ADLS CPD

CPD WEBINAR

Putting The Commercial Into Commercial Mediation

PAPER

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Presenter

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INTRODUCTION

1. [SLIDE 2] 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."*[1]

2. Mediation can be a highly effective alternative to litigation. Mediation can be simply defined as: "*the attempt to settle a dispute through a neutral party*"[2]. 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*"[3].

3. 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[4]. The days on which mediation was to occur were known as "*lovedays*"[5]. Barry White would have approved.

4. Modern mediation in New Zealand arguably started in industrial relations. An Industrial Mediation Service was set up in 1970[6]. From there, and following international trends, it spread into other fields, notably family law via the Family Proceedings Act 1980, and environmental law through the Resource Management Act 1991.

5. In the 1990s mediation spread into commercial litigation, particularly in construction and insurance disputes. That development was largely market-driven. But statutory encouragement followed there too. When the Weathertight Homes Resolution Services Act 2006 was enacted to deal with the leaky homes crisis, mediation was at the centre of its regime. Mediation has also been used extensively for earthquake insurance disputes, and seems set to be for use in cyclone insurance disputes.

6. In New Zealand, mediation is now referred to in over 100 statutes, and is often mandated by them. The Farm Debt Mediation Act 2019 is a recent notable example (I have mediated around $300M worth of farm debt under this Act). Mediation is all but compulsory in employment, family, and Weathertight Homes Tribunal disputes. Many standard-form and bespoke contracts require parties to mediate disputes before litigating them.

7. But, in some commercial sectors, there can still be a reluctance to mediate. This can be driven by a perception that mediation is a "soft" option – maybe a fear that it really will be a "love day". As a lawyer advising a client, how do you get past that? How do you convince a client in a commercial dispute that mediation is a good option? And, if you can, how do you get the best from the process? This seminar examines these issues through a commercial lens, by asking:

   (a) What is the business case for mediation in commercial disputes?

   (b) Why might mediation be better value than other forms of dispute resolution?

   (c) "*Why wouldn't you?*"; and

   (d) How do you get the best result for a business at a mediation?

[SLIDE 3] WHAT IS THE BUSINESS CASE FOR MEDIATION IN COMMERCIAL DISPUTES?

8. What is the business case for mediation in commercial disputes? This question can be answered in six parts:

   (a) It works – settlement rates are high;

   (b) It is cheap;

   (c) It is flexible;

   (d) It allows the parties to be creative with solutions;

   (e) The parties retain control; and

   (f) It is very popular – which tends to confirm (a)-(e) (do not just take my word for it!).

[SLIDE 4] The business case for mediation in commercial disputes: it works – settlement rates are high

9. There is substantial empirical evidence to show that mediation works, in the sense that settlement rates are high. For example:

   (a) US Department of Justice records for Department litigation in 2012 across the US showed that the success rate for voluntary ADR in Department litigation ranged from 69%-79%[7];

   (b) The 10th CEDR Audit found that, in the UK, for the 2022 year, civil and commercial mediations had an aggregate settlement rate of 92%, with 72% settling on the day, and 20% settling shortly after the mediation day[8]; and

   (c) A 2019 survey of New Zealand commercial mediators by Dr Grant Morris of Victoria University found that:

      (i) All reported settling at least 60% of the cases they mediated;

      (ii) 85% reported settling 80-100%; and

      (iii) 55% said that they settled 90-100%.[9]

[SLIDE 5] The business case for mediation in commercial disputes: it is cheap

10. Particularly compared to litigating, mediation is cheap. Most (85% of) commercial mediations in New Zealand are one day or less[10]. Mediator fees vary from $2500 to c.$10,000[11]. There will sometimes be venue fees too. The mediator's fees and the venue fees will be split between the parties. There will usually be lawyer's fees and sometimes expert fees.

11. Every case will be different. But I would suggest that, generally, a commercial case can be mediated for an all up per party cost of $10,000-$30,000. In the context of most commercial disputes, that is in fact very cheap.

[SLIDE 6] The business case for mediation in commercial disputes: it is a flexible process

12. Mediation is a particularly flexible dispute resolution process. Parties can choose:

    (a) Their mediator. There are around half a dozen full-time commercial mediators in New Zealand. There are also many other skilled folk who work as mediators as part of a wider practice. Most, but not all, commercial mediators in New Zealand are lawyers. Of the lawyers, many are litigators by experience, but others were judges, or have a background in academia;

    (b) Their format. Since the pandemic, online mediation has exploded. The 10th CEDR Audit found that, in the UK, for the year ended 30 September 2022, 64% of an estimated 17,000 mediated civil and commercial cases were mediated online[12]. In the US, many mediators still work mainly online. Mediations here in New Zealand have tended to go back to in-person since restrictions lifted, but some are still conducted online, and others are undertaken on a hybrid basis (with some online attendees);

    (c) Their venue, if in person;

    (d) The date, start time, and duration. A mediation can be convened at any time, and on very short notice;

    (e) Who should attend; and

    (f) What information to exchange.

13. This flexibility enables the parties to tailor a process that works best for them. This will be a contributing factor to the success of the process.

[SLIDE 7] The business case for mediation in commercial disputes: it allows the parties to be creative with solutions

14. Courts have limited remedial options. Most cases are about damages. Sometimes they are about prohibitive or declaratory relief. It is rare for the Courts to order a party to take a positive step (eg a writ of mandamus), other than to pay money.

15. By contrast, in a mediation, parties can be creative with solutions. They can agree anything. For example:

    (a) Apologies, statements recognising harm, and joint statements;

    (b) Agreements for parties to work further together in the future. This type of agreement is very common in the farm debt context - the farmer and the lender will agree to work together on restructures, sell-downs and/or business planning, to get the debt under control to the benefit of both;

    (c) Licensing arrangements – these are quite common in IP disputes;

    (d) Swaps of land, shares, and anything else. I once mediated a leaky home claim where the original owner, who thought the house was great, bought it back from the claimant;

(e) Territory agreements, and restraints of trade (which can be apt of breach of confidence claims and/or business break-ups); and

(f) Technology transfers.

16. The ability to be creative with solutions appeals to commercial parties. They often have a better insight into the opportunities for value-creation than we lawyers.

[SLIDE 8] The business case for mediation in commercial disputes: the parties have control

17. Mediation is all about the parties. They get to decide (with advice) on process, and solutions. They have control. Contrast this with determinative processes, which are largely controlled by the lawyers, and ultimately by the decision-maker.

[SLIDE 9] The business case for mediation in commercial disputes: it is very popular

18. Commercial mediation is very popular. This tends to confirm the contentions above. Which is good, because obviously I have something of an inherent bias in favour of the process!

19. In this regard:

(a) Research by Dr Grant Morris of Victoria University suggests that there are 800-1000 commercial mediations a year in New Zealand[13]. This compares to the 351 civil matters disposed of by trial in the High Court in 2021[14];

(b) Some 70-85% of leaky homes cases dealt with by the WHRS were being resolved by mediation[15]. Many Canterbury Earthquake Sequence insurance disputes were resolved by mediation; and

(c) The 10th CEDR Audit found that, in the UK, for the year ended 30 September 2022, approximately 17,000 civil and commercial cases were mediated[16]. It was further recorded that the value of cases mediated each year is approximately GDP20 billion[17].

20. Is commercial mediation becoming more popular in Aotearoa? Dr Grant Morris's recent research has suggested that there is no evidence that the number of commercial mediations is increasing here[18]. But the 10th CEDR Audit in the UK found that civil and commercial mediation levels are still increasing there[19], and we do tend to follow UK trends. My sense is that numbers will be affected by circumstances, like the leaky homes crisis and the Canterbury Earthquake Sequences, but that mediation is becoming more popular in more sectors of the commercial market. For example, via farm debt mediation, the banking and finance sector is now, in my view, much more interested in, and supportive of, the process.

[SLIDE 10] WHY MIGHT MEDIATION BE BETTER VALUE THAN OTHER FORMS OF DISPUTE RESOLUTION?

21. Why might mediation be better value than other forms of dispute resolution? I will approach this question in two parts; looking firstly at why mediation might be better value than determinative processes, and secondly at whether it is better value than negotiation.

Why might mediation be better value than determinative processes?

22. Mediation can be better value than determinative processes (arbitration/Court), because:

    (a) It saves time;

    (b) It saves money; and

    (c) It helps parties get away from the stress of litigation.

[SLIDE 11] Why might mediation be better value than determinative processes? – Saves time

23. Mediation can save the parties time. Obviously how much time is saved will depend on the point in a dispute at which the parties mediate. This varies – I have seen mediations take place a month after a dispute has arisen, and a month before trial.

24. I am often asked: "*when is the best time to mediate?*". I say that parties should mediate as soon as they are sufficiently well-informed about a case, within economic reason, to do so.

25. The following studies support the view that mediation can save parties time:

    (a) 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[20];

    (b) A 2011 study of civil cases in Michigan found that mediation produced far more settlements and consent judgments (84% of cases) than other approaches. The mediated cases also resolved more quickly (regardless of whether they settled or not)[21]; and

    (c) US Department of Justice records for Department litigation in 2012 across the US showed that 1,516 months of litigation time were saved (ie, over 100 years) via voluntary ADR[22].

26. It is worth noting in this context that the median age at disposal for civil trials in the High Court was 740 days in 2021[23].

[SLIDE 12] Why might mediation be better value than determinative processes? - Saves money

27. Obviously, time is money in a commercial context. And the longer parties litigate the more likely they are to accrue greater costs.

28. Again, there are comprehensive studies which support the view that mediation can save the parties money:

    (a) In a 2010 survey of mediations in UK construction disputes:

> *"[t]he cost savings attributed to successful mediations were significant….. . Only 15% of responses reported savings of less than £25,000; 76% saved more than £25,000; and the top 9% of cases saved over £300,000..."*[24]";

(b) The 10th CEDR Audit found that, in the UK:

- *By achieving earlier resolution of cases that would otherwise have proceeded through litigation, the commercial mediation profession this year will save business around £5.9 billion in wasted management time, damaged relationships, lost productivity and legal fees.*
- *Since 1990, our profession has contributed savings of £50 billion.*[25]"

(c) A Canadian meta-analysis on the effectiveness of mediation in civil law disputes found that:

> *"Overall, mediation processes are fairly effective in creating both time savings and costs savings. The meta-analysis shows that mediation results in improvements of at least 16% or 17% to perceptions of time and cost savings, which is supported by documented savings in the areas of time and cost. Depending on the characteristics of the mediation program, these improvements could be at least 40%, but are more likely in the range of around 30%.*[26]"

[SLIDE 13] Why might mediation be better value than determinative processes? - Helps parties get away from the stress of litigation

29. Most parties find litigation stressful. Even those that start with fire in their bellies become jaded and exhausted by the process over time. Litigation is a tough process for the protagonists.

> *"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)

> *"Most small business owners are invested personally in their business; litigation causes not just financial loss, but also substantial emotional hardship, and often changes the tone of the business".*
>
> Klemm Analysis Group 2005

30. A 2012 Victoria, Australia, survey of B2B litigation costs[27] found that:

(a) 52% of businesses said that the dispute had an adverse effect on their level of work-related stress – 62% of those said the impact as high; and

(b) 31% of businesses said the dispute had an adverse effect on their general health and well-being – 59% said the impact was high.

31. **[SLIDE 14]** Being on the winning side does not necessarily ease the pain. In this regard:

(a) *"A successful lawsuit does not provide the "greenback poultice""* [28];

(b) 70% of doctors win malpractice suits in the US, but 70-86% still report symptoms of depression during the lawsuits[29]; and

(c) In the US, there has been commentary on "*Litigation Response Syndrome*", an effect like PTSD[30].

32. Workplace wellbeing is becoming a greater part of the commercial landscape. In this context, the importance, and value, of avoiding the stress of litigation (or at least unnecessary litigation) will grow. By helping parties to settle disputes, and consequently move on, mediation can help with this.

[SLIDE 15] Is mediation better value than negotiation?

33. The most common form of commercial dispute resolution continues to be negotiation. Is mediation better value than negotiation? No, not necessarily. Often, party to party, and/or lawyer to lawyer, discussions will be the best way to get matters resolved. In some cases, negotiation will be cheaper, and quicker, than mediation.

34. Negotiation and mediation are not mutually exclusive. Often, the cases I mediate have been the subject of prior negotiations. The parties have just been unable to achieve settlement that way.

35. In other cases, negotiation is not an option. This may be a function of the nature of the dispute, and/or the parties. Many international disputes – think Northern Ireland, or Israel/Egypt – have required a mediator to help the parties find solutions.

36. Mediation does have some potential advantages over negotiation. Involving an independent neutral can enable the parties to talk to each other in a more constructive way. By agreeing to engage in the process, the parties can start a cascade of compromise. Their commitment to the process enhances their commitment to settle.

37. Interestingly, there is also research which suggests that mediation achieves more durable settlements than those which have been negotiated. In a Scottish mediation pilot that ran from 2006 through 2008, 90% of parties 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[31].

[SLIDE 16] "WHY WOULDN'T YOU"?

38. Lest this seminar be seen merely as a mediation commercial, it is worth noting that there may be good reasons not to mediate. In particular:

(a) There are some cases at the cutting edge of the law which require a judicial decision;

(b) There are some cases where, for one party at least, the issues are existential to a point which entirely precludes compromise;

(c) There are some cases where a key protagonist, be it a party, a lawyer, or an expert, is so doggedly irrational that compromise is again precluded. Beware with this one though – sometimes perceptions are not reality in this regard;

(d) Where a statute/law requires a decision; and

(e) As above, often negotiation will be the best way to get matters resolved.

39. But I would suggest that it is always wise to keep considering mediation as part of the suite of commercial dispute resolution options.

[SLIDE 17] HOW DO YOU GET THE BEST RESULT FOR A BUSINESS AT A MEDIATION?

40. Once a decision to mediate has been made, how do you get the best result for a business at a mediation? There is a lot that could be said on this topic. I will focus on three areas:

(a) The importance of preparing a thorough litigation risk assessment;

(b) The importance of preparing a thorough litigation cost/benefit assessment; and

(c) Some tips for counsel on the day.

[SLIDE 18] Get the best result for a business at a mediation by - preparing a thorough litigation risk assessment

41. In advance of a mediation, a thorough litigation risk assessment should be prepared. The objective is to ensure that you and your client have a full appreciation of what lies ahead if the matter is not settled at mediation. 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?

(b) *Risks on the facts* – what hurts your client's case? How will the witnesses go, and will they be credible? Who has the best expert? Are there what Paul Wolfowitz would call "*known unknowns*" that might come out and 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? What is the applicable interest rate, and will the Court have any discretion on when to award interest from? Are claims to general and/or exemplary damages realistic? Has your client mitigated, and/or gained betterment?

(d) *Appeal risks* - what is the chance that, if you win, the other side will appeal? If the chance of an appeal is real, what will be the risks and costs associated with that? And

(e) *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 19] Get the best result for a business at a mediation by - preparing a thorough litigation cost/benefit assessment

42. In advance of a mediation, a thorough litigation cost/benefit assessment should also be prepared. How does it look to approach the litigation primarily as an economic transaction? What is the maximum upside? What is the maximum downside?

43. **Exercise**: Let us consider a fictional case, *"X v Y"*, which has the following features:

(a) It is a $750k claim by X against Y, regarding alleged defects in industrial machinery supplied by Y to X;

(b) The parties have agreed to mediate before a statement of claim is filed, but the parties/lawyers are well across the issues;

(c) The lawyers predict a five-day High Court trial, with an engineering expert each, and three staff members each, giving evidence; and

(d) They agree that 2B costs would be applicable.

44. In private session with X and their counsel, the mediator asks: "*how much from here to the end of a trial?*". Sometimes, in my experience, this prompts counsel to go: "…, *um* (peers briefly at a nearby artwork for inspiration), …. *I reckon around $100K*".

Attendees:

Write, roughly:

- What might X's legal costs be from filing to judgment?
- What might a 2B costs award in X's favour be at the end of trial?
- Beyond legal costs, what other costs should X be taking into account?

Some commentary on these issues follows.

45. **[SLIDE 20]** 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%[32].

46. **[SLIDE 21]** Why do lawyers underestimate?

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

(b) They may be afraid of sticker shock, and that the client will go elsewhere;

(c) They may be embarrassed by their own fees; and/or

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

47. **[SLIDE 22]** Estimates often do not allow for common attendances such as these:

(a) Repeated settlement discussions that go nowhere;

(b) Memoranda and Court appearances regarding timetable lapses;

(c) Time liaising with other stakeholders – boards, insurers, funders;

(d) Time spent bringing new staff up to speed;

(e) Time spent periodically "re-immersing" in the case;

(f) Time researching and discussing ideas/tactics that do not pan out;

(g) Extra attendances caused by a party/lawyer on the other side being hard work/uncommercial; and

(h) Time wasted amongst irrelevant documents? A 2008 US survey found that the ratio of pages discovered to pages entered as exhibits was as high as 1000/1[33].

Collectively an **"easy 20%"** extra on many files.

48. **[SLIDE 23]** A compounding effect of underestimating likely litigation costs is that it can make scale costs look like a reasonable return.

49. That perception is encouraged when litigants are told that scale costs could be, as the Rules Committee intended, 2/3rds of reasonable actuals (HCR 14.2(d)). Most of the time, scale costs will be well short of that. A better estimate is 1/3rd to a half.

50. **[SLIDE 24]** So, let us go back to *X v Y*. It did not settle, a claim was filed, and it went through to a trial. Did the $100k estimate stack up? Did yours? I have prepared a hypothetical schedule of likely actual, and scale, costs for such a claim. See the **Handout**:

(a) The schedule is subject to specific assumptions (see notes);

(b) It arrives at a figure for likely actual legal costs of $203,760; and

(c) It arrives at 2B scale costs of $70,933.

51. **[SLIDE 25]** Some will say: "*Ah, but we will get increased/indemnity costs if we win*". Not so fast:

(a) HCR 14.6 allows for such awards, but:

> "*Such an award is inherently in conflict with the aim of the costs regime, so cannot be expected unless there are substantial reasons for departing from the norm*"

Beck, *Civil Procedure – A to Z of New Zealand Law,* at 13.3;

(b) Parties (and sometimes counsel) tend to conflate a good case with *"the path of the righteous"*. But the reality is that increased and indemnity costs are declined far more often than they are granted; and

(c) Remember too that the Court has a discretion to refuse, or reduce, costs, HCR 14.7.

52. Others might say: *"OK, but legal costs, that's the bottom line"*. Not so fast again…

Business costs arising from litigation

53. **[SLIDE 26]** Significant unrecoverable business costs can arise from litigation. In particular, consider:

(a) Management time, distraction, relationships affected, productivity affected, morale affected;

(b) In a 2012 Victoria, Aus., survey of B2B litigation costs, 37% of those surveyed said the dispute had an adverse effect of the performance of their business, 40% of those said the impact was high[34];

(c) A survey of 500 US CEOs found that lawsuits caused 36% of their companies to discontinue products, 15% to lay off workers[35]; and

(d) There is also the cost of money– money sunk into legal fees is not earning any immediate return – there is no interest on costs.

Emotional/stress costs

54. **[SLIDE 27]** Regarding emotional costs – refer back to our discussion about the stress associated with litigation. It is hard to put a value on: "*loss of sleep, anxiety, anger and problems dealing with others, including their own families*". But I do not think that because these things defy numerical specificity they should be ignored.

Other costs

55. It is also important to consider reputational costs, the costs of precedent, and potential recovery costs.

[SLIDES 28, 29] *Let us go back to X v Y*

Description – X wins - the 2B scale costs max upside	$
Claim	750,000
+ 2B scale costs	70,933
+ Interest at, say 5% (assume 18 months from claim to judgment)	56,250
Sub total	877,183
- Actual legal costs (assume expert's costs are neutral with award)	203,760
- Cost of money for actual costs (including expert's costs), say	10,000
- An allowance for business costs, say	50,000
- An allowance for emotional/stress costs, say	25,000
- Recovery costs	?
Total 2B scale costs max upside	588,423 - ?

Description – X loses - the 2B scale costs max downside	$
Claim	0
- 2B scale costs (let's assume similar, minus interloc.) payable to Y	60,000
- Disbursements payable to Y (incl. Y's expert's costs), say	15,000
- Actual legal costs	203,760
- X's expert's costs, say	10,000
- Cost of money for actual costs (including expert's costs), say	10,000
- An allowance for business costs, say	50,000
- An allowance for emotional/stress costs, say	25,000
- Reputation, precedent costs	?
Total 2B scale costs max downside	-373,760 - ?

56. [SLIDE 30] Approaching X's $750k claim primarily as an economic transaction:

(a) X's maximum upside is **$588,423 - ?**; and

(b) X's maximum downside is **-$373,760 - ?**.

The case should settle within that delta. Where the case should be settled within that delta is a function of the risk assessment.

57. All of this might seem like a difficult conversation to have with your client. But, actually, this sort of knowledge is power. When a lawyer and a client come to mediation with a real, mutual, understanding of litigation risk and litigation cost/benefit, they are much better able to make good decisions.

[SLIDE 31] Get the best result for a business at a mediation by - mediating well as counsel on the day - tips

58. The lawyer has a hard job in a mediation. They must be part gladiator, and part voice of reason. They must be combative, but also constructive. It is a delicate balance.

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

(a) Be strong. Just because it is a mediation does not mean that you have to agree with the other party. 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. They lack impact;

(c) If there is a significant emotional dynamic to the dispute, acknowledge it early – this will aid communication;

(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 commercial and realistic approach to negotiations, which can in turn encourage the other side to do the same;

(e) Watch reactions. It is hard in the heat of a mediation, but it is a useful skill to be able to keep an eye on how people are reacting to what is going on. What points seemed to particularly upset them, what do they seem confident about, who defers to who, and so on. Most people are not very poker-faced, and their reactions can tell you a lot about how they view the case;

(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 32] Be there for your client. Appreciate that it will be a stressful day for them, and support 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.

I see tears in commercial mediations. I see internal bust-ups within parties. And I see quite a few walk-out threats. These are all stress-indicators. As mediator I work hard to help people through the process. But counsel have an important role too. You are your client's rock;

(h) 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 it[36]). 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;

(i) 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;

(j) Be constructive and imaginative when it comes to settlement;

(k) 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, and it is very important to stay the course; and

(l) 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* [37].

[SLIDE] CONCLUDING REMARKS & QUESTIONS

60. Mediation is an excellent way to achieve cost-effective settlements of commercial disputes. It gets commercial clients out of the sausage machine that litigation can become. Hopefully this seminar has gone some way towards helping you to put the commercial into commercial mediation.

[1] Ambrose Bierce (American humorist, author), cited on www.neimanmediation.com
[2] Dictionary.reference.com/browse/mediator
[3] *How to Master Commercial Mediation*, Richbell et al, Bloomsbury, 2015, p3
[4] 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",
[5] Neuberger address, n4, citing: Derek Roebuck, *Mediation and Arbitration in the Middle Ages 1154 to 1558* (2013), pp 29ff
[6] *Staff Seminar 2013: "Towards a history of mediation in New Zealand's legal system"*, Morris G, p5
[7] *A Case for Mediation: The Cost-Effectiveness of Civil, Family, and Workplace Mediation*, Sarah Vander Veen, January 2014 http://www.mediatebc.com/PDFs/1-52-Reports-and-Publications/The-Case-for-Mediation.aspx, citing: Statistical summary: Use and benefits of alternative dispute resolution by the Department of Justice. (2012). Retrieved from: http://www.justice.goc/olp/adr/doj-statistics.htm
[8] CEDR, The Tenth Mediation Audit, 1 February 2023, p7
[9] Resolution Institute/Victoria University of Wellington "Commercial Mediation in New Zealand: The Mediators" Project Report (August 2019), p15
[10]Ibid, p20
[11] Ibid, p16
[12] CEDR, The Tenth Mediation Audit, 1 February 2023, p3
[13] See LEADR/Victoria University Commercial Mediation in New Zealand Project Report (June 2015), p5, and summary at *Mediation in New Zealand*, Morris & Shaw, Thomson Reuters, 2018, p253
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