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**LAWYERS' RESISTANCE TO MEDIATION:  
A SCOTTISH PERSPECTIVE**

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# **LAWYER RESISTANCE TO MEDIATION: A SCOTTISH PERSPECTIVE<sup>1</sup>**

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## **Introduction**

The issue of lawyer resistance to mediation is one which has blighted the process since the early days of its re-birth in the 1960's USA. While mediation has grown significantly in many jurisdictions globally in recent decades and lawyers heavily populate the mediation field in many contexts both as mediators and as party representatives, simultaneously, lawyers stand accused of acting as a roadblock to mediation's growth. It has been argued that although clearly many lawyers have embraced mediation, many others remain on the fringes apathetic, others are openly sceptical or even anti-mediation in their posturing. Against this backdrop, this paper analyses the notion of lawyer resistance to mediation, the motives of those lawyers who can be seen to have resisted mediation and the impact that any erection of barriers by lawyers has had on, and may in the future hold for mediation practice. While the focus is primarily upon Scotland, the paper also draws on international evidence and indeed my findings may be of relevance to other jurisdictions in which similar issues and trends may be noted. The paper draws on empirical evidence, speculation from academic commentators and others as well as my own observations stemming from 16 years experience in the field, much of which I have spent in conversation with lawyers, mediators, disputants and scholars.

It needs to be said at the outset that lawyers are an easy target any scrutiny of their motives with regard to mediation must take account of that. While surveys of lawyers generally tell us that clients are happy with their own lawyers the general perception of lawyers is poor. They suffer a poor reputation compared to other professionals. Anti-lawyer jokes are rife. Blogs and websites attacking lawyers are commonplace. Characterisations of lawyers in the print and visual media often portray lawyers as shysters, deadbeats, emotionally unstable or cold and calculating. The typical public perception of the lawyer is one who bathes in caviar and paupers' tears - a cynical professional motivated by money to the expense of all else. Like any profession there is historical evidence of course of moves on behalf of the legal profession to enhance their economic interests in various ways and key constructs in lawyer remuneration such as the billable hour clearly lend succour to such a jaundiced view of the profession. Nonetheless, we should

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be wary of allowing the poor perception of lawyers generally to bleed into a rational analysis of their interaction with mediation.

## **Lawyers and Mediation in Scotland: A Review of interaction**

I should begin by saying here that Scotland is a separate and distinct legal jurisdiction from the remainder of the UK. It is what one can term a 'mixed system' in that it has borrowed and is influenced from both of the major legal schools – the common law or Anglo American model and the Roman, civil law tradition. The system of civil justice in Scotland, however, is fundamentally based in the common law tradition and as such mainly adversarial in nature.

The development of mediation, far less lawyers' involvement therein, is still at a relatively early stage in Scotland.<sup>2</sup> Early English developments trickled over the border as mediation began to make an, albeit modest, mark upon Scotland in the late 1980's. A smattering of Scottish lawyers was quick to respond to mediation's promise. One of the first such developments, 'CALM', an association of family lawyer-mediators, was established in 1990. The Faculty of Advocates first established a commercial mediation service in 1996. The Law Society of Scotland followed suit with the inception of ACCORD – a grouping of commercial solicitor-mediators trained in mediation techniques.<sup>3</sup> Some Scottish lawyers also became members of the now defunct 'Mediators' Association'.<sup>4</sup> Outside of family and community mediation, these early initiatives, however, fell into abeyance largely due to a lack of client demand for their services. Nonetheless, rising from the ashes of these early endeavours, new developments have since taken root: lawyers have become involved in providing *pro bono* mediation for the Edinburgh sheriff court pilot mediation service and similar later pilots in Glasgow and Aberdeen sheriff courts;<sup>5</sup> recent times has seen the development of commercial mediation providers in Scotland such as Core Mediation<sup>6</sup> and Catalyst Mediation,<sup>7</sup> both of whom boast significant lawyer representation on their mediation panels and a new Faculty of Advocates Mediation Service was set up in 2007. Such initiatives reflect perhaps a new, reinvigorated interest in mediation in, at least, certain sectors of the Scottish legal profession. Indeed recent field work suggests that a growing cabal of lawyers in Scotland are keen to embrace mediation in a wide range of civil disputes.<sup>8</sup> Steps in setting consistent standards for practice have tentatively begun. The Scottish Mediation Network, an interdisciplinary linking body for mediation activity across the spectrum of civil dispute spheres, was established in 2005

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<sup>2</sup> R Mays & B Clark *Alternative Dispute Resolution in Scotland* (Scottish Office Central Research Unit: 1996)

<sup>3</sup> A Law Society of Scotland committee on mediation was set up at this time, although later disbanded.

<sup>4</sup> Formed in 1995. The author was a member of the original steering committee.

<sup>5</sup> E Samuel, *Supporting Court Users: The In-Court Advice and Mediation Projects at Edinburgh Sheriff Court Phase 2* (2002: Scottish Office Central Research Unit); M. Ross and D. Bain, *Report on Evaluation of In Court Mediation Schemes in Glasgow and Aberdeen Sheriff Courts* (2010: Scottish Executive).

<sup>6</sup> <http://www.core-mediation.com>.

<sup>7</sup> <http://www.catalystmediation.co.uk>.

<sup>8</sup> See, for example, B. Clark., *Mediation and Scottish Lawyers: Past, Present and Future* (2009) 13 ELR 252

with a view to introducing and developing common standards in training and regulation in mediation practice. In stark contrast to the pro-mediation stance of much of the English judiciary, however, any significant court involvement in promoting mediation remains absent in Scotland.<sup>9</sup> University level education in mediation remains sparse in law schools, albeit that, in recent years, instruction has increased.

## **Lawyer resistance in Scotland**

The notion that lawyers have on one level or another acted as a roadblock to mediation's development in civil disputes in Scotland is a longstanding one. My own early research in 1996 noted that those active (or seeking to become active) in the ADR field often blamed the lack of mediation activity on lawyers' ignorance of, or resistance to ADR processes.<sup>10</sup> In an evaluation of the Edinburgh sheriff court mediation service, it was suggested that where parties were legally represented they were less likely to mediate.<sup>11</sup> Empirical evidence from England and Wales has suggested that lawyers are often resistant to mediation. Research from one early English pilot mediation scheme found that demand for mediation was most limited when both parties were legally represented.<sup>12</sup> Dame Hazel Genn's more recent research into the mediation pilots in Central London County Court again blamed the starkly disappointing mediation uptake firmly at the door of lawyers.<sup>13</sup>

## Money, money, money

On a basic level, it can be argued that lawyers have not embraced mediation because of the negative impact it might have on their income. The general argument that lawyers' behaviour may generally be shaped, amongst other things, by economic considerations is not a new notion.<sup>14</sup> Empirical evidence in the USA has revealed a link between the way that lawyers are remunerated and take-up of mediation. Hence, it has been argued that contingency fee arrangements dictate an approach by lawyers conducive to a quick turnaround of cases to maximise income. This may be unlikely to lead to an increase in uptake in mediation if it is seen as an additional and potentially time consuming process step in a process in which swift resolution is sought. Similarly, lawyers paid on an hourly basis may favour recourse to full discovery and delayed settlement not merely to give their clients extra leverage in negotiations but also to improve their own levels of

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<sup>9</sup> See B. Clark, "Institutionalising Mediation in Scotland" (2008) 3 JR 193

<sup>10</sup> Mays & Clark, *supra* n.1/

<sup>11</sup> E Samuel, *supra* n. 5 at para 4.2.50.

<sup>12</sup> H Genn *The Central London County Court Pilot Mediation Scheme Evaluation Report* (1998: Lord Chancellor's Dept).

<sup>13</sup> H Genn *et al*, *Twisting Arms: court referred and court linked mediation under judicial pressure* (2007) available at <http://www.justice.gov.uk/publications/docs/Twisting-arms-mediation-report-Genn-et-al.pdf>

<sup>14</sup> See, for example, H Krizter, "Contingent-fee lawyers and their clients: settlement expectations, settlement realities, and issues of control in the lawyer-client relationship (1998) 23 L. & Soc. Inquiry 795.

compensation.<sup>15</sup> In my recent research of commercial lawyers in 2006, Scottish commercial litigator respondents were generally quick to scotch any speculation about such questionable, economically-induced behaviour. In relation to the statement, “lawyers will lose money if ADR becomes popular”, only 15.6% of respondents agreed with the statement as opposed to 64.5% who disagreed.<sup>16</sup> Similarly research conducted in 2010 with Scottish construction lawyers again found respondents quick to deny that mediation would lead to a reduction in their income.<sup>17</sup>

### Legitimate resistance

Lawyer resistance may often stem perhaps from a legitimate view that mediation is not required, perhaps because there are other, more appropriate, means at hand to resolve the dispute in question. In this sense, surveys of lawyers have suggested that although they are often in favour of mediation in the abstract, in practice this tends to translate into “but not appropriate in this particular case”. Mediation is no panacea, cannot always lead to a settlement and there exists legitimate fears that unsuccessful mediation may simply add a further layer of costs and delay into what may already be an expensive dispute resolution process. Moreover, although the Scottish civil litigation system is adversarial in nature and generally allows tactical deployment by the parties, it is understood that the endemic problems of inherent delay and exorbitant costs found in other common law systems, such as England and parts of the USA have not been so prominent in Scotland, particularly in specialised commercial procedures. Prominent Scottish judges and sheriffs have over

My recent research suggests that the majority of lawyer respondents at the cold face of litigation practice do not share such rose-tinted views of Scottish civil court processes. While some voiced favourable views on the commercial procedures in Scottish courts, in response to the statement: “litigation is generally well adapted to the needs and practices of the business community”, only 31% of commercial litigator respondents agreed as opposed to 60% that disagreed. My construction lawyer respondents were in general similarly negative about litigation.

A further argument that might be presented by lawyers not suggesting mediation to their clients is that if negotiation is imminent and viewed as likely to succeed then there is no need to expend additional client monies on mediation. In my 2006 study, more than three quarters of respondents who had rejected ADR offers from opponents reported that “belief that negotiator was capable of settling the case” was a relevant factor. Mediation proponents

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<sup>15</sup> See R Wissler, “Barriers to attorneys’ discussions and use of ADR” (2004) 19 Ohio St J on Disp Resol. 459 at 467.

<sup>16</sup> B. Clark & C. Dawson, “ADR and Commercial Litigators: A Study of Attitudes and Experience” (2007) 2 CJK 228.

<sup>17</sup> A. Agapoui & B. Clark, “Scottish construction lawyers and mediation: an investigation into attitudes and experiences, forthcoming, IJLBE 2011.

would doubtless counter that mediation may lead to earlier settlement as well as the prospect of widening the pie of what is on offer to disputing parties in the way of creative settlements beyond the limited menu of remedies offered by the courts. Evidence of creativity of settlement in practice is mixed, however, and it seems that in the main, mediated settlements at least in general commercial/civil matters are often financial compromises. The transformative mediation movement may counter that there are more profound client benefits that may arise from the mediation beyond any settlement itself, such as self-empowerment, self-learning and learning about one's opponents.<sup>18</sup> Clients mired in an intractable dispute, however, may not be particularly receptive to the merits of the softer aspects of the mediation experience when resolution of the impasse is the principal aim.<sup>19</sup>

### Cultural barriers

The notion that established, traditional cultural patterns may shape lawyers' attitudes to new ways of working (including mediation) should not be underestimated. For some time commentators have averred that mediation may only begin to flourish in Scotland with an attendant cultural change in the profession. In particular, the adversarial training of lawyers and the working environment they inhabit has been pointed to as an inhibiting factor for mediation's development. Quoted recently, for example, Rod Mackenzie, a leading Scottish litigator, said that "[commercial] mediation is almost completely non-existent... that is because lawyers are taught to litigate and not mediate. There is no cultural foundation for mediation in our legal system."<sup>20</sup> In respect of whether mediation was being stifled because it is anathema to the 'macho', adversarial litigation culture that Mackenzie was hinting at, the following statement was put to respondents in my research: "if a lawyer participated more often in ADR his/her standing amongst colleagues would suffer". A stark response was obtained in that a mere 4% of respondents agreed, as opposed to 92% that disagreed. The bulk of respondents appeared then to be comfortable with at least the idea of consensual forms of dispute resolution within the litigation environment. Similarly, few respondents to the study supported the idea that suggesting ADR to the other side was a sign of weakness in a case (another issue that may be linked to the adversarial culture of litigation negotiations): only 12% of respondents agreed, while 85% disagreed with this notion.

This kind of questioning on particular issues focusing on overtly adversarial, 'macho' traits is perhaps too specific, however, to be especially instructive.

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<sup>18</sup> See generally, R A Baruch Bush & J P Folger, *The Promise of Mediation: Responding to Conflict Through Empowerment and Recognition* (1994).

<sup>19</sup> S Subrin, "A traditionalist looks at mediation: it's here to stay and much better than I thought" (2002/3) 3 Nev L R 196.

<sup>20</sup> R Mackenzie quoted in R Draycot, "Natural born killer" (2004) *The Firm Magazine*, available at <http://www.firmmagazine.com>.

Other more general, cultural norms of the legal profession may be of more import in the context of embracement of mediation. The recent findings of the evaluation of the mediation projects within the Central London County Court, for example, suggested that significant cultural barriers to the development of mediation in the English legal profession remain. In particular, evidence from that study suggested that many lawyers seemed to habitually dismiss court referral to mediation, often without any discussion with their clients, as something irrelevant and anathema to their general *modus operandi*. Mediation simply did not 'fit' into their general scheme of practice in respect of dispute handling. Mediation lies at a more mature stage of development in England and Wales than in Scotland. If there continues to exist cultural barriers to mediation's acceptance within the legal profession south of the border, then one would expect such barriers to be present in Scotland too.

Nonetheless, there is some evidence of at least a limited cultural change within the legal profession taking place. For example, many Scottish law firms are now re-labelling their litigation operations, 'conflict resolution' departments; collaborative law – in which lawyers representing disputing parties (primarily in family matters) agree to act in a consensual fashion with each other and not litigate the case - is gaining popularity in Scotland; an increasing number of Scottish lawyers are taking some form of mediation training and many publicly support the use of mediation; and the recent sheriff mediation pilots may have the top-down effect of propagating a mediation culture throughout the profession. Moreover, the inception of the commercial procedure in the Court of Session and certain sheriff courts (and comparable personal injury procedure<sup>21</sup>) with their quasi-conciliatory ethos and emphasis on expediting settlement may be assisting the displacement of traditional adversarial litigation norms. In view of such developments, arguably the climate for mediation's embracement by the Scottish legal profession is becoming less inclement than hitherto might have been the case.<sup>22</sup> Nevertheless, such developments at best, perhaps, represent encroachments at the fringes of general practice rather than any significant cultural shift *per se*. As will be discussed further below, the general pattern of adversarial, rights-based, partisan representation played out in the shadow of court adjudication by litigation lawyers may remain the norm. Mediation fits somewhat uneasily into this template and may be ignored by many as a result.

## The Lawyer as Gatekeeper

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<sup>21</sup> See E Samuel, *Managing Procedure: Evaluation of New Rules for actions of damages for, or arising from, personal injuries in the Court of Session* (2003: Scottish Executive).

<sup>22</sup> As a relatively small jurisdiction, a cultural shift within the Scottish legal profession may arguably take place more easily than in larger, more disparate groupings – see J McFarlane, *The New Lawyer: How Settlement is Transforming the Practice of Law* (2008) at 19.

It is often remarked without too much accompanying fuss, that lawyers are 'gatekeepers' to mediation's development. Given this oft-stated truism, the argument follows that it is crucial if mediation is to flourish, for lawyers to be brought on-side with the process. While lawyers are doubtless often instrumental in legitimising mediation in the eyes of their clients, and empirical studies seem to bear out this assertion in many contexts, the influence of lawyers over their clients in the course of a dispute clearly varies considerably. In fact glib assertions that lawyers act as gatekeepers placing insurmountable barriers to the prospective joys of mediation in the way of their hapless clients have perhaps clouded attempts to ascertain how clients across different dispute areas actually respond to the promise of mediation and what might be done to better sell the process to them. Indeed, numerous studies have suggested that lawyers have become increasingly receptive to mediation as a form of dispute resolution, at least in the abstract. Nonetheless, the surge in general enthusiasm does not, it seems, always transfer into the reality of increasing case referrals, save where courts or state funding rules propel disputants (and their lawyers) into mediation through various degrees of arm twisting. In responding to questions as to why mediation offers have refused or mediations have not settled, lawyers often blame their clients; the premise here being that lawyers are unable to convince their clients to see the benefits that they themselves they see that mediation might hold. While it might be speculated that such explanations represent no more than a socially desired response, masking lawyer intransigence towards the process, a recent EU funded survey of EU lawyers and business corporations conducted by a consortium led by the ADR Center, revealed that generally speaking lawyers held more positive perceptions of mediation than clients in issues such as potential success rates and time taken to reach settlement. Moreover, lawyers were reported to be more likely to have established a presumptive policy on the use of ADR than corporations and were more likely to favour the instigation of court rules to facilitate mediation.<sup>23</sup> Moreover, there is evidence from studies of individual disputants that mediation is not seen as a particularly attractive proposition, either because parties are seeking to be 'saved' by champions to fight their corner, or because they might prefer an authoritative decision to be rendered on their behalf. Against this backdrop then of potential client ambivalence towards mediation, it is worth exploring the lawyer-client relationship, in particular, seeking to ascertain, "who is in charge" and how that might impact upon the way that a dispute is handled and ultimately disposed of.

### General Ideas

Traditionally it can be said that the legal profession has shown a desire to exert dominance over the lawyer-client relationship and exercise their status as experts with the client mere naïfs. In part at least, this may have been

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<sup>23</sup> ADR Center et al, *The Cost of Non ADR – Surveying and Showing the Actual Cost of Intra-Community Commercial Litigation* (2010)

achieved through history by clothing the law in mystique and embedding legal practice in arcane language and practices. This kind of activity – creating a chasm between their art and the layman - is of course common to all professions in their quest for control and status. Furthermore, traditional legal education and training peddles and hence anticipates in practice, a model of resolution of disputes based solely on legal norms with the client and her extra-legal needs and interests conspicuously absent. The traditional model of legal practice in which lay clients' dispute 'stories' are reframed by an expert lawyer into a legal narrative, thus encourages lawyer-client interactions in which the lawyer calls the shots.

In the realm of dispute resolution processes, recognising the classic, subservient nature of the client, it has been noted generally that lawyers play a critical role in communicating ideas as to the legitimacy of different methods to their clients through "law talk". Thus, according to the classic study by Sarat and Felstiner, "lawyers' assimilation, acceptance, rejection, integration, or other response to alternatives to established norms of litigation practice is critical to both the practical consequences and the impact of civil justice reform and innovation."<sup>24</sup> International experience bears out the truth of this notion in respect of mediation, at least in certain contexts. In her review of the development of court annexed mediation programmes in the USA, Wissler, for example, points to the prominent role of lawyers in directing their clients towards mediation in the court-referred context. She attributes this, *inter alia*, to the limited role that clients play in negotiations outside mediation, the general unfamiliarity of clients towards ADR in general and the significant influence that lawyers hold over their clients.<sup>25</sup> In a similar fashion, Lande found that business executives generally received the bulk of their information about ADR from their attorneys. He further noted that as those attorneys became more experienced in ADR they would be more likely to present themselves as experts in the field with a view to guiding their clients in this respect.<sup>26</sup>

Lawyers are not always in the driving seat in terms of their relationship with clients, however. Although the reality of the situation is doubtless more complex and variations on the broad themes espoused here will be found, research has shown that in general, the more sophisticated and powerful the client is, the less the lawyer is able to exert control over that client in their interactions, including how disputes ought to be resolved. In accordance with the traditional stereotype, lawyers representing disempowered, 'one-shotter' clients in such disputes as personal injury,<sup>27</sup> divorce, consumer and poverty cases may typically view themselves as 'taxi drivers' – in which the client decides on the destination but the route (and thus how the dispute is handled)

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<sup>24</sup> A Sarat & W L F Felstiner, "Lawyers and legal consciousness: law talk in the divorce lawyer's office" (1989) 98 *The Yale Law Journal* 1663 at 1664.

<sup>25</sup> R Wissler, "The effectiveness of court-connected dispute resolution in civil cases" (2004) 22 *Conflict Resolution Quarterly* 55.

<sup>26</sup> J Lande, "Getting the Faith: Why Business Lawyers and Executives Believe in Mediation" (2000) 5 *Harvard Negotiation Law Review* 137 at 169.

<sup>27</sup> Recent research into personal injury actions in Scotland has suggested that lawyers typically remain in control of decisions as to how such disputes are handled: S Coope & S Morris, *Personal Injury, Negotiation and Settlement* (2002, Scottish Executive).

is determined by the lawyer.<sup>28</sup> This may be unsurprising given the gulf in power that may subsist between lawyers and individual clients in such matters alluded to above. More powerful clients may present an altogether different proposition for their lawyers, however. In this sense, there may be an inverse relationship, between the client's status and the control the lawyer exerts over that client.<sup>29</sup> In his seminal 1970's work, Handler has noted that although "lawyers dominate the relationship when clients are poor, deviant, or unsophisticated... [s]trong, rich and confident clients direct their lawyers...."<sup>30</sup>

Commercial clients, in particular, may typically fall into Handler's latter category. US empirical studies, for example, have corroborated the notion that external corporate lawyers in fact rarely drive their clients' goals and rather are commonly seen as mere 'tools' or 'conduits' of their clients.<sup>31</sup> Accordingly, such lawyers can be viewed as 'hired guns' concerned with doing the bidding of their clients rather than exhibiting any real measure of independence and authority over the client. In general it can be said that, as quintessential repeat players in civil disputes, commercial clients will be able to learn more about dispute resolution processes (and lawyers' interests within such processes). Research in the USA even goes so far as to suggest that increased competition for corporate business discourages client-influencing practices on the part of external lawyers, who fear that if they lean too heavily on clients to follow their lead they may swiftly find themselves replaced by more compliant attorneys.<sup>32</sup> The same pattern has been reported in other jurisdictions, including, New Zealand.<sup>33</sup>

Writing in the midst of a global economic crisis, it can be said that in such inclement financial conditions, lawyers are becoming even more likely to kowtow to their commercial clients, for which they are increasingly becoming reliant on for their continued financial viability. Evidence across Europe suggests, for example, that lawyers are increasingly amending their practices, reducing costs by varying their standard hourly billing rates, and increasingly seeking to appease their clients in an ever more competitive environment.

The past two decades or so has also seen a distinct growth in in-house legal counsel. Thus commercial clients have become more informed legally and less reliant on external lawyers. In-house counsel, who carry none of the incentives of external lawyers to render dispute resolution an expensive process, do not merely carry out prophylactic activities, but may also influence the direction of general legal policy within their corporations.<sup>34</sup> Recent UK research by Herbert Smith has gone so far as to suggest that the

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<sup>28</sup> L Mather, "What do clients want? what do lawyers do?" (2003) 52 Emory L J at 1065 at 1075.

<sup>29</sup> See J. Heinz and E. Laumann, "Diversity, Representation and Leadership in an Urban Bar: A First Report on a Survey of the Chicago Bar" (1976) American Bar Foundation Research Journal 717.

<sup>30</sup> J. Handler, *Social Movements and the Legal System: A Theory of Law Reform and Social Change* (1978) at 25.

<sup>31</sup> See, for example, R A Kagan & R E Rosen, "On the social significance of large law firm practice", (1985) 37 Stan. L. Rev. 399; E Spangler, *Lawyers for Hire: Salaried Professionals at Work* (1986) at 64 reviewed in Mather, *supra* n. 66.

<sup>32</sup> M. Kelly, *Lives of Lawyers: Journeys in the Organization of Practice* (1994) at 212. See also S. Subrin, "A traditionalist looks at mediation: It's here to stay and much better than I thought" (2002/3) 3 Nev L J 196 at 213.

<sup>33</sup> S. Freeman-Greene, "Mediation: Can We Ignore It?", available at <http://www.leadr.co.nz/db/index.php/articles-mainmenu-162/78-mediation-can-we-ignore-it>

<sup>34</sup> M Cain & C Harrington, *Lawyers in a Post-modern world* (1994).

major factor dictating the attitudes and behaviour of UK blue-chip companies towards ADR is the attitude thereto of their in-house counsel.<sup>35</sup>

Even in respect of individual clients, greater access to on-line generic legal advice and information may be shifting the power dynamic between lawyers and clients, with the latter perhaps now more forthcoming with their own views as to how disputes might be handled. The continued growth of consumerism movements manifest in different jurisdictions and relative decline in the professional status of lawyers across the globe may also be tilting the power scales in the clients' direction.

In those dispute contexts then in which clients are typically dominated by their advisors (be they lawyers, advice centres or housing associations) and have little choice than to place their trust in the guidance offered as to how those disputes should be handled, then 'selling' mediation to those advisors may be important. In relation to disputes involving commercial parties, however, although the further education of external lawyers in the opportunities presented by mediation will doubtless be of value, expediting the practice of mediation may require a better 'sell' to clients themselves and their in-house legal team.

## **Conclusion**

While it is difficult to point to evidence beyond the anecdote of less than altruistic lawyer reasoning for blocking mediation in Scotland, that is not to suggest that lawyers are always right in being less than enthusiastic about mediation in practice. Despite an increasing cabal of lawyer enthusiasts and evidence of an upsurge in interest, unfamiliarity, at least in any developed sense of what mediation may entail and what benefits might accrue for clients, probably remains fairly widespread within the Scottish legal profession as a whole. It is also highly plausible that in many contexts mediation simply does not 'fit' into existing legal practice norms. In particular, lawyers may find it difficult to adjust to a more client-centred vision of dispute resolution that arguably is central to mediation or unshackle themselves from tried and tested modes of negotiation practice in which recourse to mediation seems unnecessary.

In recent times, it seems that certain clients have begun to flex their muscles in the lawyer-client relationship, leading to a shift in the power dynamic and more client control over how disputes are handled. Against this backdrop, it is important to note that evidence suggests voluntary mediation take-up is typically low, even where it is provided gratis. My own research in Scotland has also revealed that often clients do not want to mediate. More research is needed to ascertain what the prospect of mediation holds for would-be users in Scotland, how mediation may be better 'sold' to disputants and the role that lawyers both do and should play in this regard.

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<sup>35</sup> Herbert Smith, *The Inside Track: How the Blue Chips are Using ADR* (2007). See also J McFarlane, *Culture Change? Commercial Litigators and the Ontario Mandatory Mediation Programme* (2003) at 7-8.

Implementation of the proposals stemming from the recent consultation into civil justice reform in Scotland,<sup>36</sup> may lead to the development of more court linked mediation programmes and increasing judicial pressure to mediate. International experience suggests that such an ‘institutionalisation’ of mediation is often crucial to expediting mediation and in particular in getting lawyers on board. The flip side of this scenario which can be observed in other jurisdictions, however, is one in which lawyers begin to dominate the mediation field and mould the process in such a way as to best fit their own interest and practice models rather than the best interests of users, typically through evaluative, settlement driven processes presided over by lawyer-mediators with lawyers in attendance often absent their clients. For reasons of space constraints, the issue of the legal ‘capture’ of mediation cannot be discussed in this paper. Suffice to say here though, that while it is debatable whether such developments should be seen in a negative light or not, those seeking to bring lawyers on-side with mediation must remember to be careful about what they wish for....

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<sup>36</sup> Lord Gill, Review of Civil Justice in Scotland, 2010