

The Seventh Mediation Audit

A survey of commercial mediator attitudes and experience

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Introduction

This marks the seventh occasion on which CEDR (The Centre for Effective Disputes Resolution) 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.

The primary focus of the survey is to assess how the market and mediation attitudes have changed over the past two years. This year 319 responses were included, a statistically significant sample that represents over 50% of the individual membership of the Civil Mediation Council. 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. We plan to release these findings separately but where relevant we have cross-compared the responses from the lawyers' survey with that of the mediators' survey.

Further feedback on respondents' views about mediation techniques which did or did not work will be published shortly in a separate report dealing specifically with professional skills issues.

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.

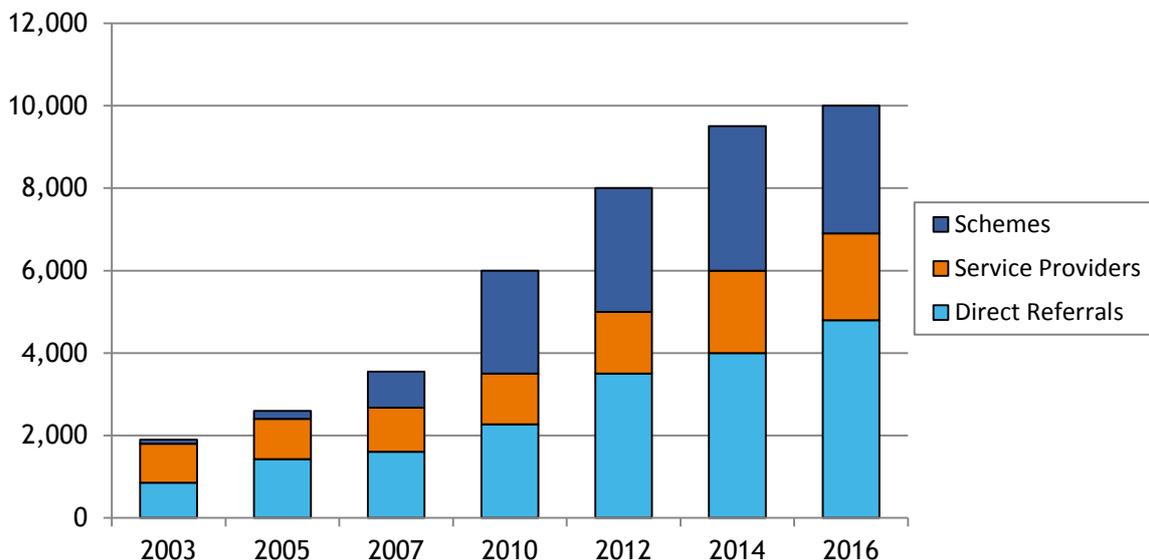
We do not, therefore, claim to cover either community or family mediation (although some of our respondents do report also being active in those fields).

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 caseloads, we estimate that the current size of the civil and commercial mediation market in England & Wales is in the order of 10,000 cases per annum. This is just 5.2% more than the 9,500 cases we estimated in 2014, suggesting that there has a slowing down of growth in the overall marketplace over the past two years.

This conclusion may not, however, reflect the experience of many mediators or mediation service providers. This is because it appears that the shape of the market is undergoing some change – the distinction between direct referrals and service providers is starting to disappear as some mediators move into self-organised groupings for marketing purposes; and the number of stand-alone schemes is diminishing as they become absorbed by providers. Clearly, therefore, there are winners and losers – when the Civil Mediation Council's own survey asked its provider members whether mediations were harder to come by, 42% reported that conditions were harder, whilst 33% reported an improvement.



The pattern of commercial clients and advisers making referrals directly to their chosen mediators rather than seeking nominations from providers continues. Our latest survey shows that 70% of ad hoc cases are being handled on this basis (as compared to 66% in 2014; 71% in 2012, 65% in 2010, 60% in 2007, 55% in 2005 and 45% in 2003).

The age of the service provider is not over, however. Our parallel survey of lawyers indicates that 45% of cases are still arranged through providers (even if they are then working with their chosen mediator). Furthermore, of the case activity reported by the CMC's members in its own survey, 86% was delivered by seven large providers/groupings of over 100 mediators. These organisations may not adopt the same operating model, but their dominance in the market confirms the power of collective marketing as well as the challenges faced by the lone professional.

Finally, the market is still dominated by a select few, with a group of around 145 individuals involved in around 85% of all non-scheme commercial cases (i.e. an average of around 40 cases each). The size of this group has grown from 130 in 2014, suggesting that more competition is developing, albeit quite slowly.

The mediators

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

- 54% Advanced mediators – who described themselves as “*reasonably*” or “*very*” experienced;
- 22% Intermediates – who categorised their lead mediator experience as “*some*” or “*limited*”; and
- 24% 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. Advanced mediators reported more extensive practices but, for most in this group, commercial mediation remains a part-time profession, with only 40% (2014: 47%; 2012: 39%; 2010: 37%) characterising themselves as “full-time” mediators. 56% (2014: 46%) report undertaking less than 10 mediations a year.

The age of the average female mediator, at 50, is the same as was reported in our 2014 Audit, whilst the average male mediator remains at 57. We are, therefore, seeing a very modest impact from new, younger entrants into the field. The Advanced mediator group are only a year or so older than the average.

There are continuing signs of increased female involvement in the field, with 35% of respondents being women (2014: 26%; 2012: 22%; 2010: 19%). If we take the Novice group as being representative of people looking to enter the profession, the proportion of women has risen markedly from 30% in 2014 to 42%. There are also some suggestions that women already in the profession are progressing more quickly – they now represent 29% of the Advanced group of mediators (2014: 25%; 2012: 18%).

Other aspects of diversity remain a concern, with 92% of respondents categorising themselves as being white. Although this figure appears to have improved slightly since the 2014 Audit reported 96% white participation, the detailed analysis suggests that this change has arisen from the inclusion of a number of non-UK based respondents rather than any underlying broadening of the UK marketplace.

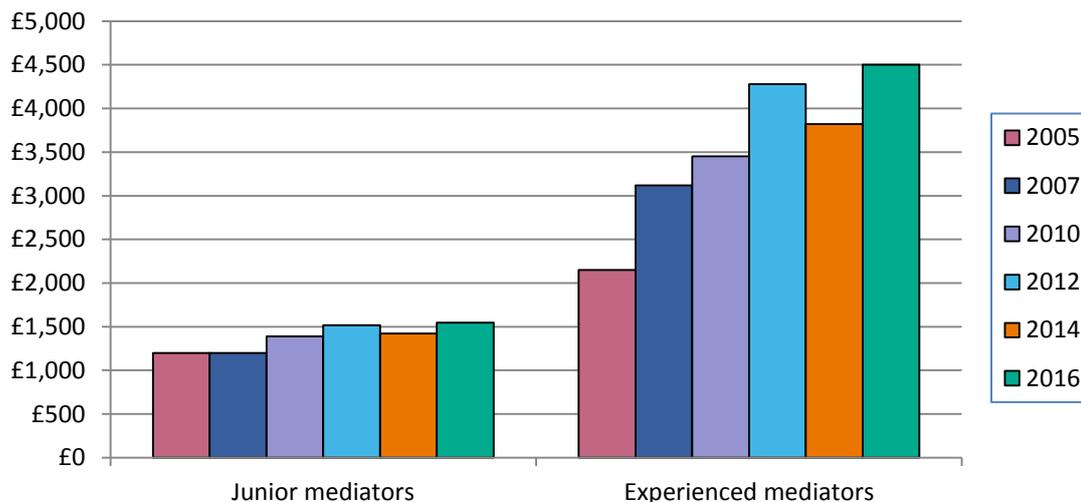
The trend away from lawyer mediators is, however, continuing, and for the first time less than half (43%) of our respondents were legally qualified. This is a continuation of the trend identified in previous Audits (2014: 52%; 2012: 62%). Whilst the proportion of lawyers within the Advanced group remains higher, at 57%, this too has fallen significant in recent years (2014: 60%; 2012: 70%).

The data suggests that this decline in the proportion of lawyer mediators is attributable to increased engagement of other fields rather than any reduction of interest from the legal profession. With each successive Audit the list of respondents’ job titles reveals the increasing professional diversity of the field, with new entrants reflecting areas of progress in mediation applications (e.g. workplace, tax, medical, education). There are also signs, particularly amongst more recent entrants to the field, of increased interest in mediation amongst general managers and businesspeople.

Mediator earnings

Although the 2014 Audit reported, for the first time ever, a decrease in average fee rates, that position has reversed this time, and again we see quite significant increases:

- Average fees of the less experienced mediator group for a one-day mediation have risen by 8.6% over the past two years to £1,545 (2014: £1,422; 2012: £1,517; 2010: £1,390).
- Average fees for more experienced mediators have risen by an even larger amount, 17.8%, to £4,500 (2014: £3,820; 2012: £4,279; 2010: £3,450).



As usual, these averages conceal a wide variation in individual rates:

Average earnings for a one-day mediation:

	2016	2014	2012	2010	2007
Pro bono only	10.4%	8.1%	7.4%	10.3%	9.1%
Under £500	6.3%	4.0%	5.3%	5.8%	8.5%
£501 - £1,250	17.4%	22.1%	24.0%	22.4%	29.1%
£1,251 - £2,000	17.4%	16.8%	18.1%	19.2%	17.0%
£2,001 - £2,500	8.3%	14.8%	14.6%	10.9%	10.3%
£2,501 - £3,000	9.7%	12.1%	8.2%	7.7%	9.7%
£3,001 - £3,500	8.3%	7.3%	4.7%	9.0%	6.7%
£3,501 - £4,000	4.9%	3.4%	4.1%	4.5%	2.4%
£4,001 - £4,500	3.5%	2.0%	1.2%	1.3%	1.2%
£4,501 - £5,000	2.1%	2.0%	4.1%	5.1%	3.0%
£5,501 - £6,000	4.2%	3.4%	3.5%	2.6%	1.2%
£6,001 - £6,500	1.4%	2.0%	0.6%	-	1.8%
£6,501 - £7,000	-	0.7%	1.8%	-	-
£7,001 - £7,500	1.4%	-	-	0.6%	-
£7,501 - £8,000	0.7%	-	0.6%	0.6%	-
£8,000 - £8,500	1.4%	-	-	-	-
£8,500 +	2.8%	1.3%	1.8%	-	-

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

- o Those undertaking between 20 and 30 mediations a year are earning between £22,000 and £81,000 with an average of £55,000 (2014: £70,000; 2012: £90,000; 2010: £73,000). The decline in average earnings in this group result from an increasing proportion of their workload being on less remunerative scheme cases.
- o Those mediators undertaking between 30 to 50 mediations a year are earning between £90,000 and £330,000, with an average of £175,000 (2014: £128,000; 2012: £145,000; 2010: £126,000)
- o Those undertaking over 50 cases a year are earning are earning between £100,000 and £775,000, with an average of £400,000 pa (2014: £370,000; 2012: £414,000; 2010: £296,000).

The most successful mediator we surveyed reported average earnings of over £8,500 per case on a workload of around 90 cases, giving an annual income of some £775,000.

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				
07	10	12	14	16		16	14	12	10	07
1	1	1	1	1	Professional reputation – experience/status	1	3	1	1	1
2	2	3	3	2	Professional background/qualifications	5	4	6	5	8
4	6	4	6	3	Sector experience	3	6	7	6	7
3	4	2	2	4	Availability	6	1	3	4	4
6	5	7	7	5	Professional reputation – mediation style	2	2	4	3	3
8	9	8	4	6	Recommendation – by lawyer in previous case	8	7	5	7	2
7	8	6	5	7	Fee levels	4	5	2	2	5
10	7	9	8	8	Repeat business – with lawyer	7	9	8	8	6
5	3	5	9	9	Recommendation – by provider	13	10	14	10	9
9	10	10	10	10	Location	12	8	9	12	12
12	13	14	11	11	Professional reputation – settlement rate	9	12	13	11	13
13	15	11	12	12	Marketing activity (e.g. mailshots, website)	16	17	12	15	17
17	14	16	17	13	Recommendation – by directories	14	16	15	14	14
11	12	12	14	14	Recommendation – by client in previous case	10	13	10	9	10
16	11	15	16	15	Recommendation – by other mediators	15	14	17	17	15
15	17	13	13	16	PR activity (e.g. articles, speeches)	17	15	16	16	16
14	16	17	15	17	Repeat business – with client	11	11	11	9	11

Within this ranking, “professional reputation – experience/status” has long been the clear winner with both mediators and lawyers. However it is interesting that lawyers place far more emphasis on “professional reputation – mediation style” than do mediators. It is also interesting that “availability” has fallen back as a significant factor – this may be another sign that mediators are not as busy as they used to be.

We also asked mediators how often they emphasised their profession when promoting themselves; how often was it a significant factor in their securing appointments; and, finally, how often did it turn out to be actually relevant and needed in the subsequent mediation. As the table below indicates, there were marked differences in the respective proportions of lawyer and non-lawyer mediators reporting these situations as occurring “almost always” or “frequently”:

	Lawyers		Others	
	2016	2014	2016	2014
Used in self-promotion	49%	43%	58%	64%
Influential in getting work	65%	65%	55%	55%
Relevant in practice	67%	62%	50%	43%

The gap between the extent to which lawyer and non-lawyer mediators market their professional background seems to be decreasing, but it is still the non-lawyer mediators who are working harder to promote their professional background, albeit that this does not seem to be working for them as well as it does for the lawyers. In the meantime, the debate about the respective merits of different backgrounds continues without any sign of likely resolution – although perhaps a consensus will in due course emerge around the views of one respondent who commented that: *“It is important to emphasise that I am an experienced mediator, not a lawyer who has grafted on a skill and not undertaken the full transition to a new approach and a new profession”*.

Performance in mediation

Although the overall success rate of mediation remains constant, with an aggregate settlement rate of around 86%, there is a variation from previous years’ audits in how those settlements are achieved. The proportion of cases that achieve settlement on the day of mediation has fallen from 75% to 67%, but this decrease has been offset by an increase in the proportion of cases that settle shortly after mediation, rising from 11% to 19%.

When linked to the evidence that mediations are taking longer, this change in the pattern of settlement rate may well suggest that cases are becoming harder, with parties needing longer time to reach agreement.

We asked mediators to provide a breakdown of the number of hours they spent on a typical mediation. This revealed that the average time spent has increased by over 2 hours, or 13%, since the 2014 Audit.

	2016	2014
Preparation		
Reading briefing materials	5.8	4.7
Client contact	2.3	2.2
Mediation		
Working with clients on the day	8.2	7.8
Post-mediation		
Follow-up / on-going involvement	2.3	1.7
Total	18.6	16.4

The average advanced mediator continues to spend 3 - 4 hours less on each case than a less experienced individual, with the shortfall being caused by their spending less time in preparation and also less time in post-mediation follow-up.

A significant proportion of mediator time continues to be unremunerated – amongst experienced mediators, an average of around 5½ hours (2014: 4 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; less experienced mediators wrote off even more time (over 6 hours, or 34% of their total time, on average).

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

- 69% of lawyers (2014: 71%; 2012: 64%) and 64% (2014: 62%; 2012: 59%) of clients were rated as having performed quite well or very well
- 19% (2014: 15%; 2012: 21%) of lawyers and 21% (2014: 23%; 2012: 24%) of clients were rated as having performed adequately
- 12% (2014: 14%; 2012: 15%) of lawyers and 15% (2014: 15%; 2012: 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 findings are broadly consistent with the findings of our separate survey of lawyer perceptions. Lawyers rated 60% (2014: 54%; 2012: 52%) of their counterparts, and 70% (2014: 70%; 2012: 56%) of clients, as having performed well or very well in mediation, with 13% (2014: 20%; 2012: 17%) of lawyers and just 4% (2014: 15%; 2012: 15%) of clients performing poorly. Thus, both surveys confirm the continuing trend of lawyers becoming more familiar with the process and getting better at working within it, even if there remains a group of under 15% who are still lagging behind.

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

- 81% (2014: 82%; 2012: 69%) of mediators were reported as performing quite well or very well, with 60% (2014: 53%; 2012: 48%) in the highest category.
- 14% (2014: 12%; 2012: 22%) were reported as performing adequately.
- 5% (2014: 6%; 2012: 9%) performed less than adequately, of which 1% (2014: 2%; 2012: 4%) were rated as being very poor.

Amongst the examples of poor mediator practice that lawyers highlighted, the following reflect recurring themes:

- *“A well-known mediator acted in a mediation for one of my clients against a large opponent (who chose him). He came across as being on their side”.*
- *“Acted as a messenger - just interested in shuttling between the parties making settlement offers.”*
- *“Letting previous professional background influence their approach to the mediation - seeking to try or argue a case with one team rather than explore and identify issues”*

In order to try to obtain further insights into the challenges that mediators encounter when working with parties and their advisers, we asked about the frequency with which they encountered particular behaviours within client negotiation teams:

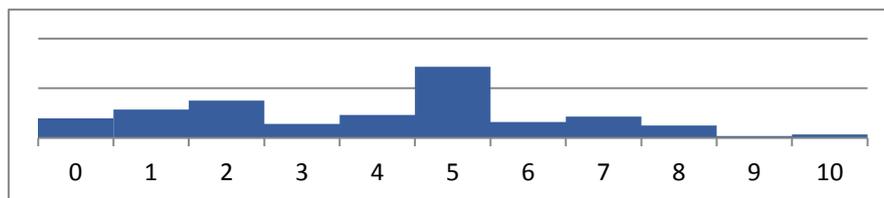
	Frequently or almost always
Over-reliance on advisers	48%
Group think	41%
Avoidance	24%
Inter-personal conflict within team	14%
Disagreement about strategy	7%
Poor negotiation strategy	3%

As for more positive behaviours, mediators reported encountering effective leadership of client negotiation team on 40% of occasions, and good negotiation strategies on just 24%.

Finally we asked mediators about the approach that they adopted within mediation. There has been a long-running discussion in the field about the respective merits of facilitative and evaluative approaches, but we wanted to find out what is happening in practice.

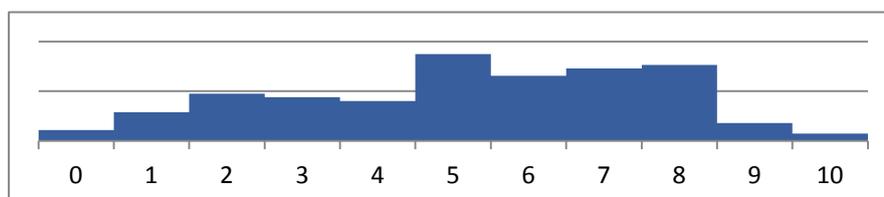
Firstly we asked mediators about their personal philosophy for mediation. As might be expected given the nature of most mediator skills training, respondents showed a marked preference towards the lower end of the spectrum (on the basis that a score of 0 means fully facilitative, 10 means fully evaluative and 5 is 50/50).

Personal philosophy of mediation



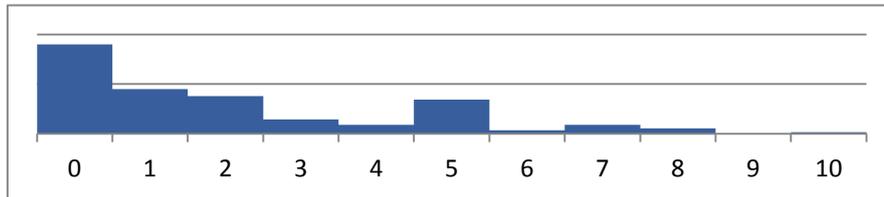
However, this did not always match with where mediators believe that parties and their advisers expect them to be (based on what is said during mediations) – clearly they are looking for a more evaluative approach.

Parties' expectations

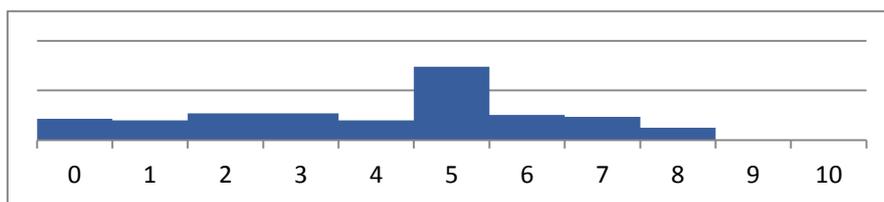


We then asked mediators for more details about the approaches they adopted at different stages of the mediation process.

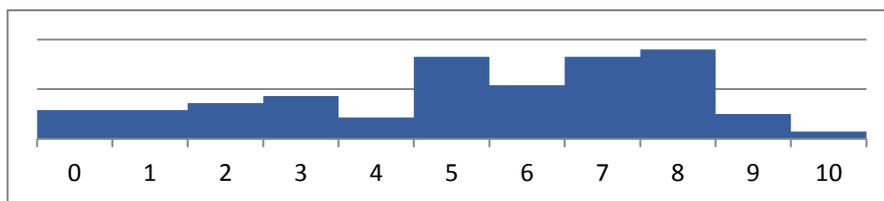
First phase of mediation – when you are uncovering information



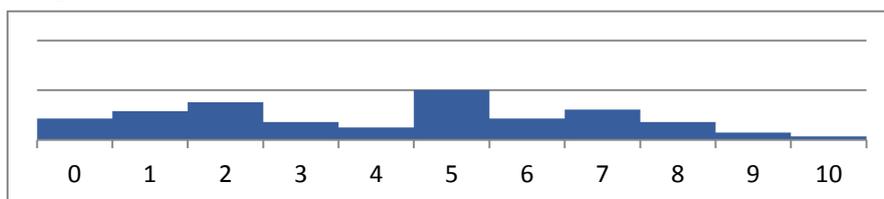
Trying to get negotiations moving



When everything is stuck



Closing the deal



Arguably this sort of pattern is what one might expect – mediators trained in a facilitative doctrine tend to favour that approach and start out using it, but many (although clearly not all) veer towards more evaluative strategies when the going gets tough.

Further analysis on this topic will be provided in a subsequent report. Particular questions still to be addressed include (a) does a mediator’s preferred approach vary according to their level of experience; (b) is there any correlation between mediator approach and settlement rates; and (c) are lawyer mediators more, or less, evaluative than non-lawyer mediators. These questions, along with feedback on respondents’ views about mediation techniques which did or did not work will be published shortly in a separate report dealing specifically with professional skills issues.

Standards and regulation

We asked both mediators and lawyers about the Jackson reforms and whether they had had any impact on either the number of cases coming to mediation or the ease/difficulty of settling cases at mediation.

- (a). What impact have the Jackson reforms had on the number of cases coming to mediation?

	Mediators		Lawyers	
	2016	2014	2016	2014
Decrease	6%	12%	7%	5%
No difference / too early to tell	54%	70%	50%	70%
Increase	41%	18%	43%	25%

- (b). What impact have the Jackson reforms had on the ease/difficulty of settling cases at mediation?

	Mediators		Lawyers	
	2016	2014	2016	2014
Harder	13%	9%	3%	3%
No difference / too early to tell	58%	73%	73%	79%
Easier	29%	18%	24%	17%

So whereas respondents were largely sitting on the fence two years ago – and most still are – those who are prepared to express a view are tending to give the Jackson reforms a positive assessment, although it is clear that there are still mixed views about the double-edged sword of the costs provisions.

As for mediators' views on what should be the main priorities of the Civil Mediation Council for the next two years, there were some critical comments about the CMC but a clear consensus is emerging around the notion of the CMC as a professional body whose primary role is work with governments, clients and advisers to increase the take-up of mediation. However, many are critical about the extent of the CMC's present marketing efforts.

There seems little support for detailed regulation of mediation practice, but some believe that more proactive promotion of the significance of Registered Mediator status would provide reassurance to government and the public; others are concerned that uniform standards for training and accreditation need to be introduced as a means of avoiding a proliferation of training providers.

Lawyers' views on the priorities for the CMC largely mirrored those of mediators in that they still see a significant need for further promotion of the benefits of mediation. A number of lawyers also mentioned the need to do further work with the judiciary in particular.



Future aspirations

Looking to the future, 33% (2014: 32%; 2012: 38%) of mediators expect to be mediating more, although this would still not be their main occupation; whilst a further 29% (2014: 32%; 2012: 28%) expect to have become full-time mediators. Only 8% (2014: 7%; 2012: 3%) expect to have developed a more specialist mediation practice.

As to potential obstacles or challenges in their way, the individual who commented that *"I would love to mediate but don't have any opportunity"* captured the sentiments of many – respondents remain deterred by what they see as a combination of an insufficient number of mediation opportunities and an over-supply of aspiring mediators seeking to break into a marketplace that remains dominated by a limited number of established players.

It seems that the field is, therefore, likely to remain one in which there are a considerable number of part-time practitioners. However, one lawyer sounds a note of caution: *"The number of people out there who are "playing at mediation" - a hobby alongside their real job - is the biggest risk factor in relation to the credibility of our profession. It is very difficult to succeed at being a litigator 98% of the time and a mediator 2% of the time"*.

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. Many felt that the mainstream areas of general commercial disputes still had a lot of growth potential, but Employment/Workplace, Professional Negligence and Personal Injury were the most frequently mentioned sectors. Family mediation was also identified as a potential growth area.

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 can 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 £10.5 billion (2014: £9 billion).
- Since 1990, effectively the launch point of civil and commercial mediation with England & Wales, the total value of mediated cases is approaching £85 billion.
- By achieving earlier resolution of cases that would otherwise have proceeded through litigation, the commercial mediation profession this year will save business around £2.8 billion a year in wasted management time, damaged relationships, lost productivity and legal fees.
- Since 1990, our profession has contributed savings of £22.6 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 £26.5 million.



Conclusion

Although the findings of this latest CEDR Mediation Audit may lack the spectacular growth rates of previous years, there is a consistent message coming through in the data, and reinforced by the feedback from lawyers, namely that commercial mediation is firmly established in the dispute resolution landscape.

We are, however, still a very young profession. We face many of the practical realities that confront other professions, notably that our pyramid has a broad base and steep slopes to climb, with only a small proportion getting to the very top. The supply of willing and available mediators still outweighs the level of demand for our services, but we still see many situations where parties would have benefitted from more effective, and earlier, mediation intervention; and when we do get involved the benefits are usually clear for all to see.

Many of our structures are hardly designed to assist individual advancement as mediation is essentially a solo profession in which we need to market ourselves as individuals; but collectively we are looking for the Civil Mediation Council and others to take the lead in growing the market for the benefit of all. Perhaps, however, there is more that we aspiring mediators should do to assist the cause – to repeat a thought from the very first Mediation Audit in 2002, if every mediator could generate just one additional mediation opportunity from his/her day-to-day workload, the size of the market would double overnight.

We are still debating the merits of practice standards and regulation, but clearly many mediators see this as an integral part of growing the field. As with other new markets there is a concern that new opportunities attract opportunists, and there is, therefore, an emerging sense of the need to move forward with common minimum standards for training which would at least serve as a barrier to exclude the under-trained venturers. We should not, however, lose sight of the need also to raise our game at the top of the profession – there are signs in these Audit results that mediations are becoming harder, something which should not be surprising given that lawyers' negotiation skills are getting better. After all, no-one is going to pay us to push at an open door.

Graham Massie
CEDR Director
11 May 2016

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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