

Settlement Week 1991

The writer is a member of the committee which organised and implemented Settlement Week 1991. The views expressed here are not necessarily those of that committee. The writer acknowledges with gratitude his reliance in part on a draft evaluation of Settlement Week 1991 by Dr C Chinkin and Mrs M Dewdney.

What was Settlement Week 1991?

Settlement Week 1991 took place in the week of 14-18 October 1991.

In and around that week, the parties in 180 cases awaiting trial in the Supreme Court voluntarily took part in mediations of the disputes that gave rise to those court proceedings. About 66 mediators, all legally qualified and counting 4 practising barristers amongst them, helped the parties attempt to negotiate settlements to their disputes.

The results were striking: more than 70% of the matters mediated settled. At 30 October 1991, the results were as follows (statistics courtesy of the Law Society of New South Wales):

Statistics

Total number of matters listed and proceeding to mediation -	237
Number of matters dealt with during Settlement Week (14-18 October 1991) -	164
Number of matters dealt with as at 30 October 1991 -	180
Matters settled - 128 (71.1%); matters not settled -	52

What was the rationale for Settlement Week?

Most civil cases settle before hearing. The objective of Settlement Week was to give parties and their legal representatives an opportunity to negotiate settlement, in the structured setting of mediation and under the aegis of the Law Society, well before the hearing. Settlement Weeks are widely used for this purpose in the United States.

What is mediation?

Mediation is not arbitration. It is a structured negotiation assisted by a trained neutral third party called a mediator. It is voluntary in two senses. First, entering into mediation is voluntary. Second, the mediator has no power to bind the parties to any particular result. If they reach a settlement, it is because they agree to it. The parties are required to attend in person with their legal representatives and, if a party is other than a natural person, someone with authority to settle the proceedings is required to attend.

Mediators use several proven techniques:

They help the parties isolate the issues in dispute and assess the strength of their positions with respect to the issues.

- They develop options for resolving the dispute.
 - They try to frame agreements which accommodate the interests and needs of the parties.
- Mediations are confidential and are conducted on a "without prejudice" basis.

Who were the mediators?

The Law Society assembled a panel of about 65 mediators, all legally qualified and with training in mediation from bodies such as LEADR (Lawyers Engaged in Alternative Dispute Resolution), the Australian Commercial Disputes Centre, the Community Justice Centre and the Family Mediation Service. Five of the mediators were practising barristers, including one Senior Counsel (though only four were able eventually to participate in Settlement Week). All mediators were required to attend a full day's additional training, and optional training on mediating personal injury disputes was also organised.

Who organised Settlement Week?

Settlement Week was an initiative of the Law Society's Dispute Resolution Committee. It began work on Settlement Week 1991 in August 1989. That Committee received co-operation from the Supreme Court, the Bar Association of New South Wales, the GIO, the Legal Aid Commission, the Attorney-General's Department and plaintiffs' solicitors, all of which provided representatives who served on a hardworking planning and implementation committee. The Law Foundation provided a grant towards administrative costs of nearly \$50,000.

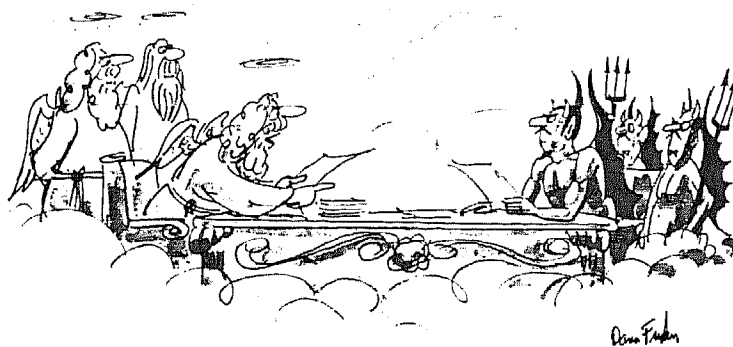
How were cases selected for Settlement Week?

This was a two-step process. First, with great assistance from the Supreme Court's staff (particularly its Chief Executive Officer and Principal Registrar, Warwick Soden), about 3,000 cases awaiting trial were selected from the Court's lists. On 8 March 1991, 6,500 letters, printed by the Supreme Court, were sent out over the signature of the President of the Law Society to the

solicitors for the parties in those cases.

The letters invited and encouraged the solicitors to seek instructions to submit these cases to mediation in Settlement Week. Only if all parties to a proceeding agreed would the matter proceed to mediation. This - the agreement of the parties to mediation - was the second step in selection of cases for Settlement Week.

Eventually, about 1,450 positive responses to the letters



"Then it's agreed. Watson, Smith, Teller, and Wilson go to Heaven; Jones, Paducci, and Horner go to Hell; and Fenton and Miller go to arbitration."

Drawing by Dana Fradon; © 1987 The New Yorker Magazine, Inc.

were received; this produced about 240 matters where all parties agreed and all parties paid the fee. These cases proceeded to mediation in Settlement Week.

Many of the negative responses to the letters revealed that the proceedings concerned had already settled, had been set down for trial, or had been discontinued.

What was the financial structure of Settlement Week?

The parties were charged \$800 for each mediation, divided among the parties as they agreed. For this, they received a preliminary conference with a mediator of about an hour, and a three-hour mediation. The mediator was paid \$800 for this by the Law Society. If the parties wished to continue the mediation beyond these hours, they had to agree to pay their mediator for the additional time at a rate to be agreed, but not to exceed \$200 per hour.

The parties also agreed, by executing a detailed mediation agreement, that if their mediation was not successful, its costs would be costs in the cause.

What was the role of the Bar?

As mentioned already, four barristers were mediators. Counsel appeared at a significant number of mediations (the detailed statistical evaluation of Settlement Week was not complete when this article was written). Anecdotal accounts by mediators at two evaluation meetings (given in such a way as to preserve confidences and to not disclose the identities of participants) indicated that many counsel were very helpful in the negotiating process. Some, however, betrayed their lack of understanding of the nature of mediation by attempting to elicit evidence from their clients, as if in chief, and to cross-examine opposing parties.

As far as the future is concerned, one hopes that more barristers will consider undertaking training as mediators. Those who took part in Settlement Week seem to agree that the process of mediating was intellectually stimulating and challenging, often exhausting, but eminently satisfying when, as often happened, the parties settled their disputes.

BREAKDOWN ACCORDING TO NATURE OF CLAIM			
	Settled	Not Settled	Still to Be Mediated
Personal Injuries - Motor Vehicle	73	14	18
Personal Injuries - Industrial	15	8	2
Probate (including Family Provision Act)	9	6	5
Real Property & Intellectual Prop.	8	5	7
Commercial	4	3	3
Contract	11	6	6
Partnership	1	1	1
Defacto Relationships Act	3	0	4
Tort (including medical negligence)	3	9	10
Costs Dispute	1	0	1
TOTALS	128	52	57

Barristers should also be aware that recently promulgated Bar Rule 79C permits them to put résumés that comply with that rule on file with organisations offering mediation services, such as LEADR and ACDC. Those bodies are often consulted by parties needing the services of mediators.

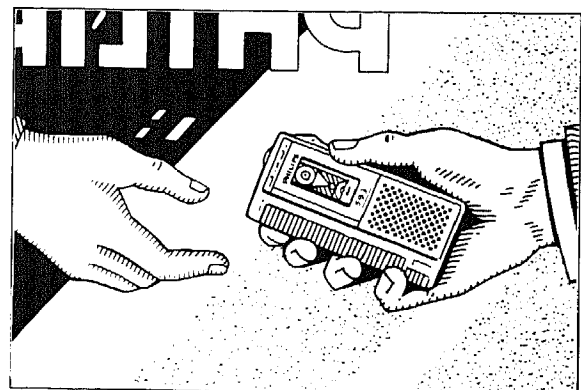
It is also worth noting that under s.53A of the Federal Court Act 1976 (added recently by the Courts [Mediation and Arbitration] Act 1991), the Federal Court will be able to refer matters to a mediator with the consent of the parties. That section is yet to be proclaimed (as is a similar new s.19B in the Family Law Act 1975); it is understood that proclamation will not occur until rules of court implementing those sections are promulgated.

What Next?

The Law Society's Dispute Resolution Committee is preparing a detailed evaluation of Settlement Week 1991, heavily based on detailed questionnaires that the mediators, the parties, solicitors and counsel were asked to complete. If it is seen as a success, and if a way can be found to make future settlement weeks possible without the enormous contribution of voluntary labour that this first one required, Settlement Week may be made a regular event and extended to jurisdictions other than the Supreme Court.

The ultimate aim, however, is to make settlement weeks unnecessary, by making mediation such an accepted part of the normal processes of dispute resolution that parties will engage in it without the impetus of specially organised occasions such as Settlement Week 1991. □ Robert Angyal

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