

The Third Mediation Audit

A survey of mediator attitudes
undertaken in connection
with The Third European
Mediation Congress

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This marks the third 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 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 and lawyer contacts both of CEDR and of other leading service providers and members of the Civil Mediation Council.

This year there were 227 mediators and 124 lawyers who participated in the survey, a statistically significant sample. As in any survey, not all participants answered every question.

The survey highlights many areas from the previous two surveys while incorporating some new questions suggested by past readers.

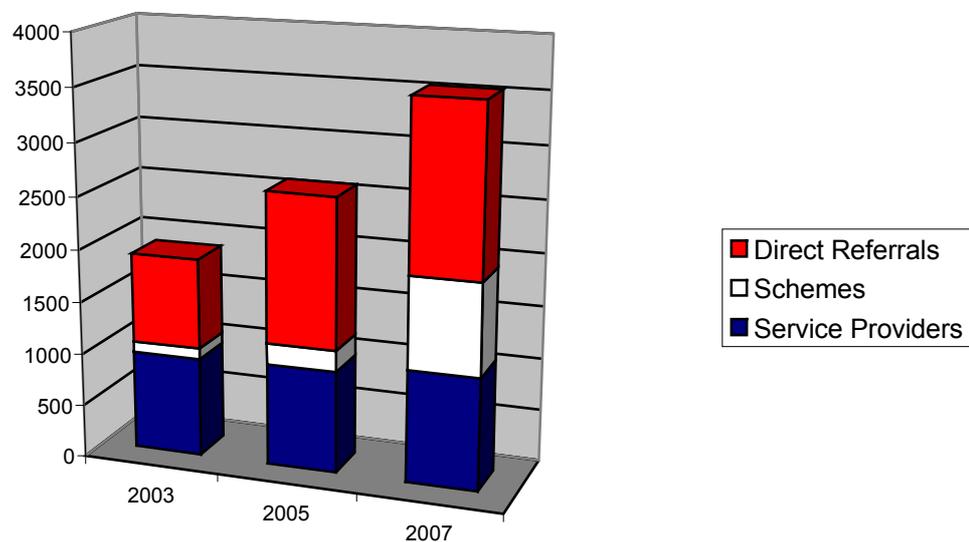
The particular focus of this year's survey was to assess how the market and mediation attitudes have changed over the past two years.

The mediation marketplace

We have found for the first time evidence of 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 such as the employment schemes now operated by many major employers. Collectively these schemes now constitute around 25% of the total market.

These schemes generally operate through service provider organisations. However if their impact is excluded, we can see that the trend towards clients making direct referrals to mediators rather than working through providers continues apace, with just over 60% of ad hoc cases now being handled on this basis (as compared to 55% in 2005 and 45% in 2003). As might be expected, direct referral activity is particularly prevalent amongst the most experienced mediator group, 58% of whom obtained more than half of their work from direct referrals, with around one-third exceeding 80% direct referrals, and 18% 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 3,400 - 3,700 cases per annum, roughly 33% up on our 2005 estimate of 2,500 - 2,700. Of this growth rate, we attribute around 20% to the growth in schemes and 13% to the growth in ad hoc referrals.



This market continues to be dominated by a select few. There is a group of around 80 individuals who collectively are involved in nearly 80% of all non-scheme cases (2005: 65 individuals held 70%); and within this group, some 35 individuals are involved in 57% of all cases (2005: 50%).

Our survey responses confirm also that service providers 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 organisations were named by respondents as being organisations they regularly mediate with.

The mediators

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

- c50% Advanced mediators - who described themselves as “*reasonably*” or “*very*” experienced;
- c27% Intermediates - who categorised their lead mediator experience as “*some*” or “*limited*”; and
- c23% Novices - who were generally accredited but had no experience as a lead mediator.

This overall profile is broadly consistent with that observed in 2005 and 2003.

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 55% (2005: 35%) reporting undertaking more than 10 mediations a year.

The average mediator is two years older than when we last surveyed in 2005, suggesting that we are looking largely at the same group of individuals, with any fresh “young blood” yet to make any significant impact on the group as a whole.

With women at 49, and men at 54, both genders are around seven years older than the respective averages for law firm partners. The more experienced mediator group are a couple of years older than these averages; they are also predominantly male (90%) and white (96%).

The mediator group as a whole shows slightly more diversity, with 18% female representation, but this still falls well short of our usual comparator, the legal profession, where 42% of practising solicitors are women.

And the field continues to be dominated by the legal profession, with 57% being legally qualified, the same as in our last survey. There are, however, some early signs that this position may change in the future, as the less experienced and younger mediators appear to be a more diverse group, with only around a third legally qualified².

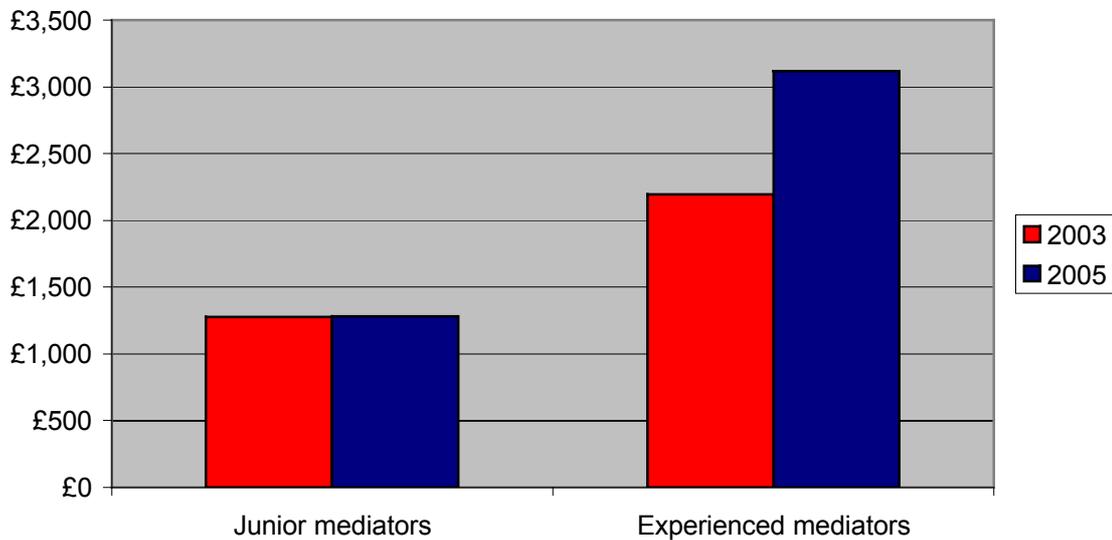
¹ By which we mean the five other providers most prominent within the Civil Mediation Council, namely the Academy of Experts, ADR Chambers, ADR Group, Chartered Institute of Arbitrators and In Place of Strife/ACI.

² Although a less positive interpretation is there is a causative effect - that non-legally qualified mediators tend to be less experienced because, as a group, they find it harder to secure appointments where the decision-makers are largely legal advisers.

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, and only 31% characterise themselves as “full-time” mediators.

Nevertheless, for some, mediation is becoming a very lucrative field. Although average fees of the less experienced mediator group for a one day mediation have remained virtually unchanged since our 2005 audit, at around £1,200, the average fees for more experienced mediators have risen from £2,196 in 2005 to £3,120 - an increase of 42% over a two year period.



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

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

- 4% of experienced mediators, each undertaking between 20 and 30 mediations a year, are earning around £53,000pa (2005 - £43,000)
- 5% of experienced mediators, each undertaking between 30 to 50 mediations a year, are earning around £121,000pa (2005 - £102,000)
- 13% of experienced mediators, each undertaking over 50 cases a year, are earning around £282,000pa (2005 - £177,000). (This income increase of almost 60% reflects not only the above mentioned 42% increase in fee rates but also increased activity levels amongst this group - in effect, the busiest mediators have become around 12% busier over the past two years).

Average earnings for a one-day mediation:

| | |
|-----------------|-------|
| Pro bono only | 9.1% |
| Under £500 | 8.5% |
| £501 - £1,250 | 29.1% |
| £1,251 - £2,000 | 17.0% |
| £2,001 - £2,500 | 10.3% |
| £2,501 - £3,000 | 9.7% |
| £3,001 - £3,500 | 6.7% |
| £3,501 - £4,000 | 2.4% |
| £4,001 - £4,500 | 1.2% |
| £4,501 - £5,000 | 3.0% |
| £5,001 - £5,500 | - |
| £5,501 - £6,000 | 1.2% |
| £6,000 + | 1.8% |

The most successful mediator we surveyed reported average earnings of over £6,500 on a caseload of nearly 100 cases, giving an annual income of around £650,000.

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

Within this ranking, “professional reputation - experience/status” was unsurprisingly the clear winner with both mediators and lawyers, attracting nearly twice as many votes as the second and third factors listed. The bottom seven items on the list all attracted very low levels of support.

Whilst there is a broad consensus as to which items come at the very top and bottom of the list, it is interesting to note the differing emphases placed by mediators and lawyers on the balance of influence of mediator background versus mediator style. Colleague recommendations and prior experience also seem to play a greater part in lawyer decisions than many mediators appreciate.

Performance in mediation

Mediators report that around 75% of their cases settled on the day, with another 13% settling shortly thereafter so as to give an aggregate settlement rate of 88%. This is slightly lower than the aggregate 93% rate reported in the 2005 Audit, although we noted at the time that that figure seemed surprisingly high compared to previously published service providers' rates that are generally in the 80-85% range.

There was no significant difference in aggregate settlement rates across the three differing groups of mediator experience, although less experienced mediators were around 8% less successful on the day (but then made up this shortfall with more follow-up settlements).

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

- 64% of lawyers and 63% of clients were rated as having performed quite well or very well (with 41% of lawyers and 36% of clients rated in the highest category)
- 17% of lawyers and 20% of clients were rated as having performed adequately
- 19% of lawyers and 17% of clients were rated as performing less than adequately (with 7% of lawyers and 6% of clients rated as having been very poor).

These findings were validated by our separate survey of lawyer perceptions. Lawyers rated 52% of their counterparts, and 62% of clients, as having performed well or very well in mediation, with 17% of lawyers and 10% of clients performing poorly.

Compared to the findings of our 2005 Audit, a performance improvement amongst lawyers is revealed by a 6% shift from “adequate” to “quite well”, and a similar increase in the proportion of those rated “very well”. There remains, however, a disappointing rump of almost 20% whose performance is less than adequate, a figure that remains unchanged since 2005.

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

- 80% of mediators were reported as performing quite well or very well, with 56% in the highest category. Both of these figures are slightly higher than the 2005 findings of 78% and 48% respectively.
- 14% were reported as performing adequately
- 6% performed less than adequately, of which 2% was rated as being very poor. This marks a slight improvement on 2005's figures of 8% and 2% respectively.

Ethical challenges

For the first time, the Audit contained a series of questions designed to gather views about ethical challenges or other issues that might be emerging within the mediation profession. Specifically respondents were invited to identify any ethical challenges they had identified in three areas: practices adopted by mediators; business models adopted by individual mediators; and business models adopted by service providers.

It should be emphasised that the level of responses to these survey questions was reassuringly low, with only some 12% of all respondents raising any issues at all. Nevertheless, it is important that such matters raised are properly aired.

The main challenges raised by mediators in relation to the practices adopted by mediators dealt with:

- Confidentiality - a number of mediators (and lawyers) raised doubts as to whether confidentiality was always being scrupulously observed, particularly in the final push for settlement. One lawyer reported *“the failure by one or two experienced mediators to fail to observe confidentiality in private sessions - they were either careless or thought they could do the deal (wrongly)”*.
- Evaluation - there were some concerns, particularly in time-limited matters or with unrepresented clients, that certain mediators might adopt an inappropriately evaluative stance. As one respondent put it, *“is it appropriate for mediators to rubbish both parties positions in order to frighten them into settlement?”* One lawyer reported a situation in which *“I was convinced the mediator wanted to tick ‘success’ for them, at any cost to the parties”*.
- Party conduct - a range of concerns were expressed around the problems of what a mediator should do when they perceive a party to be seeking to abuse the process, for example by seeking to manipulate the mediator, mislead the other side or even to pursue an illegal outcome (money laundering was mentioned as a particular area of concern).

Looking specifically at any issues raised by the business models adopted by individual mediators, the main challenges were identified as being:

- Relationships - There was some perception by both mediators and lawyers that an individual’s over-dependence on repeat referrals from a small number of law firms might prejudice neutrality. One mediator commented that *“we must all guard against repeat business diminishing impartiality”*, and suggested that *“we should develop a personal practice of disclosing all prior contacts with parties and lawyers”*.
- Over-trading - As one respondent wrote: *“it is difficult to believe that mediators who are full time are able to give as much to each mediation as their part time colleagues. It is a tiring process and mediators needs to limit self interest in maximising their mediation work with the need to give each one due care and*

attention". Other respondents referred specifically to the undesirability of mediators undertaking "back-to-back" mediations on successive days.

Finally, in relation to challenges arising from the business models adopted by service providers, the key issues were:

- Mediator selection - By far the most common complaint from mediators was that service providers "tend to favour employees or people who have been associated with them for a long time rather than new talent".
- Fee charging/splits - Some mediators also raised concerns about a lack of transparency about fee arrangements, whilst others objected to "charging the client way over the fee that the mediator gets".
- Non-profit issues - Mediators raised a number of concerns, presumably directed towards CEDR, about the tensions between organisations' non-profit status and their activities as commercial mediation service providers.

Standards and regulation

Mediators strongly (67.5%) favoured the civil justice system taking a more directive approach towards the promotion of mediation, although only 10.3% went so far as to support a fully mandatory system. In contrast 26.2% favoured the status quo, whilst only 6.3% favoured a more relaxed approach. These survey findings are remarkably close to those reported in both 2005 and 2003.

Lawyers also support change, albeit less strongly - 56% favour a more directive approach (as compared to only 41% in 2005), with 8% favouring a fully mandatory system.

However, mediators continue to be opposed to a Mediation Act (60% vs 17% with 23% undecided), a strength of feeling which has hardened since 2005 (when only 46% were opposed, 23% in favour, and 31% undecided).

Although both ideas continue to attract majority approval, support for either a single standard of basic professional training and/or a single regulatory body for setting and monitoring professional standards also seems to be waning:

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

| | 2007 | 2005 | 2003 |
|------------|-------|-------|-------|
| Yes | 52.3% | 61.7% | 71.5% |
| No | 31.3% | 38.3% | 28.5% |
| Don't know | 15.6% | - | - |
| Don't care | 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?

| | 2007 | 2005 | 2003 |
|------------|-------|-------|-------|
| Yes | 58.5% | 70.9% | 76.4% |
| No | 30.1% | 29.1% | 23.6% |
| Don't know | 10.6% | - | - |
| Don't care | 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 - 10% 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, CEDR remained the most popular body amongst existing candidates to fill each of these roles (with 29% support for the training role and 21% for the professional standards role). The Civil Mediation Council was the only other body to receive significant support (11% and 16%).

However, there was a clear preference (52% in each instance) for a new body to fill the roles. 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 (72% for training standards; 68% for regulation) was for a UK body.
- Amongst mediators, the idea of an association of mediators attracted 55% support as the preferred setter of single training standard but only 46% support for a regulatory role. Paradoxically, however, those favouring a UK only route preferred to go with an association of mediators for both functions.
- In contrast, around 71% of lawyers preferred a regulatory body for both functions, expressing a two-to-one preference for such a body to be UK based.

Future aspirations

Looking to the future, 39% of mediators expect to be mediating more, although this would still not be their main occupation (2005: 47%; 2003: 61%), and a further 13% expect to have developed a more specialist mediation practice.

A further 33% expect to be, or have become, full-time mediators (2005: 34%; 2003: 23%). (If we assume “full-time” to mean undertaking at least 30 mediations a year, this statistic would require a trebling of the size of the group presently operating at this level).

As to potential obstacles or challenges in their way, respondents were equally balanced between those identifying market conditions (and particularly the underlying level of demand for mediation services) as being most problematic, and those who 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.

Finally, it is noticeable that mediators continue to see the growth in the field largely in terms of their own personal roles as mediators. Notwithstanding that around 57% of respondents were lawyers, their reported involvement in cases as mediators out-numbered their involvement as legal advisers by a factor of six to one. Further, when asked about their future aspirations, not one said that they hoped that their main area of increased involvement would be to see themselves acting more frequently as a client representative in mediations.

Priorities for the future

When we asked mediators for their views as to the main priorities both for the mediation community and for CEDR over the next two years, the overwhelming response was a plea for further promotional work in order to grow the market and thus overcome some of the obstacles outlined above. 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 greater infrastructure within the field. Some expressed this in terms of the need still to establish mediation “*as a profession*”, whilst others referred to the need for more co-operation amongst leading bodies, both to develop and maintain standards and to act as a counterweight to any move towards external regulation.

Similar themes came over in the priorities for CEDR. In addition, many less experienced mediators pressed for a widening of CEDR’s panel and/or initiatives to create further opportunities for new mediators to gain practical experience.

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 for the first time to publish some data 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 a single £1.5 billion corporate transaction mediated by CEDR in 2006). If, however, the effect of such cases is excluded, the value of cases mediated each year is approximately £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 £23.5 billion.

- By achieving earlier resolution of cases that would otherwise have proceeded through litigation, the commercial mediation profession this year will save business in excess of £1 billion a year in wasted management time, damaged relationships, lost productivity and legal fees.
- Since 1990, our profession has contributed savings of £6.3 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 £8.2 million.

Conclusion

Clearly the commercial mediation field has already made a very significant contribution to our society, and the early pioneers should rightly be proud of that achievement.

We are, however, 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. There are also many who are still looking to establish a place at a table dominated by relatively few.

If, therefore, there is one flag around which our merging profession might rally, surely it lies in the recognition that we still need to work more closely together to grow awareness of our expertise and greater recognition of the value that can be delivered through mediation.

Graham Massie
8 November 2007

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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