

7-1-2007

# Mediators fees — why I now charge a percentage of the lawyers' fees

Patrick Cavanagh  
*Bond University*

---

## Recommended Citation

Cavanagh, Patrick (2007) "Mediators fees — why I now charge a percentage of the lawyers' fees," *ADR Bulletin*: Vol. 9: No. 9, Article 2.  
Available at: <http://epublications.bond.edu.au/adr/vol9/iss9/2>

This Article is brought to you by [epublications@bond](mailto:epublications@bond). It has been accepted for inclusion in ADR Bulletin by an authorized administrator of [epublications@bond](mailto:epublications@bond). For more information, please contact [Bond University's Repository Coordinator](#).

**From the practitioner's side of the table**

# Mediators fees — why I now charge a percentage of the lawyers' fees

**Pat Cavanagh**

*This is the first in a series on ADR practitioner's reflections on ADR practice. Reverent and irreverent contributions are invited.*

We know that mediator pay rates are variable — from zero to \$10,000 a day. Most of us charge somewhere within this range, but I am wondering why we don't charge a percentage of what the lawyers have charged and been paid by the combined parties.

When I work as a mediator I expect to be paid, and well at that. If my charges are too high then a prospective client is entitled to seek the services of another individual. Go seek out an ideologue who believes in providing free service or else a low hourly rate on the basis that this is a social duty or a high moral calling that should be emulated by all mediators. I don't believe this. My plumber, electrician and mechanic have never given me free professional services — why should I?

Such mercenary thoughts occurred to me after completing a recent franchise mediation. The dispute was not complicated. In essence the franchisee wished to withdraw from the franchise. The reason was that he was making too much money and did not want to keep paying the ongoing fees. The franchisor, not unnaturally, wanted to keep the franchise contract in force. That was the essence of the dispute. This is the legal documentation that I was given:

- a statement of claim (20 pages)
- a statement of defence and counterclaim (43 pages);
- assorted affidavits (150 pages);
- application for injunction (adjourned by judge with no decision) (10 pages);

- franchise agreement (100 pages);
- written submissions on injunction (60 pages).

The lawyers had set the matter down for a four-day hearing in two months time. They then extended the hearing time to 10 days and were told that the earliest time slot was in three months time but this depended on prior cases and that it might not be heard until another six months. To date the fees paid to the lawyers were:

- plaintiff's lawyers — \$70,000;
- defendant's lawyers — \$150,000.

The estimate for additional future legal costs were:

- plaintiff's lawyers — \$300,000;
- defendant's lawyers — \$350,000.

The future fees included the cost of the subsequent appeal that each party had committed to if they were unsuccessful at trial.

None of the legal documentation addressed the real issues in dispute. It

- Were the personal guarantees valid and enforceable?
- What was the proper use of the advertising fund?
- Why was an audited copy of the accounts refused?
- Was the subsequent production of the advertising account within the stipulated contract time?
- Was the contract unconscionable?
- Did the actions of the franchisor constitute misleading and deceptive conduct?
- Has the franchisee breached the agreement by removing company signage from the premises and vehicles?

All of the above were canvassed at length before the mediation and had resulted in bills to date of \$220,000. All were completely irrelevant to the resolution of the dispute.

The only matter that required mediation was: What is the future of the business —

Go seek out an ideologue who believes in providing free service or else a low hourly rate on the basis that this is a social duty or a high moral calling that should be emulated by all mediators.

was a total waste of paper and effort. The advisers had also defined the issues as:

- Was the agreement enforceable?
- What disclosure and documentation was signed at the commencement of the franchisee?
- Did the franchisee breach the terms of the agreement?
- Was the franchisee entitled to terminate?
- Was the purported termination valid?

- (1) in the short term; and
- (2) in the long term?

The mediation occurred at the request of one party who became concerned about the time and money invested to date. Neither of the lawyers had proposed mediation despite the fact that mediation is mandated in the Franchise Code and in the particular franchise agreement. Both of these provisions were ignored and litigation was pursued.



The parties agreed that no lawyers would attend the mediation.

The matter was resolved in one day by the adaptation of variations to the franchise agreement incorporating broad commercial terms that both parties accepted. The total mediator's fee was \$4000 — a good financial return for any mediator but I had a feeling of being short-changed. This feeling came from the fact that the lawyers' fees for something of no value exceeded mine by \$216,000. The mediation also eliminated future legal costs of approximately \$650,000.

Given this extreme disparity between

the fees of mediators and lawyers, I wish to amend the basis of charging fees. In commercial matters where the parties are well-resourced, I propose that mediators should charge a percentage fee of 20 per cent of the costs either paid or payable to the lawyers. This will ensure that as parties seem to accept the fees of lawyers as of necessity involving quality and relevance, then this will have a flow on for professional mediators. This proposal will allow for those mediators with an ideological agenda to work for minimal reward with those of a more mercenary agenda to receive a benefit

courtesy of the legal profession.

If I had adopted my new percentage fee formula my fee would have been \$180,000. It's almost as good as being a plumber, mechanic or electrician. And yes, I am aware of mediator codes of conduct and the ethics of contingency fees, but today I'm making another point of principle. ●

*Pat Cavanagh is a Brisbane Mediator and Consultant and Adjunct Associate Professor in the Dispute Resolution Centre at Bond University. He can be contacted at <patrick.cavanagh@settle.net>*

## developments in ADR

- Former corruption commissioner Kevin Hammond will mediate Supreme Court criminal cases under a West Australian pilot program. Criminal case conferencing, or mediation, started in the court in November last year and is expanding. The concept is similar to civil mediation, which has been used in the courts for years. But the concept has now been opened up to use in the prosecution of wilful murder, armed robbery and Western Australia's most serious crimes. Criminal case mediation is a separate process to that heard before Supreme Court judges. The judges are not privy to what is said in mediation and nothing said during those conferences can be used against an accused person. The aim of the criminal conferencing was to identify and resolve any pre-trial issues, with the aim of reducing the court time that was used for such matters. For more information see <[www6.lexisnexis.com/publisher/EndUser?Action=UserDisplayFullDocument&orgId=675&docId=I:639749534&topicId=13929&start=1&topics=single](http://www6.lexisnexis.com/publisher/EndUser?Action=UserDisplayFullDocument&orgId=675&docId=I:639749534&topicId=13929&start=1&topics=single)>.
- On 13 July 2007 Andre van der Merwe, the adjudicator of the

South African Institute of Intellectual Property Law (SAIPL), made the first order to transfer a domain name, <[telkommedia.co.za](http://telkommedia.co.za)>, under the .ZA Alternate Dispute Resolution Regulations which were published in November last year by the South African Department of Communications. The Regulations provide a new online arbitration procedure that governs local domain name disputes in South Africa. At an administrative cost of R10,000, the new online arbitration procedure for settling domain name disputes is faster and more affordable. For more information see <[www.freehills.com.au/publications/publications\\_6906.asp](http://www.freehills.com.au/publications/publications_6906.asp)>.

- Interim results from an ongoing survey of UK construction litigation conducted by the Technology and Construction Court (TCC) and King's College, London, reveal that much mediation of construction disputes is occurring, but litigants are not interested in the TCC's pilot project to provide judges as mediators. Of the many cases settled, about one-third were resolved through mediation, with most of the rest settling by direct negotiations. Of the mediations conducted, four-fifths occurred at the parties' own initiative, generally with use of a limited number of well-regarded barristers and construction professionals as mediators. During

the first year of the TCC pilot program, litigants have been willing to use judges as mediators only twice. From <[www.mediate.com/adnews/](http://www.mediate.com/adnews/)>, for more information see <[www.thelawyer.com/cgi-bin/item.cgi?id=126749&d=122&h=24&f=46](http://www.thelawyer.com/cgi-bin/item.cgi?id=126749&d=122&h=24&f=46)>.

- China's Supreme Court President recently emphasised the importance of continuing to pursue mediation as an alternative to civil trials, calling for a step-up in mediation work. However, courts should not attempt to meet mediation quotas, but should ensure that mediation remains voluntary and fully respect the will of the litigants. From <[www.mediate.com/adnews/](http://www.mediate.com/adnews/)>.
- Bangalore, India's third largest city, inaugurated its first mediation centre on 21 June in a ceremony attended by the Chief Justice of India and Supreme Court judges in what has been called one of the most significant developments in the judicial history of the state. The mediation centre is one of a handful in India. The centre currently handles civil cases with 57 trained mediators and a success rate of nearly 50%. The High Court plans to train additional mediators from surrounding districts and expand to include minor criminal matters. From <[www.mediate.com/adnews/](http://www.mediate.com/adnews/)>.