

The Fourth Mediation Audit

A survey of commercial mediator attitudes and experience

11 May 2010

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Registered charity no: 1060369



This marks the fourth occasion on which CEDR has undertaken a survey of the attitudes of civil and commercial mediators to a range of issues concerning their personal background, mediation practice and experience, ethical issues, professional standards and regulation, and priorities for the field over the coming years. The particular focus of this year's survey was to assess how the market and mediation attitudes have changed over the past two years.

The survey was undertaken using an internet-based questionnaire, which was open to all mediators and lawyers, regardless of organisational affiliation, and which was publicised by way of CEDR's website and direct e-mail to the mediator contacts both of CEDR and of other leading service provider organisations and members of the Civil Mediation Council. This year 221 mediators participated in the survey, a statistically significant sample, and almost exactly the same number as last time. As in any survey, not all participants answered every question.

Alongside our survey of mediator attitudes, we conducted a parallel survey of lawyer attitudes in order to provide a client-oriented perspective to some of the questions raised. This survey did not attract as wide a response as in previous years, and we have therefore only published those findings where there appears to be a statistically significant contrast between the views of mediators and those of lawyers.

As noted in the introduction to this report, it is important to emphasise that this is a survey of civil and commercial mediators.

The Mediation Audit is a biennial initiative undertaken by CEDR as part of its public mission to cut the cost of conflict and create a world of choice and capability in conflict prevention and resolution.

CEDR is grateful for the support of its members.

For further details, see our website: www.cedr.com

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Introduction

It is something of a milestone in the history of the growth of mediation as a tool for the effective resolution of disputes that, for the first time, this Audit report needs to start with a definition of terms.

Whereas previously it may have been sufficient simply to refer to the civil and commercial mediation field as a single entity, the continued emergence of new areas of practice requires greater precision in terms of which areas are covered by this Audit.

Our 2007 Audit noted for the first time, the significant, and emerging, impact of schemes - that is, structured and often fixed fee and time-limited, court-connected models such as the Court of Appeal Mediation Scheme and the National Mediation Helpline, as well as sector- or organisation-specific arrangements. This growth has continued apace, and is now supplemented not only by the HMCS Small Claims Mediation Service (which conducted 9,240 mediations in the year to 31 March 2009) but also by an increasing number of employment and workplace schemes.

Many, if not all of these schemes may now fall within the ambit of the Civil Mediation Council. However, they remain largely outside the survey population for this Audit. This reflects the background of the surveying organisation, CEDR, and the channels through which survey responses were canvassed.

Undoubtedly there is some overlap, but in the main the mediators who were targeted for this Audit are those who come from the civil and commercial tradition of the past twenty years. With the broadening of remit of the Civil Mediation Council, one of the challenges for the Audit in two years' time will be to reach out to the newer fields of practice, but for the time being the results set out herein should only be regarded as indicative of the views of mediators from the civil and commercial background.

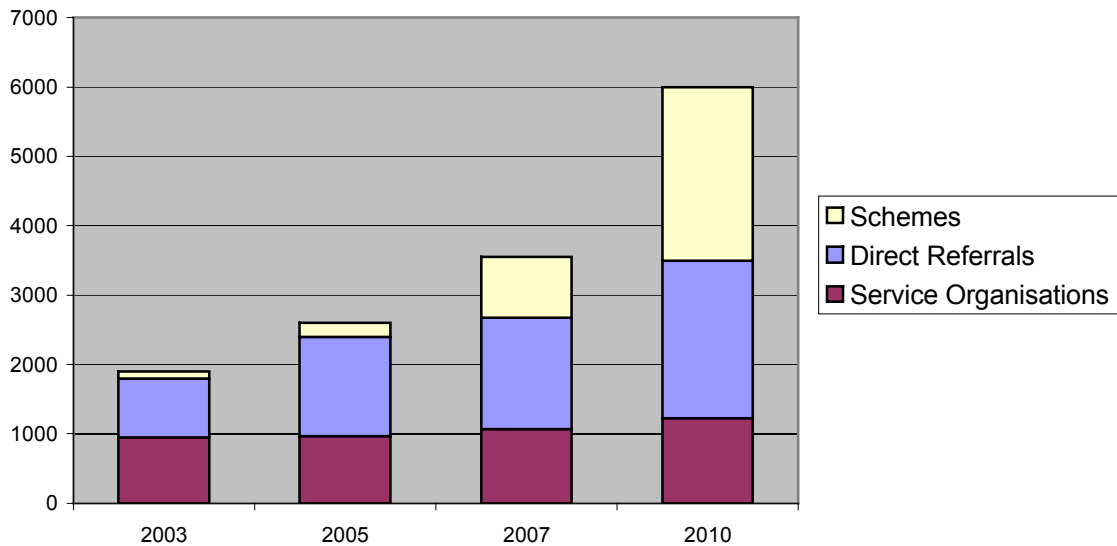
The mediation marketplace

For individual cases, we can see a continuation of the long-term trend towards clients making direct referrals to mediators rather than working through service organisations.

Nearly 65% of ad hoc cases are now being handled on this basis (as compared to 60% in 2007, 55% in 2005 and 45% in 2003). As might be expected, direct referral activity is particularly prevalent amongst the most experienced mediator group, nearly two-thirds of whom obtained more than half of their work from direct referrals, with around 40% exceeding 80% direct referrals, and 22% claiming to be totally free of providers.

At the same time, however, the pie is expanding. On the basis of mediators' reported case loads, we can now project the current size of the civil and commercial mediation market as being in the order of 6,000 cases per annum, of which around 60% represents ad hoc referrals to service providers and individual mediators, with the balance attributable to schemes such as the National Mediation Helpline, Court of Appeal Mediation Scheme and others in the civil and commercial arena (including self-administered in-house in some large corporate and public sector bodies).

This is a virtual doubling of activity since our 2007 Audit, with the vast majority of the growth being attributable to schemes. Excluding such activity from the equation, we estimate that mainstream ad hoc commercial casework has risen by around 30% since 2007.



This market continues to be dominated by a select few, although the size of that group is slowly rising. A group of around 90 individuals collectively are involved in around 85% of all non-scheme commercial cases (2007 - 80 individuals held 80%); and within this group, some 50 individuals are involved in 70% of all cases (2007 - 35 individuals held 57%).

Our survey responses confirm also that service organisations face increasing competition not just from direct referrals to individual mediators but also from within their own ranks. Whilst it might be expected given the nature of the survey that 24% of respondents reported that they regularly mediate with CEDR, with half of that number also working with at least one of the other leading providers in England & Wales¹, it was certainly surprising that over 50 other bodies were named by respondents as being organisations they regularly mediate with.

These other organisations were largely other Accredited Mediation Providers involved with the National Mediation Helpline (there are 45 in all). However, very few of them are specialist workplace or employment mediation service providers (of whom 40 in total are registered by the Civil Mediation Council). This finding seems to confirm the view that there is currently only limited overlap between the commercial and workplace sectors - evidently this Audit survey has failed to reach the bulk of the workplace mediation community, and this is the main explanation for the disparity between this Audit's findings on the size of the commercial mediation marketplace and the rather larger figures for the Civil Mediation Council's membership activity² as a whole.

¹ By which we mean the five other service organisations most prominent within the Civil Mediation Council, namely the Academy of Experts, ADR Chambers, ADR Group, Chartered Institute of Arbitrators and In Place of Strife/ACI.

² Based on an aggregation of individual mediator and organisational returns, the Civil Mediation Council currently reports around 9,000 cases in aggregate.

The mediators

In terms of personal mediation experience, respondents were split between three broad categories:

- 55% Advanced mediators - who described themselves as “*reasonably*” or “*very*” experienced;
- 22% Intermediates - who categorised their lead mediator experience as “*some*” or “*limited*”; and
- 23% Novices - who were generally accredited but had no experience as a lead mediator.

This overall profile is not significantly different from that observed in previous Audits, although we have seen a 5% progression from the Intermediate category into the Advanced group, presumably reflecting the fact that our respondents are gradually increasing their experience.

The vast majority of Novice and Intermediate mediators reported personal involvement in no more than four mediations a year, whilst Advanced mediators reported more extensive practices, with 56% (2007: 55%) reporting undertaking more than 10 mediations a year.

Compared to our 2007 Audit respondents, the average female mediator, at 48, is one year younger whilst the average male mediator, at 55, is one year older. What this tells us is that, for the first time, we are seeing in the Audit results the impact of new, younger entrants into the field. This is particularly the case with women, who now make up 28% of our Intermediate group who have “*some*” or “*limited*” lead mediator experience.

There are also signs that more women are breaking into the Advanced group - this more experienced group are a couple of years older than these averages, but they are a slightly more diverse group, albeit still predominantly male (82%, down from 90% in 2007) and white (96%).

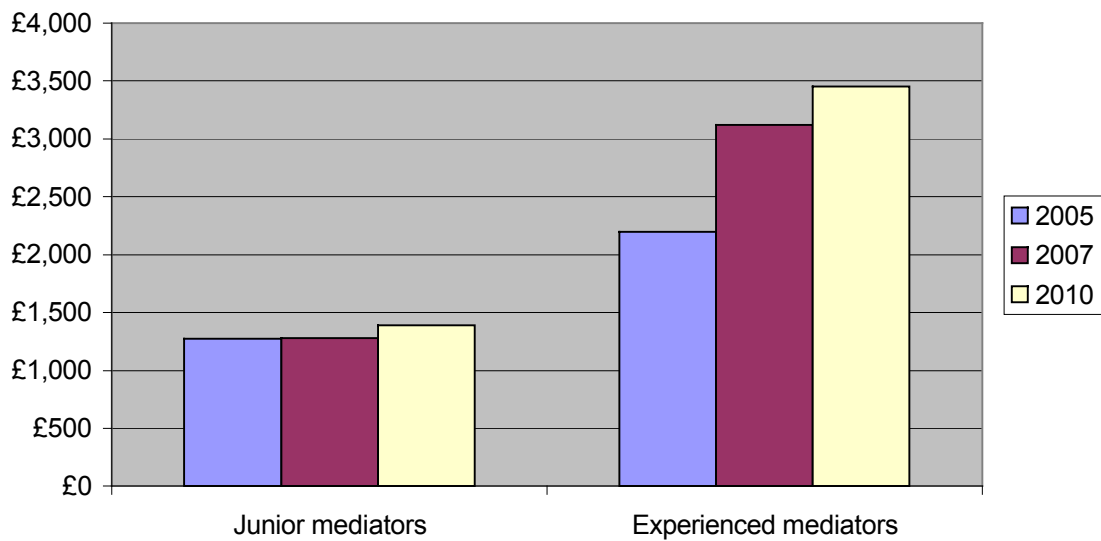
In terms of overall diversity, the mediator group still falls well short of our usual comparator, the legal profession, where 45% of practising solicitors are women with an average age of 38, compared 44 for men, and almost 11% are drawn from ethnic minority groups. In contrast, we have only 19% female and 5% minority representation notwithstanding that the field continues to be dominated by the legal profession, with 60% being legally qualified, slightly up from the 57% reported in our last Audit.

Mediators’ practices

Even amongst the most experienced group - those who describe themselves as “*reasonably*” or “*very*” experienced - the great majority are still combining their practice with another profession. Only 37% characterise themselves as “full-time” mediators, although this figure is up from the 31% in the 2007 Audit.

Nevertheless, for some, mediation is becoming a very lucrative field:

- Average fees of the less experienced mediator group for a one-day mediation have increased from around £1,200 in 2007 to £1,390, an increase of 15.8% over a thirty-month period.
- Average fees for more experienced mediators have risen from £3,120 in 2007 to £3,450 in 2010, an increase of 10.6%.



These averages do, however, conceal a wide variation in mediator fee rates as indicated by the table below:

Average earnings for a one-day mediation:

	2010	2007
Pro bono only	10.3%	9.1%
Under £500	5.8%	8.5%
£501 - £1,250	22.4%	29.1%
£1,251 - £2,000	19.2%	17.0%
£2,001 - £2,500	10.9%	10.3%
£2,501 - £3,000	7.7%	9.7%
£3,001 - £3,500	9.0%	6.7%
£3,501 - £4,000	4.5%	2.4%
£4,001 - £4,500	1.3%	1.2%
£4,501 - £5,000	5.1%	3.0%
£5,001 - £5,500	-	-
£5,501 - £6,000	2.6%	1.2%
£6,000 - £6,500	-	1.8%
£7,000 - £7,500	0.6%	-
£7,500 +	0.6%	-

By combining fee rates with reported activity levels, we have projected average incomes for differing levels of “full time” mediator as follows:

- 11% of experienced mediators, each undertaking between 20 and 30 mediations a year, are earning around £73,000pa (2007 - £53,000)
- 7% of experienced mediators, each undertaking between 30 to 50 mediations a year, are earning around £126,000pa (2007 - £121,000)
- 15% of experienced mediators, each undertaking over 50 cases a year, are earning around £296,000pa (2007 - £282,000).

The most successful mediator we surveyed reported average earnings of over £7,500 per case on a workload of around 80 cases, giving an annual income of over £600,000. This is similar to the highest earner identified in the 2007 Audit.

Sources of work

We asked both mediators and lawyers to assess the relative significance of a number of factors in determining why individuals secured commercial mediation appointments, and then compared the aggregate rankings as set out in the table below:

Mediators			Lawyers	
2007	2010		2010	2007
1	1	Professional reputation - experience/status	1	1
2	2	Professional background/qualifications	5	8
5	3	Recommendation - by provider	10	9
3	4	Availability	4	4
6	5	Professional reputation - mediation style	3	3
4	6	Sector experience	6	7
10	7	Repeat business - with lawyer	8	6
7	8	Fee levels	2	5
8	9	Recommendation - by lawyer in previous case	7	2
9	10	Location	12	12
16	11	Recommendation - by other mediators	17	15
11	12	Recommendation - by client in previous case	9	10
12	13	Professional reputation - settlement rate	11	13
17	14	Recommendation - by directories	14	14
13	15	Marketing activity (e.g. mailshots, website)	15	17
14	16	Repeat business - with client	9	11
15	17	PR activity (e.g. articles, speeches)	16	16

Within this ranking, “*professional reputation - experience/status*” was unsurprisingly the clear winner with both mediators and lawyers. Professional background and mediation style are also both relatively high, although mediators and lawyers do not seem to agree as to which is the more important.

In terms of changes in attitudes between 2007 and 2010, mediators seem increasingly to believe in the importance of recommendations by providers and other mediators as well as repeat business with lawyers. However, lawyers seem to have a different view, with fee levels becoming of increasing importance.

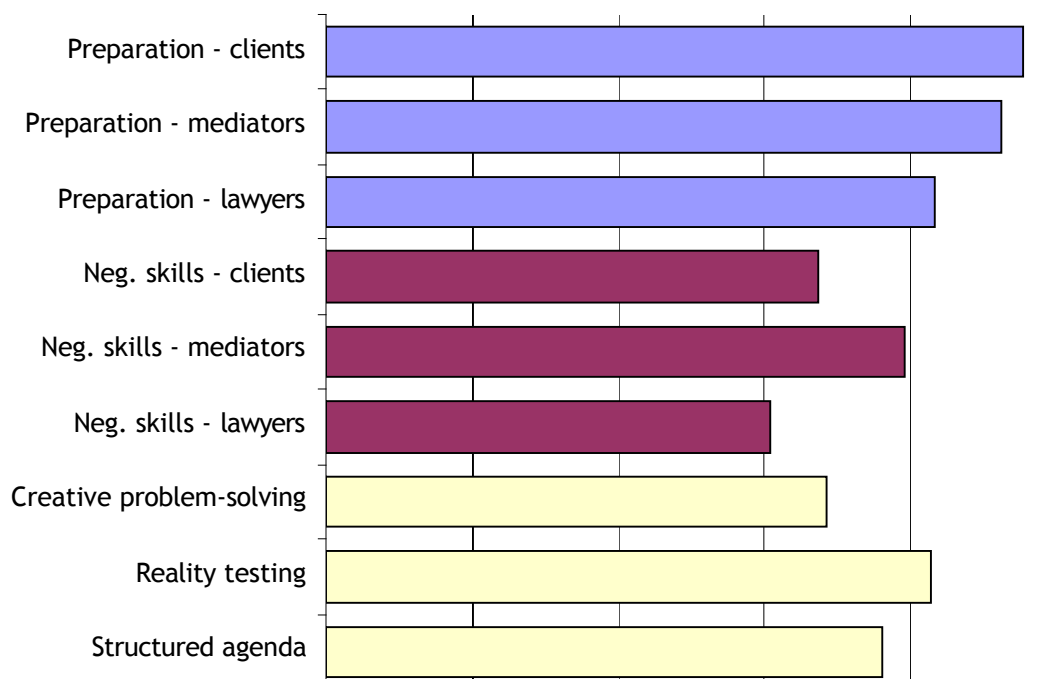
Sector experience still rates only in mid-table in terms of importance in securing appointments, suggesting that the day of the sector-specialist mediator has yet to come. Similarly, there seems to be little sign of any differentiation by that other commonly claimed metric of mediator suitability, settlement rates.

Performance in mediation

Mediators report that around 75% of their cases settled on the day, with another 14% settling shortly thereafter so as to give an aggregate settlement rate of 89%. This is almost identical to the performance reported in the 2007 Audit, but slightly lower than the aggregate 93% rate reported in the 2005 Audit (although we noted at the time that that figure seemed surprisingly high).

There was no significant difference in aggregate settlement rates across the three differing groups of mediator experience, although less experienced mediators were around 10% less successful on the day but then made up this shortfall with more follow-up settlements. Again, we have observed this pattern in previous Audits.

As to the most important contributors to settlement of cases in mediation, it was interesting to note that mediators identified preparation (by clients, mediators and lawyers, in that order) as being by far the most important factor, even outweighing the impact of negotiation skills and specific mediator techniques such as reality testing.



As to the reason behind non-settlements, mediators generally offered the familiar explanations of intransigent parties, unrealistic expectations and clients on fishing expeditions with no real desire to settle. For the first time, however, the role of Conditional Fee Agreements emerged as a factor, with a number of respondents citing instances in which, due to high uplifts, claimants' solicitors costs had become out of all proportion to the other issues in dispute, resulting in conflicts of interest between solicitor and client and, as a result, an additional barrier to settlement. One respondent went so far as to predict that the role of CFAs could have a significant effect on the level of future mediation settlements.

We asked mediators for their views on the performance those lawyers and clients they encountered in their mediations:

- 60% of lawyers and 62% of clients were rated as having performed quite well or very well
- 22% of lawyers and the same proportion of clients were rated as having performed adequately
- 18% of lawyers and 16% of clients were rated as performing less than adequately (with 7% of lawyers and 5% of clients rated as having been very poor).

These figures are all broadly consistent with those reported in our 2007 Audit, the only exception being that the proportions of lawyers and clients now rated in the highest category, at 33% and 27% respectively, are each around 7% below 2007 levels.

These findings were validated by our separate survey of lawyer perceptions. Lawyers rated 59% of their counterparts, and 71% of clients, as having performed well or very well in mediation, with 17% of lawyers and 6% of clients performing poorly.

Turning the tables, our separate survey of lawyers also asked for their ratings of mediator performance:

- 76% of mediators were reported as performing quite well or very well, with 47% in the highest category. Both of these figures are slightly lower than the 2007 findings of 80% and 56% respectively.
- 17% were reported as performing adequately
- 7% performed less than adequately, of which 2% were rated as being very poor.

It is perhaps inevitable that a broad survey of this nature will attract responses across the entire spectrum. Nevertheless, it is disappointing that there still appears to be a rump of almost 20% of lawyers and 7% of mediators whose performance is reported as less than adequate.

Standards and regulation

Mediators strongly (72%) favoured the civil justice system taking a more directive approach towards the promotion of mediation, although only 3% went so far as to support a fully mandatory system. In contrast 23% favoured the status quo, whilst only 5% favoured a more relaxed approach. These survey findings are remarkably close to those reported in all three of our previous Audits.

In contrast, lawyer support seems to be gravitating towards the status quo, with 52% now content with the present arrangements and the balance largely favouring only a slight toughening up (2007 - 56%). This year no lawyers favoured a fully mandatory system (2007 - 8%).

Support for either a single standard of basic professional training and/or a single regulatory body for setting and monitoring professional standards is broadly unchanged since 2007:

- (a). Would you welcome a single standard of basic professional training of commercial mediators (as against a free market in basic accreditation)?

	2010	2007	2005	2003
Yes	52.8%	52.3%	61.7%	71.5%
No	28.8%	31.3%	38.3%	28.5%
Don't know	13.6%	15.6%	-	-
Don't care	4.8%	0.8%	-	-

- (b). Do you believe there should be a single regulatory body for setting and monitoring professional standards of practice by commercial mediators and dealing with public complaints against mediators?

	2010	2007	2005	2003
Yes	54.9%	58.5%	70.9%	76.4%
No	26.2%	30.1%	29.1%	23.6%
Don't know	18.0%	10.6%	-	-
Don't care	0.8%	0.8%	-	-

Note: The “don't know” and “don't care” options were not available in the 2005 and 2003 surveys.

Lawyer responses to each of the above questions are broadly in line with mediator responses, subject to a generally lower level of interest in this topic - consistent with the 2007 finding, 11% of lawyers indicated that they “*don't care*” whether or not a single standard of professional training exists.

Amongst mediators who responded “Yes” to each of the above questions, the Civil Mediation Council has now overtaken CEDR as the most popular body amongst existing candidates to fill each of these roles, with 27% (2007 - 11%) support for the training role and 34% (2007 - 16%) for the professional standards role.

There was some indication in respondents' write-in comments that support for the Civil Mediation Council might have been even higher were it not for concerns about its resourcing and/or representativeness.

CEDR still scored highly for the training role (23% as against 29% in 2007) but support for it taking on a professional standards function has decreased sharply to 9% (2007 - 21%).

With the emergence of the Civil Mediation Council, support for a new body to fill these roles has also fallen, but remains significant (at 41% and 44%, respectively, as compared to 52% support in each instance in 2007).

The range of options offered in the Audit (covering combinations of UK, European or worldwide associations of mediators or other regulatory body) fragmented the responses, meaning that no one option achieved a clear majority. However a few themes are evident:

- As between choices of UK, European or worldwide bodies, the overwhelming preference was for a UK body - with 69% (2007- 72%) support for the training standards role, and 81% (2007 - 68%) for a regulatory function.
- There was stronger support for an association of mediators rather than a regulatory body in relation to both the setting of training standards (56%: 34%) and the monitoring of practice standards (50%: 47%)
- In contrast, our 2010 lawyer survey confirmed our 2007 findings, with a two-to-one preference for a UK-based regulatory body for both functions.

Support for the International Mediation Institute has hardly progressed since 2007, remaining low at around 4% under each function.

Future aspirations

Looking to the future, less than 10% of mediators see themselves as doing either the same number or fewer mediations in five years' time.

42% (2007 - 39%) of mediators expect to be mediating more, although this would still not be their main occupation; whilst a further 30% expect to have become full-time mediators, a figure which is broadly consistent with previous Audits (2007 - 33%; 2005 - 34%; 2003 - 23%).

Only 3% expect to have developed a more specialist mediation practice (well down on the 13% with such an expectation in 2007), again consistent with the continuing notion of the generalist mediator.

As to potential obstacles or challenges in their way, the predominant response was to blame market conditions, particularly the insufficient level of demand for mediation services, although a number also complained about the number of newly trained mediators entering the market. A rather smaller proportion saw the challenge in more personal terms, namely their own difficulty in obtaining sufficient mediation referrals from which to grow a reputation and, hence, a successful practice. Some recognised a need for more pro active marketing on their part to raise their profile, but others admitted an aversion to what they regarded as self-promotion.

Growth areas

We asked mediators to identify which types of dispute or business sector would see the most growth in mediation usage over the next two years. No doubt reflecting the wide range of respondents' backgrounds, this question attracted a long list of suggestions, although Employment/Workplace was far and away the most frequently mentioned (by 27% of all Audit respondents).

The list of other areas mentioned was headed by Personal Injury and the Public Sector, and also included: Banking; Community; Construction; Contract; E-business; Family; Financial; Healthcare; Human Rights; Insolvency; Insurance; International; IP; Maritime; Matrimonial; Professional Negligence; Projects; Public Law; Retail; Small Claims and Sport.

Priorities for the future

When we asked mediators for their views as to the main priorities for the mediation community over the next two years, the overwhelming response was a plea for further promotional work in order to grow the market. Some had specific suggestions as to which audiences should be targeted (with the judiciary and business most frequently mentioned) but from most the messages were simply to "*raise awareness*" and "*emphasise successes*".

Mediators also expressed a wish for stronger infrastructure within the field. Consistent with the findings on regulation and standards reported earlier, there were mixed perspectives about whether more or less regulation was required, with both views expressed forcefully. The one area of consensus, however, was that there should be less fragmentation within the mediator profession - some complained about the plethora of providers, with one colourfully referring to the "*balkanisation of mediation outlets*". Many others suggested that the profession should be working more closely together.

Alongside these complaints about provider numbers, a number of respondents expressed concern at the number of new aspiring mediators graduating from the training providers, with some suggesting that such training activity should be cut back until such time as there was enough work to go around for those already qualified. Others were more concerned that those training providers should improve standards.

Provider organisations also came in for some criticism as regards the lack of transparency of their fee arrangements and panel membership arrangements.

Contribution of the field

Finally, by combining the results of the Mediator Audit surveys with detailed operational statistics taken from CEDR's own caseload, we are able to update our assessment as to the overall economic impact of the commercial mediation field as a whole:

- The total value of cases mediated (i.e. the amount at issue) can be significantly influenced by the impact of mega-cases (such as the two £1 billion corporate transactions mediated by CEDR in 2009). If, however, the effect of such cases is excluded, the value of cases mediated each year is approximately £5.1 billion (2007 - £4.1 billion).

- Since 1990, effectively the launch point of civil and commercial mediation with England & Wales (as marked by the emergence of both CEDR and the ADR Group), the total value of mediated cases is approaching £40 billion.
- By achieving earlier resolution of cases that would otherwise have proceeded through litigation, the commercial mediation profession this year will save business around £1.4 billion a year in wasted management time, damaged relationships, lost productivity and legal fees.
- By way of comparator, the recent report from the Ministry of Justice states that during 2008/9 ADR was used by government departments in 314 cases, saving costs estimated at £90.2 million.
- Since 1990, our profession has contributed savings of £8.8 billion.

By way of a comparator to these figures, our audit results suggest that the aggregate value of the mediation profession in terms of total fee income is around £13.5 million.

Conclusion

Twenty years ago saw the inception of the English civil and commercial mediation field with the formation of both the ADR Group and CEDR. Today we have an emerging profession which not only makes a very significant contribution to the business economy in terms of cutting the cost of conflict, but is itself remarkably cost-effective in so doing.

We do, however, still need to get our own house in order. Support for the Civil Mediation Council is growing steadily, but still only two in five see it as the answer to their quest for further regulation - an outcome which only a very small majority favour in the first place.

We are also still a fragmented field, with a plethora of individual mediators and service provider organisations, very few of whom are satisfied with the volume of work they currently undertake. Many are striving to establish a place at a table dominated by relatively few.

It is, however, undeniable that significant progress has been made in the recent years since our last Audit. The commercial market is still growing steadily and there are encouraging signs of new areas of application, most notably in the workplace and employment fields.

Commercial mediation may not, therefore, yet be a mature profession, but it is coming of age and has an encouraging future - even if growing pains remain.

Graham Massie
11 May 2010