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# TO SOLVE PROBLEMS, NOT MAKE THEM: INTEGRATING ADR IN THE LAW SCHOOL CURRICULUM<sup>1</sup>

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## I. INTRODUCTION

**M**ANY law students come to law school to learn how to solve problems, do justice and make the world a better place.<sup>2</sup> They are often surprised at just how quickly they learn to maximize individual interests, and become adversarial gladiators and zealots for the litigation system. Like Roger Fisher and William Jackson,<sup>3</sup> I believe that our current conventions for teaching law students to become lawyers distort what lawyers need to know about the world and how they should act in the world. The evidence of rising dissatisfaction with the legal profession<sup>4</sup> makes clear that many lawyers would prefer to perform more useful and satisfying tasks within their jobs as lawyers.<sup>5</sup> For me, integrating alternative dispute resolution into the law school curriculum at many different levels is one way of expanding the conception of lawyer as a helping professional and an important way to permit the expression of the more altruistic, as well as instrumentally useful, aspects of being a lawyer.<sup>6</sup> Well educated lawyers should be taught to solve problems, facilitate relationships and transactions and negotiate legislation and diplomatic arrangements, not just to litigate disputes.<sup>7</sup> A fully rounded education in law must involve the teaching of professional

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1. This essay is less of a response to Roger Fisher and Williams Jackson's *Teaching the Skills of Settlement*, 46 SMU L. REV. 1985 (1993), virtually all of which I agree with, than a blueprint for curricular development in ADR for law schools. It is based on several talks I gave to the faculty at Georgetown Law School in the fall of 1992 to help develop an "ADR consciousness" in a variety of law school courses, and I thank my Georgetown colleagues for their receptivity and useful questions and comments.

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2. See Robert V. Stover, *MAKING AND BREAKING IT: THE FATE OF PUBLIC INTEREST COMMITMENT DURING LAW SCHOOL* (H. Erlanger ed., 1989).

3. See Fisher & Jackson, *supra* note 1.

4. See *THE REPORT OF AT THE BREAKING POINT, A NATIONAL CONFERENCE ON THE EMERGING CRISIS IN THE QUALITY OF LAWYERS' HEALTH AND LIVES—ITS IMPACT ON LAW FIRMS AND CLIENT SERVICES* (American Bar Association, 1991).

5. See Albie M. Davis, *Mediation: The Field of Dreams? If We Build It, They Will Come!*, 9 NEGOTIATION J. 5 (1993).

6. For my views on how altruism and empathy should be central concerns for a lawyer, see Carrie Menkel-Meadow, *Is Altruism Possible in Lawyering?*, 8 Ga. ST. U. L. REV. 385 (1992).

7. See Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem-Solving*, 31 UCLA L. REV. 754 (1984).

skills and behaviors, as well as cognitive understanding. What we teach now are skills in case parsing, argumentation, and dialectical and analytic thinking, rather than problem-solving, creativity and synthetic thinking.

## II. GOALS AND PURPOSES OF AN ADR CURRICULUM

Teaching students about dispute resolution, which broadly includes negotiation, problem-solving, and mediation, as well as litigation, serves at least four distinct goals. First, a focus on the broad spectrum of actual dispute resolution devices<sup>8</sup> provides a more accurate description of how the legal system actually operates. Most cases settle<sup>9</sup> and students need to know how the modal cases are handled. Beyond litigation, lawyers need to know how legislation is negotiated, how transactions are put together, and how international and governmental diplomacy is conducted.

Second, dispute resolution study provides a valuable way to incorporate experiential learning in legal education. By participating in exercises designed to put students in role, students experience the tasks of creative problem-solving, ethical responsibilities and the relation of theory to practice.<sup>10</sup> Professional judgement and decision making requires the kind of thinking or action that only reflection after role-playing or actual practice provides.<sup>11</sup> If, as Donald Schon suggests, too much professional education is abstract thinking on the cliff overlooking the valley of problems on the ground,<sup>12</sup> we must provide a setting where abstract theory can be applied to solving the problems of the human "swamp." Case studies and problem sets, either with real or "simulated" clients, broaden, open and deepen the texts of study, beyond the appellate case and its fixed facts to the more realistic human dynamics of fluid and differentially experienced "facts."

Third, the concrete lawyering skills that can be taught with a focus on dispute resolution are central to the performance of any lawyering work. How a lawyer frames a question in an initial interview tells us much about

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8. For useful teaching materials here, one can use any of the new ADR texts such as STEPHEN B. GOLDBERG, ET AL., *DISPUTE RESOLUTION* (1992); LEONARD L. RISKIN & JAMES E. WESTBROOK, *DISPUTE RESOLUTION AND LAWYERS* (1986); JOHN MURRAY, ET AL., *PROCESSES OF DISPUTE RESOLUTION: THE ROLE OF LAWYERS* (1989); NANCY ROGERS & RICHARD SALEM, *A STUDENT'S GUIDE TO MEDIATION AND THE LAW* (1987); GERALD R. WILLIAMS, *LEGAL NEGOTIATION AND SETTLEMENT* (1983); LEO KANOWITZ, *ALTERNATIVE DISPUTE RESOLUTION: CASES AND MATERIALS* (1985).

9. Settlement rates are remarkably constant across case types, including both civil and criminal matters. Settlement rates seem to be inching upward from a rate of just over 90% of all cases to figures closer to 93 or 94% in some areas. See, e.g., Marc Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 *UCLA L. REV.* 4 (1983); Samuel R. Gross & Kent D. Syverud, *Getting to No: A Study of Settlement Negotiations and the Selection of Cases for Trial*, 90 *MICH. L. REV.* 319 (1991).

10. For some examples of useful instructional problems see LEONARD L. RISKIN & JAMES E. WESTBROOK, *INSTRUCTOR'S MANUAL FOR DISPUTE RESOLUTION AND LAWYERS* (1987).

11. See DONALD SCHON, *THE REFLECTIVE PRACTITIONER* (1984); DONALD SCHON, *EDUCATING THE REFLECTIVE PRACTITIONER* (1987).

12. Donald Schon, *Workshop on Integrating Theory and Practice in the Law School Curriculum*, Comments made at the AALS Annual Meeting (1992).

how that lawyer hopes to deal with the problem. Should the problem be solved according to the lawyer's or the client's framing of the issue?<sup>13</sup> Dispute resolution skills demonstrate the interactive nature of the lawyer's work—the dynamism of counseling and negotiating on behalf of a client as facts, needs and interests change over time. A focus on how such skills change with the context demonstrates the logic of question-framing in an interview, a deposition, a negotiation session, a mediation and a direct examination. Lawyers can learn to become useful before disputes harden into contentious lawsuits, depending on how they use their skills.

Finally, using the dispute resolution framework for teaching about what lawyers do, facilitates a particular normative agenda as well. Students can understand when and why adversarial conduct is inefficient and generates non-Pareto optimal solutions to legal problems,<sup>14</sup> and how it can be hurtful to parties and create long-term wear and tear on lawyers. By exploring joint gain problem solving, students can experience the empowerment of creatively expanding the "res" before it must be divided or finding whole new ways to structure legal relations, both long-term and one-shot. Focusing on solving problems in cooperative teams teaches students to work productively in groups rather than to exclusively defeat or out maneuver individual opponents. Thus, more diverse manners or methods of learning can demonstrate a richer set of ways for lawyers to do their work.

### III. LEVELS OF LEARNING DISPUTE RESOLUTION: COGNITIVE AND BEHAVIORAL KNOWLEDGE

Dispute resolution education provides an ideal opportunity for students to learn how to be lawyers on two levels—"thinking like a lawyer" (cognitive and intellectual understanding of legal and policy processes) and "doing like a lawyer" (behavioral competency in using the skills and judgment that constitute the actual work in which the concepts of law and lawyering are expressed). Different courses can focus on different levels of analysis and performance, but an ideal course on dispute resolution (or a course which deals with some dispute resolution issues) should make some effort to combine these levels of learning.<sup>15</sup>

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13. See Carrie Menkel-Meadow, *The Transformation of Disputes by Lawyers: What the Dispute Paradigm Does and Does Not Tell Us*, 2 J. OF DISP. RESOL. 25 (1985); DAVID BINDER, ET AL, *LAWYERS AS COUNSELORS* (1990). By adding a question like "how would you like to see this turn out?" or "what would you like to have happen in this matter?" at the beginning of an interview, the lawyer allows the client to self-define the goals of representation and suggest some ideas for solutions. Such open-ended questioning of clients is quite rare in most legal interviews where lawyers are more likely to dominate the setting of goals.

14. See HOWARD RAIFFA, *THE ART AND SCIENCE OF NEGOTIATION* (1982); ROBERT AXELROD, *THE EVOLUTION OF COOPERATION* (1984).

15. I have seen many successful attempts to survey dispute resolution methods and concepts in survey ADR courses or portions of civil procedure or contracts courses. In my view, even these brief introductions to dispute resolution processes should contain some experiential exercise for students to truly understand (in the Weberian sense of VERSTEHEN) how the processes differ from one another. A classic exercise which is common for introduction to the field is a "med-arb" exercise, originally created by mediator Gary Friedman and described in Leonard L. Riskin, *Mediation in the Law Schools*, 34 J. LEGAL EDUC. 259, 265 (1984). I have

On the cognitive level, issues about dispute resolution raise important jurisprudential questions about our legal system.<sup>16</sup> Here, I will briefly canvass the issues that could be explored in a dispute resolution survey course, the first year course in civil procedure, a jurisprudence course, or more advanced seminars in dispute resolution policy and advanced criminal and civil procedure. Why do we resolve disputes the way we do? Here, comparative study of the inquisitorial system of Continental Europe<sup>17</sup> or the uses of mediation in China and Japan<sup>18</sup> can enable students to see that our adversary system is simply one choice among many possible ways of structuring a legal system. Similarly, by exploring how the use of alternative dispute resolution in our courts at the present time has begun to transform our own disputing institutions, students can consider what the primary qualities of a court are—when does a court cease being a court (if it is engaged in settlement, not decisional, activities) and when is a judge not a judge?<sup>19</sup> In an adversary system that is structured on the basis of party initiation of activities, there are serious questions about when certain processes may be mandated, both constitutionally<sup>20</sup> and jurisprudentially.<sup>21</sup> Many dispute resolution scholars and practitioners now draw the line by finding it permissible to mandate attendance at alternative dispute resolution activities, but not to coerce particular settlements or outcomes.

Among the important policy questions to be considered about dispute resolution are the recent efforts to legislate against secrecy in settlements involving particular kinds of cases, such as those affecting public health and safety,<sup>22</sup> which necessarily involve consideration of conflicting principles in the law of public access to litigation, and parties' rights to privately conclude agreements. Related to these issues are those dealing with access to and cost

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expanded the exercise to include a negotiation component. For a full description of the exercise, contact me at UCLA Law School.

16. I explore some of these issues in greater depth in Carrie Menkel-Meadow, *Pursuing Settlement in An Adversary Culture: A Tale of Innovation Co-opted or the "Law of ADR,"* 19 FLA. ST. U. L. REV. 1 (1991).

17. See, e.g., John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823 (1985); MIRJAN DAMASKA, *THE FACES OF JUSTICE AND STATE AUTHORITY: A COMPARATIVE APPROACH TO THE LEGAL PROCESS* (1986).

18. See, e.g., Stanley Lubman, *Mao and Mediation: Politics and Dispute Resolution in Communist China* 55 CAL. L. REV. 1284 (1967); TAIMIE BRYANT, *MEDIATION OF DIVORCE DISPUTES IN THE JAPANESE FAMILY COURT* (1984) (unpublished Ph.D. dissertation, UCLA); I. SHIMAZU, *SOME CHARACTERISTICS OF DIVORCE IN JAPAN*, 18(2) *Conciliation Courts Rev.* 31 (1980); *DIVORCE MEDIATION AND THE LEGAL PROCESS* (R. Dingwald & J. Eckelaar eds., 1988).

19. See MARTIN M. SHAPIRO, *COURTS: A COMPARATIVE AND POLITICAL ANALYSIS* (1981); Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 376 (1982).

20. See Dwight Golann, *Making Alternative Dispute Resolution Mandatory: The Constitutional Issues*, 68 OR. L. REV. 487 (1989).

21. See, e.g., Policy Statement of ACLU Committee on Alternative Dispute Resolution, March, 1993.

22. See, e.g., Florida's "Sunshine in Litigation" legislation, FLA. STAT. ANN. § 69.081 (West 1993); Joseph F. Sullivan, *In Lawsuits, How Much Should the Courts Keep Secret?*, N.Y. TIMES, Mar. 3, 1991, § 4, at 6; Arthur R. Miller, *Confidentiality, Protective Orders and Public Access to the Courts*, 105 HARV. L. REV. 427 (1991); Carrie Menkel-Meadow, *Public Access to Private Settlements: Conflicting Legal Policies*, 11(6) *ALTERNATIVES TO THE HIGH COST OF LITIGATION* (June 1993).

of providing alternative forms of dispute resolution. While some argue that only those with "minor" or lesser value cases are shunted off to "inferior" justice systems,<sup>23</sup> others are concerned that only those who are well endowed can purchase alternative justice systems (like the California Rent-A-Judge scheme)<sup>24</sup> and thus, opt out of a time-consuming and less expert system, thereby depriving the public fisc of important funds for public financing of the justice system. Even if both less-, and more well-endowed parties choose some form of ADR, then an additional set of issues is raised about whether power imbalances can appropriately be addressed without the full force of the public law system.<sup>25</sup>

The use of alternative dispute resolution devices also raises questions about the standards to be applied for their use. Increasingly, courts and legislatures must deal with issues of confidentiality, liability and immunity.<sup>26</sup> A wide variety of professional associations and other bodies have begun drafting ethics standards for mediators and other ADR providers.<sup>27</sup> Important questions are raised about whether mediation and ADR work will be treated the same way as "representational" legal work or whether it should be assimilated to judicial work or to some hybrid form.<sup>28</sup> For example, if the ethical rules require disclosure of adverse authority to the tribunal,<sup>29</sup> must a party disclose adverse authority in an arbitration or mediation conducted outside of the courthouse but with the court's imprimatur?

In addition to these jurisprudential questions, alternative dispute resolution as a field raises a host of concrete problems of evaluation. How are the competing goals of efficiency and quality of justice to be measured and accommodated in our court system?<sup>30</sup> How can empirical studies be structured to assess the different modes of dispute resolution when it is impossible to subject the same case to different treatments?<sup>31</sup> How is the growing

23. See, e.g., 1 THE POLITICS OF INFORMAL JUSTICE: THE AMERICAN EXPERIENCE (Richard L. Abel ed., 1982).

24. See Robert Gnaizda, *Secret Justice for the Privileged Few*, 66 JUDICATURE 6 (1982).

25. For a taste of this critique of ADR from a variety of different sources, see Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984); Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359; Trino Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545 (1991). See generally sources collected in Menkel-Meadow, *supra* note 16 at 3 n.7.

26. For a good review of how these issues are being handled by both courts and legislatures, see NANCY ROGERS & CRAIG A. MCEWEN, *MEDIATION: LAW, POLICY & PRACTICE* (1989). See, e.g., *Howard v. Drapkin*, 271 Cal. Rptr. 893 (Cal. Ct. App. 1990).

27. See, e.g., SOCIETY FOR PROFESSIONALS IN DISPUTE RESOLUTION — ETHICAL STANDARDS (1986); ACADEMY OF FAMILY MEDIATORS, STANDARDS OF PRACTICE FOR FAMILY AND DIVORCE MEDIATORS (1984); ABA STANDARDS OF PRACTICE FOR LAWYER MEDIATORS IN FAMILY DISPUTES (1984); NATIONAL STANDARDS FOR COURT-CONNECTED MEDIATION PROGRAMS, CENTER FOR DISPUTE SETTLEMENT—THE INSTITUTE OF JUDICIAL ADMINISTRATION (1992).

28. See ABA MODEL RULES OF PROFESSIONAL CONDUCT Rule 2.2 (1983) (concerning representation of multiple parties in an intermediation-like setting but disclaiming applicability to explicit mediation).

29. MODEL RULES OF PROFESSIONAL CONDUCT, Rule 3.3(a)(3) (1983).

30. See, e.g., *Symposium, Quality of Dispute Resolution Issue*, 66 DEN. U. L. REV. (1989).

31. For some efforts to do this experimentally, see JOHN W. THIBAUT & LAURENS WALKER, *PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS* (1975), and empirically, see E. ALLEN LIND, ET AL., *THE PERCEPTION OF JUSTICE: TORT LITIGANTS' VIEWS OF TRIAL*,

number of mass tort cases to be managed in ways that provide both individual justice and a system that can grant a timely hearing to all claimants?<sup>32</sup> These are important policy questions that tomorrow's practitioners must be able to deal with and evaluate, both to advise clients and to help structure the legal system of the 21st century. Increasingly, students of dispute resolution are encouraged to think systematically about planning for dispute resolution design in the aggregate, for their clients (by drafting contract clauses,<sup>33</sup> or designing dispute-grievance systems for them) and for the administration of justice in governmental or other institutional settings.<sup>34</sup>

Beyond the particular jurisprudential questions of dispute resolution systems, there are other important intellectual frameworks to master in understanding how people negotiate transactions and resolve disputes. Bargaining theory, game theory, economic analysis, and the application of social psychology to law,<sup>35</sup> provide useful frameworks for broadening the disciplinary bases from which students study legal phenomena. For example, whether Axelrod's effective "tit for tat" cooperative computer program for playing a version of the Prisoner's Dilemma game applies to negotiation information strategies, anti-trust behavior or discovery conduct is an important heuristic with which students may begin to understand how human behavior structures the way law is "made" and practiced. Negotiation and other theorists are currently engaged in significant debates about whether rationality, irrationality, or arationality in behavior are the most accurate predictors of what occurs in conflict resolution.<sup>36</sup> Translated into practical legal terms, should we formally recognize different predilections on the part of lawyers to be gladiators (litigators), or peacemakers (negotiators), as Roger Fisher has

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COURT-ANNEXED ARBITRATION AND JUDICIAL SETTLEMENT CONFERENCES (Rand 1989); E. ALLEN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* (1988).

32. See, e.g., RICHARD SOBOL, *BENDING THE LAW: THE STORY OF THE DALKON SHIELD BANKRUPTCY* (1991); PETER H. SCHUCK, *AGENT ORANGE ON TRIAL: MASS TOXIC DISASTERS IN THE COURTS* (1986); GERALD M. STERN, *THE BUFFALO CREEK DISASTER: THE STORY OF THE SURVIVORS' UNPRECEDENTED LAWSUIT* (1977). While the assumption here is usually that class actions provide efficient ways to deal with multiple claims, some forms of injury require individualized assessment, for purposes of both claim evaluation and damages, and because of the psychological desire for confrontation and a hearing. In my own experience as an arbitrator in the Dalkon Shield Trust litigation, I have found that it is possible for ADR proceedings to provide a forum in which these needs can be met. In the latest round of mass torts, courts and lawyers are trying to structure a system for managing fairly and efficiently the breast implant litigation.

33. Whitmore Gray, *Dispute Resolution Clauses—Some Thoughts on Ends and Means*, *ALTERNATIVES*, Aug. 1984, at 12.

34. See, e.g., WILLIAM L. URY ET AL., *GETTING DISPUTES RESOLVED: DESIGNING SYSTEMS TO CUT THE COSTS OF CONFLICT* (1988).

35. See, e.g., H. PEYTON YOUNG, *NEGOTIATION ANALYSIS* (1991); ROBERT AXELROD, *THE EVOLUTION OF COOPERATION* (1985); HOWARD RAIFFA, *THE ART AND SCIENCE OF NEGOTIATION* (1982); BART R. BROWN & JEFFREY Z. RUBIN, *THE SOCIAL PSYCHOLOGY OF BARGAINING* (1975).

36. See, e.g., Daniel Kahneman & Amos Tversky, *Conflict Resolution: A Cognitive Perspective*; Lee Ross, *Reactive Devaluation in Negotiation and Conflict Resolution*; Ronald Gilson & Robert Mnookin, *Cooperation and Competition in Litigation: Can Lawyers Dampen Conflict?*, all in *BARRIERS TO CONFLICT RESOLUTION* (K. Arrow et al, eds. forthcoming 1993) (presented at Stanford Conference on Barriers to Conflict Resolution, Feb. 19-21, 1993).

suggested, in separating law firm litigation departments into settlers or fighters?<sup>37</sup>

These issues could all be conventionally treated through traditional legal materials — cases, statutes, articles, and policy discussions. Such study should also be supplemented by a focus on the empirical work that has been done on how lawyers, particularly as dispute resolvers, actually behave.<sup>38</sup> Often our generalized models or abstractions of lawyer behavior do not accurately describe the grim realities of routinized, “satisficing” behavior on the part of many lawyers.

Knowledge about dispute resolution is not the same thing as being able to do dispute resolution. At the behavioral level, students can learn to understand these issues better if they are skilled in performing dispute resolution tasks, and understand the differences in the role of advocate, adjudicator, facilitator, conciliator, mediator, party, and representative. Skills instruction and role-plays enable students to understand and perform such important lawyering tasks as questioning, listening, aggregation, and disaggregation of issues and problems, creativity,<sup>39</sup> legal analysis, and interpersonal competence. Such exercises also serve as models for conducting negotiation,<sup>40</sup> mediation<sup>41</sup> and other forms of lawyer participation in dispute resolution. In one of my favorite exercises, designed to teach creativity, I have students pick five cases at random from a case reporter and after briefing the result ordered by the court, each student is asked to think of three other possible solutions to the parties’ real underlying problems or concerns that initially brought them into litigation. In other courses, students can be asked to draft dispute resolution clauses (contracts), conduct summary jury trials (civil procedure), or negotiations (torts or property), in contrast to the more traditional forms of trial.

In focusing on the experiential and behavioral aspects of lawyering, through skills learning and role-playing, students can be asked to consider such questions as what kinds of arguments are made in different fora, what kinds of outcomes are produced by different processes, what kinds of behav-

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37. See Roger Fisher, *What About Negotiation As A Specialty?*, 69 A.B.A. J. 1221 (1983); see also Marguerite S. Millhauser, *Gladiators and Conciliators—ADR A Law Firm Staple*, B. LEADER, Sept.-Oct. 1988 at 20.

38. For some introduction to this literature see HERBERT KRITZER, *LET’S MAKE A DEAL: UNDERSTANDING THE NEGOTIATION PROCESS IN ORDINARY LITIGATION* (1990); HAZEL GENN, *HARD BARGAINING: OUT OF COURT SETTLEMENT IN PERSONAL INJURY ACTIONS* (1987); Howard S. Erlanger et al., *Participation and Flexibility in Informal Processes: Cautions From the Divorce Context*, 21 L. & SOC’Y REV. 585 (1987); JANET C. ALEXANDER, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 STAN. L. REV. 497 (1991); Samuel R. Gross & Kent D. Syverud, *Getting to No: A Study of Settlement Negotiations and the Selection of Cases for Trial*, 90 MICH. L. REV. 319 (1991).

39. See, e.g., MARTIN GARDNER, *AHA! AHA! INSIGHT!* (1978); JAMES ADAMS, *CONCEPTUAL BLOCKBUSTING: A GUIDE TO BETTER IDEAS* (3rd. ed. 1990).

40. See Menkel-Meadow, *supra* note 7, at 817-29; ROGER FISHER ET AL., *GETTING TO YES* (2d. 1992); see also Fisher & Jackson, *supra* note 1 (outlining particular structures of negotiation).

41. See, e.g., CHRISTOPHER MOORE, *THE MEDIATION PROCESS* (1987); GARY FRIEDMAN, *CENTER FOR THE DEVELOPMENT OF MEDIATION IN LAW MEDIATION TRAINING MATERIALS MEMOS 1-7* (1984).



iors do particular processes activate,<sup>42</sup> which processes seem more comfortable,<sup>43</sup> who is in control of which processes (parties, lawyers, third parties), what controls the outcomes in each process (“rights” or “interests or needs”), and which outcomes seem fair or unjust. Using skills exercises and problem sets puts flesh on the bones of a more abstract discussion of these important dispute resolution issues.

Intensive skills work actually teaches students different behaviors than they are taught to master in the rest of their legal education—openness to clients, receptivity, synthetic powers of reasoning, creativity, listening, discretion and judgment. In learning to systematically solve problems, students learn to expand the issues in a problem (rather than narrow them) to encourage more “trades” and possible combinations of solutions, rather than to reduce disputes to zero-sum claims about money. Each legal problem or transaction has (for each party) a who (the parties), a what (the “res” or thing in dispute or to be bargained for), a when (timing for the performance of particular acts), a how (means or methods of payment, transacting business, apologizing, or doing something for or with the other), a where (the place or jurisdiction of action) and a why (the underlying reasons for the dispute or transaction) that can be explored, expanded and rearranged to create greater numbers of possible solutions, thereby increasing the quality and quantity of possible solutions.<sup>44</sup> These particular skills, learned for dispute resolution purposes, can then be generalized for use in all lawyering.

#### IV. THE PEDAGOGY OF ADR

These important issues of learning how to do dispute resolution, as well as how to think about it, are best taught through simulation role-play exercises in the first year, either through the pervasive method,<sup>45</sup> or through a separate survey course in ADR, common now in a number of law schools.<sup>46</sup> Students can be asked to recreate the earlier stages of cases already found in their casebooks to excavate the early signs of disputes and to uncover other

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42. Like many teachers of negotiation I have students do several brief psychological “tests”—the most common being the Thomas-Kilman MODE. See K. THOMAS, CONFLICT AND CONFLICT MANAGEMENT IN THE HANDBOOK OF INDUSTRIAL AND ORGANIZATIONAL PSYCHOLOGY (M. Dunnette ed. 1975); see also RODERICK GILKEY & LEONARD GREENHALGH, THE ROLE OF PERSONALITY IN SUCCESSFUL NEGOTIATING, in NEGOTIATION THEORY AND PRACTICE (William Breslin & Jeff Rubin eds. 1991).

43. Many students are drawn to mediation because they fear conflict, until they realize that mediation is the process in which conflict is often the most direct.

44. For a fuller explication of this analysis of legal problems and how it can be applied in negotiation, see Menkel-Meadow, *supra* note 7.

45. For sample problems to be used throughout the first year curriculum, see LEONARD L. RISKIN & JAMES E. WESTBROOK, TEACHER’S MANUAL FOR DISPUTE RESOLUTION AND LAWYERS.

46. For an excellent evaluation of the effectiveness of teaching about ADR in changing law student repertoires of problem-solving consciousness and behavior, see RONALD PIPKIN, PROJECT ON INTEGRATING DISPUTE RESOLUTION INTO STANDARD FIRST YEAR COURSES: AN EVALUATION, FINAL REPORT TO THE UNIVERSITY OF MISSOURI-COLUMBIA SCHOOL OF LAW (finding that students exposed to ADR in both pervasive course treatment and in a first year survey course were more likely to understand problem-solving approaches to legal issues than students at law schools with little or no exposure to such teaching).

ways of solving them. In civil procedure, for example, students can focus on the decision to bring a lawsuit rather than to pursue some other form of self-help or dispute resolution.<sup>47</sup> Students can renegotiate contracts and draft ADR clauses. In some types of classes, whole sessions can be devoted to dispute resolution simulations—a siting problem in environmental law, negotiations in international law, simulated arbitrations in labor law or commercial law, or a reg-neg proceeding in administrative law.

Students can also learn to analyze dispute resolution skills and issues by parsing transcripts of lawyer-lawyer or lawyer-client interactions,<sup>48</sup> rather than case materials, or by reviewing the growing library of video-tape materials demonstrating dispute resolution processes.<sup>49</sup> In more sophisticated programs, students can watch and evaluate court-connected programs and conduct empirical projects on the effectiveness of particular dispute resolution processes.<sup>50</sup>

In advanced courses or clinical programs, students can engage in sequenced exercises designed to teach intensively the skills of question-framing, interviewing, facilitating others at communication and problem-solving (mediation), negotiating (both with clients and with “opponents”), and in more complex disputes, in forming coalitions of multiple parties.<sup>51</sup>

In designing an ADR curriculum, the ideal form would be a fully sequenced program with some introduction in the first year, either through pervasive course treatment or a survey course, followed by clinical courses or seminars devoted to particular skills or processes (interviewing, counseling, negotiation and mediation), with either or both simulation and real case experience,<sup>52</sup> and a concluding seminar designed to explore the larger jurisprudential and policy issues implicated in the use of a greater variety of dispute resolution formats.<sup>53</sup>

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47. An important reading assignment for such an exercise might include, William L. F. Felstiner et al., *The Emergence and Transformation of Disputes: Naming, Blaming and Claiming*, 15 L. & Soc’y REV. 63 (1980-81).

48. The text I am writing with Bea Moulton pursues this format. CARRIE MENKEL-MEADOW & BEA MOULTON, *BEYOND THE ADVERSARIAL MODEL: MATERIALS ON NEGOTIATION AND MEDIATION* (West Publishing, forthcoming).

49. See, e.g., LEONARD RISKIN, *DISPUTE RESOLUTION TAPES* (West Publishing, 1992); NATIONAL INSTITUTE FOR DISPUTE RESOLUTION EDUCATION AND TRAINING, *A VIDEO REFERENCE GUIDE* (1989).

50. See Carrie Menkel-Meadow, *Lawyer Negotiations: Theories and Realities—What We Learn From Mediation*, 56 MOD. L. REV. 361 (1993).

51. See, e.g., MULTI-LATERAL NEGOTIATION in *NEGOTIATION THEORY AND PRACTICE* § VIII (J. William Breslin & Jeffrey Rubin eds. 1991).

52. More and more law schools are offering mediation clinics in which students actually facilitate the resolution of real legal problems. Such programs are now available at Columbia, UCLA, Denver, New Mexico, Ohio State, George Washington, Loyola, CUNY and a number of other law schools. See Beryl Blaustone, *Training the Modern Lawyer: Incorporating the Study of Mediation Into Required Law School Courses*, 21 SW. U. L. REV. 1317 (1992).

53. An important current issue is how each of the federal district courts is studying and implementing the requirements of the Civil Justice Reform Act of 1990 (requiring each district to develop plans for reduction of delay and implementation of alternative dispute resolution devices). See, e.g., ELIZABETH PLAPLINGER & MARGARET SHAW, *CENTER FOR PUBLIC RESOURCES, COURT ADR: ELEMENTS OF PROGRAM DESIGN* (1992); *EMERGING ADR ISSUES IN STATE AND FEDERAL COURTS* (A.B.A. Sec. Litig., Frank E. A. Sander ed. 1991).

Familiarity with a greater variety of ways to solve legal problems will help students deal with such questions as the appropriate role of law in legal problem-solving—what should be decided with reference to legal entitlements, what with respect to the underlying needs and interests of the parties and how are we to understand both individual and system-wide justice.

Whether or not the use of ADR is ultimately justified by instrumental needs to reduce the caseload pressure on courts, or by more transformative aspirations to provide more tailored and better quality solutions for the parties, it is clear that lawyers of the 21st century will have to know how to settle as well as how to litigate. It is time that our law school curricula respond to the needs of what our students will have to know in order to provide high quality, satisfactory solutions to the legal problems of the future.