

# Contents

<b>1</b>	<b>The History of Lawyers and Mediation</b>	1
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
<b>2</b>	<b>Lawyer Resistance to Mediation</b>	29
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

2.7 Quality Objections ..... 62

2.8 Conclusion ..... 64

References ..... 64

**3 Lawyer Involvement in Mediation and the Co-Option Thesis ..... 71**

3.1 Introduction ..... 71

3.2 The Co-Option Thesis ..... 73

3.2.1 The Seeking of New Markets ..... 74

3.2.2 The History of Lawyers and Professional Skirmishes ..... 74

3.2.3 Demand Creation and New Markets ..... 76

3.2.4 Evidence of Lawyer Accommodation in Other Fields ..... 77

3.3 The Roots of Lawyer Engagement with Mediation ..... 79

3.3.1 Introduction ..... 79

3.3.2 Commercial Imperatives ..... 80

3.3.3 Belief in the Process ..... 80

3.3.4 Better Professional Experiences ..... 81

3.3.5 Assisting Negotiations ..... 82

3.3.6 Responding to Client Demand ..... 83

3.4 Strategies Used to Gain a Foothold in the Field ..... 84

3.4.1 Asserting Ownership and Defensive Marketing ..... 85

3.4.2 Lobbying and Regulatory Capture ..... 86

3.4.3 Mediation and the Unauthorized Practice of Law ..... 90

3.4.4 Lawyer ‘Shopping’ for Lawyer-Mediators ..... 95

3.5 Conclusion ..... 96

References ..... 97

**4 Mediation and Lawyers: Does the Cap Fit? ..... 101**

4.1 Introduction ..... 101

4.1.1 The Risk of Lawyer Involvement ..... 102

4.1.2 Legal Education ..... 103

4.1.3 Lawyer Personalities ..... 103

4.2 Representing Clients in Mediation ..... 105

4.2.1 Lawyer Negotiations ..... 106

4.2.2 Evidence of Shifts in Negotiation Approaches ..... 108

4.2.3 Lawyers in Mediation ..... 110

4.3 Lawyer-Mediators ..... 117

4.3.1 General Points ..... 117

4.3.2 Training and Education ..... 118

4.3.3 The Value-Added Nature of Lawyer-Mediators ..... 119

4.3.4 Lawyer-Mediators and the ‘Lawless’ Nature of Mediation ... 120

4.3.5 What Do Lawyers Want from Mediators? ..... 120

4.3.6 The Facilitative/Evaluative Divide ..... 122

4.3.7 What Do Clients Want from Mediators? ..... 125

- 4.3.8 Evidence as to Differences Between Lawyer-Mediators and Non-Lawyer-Mediators ..... 126
- 4.3.9 Gender Issues ..... 127
- 4.4 Judicial Mediation ..... 128
  - 4.4.1 Judges as Mediators ..... 129
  - 4.4.2 Empirical Evidence ..... 131
- 4.5 Conclusion ..... 133
- References ..... 134
  
- 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**



<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