Chapter 5. Users’ experiences of the VOL mediation scheme

The survey

As part of the review of the VOL mediation scheme since 1999, in spring 2004 self-completion questionnaires were sent to the parties and representatives involved in 218 of the cases mediated in the Central London VOL scheme during 2003. Names and addresses were obtained from the mediation database or CaseMan and questionnaires intended for parties were sent directly to them rather than via solicitors in an effort to maximise response. Each questionnaire to a party or lawyer was mailed with a personalised letter containing the case reference number, together with a stamped, return envelope. The first mailing was despatched in the week of March 1 2004. After 2 weeks, a reminder letter was sent to non-respondents and after a further 2 weeks, another reminder letter was sent together with a fresh questionnaire. Questionnaires were returned rather slowly, with the last questionnaire from a solicitor being received in the office in May 2005.

The questionnaires used for claimants, defendants and their representatives in this review were a truncated form of the questionnaires used for the 1998 evaluation of the Central London VOL mediation pilot scheme. Where relevant, comparisons of responses with the 1998 findings have been made. The questionnaires covered the following issues:

- Characteristics of the case
- Reasons for trying mediation
- Previous experience of mediation and court proceedings
- Representation
- Evaluation of the mediation including
  - Confidence in mediator
  - Likes and dislikes
- Outcome of mediation and settlement details
- Eventual outcome of unsettled cases
- Perceptions of savings in cost and time.
Survey response

In all, 266 questionnaires were returned relating to 165 of 218 cases mediated during 2003 (Figure 5.1). This means that some information from either parties or lawyers is available for three-quarters of cases mediated during 2003. In 87 cases mediated in 203, one completed questionnaire was returned; in 58 cases, two completed questionnaires were returned; in 17 mediated cases, three questionnaires were returned; and in three cases, all four questionnaires were returned by claimant, defendant, claimant’s representative and defendant’s representative.

Figure 5.1 Number of questionnaires received for 165 of 218 cases mediated in 2003

67 claimants, 63 defendants, 74 claimants’ representatives and 62 defendants’ representatives returned questionnaires. These questionnaires related to 165 cases of which 44% had settled at mediation and 56% had not settled. Although the response rate to the survey was relatively low, the breakdown of settled to unsettled cases is similar to the overall breakdown of settled and unsettled cases during the year 2003 (39% settled and 61% unsettled) (Table 5.1 parties and Table 5.2 representatives). Moreover, the case type distribution of returned questionnaires reflected that of the sample of mediated cases as a whole, as discussed in the previous Chapter.

| Table 5.1 Breakdown of claimants and defendants responding to survey by whether settled at mediation (n=130) |
|-------------------------------------------------|----------------|----------------|----------------|
|                                                 | Defendant | Claimant | Total  |
| Unsettled                                       | 49%       | 58%      | 54%    |
| Settled                                         | 51%       | 42%      | 46%    |
| Total                                           | 100%      | 100%     | 100%   |
Users’ experiences of the VOL mediation scheme

Table 5.2  Breakdown of claimants and defendants’ representatives responding to survey by whether settled at mediation (n=136)

<table>
<thead>
<tr>
<th></th>
<th>Defendant</th>
<th>Claimant</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Unsettled</td>
<td>53%</td>
<td>58%</td>
<td>56%</td>
</tr>
<tr>
<td>Settled</td>
<td>45%</td>
<td>42%</td>
<td>43%</td>
</tr>
<tr>
<td>Total</td>
<td>100%</td>
<td>100%</td>
<td>100%</td>
</tr>
</tbody>
</table>

Questionnaires were also sent to a sample of mediators who had mediated cases in the VOL scheme during 2003, asking them to provide some feedback on the mediations. In particular, mediators were asked to say why they felt that cases had settled or failed to settle at the mediation appointment, and their responses on this issue are presented in the final section of the Chapter.

Dispute features

As a preliminary to obtaining feedback on motivation for mediating and the mediation experience, parties and lawyers were asked for some information about cases in order to assess the point at which cases were being mediated and the contentiousness of the case.

Length of dispute

Mediating parties and representatives were asked how long the dispute had been going on at the time that they agreed to attempt mediation through the Central London VOL scheme (Table 5.3). About one in five respondents said that the dispute had been going on for more than three years when they agreed to try mediation, and overall around two-in-three respondents were involved in disputes that had been going on for more than 1 year at the time of agreeing to mediate.

Table 5.3  “How long had the dispute been going on when you agreed to try mediation?” (n=129)

<table>
<thead>
<tr>
<th>Time Duration</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Less than 6 months</td>
<td>5%</td>
</tr>
<tr>
<td>More than 6 months, less than 1 year</td>
<td>12%</td>
</tr>
<tr>
<td>More than 1 year, less than 2 years</td>
<td>43%</td>
</tr>
<tr>
<td>More than 2 years, less than 3 years</td>
<td>21%</td>
</tr>
<tr>
<td>More than 3 years</td>
<td>19%</td>
</tr>
<tr>
<td>Total</td>
<td>100%</td>
</tr>
</tbody>
</table>
**Legal representation**

In common with the 1998 evaluation of cases entering the VOL mediation scheme, the majority of parties responding to the 2004 survey had received legal advice during the course of their dispute. Only one in ten parties did not have legal about their dispute advice at any time. Over three-quarters of responding parties had been advised by a solicitor all the way through their disputes (79%). Figure 5.2 shows that there was some difference in this respect between claimants and defendants, with claimants being somewhat less likely to have received legal advice all the way through their dispute.

**Figure 5.2 Did you have any advice from a solicitor about the case? (n=129)**

In about three-quarters of cases where parties had received legal advice, their solicitor attended the mediation session (73%). In a minority of cases where a solicitor did not attend the mediation with clients, the most common reason given by parties was to save costs (44%) or because they were “not needed” (25%). Other reasons given were that they or their solicitor had not considered it appropriate for the solicitor to attend (13%) or that the respondent had not been aware that the solicitor was needed (6%).

**Reasons for mediating**

**Parties**

All claimants and defendants were asked why they had decided to try mediation in this particular case (Figure 5.3). Overall, the most common reasons given were that they had been advised to do so by their solicitor (22% of all respondents), to reduce costs (14%), to reach a settlement (14%), or because a judge had advised them to do so
(18%). There were, however, some notable differences between claimants and defendants. Claimants were more likely than defendants to say that their solicitor had advised them to mediate (30% of claimants as compared with 13% of defendants). Among defendants, the most common reasons given for deciding to mediate was to reduce costs (18%) or because a judge had advised them to do so (17%).

In comparison with the findings of the 1998 review, the role of the courts in encouraging or pressing parties to mediate is notable. Among the reasons for mediating in the 2004 survey, the “courts and the judiciary” were mentioned in over one in four cases (fear of costs sanctions (2%), the court’s “advice” (10%), and advice from a judge (14%)). In the 1998 survey only 4% of claimants said that they had mediated because they had been told to do so by a judge and about 7% of defendants gave the same response. There was no reference to cost sanctions or to advice from the court in the 1998 evaluation of the VOL mediation scheme, which, of course, was conducted prior to the implementation of the Civil Procedure Rules in 1999 and the cases of Cowl and Dunnett in 2002.
The free text on questionnaires was analysed to provide more detail of how parties and representatives explained their reasons. This was considered important in seeking explanations for the falling settlement rate in the Central London VOL scheme. Some of the questionnaire material provided insights into decision-making about entering the VOL mediation scheme and evidence of increasing pressure from the courts on parties to mediate. Questionnaires also demonstrated that in some cases mediation had been attempted reluctantly.

**Cost savings**

Cost saving was clearly a principal motivation for some mediating parties. This included the legal costs of continued litigation and the possible costs of a trial. In some cases respondents referred to the cost to their business of management being caught up in litigation.

“In order to resolve the matter early and keep the cost down.”
“To save further wasting of my and management time, to avoid further costs, little likelihood of achieving counterclaim should we be successful in full court, i.e. actually receiving the money.”

“Because of the potential length and cost of trial balanced against cost of mediation.”

“We only found out about this possibility when the claimant offered mediation. It seemed an eminently sensible way to proceed and we accepted immediately. We feel we owed the claimant nothing and saw a way to come to an agreement that didn’t cost the earth.”

### Breaking deadlock in negotiations

There were also cases where negotiations between the disputing parties had become stuck, or communication had broken down and mediation was seen as an opportunity to move on the process of working towards a settlement. Often this was accompanied by expressions of weariness of litigation and a desire to see an end to the dispute.

“My solicitor suggested that it might speed up the fairly fruitless negotiations between ourselves and the defendant’s solicitors.”

“We believed that a settlement could be achieved and it gave the opportunity to discuss face to face with the defendant as we had been having trouble communicating with him.”

“It seemed a very reasonable avenue to try. Perhaps face-to-face discussion with a third party would introduce some sense and logic to an absurd and ultimately trivial argument. It certainly seemed more suited to this matter than wasting court time.”

“To try and avoid expensive litigation in the court. Also use an independent and neutral expert to find a solution to the problem. To move the case on as it had reached a vexatious situation.”

### Court-directed/suggested mediation

As mentioned above, by comparison with the 1998 evaluation, the reasons given for attempting mediation in the 2004 survey more often referred to suggestions or directions from the Court to attempt mediation. This indicates the greater proactivity of the judiciary in relation to mediation and, in some cases, a feeling on the part of parties or lawyers that such suggestions ought not to be ignored. Others were happy to accept the court’s suggestion, feeling that the scheme was worth trying.

“It was suggested by the court. In fact we were made to feel this was not optional.”

“The court directed in December 2002 that both parties should attempt mediation.”
“Suggested by court and approved in principle by my solicitor.”

“Mediation recommended by Circuit Judge owing to complexity of the case.”

“The defendant finally agreed following encouragement from the judge. We heard of the service some months before and had been keen to use it.”

**Avoiding costs sanctions**

On the other hand, there was evidence that both claimants and defendants were trying mediation principally to avoid the threat of costs sanctions, rather than because of any particular positive interest in mediation or any particular hopes of a successful outcome. For example:

“Because the judge at one of the hearings recommended it and said he would take a dim view if either party did not try this route.” (Defendant non-PI)

“Because our solicitor advised us that if we did not attempt mediation we may not have been awarded costs in court.”

“We were slowly getting nowhere. Our solicitors informed us that we would have to proceed to court but that this would be very expensive and that the court would not look favourably on us if we had not exhausted all possible routes to settlement.” (Claimant boundary dispute)

**Representatives**

Cost containment was the most frequent reason given by both claimants and defendants’ representatives for advising clients to mediate (Figure 5.4). Claimants’ representatives were slightly more inclined to say that their advice had been based on a desire to reach settlement.

In common with parties’ reasons for mediating, representatives often said that they had advised mediation in response to court encouragement or a court order. Cost sanctions were another concern.
Looking at the outcome of mediations by reasons for mediating there is some suggestion that cases in which parties and/or representatives mentioned pressure from the court or fear of cost pressure were somewhat less likely to settle than those cases where this was not given as a reason for mediating. Where court pressure to settle was mentioned by survey respondents as a reason for mediating, the settlement rate at mediation was 38%. Where some other reason was given for mediating, the settlement rate was 47%. There was evidence in questionnaires of the impact of judicial encouragement or pressure on decisions to mediate. For example, the following ‘reasons’ for mediating were given by representatives:

“I did not recommend mediation. It was forced on us by the court imposing costs penalties if the claimant did not agree to mediation.”

“Because the Circuit judge insisted upon it and the other side was also required to go through the process.”

“The Court ordered it. The claimant had twice asked the defendant to mediate but she refused before this time.”

“It was recommended by the other party, then ordered by the court.”
“The court strongly suggested mediation in directions and sanction on costs indicated in directions if mediation not attempted.”

“The Court contacted us about it and I was able to persuade my client that if she didn’t agree to mediation it would not help her case because the respondent was appearing eager to mediate.” (Claimant rep)

“Because of Dunnett v Railtrack.” (Claimant rep)

“To avoid an adverse costs order; there was a remote possibility of settlement; to understand the defendant’s case.” (Claimant rep)

“I did not recommend it; the court ordered it. I was always very doubtful about the value of mediation in this case.”

There was a high degree of consensus among representatives about what they hoped mediation would achieve. Settling the case was the most common objective cited, with 94% of representatives giving this as an objective. The next most common objective given was narrowing of issues, with about one-third of representatives citing this as an objective. One-quarter of representatives hoped for clarification of factual issues, and about 16% hoped for clarification of legal issues.

“The costs of pursuing the matter to trial would have far outweighed the amount in dispute. Mediation is an effective means of allowing the parties to reach a resolution amongst themselves as opposed to having a decision imposed.” (Defendant rep probate)

“The value of the case was not high in relation to the costs of preparing the case and dealing with the issues and evidence. The client had a positive experience of mediation from a previous case where we had recommended it and was persuaded of the benefit.” (Defendant rep breach of covenant)

“This was a low value case, with messy issues which was not cost effective to run to trial under the Fast Track.” (Defendant rep debt)

“We, as the defendants, wanted to dispose of the expense and inconvenience of litigation which was effectively in this case conducted by the claimant personally. It was though that a strong and able mediator would bring some common sense to bear on this problem.” (Defendant rep breach of covenant)

**Why cases had failed to settle pre-mediation – representatives’ views**

Representatives were also asked why their client’s case had not settled prior to mediation (Figure 5.5). The most common reasons given for failure to settle were that the opponent was unreasonable (37%) or that the parties were too far apart (28%). There was little difference between defendant and claimant representatives in their
analysis of obstacles to settlement, with both groups most often believing that their opponent was being unreasonable. Given the preponderance of these reasons and the frequency with which either a gulf between the parties was perceived or unreasonableness on the other side, it is perhaps less surprising that settlement rates were not particularly high. On the other hand, in the 1998 evaluation, solicitors often cited a gulf between the parties or polarisation of positions as a reason for mediating.

**Figure 5.5 Representatives’ assessment of why cases had not settled prior to mediation**

<table>
<thead>
<tr>
<th>Reasons why case had not settled prior to mediation (n=128)</th>
<th>Defendant reps (n=59)</th>
<th>Claimant reps (n=69)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Entrenchment</td>
<td>9%</td>
<td>6%</td>
</tr>
<tr>
<td>Lack of communication</td>
<td>9%</td>
<td>10%</td>
</tr>
<tr>
<td>Offers had been too low</td>
<td>3%</td>
<td>12%</td>
</tr>
<tr>
<td>Other/own party convinced of strength of case</td>
<td>9%</td>
<td>3%</td>
</tr>
<tr>
<td>Parties too far apart</td>
<td>27%</td>
<td>29%</td>
</tr>
<tr>
<td>Unreasonable opponent</td>
<td>39%</td>
<td>35%</td>
</tr>
<tr>
<td>Other</td>
<td>5%</td>
<td>6%</td>
</tr>
</tbody>
</table>

**Offers**

According to representatives, prior to the agreement to mediate, claimants had made offers in 21% of cases; defendants had made offers in 29% of cases; both sides had made offers in 18% of cases; and in the remaining one-third of cases, no offers of settlement had been made by either side.

**Assessments of strength of case**

**Parties**

Parties were asked what they felt their chances of winning would have been at trial at the time they took the decision to mediate their dispute. The responses showed a significant difference in perception between claimants and defendants, with claimants being more optimistic about their chances of succeeding at trial (Figure 5.6). The vast majority of claimants (85%) believed that their chance of winning was 75% or better, as
compared with a little over half of defendants who thought their chances of winning were that strong. Therefore, defendants with somewhat weaker cases might be more prepared to mediation. These findings are roughly consistent with those of the 1998 review of the scheme.

**Figure 5.6 “At the time that you accepted the offer to mediate the case, how good did you think your chance was of winning your case if it went to court?” (n=126)**

![Diagram showing perceived chances of winning by parties and representatives.](image)

**Representatives**

As with parties’ views, claimants’ representatives were more optimistic about the chances of winning the case at trial than defendants’ representatives. Figure 5.7 shows that while one in five claimants’ representatives thought that they would have a 95% chance of winning at trial, only one in ten of defendants’ representatives put their chances that high. It appears that claimants’ representatives are mediating cases that they feel are relatively strong. Defendants, on the other hand, are mediating cases where they feel that the chances of outright success are relatively weaker.
Figure 5.7 Representatives’ views on chances of winning in court

<table>
<thead>
<tr>
<th>Chance of Winning</th>
<th>Claimant Reps (n=72)</th>
<th>Defendant Reps (n=60)</th>
</tr>
</thead>
<tbody>
<tr>
<td>About 95%</td>
<td>10%</td>
<td>21%</td>
</tr>
<tr>
<td>About 75%</td>
<td>37%</td>
<td>35%</td>
</tr>
<tr>
<td>About 50%</td>
<td>29%</td>
<td>37%</td>
</tr>
<tr>
<td>About 40%</td>
<td>10%</td>
<td>1%</td>
</tr>
<tr>
<td>About 20%</td>
<td>7%</td>
<td></td>
</tr>
<tr>
<td>About 10% or less</td>
<td>2%</td>
<td>1%</td>
</tr>
</tbody>
</table>

Previous experience of mediation

At the time of agreeing to mediate, the majority of parties responding to the survey (91%) had never been to a mediation before, and there was no significant difference between claimants and defendants in this respect (Figure 5.8).

Figure 5.8 Parties’ prior experience of mediation

*Have you ever been to a mediation before?*

<table>
<thead>
<tr>
<th>Experience</th>
<th>Claimants (n=67)</th>
<th>Defendants (n=63)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Never</td>
<td>90%</td>
<td>92%</td>
</tr>
<tr>
<td>Once</td>
<td>6%</td>
<td>5%</td>
</tr>
<tr>
<td>More than once</td>
<td>5%</td>
<td>3%</td>
</tr>
</tbody>
</table>
On the other hand, as indicated in Figure 5.9, a substantial proportion of both claimants and defendants had been to court before, with claimants more likely to have been to court more than once. The frequency with which parties had previously attended court is a reflection of the number of business disputes dealt with in the VOL mediation scheme.

**Figure 5.9 Parties’ prior experience of court proceedings**

```
<table>
<thead>
<tr>
<th></th>
<th>Claimants (n=67)</th>
<th>Defendants (n=62)</th>
</tr>
</thead>
<tbody>
<tr>
<td>More than once</td>
<td>46%</td>
<td>24%</td>
</tr>
<tr>
<td>Once</td>
<td>34%</td>
<td>34%</td>
</tr>
<tr>
<td>Never</td>
<td>34%</td>
<td>42%</td>
</tr>
</tbody>
</table>
```

Among the representatives responding to the survey, one in three said that they had no previous experience of mediation (34%), a little over half said that they had some experience of mediation (55%) and about one in ten said that they had extensive experience of mediation (10%). These figures are somewhat different from comparable data in the 1998 review and reflect greater familiarity with mediation. For example, in the 1998 review three-quarters of representatives said that they had no previous experience of mediation and only 25% said that they had some experience of mediation. Overall, representatives regarded the information about mediation received from the court as helpful, with about four in ten saying that it was very helpful, a similar proportion saying that the information was quite helpful (43%) and the remaining 17% finding the information not very helpful.

**Evaluation of the mediation scheme**

**Confidence in the mediator**

Parties were asked whether they had had confidence in their mediator during their mediation session and the questionnaires revealed no difference between defendants and claimants in terms of their levels of confidence in their mediator. Around 60% of

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respondents said that they had had confidence in their mediator at all times. There was, however, some difference depending on whether or not the case had settled. Although there was some loss of confidence in mediators after initial impressions among both settled and unsettled cases, this loss of confidence was expressed more frequently among parties whose cases had not settled.

**Figure 5.10 Parties’ confidence in the mediator**

<table>
<thead>
<tr>
<th>Response</th>
<th>Settled (n=60)</th>
<th>Unsettled (n=69)</th>
</tr>
</thead>
<tbody>
<tr>
<td>All the time</td>
<td>58%</td>
<td>62%</td>
</tr>
<tr>
<td>Not at first, but later</td>
<td>4%</td>
<td></td>
</tr>
<tr>
<td>At first, but lost confidence</td>
<td>20%</td>
<td>26%</td>
</tr>
<tr>
<td>No confidence</td>
<td>2%</td>
<td>7%</td>
</tr>
</tbody>
</table>

Representatives were also asked about their confidence in the mediator (Figure 5.11). Of those who attended mediation, a little over half of the representatives said that they had confidence in their mediator all the time (54%) and there was no difference in perception, depending on whether the mediators had been barristers, solicitors or non-lawyers. However, there was a significant difference in perception associated with the outcome of the mediation. Among representatives whose cases did not settle at mediation, around one in ten said that they had not had confidence in their mediator, and a further one-third said that they had lost confidence in the mediator during the course of the mediation. On the other hand, over half of those whose cases did not settle said that they had had confidence all the time, as compared with two-thirds of those whose cases had settled.
Perceptions of neutrality and fairness

**Parties’ perceptions**

Perceptions of mediator neutrality also varied depending on the outcome of the mediation and whether the respondent was a claimant or a defendant. Figure 5.12 shows that defendants whose cases did not settle were more likely to say that the mediator had been completely neutral than claimants whose cases did not settle. This suggests that claimants were less happy than defendants about failure to settle. However, even when cases did settle, there were perceptions of a lack of neutrality. A little over half of defendants who settled thought that the mediator was completely neutral (56%), while two-thirds of claimants who settled thought that the mediator was completely neutral (64%).
Users’ experiences of the VOL mediation scheme

Figure 5.12 Parties’ perceptions of mediator’s neutrality

<table>
<thead>
<tr>
<th></th>
<th>Defendants unsettled (n=30)</th>
<th>Claimants unsettled (n=30)</th>
<th>Defendants settled (n=32)</th>
<th>Claimants settled (n=28)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Completely neutral</td>
<td>90%</td>
<td>77%</td>
<td>56%</td>
<td>64%</td>
</tr>
<tr>
<td>Fairly neutral</td>
<td>3%</td>
<td>3%</td>
<td>25%</td>
<td>25%</td>
</tr>
<tr>
<td>Not really neutral</td>
<td>3%</td>
<td>18%</td>
<td>16%</td>
<td>11%</td>
</tr>
<tr>
<td>Not at all neutral</td>
<td>7%</td>
<td>3%</td>
<td>3%</td>
<td>11%</td>
</tr>
</tbody>
</table>

“I felt the mediator was very much pushing for me to settle when I was not entirely convinced. She would say they are ready to settle – which to me implied I was less ready – also when she went to the other room I could hear laughter.” (Claimant)

“His main target appeared to be to reach mediation between the parties disregarding which party is right, which party is wrong. I wish he would be on the side of the right party.” (Claimant)

“The mediator was not biased but clearly had his own agenda, i.e. to conclude the case within the time frame. The claimant brought no evidence, whilst I did. The claimant did not revisit their position until the very end. I felt I came under undue pressure to settle at all cost.” (Defendant)

Representatives’ perceptions
There were no significant differences overall between representatives’ perceptions of neutrality associated with settling or not settling cases at mediation. However, in common with parties’ views, claimants’ representatives were more likely to doubt mediator neutrality where cases had failed to settle (Figure 5.13).
Among those who thought that the mediator did not appear to be neutral, the chief complaints related to putting pressure on the party, general bias, and time issues. “He was VERY sympathetic to the applicant even though she clearly owed money to my client. Very much coercing my client to accepting a sum of money without any real consideration of the level of that sum. She felt at one point that she had no choice.” (Def rep)

Representatives were also asked for their assessment of how fairly the mediation was conducted (Figure 5.14). Overall, the response was very positive with over three-quarters saying that the mediation was conducted very fairly (76%), some 18% thought the mediation was conducted quite fairly and only six percent felt that it was either somewhat unfair or very unfair. There was no difference between claimants and defendants’ representatives in perceptions of fairness or mediation. Perceptions of fairness were, however, associated with outcome of mediation. Those representatives whose cases had not settled at the mediation were less likely to say that the mediation was very fair. It should also be noted that one in five of those representatives whose cases *had* settled, said that the mediation was “quite fair” rather than “very fair.”
Figure 5.14 Representatives’ assessment of fairness of mediation

“What is your assessment of how fairly the mediation was conducted?” (n=122)

- Very fair: 73%
- Quite fair: 80%
- Somewhat unfair: 17%
- Very unfair: 5%

Where there were complaints about unfairness these most frequently related to the mediator’s behaviour (68%). A minority felt that their client had been rushed into settlement (14%) and a similar proportion complained about the other party’s behaviour (14%).

“Time was wasted on marginal points by the mediator, who seemed to work on the basis that he did very little in two and a half hours and the put great pressure on during the last half hour.” (Def rep)

“Mediator not interested in exploring claimant’s position. Did not give any appreciable time to doing so. Did not allow either side to explain their positions to the other. Called a halt to the procedure of his own volition and not at request of parties.” (Claimant rep)

“At the time I believed him to be totally non-neutral but speaking to the other side afterwards they found him likewise to be disorganised, rude and unprofessional.” (Def rep)

“The mediator did not seem to control the whole process, in that there was confusion over who should be in what room when. Further, the M’s lack of legal background meant he was unable to express any view about the form in which the outcome was expressed.” (Claimant rep)

“The mediator did not appear to consider any of the issues in the case at all, but stressed simply the costs aspect.” (Claimant rep)
**Mediator control of mediation**

About six in ten of parties thought that the level of control exerted by the mediator was about right. However, about one-third of parties said that they would have liked the mediator to exert more control (37%) and only a handful would have preferred less control. Those parties whose cases did not settle were more likely to express a desire for more control than those whose cases did settle (44% of those who did not settle thought there should have been more control compared with 28% of those who settled at mediation).

**Formality of mediation**

It seems that, overall, parties’ expectations of the level of formality of mediations were met, with 59% of respondents saying that the level of formality was as expected. Where there was a mismatch between expectations and experience, the mediation was felt to have been less formal than expected (34% of respondents), with only a handful finding the mediation more formal than expected (7%). This suggests that more could be done to manage expectations.

**Positive evaluations of mediation**

All parties were asked whether there were any things about the mediation process that they particularly liked. The features most frequently mentioned with approval (Figure 5.15) were the informality of the process (24%), mediator’s skills (12%), and effective participation (11%). There were few differences between claimants and defendants in perceptions, although claimants were more likely than defendants to mention the value of informality.

“I liked the fact that the atmosphere was informal, that I was able to come and put my point forward and present my case.”

“I found it much more relaxed than I thought it would be. Much to my surprise it was rather enjoyable. And the mediator was excellent. I only wish that all solicitors had such a sense of purpose to resolve their case.”

“The informality and friendliness of the proceedings. I was very nervous initially, but was very soon put at my ease.”

There was, however, a marked difference between parties and representatives in their feelings about mediation. Parties stressed their approval of the informality of the
mediation, their ability to participate in the procedure and the mediator’s skills. Representatives tended to emphasise the scope for effective participation, the focus on issues, reaching settlement and reduction in costs. Only one representative asserted that there was “nothing” that they liked about the mediation process (Figure 5.15).

**Figure 5.15 Parties’ and representatives’ assessments of positive features of mediation**

**Negative evaluations of mediation**

One in five respondents (22%) said that they liked nothing about the mediation. This was most common among those respondents whose cases had not settled at mediation. One in three of those who had not settled and who answered this question said that they had liked nothing about the mediation, as compared with 12% of those who had settled. One-third of defendants said there was “nothing” they disliked about the mediation, while only one-quarter of claimants said there was “nothing” they disliked.
The most common features disliked by parties were that the mediation was rushed (11% overall), failure to settle (7%), the mediation facilities (9%), the focus on settlement (10%), the procedure (11%), that the mediation was too long (7%), or that the mediator was poor (8%). Examples of comments made in relation to these issues on the questionnaire are as follows:

“I felt that the mediator had no knowledge of this type of dispute. Whilst he was very fair he had no background regarding the dispute or issues involved. I would not suggest the involvement of a lawyer, but rather someone with some relevant commercial knowledge.”

“The mediator did not shed any light on who had the stronger case. He did not know who had the stronger case. He gave no direction in this respect. He did not know the law. This disappointed me.”

“There was no use of justice. Rules were imposed which should not have been. There was no time for considering consequences. My solicitor did not seem to have experience of procedure.”

“Room was not particularly clean. No ability to obtain refreshments. Nothing works at the Central London Court.”

“Very drawn out. Rooms cold, no warm refreshments. Both other parties allowed to join forces by mediator.”

“Accommodation was cramped, uncomfortable and dirty. Maybe this is deliberate to speed things along. Time was limited.”

Those parties who had settled their dispute at the mediation appointment were most likely to mention that the mediation had been rushed and that they had disliked the focus on settlement. Among those who failed to settle, the most common complaint was the failure to settle itself, poor mediator skills, practicalities and procedure. Of those respondents who settled their case at mediation, 38% said that there was nothing they disliked about the mediation, as compared with 21% of those whose cases did not settle.

Again, there were stark differences between parties and representatives in their assessment of the mediations in which they were involved. Representatives were more likely than parties to note that there were things about the mediation they particularly disliked and, specifically, more frequently mentioned that the mediation had been rushed and that costs had been increased (Figure 5.16).
Figure 5.16 Parties’ and representatives assessments of negative aspects of mediation

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Were there any things about the mediation process that you particularly disliked?

<table>
<thead>
<tr>
<th>Issue</th>
<th>Representatives (n=103)</th>
<th>Parties (n=98)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Rushed</td>
<td>10%</td>
<td>24%</td>
</tr>
<tr>
<td>Focus/pressure on settlement</td>
<td>12%</td>
<td>10%</td>
</tr>
<tr>
<td>Poor mediator</td>
<td>8%</td>
<td>8%</td>
</tr>
<tr>
<td>Increased costs</td>
<td>8%</td>
<td>8%</td>
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<tr>
<td>Failure to settle</td>
<td>8%</td>
<td>7%</td>
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<tr>
<td>The other party</td>
<td>7%</td>
<td>7%</td>
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<tr>
<td>Practicalities</td>
<td>5%</td>
<td>3%</td>
</tr>
<tr>
<td>Too lengthy</td>
<td>5%</td>
<td>3%</td>
</tr>
<tr>
<td>Nothing</td>
<td>4%</td>
<td>3%</td>
</tr>
<tr>
<td>Procedure</td>
<td>11%</td>
<td>11%</td>
</tr>
<tr>
<td>Informality</td>
<td>2%</td>
<td>2%</td>
</tr>
<tr>
<td>Other</td>
<td>3%</td>
<td>11%</td>
</tr>
</tbody>
</table>
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“In this case the mediator leaving us alone and waiting for most of the three hours with little happening. No real negotiation was even started until the last half hour when undue pressure was put on both parties by the mediator, who became agitated and rude.” (Def rep)

“I believe in mediation in all cases if possible. But this experience was terrible. The mediation was handled extremely poorly and unprofessionally.” (Def rep)

**Failure to settle at mediation**

Those parties and solicitors whose cases failed to settle at mediation often expressed considerable dissatisfaction, particularly when they felt that they had been directed to mediate by judicial recommendation. Although some of the comments made by parties and representatives in unsettled cases were more positive in seeing that the mediation had been constructive, these were in the minority.

The most common reason given for failure to settle was the intransigence or personality of the opposing side, often coupled with a sense that there had never been any optimism that the case might settle. In a minority of cases, and this was true of the more constructive attitudes towards failure to settle, the failure was attributed to time...
constraints, mediator shortcomings, and occasionally the physical surroundings of the court, which were felt to be not conducive to settlement (see further below).

**Court recommended**

Attempting mediation as a response to judicial pressure rather than personal choice, was a common complaint. As discussed at various points in the report, it seems clear that excessive pressure can be counterproductive, with parties ‘going through the motions’ to avoid a cost order. Paradoxically, it is possible that a proportion of parties attempting mediation as the result of a judicial direction in the VOL scheme may have been feeling a greater degree of compulsion than some of those who entered the ARM scheme, and this may account for the lower settlement rate in the VOL scheme in recent years.

“I did not recommend mediation, it was forced on my client by the District Judge at Watford…The defendant intended to use whatever means to move the boundary...The mediation wasted 6 months of time and greatly increased the costs of the action. The mediation should not have been held...Where the cost of litigation is being used by one relatively wealthy party as a tool to defeat an (elderly party) of limited means, mediation is inappropriate. A DJ should be alive to such matters and not blindly order mediation…The mediation process is an effective way of settling a wide variety of disputes. If one party strongly resists the process because there is, in the view of his legal advisers, no prospect of success, a DJ should not enforce the process. This claimant was failed miserably by the court process at virtually every stage of what should have been a short and efficient action.” (Claimant rep, boundary dispute)

“We recommended mediation (to our clients) to avoid an adverse costs order. There was only a remote possibility of settlement. The Court should not push parties to mediate. It is an expensive process, but there should be a positive duty on legal advisers to have considered it. It is a good tool for parties that are sensible and genuinely want to end litigation.” (Claimant’s rep, claim for professional fees)

“It was recommended by the judge. The mediation was accepted by the other side only to secure their costs in case they won...Mediation is used by larger companies only to intimidate the small-private defendant. Despite the fact the Judge told us that mediation will be with the company directly, only their solicitor turned up who said he was not authorised to settle!!! THIS WAS NOT GOING TO BE REPORTED TO THE JUDGE. This issue created complete mistrust in court systems and afterwards. I settled later on because I saw COURTS CANNOT BE TRUSTED.” (Defendant. Subsidence claim blamed on defendant’s tree.)

**Intransigence**

The importance of parties’ willingness to negotiate and their openness to the possibility of settlement was underlined by complaints from some who felt that the failure to reach
settlement in the mediation was the result of their opponent’s intransigence. As we have seen, unless parties are prepared to give some ground, or at least reconsider their position, then mediation is unlikely to achieve a settlement.

“Mediation does not work if the parties are not willing to give some ground. No one was prepared to budge...It was ordered by the court. The other side just seemed to use it to try and keep fighting the litigation.” (Claimant rep. Dispute over family business. Increased costs by about £2500-3000 and increased time)

The comments made by dissatisfied parties and representatives underline the importance of willingness to negotiate and to compromise in reaching a successful outcome in mediation.

**Failings in the mediator**

Failure to reach agreement by the end of the mediation was also sometimes attributed to lack of skill or lack of legal knowledge on the part of the mediator. Certainly, expectations of mediators were relatively high.

“This was an unfortunate situation where the claimant did not understand the law and the mediator could not advise/express an opinion. I have no idea how the mediator dealt with the claimant during their meetings, but I feel he allowed the claimant to continue to be unrealistic.” (Defendant rep, damages for breach of contract for £80,000)

“The mediator is crucial to the outcome. I consider a major factor in this case was that the mediator was neither legally trained or a member of the construction industry and therefore he was unable to help progress any issues.” (Claimant’s rep, construction case)

**Time constraints**

Evidence from parties, mediators and representatives on the impact of time limits in the Central London VOL scheme was rather mixed and to some extent was influenced by the mediation outcome. Where cases were successfully mediated, the time constraint was sometimes seen as a contributing factor to maintaining momentum during the session that led to settlement. On the other hand, where agreement was not reached by the end of the mediation session, the time limit was identified as a constraint, as in the following example:

“It is very difficult to make an obstinate person, poorly advised by an out of touch solicitor agree to settle. The mediator achieved this. However, the closing of the building at the time of drafting the disclosure terms wrecked the agreement...It added £2,000 to our legal costs immediately as we sought top reach agreement, and uncertainty to the future result. It may result in the case going to the
It has to be said, however, that if agreement is very close by the end of the mediation session, it is difficult to understand why a second mediation session was not arranged to complete the settlement discussions or why the parties and their representatives might not continue negotiations themselves, without the need for a further mediation session. In fact, the data reported in the previous chapter show that the number of cases settling within 14 days of an unsuccessful mediation was relatively modest.

**Fairness of mediation outcome**

Parties were asked whether they felt that, considering everything, the outcome of the mediation had been fair. Responses to this question showed little difference between claimants and defendants in their perceptions of fairness, although claimants in settled cases were slightly more likely than defendants in settled cases to feel that the outcome had been *unfair* (35% of claimants settling as compared with 27% of defendants).

Among those who said the outcome was unfair, the most common reasons given were: that the amount of the settlement was wrong (64%); that the mediator’s behaviour was unfair (21%); and that there was no justice in the settlement (14%).

*“The process felt pressurised, due to time and the mediator. My sense of it is that I have managed to keep my home (Thank God) but I have lost £18,500 total in legal costs – of which I will get back £3,500. I will have to pay for the legal costs towards the transfer of the property even though I have nothing to gain from the process.”* (Claimant property dispute settled)

**Impact of mediation on time and cost**

**Parties’ views on costs savings**

Parties who had attended mediation were asked whether they felt that the mediation had made any difference to their costs. Overall, a little over one-third of respondents said that the mediation had saved costs (38%) and about one in five thought that the mediation had made no difference to costs (21%). Some 12% said that there had been no costs involved and 29% said that costs had been increased. The replies revealed little difference between claimants and defendants in their perception of the impact of mediation on costs.
However, there was a significant difference in perception between those respondents whose cases had settled at mediation and those whose cases did not settle (Figure 5.17). Almost two-thirds of those whose cases settled felt that they had saved costs and 7% thought that mediation had increased their costs; these figures are consistent with those found in the 1998 review. Among those respondents whose cases had not settled, 45% thought that their costs had increased, almost one in five thought that they had saved costs (19%), and a little over one-quarter thought that the mediation had made no difference to their costs (28%). In the 1998 review of the scheme, parties whose cases were unsettled were somewhat less likely to perceive an increase in costs and somewhat more likely to think that costs had been saved despite failure to settle.  

Figure 5.17  Parties’ view of whether mediation saved legal costs

Figure 5.18 shows that among those who felt that costs had been saved, and were able to place a figure on the amount saved, a relatively high proportion of respondents thought that the saving made had been quite substantial. Almost one in three thought that they had saved £10,000 or more.

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57 Figure 4.1, op cit, p.81, Genn 5/98.
Users’ experiences of the VOL mediation scheme

Figure 5.18 Parties’ estimates of cost savings as a result of mediation.

Among those who thought that costs had increased (22% of respondents), and who were able to estimate a figure, the median extra cost was estimated at £750 with a minimum extra cost of £100 and a maximum additional cost estimated at £5,000.

Representatives’ views on cost savings

About half of those representatives replying to the survey said that mediation had saved legal costs (Figure 5.19). About 15% said that the mediation had made no difference to legal costs and a little over one-third (35%) said that the mediation had increased legal costs. There was no significant difference between claimants and defendants’ representatives in this respect. However, again, representatives’ views varied significantly depending on whether or not cases had settled at mediation. Where cases had settled at mediation, 90% of representatives believed that legal costs had been saved and only around one in ten thought that costs had been increased by the mediation. On the other hand, where the case had not settled at mediation, over half of the representatives believed that costs had been increased (55%), although one in five still felt that costs had been saved. These findings are again consistent with the 1998 review of the scheme, although at that time a lower proportion of representatives felt that unsettled mediations had increased costs.  

58 Figure 4.7 p94, 5/98 op cit.
Figure 5.19 Representatives’ views of cost savings

Consistent with the perceptions of parties, representatives who were able to estimate the amount of cost savings frequently thought that substantial savings had been made. Figure 5.20 indicates that two in three of those who felt that costs had been saved estimated savings to be in excess of £5,000.
**Parties’ views on time savings**

Parties and representatives were asked slightly different questions about the impact of mediation on time spent resolving the dispute. Parties were asked, “In trying to sort out this dispute did mediation save you time, or did it increase the time you spent, or did it make no difference to the amount of time you spent on the dispute?” Taking the responses from parties as a whole, Figure 5.21 shows that about one-quarter of respondents thought that the mediation had made no difference to the time involved in dealing with their dispute. One-third thought that the time had been increased, and 42% thought that time had been saved. Again, there were no significant differences between claimants and defendants, but there were significant differences in perception of timesavings depending on whether or not the case had settled. Almost three-quarters of respondents who had settled their case thought that the mediation had saved time (73%), while only 17% of those whose cases did not settle thought that mediation had saved time. When cases did not settle at mediation, a little over half thought that mediation had increased time spent on the case (56%).

**Figure 5.21 Parties’ views of time saved by mediation**

Most of those who perceived that mediating had saved some time measured the saving in days (46%), although over one-third thought that they had saved months or years (Figure 5.22). Some of this difference, however, appears to stem from varying interpretations of the question by respondents. Some respondents clearly measured
Users’ experiences of the VOL mediation scheme

time saving in terms of the number of hours spent dealing with the dispute as opposed to the amount of time that might have otherwise elapsed before the dispute was finally settled by agreement or had been tried in court.

Representatives’ views of time savings

Representatives were asked to say whether, considering everything, mediation had reduced, increased, or made no difference to the amount of time that they had spent on the case. Some 42% of representatives said that mediation had saved time, a little over one-third of representatives (37%) thought that mediation had increased time and about one in five thought that the mediation had made no difference to the amount of time that they had spent on the case. Unsurprisingly, however, there was a significant difference in response associated with whether or not the case had settled at mediation (Figure 5.22). When cases had not settled, about three-fifths of representatives thought that the mediation had increased the amount of time spent on the case and only one in five thought that time had been saved. About three-quarters of representatives whose cases had settled felt that mediating had saved time and only 5% thought that time had been increased.

Figure 5.22 Representatives’ assessment of time saved

![Figure 5.22 Representatives’ assessment of time saved]

Generally, representatives expressed timesavings and extra time spent on cases in terms of hours. Figures 5.23 and 5.24 show the distribution of estimated hours saved and extra hours expended on mediated cases.
Estimates of time saved as a result of mediation show a very wide range with 28% of those responding estimating savings to be no more than 8 hours and 25% thinking that the saving had been 30 hours or more.

Three-quarters of those who thought that they had spent extra time on the case estimated the additional time spent to be no more than 1 day; 27% of those responding thought that the extra time had amounted to no more than 4 hours. However, one-quarter of those who thought that they had spent more time on the case as a result of mediation felt that the extra time amounted to more than 1 day.

Figure 5.23 Representatives’ estimates of time savings as a result of mediation

![Graph showing time savings](image)

Figure 5.24 Representatives’ estimates of time increases as a result of mediation

![Graph showing time increases](image)
General assessments of mediation by parties and representatives

Would you mediate again?

Overall, about three-quarters of parties said that they would probably, or definitely, try mediation again, and only about one in ten said that they would definitely not try mediation again (Figure 5.25). Although there was little difference between defendants and claimants on this question, unsurprisingly there was a significant difference in response depending on whether or not the case had settled at mediation. About one-third of those parties whose cases had not settled said that they would probably or definitely not try mediation again, as compared with around one in ten (11%) of those whose cases settled at mediation. This indicates clearly the impact of settlement at mediation on perceptions of the process, apparently, irrespective of whether the party was a claimant or a defendant. On the positive side, however, two-thirds of parties who had unsuccessfully mediated said that they would probably, or definitely, try mediation again.

Figure 5.25 Parties’ views on whether they would try mediation again

Would you try mediation again? (n=127)
Users’ experiences of the VOL mediation scheme

**Would definitely mediate again**

Those who said that they would definitely mediate again often expressed considerable enthusiasm for the process, and focused on success in achieving a settlement, the skill and qualities of the mediator, the attractions of an informal process and the speed of the procedure.

“I think all disputes should automatically go to mediation and any side not willing to go and actively attempt to settle at the mediation should be noted so at the court case made to pay all costs and compensation to the other party if they lost the case.” (Claimant settled large property claim at mediation)

“We think mediation is the best thing since sliced bread. We believe that if such a system was widespread and well known, the number of court cases could be drastically reduced. We were impressed and cannot recommend mediation highly enough.” (Defendant breach of contract case, settled)

**Would mediate again despite reservations**

When there were reservations about mediation, for example, where a case had failed to settle or where there had been pressure to mediate, respondents were often able to see the potential in the process. Sometimes the failure to achieve a settlement, or reservations about the particular mediation stemmed not from perceived weaknesses in the process itself, but in some aspect of the particular mediator or opponent or opponent’s representative.

“Unfortunately the defendant was initially against mediation and when pressed by the judge he mediated. Since the defendant's strategy had been to delay payment, he did not put much effort into mediation. Despite the above, I would certainly use the process again and I would heartily recommend it. In a normal dispute I can see it significantly reducing both costs and time.” (Claimant in debt case)

“[Would mediate again:] But only if the mediator was a very experienced lawyer or barrister or judge who could give guidance on legal/contractual matters, and also the likely outcome in court. We and the defendant were further apart at the end of the mediation than before.” (Claimant debt case)

“My dissatisfaction with the process stems from my solicitor who had no previous experience of mediation. He persuaded me that a barrister was required to attend. Due to the informal nature of the process the barrister was totally unnecessary and I could have easily attended on my own. The legal pressure cost me dear! The process was useful as it made the defendant realise he owed me money, a fact he failed to appreciate before. It was very helpful that the mediator was an architect who advised me not to accept the sum offered at mediation. Victory in these cases is always hollow as we have now settled for £9000 but approximately £7500 are costs! The process would be improved if the mediator could act as a judge!” (Claimant unsettled debt case)
**Probably would not mediate again**

When respondents said that they would probably not mediate again, this was often an expression of frustration at feeling that they had been pushed into a process that they had not chosen and which had ultimately not succeeded in bringing an end to the dispute. There were cases where people had reluctantly agreed to mediate, only to find that their opponent was completely intransigent during the mediation session, or behaved in a way that left the respondent feeling that the session had been a charade or a fishing exercise on the part of their opponent. Occasionally, people had reluctantly agreed to attend mediation, only to find that their opponent had failed to attend, wasting their time and the cost of preparation for the mediation session.

> “It was a waste of time if there is no reason to settle you have an impasse. If the Judge was to be told that one party or the other had refused to work with, or mediate, and just wasted time it may help to make mediation worth trying. Mediation for me just ran up my cost. I was very unhappy when I found out the other party had no intention of mediating.” (Claimant – not settled at mediation but won at trial)

> “If both parties were held to greater responsibility for their behaviour at mediation, a better outcome would be achieved. There is some tendency for parties to ‘have a good time’ and practice for court appearance.” (Defendant, unsettled debt case)

Other explanations for respondents feeling that they would not be keen to repeat the mediation experience could be found in unhappiness with the mediator, particularly where cases did not settle. As discussed in various parts of this report, the skill and approach of the mediator is perceived as a critical factor not only in the success of mediation in terms of settlement, but in the lingering impression of the experience with which mediating parties are left – especially when they have not been able to achieve a settlement by the end of the mediation session. The mediator, although only a facilitator, is in fact central in the mediation session and his or her skill is observed and evaluated carefully by the participants in the mediation.

> “The efforts of the mediator were well intended, but his lack of legal knowledge on this subject left him unable to discuss the subject in an informed manner, with the other party. This resulted in the mediator asking my solicitor to advise the other party on the subject. This advice they ignored and refused at the meeting to offer any settlements or agree to mine. As a result the mediator decided to abandon the meeting early as the other party was unwilling to negotiate.” (Defendant unsettled dispute)
**Representatives’ views on timing of mediation**

Most representatives felt that the mediation had been held at the right time in the life of the dispute (59%), although over one-third of representatives said that the mediation had occurred too late (38%) and only three percent thought that the mediation had occurred too early. This finding can be compared with the complaints in the ARM pilot of cases being referred to mediation too early (above Chapters 2 and 3).

**Representatives’ assessments of the value of mediation**

Representatives who had attended mediations with or on behalf of clients were asked some general questions about their views of the potential of mediation. About three-fifths of representatives (60%) said that they thought mediation was a good way to handle a significant number of cases, about one-third (35%) thought that mediation could be helpful in a minority of cases, and five percent thought that mediation was a complete waste of time. These findings are slightly more negative than those obtained in the 1998 review where no representative had thought that mediation was a complete waste of time.

When asked whether they had recommended mediation to other clients almost one-half reported that they had recommended mediation more than once (49% of respondents); about 17% reported that they had recommended mediation once to another client, and just over one-third (34%) said that they had not recommended mediation to any other clients. These figures are virtually identical to the findings of the 1998 review of the mediation scheme.

On the question of the kinds of cases for which mediation is most appropriate, one-quarter of representatives said that “all” cases were appropriate. The kind of civil cases most often mentioned as being particularly appropriate for mediation were commercial cases, those where the claim value was low (and costs would be out of proportion), straightforward debt cases, cases where one party is not legally represented, and cases where disputes relate to issues of fact rather than law. Those cases most often mentioned as being inappropriate for mediation were those with complex factual and legal issues, personal injury cases, and large commercial claims.
Mediators’ perspective on the VOL scheme

Mediators who had conducted mediations during 2003 were also sent questionnaires seeking feedback on their cases. They were asked what, in their view, had contributed to successful mediations and, where unsuccessful, what factors they felt helped to explain the failure. Fifty-four questionnaires were sent out and 32 questionnaires were returned, representing a response rate of a little under 60%.

What contributes to successful mediation?

Where mediations had been successful, key factors mentioned by mediators when accounting for success appeared to be the mediator’s ability to facilitate negotiation, skill in reality testing, in the context of the parties’ willingness to cooperate and compromise and ultimately their motivation to settle.

Perhaps unsurprisingly, success at mediation was often attributed to simple negotiations, and mediators saw ‘reality testing’ as important in achieving settlement. Mediators explained how encouraging parties to focus on the risks of continued litigation created the conditions within which parties could reflect on their interests and see the advantages of compromise. In this way, reality testing leads to more ‘realistic’ expectations and greater willingness to give ground:

“During the mediation and before the mediation, parties were forced to allocate sufficient management time to the problem; also mediation highlighted the risk of continued litigation for a low value dispute.”

“The sudden realisation that the dispute could spiral out of control and involve unjustifiable costs and time consequences.”

“I managed to reduce their expectations and to see the potential outcome if they did not settle.”

“Both sides were faced with a mutually unpleasant alternative; i.e. the proceedings continuing with varying degree of uncertainty of outcome and preferred to reach their own deal.”

“The parties were asked to focus on the wider issue – did they want the association to survive, or for there to be two rival associations. They both agreed that one association would be better.”

On the other hand, ‘reality testing’ depends on the parties having the motivation to enter into the spirit of mediation, willingly accepting the opportunity to reflect on the weaknesses as well as the strengths of their position and to take a realistic approach to
the downsides of litigation. In the view of mediators, success at mediation depends on a co-operative stance from the parties and their legal advisers, as well as on the skills of the mediator:

“The common sense and integrity of the claimant’s legal advisor.”

“Willingness of the claimant to be flexible in the seeking of a resolution.”

“I believed I was persuasive in encouraging both parties to settle.”

“The mediator’s persistence.”

That the motivation and will to settle is critical in the outcome of mediation was underlined by some vivid examples of sessions that had started unpromisingly, but in the end had succeeded in reaching agreement.

“This case began with a VERY angry joint session which didn’t seem likely to lead to a settlement, but a settlement was reached after the first hour. Clearly both sides had come to the meeting with two aims: - to have a huge row; and – to dispose of the case; and they both achieved both objectives. Without the framework of the mediation meeting this wouldn’t have been possible.”

“Parties need to understand that mediation is about need and interests going forward not simply re-hearing legal and moral arguments. Guidance on this might be helpful. This was a difficult mediation due to the initial intransigence of all parties, once a little movement was made however it became a little easier, but was touch and go until the very last minute.”

**Value of pre mediation contact**

The majority of mediators made some form of contact with solicitors or parties before the mediation itself. This strategy was often thought to be important in increasing the chance of a successful outcome to the mediation. According to mediators, pre-mediation contact offers the opportunity to establish a relationship with the disputing parties and familiarise them with the process. It also provides a useful initial opportunity to explore the issues that are likely to be the focus of discussion and to encourage the parties to prepare for the mediation in order to make the most of the limited time available:

“In many cases it first starts to build a rapport with the mediator and second helps the parties understand the process…giving reassurance to an unrepresented party (the claimant).”

**Accounting for failure at mediation?**

In response to the opportunity to account for failure to settle at the end of the mediation, mediators tended to blame the attitude of the parties, entrenchment, lack of preparation
by the parties, and time constraints. This is consistent with their views on the factors that are important in achieving a successful outcome at mediation.

**Attitude and entrenchment**

The stance of the parties was clearly seen as an important factor in determining the outcome of mediation. Lack of motivation to settle, an interest in continuing conflict rather than reaching an accommodation and general entrenchment were all seen as major obstacles to settlement.

“Parties came to the mediation saying they wanted to settle, but they seemed to want to continue the dispute.”

“Both sides believed that had a strong case. The claimant, in particular, who was not legally represented, considered that he would be likely to do better by proceeding with the case, even though he was aware that if he lost he could be liable for the defendant costs.”

“Neither party was of a mind to reduce their expectations. Both parties were pursing untenable claims/counterclaims.”

“There was too large a discrepancy between what the claimant was demanding and what either of the defendants were prepared to pay.”

In some cases, the factors that, in the mediator’s view, had obstructed settlement at mediation were part of the history of the case and were the cause of failure to settle prior to mediation. This was sometimes the case where the dominant factor in failure to settle at mediation was the unreasonableness of one or both parties:

“[The reason the case did not settle at mediation was] a difficult client with unrealistic expectations whose solicitor had had difficulties in obtaining instructions; e.g. despite agreeing to send me copies of papers by phone his client then countermanded but I was not told until the day of the mediation. Broadly, however it seemed as though the client, who was struggling financially, was content to allow the case to run. The solicitors could not get progress through negotiation which had failed and had no option but to bring proceedings.”

This analysis from the professionals of how entrenchment and unwillingness to compromise obstructs settlement sits rather uncomfortably with the support shown by some mediation providers for compulsory mediation, discussed in Chapter 1 in relation to the ARM pilot in Central London.

“The success of mediation depends on both sides being willing to settle the case. In the cases in which I have been involved where there has been no settlement, the failure to settle is usually attributable to one side or the other being ‘bloody-minded’ and not sufficient disincentives to the case proceeding to trial.”
**Poor legal advice**

Lack of legal advice, poor legal advice, and lack of preparation by lawyers for mediation sessions was also seen as a problem both prior to mediation and sometimes at mediation sessions. Occasionally, poor preparation was simply a function of unfamiliarity with mediation processes on the part of lawyers accompanying clients.

“The respective lawyers took an over legalistic and adversarial approach and racked up considerable costs which far outweighed the value of the claim.”

“External solicitors acting for each party saw this as a straight claim for unpaid invoice. The business people attending the mediation could understand better the nuances and actions behind the unpaid invoice.”

“The claimant (a large company) sent a junior member of their in house legal team who had no knowledge whatsoever of mediation; more importantly she had no delegated authority to negotiate and was very conscious of her own (v. junior) position within the company.”

**Solicitors’ contributions**

To gauge mediators’ perceptions of the role of solicitors in mediation, mediators completing feedback forms were asked if the presence of lawyers might affect the outcome of mediation. Representatives were often seen as an asset by mediators, particularly in helping their clients to take a realistic view of the strengths and weaknesses of their case. Where solicitors were familiar with, or understood the mediation process, they could also support their client and assist in seeking creative solutions to the dispute.

“A good adviser is always positive.”

“The contribution of solicitors varies, but it is generally positive in encouraging the party to understand the other side’s point of view and hence to settle. It is necessary for the mediator to be positive towards the representative.”

“Positive - It is not meaningful to discuss the legal merits with lay people. More pressure can be brought to bear on parties who are represented.”

“They help the parties examine options and understand risk, strengths and weaknesses.”

However, mediators also indicated that the contribution of solicitors in some cases had been at best neutral, and at worst detrimental to the mediation process.

“The two parties did all the running in the case. As far as I was aware the representatives played no role in the outcome of the mediation.”
[The contribution of representatives was] negative in that the reps had already argued the case in a point-scoring manner for a year and held to their positions.”

“He showed little energy before or during the mediation and was slow to respond to calls etc.”

“Whilst the defendant’s solicitor was helpful, the claimant’s solicitor tended to support the claimant’s inflexible attitude.”

**Timing of Mediation**

Mediators were also asked whether the mediation had occurred at an appropriate time in the life of the dispute. While the majority of mediators felt that timing of the mediation had been about right, a significant number of mediators thought that the mediation had occurred too late. They believed that a more appropriate time would have been before the parties had become entrenched and before high legal costs had been incurred. Some mediators thought that the mediation should have occurred as early as at the exchange of initial papers. The sense that a proportion of mediations had occurred rather late reflects the fact that about 40% of respondents said that their dispute had been going on for more than two years when they agreed to try mediation.

“Should have been before the claimant had begun to accumulate significant costs in the recovery of the debt. The defendant was resistant to these costs.”

“The mediation should have occurred 2 years earlier when (a) the [claimant’s] information was current and (b) the defendant had not the had the time to become embittered and entrenched.”

“At the very beginning. The court file was quite thick. The case should have been referred at the outset – all the parties needed was some coaching in how to communicate in a non-confrontational manner. The court system simply gave them the tools and environment to continue down the adversarial path.”

Only one mediator felt that the mediation had occurred too early and that the accumulating cost and delay of litigation had yet to impact on the attitude of the disputing parties:

“The parties were still at the early stage of their ‘personal’ dispute. Court time and costs might improve their attitudes.”

**Time limitation**

As discussed in Chapter 3, there are conflicting views about whether the time limit of 3 hours on Central London mediations contributes to settlement or acts as a constraint. Those mediators returning feedback forms about VOL mediations in 2003 frequently
Users’ experiences of the VOL mediation scheme

referred negatively to the time limitation on mediation sessions. Three hours was thought to be too short where cases were complex, highly contentious, or where positions were entrenched. For example:

“The time limit of three hours is too short for complex cases. Four hours or half a day would be better.”

“All commercial court mediations that I have been involved in are [too] short… This is not helped by the fact that you know that someone is waiting to lock up… we started seriously talking ½ hr before the scheduled end and ended up ¼ hr late i.e. all the business was done in ¾ hr under pressure.”

“I am extremely pro-mediation. This type of scheme, however, gives me reservations due to the ‘one size fits all’ approach. I have found the time limit a serious constraint for several reasons:
1) Usually there are side issues that take time to identify.
2) Parties are seldom adequately prepared.
3) Parties/lawyers discussions are crucial, especially as many lawyers only pay lip service to mediation. It takes time to separate them from their clients.
4) The atmosphere at the CLCC for mediations is unhelpful, with only security staff available – The imputation of lack of support is clear.”

However, there were some who felt that the time limit helped to maintain momentum and that it was a positive factor in successful outcomes.

“When I started doing these mediations I though that 3 hours was too short. With experience and improved techniques have changed my mind. 2 hours is generally sufficient or I expect the parties will settle during the next few days.”

“I find having a time-limited mediation is helpful in concentrating the minds of the parties. However its success depends on both sides being willing to settle the case.”

Mediator’s fee

A concern raised by mediators about the VOL scheme at Central London was the level of the fee, echoing some of the complaints made by mediators who returned report forms for the ARM pilot. Some mediators felt that the current fee was inadequate and that remuneration arrangements were unsustainable in the long term. For example:

“The fee paid to the mediator (£150 inclusive of VAT) is woefully inadequate, bearing in mind that in addition to the 3 hours allocated for the actual mediation, at least another 3 hours is spent in preparing for the case and in pre mediation contact with the parties.”

“Because the payment of £200 flat fee to mediators is quite low what will happen is experienced mediators will eventually move on to more rewarding things. For now most mediators will only contemplate accepting these nominations for purposes of gaining experience and fulfilling CPD requirements. May I humbly
suggest the introduction of sliding scale of fees, depending on the value of the dispute, as is the case in Exeter and Birmingham."

While there is no doubt that the current remuneration for mediators providing services in the Central London VOL scheme is extremely modest, the cost of mediation for parties is a critical policy issue. There is a limit to the extent to which mediators’ fees can rise if court-based schemes are to remain attractive for low-value cases, particularly in a climate of declining settlement rates.

Summary

Since 1999, users and representatives’ explanations for entering the VOL mediation scheme have indicated the increased role of the courts in encouraging or pressing parties to mediate. Encouragement or directions by a judge, or fear of potential costs sanctions, were mentioned as the reason for mediating by one-quarter of those responding to questionnaires. By contrast, in the 1998 review of the VOL scheme, only a handful of respondents gave court encouragement as a reason and there was no reference to cost sanctions. Other reasons for mediating included the possibility of saving cost and time and the opportunity to get past logjams in negotiations.

The majority of parties attending mediation had no previous experience of mediation. Most respondents displayed high levels of confidence in mediators and confidence in the neutrality of the mediator. Representatives generally assessed mediations to have been fair, although there was some evidence of more negative evaluations where the mediation had not achieved a settlement. In general, parties valued the informality of the process, the skill of the mediator, and the opportunity to be fully involved in the settlement of the dispute. The most common features disliked were that the mediation was rushed, failure to settle, facilities, focus on mediation, or poor skills on the part of the mediator. The survey of mediating parties and representatives again underlines the fact that the skill and approach of the mediator are seen as critical factors in the success of mediation. Such skills also have an important influence on the impression of the process as a whole, especially among those parties who are not able to achieve a settlement during mediation. Although mediators are not judges and their role is to facilitate settlement, not to preside over proceedings, they are absolutely central in the mediation process and their performance is important in evaluations of that process.
In accounting for failure to settle at the end of mediation, common reasons given by respondents to the survey were: court direction when parties were unwilling to compromise, the intransigence or personality of the opposing side, failings in the mediator and time constraints.

Where mediation had been successful, both parties and representatives felt that costs had been saved. On the other hand, where mediation had not been successful about half of parties and 55% of representatives thought that costs had been increased, although about one in five still felt that some costs had been saved. These findings are fairly consistent with the 1998 review; in the current survey, however, unsuccessful parties and representatives were more likely to feel that unsuccessful mediation had increased the cost of the case. Both parties and representatives felt that successful mediation had saved time and conversely, where mediation was unsuccessful there was a tendency to feel that the mediation had increased the time taken to conclude the dispute. The majority of parties felt that they would try mediation again, whether or not their case had settled at the mediation. The proportion of lawyers who reported having recommended mediation to their clients once or more than once in the past was virtually identical to the findings of the 1998 review, suggesting no significant growth in the enthusiasm of the profession for mediation.

Successful mediation, as gauged by mediators’ analyses, is influenced by the skill of the mediator and motivation and willingness of parties to compromise. Mediators attributed failure at mediation to the attitude of parties, entrenchment, lack of preparation by the parties, and the time constraints of the Central London scheme.
Chapter 6. Conclusion

The ARM pilot was devised as an experiment in quasi-compulsory mediation. Some enthusiasm for the experiment had been generated by the apparent success of a mandatory mediation programme in Canada where 3,064 cases were dealt with over a 23-month period (1,110 in Ottawa and 1,954 in Toronto). The evaluation of the Ontario mandatory mediation programme records that: “a small number of cases have been exempted from mandatory mediation. Between January 1999 and December 1 2000, pilot project staff report 25 exemptions in Ottawa and 69 in Toronto.” The report goes on to note: “Mandatory mediation is an article of faith in Ottawa, a part of the fabric of litigation. Toronto is only beginning – both with case management and with mandatory mediation.” Reporting on a focus group discussion with lawyers undertaken as part of the evaluation, the report noted: “The general experience of participants was that motions to exempt from mediation were very rarely used, although some participants had had them granted.”

Clearly, the response to the ARM pilot in London was somewhat different. Over a period of 12 months, some 1,232 cases were referred to mediation under ARM. Of these about 70% sought to opt out of the scheme. In the end, mediation dates were fixed for about 47% of referred non-personal injury cases and for about 12% of personal injury cases. The high rate of objections and small number of cases proceeding to mediation mean that the minority of cases referred to mediation under ARM can hardly be regarded as a body of mediations “under compulsion”.

Outcome of ARM

During the 12-month experimental ARM scheme, 1,232 civil disputes were randomly referred to mediation, of which 82% concerned damages for personal injuries. By the end of the evaluation period, only 22% of the cases referred to mediation had been listed for mediation and ultimately only 14% of those cases originally referred to mediation had been mediated. In a caseload dominated by personal injury cases, the pilot scheme

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60 Ibid, p.28.
61 Ibid, p.54.
62 Ibid, p.56.
experienced a high rate of objection to automatic referral throughout its life. The strategy of personal injury cases was to object to mediation or to settle before replying, whereas in non-personal injury cases objections to referral to mediation were raised less often. Following the Halsey judgment, the District Judge assigned to hear objections to the scheme felt that her powers were limited to persuading rather than ordering reluctant parties to change their minds. Hearings to consider objections did not generally result in mediation bookings and tended to introduce delay into the processing of cases.

The broad figures from the ARM experiment suggest that quasi-compulsion in the London context has not been particularly successful. The overall opt-out rate commenced at around 80% and, although there was some reduction in the number of objections in the last third of the pilot, nonetheless, by the end of the pilot only a minority of cases had been mediated. On the other hand, this report has repeatedly referred to the significant difference in take-up of mediation between personal injury and non-personal injury cases. Among the personal injury cases referred to mediation, objections were raised in about 90% of cases. However, the opt-out rate for non-personal injury cases was much lower and the settlement rate at mediation was actually better than that obtained in the voluntary scheme. This suggests that there may be a benefit in automatically referring non-personal injury cases to mediation, so long as judicial time is not spent trying to persuade those who opt out to change their minds. The pilot has shown that this is an ineffective use of time and may impose inappropriate pressure on parties to mediate.

**Settlement**

Of the cases actually mediated under the ARM pilot scheme, the settlement rate over the course of the year followed a broadly downward trend, from a high of 69% among cases referred in May 2004 to a low of just below 38% for cases referred in March 2005. The average over the year was 53% with a handful settling within 14 days of the mediation session. Where neither party objected to mediation the settlement rate was 55%. Where both parties originally objected to mediation, but were then persuaded to go ahead with mediation, the settlement rate was lower at 48%. The majority of cases referred to mediation under the ARM scheme concluded by means of an out-of-court settlement without ever going to mediation, although among those cases involved in objections hearings, a higher proportion continued to trial.
Explaining mediation decisions and settlement

Multivariate analysis, seeking to identify the factors most likely to discriminate between cases accepting and objecting to automatic referral, showed higher value claims and those not involving personal injury were most likely to accept automatic referral.

Analysis seeking to identify determinants of settlement at mediation – including case type, case value, party-configuration, representation and case complexity – found that none of the variables used were good predictors of outcome. It is therefore likely that the explanation for success or failure at mediation is to be found in some mix of individual characteristics of cases, the attitude and motivation of parties, and the approach, skill and knowledge of the mediator. This is a subject worthy of further research.

Analyses of the impact of mediation on judicial and administrative time suggest that while ARM mediations reduced judicial time by decreasing the likelihood of trial, they increased administrative costs. The analysis demonstrated a strong and quantifiable relationship between court time, case duration and the occurrence of trials.

The study found no strong evidence to suggest any difference in case duration between mediated and non-mediated cases. Similar proportions of each type of case were resolved within two years of issue. It was, however, evident that the probability of a trial within two years of issue was significantly lower for mediated non-PI cases, although this was not true of personal injury cases.

Opting out

In common with other evaluations of court-based mediation schemes in England, interviews with solicitors advising clients in the ARM pilot highlighted the critical role of the legal profession as gatekeeper to mediation. The pilot scheme was not interpreted by most solicitors as compulsory in any sense and many regarded opting out as a mere bureaucratic hurdle. Considered justifications for opting out included the timing of the referral, the anticipated cost of mediation in low-value claims, the intransigence of the opponent, the subject matter of the dispute, and a firm belief that the case would settle anyway and that mediation was therefore unnecessary.
Users’ experiences of ARM

Evaluations of mediation experiences in the ARM scheme were substantially influenced by whether or not the case had settled at mediation. Those involved in unsettled mediations were considerably more negative in their assessments than those attending mediations that had settled. Explanations for failure to settle at mediation focused on the behaviour of the opponent, including intransigence and unwillingness to compromise. Some felt that their mediator had demonstrated a lack of skill and others felt that the 3-hour time limit was too short. Those who felt that they had been compelled to attend unsuccessful mediations frequently expressed discontent about the ARM scheme, arguing that bringing unwilling parties to the mediation table was inappropriate and costly.

In almost every interview with representatives involved in unsettled mediations, the view was that the mediation had increased the legal costs of the case, most commonly by around £1,000 to £2,000.

Where mediations had been successful, evaluations were more positive with explanations for the outcome focusing on the skill of the mediator, the opportunity to exchange views and reassess one’s own position and the willingness of opponents to negotiate and compromise. Successful mediations were generally thought to have saved legal costs, especially where a trial had been avoided.

Key positive features of mediation were said to be the informality of the procedure, the speed of proceedings, potential for settlement, and the opportunity to make cost savings. Negative experiences of mediation were said to be the danger of giving away too much about the case, the cost of mediation – especially where there was no settlement – and the physical environment at Central London, which was universally seen as a significant impediment to settlement.

Mediators’ views of ARM

Mediators confirmed that key factors contributing to settlement in the ARM scheme were the willingness of the parties to negotiate and compromise, the contribution of legal representatives, their own skill as mediators, and administrative support from the court. Explanations for failure to settle ARM cases at mediation focused on parties’
unwillingness to negotiate or compromise. The significance of the parties' willingness to negotiate and compromise as an explanation for success and failure in mediation sits uncomfortably with the evident support shown by some mediation organisations for an experiment in compulsory mediation. If mediators believe that motivation to settle is critical to outcome, then an appropriate mediation policy must surely be one of facilitation, education, encouragement and possibly incentives, rather than the threat of penalties, which simply creates the conditions for going through the motions.

The VOL scheme
Demand for the VOL scheme at Central London increased significantly following the case of Dunnett v Railtrack in 2002. This case confirmed the power of the courts under the CPR to deny a successful party in litigation their legal costs if they are deemed to have acted unreasonably in refusing to attempt to settle their dispute by mediation. Since 1998, the range of non-personal injury cases has been more varied and the mediation caseload less dominated by company v company disputes. On the other hand, in Central London, personal injury cases have continued to shun mediation. Only 40 of the 1,000 cases mediated in the VOL scheme between 1999 and 2004 concerned personal injury.

More important, despite the significant increase in the uptake of the VOL mediation scheme, the settlement rate at mediation has been gradually declining from the high of 62% in 1998 to below 40% in 2000 and 2003. The most recent figures show some recovery; but since 1998, the settlement rate has not exceeded 50%. This finding is of significance given the potential cost impact of unsettled mediation.

Users' experiences of the VOL scheme
A survey of users and representatives mediating in the VOL scheme during 2003 highlighted the increased role of the courts in encouraging or pressing parties to mediate. In explaining their reasons for attempting mediation, about one-quarter of respondents mentioned encouragement or directions by a judge, or fear of potential costs sanctions. By contrast, in the 1998 review of the VOL scheme, only a handful of respondents gave court encouragement as a reason and there was no reference to cost sanctions.
Conclusion

Overall, reaction to mediation was positive, with users and representatives displaying confidence in mediators and their neutrality. Parties valued the informality of the process, the skill of the mediator, and the opportunity to be fully involved in the settlement of the dispute. The most common features disliked were that the mediation was rushed, failure to settle, facilities, or poor skills on the part of the mediator. The user survey again underlines the critical importance of the skill and approach of mediators. Although mediators are not judges and their role is to facilitate not preside, they are central in the mediation process and their performance is important in users’ overall evaluation of that process.

In accounting for failure to settle at the end of mediation, common reasons given by respondents to the survey were: court direction when parties were unwilling to compromise, the intransigence or personality of the opposing side, failings on the part of the mediator and time constraints.

In general, where mediation had been successful parties and representatives felt that costs had been saved. Conversely, where mediation had not been successful, about half of parties and representatives thought that costs had been increased, although about one in five still felt that some costs had been saved. These findings are fairly consistent with the 1998 review, although users are now more likely to say that unsuccessful mediation increased the cost of the case. Both parties and representatives felt that successful mediation had saved time. Conversely, where mediation was unsuccessful, there was a tendency to feel that the mediation had increased the time taken to conclude the dispute. The majority of parties felt that they would try mediation again, whether or not their case had settled at the mediation.

The proportion of lawyers who reported having recommended mediation to their clients once or more than once in the past was virtually identical to the findings of the 1998 review, suggesting no significant growth in the enthusiasm of the profession for mediation.

Mediators’ analyses of factors contributing to success at mediation suggest that the motivation of the parties and willingness to compromise and skill of the mediator are critical to the outcome. Failure to settle tended to be attributed to the attitude of parties,
entrenchment, parties’ failure to prepare adequately for the mediation, and the time constraints of the Central London scheme.

**Learning from evaluation of mediation schemes**

**Explaining settlement**

It was not possible statistically to identify key determinants of settlement in mediation, but the qualitative information from both the ARM and VOL schemes from parties, representatives and mediators, suggests that the motivation and willingness of parties to compromise is critical. In this context, it is reasonable to infer from the declining settlement rate since 1999 that judicial pressure has been successful in propelling disputing parties towards mediation, but has drawn into the VOL scheme a proportion of unwilling parties. These parties, presumably, have participated through fear of costs’ penalties, rather than as a result of a genuine desire to negotiate toward settlement. As has been noted in the Netherlands, where several experiments in court-encouraged mediation have been evaluated, those referring cases to mediation must ensure that the case in question is suitable for mediation. In arriving at such a judgement, the attitude of the parties is, perhaps, the most important factor:

“The key indication seemed to be the willingness of the parties to negotiate. Experienced mediators agree that it is not the type of case that determines the chances of successful mediation, but the attitudes and insights of the parties. They have to be prepared for and capable of discussing a solution to their conflicts while also being able to develop an eye for their mutual interests.”

The evidence from the ARM and VOL schemes suggest that facilitation and encouragement together with selective and appropriate pressure are likely to be more effective and possibly efficient than blanket coercion to mediate. Evidence from recent evaluations of court-based mediation schemes in Exeter, Guildford and Birmingham support this conclusion. In Birmingham, a purely voluntary scheme enjoyed a 60% settlement rate during the period 1999-2004. In Guildford, the settlement rate for the voluntary scheme was 53% between 2003 and 2004. In the same court, some cases

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Conclusion

were selectively referred to mediation by the judiciary and among those cases, the settlement rate at mediation was as high as 75%. By contrast, in Exeter, where the judiciary exerted considerable pressure to mediate, the settlement rate was about 40% and only 30% for cases that had been judicially referred. The author of the evaluation suggests that the explanation for the lower settlement rate at Exeter, as compared with Guildford, might be an “over-enthusiasm for mediation” which led to cases being referred that were more complex and, therefore, unlikely to settle at time-limited mediations. The author also notes that the judiciary in Exeter were exerting more pressure on parties than at Guildford and that this might account for the depressed settlement rate. Apparently, settlement rates have been gradually recovering since a decrease in judicial pressure following the *Halsey* judgment in 2004.

**Demand for mediation in context**

Historically the principal demand for mediation in the VOL scheme at Central London (and now the ARM pilot) has been among non-personal injury cases, largely for disputes over contracts between businesses. Individuals in modest numbers have also used the schemes to sue companies for poor workmanship, spoiled holidays, possession proceedings, boundary disputes, and intellectual property. These cases have tended to lead more often to trials than personal injury cases where settlement is pervasive. Given the persistent rejection of mediation in personal injury cases, there is a significant policy question about the value of expending energy and resources attempting to persuade parties and lawyers in such cases to experiment with mediation. Lack of interest in mediation on the part of defendant insurance companies is intriguing, given the potential for reducing overall costs through mediation. But unless the defence side of the personal injury equation changes its strategy, it is hard to see how a large proportion of the current caseload of the county courts can be encouraged to embrace mediation. On the other hand, given the greater volume of trials in non-personal injury cases referred to in Chapter 2, success in encouraging non-PI cases to mediate could yield significant benefits to the administration of justice in terms of savings in judicial time.

**Demand for mediation and the role of advisers**

Information from the ARM evaluation, in particular, reinforces the significant gatekeeper-role of the legal profession and other advisers in relation to mediation. As indicated in

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the 1998 review of the Central London VOL scheme and subsequent evaluations,\(^{66}\) the majority of litigants are legally represented and defer to the advice offered by their lawyer. When most litigants do not have personal knowledge, let alone experience of mediation, it is not surprising that they do not challenge perfunctory discussion and brisk advice about the value of mediation in their particular case. The legal profession has more knowledge and experience of mediation than was the case a decade ago – especially within large commercial firms. Nevertheless, it is clear that in the majority of personal injury cases and in most standard non-personal injury cases, the profession remains to be convinced that mediation is the obvious or even an appropriate approach to dispute resolution. In the absence of any discernible incentives for the grass roots of the profession to opt for mediation on behalf of their clients, there is a policy challenge in reaching out to litigants so that consumer demand for mediation can develop and grow. This also implies that if courts want to encourage litigants to consider mediation, imaginative ways need to be found for promotional material to be communicated directly to parties.

**Improving court-based mediation**

Evaluation of the ARM and VOL schemes, together with earlier evaluations and recent evaluations from Birmingham and Exeter, establish the importance of efficient and dedicated administrative support to the success of court-based mediation schemes, and the need to create an environment conducive to settlement. Most court-based schemes use the court building for mediation, which means that appointments take place at the end of the day from around 4.30 p.m. - 7.30 p.m. Evidence from ARM and VOL suggests that if parties are tired and possibly hungry this may work against settlement. Tired, hungry and thirsty people, confined to cramped and hot rooms are likely to be more focused on escape than settlement, content to abandon proceedings rather than prolong an uncomfortable experience. If courts wish to encourage mediation through the provision of facilities and if they want to maximise the effectiveness of that service, then serious attention has to be paid to the facilities provided.

**Promoting mediation: sticks and carrots**

In policy terms, where there is no bottom-up demand for mediation, demand can be created by means of facilitation, education, encouragement, pressure and pressure

accompanies by sanctions, or incentives. The evidence of both the ARM and the post-
1999 VOL scheme at Central London indicates that, while in the English context the
recent policy of judicial pressure to mediate accompanied by the threat of sanctions is
capable of propelling cases into mediation this is not necessarily particularly effective in
terms of settlement rates. Furthermore, settlement rates matter because unsettled
mediation may increase the cost and the delay that mediation is intended to reduce.
The indications from these evaluations are that a more effective mediation policy would
combine education and encouragement through communication of information to parties
involved in litigation; facilitation through the provision of efficient administration and good
quality mediation facilities; and well-targeted direction in individual and appropriate
cases by trained judiciary, involving some assessment of contraindications for a positive
outcome. The ultimate challenge in policy terms is to identify and articulate where the
incentives might lie for the grass roots of the legal profession to embrace mediation on
behalf of their clients.