

The new normal

High Conflict Behaviour in Legal Disputes

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High Conflict Behaviours

The impact in the justice sector, the issues, skills and systemic approaches.

- 1 The impact of HCBs in the justice system – the relationship with the SRL population
- 2 What are HCB's? A short video
- 3 What causes HCB's? How are these behaviours different from situational stress behaviours?
- 4 Three skill areas – communication, using an EAR response, setting limits
- 5 Systemic supports.
- 6 Triage, referral and help.

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Introduction

Increasing levels of high conflict behaviour in the legal system?

What is going on in Australia and elsewhere?

- Self Represented Litigants (SRLs) as a group are reported as increasing
- 40% increase in UK 2010/2011 in line with legal aid reductions)



Impact on courts, tribunals and others?

ACJI 2012 Study on SRLs

ACJI study findings



- Data Gaps - what don't we know?
 - Almost no demographic information
 - How many, and if this is available how many are active?
 - Why self-represented? – Cost, assumed competency
- What types of matters are SRLs involved in?
- Drivers – global or economic?
 - Better information access – do it yourself
 - Legal industry lagging in face of disruptive technology
 - Courts, tribunals seen as able to be accessed by SRLs

2015 Study

Analysis of litigated civil cases in Supreme Court



- Early findings – obscured by celebrity ‘SRLs’
- Large number of adjudicated matters involve the government and private industry
- Few involve individuals
- Where individuals are involved – judges describe some obsessive behaviour in a sizable proportion of disputes (query half) – this may vary from jurisdiction to jurisdiction

High Conflict Behaviours in the Justice Sector

Where and how?


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- A small number of litigants can be categorised as ‘difficult,’ ‘obsessive’
Are they the new face of process abuse in Australian courts?
- What is happening in Australia now?
- The spectrum

Different responses



Many are 'not a problem for the system but a user' (Civil Justice Council 2011)

Obsessive litigants -

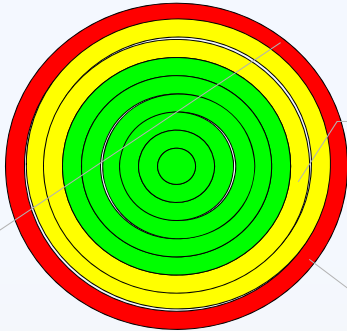
- New legislation in Victoria, Australia defines Vexatious Litigants as persistent, repeaters, using many forums potentially concurrently



High Conflict Behaviours and High Conflict Personalities

Significance of Behaviour in Dispute Resolution

- Bill Eddy – High Conflict Institute



REASONABLE PERSONS: appropriately upset about conflict issues; able to settle and resolve conflicts and engage in Dispute Resolution (DR).

MALADAPTIVE PERSONALITY TRAITS: Appear normal, but inappropriately upset, highly exaggerated, distorted logic; MAY resolve conflicts and engage in DR with careful management

PERSONALITY DISORDERS: Rigid patterns of behaviour; Chronically distressed; chronic Interpersonal dysfunction; MAY be unable to function rationally in DR or a court

The population

– the difficult and obsessive minority?

Reported that around 15% of people have a personality disorder

Some with disorders are unlikely to be involved in court or tribunal disputes – particularly if anxious or depressed

A further 10% may have behavioural traits that make it more likely that they will be involved in conflict or unable to resolve issues

In the US it has been suggested that 50% of those active in the Family Court system have high conflict behaviours

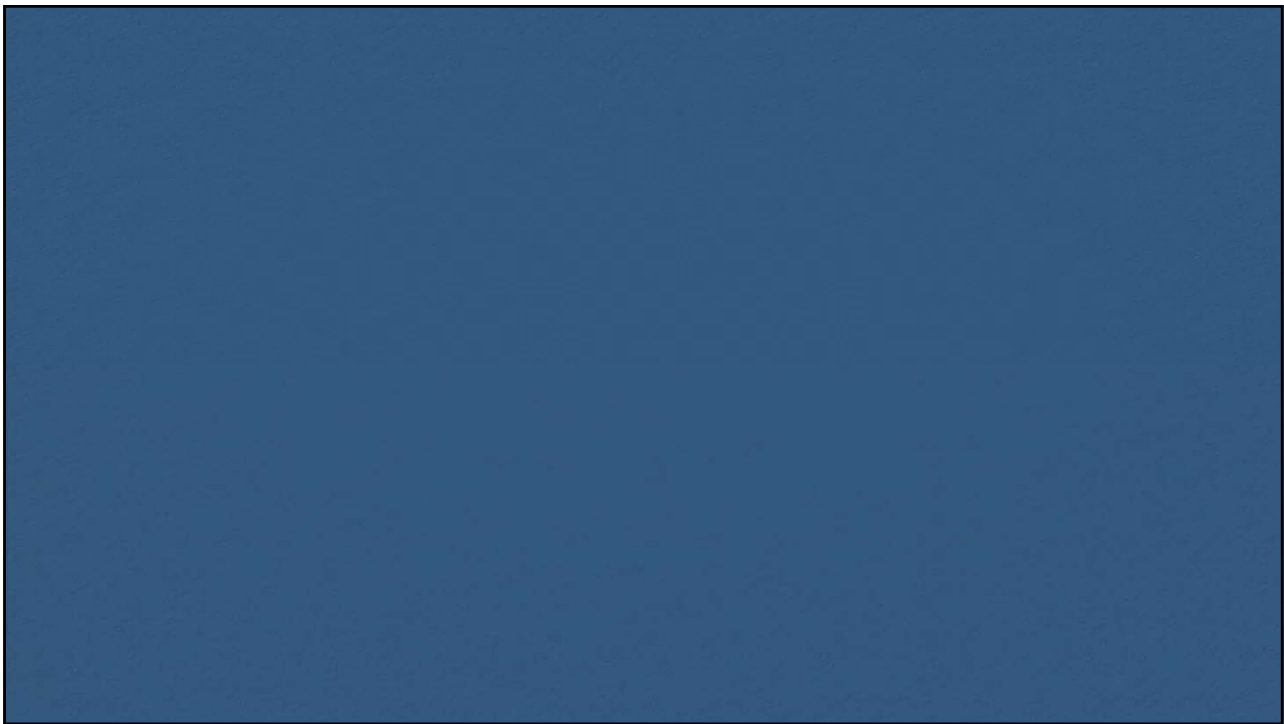
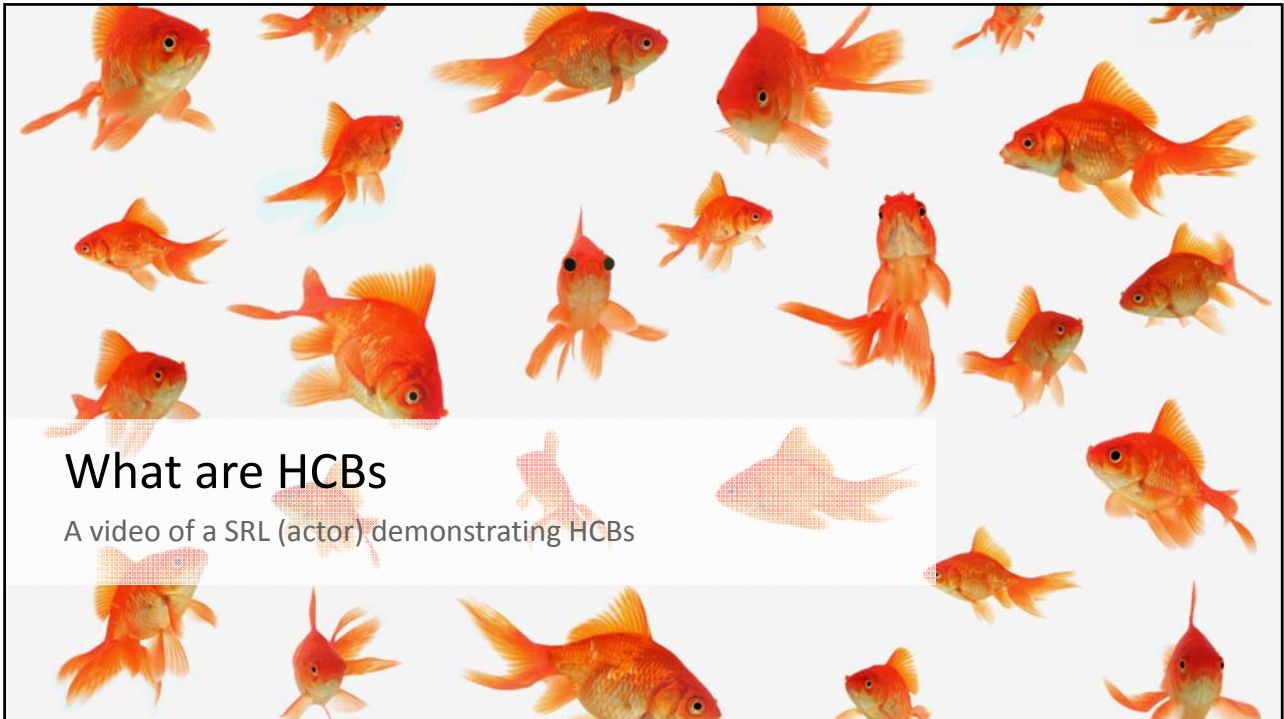
In the UK it is estimated as 30-40%

‘Significant link’ between mental illness and rights problems UK and NZ (Pleasance, Balmer 2009)

HCPs may also impact on other government services

- Unreasonable behaviour – NSW Ombudsman Service





Case Study Example

Obsessive litigants may attract:

- Far more court/tribunal interaction than the 'other side'
- Multiple interactions clarifying the claim
- Excessive material containing emotive language, in narrative style and irrelevant
- Uncertainties over standing or entitlement to take action
- Difficult case management with new issues emerging later creating disorganised process flow
- Tendencies to ascribe action to 'principle' or to a 'greater cause'
- Long term relationships with courts



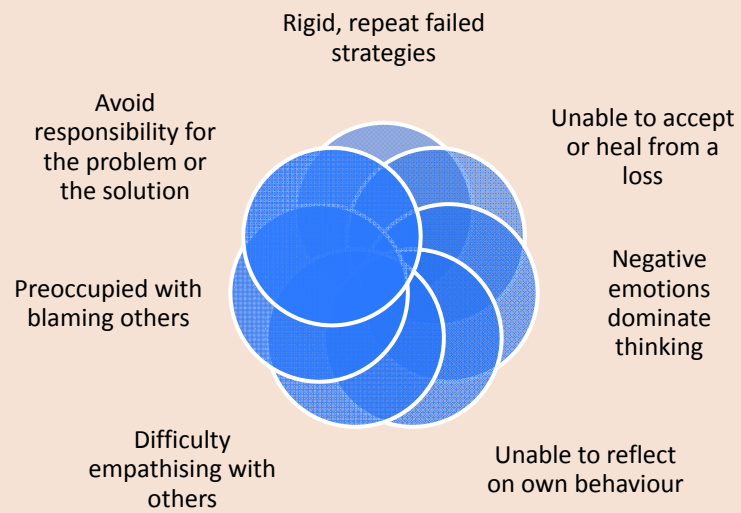
The impact on other litigants can be extensive

What causes HCBs?



High Conflict Behaviours

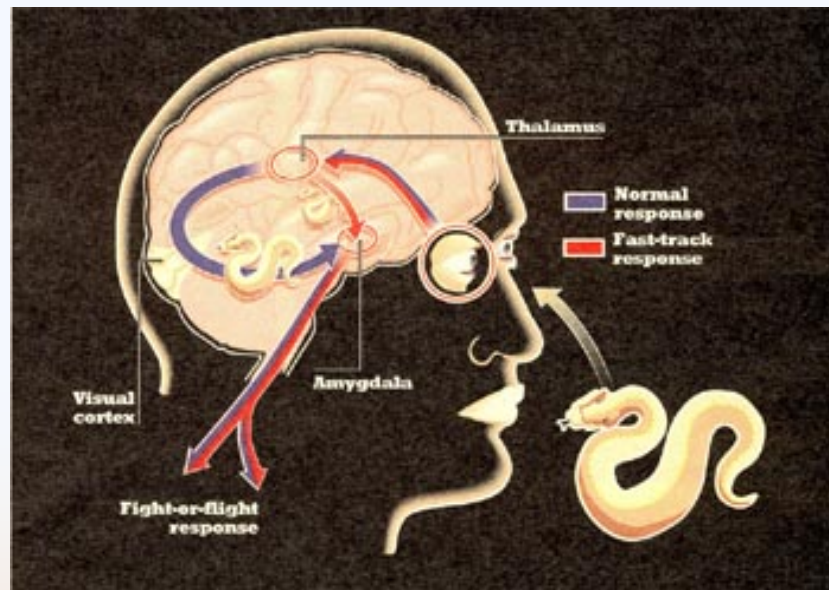
Symptoms



Flipping your lid...



Inside your brain



9 Functions of the Mid Pre-Frontal Cortex

Siegel

Insight

Bodily regulation

Fear Modulation

Emotional balance

Intuition

Attuned Communication

Moral Awareness

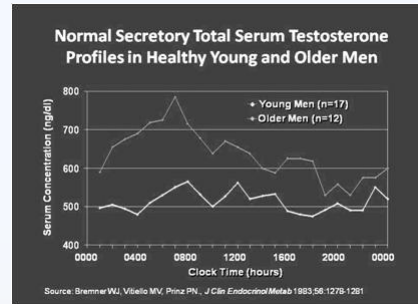
Response Flexibility

Empathy

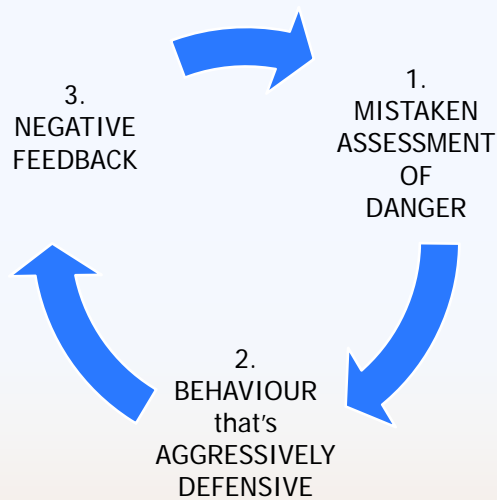
The role of hormones

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Cycle of high conflict thinking



Three Step Cycle

– Bill Eddy

1. Mistaken Assessment of Danger

Person with High Conflict behaviours feels internal distress, but it *feels* like external danger
(Being Abandoned, Treated Inferior, Ignored, Dominated, etc.)

2. Behaviour that's *Aggressively Defensive*

HCB verbally, physically, legally, financially, etc. attacks the *perceived* source of danger

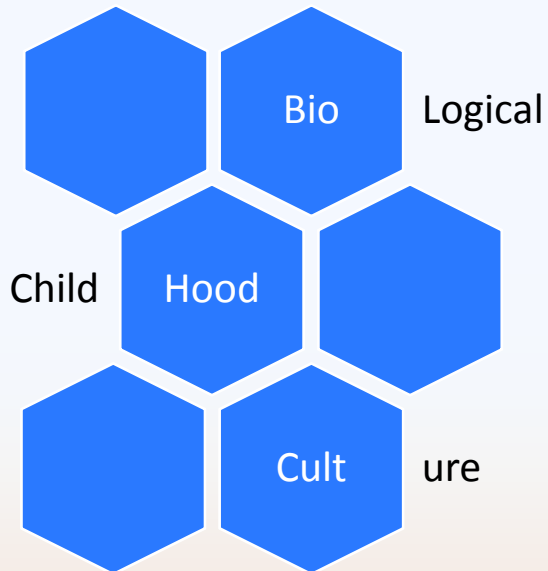
3. Negative Feedback

HCB gets negative feedback (most feedback *feels* negative to people with HCBs), which escalates them

The Issue is Not the Issue

- In high-conflict cases, the issue is not the issue. The high-conflict thinking is the issue, with distorted perceptions and expectations.
- For many people with high-conflict behaviours, they are stuck with their negative emotions and can't easily access their problem-solving skills.
- To handle them, you need to learn to communicate with the rational part of the brain.

CAUSES



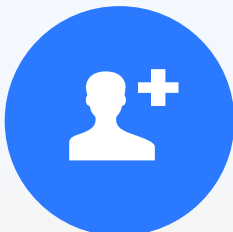
1. **Biological factors**, such as genetic tendencies and temperament at birth.
2. **Early childhood factors**, such as early parenting “attachment” disruptions, child abuse or other trauma before age 5.
3. **Social learning**, such as “invalidating environments”: being ignored for positive behaviours and getting more attention for mood swings and extreme emotions; family and community tolerance of bad behaviour; role models with extreme personalities.
4. **Cultural changes**, like increasing narcissism, drama, mood swings and violence in popular culture.

High Conflict Behaviours

Two key issues:

#1: Self-Awareness

- Some lack an ability to be self-aware and can't reflect on their own behaviour.



#2: Adaptive Response

- Some lack an ability to adapt their behaviour to changing circumstances. They repeat mistakes.



High Conflict Behaviour Types

Bill Eddy: *"It's All YOUR Fault!"* (2008)

"Love you, Hate you" Behaviours

- Often Angry, Sudden Mood Swings

"I'm Very Superior" Behaviours

- Demanding and Demeaning

"Always Dramatic" Behaviours

- Superficial, Helpless, Exaggerates

"Con Artists" Behaviours

- Deceptive, Manipulative, Hurtful

"I'll Never Trust you" Behaviours

- Fearful, Resentful, Suspicious

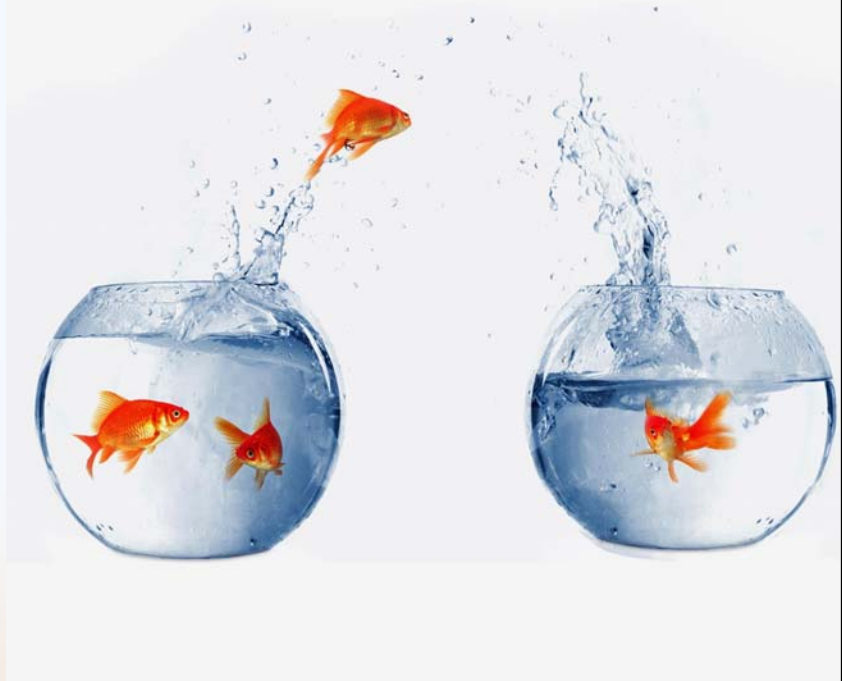


High conflict cases

Our Objective – Serious, careful and dignified dispute resolution

Issues:

- Expectations and perceptions
- Understanding, communication skills and access to information
- High Conflict Behaviours resist rational input



Disputants

Basic day to day strategies -

1. Process guidelines
2. Communication skills – explanation, questions, breaks, issue identification and checking.
3. Summary, reflection and using ‘tags’

How do you introduce self, role, process, restrictions and communication?

What do studies show?

- Prof Jennifer Lerner (Harvard)
- Studies on rats
- Studies on people
- Preparation helps
- Process explanation assists



Processes

- Variation across jurisdictions
- Some support services
- Some unbundled services
- Impact of legal advice and representation
- Increase in online support and services and early triage
- Concern that practitioners in the system – judicial officers and staff – may ‘bend over backwards’



Using ADR

Is ADR an alternative?

Who has access to ADR?

- Is there any triaging or screening
- Is there organised material preparation beforehand improving the chances of successful mediation?

What are the supports?

- Safety around the conferences
- Video conferencing options
- Unbundled legal advice opportunities

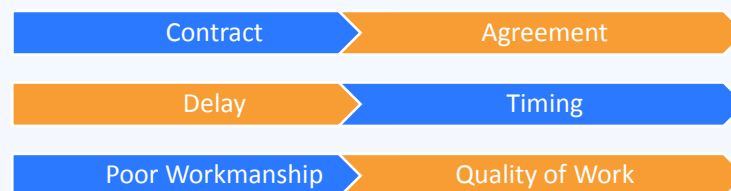


Less than 3% of civil cases commenced in higher courts progress to a final contested hearing

Basics...



Allow time to express – limit to brief overview – 3 – 4 minutes.
Identify and check issues (neutral and mutual if possible).



Summary and Reflection

Can I just check that I have heard you correctly? I understood you to say that you had entered into the ...and then I think you said...and then you talked about...and then you said...did I hear you correctly?



Strategies to use...

- Repetitive - I think I heard you talk aboutearlier – so this is clearly important to you?
- Use an EAR (Empathy, Attention and Respect) response or try another strategy – for example, short break (with or without private sessions), explanation of process etc.
- Should another approach be used?



4 Key Skills for HCBs

- Bill Eddy



CONNECTING

with E.A.R.



ANALYSING

realistic alternatives and
outcomes



RESPONDING

to inaccurate information



SETTING LIMITS

on high conflict behaviour

Connect with E.A.R.

Bill Eddy – High Conflict Institute



If **frustrated** by emotional reactivity and thinking distortions – it is easy to get “emotionally hooked,” and to withhold any positive responses. It’s easy to feel a powerful urge to attack or criticize.

Instead, consciously use your E.A.R:

- EMPATHY
- ATTENTION
- RESPECT

E.A.R. Statements

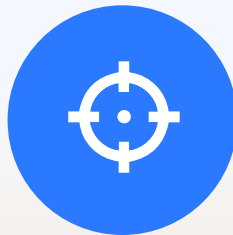
Empathy

- I can see this is important to you
- I understand this can be frustrating



Attention

- I want to understand what you are saying
- Tell me what's going on



Respect

- I can see you have put a lot of thought into this
- I respect that this is difficult and you have put a lot of effort into this



E.A.R. – words, tone and action

Example: “I can hear **that** you are frustrated that I can’t answer your question today. I will pay **attention** to your concerns about this issue and any information that you want to provide. I **respect** that it may be hard to come to talk about this matter and know that you are committed to solving this problem. Once I have more information I will be able to do more.”



Some cautions about E.A.R.

- Avoid believing or agreeing with content.
- Avoid volunteering to “fix it” for them (in an effort to calm down their emotions).
- Avoid rejecting them or having an angry confrontations with them because of their heightened emotions.
- You don’t have to listen forever.
- If doesn’t work, focus on tasks.



Showing your E.A.R.

In words, tone and approach – sensitivity to facial expressions and tone

Empathise

- don’t argue with their logic – try to understand it. You won’t talk them out of their fears, but you can **empathise with their fears.**

Pay attention

- Reduce their fears in the process, by reassuring that you are not going to make assumptions or quick decisions; **pay attention to their concerns.**

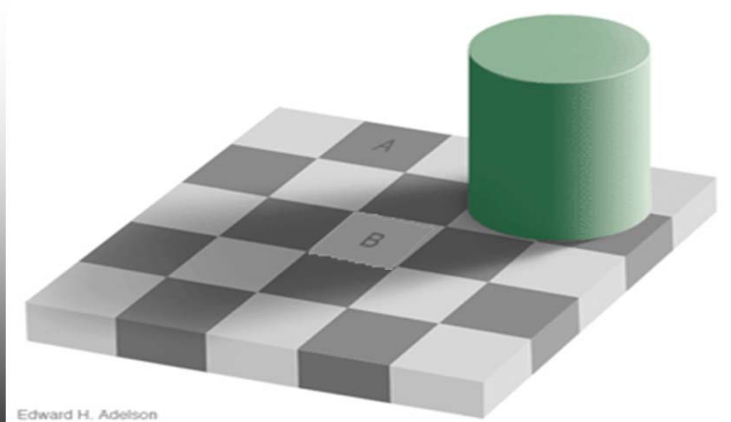
Be respectful

- Put more energy into clarifications, to make sure you understand how they are thinking, and what they heard you say.

The style of engagement?



Perceptions



Edward H. Adelson

Talking to the Rational Slow Brain

System I and System II thinking.

- Tone of voice and body language is amazingly important: Calm, confident, firm
- Avoid personal attacks: these escalate defensiveness and bad behaviour
- Avoid threats: these escalate the HCBs
- Avoid logical arguments in times of stress
- Avoid giving Negative Feedback.



Setting Limits on High Conflict Behaviour

List making and limits



- Those with HCBs need limits because they can't stop themselves
- With HCB clients, focus on external reasons for new behaviour, usually a policy, guideline or by reference to the applicable law:
 - "Our policies require me to ..."
 - "The law requires..."
 - "The process that is set out in the legislation means I have to..."

Setting Limits (cont'd)

Set Personal Limits

- About when the session will occur
- About how long the session will go for
- About what you will discuss
- About who will be present
- About phone & email access to you and your staff
- About what they need to bring
- About what they need to do before



Setting Limits (cont'd)

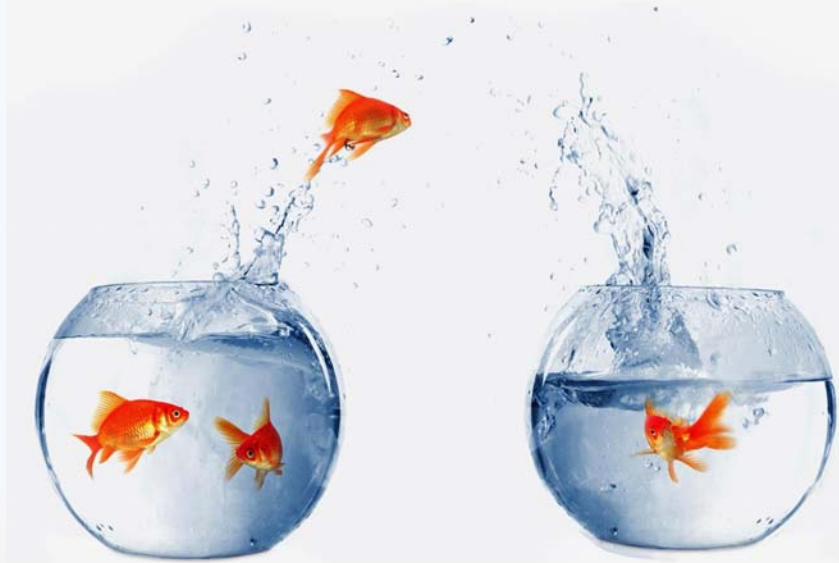
Set Organisational Limits

- What authority is there in your organisation that can set limits beyond those than you can set alone?
- What policies and procedures exist?








Finishing processes with HCBs

- Lay the groundwork for termination of process from the start, with clear expectations & limits.
- Avoid impulsive terminations or session conclusions – an abrupt end can trigger a memory of all of the client's bad endings & lead to potentially uncontrollable emotions and bad behaviour (stalking, more litigation, etc.)
- Suggest that your views are incompatible
- Show empathy, attention and respect, even while concluding the process.



Applying HCB Skills

- 
 Work hard at appearing neutral
- 
 Have them make as many process decisions as is possible
- 
 Ask "What do you think about that proposal?" rather than "How do you feel about that?" so don't open up emotions.
- 
 Prepare for breach of agreements
- 
 Avoid pressing them for agreement; hold back and keep burden on them. Yes, no, maybe (proposals).

Summary of interactions

Skills:



Preliminary explanation of the process and use as a reference point



Imposition of firm time limits



Joining the SRL in problem-solving, flagging intention and asking for feedback

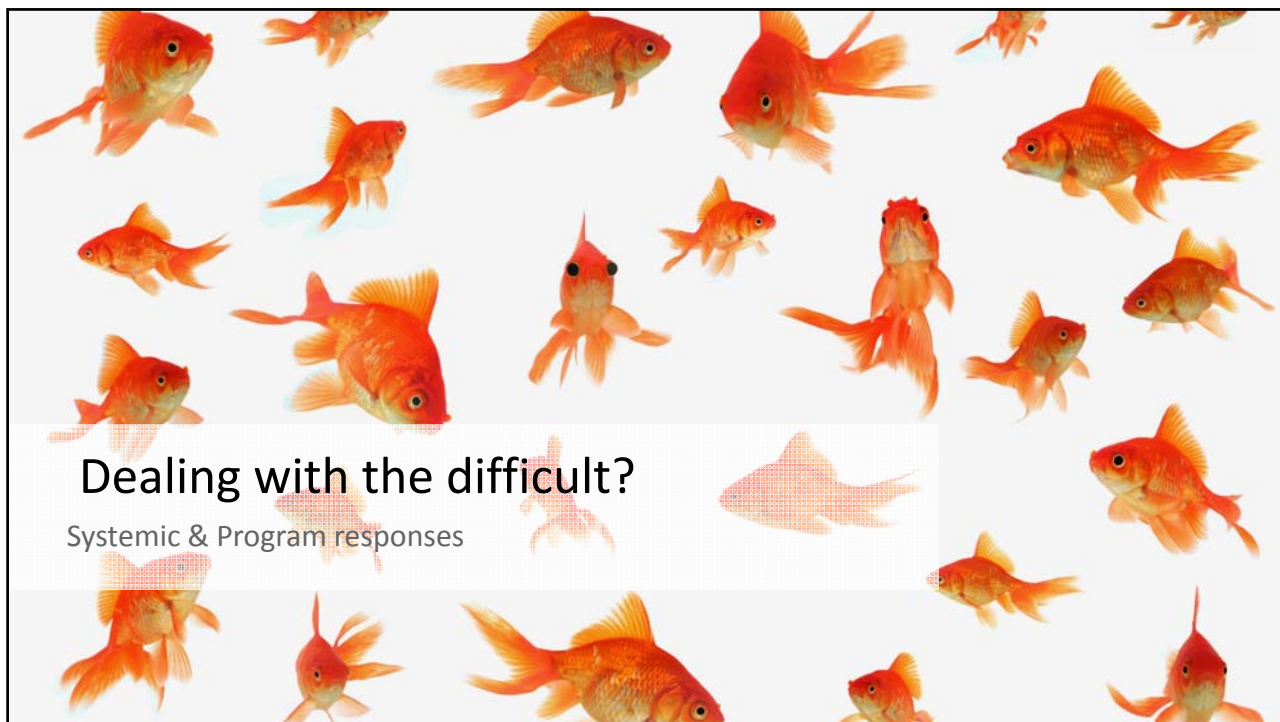


List making, issue identification, communication skills

Other matters?

- Adopt and use particular communication techniques – to model, where appropriate, responses that demonstrate empathy, attention and respect (PJ Study Greacon 2008).
- Support short breaks, encourage list making (which can promote more rational behaviour), and early issue identification with visual cues and printed resource and other materials.
- Indicate to the representative for the other side the extent of assistance that will be offered to the person and ask for feedback before providing that assistance to maintain a perception of fair treatment for the other parties. Brief standardised checklists may be helpful





Dealing with the difficult?

Systemic & Program responses

Dealing with the difficult?

Systemic & Program responses



Systemic responses

ADR programs, civil rules streamlining

Changing the end to end legal service model – disaggregation and discrete services only (QPILCH)



New legislation

- Victorian Act - *Vexatious Proceedings Act 2014*
- *Acting in concert; tiered restrictions; expansion to all courts/tribunals*



Program responses (resource constrained)

Kits, videos, simplified forms & processes, pro bono

- Court Coordinators liaising with agencies & help that is -
- ‘Practical, emotional & signposting but not legal’ (CJC)

Conclusions

We need to think about how to respond –

- Build system-based and uniform responses, undertaking collective action and introducing oversight
- Understand difficult behaviours and how to work with them
- Concentrate on interfaces with other agencies
- Find ways to attend to the impacts of interactions for those with no choice
- Use technology to inform, simplify improve how we work
- Routinely act early in the life of a dispute to redirect if it will offer a better outcome.



Thank you

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