

# **The factors influencing mediation referral practices and barriers to its adoption: A survey of construction lawyers in England and Wales**

## **Introduction**

Warren Burger, a former Chief Justice of the United States of America, once said:

‘The obligation of our professions...is to serve as healers of human conflict. To fulfil our traditional obligation means that we should provide mechanisms that can produce an acceptable result in the shortest possible time, with the least possible expense and with the minimum stress on the participants. That is what justice is all about’ (Burger, 1982)

Certain questions regarding the value of litigation require to be directed at Warren Burger’s comments. Dispute resolution is a service industry and must recognise client needs (Bok, 1983). This theme has been taken up by many leading members of the judiciary and was the cornerstone of Lord Woolf’s interim and final reviews of English civil litigation, *Access to Justice* (Woolf, 1996). The recommendations made by Lord Woolf were embodied in the Civil Procedure Rules (CPR) and, among these, mediation was brought in as an option for consideration before court proceedings commenced (Roberts, 2002).

With the introduction in April 1999 of the Civil Procedure Rules proposed by Lord Woolf, judges in England have the power to stay proceedings for one month, either with the consent of both parties or on their own initiative to allow a period of time for mediation to be conducted (Genn, 2013).

CPR Rule 1.4 provides that:

“The court must further the over-riding objective by actively managing cases.

Active case management includes ... (e) encouraging the parties to use an alternative dispute resolution procedure if the court considers that appropriate and facilitating the use of such procedure.”

The English courts also have the power to use costs awards as a sanction against parties who refuse unreasonably to attempt mediation. This ability in the English Rules to encourage the use of mediation has been backed up by comment and orders from judges in a series of cases since 2000, culminating in the decision of the Court of Appeal in *Halsey v Milton Keynes NHS Trust* decided in May 2004. In *Halsey* the Court of Appeal examined the question of when a costs sanction would or would not be imposed on a successful party who had unreasonably refused to enter into mediation beforehand (Hodges & Tulibacka, 2009).

The decision in *Halsey* was that the refusal of the NHS Trust to mediate was reasonable because they believed correctly that they would win and the claimant failed to satisfy the test of establishing that mediation had a reasonable chance of success. The court also held that in a relatively small claim such as this, the cost of mediation would have been disproportionately high. *Halsey* was referred to in the decision of the Court of Appeal in *Burchell v Balland* decided in April 2005. In another case, decided in 2005, *The Wethered Estate Limited v Michael Davis and Others* the court accepted that, just because there had been mediation, this did not prevent a party from claiming that a delay in going to mediation was unreasonable. In *Earl of Malmesbury v Strutt & Parker*, decided in March 2008, Justice Jack examined the conduct of parties at mediation as a relevant factor in making a costs award where the mediation had not resulted in settlement.

The above cases demonstrate the approach now taken in England by making it clear that the English courts will not tolerate unreasonable refusal to take part in mediation where the parties have contracted to mediate or where the courts consider it might achieve a settlement outcome (Gaitskell, 2005). They will even go so far as to consider whether the parties' conduct at the mediation was unreasonable if the parties waive the confidentiality of the mediation process (Gould, 2007). As a result of these changes in the Rules and resultant pressure from the judiciary, the position in England is that the use of mediation in particular has increased significantly since the introduction of the Civil Procedure Rules (Dwyer & Dwyer, 2009).

The more recent Jackson Cost Review has provided greater impetus for the use of mediation (Genn, 2013). A failure to respond to a request to engage in mediation may also be deemed unreasonable by the courts as, for example, in the case of *PGF II SA v OMFS Company I Limited*. Nevertheless, while the Rules are being used by the courts in England and Wales increasingly to 'encourage' parties to look to alternative methods to settle differences, little can be gleaned from the literature on the central role of construction lawyers in mediation, and more specifically the extent to which they refrain from referring cases to mediation in a manner inconsistent with their clients' interests. Much of the construction-based research so far has focused on how mediation is bearing up in practice, its use, appealability and possible improvements (e.g. Gould, 2007; Gould, 2009; Gould et al., 2010). There is currently little understanding & empirical evidence on construction lawyers' incentives and barriers that influence their use of mediation, reinforcing the need for further research.

The aim of the research is to address the knowledge gap by exploring the factors influencing construction lawyers' mediation referral practices, and barriers to adoption within England & Wales. The paper is divided into four sections: the first section presents a literature review of lawyers' role in mediation, referral practices and the power they exercise over the process; the second section describes the research design, focusing on the design and deployment of the survey tool; section three presents the analysis of the survey findings in light of the writings; and finally section four summarises the findings and conclusions of the study.

### **Lawyers as Gatekeepers to Mediation**

It is widely accepted that lawyers play an intermediary role between their clients and the legal system (Welsh, 2001). Socio-legal scholars have long examined the ways in which legal professionals assist clients understand the vagaries of the legal process, how legal rules relate to individual problems and the workings of the legal institutions across different jurisdictions (Murray, 1996). As part of this continuing scholarly tradition, examples abound of research into the role of lawyers in the mediation process as 'gatekeepers' both within and across jurisdictional boundaries and within differing contexts (for example, McAdoo & Welsh, 1997). There has been much debate and discussion on the role that lawyers should play in the mediation process (Reich 2002). Increasingly, lawyers are involved in mediations as advocates (Goldfien & Robbennolt, 2007).

The engagement of lawyers in mediation is seemingly attributed to the growth of court-annexed mediation provisions, in which disputants are represented by legal counsel. Although a wide array of reasons for lawyer involvement in the process can be seen from the literature, including client demand and lawyers' seeking out of more enriching work (see Clark, 2012).

It is widely recognised that the increasing involvement of lawyers in mediation can affect the way in which the process is conducted, the lawyer-client power balance and the perception of the process itself (Wissler, 2003).

It is also widely documented that the practice of mediation is affected by the way lawyers perceive and utilise it, such that they are commonly referred to as gatekeepers to the process (Welsh, 2004). Indeed, a growing body of research demonstrates that lawyer's control which disputes are mediated, the choice of mediator, and the prioritisation of interests within the process itself.

If we accept that lawyers' perceptions and values influence the ability of mediation to deliver potential benefits, then it follows that lawyers' interests need to be taken into account for mediation to be more widely adopted as a favoured means of dispute resolution, notwithstanding that lawyers' interests can often diverge from those of clients (Sela, 2009). Wissler (2003) notes that many of the policies used to promote the greater use of mediation have focused on the legal practitioner rather than the client base. Studies typically show that lawyers initiate discussion of mediation, insofar as they have significant influence on clients' perceptions and use of the process.

### **Barriers to lawyers' use of mediation**

While there are a plethora of academic studies on the barriers to lawyers' use of mediation, there is scant knowledge on the nature, scope and influence of these barriers. There have been, however, some notable exceptions that have attempted to address the knowledge gap Wissler (2003) usefully summarises the types of barrier, drawing on US-based research. These include: lack of knowledge and familiarity with mediation processes (Kannerman & Tversky, 1995), and attitudes to and perceptions of mediation; negative experiences with the process, financial and economic interest (Sternlight, 1999); and the extent of judicial involvement in the mediation process (Guthrie, 2001).

### **Research Design**

The aim of this research is to explore the factors influencing construction lawyers' mediation referral practices, and barriers to adoption within England & Wales.

A questionnaire survey was developed and deployed for this purpose, utilizing Survey Monkey software. The web-based questionnaire was self-administered, necessitating the need for it to be self-explanatory. In order to achieve this, a covering email was included with the Survey Monkey web-link describing the aims and objectives of the research. The nature and structure of the questionnaire was based on that first used to explore Israeli commercial lawyers' mediation referral practices, and barriers to adoption (Sela, 2009) and adapted to the construction context.

There are many advantages to a quantitative approach (Couper, 2000). Quantitative data can be measured and scored more easily because they are collected using surveys and questionnaires. Qualitative data are more difficult to measure because they obtain opinions and ideas collected from interviews and focus groups. Quantitative methodologies also have the strength of establishing generalities and the ability to study large numbers of participants.

### ***Questionnaire Development***

The questionnaire was divided into three sections as described below;

### **Section One: Background and Experience within the Legal Profession**

A number of variables from the survey were selected from the questionnaire to capture the distribution of respondents by firm size and level of experience within the legal profession, respectively.

### **Section Two: Experience, Training & Mediation Practice**

In terms of experiences of mediation, respondents will be asked to rate their perceptions on a number of questions ranging from the influence of mediation training on the likelihood of using mediation; their propensity to use mediation as a function of their level of experience within the legal profession; levels of satisfaction with different elements of the process, the decisions to recommend mediation to a client and reasons to refuse mediation proposals from the opposing party in a case. The purpose of these questions was to ascertain an understanding of the factors that influence the use and efficacy of the mediation process.

### **Section Three: Barriers to discussion and use of mediation**

The respondents were then asked to rate their responses to a number of questions ranging from clients refusal to mediate, the absence of good mediators, the influence of the legal and judicial system, prior negative experiences of the process, preferences for alternative dispute resolution, and the influence of time and money factors on lawyers' use of mediation. The purpose of these questions was to ascertain an understanding of the barriers to the discussion and use of mediation to resolve construction disputes.

### ***Research Sample***

There is no publicly available directory of construction lawyers in England and Wales. In order to establish a representative sample of construction lawyers, it was necessary to create a new database, combining membership lists of professional associations. The combined database comprised the 'population' of construction lawyers, which included 761 solicitors, barristers and mediators based and operating in in England and Wales. Although the database was incomplete, since not all construction lawyers are listed in professional association directories, it was the best available option for the investigation. For the purposes of this study, a random sample generator yielded a sample of 563 construction lawyers. This number was further narrowed down due to additional coverage challenges.

The survey was eventually distributed to 400 lawyers in England and Wales. A small sample of legal practitioners provided assistance with the pilot study process. The respondents were told the questionnaire was a pre-test and the group were questioned about their understanding of the questionnaire and asked to comment on possible rephrasing or clarity of questions. Following the pilot, certain revisions were undertaken.

The length of the questionnaire to be completed was shortened to encourage a better response rate. The final response rate from the survey was 53%, which compares favourably with other online surveys more generally, and specifically ones related to lawyers (Gupta et al., 2002).

## Analysis of Questionnaire Results

When all the questionnaires had been returned through Survey Monkey, the questionnaire data were analysed using the SPSS software package.

### *Firm size and level of experience within the legal profession*

Figures 1 and 2 provide a breakdown of the distribution of respondents by firm size and level of experience within the legal profession, respectively.

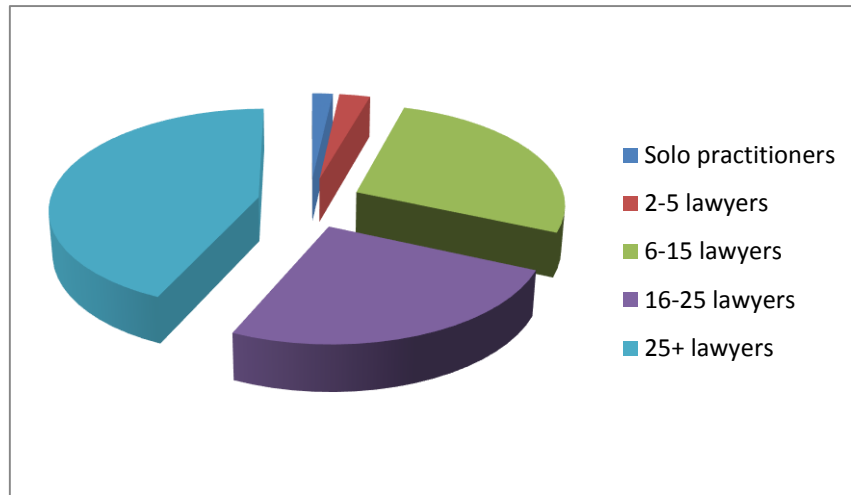


Figure 1: *Distribution of respondents by firm size*

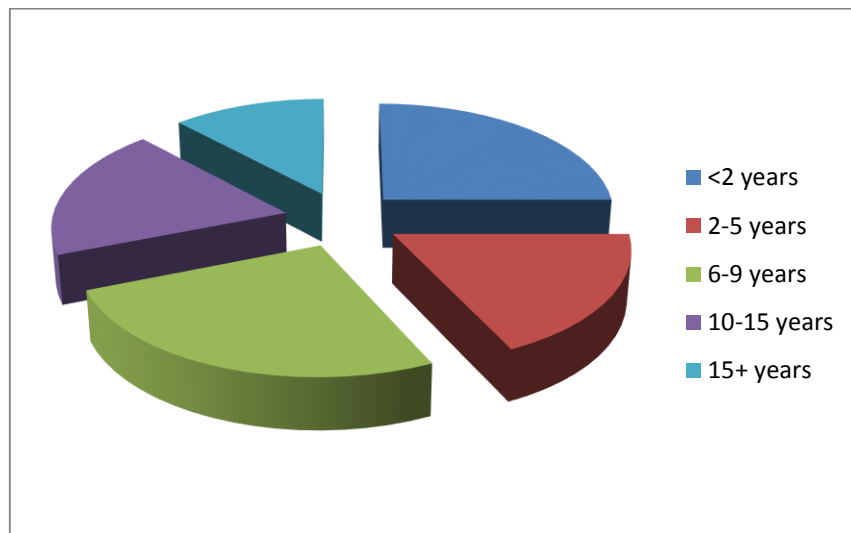


Figure 2: *Distribution of respondents by level of experience within the legal profession*

There seems to be no statistical information available on the distribution of construction lawyers by size of firm or level of experience within the legal profession in England and Wales, so it is difficult to establish whether the sample frame is representative of the population. Certainly, it was much easier to obtain email addresses of construction lawyers employed in larger firms than in smaller ones.

This might explain, relative to their representation in the population and the sample frame, why there are a high proportion of respondents working in larger firms, compared to those employed in small firms or as sole traders. There are no reliable demographic data on the distribution of construction lawyers in England and Wales, so it is also difficult to ascertain whether the sample is representative of the population from a statistical point of view. However, some studies indicate that those who participate in web-based questionnaire surveys tend to be experienced internet users and predominantly young males (Andrew et al., 2003).

### **Lawyers Referral Practices and Views of Mediation**

One of the aims of the exploratory study was to capture empirical data on construction lawyers' views and attitudes relative to mediation. According to Janoff (1991) there are two direct measures of lawyers' familiarity with mediation: the first being their mediation education, which has the potential to shape attitudes to the process; and second their experiences of mediation, either as mediators themselves or as legal counsel.

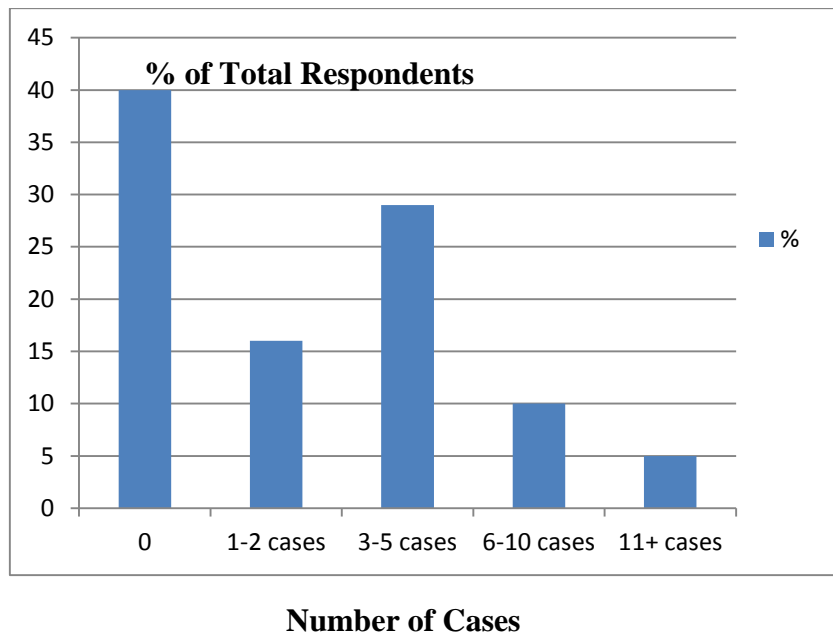
#### ***Mediation training***

Of the total, 78% of respondents had received some form of training in mediation, with 24% of those having attended external courses on the process and 12% in-house training sessions.

Only about one-fifth, 21%, had been trained as accredited mediators and a similar proportion of respondents, 19%, had had some exposure to mediation during their tertiary education. These figures resonate with the findings of a 2010 study of Scottish construction lawyers and commercial lawyers, in which around 20% of the respondents indicated that they had some exposure to mediation at Law School (Agapiou & Clark, 2011).

#### ***Client representation in mediation***

Interestingly, in terms of those respondents who had working experience of mediation over the previous two years (60% of the total number of respondents), 80% had reported representing at least one party in a mediation in the two years preceding the questionnaire survey. This figure is a positive sign that lawyers are at least willing to represent clients in mediation cases. Nevertheless, less positive is the relatively low proportion of respondents who reported their willingness to mediate a case in more than five cases over the previous two-year period. The results of the survey indicate that only 44% of respondents mediated in three or more cases and 5% in 11 or more cases. Figure 3 presents a breakdown of the number of cases mediated over the previous two years.



*Figure 3: Number of cases mediated in previous two years*

***The propensity to discuss or use mediation as a function of lawyers' level of experience within the legal profession***

The correlation between the number of years practising law and the number of cases mediated in the previous two years is presented in Table 1. It would seem that the more experienced practitioners reported using more mediation within the preceding two years than did the less experienced. This finding is consistent with Gilson & Mnookin's (1994) proposition that more experienced lawyers are able to develop a more 'co-operative reputation' as a function of their repeated professional encounters than less experienced lawyers. They attribute the difference in the ability to gain a cooperative reputation to the growth in the size of the legal profession, the assumption being that more experienced practitioners would have a greater chance of gaining a 'cooperative reputation' in a smaller-sized legal jurisdiction, compared to successive generations of lawyers who would find it more difficult within a growing legal fraternity. This explanation may have some merit for the English and Welsh context, where there have been sharp increases in the number of legal professionals of late, due mainly to the proliferation of Law School programmes. However, this does not explain the results for those who had been in practice for 11-15 years. The discrepancy may be the result of coverage error, incidental or indeed the result of an undetected bias in the process of data collection. No discernible characteristics e.g. practice size, level and type of mediation training, of those practitioners who had practised law for between 11 and 15 years and mediated cases were identified, compared to the remainder of the sample frame.

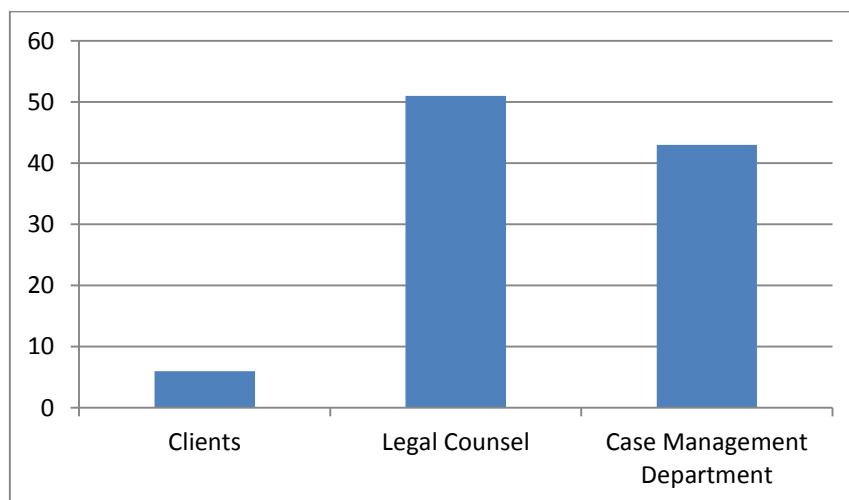
**Table 1:** *The correlation between the numbers of years practicing law and the number of cases mediated in the previous two years*

Cases Mediated	Years of Experience				
	<2	2-5	6-10	11-15	16+
0	26	10	5	20	10
1-2	25	35	30	30	10
3-5	49	40	35	40	45
6-10	0	10	15	10	30
11+	0	5	10	0	5
Total	100	100	100	100	100

[N= 212, in chi-square test p= 0.001; Linear by Linear Association =11.33, df =1]

***The decision to recommend mediation to a client***

Overall, the results indicate that construction lawyers do use mediation, but not whether they wanted to use it or were compelled to do so in some way. On the whole, construction lawyers do not initiate discussion of mediation either on a regular or voluntary basis. Indeed, of the lawyers who reported discussing mediation with clients, only 15% indicated that they ‘often’ discussed the possibility with their clients without being compelled to do so in some way by the courts. On the other hand, around 48% of survey respondents reported that they ‘never’ or ‘rarely’ discussed mediation with their clients under similar circumstances. A similar proportion reported discussing the use of mediation with their clients only ‘sometimes’. It would be interesting to establish who most commonly suggests using mediation at this point, as this may provide some explanation for the above responses. Figure 4 provides a breakdown of the party/parties who most commonly suggest using mediation. The results indicate the centrality of the courts in the initiation of mediation.



**Figure 4:** *The party most commonly suggesting using mediation*

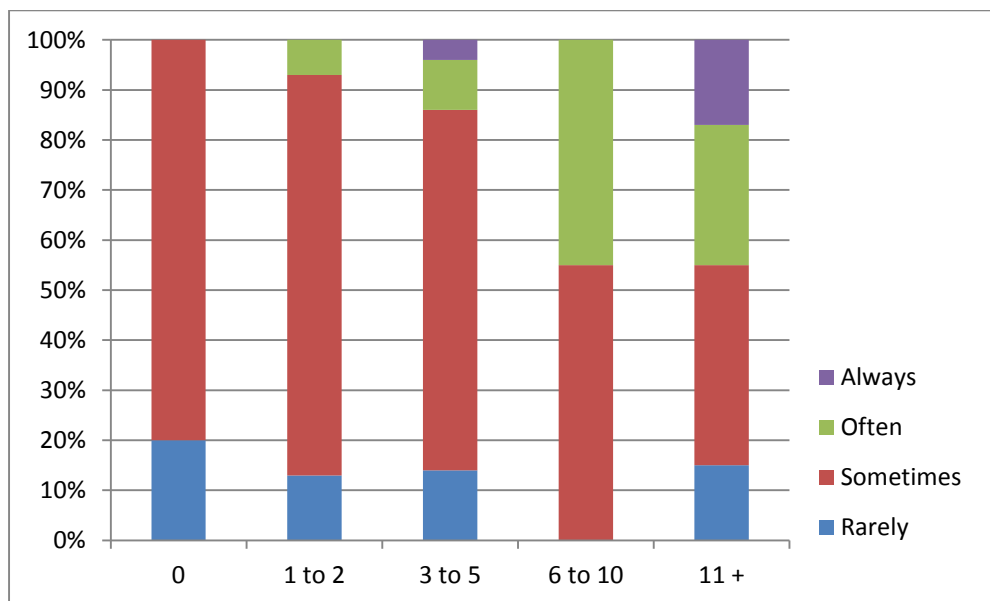


## Familiarity and likelihood of using mediation

The results of the survey indicate that lawyers familiar with mediation, whether by means of training or client representation, express favourable views of the efficacy of the process. Around two-thirds (64%) of respondents ‘sometimes’ found mediation an effective means to resolve construction cases, while 20% ‘often’ and 3.5% ‘always’ found it effective, respectively. Only 8% considered it ‘rarely’ effective and only 2% of respondents believed it was ‘never’ effective.

### *The relationship between lawyers’ exposure to mediation and their propensity to recommend the process to their clients*

The results also indicate that mediation training and experience of representing a client in the process were both positively and independently correlated with a more favourable view of the effectiveness of the process. Wissler (2003) suggests that there is indeed a relationship between lawyers’ exposure to mediation and their propensity to recommend the process to their clients. Such correlations have been found in other studies undertaken elsewhere in the UK, e.g. Scotland (Clark & Dawson, 2006). The results also support Riskin’s (2003) central argument regarding lawyers’ mediation experience and the increased utility of the process. While it is also noteworthy that there was only a marginally significant correlation between views of the efficacy and use of the process, the number of cases mediated was significantly correlated with those particular views. Figure 5 illustrates that lawyers who had mediated more cases expressed more favourable opinions on its effectiveness.



Chi-Square test  $p = 0.042$ ; linear by linear association = 4.630;  $df = 1$  (N=213)

Note: No pattern was detected in the correlations, but this may reflect the small number of respondents who have not used mediation (N=20)

Figure 5: Correlation between number of cases mediated and view of the effectiveness of the process.

### *The inclusion of mediation clauses in contracts*

The sample of construction lawyers were asked to express their views on the inclusion of mediation clauses in construction contracts. It could be argued that lawyers, who express favourable views on the effectiveness of the process, would be more inclined to include mediation clauses in contracts at the drafting stage.

Of those who had experience of drafting contracts, a majority (80%) would be reluctant to include such clauses in contracts. Indeed, 49% of respondents said they would 'never' include a mediation clause in a contract, with only 20% of the sample indicating they would do so. Despite the evidence of an association, it is difficult to establish from the results the direction of any causal relationship. While more experienced lawyers had more experience of the process, it is no surprise that they expressed more favourable views on the effectiveness of mediation. The lack of support for the voluntary inclusion of mediation may suggest that lawyers are in some way influenced by their clients' opinion on the matter; however, in all probability, given the role of lawyers in decision-making, the above responses are more indicative of lawyers' views. Certainly, there is a notable shift, among those with greater experience within the legal profession, towards 'sometimes' including a mediation clause within a construction contract – from 19% to 32%. It is possible to obtain additional insights into construction lawyers' more general views of mediation from the factors that influence their decision not to use the process. This analysis is presented below.

### **Barriers to lawyers' discussion and use of mediation**

The analysis here is based on a number of questions in which construction lawyers were asked to rate the frequency at which different factors had influenced their decision not to use mediation.

#### ***Client refusal to use mediation***

It is well understood that lawyers provide a service to their clients. It is possible that a real barrier to the use of mediation is the unwillingness of clients to use the process. However, there is no conclusive empirical evidence to support such a proposition within the construction arena (Agapiou & Clark, 2013). Indeed, there is some evidence to suggest that end-users have very little knowledge of the available options for the resolution of construction disputes (Agapiou & Clark, 2013). The proponents of court-annexed mediation assume that the demand for mediation services will increase through concerted efforts to educate the client body. The results of the survey, however, do not support such an explicit assumption. It seems that only one-third (32%) of respondents reported client refusal as a factor often militating against the use of mediation, while 48% reported that clients 'never' or 'rarely' refuse to use the process. This finding is important; it is indicative that disputants more often than not do not act as barriers to the use of mediation after it has been proposed by opposing counsel. It may be that some other factors, so far undetected, militate against the use of mediation.

#### ***The absence of good mediators***

The professional level of mediation has often been considered, at least anecdotally, to be a significant barrier to the use of mediation in the construction context. It could be argued that if the level of professional mediation services is low, this might impede the adoption of the process. This assumption, however, is not borne out by the results of the questionnaire survey. Some two-thirds (65%) of the construction lawyers who responded to the survey 'rarely' or 'never' considered the professional level of mediation services to be a significant factor in their decision not to use mediation. Only 4% of respondents 'often' considered the absence of good mediators a significant factor in their decision not to refer cases to mediation.

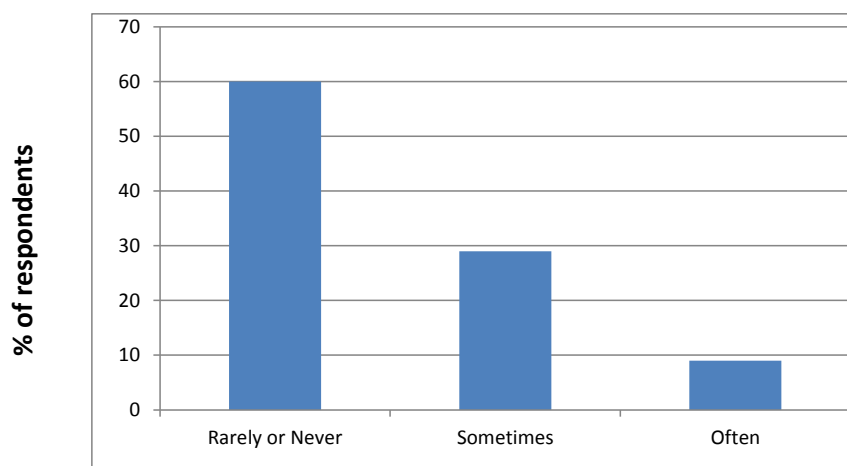


Figure 6: *Absence of mediators influenced the decision not to refer cases to mediation*

### **The influence of the legal and judicial system**

There is anecdotal evidence that the judicial system in England and Wales may also impede the development and adoption of mediation in the construction field. Nevertheless, the results reveal that on the whole, construction lawyers with experience of mediation do not view the position of the courts as having a negative effect on the decision to refer cases to mediation. If mediation agreements create uncertainty compared to court decisions, then this may be perceived as a significant barrier to the use of mediation. Indeed, 85% of respondents agreed that such uncertainty 'rarely' or 'never' influenced their decision not to use mediation. Similarly, the inability to create enforceable precedents from mediation did not act as a deterrent to its adoption. It also seems that the sample frame were conclusive in their opinion that the courts do not act as a deterrent to the referral of cases to mediation. Indeed, 92% of respondents were 'rarely' or 'never' influenced not to use mediation because of the position of the courts in relation to the process.

### **Prior negative experience of the process**

Anecdotal evidence points to lawyers' dissatisfaction with mediation services as a major contributing factor for the low take-up of the process in the construction field. Interestingly, over three-quarters (78%) of respondents who reported negative experiences with mediation concluded that this had 'little' or 'no' effect on their decision not to refer a case to mediation. Only 2% said that it 'greatly' affected their decision and 18% indicated that it had influenced them 'somewhat'. It may be their dissatisfaction and reluctance to refer cases to mediation are rooted in other factors, so far undetected. It is noteworthy that respondents' views on the effects of negative experience are not correlated with the extent they had used it, or whether it had been used at all as a means of resolving a dispute. Nevertheless, there would seem to be a significant correlation between respondents' views on the effect of negative experience on mediation's effectiveness. It seems that the more favourable the views were on the effectiveness of mediation, the less prior negative experience had influenced the decision not to refer a case to mediation. While the results do not establish causality, they are indicative of the overall impression of lawyers' mediation experience relative to its perceived effectiveness.

## **Preference for alternative forms of dispute resolution**

The literature indicates that lawyers would consider, amongst other things, the compatibility of the process to the dispute at hand in addition to the desirability of alternative means of dispute resolution. Around a quarter of respondents (26%) 'often' and 'sometimes' (48%) would not use mediation because the case at hand was not suitable for dispute resolution. Arguably, if some cases are indeed not suitable for mediation it would be useful to establish why lawyers identify particular cases as suitable, but others less so. Construction lawyers appear to have a pre-disposition to adjudication, particularly given the centrality of the process in dispute resolution (Agapiou & Clark, 2011). The survey respondents did not express a general preference for adjudication per se. The view accords with the mainly anecdotal concerns espoused over costs, the complexities and the quality of adjudication decisions. It would seem that the decision not to refer a case to mediation was influenced by the prospect of adjudicatory settlement. Indeed, the overwhelming majority of the sample frame (80%) said that their personal preference for adjudication had 'little' or 'no' effect on their decision not to refer a case to mediation; only 6% and 11% said it influenced them 'greatly' and 'somewhat', respectively. This finding is encouraging for the wider adoption of alternative means of dispute resolution in England and Wales. Interestingly, the fact that a mediator is not empowered to decide a case, unlike a judge or an arbitrator, did not have a significant influence on lawyers' decision not to refer a case to mediation. Only 3.5% of respondents indicated that a mediator's lack of coercive power 'generally' influenced their decision not to propose mediation to a client. On the other hand, an overwhelming 70% of respondents reported that the lack of coercive power had 'little' or 'no' effect on their decision to refer a case to mediation. Around 25% of the sample frame said that it influenced them 'somewhat'.

## **Time and Money Factors**

It could be argued that lawyers' potential financial gains from mediation as compared to other forms of dispute resolution could affect views of and attitudes to the process. The literature indicates that there are two major factors that can affect lawyers' financial gains. These are the time a lawyer invests in a case and the profits they can accrue.

### ***Time Factors***

According to Sela (2009) it is possible to divide time, as a resource, into three different categories: the time investment to conclude a case, and the time that the lawyer and the client invest in the case. The results of the survey show that the overwhelming majority of the respondents believed that mediation requires less time to conclude (71.4%) than adjudication. The respondents also believed that they would invest less time working on the case (58%). Around one-half of the respondents (48.3%) indicated that clients would also invest less time in mediation, as compared to adjudication.

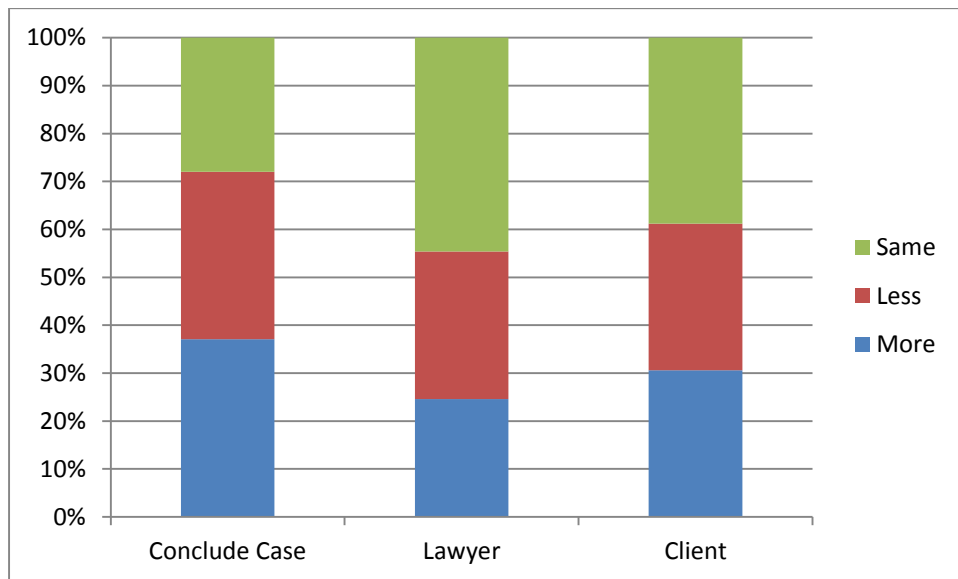


Figure 7: Time invested in mediation as compared to adjudication

There would seem to be a noticeable difference in the number of respondents who reported that it takes less time to conclude a mediated case, and the number who believed they would invest less time in the process.

Naturally, lawyers would invest less time in a process that arguably takes less time to complete generally. In comparison with adjudication, mediation is much less onerous in terms of paperwork, while being much less lucrative as a consequence from the lawyers' perspective. The self-reported personal experiences of respondents, biases, reluctance to admit to a smaller workload in mediation and associated financial implications, may well explain the reported differences observed. Mediation is widely considered to be a principal-focused process, yet the results seem far from conclusive. Some 17% of respondents believed that clients would need to invest more time in mediation in comparison to adjudication. This finding is in itself interesting from the point of view of the clients' involvement in the mediation process. It seems to indicate that lawyers either remain central figures in mediated cases, or arguably that even the most highly-involved clients invest much less time in the process than in a court trial setting. There is a widely-held belief that the perceived shorter time required to conclude a mediated case can affect different aspects of a lawyer's interaction with the process.

One of these aspects is their potential to generate profits, as a product of the fee-billing model utilised. If, for instance, a lawyer's fee is calculated on the basis of an hourly rate, then less time spent on a case would affect their immediate profits. Alternatively, if a lawyer is paid a fee conditional on a positive outcome, then less time spent on a case would translate into greater accrued profits. Interestingly, Riskin (2003) notes the potential for a financial loss for lawyers from the use of a conditional fee approach within mediation, particularly in a situation where disputants trade off monetary undertakings for the preservation of the business relationship as part of the settlement. On this point, Gilson & Mnookin (2009) also note the possible divergent interests of lawyers working on a case and their firm's organisational policies. On the one hand, lawyers may well be compelled to consider short-term interests to maximise their billable hours as part of an organisational quota, whereas their firm may be more concerned with long-term profit potential and client retention.

According to Klein (2008), the potential for a conflict of interest is not limited to conditional fee-award cases, although it could be more marked in such cases. Burns (2011) suggests that fee arrangements entail the potential for conflict of interest, in particular as lawyers' financial self-interest is consistent with their client's goals in the representation. There was no direct survey evidence to provide an insight into this issue, although in general there does not seem to be any indication that firms do not consider mediation a legitimate tool to resolve disputes within English legal circles.

***Money factors: short- and long-term profits***

Riskin (2003) posits that 'referral [of a case] to mediation would cost lawyers all or part of their fees'. The results of the questionnaire lend some support to this assertion, but only up to a point. Around 35% of the survey respondents reported lower profits from mediation as compared to adjudication, when questioned about short- and long-term profit generating potential. Some 33% of the lawyers surveyed earned similar amounts whether they were engaged in mediation or adjudication, with approximately 17% reporting more if they were involved in mediated cases. It would seem from the results that there was no statistically significant difference in the distribution of responses among lawyers surveyed, in terms of their firm's size or their experience within the legal profession.

It is noteworthy, however, that a statistical variation exists between the views of lawyers according to their experience within the profession and their views of long-term profit potential in respect of mediation, compared to litigation. In general, those with six years or more in practice expressed more favourable views as to the long-term profits potential of mediation, compared to those with less than six years' experience. Table 2 illustrates the observed difference, by level of experience, in the views of construction lawyers on the long-term profit potential of mediation, compared to interaction with litigation.

*Table 2: Differences in the views of construction lawyers on the long-term profit potential of mediation, compared to interaction with litigation proceedings, by level of experience*

Profit Potential	Practical Experience	
	<6 yrs.	6 (+) yrs.
Less	55	31
Same	32	42
More	9	27
Total (%)	100	100

Chi-square test df = 2, p =0.058; likelihood ratio LR =5.67

Nevertheless, the proponents of court-annexed mediation would be heartened by the fact that a majority of the survey respondents with recent experience of mediation reported more favourable views of mediation relative to the potential to accrue profits in the long term (see Figure 8).

Number of cases mediated in the preceding two years

1-5 6-10 11-15 15+

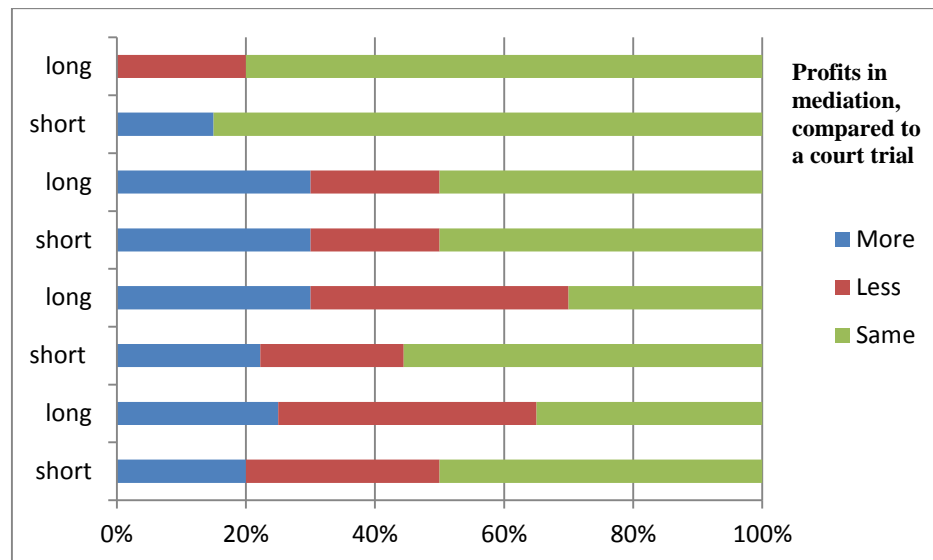


Figure 8: Views of short-term and long-term profits in mediation, compared to adjudication by experience of the mediation process

Interestingly, although the lawyers surveyed reported diminished income from their involvement in mediation, compared to adjudication, an overwhelming majority (85%) indicated that this had ‘little’ effect on their decision not to refer a case to mediation. The results of the survey indicate the potential for the reduction in profits as a consequence of lawyers’ involvement in mediation rather than litigation. While the sample frame expressed the view that this factor would not necessarily affect their decision to use mediation to resolve a dispute, there are reasons to be sceptical about the survey results in this context. Clearly, the reduction in profits can be mitigated if the ambiguity associated with appropriate mediation fee levels or scales could be addressed and minimised in some way. This would require the establishment of a standardised approach to setting fee scales for mediation advocacy and counsel, as a means to facilitate the process among both lawyers and their clients.

### Summary & Conclusion

The aim of this research was to explore the factors influencing construction lawyers’ mediation referral practices and barriers to its adoption, based upon a survey of practitioners in England & Wales. The analysis undertaken has identified factors that may act as barriers to construction lawyers’ use of mediation. The findings from this exploratory study have the potential to both reflect current practice within the legal profession within England and Wales, and to provide policy makers with empirical evidence on the barriers to the utility of mediation with construction context.

The findings suggest that more experienced lawyers reported using mediation to a far greater extent than the less experienced, consistent with the proposition that more experienced lawyers develop a *co-operative reputation* as a function of their repeat professional encounters. The majority of construction lawyers did not report having less influence on their clients within the mediation process itself. It is possible that many of the respondents were unclear how to operate in a mediation context. This ambiguity may well manifest itself as a reluctance to engage in the process, whether it is an inability to provide counsel on the intricacies of mediation or an expression of lawyers’ own personal preferences. A clearer definition of the role of the lawyer in mediation would help to overcome the perceived barrier to the use of the process.

The results also reveal that the absence of good mediators, influence of the courts, negative experiences and preferences for other forms of dispute resolution do not act as barriers to the referral of cases to mediation. It would also seem that self-reported financial interests do not deter lawyers from referring cases to mediation. Nevertheless, there may be a need to develop more standardised approaches to setting mediation fee scales, in order to minimise lawyers' diminished fee income as a consequence of their increased involvement as advocates or counsel in mediated cases.

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