

CONTRA COSTA COUNTY BAR ASSOCIATION



NEGOTIATING THE RELATIONAL ESTATE

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Mediator | Temporary Judge | Parental Coordinator

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A large graphic on the left side of the slide consists of two overlapping circles. The front circle is a vibrant purple, and the back circle is a lighter, pinkish-purple. The word "AGENDA" is centered in the purple circle in a dark blue, uppercase, sans-serif font.

AGENDA

- The Relational Estate
- The Lawyer's Job
- The Mental Process
- The Holistic Approach

Defining Relational Estate

Pre-existing understandings (often assumed and unstated) about how the other person or persons will approach a conflict based on an individual's understanding of the nature of the relationship.

Attorney-Client Relationship – Case Law

- The attorney-client relationship is a fiduciary relationship of the very highest character. *Cox v. Delmas* (1893) 99 Cal. 104
- As a fiduciary, an attorney must refrain from using undue influence and must be committed to the most scrupulous good faith. *Trafton v. Youngblood* (1968) 69 Cal.2d 17; *Clark v. State Bar* (1952) 39 Cal.2d 161
- Once an attorney renders his advice, an attorney must respect and defer to decisions properly reserved for the client. *Davis v. State Bar* (1983) 33 Cal.3d 231, 188 Cal.Rptr. 441, 655 P.2d 1276.

California

Attorneys act as counselors, and in rendering advice to their clients may, and when appropriate should, consider social, economic and even political factors as well as legal. [Citations omitted.] Clients have a right to expect their attorneys to render complete and candid advice. *Wolfrich Corp. v. United Services Auto. Ass'n* (1st Dist. 1983) 149 Cal.App.3d 1206, 1211 (overruled on other grounds by *Doctors' Company v. Superior Court* (1989) 49 Cal.3d 39, 40).



Communication with Clients

(Rule Approved by the Supreme Court, Effective November 1, 2018)

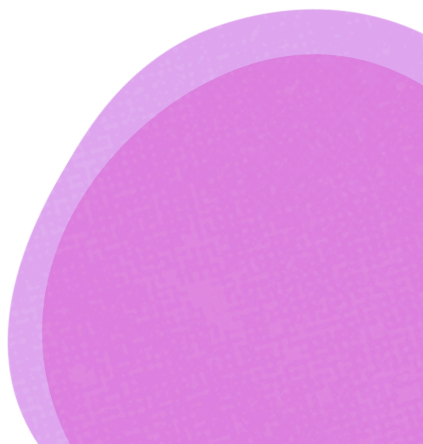
(a) A lawyer shall:

- (1) promptly inform the client of any decision or circumstance with respect to which disclosure or the **client's informed consent is required** by these rules or the State Bar Act;
- (2) reasonably consult with the client about **the means by which to accomplish the client's objectives** in the representation;
- (3) **keep the client reasonably informed** about significant developments relating to the representation, including promptly complying with reasonable requests for information and copies of significant documents when necessary to keep the client so informed; and
- (4) advise the client about any **relevant limitation on the lawyer's conduct** when the lawyer knows* that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) **A lawyer shall explain** a matter to the extent reasonably necessary **to permit the client to make informed decisions** regarding the representation.

(c) A lawyer may delay transmission of information to a client if the lawyer reasonably believes that the client would be likely to react in a way that may cause imminent harm to the client or others.

(d) A lawyer's obligation under this rule to provide information and documents is subject to any applicable protective order, non-disclosure agreement, or limitation under statutory or decisional law.





Advisor

(Rule Approved by the Supreme Court, Effective November 1, 2018)



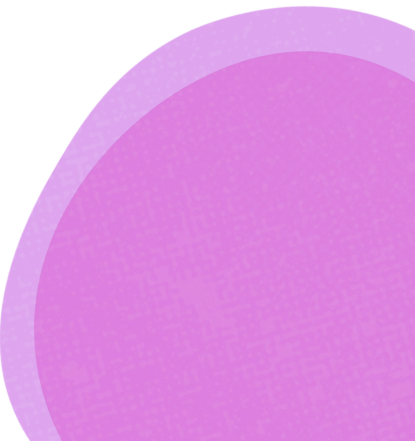
In representing a client, a lawyer shall exercise independent professional judgment and render candid advice.

Comment:

[1]...

[2] This rule does not preclude a lawyer who renders advice from referring to considerations other than the law, such as moral, economic, social and political factors that may be relevant to the client's situation.

- See https://www.calbar.ca.gov/Portals/0/documents/rules/Rule_2.1-Exec_Summary-Redline.pdf for redline changes to ABA Model Rule 2.1



Comment 2 to ABA Model Rule 2.1

[2] Advice couched in **narrow legal terms** may be of **little value** to a client, especially where practical considerations, such as **cost or effects on other people**, are predominant. Purely technical legal advice, therefore, can sometimes be inadequate. It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice. Although a lawyer is not a moral advisor as such, **moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied.**

Comment 3 and 5 to ABA Model Rule 2.1

- [3] A client may expressly or impliedly ask the lawyer for purely technical advice. When such a request is made by **a client experienced in legal matters**, the lawyer may accept it at face value. When such a request is made by a client inexperienced in legal matters, however, the lawyer's responsibility as advisor may include indicating that **more may be involved than strictly legal considerations.**
- [4]
- [5] In general, a lawyer is not expected to give advice until asked by the client. However, when a lawyer knows that a client proposes a course of action that is likely to result in **substantial adverse legal consequences** to the client, the lawyer's duty to the client under **Rule 1.4** may require that the lawyer offer advice if the client's course of action is related to the representation. Similarly, when a matter is likely to involve litigation, it may be necessary under Rule 1.4 to inform the client of forms of dispute resolution that might constitute **reasonable alternatives to litigation...**

WHAT INFORMS CLIENTS' BELIEFS?



Examples of Personal/Emotional Goals

- I want to resolve the dispute with dignity.
- I want to keep our dispute private.
- I want to maintain a respectful relationship with the other party(ies).
- I want to be treated respectfully.
- I want to treat the other party(ies) respectfully.
- I want to know that I am protected (e.g., insurance).
- I want to acknowledge the mistakes I have made.
- I want to take responsibility for my part of the dispute.
- I want to be able to trust the other party(ies) more.
- I want the other party(ies) to be more trusting of me.
- I want to save the family/business/relationship.
- I want to know that we made our best effort to save the family/business/relationship.

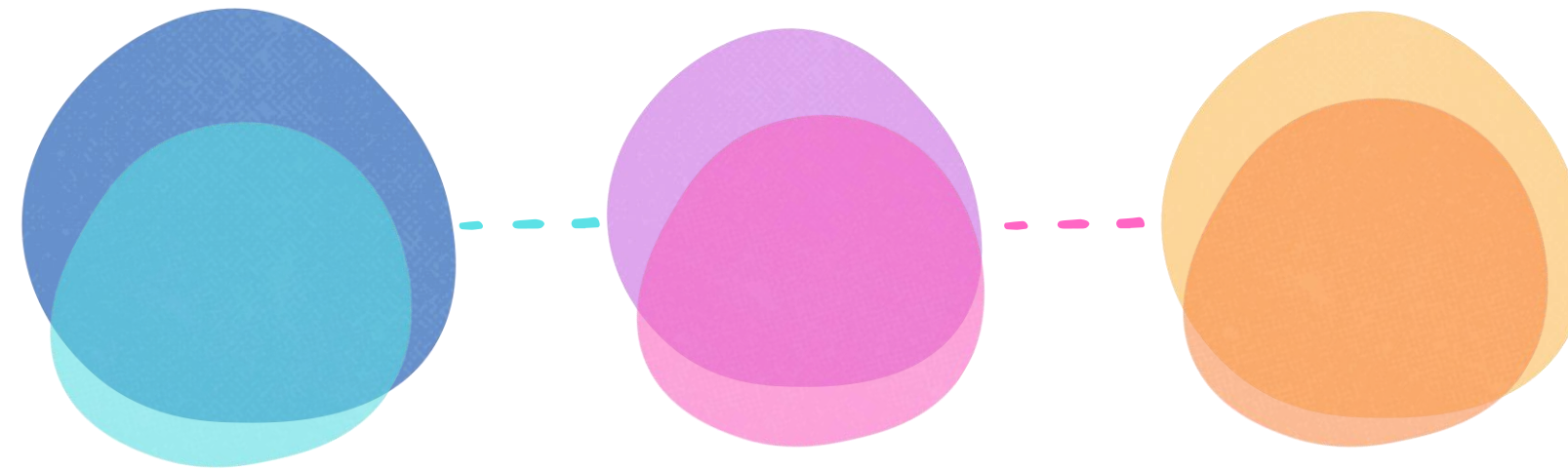


More Examples of Personal/Emotional Goals

- I want him/her to know how much he/she hurt me.
- I want him/her to apologize for what he/she has done.
- I want to do the honorable thing.
- I want to settle this matter in a way that is consistent with my religious or spiritual values.
- I want to listen better.
- I want to be less angry.
- I want to be less frightened.
- I want to be less reactive.
- I want closure.
- I want to be generous.
- I want the other party(ies) to acknowledge that I have been generous.



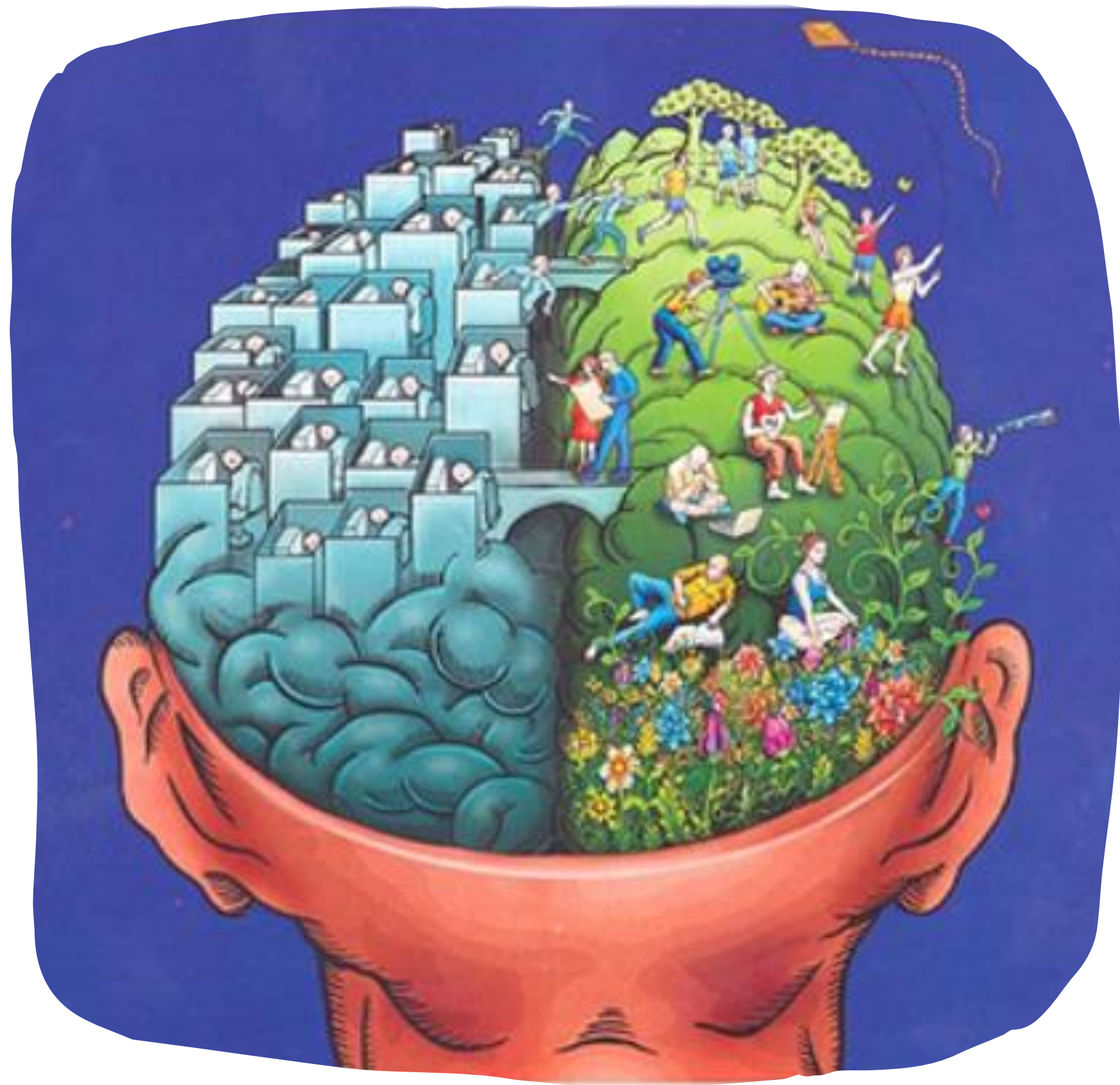
Continue to update and refine your list by asking yourself:



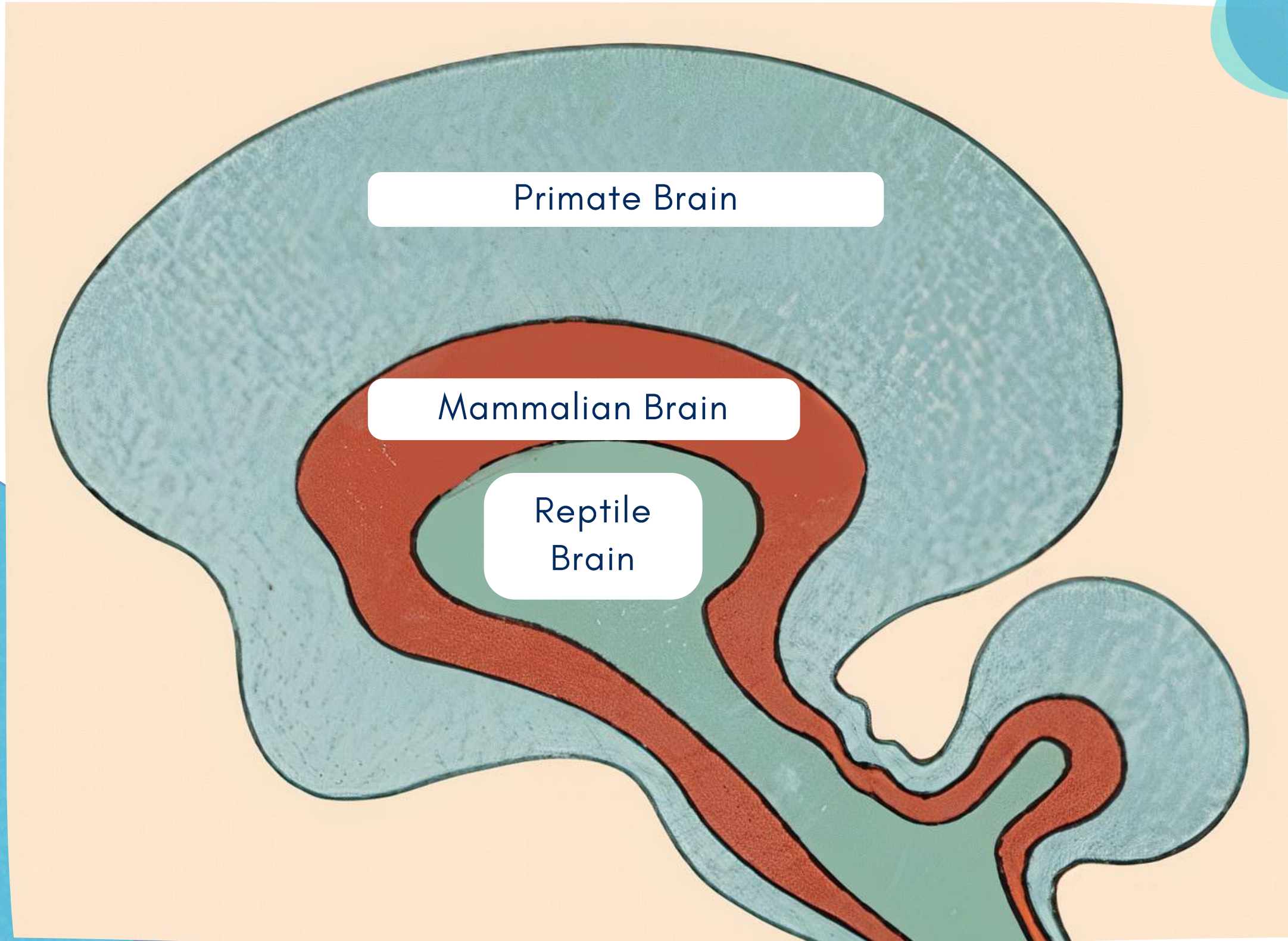
- Are my goals realistic?
- Is this goal/interest so important to me that I would be willing to make a major sacrifice in order to achieve it?
- Is this a goal that can be achieved during the mediation process?
- Would I regard this goal as legitimate if the other party(ies) had the same goal?
- Is this really an interest or is it a position?
- Is this goal based partly on spite?
- Is this goal consistent with my values?
- Is this goal really as important as the other goals?
- Would the other party(ies) have to make an unreasonable sacrifice in order for me to achieve this goal?

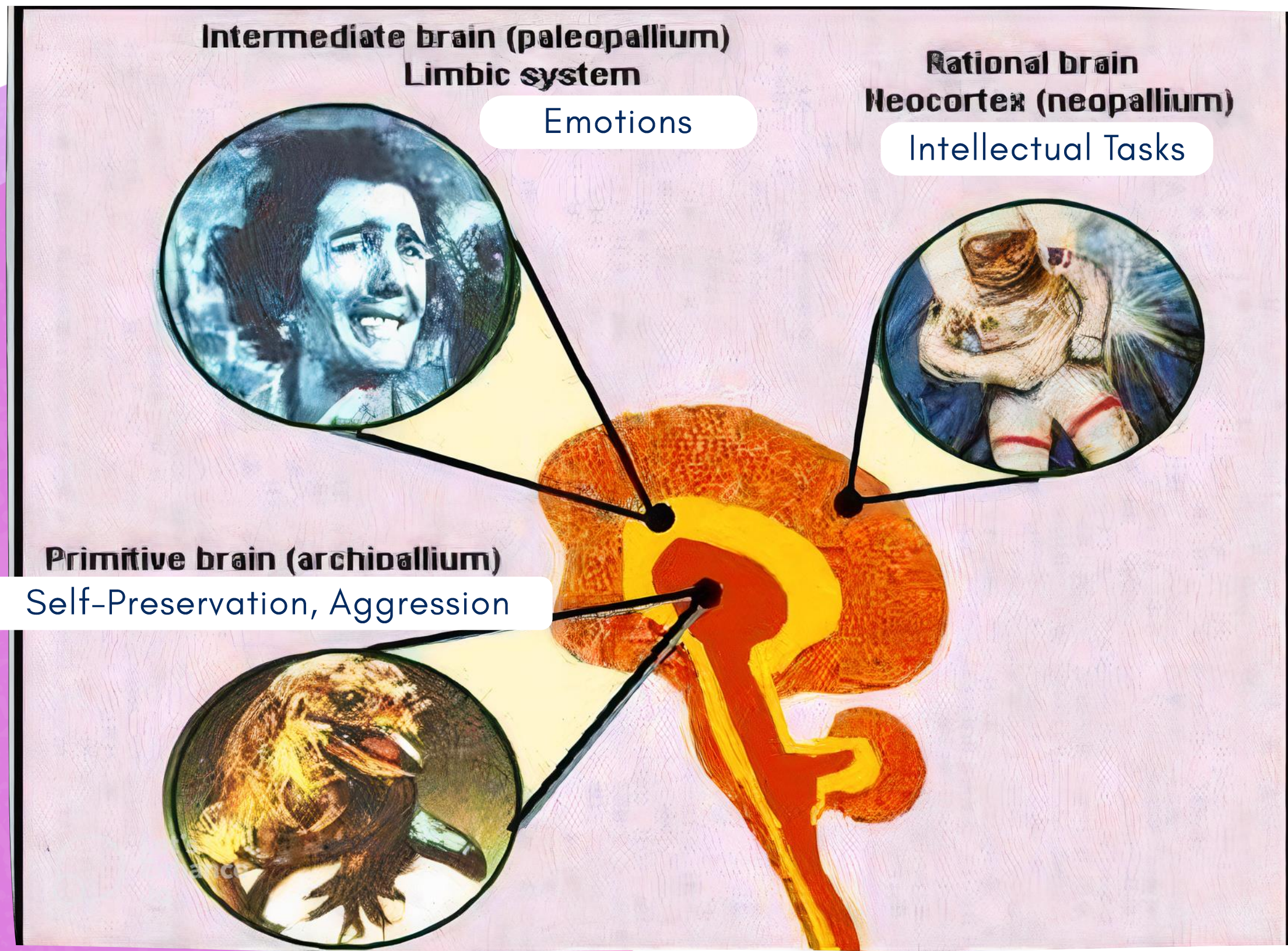
What does "Informed Consent" mean?

CRPC 1.0.1(e): e) "Informed consent" means a person's agreement to a proposed course of conduct after the lawyer has communicated and explained (i) the relevant circumstances and (ii) the material risks, including any actual and reasonably foreseeable adverse consequences of the proposed course of conduct.



What Does Neurobiology
Have to Tell Us About
the Client who is
emotionally triggered?





The Role of the Mediator

- Identifying options (including options not yet identified by the parties).
- Explaining the legal and practical repercussions attached to each option.
- Assist each party to apply that party's priorities/values to decision.
- Provide independent assessment of how an option either will or will not address each party's stated goals and interests.
- Provide alternative perspective (recommend consideration of other options).
- Avoiding substituting your professional judgment for that of the parties.

Thank You Any Questions?

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