

THROWING BABIES OUT WITH THE BATHWATER? — ADVERSARIALISM, ADR AND THE WAY FORWARD

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Negative comments about the workings of the adversarial system have resonated from the judiciary, government agencies, lawyers and other stakeholders. In response to such criticisms, there has been an increasing emphasis upon non-adversarial approaches to justice and alternative dispute resolution (ADR). This is a development that should be welcomed. Proponents hold that these 'new' approaches to legal disputes will enhance justice in many areas and reduce negative factors such as the cost, time investment, delays, stress and disempowerment often experienced by those involved in the litigation process. At the same time, we take up the Hon Michael Kirby's point that for ADR to assume all the functions of the court would be to 'throw the baby out with the bathwater'; but it would also be counterproductive for ADR to too closely assume judicial procedures. We agree that the relationship between the two processes needs to be 'correct and evolving' and the success of both hinges largely on the integrity and expertise of the personnel involved and their understanding of conduct appropriate to each process. In this article, we consider the ways in which the borders between adversarial and ADR processes may blur; and the ways in which a lack of understanding of appropriate conduct by participants who are representing parties in mediation may detrimentally impact both processes.

I INTRODUCTION

The Hon Michael Kirby has stated:

Getting the relationship between courts and ADR right is itself an important challenge for us all. It is neither feasible nor desirable for ADR to take over all the functions of courts any more than it is for ADR to imitate slavishly the procedures that courts observe. The great challenge that lies ahead is ensuring a correct and evolving relationship between ADR and the curial process. This is unlikely to be static. The success of ADR practices, like

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the success of the courts, will necessarily depend upon the integrity, skills and training of the personnel involved.¹

Negative comments about the efficacy, suitability and sustainability of the adversarial system in common law countries resonate from the judiciary, government agencies, lawyers and other stakeholders.² An increasing emphasis upon non-adversarial approaches to justice and alternative dispute resolution (ADR) has been the primary response.³ Indeed, in the last two decades we have borne witness to the rapid and sustained growth and institutionalisation of ADR.⁴ This has meant that the theoretical framework upon which the ADR movement is based is increasingly influencing both the legal culture and a range of legal processes in both civil and criminal jurisdictions.⁵ As the Australian Law Reform Commission (ALRC) pointed out — as relatively long ago as 1999 — ‘processes such as case management, court or tribunal connected ADR processes and discretionary rules of evidence and procedure have modified adversarial features of the system’.⁶ Problem-solving courts, underpinned by notions of restorative justice and therapeutic jurisprudence, now play a role in the Australian justice system. Collaborative law is exercising an increasing influence on family law practice.⁷ Some ADR approaches, particularly mediation, are grafted onto the process of the adversarial system, a development not confined to Australia. An outline of ADR processes in Australia is given by the National Alternative Dispute Resolution Advisory Council (NADRAC),⁸ and while not intended to be exhaustive, this outline reveals the widespread use of ADR processes in a variety of contexts: community dispute resolution; family mediation services; courts and tribunals; statutory agencies; industry schemes; public policy dispute resolution; commercial ADR; and internal organisation ADR. As Genn writes (with specific reference to the United Kingdom): ‘Although the case for private mediation has traditionally been framed around process — quicker, cheaper, less stressful than

- 1 Michael Kirby, ‘ADR in Australia — Without Fear or Favour? (Speech delivered at the Institute of Arbitrators and Mediators Australia Annual Conference, Melbourne, 30 May 2009) 21–2 <http://www.michaelkirby.com.au/images/stories/speeches/2000s/2009+/2361.lama_Conference_May_2009.pdf>.
- 2 Michael King et al, *Non-Adversarial Justice* (Federation Press, 2009) 1; Hazel Genn, ‘Civil Mediation: A Measured Approach?’ (2010) 32 *Journal of Social Welfare and Family Law* 195, 197–8; Blake D Morant, ‘The Declining Prevalence of Trials as a Dispute Resolution Device: Implications for the Academy’ (2012) 38 *William Mitchell Law Review* 1123, 1125–6.
- 3 National Alternative Dispute Resolution Advisory Council (NADRAC), *A Framework for ADR Standards* (April 2001) <<http://www.ag.gov.au/LegalSystem/AlternateDisputeResolution/Documents/NADRAC%20Publications/Framework%20for%20ADR%20Standards%20Body%20of%20Report.pdf>>; Morant, above n 2; Marc Galanter, ‘The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts’ (2004) 1 *Journal of Empirical Legal Studies* 459.
- 4 Tania Sourdin, *Alternative Dispute Resolution* (Thomson Reuters, 4th ed, 2012) 17; Genn, above n 2; Judy Gutman, ‘Litigation as Measure of Last Resort: Opportunities and Challenges for Legal Practitioners with the Rise of ADR’ (2011) 14 *Legal Ethics* 1, 1.
- 5 National Alternative Dispute Resolution Advisory Council (NADRAC), *Issues of Fairness and Justice in Alternative Dispute Resolution*, Discussion Paper (1997) 1.
- 6 Australian Law Reform Commission, *Review of the Federal Civil Justice System*, Discussion Paper No 62 (1999) 28 [2.28].
- 7 See further Julia Macfarlane, ‘Experiences of Collaborative Law: Preliminary Results from the Collaborative Lawyering Research Project’ (2004) 1 *Journal of Dispute Resolution* 179.
- 8 NADRAC, *A Framework for ADR Standards*, above n 3, 25.

trial — it is increasingly being presented not merely as a useful alternative or supplement to public courts, *but as an equal or, indeed, preferable method of handling disputes.*⁹

Proponents hold that these ‘new’ approaches to legal disputes will enhance justice in many areas, and reduce negative factors that are often experienced by those involved in the litigation process including cost, time investment, delays, and disempowerment.¹⁰ There are dangers, however, associated with these developments. The growth in ADR brings with it the need to ensure that there is informed and effective participation by parties to the ADR process, that the disputes sought to be resolved through ADR are suitable for ADR, that ADR is accessible, fair in procedure and confidential, and that ADR personnel are appropriately trained.¹¹ As the Hon Michael Kirby pointed out in the quotation at the beginning of this article, two issues need to be addressed: first, there must be ‘a correct and evolving relationship between ADR and the curial process’, and second, the success of both processes hinges upon the integrity, skills and training of the relevant personnel.¹²

Each process has its place.¹³ Enthusiasm for ADR, however, may lead us to ‘throw the baby out with the bathwater’, by inappropriately rejecting the adversarial system, which still plays a significant and constructive role in the resolution of disputes. As Lord Neuberger has pointed out, the adversarial system provides the framework for securing the enforcement of rights and the rule of law in which ADR can operate.¹⁴ Enthusiasm for ADR may lead us to overestimate the value of ADR,¹⁵ and apply it in contexts that are not entirely appropriate or effective.¹⁶ On the other hand, adversarial processes and practices may inappropriately influence ADR, thereby detracting from the potential benefits of such processes. Further, abuse of process by actors in either system (which can arise from a lack of integrity or lack of expertise/training) can have a detrimental effect. Most notably, we would suggest, misplaced adversarialism, what Enright terms ‘tactical adversarialism’,¹⁷ not only impedes adversarial processes but can ‘spillover’ into the ADR context when lawyers are representing parties. Indeed, the problems of

9 Genn, above n 2, 201 (emphasis added). Morant, above n 2, 1126–7 notes the decline in trials attributable, inter alia, to the rise in ADR. See also NADRAC, *Issues of Fairness and Justice*, above n 5, 15: ‘Increasingly ... ADR is seen, not as an alternative to the formal justice system, but as a dispute resolution system in its own right.’

10 NADRAC, *A Framework for ADR Standards*, above n 3, 25.

11 Ibid 36 [2.87].

12 Kirby, above n 1, 22.

13 See, eg, Genn, above n 2, 201; Lord Neuberger MR, ‘Educating Future Mediators’ (Speech delivered at the Fourth Civil Mediation Council National Conference, London, 11 May 2010); Gutman, above n 4.

14 Lord Neuberger MR, ‘Equity, ADR, Arbitration and the Law: Different Dimensions of Justice’ (Speech delivered at the Fourth Keating Lecture, Lincoln’s Inn, 19 May 2010). See also NADRAC, *Issues of Fairness and Justice*, above n 5, 16, which notes that, despite the criticisms of litigation, it contains many safeguards of fairness and justice, can ameliorate power imbalances, provides protection through procedural and evidentiary rules, provides an impartial third party decision-maker who makes decisions according to established principles, and is open, observable and subject to appeal.

15 Genn, above n 2, 201.

16 For instances of such issues, see NADRAC, *Issues of Fairness and Justice*, above n 5, 178–9.

17 Christopher Enright, *Tactical Adversarialism and Protective Adversarialism* (Maitland Press, 2012).

this form of lawyer conduct may be worse in this context because of the private nature of ADR and the difficulties inherent in identifying wrongful conduct. We argue that by carefully delineating between adversarial and ADR processes and the conduct of practitioners appropriate to each, we can preserve the value of the adversarial system, whilst developing the benefits of ADR for appropriate contexts.

In this article, we begin by contextualising the discussion, briefly outlining the strengths and criticisms of the adversarial system and highlight how the use of ADR to address those criticisms. We then discuss the problems that can arise from the interrelationship between the two systems, before considering issues arising from the problems of personnel involved in each system. Lastly, we suggest some considerations for a way forward that will allow us to retain the benefits of both the adversarial and facilitative ADR approaches to justice.

Despite its Australian emphasis, the article has global application. Dissatisfaction with traditional, adversarial justice systems and with the culture of adversarialism that is entrenched in many sectors of the legal profession is almost universal in common law jurisdictions.¹⁸ Furthermore, many law reform agendas contain common threads such as seeking to avoid litigation (especially unnecessary, ill-founded and protracted litigation), encouraging settlement of disputes, promoting court case management schemes,¹⁹ and increasing the use of ADR processes in mainstream conflict resolution.²⁰

The term ‘adversarial system’ ‘refers to the common law system of conducting proceedings in which the parties, and not the judge, have the primary responsibility for defining the issues in dispute and for investigating and advancing the dispute’.²¹ We note the ALRC’s observation that the use of the term ‘adversarial’ often carries with it negative connotations that cloud the debate over reform of the legal system.²²

Whilst we define ADR as ‘an umbrella term for processes, other than judicial determination, in which an impartial person assists those in a dispute to resolve the issues between them’,²³ this article is not limited to a discussion of ADR. This article also canvasses the comprehensive law movement. The term ‘comprehensive law’ derives from the work of Susan Daicoff,²⁴ and describes a movement seeking to accentuate law as a ‘healing agent’, seeking to harness the ‘rights plus’ capacities of law. Daicoff describes comprehensive law as a combination

18 Bobette Wolski, ‘Reform of the Civil Justice System Two Decades Past — Implications for the Legal Profession and Law Teachers’ (2009) 21(3) *Bond Law Review* 192, 195–6. See also Genn, above n 2; Morant, above n 2.

19 Wolski, above n 18, 207.

20 Ibid 210.

21 Australian Law Reform Commission, above n 6, 27 [2.25].

22 Ibid 26 [2.23].

23 National Alternative Dispute Resolution Advisory Council (NADRAC), *Dispute Resolution Terms* (September 2003) 4 <<http://www.ag.gov.au/LegalSystem/AlternateDisputeResolution/Documents/NADRAC%20Publications/Dispute%20Resolution%20Terms.PDF>>.

24 Susan Daicoff, ‘Law as a Healing Profession: The Comprehensive Law Movement’ (2006) 6 *Pepperdine Dispute Resolution Law Journal* 1.

of ‘vectors’, including collaborative law, restorative justice, preventative law and mediation. Comprehensive law is based on the ideas of non-adversarialism and a multi-disciplinary, therapeutic approach to justice.

ADR may be facilitative, advisory or determinative. In facilitative ADR processes — such as mediation, facilitation and facilitated negotiation — a dispute resolution practitioner assists the parties to identify and seek to resolve disputes.²⁵ In advisory ADR processes — such as expert appraisal, case appraisal, case presentation, mini trial and early neutral evaluation — a dispute resolution practitioner considers and appraises the dispute, providing advice as to its facts, the law and, in some cases, outcomes. In determinative ADR processes — such as arbitration, expert determination and private judging — a dispute resolution practitioner evaluates the dispute and makes a determination.²⁶ In this article, we are primarily concerned with facilitative, as opposed to determinative or advisory, processes. Of the various modalities of facilitative ADR, we are particularly concerned with mediation.

II A BROKEN SYSTEM? ADVERSARIALISM AND THE FLIGHT TO ADR

Australia’s adversarial legal system gives primacy to the parties, that is, the disputing individuals. It assumes that the parties are capable of articulating their rights, assembling the appropriate evidence, and presenting their arguments to a non-interventionist judge in court. In this system, justice is inherently linked to adherence to process.²⁷ Those who access courts are adversaries, doing battle by the court’s rules. The court’s role is to declare a ‘winner’.²⁸ This model derives from the ‘separation of powers’ doctrine laid down by the *Australian Constitution*. Chapter III of the *Constitution* vests the judicial power of the Commonwealth in the High Court and other federal courts created by Parliament. The judicial power must be exercised in accordance with the judicial process, which ‘includes an open and public inquiry, the application of the rules of natural justice and a determination of the law and the facts and the application of the law to those facts’.²⁹ The adversarial system has strengths, most notably ‘impartiality, independence, consistency, flexibility and the democratic character’ of its processes.³⁰ We consider these at greater length in the discussion that follows.

25 NADRAC, *Dispute Resolution Terms*, above n 23, 7.

26 *Ibid* 6.

27 Enright, above n 17, 1.

28 Nigel Stobbs, ‘The Nature of Juristic Paradigms: Exploring the Theoretical and Conceptual Relationship between Adversarialism and Therapeutic Jurisprudence’ (2011) 4 *Washington University Jurisprudence Review* 97, 129.

29 Australian Law Reform Commission, above n 6, 32 [2.38].

30 *Ibid* 29 [2.30].

Nevertheless, the adversarial system has been much criticised.³¹ We turn now to consider the criticisms of the system.

A Dissatisfaction with the Adversarial System

The adversarial system of justice in Australia has attracted much criticism. Such criticism is not a recent phenomenon. In 1999, Sir Anthony Mason recognised a growing dissatisfaction with adversarial justice:

It is no exaggeration to say that there has been an erosion of faith in the virtues of adversarial justice as exemplified in the system of court adjudication. That erosion of faith has not come about overnight. It has been developing over time. The rigidities and complexity of court adjudication, the length of time it takes and the expense ... has long been the subject of critical notice.³²

More recent comments support this view. Finkelstein argues that the adversary system is not a system capable of discovering the truth;³³ Stobbs contends that the adversarial system makes no effort to determine or deal with whatever instigated the dispute in the first place.³⁴ The heavy reliance of the adversarial system on process has attracted criticism:

Reliance on procedural and evidentiary rules confines disputes to narrow legal parameters, ignoring the human element of most disputes. ... disputants' needs, wants, and concerns ... do not necessarily fit into the confines of legally accepted categories of disputing.³⁵

Some, such as Daicoff, criticise the 'win/lose' approach of determinative justice. Using terms such as 'other-blaming' and 'position-taking'³⁶ as descriptors of the adversarial system, she claims the adversarial stance:

immediately begins to marshal forces to fight the lawsuit. This sets up a defensive, adversarial psychological posture in which each party becomes ego-invested in appearing 'right' and 'winning'. ... the traditional approach is more likely to pit individuals against each other, result in

31 Many of these criticisms are outlined in Marilyn A K Scott, 'Collaborative Law: Dispute Resolution Competencies for the "New Advocacy"' (2008) 8 *Queensland University of Law and Justice Journal* 213, 225–9.

32 Sir Anthony Mason, 'The Future of Adversarial Justice' (Speech delivered at the 17th Australian Institute of Judicial Administration Annual Conference, Adelaide, 6–8 August 1999).

33 Ray Finkelstein, 'The Adversarial System and the Search for Truth' (2011) 37 *Monash University Law Review* 135, 135.

34 Stobbs, above n 28, 129.

35 Judy Gutman, 'The Reality of Non-Adversarial Justice: Principles and Practice' (2009) 14 *Deakin Law Review* 29, 34.

36 Susan Daicoff, 'The Comprehensive Law Movement: An Emerging Approach to Legal Problems' (2006) 49 *Scandinavian Studies in Law* 109, 110.

accusing and blaming, and drive the parties further apart and towards a more psychologically ‘defended’ state.³⁷

Some critics point to more practical problems of the adversarial system such as crowded courts and the high expense of litigation. In the context of the criminal system, Freiberg points to the lack of regard for victims and the public.³⁸ Other critics note the extension of the adversarial system into ‘a culture of argument and critique’ that limits creative problem solving and discourages apology, admission of wrongdoing and acceptance of responsibility.³⁹

The growth of non-adversarial approaches to justice reflects, at least in part, ‘a deep disenchantment with the traditional, confrontational techniques that are inherent in the common law adversarial system’.⁴⁰ Such approaches include therapeutic jurisprudence, restorative justice, mediation, case management, collaborative lawyering, and court or tribunal connected ADR processes.⁴¹ They also include external dispute resolution systems and family dispute resolution. These various processes are based on a mix of therapeutic, preventive and problem-based theories, but there are some commonalities amongst them: they focus on the needs and interests of people and endeavour to repair relationships and prevent conflict, rather than emphasise who is right or wrong;⁴² they seek to promote a consensus based approach,⁴³ seeking to encourage open and respectful communication,⁴⁴ and striving to achieve ‘connection rather than separation’.⁴⁵ They are often multidisciplinary, rather than legally focussed.⁴⁶ For instance, affiliated services that support family dispute resolution include counselling services, specialist family violence services, and parenting order programmes (to assist high conflict separating families).

The use of facilitative ADR processes seeks to harness the ‘rights plus’ potential of law and law’s inherent ability to act as an agent for constructive change, both for

37 Susan Daicoff, ‘Making Law Therapeutic for Lawyers: Therapeutic Jurisprudence, Preventive Law, and the Psychology of Lawyers’ (1999) 5 *Psychology, Public Policy, and Law* 811, 825.

38 Arie Freiberg, ‘Post-Adversarial and Post-Inquisitorial Justice: Transcending Traditional Penological Paradigms’ (2011) 8 *European Journal of Criminology* 82, 82.

39 The work of Deborah Tannen, *The Argument Culture: Moving from Debate to Dialogue* (Random House, 1998) is discussed in an article by David B Wexler, ‘Therapeutic Jurisprudence and the Culture of Critique’ (1999) 10 *Journal of Contemporary Legal Issues* 263, 263.

40 Freiberg, above n 38, 83.

41 Sourdin, above n 4, 295.

42 Daicoff, ‘Making Law Therapeutic for Lawyers’, above n 37, 826.

43 See European Commission, *Alternative Dispute Resolution — Community Law* (4 November 2009) European Judicial Network in Civil and Commercial Matters <http://ec.europa.eu/civiljustice/adr/adr_en_en.htm>.

44 Susan Douglas, ‘Humanising Legal Education: Lessons from ADR’ (2012) 23 *Alternative Dispute Resolution Journal* 216, 222.

45 Roger Fisher, William Ury and Bruce Patton, *Getting to Yes: Negotiating an Agreement without Giving In* (Random House Business Books, 2nd ed, 1997), cited in Just Balstad, ‘What Do Litigants Really Want? Comparing and Evaluating Adversarial Negotiation and ADR’ (2005) 16 *Alternative Dispute Resolution Journal* 244, 245.

46 Freiberg, above n 38, 86. See also NADRAC, *A Framework for ADR Standards*, above n 3, 6 [1.26]: ‘NADRAC acknowledges that many of the processes used in ADR borrow from, and are borrowed by, other fields of endeavour, for example, management, public sector planning, complaint handling, counselling, therapy and community development.’

individuals and the community.⁴⁷ This introduces a transformative discourse into the system. Whilst the ubiquitous nature of conflict is recognised and accepted, the transformative approach to mediation builds on the facilitative ADR movement⁴⁸ — including its basis in the collaborative problem solving approach — but it goes further. Rather than seeking to facilitate the goals and interests of both parties in the mediation, it endeavours to empower parties to acknowledge each other's point of view, by, for example, transforming the relationship, which might be described as an effort to make the world a better place.⁴⁹ The idea of using the legal system as a platform to repair the world has obvious and instant appeal, and is in stark contrast to the negative emotional framework and the 'dark side' conjured up by discussions that centre on the negative effects of adversarialism on stakeholders.

With this aspirational goal in mind, various non-adversarial models have been embraced with high hopes and it could be argued that these models have brought benefits to the justice system. But an over-zealous enthusiasm for the benefits of ADR could result in the destabilisation of the adversarial system — a situation that could be described as throwing the baby out with the bathwater. We turn now to discuss some of the strengths of the adversarial system.

B Strengths of the Adversarial System

1 Judicial Impartiality

Judicial impartiality is considered a major strength of the adversarial system and, in Australia, is a constitutional imperative.⁵⁰ Judicial impartiality 'is a principle which is valued not just as a means of ensuring fair and truthful judgments but for its key role in maintaining public confidence in the decisions of the courts'.⁵¹ Such confidence is furthered, it has been suggested, by helping losing parties understand the reasons for the result.⁵² In practice, the adversarial system is a highly transparent process that aligns with democratic principles.⁵³ In the adversarial system, disputing parties have the opportunity to participate by presenting their particular understanding of the disputed issues to the court

47 Daicoff, 'Law as a Healing Profession', above n 4.

48 Zena Zumeta, *Styles of Mediation: Facilitative, Evaluative, and Transformative Mediation* (September 2000) *Mediators & Everything Mediation* <<http://www.mediate.com/articles/zumeta.cfm>>.

49 See Robert A Baruch Bush and Joseph P Folger, *The Promise of Mediation: Responding to Conflict through Empowerment and Recognition* (Jossey-Bass Publishers, 1994); William L F Felstiner, Richard L Abel and Austin Sarat, 'The Emergence and Transformation of Disputes: Naming, Blaming, Claiming ...' (1980) 15 *Law and Society Review* 631.

50 *Australian Constitution* ch III. The Judiciary is to exercise absolute independence in rendering impartial decisions — free from any influence of the executive or the legislature. It is important that the public has full confidence in the judiciary's ability to protect the rights and freedoms of individuals and guard against abuses of power.

51 Kate Malleon, 'Safeguarding Judicial Impartiality' (2002) 22 *Legal Studies* 53, 53.

52 New South Wales Bar Association, Submission No 88 to Australian Law Reform Commission, *Managing Justice: A Review of the Civil Justice System*, 2000, 106 [1.124].

53 Enright, above n 17, 5.

to aid the judge (or judges) in making decisions. Judges declare the party who presents the most persuasive case as the winner. Importantly, judges are expected to make these decisions without prejudice, that is, without actual or perceived bias.⁵⁴ Former Chief Justice Gleeson stated that a judge's demeanour 'gives to the parties an assurance that their case will be heard and determined on the merits, and not according to some personal predisposition on the part of the judge'.⁵⁵

2 Pursuit of Truth

There is some debate as to whether or not the adversarial system is structured to find the truth. Lord Denning is often quoted as saying that it is the judge's main objective 'to find out the truth, and to do justice according to law'.⁵⁶ Finkelstein notes that 'the search for truth is central to the court's legitimacy in the public's eye'.⁵⁷ On the other hand, former Chief Justice Mason asserts that '[w]ithin the adversarial system, despite some statements to the contrary, the function of the courts is not to pursue the truth but to decide on the cases presented by the parties'.⁵⁸ Irrespective of the apparent contradiction, these may not be conflicting understandings, but two sides of the one coin. For instance, the claim that the truth is revealed through the adversarial process is based on the view that, the litigation process can be likened to an economic activity. In an effort to pursue their own self-interest, it is expected that those involved will present all the relevant materials to the court,⁵⁹ and that the truth will be revealed by providing the judge with all that is necessary to make a determination. The adjudicative system can thus still play a significant and constructive role in the resolution of disputes.

3 User Benefits

Despite various criticisms, the adversarial system is considered to offer a number of benefits to users. These include: voice (appearing in a courtroom allows a litigant to be heard); procedural justice (litigants believe the judicial process affords them a fair and just method for resolving disputes); vindication (beyond providing a resolution, a trial determines who is right or wrong); validation (beyond being vindicated, litigants desire for their feelings, such as hurt or anger, to be acknowledged and deemed justifiable); impact (litigants want to perceive that they have an impact on their personal situation as well as on the greater social good); and safety (because conflict is often viewed as risky, litigants can prefer to seek out the safety that formal rules and procedures of a courtroom provide).⁶⁰

54 Malleson, above n 51, 55.

55 AM Gleeson, 'Performing the Role of the Judge' (1998) 10 *Judicial Officers Bulletin* 57, 58.

56 *Jones v National Coal Board* (1957) 2 QB 55, 63.

57 Finkelstein, above n 33, 135.

58 Mason, above n 32, 5–14.

59 Enright, above n 17, 5.

60 Elena B Langan, "'We Can Work It Out': Using Cooperative Mediation — A Blend of Collaborative Law and Traditional Mediation — To Resolve Divorce Disputes' (2011) 30 *Review of Litigation* 245, 255–6.

Thus, despite criticism of the adversarial system and the so-called ‘flight to ADR’, the adversarial system has strengths that should not be lost. On the other hand, ADR offers its own benefits. In order for the benefits of each method of dispute resolution to be retained, the distinctive features of each must be respected. However, as the system has evolved, some blurring of boundaries has occurred.

III PROBLEMS ARISING FROM THE RELATIONSHIP BETWEEN THE TWO METHODS OF DISPUTE RESOLUTION

The quote by the Hon Michael Kirby at the beginning of this article highlights the need for clarity around the relationship between adversarial and ADR processes. This relationship has been clouded by the mandatory use of case management by courts.⁶¹ For example, in several Magistrates’ Courts in Victoria, all defended civil proceedings, where the amount sought in the complaint is below a certain monetary threshold, have been referred to mediation since 2007, pursuant to s 108 of the *Magistrates’ Court Act 1989* (Vic). Further, the relationship between litigation and mediation is cemented in the sense that various state statutory schemes provide for cases to be referred to mediation,⁶² most of which takes place through court-annexed services.⁶³ Bergin refers to this interaction between courts and ADR as ‘judicial mediation’.⁶⁴ In some jurisdictions this service is provided by the registrars,⁶⁵ in other jurisdictions, registrars and/or judicial officers carry out this task,⁶⁶ and it is also the case that many court connected mediation sessions are carried out by private practitioners.

In addition, the fact that r 7.2 of the *Australian Solicitors Conduct Rules*,⁶⁷ and r 38 of the *Australian Bar Association Barristers’ Conduct Rules*,⁶⁸ require that solicitors and barristers advise their clients of the alternatives to fully contested adjudication strongly implies that the relationship between ADR and

61 Jim Mason, ‘How Might the Adversarial Imperative Be Effectively Tempered in Mediation?’ (2012) 15 *Legal Ethics* 111, 115.

62 *Court Procedures Rules 2006* (ACT) r 1179; *Federal Court Rules 2011* (Cth) r 28; *Civil Procedure Act 2005* (NSW) s 26; *Supreme Court Act* (NT) s 83A; *Uniform Civil Procedure Rules 1999* (Qld) s 319; *Supreme Court Act 1935* (SA) s 65; *Supreme Court Rules 2000* (Tas) r 518; *Supreme Court (General Civil Procedure) Rules 2005* (Vic) r 50.07; *Supreme Court Act 1935* (WA) s 69.

63 Except for the Australian Capital Territory, Queensland and South Australia.

64 P A Bergin, ‘Judicial Mediation in Australia’ (Paper presented at the National Judicial College, Beijing, 25–28 April 2011) 2.

65 New South Wales, Western Australia and Tasmania.

66 Victoria and the Northern Territory.

67 These rules have been adopted by Queensland, South Australia and New South Wales; but similar rules apply in the Northern Territory (see Law Society of Northern Territory, *Rules of Professional Conduct and Practice* (at May 2005) rr 10A.3, 10A.7) and Victoria (see Law Institute of Victoria, *Professional Conduct and Practice Rules 2005* (at 30 September 2005) r 12.3).

68 These rules have been adopted by New South Wales, Queensland, South Australia and Western Australia; but similar provisions apply in the Australian Capital Territory (see *Legal Profession (Barristers) Rules 2014* (ACT) r 17A) and the Northern Territory (see Northern Territory Bar Association, *Barristers’ Conduct Rules*, r 17A).

the adversarial process is now considered to be important for the efficient and effective operation of Australia's legal system.

This mandatory requirement for mediation, however, may create conflict between the two systems in the following ways: first, it may challenge the underlying premise of voluntary participation in mediation; second, mediation may be utilised in disputes where it is inappropriate; third, the interaction of the two systems may give rise to confidentiality issues; fourth the mandatory requirement for mediation may compromise the public good associated with the doctrine of precedent; fifth, it may compromise participant satisfaction; and finally, it may deny participants procedural justice. We now consider these issues in turn.

A Mediation and the Premise of Voluntary Participation

Facilitative ADR processes are built on the premises of voluntary participation by disputants, as well as their empowerment in and ownership of their dispute⁶⁹ and, importantly, their self-determination in its resolution.⁷⁰ Mediation theory is based on a non-coercive discourse grounded on consensus and personal autonomy.⁷¹ These principles appear to conflict with the statutory imperatives that require parties to participate in ADR (and particularly mediation).⁷² Interestingly though, some authors have noted that where ADR is an option (that is, it is not mandated) there are low take-up rates,⁷³ although it is suggested by Boulle that where this happens the matter is probably not suitable for settlement.⁷⁴

B Use of Facilitative ADR in Situations Where It May Not Be Appropriate

The inappropriateness of ADR in some cases has long been acknowledged in family dispute resolution where domestic violence has featured in the history of

69 Nils Christie, 'Conflicts as Property' (1977) 17 *British Journal of Criminology* 1; Laurence Boulle, *Mediation: Principles, Process, Practice* (LexisNexis, 3rd ed, 2011) 63.

70 See Nancy A Welsh, 'Reconciling Self-Determination, Coercion, and Settlement in Court-Connected Mediation' in Jay Folberg, Ann L Milne and Peter Salem (eds), *Divorce and Family Mediation: Models, Techniques, and Applications* (Guilford Publications, 2004) 420.

71 See Wolski, above n 18, 213.

72 The following cases are instances where courts have used their discretion to mandate mediation without consent of the parties to the dispute: *Sellar v Lasotav Pty Ltd* [2008] FCA 1766 (25 November 2011); *Waterhouse v Perkins* [2001] NSWSC 13 (25 January 2001); *Idoport Pty Ltd v NAB Ltd* [2001] NSWSC 427 (23 May 2001); *Dickerson v Brown* [2001] NSWSC 714 (5 April 2001).

73 Hilary Astor and Charles Chinkin, *Dispute Resolution in Australia* (LexisNexis Butterworths, 2nd ed, 2002) 270. NADRAC, *A Framework for ADR Standards*, above n 3, 24 [2.59] reports that efforts to estimate 'the level of service demand and usage is ... problematic'. See also at 24–5 [2.60].

74 Boulle, above n 69, 77–9; John Wade, 'Don't Waste My Time on Negotiation and Mediation: This Dispute Needs a Judge' (2001) 18 *Mediation Quarterly* 259, 272, cited in Cameron Green, 'ADR: Where Did the "Alternative" Go? Why Mediation Should Not Be a Mandatory Step in the Litigation Process' (2010) 12(3) *ADR Bulletin* article 2, 3.

the particular relationship.⁷⁵ But caution as to the use of ADR has also been raised in other contexts. For instance, a study on the resolution of workplace disputes found issues relating to the appropriateness of private ADR for workplace disputes in which a power imbalance exists between disputants, where private ADR is used as a means of gaining compliance with an employer agenda, and where private ADR consultants are engaged as a means of avoiding difficult communications with employees.⁷⁶

C Challenges to Confidentiality and Misuse of Process

The requirement of confidentiality — in the sense that it attaches to some mediation proceedings — may result in some practical problems. For instance, a judge who has been involved in a mediation that failed cannot continue to hear the matter, and this could give rise to a situation where there are not enough judges to deal with the caseload.⁷⁷ In addition, there is a risk that mediation is used as a means of determining the strength of the opposition's case — effectively using mediation as a 'dry run' rather than approaching mediation in good faith.⁷⁸

D Challenges to the Public Good Arising from Precedent

Some writers, such as Gruin, have highlighted the public good associated with litigation and the doctrine of precedent.⁷⁹ Gruin expresses concern about the loss of precedential value that is inherent in the use of private ADR processes and the way in which this can undermine the values of the common law legal system: rationality, equality and justice.⁸⁰ While Gruin is not arguing for the removal of ADR processes, he strongly argues for the retention of the adjudicative option. Similarly, Redfern quotes Federal Court Justice Lander who observes that: '[i]f everything goes to alternative dispute resolution, nobody is ever considering what the law is'.⁸¹ Although His Honour commends ADR for alleviating the burden on judges hearing disputes, and also for providing quicker and cheaper dispute

75 See, eg, Jennifer P Maxell, 'Mandatory Mediation of Custody in the Face of Domestic Violence: Suggestions for Courts and Mediators' (1999) 37 *Family and Conciliation Courts Review* 335. Cf recent work, such as Amy Holtzworth-Munroe, 'Controversies in Divorce Mediation and Intimate Partner Violence: A Focus on the Children' (2011) 16 *Aggression and Violent Behaviour* 319, which suggests more empirical work needs to be done around this issue.

76 Bernadine Van Gramberg, 'The Rhetoric and Reality of Workplace Alternative Dispute Resolution' (2006) 48 *Journal of Industrial Relations* 175, 188.

77 Bergin, above n 64, 3.

78 *Ibid.*

79 Julian Gruin, 'The Rule of Law, Adjudication and Hard Cases: The Effect of Alternative Dispute Resolution on the Doctrine of Precedent' (2008) 19 *Australian Dispute Resolution Journal* 206, 208, citing T Terrell, 'Rights and Wrongs in the Rush to Repose: On the Jurisprudential Dangers of Alternative Dispute Resolution' (1987) 36 *Emory Law Journal* 541, who suggests that judicial adjudication is a public good.

80 Gruin, above n 79, 208.

81 Michael Redfern, 'Should Pre-Litigation Mediation Be Mandated?' (2012) 23 *Australasian Dispute Resolution Journal* 6, 7.

resolution than the courts, he notes the important role of courts in developing and interpreting the law.⁸²

E Issues of User Satisfaction and Benefit

Although there is general acceptance that the rise of ADR is a positive development,⁸³ questions relating to the level of user satisfaction have been raised.⁸⁴ The research in this area confirms that procedural fairness is an important criterion that affects user satisfaction. Consideration of studies — conducted by Thibaut and Walker,⁸⁵ Hensler,⁸⁶ Delaney and Wright,⁸⁷ Ardagh and Cumes,⁸⁸ and Hunter⁸⁹ — brings to light some important differences in their findings. One such difference is in regard to the relationship between satisfaction and outcomes. While Hensler, and Thibaut and Walker found that outcomes were not necessarily important to a client's satisfaction, Hunter found 'perceptions of and satisfaction with procedure and outcomes were inextricably intertwined'.⁹⁰ Balstad, in an overview of the empirical work, concludes that if participants are concerned only with being able to control their own matter, they would favour a court trial; but if they wish to also have some say in the outcome then mediation would be attractive.⁹¹ The fact that participants desire control of their matters may in fact dissuade them from choosing mediation, since one of the suggested advantages of this medium is the lack of formal rules and therefore a lack of process.⁹²

F Challenges to Procedural Justice

Whilst legal actors may perceive procedural justice as equating with fairness when due process is afforded by adhering to substantive and procedural rules, Tyler identifies four factors that represent fairness for litigants and the public:

82 Ibid. For a recent critical discussion of adjudication as a public good, see Stephen J Ware, 'Is Adjudication a Public Good? "Overcrowded Courts" and the Private-Sector Alternative of Arbitration' (2012) 14 *Cardozo Journal of Conflict Resolution* 899.

83 Astor and Chinkin, above n 73, 23.

84 See, eg, Deborah R Hensler, 'Suppose It's Not True: Challenging Mediation Ideology' (2002) 1 *Journal of Dispute Resolution* 81; Balstad, above n 45.

85 Laurens Walker et al, 'Reactions of Participants and Observers to Modes of Adjudication' (1974) 4 *Journal of Applied Social Psychology* 295.

86 Hensler, above n 84, 81.

87 Marie Delaney and Ted Wright, 'Plaintiffs' Satisfaction with Dispute Resolution Processes: Trial, Arbitration, Pre-Trial Conference and Mediation' (Research Paper, Justice Research Centre, January 1997).

88 Anne Ardagh and Guy Cumes, 'Lawyers and Mediation: Beyond the Adversarial System?' (1998) 9 *Australasian Dispute Resolution Journal* 72.

89 Rosemary Hunter, 'Through the Looking Glass: Clients' Perceptions and Experiences of Family Law Litigation' (2002) 16 *Australian Journal of Family Law* 7.

90 Ibid 17.

91 Balstad, above n 45, 256–7.

92 Ibid 248. Although '[f]acilitative ADR is claimed to provide parties with greater control over the process and responsibility for the outcome': see NADRAC, *A Framework for ADR Standards*, above n 3, 25 [2.61].

neutrality, respect, participation and trustworthiness.⁹³ According to Lind and Tyler, ‘fair’ procedures prompt stakeholder compliance with outcomes, and help to legitimise the decision making process.⁹⁴ Stakeholder satisfaction with ADR processes⁹⁵ can be explained by the application of Tyler and Lind’s criteria referred to above. NADRAC has emphasised the goal of procedural fairness in ADR processes in its ‘Framework Standards’.⁹⁶

However, leaving stakeholder satisfaction to one side, there have been concerns expressed about ADR and procedural justice.⁹⁷ ADR processes, such as mediation, are not open to review. They are private and confidential, as far as the law allows, and therefore are not open to public scrutiny. Although several ADR processes, such as mediation, are ‘process driven’, those processes are generally fluid and flexible.⁹⁸ There are no clear ‘rules’ to follow. The law is not applied to the facts.⁹⁹ The doctrine of precedent is not applied and like cases may very well not be treated alike. It has been suggested that the focus on settlement also compromises procedural justice. Rankin, for instance, posits ‘a fundamental jurisprudential dilemma: in focusing on settlement “at all costs”, have the courts side-stepped justice in the process?’¹⁰⁰

G Costs and Delay

There is some risk that the problems of cost and delay identified in the adversarial system may not be overcome by ADR processes. For instance, recently, concern has been raised about the significant costs and delays occasioned by collaborative law. Notwithstanding such concerns, empirical research findings are positive about the process. Sourdin reviews some research studies relating to collaborative practice.¹⁰¹ The International Academy of Collaborative Professionals (IACP) survey results about collaborative practice in non-family law matters have, since 2006, suggested that clients experience high levels of satisfaction when they participate in collaborative practice.¹⁰² Sourdin also refers to Macfarlane’s

93 Tom R Tyler, ‘Citizen Discontent with Legal Procedures: A Social Science Perspective on Civil Procedure Reform’ (1997) 45 *American Journal of Contemporary Law* 871, 887.

94 Elizabeth Mullen and Linda J Skitka ‘When Outcomes Prompt Criticism of Procedures: An Analysis of the Rodney King Case’ (2006) 6 *Analyses of Social Issues and Public Policy* 1, 2 citing E Allan Lind and Tom R Tyler, *The Social Psychology of Procedural Justice* (Springer, 1988).

95 Jill Howieson, ‘Perceptions of Procedural Justice and Legitimacy in Local Court Mediation’ (2002) 9(2) *Murdoch University Electronic Journal of Law* 1, 5.

96 NADRAC, *A Framework for ADR Standards*, above n 3, 13–14 [2.3].

97 See the review of the literature in Howieson, above n 95, 4. See also Rebecca Hollander-Blumoff & Tom R Tyler, ‘Procedural Justice and the Rule of Law: Fostering Legitimacy in Alternative Dispute Resolution’ (2011) 1 *Journal of Dispute Resolution* 1; Hensler, above n 84.

98 For example, in the mediation process, if and when to break from joint session into separate session.

99 Howieson, above n 95, 7.

100 Mark J Rankin, ‘Settlement at All Cost: The High Price of an Inexpensive Resolution?’ (2009) 20 *Australasian Dispute Resolution Journal* 153, 155.

101 Sourdin, above n 4, 123.

102 *Ibid* 124.

three-year study of collaborative law in the family context,¹⁰³ and she notes that Macfarlane's conclusion suggests that collaborative law 'offers a chance for separating spouses to negotiate a solution they deem fair'.¹⁰⁴

In summary, it is clear that the relationship between ADR and adversarial systems is, as the Hon Michael Kirby points out, evolving and dynamic and we must monitor the ways in which the two systems interact in order to ensure that the benefits of each system are, to the greatest extent possible, retained. In addition to problems in the relationship between the two systems, the success or otherwise of the legal system is heavily dependent, as the Hon Michael Kirby points out, on the integrity, skills and training of the relevant personnel.

IV PROBLEMS ARISING FROM THE CONDUCT OF PARTICIPANTS IN EACH SYSTEM

An important aspect of smooth operation of both ADR and adversarial systems is an appreciation of the proper role of participants: 'any human system requires men and women for its administration and fulfilment'.¹⁰⁵ A lawyer's conduct can either frustrate or facilitate process,¹⁰⁶ and traditional conceptions of lawyer conduct within an adversarial system may influence and affect ADR processes.

One study, for instance, has identified that the use of ADR processes in family disputes is characterised by often vexed relationships between lawyers and family dispute resolution practitioners. This is because family lawyers may engage in aggressive adversarialism (a problem discussed below). In addition, there can be misunderstanding and disrespect between family lawyers and family dispute resolution practitioners as to their respective roles.¹⁰⁷ It has also been shown that lawyers, accustomed to advocating for their clients, may not appreciate or enable direct disputant participation in court-connected mediation processes. One study found family lawyers 'demonstrated a widespread ignorance of fundamental mediation values grounded in individualism'.¹⁰⁸

As noted above, one key finding is that misplaced or excessive adversarialism, that is, what Enright terms 'tactical adversarialism',¹⁰⁹ a problem that has long been criticised in the adversarial system, may also undermine ADR systems.

103 Ibid 126, citing Julie Macfarlane, 'The Emerging Phenomenon of Collaborative Family Law (CFL): A Qualitative Study of CFL Cases' (Research Report, 2005).

104 Sourdin, above n 4, 128, quoting Macfarlane, above n 103, xiv.

105 Edward D Re, 'The Lawyer as Counselor and the Prevention of Litigation' (1982) 31 *Catholic University Law Review* 685, 687.

106 Mason, above n 32, 114.

107 Helen Rhoades et al, 'Enhancing Inter-professional Relationships in a Changing Family Law System' (Final Report, The University of Melbourne, 2008) v.

108 Olivia Rundle, 'Barking Dogs: Lawyer Attitudes Towards Direct Disputant Participation in Court-Connected Mediation of General Civil Cases' (2008) 8 *Queensland University Technology Law and Justice Journal* 77, 91.

109 Enright, above n 17.

A 'Tactical Adversarialism' in the Courts

It is fundamental to the adversarial system that the lawyer's primary duty, one that transcends all others, is to the administration of justice. This principle has been reiterated by courts,¹¹⁰ expressly included in the professional conduct rules,¹¹¹ and has been the subject of academic writing¹¹² and judicial comment.¹¹³ Chief Justice Warren has remarked that the 'duty to the court must come before winning'; that 'there is a fine line between permissibly robust advocacy and impermissible dereliction of duty'; and that '[t]he desire to win a case has no part to play in the assessment by a practitioner of their responsibility towards the court'.¹¹⁴ Whilst Her Honour's remarks underscore the notion that excessively adversarial behaviour by lawyers can compromise a lawyer's duty to the court, Dal Pont makes the more general point that it is in the public interest that all court processes are not compromised by abuses, as this may lead to inequity and bring the legal system into disrepute.¹¹⁵ The connection between the role of the lawyer, the legal system and service to the community is longstanding and strong.¹¹⁶

Adversarialism is an inevitable consequence of an adversarial system, of course, but some attempts have been made to distinguish between 'good' and 'bad' adversarialism. Enright, for instance, distinguishes 'protective' and 'tactical' adversarialism. Protective adversarialism on the part of advocates is essential for justice, conversely, he describes tactical adversarialism as 'toxic' to justice.¹¹⁷ Enright defines protective adversarialism as:

the level of adversarialism that is needed so that an independent lawyer can properly protect the rights of their client and so help ensure that they receive a fair trial. It furnishes basic fairness to each party. At the same time it assists greatly the task making of effective decision by ensuring that the case of each party is properly put to the court. Because the court is then possessed of each party's case it has the full range of information and arguments before it.

This approach is in line with the dictum which Lord Reid famously set out in *Rondel v Worsley*:

Every counsel has a duty to his client fearlessly to raise every issue, advance every argument, and ask every question, however distasteful, which he thinks will help his client's case. But, as an officer of the Court

110 See, eg, *Rondel v Worsley* [1969] 1 AC 191, particularly the dictum of Lord Reid at 227.

111 Law Council of Australia, *Australian Solicitors Conduct Rules* (at June 2011) r 3.1; Australian Bar Association, *Barristers' Conduct Rules* (1 February 2010) r 5(a).

112 See Lillian Corbin, 'Australian Lawyers as Public Citizens' (2013) 16 *Legal Ethics* 57.

113 *Gianarelli v Wraith* (1988) 165 CLR 543.

114 Chief Justice Marilyn Warren, 'The Duty Owed to the Court — Sometimes Forgotten' (Speech delivered at the Judicial Conference of Australia Colloquium, Melbourne, 9 October 2009).

115 Gino Dal Pont, *Lawyers Professional Responsibility* (Thomson Reuters, 5th ed, 2013) 573.

116 See the remarks of Kitto J in *Ziems v Prothonotary of the Supreme Court of New South Wales* (1957) 97 CLR 279, 297.

117 Enright, above n 17, ix.

concerned in the administration of justice, he has an overriding duty to the Court.¹¹⁸

Tactical adversarialism, on the other hand, is an abuse of process. It ‘occurs where the rules and practices allow a lawyer to attempt to win the case by means of tricks and stratagems that have no connection with the merits of the case’.¹¹⁹ Some writers refer to the term ‘zealous advocacy’ but, in our view, Enright’s distinction captures the problem more effectively, as an advocate may be rightly zealous in their exercise of ‘protective adversarialism’. The problem is the desire to win at all costs, even if that means compromising the legal process, its institutions and, ultimately, justice itself.

This distinction between protective and tactical adversarialism once again focuses much of the concern about the adversarial system itself to the conduct of lawyers. Indeed, Enright identifies a problem of ‘[tactical] adversarial addiction’ amongst lawyers:

In common law jurisdictions many lawyers are culturally attached to, if not addicted to, the notion of adversarialism. If wigs and gowns robe the bodies of barristers, a fervent commitment to adversarialism often garbs their souls. This commitment tends to feature in discussions about reforming aspects of court procedure by their propounding the notion that any lessening of adversarialism diminishes justice.¹²⁰

Tactical adversarialism may occur when a lawyer’s independent forensic judgement is compromised, leading to the use of unfair trial tactics, unnecessary delays, evidence being destroyed, exponential rises in the cost of and time spent on litigation, and stakeholders expending time, money and energy on ‘hopeless cases’. Examples of ‘adversarialism gone mad’ are plentiful. Cases such as *White Industries (Qld) Pty Ltd v Flower & Hart*,¹²¹ *Gunns v Mar*,¹²² and *McCabe v British American Tobacco Australia Services Limited*¹²³ are illustrative of the four categories of professional conduct that Parker and Evans class as being an unfair use of the litigation process.¹²⁴ Unfair use of the litigation process describes actions including using the process for an inappropriate motive, making unsupported or irrelevant allegations against someone, instituting proceedings in disregard of the likelihood of success, and conducting litigation in a manner that unreasonably delays the proceedings and/or increases the costs of the litigation.¹²⁵

118 *Rondel v Worsley* (1969) 1 AC 191, 227.

119 Enright, above n 17, 22.

120 *Ibid* 3.

121 (1998) 156 ALR 169.

122 [2006] VSC 329 (28 August 2006).

123 [2002] VSC 73 (22 March 2002).

124 Christine Parker and Adrian Evans, *Inside Lawyers Ethics* (Cambridge University Press, 2nd ed, 2014) 188.

125 *Ibid*. ‘[A]lmost all studies of litigation, discovery is singled out as the procedure most open to abuse, the most costly and the most in need of court supervision and control’: New South Wales Bar Association, above n 52, 431 [6.67].

B Tactical Adversarialism in the ADR Context

At one level, it could be argued that this problem of tactical adversarialism in the adversarial context is a justification for ADR processes. However, this overlooks the issue that undue adversarialism may also contaminate the ADR process. This problem has been acknowledged for some time. For instance, in 1999, in the context of the rise of court-annexed ADR processes, Dearlove¹²⁶ posed the question of how courts might deal with lawyers who abuse ADR processes, noting problems such as: lawyer failure to attend ADR; use of ADR as a ‘fishing expedition’ to gain an advantage in litigation, rather than resolving the dispute; failure to disclose fraud in an ADR process; ‘[p]ig-headed’ lawyer conduct (where lawyers are more interested in their own egos and interests than those of their clients); ‘[g]reedy lawyers’ who use ADR to impose another level of costs on the client; and use of ADR for an ulterior purpose (such as using ADR for the purposes of delay). Menkel-Meadow also cautioned against this problem, noting a continuing education program that advertised itself as ‘How to Win in ADR!’ and then observing that:

lawyers as ‘advocates,’ as well as ‘problem-solvers’ and parties now come to the wide variety of dispute resolution processes with a whole host of different intentions and behaviors, many of which may be inconsistent with the original aims of some forms of ADR. As skillful advocates try to manipulate ADR processes in order to achieve their conventional party maximization goals, the rules of behavior demanded in ADR become both less clear and in some respects even more important.¹²⁷

Such abuses signify the spillover of tactical adversarialism into ADR processes. Ironically, however, the problem of tactical adversarialism in ADR may be even more problematic than in the adversarial system. Menkel-Meadow points out that rules of professional conduct are still based on an adversarial conception of lawyer behaviour and as such are ‘not responsive to the needs, duties, and responsibilities of one seeking to be a “non-adversarial” problem-solver’.¹²⁸ This problem is exacerbated by the fact that, although judicial condemnation of inappropriate adversarial behaviour by legal practitioners resounds,¹²⁹ it is often the case that no action has been taken by the courts or the regulator to discipline the lawyers involved. This calls into question the powers and frameworks of courts and regulators in this regard, as well as the content and effectiveness of the professional conduct rules generally.

There is also considerable potential for role confusion in ADR:

¹²⁶ Grant Dearlove, ‘Sanctions for the Recalcitrant Lawyer and Party’ (1999) 2 *ADR Bulletin* article 1, 2.

¹²⁷ Carrie Menkel-Meadow, ‘Ethics in Alternative Dispute Resolution: New Issues, No Answers from the Adversary Conception of Lawyers Responsibilities’ (1997) *South Texas Law Review* 407, 408.

¹²⁸ *Ibid* 410. It is arguable that the requirement in the rules for lawyers to ensure that their clients are aware of the ‘alternatives to fully contested adjudication’ has tempered this approach in Australia: see, eg, Law Council of Australia, *Australian Solicitors Conduct Rules* (at June 2011) r 7.2.

¹²⁹ See, eg, the dictum of Goldberg J in *White Industries (Qld) Pty Ltd v Flower & Hart* (1998) 156 ALR 169, 249–50.

when mediators now function both as facilitators and as evaluators, and lawyers work both as litigators, and as neutrals, the variety of behavioral repertoires located in single individuals or role conceptions challenges the categorization required for rulemaking. When practitioners within ADR approach their work with entirely different philosophical conceptions of what they are doing, ‘solving problems’ or ‘representing clients’, there may either be a mismatch of understood ethical norms or at the very least, a potential lack of clarity of purpose. What is appropriate when the game is clear (adversary representation), although arguable in many instances, becomes alarmingly uncertain when we are not even playing the same game.¹³⁰

Menkel-Meadow’s remarks underscore the reality of contemporary legal practice where lawyers sometimes represent their clients in ADR processes and at other times act as third-party neutrals in ADR processes. Different ethical issues present themselves in the ADR context depending on which role the lawyer accepts and plays in the particular case.¹³¹ ‘Right’ conduct is central to ethical legal practice in both applications and paradigms of legal professional practice and it is important that lawyers understand the role they are playing.

This role confusion has been, perhaps, most evident in the mediation context. Mediation research points to the non-coercive characteristic of the process leading to Bush and Folger’s ‘satisfaction story’.¹³² Despite this, there has been much academic writing on mediators using their power and their various professional techniques to exert pressure on parties to settle in both private and court annexed mediation processes.¹³³ At the same time, there are practical problems sanctioning abuse of process in the ADR context:

For instance, it is not always easy to discern that the ADR process is being used for a purpose other than that for which it was ordered. Senior lawyers can disguise their motives through posturing, acquiescence, or even theatrics. A convenor may not be alert to these subtle nuances or preconceived agendas initiated by a party.¹³⁴

Further, because of the private and confidential nature of ADR proceedings, sanction must depend on the evidence and complaint of a disgruntled party or its legal representatives.¹³⁵

130 Menkel-Meadow, above n 127, 410–11.

131 Anna Robertson, ‘Ethics in Mediation and the Process of Making Ethical Decisions’ (Speech delivered at the Continuing Professional Development Seminar, Law Institute of Victoria, Melbourne, 12 May 2011).

132 See Timothy Hedeem, ‘Coercion and Self-Determination in Court-Connected Mediation: All Mediations are Voluntary, but Some are More Voluntary than Others’ (2005) 26 *Justice System Journal Denver* 273; Wolski, above n 18; Baruch Bush and Folger, above n 49.

133 Hedeem, above n 132; Arghavan Gerami, ‘Bridging the Theory-and-Practice Gap: Mediator Power in Practice’ (2009) 26 *Conflict Resolution Quarterly* 433.

134 Dearlove, above n 126, 4.

135 *Ibid* 6.

In addition to role confusion, there may be outright opposition to ADR processes on the part of lawyers. For instance, Scott has found that, despite the growing sophistication of mediation theory and practice, and the fact that dispute resolution processes are now legislated for in relation to both private and public disputes, many lawyers are reluctant to accommodate ADR. Reasons given include: lawyers' beliefs that their competence is focussed on the litigation process; the notion that only adversarial bargaining fits with the culture and practice of law; the idea that law is best served by confining disputes to their legal aspects; and concern that mediation will undermine the rule of law and it may be too difficult to change from a competitive to a cooperative framework.¹³⁶

V THE WAY FORWARD

Our analysis suggests that, in the evolution of the relationship between adversarial and ADR processes, tensions between the values and practices of the two systems have become increasingly evident; and that lawyers, when representing clients in mediation, may carry over adversarial notions of their role and conduct inappropriately into ADR processes. These problems may serve to undermine the benefits of ADR; and may lead us to reject the strengths of the adversarial system. In order to harness the strengths of each mode of dispute resolution, careful thought must be given to the way forward.

Most importantly, we would suggest that consideration should be given to the most appropriate process for resolution of the dispute at hand. Although recent legislative reforms require dispute stakeholders to use reasonable endeavours to resolve disputes,¹³⁷ there is still uncertainty surrounding the best approach. Sourdin notes in the specific context of collaborative law, for instance, that:

While such obligations have been present for decades and have required many to attend mandatory forms of ADR in the pre-litigation environment, the extension of these obligations to a much broader class of civil disputes has caused significant concern among lawyers and judges.¹³⁸

She argues that thought needs to be given to whether a collaborative law approach — 'as opposed to a quicker, simpler mediated alternative including legal advice' — is most appropriate.¹³⁹

It is also important to define the objectives and processes appropriate to the resolution of the dispute in question. In the court setting, for instance, Rundle

136 Marilyn A K Scott, 'Collaborative Law: Dispute Resolution Competencies for the New Advocacy' (2008) 8 *Queensland University of Technology Law & Justice Journal* 213. See also Sourdin, above n 4, 284.

137 See, eg, *Civil Procedure Act 2010* (Vic) s 22.

138 Tania Sourdin, 'Civil Dispute Resolution Obligations: What is Reasonable?' (2012) 35 *University of New South Wales Law Journal* 889, 912.

139 Anne Ardagh, 'Repositioning the Legal Profession in ADR Services: The Place of Collaborative Law in the New Family Law System in Australia' (2008) 8 *Queensland University of Technology Law and Justice Journal* 238, 251.

has argued that courts should decide ‘whether or not the aim of their mediation program includes maximising the self-determination and empowerment of disputants’ or whether they seek to achieve other goals, ‘such as settlement by agreement, in accordance with legal precedent and in an efficient manner’.¹⁴⁰ In this regard, it is noted that ADR processes call on the person presiding over the dispute resolution process — and we note that where the process has been grafted onto the adjudicatory system, this may mean court officers or the judge — ‘to be much more interventionist and to modify and customize procedure according to the opportunities that arise to address the real substance at the heart of disputes or of offending behaviours’.¹⁴¹ The objectives — and limits of the process — should be more explicitly communicated to all the stakeholders involved in disputes. In this regard, the Law Council of Australia has published guidelines for those acting as mediators, and more specifically for the purpose of this article, for practitioners representing clients in mediation settings.¹⁴²

Roles and responsibilities need to be carefully identified and articulated, not only as between adversarial and ADR processes, but between different forms of ADR, which offer differing degrees of flexibility and control.¹⁴³ In this regard, and acknowledging the problem of misplaced and excessive adversarialism, re-education and training of the legal profession may be required in order to ensure effective facilitative ADR processes. As noted earlier, Rundle found the lawyers interviewed for her research demonstrated a ‘widespread ignorance of fundamental mediation values’.¹⁴⁴

Lastly, we believe that there is a need for a broader legal education that acknowledges and respects ‘process pluralism’. Recently, NADRAC called on law schools to consider the amount of ADR teaching incorporated into their law degrees, arguing that, increasingly, ADR will impact on legal practice. Specifically, NADRAC recommends that students be given an understanding of the way in which ADR infuses the Australian justice system, the types of ADR processes, the theory, philosophy and principles behind ADR processes, the benefits and disadvantages of ADR and litigation, and the responsibilities for actors in ADR processes.¹⁴⁵ As Scott argues, there are good arguments for supplementing and augmenting the orthodox rights-based law curriculum with ‘other insights, tools and practical skills to enable context-sensitive case appraisal,

140 Rundle, above n 108, 91.

141 Stobbs, above n 28, 120.

142 See The Law Society of New South Wales, *The Law Society Guidelines for Those Involved in Mediations* <<http://www.lawsociety.com.au/idc/groups/public/documents/internetcontent/026506.pdf>>; Law Council of Australia, *Guidelines for Lawyers in Mediations* (August 2011) <<http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/a-z-docs/MediationGuidelines.pdf>>.

143 Mieke Brandon and Tom Stodulka, ‘A Comparative Analysis of the Practice of Mediation and Conciliation in Family Dispute Resolution in Australia: How Practitioners Practice Across Both Processes’ (2008) 8 *Queensland University Technology Law and Justice Journal* 194, 211.

144 Rundle, above n 108, 91.

145 National Alternative Dispute Resolution Advisory Council (NADRAC), *Teaching Alternative Dispute Resolution in Australian Law Schools* (2012) 18 <<http://www.ag.gov.au/LegalSystem/AlternateDisputeResolution/Documents/NADRAC%20Publications/teaching-alternative-dispute-resolution-in-australian-law-schools.pdf>>.

creative and pragmatic problem-solving and relationship-building with clients and other counsel'.¹⁴⁶ Legal education has, however, despite the considerable reforms over the past 15 years, remained strongly committed to training lawyers for the adversarial system. NADRAC found in its survey of law schools that, of the 27 schools that responded, only eight included a mandatory subject in their law curriculum where 50 per cent or more of the teaching focused on ADR,¹⁴⁷ though most had elective ADR subjects.

VI CONCLUSION

As the Hon Michael Kirby points out, '[g]etting the relationship between courts and ADR right is itself an important challenge for us all'.¹⁴⁸ The adversarial system, despite its criticisms, remains an important source of justice. ADR processes offer powerful benefits. As the two systems evolve, it is important that the values and practices of each system are not confused. It is also important that lawyers understand their roles and responsibilities within each system and that tactical adversarialism — which has long been considered a problem in the adversarial system — does not spill over into ADR.

146 Scott, above n 136, 236, quoting Julie Macfarlane, 'What Does the Changing Culture of Legal Practice Mean for Legal Education?' (2001) *Windsor Yearbook of Access to Justice* 191, 209.

147 NADRAC, *Teaching Alternative Dispute Resolution*, above n 145, 9.

148 Kirby, above n 1, 21.