EFFECTIVE LAWYERING IN THE NEW PLAN-MAKING PARADIGM

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Some learnings from the Auckland Unitary Plan and Christchurch Replacement District Plan processes

Introduction

[1] The Auckland Unitary Plan (AUP) and Christchurch Replacement District Plan (CRDP) inquiries could become the models for an optional track for the making of plans under the Resource Management Act 1991 (RMA). While the RMA 'call in' and 'national significance' tracks have been used a number of times, especially for infrastructure, the AUP and CRDP processes chart a new course into first instance 'independent hearings panel' processes for plan-making.

[2] Each was under special legislation that bypassed normal RMA 'two step' processes. The AUP inquiry was for formulation of a regional policy statement, regional, regional coastal and district plans for the greater Auckland Region. It was under Part 4 of the Local Government (Auckland Transitional Provisions) Act 2010 (LGATPA), and followed the restructuring of Auckland's local authorities into a single Auckland Council. The CRDP inquiry was for formulation of a replacement district plan for Christchurch city, including Banks Peninsula. It was under the Canterbury Earthquake (Christchurch Replacement District Plan) Order 2014 (OIC) and was part of the recovery response to the Canterbury earthquakes, under the Canterbury Earthquake Recovery Act 2011 (CERA).

[3] In one sense, each was an extraordinary measure for extraordinary times. However, as these models, or variations of them, could be an option for plan making going forward, it is timely to consider the attributes of effective lawyering in this new paradigm.

[4] As judicial officers, we do not express any opinion on the merits, or otherwise, of such processes. Nor do we traverse the war story dimensions of our experiences. In particular, we are mindful that some matters arising from our inquiries are before the High Court or Environment Court and we make no observations about those matters. Instead, on the basis of our understanding of the legislation that governed our inquiries, we offer our views on what counsel more accustomed to de novo plan appeals should consider (and brief their clients on) before entering this different world of independent hearings panel plan-making.

Overview of the AUP and CRDP inquiry processes

[5] With some similarity to the Environment Court, our panels comprised both judicial and expert members, the expertise being in planning, tikanga Māori, business and engineering. Appointments were by relevant Ministers. Each panel had a secretariat, including lawyers, planners, and administrative staff. Each also had access to professional

mediators and expert witness facilitators. The Environment Court provided significant resourcing assistance to each panel on those matters.

[6] Each panel had a website and provided for electronic filing of all documents. Each also had dedicated premises, fully equipped including with electronic transcription services.

[7] Our inquiry processes were quasi-judicial. Each was both adversarial (in the sense, for example, that cross-examination was allowed, subject to directions) and inquisitorial (in the important sense that the panels themselves tested evidence).

[8] An important design difference between them was that the AUP Panel made recommendations to Auckland Council on the AUP, whereas the CRDP Panel made final decisions on proposals to formulate the CRDP. There were corresponding differences in appeal regimes. In the case of the AUP, there were two appeal tracks. Appeals were to the Environment Court when either Auckland Council did not accept a panel recommendation or where the panel identified that its recommendations was beyond the scope of submissions. Otherwise, appeals on the Council's decisions were to the High Court. Some 65 were made to the Environment Court and 41 to the High Court, with 8 applications for judicial review. For the CRDP, appeals were only to the High Court on questions of law. As we write this paper, five have been lodged, two of which have been determined and two heard and awaiting decision.

[9] That overview sets the context of what we will now consider.

The adversarial and inquisitorial nature of independent hearings panel processes

[10] All plan-making processes, including Environment Court appeals, are concerned with competing public and private rights and interests. Inherent in that is the ability of any person to make a submission (or further submission), call evidence on and advocate for their particular interests, including in competition with others, and be heard in a public hearing of record.

[11] Under normal 'two step', these processes for competitive participation in plan-making are deliberately less formal at first instance. In particular, cross-examination is not allowed. In this respect, the adversarial nature of AUP and CRDP independent hearings panel processes were more similar to those of the Environment Court. Both allowed for cross-examination (although on the basis of leave being granted). Both provided for pre-hearing meetings, expert witness conferencing and alternative dispute resolution.[162] In both inquiries, pre-hearing case management processes, expert conferencing and facilitated mediations were actively employed and highly influential in the determination of outcomes.

[12] However, a key point of distinction is as to the roles of the Environment Court and independent hearings panels.

[162] LGATPA, sections 131 – 134, OIC, schedule 3, clauses 3, 9, 10.

[13] Although Environment Court plan appeals are heard de novo (s 290), the Court's role is judicial appellate. The boundaries of what the Court considers in a plan appeal are set by the scope of relief sought in the appeal(s) (subject to the rider in s 293, RMA).[163] Typically, that means that only part(s) of a statutory instrument are in issue. The remainder is as decided by the first instance decision-maker (and the Court must have regard to that decision: s 290A, RMA). Also, typically, what is heard in an Environment Court appeal is only what remains following Environment Commissioner-assisted mediation.

[14] By contrast, independent hearings panels are first instance decision-making or recommendatory bodies on the entire proposed statutory instrument. Panels do not discharge their duty until they have determined the appropriate content of the entire plan or other instrument. Panels are subject to all requirements of the RMA and, in particular, ss 32 and 32AA (except as this may be modified by the panel's empowering legislation). The scope of what panels can decide would generally range between what the Council has notified and what is sought as relief by submissions according to the two-stage test in *Clearwater* and *Motor Machinists*.[164] Indeed, the AUP Panel's powers of recommendation, and CRDP Panel's powers of decision, were explicitly not limited to the scope of submissions made.[165] In the case of the CRDP, reflecting the fact that the Panel made final decisions incrementally on notified proposals, this extended to an ability of the Panel to revisit earlier decisions so as to ensure that the CRDP as a whole is 'coherent and consistent'.[166] Consistent with this wider brief, neither panel was confined to considering the evidence tendered by parties (and Council s 32 reports) in that each could also commission reports.[167]

[15] Environment Court plan appeals have both adversarial and inquisitorial dimensions. For example, the Court's members will ask questions of witnesses and the Court has the power to call its own evidence. However, in a comparative sense, independent hearings panel processes are significantly more inquisitorial in nature.

Mediation settlements and expert conferencing

[16] In the empowering legislation for both inquiries, explicit provision was made for facilitated mediation and expert witness conferencing.

[17] Lawyers accustomed to Environment Court appeal processes will be familiar with the very significant role of the Court's mediation services and of joint memoranda of parties seeking determination of appeals by consent order. Mediation results in a very high number of cases being either fully resolved or significantly reduced in scope by these processes. The filing of a joint memorandum seeking a consent order determination, with appropriate certification by parties as to RMA matters, frequently sees matters determined in the absence of a hearing. [168]

[163] There is a good discussion of the Environment Court's judicial appellate role, under s 293 RMA, in *Federated Farmers of New Zealand (Inc) Mackenzie Branch v Mackenzie District Council* [2015] NZRMA 52, [xxx].

[164] *Clearwater Resort Limited v Christchurch City Council* HC Christchurch AP34/02,14 March 2003, and *Palmerston North City Council v Motor Machinists Limited* Kös J [2013] NZHC 1290.

[165] LGATPA, s 144(5), OIC, cl 13.

[166] OIC, cl 13(5).

[167] LGATPA, s 164(b), OIC, sch 3, cl 8.

[168] There is a useful discussion of joint memoranda seeking consent orders in *Hurunui v Canterbury Regional Council* [2016] NZRMA at 71, Mander J.

[18] By contrast, as noted, independent hearings panels carry the responsibility of first instance evaluation and determination of the appropriate plan outcome. Hence, while joint memoranda that settle differences between parties before an independent hearings panel process are usually influential, they do not necessarily have the same consequences as joint memoranda seeking consent order in an Environment Court appeal.

[19] Facilitated expert conferencing and mediation were actively employed in both panel inquiries to very good effect in working through and resolving very difficult issues. Several Environment Court commissioners and other experts in mediation facilitation were employed throughout both inquiries. This resulted in very significant savings in hearing time for both.

[20] In the AUP process, two important topics were the subject of facilitated expert conferencing:

- the assessment of residential capacity for the purposes of considering urban growth objectives and policies; and
- the assessment of the landscape values and the potential development costs of viewshafts of the maunga for the purposes of reviewing the schedule of protected viewshafts.

[21] These conferencing exercises were substantial, occurring over an extended period while other hearings were going on. They both went back to the basic data available and developed or built on techniques for using that data to focus on the effects (and in particular the adverse effects) of activities on the environment as a foundation for plan provisions. The outputs of both processes were of enormous value to the panel in its deliberations on two particularly significant and strongly contested aspects of the AUP. The quality of the work done was obviously dependant on the qualities of the expert witnesses who participated.

[22] In the CRDP inquiry, a standout example of where facilitated mediation and conferencing delivered excellent outcomes concerned proposals on what are termed ‘New Neighbourhood Zones’. These are areas of land on the periphery of the city that the Canterbury Regional Policy Statement 2013 earmarks as ‘greenfield priority areas’ for the comprehensive development of new residential communities as part of a strategic approach to addressing forecast urban growth. The notified proposals were reasonably contentious. In addition to that, it became evident during the testing of evidence that there were serious conceptual and drafting flaws in what had been notified. The issue was so serious that the Council’s own peer review planning witness recommended a substantially different conceptual and drafting approach. Adjournments were granted but, when matters were heard again, it was evident that serious problems remained unresolved. There were issues as to whether the panel had sufficient jurisdictional scope for these problems to be resolved.

[23] With the support of the parties, we issued a detailed Minute on the nature of these problems and potential options to explore with a view to addressing them. A direction to re-notify an aspect of the proposals followed. An Environment Commissioner was assigned to facilitate mediation, over several sessions and weeks. This led to a significant degree of consensus on a way forward.

[24] However, the 'horse trading' of mediation does not necessarily deliver the most appropriate planning outcome. In the case of the New Neighbourhood Zones, the mediation produced a consensus outcome on the provisions but these included a number of conceptual and drafting deficiencies. To address those, we re-convened what we termed a 'sleeves rolled up' hearing (more on that shortly). Ultimately, a much more confined set of issues was left for closing submissions and to be resolved by our decision. That decision, confirming the modified New Neighbourhood zone provisions, was not appealed.

How principles of natural justice bear on panels' engagement with parties

[25] Independent hearings panels, as quasi-judicial bodies, are governed by principles of natural justice and due process (supplemented by legislative requirements for fair and appropriate procedures, public hearings and protection of sensitive information).[169]

[26] An important aspect of this is for panels to ensure transparency in how they engage with parties. This is an aspect of where the adversarial and inquisitorial dimensions of a panel's work intersect. To ensure parties have a fair hearing, the panel must be mindful to ensure fair opportunity for parties to know and respond to what may be 'on a panel's mind'.

[27] For example, in the context of any hearing of a topic or chapter, panel thinking about issues may evolve through the testing of evidence in cross-examination and panel questioning. A further dimension to that concerns the related proposed provisions. More broadly, a panel's task in relation to one hearing is not isolated from other hearings in that the ultimate purpose is to determine, or recommend, the most appropriate 'plan'. Hence, a panel's thinking can evolve beyond the immediate context of a particular plan, as other relevant matters are considered. An example could be in relation to how a topic or chapter the subject of one hearing sits with another topic or chapter dealt with in another hearing (potentially by a differently constituted panel). Another example could be where the panel is concerned about issues of overall drafting consistency and coherence. That could be, for instance, when drafting is offered by parties to a settlement but which does not sit well with the remainder of the plan. Or it could simply be because the panel finds emerging drafting problems inherent in what the Council itself has proposed in different notified parts of the proposed plan.

[28] Ensuring fair opportunity for parties, with relevant interests, to understand and respond to evolving panel thinking is by no means straightforward. That is particularly given the fact that many parties will elect to make submissions only on parts of the notified proposal.

[29] Each of us encountered such challenges during our inquiries and developed various responses to them. As a general rule, we found parties generally appreciated an approach that gave them insight into, and opportunity to respond to, what was troubling us.

[30] A commonly employed technique, sometimes explicitly requested by parties, was for the chair or deputy chair to issue a Minute for the purposes of further mediation and/or supplementary submissions. On occasions, a Minute would go into some detail concerning the preliminary views of the panel on the evidence. Sometimes, such a Minute would be issued after parties had worked through differences on drafting matters, and even after

[169] LGATPA, s 136, OIC sch 3, cl 4.

closing submissions were received. For the AUP, which included the regional policy statement as well as the plans for Auckland, the panel issued 'interim guidance' in respect of a number of RPS topics to assist submitters when presenting their submissions at the plan level.

[31] The afore-mentioned 'sleeves rolled up' hearing was used on a number of occasions in the CRDP inquiry to good effect to deal with significant technical drafting issues. In essence, it was a resumption of the hearing on the record, but with some difference in design so as to encourage parties to work together with the panel to solve the drafting problems. The hearing room was re-configured to put panel members and interested parties' counsel and/or planning consultants around a single table. Prior to the resumed hearing, the chair or deputy chair issued a Minute setting an agenda or drafting issues. Attendance was open to all, attendees were able to attend with legal counsel and/or planning witnesses (who were not sworn in for the purpose), and proceedings were recorded. Following the resumed hearing, a further Minute was issued, recording outcomes and setting a timetable for supplementary closing submissions. The AUP panel adopted a similar approach in relation to the Waitakere Ranges topic, which raised a number of issues that were specific to that part of the Auckland region and called for a tailored approach.

[32] The things we have just described are intended to bring colour to the different nature of independent hearings panel processes, particularly in terms of their adversarial and inquisitorial dimensions. On these matters, the special legislation that governed the AUP and CRDP inquiries allowed for closely similar approaches. Perhaps that signals these are logical outworkings of the independent hearings panel model of first instance participatory plan-making.

[33] There are implications in all these things for how lawyers approach their various tasks in case management, deal-making and engagement, and advocacy. There are obvious associated matters clients need to be forewarned about, including as to the risks and costs involved.

The different role of and demands on the Council team

[34] A starting comment on this topic is that independent hearings panel processes demand a significantly different quality of approach from the Council team. To use a hackneyed phrase, it is a 'paradigm shift'.

[35] We shortly discuss the particular dynamics and speed of panel processes and what that means for lawyers generally. For the Council team, however, there are also other matters that mean that Councils need to invest in a much greater level of quality strategic leadership than they will be accustomed to in their running of 'business as usual' plan reviews and appeals.

[36] One dimension of this concerns Councils' statutory functions and responsibilities. Of course, assignment of plan-making to an independent hearings panel track removes from the Council its usual statutory function of hearing submissions. It also either removes the Council's role of deciding on the proposal or changes that role to making a decision on the panel's recommendation on that proposal. However, importantly, those modifications to the Council's usual plan-making functions leave intact the Council's statutory

responsibilities for initiating and notifying[170] proposals, and administering and enforcing the observance of the plan once it is in force.[171]

[37] Given that Councils retain those responsibilities, panels will want to understand what strategic intentions the Council seeks to achieve through the proposal in issue. The Council team (particularly the Council's lead counsel and lead planning witness) must be able to coherently and clearly explain and defend those intentions, and how the proposal reflects them. The lead planning witness should be the senior officer or consultant who carries the strategic leadership responsibility, on behalf of the Council, for the proposal and is fully familiar with its strategic intentions and design.

[38] A well-led and well-run Council case would see that strategic theory permeate all the Council's evidence (including its s 32 report) and submissions.

[39] This is not to say that the Council, as a party, enjoys any advantage over any other party in the way their case will be received. It is simply to acknowledge that a Council participates as the statutory authority with responsibility for proposing, and ultimately administering, and enforcing the relevant plan.

[40] The Council's statutory responsibility for proposing, administering and enforcing the plan carries with it a responsibility for the quality and consistency of its drafting. Panels are entitled to expect that the responsible Council will demonstrate leadership in those matters in its participation in an inquiry. Again, that leadership should be shown through its lead planning witness, in evidence and in other engagement through the inquiry process. The drafting that witness proposes should be the product of the combined prior joint work of that witness and the Council's lawyers, commenced sufficiently early in plan preparation that it informs a sound overall design of approach in the notified proposal. Councils should bear in mind that plans are subordinate legislation, and their drafting should accord with related drafting principles, as well as being plainly and clearly written so as to be understood by members of the public.

[41] The quality of Council leadership we have described is of a significantly higher standard than what Councils may be accustomed to in relation to normal 'two step' processes. However, this greater level of investment is important for giving structural stability to inquiry processes. It allows others to more fairly participate by being able to focus on the true resource management choices needing to be made, rather than also having to apply resources towards trying to fix flawed conceptual and/or drafting leadership by the Council. It also assists the panel to be able to fairly and efficiently conduct and conclude its task. That is why we call it a paradigm shift.

[42] A further important dimension of a Council's role is to support the panel to fulfil its responsibilities to hear and rule on submissions, and decide or recommend on the plan.

[43] One aspect of this supportive responsibility is purely administrative. It includes ensuring suitable hearings facilities and transcription services. Of critical importance, the Council must ensure that the panel has access to a reliable, ordered and readily searchable, electronic submissions database. The Council must also ensure that its electronic plan documentation is properly formatted and compatible with the panel's own systems (subject to maintaining proper security protocols).

[170] RMA ss 59, 63(1), 72.
[171] RMA, s 84.

[44] Doing those administrative things well is critical to enabling the panel to soundly, and efficiently, complete its task.

[45] A further dimension of this supporting role concerns the Council's participation in the inquiry itself. Panels will rely on the Council team to identify live and evolving issues. The Council's lawyers need to be active in coordinating with parties to facilitate expert witness conferencing and mediation. They (and the relevant Council lead manager) must have excellent communication lines with the panel secretariat. Importantly, the Council needs to have effective processes for communicating with the panel, through the chair or deputy chair. For instance, that includes making effective use of memoranda seeking procedural directions on issues as they are anticipated to arise. This dimension to the Council's role in the hearing can also extend to providing drafting services when called upon, on the basis that the Council reserves its position on the appropriate outcomes.

[46] This role of assisting the panel to fulfil its responsibilities does not, of course, preclude the Council from advocating, as a party, for the outcomes it seeks. In essence, those leading the Council's case need to come with dual personas and ensure each fosters the panel's confidence. For a Council lawyer, that can brings into sharp focus the sometimes tensioned responsibilities they have to their client and to the panel.

Dealing with the dynamics and speed of independent hearings panel inquiries

[47] The dynamics and speed of independent hearings panel processes also clearly set them apart from usual RMA two step processes. In essence, delivering outcomes much more quickly than usual is a key driver of this option.

[48] According to an MfE study undertaken in 2008, it was taking on average 8.2 years from the start to the finish of the plan-making process.[172] That compares with 36 months for the AUP inquiry from the date of notification to the publication of the Council's decisions and an anticipated 27 months to complete the CRDP inquiry.

[49] However, the true significance of that for processes is not so much in the total time from start to finish but in how that time is broken down.

[50] The 8.2 year average for usual plan-making processes is broken into several phases, with significant time gaps between them. For example, the MfE study indicated that, on average, 2.5 years was taken up with pre-notification research, drafting and consultation and 3.3 years taken in resolving appeals.[173] That appeal time includes mediation, case management and hearing phases. The period of time taken in Council hearings and decisions can also be expected to be broken into different phases, according to particular topics and issues, rather than being continuous.

[51] By contrast, independent hearings panel processes are effectively continuous. In the case of the AUP, the regional policy statement, regional coastal plan, regional plan and district plan were being dealt with together. Hearings were organised into 70 topics with 58 separate hearing sessions. This was structured with the RPS at the beginning and then

[172] Mfe.govt.nz, Publications, referring to RMA sch 1 Processes – Preliminary Analysis of Options for Future Amendments.

[173] We note that this study is now quite out-dated on the matter of Environment Court appeal processing times. Statistics reported to Parliament on these matters in the last 2 years indicate much improved clearance rates.

broadly from the general to the specific, with the final phase of hearings being in relation to area- or site-specific zonings and precincts. In the case of the CRDP, the OIC provided for an incremental approach whereby the Council notified 'proposals' (often only portions of a chapter) on which submissions and further submissions were made and which the Panel was required to hear and decide. Each panel decision was then open to appeal. Often, hearings occurred in parallel, before differently constituted panels. To date, the panel has issued 52 individual decisions on this basis. By comparison with two-step, therefore, the processes are mercilessly relentless.

[52] For those chairing the process, there is a much greater investment required in case management. Especially when the empowering legislation sets a time limit for the inquiry, time becomes a precious resource that must be rationed. Directions must be set on this, and there is limited capacity for flexibility. Case management must be both proactive, through pre-hearing meetings and related timetabling and other directions, and responsive to what are inherently dynamic processes. Things will inevitably change and evolve, through the inquiry process, and chairs must be very alert to managing this.

[53] Lawyers running cases in these inquiries, especially those representing clients with interest in various topics or chapters, face corresponding challenges. They must be pro-active, in ensuring their client's interests are accounted for in pre-hearing meetings and related directions. Teams need to be well-led, especially when representation may need to be arranged for parallel hearings. Lawyers also must be ready to effectively and quickly respond to changing dynamics. They need to be in tune with things, and readily able to engage with related parties, the secretariat staff and the panel chair/deputy chair, when this is required. For example, this could be prompted by issues arising in evidence, or in another related panel hearing, or in mediation, or in a Minute issued by the panel on some matter.

[54] Effective lawyering in independent hearings panel processes requires a well-led well-resourced strategy. The best strategic plan is one that has sufficiently covered the detail of what is expected to be able to adapt to what will inevitably change.

Be prepared to do deals and be flexible

[55] The intensity and dynamics of independent hearings panel processes mean that 'success' is not likely to be simply measured by whether your client gets what you asked for. Clients need to be prepared to do deals, make astute compromises, and be flexible in their thinking about what constitutes a 'successful outcome'. Choices may need to be made quickly. Lawyers should try to get instructions that allow for them to lead and manage cases on such a basis, in the best interests of their clients. Otherwise, lawyers could face the prospect of seeking rounds of new instruction only to leave their clients disappointed by the outcomes.

[56] It is important to adopt a strategic view and be able to place a client's submission in the context of the overall plan or at least the relevant section or chapter of it. Too often, submissions are limited by a 'silo' approach. While a client will see things from their own position and perspective, the panel is looking for a broader approach to the issues. It is important to remember that, in this inquisitorial setting, the determinative question will be: what is the most appropriate plan provision? Lawyers need to keep in mind that the most persuasive case is likely to be one that best assists the panel to answer that.

Invest in quality expertise including in plan drafting

[57] A lot can be said on this topic. While independent hearings panel processes are inquisitorial, the source of expertise for their decisions should be primarily in the evidence called by parties. That applies to both expert opinion and the drafting of provisions.

[58] Firstly, a brief word on the choice of experts. The chapter and topic based approach to plan formulation will often see a party's experts presenting several briefs of evidence and appearing several times before the panel. The witness's evidence will have been pre-read. S/he will be giving evidence after rounds of mediation and conferencing, through which issues are narrowed. S/he may have an opportunity to present a brief oral summary before being tested by cross-examination and panel questioning. Appearances, each time, can be expected to be brief and intense.

[59] Clients should be discouraged from cutting corners by engaging inexperienced, or inappropriately qualified, witnesses. Such an approach may seem pennies wise, but will usually prove pounds foolish. An important reason why that is so concerns the panel's obligations under RMA ss 32 and 32AA. As panels undertake first instance decision-making, they carry responsibility for evaluating options according to the requirements of ss 32 and 32AA, RMA. The enquiry that panels must make is primarily an evidential one. Hence, the relevance and quality of the evidence, from experts according to the Environment Court's Code of Conduct, is all important.

[60] That evidential evaluation is for the purpose of determining objectives, policies, rules and other plan provisions.

[61] As we have noted, the ideal approach is where the Council that initiates a proposal backs that with clear strategy and associated quality drafting, in their lead planning evidence. Under such a model, a party who also invests in quality in their witness team, including for plan-drafting, is well placed to contest key issues effectively.

[62] However, where a Council does not exercise such leadership, it can be expected that the responsibility for it will pass to the panel. Under such a scenario, a panel will still strive for assistance from the parties. Again, under such a model, a party who invests in quality in their witness team, including for plan-drafting, is likely to be well served. However, the dynamics of engagement could well change. In particular, parties would want to ensure they have ready access to drafting assistance, when panels may call for it during the process.

It is quicker but participating effectively isn't cheap

[63] The usual decision-maker's dilemma is that everyone wants something that is quick, cheap and good, but anyone can only ever choose two of those. Statutory timeframes require 'quick' and the potential consequences for people, communities and the environment mean that 'good' is the minimum standard for a plan.

[64] As can be gathered from this, participation in independent hearings panel processes is unlikely to be 'cheap'. Rather the financial and economic gains are more in the sense that they deliver plans much more quickly than traditional 'two step'. Lawyers need to be careful to properly brief their clients on those realities. In essence, a client needs to see value in terms of influencing the final outcomes that they will then need to live with once the plan is in effect.