

Kluwer Mediation Blog

Gatekeepers to Commercial Mediation in New Zealand

Geoff Sharp (Brick Court Chambers / Clifton Chambers) · Wednesday, July 6th, 2016



Recently, Dr. Grant Morris of Victoria University in Wellington, New Zealand completed valuable research on the nature of private commercial mediation in New Zealand.

The aim of the June 2016 research was to examine the commercial mediation market from a gatekeepers' perspective – that inevitably meant lawyers were the main source of data. Commercial lawyers at law firm partner level together with chief legal counsel (general counsel) for government departments or private companies were targeted through a process of surveys and interviews.

Interesting comparisons can be made with the [CEDR 2016 Mediation Audit](#) that came out around the same time and found that 10,000 commercial mediations were completed in England and Wales in the last 12 months, an increase of 5% on 2014.

You can read the full NZ report [here](#).

Some specific conclusions included;

> 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.

Dr Morris was assisted by researcher Amanda Lamb.

Earlier research using data from NZ commercial mediators [can be found here](#); reporting that 66% of commercial mediations in New Zealand are conducted by a group of approximately 10 full-time or near full-time mediators. Compare this to the recent CEDR finding that 85% of mediations in the last year in England and Wales are conducted by a group of 145 mediators (up from 130 mediators in 2014).


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