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Benefits of agreeing to disagree

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PHIL REID/The Dominion Post

MIDDLE GROUND: Mediator Geoff Sharp, centre, is expecting mediation work to grow.

You're angry, frustrated. Is there a chance you can salvage the situation and not go to court?

In a climate where money is getting tighter by the day, mediators are expecting more people to knock on their doors.

"There's quite a bit of debate among mediators globally whether this environment will mean more

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mediation, and certainly my experience in the first couple of months of the year is, absolutely," Wellington lawyer and commercial mediator Geoff Sharp said.

"People will have more disputes in hard times, people will be looking for their money where they might have been willing to forgive and forget in better times, and I think both mediation and arbitration will increase in this environment, as will litigation."

The reason why businesspeople might choose to sit down around a table with their opponent varies: sometimes it is required by the courts. Other times people seek it out privately. Usually mediation is seen as a cheaper option, but it can often be better for business too.

"It works best when there are commercial relationships to be saved which won't survive, normally, a knock-them-down, drag-em-out court trial," Mr Sharp said.

"Examples of that are commercial landlords and tenants; contracting parties who are locked into long-term supplier contracts who have a dispute or difference but are going to have to deal with each other in future. That's where mediation really comes into its own."

If you've never been near a court or had an employment dispute, you may never have thought about mediation. It first really came to public attention in the 1980s when government departments began to use mediation, and in the early 1990s, when lawyers began adopting it.

Low-cost mediation is offered by the Labour Department to employers and staff and by the Building and Housing Department for landlords and tenants.

Commissioners for human rights, privacy and health and disability, resource management cases and the Weathertight Homes Resolution Service have also introduced more New Zealanders to mediation.

For ordinary people, a free pilot mediation service began this month at the Waitakere Community Law Centre for disputes worth \$20,000 or less. It's a national first but it does not cater for businesses, which are either steered towards private mediation or the Disputes Tribunal.

Last month Prime Minister John Key lifted the maximum claim level the tribunal could deal with to between \$15,000, or \$20,000 with the consent of both parties.

Carol Powell, chairman of LEADR, an organisation representing mediators, says the mediation option is increasingly being seen as a way of saving relationships.

"It's a very commonly used process in the States, it's becoming a very commonly used process in Australia and it's a lot more commonly used now than it was five or 10 years ago in New Zealand."

Mediation was also preferable to the courts because it was cheaper, quicker and could find more flexible solutions.

"Quite often I find in commercial disputes, the way through the trees is for the parties to agree upon what they're going to do with one another next," she said.

"It might be 'How are we going to deal with this problem when it comes up again?', or it might be, 'Shall we agree to do this future business together and these will be the terms of that future business'."

Ms Powell said a stalemate situation rarely occurred, with around 80 to 90 per cent of disputes through the High Court resolved through an agreement in writing.

In the few cases where mediation didn't work, the parties would be steered back to their other options.

"Any lawyer will tell you that a dispute which is worth less than, say, \$100,000 is really not worth bringing proceedings," because of the legal fees, Ms Powell said.

While some mediators would charge upwards of \$250 an hour, "a good number of mediators" were more flexible.

Auckland mediator and lawyer Deborah Clapshaw said that when mediation did not work, it was sometimes because one party had a vested interest in keeping the dispute alive.

There could be "funding issues, absent parties who need to be at the table, lack of preparation," or a lack of reality about court outcomes. People could sometimes have a "lack of vision" regarding their options for resolution or even a view that "not enough blood" had been spilt or money spent in litigation.

But when mediation worked, people tended to stick to their agreements, Mr Sharp said, partly because they were legally enforceable but also because "they have come to them voluntarily".

Most commercial cases only took a day to resolve, but it could be a long day.

"Often it can be a 15-hour day, or you can surprise yourself and finish at 3pm."

A good mediator, Mr Sharp said, was someone who had a knowledgeable background, was willing to persevere and was aware of people's "positions" compared to their "interests". In other words, a person might want \$10 but it was why they wanted \$10 which was often more useful. Having good "antennae" and an ability to read between the lines was also important.

"You need to be aware that people say things when they mean something else. You need to know that when they say `That's my final offer,' they actually mean, `Gee, just work a bit harder Geoff and see what else you can do'. There is a real crossover between mediation and the behavioural sciences."

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