The case for mandatory mediation of civil disputes

Barrister and mediator **Mark Kelly** explains the benefits of a compulsory mediation model

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."*

Mediation has become a fulcrum for this sentiment in modern dispute resolution, so much so that in New Zealand it is now close to mandatory in multiple contexts, including the Family Court and the Employment Relations Authority. It is also used to settle most cases in the Weathertight Homes Tribunal.

It should be mandatory, subject to a limited right to apply for exemption, in all civil disputes filed in New Zealand's courts.

It is true that most cases settle anyway, but mandatory mediation should encourage that to happen more quickly, cheaply and efficiently. There are still too many clients and/or lawyers who dig in unnecessarily, and, ultimately, at great cost. There are also too many who are unwilling to try to initiate mediation for fear of appearing weak. I have heard more than one senior counsel say, "I only mediate cases I know I'm going to lose", which rather ignores Lincoln's sage advice.

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Various mandatory mediation regimes for civil disputes already exist in Canada and Australia. These regimes have borne fruit. A study on Ontario's mandatory mediation scheme led researchers to conclude that it led to significant reductions in the time taken to dispose of cases, and litigation costs.

The Italian government has also sought to introduce a mandatory mediation scheme. That scheme was examined by the Court of Justice of the European Union in *Alassini v Telecom Italia SpA [2010] 3 CMLR 17 ECJ*, and the Court opined that mandatory mediation was more efficient than an optional procedure.

Some argue that making mediation mandatory is antithetical to its consensual philosophy. But that does not seem to compromise it in the fora in which it is already all but mandatory. Compulsion to mediate is already a major factor in civil disputes anyway. Many contracts require it, and the courts can push parties hard to mediate. In the UK, recent decisions have made it clear that even parties which have ultimately been successful in litigation can have their costs awards reduced for an unreasonable failure to mediate; a point most recently highlighted in *Northrop Grumman v BAE [2014] EWHC 3148*.

Many clients only mediate because their lawyers tell them they should. Is it such a great leap for it to be the rules which tell them they should? It is also important to note that making mediation mandatory does not involve forcing people to settle; it just involves forcing them to talk about settling in a proven format.

Others argue that mediation, with its inability to create precedent, and lack of formal controls to protect fairness, is no substitute for the courts and should not be given priority over them. That is, with respect, the elephant running in fear of the mouse. Most mediators recognise and welcome the fact that they must mediate 'beneath the shadow of the law' (or 'basking in its rays' for a cheerier flavour). There will always be cases that cannot and should not settle and are for the courts to decide. Parties can only settle if they both agree, and settlements which are unlawfully obtained or unlawful in their terms can still be reopened by the courts.

The vast majority of civil cases do settle. Making mediation mandatory in civil cases should encourage that to happen more quickly, efficiently, and cheaply. An objective that, no doubt, Honest Abe would applaud. **NZL**