

2025

WILLS & ESTATES CPD SUPER DAY

SVENSON
BARRISTERS



SESSION 3:

'WHAT GOES WRONG FOR SOLICITORS - ETHICAL DISCUSSION'



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TOP TIPS

1. Intake – Pre-Conference
2. Communication
3. Three layers of confidentiality
4. BATNA WATNA
5. Disclosure of critical documents
6. What are your ethical obligations?
7. Documenting the agreement

Intake

First port of call.

Can discuss a wide range of issues to:

1. Save time throughout the day,
2. Ensure all expectations are set by all parties,
and
3. Avoid mistakes.

Intake

AMDRAS Professional Domains:

Registered Practitioners (RPs) must ensure that participants are provided with the following:

- (a) a description of the dispute resolution process and the steps involved.**
- (b) information on how to provide feedback or lodge a formal complaint in relation to the practitioner.**
- (c) The initial assessment or intake may be conducted by a person other than the RP. It can take the form of a preliminary conference with the parties and should include:**
- (d) assessing what dispute resolution process is suitable and whether variations are required (for example, using an interpreter or a co-mediation model in culturally and linguistically diverse communities, Indigenous Australians, or introducing safeguards where violence is an issue).**
- (e) explaining to participants the nature and content of any agreement or requirement to enter mediation or a dispute resolution process, including confidentiality, costs and how they are to be paid.**
- (f) identifying who is participating in the process and to what extent participants have authority to make decisions.**
- (g) deciding venue, timing, and other practical issues.**
- (h) ensuring the provenance and verification of documents**

Communication

WHY?

Confidentiality

The 3 layers of confidentiality

Lawyer Client

Mediator Parties

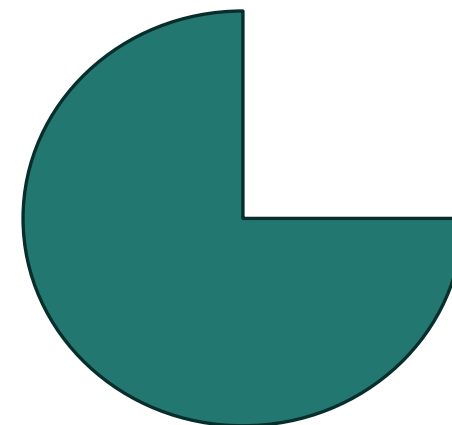
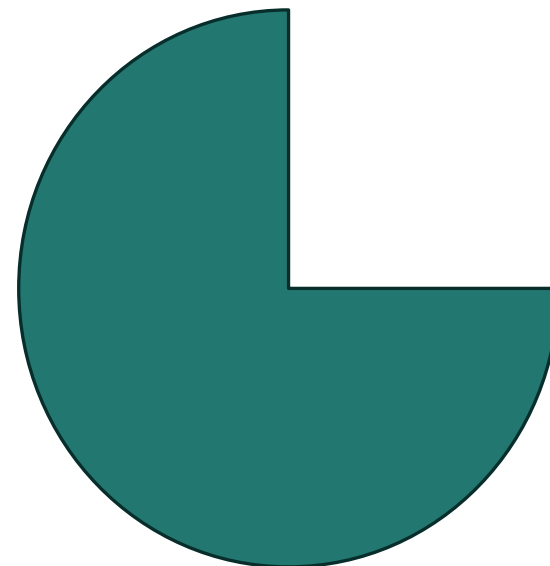
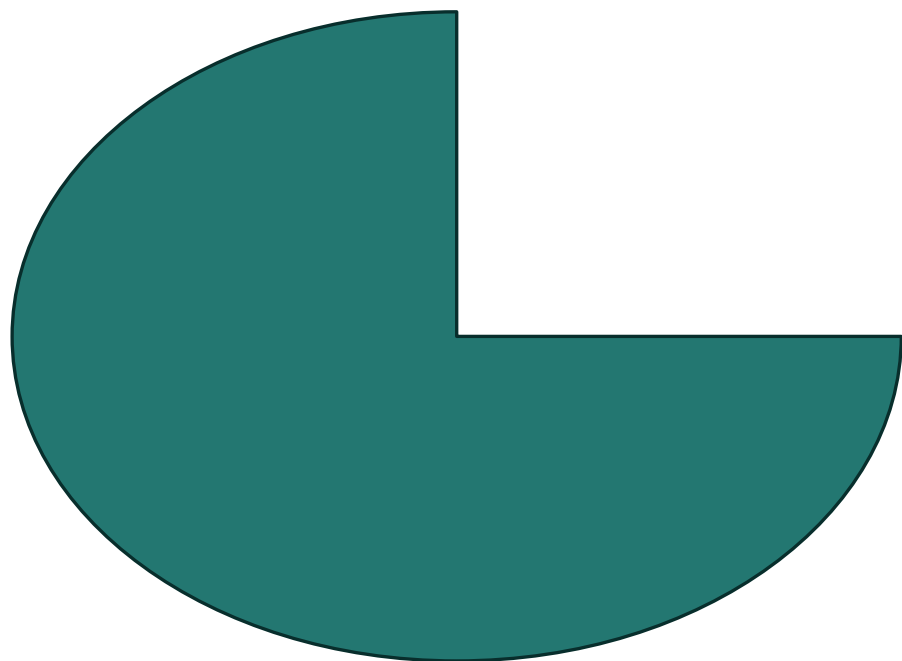
Mediator Lawyers Parties

BATNA WATNA*

1. Focus on WATNA
2. Be realistic
3. Find your ZOPA

*Developed by Roger Fisher and William Ury from the Harvard Negotiation Project, authors of the book :Fisher, Roger; Ury, William (1981). Getting to Yes: Negotiating Agreement Without Giving In (1st ed.). Boston: Houghton Mifflin.

BATNA WATNA



Disclosure of critical documents

- CIVIL PROCEDURE ACT 2010 - SECT 26 Overarching obligation to disclose existence of documents (1) Subject to subsection (3), a person to whom the overarching obligations apply must disclose to each party the existence of all documents that are, or have been, in that person's possession, custody or control—
 - (a) of which the person is aware; and
 - (b) which the person considers, or ought reasonably consider, are critical to the resolution of the dispute.
- (2) Disclosure under subsection (1) must occur at—
 - (a) the earliest reasonable time after the person becomes aware of the existence of the document; or
 - (b) such other time as a court may direct

Disclosure of Critical Documents

County Court Practice Note (Family Property List) PNCLD 4-2023

4.20 The following documents will generally be considered to be critical to the resolution of a List proceeding:

(a) where financial need is relied upon by any party or beneficiary (for both the person with financial need and any spouse of that person):

(i) current proof of balance or latest bank statements for all savings accounts

(ii) evidence of current liabilities (e.g., latest credit card statements, loan account statements)

(iii) evidence of current superannuation balance

(iv) tax returns and notices of assessment for the last two years (if lodged)

(v) where income from employment is received:

(A) PAYG summaries for at least two pay periods

(vi) where Centrelink payments are received:

(A) Centrelink payment summaries for the last two years

(B) a Centrelink income statement obtained within the last three months.

(b) for the executor or administrator:

(i) the inventory of assets and liabilities filed with probate

(ii) current estate accounts providing a list of current assets (with valuation where appropriate); liabilities; a summary of income received and expenses paid; and an estimate of costs and future liabilities.

What are your ethical obligations?

- Must not misrepresent even by omission
- *Legal Services Commissioner v Garrett* [2009] LPT 12
- *Legal Services Commissioner v Mullins* [2006] LPT 012

What are your ethical obligations?

- *Legal Services Commissioner v Garrett* [2009] LPT 12.

“26 Whether it is reasonable for a solicitor in the position of the respondent to rely on counsel’s advice will be affected by many factors. In the circumstances of this mediation, the respondent was not a passive recipient of counsel’s advice, but brought his own legal knowledge, skill and experience to his consideration of it. The observations made by Kirby J in the context of an allegation of professional negligence in *Boland v Yates Property Corporation Pty Ltd* (1999) 74 ALJR 209, 240 [142] are apposite.”
Per Mullins J (at[26])

Documenting the agreement

- Masters v Cameron (1954) 91 CLR 353
- Janati V Nulis Nominees (Australia) Limited (ACN 008 515 633) & Anor [2024] VCC 1826 Per Tran J
- “Best practice, in a court-ordered mediation, requires: (a) agreement (ideally before the mediation commences, but at least before it concludes) as to whether any oral agreement reached is immediately binding, or only binding after it is formally documented; (b) agreement as to whether any party requires an accredited interpreter to attend the mediation, or for any document to be translated; and (c) before the mediation is concluded, agreement on the next steps and any remaining issues to be addressed. Best practice was not followed in this case. I venture to suggest that it is not followed in many mediations. This is what can happen if it is not.” (at[1])

Documenting an agreement

Principles in determining enforceability:

Sully v English [2022] VSCA 184 per NIALl, SIFRIS and WALKER JJA

- “(a) the parties intend to be bound immediately, though expressing a desire to draw up their agreement in a more formal document at a later stage;
- (b) the parties intend to be bound immediately, but may wish the operation of a particular clause or term to be delayed pending the drawing up of a more formal document; or
- (c) the parties intend to postpone the creation of contractual relations until a formal contract is drawn up and executed.

Since *Masters v Cameron* was decided, Courts have recognised a fourth category — that being where the parties intend to be bound immediately by terms which they have agreed upon, whilst expecting to make a further contract in substitution for the first contract containing, by consent, additional terms.” (at [62])

Final Thoughts

- Prepare
- Communicate
- Listen