

## Disputes settled without going to court

By [Chris Barton](#) [Email Chris](#)

9:25 AM Friday Mar 9, 2012

It's a genteel version of a cage fight. Two people locked inside to battle until only one is left standing. Except in this case, the protagonists are fighting as a tag team with their lawyers. And also in the cage is a new-age umpire, a facilitator.

Within reason, anything goes once the door is shut. The parties are encouraged to entertain creative solutions to their troubles and the one-day session is designed to produce an outcome. Best of all, what happens in the cage stays in the cage.

Welcome to mediation – the environment businesses are turning to in droves to settle their commercial differences. "Droves" may be an exaggeration, because no one is keeping records of these confidential proceedings. The first rule of Fight Club is you do not talk about Fight Club.

"All lawyers and more so judges have to do something of a brain transplant when they switch to mediation," says former High Court judge Robert Fisher, QC, now working as both a mediator and arbitrator. "We are very used to a rights-based resolution of disputes – who the law says should win. You quickly realise it's not all about legal rights at all. Instead of imposing your view on the parties as judges are wont to do, you are really there to help the parties express their own views to each other."

He describes a typical mediation day – the first half spent exploring what would happen if the dispute were to go to court and the second half evaluating what's wanted, alternating with offers and counter offers, until everybody agrees on an appropriate compromise.

It's not for everyone. But anecdotally, mediation does seem to be on the rise. In 2010 there were just 301 defended civil hearings in High Courts across New Zealand – significantly down on the 424 in 2009 and the 433 and 373 in 2008 and 2007 respectively. The drop led some to wonder whether the High Court's civil jurisdiction was in a "[death spiral](#)". But by last year the number of defended hearings had bounced back with a vengeance to 479.

The chief High Court Judge, Justice Helen Winkelmann, acknowledges "cases are being referred to mediation in greater numbers by lawyers," but doesn't see the rise in "alternative dispute resolution" as necessarily a good thing. At the [Arbitrators' and Mediators' Institute of New Zealand](#) conference last year she noted there was a 66 per cent increase in High Court civil proceedings over the past five years, excluding insolvency proceedings, which have also increased. And that most cases never go all the way through the court; just 10 per cent of proceedings that start with a Statement of Claim are resolved through a judgment following a hearing.

"Cases settle in the shadow of the law" said Justice Winkelmann. She is concerned an "anti-litigation narrative" – overselling the benefits of mediation – might erode confidence in the civil court system. "Such an outcome is not in the interests of society as ultimately it will undermine the rule of law."

In England, Master of the Rolls Lord Neuberger [said something similar in 2010](#). He pointed out that consensual settlement has long been a part of litigation – whether it's a last-minute negotiated settlement at the door of the court, or an agreement reached during the long course of litigation. He questioned



Former judge Robert Fisher, QC: 'The courts need mediation and mediation definitely needs the courts.' Photo / Greg Bowker

whether an ever-expanding role for mediation – "treating mediation as good and litigation as bad" – was consistent with a commitment to equal access to justice.

The pro mediation lobby, Lord Neuberger worries, is creating confusion, causing many to see the civil justice system as simply another provider of services to consumers." It's a view he believes is fundamentally, and dangerously, wrong. The justice system is part of our constitutional framework – part of government, not a service, says Neuberger.

It's an argument that links to Owen Fiss' 1984 essay [Against Settlement](#). "Settlement is for me the civil analogue of plea bargaining: Consent is often coerced; the bargain may be struck by someone without authority," writes Fiss. "The absence of a trial and judgement renders subsequent judicial involvement troublesome ... settlement is a capitulation to the conditions of mass society and should be neither encouraged nor praised."

To which the growth industry of mediation collectively shrugs "whatever." Fisher doesn't accept mediation is in competition with the courts at all. "It's like saying eating is more important than breathing. I'd rather have both. The courts need mediation and mediation definitely needs the courts."

Civil litigation is still healthy in the High Court, he says. "It is the backstop to other forms of resolving disputes – the sword of Damocles in the corner of the room," helping everyone to concentrate.

Fisher says the market has spoken. "People have been going to mediation in their droves, not because of anything the mediation industry says, but because people find it suits their interest." He cites six drivers:

Speed: civilly litigated cases take 12–18 months through the court if fully defended. Mediation can happen as soon as the parties are ready.

Cost: mediation still has the costs of lawyers and other experts such as forensic accountants, but it's less than the courts.

Uncertainty: waiting 18 months to know about a win or loss of millions of dollars makes financial planning difficult.

Stress: mediation lessens the strain of litigation, with its drawn out battles of evidence and cross examination.

Control, aka party autonomy: parties control the procedure followed.

Confidentiality: unlike the court, mediation doesn't happen in the glare of publicity.

Fisher does agree there is a mismatch between [mediation rhetoric and reality](#). He says some will tell you with a straight face that even in a litigation context, mediations are essentially a journey to self-discovery. "Along the way the parties learn much about their own emotions, their distorted view of the past, their relationship with each other, and where their own best interests truly lie. Thus equipped, they join hands in crafting a mutually pleasing outcome."

Such an approach is appropriate in disputes involving personal and family and emotional issues, says Fisher. Or in a commercial environment where there is a continuing relationship. But that's not the case in the majority of commercial disputes.

"One side wants as much money as they can get and the other side wants to part with as little money as it can get away with," says Fisher. "So to explore what is in everyone's best interests and what can be a win-win solution is all beating the air really." If the parties are never going to see each other again, and don't care if they leave with the other side brassed off with them, why not be up front about it?

Such a situation, says Fisher, calls for "an evaluated mediation" – a phrase many in the industry regard with horror because it sounds an awful lot like what a judge would do. "It is a bit like a mini trial except there is not going to be any judgement handed down at the end of it," says Fisher. He stresses the evaluation is done by the parties with the mediator chairing the discussion. A process that shows how the dispute looks like when laid out on the table.

Such evaluation skills are largely lacking from mediator training, says Fisher. As are skills to help with the psychology and tactics of bargaining – such as whether to begin with an extreme offer or whether such an extreme position will cause the other party to walk out or become hostile.

Ronald Pol, who advises corporates on controlling legal costs, has a word of warning. The promised flexibility and speed of arbitration and mediation compared with litigation is not always as straightforward as it seems. "The theory never quite managed to survive the impact of lawyers, and retired judges, acting as arbitrators and mediators – introducing many of the rules and practices of litigation," says Pol. Arbitration, in particular, he says, often becomes entangled with many of the rules and costly processes of litigation.

With complex processes creeping into arbitration and mediation, some companies now try to resolve disputes on a business-to-business basis whenever possible says Pol – by direct negotiation, and sometimes pragmatic trade-offs. In 2003 Wellington-based TeamTalk chief executive David Ware challenged Auckland-based MCS Digital boss Allan Cosford to an [arm wrestle to settle a \\$200,000 dispute](#). Ware lost. "Sure, losing hurts," he said at the time. "But not nearly as much as paying lawyers' bills."

Mediation came to New Zealand in the early 1990s following developments in United States in the 1980s. The idea of introducing a neutral third party to the process and focussing on "interests and not positions" came from texts like [Getting to YES: Negotiating Agreement Without Giving In](#). It advocates a facilitative model in which a non-interventionist mediator helps the parties find a "win-win" solution that meets the hidden interests of all concerned.

Other models followed, often with a therapeutic emphasis. Schools of thought included transformative mediation, focusing on the underlying problems in the parties' relationship, and narrative mediation, where the parties deconstruct competing stories and replace them with a third story of shared understanding. Lately, a pragmatic school has evolved advocating direct mediator participation and evaluative input.

In New Zealand the mediation profession is not regulated so anyone can hang out their shingle and call themselves a mediator. There are two professional bodies – [LEADR NZ](#) and the [Arbitrators' and Mediators' Institute of New Zealand](#) – each with its own rules and registration requirements.

Geoff Sharp left his legal practice in the late 90s to become a full time mediator focussing on commercial disputes. He describes his job as one of finding interests. The "silly orange story" explains. Two children were fighting over an orange. That's the position – both wanted the orange. Their mother intervened and gave half to each so both children got 50 per cent of what they wanted. Had she explored their interests – one child wanted the orange's juice and the other wanted the rind to make a cake – they both could have had 100 per cent.

"I was dissatisfied with black and white results," says Sharp. "Clients would sometimes win in court, but not feel they'd won because of cost and time." Becoming a mediator required a different mindset – learning not to be a problem solver. "I'm happy to accept there are a million answers and I'm shepherding the process."

Do mediators have tricks of the trade to coerce settlement? "The days of finishing at 2am in the morning are gone," he says. "I think everyone has got better at this, so we are no longer having mediation by attrition."

Most mediators, he says aim for a settlement rate of 80–90 per cent. "We talk about being a closer. Parties and lawyers want a closer. But resolution at all costs is a dangerous thing." He agrees most commercial mediation is about "helping parties get to a number". But outcomes that wouldn't happen in court are still possible. Like the chance remark in a recent mediation by a party saying he was going to sell up and move on when the dispute was over. "That was his interest and it led to the other party buying the business."

Tauranga lawyer Mark Beech works across the fields of litigation, mediation and arbitration. He sees the rise in mediation as directly related to contractual dispute resolution clauses. In the past such clauses would normally provide for a referral to arbitration, whereas today there will almost always be a requirement for mediation before going to court.

Beech stresses the role of counsel in protecting the client from undue pressure or power imbalances. He has been in late night mediations, but says such decisions to keep going are made only if the parties agree they are making progress. "I've never been in a situation where I've felt compelled to stay. Or when the mediation was putting undue pressure on my client, or the other side, to settle."

Beech says the choice of mediator is crucial – especially in disputes requiring specialised knowledge. Mediators also get known for their different styles – some being more interventionist than others. Some won't read anything before the mediation. Others insist on pre-mediation synopses of position and key contractual documents; and some are chosen for their settlement record, particularly in insurance cases.

Beech says most mediations "end up with someone giving a cheque or someone receiving a cheque." But some reach a different plane. He describes a mediation organised by the Health and Disability Commissioner where he was counsel for a Health Board. "The patient's life had changed as result of operation gone wrong and no amount of money was going compensate them for lifestyle choices they were now deprived of. On other hand the doctor was mortified and was reflecting on their future career." The mediation resulted in a compensation cheque, but also an apology, a commitment to do some retraining and to change certain systems within the Heath Board to avoid the situation happening again. "At the end you had the parties coming together saying: 'How can we make something good out of this really bad situation?' It was a very emotional day."

## REACHING AGREEMENT

### Mediation

Confidential and consensual, with an independent and impartial mediator facilitating negotiation between the parties to help them resolve their dispute. The mediator is not a decision-maker, but guides the process. If a dispute is resolved in mediation, a written agreement setting out the result is signed by the parties and is a binding contract.

### Arbitration

A confidential process in which an independent and impartial arbitrator makes a decision, after hearing from the parties. The arbitrator's decision – called an "award" – is normally final, binding and enforceable by the courts.

### What it costs

Mediator charges range from \$3500 to \$7000 a day, or \$350–\$500 an hour. Terms vary depending on the time provided for, pre-mediation and administration, travelling time and expenses.

### In the high court

611.5 days: Median waiting time from the date of filing to a fixture for general civil proceedings, at the end of last year.

314.5 days: Median waiting time for a scheduled civil court hearing once the case is ready to be heard, at the end of last year.

484: Number of civil proceedings awaiting a hearing.

48: Civil proceedings awaiting judgment.

### More information

\* [LEADR](#), the Association of Dispute Resolvers

\* [Arbitrators' and Mediators' Institute of NZ](#)

By [Chris Barton](#) [Email Chris](#)

TheOwl (Auckland Central) | 10:47AM Friday, 09 Mar 2012

Its another nail in the coffin for kiwi workers, employers should expect the skilled to flee to Austrlia. Get a good life insurance plan if you expect to be a port worker.

DBD (Dannemora) | 11:05AM Friday, 09 Mar 2012

Lawyers would lose money if disputes were settled this way.

But there is hug oppourtintiy for people to set up a new business based on mediated disputes. One does not need legal knowlede but they do need the ability to analyse, reason and council.

Something has to be done to speed up process, both by the courts and the lawyers that delay proceedings for more finacial gain. I've seen it done in court rooms often enough, it's appalling.

Gandalf (St Heliers) | 03:38PM Friday, 09 Mar 2012

I recently attended a mediation in Auckland, and was quite impressed with the process although it did go on to 2.00 am. It can save a lot in legal fees, you really want to avoid court in that respect. Many serious cases are resolved out of court, mediation is just another option in this process, and suits multi party situations quite well.