

The Fifth Mediation Audit

A survey of commercial mediator attitudes and experience

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Introduction

This marks the fifth 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, professional standards and regulation, and priorities for the field over the coming years.

The survey was undertaken using an internet-based questionnaire, which was open to all mediators in the United Kingdom, regardless of organisational affiliation. It was publicised by way of CEDR's website and direct e-mail to the mediator contacts both of CEDR and of other leading service providers and members of the Civil Mediation Council, in conjunction with which this Mediation 2012 Audit has been carried out.

The particular focus of this year's survey was to assess how the market and mediation attitudes have changed over the past two years. This year 238 mediators participated in the survey, a statistically significant sample. 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 from the mediators, and we have therefore only published those findings where there appears to be a statistically significant and interesting contrast between the views of mediators and those of lawyers.

It is important to emphasise that this is a survey of the civil and commercial mediation landscape, a field we have very loosely defined as encompassing any and all mediation activity that might reasonably fall within the ambit of the Civil Mediation Council. This reflects the background of the surveying organisation, CEDR, and the channels through which survey responses were canvassed.

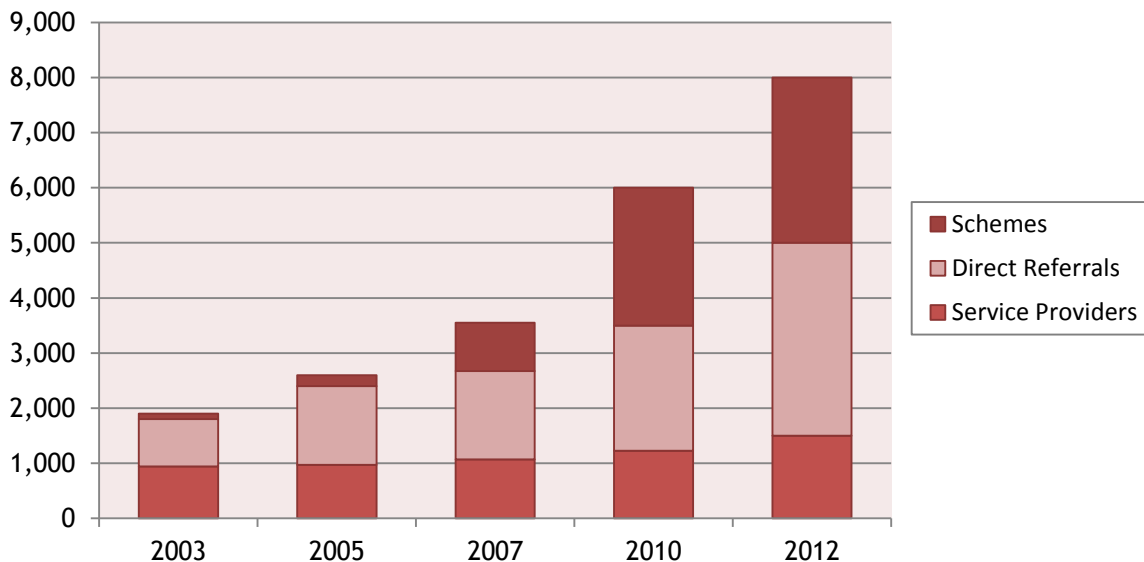
We do not, therefore, claim to cover either community or family mediation (although some of our respondents do report also being active in those fields).

Furthermore, we do not include the statutory ACAS service or the HMCS Small Claims Mediation Service, quite simply because the scale of their activities would each far outweigh the other findings of this survey.

The mediation marketplace

On the basis of mediators’ reported case loads, we can now estimate the current size of the civil and commercial mediation market as being in the order of 8,000 cases per annum. This represents a year-on-year increase of about 15% pa since our 2010 Audit.

The major contributor to this growth has been an almost 20% pa growth in ad hoc commercial case referrals to both individuals and providers. This sector represents about 60% of the total market. There has also been growth in workplace and other scheme activity, around 10% pa in total, but this has been slowed by the closure of the National Mediation Helpline (or more specifically by the discontinuance of any proactive marketing activity).



Ignoring schemes, which almost by definition operate through service provider organisations, we can see a continuation of the long-term trend towards commercial clients and advisers making direct referrals to their chosen mediators rather than working through providers. Our survey shows that 71% of ad hoc cases are now being handled on this basis (as compared to 65% in 2010, 60% in 2007, 55% in 2005 and 45% in 2003). This figure does, however, now have to be interpreted with some caution, as our survey also shows indicators of gravitation by some mediators back into self-organised groupings, and the distinction between making a direct referral and working through a provider is no longer as absolute as it once was.

As might be expected, direct referral activity is particularly prevalent amongst the most experienced mediator group, nearly three-quarters of whom obtained more than half of their work from direct referrals, with around 45% (2010: 40%) exceeding 80% direct referrals, and 25% (2010: 22%) claiming to be totally free of providers.

Finally, the market continues to be dominated by a select few, although the size of that group is steadily rising. A group of just over 100 individuals are involved in around 85% of all non-scheme commercial cases (2010: 90 individuals held 85%); and within this group, some 60 individuals are involved in 70% of all cases (2010: 50 individuals held 70%).

The mediators

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

- 52% Advanced mediators - who described themselves as “*reasonably*” or “*very*” experienced;
- 25% 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 very similar to that observed in previous Audits.

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 52% (2010: 56%) reporting undertaking more than 10 mediations a year.

Compared to our 2010 Audit respondents, the average female mediator, at 49, is just one year older, as is the average male mediator, at 56. We are, therefore, seeing a very modest impact from new, younger entrants into the field.

Continuing the pattern observed in previous Audits, there are small signs of increased female involvement in the field, with 22% of respondents being women (2010: 19%). However, this is all happening at the less experienced end of the profession - women now make up 30% of our Novice group (2010: 17%) and 28% of our Intermediate group (2010: 28%).

It is disappointing that the proportion of women in the Advanced group, which seemed to be increasing in 2010, has now stalled. This Advanced group are only one year older than the profession’s averages, but they are not a particularly diverse group, being predominantly male (82%), lawyers (70%) and white (96%). Each of these figures is unchanged from 2010.

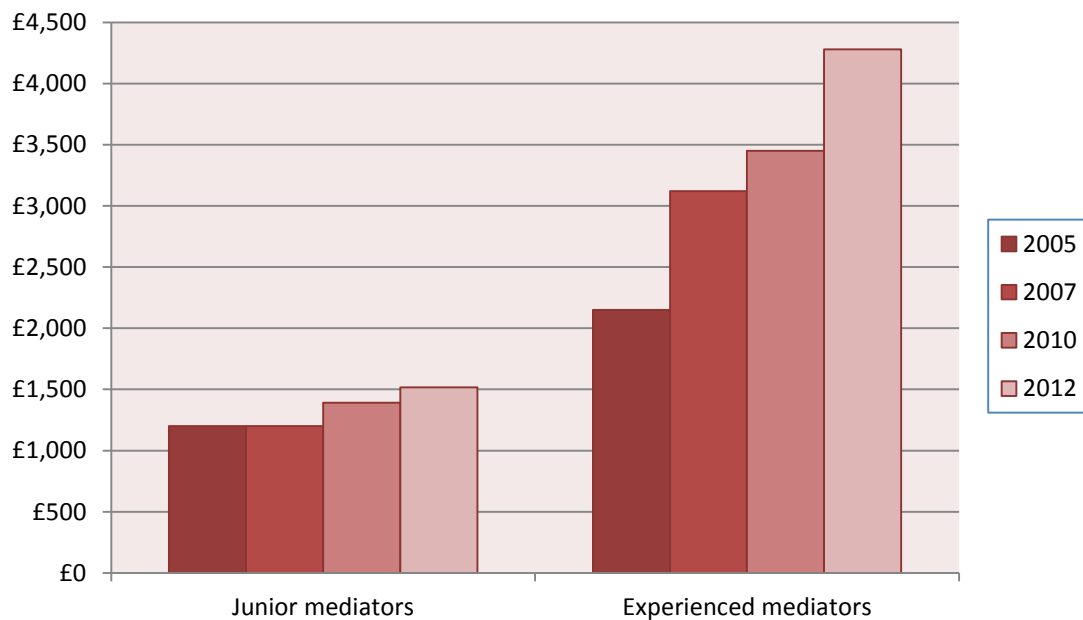
In terms of overall diversity, therefore, the mediator group still falls well short of our usual comparator, the legal profession, where 46% of practising solicitors are women with an average age of 38, compared to 44 for men, and almost 11% are drawn from ethnic minority groups. In contrast, we are a dozen years older on average, and still have only 22% female and 4% minority representation notwithstanding that the field continues to be dominated by the legal profession, with 62% being legally qualified, slightly up from the 60% 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 39% characterise themselves as “full-time” mediators, although this figure is up from the 37% in the 2010 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 £1,390 in 2010 to £1,517, an increase of 9.1% over a two year period.
- Average fees for more experienced mediators have risen from £3,450 in 2010 to £4,279 in 2012, an increase of 24.0%.



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:

	2012	2010	2007
Pro bono only	7.4%	10.3%	9.1%
Under £500	5.3%	5.8%	8.5%
£501 - £1,250	24.0%	22.4%	29.1%
£1,251 - £2,000	18.1%	19.2%	17.0%
£2,001 - £2,500	14.6%	10.9%	10.3%
£2,501 - £3,000	8.2%	7.7%	9.7%
£3,001 - £3,500	4.7%	9.0%	6.7%
£3,501 - £4,000	4.1%	4.5%	2.4%
£4,001 - £4,500	1.2%	1.3%	1.2%
£4,501 - £5,000	4.1%	5.1%	3.0%
£5,001 - £6,000	3.5%	2.6%	1.2%
£6,001 - £6,500	0.6%	-	1.8%
£6,501 - £7,000	1.8%	-	-
£7,001 - £7,500	-	0.6%	-
£7,501 - £8,000	0.6%	0.6%	-
£8,500 +	1.8%	-	-

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

- 10% of experienced mediators, each undertaking between 20 and 30 mediations a year, are earning around £90,000 pa (2010 - £73,000)
- 7% of experienced mediators, each undertaking between 30 to 50 mediations a year, are earning around £145,000 pa (2010 - £126,000)
- 15% of experienced mediators, each undertaking over 50 cases a year, are earning around £414,000 pa (2010 - £296,000).

Clearly the most successful mediators are benefitting not only from a significant increase in average rates but also from increased activity levels.

The most successful mediator we surveyed reported average earnings of over £8,500 per case on a workload of around 80 cases, giving an annual income of some £720,000. This is about 10% up on the highest earnings identified in the 2010 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	2012		2012	2010	2007
1	1	1	Professional reputation - experience/status	1	1	1
3	4	2	Availability	3	4	4
2	2	3	Professional background/qualifications	6	5	8
4	6	4	Sector experience	7	6	7
5	3	5	Recommendation - by provider	14	10	9
7	8	6	Fee levels	2	2	5
6	5	7	Professional reputation - mediation style	4	3	3
8	9	8	Recommendation - by lawyer in previous case	5	7	2
10	7	9	Repeat business - with lawyer	8	8	6
9	10	10	Location	9	12	12
13	15	11	Marketing activity (e.g. mailshots, website)	12	15	17
11	12	12	Recommendation - by client in previous case	10	9	10
15	17	13	PR activity (e.g. articles, speeches)	16	16	16

12	13	14	Professional reputation - settlement rate	13	11	13
16	11	15	Recommendation - by other mediators	17	17	15
17	14	16	Recommendation - by directories	15	14	14
14	16	17	Repeat business - with client	11	9	11

Within this ranking, “*professional reputation - experience/status*” was unsurprisingly the clear winner with both mediators and lawyers. Availability also appears to be becoming increasingly important.

Professional background and mediation style are also both relatively high, although mediators and lawyers continue to disagree as to which is the more important.

In terms of changes in attitudes between 2010 and 2112, mediators still seem to place great store on recommendations by providers, but these are clearly of diminishing significance to lawyers. Mediators also seem to be missing the importance which lawyers claim to place on fee levels (although this does beg the question of why, if fee levels are so significant, market rates have apparently moved so significantly in the past two years).

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 still 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 just over 70% of their cases settled on the day, with another 20% settling shortly thereafter so as to give an aggregate settlement rate of around 90%. This aggregate is almost identical to the performance reported in the 2010 Audit (75%: 14%), although there has been shift of around 5% away from settlement on the day.

For the first time this year, we asked mediators to provide a breakdown of the time they spent on a typical mediation.

Analysis of time on a typical mediation:

	Hours
Preparation	
Reading briefing materials	5.0
Client contact	2.1
Mediation	
Working with clients on the day	7.9
Post-mediation	
Follow-up / on-going involvement	1.8
Total	16.8

Although the average length of the mediation day, working with clients, was very consistent across the different experience levels, at just under 8 hours, the more experienced

mediators tend to spend less time in preparation and also less time in post-mediation follow-up. This means that the average advanced mediator spends nearly 3 hours less on each case than a less experienced individual, a result which is surprising given that we might assume that the more experienced mediators would typically be working on more complicated and higher value cases.

Of their total time, an average of 4.25 hours was unpaid, either because the mediator did not charge specifically for all of the hours incurred or because he/she was operating a fixed fee arrangement. As might be expected, less experienced mediators tend to write off more time (7.2 hours, or 38% of their total time, on average).

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

- 64% of lawyers and 59% of clients were rated as having performed quite well or very well
- 21% of lawyers and 24% of clients were rated as having performed adequately
- 15% of lawyers and 17% of clients were rated as performing less than adequately (with 5% of lawyers and 6% of clients rated as having been very poor).

These figures are all broadly consistent with those reported in our 2010 Audit, the main variation being that there has been a 3-4% shift in lawyer standards, with more now positively rated and an equivalent reduction in the under-performers. This shift is consistent with anecdotal evidence from our survey that one of the main changes for the better that mediators have seen in recent years has been a gradual improvement in lawyers' familiarity with the process.

These findings were validated by our separate survey of lawyer perceptions. Lawyers rated 52% of their counterparts, and 56% of clients, as having performed well or very well in mediation, with 17% of lawyers and 15% of clients performing poorly. Although interestingly these lawyers' views are far more critical than they were in 2010 when, for example, they rated 59% of their counterparts and 71% of clients as having performed well. The reason for this change is unclear, although it may be consistent with the observation from mediators, when asked what has changed for the worse in the past two years, that they perceive lawyers as adopting more tactical approaches to mediation).

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

- 69% of mediators were reported as performing quite well or very well, with 48% in the highest category. It is interesting to note that, although the proportion in the highest category has remained constant, the group of those performing quite well or very well as steadily declined from 80% in 2007 to 76% in 2010 and now to 69%.
- 22% were reported as performing adequately.
- 9% performed less than adequately, of which 4% were rated as being very poor.

To repeat an observation that has been made in each of the previous Audit reports, it is disappointing that there still appears to be a rump of around 15% of lawyers and 9% of mediators whose performance is reported as less than adequate.

Standards and regulation

Mediators strongly (66%) favoured the civil justice system taking a more directive approach towards the promotion of mediation, of whom 10% went so far as to support a fully mandatory system. In contrast 27% favoured the status quo, whilst 7% favoured a more relaxed approach.

These survey findings are broadly similar to those reported in all four of our previous Audits in that there is a clear consensus around a toughening up of the present system. There has, however, been a rise from 3% to 10% in support for a fully mandatory system.

Lawyers' views are broadly consistent with those of the mediators, with a strong preference for the status quo and/or a slight toughening up of the regime. They are however, less radical in their views, and, for the second Audit running, none of the lawyers favoured a fully mandatory system.

Support for a single standard of basic professional training has been broadly unchanged since 2007 but, having declined in 2010, there are now some signs of a revival of interest in having a single regulatory body for setting and monitoring professional standards:

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

	2012	2010	2007	2005	2003
Yes	52.1%	52.8%	52.3%	61.7%	71.5%
No	32.1%	28.8%	31.3%	38.3%	28.5%
Don't know	13.9%	13.6%	15.6%	-	-
Don't care	1.8%	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?

	2012	2010	2007	2005	2003
Yes	61.7%	54.9%	58.5%	70.9%	76.4%
No	28.4%	26.2%	30.1%	29.1%	23.6%
Don't know	9.9%	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.

Lawyers show a broadly similar level of support (56%) for a single training standard, although interestingly 21% indicate that they "*don't care*". There is, however, even stronger support from lawyers for a single regulatory body (73%).

Amongst mediators who responded “Yes” to each of the above questions, the Civil Mediation Council retains its position as the most popular body amongst existing candidates to fill each of these roles, although support is still modest at 30% (2010: 27%) for the training role and 32% (2010: 34%) for the professional standards role. There is, however, still a general interest in a new body or bodies taking on both of these roles (41% and 46% respectively).

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 new UK, European or worldwide bodies, the overwhelming preference was for a UK body, with 74% (2010: 69%) support for the training standards role, and 81% (2010: 81%) for a regulatory function.
- There was stronger support for an association of mediators rather than a regulatory body in relation to the setting of training standards (48%: 38%) but for the first time a regulatory body was favoured for the monitoring of practice standards (60%: 29% as compared to 50%: 47% in 2010).

Support for the International Mediation Institute has diminished to only 1% for each function (compared to around 4% in 2010).

Amongst lawyers, CEDR remains the most favoured for setting training standards (at 29% as against 19% for the Civil Mediation Council) whilst there is overwhelming support for a new body to fulfil the regulatory role (56% as against just 16% support for the Civil Mediation Council).

Some uncertainty about the role of the Civil Mediation Council also came through when we asked mediators for their views as to what should be its main priorities for the next two years. There was a clear consensus that more should be done to promote mediation take-up, but beyond that views were very mixed. Regulation of the field was clearly a topic of interest to many, but respondents were equally divided between those wanting the Council to step up and take on a regulatory role, and those arguing strongly that it should campaign against regulation. Its constitutional arrangements also come under criticism from some mediators who regard it as dominated by the larger providers and training institutions.

Future aspirations

Looking to the future, around 20% of mediators see themselves as doing either the same number or fewer mediations in five years’ time. (This compares to less than 10% in 2010).

38% (2010 - 42%) of mediators expect to be mediating more, although this would still not be their main occupation; whilst a further 28% (2010: 30%) expect to have become full-time mediators. Only 3% expect to have developed a more specialist mediation practice.

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 and/or the established mediators “hogging all the work” or providers

running a “closed shop”. 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 proactive marketing on their part to raise their profile, but others argued that the providers, and most particularly the training businesses, should provide them with more assistance to get their careers started.

Growth areas

We asked mediators to identify which types of dispute or sector of business would see the most growth in mediation usage over the next two years. No doubt reflecting recently publicity, Employment/Workplace, Small Claims and Family were the most frequently mentioned.

The list of other areas mentioned was headed by General Commercial, Personal Injury and the Public Sector, and also included: Banking; Competition; Construction; Healthcare; Human Rights; Insolvency; Insurance; International; IP; Landlord/Tenant; Maritime; Professional Negligence and Property.

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 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. If, however, the effect of such cases is excluded, the value of cases mediated each year is approximately £7.5 billion (2010: £5.1 billion).
- Since 1990, effectively the launch point of civil and commercial mediation with England & Wales, the total value of mediated cases is approaching £50 billion.
- By achieving earlier resolution of cases that would otherwise have proceeded through litigation, the commercial mediation profession this year will save business around £2 billion a year in wasted management time, damaged relationships, lost productivity and legal fees.
- Since 1990, our profession has contributed savings of £12.5 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 £20 million.

Conclusion

Civil and commercial mediation is now an established field 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.

Furthermore, there are clear signs that demand for mediators' services continues to grow, albeit that demand is largely captured by a core group of established names, with very little evidence of diversification or an influx of new talent.

Clearly, some of the first generation of mediators are now doing very well for themselves. However, rather than being seen as a natural development in a maturing profession, this too has become a cause of resentment for those who are dissatisfied with the volume of work they currently undertake.

Our own teaching would suggest that we should focus on working together to expand the size of the pie, rather than fight over our respective market shares, but this has so far proven difficult to achieve as the field is still very fragmented, with a plethora of individual mediators and service provider organisations. We are also fragmented in terms of our diverse views as to the future direction and governance of our profession.

The one area in which there does seem to be consistency is in the model of service delivery for higher value commercial disputes. Whether delivered by an individual mediator or a provider, the business model of a single day of mediation still predominates, particularly amongst the more experienced mediators. The good news is that the approach seems to work, as overall settlement rates remain unchanged; the risk, however, is that innovation and adaptation to client needs is lost and we fall into the mediocrity of commoditisation, with a limited group of individuals from very similar professional and personal backgrounds, offering a largely homogeneous service.

Graham Massie
15 May 2012

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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