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Title of research:

“An Analysis of Local Solicitors’ Attitudes to and Use of Mediation”

Abstract

Legal practitioners are considered to be the “gate-keepers” for a significant proportion of the mediation work currently being undertaken in the UK. This small-scale study undertaken in Canterbury explores the attitudes of local solicitors to and their use of mediation as a process for resolving disputes. The study provides an initial review of current research in the field of civil mediation in the UK, which albeit limited and now a little dated, reveals some practitioner ambivalence towards mediation and potentially provides some key themes regarding legal practitioners’ uncertainty about the use of mediation. This could arguably go some way to explain why mediation is not more widely used for a range of differing dispute categories. Some key themes are revealed from the author’s study through data collected from local legal service providers who practice in the areas of family law, civil and commercial law and employment law. A range of conclusions, both positive and negative are drawn regarding the use of mediation in the area of family law practice and the attitudes of firms are highlighted and contrasted with those of individual solicitors. The responses from those participants associated with civil and commercial practice areas tended to be more positive, particularly with regard to the idea of introducing a more compulsory element to the use of mediation, whilst the responses from those practitioners in the area of employment law seemed to suggest a lack of use and understating of the process. The study concludes with the view that the findings from local practitioners appear to reinforce the research undertaken by Professor Dame Hazel Genn in a study she undertook some seven years ago, and do indicate that the attitudes of legal service providers towards mediation are still mixed. This may serve to explain (at least in part) why mediation remains significantly under-used and the changes introduced by the government to encourage the use of mediation have so far not been received that favourably by all legal practitioners.

Importance of Research/ Literature Review

'Analysis on Local Solicitors' attitudes to and Use of Mediation'

Mediation is generally defined as being the intervention by a third neutral party to a dispute with the consent of the participants in the process.¹ Mediation's significance lies in the idea that the process is to strengthen relationships of trust between the parties and to build problem solving relationships.² Whilst attempting to resolve disputes, in the UK, parties are entitled to a fair hearing with appropriate independence, within a reasonable time and for reasonable costs provided through the use of mediation.³ Lord Woolf addressed the issues of cost and delays with civil justice in the UK through his Access to Justice Report 1996 and subsequently parliament introduced the Civil Procedure Rules 1998.⁴ It was proposed by Lord Justice Jackson in his review of Civil Litigation Costs that the conclusion can be reached that alternative dispute resolution plays a vital role in reducing the costs of civil disputes through allowing for early settlements.⁵ Mediation is consequently significantly less expensive, quicker and allows for the continuation of relationships whilst preventing a drain on time and resources.⁶ Mediation therefore possess many advantages, however there is still some reluctance towards the use of mediation as an alternative method of dispute resolution by legal professionals despite the returns that mediation offers.

The development of civil mediation was initiated through the Woolf Report 1996, the Civil Procedure Rules 1998 and the Access to Justice Act 1999 which placed a much greater emphasis on the use of mediation as an alternative method of resolving disputes and made litigation a last resort.⁷ The Civil Procedure Rules 1998 aim to put greater prominence on individuals to make use of ADR, including mediation, through permitting costs orders and also allowing judges to suspend court proceedings and recommending that the parties try

¹ Christopher W Moore, *The Mediation Process* (3rd edn, Jossey-Bass 2003) 15.

² Christopher W Moore, *The Mediation Process* (3rd edn, Jossey-Bass 2003) 15 – 16.

³ Susan Blake, Julie Browne and Stuart Sime, *The Jackson ADR Handbook* (edn, Oxford University Press 2013) 1.

⁴ P Barrett, 'Part 36 and mediation: an offer to settle will not suffice – PGF II SA v (1) OMFS Co and (2) Bank of Scotland Plc' (2012) *Arbitration* 401; Access to Justice Report 1996; Civil Procedure Rules 1998.

⁵ G Huntley, 'You can drag a horse to mediation...' (2013) *New Law Journal* 163.

⁶ KG Allred, 'Relationship Dynamic Disputes' in Michael L Moffitt and Robert C Bordone (eds), *The Handbook of Dispute Resolution* (Jossey-Bass 2005) ; Timothy Heeden, 'Coercion and Self-Determination in Court –Connected Mediation : All Mediations are voluntary, but some are more voluntary than others' (2005) *The Justice System Journal* 26 ; Moffitt M L and Bordone R C , 'Perspectives on Dispute Resolution' in Micheal L Moffitt and Robert C Bordone (eds), *The Handbook of Dispute Resolution* (Jossey-Bass 2005) ; M Petsche, 'Mediation as the preferred method to solved international business disputes? A look into the future' (2013) *International Business Law Journal* 251.

⁷ Woolf Reforms 1995; Access to Justice Act 1996; Civil Procedure Rules 1998.

mediation.⁸ The courts also have a duty to further the Overriding Objective, obliging the court to deal with cases justly and at a proportionate cost, whilst at the same time promoting the use of mediation.⁹ It is increasingly difficult for parties involved in a dispute to refuse to consider the use of alternative dispute resolution, without running the risk of adverse cost orders, particularly when a judge strongly recommends that such a route should be considered.¹⁰ This is illustrated by the case of *Cowl v Plymouth City Council* [2001].¹¹ The Woolf Reforms and also Sir Rupert Jackson's report have placed emphasis on active case management providing litigating parties greater opportunities to make use of mediation.¹² There are also a series of cases which display the consequences of the failure by parties involved in a civil dispute to consider the use of mediation. The cases of *MacMillan Williams v Range* [2004] and also *PGF II SA v (1) OMFS CO AND (2)* [2013] display the consequences of not considering the use of mediation.¹³ The decision in *MacMillan* [2004] shows that both parties were penalised when they both jointly failed to consider the use of mediation to resolve their dispute and no costs order was made.¹⁴ Therefore it can be seen through the judiciary's compliance with the Overriding Objective and by imposing costs orders that parties and their lawyers are under a duty to deal with cases justly and at a proportionate cost and use ADR where appropriate rather than litigation.

Mediation has been developed along with other methods of alternative dispute resolution to address the shortcomings in the formal structure of law and the court system.¹⁵ Mediation has the key advantage of being significantly less expensive than alternative forms of dispute resolution. The issue of proportionality was outlined by Etherton LJ when he observed that often the cost of litigation far exceeds the amount received by the claimant and too often these cases appear in court.¹⁶ Further advantages of mediation were also expressed in *Dunnett v Railtrack Plc* [2002] in which it was expressed that mediation allows

⁸ Civil Procedure Rules 1998, Rule 44.5 ; *Macmillan Williams v Range* [2004] EWCA Civ 294 ; *Leicester Circuits Ltd v Coates Brothers Plc* [2003] EWCA Civ 333 ; There is the forbearance of costs if there is an unexplained withdrawal from an agreed mediation where there was a prospect of certainty of success of mediation.

⁹ Civil Procedure Rule s 1998, Rule 1.1 ; S Shipman, 'Court Approaches to ADR in the Civil Justice System' (2006) *Civil Justice Quarterly* 181.

¹⁰ Timothy Heeden, 'Coercion and Self-determination in Court-Connected Mediation: All mediations are voluntary but some are more voluntary than others' (2005) *The Justice System Journal* 26.

¹¹ Timothy Heeden, 'Coercion and Self-determination in Court-Connected Mediation: All mediations are voluntary but some are more voluntary than others' (2005) *The Justice System Journal* 26; Shirley Shipman, 'Court Approaches to ADR in the Civil Justice System' (2006) *Civil Justice Quarterly* 181; *Cowl v Plymouth City Council* [2001] EWCA Civ 1935 [27].

¹² P Barrett, 'Part 36 and mediation: an offer to settle will not suffice –PGF II SA v (1) OMFS Co and (2) Bank of Scotland Plc' (2012) *Arbitration* 401.

¹³ *MacMillan Williams v Range* [2004] EWHC Civ 294; *PGF II SA v (1) OMFS CO AND (2)* [2013] EWCA Civ 1288.

¹⁴ *MacMillan Williams v Range* [2004] EWHC Civ 294.

¹⁵ Gary Slapper and David Kelly, *English Legal System* (13th edn, Routledge 2012) 551.

¹⁶ *Newman v Framewood Manor Management Co Ltd* [2012] EWCA Civ 159.

results to be achieved by the parties which are '*quite beyond the power of lawyers and courts to achieve*'.¹⁷ Mediation also possesses the significant advantage that solutions are not imposed on the parties and it is both a private and consent-based procedure.¹⁸ The Civil Procedure Rules 1998 create a greater emphasis on parties to make use of mediation.¹⁹ The rules aim to encourage the parties to use the alternative forms of dispute resolution, but do not force them to participate; the process is voluntary and allows for self-determined outcomes.²⁰ For parties to a civil dispute self-determination is one of the main strengths that mediation offers as it empowers them to create their own solutions.²¹ The self-determination aspect of mediation allows for the spirit of consensual problem-solving and has led to moral developments making individuals feel more efficacious.²² These are some of the advantages which mediation offers which could be attractive to both local legal practitioners and their clients.

Mediation popularity continues to develop for civil disputes, for example, as government agencies and their departments have adopted 'The Dispute Resolution Commitment', which is aimed to encourage '*increased use of flexible, creative and constructive approaches to dispute resolution*'.²³ Mediation also continues to be of growing importance and diversity as a number of successful bodies who support and promote the use of ADR have been established and of significance is the Civil Mediation Council, which has for instance made suggestions for the development of standards for training and practice.²⁴ The development of mediation can also be shown in the specific areas of family and employment law.²⁵ The use of mediation for family disputes increased throughout the period of 2007/2008 as a result of the advantages the procedure offers.²⁶ The Children and Families Act 2014 recently

¹⁷ Per Brooke LJ ; *Dunnett v Railtrack Plc* [2002] EWCA 3006 Civ 576.

¹⁸ Catherine Elliott and Frances Quinn, *English Legal System* (11th edn, Pearson 2013-2014) 630.

¹⁹ Civil Procedure Rules 1998.

²⁰ Civil Procedure Rules, Part 1 – Overriding Objective para 1.4 (2) (e); where parties are encouraged by the court to make use of alternative dispute resolution as part of the court's commitment to manage cases ; Timothy Heeden, 'Coercion and Self-determination in Court-Connected Mediation: All mediations are voluntary but some are more voluntary than others' (2005) *The Justice System Journal* 26; Shirley Shipman, 'Court Approaches to ADR in the Civil Justice System' (2006) *Civil Justice Quarterly* 181.

²¹ David Spencer and Michael Brogan, *Mediation Law and Practice* (edn, Cambridge University Press 2006) 84 – 87.

²² M Petsche, 'Mediation as the preferred method to solve international business disputes? A look into the future' (2013) *International Business Law Journal* 251; Heather Pinock, 'Does Mediation make us better? Exploring the capacity-Building potential of Community Mediation (2013) *Conflict Resolution Quarterly* 31(1).

²³ Ministry of Justice and Attorney General's Office *The Dispute Resolution Commitment* (2011) 1.

²⁴ Susan Blake, Julie Browne, Stuart Sime, *The Jackson ADR Handbook* (edn, Oxford University Press 2013) 7 ; Civil Mediation Council deals with civil and commercial and employment disputes and is used by the Ministry of Justice to maintain a quality control. The Council is used by the government, judiciary and legal professionals.

²⁵ Karen Laing, 'Closing the gate: family lawyers as gatekeepers to a holistic service' (2010) *International Journal of Law in Context* 167.

²⁶ Dylan Kneale, Chris Sherwood, Patrick Sholl, Janet Walker, 'Engaging both parties in mediation within a changing funding climate – Perspectives from Relate's mediation staff' (Relate, February 2014) <<http://www.relate.org.uk/files/relate/publication-mediation-report-feb2014.pdf>> accessed 19 March 2014.

has developed a more mandatory stance towards the use of mediation since the Act requires that parties attend a Mediation Information Assessment Meeting.²⁷ Employment law also advocates the use of mediation through the ACAS Code 2009.²⁸

The use of mediation to resolve workplace disputes is high on both research and policy agendas in Britain.²⁹ Workplace mediation is also a growing area which holds the aim of resolving internal complaints, disputes and grievances before they result in more formal proceedings and loss of time and productivity to the company.³⁰ Mediation is effective due to the need to maintain relationships within the workplace. Also complex settlements can also be generated which could not be achieved in court proceedings. The 2009 ACAS code recommends that disciplinary and grievance procedures should be dealt with in the workplace with an external or independent internal mediator. However, employment disputes more commonly use conciliation rather than mediation as there is now a compulsory Early Conciliation Scheme for claims which are intended to be brought before an employment tribunal.³¹ ACAS mediation and conciliation schemes are regulated by statute, unlike most other mediation processes in the UK, which are regulated by a contract made between the parties.³² This still portrays the increased emphasis on the use of ADR despite the fact that it does not have to be mediation.

Developments in acknowledging the benefits of ADR and particularly mediation and arbitration have been evident in the business/commercial world, in that large companies and influential institutions have already left the lawyers behind through their recognition of costs and other drawbacks of litigation.³³ It is expressed that they prefer ways which require them to act in good faith and co-operate in order to maximise profits for both sides.³⁴ There is also further emphasis placed on the use of mediation by large companies since good corporate governance now suggests the use of mediation by large companies for the resolution of disputes.³⁵ Also since 1994 the Commercial Court has led developments requiring lawyers to consider with their clients, the possibility of attempting to resolve the

²⁷ Children and Families Act 2014, s10 (1).

²⁸ ACAS Code, 2009.

²⁹ Paul Latreille, Franz Buscha and Anne Conte, 'Are you experienced? SME use of and attitudes towards workplace mediation' (2012) *The International Journal of Human Resource Management* 23(3).

³⁰ *ibid.*

³¹ ACAS Code, 2009.

³² Susan Blake, Julie Browne, Stuart Sime, *The Jackson ADR Handbook* (edn, Oxford University Press 2013) 2.

³³ Derek Roebuck, 'Time to think: understanding dispute management' (2011) *Arbitration* 342.

³⁴ *ibid.*

³⁵ Derek Roebuck, 'Time to think: understanding dispute management' (2011) *Arbitration* 342.

dispute through using ADR and to ensure that parties are fully aware of the costs involved.³⁶ The small claims mediation service also displays the developments of ADR within the UK. It operates in all county court centres and from the 1 April 2013 cases to the value of £5,000 or less will automatically be referred for mandatory consideration of mediation. Cases which are valued between £5,000 and £10,000 will not automatically be referred for the consideration of mediation as a potential way to resolve the dispute, unless it appears that mediation would be the appropriate method for resolving the dispute.³⁷ Therefore the benefits of using mediation have been recognised and continue to be increasingly used within society to resolve a diverse range of disputes.

Furthermore, it is suggested by Hazel Genn in her 2007 report on Court Referred and Court Linked Mediation that the use of mediation by small businesses produced a higher percentage of resolutions at 87 per cent where courts and tribunals was 35 per cent.³⁸ It was also established that of the medium and large companies within the study many had used mediation and also had a commitment to the future of mediation.³⁹ However, although there is a growing awareness of mediation and its benefits there is still a low uptake which is portrayed in the data set for the survey on small-medium-sized enterprises (SMEs), commissioned by the Advisory, Conciliation and Arbitration Service.⁴⁰ This revealed that 64 percent of SMEs had heard of mediation, however only 7 per cent had used mediation.⁴¹

Moreover, it is submitted that Lord Woolf and the majority of the judiciary genuinely desire mediation to be used where appropriate to ease the strain on the court system and allow quicker and more cost effective outcomes to be achieved.⁴² There is also judicial support for ADR which was endorsed through the case of *Halsey v Milton Keynes NHS Trust* [2004] in which it was expressed '*All members of the legal profession who conduct litigation should*

³⁶ Susan Blake, Julie Browne, Stuart Sime, *The Jackson ADR Handbook* (edn, Oxford University Press 2013) 2.

³⁷ Susan Blake, Julie Browne, Stuart Sime, *The Jackson ADR Handbook* (edn, Oxford University Press 2013) 2.

³⁸ Professor Dame Hazel Genn 'Twisting arms: court referred and court linked mediation under judicial pressure' (Ministry of Justice research series 1/07, May 2007) < http://www.ucl.ac.uk/laws/judicial-institute/docs/Twisting_arms_mediation_report_Genn_et_al_1.pdf > last accessed 25th Feb 2014.

³⁹ *ibid.*

⁴⁰ Paul Latreille, Franz Buscha and Anne Conte, 'Are you experienced? SME use of and attitudes towards workplace mediation' (2012) *The International Journal of Human Resource Management* 23(3).

⁴¹ *ibid.*

⁴² P Barrett, 'Part 36 and mediation: an offer to settle will not suffice – PGF II SA v (1) OMFS Co and (2) Bank of Scotland Plc' (2012) *Arbitration* 401.

now routinely consider with their clients whether their disputes are suitable for ADR.⁴³ However, it could be seen that lawyers who do not wish to use the process simply intend to give the impression that they have considered and engaged in the process.⁴⁴ This attitude may be a consequence of the adversarial nature of lawyers' training and practitioners not being convinced by the values of mediation.⁴⁵ There is still the notion that real law involves the court, civil procedures and evidence, as such litigation is emphasised in professional training.⁴⁶ Therefore the further development and uptake of mediation depends on creating a more positive and informed outlook amongst legal practitioners. This can also be seen as through the period of 2011/2012 the percentage of people taking up mediation decreased.⁴⁷ Mediation may also be hindered by the attitudes of lawyers who do not value the procedure as a result of the lack of guidelines, standards of assessment and also a lack of code of practice for mediators which allows for diverse practices of mediation.⁴⁸

In other jurisdictions mediation has increasingly been used to resolve civil disputes.⁴⁹ In Canada, Ottawa, the Superior Court of Justice has attempted a pilot program requiring disputants to try mediation in the early stages of civil mediation.⁵⁰ Mediation is expressed by the Attorney General of Ontario as being an opportunity to improve both access to justice and avoid the costs and inefficiencies of traditional litigation.⁵¹ The study carried out by Professor Hazel Genn in 2007 asserted that the Ontario Mandatory Mediation Program had a large satisfaction rate with litigants and lawyers.⁵² It is displayed from the findings of Genn's research of approximately 2,500 cases mandated to mediation, there were only 25 exceptions, therefore showing a low exception rate of approximately 1 – 2 per cent of

⁴³ *Hasley v Milton Keynes NHS Trust* [2004] EWCA Civ 576.

⁴⁴ P Barrett, 'Part 36 and mediation: an offer to settle will not suffice – PGF II SA v (1) OMFS Co and (2) Bank of Scotland Plc' (2012) *Arbitration* 401.

⁴⁵ *ibid.*

⁴⁶ P Barrett, 'Part 36 and mediation: an offer to settle will not suffice – PGF II SA v (1) OMFS Co and (2) Bank of Scotland Plc' (2012) *Arbitration* 401.

⁴⁷ Dylan Kneale, Chris Sherwood, Patrick Sholl, Janet Walker, 'Engaging both parties in mediation within a changing funding climate – Perspectives from Relate's mediation staff' (Relate, February 2014) <<http://www.relate.org.uk/files/relate/publication-mediation-report-feb2014.pdf>> accessed 19 March 2014.

⁴⁸ Laurence Boulle, *Mediation Principles Process Practice* (2nd edn, LexisNexis Butterworths 2005).

⁴⁹ Michael Coyle, 'Defending the Weak and Fighting Unfairness: Can Mediators Respond to the Challenge (1998) *Osgoode Hall Law Journal* 36.

⁵⁰ Michael Coyle, 'Defending the Weak and Fighting Unfairness: Can Mediators Respond to the Challenge (1998) *Osgoode Hall Law Journal* 36.

⁵¹ Michael Coyle, 'Defending the Weak and Fighting Unfairness: Can Mediators Respond to the Challenge (1998) *Osgoode Hall Law Journal* 36.

⁵² Professor Dame Hazel Genn 'Twisting arms: court referred and court linked mediation under judicial pressure' (Ministry of Justice research series 1/07, May 2007) <http://www.ucl.ac.uk/laws/judicial-institute/docs/Twisting_arms_mediation_report_Genn_et_al_1.pdf> last accessed 25th Feb 2014.

cases.⁵³ Evidence from the London Scheme displays a contrast to the findings in Ottawa regarding the interest of participants in proceeding to mediation.⁵⁴ The London scheme revealed that over a period of 12 months around 1232 cases were referred to mediation, of which 70 per cent of those participants opted out of the scheme and chose not to participate in the mediation programme.⁵⁵ Genn's findings suggest that the reasoning behind the low take up rate in the Central London County Court pilot scheme for non-family disputes was due to the ignorance of legal professionals along with the unwillingness of the parties involved to compromise on their desires.⁵⁶ This outlines some of the issues surrounding attitudes of legal professional towards mediation within the UK and the consequential effect on its uptake.

Mediation is also used effectively in Australia where the process is becoming institutionalised.⁵⁷ Justice Rogers of the Commercial Division of the Supreme Court of New South Wales when critiquing the decision in *Allco Steel (Qld) Pty Ltd v Torres Strait Gold Pty*, advocated that mediation allows for a different perspective on the dispute and permits a settlement where the parties are determined at the outset not to achieve one.⁵⁸ The mediation program in Australia could be seen to be a success as a survey by the New South Wales government into the dispute resolution requirements of businesses and commercial organisations displayed the need for a more cost effective and quicker method to resolve disputes, rather than litigation, one which promotes commercial goodwill and also would lessen the commercial losses to the business or company.⁵⁹ The Chief Justice of New South Wales introduced the Australian Commercial Disputes Centre to allow disputes to be dealt with quickly and promoted alternative dispute resolution within the business community.⁶⁰ The Australian Capital Territory (ACT) currently has a mandatory mediation statutory scheme presently running which is contained within the Civil Law (Wrongs) Act 2002,

⁵³ *ibid.*

⁵⁴ Professor Dame Hazel Genn 'Twisting arms: court referred and court linked mediation under judicial pressure' (Ministry of Justice research series 1/07, May 2007) < http://www.ucl.ac.uk/laws/judicial-institute/docs/Twisting_arms_mediation_report_Genn_et_al_1.pdf > last accessed 25th Feb 2014.

⁵⁵ *ibid.*

⁵⁶ Professor Dame Hazel Genn 'Twisting arms: court referred and court linked mediation under judicial pressure' (Ministry of Justice research series 1/07, May 2007) < http://www.ucl.ac.uk/laws/judicial-institute/docs/Twisting_arms_mediation_report_Genn_et_al_1.pdf > last accessed 25th Feb 2014.

⁵⁷ Laurence Boulle, *Mediation Principles Process Practice* (2nd edn, LexisNexis Butterworths 2005).

⁵⁸ *Allco Steel (Qld) Pty Ltd v Torres Strait Gold Pty Unreported*, Supreme Court of Queensland, 12 March 1990 ; David Spencer and Michael Brogan, *Mediation Law and Practice* (edn, Cambridge University Press 2006) 269.

⁵⁹ David Spencer and Michael Brogan, *Mediation Law and Practice* (edn, Cambridge University Press 2006) 279.

⁶⁰ *ibid.*

section 95(1).⁶¹ This includes the provision that any court or tribunal may refer a case or part of a case to mediation without the consent of the parties.⁶²

Mediation can therefore be portrayed as a process which offers many advantages as a method of alternative dispute resolution. The compulsory nature of mediation in some other common law jurisdictions hints at the benefits which mediation can provide as a process for resolving disputes. Within the UK this is also shown in the areas of family, commercial and employment law through the Children and Families Act 2014, the ACAS Code 2009 and also the commitment of large companies to the use of mediation as a result of the benefits that mediation can offer. Mediation has been increasingly used effectively in other common law jurisdictions and in other jurisdictions, where in some cases there is also a compulsory stance taken to its use. However, despite the evolution of mediation in the UK and also the examples in other jurisdictions where it has been mandated, there are still reservations held by legal professionals which is expressed by Genn as being a significant factor impacting upon parties' participation in mediation to resolve disputes.⁶³

⁶¹ Civil Law (Wrongs) Act 2002, section 195(1); David Spencer and Michael Brogan, *Mediation Law and Practice* (edn, Cambridge University Press 2006) 279.

⁶² Civil Law (Wrongs) Act 2002, section 195(1).

⁶³ Professor Dame Hazel Genn 'Twisting arms: court referred and court linked mediation under judicial pressure' (Ministry of Justice research series 1/07, May 2007) < http://www.ucl.ac.uk/laws/judicial-institute/docs/Twisting_arms_mediation_report_Genn_et_al_1.pdf > last accessed 25th Feb 2014.

Methodology

Topic of Research

“An Analysis of Local Solicitors’ Attitudes To and Use of Mediation”

The purpose of the study is to analyse local solicitors’ attitudes to and the use of mediation. I will seek to explore meanings and perceptions to gain a better understanding of the use of mediation, along with whether mediation could be used more effectively. The findings of the study may assist the service provision aspect of the University’s Mediation Clinic.

Methods Used

This was a qualitative research project exploring the central phenomenon of local solicitors’ attitudes towards and use of mediation. The aim of the project was to explore meanings and perceptions to gain a better understanding of the use of mediation and whether mediation could be used more effectively.⁶⁴ The population under study was 30 solicitors’ firms within the City of Canterbury which offer family, employment and civil and commercial services. The study will observe the individual characteristics of the members and how they respond to the questions on uses and their opinion on mediation, surveying the diversity within the population.⁶⁵ Participants were made aware of the interviewer’s purpose to ensure their co-operation was maintained.

The grounded theory was used to determine themes which arose from the interviews with the legal professionals. The surveys were collated into the separate practices of family, civil and commercial and employment law. The themes were deduced from the responses provided and common themes from the questionnaires were analysed.

A separate survey was carried out through Survey Monkey. The questions were closed to allow for quick answers to be given.

⁶⁴ Barbra Dicicco-bloom and Benjamin F Crabtree, ‘The qualitative research interview’ (2006) *Medical Education* 40(4).

⁶⁵ Harrie Jansen, ‘The Logic of Qualitative Survey Research and its Position in the Field of Social Research Methods’ (2010) 11(2).

Interviews

Personal interviews were conducted, however if there was not an opportunity to conduct the interviews in person then telephone interviews were conducted.

It is considered important that researchers carry out their own qualitative interviews since it promotes familiarity with the details of the data.⁶⁶ It is essential that a researcher must be unobtrusive in order not to impose their own views onto the interviewee. The best technique for this is suggested to be an unstructured interview or semi-structured interview.⁶⁷ The interviewer therefore had some general questions and let the participants speak freely and in-depth, leaving the interpretation and analysis to the researcher.⁶⁸ There were also some prompt questions to ensure that detailed answers were given.⁶⁹

In-depth interviews can provide extensive data on the attitudes of local solicitors; however it is suggested that often this can take 30 minutes to multiple hours to complete. Therefore question were limited in number as I still required open and unobtrusive questions which allow in depth answers to be given, however due to time constraints there were fewer questions.⁷⁰

Sampling

The sample was taken in order to gather information from participants within Canterbury with the purpose of attributing it to a larger population. The study included 30 solicitors' firms in the city of Canterbury, 10 for each practice of: family, employment and civil and commercial.

Location

The population of the study was proposed to include 30 legal firms within Canterbury which offer family, employment and civil and commercial services.

⁶⁶ P Woods 'Qualitative Research' (University of Plymouth, 2006)

<<http://www.edu.plymouth.ac.uk/resined/qualitative%20methods%20/qualrshh.htm>> last accessed 28th May 2014.

⁶⁶ Barbra Diccio-bloom and Benjamin F Crabtree, 'The qualitative research interview' (2006) *Medical Education* 40(4).

⁶⁷ Barbra Diccio-bloom and Benjamin F Crabtree, 'The qualitative research interview' (2006) *Medical Education* 40(4).

⁶⁸ *ibid.*

⁶⁹ P Woods 'Qualitative Research' (University of Plymouth, 2006)

<<http://www.edu.plymouth.ac.uk/resined/qualitative%20methods%20/qualrshh.htm>> last accessed 28th May 2014.

⁷⁰ Barbra Diccio-bloom and Benjamin F Crabtree, 'The qualitative research interview' (2006) *Medical Education* 40(4).

Research was conducted in the City of Canterbury with a sample size of **30** legal firms.

The **sample frame** will be:

10 Employment Legal Firms

10 Family Legal Firms

10 Civil and Commercial Legal Firms

Equal numbers of each practice (employment, civil and commercial and family) were contacted.

A pilot study was carried out with David Riordan at Whitehead Monckton Solicitors to ensure the questionnaire generated results and the questions were appropriate. The interview was carried out via telephone during the week commencing the 2nd June 2014

Analysis of Results

I. Introduction

Mediation possesses many advantages in comparison to litigation and other forms of alternative dispute resolution; however there is still some ambivalence amongst legal professionals towards mediation and its use as an alternative method of dispute resolution. This study aims to highlight the attitudes of local legal professionals, in Kent, towards mediation and its use in order to generate data which might have some implications nationally. Although, this study was only preformed on a very small-scale and with a small data set of solicitors in Kent.

Professor Dame Hazel Genn's study in 2007 on Court referred and Court Linked Mediation for contentious non-family cases displayed positive findings for the use of mediation in Ontario, however the large satisfaction rate amongst participants towards a compulsory mediation program was not found in the pilot scheme in London.⁷¹ The study was based around the use of civil mediation contentious non-family cases; however the findings of the study could also highlight the attitudes towards and use of all types of mediation by legal professionals. The results signified that the number of participants in London who chose to opt out of the mandatory scheme was significantly higher than in Ontario and Professor Dame Hazel Genn accredits this to the ignorance of legal professionals, along with the lack of desire amongst parties to a dispute to compromise.⁷² The Genn study, now seven years old, attributes the lack of use of mediation towards legal professionals' attitudes and consequently the aim of the study is to understand and analyse local solicitors' attitudes towards and also the use of mediation. She suggests that the main challenge in policy making is to identify and articulate incentives for legal professionals to embrace the use of mediation on the behalf of their clients and this study also analysed clients' views on

⁷¹ Professor Dame Hazel Genn 'Twisting arms: court referred and court linked mediation under judicial pressure' (Ministry of Justice research series 1/07, May 2007) < http://www.ucl.ac.uk/laws/judicial-institute/docs/Twisting_arms_mediation_report_Genn_et_al_1.pdf > last accessed 25th Feb 2014.

⁷² *ibid.*

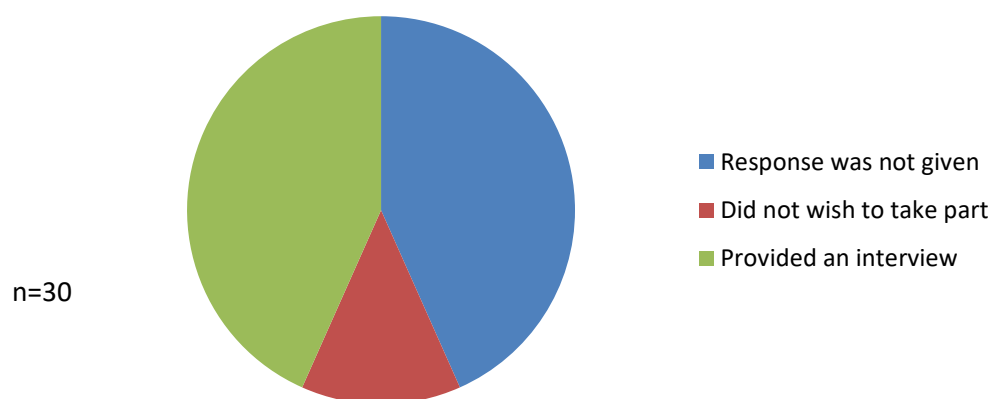
mediation once it had been suggested by legal professionals in order to gain a data set which could accurately represent attitudes towards mediation and its use.

II. The Study

The study analysed 13 solicitors' attitudes towards mediation. The total sample size was 30 solicitors from 8 law firms within Canterbury who offer family, employment or civil and commercial services. Multiple questionnaires were completed with some of the 8 firms because different participants have different sector expertise.

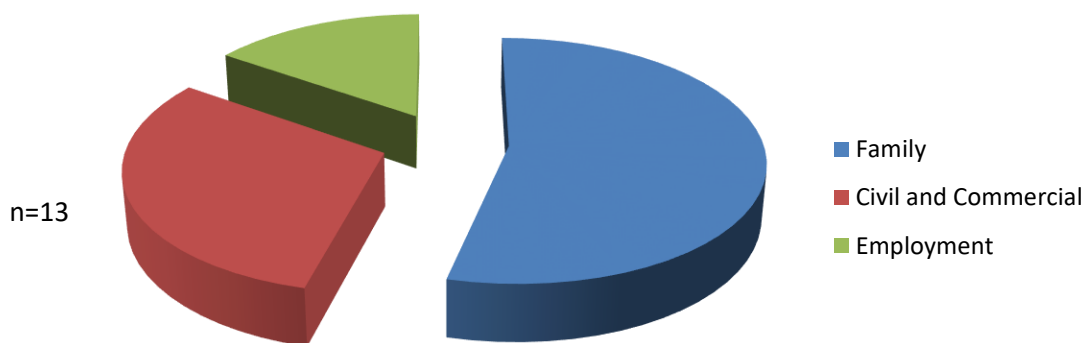
43.3% of the respondents that were contacted provided in-depth interviews on their use and attitudes towards mediation. 43.3% did not respond to the emails and/or phone calls regarding participating in the study. The 43.3% of non-respondent was made up of 13 solicitors and 3 of the 13 could not be contacted as they were on annual leave. 4 out of the 30 solicitors contacted (13.3%) did not respond, were not interested in the study or could not help as they did not have sufficient knowledge on mediation to be able to complete the questionnaire.

Number and type of response from Legal Service Providers in Canterbury



Of the 13 solicitors analysed there was a ratio of 7:4:2 for family, civil and commercial and employment areas of practice performed by the solicitors. The higher response rate for family solicitors may be as a result of the increased understanding and use of mediation due to the change in law making family disputes have a compulsory mediation session.⁷³ The low response rate for employment solicitors may also be accredited to a change in law which emphasises an increased use of alternative dispute resolution; however the change did not focus on the use of mediation.⁷⁴ This will be explored further in the employment law results. Overall the number of participants in the study was small which lead to a modest data set. However, of the solicitors who participated most were based in large and established firms, which may allow for comparisons to be draw from this small regional study to the use and attitudes towards mediation nationally.

Proportion of responses provided by family , civil and commercial and employment local practitioners



During the study participants were made aware of the interviewer's purpose to ensure that the interview met its objectives and also without the co-operation of the participants qualitative interviews are not successful since the participants are unaware of the topic and aim of the study.⁷⁵ Semi-structured interviews were carried out with the 13 participants.⁷⁶ Some general questions were asked which allowed the participants to speak freely and in depth, leaving the interpretation and analysis to the researcher.⁷⁷ Prompt questions were

⁷³ Children and Families Act 2014, s10(1).

⁷⁴ Enterprise and Regulatory Reform Act 2013, Part 2 – Employment, Section 7, Sub-Section 1-3.

⁷⁵ Harrie Jansen, 'The Logic of Qualitative Survey Research and its Position in the Field of Social Research Methods' (2010) 11(2).

⁷⁶ Barbra Diccio-bloom and Benjamin F Crabtree, 'The qualitative research interview' (2006) Medical Education 40(4).

⁷⁷ *ibid.*

also used to ensure that detailed answers were given.⁷⁸ In depth interviews provided extensive data on the attitudes of local solicitors. The questionnaire was limited to 14 questions which allowed for in depth answers to get given by the participants, but limited the length of the interviews to a maximum duration of 30 minutes.⁷⁹

A separate survey was carried out through 'Survey Monkey' to ensure that as many participants were targeted as possible.⁸⁰ The questionnaire was sent to 8 of the potential participants. The questionnaire was designed with closed questions. The 'Survey Monkey' questionnaire generated one civil and commercial response from potential participants contacted.

III. Analysis of Results obtained from Family Solicitors

The key themes deduced from the family questionnaires about the understanding of the mediation process display that there is a general understanding of mediation as being an independent third party neutral to a dispute who facilitates the process.⁸¹ The advantages that the mediation process possesses are recognised by the family solicitors and although the number of participants was small, the firms sampled were large and established. A common theme deduced from the family questionnaires was that a significant advantage offered by the mediation process is cost savings, which is one of the five philosophies of mediation.⁸² Mediation has been developed along with other methods of alternative dispute resolution to address the shortfalls of the formal structure of law and the court system of which time and costs are particular problems.⁸³ These were some of the issues highlighted by Lord Justice Jackson in his review of Civil Litigation Costs.⁸⁴ He also reached that alternative dispute resolution plays a vital role in reducing the costs and delays in civil disputes through allowing for early settlements.⁸⁵

⁷⁸ P Woods 'Qualitative Research' (University of Plymouth, 2006)

<<http://www.edu.plymouth.ac.uk/resined/qualitative%20methods%202/qualrsh.htm>> last accessed 28th May 2014.

⁷⁹ Barbra Diccio-bloom and Benjamin F Crabtree, 'The qualitative research interview' (2006) *Medical Education* 40(4).

⁸⁰ *Survey Monkey is a questionnaire building website. It allows questions to be entered and a range of responses to be given. It generated a URL which can be sent to potential respondents. The website monitors the number of respondents.*

⁸¹ Christopher W Moore, *The Mediation Process* (3rd edn, Jossey-Bass 2003) 15.

⁸² David Spencer and Michael Brogan, *Mediation Law and Practice* (edn, Cambridge University Press 2006) 84 – 87.

⁸³ Gary Slapper and David Kelly, *English Legal System* (13th edn, Routledge 2012) 551.

⁸⁴ G Huntley, 'You can drag a horse to mediation...' (2013) *New Law Journal* 163.

⁸⁵ *ibid.*

Furthermore, a further key theme arising from the family data was that mediation has the advantage of increasing the parties control over the process and the outcome. The advantage was made in comparison to other forms of dispute resolution and litigation. One of the main strengths of mediation lies in the power that it affords the parties to invent their own approach to their solution permitting the key element of self-determination.⁸⁶ The ideological premise is the idea of self-determination and this can be seen to have led to the moral development by making individuals feel more efficacious.⁸⁷ The acknowledgement of feelings is also considered to be an advantage that the process of mediation possesses in comparison to other form of dispute resolution and litigation.

The mediator is a fundamentally neutral and independent person which allows them to be objective throughout the process.⁸⁸ These were key themes prominent in the responses from participants along with the mediators' ability to facilitate discussions. Participants also considered the mediators and the mediation process allows for increased communication between the parties. The mediator can facilitate, enhance communications, and also bring expertise to the process through their experiences and training.⁸⁹ The mediators can therefore enable communication between the parties allowing the disputants to determine their bargaining sets.⁹⁰ Also, communication between the parties and the facilitation of the mediator leads to a substantial increase in the level of co-operation.⁹¹ The key themes in the family questionnaires display an understanding of the mediation process and this could signify that there is an increased use of mediation.

A key theme which was apparent in the family law interviews was that the success of mediation is dependent upon the quality of the mediator as it was stated '*a good mediator would mean that mediation would be a good option*'. Mediation is dependent on the mediator and their style and this was seen as an issue. This can be a problem as mediation

⁸⁶ Michael Coyle, 'Defending the weak and Fighting Unfairness: Can mediators Respond to the Challenge?' (1998) *Osgoode Hall Law Journal* 36 ; T Heeden , 'Coercion and Self-determination in Court-Connected Mediation: All mediations are voluntary, but some are more voluntary than others' (2005) *The Justice System Journal* 26.

⁸⁷ M Petsche, 'Mediation as the preferred method to solve international business disputes? A look into the future' (2013) *International Business Law Journal* 251 ; Heather Pinock, 'Does Mediation make us better? Exploring the capacity-building potential of Community Mediation' (2013) *Conflict Resolution Quarterly* 31(1).

⁸⁸ M Coyle, 'Defending the weak and fighting unfairness: Can mediators respond to the challenge?' (1998) *Osgoode Hall Law Journal* 36(4).

⁸⁹ M Coyle, 'Defending the weak and fighting unfairness: Can mediators respond to the challenge?' (1998) *Osgoode Hall Law Journal* 36(4); S N Exxon, 'How can a mediator be both impartial and fair?: Why ethical standard of conduct create chaos for mediators' (2006) *Journal of Dispute Resolution*.

⁹⁰ G EisenKopf and A Bachtiger, 'Mediation and Conflict Prevention' (2012) *Journal of Conflict Resolution* 57.

⁹¹ *ibid*.

can be classified into two main styles, facilitative and evaluative and the separate styles are set out by Riskin in 1996.⁹² The different styles of mediation practiced by the family mediators were discovered when participants were asked to describe the process of mediation and words such as '*persuades*' were used when describing the mediators role, leading to the view that this participant prefers the evaluative style of mediation. This could therefore produce problems due to the lack of uniform style which is accepted and undertaken by all mediators and if there is not a unanimously accepted style of mediation to which all mediators must adhere. There is a large amount of confusion surrounding the evaluative style of mediation and it is inferred that the standards or guidelines that are offered within mediation are often unclear, vague or contradictory in terms.⁹³ There may be calls for the need for the facilitative style of mediation to be adopted uniformly since mediation should permit parties' freedom of choice and self-determination of the outcome. This ensures that a fair procedure would be granted to the parties where a mediator does not attempt to interfere with the free choice and permits un-coerced decisions by the parties, however currently mediators are free to choose their mediation style preference.⁹⁴

There was some contradiction in the advice that parties should have received. One participant suggested that parties should have sought some legal advice before mediation so that they get a fair settlement from the mediation process. However, this was subsequently contradicted in a further interview since it was suggested that if a lawyer has been seen first by the clients, then they often want their lawyer with them. This sometimes makes the mediation harder since parties would be unlikely to move from their '*ideal*'. Also this involved the difficulty of repeating the explanation of the dispute to a lawyer and also to a mediator. It was a common theme that participants felt that mediation did not work or achieve satisfactory results when the mediators were non-lawyers and it was also commonly stated that non-lawyer mediators would not be recommended in the future.

⁹² Leonard L Riskin, 'Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the perplexed' (1996) *Harvard Negotiation Law Review* 1(7); Donna Shestowsky, 'Procedural Preferences in Alternative Dispute Resolution: A Close, Modern Look at an Old Idea' (2004) *Public Policy and Law* 10(211).

⁹³ Donna Shestowsky, 'Procedural Preferences in Alternative Dispute Resolution: A Close, Modern Look at an Old Idea' (2004) *Public Policy and Law* 10(211).

⁹⁴ Donald T Weckstein, 'In Praise of Party Empowerment – And of Mediator Activism' (1997) *Willamette Law Review* 33(501); Michael Coyle, 'Defending the Weak and Fighting Unfairness: Can Mediators Respond to the Challenge?' (1998) *Osgoode Hall Law Journal* 36 [625] – [666]; Angela Cora Gracia, Kirstie Visa and Stephen P Whitaker, 'Disputing Neutrality: A Case Study of a Bias Complaint during Mediation' (2002) *Conflict Resolution Quarterly* 20(2).

Petsche in 2013 suggested that mediation relies on the skills that the mediator possesses.⁹⁵ It is argued that the relationship that the mediator maintains with the parties is vital to the process through their skills or building future relationships between the parties.⁹⁶ Despite the fact that the mediator is fundamentally neutral, allowing them to be objective, there is no uniformity or commonly accepted view as to how the mediator can assist the parties with their dispute.⁹⁷ Another common theme arose that the mediator cannot give advice to the clients. Therefore there were still some perceived disadvantages or problems which may be encountered with mediation and although there is increased use of mediation, attitudes towards mediation commonly suggest that there are still problems with mediators' quality and qualifications.

Furthermore, the possibility of a lack of an end result was considered to be a disadvantage with mediation when family solicitors were asked to compare mediation to other methods of dispute resolution including litigation. There is the possibility that an end result will not be achieved as mediation is voluntary and allows for participants to be free to leave the process; they do not have to settle and the process should be performed without coercion on the behalf of the mediator. Although through the introduction of Mediation Information and Assessment Meeting there is something approaching a more compulsory element to family mediation, the process is still voluntary after this meeting and self-determination remains an essential element for family matters.⁹⁸ This consequently means that the parties will not be coerced to settle which may result in an agreement not being reached by the parties. The binding force of the agreement was found to be an issue as the mediation settlement agreement cannot be enforced like a judgment and separate proceedings for breach would have to be commenced. It is stated that agreements reached through the mediation process are far less effective due to the fact that they are contracts and contain the legally binding force of private agreements.⁹⁹ Consideration should also be given to the fact that if an agreement is not reached then the parties will proceed to court and this will

⁹⁵ *Dunnett v Railtrack plc* [2002] EWCA Civ 303 [4]; M Petsche, 'Mediation as the preferred method to solve international business disputes? A look into the future' (2013) *International Business Law* 251.

⁹⁶ Jerry M Wittmer, Peter Carnevale and Michael E Walker, 'General Alignment and Overt Support in Biased Mediation' (1991) *The Journal of Conflict Resolution* 35(4) [594] – [610].

⁹⁷ M Coyle, 'Defending the weak and fighting unfairness: can mediators respond to the challenge?' (1998) *Osgoode Hall Law Journal* 36(4).

⁹⁸ T Heeden, 'Coercion and Self-determination in Court-Connected Mediation: All mediations are voluntary, but some are more voluntary than others' (2005) *The Justice System Journal* 26.

⁹⁹ M Petsche, 'Mediation as the preferred method to solve international business disputes? A look into the future' (2013) *International Business Law Journal* 251.

be counter-productive, increasing costs and time when court proceedings could have been commenced initially.¹⁰⁰

Despite the perceived disadvantages the firms' views were all positive towards the use of mediation and 100 per cent of the participants stated that there was an increased emphasis on the use of mediation. Some of the participants elaborated and stated that there was an increased emphasis towards mediation in family law as a result of the changes made in the Children and Families Act 2014, which puts a more mandatory stance on the consideration of mediation and requires that disputants attend a Mediation Information and Assessment Meeting before they can proceed to litigation.¹⁰¹

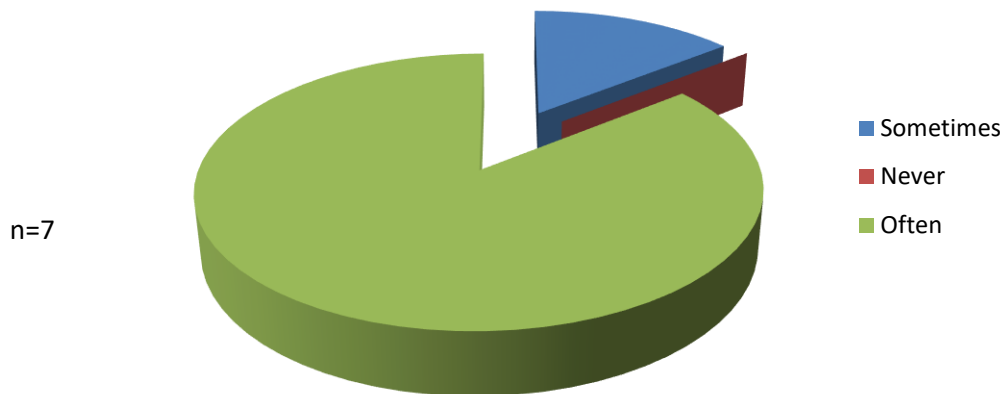
Personal views were more varied than the views of their firms. There was an issue with understanding the different alternative dispute resolution processes as one participant quoted that she had heard a solicitor referring to mediation as '*mediation and arbitration they are all the same really*'. A common theme amongst respondents was that solicitors still preferred round table meetings to mediation since they could attend with their client similar to collaborative law, however unlike collaborative law should the process fail they could continue working with their client.¹⁰² Therefore, although the diagram below presents the findings that there is increased use of mediation, with further analysis it can be inferred that attitudes towards mediation are more negative amongst individuals in comparison to the overall views of the firms. The overall positive view of the firms and the increased number of recommendations made could be attributed to the compulsory element as a result of the change in the law, however in reality solicitors would actually prefer a round table meeting where they can attend with their clients and also continue to represent their clients should the process fail.

¹⁰⁰ M Coyle, 'Defending the weak and fighting unfairness: can mediators respond to the challenge?' (1998) *Osgoode Hall Law Journal* 36(4).

¹⁰¹ Children and Families Act 2014, s10 (1).

¹⁰² *Collaborative Law is where lawyers and clients commit to try and resolve a dispute without proceeding to litigation.*

Frequency of Mediation Recommendations made by Family Solicitors



Some participants also held views that the government had made a mistake when making the process partly compulsory and this was now seen as an extra hurdle from clients' perspectives before they can proceed to court. The introduction of a compulsory scheme does allow the development of a fair procedure and uniformity when deciding which cases should be mediated. However, from the point of view of the solicitors who do not agree with the new compulsory stance it is suggested that although the compulsory element would allow for uniformity it could be contended that it would not provide fairness or justice and would instead prevent people from exerting their right to access the court system.¹⁰³

IV. Analysis of Results obtained from Civil and Commercial Solicitors

Key themes arose out of the civil and commercial interviews including the attitude towards mediation that there is a less adversarial nature and less stress is suffered by the participants. Mediation has developed along with other methods of disputes resolution to address the shortfalls of the formal structure of law and the court system.¹⁰⁴ The common

¹⁰³ P Barrett, 'Part 36 and mediation: an offer to settle will not suffice – PGF II SA v (1) OMFS Co and (2) Bank of Scotland Plc' (2012) *Arbitration* 401.

¹⁰⁴ Gary Slapper and David Kelly, *English Legal System* (13th edn, Routledge 2012) 551.

theme deduced from the study was the lack of an adversarial nature which would be experienced in the court room.¹⁰⁵ Other advantages also mentioned were the elements of cost and time savings. Therefore portraying the positive view held of mediation due to the advantages that the process offers over litigation and other methods of dispute resolution. The issues of costs and delays in the litigation system, which Lord Woolf aimed to address through the introduction of the Access to Justice Report 1996 and the introduction of the Civil Procedure Rules 1998, put a greater emphasis on the use of alternative dispute resolution.¹⁰⁶ It was suggested by Lord Justice Jackson in his review of Civil Litigation Costs that the conclusion can be reached that alternative dispute resolution plays a vital role in reducing the costs of civil disputes through allowing for early settlements.¹⁰⁷ Mediation is therefore significantly less expensive and quicker, and prevents a drain on time and resources.¹⁰⁸ The issue of costs was also outlined in the case of *Newman v Framewood Manor Management Co Ltd* [2012] where it was claimed that the case was appropriate for mediation and the cost of litigation exceeded the amount which was received by the claimant, thus raising some serious proportionality issues.¹⁰⁹

When asked about the firms views, all participants agreed that there was an increased emphasis towards the use of mediation. This was suggested as being due to costs orders and recent case law which aim to encourage the increased use of mediation to resolve disputes. It was suggested that it would be a '*brave person to reject using mediation if the other side suggests it*', inferring the increased use is due to the fact that the law is initiating changes to start making the use of mediation more widespread. This is shown by the Civil Procedure Rules 1998 which aim to put greater emphasis on individuals to use alternative dispute resolution and state that if the court is of the opinion that an action could have been settled more effectively through alternative dispute resolution, then it may penalise the party who did not consider mediation through awarding costs under rule 44.5.¹¹⁰

¹⁰⁵ Catherine Elliott and Frances Quinn, *English Legal System* (11th edn, Pearson 2013-2014) 630.

¹⁰⁶ Access to Justice Report 1996; Civil Procedure Rules 1998; P Barrett, 'Part 36 and mediation: an offer to settle will not suffice – PGF II SA v (1) OMFS Co and (2) Bank of Scotland Plc' (2012) *Arbitration* 401.

¹⁰⁷ G Huntley, 'You can drag a horse to mediation...' (2013) *New Law Journal* 163.

¹⁰⁸ KG Allred, 'Relationship Dynamics in Disputes' in Michael L Moffitt and Robert C Bordone (eds), *The Handbook of Dispute Resolution* (Jossey-Bass 2005); T Heeden, 'Coercion and Self-determination in Court-Connected Mediation: All Mediations are Voluntary, but some are more voluntary than others (2005) *The Justice System Journal* 26.

¹⁰⁹ *Newman v Framewood Manor Management Co Ltd* [2012] EWCA Civ 159; T Allen, 'A litigation nightmare' (2013) *New Law Journal* 163.

¹¹⁰ Civil Procedure Rules 1998, r44.5; *MacMillan Williams v Range* [2004] EWCA Civ 294; *Leicester Circuits Ltd v Coates Brothers Plc* [2003] EWCA Civ 333; *Dunnett v Railtrack Plc* [2002] EWCA Civ 303; Gary Slapper and David Kelly, *English Legal System* (13th edn, Routledge 2012); G Huntley, 'You can drag a horse to mediation...' (2013) *New Law Journal* 163.

Despite the positive view of increased emphasis towards the use of mediation, there was a common theme in the research undertaken that there are some disadvantages and the promotion of mediation and its use may also be hindered by the attitudes of legal professionals. It is suggested that mediation may be hindered by the attitudes of lawyers who do not value the procedure as a result of the lack of guidelines, standards of assessments and also as a result of a lack of a code of practice for mediators which allows for diverse practices of mediation.¹¹¹ It is also stated by academics that lawyers sometimes do not wish to use mediation but intend to give the impression that they have considered and engaged in the process.¹¹² This was shown in the data set collected as at least one participant stated that there will not be a solicitor who would state openly that they are against mediation. It was also indicated by a participant that if the number of solicitors who said they were pro – mediation did in fact use mediation there would be significantly more cases proceeding to mediation. This attitude may be a consequence of the adversarial nature of lawyers' training and practitioners being unconvinced of the values of mediation which can be inferred from the quote '*I want to train as a mediator but I have been told that I do not have the right attitude for it*'.¹¹³ There is still the notion that real law involves the court, civil procedures and evidence, as such litigation is emphasised in professional training.¹¹⁴ This was also a common theme in the data set for civil and commercial solicitors as one participant suggested that they are '*inbuilt towards litigation*' and this was also as a result of key performance indicators and the number of cases which had to proceed to litigation.

It could also be inferred from the modest data set that the personal views do not always match the firms' views toward mediation. It was suggested that there was an increased emphasis by the firms towards the use of mediation and 100 per cent of the participants agreed with the increased emphasis. However, from the data set obtained it can be inferred that personal attitudes are less positive towards mediation since cases were less frequently recommended to be taken to mediation.

¹¹¹ Laurence Boulle, *Mediation Principles Process Practice* (2nd edn, LexisNexis Butterworths 2005).

¹¹² P Barrett, 'Part 36 and mediation: an offer to settle will not suffice – PGF II SA v (1) OMFS Co and (2) Bank of Scotland Plc' (2012) *Arbitration* 401.

¹¹³ *ibid.*

¹¹⁴ P Barrett, 'Part 36 and mediation: an offer to settle will not suffice – PGF II SA v (1) OMFS Co and (2) Bank of Scotland Plc' (2012) *Arbitration* 401.

Frequency of Mediation Recommendations made by Civil and Commercial Solicitors



Furthermore, it was also suggested that mediation's popularity would only increase if there was a compulsory element, for example the Civil Procedure Rules. With commercial disputes the use of mediation is still small. However, the use of mediation has increased in the US. This could be attributed to the clear ethical standards of practice enforced in North America which educate the public and practitioners alike and ensure the maintenance of the reputation of mediation.¹¹⁵ Therefore it could be inferred that mediation is still under-used by civil and commercial legal practitioners and to increase the use of mediation a more compulsory stance must be taken similar to the practice in other common law jurisdictions.

¹¹⁵ Christopher W Moore, *The Mediation Process* (3rd edn, Jossey-Bass, 2003).

V. Analysis of Results obtained from Employment Solicitors

The key themes from the small data set gathered for employment solicitors within Canterbury displays that there is some understanding of mediation, however mediation is not used. The sample of data gathered was small, however it is representative of large and well established firms offering employment services. The use of mediation to resolve workplace dispute is high on both research and policy agendas in Britain.¹¹⁶ Workplace mediation is also a growing area which holds the aim of resolving internal complaints, disputes and grievances before they result in more formal proceedings and loss of time and productivity to the company.¹¹⁷ Mediation is effective due to the need to maintain relationships within the workplace. Also complex settlements can also be generated which could not be achieved in court proceedings.¹¹⁸

However, it was deduced from the interviews with the employment solicitors that there is not an increased emphasis towards mediation as was seen in civil and commercial law and family law. The majority of the employment law solicitors stated that there was not an increase emphasis towards the use of mediation to resolve disputes. The reasoning given by the employment solicitors for the low use of mediation was that employment disputes more commonly use conciliation rather than mediation as there is now a compulsory Early Conciliation Scheme for claims which are intended to be brought before an employment tribunal.¹¹⁹ ACAS conciliation schemes are regulated by statute, unlike most other mediation processes in the UK, which are regulated by a contract made between the parties.¹²⁰ This portrays the increased emphasis on the use of ADR to resolve disputes; however there is very little use of mediation and this appears to have led to a more limited understanding of the process. Furthermore, the use and attitudes towards mediation could also be low by employment solicitors due to the change in law as the Enterprise and Regulatory Reform Act

¹¹⁶Paul Latreille, Franz Buscha and Anne Conte, 'Are you experienced? SME use of and attitudes towards workplace mediation' (2012) *The International Journal of Human Resource Management* 23(3).

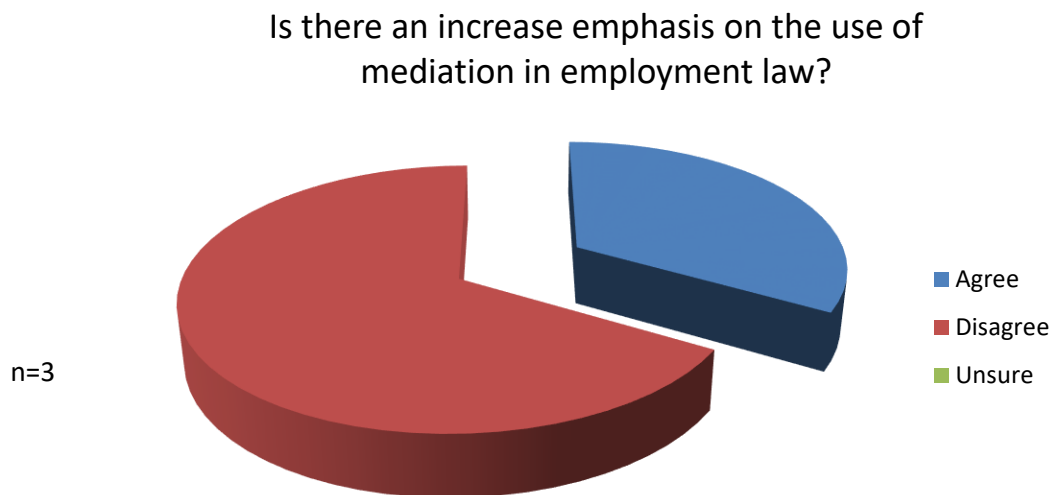
¹¹⁷ *ibid.*

¹¹⁸ Paul Latreille, Franz Buscha and Anne Conte, 'Are you experienced? SME use of and attitudes towards workplace mediation' (2012) *The International Journal of Human Resource Management* 23(3).

¹¹⁹ ACAS Code, 2009.

¹²⁰Susan Blake, Julie Browne, Stuart Sime, *The Jackson ADR Handbook* (edn, Oxford University Press 2013) 2.

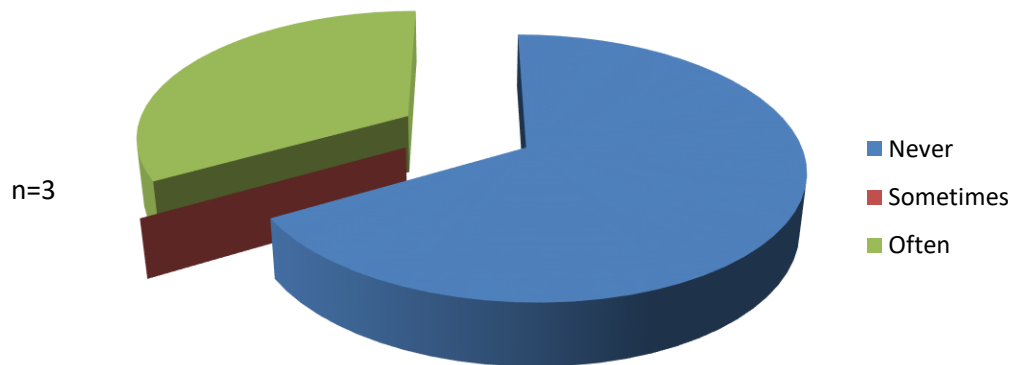
2013, Part 2, Section 7 displays that conciliation is now mandatory for employment disputes.¹²¹



Moreover, the personal views held by the employment solicitors who participated in the study display a common theme that they believe that there is no need for them to use mediation as they use ACAS who refer them to a conciliation service. Therefore the majority of the employment solicitors have never recommended a case to be taken to mediation. The firms' views also display similar general findings stating that mediation can be use, however the use of mediation is not vital and there is more emphasis on the use of conciliation.

¹²¹ Enterprise and Regulatory Reform Act 2013, Part 2 – Employment, Section 7, Sub-Section 1-3.

Frequency of Mediation Recommendations made by Employment Solicitors



Conclusion

The research performed by Professor Dame Hazel Genn, now nearly a decade old, attributes the under-use of mediation to the ignorance of legal professionals, along with the unwillingness of the parties involved to compromise on their desires and consequently the aim of this study was to analyse local solicitors' attitudes towards and the use of mediation¹²² The majority of respondents in this study were family practitioners and it can be inferred that this is as a result of the more compulsory stance made in family law through the changes in law.¹²³ This could also provide reasoning for the good understanding of mediation and high use of mediation amongst legal practitioners.

However, a common theme revealed by the family research was that the government was wrong to amend the law and make family law have a compulsory element of mediation. The firms' views were positive, however individual views held by legal practitioners were slightly more negative and a common theme was the suggestion that 'round-table' meetings would be a more advantageous process rather than compulsory mediation. Mediation was also considered to possess disadvantages since there could be a lack of an end result achieved by

¹²² Professor Dame Hazel Genn 'Twisting arms: court referred and court linked mediation under judicial pressure' (Ministry of Justice research series 1/07, May 2007) < http://www.ucl.ac.uk/laws/judicial-institute/docs/Twisting_arms_mediation_report_Genn_et_al_1.pdf > last accessed 25th Feb 2014.

¹²³ Children and Families Act 2014, s10(1).

the process. Also common themes were deduced that the mediator quality and qualifications has a significant impact on the mediation and many family practitioners favoured choosing a lawyer mediator. There were differing views about when to get legal advice and what impact this would have on the mediation. It was suggested that pre-mediation legal advice can make parties positional. Alternatively, not getting legal advice as to where they stand before the mediation may give rise to an unfair agreement. Attitudes towards mediation suggests that mediation does possess some major advantages including increasing the parties' control over the process to generate an outcome which was designed by the parties, along with increased communication between the parties during the process.

Moreover, in contrast to the negative findings found with regard to the compulsory element in family mediation, civil and commercial practitioners stated that it would be more beneficial to have a compulsory element for the use of mediation in civil and commercial disputes as shown in other common law jurisdictions, with reference drawn to the use of mediation in other common law jurisdictions. In Canada, Ottawa, the Superior Court of Justice has attempted a pilot program requiring disputants to try mediation in the early stages of civil mediation.¹²⁴ Mediation is expressed by the Attorney General of Ontario as being an opportunity to improve both access to justice and avoid the costs and inefficiencies of traditional litigation.¹²⁵ The study carried out by Professor Hazel Genn in 2007 asserted that the Ontario Mandatory Mediation Program had a large satisfaction rate with litigants and lawyers.¹²⁶ It is displayed from the findings of Genn's research of approximately 2,500 cases mandated to mediation, there were only 25 exceptions.

Mediation is also used effectively in Australia where the process is becoming institutionalised.¹²⁷ Justice Rogers of the Commercial Division of the Supreme Court of New South Wales when critiquing the decision in *Allco Steel (Qld) Pty Ltd v Torres Strait Gold Pty*, advocated that mediation allows for a different perspective on the dispute and permits

¹²⁴ Michael Coyle, 'Defending the Weak and Fighting Unfairness: Can Mediators Respond to the Challenge (1998) *Osgoode Hall Law Journal* 36.

¹²⁵ Michael Coyle, 'Defending the Weak and Fighting Unfairness: Can Mediators Respond to the Challenge (1998) *Osgoode Hall Law Journal* 36.

¹²⁶ Professor Dame Hazel Genn 'Twisting arms: court referred and court linked mediation under judicial pressure' (Ministry of Justice research series 1/07, May 2007) < http://www.ucl.ac.uk/laws/judicial-institute/docs/Twisting_arms_mediation_report_Genn_et_al_1.pdf > last accessed 25th Feb 2014.

¹²⁷ Laurence Boulle, *Mediation Principles Process Practice* (2nd edn, LexisNexis Butterworths 2005).

a settlement where the parties are determined at the outset not to achieve one.¹²⁸ The mediation program in Australia could be seen to be a success as a survey by the New South Wales government into the dispute resolution requirements of businesses and commercial organisations displayed the need for a more cost effective and quicker method to resolve disputes, rather than litigation, one which promotes commercial goodwill and also would lessen the commercial losses to the business or company.¹²⁹ The Chief Justice of New South Wales introduced the Australian Commercial Disputes Centre to allow disputes to be dealt with quickly and promoted alternative dispute resolution within the business community.¹³⁰ The Australian Capital Territory (ACT) currently has a mandatory mediation statutory scheme presently running which is contained within the Civil Law (Wrongs) Act 2002, section 95(1).¹³¹ This includes the provision that any court or tribunal may refer a case or part of a case to mediation without the consent of the parties.¹³²

The research reveals there to be an increased use of mediation for civil and commercial disputes, however the compulsory element was suggested to be required to improve the notion that solicitors state that they have tried mediation, are pro-mediation and give the appearance they have attempted to use mediation, however in reality they are not pro-mediation and have not positively attempted to resolve the dispute through mediation.¹³³ It was suggested that the requirement could be embedded within the Civil Procedure Rules and would mean that the false positive created by legal professionals stating they are pro-mediation when in fact they are not would not be created. This research did also reinforce some of the findings by Professor Dame Hazel Genn, that in civil and commercial legal disputes practitioners are sometimes ignorant about the use of mediation through being more hard-wired towards litigation and also suggestions were made by some participants that they do not have the right attitudes for mediation. It was also suggested that if the number of solicitors who said they were pro-mediation did in fact use mediation there would be significantly more cases proceeding to mediation. This attitude may be a consequence of the adversarial nature of lawyers' training and practitioners being

¹²⁸ *Allco Steel (Qld) Pty Ltd v Torres Strait Gold Pty Unreported*, Supreme Court of Queensland, 12 March 1990 ; David Spencer and Michael Brogan, *Mediation Law and Practice* (edn, Cambridge University Press 2006) 269.

¹²⁹ David Spencer and Michael Brogan, *Mediation Law and Practice* (edn, Cambridge University Press 2006) 279.

¹³⁰ *ibid.*

¹³¹ Civil Law (Wrongs) Act 2002, section 195(1); David Spencer and Michael Brogan, *Mediation Law and Practice* (edn, Cambridge University Press 2006) 279.

¹³² Civil Law (Wrongs) Act 2002, section 195(1).

¹³³ P Barrett, 'Part 36 and mediation: an offer to settle will not suffice – PGF II SA v (1) OMFS Co and (2) Bank of Scotland Plc' (2012) *Arbitration* 401.

unconvinced of the values of mediation. Issues were also raised surrounding the lack of mediation guidelines, standards of assessment or codes of practice for mediators, which allows for diverse mediation practices.

The fewest responses were provided by solicitors practising in the area of employment law. This is perhaps due to the fact that with a recent change in the law and the introduction of the ACAS Code, the focus with employment disputes is on conciliation rather than mediation. This perhaps explains the lack of use of mediation by employment solicitors and their ambivalence towards mediation as the practice is not required.

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Appendices

Appendix A: Open Questionnaire

Appendix B: Survey Monkey Questionnaire

Appendix C: Participant Consent Forms

Appendix D: Research Proposal

1. Topic of research
2. Location
3. Ethics, Police and Occupational Health Clearance
4. List of Participants
5. Introductory Email
6. Survey Monkey Email
7. Survey Monkey Questionnaire

APPENDIX A:



Research Intern Project R22 – Abigail Howland

The Mediation Clinic at Canterbury Christ Church University, guided by LJ Mance of the Supreme Court, is currently seeking to engage with legal service providers to gather data in order to gauge their approach to mediation.

It is anticipated that the data gathered will help inform the undergraduate taught law curriculum of which we welcome the views of local legal professionals. It is also hoped that the data will have an external impact on the Canterbury Christ Church Mediation Clinic.

Thank you for participating in the research questionnaire.

1) What area of practice are you in?

Family	Employment	Civil and Commercial
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2) Do you know how mediation works? If so, what do you understand the process to be?

3) Are there any advantages you consider mediation possesses in comparison to other forms of dispute resolution or litigation?

4) Are there any disadvantages you consider mediation possess in comparison to other forms of dispute resolution or litigation?

5) How does the firm view the process of mediation?

6) What are your personal views on mediation?

7) Would you say there is an increased emphasis on the use of mediation?

Agree	Unsure	Disagree
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8) Do you have any experience with mediation?

9) Have you recommended cases to be taken to mediation?

Often	Sometimes	Never
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IF yes, how many cases have been referred?

10) Does the firm use any internal or external mediation service providers?

If external what criteria do you use to select the mediator? Ie) are they local? Does the mediator have legal expertise or general expertise? Is it dependent on the complexity of the case or the value of the case? Does it depend on the type of dispute? Is it dependant on the fees of the mediator?

11) Can you explain why you have previously recommended using mediation?

12) Can you explain why you have not previously recommended using mediation?

13) Was mediation taken up by the clients after it was recommended?

If not why not?

14) Mediation currently has an advisory board made up of Lord Justice Mance, Sir Ian Johnston and Henry Brown and we are planning to publish the results from this study. Would you like to see results and participate in a Symposium with us?

APPENDIX B:

<https://www.surveymonkey.com/s/ZNYQ97G>

APPENDIX D:



Research Intern Project R15 – Abigail Howland

Topic of Research

“An Analysis of Local Solicitors’ Attitudes To and Use of Mediation”

The purpose of the study is to analyse local solicitors’ attitudes to and the use of mediation. I will seek to explore meanings and perceptions to gain a better understanding of the use of mediation, along with whether mediation could be used more effectively and whether the Canterbury Christ Church Mediation Clinic could aid this.

Location

The population of the study will be 30 legal firms within Canterbury which offer family, employment and civil and commercial mediation.

Research will be conducted in the city of Canterbury with a sample of size of **30** legal firms.

The **sample frame** will be:

10 Employment Legal Firms

10 Family Legal Firms

10 Civil and Commercial Legal Firms

The samples would be randomly selected from the firms within the city of Canterbury to allow comparisons to a larger population of which the entities are members of.

Ethics, Police and Occupational Health Clearance

Will your research involve human participants as your research subjects? Yes

If yes, please respond to the following questions

- a) *Will the study involve participants who are particularly vulnerable or unable to give informed consent (e.g. children, people with learning disabilities)? No*
- b) *Will it be necessary for participants to take part in the study without their knowledge and consent at the time (e.g. covert observation of people in non-public places)? No*
- c) *Will the study involve discussion of sensitive topics (e.g. sexual activity, drug use)? No*
- d) *Will the study involve invasive or intrusive procedures such as blood taking from participants or the administration of drugs, placebos or other substances (e.g. food substances, vitamins)? No*
- e) *Is physiological stress, pain, or more than mild discomfort likely to result from the study? No*
- f) *Could the study induce psychological stress or anxiety or cause harm or negative consequences beyond the risks encountered in normal life? No*
- g) *Will the study involve recruitment of participants (including staff) through a Local Authority Department of Social Services or through the NHS? No*
- h) *Have you received Criminal Records Bureau and Vetting & Barring Scheme clearance? No*
- i) *Have you had a recent occupational health screening [students proposing to carry out research in NHS or Social Care environments only] Not applicable*

If 'yes' to any category a-g, or 'no' to category h & i, what steps are being taken to address these issues?

Not applicable to this research proposal.

Internal CCCU Ethics form has been submitted and approved.

Participants will sign a consent form prior to interview or questionnaire data being included.

List of Potential Participants



Research Intern Project R15

An Analysis of Local Solicitors' Attitudes To and Use of Mediation

List of Solicitors in Canterbury & Surrounding Areas

Name of Company	Address	Contact Details	Areas of Practice
Boys & Maughan	9 & 10 Court Chambers, Broad Street, Canterbury, Kent CT1 2LW	01227 207000	-Commercial -Employment -Family (inc Mediation) -Personal Injury
Bond Joseph	65 Burgate, Canterbury, Kent CT1 2HJ	01227 453545	-Criminal Litigation
Barford Fraser Solicitor Limited	Lombard House Business Centre, 12-17 Upper Bridge Street, Canterbury, Kent, CT1 2NF	08445 610516	-Family
Furley Page LLP	39 St. Margarets Street, Canterbury, Kent, CT1 2TX	01227 763939	-Commercial -construction -Family (inc Mediation) -Employment
Girlings	16 Rose Lane, Canterbury, Kent, CT1 2UR	01227 768374	-Family -Dispute Resolution/Med iation
Beadle Pitt & Gottschalk	1 St. Margarets Street, Canterbury, Kent, CT1	01227 464481	-Commercial -Family

	2TT		-personal injury -private client
Gardner Croft LLP	2 Castle Street, Canterbury, Kent, CT1 2QH	01227 813 400	-Company -Employment -Family -Neighbour disputes
Robinsons Solicitors	River House, Stour Street, Canterbury, Kent, CT1 2NZ	01227 762888	-Commercial -Conveyancing -Employment -Family
Whitehead Monckton Limited	32-33 Watling Street, Canterbury, Kent, CT1 2AN	01227 643250	-Commercial -Employment -Family (inc Mediation) -Dispute Resolution Service -Landlord/ Tenant -Neighbour Disputes -Litigation
Foster Mackay Limited	75 St. Dunstons Street, Canterbury, Kent, CT2 8BN	01227 472052	-Commercial -Employment -Family -Landlord/ Tenant -Neighbour Disputes -Dispute Resolution – Civil/ Commercial Mediation
Cooper & Co	Canterbury Innovation Centre, University Road, Canterbury, Kent, CT2 7FG		-Commercial litigation -litigation -personal injury -consumer
Wolton & Co	30 St Dunstan's Street, Canterbury, Kent, CT2 8HG	01227 452138	-Mental Health -Public
Johnson Clarke Solicitors	Canterbury Innovation Centre, University Road, Canterbury, Kent, CT2 7FG	01227 811 713	-Personal injury -Private client -Family -Family mediation -clinical negligence
Thomas	Canterbury Innovation	020 8681 8140	-Commercial

Mansfield Solicitors Limited	Centre, University Road, Canterbury, Kent, CT2 7FG		litigation -Employment -Litigation (general)
Morris Sutherland	South Oast, The Street, Patixbourne, Canterbury, Kent, CT4 5BZ	01227 830462	-Education -Family -Family Mediation
Fairweathers	Unit 29-30 Roper Close, Canterbury, Kent CT2 7EP	01227 811 014	-Family
Bull & Bull	98 Thomas Way, Lakesview International Busine, Hersden, Canterbury, Kent, CT3 4NH	01227 714860	-Commercial -Landlord / Tenant -Private Client
Direction Law	31 Watling Street, Canterbury Kent CT1 2UD	01227 764 141	-Commercial -Employment

Introductory Email



Dear (*Firm Name*),

The Mediation Clinic at Canterbury Christ Church University is currently seeking to engage with local legal service providers to gather data in order to gauge their attitude to and use of mediation.

The study will involve completion of a short questionnaire on aspects of mediation carried out in an interview conducted by myself, Abigail Howland, in the role of Law and Mediation Intern. The questionnaire should last no longer than 30 minutes and can be arranged at a mutually convenient time. The questionnaire can be completed by yourself or by a member of your *family/employment/commercial* team. *The study can be completed within branch or, if more convenient, at the Canterbury Christ Church Mediation Clinic, via a telephone call or email.*

It is anticipated that the data will help inform the undergraduate taught curriculum, particularly that of the Law Programmes. The data will also have an external impact on the Canterbury Christ Church Mediation Clinic.

I will telephone further to my email to ascertain your willingness to participate in this research study. Please find attached to this email the questionnaire and consent form should you be willing to participate in the study.

Kind regards,

Abigail Howland

Canterbury Christ Church Law and Mediation Intern

Law & Criminal Justice Department

Canterbury Christ Church University

Survey Monkey Email



Dear (*Firm Name*),

The Mediation Clinic at Canterbury Christ Church University, guided by LJ Mance of the Supreme Court, is currently seeking to engage with legal service providers to gather data in order to gauge their approach to mediation.

The study will involve a short questionnaire which can be accessed via the link below.

<https://www.surveymonkey.com/s/ZNYQ97G>

It is anticipated that the data gathered will help inform the undergraduate taught law curriculum of which we welcome the views of local legal professionals. It is also hoped that the data will have an external impact on the Canterbury Christ Church Mediation Clinic.

I can be contacted via email or telephone on 01227 767700 Ext. 3760 should you have any questions.

Kind regards,

Abigail Howland

*Canterbury Christ Church Law and Mediation Intern
Law & Criminal Justice Department
Canterbury Christ Church University*

Survey Monkey Questionnaire (Screen Shot views of Survey)

https://www.surveymonkey.com/s.aspx?PREVIEW_MODE=D SurveyMonkey, Inc ... SurveyMonkey Survey Summa... [SURVEY PREVIEW MODE] ...

An Analysis of Local Solicitors' Attitudes to and use of Mediation

Dispute Resolution Questionnaire

1 / 1 100%

The Mediation Clinic at Canterbury Christ Church University, guided by LJ Mance of the Supreme Court, is currently seeking to engage with legal service providers to gather data in order to gauge their approach to mediation.

It is anticipated that the data gathered will help inform the undergraduate taught law curriculum of which we welcome the views of local legal professionals. It is also hoped that the data will have an external impact on the Canterbury Christ Church Mediation Clinic.

Thank you for participating in the research questionnaire.

1. What area of practice are you in?

2. Are there any advantages you consider mediation possesses in comparison to other forms of dispute resolution or litigation?

- Cheaper
- Quicker
- More friendly/ Informal
- All of the above
- None of the above
- Other (please specify)

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3. Are there any disadvantages you consider mediation possess in comparison to other forms of dispute resolution or litigation?

- The decision is not binding
- There may be some compromise for the parties
- Both parties must want to achieve a settlement and have common resolution ideas for a settlement to be achieved
- All of the above
- None of the above
- Other (please specify)

4. How does your firm view the process of mediation?

Strongly Disagree with mediation Disagree with mediation Agree with mediation Strongly Agree with mediation

5. Would you say there is an increased emphasis on the use of mediation?

Strongly Disagree Disagree Agree Strongly Agree

6. Have you recommended cases to be taken to mediation?

Never Sometimes Often

7. Does the firm use internal or external mediation service providers, if any? Select all that are applicable

- Internal Mediation Service
- External Mediation Service
- Rarely use mediation

8. Could you explain the reasons why mediation has previously been recommended?

9. Could you explain the reasons why mediation has not been recommended?

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 SurveyMonkey, Inc ...
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 [SURVEY PREVIEW MODE] ...

Convert Select

Strongly Disagree Disagree Agree Strongly Agree

6. Have you recommended cases to be taken to mediation?

Never Sometimes Often

7. Does the firm use internal or external mediation service providers, if any? Select all that are applicable

Internal Mediation Service
 External Mediation Service
 Rarely use mediation

8. Could you explain the reasons why mediation has previously been recommended?

9. Could you explain the reasons why mediation has not been recommended?

10. Was mediation taken up by your clients after it was recommended? Please give the reason

Yes
 No

Powered by **SurveyMonkey**
 Check out our [sample surveys](#) and create your own now!