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Consequences of Power

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INTRODUCTION

This Article challenges a basic premise that litigants and their attorneys broadly understand and desire similar things from case processing leading up to and including litigation-track mediation, and have similar interests in the process that might end their litigation. In providing new empirical research from medical malpractice cases, I offer disconcerting evidence of the surprising degree to which perceptions, desires, and meanings actors ascribe to these litigation-track processes are not only diverse, but frequently contradictory. I demonstrate that notwithstanding their different allegiances, lawyers on all sides of cases have similar understandings of the meaning and purpose of litigation-track mediations. At the same time, plaintiffs and defendants have the same understandings and visions of what mediation "is" and how they wish to resolve their cases there, short of trial. Yet disputants' views are frequently opposed to those of legal actors, often including their own lawyers. I show this to be seriously problematic through one manifestation of these differences: the issue of defendant attendance at mediation. I argue that due to disparities in knowledge, power, and interests between litigants and attorneys, plaintiffs and defendants are regularly not afforded communication opportunities to address issues of prime importance to them during the processing of their cases. Thus, by examining case processing from a unique angle – that of juxtaposing actors' discourse on all sides of the same cases – this Article reveals inherent problems with the core workings of the legal system. This is something that current debates on formal and informal processing of litigated disputes have failed to capture.

Litigation-track mediations are increasingly well described and understood through a fast growing literature. However, current debates have largely focused on structural features, and have failed to critically analyze the process from actors' perspectives.[1] Although

1. Unlike most similar studies that have focused on structural features of litigation and mediation processes, some informed by a neo-systems theory perspective, this research applies interpretive theory, drawing on an agency-structure paradigm to make sense of the data. Thus, the research focuses on recovering actors' understandings and meanings affecting their actions within the interface of social structure – here, the litigation and mediation processes. *See generally* PIERRE BOURDIEU, OUTLINE OF A THEORY OF PRACTICE 3, 21, 72 (1977); ANTHONY GIDDENS, THE CONSTITUTION OF SOCIETY: OUTLINE OF THE THEORY OF STRUCTURATION 5, 25, 50 (1984); ALFRED SCHUTZ, THE PHENOMENOLOGY OF THE SOCIAL WORLD xxi, xxiii, xxviii (1967); MAX

the understandings and desires of lawyers and clients during case processing have long been questioned by scholars, little empirical data exists on the inside workings of litigation-track mediations and how they are understood by the actors involved. For instance, legal research has documented regular defendant absences from litigation-track medical malpractice mediations. These absences have resulted in "face-to-face communication between defendant-physicians and plaintiffs being the exception rather than the rule in medical mediation, just as it is in other forms of mediation."[2] However, there has been a lack of deeper investigation into this aspect of case processing. Additionally, although the use of mediation as a means of dispute resolution represents a material transformation in the practice of law,[3] relatively little data exists from actors on attorneys' roles in this regard.[4]

It has been argued that law students "have learned little about encountering people in situations of stress and fashioning solutions to their problems in ways that are responsive to the human as well as legal dimensions of the problems."[5] Assuming this view is correct, how does this inadequacy affect litigation processes such as mediation?[6] I present evidence of attorneys' regular decisions and reasoning against having defendants present at litigation-track mediations regardless of court rules to the contrary and unbeknownst to most litigants. Yet, plaintiffs and defendants, having strikingly similar

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WEBER, WIRTSCHAFT UND GESELLSCHAFT 1 (A.M. Henderson & Talcott Parsons trans., J.C.B. Mohr 1957) (1922).

2. *See* Robert Gatter, *Institutionally Sponsored Mediation and the Emerging Medical Trust Movement in the U.S.*, 23 MED. & L. 201, 204-06 (2004).

3. *See* Kimberley Kovach, *Lawyer Ethics Must Keep Pace with Practice: Plurality in Lawyering Roles Demands Diverse and Innovative Ethical Standards*, 39 IDAHO L. REV. 399, 400, 403-04 (2003).

4. Jean Sternlight, *Lawyers' Representation of Clients in Mediation: Using Economics and Psychology to Structure Advocacy in a Nonadversarial Setting*, 14 OHIO ST. J. ON DISP. RESOL. 269, 275 (1999); Deborah Hensler, *A Research Agenda: What We Need to Know About Court-Connected ADR*, 6 DISP. RESOL. MAG. 15, 15 (1999).

5. Austin Sarat, *Lawyers and Clients: Putting Professional Service on the Agenda of Legal Education*, 41 J. LEGAL EDUC. 43, 43 (1991).

6. This issue is particularly important in light of mediation's popularity and institutionalization into the formal justice systems in many US jurisdictions and worldwide. This includes Canada, UK, Europe, Australia and a number of civil law jurisdictions. *See generally* MICHAEL PALMER & SIMON ROBERTS, DISPUTE PROCESSES: ADR AND THE PRIMARY FORMS OF DECISION MAKING 148 (1998); Nadja Alexander, *Global Trends in Mediation*, 13 WORLD ARB. & MEDIATION REP. 272, 272-73, 275 (2002); Bobbi McAdoo & Art Hinshaw, *The Challenge of Institutionalizing Alternative Dispute Resolution: Attorney Perspectives on the Effect of Rule 17 on Civil Litigation in Missouri*, 67 MO. L. REV. 473, 475 (2002); Jacqueline Nolan-Haley, *Court Mediation and the Search for Justice through Law*, 74 WASH. U. L.Q. 47, 100 (1996).

comprehensions and needs, have significantly different understandings and agendas for the process as compared with legal actors. Litigants' and attorneys' diverse understandings and needs, coupled with their unequal knowledge and power relations frequently result in harm to both plaintiffs and defendants, as an opportunity for communication is eliminated in these often life-altering cases. In light of contingency fee realities, these mediations may represent disputants' only chance for communication within litigation. Thus, the findings analyzed here provide unique evidence suggesting that something within the processing of disputes is not being captured in the current discourse on formal and informal justice.

By providing generally elusive empirical data from litigants themselves on their understandings of case processing,[7] this Article offers new insight into the little known, yet critical, area of litigants' hidden agendas for litigation and mediation.[8] In light of the sensitive subject matter in these cases, views of defending physicians are even more rarely heard than those of plaintiffs. Although valuable work has been undertaken, such as Sarat and Felstiner's observations of US divorce lawyers and their clients,[9] overall little in-depth empirical knowledge exists on litigants' dispute perceptions[10] and their agendas for litigation and mediation.[11] Gaining access to all sides' perspectives (particularly disputants) within ongoing litigated cases often proves impossible, underscoring why such studies are rarely

7. *See generally* Chris Guthrie, *The Lawyer's Philosophical Map and the Disputant's Perceptual Map: Impediments to Facilitative Mediation and Lawyering*, 6 HARV. NEGOT. L. REV. 145, 165 (2001); Neil Vidmar, *The Small Claims Court: A Reconceptualization of Disputes and an Empirical Investigation*, 18 L. & SOC'Y REV. 515, 515 (1984).

8. *See* Tamara Relis, *Civil Litigation from Litigants' Perspectives: What We Know and What We Don't Know About the Litigation Experience of Individual Litigants*, *in* STUDIES IN LAW, POLITICS AND SOCIETY 174-77 (Austin Sarat & Patricia Ewick eds., 2002).

9. On diverse dispute understandings and case transformations by divorce lawyers, *see generally* Austin Sarat & William Felstiner, *Law and Social Relations: Vocabularies of Motive in Lawyer/Client Interaction*, *in* THE LAW & SOCIETY READER (Richard Abel ed., 1995); Austin Sarat & William Felstiner, *Law and Social Relations: Vocabularies of Motive in Lawyer/Client Interaction*, 22 L. & SOC'Y REV. 737, 739-42, 766-67 (1988); Austin Sarat & William Felstiner, *Law and Strategy in the Divorce Lawyer's Office*, 20 L. & SOC'Y REV. 93, 116-17 (1986).

10. *See* Guthrie, *supra* note 7, at 145, 165.

11. *See* Jean Sternlight, *ADR Is Here: Preliminary Reflections on Where It Fits in a System of Justice*, 3 NEV. L.J. 289, 289 (2003); Gregory Todd Jones, *Fighting Capitulation: A Research Agenda for the Future of Dispute Resolution*, 108 PENN ST. L. REV. 277, 284 (2003).

successfully undertaken.[12] Nevertheless, this does not diminish the importance of hearing disputants' voices in this context.[13]

The data presented here also contribute to the broader debates on whether the goals of lawyers and clients inevitably diverge, as well as whether lawyers intensify or moderate legal conflict.[14] The findings likewise challenge the conversation in the lawyering theory literature, which asks questions such as: How do attorneys understand what a particular client's "problem" is? What "facts" do attorneys perceive and what "facts" escape them? Are there serious disparities between the public's and the profession's sense of what constitutes conflict "resolution"? Is the law adequately serving clients' needs?[15] It has been suggested that "in light of the tensions inherent in lawyer-disputant relationships, disputants' views on mediation might diverge from those of their lawyers."[16] In testing this issue empirically, the findings analyzed here challenge the unfettered praise of mediation[17] as an opportunity for empowerment[18] and

12. *See generally,* Nancy Welsh, *Stepping Back Through the Looking Glass: Real Conversations with Real Disputants About Institutionalized Mediation and Its Value*, 38 OHIO ST. J. ON DISP. RESOL. 573, 604-05 (2004); Margaret Thornton, *Equivocations of Conciliation: The Resolution of Discrimination Complaints in Australia*, 52 MOD. L. REV. 733, 733 (1989); Brenda Danet et al., *Obstacles to the Study of Lawyer-Client Interaction: The Biography of a Failure*, 14 L. & SOC'Y REV. 905, 905 (1980).

13. As Welsh notes, "listening to disputants voices should be particularly important in . . . democracies that proclaim the value and dignity of the individual and in a field that names disputants' self-determination as its fundamental underlying principle . . . essential for the maintenance of the legitimacy of the public institutions that embrace mediation." *See* Welsh, *supra* note 12, at 578, 605-06.

14. *See* Richard Abel, *What We Talk About When We Talk About Law*, *in* THE LAW & SOCIETY READER 6 (Richard Abel ed., 1995).

15. Richard Sherwin, *Lawyering Theory: An Overview What We Talk about When We Talk about Law*, 37 N.Y.L. SCH. L. REV 9, 42, 48 (1992).

16. *See* Welsh, *supra* note 12, at 573, 575, 597.

17. For examples of mediation's benefits generally, see Von Christiansen, *The Role of Reconciliation in the Mediation Process: Lessons From a Traditional Chinese Village*, 52 DISP. RESOL. J. 66, 72 (1997). For mediation benefits in medical disputes specifically, see, e.g., Alma Saravia, *Notes and Comments: Overview of Alternative Dispute Resolution in Healthcare Disputes*, 32 J. OF HEALTH & HOSP. L. 139, 139 (1999); Rita L. Gitchell & Andrew Plattner, *Mediation: A Viable Alternative to Litigation for Medical Malpractice Cases*, 2 DEPAUL J. HEALTH CARE L. 421, 459 (1999); Catherine Meschievitz, *Mediation and Medical Malpractice: Problems with Definition and Implementation*, 54 L. & CONTEMP. PROBS. 195, 198 (1991); Susan Polywka, *Mediation of Clinical Negligence Claims: A Pilot Scheme Endorsed by the NHS Executive in the Anglia and Oxford Region*, 3 CLINICAL RISK 80, 81 (1997); James W. Reeves, *ADR Relieves Pain of Health Care Disputes,* 49 DISP. RESOL. J. 14, 17 (1994); Edward Dauer & Leonard Marcus, *Adapting Mediation to Link Resolution of Medical Malpractice Disputes with Health Care Quality Improvement*, 60 LAW & CONTEMP. PROBS. 185, 199 (1997); Henry Brown & Arnold Simanowitz, *Alternative Dispute Resolution and Mediation*, 4 QUALITY HEALTH CARE 151, 153 (1995).

for disputant self-determination.[19] Likewise, the data challenge dominant understandings of how litigation-track mediation works in practice – something for which there is also a dearth of in-depth empirical knowledge representing any aggregate view.[20]

Consequently, I offer a new theory, in which the identities of attorneys and litigants in the context of litigation and mediation are reinvented to reflect this reality and to serve as a basis for meaningful legal reform. My theory necessitates revising conceptions about formal and informal case processing to reflect legal and lay actor groups' divergent understandings and aims. Underlying each actor group's disparate comprehensions and needs is an unlikely conceptual alignment between plaintiffs and defendants, distancing them from legal actors (including their own representatives). Lawyers are also notionally aligned, regardless of which side they are on. Each "new" conceptual group – i.e. (1) attorneys on all sides, and (2) disputing plaintiffs and defendants – ascribes similar meanings to these disputes and their resolution, wants similar things, and wants communication. However, these "new" groups do not want the same things nor do they speak the same "language" in describing these cases and their resolution. Thus, actors involved in dispute resolution create competing meanings of what resolution entails.

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18. *See* STEPHEN B. GOLDBERG ET AL., DISPUTE RESOLUTION NEGOTIATION, MEDIATION, AND OTHER PROCESSES 154-55 (3d ed., 1999); Robert Baruch Bush, *"What do We Need a Mediator for?": Mediation's "Value-Added" for Negotiators*, 12 OHIO ST. J. ON DISP. RESOL. 1, 29-30 (1997).

19. For a discussion of opportunities for disputant self-determination, *see, e.g.*, ROBERT BARUCH BUSH & JOSEPH FOLGER, THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION 2-3, 81 (1994); Kimberlee Kovach, *New Wine Requires New Wineskins: Transforming Lawyer Ethics For Effective Representation in a Non-Adversarial Approach to Problem Solving: Mediation*, 28 FORDHAM URB. L. J. 935, 939, 942-43, 952 (2001); Nancy Welsh, *The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?*, 6 HARV. NEGOT. L. REV. 1, 15-18 (2001).

20. *See, e.g.*, Deborah Hensler, *Our Courts, Ourselves: How the Alternative Dispute Resolution Movement Is Re-Shaping Our Legal System,* 108 PENN ST. L. REV. 165, 192, 195 (2003); Gregory T. Jones, *Fighting Capitulation: A Research Agenda for the Future of Dispute Resolution*, 108 PENN ST. L. REV. 277, 290-91 (2003); John Lande, *Toward More Sophisticated Mediation Theory*, 2000 J. DISP. RESOL. 321, 330; Craig A. McEwen & Roselle L. Wissler, *Finding Out if It Is True: Comparing Mediation and Negotiation Through Research*, 2002 J. DISP. RESOL. 131, 142 (2002); Jeffrey W. Stempel, *Forgetfulness, Fuzziness, Functionality, Fairness, and Freedom in Dispute Resolution: Serving Dispute Resolution Through Adjudication*, 3 NEV. L.J. 305, 353 (2003) [hereinafter, Stempel, *Serving Dispute Resolution*]; Jeffrey W. Stempel, *Identifying Real Dichotomies Underlying the False Dichotomy: Twenty-First Century Mediation in an Eclectic Regime,* 2000 J. DISP. RESOL. 371, 389 (2000); Welsh, *supra* note 12, at 573, 575, 597.

Furthermore, through the discourse of all actors involved in these disputes I argue that litigants' extra-legal needs should be afforded greater recognition during litigation-track processes such as mediation. This recognition should include ensuring that defendants in insurance-related and other cases are present at litigation-track mediations to address issues of material significance to both plaintiffs and defendants, regardless of their direct legal value. In an attempt to remedy the specific problem of defendants' absences from litigation-track mediations, I propose three recommendations: (1) "opt out" clauses within court rules or statutes on mandatory mediation that effectively allow defendants' absences "by agreement of the parties" should be changed, as they frequently de facto represent agreements made between attorneys alone; (2) lawyers, at a minimum, should attempt to bring at least a proportion of their defendant clients to these mediations in order to realistically assess what effects defendant participation has on their cases; (3) core legal education for law students, and continuing legal education and ethical rules for legal practitioners must provide greater emphasis upon litigants' extra-legal dispute realities and needs during case processing. These changes should alleviate certain important agency problems that have long afflicted lawyer-client relationships and should better address litigants' legal and extra-legal needs during litigation.

This Article proceeds as follows. Part I discusses the research methodology. Part II.A then describes how decisions on whether defendants attend litigation-track mediations are made in the context of both court-linked mandatory and voluntary litigation-track mediations. This is followed by attorneys' descriptions of their mediation experiences with defendants present. Part II.B then explores the reasoning behind both defense and plaintiff attorneys' attendance decisions, and analyzes what lies beneath attorneys' reasoning. Part III presents data on the surprisingly uniform understandings and needs of plaintiffs and defendants on the issue of who should partake in their cases' mediations. Defendant doctors' views in Part III.A are followed by those of plaintiffs in Part III.B. Part IV summarizes the findings and suggests three changes to address the problems discussed. I then consider objections to these proposals, and address how they do not, either individually or in combination, operate to sufficiently undermine the foregoing analysis.

I. Research Methodology

The research methodology was based predominantly on a qualitative paradigm, using a multiple case study design. Interviews were

undertaken and questionnaires administered as soon as possible after each mediation. The primary data derives from 131 in-depth interview, questionnaire, and observation files of actors (plaintiffs, defendants, lawyers, mediators) involved in 64 mediations of the same or similar medical disputes, frequently involving fatalities or serious injuries. This includes 17 plaintiff interviews, 13 physician interviews, 27 plaintiff lawyer case interviews, 17 defense physician's lawyer case interviews, 23 defense hospital lawyer case interviews, two hospital representative/insurer interviews, and 29 mediator case interviews. The data breakdown for this topic was smaller than the complete dataset as not all interviews covered all topics. Data on the issue of defendant attendance derives from 15 case interviews with nine physician's lawyers, 14 case interviews with nine hospital lawyers, 23 case interviews with 16 plaintiff lawyers, and 25 case interviews with 15 mediators. Because the attendance issue hinged upon individuals' opinions regardless of case details, to most accurately illustrate the findings on this topic, percentages in the charts have been based upon the number of individuals interviewed who discussed attendance, and not upon the larger number of interviews I may have had with them relating to different cases. This occurred as some lawyers and mediators were repeatedly listed on the court or mediation institutions' files as acting in the various cases. Nonetheless, I obtained a wide range of exposure to different professionals. Accordingly, I am not aware of any bias resulting from the cases included in the study.

Stringent confidentiality protections in legal practice and mediation necessitated obtaining consent from each participant involved in each dispute on a case-by-case basis (plaintiffs, plaintiff lawyers, physicians, physician's lawyers, hospital lawyers, hospital representatives, insurers). Having obtained consent from virtually all actors in a case, if only one individual objected to partaking in the research, interviews with willing participants could not be included in the study. There were particular difficulties in accessing defendant physicians. This was due to a number of factors. Some physicians chose not to participate in the research because they did not want to relive the experience of being sued, because of the sensitivity of the matters involved, or because of busy work schedules. Additionally, in numerous cases it appeared to be the physician's lawyers who decided against their clients' participation in the study. One possible reason for this in ongoing litigated cases may have related to the fear that notwithstanding my confidentiality agreement with all participants any side in the litigation could attempt to subpoena my interview

notes. In view of the importance of obtaining a fully rounded view of the process from parties on all sides, as well as the fact that defendant physicians' views in this context are generally not heard, physicians who had undergone the College of Physicians and Surgeons' ("College") traditional mediations (often pre-litigation) were also contacted. Of the 13 defendant physician interviews, nine related to College mediation experiences.

College mediations were similar to litigation-track mediations in many respects. Although unable to order financial compensation, some College mediations were precursors to litigation, indicating complainants' similar mindsets to litigating plaintiffs. Likewise, physicians at these mediations did not know whether complainants would take further legal action. Thus, defending physicians underwent the same experiences in that they were subject to legal repercussions, or the threat of legal or other serious professional and personal repercussions. Complaints could remain on physicians' records throughout their careers, affecting physicians' future work opportunities and forcing some to relocate. Other similarities included: attendance was pseudo-mandatory in that physicians opting not to attend resulted in disputes being decided in a Discipline Committee hearing, likened by some to a trial; physicians predominantly attended with lawyers; complainants also generally had legal advice; some of the mediators were lawyers; a number of non-lawyer mediators also mediated in litigation-track mediations; and mediations were sometimes conducted in lawyers' offices. Subsequent to these mediations, complainants either dropped their cases or filed lawsuits.[21]

Analysis of participants' discourse was facilitated by the Atlas.ti qualitative analysis computer program, enabling grounded theory. The dataset was segmented into 5508 coded quotes, utilizing 2617 codes, which were later grouped into 263 code families, e.g., litigation aims, mediation aims, views on attendance, representing the main areas of analysis covered by the topic guides and questionnaires. The observation data was coded using the same coding framework as that utilized for the rest of the dataset.[22] The integrity of the data was

21. *See* The College of Physicians and Surgeons of Ontario, *General College Information*, http://www.cpso.on.ca/About_the_College/geninfo.htm (last visited March 3, 2007). The College mediation system covered during the Fieldwork Period differs from the one used today.

22. *See generally* GERHARD FASSNACHT, THEORY AND PRACTICE OF OBSERVING BEHAVIOUR 57, 60-61, 82 (Christina Byrant trans., Academic Press 1982) (1979) (setting out an observational methodology).

carefully preserved and triangulation of methods utilized to enhance internal validity.[23] As to external validity, not only were natural groupings (social segmentation) used enabling generalizations to wider populations as is common in qualitative research and similar projects, but by approaching all medical mediations in the research sites conducted during the Fieldwork Period of May 2000 to October 2001 a form of census was also conducted allowing for generalizations outside respondent groups (e.g. the court office provided me with weekly updates on impending medical mediations and participants from their 'Sustain' database).[24] Although the nature of the sample excluded the possibility of meaningful regression and multivariate analysis, a small amount of quantitative analysis was also undertaken, utilizing descriptive statistics to assess percentages and proportions of particular responses and to evaluate, as far as the data permitted, the strength of any associations between certain variables such as individuals' views/perceptions and their genders or actor positions.

Of course, as in all such research a number of methodological weaknesses exist. As with similar qualitative legal research the fact that a random probability sample was impossible to obtain limits the generalizations that can be made from the findings across populations. There are also inherent risks in extrapolating without qualification from one location to another. However, it is acceptable to generalize thematic conclusions. Additionally, the small number of directly observed mediations (seven), due to permission difficulties, can be seen as a weakness. To counter this weakness, observation data was used solely to support or contradict interview and questionnaire data. Due to the small numbers within each actor group, the findings must be regarded as tentative. However, in support of what the findings can say as to general legal and mediation practices, although I looked at particular respondents in particular institutions, there is no a priori reason to think that these findings would be different from other mediations in other culturally similar jurisdictions.

23. In cases that comprised two or more plaintiffs, each was interviewed in different locations.

24. *See, e.g.,* LINDA MULCAHY ET AL., MEDIATING MEDICAL NEGLIGENCE CLAIMS: AN OPTION FOR THE FUTURE? (2000); Thomas Metzloff et al., *Empirical Perspectives on Mediation and Malpractice,* 60 LAW & CONTEMP PROBS. 107, 112-13, 123-25 (1997).

II. Lawyers as Attendance Arbiters Reflecting Existing Allocations of Power

> In insurance litigation, a lot of times the defense will not bring the defendant. Now, this is against the case law. There have been rulings by the ADR masters that everyone has to be there. So what happens is . . . I get the consent of all parties . . . that if someone's not there everyone consents to proceed; which is really the poor way.[25]
>
> – Male lawyer-mediator at a mandatory mediation

> I have had but one physician attend out of in excess of 100 voluntary mediations . . . as a plaintiffs' counsel. So they just don't show up.[26]
>
> – Male plaintiff lawyer referring to voluntary mediation

This Part discusses the existing allocation of power in terms of the behind-the-scenes decisions on who attends court-ordered or voluntarily arranged medical malpractice mediations for cases on trial lists. By exploring the views of legal actors on defendant participation at mediations, followed by a comparison of disputants' perspectives, certain important realities become evident. Through the conduit of analysis on the attendance issue, the data additionally provide insight into the diverse meanings and purposes ascribed to litigation-track mediation itself by each of its actor groups. In looking deeper, the findings represent much more than simply the matter of mediation participation. They address perplexing questions such as, what was the real nature of these serious disputes that were proceeding down the litigation-mediation route? To whom did these disputes belong? What did mediation mean to its actors? Part II.A highlights the fact that plaintiff and defense attorneys are the de facto "attendance arbiters." This is followed by legal actors' descriptions of their mediation experiences with defendants present. Part II.B explores physician's lawyers', hospital lawyers' and plaintiff lawyers' proffered reasoning for their views on defendant participation in mediations, and examines what lay beneath these views.

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25. Tamara Relis, Parallel Worlds of Disputes and Mediation: Disputants, Lawyers and Gendered Actors' Perspectives (forthcoming 2008). (All quotes referenced to the author's book can be found in chapter 4 unless stated otherwise).

26. *Id.*

A. *The Attendance Arbiters*

> The court-linked mediations . . . are not party-oriented. They're solution-oriented.[27]
>
> – Female non-lawyer mediator (describing experiences with voluntary & mandatory mediations)

Defendant absence from medical malpractice mediations has been reported in the scant empirical research in this area. For instance, notwithstanding that North Carolina courts require the presence of all parties at mediation (unless all lawyers and mediators involved have agreed otherwise),[28] court files in a study by Metzloff et al. indicated that defendant physicians in North Carolina were frequently absent from mediations.[29] Likewise, in the Wisconsin panel mediation program, defendant doctors were absent 35 percent of the time.[30]

In the present study, defendant physicians did not attend most litigation-linked mediations, be they voluntary or mandatory. This was evident from the discourse of virtually all legal actors.[31] For

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27. *Id.*

28. N.C.R. Implementing Mediated Settlement Conferences in Super. Ct. Actions Rule 4 (1991) (amended 1995).

29. Metzloff, et al., *supra* note 24.

30. *See* CATHERINE MESCHIEVITZ, MEDIATING MEDICAL MALPRACTICE CLAIMS IN WISCONSIN: A PRELIMINARY REPORT 17 (1990); Catherine S. Meschievitz, *Efficacious or Precarious? Comments on the Processing and Resolution of Medical Malpractice Claims in the United States*, 3 ANNALS HEALTH L. 123, 135 (1994). *See generally* WIS. STAT. ANN. § 655-56 (2004); WIS. STAT. ANN. § 655.42-455.68 (2004) (setting out attendance rules).

31. The research methodology was based predominantly on a qualitative paradigm, using a multiple case study design. For an in-depth discussion of the methodology utilized in this work, see *supra* Part I. Data was systematically collected from three mediation sites in Toronto conducting traditional mediations, from May 2000 to October 2001. These included the ADR Chambers (the largest voluntary alternative dispute resolution provider in Canada with mediators being retired judges and senior counsel), the Ontario Court-Linked Mandatory Mediation Program ("MMP"), and the College of Physicians and Surgeons ("College") mediations – the latter two sites having lawyer and non-lawyer mediators. ADR Chambers' voluntary mediations occurred only when lawyers wanted to mediate, being generally late in the litigation process as all cases were already on trial lists. *See* ADR Chambers, *ADR Chambers: Mediation*, http://adrchambers.com/mediationintro.htm (last visited March 3, 2007). David Lees, *Justice Out of Court: With Our Legal System Clogged with Civil Litigants and Costs Spiraling out of Control, Canadian Firms Have Learnt a Lesson from Their U.S. Counterparts: Mediation Really Is the Better Way*, The Financial Post (Toronto), May 1, 1998 at 23, 25, 28. The mandatory court-linked mediations are similar to many US court-connected programs (and to those in other provinces). They occurred in a variety of locations (predominantly in lawyers' offices) around Toronto. Although adjournments were not uncommon, mediations generally had to occur within 90 days after the first defense had been filed, unless the court ordered otherwise. *See* ONT. R.

court-mandatory mediations, Rule 24.1.11 of the Ontario Rules of Civil Procedure requires all litigants and their lawyers to attend mediations or face monetary penalties, unless a court imposes an order to the contrary.[32] While the rule clearly includes named defendant doctors (and nurses), defendant attendance was not commonplace in any mediation, mandatory or voluntary. Instead, defendants' lawyers generally attended alone (sometimes accompanied by insurance representatives and/or hospital representatives). Prior agreement between the "parties" generally provided a way out of the court rule. For voluntary mediations, defendants virtually never attended. Consequently, I sought to delve deeper into the attendance issue and to examine actors' underlying perceptions and understandings in order to better comprehend why it was that parties to disputes, generally extremely serious in nature, were regularly not participating in the mediation of those disputes. The results were surprising.[33]

First, views from the bulk of legal actors in all groups clearly indicated that in the vast majority of instances, defendants' lawyers, plaintiffs' lawyers or both were responsible for whether or not defendants (and in some cases plaintiffs) attended mediations, be they mandatory or voluntary.

> Normally I don't take my doctors to my mediations . . . I never had one there. *Do they want to go?* Um, no. *No.* I've never really canvassed it with them to tell you the truth. Most of them don't. I mean, if they're busy, um, it's stressful, uh, because it's just dollars and cents . . . . But I don't think they can play a significant role . . . .[34]
>
> – Male physician's lawyer

> The more logical and rational, and less emotional the physicians are, the more likely it is that I'm going to say to them 'Why don't you come?'[35]
>
> – Female physician's lawyer

CIV. P. 24.1.09. Therefore, mandatory mediations generally took place prior to discoveries (as opposed to afterwards as in many US states). *See* Julie Macfarlane, *Culture Change? A Tale of Two Cities and Mandatory Court-Connected Mediation*, 2002 J. DISP. RESOL. 241, 244. Disputes that did not settle at mediation continued down normal litigation routes. *See* Ontario Ministry of the Attorney General, *Ontario Mandatory Mediation Program: Fact Sheet on the Mandatory Mediation Program, available at http://www.attorneygeneral.jus.gov.on.ca/english/courts/manmed/notice.asp* (last visited March 3, 2007).

32. Ont. R. Civ. P. 24.1.11(1).

33. *See supra* Research Methodology in Part I.

34. RELIS, *supra* note 25.

35. *Id.*

The situation appeared to be the same with hospital defense attorneys.

> I haven't seen too many where we wanted to have the nurse there.[36]
>
> – Female hospital lawyer

In light of lawyers' roles as "attendance arbiters" coupled with the fact that defendants generally did not attend litigation-track mediations, I paid particular attention to lawyers' descriptions of their experiences in mediations where the defendants were present. Given that lawyers most commonly decided against defendant participation in mediations, one would have expected their experiences with physicians at mediations to have been negative. Interestingly, most lawyers had few or no mediation experiences with physicians present. Of the four with such experience, it was striking that no lawyer stated that it would have been better if the defendant had not attended. In fact, all experiences were depicted positively. Lawyers generally found it helpful to have doctors present in a variety of situations, including where the doctor could explain a causation issue and where the mediator has to resolve a credibility issue. As examples,

> *You have been to one voluntary mediation with the physician there. How did that go?* It was fine. I mean, because there was a credibility issue of who said what to who when. It was somewhat important for the mediator to listen to both people. So it was okay. But it was okay primarily because that was the purpose; and the individuals involved both went about it in a businesslike way. *The plaintiff and physician?* Yes.[37]
>
> – Male plaintiff lawyer

> *Have you ever attended with physicians present?* Yes. Only once. *How did that go?* From what I recall, it was very helpful. But in that case there was absolutely no chance for settling unless the plaintiff was walking away. And it was helpful because the plaintiff came to that realization. So, yes, it made the case go away. So it was helpful in that sense . . . . But for the most part, I don't think the presence of the physician is critical.[38]
>
> – Female physician's lawyer

Moreover, some descriptions of mediation experiences with defendants present included references to the fact that both plaintiffs and defendants themselves benefited from these encounters. For instance,

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36. *Id.*
37. *Id.*
38. *Id.*

> A woman complained of chest pains, was taken to the hospital and released. She had a heart attack and died the next day. So we sued the doctor who examined her. And he was able to go through all of the extra tests he went through and the fact that he dug up her old EKG charts and compared new ones to them. And it became obvious in a way that it hadn't been before, that the guy really spent time, went the extra mile to satisfy himself that she was okay . . . I learned this at the mediation . . . The clients also realized that their mother hadn't been given this mistreatment in the hospital . . . I think it helped the plaintiffs accept that we're going to drop our case against the doctor but it's not like he's getting away with murder . . . .[39]
>
> – Male plaintiff's lawyer

> *Do you feel there was any benefit to the physicians*? In the two cases I've had with physicians there . . . yes. . . . . There was something positive in . . . trying to address the issues from all sides, in the presence of both parties . . . the doctors' side was there. . . . . They wanted their point of view put forward . . . to have it understood that this is their explanation. They didn't do anything wrong, or they didn't mean to do anything wrong . . . .[40]
>
> – Male physician's lawyer

Still, most lawyers were inclined not to have defendants present at mediations. One reason may have been lawyers' own comfort levels. As one specialist lawyer noted,

> I only had one occasion when the physician was there. Um, I don't think it interfered with the, uh, process; may even have been conducive to the process. Oddly enough, just because maybe it's what you're used to. I, um, actually felt a little uncomfortable myself. I was the plaintiff's counsel. I had to change my way of expressing myself. My sense is that there could be a lot of cases where, from a plaintiff's counsel point of view, I think it might not at all be a good idea. That particular case . . . went pretty good. It went much better than I anticipated. And I don't know whether that is just because I was anticipating the worst and it didn't happen, or that physician was truly unique, or you know, all physicians could benefit from being at these things. But it's just so foreign to have the physician right there.[41]
>
> – Male plaintiff and physician's lawyer

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39. *Id.*
40. *Id.*
41. *Id.*

Other attorneys surmised that physician's lawyers did not want doctors at mediation because of a fear they would divulge too much information (both about themselves as well as the disputed incidents), equating mediation with an "informal" or a "free" discovery process where opponents would "get to hear what happened." Accordingly, what lay behind the views of lawyers in each legal actor group is examined in Part II.B, to more fully examine the phenomenon of defendant absences from litigation-track mediations.

B. *Attorneys' Reasoning on Defendants' Mediation Attendance*

> There's an issue that we as a profession ought to talk about frankly. This business is about winning cases [pause]. And maybe it shouldn't be. Because if we make winning cases the ultimate objective . . . if I am a defense counsel, I don't want to tell anybody anything for as long as I possibly can. My tactics are to capitalize on the ability to provide as much information in as controlled a fashion as late as possible, in order to catch the other side by surprise – because that will maximize my chances of winning a case. My client will be far happier with me than if I lose. That's the truth. And for plaintiffs it's the same thing.[42]
>
> – Male plaintiff and physician's lawyer

Each lawyer group was asked about their views on defendant attendance at mediation. Mediators' views (including lawyer-mediators) were additionally sought in order to provide greater insight into this issue from the non-disputant standpoint. Despite defendant non-attendance norms, a substantial proportion of actors in each lawyer group discussed reasons both for and against physician attendance. However, no physician's lawyers and only a minority of plaintiff lawyers solely proffered reasons in favor of defendants attending mediations. In sharp contrast, the majority of the mediators spoke only of reasons why defendants should attend.[43]

The data was then sub-divided into the particular explanations proffered by actors on this issue. The charts below illustrate non-disputants' expressed reasoning, highlighting the overall similarities in thinking of legal actors, regardless of their roles.[44]

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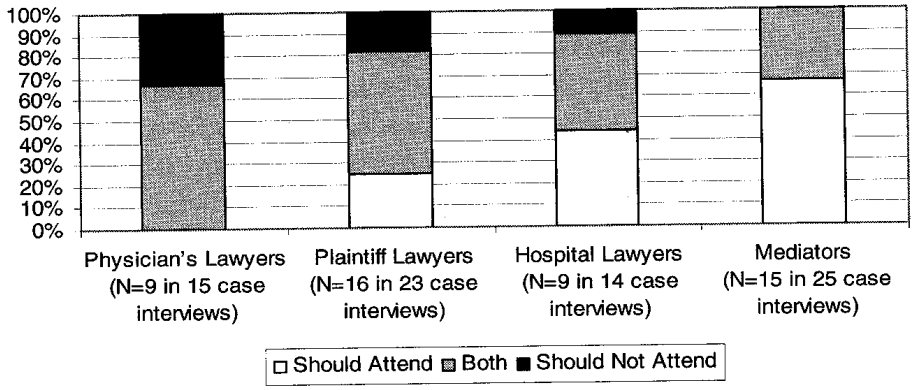
42. *Id.*

43. *See* FIGURE 1, *infra*.

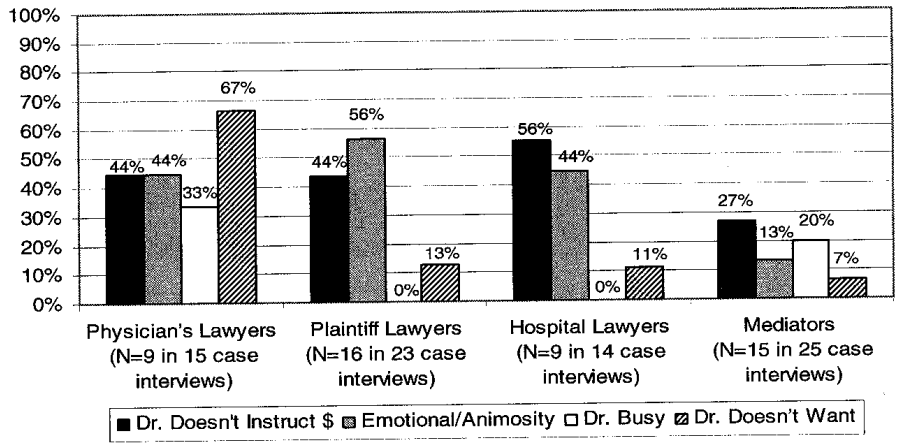
44. Despite defendant non-attendance norms at mediation, interestingly a similar and material proportion of actors in each lawyer group discussed reasons both for and against physician attendance. Yet, it was only in the mediator group (including lawyer-mediators) where the majority spoke only of reasons why defendants should attend – with no members speaking solely against defendants' presence.

FIGURE 1. NON-DISPUTANTS' VIEWS ON DEFENDANT PHYSICIANS' ATTENDANCE AT MEDIATION



The fact that legal actors in all groups offered similar reasoning against defendant attendance as compared with the mediator group was interesting. The two most frequently cited reasons against doctors' mediation participation – that it raises emotions and that doctors do not instruct on money – provide significant insight into the

FIGURE 2. NON-DISPUTANTS' REASONS AGAINST DEFENDANT ATTENDANCE AT MEDIATION



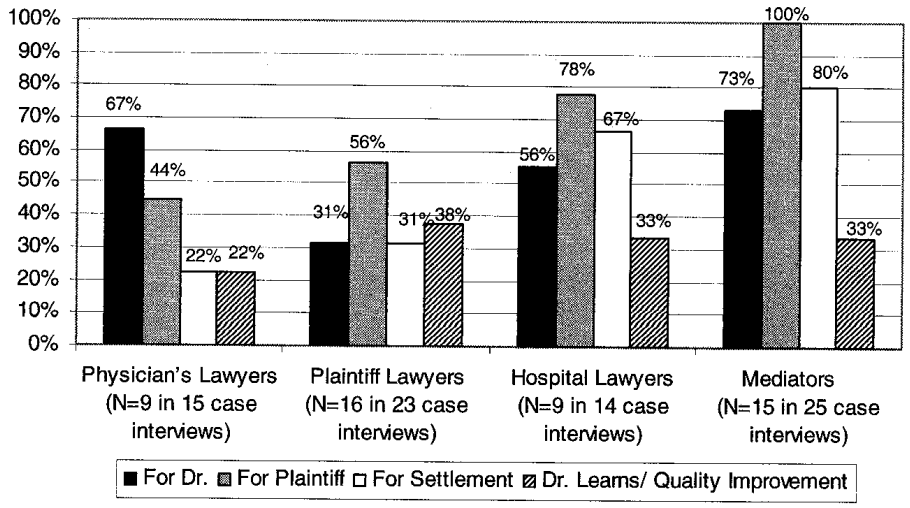
stance of legal actors, as will be seen below. The majority view of physician's lawyers – that defendant doctors did not want to attend mediations – will be further examined from physicians' perspectives in Part III below.

Other studies have reported similar reasons for defendant non-attendance at mediations. For instance, in a North Carolina study, reasons offered for physicians' mediation absences included busy schedules, travel difficulties and decisions made by defense lawyers

and insurers that physicians' attendance would be counter-productive (as either plaintiffs' or defendants' anger or animosity was perceived as an obstruction to reaching settlements).[45] Similarly, in a Canadian study of mediated civil cases entailing various dispute-types, there were differing opinions on the appropriateness of mediation for emotion-laden cases, with some lawyers of the view that settlements would be far more elusive in mediations where emotions ran high.[46]

Articulated reasons in favor of defendants' mediation attendance were also examined. These included "for the benefit of the plaintiff," "for the benefit of the physician," and "to encourage settlement." The first two reasons demonstrated, at least in part, extra-legal considerations not critical for fiscal or legal settlement of particular disputes. These reasons included psychological, emotional, learning, and understanding issues. Thus, they were termed "extra-legal reasons" for attendance.[47]

FIGURE 3. NON-DISPUTANTS' REASONS IN FAVOR OF DEFENDANT ATTENDANCE AT MEDIATION



Several interesting points emerged.[48] First, most actors in each non-disputant group did not mention physicians' learning as a reason

45. Metzloff et al., *supra* note 24, at 125.

46. *See* JULIE MACFARLANE, COURT-BASED MEDIATION OF CIVIL CASES: AN EVALUATION OF THE ONTARIO COURT (GENERAL DIVISION) ADR CENTRE TORONTO: Ontario Ministry of the Attorney-General, Queen's Printer for Ontario (1995).

47. *See* FIGURE 3, *supra*.

48. Notwithstanding physician and plaintiff lawyers regularly deciding against having doctors at mediation, the majority in each group noted that attendance could help their clients personally. The fact that only a minority of these legal actors (as

why they should attend mediation. A disparate picture emerged when speaking to physicians themselves, as will be seen below. Second, in contrast to the majority of plaintiff and physician's lawyers who did not feel that defendant attendance could assist settlement, the bulk of mediators did feel this way. Mediators, who seemed much more focused on the process, may have wanted doctors there because they wanted a particular kind of settlement (one in which the doctor accepts responsibility) and not just any settlement (which could be achieved by adjudication).[49] Nevertheless, this suggested, at least in part, a paradoxical situation. On the one hand, lawyers wanted settlement but chose not to bring defendants to mediation for various reasons. On the other hand, mediators, chosen and judged by lawyers based on their settlement rates, were mostly of the view that defendants' absences adversely affected their abilities to facilitate settlements.

Third, it was intriguing that a greater proportion of hospital lawyers felt plaintiffs could benefit by seeing physicians at mediation than did plaintiffs' own lawyers. This may have been a function of the different tactical position hospitals were in vis-à-vis the other lawyer groups. It may also have been related to the gender makeup of the actor groups. Claimants' lawyers were 88 percent male and 12 percent female, whereas hospital lawyers were 33 percent male and 67 percent female. Indeed, despite defendant absence norms, gender differences were evident in lawyers' discourse overall on this issue, suggesting that gender was a factor affecting how lawyers viewed disputes.[50] In contrast to males' views on defendant attendance, female

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opposed to the majority of mediators) felt that defendants' presence could assist settlement chances may provide an explanation.

49. Comments on manuscript from Richard Abel, UCLA Law School, to author (Sept. 5, 2005) (on file with author).

50. My literature review revealed no similar empirical research examining this issue. Indeed, it has been argued that no systematic empirical studies have looked at gender-based differences in lawyers and parties in dispute resolution. *See, e.g.*, Stempel, *Serving Dispute Resolution, supra* note 20, at 310-12. For debates on gender and dispute resolution theory, see generally Steven N. Subrin, *A Traditionalist Looks at Mediation: It's Here to Stay and Much Better Than I Thought*, 3 NEV. L.J. 196, 207-08 (2003) (noting the lack of empirical evidence, but speculating that women may be better suited temperamentally to mediation than males; arguing that women may be more sensitive to disputants' relationships and relational facets of disputes). Likewise, utilizing Carol Gilligan's findings, Menkel-Meadow posits that females' different moral reasoning to males, being motivated by an ethic of care rather than a more abstract rights-based stance may result in women having a greater natural inclination for mediation and a greater sense of empathy with the opposing side. Carrie Menkel-Meadow, *Portia in a Different Voice: Speculations on a Woman's Lawyering Process*, 1 BERKELEY WOMEN'S L.J. 39, 43, 52 (1985). *See also*, Deborah M. Kolb & Linda L. Putnam, *Through the Looking Glass: Negotiation Theory Refracted Through*

attorneys spoke more often of extra-legal considerations and reasons in favor of defendants' attendance and less often of tactical reasoning against having defendants present at mediation. This suggests that female lawyers may ascribe different meanings to conflict and its resolution as well as to the mediation process itself, with women more likely to view it as a forum for resolving both human and legal issues.[51]

1. *Defense Physician's and Hospital Lawyers' Views*

> *Do you think it helps plaintiffs to have defendants there or not?*
> Oh, I have no idea what goes through the minds of plaintiffs.[52]
> – Male physician's lawyer

All plaintiffs' lawyers offered reasons why doctors should not attend mediations. It was particularly noteworthy that a substantial minority (44 percent) acknowledged that physician attendance could assist plaintiffs, with only one lawyer articulating that plaintiffs actually wanted physicians at mediation. This tied in with other findings from the dataset that virtually all physicians' defense lawyers were of the view that these disputes were solely about money as far as plaintiffs were concerned.[53] These lawyers' often-stated reason

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the Lens of Gender, *in* WORKPLACE DISPUTE RESOLUTION: DIRECTIONS FOR THE 21ST CENTURY 231, 235 (Sandra E. Gleason ed., 1997); LINDA BABCOCK & SARA LASCHEVER, WOMEN DON'T ASK: NEGOTIATION AND THE GENDER DIVIDE, 41-61, 102-03 (2003) (discussing findings of several studies on differences in gender approaches to negotiation); Amy Cohen, *Gender: An (Un)Useful Category of Prescriptive Negotiation Analysis?* 13 TEX. J. WOMEN & L. 169 (2003); Carrie Menkel-Meadow, *Teaching about Gender and Negotiation: Sex, Truths, and Videotape*, 16 NEG. J. 357, 359 (2000).

51. Due to small numbers resulting from subdivisions, groups were combined. When looking at all lawyers combined (ten females; twenty-three males), females (10/10 or 100%) spoke more often than males (12/23 or 52%) of disputants' extra-legal needs (psychological, emotional, understanding, learning, etc.) when considering whether defendant physicians should attend mediations. Similarly, when examining solely defense lawyers' discourse (eight females; nine males), all females (8/8) but only 56% (5/9) of males mentioned litigants' extra-legal needs. To further test this finding and in light of the fact that material numbers of lawyers discussed reasons both for and against defendant attendance, views against attendance were also examined. These related solely to tactical reasons against having doctors present at mediations. Yet here too, the findings were similar. When looking at all lawyers combined, 83% (19/23) of males but only 60% (6/10) of females discussed tactical reasons against physician presence at mediations. Likewise, when considering solely defense lawyers, 89% (8/9) of males but only 63% (5/8) of females discussed tactical reasons against defendants' attendance at mediations. As the plaintiff attorneys' group consisted of only two females, this precluded meaningful analysis of their group alone. For an in-depth discussion of the gender issue, see generally RELIS, *supra* note 25.

52. *Id.*

53. *See id.* at ch. 2.

against attendance – that doctors did not instruct them on monetary issues – further built on this theme.

Yet, what was particularly intriguing from the overall views of physician's lawyers was that despite non-attendance norms and reasons for decisions against doctors' presence at mediation, most physician's counsel (67 percent) at the same time noted that attendance could benefit defendant doctors personally (e.g., hearing their side being put forward, facing plaintiffs, hearing plaintiffs' perspectives). Indeed, virtually all physician's attorneys noted in their questionnaires that underlying issues were "much more important" or "about as important" to their clients as compared with financial compensation. Yet, these lawyers did not seek to ensure that their physician clients attended these mediations so as to provide them with the opportunity to attempt to address these underlying issues.[54] In light of the fact that only 22% felt doctors' presence could assist settlement chances, there appeared to be an inherent dissonance between lawyers' understandings of the meaning and purpose of mediation as compared with those of disputants. The following quotes elucidate physician's lawyers' views.

On doctors not instructing about money:

> First of all, the doctor's not the decision-maker on what's going to make the plaintiff happy, which is money. Plaintiffs are looking in the vast majority of cases for compensation for their injuries, financial compensation. Doctors don't decide that. So I don't see a purpose, a role for them at these mediations . . . I settled a bunch of these cases at mediation that I've never taken the doctor to. I don't think they need to be there. They don't give us instructions in terms of how much money to pay. So the doctor sitting there is not going to make a difference.[55]
>
> – Male physician's lawyer

On emotions and animosity:

> I don't like the emotional component. I really don't. I think there are other places for it. *You don't see any benefit for either side by physicians attending?* No. I don't think doctors need to have that, eh, thing. And I'm not sure it's productive . . . . Because this isn't an opportunity for doctors to feel better . . . . For the most part, I don't think that the presence of the physician is

54. Both physician and hospital attorneys effectively had two clients in each case: the physician or hospital and the insurer.

55. RELIS, *supra* note 25.

> critical. I know that's contrary to the whole concept of mediation that parties have an opportunity to speak. But again, it just raises the emotions up, without any resolution . . . .[56]
>
> – Female physician's lawyer

Others made similar comments, including the explanation that doctors did not want to attend. Yet, at the same time, it was generally accepted that physicians themselves could benefit by attending mediations.

> I see no need to have the client there . . . . These cases are very often won by experts. . . . . Very often, I think *defendants* pose a greater risk of being uh, a stumbling block . . . . I've never found the defendant to be particularly helpful. And very often uh, simply get in the way at mediation in terms of getting a resolution . . . . *Any benefit to physicians themselves*? Sure, I mean clients are always interested in how these things are resolved . . . . But I don't think they add to uh, the environment, in terms of a "successful" mediation. It's [the] insurers' call . . . . Defendants would have to be persuasive, in terms of what they can add. And if they can't add anything, my practice is simply not to have them there.[57]
>
> – Male physician's lawyer

> Quite frankly I think it might be a detractor to it, to have them all sitting in the room . . . because there's . . . a lot of animosity that they don't have towards us . . . and a lot of physicians are quite upset about being sued . . . . I think the animosity could be a deterrent to it . . . . So I don't see a role for physicians; I don't see a benefit . . . . I've never seen a reason at mediations, where I said 'Gee I wish the doctor was here. We could have settled that case if he'd been here.' . . . . Plaintiffs are . . . not there to help educate the doctor, you know, on his misdeeds. The doctors by that point aren't in a position where they want this opportunity to vent. And if that's what they want, it's probably not going to help settle the case. It might make him feel better. I don't know.[58]
>
> – Male physician's lawyer

Notwithstanding a few physician's lawyers commenting on the benefits of physician attendance, overall these attorneys were firmly situated in the anti-attendance camp.[59] Few physician's lawyers addressed whether plaintiffs could benefit from seeing physicians at

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56. *Id.*
57. *Id.*
58. *Id.*
59. *See supra* FIGURE 1.

mediations without probing by the interviewer. When asked, they often stated that they did not know what plaintiffs felt, sometimes were not sure what their physician clients felt, and frequently were of the view that doctors had little to gain legally by attending mediation. These attorneys may not have wanted their clients at mediations because it could only shift the discussion from money to responsibility, making it more difficult to settle.[60] Thus, overall, physician's lawyers' discourse suggested that they perceived mediation as their forum first and disputants' only secondarily. Hence, unsurprisingly, physicians were usually absent at mediations.

Hospital lawyers generally were not involved in defendant physicians' attendance decisions. Therefore, their views are not elaborated upon here. Suffice to say that most (89 percent) spoke of positive reasons why defendant physicians should attend mediations,[61] with the most cited reason being extra-legal consideration "for the plaintiff" (78 percent).[62] However, it should be noted that hospital lawyers were in a different position tactically on the issue of doctor attendance to physician's lawyers. Hospital lawyers may have wanted physicians present to shift responsibility from the hospitals to the doctors, who were sued separately.[63]

> I thought it was helpful because there were a lot of allegations being shoved to the hospital, which clearly the doctor was responsible for. And he was there accepting responsibility for things. So he was able to say 'No, you're wrong. I did that. I did this. The nurse does this.' So it was very helpful . . . . And it was a lot more credibility than me saying exactly the same thing, because plaintiffs' counsel didn't want to listen to me say that we weren't actually involved.[64]
>
> – Female hospital lawyer

Moreover, most hospital lawyers (57 percent) gave reasons similar to those of physician's lawyers as to why their own defendants, e.g. nurses, should not attend mediations.[65] The most common reasons given were that nurses did not instruct on money and that their presence resulted in raised emotions.

> It's helpful in cases where there's a misunderstanding as to what was done. It's not helpful in cases where there's a lot of bitterness . . . . It just won't add . . . because they don't provide

60. *See* Abel, *supra* note 49.
61. *See* FIGURE 1, *supra*.
62. *See* FIGURE 3, *supra*.
63. *See* Abel, *supra* note 49.
64. RELIS, *supra* note 25.
65. *See* FIGURE 2, *supra*.

> us with instructions in terms of settlement . . . I haven't seen too many where we really wanted to have the nurse there . . . .[66]
>
> – Female hospital lawyer

> We kind of treat the process a bit, so it was a little bit more palatable for everybody . . . . *With defendants not attending?* Yup, yup . . . . I don't think I've ever brought anyone from the hospital to mediation . . . . I don't have a need to have my client there to assist me . . . in order to bring things to settlement . . . . I'm not convinced that their personal presence would necessarily be helpful to the process . . . . I'm able to remain a little bit more detached . . . and save them the agony of going through something that is not pleasant for them and that they really don't have a whole lot to contribute to anyway . . . . Though there are exceptions . . . the resolution of these issues can become really focused on expert opinion.[67]
>
> – Female hospital lawyer

Thus, defense attorneys' views on mediation attendance form an intrinsic part of their litigation and mediation strategies, which focused solely upon monetary settlement or abandonment of claims. Plainly, these views result from lawyers' conceptions of what litigation-track mediation "is." Interestingly, like physician's lawyers, hospital lawyers discourse impliedly suggests that they view mediation as their forum first and disputants' only secondarily. This phenomenon was similarly found within the discourse of plaintiff lawyers.

2. *Plaintiff Lawyers' Perspectives*

The views of most plaintiff lawyers were strangely reminiscent of those on the defense, suggesting why plaintiff attorneys did not demand defendant attendance at mediation.[68] In this way, plaintiff lawyers' interests appeared aligned with those of defendant lawyers'. This suggested that shared professional roles were more important than partisanship, even though most medical malpractice lawyers specialized exclusively in plaintiffs or defendants and did not often change sides during their careers.[69]

The bulk of plaintiff attorneys (81 percent) noted reasons in favor of defendants attending mediations. At the same time, most (75 percent) also gave reasons against attendance.[70] As with the other legal

66. RELIS, *supra* note 25.
67. *Id.*
68. *See* FIGURE 1, *supra*.
69. *See* Abel, *supra* note 49.
70. *See* FIGURE 1, *supra*.

actor groups, plaintiff lawyers' cognizance of extra-legal issues important to disputants appeared to conflict somewhat with their own tactical understandings of mediation's purpose, i.e. "getting a settlement." Similar to the findings on physician's lawyers, this conclusion was supported by the fact that only a minority of plaintiff lawyers (31 percent) felt that defendants' presence at mediation could assist in reaching settlements.[71] Though few disputed that physician attendance could be beneficial for claimants, plaintiff attorneys' reasons against defendants' mediation attendance were also redolent of those proffered by defense lawyers: doctors did not instruct about money (44 percent) and defendant attendance would raise emotions/animosity, impeding settlement chances (56 percent).[72] The following quotes are illustrative of the views of most plaintiff lawyers:

> *Any benefits of defendant attendance?* There may be something therapeutic for my clients. . . . . But the worry I always have is that we get derailed by emotional issues that, in effect, will get in the way of getting the legal issues solved. So, um, perhaps I can be accused of lacking compassion and the psychological expertise to know what my clients need on a mediation . . . . A mediation is supposed to be to get a case settled. So I do have a narrow focus . . . . In most cases, doctors would just get in the way. Typically the doctor doesn't make the decision to settle the cases. But invariably they seem to have a lot of say on the subject if they're given the opportunity. And I would think it would be an impediment to efficient mediation. Now, that's a bit of guesswork . . . but . . . it might create another layer of emotion and conflict they don't need at mediation. Very rarely do people care about how sorry the doctor is by the time they get to mediation . . . .[73]
>
> – Male plaintiff lawyer

> In a lot of cases . . . the plaintiffs are very angry at the doctors. There may be some cathartic benefit in having face to face . . . also to see the human side of the doctor. But I don't know if it's going to make cases go away . . . . It's not like . . . it's a way of sort of helping the lawyer get rid of a case that's just driven by emotion and letting the client see the light.[74]
>
> – Male plaintiff lawyer

Moreover, similar to other legal actors, the discourse of most plaintiff lawyers demonstrated that their attendance decisions were

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71. *See* FIGURE 3, *supra*.
72. *See* FIGURE 2, *supra*.
73. RELIS, *supra* note 25.
74. *Id.*

reached utilizing considerations within the framework of their own strategic agendas.[75] For example,

> I've seen some cases where defendant attendance was useful in terms of the overall strategy of what we're going to do with our case, proceed or not. *Is it useful in terms of coming to a settlement?* Um, well I suppose so because with a doctor being there, able to apologize, perhaps cut through some of the anger. You can perhaps lower the expectation a little bit for settlement purposes . . . But not everything can be reduced to a rule . . . Sometimes you get unreasonable plaintiffs . . . .[76]
>
> – Male plaintiff lawyer

A minority of plaintiff lawyers did discuss solely pro-attendance reasons (25 percent), stressing plaintiffs' extra-legal needs.[77] For instance,

> It could be a good thing . . . . For plaintiffs in some cases it would be useful just have that emotional confrontation, for the feelings that they have about this person whom they trusted who had done something in their mind wrong even in cases where liability is in issue . . . . There are lots of cases where they want some kind of explanation from the doctor himself . . . about what might have happened . . . as opposed to from a lawyer . . . It's really plaintiffs talking to lawyers. Uh, that's not really what plaintiffs want to do . . . . But yeah, I think in one sense or another we're back in this non-legal way to approach a case.[78]
>
> – Male plaintiff lawyer

However, among those who discussed both reasons for and against defendant attendance only 56 percent of plaintiff lawyers mentioned that defendants should attend "for the plaintiff"[79] and only 25 percent specifically mentioned that plaintiffs generally wanted physicians present at mediations.[80] In light of the findings described in Part III, this was surprising.[81] Indeed, procedural justice research emphasizes that all disputants should attend mediations.[82] Likewise, others postulate that "without both accuser and

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75. *See* FIGURE 2, *supra*.
76. RELIS, *supra* note 25.
77. *See* FIGURE 1, *supra*.
78. RELIS, *supra* note 25.
79. *See* FIGURE 2, *supra*.
80. RELIS, *supra* note 25, at ch. 4.
81. *See* FIGURE 4, *infra*, illustrating that 100% of plaintiffs and defendant physicians felt doctors should attend mediation.
82. *See* Nancy A. Welsh, *Making Deals in Court-Connected Mediation: What's Justice Got To Do With It?*, 79 WASH. U. L.Q. 787, 845 (2001).

accused retelling the story, there can be no real understanding of the conflict, nor of its roots. Genuine resolution to conflict cannot occur. Mere settlement will be the closest parties come to achieving closure to their disputes."[83] One study of voluntarily mediated (non-litigated) disputes, though not empirically rigorous, also suggests that physician education at mediation can result in quality improvement in medical care.[84] Thus, it could be argued that legal actors were, in effect, causing harm to disputants by not encouraging defendants to attend mediations, which may have been disputants' only opportunity for communication and psychological healing in relation to these often life-altering events.

In sum, regardless of which side lawyers were on, in speaking about defendants' mediation attendance their opinions were similar with respect to what they understood to be the purpose or meaning of litigation-track mediation: achieving settlement or abandonment. Lawyers' regular decisions "not to invite" defendants to these mediations, something unknown to most disputants, made plaintiffs angry with defendants' absences and led most plaintiffs to think that the doctors did not want to face them.[85] Although attorneys discussed reasons both for and against defendant attendance at mediation, the vast majority decided or acquiesced in decisions to exclude defendant physicians, proffering similar reasons against having defendants at mediation. Yet, these legal actors generally had little or no experience of mediations with physicians present. Of the few with experience, none recounted a single instance of doctors' attendance raising emotions or behaving arrogantly and thereby reducing settlement chances.[86] Nevertheless, this was one of the two primary reasons proffered by lawyers against doctors' presence at mediation.[87] Similar reasoning was found in Metzloff's research.[88]

However, the premise for this reasoning is weakened by the fact that the physician attendance issue predominantly pertained to

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83. *See* Christiansen, *supra* note 17, at 72.

84. Dauer & Marcus, *supra* note 17, at 185-86, 211.

85. *See infra,* Part III.B on plaintiffs' views on mediations with absent defendants.

86. One might argue that it was only congenial physicians who were invited by their lawyers to attend mediation, explaining why experiences were depicted positively. However, this argument is weakened by the fact that in some cases physicians attended mediations solely because plaintiff lawyers (who knew nothing of their dispositions) insisted they be there. RELIS, *supra* note 25.

87. *Id.*

88. *See* Metzloff et al., *supra* note 24, at 142.

mandatory court-linked mediations, where for a whole host of reasons (e.g. mediation timing being far too early within the litigation, quality of mediators) most lawyers generally viewed settlement as unlikely in any event. This attitude undermines the basis of the "emotions" argument, which seems to largely rest on supposition and conjecture about what may occur if defendants attended. In fact, at that early stage, one may argue that from lawyers' perspectives doctor attendance could only assist in attempting to get at least some plaintiffs to abandon their claims.

Another articulated reason against physician attendance was that many physician's lawyers said doctors did not want to participate. Yet, lawyers' overall negative attitudes towards mandatory mediation make it unlikely that mediation is generally described to physicians as any form of opportunity for them, legal or extra-legal. For example, several physician's lawyers described court-linked mandatory mediations as a "waste of time," or that "nothing is going to happen."[89] Hence, apart from the obvious difficulties in facing such situations, it would be logical that physicians would not want to engage in such a process. Lawyers also noted doctors' busy work schedules, but not a single doctor mentioned this when interviewed directly. Furthermore, legal actors discussed conflicting circumstances as to when physicians should not attend mediations. They included: "if mediation was early on" and "if mediation was later on after expert evidence was obtained," not in "mandatory mediations" and not in "voluntary mediations," not "if liability was disputed" and not "if it was only a quantum mediation where the focus would be on getting to a number."[90] Arguably, the inconsistency of the individual reasons further serves to weaken the arguments against physician attendance.

The only other primary reason proffered by attorneys against defendant attendance remains the fact that doctors are not responsible for whether or how much money to settle for. The importance of this reason for legal actors was underscored in their describing physicians' presence as "not critical," "interference," or "disturbing." This must highlight a simple truth: overall, legal actors did not need physicians' attendance at mediation. Why would they when mediation was perceived predominantly as a venue for monetary settlement or abandonment resulting from outside expert opinion? Why would

89. RELIS, *supra* note 25.
90. *Id.*

they when another player, the insurer, was now involved in the dispute, altering its dynamics if not its perceived nature? Indeed, throughout the attorney interviews there was a duality constantly present about the very nature of these disputes. On the one hand, the attorneys all clearly acknowledged that these disputes were between doctors and patients or surviving relatives. Yet at the same time, their discourse on the attendance issue reflected something different: that these disputes were between insurers and plaintiffs arguing about whether their losses warranted monetary compensation and, if so, how much?

Thus, attorney discourse surrounding defendant attendance was linked almost exclusively to issues of settlement and the effect of defendants' presence on lawyers' strategic agendas. For most legal actors, mediation was a vehicle for monetary settlement or case abandonment, where strategy, negotiation and settlement or money talk played out. Lawyers on all sides perceived parties' attendance generally as either an assistance or hindrance to this end. Defendants' presence was often perceived as risky (by causing "raised emotions") or unnecessary (as any settlement monies would not come from physicians) for legal actors. Any talk of mediation being a venue for disputants' extra-legal communication and psychological healing was discussed only secondarily or as a serendipitous effect. Although most acknowledged the possibility of treating disputants' extra-legal needs through defendant attendance, the majority of lawyers were ultimately against having doctors present. As a result, the discourse on defendant attendance reveals unspoken understanding of mediation's purpose and meaning.

3. *Attorneys' Perceived Forum*

Additionally, legal actors' discourse repeatedly suggested that lawyers perceive mediation as "their" forum first and foremost, a tool to assist their tactical and legal missions. Lawyers are not assessed by their peers or employers on any extra-legal assistance they confer on disputants at mediation. So it follows that such assistance would generally not form part of the mediation equation for them. In the words of one plaintiff lawyer, "Catharsis . . . is not going to help lawyers get rid of cases." This correlates with the fact that although the majority of attorneys acknowledged the potential for extra-legal benefit to disputants if defendants were present, most did not want physicians there as they did not believe defendants' attendance would assist them in reaching settlement. Attendance decisions resulting

in defendants' absences at mediations seemed to be based predominantly upon lawyers' strategic interests and needs, and were aimed at protecting attorneys' agendas from any type of interference or perceived risk.[91]

Decisions against having defendants present at mediation may also have been a function of what lawyers were used to and thus desired in terms of their own comfort levels, both psychologically and logistically. Some attorneys described feeling restricted in what they could say at mediation if doctors were there, utilizing words such as "foreign" and "uncomfortable" to describe their experience. Even in relation to claimants, one male defense lawyer remarked,

> There wouldn't necessarily be the kind of honesty with the plaintiffs sitting there. I'm not going to say 'look you may be right. I think my doctor may not be so terribly credible on that issue there, but meanwhile I don't think your asking for four million dollars is a reasonable response here, and let me tell you why. *But I'd be comfortable to say that to their counsel.*[92]

Attorneys' reluctance to deal with "non-legal" issues, which are often the most important ones to clients, has been found in the context of divorce lawyers and litigants as well as in small claims cases.[93] As one physician's lawyer in the present study stated, "My job's not . . . primarily to help the doctor feel better about stuff. My

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91. As noted, notwithstanding attorneys' focus on tactics and monetary issues, the bulk of lawyers' discourse on defendant attendance in every legal actor group was peppered with extra-legal references in the form of pro-attendance reasons "for the plaintiff" or "for the physician." This appeared to denote extra-legal considerations now inherent in attorneys' thinking about their cases, something essentially absent in the days when bilateral lawyer negotiations ruled. This finding is part of a recurrent theme. *See generally* RELIS, *supra* note 25, at ch. 1. On the basis of a wide range of evidence through an examination of all facets of professional and lay actors' understandings in these cases, I argue that as a consequence of mediation's extra-legal world being thrust upon the legal world, mediation is gradually resulting in lawyers reconceptualizing their roles and thinking about their cases on a more holistic, human basis. Indeed, some lawyers even spoke about the defendant attendance issue not within a legal paradigm, but predominantly within an extra-legal one, discussing at length the benefits derived by their clients from mediation in cases where no settlements had been reached. These issues were not normally within the province of the law or the legal world.

92. *Id.* at ch. 4.

93. *See* LYNN M. MATHER ET AL., DIVORCE LAWYERS AT WORK: VARIETIES OF PROFESSIONALISM IN PRACTICE 68-69, 91-92 (2001) (observational research of divorce lawyers and clients); Austin Sarat & William Felstiner, *Law and Strategy in the Divorce Lawyer's Office*, 20 L. & SOC'Y REV. 93 (1986); John M. Conley & William M. O'Barr, *Hearing The Hidden Agenda: The Ethnographic Investigation Of Procedure*, LAW & CONTEMP. PROBS., Autumn 1988, at 181, 196 (ethnographic research into US small claims litigants).

job is to achieve a resolution to this dispute between the parties."[94] However, this failure to deal with what are perceived as disputants' extra-legal needs is a matter of serious concern. As Conley and O'Barr note,

> There is an 'importance, if not pre-eminence of non-economic factors for litigants' . . . *thus* 'the discontinuity between litigant agendas and the operating assumptions of the system may be a fundamental source of dissatisfaction with the law' . . . . The law should not leave unexamined the assumptions about rational economic goals that permeate the civil justice system . . . . It is essential to comprehend litigants' hidden agendas for any evaluation or . . . procedural reform.[95]

Hence, Part III explores how disputants, the protagonists in these cases, perceive the attendance issue as well as the meaning and purpose of mediation for their cases on the litigation track.

III. Facing Opponents: Disputants Ascribe Common Meaning to Mediation

This Part explores lay disputants' perspectives on the same issue of defendant attendance at mediation. Yet, in examining this phenomenon it describes a different world, one almost anathema to the one seen previously. It is a world bereft of tactical or monetary settlement considerations, where the concept of mediation presages human interchanges of significance in the lives of many disputants. Surprisingly, the views of opposing parties on the issue were very much the same, even though in most cases plaintiffs and defendants had no relationship prior to the disputed incident.

Even on the surface, the charts below affirm unexpected similarities between the views of plaintiffs and defendants that are materially different to the general stance of legal actors, including their own attorneys. First, disputants' overall discourse is examined. In stark contrast to the findings on legal actors, every single plaintiff and defendant physician felt that defendants should be present at mediation, with none offering any reasons why they should not attend. Moreover, all disputants emphasized the importance of defendants' presence and noted the lack of closure when opposing parties were absent. Second, when looking more closely at the specific reasoning behind disputants' attendance views, plaintiffs' and defendants' discourse was also quite similar.

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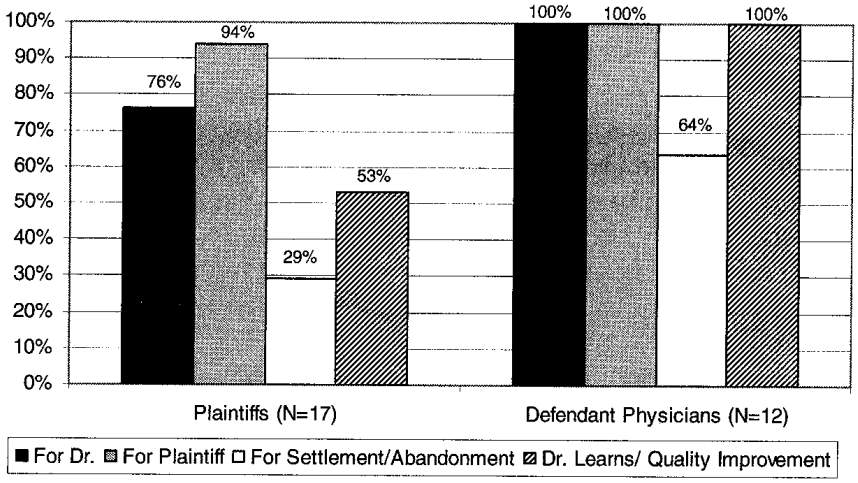
94. Relis, *supra* note 25.
95. Conley & O'Barr, *supra* note 93, at 183, 196.

FIGURE 4. DISPUTANTS' REASONING ON WHY DEFENDANTS SHOULD ATTEND MEDIATION



Claimants' and physician defendants' reasoning in favor of defendants' mediation attendance was similar.

These findings will be discussed below. Yet it is only upon hearing disputants' own voices that the co-existence of two almost entirely discordant worlds of disputes and their "resolution" becomes evident. This highlights the profound consequences for many disputants who are impacted by attorneys' mediation attendance decisions. These issues will be explored by first considering the views of doctors followed by those of plaintiffs, which are examined in the context of five mediation case studies (two with defendants present and three with defendants absent).

A. *Defending Doctors' Views on Attending Mediation*

> *In civil cases the money comes from insurers, so really it's between them.* No. That is ridiculous . . . . The dispute is initiated by the plaintiffs, and defended by doctors, defending their actions. That is the focus . . . . What happens here is you get egos and other issues, which take away the focus. . . . Mediation is to . . . convince plaintiffs there is really nothing that has gone on. There has been no maliciousness. . . . That is the objective of mediation . . . . What you're talking about is a settlement, which is quite different than mediation. That is not mediation of the dispute. That is mediation to a settlement. And they are different objectives . . . What you have got there is a confused issue. I

> am not sure the . . . system they have set out is wise enough for that.[96]
>
> – Male surgeon
> (with experience in College & court-linked mandatory-mediations)

For physicians, mediations are part of disputes that are often extremely stressful and very upsetting, particularly if connected with a lawsuit. Their professional reputations, livelihoods, and what they strive to do could be at stake. Still, notwithstanding the difficult nature of the mediation exercise for doctors, all those interviewed in this study were willing to attend, perceiving mediation as an opportunity to explain their side. In the 13 cases discussed, none of the physicians mentioned their busy practices as a deterrent to their attendance. For instance,

> I welcomed the opportunity to defend myself is the best way to put it. *At mediation.* Oh yeah . . . For me, it was an opportunity to speak to them.[97]
>
> – Male surgeon, College mediation

> I think anybody would welcome the opportunity . . . to explain why they did what they did. They can explain their approach to the problem, and why they thought it was a reasonable approach to the problem.[98]
>
> – Male surgeon, College mediation

> *What about compulsory mediation attendance?* I don't have a problem with that. I mean, as long as the frivolous stuff gets sorted out beforehand.[99]
>
> – Male surgeon, Court-linked mandatory mediation

These findings contribute to the scant body of knowledge on the mediation objectives of defending physicians. In fact, the only previous study found on point – Dauer's study of the Massachusetts voluntary medical malpractice mediation pilot – covered only 10 non-litigated cases. There too physicians wanted the chance to apologize, express regret, and provide assurances that incidents would not recur.[100]

In view of the predominantly positive feedback received by defending physicians in the present research, it should be noted that

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96. RELIS, *supra* note 25. The term College stands for College of Physicians & Surgeons of Ontario.
97. *Id.*
98. *Id.*
99. *Id.*
100. *See* Dauer & Marcus, *supra* note 17, at 211.

doctors were invited to voice their views anonymously with the possibility of precipitating change in the context of a new court-linked mandatory mediation program that effectively forced them to attend mediations. Thus, doctors who felt negatively about mediation should have been equally willing to offer their views as those doctors who felt positively. On the issue of willingness to attend, however, it should be noted that most physicians interviewed had already undergone mediation. Doctors whom physician's lawyers had referred to as "not wanting to attend" most probably had not experienced mediation, therefore, the views here may offer greater understanding of how, if at all, defendants' mediation perceptions may change with mediation attendance. What dominated defendants' discourse most significantly was the very different meaning they ascribed to these disputes and their mediation as compared to legal actors. This meaning emerged not only in discussing the importance of their attendance, but also in describing personal benefits they derived through mediation.

1. *"Real" Mediation Could Not Occur Without Defendants*

For defendant physicians, mediation was about disputants communicating with each other. Therefore, "real" mediation could not occur without them.

> *What if your lawyer attended alone?* Oh no, that process could not have taken place without my being there. It would have been a very different thing . . . A lawyer would never have done what I did . . . My lawyer wouldn't have sat there with the family commiserating with them about . . . her death . . . I was able to say that to them . . . I think that may have been the best thing that happened there for them . . . To me, the whole process, the whole notion of a mediation, is that it's a personal process. If the doctor is not present, what's the point? You know, it's a legalistic exercise, a hypothetical exercise. *And where there's a civil action* . . . I would probably always attend. That would be my choice.[101]
>
> – Female physician, College & court-linked mediation

> This is supposed to be primary interaction between physician and patient. Mediation is not between lawyers. That is the whole point of this . . . . Mediation is an opportunity . . . to sit down and have a less excitable environment in which to discuss what happened . . . to communicate with the patients, get our point across . . . . When you have all this cacophony going on

101. RELIS, *supra* note 25.

> behind you of experts disputing, it takes away the physician's and the patients' ability to communicate themselves.[102]
> – Male surgeon, College & court-linked mandatory-mediations

Defendants' perception of mediation as a forum for "human communication" and "feeling better" further emerged when physicians described their mediation experiences.

2. *Mediation is "Human Communication" and "Feeling Better"*

Regardless of mediation venue or whether settlement or abandonment ensued, all physicians described how they benefited personally by attending mediation. Similarly, all doctors felt their presence benefited plaintiffs, and most (64 percent) were of the view it could assist in resolving disputes.[103] In discussing these benefits, physicians' discourse repeatedly reflected their understandings of mediation as a forum for various types of human communication, learning and addressing psychological needs, such as the need to explain their perspectives and intentions (in response to upsetting complaints or litigation documentation). This was equally the case for defendants who initially were not eager to attend mediation. It may have been that through mediation participation they felt they regained some control over their disputes. For instance, in one fatality case,

> I think they wanted to get some explanation as to why the fatality had occurred . . . . They wanted answers, and they just didn't know how to go about getting it . . . . They were caught up in the process . . . They had had these questions . . . and the process takes over . . . . Mediation was an opportunity . . . to be able to sit down and actually . . . discuss it . . . communication was required . . . . *Any emotional or psychological relief?* Absolutely. Oh yeah. *What made you feel that*? That they had listened; that I was able to put my points across; and that they saw I really cared . . . I was there and able to express. That is the key . . . Mediation becomes your forum . . . The first thing is that we don't want the results that occurred to have happened in the first place . . . Most of us . . . take several weeks to recover. That has to be conveyed to the family . . . . I think they were surprised that . . . I cared that much . . . . I can still see them looking at me . . . . When people see how you react and there are nonverbal cues that you do care, that makes a significant difference . . . . *For court-linked mediations*? I think, any time, mediation should always be tried. If there's any possible meeting of

102. *Id.*
103. *See* FIGURE 4, *supra*.

> the minds . . . *Meaning you should be at mediation?* Absolutely . . .[104]
>
> – Male surgeon, College & court-linked mediations

Conversely, the discourse of physicians who mediated without complainants present evinced their own lack of closure and need for communication.

> It would have been better for me that the other party attend the mediation . . . . The patient may have had a different perspective if she would have heard my point of view. I think she had a biased viewpoint; that I did not provide proper care, that I did not care about her, that I wasn't looking out for her best interests, those sorts of things.[105]
>
> – Female physician, College mediationr

> I wouldn't mind attending mediation . . . . I'd be happy to explain why . . . it really could not be foreseen, and that I didn't do anything wrong . . . I was sorry what happened to her. But that does not necessarily mean it was negligent . . . . I'd say I can understand why she'd be unhappy, but this is my side of things. And we'd meet together. That would be something that would be useful for me, individually. I think most doctors would be interested in that.[106]
>
> – Male surgeon, College mediation

Regardless of mediation venue or their particular mediation experiences, in discussing their attendance physicians spoke of diverse personal needs and human benefits. This was far removed from most lawyers' tactical perceptions of the issues, and surprisingly more akin to claimants' discourse, as will be seen below. In fact, notwithstanding the tragedies and potential animosity between them, on the mediation plane a conceptual alignment of plaintiffs and defendants emerged through their discourse on disputants' joint attendance at mediation, re-grouping them in opposition to mediation's legal actors, including their own representatives. For instance, regardless of mediation timing, most physicians spoke of mediation as a chance to satisfy their need to put forward their side. This correlated with claimants' needs to hear physicians' explanations as well as their own needs to articulate their perspectives. Interestingly, defendants were even more uniform than plaintiffs in their reasoning as to why they should attend mediation.[107] This was significant as the data

104. RELIS, *supra* note 25.
105. *Id.*
106. *Id.*
107. *See* FIGURE 4, *supra*.

suggested that some physicians initially may not have been eager to mediate, may have had negative experiences or perceptions of the mediation institutions, and in some cases subsequent to College mediations plaintiffs sued (or it was anticipated they would sue).

It appeared therefore that something unexpected took place at mediation. This may have been linked to the fact that despite most legal actors' views to the contrary, all defendant physicians in various degrees discussed learning things they would not have known had they not participated in mediation. By attending mediation and hearing claimants directly, physicians acquired insight into plaintiffs' perspectives and positions. They learned the meaning of these disputes and their consequences to plaintiffs, particularly with regard to intangible issues pertaining to plaintiffs' perceptions such as how they perceived defendants' conduct and how events unfolded. In speaking of defendant attendance at mediation, many of the same issues were discussed by plaintiffs. The only difference was that they spoke from opposite ends of disputes.

B. *Plaintiffs' Views on Facing Defendants*

> We were there personally because it affected us . . . . Even if she just sat in the corner and didn't say a word. But she had to listen to us. She had to see our tears. She had to see my mother in those pictures and see what it was like three years later . . . . She needed to come to hear what her actions caused . . . . What she could have learned from it may have benefited her patients in the future . . . . That's why I don't have a sense of closure . . . because she was not there . . . . She didn't have to sit there and look at me and say 'I am sorry' or 'This is what happened to me. I've had repercussions . . . .' I'm very interested to know; and I have no sense of that.[108]
>
> – Female plaintiff; settled at mediation

For claimants who had suffered serious injury or loss of loved ones, it was psychologically and emotionally difficult to undergo mediation involving those perceived to be responsible. Yet like physicians, every plaintiff provided reasons why defendants should attend, the vast majority wanting defendants to see and hear them directly. Interestingly, most plaintiffs (76 percent) felt that defendant attendance would also benefit physicians themselves. This was regardless of age, injury type, whether physicians attended their mediations or whether mediations induced settlement. In fact, claimants discussing defendant attendance at mediation did not – in contrast to legal

108. RELIS, *supra* note 25.

actors – generally mention "settlement" unless probed. As with defendants, mediation for plaintiffs predominantly meant communication between disputants and treating their psychological needs. This finding correlates with other findings on plaintiffs' litigation aims in the larger research project, as well as with survey research into medical disputes in various countries where plaintiffs' desires for pecuniary recompense have never been found to be a predominant litigation motivation.[109] Thus, plaintiffs' attendance discourse provided evidence to strengthen their conceptual alignment with defendants in terms of the common meaning they ascribed to mediation of their cases. Regardless of whether or not defendants were there, actors' discourse within the cases repeatedly evince the starkly disparate understandings and views of attorneys versus disputants about how these cases should be resolved. The following five case studies – two where defendants were present, followed by three where defendants were absent – illustrate these points and highlight the harm involved when plaintiffs attended mediations alone.[110]

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109. These countries include the United States, Great Britain, and Australia. For the United States, see Dauer & Marcus, *supra* note 17, at 185-86, 218 and Meschievitz *supra* note 17, at 200-01. For Great Britain, see Hazel Genn, *Access to Just Settlements: The Case of Medical Negligence*, *in* REFORM OF CIVIL PROCEDURE: ESSAYS ON 'ACCESS TO JUSTICE' 393 (A. A. S. Zuckerman & Ross Cranston eds., 1995) and Charles Vincent & Magi Young, *Why Do People Sue Doctors? A Study Of Patients And Relatives Taking Legal Action*, 343 LANCET 1609, 1609-13 (1994). For Australia, see A.E. Daniel et al., *Patients' Complaints about Medical Practice*, 170 MED. J. AUSTRL. 598-601 (1999) and Paul Nisselle, *Editorial: Angered Patients and the Medical Profession*, 170 MED. J. AUSTRL. 576, 576-77 (1999).

110. Disputants' discourse on defendant attendance at mediation also revealed a notable gender trend relating to plaintiffs. Although all disputants regardless of gender proffered reasons in favor of their attendance, in mediations where defendants were absent only male plaintiffs wanted physicians there without hesitation. In comparison (although later altering their views,) female plaintiffs were seen to be less inclined initially than males to face their perceived wrongdoers at mediation. Most females (73%) discussed emotional difficulties in facing defendants. For a small minority, this resulted in them feeling unable to face their perceived wrongdoers. Some female claimants also expressed concern about how their reactions to defendants at mediation might be perceived by others. This too was absent from males' discourse. Consequently, unlike their male counterparts, a material number of female plaintiffs initially discussed relief at physician absence from mediation. However, upon reflection all recanted and noted how they had lost out due to defendants' absence. This female trend may be significant in mediations where plaintiffs have real input into defendant attendance. Without specifically being made to consider all aspects of defendant attendance by their representatives – something unlikely given lawyers' views on the issue – the data suggests that females are more likely than males to initially refuse, or to more readily acquiesce in decisions against mediating with defendants present. Consequently, albeit partially of their own doing, both female plaintiffs and defendants involved in their disputes may be disadvantaged by missing

1. *Mediations with Defendants Present*

Case Study #1: Fatality case at a post discovery mandatory mediation (no settlement reached)

This case involved a dispute over a "do not resuscitate" order and the fatality of the plaintiffs' husband and father. Notwithstanding the deceased's age of 86 the mediator noted "it came out in mediation that this man was looking forward to living and that this man had a lot to live for."[111] The physician's lawyer did acknowledge during his interview that there was something positive in having the defendant there who wanted his perspective put forward while all sides' issues were aired. However, in his questionnaire responses the physician's attorney "agreed" that the mediation was a total waste of time, "very strongly agreed" that mediation was inappropriate for this type of case, and "strongly disagreed" that the mediation was successful in clarifying or narrowing the issues. Likewise, the plaintiff lawyer's questionnaire responses were notable. He "disagreed" that mediation revealed facts that helped move parties towards settlement or that mediation clarified or narrowed the issues. He described the mediation as follows:

> The physician was very quiet and seemed to participate very little . . . I am not at all sure why he was there because he made no statement, and his position was basically ignored by his counsel. . . . I don't think there was anything valuable to having him there. When you think of what's being asked for, the person who's really making the decision for the lawyer – the insurer – is not there at all. . . . *Do you think the doctor benefited at all?* I

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the opportunity for material benefits described by disputants when mediating together. This finding informs the strand of feminist critiques of informal justice relating to the internalization of disempowerment, but with the twist that female claimants may be contributing to their own disadvantage at mediations in this respect. *See* Randy Kandel, *Power Plays: A Sociolinguistic Study of Inequality in Child Custody Mediation and a Hearsay Analog Solution*, 36 ARIZ. L. REV. 879, 882 (1994); Isolina Ricci, *Mediator's Notebook: Reflections on Promoting Equal Empowerment and Entitlement for Women*, *in* DIVORCE MEDIATION: PERSPECTIVES ON THE FIELD, 49 (Craig Everett ed., 1985). Interestingly, similar findings were reached in a Canadian survey study on victims of sexual violence who sought legal compensation (relating to 10 female litigating plaintiffs and 30 who sought government compensation from the criminal injuries compensation board ("CICB")). The study found that many females chose the CICB program instead of litigation because they did not want to face the perpetrators, as it was too difficult for them emotionally and psychologically. Nathalie Des Rosiers et al., *Legal Compensation for Sexual Violence: Therapeutic Consequences and Consequences for the Judicial System*, 4 PSYCHOL. PUB. POL'Y. & L. 433, 435, 438 (1998).

111. RELIS, *supra* note 25, at ch. 4.

> don't think so. . . . I think he feels badly . . . not medically . . . . I think he's genuine. I think he's sincere about the fact that he did not have that communication he should have.[112]

What was not mentioned was that this understanding resulted from the defendant being present at mediation. In comparing plaintiffs' and defendants' discourses in the same case, one begins to see the legal versus the lay actor alignment on the attendance issue emerge.

Male plaintiff (son):

> How did you feel about mediation with the doctor? I felt really good, because we are the two parties involved, directly involved with each other. I think that's important, because I don't want to have some faceless person . . . lawyer . . . *at the mediation*. This is between you and I. . . . I'm taking time out of my life and I think you should be there. If you did your job right in the first place, all of us would not be there. . . . So this way the doctor and I are there face to face. I know what happened in my heart. You know the truth . . . you look me eye to eye, and I'll tell you. And you can question me back. That's the best thing . . . It's important the doctor is always, always there. Even though there's a lack of doctors. Give me at least that respect.[113]

Later he said,

> The most important thing to me in the mediation process was to see Dr _____, a very aggressive person, very vocal, loud, now primarily defensive. He was just a very meek man, very mellow . . . He was so quiet because he knows he's wrong . . . . Before he was very cocky, very confident; and all of a sudden you have a quiet person at mediation . . . *Did you get any explanation?* No, nothing . . . . But I know he felt guilty, otherwise he would have . . . looked at you . . . . But for two hours . . . he had his head down . . . . Nobody can tell me he didn't feel . . . . He heard my mom. He heard me . . . . He knows the truth . . . . But unfortunately it's the law and his lawyer's saying 'Don't look into the light . . . .' But I feel good. This is what I got out of mediation . . . . *Seeing Doctor ___?* That is the most important thing to me . . . . I would have never known that without mediation . . . . That's a benefit to me, because I know at night-time he's not living with himself too well . . . Dr ____ knows in his heart he did wrong, but he can't admit to it. *You learned that at mediation?* I

112. *Id.*
113. *Id.*

> saw that in his face. That told me everything . . . . *Anything else you thought was good at mediation?* . . . . No, not really.[114]

Female plaintiff (widow):

> I am 100% sure I wanted him there. I even told my lawyer, if he will not attend we should postpone mediation . . . I am very happy that I explained everything . . . and I noticed when I said 'Dr _____ you admitted in your office . . .' His lawyer didn't know about that. I noticed they whispered during my speech . . . Dr _____ was little bit shaky . . . . He felt he is guilty . . . Dr _____felt uncomfortable . . . .[115]

The descriptions of the physician's body language during this mediation matched data on other defendant physicians during court-linked mediations. However, looks may have been deceiving. Nonetheless, it was equally evident in the defendant's explanation of his attendance that mediation for him was about human communication and dealing with psychological needs.

Male defendant physician:

> When it came before mediation . . . I was told I had to attend . . . *Without having had the prior meeting?* I would be curious to know what their arguments are, what they are looking for, and just to see their point of view would have been helpful. . . . There's always issues . . . You need a meeting with the family and people need to talk, and then everyone has to express their point of view . . . I think mediation is good if no contact has been made. It has a lot of positive things, because it allows people to talk, and then see the point of view of the other person. . . . I had some feelings of apprehension initially, which with time I felt more at ease and just getting to face them and becoming more familiar and knowing what I'm dealing with, what I'm facing . . . I expressed again my point of view . . . I tried to avoid eye contact. I didn't feel I would have anything to gain . . . . After I spoke I was pleased in the sense that I thought that I had a very professional attitude and I really said what needed to be said . . . I was happy the way things happened . . . .[116]

In describing defendants' mediation attendance each disputant spoke of the verbal and non-verbal extra-legal communication and psychological benefit they derived, perceiving this as inherent to mediation. This was despite the emotionally charged atmosphere, the

114. *Id.*
115. *Id.*
116. *Id.*

fact that no settlement ensued and regardless of the intended meanings of those who were communicating. Though disputants' views of each other remained negative, having gone through mediation each felt less disturbed about the other as well as about their own situations. Parallel to these understandings, the perceptions of the legal actors on opposing sides of the case were similar to each other but markedly different from those of the parties involved, illustrating the very different meaning they ascribed to the mediation process.

Although the next dispute had different case facts, the same disparate perceptions of mediation were evident in comparing lay versus legal actors' discourse on defendants' attendance. As with the previous case, the plaintiff's lawyer did not think much of the mediation. In his questionnaire, he "disagreed" that mediation was successful in clarifying or narrowing issues, and "agreed" that the mediation was a waste of time.

Case Study #2: Bladder operation case in a pre-discovery mandatory mediation

This case involved a gentleman who had a severe bladder problem, resulting in urination 8-10 times daily, headaches, vomiting and strong belly pain. The defendant urologist performed an operation to attempt to alleviate the problem. Subsequent to the operation, the plaintiff said his problem had materially worsened, having to urinate approximately 20-25 times a day or more (sometimes every 2-3 minutes) and still suffering persistent headaches, belly pain and backache. The plaintiff's lawyer suggested that the initial diagnosis and operation may not have been correct and may have worsened the problem. As a result, the plaintiff could not keep his job. However, other issues were involved as well.

Male plaintiff lawyer:

> We all felt we're wasting our time at mediation and wished we didn't have to be here. The defense side as well. I mean they had nothing to gain. There was no way we were going to discuss a settlement, not a chance. . . . *Except for the emotional element?* Yeah, and who knows how important that is, ultimately. But in terms of the more narrow focus of 'will it assist me in winning or losing a case?' No; waste of time. . . .[117]

Yet, he spoke differently when I asked about his client.

117. *Id.*

> *Was it important for your client?* Clients very much want a chance to confront the person they feel has harmed them. I think that's true in most kinds of legal disputes . . . I was surprised to see my client rise to the occasion and speak relatively eloquently to this doctor . . . . It actually amazed me to see him sort of rise up and take charge verbally . . . . It was a different person I'd never seen . . . I couldn't have shut him up if I'd wanted to. He went on and on, outlining his complaints and his feelings in a way that I'd never heard him express. I mean, it was an important moment for him, irrelevant to the case itself, the legal procedure, the issues, the likelihood of settlement. But it was important for him because it may be the only chance he gets.[118]

> He doesn't have any money, as many people in his situation don't. So when plaintiffs' lawyers take on the cases without retainers, without money, if we don't have a damn strong sense that there's going to be money at the end, we're not going to waste months of our lives on it . . . . After a discovery you might have to say 'Sorry, I'm not going to do this without money.' It's certainly an issue in all cases. And so that may be the one chance they have to confront their perceived assailant.[119]

Indeed, as in all cases, the plaintiff spoke from a 'parallel world' about the mediation and the attendance issue.

Male plaintiff:

> Oh, I felt so happy to go into the mediation, to reach the doctor face to face . . . to talk to him . . . . I had to get the doctor down there, face to face . . . because I wanted to let him know and let him tell me what surgery he did to me . . . or what he didn't do . . . . I felt so happy because I just wanted to explain and let Dr _____ know how I felt because he always kept ignoring me. *Did you want to hear Doctor _____'s side?* Yes . . . I wanted to hear his side. But Dr _____ didn't say much at mediation. *So what made you feel happy?* Because to have the doctor there . . . to let him face the guy who he did the surgery too . . . . You become a victim and doctors should know about how they affected you . . . . It's important for the doctor to hear for his future career . . . . He failed to do his professional duty in the proper way. He should think about it. It would help him . . . . He could learn . . . how to treat somebody else.

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118. *Id.*
119. *Id.*

> He was just bending his head down . . . . I was thinking he believes he did some things that he's not supposed to do. So, he feels shame . . . . Mediation helped me a lot because by reaching the doctor, facing the doctor . . . I gained from the mediation . . . I got to know the doctor a little more than what I knew before . . . from his behavior at mediation . . . . I learned he's not a good guy. He just thinks about . . . his career. He didn't care for his patient . . . . Right now maybe his professional life is going down. Others will not trust him . . . I was thinking about it before, but I learned a little more at the mediation . . . .[120]

Thus, similar to the previous case, despite being costly for the plaintiff ("more than his weekly pay check"), with no resulting settlement and his lawyer viewing the mediation as a waste of time, the plaintiff felt mediation "was worth it" and "helped him out a lot," predominantly due to the defendant's presence and the consequent communication that ensued. As in other cases, much occurred beneath the surface during mediation. This was notwithstanding the doctor speaking little and the plaintiff not believing what he did say. Yet, by thinking worse of the physician, the plaintiff appeared to feel better about his own situation.

Hence, despite being on opposite ends of serious, often life-altering disputes, plaintiffs and defendants were on the same conceptual plane in wanting similar things from mediation, mostly discussing issues of communication with one another. Each party felt empowered only if the other party was there. Without defendants present, it was the lawyers who controlled the process and spoke predominantly to each other. Plaintiffs wanted defendants "to hear" what they had been through and "to see" what had happened to them. Even when doctors said little or nothing at mediation, their perceived non-verbal communications resulted in plaintiffs feeling better about their situations. This was the same with physicians, regardless of the level of their mediation participation.

By defendants simply being present, even without uttering a word, disputants saw, heard and learned things, both tangible and visceral. This was regardless of the correctness of individuals' perceptions or whether disputants' views changed about their opponents. Therefore, whatever transpired, including whether or not settlement resulted, defendants and plaintiffs who mediated together repeatedly discussed material psychological benefits – even when viewing each other in a worse light after mediation. This finding offers empirical support to those who have argued in favor of doctors'

120. *Id.*

attendance at mediation to show they care and to hear for themselves the nature of plaintiffs' cases.[121]

Yet, as the next three case studies illustrate, this interchange was effectively taken away from parties in mediations where lawyers decided against physician attendance for reasons far removed from the understandings and needs of disputants themselves. Disputants who did not mediate together lacked their own closure. Furthermore, defendants' absence from mediation harmed plaintiffs' perceptions of them and likewise did not improve their perceptions of the plaintiffs. Nevertheless, it was striking that even without defendants present, the meaning plaintiffs ascribed to court-linked mediations was the same.

2. *Mediations with Defendants Absent*

> Clients inevitably follow advice given by their lawyer. If their lawyer says 'This is the deal . . . . This is the figure; settle it,' it doesn't matter whether the doctor or nurse has been there to hear the whole story or not. The case settles, because the family are usually unsophisticated litigants. . . . It's very rare they will say 'no.'[122]
>
> – Male hospital lawyer

Where defendants were absent from mediation, most plaintiffs either did not know why the doctors did not attend or believed the doctors simply chose not to attend. As one mediator noted "plaintiffs are thinking that the doctor just doesn't want to face them." Only a minority of claimants (24 percent) appeared to be aware that attorneys decided whether defendants attended.[123] Interestingly, all seemed quite accepting of this, with few exhibiting negative feelings towards lawyers. This may have been because virtually all were first-time litigants. Nevertheless, the meaning of mediation for plaintiffs who were surrounded at mediations solely by lawyers or representatives was the same as for disputants who mediated together.

Case Study #3: Loss of sight case at a post-discovery voluntary mediation (no settlement reached)

Having lost most of her vision as a result of undetected glaucoma by an optometrist she had been visiting for 16 years, the plaintiff

121. *See* Gitchell & Plattner, *supra* note 17, at 445-46.
122. RELIS, *supra* note 25.
123. *Id.* at ch.4

never received an explanation or any form of apology from the defendant. There had been no contact since the incident in dispute.

Male defendant lawyer:

> The optometrist did not attend. He was advised early on that despite his feelings to the contrary, he would lose in a courtroom. So his involvement after that became rather peripheral . . . . He was advised of the mediation, but not invited to attend, given that liability was not in issue. It was just quantum.[124]

Male plaintiff lawyer:

> I'm not sure how I feel about whether defendants should show up. *Did your clients want the defendant there?* I'm not sure. I never discussed it with them. I'd be curious to see what they say about that.[125]

The plaintiffs discussed the attendance issue without even being asked about it.

Female plaintiff:

> *Did mediation benefit you at all?* [Pause] Well, I didn't see the doctor. I didn't get to tell him how I felt . . . you messed up. You should be there . . . . His time is not any more precious than mine . . . I refuse to feel inferior to anybody . . . . He should jolly well be there . . . . Money does not equate closure . . . for me. If I had gotten the check, the open wound would still be there. I would still be . . . marking blind on the same spot. If the doctor had been there that would definitely have brought me closure to all this madness.[126]

Male co-plaintiff (husband):

> I wish I had the opportunity to say to the doctor instead of them . . . . He should have been there. I still want an apology from the doctor . . . . It's the doctor that caused it, and having the opportunity to address him directly . . . would help . . . . Why should plaintiffs miss work to be there and they don't make that sacrifice? They should be the first person to be at that mediation . . . . They . . . messed up the plaintiff's life . . . . That made me more resentful towards him . . . the doctor, because there was absolutely no apology, no remorse . . . . Maybe the reason

124. RELIS, *supra* note 25.
125. *Id.*
126. *Id.*

> he was not there is he felt as if he has deceived us, an embarrassment . . . . Why did he not make it? He just didn't want to face us . . . . Maybe that's how he feels. That's the reason why he did not attend the mediation.
>
> *Can doctors benefit by mediation*? Oh yes . . . . They'll see the blind eyes . . . . They'll see these things, and that will enable them to be more careful. These are real people . . . . But when you don't see them, you don't deal with them. It's like out of sight out of mind.[127]

This type of scenario was repeated throughout virtually all of the case studies. Plaintiffs' primary complaint that doctors did not hear them was exaggerated if physicians were absent. When present, defendant physicians had to listen, even if they did not acknowledge what they heard.[128]

Case Study #4: Vasectomy dispute case at a pre-discovery mandatory mediation (no settlement reached)

In a vasectomy dispute, upon the wife's subsequent pregnancy and abortion, the only explanation the couple said they received from the surgeon was "It must be an act of God . . . . Maybe one in one hundred thousand cases this might happen."[129] No form of apology was given. As the non-lawyer mediator explained:

> I think more than any kind of compensation, the plaintiffs are looking for an acknowledgement that something went wrong . . . . There was never an acknowledgement to them that 'What a horrible thing, wanting this baby, but not being able to keep it, due to economic conditions.' I think it became also a religious issue. They're practicing Catholics . . . . They had done this . . . thing that goes against everything they believe. This came out when the husband spoke in mediation . . . . The defendant lawyer was focused on 'No. This isn't malpractice.' Can't pass that. I think this happened because the doctor wasn't there. You couldn't ask the doctor 'How would you like to respond to this?' How would you like to acknowledge that this was difficult? I think if they heard from the doctor 'I'm sorry you went through all this . . . . But, let me amplify for you again . . . ' eventually they would listen . . . I think it's in doctors' best interests to defend themselves and put a human face to this versus a legal face . . . .[130]

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127. *Id.*
128. *See* Abel, *supra* note 49.
129. RELIS, *supra* note 25.
130. *Id.*

Male plaintiff:

> He wasn't there . . . . Well, no. It was bad. I would have like to have seen him there. So I could tell him my side of the story . . . . Because I wanted him to know. Hear it coming from my mouth . . . because of this operation we went through a lot of grief . . . . *Do you know why he wasn't there?* No I don't, no . . . I assumed he would be there . . . I was eager to . . . tell him my side and ask for answers like 'why' and just to see what he would say . . . . I don't want to hurt this doctor. I just want him to own up for what he's done, the mistake he has done. But he wasn't even there to listen to it. So what, what the heck, you know? He wasn't even there, like why should he care? If he's not even going to be there to listen . . . . Like he did the operation and it's over now. He's done his job and like 'leave me alone' . . . . He's done me wrong, and he's not owning up to it.[131]

Female plaintiff:

> I was angry, because I would like to see who put me through all this . . . . My dispute wasn't with the doctor's lawyer. My dispute is with the doctor. He's the one that did the damage. He should be the one that's there . . . . *Any explanation?* I got a lot of mumbo jumbo. But nothing that would give me an understanding of why this happened . . . . If the doctor was there, I would have asked a lot of questions . . . . I didn't get the answers I was looking for; not just with the settlement. I'm just angry that my questions will never be answered about why things happened.
>
> It would help them to hear the plaintiff's part, and to get an understanding of the situation; what they put a person through . . . I had a really bad opinion of him . . . . *Did it change since mediation?* Nope . . . I just felt that he was wrong and he should have owned up to his mistake.[132]

Again, the defense lawyer's understanding of mediation was quite different from that of the plaintiffs. In speaking of the defendant's attendance, although not demanding that the defendant attend, the claimants' attorney took some account of extra-legal factors.

131. *Id.*
132. *Id.*

Male physician's lawyer:

> The mediation will be a waste of time as there are no expert reports yet. No physician will be there and I expect to be there for 5 minutes.[133]

Male plaintiff lawyer:

> I didn't know for sure whether the doctor would be there . . . . They probably would have liked him to be there . . . to hear from him what he says went wrong . . . to have him try to explain how this happened . . . . They'd get the sense of what has happened to the doctor . . . . The doctor would get a better appreciation of what they've gone through, was sorry for what they had gone through . . . and maybe an understanding as well that what the plaintiff is looking for is not . . . just money . . . .[134]

Finally, the last case study represents a classic case of the phenomenon of "mediation for a settlement without mediation of the dispute."

> Case Study #5: Child operation case at a mandatory mediation (settlement reached)

This case involved an operation on a child, in which only one out of the two parts was completed. However, the child had had other medical procedures and a material fear of going to doctors. He had to undergo 3 operations in total, having to be sedated three times. Thus, at least as far as the plaintiff parents were concerned, the dispute involved much more than simply undergoing another operation to complete what had not been done. As the father noted in the mediation, "I said everything would be okay after the first operation and then it wasn't. I lost credibility with my four year old."[135]

Male defendant surgeon (absent from mediation):

> Why did they sue? I have no idea . . . . I would like to have been at the mediation . . . . *Why didn't you attend?* I wasn't asked. My lawyer sort of said to me . . . 'I don't think you need to be there' . . . . If I would have said 'Oh, I'd like to be there' I probably could have been there. But the way it was sort of put to me 'I'll let you know if you need to be there.'

133. *Id.*
134. *Id.*
135. *Id.*

> It troubles me . . . the mistake was made because we were trying to make things happen sooner for this family. So . . . I would like to have been there . . . to make sure that information came forward . . . . My concern was to simply to have the parents appreciate the sequence of events . . . I think attending would be beneficial. Yeah, I think I probably would have benefited because I might not feel as strongly that these parents took advantage . . . .[136]

Male plaintiff (father):

> When he was first told about the mistake . . . . He didn't look too concerned . . . . No apology, nothing like that . . . . His tone of voice, very monotone . . . no sincerity . . . like 'Oh, I'm really sorry. Let me look into it' . . . . But instead 'Here's the form I read.' Then he just walked away.
>
> I would have liked him to be there and to say, 'I'm sorry' at least . . . . Even if he had just walked in and showed his presence, at least to show he was concerned, that he was sincerely sorry for what happened . . . . But my lawyer asked him not to be there for some reason, and I never got an explanation to that. But I trusted my lawyer's judgment . . . . *You knew he was not going to attend.* No, not till the mediation morning . . . . If I was some . . . millionaire . . . maybe the surgeon would have been there . . . *After mediation?* My views never changed about doctor.[137]

Female plaintiff (mother):

> *Do you know why the doctor didn't show up?* I have no idea . . . I was told he wasn't going to be there . . . . He should have been there . . . to apologize . . . . He didn't give us any apology when the whole incident happened . . . . *Did mediation affect your understanding of Doctor _____'s side*? No, not at all . . . because nothing was really explained . . . . *How do you feel about Doctor _____ now?* Oh, I feel the same. I can't believe he did not want to admit fault. He wasn't apologetic about it . . . .[138]

For these plaintiffs, notwithstanding the defendant's absence, the meaning of mediation still entailed communication between disputants in order to fulfill their psychological needs. Despite settling, the plaintiffs did not feel better about their situation, describing a far less satisfying mediation experience than plaintiffs who mediated with physicians in cases that did not settle and involved more serious

136. *Id.*
137. *Id.*
138. *Id.*

harm. A substantial reason for this involved the lack of communication by plaintiffs and defendants. Why did this occur?

Male plaintiff lawyer:

> It was my recommendation that we not insist the doctor be there. They followed my recommendation . . . . It would make it an uncomfortable three hours for them to be in the same room with him . . . . It would have made it a more uncomfortable atmosphere for everybody, because they had this animosity . . . The defense lawyers had advised me that for settlement purposes . . . liability wouldn't be an issue. So because we were only dealing with quantum, I didn't think it would be necessary or helpful to have the doctor there. It would ratchet up the tension level, and it wasn't like we were going to need an apology from him to get it settled because my clients were only talking about quantum . . . . The doctor doesn't make the decision about how much to pay . . . . So I didn't think there was much to be gained by having him there . . . .[139]

Male physician's lawyer:

> Could we come to some reasonable figure on damages? That was the issue at mediation . . . . Although the doctor was available and willing to attend, I felt it was unnecessary, given that liability wasn't going to be a focus at the mediation. It was entirely an issue of money, and really he had no role or interest in that . . . I mean he could spend his time doing other things . . . . Then when the plaintiffs' lawyer said . . . I thought 'well that's great . . . everybody's in sync. We don't need to have him attend . . . Given they had some animosity . . . his absence probably assisted in the resolution. They might have been more intransigent . . . . But I don't know. That's pure speculation.[140]

As with all the other case studies, this mediation underscored the alignment of legal versus lay actors' interests on the issue of defendant attendance at mediation and exemplified missed opportunities for disputants to communicate, understand and "feel better" about their own situations. Although the case settled, neither side ever came to understand the other's perspective or the reasoning that led to their conduct. Still, the meaning of mediation for plaintiffs in cases where defendants were absent mirrored those of plaintiffs in mediations with defendants present. For all plaintiffs, mediation

139. *Id.*
140. *Id.*

meant communication with defendants and treating their psychological needs. These issues, as well as the resentment towards defendants for mediation absences, were inherent in virtually all cases.

Thus, far from the forum where tactical strategies played out, mediation – for disputants – was a place to treat human needs and preserve human dignity. It was a place for both verbal and non-verbal communication, information sharing, human interchange, and most importantly "feeling better about their situations." It was an environment where material psychological or therapeutic benefits were in reach. This understanding was exhibited in the starkly different discourse of both plaintiffs and defendants on defendant attendance at mediation, with no mention being made of monetary settlement or the obvious fact that any settlement monies would not come from physicians themselves. Instead of most attorneys' strategic considerations, all plaintiffs and defendants spoke of psychological, therapeutic or educational reasons for mediating together. Notwithstanding any psychological difficulties in attending, all disputants emphasized the importance of defendants' presence and the lack of closure when defendants were absent. It was not so much that defendants were eager to attend mediation, but that they could not conceive mediation as occurring without them there. Even for disputants who did not mediate together, their discourse on "what could have been" revealed identical conceptions of this litigation-track process.

Plaintiffs' needs to have physicians at mediation may also have related to desires to level the playing field. Without defendants present, mediating plaintiffs were surrounded by professionals in a room where no one – apart from plaintiffs themselves – had anything to lose personally. This psychological leveling of the playing field also appeared to serve physicians' interests. Although being put into a forum with patients or families introduced a form of lay scrutiny of defendants' actions, it may have been that by attending defendants felt they regained some control over their disputes.

Thus, regardless of mediation venue, the issues in dispute or whether settlement ensued, by "not inviting" or not encouraging defendants to attend mediations, lawyers may have acted to both plaintiffs' and defendants' detriment. Apart from not addressing physicians' extra-legal needs, doctors' absence recurrently resulted in plaintiffs' perception that physicians themselves had refused to face them and acknowledge their tragedies or their pain. This engendered further animosity towards physicians who, unbeknownst to plaintiffs, in many cases were not offered the choice of attending. By

shutting defendants out of a fundamental part of their own disputes, legal actors caused mediations to represent missed opportunities for disputant communication and psychological healing. In view of contingency fee realities, mediation may have been the only opportunity disputants would ever have for face-to-face interaction during litigation.

IV. Changing the Balance of Power: The Case for Protecting Litigants' Extra-Legal Enterests

> Lay individuals desire different things from the legal system than they are typically given. What they want reflects a psychological paradigm. Yet, this is fundamentally different from the paradigm of legal decision-making that legal actors are socialized into in law school, and which dictates discussions in the legal field.[141]

Through an examination of actors' discourses on the issue of defendants' mediation attendance, this Article has revealed the very divergent, often conflicting understandings, needs and interests of attorneys versus litigants in litigation-track mediations. As such, the attendance issue can be conceptualized as a discontinuity between legal versus extra-legal interests in case processing. Underlying each actor group's disparate understandings and needs is an unlikely conceptual alignment between plaintiffs and defendants, distancing them from legal actors including their own representatives. Each "new" conceptual group – specifically legal actors on all sides, versus disputing plaintiffs and defendants – ascribes similar meanings to these disputes and their resolution, wants similar things and wants communication. However, these "new" groups do not want the same things nor do they speak the same "language." Instead, actors involved in the processing of these cases create competing meanings. Lawyers understand case processing as tactics and strategy, and disputants view their cases through a lens of psychological needs and emotions.

First, evidence was proffered as to attorneys' regular decisions and reasoning against having defendants attend litigation-track mediations, despite most attorneys' limited experiences with defendants present. Second, it was shown that plaintiffs' and defendants' understandings and desires for the process were overall uniform, whilst being very different from those of lawyers in all camps. Third, the case

141. Tom Tyler, *Citizen Discontent with Legal Procedures: A Social Science Perspective on Civil Procedure Reform*, 45 Am. J. Comp. L. 871, 872-84 (1997).

studies revealed that disputants' needs remain secondary, primarily due to the unequal knowledge and power relations inherent in lawyer-client relationships. This frequently resulted in real harm to both plaintiffs and defendants, appropriating their opportunity for communication and leaving material issues for them unaddressed. With doctors – the central participants – absent, mediations could not address the core issue of responsibility. Instead, mediations were transformed into venues for bargaining over money, depriving plaintiffs of any other remedy, such as acceptance of responsibility or acknowledgment of harm.[142] Moreover, doctors were often blamed for their mediation absences where it frequently appeared not to be their fault.

Thus, this Article offers a new theory that argues for the reinvention of identities of attorneys and clients in the context of formal and informal case processing as a basis for any meaningful legal reform. Increased attention to litigants' extra-legal needs during formal and informal dispute processes is necessary, though long ignored in the civil justice system. The findings here support those who have previously urged lawyers to integrate clients' legal and extra-legal interests "to adequately serve clients' human needs and interests,"[143] those who advocate a general "ethic of care"[144] to be part of lawyers'

142. *See* Abel, *supra* note 14.

143. *See, e.g.,* DAVID A. BINDER & SUSAN C. PRICE, LEGAL INTERVIEWING AND COUNSELING: A CLIENT CENTERED APPROACH 22, 185-86 (1977); ROBERT H. MNOOKIN ET AL., BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES 169 (2000); LEONARD RISKIN ET AL., DISPUTE RESOLUTION AND LAWYERS 86-95 (1997); Warren Lehman, *The Pursuit of a Client's Interest*, 77 MICH. L. REV. 1078, 1079-80 (1978); Peter Margulies, *"Who Are You to Tell Me That?": Attorney-Client Deliberation Regarding Nonlegal Issues and the Interests of Nonclients*, 68 N.C. L. REV. 213, 213 (1990); Carrie Menkel-Meadow, *From Legal Disputes to Conflict Resolution and Human Problem Solving: Legal Dispute Resolution in a Multidisciplinary Context*, 54 J. LEGAL EDUC. 7, 7 (2004) [hereinafter, Menkel-Meadow, *Legal Disputes and Human Problem Solving*]; Jacqueline M. Nolan-Haley, *Lawyers, Clients, and Mediation*, 73 NOTRE DAME L. REV. 1369, 1386 (1998); Stephen L. Pepper, *Counseling at the Limits of the Law: An Exercise in the Jurisprudence and Ethics of Lawyering*, 104 YALE L.J. 1545, 1602-04 (1995); Jean R. Sternlight, *Lawyers' Representation of Clients in Mediation: Using Economics and Psychology to Structure Advocacy in a Nonadversarial Setting*, 14 OHIO ST. J. ON DISP. RESOL. 269, 269, 274 (1999).

144. *See generally* CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT 8, 25-29, 33 (1982) (discussing divergences in males' versus females' moral reasoning, with males inclined to view problems from a hierarchal, independent, rights-oriented perspective and females tending to seek relational compromises and avoid win-loss, rights-based solutions utilizing an "ethic of care").

practices,[145] and those who advocate transforming attorneys' orientations from an adversarial paradigm to a problem solving one.[146] As Menkel-Meadow notes, in this "era of poststructural, postmodern knowledge, the attributes of the adversary system as the 'ideal type' of a legal system must be re-examined as human disputes have not only legal implications, but often a host of other concerns, e.g. emotional, interpersonal and moral. Thus, the objectives of the legal system and the methods utilized to reach those objectives require rethinking as well as a 'cultural change.'"[147]

As these problems derive partially from narrow, adversarial approaches to disputes, changes are necessary within legal education. This might be achieved through further emphasis on disputants' case realities within core legal education for law students as well as in continuing legal education and ethical rules for practitioners. Various changes have occurred in American law schools to include new approaches to lawyering aimed at supplementing adversarial teachings. They include "therapeutic jurisprudence," "holistic lawyering," and "collaborative lawyering."[148] However, these approaches still remain on the periphery of legal education and practice.[149] For the

145. *See, e.g.,* Stephen Ellmann, *The Ethic of Care as an Ethic for Lawyers*, 81 GEO. L.J. 2665, 2667 (1993); Kovach, *supra* note 3, at 418; Kovach, *supra* note 19, at 966-67; Ann Shalleck, *The Feminist Transformation of Lawyering: A Response to Naomi Cahn*, 43 HASTINGS L.J. 1071, 1078 (1992).

146. *See, e.g.,* Guthrie, *supra* note 7, at 180-82; Kovach, *supra* note 3, at 429; Kimberlee K. Kovach, *Good Faith in Mediation - Requested, Recommended or Required? A New Ethic*, 38 S. TEX. L. REV. 575, 619 (1997); Menkel-Meadow, *Legal Disputes and Human Problem Solving*, *supra* note 143, at 9; Carrie Menkel-Meadow, *Ethics in Alternative Dispute Resolution: New Issues, No Answers from the Adversary Conception of Lawyers' Responsibilities*, 38 S. TEX. L. REV. 407, 409-10, 428 (1997) [hereinafter Menkel-Meadow, *Ethics in ADR*]; Nolan-Haley, *supra* note 143, at 1372-73; Joshua D. Rosenberg, *Interpersonal Dynamics: Helping Lawyers Learn the Skills, and the Importance, of Human Relationships in the Practice of Law*, 58 U. MIAMI L. REV. 1225, 1228, 1234 (2004).

147. *See* Carrie Menkel-Meadow, *The Trouble with the Adversary System in a Postmodern, Multicultural World*, 38 WM. & MARY L. REV. 5, 7, 42 (1996) [hereinafter Menkel-Meadow, *Trouble With The Adversary System*].

148. Therapeutic Jurisprudence examines emotional and psychological implications of the legal system and attempts to apply law in a more therapeutic way. It posits that lawyers' actions should strive to achieve and maintain the psychological or physical wellbeing of the individual. *See, e.g.,* Lorraine E. Ferris, *Using Therapeutic Jurisprudence and Preventive Law to Examine Disputants' Best Interests in Mediating Cases About Physicians' Practices: A Guide for Medical Regulators*, 23 MED. & L. 183, 185-86 (2004); Kovach, *supra* note 19, at 971; Dennis Stolle et al., *Integrating Preventive Law and Therapeutic Jurisprudence: A Law and Psychology Based Approach to Lawyering*, 34 CAL. W. L. REV. 15, 50-51 (1997); Bruce J. Winick, *The Jurisprudence of Therapeutic Jurisprudence*, 3 PSYCHOL. PUB. POL'Y. & L. 184, 192 (1997).

149. *See* Paul Brest, *Skeptical Thoughts: Integrating Problem Solving into Legal Curriculum Faces Uphill Climb*, 2000 ABA DISP. RESOL. MAG., Summer 2000, at 20;

much-needed cultural change within legal practice generally, similar approaches must be included in mainstream legal education regardless of jurisdiction. These suggestions resonate with recommendations that legal education and changes in ethical rules for lawyers is key in transforming attorneys' orientations to a problem-solving paradigm from an adversarial one.[150] What is clear, however, is that such an approach is not a panacea, as such education has been in existence for a number of years. Thus, much more remains to be done.[151]

In addition, following from the findings noted here, "opt out" clauses within court rules allowing for litigants' absences from mediation "by agreement of the parties" should be changed as they frequently represent agreements made by lawyers alone. Finally, attorneys involved in these cases should, at a minimum, try to bring a proportion of their defendant clients to these mediations in order to realistically assess what effect this has on their cases.

Various objections might be made to these proposals. First, it might be argued that disputants' extra-legal objectives are not within the legitimate fields of lawyers' operations. Second, it may be asserted that mediations of frivolous cases might unnecessarily take defendants away from their important work of caring for other patients. Third, it might be contended that defendants' presence at mediations might prejudice the interests of stakeholders such as insurers or the medical defense organizations.

In response to these arguments I make the following points. First, as lawyers have achieved over generations a near monopoly over dispute management,[152] developing procedural fairness should be lawyers' priority.[153] Moreover, based upon the premise that the law and its workings must exist for the benefit of laymen rather than legal actors, if lawyers do not work to assist disputants with these

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Leonard L. Riskin, *The Contemplative Lawyer: On the Potential Contributions of Mindfulness Meditation to Law Students, Lawyers, and Their Clients*, 7 HARV. NEGOT. L. REV. 1, 8, 10, 14, 16-21, 23 (2002); Frank E. A. Sander & Robert H. Mnookin, *A Worthy Challenge: The Teaching of Problem Solving in Law Schools*, 2000 ABA DISP. RESOL. MAG., Summer 2000, at 21.

150. *See, e.g.,* Kovach, *supra* note 3, at 418, 429; Kovach, *supra* note 146, at 619; Menkel-Meadow, *Legal Disputes and Human Problem Solving*, *supra* note 143, at 9; Menkel-Meadow, *Ethics in ADR*, *supra* note 146, at 409-10, 428; Nolan-Haley, *supra* note 143, at 1372-73.

151. *See* Kovach, *supra* note 19, at 972; Menkel-Meadow, *Ethics in ADR*, note 146, at 427.

152. *See generally* PALMER & ROBERTS, *supra* note 6, at 25.

153. *See* STUART HAMPSHIRE, JUSTICE IS CONFLICT 40, 79 (1999).

issues, who else is in the position to? Who else has the power to bring disputants together once cases are in the legal system?

Second, in terms of frivolous cases unnecessarily taking physicians' time, it should be noted that many frivolous claims are weeded out of the system consequent to contingency fee realities for lawyers who will not take on or continue work on clearly unmeritorious cases. Furthermore, having mediations take place after expert reports have been acquired or after discoveries would further weed out unmeritorious complaints.

Third, in relation to stakeholders' interests being prejudiced by defendant attendance, two points can be made. The first is that the confidentiality inherent in mediation processes that deems all communications within mediations to be privileged and without prejudice is aimed to protect what occurs within the process from use in subsequent court proceedings.[154] The second is that viewing lawyers, insurers or other such entities as collectivities, their interests (being themselves to "continue in existence") must matter only inasmuch as they protect and advance individuals' interests and concerns. This is because lawyers as collectivities act as proxies for individuals, and not in their own names. If the interests of collectivities conflict with individuals' interests, collectivities then obtain their own interest, and the system is then shown to become concerned with itself.[155]

This Article presents one facet of a system where disputes are no longer wholly "owned" by disputants, in some sense being co-opted from them by legal actors in the justice system. Thus, decisions with material consequences for disputants are often taken out of their hands. I hope these findings will generate debate and further recognition of the inextricability of disputants' legal and extra-legal needs during case processing.

154. *But see* RELIS, *supra* note 25, at ch. 5 (detailing lawyers' lack of faith in mediation's confidentiality).

155. Joseph Raz, Address at the Columbia University Legal Philosophy Seminar Series, New York, N.Y. (2004); Interview with Joseph Raz, Professor of Law, Columbia University, in New York, N.Y. (Sept. 29, 2004).