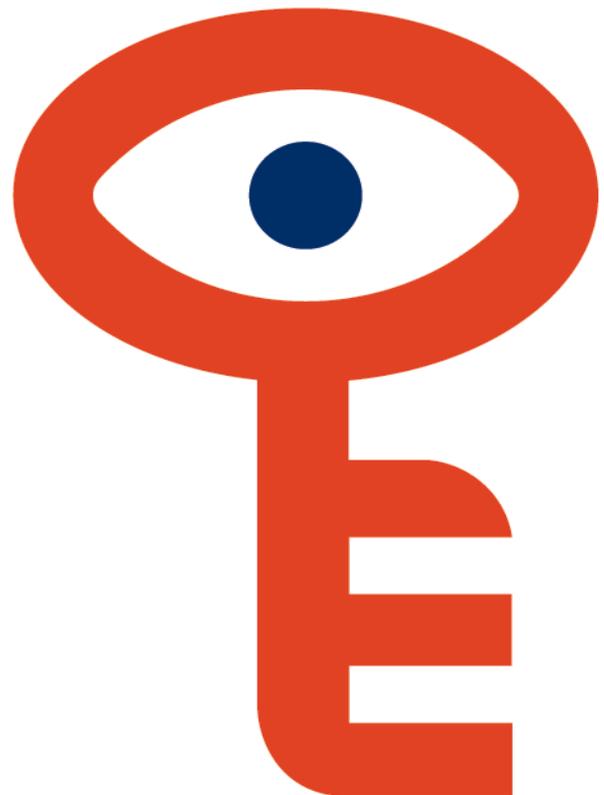


The Sixth Mediation Audit

A survey of commercial mediator attitudes and experience

22 May 2014

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Introduction

This marks the sixth 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 2014 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 295 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. 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.

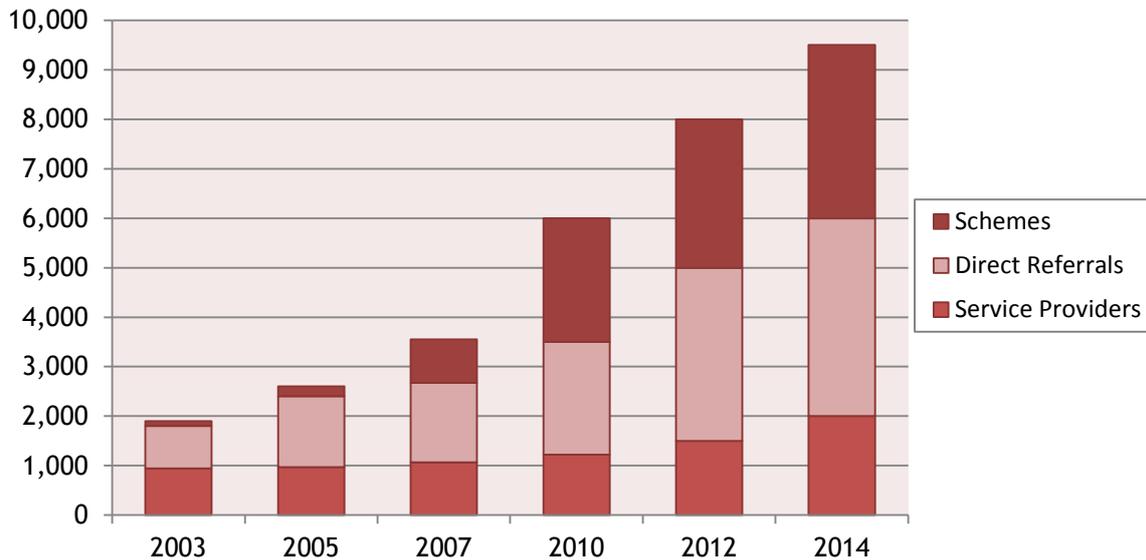
It is important to emphasise that this is a survey of the civil and commercial mediation landscape, a field we have very loosely defined as encompassing any and all mediation activity that might reasonably fall within the ambit of the Civil Mediation Council. This reflects the background of the surveying 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 9,500 cases per annum. This represents a year-on-year increase of about 9% pa since our 2012 Audit, which is less than we have seen in previous Audits, suggesting that the pace of progress has slowed in recent years.



There seems also to have been a halt in long-term trend towards commercial clients and advisers making referrals directly to their chosen mediators rather than working through providers. Our latest survey shows that 66% of ad hoc cases are being handled on this basis (as compared to 71% in 2012, 65% in 2010, 60% in 2007, 55% in 2005 and 45% in 2003).

This change may also reflect the gravitation by some mediators back into self-organised groupings for marketing purposes, with the distinction between making a direct referral and working through a provider 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 51% (2012: 45%) exceeding 80% direct referrals, and 26% (2012: 25%) claiming to be totally free of providers.

The market is still dominated by a select few, although the size of that group is steadily rising. A group of around 130 individuals are involved in around 85% of all non-scheme commercial cases; the size of this group has grown by 30% since 2012 when just 100 individuals held 85% of the market. As indicated below, however, this increased competition seems to have had an adverse impact on individual income levels.

The mediators

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

- 56% Advanced mediators - who described themselves as “*reasonably*” or “*very*” experienced;
- 22% Intermediates - who categorised their lead mediator experience as “*some*” or “*limited*”; and
- 22% 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 54% (2012: 52%) reporting undertaking more than 10 mediations a year.

Compared to our 2012 Audit respondents, the average female mediator, at 50 is just one year older, as is the average male mediator, 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 small signs of increased female involvement in the field, with 26% of respondents being women (2012: 22%; 2010: 19%). If we take the Novice group as being representative of people looking to enter the profession, the proportion of women remains constant at around 30%. There are, however, some suggestions that women already in the profession are progressing more quickly - they now represent 25% of the Advanced group of mediators (2012: 18%).

Other aspects of diversity remain a concern, with 96% categorising themselves as being white (unchanged since 2010). There are, however, signs that more non-lawyer mediators are emerging - of the respondents to our survey, 52% were legally qualified (2012: 62%) and whilst the proportion of lawyers in the Advanced group remains higher, at 60%, this too has fallen by 10% over the past two years.

For the first time this year our Audit included some questions designed to explore the impact and relevance of mediators’ professional backgrounds. We 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
Used in self-promotion	43%	64%
Influential in getting work	65%	55%
Relevant in practice	62%	43%

A similar comparative analysis, looking at the responses of full-time mediators compared to their part-time colleagues, revealed no significant differences between the groups.

Clearly it is the non-lawyer mediators who are working harder to promote their professional background, but this does not seem to be working for them as well as it does for the lawyers. As far as the relevance of professional background is concerned, no doubt the respective camps will each be able to find comfort in the data on an issue which clearly remains controversial. A selection of respondents' comments encapsulates the debate:

“As a non-lawyer I find it very difficult to get any paid mediation work”.

“Being a lawyer should make no difference to how proficient you are as a mediator. Sufficient knowledge of offers, costs implications and consent orders isn't rocket science. But the confidence gained from being inured in disputes for years and being within the legal 'club' undoubtedly gives one an advantage despite the fact that it ought not to make all that much difference. You are either good with people in conflict or you are not. It's the users' perception that is at fault in over playing the lawyer mediators skills over and above the other professions”.

“I am a very experienced commercial dispute lawyer. As such parties know they cannot pull the wool over my eyes. I am able to reality test much more effectively by using my understanding of the litigation process and also the law. I can talk to parties about what will happen at trial, weight of evidence, contractual arguments etc.....My 25 years' experience in private practice is a massive help in guiding my intuition as to where a settlement is likely to lie. That improves the chance of settlement. That said, I have come across some excellent mediators who are not legally qualified - they tend to have a different approach, which can be very effective”.

“There is a tendency for the lawyers to dominate the mediator appointment process. There is a place for the non-lawyer mediator who can in certain cases have a greater empathy with the parties due to their practical background...more support to the non-lawyer mediator would be welcome”.

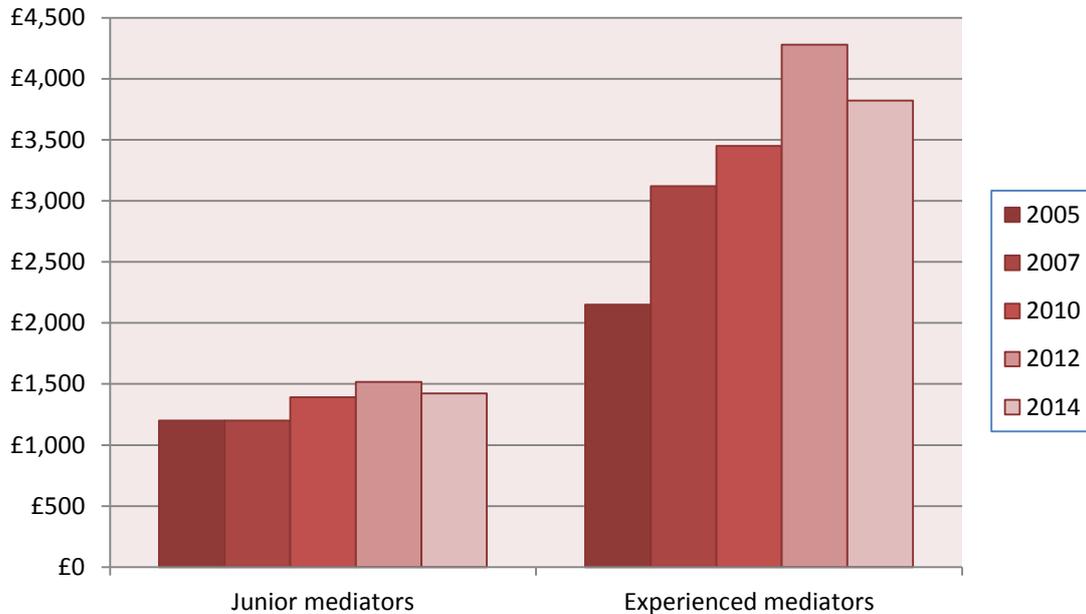
Mediators' practices

Even amongst the most experienced group - those who describe themselves as “reasonably” or “very” experienced - many are still combining their practice with another profession although the picture is gradually changing. 47% now characterise themselves as “full-time” mediators, a figure which is well up from previous Audits (2012: 39%; 2010: 37%).

This increased competition has, however, had an impact upon billing rates and overall income levels; and for the first time our Audit has seen a decrease in fee levels:

- Average fees of the less experienced mediator group for a one-day mediation have fallen to £1,422, a decrease of 6.3% (2012: £1,517; 2010: £1,390).

- Average fees for more experienced mediators have fallen by an even larger amount, 10.7%, down to £3,820 (2012: £4,279; 2010: £3,450).



As usual, these averages conceal a wide variation in mediator fee rates as indicated by the table below:

Average earnings for a one-day mediation:

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

By combining fee rates with reported activity levels, we have projected average incomes for differing levels of “full time” mediator. These show the impact of the overall fee level income reduction:

- Those undertaking between 20 and 30 mediations a year are earning around £70,000 pa (2012: £90,000; 2010: £73,000)

- Those mediators undertaking between 30 to 50 mediations a year are earning around £128,000 pa (2012: £145,000; 2010: £126,000)
- Those undertaking over 50 cases a year are earning around £370,000 pa (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 80 cases, giving an annual income of some £720,000. This is similar to the highest earnings identified in the 2012 Audit, which may suggest that fee pressure is not so significant at the very top of the field.

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

Within this ranking, “*professional reputation - experience/status*” has long been the clear winner with both mediators and lawyers but this year it has fallen back for lawyers who say they are now placing more emphasis on “*professional reputation - mediation style*”; this might reflect an increasing sophistication of lawyer use of the process. Possibly this might also be why lawyers no longer seem to be swayed by mediators’ promotional marketing mailshots and websites.

Performance in mediation

Mediators report that just over 75% of their cases settled on the day, with another 11% settling shortly thereafter so as to give an aggregate settlement rate of around 86%. This is not significantly different from the performance reported in previous Audits (2012: 70%/20%; 2010: 75%/14%).

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	4.7
Client contact	2.2
Mediation	
Working with clients on the day	7.8
Post-mediation	
Follow-up / on-going involvement	1.7
Total	16.4

These figures are similar to the results of our 2012 Audit. Furthermore, the average advanced mediator continues to spend nearly 3 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 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:

- 71% of lawyers (2012: 64%) and 62% (2012: 59%) of clients were rated as having performed quite well or very well
- 15% (2012: 21%) of lawyers and 23% (2012: 24%) of clients were rated as having performed adequately
- 14% (2012: 15%) of lawyers and 15% (2012: 17%) of clients were rated as performing less than adequately (with 6% of lawyers and 5% of clients rated as having been very poor).

These findings were validated by our separate survey of lawyer perceptions. Lawyers rated 54% (2012: 52%) of their counterparts, and 71% (2012: 56%) of clients, as having performed well or very well in mediation, with 20% (2012: 17%) of lawyers and 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 15-20% who are still lagging behind.

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

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

Whilst it might be reassuring to suggest that this data suggests that mediators are becoming even more effective, a less self-serving interpretation might be that lawyers are getting better at selecting the right mediator for each particular set of circumstances.

Standards and regulation

Mediators' strength of feeling that the civil justice system should be taking a more directive approach towards the promotion of mediation is clearly hardening at 76% (2012: 66%), and there are now 15% (2012: 10%) who support a fully mandatory system. In contrast only 19% (2012: 27%) favour the status quo, whilst 5% (2012: 7%) favour a more relaxed approach.

Lawyers' views remain more conservative than those of the mediators, with 33% preferring for the status quo and 57% a slight toughening up of the regime.

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
Decrease	12%	5%
No difference / too early to tell	70%	70%
Increase	18%	25%

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

	Mediators	Lawyers
Harder	9%	3%
No difference / too early to tell	73%	79%
Easier	18%	17%

As for their overall views on the advantages or disadvantages that Jackson brought to mediation, our two survey groups both highlighted the double-edged sword of the costs provisions:

“Costs control becomes a mantra and making the clients aware of costs implications at all stages must encourage settlement a bit earlier although the data is at the moment mixed. The disadvantage is that the costs of managing the process become costlier with increased navel gazing to ensure compliance” - from a mediator

However, as one lawyer observed:

“They make mediation seem like the poor man’s process instead of a better process than litigation”.

Overall, our survey data shows that there is a slight tendency towards a positive albeit modest assessment of Jackson’s impact although, for most, the jury is still out.

In previous Audits, we have gathered mediators’ views on wide range of options around the issues of whether there should be a single standard of basic professional training and/or a single regulatory body for setting and monitoring professional standards. This year, however, we have them specifically about the plans of the Civil Mediation Council.

- (a). Do you welcome the CMC’s plans to introduce registration of training courses for commercial and workplace mediators?

	Mediators	Lawyers
Yes	71%	51%
No	6%	5%
Don’t know	17%	30%
Don’t care	6%	14%

- (b). Do you welcome the CMC’s plans to introduce an individual mediator registration scheme as a basic standard of competency for mediators?

	Mediators	Lawyers
Yes	64%	64%
No	19%	9%
Don’t know	14%	20%
Don’t care	3%	7%

As for mediators’ views on what should be the main priorities of the Civil Mediation Council for the next two years, there is far less divergence than we have seen in previous Audits. There is still a clear consensus that much more should be done to promote mediation take-up, but most now seem to accept that building a profession is a key element of the campaign, although a few suggest that adopting a more outward-facing focus might assist.

- By achieving earlier resolution of cases that would otherwise have proceeded through litigation, the commercial mediation profession this year will save business around £2.4 billion a year in wasted management time, damaged relationships, lost productivity and legal fees.
- Since 1990, our profession has contributed savings of £17.5 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 £22.5 million.

Conclusion

In this year, the 450th anniversary of the birth of William Shakespeare, it is perhaps timely to reflect on what The Sixth Mediation Audit tells us about the stage of maturity that our field of *“men and women merely players”* has reached.

We have moved through infancy and childhood, and maybe even the phase of the lover *“sighing like a furnace, with a woeful ballad”* is now beyond us as we have grown past proselytism of early enthusiasm about mediation in favour of more hard-nosed promotion of the social and business benefits it can deliver.

But where are we now? The competitive pressures in our own marketplace suggest that we may well be the soldier *“jealous in honour, sudden, and quick in quarrel, seeking the bubble reputation”*.

No doubt, however, we aspire to be justice, *“full of wise saws, and modern instances”*. And in many respects, this Audit confirms that this is where we are headed - like most young adults, still with our own “issues” but certainly healthy and strong in body and mind and moving in the right direction even if we don’t always agree on how to get there.

Graham Massie
22 May 2014

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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