

# BARKING DOGS: LAWYER ATTITUDES TOWARDS DIRECT DISPUTANT PARTICIPATION IN COURT-CONNECTED MEDIATION OF GENERAL CIVIL CASES

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*Direct disputant participation is a vehicle for the delivery of fundamental attributes of mediation, such as self-determination; empowerment; and focus on the individual disputants. However, in court-connected mediation practice, disputants often rely upon a professional spokesperson rather than participating directly. This article examines lawyer attitudes and practices in relation to the direct participation of their clients in court-connected mediation. The lawyer perspective is compared to the traditional mediation perspective of direct disputant participation. That comparison provides some explanation for the nature of court-connected mediation practice. Some implications arising from the trends of disputant participation in court-connected mediation are considered.*

## I INTRODUCTION

Potentially, mediation offers an opportunity to disputants to participate directly in the resolution of their own disputes.<sup>1</sup> According to the Australian National Mediator Practice Standards, '[t]he purpose of a mediation process is to maximise participants' decision making.'<sup>2</sup> Direct disputant participation is a powerful way of promoting this purpose. Direct disputant participation reflects values of self-determination and empowerment, which are foundational values from which modern mediation practice

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<sup>1</sup> L Boulle, *Mediation: Principles, Process, Practice* (Butterworths, 2<sup>nd</sup> ed, 2005) 227-8.

<sup>2</sup> *Australian National Mediator Standards: Practice Standards* (National Mediation Conferences Limited and Western Australian Dispute Resolution Association, 2007) Standard 2, <[www.mediationconference.com.au/html/Accreditation.html](http://www.mediationconference.com.au/html/Accreditation.html)> at 8 July 2008.

emerged.<sup>3</sup> Direct disputant participation is promoted, particularly in the facilitative and transformative mediation models, but is not a fundamental characteristic of the evaluative or settlement mediation models. Direct disputant participation is not necessarily evidenced in mediation practice, particularly in court-connected mediation.<sup>4</sup>

Court-connected mediation brings together two perspectives of dispute resolution. First, the traditional mediation perspective, a notion of dispute resolution, identified from mediation literature. In this article, the traditional mediation perspective is equated with the primarily facilitative, satisfaction driven notion of mediation.<sup>5</sup> This notion of mediation is narrow and excludes a broad range of mediation practice and theory. However, it is the 'traditional' mediation perspective because it represents the interest-based, problem-solving foundations from which the modern mediation field has developed. Secondly, court-connected mediation can be viewed from the legal perspective, an understanding of dispute resolution held by legal actors including; lawyers and court officers. This perspective is influenced by traditional legal approaches to the resolution of disputes.

In this article previous research and new empirical research findings will be relied upon to demonstrate lawyers' perspectives of disputant participation in court-connected mediation. This article outlines the empirical research method adopted to obtain lawyers' perspectives of court-connected mediation. The claimed advantages of direct disputant participation are then elaborated. Lawyer attitudes to direct disputant participation, perspectives of participant roles and descriptions of patterns of disputant participation are then outlined. Implications for the nature of court-connected mediation and the extent to which limited direct disputant participation is problematic are considered. It is concluded that the extent to which the evidence poses a problem is dependent upon the goals of the court-connected mediation program. Subsequently, it is recommended that courts define their program objectives clearly and ensure that participants are aware of the limitations of the process conducted in the program. If a court decided to encourage direct disputant participation within its mediation program, the research findings indicate that there is a need to implement measures to enable this to happen, including educating the legal profession about the potential benefits of direct disputant participation.

## II EMPIRICAL RESEARCH METHOD

Between April 2006 and May 2007, I conducted interviews of 42 legal practitioners who practised in the Supreme Court of Tasmania's ('the court's') mediation program. Ten mediations were also observed, to provide an additional source of data, to test the conclusions that were drawn on the basis of the interviews.<sup>6</sup> However, the interviews were the main source of data used for the purposes of the research. The court's

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<sup>3</sup> Boule, above n 1, 60-8; T Sourdin, *Alternative Dispute Resolution* (Law Book Company, 2<sup>nd</sup> ed, 2005) 28.

<sup>4</sup> N Welsh, 'The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?' (2001) 6 *Harvard Negotiation Law Review* 1; N Welsh, 'Disputants' Decision Control in Court-Connected Mediation: A Hollow Promise Without Procedural Justice' (2002) *University of Missouri Journal of Dispute Resolution* 179.

<sup>5</sup> R A Baruch Bush and J P Folger, *The Promise of Mediation: The Transformative Approach to Conflict* (Jossey-Bass, revised ed, 2005) 19.

<sup>6</sup> Not all of the lawyers who were observed in mediation participated in an interview.

mediation program is conducted within a legislative framework<sup>7</sup> and a policy environment that encourages the efficient resolution of litigated matters. Most of the matters that are mediated in the court's program are personal injuries matters. Other mediated matters include: commercial disputes; professional negligence claims; estate matters; and relationship matters.

Approaches by email, telephone or letter were made to 142 of the legal practitioners, who had been identified as those who practised in the court's civil jurisdiction. Thirty interviews were conducted following initial contact by either email or telephone. To ensure that senior practitioners and members of the independent bar were not under-represented in the study, letters were sent to a random selection of 19 practitioners within these categories in December 2006. A further 12 interviews resulted from those letters.

The interviewees represented approximately 29% of the practitioners who worked in the relevant jurisdiction at the time.<sup>8</sup> The general characteristics of the interviewees were comparable to that population.<sup>9</sup> The characteristics of the population sample and the interview sample are presented in the Appendix. The mediation experience of the interviewees correlated with their years of legal practice, as there was a fairly even spread in the number of mediations in which the practitioners had participated over the 12 months prior to the interview.<sup>10</sup>

Each interview lasted between half an hour and one and a half hours. The interviews were semi-structured and practitioners were encouraged to share any information or opinions, which they considered to be relevant to the court's program. A schedule of questions was followed, but adapted according to time constraints when necessary. Each interview was recorded digitally and later transcribed onto a database.<sup>11</sup>

The 10 observations were conducted in person. If all participants agreed to my observation of the mediation, read the information sheet and signed a consent form, I sat in the mediation room and silently observed. I made some handwritten notes and they are the only recording of the observations.

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<sup>7</sup> The Legislative framework governing the program includes the *Alternative Dispute Resolution Act 2001* (Tas) and the *Supreme Court Rules 2000* (Tas) Pt 20.

<sup>8</sup> The population of legal practitioners practising in civil matters at the Court was approximately 146. This figure was produced from a list of practitioners, who the then Registrar identified as practising in the Supreme Court of Tasmania's civil jurisdiction.

<sup>9</sup> The interview sample had 5% more males, 4% more barristers, an over-representation of legal practitioners from the North of the state and under-representation of practitioners based in the North-West. However, the interviews did not suffer from a 'Hobart-centric' bias. There were also a lesser proportion of representatives of the more junior members of the legal profession. A number of more recently admitted practitioners declined to be interviewed on the basis that they had little or no experience in Supreme Court mediation. By interviewing a higher proportion of more senior practitioners, the research benefited from the perceptions of the mediation program that have developed through experience. However, there was still a sample of junior practitioners included in the interview data.

<sup>10</sup> Of the 39 legal practitioners who were asked to estimate the number of mediations that they had participated in over the past 12 months, 34 (87%) indicated that they had participated in between 1 and 10 mediations. The other five practitioners had participated in between 11 and 12. Further breakdown of these figures is not possible, as the responses were recorded in the database as '1 to 10', '11 to 20' and so on.

<sup>11</sup> Technical difficulties were encountered in three interviews, which meant that handwritten notes were relied upon for those interviews.

## III CLAIMED ADVANTAGES OF DIRECT DISPUTANT PARTICIPATION

There are a number of potential benefits of direct disputant participation, some of which were mentioned at the beginning of this article. It is recognised in mediation literature that by participating directly in the resolution of disputes, disputants are empowered to resolve their own conflict.<sup>12</sup> They also benefit from the focus on themselves as individuals and their own needs, interests and relationships.

It is more likely that disputants who participate actively in mediation are able to maximise the satisfaction of their individual needs, than those who take a passive role.<sup>13</sup> Active participants contribute to the setting of the agenda for discussion and can ensure that it includes all of the issues they want raised. Their individual interests are likely to be considered in the formulation and consideration of options for resolution. On the other hand, without direct input from the disputants, the likelihood that the conversation will be about external rather than individual interests is heightened.

Although, the benefits of direct disputant participation are promoted in mediation literature, there are a number of problems with the expectation that all disputants will participate directly in mediation. The promotion of direct disputant participation without qualification, ignores questions about whether particular individuals have the capacity to participate directly, whether it is appropriate that they do and whether they want to.<sup>14</sup> Sometimes the relationship between the disputants may be such that there is a power imbalance that may be exacerbated if the disputants negotiate directly with one another during the mediation process.<sup>15</sup>

These issues are particularly pertinent where disputants have not volunteered freely to the referral to court-connected mediation. Compulsory mediation means that disputants are more likely than voluntary participants to lack the capacity or willingness to participate in an interest-based bargaining process. They have not necessarily sought an opportunity to actively participate, but may be at mediation to proceed with a routine part of the litigation process.<sup>16</sup>

There is a need to find a balance between the benefits and problems of direct disputant participation. The outcome of this balancing exercise depends upon which benefits and problems are perceived to occur, when disputants actively participate in mediation.

Ideally, if the principle of self-determination is maximised, the disputant makes the decision about the extent of his or her own participation and therefore determines the nature of his or her own role in mediation. A disputant's individual capacity and preferences are therefore taken into account when determining his or her role and the opportunity for direct participation is maximised. If they want to participate, that preference should be supported. On the other hand, disputants who prefer that another person speaks on their behalf should be granted that opportunity.

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<sup>12</sup> Boulle, above n 1, 60-8; Sourdin, above n 3, 28.

<sup>13</sup> J Lande, 'Toward More Sophisticated Mediation Theory' (2000) *Journal of Dispute Resolution* 321, 323.

<sup>14</sup> H Astor and C Chinkin, *Dispute Resolution in Australia* (LexisNexis Butterworths, 2<sup>nd</sup> ed, 2002) 159.

<sup>15</sup> *Ibid* 160-3.

<sup>16</sup> *Ibid* 158.

## IV LAWYER ATTITUDES TO DIRECT DISPUTANT PARTICIPATION

In relation to direct disputant participation, there was evidence of a lack of appreciation within the Tasmanian legal profession of the potential benefits that direct disputant participation can offer. Twenty-nine (69%) of interviewees did not mention direct disputant participation as either a beneficial or detrimental feature of court-connected mediation. This suggests that from the perspective of many lawyers, direct disputant participation is not considered to be a fundamental feature of the process. Legal practitioners who do not consider that direct disputant participation is a fundamental or significant feature of mediation, are unlikely to encourage their clients to participate directly in it.

Thirteen (31%) legal practitioners mentioned direct disputant participation in relation to positive or negative features of mediation. Only six (14% of interviewees) mentioned it in response to the questions; 'What are the advantages of court-connected mediation?' or 'What are we gaining by having so many cases go to mediation?' which encouraged interviewees to identify beneficial features of mediation.<sup>17</sup> Two examples of these comments are:

So to give people the opportunity to resolve it at that stage where they feel that they can participate in it and that they've had some control over their destiny is definitely a good thing.<sup>18</sup>

they get to talk ... If you're acting for a plaintiff they get to express their anger or their confusion or their despair if you like ... I think that's very good.<sup>19</sup>

These types of comments were made by only a small number of practitioners and therefore, may represent a minority view within the legal profession.

The lawyers' interview responses reflected a range of concerns about the dangers of direct disputant participation. Seven lawyers (17% of interviewees) nominated direct disputant participation as a disadvantage of the mediation process.<sup>20</sup> The primary reasons offered for considering disputant participation to be a disadvantage were: the disputants' perceived lack of experience at mediation; communication skills; or intellectual capacity. These reasons are illustrated by the following extracts:

The only person disadvantaged in the process is the lay plaintiff. Everyone else has been there before.<sup>21</sup>

Often they don't have the capacity to deal with the intellectual arguments that are being made.<sup>22</sup>

It is the plaintiff's mediation and I'm generally speaking quite happy for my client to speak and say what difficulties they are having because they're the person that is living it ... But the disadvantage of that can be that the plaintiff might not be a very good

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<sup>17</sup> Lawyers 4; 6; 21; 23; 39 and 40.

<sup>18</sup> Lawyer 6.

<sup>19</sup> Lawyer 4.

<sup>20</sup> Lawyers 1; 2; 8; 9; 22; 24 and 31.

<sup>21</sup> Lawyer 1.

<sup>22</sup> Lawyer 2.

communicator or actually might sound as if they're not being totally honest, or that they are exaggerating.<sup>23</sup>

Potential damage to the legal arguments prepared by the lawyers was an additional disadvantage of direct disputant participation that was identified. Exposure of the client as a weak witness was perceived to detract from the strength of the legal case. Three legal practitioners demonstrated that they were concerned about their clients revealing something in mediation that the lawyer believed ought not be revealed.<sup>24</sup> For example: 'your client might start shooting from the hip and saying things that you wish that they had never revealed, your client might be aggressive or show that they're not going to be a credible witness.'<sup>25</sup> This comment also reveals a concern about losing control over the client.

Another practitioner commented that direct disputant participation was an obstacle to frank discussion between lawyers.<sup>26</sup> Where he wanted to raise fundamental problems such as a disputant's credibility, he preferred to negotiate directly with the other lawyer, rather than to conduct a mediation in the presence of the clients.<sup>27</sup>

Overall, lawyers appear to be more concerned about potential problems arising from direct disputant participation, than the potential benefits.

## V LAWYER DESCRIPTION OF DISPUTANTS' AND LAWYERS' ROLES IN COURT-CONNECTED MEDIATION

In the Supreme Court of Tasmania, the degree to which disputants participate directly in mediation appears to be determined by the legal practitioners, rather than by the disputants themselves. Many legal practitioners indicated during interviews, that they decide upon the degree of participation by their clients. In their responses to the questions: 'How do you prepare yourself and your client for mediation?' and 'How does a typical mediation work at the Supreme Court of Tasmania?' 29 practitioners provided insight into their practices, in relation to direct disputant participation in mediation. The verbs used by these practitioners to describe their interaction with their own clients in regard to the client's participation included: 'tell,'<sup>28</sup> 'direct,'<sup>29</sup> 'decide,'<sup>30</sup> and; 'advise.'<sup>31</sup> One practitioner makes a 'determination',<sup>32</sup> as to whether or not the client is able to speak for themselves in mediation. Another practitioner indicated that she 'recommends' that her client does not speak.<sup>33</sup> The language chosen suggests that lawyers are quite interventionist in the decision about whether or not a disputant will participate directly in mediation.

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<sup>23</sup> Lawyer 31.

<sup>24</sup> Lawyers 8; 9 and 31.

<sup>25</sup> Lawyer 8.

<sup>26</sup> Lawyer 24.

<sup>27</sup> The practitioner did not elaborate as to the positive consequences of having an opportunity to tell the other lawyers that their client lacked credibility.

<sup>28</sup> Lawyers 3; 6; 11 and 24.

<sup>29</sup> Lawyers 18 and 30.

<sup>30</sup> Lawyers 29 and 35.

<sup>31</sup> Lawyers 34 and 42.

<sup>32</sup> Lawyer 14.

<sup>33</sup> Lawyer 20.

Some lawyers believe that it is undesirable for any disputants to participate directly in mediation. They either tell or advise all of their clients not to say anything during the mediation process. For example: 'I tell them not to say a word, unless I invite them to.'<sup>34</sup>

The majority of practitioners who addressed the issue of direct disputant participation during the interviews (88% of 29 practitioners) did not support uncontrolled disputant participation. For example:

[T]he best advice to give a client, whether it be an insurer or plaintiff client is 'let me do the talking.' So the client says nothing ideally and the lawyer would go point by point through the liability issues.<sup>35</sup>

Generally speaking, the parties don't say anything unless they want to, because quite often it's not helpful. The lawyers are over the facts and having emotion added in doesn't help anything. Although in some cases it can, particularly in disputes over deceased estates, it's quite useful to have a party having something to say.<sup>36</sup>

By contrast, the following practitioner does prefer that his clients outline their own cases in mediation. However, he coaches them as to what that case is beforehand.

Then I'll also warn them that they may be required to outline their own case and ... ask them what their own case is. Because often by that point they will have lost track about what their own case is actually about and then I'll obviously need to advise them if they have lost track because sometimes you do find that.<sup>37</sup>

There were some indications that lawyers understand that mediation provides an opportunity for direct disputant participation. In recognition of this opportunity, some lawyers tell their clients that they can speak if they want to, however many practitioners followed this with a warning about the danger of saying something detrimental to their legal case in mediation. For example:

I always tell the client that they have a right to speak if they want to, but that my advice is that they don't unless on specific topics that we've discussed.<sup>38</sup>

I'm probably naughty because I would be telling my client not to speak. I would be saying to my client that it's their conference, they can speak if they want to, but my recommendation would be not to speak unless it's about their experience of pain. I'm happy for them to speak about their experience of pain and the difference it's made to their life, but I discourage them speaking about how the accident happened, so issues that are really relevant to liability.<sup>39</sup>

These results suggest that most lawyers are cautious about direct disputant participation in mediation. The majority of interviewees were of the opinion that the appropriate role of a client in mediation is passive. Clients should either not participate or participate when invited or allowed to by their legal practitioner. Lawyers tend to discourage their

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<sup>34</sup> Lawyer 24.

<sup>35</sup> Lawyer 37.

<sup>36</sup> Lawyer 16.

<sup>37</sup> Lawyer 8.

<sup>38</sup> Lawyer 34.

<sup>39</sup> Lawyer 20.

clients from participating directly, to manage their clients' participation or to decide for their clients what the appropriate degree of disputant participation is in a particular case. Lawyers are, in short, the stage managers of disputant participation. This finding is consistent with Gordon and Gerschman's findings derived from their interviews of lawyers.<sup>40</sup> Some contrasting evidence of lawyer practices in mediation has been identified.<sup>41</sup> McEwen et al found that the divorce lawyers in their study tended to refrain from taking over the proceedings and to encourage their clients to participate directly in mediation.<sup>42</sup> Clearly, there are variations of practice between individual lawyers, locations and practice areas.

In the Supreme Court of Tasmania, the interview and observation data indicates that direct disputant participation is not prevalent in most torts and many simple commercial matters. The primary participants in mediation of these disputes are the lawyers and the mediator. This is consistent with the attitudes demonstrated by lawyers towards the direct participation of their clients. If disputants participate in court-connected mediation at the Supreme Court, it is usually to either: present their story of how their dispute or injury has affected them; or to answer questions put to them by one of the legal practitioners or the mediator. Legal practitioners and mediators tend to control the mediation process and content. This tends to take the focus away from the disputants and their goals and moves the focus towards their lawyers instead. On the other hand, in relationship or estate matters disputants are more likely to participate directly than in other matters.<sup>43</sup> In those types of disputes there are no legal questions of fault and the future needs of the parties is a legal issue. Furthermore, the disputants are directly involved in mediation and have a relationship with one another.

There was some evidence that legal practitioner control over disputant participation was reinforced by mediators. For example, during one observed personal injuries mediation, the plaintiff started answering a question that had been posed by the defendant's legal practitioner. The mediator interrupted the plaintiff, looked at the plaintiff's lawyer and asked: 'Are you happy for [the plaintiff] to speak?'<sup>44</sup> This example, together with other observations, indicated that the court-connected mediators sometimes reinforce lawyer control over the degree of disputant participation. Sometimes, the mediator who asked such a question might be inviting the lawyer to resist potential cross-examination of his or her client by another lawyer. Mediators reported in interviews that they do support disputant participation, but that they usually leave the decision about whether or not to participate between the lawyers and their clients. This practice contrasts with the

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<sup>40</sup> E E Gordon, 'Why Attorneys Support Mandatory Mediation' (1999) 82(5) *Judicature* 224, 227; J Gerschman, 'Pilot Study Examines Lawyer's Roles in VCAT Mediations' (2003) 7 *VCAT Mediation Newsletter* 7, 9.

<sup>41</sup> C A McEwen, N H Rogers and R J Maiman, 'Bring in the Lawyers: Challenging the Dominant Approaches to Ensuring Fairness in Divorce Mediation' (1995) 79 *Minnesota Law Review* 1317, 1375.

<sup>42</sup> *Ibid.*

<sup>43</sup> This trend was reported by mediators and the interview data alone is relied upon in drawing this distinction. No observations were conducted in these kinds of matters.

<sup>44</sup> Observation 1 June 2007. Discussions with two mediators after this observation confirmed that it was not unusual for mediators to check whether lawyers were comfortable with their clients answering questions from the other legal practitioner.



mediator behaviour promoted in some literature, which proposes that one of the mediator's roles is to encourage advisors to allow the disputant to speak directly.<sup>45</sup>

The role that disputants play in mediation is closely related to the role that is played by the lawyers who participate in mediation. There are disparate opinions within mediation literature about the appropriate role of lawyers in mediation. The lawyers' role varies depending on the context of the mediation.<sup>46</sup> In court-connected mediation of general civil cases there is a tendency to focus on professional representation, rather than the disputants themselves resolving the dispute.<sup>47</sup> However, a primarily advisory role is encouraged and advocacy discouraged by most theorists and in some guidelines for practice.<sup>48</sup> From this perspective, the lawyer's role is not usually to conduct the negotiations on behalf of the client. Exceptions to this general rule include where a disputant lacks the capacity to speak for themselves or to do so might expose them to inappropriate behaviour by the other disputant.<sup>49</sup> On the other hand, many legal practitioners promote strategic adversarial advocacy within mediation.<sup>50</sup>

A partial explanation for the role that lawyers tend to play in court-connected mediation is that mediation calls for participants to perform roles that are entirely different from the roles that are performed in traditional pre-trial and trial processes. Lawyers are accustomed to performing a strategic adversarial role in litigation. The direct and active disputant participation that is promoted in mediation literature is quite different from the role of the passive observer that clients usually adopt in litigation. Lawyers are accustomed to being the main participants in litigation, and therefore it is understandable that many want to play the main part in court-connected mediation.<sup>51</sup> One of the interviewees made the following comment: 'Generally speaking I don't

<sup>45</sup> L Boule, *Mediation: Skills and Techniques* (Butterworths Skills Series, 2001) [5.16] and [10.55]; Micheline Dewdney, *Party, Mediator and Lawyer-Driven Problems and Ways of Avoiding Them* (2007) LEADR <[www.leadr.com.au/articles](http://www.leadr.com.au/articles)> at 25 June 2007; R Charlton and M Dewdney, *The Mediator's Handbook: Skills and Strategies for Practitioners* (LBC Information Service, 2<sup>nd</sup> ed, 2004).

<sup>46</sup> M Walker, 'Guidelines for Lawyers in Mediations' (2007) 9(8) *ADR Bulletin* 150, 151.

<sup>47</sup> Margaret A Shone, 'Law Reform and ADR: Pulling Strands in the Civil Justice Web' (Paper presented at the Australasian Law Reform Agencies Conference, Wellington, New Zealand, 13-16 April 2004).

<sup>48</sup> Law Society of New South Wales, *Mediation and Evaluation Information Kit* (2004) <[www.lawsociety.com.au](http://www.lawsociety.com.au)> at 11 July 2005; Gerschman, above n 40; Boule, above n 1, 232-44; C W Moore, *The Mediation Process: Practical Strategies for Resolving Conflict* (Jossey-Bass, 3<sup>rd</sup> ed, 2003) 150; A Ardagh and G Cumes, 'Lawyers and Mediation: Beyond the Adversarial System?' (1998) 9 *Australian Dispute Resolution Journal* 72, 74; B Sordo, 'The Lawyer's Role in Mediation' (1996) 7 *Australian Dispute Resolution Journal* 20, 24; Ann Beckingham and Jim Cyngler, 'The Involvement of Lawyers, Accountants and Other Professionals When Attending Their Clients' Mediations' (Paper presented at the 4th National Mediation Conference, Melbourne, [4th -8th], April 1998).

<sup>49</sup> R Field, 'A Feminist Model of Mediation that Centralises the Role of Lawyers as Advocates for Participant who are Victims of Domestic Violence' (2004) 20 *The Australian Feminist Law Journal* 65.

<sup>50</sup> C-M Caputo, 'Lawyers' Participation in Mediation' (2007) 18 *Australasian Dispute Resolution Journal* 84, 86; M Redfern, 'Mediation and the Legal Profession' (2002) 13 *Australasian Dispute Resolution Journal* 15, 17; R G Spier, 'Mediation Miscues: The 10 Biggest Mistakes Lawyers Make in Mediation' (1999) 59 *The Oregon State Bar Bulletin* 35; J W Cooley, *Mediation Advocacy* (National Institute of Trial Advocacy, 2<sup>nd</sup> ed, 2002); Jeff Kichaven, *Mediation Advocacy: The State of the Art* (2003) Mediate.com <<http://www.mediate.com/pfriendly.cfm?id=1821>> at 6 March 2006.

<sup>51</sup> Gordon, above n 40, 227.

encourage people to say anything until such time as they're spoken to and then I warn them that they've got a dog and they shouldn't be barking themselves.'<sup>52</sup>

Lawyers who consider that their job is to 'bark' for their clients, are extremely unlikely to encourage their clients to 'bark' for themselves.

Contrary to the common perception of the restriction of the lawyers' role in mediation to advisor, lawyers perceive that their role in mediation includes a multitude of tasks, some of which are advisory, some of which require them to act as a negotiator or advocate.<sup>53</sup> I asked 39 interviewees<sup>54</sup> to indicate: 'Which of the following best describes the legal practitioner's role in court-connected mediation?' The options were 'advocate'; 'advisor'; or 'negotiator'. Only two respondents (5%) indicated that in their opinion the role of the lawyer in court-connected mediation is to advise only. Five practitioners (13%) were of the opinion that the lawyers' role is only to negotiate. No practitioners believed that the lawyers' role in court-connected mediation is to advocate only. These results show that the overwhelming majority of Tasmanian lawyers who were interviewed do not consider that the lawyers' role in court-connected mediation is restricted to that of advisor only.

Looking at each role in turn, 77% of legal practitioners were of the opinion that the legal practitioner's role includes an element of advocacy, 82% believed that legal practitioners ought to provide advice during mediation and 97% believed that the legal practitioner's role includes that of negotiator. Most of the lawyers (69%) believe that their role in court-connected mediation includes elements of advisor, advocate and negotiator. Lawyers expect to act as agents for their clients by negotiating or advocating on their behalf. This reflects a perception that their role is to represent their clients throughout all aspects of litigation, including during court-connected mediation. This mixture of roles is consistent with the lawyers' usual mix of tasks in representing their clients in litigation.

The expectation that lawyers will speak on their clients' behalf during mediation may also be affected by the nature of the relationship between lawyers and their clients. Coben asserts that many clients do not want to be active participants in the resolution of their disputes, which is why they engage a lawyer to act on their behalf.<sup>55</sup> It is possible that some clients expect to be relieved of the responsibility of being active participants in the resolution of their dispute once they have secured legal representation. Although, the promotion of self-determination may theoretically maximise disputant responsibility, some disputants may prefer not to take responsibility for the resolution of their dispute. No empirical evidence has been identified that confirms anecdotal claims such as Coben's, and the disputant perspective is outside the scope of my empirical research. Furthermore, several empirical studies of disputant satisfaction have concluded that disputants rate direct participation and adequate speaking opportunities highly in respect

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<sup>52</sup> Lawyer 25.

<sup>53</sup> For example: McEwen, Rogers and Maiman's US research found that most of the lawyers interviewed for that study considered that their role included protecting against mediator pressures or unfair bargaining advantages by the other side. McEwen, Rogers and Maiman, above n 41, 1360.

<sup>54</sup> The first three interviewees were not asked this question, which was developed after reflection upon the initial interviews.

<sup>55</sup> J R Coben, 'Summer Musings on Curricular Innovations to Change the Lawyer's Standard Philosophical Map' (1998) *Florida Law Review* 735, 741.

of their satisfaction with the mediation process.<sup>56</sup> Other research showed mixed effects of direct disputant participation.<sup>57</sup> It is possible that litigants, whose conflict management strategy has brought them to the apex of the conflict resolution pyramid, are more likely than the general population to want to avoid active participation in the resolution of their dispute. The advice of their lawyer may also contribute to such expectations.

## VI IMPLICATIONS OF THE RESEARCH FINDINGS

This article so far, has demonstrated that patterns of disputant participation in court-connected mediation of general civil disputes tend to diverge from the traditional mediation vision of direct and active participation. It appears that many lawyers actively discourage their clients from direct participation in court-connected mediation of general civil disputes at the Supreme Court of Tasmania. Lawyer attitudes appear to contribute to patterns of disputant participation in mediation at the court, thereby shaping the nature of the process.

When direct disputant participation is encouraged in mediation, the disputants themselves have an opportunity to present their point of view, followed by clarification by their lawyer if necessary. However, in court-connected mediations the party presentations will usually be made by the lawyers with some limited contribution from the disputants. Where disputants rely upon a spokesperson, there is inevitably less focus on the individual disputants than if they spoke for themselves. If there is less focus on the individual needs, interests, emotions and relationships of disputants who do not participate directly in court-connected mediation, those matters are less likely to be resolved, satisfied or improved through the court-connected mediation process. In order for individuals to achieve such individualised treatment, they ought to participate directly.

Despite the fact that theoretically, disputants are free to agree to litigation outcomes that depart from legal norms,<sup>58</sup> the law is highly influential in court-connected mediation. The context of litigation encourages an assessment of the dispute in terms of legal rights. The formal legal system exists for the purpose of resolving legal disputes according to the law. Because of the role that legal issues play in the litigation system and in court-connected mediation, it is unsurprising that the legal issues are given some priority over the non-legal issues.

Within court-connected mediation both legal practitioners and mediators have a relationship and some obligations towards the court as the administrator of justice. They are therefore likely to be influenced by the institutional goals of the mediation program,

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<sup>56</sup> Boule, above n 1, 597-8; C Bartlett, 'Mediation in the Spring Offensive 1992' (1993) 67(4) *Law Institute Journal* 232; M Delaney and T Wright, *Plaintiff's Satisfaction with Dispute Resolution Processes: Trial, Arbitration, Pre-Trial Conference and Mediation* (Justice Research Centre, 1997); J Howieson, 'Perceptions of Procedural Justice and Legitimacy in Local Court Mediation' (2002) 9(2) *Murdoch University Electronic Journal of Law* <[http://www.murdoch.edu.au/elaw/issues/v9n2/howieson92\\_text.html](http://www.murdoch.edu.au/elaw/issues/v9n2/howieson92_text.html)> at 29 June 2008. For further references see Boule, above n 1, Chapter 16 at fn 13 and 15.

<sup>57</sup> R L Wissler, 'Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research' (2002) 17(3) *Ohio State Journal on Dispute Resolution* 641.

<sup>58</sup> M A Eisenberg, 'Private Ordering Through Negotiation: Dispute-Settlement and Rulemaking' (1976) 89(4) *Harvard Law Review* 637, 654.

which include pursuing settlement of litigated matters. Despite the range of potential benefits of mediation, it is clear that the benefit of efficiency is often prioritised by courts.<sup>59</sup> There is a widespread view that the enthusiasm of court administrators for mediation was founded primarily on a perception of mediation as a case management tool,<sup>60</sup> rather than on an interest in incorporating mediation values of individualism and self-determination into the formal justice system.<sup>61</sup> Case management delivers benefits to litigants through a more efficient administration of justice.

Whether or not it is problematic that disputants tend not to participate directly in court-connected mediation depends upon the goal of the process. The aims of the court and the participants in such programs may diverge significantly from the facilitative mediation aim of self-determination and the maximisation of the satisfaction of the individual needs and interest of disputants. One alternative aim is the objective of evaluative mediation, which is to 'reach a settlement according to the legal (or other) rights and entitlements of the disputants and within the anticipated range of court, tribunal or industry outcomes.'<sup>62</sup> The context of court-connected mediation within the litigation process makes it likely that this aim is of high importance in court-connected mediation.

When the goal is to achieve settlement within the range of anticipated legal outcomes, an evaluation of the dispute on its legal merits (or other objective standard) is conducted within the mediation. The disputants' individual interests take a low priority, because they are not necessarily relevant to the legal issues. If the individual interests of the disputants are not essential considerations to achieve the goal of the process, then it may not be problematic that they do not have an opportunity to present those interests. Furthermore, it could be argued that disputants who are encouraged to present their interests, only to have them dismissed as being irrelevant to the resolution of the dispute, may be less likely to be satisfied, than those who are told that the process is about resolving the legal issues and who therefore, do not expect to have an opportunity to discuss their individual interests.

Stakeholders in court-connected mediation do not always share the same aims as one another. Therefore, although direct disputant participation may not be necessary in order to meet some participants' goals, it may be essential for other participants to reach their goals. For example, in a personal injuries claim the court; the mediator; and the lawyers may share the goal of achieving a settlement within the range of anticipated legal outcomes. The defendant's goal may be to resolve the matter as quickly as possible. This group of participants would probably prefer that the lawyers conduct the

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<sup>59</sup> L Boule, 'Minding the Gaps: Reflecting on the Story of Australian Mediation' (2000) 3(1) *ADR Bulletin* 3, 5; N Alexander, 'Mediation on Trial: Ten Verdicts on Court-Related ADR' (2004) 22(1) *Law in Context* 8, 17; Shone, above n 47, 6. This focus in court-connected mediation is an outcome of the inter-relationship between court-connected dispute resolution (including mediation) and the civil justice system. Astor and Chinkin, above n 14, ch 2.

<sup>60</sup> Astor and Chinkin, above n 14, 245-6; J Hunter, C Cameron and T Henning, *Litigation I: Civil Procedure* (LexisNexis, 7<sup>th</sup> ed, 2005) [2.17]; Judge P D Mahony, 'Private Settlement - Public Justice' (2000) 31 *Victoria University of Wellington Law Review* 225 <[www.austlii.edu.au/nz/journals/VUWLR/2000/18.html](http://www.austlii.edu.au/nz/journals/VUWLR/2000/18.html)> at 29 June 2008; J Martin, 'Friendly Persuasion - How Mediation Benefits Case Management: The Experience in the Supreme Court of Western Australia' (1996) 6 *Journal of Judicial Administration* 65, 66.

<sup>61</sup> Alexander, above n 59, 17.

<sup>62</sup> Boule, above n 1, 44.

negotiations on the behalf of their clients in the interests of utilising legal expertise and efficiency. The plaintiff might, on the other hand, want to tell his story of the impact that the accident has had on his life and to get some reassurance that the defendant believes his claim is genuine. This aim is unlikely to be achieved without direct disputant participation. The plaintiff may remain unsatisfied despite an 'adequate' settlement amount.

The likelihood that participants will have diverse aims in mediation, presents a challenge for the mediation field. If a participant's goals would be best achieved by direct disputant participation, but this is not facilitated, then they are likely to be dissatisfied with the mediation process. An effective way to manage this problem is to present clear goals for a mediation program and for each mediation conducted within that program. Such clarification manages the expectations of participants in relation to the process.

Unfortunately, court-connected mediation programs rarely articulate the program goals,<sup>63</sup> and there is evidence that this tends not to happen at the micro-level of individual mediations either. For example, the Supreme Court of Tasmania's mediation program is conducted in the absence of any formal guidelines for practice, beyond the extremely broad provisions of the *Alternative Dispute Resolution Act 2001* (Tas) and the *Supreme Court Rules 2000* (Tas). Rule 519(2) provides that (subject to guidelines that may be approved by the judges) 'a mediation is to be conducted in any manner the mediator determines.'<sup>64</sup> No guidelines have been set by the judges about the practice of mediation within the court's program. This has resulted in considerable variation in mediation practice. Such flexibility has both strengths (such as adaptability) and weaknesses (such as lack of clarity). The following comment by one of the lawyer interviewees, who is a practising mediator outside the Supreme Court, indicated that the aim of individual mediations is not always clearly identified at the Supreme Court:

there's three simple steps in a mediation. The first one is where you ask the parties 'what are we here for? what do we want to achieve?' The answer is a fair resolution. And then they state their case, and the mediator says 'well what options exist to achieve that aim?' And then when they come up with options, well you just say 'well how is that option going to achieve our aim?'... The mediators down there don't ever start off with an aim.<sup>65</sup>

Without clarity of expectation about the aim of a mediation, it would be difficult for participants to consider whether or not their goals are likely to be achieved through the mediation process. Without a discussion about what the participants want to achieve in mediation, the nature of the process cannot be shaped to suit those aims.

There are wide ranging benefits that may be gained from mediation. Direct disputant participation is a fundamental source of benefits, such as self-determination and empowerment. However, even if disputants do not participate directly in the mediation process, there are other benefits that may still be enjoyed, such as settlement; consensual as opposed to determined outcomes; and efficiency relative to alternative processes. Disputants who attend court-connected mediation also have the opportunity

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<sup>63</sup> K Mack, 'Court Referral to ADR: Criteria and Research' (National ADR Advisory Council and Australian Institute of Judicial Administration, 2003) 17.

<sup>64</sup> *Supreme Court Rules 2000* (Tas) r 519(2).

<sup>65</sup> Lawyer 12.

to be present when the dispute is negotiated, as opposed to negotiation between lawyers, which usually takes place without the disputants being present. These benefits may be satisfactory and adequate for many participants. Widespread support for court-connected programs from lawyers and disputants indicates that they are generally satisfied with the way that court-connected mediation processes are conducted.

Furthermore, if litigants want to resolve their dispute in accordance with legal principles, they may not value an exploration of their individual non-legal interests. It is, however, also inappropriate to assume that litigants would not appreciate or value an interest-based disputant-centred bargaining process, if it was offered to them. Disputants and lawyers may be unconsciously unskilled in a range of conflict resolution strategies. The question of whether or not courts ought to be offering such processes within their programs is another question for future consideration.

In addition to the clear definition of the courts' own objectives for a mediation program, the aims of the participants in mediation ought to be identified and clarified either before or at the commencement of each mediation session. The purpose of the mediation process should be explicit and mutually agreed. The question of disputant participation should be raised. The process might sometimes be tailored to meet participant expectations or those expectations might be adjusted if participants expect a process, other than the one that the mediator is prepared to conduct.

In order to represent the nature of court-connected mediation program clearly, courts should consider whether or not some of the dispute resolution process that they call 'mediation' should be called another name. The very broad and inclusive definitions of mediation that tend to be preferred in court-connected programs blur the distinction between mediation and other processes. For example, if it is not anticipated that disputants will be the main participants within court-connected mediation and the focus will be on the legally available outcomes, then the process may be more accurately called a 'settlement conference' or 'neutral evaluation' depending on the anticipated role of the mediator. Alternatively, it is possible to specify the kind of mediation that is practised, by distinguishing between 'settlement mediation'; 'evaluative mediation'; 'facilitative mediation'; and 'transformative mediation', and specifying the aims and features of each model. This would raise awareness of the alternative mediation practices that are available both within and outside of the court-connected program. Renaming processes to more specific terminology would avoid potential confusion about the nature of court-connected dispute resolution. It would, however, also decrease the ability to shift between mediation styles when appropriate.

Alternatively, it is open for courts, upon reflection upon the nature of their mediation practice, to decide that the process ought to adhere more closely to the mediation perspective and its focus on individual disputants. If this conclusion is reached, then information needs to be distributed to potential participants about the nature of the process, and mediators need to actively promote more focus on individual needs and interests. Lawyers should be educated about the potential benefits of direct disputant participation and interest-based bargaining. They should also receive training in relation to their role in preparing their clients for mediation and how to participate in a less dominant way during the mediation process. They should also be encouraged to provide their clients with adequate and accurate information about mediation to enable their

clients to decide the degree of their participation in the court-connected mediation process.

## VII CONCLUSION

The empirical research outlined in this article has demonstrated that lawyers do not tend to perceive that the lack of direct disputant participation in court-connected mediation is problematic. From the perspective of many lawyers, direct disputant participation is not a fundamental feature of the mediation process. Furthermore, lawyers are alert to the risks of direct disputant participation and tend to protect against those risks by being the spokesperson for their client. Most lawyers perceive that advocacy is a fundamental part of their job and believe that their clients pay them to speak on the clients' behalf. Therefore, lawyers tend to discourage their clients from participating directly in court-connected mediation.

There are a number of recommendations that flow from the consideration of the implications of the research findings. First, courts need to define the objectives of court-connected mediation programs clearly. Courts need to decide whether or not the aim of their mediation program includes maximising the self-determination and empowerment of disputants. It may be that many courts do not seek to prioritise these goals, but implement mediation programs for the purpose of achieving other goals such as settlement by agreement, in accordance with legal precedent and in an efficient manner. Whatever the objectives are, all potential participants ought to be informed about them and the subsequent limits of the program. Secondly, at each court-connected mediation, the goals that participants bring to the process ought to be defined. The capacity for the court-connected process to achieve those goals should be considered and made explicit by the mediator. This practice would reinforce the boundaries of court-connected mediation practice that would be defined through the definition of the program objectives. Finally, if courts consider that greater attention ought to be given to enabling direct disputant participation in their mediation programs, then specific mechanisms need to be introduced to achieve this. This may require re-education and training of the legal profession. The Tasmanian lawyers who were interviewed for this research demonstrated a widespread ignorance of fundamental mediation values grounded in individualism. That may not be problematic unless court-connected mediation programs seek to offer the benefits that are derived from the interest-based bargaining process, such as self-determination; responsiveness; and empowerment. Direct disputant participation is required for those benefits to be maximised.

## APPENDIX

*Comparison of general characteristics of legal practitioners in the population sample and interview sample*

<b>Characteristic</b>	<b>% of the population of legal practitioners practising in the Court</b>	<b>% of the interview sample</b>
Gender - male	81	86
- female	19	14
Barrister and Solicitor	92	88
Barrister	8	12
Decade of admission to the Supreme Court of Tasmania		
1960s	4	7
1970s	25	22
1980s	32	38
1990s	30	26
2000s	9	7
Base – South	79	79
- North	9	14
- North-West	12	7