

THE ROLE OF LAWYERS IN MEDIATION: INSIGHTS FROM MEDIATORS AT VICTORIA'S CIVIL AND ADMINISTRATIVE TRIBUNAL

KATHY DOUGLAS* AND BECKY BATAGOL**

Mediation is an increasingly important part of legal practice with the institutionalisation of alternative or appropriate dispute resolution in our legal system. Mediation has been embraced by courts and may be part of pre-action requirements in some jurisdictions. How lawyers can best contribute to mediation has been discussed in the literature and is informed by ethical requirements. This article provides insights into the role of lawyers in mediation using interviews with sixteen mediators at the Victorian Civil and Administrative Tribunal of Victoria. It explores collaborative approaches that lawyers can adopt within the spectrum of roles that lawyers may take when representing a client in mediation developed by Olivia Rundle.

I INTRODUCTION

The institutionalisation of alternative or appropriate dispute resolution (ADR) within the Australian civil justice system means that lawyers are increasingly engaging with ADR.¹ Lawyers must adjust their practice to serve their clients' needs in a changing legal environment.² ADR can include a number of different processes, ranging from arbitration to the most widely used mediation.³ Mediation is a standard feature of contemporary dispute resolution and is mandated in most courts in Australia.⁴ The approach of lawyers to mediation is important in achieving resolution to a dispute, as lawyers influence the process and success of

* BA, LL.M., (Monash), Dip Ed (Melbourne), PhD (RMIT University), Senior Lecturer in Law, Graduate School of Business and Law, RMIT University.

** BA (Hons), LLB (Hons), PhD (Monash), Senior Lecturer, Faculty of Law, Monash University. This article was written with the assistance of grants from the Australasian Institute of Judicial Administration, RMIT and the Faculty of Law at Monash University. The authors would like to thank our research assistants Jude Courtin and Clare Coburn, the Victorian Civil and Administrative Tribunal (VCAT) and especially the VCAT mediators we interviewed, whose ideas are at the heart of this research.

1 Chief Justice T F Bathurst, 'The Role of the Courts in the Changing Dispute Resolution Landscape' (2012) 35 *University of New South Wales Law Journal* 870, 872-4.

2 Christine Parker and Adrian Evans, *Inside Lawyers' Ethics* (Cambridge University Press, 2007) 14.

3 National Alternative Dispute Resolution Advisory Council, *Dispute Resolution Terms: The Use of Terms in (Alternative) Dispute Resolution* (September 2003) 4, 9; Tania Sourdin, *Alternative Dispute Resolution* (Thomson Reuters, 4th ed, 2012) ch 1.

4 Melissa Hanks, 'Perspectives on Mandatory Mediation' (2012) 35 *University of New South Wales Law Journal* 929.

mediation.⁵ Culture around legal practice and lawyers' attitudes to the ways that disputes should be conducted are important.⁶ Lawyers in mediation can embrace the underlying philosophy of much of mediation practice and engage in collaborative problem-solving that is non-adversarial in orientation.⁷ Alternatively, lawyers may stymie the potential for settlement by taking an adversarial, rights based approach in mediation.⁸ At times lawyers may need to advocate vigorously for their clients' rights, but automatically approaching mediation with an adversarial mindset may defeat some of the potential of mediation to meet their clients' needs.

In this article, we explore the role of lawyers in mediation through the insights of mediators at the Victorian Civil and Administrative Tribunal (VCAT). VCAT provides an ideal environment for understanding the role of lawyers in mediation because it has a well-established court-connected (or in this case — tribunal-connected) mediation service that has been central to practice at VCAT since it was established in 1998.⁹ Such a long period of operation of the VCAT mediation service has allowed a collaborative mediation culture to develop amongst members, dispute resolution professionals, and lawyers attending there. Being a court-connected service, lawyers frequently participate in and around the mediation process at VCAT. This means that mediators are familiar with working with lawyers and they were able to respond to our questions about the role of lawyers from experience. Previous research at VCAT has considered the lawyers role through the interviewing of lawyers who worked at VCAT.¹⁰ Our research complements this previous study by providing insights from the other main professional player in VCAT mediations — the mediators themselves.

As a background to our discussion, we consider the specific legal and ethical requirements that lawyers must obey, and the nature of court-connected mediation. We explore existing research into lawyers' roles in mediation as well as current knowledge of what collaborative, constructive legal representation in mediation can mean.

5 Jean Poitras, Arnaud Stimec and Jean-François Roberge, 'The Negative Impact of Attorneys on Mediation Outcomes: A Myth or a Reality?' (2010) 26 *Negotiation Journal* 9. See also Jaimie C Kent, 'Getting the Best of Both Worlds: Making Partnerships between Court and Community ADR Programs Exemplary' (2005) 23 *Conflict Resolution Quarterly* 71; Jean Poitras and Susan Raines, *Expert Mediators: Overcoming Mediation Challenges in Workplace, Family and Community Conflicts* (Jason Aronson, 2013) ch 4.

6 Victorian Law Reform Commission, *Civil Justice Review*, Report No 14 (2008) 81.

7 Julie Macfarlane, *The New Lawyer: How Settlement Is Transforming the Practice of Law* (University of British Columbia Press, 2008) ch 1. Macfarlane suggests a conflict resolution advocacy where lawyers approach disputes beginning with ADR options: at 109.

8 National Alternative Dispute Resolution Advisory Committee, *The Resolve to Resolve: Embracing ADR to Improve Access to Justice in the Federal Jurisdiction* (September 2009) 136.

9 *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 88.

10 Joel Gerschman, *Unearthing Lawyers' Role in VCAT Mediation: Do Theory and Practice Converge?* (LLB Thesis, Monash University, 2002).

II LEGAL AND ETHICAL REQUIREMENTS GOVERNING LAWYERS' PARTICIPATION IN DISPUTE RESOLUTION

Lawyers' participation in ADR, and mediation especially, is increasingly part of standard legal practice.¹¹ Governments at all levels aim to shift legal culture 'from one of adversarial dispute resolution to one of cooperation and conciliation, one of improved access to justice, and one of utilising the full benefits of ADR processes'.¹² The past five years have seen Australian governments in multiple jurisdictions use legislation to attempt to bring about cultural change around lawyers' use of ADR.¹³ 'Overarching purpose' and 'pre-action' provisions have been central here. Overarching purpose provisions require parties, their lawyers, and sometimes the courts to facilitate the timely and efficient resolution of civil disputes. For example, in Victoria, s 7(1) of the *Civil Procedure Act 2010* (Vic) states that the 'overarching purpose of the ... [legislative framework] is to facilitate the just, efficient, timely and cost-effective resolution of the real issues in dispute'. Use of an ADR process, which includes mediation, is explicitly referred to in s 7(2)(c) as one method of achieving the overarching purpose. In New South Wales, civil courts, with the assistance of parties, must give effect to a similar 'overriding purpose' to 'facilitate the just, quick and cheap resolution of the real issues' in civil proceedings.¹⁴ In the Federal Court of Australia, parties to civil proceedings have been required since 2009 to fulfil the 'overarching purpose' of civil practice and procedure, being the 'just resolution of disputes ... as quickly, inexpensively and efficiently as possible'.¹⁵ Failure to comply with this duty must be taken into account by Federal Court judges when awarding costs.¹⁶

Pre-action procedures encourage full disclosure of information between the parties, early settlement of disputes, and, where the matter cannot be resolved, the narrowing of the issues in dispute, all before proceedings have commenced.¹⁷ In relation to ADR, pre-action procedures are significant because they change the position of ADR within the civil justice system from court-connected or referred services, towards pre-trial ADR services offered by non-court providers or undertaken informally.¹⁸ In both the Federal Court of Australia and the general lists of the Federal Circuit Court of Australia, both applicants and respondents

11 Donna Cooper, 'The "New Advocacy": Dispute Resolution Advocacy and the Emergence of the Role of Lawyer Representatives in Negotiation, Mediation and Conciliation Processes' (2013) 24 *Australasian Dispute Resolution Journal* 178; Justice Michael Pembroke, 'Dancing to a New Tune' (2013) 51(5) *Law Society Journal* 52; Tom Fisher, Judy Gutman and Erika Martens, 'Why Teach ADR to Law Students? Part 2: An Empirical Survey' (2007) 17 *Legal Education Review* 67; Macfarlane, *The New Lawyer*, above n 7, 7–12.

12 Jill Howieson, 'The Professional Culture of Australian Family Lawyers: Pathways to Constructive Change' (2011) 25 *International Journal of Law, Policy and the Family* 71, 73.

13 Michael King et al, *Non-Adversarial Justice* (Federation Press, 2nd ed, 2014) ch 7.

14 *Civil Procedure Act 2005* (NSW) s 56.

15 *Federal Court of Australia Act 1976* (Cth) s 37M.

16 *Ibid* s 37N(4).

17 Victorian Law Reform Commission, above n 6, 109.

18 King et al, above n 13, 120.

must file 'genuine steps' statements prior to litigating.¹⁹ Genuine steps statements must include detail about party initiatives to engage with the dispute in a manner that promotes settlement. Consideration of, and participation in ADR processes such as mediation are 'genuine steps' that can be taken to resolve a civil dispute.²⁰ Lawyers have a duty to advise and assist clients with the filing of a genuine steps statement,²¹ and failure to do so may cause lawyers to be subjected personally to costs orders.²² These requirements are also enforced through the possibility of adverse costs orders against parties, and through non-compliance being taken into account by a judge when performing functions or exercising powers in relation to civil proceedings.²³ In the federal field of family law, pre-action procedures have been in place for financial disputes since 2004. Those procedures require that each prospective party to a case in the Family Court of Australia make a 'genuine effort' to resolve the dispute before starting a case, by participating in dispute resolution 'such as negotiation, conciliation, arbitration and counselling'.²⁴ For parenting disputes, family dispute resolution (most often mediation) is required in most cases before a family court can hear a matter.²⁵

There are a number of ethical requirements in legal professional conduct rules that affect lawyers' conduct in mediation, including the duties owed to clients of honesty and courtesy, competence and diligence, loyalty and confidentiality. However these more general requirements provide minimal guidance as to how lawyers should conduct themselves in mediation, other than obligations not to mislead.²⁶ What is unclear from existing professional conduct rules in Australia, the United States and the United Kingdom is whether mediators should be owed the same duties as a lawyer owes the court, or whether they should be treated as third parties.²⁷ The National Alternative Dispute Resolution Advisory Council (NADRAC) suggests that '[i]t may also be desirable for legal professional bodies to amend their codes of conduct or issue guidelines to define standards of practice for lawyers participating in ADR'.²⁸ Lawyers must therefore consider how best to

19 *Civil Dispute Resolution Act 2011* (Cth) ss 6–7. Pre-action requirements were also introduced in Victoria and New South Wales but have since been repealed. See King et al, above n 13, 120–3; Tania Sourdin, 'Resolving Disputes without Courts: Measuring the Impact of Civil Pre-Action Obligations' (Background Paper, Australian Centre for Court and Justice System Innovation, March 2012) 18.

20 *Civil Dispute Resolution Act 2011* (Cth) s 4.

21 *Ibid* s 9.

22 *Ibid* s 12. See, eg, *Superior IP International Pty Ltd v Ahearn Fox Patent and Trade Mark Attorneys* [2012] FCA282 (23 March 2012), where no genuine steps had been undertaken, and the Federal Court ordered the legal representatives of the parties be joined for the purposes of costs.

23 *Civil Dispute Resolution Act 2011* (Cth) ss 11–12.

24 *Family Law Rules 2004* (Cth) r 1.05, sch 1(1)(a).

25 *Family Law Act 1975* (Cth) s 60I.

26 Bobette Wolski, 'An Evaluation of the Rules of Conduct Governing Legal Representatives in Mediation: Challenges for Rule Drafters and a Response to Jim Mason' (2013) 16 *Legal Ethics* 182, 191. See also Law Council of Australia, *Australian Solicitors' Conduct Rules 2011* (at June 2011) rr 4.1.1, 4.1.2, 4.1.3, 9.1.

27 Wolski, above n 26, 188–9.

28 National Alternative Dispute Resolution Advisory Council, *Maintaining and Enhancing the Integrity of ADR Processes* (2011) 38.

represent a client in the process, and continuing professional education may assist them to do so.²⁹

In addition to binding professional conduct rules, there are a number of voluntary guidelines available to inform the task of legal representation in ADR.³⁰ These guidelines provide an opportunity to reflect on the process and role of the legal representative. A key example is the *Guidelines for Lawyers in Mediations* by the Law Council of Australia (LCA).³¹ They are premised on the facilitative model of mediation, an approach to mediation practice that promotes collaborative problem solving, one of the founding principles of the contemporary mediation movement.³² The role of the lawyer in mediation contemplated by these guidelines is clearly non-adversarial, and goes beyond the mere provision of legal advice.

Guideline 1 deals with the role of the lawyer in mediation and states that '[a] lawyer's role in mediation is to assist clients, provide practical and legal advice on the process and on issues raised and offers made, and to assist in drafting terms and conditions of settlement as agreed'.³³ The LCA notes that the lawyer's role will vary depending on the nature of the mediation process and the conflict in which the client is involved.³⁴ The lawyer must consider whether their presence at the mediation is necessary to safeguard the client's interests or whether they can merely give advice prior to the mediation.³⁵ In considering when to mediate, the guidelines note that '[t]iming is an important factor in establishing a framework conducive to settlement' and that lawyers should take into account 'the mindsets of the parties'.³⁶ Importantly, the guidelines suggest that lawyers preparing for mediation 'should look beyond the legal issues and consider the dispute in a broader, practical and commercial context'.³⁷ The commentary section of this guideline notes that this wider context may include 'personal ... needs' and that lawyers should help their clients to 'identify positions and interests and the best ways to achieve outcomes'.³⁸ The guidelines also suggest that lawyers undertake a risk analysis, explain the process of mediation to the client, work with the client to identify interests rather than merely positions, and together develop possible strategies that may result in settlement.³⁹ The LCA suggests that mediation is 'a problem-solving exercise'.⁴⁰ These provisions contemplate a role for lawyers in mediation that goes beyond merely providing advice on the legal issues in dispute. Lawyers are encouraged to actively participate in the wider-problem

29 Ibid ch 2. NADRAC suggests that 'further training of lawyers would be desirable to change thinking from a rights-based to an interest-based approach when participating in ADR': at 38.

30 See, eg, Law Council of Australia, *Guidelines for Parties in Mediations* (2011); Family Law Council, *Best Practice Guidelines for Lawyers Doing Family Law Work* (2nd ed, 2010) 14.

31 Law Council of Australia, *Guidelines for Lawyers in Mediations* (2011).

32 Facilitative mediation is discussed in more detail in Part III of this article.

33 Law Council of Australia, *Guidelines for Parties in Mediations*, above n 30, 3.

34 Ibid.

35 Ibid.

36 Ibid 4 (guideline 3).

37 Ibid 5 (guideline 5).

38 Ibid 5–6.

39 Ibid 5.

40 Ibid 6–7 (guideline 6).

solving tasks of facilitative mediation.⁴¹ In light of this, the contemplated role of the lawyer in the LCA guidelines should on most occasions be non-adversarial: 'A lawyer who adopts a persuasive rather than adversarial or aggressive approach, and acknowledges the concerns of the other side, is more likely to contribute to a better result.'⁴²

Overarching purpose and pre-action legislative requirements, in addition to professional conduct rules and non-binding guidelines, increasingly ask that lawyers encourage their clients to participate in ADR, including in mediation. Where lawyers themselves are participating in mediation with their clients, they are encouraged to behave in a way that facilitates the resolution of the dispute in the least adversarial manner possible.

III THE NATURE OF COURT-CONNECTED MEDIATION

As mediation increasingly becomes embedded in court and tribunal processes, there is a question of the extent to which mediation offers parties a genuine alternative to outcomes that a court or tribunal would deliver. In the early 1990s, at the dawn of the contemporary mediation movement, Carrie Menkel-Meadow expressed concern that the involvement of lawyers in ADR would result in adversarial ADR processes.⁴³ As we will show, contemporary research confirms that lawyers' involvement in court-connected mediation may reduce the control which parties have over outcomes in mediation, limiting the benefits of mediation over litigation.

Generally, mediation in Australia is seen as a facilitative process, where '[t]he mediator has no advisory or determinative role in regard to the content of the dispute or the outcome', but where the mediator simply provides a 'process by which resolution is attempted'.⁴⁴ This is also known as 'the process-content distinction',⁴⁵ and is consistent with one of the philosophical fundamentals of facilitative mediation — party empowerment (also known as self-determination or party control).⁴⁶ Facilitative mediation can therefore be distinguished from other dispute resolution processes, including litigation, where an outcome is imposed upon the parties by a decision-maker.⁴⁷ An advantage of facilitative mediation is that because it is party-led, the outcome is likely to be more palatable

41 Ibid 7 (guideline 6.1).

42 Ibid. Guideline 7 suggests that lawyers generally need to report to their clients in writing regarding the mediation: at 8.

43 Carrie Menkel-Meadow, 'Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-Opted or "The Law of ADR"' (1991) 19 *Florida State University Law Review* 1, 5. See also Joseph P Folger, "'Mediation Goes Mainstream' — Taking the Conference Theme Challenge' (2002) 3 *Pepperdine Dispute Resolution Law Journal* 1, 3.

44 National Alternative Dispute Resolution Advisory Council, *Dispute Resolution Terms*, above n 3, 9.

45 Laurence Boulle, *Mediation: Principles, Process, Practice* (Lexis Nexis Butterworths, 3rd ed, 2011) 35.

46 Sourdin, *Alternative Dispute Resolution*, above n 3, 70.

47 King et al, above n 13, ch 7.

to the parties and therefore durable. Facilitative mediation employs collaborative problem-solving and integrative bargaining techniques.⁴⁸

One of the key criticisms of facilitative mediation is that it does not provide the same level of rights protection as the adversarial legal system.⁴⁹ Connected to this critique are strong concerns about the private nature of dispute resolution through ADR that comes with the ever-present possibility of concealed coercion.⁵⁰ Laura Nader names the coercive potential of ADR “soft” violence.⁵¹ It has been argued that the privacy of ADR processes permits the exploitation of imbalances of power by stronger parties. Some commentators have argued against the inclusion of mediation in the court-connected context due to the abdication of the state in dispute resolution that mediation represents.⁵² Following her study of parties in medical injury disputes, Tamara Relis concludes that the critiques of the institutionalisation of ADR are fully justified as parties’ needs are not being met through systematic use of mediation (although she cautions against glorification of the formal justice system also).⁵³ These views are also supported in the writings of Owen Fiss, Judith Resnik, Richard Abel and Hazel Genn.⁵⁴ The key thread linking these views is the absence of rights protection under law in ADR processes.

Nevertheless, the incorporation of mediation within court processes is now widespread in Australia.⁵⁵ A common form of mediation used in the legal system is evaluative mediation (sometimes referred to as substance-oriented mediation).⁵⁶ The goal of evaluative mediation is to reach agreement based on the legal rights and entitlements of the parties. This has the advantage of protecting the legal rights of the parties and reducing the chance of ‘settling for less’ in mediation. In evaluative mediation, the participants are focused upon persuading the mediator

48 Carole Brown, ‘Facilitative Mediation: The Classic Approach Retains Its Appeal’ (2004) 4 *Perpperdine Dispute Resolution Law Journal* 279, 281–4. Collaborative problem-solving in mediation means it is important for lawyers to listen and respond to evidence and information that might impact on the strength of a client’s case: Harold L Abramson, *Mediation Representation: Advocating in a Problem-Solving Process* (National Institute for Trial Advocacy, 2004) 248–9.

49 Hilary Astor and Christine Chinkin, *Dispute Resolution in Australia* (LexisNexis, 2nd ed, 2002) 26; 50–1.

50 Tom R Tyler, ‘The Quality of Dispute Resolution Procedures and Outcomes: Measurement Problems and Possibilities’ (1989) 66 *Denver University Law Review* 419, 431.

51 Laura Nader, ‘Controlling Processes in the Practice of Law: Hierarchy and Pacification in the Movement to Re-Form Dispute Ideology’ (1994) 9 *Ohio State Journal on Dispute Resolution* 1, 10.

52 Hazel Genn, Shiva Riahi and Katherine Fleming, ‘Regulation of Dispute Resolution in England and Wales: A Sceptical Analysis of Government and Judicial Promotion of Private Mediation’ in Felix Steffek and Hannes Unberath (eds), *Regulating Dispute Resolution: ADR and Access to Justice at the Crossroads* (Hart Publishing, 2013) 135.

53 Tamara Relis, *Perceptions in Litigation and Mediation: Lawyers, Defendants, Plaintiffs and Gendered Parties* (Cambridge University Press, 2009) 14.

54 Owen M Fiss, ‘Against Settlement’ (1984) 93 *Yale Law Journal* 1073, 1075; Judith Resnik, ‘Whose Judgment? Vacating Judgements, Preferences for Settlement, and the Role of Adjudication at the Close of the Twentieth Century’ (1994) 41 *UCLA Law Review* 1471, 1527; Richard L Abel, ‘The Contradictions of Informal Justice’ in Richard L Abel (ed), *The Politics of Informal Justice* (Academic Press, 1982) vol 1, 267, 308; Hazel Genn, *Judging Civil Justice* (Cambridge University Press, 2010) 121–5.

55 Stephen Colbran et al, *Civil Procedure: Commentary and Materials* (Lexis Nexis Butterworths, 5th ed, 2012) 50–3.

56 Sourdin, *Alternative Dispute Resolution*, above n 3, 71.

(rather than each other), and the advice of the mediator is central to the resolution of the dispute.⁵⁷ Practice in most court-connected contexts will frequently include evaluation, and the adversarial culture of the court-room is often transferred to the mediation.⁵⁸ Evaluative mediation has been criticised for undermining the opportunity mediation presents for party participation and self-determination.⁵⁹ Evaluative mediation is arguably an extension of the adversarial legal system. Lawyers largely retain control of the evaluative mediation process and it will provide few of the party-choice benefits that facilitative mediation offers.

Lawyers can influence the ways that mediation is undertaken in terms of the model used and the approach taken.⁶⁰ Some lawyers have shown a preference for an evaluative, rights-based approach over the widely endorsed facilitative model.⁶¹ Such an approach undermines party-empowerment and self-determination.⁶² However it may increase rights protection for lawyers' clients. In the United Kingdom, Relis found that often in mediation, clients were dominated by their lawyers and their lawyers' construct of what was best, to the point where clients' understandings and needs were frequently ignored.⁶³ She also found that lawyers' approach to mediation varied according to the sex of the lawyer, with female lawyers being more collaborative and relationship focused.⁶⁴ In Victoria, Tania Sourdin's evaluation of mediation in the Supreme and County Courts in Victoria found that, in some instances, legal representatives dominated opening statements — leaving clients little opportunity to provide input to party statements; restricted use of interest-based approaches; and made extensive use of shuttle negotiation techniques.⁶⁵ This study showed:

Some mediations may be conducted in a way that is more comfortable for lawyers, rather than disputants. Lawyers choose the mediators and lawyers therefore play an important role in determining the process adopted.⁶⁶

Sourdin's research found that parties expressed satisfaction with mediation in the courts, but that the process they experienced did not allow them to participate

57 Ibid.

58 Boulle, above n 45, 44.

59 Nancy A Welsh, 'The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?' (2001) 6 *Harvard Negotiation Law Review* 1, 23.

60 Poitras, Stimec and Roberge, above n 5, 12–14.

61 See, eg, Peter Callaghan, 'Roles and Responsibilities of Lawyers in Mediation' (2007) 26 *The Arbitrator and Mediator* 39; Micheline Dewdney, 'Party, Mediator and Lawyer-Driven Problems and Ways of Avoiding Them' (2006) 17 *Australasian Dispute Resolution Journal* 200; Ruth Charlton, 'Whose Mediation Is This Anyway?' (2007) 45(2) *Law and Society Journal* 44; Julie Macfarlane, 'Culture Change? Tale of Two Cities and Mandatory Court-Connected Mediation' (2002) 2 *Journal of Dispute Resolution* 241; Robert A Baruch Bush, 'Staying in Orbit, or Breaking Free: The Relationship of Mediation to the Courts over Four Decades' (2008) 84 *North Dakota Law Review* 705.

62 Leonard Riskin and Nancy Welsh, 'Is That All There Is?: "The Problem" in Court-Oriented Mediation' (2008) 15 *George Mason Law Review* 863.

63 Relis, above n 53, 237–8.

64 Ibid 245.

65 Tania Sourdin, *Mediation in the Supreme and County Courts of Victoria* (Department of Justice, Victoria, 2009) iii–iv.

66 Ibid iv.

fully.⁶⁷ Similar findings were reported from research at VCAT on lawyers' role in mediation from the perspective of lawyers.⁶⁸ Following interviews with 10 lawyers who regularly appeared in two lists at the tribunal, Joel Gerschman found that lawyers did not generally encourage party participation because they feared that their client may disclose information that might later damage their case if it continued to a hearing.⁶⁹ The majority of lawyers showed little propensity for collaborative problem solving in mediation and instead engaged in incremental bargaining approaches. A minority, 4 lawyers out of 10, supported a more relational approach and encouraged clients to adopt non-legal solutions.⁷⁰

These findings from the research on mediation practices in Victoria are mirrored in research from Tasmania.⁷¹ In interviews with solicitors operating in the Tasmanian Supreme Court jurisdiction, Olivia Rundle found that the lawyers there were mainly concerned with achieving settlement. These lawyers were often reluctant to involve clients in opening statements, citing concerns that clients might divulge information that may later harm their legal case.⁷² The approach of the lawyers accorded with the aims of the court to achieve efficient and timely settlement.⁷³

Cumulatively, these studies suggest that lawyers practising in court and tribunal-connected mediation processes tend to dominate the process and leave less scope for client input into the process and outcomes of mediation. The research confirms Menkel-Meadow's concerns that lawyers could colonise the mediation process as ADR becomes increasingly incorporated into the adversarial justice system.⁷⁴ Lawyers representing clients in this context may be intervening to protect their clients' legal rights, but the effect may be to undermine client empowerment and self-determination. Arguably, such an approach is more consistent with an evaluative than facilitative mediation process and closely aligns with the traditional roles of lawyer and client in adversarial litigation practice.

However, other evidence suggests that lawyers who are able to employ a collaborative, problem-solving approach within facilitative mediation are arguably more open to addressing the whole of the conflict presented in mediation, and not merely the legal issues. This opens up the possibility of genuine inter-professional collaboration between lawyers and mediators — a collaboration that may enhance client self-determination and protect legal rights in mediation. This 'other' form of legal practice in mediation is explored in the next Part of this article.

67 Ibid.

68 Gerschman, above n 10.

69 Ibid 54–6.

70 Ibid 57.

71 Olivia Rundle, 'Barking Dogs: Lawyers Attitudes Towards Direct Disputant Participation in Court-Connected Mediation of General Civil Cases' (2008) 8 *Queensland University of Technology Law and Justice Journal* 77.

72 Ibid 81–7.

73 Ibid 88–90. The approach of the lawyers could also be categorised as the settlement model. Notably, according to Boule, mediators can move through a range of practice models in the one mediation: Boule, above n 45, 43.

74 Menkel-Meadow, above n 43, 5. See also Folger, above n 43, 3.

IV COLLABORATIVE LAWYERING IN MEDIATION: WHAT DOES IT LOOK LIKE?

Collaborative practice in mediation, where lawyers actively work with dispute resolution practitioners to protect client rights and empower parties is rare, but does exist in Australia.

Helen Rhoades et al conducted research in 2008 into four well-known family dispute resolution programs (as family mediation is known in Australia) chosen for having good working relationships with the legal profession.⁷⁵ Lawyers working well with mediators were interviewed also.⁷⁶ The study found that the features of positive collaborative relationships between the legal and dispute resolution professions were:

- Practitioners described a complementary services approach to their relationship, in which each group saw themselves and the other profession as contributing different but equally valuable and complementary skills and expertise to the dispute resolution process;
- Practitioners understood and respected the nature of each profession's roles, responsibilities and ways of working with family law clients;
- Practitioners had a shared expectation of the dispute resolution process and a clear understanding of the dispute resolution program's aims and approach to working with family law clients;
- Family lawyers engaged in 'positive' advocacy practices;
- Practitioners trusted the intake screening and referral practices of the other profession in cases involving family violence;
- Practitioners engaged respectfully with members of the other profession and extended professional courtesies, such as the provision of timely feedback about clients.⁷⁷

Where this 'complementary services approach' existed, according to Rhoades et al, it was developed and maintained 'through regular and positive contact' between the different professionals in joint professional development sessions or information sharing forums.⁷⁸ Within this 'complementary services approach' to mediation a range of specific roles could be adopted by lawyers.

Follow-up research by Rhoades et al surveying family lawyers and family dispute resolution practitioners from a wider range of agencies⁷⁹ confirmed the characteristics of successful collaborative relationships but demonstrated

75 Helen Rhoades et al, 'Enhancing Inter-Professional Relationships in a Changing Family Law System' (Final Report, The University of Melbourne, 2008) i–ii, 14–17.

76 Ibid 14.

77 Ibid 49.

78 Ibid.

79 Ibid ii–iii, 36.

how rare such successful inter-professional collaboration was in family law.⁸⁰ The subsequent study showed that ‘many [family lawyers and family dispute resolution practitioners] have little contact with members of the other profession and [that] there are significant misunderstandings and tensions between the two groups’.⁸¹

There is evidence that mediators can play a significant role in educating lawyers and in encouraging them towards less adversarial practices. Cheree Sefton, in her interviews with 10 mediators from the Australian Capital Territory, found that mediators who did not want lawyers to be adversarial in the process, encouraged lawyers to participate in a non-adversarial fashion through indirect and direct education about the collaborative, facilitative approach.⁸²

The benefits of the collaborative practice around mediation for family dispute resolution described by Rhoades et al is that clients benefit from both forms of professional input. They are empowered to participate in a genuinely facilitative mediation process with all of the benefits of self-determination, and are still provided with the rights protection of legal representation. If such collaborative relationships were to be replicated across the dispute resolution sector, the benefit of mandated participation in dispute resolution would be significant indeed.

In the remainder of this article, we explore the specifics of legal practice in mediation that are consistent with a collaborative relationship between lawyers and dispute resolution practitioners. We begin by exploring a spectrum of legal practice in and around mediation devised by Rundle, before examining what occurs at in mediation at VCAT.

V SPECTRUM OF LAWYERS’ ROLES IN MEDIATION

The involvement of lawyers in and around mediation varies considerably according to the field of practice and the style of individual lawyers. In some areas of practice lawyers routinely attend mediation with their client, such as with compulsory conferences for damages claims for workplace injuries in Queensland,⁸³ and Roundtable Dispute Management (family dispute resolution) at Victoria Legal Aid.⁸⁴ In other contexts, such as family dispute resolution at Family Relationship Centres, lawyers are less often involved in attending centres with their clients for mediation, but Centres are encouraged to ‘develop cooperative arrangements

80 Ibid 39.

81 Ibid.

82 Cheree Sefton, ‘No Square Pegs in Round Holes: What Mediators Want Lawyers to Do in Mediation and How They Get It’ (2011) 22 *Australasian Dispute Resolution Journal* 22, 25–9.

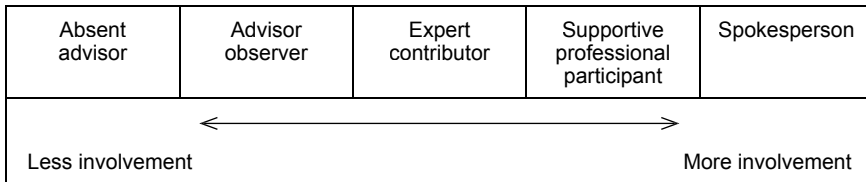
83 *Workers’ Compensation and Rehabilitation Act 2003* (Qld) s 289.

84 Details of Roundtable Dispute Management can be found at Victoria Legal Aid, *Family Dispute Resolution at Victoria Legal Aid* <<http://www.legalaid.vic.gov.au/get-legal-services-and-advice/roundtable-dispute-management-rdm>>.

with [local] legal service providers in order to ensure clients have access to ... timely legal advice to assist them' before and after mediation.⁸⁵

Olivia Rundle has outlined a spectrum of five ways that lawyers can participate in mediation.⁸⁶ The spectrum provides a more nuanced and comprehensive approach to lawyers' practice than is provided in the Law Council of Australia guidelines.⁸⁷ Rundle acknowledges that lawyers are unlikely to adopt one model throughout a mediation, but rather will move between models.⁸⁸

Rundle's spectrum varies from almost no involvement of lawyers in mediation (providing clients with comprehensive self-determination) to almost total control of the mediation process by lawyers. A diagram of the spectrum is reproduced below.⁸⁹



The first model — the 'absent advisor,' focuses on legal practice prior to as well as after the mediation. The absent advisor will provide both substantive and procedural advice to their clients, and coach them on participation, but will not attend mediation. They will also assist clients to formalise agreements made in mediation.⁹⁰ The remaining four models involve the lawyers attending mediation and participating to varying degrees.

The second model — the 'advisor observer,' prepares the client for mediation and attends mediation with the client, but only to provide them with support and advice. The advisor observer does not interact with the mediator or the other party during the mediation session.⁹¹ A lawyer working as an advisor observer is able to hear first-hand from the other party and their lawyer in a mediation, which will assist the lawyer in advising their client.⁹² Rundle questions whether lawyers and clients would find value for money in this model and suggests that the advisor observer role is probably only a useful role for lawyers to adopt in mediation where data gathering is necessary, such as in complex cases where mediation is to be held early in the dispute before substantial information exchange has occurred.⁹³

85 Department of Social Services, Australian Government, *Operational Framework for Family Relationship Centres* (August 2011) 6.

86 Olivia Rundle, 'A Spectrum of Contributions That Lawyers Can Make to Mediation' (2009) 20 *Australasian Dispute Resolution Journal* 220.

87 Law Council of Australia, *Guidelines for Lawyers in Mediations*, above n 31.

88 Rundle, 'A Spectrum of Contributions That Lawyers Can Make to Mediation', above n 86.

89 Diagram cited from *ibid* 222.

90 *Ibid*.

91 *Ibid* 223–4.

92 *Ibid* 224.

93 *Ibid*.

In contrast, the third model — ‘the expert contributor’, does participate in mediation, but limits their input to providing legal advice to their client which may then be shared with other participants.⁹⁴ The expert contributor lawyer may engage with the other party’s lawyer during mediation and they will often assist the client in ‘reality testing ... the realistic alternatives to settlement proposals’.⁹⁵ An expert contributor will not, however, negotiate on behalf of their client but will engage with other lawyers in a persuasive manner.⁹⁶

The fourth model is the ‘supportive professional participant,’ where the lawyer ‘works with the client to prepare for the mediation and supports the client through the mediation process, by working collaboratively towards an acceptable outcome’.⁹⁷ Both the lawyer and the client participate directly in mediation negotiations under this model. The supportive professional participant takes a more active role in mediation than the expert contributor does — the lawyer acting as supportive professional participant may negotiate, request a private session, draft a mediation agreement, and reality test the workability of a settlement proposal (which goes beyond reality testing alternatives to settlement).⁹⁸ Rundle identifies that with this model, ‘[t]he benefits of lawyer participation can be maximised whilst retaining the essence of client-determination of the content and outcomes of the mediation process’.⁹⁹ Rundle also argues that ‘[i]t may be [particularly] appropriate [for lawyers to work as supportive professional participants] in court-connected [mediation] settings where the client wants to participate in the dispute resolution process but needs significant assistance and support from the lawyer’.¹⁰⁰ Arguably, this model is the most holistic problem-solving approach of the five models. Under this approach not only is legal advice given but the lawyer is also an active participant in coaching their client and reality testing alternatives in the manner of the facilitative model of mediation. The lawyer helps to bring out needs rather than positions in the negotiation. The creative aspects of the facilitative model, where solutions to a dispute are brainstormed, are assisted by the lawyer’s role under this model.

The last of Rundle’s models is the ‘spokesperson’.¹⁰¹ This is a lawyer-centred approach where the lawyer speaks for the client, negotiates on their behalf and also provides appropriate legal advice. In this model the lawyer will interact with the mediator and the other side. The client, is largely silent through the mediation process and does not negotiate themselves. With this approach there is likely to be a rights framework around the dialogue in the mediation. Rundle argues that this may be the most appropriate role for a lawyer to adopt in situations where mediation would otherwise be inappropriate because of capacity or power

94 Ibid 225.

95 Ibid.

96 Ibid 224–5.

97 Ibid 225.

98 Ibid 226.

99 Ibid.

100 Ibid 226–7.

101 Ibid 227–8.

imbalance issues.¹⁰² This role most closely aligns with the traditional advocacy role which lawyers and clients have within the adversarial system. This approach is also consistent with evaluative mediation.

In this article, we use Rundle's spectrum of contributions that lawyers can make to mediation in analysing the VCAT data. This will help us to understand what specific legal practices lawyers might adopt in and around mediation to help them to be collaborative professionals who actively contribute to helping their clients achieve the self-determination benefits of mediation while still protecting their clients' legal rights.

VI THE STUDY CONTEXT: MEDIATION PRACTICE AT VCAT

We chose to study mediation practice at Melbourne's VCAT because of its well-established facilitative mediation practice (as one of the oldest court or tribunal-connected mediation practices in Australia) and because of the good collaboration we observed between legal and dispute resolution professionals there. There is overwhelming research evidence that lawyers practising in court and tribunal-connected mediation processes tend to dominate the process and leave less scope for client input. Studying mediation practice at VCAT enabled us to explore the specific constructive roles which lawyers engaged in mediation might adopt, and provided us with insights into how lawyers might balance rights protection against client empowerment in mediation processes.

VCAT is Australia's largest administrative tribunal with just under 90,000 originating applications in 2013–14.¹⁰³ Established in 1998, VCAT exercises jurisdiction over almost all administrative and many civil matters in Victoria across three divisions — the Civil, Administrative and Human Rights Divisions — under which 11 specialist lists operate. In 2013–14, the busiest lists were the residential tenancies, civil claims and owners corporations lists in the Civil Division, the guardianship list in the Human Rights Division, and the planning and environment list in the Administrative Division.¹⁰⁴ VCAT aims 'to serve the community by resolving disputes in a timely, cost-effective and efficient way'.¹⁰⁵ Legal representation at VCAT is only permitted at the discretion of Tribunal Members in limited circumstances, including where the party is a child, a municipal council, a Minister, a holder of statutory office or where all parties agree.¹⁰⁶ This practice was designed to provide the right to legal representation where necessary, while still avoiding prolonged, adversarial and legalistic tribunal

102 Ibid 227.

103 Victorian Civil and Administrative Tribunal, *Annual Report 2013–14* (2014) 6. See also Justice Garde, '2012: A Year in Review' (Paper presented at the seminar hosted by Russell Kennedy and the Planning Institute Australia, 21 February 2013) 1.

104 Victorian Civil and Administrative Tribunal, *Annual Report 2013–14*, above n 103, 11.

105 Ibid 4.

106 *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 62. Representation by other professionals such as engineers or architects is also permitted under this section.

procedures.¹⁰⁷ As a result, a majority of parties before VCAT are self-represented, especially in high volume lists such as civil claims, residential tenancies and guardianship.¹⁰⁸ Legal representation is common in low-volume lists in complex cases such as within the domestic building list.¹⁰⁹

Mediation has been part of VCAT's practice since the Tribunal was established in 1998. Mediation is now one of three forms of ADR used at VCAT (the others being compulsory conferences — a form of conciliation,¹¹⁰ and Short Mediation and Hearings — recently made available in the civil claims list).¹¹¹ In 2013–14, the number of matters resolved through mediation at VCAT was greatest in the domestic building, planning, civil claims, real property and owners corporations lists.¹¹² Settlement rates at mediation at VCAT have consistently averaged around 70 per cent across all lists,¹¹³ with annual mediation settlement rates usually highest in the legal practice list and lowest in the retail tenancies list.¹¹⁴ Parties may attend mediation at VCAT voluntarily or compulsorily at the order of the Tribunal.¹¹⁵ Mediation is generally offered early in a dispute and the Tribunal promotes the use of a facilitative approach.¹¹⁶ The facilitative approach was confirmed by VCAT in 2013 when it stated that the aim of the ADR processes at VCAT was to assist 'parties to have control over their outcomes'.¹¹⁷ At the Melbourne VCAT office, mediation takes place in the purpose-built mediation centre.¹¹⁸ An intake and assessment service has been recently established in a number of lists.¹¹⁹ As with most court-connected ADR processes, mediation at VCAT is confidential with evidence of what was said or done in mediation being inadmissible at hearings.¹²⁰ VCAT policy around legal representation in mediation is the same as for representation at hearings — legal representation will only be permitted in mediation in limited circumstances.¹²¹ 'If representation is permitted at a mediation, the Mediator will usually decide who is present in the mediation room and the extent to which they participate.'¹²² VCAT employs a panel of mediators, most in casual employment, and Tribunal Members also mediate. A senior Tribunal Member, known as the ADR Member, together with

107 Victoria, *Parliamentary Debates*, Legislative Assembly, 9 April 1998, 974 (Jan Wade, Attorney-General).

108 Justice Kevin Bell, *One VCAT: President's Review of VCAT* (2009) 17.

109 *Ibid.*

110 *Victorian Civil and Administrative Tribunal Act 1998* (Vic) 83.

111 Victorian Civil and Administrative Tribunal, *Annual Report 2012–13* (2013) 18.

112 Victorian Civil and Administrative Tribunal, *Annual Report 2013–14*, above n 103, 17.

113 Bell, above n 108, 35.

114 *Ibid* 37.

115 *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 88.

116 Judge Iain Ross, 'A Centre of Excellence in ADR' (2009) 83(9) *Law Institute Journal* 34; Bell, above n 108, 35.

117 Victorian Civil and Administrative Tribunal, *Annual Report 2012–13*, above n 111, 19.

118 *Ibid* 18.

119 *Ibid* 19.

120 *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 92.

121 Victorian Civil and Administrative Tribunal, *VCAT Practice Note PNVCAT4 — Alternative Dispute Resolution (ADR)*, 1 January 2013, 5.

122 *Ibid.*

the Principal Mediator lead and facilitate the service.¹²³ VCAT is a Recognised Mediator Accreditation Body under the National Mediator Accreditation Scheme. As of 2013, 85 of VCAT's 102 mediators were accredited through VCAT and receive their continuing professional development through VCAT.¹²⁴

VII METHODOLOGY

The qualitative, exploratory study was conducted with mediators who practice at VCAT. This study complements previous research with lawyers at VCAT on their role in mediation.¹²⁵ In our study, mediators were interviewed to explore understandings of many aspects of mediator practice, including the attitude of mediators to the ways that lawyers could contribute to mediation. As an instance of exploratory research, this study poses questions and seeks to answer them in terms of identifying concepts and factors, exploring the concepts and factors, and considering inter-relationships that can be developed into theories and investigated further in subsequent studies.

The 16 mediators were self-selected from the pool of approximately 60 mediators at VCAT at that time. An invitation to participate in the research project was emailed to all mediators. The interviews themselves were conducted in late 2009. There were equal numbers of female and male mediators in the sample. We spoke to five mediators who were older than 60; six mediators aged in their 50s; four mediators in their 40s and one mediator aged between 30 and 40 years old. Ten mediators in the sample had a legal background, one was both a lawyer and a social worker, and the rest were non-lawyers. The professional backgrounds of the non-lawyer mediators included architecture, town planning and engineering. All but three of the mediators interviewed worked across multiple lists in their mediation practice at VCAT. The mediators in the sample were highly experienced in their profession with their average mediation experience being 14 years. Four mediators had 20 years or more experience mediating and the mediator with the least experience had worked as a dispute resolution practitioner for five years. In this report of findings, the identities of the mediators have been concealed with mediators given pseudonyms. The interview transcripts were analysed and coded to articulate themes. There were a number of questions asked of each participant including 'do you have any reflections relating to lawyers' roles in mediation?' and 'what are lawyers' best roles in mediation?'

VIII FINDINGS

The interviews with VCAT mediators provide us with important insight into the specific roles that lawyers can adopt in mediation which are consistent with

123 Victorian Civil and Administrative Tribunal, *Annual Report 2012–13*, above n 111, 18.

124 *Ibid* 20.

125 Gerschman, above n 10.

collaborative inter-professional practice. Such practices would provide clients with both the benefits of self-determination in mediation and the rights protection of legal representation throughout the process.

This discussion of the findings of the study has been structured according to Rundle's spectrum of contributions that lawyers can make to mediation.¹²⁶ Table 1 summarises the responses of the VCAT mediators we interviewed to the questions asked about their preferred role of lawyers in mediation.

Table 1: VCAT mediators' support for Rundle's spectrum of contributions that lawyers can make to mediation. Many mediators supported more than one model.

Model of legal involvement in mediation	Mediators supporting model (No.) (total n=16)	Mediators supporting model (%)
Absent Advisor	1	6%
Advisor Observer	0	0
Expert Contributor	11	69%
Supportive Professional Participant	8	50%
Spokesperson	6	38%

The mediators in the study emphasised that they perceived the value of lawyer contribution as dependent on the nature of the dispute. That is, different models of lawyers' involvement were preferred by mediators in different circumstances. This is why, in this study, mediators indicated that more than one model was preferred. On the whole, VCAT mediators' preferences coalesced around the middle of Rundle's spectrum with the most support provided for the expert contributor role followed by the supportive professional participant. These two roles for lawyers have active participation in mediation by both the lawyer and their client in common, showing that the VCAT mediators we spoke with valued both self-determination (client empowerment) and legal representation in mediation.

The stronger preference for the expert contributor role (69 per cent of mediators compared with 50 percent who endorsed the supportive professional participant role), where the lawyer does not negotiate on behalf of the client but does actively provide legal advice, can be explained by the uneasiness expressed by almost all of the VCAT mediators about the dominating practices used by some lawyers in mediation. While most mediators valued legal representation, they valued representation by lawyers who understood the mediation process at VCAT, who were prepared to support their client's participation in it and work collaboratively with those around the mediation table to achieve a just and robust settlement. The mediators were wary of lawyers co-opting the mediation process without a genuine attempt to settle. Many mediators explained that while most lawyers at VCAT understood the process and worked constructively to achieve quality

¹²⁶ Rundle, 'A Spectrum of Contributions That Lawyers Can Make to Mediation', above n 86, 220.

outcomes in mediation, there were a small minority of 'rogue' legal practitioners who aggressively undermined the process and fomented conflict. Many of the mediators we spoke to responded to rogue lawyers by educating them about the mediation process and winning their trust and cooperation. The mediators reported that over time this resulted in the creation of a cohort of lawyers practising at VCAT who worked well around the mediation process. However, the general preference for the expert contributor over the supportive professional participant role reveals another method by which many VCAT mediators maintain control of the mediation process in the case of rogue lawyers — partitioning the role of lawyers by limiting their involvement in mediation to the provision of expert legal advice.

Table 1 also demonstrates how support for the role of lawyers by the VCAT mediators tended towards the end of the spectrum where lawyers were more rather than less involved in the mediation process. While just 1 mediator (or six per cent) supported the absent advisor role where the lawyer does not attend mediation at all, six mediators (38 per cent) supported the spokesperson role at the other end of the spectrum, where the lawyer speaks on behalf of their client in mediation. This reflects the strong support that mediators in our sample expressed for the participation of lawyers in mediation at that Tribunal. The VCAT mediators revealed themselves to be working quite successfully in collaboration with lawyers in and around the mediation process. They exhibited a significant amount of trust in lawyers and their role in and around mediation. The relationship of mediators with lawyers at VCAT at the time of data collection had progressed beyond the traditional rivalry of these professions. Mediation at VCAT had been in operation for 11 years at the time of data collection. On the whole, the mediators explained that a good working relationship had developed with most lawyers practising at VCAT that made them tend to prefer the involvement of lawyers in mediation over their absence. While most of the mediators we spoke to did not endorse the spokesperson role for lawyers in mediation, a sizeable majority (38 per cent) could see some value in lawyers speaking for clients, providing that the lawyers engaged in appropriate 'positive' advocacy practices.

The following Part of this article analyses in detail the specific tasks that the VCAT mediators believed that lawyers should undertake in and around mediation. The analysis has been structured according to Rundle's spectrum of the five roles that lawyers can adopt in mediation.

The mediators were unanimously clear that they preferred lawyers to adopt less adversarial approaches to working in mediation through providing their clients with an active voice in mediation, however the mediators still valued the role of the lawyer in protecting their clients' rights. Overall, the VCAT mediators preferred lawyers to have an active but not dominating role in mediation; they wanted lawyers to provide legal advice to their clients in mediation and be open to listening and flexible enough to tailor their advice in response to information received in mediation; they wanted lawyers to work collaboratively with their client, with mediators and other parties and their lawyers in mediation; they wanted lawyers to be able to creatively problem-solve in mediation (although

not always, sometimes the mediators wanted the lawyers simply to provide legal advice); they wanted lawyers to engage respectfully with others around the mediation table; they wanted lawyers to understand and support the mediation process; they wanted lawyers to adopt a complementary services approach, whereby they saw themselves and mediators as providing different but equally valuable services in mediation and the wanted lawyers to engage in 'positive' advocacy practices.

The analysis of the data demonstrates how the VCAT mediators interviewed in this study respected lawyers' involvement in the mediation process and expressed views consistent with having successful collaborative relationships with the lawyers who attended mediation at VCAT. We show that many of the elements of successful collaboration between lawyers and mediators identified by Rhoades et al's 2008 research into family law were present in the responses of the VCAT mediators to our questions.¹²⁷ The study suggests that within the frame of a collaborative, less adversarial, complementary approach, there are a diverse range of roles which lawyers can adopt within mediation.

A The Importance of Good Lawyers' Presence in Mediation: Rejection of the Absent Advisor Model

Rundle's absent advisor model of legal practice has lawyers preparing their clients for mediation but not actually attending mediation. A lawyer acting as an absent advisor provides legal and strategic advice to their client and may formalise the agreement after mediation.¹²⁸ The VCAT mediators, whether or not they were lawyers themselves, nearly universally rejected Rundle's absent advisor model of lawyers' roles around mediation. Almost all mediators preferred to have lawyers present in mediation, providing the lawyers were collaborative in their work practices. Fifteen of the 16 mediators (94 per cent) expressed support for the contribution that lawyers can make to mediation. For example, mediators stated:

I think experienced lawyers add a lot to the process. If you get good lawyers who know what they're doing then we can work with lawyers together to assist their clients ... A good lawyer enables people to make more informed decisions because they've got somebody there to advise them, somebody who's present, not somebody they ring up later or somebody they go and see later (Anne p 8).

Absolutely [lawyers are] important. I get very upset, especially in these types of tribunals where they say lawyers aren't necessary. Lawyers are very necessary in terms of every tribunal and every situation has a legal element to it (Barry p 11).

127 Rhoades et al, above n 75, 49.

128 Rundle, 'A Spectrum of Contributions That Lawyers Can Make to Mediation', above n 86, 222.

I love absolutely, love having lawyers present. Probably [it's] because I am a lawyer and an older lawyer and that's why I say that. Makes my role a lot easier (Helen p 5).

I love lawyers because I always think that they are my compass. If I go too far they will pull me back so I think of — they're my compass. If I'm saying something that's bordering on perhaps giving advice or whatever else they will let me know (Fiona p 29).

If [we] have lawyers on both sides, they have knowledge and they need to negotiate. They know the ropes. They will narrow the issues. Only works if both parties represented (Melissa p 28).

The strong endorsement from almost all VCAT mediators of the active presence of lawyers in mediation is important in the context of tribunal practice at VCAT where, in order to avoid legalistic processes, legal representation is only permitted in limited circumstances, including at mediation.¹²⁹ The assumption behind such a policy is that it is lawyers who are the source of adversarialism.¹³⁰ However, VCAT mediators do not take the same simplistic view.

The VCAT mediators preferred to have lawyers attending with their clients in mediation for two key reasons. First, because lawyers present for each side in mediation enable updated legal advice to be provided on the spot in mediation, one of the clear disadvantages that Rundle identified with the absent advisor model.¹³¹ Second, because the lawyers allow the mediator to do their job, which in a facilitative process such as that at VCAT is to provide a process for resolution of the dispute without an advisory or determinative role.¹³² It seems likely that there is pressure upon facilitative mediators in many circumstances to provide advice to parties in order to achieve a settlement, and that the distinction between permissible 'information' and impermissible 'advice' given by mediators may be at times hard to sustain in practice.¹³³ Both Helen and Fiona's statements above suggest that the presence of lawyers for each party guides them through this particular dilemma — the presence of lawyers for the parties enables mediators to provide a process without needing to advise the parties. Melissa argues that a lawyer in mediation works only if both parties are represented. These mediators therefore repudiate the absent advisor role for lawyers in mediation at VCAT to better enable the proper working of the facilitative mediation process.

However, not all of the mediators supported the presence of lawyers within mediation at VCAT. One mediator stood apart from her colleagues in preferring the absent advisor model of lawyering around mediation (although this mediator,

129 *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 62; Parliament of Victoria, *Parliamentary Debates*, Legislative Assembly, 9 April 1998, 974 (Jan Wade, Attorney-General).

130 For the same debate in the family law context, see Becky Batagol, 'Fomenters of Strife, Gladiatorial Champions or Something Else Entirely? Lawyers and Family Dispute Resolution' (2008) 8 *Queensland University of Technology Law and Justice Journal* 24.

131 Rundle, 'A Spectrum of Contributions That Lawyers Can Make to Mediation', above n 86, 222.

132 National Alternative Dispute Resolution Advisory Council, *Dispute Resolution Terms: The Use of Terms in (Alternative) Dispute Resolution* (2003) 9.

133 Boulle, above n 45, 275.

Nicole, could still see a role for lawyers in mediators in some of the more 'commercial' lists within VCAT where professional control of the process was important):

I'm a bit more reserved than that about the role of lawyers. They're helpful in terms of control of the process, but if that's not necessarily what you're wanting to achieve, they're not. So I have no doubt in commercial disputes, such as in domestic building, it's really helpful ... [but] they can keep people entrenched in a position, keep everybody a bit blocked and a bit in their corners, and can sometimes act as a bit of a barrier to the person speaking. [It] depends on the lawyer and the list (Nicole pp 8–9).

As Nicole's last sentence hints, the level of endorsement for lawyers' presence in mediation was also tempered by a concern for the 'right' kind of lawyer to be present practising in the 'right' kind of way in and around mediation. Many of the VCAT mediators' rhetoric around the role of lawyers differentiated between 'good' and 'bad' lawyers. Almost all of the mediators stated that while most lawyers who attended with their clients supported the mediation process, there was a small minority of adversarial lawyers who undermined the process. The key element the mediators wanted in a lawyer who attended mediation was a collaborative lawyer. The mediators were prepared to train the lawyers to achieve the kind of legal practice that the mediators' thought worked best in mediation.¹³⁴ Some examples of comments from the VCAT mediators that illustrate this view were:

The strength of the good lawyers are that they all work together. [I] have lots of meetings just with lawyers on their own. They will work together and with us as members to try to get the outcome for their clients and I think that's the benefit.

But if you get an obstructive lawyer ... I spend a lot of time working with lawyers because if you can get the lawyers all on the same page then if you can get their client, then they can work on getting their clients (Anne pp 8–9).

Some [lawyers] don't let the client speak and what I do here is have a private session with the lawyer. If things are still not working in the mediation, I'll have private session with the parties. Most lawyers do the best they can and do want a resolution. If the lawyer is a bad lawyer, it is a nightmare though (Helen p 5).

When I first started as a mediator I used to dread having a lawyer in mediation. Lots of lawyers early on in the piece ran very much the line of you know, we're the professionals we should run this in court, rather than the other way around. I think that's changed over time (Jon p 14).

134 This approach was also evident in the study of Australian Capital Territory mediators: Sefton, above n 82, 29.

They've grown from 1998 when we first started mediating here there wasn't that huge amount of mediation you had to actually teach people how to ... in some ways we've taught the lawyers how to deal with the mediation (Fiona p 29).

The reservations expressed by the VCAT mediators regarding lawyers in these statements show that they distinguish between collaborative and adversarial styles of working around mediation. The mediators, especially Jon and Fiona who have mediated at VCAT since the Tribunal opened in 1998, explained that in their practice as mediators, they worked with lawyers to encourage more collaboration around the mediation process so that lawyers attending VCAT mediations with their client had developed more collaborative and supportive practices over time. The 'bad' or 'obstructive' lawyers complained about by the mediators are those lawyers who are not familiar with the VCAT jurisdiction or who refuse to respond to the mediator's entreaties to practice more collaboratively.

The collaborative legal practice described and sought by the VCAT mediators above mirrors many of the elements of successful inter-professional collaboration between lawyers and mediators in the family law context identified by Rhoades et al.¹³⁵ Jon and Fiona's description of changing practices amongst lawyers attending mediation at VCAT reveals the development of a 'shared expectation of the dispute resolution process' amongst lawyers and mediators, one of Rhoades et al's six elements of successful inter-professional collaboration.¹³⁶ Helen and Anne's descriptions of working individually with obstinate lawyers also shows the development of a shared expectation amongst the professionals, because, as Anne explains, 'if you can get the lawyers all on the same page then if you can get their client'. These mediators' descriptions show that the development of shared expectations regarding the mediation process at VCAT has been a mediator-led process where the mediators have deliberately set out to educate lawyers attending mediation with their clients at VCAT about the nature of the process so that lawyers share the mediators' understandings of and expectations of mediation. This shared expectation means that mediators and lawyers can successfully work together as a team, albeit with quite different roles in the process, with a mutual understanding of the aims of mediation at VCAT and an agreed approach to working with clients.

In their research into family dispute resolution programs, Rhoades et al identified a link between, on one hand, a lack of understanding by lawyers of how mediators work with clients as well as a weak grasp of the goals of particular dispute resolution programs, and, on the other hand, poor inter-professional relationships.¹³⁷ That research suggests that the reported actions of mediators in educating lawyers about the mediation program at VCAT have probably been central to achieving the level of collaboration reported by the mediators with the lawyers at the Tribunal. The nearly universal support by the VCAT mediators

135 Rhoades et al, above n 75, 49.

136 Ibid.

137 Ibid 56.

for the presence of collaborative lawyers within mediation is most likely a result of the active work that the mediators reported themselves as doing in educating lawyers.

In summary, the VCAT mediators nearly universally rejected Rundle's absent advisor model of lawyers' roles around mediation, providing the lawyers were collaborative in their work practices. These mediators preferred to have lawyers present in mediation for two reasons — to enable updated legal advice to be provided on the spot in mediation and to permit the mediators to do their job better. It is unsurprising that mediators working at Melbourne's VCAT were so supportive of lawyers. Mediation at VCAT occurs alongside tribunal hearings and parties in mediation are frequently represented. Mediators at VCAT have come to rely on lawyers and work in partnership with them in their mediation practice. However, the support for lawyers demonstrated by the VCAT mediators differentiated them from mediators in other court-connected contexts because they could see a constructive role for lawyers within the mediation process. VCAT mediators utilised and trained lawyers to help achieve settlement and in so doing, they demonstrated an inter-professional collaborative approach.

B *The Participatory Lawyer: Dismissing the Advisor Observer Role*

Rundle's advisor observer model for lawyers' participation in mediation involves the attendance of the lawyer at mediation without active participation in the mediation sessions or in private sessions with the mediator.¹³⁸ An advisor observer will not interact with the mediator or other party in mediation, leaving that to their client. However, such a lawyer can provide advice to their client in light of hearing first-hand representations from the other side. There was no expressed support for the advisor observer role amongst the VCAT mediators. The mediators preferred a more active role for lawyers in mediation at the Tribunal, as attested to by the discussion of the remaining three of Rundle's models of legal practice around mediation.

C *Valuing the Expert Contributor*

The expert contributor in Rundle's spectrum will actively contribute to mediation but the lawyer's contribution is limited to being an expert in law.¹³⁹ A lawyer working as an expert contributor in mediation will share legal advice with their client but also with the other participants during mediation. The party is the negotiator in this model and the expert contributor does not negotiate on their behalf. However, the expert contributor can engage in 'reality testing' with the client regarding settlement proposals and similar issues.

138 Rundle, 'A Spectrum of Contributions That Lawyers Can Make to Mediation', above n 86, 223–4.

139 Ibid 224–5.

Of all of Rundle's models of legal practice around mediation, there was strongest support for the role of expert contributor amongst the VCAT mediators. Eleven out of the 16 mediators participating in our study saw a lawyer's role primarily as legal advisor rather than negotiator. Lawyers were seen as helpful when involved in defining the legal problem and also in reality testing alternatives to legal settlement with their client. Participants saw the role of the lawyer as active in the process, that is, contributing to the discussion in the mediation (and therefore an 'expert contributor' rather than 'advisor observer'). The lawyer role centred around their expertise, protecting their client's interests and helping frame negotiations through their legal knowledge. For instance, mediators explained their views on the lawyer's role in mediation:

To give advice on legal issues (Patrick p 12).

I agree with Sir Laurence Street. [A lawyer's] job is to be at his client's elbow, not in front of them, and he's there to advise his client. He is not there to go into bat for him (Edward p 9).

Cut to the chase. [Lawyers] are used as a sounding board, a reality tester. You can talk to the lawyer separately and I think sometimes clients do feel that they are being left out of the loop, but I am not there to advise them, so I may come very heavy on the lawyer ... But if I come heavy with him, I am pretty sure that he has come back in here and said, 'Well, you know, we better have another look at this ... ' So I think lawyers are essential (Barry p 13).

These mediators are clear that the role of the lawyer is to provide the advice to clients necessary to assist with resolution of the dispute, including reality testing legal alternatives to settlement, but the lawyer's role is not to negotiate on behalf of their client. That view conforms with the expert contributor role. Edward defers in his answer to Sir Laurence Street's well-known view from 1992, that in mediation:

Legal advisers are not present as advocates or for the purpose of participating in an adversarial, courtroom-style contest with each other, still less with the opposing party. A legal adviser who does not understand and observe this is a direct impediment to the mediation process.¹⁴⁰

Barry's response to the question on the role of lawyers in mediation showed that he, as a mediator, could not advise the clients to settle but a lawyer could, and he concluded that this advisory role of lawyers was essential to achieving settlements through mediation. For another mediator, Kate, a lawyer in mediation could assist in the assessment of whether a party was likely to win in a hearing if the case did not settle.

What lawyers do well is that they can give knowledgeable information to their clients about the likely chances of success and failure. Because

140 Sir Laurence Street, 'Representation at Commercial Mediations' (1992) 3 *Australian Dispute Resolution Journal* 255, 255.

they're both knowledgeable in the law and they're at arm's length from the problem (Kate p 15).

Again, Kate's view drew upon the legal expertise of the lawyer. She acknowledged that the lawyer was the professional best placed to give advice, because the lawyer could view the legal problem dispassionately. That might be said to be another part of the role of lawyer as reality tester of settlement options. Sourdin argues that reality testing of alternatives to settlement fulfils a dual role — assisting the parties to achieve an agreement and ensuring they are informed about the alternatives.¹⁴¹ Understanding alternatives to settlement is a way of gaining bargaining power in mediation and at reaching agreement which accord with accepted principles of law.¹⁴² The VCAT mediators valued this role, one which lawyers are uniquely qualified to provide in achieving a fair settlement.

Analysis of the VCAT mediator interviews shows that the kind of advisory behaviour that mediators consistently valued was working with the lawyer to open up opportunities for listening in the mediation. Mediators valued lawyers who were able to listen to information provided by the other side in mediation and provide a more holistic assessment of the legal issues in dispute. Thus the 'opening up' of a discussion of a legal problem can be assisted by a lawyer. Many of the mediators saw the lawyers as helping clients to see the 'reality' of the situation and also to respond to new information that arose in the mediation. That is, the lawyer needed to reassess the strength of their client's case after receiving new information in mediation, and communicate this to the client. Two of the mediators in the study, John and Fiona, strongly argued for this approach:

A lot of lawyers will advocate very strongly for their clients but often those lawyers. [They will] just sit back and ... listen to what the other side says, rather than what their client has told them. They will quite often say to me in private session or afterwards, 'I didn't know that'. So if they're listening. Their biggest advantage is that they're professionals, they understand the law, they can give tremendous advice to their clients about the likely outcomes, the costs of proceeding and many lawyers do that very well. The biggest thing they can bring is an open mind whilst advocating for their clients that they may not have the full story (John p 13).

Lawyers are very good as a resource and providing new information they give their clients certain advice prior to a mediation and they'll say you've got you know, 'This is your prospects of winning', or whatever on the information that the client gave them and it's very, very helpful for them to hear what the other party is saying. Once they hear what the other party is saying, in a private session they'll say, 'You know what, I have to reassess because I've just heard ... what the other party is saying and about some things that you didn't tell me', you know and then they'll give you advice

141 Sourdin, *Alternative Dispute Resolution*, above n 3, 239.

142 Becky Batagol and Thea Brown, *Bargaining in the Shadow of the Law: The Case of Family Mediation* (Themis Press, 2011) 54.

which is very — they're on the ball. They keep it on track. Easier for me (Fiona pp 29–30).

Both Fiona and John valued the opportunity for lawyers to be present at mediation to hear the other side's story, and to advise their clients based upon this new information obtained at mediation. As Fiona explained, such astute advice made her role easier. For John, the existence of lawyers in an advisory role was an 'advantage' to him.

In valuing the legal expertise and advice of lawyers within mediation, the VCAT mediators demonstrate two further elements identified by Rhoades et al as being essential to successful inter-professional collaboration between mediators and lawyers — the 'complementary services approach' and that 'practitioners understood and respected the nature of each others' roles' around the mediation process.¹⁴³ Rhoades et al describe the complementary services approach as 'collaboration ... based on a clear division of expertise',¹⁴⁴ in which both mediators and lawyers

conveyed a sense of working together as a 'partnership' of complementary service providers, and displayed a high degree of appreciation for the other profession's skills and area of expertise. In particular, these participants regarded this approach as an important way of addressing gaps in their own professional roles.¹⁴⁵

The inter-professional respect identified within successful collaborative relationships in the same study related to 'respecting role boundaries and deferring to the other profession's area of professional expertise'.¹⁴⁶ The VCAT mediators' preference for lawyers adopting the expert contributor role in mediation is strong evidence of a successful collaborative relationship between mediators and lawyers at VCAT. The mediators conveyed a sense of working in partnership with lawyers as they indicated that their role was made easier through the provision of sound advice to their clients. The VCAT mediators understood that their role as facilitative mediators was to work with all parties to provide a process and that settlement could be more easily achieved if the parties had the help and protection of partisan advisers — the lawyers. This attitude is indeed a complementary services approach.

Further, the VCAT lawyers demonstrated respect for the work of 'good' lawyers in the mediation process. The mediators understood that a lawyer's role was different to theirs and was necessarily partisan. Their comments here suggest that they valued the advisory role of lawyers and recognised that the advice given by lawyers who respected the mediation process was beneficial to the process and more likely to achieve a settlement. Mediator Anne (p 5) specifically mentioned that working with respectful lawyers made their job easier — 'I like lawyers, they make my role a lot easier. There is respect within the legal profession. They

143 Rhoades et al, above n 75, 49.

144 Ibid 18.

145 Ibid 19.

146 Ibid 28.

can talk and do a lot of good work for the party.’ Anne’s statement suggests the presence of inter-professional respect between lawyers and mediators at VCAT regarding role boundaries.

On the whole, the expert contributor role was the model most supported by the VCAT mediators we interviewed. Specific tasks undertaken by expert contributor lawyers in and around mediation that the mediators mentioned positively were providing legal advice to clients, providing clients with advice and information about alternatives to settlement (reality testing settlement alternatives), listening to the other side in mediation, and providing holistic advice based upon what has been gleaned in mediation. However these mediators did not want lawyers to negotiate on behalf of their clients in many circumstances, as the mediators strongly supported party self-determination and empowerment. The VCAT mediators explained that these tasks performed by lawyers made their job as mediators easier, demonstrating both a complimentary services approach and respectful engagement with the legal profession. To most VCAT mediators, the role of expert contributor was the model of legal practice most conducive to successful inter-professional collaboration with lawyers at mediation.

D Supporting the Supportive Professional Participant

A lawyer working as a supportive professional participant in mediation works in partnership with their client toward the outcome they both agree is acceptable.¹⁴⁷ A key difference between this model and that of the expert contributor is that either the supportive professional participant or the client may negotiate in mediation. An expert contributor lawyer will not negotiate. The supportive professional participant is a holistic model of legal practice, providing scope for both protection of legal rights and client empowerment and self-determination. This model upholds a facilitative mediation process.

Eight of the 16 VCAT mediators we interviewed (or 50 per cent) supported lawyers in mediation working as supportive professional participants. These mediators saw lawyers’ role in mediation as being more than providing legal advice, and approved of more actively engaged, problem-solving and collaborative forms of legal practice and negotiation in mediation.

A common theme present through VCAT mediators’ responses was the role of lawyer as an active negotiator in mediation who narrows the issues in dispute and suggests options for settlement. The tribunal-connected context of the mediation process was central in leading mediators to support such an active role for lawyers. As articulated by mediators Barry and Charlotte mediators valued lawyer contribution:

Lawyers are very necessary in terms of every tribunal and every situation has a legal element to it. So whilst you may not need your lawyer here, you often need to have the advice of your lawyer. [Lawyers] get to the issues.

147 Rundle, ‘A Spectrum of Contributions That Lawyers Can Make to Mediation’, above n 86, 225–6.

Maybe it's me being a lawyer and I can also speak to them in the same language, but lawyers will often cut out the rubbish and say, 'Okay, here is the issues that we want to talk about' (Barry p 13).

They're helpful in terms of isolating the issues and sort of just nailing it. Here's the five things, two things, whatever the list is, and they can articulate it and they can narrow it. So I think ... they can be useful. Also in terms of the nuts and bolts of when we get to an agreement, in terms of the drafting of the terms of it, and it's not to be particularly legalistic, but for whatever might go on a permanent condition, it does have to work in a real world. Also re their clients, probably some reality checking ...' either before you get there or at the time (Charlotte p 8).

These comments suggest that these mediators approve of a role for lawyers which is greater than providing legal advice, as an expert contributor would. Half of the mediators we spoke to preferred at times to work with lawyers in the supportive professional participant role, that is, with lawyers who are collaboratively engaged in facilitating robust, lasting settlements. The mediators approved of lawyers who worked to bring clarity to the issues in the dispute, who promoted the concerns that were important to a client, while still helping a client to understand that they may not be successful in court. Charlotte's comments propose a role for lawyers in mediation which goes beyond achieving settlements, to increasing the likelihood that the agreements made will be effective — also known by the mediators as 'reality testing'. Rundle identifies reality testing of the workability of a settlement proposal as an element of practice of the supportive professional participant which goes beyond the reality testing of legal alternatives to settlement which an expert contributor would provide. Other mediators also identified the importance of lawyers helping clients to consider how workable an agreement might be and to reality test options:

And one of the things that I always urge parties in a mediation to do, is don't use them as lawyers, use them as friends and as sounding boards. That part of the lawyer's role is often just thrown out. They said that [lawyers] increase costs, but every case here, if you are talking about VCAT has a legal element to it (Barry pp 13–14).

Letting the client think about options even beforehand but also preparing them to have an open mind about options that might arise during the course of the mediation. I like it when they go out and advise their clients because I think it's a good reality check test. And sometimes I know people get a bit worried that lawyers are putting their clients off, but they're only putting their clients off because they don't think it's in their client's best interest (Isabel pp 10–11).

Barry, Charlotte and Isabel's comments here indicate that they believe that lawyers should have a role in helping their clients to understand the impact of a proposed agreement for clients — enabling clients to choose proposals which are more likely to work for them and should therefore be more robust.

Another key element that can be identified in the responses of the VCAT mediators is the concept of lawyers working collaboratively around mediation to achieve a fair settlement, not just in partnership with their client but with the mediator and the other lawyer also:

The strength of the good lawyers are that they all work together. I have lots of meetings just with lawyers on their own. They will work together and with us as members to try to get the outcome for their clients and I think that's the benefit (Anne pp 8–9).

They can give objective, informed advice and I let them talk to their client in private session by themselves, because there are things that they want to tell their client that they don't want to tell them in front of me. Because they're concerned that if I know what their bottom line is, that I might let it out, let the cat out of the bag (Kate pp 15–16).

These mediators valued the collaborative work of lawyers and the complementary services which lawyers offered their clients. Kate's statement shows a sophistication of thought around her collaboration with lawyers — she recognises that working in concert with lawyers to achievement settlement in mediation may require the mediators to keep some distance from lawyers to allow the lawyers to frankly advise their clients. These mediators respected and valued the work of lawyers and expressed the view that while it was important to work with lawyers to progress towards settlement, it was necessary to allow space for lawyers to protect their client's interests. That view differentiates between zealous adversarialism and positive advocacy practices on the part of lawyers. The views of these VCAT mediators correspond with the sentiments of the mediators and lawyers from Rhoades et al's 2008 study, which highlighted the importance of a complementary services approach, that '[p]ractitioners ... understood and respected the nature of each other's roles' around the mediation process,¹⁴⁸ and that mediators could distinguish between 'good' and 'bad' advocacy practices by lawyers.¹⁴⁹

An element of legal practice which some of the VCAT mediators endorsed was a problem-solving approach taken by lawyers in mediation. Two mediators mentioned this specifically:

Actually [lawyers'] best role is their capacity to do things outside the mediation that I can't do. For example in guardianship last week where what was agreed was that the mother wanted all three children to be making decisions about their finances together and they were ultimately prepared to do that but everyone could foresee that there was likely to be some problems with that not very far down the track. And the lawyer who was involved in that mediation really helpfully came up with some proposals, you know, found the name of an Italian speaking mediator who could assist the family and engaged them all in an agreement about that

148 Rhoades et al, above n 75, 49.

149 Ibid 23.

mediator being on call if needed and that kind of thing. I would be stepping outside my role to be making those calls about what might happen beyond the mediation but she was fantastic (Nicole p 9).

I'm not saying they're [lawyers] not good at solving problems. You still get other times when we'll get the lawyers involved, but that tends to be in bigger mediations and more drawn out mediations. I've found some very difficult mediations that the lawyers themselves have been excellent at, on those particular issues, and are really, they've stepped outside their role of pure hard and fast advocacy lawyers, to being trying to genuinely solve a problem (Owen pp 16–17).

Such an approach arguably goes further than Rundle's supportive professional participant model. It implies an effort on the part of lawyers to actively anticipate and solve their clients' problems in a way that traditional legal practice does not encourage. This approach may have much in common with the role of the lawyers from a comprehensive law, preventive law, creative problem solving and therapeutic jurisprudence¹⁵⁰ perspective where lawyers are encouraged to consider the psychological, social, emotional and relational consequences of their clients' problem.¹⁵¹ Nicole especially valued the freedom this gave her as mediator to stay within her role. Again, this is a demonstration of the complementary services approach identified by Rhoades et al. However, just 2 out of 16 mediators mentioned approval for such an active problem-solving approach, suggesting most VCAT mediators preferred more traditional forms of legal practice within mediation.

Just over half of the mediators we interviewed agreed that lawyers, at times, can adopt the role of the supportive professional participant in mediation. The specific functions that they endorsed under this model were an active attempt by lawyers to narrow the issues in dispute and suggest options, real world reality testing with clients of proposals, collaboratively working with clients, mediators and other lawyers to reach outcomes, and, for two mediators, creative problem-solving in and around mediation. These views, which often contained quite sophisticated understandings of 'good' advocacy practices by lawyers, correspond with the views of family mediators involved in highly successful collaborative relationships in the work of Rhoades et al.

E The Spokesperson: Endorsing 'Positive' Advocacy Practices

A lawyer acting as a spokesperson will negotiate on behalf of her or his client during mediation with the client having a very limited role in the process

150 For detail concerning the approach of therapeutic jurisprudence to legal practice and the focus on client wellbeing see King et al, above n 13, ch 2. For detail on preventative law see at ch 4. For detail on creative problem solving see at ch 5.

151 Susan Daicoff, 'Law as a Healing Profession: The "Comprehensive Law Movement"' (2006) 6 *Pepperdine Dispute Resolution Law Journal* 1, 10.

(although in some matters, the client may wish to speak).¹⁵² This model aligns with the traditional adversarial roles of lawyers and clients in litigation, and closely supports an evaluative model of mediation.

Most of the VCAT mediators we spoke to rejected a spokesperson role for lawyers in mediation. Unsurprisingly, these mediators disliked lawyers who attempted to take over the mediation when narrowing the issues and reality testing. They distinguished between positive and problematic advocacy practices by lawyers. These mediators explained how aggressive advocacy undermined the mediation process, and in particular the values of client empowerment and self-determination which are so central to facilitative mediation. As an example, Edward valued lawyers giving expert advice within mediation, but was cautious of lawyers co-opting the process in the name of speaking for their clients:

When I first started mediating we got ... head-kicking lawyers who say, you know, 'My client isn't going to speak, I'm going to speak for him' etc. You don't see that as much today. The best of them know to let their client go and I mean you're still, there's still the tendency for them to make the opening statement and then turn and say 'Well do you want to add anything?' If he's the lawyer and if he wants to run the case that way — But his role is to advise his client (Edward p 9).

Edward's rejection of the spokesperson role for lawyers in mediation follows from his experience of some lawyers colonising the process and denying their clients self-determination within it. It is this approach, seen as a consequence of the annexing of mediation services to courts or tribunals as has occurred at VCAT, that causes anxiety within some of the mediation literature also.¹⁵³ Another VCAT mediator, David, discussed what he saw as the dominance of lawyers in the tribunal-connected mediation process at VCAT. Both Edward and David made it clear that not all lawyers act in this way and they were discussing the exception to the rule:

[It's] part of it is a systemic problem, [lawyers] don't want to give up control or authority and lawyers don't want to give up control over a case once they've got their hands on it often ... So what you get from VCAT to a certain extent but more so in private practice are mediations which aren't really mediations in the sense where the parties come together to discuss their issues. It's much more a lawyer-driven process (David p 14).

In contrast, 6 of the 16 mediators we interviewed expressed some support for lawyers acting as a spokesperson for their client in mediation. These mediators could see that lawyers could adopt positive advocacy practices within mediation. For Fiona, this role as spokesperson enhanced the role of the lawyer as narrower of issues through legal expertise:

This is a lazy one but during a mediation I will get the lawyers to tell me the story because they can tell me concisely and briefly, what's important

¹⁵² Rundle, 'A Spectrum of Contributions That Lawyers Can Make to Mediation', above n 87, 227–8.

¹⁵³ See, eg, Menkel-Meadow, above n 43, 5; Folger, above n 43, 3; Relis, above n 53, 14, 237–8.

... They get straight to it and they don't dither around with all this other nonsense. You don't have to ask them a hundred questions before I know what they're saying to you. That's how I start my mediations (Fiona p 29).

This sizeable minority of mediators saw the lawyer's role within mediation as that of an advocate that could speak for their client in certain circumstances. For instance, the following mediators stated that the lawyer's role in mediation was:

Definitely advocacy. I've seen some [lawyers] grow in ten and eleven years, just grow into be excellent advocates. But I don't know whether they're necessarily any better in a mediation. But some of them really do specialise in these fields (Owen pp 17–18).

As advocates. I generally find lawyers very useful, I often find if you can manage the lawyer and if they are clear in their role and I like parties involved as well (David p 13).

The [lawyers] I've had tended to be very constructive, even though they might want to cut to the chase. That's okay. But they're being very constructive (Charlotte p 8).

Fiona, Owen, David and Charlotte recognised the value of client advocacy in mediation. For them, the role of spokesperson was an appropriate role for lawyers to adopt at times in mediation because it created efficiencies and protected clients.

The key difference between the minority of mediators who approved of advocacy within the mediation process and the majority who rejected the spokesperson role for lawyers in mediation, was a differentiation between positive and problematic advocacy practices by lawyers. David's two comments, one that criticised the spokesperson role and the other that professed confidence in it, show that as a mediator, he could see both a positive and problematic advocacy role for lawyers in mediation. Some of the VCAT mediators were prepared to support the spokesperson role for lawyers in mediation, provided that the lawyers engaged in positive advocacy practices.

Rhoades and her colleague's research into inter-professional relationships around family mediation identified lawyers engaging in "positive" advocacy practices' as an element of successful inter-professional collaboration between lawyers and mediators.¹⁵⁴ In their study, they found that most family mediators who had poor working relationships with family lawyers, tended to 'confuse ... "advocacy" and "adversarialism"' and reject the partisan nature of a lawyer's client advocacy role.¹⁵⁵ In contrast, mediators who had successful collaborative relationships with lawyers 'distinguished between "good" and "bad" advocacy practices'.¹⁵⁶ Of the latter group of mediators, Rhoades and her co-authors explain that

these practitioners regarded 'good' advocacy practice as requiring lawyers to 'reality test' their client's instructions where these were 'unreasonable'

154 Rhoades et al, above n 75, 49.

155 Ibid ix.

156 Ibid 23.

or unmanageable or contrary to the child's interests. 'Bad' advocacy practice, on the other hand, was associated with family lawyers who 'overplayed' their advocacy role, for example, by unquestioning support for a client's instructions, however unrealistic or impracticable.¹⁵⁷

Reconciling these findings with the views of the VCAT mediators, it is clear that all of the VCAT mediators who mentioned client advocacy — including those who supported the spokesperson role in mediation and those who did not — displayed evidence of rhetoric consistent with successful collaborative relationships with lawyers. They were all able to distinguish between positive and problematic advocacy practices by lawyers in mediation. Focusing on Edward and David's comments that criticised lawyers' spokesperson role in mediation, both mediators revealed a sophisticated understanding of lawyers' client advocacy role, accepting the importance of client advocacy, but challenging the appropriateness of that role where it is used to undermine the mediation process. They did not simply conflate advocacy with adversarialism. This recognition of the value of client advocacy and a preference for lawyers engaging in positive advocacy practices amongst the VCAT mediators shows evidence of successful inter-professional collaboration in mediation at VCAT.

IX CONCLUSION

As ADR has become so central to the operation of our Australian civil system, the role of lawyers in mediation requires more attention. Existing research has shown that some lawyers working in court-connected mediation practices tend to dominate the process and leave little, if any space for client input into the process and outcomes of mediation. Such an approach undermines the self-determination philosophy of facilitative mediation and limits the potential of mediation to provide solutions beyond those which could be achieved through litigation. In our small study of mediation practice at the well-established mediation service at VCAT, we have sought to pinpoint ways that lawyers can adopt constructive roles in and around court-connected mediation.

Analysis of the data in this study shows that the relationship between lawyers and mediators at VCAT has progressed beyond the traditional rivalry of the two professions and towards a high level of inter-professional collaboration. In this collaborative context there were a range of possible roles that lawyers might adopt to support and empower their clients in mediation. The VCAT mediators we spoke to generally supported an active but not dominating role for lawyers in mediation, with preferences most strongly centred around the expert contributor and supportive professional participant roles on Rundle's spectrum. The preferred roles all complemented the role of the mediator and enabled clients to experience the self-determination benefits of facilitative mediation, while still receiving the rights protection of legal representation in mediation. The VCAT

157 *Ibid.*

mediators demonstrated how mediators can assist in developing and sustaining the inter-professional collaborative culture of the mediation service. Ultimately, the interpersonal contact between lawyers and mediators may be more effective in facilitating a less-adversarial culture around court-connected ADR than legislative and ethical requirements may be.

In the context of the institutionalisation of ADR, the involvement of lawyers in the mediation process is a central feature of the success or failure of widespread use of ADR processes within the civil justice system. Lawyers' practices will influence whether mediation practices are facilitative or become evaluative in nature. Our findings point towards the potential for lawyers to adopt a range of roles in court-connected ADR practice beyond VCAT. Lawyers can adopt roles in mediation that provide clients with both the protection of legal representation around mediation but with the benefits of client empowerment through direct participation. Lawyers' contribution to mediation can go beyond client advocacy, even beyond legal advice and reality testing alternatives to settlement. In the right collaborative environment, lawyers can adopt more engaged practices such as active listening in mediation to provide more holistic advice, holistic reality testing with clients, strategically intervening in mediation by narrowing the issues in dispute and generating options, collaboratively working with others in mediation, advocating for vulnerable clients and, in some circumstances, providing creative solutions to client problems.

The key avenue for further research is to gain an understanding of what lawyers working collaboratively in court-connected ADR services themselves view their role as being in and around mediation. Our findings are limited to the views of mediators only, at one court-connected ADR service. There is some evidence of what lawyers think their role in mediation should be — Rundle's 2008 study into court-connected mediation at the Supreme Court of Tasmania found that the overwhelming majority of lawyers consulted thought that they should not be restricted to an advisory role in mediation and that they should also advocate and negotiate for their clients in mediation.¹⁵⁸ The role envisaged by those lawyers is consistent with a traditional lawyer's role in litigation and goes beyond the role that most VCAT mediators saw lawyers as having around mediation. The Tasmanian civil lawyers did not appreciate the value of direct disputant participation in mediation.¹⁵⁹ However the environment of the two studies differ greatly. The level of client participation at the Tasmanian ADR service was determined by lawyers,¹⁶⁰ whereas at VCAT, it is the mediators who determine who is present in the mediation room and the extent to which they participate.¹⁶¹

Our research has shown that the key to successful involvement by lawyers in mediation is a highly collaborative inter-professional relationship between lawyers and mediators at the particular ADR service. That collaboration can involve

158 Rundle, 'Barking Dogs', above n 71, 86.

159 Ibid 81.

160 Ibid 82.

161 Victorian Civil and Administrative Tribunal, *Practice Note No PNVCAT4 of 2013 — Alternative Dispute Resolution*, 1 January 2013, 5.

shared expectations of the dispute resolution process, a complementary services approach, and understanding and respect for the different professional roles in mediation and the use of positive advocacy practices by lawyers. The creation of a high-quality ADR processes within the legal system must involve collaboration between legal and dispute resolution professionals to balance the need to provide a flexible and empowering dispute resolution process that meets party needs against the necessity for protection of the rights of vulnerable parties. Education of lawyers especially about ADR processes is central.¹⁶² This may occur at law school and also in formal continuing professional development.¹⁶³ However our findings show that over time, as a court-connected ADR services becomes more established, non-adversarial legal practice around ADR can develop through active engagement with lawyers by mediators. This collaborative professional relationship becomes a powerful way of educating, or acculturating lawyers into non-adversarial legal practice around mediation.

162 National Alternative Dispute Resolution Advisory Council, *Teaching Alternative Dispute Resolution in Australian Law Schools* (November 2012), 7–8.

163 Tania Sourdin, 'Not Teaching ADR in Law Schools? Implications for Law Students, Clients and the ADR Field' (2012) 23 *Australasian Dispute Resolution Journal* 148.