
[SLIDE 1] **"*HOW TO GET THE MOST OUT OF COMMERCIAL MEDIATION*"**

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INTRODUCTION

1. **[SLIDE 2]** Mediation can be simply defined as: "*the attempt to settle a dispute through a neutral party*"[1]. The neutral acts as a facilitator of negotiations, not as a decision-maker. Mediation: "..*puts the power for a solution back into the hands of those most affected – the parties – and enables them to construct a solution that works for them*"[2].

2. Mediation has been around for a long time. Legislation at the time of Henry I (1100-1135) encouraged mediation, or "settlement by love" as it was referred to then[3]. The days on which mediation was to occur were known as lovedays[4]. Barry White would have approved.

3. Since the 1990s, mediation has been increasingly used as a dispute resolution mechanism for civil disputes. It is used commonly in construction, insurance, trusts and estates, property, partnership and negligence claims. It is all but mandatory for employment disputes, and, since 2020, in the farm debt context.

4. The consensual nature of the process, the chance to address broader issues, and the opportunities for constructive solutions, all make mediation an apt go to. It is an important part of any dispute resolver's toolkit.

5. **[SLIDE 3]** But they are challenging days. This seminar will look at how advisors can get the most from the process for their clients. It will examine:

   (a) Why mediate?

   (b) When to mediate;

   (c) Online or in-person?

   (d) Preparation - the most important factor in getting the best from the process;

   (e) Mediating well as advisor "on the day";

   (f) Dealing with difficult people; and

   (g) Deadlock-breaking.

[SLIDE 4] WHY MEDIATE?

6. Litigation can be a blunt tool for dispute resolution. The American humourist Ambrose Bierce described a lawsuit as:

> *"A machine which you go into as a pig and come out of as a sausage*."[5]

7. Abraham Lincoln, who did a bit of lawyering in his time, wrote:

> "*Discourage litigation. Persuade your neighbours to compromise whenever you can. Point out to them how the nominal winner is often the real loser in fees, expenses and waste of time."*

8. **[SLIDE 5]** Why mediate? - Mediation works. It achieves robust settlements. Even when settlement is not achieved, mediation helps cases to resolve more efficiently. There is substantial empirical evidence for this:

   (a) A 2015 survey of commercial mediators in New Zealand by Dr Grant Morris of Victoria University found that all reported settling at least 70% of the cases they mediated. 56% said that they settled 90-100%[6];

   (b) In a Scottish mediation pilot that ran from 2006 through 2008, 90% of litigants that settled at mediation reported that the terms of their agreement had been carried out, while only 67% of litigants who otherwise settled during the course of litigation reported compliance with the agreement[7]; and

   (c) A 2001 study of mediated EU commercial cases found that even those that did not settle at mediation were shorter and less costly to the courts and the disputants[8].

9. **[SLIDE 6]** Why mediate? - Mediation gives the parties control – they can decide when, and where to mediate, and they can choose their mediator. They also have control over how the case is resolved.

10. Why mediate? - Mediation gives parties a breadth of options beyond what can be ordered by the Courts. I have seen cases where:

   (a) Apologies have been made;

   (b) Commitments to rekindle family gatherings have been made;

   (c) Family loans were made, or written off;

   (d) Interests for life were created when none had been anticipated;

   (e) Property was swapped; and

   (f) A farm went to one son at a deep discount to keep it in the family.

   There are a multitude of other possibilities.

11. Why mediate? - You might have to! See s145 of the Trusts Act 2019, *Wright v Pitfield*, Venning J. Farm Debt Mediation Act 2019. Many contracts.

[SLIDE 7] WHEN TO MEDIATE

12. Disputants can mediate any time, from the first sign of a dispute, to post trial.

13. Generally, the earlier you mediate:

    (a) The more scope for costs savings; and

    (b) The more scope for saving relationships, and limiting emotional pain:

> "*A prolonged dispute will only serve to worsen and lengthen the grieving process..*"
>
> CEDR's Complete Guide to Trusts, Wills and Probate Mediation

14. The caveat - you need to be sufficiently well-informed about the case to make intelligent decisions about settlement. Sometimes that needs discovery, expert involvement, or even briefs. Depends on the case. How much is at stake will also have an effect on these calls.

[SLIDE 8] ONLINE OR IN-PERSON?

15. I enjoy mediating in person, and it is what most advisors are used to. But obviously needs must in these strange times.

16. The pandemic has pushed many things online – from school to catch-ups with grandparents. For my part, I have mediated a great deal online since the pandemic started, and can say that it does work.

17. Many practitioners are anxious about mediating online. They worry about personal connections, tech issues, and "Zoom fatigue". These worries are all fair. But they can be allayed:

    (a) Sufficient personal connections can still be generated online. I find that participants get particularly comfortable once they are familiar with the security and accessibility of their team breakout rooms;

    (b) Tech issues can happen, but are rare, and rarely insurmountable; and

    (c) "Zoom fatigue" can be addressed with regular breaks, and by encouraging an efficient approach.

18. Mediating online also has benefits. It is much harder for difficult personalities to be difficult from a 2sqcm box on a screen. Lay participants may feel more at ease joining from home, rather than being in a room full of suits and files.

19. I remember one large multi-party estates case I did online, where we had parties and lawyers zooming in from 10 different locations. There were people at breakfast benches, in armchairs, and at desks. It settled after a 12-hour day. All were delighted with the result.

20. Overseas, mediating online has been predominant since the pandemic took hold. CEDR's Ninth Mediation Audit (https://lnkd.in/gKQpAkP3) stated that, in the UK, between March and September 2020, 89% of commercial mediations were conducted online. Settlement rates also went up in 2020.

21. A survey recently published by the International Mediation Institute (https://lnkd.in/gCX6wr8w) questioned leading commercial mediators across the world about online practice. The mediators reported that benefits included: access to participants, time efficiency, and cost efficiency. The mediators reported that "*the online shift has not led to a significant change in settlement rates*".

22. Even after the pandemic, my sense is that online mediation will still be a frequent choice. It works well if folk have travel difficulties, and/or if costs are tight. It also has a significant carbon advantage.

[SLIDE 9] PREPARATION – THE MOST IMPORTANT FACTOR IN GETTING THE BEST FROM THE PROCESS

23. Prepare well. A failure to prepare for mediation, a "she'll be right on the day" approach, can be fatal.

24. I recommend that you:

    (a) Undertake a thorough litigation risk assessment;

    (b) Undertake a thorough litigation costs assessment;

    (c) Figure out who needs to attend the mediation;

    (d) Prepare your client for the mediation as a process;

    (e) "Minimise information asymmetries"; and

    (f) Prepare a draft settlement agreement.

Litigation risk assessment

25. Undertake a thorough litigation risk assessment. Important factors for consideration include:

    (a) *Risks on the law* – what are the chances of a Court or some other decision-maker deciding key legal points in your client's favour? What are the appeal risks?

    (b) *Risks on the facts* – what hurts your client's case? Will the witnesses be credible? Who has the best expert? Are there what Paul Wolfowitz would call "known unknowns" that might hurt your client?

    (c) *Risks on quantum* – is there a sliding scale of what could be awarded? Might the judge allow some aspects of a claim but not others?

    (d) *Recovery risks* - if your client wins any money or costs, will they be able to recover what they win from the other side.

    Depending on the case, some of these factors will be more important than others, but all need to be considered.

[SLIDE 10] Litigation costs assessment

26. There is an economic transaction that underlies any civil litigation. Litigants should be considering - How much could I get? How much could I lose? Litigation costs are a key part of this assessment. They determine the net position.

27. Lawyers often massively underestimate likely litigation costs. The Lawyer's Global Litigation Top 50 survey 2013 found:

    (a) General counsel saw an average disparity between budget and final bill of +40%; and

(b) 14% saw divergences as high as +80-100%.

28. Why do lawyers underestimate?

(a) Litigation is seldom predictable. But this does not explain the marked tendency to *under*estimate;

(b) May be afraid of sticker shock – client may go elsewhere;

(c) May be embarrassed by own fees; and

(d) May want to tell the client what they want to hear.

29. Carefully consider any estimate given. And err on the upside.

[SLIDE 11] *Increased/indemnity costs?*

30. Parties who have "*behaved extremely badly*" - *Bradbury v Westpac Banking Corp* [2009] 3 NZLR 400, can be exposed to increased, or even indemnity costs, under HCR 14.6.

31. But remember that the Court also has a discretion to refuse, or reduce, costs, HCR 14.7.

32. Non-scale costs awards are still relatively rare.

[SLIDE 12] *Emotional costs*

33. The other thing to bear in mind is emotional/stress costs for the participants.

> *"For some people, the pressure can cause loss of sleep, anxiety, anger and problems dealing with others, including their own families…There may even be serious psychological consequences such as depression".*
>
> Vaughan-Birch, in *Raconteur* (25 May 2016)

It is hard to put a value on these pressures. But they should not be ignored.

Overall re risk and costs

34. Careful pre-mediation assessment of risk and costs is power. When an advisor and a client come to mediation with a real, mutual, understanding of these factors, they are far less stressed, and much better able to make good decisions.

[SLIDE 13] Figure out who needs to attend the mediation

35. All affected parties should attend a mediation, if possible.

36. Counsel – in my experience counsel are usually a huge asset to the process.

37. Support people? Plusses and minuses.

38. Experts – often important – but beware advocates.

[SLIDE 14] Prepare your client

39. How would you go about this?

    (a) Explain what mediation is, and how it will work;

    (b) Make sure that they appreciate that the mediator will not make a decision;

    (c) Make sure that they appreciate that they do not have to settle;

    (d) Tell them who will be at the mediation (important for you to know too); and

    (e) Most importantly, have a clear discussion about what a realistic settlement might be.

[SLIDE 15] "Minimise information asymmetries"

40. Information asymmetries are a major cause of mediations not settling. One side, or both, simply do not know enough about the case to make a good decision. There are things that can be done to minimise information asymmetries. For example:

    (a) Get, and share, expert reports, up-to-date accounting materials, and/or other pertinent evidence;

    (b) Take steps to ensure that the other side appreciates the strength of your client's case before the mediation begins. This might involve forwarding expert reports to the other side in advance of the mediation, or drawing a key case to their attention. Mediation by ambush rarely works. People need time to process a new risk factor.

[SLIDE 16] Prepare a draft settlement agreement

41. This is common, and sensible. Many settlement agreements contain a lot of uncontroversial material: who the parties are, what they are settling, confidentiality, who any payment is to be made to, discontinuance etc. Setting all of that out in a draft document ahead of the mediation can save a lot of time late in the day, when everyone is usually quite tired.

[SLIDE 17] MEDIATING WELL AS ADVISOR "ON THE DAY"

42. There are no absolutes, and each mediation will be different, but here are some tips:

(a) Be strong. Clients rightly expect their lawyer to be a compelling advocate for their cause. Clients will also rightly expect their lawyer to stand up to aggressive tactics by the other side. Being strong does not mean being unduly aggressive yourself, being snide, shouting, or putting people down. That sort of advocacy is acutely unpersuasive, and can derail the process. Be strong in a calm, unflappable, considered, respectful and determined way;

(b) Avoid long openings. Usually they lack impact;

(c) Acknowledge "the pain";

(d) Acknowledge risks. Every litigant has some risks. Acknowledging some of them to the other side, without giving the farm away, has real benefits. Firstly, it makes what you have said about the strengths of your client's case sound more compelling. Secondly, it sends a signal that your side is going to take a realistic approach to negotiations, which can in turn encourage the other side to do the same;

(f) Work with the mediator. Take careful heed of the questions they ask, and any cues they give. Often these will be important indicators of how an objective third party is seeing things. In private sessions, ask the mediator their thoughts on the mood of the room, and how they think settlement negotiations might best be progressed;

(g) **[SLIDE 18]** Support your client. Appreciate that it will be a stressful day for them, and help them through it. Take a break with them if they look like they need it. Make sure they understand what is going on, and ask them if there is anything that is concerning them, or more that they want said. Take them back through the risk and costs assessments if necessary.

(a) Do not rush to private sessions. A lot of lawyers want to move to private sessions too soon. Avoid this (and there is a good article by Geoff Sharp decrying this trend[9]). Make sure that you have made your best points to the other side first, and responded to theirs. Trying to do this after the open session has concluded is less effective;

(b) Be prepared to justify a settlement offer. A position based on principle will always be more persuasive than a figure that is plucked from the air. If one party justifies a settlement offer, it puts pressure on the other party to do the same;

(c) Be constructive and imaginative when it comes to settlement. Often it is the advisors who spot the opportunity for innovative solutions;

(d) Do not give up. Mediations can get very tiring towards the end, and it can be a very hard day. But often the seemingly intractable can move to settled within the last hour of a mediation. Stay the course; and

(e) Always record the terms of a settlement in a written agreement. This has always been good practice, and the importance of doing it was emphasised by the 2011 Court of Appeal case, *Sheppard v Specialized Bicycle* [10].

[SLIDE 19] DEALING WITH DIFFICULT PEOPLE

43. Difficult people - those who are aggressive, wildly emotional, snide, unduly contrary – can pop up in mediations. Disputes are often highly charged, and this can bring out bad behaviour in even otherwise lovely folk. What can you do?

44. If you know in advance that someone is likely to be difficult, prepare for that – prepare yourself, the client, and the mediator.

45. Recognise it for what it usually is – a stress reaction.

46. On the day, you can discourage bad behaviour, proactively, by:

    (a) Naming the pain;

    (b) Making appropriate concessions – “we agree” is very disarming;

    (c) Modelling good behaviours

47. If bad behaviour happens, the mediator will help. You can also address it reactively, by:

    (a) Staying calm;

    (b) Naming the pain;

    (c) Re-focussing back on the issues;

    (d) Taking a break;

    (e) Setting a boundary;

    (f) Switching approach – shuttle diplomacy, short lineouts.

[SLIDE 20] DEADLOCK BREAKING

48. Here are some options and strategies for deadlock-breaking:

(a) As Don Draper famously said in Mad Men, "*if you don't like what's being said, change the conversation"*. Typically, the snag gets hit on the dollars. Start talking about another aspect of settlement (eg payment terms). No one will forget about the dollars, but the change gives people a chance to reassess, and perhaps something to justify a new number a little further down the track;

(b) Look at other settlement options – "growing the pie". Is there something else that can go into the mix, or another way of settling? I mediated a weathertightness claim where the original vendor bought the house back from the plaintiff, with financial support from another party;

(c) Bracketing – if A will drop by X, will B come up by Y?

(d) Range bargaining – If A will come into the 500s, will B come into the 300s?

(e) Look at bringing other ADR techniques into play, eg:

(i) An expert determination on a disputed technical point, or a legal opinion on a disputed legal point. Could be binding/non-binding. I was involved in a settlement that had provision for a non-binding expert determination on a misuse of confidential information claim;

(ii) MEDALOA;

(f) **[SLIDE 21]** Change who is talking/calling a short lineout. Get the lawyers, or the parties, together separately;

(g) "Call a friend" - See if there is someone outside of the mediation who can add something. Obviously, this needs to be done appropriately in terms of the confidentiality restrictions applying to the mediation;

(h) Blind bidding;

(i) Chance options – toss a coin, or put options in a hat and draw one out; and/or

(j) Split the difference.

[SLIDE 22] CONCLUDING REMARKS & QUESTIONS – GETTING THE BEST FROM THE PROCESS

Mark Kelly, JUNE 2022

[1] Dictionary.reference.com/browse/mediator
[2] *How to Master Commercial Mediation*, Richbell et al, Bloomsbury, 2015, p3
[3] From address by Lord Neuberger to the Civil Mediation Conference, 12 May 2015, citing: *Leges Henrici Primi* p173, 54.2 and 3, from "A View From On High",
[4] Neuberger address, n4, citing: Derek Roebuck, *Mediation and Arbitration in the Middle Ages 1154 to 1558* (2013), pp 29ff
[5] Ambrose Bierce (American humorist, author), cited on www.neimanmediation.com
[6] LEADR/Victoria University Commercial Mediation in New Zealand Project Report (June 2015), p5
[7] Vander Veen, n21, citing: Ross, M. & Bain, D. (2010). Report on evaluation of in court mediation schemes in Glasgow and Aberdeen Sheriff Courts. Edinburgh: Queen's Printers of Scotland. Retrieved from: http://www.scotland.gov.uk/Publications/2010/04/22091346/19.
[8] Vander Veen, n21, citing: De Palo, G., Feasley, A., & Orecchini, F. (2011). Quantifying the cost of not using Mediation – A data analysis. Brussels: European Parliament Policy Department C: Citizens' Rights and Constitutional Affairs. Retrieved from: http://www.europarl.europa.eu/document/activities/cont/201105/20110518ATT19592/20110518ATT19592EN.pdf
[9] http://geoffsharp.co.nz/wp-content/uploads/2010/10/IN-PRAISE-OF-JOINT-SESSIONS.pdf
[10] [2011] 3 NZLR 620