

# LEGAL EDUCATION

## EN ROUTE TO A COLLABORATIVE MIND-SET: WHY LEGAL EDUCATION NEEDS TO CHANGE

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*The doctrinal, adversarial nature of the education of lawyers not only affects the way they think, it also informs their approach to alternative mechanisms of dispute resolution such as mediation. The paper relies on mediation to highlight the problems that can arise from the adversarial stance. It considers the construction of ethical identities and discusses how legal training leads the majority of lawyers to primarily become adversarial advocates. While there is no single style of mediation, there are rules of professional conduct that do apply. However, there can be tactical advantages in the use of mediation that could be ethically questionable. Ethical styles are used to predict how ethical identities can impact on the practice of mediation. Finally, the article proposes that a more integrative teaching approach to skills and ethics would be more appropriate for students entering the modern legal marketplace.*

### I INTRODUCTION

There is no single definition of what ‘mediation’ is, so the paper begins by discussing the four styles suggested by Laurence Boule.<sup>1</sup> There are rules governing a lawyer’s professional conduct that have an ethical<sup>2</sup> basis and they are briefly defined, including the tactical advantages of mediation. The paper then analyses four ethical styles that lawyers adopt in practice, concluding that the majority of lawyers, as a result of their training are primarily adversarial advocates. These ethical styles are utilised as a tool thereby predicting how an individual lawyer will relate to specific models of mediation. Legal education is the fundamental reason lawyers think the way they do. Their reaction to dispute resolution options and how they utilise them reflects the adversarial nature of legal education in Australia. Therefore an examination of how doctrinal legal education shapes students’ attitudes to alternatives to litigation is included. The paper argues that, despite changes to legal education in the last fifteen years, there is a necessity to integrate both ethics and skills training cumulatively throughout the law degree to be more in line with the needs of the burgeoning growth in alternatives to litigation. While the arguments in this paper are applicable to all forms of alternative dispute resolution (ADR), the focus is on mediation.

### II STYLES OF MEDIATION

Mediation is not a single entity that can be easily described. There is an enormous range of styles of mediation, ‘depending on what the mediator is trying to achieve’.<sup>3</sup> In general terms,

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mediation is where the parties to a dispute, with the assistance of a neutral third party, identify the issues surrounding the dispute and attempt to come to an agreement; essentially, it is a form of 'assisted negotiation'.<sup>4</sup> Assistance can come in many forms, not just from the mediator. Lawyers can facilitate the process in a variety of ways from merely recommending it as an alternative to sending threatening lawyer's letters or resorting to litigation. Lawyers can also be involved throughout the process either as an advisor or even as an advocate.

Laurence Boulle identifies four models of mediation to attempt to define what mediation actually is. 'These are the *settlement, facilitative, transformative* and *evaluative* models'.<sup>5</sup> These are merely definitional models as a tool of analysis, not necessarily discrete methods of mediation. The facilitative model (the one to which most of the literature about mediation refers) is an interest-based method, aimed at addressing the parties' needs and interests, rather than their strict legal entitlements. The role of the mediator is to assist the parties in their dialogue and encourage settlement. There is no requirement for the mediator to have expertise in the field under dispute. The mediator does not take an interventionist role, as the process is party controlled.<sup>6</sup> Settlement mediation is about compromise. It encourages bargaining to a settlement point between the parties' positions based on their self-perception, encouraging them to move to a compromise. It therefore involves positional bargaining. This method is open to manipulation, but it is a method that is easily understood. It most nearly replicates that with which inexperienced negotiators are conversant. Transformative mediation is more about changing the *cause* of the problem and improving relationships through empowerment. It is a therapeutic method with resolution of the dispute as secondary to improving relationships. Finally, evaluative mediation is advisory in nature. There is a focus on legal rights and entitlements, using industry standards or community norms. Through the provision of information and expertise it predicts the outcome should the matter go to court. The mediator takes on an interventionist role, meaning less party control than other models.

Despite not being definite discrete methods of mediation, the models do, however, raise the question of what ethical standards apply within them. For example, being free of the constraints often associated with the rules of court, can an adversarial advocate bargain aggressively on behalf of their client?<sup>7</sup> While rules of professional conduct in mediation do exist, they contain 'little that *explicitly* sets out specific standards for lawyers' behaviour'<sup>8</sup> while participating in mediation. Conversely, there may be a necessity to establish an entirely new set of standards for lawyers acting as either advisers or mediators, given the purpose of most negotiation models is to come to a consensual agreement.<sup>9</sup>

### III PROFESSIONAL CONDUCT AND MEDIATION

In legal practice, despite rules of professional conduct that govern the conduct of practitioners, there are many grey areas that are open to interpretation. One such area is mediation. In reaction to the perception that professionals were controlling ADR, 'turf wars broke out between various professionals and other groups for ADR work'.<sup>10</sup> Mediation came about as a reaction to traditional methods of dispute resolution within the formal justice system.<sup>11</sup> It is often seen as cheaper, faster and fairer than formal litigation, though some see this is a simplistic and erroneous claim.<sup>12</sup> The legal profession was seen to dominate the system, without always taking into account what their clients wanted, leaving many people with a sense of dissatisfaction.<sup>13</sup> The legal profession, although initially sceptical of mediation, now incorporates it as an essential part of their normal legal practice.<sup>14</sup>

Under the rules of professional conduct, lawyers are bound to advise clients competently, including giving accurate information about the benefits of alternatives to litigation.<sup>15</sup> Mediation and other alternatives to litigation are getting more attention within legal practice even among lawyers who were initially resistant to it.<sup>16</sup> There is a professional responsibility on lawyers, who believe that mediation is the most appropriate method of dispute resolution in a particular case, to encourage the client to attend having accurately informed them of its ‘purpose and potential benefits’.<sup>17</sup> Lawyers, however, are trained in the interpretation of rules and their ethical approach can colour the way they proffer that advice. With their education emphasising the adversarial advancement of client interests, they have skills that do not ‘transfer easily to mediation and additional training is required’.<sup>18</sup> Why wait until the latter part of the degree, or even after graduation, to gain these skills? It would be far more beneficial for the legal profession in the future if this training were central to legal education in Australia and will be discussed below.

Many lawyers feel more comfortable with the proscriptive rules of court and find the less formal rules of mediation problematic, wishing to establish clear guidelines.<sup>19</sup> While exhorting lawyers to be aware of their responsibility to advise clients of the benefits of mediation, some academics talk of its potential tactical advantages.<sup>20</sup> If there is a possibility that the court will mandate mediation, for example, there is a tactical advantage in engaging in private mediation as it gives the parties the right not only to choose the mediator, but also to retain control over the process.<sup>21</sup> As mediation is confidential, there can be a commercial advantage in avoiding publicity. More concerning is the advantage that ‘if the mediation does not successfully resolve the dispute, it will have sharpened the focus and understanding of the issues in dispute and be indicative that it is in the interests of the parties to proceed to trial’.<sup>22</sup> This is not problematic if the sharpened focus is only a *by-product* of the mediation, or the parties know and understand why they are proceeding to trial. The problem occurs where mediation is deliberately engaged in for the purpose of information gathering on the other party’s case, rather than a genuine desire to come to an agreed settlement. Where the financial and emotional status of the parties is unequal the weaker party may find that, even though they entered the process in good faith and in the belief that resolution was possible, they have given away more information than they would otherwise have done if the matter were proceeding straight to trial.

Further, there are financial incentives for lawyers to engage in ADR. By providing alternatives to expensive litigation, there is a potential to expand business opportunities with additional services. Law practice is a competitive business and informed and knowledgeable clients will move to a firm that offers the widest range of information. The public is becoming more aware of the advantages of ADR and it makes good financial sense to proffer all available options.<sup>23</sup> This raises the question of how a lawyer’s ethical style affects their relationship with alternative dispute resolution, particularly mediation, and whether that style will direct them to a specific form of mediation.

#### IV LAWYER INVOLVEMENT IN MEDIATION

Mediators should encourage parties to consult lawyers if the dispute involves questions of law, particularly if the lawyers themselves are not involved in the actual sessions. This gives the client the opportunity to be appraised of all the possible choices available to them. The client may prefer to relinquish some of their legal rights for a variety of reasons, for example to get it over with so they can get on with their lives. Some mediators prefer the parties to represent themselves, without the inclusion of outside parties. This can be empowering for the parties if they are able to achieve a desirable outcome. However, it presupposes that the parties are of equal

bargaining power. Where the parties are in agreement they may, by the encouragement of the mediator, decide to exclude lawyers from the bargaining table. Even though lawyers may face exclusion from the actual mediation process, they may be called on for advice prior to mediation. It is also advantageous for disputants to have any agreement assessed to ensure they understand the implications of potential obligations.<sup>24</sup> If lawyers or other professional advisers are present, they may be asked to remain silent. This does not mean that the advisor does not have a role to play, however, and strategies should be agreed to in the event that the advisor wants to take a break and discuss options with the client. How the individual lawyer copes with these strictures is going to be affected by their particular ethical style, and hence choice (where possible) of mediation model, which will be discussed below.

## V ETHICAL IDENTITIES

While some circumstances indicate that more weight should be given to ethical considerations, it is the choices that people make that give them their individual ethical character.<sup>25</sup> Parker and Evans<sup>26</sup> argue that there are, essentially, four ethical styles, namely *Adversarial Advocate*, *Responsible Lawyer*, *Moral Activist* and *Ethics of Care*.<sup>27</sup> While disclaiming that any one lawyer adopts one style to the exclusion of others, the majority of lawyers predominantly favour one. The adversarial advocate is the traditional conception. The lawyer acts zealously on behalf of their client, with winning the primary objective against an opponent. It focuses on lawyers being a representative of the client within the legal system. It is, however, only one social construct that could affect a lawyer's ethics. For the responsible lawyer, advocacy is tempered by compliance with the spirit of the law. There is an emphasis on their duties as officers of the court. They still advocate on behalf of their clients, but also see it as their responsibility to ensure that the justice system is maintained. The responsible lawyer works to ensure the law works fairly and justly and is less client-centred. In neither the adversarial advocate, nor the responsible lawyer approach, is there an intention to change the workings of the legal system or advance 'standards of social justice external to the law'.<sup>28</sup>

Conversely, the moral activist takes a political stance on ethics, which promotes the public interest and law reform. The practitioner seeks to convince the client of the 'moral thing to do'. They believe that ethics comes from their personal and philosophical view of life. The aim is to do justice according to personal convictions. They will withdraw from a cause they do not find 'worthy'.<sup>29</sup> Moral activists fully participate in challenging laws they believe to be unjust. They are the lawyers most likely to accept a case in order to create change.<sup>30</sup> Ethics of care is more interested in preserving relationships and avoiding harm. People and relationships are seen as being more important than institutions. Similar to moral activism, ethics of care seeks to promote justice. However, ethics of care places more focus on personal and relational ethics. There are claims that ethics of care is more female oriented, which is a somewhat controversial claim. It is a form of ethics that is holistic in approach, by looking beyond the client's economic and financial interests, into how the client's issues impact on other areas of their lives.<sup>31</sup> It is an ethical paradigm that encourages participation and sharing of knowledge. It helps the client to make informed choices and promotes alternative forms of resolving disputes.<sup>32</sup> Mediation as a method of not only resolving disputes, but also preferably preventing them, is common.<sup>33</sup> The paper will now use these ethical models as a predictive tool to as to how ethical style affects choice of mediation model.

## VI THE RELATIONSHIP BETWEEN MODELS OF ETHICS AND MEDIATION

To turn now to use of the four ethical styles and how they potentially relate to models of mediation. The adversarial advocate, then, is most likely to favour settlement mediation. It gives the lawyer the opportunity to bargain on behalf of their client, or advise the client as to the best way they can achieve the closest proximity to their desired outcome. They are accustomed to positional bargaining and their law school training equips them well for this role. If they have not had sufficient training in focusing on interests, they have the potential to be a liability in facilitative mediation. As mediators, however, they would also be well suited to evaluative mediation where they are able to use their expertise in legal rights and professional experience in predicting the likely outcome should the matter proceed to court. Evaluative mediation, with its move away from consensual thinking grounded in interests to a two-way rights basis, is suited to their ethical stance. This paper predicts that, for an adversarial lawyer, transformative mediation would be so far outside their realm of experience as to not even rate consideration. For a zealous advocate it is the outcome, rather than their client's feelings, that are paramount.

The responsible lawyer, while also favouring settlement for similar reasons as the adversarial lawyer, is more likely to accept the advantages of facilitative mediation. With their focus on the maintenance of justice, they are likely to be attuned to the best way to achieve justice for all. The definition of 'justice' in this context is the idea that no party is taken advantage of by a stronger participant, whether that is the lawyer's client or the other party. By viewing the dispute as one which is capable of resolution, the responsible lawyer will not view the other party as an opponent; rather they will view both sides as equally deserving of all available information and assistance to reach the desired outcome. The way that facilitative mediation works to come to a mutually beneficial outcome ensures that everyone involved has a voice. Its efficiency in ensuring a fair outcome is fitting with the spirit of the law while not having the sole emphasis on only their client. 'Fair' means that all parties have a say in the process, rather than describing a fair resolution of the outcome. From a subjective standpoint, some clients are willing to forego their legal entitlements in order to settle the dispute and get on with their lives. The model facilitates an agreement that the parties can live with and is therefore more likely to be lasting. The lawyer who favours the responsible ethical model is more likely to accept the advantages of facilitative mediation. Responsible lawyers are more likely than the adversarial lawyers to be comfortable with evaluative mediation as it protects legal rights and entitlements through an almost arbitration style. Again, transformative mediation is unlikely to be favoured by a lawyer who adopts this ethical mode.

The moral activist, with their focus on morality, would be more suited to the settlement or even the evaluative methods of mediation. There, they could utilise their powers of persuasion to try to challenge the system or convince their client to come to a morally acceptable settlement. However, they are also the least likely to engage in mediation, given that there is no platform for changing the law or bringing the issue to public attention. There is little opportunity in mediation for the moral activist to challenge a system they believe to be unjust. One aspect of mediation, particularly court ordered mediation, is the confidentiality requirements. The moral activist can find the closed process frustrating, especially if there are perceived problems when a particular session is not open to challenge. For example, if government agencies are included in, say, a family group conference, there can be an ongoing relationship between the mediator/s and the representatives of the agency. Repeat players can unconsciously take both the process and each other for granted. The combined effect of mediator and agent can give the *perception* that all factors are not given equal weight, leaving the client feeling they have not *really* been heard.

There are, in fact, occasions when one party has *not* been heard. The moral activist, whose natural inclination is to expose these kinds of issues, will find it very difficult to recommend mediation if there is a possibility of lack of independence from the mediator.

The lawyer who has a holistic ethics of care approach, on the other hand, is the most likely to be happy to engage in the transformative model of mediation, both as advocates and as mediators themselves. The focus is not so much on resolving the dispute, but finding the underlying cause and assisting to remedy issues such as alienation, and disempowerment. This theory posits the mediator as assisting parties to change the way they view disputes. It is relationally informed and motivated, thereby attempting not only to assist the parties but also the whole of society by using an interventionist approach.<sup>34</sup> This is in accordance with the desire to treat the client as a person with importance placed on their whole life, not just the dispute. By effective intervention, then, they can direct the mediation to the desired outcome, whether or not any form of agreement is reached. The ethics of care lawyer would equally be able to engage in facilitative mediation given its interest-based orientation.

## VII TRADITIONAL LEGAL EDUCATION

There is general acceptance that Australia's common law legal culture is adversarial. One reason given for this is the conservative and doctrinal nature of legal education.<sup>35</sup> Even as students enter law school most of them have preconceived ideas on what being a lawyer is all about.<sup>36</sup> Many students come into law school with the preconception that the practice of law is always an ongoing competition between diametrically opposed standpoints. Television often presents legal practice as a gladiatorial contest, for example Boston Legal presents winning in court as the imperative rather than uncovering the truth, or settling on a mutually agreeable outcome between litigants. Even mediation, as depicted in programmes such as the Australian Broadcasting Corporation's drama series 'MDA', is depicted as a highly tactical fight between two sides, where the winner takes all.

Although legal education has changed drastically in the last fifteen years, the fact that the 'Priestly Eleven'<sup>37</sup> is still a requirement for admission to practice means that much of the traditional approach to the education of lawyers is still in place.<sup>38</sup> There is a strong emphasis on substantive law, with much of a student's time spent examining High Court cases and statutes, orienting students to an adversarial way of viewing the resolution of disputes.<sup>39</sup> Litigation is seen as the ultimate possible outcome of almost any legal conduct.<sup>40</sup> The main purpose of courts is to come to a decision between two opposing choices, with one party winning and the other losing or being found to be at fault, thereby 'intensifying hostility between disputants'.<sup>41</sup> This all or nothing attitude carries legal professionals beyond the courtroom door, to influence other areas in which they practice.<sup>42</sup> For example, when lawyers are engaging in a negotiation where there is potential for both sides to attain their clients' desires, a lawyer with adversarial approach is unlikely to allow the other side to gain any ground even if there is no substantial cost.

Legal education in law school predominantly prepares students to 'think like lawyers',<sup>43</sup> inculcating and replicating an adversarial orientation. Unfortunately, the emphasis on doctrinal, knowledge-based learning is not keeping pace with the needs of modern practitioners. Arguably much of what students learn is out of date by the time they graduate.<sup>44</sup> The Australian Law Reform Commission (ALRC) report of 2000, 'Managing Justice', made the recommendation that law schools should shift their focus from a substantive, knowledge based education of the Priestly Eleven, to an orientation on '... what lawyers need to be able to do'.<sup>45</sup> The majority

of law schools, it is evident, are yet to take up this recommendation. Often, the only practical experience a law student will get while at university will be participation in competitions, again, the majority of which are primarily adversarial, with the winner being the one who can present the strongest argument on behalf of their client. Even the negotiation competitions, at least at the national level, pit teams against each other whereby the team who comes closest to their client's instructions is likely to be awarded the round. While judging criteria include teamwork, flexibility and ethics, there is also a strong emphasis on tactics and strategy.<sup>46</sup> This can lead competitors to view the negotiation process as a fight with only one winner. It may be more efficacious if negative points were awarded for teams that refused to engage collaboratively. If students see that unwillingness to engage in genuine collaboration is penalised they will learn a valuable lesson about the disadvantages of brinkmanship by seeing that one team can still win the competition through their superior skill in the art of principled negotiation.

The study of core subjects has the potential to embed an adversarial tone to the degree and subjects like dispute resolution are either unavailable or limited. At the University of Tasmania, for example, Dispute Resolution is only available as a Summer School elective with limited numbers. Students are only able to enrol in this subject upon the successful completion of at least five core subjects. Many new graduates now have some knowledge of mediation; however, many law degrees have no in-depth training, so lawyers often lack the requisite practical skills.<sup>47</sup> The majority of universities in Australia only offer alternative dispute resolution courses at a post-graduate level. It is likely that the adversarial mind-set is already firmly entrenched in students' minds by this time. There is evidence that there is an increase in understanding of mediation amongst practising lawyers, however there is still a level of resistance too, with knowledge at a rudimentary level only. While a practitioner may claim a commitment to mediation, if their understanding of its processes is limited then that commitment is likely to be only rhetorical.<sup>48</sup> In other words, they only affect a commitment to mediation, not because they have a genuine belief in its advantages. Given the rapid growth of ADR legislation, and increase in court-mandated mediation, this is somewhat surprising.<sup>49</sup> Often lawyers will only use mediation if mandated to do so, preferring adversarial methods of negotiation.<sup>50</sup> If education is critical to the shape of legal culture, and the efficacy of its operation in practice,<sup>51</sup> then the strong emphasis on adversarial attitudes must have some effect on the way lawyers approach methods of dispute resolution.

## VIII THE FUTURE OF LEGAL EDUCATION

The ALRC Issue Paper, *Managing Justice*, reports that the recommended shift to skill development for law students has been slow. Since then there have been numerous reports that legal education should shift from its traditional focus. However, it is apparent that not all law schools have necessarily followed those recommendations.<sup>52</sup> Where change does take place, it tends to be uneven and does not entirely move away from the traditional model of doctrinal, adversarial method of teaching law.<sup>53</sup>

Students can still lack the basic practical skills they need in modern legal practice.<sup>54</sup> Despite the shift to greater student involvement in tutorials and seminars, where students learn valuable oral skills,<sup>55</sup> they are rarely encouraged to work collaboratively. While reasoning, analysis and advocacy are important legal skills, so, too, are advanced communication skills.<sup>56</sup> These skills are particularly important if, as is increasingly the case, lawyers are engaging in alternative dispute resolution. The learning process remains individualistic and students are warned to hand in only their own work or risk a charge of plagiarism.<sup>57</sup> The teaching of ethics across Australia is not

consistent. While all law schools teach ethics, it is taught at different stages in the curriculum,<sup>58</sup> often not until they do a professional legal practice course.<sup>59</sup>

By examining the available evidence, and despite assertions in some of the literature that legal education has changed in recent years, this paper contends that changing the way law is presented in law schools is still both necessary and inevitable. The question remains as to how that can be achieved. Instead of teaching law as discrete, separate subjects, with little interrelationship between them, it makes sense to take an integrative approach. Litigation, for example, is no longer the primary form of dispute resolution; therefore, *all* students who plan to practise as lawyers need to learn other methods, such as mediation.<sup>60</sup> When students know and understand that there is a range of ethical styles then they will be better equipped to enter the legal workforce with an understanding of how ethics affects the dynamics of their relationships. This is equally true for their relationship with clients as well as other practitioners, legal or otherwise. Self-analysis and understanding can only create a well-rounded graduate. Arguably, law schools should focus on the requisite skills *throughout* the degree, thereby cumulatively developing students' abilities.<sup>61</sup> It may be too late to leave skills development until nearing graduation, as the adversarial mindset may well be inculcated by then. Further, a deeper understanding and recognition as to how others operate, on an ethical level, is essential to an effective working relationship, especially when lawyers are entering mediation and other alternative dispute resolution mechanisms. The early introduction of ethics, and reinforcement of the necessity of an ethical approach to lawyerly activities, would be beneficial, as ethical standards affect every part of legal practice.<sup>62</sup> Students will then have the capacity to reflect on what type of lawyer they want to be, rather than blindly following traditional dictates.

## IX CONCLUSION

Despite changes to the way law schools train their students, they still tend to lead graduates to understand law as an adversarial occupation. The emphasis on doctrinal education through the Priestly Eleven core subjects is still a requirement for admittance to practise. The attitude that this inculcates can affect the way that lawyers approach ethical dilemmas and hence the ethical model they are likely to adopt. As a result, most lawyers tend to be adversarial advocates in terms of ethical approach. With the increase in mediation as a valid form of dispute resolution, particularly court-mandated mediation, rules of professional conduct are developing. Advice from some academics, however, as to the tactics available to lawyers involved in mediation, whilst purporting to instruct readers about those rules, raises the question of ethical conduct. Differing ethical styles are likely to impact on the mediation model a lawyer is going to feel most comfortable with, and the success or otherwise of their involvement in mediation. Most students do not have a good grounding in ethics early in their degree, often not encountering the concept until they do a professional legal practice program. By that time, the adversarial attitude is well ingrained. Law schools tend to fail to train students adequately in the practical skills they require to participate in collaborative styles of negotiation, in fact often actively discouraging collaboration. Overcoming the adversarial mind-set that law school can teach is possible, however. The other, arguably inevitable, way to move from adversarialism to collaborative negotiation is to change the way law is taught. By using an integrative approach to teaching practical skills and ethics, then students will be more ably equipped to understand, and engage in, the collaborative methods of dispute resolution.

*Keywords:* legal education; mediation; integrative teaching; skills; ethics.

## ENDNOTES

- 1 Laurence Boulle, *Mediation: Principles, Process and Practice* (2<sup>nd</sup> ed, 2005) ('Core and Variable Features of Mediation') 43-45.
- 2 The author accepts that there is no single definition of 'ethical' in this context, and that it is a highly contentious area. For the purposes of this paper, unless otherwise stated, 'ethical' means the philosophical approach a lawyer adopts in governing their behaviour, their personal approach to what is 'right' or 'wrong', or integrity, as well as what is considered to be their 'professional responsibility'. Gino Dal Pont, *Lawyers Professional Responsibility in Australia and New Zealand* (1996) 3-4.
- 3 David Spencer and Tom Altobelli (eds), *Dispute Resolution in Australia. Cases and Materials* (2005) 139.
- 4 Christine Parker and Adrian Evans, *Inside Lawyers Ethics* (2007) 126.
- 5 Boulle, above n 1, 43-45.
- 6 Ibid.
- 7 Parker and Evans, above n 4, 121.
- 8 Ibid 125.
- 9 Ibid 121.
- 10 Hilary Astor and Christine Chinkin, *Dispute Resolution in Australia* (2<sup>nd</sup> ed, 2002) 10.
- 11 Ibid.
- 12 Ibid 52, 53.
- 13 Mary Noone, 'Lawyers as Mediators: More Responsibility' (2006) 17 *Australian Dispute Resolution Journal* 96,100.
- 14 Ibid.
- 15 David Spencer, 'Liability of Lawyers to Advise on Alternative Dispute Resolution Options' (1998) *Australian Dispute Resolution Journal* 292.
- 16 Astor and Chinkin, above n 10, 10.
- 17 Gino Dal Pont, *Lawyers' Professional Responsibility in Australia and New Zealand* (2<sup>nd</sup> ed, 2001) 88.
- 18 Noone, above n 13, 96.
- 19 David Spencer and Tom Altobelli (eds), *Dispute Resolution in Australia. Cases and Materials* (2005) 458.
- 20 Dal Pont, above n 17, 87.
- 21 Ibid.
- 22 Ibid 88.
- 23 Spencer, above n 15, 294-302.
- 24 Gay Clarke and Iyla Davies, 'Mediation — When is it Not an Appropriate Dispute Resolution Process?' (1992) 3 *Australian Dispute Resolution Journal* 74.
- 25 Parker and Evans, above n 4, 21-22.
- 26 Ibid.
- 27 Ibid 23.
- 28 Ibid 27.
- 29 Ibid 28.
- 30 Ibid 29.
- 31 Ibid 32.
- 32 Ibid 34.
- 33 Ibid.
- 34 Robert Bush and Joseph Folger, *The Promise of Mediation. The Transformative Approach to Conflict* (2005) 41-84.
- 35 Nick James, 'How Can Flexible Delivery Enhance the Facilitation of a Critical Understanding of Law?' In L Richardson and J Lidstone (eds), *Flexible Learning for a Flexible Society – Proceedings of ASET-HERDSA 2000 Conference* (2001) 336, 337.
- 36 Australian Law Reform Commission, *Review of the Adversarial System of Litigation. Rethinking Legal Education and Training* (1999) [5.8].

- 37 The Priestly Eleven are the core subjects required for admission to practise. They are Contracts, Torts, Criminal Law, Property, Equity (including Trusts), Administrative Law, Constitutional Law, Evidence, Company Law, Civil Procedure and Professional Conduct. They are named after the chair of the Priestly Committee – Justice Priestly, *Uniform Admission Requirements: Discussion Paper and Recommendations* (1992).
- 38 Mary Keys and Richard Johnstone, ‘Changing Legal Education: Rhetoric, Reality, and Prospects for the Future’ (2004) 38 *Sydney Law Review* 2.
- 39 Australian Law Reform Commission, above n 36, [5.7].
- 40 Australian Law Reform Commission, *Review of the Adversarial System of Litigation* (2001) [11.10].
- 41 Richard Miller and Austin Sarat, ‘Grievances, Claims, and Disputes: Assessing the Adversarial Culture’ (1980-1981) 15 *Law and Society Review* 526.
- 42 Australian Law Reform Commission, above n 40, [11.10].
- 43 Australian Law Reform Commission, above n 36, [5.7].
- 44 Sally Kift, ‘A Tale of Two Sectors: Dynamic Curriculum Change for a Dynamically Changing Profession’ (Paper presented at the 13<sup>th</sup> Commonwealth Law Conference, Melbourne, 13-17 April 2003) 1.
- 45 Australian Law Reform Commission, *Managing Justice: A Review of the Civil Justice System* (2000) [2.21].
- 46 *Sir Laurance Street Negotiation Championship Rules* (2008) < <http://www.alsaconference2008.com.au> > 8 at 2 July 2008.
- 47 Astor and Chinkin, above n 10, 212.
- 48 Hilary Astor, *Quality in Court Connected Mediation Programs: An Issues Paper* (2001) 36.
- 49 David Spencer, ‘Liability of Lawyers to Advise on Alternative Dispute Resolution Options’ (1998) 9 *Australian Dispute Resolution Journal* 292.
- 50 Astor and Chinkin, above n 10, 37.
- 51 Australian Law Reform Commission, above n 45, [2.3].
- 52 Kift, above n 44, 3.
- 53 Keys and Johnstone, above n 38, 3.
- 54 *Ibid* 4.
- 55 Tania Sourdin, ‘To the Bench or Across the Table?’ *Lawyers Weekly On-line* (2006) 2, <[www.lawyersweekly.com.au/articles/to-the-bench-or-across-the-table](http://www.lawyersweekly.com.au/articles/to-the-bench-or-across-the-table)> at 22 January 2008.
- 56 *Ibid*.
- 57 Keys and Johnstone, above n 38, 14.
- 58 *Ibid* 7. .
- 59 Anne Trimmer, ‘The Legal Profession in 2010 — Issues for Legal Education’ (2001) 2 *University of Technology Sydney Law Review* 2.
- 60 Sourdin, above n 55, 2-7.
- 61 Keys and Johnstone, above n 38, 12.
- 62 Trimmer, above n 59, 2-3.