

# FOMENTERS OF STRIFE, GLADIATORIAL CHAMPIONS OR SOMETHING ELSE ENTIRELY? LAWYERS AND FAMILY DISPUTE RESOLUTION<sup>1</sup>

DR BECKY BATAGOL\*

*Popularly, lawyers are conceived of as relentlessly adversarial. In the context of family law, the model of compulsory family dispute resolution currently practised in Australia is premised upon an adversarial assumption. Implicit is the view that family lawyers destroy their clients and their families. To a lesser extent, it is understood that lawyers can sometimes offer protection to vulnerable parties. Recent reforms to the processes used to resolve family disputes in Australia have increased the need for collaboration between family dispute resolution practitioners and family lawyers. A collaborative approach demands a more sophisticated non-adversarial view of how family lawyers operate than the negative adversarial stereotype allows. To support this position, this article utilises data from a pre-reform study of family mediation to demonstrate how legal advice around family mediation may operate to provide a protective safety net for vulnerable parties forced to negotiate in family dispute resolution.*

*This article is intended to contribute to the growing body of work on the emerging concept of non-adversarial justice. Non-adversarial approaches can be described as a range of processes used to resolve disputes away from the courts and processes used by courts which adopt a problem-solving approach.<sup>2</sup>*

---

\* Lecturer, Faculty of Law, Monash University.

<sup>1</sup> This article draws upon research funded by the Australian Research Council, the Department of Education, Employment and Workplace Relations, Monash University and the Law and Justice Foundation of NSW. That research will be published in full later in 2008 by the Law and Justice Foundation of NSW authored by Becky Batagol and Professor Thea Brown of Monash University. Earlier versions of this work have been presented at the UK Socio Legal Studies Association Conference in April 2005 and a seminar at the Oxford Centre for Family Law and Policy in June 2005, as well as at the NADRAC Research Forum, Melbourne, 2007. I am grateful for the financial support, feedback and comments received, including the comprehensive and insightful comments of the anonymous referee of this article and those of Professor Arie Freiberg and Dr Michael King. I would particularly like to thank Associate Professor Helen Rhoades for generously sharing material referred to in this article.

<sup>2</sup> The first published work on non-adversarial justice is written in the criminal context: A Freiberg, 'Non-Adversarial Approaches to Criminal Justice' (2007) 16 *Journal Judicial Administration* 205.

## I LEGAL ADVICE AND FAMILY DISPUTE RESOLUTION

This section explores how current Australian policy on the use of legal advice alongside family dispute resolution has been developed with an adversarial conception of lawyers in mind.

A *Family Dispute Resolution*

Family dispute resolution is now central to the operation of the Australian family law system.<sup>3</sup> The *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth) introduced ‘family dispute resolution,’ (replacing family and child mediation) and made it compulsory in many post-separation disputes over children.<sup>4</sup> Since 1 July 2007 all separated parents who go to the Federal Magistrates’ Court or the Family Court of Australia seeking new orders in relation to disputes over their children must attempt family dispute resolution before their case can be heard.<sup>5</sup> It has been argued that these provisions do not just mandate attendance at family dispute resolution, but also require participation in good faith.<sup>6</sup> There are some exceptions to the attendance requirement in cases where there are ‘reasonable grounds’ to believe that there has been or there is a risk of abuse to a child or there is a risk of family violence from one of the parties to the proceedings<sup>7</sup> and in a range of other circumstances.<sup>8</sup> Family dispute resolution is offered at Family Relationship Centres, at community organisations under the Family Relationship Services Program and by private providers.

Separated parties may still opt to go directly to a lawyer without attending family dispute resolution at all in circumstances where orders sought relate to divorce, matrimonial property, finances and financial agreements (and not care of children),<sup>9</sup>

<sup>3</sup> H Rhoades, H Astor, A Sanson and M O’Connor, *Enhancing Inter-Professional Relationships in a Changing Family Law System: Final Report* (2008) Sydney Law School 1 <[http://www.law.usyd.edu.au/about/staff/HilaryAstor/FamilyLaw\\_FinalReport\\_May08.pdf](http://www.law.usyd.edu.au/about/staff/HilaryAstor/FamilyLaw_FinalReport_May08.pdf)> at 5 July 2008.

<sup>4</sup> Section 10F of the *Family Law Act 1975* (Cth) defines family dispute resolution to mean ‘a process (other than a judicial process) in which [an independent] family dispute resolution practitioner helps people affected, or likely to be affected, by separation or divorce to resolve some or all of their disputes with each other.’

<sup>5</sup> *Family Law Act 1975* (Cth) s 60I(7). Courts may also order that parties attend family dispute resolution on their own initiative or upon the application of one of the parties to the proceedings: *Family Law Act 1975* (Cth) s 13C. It is now permitted for the courts to include provisions in parenting orders directing parties towards particular dispute resolution processes (such as family dispute resolution) in the event of disagreement between the parties regarding the terms or operation of the order: *Family Law Act 1975* (Cth) s 64B(2).

<sup>6</sup> T Altobelli, ‘A Generational Change in Family Dispute Resolution in Australia’ (2006) 17 *Australasian Dispute Resolution Journal* 140, 146. If one party to a dispute refuses to attend family dispute resolution, or attends but fails to make a genuine effort to resolve the issues, the family dispute resolution practitioner may issue a certificate certifying this behaviour: *Family Law Act 1975* (Cth) s 60I(8). This certificate and the recalcitrant behaviour that it records, may be taken into account by the court when determining whether to award costs against a party: *Family Law Act 1975* (Cth) s 117(2), (2A). Ordinarily in family law proceedings, a party will bear his or her own costs: *Family Law Act 1975* (Cth) s 117(1). A departure from this status quo means that refusal to attend or genuinely attempt to resolve the issues in dispute at family dispute resolution now carries with it the potential for severe financial penalties.

<sup>7</sup> *Family Law Act 1975* (Cth) s 60I(9)(b).

<sup>8</sup> *Family Law Act 1975* (Cth) s 60I(9)(e).

<sup>9</sup> Although in many of these circumstances, pre-action procedures would apply to parties before the courts: *Family Law Rules 2004* (Cth) r 1.05. These procedures encourage ‘parties to consider and use

where consent orders will be sought, in urgent circumstances or where a court has already made a parenting order within the last 12 months and where an application for contravention is sought.<sup>10</sup> In circumstances where there is actual or apprehended violence or abuse, applicants for parenting orders may go directly to a lawyer, however before a court application can be made, clients must still attend a government-funded community organisation or a Family Relationship Centre to receive advice about other services and processes including alternatives to court action.<sup>11</sup>

## B *Legal Advice in and Around Family Dispute Resolution*

The legislation does little to encourage use of legal advice alongside family dispute resolution. Family dispute resolution practitioners are not permitted to give legal advice (except on procedural matters).<sup>12</sup> Until the review of the *Family Law Rules* (Cth) in 2004, family mediators (now re-badged family dispute resolution practitioners) were required to direct mediating parties to seek legal advice before and during mediation as well as before any agreement which arose from the mediation became legally binding.<sup>13</sup> However the present Rules are silent on this issue, meaning that family dispute resolution practitioners are not currently legislatively required to advise mediating parties to seek legal advice.<sup>14</sup>

In practice, Family Relationship Centres can provide limited, generalised 'legal information' but if a client asks how that information applies to them, staff can offer a referral to a legal service.<sup>15</sup> Relationship Centres and community organisations do refer clients undertaking family dispute resolution to lawyers, however these practices are not legislatively mandated and may vary according to location. The *Guidelines for Referrals to Legal Advice* used by staff at Family Relationship Centres state:

The Family Relationship Centres (Centres) are not intended to work alone but as an integral part of a much wider system. As the legal profession and legal services are an important part of that system, the Government expects the new Centres to work collaboratively with them to ensure the best outcomes for clients.<sup>16</sup>

Each Centre is required to develop relationships with local private legal practitioners, community legal centres and legal aid offices in order to facilitate referrals to legal

---

a dispute resolution method rather than having the case resolved by trial.' (*Family Law Rules 2004* (Cth) r 1.06(a)). The rules may require participation in dispute resolution services, such as family counselling, negotiation, conciliation or arbitration.

<sup>10</sup> *Family Law Act 1975* (Cth) s 60I(9).

<sup>11</sup> *Family Law Act 1975* (Cth) s 60J(1)(b). But see *Family Law Act 1975* (Cth) s 60J(2) which does not require evidence in writing if there is a risk of family violence or child abuse occasioned by the delay in obtaining advice.

<sup>12</sup> *Family Law Regulations 1984* (Cth) reg 64(d).

<sup>13</sup> *Family Law Rules 1984* (Cth) O 25A, r 12, now repealed.

<sup>14</sup> However, the *Family Law Act 1975* (Cth) encourages parties making financial agreements under Part VIII A of the Act to seek legal advice if they wish the agreements to become legally binding.

<sup>15</sup> Australian Government, Attorney-General's Department, *Operational Framework for Family Relationship Centres* (2007) 47 (*Guidelines for Referrals to Legal Advice by Staff in Family Relationship Centres*)

<[http://www.ag.gov.au/www/agd/agd.nsf/Page/Families\\_FamilyRelationshipServicesOverviewofPrograms\\_ForFamilyRelationshipServicesPractitioners\\_FamilyRelationshipCentreResources#Framework](http://www.ag.gov.au/www/agd/agd.nsf/Page/Families_FamilyRelationshipServicesOverviewofPrograms_ForFamilyRelationshipServicesPractitioners_FamilyRelationshipCentreResources#Framework)> at 5 July 2008.

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

advice.<sup>17</sup> Staff at Centres are given discretion in determining whether it is appropriate to make a referral for legal advice.<sup>18</sup> Varied, localised cultures are being established at Relationship Centres in relation to legal referrals. Some Relationship Centres have cultivated strong local ‘socio-legal service networks’ (sources of referral both to and from the Centres) through holding numerous information seminars and meetings with neighbourhood service providers, including lawyers.<sup>19</sup> The existence and strength of these networks are not uniform and will depend upon the nature of the dispute resolution practised and the efforts of each Relationship Centre and surrounding local practitioners.<sup>20</sup>

While Centres are encouraged to develop working relationships with local service providers there are some limits on what can be done. The current *Operational Framework* that governs Family Relationship Centres states that referrals by Centres must always ‘be on the basis of the most appropriate service for the client, not any relationships the Centre has with a particular service.’<sup>21</sup> The same guidelines require that Centres are also ‘impartial’ in their referrals and allow the client to choose which external service to use.<sup>22</sup> While designed to reduce the likelihood of favouritism, these requirements may potentially undermine some of the closer collaborative approaches with local private practitioners.<sup>23</sup> The Centres may effectively be left with just two options for referral to private legal practitioners: first, a referral to the State or Territory law society who maintain a directory of practising lawyers or, second, at best, a ‘passive referral’ (merely providing contact details to clients) to a range of local lawyers, leaving clients to make their own communication with the lawyer. The *Operational Framework* suggests that passive referrals increase the likelihood of clients not taking up the referral and provide for a range of more active referral techniques that can increase referral uptake.<sup>24</sup> These requirements may reduce the possibilities for creative collaboration with private practitioners or that clients will actually seek legal advice.

There is nothing legislatively preventing participants in family dispute resolution from having their lawyer present during the process. However at Family Relationship Centres, lawyers are not permitted to attend dispute resolution sessions under the *Operational Framework*:

---

<sup>17</sup> Ibid.

<sup>18</sup> Ibid.

<sup>19</sup> The Frankston Family Relationship Centre has developed a strong socio-legal network in this way; see T Brown, *Research Report: Frankston Family Relationship Centre* (2008).

<sup>20</sup> The research conducted by Rhoades and her co-authors has clearly shown that professional relationships between family dispute resolution practitioners and family lawyers vary according to the nature of the family dispute resolution service offered, including the goals and approach of the family dispute resolution program. Consequently, they recommend that initiatives used to cultivate good interpersonal relationships between members of these professions will need to be tailored to individual practices: Rhoades et al, above n 3, 60.

<sup>21</sup> Australian Government, Attorney-General’s Department, above n 15, 31.

<sup>22</sup> Ibid.

<sup>23</sup> For example, the guidelines may create difficulty implementing at Relationship Centres a program such as the highly regarded Relationships Australia (Vic) Lawyers Panel, where approximately 20 local practitioners are selected for their willingness to work with family dispute resolution practitioners. A system of mutual referrals between the dispute resolution service and lawyers as well as monthly meetings are established. For fuller details of this program see Rhoades et al, above n 3, 14-15.

<sup>24</sup> Australian Government, Attorney-General’s Department, above n 15, 66.

Family Relationship Centres will not provide legal advice to clients and clients will not be legally represented in sessions conducted at the Centres. The intention is to move away from an adversarial approach to negotiating parenting arrangements after separation.<sup>25</sup>

Organisations funded separately under the Family Relationship Services Program are not constrained by the *Operational Framework* but do not usually have lawyers present in dispute resolution.

### C *The Adversarial Lawyer in Australian Policy*

In Australia, the promotion of family dispute resolution has been accompanied by a denigration of the role of lawyers in the resolution of family disputes.<sup>26</sup> The adversarial system is deemed inappropriate for separating families,<sup>27</sup> and lawyers are associated with that culture. There is a strong preference for professional assistance for separating couples to be provided by members of the ‘helping professions’ (counsellors, psychologists and social workers)<sup>28</sup> over the advice and assistance of the legal profession.<sup>29</sup> As part of this trend towards ‘informal justice,’<sup>30</sup> family dispute resolution conducted by family dispute resolution practitioners is pressed upon disputants as an attractive alternative to lawyer-led dispute resolution. Similar trends towards mediation and away from assistance provided by family lawyers have been identified in US and UK family policies.<sup>31</sup>

<sup>25</sup> Ibid 11.

<sup>26</sup> C Banks, ‘Being a Family Lawyer and Being *Child Focussed* — A Question of Priorities?’ (2007) 21 *Australian Journal of Family Law* 37, 39-40.

<sup>27</sup> See J Dewar and S Parker, ‘English Family Law Since World War II: From Status to Chaos’ in S N Katz, J Eekelaar and M Maclean (eds), *Cross Currents: Family Law and Policy in the United States and England* (Oxford University Press, 2000) 123, 129. An example of such a view in Australian policy is in Australian Government, *A New Family Law System: Government Response to Every Picture Tells a Story* (2005) Australian Government, Attorney-General’s Department 3 <[http://www.ag.gov.au/www/agd/agd.nsf/Page/Publications\\_Anewfamilylawssystem-Governmentresponsetoeverypicturetellstastory-June2005](http://www.ag.gov.au/www/agd/agd.nsf/Page/Publications_Anewfamilylawssystem-Governmentresponsetoeverypicturetellstastory-June2005)> at 5 July 2008: ‘Adversarial processes tend to escalate and prolong conflict. As part of this response, the government intends to reduce the adversarial nature of [the] process.’

<sup>28</sup> For a discussion of this term; ‘the helping professions’, and of the tussle between those from the helping professions and lawyers over control of post-separation children’s disputes in the USA, see M Fineman, ‘Dominant Discourse, Professional Language, and Legal Change in Child Custody Decision-Making’ (1988) 101 *Harvard Law Review* 727.

<sup>29</sup> Hunter identifies denigration of family lawyers as a notable feature of Australian government family policy. She further notes that this view has also underpinned family law reform in the UK. R Hunter, ‘Adversarial Mythologies: Policy Assumptions and Research Evidence in Family Law’ (2003) 30 *Journal of Law and Society* 156, 156-8.

<sup>30</sup> Roberts identified a number of trends in family policy as far back as 1983, labelling them ‘informal justice,’ including a preference for private consensus over external coercion, a retreat from the intervention of legal professionals and a general desire to shift family dispute management away from government: S Roberts, ‘Mediation in Family Disputes’ (1983) 46 *Modern Law Review* 537, 540.

<sup>31</sup> Fineman has shown how a similar (but earlier) policy push towards compulsory mediation in the US occurred because mediators, using the language of therapy rather than law, successfully captured the attention of policy-makers looking for solutions to the ‘custody problem.’ Fineman, above n 28, 732-3. In the UK, Maclean, Eekelaar and Beinart have pointed out that mediation was funded under the *Family Law Act 1996* (UK) in response to fears that the lawyer-based system was producing the acrimony and hostility within the family law system: J Eekelaar, M Maclean and S Beinart, *Family Lawyers: The Divorce Work of Solicitors* (Hart Publishing, 2000) 2. On the UK, see also P Lewis, *Assumptions About Lawyers in Policy Statements: A Survey of Relevant Research*, Lord Chancellor’s Department Research Series No 1/00 (2000).

Many aspects of the Australian family law system have been designed with the conception of the adversarial lawyer in mind.<sup>32</sup> This view caricatures family lawyers as ‘aggressive and litigious gladiators who resist compromise.’<sup>33</sup> In 2003, the report for the *Every Picture Tells a Story* Inquiry (that led to the introduction of compulsory dispute resolution) depicted family lawyers as encouraging conflict at great emotional and financial cost to their clients:

It seems that the present system can do nothing about one party dragging the other through drawn out and repeated court battles for purely vindictive reasons. Many within the legal fraternity appear to exacerbate this by their adversarial approach. This experience becomes extremely expensive (over \$200,000 for one witness) and the process seems to destroy families and escalate disputes ... The committee’s objective is to devise a system where the involvement of lawyers is the exception rather than the rule.<sup>34</sup>

Vilification of family lawyers in government policy artificially constructs a competition for clients between the family legal profession and the increasingly professionalised dispute resolution sector. Lawyers traditionally had a monopoly over assisting separating families through the divorce process and obtaining ancillary relief. Their central role in the resolution of family disputes established family lawyers as prime targets of critics of the traditional adversarial system in family law.<sup>35</sup> Since the 1970s, there has been an increasing concern to protect the children of separating parents, and a welfarist discourse has emerged in family policy.<sup>36</sup> It is sometimes assumed that family lawyers, in the classic adversarial style, overlook the welfare of children in preference for an exclusive focus on pursuing the client-parents’ interests.<sup>37</sup> Non-adversarial processes such as family dispute resolution offer an important mechanism by which welfare notions are brought into family law.<sup>38</sup>

It seems that family lawyers have lost the public relations war in Australia. Fineman argues that governments accept narratives where lawyers and the adversarial system are ‘horror stories’ compared with the ‘fairytale’ of mediation because ‘[t]his form of presentation makes the professional standards of the helping professions and the legal system concrete, understandable, and susceptible to positive action.’<sup>39</sup> A policy which centralises non-adversarial processes and minimises the role of lawyers in the family law system is helped by the unpopularity of lawyers amongst the general community.

---

<sup>32</sup> Banks identifies numerous instances of anti-lawyer sentiments expressed during the public hearings for the 2003 House of Representatives Standing Committee on Family and Community Affairs *Every Picture Tells a Story* Inquiry. In many of these statements, lawyers were characterised as inherently adversarial: Banks, above n 26, 39-40.

<sup>33</sup> L Mather, ‘Changing Patterns of Legal Representation in Divorce: From Family Lawyers to *Pro Se*’ (2003) 30 *Journal of Law and Society* 137, 151.

<sup>34</sup> House of Representatives Standing Committee on Family and Community Affairs, Parliament of Australia, *Every Picture Tells a Story: Report on the Inquiry into Child Custody Arrangements in the Event of Family Separation* (2003) [4.4], [4.47].

<sup>35</sup> G Davis, *Partisans and Mediators: The Resolution of Divorce Disputes* (Clarendon Press, 1988) 85.

<sup>36</sup> B Neale and C Smart, “‘Good’ and “‘Bad’ Lawyers? Struggling in the Shadow of the New Law’ (1997) 19 *Journal of Social Welfare and Family Law* 377, 380.

<sup>37</sup> Rhoades and her co-authors identified a view amongst a cohort of family dispute resolution practitioners who had limited contact with family lawyers that was highly critical of family lawyers’ failure to prioritise the interests of children when representing parents: Rhoades et al, above n 3, 54.

<sup>38</sup> Neale and Smart, above n 36, 382.

<sup>39</sup> Fineman, above n 28, 753.

Australian family law and policy is strongly influenced by a desire to reduce adversarialism in family disputes. Lawyers are associated with the most damaging aspects of the adversarial system. Family dispute resolution is promoted in preference to a more traditional focus on the court system and service provision by lawyers. Legal advice around and within family dispute resolution is not encouraged under law, however actual referral practices to lawyers will vary between services.

## II THE ADVERSARIAL LAWYER STEREOTYPE

Popular and political views of lawyers cluster around the concept of adversarialism. This section explores those views in an attempt to define what is meant by ‘adversarialism’ in family legal practice. The views drawn on reflect those expressed popularly in western industrialised societies, by non-legal professionals who work in the family law system and also by governments. However the adversarial family lawyer exists more in stereotype than practice — studies have consistently shown that family lawyers can most accurately be described as ‘non-adversarial’.

Within claims of adversarialism, it is possible to identify two broad schools of thought on the impact which adversarial lawyers have on our society. The first, the fomenters of strife view, is that lawyers bring harm at the financial and personal cost of their clients and should therefore be avoided if not prohibited.<sup>40</sup> The second, less common perception, the gladiatorial champion view, is that lawyers will battle to protect the rights and interests of needy clients in the courtroom arena and therefore offer a necessary and desirable professional service. Although seemingly contradictory, these two views can be reconciled in their conception of lawyers as adversarial operators. The lawyer in the fomenter of strife archetype is a manifestation of all that is wrong with the adversarial legal system with its competitiveness, legalism, inefficiency and expense, whereas the gladiatorial champion represents some of the few beneficial aspects of having a strong advocate. Both of these views are explored in a little more detail here in relation to family lawyers.<sup>41</sup>

### A *Fomenters of Strife*

The fomenters of strife stereotype focuses on the harmful effects that adversarial lawyers bring to their clients and to society generally. The assumptions about family lawyers in Australian policy (described above)<sup>42</sup> conform to the fomenters of strife stereotype. It is assumed that lawyers are the source of conflict in family disputes. The fomenters of strife view can be discerned in public attitudes to lawyers also. After examining public opinion polls, representations of lawyers in popular media, lawyer jokes and political discourse in the US, Galanter argues that mistrust pervades popular

<sup>40</sup> The ‘fomenters of strife’ language has been borrowed from Galanter, where it is one of the categories he identifies in his taxonomy of anti-lawyer themes in popular discourse. M Galanter, ‘Predators and Parasites: Lawyer-Bashing and Civil Justice’ (1994) 28 *Georgia Law Review* 633, 635.

<sup>41</sup> Kimm, in her study of Victorian lawyers sampled in 2000 and 2005, has developed a different set of four classifications of family law practitioners. She categorises family lawyers as ‘conciliatory’ who work with other lawyers to achieve settlement, as ‘Olympian partisans’ — experts in their mastery of law and tactics, as ‘gladiators’ — always aggressive, and also as ‘feral’ practitioners. The majority of Kimm’s Melbourne respondents in 2000 and especially 2005 were conciliatory practitioners and could not be described as adversarial. J Kimm, *The Family Court, Judges and Lawyers: Changing Practices Amongst Victorian Family Lawyers* (PhD Thesis, Monash University, 2008) ch five.

<sup>42</sup> See section IC of this article: ‘The Adversarial Lawyer in Australian Policy’.

perceptions of the legal profession.<sup>43</sup> In a large-scale survey of the UK population, Genn and her co-researchers identified an alienation from the institutions and processes of the law, including a lack of sympathy with legal language, mystifying court procedures and the closed world of the legal profession as well as a concern with the camaraderie between opposing advocates.<sup>44</sup> Within these political and popular perceptions, a few distinct assumptions can be identified.

First, it is assumed that lawyers are wedded to adversarial dispute resolution methods and are the source of (or at the very least encourage) conflict between separating couples. Here, lawyers are depicted as ‘aggressive, competitive hired guns, unprincipled mercenaries who foment strife and conflict by encouraging individual self-serving and self-assertion rather than cooperative problem solving.’<sup>45</sup> An example of this particular form of the adversarial stereotype comes from the statement rejecting the presence of lawyers at family dispute resolution sessions conducted at Family Relationship Centres in the *Operational Framework*, quoted above.<sup>46</sup> It accepts that adversarialism in family disputes emanates chiefly from lawyers and that they should only be minimally involved in the resolution of family disputes. Those lawyers are assumed to be the fomenters of family strife. What follows from this assumption is a view that in the family context, the removal of lawyers will result in the removal of much of the worst of the conflict that pervades the family law system.

Second, it is assumed that lawyers’ interventions are mostly harmful to separating families. Lawyers’ professional partisanship is the specific target of attack here. ‘One particularly unfortunate aspect of [family law] cases is the attorney’s binding obligation to pursue and achieve his client’s wish, regardless of whether this is compatible with the child’s needs. These seem to be the cases which, ultimately, no one wins.’<sup>47</sup> That view is echoed in the complaints of many of the Australian family dispute resolution practitioners interviewed by Rhoades and her co-authors in 2007:

[S]ome (although not all) family dispute resolution practitioners who offered critiques of partisanship did not have a clear understanding of client advocacy. In particular, some practitioners conflated ‘advocacy’ with ‘adversarialism,’ suggesting that the representation of a single party to a dispute was inherently adversarial or inevitably exacerbated conflict.<sup>48</sup>

The family dispute resolution practitioners who proffered this view were those who had less professional contact with family lawyers. Practitioners who enjoyed closer collaborative relationships with family lawyers were more likely to adopt a more nuanced view of the family solicitor’s role,<sup>49</sup> suggesting the fomenters of strife view might perhaps be strongest amongst those who view lawyers from afar. Through their adversarial dispute resolution strategies, lawyers are seen to destroy families, in contrast

<sup>43</sup> M Galanter, ‘The Faces of Mistrust: Images of Lawyers in Public Opinion, Jokes and Political Discourse’ (1998) 66 *University of Cincinnati Law Review* 805.

<sup>44</sup> H Genn, S Beinart, S Finch, C Korovessis and P Smith, *Paths to Justice: What People Do and Think About Going to Law* (Hart Publishing, 1999) 247.

<sup>45</sup> Galanter, above n 40, 635.

<sup>46</sup> See section IB of this article: ‘Legal Advice in and Around Family Dispute Resolution’.

<sup>47</sup> J Wallerstein and J Kelly, *Surviving the Break-up: How Children and Parents Cope with Divorce* (Basic Books, 1980) 30.

<sup>48</sup> Rhoades et al, above n 3, 50.

<sup>49</sup> Ibid.

to mediators, social workers, counsellors and psychologists who provide therapeutic services to assist families through difficult transitions.

Third and finally, lawyers are seen as ‘economic predators’<sup>50</sup> who charge excessively for their services. The wealth acquired by family lawyers is immorally earned from their clients through aggravating the pain suffered by separating spouses. Banks identifies this assumption amongst witnesses to the *Every Picture Tells a Story* Inquiry in 2003, in the perception that lawyers are not there for the ‘initial comfort and support of their client but for financial gain.’<sup>51</sup>

## B *Gladiatorial Champions*

The second adversarial approach to lawyers identified is the gladiatorial champion view. According to this perspective, an adversarial lawyer should ‘advance their client’s partisan interests with the maximum zeal permitted by the law.’<sup>52</sup> The solicitor’s zeal under the gladiatorial champion approach is of enormous benefit to disempowered or vulnerable clients who must fight a more powerful opponent. In Rhoades’ study, family dispute resolution practitioners who worked collaboratively with family lawyers valued legal practitioners’ advocacy role for less powerful clients and in very difficult cases where no relationship-based solution could be found.<sup>53</sup>

The gladiatorial approach centralises the role of lawyers in upholding rights and ensuring the rule of law through using the court system to demand equal treatment before the law. There is some evidence of popular support for this view from the UK, where Genn’s study of legal needs found that 81% of British people experiencing family or relationship difficulties chose to visit a family solicitor for assistance. In that study, Genn and her co-authors found evidence that the idea of courts as a place in which ordinary citizens can enforce rights was important to the UK national consciousness.<sup>54</sup> Lawyers play an almost heroic role in this system, providing legal advice to sustain their clients’ claims and, if necessary, acting as partisan advocates for client rights. The gladiatorial champion view is less commonly expressed than the fomenters of strife approach. In Genn’s research, the people least likely to subscribe to this view were middle-aged, well-educated people with previous experience of legal advice as well as those who had recently lost a court case.<sup>55</sup>

The fomenters of strife and the gladiatorial champion views can both be identified amongst popular, political and professional perceptions of lawyers. Both views hold in common the conception of the lawyer as an adversarial operative. Neither view is able to incorporate non-adversarial elements into legal practice.

---

<sup>50</sup> Galanter, above n 40, 636.

<sup>51</sup> Banks, above n 26, 39.

<sup>52</sup> C Parker and A Evans, *Inside Lawyer’s Ethics* (Cambridge University Press, 1<sup>st</sup> ed, 2007) 14.

<sup>53</sup> Rhoades et al, above n 3, 50.

<sup>54</sup> Genn et al, above n 44, 226-7.

<sup>55</sup> *Ibid* 228.

C *Are Family Lawyers Always Adversarial?*

Hunter explains this perception of the adversarial lawyer as a myth.<sup>56</sup> Research evidence suggests that lawyers adopting a purely adversarial approach are exceptional in family practice. Most family lawyers seek to diffuse conflict and regularly encourage clients to settle. For example, Eekelaar, Maclean and Beinart found no excessive or even noticeable zeal to meddle in the conflict between parties, amongst the UK family solicitors they observed.<sup>57</sup> Instead, they found that family lawyers consciously made an effort to reduce tension between parties, regularly encouraged parties to discuss matters between them and provided a significant amount of practical support and reassurance to clients in addition to legal advice.<sup>58</sup> Eekelaar, Maclean and Beinart also found that the lawyers they observed sought to align their clients' expectations of what they could achieve in their case with what the lawyer thought would be achievable in court.<sup>59</sup> In this way clients were dissuaded from fighting what the solicitor considered an unwinnable fight and encouraged to settle. In Australia, Dewar and Parker found that a major part of a family lawyer's work was managing expectations as to attainable outcomes, which limited the number of strategies employed by disputants and encouraged settlement.<sup>60</sup>

Furthermore Eekelaar, Maclean and Beinart's research suggests that lawyers' interventions are not necessarily harmful to separating families and may actually benefit families as solicitors provide support for clients through reassurance, advice and practical action, in addition to legal advice. In a study of mainly Victorian family lawyers sampled in 2000 and 2005, Kimm found that 'clients' stress and hostility primarily does not arise from the actions of lawyers' but from the matrimonial breakdown and the very process that follows.<sup>61</sup> This suggests that family lawyers are not the fomenters of strife they are assumed to be. Similar evidence of the tendency of divorce attorneys to settle has emerged from the US.<sup>62</sup>

It has also been shown how family lawyers are mostly child-focussed. In the UK, King found that an essential part of a lawyer's work in children's disputes was to encourage parents to 'be sensible', which consisted of telling parents to restrain their anger, consider their children's best interests and settle.<sup>63</sup> The majority of the Queensland family lawyers interviewed by Banks considered their commitment to the needs of the child to be on equal footing with their more traditional adversarial ethical duties to the

---

<sup>56</sup> Hunter, above n 29.

<sup>57</sup> Eekelaar, Maclean and Beinart, above n 31, 113.

<sup>58</sup> Ibid 184.

<sup>59</sup> Ibid 98.

<sup>60</sup> J Dewar and S Parker, 'The Impact of the New Part VII *Family Law Act 1975*' (1999) 13 *Australian Journal of Family Law* 1, 16-17.

<sup>61</sup> Kimm, above n 41, 354.

<sup>62</sup> L Mather, C McEwan and R Maiman, *Divorce Lawyers at Work: Varieties of Professionalism in Practice* (Oxford University Press, 2001); and A Sarat and W Felstiner, *Divorce Lawyers and their Clients* (Oxford University Press, 1995).

<sup>63</sup> M King, "Being Sensible": Images and Practices of the New Family Lawyers' (1999) 28 *Journal of Social Policy* 249, 261-3. King argues that by not meeting clients expectations of being partial to clients' wishes yet still acting for them, lawyers are able to construct their services as being more effective than mediators: 'By reconciling in this way what appear to be two irreconcilable objectives – the client's wish for a champion in the matrimonial war and the perceived need of the children for peace and harmony between their parents – solicitors are able to retain their firm foothold in divorce proceedings' at 263.

client and the court. This often led to tension for those practitioners over what their ethical duties demanded of them.<sup>64</sup> The strategies adopted by these family lawyers to keep children the focus of negotiation were not commensurate with a simple adversarial stereotype.<sup>65</sup>

The range of behaviours attributed to family lawyers in the UK, US and Australian research are not well represented by the fomenters of strife and gladiatorial champion stereotypes, both of which conceive of family lawyers as wholly adversarial. Assumptions about family lawyers in government policy do not match the reality of most professional legal conduct within the family law system. Actual legal practice in the family law field appears to more nuanced than the adversarial stereotype allows.

### III EMPIRICAL EVIDENCE: NEGOTIATING WITHOUT LAWYERS

It is useful to examine evidence of family law client attitudes towards lawyers and to the use of lawyers around family dispute resolution. This enables us to better understand how strongly the adversarial stereotype – in both its fomenters of strife and gladiatorial champion variations – influences what occurs in family dispute resolution. It helps us to assess the appropriateness of Australian policy on legal advice around family dispute resolution.

The data in this section was gathered from an in-depth study of clients and professionals in family and child mediation. Family and child mediation existed prior to 2006, the precursor to family dispute resolution. Information was collected on 22 cases although the study centred around eight richly detailed case studies — mediating couples, their mediators and any legal advisers they had.<sup>66</sup> Of these eight cases, three dealt with property or financial issues, three with children's issues such as with whom the children would live or spend time with and two cases with both property/finance and children's issues. A qualitative exploratory approach was taken. Mediating parties were recruited from three community-based family mediation services (funded under the Family Relationship Services Program, which is separate from the Family Relationship Centre program) in Melbourne and Sydney in 2001 and 2002.<sup>67</sup>

The principle behind the research design for this project was to gain as complete a picture as possible of the mediation experience, taking into account the varied perspectives of different participants in the mediation processes at different times. Unusually, all of the data gathered comes from a matched sample, so that the different participants' responses can be compared against each other. A combination of observation of mediation sessions, file analysis and interview were used. Mediating

---

<sup>64</sup> Banks, above n 26, 47.

<sup>65</sup> Ibid 47-56.

<sup>66</sup> It is desirable in social science research that data samples be representative of the population from which they are selected or in the very least that cases have been selected in a way that reduces or avoids bias: E Babbie, *The Basics of Social Research* (Wadsworth Publishing Company, 1999) 178-9; and T Baker, *Doing Social Research* (McGraw Hill College, 3<sup>rd</sup> ed, 1999) 135. Although the cases selected for this study could not be described as a representative sample of families attending family dispute resolution services, a number of measures were taken to avoid, or at least reduce bias, including approaching all clients who first attended each dispute resolution service during a designated period and through collecting data at three services across two states.

<sup>67</sup> This study will be reported in full in 2008 by the Law and Justice Foundation of NSW authored by Becky Batagol and Professor Thea Brown of Monash University.

parties were asked for their expectations of and assessment of the value and fairness of the mediation process and any agreements made immediately before mediation, soon after mediation and between a year and two years after mediation. Family Court records were also accessed some time after mediation commenced. Because previous studies have found that family law clients possess limited information and often hold inaccurate perceptions of their case, especially in relation to dispute resolution methods used,<sup>68</sup> the views of mediators and lawyers were also canvassed to provide a measured professional perspective upon the mediation process. The small sample size means that the findings of the study may not be representative of the broader mediating population. Despite this, the data can be used to develop theories that can be tested by further research. This is a pre-reform study conducted prior to 2006, however the findings remain highly relevant to the post-reform Australian environment because there is a common emphasis in the old and new systems upon ‘encouraging people to take responsibility for resolving disputes themselves, in a non-adversarial manner.’<sup>69</sup>

### A *Choosing Mediation to Escape the Adversarial Lawyer*

There was strong evidence amongst the mediating parties observed that general distrust of lawyers, as well as of the system they operate in, was a very strong motivating factor in deciding to attend family mediation. Mediation was perceived to operate in a very different culture to that of the legal profession, who were strongly associated with an adversarial legal system. Some of the views expressed by the parties who attended mediation are summarised in the following table.

<b>Lawyers</b>	<b>Mediation</b>
Combative dispute resolution methods	Dispute resolution by compromise/settlement
Adversarial	Non-Adversarial
Partial	Neutral
Lack of focus on emotional aspects of dispute	Focus on financial and emotional, as well as legal aspects of dispute
Damages relationship with ex-partner	Preserves relationship with ex-partner
May obtain a good settlement for their client	May not result in such a good settlement for the party
Expensive	Less Expensive
Provides protection of the law	Protected by trust between spouses

Table of Mediating Parties’ Perceptions of Lawyers and Mediation

This table highlights the polarities constructed by mediating parties between the culture of mediation and the culture of the family legal profession. Parties strongly associated lawyers with the adversarial legal system. The fomenters of strife stereotype was a strong motivating factor in choosing mediation. Lawyers’ skills were perceived as being limited to those gladiatorial skills used in contested proceedings, and family lawyers were not credited with employing or having any negotiation or settlement skills. Family law solicitors were seen as the initiators of the contest between separating parties, rather than being instructed to fight. Family lawyers were also presented as being unable to see

<sup>68</sup> R Hunter, A Genovese, A Melville and A Chrzanowski, *Legal Services in Family Law* (2000) Justice Research Centre 281-3 <<http://www.lawfoundation.net.au/report/familylaw>> at 6 July 2008.

<sup>69</sup> Explanatory Statement, Family Law Amendment (Shared Parental Responsibility) Bill 2005 (Cth) 1.

beyond the legal aspects of the dispute, to the emotional and psychological aspects of the problem. Over and beyond all of this, lawyers were accused of charging excessive amounts for their services, profiting from the conflict they encouraged. As an example of such a view, Hilary Agnew<sup>70</sup> held a grim view of the legal profession:

Hilary: I really don't want to go down the path of hiring a lawyer and trying to get a better deal.

Q: That's because of the cost?

Hilary: Yeah. It might be a silly decision in the long term. But I just don't want it to go that way. Because what I have basically heard — I've got a friend who is a solicitor, he doesn't deal with family law but he said very simply that lawyers make a lot of money making couples not trust each other. And it's through that not trust that, when you start getting scared and paranoid, that you start spending a lot of money on a lawyer. I think that it is very unfair that lawyers are feeding off bad emotions. So, I mean I trust Simon to a certain extent, he trusts me.<sup>71</sup>

She believed that she was protected by the trust she had in her ex-husband Simon and did not require the additional protection provided by law. Hilary accused family lawyers of three improprieties — encouraging conflict and distrust between separating couples, immorally profiting from the emotional devastation of their clients and charging their clients a great deal. In short, she believed a family lawyer would damage the trust between her and her husband. These were grave charges indeed. Hilary's views very closely mirror the three assumptions identified in this article behind the fomenters of strife view. She chose mediation at the cost of some of her legal entitlements in order to preserve her relationship with her ex-husband.

We are both compromising. What's a few thousand dollars over your lifetime? The main thing is that I can still have some sort of relationship with him because of the children, there is no bad feelings and animosity.<sup>72</sup>

Amongst the parties observed, there were repeated expressions of the fomenters of strife view. The perceived source of the harm was lawyers' financial greed and their unrelentingly adversarial methods of dispute resolution which fomented conflict and destroyed relationships. Some parties acknowledged that legal representation might win them a better 'deal' but they were not prepared to accept this gain at the cost of such economic and emotional trauma. Most of the parties observed at mediation felt this way and chose to use mediation as a method of avoiding further involvement with lawyers. These parties frequently expressed confidence in their ability to come to a resolution with their former partner without the need resort to adversarial methods (and therefore a lawyer). This confidence was often expressed as trust: trust between former spouses which negated the need to engage a lawyer for representation.

There were a just a few parties in this study who expressed views that the assistance of a lawyer might be useful. That perception more closely aligns with the gladiatorial

---

<sup>70</sup> Research participants have been given invented names, some key personal details have been altered and dates of observations and interviews have not been included to conceal the identities of participants.

<sup>71</sup> Interview with Hilary Agnew, First Post-Mediation Interview, 3.

<sup>72</sup> Ibid 9.

champion view, although this position was less frequently expressed than the fomenters of strife view. These parties accepted that family lawyers could possibly provide a better settlement for them as they were vulnerable in some way. Only three parties of 16 engaged lawyers for ongoing representation (rather than for one-off advice). Those parties adopted the gladiatorial champion view. They did so because they felt vulnerable for some reason and wanted protection. One party wanted an advocate and guide through the legal process who would protect her from emotional turmoil of speaking to her former husband directly,<sup>73</sup> another wanted an expert who would help her to achieve her desired outcome in a tricky area of law<sup>74</sup> and a third wanted an archetypal adversarial lawyer who would fight for him because he thought he had a weak legal case.<sup>75</sup>

Without exception parties interviewed thought that family lawyers were adversarial. This was true regardless of whether the person subscribed to the fomenters of strife or gladiatorial champion view.

Mediation, in contrast, was seen by the parties interviewed as much fairer. Through its settlement ethos, mediation was seen to preserve the relationship between separating parties, a particularly important matter for parents. Mediation was viewed as holistic, catering for many aspects of the couple's relationship, and less expensive than seeing a lawyer. While the parties may miss out on some of their legal entitlements when negotiating a compromise in mediation, this was perceived to be less important than the losses prevented by avoiding lawyers. And in mediation, because the goodwill between the separating couple would be maintained, enough trust would exist to ensure that parties were protected from harm once the parties agreed not to breach the agreement. Help provided by lawyers was therefore judged unnecessary.

The two cultures of lawyers and mediation were seen by many parties as incompatible — they would either engage a lawyer or go to mediation, not both. They did little or nothing to obtain legal advice alongside mediation. The whole nature and philosophy of the two cultures were seen as irreconcilable. These views correlate with popular perceptions of lawyers, with some of the views expressed by family dispute resolution practitioners interviewed as part of Rhoades and her co-authors' second study and with the assumptions about lawyers in government policy.<sup>76</sup> Whether parties attending mediation had absorbed this policy rhetoric, the views of the professionals who assisted them or whether government policy has picked up on a popular discourse is unclear. However the practical consequence of the prevalence of the fomenters of strife view is that very few parties saw the possibility of engaging a solicitor to assist them in mediation.

## B *Negotiations during Mediation in the Absence of Legal Advice*

In the study, the lack of clear and consistent legal advice heightened uncertainty in family mediation. In turn, uncertainty over the law was used in mediation as a powerful bargaining chip by parties who were greater risk takers and less averse to court

---

<sup>73</sup> Interview with Irene Makris, First Post-Mediation Interview, 9.

<sup>74</sup> Interview with Sue Johnson, First Post-Mediation Interview, 3.

<sup>75</sup> Interview with Andrew Duke, First Post-Mediation Interview, 4.

<sup>76</sup> These views are described earlier in this article in section IC above: 'The Adversarial Lawyer in Australian Policy'.

processes and outcomes. In this section, a single case study has been chosen to illustrate the damaging effect that a lack of legal advice did have upon negotiations in family mediation.<sup>77</sup>

Tammy Paas went to mediation seeking more money from her former partner Gary McCurdy in order to help meet the expenses of looking after their four children, who lived with her. Gary was a tradesman and refused to disclose his income during the mediation process. Tammy admitted she didn't know whether the payment she was seeking would be classified under law as child support or spousal maintenance. Her uncertainty was linked to the fact that she did not have legal advice and that the area of law was both complex and discretionary, as the following exchange in mediation illustrates:

Tammy: Spousal Maintenance is just a term. Some people say it doesn't exist. Some say it's now included in child support. I've cobbled together information from different sources. I can't afford a lawyer. All my sources say I should ask for more money. A friend said to me my child support is babysitting money — children cost money. I appreciate it — the welfare system also — they give me more money to look after the kids. Gary is unimpaired in going to work — I have to get four people out of the door and to soccer and parties.

Mediator: Gary has raised his financial situation. Tammy, if you got extra money over and above children support — is that what you want? This is not spousal maintenance — you want extra?

Tammy: The term 'spousal maintenance' just cropped up. Whether it is spousal maintenance or more money and being generous.<sup>78</sup>

It can come as no surprise that in an interview after mediation Tammy expressed her frustration with the difficulty of the law regarding spousal maintenance and the uncertainty this created for her. Tammy had been unable to afford legal advice. She represented herself before the local court and had received one-off advice from a range of free sources including community legal services and acquaintances at parties:

And funnily enough, all the legal people that I speak to sort of wonder, whether there is such a thing as spousal maintenance, and they all have to pull out their books and flick through and have a look. You know, it's like, well I mean it's either current or it's not, it's either used or it isn't, you know. [laughs] So I felt that I was getting conflicting information sometimes from the free lawyer that I used through [a church support service] and there was one at [the local] Court. Because I suppose family law is rapidly changing, all the time, because of the influx of people using it, and I suppose you have to be in the industry fully functioning to be totally up to speed.<sup>79</sup>

As soon as Tammy revealed in mediation that she was unclear about her legal entitlements, Gary pounced on her uncertainty and attempted to exploit it:

Mediator: So Gary, you are saying if Tammy can't cope, you would have [the children] live with you? Tammy has said spousal maintenance is just a term — she just wants to know what you could pay.

<sup>77</sup> At least one other case in the eight case sampled demonstrated the same point.

<sup>78</sup> Paas/McCurdy, Mediation Session One, 7.

<sup>79</sup> Interview with Tammy Paas, First Post-Mediation Interview, 9.

Gary: The definitive summary shows I have contributed over \$300 per week to Tammy directly. The definitive summary shows a father who loves his kids ... We have a relationship breakdown that shows that the law favours the mother. Tammy goes to Legal Aid. I don't know what spousal maintenance is — why would you go to court to get something you don't know what it is? Tammy, if you are finding it too hard —<sup>80</sup>

Gary strategically emphasised the uncertainty of the law in order to undermine Tammy's legal claim to payment. By contrasting Tammy's legally uncertain claim for spousal maintenance with his own 'definitive summary' of what he had paid for the children, Gary was attempting to show the weakness of Tammy's legal case and the strength of his own case. His aim was to gain power over her. In this relationship there was a long history of his manipulative and violent behaviour. This passage appears to demonstrate continued abusive behaviour by Gary in mediation and it was the uncertainty of the law that he was able to exploit to do so. His final phrase, 'Tammy, if you are finding it too hard' was designed to demean Tammy and to suggest that she had taken on more than she could handle.

This case demonstrates how complex and discretionary law can lead to uncertainty which can be exploited in negotiations by stronger parties. Tammy's lack of consistent and clear legal advice meant that she had no firm understanding of the law in relation to spousal maintenance and could not construct a legal claim for more money in mediation. Whenever she asked for more money, and attempted to frame her request as a legal claim, Gary simply argued that the law was indeterminate and complex. This was indeed a powerful tool which effectively displaced the relevance of law to the mediation session. Tammy knew she needed more money but was unable to summon the power of law to make her argument in mediation because of its uncertainties.

The mediators were unable to effectively assist with clarifying uncertainties about the law. Mediators cannot provide expert legal advice according to their position as middle-ground facilitators and by law. In this case, the mediators urged the parties to obtain legal advice and broke off mediation to enable it. However this tactic was ineffective as Tammy could not afford advice.

What seems to have exacerbated the confusion is that both parties only had fleeting contact with family solicitors. Family law solicitors potentially provide an island of interpretive certainty in the sea of broad discretionary family law principles.<sup>81</sup> There is evidence to suggest that specialist family lawyers within a jurisdiction are able to create 'communities of practice' that develop common expectations of outcomes in particular cases, that is agreed interpretations of family law principles that 'serve to regularize behaviour, rendering it more predictable and their work more manageable.'<sup>82</sup> Neither of the parties in this case had engaged lawyers for ongoing representation or advice although they had both received fleeting legal advice. This meant that they had no chance to access the community of practice that may have existed amongst specialist family lawyers. There was no regularised interpretation of the law shared between the parties.

---

<sup>80</sup> Paas/McCurdy, above n 78, 7.

<sup>81</sup> R Ingleby, *Solicitors and Divorce* (Oxford University Press, 1992) 144; and J Dewar, 'Family Law and Its Discontents' (2000) 14 *International Journal of Law, Policy and the Family* 59, 71.

<sup>82</sup> Mather, McEwan and Maiman, above n 62, 48.

While the cases in this study are not necessarily representative of the broader population, the data does demonstrate that where discretionary legal principles remain and the law is complex, uncertainty about the law can lead to abuse of unequal bargaining power in family dispute resolution.<sup>83</sup> The reduction of legal uncertainty in family dispute resolution through improved access to legal advice around the process may lessen the occurrence of systematic exploitation by more powerful negotiators. This evidence adds urgency to the calls for increased collaboration between family dispute resolution practitioners and lawyers in the Australian family law system. Careful use of legal advice *in conjunction* with family dispute resolution may assist in reducing legal uncertainty and reasserting the role of law in such processes. This may, in turn, enable law to perform its function of protecting vulnerable parties negotiating privately in family dispute resolution.<sup>84</sup> A policy priority must be the removal of any barriers to collaboration between lawyers and family dispute resolution practitioners. This study suggests that one of the key barriers may be family law disputants' attitudes to family lawyers. With the fomenters of strife stereotype featuring so strongly in the minds of parties, *active steps* need to be taken to ensure that parties receive legal advice necessary to ensure that uncertainties about law in family dispute resolution are minimised.

#### IV COLLABORATIVE MODELS OF PRACTICE AROUND FAMILY DISPUTE RESOLUTION

In an environment where family dispute resolution is mostly compulsory, collaborative practices between family lawyers and dispute resolution professionals are essential to ensure that negotiated agreements meet the needs of *all* members of separating families. Family policy must encourage inter-professional contact and ensure that any barriers to the development of working relationships between family dispute resolution and legal practitioners are removed.

This section explores three models of ethical non-adversarial legal practice. These models better reflect what we know the majority of family lawyers already do. They are not presented here as a demand for change by the legal profession but as a demonstration of non-adversarial conceptions of family legal practice. This section also outlines a number of examples of collaborative practices between legal and dispute resolution professionals.

##### A *Three Approaches to Non-Adversarial Lawyering*

Banks argues that, 'a nuanced understanding of how family lawyers approach the legal and ethical tensions inherent in their work has been missing from the literature and from

---

<sup>83</sup> This is not to suggest that discretionary principles should be abandoned. There is evidence to suggest that replacing discretionary legal standards with rule-based principles may not be a satisfactory way of reducing uncertainty over the law. Dewar and Parker found that rule-based principles introduced in Australia in 1996 created 'uncertainty about the extent of the resident parent's decision-making autonomy, an uncertainty that itself can be exploited by an ill-intentioned former partner.' Dewar and Parker, above n 60, 14. Rhodes, Graycar and Harrison found that the 1996 introduction of the presumption of shared parental responsibility actually *increased* the scope for disagreement about the law: H Rhoades, R Graycar and M Harrison, *The Family Law Reform Act 1995: The First Three Years* (The University of Sydney and the Family Court of Australia, 2000) 59.

<sup>84</sup> Eekelaar argues that one of the key functions of law in family life is to provide protection for individuals from the potential harms suffered by family members: J Eekelaar, *Family Law and Social Policy* (Weidenfeld & Nicolson, 2<sup>nd</sup> ed, 1984) 25.

the public discourse.’<sup>85</sup> Parker and Evans have developed three ‘alternatives to adversarial advocacy’, which encapsulate the range of ethical considerations to be taken into account by lawyers when not acting in a stereotypically adversarial manner.<sup>86</sup> These models better capture what family lawyers actually do than the adversarial stereotype allows for. An Australian family policy which is able to incorporate such a nuanced understanding of family legal practice as Parker and Evans provide will be better placed to effect the changes necessary to remove barriers to increased collaboration between lawyers and family dispute resolution practitioners.

Under Parker and Evans’ model, a lawyer may adopt the practices and values of any of the three non-adversarial approaches – or indeed an adversarial approach – depending upon the circumstances of the case. The first of Parker and Evans’ non-adversarial models is what they term the ‘responsible lawyer’ approach. It

focuses on the lawyer’s role as an officer of the court and guardian of the legal system. The responsible lawyer is still an advocate for the client, but he or she has an overriding duty to maintain the justice and integrity of the legal system, even against client interests, in the public interest.<sup>87</sup>

This approach is a response to criticisms of adversarial lawyers who pursue their clients’ interests at the expense of the other party and the integrity of the legal system. Parker and Evans’ second alternative to the adversarial model is the ‘moral activist lawyer’. Moral activists should always act according to their ‘own convictions about what it means to do justice in different circumstances and [should] seek out ways to act out those convictions as lawyers.’<sup>88</sup> This is a radical approach to legal ethics, often involving a critique of the existing legal system and a strong commitment to law reform. However where the moral activist does not believe their client’s cause to be just, the lawyer will not advocate as zealously for their client’s interests as an adversarial or even responsible lawyer would.<sup>89</sup> Again, this approach responds to criticisms of the zealotry of adversarial lawyers by suggesting that lawyers should not act for clients if it will undermine the ideals of justice. Parker and Evans’ third non-adversarial approach is the ethics of care, or relational lawyering. This approach is more concerned with the maintenance of lawyer, client and community networks/ relationships than with preserving the institutions of the legal system or the ideals of justice. A relational lawyer will attempt to

serve the best interests of both clients and others in a holistic way that incorporates moral, emotional and relational dimensions of a problem into the legal solution. It is particularly concerned with preserving or restoring (even reconciling) relationships and avoiding harm.<sup>90</sup>

---

<sup>85</sup> Banks, above n 26, 56.

<sup>86</sup> Parker and Evans, above n 52, 21.

<sup>87</sup> Ibid 24.

<sup>88</sup> Ibid 28.

<sup>89</sup> Ibid 29.

<sup>90</sup> Ibid 32-3. The relational approach is identifiable in some literature as a therapeutic jurisprudence approach to lawyering. See D Wexler, ‘Practicing Therapeutic Jurisprudence: Psycholegal Soft Spots and Strategies’ in D Stolle, D Wexler and B Winick (eds), *Practicing Therapeutic Jurisprudence: Law as a Helping Profession* (Carolina Academic Press, 2000) 45.

This approach is distinct from the adversarial lawyer's approach. The relational lawyer considers the client's best interests in a psychological sense in addition to their legal needs and will consciously seek non-adversarial avenues for dispute resolution in an attempt to better preserve their client's relationships.

These models reflect the reality of daily practice as a family law solicitor. They show how family lawyers can owe a duty to their client, as adversarial advocates, yet still incorporate a concern for the parents' ongoing relationship and the interests of the children, as relational lawyers. Banks specifically tested whether the practices of family lawyers reflected Parker and Evans' approaches in her study of Queensland practitioners. The family lawyers interviewed by Banks sought to apply each of these models of legal practice, both adversarial and non-adversarial.<sup>91</sup> However Banks found that the relational lawyer approach best reflected how family lawyers operate: '[I]t explains their commitment to being child focused and provides an understanding of the tensions inherent in the practice of family law.'<sup>92</sup>

These three approaches provide a sophisticated non-adversarial conception of what family lawyers do. That conception is far more accurate than the simplistic adversarial stereotype encapsulated in the fomenters of strife and gladiatorial champion views. A more subtle understanding of the work of family lawyers may enable the development of family policies that encourage increased collaboration between family lawyers and family dispute resolution practitioners.

#### B *Professional Collaboration and Family Dispute Resolution*

It has been argued that the success of the 2006 reforms may hinge upon the ability of family lawyers and family dispute resolution professionals to collaborate effectively.<sup>93</sup> Such collaboration is an important factor in attaining fairness in privately negotiated agreements that emanate from the new system. Access to quality legal advice and legal representation may help parties to agree on interpretations of law and therefore limit exploitation of legal uncertainty in family dispute resolution by stronger, more strategic negotiators. In this context, family lawyers can provide a useful settlement service in conjunction with family dispute resolution professionals. Those lawyers ought not be simply labelled 'adversarial'.

Of course, the appropriateness of legal representation depends upon the nature of the dispute resolution offered and the parties' circumstances. Collaborative practices should be implemented cautiously and with independent evaluation. Lawyers are not needed in every family dispute. In some cases where lawyers are possibly needed, their advice may not be heeded as some parties refuse to be made reasonable or sensible by their solicitor. The presence of lawyers does not remove feelings of hurt, guilt and blame connected to the end of relationships, which are often drivers of extreme litigious behaviour in family law. And nor does the involvement of lawyers in family law disputes make everyone satisfied with their agreements. Still, the evidence of the benefits of legal advice warrants further investigation into the various means of increasing lawyer involvement in the resolution of family disputes.

---

<sup>91</sup> Banks, above n 26, 47.

<sup>92</sup> Ibid 44.

<sup>93</sup> Rhoades et al, above n 3, 4.

This section briefly outlines options for collaborative practices between family lawyers and family dispute resolution practitioners. These practices demonstrate that it is possible and, in many cases, desirable for legal professionals to work in collaboration with clients and dispute resolution professionals to ensure the best possible outcomes for clients and their children alike.

Rhoades and her co-researchers have demonstrated how existing programs which successfully involve systematic collaboration between family dispute resolution practitioners and family lawyers are uncommon.<sup>94</sup> Their 2007 survey found that ‘many practitioners have little direct contact with members of the other profession.’<sup>95</sup> Their 2006 study focussed on existing collaborative relationships<sup>96</sup> and concluded that features of successful partnerships included a complementary services approach (where dispute resolution and legal professionals saw each other as providing different but equally valuable services to clients), shared goals between lawyers and family dispute resolution practitioners, a common understanding of each profession’s role, responsibilities and practices and positive inter-professional practices.<sup>97</sup> Their research suggests that there is a great deal that can be done to encourage inter-professional collaboration to assist clients attending family dispute resolution, including education for both professions (for family dispute resolution practitioners on the professional roles and responsibilities of lawyers, and for family lawyers on the nature of different family dispute resolution practices) as well as the facilitation of joint professional development opportunities.<sup>98</sup>

Cooper and Brandon help us to better conceptualise the specific role that family lawyers can play around family dispute resolution. They contend that the role of the family lawyer will differ according to whether their client is involved in a facilitative or advisory process.<sup>99</sup> In advisory processes, the lawyer may need to protect their client’s interests more strongly where the lawyer has a different understanding of the range of appropriate court outcomes to the dispute resolution practitioner. In facilitative processes, the lawyer will play an important preparatory role, providing clients with clear ideas of suitable options and realistic settlement outcomes for negotiating purposes, as well as drafting legally binding agreements afterwards.<sup>100</sup> Whichever process is used, Cooper and Brandon argue that family lawyers can play an important non-adversarial role *before* the process (legal advice as to likely outcomes, process advice and education, assisting clients to gather necessary information for negotiation and in ascertaining their needs, interests and bottom line) *during* the process (actively listening to their client’s opening statement and filling in any omissions made, assisting clients to negotiate constructively and productively including providing justifications for proposals made, holding private caucuses with their client to determine whether a proposal is reasonable, realistic and practical and assisting clients to maintain an assertive stance where that is reasonable) and *after* the process (drafting the final agreement and providing the client

---

<sup>94</sup> Ibid 37-8.

<sup>95</sup> Ibid 37.

<sup>96</sup> Specifically Relationships Australia (Vic)’s Lawyer’s Panel, Victoria Legal Aid’s Roundtable Dispute Management, the Family Court of Australia’s Magellan program and Unifam’s Keeping Contact program.

<sup>97</sup> Rhoades et al, above n 3, 18.

<sup>98</sup> Ibid 57-61.

<sup>99</sup> D Cooper and M Brandon, ‘How Can Family Lawyers Effectively Represent their Clients in Mediation and Conciliation Processes?’ (2007) 21 *Australian Journal of Family Law* 288.

<sup>100</sup> Ibid 294.

with support to adhere to the agreement).<sup>101</sup> Cooper and Brandon argue that ‘disputing parties will have an even greater need for non-adversarial advice and representation’ in the wake of the 2006 reforms.<sup>102</sup>

Field has proposed a model of family dispute resolution in cases of family violence that would involve family lawyers attending mediation as well as providing advice during the mediation process.<sup>103</sup> Her model emphasises thorough screening for violence, significant training for dispute resolution staff and access to independent legal advice for targets of violence at three distinct stages of the process: *before* dispute resolution to ensure informed consent to the process, advice as to her legal position and alternatives to negotiation and coaching; *during* dispute resolution for advocacy, if necessary, and support; and *after* dispute resolution for safety and support as well as making the agreement legally binding and advice in the event of a breach. The pre-process role of the lawyer involves providing the client with a clear understanding of the process and of the best and worst possible outcomes if negotiation fails as well as coaching the client in negotiation skills.<sup>104</sup> During dispute resolution, the lawyer may attend sessions with their client as a supportive presence, they may negotiate a session format which suits their client (such as asking for a break) and providing advice to their client where necessary or requested.<sup>105</sup> After dispute resolution has concluded the lawyer in this model may assist the client to formalise any agreement reached or if no agreement has been reached, advice on the next steps to be taken.<sup>106</sup>

Field’s model demonstrates another method of non-adversarial, collaborative legal practice around family dispute resolution. It does not assume a purely adversarial role for family lawyers: neither the fomenter of strife nor the gladiatorial champion could operate within it. The model has the potential to assist with fair participation in family dispute resolution processes for targets of violence and reduce the potential for exploitation. It relies upon significant collaboration between family dispute resolution practitioners and lawyers to level the extreme power imbalance created by violence. In such circumstances, a family lawyer would be required to adopt some of the non-adversarial approaches discussed by Parker and Evans. One possibility for implementation of this model is that a violence support solicitor could be employed by Family Relationship Centres and dispute resolution services.

## V CONCLUSION

Family lawyers have a bad reputation. Yet they can play a vital role in preventing some forms of exploitation that occur in family dispute resolution. Australian family policy

---

<sup>101</sup> Ibid 294-307.

<sup>102</sup> Ibid 308.

<sup>103</sup> R Field, ‘A Feminist Model of Mediation that Centralises the Role of Lawyers as Advocates for Participants who are Victims of Family Violence’ (2004) 20 *Australian Feminist Law Journal* 65 and, 85-91; R Field, ‘Federal Family Law Reform in 2005: The Problems and Pitfalls for Women and Children of an Increased Emphasis on Post-Separation Informal Dispute Resolution’ (2005) 5 *Queensland University of Technology Law Journal* 28, 44-50; and R Field, ‘Using the Feminist Critique of Mediation to Explore “The Good, the Bad and the Ugly” Implications for Women of the Introduction of Mandatory Family Dispute Resolution in Australia’ (2006) 20 *Australian Journal of Family Law* 45, 78.

<sup>104</sup> Field, ‘Federal Family Law Reform in 2005’, above n 103, 45-6.

<sup>105</sup> Ibid 47-8.

<sup>106</sup> Ibid 48.

has been developed with an adversarial conception of lawyers in mind. On the whole, family lawyers tend to operate in far less adversarial ways than the stereotype allows for — in parenting cases, carefully tempering the demands of the client-parent with a focus on the needs of the children. The adversarial stereotype does not provide an adequate basis for developing a family policy that treats lawyers as partners and not adversaries. This article has canvassed a number of options for collaborative practices that involve lawyers and family dispute resolution practitioners working together to provide a holistic service for family law clients. If lawyers are to play a greater part in advising clients in and around family dispute resolution, then a number of changes need to be made to Australian family policy to overcome barriers to collaboration.

One of the key barriers to increased collaboration between lawyers and dispute resolution professionals is client attitudes to lawyers. The fomenters of strife and, to a lesser extent, the gladiatorial champion views have been powerfully imprinted in the minds of family disputants. In the study described in this article, these attitudes resulted in few parties seeking legal advice in conjunction with family mediation, exacerbating the level of uncertainty about the law. Parties who were willing to exploit that uncertainty in mediation were able to bargain the other party below their legal entitlements.

A second barrier to increased collaboration is the often vexed inter-professional relationship between lawyers and family dispute resolution practitioners. Some family dispute resolution practitioners confuse lawyers' client advocacy for adversarialism.<sup>107</sup> There is also some evidence that family lawyers' lack an understanding of how family dispute resolution practitioners work.<sup>108</sup> In particular the evidence discussed in this article suggests that without a clear understanding of and respect for the work of family lawyers amongst dispute resolution professionals, clients are unlikely to overcome their own prejudices against family lawyers and obtain legal advice alongside the family dispute resolution they are obliged to attend.

There is a role for government in overcoming these barriers. Policy changes can be made without statutory reform. To facilitate increased collaboration between lawyers and family dispute resolution practitioners in Australia, the *Family Law Regulations* should be amended to require family dispute resolution practitioners to encourage separating families using family dispute resolution to seek the advice of family lawyers in order to better understand the parameters of the law applying to their dispute. The Regulations should also be amended to expressly permit lawyers to attend family dispute resolution sessions to represent and advise their clients. Furthermore, reforms to the *Operational Framework* are desirable to remove impediments to Family Relationship Centres making referrals to individual lawyers. All Family Relationship Centres should be provided with support to develop effective networks of local legal practitioners. Such policy reform may also involve systematic training for both lawyers and family dispute resolution practitioners in professional responsibilities and models and methods of best practice for legal advice around family dispute resolution.

---

<sup>107</sup> Rhoades et al, above n 3, 64.

<sup>108</sup> Ibid 54-5.