



**2003 ANNUAL MEETING WORKSHOP  
ON DISPUTE RESOLUTION:**

***RAISING THE BAR AND  
ENLARGING THE CANON***

Friday, January 3, 2003  
Marriott Wardman Park Hotel  
Washington, D.C.

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**IMPORTANT:**

**Please complete the Evaluation Form for this Workshop.  
It can be found at the end of this booklet.  
Your comments will assist us in planning future conferences.**

## **WELCOME**

### **WELCOME TO THE AALS 2003 WORKSHOP ON DISPUTE RESOLUTION: *RAISING THE BAR AND ENLARGING THE CANON !***

Since the first AALS Dispute Resolution Workshop in 1982, at Harvard Law School, the field has blossomed in ways that few of us could have predicted and that we may not fully understand. That 1982 workshop was truly an introductory and exploratory event. Today, the level of sophistication is much higher and the questions we face are much more difficult.

We hope this Workshop will foster understanding by helping us focus on past, present, and future evolution of the field and our work as teachers, scholars, and practitioners of dispute resolution. The first plenary session, led by Carrie Menkel-Meadow of Georgetown, explores the modern history of dispute resolution in the law and in law schools, including perspectives from social sciences. In a sense, this session looks at the evolution of the canon of our field. The second plenary, moderated by Andrea Schneider of Marquette, considers some less established aspects of the field, such as emphases on ethics, emotions, culture, and mindfulness. (In fact, however, the dividing line between what is firmly entrenched in the field and what is not, is not so clear.) In the wrap-up session, Frank Sander of Harvard--who played a leadership role in organizing the first AALS Dispute Resolution Workshop in 1982, will reflect on the 2003 Workshop and what it portends for the future of our work. Our luncheon will be sparked by Eric Green's presentation, "Lessons Learned from High-Visibility Cases," drawing on his experience in mediating the Microsoft antitrust case and other well-known matters.

The workshop also features two blocks of interactive, concurrent sessions--twenty-three in all--dealing with scholarship, practice, and teaching issues on a wide-range of topics, such as Procedural and Social Justice, Teaching Law in ADR Courses, Conducting and Using Empirical Research, Dispute Resolution Systems Design, Building Community, Multi-Party Dispute Resolution, Special Masters and Mass Torts, Arbitration Pedagogy, the Comprehensive Law Movement, Conflict Theory, Ethics, and Emotion in Negotiation.

One consequence of having so many wonderful concurrent sessions is that each of us will have to miss most of the programs in which we would like to take part. Fortunately, there is a plan to address this problem. First, we have asked each speaker to provide a brief outline for inclusion in this program book. In addition, the AALS has established a website for this Workshop, which you can reach through the AALS homepage,

<http://www.aals.org/am2003/workshop.html>, that will include more extensive materials, such as teaching materials and course syllabi.

Many people helped produce this event. I extend warm gratitude to Jim Coben of Hamline Law School, Chair of the Section on Dispute Resolution, who started this process by preparing a splendid proposal to the AALS Professional Development Committee; to the Professional Development Committee, which approved his proposal; to AALS President Dale Whitman, who appointed the planning committee; to the AALS for their excellent assistance and guidance to the planning committee; to the best planning committee a chair could have-- James Alfini of Northern Illinois, Carol Bensinger Liebman of Columbia, and Gerald Williams of Brigham Young; to Chris Honeyman, Consultant to the planning committee, and an expert on who is doing what in both dispute resolution theory and practice; to the chairs and speakers for each of our 28 sessions, including 61 full-time law school teachers from 39 law schools and 10 other experts from private dispute resolution practice, universities, government agencies or non-profit organizations, and who prepared materials and will lead interactive sessions; and finally to every person in this room, each of whom brings knowledge, experience, energy and curiosity that will make this event sparkle and shine.

I wish you a fruitful and happy day.

Leonard L. Riskin  
University of Missouri-Columbia School of Law

**AALS ANNUAL MEETING  
WORKSHOP ON DISPUTE RESOLUTION:  
RAISING THE BAR AND ENLARGING THE CANON**

**January 3, 2003  
Marriott Wardman Park Hotel  
Washington, DC**

**Friday, January 3, 2003**

**8:45-9:00 a.m.**

**Welcome**

Dale A. Whitman, University of Missouri-Columbia  
and AALS President

**Marriott Ballroom Salon II**

*Lobby Level*

**Introduction**

Leonard L. Riskin, University of Missouri-Columbia and Chair,  
Planning Committee for AALS Annual Meeting Workshop on  
Alternative Dispute Resolution

**9:00-10:30 a.m.**

***Raising the Bar***

Historical Overview and Moderator

Carrie J. Menkel-Meadow, Georgetown University

Insights from Economics

Jennifer Gerarda Brown, Quinnipiac University

Insights from Social Sciences

Howard Gadlin, Ph.D., Ombudsman and Director, Center for  
Cooperative Resolution, National Institutes of Health,  
Bethesda, MD

Insights from Cognitive Psychology

Chris Guthrie, Vanderbilt University

Insights from Social and Procedural Justice Theory

Nancy Welsh, The Pennsylvania State University

**10:30 – 10:45 a.m.**

Refreshment Break

**Ballroom Foyer**

*Lobby Level*

**10:45 a.m. – 12:00 noon**  
**Concurrent Sessions**

ADR Clinics – Design  
& Management

**Taft**  
*Mezzanine Level*

Alice M. Council Curtis, Regent University  
Scott H. Hughes, University of New Mexico, **Chair**  
Carol L. Izumi, The George Washington University

Arbitration Pedagogy

**Kennedy**  
*Mezzanine Level*

Sarah Rudolph Cole, The Ohio State University, **Chair**  
Homer C. La Rue, Howard University  
Stephen J. Ware, Samford University

Conducting and Using  
Empirical Research

**Park Tower Suite 8219**  
*Lobby Level*

Bobbi McAdoo, Hamline University  
Janice Nadler, Northwestern University  
Jennifer K. Robbennolt, University of Missouri-Columbia, **Chair**

Conflict Theory

**Park Tower Suite 8212**  
*Lobby Level*

Robert M. Ackerman, The Pennsylvania State University  
Ken Fox, Assistant Professor, Graduate School of Public  
Administration and Management and University-wide Director,  
Conflict, Hamline University  
Julie M. Macfarlane, University of Windsor  
Richard C. Reuben, University of Missouri-Columbia, **Chair**

Dispute System Design

**Johnson**  
*Mezzanine Level*

Cathy A. Costantino, Counsel, Legal Division, Federal Deposit  
Insurance Corporation, **Chair**  
Nancy Rogers, The Ohio State University  
Margaret L. Shaw, ADR Associates, New York, New York

Globalization and  
Dispute Resolution

**Park Tower Suite 8209**  
*Lobby Level*

Harold I. Abramson, Touro College  
Matthew A. Levitt, Senior Fellow, The Washington Institute for  
Near East Policy, Washington, D.C.  
Andrea Kupfer Schneider, Marquette University, **Chair**

Innovations in ADR Pedagogy

**Truman**  
*Mezzanine Level*

John L. Barkai, University of Hawaii  
Lela Porter Love, Yeshiva University, **Chair**  
Maude H. Pervere, Stanford Law School

Insights from the Social Sciences

**Roosevelt**  
*Mezzanine Level*

Jennifer Gerarda Brown, Quinnipiac University, **Chair**  
Chris Guthrie, Vanderbilt University

Mass Torts and Class Actions

**Eisenhower**  
*Mezzanine Level*

Francis E. Mc Govern, Duke University  
Linda R. Singer, ADR Associates, Washington, D.C.

Mediation Advocacy

**Park Tower Suite 8210**  
*Lobby Level*

Lynn P. Cohn, Northwestern University  
Dwight Golann, Suffolk University, **Chair**  
Jeffrey M. Senger, Deputy Senior Counsel, Office of Dispute  
Resolution, U.S. Department of Justice, Washington, DC

Teaching the Law in ADR Courses

**Park Tower Suite 8216**  
*Lobby Level*

Kimberlee K. Kovach, The University of Texas  
Jacqueline Nolan-Haley, Fordham University **Chair**  
Jonathan M. Hyman, Rutgers, Newark

The Understanding-Based  
Approach to Mediation

**Park Tower Suite 8206**  
*Lobby Level*

Carrie J. Menkel-Meadow, Georgetown University  
Jack Himmelstein, Co-Founder and Co-Director, The Center for  
Mediation in Law, New York, NY  
Leonard L. Riskin, University of Missouri-Columbia

Where and How to Teach ADR  
in Law School Curriculum?

**Park Tower Suite 8222**  
*Lobby Level*

James R. Coben, Hamline University, Chair  
L. Randolph Lowry, Pepperdine University  
Suzanne J. Schmitz, Southern Illinois University

**12:00 noon – 1:45 p.m.**  
**AALS Luncheon**

**North Cotillion Ballroom**  
*Mezzanine Level*

***Lessons Learned from High Visibility Cases***

Eric D. Green, Boston University

Introduction: Carol Bensinger Liebman, Columbia University

**2:00-3:15 p.m.**  
***Enlarging the Canon***

**Marriott Ballroom Salon II**  
*Lobby Level*

Introduction: James J. Alfini, Northern Illinois University

Culture

Pat K. Chew, University of Pittsburgh

Emotions in Negotiation

Clark J. Freshman, University of Miami

Ethics

Scott Peppet, University of Colorado

Mindfulness

Leonard L. Riskin, University of Missouri-Columbia

Moderator: Andrea Kupfer Schneider, Marquette University, **Chair**

**3:15 - 3:30 p.m.**  
Refreshment Break

**Ballroom Foyer**  
*Lobby Level*

**3:30 – 4:45 p.m.**  
**Concurrent Sessions**

ADR Clinics – Supervision  
& Evaluation

**Park Tower Suite 8209**  
*Lobby Level*

Bobby Marzine Harges, Loyola University, New Orleans  
Kimberlee K. Kovach, The University of Texas  
Ellen Waldman, Thomas Jefferson School of Law

Building Community

**Park Tower Suite 8216**  
*Lobby Level*

Robert M. Ackerman, The Pennsylvania State University  
Joseph B. Stulberg, The Ohio State University, **Chair**

Community Lawyering

**Johnson**  
*Mezzanine Level*

Roger Conner, Director, Search-USA, Search for Common Ground,  
Washington, DC  
David Dominguez, Brigham Young University, **Chair**  
Sudha Shetty, Seattle University

Comprehensive Law Movement:  
e.g., Collaborative Law,  
Therapeutic Jurisprudence,  
Lawyer as Healer, etc.

**Park Tower Suite 8210**  
*Lobby Level*

Susan Daicoff, Florida Coastal School of Law, **Chair**  
David Link, President, International Center for Healing and the  
Law, Kalamazoo, Michigan and Notre Dame Law School  
Julie M. Macfarlane, University of Windsor

Cross-Cultural Issues in ADR

**Park Tower Suite 8219**  
*Lobby Level*

Howard Gadlin, Ph.D., Ombudsman, National Institutes of Health,  
Bethesda, MD  
Laura Michelle LeBaron, Associate Professor, Institute for Conflict  
Analysis and Resolution, George Mason University, Fairfax, VA  
Ilhyung Lee, University of Missouri-Columbia, **Chair**

Ethics and ADR

**Taft**

*Mezzanine Level*

Jonathan R. Cohen, University of Florida, **Chair**  
Michael Lee Moffitt, University of Oregon  
Scott Peppet, University of Colorado

Lawyers' Emotions in  
Dispute Resolution

**Roosevelt**

*Mezzanine Level*

Clark J. Freshman, University of Miami, **Chair**  
Daniel L. Shapiro, Senior Lecturer, MIT, Associate, Harvard  
Negotiation Project, Research Fellow, Department of Psychiatry,  
Harvard Medical School

Mediation: Should We Teach  
What the Market Wants?

**Eisenhower**

*Mezzanine Level*

Dwight Golann, Suffolk University  
Jane H. Gordon, University of Oregon, **Chair**  
Christopher Honeyman, President, Convenor Dispute Resolution,  
Madison, WI  
Peter R. Robinson, Pepperdine University

Mindfulness

**Park Tower Suite 8212**

*Lobby Level*

Daniel S. Bowling, Executive Director, Private Adjudication Center  
an Affiliate of Duke University School of Law, Durham, NC  
Leonard L. Riskin, University of Missouri-Columbia, **Chair**

Multi-Party Dispute Resolution

**Park Tower Suite 8222**

*Lobby Level*

Michael K. Lewis, ADR Associates, Washington, D.C., **Chair**  
Carrie J. Menkel-Meadow, Georgetown University

Reflective Practice and Other  
Strategies for Developing  
True Expertise in ADR

**Truman**

*Mezzanine Level*

Phillip J. Harter, Vermont Law School  
Richard K. Neumann, Jr., Hofstra University  
Gerald R. Williams, Brigham Young University, **Chair**

Social and Procedural Justice  
and the Role of ADR

**Park Tower Suite 8206**  
*Lobby Level*

James J. Alfani, Northern Illinois University  
Isabelle R. Gunning, Southwestern University  
Nancy Welsh, The Pennsylvania State University, **Chair**

4:55 - 5:30p.m.

**Marriott Ballroom Salon II**  
*Lobby Level*

***Now What?***

Introduction: Gerald R. Williams, Brigham Young University

Frank E. A. Sander, Harvard Law School

**PLANNING COMMITTEE FOR 2003 ANNUAL MEETING WORKSHOP  
ON ALTERNATIVE DISPUTE RESOLUTION**

JAMES J. ALFINI  
*Northern Illinois University*

CAROL BENSINGER LIEBMAN  
*Columbia University*

LEONARD L. RISKIN, **Chair**  
*University of Missouri-Columbia*

GERALD R. WILLIAMS  
*Brigham Young University*

**AALS COMMITTEE ON PROFESSIONAL DEVELOPMENT**

ALISON GREY ANDERSON  
*University of California at Los Angeles*

DAVID F. CHAVKIN  
*American University*

MARJORIE L. GIRTH  
*Georgia State University*

ROBERT A. HILLMAN, **Chair**  
*Cornell Law School*

STEVEN H. HOBBS  
*The University of Alabama*

DANIEL LOUIS KEATING  
*Washington University, St. Louis*

MARIA L. ONTIVEROS  
*Golden Gate University*

NANCY B. RAPOPORT  
*University of Houston*

JENNIFER LORRAINE ROSATO  
*Brooklyn Law School*



## WORKSHOP SEAKERS

**ABRAMSON, HAROLD I.,\* (M)** Prof. Touro. b.1949. B.B.A., 1971, Michigan; J.D., 1974, Syracuse; M.P.A., 1982, ; LL.M., 1983, Harvard. *Admitted:* NY, 1975; DC, 1980. Staff Att'y, Monroe Cty. Legal Assist. Corp., Rochester, NY, 1974-76; Assoc. Counsel, NYS Consumer Protec. Bd., Albany, 1976-78; Dir. & Spec. Counsel, Utility Interven. Off., 1978-81; Primary Consult., Gov'rs Task Force on Energy Cost Reduc., C'wealth of MA, Boston, 1982; Ass't Prof. Touro, 1983-85; Assoc. Prof., 1985-87; Assoc. Dean, Acad. Affrs., 1986-91; Prof., since 1987; Acting Dean, fall 1991; V-Dean, 1992-96. *Subjects: Administrative Law; Alternative Dispute Resolution; Antitrust; Commercial Law; International Transactions; Legislation; Regulated Industries.* CEELI Legal Specialist in Russia, Central & E. European Law Initiative, ABA, since 1992; Chrspn., Com. on ADR, NYS Bar Ass'n, 1993-97; Mediator, Fed. Eastern Dist. Ct., NY, since 1996. Vis. Prof., spring 2002, Yeshiva.

**ACKERMAN, ROBERT M., (M)** Prof. & Dir., Cntr. for Dispute Resolu. Penn State-Dickinson. b.1951. B.A., 1973, Colgate Univ.; J.D., 1976, Harvard. *Admitted:* CO, 1976; PA, 1982. Assoc., Holme, Roberts & Owen, Denver, 1976-80; Ass't Prof., Dickinson, 1980-83; Assoc. Prof., 1983-85; Prof., 1985-96; Vis. Lect., Leicester Poly. Sch. of Law, Eng., spring 1987; Vis. Prof., Penn. St. Univ., Coll. of Med., Hershey, spring 1989; Vis. Prof., Univ. of Vienna, Sch. of Law, Austria, spring 1994; Assoc. Dean, Inst'l Progs. & Plng., Dickinson, 1995-96; Dean & Prof., Willamette, 1996-99; Prof., Penn State-Dickinson, since 1999; Dir., Cntr. for Dispute Resolu., since 2000. *Subjects: Alternate Dispute Resolution; Conflict Theory, (S); Legal History, (S); Legislative & Administrative Process; Mediation; Torts; Trial & Appellate Advocacy.* Instructor's Manual with Simulation and Problem Materials to Accompany Riskin and Westbrook's Dispute Resolution and Lawyers (Contrib.), 1987, 2d ed. 1998; To Promote the General Welfare (Contrib., Carney, ed.), 1999. *Member:* Phi Beta Kappa; Ass'n for Conflict Resolu.; Am. Inns of Ct. Appellate Off'r, PA Spec. Educ. App. Panel, 1990-95; Civil Just. Reform Act Adv'y Grp., U.S.D.C., M.D. PA, 1993-96; Mem., OR Law Comm., 1997-99.

**ALFINI, JAMES J., (M)** Prof. No. Illinois. b.1943. A.B., 1965, Columbia; J.D., 1972, Northwestern. *Admitted:* NY, 1973; IL, 1976. Reginald Heber Smith Fellow, Monroe Cty. Legal Assist. Corp., Rochester, NY, 1972-73; Ass't Dir., Res., Am. Jud. Soc., Chgo., 1973-76; Dir., Res., 1976-80; Ass't Exec. Dir., 1980-85; Assoc. Prof., Fla. State, 1985-90; Prof., 1990-91; Dean, No. Illinois, 1991-97; Prof., No. Illinois, since 1991. *Subjects: Alternative Dispute Resolution; Civil Procedure; Constitutional Law; Environmental Law; Professional Responsibility.* Making Jury Instructions Understandable (with Elwork & Sales), 1982; Judicial Conduct and Ethics (with Shaman & Lubet), 1990, 2d ed. 1995. *Member:* ALI; Law & Soc. Assn. Dir., Educ. & Res., FL Dispute Resolu. Cntr., 1986-91; Med. & Arb. Rules Com., Sup. Ct. of FL, 1987-91; IL Jud. Ethics Adv'y Com., 1992-98.

**BARKAI, JOHN L., (M)** Prof. & Dir., Clin. Prog. Hawaii. b.1945. B.B.A., 1967, ; M.B.A., 1968, ; J.D., 1971, Michigan. *Admitted:* MI, 1972; CA, 1973; HI, 1978. Att'y, Defenders' Off., Detroit, 1972-73; Vis. Assoc. Prof., Wayne State, 1973-74; Assoc. Prof., 1974-78; Assoc. Prof., Hawaii, 1978-83; Assoc. Dean, 1982-83; Prof., since 1983; Vis. Sr. Fellow, City Polytechnic of Hong Kong, 1992-93. *Subjects: Clinical Teaching; Criminal Procedure; Evidence; International Business Transactions; Legal Writing; Negotiation & Alternative Dispute Resolution.* Consult Dir., Cts. Proj., Prog. on Conflict Resolu., since 1985; Com. Mem., HI Sup. Ct. Stdg. Comm. on Rules of Evid., since 1993; Chair, ADR Sect., AALS, 2001.

**BOWLING, DANIEL S.** Exec. Dir., Private Adjudication Ctr., Durham, No. Car. B.A., Furman; J.D., Harvard. Public Defender, Charleston, So. Car.; Member, Urban Law Inst.; Founder, LowCountry Mediation Network, Charleston, So. Car.; Exec. Dir., Soc. of Professionals in Dispute Resolution, 1997-2000; Chief Exec. Off., Assoc. for Conflict Resolution; Adj. Prof., Howard; Exec. Dir., Private Adjudication Ctr., Durham, No. Car.; Adj. Prof., Duke. *Bringing Peace into the Room: The Personal Qualities of the Mediator and their Impact on Mediation* (with Hoffman), 2000.

**BROWN, JENNIFER GERARDA, (F)** Prof. & Dir., Cntr. on Dispute Resolu. Quinnipiac Univ. b.1960. B.A., 1982, Bryn Mawr; J.D., 1985, Illinois. Notes & Comments Ed., Ill. L. Rev. *Admitted:* IL, 1985. Clerk, Hon. Harold A. Baker, U.S.D.C., C.D. IL, Danville, 1985-86; Assoc., Winston & Strawn, Chgo., 1986-89; Bigelow Fellow, Univ. of Chicago, 1989-90; Ass't Prof., Emory, 1990-93; Assoc. Prof., 1993-94; Assoc. Prof., Quinnipiac, 1994-96; Prof., since 1996; Vis. Prof., Illinois, spring 1998. *Subjects: Alternative Dispute Resolution; Civil Procedure; Feminist Jurisprudence, (S); Legal Profession; Negotiation.*

**CHEW, PAT K., (F)** Prof. Pittsburgh. b.1950. A.B., 1972, Stanford Univ.; M.Ed., 1974, ; J.D., 1982, Univ. of Texas. *Admitted:* IL, 1982; CA, 1985. Grad. Study, Sch. of Bus., Univ. of Texas, 1979-80. Att'y, Baker & McKenzie, Chgo., & San Fran., 1982-85; Adj. Prof., Cal., Hastings, 1984-85; Ass't Prof., Pittsburgh, 1985-89; Assoc. Prof., 1989-94; Prof., since 1994; Vis. Prof., Univ. of Texas, 1994; Prof., Semester-at-Sea Prog., Inst. of Shipboard Educ., spring 2000. *Subjects: Alternative Dispute Resolutuion; Comparative Law, (S); Corporations; Employment Law; Race Relations & ADR, (S).* Director's and Officer's Liabilities, 1993 & supps., 2000; Corporations and Other Business Organizations: Cases, Materials, Problems, (with Soderquist, Sommers & Smiddy), 5th ed. 2001; The Conflict and Culture Reader, 2001. *Member:* Phi Kappa Phi; Beta Gamma Sigma. Exec. Com., Min. Sect., AALS, 1989-90, 1996-97; Min. Affrs. Com., LSAC, 1999-01.

**COBEN, JAMES R., (M)** Assoc. Clin. Prof. & Dir., Dispute Resolu. Inst. Hamline. b.1956. B.A., 1979, Williams Coll.; J.D., 1986, Northeastern. *Admitted:* MN, 1986. Jud'l Clerk, Hon. Robert G. Renner, D.C.J., Dist. of MN, St. Paul, 1986-88; Clin. Instr., Hamline, 1988-00; Assoc. Clin. Prof., since 2000. *Subjects: Alternative Dispute Resolution; Clinical Teaching. ADR Rev. Bd., MN. Sup. Ct., 1999-02.*

**COHEN, JONATHAN R., (M)** Ass't Prof. Univ. of Florida. b.1966. A.B., 1987, A.M., 1989, ; J.D., 1992, ; Ph.D., 1993, Harvard. *Admitted:* MA, 1992; NY, 1993. Clerk, Hon. Benjamin Kaplan, MA App. Ct., Boston, 1996; Att'y, Stoneman, Chandler & Miller, L.L.P., Boston, 1996-97; Hewlett Fellow, Prog. on Negotiation & Lect., Harvard, 1997-99; Ass't Prof., Univ. of Florida, since 1999. *Subjects: Evidence; Negotiation/ADR.*

**COHN, LYNN P., (F)** Sr. Lect. Northwestern. b.1961. B.A., Illinois; J.D., Northwestern. *Admitted:* IL, 1987. Fellow, Illinois, 1982; Fellow, Cal., Berkeley, 1983. Sr. Lect., Northwestern, since 1999. *Subjects: Mediation; Negotiations.*

**COLE, SARAH RUDOLPH, (F)** Assoc. Prof. Ohio State. b.1966. B.A., 1986, Puget Sound; J.D., 1990, Univ. of Chicago. Ed.-in-Ch., U. Chi. Legal F. *Admitted:* WA, 1990; IL, 1993. Assoc., Heller, Ehrman, White & McAuliffe, Seattle, 1990-91; Jud. Clerk, Judge Eugene Wright, 9th Cir., Seattle, 1991-92; Assoc., Seyfarth, Shaw, Fairweather & Geraldson, Chgo., 1993-94; Vis. Ass't Prof., Creighton, 1994-95; Ass't Prof., 1995-98; Assoc. Prof., Creighton, 1997; Vis. Assoc. Prof., Univ. of Oklahoma, 1997-98; Assoc. Prof., Ohio State, since 1998. *Subjects: Administrative Law; Alternative Dispute Resolution; Remedies; Torts.* Rogers, McEwen & Cole, *Mediation: Law, Policy & Practice*, 2d ed. 1994 & supps. Acad. Adv'y Fac., Unif. Med. Act, Nat'l Comm'rs on Unif. St. Laws, since 1998.

**CONNER, ROGER** B.A., Oberlin; J.D., Michigan. Dir., Search-USA, Search for Common Ground, Washington, D.C. Founder, Ctr. for the Community Interest; Exec. Dir., Amer. Alliance for Rights and Responsibilities, 1989-1998; Dir., Search-USA, Search for Common Ground.

**COSTANTINO, CATHY A.** Counsel, Fed. Deposit Insurance Corp. B.A., 1977; M.S. 1978, Catholic; J.D., 1982, Berkely. *Admitted:* DC, 1982. Counsel, Steptoe & Johnson, Washington, DC, 1982-86; Ass't. Gen. Counsel, Fed. Home Loan Bank Board, Washington, DC, 1986-89; Counsel, Fed. Deposit Insurance Corp., Washington, DC, since 1989; Adj. Prof., Georgetown, since 1993; Adj. Prof., George Washington, since 1998; Instructor, Columbia, since 1998; Adj. Prof., George Mason, since 1998. *Designing Conflict Management Systems*, 1996. Best Applied Book Award, Int'l. Assoc. of Conflict Mgmt., 1997.

**CURTIS, ALICE M. COUNCIL, (F)** Assoc. Prof. Regent. b.1946. B.A., 1974, Howard; J.D., 1980, Georgetown; M.A., 1983, Antioch. *Admitted:* DC, 1984. Ass't to Dean, Acad. Affrs., Antioch, 1980-81; Clin. Fellow, 1981-83; Priv. Prac., Sole, DC, 1984-94; Admin'r/Dir., Public Ministries, Christian Legal Soc., Annadale, VA, 1987-90; Assoc. Prof., Evergel Univ., Springfield, MO, 1994-98; Assoc. Prof., Regent, since 1998. *Subjects:* Family Law Clinic & Counseling; *Family Law; Mediation; Negotiation.* *Member:* Phi Delta Phi; James Kent Am. Inn of Ct. Bd. of Dirs., Ozarks Public TV, 1994-96; Bd. Mem., Christian Educ. Ass'n Int'l, since 1998.

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## **Raising the Bar**

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From Legal Disputes to Conflict Resolution and Human Problem Solving: An Introduction to Dispute Processing and Conflict Resolution: Theory, Practice and Policy (Ashgate-Dartmouth Press: Aldershot, UK and Burlington, Vt., 2003 (forthcoming) © Carrie Menkel-Meadow

### *Legal Process, Conflict and Justice*

The essays published in this volume represent my own intellectual journey, as well as a description of the evolution of the field of dispute resolution (rooted in legal studies) to the now broader field of conflict resolution that encompasses the study of disputes and conflicts, not only when they “come to law” in legal disputes, but in all the forms of human conflict, including the interpersonal, domestic and international. While my work began in legal disputing, it quickly moved to the more interdisciplinary study of conflict resolution when I sought better solutions to human problems than those afforded by courts or unprincipled compromises in conventional negotiation processes. These essays focus on several important themes as dispute resolution in law has expanded to include the fuller study of human conflict situations: First, although necessary and important in some cases, conventional legal processes, like adjudication and adversarial negotiation, are often inadequate for a fuller satisfaction of human needs and interests and so we must look to other processes than traditional institutions or practices, depending on the nature and kind of conflict or dispute at issue. With a growing availability of different kinds of processes for different kinds of matters, we are also developing a broader array of “process institutions.” This is “process pluralism” and should expand the focus of what is studied in law and jurisprudence. Second, while much of my work could be characterized as “procedural” or “process” driven, I am also concerned with exploring where our substantive solutions to human problems come from and how we can improve upon the human repertoire for problem solving. This is the “creativity” in human conflict resolution that I believe is necessary for our future survival. Third, developments in the parallel fields of legal dispute resolution and the more multi-disciplinary conflict resolution provide us with a special opportunity to explore the correspondences, contrasts and learning from domestic disputes and international conflicts, as we test whether particular concepts, approaches and processes can be generalized or have only contextual validity. Finally, my work in the field of dispute and conflict resolution has always been a movement back and forth from theory development to practice, seeking what Donald Schon has called “theory-in-use” (Schon, 1983; Schon & Rein 1994) and what I have called “ethical practice”; practice that is informed by theory and by morally legitimate uses. Disputes and conflicts are human constructs – we need theory to understand their causes, dynamics and trajectories of actions and reactions, but ultimately, we need practice to use conflict creatively and constructively, to make “justice” in legal terms and to make “peace” in human terms.

I came to law seeking justice, equality, and fairness. When I didn’t always find it in conventional legal structures, I went looking in other places. My own intellectual and professional journey has coincided with (and, I believe, influenced) the modern

development of legal dispute resolution as a field, (now much larger than procedure, remedies and substantive, as well as adjectival, law). I hope these essays will illuminate how the field is currently being constituted, defined, practiced, theorized, criticized and reformed as I hope to contribute to how the field matures in the future.

If recent world events have taught us anything, it is that conflict and conflicting notions of the good are inevitable for human beings. So, while many of us seek ways to establish more universal notions of the good toward which to direct our human efforts, it has, sadly, become, in the early years of the twenty-first century, more common for us to assume there will be basic value differences among us. We should, then, spend our time thinking about how we can at least develop fair and considerate processes for communicating enough with each other so that we may act with the most benefit and the least harm. Some offer hopes that “the rule of law” can be universalized as a principled way to resolve conflicts, domestically and internationally. Others of us see law as often conflictual, indeterminate and politically contested or manipulable, or so focused on the need for regulation of the aggregate that it cannot always do “justice” in particular cases. Legal justice is not always actual justice (Luban, 1995; Menkel-Meadow, 1995).

The social philosopher Stuart Hampshire has recently concluded, in his book *Justice is Conflict* (2000), that while we may never agree about what the content of universal justice is (“because there never will be such a harmony, either in the soul or in the city,” (pg. 4), we might instead come closer to recognizing that “fairness in procedures for resolving conflicts is the fundamental kind of fairness and that it is acknowledged as a value in most cultures, places and times: fairness in procedure is an invariable value, a constant in human nature.” (Pg. 4). Hampshire goes on to say – in words eloquent enough to make one feel proud of what has constituted at least half of a lifetime’s work of theorizing and practice in conflict resolution – that:

[b]ecause there will always be conflicts between conceptions of the good, moral conflicts, both in the soul and in the city, there is everywhere a well-recognized need for procedures of conflict resolution, which can replace brute force and domination and tyranny....(pg. 5)

The existence of such an institution [for conflict resolution], and the particular form of its rules and conventions of procedure are matters of historical contingency. There is no rational necessity about the more specific rules and conventions determining the criteria for success in argument in any particular institution, except the overriding necessity that each side in the conflict should be heard putting its case (“*audi alteram partem*”). (Pg. 18)

[T]he skillful management of conflicts [is] among the highest of human skills. (Pg. 35).

Hampshire identifies several principles which are crucial to understanding the importance of procedural justice:

1. Conflict is human and ubiquitous. Conflict is actually necessary for defining what is important about oneself and the polity to which individuals belong, and for instigating important social change (e.g., the elimination of slavery, the movements toward racial and gender equality, as well as increased democratic participation in many nations). Agreement on all human values is unlikely given human diversity, deep-seated cultural norms and the variation of human needs and desires.

2. Even if we cannot all agree on substantive norms and goals we can probably agree on some processes for how to make decisions that will enable us to go forward and act. We might have some almost virtually universal ideas about procedural fairness, like the ability to “make a case” and “be heard” and to have impartiality and fairness govern any decision-making process (Tyler, 2001, Tyler & Lind, 1988). Some might go further and suggest that some participation in the process by which decisions are made is essential to the legitimacy of a process (with or without commitments to democratic political regimes).

3. There is historical (and I would add functional) variation to what those fair procedures might be in any particular context, as long as *all* (not just “both”) parties are given an opportunity to be heard on (or, I would add, participate in) decisions affecting them. This is the principle of *process pluralism* (which is of defining importance to the modern dispute resolution movement and what distinguishes us, conflict theorists and practitioners, from more conventional jurists who often still see conventional legal processes as the only way forward to substantive justice).

4. Conflict resolution is a human skill (to be theorized about, taught, learned and practiced) and a difficult, but highly valued, one at that. (I would add it is more than a “single” skill, constituting a multi-dimensional set of skills, implicating abilities to listen, articulate, advocate, empathize, analyze, facilitate, create, manage and care about people and their problems, issues, values and material well-being.)

#### *Process Pluralism*

Yet, if procedural justice is important to modern justice seekers, it is also important to recognize that particular processes do affect outcomes. This is what drew me away from focusing on limited legal remedies to thinking more broadly about substantive problem solving and conflict resolution in deeper and richer sociological and psychological contexts, (Menkel-Meadow, 1983). While process pluralism allows us to choose different processes for functional or other reasons, we must also consider that the choice of a particular process will almost certainly affect the outcome we produce. This is the basic principle of my own work in negotiation – to choose an adversarial process, (whether litigative or negotiable) is to limit the field of possible outcomes to distributive arrangements (binary or zero or negative sum solutions, stalemates, or unprincipled compromises). To choose another process may allow for more creative, joint-gain, wealth creating and satisfactory possibilities to emerge (Menkel-Meadow, 1984, ch. 3 this volume). Thus, process pluralism has both a darker and a lighter side. While more choices of process might appear to improve substantive outcomes, especially with more party participation, each process produces its own morality (an insight we owe to legal philosopher and practitioner Lon Fuller, (2001) and structures its own solutions and outcomes. Critics suggest that coercive pushes toward participatory processes seeking consensus and false “harmony” may be just as unjust as the harder-edged and more hierarchical conventional institutions (Nader, 1993).

With increasing sensitivity to the notion that different processes produce different outcomes, modern analysts are now looking at how particular conflict and dispute resolution or democratic processes (rational-principled vs. preference trading-bargaining, open vs. closed, plenary vs. committee) produce different results, even in such value-laden deliberations as constitution making (Rakove, 1987; Elster, 1995;

Lansky, 2000) and in such complex settings as private and governmental organizations, as well as in both private and public international settings.

For me, a focus on how we deal with human conflicts in a wide range of contexts, (from the individual to the dyadic; group, organizational, social and relational; commercial as well as political; local, domestic and international), raises issues of inevitable tensions among and between the very values about which we have conflicts: Can peace be achieved without justice? Can justice be achieved without peace? Is law a proper measure of justice? If not law, what is? How much should individual or group parties be able to craft their own arrangements or agreements to proceed with social, economic and political life without consideration of the effects of their arrangements on others? Must all dispute or conflict resolution be accountable to those outside of the dispute itself? When is a “dispute” between two parties really a “poly-centric” conflict, affecting others, or implicating more enmeshed social values? If there is process pluralism, how are we to judge if the “proper” process has been chosen for the particular matter at hand? These are some of the questions this introductory essay and the articles that follow it explore.

Like Stuart Hampshire, I believe in procedural justice as justice because we need ways to talk to and struggle with each other about how to move forward when we disagree. Unlike Stuart Hampshire, I do not adopt the streamlined and universalized definition he gives of procedural justice as reducing to “the adversary principle” of (merely) “hearing the other side.” Much of my work has been devoted to demonstrating that most disputes and conflicts do not have only two sides, either of parties or “players” (plaintiffs and defendants) or “issues” or arguments (“win/lose”, “yes/no”). In our post-modern and fractured world, many disputes and conflicts are, in fact, characterized by complicated issues (e.g. resource allocation), multiple party responsibility (are we past single fault attributions and simplistic causal assumptions in law yet, or do we lag so far behind science?), and generational and other “third party” impacts (such as in environmental and family dissolution matters). In my view, we need both new multi-party processes (beyond the outmoded two-sided adversary system, Menkel-Meadow, 1996b) and new substantively creative solutions (Menkel-Meadow, 2001, ch. 11 this volume) (beyond the “limited remedial imaginations of courts and other legal institutions,” Menkel-Meadow, 1984) to find justice in our increasingly diverse, post-modern world.

In this introductory essay I outline the challenges, cleavages, and consensuses that have emerged as the field of dispute processing or conflict resolution has attempted to create, define and implement institutions and processes of procedural justice, as I outline my own contributions to this field in the essays and articles that follow. Throughout, a few important themes recur.

### *Of Disputes and Conflicts and Dispute Processing and Conflict Resolution*

The field is now variously referred to as “dispute resolution” “alternative dispute resolution” (assuming all processes other than adjudication are “alternative”), or “appropriate dispute resolution” (assuming functional fits of “forums to fusses” (Sander & Goldberg, 1994). More broadly, conflict resolution. demonstrates, in its multifarious nomenclature, its rather promiscuous or multiple-heritage ancestry. Many different intellectual disciplines have contributed basic concepts, research agendas, institutional forms and professional roles, enactments and practices. For purposes of some (perhaps artificial) clarity, I suggest here, as I review the history of the development of the field and its key ideas and concepts, that “disputes” and

“dispute resolution” have been constituted by the legal field (Bourdieu, 1987, 1993), and “conflicts” and “conflict resolution” by the broader pastiche of the social sciences (anthropology, political science, international relations, sociology, psychology, history, economics and game theory) and their more multi-disciplinary social activist spin-offs, such as peace studies (Lederach, 1995), social movement theory and practice (Ackerman & Duvall, 2000) and conflict resolution, (Miall, Ramsbotham, Woodhouse, 1999; Kriesberg, 1998). While ‘disputes’ may be about legal cases, conflicts are more broadly and deeply about human relations and transactions. Conflict ‘handling’ may be both more and less involving and complicated than ‘dispute settlement’ or ‘conflict management.’

The study of “dispute processing” is a sort of bridge terminology and field, having been constituted by legal anthropologists (some of whom were and are lawyers) to move the focus away from legally constructed “cases” to the broader notion of culturally and contextually embedded “disputes” having existences, before, during and after formal legal disputes (Llewellyn & Hubbell, 1941; Abel, 1973, Felstiner, 1974; Felstiner, Abel & Sarat, 1980-81; Nader & Todd, 1978). This rich line of both theorizing and empirical study of dispute processing in the tradition of socio-legal studies (Law & Society Rev. 1980-81) has sought to study disputants, their representatives, the context and content of their disputes and the varieties of processes chosen to “process” (not necessarily to resolve or manage) their disputes in order to uncover what social processes and relationships, in addition to, or other than, “law,” influences what actually happens to disputes.

The socio-legal focus on “disputing processes” de-centers – but does not eliminate – law as the primary variable explaining how disputes are resolved. It was a natural derivative of the school of legal realism which, in its own time, de-centered doctrine in legal studies and indeed, provided the first generation of dispute resolution scholars and practitioners, among them Lon Fuller, Soia Mentshikoff, and Karl Llewellyn, who studied legal institutions, where doctrine was made, enforced, and sometimes resisted or transformed in practice (see Menkel-Meadow, 2000, ch. 1, this volume).

The study of conflict and conflict resolution clearly pre-dates the focus on disputes and dispute resolution institutions in the law. Sociologists, such as Durkheim, Marx, Simmel (1955) and Lewis Coser (1956) among others, were interested in both the structure and function of various forms of conflict in society. It was sociologists who first argued for the constructive role of conflict and the positive social change dimensions of conflict in society.

Social psychologists took up the study of conflict, in both its “destructive” and “constructive” forms (Deutsch, 1973; Lewin, 1948) as they focused on both individual and group behaviors in preventing, making, escalating, resolving and reconciling conflict (Pruitt & Rubin, 1986). A different group of social psychologists studied and created a new field, “procedural justice” which empirically examined differences with respect to expectations and performances in different process settings (contrasting, for example, adversarial structures with inquisitorial ones, Tyler & Lind, 1988; Thibaut & Walker, 1975, and now mediation and arbitration forms with adjudication). These social scientists have documented that participants in dispute resolution processes have a strong desire for “procedural fairness,” that may be more robust than their satisfaction or concerns about actual outcomes (Lind, et.al., 1990).

Social psychologists have more recently focused on how human cognitive errors both produce conflict and prevent us from resolving conflicts in rational and efficient

ways, identifying a group of heuristic and strategic errors we make in processing information and forming preferences when we interact with others (Arrow et. al. 1995; Reason, 1990; Nisbett & Ross, 1980; Ross & Nisbett, 1991; Kahneman, Solvic & Tversky, 1982; Bazerman & Neale, 1992; Bazerman, 1998).

Sociologists and social psychologists together have produced a variety of typologies and taxonomies of types of conflicts, specifying such variations as material vs. non-material (value or needs based) conflicts; perceptual, behavioral, and attitudinal conflicts; malleability or changeability of the res in conflict; numbers of parties in conflict (dyadic vs. multi-party); inter-group (e.g., nation-state) vs. intra-group (organizational) conflicts; and intrapersonal vs. interpersonal conflicts. Efforts at cataloguing types of conflicts, replicated in political science for both domestic and international disputes and conflicts, and now law, are based on the rationalistic hopes that taxonomies of characteristics will enable us to collect data, identify patterns or “indicators” and make predictions for the trajectory of a conflict and perhaps for its “treatment” in various forms of prescriptive conflict resolution interventions.

Cultural variations in how conflicts are defined, experienced and acted on have engaged anthropologists since at least the nineteenth century (Avruch, 1998, 2002). Now the old debates about cultural differences have reared their heads again in claims of “clashes of civilizations,” both in the definitions of and the “processing” (including interpretation or “meaning-making”) of conflicts, at nation-state, cultural, ethnic, religious, group and individual levels (Huntington, 1997). Some of our Americanized – “newer” – forms of dispute resolution are derived from older forms in other cultures and some would say, “lose something in the translation,” derived from African moots (Gulliver, 1979) or Asian mediation (Lubman, 1997) even as they try both to adopt new cultural forms and “mediate” cultural diversity within one nation and its internal disputes (Chew, 2001).

International relations theorists, who were among the first to formally study negotiation processes (along with game theorists and mathematicians, developing models for strategic interactions in war and cold-war settings), have re-emerged as organizers of both theoretical and empirical propositions to test in modern international crisis (Crocker, et.al., 1999,2001) (see, e.g. the role of deadline and “ripeness” in dispute settlement (Zartman, 1985, 2000; Malley & Agha, 2001; Mitchell, 2000). Roger Fisher, key developer of the “principled negotiation” model of integrative negotiation in *Getting to Yes* (1982), although a law professor at the time, developed many of his insights from international and diplomatic service in the US State Department, (Fisher, 1969).

Looking at choices about how to behave in conflict situations, theorists (from game theory, mathematics, economics and political science, e.g. von Neuman & Morgenstern, 1944; Schelling 1960; Luce & Raiffa, 1957; Nash, 1950, 1953; Axelrod, 1984; Brams & Taylor, 1996) have inspired both laboratory and empirical studies of strategic behavior and interaction focusing on how participants in a conflict or dispute situation respond, both to inner needs and interests, those of clients or principals (in representative settings, Mnookin & Susskind, 1999; Menkel-Meadow, 1993b, Ch. 7, this volume) and to the “others” (adversaries or partners) in settings where more than one person is needed to coordinate action or respond to a conflict. Some of the earliest and best work in conflict theory has been derived from organizational management (Follett, 1996; Blake, Shepard and Mouton, 1964; Thomas, 1976), labor relations (Walton & McKersie, 1965) and the applied sciences of decision- making (Hammond,

Keeney & Raiffa, 1999; Klein, 1999; Zeckhauser, Keeney & Sebenius, 1996) and problem solving (Adams, 1974)

A new turn in political theory and practice, with implications (see below) for legal dispute resolution, has focused on processes that foster democratic discourse and enhance opportunities for participation in decisions that effect the polity. Informed by the moral and social philosophy of Jurgen Habermas (1996, 1990, 1984) seeking “ideal speech conditions,” this new theory attempts to describe alternative processes to maximize citizen participation in policy making and resolution of contested disputes where inevitable value differences occur with increasingly diverse populations. Political theorists (Dahl, 1998; Guttman & Thompson, 1996; Mansbridge, 1980; Bohman, 1996; Fishkin, 1991) and policy activists (Sirianni & Friedland, 2001; Susskind & Zion, N.D.) have suggested new ways for developing alternative processes to our formally constitutionalized governmental institutions of executive, legislative and judicial power, ranging from ad hoc policy making groups (Susskind, 1999); negotiated rule-making (Harter, 1982, Freeman, 1997), regionalized or substantively organized decision-making (Sabel & Dorf, 1998; Kaye, 1997; Berman & Feinblatt, 2001) and “public conversations” that seek to enhance human understanding, if not effectuate particular outcomes or agreements (LeBaron & Carstarphen, 1999), all based on different notions of “negotiated” agreements of the polity.

To the extent that the new multi-disciplinary field of conflict resolution (Kriesberg, 1998; Deutsch & Coleman, 2000) has been born out of these different disciplines, there is an interesting mix of individual, organizational, theoretical, empirical and professional levels of theory, practice and policy. Conflict resolution theory, research and practice now focus on the development of professionals in negotiation, mediation, facilitation, consensus building and other conflict resolution skills; the empirical study of particular kinds of conflicts (domestic, as well as international), and the institutional design and evaluation of particular approaches to structuring conflict resolution or management.

### *Legal Processes, Legal Institutions and the Law in Conflict Resolution*

It was precisely because the legal field’s focus on “legal disputes” or cases was so narrow and explained so little that I first began to think and write about legal disputes and the search for justice in a broader disciplinary framework (Menkel-Meadow, 1983). As a practicing lawyer for the poor and then as a legal clinician teaching law students how to be lawyers, I was struck by the insufficiency of legal remedies at solving clients’ underlying problems and addressing underlying needs. (Menkel-Meadow, 1984). Legal disputes were a much narrower sub-set of actual human, social, political and economic conflicts.

In order to understand how legal disputes might better be resolved I turned to a number of different disciplines (sociology, political science, psychology, economics, mathematics, game theory, international relations and the newer peace studies and conflict resolution) for theoretical frameworks to help me understand how human problems were resolved in realms outside of law. My “Legal Negotiation: A Study of Strategies In Search of a Theory” (1983, ch. 2, this volume) essay was a review of this literature, both scholarly and popular, to demonstrate that other fields had gone much further than law, jurisprudence and even the newer clinical study of law to develop models and frameworks for studying negotiation processes for human dispute resolution and problem solving.

The strategic work of game theorists to understand interactions of, first, two parties, and then, more than two parties, in situations of perfect, mixed or no information seemed to have great resonance for legal disputes which, culturally at least, are most often conceived of as competitive, distributive games of allocation of limited resources (mostly money in lawsuits, but also stock, land and even children in child custody cases and other “tangibles” that might not be divisible at all). Strategic “moves” to maximize money or tangibles, on behalf of a client, seemed the lawyer’s most common default behavior, based on assumptions of resource scarcity and goals of client maximization. If the law’s purpose was to declare right and wrong then disputes resolved in legal institutions, like courts or legislatures, were likely to have binary outcomes (or compromises – typically “split the difference” compromises – based on binary claims). The conventional adversarial lawyer’s job, like the pay-off maximizing game player, was to gather as much of the goods or goodies for the client as possible. Advocacy in court was seen as directly transferable to adversarial persuasion techniques in negotiation, where only the audience differed (see e.g., Cohen, 1980).

From a broader perspective, much of this emphasis on competitive strategies in negotiation mirrored strategic, if deterrent, approaches to larger political conflicts in the Cold-War era. Many social commentators have suggested that although law may be the leading “adversarial” institution, much in Anglo-American culture is based on adversary argument, from the media, to politics, to education, to gender relations (Tannen, 1998). Social psychologists, labor negotiators, organizational development specialists and anthropologists, however, focused on a broader catalogue of human behavior, suggesting, at the very least, that there were a greater variety of human approaches to negotiated problems, differentiating integrative possibilities (substantive “trades” of differentially valued items) with use of different human interactional processes (cooperation, collaboration and adaptation, Hopmann, 2001).

I studied this multi-disciplinary literature for insights into two aspects of dispute and conflict resolution in law that remain present in my work today: 1) dispute resolution involves both *process* and *substance* and 2) these elements of any human problem interact and are constitutive of each other. Thus, to the extent that one considers the *res* of a problem to be an indivisible tangible item or an uncompromisable principle or belief, then competition is likely to be the process chosen. In turn, this choice of process (adversarialism or competition) will affect (and limit) the possible outcomes to binary, compromised or stalemated or impasse solutions (see page 760 of Menkel-Meadow, 1984). Different orientations, mind-sets, frameworks, approaches or assumptions (after analysis about the *res*, the number of parties, etc.) about what the matter is about (the “science” of negotiation, Raiffa, 1982) should cause the skilled negotiator to choose appropriate processes (to be enacted in the *artful* practice or behavioral aspects of conflict resolution) for the kind of matter at hand.

In short, as I have now written many times (and taught thousands of students over the years), conflict resolution involves both *cognitive* (the “science” or analysis of any conflict or dispute) and *behavioral* (the “art” and practice of conflict resolution and problem solving) components. We must learn to analyze and understand what conflicts and disputes are about, in their full contextual complexity (including a variety of contextual factors specified in Menkel-Meadow, 1983 at 927-28) before we can choose the appropriate behavioral response. Once we have decided on our goals and desired outcomes, we can seek to achieve them with a broader repertoire of processes and

behaviors (whether goals are defined as maximizing individual or joint gain, or seeking Pareto-optimal or “just” solutions). That broader repertoire of behaviors (communication skills, creative problem solving, questioning, as well as persuading, listening, synthesizing, as well as analyzing) can and must be taught (Menkel-Meadow, 2001b, 1999c, 1994, 1993). Legal problem solving is not just about adversarial argument or persuasion about what is “right” for the client; it is about understanding a range of possible goals for clients and those with whom they interact, and seeking both substantive outcomes and appropriate processes to satisfy the needs and interests of clients and those engaged in activity with the client.

But mere analysis of the status quo was not all that I had in mind. In one of those wonderful moments of intellectual convergence (more pretentiously described as a “paradigm shift” in legal problem solving (Kuhn, 1970), many critics of the legal system were focused not only on the increasing cost, and time-delays of the litigation system (Sander, 1976) (what I have labeled the “quantitative” approach to legal conflict resolution), but on the quality of the solutions or resolutions produced by court orders or settlements negotiated in their “shadow” (Mnookin & Kornhauser, 1979). At about the same time that I sought to reorient lawyers to a “problem-solving” approach to negotiation (Menkel-Meadow, 1984), Roger Fisher and the newly created Program on Negotiation at Harvard University focused on “principled negotiation” (Fisher & Ury, 1981; Raiffa, 1982; Lax & Sebenius, 1986) to develop models for negotiators to successfully pursue joint gain and agreements that are wise, efficient and improve – rather than destroy – relationships by looking for different kinds of “solutions” to legal, social, political and economic problems. I called it “creative problem-solving” (1984), but in more technical disciplinary terms, this work asked lawyer-negotiators who had cultural default assumptions about scarce resources and competitive behaviors to think instead in terms of integrative solutions and wealth creating, rather than wealth destroying solutions (the negative-sum games of litigation and sunk transaction costs).

In trying to reorient lawyers to a different set of assumptions about legal problems, expanding and enhancing their substantive problem solving skills, I found that while others had gone before me, both inside and outside of law, lawyers seemed to need to be reminded of this important work. At the level of searching for creative ways to manage conflict, to seek integrative solutions and to create “pie-expanding” – rather than pie diminishing – solutions (I use many food metaphors in my work!), the early work of administrative scientist Mary Parker Follett and related work in labor management relations (Walton & McKersie, 1965) were key. Foundationally significant were social psychologists Abraham Maslow (1972) and George Homans (1961) whose important work suggested that basic human needs must be met for human flourishing and may be complementary for different human beings, rather than always conflicting, for satisfactory human interaction and problem solving.

At the level of process, the Legal Realists, Lon Fuller, Soia Mentschikoff and Karl Llewellyn, among others, suggested that different legal processes and institutions (adjudication, arbitration, mediation and “common business practices” or social norms) served different functions and produced different kinds of outcomes (often with their own jurisprudential justifications, integrity or “morality”). I trace these, and other earlier “roots” of modern legal dispute resolution theory in the first essay which appears in this volume (“The Mothers and Fathers of Invention: The Intellectual Founders of ADR,” Menkel-Meadow, 2000). My aspiration has been to continue this work to add other processes to the mix (negotiation, facilitation, consensus-building

and other multi-party processes) to analyze, understand and implement both process values (more participation and legitimacy of result) and substantive justice values (better “quality” and more tailored and creative solutions to legal problems).

Viewing negotiation as one of the foundational blocks (in both theory and practice) of good dispute resolution, I have focused on some counter-legal-cultural notions. While compromise or “split the difference” solutions between two high and opposite offers or demands is a common approach to traditional legal negotiations (and, sadly, serves as the model for what is called “Lloyds of London” settlement brokerage by judges in judicial settlement conferences (see “For and Against Settlement: The Uses and Abuses of the Mandatory Settlement Conference,” Menkel-Meadow, 1985, ch. 5 this volume), compromise is often an unprincipled result in legal negotiations where parties or lawyers fail to explore the full panoply of their various needs and interests, including legal, economic, social, psychological, emotional, moral, political, and religious (see “Toward Another View of Legal Negotiation: The Structure of Problem Solving,” Menkel-Meadow, 1984, ch. 3, this volume).

Although Fisher, Ury and Patton’s template focuses on going behind “positions” to look for parties’ real “interests,” which can often be met by “efficient trades” of compatible, but not conflicting interests (e.g. different valuations of time, money, things, tax leveraging, etc.), I have urged a focus on “needs” (in my case from a feminist focus on human needs, but compatible with John Burton’s focus on human needs in the international dispute context (Burton, 1990). As “needs” may stand behind or “under” even interests (often self-proclaimed and still assumed to be mostly economically instrumental), the lawyer can probe for (in interviews and other interactions with the client, see “The Transformation of Disputes By Lawyers, What the Disputing Paradigm Does and Doesn’t Tell Us,” Menkel-Meadow, 1985) longer term needs beyond the short-term, case-based “interests.” The lawyer may help uncover the needs of the client and other affected third parties. This broader, social welfare (if perhaps somewhat maternalistic) approach to determining what actually may be at issue in a dispute is consistent with the approach of many mediators and conflict resolvers to go beyond the “framed” dispute to look at what the underlying conflict is really about and “reframe” it. With a deeper and perhaps longer list of “needs”, efficient trades continue (perhaps there are more or less of them) but parties’ and their lawyers can attempt to negotiate for deeper, and ultimately, more stable satisfaction among the parties. Here, “compromise” is often only a last resort, after principles and satisfaction or “trades” of needs are fully pursued or, in the language of conventional bargainers, “exploited.”

As I have argued on these and other pages (see “Whose Dispute Is It Anyway? A Philosophical and Democratic Defense of Settlement (in some cases),” Menkel-Meadow, 1995a), “compromise” need not be seen as anathema to juristsprudes who view principle and law as the sole measure of justice. John Coons (1979, 1964) argued quite eloquently, long before the current work in legal dispute resolution, that some legal matters are not capable of binary solutions (e.g., child custody, now institutionalized in joint legal custody, comparative fault, now institutionalized in comparative negligence regimes, and mixed questions of law and fact with mixed legal responsibility or factual uncertainty, the jury compromise) and so, in some cases “compromises” or negotiated resolutions are actually more “just” than more extreme binary solutions, precisely because of their distributed “precision”. I have argued a somewhat related point that while legal principles (especially statutory law, passed by legislatures for the “average” “aggregate” or “typical” situation) may serve as “general”

justice, in particular cases, justice may better be served by tailored “departures” from the general rule (as long as the negotiated solutions are not otherwise unlawful (Menkel-Meadow, 1984, 1995). Negotiated justice may, then, for the individuals involved, be more “just” than legislated or court-ruled justice.

To the extent that negotiation (and mediation), with its assumptions of compromised results, have often appeared distasteful to principled and pure jurists, more recent extensions of some of Lon Fuller’s work usefully have explored the internal (and external) integrity of both such processes and such outcomes. Where issues or items are multi-faceted or value is embedded or connected in a web of other issues or parties (as in Fuller’s classic division of an art collection, Fuller, 1971), trades, tailor-made solutions or contingent agreements, linking past to future in dynamic and changeable solutions, are often preferable to rigid, past-focused adjudication of “rights and responsibilities” from rigid legal principles. At the macro societal level, even the much derided Machiavelli (1961, pp.90-92, 101) has much to teach us about the value of compromise – to hold the polity together, the prince or leader (or lawyer) may not be too “virtuous” (or principled) himself – it is his job to hold together a widely divergent population with outcomes or solutions that are satisfactory to “most of the people, most of the time” and he must, above all, be flexible. The politician, who must work with others with different values from himself, like the lawyer, must consider long-term goals, future “deals” and the peace and harmony of the larger community, while acknowledging that to “compromise” is often to apprehend and recognize the reality of the needs of the “other” (Golding, 1979).

Thus, in modern negotiation theory consideration of “the other” is as important as consideration of gain for one’s principal. “Getting to Yes” means creating conditions so that the “other” will want to do what you ask of him, by providing him with enough gain or needs satisfaction to render an agreement better than the condition of no agreement at all. In negotiation parlance, the negotiated agreement must be better than the BATNA (the Best Alternative To a Negotiated Agreement). Focus on achieving joint gain then inspires the good negotiator to be creative and look for substantive solutions that are satisfactory or welfare enhancing for all parties. This is why working on mutually agreed to (truly “consented” to) solutions seems so much more appealing to me than the coerced or commanded outcomes of formal legal institutions, which, even when ordering “just results,” are so often resisted by hostilely defeated parties. (Though I would never argue that *Brown v. Board of Education* (1954) was not a necessary court decision that enunciated an important social and constitutional norm of non-discrimination, its failure to be immediately complied with is a product of resistance (and, sadly, popular will) to a commanded court order).

Much of negotiation and other non-adjudicative forms of legal dispute resolution, thus, are justified on philosophical and political grounds of consent. The claim made on behalf of such non-adjudicative forms of dispute resolution is that when commands from government-sponsored institutions, like courts, are not required, decisions reached by the parties themselves or facilitated by “wise elders” (as in many forms of mediation) (Shapiro, 1981) will have greater legitimacy and longevity as the product of the parties’ own agreements, rather than commanded from on high.

This key underlying value of “consent” is itself contested, as many commentators have suggested that negotiation is more often a product of the power (economic, legal, social or other “endowments”) that parties bring to the negotiation, and thus may not always reflect either “principled” negotiation, problem solving impulses or even “fair trades” (see, e.g., Grillo, 1991; Fiss, 1984, Delgado et.al., 1985).

For such critics, the use of private negotiation or now the more institutionalized forms of ADR (mediation, arbitration and related processes) may be dangerous because there is no state supervision to ameliorate such power imbalances and to assure that important legal principles are followed. Issues of social differences in negotiated processes, including race (Ayres, 1991), gender (Kolb & Williams, 2000) and class (Young, 2001), have also called into question the possibility that negotiation can really serve disempowered parties to create value or make better outcomes than they would receive in more formal legal institutions.

As a feminist, I have been a sympathetic participant in these critiques but I have also argued the important point that alternatives to litigation must also be measured against the fairness and power distributions in more conventional litigation venues. So, in various of the articles that appear in this volume (“When Dispute Resolution Begets Disputes Of Its Own,” Menkel-Meadow 1997, ch. 8, this volume; Menkel-Meadow, 1995a), I have talked about the “baseline” problem of being clear about what is being measured against what. In my parlance, “litigation romanticists” often presume equality of legal resources (both economic and competency) or judges willing to step out of their passive role to ensure equal representation of all parties. Litigation, in my view, is no more likely, than alternatives to litigation, to produce complete “fairness.” We do not yet have definitive empirical studies of these matters as it is virtually impossible to subject the same case to two different treatments (litigation or some alternative) to test which outcomes are “better,” (even if we could agree on appropriate metrics). Is a “better” or “fairer” solution one that tracks the law? Redistributes resources equitably among the parties? Maximizes joint gain for the parties? Causes the least harm to the parties or those outside of the dispute? Or maximizes gain (or provides clearer precedent) for those outside of the dispute? Alas, in my view, while game theory permits easier measurement of pay-off schemes (especially in distributive games, but also in integrative games), the real legal world must consider not only the game players, but also those affected by the game (the “human externalities” of any dispute) and the longer term effects on the system itself.

#### *From Dyadic Negotiation to Mediation and Multi-Party Processes*

It is precisely because I have argued that we will never be able to fully answer the question of whether litigation or particular forms of alternatives to litigation (and there are many of them) are always “better” or “fairer” or “more just” that I have followed in the path of Lon Fuller, and my own sociological training, to suggest that it might give us greater explanatory purchase to study the conditions under which particular forms or institutions of process might be more advantageous than others. Thus, as the study of negotiated solutions expanded to suggest facilitated negotiation (mediation) when the parties are unable to craft their own solutions, I examined the different forms that mediation, like negotiation, might take in different contexts (“The Many Ways of Mediation,” Menkel-Meadow, 1995b, ch. 4, this volume; Menkel-Meadow, 2001e).

When parties negotiate (even when attempting to solve problems or maximize joint gain) they are still subject to a host of strategic problems (e.g., the giving and getting of information, whether and when to trust others, how quickly to come to agreement versus pursuing long-term or dynamic issues in a negotiation). The use of a third party neutral to “manage” the negotiation process, to facilitate communication and to aid in the crafting of solutions has increased the use and study of mediation in recent decades, even in the most conventional of legal matters. Whether used in the

pure Fullerian case-types of on-going relationships (business, labor, family) or now, even in one-shot small claims matters in lower courts (Menkel-Meadow, 1993b, ch.7, this volume), mediation is used not only to facilitate communication and improve relations among the parties, but to prevent “waste” at the negotiation table and to produce more Pareto-optimal solutions.

Like the efforts to categorize and generalize about different frameworks or mind-sets in negotiation, mediation has also been subjected to efforts at taxonomies and typologies. Pure mediators are “facilitators” (of human communication, negotiation techniques), but never “decide” anything for the parties (and are called therapeutic, by those outside of the field, Silbey & Merry, 1986). More recently, at least in legal practice, it has been recognized that mediators, though not deciding anything, as third party neutrals would in arbitration, may be “evaluators” (Riskin, 1996) of parties’ claims, arguments and the likely legal outcome should cases go to full adjudication, before a judge or jury. Mediators often serve as “reality-testers,” asking the parties to consider how realistic and reasonable their plans are for the enforcement of the agreement. Mediation, like negotiation, thus has the power to create relationships, rules, agreements and plans for the future (unlike the backward focus of most court decisions).

Efforts to demarcate various schools of mediation, such as “transformative mediation” (“recognition and empowerment” of parties differentiated from “problem-solving/settlement” of the dispute (Bush & Folger, 1994), when deracinated from the context of the dispute or conflict, have seemed less useful to me than the deeper, contextually-based analysis of older scholars like Fuller and Mentschikoff. There are different mediation technologies, techniques, practices and approaches. For example, there are issues of more directive questioning, use of separate meetings or caucuses, whether mediators should be totally “neutral” or merely “unbiased” or actually “enmeshed” in and knowledgeable about the dispute or disputants). The more interesting question to me has been whether there are universal or generalizable principles to be used in applying these techniques to particular disputes or whether context must determine appropriate forms and techniques. In recent work I have explored this difficult question of the generalizability of our propositional knowledge bases with respect to particular forms of dispute resolution (e.g., the role of “deadline” and privacy in both domestic and international disputes, Menkel-Meadow, 2002d) and in particular contexts (Menkel-Meadow, 2001e). And, as more fully explored below, issues of techniques, practices and forms of participation may change depending on how many parties or stakeholders are engaged in a dispute or conflict and whether the conflict is a private matter (as in many, but not all lawsuits) or a question of public import (such as in multiple party class actions or governmental regulation or public policy setting).

### *The Morality and Legitimacy of Process: Macro and Micro Ethics Issues in Dispute Resolution*

The issues surrounding appropriate use of different forms of dispute and conflict resolution depend enormously, in my view, on the context. Thus, as various forms of ADR have been institutionalized and their animating principles or sensibilities have been distorted (“Pursuing Settlement in an Adversary Culture: The Co-optation of Innovation,” Menkel-Meadow, 1991, ch. 6, this volume), such as in the importation of consensual dispute resolution forms to commanded and compulsory use in courts and contracts, (Menkel-Meadow, 2002b, 1999), I have been raising issues about the

appropriate regulations, rules and standards (the “ethics” of ADR, Menkel-Meadow, 2001d) that should be applied when legal dispute resolution conflates compulsory legal process and coerced participation with true consent and party self-determination (see, e.g., “Ethics and Professionalism in Non-Adversarial Lawyering, Menkel-Meadow, 1999, ch. 9, this volume, and Menkel-Meadow, 1997a,b). Using different kinds of dispute and conflict resolution processes in different contexts (personal, organizational, contractual, voluntary, litigative, compulsory, court-annexed, private, public, international) presents enormous difficulties in different expectations of roles (for third parties, disputing parties and their lawyers, (see “Ethics in ADR Representation” Menkel-Meadow, 1997c, ch. 10, this volume) and for duties owed to those affected by the dispute, as well as presenting concerns about the legitimacy about the processes used. While I have written a great deal about the specific issues of ethical practice in legal dispute resolution, including confidentiality, conflicts of interests, conflicts and choice of laws, fees, accountability and liability, competence, credentialing and candor (and participated in the drafting of several model ethics codes, see CPR-Georgetown Commission on Ethics and Standards in ADR, Proposed Model Rule for the Lawyer as Third Party Neutral (2002b) and Principles for ADR Provider Organizations (2002a) (available at [www.cpradr.org](http://www.cpradr.org)), it is not the specifics of rules that I most worry about – it is the integrity of the choices made by those in conflict and those seeking to help resolve conflict to choose appropriate processes for their matters and then to utilize those processes with a sense of integrity and fairness. In short, it is the foundational values, and intent of the parties, rather than the specific rules, that matter most (see Menkel-Meadow, 2001c).

If, as Lon Fuller suggested decades ago, each process has its own uses and “morality,” then we must exert our best efforts in theory development and practice to study what the morality of each process should be. This project has become increasingly complex as the number of processes continues to increase and “hybridize” (from mediation to med-arb, to early neutral evaluation in courts, to private mini-trials, to public summary jury trials to mini-jury trials, to consensus building fora to facilitated policy making and negotiated rule-making) (Scanlon, 2002), thus making process-specific morality perhaps more difficult to elucidate.

### *The Future of Dispute Processing and Conflict Resolution: Of Multiple Parties, Creative Solutions and New Institutions for Resolving Conflict*

As the 21st century has begun with some of the most horrific and seemingly insoluble conflicts before us as human beings, beyond the individual disputes and conflicts of lawsuits to “virtual” or “viral” conflicts both larger and more permeable than the nation-state, we will need all of the forms of conflict resolution we can muster to attempt a peaceful future for the human race. This seems a most propitious time for the further development of the field of conflict resolution.

For me, the hope to solve problems through conflict resolution has always seemed a sort of optimistic “sensibility” or “leitmotiv,” informing the way I look at conflicts at both the individual and international level. Decades of inter-disciplinary study has given me hope that we are continuing to make progress on some key concepts – that we cannot solve problems with an exclusive focus on self-interest or top-down command, but must consider the needs, interests and participation of others with whom we come into contact. I believe and hope that there are possibilities to create solutions and resources in lieu of destroying them in our interactions with each other. We must “create wealth” in the sense of enhanced human well-being if we are to

continue to inhabit the planet with others who materially have less than us. Sometimes we will need help from wise intervenors and those wise intervenors can develop more knowledge about what is effective in their practice. I also believe that, while we need experts to help in conflict resolution, being able to truly participate in the decisions that affect our lives is a human necessity for legitimate societal outcomes and for peaceful co-existence of people with divergent values, so there is some tension between the aspirations of democratic participation and expert facilitation in conflict resolution theory and practice.

In the context of these large and general assertions there are many interesting and concrete intellectual and practical projects to pursue. As we recognize that many disputes now involve multiple parties (if even only the insurer in a conventional two party- plaintiff-defendant lawsuit and the increased use of class actions in a variety of legal contexts) and many issues, negotiation theorists have appropriately turned their attention to development of theory for multi-party, multi-issue negotiations (drawn from legal, business, political and international disputes and conflicts), studying such issues as coalition formation, group dynamics, negotiation in dynamic settings, the role of leadership and coordination, information processing and the different dynamics of competition, collaboration, cooperation and coordination in multi-party settings (Sebenius, 1996; Sunstein, 2000). This theory is currently being tested in such fora as negotiated rule-making before administrative tribunals, in public policy setting (Carpenter & Kennedy, 2001 and Susskind, 1999), in community disputes, in Truth and Reconciliation Commissions (Minow, 1998; Marks, 2000; Helmick & Petersen, 2001), in public conversations and dialogue projects all over the world (see Search for Common Ground at [www.sfcg.org](http://www.sfcg.org)), as well as in new forms of conventional law courts, seeking multi-disciplinary solutions to common problems (drugs, family dysfunction, etc., Kaye, 1997).

My own theoretical work has come to focus on how interdisciplinary conflict resolution theory can be re-united with legal and political theory, jurisprudence and constitutional law to explore how these newer forms of conflict resolution and dispute processing can become perhaps a “fifth branch” of governance (beyond executive, legislative, judicial, and administrative) to a form of “ad hoc democracy” of participation by the “acted-upon” that marries modern democratic discourse theory to conflict resolution theory (Menkel-Meadow, N.D.). At the theoretical level, this work asks how we can form conflict resolution processes that enable all forms of human discourse to be “heard” in Hampshire’s terms. Can we create “space” for human communication that simultaneously allows for expression of 1) reasons, principles and persuasion; 2) preference trading and bargaining; and 3) passions, emotions and beliefs and that can find a way for such expressions to enrich our understandings of each other and find ways of solving specific problems.

Can we find ways to address the more general problem of co-existence with varied and diverse needs and values (Lederach, 1995; Ackerman & Duvall, 2000; Crocker, Hampson and Aall (1999, 2001)? These are the future process and jurisprudential issues – how can we develop processes that allow in and legitimate more than one form of discourse? Some new legal, governmental and private processes are already experimenting with these multiple levels of discourse – negotiated rule-making, problem-solving courts, and public conversations or dialogues to name a few (see “When Litigation is Not the Only Way,” Menkel-Meadow, 2002e, ch. 12 this volume, for some further examples). New process institutions must be responsive to foundational process values of participation, assent, self-determination and mutual

responsiveness and respect, while aspiring to achieve both peace and justice. Many international efforts, like those in simple legal dispute mediation now proceed at both “informal” and “formal” levels simultaneously. Two-track diplomacy plays out in the international arena as caucuses are used in private mediation, exploring both “bottom-up,” informal, private and task oriented problem solving, with more formal, facilitated or orchestrated public, transparent and joint meetings.

My own recent work attempts to organize and explicate the differences in process and process institutions that can be mapped according to the modes of discourse (principled reasons, bargaining and emotions) and different forms of process (open/closed; plenary/committee; expert-facilitator/leaderless(naturalistic) for different kinds of entities in conflict (permanent, constitutive, temporary/ad hoc), with some examples as indicated in the following chart:

### **MODES OF CONFLICT RESOLUTION**

Mode of Discourse	Principled (Reasons)	Bargaining (Interests)	Passions (needs/emotions/relig)
Forms of Process			
Closed	Some court proceedings; arb.	Negotiation-US Constitution; diplom.	Mediation (e.g. divorce)
Open	French Constitution; courts; arb	Public Negotiations; some labor	Dialogue Movement
Plenary	French Constitution	Reg-Neg.	Town meetings
Committees	Faculty committees; Task groups	US Constitution/US Congress	Caucuses-interest groups
Expert/Facilitator	Consensus Building	Mini-Trial	Public Conversations
Naturalistic (Leaderless)			Grassroots Organizing/WTO protests
Permanent	Government, Institutions	Business Organizations, Union	Religious Org; AA,
Constitutive	UN, National Const.	Nat. Const./Prof. Assoc.	Civil justice movements, peace
Temporary/Ad Hoc	Issue org./social justice	Interest groups	Yippies, New Age, vigilantes

Principles = reasons, appeals to universalism, law

Bargaining = interests, preferences, trading, compromises

Open = public or transparent meetings or proceedings

Closed = confidential, secret process or even outcomes (settlements)

Plenary = full group participation, joint meetings

Committees = task groups, caucuses, parts of the whole

Expert-facilitator = led by expertise (process or substantive or both)

Naturalistic = leaderless, grassroots, ad hoc

Permanent (organizational, institutional),

Constitutive (“constitutional”)

Temporary/ad hoc groups or disputants

At the substantive level, I think we have also learned that even in the largely generalist domain of law, we need more multi-disciplinary forms of problem solving. It is not enough to create new process institutions if we do not know what problems they are supposed to solve.

In “Aha? Is Creativity Possible in Legal Negotiation and Teachable in Legal Education?” (Menkel-Meadow, 2001b, ch. 11, this volume), I explore how new scientific work in creativity (Csikszentmihalyi, 1996) and multiple forms of human intelligence (Gardner, 1999, 1983) can be harnessed to legal problem solving to develop new legal concepts, tropes, entities and solutions to legal problems if we can really learn to “think outside of the box.” Traditional legal thought, categories, remedies and institutions have served us moderately well in the Anglo-American world, with well developed constitutional (both written and unwritten), common law and statutory solutions to many intra- and inter-national legal disputes. But, these institutions and ways of thinking have also been limiting (some are focused on the past and are not flexible enough to adapt to rapidly changing social, scientific and political conditions; others are too binary in how “truth” is established and how remedies can be awarded; still others exclude too many of the people whose lives are affected by decisions taken on their behalf, whether truly “representative” or not). Some of these processes may not appeal to our human need for healing, or spiritual or ethical “wholeness” or deeper values of human connection.

In the parable of the good camping trip that we now use to teach the value of human diversity, we are asked to consider whom we would want to take on a moderately arduous trek through the mountains. Clearly we need a map-reader, navigator, astronomer, cook, storyteller, medical expert, botanist, wood cutter, animal lover (and tamer or hunter, should we encounter hostile forms of animal life), strong pack-carriers and perhaps a musician or clergy person for the campfire at day’s end. To whatever list any group makes up, I would now add a “conflict resolver” or “process expert” who would be able to handle, facilitate and manage whatever internal conflicts such a diverse range of talent would inevitably encounter (until such time as all of us, as human beings are “expert” in resolving our own conflicts, or at least have sufficient skills to do it on our own). We need many substantive (and creative) approaches to questions of survival; we also will need to coordinate how we reach solutions, answers or agreements, even if they are only provisional, until dynamics change, new information is learned.

Just as legal dispute resolution has begun to evolve from conventional, traditional adversary adjudication in the courts as the exclusive or preferred method for legal dispute resolution, human conflict resolution now requires a variety of substantive domains (science, physical, human, social, cultural, spiritual, artistic) to search for ways to create peace and justice. The outlines of new substantive ideas and solutions may still be obscure or illusory; the forms of process we can use to come together are more varied and interesting than ever before. We will need to develop new theory, experiment with new institutions, practices and policies and then study and evaluate them for generalizability and applicability to new and different situations. Our very survival depends on it. What an exciting, if challenging time, to be a conflict resolution theorist, teacher, practitioner and “process architect.”

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## **TEACHING ARBITRATION LAW**

**Sarah R. Cole, The Ohio State University**  
**Homer C. LaRue, Howard University**  
**Stephen J. Ware, Samford University**

- I. Law schools' coverage of arbitration law.
  - A. As part of an Alternative Dispute Resolution (ADR) course.
  - B. Stand-alone arbitration courses.
    1. Covering arbitration generally.
    2. Focusing on particular types of arbitration.
      - a. Commercial arbitration.
      - b. Labor and employment arbitration.
      - c. International arbitration.
  - C. Brief appearance in first-year courses.
- II. Advocate's Perspective or Arbitrator's Perspective?
  - A. Advocate's Perspective
    1. Teaching doctrine.
    2. Teaching skills.
      - a. Legal analysis and reasoning.
        - i. Body of case law well-suited to Socratic dialog.
        - ii. Analyzing, and making arguments based on, statutes.
        - iii. Deep tensions between important policies.
      - b. Other fundamental lawyering skills: problem-solving and role-playing exercises.
        - i. Factual investigation, client counseling.
        - ii. Litigation arguments about the enforceability of an arbitration clause.
        - iii. Drafting an arbitration clause in a form contract.
        - iv. Negotiating the terms of an arbitration agreement.
  - B. Arbitrator's Perspective
    1. Should arbitrator skills receive attention?
      - a. Opinion drafting

- b. Running a hearing
    - 2. Arbitrator's ethics
  - III. Teaching arbitration law in particular contexts.
    - A. As part of an ADR course.
      - 1. Casebooks.
      - 2. Organization: cover arbitration before or after negotiation and mediation?
      - 3. Law versus practice
    - B. Stand-alone arbitration courses.
      - 1. Covering arbitration generally.
        - a. Casebooks.
        - b. Videos and other resources.
      - 2. Focusing on particular types of arbitration.
    - C. Brief appearance in first-year courses.
- IV. Conclusion

## **Teaching Arbitration -- Resources**

### **Domestic Arbitration Casebooks**

#### Commercial Arbitration

Jeffrey A. Burns, *Methods of Practice—Litigation Guide*, 3d (West 2001).

Thomas E. Carbonneau, *Cases and Materials on the Law and Practice of Arbitration* (Juris Publishing, 2d ed. 2000).

Christopher R. Drahozal, *Commercial Arbitration: Cases and Problems* (LexisNexis 2002).

Stephen K. Huber and E. Wendy Trachte-Huber, *Arbitration: Cases and Materials* (Anderson Publishing 1999).

Alan S. Rau, Edward F. Sherman and Scott R. Peppett, *Arbitration* (Foundation 2d ed. 2002).

Katherine V. W. Stone, *Private Justice: The Law of Alternative Dispute Resolution* (Foundation Press 1999).

#### Labor Arbitration

Laura J. Cooper, Dennis R. Nolan and Richard A. Bales, *ADR in the Workplace* (West 2000).

Laura J. Cooper, Dennis R. Nolan, *Labor Arbitration: A Coursebook* (West American Casebook Series 1994).

William F. Dolson, Max Zimny, and Christopher A. Barreca, *Labor Arbitration: Cases and Materials for Advocates* (ABA Section of Labor Employment 1997).

#### International Arbitration

Andreas F. Lowenfeld, *Lowenfeld's International Litigation and Arbitration*, 2d (West 2d ed. 2002).

Tibor Varady, John J. Barcelo, III, Arthur T. von Mehren, Varady, Barcelo and von Mehren's *International Commercial Arbitration* (West 2001).

Craig Reisman, et al., *International Commercial Arbitration*; Cases, Materials and Notes on the Resolution of International Business Disputes (Foundation Press 2001).

Russell J. Weintraub, *International Litigation and Arbitration: Practice and Planning* (Carolina Academic Press 3d ed. 2001).

## USEFUL ARBITRATION TREATISES

James Acret, *Arbitration of Construction Claims 2002* (Building-News 2002).

James Acret, *Construction Arbitration Handbook* (West 2001).

Steven C. Bennet, *Arbitration: Essential Concepts* (American Lawyer Media 2002).

Eric E. Bergsten, *International Commercial Arbitration* (Oceana 1980 continuous revisions)

Gary B. Born, *International Commercial Arbitration: Commentary and Materials* (Transnational Publishers 2d ed. 2001).

Gary B. Born, *International Commercial Arbitration in the United States: Commentary and Materials* (Kluwer 1994).

Tim Bornstein, Ann Gosline, Marc Greenbaum, eds., *Labor and Employment Arbitration*, 2d ed. (Matthew Bender 1988).

Jack J. Coe Jr., *International Commercial Arbitration: American Principles and Practice in a Global Context* (Transnational Publisher 1997)

John W. Cooley, *The Arbitrator's Handbook* (NITA 1998).

John W. Cooley & Steven Lubet, *Arbitration Advocacy* (NITA 1997).

Rodolphe J. A. De Seife, *Domke on Arbitration* (Callaghan 1987).

Frank Elkouri et al., *How Arbitration Works: Elkouri & Elkouri* (BNA Books 5<sup>th</sup> ed. 1997)

Richard Garnett et al., *Practical Guide to International Commercial Arbitration* (Oceana Publications 2000).

Ian McNeil et al., *Federal Arbitration Law: Agreements, Awards, and Remedies Under the Federal Arbitration Act* (Little, Brown 1994).

Mauro Rubino-Sammartano, *International Arbitration Law and Practice* (Kluwer Academic Publishers 2d Rev. ed. 2001).

Ray J. Schoonhoven, ed., *Fairweather's Practice and Procedure in Labor Arbitration* (BNA 4th ed. 1999).

David St. John Sutton, John Kendall, Judith Gill, *Russell on Arbitration* (Sweet & Maxwell 21st ed. 1997).

Stephen J. Ware, *Alternative Dispute Resolution* (West 2001).

## **Conducting and Using Empirical Research: Law Professors Can Conduct Empirical Research**

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**Janice Nadler, Northwestern University**  
**Jennifer K. Robbennolt, University of Missouri-Columbia**

Law professors can conduct empirical research! And they should, especially given our need for more accurate information in the ADR field. It does not have to be mysterious or frightening to do research, and you don't have to be a Ph.D. either!

A list of 10 things you should know:

1. Researchers and practitioners should talk to each other
2. You want your research to be valid and reliable
3. There are lots of research methods: laboratory experiments, interviews, surveys, archival research, observational studies, content analyses, psychological testing, etc. They each have advantages and disadvantages.
4. There are ethical issues of which researchers should be aware (e.g., informed consent).
5. It's great when you have "control" groups, but it's not the only way to do research.
6. When you use questionnaires, be aware that there are "good" and "bad" questions.
7. Be aware of your own bias when planning for and conducting the research.
8. Find a helpful social science type to help with statistical inferences because they are really important.
9. When you report your research, describe your methodology, give your evidence and tell why you reached the conclusion you did. Look for this in the research reports you read as well, to help you evaluate whether others did "good" research.
10. Much ADR research suffers from:
  - a. absence of controls for placebo effect (I am so happy you are studying me that my answers contain some of this happiness)
  - b. absence of controls for pretreatment differences between mediated cases and the non-mediated comparison cases (context and selection of cases matter big time)
  - c. incomplete description of the methodology (if I don't tell you how I did this study, it will be hard to criticize it!)

**Resources and Examples of Empirical Research in ADR  
(A non-exhaustive list.)**

**Basic Research Methods Texts:**

BARBARA SOMMER & ROBERT SOMMER, *A PRACTICAL GUIDE TO BEHAVIORAL RESEARCH: TOOLS AND TECHNIQUES* (5<sup>th</sup> Ed. 1997) (New York: Oxford University Press).

JEFFREY KATZER, KENNETH H. COOK, & WAYNE W. CROUCH, *EVALUATING INFORMATION: A GUIDE FOR USERS OF SOCIAL SCIENCE RESEARCH* (4<sup>th</sup> Ed. 1998) (Boston: McGraw-Hill).

DAVID L. FAIGMAN, ET AL., *SCIENCE IN THE LAW: STANDARDS, STATISTICS, AND RESEARCH ISSUES* (2002) (West).

**Journal Articles, Monographs, and Reports:**

Linda Babcock, et al., *Forming Beliefs about Adjudicated Outcomes: Perceptions of Risk and Reservation Values*, 15 INT'L REV. L. ECON. 289 (1995).

Linda Babcock, et al., *Biased Judgments of Fairness in Bargaining*, 85 AM. ECON. REV. 1337 (1995).

Linda Babcock & George Loewenstein, *Explaining Bargaining Impasse: The Role of Self-Serving Biases*, 11 J. ECON. PERSP. 109 (1997).

Linda Babcock & Greg Pogarsky, *Damage Caps and Settlement: A Behavioral Approach*, 28 J. LEGAL STUD. 341 (1999).

Lisa B. Bingham, *On Repeat Players, Adhesive Contracts, and the Use of Statistics in Judicial Review of Employment Arbitration Awards*, 29 MCGEORGE L. REV. 223 (1998).

Lisa B. Bingham, et al., *Exploring the Role of Representation in Employment Mediation at the USPS*, 17 OHIO ST. J. ON DISP. RESOL. 341 (2002).

JAMES B. EAGLIN, *THE PRE-ARGUMENT CONFERENCE PROGRAM IN THE SIXTH CIRCUIT COURT OF APPEALS*, Federal Judicial Center (1990).

Lauren B. Edelman, et al., *Internal Dispute Resolution: The Transformation of Civil Rights in the Workplace*, 27 LAW & SOC'Y REV. 497 (1993).

Lee Epstein & Gary King, *Rules of Inference*, 69 UNIV. CHI. L. REV. 1 (2002).

Elizabeth Gordon, *Why Attorneys Support Mandatory Mediation*, 82 JUDICATURE 224 (March-April 1999).

Elizabeth Gordon, *Attorneys' Negotiation Strategies in Mediation: Business as Usual?*, 17 MEDIATION Q. 377 (2000).

Deborah R. Hensler, *A Research Agenda: What We Need to Know About Court-Connected ADR*, DISP. RESOL. MAG., 15-17 (1999).

Deborah R. Hensler, *ADR Research at the Crossroads*, 2000 J. DISP. RES. 71 (2000).

Christopher Honeyman, et al., *Not Quite Protocols: Toward Collaborative Research in Dispute Resolution*, 19 CONFLICT RESOL. Q, Fall 2001.

Jonathan M. Hyman, et al., *Civil Settlement-Styles of Negotiation in Dispute Resolution* (study prepared for the New Jersey Administrative Office of the Courts with an SJI grant).

Chris Guthrie et al., *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 802-03 (2001).

Chris Guthrie, *Framing Frivolous Litigation: A Psychological Theory*, 67 UNIV. CHI. L. REV. 163 (2000).

JAMES S. KAKALIK ET AL., AN EVALUATION OF JUDICIAL CASE MANAGEMENT UNDER THE CIVIL JUSTICE REFORM ACT, RAND (1996).

Russell Korobkin, *Aspirations and Settlement*, 88 CORNELL L. REV. 1 (2002).

Russell Korobkin & Chris Guthrie, *Psychological Barriers to Litigation Settlement: An Experimental Approach*, 93 MICH. L. REV. 107 (1994).

Russell Korobkin & Chris Guthrie, *Opening Offers and Out-of-Court Settlement: A Little Moderation May Not Go a Long Way*, 10 OHIO ST. J. DISPUTE RES. 1 (1994).

Russell Korobkin & Chris Guthrie, *Psychology, Economics, and Settlement: A New Look at the Role of the Lawyer*, 76 TEXAS L. REV. 77 (1997).

John Lande, *Getting the Faith: Why Business Lawyers and Executives Believe in Mediation*, 5 Harv. Negot. L. Rev. 137 (2000).

John Lande, *Failing Faith in Litigation? A Survey of Business Lawyers' and Executives' Opinions*, 3 Harv. Negot. L. Rev. 1 (1998).

E. Allan Lind, et al., *In the Eye of the Beholder: Tort Litigants' Evaluations of Their Experiences in the Civil Justice System*, 24 LAW & SOC'Y REV. 953 (1990).

George Loewenstein et al., *Self-Serving Assessments of Fairness and Pre-Trial Bargaining*, 22 J. LEGAL STUD. 135 (1993).

Robert J. MacCoun, *Unintended Consequences of Court Arbitration: A Cautionary Tale from New Jersey*, 14 JUST. SYS. J. 229 (1991).

Bobbi McAdoo, *A Report to the Minnesota Supreme Court: The Impact of Rule 114 on Civil Litigation Practice in Minnesota*, 25 HAMLINE L. REV. 401 (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 (2002).

Craig A. McEwen, et al., *Lawyers, Mediation, and the Management of Divorce Practice*, 28 LAW & SOC'Y REV. 149 (1994).

Craig A. McEwen & Richard J. Maiman, *The Relative Significance of Disputing Forum and Dispute Characteristics for Outcome and Compliance*, 20 LAW & SOC'Y REV. 439 (1986).

Craig A. McEwen & Roselle L. Wissler, *Finding Out if it is True: Comparing Mediation and Negotiation Through Research*, 2002 J. DISP. RESOL. 131 (2002).

Julie Macfarlane, *Culture Change? Commercial Litigators and the Ontario Mandatory Mediation Program*, 2002 J. DISP. RESOL. (forthcoming 2002).

BARBARA S. MEIERHOEFER, COURT-ANNEXED ARBITRATION IN TEN DISTRICT COURTS, Federal Judicial Center (1990).

Michael Morris, et al., *Schmooze or Lose: Social Friction and Lubrication in E-Mail Negotiations*, 6 GROUP DYNAMICS: THEORY, RESEARCH & PRACTICE 89 (2002).

Tina Nabatchi & Lisa B. Bingham, *Transformative Mediation in the USPS REDRESS Program: Observations of ADR Specialists*, 18 HOFSTRA LAB. & EMP. L. J. 399 (2001).

ROBERT J. NIEMIC, MEDIATION IN BANKRUPTCY: THE FEDERAL JUDICIAL CENTER SURVEY OF MEDIATION PARTICIPANTS, Federal Judicial Center (1998).

ELIZABETH PLAPINGER & DONNA STIENSTRA, ADR AND SETTLEMENT IN THE FEDERAL DISTRICT COURTS: A SOURCEBOOK FOR JUDGES AND LAWYERS, Federal Judicial Center (1996).

Greg Pogarsky & Linda Babcock, *Damage Caps, Motivated Anchoring, and Bargaining Impasse*, 30 J. LEGAL STUD. 143 (2001).

Jeffrey J. Rachlinski, *Gains, Losses, and the Psychology of Litigation*, 70 S. CAL. L. REV. 113 (1997).

DAVID RAUMA & CAROL KRAFKA, VOLUNTARY ARBITRATION IN EIGHT FEDERAL DISTRICT COURTS: AN EVALUATION, Federal Judicial Center (1994).

ELIZABETH ROLPH & ERIK MOLLER, EVALUATING AGENCY ALTERNATIVE DISPUTE RESOLUTION PROGRAMS...A USER'S GUIDE TO DATA COLLECTION AND USE, RAND (1995).

DONNA STIENSTRA, ET AL., A STUDY OF THE FIVE DEMONSTRATION PROGRAMS ESTABLISHED UNDER THE CIVIL JUSTICE REFORM ACT OF 1990, Federal Judicial Center (1997).

Donna Stienstra, *Evaluating and Monitoring ADR Procedures*, FJC DIRECTIONS, Dec. 1994, at 24.

Leigh Thompson & George Loewenstein, *Egocentric Interpretations of Fairness and Negotiation*, 51 ORGANIZATION BEHAV. & HUM. DECISION PROCESSES 176 (1992).

Leigh Thompson & Janice Nadler, *Negotiating Via Information Technology: Theory & Application*, 58 J. SOC. ISSUES 109 (2002).

Roselle Wissler, *When Does Familiarity Breed Content: A Study of the Role of Different Forms of ADR Education and Experience in Attorneys' ADR Recommendations*, 2 PEPPERDINE DISP. RESOL. L. J. 141 (2002).

Roselle Wissler, *Court-Connected Mediation in General Civil Cases: What We Know From Empirical Research*, 17 OHIO ST. J. ON DISP. RESOL. 641 (2002).

Roselle Wissler, *The Effects of Mandatory Mediation: Empirical Research on the Experience of Small Claims and Common Pleas Courts*, 33 WILLAMETTE L. REV. 565 (1997).

Roselle Wissler, *Mediation and Adjudication in the Small Claims Court: The Effects of Process and Case Characteristics*, 29 LAW & SOC'Y REV. 323 (1995).

**Conducting and Using Empirical Research:  
Conducting Empirical Research on Email Negotiations**

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Abstract

Teachers of Negotiation and Alternative Dispute Resolution can use negotiation exercises conducted via email to accomplish two main goals: as a pedagogical tool to illustrate the advantages and pitfalls of e-negotiations, and as a research tool to investigate specific hypotheses of interest. Assigning to students a negotiation exercise to be conducted via email (or other electronic means such as instant messaging) permits the researcher to examine the negotiation transcripts, which are often very revealing. Dividing students into groups and carefully manipulating the procedures or instructions for the negotiation allows the researcher to examine the unique influence of particular factors that may be at play in the negotiation, such as the relationship between the parties, the influence of making the first offer, anchoring on a specific figure and insufficient adjustment away from it, and techniques that build rapport over email, to name just a few. Negotiation teachers from different law schools can collaborate so that students from different law schools negotiate with one another via email. Conducting email negotiations with strangers permits the researcher to examine issues regarding escalation of negative emotion and deterioration of trust that often arise in negotiations in adversarial contexts.

# **Integrating Conflict Theory into the Law School Curriculum**

**By**

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*with*

**Robert Ackerman, Penn State-Dickinson**

The following discussion is intended to serve as an introduction to conflict theory as a course of instruction at a law school, addressing some fundamental considerations and providing some thoughts on how they may be handled.

## **1. What is conflict theory?**

Conflict Theory refers generally to those theories that seek a greater understanding of the source and nature of conflict; how and why it escalates, de-escalates, or persists; and the conditions under which it can be constructive or destructive. It is related to conflict resolution, and conflict resolution theory, but is different in that it focuses on the nature, structure, and implications of conflict *before* resolution strategies are considered rather than focusing primarily on how the conflict might be resolved.

By its nature, Conflict Theory is an interdisciplinary course of study, drawing substantially on scholarly literatures other than law, including psychology, sociology, anthropology, and economics, among others. Depending upon such factors as instructor preference, and size of class, it can also include a clinical component to help round out the theoretical study with applied experiential learning.

## **2. Why teach conflict theory in a law school?**

In the main, Conflict Theory is a perspectives course, which, like jurisprudence, legal history, and critical legal studies, broadens the student's understanding of the law, and lawyering, beyond mere doctrine and application.

In particular, Conflict Theory can help law students achieve greater empathy for their clients, and provide deeper insights into what processes and remedies might be most effective in addressing the client's needs and interests. It can also enhance the students' own emotional intelligence by providing a deeper understanding of how they relate to conflict, both as individuals and as lawyers. Finally, Conflict Theory can give law students a fuller perspective of their place as lawyers in society, and how they may serve that role more constructively.

In this way, Conflict Theory supports, and is supported by, more traditional dispute resolution courses, including client counseling, negotiation, mediation, the dispute resolution survey course, systems design, as well as preventive and therapeutic law.

## **3. How can Conflict Theory be integrated into the law school environment?**

At least two models are possible: Integration into other courses, and a stand-alone course.

*A. The Integrative Approach:* Students may be introduced to conflict theory in the early portions of most traditional dispute resolution courses with a discussion about theories about the nature of conflict (individual characteristics, social process, social structure, identity theories), the meaning of escalation (expansion in parties, issues, intensity of tactics, etc.), and the implications for the rest of the course (whatever the course may be).

*B. Stand-alone model.* A 2-3 unit stand-alone course or seminar provides a vehicle for a much richer treatment, of course. You may want to consider having the class meet one day a week rather than two or three, to allow for more time to integrate theory and demonstrative activities such as role plays, exercises, etc. For examples of syllabi, see <http://www.aals.org/am2003/workshop.html>.

#### **4. What is the scope of the Conflict Theory Course?**

In structuring the Conflict Theory course, hard choices will have to be made, but do allow one to shape the course according to instructor preferences. A few dimensions are:

*A. Types of conflict.* The question here is whether to focus on interpersonal conflict, or to expand to group conflict, social conflict, or, even more broadly, international conflict. A substantial conflict theory course can be structured around any or all of these possibilities.

*b. Interdisciplinary breadth.* How many different disciplinary perspectives can the class (and instructor!) adequately manage? For example, game theory has made, and continues to make, important contributions to our understanding of conflict, but students often have difficulty getting beyond the most basic considerations of game theory.

#### **5. What role plays, exercises, and other teaching tools are available?**

Role plays and exercises are particularly challenging because most such materials in the dispute resolution field are directed at helping students work with various methods of conflict resolution, such as negotiation and mediation, rather than identifying, experiencing, and managing the dynamics of the conflict itself. That said, some of the role plays and exercises that are commonly used in negotiation and other dispute resolution courses can be used in a conflict theory course, such as the prisoner's dilemma games (*Oil Pricing*, *Win As Much as You Can*), and the *Management of Differences Exercise* (Thomas-Kilman).

One technique for creating some value out of this problem is to structure a writing component into the course, and to have students work, either alone or in teams, at developing role plays that will bring out two or three specific aspects of conflict theory (with teaching notes!). Some can be quite good, and usable in later classes.

Two other teaching tools are worth noting. First, movies can be particularly helpful in bringing conflict theory down to Earth. *The Cuban Missile Crisis*, and its more modern incarnation, *Thirteen Days*, for example, provides a vehicle for analyzing most if not all issues that would be covered in a Conflict Theory course.

Second, mindfulness meditation can also be used as a teaching tool. Len Riskin, for example, has pioneered this innovation in his Understanding Conflict course, which is required for the Missouri LL.M. in Dispute Resolution. He uses it primarily as a vehicle to help students who wish to participate in this part of the course understand how the mind relates to conflict, and how perceptions of self and other contribute to the development and potential resolution of conflict.<sup>1</sup>

## **6. Interdisciplinary opportunities.**

Because of the potential breadth of the topic, a conflict theory course readily lends itself to guest lecturers from other disciplines who can extend these principles to areas of particular curricular, student, or scholarly interest. One might draw upon a colleague in the psychology department to address group or attribution theory, for example, or upon a journalism professor to address the media's impact on social conflict, or upon a business professor to discuss implications of conflict theory for organizational management and change.

## **7. Evaluating students.**

The method for evaluating students can vary depending upon the size of course, teaching objectives, whether a clinical component is included, and other traditional considerations.

The course readily lends itself to a traditional law school examination, which can be helpful for large classes. Similarly, Conflict Theory also lends itself to the use of reflective papers, particularly those that compel the students to apply conflict theory principles to their personal lives and experiences.

Finally, the nature of the material also lends itself to student research papers, giving students the opportunity to more deeply explore topics of interest, such as the relation of gender or power to conflict and escalation, or integrating trust analysis into systems evaluation. One word of caution here, though: While it is often not difficult for students to identify topics of interest, the research itself can be more difficult for them (particularly during a 14-week semester) because it requires research in areas other than those covered by such traditional vehicles as cases and law review articles.

## **8. Resources (books we use or draw upon to teach the course).**

- \* Barbara Benedict Bunker, Jeffrey Z. Rubin & Associates, *Conflict, Cooperation & Justice: Essays Inspired by the Work of Morton Deutsch* (1995)
- \* Pat K. Chew, *The Conflict and Culture Reader* (2001)
- \* Morton Deutsch and Peter Coleman, *The Conflict Resolution Handbook* (2000)
- \* Kenneth Cloke, *Resolving Personal and Organizational Conflict: Stories of*

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<sup>1</sup> For more on Professor Riskin's work on mindfulness meditation and the law, see generally Leonard L. Riskin, *The Contemplative Lawyer: On the Potential Benefits of Mindfulness Meditation to Students, Lawyers, and their Clients*, 7 HARV. NEG. L. REV. 1-66 (2002); see also *The Initiative on Mindfulness in Law and Dispute Resolution* web site at [www.law.missouri.edu/csdr/mindfulness.htm](http://www.law.missouri.edu/csdr/mindfulness.htm).

*Transformation and Forgiveness* (2000)

\* Steven Keeva, *Transforming Practices: Bringing Joy and Satisfaction into the Legal Life* (1999)

\* Louis Kreisberg, *Constructive Conflicts: From Escalation to Resolution* (1998)

\* Bernard S. Mayer, *The Dynamics of Conflict Resolution* (2000)

\* Doug Stone et al, *Difficult Conversations: How to Discuss What Matters Most* (1999)

\* Jeffrey Z. Rubin, Dean G. Pruitt, and Sung Hee Kim, *Social Conflict: Escalation, Stalemate and Settlement* (2nd ed. 1994)

\* James A. Schellenberg, *Conflict Resolution: Theory, Research, and Practice* (1996)

\* Vamik Volkan, *Blood Lines: From Ethnic Pride to Ethnic Terrorism* (1997)

## **9. People to Contact for Help:**

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## **Introduction to International Private Mediation<sup>2</sup>**

**Hal Abramson  
Touro College**

A number of familiar issues need to be re-visited when adapting domestic mediation to the needs of an international private dispute. These issues can be easily explored in an introductory course on dispute resolution processes or an international dispute resolution course, once students have gained an understanding of the basic mediation process. You might pose the following questions:

1. **Selecting a Mediator:** How do you select a mediator that is viewed as neutral by all the parties? What additional questions should you ask about a mediator's approaches to the mediation in order to avoid any cross-cultural misunderstandings?
2. **Logistics:** What special logistical problems arise when convening a mediation session for parties from different countries?
3. **Confidentiality:** What additional legal research should you do to determine whether the mediation sessions will be confidential?
4. **Enforceability of Agreements:** What can you do to ensure that the settlement agreement would be enforceable in all the relevant jurisdictions?
5. **Back-up Adjudicatory Process:** What adjudicatory process would be a meaningful back-up in case the dispute is not fully resolved in the mediation? Would the predicted outcome provide parties a meaningful reference point when deciding whether to settle or adjudicate? What substantive law would apply?

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<sup>2</sup> See, Abramson, Chapter VI, "International Dispute Resolution: Cross-Cultural Dimensions and Structuring Appropriate Processes" 929-938 in Rau, Sherman, and Peppet, *Processes of Dispute Resolution* (2002).

# **The World Trade Organization (WTO) as an example of Dispute Systems Design**

**Andrea K. Schneider  
Marquette University**

## **A. Why should we care about the WTO in ADR?**

1. *Globalization*  
The number and variety of international dispute resolution systems continue to grow and evolve. The WTO is one good example (NAFTA is another).
2. *Variety*  
It is interesting to compare what is happening internationally with how domestic dispute resolution systems are created and adds variety to an ADR class

## **B. How the WTO system works**

1. *Mediation*  
Parties first have the opportunity to mediate their trade dispute through conciliation. This has happened frequently and also in high profile cases (i.e. the EU case against US regarding Helms-Burton act which sanctioned companies around the world doing business with Cuba)
2. *Panel Hearing*  
If parties do not settle, the dispute is heard by a panel of appointed trade experts.
3. *Appeal*  
The decision of the panel can be appealed to the standing appellate body of the WTO.
4. *Arbitration*  
Parties can choose arbitration as an alternative to the above process.

## **C. How can we use the WTO to talk about similar issues in dispute resolution and dispute systems design theory?**

1. *Which Type of Disputes*  
The jurisdictional battles over whether WTO should be addressing non-trade issues of employment, human rights, environment are similar to jurisdiction questions about binding arbitration in employment and consumer cases.
2. *Diplomacy versus Adjudication*  
The WTO system has increased formality and use of sanctions compared to the old system—this raises the issue of diplomacy versus adjudication as the best way of resolving disputes.
3. *Loop Back*  
There is no established loop back procedure between panel and appeal step at the WTO—a primary suggestion for domestic dispute resolution systems.

4. *Equal Access*

The WTO has started to provide legal assistance to poorer countries raising some of the same issues about access to ADR for poorer people here.

## **Innovations in ADR Pedagogy: What Do I Do In My ADR Class That You Might Not Be Doing?**

**John Barkai  
University of Hawaii**

We all do a few different things in our ADR classes. It would be wonderful to get some fresh teaching approaches from everyone attending this session, or even better, from everyone who teaches ADR. My contribution will be to mention a few things that I do in, and for, my classes that I would guess that many of you do not do. I will provide a short description of these ideas here, and will also provide written materials where I have something else such as an exercise or a memo to students. The AALS has said that they will post files that speakers wish to post on the AALS web site - so I assume they will appear somewhere on [www.aals.org](http://www.aals.org). In addition, I will post the files on my own web site at [www2.hawaii.edu/~barkai/aals](http://www2.hawaii.edu/~barkai/aals). (note the "2" after the "www")

### **BARKAI CHORUS; READ-ALONG SCRIPTS**

I have found that the most effective way of teaching people to talk, and ultimately think differently, is to give them the specific words to say in certain situations. Therefore, I have prepared a variety of scripts to be read aloud in class, either in pairs or as a full class chorus. Remarkably, student can later use these same phrases both in simulations and real life situations - and generally use them appropriately. They soon can make up their own phrases. I use the method for questioning, active listening, general communication, mediation, various negotiation gambits, and meeting facilitation. I developed this method for teaching ADR to non-native speakers of English, but it works for everyone. I have more fully described this methodology in John Barkai, "Teaching Negotiation and ADR: The Savvy Samurai Meets the Devil," 75 Nebraska Law Review 704 (1996).

(examples in the article and on the web sites)

### **CREATE "READ-ALONG" GAMBITS**

A gambit is "a remark intended to start a conversation or make a telling point" or "a chess opening move in which a player risks one or more minor pieces to gain an advantage in position." English as a Second Language (ESL) instructors teach their students gambits to begin certain parts of conversations. The technique is similar to books titled "What do you say when you want to ..." I require my students to write 2-4 pages of gambits (non-graded) at the end of the semester. Examples would be, "What Do I Say When I want to make the first offer?", "... to get them to make the first offer?", "... to offer a concession?", "... to ask for a concession?", etc. - or as a mediator "to probe for underlying interests?", "... explain confidentiality?", "... to play the agent of reality?", "... to get a party to offer the first concession?", "... to get a party to consider an apology?", etc. Writing these gambits really helps the students to understand the use of these techniques and expands their "toolbox" of techniques. I can use the edited gambits to do the Barkai Chorus in future classes.

(Gambits memo to students on web sites)

## EXAMPLE OF QUESTIONING READ-ALONG

What do you think is one of the most important issues facing this country in the next 10 years?

Tell me more about that.  
What do you mean by that?  
Can you put that in other words?  
How do you feel about that?  
What do you mean by \_\_\_\_\_?  
Can you be more specific?  
How so?  
In what way?  
That's helpful, keep going.  
Humm, hum.

## DEMONSTRATING MEDIATION TO THE FIRST YEAR LEGAL WRITING CLASS

I heard Jim Coben (Hamline) describe this idea at an AALS meeting. We now take a first year legal writing problem and do a mediation demonstration. The role players are active mediators, not law faculty or students. I give them the facts from the legal writing problem, and they make up any additional facts necessary for the mediation simulation. We are not trying to create a perfect simulation. We just want to provide a small ADR perspective in the first year of law school. We do one large group meeting for all legal writing sections. I usually provide opening remarks, moderate the mediation simulation using the "stop the action buzz" described below, and handle the post-simulation questions using the "multiple questions before an answer" technique described below.

### STOP THE ACTION AND "BUZZ"

Stop the simulation (or video) and ask the students to talk to the person next to them for one minute about what they would do next if they were the negotiator or mediator. These "buzz" groups encourage active learning and really increase the energy in the room. An excellent addition to a mediation demonstration. Everyone gets involved. About 90 percent of the buzz groups are actually talking about what I asked them to talk about; 10 percent are discussing lunch. (That's probably a better percentage than I get with most of my questions).

### ANSWERING QUESTIONS (especially for guest speakers and panels)

When several students raise their hands with questions, take several questions at once (2-4). Answer all the questions but give the most "answer time" to the questions that have the most to do with what you are trying to teach. This technique is especially effective with guest speakers or panels. Sometimes the first question is really off the mark, but the guest takes a lot of time to answer. The class is suddenly over, and it was diverted from the coverage you wanted. Using multiple, consecutive questions, there is more participation from the audience, and more "answer time" is spent on important topics. I learned this technique from watching the late Professor Jim Boskey moderate an ADR panel at the AALS annual meeting in San Antonio.

## USING FINAL EXAMS QUESTIONS TO HELP THE STUDENTS LEARN

On the first day of class, I pass out this final exam question.

"What were the 10 most important skills or ideas you learned (or had reinforced) about negotiation and dispute resolution during this semester? Next, select three of those skills or ideas and explain why they are important in negotiation and dispute resolution."

This question forces the students to examine what they have learned in the class, and it is useful feedback to me. If they really start their lists after the first class, the process provides an on-going review. Their answers about "why" they think the three ideas were important often provide me with different ways of explaining concepts in future classes - "Your BATNA is your Plan B" - "The 3 L's of Communication are Listen, Listen, Listen." About 5-10 percent of what they thought was most important were not things that I explicitly taught. (That's humbling.) They learned and distilled these concepts on their own. (Note: My students can write the take-home final exam which is given to them one month before the semester ends, do a research paper, or create and analyze a simulation).

## PUTTING TWO CLASSES TOGETHER FOR A CROSS-CULTURAL NEGOTIATION

Besides teaching ADR in the law school, I teach international ADR classes in our business school's Japan Focused and China Focused Executive MBA programs and at the Japan American Institute for Management Science. Two-thirds of the former students are from Asian countries other than Japan; 90 percent of the later students are from Japan. These classes have joint classes with the law students. We do small group discussions about country and cultural differences followed with a negotiation in which the negotiation teams are comprised of students from different classes (mixed teams increases the learning much more than teams of one class against the other class). We have short negotiation demonstrations in Japanese and Chinese. Depending on student enrollment, we have had short demonstrations by negotiators from India, Indonesia, Korea, Philippines, Thailand, and the ethnically Chinese areas (Hong Kong, PRC, Singapore, Taiwan). Even though few of us can understand the language, just watching the body language, other non-verbal behavior, pace, tone, and greetings can be very instructive.

## USING FINAL EXAMS ANSWERS FOR RESEARCH AND SCHOLARSHIP.

I ask some exam questions that I clearly do not have the answers to and would like to have the creative input of 30-40 students on (no limited enrollment in my class). The questions facilitate learning, and I am hoping to (someday) turn the answers into an article about "What my students learned and taught me in our ADR class."

Even now, I can confidently state to the next class what the previous class thought were the ideas most helpful to them - usually "interests" and "BATNA." Clearly, the "10 most important skills or ideas you learned in this class" question which was described above could be turned into an article. Because I teach ADR in several different programs, I have the opportunity to do some comparison of answers from law students, MBA students, and international students.

I have found the "Lists of 10 questions" work quite well for generating specific suggestions. Here is a recent question.

Negotiation theorists and academics have a lot to say and can offer good advice about integrative, win-win negotiations. However, some people would say that

those same theorists and academics have not added greatly to the literature about money negotiations. Your task is to create a list of "The Ten Most Important Rules For Getting More or Keeping More Money in Negotiations" and to explain the basis for your ideas where useful. These rules would be like Black Letter Law - these rules are guidelines, but there certainly are exceptions. An added benefit of exam questions such as these is that I really enjoy reading the exams.

#### REQUIRING WRITTEN ASSIGNMENTS FOR MISSED CLASSES

If students miss more than one of my ADR classes (my class meets once a week for 100 minutes), they must write a 1-2 page report about the topic of the class they missed. My syllabus states:

After more than one absence (whether excused or not), each additional absence requires the submission of a 1-2 page report that summarizes an ADR article about the topic of the class you missed. I expect you to read at least 20 pages for this assignment. If you miss 4 classes, you might not receive credit for this class even if you do the make-up journals. We (you, me, and the Associate Dean) will "negotiate" this issue, but you will have little power in this negotiation.

This requirement encourages attendance. Students don't easily miss class because it "costs" them about as much time in making up the class as they save by not coming to class. Furthermore, some students end up doing outside reading for the class. Finally, they are told that their 1-2 page report is supposed to be an executive summary of the article that other students could learn from (I haven't done this yet).

#### MY USE OF JOURNALS

Each student must write two 1-2 page confidential journals each semester. A core part of the instructions for writing the journals was provided to me many years ago by Professor Frank Sander. I never talk directly about anyone's journal in subsequent classes, but I think that I could use some of the ideas in later classes. When I have a class of international students I put in my journal instructions: "Please try to include a proverb, quotation, or saying about conflict or negotiation from your country."

(journal instructions on web sites)

#### CARTOON CAPTIONING (on exams and use in class)

I put an uncaptioned cartoon on my final exam and give full credit for any answer written in English (everyone gets full credit). I think it allows students to blow off some steam, and be creative. I can use the captions in future classes, and I send a list of good captions to guest speakers from that year. I run the cartoon captioning contest in the ABA's Dispute Resolution Magazine. You can find cartoons and captions at the end of each issue.

#### SIMULATE TELEPHONE NEGOTIATIONS WITH (PHYSICALLY) BACK-TO-BACK NEGOTIATIONS

Negotiation and ADR courses assume that most negotiations are done face-to-face, and almost all in-class negotiation simulations are done with the parties face-to-face. However, from our (still to be published) research in Hawaii of how and under what conditions cases settled, we found from over 400 surveys of lawyers about factors

contributing to settlement, that telephone negotiations (not face-to-face negotiations) occurred most frequently and were most often ranked as having the greatest positive impact on the settlement process. Therefore, sometimes I require that students negotiate out-of-class over the telephone, or I have the students sit in class back-to-back and do a negotiation (or just have a conversation). It is hard for them to do that. After our research findings, I realize that we need to learn more and teach more about telephone negotiations.

#### TEACHING MEETING FACILITATION

Meeting facilitation (essentially mediating a meeting) has become very popular in Hawaii for various public meetings, strategic planning sessions, retreats, and other high-conflict meetings. I spend one class on this topic in the law school classes and two classes in the business school classes. The topic presents a great opportunity to use concepts such as negotiation, mediation, communication, and Myers-Briggs in the classroom. Lawyers will frequently work in groups, serve on bar committees, and are appointed to boards of directors. The law students find they have immediate use for this skill in their study groups and law school committees. I have included my Meeting Facilitation Handout on the web sites.

#### USE OF OPTICAL ILLUSIONS

I use optical illusions as part of my introductory class and as the theme through out the semester. I show some optical illusions in almost every class to reinforce the theme of seeing things from different perspectives. See the Samurai article for more information. You can find optical illusions on the web and many books with illusions in your public library. Non-native speakers of english really appreciate something that is visual, not verbal.

#### USING MAGIC TRICKS, TALKING STUFFED ANIMALS, AND OTHER PROPS.

I'll do almost anything that gets and keeps my students' attention. There are many magic tricks that require no skill at all. Money magic tricks (making coins disappear and changing bills from one denomination to another) seem very appropriate for a negotiation class, especially when talking about distributional negotiations. Frankly, students seem to appreciate any attempt at humor and diversion, no matter how silly. You can buy a magician coloring book at any magic store. I put on the cover "Inside the heads of my ADR students." I tell my class, "This is what's inside you brain about ADR when we start class," (as I thumb through blank pages); "The is what you know about mid-semester" (as I thumb through out-lined images); "This is what you will be like at the end of the semester" (as I thumb through a rich set of color images). It's fun. Buy one! (see the Samurai article for other ideas).

## **Innovations in ADR Pedagogy**

**John Barkai, University Hawaii**  
**Lela P. Love, Benjamin Cardozo School of Law**  
**Maude Pervere, Stanford University**

### **Introduction: The Importance of Pedagogy-- Lessons from Hollywood**

Video clips illustrating dramatically different pedagogical approaches will highlight the impact of different approaches to teaching. Reflection and analysis will follow to elicit principles of good practice in education.

### **Motivating Students in Giving and Evaluating Assignments**

An exploration of the interplay between student motivation and the method of assigning and evaluating student work.

### **Demonstrations and Discussion of Innovations in ADR Pedagogy**

Several innovative techniques will be displayed. Participants will be asked to share their own favorite classroom techniques.

## **Mediating Class Actions**

**Linda R. Singer  
ADR Associates, L.L.C.  
Washington, D.C.**

- I. Substantive areas where class actions have been or could be mediated
  1. Employment
  2. Other civil rights
  3. Consumer
  4. Securities
  5. Mass Torts
- II. Mediator's role in determining who is at the table
  1. Class representatives?
  2. Experts?
- III. Order of issues
  1. Monetary relief
  2. Injunctive relief
- IV. Relationships among negotiators and between negotiators and mediator
- V. Communicating with parties not at the table
  1. Mediator's role
  2. How confidential?
- VI. Mediator's role in communicating with court
- VII. Agreements in principle
- VIII. Mediator's role at fairness hearing
- IX. Post settlement claims procedures
  - Fixed fund or open-ended
  - Allocation by plaintiffs or neutral(s)
  - Allocation processes
- Degrees of formality
- Benchmarking
- Appeals
- Roles for neutrals
- X. Implications for teaching and research

**Teaching Mediation Advocacy:  
Mediation Process and Advocacy Workshop Overview**

**Lynn P. Cohn  
Northwestern University**

- I** Transition from Negotiation to Mediation
  - a.** All students have taken Negotiations
  
- II** Mediation Process
  - a.** Live Demonstration
  - b.** Intensive Skills Training involving classroom and simulations with coaching/evaluation
  - c.** Focus on Facilitative Model
  - d.** Opportunity for students who are certified by local mediation services provider to do pro bono cases
  
- III** Evaluative/Transformative Mediation (and spectrum beyond labels)
  
- IV** Choosing a Mediator
  
- V** Mediation Policy Issues
  - a.** Public Encouragement of Mediation
  - b.** Quality Control (Mediator Qualifications/Accountability)
  - c.** Confidentially
  - d.** Ethical Issues
  
- VI** Transition from Trial Advocacy to Mediation Advocacy (Similarities/Differences)
  
- VII** Representing a Client Role Play
  
- VIII** Representing a Client Role Play/Pre-mediation Submission
  
- IX** Representing a Client in Mediation Role Play/Real Client/Professional Mediators/Advocacy Coaches

Texts: Goldberg, Sanders & Rogers, Dispute Resolution;  
Cooley, Mediation Advocacy  
Exam: Definitions/Analysis and Judgment in Scenarios  
Class: 30 students

## **Bringing the Real World to the Class Room and the Class Room to the Real World**

- I      Role Play
  - a.      Real Clients
  - b.      Professional Mediators
  - c.      Practicing Attorneys Serve as Advocacy Coaches
  
- II     Feedback to Students on:
  - a.      Tone
  - b.      Use of Mediator
  - c.      Prep of Client
  - d.      Proposals
  
- III    Group Debrief
  - a.      Feedback from Students/Mediators/Advocates
  - b.      Students Learn
  - c.      Students Teach
  - d.      Mediator/Advocacy Candor
  
- IV    Challenges
  - a.      Obtaining Volunteers (payback is hell)
  - b.      Changing Schedules
  - c.      Managing Expectations
  
- V     Benefits
  - a.      Information
  - b.      Collaboration
  - c.      Connections Between Groups
  - d.      Addressing what Plays in the Real World vs Class Room
  - e.      Modeling

## **Mediation Representation as Part of an ADR Survey Course**

**Dwight Golann  
Suffolk University**

### **I. How to allocate time in a large ADR survey course?**

1. Must teach negotiation and mediation as a foundation, and also cover other ADR
2. In classes of 50+ students, roleplaying is still feasible, especially with a TA. Individual critiques of performances, however, are impossible. I rely instead on reports of outcomes and short strategy and reflective papers.
3. My time allocation: 5 weeks negotiation, 4 weeks mediation, 1 week arbitration, 1 week hybrids and system design, 2 weeks ANegotiating Through a Mediator
4. I don't call it "advocacy," since mediation is almost entirely assisted negotiation
5. Question: Should this topic receive more attention?

### **II. What overall themes?**

1. Reject the Apotted plant and Aall-powerful surgeon images of a mediator.
2. Mediators have power over the process and do influence the outcome. They add cost and complication to bargaining, but also value -- if properly used.
3. Mediators can be your helper, but are not usually your Ally. You are often in a three-sided negotiation: with the other side(s) and with the mediator.
4. Your task: To harness the mediator's power to advance your objectives.
5. You should be appropriately cooperative, but it's an attitude, not the only goal.
6. Key questions:
  - a. What can the mediator do to assist my bargaining strategy in this case?
  - b. How can I most effectively enlist the neutral's aid?

### **III. Which teaching techniques?**

1. Give students a theoretical structure (lecture assisted by slides)
2. Show them Abest practices (videos of experienced lawyers in mediation)
3. Make them think about choices (ask for strategy and reflective memos)
4. Have them practice and debrief the experience (roleplay)

#### **IV. What resources?**

1. Existing videos almost all focus on mediator skills, not representation
2. Roleplays tend to focus on relationship repair, not money claims.
3. One option: [Representing Clients in Mediation](#) (get the [Teacher's Cut](#) version, which omits my mini-lectures), with transcript, outlines, roleplay. Call 800-285-2221 or go to [www.abanet.cor/cle](http://www.abanet.cor/cle). Ask for [AVOORCME@](mailto:AVOORCME@)

Realistic mediator-focused videos: [Mediators at Work: Breach of Warranty?](#) and [A Case of Discrimination?](#) from the Harvard Program on Negotiation.

## **Mediation Advocacy Training at the Justice Department**

**Jeffrey M. Senger**  
**U.S. Department of Justice**

1. Tough crowd
  - a. The “Black, Smoking Hole Theory of Litigation@
  - b. Genghis Khan as a litigator
2. Start with interest-based negotiation
  - a. Interests, Options, Criteria, Alternatives
  - b. Ostrich Negotiation
  - c. Oil Pricing Game
  - d. Sally Soprano Negotiation
3. Barriers to unassisted negotiation
  - a. Reactive devaluation
    - i. Army experiment
  - b. Loss aversion
    - i. Mug experiment
  - c. Judgmental overconfidence
    - i. Great Battle of Chalons
4. Mediation
  - a. Burning sailboat orientation
  - b. Range of processes
  - c. Selecting a neutral
  - d. Should ADR be used group workshop
  - e. Risk analysis
  - f. Ethics
  - g. Advocacy
  - h. Perspectives from a mediator
  - i. Diagnostic evaluation of current participant cases
  - j. Preparation workshop with clients
5. Roleplay
  - a. Professional, full-time mediators
  - b. Other side stays in the room
    - i. Twice as much learning
    - ii. Prevents dispersion
    - iii. Avoid noise
    - iv. Avoid gamesmanship
  - c. Worked well/do differently
  - d. Intent/impact
  - e. Ask mediator questions
  - f. Ask each other questions, in and out of role
  - g. Large group debriefing roleplay hazards
  - h. Fighting the roleplay
  - i. Focus on individual emotional experiences
  - j. Time-consuming
  - k. Sometimes better just to tell them what they need to know

6. Roleplay advantages
  - a. Highest evaluations
  - b. Surprisingly close to real life

## Teaching the Law in ADR Courses

**Jacqueline Nolan-Haley, Fordham University, Chair**  
**Jonathan Hyman, Rutgers University, Newark**  
**Kimberlee Kovach, The University of Texas**

I. What is the meaning of “law” in the study of alternative dispute resolution?

A. Positive Law

- i. Case law developments in the various ADR processes
- ii. Federal and state rules governing the use of ADR processes
- iii. Court Rules governing the use of ADR processes

B. Natural Law and the Meaning of Justice in ADR

- i. Does justice have a place in ADR?
- ii. Why does this question matter?
- iii. What does justice mean in an ADR context?
  - a) Should mediated agreements be equivalent to results that could be obtained in court?
  - b) Who should/does make justice decisions in ADR: lawyers for the parties, clients, judges or neutrals?

II. Why teach law in an ADR course?

A. What are the benefits of integrating law and process in an ADR course?

B. What are the challenges in engaging in this approach?

III. Teaching the “law” in ADR courses

A. Negotiation

It’s never too late to think about the law from those other courses.

- i. The law in the negotiation: have students reason about legal claims and defenses to develop aspirations and set reservation values (for dispute-resolution negotiation), articulate legal doctrines to guide contract terms (for transactional negotiation), and consider their use of legal argument in the negotiation.
- ii. The law about the negotiation: have students use contract and tort law of misrepresentation and fraud to understand the limits of concealment and misdirection in negotiation. (This will take care of much of what is commonly

seen as the key ethical problem in negotiation –“lying” – and will permit attention to other ethical issues, such as avoiding unnecessary harm to others and the ethical implications of problem-solving negotiation.)

iii. Pedagogy: Teaching Methodologies

a. Writing (or modifying) simulated negotiation problems with substantive legal issues in mind.

b. Reserving time to discuss legal issues as part of the reflective analysis of simulations.

c. Selecting ways for students to understand and use substantive law: Lecture? Hornbooks, internet and practice guides? Restatements? Casebooks? Independent student research?

B. Mediation

As a preliminary inquiry, students should consider the relevance of traditional law frameworks in responding to the law *of* mediation and the law *in* mediation. Specific consideration is given to contracts and torts law.

i. Black letter law that cannot be ignored in mediation—legal issues related to confidentiality, enforceability, and professional responsibility concerns related to the neutral.

ii. What is the role of law in mediation?

iii. Pedagogy: Teaching Methodologies

iv. Example

a) Preliminary reading assignment from syllabus on specific legal topic, e.g., enforceability of the agreement reached in mediation

b) Related simulation problem

c) Related drafting Problem

d) De-Brief

Identify legal issues in the problem, i.e. informed consent  
Interactive discussion about the law that applies to these issues

e) Mini lecture on the specific topic

C. Arbitration

i. Statutory and case law surrounding use of arbitration

- ii. Areas of emphasis
  - a) Primary focus on contractual issues
  - b) Difficulties of coverage/balance
- iii. Pedagogy: Teaching Methodologies
  - a) Socratic
  - b) Lectures
  - c) Groups/class discussion
  - d) Simulation
- iv. Example
  - a) Mock Arbitration
  - b) Lecture/discussion on issues of enforcement, modification and lack of appeal of awards
  - c) Draft and argument of motion to set aside or enforce
  - d) Ruling and feedback
- v. Evaluation of Learning i.e. grading options

## **Where and How to Teach ADR in the Law School Curriculum**

**James Coben, Hamline University**  
**L. Randolph Lowry, Pepperdine University**  
**Suzanne Schmitz, Southern Illinois University**

The program will begin with a survey of the audience as to their experience in teaching Alternative Dispute Resolution (ADR) classes so that the program can be directed to the needs of most of the audience.

With the help of the audience, we will develop an inventory of the means in which ADR is currently being taught in law schools across the nation. Our inventory will include the examination of:

- Stand-alone ADR courses;
- The infusion of ADR into the first year and upperclass courses;
- ADR clinics and practicums;
- Study abroad programs;
- Moot court competitions;
- Writing competitions and awards;
- Extracurricular methods of teaching about ADR; and
- Other means

We will spend some time analyzing the pros and cons of various approaches. We also will explore the risks of too much focus on ADR. How do we ensure that the “second generation” of ADR teaching moves from the margins to the core of legal education?

Using interactive methods, we will dream about the ADR curriculum of the future, including the increased use of multi-disciplinary classrooms and teaching, the infusion of ADR into more of the curriculum, and the use of team-teaching among other ideas.

Finally, we will develop an action agenda of items that would enrich our teaching, considering such matters as textbooks, exercises, videos, and other supplemental materials.

**ADR and Legal Education Articles**  
**Compiled by Suzanne Schmitz**

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# **Enlarging the Canon: The Pervasiveness of Culture**

**Pat K. Chew**  
**University of Pittsburgh**

Culture: a common system of knowledge and experiences that results in a set of rules or standards that produce behavior within a range that is considered acceptable.

## Proposition

The question is not whether we should consider culture as a relevant factor when studying conflict. Culture is the “lens” through which we view and experience conflict. The salient questions are instead: To what extent do we recognize the pervasiveness of culture in understanding conflict? In what ways do we use our recognition to help resolve conflict more constructively?

### I. Beginning to Understand the Cultural Context

- A. Our Cultural Profile
- B. Our Perceptions of Others’ Cultural Profile
- C. Interactive Dynamics: Framing and Gaming
- D. Extending Beyond the “People” Component—Institutional Cultures

### II. Tensions Between Accepting Pervasiveness of Culture in Conflict and American Legal Traditions

- A. Social and Political: Challenges in defining a culture and risks of stereotyping
- B. Philosophical: Legal principles as predicated on assumptions of uniform application
- C. Practical: How to utilize and implement. Knowledge, application, skill development and psychological transitions

## Teaching Ideas \*

1. Think of a heated dispute where different parties experienced and described the conflict differently. How did these differences come about? How did the individuals involved, the cultural norms, or the event itself contribute to these differences? How did the first person to describe the conflict shape the resolution process and outcome? If you were the mediator, how would these factors have influenced you, your way of handling the dispute, or the eventual outcome?
2. There are many ways in which we acquire our own, individual “culture”, including the stories that we grew up with. Identify a favorite family story that deals with a conflict or dispute, either taken from a book or passed down orally. Reflect on how the story transmitted important values and approaches to resolving conflict.
3. Graphically depict your own “cultural map.” You might begin by identifying key cultural groups to which you belong. For this exercise, you can define “cultural group” broadly to include groups that have influenced how you perceive the world and what is important to you. These might include your family, ethnic, religious, school, or occupational group. Be creative in how you depict your map. It might be a circle with free-flowing lines to depict the relative importance of and interrelationships between each group.

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\*These teaching ideas are excerpted from The Conflict & Culture Reader (ed. by Pat K. Chew, NYU Press, 2001). This book offers interdisciplinary readings in four parts. Each part includes introductory material, commentary on research, and teaching ideas linked to the readings. The tensions between cultural relativism and universalism are addressed throughout the book.

Part I introduces some fundamental inquiries: What is culture? What is conflict? Why should we study their relationship?

Part II considers how gender and conflict are interrelated and the ensuing implications of these interrelationships—noting various ways in which individuals of different genders may approach conflict resolution differently and be differentially impacted .

Part III surveys issues on race, ethnicity, and conflict, particularly in the United States. Readings explore dispute resolution approaches and different perceptions of conflict between Whites and Blacks, between different minority groups, and within ethnic groups.

Part IV explores global perspectives on culture and conflict, drawing from a range of geographical contexts--noting for instance, cultures which prioritize peacefulness over other goals and the cultural contrast between the Middle East and Western philosophies of conflict.

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# **Emotion and Negotiation: From Emotion as Barrier to Efficient Emotion**

**Clark Freshman  
University of Miami**

1. Competing Paradigms For Emotion and Negotiation
  1. The Traditional Paradigm
    1. Emotion is negative emotion (such as anger)
    2. Only very strong emotions matter
    3. Emotion interferes with negotiation
    4. The lawyer (and or mediator) can “cool out” the emotionally \ hot client
  2. A Competing Paradigm: Efficient Emotion
    1. Emotion includes positive and negative emotion
    2. Even very mild changes in emotion – like that after watching a five minute funny video – are associated with statistically significant differences in negotiation outcomes
    3. Certain emotions are associated with success in certain negotiations
      1. Certain emotions may be individually efficient because negotiators themselves will do better (get more individual gains)
      2. Certain emotions may be socially efficient as well because they lead to more joint gains (a.k.a., a larger pie)
    4. The lawyer should not simply avoid emotion
    5. The lawyer should promote emotions associated with success with particular kinds of negotiations
2. Evidence For Efficient Emotion
  1. Non-lawyer studies and “positive” psychology
    1. Business and undergraduate students induced to be in positive moods get more joint gains and sometimes more individual gains
    2. Business and undergraduate students induced to be in negative moods get fewer joint gains and sometimes fewer individual gains as well
  2. Larger constellation of positive psychology studies
    1. Those induced to be in positive moods do better in variety of higher level cognitive tasks
  3. Findings from research with law students – emotion and negotiation success
    1. Positive emotion associated with greater *individual* success at tasks both with potential for individual gain and joint gain
    2. Negative emotion associated with less individual success
    3. Positive emotion and negative emotion have distinct influences – merely reducing negative emotion not sufficient to optimize probable success!
  4. Findings from research with law students – emotion and law school

- 5. success generally
  - 5. Research involved over 100 first year students and over 100 second year students
  - 6. Preliminary analyses shows certain positive emotional habits – including various kinds of optimism and willingness to reframe events in positive ways – associated with greater success as measured by class rank and gpa
  - 7. Preliminary analyses of
3. Efficient Emotion vs. Positive Psychology
- 1. Evidence of independence of positive emotions
    - 1. Existing research often theorizes that distinct emotions – particularly that positive emotion is not merely the absence of negative emotion
    - 2. But existing research has difficulty showing this because of limitations of method of
  - 2. What induces positive emotion may vary for different individuals and sets of individuals
    - 1. Traditional mood inductions don't test what works for different individuals
    - 2. Glade makes some people happy, but some sneeze!
  - 3. Positive emotion may often be efficient but not for every negotiation or for every stage of a negotiation or for every type of person
    - 1. Negative emotion and some negotiation success: negative emotion as signaling
      - 1. Thompson et al theorize displaying negative emotion may be associated with success at certain negotiations (more negative emotion by Baker might have led Iraq not to invade Kuwait)
    - 2. Negative emotion and some stages of negotiation
      - 1. Negative negotiations may inhibit success where there are possible joint gains
      - 2. Negative emotion may often lead to lower setting of goals and therefore less likelihood of success
      - 3. But some research – this is very controversial! – suggests positive emotion leads people to simply rely on old patterns rather than creative solutions
      - 4. And some research suggests positive emotion may lead to greater concessions
4. A Special Role For Lawyers?
- 1. Lawyers and emotion: some generalizations
    - 1. Lawyers have higher instances of symptoms of various kinds of negative emotions
    - 2. Sometimes difficult to get at if one asks only summary questions
    - 3. Lawyers may lack efficient levels of positive emotion
    - 2. But lawyers may have greater potential for training in efficient emotion
      - 1. Greater distress may mean greater motivation to learn!

2. Lawyerly habits may fit some methods of mood management
  - 1 E.g. both cognitive-behavioral techniques and lawyering involve testing assumptions and weighing evidence
  
5. Stages of Efficient Emotion Training
  1. Awareness of importance of emotion
  2. Training in awareness of emotions
  3. Training in approaches to efficient emotions
    1. Option one: Inducing efficient emotions
      1. Awareness of what works for given individuals
    2. Option two: Attempting to correct for effects  
Easier to correct for setting low targets from negative mood than correcting for failures of creativity from lack of positive mood!
  3. Long-term and shorter term approaches

Sources for More Information:

4. Clark Freshman, Adele Hayes, and Greg Feldman, The Lawyer as Mood Scientist, 2002 J. Disp. Resol 1.
5. Leigh Thompson, The Mind and Heart of the Negotiator

## Enlarging the Canon – ADR Ethics

**Scott Peppet**  
**University of Colorado**

### MAIN QUESTIONS AND POINTS ON ENLARGING THE CANON VIS-À-VIS ADR ETHICS:

	<b>On Negotiation Ethics</b> (Ethics of Advocates)	<b>On Mediation Ethics</b> (Ethics of Third Parties)
<b>Enlarging the Research Agenda:</b>	<ol style="list-style-type: none"> <li>1. How can we tie the ethics of legal advocacy to moral theory about honesty, fairness, etc? There is a lot to learn from moral philosophy.</li> <li>2. There is also a lot that bargaining analysts can <i>give</i> to moral philosophy: modern moral theory—particularly contractarianism and contractualism—is increasingly based in bargaining analytics. We can contribute to that debate.</li> </ol> <p><i>My own work in this area focuses on questions such as:</i></p> <ul style="list-style-type: none"> <li>~ the moral significance of the model rules;</li> <li>~ whether there is a moral duty to cooperate in bargaining</li> <li>~ what honesty and fairness require in bargaining</li> </ul>	<ol style="list-style-type: none"> <li>1. Almost everything remains up for grabs. Should we have uniform ethics rules? What should they be—and how uniform? How should they be enforced and institutionalized?</li> <li>2. Traditional assumptions are ripe for reconsideration: What does neutrality require? How important is confidentiality?</li> <li>3. How to deal with third party processes in new contexts: in deal-making, in ombuds offices, in institutional settings?</li> </ol> <p><b>My own work in this area focuses on questions such as:</b></p> <ul style="list-style-type: none"> <li>~ rethinking neutrality: the use of contingent fees by mediators</li> <li>~ the use of mediation in contract formation (deal-making) as opposed to traditional disputes</li> </ul>

<b>Enriching the Teaching Agenda:</b>	<ol style="list-style-type: none"><li>1. How to make moral/ethical theory practical and incorporate it as a skill in a practice-oriented course?</li><li>2. How to integrate ethics into a negotiation or mediation curriculum, rather than have it as one stand-alone day during the semester?</li><li>3. How to integrate these materials into standard Professional Responsibility courses and other core courses that touch upon negotiation and third party processes?</li><li>4. There is a tremendous need for new teaching materials on negotiation ethics: cases, videos, exercises, etc. How can we facilitate the development and exchange of such materials?</li></ol>
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## **Mindfulness in Dispute Resolution and Law \***

**Leonard L. Riskin  
University of Missouri-Columbia School of Law**

**To accompany presentations in the second plenary session *and* the afternoon  
concurrent session on Mindfulness**

### **I. An Overview of Mindfulness Meditation (a.k.a. insight meditation, vipassana meditation).**

**A. What it is.** A method of deliberate, moment-to-moment attention, developed by the Buddha some 2500 years ago in India, which has become popular in the West in recent years. It is practiced by people from many religious traditions and in secular settings.

**B. How it works.** Practitioner develops the ability to concentrate, then learns to observe, without judging, her bodily sensations, emotions, and thoughts and the operation of her mind. Learns this in meditation, then applies it in everyday life.

**C. Potential outcomesBin General.** Relief of stress; development of self-awareness, empathy, compassion, equanimity, happiness; clarification of values; improvement in ability to concentrate and to deal with pain.

**D. Where, how and why it is taught.**

1. Insight meditation for the general public: Generally through non-profit organizations that offer retreats and other educational programs.
2. Health care: E.g., The Mindfulness-Based Stress-Reduction Program at the University of Massachusetts Medical School.
3. Athletics: E.g., The Chicago Bulls and L.A. Lakers basketball teams.
4. Prison: Many prisons and jails across the U.S.
5. Corporate sector: E.g., Monsanto.
6. Higher education. Many college and university courses, generally supported by Contemplative Practice Fellowships from American Council of Learned Societies. Several medical schools. E.g., University of Massachusetts, Thomas Jefferson School of Medicine.
7. In connection with Christian and Jewish traditions.

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\* Copyright (c) 2003 Leonard L. Riskin. This draws heavily on Leonard L. Riskin, *The Contemplative Lawyer: On the Potential Benefits of Mindfulness Meditation to Law Students, Lawyers, and their Clients*, 7 HARV. NEGOT. L. REV. 1-66 (2002), which appeared in a symposium on *Mindfulness in ADR and Law*. A webcast of the live symposium, held at Harvard Law School in Mar. 2002, is available at [http://www.pon.harvard.edu/news/2002/riskin\\_mindfulness.php3](http://www.pon.harvard.edu/news/2002/riskin_mindfulness.php3). For a collection of materials on this topic, see the webpage for the Initiative on Mindfulness in Law and Dispute Resolution, <http://www.law.missouri.edu/csdr/mindfulness.htm>.

## II. Current Uses in Law Practice and Legal Education.

### A. Law Practice

1. Hale and Dorr, Boston, has held several extensive Mindfulness-Based Stress reduction programs for its lawyers. Nutter, McClennan & Fish, Boston, currently offers mindfulness programs for its lawyers.
2. Mindfulness meditation instruction for lawyers has been offered by the Center for Contemplative Mind in Society, CUNY Law, University of Missouri-Columbia, and other organizations.
3. CLE. CLE programs have been offered by the University of Missouri-Columbia School of Law, CUNY Law School, and the Iowa Peace Institute. One day program for Directors of Lawyer Assistance Programs (fall 2002).

### B. Law Schools

1. Retreats for Yale and Columbia Law School students.
2. Law school courses that include mindfulness meditation at Suffolk, Denver, Miami, Missouri-Columbia, and Hastings Law Schools.
3. On campus non-credit programs. E.g., Harvard Law School (six week program beginning Feb. 2002). The University of Missouri-Columbia School of Law and the University of North Carolina School of Law have twice offered non-credit Mindfulness-Based Stress Reduction programs to J.D. students.
4. Brief programs at law schools for faculty or students. I have led such programs at Harvard, Marquette, Touro and Cardozo (Yeshiva) Law Schools.

### C. Negotiation training. Day-long workshop on Awareness and Negotiation.

### D. Mediation training and Education.

1. Advanced mediation training based on mindfulness offered through Southern Methodist University, the Iowa Peace Institute in, and Pepperdine University Institute for Dispute Resolution in Malibu, and University of Missouri-Columbia. Spring 2000 graduate course on Mediation Mindsets and Mindfulness through SMU Graduate Program in Dispute Resolution.
2. Workshops on Mindfulness in Mediation and Lawyering. For Indiana Supreme Court CLE Office, Pepperdine University School of Law.

## III. Potential (Special) Benefits to Mediators and Lawyers

**A. Decreased stress and increased happiness:** Contribute to **feeling better** and **performing better** in general, especially in complex tasks. Greater satisfaction in work.

**B. Enhanced self-awareness** helps mediator, negotiator or lawyer.

1. **Listen better.**
2. **Notice internal processes**, such as tensions, habitual reactions, mind-sets, and limiting assumptions (such as adversarial perspectives).
3. **Respond** instead of **react**; choose most appropriate perspectives and behaviors. This enhances likelihood of adopting and implementing

**interest-based** approaches to negotiation and **facilitative-broad** approaches to mediation.

#### **IV. Potential Concerns**

**A.** That mindfulness could undermine the "lawyer's standard philosophical map" or otherwise impair lawyers' abilities to carry out adversarial activities that may appear essential to lawyering.

**B.** That mindfulness could enable some lawyers to more easily carry out increasingly adversarial moves.

### **RESOURCES**

#### **Organizations and Websites**

The **Cambridge Insight Meditation Center** offers a wide variety of insight meditation-related programs. 331 Broadway, Cambridge, MA 02139. [www.cimc.info](http://www.cimc.info). Tel: 617/441-9038.

The **Center for Contemplative Mind in Society**, 199 Main St., 3<sup>rd</sup> Floor, Northampton, MA 01060. The Center's law program has sponsored a series of insight meditation retreats for lawyers and law students. For information, contact Mirabai Bush, executive director, or Heidi Norton, law program director, at 413/268-9275; email: [heidi@contemplativemind.org](mailto:heidi@contemplativemind.org). [Http://contemplativemind.org](http://contemplativemind.org)

The **Center for Mindfulness in Medicine, Health Care, and Society** at the University of Massachusetts Medical School provides training in mindfulness for a wide range of organizations, operates a stress and pain reduction clinic, and conducts research on the effects of mindfulness practices. Saki Santorelli, Director, Center for Mindfulness in Medicine, Health Care, and Society, Department of Medicine, University of Massachusetts Medical School, 55 Lake Avenue North, Worcester, MA 01655; Tel: 508/856-5493; Fax: 508/856-1977. [Http://www.umassmed.edu/cfm](http://www.umassmed.edu/cfm)

**Forest Way Insight Meditation Center**, P.O. Box 491, Ruckersville, VA 22968; Tel: 804/990-9300; Fax: 804/990-9301; Email: [forestway@cstone.net](mailto:forestway@cstone.net). Web site: [www.forestway.org](http://www.forestway.org)

**Initiative on Mindfulness, Law and Dispute Resolution**, University of Missouri-Columbia School of Law, <http://www.law.missouri.edu/csdr/mindfulness.htm>.

**Insight Meditation Society**, 1230 Pleasant Street, Barre, MA 01005; Tel: 978/355-4378. Offers insight meditation retreats. [Http://www.dharma.org](http://www.dharma.org)

**Mid-America Dharma Group**, 717 Hilltop Drive, Columbia, MO 65201; Tel 573/817-9942; email: [ginny@midamericadharmagroup.org](mailto:ginny@midamericadharmagroup.org). Includes information about retreats and sitting groups across the U.S. and Canada.

**Spirit Rock Meditation Center**, 5000 Sir Francis Drake Blvd, P.O. Box 169  
Woodacre, CA 94973; Tel: 415/488-0164; Fax: 415/488-017.

Website maintained by Steven Keeva, author of the book **Transforming Practices: Finding Joy and Satisfaction in the Legal Life**.  
[Http://www.transformingpractices.com](http://www.transformingpractices.com).

**Vipassana Meditation Centers** operated by S.N. Goenka and his assistants around the world, <http://www.dhamma.org>.

**Books and Articles** (\* Means highly recommended introductory explanation of mindfulness)

Mark Epstein, *Thoughts without a Thinker: Psychotherapy from a Buddhist Perspective* (Basic Books 1995).

Mark Epstein, *Going to Pieces without Falling Apart: A Buddhist Perspective on Wholeness* (Broadway 1998).

Daniel Goleman, *Emotional Intelligence: Why it Can Matter More than IQ* (Bantam 1995).

Daniel Goleman, *Working with Emotional Intelligence* (Bantam 1998).

Joseph Goldstein, *Insight Meditation: The Practice of Freedom* (Shambhala 1994).\*

Henepola Gunaratana, *Mindfulness in Plain English* (Wisdom 1992). (*Highly recommended for basic introduction to mindfulness.*)

Phil Jackson & Hugh Delehanty, *Sacred Hoops: Spiritual Lessons of a Hardwood Warrior* (Hyperion 1995).

Phil Jackson & Charley Rosen, *More than a Game* (2001).

Jon Kabat-Zinn, *Full Catastrophe Living: Using the Wisdom of Your Mind to Face Stress, Pain & Illness* (Delta 1990).

Jon Kabat-Zinn, *Wherever You Go, There You Are: Mindfulness in Everyday Life* (Hyperion 1994). (*Highly recommended for basic introduction to mindfulness.*)

Steven Keeva, *Transforming Practices: Bringing Joy and Satisfaction to the Legal Life* (Transaction Books, 1999).

Leonard L. Riskin, *The Contemplative Lawyer: On the Potential Contributions of Mindfulness Meditation to Law Students and Lawyers and their Clients*, 7 *Harvard Negotiation Law Review* 1-66 (June 2002) (the centerpiece of a Symposium on Mindfulness in Law and ADR). A webcast of the live symposium held at Harvard Law

School in March 2002 is available at  
[http://www.pon.harvard.edu/news/2002/riskin\\_mindfulness.php3](http://www.pon.harvard.edu/news/2002/riskin_mindfulness.php3).

Zindel V. Segal, J. Mark G. Williams & John D. Teasdale, Mindfulness-Based Cognitive Therapy for Depression: A New Approach to Preventing Relapse (Guilford 2002).

Breath Sweeps Mind: A First Guide to Meditation Practice (Jean Smith, ed., Tricycle 1999).

Eckhart Tolle, The Power of Now (New World Library 1999).

### **Audiotapes and Videotapes**

The Dharma Seed Tape Library, <http://www.dharmaseed.org/>, offers a variety of audiotapes and videotapes, including some intended for beginners.

Mindfulness Meditation Practice Tapes with Jon Kabat-Zinn and Saki Santorelli are available through <Http://www.umassmed.edu/cfm>

## **ADR Clinics - Supervision & Evaluation**

**Bobby Marzine Harges  
Loyola University New Orleans**

### **OUTLINE OF REMARKS**

#### **I. Training of Students in Mediation Clinic**

- A. Students are required to take Mediation and Arbitration Seminar before enrolling in clinic
- B. One to two day mediator skills training at beginning of semester
- C. Weekly Meetings with Students

#### **II. Site of Mediation**

- A. At law school
  - i. Telephone solicitation of litigants requesting them to mediate
  - ii. Students' frustrations over litigants refusing to mediate
  - iii. Convenient for professors and students, not for litigants
- B. At courthouse
  - i. Judge's chambers
  - ii. Conference room

#### **III. Supervision of Students During Mediation**

- A. Supervision of mediations held at law school
- B. Supervision of students held at courthouse

#### **IV. Evaluation of Students**

- A. Evaluation of diaries kept by students
- B. Attendance and participation in weekly meetings
- C. Observation of students at mediation sessions
- D. Final examination paper

## **Building Community**

**Joseph B. Stulberg**  
**The Ohio State University**

- I. Framing the Challenge
  - A. DR processes and tenets of democratic theory
    1. Normative commitments to process dynamics and substantive outcomes.
    2. A historical perspective on DR development:
      - A. Nature of controversies
      - B. Diversity (in)sensitivities of institutions and players.
  - B. Concept of a problem: a lawyer's normative choice in problem-definition
    1. How extensive is the 'shadow of the law?'
    2. The myth of non-adversarial bargaining
  - C. Role definition and responsibilities
    1. Reactive framework
      - A. Party
      - B. Advocate
      - C. Intervener
    2. Partnering framework
      - A. Party
      - B. Advocate
      - C. Intervener
- II. Testing the Waters: The Mediator's Role in Building Relationships  
(Case Scenario - see attachment)
  - A. Questions of entry
    1. What is the 'problem?'
    2. Matching or crafting process to challenge
      - A. Participants
      - B. Building a dialogue framework
    3. Avoiding co-optation
    4. Qualifications
    5. Financing services

- B. Crafting the advocate's role
  - C. Crafting a party's role
- III. Implications of "Building Relationships" on Legal Education
- A. Concept of a professional in a community setting
  - B. Visions of effective advocacy
  - C. Blending lawyering skills into capacity-building initiatives

**Community Oriented Lawyering  
New Opportunities to Serve, for Lawyers and Law Schools**

**Roger Conner  
Executive Director  
Search for Common Ground-USA**

- I. *Community Oriented Lawyering is an “organizational strategy” of law offices that makes problem solving for individual and community clients’ part of the core mission of the office and the daily work of line attorneys. It’s characteristics, by contrast to a case-centered strategy, are as follows:***

	Case Centered	Community Oriented
Unit of work	Crimes Cases Complaints	People Problems Relationships
Definition of success	Win cases Uphold rule of law Be fair and impartial	Reduce the severity of the problem Improve quality of life Restore relationships
Community role	Witnesses Clients	Influences priorities Necessary partner
Interagency collaboration	Limited to high-visibility cases, “issue <i>du jour</i> ”	<b>FREQUENT, INTENSIVE</b>
Tools	Investigation Negotiation Criminal Prosecution Plea Bargaining <b>CIVIL LAWSUITS</b>	Also includes: Community mobilization Training Alternative remedies Negotiated voluntary compliance Motivating agency cooperation
Favorite question	What happened?	What’s happening?

- A. *The basic mission is enlarged:*** Community Oriented Lawyering concerns people and places, in addition to crimes and cases. In addition to winning cases, Community Oriented Lawyering seeks to directly *generate outcomes* that clients and community stakeholders value, such as increasing public safety, preventing crime, solving neighborhood problems, helping individuals find the help they need to improve their lives, or facilitating economic development.
- B. *The basic unit of work for line attorneys is a problem rather than a case.*** In this new strategy, prosecutors think of drug markets instead of drug cases; legal

services lawyers focus on the health of neighborhoods not only the list of addresses on their case-files.

- C.** *The tool kit is larger.* To these offices, conventional case processing is simply a tool, not an end in itself. The new prosecutors use civil instead of criminal suits, legal aid lawyers invent new forms of action to get vacant properties quickly into the hands of non-profit developers, and defenders may collaborate in creation of new drug courts and mental health courts. All of them mobilize neighborhood residents, educate potential victims, use non-adversarial remedies; in other words, whatever it takes. They are much more likely than their peers to rely on negotiated, voluntary compliance.
- D.** *The relationship to the community is different.* In the new approach, the community is seen as a potential partner, not merely a passive client. The community helps define what is important and also what constitutes success. Line prosecutors meet with neighbors and business owners to identify urgent priorities, sometimes moving their offices the neighborhoods to learn, first hand, why car theft is a priority of local residents. Defenders listen actively to victims and support new laws to prevent crime and improve programs to prevent crime. Law schools establish new clinics based on a canvass of the needs of neighborhood organizations rather than the existing law school curriculum.
- E.** *Collaboration with other groups is frequent and intense.* In more conventional practice, lawyers work alone or in small groups. Once an office or division shifts to solving problems and generating outcomes, it discovers that success depends on educating, persuading, cajoling, meeting, sharing information, and (even) sharing power with other agencies and organizations, public and private. U.S. Attorneys discover that they need street gang workers from non-profit organizations to stop gun violence. Public interest lawyers discover they must work with police when they represent neighborhood groups. Defense attorneys need the help of prosecutors and judges to clear outstanding warrants so their clients can get employment. *Pro bono* attorneys need volunteer psychiatrists to help mentally ill clients apply for disability benefits.
- F.** *The key question is different.* The conventional practice is revolves around the question, “What happened?” The newer offices ask, in addition, “What's happening?” The angle of vision is profoundly different: One is trying to assign responsibility for what *has* happened; the other, in addition, seeks to reshape what *will* happen.

## **II. Community Oriented Lawyering can be found in many different law offices and legal programs**

- A.** *Law School Clinics:* Many law schools now have clinics where clients are community organizations or small businesses operating in distressed communities. Others have pioneered a holistic approach to individual client representation in areas such as family law, loss of public benefits, and criminal defense.
- B.** *Pro Bono:* In many communities, *pro bono* attorneys are helping local non-profit organizations, representing start-up small businesses in distressed communities, and playing a part—with other professionals—in holistic responses to complex human problems such as homelessness, addiction, untreated mental illness, and child abandonment and abuse.

- C. *Legal aid and legal services*: Some offices have shifted to “holistic” representation, treating the legal issue that the client brings in—such as eviction or loss of public support—as the “presenting problem” only. Others have set up separate divisions to represent community *groups* rather than individuals, which often involve an extensive transactional law practice.
- D. *Community Prosecution*: District Attorneys, U.S. Attorneys, and City Prosecutors in many jurisdictions have reassigned line attorneys to specific, high-crime neighborhoods where they generate new, collaborative strategies to address chronic problems, often using their knowledge and status as leverage to cause public agencies to address underlying causes. Others create divisions or sections that take a problem-solving approach to a class of cases.
- E. *Community Oriented Defenders*: Some defender agencies are shifting to holistic representation, employing social workers and former prisoners, for example, to persuade judges to forego incarceration by assembling a meaningful plan for addressing the life issues that are giving rise to crimes. Others are creating offices or divisions to represent clients from specific neighborhoods, so they can work with community groups to create networks and services of support for persons under community supervision, and better support community groups seeking system change.
- F. *Private practitioners*: Some attorneys whose practice is protecting against violations of civil rights or environmental laws routinely use litigation or the threat of litigation as leverage to bring traditionally excluded groups to the table for formal collaborative problem-solving processes.
- G. *Municipal attorneys*: City/county attorneys as well as in-house lawyers in local agencies are well positioned to take a pro-active, problem-solving approach to chronic problems rather than limiting themselves to serial, unsatisfying court battles.

**III. *Estimating the Extent of Community Oriented Lawyering***: As part of a project at the National Institute of Justice of the U.S. Justice Department, several surveys were conducted of police chiefs and line officers, prosecutors and line attorneys, and law school clinic directors. The empirical findings can be summarized as follows

- A. *Lawyers outside of government*:
  1. 27 per cent of all law schools reporting have clinics that focus on community economic development; 19 per cent have clinics to assist non-profit organizations; 5 per cent have clinics that address neighborhood safety. The survey did not allow an estimate of the number of clinics taking a more holistic approach to the representation of individual clients.
  2. While there is no estimate of the number of pro bono and civil legal services programs that take a community oriented approach, 23 per cent of all police executives in the survey reported that non-governmental lawyers “sometimes” assist community groups on issues related to neighborhood safety in their jurisdictions.
- B. *Prosecutors and Municipal Attorneys: The police perspective*
  1. One-fourth to one-third of all police agencies report that *either* prosecutors, city/county attorneys, or police legal advisors are “frequently” involved with them in problem solving;

2. Both chiefs and line officers report that lawyer involvement significantly increases the effectiveness of their problem-solving work, and half of all chiefs have recently made specific efforts to secure more;
3. The demand for community oriented lawyering from police far exceeds the supply. Most experienced officers report that they “frequently” (50%) or “sometimes” (18%) deal with complex problems where needed legal assistance is not available. 13% report that they routinely get such support.

**C. In Prosecutors’ offices**

1. Half of all prosecutors report that community prosecution in some form is present in their offices, at least in an experimental location;
2. Community Prosecutors are much more likely to be engaged directly with community groups and agencies *other than* police as compared to their peers;
3. Community Prosecution tends to be implemented with full-time prosecutors specifically assigned to this task in larger cities; in jurisdictions of less than 250,000, it tends to involve adding new tasks involving direct contact with the community to the work of existing line attorneys.
4. Line attorneys who are assigned to work directly with community members on problem solving make significant changes in priorities and operational tactics, and also report very high levels of personal job satisfaction.

**IV. Questions to be answered in the future include:**

- A.** Where does Community Lawyering add the most value?
- B.** It takes more time per client served. How can we measure the work and evaluate the benefits and costs?
- C.** What are the risks and dangers of this new approach?

## **Community Lawyering as Taught and Practiced at Brigham Young University Law School**

**David Dominguez  
Brigham Young University**

Contact me or see, David Dominguez, *Redemptive Lawyering: The First (and Missing) Half of Legal Education and Law Practice*, 37 California Western Law Review 27 (2000)

- I. Thesis and Definition: Attorneys and disputants need to stretch their respective roles when dealing with hard public controversies.
  - A. Conventional legal education and law practice conceptualize the role of attorney in the community as that of an expert who reacts to social conflict by acting as a zealous advocate for one interest group.
    1. Community Lawyering (CL) supplements this “expert/reactive” role with proactive, collaborative intervention.
    2. It teaches law students how to work in teams to identify and implement alternative community problem solving methods, especially to enrich formal public offices and informal social roles, cultivate long-term partnerships among diverse parties, and improve service networks.
  - B. Disputants involved in public controversies may be deciding too quickly that lawyers and the legal system offer the best way to frame and process conflict.
    1. They may not pause to consider alternative ways to leverage the immediate problem to integrate other parties, values and concerns, or to use a different timeline to map out contingencies.
    2. The law serves an important role in dispute resolution but is too often used as a primary option by both “insider” groups (who are over-lawyered) and the “outsider” advocacy organizations (who are under-lawyered).
  - C. Working Definition: CL helps a wide range of interest groups and stakeholders (both those presently identified and those who are implicated) to weigh the advantages of immediate access to the legal system against other forms of community problem solving, particularly community negotiation of affected public roles, plans, resources, alliances, and so on.
    1. CL teaches how to design and negotiate “wellness models,” prevention schemes, and new strategic alliances of collaboration.
    2. CL affirms, however, the value of legal representation. When an advocacy group makes an informed decision that a lawsuit is the best route to take, CL shows attorneys how to work more effectively with advocacy groups and grassroots organizations, giving them a bigger say in the handling of specific legal matters as well as in the direction of public policies underlying the law.
- II. CL as Taught at BYU Law School
  - A. The foundational skill to be introduced at the start of the term and practiced throughout the semester is critical reflection. Critical reflection awakens law students to see how easily we render American life as a bundle of legal interests and law claims. We take stock of the bias toward framing conflict as one hard position in opposition to another hard position (distributional outcomes).

B. The opening exercise is writing an “Updated Personal Statement”: Students are handed copies of their original essay that formed part of their law school application and that spoke eloquently to their reasons for attending law school. They examine how differently they view themselves and legal education and discuss the discrepancy between what they had hoped for and what they in fact experienced. They come to see how they have been conditioned (and overwhelmed) by the law school teaching culture, the classroom environment, and other zero-sum environmental conditions (e.g., class rank, job interviews, placement in co-curricular activity). They appreciate how difficult it is to join with others to resist institutional pressure to conform to pernicious social practices.

C. Critical reflection is sustained and honed through weekly written papers on assigned topics. Topics include, “What does it mean that I am more than just a student of the law, that I am its steward entrusted with its management, direction, and purpose?”;

D. Building on critical reflection, the next set of CL skills includes active listening, facilitation, mediation, and added-value negotiation. These skills are introduced and strengthened as students propose, consider, and finally select the field project.

### III. Extending In-class Community Building into the Field: The Three Overriding Questions

A. “Who else is at risk as I intervene with legal resources?” As I contribute the expert role of attorney, offering legal advice and representation, am I legitimizing one form of discourse at the expense of a more inclusive community dialogue? Which new voices do we need to hear?

B. “What more is at stake?” As I think like lawyer, what an extra-legal concerns am I missing? Where are there opportunities for trading on differences that would be better addressed by teachers, police officers, clergy, etc? Am I closing files when I should be opening doors? Am I influencing others to settle for too little?

C. “How can we meet and exceed original expectations and goals?” Although the parties may be satisfied in the short term, are they and others are better equipped to prevent or handle new problems when they occur? Knowing that our professional workload limits our sustained involvement, have we mentored others in leveraging the talents of those who remain involved?

### IV. An Illustration of Applying the Three Questions: The Legal and Extra-legal Problem of Establishing a Community Center at the Boulders Apartments

A. The Boulders Apartments (Boulders) is located in the rough, low-income section of Southwest Provo. The sprawling residential complex has 388 units, approximately 1200 tenants, half of whom receive public assistance and/or are under the care of Utah State Mental Health, Utah State Workforce Services, Utah County Probation and Parole, and other service organizations. Of the 1600 calls for police service in the past 16 months, many are calls alleging domestic violence, drug activity, gang behavior, prostitution, car theft, and the like.

B. The multicultural, multinational, multilingual residents form a microcosm of the poorer parts of Provo (and, for that matter, disadvantaged communities throughout Utah, especially those dealing with rapidly changing demographics). Provo is now 10% Latino and this segment of Provo is the fastest growing.

C. Boulder residents face many legal and extra-legal issues in a wide variety of areas: housing, police relations, immigration, K-12 education, health care, employment, disability, cross-cultural communication, etc.

D. The CL class began the field project by conducting many one-on-one interviews with Boulders residents and management, public officials, local leaders, police officers, agency providers, and BYU resources to get a full range of descriptions of strengths and weaknesses, assets and liabilities, histories and hopes surrounding the issues, and other relevant information.

E. A key concern emerged among the various parties: There is no space on-site which might accommodate information sessions on the law (especially immigration and police relations), healthcare, education, English classes, career training, computer literacy, tutorial assistance for the schoolchildren, etc. Hence, the pressing question: How to establish a community center at Boulders?

F. The initial conclusion on the part of various (angry) stakeholders was to solve the problem by mobilizing angry voices and bringing public pressure to bear; next, by directly and forcefully demanding that management dedicate adequate space for on-site community development; and, finally, by filing a lawsuit. (There is federal law that would support such legal action since the units are federally subsidized.)

G. Asking, "Who else is at risk if we proceed with a lawsuit," we assembled small gatherings of diverse parties to demonstrate the benefits of critical reflection, active listening, facilitation, mediation and negotiation. After these meetings helped the parties to reframe the issues, they appreciated that there were many creative approaches to the problem, including an unprecedented Boulders Community Festival that was a product of dialogue, negotiation, and teamwork.

H. Asking, "How much more is at stake than the end result of a community center at Boulders?," we have helped parties tap local university resources and form new partnerships with the local cities to address a wide range of pressing problems.

I. Asking, "How do we meet and exceed our original expectations and goals?," one development is especially encouraging: Boulders Management, which at first was defensive and spoke of feeling "threatened," is now trying to teach managers at other residential complexes in Las Vegas and Phoenix to replicate our transformation in community relations.

# **The Comprehensive Law Movement: Law as a Healing Profession**

**Susan Daicoff**  
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**Abstract:** A “tripartite crisis” exists in the legal profession today, consisting of: deprofessionalism, low public opinion of lawyers and the legal system, and lawyer distress. Lawyers and nonlawyers alike express dissatisfaction with lawyers, the practice of law, and the outcomes of legal processes. Nonlegal dispute resolution mechanisms in society have failed and we have become dependent on legal processes (which are often adversarial and other-blaming) to resolve conflict. Lawyers are extraordinarily unhappy, suffering from depression, anxiety, substance abuse, and general psychological distress at rate that is almost twice that found in the general population. This talk will focus on an emerging movement in the law and its potential to ameliorate some of these problems.

In the last decade of the 20<sup>th</sup> century, perhaps in response to this widespread dissatisfaction with the legal system and lawyers, a new movement in law began to coalesce -- towards law’s potential as a healing profession. This movement takes an explicitly comprehensive, integrated, humanistic, interdisciplinary, and often therapeutic approach to law and lawyering. This “comprehensive law movement” is evidenced by the rise of a number of new disciplines, or “vectors,” that have rapidly gained visibility and popularity. The vectors include: therapeutic jurisprudence, restorative justice, collaborative law, transformative mediation, procedural justice, preventive law, creative problem solving, holistic justice, and problemsolving courts (e.g., drug treatment courts, mental health courts, and other specialized courts).

The vectors of the comprehensive law movement differ from traditional law and legal practice in that they explicitly seek to resolve legal matters in ways that are healing, ameliorative, or psychologically optimal for the people involved. They also explicitly consider extralegal concerns, meaning factors other than strict legal rights and duties (such as individuals’ wellbeing, relationships, needs, resources, values, morals, and goals, or concepts of psychology, personal wellbeing, moral growth, and interpersonal connection and harmony).

The relationship of this developing movement to lawyer wellbeing and the other problems in the legal profession will be explored. The future of this movement, its potential to transform the law, and its relationship to existing legal processes, including dispute resolution processes, will also be explored.

## **Description of the Vectors:**

**Collaborative law** - is a nonlitigative, collaborative process employed mainly in divorce law, where the spouses and their respective attorneys resolve the issues outside of court (a 4-party process). No litigation is usually instituted until settlement is reached and the attorneys are forbidden from representing their clients in court should the agreement process break down. Basically, it puts the divorcing spouses with their respective attorneys into a collaborative, 4-way series of discussions designed to reach

settlement outside of litigation. Because the attorneys must withdraw if the process breaks down, the attorneys' financial interests are the same as the clients' -- to reach settlement. This contrasts with the usual process, in which the lawyers "win" whether the clients settle or not, since they simply litigate the case if negotiations break down. There is also a strong psychological component to the lawyer-client relationship in that emotions, needs, transference, etc. are openly acknowledged and dealt with in order to maximize results of the 4-way conferences. Although currently being used only in the domestic area, collaborative law could be appropriate for a number of other areas, such as employment law. It is associated with practicing attorneys Pauline Tesler (Bay Area, California) and Stewart Webb (Minnesota). See [divorcenet.com](http://divorcenet.com) and [collaborativelaw.org](http://collaborativelaw.org); Pauline's email is [pht@lawtsf.com](mailto:pht@lawtsf.com).

**Restorative justice** - refers to a movement in which criminal justice and criminal sentencing are done by the community, victim, and offender in a collaborative process with all players present, focusing on the relationships between the offender, victim, and community. It is the antithesis of a top-down, hierarchical system where the judge (up) imposes a sentence on the defendant (down). From the website: "The Center for Restorative Justice & Peacemaking at the University of Minnesota School of Social Work on the University's St. Paul campus has been established to provide technical assistance, training, and research for those in the state of Minnesota, nationally, and internationally in support of restorative justice practice and principles. Through restorative justice, victims, communities, and offenders are placed in active roles to work together to... Empower victims in their search for closure; Impress upon offenders the real human impact of their behavior; Promote restitution to victims and communities. Dialogue and negotiation are central to restorative justice, and problem solving for the future is seen as more important than simply establishing blame for past behavior. Balance is sought between the legitimate needs of the victim, the community, and the offender that enhances community protection, competency development in the offender, and direct accountability of the offender to the victim and victimized community." It is associated with Mark Umbreit, who is a social work professor at the University of Minnesota. Website is: <http://ssw.che.umn.edu/rjp/>.

**Procedural justice** - refers to Tom Tyler's empirical findings that, in judicial process, litigants' satisfaction depends more on being treated with respect and dignity, being heard, having an opportunity to speak and participate, and how trustworthy the authorities appear/behave, than they do about the actual outcome (e.g, winning vs. losing) of the legal matter. It is associated with Tom Tyler.

**transformative mediation** - as described in Bush and Folger's book, *The Promise of Mediation*. In this process, the procedure and the players are dynamic. The parties are moved towards continuing relationships with each other instead of seeing the process as static and simply a resolution of one dispute. Apparently the United States post office is training mediators in this process in order to apply it to mediate employment disputes. Robert Bush is a law professor at Hofstra Univ. School of Law in Hempstead, NY; Folger is a communication professor at Temple University.

**Therapeutic jurisprudence** - focuses on the therapeutic or countertherapeutic consequences of the law and legal procedures on the individuals involved, including the clients, their families, friends, lawyers, judges, and community. It attempts to reform law and legal processes in order to promote the psychological well-being of the

people they affect. From its website: "Therapeutic Jurisprudence concentrates on the law's impact on emotional life and psychological well-being. It is a perspective that regards the law (rules of law, legal procedures, and roles of legal actors) itself as a social force that often produces therapeutic or anti-therapeutic consequences. It does not suggest that therapeutic concerns are more important than other consequences or factors, but it does suggest that the law's role as a potential therapeutic agent should be recognized and systematically studied." It has been widely applied to both substantive law and legal processes with increasing visibility since 1990. It has also been applied to police work and become very popular with judges. Its founders are David B. Wexler, Professor of Law at University of Arizona and University of Puerto Rico & Bruce Winick, Professor of Law at University of Miami. Website is: <http://www.law.arizona.edu/upr-intj/>.

**Preventive law** - explicitly seeks to intervene in legal matters before disputes arise and advocates proactive intervention to head off litigation and other conflicts. Emphasizes the lawyer-client relationship, relationships in general, and planning. A long-standing, harm-averse movement. It is associated with Professor and Dean Emeritus Edward Dauer at University of Denver College of Law and the late Louis Brown.

**TJ/PL** - therapeutic jurisprudence and preventive law have been integrated into a single approach to law and lawyering in a series of articles, combining both approaches. See articles and book by Dennis Stolle and others integrating the two.

**Holistic law** - "acknowledge[s] the need for a humane legal process with the highest level of satisfaction for all participants; honor[s] and respect[s] the dignity and integrity of each individual; promote[s] peaceful advocacy and holistic legal principles; value[s] responsibility, connection and inclusion; encourage[s] compassion, reconciliation, forgiveness and healing; practice[s] deep listening, understand[s] and recognize[s] the importance of voice; contributes[s] to peace building at all levels of society; recognize[s] the opportunity in conflict; draw[s] upon ancient intuitive wisdom of diverse cultures and traditions; and [encourages the lawyer to] enjoy the practice of law" (from its website). It is explicitly interdisciplinary, allows the lawyer to incorporate his or her own morals and values into client representation, seeks to "do the right thing" for the lawyer, clients, and others involved. Seeks to find solutions to legal matters in a broader, more holistic approach than is traditionally associated with lawyers, like holistic medicine. It is associated with the International Alliance of Holistic Lawyers and practicing lawyer William Van Zyverden in Vermont; his email is [hjc1@aol.com](mailto:hjc1@aol.com) and the website is: <http://www.iahl.org/index.htm>.

**Creative problemsolving** - is associated with an the McGill Center at California Western School of Law - is explicitly humanistic, interdisciplinary, creative, and preventive in its approach to legal problems. Seeks to find solutions in a broader approach than is traditionally associated with legal work. From the website: " This is the first program in San Diego specifically dedicated to scholarly research and objective practical training in problem solving, dispute resolution and preventative law. As an institutional focal point for the school's overall mission of educating creative problem solvers, the Center explores the processes used by the law to address human and social problems, identify and describe competencies required to help individual, organizations and communities solve their problems effectively, and educates law

students, lawyers and others in the skills and techniques of creative problem solving. For students, the Center is a teaching institution for learning the theory and practice of problem solving and conflict resolution. For the academic community, the Center is a vehicle for the production and dissemination of research on conflict theory, dispute resolution and problem solving. For the local and national community, the Center provides a forum for training and dialogue about the resolution of complex socio-legal problems and preventative law." The institute's executive director is Jamie Cooper; other professors there who are involved are Janeen Kerper, Linda Morton, Tom Barton, Janet Weinstein, Janet Bowermaster, and others at CWSL. Website: <http://www.cwsl.edu/admissions/bulletin>, then choose McGill Center for Creative Problem Solving.

### **Intersections:**

All of these "vectors" have similarities and some intersect in many ways. Two of their points of universal intersection are:

(1) All are focused on **optimizing human wellbeing**. They seek to achieve the maximal psychologically beneficial outcome -- by explicitly being nonadversarial, nongladiatorial, noncontentious, collaborative, interdisciplinary, creative, respectful of others' feelings and needs, and nonbrutalizing and by seeking to maximize the emotional wellbeing of all parties involved.

(2) All explicitly focus on extra-legal concerns, meaning factors other than the strict legal rights and obligations of the parties, such as their emotions, relationships, feelings, needs, resources, goals, psychological health, etc. - this is what Pauline Tesler calls "**rights plus.**"

### **Philosophical Organization of the Movement:**

Some of the vectors are more practical, concrete, and tangible while others are more philosophical, theoretical, and broad. The more philosophical ones can be seen as "lenses" through which the other, more concrete vectors can be evaluated. For example, if dispute resolution is viewed as a collection of dispute resolution alternatives, including litigation, arbitration, mediation, negotiation, and other alternatives, then collaborative law and facilitative and transformational mediation are clearly part of this collection. Law practice can be viewed as a broader collection of "processes," including this collection of dispute resolution processes along with preventive law, TJ/PL, and simple one-client counseling. The remaining vectors can be seen as parallel "lenses" through which the attorney views, evaluates, and assesses each of these processes' likely consequences, outcomes, viability, and desirability in each legal matter handled by the attorney. For example, each of the legal processes can be viewed from a TJ (is this process therapeutic or not? how could it be made so?), holistic (how does this process take into account the healing of the client and lawyer?), procedural justice (how will this process affect the participants psychologically?), or CPS perspective (does this process allow for the broadest, most creative approach to solving the problem?). A related lens might be religious lawyering (is this process consistent with the lawyer's and client's religious beliefs?).

The unanswered question is whether all of the lenses in the comprehensive law movement are all really simply "therapeutic" in intent or are actually broader –

meaning more comprehensive and humane than our conventional way of viewing law, which tends to focus on legal rights and duties and the economic "bottom-line" of the outcome.

**Potential Related "Vectors:"**

Others have suggested that the following may also be related to the comprehensive law movement: religious lawyering (interjecting religious values into law practice); the movement to resurrect secular humanist values in law; the politics of meaning; the efforts of the Contemplative Mind & Society Institute, including the Yale meditation project sponsored by the Fetzer Institute; affective lawyering; rebellious lawyering; law and socioeconomics; and the humanizing legal education movement.

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## **“Collaborative Lawyering” or “Settlement-Only” Counsel: Implications for the Delivery of Legal Services and the Practice of Law**

**Dr Julie Macfarlane**  
**Professor of Law, University of Windsor (on leave)**  
**Visiting Professor, Osgoode Hall Law School of York University**

“Collaborative lawyering” is part of a “new wave” of lawyering philosophies and strategies - including holistic lawyering, therapeutic jurisprudence, and the application of meditation and mindfulness to legal practice - that reflect the disenchantment of both clients and counsel with traditional forms of adversarial process and client representation.

Civil justice innovations over the past 15 years have focused on changing the procedural context within which settlement will take place, including case management programs and court-annexed mediation programs. A different approach focuses on reconceptualising and restructuring roles and relationships among lawyers who, as the agents of disputing in civil justice systems, are primarily responsible for the negotiation of settlements.

### **What is “Collaborative Lawyering”?**

“Collaborative lawyering” refers to a contractual commitment between lawyer and client *not* to resort to litigation to resolve the client’s problem. The lawyer is retained to provide advice and representation regarding the non-litigious resolution of the conflict, and to focus on developing a negotiated, consensual outcome. If the client does decide that legal action is ultimately necessary in order to resolve the dispute, the retainer stipulates that the collaborative lawyer (along with and any other collaborative professionals such as divorce coaches or financial planners) must withdraw and receive no further remuneration for work on the case.

Originating in Minneapolis in 1990, networks of lawyers wishing to participate in collaborative lawyering arrangements have flourished in various US states, including Minnesota, Ohio, Wisconsin, California, Texas and Georgia and now in most Canadian including British Columbia, Alberta, Saskatchewan and Ontario. Proponents of collaborative law suggest this approach reduces legal costs, expedites resolution, leads to better, more integrative solutions and enhances personal and commercial relationships.

### **DIFFICULT QUESTIONS**

The growth of collaborative lawyering – thus far confined almost entirely to family law practice - has been controversial. While the effort to develop a more responsive and less aggressive form of family practice is welcomed by many, the practice of collaborative or settlement-only lawyering raises a host of practice, ethical and organizational issues for lawyers. For example

- ❖ To what extent can collaborative lawyering adequately protect family law clients who are fearful of negotiating directly with their former spouse?
- ❖ What type of advocacy are lawyers providing where all or most negotiations take place in front of the other side? (the “fourway” meeting)
- ❖ Does the requirement that all “relevant” (?) information is disclosed and shared among members of the collaborative “team” – clients and counsel – signal the death of solicitor/client privilege?
- ❖ In some cities, the collaborative “team” include therapists and/or financial advisors. What are the implications for legal practice of such close intra-professional co-operation?
- ❖ What are the appropriate qualifications for lawyers describing themselves as “collaborative”? And are some lawyers cynically exploiting collaborative lawyering as a marketing ploy?
- ❖ What is the relationship between collaborative lawyering and family mediation? Does collaborative lawyering “replace” family mediation?

### **THE FIRST EMPIRICAL RESEARCH STUDY**

The Social Science and Humanities Research Council of Canada has funded a three year study (2001/4) to examine and evaluate the potential impact of the emerging practice of “collaborative lawyering”. Dr. Julie Macfarlane of the University of Windsor Faculty of Law (presently Visiting Professor at Osgoode Hall Law School) is the Principal Investigator. During the first year of this study approximately 70 lawyers and clients were interviewed at more than a dozen North American sites. During year two of the study (2002/3) the progress of a sample of cases where legal services have been contracted on a collaborative basis are being tracked at five pilot sites (Minneapolis, San Francisco, Regina, Medicine Hat and Vancouver). Collaborative professionals and their clients involved will be interviewed (confidentially and all data anonymised) at various stages of the case. In addition focus groups at each pilot site will discuss the collaborative process and evaluate its impact on the practice of law.

From the plethora of questions raised by collaborative lawyering (see back), key questions for this project are the impact of collaborative lawyering on the traditional model of lawyer-to-lawyer negotiations, including the changing notion of advocacy implied by the collaborative approach - what types of outcomes are produced by the collaborative model – and the range of professional ethical issues implicated by the CL model (eg screening, zealous representation, disclosure, solicitor/client privilege, pressure to settle, withdrawal).

### **THE PHENOMENON OF THE COLLABORATIVE LAW GROUPS**

The Collaborative Lawyering Groups or Networks that are springing up all over North America represent a fascinating phenomenon in themselves. Since a commitment to eschew litigation requires the agreement of all counsel on a file (and hence the development of a formal collaborative retainer agreement), groups or associations of collaborative lawyers are being established to co-ordinate lawyers who wish to do this work. Collaborative Law groups commonly set membership and training requirements, and generally act as “gatekeepers” to other lawyers and professionals

wishing to participate in these processes. Some groups are even developing expulsion criteria to deal with members who have been acting in a manner considered “uncollaborative”! The groups function as social as well as professional networks for their members, offering collegial support to lawyers who are seeking a different way to serve their clients and to practise law.

### **TEACHING ABOUT COLLABORATIVE LAWYERING**

While there are numerous collaborative law trainings being offered all over the country, the integration of information and, most importantly, critical debate about the growth of collaborative law into law school curricula is at a very early stage. Obvious places to consider teaching about collaborative lawyering include existing courses on dispute resolution, the legal profession and family law. Some of the questions that might be raised in these classes include :

1. As part of a course on methods of dispute resolution,
  - ❖ What does it mean for counsel to commit to a settlement-only strategy?
  - ❖ What types of skills and abilities does a settlement-only advocate require?
  - ❖ How should a “negotiation specialist” be trained and qualified?
  - ❖ What if any difference might an undertaking to forego litigation have on the relationship between lawyer and client?
  - ❖ What safeguards are needed where one spouse appears much stronger than the other in the collaborative process?
  - ❖ For whose benefit is the constraint on litigation – client or lawyer?
  - ❖ What is the relationship between collaborative lawyering and other dispute resolution options available to family law clients?
  
2. As part of a course on the legal profession,
  - ❖ What are the implications of a two-track profession (settlement, litigation) for the internal culture and hierarchies of the profession?
  - ❖ What if any difference does it make to the lawyer’s conception of advocacy to represent a client on (a) a collaborative file? (b) a litigation file?
  - ❖ Is it likely that collaborative lawyering could be expanded into areas of legal practice outside family law? Why or why not?
  
3. As part of a family law course,
  - ❖ What advantages does collaborative lawyering offer family clients?
  - ❖ What is the influence of the “shadow of the law” on collaborative lawyering and its outcomes?
  - ❖ What are the downsides to collaborative lawyering for some family clients?
  - ❖ How should a history of violence or intimidation be dealt with in a collaborative process?
  - ❖ What client profile might be most suited to this approach?

- ❖ Should collaborative lawyering settlements be subjected to scrutiny by a family court judge?

**A SHORT (EXCERPTED) READING LIST ON COLLABORATIVE LAWYERING AND RELATED SETTLEMENT-ONLY APPROACHES**

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Tesler, Pauline, "Collaborative Law: A New Approach to Family Law ADR" 2 *Conflict Management* 12 (Summer 1996)

Tesler, Pauline, "Collaborative Law: A New Paradigm For Divorce Lawyers" 5 *Psychology, Public Policy & Law* 967 (December 1999)

Tesler, Pauline, "Collaborative Law: What It is, and Why Lawyers Need to Know About It" 13 *American Journal of Family Law* 215 (Winter 1999)

Tesler, Pauline, "Collaborative Law: Where Did It Come From, Where Is It Now, Where Is It Going?" 1 *The Collaborative Quarterly* 1 (1999)

Tesler, Pauline, "The Believing Game, The Doubting Game, and Collaborative Law A Reply to Penelope Bryan" 5 *Psychology, Public Policy & Law* 1018 (December 1999)

Tesler, Pauline, "The Good, the Bad and the Ugly: Collaborating with Anyone Who Shows Up – A Conversation with John McCall" *The Collaborative Quarterly* vol. 2, Issue 1 (May 2000) at 1

Williams, Gerald, "Negotiation as a Healing Process" (1996) 1 *Journal of Dispute Resolution* 1

Winick, Bruce, "Symposium: Creative Problem Solving Conference: Therapeutic Jurisprudence and the Role of Counsel in Litigation" (2000) 37 *California Western Law Review* 105.

**CROSS-CULTURAL NEGOTIATIONS**  
**Law 628**  
**Spring 2003**  
**Ilhyung Lee**

**Course Information and Guidelines**

*We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts.\**

Welcome to Cross-cultural Negotiations. In this course, we will examine how cultural factors may affect the dispute resolution process.

I. Course Materials

The main required text is a collection of photocopied materials available at the MU bookstore. (For your information, these materials are part of a forthcoming text on the subject, edited by Professor Grant R. Ackerman of Rutgers University.) There will also be occasional handouts.

II. Grading

The course grade will be determined by: (i) a research paper to be turned in at the end of the course in May and (ii) timely class attendance and participation, as follows:

- 80% Research paper (due Friday, May 2, 2003, Noon)
- Preliminary draft (ungraded) (due Friday, March 14, 2003, Noon)
- 20% (Timely) Attendance and class participation

The subject of the research paper is up to you, but must relate to some aspect of (i) cross-cultural negotiation or dispute resolution or (ii) culture and law. If you have any question about the suitability of your subject in meeting course requirements, please see me before commencing work. The final product must reflect significant independent research and original writing and analysis. The length of the paper will vary depending on the subject, but 20 pages is an approximate guideline. You will receive more information about the research paper separately.

III. Attendance/Class Participation

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\*The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 9 (1972).

By faculty decision and ABA rule, regular attendance in this and all other courses is mandatory. If you know that you will not be able to attend a class, please let me know in advance. If unexpected circumstances or emergencies prevent attendance, please let me know as soon as you can. Excessive absences are grounds for adjustment of the course grade. Continued absences are grounds for failing the course.

Attendance is especially important given the limited number of class meetings in this course.

**The course is designed to be interactive. For the class to be a successful experience, it requires input from all participants.**

#### IV. "Office Hours"

My office is in Room 311. The telephone number is 882-2426. If you prefer, my e-mail address is LeeIH@missouri.edu. Like other faculty members, I do not plan to keep formal office hours, mainly because they often discourage students from stopping by at other mutually convenient times. My only request is that you avoid the time before class. This semester, in addition to this course, I have a class on Wednesdays and Fridays from 12:30 to 1:45 p.m. If unexpected circumstances arise and I am not able to meet with you when you walk in, please understand if I ask you to make an appointment. At other times, you are more than encouraged to stop by. We may discuss any part of the course, or just about anything you wish.

**CROSS-CULTURAL NEGOTIATIONS**  
**Law 628**  
**Spring 2003**  
**Ilhyung Lee**

**Syllabus and Reading Assignments**

- I. Introduction and ADR Review (January 16)  
Introductions; course policies; administrative tasks; review of conflict/dispute resolution methods
  
- II. Introduction to Cultures (Jan. 23)  
Cross-cultural exercise (crossing borders)  
Discussion  
  
Reading: Supplement, 3-13
  
- III. “World Views”; Interaction of Cultures (Jan. 30)  
Views of the world; cultures and civilizations; communication process  
“Exercise in judgment/perception”  
  
Reading: Supplement, 15-35
  
- IV. Context; Time; Perceptions (Feb. 6)  
High/low context cultures; mono-/polychronic time orientation  
Attribution theory  
  
Reading: Supplement, 39-44; Handout
  
- V. Culture and Values; Introduction to Cultural Dimensions (Feb. 13)  
Culture and values; temporal focus  
Cultural dimensions: individualism/collectivism; uncertainty avoidance  
Reading: Supplement, 47-54, 55-58, 61-87 (skim)
  
- VI. More on Cultural Dimensions (Feb. 20)  
Cultural dimensions: power distance; masculinity/femininity  
Cultural dimensions in application  
Reading: Handouts
  
- VII. Cross-Cultural Negotiation (Feb. 27)  
Cultural dimensions wrap-up  
Exercise: German-Chinese negotiation and Three Rivers  
Background reading: Supplement, 91-114; 115-23  
Reading: Supplement, 125-56; Handouts
  
- VIII. U.S.-Korea (March 6)  
Preparations for U.S.-Korea business negotiation exercise  
Reading: Supplement, 157-73

>>**Saturday, March 8, 2003 Noon to 5:30 p.m.**<<

**U.S.-Korea business negotiation exercise**

Luncheon at Reynolds Alumni Center

Negotiations in Hulston Hall

Review session

IX. Culture and Law; Course Conclusion (March 13)

Reading: Handouts

**Friday, March 14, 2003 – Noon**

**Preliminary draft of research paper due**

**Week of March 31 - April 4, 2003**

**Research paper conferences**

**Friday, May 2, 2003 – Noon**

**Final research paper due**

# Teaching “Emotion” and “Negotiation” to Lawyers and Law Students: Challenges, Opportunities, and Options

Clark Freshman, University of Miami  
Dan Shapiro, Harvard University

## Themes of concurrent session

1. **Awareness of role of emotions in negotiation**
2. **Emotions are not bad; worth ignoring**
3. **How to manage**
4. **Here’s how to teach emotions in negotiation**

### 1. Challenges

1. “Resistance” by students
  - Flaky
  - Non-substantive
  - Overwhelming
2. “Resistance” by teachers
  - Do I have the skills to do this (do I need to be a therapist?)
  - Where’s the “hard science?”

### 2. Opportunities

1. “Fluoride for mental health”
  1. Emotional crisis among lawyers and law students: People don’t seek out help
  2. Law school negotiation class may help out with emotions
    1. People may take negotiation classes who won’t seek other help just as fluoride reaches people who won’t see the dentist
      - (1) Some may fear stigma of seeking help or deny negative emotions
      - (2) Others may not realize efficient emotions may benefit even quite healthy people – like fluoride
    2. Fit between negotiation training and emotional efficiency
      1. Education about importance: existing studies show link between emotion and negotiation
      2. Negotiation training and improving emotion
        1. Predictors of depression \_ absence of well-being, dichotomous thinking predicts depression; negotiation tries to encourage **non-zero-sum thinking**; we see different options
      3. Group approaches to changing emotion
        1. Some success in reducing negative emotions and promoting positive emotions

### 3 Challenges Redux

- 1 Existing negotiation training may lack other aspects of

emotional education

1. Some train in awareness of mind-states and attitudes (e.g., mindfulness at Harvard; Beyond Winning)
  2. Others view negotiation as more a product of personality
    - 2 Relatively little study of what emotional training works with lawyers
1. Modifications of mindfulness by Riskin
  - 2 Choices and Options
    - Call in experts?
    1. Working with psychologists and other helping professionals?  
Exposure to single method in-depth versus multiple methods
    1. Research support for both
  - 3 Audience brainstorming and sharing of options
  - 4 Choices in training
    - Substantive choices
    1. Attempts to change emotion or change responses to emotion?
    2. Attempts to correct

## **MEDITATION: SHOULD WE TEACH WHAT THE MARKET WANTS?**

### **The Schizophrenic Nature of ADR Teaching and Practice: “Where’s the Money?” meets “All Interests, All the Time...”**

**Professor Dwight Golann  
Suffolk University**

#### **I. What’s the problem?**

- We teach in professional schools, and most of our students become advocates rather than neutrals.
- Current ADR courses teach valuable techniques, but they omit key techniques and give students a mistaken impression of the world of legal practice.
- As a result our students enter their careers with unrealistic assumptions and inadequate ADR skills.

#### **II. What specific gaps exist?**

- Much ADR teaching assumes that through enlightened bargaining techniques lawyers can eliminate the need to engage in positional negotiation.
  - We often present distributional techniques as undesirable and even shady, and advise students to focus exclusively on parties’ interests and relationships.
  - Casebooks and videos center on problems that have a heavy bias in favor of relationship repairs and other interest-based settlements.
  - Student ADR competitions focus exclusively on “nice” bargaining skills.
- By contrast, lawyers and professional mediators report that monetary bargaining is endemic in legal mediation, relationship repairs are infrequent, and that a broadly facilitative approach can reduce, but does not eliminate, distributive bargaining. The result: ADR students receive a distorted picture of the world they will enter and fail to acquire necessary skills.

#### **III. What could be done?**

- Students should be taught that integrative bargaining and relationship-building are important and often-neglected aspects of law practice, and they should learn techniques to achieve these goals.
- It is also essential, however, to prepare students for the Hobbsean world of law practice. We can do this by:
  - Presenting a realistic picture of the methods that currently dominate legal mediation and negotiation. Advocating a better approach to dispute resolution, but not obscuring what students will actually encounter.
  - Teaching students both positional and integrative methods. Presenting distributive approaches as a legitimate, widespread, but risky, option.
  - Teaching students how to explore integrative options while protecting clients from distributive responses.

## **MEDITATION: SHOULD WE TEACH WHAT THE MARKET WANTS?**

**Chris Honeyman, mediator/arbitrator**

Over more than two decades as a neutral, I've seen a shift in young lawyers' attitudes. Most of my cases have involved continuing relationships, coupled with politics on both sides. When I started, it seemed that freshly minted lawyers generally required a period of retraining before many of them would grasp that the attitudes they brought to a mediation, arbitration hearing or administrative law proceeding today could have adverse consequences for their client's dealings with the same opposing party tomorrow. It's been mostly heartening to see the evolution of dispute resolution training, with its stress on the maintenance and development of relationships.

Yet the dominant mode of this training may have overshot the mark. I think there are two kinds of gaps (though they overlap) between what is being taught and what is needed in practice. They might be distinguished as "substantive" and "moral" gaps.

The substantive gaps occur when a regular element in typical negotiation is omitted from or given little attention in training. Two varieties that seem common are numerical elements of offers in general and distributive aspects in particular, and the handling of disputes that have a strongly political element (which I'd define as "any dispute in which it is in the interest of someone at the table that the case fail." This is not confined to labor and public policy disputes; political behavior is pretty common in the corporate world, and thus likely to enter into lots of disputes your graduates handle.) To the extent that negotiation training is argued as necessary because it reflects the real world of how most cases are resolved, such omissions are oddly short-sighted.

But I'd distinguish the simple fact of these omissions from the larger problem, which I'm calling a "moral" gap in quotation marks, because it seems useful to reflect on why merely incorporating material on numbers and distributive bargaining might not be enough. I agree with Dwight Golann's assertion in his prefatory notes for this session, to the effect that most people who are teaching negotiation and conflict resolution in law schools show a distinct preference for the construction or reconstruction of long-term relationships. Whether this reflects a moral stance or a political position, though, it means that efforts to incorporate distributive elements may be half-hearted, without some accompanying "rethink" of the larger strategy of teaching negotiation.

For example, I've seen a highly capable teacher design an intriguing, richly complex and otherwise well-crafted exercise, in which the students, assigned as parties and attorneys, encountered mediators who were essentially at sea — because the case clearly involved large amounts of dollars and possible reorganization of a complicated public facility, while most of the budget, staff size and distribution, and other numerical data to support any offer were simply missing from the working materials. I know from other encounters that this teacher is highly capable of dealing in numbers. So the gap is not one of talent, but of intent: the teacher wanted the students to think in terms of relationships. But to that end, he had (apparently unconsciously) suppressed the dollar and other numerical elements any set of normal parties would have known.

Anecdotally, this seems common. Giving dollars and other numbers their due, however, should make it possible to demonstrate how an *excessive* focus on these elements can lead to settlement, but on terms that won't work well in the long run. I'd argue for at least some teaching exercises being designed such that different teams will achieve some settlements which focus on the short-term and others focusing on the long-term. (I worked up one like this once, so I know it can be done. Unfortunately that one takes at least two hours to play out.)

Used conscientiously, this approach would provide an opportunity to discuss the pluses and minuses of typical handling of real live negotiations more openly. Not to give "space" to negotiation elements that are so prevalent after law school, meanwhile, practically invites the senior attorneys in a firm to undercut this training, by explaining condescendingly to a newly hired lawyer that "what you learned in school is all right for school, but you're in the real world now." I submit it would be better practice to provide the recently graduated student with a ready riposte.

## **MEDITATION: SHOULD WE TEACH WHAT THE MARKET WANTS?**

**Jane Gordon**  
**University of Oregon**

### **Why is this topic important?**

In law teaching, there is often a fine balance between theory, critical analysis, and practical application. Part of the tension exists because of the dual goals of law school. One goal is to prepare thoughtful, creative and vibrant practitioners. Thus, it is important to learn about historical underpinnings, the dynamic forces which shape law, legal theories, and to explore the changes which have occurred in particular fields. Yet, a second goal is to ensure that our students can actually **practice** the law and can function as effective, ethical legal representatives. It is not uncommon for law school graduates to feel that they haven't learned much during law school about what they actually will do as a lawyer. Clinics, externships, skills classes, and jobs all help to some extent. But the tension still exists. Another part of the tension results from the evolutionary nature of the law and law practice.

As with all law subjects, this balance and tension exists in ADR teaching as well. In addition, the use of ADR has been explosive. Many, if not most, of the lawyers and judges participating in ADR processes did not learn about them in law school. To complicate matters, the term used to describe one key ADR practice, namely mediation, is applied to a wide range of different processes and behaviors. ADR usage is not stagnant and the students who are now taking courses in negotiation, mediation, and arbitration, as well as theories of conflict, and other related topics will influence the field in years to come.

So, there are many important questions: Should we teach what the market wants? Are we failing to do so now? Who/what is driving the market? Is there a cohesive "market," to which we should be responsive? Should we have a role in questioning common market practices? What role will law-school trained professionals have in conflict resolution processes of the future?

### **What are some of the gaps between academia and practice in dispute resolution?**

In dispute resolution skills teaching (within the classroom), there can be the kind of gap that troubles all simulation courses. That is, how to authentically replicate reality. Therefore, there can be difficulty in creating a world for a negotiating student that replicates complex financial considerations, time pressure, emotional impact, and assessment of realistic best and worst case scenarios. In a mediation skills setting, we can have students act as attorneys while we have other students act as mediators and others act as disputants, but achieving a deep understanding of how each participant would actually function often stretches the simulation. Gaps can also occur when faculty teach an approach as "best practice," without acknowledging its limits and the benefits of other approaches.

In courses which focus on theory, there is always the potential gap between describing process and actually understanding how those processes are lived.

### **What are some answers?**

- be involved in bar association and other practice groups, to ensure our own broad knowledge in this rapidly evolving field
- educate students about different practices and their strengths and weaknesses
- when one particular methodology is the focus of a class or skills training. place it into a context (where on a continuum does this practice fall relative to a variety of goals and process decisions)
- use excellent teaching tools: realistic videos, simulations which are well-crafted, articles which describe practice and articles which critique
- offer clinics, externship, and “shadowing” opportunities so students can participate and observe actual ADR processes
- carefully label, describe, and coordinate course content
- host supplementary speakers and symposia in which students and practitioners explore topics of importance together: how to best prepare clients for mediation; ethical considerations in ADR practice; recent cases in the field; how to choose a mediator; etc.
- integrate ADR into regular substantive courses (use practitioners in the field who can describe actual practice, or carefully crafted simulations)
- teach students the historical and theoretical underpinnings of ADR and be sure that they know that here, as in other fields, the choices they make as practitioners, will influence the field in years to come

## **MEDITATION: SHOULD WE TEACH WHAT THE MARKET WANTS?**

**Peter Robinson**  
**Pepperdine University School of Law**

### **Why is this topic important?**

We are stumbling into an incredible question with all kinds of ramifications. Throwing caution to the wind and hoping that these comments without caveats will be among friends, I propose the following:

Our program teaches two kinds of students: mostly young law students who will not be neutrals for decades and mid career professionals (mostly lawyers) preparing to be neutrals.

For the law students, the answer to this question is buried in a law school wide issue of the extent to which the ADR courses are suppose to teach students to think like lawyers or to develop skills associated with legal practice. The "relationally sensitive problem solving approach to mediation advocacy" would probably be described by non ADR faculty members at typical law schools as teaching students to stop thinking like a lawyer. However, many ADR faculty members would defend this approach to advocacy as a very artful lawyering skill for certain kinds of cases.

Knowing that the ADR classes could form a good part of the lawyering skills curriculum for many law schools, the issue becomes whether these classes should provide a broad scope of skills lawyers would need to develop to serve their clients well when settling cases.

"Teaching what the market wants" suggests that the average lawyer mainly works on cases that requires skills other than "relationally sensitive problem solving approaches to mediation advocacy." This question is important because it creates an opportunity for the ADR faculty to consider if his/her school's curriculum prepares students for common if not dominant kinds of legal cases dealing with issues or personalities that do not lend themselves to relationally sensitive problem solving approaches.

If the ADR courses are the only source of lawyering skills related to settlement, then shouldn't the norm be to cover the broad scope of settlement skills a lawyer might need to serve the client.

### **What are some of the gaps between academia and practice in the area of dispute resolution?**

1. The presence of evaluation in the mediation of legal disputes with attorney advocates participating.
2. How to manage attorney advocates in mediation?
3. How the attorney uses the mediator to manage his own client.

4. Distributing fixed pies in a mediation.
5. How clients and attorneys can / should both participate in a mediation.
6. Who does the mediator serve....attorney or principle?

In short, many of the mediation courses are very similar to the community mediation courses many of us took as we entered this field. The model we are teaching has not evolved to assume that lawyers are participating and to take advantage of the resource and dynamic attorney advocates create when participating in the mediation. If we teach mediation in law schools, shouldn't the assumption of context be that lawyers are participating and the model morph to account for their presence?

**What are some answers?**

Teach mediation with an assumption that attorneys are present and participating.

**Mindfulness  
in Dispute Resolution and Law \***

**Leonard L. Riskin  
University of Missouri-Columbia**

**To accompany presentations in the second plenary session *and* the afternoon  
concurrent session on Mindfulness**

**I. An Overview of Mindfulness Meditation (a.k.a. insight meditation, vipassana meditation).**

**A. What it is.** A method of deliberate, moment-to-moment attention, developed by the Buddha some 2500 years ago in India, which has become popular in the West in recent years. It is practiced by people from many religious traditions and in secular settings.

**B. How it works.** Practitioner develops the ability to concentrate, then learns to observe, without judging, her bodily sensations, emotions, and thoughts and the operation of her mind. Learns this in meditation, then applies it in everyday life.

**C. Potential outcomesBin General.** Relief of stress; development of self-awareness, empathy, compassion, equanimity, happiness; clarification of values; improvement in ability to concentrate and to deal with pain.

**D. Where, how and why it is taught.**

1. Insight meditation for the general public: Generally through non-profit organizations that offer retreats and other educational programs.
2. Health care: E.g., The Mindfulness-Based Stress-Reduction Program at the University of Massachusetts Medical School.
3. Athletics: E.g., The Chicago Bulls and L.A. Lakers basketball teams.
4. Prison: Many prisons and jails across the U.S.
5. Corporate sector: E.g., Monsanto.
6. Higher education. Many college and university courses, generally supported by Contemplative Practice Fellowships from American Council of Learned Societies. Several medical schools. E.g., University of Massachusetts, Thomas Jefferson School of Medicine.
7. In connection with Christian and Jewish traditions.

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\* Copyright (c) 2003 Leonard L. Riskin. This draws heavily on Leonard L. Riskin, *The Contemplative Lawyer: On the Potential Benefits of Mindfulness Meditation to Law Students, Lawyers, and their Clients*, 7 HARV. NEGOT. L. REV. 1-66 (2002), which appeared in a symposium on *Mindfulness in ADR and Law*. A webcast of the live symposium, held at Harvard Law School in Mar. 2002, is available at [http://www.pon.harvard.edu/news/2002/riskin\\_mindfulness.php3](http://www.pon.harvard.edu/news/2002/riskin_mindfulness.php3). For a collection of materials on this topic, see the webpage for the Initiative on Mindfulness in Law and Dispute Resolution, <http://www.law.missouri.edu/csdr/mindfulness.htm>.

## II. Current Uses in Law Practice and Legal Education.

### A. Law Practice

1. Hale and Dorr, Boston, has held several extensive Mindfulness-Based Stress reduction programs for its lawyers. Nutter, McClennan & Fish, Boston, currently offers mindfulness programs for its lawyers.
2. Mindfulness meditation instruction for lawyers has been offered by the Center for Contemplative Mind in Society, CUNY Law, University of Missouri-Columbia, and other organizations.
3. CLE. CLE programs have been offered by the University of Missouri-Columbia School of Law, CUNY Law School, and the Iowa Peace Institute. One day program for Directors of Lawyer Assistance Programs (fall 2002).

### B. Law Schools

1. Retreats for Yale and Columbia Law School students.
2. Law school courses that include mindfulness meditation at Suffolk, Denver, Miami, Missouri-Columbia, and Hastings Law Schools.
3. On campus non-credit programs. E.g., Harvard Law School (six week program beginning Feb. 2002). The University of Missouri-Columbia School of Law and the University of North Carolina School of Law have twice offered non-credit Mindfulness-Based Stress Reduction programs to J.D. students.
4. Brief programs at law schools for faculty or students. I have led such programs at Harvard, Marquette, Touro and Cardozo (Yeshiva) Law Schools.

### C. **Negotiation training.** Day-long workshop on Awareness and Negotiation.

### D. **Mediation training and Education.**

1. Advanced mediation training based on mindfulness offered through Southern Methodist University, the Iowa Peace Institute in, and Pepperdine University Institute for Dispute Resolution in Malibu, and University of Missouri-Columbia. Spring 2000 graduate course on Mediation Mindsets and Mindfulness through SMU Graduate Program in Dispute Resolution.
2. Workshops on Mindfulness in Mediation and Lawyering. For Indiana Supreme Court CLE Office, Pepperdine University School of Law.

## III. Potential (Special) Benefits to Mediators and Lawyers

### A. **Decreased stress and increased happiness:** Contribute to **feeling better** and **performing better** in general, especially in complex tasks. Greater satisfaction in work.

### B. **Enhanced self-awareness** helps mediator, negotiator or lawyer.

1. **Listen better.**
2. **Notice internal processes**, such as tensions, habitual reactions, mind-sets, and limiting assumptions (such as adversarial perspectives).

3. **Respond** instead of **react**; choose most appropriate perspectives and behaviors. This enhances likelihood of adopting and implementing **interest-based** approaches to negotiation and **facilitative-broad** approaches to mediation.

#### **IV. Potential Concerns**

- A.** That mindfulness could undermine the "lawyer's standard philosophical map" or otherwise impair lawyers' abilities to carry out adversarial activities that may appear essential to lawyering.
- B.** That mindfulness could enable some lawyers to more easily carry out increasingly adversarial moves.

### **RESOURCES**

#### **Organizations and Websites**

The **Cambridge Insight Meditation Center** offers a wide variety of insight meditation-related programs. 331 Broadway, Cambridge, MA 02139. [www.cimc.info](http://www.cimc.info). Tel: 617/441-9038.

The **Center for Contemplative Mind in Society**, 199 Main St., 3<sup>rd</sup> Floor, Northampton, MA 01060. The Center's law program has sponsored a series of insight meditation retreats for lawyers and law students. For information, contact Mirabai Bush, executive director, or Heidi Norton, law program director, at 413/268-9275; email: [heidi@contemplativemind.org](mailto:heidi@contemplativemind.org). [Http://contemplativemind.org](http://contemplativemind.org)

The **Center for Mindfulness in Medicine, Health Care, and Society** at the University of Massachusetts Medical School provides training in mindfulness for a wide range of organizations, operates a stress and pain reduction clinic, and conducts research on the effects of mindfulness practices. Saki Santorelli, Director, Center for Mindfulness in Medicine, Health Care, and Society, Department of Medicine, University of Massachusetts Medical School, 55 Lake Avenue North, Worcester, MA 01655; Tel: 508/856-5493; Fax: 508/856-1977. [Http://www.umassmed.edu/cfm](http://www.umassmed.edu/cfm)

**Forest Way Insight Meditation Center**, P.O. Box 491, Ruckersville, VA 22968; Tel: 804/990-9300; Fax: 804/990-9301; Email: [forestway@cstone.net](mailto:forestway@cstone.net). Web site: [www.forestway.org](http://www.forestway.org)

**Initiative on Mindfulness, Law and Dispute Resolution**, University of Missouri-Columbia School of Law, <http://www.law.missouri.edu/csdr/mindfulness.htm>.

**Insight Meditation Society**, 1230 Pleasant Street, Barre, MA 01005; Tel: 978/355-4378. Offers insight meditation retreats. [Http://www.dharma.org](http://www.dharma.org)

**Mid-America Dharma Group**, 717 Hilltop Drive, Columbia, MO 65201; Tel 573/817-9942; email: [ginny@midamericadharm.org](mailto:ginny@midamericadharm.org). Includes information about retreats and sitting groups across the U.S. and Canada.

**Spirit Rock Meditation Center**, 5000 Sir Francis Drake Blvd, P.O. Box 169 Woodacre, CA 94973; Tel: 415/488-0164; Fax: 415/488-017.

Website maintained by Steven Keeva, author of the book **Transforming Practices: Finding Joy and Satisfaction in the Legal Life**.  
[Http://www.transformingpractices.com](http://www.transformingpractices.com).

**Vipassana Meditation Centers** operated by S.N. Goenka and his assistants around the world, <http://www.dhamma.org>.

**Books and Articles** (\* Means highly recommended introductory explanation of mindfulness)

Mark Epstein, *Thoughts without a Thinker: Psychotherapy from a Buddhist Perspective* (Basic Books 1995).

Mark Epstein, *Going to Pieces without Falling Apart: A Buddhist Perspective on Wholeness* (Broadway 1998).

Daniel Goleman, *Emotional Intelligence: Why it Can Matter More than IQ* (Bantam 1995).

Daniel Goleman, *Working with Emotional Intelligence* (Bantam 1998).

Joseph Goldstein, *Insight Meditation: The Practice of Freedom* (Shambhala 1994).\*

Henepola Gunaratana, *Mindfulness in Plain English* (Wisdom 1992). (*Highly recommended for basic introduction to mindfulness.*)

Phil Jackson & Hugh Delehanty, *Sacred Hoops: Spiritual Lessons of a Hardwood Warrior* (Hyperion 1995).

Phil Jackson & Charley Rosen, *More than a Game* (2001).

Jon Kabat-Zinn, *Full Catastrophe Living: Using the Wisdom of Your Mind to Face Stress, Pain & Illness* (Delta 1990).

Jon Kabat-Zinn, *Wherever You Go, There You Are: Mindfulness in Everyday Life* (Hyperion 1994). (*Highly recommended for basic introduction to mindfulness.*)

Steven Keeva, *Transforming Practices: Bringing Joy and Satisfaction to the Legal Life* (Transaction Books, 1999).

Leonard L. Riskin, *The Contemplative Lawyer: On the Potential Contributions of Mindfulness Meditation to Law Students and Lawyers and their Clients*, 7 *Harvard Negotiation Law Review* 1-66 (June 2002) (the centerpiece of a Symposium on Mindfulness in Law and ADR). A webcast of the live symposium held at Harvard Law School in March 2002 is available at [http://www.pon.harvard.edu/news/2002/riskin\\_mindfulness.php3](http://www.pon.harvard.edu/news/2002/riskin_mindfulness.php3).

Zindel V. Segal, J. Mark G. Williams & John D. Teasdale, *Mindfulness-Based Cognitive Therapy for Depression: A New Approach to Preventing Relapse* (Guilford 2002).

*Breath Sweeps Mind: A First Guide to Meditation Practice* (Jean Smith, ed., Tricycle 1999).

Eckhart Tolle, *The Power of Now* (New World Library 1999).

### **Audiotapes and Videotapes**

The Dharma Seed Tape Library, <http://www.dharmaseed.org/>, offers a variety of audiotapes and videotapes, including some intended for beginners.

Mindfulness Meditation Practice Tapes with Jon Kabat-Zinn and Saki Santorelli are available through [Http://www.umassmed.edu/cfm](http://www.umassmed.edu/cfm)

## MULTI-PARTY MEDIATION

**Michael K. Lewis**  
**ADR Associates, LLC**

- I. Some common differences between multi-party disputes and other types of disputes brought to mediation
  - a. Governments often involved
  - b. Clients often not directly involved
  - c. May be difficult to identify all stakeholders
  - d. Implementation of any agreement may be difficult
- II. The Mediator's roles
  - a. Mediating across the table
  - b. Mediating among the parties on one side of the table
  - c. Dealing with political actors important to the resolution of the dispute
  - d. Helping to ensure implementation of any agreement
  - e. Communicating with parties not at the table
- III. Recurring Issues
  - a. The role of confidentiality.
  - b. The role of public participation
  - c. If dispute is a legal case, the mediator's role viz a viz the court
  - d. The mediator's continuing responsibility post-agreement
- IV. Two examples
  - a. *Pigford v. Veneman*, the Black Farmers' law suit
    - i. Class action filed against the Department of Agriculture for discrimination in its credit programs
    - ii. Class of approximately 23,000

- iii. Consent Decree provided an opportunity for every claimant to demonstrate that they had been discriminated against, but required no structural change at USDA.
- b. The Helen Kramer Landfill
- i. Case brought by the USEPA (and the NJDEP) against approximately 300 parties for violation of CERCLA and the New Jersey Spill Act.
  - ii. Questions: Who pays what? Natural Resources were damaged, how are they to be fixed? Who does the work to fix things?
  - iii. Among the parties: private companies, large and small; approximately 20 surrounding municipalities; New Jersey state agencies as plaintiffs and defendants.

## **SOCIAL AND PROCEDURAL JUSTICE AND THE ROLE OF ADR**

**James J. Alfini, Northern Illinois University**  
**Isabelle R. Gunning, Southwestern University**  
**Nancy A. Welsh, The Pennsylvania State University**

### **Agenda**

1. Introductions
2. What *was* the promise of mediation? What were “the elements of the faith?”  
What were/are the core values?
  1. The promise of impartiality, neutrality, social justice  
The promise of self-determination, procedural justice  
The promises enunciated in the ethical codes
3. As mediation has been institutionalized, what has happened to these elements of the faith? Why?
  1. Observations regarding the evolution of the mediation process as institutionalized in the courts (non-family civil) and administrative agencies (special education)
  2. Social justice implications and explanations of such evolution
  3. Procedural justice and self-determination implications and explanations of such evolution
  4. Audience reactions, questions, discussion
4. Is it necessary and possible to re-infuse mediation with a commitment to social justice, procedural justice and self-determination? What unique contributions can law faculty make to this?
  1. Ideas for our service--discussion/brainstorming
  2. Ideas for our classrooms--discussion/brainstorming
  3. Ideas for our research and scholarship--discussion/brainstorming
5. Conclusion

**2003 AALS ANNUAL MEETING WORKSHOP ON DISPUTE RESOLUTION:  
RAISING THE BAR AND ENLARGING THE CANON**

Friday, January 3, 2003  
Washington, D.C.

**EVALUATION FORM**

The Professional Development Committee relies on your feedback and suggestions in planning future workshops and conferences that meet your professional needs and interests. If you are unable to return this form during the workshop, please mail it within the next few days to Association of American Law Schools, 1201 Connecticut Avenue, N.W., Suite 800, Washington, D.C., 20036, or FAX (202) 296-8869.

1. Job title: \_\_\_\_\_
2. Role at this workshop:   ( ) Registrant                   ( ) Speaker           ( ) Planning Committee Member  
                                  ( ) Concurrent Session Leader           ( ) Other: \_\_\_\_\_
3. If applicable, how many years have you been working full-time in legal education?  
                                  ( ) 0-5                   ( ) 6-15                   ( ) 16-25                   ( ) 25 or more
4. How do you rate the workshop overall?  
                                  ( ) poor                   ( ) fair                   ( ) good                   ( ) very good           ( ) excellent

Comments:

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**5. Please evaluate (or indicate you did not attend) ALL parts of the workshop**

<b>EVENT</b>	<b>poor</b>	<b>fair</b>	<b>Good</b>	<b>very good</b>	<b>Excel- lent</b>	<i>did not attend</i>
<b>Plenary Session: Raising the Bar</b>	( )	( )	( )	( )	( )	( )
<b>Concurrent Session: ADR Clinics – Design &amp; Management</b>	( )	( )	( )	( )	( )	( )
<b>Concurrent Session: Arbitration Pedagogy</b>	( )	( )	( )	( )	( )	( )
<b>Concurrent Session: Conducting and Using Empirical Research</b>	( )	( )	( )	( )	( )	( )
<b>Concurrent Session: Conflict Theory</b>	( )	( )	( )	( )	( )	( )
<b>Concurrent Session: Dispute System Design</b>	( )	( )	( )	( )	( )	( )
<b>Concurrent Session: Globalization and Dispute Resolution</b>	( )	( )	( )	( )	( )	( )

<b>Concurrent Session: Innovations in ADR Pedagogy</b>	( )	( )	( )	( )	( )	( )
<b>EVENT</b>	<b>poor</b>	<b>fair</b>	<b>Good</b>	<b>very good</b>	<b>Excel- lent</b>	<b>did not attend</b>
<b>Concurrent Session: Insights from Social Sciences</b>	( )	( )	( )	( )	( )	( )
<b>Concurrent Session: Mass Torts and Class Actions</b>	( )	( )	( )	( )	( )	( )
<b>Concurrent Session: Mediation Advocacy</b>	( )	( )	( )	( )	( )	( )
<b>Concurrent Session: Teaching the Law in ADR Courses</b>	( )	( )	( )	( )	( )	( )
<b>Concurrent Session: The Understanding-Based Approach to Mediation</b>	( )	( )	( )	( )	( )	( )
<b>Concurrent Session: Where and How to Teach ADR in Law School Curriculum?</b>	( )	( )	( )	( )	( )	( )
<b>Luncheon: Lessons Learned from High Visibility Cases</b>	( )	( )	( )	( )	( )	( )
<b>Plenary Session: Enlarging the Canon</b>	( )	( )	( )	( )	( )	( )
<b>Concurrent Session: ADR Clinics – Supervision &amp; Evaluation</b>	( )	( )	( )	( )	( )	( )
<b>Concurrent Session: Building Community</b>	( )	( )	( )	( )	( )	( )
<b>Concurrent Session: Community Lawyering</b>	( )	( )	( )	( )	( )	( )
<b>Concurrent Session: Comprehensive Law Movement; e.g., Collaborative Law, Therapeutic Jurisprudence, Lawyer as Healer, etc.</b>	( )	( )	( )	( )	( )	( )
<b>Concurrent Session: Cross-Cultural Issues in ADR</b>	( )	( )	( )	( )	( )	( )
<b>Concurrent Session: Ethics and ADR</b>	( )	( )	( )	( )	( )	( )
<b>Concurrent Session: Lawyers' Emotions in Dispute Resolution</b>	( )	( )	( )	( )	( )	( )
<b>Concurrent Session: Mediation: Should We Teach What the Market Wants?</b>	( )	( )	( )	( )	( )	( )
<b>Concurrent Session: Mindfulness</b>	( )	( )	( )	( )	( )	( )

<b>Concurrent Session: Multi-Party Dispute Resolution</b>	( )	( )	( )	( )	( )	( )
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<b>EVENT</b>	<b>poor</b>	<b>fair</b>	<b>Good</b>	<b>very good</b>	<b>Excel- lent</b>	<i>did not attend</i>
<b>Concurrent Session: Reflective Practice and Other Strategies for Developing True Expertise in ADR</b>	( )	( )	( )	( )	( )	( )
<b>Concurrent Session: Social and Procedural Justice and the Role of ADR</b>	( )	( )	( )	( )	( )	( )
<b>Plenary Session: Now What?</b>	( )	( )	( )	( )	( )	( )

6. Please comment on speakers who were particularly effective or ineffective.

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7. Any other comments? (e.g., Was the content of the program good? Which topics should be included or excluded? Were you happy with the schedule?)

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