## Contents

### 1 The History of Lawyers and Mediation

1.1 Historical Development ................................................. 1  
   1.1.1 The Lawyer Pioneers of ADR .................................... 2  
   1.1.2 ADR In and Out of the Traditional  ......................... 3  
1.2 Mediation and Lawyers in the Post-Pound Era .................... 6  
   1.2.1 USA ............................................................... 7  
   1.2.2 The Common Law World ........................................ 9  
   1.2.3 Continental Europe ........................................... 17  
   1.2.4 Supra National, European Developments ...................... 22  
1.3 Conclusion ............................................................. 24  
References ............................................................................. 25  

### 2 Lawyer Resistance to Mediation

2.1 Introduction ............................................................. 29  
2.2 The Public Perception of Lawyers .................................... 31  
2.3 The Lawyer as Gatekeeper ............................................... 33  
   2.3.1 Clients and Mediation ........................................... 33  
   2.3.2 General Ideas .................................................... 35  
   2.3.3 Lawyer-Client Relationship in the Dispute Resolution Context 36  
   2.3.4 Lawyer Control and Client Type ................................ 37  
2.4 Money, Money, Money .................................................. 40  
   2.4.1 The Case Against Lawyers ..................................... 40  
   2.4.2 Evidence of Financially Motivated Behaviour ................ 41  
   2.4.3 Lawyers’ Economic Interests and Disputing Practices ...... 43  
2.5 Ignorance and Cultural Barriers ....................................... 46  
   2.5.1 Lawyers and Culture ............................................. 47  
   2.5.2 Lawyer Cultural Biases and Mediation ....................... 52  
   2.5.3 Shifting Trends? .................................................. 56  
2.6 Fears Over the Efficiency of Mediation ............................. 57  
   2.6.1 Parties’ Costs in Mediation .................................... 59  
   2.6.2 Tactical Use ....................................................... 61
3 Lawyer Involvement in Mediation and the Co-Option Thesis

3.1 Introduction

3.2 The Co-Option Thesis

3.2.1 The Seeking of New Markets

3.2.2 The History of Lawyers and Professional Skirmishes

3.2.3 Demand Creation and New Markets

3.2.4 Evidence of Lawyer Accommodation in Other Fields

3.3 The Roots of Lawyer Engagement with Mediation

3.3.1 Introduction

3.3.2 Commercial Imperatives

3.3.3 Belief in the Process

3.3.4 Better Professional Experiences

3.3.5 Assisting Negotiations

3.3.6 Responding to Client Demand

3.4 Strategies Used to Gain a Foothold in the Field

3.4.1 Asserting Ownership and Defensive Marketing

3.4.2 Lobbying and Regulatory Capture

3.4.3 Mediation and the Unauthorized Practice of Law

3.4.4 Lawyer ‘Shopping’ for Lawyer-Mediators

3.5 Conclusion

References
5 The Fusing of Mediation, Lawyers and Legal Systems .......... 139
  5.1 Introduction .................................................................. 139
  5.2 Mediation and Civil Justice Concerns ........................... 139
    5.2.1 The Shifting of Mediation into the Mainstream .......... 140
    5.2.2 The Backdrop to Justice Concerns ......................... 142
    5.2.3 The Debate Over Mandatory Mediation ................... 144
    5.2.4 Mediation and ‘Justice’ ......................................... 148
    5.2.5 Power Imbalances in Mediation .............................. 156
    5.2.6 Mediation and the ‘Loss of Law’ ............................ 159
    5.2.7 Mediation’s Relationship with Formal Civil Justice .... 163
  5.3 Mediation Practice in the Institutionalised Context .......... 164
    5.3.1 Problems with Current Court-Connected Mediation .... 164
    5.3.2 Accepting Change in Court-Connected Mediation ....... 165
  5.4 Conclusion ................................................................... 168
References ........................................................................... 169

6 Conclusion: The Future of Lawyers and Mediation .......... 175
  6.1 Introduction ................................................................... 175
  6.2 Treading Carefully: Lawyers’ Future Steps on the Mediation Field 176
    6.2.1 Reforming Legal Education ................................... 178
    6.2.2 Regulating Mediation Practice .............................. 179
    6.2.3 Ethical Codes and Rules of Professional Practice for Lawyers Representing Clients in Mediation ........................... 180
  6.3 Final Thoughts .......................................................... 182
References ........................................................................... 182

Index ................................................................................. 183
Lawyers and Mediation
Clark, B.
2012, XVI, 196 p., Hardcover
ISBN: 978-3-642-23473-6