

# COMMERCIAL MEDIATION – TOP TIPS FOR BEST OUTCOMES

## HOW TO GET THERE?

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*Every conflict we experience, no matter how trivial, points us toward a crossroads in our lives. One path leads us into anger, fear, confrontation, and bitterness and draws us into quarrels over the past. This path reveals a deep level of caring about outcomes, sterile communications, contemptuous ideas, negative emotions, and unpleasant physical sensations, blinding us and dissipating our energy and spirit. This is the path of impasse, aggression, and antagonism.*

*A second path leads us into empathy, acceptance, honesty, and mutual respect and draws us into negotiations over the future ...*

*In addition to these is a third path ... This path leads us into increased awareness, compassion, integrity, and heartfelt communications and draws us into awareness of the present. It integrates the honesty and caring about outcomes encountered on the first path with empathy and caring about people encountered on the second ...*

*In this way, every conflict leads us to two different crossroads. In the beginning, we face a choice between fighting and problem solving. Later, we face a subtler, more arduous and far-reaching choice between merely settling our conflicts and seeking to learn from them, correcting our behaviours, and moving toward forgiveness and reconciliation.*

Ken Cloke, *The Crossroads of Conflict – A journey into the heart of dispute resolution*  
Janis Publications, 2006

### 1. Introduction

Looking at Jenny McManus’s headline article in last week’s *Independent*, this seminar is timely; though it does seem to be a pet topic for that paper. I’m not sure that ADR warrants the shocked tones employed by Ms McManus.

As practising lawyers, we have been trained in the subtleties of the law; to appreciate the niceties of fine distinctions; to be able to compartmentalise issues; and to value the commercial certainties provided by the doctrine of precedent.

For those of us who don’t go to court, the wise and considered reasoning of our very best judges gives us the guidance on ordering our clients affairs and business activities in such a way that it protects our clients’ interests and hopefully secures the best outcomes for them. Without reported cases and the doctrine of precedent, where would we be?

And yet. For some reason, your client often does not quite share your enthusiasm for fine legal distinctions, and there is a very good reason for that. With very few

exceptions, most commercial clients have businesses they wish to run, which typically do not involve spending time in lawyers' offices reading through briefs and understanding the procedural hurdles to *having their day in court*.

So, you explore alternatives. Historically, this was through arbitration, with specialists who understand the issues acting as decision makers after a truncated, and less *legalistic* process of argument. I would suggest, however, that the prize for quick and efficient determination of legal disputes now lies elsewhere. Most arbitrations involve extensive discovery and appeals, with AMINZ's new Arbitration Appeal Panel adding a further layer of complexity; much of the difference between going to court and arbitration has vanished.

I would not wish to give the impression I am opposed to arbitration. With the current Chief Justice being opposed to a specialist bench (like the Technology and Construction Courts of the UK and HK), arbitration has a real advantage in having experienced specialists available to undertake complex litigation. These days, however, arbitration is unlikely to be quicker or necessarily cheaper than going to court.

In the myriad of ADR options, only one is truly voluntary, and only one offers clients total control over the outcome, and that is a negotiated settlement through mediation.

## 2. Growth in mediation

*... in discussing the future of civil litigation it is difficult for those of us who make a living from it to avoid the subconscious influence of our own role within it. Former judges usually want more arbitration and private mediation. Sitting judges usually prefer major trials of social, commercial or legal significance; few relish case management, interlocutory applications, and high volume trivia. Barristers are usually protective of their role as highly paid gladiators who control the procedural destiny of their own cases. Civil servants usually place the emphasis on throughput rather than quality. Most politicians want to reduce complex problems to populist sound-bites. Academics consider it their painful duty to rein in the dangerously wide freedoms arrogated to themselves by judges. And when was the last time the presenter of a conference paper made his or her mark by applauding the status quo? On a topic like this we are all hopelessly mired in self-interest. All we can do is try to evaluate the idea rather than its source.<sup>1</sup>*

In her article in the *Independent*<sup>2</sup>, Jenni McManus identifies high costs, certain delay, rigid procedures and uncertain outcomes as driving commercial litigants away from the courts and into the arms of arbitrators and mediators. McManus goes on to quote Chapman Tripp's Jack Hodder as observing that there would need to be *strong countervailing reasons* for a chief executive not to consider alternative dispute resolution.

Traditionally, commercial litigants view mediation with some suspicion. For most of us, mediation was the stuff of family courts, cups of tea and biscuits, active listening,

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<sup>1</sup> *Whether the adversarial process is past its use-by date – a New Zealand perspective*  
A paper by the Hon Robert Fisher QC for the NZ Bar Association and the Legal Research Foundation Civil Litigation Conference, 22 February 2008, at para 2.

<sup>2</sup> *Litigants turn their back on courts*, Jenni McManus, *The Independent* 26 June 2008, at p 6

asking open questions like “*How do you feel about that?*”, if not group hugs and singing *Khumbaya*.

This is not an attractive proposition for many. This unease is not helped by a perception of uncertainty of the process and the potential lack of structure around the result. Mediations traditionally have compromise writ large all over them. In our opening statements, most of us explain that you might not get your ideal result, but we hope that you will come out of the process with a result that is workable; that you can live with.

It is no surprise that many decision makers are tempted to send a relatively junior executive to mediation, hamstrung either by the inability to commit to a settlement or by the expectation of the boss’s wrath when the settlement deal is explained back at the office. Conversely, those same decision makers will often settle when they are directly engaged in the mediation.

That might offend some of you who feel there is a right and just answer provided by the law, and clients are entitled to exercise their rights. Let me give you an example of how some clients might view that.

A few years ago, an acquaintance entered into an unconditional contract to purchase a commercial property. The price was in the region of a million dollars. Prior to settlement, the vendor (an Asian lady) announced that the sale was off as she had found another buyer who had offered more.

The purchaser put a caveat on the property, and after lengthy litigation, in which the vendor ended up representing herself (after going through a number of lawyers) and abusing the judge, the purchaser won. At every stage, including being awarded costs which covered the entire purchase price.

After such a resounding victory, I asked this person if he was happy now being able to get on with his property development business, particularly now that the property had over doubled in value. He said no. Had he known how long it would go on for, and how it would take up so much of his time, he would not have bothered. His business was property development, not litigation.

At the heart of our *dilemma* according to Hon Robert Fisher QC is the *ideal justice fallacy*. This is the assumption that ideal justice is both attainable and every person’s right. Frustrated and disillusioned litigants greet the suggestion that certain disputes do not warrant legal representation with indignation. It seems to me that lawyers perhaps engage too eagerly in defining their clients’ rights without considering the cost of establishing those rights, and the likelihood of successfully and meaningfully enforcing them. In that context, an enforceable, negotiated settlement agreement may be of considerable value to both parties.

Mediation can be a useful alternative to full on litigation. As Bob Fisher observes:

*The adversarial process is fundamentally sound but do we need a Rolls Royce to visit the local dairy. Most of the time a Lada or bicycle would do. So long as we recognise that we should also be using many other ways of resolving civil disputes.*

### 3. What mediation is and isn't

*And the King said, Bring me a sword. And they brought a sword before the king.*

*And the King said, Divide the living child in two, and give half to one, and half to the other.*

1 Kings 3:24

When ADR is discussed, we often hear the expression *the justice of Solomon* as a reference to halving the difference. The story of King Solomon threatening to cut a baby in half is actually more an example of the result that wider dispute resolution techniques, like mediation, can achieve. By reality testing the settlement options (sharing the child, albeit with the unfortunate side effect of killing it), King Solomon was able to return the child to its mother.

Perhaps a less brutal and more illustrative analogy is the classic dispute between two parties over an orange. A simple answer to the dispute might be to divide the orange in two, and give the parties half each. It is only after the parties put aside their rights claims and disclosed their interests in the orange that the mediator was able to ascertain that one party wanted the juice and pulp, where the other wanted only the zest. Under this analogy, both parties got 100% of what they wanted.

At its simplest, mediation is a process under which the parties:

- (a) Express their respective positions, during which they may also express their disappointment with the other party (*venting*) and what their actions have cost them. This may well be their first opportunity to do this in a controlled environment.
- (b) Get the chance to see the strength of the other's position.
- (c) Consider the alternatives to a negotiated settlement, and test the likelihood of their preferred outcomes.
- (d) Possibly reach a settlement agreement, though this is not an absolute pre-requisite for a successful mediation.

The true magic of mediation is the change in perspective which most parties often undergo during the mediation process.

Typically, by the time mediation has become an option, the parties' positions have either become, or are well on the road to being reasonably entrenched. They will usually have had a disagreement with the other party and obtained legal advice as to their *rights*. As the dispute progresses, the parties tend to head further down the road to a fully entrenched rights based position.

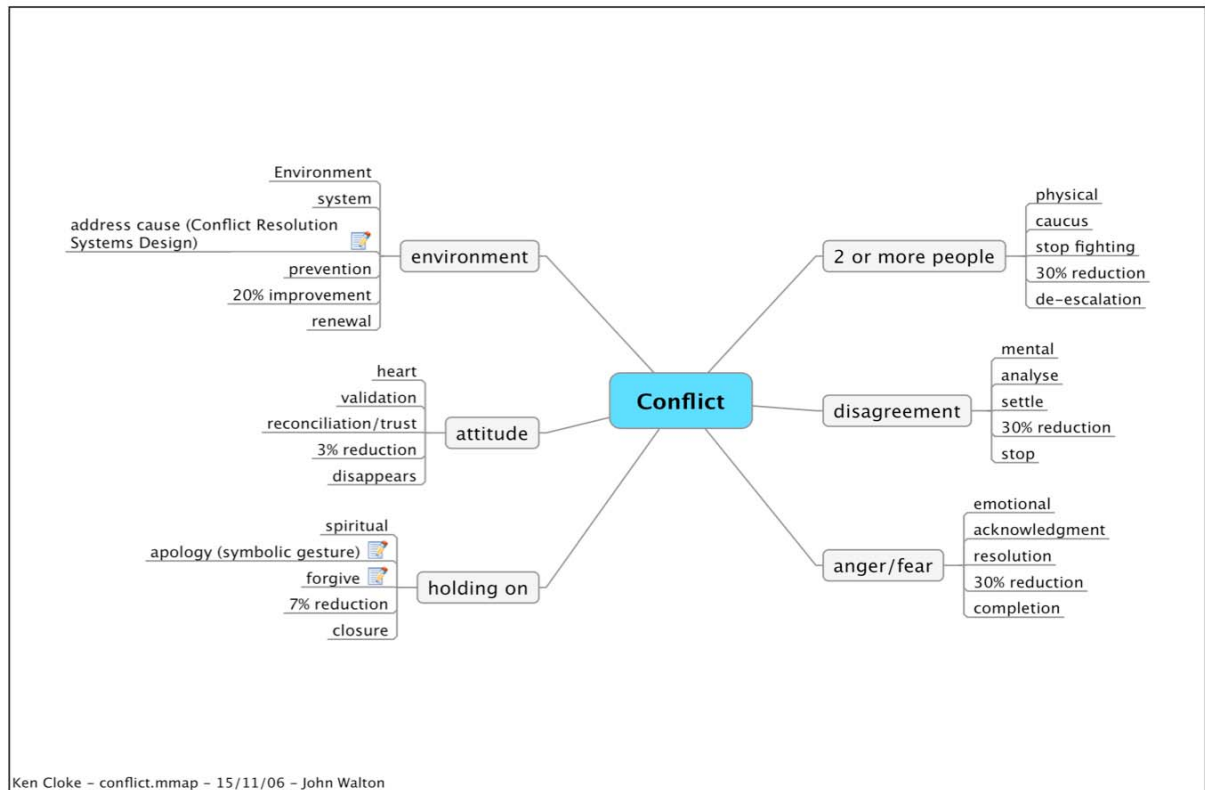
One of the first goals of mediation is to get the parties to move their focus from their *rights* to their *interests* in resolving the dispute and moving on.

In the quote at the head of this paper, Ken Cloke refers to two crossroads.

At the first, we have the choice between the path of conflict and the path of empathy, acceptance, honesty and mutual respect which bring us into productive negotiation.

Needless to say, Dr Cloke identifies mediation as the tool to draw us down the second path.

At the second crossroads, we have a third path which leads to a better world, if you'll excuse the utopian language.



The figure above is an alternative presentation of Dr Cloke's dispute matrix.

Starting top right, and moving clockwise, the first stage of dispute resolution through mediation is to de-escalate the dispute, ie to stop fighting. This results in a 30% reduction in the dispute. If the disagreement can be dealt with, typically settled, there is a further 30% reduction. At 60%, this is clearly only part of the picture, and where most mediations will end. This is the horse-trade scenario, where the parties have no need of a further relationship; the price is simply settled.

This will often not be enough, where the parties do have an ongoing relationship; particularly if that relationship is high value, like an infrastructure project, or is commercially complex or enduring.

The next stage is to resolve the fear and anger engendered by the dispute, and that comes from dealing with the emotions surrounding the dispute, whether it is anger at being exploited, or fear of having the relationship terminated and the losses that would entail. For this, Dr Cloke awards a further 30%.

In the next two stages, you get 7% and 3% (bringing us to 100%) for making an apology or some other symbolic gesture and validating the other party's position. At

this stage, there is a true reconciliation with a re-establishment of trust and the dispute and all that came with it has gone.

Dr Cloke then identifies a further 20% improvement in relations between the parties, which comes with *systems design* which addresses the cause of the conflict. I'm sure you can all picture the scene – the parties have been through an extensive mediation, with the result that they are back on good terms and working together. One inevitably asks the other "*How did we get into this position in the first place*", and it is only when you address the root cause and put systems in place to do this, that you gain the further improvement which Dr Cloke sets at 20%.

I appreciate that a 120% improvement in any relationship is perhaps idealistic, and for some unachievable. From my own experience, there is often a moment at which the parties' positions shift – whether it is the result of reality testing or making just the right comment at the right moment. At that point, you can usually say that the parties reassessed their *rights* based perspective, and accepted the realities of an *interests* based assessment of their positions, and took the unnerving step of exploring alternative outcomes.

If the parties take the opportunity to go any further, that will depend on the nature of the dispute, the parties and the skills of the mediator.

#### 4. **Potential Routes to Mediation**

Many commercial agreements (particularly in the construction industry) now include a mandatory referral to mediation as part of a tiered dispute resolution process. Mediation is also included in many statutory processes<sup>3</sup>, and is explored in many court instituted proceedings.

While the referral to mediation may be mandatory, it remains a voluntary process. As success in mediation is typically measured by a settlement agreement, rather than a report or a decision or any concept of a referee's determination, if one party refuses to cooperate, there is often little point in progressing mediation with a reluctant party. There are only so many times you can persuade one of the parties not to walk out.

The decision of whether or not to refer a dispute to mediation, or cooperate in mandatory mediation, will always rest with your clients. As practising lawyers, you can influence that decision significantly. Before embarking on a mediation, whether as mediator or representing one of the parties, I always say to myself:

*It's not about me*

For lawyers representing parties in mediation, the issue should always be – is this in the best interests of my client?

Having answered that question, it is up to all of us who practise in this area to bring our skills to the table.

Mediators should bring all their skills and experience to the table. The critical skill is as a mediator, and in understanding the nature of conflict.

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<sup>3</sup> A search of the NZ Statutes database reveals 233 references to mediation in NZ statutes.

Conversely, it can be very unhelpful to have a mediator who takes *neutrality* to the point of being passive, relying purely on the process. It is always worth considering that the disputants are usually experts in their particular fields. They will already have been in negotiation, and they will have taken expert legal advice. When engaging in commercial mediation, it is my experience that the parties benefit from mediators who understand the subtleties of the dispute (if not the subject matter) and can bring their experience and negotiating expertise to the table<sup>4</sup>.

While neutrality at some level is commendable, it should not be at the expense of giving the parties the benefit of your perceptions and your experience.

There is also a tendency to consider mediation only as a tool in avoiding litigation or arbitration. Mediation has the potential for far wider application than this.

In complex projects, the relationship between the parties, and the potential for conflict, is established during the selection and award process. An aggressive tender process followed by enthusiastic and opportunistic exploitation of a competitive negotiation will often leave the successful party wondering if it has left money on the table and possibly aggrieved before the project has even started. Dispute of some sort is an inevitability in these projects; I have often heard one party observe “*You held my feet to the fire before – don’t expect me to be cooperative when things aren’t going your way*”.

In the construction industry, where binding interim determination has been standard practise for more than half a century (whether by the architect/engineer, an adjudicator or a disputes adjudication board), there are moves to appoint project mediators at the outset<sup>5</sup>.

The first step is to meet with the parties to establish lines of communications and to review the risk register for the project, to identify the pressure points for the parties.

The second stage is to monitor contract communications to try to identify and deal with potential dispute before they escalate, and the final stage is formal mediation.

While many lawyers will counsel holding off mediation until the dispute has crystallised, it is my experience that mediation can be as, if not more effective if the parties acknowledge that conflict and the potential for dispute is inherent in complex and high value projects with lengthy relationships. Dispute is a continuum, and frequently the sooner the skills that mediation can bring are applied, the better.

## 5. Dealing with multiple parties

From time to time, we get involved in multiple party mediations. The most common would be in respect of leaky homes, where every one from the owner to the designer, subcontractors and local councils get dragged in. I have also struck this in the marine industry, where a number of parties have an interest in the outcome.

In one of my first mediations as mediator, there were 5 parties directly interested in a marine construction dispute – the vessel owner, the contractor, the material supplier,

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<sup>4</sup> For a fuller discussion of this, see *Beyond Neutrality* by Bernard Mayer.

<sup>5</sup> This was first established by the Centre for Effective Dispute Resolution (see [www.cedr.com](http://www.cedr.com) and search for CEDR Solve). A New Zealand version of this approach is available for download from [www.johnwalton.co.nz](http://www.johnwalton.co.nz)

the yard owner and an industry representative. To compound matters, the vessel owner did not speak English well (or perhaps periodically chose not to).

Before the matter was referred to mediation, the owners had taken every step they could think of to escalate the dispute, short of actually paying their lawyers and instituting proceedings. They complained directly to the Prime Minister, the papers, the material suppliers and maligned the contractor and the NZ marine industry, generally. By the time they came to mediation, the relationships between the parties were toxic to say the least.

After almost more time than the parties could bear, they had all expressed their respective positions, as only those with a marine industry background can. What became quickly apparent was that all the parties actually wanted to resolve the dispute, but couldn't work out how. They were also clearly very wary of being pushed into costs and liabilities which were open ended and out of all proportion to what they were originally responsible for; and it is fair to say none of them trusted the owner.

What the parties were actually looking for was for some one else to propose a way forward. While caucusing with each of the parties, I explored the available options, and then put a solution to the main protagonists, the vessel owners and the main contractor. Left to their own devices, no one expected them to get to a resolution, and yet the solution was relatively simple. Included in the mediation agreement was a media statement, which the parties agreed to circulate, which addressed some of the damage which the vessel owner had caused.

Where there are multiple parties, each with their own agenda, there is a risk that the dispute gets distracted, or that progress is hard to make (much like herding cats). In those situations, it can be useful to identify the main protagonists and to explore a resolution with them, and to then bring in the peripheral parties as necessary. In these cases, guiding the parties to find a resolution requires more active participation by the mediator, whether in reality testing or simply exploring alternative options.

## 6. **Likely perceptions - sign of weakness?**

There has always been a perception that it is the party who blinks first, or has the weakest position who proposes mediation. I believe most competent commercial decision makers have moved on from this simplistic view.

Issues such as face or doubts about the strength of your position have, from my observations, largely gone. Some decision makers have reservations, mostly out of the uncertainty of what the process involves and an unease about where the parties might get to at the end of the process. Properly prepared, these reservations soon fade.

Of course, it helps if their legal advisers share this view.