



# Improving diversity in commercial mediation

Executive Summary Report



# Acknowledgements

In the course of this project, CEDR has consulted with a large group of mediators, lawyers and experts in diversity. We would like to thank the following for their contribution. We would also like to thank our internal team who have worked on this project.

Heather Allen  
Sheila Bates  
Stephen Boyd  
Joti Chana  
Mair Coombes - Davies  
Abigail Day  
Karen Flanagan  
Tracey Fox  
Nathan Goldblatt  
Neil Goodrum  
William Ingram Hill  
Jessica Kitsell  
Alexandra Marks  
Graham Massie  
Fionnuala McCredie  
Helen Prosser  
Liz Rivers  
Chula Rupasinha  
Richard Schaverien  
Joe Shammah  
Felicity Steadman  
Peter Thompson

## **CEDR Internal Group**

Farad Asghari  
Ana Virginia Bauder  
Isabel Castellanos  
Joanna Cavell  
Eileen Carroll QC (Hon)  
Karl Mackie CBE  
Susanne Schuler  
James South  
Dalitso Tembo  
Frederick Way  
Nermine Zeyn

## **Report Authors**

Isabel Castellanos  
Susanne Schuler  
James South  
Frederick Way

## **Images**

Isabel Castellanos

## **Special acknowledgement**

Farad Asghari  
Ana Virginia Bauder

# Introduction

2019 marks 30 years of commercial mediation in the United Kingdom. In that time commercial mediation has become a mainstay of dispute resolution practice. Despite this richness in the use of mediation, there is, however, not the same richness of diversity in those who are mediating.

## Why Diversity matters?

Diversity is a key component in business success. Research from McKinsey in 2018 shows that diverse teams increase business performance and have more accurate group thinking.

Within commercial mediation a lack of diversity is negative for clients and mediators. For clients, there is potentially a lack of reflection of the clients' own personal characteristics, less ability to see a range of mediator styles and a lesser diversity of life experience of mediators working with parties. For the mediation profession, a lack of diversity blocks women, people from BAME backgrounds and younger mediators from gaining work and negatively affects all mediators through the creation of stereotypes as to who is a mediator.

## Diversity in the Commercial Mediation Profession

The commercial mediation profession is lacking in diversity. There are significantly fewer women (33.6%) working in commercial mediation than men (66.4%). The proportion of BAME commercial mediators is lower than the general population and comparable professions, such as law. Commercial mediators are also generally older than other professions, with the majority (77.5%) of active mediators being over the age of 50.

Commercial mediation as a profession is stereotypically older, white and male. As mediation progresses to its next 30 years, we want there to be no stereotype as to who a mediator is.



## Scope and Methodology

The aim of the Diversity project is to look at improving diversity within civil and commercial mediation in England and Wales, with regard specifically to Gender, Age and Race/Ethnic origin.

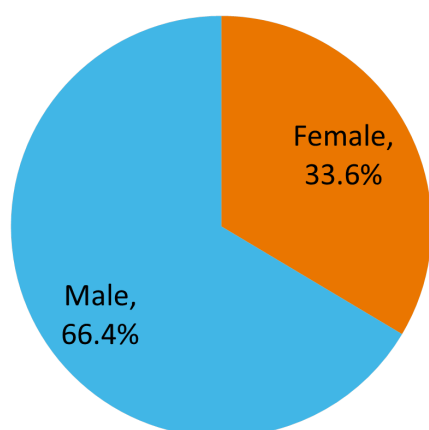
Over the last year, CEDR has conducted field and desktop research and engaged focus groups of mediators, users and professionals to engage with this issue.

# The State of Play - Current Statistics on Diversity in Commercial Mediation

As the CEDR Mediation Audit is the only survey of commercial mediators in the UK, it is the primary data set for this research. This data was cross compared with general population statistics, data from comparable professions and CEDR's own internal data. Our review of the CEDR Mediation Audit 2018 of 290 practising civil and commercial mediators revealed the following trends.

## Gender

Of Mediators who are actively working (defined as conducting more than one case a year) in the field of civil and commercial mediation, 33.6% are women. Of mediators conducting more than 10 mediations a year, 30.4% are women.



From our research there are particularly focused attrition points for women in training to become commercial mediators, being selected for mediator panels (the average commercial panel has 28.7% female mediators) and stereotyping by case type.

## Age

Commercial Mediators are also significantly older than workers in other fields. 77.5% of commercial mediators are over the age of 50 and 42.4% are over the age of 60. This contrasts with the demographics of those gaining accreditation. Whilst 56% of those training are under the age of 50, only 22.5% of practising mediators are under 50.

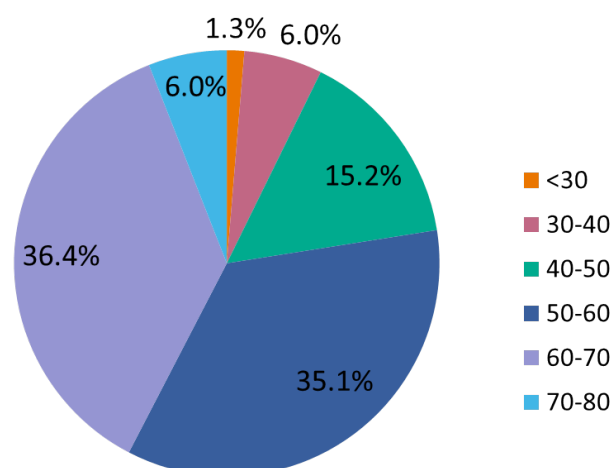
From our research, we see major attrition points in mediators under 50 in getting selected to join panels and in getting selected for mediations.

## Race

92.7% of civil and commercial mediators are white, compared with 86% of the general UK population. There is a significant decrease in Black and Asian commercial mediators in the UK, compared with the general population.

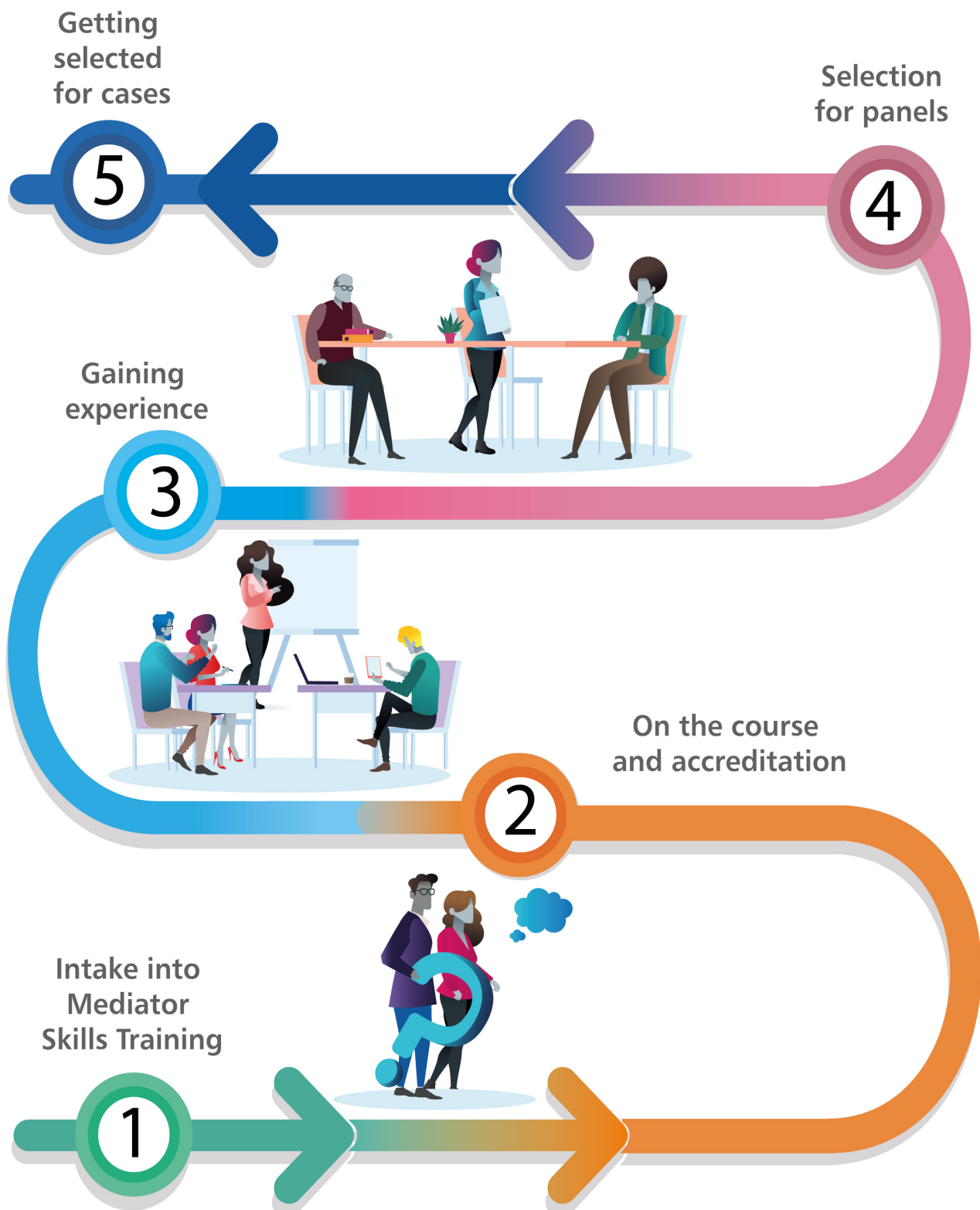


From our research, there are potential attrition points for race and ethnicity from individuals of BAME backgrounds deciding to become commercial mediators, through to selection for panels and potentially mediator selection



# The Mediator Progression Path – A Process for Understanding Barriers to Commercial Mediation

In order to understand the specific barriers that can be faced in a mediator being selected to get commercial cases, we looked at the overall progression path of a mediator from deciding to become a mediator at all, through to getting regularly selected as a mediator by parties for commercial work. For each major stage of the pathway, with the aid of our focus groups and secondary research of other professions, we identified potential barriers to progression and proposed possible recommendations for improvement.



# Barriers and Recommendations at each stage of the Mediator Progression Path



## Stage 1: Choosing to become a mediator

---

### **Barriers and Recommendations**

The first stage of the mediator progression path is in an individual deciding to become a commercial mediator at all. In order to make that decision a potential mediator needs to be aware of commercial mediation, consider themselves as able to succeed and have the means and time to train.

The biggest factor in determining how an individual perceives their own capabilities of success is the extent to which they can see role models with similar characteristics to themselves succeeding on the course and as professional mediators. Research shows that without such role models an individual perceives a challenge, such as becoming a mediator and finding work, as harder and less suited to them than if such a role model existed. For example, due to the lack of BAME mediators working in the commercial

mediation space, this may have a knock-on effect to potential BAME mediators coming through who may perceive the field as unwelcoming or particularly challenging for them.

By contrast, the existence of a role model (and ideally more than one) who has not only achieved success but also has a clear path and route for how they achieved such success can be beneficial to an individual in making a goal seem more realistic and achievable and of improving their own self-belief. Other factors that are relevant at this stage for improving diversity include access to financial support to attend mediator training courses and providing flexible training options (e.g. modular courses).

- There should be a greater use and promotion of BAME, Female and Younger commercial mediator role models by providers to attract new mediators to the profession.
- Training providers should review their promotional materials to encourage diversity. Staff who speak to prospective applicants should be trained to help all applicants to understand how they can overcome barriers to becoming a mediator.
- Training providers should consider giving financial support to mediators from under-represented backgrounds to encourage them to undertake the course.



## Stage 2: On the mediation course

### **Barriers and Recommendations**

The second stage relates to an individual's experiences on the mediator accreditation course and their chances of accreditation.

The culture of any mediator training course and perceived biases are critical for determining an individual's success on the course and continued belief in their ability to become a commercial mediator.

We assessed the extent to which there is a culture of commercial mediation and if it can be perceived as a "male" type of work. The main area of secondary research in relation to this is social role theory. This suggests that whilst men's roles are usually characterised by pragmatic skills such as being masterful, goal oriented, instrumental and independent, women's roles are characterised by altruistic attributes such as being cooperative, friendly, generous and educational.

The question we need to explore further is, if and how commercial mediator skills courses influence the perception of a stereotype of a mediator through the language used on the course, e.g. perceived male words ("commercially minded", "problem solver" etc.) Using male names and pronouns for the mediator, the choice of case studies or references trainers make in the context of commercial mediation which could support a certain perception. It is important that when assessments are carried out they do not reinforce these stereotypes or make unconscious bias associations that a particular characteristic such as "commanding authority" has an implicit gendered, race or age characteristic.

- All training materials, role-plays and assessment criteria should be reviewed for unconscious bias. Materials should be created and used with the principles of diversity and inclusion.
- Trainers, coaches and assessors should receive training in unconscious bias and diversity and inclusion.
- Training providers should review the ethos and culture of their courses to ensure that they do not disadvantage any group.
- Training providers should provide follow on courses and additional modules (for example, law for non-lawyer mediators) to support new mediators.



## Stage 3: Getting early experience

### **Barriers and Recommendations**

The third stage of the mediator's progression path is the most individual and ambiguous stage. Whilst there is support and guidance in becoming a mediator and during the training and the accreditation process; and once a mediator joins a panel and starts receiving regular work, they also receive clear feedback, the stage in between of gaining experience and overcoming the first hurdles is largely down to the individual.

What makes this stage particularly challenging is that the individual needs to both build a network of contacts whilst also gaining experience and a reputation.

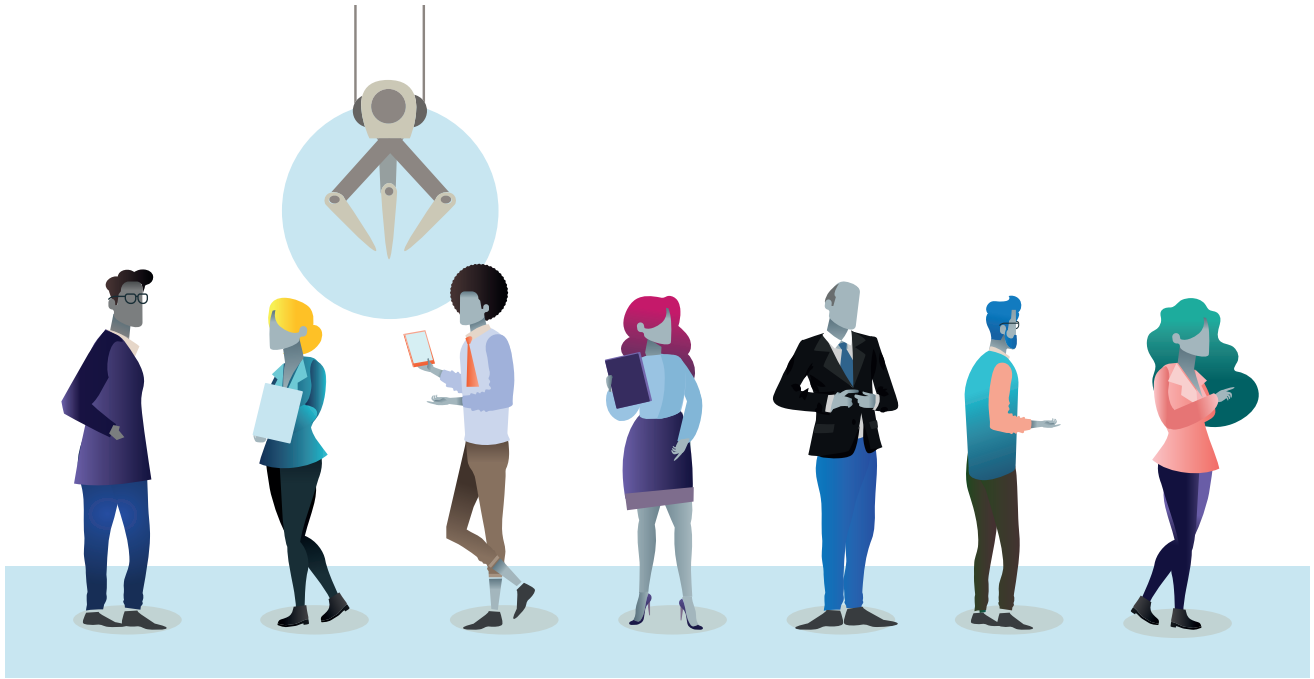
This is clearly much easier for those who already have such networks from previous practice and who are also able to gain experience by being available for every opportunity, including at very short notice.

Those who are already part of various networks are likely to be older professionals and they are less likely to be younger mediators, women or BAME professionals. The fact that mediators will often have to take a large amount of unpaid work experience sessions (such as shadowing mediators) also disadvantages those who cannot commit to unpaid work.

Those with more established careers are both able to use their networks to get opportunities quicker and are able to take time off more easily due to greater flexibility and control of their professional time. Therefore thought needs to be given in both how to support new mediators in finding networks and also being able to shadow and gain experience.

- Providers and clients should increase the number of networks specifically for younger mediators, BAME mediators and female mediators.
- Mediator Observerships, shadowing, and work experience support should be assigned on a random basis.
- Experienced mediators should be encouraged to take new mediators from pools of new mediators as assistants or for work experience, rather than only take those they know.
- Providers should consider having pathways to panels, to enable mediators to progress from accreditation through to selection.





## Stage 4: Selection for panels

### **Barriers and Recommendations**

In order to get commercial mediation work, mediators will often want to join professional panels of mediators, for example the CEDR UK panel. The issue with panels from a diversity and inclusion perspective is often that it's unclear how an individual would progress from being an accredited mediator, through to joining a panel.

In panels with criteria for selection, often it can be based on unconscious bias or indirect disadvantage due to the criteria used for selection. For example, criteria for selection may include a mediator's accreditation status, their mediation experience, their professional background and external reputation; their field of expertise and their availability and effectiveness to take work.

For other panels, there may be no clear selection criteria at all and it may be on a "who knows who" basis. These factors are likely to unconsciously

disadvantage BAME mediators, younger mediators and women due to their proportionally lower chance of satisfying these criteria, or having the appropriate networks.

For example, if a mediation panel is looking for someone with a 15 years' experience as a partner at a law firm, that person is naturally unlikely to be a younger mediator but they are also less likely to be from a BAME background or a woman due to the fact that these individuals for lack of diversity in other professions are less likely to have these qualities. Overly rigid panel criteria therefore can disadvantage mediators from diverse backgrounds from becoming mediators.

- Panels should have clear transparent criteria for selection and a clear process available to all applicants.
- Selection for panels should be carried out by a diverse group who have received unconscious bias training.
- The criteria for selection for panels should be reviewed to ensure that they are inclusive. The fundamental selection points should be mediator experience and ability.
- Panels should consider having tiered panels of more senior and junior mediators to allow entry into the profession from newer mediators.
- Feedback should be given to all applicants who apply for panels.



## Stage 5: Getting selected for cases

### **Barriers and Recommendations**

Actual case selection can be one of the greatest areas for diversity barriers.

Whilst in scheme work and fixed fee mediation, parties usually do not get to select their mediator, in the vast majority of commercial work, the parties have a very firm control over who the mediator is. In approximately 50% of cases the mediator is selected directly by the lawyers on previous use; 25% through consultation between the lawyers and 25% through selection from recommendations by a provider.

This can lead to a stagnation in terms of selection and the clear possibility of bias or preference for a certain mediator. Even in situations where the provider is involved, there is still the possibility for unconscious bias. In looking at who gets selected to be a mediator, we can see that parties will often use loaded terms.

One lawyer told us how they look for someone with “grey hair and maturity” to be the mediator.

Another told us about the “risk factor” of picking a mediator and that they look to lessen this by picking someone who is as similar to the most senior lawyer working on the case as possible. A third mentioned how they have a tendency to look for an “elder statesman” when selecting a mediator.

The selection process therefore, frequently reinforces the diversity biases already inherent in the profession. By contrast, there is an increase in clients who are actively looking for diversity in mediation selection and who will ask for suggestions of mediators from different backgrounds.

- Mediation providers and clients who have lists of preferred mediators should review these lists and panels for diversity and inclusion annually.
- When presenting lists of mediators for clients to select, providers should endeavour to provide diverse lists. Clients should also request diverse lists from mediation providers and reject non-diverse lists.
- Mediator CVs and documents to clients should be reviewed for unconscious bias in presentation or stereotyping.
- Client advisers should be trained in unconscious bias and how to deal with this, including from clients.
- Clients should be encouraged to use different mediators and fixed price mediation.

# Conclusion and Next Steps

## Conclusion

From our report, we can see that there is significant room for improvement within the mediation profession for it to become reflective of the community that we aim to serve. As the world becomes more varied, so too should we.

As mediators, we know that every conflict is a challenge and an opportunity. We hope now to take this learning and work with the entire community of parties, mediators and the wider public to understand what this means for the profession and how we can implement the recommendations of this project.

Over the next 12 months, the CEDR Foundation intends to reach out and discuss the barriers to diversity and potential recommendations with law firms, mediators and other mediation providers. CEDR also intends to look at putting into place in its own practice, the recommendations within this report.

As we approach the 30th anniversary of mediation in the UK, we look forward to seeing it grow and develop.

## Find out more

This report is an Executive Summary. The Full CEDR Foundation Report on Improving Diversity in Commercial Mediation can be accessed at [www.cedr.com/foundation](http://www.cedr.com/foundation)

## How to get in touch

If you would like to discuss a specific issue or recommendations raised in this report, please contact the Head of the CEDR Foundation Frederick Way ([foundation@cedr.com](mailto:foundation@cedr.com)).

You can follow CEDR more widely with regards to diversity on website and social media.



[www.cedr.com](http://www.cedr.com)



[@cedrsays](https://twitter.com/cedrsays)



[cedrtalks](https://www.youtube.com/channel/UCedrtalks)



+44 (0) 207 536 6000



EC4Y 1EU

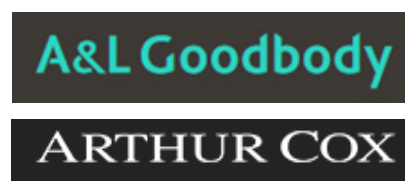


[info@cedr.com](mailto:info@cedr.com)

The CEDR Foundation is supported by its members and CEDR services who make these projects possible.

#### Our CEDR Foundation Members

ALLEN & OVERY



SLAUGHTER  
AND MAY

WILLIAM FRY



WHITE  
& CASE

M&S  
EST. 1884

STEPHENSON  
HARWOOD