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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.[1]

[1]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."[2] 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

[2]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.[3] 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.

[3] Abel (1989), p 81.

In particular, disputes over the role of the lawyer in mediation cut across the facilitative/evaluative divide in mediation discourse.[4] 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"[5] 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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[4]In short, whether the mediator will simply facilitative 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.

[5]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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Chapter 1
The History of Lawyers and Mediation

1.1 Historical Development

A detailed examination of the history of mediation is beyond the scope of this book but as Nadia Alexander has recently noted, "[m]ediation is a process which is both new in terms of its emergence in the legal arena and old in terms of its timeless universality."[1] Despite the generally espoused view of mediation as a modern, alternative to longstanding, traditional dispute resolution mechanisms, it should not be forgotten that across myriad cultures, forms of mediation have been present historically for centuries.[2] Indeed, "mediation is a folk concept which existed prior to the evolution of state law, legal system and lawyer-litigators."[3] So, for instance, mediatory forms of dispute resolution were practised in pre-capitalist, tribal societies, in ancient Greek cultures as well as in mediaeval England.[4] Since its earliest stages of establishment, the USA has experienced a gradual development of the use of extra-judicial forms of dispute resolution such as mediation.[5] The post-industrial era in the developed world also saw mediation flourish in particular contexts; witness the twentieth century growth of labour mediation, for example, in the USA and other parts of the western world.[6] Equally it should be noted that mediatory processes have historically been embedded within the legal systems of many civil law countries including much of continental Europe primarily through the role of the 'settlement judge' (including the *Juge de Paix* in France and *Vrederechters* in the Netherlands) as part of an 'inquisitorial' system of civil

[1] Alexander (2006), p. 1.

[2] See generally Roebuck (2007).

[3] Mulcahy (2002), p. 205.

[4] Abel (1983) cited in Roebuck (2007), p. 105; Levinson (1994).

[5] An excellent review can be found in Auerbach (1983), Chap. 1.

[6] See Murray et al. (1996), p. 75.

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justice. Equally some judges have traditionally sought to actively settle disputes brought before their courts in the common law world.[7]

More modern times, however, have been characterised by what can be termed a 're-institutionalisation' of mediation as part of a wider "Alternative Dispute Resolution" ('ADR') movement. The modern ADR movement can be largely traced back to its emergence in the 1970s, USA deriving primarily from the National Conference on the Causes of Popular Dissatisfaction with Administration of Justice (the 'Pound Conference') in Minnesota in 1976 in which Professor Frank Sander is credited with first coining the phrase, "Alternative Dispute Resolution".[8] Although modern mediation is thus often viewed as a characteristically Anglo-American development, in the Pound Conference era parallel debates regarding the establishment of alternative forms of dispute resolution were concurrently taking place in Europe, such as those promoted by the Florence Access to Justice Project.[9] Unlike its European equivalents, however, the Pound conference had a major and almost immediate impact on expediting the process of mediation in its native land.

1.1.1 The Lawyer Pioneers of ADR

In some senses, it can be said that despite its 'alternative' billing, the modern ADR movement was something that lawyers, peddlers of traditional dispute resolution, largely constructed themselves.[10] While the father of the term 'ADR', Professor Frank Sander, is an academic lawyer, more importantly perhaps, the pioneering ADR movement was propelled by the significant support lent to it by a spate of leading figures prominent in the US legal profession of the time, including most prominently Chief Justice Warren Burger. The pro-ADR rhetoric of these lawyers was often fierce and somewhat paradoxically directed against themselves and the very legal system in which they inhabited. Burger was blunt in his assessment of a society dominated by the law and lawyers: "we may well be on our way to a society overrun by hordes of lawyers, hungry as locusts, and brigades of judges in numbers never before contemplated".[11]

All is not what it appears, however. Although the Chief Justice cautioned against the ills of hordes of hungry lawyers, locusts even, his arrows were not targeted

[7] See, for example, the discussion of American judges in Hensler (2003), p. 175. This practice has expanded in more recent times, see the discussion in Chap. 4.

[8] Sander (1979). The theoretical origins of modern mediation can be charted back to the works of Lon Fuller and other eminent legal jurists. For a stimulating summary of mediation's theoretical nascence, see Menkel-Meadow (2000).

[9] Cappelletti (1978).

[10] Roberts and Palmer (2005), p. 66.

[11] Sibley and Sarat (1989), fn 19.

against the lawyer and the law *per se*. For 'efficiency'[12] proponents like Burger, ADR was seen primarily as a remedy for the ills of an increasingly litigious society straining the seams of the formal justice system. It should then be understood that such legal proponents' aims for the ADR movement were somewhat modest and unsophisticated: the basic rationale was to dampen down a perceived American litigation explosion,[13] provide a more efficient means for handling disputes, help alleviate the perceived crippling court case loads of the day, and in particular, siphon off what can rather unfairly be termed 'garbage' cases[14] from the system. In this sense, the agenda espoused by Burger and his ilk were both anti-law and pro-law simultaneously: anti-law in that ADR was perceived principally as a way of shifting certain litigants out of the formal legal system, underplaying the legal dimensions of such disputes and removing them from the jurisdiction of lawyers, but also pro-law in that such diversion would help preserve the formal legal system for its use in more important cases. As Sibley and Sarat have suggested: "[for] the establishment bar and legal elites who... promoted ADR as a way of dealing with the contemporary crisis of the courts...[t]heirs is not a critique of the essence or ideals of adjudication; instead they seek to save adjudication by limiting it, to preserve the space of law by not overtaxing its institutional capacity".[15] So a prominent factor in developing ADR was to answer the courts' *crie de coeur*. Hence, far from decrying the inherent value of traditional adjudication, ADR in this sense, reaffirmed the importance of litigation's (and hence the lawyer's) role in society.[16]

1.1.2 ADR In and Out of the Traditional

A consequence of linking ADR's role with the fate of litigation allied to the involvement of lawyers and judges in the movement was an intertwining of the alternative with the traditional. ADR thus became to be generally promoted not on its own footing but rather as an appropriate diversion from the court generally for cases of perceived lesser import. Thus in practice ADR programmes became yoked to the traditional system by the means of court-sponsored programmes in low value

[12] This terminology is borrowed from Sibley and Sarat (1989).

[13] Whether or not there was in fact a litigation explosion taking place at this time has been hotly contested—see, for example, Galanter (1985).

[14] Of no significant value in either monetary or legal terms.

[15] Sibley and Sarat (1989), p. 446.

[16] It would be misleading to suggest, however, that all those involved in the Pound Conference could be described as efficiency proponents. Analysis of the Pound Conference proceedings reveal that many of the participants were primarily interested in expanding access to justice rather than simply being concerned with ADR's capacity for institutional efficiency—see Welsh and McAdoo (2005), pp. 401–405.

matters with appropriate cases channelled to ADR from the judiciary. While the rhetoric of the efficiency proponents was thus often cloaked in arguments promoting an eschewing of lawyers and adversarialism (for the 'garbage' cases at least) the reality was that ADR programmes began to mirror, in at least some aspects, the very courts and attendant processes from which their referrals emanated. This 'contamination' can be seen as an inevitable repercussion of ADR's institutionalisation.[17]

Nonetheless, some mediation programmes began life far removed from the dusty confines of the courtroom. While court-based ADR programmes were gathering pace in the USA, grassroots founders of community mediation were concurrently establishing programmes with scant concern for the preservation of litigation systems but rather placing an emphasis on increasing the *quality* of process and settlement outcomes for disputants, above and beyond those offered by traditional legal paradigms.[18] Putting clear blue water between mediation and formal dispute resolution, these 'quality proponents'[19] viewed mediation as a true alternative to litigation, characterised by a paradigm shift in dispute handling: from the pursuit of individual legal rights to maximisation of mutual interests; from the imposition of decisions to party empowerment and self-determination; from adversarialism and conflict to harmony, compromise and community. Inherent in such mediation pioneers' vision of dispute resolution was a marked condemnation of the traditional legal system in general (and hence the role of lawyers therein). While such a jaundiced view of formal dispute resolution was mirrored by the efficiency proponents, it was heavily diluted and stopped short of the often unbridled nature of the assault of 'legal justice' launched by grassroots, quality proponents of mediation.

Many early community programmes were thus designed to sit outside rather than within the confines of litigation systems. Such programmes often resisted any link whatsoever with traditional litigation processes and, for example, would not accept referrals from courts at all. Lawyers - seen at best as an irrelevance and at worst, a menace - were generally absent from participation in such programmes and in many cases proscribed. Viewed through the quality proponent's lens, mediation was thus fundamentally concerned with wresting control back from lawyers and legal processes into the hands of disputants (and communities) themselves. The preservation of litigation through purifying its case-load was not a consideration. Unlike the efficiency proponents' implicit view that legal justice ought to be rationed and sacrificed in cases of lesser import, quality proponents thus challenged the general notion that legal precepts were the only legitimate norms against which disputes should be settled and within which true 'justice' could be found. Theirs was a pluralistic notion of justice in which other identifiable social norms based, for

[17] This tainting of the mediation process may not necessarily be seen in a negative light. These matters are discussed in detail in later chapters of this book.

[18] Welsh (2001), pp. 15–16.

[19] Sibley and Sarat (1989).