

## **ADR and Scottish Commercial Litigators: A study of attitudes and experience\***

### **Introduction**

At the time of writing, it is ten years since one of the present authors conducted what was then the first empirical study into Alternative Dispute Resolution (ADR) in Scotland.<sup>1</sup> At that juncture ADR was clearly at an embryonic stage of its development. While revealing an enthusiasm for adoption of ADR techniques in different dispute areas, the research suggested that ADR practice in Scotland remained somewhat thin on the ground.

In the intervening period, ADR has made steady if unspectacular strides particularly in such areas as matrimonial<sup>2</sup> and community matters.<sup>3</sup> Despite the fact that recent times have seen the inception of a host of new commercial mediation providers in Scotland such as Core Mediation<sup>4</sup> and Catalyst Mediation,<sup>5</sup> self-reporting increasing numbers of mediated cases, it has been suspected that ADR's development has remained somewhat stagnant in the commercial dispute field and in particular fallen behind the comparable growth seen in England and Wales.<sup>6</sup> Articles in the legal and professional press expounding the virtues of ADR in all sorts of dispute resolution areas in Scotland have been rife over the last decade or so.<sup>7</sup> In short, it is claimed that unlike traditional forms of dispute resolution, ADR processes may be quick, cheap, harmonious, confidential and conducive to party empowerment. The apparent disappointing state of affairs regarding commercial ADR in Scotland then may seem somewhat perplexing.

One factor that it has been argued will be key to the development of ADR in Scotland is the reaction of lawyers thereto. Given lawyers' traditional role in handling disputes on behalf of their clients, legal professionals clearly act as gatekeepers to dispute resolution fora.<sup>8</sup> The responses of lawyers are therefore likely to be integral in charting the future development of commercial ADR in Scotland. Previous studies have hence called for research into lawyers' interaction with ADR to be undertaken.<sup>9</sup> Against this backdrop, the purpose of the research from which this article is drawn is to examine Scottish commercial litigation lawyers' awareness, experience and attitudes relative to ADR.<sup>10</sup> The study thus endeavours to identify key policy issues relative to commercial ADR's development, in addition to painting a picture of Scottish commercial litigation lawyers' current interaction with ADR processes.<sup>11</sup>

### **Methodology**

At the beginning of August 2005, 464 questionnaires were sent to respondents together with a covering letter explaining the nature of the study. The initial letter was followed up by a second, subsequent call for responses. Five of the questionnaires, were returned uncompleted, either on the basis that either the recipient could not be traced or had no experience in commercial matters. Of the remaining 459 questionnaires, 140 were returned. This represents a response rate of 30.5%,<sup>12</sup> which although modest is in fact slightly higher than those attained in similar recent studies in England and Wales,<sup>13</sup> and Australia.<sup>14</sup>

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The sample was established by a number of means. We were interested in canvassing the views of different sorts of legal professionals who may be involved in commercial disputes, hence it was determined to target solicitors, solicitors-advocates and advocates with a specialism in commercial litigation in Scotland. Ascertaining a sample group in this regard was not without its difficulties. Although the Law Society of Scotland provided lists of firms that offered commercial litigation services, it was unable to provide details of individual solicitors who were commercial litigation specialists. To ascertain an appropriate sample group, recourse was made to a list of Scottish solicitors with a commercial litigation specialism published in 1999.<sup>15</sup> Given the outdated nature of this database, contact was made with each solicitor's employers to ascertain if they were still working there and, if not, any forwarding address. By this process, we were able to trace the majority of those on the list while also picking up other solicitors, with a commercial litigation specialism, who worked with particular firms to add more recent entrants to the solicitors' profession to the research sample. Establishing sample groups for advocates and solicitor advocates was more straightforward. Both professional groupings held lists of those within the respective professions that were specialists in commercial litigation.

Breakdown of respondents

Of the 140 respondents to the survey, 90 were solicitors, 24 were advocates and 26 were solicitor advocates. Additionally, seven of the advocates were QC's. Nine of the respondents were accredited mediators. In terms of when respondents had been admitted into practice, this is illustrated (in terms of number of respondents) by Table 1 below

Table 1

Before 1960	0
1960's	2
1970's	28
1980's	50
1990's	50
2000 +	8
No response	2

Unlike the case with previous Scottish research in this area which has canvassed the views of lawyers with particular interests and involvement in ADR,<sup>16</sup> the purpose of this study was to illicit the views and experiences of commercial legal professionals in general towards ADR. In any study of this kind, there is a danger of course that those that have a vested interest in promotion of the area are more likely to respond. While the results of this research must be read in this light, the fact that the vast majority of the respondents to the study were not mediators – and as we shall note below, the majority of respondents had no direct experience of ADR - tempers this concern somewhat.

### **Knowledge of ADR**

The first question in the study centred on respondents' knowledge of different ADR processes. Rather than simply ask which forms of ADR respondents were aware of, the question was phrased in the following way: "which of the following forms of ADR could you explain to a client if asked?"<sup>17</sup> Respondents were then asked to tick a box against forms of ADR denoting their ability to describe the following processes: "mediation"; "early neutral evaluation"; "mini-trial" and "other (please state)". A stark result of the research is that all respondents who answered the question claimed to be able to describe mediation to their clients.<sup>18</sup> While it is impossible from responses to this question to ascertain what respondents perceived the mediation process to entail,<sup>19</sup> this confidence in ability to describe mediation to clients seems to fly in the face of received wisdom concerning a general lack of awareness of ADR amongst the Scottish legal fraternity.<sup>20</sup>

While there appears then to be a widespread awareness of mediation,<sup>21</sup> other ADR processes did not fare so well. Only 24 respondents (17.4%) felt able to explain early neutral evaluation and a mere 14 respondents (10.1%) said they could explain mini-trial. Some other forms of ADR were alluded to by respondents, for example: "ACAS procedures", two respondents; "expert determination", two respondents; "conciliation", one respondent; "on-site neutral", one respondent; "dispute panel", one respondent; "on-line dispute resolution", one respondent.<sup>22</sup> Some of the additional processes noted may in fact be variations on a theme of more widely known ADR processes or indeed, different names for the same processes - redolent of the general definitional problems that have dogged ADR since its inception.

In comparison with similar studies in other jurisdictions, this reported paucity of knowledge regarding what can be viewed as 'alternative' ADR types is significant. In Zariski's 1997 study of Australian lawyers' attitudes and experiences of dispute resolution, for example, 28% of respondents felt able to describe early neutral evaluation, while 26% could explain mini-trial.<sup>23</sup> Awareness of alternatives to mediation was even higher in a recent England and Wales study by Brooker and Lavers, in which 42% of respondents described themselves as either "familiar" or "very familiar" with early neutral evaluation.<sup>24</sup> The reported awareness levels of fringe ADR processes south of the border, however, may merely be due to increased levels of education in ADR processes rather than any increased practice of these alternative forms of ADR. As Wood has observed, in England and Wales mediation is the only form of ADR to have survived a "Darwinian test" to become the ADR mode of choice, while other ADR forms are "defunct".<sup>25</sup> Our study suggests that the negative state of affairs for purveyors of other forms of ADR in Scotland is even more pronounced than that south of the border. Moreover, as we shall discuss later, our results show that virtually all ADR practice recorded by the respondents related to mediation.

It is worth noting here that the term 'Alternative Dispute Resolution' has become somewhat unfashionable of late. In particular the perceived pejorative use of the term 'alternative' has led to a re-labelling in some quarters and its replacement with 'assisted' or 'appropriate'. The term 'alternative' may be considered inappropriate given that as Ross has noted "[t]he ADR movement to date has been promoted as a potential replacement of the adversarial process of litigation. In reality, however, ADR is used in a variety of ways in and around the court process"<sup>26</sup>

### Organisation policy towards ADR

The study then sought to gauge the extent that firms and other organisations that respondents were employed by had embraced any organisational policy or practice towards the consideration of ADR processes.<sup>27</sup> From 118 respondents to this question, only one (0.8%) recorded that there was any organisational policy or practice of avoiding ADR processes, compared with 72 (61%) reporting a policy or practice of considering ADR. Some 40 respondents (33.9%) noted that there was no policy or practice either way while the remainder did not know. These findings at least suggest that there has been some semblance of organisational absorption of ADR processes within law firms. In this sense, it is worth noting that many of the large Scottish commercial firms advertise mediation specialists. In a like fashion, litigation departments in some of these commercial firms have been re-branded 'dispute resolution' departments to bolster the view that litigation is not the only option for resolving clients' disputes.

### Training in ADR

The question of adequate training in ADR has long been identified as one of the key policy issues to be resolved in charting the future development of ADR both here in Scotland and elsewhere. Lack of adequate training (alongside regulation) has been pointed to as a barrier to ADR development and sub-standard or variable training provision may raise questions regarding quality assurance in respect of ADR practice.<sup>28</sup>

Training in this context can be provided by various means including programmes leading to accreditation as mediators, educational courses upon ADR in general or training in skills for representing parties in mediation, 'in-house' training or university provision. Respondents were asked to indicate which, if any, of the above they had engaged in. Despite the fact all respondents felt able to describe the mediation process to clients, some 57 respondents (40.7%) had no training in ADR at all. This fact may raise questions as to those non-trained lawyers' perceptions as to what the mediation process entails; particularly in light of previous English research by Genn which found that many lawyers harboured no more than vague notions about mediation and perceived the process as no different than typical lawyer negotiations.<sup>29</sup>

Some 63 respondents (45%) had attended external training courses on ADR and 17 (12.1%) had received accreditation as mediators.<sup>30</sup> The figure who had trained as mediators is less than that revealed in comparable research in England and Wales, in which 22% of respondents had received such training by the year 2001.<sup>31</sup> As we shall note later, this expansion into mediation practice south of the border may be tied to a wider embracement of commercial mediation by English lawyers in the post-Civil Procedural Rules environment. In our study, 40 respondents (28.6%) had received training 'in-house'. In-house training, which presumably varies from firm to firm, may lead to a lack of uniformity in approaches of what ADR processes entails, the conduct of ADR neutrals and the role of lawyers representing clients therein. We shall discuss further below the general issue surrounding the involvement of legal professionals in ADR processes.

The most startling result in respect of training is that of the 140 respondents to the survey, only five (3.6%) indicated that they had received training while at university in either degree or diploma studies. Many of the respondents entered the profession some time ago and would have attended degree or diploma studies prior to the development of ADR processes in Scotland. It is of no surprise then that ADR would not have hitherto

been encountered in University curricula. Indeed, of the five respondents who reported exposure to ADR education in their university days, none had entered the profession prior to the 1990's. Previous research in Scotland had been critical of the lack of training provision offered by Universities.<sup>32</sup> Academic educational provision in ADR may have increased slightly of late but remains patchy at best.<sup>33</sup>

In sum, a small majority of our respondents had received some form of training in ADR either in-house or through external provision. This result, coupled with the high reported level of organisational embracement of ADR processes, is anathema to the oft reported image of a legal profession set against the adoption of new forms of dispute resolution. Many of our commercial lawyers appear to have some awareness of ADR procedures, have sought out knowledge regarding ADR and acknowledge such processes in their working practices. Nonetheless, evidence of both ADR practice and active lawyer promotion thereof may be more instructive and it is to these issues that we now turn.

### **Experience of ADR**

The next section of the study sought to gauge the experiences of respondents in ADR. As noted above, virtually all reported ADR processes that parties had been involved in were mediation. This factor, coupled with the high awareness of mediation and limited awareness shown of other ADR processes suggests that in the main when respondents discuss views on ADR, they are referring to mediation rather than other ADR processes.

### **Factors in recommending ADR to a client.**

In reviewing the potential development of ADR in civil matters in Scotland, a recent Scottish Executive research report<sup>34</sup> indicated that a key question concerned ADR's appropriateness to different dispute types. Indeed it has been recognised by even the most ardent ADR proponents that mediation is no panacea and that in some instances it will not be suitable – for example, where an injunction is sought or a ruling of the court is required to set a precedent.<sup>35</sup> Other factors such as type of dispute, the financial value at stake and attitudes of, and relationship between disputants may also be relevant in determining in what circumstances ADR processes such as mediation are appropriate. Against this backdrop, respondents were given a list of factors and asked that if they had ever made recommendations to a client to attempt ADR, whether the factors listed were either “always relevant”; “often relevant”; “sometimes relevant”; “rarely relevant”; or “never relevant” to the decision to recommend.<sup>36</sup> Ninety-seven respondents (69.3%) had recommended participation in ADR to their clients.

The factors listed were:

- A reduction in legal costs for your client
- Low size of financial sum in dispute
- Achieving a speedier settlement
- Reaching a creative settlement
- The possibility of assessing the risk of continuing the dispute
- A weakness in a client's case
- Narrowing the issues in dispute
- Enabling continuation of a business relationship
- Gaining information on the other side's case
- Privacy

- Other (please specify)

Some of the key, most commonly touted benefits of mediation and related ADR processes are that of low costs and quickness of settlement. It has been suggested, however, that the issue of cost-effectiveness of mediation is not so clear cut.<sup>37</sup> In particular, it has been claimed that in respect of civil mediation in England and Wales, given early case preparation requirements, the process in fact involves a front loading of costs so that although resolution may be speedier than litigation, mediated settlement is in fact no cheaper.<sup>38</sup> Respondents to our study, however, clearly viewed there to be cost savings attendant to ADR participation. Some 77 respondents to this question (79.4%) said that a reduction in legal costs for their clients was either “always relevant” or “often relevant”. Similarly, 82 respondents (84.5%) indicated that reaching a speedier settlement was either “always” or “often” a relevant factor. Another factor which one might think would be of importance to commercial clients is that of privacy. While this factor was only identified as being “always” or “often” relevant by 34 respondents (35.1%), it was identified as “sometimes” relevant by a further 38 respondents (39.2%). Commercial sensitivities will fluctuate on a case by case basis and it is no surprise that the applicability of this factor varied.

The forward thinking nature of the mediation process and its ability to engender creative solutions, beyond the reach of court remedies, is a perceived potential benefit of the process. The extent that mediation may actually achieve creativity of settlement in practice, however, can be questioned. For example, Brooker and Lavers indicated in their study of commercial and construction mediations in England and Wales that creative settlements were reached by participants to mediation in a mere 7% of cases.<sup>39</sup> From our survey it was not possible to glean the extent that creative settlements were in fact reached in mediations respondents were party to. Respondents expressed a clear view, however, that the potential for reaching creative settlements may be an important factor in recommending ADR to their clients. Some 61 respondents (62.9%) said that this factor was either “always” or “often” relevant to the decision to recommend ADR to a client, while a further 23 (23.7%) indicating it was “sometimes” relevant.

Linked to creativity of settlement is the issue of preserving existing business relationships. A key feature of mediation across all dispute spheres is that the consensual nature of the process may be more appropriate where the parties are in (or wish to facilitate) a continuing relationship.<sup>40</sup> It is trite to remark that the adversarial nature of the litigation process may render it unlikely that parties will be able to work together post-litigation. In this sense, enabling continuation of a business relationship was seen as “always” or “often relevant” by 54 respondents (55.7%) and “sometimes relevant” by a further 27 respondents (27.8%) in advising their clients to attempt ADR.

#### *Tactical Motives*

A factor that may stifle the development of mediation is the fear from prospective participants that the other party may harbour less than altruistic motives for their involvement therein. In this sense, Brooker and Lavers’ study of construction mediation revealed that over half of the respondents reported “some element of strategic deployment of mediation” and suggested that “reaching settlement is not always the prime motivation for agreeing to mediate and not all... clients attend mediation in good faith”.<sup>41</sup>

As has been noted,<sup>42</sup> lawyers south of the border have embraced ADR arguably at least in part because of the primacy afforded mediation under the post Civil Procedural Rules regime and the cost sanctions that might be levied against those who unreasonably refuse to attempt mediation.<sup>43</sup> What this may entail then is an influx of parties attending mediation sessions, but some perhaps under duress. This fact heightens the prospect of tactical use of the process.

It might be speculated that in a purely voluntary system of mediation, as is the case in respect of Scottish commercial disputes, when parties do attend they would more likely do so with a genuine desire to reach settlement. If we are to take respondents to our study at face value, it would appear that cynical approaches may be rarer in Scotland than south of the border. For example, the opportunity to gain information on the other side's case was considered "always" or "often relevant" by only 17 respondents (17.5%). A further 30 respondents (30.9%) reported, however, that it may be "sometimes relevant".

ADR processes may be also used to pursue tactical aims other than settlement, which nonetheless seem more legitimate than early discovery of the other side's case. Other studies have revealed that mediation may commonly be used as a way in which clients could investigate their own cases.<sup>44</sup> In our study, in response to a question as to how relevant the prospect of assessing the risk of continuing a dispute was, 68 respondents (70.1%) thought this was "sometimes", "often" or "always" relevant. This represents a stronger response than found in respect of those who stated that finding out about the other side's case was a relevant factor. There is a fine line to be drawn, however, between gauging the risk in continuing a dispute (by perhaps assessing the strength of one's own case) as opposed to assessing the strength of an opponent's case. Clearly the latter has an influence on perceptions of the former. It may be speculated that respondents were willing to reveal a desire to ascertain more about evaluating the risk of continuing the dispute, as, unlike ascertaining information about the other side's case, this may appear a more legitimate use of the process.

In any case, any tactical use of mediation must be set against the context of what occurs in traditional means of dispute resolution. In the litigation process, its earlier procedural aspects often involve the pursuit of such knowledge, with a view to finding an appropriate settlement range. So while mediation purists may balk at this kind of tactical behaviour, it should hold few surprises.<sup>45</sup>

#### *Weakness in a client's case*

Allied to any tactical deployment of mediation is the notion that recourse to ADR procedures may be more relevant where a party's case is weak from a legal perspective. It may be speculated that where a party and/or their representative believes they have a strong case, they may be more likely to seek recourse through litigation.<sup>46</sup> Such an argument is predicated upon the idea that legal rights are paramount in the overall context of the dispute at hand. By contrast, parties' interests may lead them to subjugate their rights in favour of a resolution that best meets those interests. Hence, parties with strong legal cases may favour mediation in an attempt to head off the deleterious consequences of escalation of the dispute. Against this backdrop it is notable that only 21 respondents (21.6%) stated that a weakness in a client's case was either "always" or "often relevant" with a further 39 (40.2%) stating that this factor was "sometimes

relevant”. So this finding supports the idea that commercial mediation is not merely deployed where lawyers view their prospects of succeeding in litigation as bleak.

#### *Low value disputes*

Given potentially exorbitant court costs,<sup>47</sup> it may be suspected that where the size of the sum of dispute is low, then resolution procedures that informalise justice thus cutting costs may be seen as more appropriate.<sup>48</sup> Our survey revealed a fairly even spread of responses in this regard, between those who found the low value of a dispute “always” and “often” relevant and those who viewed it as “rarely” or “never” relevant. The research suggests then that mediation in commercial matters is not, at least in a universal sense, perceived as some kind of second class dispute resolution procedure, only appropriate where the matter at hand is, at least in financial terms, of less import. This notion chimes with the anecdotal reports from ADR providers increasingly suggesting that mediation is being utilised in high value disputes.<sup>49</sup>

#### Factors in declining the use of ADR

The next question asked respondents to consider the number of times in which they had declined an offer from the opposing party to participate in an ADR process, and the factors which informed any such decision to decline. A large number of respondents reported that they had never declined an offer to participate in ADR. Hence only 58 respondents (41.4%) of respondents were able to answer this question. Responses to this question have to be interpreted in the light of the low response rate. Nonetheless, the results may help shed some light on some of the factors which may render mediation inappropriate, thus militating against any blanket, mandatory system of case referral.

Once again respondents were asked to indicate the relevance of particular factors in decisions to decline a proposal of ADR by way of a Likert scale of: “always relevant”, “often relevant”, “sometimes relevant”, “rarely relevant” and “never relevant”. The options listed were as follows:

- client did not want to use ADR
- belief in strength of client’s case
- belief that opposing party would not take part in good faith
- case type not appropriate for ADR
- belief that negotiation was capable of settling the case
- belief that recovery of documents was essential prior to settlement

Some 56 respondents (96.6%) suggested that the fact that clients did not want to use ADR was either “always” (44.8%); “often” (27.6%); or “sometimes” relevant (24.1%). Belief in strength of a client’s case was also a prevalent factor cited as relevant in decisions to refuse ADR: “always” relevant by 6 respondents (10.3%); “often” relevant by 19 respondents (32.8%) and “sometimes” relevant by 14 respondents (24.1%).

Given that essentially speaking litigation is predicated on a right/wrong dichotomy that produces winners and losers, it should raise few eyebrows that where parties are confident in the strength of their legal case this may be an important factor in rejecting ADR processes which are characterised by the notion of compromise (albeit, as we noted above, respondents sought to participate in ADR in circumstances in which weakness in

their clients' case was not paramount). This is not to say that many of those intransigent parties, buoyed by a perception of strength in their case, may not ultimately settle out of court in any case. It should be noted though that in the latter stages of pre-trial court proceedings, those parties may perceive an increased leverage at that stage to extract a more favourable settlement than might be possible by ADR at an earlier juncture. Moreover, it may be argued that the mere fact that the opponent suggests recourse to ADR could be seen as a sign of weakness in that side's legal armoury, which in turn may render either the lawyer or client in receipt of the offer with a more favourable perception of their own case. This issue is returned to in "the attitudes to ADR" section below.

The fact that clients did not want ADR was returned as a reason for rejection of ADR more commonly than any rationale grounded in a lawyer's belief of strength in the client's case. This suggests that irrespective of a lawyer's view of the voracity of a case, in many instances, the client's perspective may override this. Client barriers to ADR and the lawyer/commercial client relationship are again further discussed under the "attitudes to ADR" section below.

Allied to client reluctance is the fear alluded to above under the discussion of tactical motives for involvement in ADR that the opposing side might not take part in good faith. Clearly some lawyers and perhaps, we might surmise, also their clients, shared this view. In terms of this factor, five respondents (8.6%) viewed this as "always relevant"; 14 respondents (24.1%) as "often relevant" and 27 respondents (46.6%) as "sometimes relevant" in refusing an offer to attempt ADR.

One further noteworthy consideration in rejecting ADR offers was the "belief that negotiation was capable of settling the case". This factor was "always relevant" more than any other factor except that the client did not want ADR ("always relevant", 9 respondents (15.5%); "often relevant", 12 respondents (20.7%); "sometimes relevant", 24 respondents (41.4%)). If negation is imminent and viewed as likely to succeed then there would be no need to expend client monies on mediation.<sup>50</sup> If litigation has commenced, however, then negotiated settlement often occurs at a very late stage in the court proceedings after which much time, money and effort has been expended. Proponents of mediation argue that mediation allows for a settlement which may take place at an earlier stage in the court proceedings.<sup>51</sup> As we noted above, creative settlements may be more likely under mediation than in typical lawyer-led positional bargaining. It may be, however, that a settlement in mediation may in some sense be viewed as a less informed one – parties may at an early stage labour under misconceptions about the respective strength of their own and opponent's case. Comparatively little may be known about the parties' relative legal positions regarding the dispute at an early juncture. As we alluded to above, such issues may only become uncovered as the court procedure continues and in particular, after recovery of documents has taken place. At this point, cards are firmly laid on the table and an out of court settlement can take place firmly, to use the well worn words, in the 'shadow of the law' – i.e. in view of the respective strengths of parties' legal cases. Much perhaps depends here on the complexity of the case at hand from a legal perspective with arguably then mediation being less appropriate at an early stage for more complex cases. In this sense it should be noted that the fact that ADR was rejected because of the necessity for discovery of documents to first take place received some support from respondents: "always relevant", one respondent (1.7%); "often relevant", 14 respondents (24.1%); "sometimes relevant", 23 respondents (39.7%).

In terms of case-type, some support was found for the idea that particular sorts of cases, which could relate, for example, to dispute sphere or nature of remedy sought, may render recourse to ADR inappropriate. Four respondents (6.9%) reported the case type being inappropriate as “always relevant”, 12 respondents (20.7%), “often relevant” and 29 respondents (50%), “sometimes” relevant. While we have already noted that ADR processes may be inappropriate, for example, where an injunction is sought or where a party desires a court decree to set a precedent, less is known about the applicability of ADR processes such as mediation to different commercial dispute spheres. Clearly more research is needed to answer this question, but as we shall note below, mediation has been successfully utilised in Scotland, and thus by implication may be appropriate, in a wide range of different commercial dispute types.

### Representing clients in ADR

Of the 140 respondents, only 48 (34.8%) had any experience of representing their clients in ADR processes. One respondent had acted as a representative in early neutral evaluation, but aside from this isolated instance, there was no other reported ADR experience other than mediation. Given that it is more likely that those with experience would have responded to the questionnaire than those that who did not, we would suspect that the percentage of commercial lawyers in Scotland as whole who had experience of representing clients in mediation would be lower than the 34.8% recorded here. Nonetheless, as we shall discuss further below, the responses indicate a small, albeit significant measure of practice in commercial mediation.<sup>52</sup>

Of the 48 respondents with experience, 30 (62.5%) had acted more than once in the representation capacity. This may lend support to the idea that lawyers, once they experience mediation, may become repeat players in the process. The first question in this section asked respondents how many times that they had represented clients in ADR processes, broken up into different dispute areas. They were also asked to indicate the number of cases that “settled”, “partially settled”, or “did not settle”.<sup>53</sup>

In terms of number of reported cases, the 48 respondents who had experience, reported that they had acted as party representatives in some 147 cases across a wide range of dispute areas.<sup>54</sup> For want of any formal definition, we were keen not to place too restrictive a view on what amounted to a ‘commercial’ dispute. The categories listed (which included an “other” option), frequency of mediation and settlement rate are set out in Table 2 below.

Table 2

	Total number of cases	Number of cases that settled	Number of cases that partially settled	Number of cases that did not settle
Breach of contract <sup>55</sup>	63	46	4	11
Professional negligence <sup>56</sup>	20	16	2	1
Shareholder dispute	6	6	0	0
Personal injury	6	5	1	0
General negligence	2	1	0	1
Goods and services	7	7	0	0

Debt	5	5	0	0
E-Commerce	6	6	0	0
Employment	18	13	2	3
Construction <sup>57</sup>	4	4	0	0
IP	7	4	1	2
Partnership	2	0	1	1
Professional relationship	1	0	0	1
Total	147	113	11	20

Breach of contract cases are the most commonly cited examples of mediated cases. Such cases of course represent very typical commercial disputes, but there may be particular reasons why breach of contract cases are deemed appropriate for resolution by mediation and others less so for which further research may assist in identifying. These results chime with comparable English research which found that breach of contract and professional negligence represented a majority of commercial mediations in England and Wales.<sup>58</sup> Although other studies have suggested that personal injury cases were not generally appropriate for recourse of mediation<sup>59</sup> our study found some evidence of successful mediation practice in respect of personal injury disputes. Mirroring the general findings of similar research,<sup>60</sup> our research does not suggest that particular dispute types, when referred to mediation, are less amenable to resolution therein. In this sense, there is generally little disparity reported in our study with regard to settlement rates in different sorts of disputes, although in many cases the numbers involved are too small to make any observations.

The above results reveal a settlement rate of 78.5%<sup>61</sup> and if “partially settled” cases are included the rate rises to 84.4%. These reported success rates stand up well to the high anecdotal figures which have been banded around by ADR service providers over the years – rates which cynics may have considered to be somewhat inflated. Reported anecdotal settlement rates include between 74 and 78%, CEDR; 85%, The ADR Group; over 75%, Catalyst Mediation; over 80%, Core Mediation.<sup>62</sup>

#### *ADR Satisfaction*

It may be suspected that success rates measured in terms of settlement may not necessarily correlate with lawyer or client satisfaction. While it was not possible in this study to canvass the views of clients in this regard, our respondents generally presented very favourable views on different aspects of their mediation experiences. In this sense, respondents were asked to respond to different elements of the ADR process on a Likert scale of “always satisfied”, “often satisfied”, “sometimes satisfied”, “rarely satisfied” and “never satisfied”.<sup>63</sup> The elements of the process listed were as follows:

- the speed of the ADR process
- the cost value of the ADR process
- the skill of the mediator/ADR neutral and
- the ability of ADR to deliver an outcome that meets your client’s requirements<sup>64</sup>

Of the 48 responses to this question, no respondents replied that they were “never satisfied” with any of the elements of the ADR process and only four respondents indicated that they were “rarely satisfied” with the speed (1); cost (1) and outcome that met client’s requirements (2). In the main, respondents were exceptionally well disposed towards their experiences within mediations. In respect of speed: “always satisfied”, 19 respondents (39.6%); “often satisfied”, 23 respondents (47.9%); “sometimes satisfied”, 10 respondents (20.8%). For cost: “always satisfied”, 13 respondents (27.1%); “often satisfied” 20 respondents (41.7%), “sometimes satisfied”, 17 respondents (35.4%). For the skills of the mediator: “always satisfied”, 15 respondents (31.3%); “often satisfied”, 26 respondents (54.2%); “sometimes satisfied”, 12 respondents (25%). Ability of mediation to meet clients’ requirements: “always satisfied”, 12 respondents (25%); “often satisfied”, 19 respondents (39.6%); “sometimes satisfied”, 18 respondents (37.5%).

These favourable responses, coupled with high settlement rates, suggest real success in those commercial mediations that have taken place in Scotland. The responses nonetheless indicate a small measure of dissatisfaction and more detailed research into client and lawyer experiences of commercial mediations may assist in identifying further issues of concern in respect of operation of the mediation process and conduct of mediators therein.

#### *Mediation failure*

The next question centred on causes of failed mediations in which respondents had participated.<sup>65</sup> Again respondents were given a number of potential causes of failure and asked to report whether each was “always”, “often”, “sometimes”, “rarely” or “never” relevant. Very few responses were given here in view of the fact that only a small number of failed mediations were reported and hence only some very general assumptions can be drawn from the data.<sup>66</sup> Client factors were the reported predominant cause of failure by some margin. In respect of whether clients had unrealistic expectations, 18 respondents, (78.3%) stated that this “always” or “often” contributed to failure (another 3 respondents (13%) stated that this was “sometimes” a factor). Similarly, in respect of the factor, “one or more disputants were entrenched or polarised in their position”, 19 respondents (82.6%) stated that this “always” or “often” contributed to failure (another 3 respondents (13%) viewed this as “sometimes” contributing to failure). Allied to the above factor is the notion that there may subsist bad feeling between the parties. This factor was reported as having contributed to the failure “always” or “often” by 15 respondents (65.2%) and “sometimes” by 8 respondents (34.8%).

The issue of client barriers to ADR development is discussed further below under the “attitudes to ADR” section. Suffice to say here that in the above cases, despite clients’ intransigence to settlement, they had nonetheless been persuaded to attend the mediation session voluntarily. We might speculate then that the more that clients are press-ganged into mediation attendance, the greater likelihood then that negative attitudes, stifling settlement, will arise.

By contrast, other factors listed were less commonly reported as contributing to failed mediations. “Lack of skills of the ADR professional” was reported as “always” or “often” a relevant factor by no respondents. It was stated that this factor was “sometimes” relevant by 6 respondents (30%) and “rarely” relevant by 8 respondents (40%). One of the fears alluded to above regarding suitability of mediation was the idea

that mediation might be exploited and utilised in a tactical fashion by parties seeking to 'milk' or abuse the process. In this sense, there was some evidence that the tactical use of mediation may have contributed to some failed mediations. While no respondents viewed the factor as "always" relevant, it was cited as "often" or "sometimes" relevant by 8 respondents (38.1%) and a "rarely" a relevant factor by another 8 respondents (38.1%).

Finally, it has been noted that some disputes, which essentially boil down to a dispute over facts, may not be the most amenable to resolution by mediation.<sup>67</sup> To this end, there is some evidence that conflict of evidence has contributed to failed commercial mediations in Scotland. While no respondents noted that a "conflict of evidence" was "always" a relevant factor in failed mediations, it was noted as "often" or "sometimes" relevant by 11 respondents (57.9%) and "rarely" relevant by 4 respondents (21.5%).

### **Commercial Lawyers' Attitudes to ADR**

The final section of the questionnaire sought to ascertain respondents' views on a number of policy issues relevant to the development of commercial ADR in Scotland. Respondents were provided with a number of statements and asked to indicate one of the following responses: "strongly agree", "somewhat agree", "somewhat disagree", "strongly disagree" or "don't know". For ease of analysis, the statements can be grouped into the following broad categories: the relationship between lawyers and ADR processes; the relationship between traditional dispute resolution processes and ADR; inherent deficiencies in ADR processes; and barriers to the development of ADR.<sup>68</sup>

### **Lawyers and ADR**

At a most basic level it can be argued that lawyers have no truck with ADR simply because it is not in their best interests. Traditional forms of dispute resolution may be dogged by protraction and expense for clients, which it has been contended, benefits the lawyer who has no incentive to promote a speedy, cost-effective form of dispute resolution. While this may be a somewhat cynical, unsophisticated argument, it has long been suspected by commentators that lawyers have on one level or another acted as a barrier to ADR.<sup>69</sup> Clark and Mays, noted that those active in the ADR field often blamed the legal profession for the lack of ADR practice for their ignorance of, or indifference to ADR processes.<sup>70</sup> The Scottish Consumer Council suggested that "it may... be that some solicitors fear that suggesting mediation to their clients will cause them to lose out financially".<sup>71</sup> Moreover, there is some empirical evidence from England and Wales which suggests that certain lawyers have shied away from mediation because of the potential implications for their fees.<sup>72</sup>

In view of this conspiracy theory, respondents were asked to respond to the following statement: "lawyers will lose money if ADR becomes popular". The response was stark. No respondents "strongly" agreed with the statement, 21 respondents (15.6%<sup>73</sup>) "somewhat" agreed, 51 respondents (37.8%) "somewhat" disagreed and 36 respondents (26.7%) "strongly" disagreed.<sup>74</sup> Taken at face value, this response casts doubt on the idea that Scottish commercial lawyers are seeking to stifle ADR on the grounds of a potential resulting reduction in income.<sup>75</sup>

This response, however, may raise other concerns along the lines that lawyers might perceive ADR as no more than some kind of business opportunity which might lead to a 'milking' of ADR for the needs of the profession but to the detriment of others.<sup>76</sup> In this

sense, research by Mays and Clark revealed a suspicion voiced by both non-lawyer and lawyer participants to that study that defensive marketing in the Law Society of Scotland was afoot and that the professional body sought merely to maximise their members' interests in ADR, in the event of a proliferation of demand for such services.<sup>77</sup>

Against this backdrop, responses to the following statement may be illustrative: "ADR is an opportunity for lawyers to offer further services to their clients". Some 46 respondents (34.1%<sup>78</sup>) "strongly" agreed with the statement, 72 respondents (53.3%) "somewhat" agreed, while only 6 respondents (4.4%) "somewhat" disagreed and 4 respondents (3%) "strongly" disagreed.<sup>79</sup>

Our respondents therefore strongly endorse the idea that ADR presents a new business opportunity for lawyers. That Scots lawyers should seek to embrace new markets is not surprising, particularly against a backdrop of the removal of lawyers' monopolies of late in areas such as conveyancing and executries. We are not suggesting that there is anything illegitimate in this. There is clearly a role for lawyers to play in representing clients in mediation - commonplace in commercial mediation practice at present<sup>80</sup> - and also an opportunity to act as mediators. The appropriateness of lawyers to act as mediators, however, is an issue of debate that cuts to the heart of what mediation practice entails. Previous research has indicated that tensions subsist between lawyer and non-lawyer mediation providers.<sup>81</sup> Aside from criticism regarding a high-jacking of mediation practice by lawyers and the squeezing out of other players in the market place, concerns have been voiced regarding the suitability of lawyers to take on the mantle of mediation practice in view of the traditionally adversarial, partisan nature of their role, which may be at odds with the consensual nature of mediation.<sup>82</sup> Roberts, for example, suggested that it is "hazardous to seek mediators from within a profession whose members are traditionally most at home in an active, advisory and representative role".<sup>83</sup>

Our respondents did not share this view. Given that respondents were lawyers, it may be of little surprise that on balance they viewed legal professionals as the best ADR neutrals.<sup>84</sup> While only eight respondents (5.8%<sup>85</sup>) "strongly" agreed with the statement that "Legal practitioners make the best ADR neutrals", some 59 respondents (43.1%) "somewhat" agreed. Only 29 respondents (21.2%) "somewhat" disagreed with the statement and three respondents (2.2%) "strongly" disagreed. A significant number of respondents - 38 (27.7%) - did not know. Given the low mediation practice and variable ADR training rates that the study uncovered, it might be speculated that to some extent this response may represent no more than a natural arrogance within the legal professional ranks<sup>86</sup> and not one rooted in any real appreciation of mediation and the role of the mediator within that process. If we analyse this response against two factors - mediation practice and ADR training - some interesting findings are uncovered.

Training had almost no bearing on views as to whether lawyers were the best ADR neutrals. In fact those who had received ADR training were slightly more likely to view that lawyers made the best ADR neutrals than those in the general set of responses.<sup>87</sup> As noted above, lawyers may receive ADR training in-house by fellow lawyers, in University law courses, or most commonly by external mediation providers. Such Scottish providers include Core Mediation and Catalyst Mediation: essentially bodies provided by lawyers for other lawyers and it may be of little surprise then that any inherent assumption that lawyers are the natural inheritors of the mediator's crown endures amidst this lawyer-dominated environment.

By contrast to the negligible effect of training, interestingly mediation practice appeared to make respondents markedly less likely to view that lawyers made the best ADR neutrals. In this sense, from 48 experienced respondents who answered the question, 1 (2.1%) “strongly” agreed with the statement, 17 (35.4%) “somewhat” agreed, 15 (31.3%) “somewhat” disagreed and 2 (4.2%) “strongly” disagreed.<sup>88</sup> The responses here are hence markedly more balanced than the general set of responses.<sup>89</sup> At first blush it might be speculated that this shift in response may be caused by negative experiences of lawyer mediators but the very low reported negativity concerning the skills of mediators militates against this idea. It may perhaps have been the case then that some respondents have experienced mediations in which non-lawyer mediators excelled. The more balanced view regarding lawyers acting as ADR neutrals may rather, however, be merely rooted in a deeper appreciation of the mediation process borne out by exposure to the process in practice.

We have already suggested that the traditional role of the lawyer may arguably be anathema to the consensual ethos of mediation. It may be, however, that mediation practice in Scotland lends itself more appropriately to lawyers than one might suspect. In this sense, it has been suggested that mediation in Scotland is be more ‘evaluative’ in nature than theory suggests.<sup>90</sup> Whereas ‘pure’ mediators are mere facilitators of parties’ communication and negotiation,<sup>91</sup> in an evaluative model of mediation, “a mediator focuses... on the legal claims, assesses the strengths and weaknesses of those claims, predicts the impact of not settling and pushes the parties to his/her evaluation of the appropriate settlement”.<sup>92</sup> Clearly lawyers may be well placed to offer this kind of service. It can be argued, however, that at least in respect of large scale commercial disputes, where each side is likely to have their own legal representation, commercial mediators need be less evaluative in practice.<sup>93</sup> Indeed, evaluative models of mediation practice may in fact stifle the scope for the development of creative, ‘win-win’ solutions. Against this backdrop, legal knowledge and attributes may be less relevant and what may be important are skills such as problem solving, dispute resolution, creativity and the ability to extricate parties from entrenched positions to interests.<sup>94</sup> Of course many lawyers may hold such skills in spades, but so too will parties drawn from a range of other professions.<sup>95</sup> More research is needed to evaluate commercial mediation practice in Scotland, the sorts of models mediators employ and the role of lawyers therein.<sup>96</sup>

#### *‘Macho’ litigation culture*

In respect of whether mediation is being stifled because it is anathema to a ‘macho’, adversarial culture that litigation lawyers work within,<sup>97</sup> the following statement was put to respondents: “if a lawyer participated more often in ADR his/her standing amongst colleagues would suffer”. A very stark response was obtained here. No respondents “strongly” agreed with the statement while only five respondents (3.7%<sup>98</sup>) “somewhat” agreed. By contrast, 39 respondents (28.9%) “somewhat” disagreed and 85 respondents (63%) “strongly” disagreed.<sup>99</sup> Clearly then the vast majority of respondents are comfortable with the adoption of consensual forms of dispute resolution within the litigation environment. These findings are perhaps not especially surprising when one recognises the fact that the vast majority of cases brought to litigation will settle extrajudicially at some point and thus lawyers are commonly engaged in conciliatory activities in an attempt to strike a resolution to their clients’ disputes. Moreover, the inception of the commercial procedure in the Court of Session and certain sheriff courts, with its more conciliatory approach and emphasis on expediting settlement may be assisting the displacement of traditional adversarial litigation norms.

Similarly, despite assertions to the contrary,<sup>100</sup> very few respondents supported the idea that suggesting ADR to the other side was a sign of weakness in a case: only two respondents (1.4%<sup>101</sup>) “strongly” agreed and 14 respondents (10.1%) “somewhat” agreed with this view while 62 respondents (44.6%) “somewhat” disagreed and 56 respondents (40.3%) “strongly” disagreed.<sup>102</sup> The two above responses coupled with increased ADR training and recognition within law firms may indicate that although mediation activity is rare, such processes are becoming a more accepted part of the litigation culture in Scotland. This must bode well for future of commercial mediation in Scotland.

### ADR and the Courts

#### *To compel or not compel?*

Building on from this last idea is the extent that ADR processes should be enmeshed within the litigation process and institutionally driven by the judiciary. It has been well documented that one of the key drivers in the exponential growth of mediation in commercial matters in England and Wales has been judicial embracement of the process in the prominent role placed on expediting settlement in the post Civil Procedural Rules (CPR) regime. In this sense, the expediting of ADR is not merely a result of court referrals, but also in increased voluntary, *ad hoc* take-up against a backdrop of increased judicial promotion.<sup>103</sup> Writing recently Ross has suggested that at present judicial embracement of ADR in Scotland is patchy and that judicial drives to expedite ADR are necessary.<sup>104</sup> That is not to say that there is not some recognition of ADR within Scottish litigation processes. For example, in commercial actions there are rules which allow the judiciary to refer a case to mediation.<sup>105</sup> A pilot mediation scheme for consumer disputes has also taken place in Edinburgh sheriff court.<sup>106</sup> On the back of the perceived success of the programme, the scheme has since been rolled out in other sheriff courts.<sup>107</sup> It seems in general though that moves to embrace mediation within the litigation process is “dependent to a lesser extent upon the judge’s decision to invoke some mediation process and to a greater extent upon the parties’ decision to use the speedier and more flexible court process for commercial actions”.<sup>108</sup>

Against this backdrop, study participants were asked to respond to two statements related to the interaction between the courts and ADR. The first statement was “Scottish judges should refer more commercial cases to ADR”. From 135 respondents who answered the question, roughly the same agreed as disagreed: 13 respondents (9.6%) “strongly” agreed with this statement and 41 respondents (30.4%) “somewhat” agreed as opposed to 31 (23%) that “somewhat” disagreed and 25 (18.5%) that “strongly” disagreed.<sup>109</sup> The second statement regarding judicial promotion of ADR was “Making ADR a mandatory first step would be a positive development”. The general response to this statement was less ambiguous, with a preponderance of respondents against mandatory recourse to ADR. Of 135 respondents to answer this question, 9 respondents (6.7%) “strongly” agreed, 28 respondents (20.7%) “somewhat” agreed, 41 respondents (30.4%) “somewhat” disagreed and 50 respondents (37%) “strongly” disagreed.<sup>110</sup>

In general then it seems that while there is a recognition that judicial promotion may help to expedite the development of commercial ADR and perhaps lend some legitimacy to ADR processes, mandatory recourse did not receive much support. Some forthright views were expressed on this issue. Ten respondents used the comments section on the questionnaire to argue that mediation was more effective when parties genuinely were committed to the process and that mandatory recourse was anathema to the spirit of

mediation and other such ADR processes. Many of these respondents, by contrast, advocated court referral and voluntary take-up. The difficulty with this position is that the schism between mandatory and non-mandatory referral to mediation is blurred. For example, by virtue of Rule 1.4(2) (e) of the CPR, English courts have been handed the task of “encouraging ADR”. What this exactly entails has been left unelaborated, however, with no guidance provided in the CPR. Different courts have responded in different ways. In *Shokusan v Danovo*,<sup>111</sup> it was held by Blackbourne J. that a court had the power to order mediation even if one party was unwilling to take part. The Court of Appeal in *Halsley v Milton Keynes General Trust NHS*,<sup>112</sup> however, took the view that compulsory referral would be contrary to the fundamental right of a litigant to have access to the courts and also potentially anathema to Art 6(1) of the European Convention on Human Rights. Nonetheless the promotion of mediation by courts by way of costs sanctions may be tantamount to compulsion by the back door. In *Dunnet v Railtrack Plc*,<sup>113</sup> it was held that given what was deemed an “unreasonable” refusal to attempt mediation, costs were not awarded against unsuccessful claimants.<sup>114</sup>

Some commentators have suggested that mandatory recourse to ADR is not problematic because the only obligation upon such parties is “to attend at a scene of a potential negotiation” and not to settle.<sup>115</sup> Moreover, it might be argued that compulsory recourse to mediation but with no duty to settle would not be contrary to Art. 6(1), especially as this would occur against a general backdrop of encouraging settlement within the English litigation system. Nonetheless, the position of our respondents is clear that compulsory referral to ADR is generally not supported. Parties may subjugate their rights in favour of their interests if they perceive the latter to be more important in the circumstances, but there should no compulsion to do so. We share the view that any attempt to enmesh mediation within the fabric of traditional, judicial forms of dispute resolution should be tempered by this notion. It is perhaps telling that those respondents with (generally positive recorded) experience of representing parties in ADR were no more in favour of compulsory recourse to ADR than respondents in general. While they were a little more likely to support the need for increased judicial referrals to ADR than general respondents – 53.8% “strongly” or “somewhat” agreed compared to 40% – they were no more likely to support mandatory referral than respondents in general – 25% “strongly” or “somewhat” agreed compared to 27.4%.<sup>116</sup>

### *Judicial views*

A system of court referral is predicated to a great extent on an awareness and enthusiasm for ADR throughout the judiciary. To this end, calls have been made for increased education and training in ADR processes for the judiciary.<sup>117</sup> In respect of the limited scope for judges at present to refer parties to mediation, judicial responses are thus far patchy. As Ross has stated “[j]udicial attitudes to the concept of court ordered mediation... vary geographically and individually”.<sup>118</sup> While judicial training and education is required, it needs to be recognised that courts and those who operate them may have their own agendas too and may be reluctant to divest themselves of cases to mediation which would otherwise become part of their docket.<sup>119</sup> In her report concerning the development of commercial procedure in the Glasgow Sheriff Court, it is telling perhaps that Samuel notes “alternative methods of dispute resolutions, such as mediation and arbitration, were believed to be growing in popularity amongst commercial litigators... There was concern in some quarters that the Sheriff Court might lose its position as a principal forum for dispute resolution in commercial cases”.<sup>120</sup>

### ADR deficiencies

Arguments over compulsion lead logically on to the issue of inherent deficiencies in ADR which may render such processes inappropriate for wholesale embracement. Respondents were asked to comment on two such deficiencies, namely: “ADR processes may be detrimental to the development of the law”; and that “ADR is inappropriate where there is a power imbalance between the parties”.

### *ADR and the development of the law*

Fiss in his seminal work “Against Settlement” suggested that the diversion of cases from the formal adjudicative system to ADR may be contrary to the development of the law.<sup>121</sup> In particular, he argued that if too many cases are diverted from the courts to other forms of settlement, the appeal courts will have an insufficient number and quality of cases from which to make the law.<sup>122</sup> This may seem a fundamental concern in common law systems, reliant to a great degree on precedent for the development of legal doctrines. Whether this is an issue not so much of concern to litigation lawyers – who may be focused upon producing the best result for their client – as opposed to policy-makers is unclear. Ross has suggested, however, that “[lawyers] may crave... expansion of knowledge through setting of precedent”.<sup>123</sup>

In response to the statement “ADR is detrimental to the development of the law”, no respondents “strongly” agreed with this statement while only 32 respondents (23.9%<sup>124</sup>) “somewhat” agreed. By contrast, while 32 respondents (23.9%) “somewhat” disagreed with the statement, a further 60 respondents (44.8%) “strongly” disagreed. This general repudiation by respondents of the notion that ADR is detrimental to the development of the law is perhaps not surprising. As we have noted, in the vast majority of cases filed, parties do not ultimately have the dispute resolved by judicial means in any case and rather settle by compromise. In general then it is likely that mediated settlements will take place as an alternative to negotiated settlement rather than judicial decision. Mediation may hence be better viewed as less an alternative to litigation but rather an alternative to ‘door of the court’ negotiated settlement and any expediting of the process is unlikely to have a major impact upon judicial rulings in general.<sup>125</sup> Moreover, when parties seek to settle extra-judicially by whatever means it would not seem appropriate to suggest that when the legal principle at the heart of their dispute is one which society may benefit from by a judicial determination then the parties should be coerced into adjudicative settlement.<sup>126</sup>

### *Power imbalances*

Concerns have been voiced regarding the inherent deficiency of mediation in addressing power imbalances between disputing parties particularly in the matrimonial<sup>127</sup> dispute field, although also in respect of other civil disputes.<sup>128</sup> Imbalances may be apparent in different ways: for example, they may be based on monetary levels, access to legal advice, or centred on grounds of race or sex. It might be speculated that at least in ‘true’ commercial disputes – where both parties are commercial concerns – then such power imbalances in mediation may be of less relevance, particularly where each side is legally represented. This may not be the case in consumer-type disputes, where mediation may typically take place without legal representation, at least on the part of the consumer claimant.<sup>129</sup> It seems that the respondents to our study generally shared the view that the existence of power imbalances is less likely to be of import within the commercial dispute context, or that where power imbalances did exist, the same could be alleviated

by the role of the ADR neutral. In response to whether ADR is inappropriate where there are power imbalances between the parties, only four respondents (3%<sup>130</sup>) “strongly” agreed with the statement with a further 31 (23.3%) “somewhat” agreeing, compared to 51 (38.3%) who “somewhat” disagreed and 37 (27.8%) who “strongly” disagreed.<sup>131</sup>

### Developmental issues and barriers to ADR propagation

#### *Lack of awareness in the legal profession*

Despite the fact that respondents unanimously asserted that they could explain mediation to clients, respondents generally took the view that their fellow lawyers knew little about ADR processes. In response to the statement “There is a distinct lack of awareness regarding ADR amongst the legal fraternity in Scotland”, 25 respondents (18%<sup>132</sup>) “strongly” agreed, and 70 (50.4%) “somewhat” agreed as opposed to 24 (17.3%) that “somewhat” disagreed and 10 (7.2%) that “strongly” disagreed.<sup>133</sup> How can these two sets of results be squared? First, those who did not respond to our survey may have shown lower levels of awareness regarding ADR than respondents. Moreover, as noted above, merely because all respondents claimed to be able to describe mediation to a client, it does not necessarily follow that they held any informed appreciation of the process and the benefits that it might reap for their clients. There may also be an issue with communication here in that although awareness levels regarding ADR may be high on an individual lawyer or firm level, that knowledge is not being effectively propagated throughout the profession as a whole. Additionally, perhaps resistance from legal professionals to the use of ADR for various reasons alluded to in this article or the intransigence of their clients is being misinterpreted by other lawyers as a mere lack of awareness within the profession.

In respect of any widespread ignorance, there is clearly a role for professional bodies such as the Law Society of Scotland and Faculty of Advocates to reach out across their membership and propagate ADR. As noted above, the Law Society of Scotland has been criticised in the past for its defensive marketing strategy apropos ADR and its lack of active promotion of such processes. In their Scottish Office research, Mays and Clark found evidence of a lamentable lack of active promotion in respect of ADR on behalf of the Law Society.<sup>134</sup> It was reported in 2003 that the Law Society had not yet remedied the situation and “could not be accused of over-egging ADR”.<sup>135</sup> There have been cautious musings from the Law Society regarding mediation since. In its 2004 annual report, the Law Society’s civil procedure committee stated that “[m]ediation continued to be the subject of media coverage from which it is evident that there is a strong political desire for increased use of mediation in resolving civil disputes. The Committee remain of the view that while there is a role for mediation in certain types of dispute, it should remain a voluntary process freely entered into by the parties, and should not be imposed by Rules of Court with sanctions for non-compliance.”<sup>136</sup> Our research nonetheless points to an information gap and suggests that more needs to be done by the Law Society (and also the Faculty of Advocates) in helping to expedite the development of commercial mediation in Scotland.

#### *Training*

In an effort perhaps to alleviate this perceived lack of awareness, respondents were largely in favour of compulsory training. In respect of the statement, “Training in ADR for Scottish lawyers should be compulsory”, 16 respondents (11.5%<sup>137</sup>) “strongly” agreed,

while 70 respondents (50.4%) “somewhat” agreed as opposed to 24 respondents (17.3%) that “somewhat” disagreed and 15 respondents (10.8%) that “strongly” disagreed.<sup>138</sup> While, as noted above, some 60% of respondents had received some form of training and education in ADR, it is likely that the percentage of those who had received ADR training will be far smaller in respect of the profession as a whole. Moreover, our analysis not surprisingly tells us that there is a strong link between training and practice of ADR. Respondents who had received training were much more likely both to suggest ADR to their clients and represent clients in mediations than non-trained respondents.<sup>139</sup> Clearly then increasing training and education within the legal profession may be key in the development of commercial ADR.

#### *Client resistance*

As we have noted above, where offers to engage in ADR have been turned down by respondents it has largely been caused by the fact that their clients did not want to engage in the process. Moreover, in respect of those failed mediations reported, invariably again such failure was caused by client factors. It might be speculated then that ignorance and/or resistance to ADR processes within the commercial client base,<sup>140</sup> is to blame for the relative paucity of commercial mediations in Scotland. This is by no means a new assertion. Mays and Clark reported that some respondents to their study viewed that consensual modes of dispute resolution might be anathema to litigants’ desires for confrontation and conflict.<sup>141</sup> Moreover, the fact that mediation is something relatively untried and untested was also viewed as a key barrier to wholesale acceptance by clients.

Such sentiments were shared by some respondents to our study. Some respondents cited the fact that by the time ADR was suggested clients were too polarised and in the words of one, did not want to “pussyfoot around” at this stage. Another stated that clients “did not want to be guinea pigs”. Generally, however, respondents did not strongly support the view that “the principal barrier to the development of ADR in Scotland is its negative perception among clients”. In response to this statement, only nine respondents (6.5%<sup>142</sup>) “strongly” agreed while another 40 respondents (28.8%) “somewhat” agreed. A slightly higher number of respondents disagreed: 41 respondents (29.5%) “somewhat” disagreed and 16 (11.5%) “strongly” disagreed, with a comparatively high, 33 respondents (23.7%) stating that they did not know. With regard to the high incidence of clients not wanting ADR, or mediations failing because of the conduct of clients, many respondents may have been of the view that there was nothing illegitimate in this behaviour – mediation may not be appropriate in all cases, and should not be foisted upon unwilling parties – and hence such client attitude/behaviour was not seen as the principal barrier to ADR’s development.

While consumer clients may lack of knowledge and experience of the litigation process and hence may be less likely to take a realistic view of their dispute and possible dispute resolution outcomes, commercial clients, typically repeat players in the litigation game, may be better informed about their dispute resolution options, more realistic in their appraisals of possible outcomes of their disputes and more rational in their conduct as a result.<sup>143</sup> Our survey suggests that nonetheless commercial clients in Scotland are not embracing mediation on a significant level yet. Why might this be so? Even if mediation will not always be appropriate it seems likely that given the extent of ‘door of the court settlement’ that occurs it will be apposite in a far greater number of cases than are currently being mediated. As we noted at the beginning of this article, lawyers are

commonly viewed as gatekeepers to dispute resolution mechanisms. If lawyers are informed about the advantages of mediation to eschew the costs, time and stresses of litigation, in respect of a dispute that will often settle extra-judicially in any sense, should it not be incumbent upon them to seek to override their clients' steely determination to continue with litigation to 'door of the court' settlement and steer these clients to mediation? The problem with this argument is that at least in respect of commercial clients, it may be based upon a false premise – namely that lawyers hold the power cards in the lawyer-client relationship. It has been contended that for various reasons commercial clients<sup>144</sup> have become increasingly more dominant in the lawyer-client relationship.

In his seminal work, it was suggested by Johnson that in general, professional groups could be classified into one of two categories, namely: "collegiate" and "patronage" professions. He viewed that the legal profession fell into the collegiate camp, in that lawyers were able to exert power in the relationship over their clients. This he argued, stemmed primarily from the knowledge gap that subsisted between lawyers and clients.<sup>145</sup> The balance may have tilted of late in commercial legal practice. Recent times have seen a distinct growth in in-house legal counsel within commercial enterprises. This may mean that commercial clients have become more informed legally and therefore less reliant on external counsel. These in-house lawyers are not merely carrying out prophylactic activities, but may also be influencing the direction of general legal policy within their corporations.<sup>146</sup> As noted above, the other factor that distinguishes commercial clients from other disputants, such as consumers, is that they are commonly repeat players. They will thus be able to learn more about dispute resolution processes and the legal profession (and lawyers' interests within the process) which again suggests that the power balance between clients and lawyers has tilted somewhat. Handler notes the schism between lawyers who represent commercial clients as opposed to consumers: "[s]trong, rich and confident clients direct their lawyers... lawyers dominate the relationship when clients are poor, deviant, or unsophisticated."<sup>147</sup> A number of US empirical studies corroborate the notion that corporate lawyers rarely drive their clients' goals and rather are commonly seen as mere 'tools' or 'conduits' of their clients.<sup>148</sup> In this sense, one or two respondents to our study suggested that a problem lay with the attitudes of commercial clients' in-house lawyers, who took the view that if they had been unable to resolve the dispute themselves then litigation was the only option.

These factors, along with reported client resistance both to and within ADR processes, suggests that bar any institutional drive to embrace ADR's development along the lines of the English CPR, the future of the development of commercial mediation may rest to a large extent on clients themselves, irrespective of attempts made by litigation lawyers to propagate ADR. As we have noted, clients may often be justified in refusing to participate in ADR or refusing to settle therein. Nonetheless, it can be contended that a skewed perception of clients towards mediation may exist which has blighted development of the process. In this sense, Ross has argued that currently mediation is typically associated with negative characteristics such as weakness, compromise and concession. She contends that rather the process ought to be marketed more as one which can meet the 'selfish' needs of clients, more appropriately than traditional dispute resolution means.<sup>149</sup> As we have noted there is little doubt that a negotiated settlement through mediation may in many cases meet clients' individual interests in a superior way than proceeding to litigation and/or 'door of the court' settlement. Marketing mediation in such a way as to focus squarely on meeting clients' 'selfish' needs may help to

convince recalcitrant clients that there is something to be gained by engaging in the process.

### *The appropriateness of litigation*

An additional factor stifling commercial ADR may be the appropriateness of civil litigation processes in Scotland. Although the traditional litigation system in Scotland typically allows “secrecy and surprise”<sup>150</sup> and does not encourage settlement, it seems well recognised that the problems of cost and delay endemic to the litigation process in England and Wales have not been so marked north of the border. In particular, the Commercial Cause in the Court of Session and certain sheriff courts – a speedier procedure in which the judge undertakes a more pro-active role in assisting the parties reach an early settlement - has received some approbation of late as an appropriate vehicle for the resolution of commercial disputes.<sup>151</sup> A handful of respondents in the comments section of the study were keen to bestow the virtues of the commercial cause and highlight the lack of need for mediation as a result.

In general, however, respondents took a less positive view of commercial litigation procedures in Scotland. In response to the statement, “litigation is generally well adapted to the needs and practices of the business community” only six respondents (4.5%<sup>152</sup>) “strongly” agreed, while 35 respondents (26.1%) “somewhat” agreed as opposed to 61 respondents (45.5%) who “somewhat” disagreed and 26 respondents (19.4%) who “strongly” disagreed.<sup>153</sup> In this sense, disillusionment with traditional processes seems to be just as real within the legal profession as with other commentators.<sup>154</sup>

When responses were gauged against mediation experience, a significantly lower number of respondents agreed that litigation served commercial clients’ interests well. Only one of 48 respondents (0.2%) who had represented clients in mediation “strongly” agreed with the statement, while another 7 (14.6%) “somewhat” agreed as opposed to 28 (58.3%) who “somewhat” disagreed and a further 12 (25%) that “strongly” disagreed. It is of little surprise then that in general those in the profession most disillusioned with traditional processes have sought to embrace mediation. Aside from any positive attributes of mediation *per se*, the unsatisfactory nature of traditional dispute resolution from the lawyer’s viewpoint may be a driving factor for the adoption of alternatives.

### **Conclusion**

The research that this article reports on has sought to inform assumptions relative to commercial ADR in Scotland through empirical evidence. In particular the research provides insights into the views of commercial lawyers on ADR and evidence of their current interaction with such processes. To some extent, the findings of our survey are not surprising and confirm much academic speculation. In this sense there appears to be a small but significant measure of mediation practice across a wide array of commercial disputes in Scotland. In the main, mediation is successful and perceptions of those lawyers involved generally positive. Moreover, the majority of respondents, including those with no ADR experience, saw the potential benefits for their clients (and themselves) in adopting ADR, while generally giving short shrift to academic criticisms. ‘Alternative’ ADR processes seem dead in the water.

The Scottish Consumer Council recently discussed the need for a cultural shift in the legal profession before ADR would develop.<sup>155</sup> One leading Scottish litigator was

reported recently as saying that “[m]ediation is almost completely non-existent in [the commercial litigation] market... I think that is because lawyers are taught to litigate and not to mediate. There is no cultural foundation for mediation in our legal system.”<sup>156</sup> Our research has found that although barriers to development remain, such a cultural shift may in fact be occurring within the profession, through a combination of pilot court mediation schemes, heightened mediation publicity and training opportunities, increased university mediation provision, and government and professional body endorsement. Levels of training and organisational embracement of ADR within law firms are also significant. This cultural embracement of traditional dispute resolution players may chime with the notion that mediation should now be seen, as less an alternative to traditional dispute resolution but rather as symbiotic to it. Further analysis of our study may help to inform as to whether there is a developing cultural shift towards the adoption of mediation within the Scottish legal fraternity with new legal professionals, more open-minded and less conservative in their outlook on dispute management and dispute resolution processes than their more experienced peers, willing to take the mediation movement forward.

The key that may unlock the door to the expediting of commercial mediation may to some extent lie with clients, however. Given the dominant position of commercial clients in the lawyer-client relationship, save any radical embracement of mediation by the courts, further publication of the potential benefits of mediation throughout the client base may be required before practice takes off. The confidential nature of mediation means that success stories are often kept under wraps and hence word of mouth propagation of the benefits of the process may have been slow thus far. It has been suggested, however, that client-driven mediation has already occurred in the UK with regard to particular dispute areas such as medical negligence, North Sea hydrocarbon exploitation and UK-wide government departmental matters.<sup>157</sup> Selling mediation as a way in Ross’s words to best meet clients’ ‘selfish’ needs might assist in the further propagation of mediation in Scottish commercial disputes.

Mediation is no panacea. The process will not always be suitable. Further research may be required on its appropriateness for different sorts of commercial disputes and the most apposite models of mediation practice to be employed therein. Even though reality remains lagging behind rhetoric for the time being, the future prognosis of commercial mediation in Scotland seems a positive one. It also seems clear that in any widespread development of commercial mediation, lawyers, as key participants in traditional means of resolving disputes, may be just as prominent players in such alternatives.

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<sup>1</sup> R. Mays & B. Clark, *Alternative Dispute Resolution in Scotland* (Edinburgh: Scottish Office Central Research Unit, 1999). The data was in fact collected in 1996.

<sup>2</sup> J. Lewis, *The Role of Mediation in Family Disputes in Scotland* (Edinburgh: Legal Studies Research Findings No 23, Scottish Office Central Research Unit, 1999); F. Myers & F. Wasoff, *Meeting in the Middle: A Study of Solicitors’ and Mediators’ Divorce Practice* (Edinburgh: Legal Studies Research Findings No 25, Scottish Executive Central Research Unit, 2000).

<sup>3</sup> J. Dignan & A. Sorsbury, *Resolving Neighbour Disputes through Mediation in Scotland* (Edinburgh: Scottish Office Central Research Unit, 1999).

<sup>4</sup> See <http://www.core-solutions.com>.

<sup>5</sup> See <http://www.catalystmediation.co.uk>.

<sup>6</sup> M. Ross “Mediation in Scotland: An Elusive Opportunity?” in A.N. Verlag & O. Schmidt eds, *Global Trends in Mediation* (2006) (2<sup>nd</sup> edn, advance copy made available to the author for which I am grateful to both Margaret Ross and Kluwer Publications); B. Clark, “A time for change? The

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development of commercial ADR in Scotland” (2003) 20 Scots Law Times 169-172; F. Macdonald, *The Use of Mediation to Settle Civil Justice Disputes: a Review of Evidence* (Legal Research Studies Programme No 50/2004).

<sup>7</sup> See for example, E. Malcolm, “Breakpoint: Advantage Mediation” (2004) 49 JLSS 33; B. Clark, *supra* n. 6; J. Sturrock & D. Semple, “Mediating a cultural revolution” (2001) 46 JLSS 21.

<sup>8</sup> B. Clark & R. Mays “Lawyers and ADR” (1996) 6 Juridical Review 389.

<sup>9</sup> See Clark & Mays *supra* n. 8. It has also been suspected that lawyers may stifle ADR because of ignorance of, and/or resistance to such processes. These issues are discussed in detail below.

<sup>10</sup> The definition of ADR utilised in the study, included alternative forms of dispute resolution excluding traditional processes such as litigation, arbitration and negotiation.

<sup>11</sup> It should be noted that while this is the first study of Scottish commercial lawyers’ experiences and attitudes in respect of ADR, similar studies have been undertaken in other jurisdictions such as England and Wales (See P. Brooker and R. Lavers, “Commercial and Construction ADR: Lawyers’ Attitudes and Experience” (2001) 20 CJQ 327) and Australia (A. Zariski, “Lawyers and Dispute Resolution: What do they think and know (and think they know)? Finding out through survey research” (1997) Murdoch University Electronic Journal of Law Vol 4, No 2 (1997)). We were influenced in the design of our own work by these studies. Moreover the existence of this research is a useful springboard for the comparative analysis of lawyers’ attitudes to, and experiences of commercial ADR. Divergences in findings may prove instructive in the identification of particular policy developments pertinent to commercial ADR’s development in Scotland.

<sup>12</sup> From a sample frame of 459.

<sup>13</sup> In which a response rate of 24.2% was recorded.

<sup>14</sup> A. Zariski, *supra* n. 11, recorded a response rate of 16%. Albeit that the response rate in our study lags behind return rates in US surveys – see for example, B. McAdoo & N. Welsh “Does ADR really have a place on the lawyer’s philosophical map?” (1997) 18 Hamline J. Pub. L. & Pol’y 376 in which a 60% response rate was recorded.

<sup>15</sup> *Individual Solicitor’s Specialisms*, (1999: T&T Clark).

<sup>16</sup> Mays and Clark, *supra* n. 1

<sup>17</sup> A similar question was asked by Zariski in his study of attitudes and experiences of Australian lawyers in respect of dispute resolution processes - see Zariski, *supra* n. 11.

<sup>18</sup> Two respondents did not answer the question.

<sup>19</sup> There is no one universally recognised definition of mediation as such and practice may vary accordingly. The disparity in approach of mediation and consequences this might hold for the choice of mediators is discussed further below.

<sup>20</sup> Clark and Mays *supra* n. 8; H. Genn and A. Paterson, *Paths to Justice Scotland* (Oxford: Hart, 2001). B. Clark *supra* n. 6; M. Ross, “Mediating in the Shadow of Civil Procedural Law in Scotland: Away from ‘Nursing Wrath’ towards Nurturing Choice”, Ohio State Journal of Dispute Resolution. Interestingly, this assumption tended to be held by the respondents themselves. Over 2/3rds of respondents in response to a later question in the study either “strongly” agreed or “somewhat” agreed with the statement that “there is a distinct lack of awareness regarding ADR amongst the legal fraternity in Scotland”. This issue is discussed further below.

<sup>21</sup> It may be speculated of course that those who did not respond to the study were generally less aware of the mediation process than respondents.

<sup>22</sup> Three respondents who had experience of construction work mentioned awareness of adjudication. This study was not targeted at construction lawyers and it is likely that the bulk of respondents would not consider adjudication to be a form of ADR.

<sup>23</sup> Zariski, *supra* n. 11.

<sup>24</sup> Brooker and Lavers *supra* n. 11.

<sup>25</sup> B. Wood, “Juggling Act” (2004) 18 The Lawyer 27.

<sup>26</sup> Ross *supra* n. 20 at 11. Nonetheless the term is still prevalent. See for example, the ‘ADR guidance’ published by the Scottish Executive in October 2003, available at <http://www.scotland.gov.uk>.

<sup>27</sup> The question was not asked of advocates, who by nature of their profession, must work alone.

<sup>28</sup> B. Clark & R. Mays “Regulating ADR: The Scottish Experience” (1996) 5 WJCLI 199; Scottish Consumer Council, *Consensus Without Court* (2001) at para 4.4.

<sup>29</sup> H. Genn, *Central London County Court Pilot Mediation Scheme: Evaluation Report* (Lord Chancellor’s Dept Research Series No 5/98) at para 2.10.1.

<sup>30</sup> It is interesting that this number is greater than those who identified themselves as mediators in the designations section of the questionnaire. Eight respondents who said they had been trained as

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mediators did not evidentially view themselves currently as such, perhaps through a lack of mediation practice.

<sup>31</sup> Brooker & Lavers *supra* n. 11.

<sup>32</sup> See B. Clark & R. Mays “The development of ADR in Scotland” (1997) 16 CJQ 26.

<sup>33</sup> M. Ross, *supra* n. 6. The author is aware of relatively new developments, such as an optional mediation elective on the Diploma in Legal Practice offered at the Glasgow Graduate School of Law.

<sup>34</sup> F. Macdonald, *supra* n. 6.

<sup>35</sup> See for example G. Holliron, “ADR in commercial disputes” in R. Mackay & S. Moody (eds) *Green’s Guide to Alternative Dispute Resolution in Scotland* (1996).

<sup>36</sup> It should be noted that in respect of some of the respondents it may be that they recommended ADR processes only once or twice and thus any distinction between “always”, “often” and “sometimes” relevant is illusory.

<sup>37</sup> F. Macdonald, *supra* n. 6.

<sup>38</sup> J. Fortham, “Settlement under the CPR: quicker but no cheaper” (2001) 89 IHL 27.

<sup>39</sup> Brooker and Lavers, *supra* n. 11 at 338.

<sup>40</sup> A key reason why mediation has been deemed appropriate in respect of family and community disputes.

<sup>41</sup> Brooker and Lavers “Construction Lawyers’ Experience with Mediation Post-CPR” (2005) 21 Const. LJ 19 at 37.

<sup>42</sup> Clark, *supra* n. 6.

<sup>43</sup> Discussed further below.

<sup>44</sup> Brooker and Lavers, *supra* n. 11.

<sup>45</sup> An associated non-settlement rationale for participation in mediation is narrowing the issues in dispute. In respect of whether this factor was important our findings were ambiguous. The bulk of respondents viewed that the possibility of narrowing the issues was “sometimes relevant”, with roughly the same reporting that it was “never relevant” as reporting this factor as “always relevant”. It seems in any case that in practice narrowing the issues may not be an outcome that is prevalent in Scottish commercial mediations. As we will note later regarding mediation outcomes, partial resolution of disputes is a relatively rare outcome of mediation; the vast majority resolve, with a minority not settling.

<sup>46</sup> In Genn’s study of the mediation pilot scheme in the English Court of Appeal (H. Genn, *Court-based ADR initiatives for non-family civil disputes: The Commercial Court and the Court of Appeal* (2002: Lord Chancellor’s Department. Research Series, No. 1/02)), opt-in rates were low because of the fact that one party had already won a case at first instance.

<sup>47</sup> Albeit that it seems accepted that the problems of cost and delay traditionally endemic to civil court procedure south of the border are not so apparent in Scotland.

<sup>48</sup> This phenomenon of rationing justice can of course be seen in the Scottish civil court procedures themselves. In respect of low value matters, in particular court procedures such as the small claim and summary cause, full adherence to recognised procedural rights are compromised.

<sup>49</sup> See for example, <http://www.core-solutions.com/mediation.html>.

<sup>50</sup> A. Evans “Forget ADR: Think A or D” (2003) 22 CJQ 230 at 233.

<sup>51</sup> It seems that the new commercial action in the sheriff court (and similar procedure in the Court of Session) may, however, lead to earlier negotiated settlements – see E. Samuel, *Commercial Procedure in Glasgow Sheriff Court* Scottish Executive Research Findings No 57/2005. The impact that the commercial action may have on demand for ADR is analysed below.

<sup>52</sup> Of course, any remarks pertaining to the extent of mediation practice in Scotland, must be tempered by the fact that although it may be suspected that lawyers are commonly involved in representing parties in commercial mediations, this may not always be the case and either one or both parties may not be represented in such a way, particularly in lower-value disputes. This would indicate an increased number of mediations than those reported. Also in respect of other forms of ADR, of which any reported practice has been negligible, again it is possible, although we can find no evidence of this, that such forms do exist in practice but where parties are not legally represented.

<sup>53</sup> We did not seek to define the term ‘partial settlement’. This idea may relate to a narrowing of issues, which are thereafter carried on to traditional dispute resolution processes. It is also worth making the point that in those mediations which were regarded as having not settled, the failed mediation may nonetheless have contributed to the later settlement of a dispute.

<sup>54</sup> There will undoubtedly be double counting here. In many cases both mediating parties will be represented by lawyers and hence different respondents may be referring to the same cases. It may also be that in some cases more than one lawyer has represented parties at the same time.

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<sup>55</sup> Two breach of contract cases were on-going and thus it was not possible to comment on settlement.

<sup>56</sup> The disparity in figures here is due to respondent error.

<sup>57</sup> The study did not target lawyers with a specialism in construction, although some lawyers indicated that they had been involved in construction mediations. It is hence likely that the small number of constructions mediations reported does not reflect the reality of practice. A small number of respondents alluded to participation in construction adjudications. These responses were ignored here, given that construction adjudication fell outwith the definition of ADR for our study. Additionally, one or two respondents reported representing parties in matrimonial disputes. Again such responses have been ignored for the purpose of this study.

<sup>58</sup> Brooker & Lavers, *supra* n. 11.

<sup>59</sup> See for example, Genn, *supra* n. 29 at 17

<sup>60</sup> Such as the study by Brooker and Lavers, *supra* n. 11.

<sup>61</sup> The settlement rate is determined from a total of 144 cases as in respect of three of the reported cases respondents did not indicate whether the case settled or not.

<sup>62</sup> English empirical research regarding settlement rates is somewhat more mixed. Research by Brooker and Lavers (*supra* n. 11) indicated a 77% rate for commercial mediations, while a study by the same authors for construction mediation revealed a 67% success rate. Research by Genn (*supra* n. 46) in relation to mediation in the English Court of Appeal indicated a mere 45% settlement rate.

<sup>63</sup> Some respondents had only taken part in one mediation, so differences in responses which range between “always”, “often” and “sometimes” satisfactory may at times be illusory. Nonetheless a clear pattern of general satisfaction emerges.

<sup>64</sup> Given that all (bar one instance) of the reported ADR processes respondents took part were mediations, these responses should again should be read as experiences within mediation processes.

<sup>65</sup> Te where the mediation had neither settled nor partially settled.

<sup>66</sup> More respondents answered this question than those who had reported representing parties in failed mediations. We might speculate that some of the responses to this question then may centre on mediations that had failed in which parties had acted as mediators.

<sup>67</sup> M. Upton “ADR in Perspective” (1993) SLT (News) 75 at 76.

<sup>68</sup> Albeit that some of the statements straddle more than one of these categories.

<sup>69</sup> To what extent such sentiments are rooted in an historical antipathy towards the profession is unclear. ‘Lawyer bashing’ is nothing new. As far back as December 1891 it was reported in *Vanity Fair* that “[Lawyers] are specimens...who fatten while their clients are ruined. They work well, and no fair as better specimens, nor more knowing in the law, which they make more complicated as they go: in recompense for which they have promoted a very beautiful system by which their clients are allowed no more access to them than is needed for the payment of their high fees” (cited in L. McIlwaine, “Tort Reform and the Compensation Culture” (2004) 4 J.P.I. 239 at 243.)

<sup>70</sup> Clark & Mays, *supra* n.8.

<sup>71</sup> The Scottish Consumer Council repeated this assertion in their later review of civil justice in Scotland (Scottish Consumer Council, *The civil justice system in Scotland: a case for review?* (2005).

<sup>72</sup> Genn, *supra* n. 29. Moreover, it may be pertinent that it was revealed that take up was lowest in the LCC mediation scheme when both parties were represented – Genn, *supra* n. 29 at 25-27.

<sup>73</sup> From a total of 135 respondents who answered the question.

<sup>74</sup> The remainder did not know.

<sup>75</sup> Albeit that this response tells us nothing about the attitudes of those who failed to respond to the study and who thus may be less well disposed towards mediation and concerned about the impact on their fee levels.

<sup>76</sup> See for example, P. Robertshaw & J. Segal “The Milking of ADR” (1993) 12 CJQ 23.

<sup>77</sup> Mays & Clark *supra* n. 1.

<sup>78</sup> From a total of 135 respondents who answered the question.

<sup>79</sup> The remainder did not know.

<sup>80</sup> See Clark & Mays, *supra* n. 8; M. Stone, “Representing clients in mediation: an essential new professional skill: Part 1” (2000) 45 JLSS 34.

<sup>81</sup> Mays & Clark *supra* n. 1.

<sup>82</sup> S. Roberts, “Mediation in the lawyers’ embrace” (1992) 55 MLR 258; Robertshaw & Segal, *supra* n. 76; Mays & Clark *supra* n. 1.

<sup>83</sup> *Ibid.*

<sup>84</sup> Again, given respondents’ wide-spread awareness of mediation and lack of awareness of other ADR processes and that virtually the only reported ADR form that parties had participated within was

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mediation, the vast majority of responses here are likely to pertain to acting as a mediator rather than any other form of ADR neutral.

<sup>85</sup> From a total of 137 respondents who answered the question.

<sup>86</sup> Roberts, *supra* n. 82 talked about a “breathtaking arrogance” of lawyers’ assumptions that they could effortlessly embrace ADR practice.

<sup>87</sup> Albeit that the differential is unlikely to be statistically significant. 51.9% of respondents who had been trained in ADR agreed that lawyers made the best mediators, while 23.5% disagreed with the statement.

<sup>88</sup> The remainder did not know.

<sup>89</sup> The differential is more stark if experienced respondents are compared only to the group with no experience of ADR in which in relation to the proposition that lawyers made the best mediators, 6.9% strongly agreed, 47.1% somewhat agreed, 16.1% somewhat disagreed and 1.1% strongly disagreed.

<sup>90</sup> Ross *supra* n. 20; R. McKay & A. Brown, *Community Mediation in Scotland: A study of its implementation* (1998: Scottish Office CRU); Lewis, *supra* n.2.

<sup>91</sup> S. Sibley & S. Merry, “Mediator Settlement Strategies”, (1986) 8 Law and Policy Quarterly 7.

<sup>92</sup> B. McAdoo & N. Welsh, *supra* n. 14 at 389.

<sup>93</sup> The issue may be different in smaller scale ‘consumer’ disputes where one or both parties may be unrepresented.

<sup>94</sup> Research conducted into commercial mediations by CEDR in 2002 found the following most valued mediator qualities: understanding the dispute and the parties; process management; encouraging communication; rapport building; personal qualities of the mediator; dealing with personalities; providing the right environment for settlement; and getting results – see CEDR, “What corporate clients want from ADR – and what they get” July 2004, available at <http://www.cedr.co.uk/index.php?location=/library/articles/what-corporate-clients-want.htm>.

<sup>95</sup> The question of training is also paramount.

<sup>96</sup> Interestingly, year of entry to the legal profession also appeared to have a small impact on views held on whether lawyers made the best ADR neutrals with newer entrants to the profession slightly less prone to viewing that lawyers made the best ADR neutrals. From 28 respondents who entered the profession in the 1960’s and 1970’s, 17 (60.7%) either “strongly” or “somewhat” agreed with the statement. In respect of the 46 respondents who entered the respondents in the 1980’s, only 21 (45.7%) either “strongly” or “somewhat” agreed with the statement. Moreover, of the 56 respondents who entered the profession in the 1990’s or since 2000, only 23 (41.1%) either “strongly” or “somewhat” agreed with the statement.<sup>96</sup>

<sup>97</sup> A view recorded by respondents in Mays & Clark *supra* n. 1. See also J. Riekert “Alternative Dispute Resolution in Australian Commercial Disputes” (1990) 1 Australian Dispute Resolution Journal 31; J. Dieffenbach, “Psychology, Society and the Development of the Adversarial Posture” (1992) 7 Ohio State Journal of Dispute Resolution 261 (cited in Zarinski *supra* n. 11).

<sup>98</sup> From a total of 135 respondents who answered the question.

<sup>99</sup> The remainder did not know.

<sup>100</sup> Scottish Consumer Council, *supra* n. 28 at 25.

<sup>101</sup> From a total of 139 respondents who answered the question.

<sup>102</sup> The remainder did not know. When testing the above two responses for date of entry to the profession to ascertain if those longer-standing members of the profession held more traditional views on the litigation environment and ADR’s place within it, no clear pattern emerged. The handful of respondents who viewed that a lawyer’s standing might suffer if he/she participated more often in ADR were not surprisingly also of the view that suggesting ADR was a sign of weakness. These respondents also generally took more negative views of ADR processes than other respondents.

<sup>103</sup> See generally, S. Shipman, “Court Approaches to ADR in the Civil Justice System” (2006) 25 CJQ 18. This phenomenon has also occurred in the USA – see for example, McAdoo & Welsh *supra* n. 14 at 385.

<sup>104</sup> Ross, *supra* n. 6.

<sup>105</sup> Although parties are not compelled to take part. Rule of Court of Session 1994, rule 47.12; Ordinary Cause Rules 1993 rule 40.12A.

<sup>106</sup> E. Samuel, *Supporting Court Users: The in-court advice and mediation projects in Edinburgh Sheriff Court, Research Phase 2*, (Edinburgh, Scottish Executive CRU, 2002).

<sup>107</sup> Scottish Executive Press Release, 22 August 2005.

<sup>108</sup> Ross *supra* n. 6 at 22.

<sup>109</sup> The remainder did not know.

<sup>110</sup> The remainder did not know.

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<sup>111</sup> [2004] 1 W.L.R. 2985.

<sup>112</sup> [2004] EWCA Civ 576.

<sup>113</sup> [2002] EWCA Civ 303.

<sup>114</sup> The court in *Halsley v Milton Keynes General Trust* sought to elaborate in what circumstances it would be appropriate to award an adverse costs award against a successful litigant who had rejected recourse to ADR. Such factors included the nature of the dispute, merits of the case, potential costs of ADR procedures, previous attempts to settle claims, prospects of success of ADR and whether ADR would delay the case. For a detailed discussion of English court approaches to encouraging ADR in the post CPR environment see S. Shipman, *supra* n. 103.

<sup>115</sup> Wood QC, *supra* n. 25 at 27; T. Allen, “Rewewing civil justice in Scotland: An English review of the Scottish Consumer Council’s call for review!”, Feb 2006, available at [http://www.cedr.co.uk/index.php?location=/library/articles/reviewing\\_civil\\_justice\\_in\\_scotland.htm](http://www.cedr.co.uk/index.php?location=/library/articles/reviewing_civil_justice_in_scotland.htm).

<sup>116</sup> A related issue pertaining to compulsory referral to mediation is that such processes may be seen to lack coercive power and cannot guarantee a settlement, thus may amount to no more than an additional hurdle to be surmounted by litigants. Our respondents in general offered modest support for this view. In response to the statement that “ADR suffers from a lack of coercive power”, from a total of 135 respondents, nine (6.7%) “strongly agreed” and 40 (29.6%) “somewhat” agreed.

<sup>117</sup> Scottish Consumer Council *supra* n. 28 at 32.

<sup>118</sup> Ross, *supra* n. 6 at 14.

<sup>119</sup> Ross, *supra* n. 6 at 29.

<sup>120</sup> Samuel, *supra* n. 51.

<sup>121</sup> O. Fiss, “Against Settlement” (1984) 93 Yale L.J. 1073.

<sup>122</sup> *Ibid* at 1087-1088. See also Ross *supra* n. 20 at 4.

<sup>123</sup> Ross, *supra* n. 6 at 29.

<sup>124</sup> From a total of 134 respondents who answered the question.

<sup>125</sup> Recent statistics from the US, where mediation has developed much more extensively, do not support the view that ADR is preventing enough precedential case law from taking place – See S. Subrin ‘A traditionalist looks at mediation: it’s here to say and much better than I thought’, (Winter 2002/2003) 3 Nev. L.J. 196.

<sup>126</sup> This is not to suggest that the role of the adjudicatory process does not have other important functions such as ensuring the law is applied equally, allowing citizens to take part in governance, checking arbitrary power, educating jurors and as acting as a substitute for anarchy and disorder – see S. Subrin *supra* n. 125. For an illuminating discussion of some of the policy arguments surrounding adjudication versus negotiated settlement, see C. Menkel Meadow, “For and Against Settlement: Uses and Abuses of the Mandatory Settlement Conference” (1985) 33 UCLA Law Review 485.

<sup>127</sup> See for example, C. Gentry “Divorce Law Update” (2004) 144 NLJ 1858.

<sup>128</sup> Genn, *supra* n. 29.

<sup>129</sup> It might be argued that under an ‘evaluative’ model of mediation, such power imbalances may be alleviated but this does give rise to concerns regarding the impartiality of the mediator. Similarly the Scottish Consumer Council has suggested that “[a] good mediator should be aware of any such power imbalance, and take steps to minimise the imbalance, so far as possible”. – Scottish Consumer Council, *supra* n. 28 at 14.

<sup>130</sup> From a total of 133 respondents that answered this question.

<sup>131</sup> The remainder did not know. It is worth noted that it has been argued that power-imbalances may not be addressed any better by traditional means of dispute resolution such as negotiation or litigation in any case. See, for example, S. Subrin *supra* n 125.

<sup>132</sup> From a total of 139 respondents to this question.

<sup>133</sup> The remainder did not know.

<sup>134</sup> Mays & Clark, *supra* n. 1.

<sup>135</sup> Clark, *supra* n. 6 at 171.

<sup>136</sup> available at [http://www.lawscot.org.uk/annualreport/2004/comrep\\_civilproc.htm](http://www.lawscot.org.uk/annualreport/2004/comrep_civilproc.htm).

<sup>137</sup> From a total of 139 respondents to this question

<sup>138</sup> The remainder did not know.

<sup>139</sup> For non-trained respondents, only eight respondents (14%) had experience representing clients in mediation, while 23 (40.4%) had recommended ADR to their clients. For trained respondents, 39 respondents (47%) had experience of representing clients in mediation, while 72 respondents (86.7%) had recommended ADR to their clients.

<sup>140</sup> This may include consumers involved in consumer type disputes.

<sup>141</sup> Mays & Clark, *supra* n.1.

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<sup>142</sup> From 139 respondents who answered the question.

<sup>143</sup> It has been suggested that clients whose own professional or business operations are orderly, rational, efficient, and reflective might prefer a method of dispute resolution that comes closest to operating in a highly rational, efficient way – see R. Redmount & F. Mosten, “Client centred consultation and ADR” (1995) 20 I.L.P. 28.

<sup>144</sup> As opposed to consumers.

<sup>145</sup> T. Johnson *Professions and Power* (1972, Macmillan, London)

<sup>146</sup> Cain & Harrington *Lawyers in a Post-modern world* (1994, OUP Buckingham).

<sup>147</sup> J. Handler, *Social Movements and the Legal System: A Theory of Law Reform and Social Change* (1978) at 25.

<sup>148</sup> See, for example, R.A. Kagan & R.E. Rosen, “On the Social Significance of Large Law Firm Practice”, (1985) 37 Stan. L. Rev. 399; E. Spangler, *Lawyers for Hire: Salaried Professionals at Work* (1986) at 64 reviewed in L. Mather, “What do clients want? What do lawyers do?” (2003) 52 Emory L.J. 1065.

<sup>149</sup> M Ross, *supra* n. 20.

<sup>150</sup> Ross, *supra* n. 20 at 1.

<sup>151</sup> Samuel, *supra* n. 51, reported very positive feedback from participants in the commercial cause in Glasgow sheriff court.

<sup>152</sup> From a total of 134 responses to this question.

<sup>153</sup> The remainder did not know.

<sup>154</sup> In respect of whether a shift in attitudes in the profession apropos litigation has developed over time, those respondents who joined their respective professions in the 1960’s or 1970’s were slightly more likely to view litigation in a positive light - 37% of such respondents viewing litigation as meeting business needs as opposed to 29.6% in the general set of responses. Regarding types of legal professional, advocates were the most likely to agree that litigation served the interests of the business community well, with 50% of advocate respondents agreeing with the statement compared to 28% of solicitor/advocates and 29.4% of solicitors. Only 22 advocates answered this question, however, and further research is needed to ascertain if anything can be read into this finding.

<sup>155</sup> Scottish Consumer Council, *supra* n. 71.

<sup>156</sup> R. Mackenzie quoted in R. Draycott, “Natural Born Killer”, (2004) *The Firm Magazine* available at <http://www.firmmagazine.com/members/feature.php?id=104>.

<sup>157</sup> Ross, *supra* n. 20 at 2.