



The Gatekeepers:
The Role of Lawyers
in the NZ
Commercial
Mediation Market

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Purpose of this research

- ▶ To collect empirical data about the commercial mediation market in New Zealand
- ▶ To move from anecdote to evidence

Research method

- ▶ Background analysis of relevant written sources
- ▶ Created survey about the nature of commercial mediation in New Zealand
- ▶ Definition of ‘private commercial mediation’
- ▶ Distributed the online questionnaire to commercial partners
- ▶ 120 responses to the survey
- ▶ Interviewed targeted survey respondents
- ▶ Used the survey responses, interviews and written sources to compile a report outlining the role of gatekeepers in NZ.

Gender

#	Answer	% of Respondents
1	Male	84 %
2	Female	16 %
	Total	100 %

- ▶ Commercial law partners act as the main gatekeepers to commercial mediation
- ▶ Male gatekeepers are referring disputes to male commercial mediators and this is primarily a result of the commercial law demographics in NZ

Mediation Awareness

#	Question	1	2	3	4	5	Total	Mean
	Extensive - Limited	32.5%	32.5%	26%	6.5%	2.5%	100%	2.14

- ▶ This particular cohort very aware of mediation and ready and willing to share their opinions about it
- ▶ Greater knowledge of mediation suggests greater likelihood that lawyers will encourage clients to mediate
- ▶ The mediation knowledge claimed by the respondents is only partly supported by professional or academic education

Dispute resolution processes used by lawyers

#	Answer	% of Respondents
1	Negotiation	91%
2	Mediation	77%
3	Litigation	74%
4	Arbitration	50%

- ▶ Cohort takes an eclectic approach to dispute resolution, happily using more informal, consensual processes (mediation and negotiation) and more rigid ones (litigation)

Lawyers recommending clients to mediate

#	Question	Always (1)	Often (2)	Sometimes (3)	Occasionally (4)	Never (5)	Total	Mean
	Please Select	7%	62%	21%	8%	2%	100%	2.36

- ▶ New Zealand's commercial lawyers are generally supportive of mediation and are not actively undermining it

What is the level of support from lawyers for mediation?

#	Question	1	2	3	4	5	Total	Mean
	Extensive-Limited	14%	51%	26%	6%	3%	100%	2.31

- ▶ The respondents believed the level of support from the legal profession for mediation is strong
- ▶ Commercial lawyers support mediation, albeit on their own terms

Reasons for recommending mediation to clients

#	Answer	% of Respondents
1	Cost	76%
2	Preservation of relationships	49%
3	Speed	48%
4	Certainty/control of outcome	20%
5	Confidentiality	10%
6	Flexibility	9%

- ▶ Cost is clearly the number one reason
- ▶ Encouraging to see the strong appreciation of how mediation can preserve business relationships
- ▶ Lawyers and mediators share a common understanding of why and how mediation can help

Reasons for NOT recommending mediation to clients

#	Answer	% of Respondents
1	Unwillingness of client or opposing client	32%
2	Client position/client case is strong	14%
3	Waste of money	11%
4	Issue of principle or precedent	11%
5	Timing Reasons	10%
6	Strategic and commercial reasons	9%
7	No certain outcome	4%

- More resistance to mediation from clients than lawyers

In what situations have lawyers represented clients in mediation?

#	Answer	% of Respondents
1	Following the triggering of a mediation clause in a contract	95%
2	Following a High Court recommendation to mediate	49%
3	Following a District Court recommendation to mediate	28%

- ▶ Mediation clauses are becoming increasingly common
- ▶ High Court is playing a larger role in encouraging commercial mediation than District Court, however both could still be increased

How often are clients accepting recommendations to mediate?

#	Question	Always (1)	Often (2)	Sometimes (3)	Occasionally (4)	Never (5)	Total	Mean
	Please Select	7%	50%	30%	11%	2%	100%	2.53

- ▶ Clients are following lawyers' advice regarding mediation
- ▶ Mediation will usually only occur if the gatekeepers suggest it

In what areas is mediation likely to be recommended?

#	Question	Always (1)	Often (2)	Sometimes (3)	Occasionally (4)	Never (5)	Total Responses
1	Contractual Disputes	16%	60%	19%	4%	1%	116
2	Property Disputes	12%	56%	27%	2%	3%	109
3	Construction	16%	55%	23%	3%	3%	97
4	Insurance	16%	52%	15%	8%	9%	94
5	Banking	11%	37%	19%	15%	18%	83
6	Other (if so, please specify)	35%	48%	7%	0%	10%	29

- ▶ The dominant mediation areas reflect dominant areas of commercial practice
- ▶ Potential for mediation to be more actively encouraged in other areas

Attributes that are prioritised when choosing a mediator

#	Answer	% of Respondents
1	Mediation experience	41%
2	Track record and reputation	38%
3	Expertise, skills and techniques	37%
4	Subject knowledge (legal or commercial)	31%
5	Cost	10%
6	Availability	10%
7	Personality	8%
8	Impartiality	8%

- ▶ It is not enough for a mediator to have requisite ability, they must have experience
- ▶ Gatekeepers expect commercial mediators to understand the law and the commercial world

Settlement rates for mediation

#	Answer	% of Respondents
1	90-100%	40%
2	80-90%	38%
3	70-80%	12%
4	60-70%	9%
5	Less than 60%	2%
	Total	100%

- ▶ Settlement rates are one component that support the conclusion that commercial mediation is successfully resolving disputes for gatekeepers' clients
- ▶ In this study the gatekeepers provide objective empirical evidence that NZ commercial mediation is of a high quality

Do lawyers improve the mediation process?

#	Answer	% of Respondents
1	Yes	94 %
2	No	6 %
	Total	100 %

- ▶ Most lawyers want to portray the legal profession in a positive way
- ▶ It appears that commercial lawyers may rate their importance and expertise in mediation too highly

Mandatory?

#	Answer	% of Respondents
1	Yes	15 %
2	In certain contexts	15 %
3	No	70 %
	Total	100%

- ▶ Lawyers are happy with mediation but on *their* terms
- ▶ They want to be able to recommend it only when they perceive it serves their clients' interests
- ▶ In contrast, commercial mediators support mandatory mediation

Challenges facing commercial mediation

#	Answer	% of Respondents
1	Limited number of effective, skilled and competent commercial mediators	28%
2	Lack of good mediators charging reasonable rates	13%
3	Lack of client awareness	10%
4	Lack of understanding by lawyers and a perception of mediation as a way of 'backing down'	9%
5	Older practitioners not being very receptive and general lack of acceptance by lawyers	6%

How can mediation be encouraged?

#	Answer	% of Respondents
1	Publicise success rates, publicise in legal and business publications and better promote mediation	14%
2	Educating clients/the public	8%
3	Educating lawyers	8%
4	Make it mandatory	6%
5	General awareness and education	5%
6	Increase the number of competent/quality commercial mediators	5%
7	Inclusion of mediation clauses in more contracts	4%
8	Promotion by judges	4%
9	Lawyers advising mediation	3%
10	Awareness at law school	2%
11	Legislative direction	2%

Conclusions

- ▶ Lawyers know about commercial mediation and support it, but largely on their own terms. For example, most are against mandatory mediation despite it being common in similar jurisdictions.
- ▶ Lawyers are not undermining mediation but believe they are contributing positively to the process.
- ▶ Clients have a more limited knowledge of mediation and usually follow their lawyer's recommendations.
- ▶ Thus lawyers play a key role as gatekeepers to commercial mediation.

Conclusions

- ▶ The main reason lawyers recommend mediation is cost ie it is cheaper than litigation.
- ▶ Lawyers prefer legal trained mediators with experience and a good reputation.
- ▶ They report high mediation settlement rates and high overall quality of mediations.
- ▶ Lawyers are generally happy with the standard of commercial mediation in New Zealand.

Conclusions

- ▶ Thus far, the project has revealed that the small group of in-demand mediators is happy with the current market, as are senior commercial lawyers. The larger group of struggling mediators is unhappy with the market.
- ▶ But what of the users? Clients and potential clients of commercial mediation are being surveyed in Part Three of this project to complete the jigsaw.