

Mediation provision in the advice sector

ASA survey conducted March – July 2002

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1 Summary of key findings and comments

- 1.1 There is very little mediation provision in the advice sector; we are aware of only four advice agencies in England and one in Scotland which run a mediation service.¹
- *Most advice agencies which have been involved in establishing a mediation service no longer directly manage or run the service. Many community mediation services were set up with help and support from a local advice agency or CAB, but are now independent. These agencies often provide a trustee as a member of the governing body in order to maintain a useful relationship with the service.*
- 1.2 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.²
- *Lottery/Community Fund money is usually provided for three-year projects. A number of mediation providers had received 3-year funding, but had been unable to find alternative funding to continue the work at the end of that time.*
 - *One service has closed because the local authority will only fund work on a case by case basis, which means that the service is unable to retain a full-time skilled and trained mediator.*
 - *The Mediation Quality Mark has just been published (Dec 2002). It provides quality standards for both family and community mediation services. However, although funding contracts are available from the Legal Services Commission for family mediation services, no such funding is available to community mediation services. This not only means that resources for the extra work involved in meeting the standards are not available to community mediation services, but that the continuing existence of these services is uncertain and unpredictable.*
 - *The government's promotion of mediation and other ADR options as a first resort for dispute resolution is dependent on secure funding for mediation providers. The evidence of this survey is that current funding arrangements are unreliable, and that services have closed and will continue to close without secure long-term funding contracts*
- 1.3 A lot of what is labelled "mediation" is in fact a form of face-to-face negotiation; a number of advice agencies are offering this form of negotiation to clients, to complement their advice-giving role. This characteristically involves setting up a meeting between their client and the party or department with which they are in dispute, and assisting both in negotiating an agreed outcome. Some refer to this service as "mediation".³
- *There is some confusion between advice-giving, negotiation and representation (where the adviser is on the side of the client, and acts on their behalf) and mediation (where the third party is impartial, and does not take sides)*
 - *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) and mediation*
 - *Some suggested guidelines are included in this briefing (see page 12)*

¹ See part 4 for details.

² See part 6 for details.

³ See part 7 for details.

2 Introduction

- 2.1 In March 2002 ASA sent out questionnaires to 139 agencies in England, Wales and Scotland, in order to build up a picture of mediation provision in the advice sector in the UK. The agencies surveyed comprised:
- 18 agencies identified in a previous ASA survey in 1999 as providing mediation
 - 63 agencies from the Federation of Information and Advice Centres (FIAC) which had ticked a box on their 2001 annual return indicating that they provided mediation, although advice was their main activity
 - all 53 law centres which are members of the Law Centres Federation (LCF), through a central email circulation list
 - 5 Citizens Advice Bureaux (CABx) which Citizens Advice indicated might be involved in providing mediation
- 2.2 Replies were received over the summer of 2002, and phone calls to a sample of FIAC agencies made in June and July 2002.
- 2.3 Six advice agencies (5 in England and 1 in Scotland) were identified as providing a defined mediation service in 2002.⁴ By December 2002 that number had reduced to five.
- 2.4 Of the 53 law centres surveyed, none were currently providing mediation, though one indicated an interest in developing such a service. One law centre was piloting referral to an external mediation provider.⁵
- 2.5 A number of mediation services known to ASA from the 1999 survey were completely independent of any advice agency, although they were members of the Mediation UK Network.
- 2.6 Of the 18 agencies known to ASA to be providing mediation in 1999, 7 indicated that they were no longer able to continue the service due to lack of funding.⁶
- 2.7 Of the 63 FIAC agencies surveyed, 4 indicated that they did not provide mediation, and 5 completed the survey questionnaire about the “mediation” they did provide. A further 17 of the original 63 agencies were contacted by telephone to gather further information about the “mediation” provision they had indicated in their annual return.⁷

⁴ Details under point 4 below

⁵ Details under point 5 below

⁶ Details under point 6 below

⁷ Details under point 7 below

3 Definitions of mediation

- 3.1 The CLS leaflet No. 23 “Alternatives to court” (October 2001) describes mediation in the following terms:

Mediation “...involves an independent mediator (someone who doesn’t take sides and who doesn’t have an interest in the problem). They will help you and the other person or company find a solution to the problem. You and your opponent, not the mediator, decide what will happen and the terms of any agreement you make. The process is voluntary, however, so you cannot force the person or organisation you have a problem with to take part.... What is said in a mediation session is confidential, so it cannot be used in court later”

- 3.2 ASA’s guide to Advising on ADR (published June 2000) defines mediation as follows:

“Mediation involves an impartial, independent third party helping disputing parties to reach a voluntary, mutually agreed resolution. The disputants, not the mediator, decide the terms of the agreement”

- 3.3 The CEDR⁸ Website outlines the process of mediation as:

“... where a neutral third party facilitates negotiations between the parties to find a solution to the dispute... Courts now actively encourage parties to consider its use.

*Unless ordered by the court, the process of mediation is **voluntary**. It is confidential and **‘without prejudice’** (nothing said in the mediation is admissible as evidence in legal proceedings). Any settlement reached becomes binding once it is put into writing and signed by the parties. If parties cannot agree a settlement they are free to arbitrate or litigate.”*

- 3.4 The Law Society’s code of practice for civil and commercial mediation defines mediation as a process in which:

1.1 two or more parties in dispute

1.2 whether or not they are legally represented

1.3 and at any time, whether or not there are or have been legal proceedings,

1.4 agree to the appointment of a neutral third party (the mediator)

1.5 who is impartial

1.6 who has no authority to make any decisions with regard to their issues

1.7 which may relate to all or any part of a dispute of a civil or commercial nature

1.8 but who helps them reach their own decisions

1.9 by negotiation

1.10 without adjudication.

⁸ Centre for Effective Dispute Resolution, one of the major national commercial mediation training organisations and mediation providers.

4 Advice agencies providing a defined and separate mediation service

4.1 Six agencies which replied to the survey provide a publicly accessible community mediation service with separate procedures and a separate identity from the advice service. These were:

- 5 CABx in England⁹
- The Edinburgh Sheriff Court Advice Service in Scotland

The Edinburgh scheme provides civil non-family mediation for advice service clients and court users. Four of the CABx provide a community mediation service, and the fifth provides a mediation service for a local authority tenants group¹⁰. One of the community mediation providers is about to pilot a new commercial mediation service dealing with employment disputes.

Characteristics of these mediation services

- 4.2 **Charges:** none of these agencies make charges to clients to use the community mediation service they provide. However, the agency which is piloting workplace/commercial mediation will be making a charge of approximately £500 per case (on a sliding scale) for this service.
- 4.3 **Network membership:** all five of the English CABx providing a mediation service are members of Citizens Advice, and three of them are members of the Mediation UK network.
- 4.4 **Mediator training and qualifications:** Mediators at the Edinburgh Sheriff Court mediation service are trained by CEDR or the Scottish Law Society. Two CABx have used the ADR Group mediator training, two have used the Mediation UK mediator training, and one has provided an in-house training course which will be accredited for the Mediation Quality Mark (MQM).
- 4.5 **MQM:** All five CABx in England are aware of the LSC Mediation Quality Mark (it does not apply in Scotland). Two are definitely intending to apply for it, two are currently uncertain about whether to apply, and one is not currently intending to apply. The reasons given are linked to lack of funding and resources.
- 4.6 **Conflict of interest:** In four of the agencies the team of advisers is completely separate from the team of mediators – it is a policy that no staff can act as both advisers and mediators in the same agency. In two CABx, the number of mediation cases is currently very low (less than 10 per year) and they do not have two separate teams of advice and mediation workers; in both agencies they are aware of the issue, and have made arrangements to keep files separately, and to refer clients to an alternative agency where possible if a conflict between the role of advice giving and mediation arises.

⁹ By December 2002 this figure was reduced to four.

¹⁰ By December 2002 this service had been suspended as the local authority would only fund it on a case by case basis, and this meant that the service was unable to retain a full-time trained and skilled mediator. Cases are now diverted to a local community mediation service.

Practice issues:

- 4.7 Services were asked to identify practice issues on which they would value national guidelines and support. The issues identified were:
- Confidentiality
 - Data protection
 - Record keeping
 - Funding
 - Low referral numbers
 - Mediation Quality Mark support

5 Law centre piloting referral to an external mediation scheme

- 5.1 Wandsworth and Merton Law Centre is piloting a scheme with LawWorks, the pro-bono mediation service which is being piloted by the Solicitors and Bar pro-bono organisations. At the time of the survey, no cases had yet been undertaken by a mediator from the scheme, as it was at an early stage of the pilot.
- 5.2 Under the LawWorks scheme, solicitors who are also mediators trained by CEDR (the Centre for Effective Dispute Resolution) will mediate cases referred by advice agencies where clients are above the level eligible for legal aid, but cannot afford to pay commercial mediation rates. Cases must be of significant importance to the individual concerned, such as an employment dispute, or the dispute must be about an issue with a value of over £1000. The Law Centre anticipates that most disputes suitable for mediation will be either employment or consumer disputes. LawWorks has provided training on assessment for suitability for mediation to the Law Centre workers.

6 Advice agencies no longer providing mediation

- 6.1 Six advice agencies which provided a mediation service in 1999 were no longer able to provide mediation in 2002 as funding had run out. For example:
- Two advice agencies were funded by the Lottery Community Fund to provide a mediation service for a three-year project. No core funding was available, and the projects closed after the three year funding ended.
 - One independent community mediation service received money in 2001 from the first round of the Partnership Innovation Budget to fund an outreach mediator to work with hard to reach communities. However other core funding was not available and the whole mediation service provision was suspended in 2002.
 - By December 2002 a seventh CAB had suspended its mediation service as the local authority would only fund mediation on a case by case basis, which meant that it was unable to retain a full-time skilled and trained mediator.

7 Agencies providing a continuum of information, advice, help, negotiation, advocacy and “mediation”

7.1 For the purposes of this survey, FIAC provided the addresses of 63 agencies which had indicated on their 2001 annual return to FIAC that they provided mediation. As only 5 agencies had returned the questionnaire, ASA contacted a further sample of 17 agencies covering a range of different types of service and locations, in order to explore this issue. ASA was able to speak in detail to 9 agencies, offering advice and information to:

- Carers
- Disabled people
- Housing association and local authority tenants
- Homeless people
- Independent theatre groups
- Unemployed people
- People with debt and money problems
- Students
- Women

7.2 A common factor amongst these agencies was the fact that they provided a range of services to their clients. The decision about what level of help to provide to each client was based on the needs of the client and the nature of each case. Characteristically the agencies were flexible about using a range of options on a continuum, which they identified as including:

- Information – general information about the law, legal rights, the issues involved (housing, debt etc), and local resources
- Advice – specific suggestions about what the client might do to deal with their particular problem or resolve their dispute
- Help – help from an advice worker with filling in forms, writing letters, responding to contact from another party
- Negotiation – speaking or writing to the other party on behalf of the client to try to deal with the problem or resolve the dispute
- Representation/advocacy – attending meetings, tribunals or courts with the client to represent them or to help them state their case
- “Mediation”

7.3 Agencies variously defined the “mediation” they provided as:

- “negotiation, advocacy or support at case meetings”
- “using conciliatory negotiation when trying to resolve disputes”
- “informal mediation between landlords and tenants, or mortgagors and mortgagees”
- “advice, information, advocacy and mediation where appropriate to disabled people”
- “occasional informal mediation in domestic disputes”
- “occasional mediation between theatre groups in dispute”
- “representing women who have problems or disputes which they need help with”

Four case studies to illustrate this practice

7.4 Case study 1

One agency explained that where their clients (housing association or local authority tenants) are involved in disputes with their landlord, they sometimes invite both parties to a meeting at their offices in order to try to resolve the dispute face to face, with the advice worker acting as “mediator”. They do not use trained mediators, and recognise that the advice workers who facilitate this “mediation” are not completely neutral, as they represent one party, usually the tenant. However, they offer a “mediator-like” perspective, and their offices provide a neutral venue. This “mediated dispute resolution” has been practised at this particular agency for at least 5 years, and has arisen out of a perceived need amongst the clients and types of dispute which they regularly deal with. They also run a local housing tenancy deposit scheme (funded by the Lottery) with a mediation option where there is a dispute about the deposit at the end of a tenancy. They are happy to advise both landlords and tenants, though the majority of their clients (ie the party who approaches them first) are tenants. Where a client is interested in pursuing “mediation”, the advice worker will contact the other party to suggest it and arrange a meeting. Although they are initially contacted for information and advice by one party, and are therefore primarily “on their side”, they do not see this as a conflict of interest; the aim is to enable both parties to resolve the dispute, and the advice worker who began the case will also run the “mediation”. They see information, advice, telephone negotiation and “mediation” as a continuum, and the most appropriate service is offered as needed. In other cases, for example where the agency ends up inadvertently advising both parties to a matrimonial housing dispute, they do have a conflict of interest policy to ensure different advisers represent each party. There is no specific funding for providing the “mediation” service; this is seen as part of the general advice service on offer.

7.5 Case study 2

This agency offers advice, information, advocacy and “mediation” where appropriate (though this is fairly rare) to disabled people in their borough. They usually represent the service user, but sometimes they are approached by service providers or landlords to mediate a dispute with a disabled user or tenant, and to offer a neutral perspective on reasonable outcomes to a dispute. They do not have trained mediators, nor do they use external mediators – they use experienced advice workers who can facilitate dispute resolution either face to face, or “shuttle” mediation over the phone. They are conscious of the potential conflict of interest, but believe that this has not been an issue so far.

7.6 Case Study 3

This agency uses “conciliatory negotiation” when trying to resolve disputes between the local authority and disabled people. In a recent case they provided an advice worker and their office as a neutral venue to try to resolve a pay dispute between carers of disabled people and the local authority department concerned. The advice workers involved are not trained mediators, and they recognise that they are not strictly neutral, as they represent their client, but they aim to resolve the dispute by bringing both sides together before it escalates.

7.7 Case Study 4

This agency provides information and advice to women, and also represents women who have problems or disputes which they need help with resolving. Sometimes they use their own workers, and sometimes they get experts in from other voluntary organisations to act as advocates for them, supporting or representing them at meetings with the other party of organisation. Examples include employment disputes, family disputes involving alcohol or drugs, negotiating with schools and educational psychologists over special needs provision for children.

Concerns about the continuum of information/advice/help/negotiation/advocacy/mediation

7.8 Some definitions of mediation are provided at section 3 of this briefing. Common factors in these definitions and requirements are:

- All parties need a clear understanding that the mediator is a neutral third party, and does not represent either side in the dispute
- All parties need a clear understanding that the mediator will not normally propose or support any particular outcome
- All parties need a clear understanding about the boundaries of confidentiality, who will/will not have access to information disclosed during mediation, and whether that information can be used in future court proceedings
- All parties need a clear understanding of the status of any agreement reached, and the options available to them if they are subsequently unhappy with the agreement

7.9 Mediation also consists of a clearly defined process, which includes:

- identifying the issues in dispute
- exploring the options for resolution
- negotiating an agreement based on the best interests of both parties

7.10 It is clear that the understanding of the process referred to as “mediation” by many of these agencies does not reflect the commonly understood definitions of mediation (given in section 3). This gives rise to a number of concerns:

- Are both parties clear about the status of the advice worker, and who they represent? (It may vary according to the nature of each occasion)
- Is the advice worker clear about whether they are on the side of their client, or whether they are attempting to be neutral? (Again, this may vary according to the nature of each occasion)
- If the advice worker acting as “mediator” proposes a solution to the dispute, would this be seen by the parties as a neutral option, or might it be interpreted as benefiting the party they are advising?
- If the advice worker is trying to resolve a dispute by acting as a mediator, who will advise the client (and the other party) about the law, their rights, and the best course of action for them to pursue? In family mediation, for example, clients are advised to seek independent legal advice before, during and after the process of mediation in order to check that solutions being discussed in mediation are fair and appropriate
- What rules of confidentiality and privilege apply to information disclosed in such a meeting?

- 7.11 The LSC Mediation Quality Mark (published November 2002) has the following requirements for mediation providers to deal with potential conflicts of interest, particularly where the mediation provider is also a legal advice provider:

E1.2 Conflict of interest

- *The procedure **must** identify when a potential conflict of interest could arise, the process that is followed, and, from October 2003, who is responsible for the process, and as a minimum, how to deal with circumstances where:*
 - *The case may involve disputes with the organisation, a member of its staff or management committee, or a funder.*
 - *A dispute that the mediator or service knows to be based on false information.*
 - *A case where the mediator has acquired any relevant information in any private or professional capacity.*
 - *Where mediation services are offered as part of a practice/consortia offering other professional services, a mediator from that practice/consortia may not act as a family mediator for any client who has received other professional services from that practice/consortia unless the mediator is able to demonstrate that the information given to other professionals at the practice/consortia has no bearing on the issues to be addressed in the mediation, and that the client has given personal consent to that person acting as a mediator, having been informed of the potential conflict of interest.*

8 Potential good practice models

- 8.1 A number of agencies responding to the ASA survey have addressed the issues of confusion of roles and conflict of interest raised by the continuum of information, advice, representation and mediation model.

Case study 5

- 8.2 AIMS is the advice, information and mediation service provided by Age Concern to help older people resolve disputes between neighbours or between landlord and tenant in sheltered housing. It is a member of Mediation UK, and an associate member of ASA.
- AIMS provides a continuum of information, advice and mediation, moving on to the next step in a staged process according to the needs of the client
 - Mediators have completed the six day Mediation UK accredited course in mediation skills

- The service follows the Mediation UK practice guidelines for mediation
- An adviser explains mediation to the client, and explores with them whether it might be appropriate. If so, a separate mediator is brought in to run the mediation session, with the adviser attending to provide guidance on law and good practice
- AIMS is applying for the LSC Mediation Quality Mark, and will therefore comply with the MQM standards for identifying and dealing with conflicts of interest (requirements E1.2 in the LSC Mediation Quality Mark, published in December 2002; discussed above)

Case study 6

8.3 Two other FIAC advice agencies have also given some thought to providing a mediation service in addition to the advice service they provide. One is an advice service for students, and the other provides general housing advice. In both cases the advice agency has:

- Approached an independent community mediation service for help with mediation practice guidelines
- Undertaken specific mediation training with an independent mediation service
- Given thought to procedures which ensure that advice files and mediation files are kept separately, and confidential information is not disclosed to the other party

However, phase two of the housing advice agency mediation project will aim to put in place a full-time generic worker who can take what they term a “holistic” approach to providing information, advice, support and mediation, which means that this project is moving away from a separate identity for the mediation project, and towards the continuum model.

9 Guidelines for the advice sector on face-to-face negotiation

9.1 This practice of face-to-face negotiation has arisen in an ad hoc way in a number of independent advice agencies, which have a tradition of developing creative and flexible ways of meeting the needs of clients. A number of the agencies spoken to in the survey made it clear that they believed the process to be a valuable way of bringing disputing parties together, and of resolving or attempting to resolve differences at an early stage, before they can escalate into more serious disputes or court proceedings.

9.2 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) and mediation.*

9.3 Therefore ASA suggests that the following guidelines should be observed:

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".