

**Resolution Institute/Victoria University ‘Lawyers as
Gatekeepers to Commercial Mediation in New Zealand’
Report (June 2016)**

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Overview:

This report contains follow on research from the study completed last year examining the nature of private commercial mediation in New Zealand. The aim of this research project is to examine gatekeepers’ perspectives on commercial mediation. The project has been part of Victoria University’s 2015/2016 Summer Research Scholarship Programme and was co-funded by the Resolution Institute (LEADR). There is a lack of empirical information on the nature and use of commercial mediation in New Zealand. This project aimed at gathering empirical data from lawyers working within this field to gain a picture of the current market. Commercial lawyers at law firm partner level and chief legal counsel (general counsel) for government departments and private companies were targeted. Responses were obtained through surveys and interviews, providing insights into the perspectives of those in a position to regularly refer clients to commercial mediation. This report analyses related written sources, survey responses and 10 targeted interviews. The survey was distributed in two stages. In stage one the surveys were distributed to large law firms and in-house counsel. For the stage two, smaller firms were sent the survey. The survey was launched on 26 November 2015 to the stage one group. Reminder emails were sent to this group on 14 December 2015 and 4 February 2016. The stage two group received the survey on 3 January 2016 with a reminder email on 15 February 2016. The interviews were conducted on 28 and 29 January 2016, 1, 8 and 22 March 2016 and 5 April 2016.

Survey Respondents

A total of 772 New Zealand commercial lawyers in high ranked positions were emailed an electronic survey. These lawyers were either partners of private law firms

or in-house general counsel (chief legal adviser) for state-owned enterprises, government departments or private corporates. 325 were commercial partners from larger sized private firms, 381 were partners from smaller sized firms¹ and 66 were in-house counsel team leaders from government departments and corporates.² There is no official list of senior commercial lawyers in New Zealand and there exists no geographic data on the distribution of such lawyers. The pool of survey respondents included both partners in private practice and in-house general counsel across the country to allow the survey to reach as many relevant lawyers as possible.

Legal Profession

There are a total of 1951 law partners and 693 directors in New Zealand.³ According to city centres, Auckland is home to 38% of partners and 39% of directors, Wellington has 13% of partners and 9% directors and Christchurch has 14% of partners and 5% of directors.⁴ This project targeted 706 of these lawyers, equating to 27% of all partners and directors in New Zealand. Not all New Zealand law partners work in commercial areas, however this is the largest area of practice. The New Zealand Law Society's 2016 annual publication regarding statistics on the legal profession revealed that 54% of lawyers indicated spending time participating in company and commercial work.⁵ To estimate the number of partners and directors involved in commercial law using the percentage above would be 1430. Therefore, the group targeted for this project is estimated at 54% of all commercial law partners and directors in New Zealand.

Survey Responses

Of the surveys that were sent out, 120 were completed. This gives an overall response rate of 16%. This is a lower response rate than similar research projects conducted in

¹ Ronald Pol et al *The Business of Law 2009* (2nd ed, Brookers, Wellington, 2009) listed law firms according to size for each region. This list was used as a guide to determine and identify large and smaller law firms.

² The NZX 50 was used to identify major private corporates and the New Zealand Government website for identification of relevant government organisations.

³ Geoff Adlam "Snapshot of the Profession" (2016) 883 Law Talk 17 at 23.

⁴ Ibid.

⁵ Ibid, at 25.

England and Wales (28%),⁶ and Scotland (30.5%).⁷ However, this difference could be related to the type of cohort selected.⁸ Upon dividing the overall response rate into further categories, we found that 65 lawyers from the large sized firms had completed the survey, giving a 20% response rate. Forty-four lawyers from smaller firms had responded, giving a 12% response rate and a 17% response rate was found for the 11 in-house lawyers who responded.

2. Location of Lawyers

#	City/Town	Response	% of respondents
1	Auckland	44	36%
2	Wellington	30	25%
3	Christchurch	12	10%
4	Hamilton	8	6%
5	Invercargill	4	3%
6	Tauranga	3	2.5%
7	Nelson	3	2.5%
8	Dunedin	3	2.5%
9	Whangarei	3	2.5%
10	Hastings/Napier	2	2%
11	New Plymouth	2	2%
12	Rotorua	2	2%
13	Blenheim	1	1%
14	Ashburton	1	1%
15	Palmerston North	1	1%
16	Dannevirke	1	1%
Total		120	100%

Senior commercial lawyers were identified from each region and added to the mailing list. This allowed for a large spread of lawyers, ranging from densely populated cities to less populated towns. As expected, the majority of respondents were from the major city centers, Auckland (36%) and Wellington (25%). There were no Gisborne lawyers who completed the survey. This is the only ‘city’ in New Zealand absent from the project findings. Auckland is the most populated city and largest commercial

⁶ Julian Sidoli del Ceno “An investigation into lawyer attitudes towards the use of mediation in commercial property disputes in England and Wales” (2011) 3 International Journal of Law in the Built Environment 182 at 187.

⁷ Bryan Clark and Charles Dawson “ADR and Scottish commercial litigators: a study of attitudes and experience” (2007) 26 Civil Justice Quarterly 228 at 229.

⁸ Two hundred questionnaires were distributed for Sidoli del Ceno’s project and Clark and Dawson distributed 459. For both projects the researchers were able to identify directly relevant individuals for the cohort.

area in New Zealand followed by Wellington. Auckland is home to 5245 lawyers, 59% of whom work in private firms and 19% as in-house lawyers.⁹ Both cities are the main commercial areas so have higher demand for commercial lawyers and contain a greater supply of law firms to compensate. Even though Wellington's population size is similar to Christchurch, the capital city is the base for many government departments and requires more in-house lawyers. There are 2302 lawyers in Wellington as opposed to 1155 in Christchurch.¹⁰ A reflection of this is expressed through survey responses. The number of responses from Wellington commercial lawyers are more than double than those from Christchurch. Smaller areas show largely reduced responses, reflecting the smaller population size and therefore reduced demand for commercial lawyers.

3. What is your gender?

#	Answer	Response	% of respondents
1	Male	101	84%
2	Female	19	16%
Total		120	100%

Female lawyers totaled to only 16%. This was expected as it reflects the gender disparity between men and women in the senior ranks of legal profession in New Zealand, in particular at law firm partner level.¹¹ Women comprise only 24% of partners in law firms,¹² and additionally males dominate the commercial law area.

⁹ Adlam, above n 3, at 19.

¹⁰ Ibid.

¹¹ Grant Morris *Law Alive: The New Zealand Legal System in Context* (3rd ed, Oxford University Press, 2015) at 255.

¹² Adlam, above n 3, at 23.

4. What is your age?

#	Answer	Response	% of respondents
1	20-30	0	0%
2	30-40	19	16%
3	40-50	45	38%
4	50-60	39	32%
5	60+	17	14%
6	Confidential	0	0%
Total		120	100%

The most common age for commercial lawyers in New Zealand was found to be between 40-50 years old (38%). This age group was closely followed by the 50-60 year old age bracket (32%). The targeted respondents all held leading roles and were specifically private practice partners involved in commercial work and in-house counsel team leaders. Due to career progression from solicitor to partner and from legal counsel to team leader, the result for older lawyers was expected. Those respondents in the 30-40 year old age bracket generally would be quite new to the position as partner and those from 40-60+ would have greater experience.

5. What is your professional legal position?

#	Answer	Response	% of respondents
1	Partner (Private Law Firm)	109	91%
2	Team Leader (In-House Counsel)	11	9%
Total		120	100%

Internet research provided an indication of those involved in commercial work, enabling the development of a contact database. The vast majority of respondents were commercial partners in private law firms (91%) with in-house counsel team leaders only equating to 9%. This tracks the same as the survey distribution percentage for in-house lawyers.

6. How many years have you been in legal practice?

#	Answer	Response	% of respondents
1	0-4	0	0%
2	5-10	6	5%
3	11-20	43	36%
4	21-30	35	29%
5	30+	36	30%
Total		120	100%

The most common number of years in legal practice was 11 to 20 years (36%). This was followed by 21 to 30 years (29%). As previously mentioned in question four, time is necessary for career progression to the more highly ranked roles. Results for this question were expected because of this factor.

7. How would you describe your knowledge of mediation?

#	Question	1	2	3	4	5	Total Responses	Mean
	Extensive: Limited	39	39	31	8	3	120	2.14
	%	32.5%	32.5%	26%	6.5%	2.5%	100%	

The majority of respondents recorded their knowledge of mediation as extensive (32.5%) or fairly extensive (32.5%). Twenty-six per cent noted their knowledge of mediation as average and the remaining 9% noted either fairly limited or limited. The overwhelming majority (91%) indicated average to extensive knowledge of mediation. This is a positive sign for mediation in New Zealand, as with greater knowledge of mediation could come greater likelihood that lawyers will encourage clients to mediate. These results reflect similar research conducted in similar jurisdictions. Agapiou and Clark investigated Scottish construction lawyers and their attitudes towards mediation, finding that 90% of respondents noted having enough knowledge of mediation to be able to explain it to a client.¹³

¹³ Andrew Agapiou and Bryan Clark "Scottish construction lawyers and mediation: an investigation into attitudes and experiences" (2011) 3 International Journal of Law in the Built Environment 159 at 164.

8. Do you have mediation training?

#	Answer	Response	% of respondents
1	Yes (if so, please describe what training)	62	53%
2	No	56	47%
Total		118	100%

Mediation training had been undertaken by 53% of the respondents who answered this question. The remaining 47% had not received any training. For those who answered 'Yes', 46% noted LEADR/Resolution Institute training sessions or completion of LEADR/Resolution Institute's five-day mediation course. New Zealand Law Society (NZLS) seminars and courses were noted by 13% and 3% noted completion of the Massey University Graduate Diploma in Dispute Resolution. Others mentioned mediation and negotiation papers offered through law schools (e.g. University of Waikato and Harvard Law School), experience on the job and seminars offered through work or overseas study (e.g. Colorado-based CDR four-day advanced mediation course). In Scotland, commercial litigators with mediation training were found to be of a similar percentage to the current study (59%).¹⁴ Another project researching construction lawyers in England and Wales found a higher percentage with mediation training (78%).¹⁵ The Scottish study is more relevant to this research project as it looked specifically at commercial litigators, the same cohort as the current study. The English study received a higher percentage for mediation training.

9. Which professional dispute resolution organisations do you belong to?

#	Answer	Response	% of respondents
1	LEADR/Resolution Institute	21	18%
2	AMINZ	14	12%
3	NZ Law Society	111	97%

Respondents could choose more than one option for their answer. There was a total of 115 responses. Nearly all respondents belonged to the NZLS (97%). More respondents belonged to LEADR/Resolution Institute (18%) than AMINZ (12%). The

¹⁴ Clark and Dawson, above n 7, at 231.

¹⁵ Andrew Agapiou "The factors influencing mediation referral practices and barriers to its adoption: A survey of construction lawyers in England and Wales" (2015) 7 International Journal of Law in the Built Environment 231 at 237.

reason behind nearly all of the respondents belonging to NZLS is because it is the professional organization for lawyers. Higher membership for LEADR/Resolution Institute compared with AMINZ could be due to the greater accessibility of LEADR/Resolution Institute's five-day mediation course and subsequent accreditation process.

10. In which of the following forms of dispute resolution do you commonly represent clients?

#	Answer	Response	% of respondents
1	Litigation	86	74%
2	Arbitration	59	50%
3	Negotiation	106	91%
4	Mediation	90	77%

This question also allowed for respondents to answer more than one option. There were a total of 117 responses. Negotiation was found to be the form of dispute resolution lawyers most commonly used to represent clients (91%). Mediation (77%) and litigation (74%) were the next most commonly used methods followed by arbitration (50%). Some respondents may have believed this questions related to physical representation in the mediation room (see question 23) rather than overall representation throughout the process. One lawyer said that typically they would go to negotiation first and if this were to fail then other dispute resolution techniques would be considered.¹⁶ This supports the high percentage for negotiation. It was interesting to find that 23% of lawyers did not commonly represent clients in mediation. This could be due to a preference towards the other forms of dispute resolution, client refusal to mediate or the lack of need to undertake mediation. These reasons will be explored later in this report.

11. Have you acted as a mediator in commercial disputes?

#	Answer	Response	% of respondents
1	Yes	33	27.5%
2	No	87	72.5%
Total		120	100%

¹⁶ Interview with a commercial partner (1 March 2016), Wellington.

Lawyers who had acted as a mediator in commercial disputes totaled 27.5% with the remaining 72.5% having not acted as a mediator in such disputes. Most lawyers will select a commercial mediator for disputes and do not tend to actively seek mediation work themselves. One lawyer stated that if they were to leave the company or go somewhere else they might take up a role as a mediator.¹⁷ This suggests that some lawyers might consider mediation as a role for later in their career. Another lawyer in private practice stated “I don’t know whether I would consider myself as having sufficient expertise and just general experience yet to bring the knowledge to a mediation or the experience to a mediation that I have seen some really good mediators use”.¹⁸ A lack of experience, conflicts of interest and lack of desire to pursue work as a mediator may contribute to low proportion of commercial lawyers acting as mediators. Also, research has found that New Zealand commercial mediators identified that there is a lack of work available and an oversupply of mediators.¹⁹

12. How often do you recommend mediation to clients in commercial matters?

#	Question	Always (1)	Often (2)	Sometimes (3)	Occasionally (4)	Never (5)	Total Responses	Mean
	Please Select	8	74	25	10	2	119	2.36
	%	7%	62%	21%	8%	2%	100%	

Lawyers who always recommend mediation to clients in commercial matters totaled 7%. The majority of respondents who ‘often’ recommend mediation equated to 62%. This was followed by ‘sometimes’ making a recommendation (21%). At the end of the spectrum (never) there was a significantly lower result (2%). Lawyers are much more inclined to ‘sometimes to always’ recommend mediation to clients (90%) than ‘occasionally or never’ recommend it to clients (10%). This is a positive sign for commercial mediation in New Zealand. The overwhelming majority had at some point recommended mediation to clients and are aware of its benefits and usefulness. It appears that lawyers are supporting commercial mediation on the whole and are open to recommending it.

¹⁷ Interview with commercial lawyer (8 March 2016), Wellington.

¹⁸ Interview with a commercial partner (22 March 2016), Wellington.

¹⁹ Grant Morris and Daniella Schroder “LEADR/Victoria University Commercial Mediation in New Zealand Project Report (June 2015)” (Research Paper, Victoria University of Wellington, 2015) at 3.

13. How often do clients accept the recommendation to mediate?

#	Question	Always (1)	Often (2)	Sometimes (3)	Occasionally (4)	Never (5)	Total Responses	Mean
	Please Select	8	59	36	13	3	119	2.53
	%	7%	50%	30%	11%	2%	100%	

Overall, 98% of these lawyers noted that in their experience clients had at some point accepted their recommendation to mediate. Half of the respondents noted that clients would ‘often’ accept their recommendation, 30% noted ‘sometimes’, 11% noted ‘occasionally’ and 7% ‘always’. Only 2% of lawyers had clients who ‘never’ accepted recommendations to mediate. It appears that the overwhelming majority of these clients have accepted their lawyer’s recommendation. This is a positive sign as clients are generally following expert advice and recognizing the benefits of using mediation.

14. How often do clients reject the recommendation to mediate?

#	Question	Always (1)	Often (2)	Sometimes (3)	Occasionally (4)	Never (5)	Total Responses	Mean
	Please Select	1	5	42	60	11	119	3.63
	%	1%	4%	35%	51%	9%	100%	

Just over half of the respondents noted that clients ‘occasionally’ reject their recommendation to mediate. Thirty-five per cent noted that their clients ‘sometimes’ rejected their recommendation. Nine per cent ‘never’ had clients reject whereas 4% would often have clients reject and 1% always. One lawyer stated that his clients are usually sophisticated individuals with legal backgrounds who always accept his recommendations. If they were to reject his recommendation to mediate then this would fracture the relationship and the client would have to find another lawyer.²⁰ This particular statement touches on the area of lawyer-client relationships. As discussed in the previous question, clients are generally positively receptive to their lawyer’s recommendations to mediate.

²⁰ Interview with a commercial partner (28 January 2016), Auckland.

15. In which commercial areas would you be likely to recommend mediation?

#	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

This question allowed for the respondent to answer more than one question or leave questions unanswered.

The most common commercial area that these lawyers were involved in recommending mediation was contractual disputes. This was followed by property, construction, insurance and banking disputes. Seventy-six per cent of lawyers in contractual disputes would either 'always' or 'often' recommend mediation. In the same categories the figure was 68% in property disputes, 71% in construction, 68% in insurance and 48% in banking disputes. However, in certain circumstances a lawyer might decide not to advise their client to mediation. Question 17 of this report addresses these issues and describes why lawyers might not refer clients to mediate. Another interesting point to note is that for insurance and particularly banking disputes there seems to be a more even spread of results. Lawyers choosing to 'occasionally' or 'never' recommend is more common.

Twenty-nine lawyers answered 'other' although only 26 lawyers specified the commercial area they would be likely to recommend mediation. Of these 26 comments, 31% of lawyers noted employment, 23% family, 12% resource management, tort and trusts/estates. Eight per cent noted regulatory work and the following areas were each 4%; share milking, intellectual property, franchise, company/shareholders, insolvency and professional conduct complaints. This shows that the respondents had different understandings of what exactly constitutes a 'commercial' area.

16. When faced with a commercial dispute, list the main reasons why you might refer clients to mediation.

#	Answer	Responses Overall	% of respondents
1	Cost	89	76%
2	Preservation of relationships	57	49%
3	Speed	56	48%
4	Certainty/control of outcome	23	20%
5	Confidentiality	12	10%
6	Flexibility	10	9%

The table above is a compilation of the most common responses. There was a total of 117 responses to this question. Seventy-six per cent of respondents noted the high cost of litigation and reduced costs when using mediation. Forty-eight per cent of all respondents noted the speed of mediation as opposed to the length of time spent with litigation. Respondents also included that mediation is a less damaging process in that it allows for the continuation of relationships (49%). These were the key reasons why these lawyers might refer clients to mediation.

Other recurring positives for mediation included having certainty and control of the outcome and the flexibility to reach a creative solution and confidentiality. A few respondents noted the cathartic nature and stress reduction mediation provides, the helpful presence of a third party and the opportunity to discuss issues with the other side. The answers in this question are reflective of New Zealand commercial mediators' views on what influences people to use commercial mediation.²¹

If viewed as a whole, these responses indicate the characteristics that differentiate mediation from litigation. Commercial lawyers recognise these characteristics and refer mediation in certain disputes where it would be beneficial in that context or where it would suit the disputing parties best. Many of the respondents stated the difference between dispute resolution processes, particularly comparing the benefits of mediation to the negatives of litigation.

²¹ Grant Morris and Daniella Schroder, above n 19, at 16.

17. When faced with a commercial dispute, list the main reasons why you might not refer clients to mediation.

#	Answer	Response	% of respondents
1	Unwillingness of client or opposing client	38	32%
2	Client position/client case is strong	16	14%
3	Waste of money	13	11%
4	Issue of principle or precedent	13	11%
5	Timing Reasons	12	10%
6	Strategic and commercial reasons	10	9%
7	No certain outcome	5	4%

This question received 117 responses. There was a wide range of reasons why lawyers might not refer clients to mediation.

The main reason for these lawyers to avoid referring was due to their client or the other party exhibiting unwillingness to mediate. This included either party maintaining negative attitudes towards mediation and exhibiting no interest, lack of agreement and a toxic relationship between disputing parties. Other recurring factors included the strength of the client's case, wasted money going through mediation, an issue of principle or establishing precedent and timing of mediation not being right. Some respondents noted strategic and commercial reasons and that mediation did not provide a certain outcome.

Only a few respondents mentioned other options of dispute resolution. One respondent noted that other forms of dispute resolution, such as negotiation would be performed before mediation is considered. Another respondent noted that other forms of dispute resolution (for example adjudication) are a better alternative to mediation. An in-house lawyer commented that there might be other alternatives, such as meeting with chief executives.

Overall it appears that commercial lawyers firstly look to their client's interests and will avoid referring mediation if it is not suitable. Most reasons appear to be due to factors covered in the previous question not working to the client's advantage.

18. If opposing counsel suggests mediation, what would be your usual response?

#	Answer	Response	% of respondents
1	Discuss with client and advise	31	26%
2	Take instructions from client	29	25%
3	Will consider it and are willing to explore pros and cons of mediation	27	23%
4	Agree to mediate	21	18%
5	Favourable response to mediation and will recommend and encourage use to client	24	20%
6	Encouragement of mediation depends on context	14	12%
7	I have not needed to go to mediation – used other methods	3	3%

There were 118 responses to this question.

If taken holistically, it appears that respondents are generally open to the option of mediation if opposing counsel makes the suggestion. Lawyers have to make sure that clients are aware of alternative dispute resolution options of mediation.²² Generally, lawyers will be positively receptive to opposing counsel's suggestion to mediate and make an effort to encourage clients to use it. This is a positive finding for commercial mediation. If one disputing party is interested in mediating, it is likely the other party will recognise this and take this into consideration when deciding upon whether or not to use mediation.

19. How often would a client request mediation without your recommendation?

#	Question	Always (1)	Often (2)	Sometimes (3)	Occasionally (4)	Never (5)	Total Responses	Mean
	Please Select	0	2	31	55	32	120	3.98
	%	0%	2%	26%	46%	26%	100%	

Scholarship has found that commercial clients, for example, commercial tenants and landlords, appear to have little knowledge of the different dispute resolution methods and are dependent upon advice from lawyers.²³ This is also present in this study. Only 28% of clients would request mediation without recommendation 'often' or 'sometimes'. It was apparent through interviews that in these situations clients would

²² Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, Rule 13.4.

²³ Sidoli del Ceno, above n 6, at 185.

either be repeat disputants²⁴ or would have a legal background.²⁵ If clients do not have the previous experience or relevant background, they will be less likely to request mediation. There appears to be a problem with educating the public about the various forms of dispute resolution. This will be further discussed in question 32.

20. What attributes do you prioritise when selecting a commercial mediator?

#	Answer	Response	% of respondents
1	Mediation experience	48	41%
2	Track record and reputation	45	38%
3	Expertise, skills and techniques	44	37%
4	Subject knowledge (legal or commercial)	36	31%
5	Cost	12	10%
6	Availability	12	10%
7	Personality	9	8%
8	Impartiality	9	8%
9	Common sense/pragmatism	8	7%
10	Willingness and commitment	6	5%

A total of 118 responses were recorded for this question. The main attribute prioritised by the commercial lawyers was experience. This was followed closely by track record and reputation, and expertise. Interestingly, ‘subject knowledge’ was fourth, suggesting a desire for evaluative mediation amongst 31% of respondents. It was evident from the survey interviews that certain mediators dominated the mediation world. These individuals have gained the majority of mediator work and consequently are the most experienced mediators. One lawyer stated; “It is a bit like when you go and see a doctor. Do you want the junior doctor or do you want the senior doctor? You probably want the senior doctor. No disrespect to the junior doctor they might be absolutely brilliant and they might know more modern ways of dealing with problems than the senior doctor does, but human nature says you want the senior person. You want the one with 20 years’ experience because hopefully they have seen it all before and you are just another one of those incidents that they know”.²⁶ Another lawyer noted that it would be quite difficult for mediators beneath the top mediators

²⁴ Interview with a commercial partner (28 January 2016), Auckland.

²⁵ Interview with a commercial partner (28 January 2016), Auckland.

²⁶ Interview with a commercial partner (1 March 2016), Wellington.

to move up to their rank.²⁷ They would have to “pop up their heads enough that they would be selected in preference [to the top mediators]”.²⁸

Poitras and Raines assessed client satisfaction and described successful mediators as experienced with frequently high settlement rates.²⁹ Overall, it appears that even though most mediators may have many of the attributes that commercial lawyers are looking for, lawyers will continue to choose the most well-known mediators. Expertise, experience, high success rates and familiarity with a particular mediator are all prioritised characteristics when it comes to selecting a mediator.

21. Is a mediator with a legal background more preferable to one without? Why?

#	Answer	Response	%
1	Yes	104	89%
2	No	13	11%
Total		117	100%

The majority of respondents preferred a mediator with a legal background (89%). Of the 100 who commented under ‘yes’, 68% noted that mediators with a legal background would have knowledge of legal principles and understand the differences in dispute resolution methods, understand complex issues and think from a legal perspective. Five per cent of respondents stated that those with a legal background will have greater critical thinking and analysis skills and 6% stated that they would have greater credibility. Eleven per cent noted that it depends on the type of dispute and a mediator with a legal background may not always be necessary.

The minority (11%) noted that a mediator with a legal background is not more preferable to one without. Of the 12 who commented, 42% said that mediator skill is important but the skill is not specifically a legal one.

²⁷ Interview with a commercial partner (22 March 2016), Wellington.

²⁸ Ibid.

²⁹ Jean Poitras and Susan Raines *Expert Mediators: Overcoming Mediation Challenges in Workplace, Family, and Community Conflicts* (Jason Aronson, Maryland, 2013) at 13.

22. Is a mediator with accreditation (e.g. LEADR/Resolution Institute, AMINZ) more preferable to one without? Why?

#	Answer	Response	%
1	Yes	71	62%
2	No	44	38%
Total		115	100%

Respondents were invited to explain their answers. See below.

Yes

#	Answer	Response	% of respondents who said 'Yes'
1	Represents professional standards and allows quality assurance	43	61%
2	Shows experience	11	16%
3	Shows expertise and skill	10	14%
4	Shows understanding	4	6%
5	Shows reputation	3	4%

Sixty-seven respondents explained their answers for this choice. 61% held the opinion that mediator accreditation presents quality assurance for their client and suggests a professional standard. Some further explained that accreditation would enhance client confidence and comfort. 16% noted that it would show that the mediator is experienced, 14% stated that it would show expertise and skill and 6% noted that it exhibits understanding. Four per cent indicated that accreditation reveals the reputation of mediators.

Accreditation may imply a certain level of experience however this does not guarantee practical experience on part of the mediator. One lawyer stated that accredited mediators might adopt a somewhat formulaic approach. Two respondents noted the LEADR/Resolution Institute mediation training programme and the high quality of mediators who have received the training.

The Centre for Effective Dispute Resolution's (CEDR) 2013 survey of in-house use of commercial mediation revealed that professional reputation was a principal factor

in choosing mediators.³⁰ Experience, qualifications and style were included in the scope of professional reputation.³¹ It is interesting that in the CEDR survey settlement rates were not considered as important for mediator choice.³² However in this project the issue of settlement rate was not raised. Track record, experience and reputation were considered important. This can be seen in the following table.

No

#	Answer	Response	% of respondents who said 'No'
1	Track record, experience and reputation is more important	20	45%
2	Look for ability and skill	12	27%
3	Depends on the type of dispute	4	9%
4	The cost of accredited mediator	3	7%

Of the 44 lawyers who answered 'No', 40 explained their answers. Half of these respondents indicated that track record, experience and reputation are more important than whether or not the mediator is accredited. This contrasts with the lawyers who answered 'yes' and noted that accreditation indicates experience or reputation. However, accreditation does not guarantee practical experience. Twenty-seven per cent noted that they look for ability and skill and 9% stated that choosing a mediator would depend on the type of dispute and issue in question. Only three lawyers stated that the cost of an accredited mediator is a deciding factor on whether or not they will use them. Question 20 revealed that only a minority of respondents (10%) considered cost to be an important factor when selecting a mediator. However, in CEDR's research project, mediator fees were considered to be an important factor when choosing a mediator.³³

³⁰ Centre for Effective Dispute Resolution [CEDR] *Preliminary Findings: Survey of In-House use of Commercial Mediation* (CEDR, London, 2013) at 6.

³¹ Ibid.

³² Ibid.

³³ Ibid.

23. How often do you physically represent clients in a mediation session?

#	Question	Always (1)	Often (2)	Sometimes (3)	Occasionally (4)	Never (5)	Total Responses	Mean
	Please Select	35	42	11	24	7	119	2.38
	%	30%	35%	9%	20%	6%	100%	

Sixty-five per cent of those who answered this question would ‘always’ or ‘often’ physically represent clients in a mediation session. The majority (94%) indicated that they have had experience of physically representing clients. This is higher than that of Scottish commercial litigators where only 35% of respondents indicated having had acted as a representative for their client in alternative dispute resolution.³⁴ CEDR’s 2013 survey revealed that in over half of cases, in-house lawyers arranged mediation themselves as opposed to using external lawyers.³⁵ It is not clear whether or not this arranged mediation included physical client representation.

24. In which cities and towns do these mediation sessions primarily take place?

#	City/Town	Responses	% of respondents	% of all responses
1	Auckland	76	68%	37.5%
2	Wellington	46	41%	23%
3	Christchurch	27	24%	13.5%
4	Hamilton	11	10%	5.5%
5	Invercargill	5	5%	2.5%
6	Tauranga	5	5%	2.5%
7	Dunedin	5	5%	2.5%
8	Napier and Hastings	5	5%	2.5%
9	Nelson	3	3%	1.5%
10	Palmerston North	3	3%	1.5%
11	Whangarei	3	3%	1.5%
12	Rotorua	3	3%	1.5%
13	New Plymouth	3	3%	1.5%
14	Blenheim	2	2%	1%
15	Masterton	1	1%	0.5%
16	Whakatane	1	1%	0.5%
17	Queenstown	1	1%	0.5%
18	Dannevirke	1	1%	0.5%
	Total	201		100%
Included only one city in response			56	50.5%
Included more than one city in response			55	49.5%

³⁴ Bryan Clark and Charles Dawson, above n 7, at 237.

³⁵ CEDR, above n 30, at 5.

One hundred and eleven lawyers answered this question and 55 were able to list more than one area. This resulted in a total of 201 responses. Thirty-eight per cent of all areas listed were mediation sessions held in Auckland, 23% in Wellington and 13% in Christchurch. These results reflect the geographical distribution of lawyers in question two. Respondents located in Auckland (37%) were similar to the proportion of mediations held in Auckland. Twenty-five percent of respondents were located in Wellington and 10% in Christchurch. This shows that the location of commercial lawyers is fairly proportional to mediations held there.

However, it also shows that 68% of lawyers in this survey indicated that they had been involved in mediations held in Auckland, 41% indicated sessions held in Wellington and 24% in Christchurch. This shows that many lawyers located out of town are travelling to the main city centres for mediations.

New Zealand research into commercial mediators has revealed that 35% of mediators who took part in the research were located in Auckland and 35% in Wellington.³⁶ In addition, mediations primarily took place in Auckland (44%) and Wellington (41%).³⁷ Morris and Schroder's research in conjunction with the current project both indicate that mediators are fairly mobile and travel to the main city centres for work when necessary.

³⁶ Morris and Schroder, above n 19, at 1.

³⁷ Morris and Schroder, above n 19, at 4.

25. In which of the following situations have you represented clients in mediation?

#	Answer	Response	% of respondents
1	Following the triggering of a mediation clause in a contract	94	95%
2	Following a District Court recommendation to mediate	27	28%
3	Following a High Court recommendation to mediate	49	49%

There were 99 respondents who answered this question. They were able to choose more than one answer. The overwhelming majority had represented clients in mediation following the triggering of a mediation clause in a contract (95%). Nearly half of all respondents noted following a High Court recommendation to mediate. The interviews revealed that lawyers chose to negotiate first before looking towards mediation. If negotiation failed then the parties followed the contractual clause and would pursue mediation. The prevalence of mediation clauses in contracts would explain the high percentage of respondents pursuing mediation following the triggering of such a clause.

26. What is the success rate of the mediations in which you have been involved?

#	Answer	Response	% of respondents
1	90-100%	45	40%
2	80-90%	42	38%
3	70-80%	13	12%
4	60-70%	10	9%
5	Less than 60%	2	2%
Total		112	100%

The majority of respondents (89%) indicated success rates between 70-100%. The remaining 11% indicated success rates below 70%.

Even though 11% of respondents noted success rates below 70%, overall the majority of commercial lawyers indicated mostly successful mediations. This is a positive finding and is on par with that of the commercial mediators' settlement rates found in Morris and Schroder's research.³⁸ In that project all mediators recorded settlement rates between 70-100%, a higher result than that of the current study.³⁹

These rates are consistent overseas jurisdictions. The success rate of commercial mediations in Scotland is between 80-100%.⁴⁰

27. Do you think lawyers improve the mediation process? Why?

#	Answer	Response	% of respondents
1	Yes	109	94%
2	No	7	6%
Total		116	100%

The overwhelming majority of respondents felt that lawyers did improve the mediation process. A total of 114 respondents commented on their choice of answer.

Yes

#	Answer	Response	% of respondents
1	Trained and skilled, understands issues and legal concepts, documents settlement appropriately and helps clients to understand and prepare	66	61%
2	Advises client	17	16%
3	Objective and reduces level of emotion	15	14%
4	Balances power and impartial	12	11%
5	Gives parties confidence	2	2%
6	Reduces pressure for parties to settle	1	1%
7	Mediation is essentially a legal process	1	1%

Ninety-four per cent of respondents who answered thought lawyers improved the mediation process, all of whom commented on this question. Most felt that lawyers understand legal issues and concepts and use their skills to aid the client. Sixteen per cent noted that lawyers help to advise clients and 14% said lawyers are objective and reduce the level of emotion. It is not surprising that lawyers feel that they improve the

³⁸ Morris and Schroder, above n 19, at 5.

³⁹ Ibid.

⁴⁰ John Sturrock "Reflections on Commercial Mediation in Scotland"(2007) 73 Arbitration 77 at 78.

mediation process and they are possibly biased in relation to this answer. Their role is to advise clients on the available dispute resolution processes. Therefore, they would consider themselves as important gatekeepers to mediation. In addition, if they were to physically represent clients in mediation, this also provides them with another avenue of income. One lawyer stated that the lawyers who would not be supportive of mediation would be older and more litigious lawyers.⁴¹

The recent Global Pound Conference in Singapore conducted an electronic multichoice questionnaire which focused on the future of dispute resolution. 400 delegates took part and were from different key stakeholder groups; advisor, party/user, adjudicative provider, non-adjudicative provider or influencer.⁴² It appeared that advisors (lawyers) ranked legal advice as having the most influence on disputants when choosing between dispute resolution methods.⁴³ The other stakeholder groups recorded efficiency first and legal advice lower on the scale.⁴⁴ It appears that lawyers perceive themselves as more valuable and influential in the dispute resolution process than users perceive them to be. Respondents in the current project may have held similar opinions which may have contributed to the high percentage who answered ‘yes’ for this question.

No

Seven respondents commented on their choice of answer. One noted that lawyers tend to be too adversarial. Another came to the conclusion that sometimes the parties get further without lawyers as they are more open to discussion. Another commented that lawyers do not improve the mediation process due to their lack of mediation skills. Another stated that it depends on the dynamics between the parties and the behavior of lawyers. The respondent also added that legal representation may be important where less sophisticated clients are dealing with more sophisticated clients. One lawyer stated that lawyers give legal advice to their client and may feel a need to defend the client in the room and pressure them. Another lawyer stated that lawyers do not help in non-binding dispute processes because they tend to make the disputants

⁴¹ Interview with a commercial partner (22 March 2016), Wellington.

⁴² Michael Leathes “Data will defeat the ‘deadening drag of status quism’ The Global Pound Conference Series has kicked off” (April 2016) <www.mediate.com>.

⁴³ Ibid.

⁴⁴ Ibid.

focus on technical merits of their position rather than on reaching a commercial outcome.

One respondent identified that mediation is often seen as a threat to lawyers' bread and butter work. This solitary comment links to Morris and Schroder's project which found that 15% of commercial mediators thought that a key challenge to mediation today was gatekeepers (lawyers).⁴⁵

28. Where did you learn the skills to represent clients in mediation?

#	Answer	Response	% of respondents
1	Experience/on the job/in practice	91	80%
2	Training and seminars	15	13%
3	Mentor, senior counsel or through observation	15	13%
4	LEADR/Resolution Institute training	13	11%
5	Textbooks and reading articles	9	8%
6	NZLS training	7	6%
7	University training	4	4%
8	AMINZ training	2	2%
9	CLE training	2	2%

A total of 114 lawyers responded to this open answer question with the majority having gained skills to represent clients through job experience. Overall it appears that the respondents have actively acquired the skills to represent clients in mediation. Thirty-eight per cent of respondents indicated some formal training. This figure is consistent with a 2011 study of Scottish construction lawyers which found that 40% of respondents had received either in-house training or had participated in external courses.⁴⁶

⁴⁵ Morris and Schroder, above n 19, at 15.

⁴⁶ Agapiou and Clark, above n 13, at 164.

29. How would you rate the overall quality of the mediations in which you have participated?

#	Question	Very Good (1)	Good (2)	Fair (3)	Poor (4)	Very Poor (5)	Total Responses	Mean
	Please Select	42	60	12	1	0	115	1.76
	%	37%	52%	10%	1%	0%	100%	

The overall quality of mediations was considered by 89% to be either ‘good’ or ‘very good’. This is a positive sign for mediation in New Zealand. It is apparent that those mediating commercial disputes are often highly skilled and results show that the standard of these mediators is of high quality. Ten per cent recorded ‘fair’ quality and only one respondent recorded ‘poor’ overall quality.

30. In your opinion, how would you describe the legal profession’s awareness of mediation?

#	Question	1	2	3	4	5	Total Responses	Mean
	Extensive:Limited	37	54	24	0	1	116	1.91
	%	32%	46%	21%	0%	1%	100%	

The overwhelming majority (99%) considered the legal profession’s awareness between ‘moderate’ to ‘extensive’. A respondent stated that the days of lack of awareness have “pretty much passed” and those who lack awareness are “the really older folk you are not seeing that much of now”.⁴⁷ Another pointed out that they would be surprised if there was not a strong awareness but questioned whether there is strong awareness of the *value* of it.⁴⁸ Agapiou and Clark’s study found that nearly all Scottish construction lawyers surveyed stated that they personally held knowledge of mediation, however they were evenly divided when asked whether or not they believed the legal profession lacked awareness of mediation.⁴⁹ Scottish commercial litigators also regarded themselves as knowledgeable about mediation, however 68% either strongly or somewhat agreed with the opinion that lawyers did not have a great awareness.⁵⁰ It appears New Zealand commercial lawyers perceive their fellow

⁴⁷ Interview with a commercial partner (29 January 2016), Wellington.

⁴⁸ Interview with a commercial partner (22 March 2016), Wellington.

⁴⁹ Agapiou and Clark, above n 13, at 174.

⁵⁰ Clark and Dawson, above n 7 at 246.

lawyers to have good awareness of mediation, more so than Scotland. However, Clark and Dawson's research was conducted nearly a decade ago. Scottish commercial litigators' awareness of mediation may have changed since then.

31. In your opinion, what is the level of support from lawyers for mediation?

#	Question	1	2	3	4	5	Total Responses	Mean
	Extensive: Limited	17	60	31	7	3	118	2.31
	%	14%	51%	26%	6%	3%	100%	

The vast majority (91%) considered there to be between 'moderate' to 'extensive' support from lawyers for mediation. This is a very good result for commercial mediators as it shows that commercial lawyers are generally open to mediation.

Twenty-six per cent of Scottish construction lawyers either strongly or somewhat agreed with the view that lawyers act as a barrier to mediation.⁵¹ However, 38% either strongly or somewhat agreed with the perception that negative clients were the barrier instead.⁵² The commercial mediation community in New Zealand has made claims that gatekeepers can act as a barrier to mediation.⁵³ Fifteen percent of mediators surveyed held this opinion⁵⁴ although the commercial lawyers in the current study did not reflect this level of resistance.

One lawyer regarded the level of support from lawyers as "surprisingly high" and noted that it shows that lawyers are putting the client's interests (as they must do ethically) ahead of their own balance sheets.⁵⁵ If the opinion of the commercial mediators is correct, it would suggest that some lawyers are acting contrary to the ethics code. Another pointed out that older lawyers nearing the end of their legal careers are less supportive of mediation. When these particular lawyers began training, mediation would not have been a common dispute resolution process.⁵⁶ This

⁵¹ Agapiou and Clark, above n 13, at 176.

⁵² Ibid.

⁵³ Morris and Schroder, above n 19, at 15.

⁵⁴ Ibid.

⁵⁵ Interview with a commercial partner (5 April 2016), Wellington. See also Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, Chapters 5 and 6.

⁵⁶ Interview with a commercial partner (22 March 2016), Wellington.

point was raised in Sidoli del Ceno's research into English and Welsh construction lawyers. Sidoli del Ceno found that those who had been in practice for a long time were not as familiar with mediation compared to those who had been in practice for a short time.⁵⁷ It was more likely that the latter group had come across mediation in their tertiary studies and were more familiar with it.⁵⁸ This would raise the issue of whether lack of support is directly related to lack of familiarity. Another interviewee stated that they would not always recommend mediation, not necessarily because it had not occurred to them but because they did not view it as suitable for that particular case.⁵⁹

32. In your opinion, how would you describe clients' awareness of mediation?

#	Question	1	2	3	4	5	Total Responses	Mean
	Extensive: Limited	3	29	44	36	7	119	3.13
	%	3%	24%	37%	30%	6%	100%	

Commercial mediators in New Zealand perceive client awareness as limited. Sixty-seven per cent were between moderately limited and moderate.

One lawyer stated that the issue is that clients are "not necessarily aware of the benefits of mediation and particularly the role that a good mediator can have".⁶⁰ Clients may also misunderstand what mediation is and may be less inclined to consider it.⁶¹ However another interviewee stated that clients have a high level of awareness.⁶² It appears that lawyers who answered that clients have moderately extensive to extensive awareness may be dealing with repeat disputants and businesspeople who are already familiar with the process. Those who answered otherwise may deal with a different type of clientele who are not as educated on the various dispute resolution processes.

⁵⁷ Sidoli del Ceno, above n 6, at 189.

⁵⁸ Ibid.

⁵⁹ Interview with a commercial partner (28 January 2016), Auckland.

⁶⁰ Interview with a commercial partner (22 March 2016), Wellington.

⁶¹ Interview with a commercial partner (28 January 2016), Auckland.

⁶² Interview with a commercial partner (28 January 2016), Auckland.

Client awareness has been identified as a key challenge facing commercial mediation in New Zealand today. This will be further discussed in question 34.

33. Do you think commercial mediation should be mandatory in NZ? Why?

#	Answer	Response	% of respondents
1	Yes	17	15%
2	No	83	70%
3	In certain contexts	18	15%
Total		118	100%

Seventy per cent did not think that mediation should be mandatory in New Zealand. Thirty per cent supported either mandatory mediation completely or ‘in certain contexts’. This is a different view from that of New Zealand commercial mediators. Sixty-five per cent of mediators thought that mediation should be mandatory in certain contexts or completely mandatory and 35% answered that it should not be mandatory.⁶³

Yes

#	Answer	Response	% of respondents who said ‘Yes’
1	More cost effective	9	53%
2	Clients should try mediation, it serves the client’s interests more than litigation	4	23%
3	Results achieved quickly	2	12%
4	Free up the Courts	2	12%
Total		17	100%

Over half of the respondents who said ‘yes’ for this question felt that mandatory mediation would be more cost effective than litigation and that disputes may be resolved before they reach the courts. Others indicated that mediation serves the client’s interests more and that they should not rush into litigation when other dispute resolution options exist that routinely provide robust outcomes. Two respondents noted that mediation provides for quick results and another two respondents stated that it would free up the courts and reduce the strain on court resources.

⁶³ Morris and Schroder, above n 19, at 14.

In Scotland, commercial litigators were asked whether “Making ADR a mandatory first step would be a positive development”.⁶⁴ Respondents who either somewhat or strongly disagreed totaled to 67%, nearly the same percentage as the current study.⁶⁵ Only 20% of commercial litigators somewhat agreed to this statement.⁶⁶ It appears that the idea of implementing mandatory ADR is not particularly favoured by commercial lawyers in both New Zealand and Scotland. However in the construction realm, Scottish lawyers were split as to whether or not mediation should be mandatory. Those who strongly or somewhat supported the idea of mandatory implementation (44%) were marginally lower than those who disagreed (46%).⁶⁷ These results are significantly different to the current survey which received lower support for mandatory mediation.

In certain contexts

Twelve respondents commented on their answer, most of whom had different answers. Two noted that in some situations mediation is not a suitable dispute resolution method. Another noted that it should only be compulsory if timing is appropriate and one lawyer recognised its cost effectiveness. One lawyer indicated that mandatory mediation should be imposed for disputes where there are no legal issues requiring a judge to decide. Another noted that mediation could act as a “filter” to the courts, subject to the ability to get interim relief.

It is interesting to see that commercial mediators are more supportive of mandatory mediation in certain contexts but commercial lawyers who support it are in the minority. Greater support of mediation by mediators could be due to them wanting more work. Lawyers tend to share the opinion that imposing mandatory mediation would take away an important objective of mediation, which is the voluntary nature of it.

⁶⁴ Clark and Dawson, above n 7, at 243.

⁶⁵ Ibid.

⁶⁶ Ibid.

⁶⁷ Agapiou and Clark, above n 13, at 174.

No

#	Answer	Response	% of respondents who said 'No'
1	It would take away the voluntary nature of mediation, parties should have a choice	46	56%
2	Waste of time and money	16	19%
3	Mediation is not always appropriate or suitable for the type of dispute	13	16%
4	Timing of mediation may not be right	4	5%
5	Clients could be exposed to power imbalances	2	2%
6	Not always effective	2	2%
Total		83	

Fifty-six per cent of respondents who said 'No' stated that if mediation were to become mandatory, it would take defeat the voluntary objective of mediation. Forcing parties into the process when they do not want to engage in mediation will be less likely to produce a successful outcome. Others noted that parties should be able to choose which dispute resolution methods they wish to engage in.

These results show that the majority of respondents prefer the current situation. Enforcing mandatory mediation might undermine the voluntary process and may change the nature of commercial mediation.

34. In your opinion, what are the key challenges facing commercial mediation in NZ at the present time?

#	Answer	Response	% of respondents
1	Limited number of effective, skilled and competent commercial mediators	28	28%
2	Lack of good mediators charging reasonable rates	13	13%
3	Lack of client awareness	10	10%
4	Lack of understanding by lawyers and a perception of mediation as a way of 'backing down'	9	9%
5	Older practitioners not being very receptive and general lack of acceptance by lawyers	6	6%
6	Failure of lawyers to advise clients to consider mediation	4	4%
7	Not enough commercial mediators	4	4%
8	Limited well qualified/accredited commercial mediators	3	3%
9	Lack of promotion	2	2%
10	Too many mediators and difficult for mediators to enter the market	1	1%

There were 101 responses to this question although only 83 responses were on topic. Twenty-eight per cent of respondents stated that the key challenge facing mediation is the lack of effective, skilled and competent mediators. There appears to be a small number of mediators that dominate the available work, therefore a large number of mediators will not be able to gain work. Due to lack of experience, these mediators may not be considered as competent or skilled as the lawyers' regular mediators. Thirteen per cent of lawyers indicated that there is a lack of good mediators who charge reasonable rates. As noted in question 20, only 10% of lawyers stated cost would be a factor in mediator choice. Question 16 revealed that 76% of respondents would refer clients to mediation and mainly drew a comparison between litigation and mediation costs. Some lawyers (10%) indicated that there is a lack of awareness amongst clients (see question 32). Respondents also found that a key challenge might be that lawyers lack an understanding of mediation or perceive the process as a way of "backing down" or view it as the "poor cousin" approach to dispute resolution (9%). Six per cent indicated that a key challenge is older practitioners not being receptive towards mediation and general lawyer lack of acceptance. Four per cent of lawyers stated that a failure to advise clients to mediation is a key challenge (4%).

One interviewee discussed mediators who are not gaining a lot of work, “it’s a matter of giving them a chance ... sooner or later [some experienced mediators are] not going to be there... but where are the others? ... your institutional clients have their favourites”.⁶⁸ The same lawyer also noted that mediators work solo and do not have a junior mediator working with them, “their skills evaporate in the room”.⁶⁹

Commercial mediators were asked the same question. Similarly to the current study, mediators identified both professional and public awareness as a key challenge (27%).⁷⁰ Twenty-one per cent stated that another key challenge is the lack of mediation skill, quality and experience.⁷¹ Again lawyers held a similar perspective. Oversupply of mediators and not enough mediation work was also identified by 24% of the commercial mediators in that study.⁷² This issue was raised by only one respondent in the current project. It does not particularly concern lawyers if mediators cannot secure work.

To some extent, lawyers and mediators have raised similar issues that act as a key challenges to mediation. However, mediators also seem to draw on issues which affect personal work opportunity, namely lack of work and oversupply of mediators.

⁶⁸ Interview with a commercial partner (5 April 2016), Wellington.

⁶⁹ Ibid.

⁷⁰ Morris and Schroder, above n 19, at 15.

⁷¹ Ibid.

⁷² Ibid.

35. In your opinion, how can greater use of commercial mediation be encouraged and increased in NZ?

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

Of the 99 responses, 14% indicated that publicising success rates and generally promoting mediation would help increase and encourage the use of mediation in New Zealand. Eight per cent stated the need for client education and another eight per cent indicated lawyer education. Five per cent were not so specific and noted general awareness and education.

Morris and Schroder's research suggested that the key challenges facing commercial mediators could be mitigated by increased promotion of mediation, particularly by the courts and professional organisations.⁷³ Some respondents in the current study appear to come to the same conclusion. Thirty-nine per cent of lawyers focus on the idea of general education, educating lawyers and clients specifically and increasing promotion through publications or judges.

Not all respondents saw a need to further increase and encourage the use of mediation. Sixteen per cent indicated that there was no need to do so and viewed the current situation as already successful.

⁷³ Ibid.

Specific conclusions

- 84% of respondents were male, similar to the 72% found in the survey of commercial mediators. The commercial partner demographic generally reflects the commercial mediator demographic, but is younger on average. This reflects the fact that commercial mediators usually come from commercial law backgrounds.
- Respondents had a good working knowledge of mediation and believed that the legal profession in general has a good working knowledge of mediation.
- Respondents believed that there is a high level of support from lawyers for mediation.
- However, clients have only a moderate level of awareness of mediation. This could be one factor holding back the growth of commercial mediation.
- 74% of respondents commonly represent clients in the mediation room thus gaining a first-hand view of mediation in action.
- 83% of respondents recommended mediation to clients often or sometimes.
- 80% of respondents' clients accept these recommendations often or sometimes. Thus commercial lawyers are regularly recommending mediation to clients and clients are regularly accepting these recommendations.
- These recommendations are most commonly occurring in the following practice areas (in order): contractual disputes, property, construction, insurance and banking.
- The main reason respondents referred clients to mediation is cost. This reason was ranked first by a large margin. The two other common reasons are speed and preservation of relationships.
- The main reason respondents chose not to refer parties to mediation was unwillingness on the part of the client. The survey showed that there is more resistance to mediation from clients than lawyers.
- It is rare for a client to request mediation without a lawyer's recommendation. Those clients that actively requested mediation were repeat disputants and/or had a strong legal/commercial background.

- Respondents prioritised the following attributes when selecting a mediator: experience, reputation, skills and subject knowledge. Only 10% of respondents prioritised cost in selecting a mediator.
- 89% of respondents preferred a mediator with a legal background. The main reasons given were knowledge of legal principles and the ability to think from a legal perspective. 62% of lawyers preferred accredited mediators but 38% were not concerned about accreditation.
- 61% of commercial mediations take place in Auckland and Wellington (compared with 54% in commercial mediator survey).
- 95% of lawyers have represented clients in the mediation process following the triggering of a contractual mediation clause, 49% following a High Court recommendation to mediate and only 27% following a District Court recommendation. The High Court is playing a role in encouraging commercial mediation.
- 89% of respondents reported mediation settlement rates between 70-100%.
- 94% of respondents believe that lawyers improve the mediation process. The main reasons given were that lawyers understand legal issues and concepts, are skilled at documenting settlements, and can advise clients. The 94% is not surprising given the cohort and reflects the inherent bias in this study ie most lawyers will want to portray the legal profession in a positive way and lawyers supportive of mediation are probably more likely to complete a mediation survey.
- 80% of respondents learned the skills to represent clients in mediation 'on the job'.
- 70% of respondents were opposed to mandatory commercial mediation.

Overall conclusions

- Lawyers know about commercial mediation and support it, but largely on their own terms. They are not undermining it. Lawyers believe they are contributing positively to the mediation process.
- Clients have a more limited knowledge of mediation but usually follow their lawyer's recommendations. Thus lawyers play a key role as gatekeepers to commercial mediation.
- 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.
- Lawyers report high mediation settlement rates and high overall quality of mediations. Lawyers are generally happy with the standard of commercial mediation in New Zealand.
- It appears that while mediators believe it would be advantageous to expand commercial mediation in NZ, lawyers are generally satisfied with the level and quality of commercial mediation. The group that has not yet been surveyed is clients and potential clients of commercial mediation.