The Five Step Mediation Preparation Model

"Failing to prepare is preparing to fail." — Benjamin Franklin

Heritage Law

Nicole Garton, B.A., LL.B, LL.M., C.Med, FEA, TEP

Summary

The major task in advance of an upcoming dispute, negotiation, conciliation and/or mediation is to prepare yourself to negotiate in the face of uncertainty. We set out a Five Step Mediation Preparation Model and enclose precedent forms you can use for your own mediation preparation.

Introduction

Mediation is essentially a facilitated negotiation. A negotiation is won or lost before it begins by the party who is most prepared.

While success in negotiation is affected by how one plays the game, the most important step for success in negotiation is how one gets ready for the game.

The following are common preparation errors:

- Neglecting to prepare adequately or at all;
- Failure to prepare the "right" information;
- Overconfident prediction of court outcomes;
- Overemphasis on "legal" as compared personal issues;
- Emotional and/or antagonistic thinking and behaviour;
- "Entrapment" – investing too much time and money into the conflict.

In advance of your negotiation or mediation, it is recommended to develop and write out the following Five Step Mediation Preparation Model at least a week prior.

The Five Step Mediation Preparation Model:

1. What **goals** does each party have? This is the reverse of "what **risks** does each party have if the conflict continues"?
2. What are the **causes** of this conflict?
3. What **bumps/glitches** are predictable?
4. What **negotiation strategies** might be helpful?
5. What **substantive outcomes** are possible/probable?

Parties should **prepare** answers to these five questions and hopefully discuss these preliminary answers with their lawyer if they have one and the chosen mediator in advance of the joint mediation meeting. This will assist the mediator to put in place appropriate procedures and interventions to best facilitate success.

In an effort to get in front of the conflict and to plan for success, mediators will usually ask each of the parties the following questions in the pre-mediation sessions:

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

A prepared participant will have thought about and have constructive answers to these questions.

Preparation Question No. 1: What are the **risks** for each party if this conflict does not settle? (What are the goals of each party?)

It is critical to prepare a simple written risk analysis. See the worksheet below.

A party's **risk** is the opposite to a party's **goal**. For example, the risk of delay reflects the goal of speed; the risk of high legal costs reflects the goal of minimising transaction costs; the risk of stress reflects the goal of good health etc. Thus a party's one page of life, business and legal goals can also reflect his/her balancing life, business and legal risks.

These perceived goals and balancing risks will provide the keys to the vast majority of settlements. Many negotiations get stuck when the focus is on "pure" percentages and money. Crossing the monetary gap will depend upon identifying "extra" life goals and risks.

Risks inherent in all mediations that do not settle are the downsides of litigation generally: uncertain out-of-pocket legal costs, uncertain judicial delays and uncertain judicial behaviour.

Specifically, it is often impossible to predict the outcome of litigation with a high degree of confidence. Disagreements on the law occur even in the highest levels of courts. An apparently strong case can be lost if evidence is not accepted, and it is often difficult to forecast how a witness will act in the witness-box. Judicial determinations involve value judgments, discretion and other subjective analysis which are inherently unpredictable. Even well-organized, efficient courts cannot routinely produce quick decisions, and appeals further delay finality. Factors personal to a party and any inequality between the party and other parties to the dispute are also potentially material.

Litigation is highly stressful for most people and notoriously expensive. An obligation on a litigant to pay the costs of another party in addition to his or her own costs can be financially ruinous. Further, time spent by parties and witnesses in connection with litigation cannot be devoted to other, productive activities. Consideration of a range of competing factors such as these can reasonably lead rational people to different conclusions concerning the best course to follow.

Your job is to prepare yourself to make the best possible decisions for yourself in the mediation session in the face of this uncertainty.

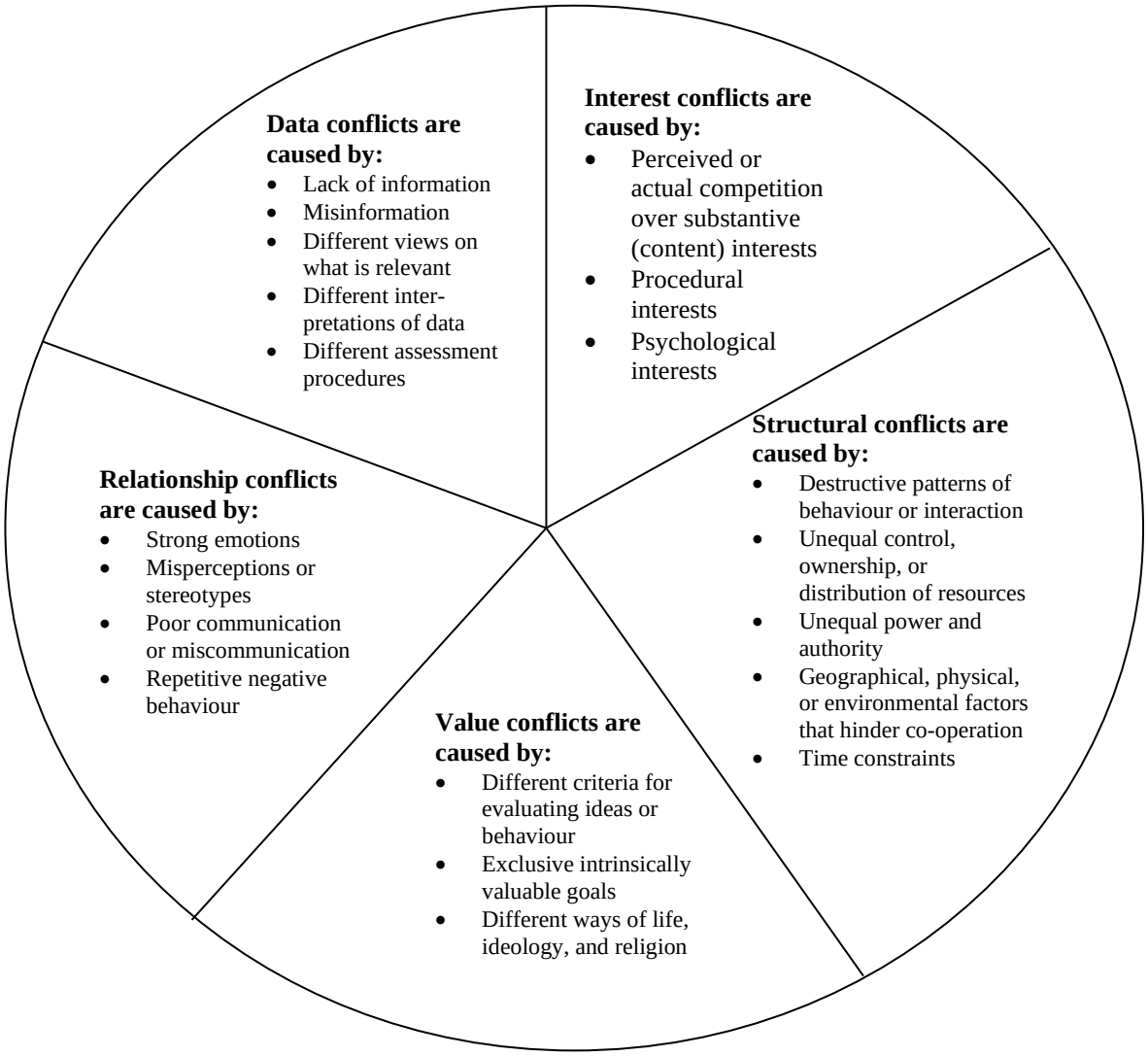
Preparation Question No. 2: What are the **Causes** of the Conflict?

Before jumping into the negotiation fray, a wise party should reflect on:

- the causes of the conflict; and
- the degree of escalation which has occurred.

Wrong diagnosis will inevitably lead to the wrong tactical decisions. As with physical illnesses, a correct diagnosis is needed before appropriate "treatment" or strategic moves can occur.

There are many helpful models developed to assist in the diagnosis of causes of conflict. One is "Moore's circle of conflict" illustrating the five (often overlapping) causes of conflict.[1]



Here are some of the common causes of conflict in family law disputes, using Moore's categories above.

(i) Data or information differences

Which of the duelling expert lawyers, valuers or doctors is more credible?; What might a judge do in one year's time?; What promises were made by or to relatives?; How do teenagers normally behave?; There are/are not assets missing; The children do/do not want to see you; You can earn extra income.

[1] *The Mediation Process: practical strategies for resolving conflict* 2nd ed. (San Francisco: Jossey-Bass 2003); see also J. Folberg and A. Milne, *Divorce Mediation: Theory and Practice* (N.Y.: Guilford Press, 1988).

(ii) Communication difficulties

"Everyone is so upset, we cannot speak without bringing old skeletons out of the closet"; "The messages sent through lawyers letters are always misunderstood and inflammatory"; "The message sent is never the message received"; "Everyone talks, talks, talks – but there is no clarity"; "Mary is so upset that she won't even discuss anything".

(iii) Relationship conflicts

"I cannot be in the same room as her"; "He presses my buttons"; "She/he is a typical female/male"; "Her lawyer is a vicious shark."; "That second wife is the real problem".

(iv) Value differences

"A second spouse/family is more important than the first"; "Someone who cares for a dying person is a saint"; "Aggressive relatives deserve to be punished"; earning income is more/less valuable than homemaking.

(v) Structural conflicts

"We cannot negotiate until we have collected more facts"; "The lawyers keep us apart"; "We do not have the skills/time/venue to communicate clearly"; "The lawyers are giving advice based on different sets of facts – garbage in-garbage out"; "The rich relatives are trying to wear us out"; "The legal system is a lottery"; "My relatives and friends say that I should not give in"; "I think that the lawyers are exacerbating conflict in order to milk the assets".

(vi) Interest conflicts

- SUBSTANTIVE Interest
  "There is only one necklace, ring, grand piano, Christmas Day, holiday house, Van Gogh, and we both want it."
- PROCEDURAL Interest
  - "It is outrageous, before even talking to us, (s)he went to see a lawyer"
  - "They want to have a two-hour meeting where the lawyers do the talking!"
  - "They do not answer our letters/phone calls/requests for information"
- PSYCHOLOGICAL Interest
  This is perhaps the most common cause of conflict in family disputes. There are many theories which are helpful to gain understanding about what is happening for parties. The "presenting" problem is money, but the "real" problem is the roller-coaster of feelings. Elisabeth Kubler-Ross' model of "loss" is sometimes helpful.[2]

We all experience "loss" in our lives (loss of mobility, promotion, youthfulness, parents, hair, hope for the future, self-image, children etc.) and many go randomly through stages of shock, denial, depression, anger, and hopefully acceptance as ways of managing these losses.

---

[2] E. Kubler-Ross, *On Death and Dying* (New York: Basic Books, 1975). M. Evans and M. Tyler-Evans, "Aspects of Grief in Conflict: Re-Visioning response to Dispute" (2002) 20 *Conflict Res Q* 83.

"Adjustive dissonance" is the phenomena where one spouse is adjusting to the loss of a spouse, piano, dream, house, sense of importance, at a different rate to another. "Stop wallowing in your grief, Fred, you've got to move on"; "But it's not fair, look what (s)he has done to the children and me"; "(S)he will come back"; "(S)he will come to her/his senses"; "It is a matter of principle that……".

At the time of a marital separation, senses of "loss" proliferate, and survivors wander up and down the grieving stages for years. For example, loss of a beloved person; familiar accommodation when the family home must be sold; familiar roles of caring; sense of self-esteem when their share of assets is small; cash-flow; a sense of immortality; last chance to have some capital; last chance to apologise or talk through a difficulty; friends; social acceptance.

These "losses" are manifested in the ubiquitous "it's a matter of principle"; "I don't care anymore"; "I can't believe this has happened"; "she just doesn't deserve it"; "I want justice"; and hopefully eventually "I want to get on with my life".

Coupled with the insights from the grieving stages over "loss", is the helpful literature on "intra-psychic conflict" – or in more popular parlance "baggage".[3] That is, we all carry baggage or unresolved hurts and losses from the past. When a loss occurs later in our lives, this baggage "resurfaces", and we replay the old tune. We pretend that this conflict is about money or furniture and the lawyers place the problem quickly and clumsily into a "legal" category of "contribution"; "economic fault"; "need and ability to pay" under the *Family Law Act*.

For example – "She has always treated me this way"; "You remind me of my father's behaviour"; "Our family has a history of doing this"; "She has always been the favoured child"; "He was always more focussed on the business/sport/money than upon us"; "I felt like a failure again" etc.

If we diagnose the wrong **cause**, we will choose the wrong **strategy**.

A purely **settlement** mediator is typically not interested in the causes of the conflict, as (s)he is trying to split the difference between the monetary claims or the overnight stays. An **evaluative** mediator may not be interested in the causes of the conflict as (s)he is trying to guess what a judge might decide and then lower disputants' expectations. However, a **problem-solving** mediator will to a lesser and greater extent, ask clients, tribes and lawyers numerous questions about **causes**.

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

Preparation Question No. 3: What are the Predictable **Hurdles, Bumps and Glitches**?

There are a number of predictable bumps which a negotiation might/would encounter. Many of these follows directly from identifying historic causes of conflict and degree of escalation.

Once identified, these can be discussed openly between the lawyers and parties (and mediator, if applicable). This practice is not pessimistic, but rather aims to lower expectations, and lead to creative suggestions on how to overcome those hurdles.

Some common hurdles may be:

(i) Entrenched relationship conflict. This pattern was likely to continue at any negotiation.

(ii) The experts predicted different likelihood of outcomes. Also the clients may not have heard/listened to advice.

(iii) No history of offers to lower expectations.

(iv) Professionals disliking each other.

(v) Personality differences of parties. Opposites seem to attract. Love is blind, marriage is a magnifying glass.

(vi) Data conflicts about values.

(vii) The uncertainty of case-law.

(viii) How to encourage two busy children to travel to visit their father, when they allegedly find the experience "boring"?

(ix) How to gain agreed clarity on liabilities for tax? Since the separation, record keeping at the alpaca farm had deteriorated, and money had allegedly "moved around".

Not all issues may be settled in one mediation session. In high conflict cases, "success" often needs to be redefined into pieces, and parties encouraged to take small steps.[4]

Preparation Question No. 4: What **negotiation strategies** might be helpful

In the "light" of the perceived **causes** for conflict, and the predicted **"bumps",** what could/should the parties and the mediator plan to do? What strategies may help this family reduce the predictable escalating conflict which lies ahead?

[4] See Pruitt and Kim, *Social Conflict: Escalation, Stalemate and Settlement* 3rd ed (New York: McGraw-Hill, 2003); J.R. Johnson and L.E.G. Campbell, *Impasses of Divorce* (New York: Free Press, 1988).

Based on conflict, intensity, and care for other parties, parties can adopt one or a combination of **five styles of conflict management** in the mediation: collaborating, competing, avoiding, accommodating, and compromising. Managing conflict is function of how assertive a party is in satisfying their own self-concern, and how cooperative they are in satisfying those of the other party.

This figure shows where each style of conflict management is placed according to how much assertive and cooperative it is.

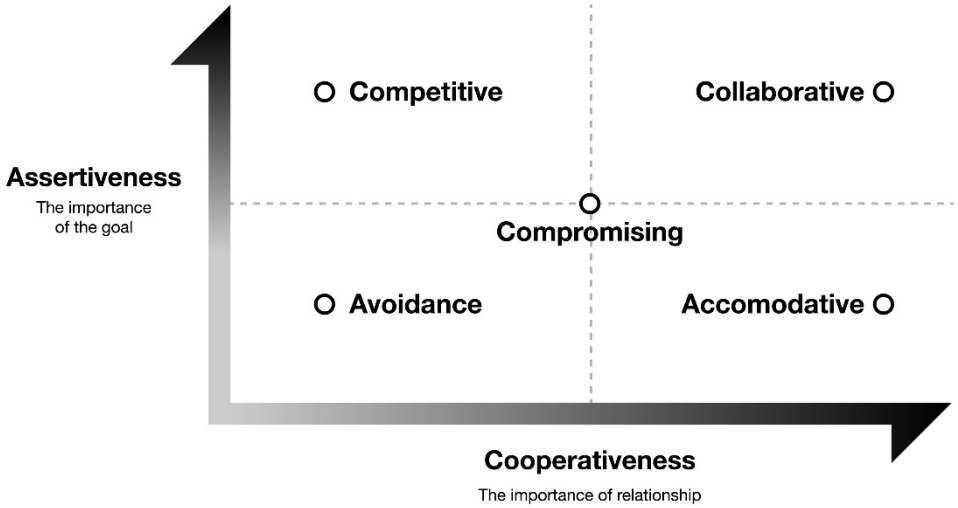


Figure 1: Approaches to Managing Organizational Conflict Model. Source: Thomas (1992)

The avoiding style of conflict management has both the lowest cooperation with other parties and lowest assertiveness of a party's own interests. This style is often used to hide from a situation or to avoid immediate stress. Moreover, it usually does not address the underlying conflict sources. Its main advantage is a cooling down of conflict whenever there are no clear solutions. Avoidance is based on distancing from problems and is effective for small problems and for difficult and escalating problems with no clear or immediate solution.

The accommodating style takes place whenever there is total cooperation with the other party while not asserting one's own concerns. Accommodation is not necessarily a sign of weakness. It may be the best and most suitable style of conflict management in certain situations, especially when the party accommodating is aware that he is wrong or when he wants improve goodwill with other parties to the conflict.

The compromising style fits in the center, with intermediate levels of cooperation and assertiveness. It is a compromise between pure competition and pure accommodation and is based on accomplishing a balance between personal and common interests. This approach is labeled as, distributed conflict management" because no one gets

exactly what they want but rather a portion of everyone's goals is accomplished. This conflict management strategy doesn't generally resolve the underlying sources of disputes but rather finds a way around them. Particularly with respect to relational disputes, the underlying causes often remain despite the overt compromise.

The competing style, also known as the dominating or contending style, is when parties try to force their will, wishes, and perspectives on others, creating competition between parties. Contending blocks other people from achieving their goals and can elicit feelings of anger, stress, and distrust which lead to misunderstandings and potentially damaged relationships. It has the characteristics of maximum assertiveness for one's own concerns and a minimum cooperativeness with another's concerns. This is a zero sum, win-lose conflict management strategy which can have adverse long-term outcomes for a family. Contending works best when a party has all the power and doesn't care about long-term relationships or wants to take the risk of damage to long-term goodwill in order to take control of a dangerous or difficult situation.

In the collaborative conflict management style, both the assertiveness to satisfy one's own concerns and the cooperativeness to satisfy the other party's concerns are maximized. Also known as an integrating conflict management style, this strategy results in a mutually acceptable situation that accommodates all concerned parties and is considered win-win. When it's possible, the collaborative conflict management style increases effectiveness, leads to solutions that satisfy all parties, and reduces the chance that conflicts will re-emerge. The result of such style is the satisfaction of the interests of both parties involved in the conflict.

In addition to style choice, **each party should reflect on effective tactics**. Chris Voss in his book *Never Split the Difference* has the following tips:

Negotiation begins with listening, making it about the other people, validating their emotions, and creating enough trust and safety for a real conversation to begin. Use mirrors to encourage the other side to empathize and bond with you, keep people talking, buy your side time to regroup, and encourage your counterparts to reveal their strategy. Tactical empathy brings our attention to both the emotional obstacles and the potential pathways to getting an agreement done.

Giving someone's emotion a name, otherwise known as labeling, gets you close to someone without asking about external factors you know nothing about. Get the other party to say no. "No" provides a great opportunity for you and the other party to clarify what you really want by eliminating what you don't want.

Preparation Question No. 5: What **substantive outcomes** are possible/probable?

What are the possible/probable outcomes to this dispute?

What it would look like to "go to court" is always relevant to preparation. One must always know one's "best alternative to a negotiated agreement" [BATNA]. Unrealistic assessments of the outcome and impact of litigation impede the negotiation process. A thorough risk assessment should produce a tipping point for each side, sometimes called the reservation value or the walkaway point, as one way

to measure settlement options – and mediators sometimes use 'risk assessment conversations' to overcome impasse. Well-prepared clients and lawyers will have done this assessment which includes the following phases:

Develop projection for most likely outcome

Step 1: Understand and Calculate Risks on Liability

1. Break each cause of action into its elements.
2. Assign probability: consider law and evidence (proof).
3. Assess overall probability of success: COMPOUND
4. Go through the same process with respect to DEFENSES.

Step 2: Project Damages

1. Break it down into heads/types of damage.
2. Assign a most likely outcome (considering probability) for quantum on each. Consider law and evidence (proof).
3. Add up #2 for each head of damage.

Step 3: Assess – multiply steps 1 and 2

Liability projection x Damage projection = most likely outcome

Step 4: Assess Process Costs

1. Consider the client interests and impact of the litigation. Consider the significance and value of each:

   Internal (and less visible) business costs
   Reputation, identity interests
   Family, business, community relationships
   Impact on third parties
   Psychological strain of uncertainty and conflict
   Loss of time and energy to advance other "life goals"

2. Project full and direct financial cost of the litigation.

   Most likely outcome – process costs = expected value of case

From: Heaving and Keet, Client-Centered Communication: How Effective Lawyering Requires Emotional Intelligence, Active Listening, and Client Choice (2021) 22(2) Cardozo Journal of Conflict Resolution 199, at 199-20

Conclusion

Only three things matter in negotiation and mediation – preparation x 3. Yet skilful and thoughtful preparation is rare.

Congratulations on putting in the work to resolve your matter and best wishes to resolve your dispute to the benefit of all parties.

Preparation Worksheets

Here are three worksheets to use when preparing for negotiation or mediation. Depending on your level of trust of the mediator and the other party, these documents can be shown in part or in whole to them.

- Negotiation Planning Worksheet
- Risk Analysis Worksheet
- What Documents to Consider Preparing for a Mediation

NEGOTIATION PLANNING WORKSTREET

"PROBLEM" DEFINITION – I must negotiate with ……..…….. to solve the following problems.

(1)	**(2)**
(3)	**(4)**

PARTY	GOALS, INTERESTS and PRIORITIES	POSITIONS (SOLUTIONS) 1. INSULT 2. TARGET 3. RESERVA-TION	"PERSUASIVE" PROPOSITIONS and "LEVERS"	APPROACH TO NEGOTIATION	OPENING and CONCESSIONS	CREATIVE OPTIONS/ PACKAGES	"OUTSIDE" ALTERNATIVES (BATNA;WATNA)
OWN SIDE							
OTHER SIDE							

Party Information Worksheet – Risk Analysis

NAME _____

Possible risks if conflict continuing to the door of the court (or occasionally even to the Umpire)	Applicable to me ☑/☒	Estimated $ value Best to worst	Applicable to other disputants	Estimated $ value Best to worst
1. …….Years of personal stress and uncertainty				
2. …….Years of stress of family members				
3. …….Years of stress on others and my work associates				
4. …….Weeks of absenteeism from work				
5. …….Weeks of lost employee time preparing for court				
6. …….Years of lost concentration and focus at work				
7. Life/business on hold for …….years				
8. Inability to "get on with life" for …….years				
9. Embarrassment and loss of good will when relatives/friends/ business associates are subpoenaed to court				
10.Negative publicity in press or business circles				
11.My lawyer's fees				
12.My accountant's fees				
13.My expert witness's fees				
14.Outcome less than offer on the table				
15.Possible costs order against me				
16.Interest lost on money received later rather than sooner				
17.Loss of control over my life to professionals				
18.Post litigation recriminations against courts, experts and Parties				

19.Loss of value by court ordered sale/appointment of receiver etc				
20.Lost future goodwill with and "pay backs" by opponents				
21.Cost and repeat of all previous factors if there is an appeal				
ESTIMATED TOTAL of Transaction Costs (best to worst)*		$		$

Date _____

Signed _____
(party)

NB: These are only rough estimates. All these figures will fluctuate up or down as the conflict develops and as more factors emerge.

Documents to Prepare for a "Mediation", Negotiation or Conciliation

1. **Chronology of "relevant" events**
2. **"Legal" documents (especially for evaluative mediation)**
3. **List of "things" or goals which are allegedly agreed upon**
4. **List of emotional, substantive and procedural *goals* of the party in order of priority**
5. **List of legal issues**
6. **List of problem solving questions**
7. **History of offers with dates**
8. **Good day – bad day legal advice;**
   Good day – bad day legal costs (3 sentences)
9. **Risk Analysis if conflict continues (cross-referenced to "*goals*" in 4)**
10. **5 Part Preparation Model**
    a. **Risk analysis and party goals**
    b. **Causes of conflict**
    c. **Possible glitches/"challenges"**
    d. **Possible helpful interventions**
    e. **Possible substantive outcomes**