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# Lawyers and Mediation

Brian Rans

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## I. INTRODUCTION

*Lawyers and Mediation*[1] is authored by Bryan Clark, a mediation scholar at the University of Strathcylde in Glasgow, Scotland and an Adjunct Professor at John Marshall Law School in Chicago, Illinois. Clark found inspiration to write this book after researching mediation in Scotland, engaging in field work and conversing with lawyers, mediators, mediation participants and academics about lawyers' impact on mediation.[2]

*Lawyers and Mediation* is neither an instructional book nor a book advocating for increased or decreased lawyer involvement in mediation; the book is a "cautious and balanced path through the thorny terrain of the lawyer's relationship with and role within and on the fringes of mediation."[3] To accomplish this objective, Clark presents evidence from multiple international scholars' empirical and theoretical studies to explain and critique arguments for and against lawyer involvement in mediation.[4]

Clark often decides against taking sides when presenting conflicting evidence, which frustrated me as a reader, but his pragmatism serves mediation research well since mediation growth has evolved quite differently across multiple jurisdictions. Thus, I recommend Clark's book to individuals who are interested in reading a collection of pragmatic research, but do not recommend the book to individuals who want to read a thesis for increased or decreased lawyer involvement in mediation.

## II. OVERVIEW

*Lawyers and Mediation* is comprised of six chapters. Chapter One sets forth the book's foundation by providing an overview of how lawyer involvement in mediation has developed over time throughout the world.[5] In Chapters Two and Three, Clark analyzes the legal community's initial resistance towards participating in mediation and subsequent motives for entering the mediation field.[6]

Chapters Four and Five, arguably the most captivating and pertinent chapters in the book, discuss how lawyer involvement impacts mediation as a dispute resolution mechanism.[7] Chapter Four analyzes research on lawyer involvement either as a party representative or mediator.[8] Chapter Five discusses the institutionalization of mediation

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* Brian Rans is an Associate Editor of the Yearbook on Arbitration and Mediation and a 2014 Juris Doctor Candidate at The Pennsylvania State University Dickinson School of Law.

[1] BRYAN CLARK, LAWYERS AND MEDIATION (2012).

[2] *Id.* at v.

[3] *Id.*

[4] *Id.*

[5] *Id.* at viii.

[6] CLARK, *supra* note 1, at viii.

[7] *Id.*

[8] *Id.*

and the benefits and consequences resulting from this happening.[9] Clark concludes the book in Chapter Six by discussing mediation's future, including topics such as mediation education, codes of conduct and training.[10]

## III. CHAPTER ONE: HISTORY OF LAWYERS AND MEDIATION

Chapter One discusses how lawyer involvement in mediation has developed over time throughout the world.[11] Clark presents research on mediation development within many jurisdictions, but fails to provide observations of the significance or success of each jurisdiction's development, which could have made this chapter more captivating and informative.

Alternative Dispute Resolution (ADR) evolved into its modern form during the 1970s after the National Conference on the Causes of Popular Dissatisfaction with Administration of Justice (Pound Conference).[12] During this time period, United States Chief Justice Warren Burger and other judicial reform proponents advocated for courts to use mediation and other ADR mechanisms to improve judicial efficiency.[13] Mediation purists often disagreed with this idea, preferring that courts did not interfere with or contaminate ADR.[14]

The United States began to formally embrace mediation after the Pound Conference and much experimentation.[15] For example, in 1994, the US Postal Service established Resolve Employment Disputes, Reach Equitable Solutions Swiftly (REDRESS) to help resolve workplace disputes.[16] In 1998, Congress enacted the Alternative Dispute Resolution Act that mandated federal courts establish ADR programs.[17] Mediation development also occurred in professional mediation organizations such as the National Institute of Dispute Resolution and the Association of Conflict Resolution.[18]

Much like the United States, common law jurisdictions such as the England, Wales, Scotland, Australia, Canada and Hong Kong quickly pursued and enacted mediation initiatives after the Pound Conference.[19] Trends across these common law

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[9] *Id*.

[10] *Id*.

[11] CLARK, *supra* note 1, at v.

[12] *Id*. at 1-2; *see also* Frank E.A. Sander, *Varieties of Dispute Processing*, *in* THE POUND CONFERENCE: PERSPECTIVES ON JUSTICE IN THE FUTURE (A. Leo Levin & Russell R. Wheeler eds. 1979).

[13] CLARK, *supra* note 1, at 3; *see also* Susan Sibley & Austin Sarat, *Dispute Processing in Law and Legal Scholarship: From Institutional Critique to the Reconstruction of Judicial Subject*, 66 DENV. U. L. REV. 437 (1989).

[14] CLARK, *supra* note 1, at 4 (stating mediation purists want to regain control of the mediation process from the legal system and give it back to the disputants).

[15] *Id*. at 2 ("[P]ound Conference had a major and almost immediate impact on expediting the process of mediation" in the United States. There were similar debates in Europe discussing alternative dispute resolution growth such as the Florence Access to Justice Project, but these initiatives did not have the immediate impact the Pound Conference had).

[16] *Id*. at 7; *see also* Lisa B. Bingham, *Why suppose? Let's Find Out: A Public Policy Research Program on Dispute Resolution*,2002 J. DISP. RESOL. 101 (2002).

[17] CLARK, *supra* note 1, at 7; *see also* 28 U.S.C. § 651a-b (1998).

[18] CLARK, *supra* note 1, at 8.

[19] *Id*. at 9.

jurisdictions include expansion in court-connected mediation, increased lawyer involvement in commercial and family mediation, policy changes such as civil procedure reforms and the creation of professional organizations providing mediation services.[20]

Scotland is the one common law country that Clark presented research on that has not experienced substantial mediation growth.[21] According to Clark, previous initiatives outside the family and commercial law contexts did not succeed due to low demand, so Scottish mediation is currently at the early stage of development with a "re-invigorated" interest from the legal community.[22]

Civil law countries such as the Netherlands, France, Germany and Italy have pursued mediation more slowly than their common law counterparts.[23] However, research still shows strong mediation development in family and commercial law contexts and increased mediation regulation.[24] For example, France requires family mediators to acquire a State Diploma for Family Mediation before practicing,[25] and Italian legislation enforces mediation agreements, promotes mediation confidentiality, institutes minimum training requirements for mediators and allows judicial mediation referrals.[26]

## IV. CHAPTER TWO: LAWYER RESISTANCE TOWARDS MEDIATION

Chapter Two presents information regarding lawyer disinterest in mediation and how lawyer disinterest has affected mediation development.[27] Throughout this chapter, Clark does a great job connecting the "gate keeper" theory, lawyer ignorance, cultural bias and economic motivations to lawyer disinterest in referring clients to mediation. Readers should also appreciate how Clark maintains a balanced approach while making subtle arguments. This allows the chapter to provide an objective foundation of research while helping the reader formulate opinions on the research presented.

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[20] *Id*. at 9-17; *see also* Shirley Shipman, *Court Approaches to ADR in the Civil Justice System*, 25 CIV. JUST. Q. 181 (2006); Nadja Alexander, *What's Law Got to Do with It?: Mapping Modern Mediation Movements in Civil and Common Law Jurisdictions*, BOND L. REV. , Dec. 2001, at art. 5; JULIE MACFARLANE, THE NEW LAWYER: HOW SETTLEMENT IS TRANSFORMING THE PRACTICE OF LAW (2008); HONG KONG POLYTECHNIC UNIVERSITY, EVALUATION STUDY ON THE PILOT SCHEME ON FAMILY MEDIATION (2004), *available at* http://www.judiciary.gov.hk/en/publications/hkpu_finalreport.pdf.

[21] CLARK, *supra* note 1, at 11-12; *see also* RICHARD MAYS & BRYAN CLARK, ALTERNATIVE DISPUTE RESOLUTION IN SCOTLAND (1996).

[22] CLARK, *supra* note 1, at 12.

[23] *Id*. at 24 (stating that civil law countries were not initially motivated by improving judicial efficiency and often considered mediation "some kind of newfangled American import that had no place in the civil law tradition"); *but cf*: MACFARLANE, *supra* note 20 (showing evidence of civil countries accepting mediation).

[24] CLARK, *supra* note 1, at 18-22.

[25] *Id*. at 19; *see also* MONIQUE SASSIER, ARGUMENTS AND PROPOSALS FOR A STATUTE OF FAMILY MEDIATION IN FRANCE (2001).

[26] CLARK, *supra* note 1, at 21-22; *see also* SASSIER, *supra* note 25.

[27] CLARK, *supra* note 1, at 31.

### *A. Gatekeeper Theory*

Lawyers have used their comparative advantage in the practice of law over laymen to influence whether clients pursue mediation by acting as the gatekeeper to the dispute resolution mechanism.[28] According to Clark, since lawyers tend to dominate the attorney-client relationship, and legal education often emphasizes legal norms over extra-legal needs, lawyers are often in a unique position to effectively reduce mediation referrals and development.[29] Client sophistication, often exhibited by parties who have mediated before and possess leverage over their attorney, can decrease the lawyer's influence over the client and increase the use of mediation (if the client so chooses).[30]

### *B. Lawyer Ignorance and Cultural Bias*

Lawyer ignorance towards mediation and cultural bias against mediation has led to decreased interest in pursuing mediation for clients.[31] According to Clark, lawyers engage in "willful blindness" and succumb to cultural barriers to maintain the status quo of the adversarial legal system.[32] Thus, for reform advocates to change how lawyers view mediation, jurisdictions need to do more than implement new rules.[33] The book recommends: 1) influencing culture at the macro level by limiting the "partisan, competitive and aggressive behaviors…of lawyers;"[34] 2) influencing culture at the local level by soliciting support from local lawyers[35] and 3) reforming legal education to include problem solving techniques and mediation skills.[36]

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[28] *Id*. at 33.

[29] *Id*. at 35-7; *see also* Anurag Sharma, *Professional as Agent: Knowledge Asymmetry in Agency Exchange*, 22 ACAD. MGMT. REV. 758 (1977); Austin Sarat & William Felstiner, *Lawyers and Legal Consciousness: Law Talk in the Divorce Lawyers Office*, 98 YALE L.J. 1663, 1663-68 (1989); Ayelet Sela, *Attorneys' Perspectives on Mediation: An Empirical Analysis of Attorneys' Mediation Referral Practices, Barriers and Potential Agency Problems and Their Effort on Mediation in Israel* (unpublished thesis) (on file with author); Adrian Borbely *Agency in Conflict Resolution as a Manager-Lawyer Issue: Theory and Implications for Research*, 4 NEGOT. CONFLICT MGMT. RES. 129 (2011).

[30] CLARK, *supra* note 1, at 37-38; *see also* John Heinz et al., *Diversity, Representation and Leadership in an Urban Bar: A First Report on a Survey of the Chicago Bar*. 2 AM. B. FOUND. RES. J. 717 (1976); JOEL HANDLER, SOCIAL MOVEMENTS AND THE LEGAL SYSTEM: A THEORY OF LAW REFORM AND SOCIAL CHANGE 25 (1978).

[31] CLARK, *supra* note 1, at 46-47.

[32] *Id.* at 46-47; *see also* John S. Dzienkowski, *Lawyering in a Hybrid Adversary System*, 38 WM. & MARY L. REV. 45, 47-61 (1996).

[33] CLARK, *supra* note 1, at 46-47; *see also* CLIFFORD GEERTZ, THE INTERPRETATION OF CULTURES (1973).

[34] CLARK, *supra* note 1, at 48-49; *see also* Robert A Kagan, *Adversarial Legalism and American Government*, J. POL. ANAL. MGMT., Summer 1991, at 369; R. Daniel Kelemen & Eric C. Sibbitt, *The Globalization of American Law*, 58 INT'L ORG. 103 (2004); John Cioff, *Adversarialism Versus Legalism: Juridification and Litigation in Corporate Governance Reform*. 3 REGUL. & GOVERNANCE 235 (2009).

[35] CLARK, *supra* note 1, at 49-50; s*ee also* Lynn Mather, *What Do Clients Want? What Do Lawyers Do?*, 52 EMORY L.J. 1065, 1070-71 (2003); John Lande, *Getting the Faith: Why Business Lawyers and Executives Believe in Mediation*. 5 HARV. NEGOT. L. REV. 137, 155-56 (2000).

[36] CLARK, *supra* note 1, at 51-52; *see also* DON PETERS, UNDERSTANDING WHY LAWYERS RESIST MEDIATION (2011); Alain Lempereur, *Negotiation and Mediation in France: The Challenge of Skill-Based Learning and Interdisciplinary Research in Legal Education*. 3 HARV. NEGOT. L. REV. 151, 161-63 (1998).

Clark states that one can argue culture is currently shifting due to evidence of enhanced lawyer satisfaction in mediation, increased mediation training opportunities and increased mediation promotion in courts.[37] However, it is still difficult for academics to gage lawyer receptiveness.[38]

### *C. Economic Motivations*

Lawyers have argued that the adversarial system's income potential is greater than that of mediation since mediation is more cost-effective.[39] The evidence that shapes this argument include the billable hour, which incentivizes lawyers' desire for delayed settlement,[40] and the notion that clients need lawyers at every stage during litigation.[41] Survey evidence is mixed on whether lawyers take these economic biases into consideration.[42] Clark presents evidence validating both sides, but clarifies data showing that lawyers do not consider economic factors, stating that lawyers are often "coy" about the financial repercussions and respond to questions with "desired responses."[43]

Lawyers have also argued that mediation is less efficient than obtaining settlement through the adversarial negotiation.[44] Clark attributes this misperception to cultural barriers and claims mediation is quicker than adversarial negotiation and delivers "better substantive satisfaction and procedural justice."[45] Despite Clark's assertion, there is mixed evidence on whether mediation decreases costs compared to adversarial negotiation.[46] Survey research in England, Wales, Scotland and Canada shows that the respondents questioned believe that mediation saves time and decreases costs, while RAND Corporation and Deborah Hensler found no evidence of cost or time savings during their research.[47]

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[37] CLARK, *supra* note 1, at 56; *see also* Julia Macfarlane, *Cultural Change?: A Tale of Two Cities and Mandatory Court-Connected Mediation*, 2 J. DISP. RESOL. 241 (2002); TAMARA RELIS, PERCEPTIONS IN LITIGATION AND MEDIATION: LAWYERS, DEFENDANTS, PLAINTIFFS, AND GENDERED PARTIES 17 (2009).

[38] CLARK, *supra* note 1, at 57.

[39] *Id*. at 40-41 (stating evidence is not conclusive on whether mediation is more cost-effective for clients); *see also* Leonard Riskin, *Mediation and Lawyers*, 43 OHIO ST. L.J. 29, 48 (1982); GORDON PEARS, BEYOND DISPUTE: ALTERNATIVE DISPUTE RESOLUTION IN AUSTRALIA (1983); Rosselle Wissler, *Barriers to Attorneys' Discussions and Use of ADR*, 19 OHIO ST. J. ON DISP. RESOL. 459 (2004).

[40] *Id*. at 43; *see also* Stephen Mayson, *The Future of the Legal Profession*, 1 NOTTINGHAM L. J. 1, 4 (1992).

[41] CLARK, *supra* note 1, at 44; *see also* Dzienkowski, *supra* note 32, at 56.

[42] CLARK, *supra* note 1, at 45-46.

[43] *Id*.

[44] *Id*. at 57.

[45] *Id*. at 57-58 (stating that mediation can neutralize lawyer bias compared to adversarial negotiation).

[46] *Id*. at 59-61.

[47] CLARK, *supra* note 1, at 59-61; *see also* Bryan Clark & Charles Dawson, *Scottish Commercial Litigators and ADR: A Study of Attitudes and Experience*, 26 CIV. JUST. Q. 228, 232-33 (2007); Penny Brooker & Anthony Lavers, *Commercial Lawyers' Attitudes and Experiences with Mediation*, 4 WEB J. CURRENT LEGAL ISSUES (2002), *available at* http://webjcli.ncl.ac.uk/2002/issue4/brooker4.html; ROBERT G HANN AND CARL BAAR, EVALUATION OF THE ONTARIO MANDATORY MEDIATION PROGRAM (RULE 24.1): FINAL REPORT—THE FIRST 23 MONTHS (2001); JAMES KAKALIK ET AL., AN EVALUATION OF MEDIATION AND EARLY NEUTRAL EVALUATION UNDER THE CIVIL JUSTICE REFORM ACT (1996); Deborah R. Hensler, *Our Courts, Ourselves: How the Alternative Dispute Resolution Movement Is Reshaping Our Legal System*. 108 PENN ST L. REV. 165, 188 (2003).

## V. CHAPTER THREE: LAWYER INVOLVEMENT IN MEDIATION AND THE CO-OPTION THESIS

Chapter Three discusses why and how lawyers have entered the mediation field.[48] Clark does a great job explaining how lawyers have gained access to the mediation field, especially when discussing the unauthorized law doctrine.[49] I found Clark's analysis on this tactic well balanced, but more argumentative.[50] I felt his passion on the subject as a result.

### *A. The Co-Option Thesis*

The co-option thesis describes how and why legal professionals have attempted to take control of the mediation field and mold mediation to meet its own interests.[51] There are multiple reasons why lawyers attempt to co-opt the mediation field.[52] Lawyers can expand their reach in the legal market and initiate business ventures such as mediation training and how-to-books.[53] Lawyers can also have a more fulfilling professional experience when practicing mediation.[54] Research shows that stress, substance abuse and relationship breakdown are more likely within the legal profession due adversarial, legal practice norms.[55] Furthermore, some lawyers prefer to not participate in trial litigation since trials can disrupt the litigator's practice, require a significant time investment and risk a lawyer looking incompetent.[56] Thus, co-opting mediation and diverting more times towards mediation can allow lawyers to focus more time on other legal tasks such as negotiation.[57]

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[48] CLARK, *supra* note 1, at 71.

[49] *Id*. at 90 (stating the unauthorized practice of law doctrine describes lawyers monopolizing mediation by declaring that it falls under the exclusive control of the legal profession); *see also* Jacqueline Nolan-Hanley, *Lawyers, Non-Lawyers and Mediation: Rethinking the Professional Monopoly from a Problem-Solving Perspective*, 7 HARV. NEGOT. L. REV. 235 (2002).

[50] CLARK, *supra* note 1, at 95 (stating that the unauthorized doctrine practice of law doctrine is "cynical, lawyer capturing of the field and an affront to the non-legal origins of mediation").

[51] *Id*. at 73.

[52] *Id*. at 79-84.

[53] *Id*. at 80; *see also* RICHARD MAYS & BRYAN CLARK, ALTERNATIVE DISPUTE RESOLUTION IN SCOTLAND (2007); Bryan Clark, *A Time for Change? The Development of Commercial ADR in Scotland 20*, SCOTS L. TIMES, at 169 (2003); DIANA MERCER, HOW DO I BECOME A MEDIATOR? RESOURCES FOR ATTORNEYS (2006), *available at* http://www.resourcesforattorneys.com/becomeamediatorarticle.html.

[54] CLARK, *supra* note 1, at 81-83.

[55] *Id*. at 82; *see also* JOHN VAN WINKLE, MEDIATION: A PATH BACK FOR THE LOST LAWYER (2001); Susan Daicoff, *Lawyer Know Thyself: A Review of Empirical Research on Attorney Attributes Bearing on Professionalism*, 46 AM. U. L. REV. 1337, 1345-49 (1997).

[56] CLARK, *supra* note 1, at 82-83; *see also* Marc Galanter, *A Settlement Judge Is Not a Trial Judge: Judicial Mediation in the United States*. 12 J.L. SOC'Y 1 (1985).

[57] CLARK, *supra* note 1, at 82-83; *see also* Stephen Subrin, *A Traditionalist Look at Mediation: It's Here to Stay and Much Better than I Thought*, 3 NEV. L.J. 196 (2003).

### *B. Strategies Used to Gain a Foothold in the Field*

Lawyers have taken multiple steps to acquire and preserve their position in the mediation field.[58] Many legal organizations and jurisdictions have implemented defensive marketing techniques and regulatory initiatives "to affirm the lawyer's primary role in the process".[59] For example, the Law Society of Scotland has enacted defensive marketing techniques to emphasize lawyer involvement over non-lawyer participation.[60] Jurisdictions, such as Greece, Germany and South Africa, have promulgated regulation restricting non-lawyers' access,[61] and Colorado, Idaho and Alabama have created mediator lists that impose difficult eligibility requirements for non-lawyer access.[62]

Lawyers have also formulated arguments citing the unauthorized practice of law doctrine, which declares mediation as within the lawyer's exclusive jurisdiction.[63] The unauthorized practice of law doctrine's merit depends upon how an individual interprets two criteria: 1) the definition of mediation and 2) the context that the mediation occurs.[64] For example, institutionalized mediators in court-connected mediation schemes utilize an "evaluative, legal-centric . . .process," which would infer that mediation is a practice of law, while traditional mediators facilitate negotiation and do not provide legal advice, which would infer that mediation is not a practice of law. [65]

Clark provides multiple opinions on whether mediation constitutes law. The American Bar Association stated that mediation is not a practice of law since mediators do not represent parties like attorneys do.[66] Carrie Menkel-Meadow, on the other hand, believes that when a mediator evaluates a legal claim's merits, the mediator is providing legal advice, which would infer that non-lawyer participation in mediation is unauthorized legal practice.[67]

## VI. CHAPTER FOUR: MEDIATION AND LAWYERS: DOES THE CAP FIT?

Chapter Four discusses how lawyers have influenced the mediation process when serving as party representatives or mediators.[68] Clark presents balanced research on the

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[58] CLARK, *supra* note 1, at 84.

[59] CLARK, *supra* note 1, at 84-90.

[60] *Id*. at 85-86; *see also* Simon Roberts, *Mediation in the Lawyer's Embrace*. 55 MOD. L. REV. 258 (1992).

[61] CLARK, *supra* note 1, at 87-88; *see also* CHRISTIAN DUVE, LESSONS LEARNT FROM THE IMPLANTATION OF THE EU MEDIATION DIRECTIVE IN GERMANY: THE POINT OF VIEW OF LAWYERS (2011), *available at* http://www.europarl.europa.eu/document/activities/cont/201105/20110518ATT19590/20110518ATT19590EN.pdf; Act 103 of 1991§ 2 (S. Afr.).

[62] CLARK, *supra* note 1, at 88.

[63] *Id*. at 90; *see also* Nolan-Hanley, *supra* note 49.

[64] CLARK, *supra* note 1, at 91.

[65] *Id*.

[66] *Id*. at 92; *see also* AMERICAN BAR ASSOCIATION, DISPUTE-WISE BUSINESS MANAGEMENT: IMPROVING ECONOMIC AND NON-ECONOMIC OUTCOMES IN MANAGING BUSINESS CONFLICTS (2006).

[67] CLARK, *supra* note 1, at 91; *see also* Carrie Menkel-Meadow, *Is Mediation the Practice of Law?*, 14 ALTERNATIVES TO HIGH COST LITIG. 57 (1996).

[68] CLARK, *supra* note 1, at101.

subject, but does make many subtle arguments unlike previous chapters. Thus, Chapter Four often creates more questions than it answers.

Clark begins the chapter by presenting evidence that lawyers are often incompatible with mediation due to lawyers' personality characteristics and their exposure to the adversarial legal system.[69] Research suggests exposing more lawyers to mediation, providing mediation training and diversifying the legal profession to include more individuals who generally have personalities compatible with mediation (i.e. minorities, women and people of lower socio-economic status) can help change this.[70]

### *A. Representing Clients in Mediation*

Lawyers can become "a dysfunctional element" within mediation when they fail to adapt to and appreciate the mediator's influence.[71] Lawyers can also negatively affect client participation and the mediation's purpose.[72] Research shows that a lawyer's presence decreases party control, which can dis-incentivize client participation, increase tactical use of mediation and decrease the mediation's focus on extra-legal needs.[73] Despite this evidence, there are still benefits and strong demands for legal representation during mediation.[74] Research suggests that lawyers can combat unequal bargaining power, protect parties from assertive mediators and encourage participation from weaker parties.[75]

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[69] *Id*. at 102-5; *see also* Riskin, *supra* note 39; Susan Daicoff, *Lawyer Know Thyself: A Review of Empirical Research on Attorney Attributes Bearing on Professionalism*, 46 AM. U. L. REV. 1337, 1344-49.

[70] CLARK, *supra* note 1, at 104-05; Neil Browne et al., *The Purported Rigidity of an Attorney's Personality: Can Legal Ethics be Acquired?*, 30 J. LEGAL PROF. 55 (2005); GITA Z. WILDER, THE ROAD TO LAW SCHOOL AND BEYOND: EXAMINING CHALLENGES TO RACIAL AND ETHNIC DIVERSITY IN THE LEGAL PROFESSION (2003); PAUL MAHARG, ET AL., MINORITY AND SOCIAL DIVERSITY IN LEGAL EDUCATION 2003, *available at* http://www.scotland.gov.uk/Publications/2003/03/16713/19583; Carrie Menkel-Meadow, *Portia in a Different Voice: Speculations on a Women's Lawyering Process*, 1 BERKELEY WOMEN'S L. J., 39 (1985).

[71] CLARK, *supra* note 1, at 104-05; *see also* Joshua Rosenberg, *In Defense of Mediation*, 33 ARIZ. L. REV. 467, 487-491 (1991).

[72] CLARK, *supra* note 1, at 110-13.

[73] *Id*. at 111-13; *see also* Olivia Rundle, *Barking Dogs: Lawyer Attitudes to Direct Disputant Participation in Court-Connected Mediation of General Civil Cases*, 8 QUEENSLAND U. TECH. L. & JUST. J., 77, 82 (2008); Roselle Wissler, *Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research*, 17 OHIO ST. J. ON DISP. RESOL. 641, 658 (2002); JULIE MACFARLANE, CULTURAL CHANGE? COMMERCIAL LITIGATORS AND THE ONTARIO MANDATORY MEDIATION PROGRAM (2001), *available at* http://dsp-psd.pwgsc.gc.ca/collection_2008/lcc-cdc/JL2-70-2001E.pdf; Penny Brooker, *Construction Lawyers' Experience with Mediation Post-CPR*, 21 CONSTRUCTION L.J. 19, 37-38 (2005).

[74] CLARK, *supra* note 1, at 111-13.

[75] *Id*. at 114-15; *see also* Craig McEwen et al., *Bring in the Lawyers: Challenging the Dominant Approaches to Ensuring Fairness in Divorce Mediation*, 79 MINN. L. REV. 1307 (1995); Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100, YALE L.J. 1545, 1597-99 (1991); Craig Pollack, *The Role of the Mediation Advocate: A User's Guide to Mediation*, 73 ARB. 20 (2007).

### *B. Lawyer Mediators*

Evidence is mixed on lawyer mediators' effect on mediation. Research shows that traditional legal education and lawyer characteristics can negatively influence how the mediation is administered, but lawyers can also serve as a stabilizing force in certain situations.[76] For example, the National Academy for Dispute Professionals suggests "that some lawyers are natural mediators."[77] Research also shows that lawyers possess skills to gain the parties' respect, maintain composure, keep confidences and analyze important issues.[78]

Lawyers can also effectively engage in either the facilitative or evaluative approach.[79] The facilitative approach entails mediators facilitating discussion between parties, while the evaluative approach allows mediators to focus on legal claims, asses merit and make recommendations.[80] Research shows evaluative mediation techniques can decrease creativity, disrupt mediator neutrality and impose mediator recommendations on unwilling parties.[81] Despite this criticism, there is still strong demand for evaluative mediation, especially with lawyer representatives who prefer mediators that have an evaluative disposition.[82]

### *C. Judicial Mediation*

Judges have served as mediators within court-connected mediation schemes in both common and civil law countries.[83] Judicial mediation is distinct from the judicial settlement conference in both common and civil law countries, but judicial mediation

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[76] CLARK, *supra* note 1, at 117-18; *see also* CRIS CURRIE, SHOULD A MEDIATOR ALSO BE AN ATTORNEY? (2000), *available at* http:/www.mediate.com/articles/currie.cfm; Vibeke Vindelov, *Mediation in Danish Law: In Retrospect and Perspective*, *in* GLOBAL TRENDS IN MEDIATION 132-33 (Nadja Alexander ed., 2006).

[77] CLARK, *supra* note 1, at 118.

[78] *Id*.; *see also* Stephen B. Goldberg & Margaret Shaw, *The Secrets of Successful (and Unsuccessful) Mediators Continued: Studies Two and Three*, 23 NEGOTIATION J. 393, 414 (2007); JOHN LANDE, DOING THE BEST MEDIATION YOU CAN (2008).

[79] CLARK, *supra* note 1, at122-24.

[80] *Id*. at 122; *see also* Leonard Riskin, *Understanding Mediators' Orientations, Strategies and Techniques: A Guide for the Perplexed*, 1 HARV. NEGOT. L. REV. 7, 25 (1996); Leonard Riskin, *Decision making in Mediation: The New Old Grid and the New New Grid System*, NOTRE DAME L. REV. 37 (2003)

[81] CLARK, *supra* note 1, at 122-23; *see also* KAY SAVILLE-SMITH & RUTH FRASER, ALTERNATIVE DISPUTE RESOLUTION: GENERAL CIVIL CASES (2004); Lela Love, *The Top Ten Reasons Why Mediators Should Not Evaluate*, 24 FLA. ST. U. L. REV. 937 (1997).

[82] CLARK, *supra* note 1, at 120-21; *see also* JILL ENTERKIN AND MARK SEFTON, AN EVALUATION OF THE EXETER SMALL CLAIMS MEDIATION SCHEME (2006); Bert Neimeijer and Machteld Pel, *Court-Based Mediation in the Netherlands: Research, Evaluation and Future Expectations*, 110 PENN ST. L. REV. 345 (2005); Roselle Wissler, *Evaluate or Facilitate*, DISP. RESOL. MAG., Winter 2001, at 35; Penny Brooker, *An Investigation into Evaluative and Facilitative Approaches to Construction Mediation*, 25 STRUCTURAL SURV. 220, 227-30 (2007); Barbara McAdoo, *A Report to the Minnesota Supreme Court: The Impact of Rule 114 on Civil Litigation Practice in Minnesota*, 25 HAMLINE L. REV. 401, 433-35 (2002).

[83] CLARK, *supra* note 1, at 128-29.

occurs more often in civil law countries, while external mediation referrals occur more frequently in common law countries.[84]

Opponents of judicial mediation argue that judicial involvement can "tarnish" mediation by "skew[ing] the participants' perceptions of the mediation process…" and decreasing party candor.[85] Courts have attempted to remedy this by requiring that judicial mediators do not serve as judges if litigation is needed, but critics claim that this is not enough to undo the damage the judge's presence has already done.[86]

Proponents for judicial mediation claim that judicial involvement expedites settlement and alleviates justice concerns by providing disputants "a day in court."[87] Research also shows that lawyer representatives have had positive experiences with judges serving in the mediator role.[88]

## VII. CHAPTER FIVE: THE FUSING OF MEDIATION, LAWYERS AND LEGAL SYSTEMS

Chapter Five discusses the consequences of integrating mediation into the legal system.[89] I found this chapter the most captivating for two reasons. First, Clark provides a balanced analysis on a controversial topic in mediation law, compulsory mediation. Second, Clark discusses the what characteristics court connected mediation programs tend to have and what characteristics planner should look to implement.

### *A. Mediation and Civil Justice Concerns*

Courts have emphasized mediation to decrease court delays and costs.[90] To accomplish these objectives, jurisdictions have enacted compulsory mediation schemes, either by requiring parties to pursue mediation or giving judges strong authority to

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[84] *Id*.; *see also* Nadja Alexander, *Introduction*, *in* GLOBAL TRENDS IN MEDIATION 23 (Alexander ed., 2006).

[85] CLARK, *supra* note 1, at 129; *see also* Simon Roberts, *Mediation in Family Disputes*, 46 MOD. L. REV. 537, 555-56 (1983).

[86] CLARK, *supra* note 1, at130; Roberts, *supra* note 85; JOHN C. CRATSLEY, JUDICIAL ETHICS AND JUDICIAL SETTLEMENT PRACTICES: TIME FOR TWO STRANGERS TO MEET (2005).

[87] CLARK, *supra* note 1, at 130-31; *see also* Ross Cranston, *Complex Litigation: The Commercial Court*, 26 CIV. JUST. Q. 190, 204 (2007); Ann Brady, *Court Mediation Scheme: A Cause for Concern*, LAW SOCIETY GAZETTE, October 25, 2007; DAN A. POLSTER, THE TRIAL JUDGE AS MEDIATOR: A REJOINDER TO JUDGE CRATSLEY (2007).

[88] CLARK, *supra* note 1, at 131-32; *see also* NADJA ALEXANDER, INTERNATIONAL AND COMPARATIVE MEDIATION: LEGAL PERSPECTIVES (2009); Peter Robinson, *Adding Judicial Mediation to the Debate about Judges Attempting To Settle Cases Assigned to them for Trial*, 2 J. DISP. RESOL. 335, 351 (2006).

[89] CLARK, *supra* note 1, at 139.

[90] *Id*. at 141-42; *see also* LORD WOOLF, ACCESS TO JUSTICE, FINAL REPORT (1996), *available at* http://webarchive.nationalarchives.gov.uk/+/http://www.dca.gov.uk/civil/final/index.htm; Descreto Legislativo 2010, n. 28 (It.); Laurence Boulle, *Minding the Gaps: Reflecting on the Story of Australian Mediation*, ADR BULL., June 2000, at art. 2; Nadja Alexander, *Mediation on Trial: Ten Verdicts on Court-Related ADR*, 22 LAW CONTEXT 8, 17 (2004).

command mediation.[91] Courts have used financial incentives to promote participant use of mediation as well.[92]

Opponents of compulsory mediation claim that court connected mediation programs refer cases of less importance to mediation, which often involve "minorities, the vulnerable and less powerful in society."[93] Thus, opponents argue that mediation in court-connected contexts provides a lesser form of justice to the parties.[94]

Opponents of compulsory mediation also claim that mandatory mediation programs violate European constitutional principles.[95] In 2004, the English and Wales Court of Appeals in *Halsey v Milton Keynes General Trust NHS* ruled that a mandatory mediation scheme violated the citizens' right to a fair trial codified in Article 6 of the European Convention of Human Rights.[96] However, in 2010, the European Court of Justice in *Alassini v. Telecom Italia SpA* disagreed with the *Halsey* court.[97] The *Alassini* court concluded that mandatory mediation schemes were constitutional under Article 6, but only if the programs do not result in binding rulings or impose undue cost or delay.[98]

According to Clark, critics who claim mediation provides a lesser form of justice fail to consider mediation's trend towards evaluative approaches and mechanisms such as judge approved settlements and advisory opinions.[99] Mediation has also shown to have strong procedural justice and high satisfaction rates of settlement compared to litigation.[100]

Proponents and opponents of compulsory mediation also debate compulsory mediation's effect on procedural fairness.[101] Opponents argue that mediators can have

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[91] CLARK, *supra* note 1, at 140; *see also* Law No. 24.573, Apr. 24, 1996 (Arg.); Descreto Legislativo 4 Mar. 2010, n. 28 (It.).

[92] CLARK, *supra* note 1, at 140-41 (stating that examples include providing subsidies or punishing a party's unreasonable refusal to pursue mediation); *see also* Shipman, *supra* note 20; D.Lgs. n. 28/2010 (It.); Barbara McAdoo & Art Hinshaw, *The Challenge of Institutionalizing Alternative Dispute Resolution: Attorney Perspectives on the Effect of Rule 17 on Civil Litigation in Missouri*, 67 MO. L. REV 473 (2002).

[93] CLARK, *supra* note 1, at 143-44.

[94] *Id*.; *see also* JEROLD AUERBACH, JUSTICE WITHOUT LAW, REVOLVING DISPUTES WITHOUT LAWYERS 124-28 (1983); HAZEL GENN, JUDGING CIVIL JUSTICE: THE 2008 HAMLYN LECTURES 114-21 (2010); Matthew Brunsdon-Tulley, *There Is an 'A' in 'ADR' but Does Anybody Know What It Means Anymore?* 28 CIV. JUST. Q. 218 (2009).

[95] CLARK, *supra* note 1, at 145-46.

[96] *Id*. at 145; *see also* Halsey v. Milton Keynes Gen. Trust NHS, [2004] 1 EWCA Civ 5761 (Eng. and Wales); European Convention for the Protection of Human Rights and Freedoms art. 6, Nov. 4, 1950, 213 U.N.T.S. 221; Deweer v. Belgium, 1980 Y.B. Eur. Conv. on H.R. 464 (Eur. Ct. H.R.).

[97] CLARK, *supra* note 1, at 145-46; *see also* Case C-317/08, C-318/08, C-319/08 and C-320/0, Alassini v. Telecom Italia SpA, 2010 E.C.R. I-02213.

[98] *Id*.

[99] CLARK, *supra* note 1, at 149-50 ; *see also* MACFARLANE, *supra* note 20; Carrie Menkel-Meadow, *Introduction, in* THEORY, POLICY AND PRACTICE xxvi (Carrie Menkel-Meadow, ed., 2001); *but cf* GENN, *supra* note 94, at 116-17.

[100] CLARK, *supra* note 1, at 150-52; *see also* Carrie Menkel-Meadow, *Whose Dispute Is It Anyway? A Philosophical and Democratic Defense of Settlement (In Some Cases)*, 83 GEO L.J. 2663, 2675 (1995); E ALLEN LIND & TOM TYLER, THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE (1988); Tricia S. Jones, *Conflict Resolution in the Field: Assessing the Past, Charting the Future*, 22 CONFLICT RESOL. Q. (SPECIAL ISSUE) 233 (2004); ANNIE DE ROO AND ROB JAGTENBERG, THE DUTCH LANDSCAPE OF COURT-ENCOURAGED MEDIATION, IN GLOBAL TRENDS OF MEDIATION 287 (Nadja Alexander, ed., 2006).

[101] CLARK, *supra* note 1, at 154 (stating that according to Nancy Welsh, the three primary factors of procedural fairness are: 1) the party's voice, 2) his or her chance of being heard and 3) how he or she is

trouble adjusting their role without showing bias when disproportionate party power distorts a mediation.[102] Lawyers representatives can dampen participants' roles too, which may decrease the participants' voice.[103] Mediators can remedy these problems associated with compulsory mediation by treating parties with respect, disclosing the rules of conduct, providing both parties with adequate time to voice their opinions, recommending parties to seek external advice and asking reality testing questions.[104] Lawyers representatives can also help by providing an aura of dignity to the proceeding, improving a weaker party's voice and enhancing settlement fairness.[105]

### *B. Mediation Practice in the Institutionalized Context*

Research shows that court connected mediation often focuses upon settlement and narrow, legal-oriented norms.[106] Furthermore, jurisdictions and courts often require court connected mediation schemes to reflect their administrative goals.[107] Thus, mediation purists may have a difficult time implementing traditional mediation characteristics such as facilitative frameworks and confidentiality stipulations.[108]

According to Clark, policies that promote settlement and narrow, legal-oriented norms improve justice and judicial efficiency, but decrease party satisfaction and limit restorative justice.[109] Thus, Clark recommends that courts should make a "conscious attempt to appropriate mediation design" and avoid imposing all facets of litigation.[110]

## VIII. CHAPTER SIX: CONCLUSION: THE FUTURE OF LAWYERS AND MEDIATION

Chapter Six concludes the book by briefly discussing mediation's future.[111] According to Clark, future mediation development should allow lawyer participation, but

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treated by the mediator and opposing party); *see also* Nancy Welsh, *Making Deals in Court Connected Mediation: What's Justice Got To Do with It?*, 79 WASH. UNIV. L. Q. 788, 820 (2001).

[102] CLARK, *supra* note 1, at 156.

[103] *Id*. at 155; *see also* RELIS, *supra* note 37, at 14; Wissler, *supra* note 73, at 686.

[104] CLARK, *supra* note 1, at 158; *see also* Albie Davis & Richard Salem, *Dealing with Power Imbalances in Mediation of Interpersonal Disputes*, *in* PROCEDURES FOR GUIDING THE DIVORCE MEDIATION PROCESS 18-20 (John Lemmon, ed., 1984).

[105] CLARK, *supra* note 1, at 155; *see also* Jill Howieson, *Perceptions of Procedural Justice and Legitimacy in Local Court Mediation*, 9 MURDOCH UNIV. ELEC. J.L.(2002); McEwen, *supra* note 75, at 1375; MACFARLANE, *supra* note 73.

[106] CLARK, *supra* note 1, at 164.

[107] *Id*. at 164-65.

[108] *Id*. at 165.

[109] *Id*. at 164; *see also* Dwight Golann, *Is Legal Mediation a Process of Repair or Separation? An Empirical Study and Its Implications*, 7 HARV. NEGOT. L. REV. 301, 336 (2002); Nancy Welsh, *Disputants' Decision Control in Court-Connected Mediation: A Hollow Promise Without Procedural Justice*, J. DISP. RESOL., 179 (2002).

[110] CLARK, *supra* note 1, at 166-68; *see also* James R. Coben & Peter N. Thompson, *Disputing Irony: A Systematic Look at Litigation About Mediation*, 11 HARV. NEGOT. L. REV. 43, 57-89 (2006); Roselle Wissler, *Representation in Mediation: What We Know from Empirical Research*, 37 FORDHAM L. REV. 419 (2010).

[111] CLARK, *supra* note 1, at 175-76.

look to counteract "dominant legal culture."[112] To do this, lawyers should emphasize humility, accept non-lawyer mediator involvement and seek mediation training and education to curb their adversarial disposition.[113]

Clark also would like legal education to embed mediation in the core legal curriculum and emphasize interdisciplinary subjects such as business, psychology, sociology and economics.[114] Jurisdictions should also create programs to educate non-lawyer mediators on pertinent legal matters, promulgate regulations that allow non-lawyer involvement and create codes of conduct administered by non-legal bodies to eliminate potential bias.[115]

## IX. CONCLUSION

*Lawyers and Mediation* is an informative overview of the lawyer's relationship with mediation since the Pound Conference.[116] Clark does a great job presenting balanced research while making subtle arguments, which helps the reader decipher "the thorny terrain of the lawyer's relationship with…mediation."[117] However, I often felt conflicted while deciding whether the benefits outweigh the consequences for each issue, and vise-versa. Thus, I recommend the book to individuals who are interested in reading a collection of pragmatic research, but do not recommend this book to individuals who want to read a thesis arguing for or against lawyer involvement in mediation.

[112] *Id*. at 176-77.

[113] *Id*. at 177-78.

[114] *Id*. at 178-79; *see also* Carrie Menkel-Meadow, *Ethics in Alternative Dispute Resolution: New Issues, No Answers from the Adversary Conception of Lawyers' Responsibility*, 38 S. TEX. L. REV. 407 (1997); Kimberlee Kovach, *Lawyer Ethics Must Keep Pace with Practice: Plurality in Lawyering Roles Demands diverse and Innovative Ethical Standards*, 39 IDAHO L. REV. 399 (2003).

[115] CLARK, *supra* note 1, at 179-81 ("[C]odes of practice for lawyers acting in the mediation seat promulgated by legal bodies conflates mediation practice with the practice of law. It can also be seen as lawyers laying claim to the…process."); *see also* Menkel-Meadow, *supra* note 114, at 430.

[116] CLARK, *supra* note 1, at v.

[117] *Id*.