# EFFECTIVE AND ETHICAL NEGOTIATIONS

## Paper for the NSW Bar Association by Campbell Bridge SC – February 2011

1. The courts have traditionally expressed the paramount duty of lawyers as being a duty owed to the court. In Giannarelli v Wraith (1988) 165 CLR 543 Mason CJ described the obligations in the following terms:-

   "*A barrister's duty to the court epitomises the fact that the course of litigation depends on the exercise by counsel of an independent discretion or judgment in the conduct and management of a case to which he has an eye, not only on his client's success, but also to the speedy and efficient administration of justice. In selecting limiting the number of witnesses to be called, in deciding what questions will be asked in cross examination, what topics will be covered in address and what points of law will be raised, counsel exercises an independent judgment so that the time of the court is not taken up unnecessarily, notwithstanding that the client may wish to chase every rabbit down its burrow. The administration of justice in our adversarial system depends in a very large measure on the faithful exercise by barristers of this independent judgment in the conduct and management of the case*."

2. The proper conduct of one's profession as a lawyer involves balancing many competing responsibilities to the courts, the community, one's profession, and to oneself. Acting in an adversarial capacity in positions of conflict highlights the difficulties associated with being confronted with numerous responsibilities to both individuals and institutions. The ethical standards which are imposed upon lawyers recognise that inherent in the lawyer's duty to the court are duties to society to uphold the proper and efficient administration of justice. There are duties to their professional colleagues to maintain high ethical standards which in turn are vital to upholding the rule of law. Such duties overlap and are interrelated. There are a series of fundamental obligations and responsibilities which must be balanced in dealing with the responsibilities of acting for a client, and the responsibilities which attach to our privileged position as lawyers. Further specific responsibilities, often misunderstood by both lawyers and clients alike, arise when engaging in negotiations.

3. In dealing with the complexities and apparent conflicts which arise from the lawyer-client relationship, it is essential that lawyers and clients alike never lose sight of a number of propositions which are set out and explained in some detail in *Legal Practitioners Complaints Committee -v- Fleming* [2006] WASAT 352:-

- Lawyers are under a stringent legal and professional obligation to the Court, their clients, the community and the administration of justice.
- If a client wants a lawyer to act contrary to professional obligations, the lawyer should, as he or she is entitled to do, decline to act further. Where the client's instructions may run counter to normal ethical principles and a practitioner's own personal standards, he or she should decline to act in accordance with those instructions.
- As the rules and the cases make clear, a practitioner is not a mere agent and mouthpiece for his client, but a professional exercising independent judgment and providing independent advice.
- A practitioner's duties to his client and his duties to the Court, do not exhaust his professional responsibilities.
- The duty to the Court may be seen as a duty to the community in the proper administration of justice. As an officer of the Court concerned in the administration of justice, a practitioner owes duties also to the standards of his profession, to the public and to his fellow practitioners.
- Honesty, fairness and integrity are also of importance in negotiations because they are conducted outside the Court and are beyond the control which a judge hearing the matter might otherwise exercise over the practitioners involved.
- It is no answer to the complaint of unprofessional conduct by misleading the Court in that the practitioner acted on the expectation that the true position would be revealed in the course of the case. (*Legal Practitioners Complaints Committee -v- Fleming* [2006] WASAT 352, *Kyle v Legal Practitioners Complaints Committee* (1999) 21 WAR 56).
- The courts recognise that there is significant public interest in practitioners acting professionally both in the conduct of litigation and in matters ancillary to it.
- The rules regulating professional conduct do not provide a code. They are simply a guide to appropriate professional behaviour.

4. The provisions of the NSW Barristers' Rules which are referred to in this paper are expressly incorporated in the Law Society of NSW Professional Conduct and Practice Rules under Rule 23 (which relates to advocacy rules). The section goes on to make the rules expressly referable to all legal practitioners. A number of those rules are relevant to negotiations.

5. As lawyers we have an over-riding obligation to advance and protect the client's interests to the best of one's ability. This includes an obligation not to encourage the client to act to his or her financial detriment when a solution with less personal and financial cost such as settlement may be open. This sentiment is specifically incorporated in the Bar Rules which provide as follows:-

> *"17 A practitioner must seek to assist the client to understand the issues in the case and the client's possible rights and obligations, if the practitioner is instructed to give advice on any such matter, sufficiently to permit the client to give proper instructions, particularly in connexion with any compromise of the case.*
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> *"17. A practitioner must inform the client or the instructing practitioner about the alternatives to fully contested adjudication of the case which are reasonably available to the client, unless the practitioner believes on reasonable grounds that the client already has such an understanding of those alternatives as to permit the client to make decisions about the client's best interests in relation to the litigation."*

6. The rules impose an obligation to actively encourage settlement of a case, not just inform the client of the settlement option. The obligation arises in respect of a lawyer's responsibilities to both the client and to the court. Even if one's client takes the attitude that he or she is not particularly interested in compromise or settlement, the fundamental obligations of a lawyer remain. In such circumstances, the client must be told of these matters. If the client chooses to ignore that advice (as sometimes happens), then the lawyer has at least discharged his or her obligations.

7. In *Skinner & Edwards (Builders) Pty. Ltd. -v- Australian Telecommunications Corporation* (1992) 27 NSWLR 567 at 571, Cole J (as he then was) said as follows:-

> *"The Court expects parties in …….litigation….to act in a sensible …….fashion. That imposes upon the parties an obligation to consider the*

*ultimate financial outcome of litigating or compromising a dispute. Unless there be some major matter of principle involved, there is no point in a party to commercial litigation succeeding and establishing a factual circumstance or legal consequence at a net cost or loss.*

*The expectation the Court has that parties will act sensibly imposes a very heavy duty indeed upon legal advisors, both barristers and solicitors. They have in my view, an obligation at the commencement of litigation in this division to advise their clients of the likely duration, inconvenience and cost of litigation upon alternative success, qualified success or loss. Only then can a client make a sensible commercial decision regarding litigation or compromise."*

8. The comments of Cole J. are not confined to commercial litigation. The effect of Rule 17 is to enshrine this practical and common sense obligation in a formal rule. There is little doubt that the obligation will require re-consideration at various stages during the conduct of proceedings. It is an ongoing obligation.

**ETHICS OF NEGOTIATIONS**

9. The topic the subject of this paper involves two distinct words – *"effective"* and *"ethical"*. The proper conduct of one's profession as a lawyer requires the philosophies underlying these two words to be conducted in an inter-related fashion. The proper conduct of negotiations utilising the above philosophies will have, at the very least, advantageous effects when it comes to effecting settlements.

10. It cannot be over-emphasised that in any of your dealings with fellow professionals, your integrity and trustworthiness is paramount. It is very much easier to negotiate and work towards a satisfactory resolution of the case if both parties believe what they are told. This does not involve laying one's cards on the table during the course of negotiations.

11. The duty to negotiate ethically does involve the concept of not actively misleading the other side. It is critical for many reasons, not the least of them ethical, that a party engaging in negotiations does not actively mislead the other side or, by acquiescence, cause the other side to be misled.

12. The issue of ethical behaviour in the context of negotiations involves at its heart the fundamental proposition that a lawyer must never make a representation to an opponent which he or she knows to be untrue. A lawyer must not permit an opponent to act upon the representation which the lawyer knows to be untrue. The Law Society Rules provide as follows:-

*"51. A practitioner must not knowingly make a false statement to the opponent in relation to the case (including its compromise).*

*52. A practitioner must take all necessary steps to correct any false statement unknowingly made by the practitioner to the opponent as soon as possible after the practitioner becomes aware that the statement was false.*

*53. A practitioner does not make a false statement to the opponent simply by failing to correct an error on any matter stated to the practitioner by the opponent."*

13. These rules are to be looked at in conjunction with Rules 21 - 23 (which relate to one's obligation to the Court). Rules 51 – 53 deal with obligations to opponents.

14. The Fair Trading Act provides as follows:-

*"42(1) A person shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.*

*(2) Nothing in this Part shall be taken as limiting by implication the generality of subsection (1).*

*43(1) A supplier shall not, in trade or commerce, in connection with the supply or possible supply of goods or services to a consumer, engage in conduct that is, in all the circumstances, unconscionable."*

15. There is no reason why a lawyer engaging in misleading and deceptive conduct on behalf of his or her client may not, along with the client be liable for a breach of the Fair Trading Act, or, in an appropriate case attracting its operation, the consumer protection provisions of the Trade Practices Act 1974.

16. There is obvious tension between obligations of frankness and disclosure and the necessity of secrecy in relation to some aspects of negotiation. The Courts have considered from time to time the concept of misleading and deceptive conduct in this context. As a general proposition, although lawyers may be liable for actual misrepresentation, they will generally not owe any common law duty of care to opposing parties involved in litigation (*Orchard -v- South Eastern Electricity Board* [1987] 1 QB 565).

17. In *Lam -v- Austintel Investments Australia Pty. Ltd.* (1989) 97 FLR 458, Gleeson CJ at 475:-

> *"Where parties are dealing at arms' length in a commercial situation in which they have conflicting interests it will often be the case that one party will be aware of information which, if known to the other, would or might cause that other party to take a different negotiating stance. This does not in itself impose any obligation on the first party to bring the information to the attention of the other party, and failure to do so would not, without more, ordinarily be regarded as dishonesty or even sharp practice."*

18. In *Legal Services Commissioner -v- Mullins* [2006] LPT 012, Mr. Mullins, a junior barrister in Queensland acting for a plaintiff in a personal injury case, was found guilty of professional misconduct and fined. In that case an expert report of Evidex had been served. The Evidex report included a comprehensive assessment for an occupational therapist of the then 48 year old plaintiff's future care needs and an accountant's valuation of the costs of that care. The report contained specific representations as to the plaintiff's life expectancy. The report set out a series of actuarial calculations based upon particular life expectancy. Negotiations proceeded upon the basis that Mr White (the Plaintiff in the principal proceedings) had a normal life expectancy for man of his age less 20% to reflect the injuries and disabilities consequent upon the subject accident.

19. A mediation of the personal injury case was set for 19 September 2003. On 16 September, Mr Mullins conferred with the Plaintiff and his solicitor, a Mr Garrett. During the course of a discussion at the conference about a draft schedule of damages to be given to the Defendant and used at the mediation, the Plaintiff said that he was to

receive chemotherapy treatment for secondary cancer which had been detected on his lungs and in other places throughout his body and that these matters had been discovered, at the earliest, on or about 1 September 2003. The significance of these matters, in terms of the Plaintiff's life expectancy, is obvious. Mr Mullins sought instructions from the Plaintiff to disclose these matters to the Defendant. He was instructed not to do so. Mr Mullins also consulted Senior Counsel about his predicament. In the absence of specific advice that he must disclose the cancer diagnosis, Mr Mullins did not disclose this fact to the defendant insurer or its lawyers prior to the mediation and consequent settlement of the case.

20. Mr Mullins conducted some preliminary discussions with his opponent, Mr Kent, about the Plaintiff's case. He attended the mediation and there provided Mr Kent with a schedule of damages with calculations patently based upon a normal life expectancy less 20%.

21. Quite obviously, the poor prognosis in relation to the cancer diagnosis had the effect of dramatically reducing those calculations based upon a necessity to revise the life expectancy figure. The offer of the insurer (Suncorp Metway) included allowances for care, future economic loss and general damages upon the basis of the Plaintiff's life expectancy as per the Evidex report. The insurer was unaware of the cancer diagnosis at the time the case settled. When the cancer diagnosis came to the notice of insurer and the insurer ascertained the fact that the Plaintiff's counsel was aware of the cancer diagnosis without disclosing that fact, a complaint was made resulting in the disciplinary proceedings against Mr. Mullins.

22. In dealing with the complaint, the Legal Practice Tribunal said as follows:-

*"[30] By continuing to call the Evidex reports in aid as information supporting Mr White's claim after learning the cancer facts and recognizing their significance for the validity of the life-expectancy assumption, the respondent intentionally deceived Mr Kent and Suncorp representatives about the accuracy of the assumption. He did so intending that Mr Kent and Suncorp would be influenced by the discredited assumption to compromise the claim: which happened.*

*[31] The fraudulent deception the respondent practised on Mr Kent and Suncorp involved such a substantial departure from the standard of conduct to be expected of*

*legal practitioners of good repute and competency as to constitute professional misconduct."*

23. In *Legal Practitioners Complaints Committee -v- Fleming* [2006] WASAT 352, Mr. Fleming, a legal practitioner who carried on practice as a solicitor in Western Australia, acted for a client in relation to a resolution of a dispute about a will. The dispute concerned claims by some siblings of the deceased as to the validity of their late mother's will and the distribution of the estate. In that case, Mr. Fleming, on his client's instructions, in the course of negotiations with the client's siblings, did not disclose the informality of the will in the course of obtaining a covenant from the siblings not to challenge the will. Mr. Fleming fully expected the sibling's solicitor to request a full copy of the will. This omission on the part of his opponent did not in any way ameliorate what was found to be unethical behaviour on the part of Mr. Fleming, especially as he was found to be *"the moving force…..in the other side's misconception".* He was found to be guilty of unprofessional conduct and was fined $7,500 and ordered to pay costs.

24. Commencing at paragraph 65 in Fleming, there is an instructive passage headed "*The professional duties of practitioners in settlement negotiations*". It should be borne in mind that in *Fleming's* case, the practitioner engaged in a course of conduct over some months which was intended to mislead the opposing party and which in fact did so, albeit, it was done on Mr. Fleming's client's express instructions. The administrative tribunal dealt with a number of the issues which arise from such a situation in the following terms:-

*"[68] The practitioner's obligations upon receipt of his client's instructions to keep secret the informal nature of her deceased husband's will and to proceed to obtain probate without the consent of the other party, were clear. He ought to have advised his client that the proposed course of conduct was likely to reflect poorly on the client's credit and honour (the Rules r 12.1).....an ex parte application was proposed to be made to the Court for probate of the will. In respect of that application he was under a stringent legal and professional obligation to disclose to the Court all relevant circumstances, including the other party's interest in and rights to challenge the grant of probate (and probably also the fact that the parties were in dispute). If, notwithstanding that advice, she insisted he proceed and he was prepared personally to do so, he ought to have advised her that.....he could not conduct*

*the negotiations in such a way as to suggest that a formal will existed or procure the other sides' consent to probate upon a false basis. Further, in relation to the application to the Court, to the extent that it could properly proceed at all, he would be obliged to advise the Court that, by reason of his client's instructions, he could not assure it that all relevant matters which ought to have been revealed had been disclosed. If she insisted nevertheless that he proceed with such negotiations and application contrary to that advice, he should, as he was entitled to (r 12.3), have declined to act further."*

25. The following observations of the Tribunal about obligations to the administration of justice and opponent (and not just one's client) are significant:-

*"[71] The lesson from a case such as this, is that where the client's instructions may run counter to normal ethical principles and a practitioner's own personal standards, he or she should think seriously before proceeding in accordance with those instructions. Practitioners who engage in misleading conduct or sharp practice can hardly expect to receive the trust and respect of their colleagues (much less of the Court). Yet such trust and respect is a fundamental requirement of a practitioner's practice if he or she is properly to play his or her part in the administration of justice and adequately to serve the interests of his or her client. Where in this type of situation the practitioner seeks guidance from the Rules, he or she ought to bear in mind that it is both the letter and the spirit of such rules which govern their conduct."*

26. The suggestion from Mr. Fleming that he expected the true situation to be apparent to his opponent did not assist him. In dealing with this issue, the Tribunal said as follows:-

*"[77] The fact that, in the normal course, a practitioner's improper conduct might be exposed, and the harm avoided by a "due diligence" undertaken by his opponent, does not alter the impropriety in any respect. In the same way that practitioners owe duties to the Court, such as drawing unfavourable authorities to the attention of the judge, irrespective of the work (or neglect) of their opponents, so in settlement negotiations or other dealings with their opponent, or indeed (and particularly) with a litigant in person, a practitioner must be perfectly candid."*

27. Particular care must be taken when drafting or settling documents such as witness statement or affidavits to ensure that there is nothing in those documents which could ultimately be construed as a misrepresentation which the author of the document knows

to be untrue. This is consistent with the duty of candour and honesty which imposes on lawyers an obligation to present evidence to the court which is not only relevant and admissible but also not misleading. In Myers v Elman [1940] AC 282 the House of Lords dealt with a case where a solicitor was alleged to have filed a defence which he must have known or suspected to be false. The House of Lords said that a solicitor:-

> *"cannot simply allow the client to make whatever the affidavit or documents he thinks fit, nor can escape the responsibility of careful investigation or supervision. The client will not give any information which is entitled to require, or if the client insists on swearing an affidavit which the solicitor knows to be imperfect, the solicitor's duty is to withdraw from the case. A solicitor who has innocently put upon the file an affidavit by his client which he subsequently discovers to be false, owes a duty to the court to put the matter right at the earliest moment if he continues to act as solicitor on the record."*

28. Particular difficulties will arise in situations where evidence which is filed is alleged to be misleading because it is incomplete in material respects but negotiations or litigation continue upon the not unreasonable assumption by the other side that the evidence represents the true, correct and complete version of the witness' evidence. In Williams & Ors v Commonwealth Bank of Australia [1999] NSWCA 345 an issue arose with respect to the truth of an unsigned statement which had been provided at a mediation. The witness in question had apparently declined to sign the statement because facts which he asserted were material were omitted. The question before the court was whether such a statement sent by the solicitor for one party to the solicitor for other party for the purposes of mediation was capable of amounting to representation that person to whom statement attributed had approved it. There were also issues about whether the sending of statement evidence of misleading or deceptive conduct for the purposes of the Trade Practices Act. Meek v Fleming [1961] 2 QB 366 is authority for the obvious proposition that it is a breach of duty to the court for a legal practitioner to disclose only some factual information while withholding any remaining relevant information.

29. In Kyle v Legal Practitioners Complaints Committee [1999] WASCA 15 a barrister was alleged to have misled the court into a belief that a witness had executed documents. The barrister had known seven days prior to the trial that a deed in question had not

been signed by a particular witness. The barrister deliberately created the impression until the second day of the trial that the defence would proceed upon the basis that the witness had in fact executed the deed. On appeal from the Legal Practitioners Disciplinary Tribunal, the Full Court of the Supreme Court of Western Australia, the Court (Ipp, Steytler and Parker JJ) upheld a finding of the Legal Practitioners Disciplinary Tribunal that the barrister was guilty of unprofessional conduct. The basis of a finding was attempting to mislead the court. A detailed discussion of the nature and extent of the duty is contained in the judgment of Ipp J at paragraphs 12 - 15 and in the judgment of Parker J at paragraphs 60 – 69.

30. While outside the context of negotiations but consistent with the attitude which the court takes to misleading conduct are cases such as Chamberlain v The Law Society of the Australian Capital Territory (1993) 43 FCR 148 (where a solicitor failed to correct an obvious error in assessment notice issued by the Australian Tax Office and permitted the tax office to enter a judgement for 10% of the disputed amount) and Coe v New South Wales Bar Association [2000] NSWCA 13 where the Court of Appeal upheld a decision of the Legal Service Tribunal striking off a barrister for filing a false affidavit in family court proceedings.

31. There is in practice no real distinction between the obligation of disclosure to the Court and deceptive and misleading conduct out of Court. In a practical sense, the approach that has been taken in cases such as Mullins is consistent with the correct approach to the relatively common situation of multiple medical reports from an expert where the expert changes his or her opinion. It has always been the position in the past 30 years from the author's personal experience that one cannot rely on the reports of an expert in situations where reports are being selectively served. Either all the reports (both good and bad are served) or none are. An interesting and difficult question which arises is how and when one deals with a situation where it comes to your attention that a previous representation, whether it be in a report a witness statement or otherwise is known to be false and when you must disclose it. Rule 53 does not impinge upon the obligation of disclosure.

32. The fact in respect of which the other side is capable of being misled must be corrected before the continuance of further negotiations and certainly must be disclosed before any mediation, settlement conference or hearing. Whether this be done by way of oral

disclosure of material facts or the service of an additional report will depend upon the circumstances of each case. To do nothing will render a legal practitioner subject to the same disciplinary proceedings with the same fate which befell Fleming and Mullins.

33. It is important that clients fully understand the lawyer's responsibilities in these situations. It is trite but a lawyer cannot withhold the relevant information. As the *Fleming* and *Mullins* cases make clear, one's ethical obligations in such matters cannot be flexible.

34. The issues with respect of candour can arise in relation to questions like *"How much money does your client have?"* or *"What does the plaintiff really want?"*, *"What would you recommend?"* and matters of that nature. While the responses to such questions could be characterised as slightly different to the somewhat more fundamental assertions of fact which created difficulties for Mullins and Fleming respectively, the best course is to decline expressly to answer the question in the terms in which it is put. One can quite legitimately simply refuse to answer such a question or obtain express instructions in relation to the appropriate response. The author is more comfortable (especially when acting for an insurer) not knowing what my client's ultimate position is in relation to resolution of a case. This enables me in the course of negotiations to simply say that I do not know. Another legitimate option is to simply refuse to answer the question. It is not a good idea ever to give an answer which you know is false in the process of negotiation or indeed at any time in relation to the conduct of the case.

35. Specific issues arise in the context of mediations which are now so common as to be almost a norm in litigation. Mediations create their own difficulties because they are conducted with a greater emphasis on frankness and candour, particularly in relation to the dialogue which occurs between lawyers for one side or the other and the mediator. Quite obviously, in such circumstances the mediator should not be told anything which is false although issues may arise about the extent to which the mediator is provided with information. Leaving aside the added complexity of confidentiality agreements and undertakings as to confidentiality, one would expect that the same sanctions as befell Mullins would apply if there was a failure to correct a misrepresentation as to fact. An endorsement of the misunderstanding by silence could give rise to the same problem.

36. Mediations also raise the further requirement of the necessity of good faith. Such a requirement arises from the relevant legislation (e.g. s27 Civil Procedure Act 2005) and such a provision is usually contained in most mediation agreements. The actual elements of good faith can be extremely difficult to precisely identify. As in many ethical situations, it can be difficult to positively identify the features but easy to have a strong sense of grievance when one or another required element is missing. At the very least, the concept of good faith has a requirement that a party act with subjective honesty of intention and sincerity. An objective standard also applies. A parties' negotiating conduct may be so unreasonable that they could not be said to be sincere or genuine in their desire to reach agreement. One indicia of good faith is whether the negotiating party has done what a reasonable person would do in the circumstances.

37. As stated by Allsop P held in *United Group Rail Services Limited v Rail Corporation New South Wales* [2009] NSWCA 177:-

> *What the phrase "good faith" signifies in any particular context and contract will depend on that context and that contract. A number of things, however, can be said as to the place of good faith in the operation of the common law in Australia. The phrase does not, by its terms, necessarily import, or presumptively introduce, notions of fiduciary obligation familiar in equity or the law of trusts. Nor does it necessarily import any notion or requirement to act in the interests of the other party to the contract.*

38. In mediations, it is sometimes said that a party making an extremely low or high offer is not conducting itself in good faith. This is not necessarily so. There is no reason why a party cannot negotiate in good faith although making an extremely low offer provided that proper consideration is given to the issues. A detailed analysis of the issue of good faith goes far beyond the scope of this paper but it is sufficient to say that if negotiations are not conducted in good faith, it is difficult to image circumstances in which they could be effective and there may well be circumstances in which the manner of conduct of negotiations could be classed as unethical.

39. Thus the obligations of a party to negotiate or mediate in good faith do not oblige nor require the party to act for or on behalf of, or in the interests of the other party, or to act otherwise than by having regard to self-interest (*Aiton -v- Transfield* [1999] NSWSC 996

cited with approval in *Azmin Feroz Daya -v- CNA Reinsurance Co. Ltd. & Ors* [2004] NSWSC 795).

**EFFECTIVE NEGOTIATIONS**

40. The skill of negotiation involves careful consideration of the subject matter of the dispute, an intimate and detailed knowledge of the dispute, as well as an understanding of with whom you may have been negotiating and on whose behalf you are negotiating. There may be all sorts of issues involved in a dispute which maybe go beyond the parameters of a purely legal dispute or pleadings. There may be far more to the differences between the parties than the legal issues. You must know your own case with all its strengths and weaknesses intimately. As we know from our own experience, the simple fact of the matter is that the better prepared we are, the easier it is to settle a case. If you do not know your brief, you may blunder to a resolution to a case in spite of yourself but remain blissfully unaware of whether the agreement which you effected on behalf of your client was a triumph, a compromise or capitulation. It is also very much easier to talk an opponent around your point of view when you are obviously on top of the material.

41. Without wishing to be exhaustive, there are common themes which arise in any paper, book or discourse about negotiation. It pays to listen carefully to what the other side has to say. In personal injury litigation, the interest of insurers is usually unilateral (i.e. risk and money) although there may be issues of publicity and other factors involved. Plaintiffs can have an entirely different agenda. For example, in cases where the plaintiff has a very strong sense of grievance (examples of which can be medical negligence cases, dust diseases cases or cases involving children), issues of attitude and apology can become critically important. In negotiating, you must not only seek to meet your own interests but to understand and set aside the other side's interests as well. If you cannot do both, then the prospects of a case resolving diminish very significantly.

42. It is well known that negotiating styles of men and women vary. It is self evident that negotiating styles of particular individuals will vary. It is important to bear in mind in negotiating any ethical or cultural considerations which may be relevant to your opponent or their lawyers. For example, wishing to delve too far into the world of social

awareness, matters such as maintaining eye contact and nodding of the head can have totally different meanings in different cultures. This is important to bear in mind because although we make the assumption that we are usually always negotiating with other lawyers. It always pays to watch the reactions and body language of the client if this is possible. Often negotiations will occur in a setting such as a mediation or even in an informal setting outside the Court room where the body language of your own or an opponent's client can say much about the extent to which negotiations are effectively being conducted.

43. The rise of mediations has changed the way in which cases are negotiated. Whereas in days gone by, negotiations are often conducted strictly on a black and white basis within the defined parameters of a dispute, mediation practice allows the parties to compromise beyond that. Statutory provisions such as those relating to the giving of an apology embodied in the Civil Liability Act can be used most effectively in settlement negotiations.

44. Some lateral thinking usually never goes astray in reaching a settlement of a dispute. If the problem as it is presented in its strictest and narrowest sense is irreconcilable, a technique of mediators is to redefine the problem to make it a little broader so that there is more scope for compromise. A good negotiator will try to do the same thing. An example of this is, in a family law context, to re-define the period of which there is a dispute for children having access. In short, if the circumstances of the dispute permit, be flexible. Be prepared to consider, as part of any settlement, alternatives to the relief which the court may order. Mediated settlements can include terms for virtually anything which assists the parties reaching a compromise – from gym memberships to donations to charity.

45. To negotiate effectively, you need to listen carefully to what the other side is saying, however unpleasant that may be. Particularly irritating can be haranguings and interrogations on the door of the Court. You may feel, with some justification, that you are only paid to run the case once and you would prefer to keep your powder dry until the judge is on the bench. Having said that, it is helpful to bite your tongue and endure the other side's speech as an advice on evidence or as a pep talk. In short, listen to

what you are told – you will invariably learn something. You may even learn that one of your fundamental perceptions about the case requires re-examination.

46. To effectively negotiate, you must ensure that there is a clear agreement between you and the other side about exactly what is being negotiated. It is fairly trite but it is essential and good practice to carefully spell out the terms of an offer and the basis upon which future negotiations will be conducted. It is all too easy to be involved in negotiations in an area with which the negotiator is familiar when, a good way into the negotiation process, one party or the other has not appreciated that there was a difference of opinion about exactly what was being negotiated. If this happens after the parties purport to reach a “binding” agreement and one side seeks to hold the other to an agreement, the unfortunate consequence can be the swearing of an affidavit, a trip to the equity court and the witness box.

47. It is good practice to make perfectly clear at the outset whether the negotiations are to be conducted plus or inclusive of costs and whether costs are to a specific figure or plus costs as agreed or taxed and matters of that nature. In personal injury cases, specific mention should be made (if applicable) to workers compensation, funds management and perhaps social security. The last two are more often matters for a plaintiff to mention but it is good practice for everyone to ensure that that everyone is perfectly aware what is being negotiated. Issues such as whether a defendant will consent to a judgement, or wishes to resolve the matter by way of a deed of release, must be raised. One must raise in advance whether or not joint defendants will agree to a judgment for the whole amount of the plaintiff’s verdict. It is also good practice every few offers to confirm the basis upon which negotiations are proceeding and do so specifically before again what is expected to be the penultimate or ultimate offer.

48. Where there are a number of matters that need to be negotiated, it is wise to identify those matters and try and resolve the ones which are most easily resolved first. It may be that you get a pleasant surprise when something you thought would be a real stumbling block is not. The unfortunate alternative can apply. It is not conducive to effective resolution of a case to proceed merrily with negotiations and then find out when the matter comes close to resolution that something which was not properly considered earlier in the negotiation process emerges as a major problem.

49. There are a number of other fundamental aspects more in the realm of psychology than the somewhat drier area of effective negotiation. Self evidently, it is easier to get somebody to agree with you if you are pleasant to them. Generally, if something is not conducive to settlement it is better left unsaid. There may be some things which are unpleasant for your opponent and may be better off unsaid but are conducive to settlement. While in many circumstances, cajoling or threatening is particularly unhelpful, it is useful to make it clear when you will draw a line in the sand. It may or may not be helpful to explain why you are drawing that line.

50. Here in New South Wales the culture of mediation is so strong that many mediations take place by consent without a court order. Interlocutory disputes are mediated. Section 26 of the Civil Procedure Act 2005 empowers the Court to refer any proceedings or any part of proceedings for mediation. Under s27 of the Civil Procedure Act 2005, it is the duty of each party to proceedings which have been referred for mediation to participate in good faith in the mediation. Any practitioner lacking in competence in the skills of negotiation will be at a significant disadvantage in his or her professional life.

51. Negotiation and settlement of disputes is a core skill in the practice of any lawyer involved in litigation. Your personal credibility is all important. If you are known to be honest, thorough, fair, but firm, you will be an effective negotiator.

**Campbell Bridge SC**
**12 February 2011**