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Response Summary

Commercial Mediation Survey




1. Rank the relative significance of these factors when picking a mediator

- 1: reputation - experience/status 69
- 2: style 79
- 3: used mediator before 85
- 4: reputation - settlement rate 124
- 5: sector experience 129
- 6: availability 136
- 7: recommendation - by another lawyer 139
- 8: professional background/qualifications 149
- 9: fee levels 179
- 10: location 180
- 11: recommendation - by LEADR/AMINZ 226
- 12: marketing (website articles etc) 242

2. Rank the relative significance of these factors when picking a case for mediation

- 1: cost savings 60
- 2: where there are valuable relationships to save 62
- 3: where your case is weak 90
- 4: where emotions are running high 96
- 5: when clients have unrealistic expectation of trial 104
- 6: where your case is strong 109
- 7: where it's the best way to get a look at their case 126

3. How often do you use mediation to resolve cases as compared with direct negotiation

- | | | |
|--|----|--|
| very few - only if I can't settle it myself | 5 |  |
| up to half the cases I settle would be through mediation | 12 |  |
| most cases I settle would be through mediation | 5 |  |

4. Why would you elect a judicial settlement conference over a private mediation?

Cost. In most cases I wouldn't and prefer private mediation which I believe is significantly I wouldn't

where I have a strong case and I am hoping for a steer from a Judge or where I am concerned that a client is unnecessarily bullish and needs to get a feel for the inside of a court room; can always go to mediation afterwards

rarely-only if we are looking for a strong indication on the law-usually when the lawyers can't agree on "what the law is" or what the correct interpretation of the law is.

I never do. Mediation is more effective and has a much better track record of success in my experience.

When I want my client to receive an independent indication, from someone qualified to have a persuasive view, of the strengths and weaknesses of our/our opponent's case and the likely prospects of success, or where I think my opponent needs a reality check.

cost saving and if other parties won't agree to mediation. On the other hand judges are usually useless mediators - and all too often we run out of time - JSC's just don't have the flexibility that mediations have.

Only if the cost of mediation was a prohibitive factor

Depends on nature of case.

only where I assessed the side most needing it would be positively affected by the impressionistic advantage a Judge might bring

I wouldn't

I wouldn't.

Occasionally involvement of Judge has positive effect on parties; but generally prefer mediation.

I wouldn't, and only use JSC if others won't mediate

Cost saving Judicial comment needed If other side won't agree to mediation

Probably not, but perhaps if I think my case is strong, or the other side is unrealistic

Cost. Possible impact of judicial comments on merits. Status of judicial officer.

Only where there is a binary issue (ie zero sum gain) and/or where one or both parties are unrealistically positional.

Only if the judicial settlement conference could be achieved significantly earlier than a private mediation.

I wouldn't usually

When there are difficult legal issues or a wide gap between the respective parties' position on legal issues and some input from a judge to resolve that might make a difference.

N/A

5. Would you like the Courts to be more directive about mediation in the pre trial process?

yes 15 

no 7 

6. Yes or no - why?

I don't have strong feelings about this but feel that the voluntary nature of mediation is significant.

even if med is unsuccessful (in the sense of not reaching agreement) it forces parties and particularly lawyers to focus

No; parties have to be willing, not made to mediate. I have no interest in being directed to mediate. In my view this would be completely against client's interests and is more likely to result in parties becoming more positional following an unsuccessful attempt at mediation

because it is an effective process to resolve disputes and can be very cost effective

The adoption of some system of mandatory pre-trial mediation is inevitable. It would be better if this was done outside the court system but at the direction of the court, as occurs in other countries.

While mediation works best when the parties attend voluntarily and are motivated to settle, the process can work well for reluctant participants if skilfully managed by the mediator and counsel.

I think it is the role of Counsel to decide if a case is or is not appropriate for mediation. There are in my view already too many instances of timetabling intervention unnecessarily adding to parties costs in litigation.

All commercial cases should before Trial is allocated being forced either through mediation or settlement conference

because unless you indicate it the Court is probably in the worst position to judge the appropriateness of and right timing for mediation

Save costs and timeframes.

A direction to mediation would be better than a direction to a settlement conference.

Settlement generally preferable even with strong case.

The rules need to be changed to make it clear that the courts can direct mediation with cost consequences if the parties don't go.

It requires a genuine willingness

Should be left to the parties - no point in forcing someone to mediation who does not want to be there.

Highly effective mean of dispute resolution. Some clients, and some practitioners need extra urging to participate

It works so well in the employment jurisdiction.



Given huge time delays and expense in civil and relationship property litigation I think the courts should actively promote a cost and time effective mechanism where people contribute to the outcome and their counsel are forced into a cooperative environment.

because it is a very valuable process

Most litigators and their clients already use ADR without the need for compulsion.

Because many litigators and some lawyers need encouragement to appreciate the benefits of mediation.

7. Generally, how do you rate your experience of mediator performance?

very well 17 
quite well 5 

8. Do you think repeat use of a mediator diminishes impartiality?

yes 1 
no 18 
possibly 3 

9. If yes, what experiences have you had?

I don't think it necessarily does - but it potentially can. This is something that the mediator and lawyer needs to be aware of and careful about (professional). Particularly where the claims are of a similar nature.

I think it could affect a parties perception but that is something counsel and the mediator need to manage especially given the small number of competent commercial mediators available.

NA

I cannot point to any instance where I know I have been benefited or harmed but certainly one feels that one is treated better by a mediator one has used often. You certainly feel the mediator tries harder to get a satisfactory result when they know you well.

Human nature/depends on mediation - some I'm confident no effect but others not so sure.

n/a

The familiarity of a particular mediator's process by other parties (especially insurers) means that those who are unfamiliar can be at a disadvantage.

10. Have you ever had concerns with mediators failing to observe confidentiality in private sessions - please explain

No

no

no

never--always chose the best!!

No.

No

no

Yes. I had one situation where I inadvertently and stupidly disclosed in a private session with a mediator some information that I had undertaken to keep confidential. The mediator was unaware whether the other side knew I had this knowledge which he thought might put them at a disadvantage in negotiations. He was insistent that I disclose my knowledge which I refused to do. By doing so I would have prejudiced my client and also myself. In my view the mediator could not disclose the information but it appeared he intended to do so against my objections. Matters evolved and the information was not disclosed but I did not have trust in the mediator as a result of this.

no

yes - some mediators say one thing then suffer from the delusion of godliness in deciding what is best and perform another

Always a concern but no specific examples.

no

No.

no

no

No

Never

Yes. Twice (in about a hundred mediations). Small, but significant, breaches which in each case caused the mediation to fail instantly.

No

No

No

Occasionally - when the mediator is hurried or too keen to shift onto brokering a deal.

11. What is your best experience with a mediator? (no names please)

It concerned a mediation involving an historic sexual abuse claim - the mediation process was remarkable. It allowed the claimant/victim the opportunity to be heard. My view is the mediation process formed part of the settlement/healing process.

na

following through after unsuccessful mediation to achieve a result; plenty of good experiences.

resolving a dispute which all counsel involved said wasn't likely to settle

Relates well to the parties, understands the problem and is committed to achieving a settlement if at all possible, but recognising the right of the parties to fail to do so. Also, making alternative suggestions as to how settlement might be achieved.

The mediation of a highly emotional employment dispute, which began with the employee abusing both the employer and counsel; descended further to threats of physical violence from which the employer and counsel hastily retreated; and ended in settlement with the employee and employer (but not counsel) in grateful tears and an embrace.

settling an intractable case against all predictions

My best experience would be getting a settlement for a client in a civil case where my client really had no prospects of defending a large claim that would have ruined him. The mediation extracted sufficient from my client to be fair and made the other side see that they needed to compromise on their legal entitlements because it was unrealistic to expect my client to pay and the result of continued litigation would have been disastrous for everyone. Before the mediation the other side saw no reasons to compromise at all.

Taking charge when looking derailed. Use of techniques to move round road blocks.

when the mediator had no idea how or why the settlement was achieved and admitted as much[but did not reduce the fee]

Maintaining a sense of humour and keeping the parties talking. Positive outcome in all mediations attended to date.

diffusing slamming fist on table demand by lawyer for "bottom line". Also (in a different mediation) excellent assistance with very strained husband and wife relationship who were being sued by former business associate.

Private mediations and Labour Department for employment, a lot of the latter.

Proactive resolution of multiparty litigation(over \$20m) resolved in a day, albeit a long one after lengthy failed JSC

I don't understand the question. Most have been successful and I've been generally happy.

Finding unexpected and highly cost-effective solution to problem. Much better outcome than I or client had predicted.

Rugby mediation. Complex issues, tight timeframe, high media interest. Great result for both parties.

A recent relationship property where the parties had dug in with their respective counsel over five years and had apparently reached real stalemate but were able to settle within a day.

resolving complex cases, well into the night - ie the mediator going well beyond the call of duty and making a real difference in doing so.

No specific recollection, but getting result in difficult case through mediation is an obvious one.

Too many to choose! but recently, a mediator said about 2 words all day - had the wisdom to let us do it when we were all very prepared and in the right zone.

12. What is your worst experience with a mediator? (no names please)

A mediator appointed by HDC to conduct a mediation (relating to death of claimant's child). The mediator did not seem to be sufficiently experienced to deal with the issues. The mediation failed and the process seemed harmful to parties on both sides of the table.

na

can't think of any and don't believe in negative comment for the sake of it

when a mediator who was a former judge expressed his view in an open session about what the law was which reinforced a party's view and made it impossible to settle as that party wanted to TEST ITS RIGHTS IN COURT

Non-participation in the process and ineffectual in achieving a settlement.

The occasion on which the mediator (not one chosen by the parties) introduced himself; said the proceedings were without prejudice and confidential; separated the parties and gave each his views of the prospects of success; and then brought the mediation to a halt after no more than half an hour, claiming it to be unresolvable. Counsel and the parties met over a coffee next door and reached agreement.

not settling a case because the mediator wouldn't express any view or give any encouragement to one of the parties to engage in the process

See 10 above

Totally unpragmatic, process of leaving parties in separate rooms for hours on end and generally unprepared.

there really have been no worsts unless the employment mediations are included in which case getting the law wrong and losing the confidence of the parties

Treating those present as part of a process to simply obtain the outcome (and mediator's success record)

Zero direction at all and seemingly little understanding of the issues (unsurprisingly it didn't settle).

Department of Labour mediators mix of skills/worse when don't engage.

2 days spent when one would have sufficed with 2 (believe it or not) mediators, where neither was proactive in resolution, leaving it to the parties and lawyers (largely) to resolve.

Someone without sufficient experience who was unable to keep the parties together for more than 30 minutes

Mediator lost control of parties; settlement not achieved.

Breach of confidence, forced relationship apart - eventually settled two months later.

A highly directive mediator where I was in fact a client and felt that bulldozing rather than mediation had taken place. The result however was within the acceptable parameters I had set for myself before the mediation.

inaction by the mediator, providing no added value to the process.

mediator was given clear instructions as to the premise for a counter-offer to be made, namely to get a response before closing session. mediator then informed other side that our counter-offer was as far as we could go. complete breach of instructions with strategic advantage lost.

A control freak who treated 2 experienced counsel as if we were obstructing the process, when we were not.

13. Do you think the use of mediation growing in your area of practice?

yes	11	
no - reached its potential and/or is static	10	

14. What are the major drawback in using mediation? (tick more than one if you wish)

time and/or cost	4	
showing your hand	6	
unable to use information gleaned	4	
risk of no resolution	7	
other	8	

15. If other - please explain

if case is strong will end up in too significant a compromise.

I don't believe there are any, other than the cost and inconvenience burden of mediation where one party is not genuinely motivated to settle.

entrenchment

"drawback (s)"

Misuse by parties to effect dismissal (employment) or other steps not intended to resolve.

n/a

Some clients need their day in court

Possible perception of being court-shy

High turnover, tight timeframes - sometimes difficult to manage in the context of a legal practice.

None of the above

A belligerent party or lawyer will waste the opportunity and your time (and client's money).

16. If there is one issue you would like addressed by the mediation community - what is it?

Greater assistance in the pre-mediation stage - addressing whether it is the best time to mediate or whether it should be deferred to enable more information to be obtained, issues to be addressed which might increase the chance of resolution.

can't think of any

quality control--

Mediators need to take a relatively active role, rather than just being a passive "referee". The parties should always be told what the process involves even if the lawyers present are well aware of this. Some mediators simply assume that this is known (incorrectly) mediation has grown enormously in recent years and will continue to do so, as the first means of achieving the resolution of a dispute. Court resolution will increasingly become the avenue of last resort.

The importance of agreeing with the parties in advance what style of mediation they want - directive or purely facilitative

In some quarters fees are spiraling as reputations grow and mediation becomes more popular. I think mediators tend to judge and market themselves on the number of mediations that result in a settlement. One hears mediators quote figures that they are successful in mediations 90% of the time or more and in fact one mediator makes a habit of telling the parties that at the commencement of each mediation so that they feel like failures if they don't settle; as if it will be their fault and not the mediators (probably true but doesn't need saying). The desire of some mediators to "settle" at all costs may be too strong and settlements are negotiated that later fall over or leave a bad taste in the mouth once the dust clears. I see this as becoming increasingly common. Associated with this is the desire to have a deal done on the day rather than allow time to contemplate and have people come back a day or two later and resume the mediation. If there is genuinely a risk of buyer's remorse then that is a reason parties should not be encouraged to settle on the day in my view. Counsel has a responsibility here also but there is often great pressure on Counsel not to be seen as an obstacle to settlement. Mediation should not be viewed as something that will resolve all problems but increasingly it is seen that way. The initiatives to revamp District Court procedures for instance is largely based on this erroneous view (and an appalling lack of research and rational thought).

Sometimes taking more control of the process-- not letting some lawyers derail the day.

consistency in forms of agreement and in the handling of confidentiality

Lobby the Court system / Min. of Economic Development to bring ADR to the attention of those (parties) involved in and funding litigation.

More skilled mediators

Firmer hand when required to stop abuse of process and greater engagement to achieve resolution.

To encourage the Rules Committee to change rules to enable Court to direct Mediation

Need wider group of experienced mediators with geographic spread. Undesirable to see the work being monopolised

Recognition that lawyers who draft up agreements on the spot after a long day can have some real liability, so that too much pressure should not be placed on the parties to sign something there and then.

I believe that relatively few lawyers see private mediation as a front line tool particularly in property disputes. I think more opportunities for dialogue between the groups in a training environment would be helpful.

Educate more lawyers about the benefits and the how, so they get better at it.

17. Want to comment further or qualify anything? - feel free

I have been very happy with the mediators I have used. I tend only to use full-time mediators and have had no bad experiences as such. Obviously some mediations go better than others

Mediation will continue to grow as the major ADR process.

No

Some mediators adopt "tricks" to get a settlement that do leave a bad taste in the mouth because the parties have no idea where they are leading. There are techniques that some adopt such as getting each side to write their best and worst expectations from mediation on a piece of paper which is then provided to the mediator to consider. This is not in my view "honest" because a party does not know why this is required or how it may be used later in the process. The party feels they cannot refuse to do as they are told by the mediator or however and usually hand over their figures. I have found that the mediator can and does use this information against the party later on (subtly but effectively) to force the party to settle with the party's worst case effectively used as the baseline for all negotiation. The party's best case expectation is effectively ignored immediately. As a result when I am acting for a party and am asked to give this information my client is unlikely to be fully honest because I will advise them what is about to occur and that lack of honesty undermines the mediation process. This technique may result in settlements but usually not ones that the parties are happy about and it reflects the "settle at all costs" mentality that pervades some mediations.

Big fan of mediation with the right mediator and right case.

more specific feedback/some constructive criticism from mediators would be helpful to the practitioners [Geoff I am happy for you to disclose my true identity - the protection offered was polite but I am interested to know who says what about practice issues like these so you don't have to send me a ny fish

Mediators should all have sound Marketing divisions/strategies...

Some positive experiences through Labour Department - generally find private mediators very good.

No

It is unfortunate in the Auckland market that some lawyers (particularly for insurers) will only mediate with one mediator but I don't know how this can be addressed.

Hard to find negative comments. I am a fervent supporter of mediation and have had very positive experiences over many many years.

I continue to regard mediation as an invaluable option particularly in property disputes.

Would you like an emailed summary of anonymous responses to this survey?

yes please -

and Geoff,

throw in a

chocolate fish

for my tro

no thanks

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