

### **MEDIATION – why advisers need to know about it**

- 1999 the Civil Procedure Rules introduced the requirement for courts and parties to consider the appropriateness of mediation or some other form of Alternative Dispute Resolution, and gave courts the power to impose costs penalties if either party refused to do this
- 2000 the Funding Code introduced the requirement that ADR schemes should be considered before legal aid funding would be granted for representation, and the power to claim the costs of ADR as a disbursement
- 1999 – 2002 six pre-action protocols introduced over the last three years encourage attempts at settlement before beginning court proceedings
- 2001 - 2002 a number of court cases have stressed the importance of considering ADR where appropriate, and costs have been awarded against parties who have refused to do this

### **Mediation in the advice sector – what’s happening?**

Between March and July 2002, with the support of the Nuffield Foundation, the Advice Services Alliance conducted research into the provision of mediation by advice agencies.

The key findings were:

1. Only 4 advice agencies in England and 1 in Scotland currently run a mediation service.
2. Services providing mediation are very vulnerable to funding fluctuations; more than a third of the mediation services identified in ASA’s 1999 survey were no longer in operation in 2002 due to funding shortfalls, or to the end of 3 year funding projects.
3. A number of advice agencies offered a service which some labelled as “mediation”. However, this service characteristically involved setting up a face-to-face meeting between the agency’s client and the party or department with which they are in dispute, and assisting both in negotiating an agreed outcome. Whilst this service was often called “mediation”, it does not conform to the commonly accepted definitions of the mediation process, especially with regard to the neutrality of the third party, and is probably best described as “face-to-face negotiation”.

### **ASA recommends . . .**

*. . . that creative and flexible ways of resolving disputes without going to court are to be encouraged. However, the advice sector needs to have*

- *a clear understanding of the nature of mediation and*
- *a clear understanding of the distinction between advice, negotiation (whether by phone, letter or face-to-face), representation and mediation.*

*Some suggested guidelines are given overleaf.*

A full copy of the report and guidelines (13 pages) is available from your network, or by email from ASA on [val.reid@asauk.org.uk](mailto:val.reid@asauk.org.uk) . It is also available in the “What’s new in Alternative Dispute Resolution” section of the ASA website on [www.asauk.org.uk](http://www.asauk.org.uk)

## **GUIDELINES FOR ADVICE AGENCIES AND NETWORKS ON FACE-TO-FACE NEGOTIATION / MEDIATION**

1. Mediation involves an **independent** mediator who is **impartial** (someone who doesn't take sides and who won't gain or lose anything by the outcome). The mediator will help both parties find a solution to the problem. **The parties, not the mediator, decide** what will happen and the terms of any agreement made. The process is **voluntary**, however, so no-one can be forced to take part. What is said in a mediation session is **confidential**, so it cannot be used in court later. *(Definition adapted from CLS Leaflet 23 "Alternatives to Court")*
2. There is as yet no commonly agreed term for face-to-face negotiation; a process which involves advisers facilitating a meeting between their client and the party or department with whom they are in dispute, in order to negotiate a solution. Networks and agencies should decide what to call this, in order to distinguish the practice from mediation; ideally there should be a commonly agreed term and common understanding of what is involved. Face-to-face negotiation should not be referred to as "mediation", as it does not reflect the commonly understood definition of mediation, especially with regard to the neutrality, impartiality and independence of the third party.
3. Networks that collect annual information on the activities of member agencies should ensure that definitions of negotiation (whether by phone, letter or face-to-face) and mediation are included to help agencies provide accurate information.
4. Agencies should clearly distinguish between the different services they offer, including advice giving, representation and negotiation. This distinction should be clear to the agency, the adviser, and to both parties.
5. Both the client and the other party need to be absolutely clear at every encounter about whether the adviser is representing the client, or attempting to act as an impartial third party. It is the responsibility of the agency to have a policy on this, and the responsibility of the adviser to ensure that both parties understand it. Generally speaking, it is unlikely that an adviser who represents one of the parties will be perceived as impartial by either party.
6. Where it is important to have a completely impartial third party to facilitate a mediation process, then the agency should refer the parties to an independent mediation service\*.
7. Where it seems to be appropriate for the adviser to assist the parties in negotiating a resolution to the dispute at a face-to-face meeting, it is the responsibility of the agency to have a policy which states the boundaries of confidentiality and legal privilege during the discussions. It is the responsibility of the adviser to ensure that both parties are aware of this.

\*Community mediation services do not make a charge to clients. Family mediation can be funded through legal aid for those eligible. Under the Funding Code, a disbursement for the cost of commercial mediation can be claimed for those eligible. Some contact details for mediation providers can be found in the CLS Directory, or in CLS leaflet 23 "Alternatives to court".