) **To obtain benefits of consent orders**

Filing an application enables a settlement to be handed to the court in the form of consent orders. Theoretically, the court checks the consent orders to ensure that the agreement is “within the range” of orders that the court might make.\textsuperscript{31}

Additionally, consent orders give greater ability to enforce an agreement quickly rather than just leaving the agreement in the form of a contract.

Finally, because the consent orders are made on the basis of oral and written statements provided to the court, both parties and their lawyers tend to be scrupulously truthful about what is said (or not said). This care usually increases confidence that the settlement has not been induced by false statements.

Moreover, if any deception has occurred, a clear written record of what was stated is intact in the court records. This record can be used to set aside the settlement if the deception is discovered later.

**CONCLUSION**

The exhortation to “stay away from court” is indeed a wise starting proposition. However, it is sometimes too simplistic to be helpful. Likewise, the diagnosis that “my clients wants or needs a day in court” is a dangerously simplistic gloss over a client’s complex life and conflict.

This article restates propositions for lawyers and other conflict managers which are familiar to medical professionals – namely that:

- Conflict, like disease, is complex.\textsuperscript{32}
- Analysing the complex causes of conflict (like the causes of disease) is an essential starting point for conflict managers;
- Quick diagnosis and quick fixes should be avoided;

\textsuperscript{30} eg: Family Law Act 1975 (Cth), s. 79 (property rights between spouses terminate if one dies before filing).

\textsuperscript{31} Harris v. Caladine (1991) FLC 92 – 217 (consent orders cannot be rubber-stamped by Registrars; there must be some evaluation of the consent orders as appropriate based on the facts and the law)

\textsuperscript{32} The analogies between disease and conflict obviously cannot be extended indefinitely. Millions of human conflicts which occur each day are classified as “beneficial” as they cause or are symptoms of personal or structural change for the “better”. Human “disease” may be common or normal, but only infrequently is it the cause or effect of “good”. Sometimes disease is a necessary control of planetary overcrowding, or it is a temporary expedient towards a subjective definition of “health” eg: smoking, immunisation, painful exercise, corrective surgery.
• Clients cannot give “informed consent” to treatment unless they are educated about the range of possible interventions and possible practical side effects of each;

• Client education about choice and risk analysis raises many challenges. These include the cost of education, and the preferences of some clients to avoid complexity and leave life-decisions to a god-like advisor.

• Vague diagnostic language is dangerous. Vague generalisations may hide convincing reasons why some clients need drastic interventions – such as an actual judicial decision (or actual brain surgery);

• It is possible to develop diagnostic checklists which can be very helpful to both professionals and clients. Those set out in this paper indicate, singly or cumulatively, but never definitively, which conflicts probably need (a) a judicial decision or (b) filing of court documents. At a minimal level, these contrary indicators need to be considered by a disputant who wishes to invest heavily in negotiation or mediation.

The ongoing development, discussion and use of checklists by conflict managers is one important method of connecting practice to demystified presumptions and ideas, and vice versa.
APPENDIX A

“DAY IN COURT” DIAGNOSTIC LANGUAGE

A commonly heard phrase from lawyers in Australia, New Zealand and USA (and probably elsewhere) is – “my client wants (or needs) a day in court”.

This statement may well contain a seed of diagnostic truth, but it requires more precise language to discern that seed. More often, this ubiquitous phrase is misleading and unhelpful. It often hides incorrect diagnosis, delusionary treatment and failure to measure the risks of side-effects.

This is because the phrase “my client wants (or needs) a day in court”;

1) reinforces client fantasies that justice, truth and finality are available at an adjudication;33
2) is too vague and has multiple possible meanings (compare the medical equivalent “my client needs a day under the knife”);
3) enables a client or listener to hear whatever (s)he wants to hear in this statement;
4) is false because if clients are sent to watch an adjudication for a day, the majority return convinced that they do not want that process at all. That is, the statement is based upon uninformed consent;
5) is false because event though a client may want an adjudication, less than 10% who commence that process will survive the multiple procedural, attrition and psychological barriers which prevent over 90% of formal filings reaching an actual final hearing.
6) is false because the few systematic studies of those disputants who manage to reach “final” adjudication indicate that the majority are so disillusioned with the process that they conclude they neither “wanted” or “needed” what was received. 34
7) is often spoken without any belief that it is true, but just as a good cop – bad cop negotiation strategy ;35
8) amounts to dangerous over-confidence in an area where diagnostic over-confidence is gradually being classified as professional negligence;
9) fails to distinguish between which part of court procedure the client needs or wants – filings, interlocutory injunctions, extensive disclosure of facts or of a particular fact (discovery); the semi-public catharsis of expansive written allegations of blame; a long delay to allow grieving to occur; the ear of a court official; mandatory mediation or case appraisal; the negotiation crisis at the door of the court; the financial and psychological exhaustion at the door of the court;

34 Eg: M. Delaney & T. Wright, Plaintiff’s satisfaction with Dispute Resolution Process: Trial Arbitration pre-trial conference and mediation, (Sydney: Justice Research Centre), (1997); P. McDonald Settling Up (Melbourne: Prentice Hall, 1986)
the hope of public vengeance or justification; the presence of a bewigged elder; the chance to tell a story in a public venue; the mutual humiliation of cross-examination; the written decision of a wise elder.

10) fails to describe in detail why a particular part of a bureaucratic adjudication is probably or possibly appropriate for this dispute. That is, again the statement is not sufficiently precise on causes of conflict and the range of possible interventions together with side-effects of each;

11) by avoiding detail, it has the appearance of a sloppy and colloquial diagnosis (compare an inappropriate medical analogy – “my client needs a good dose of drugs”);

12) reflects a false assumption that in an era of economic rationalisation disputants have free access to a certain type of adjudicatory intervention.

13) too readily serves the self-interest of the speaker who if a lawyer, is paid more money and suffers nothing if the diagnosis is partly or completely wrong;

14) may be false as the symbolism of a “day” may be literally too long or too short.

In summary, the writer hopes that this over-used, worn out and unhelpful phrase will disappear from the vocabulary of skilled lawyers.
APPENDIX B
CHECKLIST OF INDICATORS THAT A JUDICIAL DECISION WILL PROBABLY BE NECESSARY IN A PARTICULAR CONFLICT

<table>
<thead>
<tr>
<th></th>
<th>YES</th>
<th>NO</th>
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<tbody>
<tr>
<td>1. Need an administrative declaration</td>
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<td>2. Cut and dried bulk cases</td>
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<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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<td>5. Indeterminate results; uncertain rules</td>
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<td>6. Settlement offers wildly divergent</td>
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<td>7. Preservation of a tough commercial reputation</td>
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<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 disputants;</td>
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<tr>
<td>11. Entrenched judicial power over certain social issues</td>
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<tr>
<td>12. The Tribunal as theatre;</td>
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<td></td>
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<tr>
<td>13. Bluffing and playing chicken;</td>
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<td>14. Disputes where one or both disputants are not paying for the process;</td>
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<tr>
<td>15. High conflict about low resources;</td>
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<tr>
<td>16. Adjustive dissonance (each party is adjusting emotionally to loss at different rates);</td>
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<tr>
<td>17. Negative intimacy one (or both) parties’ meaning to life consists of continuing the conflict;</td>
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<td>18. Risk preference (one party enjoys a gamble);</td>
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<tr>
<td>20. Expert helpers actually make the conflict worse;</td>
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<tr>
<td>21. Hanging on to life-meaning values;</td>
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<tr>
<td>22. One or both parties are lawless renegades.</td>
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TOTALS

* 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 ONE “YES” FROM THE ABOVE LIST REACH A JUDGE.
* MANY CONFLICTS WITH TEN OR MORE “YES” ANSWERS FROM THE ABOVE LIST NEVERTHELESS REACH A NEGOTIATED SETTLEMENT AFTER YEARS OF STALEMATE.

NAME
DATE
SIGNED
### CHECKLIST OF INDICATORS THAT FILING A FORMAL CLAIM (IN COURT) WILL PROBABLY BE NECESSARY

<table>
<thead>
<tr>
<th></th>
<th>YES</th>
<th>NO</th>
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<tbody>
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<td>1.</td>
<td>An emergency response to self help;</td>
<td></td>
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<tr>
<td>2.</td>
<td>To get into a queue;</td>
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<tr>
<td>3.</td>
<td>Sanctioned deadlines for exchange of information;</td>
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<td>4.</td>
<td>To gain information from a third party by subpoena;</td>
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<tr>
<td>5.</td>
<td>Negotiations are jammed;</td>
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<tr>
<td>6.</td>
<td>Reduction of cost of endless negotiations;</td>
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<tr>
<td>7.</td>
<td>To compel face-to-face meetings in corridors of courts at interlocutory Hearings;</td>
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