

# Preface

It is perhaps best at the outset to remark that I write this book with no axe to grind. I am neither a practicing mediator nor practicing lawyer (although as a university educator of would-be lawyers as well as current and potential mediators I have a vested interest in both). This book is no practice guide or ‘how to’ manual for lawyers interested in mediation (of which there are many excellent examples). Nor, it should be said, is the book a mediation purist’s diatribe warning against the perils of lawyer entanglement with the process. Rather, I hope through this work to tread a cautious and balanced path through the thorny terrain of the lawyer’s relationship with, and role within and on the fringes of mediation.

This project was inspired by my own research begun some 16 years or so ago into mediation in Scotland, my field work and observations since and discussions with lawyers, mediators, mediation users and academics on the complex and controversial nature of the lawyer’s interaction with the process. This book owes a heavy debt to the wealth of empirical studies and theoretical analyses into mediation and lawyers undertaken by scholars internationally. The breadth of scholarship is breathtaking. Mirroring this international academic interest, the modern mediation movement is itself a global one, albeit that progress across different jurisdictions and in relation to distinct dispute areas within and across countries has occurred at widely diverging paces. As I shall illustrate in the chapters to come, to some extent at least, it may be said that the pace has been set by lawyers. They can be considered both accelerator and brake.

I cannot claim a fully comprehensive geographical coverage in this work but the book’s reach at times spans an examination of salient developments, experience and debates regarding lawyers and mediation in Scotland, England and Wales, the USA, Australia, New Zealand, Canada, South East Asia and across continental Europe. I hope I shall be forgiven for devoting perhaps a disproportionate time to matters in Scotland. Most of my own empirical work has been carried out in my native shores. Moreover, research in civil justice issues in Scotland—a small ‘mixed’ jurisdiction—does not travel particularly well and tends to be shunned in favour of studies from its larger, English and Welsh neighbouring jurisdiction, which are all too often depicted as “UK” research.<sup>1</sup>

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<sup>1</sup>Excellent though much of the scholarship in England and Wales is.

It should be noted, however, that the bulk of the key literature in the field has emerged in the USA—arguably the birthplace of modern mediation and also one of the most developed nations (at least in some US States) in terms of recognition, promotion and use of the process. Comparable development in mediation elsewhere lies at different developmental stages. So for example, Australia and Canada mirror the USA in being relatively advanced; England and Wales can be considered not too far off the pace; Scotland lies probably somewhere further back on the evolutionary road and across much of continental Europe (although there are notable exceptions), at least in its modern form, mediation still lies at a somewhat embryonic stage. No doubt though (the problems of cultural and legal transplants aside for the moment) evidence gleaned from experience in one jurisdiction may signal future prospects in others. Given the disparity in developments and available literature evident across jurisdictions, the book's treatment by no means achieves equality of coverage across different geographical areas (and I must concede that my own linguistic limitations have curtailed examination of many no doubt pertinent developments and material in non-English speaking jurisdictions).

As one would expect the interaction of lawyers within mediation, like growth in the process itself, similarly varies considerably across different nation states. Lawyers in their droves have rushed to take up their place in the brave new world of mediation. Nonetheless, many more remain on the fringes unconvinced by the promise of mediation. In short, it can be said that the more 'mainstream' mediation has become in a jurisdiction, the more it tends to be populated by lawyers, at least in certain dispute areas. This is no coincidence. As we shall discuss later in this book, lawyers have often been the authors of mainstream developments.

It should also be stressed here that the term 'mediation' is not an easy one to pin down in a definitional sense. Process pluralism abounds. Distinct mediation approaches have developed across a range of different contexts. *In extremis*, one 'mediation' process may be barely recognisable to another. While in some settings, mediation is no more than negotiation-with-bells-on; a quick way perhaps to bang heads together aided by the promptings of a third party, in the words of Carrie Menkel-Meadow, "[i]n its most grandiose forms, mediation theorists and proponents expect mediation. . . to achieve the transformation of warring nation states, differing ethnic groups, diverse communities, and disputatious workplaces, families and individuals, and to develop new and creative human solutions to otherwise difficult and intractable problems. . .it is a process for achieving interpersonal, intrapersonal and intrapsychic knowledge and understanding."<sup>2</sup> The effect that lawyers have had on creating particular normative mediation forms in different contexts and how easily they 'fit' into distinct manifestations of the process are key facets of this book.

In keeping with the heterogeneous nature of mediation, equally I would not pretend that lawyers represent a homogenous grouping across borders. The notion that the legal profession, even in the context of one jurisdiction, is a unified body

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<sup>2</sup>Menkel-Meadow (2001), pp xiii–xiv.

singing from the same specialised and esoteric hymnbook is no more than a folk concept. For the purpose of this book, this term at times encompasses autonomous legal practitioners, employed ‘in-house’ lawyers and judges. Given the disparity in make up and composition of legal professionals in different jurisdictions, it is notoriously difficult to undertake comparative study into lawyers—especially spanning the civil law and common law divide.<sup>3</sup> My task here is easier in that this work is not a comprehensive comparative study of lawyers but rather a mere snapshot of lawyers’ involvement with mediation in different jurisdictions coupled with a search for overarching trends, commonalities and divergences.

As this book shall illustrate, the interaction between lawyers and mediation is a complex, controversial and often emotive issue. Rivers of ink have been spilled over the matter. Opinions, when expressed, are often hotly contested. In my work I examine the motives of those lawyers who have become involved in mediation and equally those who have set their face away from the process. In both senses lawyers’ motives may be practical or principled; altruistic or selfish; informed or fuelled by bare unfamiliarity or wilful blindness. This work also analyses the appropriateness of lawyer involvement (as well as the law that they carry with them) in mediation and the effect that the addition of lawyers has had upon the practice of mediation. It has been argued cogently, for example, that in certain contexts, lawyers have co-opted mediation and begun to reconstruct the process in their own image with legal bargaining taking the foreground. By contrast, mediation in some contexts has been subject to cogent critiques regarding it as a ‘law-less’ process, often foisted upon the weak and disempowered. In this context, many would see the inclusion of lawyers, either as mediators or party advocates, as a necessary legal fillip to protect the rights of participants.

On the flip side of the lawyer–mediation relationship, it is undeniable that the elevation of mediation within new settlement-driven cultures of civil litigation has begun to impact upon the practice of law and the work, even the professional identity perhaps, of lawyers. This may in part be due to the lawyer’s proclivity for adapting to new circumstances. Whether lawyers are always willing (and able) to adapt to new, cultural imperatives within their professional sphere is questionable, however. The role of judges in promoting mediation, thus affording the process legitimacy (from the lawyers’ perspective at least) and shifting mediation from outside of the traditional justice system to within its boundaries, is also of great import. The same importance may be placed upon the role of academic lawyers, both in respect of the ‘academic capital’ that their writings afford to mediation, and importantly in their role in the education and training of would-be legal practitioners (and judges) and how conducive this may be to expediting legal practice norms commensurate with the development of mediation.

The debate about the place of lawyers in and around mediation runs to the very heart of mediation itself. Jostling between lawyers and others in the mediation arena represents a battle for the ground upon which the mediation process is built.

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<sup>3</sup>Abel (1989), p 81.

In particular, disputes over the role of the lawyer in mediation cut across the facilitative/evaluative divide in mediation discourse.<sup>4</sup> This is no coincidence, in the sense that as we shall note in Chap. 1, mediation's modern development as part of the 1970s Alternative Dispute Resolution (ADR) movement in the USA was characterised by the unexpected meeting of diffuse groups promoting two disparate policy aims: one the one hand, the 'quality' proponents seeking empowerment for communities and a transference of 'ownership' of disputes away from lawyers and legal processes into the hands of parties themselves; and on the other, court administrators, governments and certain influential lawyers, motivated by a desire to streamline, unburden and thus preserve traditional civil justice systems by diverting cases towards extra-judicial settlement. While the early community pioneers might have dreamt of a utopian world of dispute resolution clothed in community empowerment and transformation, far removed from the trappings of lawyers and the legal process, under the 'efficiency proponents'<sup>5</sup> view, mediation became a by-product of litigation and a repository for cases deemed suitable for diversion by the courts. Generally, lawyers became to be recognised as natural inhabitants of this environment in which mediation was seen as an adjunct, rather than alternative to, litigation.

The structure of this book is set out as follows: Chap. 1, a snapshot of the historical development of mediation in the modern context, across the common law and civil law world and a similar tracing of lawyers' involvement in the process; Chap. 2, an analysis of the evidence surrounding the extent and nature of global lawyer resistance towards mediation; Chap. 3, an examination of lawyers' motives for involvement in mediation and some of the tactics they have deployed in gaining a foothold in the field; and an analysis of evidence supporting the notion that lawyers have sought to co-opt mediation at the expense of other would-be mediators; Chap. 4, an analysis of whether the 'cap-fits'—i.e. reviewing the evidence as to the benefits and drawbacks of lawyer involvement in mediation both acting as lawyer-mediators and party advocates within the process, with a further discussion of the merits of judicial mediation; Chap. 5, an examination of the impact and consequences that the increasing institutionalisation of mediation and its linking with and embedding within formal civil litigation systems holds both for the mediation process and civil justice itself as well as a discussion of the role of lawyers in court-connected mediation; and Chap. 6, a short concluding chapter setting out a prognosis for the future regarding lawyers' interaction with mediation including such matters as determining appropriate ethical codes for mediation practice, training and educational needs, and the impact that the continued exposure to mediation may herald for legal professions generally.

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<sup>4</sup>In short, whether the mediator will simply facilitate the participants' discussion to assist them to reach a settlement or in addition, evaluate for example, their legal claims, commercial or personal interests and potential settlement options.

<sup>5</sup>The terms 'quality proponents' and 'efficiency proponents' have been borrowed from Sibley and Sarat (1989).

I hope the book will be of interest to students of law, dispute resolution, regulation and the social sciences; mediation professionals; policy makers; judges and court officials; legal practitioners and academics. I have endeavoured to state the applicable law and mediation developments as at 1 November 2011.

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<http://www.springer.com/978-3-642-23473-6>

Lawyers and Mediation

Clark, B.

2012, XVI, 196 p., Hardcover

ISBN: 978-3-642-23473-6