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# Dissertation Title

## Lawyers in Mediation



**Polyxeni Papadopoulou**

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Student Name: Polyxeni Papadopoulou  
SID: 1104140035  
Supervisor: Dr. Komninos G. Komnios

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Thessaloniki - Greece

## **Abstract**

This dissertation was written as part of the LLM in Transnational and European Commercial Law, Mediation, Arbitration and Energy Law at the International Hellenic University.

This paper critically examines the role of lawyers in the mediation process only as party representatives not dealing with their role as mediators. To introduce the unfamiliar reader to alternative dispute resolution (ADR) processes, this thesis provides a general description of ADR characteristics and the various roles of lawyers in ADR legal practice. Following, it examines the major disincentives why lawyers may seek to resist mediation and then, it analyzes in detail the role of lawyers at every stage of the mediation process presenting what happens in the European and Greek mediation regime and identifying lawyers' most common errors during advocacy.

Subsequently, this research investigates the suitability of lawyers' involvement within mediation making a recommendation for a more deliberative process in client counselling so as to a more effective use of mediation can be accomplished. Finally, the thesis tries to reach some conclusions about this ADR model as well as the strange and interactive relationship between attorneys and mediation. It is also worth stating that the findings for this dissertation were drawn from the literature and empirical studies in both common law and civil law countries.

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Keywords: alternative dispute resolution, mediation process, lawyers as party representatives, resistance, role, appropriateness.

Polyxeni Papadopoulou

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## Introduction

Systems, throughout the world, meting out justice, have broadly embraced the alternatives of court litigation as an acceptable reparative option.<sup>1</sup> The term alternative dispute resolution (ADR) copes with and settles disputes very different in type and purpose from court adjudication, also including various dispute resolution mechanisms whose list cannot be exhaustive or final as it is still in progress (e.g. arbitration, mediation, negotiation, early neutral evaluation, arb-med, med-arb etc.).<sup>2</sup> Additionally, ADR gives lawyers better opportunities to apply law and solve their clients' problems peacefully than traditional legal practice, despite the fact that, in many cases, it is considered as merely an alternative choice to the current court construction.<sup>3</sup>

More specifically, lawyers perform various functions in ADR legal process. First of all, they negotiate agreements that incorporate dispute resolution processes and as a result they engage with clients, courts, judges and with each other. It is very common for lawyers to be in a professional correlation with each other when taking part in ADR processes.<sup>4</sup> In addition, they design processes for clients<sup>5</sup> in which they may act as third-party neutrals/judges or one-sided party representatives, especially in court-connected ADR programs and also they perform duties as bar committee members, advisors to enterprises and legislators.<sup>6</sup> Moreover, lawyers advise clients about ADR, counseling them about the merits of ADR proceedings and also preparing both clients and the case.<sup>7</sup> Furthermore, they advocate for them, represent them as dominant or sole participants or accompany them as

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<sup>1</sup> See, however, the critical remarks of Fiss, *Against Settlement*, 1984, p. 1073. Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985, p.1359.

<sup>2</sup> The term ADR also is perceived to denote "appropriate dispute resolution". E.g., Menkel-Meadow, *Ethics and Professionalism in Non-Adversarial Lawyering*, 1999, pp. 153, 167-168.

<sup>3</sup> See Reno, *Lawyers as Problem-Solvers: Keynote Address to the AALS*, 1999, p. 5 (that describes the various operations carried out by lawyers).

<sup>4</sup> In this sense, some ADR scholars have argued for greater courtesy in specific ADR processes. E.g., Katsoris, *Advocacy With Civility: A Prescription for Success*, 2001, p. 1.

<sup>5</sup> See Schmitz, *What Should We Teach in ADR Courses?: Concepts and Skills for Lawyers Representing Clients in Mediation*, 2001, p. 190. See further, Goldberg, Sander and Rogers, *Dispute Resolution*, 1999, p.10.

<sup>6</sup> Riskin and Westbrook, *Dispute Resolution and Lawyers*, 1997.

<sup>7</sup> Murray, Rau and Sherman, *Processes of Dispute Resolution*, 1996, pp. 369-370.

silent advisors or co-participants in these processes<sup>8</sup> and they also re-evaluate and help their clients to enforce the terms of the agreement made in ADR. Finally, they assist their clients to return to the system after the completion of the mediation process by providing them with post-ADR mechanism representation, regarding the settlement of the case or the preparation for the following stage of dispute resolution.<sup>9</sup>

The aim of this thesis is to try to shed light on the thorny terrain of lawyers' relationship with and role within the mediation process only as party advocates focusing also on the interaction between them. The analysis of the function of lawyers as mediators is out of the scope of this paper.

Thus, this thesis consists of five chapters, each placed in a logical order to guide the reader through the topic. After this short introduction, chapter two provides a general analysis of the evidence surrounding the extent and nature of global lawyer resistance towards mediation. In chapter three the issue of the role of attorneys before, during and after the mediation process will be presented and described in detail as well as their mistakes during this process. In connection to this, the European Mediation Directive and also the European Code of Conduct for Mediators combined with the Code of Professional Conduct for Mediators by the Greek Accreditation Committee and more generally the framework of Mediation in Greece, meaning the Greek Law on mediation will be also examined. Thereafter, chapter four will deal with the much contested issue of the suitability of lawyers deluging the mediation field only as party advocates. Further, this chapter will explore some debated issues that emerge from the attachment of mediation to the legal system and the infusion of lawyers into the process and will complete with some thoughts over lawyers' future steps on the mediation field. Lastly, chapter five will provide some final remarks.

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<sup>8</sup> *Ibid.* pp. 370-371.

<sup>9</sup> *Ibid.* pp. 373-74.

## Lawyer Resistance to Mediation

A highly important matter which I will focus on this chapter is the principal restriction on more extensive use of the available mediation process which stems from lawyers' recalcitrance to using mediation and the most important reasons why lawyers all over the world resist mediating.

Periodically conducted studies on lawyers' tendency to use mediation reveal a generally positive attitude of the legal profession towards the process. However, that evidence does not seem to be related with a potential increase in voluntary occupation with the process. Indeed, not only across different countries worldwide, but also within the same country, the rate of progress of the mediation process has varied remarkably. Hence, in many states the mediation practice continues to exist at the extremes of conventional controversy, regardless of the extensive promotion and advertising. In general, the significant progress that has been made is due to the fact that mediation was considered as a process linked to traditional legislative systems.

For instance, recently in many countries there was an increasing movement in adopting the mediation process to court systems, in order to resolve disputes and conflicts instead of using court litigation. In particular, in the U.S.A., those mediation programs that were associated with court systems started appearing in the 1980s and since then they immediately expanded to countries such as the United Kingdom, Australia and Canada. However, in the countries of Asia, Western Europe, Latin America and Africa their evolution was obviously lower. Additionally, a great number of countries all over the world, have developed mediation options easily available to clients confronting conflicts and disputes that could be underlain to arbitration or litigation.<sup>10</sup>

Furthermore, it seems that many business executives in Greece are convinced that mediation provides them with more benefits than adjudication does. For example, they consider that through mediation they can settle their disputes in less time and also spending

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<sup>10</sup> Peters, *Understanding why lawyers resist mediation*, 2011, p.1.

less money, as well as they have the opportunity to secure their commercial relationships, the fame and also the trade secrets of their businesses, unlike adjudication or arbitration.<sup>11</sup>

Despite these views, businesses do not mediate frequently. Acting in accordance with these results, countries in Europe, Latin America and the U.S.A., traditionally use adjudication to settle their disputes. In addition, arbitration is considered the most common process to settle cross-border conflicts while litigation is the chosen one for dealing with domestic disputes.<sup>12</sup>

This is due to the fact that the plurality of lawyers worldwide resist mediating, even though many of them have notably contributed to the global growth of court-connected mediation programs. To put it in other way, “lawyers as “gatekeepers” to mediation have long been suspected of acting as a roadblock to mediation’s advancement”<sup>13</sup>. This universal notion regarding lawyers’ refusal to accept mediation is widespread and consists of lawyers’ resistance suggesting the procedure to their clients. Subsequently, this recalcitrance is of great importance because in most countries, attorneys either choose on their own which method of dispute resolution they will use without paying attention to their client’s opinion, or they exert powerful influence upon their clients concerning this selection. Moreover, there is evidence proving that lawyers’ aforementioned behavior is often accompanied by not drawing a full contrast between mediation and court litigation to their clients.<sup>14</sup>

If it is a commonplace that lawyer hostility against mediation does exist, it is then absolutely normal that there is a need to answer the burning question why this happens, when many clients are aware of mediation’s advantages over adjudication. There must certainly be many dissimilar factors that may be related to attorneys’ recalcitrance to mediation.

What this means is that, some reasons may seem to be lawful or socially concerned, whilst others are less admissible and it is possible to be incited by shameful and despicable

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<sup>11</sup> See for example, resolve Διαμεσολαβητές και Ειδικοί στην Εξωδικαστική Επίλυση Διαφορών (Mediators and Experts in ADR), *Διαμεσολάβηση – Οφέλη για πολίτες, επιχειρήσεις και δικηγόρους (Mediation – Benefits for clients, businesses and lawyers)* <<http://resolve.gr/service/>> Accessed 15 December 2015.

<sup>12</sup> Peters, 2011, p.1.

<sup>13</sup> Clark, *Lawyers and Mediation*, 2012, p. 29.

<sup>14</sup> Peters, 2011, p.1.

motives on behalf of lawyers. Subsequently, I generally put together those reasons that might, at first sight at least, be deemed as legal and lawful to avoid the mediation process as: objections over the quality of the services that mediation offers, absence of client demand, anxiety about the potential dishonest use of the process by opponents and controversies based on the effectiveness of mediation (e.g. if it is in fact quick or cheap) in comparison with other mechanisms of dispute resolution. Moreover, specific more neuropsychological objections may be held, including biased brain-based perceptual processes. Regarding the reasons, which may be considered as illegal, include: self-centered economic imperatives, ignorance of the usefulness of the process and cultural biases in traditional legal practice.<sup>15</sup>

With the above reasons in mind, I will assess the evidence as regards to what extent lawyer resistance has suppressed mediation's aspirations and will probe the grounds that hide behind lawyers' existing disinterest towards mediation.

### ***The Factors of this Widespread Resistance***

Bearing constantly in mind the above heated conversation, I move on analyzing the main reasons that are responsible for lawyers resisting mediation and I will start with the matter of "the lawyers' economic disincentives to mediate"<sup>16</sup>.

#### Lawyers' Economic Disincentives

Clearly, in many countries, it is seriously speculated that lawyers' worries over the damaging effect on their fee income have led to their resisting mediation. Indeed, lawyers are very interested in compensation dynamics when performing their job. So, they are very well informed that in most countries assisting their clients in settling disputes and conflicts via arbitration or litigation enhances their financial gains due to the fact that "contexts which permit charging outcome percentages"<sup>17</sup> are absent. Therefore, many lawyers gain money in accordance with the hours spent to get ready for and perform adjudication.

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<sup>15</sup> Clark, 2012, pp. 30-31.

<sup>16</sup> *Ibid.* p. 39.

<sup>17</sup> Peters, 2011, p. 4.

On the other hand, mediation constitutes a rapid and costless dispute resolution option that decreases the time legal actions require, as a survey conducted in 2009 showed. More specifically, this survey estimated 15,000 non-criminal legal proceedings being operated by wage-earner assistant, U.S.A. Lawyers and discovered that mediation saved an average of 88 attorney hours per case.<sup>18</sup> This is the reason why many end up to the conclusion that charging by the hour causes financial disadvantages for attorneys to use mediation and it results in motivating lawyers to waste time at work on purpose as well as in thwarting fast and cheap methods of dispute resolution such as mediating. Indeed, twenty-five percent of U.S.A. attorneys surveyed accepted that they believe that a potential increase in mediation would diminish their compensation payment.<sup>19</sup>

To continue with the above survey, it is apparent that attorneys in other places of the world apart from the U.S.A. who bestir themselves in civil systems that do not apply charging by the hour, also feel the same financial anxiety and uncertainty. For instance, according to the survey, in Latin America, lawyers revealed their worries about the fact that through litigation one can make a profit in contrast with mediation. In European countries such as Scotland, Denmark and Italy, lawyers' terror due to the negative effect that increasing mediation might have on their income, caused their reluctance to deal with it, as well.<sup>20</sup>

Furthermore, in many European countries, the compensation programs enacted by existing statutes, frequently discourage attorneys to mediate. For example, mediating may not be included in several compulsory or advisory fee programs, hence it makes it more difficult for lawyers to be paid for their work. In Germany, the system of insurance of legal costs pays for adjudication but not for mediation, while in Italy the fee system is fundamentally constructed on the bulk of hearings and briefs held and mediation demands neither of them.<sup>21</sup>

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<sup>18</sup> Bingham et al., *Dispute Resolution and the Vanishing Trial, Comparing Federal Government Litigation and ADR Outcomes*, 2009, p.255.

<sup>19</sup> Peters, 2011, p. 4.

<sup>20</sup> *Ibid.* p. 4.

<sup>21</sup> De Palo and Harley, *Mediation in Italy: Exploring the Contradictions*, 2005, p.469.

In my view alternative dispute resolution (ADR) and more specifically mediation does not need to indicate upsetting fall of income for lawyers. Lawyers should enjoy the right of compensation for preparing for and getting involved in the mediation process, even if this may be in need of adjusting the existing compensation schemes enacted by statutes. They should also be permitted to evolve “value-based outcome-oriented and similar bonus approaches”<sup>22</sup> as well as “success fees”<sup>23</sup> that recompense them for achieving efficient, high-quality and timely solutions by mediating.

In particular, Greece, unlike many legal systems in Europe, does not need to make any of the aforementioned amendments, as she already has a provision about lawyers’ fees in mediation. More specifically, Article 71 of the Greek Lawyers’ Code guarantees the attorneys’ fees, which are paid in advance in their entirety, either in case there is a drafted agreement for a fee (Article 58(1) of the Greek Lawyers’ Code) or not. Also, in Article 71 of the Greek Lawyers’ Code, it is also stated that the remuneration of the attorney is owed and is receptive of payment, regardless of how the resolution of the dispute has been fulfilled, whether it has occurred judicially or extra judicially. Furthermore, Article 12(2) of the Greek Mediation Act states that “Each party pays his or her own attorney’s fees”.

It is, thus, clear that if lawmakers are eager to upgrade the mediation process, then they should not ignore the structural rules of the process that provide the fees of lawyers involved.<sup>24</sup> In addition, in order the EU directive to be implemented as a legislative instrument capable of mediating all cross border disputes, then making mediation economically appealing to lawyers is of primary importance.

#### Ignorance and Shared Cultural Traditions

Every profession possesses a conceptual store of information, educational experiences and shared rules that originate from and reinforce this central knowledge. Lawyers worldwide share experiences gained by education and standards which are tightly connected to legal theories, norms of procedure and law, regardless of great dissimilarities

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<sup>22</sup> Peters, 2011, p. 4.

<sup>23</sup> Clark, 2012, p. 44.

<sup>24</sup> Except of course if there is intention to prevent lawyers from the process.

and alterations concerning the evolution of law and its origin across the world. These rules and experiences are very important to a structure of treatments and privileges for settling conflicts amicably through the adjudication process. Subsequently, this framework gives rise to lawyers' inclination to take it for granted that dispute resolution should only happen when applying legal rules to actual incidents entered into disputes and conflicts. These inclinations, in their turn, motivate lawyers to consider only through law-based glasses and this strongly affects practices when they congregate and provide information during discussions with their clients.

Furthermore, when lawyers support their general understanding on legal rules, they are able to convert complicated situations into feasible frameworks for litigation. This perception except of being crucial, it is also selective, as it highlights certain things, while excludes others. For example, this selective perception in conflicts underlines the importance of compiling information about legal and fact-based data which support or conflate these evidence matters and rights, substantial documents and significant witnesses. At the other extreme, this selective perception has the tendency to preclude the collection of information about non-monetary contemplations and interests and it does not point out considerations such as promoting respect between the disputants and meeting their expectations and desires.<sup>25</sup>

What is more, lawyers throughout the world share with each other cultural beliefs on law that emphasize old-fashioned and long-established choices and that do not really promote change. On the other hand, mediation, in particular, may assume a change from legal positions to interests on behalf of the clients and from adversarial lawyering with only purpose the winning of the case to cooperation, hence, it constitutes a challenge to customary legal formations of dispute resolution. Also, humans by their nature tend to depend on traditional and habitual approaches that constitutes a prejudice and seems to be raised by supporting willingly law as career. Legal rules and more generally the law in order to be attractive to as many lawyers as possible providing them with legal structures and frameworks should be reviewed carefully both in civil law and common law systems.

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<sup>25</sup> Peters, 2011, p. 3.

Additionally, practically in all legal systems all over the world, there are established litigation approaches with explicit rules in resolving conflicts as well as the methods for acquiring third-party decisions are straight and distinct.<sup>26</sup>

Besides that, legal culture and education in crafting the regulative structure of lawyers' actions is of great significance. Lawyers worldwide lean on legal education practices and experiences that focus on legal principles and procedures like adjudication, while they de-emphasize methods like mediating or negotiating. Moreover, across the world, mediation is not importantly included in the core of legal education. Thus, novice lawyers almost always begin to be involved in the legal profession with limited knowledge of mediation.

Furthermore, in most curriculums of law schools across the globe it is prevalent that modules on judicial adjudication are the core ones, whilst lectures on non-adversarial mechanisms of dispute resolution only intend to supplement this core knowledge, playing a secondary role. This special curricular priority given in adjudication process, gives the impression that alternative forms of dispute resolution are a curse to the traditional legal training and also indirectly indicates the superiority of adjudication over mediation in resolving conflicts and disputes. Hence, teaching the framework of ADR processes in civil law countries' educational system and especially in Greece is totally absent in the course of a bachelor degree and education, which aims to provide young scholars with inclusive education in law and with chances for further research in sectors affiliated with law, is only dedicated to the interpretation of statutes, the application of the law to narrative facts and case analysis, without any reference to clients' extra-legal desires.<sup>27</sup> Also, in Greece, law schools provide students only with the skills needed to become accurate professionals of the traditional legal approaches, without offering them the opportunity to come into contact with values beyond this long-established content of law.<sup>28</sup>

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<sup>26</sup> *Ibid.* p. 3.

<sup>27</sup> See for example, Aristotle University of Thessaloniki, *School of Law* <<https://www.auth.gr/en/law>> Accessed 12 January 2016.

<sup>28</sup> *Ibid.*

In addition to this, there is only a very small percentage of law schools in Greece that offer learning opportunities in mediating only at a postgraduate level, among which the International Hellenic University, which provides scholars with knowledge on the mediation process. Greek lawyers can also attend seminars in order to take a small taste about mediation, as well as they can sit the exams so as to become accredited mediators by the Greek Accreditation Committee. Not surprisingly, same or worse curricular variations exist in most law schools all over the world.<sup>29</sup>

Nevertheless, it is not simply the adherence to the classic legal methods of dispute resolution that may be annoying for mediation enthusiasts, but also the non-existence of explicit and comprehensive mediation coverage in legal education. As it was expected, in countries where the mediation process is more widespread such as in Australia and Canada, mediation coverage is better installed in their university law curriculums.<sup>30</sup> Conversely, across Europe, mediation coverage remains unequal, while mediation education within law schools is being developed at a slow pace and finally in many other parts of the world, it is deemed that mediation's existence in legal education is insignificant.<sup>31</sup> Thus, for all the aforementioned reasons, traditional legal classes remain the norm, with interactive classes more uncommon.

Another crucial point is that the shifts mediation indicates may also be upsetting to the general cultural norms that pervade the legal profession and especially their status quo. Traditionally, it can be said that lawyers have expressed a craving to establish superiority in their relationship with their clients.

More specifically, lawyers always enjoy feeling in control when they are involved in resolving disputes and adjudicating performs exactly this duty. Thus, in most countries, adjudicating allows lawyers to play predominant roles and remain leaders to the attempt until third-party neutrals decide. Moreover, as lawyers have the tendency to lead than follow, adjudicating once again requires lawyers to display written and oral justifications, to

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<sup>29</sup> Peters, 2011, p. 3.

<sup>30</sup> Prujiner, *Recent developments in mediation in Canada*. In: Alexander (ed.), *Global trends in mediation*, 2nd edn., 2006, p. 101.

<sup>31</sup>See for example, Ooi, *The role of lawyers in mediation: what the future holds*, 2005 <<http://www.malaysianbar.org.my/>> Accessed 14 January 2016.

gather relative evidence and also to use their abilities to apply those expert skills persuading decision-makers. Lastly, in many countries, there are provisions stating that lawyers are the only persons permitted to represent clients in adjudication.<sup>32</sup>

Under those circumstances, disputants very often surrender to their lawyers' skillfulness and knowledge and let them lead when adjudicating. Therefore, they trust their attorneys in order to handle their cases and conflicts.

On the other hand, mediating unlike adjudicating reduces lawyer opportunities to apply their expertise in order to persuade the other parties of the dispute, by de-emphasizing determinations regarding the applicable law and searching for outcomes based on decisions concerning benefits, risks and costs. Thus, mediation with the unknown aspect of the insertion of a third party to assist resolution may necessitate a kind of resignation of lawyers' control giving a more central role to the client.<sup>33</sup>

In addition, mediation is a less formal procedure, where clients can listen and talk and generally they can participate. Furthermore, mediating restricts lawyer control by providing clients opportunities to have interactive conversations directly with their counterparts without distortion from their attorneys and also to make reasonable decisions on their own adapted to their needs.

Finally, people like to act within their comfort zones based on their experiences and knowledge. As we all know through our legal experience, lawyers often avoid performing actions that include less comfort. Therefore, it is not a surprise to say that lawyers may not feel comfortable with a process that aims to confiscate their traditional role in a dispute resolution either in favor of a neutral third-party or their clients. Possibly, most of the world's lawyers, do not have any knowledge in approaching mediation counterparts and assisting clients in preparing for and taking part in mediation. Furthermore, actions that stimulate positive emotions promote resolution and boost relationships, whereas actions that generate negative, malevolent emotions distract attention from resolution and harm relationships. Thus, world's lawyers need education in how to listen and sympathize with

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<sup>32</sup> Peters, 2011, p. 4.

<sup>33</sup> Unlike third party judges.

their clients in emotional moments effectively in order not to feel uncomfortable mediating.<sup>34</sup>

Having the above background in mind of lawyers' restricted engagement with mediation and some evidence that lawyers have the control in their relationship with clients, it is easy to jump over to the conclusion that lawyers hinder the evolution of mediation.

Given that change is never easy and it often causes fears of making mistakes and receiving negative reviews from colleagues and clients, in my opinion lawyers are expected to adapt to the fact that mediation has proven and multiple benefits for their clients. In this direction, they should make sure that they do not avoid mediation because it removes them from their comfort zone when tackling with the complex emotional dynamics and also gives them less leadership, control and opportunities to use legal advocacy.

#### Fears over the Efficiency of Mediation

Lawyers appear sometimes to turn down mediation on the basis that they believe that resort to the procedure is not financially efficient, as it has already been mentioned beforehand.<sup>35</sup> This belief may occasionally at least be due to client reluctance to spend their monies on a relatively untested and untried process<sup>36</sup> and also to the lawyers' belief that they do not need a third party intervention in order to mediate a dispute.

As far as the first issue is concerned, lawyers sometimes put the blame on their clients<sup>37</sup> when they respond to questions as to why mediation has been rejected, supporting that they are powerless to persuade their clients to appreciate the advantages that they themselves see mediation might hold. It is first worth noting here that a recent EU funded survey of EU lawyers and business corporations carried out by an association the leader of

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<sup>34</sup> Fisher and Shapiro, *Beyond Reason: Using Emotions As You Negotiate*, 2005.

<sup>35</sup> See above pp. 5-7.

<sup>36</sup> Disputing parties may often be impatient to wait for "jam tomorrow"—i.e. spend money in the short term to save in the future.

<sup>37</sup> Clark and Dawson, *Scottish commercial litigators and ADR: a study of attitudes and Experience*, 2007, p.235. Agapiou and Clark, *Scottish construction lawyers and mediation: an investigation into attitudes and experience*, 2011, p.169. See also Sidoli del Ceno, *An investigation into lawyer attitudes towards the use of mediation in commercial property disputes in England and Wales*, 2011, p.188 (English property lawyers).

which is the ADR Center revealed that speaking lawyers in general had more positive perceptions of mediation than business clients in issues such as time taken to settle in mediation and potential success rates unlike the speculations that the above explanations constitute a camouflage of lawyer intolerance towards the process. Similarly, research in the U.S.A. background conducted by John Lande presented that lawyers were more thankful for mediation than business executives.<sup>38</sup>

Despite the above described research findings, there is important evidence across the world that many businesses have adopted mediation pledges and also clients in some fields are positively inclined towards mediation.<sup>39</sup> There is also some evidence from studies of individual disputants that mediation is not always seen as an extremely attractive option and lack of knowledge of the process may be responsible for this. It is noteworthy though that studies may often tell us that clients are thankful of mediation abstractedly, although there is little knowledge or no knowledge at all about what actually mediation reserves for parties. For example, in a 2005 study of German commercial undertakings in which only 28% of all firms surveyed had mediated, the authors noted a noticeable disparity between respondents' opinions on mediation theoretically and attitudes held towards the procedure during a real dispute, which were far less in favor of mediating.<sup>40</sup>

Apart from cost-ineffectiveness of mediation, clients' reluctance may also appear because parties might like it better if a ministerial decision will be rendered on their behalf<sup>41</sup> or because they seek to be rescued by their champions<sup>42</sup>. Moreover, many parties in a dispute may prefer litigation process in order to fully apply their tactics underestimating the mediation process. This may be true for defendants who are happy to prolong the process

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<sup>38</sup> Lande, *Getting the faith: why business lawyers and executives believe in mediation*, 2000, pp. 172-173.

<sup>39</sup> A number of studies in the U.S. and Latin American contexts are summarised in Peters, *It takes two to tango, and two to mediate: legal, cultural and other factors influencing United States and latin American lawyers; resistance to mediating commercial disputes rich*, 2010, pp. 387–392.

<sup>40</sup> *Ibid.* p.392.

<sup>41</sup> See for example, Merry, *Getting justice and getting even: legal consciousness among working-class Americans*, 1990. Merry and Sibley, *What do plaintiff's want? Re-examining the concept of a dispute*, 1984, pp. 151–178.

<sup>42</sup> Genn, *Paths to justice: what people do and think about going to law*, 1999, p. 100. Genn and Paterson, *Paths to justice Scotland: what people in Scotland do and think about going to law*, 2001, p. 117.

either because they want to delay payment or in the expectation that their opponent will be discouraged and quit or run out of money to complete the process.<sup>43</sup>

In respect of the latter issue (lawyers' doubt if there is enough room for mediation in a legal system in which anyway settlement prevails), empirical research often suggests that lawyers resist mediation in case of a possible negotiated agreement.<sup>44</sup> Indeed, this does not sound strange, as in many contexts, a lawyer who exercise his skills so as to settle a dispute is the standard option. Also, the perception that mediation does not offer anything specifically distinguishable from negotiation, also contributes to the resurgence of the aforementioned doubts against mediation's worth.

Furthermore, lawyers' and clients' little understanding of and cultural bias towards mediation may be connected to some range to the notion that the possibility of a negotiated settlement makes mediation a redundant accoutrement.<sup>45</sup> So, mediators may in particular ways help facilitate resolution and also upgrade the quality of settlement rules.

It may require much effort of course to understand whether lawyers are easily hiding behind such allegations to satisfy their cultural bias or mask economic imperatives. At any rate, the evidence concerning mediation's value in financial terms is not so explicit as to regard that this is always the case.

Nevertheless, those who are of the opinion that mediation is not an economically efficient process may at times misunderstand. To put it differently, it seems that in the speculation that lawyers have resisted mediation because of the economic disincentives lies the argument that mediation is more cost-efficient for participants<sup>46</sup> than traditional means of dispute resolution. First, it is indicated that mediation may settle the disputes faster and succeed more satisfactory outcomes and also it may share procedural justice for parties

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<sup>43</sup> Genn, *Judging civil justice: the 2008 Hamlyn lectures*, 2009, pp. 109–110.

<sup>44</sup> Clark and Dawson, 2007, pp. 235–236. Sela, *Attorneys' perspectives of mediation: an empirical analysis of attorneys' mediation referral practices, barriers and potential agency problems, and their effect on mediation in Israel*, 2009, pp. 43–44. See also Shestack, *Introduction: a volume paving a path forward*. In: Van Winkle (ed.), *Mediation: a path back for the lost lawyer*, 2001, p. xi.

<sup>45</sup> "Many business people who find themselves in dispute are experienced negotiators and understandably believe that if they have not been able to negotiate a settlement, then a mediator is unlikely to be able to assist"—Genn, 2009, p. 110.

<sup>46</sup> I suppose that the fact that mediation may imply savings in terms of public costs is of less importance to individual lawyers.

involved. Also, mediation may broaden the pie of the potential remedies offered to the disputants in contrast with the courts.<sup>47</sup> However, evidence of creative settlements, especially in the court-connected mediation is mixed and it seems that generally mediated settlements are frequently simply financial compromises.<sup>48</sup>

#### *Parties' Costs in Mediation*

The empirical evidence on the subject of the cheapness of mediation varies and tangible cost advantages for parties may fiercely differentiate depending the circumstances, while the extravagant and untrustworthy claims as to the cost-efficiency of mediation are plentiful. Consequently, mediation fees may diverge exceedingly from services connected to the courts generally given for free to the exorbitant rates charged per hour at the higher levels of the commercial market. Count up to such expenses the fees of attendance and preparation of lawyers and of other experts, hence, mediation, is not always regarded as an economical option for parties in a dispute.

If the issue of what to compare and contrast the costs of mediation to was solved, the establishment of the cost-efficiency of mediation would not be so difficult. Although, it may be seductive to compare the costs in mediation to parties' potential costs in litigation, it is very common for the parties to settle during the litigation cases, in any case absent mediation. Whereas, when parties mediate, they may face difficulties in discovering at what point such settlement might happen. Nonetheless, judging by the fact that mediation in most cases results to earlier settlement than non-mediated settlement, it is very possible for the parties to save money.<sup>49</sup> Conversely, where there is no settlement in mediation and consequently the case continues on the litigation path, increased costs are, certainly, most likely to occur.

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<sup>47</sup> Menkel-Meadow, *The trouble with the adversary system in the post-mod multi-cultural world*, 1996, p. 24.

<sup>48</sup> See for example, in the UK context, Genn, 2009. Brooker and Lavers, *Commercial lawyers' attitudes and experiences with mediation*, 2002, p. 1338. In the U.S. setting, Welsh, *Making Deals in Court-Connected Mediation: What's Justice Got to Do With It?*, 2001, pp. 812–816. It is debatable, however, that this lack of creativity is at least in part due to lawyer co-option of mediation.

<sup>49</sup> Wissler, *Barriers to attorneys' discussions and use of ADR*, 2004, pp. 459–508.

At the other extreme, people who take part in mediation often consider the process as cost-effective. Also, surveys conducted on lawyers internationally, disclose that they often believe that their clients may save money as a result of recourse to mediation.

#### *Tactical Use*

The effectiveness and non-settlement of the mediation process may be influenced by the malpractice of the process. To elaborate it, improper treatment might be related to deceitful engagement in the process, where lawyers or their clients might not intend to try and find resolution to the deadlock through mediation. Further, “recourse to mediation may be used as some sort of “fishing expedition””<sup>50</sup> to discover as much as details and facts as possible about an opponent’s case, or merely to waste the time and money of one’s opponent. There is also proof, especially in the U.S.A., revealing that some lawyers lie at a regular basis in mediation processes in order to improve their clients’ position in the negotiations that are under way.<sup>51</sup>

Evidence of such tactical use in practice is as a matter of fact relatively low<sup>52</sup>, however, it may be said that lawyers with little or any experience at all in mediation, will be unwilling to participate in the process fearing illegal treatment by their opponents.<sup>53</sup> So, in fear of their foe’s tactical use of mediation, lawyers may stay uneducated and not use the process. Nevertheless, evidence presents that very often lawyers’ mindsets can be altered during the mediation process from adversarialism to truthful contribution.

Consequently, it can be suggested that the confidentiality provisions of Article 7 of the EU Mediation Directive can offer a solution to the aforementioned problem of tactical use of the process. In particular, Article 7(1) of the EU Directive states that “Given that mediation is intended to take place in a manner which respects confidentiality, Member States shall ensure that, unless the parties agree otherwise, neither mediators nor those involved in the administration of the mediation process shall be compelled to give evidence

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<sup>50</sup> Clark, 2012, p. 62.

<sup>51</sup> Peters, *When lawyers move their lips: attorney truthfulness in mediation and a modest Proposal*, 2007, pp. 119–142.

<sup>52</sup> Clark and Dawson, 2007, pp. 228–249. Brooker and Lavers, 2002.

<sup>53</sup> In Wissler’s study of Arizona lawyers’ attitudes to ADR, some 26% believed that mediation might be taken advantage of, as a Trojan horse in one’s litigation strategy—Wissler, 2004, p. 485.

in civil and commercial judicial proceedings or arbitration regarding information arising out of or in connection with a mediation process". In this way, the EU Directive, addresses the issue of the evidentiary restriction to forbid hearing the mediator and those involved in the administration, such as translators, secretarial staff etc. as witnesses in a potential subsequent litigation or arbitration. Thus, this statutory and contractual confidentiality rule intend to preclude the possibility that the parties in the mediation process will be unwilling to reveal information due to their fear that this information might be used against them in a subsequent court litigation or arbitration.

Furthermore, relative provisions on confidentiality having some differentiations compared to the EU Mediation Directive, exist in both the European Code of Conduct for Mediators (Point 4) and the Greek Mediation Act (Article 10).

#### Quality Objections

The broad speculation that lawyers may resist mediation because of their anxiety as to the quality of mediators constitutes an issue per se related to any doubts over mediation's efficiency. Likewise, lawyers may generally feel uncertain about the quality of mediators available in the field.<sup>54</sup> So, occasionally this is a reason why lawyers are disinclined to advise their clients to mediate, claim that is also proved by empirical research.<sup>55</sup>

Again it can be supported that such views may often be linked to lawyers' opposition and lack of knowledge towards the process. In particular, hostility concerning the quality of mediators may be related to the fact that lawyers are unfamiliar with the mediation practice in general as opposed to the familiar for them practice in the traditional legal field. Participation, though can dispel many quality concerns of attorneys, given that researches often disclose lawyers' satisfaction after the performance of mediators.<sup>56</sup>

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<sup>54</sup> For a summary of evidence of lawyers' worries over lawyer quality in the family field, see Melville and Laing, *Closing the gate: family lawyers as gatekeepers to a holistic service*, 2010, p. 170.

<sup>55</sup> Clark, 2012, p. 62.

<sup>56</sup> Agapiou and Clark, 2011, p. 166. Relis, *Perceptions in litigation and mediation: lawyers, defendants, plaintiffs, and gendered parties*, 2009.

Nonetheless, concerns about quality may have substance and be true, as studies suggest that lawyers are often dissatisfied with the mediators' performance.<sup>57</sup> More specifically, mediators are criticized as being excessively self-assertive and ambitious in their persistent pursuance of settlement, raising moral issues regarding mediators' conduct.<sup>58</sup> Apart from this, poor mediators are once in a while being accused of sinking settlement opportunities.

Also, we must constantly have in mind that mediation still in many contexts remains an emerging field of activity and that the width that mediators are underlain to rules differs significantly across different jurisdictions. Furthermore, discussions regarding regulation lead to a dialogue about what is preferable, to guarantee the assurance of quality, contribute to the establishment of the process and infuse certainty and confidence in users on the one hand or to raise novelty in the field on the other.<sup>59</sup>

#### Biased Brain-Based Perceptual Processes

The prejudices originating from the way human brains make decisions can be considered as one last more neuropsychological factor of this resistance. To begin with, all actions engaged in recognizing, suggesting and performing dispute resolution options commence with perception. Humans understand the external world through their sensory organs and the meanings that derive from these perceptions have an impact on their actions. Recently, neuroscience evidenced that humans form these meanings mainly as the outcome of internal emotional brain reactions.<sup>60</sup>

More specifically, lawyers throughout the world think that their decisions are reasonable. However, substantial neuroscience evidence suggests that many distinguishable emotional factors often pervert logical decision-making. These factors can be divided in the emotional brain systems and neural shortcuts brains. Therefore, humans

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<sup>57</sup> *Ibid.* p. 167 (a minority of respondents blamed mediators for unsuccessful mediations in the Scottish construction sector).

<sup>58</sup> Pollack, *The role of the mediation advocate: a user's guide to mediation*, 2007, p. 20. Genn, 2009, p. 124.

<sup>59</sup> See Boule and Nestic, *Mediation: principles. Process and Practice*, 2001, p. 465. Boon et al., *Regulation mediators?*, 2007, pp. 26–50.

<sup>60</sup> Peters, 2011, p. 6.

are more likely to use emotional brain-based perceptions and neural shortcuts when facing precarious situations and nearly all disputes create substantial unpredictability, at least in the beginning.<sup>61</sup>

Although, these emotional brain-based decision-making processes and neural shortcuts normally work well, fail at times for particular reasons and many failures occur when coping with disputes, while they affect choosing adjudication to mediation.<sup>62</sup>

Furthermore, people often explain the same situations very differently, as everyone chooses and assess external incentives in distinctive ways. Also, perception is affected by what people have experienced and lawyers all over the world have probably experienced only aspects of adjudication. That is why when evaluating dispute resolution techniques, they perceive only the aspects that are associated with adjudicatory resolution. Also, this adjudicating experience motivates them to de-emphasize non win-lose solution options which are of great importance in mediating. It, also, explains why many lawyers are terrified in that mediation reduces gain and also why many of them believe that mediation is solely a kind method for acquiring less money.<sup>63</sup>

To my mind, these biased emotional brain-based perceptual patterns and neural shortcuts are adequate to have an impact on lawyers that they should use adjudication to all disputes. In particular, these patterns and shortcuts merge to strengthen adjudication against mediation. Therefore, the greater number of lawyers all over the world, almost unconsciously perceives adjudication as the alternative choice if non-mediated negotiation fails. Also, they do not usually have absolute consciousness of the benefits that mediation may hold, when they make this perception.<sup>64</sup>

### ***To sum up***

We probed and analyzed on broad terms some of the factors why lawyers may have avoided to use mediation, as well as the existing evidence. When, in practice operating

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<sup>61</sup> *Ibid.* p. 6.

<sup>62</sup> *Ibid.* p. 6.

<sup>63</sup> *Ibid.* pp. 6-8.

<sup>64</sup> *Ibid.* p. 9.

single cases, there may be a whole series of thorough reasons why lawyers will zealously oppose mediation in respect of an imminent dispute. However, across the world, lawyers have progressively begun to try mediation either voluntarily or violently forced by legislators and courts.

## **The Role of Attorneys in the Mediation Process**

Generally, in most countries' jurisdiction, the parties who prefer to settle their disputes through mediation may or may not be consistently represented by a lawyer. It belongs to the discretion of the party, for instance, if he or she may: a) be represented by a lawyer from the very beginning of the process, b) enter the process without representation and then in the course of mediation ensure representation, c) finish the mediation process and seek advice from a lawyer only to revise the terms of the mediated agreement or d) end up the mediation process and make an agreement without a lawyer's help.<sup>65</sup>

### ***A General Review***

The traditional role of lawyers at any kind of process has been to counsel their clients regarding both the substantive law and the procedure, perform the legal process in favor of them and on the whole represent their clients' interests. However, in the mediation process lawyers will continue to operate each of these traditional functions but in a different manner and content, as mediation is a non-adversarial procedure and supports the participants to have the leading role in the dispute resolution.

The crucial questions for many lawyers, are whether they should take part in the mediation sessions not in the slightest and if they do, what role they should play in these sessions. Concerning the first question, researches across the globe which conducted on public law practitioners evidenced that they were extremely of the opinion that lawyers were of vital importance to the process.<sup>66</sup> It is not a surprise, though, that according to the survey, claimant representatives were explicit about the significant role of lawyers in mediation. However, exceptions exist and lawyers may at times be unhelpful representing their clients in the process. The following section is dedicated to the analysis of the second question.

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<sup>65</sup> See for example, Ravindra, *Role of Attorneys in Mediation Process* <<http://www.americanbar.org/>> Accessed 14 January 2016.

<sup>66</sup> *Ibid.*

### ***Various Roles a Lawyer Might Undertake in Mediation***

Lawyers' activity as neutrals attempting to expedite the resolution of disputes between the parties is their most common role in the mediation process. Nevertheless, lawyers are also entitled to represent parties in mediation. The purpose of representational lawyering in mediation process contains the duties which lawyers execute generally for clients: counseling, negotiation, advocacy and evaluation. The subsequent part is devoted to the detailed examination of the aforementioned varied roles lawyers take before, during and after mediation.

#### **Before Mediation**

It is very important for a lawyer to assist the party in making educated decisions about the mediation process beforehand, as this contributes to the encouragement of the party to be responsible for resolving the dispute, something that is consistent with the principles of mediation.

More specifically, the lawyer makes an extensive overview to the party about the mediation process explaining the nature of the process, the relevant law that governs it, what to expect in the course of mediation and how the mediation process accompanies the court procedures. Also, the lawyer assists the party in making an accomplished selection of a mediator based upon factors such as the experience and the potential fees of the mediator and also the nature of the party's case. Moreover, the lawyer together with the party may review the profiles and lists for mediators<sup>67</sup> and especially in Greece for accredited mediators.

Additionally, the lawyer helps the party to decide when it is the right timing for him or her to commence the mediation process. For instance, the lawyer may suggest mediation at the very beginning of the case in order to investigate settlement before positions become firmly established, or may propose mediation after the completion of all or part of the discovery process.<sup>68</sup>

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<sup>67</sup> *Ibid.*

<sup>68</sup> *Ibid.*

It is also worth mentioning that the lawyer advises the party on the substantive law relative to the case. This allows the party to understand the various possible outcomes in a case that is litigated and to create methodically a range of permissible outcomes for the mediation process. So, such an advice helps the party to understand that there may be more than one solution which corresponds to that party's desires, hence, it helps the party to get involved in mediation eager and prepared to think carefully about a wide variety of alternatives for settlement.

#### During Mediation

As before entering mediation, the lawyer keeps on giving guidance to the party on the substantive law governing the case, aiding the party comprehend the available options and their possible ramifications, what might be meaningful to share or hear during the process and what might not be and if an agreement is not reached what possible outcomes to expect.

The parties are pushed by their lawyers all the way through the mediation process to actively take part in discussions with the aid of a well-trained neutral mediator in order to find a solution to the dispute. What is more, the lawyer assists the party in negotiating by helping him or her to collect essential information, to express concerns, desires and feelings, to create alternatives and consider the results, always having on mind the non-adversarial nature of mediation.

Also, the lawyer can advise the party on settlement discussions before and after the mediation session, whether the lawyer is present at the sessions or not (in Greece this is compulsory, as I will mention subsequently). The lawyer might also indicate to the party when is the right time to request a break, so as to take counsel from the lawyer. Sometimes, the party in consultation with the lawyer may request to make a telephone conversation with the attorney during the process.<sup>69</sup>

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<sup>69</sup> *Ibid.*

Besides all the above role, the lawyer also handles the legal process, replying to and filing necessary pleadings, prosecuting discovery and informing the party of important dates, while mediation is being conducted.

*Attendance at the Mediation Session(s)*

Regarding the EU Mediation Directive 2008/52/EC, the participation of legal advisors is not being regulated. So, it depends on each European country whether this kind of participation will be compulsory or not.

More specifically in Greece, consistent with its general spirit and purpose and in accord with EU Mediation Directive 2008/52/EC, the Law 3898/2010 (“the Greek Mediation Act”) provides no particular obligation for the lawyers of the parties regarding the conduct of mediation. It is only provided, according to Article 8(1) of Law 3898/2010, that “in the course of mediation the parties or, for legal entities, their legal representative, appear in the presence of an attorney at law” and this is mandatory. To clarify it, representatives of a legal entity may be present instead of the parties being present at a mediation. Moreover, the Greek Mediation Act ultimately made the presence of the parties’ lawyers in the mediation session compulsory in line with the prior version of the Greek CCP (Code of Civil Procedure), Article 214A(4)<sup>70</sup> and in response to extensive efforts made by major bar associations. It is also important to notice that the language of the Greek Mediation Act requires the presence of the parties themselves at the mediation proceedings, while under the amended Article 214A(4) of CCP, which provided for dispute resolution mechanisms with possible mediation elements, the parties could instead be represented by their lawyers.<sup>71</sup>

Lastly, Article 8 of Law 3898/2010 does not refer to the extent of participation by the lawyer which is mandatory during the sessions. Thus, in my view the extent of this participation belongs to the discretion of the party with no direct interference by the mediator, although he or she defines the mediation procedure in agreement with the parties (“the mediation procedure is defined by the mediator in agreement with the parties,

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<sup>70</sup> Paragraph 4 was abolished by Law 3994/2011, Art. 19.

<sup>71</sup> De Palo and Trevor (eds.), *EU Mediation: Law and Practice*, 2012, pp.153-154.

which can terminate the mediation procedure whenever they wish to”, Article 8(3) of Law 3898/2010). The party makes his or her choice after consulting his or her lawyer. So, the lawyer's duty at this stage is to enable the party to make an informed decision in order to settle the dispute, as the success of the mediation process depends, among other things, upon each party making informed decisions on these issues.

#### Extent of Lawyer Participation

In the mediation process, all the participants, the mediator, the lawyers and the parties, each have roles to play. The mediator must manage the process so as to keep the parties in focus of their task and show them the way through the problem-solving process. The lawyers must represent their clients' desires and interests in order to fulfill their moral imperatives, an issue that will be discussed later on and the parties must express their feelings, thoughts and interests, so as to reach a successful outcome.

Some preparatory conversation between the lawyer and the party on this topic is recommended. Through this conversation, the lawyer should investigate with the party the extent and the various levels of lawyer participation that is possible, highlighting to the party the non-adversarial role of the lawyer in mediation.<sup>72</sup>

#### Observation and Private Advice

One of the various roles of lawyer participation in the process is to simply observe the mediation and counsel the party in private during breaks in the sessions. This enables the party to fully engage in cooperative problem-solving, while gives the party the opportunity to immediately consult his or her lawyer. Whenever the lawyer and the party believe that a break is justified, they have the option of asking for breaks for consultation.<sup>73</sup>

The observation/advice approach is preferable when the parties desire to preserve their relationship, as in domestic relation cases where the parties have children together or sexual harassment cases where the parties have an employment relationship still in progress. Moreover, the parties' direct participation in the collaborative problem-solving process of mediation benefits these relationships in general. Also, this approach may also

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<sup>72</sup> See for example, Ravindra, <<http://www.americanbar.org/>> Accessed 14 January 2016.

<sup>73</sup> *Ibid.*

be more suitable and proper when one party is represented by his or her lawyer at the mediation sessions, while the other party is not.

#### Direct Participation

Conversely, the lawyer may participate more actively in the mediation sessions on behalf of the party, in cases where there is no significant relationship between the parties and where the lawyer concerns about the power dynamics between the parties (as in a personal injury suit).<sup>74</sup>

Lawyer's direct participation may vary from the lawyer speaking on behalf of the party to the lawyer sporadically supplementing the party's statements. For instance, the lawyer might give an outline of the settlement goals or define issues to be decided. However, given the non-adversarial nature of mediation, the lawyer will not raise objections to a party's remarks.

When lawyers of each party participate directly in the mediation sessions, there is a high risk that mediation will be converted into an adversarial process with many drawbacks in the non-adversarial context of mediation. So, a party is less likely to accept personal responsibility for the outcome of the dispute if he or she entirely depends on the lawyer to settle it. In the same way a party is unlikely to express his or her thoughts in mediation if he or she believes that the lawyer will do so on his or her behalf.<sup>75</sup>

#### Caucus Sessions

The *caucus* is a mediation technique, which a lawyer may confront if he or she attends the mediation sessions. It is a separate session between the mediator and each party to the dispute, outside of the presence of all other parties. Unless the party decides otherwise, a caucus session would include the lawyer of the party. However, in any event, mediators should not take part in a caucus with a lawyer outside of the presence of that lawyer's client.

The caucus helps the mediator (not all mediators use this technique) to investigate with the party hindrances to settlement and the results that different alternatives may have

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<sup>74</sup> *Ibid.*

<sup>75</sup> *Ibid.*

and all these behind closed doors. Furthermore, a caucus session raises certain confidentiality issues and requires specific disclosures,<sup>76</sup> which will be discussed afterwards.

#### *Mediator and Lawyer-Advocate Duties*

At European level and more specifically in Greece, Article 4(c) of the Greek Mediation Act reiterates part of the wording of Article 3(b) of the Directive (“mediator means any third person who is asked to conduct a mediation in an effective, impartial and competent way, regardless of the denomination or profession of that third person in the Member State concerned and of the way in which the third person has been appointed or requested to conduct the mediation”). Thus, the mediator should conduct the mediation in an *effective, impartial* and *competent* way. In addition, as of mid-December 2011, a Greek Code of Conduct for Accredited Mediators was enacted (GCCAM), in line with the basic requirements of the European Code of Conduct for Mediators (ECCM).

At this point, we should state one important difference between the two codes, that is that the European CCM has no binding force (on the contrary, it is clearly mentioned in its introduction that “this Code of Conduct sets out a number of principles to which individual mediators can voluntarily decide to commit, under their own responsibility”) while the Greek CCAM is state law and thus compliance is binding, while its violation implies penalties, which can extend to the revocation of a mediator's accreditation in some exceptional cases (Article 5).<sup>77</sup>

To continue with, according to the Greek CCAM, the mediator should have a strong personality, i.e. be prestigious and moral, be able to impose himself on his domain and have self-constraint. Apart from those features, in the Greek CCAM, there is also explicit reference to the basic ethical principles that the mediator must have and those are: independence and neutrality, impartiality, confidentiality and the concepts of trust and secrecy that are inextricably linked to the concept of confidentiality, integrity and good

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<sup>76</sup> *Ibid.*

<sup>77</sup> Avlogiari with the collaboration of Terzis, *Code of Conduct for Accredited Mediators: Legal Dimension-Ethic Matters*, p. 2: <<http://www.diamesolabisi.com/files4users/files/news/Code.pdf>> Accessed 16 January 2016.

faith.<sup>78</sup> As far as the concept of confidentiality, we are about to deal with it immediately below.

As we can make out, the regime of mediation in Greece does not provide any ethical rules and codes of professional practice for lawyers that represent clients in mediation, so, lawyers acting as party representatives in the mediation process often remain subject to their general practice rules and ethical codes which control and define minimum standards of behavior in negotiations carried out on behalf of their clients and have as a result interactions with their fellow lawyers in this regard. Moreover, such codes may be suitable for standard lawyering practices, however, in representational lawyering practices, provisions may require obligations which better reflect the more client-centred and collaborative nature of the mediation process. It is worth noting that some jurisdictions have already made such express provisions, thus, it is high time Greece did that, too.<sup>79</sup>

*Protections Provided to Ensure Confidentiality of Mediation Proceedings*

The EU Mediation Directive deals with insider/court confidentiality, which is one of the most litigated aspects of mediation. As we have already analyzed,<sup>80</sup> Article 7 of the Directive, requires Member States to make certain that mediators and those involved in the administration of mediation cannot be forced to give evidence from the mediation process in following proceedings unless the parties agree otherwise. This provision directs its attention to mediators and neglects to address other mediation participants, such as parties and lawyers and their obligations in relation to insider/court confidentiality.

It must be noted, however, that significant obligations on the parties and their lawyers are introduced by the provisions of Article 10 of the Greek Mediation Act on the confidentiality of mediation.<sup>81</sup>

Thus, according to Article 10 of Law 3898/2010, “mediation shall be conducted in a way not violating confidentiality, unless the parties agree otherwise”. As it is stated in the preamble of Law 3898/2010, in order for mediation to succeed, the mediator, the parties and everyone else participating in the procedure must be free to examine and understand

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<sup>78</sup> *Ibid.*

<sup>79</sup> *Ibid.*

<sup>80</sup> See above pp. 16-17.

<sup>81</sup> See above p.17.

the merits and the cause of the dispute, as well as the legal and practical issues that arise and be able to discover the alternative solutions which exist. Also, pursuant to Article 10, “before commencing with the procedure, the participants (that is lawyers as well) are to be bound in writing to respect the procedure’s confidentiality”. This provision aims to facilitate the expansion of the discussions to confidential issues that would be considered in the scope of a judicial or arbitral procedure. It is obvious that if one party is afraid to disclose confidential information regarding his case, the possibilities of reaching a settlement are decreased.

Moreover, in line with Article 10, “the parties, should they wish to, bind themselves in writing to respect the confidentiality can, if they wish, even expand the scope of confidentiality to the agreement’s content, unless disclosure of the latter is deemed necessary for its enforcement, pursuant to Article 9(3)” (see also Article 9(3) of the Greek Mediation Act and Article 7(1)(b) of the Directive).<sup>82</sup> It is also provided in Article 10 of the Greek Mediation Act that “mediators, parties, their attorneys and any other participants in mediation proceedings are not to be examined as witnesses” nor are transcripts of their statements created. At the same time, it is provided that “(the) above persons shall not be compelled to give evidence in following judicial proceedings or arbitration regarding information arising out of or in connection with a mediation process”. For example, under the scope of confidentiality, one is not allowed to disclose statements or admissions of the parties, suggestions made by the mediator, or documents that were prepared for the mediation procedure.

Furthermore, it must be noted that the preamble, but not any provisions of the law itself, states that no court or judicial authority can order the disclosure of the above information in the scope of a subsequent judicial or arbitral proceeding. It is also stated in the preamble that such information cannot be introduced as evidence.

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<sup>82</sup> See Law 3898/2010, Art. 9(3) and Directive, Art. 7(1)(b).

On this point, the new law seem to have differences from the Directive, which restricts the confidentiality protections to limiting service as witnesses and the production of evidence in civil and commercial proceedings.<sup>83</sup>

Although, the confidentiality of mediation procedures is the general rule, the law provides for an exception. According to Article 10 of Law 3898/2010, confidentiality does not apply in cases where the disclosure of information arising out of or in connection with a mediation process “is necessary for overriding considerations of public policy, in particular when required to ensure the protection of the best interests of children or to prevent harm to the physical or psychological integrity of a person”. Such reasons are addressed in Article 7(1)(a) of the Directive, too.

#### After Mediation

The lawyer helps the party to re-examine the terms of the mediated agreement, testing the party's perception of the terms and sometimes, preparing formal agreements. Also, the lawyer assists the party in completing the legal process when mediation is concluded, whether mediation resulted in complete, partial or no agreement and helps the party to re-enter the system upon completion of mediation.<sup>84</sup>

More specifically, in Greece, Article 9(1) of the Greek Mediation Act states that if settlement has been reached, so we have successful mediation, where the parties agree, after being assisted by their lawyers, the settlement is not published and has only the power of a simple agreement. However, “following the conclusion of mediation proceedings, the protocol is signed by the mediator, the parties and their attorneys at law. Upon request of one of the parties, and by care of the mediator, the original is filed with the secretariat of the First Instance Court (one member section) of the region where mediation was conducted....” (Article 9(2)) and so mediation agreement becomes enforceable. Conversely, the Law 3898/2010 does not provide for specific criteria or a specific procedure in case the mediation fails, so we do not have any settlement. In that case, the lawyer helps the party

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<sup>83</sup> See Directive, Art. 7(1).

<sup>84</sup> See for example, Ravindra, <<http://www.americanbar.org/>> Accessed 14 January 2016.

in continuing the process, which eventually will dispose of the entire case through trial or further settlement efforts.

Especially, as far as the disposal of the entire case through trial is concerned, in Greece, the conclusion of the agreement for the submission of the dispute to mediation does not itself exclude resort to state courts. According to Article 3(1) of Law 3898/2010, “until its (mediation’s) completion, recourse to mediation freezes provisionally court proceedings”, so it is only an actual submission to mediation that will temporarily preclude a procedure before state courts and this period lasts until the termination of the mediation procedure. That means that only the beginning of a mediation procedure precludes the opening continuation of a trial before state courts. In the preamble of the Law 3898/2010, it is clearly stated that the mediation agreement has no procedural consequences with respect to the exclusion of actions before state courts.<sup>85</sup>

#### *Enforcing the Mediated Agreement*

As mediation is a voluntary process in which the parties are encouraged to take responsibility for and generate their own settlement, parties are more likely to comply with the terms of any agreement reached. Therefore, hardly ever, it is essential to take any action to enforce a mediated agreement. If and when it becomes necessary, the lawyer will help the party to enforce the terms of the agreement.<sup>86</sup>

Moreover, as we have already mentioned,<sup>87</sup> under Article 9(2) of Law 3898/2010, upon request of one party, mediation agreement (in the minutes signed by the parties, their attorneys and the mediator) becomes enforceable when the mediator submits the mediation minutes to court. Furthermore, Article 9(3) of the Greek Mediation Act states that “Upon filing the mediation protocol with the secretariat of the First Instance Court (one member section), it constitutes an enforceable title pursuant to Article 904 paragraph 2 section (c) Civil procedure Code”. Thus, the agreement’s enforceability is secured even in the case of one party’s unwillingness to give explicit consent for the agreement to be made

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<sup>85</sup> Hopt and Steffek, *Mediation: Principles and Regulation in Comparative Perspective*, 2013, p. 594.

<sup>86</sup> See for example, Ravindra, <<http://www.americanbar.org/>> Accessed 14 January 2016.

<sup>87</sup> See above p. 30.

enforceable, unlike the Directive approach in its Article 6(1). The Directive, at least in principle, requires the parties' joint action.

### ***Attorneys' Common Errors in Mediation Advocacy***

Another issue inextricably connected to the role of lawyers' in the mediation process is the mistakes that lawyers make in this process. Effective representation of clients in mediation requires the same level of preparation, hard work and self-confidence as it is required in presenting a jury trial. The performance of the lawyer determines, to a large degree, the outcome of a mediation session. So, the following are some of the biggest mistakes lawyers can make.

Failing to communicate ability and eagerness to try the case

The attorney should explicitly state that he or she is willing, ready and able to take part in the dispute, in order to achieve a rational settlement for his or her client. Unfortunately, some lawyers are excessively and unreasonably confident that they can settle any case, so even in mediation, opponents know this and act accordingly.<sup>88</sup>

Making aggressive "opening statements"

Most mediators conduct a short opening meeting with all parties present. They explain the mediation process and confidentiality provisions and then encourage remarks from each side. This tendency of the mediators should not be manipulated by the lawyers in making irritant or offensive statements of the case. Frequently, it is better for them to say nothing or to state that their client attends to the procedure so as to negotiate in good faith, despite the fact that he or she feels very confident that his or her position is right. This behavior has as a result the message to become more clear and effective.<sup>89</sup>

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<sup>88</sup> See, Spier, *The Ten Biggest Mistakes Lawyers Make in Mediation*, 2000 <<http://mediate.com/>> Accessed 18 January 2016.

<sup>89</sup> *Ibid.*

### Mediating without all the appropriate parties

There are often parties who may not be formally named in a lawsuit that may be crucial for the outcome of the dispute to be present at the mediation. For example, if potential guarantors or indemnitors in a business case participate in the mediation, then the odds of reaching a settlement are increased.<sup>90</sup>

### Mediating with persons with insufficient authority

When the mediator has the opportunity to talk directly with the decision-maker of each party, the mediation process is more effective. In cases involving large corporations, it is often impossible for the decision-maker to attend the case, but the opposing lawyer should ask ahead of time so as to know the limitations imposed on the process. Also, it is rare, even when the decision-maker is present, that person to have unlimited authority. Thus, experienced mediators will support the representative to seek additional authority, especially if the additional authority will settle the case.<sup>91</sup>

### Mediating too early or too late in the case

In some cases, it is rational to attempt immediate mediation of challenging problems, in particular when the parties have a continuing relationship which they want to protect. On the other hand, it takes time for a good lawyer to get prepared for the case, so as to make a logical evaluation of a client's position. Therefore, sometimes mediation on the eve of trial is appropriate, but often lawyers do their clients a disservice, emotionally and financially, by waiting that long.<sup>92</sup>

### Setting aside inadequate time for the mediation

For the mediation process to work efficiently, clients need time to express their thoughts and opinions and possibly to change positions. Sometimes, it seems to be no progress for several hours, but many such examples of cases end up to a reasonable settlement if all sides continue to work hard until the mediator concludes that the parties

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<sup>90</sup> *Ibid.*

<sup>91</sup> *Ibid.*

<sup>92</sup> *Ibid.*

are truly at deadlock. Also, it is suggested by experience that a give and take negotiation process is more efficient than announcement and adherence to a primary position. This is not to say that parties should not make necessary and large movements, but only that the process may need some time to be successful, thus it is appropriate for lawyers as party representatives to set aside sufficient time to mediate.<sup>93</sup>

#### Failing to adequately prepare the case

Mediation requires the same amount of preparation as a trial does, so counsel should not underestimate the process and prepare themselves right. Furthermore, presenting to the mediator the facts that can be supported by permissible evidence and a reasonable evaluation of trial outcomes is of the greatest value.<sup>94</sup>

#### Failing to adequately prepare the client

Litigators with experience never take their clients to trial without exhaustive preparation, so the same should happen at mediation, as well. Moreover, the client should understand from the beginning the general nature of the process, including the confidentiality provisions in mediation and the non-adversarial nature of the process. Even more importantly, the lawyer should advise his or her client of potential dangers and weaknesses, before the mediation begins. Lastly, clients appreciate aggressiveness and diligence on their behalf, but also respect straightness and honesty from their lawyers.<sup>95</sup>

#### Revealing a "bottom line" to the mediator

It is generally best not to disclose a client's "bottom-line" to the mediator, even confidentially. That is why, while the mediator will respect the confidential nature of such information, the lawyer will expect the mediator to impose it to the other party in private caucus. It is generally better to leave the mediator and the opponent to infer where ones client may be going. Also, most mediators avoid to offer discretionary authority on behalf

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<sup>93</sup> *Ibid.*

<sup>94</sup> *Ibid.*

<sup>95</sup> *Ibid.*

of a party because of concerns that they may lose neutrality and impartiality by making bargaining decisions on behalf of one or the other side.<sup>96</sup>

Failing to understand the status of a pending settlement

There is nothing wrong with leaving the matter open, subject to mutual acceptance of final document provisions, if one or both sides still have doubts or there are details to be worked out. What is annoying, however, is if a lawyer leaves the client with a wrong impression regarding whether or not a binding agreement has been reached. Thus, it is of great importance for a lawyer to be familiar with the terms of the mediation agreement that he or she is engaged with.<sup>97</sup>

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<sup>96</sup> *Ibid.*

<sup>97</sup> *Ibid.*

## **The appropriateness of lawyers populating the mediation field as party representatives**

This is an issue which frequently generates a great deal of heated debate and views are often sharply divided, with opponents maintaining that the traditional training, education, professional role and generally the background of lawyers is anathema to mediation process, while supporters claim that these very same perceived deficiencies are extremely valuable in the mediation practice.

### ***The Worth of Lawyer Advocacy***

It can be argued that lawyer participation as client advocates in mediation sessions is undoubtedly advantageous and occasionally, necessary.

To begin with, it is obvious that experienced mediation advocates may assist their clients in effective participation in the process and aid mediators in facilitating settlement. In this regard, it is argued, for example, that lawyers may be helpful in that they may have an impact on their clients to mitigate extreme claims.

Furthermore, lawyers may actually give support and confidence to their clients to actively attend the process. In particular, studies in the family field have disclosed that the lawyers' presence generally encouraged direct client participation.<sup>98</sup> Outside of the family field, Macfarlane's research into Ontario lawyers' relationship with mediation also found some lawyer-advocates eager to willingly welcome mediation and encourage their clients to reach a successful settlement.<sup>99</sup> Undoubtedly other, more adept lawyer-advocates may do the same and support their clients to take a principal role in the process.

A second positive point of view to lawyer engagement within mediation is that some of the discernible inabilities of the mediation process can be hindered by the benefits that lawyer-advocates offer to the process. In this sense, lawyers may be regarded as constant

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<sup>98</sup> McEwen et al., *Bring in the lawyers: challenging the dominant approaches to ensuring fairness in divorce mediation*, 1995, p. 1375.

<sup>99</sup> Macfarlane, *Culture change? Commercial litigators and the Ontario Mandatory Mediation Programme*, 2001, Chap. III.

carriers for the security granted by the law, safeguarding it from anything non-legal that can pose risks. For example, in the state of family matters, it is widely accepted that lawyer involvement in mediation is essential to protect clients from the compulsion to settle exercised by the mediator.<sup>100</sup> Indeed, lawyers are necessary to keep the clients safe from mediators' insatiable appetite, which may shatter the clients' interests in mediation.<sup>101</sup>

Maybe the above views to constitute provocation on the strategy used by the mediators. However, in a ruthless market, where supply may often outdo demand, mediators do business upon their fame, so, a high settlement rate is the most apparent, though, perhaps, unprocessed way for possible users to define a mediator's effectiveness beforehand. So, the presence of lawyers may act as an entrenchment against such pressures.

Moreover, where a remarkable power imbalance exists between the opposing parties, for instance, through clear differentiations between their corresponding levels of intelligence and fluency, the lawyers' attendance in the dispute may help to rectify the harmony in this regard. To put it differently, lawyers are employed to protect client's interests and act as a fender between the client and their adversary.

A lawyer, as a client's spokesperson, may be able to express more efficiently a client's attitude in the mediation session.<sup>102</sup> This approach has to do with a partnership between the lawyer and the client, with the first one stating more fluently and coherently the claims that client seeks to promote and does not imply any kind of control or domination of the client. It is notable, though, that clients may not always seek for active participation in the mediation process. For some clients, empowerment means the attempts of a lawyer-advocate proceeding on their behalf, hence, clients may feel pleasure to assign remarkable control to their lawyers.

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<sup>100</sup> McEwen et al., 1995, p. 1394.

<sup>101</sup> Pollack, 2007, p. 20.

<sup>102</sup> Research into divorce mediation in Georgia, U.S.A. has revealed that a great majority of participants found that the presence of lawyer was useful. See Gordon, *What role does gender play in mediation of domestic relations cases?*, 2002, Table 1.

### ***Standard Adversarial Lawyering in Mediation***

Irrespective of the aforementioned benefits of lawyers' advocacy within mediation, ours is a time characterized by adversarial law practice in the mediation field and as I see it, this is influenced by several factors, which have been already analyzed. First of all, the fact that lawyers are unfamiliar with mediation and that is why they may also resist involvement in the process, made them prone to act in a more adversarial way within the mediation process. Equally, other factors such as the cultural norms, traditional legal education, lawyer personality as a more dominant human being by his nature that desires leadership to a greater extent, the regular and strategical manner as "fishing expeditions"<sup>103</sup> which lawyers use when mediating, their understanding of how their clients expected them to act in the mediation process and also their basic instinct to take control of settlement on behalf of their clients all led to the adversarial lawyering in the mediation process. Moreover, those factors, despite the fact that there are signs that indicate lawyers' inclination to start embracing the process, may render lawyers intruders in the mediation process.

More specifically, as regards the coherence of control over a settlement reached through mediation, mediation's official debate generally expects that the client shall be entirely involved in the process and in charge of generating the rules upon which the dispute is resolved. There is a speculation that lawyers, who customarily are the managers of their clients' agreements, will strive to accept this change that mediation dictates.

As expected, in a research conducted in a slue of different jurisdictions there is substantial evidence that there is a tendency on behalf of lawyers to retain control over dispute resolution within mediation<sup>104</sup> and also to talk more than their clients within mediation sessions.<sup>105</sup> Therefore, this lawyer-centric form of mediation often fails to deal with parties' thoughts, aims and interests regarding the process.<sup>106</sup>

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<sup>103</sup> Clark, 2012, p. 62.

<sup>104</sup> At least in the sense that they do not envisage that mediation leads to an increase of the time that clients spend in reaching a resolution. Sela, 2009, p. 52.

<sup>105</sup> Wissler, *Court-connected mediation in general civil cases: what we know from empirical research*, 2002, p. 658.

<sup>106</sup> Relis, 2009, p. 11.

Additionally, research found that lawyers repeatedly asked for a way to achieve monetary objectives through mediation, when clients often sought, other non-monetary aims such as explanations and apologies in front of the other party. So, in the course of the mediation journey such client interests did not dissolve or were manipulated by the lawyers' behavior of controlling mediation and so failing to meet parties' demands.<sup>107</sup>

### ***Mediation Client Counselling: Thoughts about a more Deliberative Process***

Many lawyers failed to perceive the conceptual differences between mediation process and adversarial lawyering, thus, this strongly indicates the necessity to develop a theory of "good" representational mediation practice.<sup>108</sup> But there are conflicting interests. At one end of the spectrum, we must protect client voice and encourage client participation. At the other extreme, however, professionalism requires that lawyers assist clients in making responsible decisions. In my view, the activity of client counseling plays a crucial role in managing these tensions.

Specifically, I firmly believe that Glendon's view<sup>109</sup> of the civility principles in the practice of law (decency, courtesy, cooperation, mutual respect, dignity and reasoned discourse) concerning the relationship between attorneys and clients, more deliberation between lawyers and clients<sup>110</sup> and a more relational understanding of autonomy<sup>111</sup>, constitute "a good" theory of mediation client counseling that can handle the tensions between lawyer control and client participation.

In particular, mediation client counseling based on deliberation provides structure for client decision-making both in the lawyer-client relationship and in the mediation process. As far as the client decision-making in lawyer-client relationship is concerned, prudential discussions between lawyer and client about the relative benefits of certain ways of action, help to attain educated and participatory client decision-making, the warranty of

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<sup>107</sup> *Ibid.* pp. 15-17.

<sup>108</sup> Nolan-Haley, *Lawyers, Clients, and Mediation*, 1997-1998, p. 1381.

<sup>109</sup> Glendon, *A Nation under Lawyers: How the Crisis in the Legal Profession is Transforming American Society*, 1994, p.107.

<sup>110</sup> *Ibid.* pp. 35-36.

<sup>111</sup> Glendon, *Rights Talk: The Impoverishment Of Political Discourse*, 1991, pp. 109-144.

the informed consent doctrine. In short, the methodology of deliberation brings lawyers and clients together and thus promotes trust and mutual respect. Also, the deliberative process model asks for greater attention to the principle of informed consent in mediation. Similarly, in the mediation process, decision-making belongs to the parties of the dispute after deliberations with the mediator and each other.

In short, the deliberative process entails mutual responsibilities and rights for lawyers and clients, a concept which is perceptibly absent from the prevailing lawyer or client autonomy models of decision-making.

On the whole, the principles of professionalism and civility that Glendon praises enthusiastically inspire the transformation which must happen. Lawyers and clients who can discuss civilly with one another, who can sincerely listen to each other and who can convince each other based on reasoned conversation will make all the difference.

## Conclusions

Taking everything into consideration, the relationship between lawyers and mediation is an intricate, fluid business. As we have already analyzed, in a global sense, many lawyers have moved from suspicion, ignorance and resistance to admission and embracement of mediation. The main reason for this important fact is that lawyers, through their mediating experiences, saw that mediation promotes rather than replaces their existing skills in investigating fact situations and evaluating adjudicating outcomes. Thus, they should have a place in mediation, as they can advance the process. Similarly, non-lawyers, also, brought value to the process and this should be recognized by lawyers together with the fact that core mediation traits and skills, which lawyers need to acquire, can be found in professionals of all shades even in those from non-professional backgrounds.

Equally, it is true that many lawyers remain unpersuaded of the merits of mediation either on ethical or practical grounds, both motivated by selfish or not incentives. Some of those cynical lawyers have, nevertheless, taken steps to expedite mediation, but in so doing have failed to discard their negative attitudes towards the process and remained overdependent to traditional adversarial rules in their mediation activity.

Therefore, changes in traditional legal markets in combination with an increasing client understanding of and openness to mediation may be necessary to overcome this thorny issue. For instance, as we have already recommended, we can have an approach to mediation client counseling based on a more deliberative process or we can mandate mediating, so as to stimulate growth in the field. The above changes are also important in order to differentiate mediation from judicial proceedings, as a process that shifts frames from winning to problem-solving and lets attorneys meet human desire for resolution, for alleviating organizations and individuals and for making life able to operate more efficiently and harmoniously.<sup>112</sup>

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<sup>112</sup> Peters, 2011, p.11.

With mediation's future across the globe apparently secured by such developments, it is likely that lawyers will continue to hold a leading role in the field with more and more of those currently looking in from the outside trying to take up a seat within. Also, new, non-traditional breeds of lawyers and emerging legal models of practice may also conform better to mediation activity. The controversy over the lawyer's interaction with mediation will undoubtedly continue irreducible and amidst this thriving activity, the actions and motives of lawyers relevant to mediation will continue to be underlain to critical examination.

It is my firm conviction then, that the only remaining thing in order to go a long way towards mediating is, this process to be embraced by the legal system too, apart from lawyers, as a way of expanding its legitimacy by de-professionalizing justice and bringing "lay" voices into play.

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