

A “Lawyer for All Seasons”: The Lawyer as Conflict Manager

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I. INTRODUCTION

In a keynote address made to legal educators at the American Association of Law Schools’ annual meeting in 1999, Attorney General Janet Reno expressed her wish that the American lawyer “be the problem-solver, the peacemaker, the sword, and the shield.”¹ Her vision was for a lawyer to be seen as a true “counselor” and not only as an advocate and analyst.² In the dozen years since Attorney General Reno encouraged legal educators to expand their mission beyond casting lawyers in the role of “sword[s]” and “shield[s]” in clients’ legal battles, progress has been made.³ Legal educators are increasingly offering courses, seminars, concentrations, advanced degrees, and continuing education in alternative dispute resolution (ADR) methods, conflict management, and problem solving that are designed to give law students and practicing lawyers the professional knowledge and skills to address not just the legal dimensions of clients’ disputes and problems but also the business and interpersonal

1. Janet Reno, *Lawyers as Problem-Solvers: Keynote Address to the AALS*, 49 J. LEGAL EDUC. 5, 5 (1999).

2. *Id.* at 6.

3. *See id.*

dimensions.⁴ Thus, more lawyers today are better prepared to prevent disputes from escalating into full-blown litigation and to resolve both litigation and transactional disputes in more creative, efficient ways.⁵ This progress represents only the beginning of a more fundamental and necessary transformation that, if successful, will redefine the professional identity of the American lawyer to include the role of conflict manager in addition to other important roles a lawyer must play.⁶

For this transformation to be complete, however, there must be a ground shift in thinking within the legal profession. It has been keenly observed that in the United States, “law is our national religion” and “lawyers constitute our priesthood.”⁷ Lawyers are the primary gatekeepers of conflicts in our society, deciding or strongly influencing how conflicts are handled.⁸ Despite an increased commitment to ADR processes, both legal education and our national culture still overemphasize adjudicatory processes and strategies in resolving disputes and have largely ignored the progress that has been made in recent decades in understanding effective interpersonal conflict management.⁹ Legal educators provide future lawyers with limited opportunities to learn other ways to manage

4. See Michael Moffitt, *Islands, Vitamins, Salt, Germs: Four Visions of the Future of ADR in Law Schools (and a Data-Driven Snapshot of the Field Today)*, 25 OHIO ST. J. ON DISP. RESOL. 25, 31–32 & tbl.2, 42 tbl.10 (2010) (determining, after analysis of the American Association of Law Schools’ Directory of Law Teachers from 1997 to 2007, that the number of full-time faculty teaching ADR-related courses increased by over 20%, and the number of courses being taught increased by over 200% during the time period studied). A study by the American Bar Association indicates ADR courses are among the fastest growing areas in law school curricula. SECTION OF LEGAL EDUC. & ADMISSION TO THE BAR, AM. BAR ASS’N, A SURVEY OF LAW SCHOOL CURRICULA, 1992–2002, at 33 (2004). Additionally, at least 78% of law schools offer all three primary ADR-related courses: ADR, Negotiation, and Mediation. *Id.* at 34.

5. See Moffitt, *supra* note 4, at 30–33; see also C. Michael Bryce, *ADR Education from a Litigator/Educator Perspective*, 81 ST. JOHN’S L. REV. 337, 341–46 (2007) (recounting the growth of ADR programs at American law schools and describing some of those programs).

6. SUSAN SWAIM DAICOFF, *LAWYER, KNOW THYSELF: A PSYCHOLOGICAL ANALYSIS OF PERSONALITY STRENGTHS AND WEAKNESSES* 173–74 (2004) (suggesting that the “Post-Enlightenment developments in philosophy, law, and legal practice” that recognized the role psychology and emotional elements have in legal disputes should be synthesized into a movement).

7. JEROLD S. AUERBACH, *JUSTICE WITHOUT LAW?* 9 (1983).

8. WILLIAM M. SULLIVAN ET AL., *EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW I* (2007).

9. *Id.* at 23–24; Jean R. Sternlight & Jennifer Robbennolt, *Good Lawyers Should Be Good Psychologists: Insights for Interviewing and Counseling Clients*, 23 OHIO ST. J. ON DISP. RESOL. 437, 437–38 (2008).

conflicts or to appreciate the intricacies of the interpersonal conflict in which they are so often professionally embroiled.¹⁰ Law schools impart their students with a “philosophical map” that characterizes the practice of law as an adversarial enterprise in which there must be winners and losers and a third party declares a winner based on the rule of law.¹¹ This narrow and primarily legalistic education many lawyers receive, as this Article will examine more closely below, might prepare them to be effective advocates in the context of courts and other legal proceedings but offers little guidance in how to be effective advocates in the interpersonal, collaborative processes they will frequently encounter in settlement negotiations, business deals, mediations, and organizational conflicts.¹²

In today’s competitive environment, all lawyers would be well advised to develop skills not only in handling litigation but also in assisting clients in preventing, or at least minimizing, unproductive conflicts that may lead to litigation. “Winning” lawsuits and knowing how to keep litigation costs low are only part of good lawyering because clients understand that even successful, well-managed litigation is too frequently a losing endeavor. In the future, lawyers who are able to assist clients in managing their activities more wisely to reduce the incidence of conflict, as well as deftly handle conflicts once they arise, including litigation, will be well positioned to become leaders in their profession as this new era continues to advance. In short, a lawyer must be a conflict manager.

The role of a lawyer as a conflict manager is an important subset of a lawyer’s role as a problem solver.¹³ The broader concept of problem solving, in addition to the traditional and essential lawyering skills of adversarial advocacy and legal analysis, also includes investigative skills, creative thinking, emotional awareness, and many other abilities.¹⁴ Intellectual leaders in this area such as Professor Carrie Menkel-Meadow and Dean Paul Brest have written and spoken powerfully about the need for legal education to prepare students better for their future roles as

10. SULLIVAN ET AL., *supra* note 8, at 111–12; Edward Rubin, *What’s Wrong with Langdell’s Method, and What To Do About It*, 60 VAND. L. REV. 609, 641–42 (2007).

11. Leonard L. Riskin, *Mediation and Lawyers*, 43 OHIO ST. J. ON DISP. RESOL. 29, 43–44 (1982).

12. The educational gap that exists in most law schools recently received national attention in the form of a front-page *New York Times* article decrying the lack of practical training law students receive and recounting the growing concerns of law firms and their clients that must take on the burden of completing law students’ legal education. David Segal, *What They Don’t Teach Law Students: Lawyering*, N.Y. TIMES, Nov. 20, 2011, at A1.

13. Carrie J. Menkel-Meadow, *When Winning Isn’t Everything: The Lawyer as Problem Solver*, 28 HOFSTRA L. REV. 905, 918–19 (2000).

14. *Id.* at 910–11.

professional problem solvers.¹⁵ There is also an increased awareness that all manner of legal skills need to be taught more pervasively in law schools.¹⁶ But less has been written specifically about the role a lawyer can play in managing conflict inside and outside of the traditional legal arena by using interpersonal conflict management principles and skills.¹⁷ Law schools should commit to creating conflict managers. This commitment not only includes teaching all students the proper use of ADR procedures, such as negotiation and mediation, but must also include teaching important interpersonal conflict management principles that are essential for students to perform well in those more collaborative processes.¹⁸

15. See generally PAUL BREST & LINDA HAMILTON KRIEGER, PROBLEM SOLVING, DECISION MAKING, AND PROFESSIONAL JUDGMENT: A GUIDE FOR LAWYERS AND POLICYMAKERS (2010) (providing information regarding skills that are important for lawyers and citizens generally); Paul Brest, *The Responsibility of Law Schools: Educating Lawyers as Counselors and Problem Solvers*, LAW & CONTEMP. PROBS., Summer/Autumn 1995, at 5 (maintaining that the importance of these legal skills is growing because of the increasing complexity of legal issues); Paul Brest & Linda Hamilton Krieger, *Lawyers as Problem Solvers*, 72 TEMP. L. REV. 811, 811 (1999) (emphasizing that “fundamental lawyering skills” primarily include skills unrelated to the law (internal quotation marks omitted)); Paul Brest & Linda Krieger, *On Teaching Professional Judgment*, 69 WASH. L. REV. 527 (1994) [hereinafter Brest & Krieger, *On Teaching Professional Judgment*] (claiming that law schools have a responsibility to teach these skills and improve the legal profession); Carrie Menkel-Meadow, *Aha? Is Creativity Possible in Legal Problem Solving and Teachable in Legal Education?*, 6 HARV. NEGOT. L. REV. 97 (2001) (claiming that legal creativity can underlie all legal education or be taught through specific courses); Menkel-Meadow, *supra* note 13 (explaining that effective lawyering skills must be taught before they can be put into practice).

16. See SULLIVAN ET AL., *supra* note 8, at 87–95.

17. Although not referring to lawyers as “conflict managers” specifically, there are a number of articulate voices calling for law schools to place greater emphasis on collaborative skills and psychological principles in the law school curriculum. See, e.g., John Lande & Jean R. Sternlight, *The Potential Contribution of ADR to an Integrated Curriculum: Preparing Law Students for Real World Lawyering*, 25 OHIO ST. J. ON DISP. RESOL. 247, 267–68 (2010); Leonard L. Riskin, *Mediation in the Law Schools*, 34 J. LEGAL EDUC. 259, 261–62 (1984) (explaining that lawyers must use “mediative ways” in their practice); Jean R. Sternlight, *Lawyers’ Representation of Clients in Mediation: Using Economics and Psychology To Structure Advocacy in a Nonadversarial Setting*, 14 OHIO ST. J. ON DISP. RESOL. 269, 302–13 (1999) (exploring psychological barriers to settlement); Sternlight & Robbennolt, *supra* note 9, at 437–39.

18. Andrea Kupfer Schneider, *Building a Pedagogy of Problem-Solving: Learning To Choose Among ADR Processes*, 5 HARV. NEGOT. L. REV. 113, 127–31 (2000) (examining the importance of lawyers’ understanding of emotional and nonemotional consequences in choosing a dispute resolution process).

It can be fairly said that conflict *is* the business of law. But most lawyers receive no training in the fundamental principles that govern and animate interpersonal conflict.¹⁹ Interpersonal conflict management principles are distinct from dispute resolution processes, such as mediation, for example. Interpersonal conflict management principles include social science concepts such as face-saving, conflict styles, and conflict cycles. Despite progress made in expanding the field of ADR, most lawyers remain uninformed of the psychological factors that can escalate and prolong conflict and of factors that tend to de-escalate conflict, paving the way for compromise.²⁰ Consequently, lawyers often lack the knowledge that is essential for excellence in conflict management and, hence, excellence in lawyering.²¹

Regardless of how law students are educated, lawyers are conflict managers because their clients seek consultation regarding conflicts that are multifaceted, including not only legal but also business, emotional, and interpersonal aspects.²² The lawyer who assumes the role of conflict manager appreciates the whole problem even when engaged to address only one or two facets of it.²³ The key questions that remain are whether legal educators and lawyers will acknowledge the more expansive role that lawyers can play in assisting clients, and whether they will endeavor to prepare law students to play that role well by including in the curriculum greater exposure to psychological and sociological science principles that will aid them in navigating highly conflicted situations more adeptly.

This is, of course, not to say that it is necessary for lawyers to also be psychologists or sociologists any more than it is necessary for accountants

19. Responses from 651 law firm associates by the National Association for Law Placement (NALP) show that 34.1% of the associates took a negotiating skill course and 21.7% took an ADR skill course during law school. NAT'L ASS'N FOR LAW PLACEMENT, 2010 SURVEY OF LAW SCHOOL EXPERIENTIAL LEARNING OPPORTUNITIES AND BENEFITS 18 tbl.8 (2011), available at <http://www.nalp.org/uploads/2010ExperientialLearningStudy.pdf>. However, there are overlaps in these percentages because respondents could select more than one course in their responses. Moreover, an ongoing survey by Sean Nolon, Director of Dispute Resolution Program and Associate Professor of Law at Vermont Law School, indicates that of the 200 ABA-accredited law schools in the United States, of which 138 have responded so far, only 10.9% of the schools require their students to take at least one nonlitigation dispute resolution course to graduate. Sean Nolon *Integrating Non-Litigation Dispute Resolution into the JD Curriculum: A Survey of U.S. ABA-Accredited Law Schools*, VT. L. SCH., http://www.surveymonkey.com/sr.aspx?sm=yFtyoMXI9ZFp7xaLrAFO58M1TM9B1Vd_2fstDf64koaDU_3d (last visited Jan. 8, 2012).

20. NAT'L ASS'N FOR LAW PLACEMENT, *supra* note 19, at 18 (reflecting the small percentage of law students who take courses that teach these psychological factors).

21. Paul Brest, *Skeptical Thoughts: Integrating Problem Solving into Legal Curriculum Faces Uphill Climb*, DISP. RESOL. MAG., Summer 2000, at 20, 22–23.

22. BREST & KRIEGER, *supra* note 15, at 3.

23. *Id.*

to also be lawyers. But as one would wish accountants to be familiar with law and legal analysis because their work deals intimately with statutes and administrative rules, one would also wish lawyers to be familiar with fundamental principles of managing conflict because their work involves interpersonal conflict that also has nonlegal dimensions. Time, money, and harmonious productivity are the premier concerns of today’s legal clients.²⁴ Their livelihood literally depends upon it. If lawyers are to thrive and help lead in this climate change, they must find ways to respond to the shifting needs of their clients. Those lawyers who have embraced the role of conflict manager in addition to the many other varied roles they must play, as this Article will demonstrate, confer a greater benefit to their clients and distinguish themselves in the process. They also elevate the legal profession.

To make the case for why lawyers should include conflict manager as part of their professional identity, this Article will rely primarily on examples and case studies from organizational conflicts. The reason for this particular focus is that organizations are a rich source for exploring the value of approaching disputes from a broader “conflict management” perspective, rather than a narrower “legalistic” perspective, because of the sheer variety and number of conflicts they face year in and year out. The organizational studies that this Article will explore are also particularly valuable because they provide both quantitative and qualitative data that concretely demonstrate the benefits of a conflict management perspective. The lessons learned from these studies, and the interpersonal conflict management principles that underlie them, support the idea that the legal profession’s transformation from one that emphasizes a narrower legalistic approach to one that embraces a broader conflict management approach applies to all lawyers. Such an approach also will benefit all clients, whether private citizens or organizations.

This Article explores why it is a worthy endeavor to encourage lawyers to embrace their role as conflict managers and for legal educators to implement changes in the education of law students to help them perform well in that role. Part II begins by exploring the role of the lawyer as conflict manager by assessing the traditional law school curriculum in light of two important social science principles of

24. *Briefing Law Firms: A Less Gilded Future*, ECONOMIST, May 7, 2011, at 74; *The Price of Legal Services: How To Curb Your Legal Bill*, ECONOMIST, May 7, 2011, at 14.

interpersonal conflict, in an effort to highlight where traditional law school training undermines an understanding of effective conflict management. Part III examines what it means to be a conflict-competent organization and lawyer through reviews of four case studies. Part IV concludes that embracing the role of conflict manager will become increasingly imperative if lawyers are to maintain their historical status as prominent players in addressing conflict in the twenty-first century. Although detailed discussion of potential solutions is beyond this Article's scope, this Article also concludes that it is essential for the legal profession to require education in ADR processes and interpersonal conflict management principles for all its students, and to initiate a discussion as to the nature and content of that education.

II. CONFLICT MANAGEMENT AND THE LAWYER'S CRAFT

Few professionals deal with conflict more consistently and directly than lawyers. Business, health care, and sales professionals all encounter a good number of conflicts in their day-to-day professional lives, but these conflicts are ancillary to their professions. Business people create a product or service, health care professionals deliver medical services, and sales professionals sell something. The conflict that these professionals encounter results from the simple fact that they must interact with other people to do their jobs, and where people interact significantly with others, there will be interpersonal conflict.²⁵ Unlike these professionals, the main business of most lawyers *is* conflict. Conflict is not ancillary to a lawyer's job—it *is* a lawyer's job. Lawyers who have been retained to represent clients in litigation or a legal transaction, whether they know it or not, have become part of an interpersonal conflict. Even lawsuits or transactions between large organizations involving complex and highly technical issues, such as patent infringement, are interpersonal conflicts at their heart because they are ultimately controlled by people.²⁶ People must act on behalf of the entity, negotiate for it, litigate for it, and make decisions for it, and where there is human interaction, the principles of interpersonal conflict apply in full force regardless of whether the named client is an organization or an individual.²⁷

Whether one is a litigator or transactional lawyer, and in some instances a regulatory lawyer, the primary function of the lawyer is to aid a client in settling a dispute, solving a problem, or negotiating a business deal

25. WILLIAM W. WILMOT & JOYCE L. HOCKER, INTERPERSONAL CONFLICT 2 (8th ed. 2011).

26. *See id.* at 4–5.

27. *See id.*

where needs and concerns of the parties involved are, at least to some degree, in conflict.²⁸ To prepare lawyers to be good conflict managers, law schools must teach all of their students the relevant social science principles that are fundamental to understanding the science of conflict management. Law schools not only fail to teach important conflict management principles with any regularity but tend to engender beliefs inconsistent with appropriate, empirically supported interpersonal conflict management strategies.²⁹

There are a number of relevant principles from other disciplines related to conflict management that law schools should introduce to students, including, but not limited to, emotional intelligence, conflict style, communication theory, mindfulness, cognitive dissonance theory, principles of perception and memory, decisionmaking, conflict escalation cycles, and productive conflict principles.³⁰ This Article will examine the last two principles in more detail—conflict escalation cycles and productive conflict principles—to illustrate the important role that social science principles play in managing “legal” disputes efficiently. These two areas of interpersonal conflict management theory are particularly appropriate to explore in detail in this Article because they not only are essential concepts that operate to reduce acrimony and promote amicable resolutions but

28. See DEAN G. PRUITT & SUNG HEE KIM, SOCIAL CONFLICT: ESCALATION, STALEMATE, AND SETTLEMENT 7–8 (3d ed. 2004) (defining conflict as where parties “perceive[] divergence of interest[s]” (emphasis omitted)).

29. See Mara Merlino et al., *Science in the Law School Curriculum: A Snapshot of the Legal Education Landscape*, 58 J. LEGAL EDUC. 190, 190–92 (2008); see also Menkel-Meadow, *supra* note 13, at 918. Professor Carrie Menkel-Meadow sums up the problem succinctly in commenting on the traditional law school curriculum when she states that “professionals solve human and legal problems by working with others.” *Id.* She goes on to explain, “We need to, as my third grade report card said: ‘Work and play well with others,’” but “[t]he emphasis on argument, debate, issue spotting, moot courts, and trials . . . encourage[s] a culture of acrimony.” *Id.*

30. There have been a number of excellent social science and psychology books authored by world-class scientists that are relevant to the lawyer’s work, easily digestible to nonscientists, and useful as supplements to law texts in ADR-related courses. See, e.g., DAN ARIELY, PREDICTABLY IRRATIONAL: THE HIDDEN FORCES THAT SHAPE OUR DECISIONS (2008); ROBERT B. CIALDINI, INFLUENCE: SCIENCE AND PRACTICE (5th ed. 2009); ANTONIO R. DAMASIO, DESCARTES’ ERROR: EMOTION, REASON, AND THE HUMAN BRAIN (1994); PAUL EKMAN, EMOTIONS REVEALED: RECOGNIZING FACES AND FEELINGS TO IMPROVE COMMUNICATION AND EMOTIONAL LIFE (2d ed. 2003); DANIEL GILBERT, STUMBLING ON HAPPINESS (2006); DANIEL GOLEMAN, EMOTIONAL INTELLIGENCE (1995); ELLEN J. LANGER, MINDFULNESS (1989); CAROL TAVRIS & ELLIOT ARONSON, MISTAKES WERE MADE (BUT NOT BY ME): WHY WE JUSTIFY FOOLISH BELIEFS, BAD DECISIONS, AND HURTFUL ACTS (2007).

are specifically undermined in a traditional law school curriculum that overemphasizes case-method education. Before exploring these interpersonal conflict management concepts, however, this Article will briefly describe what is meant by a “traditional” law school education.

A. *Law School’s “Signature Pedagogy”: The Case-Dialogue Method*

The classic “Socratic dialogue and case method” (case-dialogue method), famously established by Harvard Law School Dean Christopher Columbus Langdell in the 1870s, remains the predominant educational approach for most U.S. law schools.³¹ The purpose of what has been called law school’s signature pedagogy is to develop critical thinking and analytical competence in law students.³² The general approach of the case method—with significant variation among professors—consists of a two-step process. First, a student is selected to “state the case,” which involves, at a minimum, reciting the relevant facts of a published appellate opinion, describing the procedural posture of the case, and explaining what the court ruled and why.³³ Second, the professor proceeds to pose questions to the student—the Socratic dialogue—probing both the student’s understanding of the case and the case’s broader import in the context of the legal subject being studied.

The case-dialogue method teaches important legal competencies such as “the grounding of analysis in facts, the comprehensive spotting of relevant issues and concerns, the search for governing rules, principles or standards by which to make decisions, [and] the weighing of competing policy considerations.”³⁴ A well-executed case-dialogue approach can also improve students’ ability to “think on their feet” and “express themselves.”³⁵ However, an overemphasis on the “formal, procedural aspects of legal reasoning . . . mak[es] other aspects of the cases peripheral or ancillary.”³⁶

Business, ethical, and interpersonal dimensions are a few of the important aspects of disputes that the case-dialogue method often neglects or renders ancillary.³⁷ What were the financial and business ramifications for the parties taking this dispute through appeal? What

31. ROY STUCKEY ET AL., BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROAD MAP 133, 207 (2007); Rubin, *supra* note 10, at 610.

32. STUCKEY ET AL., *supra* note 31, at 210.

33. *Id.* at 213–14.

34. *Id.* at 212. The casebook is the primary tool of the case-dialogue method. See SULLIVAN ET AL., *supra* note 8, at 54–56. Casebooks are largely comprised of published federal and state appellate court opinions, which are often edited significantly to accentuate particular points of law. *Id.* at 55–56.

35. STUCKEY ET AL., *supra* note 31, at 211.

36. SULLIVAN ET AL., *supra* note 8, at 52.

37. *Id.*

ethical or moral choices did the lawyers or parties make in pursuing the litigation? What were the possible interpersonal consequences of prosecuting a prolonged and contentious legal battle where former friends or relatives were parties on opposite sides? What might a settlement have looked like? Although these questions are not always answerable, they are often worth exploring when the facts of the case are complete enough. It has been observed that by being required to view legal problems primarily from a perspective that emphasizes legal arguments and procedure, students often mistakenly view the people involved in the lawsuit merely as “‘individual strategizers,’ whatever their actual social and psychological situation.”³⁸

To teach analytical skills effectively, it may be necessary to isolate the subskill of legal analysis for some period of time.³⁹ At least one researcher has reported that “it takes at least a whole semester for most students to sufficiently internalize the basic shift in understanding necessary to a recognizably legal point of view.”⁴⁰ There is evidence to suggest, however, that the persistent use of the case-dialogue method through the last third of law school produces diminishing educational returns, with third-year law students reporting “a significant reduction in the amount of time and effort spent on their academic work, compared to their earlier years.”⁴¹ Employing a case-dialogue method education for most of a law student’s education, often long past its optimal utility, also leaves unexamined nonlegal dimensions of conflicts that are often essential for resolving the conflict efficiently.

American Bar Association Standard 302 states that “[a] law school shall require that each student receive substantial instruction in: . . . other professional skills generally regarded as necessary for effective and responsible participation in the legal profession.”⁴² In an explanatory note, the Standard illustrates what it means by *other professional skills*

38. *Id.* at 55; DAICOFF, *supra* note 6, at 72 (relating a study suggesting that law school education makes students less “[a]ltruistic, trusting, . . . ethical in dealing with others, [and] concerned for the welfare of others” than when they entered).

39. K. Anders Ericsson et al., *The Role of Deliberate Practice in the Acquisition of Expert Performance*, 100 PSYCHOL. REV. 363, 363 (1993).

40. SULLIVAN ET AL., *supra* note 8, at 53.

41. *Id.* at 77.

42. SECTION OF LEGAL EDUC. & ADMISSION TO THE BAR, AM. BAR ASS’N, STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS: 2011–2012, at 20 (2011), available at http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2011_2012_standards_and_rules_for_web.pdf.

by listing “[t]rial and appellate advocacy, alternative methods of dispute resolution, counseling, interviewing, negotiating, problem solving, factual investigation, organization and management of legal work, and drafting [as] among the areas of instruction in professional skills that fulfill Standard 302 (a)(4).”⁴³ However, “substantial instruction” is pitifully insubstantial, requiring a student to participate in only one course throughout law school that has “substantial professional skills components.”⁴⁴ This creates a gap between what law students learn in law school and what they need to know to be effective lawyers upon graduation.⁴⁵ This Article will now turn to the first of those interpersonal conflict management principles that will help to close this gap and explore its proper role in the lawyer’s craft.

B. Legal Process and the Process of Conflict

A fundamental conflict management principle, of which many lawyers are unaware, is that the longer a conflict lasts, the more intense it is likely to become and the harder it will be to resolve.⁴⁶ A major reason why persistent conflicts intensify is because of the principle commonly known as “competitive conflict escalation cycle.”⁴⁷ It is a basic tenet underlying the wisdom of early intervention and early settlement in many successful conflict management programs, as will be demonstrated in the case studies below.⁴⁸ A lawyer’s failure to appreciate this principle often results in legal disputes that last longer, sap greater energy, and cost more than they should.

43. *Id.* at 29.

44. *Id.* Interpretation 302-3 of Standard 302 states that [a] school may satisfy the requirement for substantial instruction in professional skills in various ways, including, for example, requiring students to take one or more courses having substantial professional skills components. To be “substantial,” instruction in professional skills must engage each student in skills performances that are assessed by the instructor.

Id.

45. *See* STUCKEY ET AL., *supra* note 31, at 16. The gap between what lawyers need to know to practice law well and what law schools generally teach has been a topic of serious discussion for more than three decades. There have been four major studies done on the American legal education system in recent decades: the Crampton Report, MacCrate Report, Best Practices Report, and Carnegie Report. SECTION OF LEGAL EDUC. & ADMISSION TO THE BAR, AM. BAR. ASS’N, REPORT AND RECOMMENDATIONS OF THE TASK FORCE ON LAWYER COMPETENCY: THE ROLE OF LAW SCHOOLS (1979); SECTION OF LEGAL EDUC. & ADMISSION TO THE BAR, AM. BAR ASS’N, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM (1992); STUCKEY ET AL., *supra* note 31; SULLIVAN ET AL., *supra* note 8.

46. ROXANE S. LULOFS & DUDLEY D. CAHN, CONFLICT: FROM THEORY TO ACTION 78 (2d ed. 2000).

47. *Id.* at 81.

48. *See infra* Part IV.

Law schools fail to teach competitive conflict management cycles, and their overemphasis on litigation, advocacy, and the case-dialogue method creates the erroneous impression that anything less than full-blown litigation demonstrates, at best, a lack of professional zeal and, at worst, professional negligence. Lawyers are drilled in basic legal procedure involving pleadings, discovery motion practice, and trial practice, but they are not taught that interpersonal conflict also unfolds in predictable patterns.⁴⁹ Moreover, they are not aware that the patterns of procedural practice are actually in tension with the patterns of interpersonal conflict resolution. This tension is created because the value of the discovery process must be weighed against the value of early settlement. This is a tension that lawyers must proactively manage if they are to maximize their success. The longer discovery and other mechanisms of litigation proceed, the more intense the conflict is likely to become, requiring greater resources to litigate and making settlement more difficult to accomplish.⁵⁰ Conversely, the less discovery and litigation are conducted, the less a lawyer knows about the circumstances of the dispute and the nature of the other participants so as to make valuing the case for settlement less accurate and more risky.⁵¹

The lawyer’s role as conflict manager is to manage this tension effectively to promote amicable and advantageous settlement sooner rather than later. There is no “one size fits all” formula or rule to determine when a dispute should settle because the decision to settle involves analyzing numerous factors that are highly situational.⁵² Nevertheless, understanding this tension will help attorneys make better decisions about when and how to conduct settlement discussions and consequently improve their effectiveness in managing the conflict.

49. See, e.g., SECTION OF LEGAL EDUC. & ADMISSION TO THE BAR, *supra* note 4, at 25 (showing that civil procedure is a required course by a vast majority of law schools).

50. LULOFS & CAHN, *supra* note 46, at 81–82; PRUITT & KIM, *supra* note 28, at 89–90.

51. See JOHN LANDE, *LAWYERING WITH PLANNED EARLY NEGOTIATION: HOW YOU CAN GET GOOD RESULTS FOR CLIENTS AND MAKE MONEY* 10–15 (2011); GERALD R. WILLIAMS, *LEGAL NEGOTIATION AND SETTLEMENT* 115–29 (1983).

52. WILLIAMS, *supra* note 51, at 10–12 (reviewing the factors relevant to settlement).

1. *The Two-Phase Theory of Productive Interpersonal
Conflict and the Competitive Escalation Cycle*

The best place to begin a discussion of interpersonal conflict is with the theory of how to manage it properly. The two-phase theory of interpersonal conflict management divides effective management into a “differentiation” phase and an “integration” phase.⁵³ In the differentiation phase, the “parties raise the conflict issues and spend sufficient time and energy clarifying positions, pursuing the reasons behind those positions, and acknowledging the severity of their differences.”⁵⁴ In the integration phase, parties “acknowledge common ground, explore possible options, and move toward some solution.”⁵⁵ Successful interpersonal conflict management requires that one effectively navigate the transition between the differentiation phase, where the parties attempt to understand their differences, and the integration phase, where the parties attempt to reconcile those differences.⁵⁶

The two-phase interpersonal conflict model is easy to explain but often challenging to execute. Parties can find it difficult to navigate the transition between phases successfully because the differentiation phase is riddled with psychological land mines.⁵⁷ One of the most destructive of these land mines is the competitive conflict escalation cycle. In an effort to understand the conflict, “[t]he combination of hostility and irreconcilable positions may lead to behavior that spurs uncontrolled, hostile escalation into a destructive conflict.”⁵⁸

Several distinct conflict patterns have been identified, but the competitive conflict escalation cycle is the most applicable to legal disputes and would be most beneficial for lawyers to understand.⁵⁹ In simplest terms, a competitive escalation cycle occurs when the behaviors of one person intensify the behaviors of another person.⁶⁰ A competitive escalation cycle is “characterized by a heavy reliance on overt power manipulation, threats, coercion, and deception”—behaviors that are often

53. JOSEPH P. FOLGER ET AL., *WORKING THROUGH CONFLICT: STRATEGIES FOR RELATIONSHIPS, GROUPS, AND ORGANIZATIONS* 16 (5th ed. 2005).

54. *Id.*

55. *Id.* at 17.

56. *Id.* at 22.

57. *Id.* at 17–20.

58. *Id.* at 17.

59. LULOFS & CAHN, *supra* note 46, at 77. For example, other identified conflict cycles are the “conflict avoidance cycle,” where people “avoid initiating conflict or to quickly withdraw when conflicts arise,” and the “de-escalatory cycle,” which is characterized by parties who reduce communication and interactions because of perceived grievances. *Id.* at 77–80.

60. *See id.* at 81.

associated with legal conflicts.⁶¹ The most important feature of this escalation cycle for lawyers to understand is that the longer the conflict endures, the more intense and complex it will likely become.⁶² Thus, from a competitive conflict escalation cycle perspective, the immediate days or weeks following the inciting incident provide the best opportunity to engage in meaningful settlement discussions because as the conflict progresses, the parties are more likely to undergo negative transformations in their attitudes and perceptions, which pose formidable obstacles to settlement.⁶³

2. *Negative Transformations of the Escalation Cycle: Down the Rabbit Hole*

As interpersonal conflict is prolonged and parties alternatively engage in various forms of coercion, arguments, and threats like the ones discussed above, attorneys should be aware of five forms of negative transformation that often begin to characterize disputes and should be avoided at all costs.⁶⁴ The result of these transformations is a prolonged and intensified conflict that is more difficult to control and ultimately more difficult and costly to settle.⁶⁵ This is why wise lawyers, when possible, attempt to resolve disputes as early as practicable.⁶⁶ If early settlement is not possible or advisable, conflict-savvy lawyers use productive interpersonal conflict techniques to maintain good relations with their counterparts. Once the negative transformations appear, lawyers find themselves falling further and further down the rabbit hole, arriving in a whole different world that is not conducive to satisfactory dispute resolution.

Most disputes do not start with a high level of hostility and intensity, but these negative qualities build strength the longer the dispute remains unresolved.⁶⁷ Even disputes that are characterized by anger or fear at their onset follow this same pattern of escalation because anger and fear

61. WILMOT & HOCKER, *supra* note 25, at 21 (citation omitted).

62. PRUITT & KIM, *supra* note 28, at 89–90.

63. *See id.* at 89–91.

64. *Id.*

65. *Id.* at 97 (“Conflict spirals are often hard to stop once they get started because each side feels that failing to retaliate will be seen as a sign of weakness.”).

66. For an excellent, in-depth examination of the process of early settlement, see generally LANDE, *supra* note 51.

67. *See* PRUITT & KIM, *supra* note 28, at 89–91.

are temporary feelings.⁶⁸ The damaging transformations that occur in conflict involve the parties' attitudes, perceptions, and goals.⁶⁹ Unlike feelings of anger and fear, which are transient, shifts in a person's attitude, perception, and goals are enduring and resistant to change once established.⁷⁰ This is why avoiding these destructive transformations, or at least minimizing them, is so vital to effective conflict resolution. The five common transformations that often occur as a conflict escalates are as follows: (1) tactics shift from light to heavy, (2) issues proliferate, (3) stereotyping and demonizing ensue, (4) good intentions give way to bad, and (5) the conflict expands to include more parties.⁷¹

a. Tactics Shift from Light to Heavy

Parties initially use "gentle tactics" to try to resolve disputes.⁷² Gentle tactics include forms of ingratiation and persuasive arguments.⁷³ For example, in an employment dispute between a manager and an employee over the employee's failing to receive a promotion he expected and wanted, the employee might first try to persuade the manager to give him the promotion by highlighting the excellent working relationship they have had over the years and expressing how much he looked forward to working with the manager in the new position. The employee may then respectfully present logical arguments supporting his position on why he is most deserving of the promotion and that a great mistake has been made. If these gentle forms of persuasion fail, this "great mistake," from the employee's perspective, will transform into a "great injustice," and he will look for more forceful or "heavy" ways to satisfy his goal of obtaining the promotion.⁷⁴ His arguments and manner of presenting them may become more strident. He may resort to threats, such as the threat to "go over" the manager's head and take his "case" to a higher authority within the company if the matter cannot be resolved.⁷⁵

68. *Id.* at 153.

69. *Id.*

70. *Id.*

71. *Id.* at 89–91.

72. *Id.* at 89.

73. *Id.*

74. *See id.*

75. *See id.* A "coercive commitment" is another common heavy tactic. *Id.* at 75. A coercive commitment is a form of punishment designed to compel the other person to give up the fight, such as promising to engage in a specific course of action (or inaction) until the coercer's request is met. *Id.* In our employment dispute example, a coercive commitment made by the employee might be to refuse to work overtime or perform "extra duties" until the manager grants him the promotion if the employee believes that this would hurt the manager's interests.

b. Issues Proliferate

The longer a conflict continues, the more grievances the parties tend to uncover, making the dispute more complex and more difficult to resolve.⁷⁶ In other words, issues proliferate.⁷⁷ The employee who failed to receive a coveted promotion might subsequently realize that his salary-merit increase last year was subpar and that, now that he thinks about it, his manager often makes jokes that the employee finds somewhat sexist. For her part, as the conflict intensifies, the manager might remember a travel expense reimbursement report with irregularities that the employee submitted several months ago. At the time, she waived off her suspicions, but now it seems likely that the employee has been padding his expense account!

As issues multiply and the parties become more competitive, greater resources are needed to fight about them.⁷⁸ More issues in the conflict require more investigation and analysis. More thought and analysis can require more money and time commitments. The employee dusts off his employee manual to study the promotion policy and standards, and casually investigates his manager’s history of giving promotions, looking for trends that demonstrate bias with respect to male employees of Italian descent. The manager digs out the employee’s travel expense reports for the last year and scours them for inconsistencies and evidence of fraud and deceit. There is nothing inherently wrong with parties’ discovering additional issues over which they have conflicts. These additional issues may be valid and legitimately need to be addressed. The point here is that as conflicts intensify, parties actively seek new issues to strengthen the cause, and the issues they raise are often weak or tangential to the main conflict. Consequently, they detract from the more serious issues and drain limited resources in terms of time, energy, and finances.

c. Stereotyping and Demonizing Ensur

As the parties’ conflict escalates and their relationship deteriorates, previously specific and narrow grievances transform themselves into more

76. LULOFS & CAHN, *supra* note 46, at 81.

77. PRUITT & KIM, *supra* note 28, at 89.

78. *Id.* at 89–90.

generalized grievances about the other party's attitude or personality.⁷⁹ This form of stereotyping often encourages the parties to demonize each other.⁸⁰ The employee's perspective shifts from a disagreement over his worthiness for promotion into a battle with a bigoted manager who is prejudiced against men and Italians. The manager's perspective shifts from trying tactfully to address the understandable disappointment of a valued employee after not receiving a promotion to battling an ungrateful employee who is more than likely a crook. These negative, oversimplified shifts in attitude and perspective denote an important and unwelcome turning point in any conflict because once the negative attitudes and perspectives attach to the conflict, they are difficult to disengage.⁸¹ There is also no clear signal that these negative shifts have occurred because they are incremental.⁸² They begin imperceptibly but culminate ferociously, like a house fire that begins in between the walls of the house and grows unseen until it emerges in full force and consumes the entire home.

d. Good Intentions Give Way to Bad

Another aspect of conflict escalation is a shift from the parties' initial goal of obtaining just compensation for the wrongdoing to a more caustic goal of injuring the other party.⁸³ At the beginning of most conflicts, the parties have an "individualistic orientation."⁸⁴ They simply want to satisfy their substantive needs "without regard for how well or how poorly [the] [o]ther [party] is doing."⁸⁵ So, in the first phase of the dispute, the employee just wants to get that promotion. As the conflict escalates and the parties become more competitive, however, parties will increasingly define *doing well* by how well they are doing in comparison with how well their adversary is doing.⁸⁶ Further increases in hostility and competition, in conjunction with the negative attitude and perspective shifts discussed above, sometimes intensify to such a degree that achieving their original goal is insufficient.⁸⁷ To "do well" in the matter requires hurting the other side *in addition* to satisfying substantive goals. If the

79. *Id.*

80. *Id.*

81. *Id.* at 153–54 (stating the mechanisms that sustain negative attitudes and perspectives are "self-fulfilling prophecy, rationalization of behavior, three kinds of selective information processing, and autistic hostility").

82. *See id.* at 89 (stating these transformations are "incremental").

83. *Id.* at 90.

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

original goal is unattainable, hurting the other party is a valuable consolation prize.⁸⁸ In most circumstances, the need to “hurt” the other side’s interests is satisfied by causing them sufficient inconvenience or financial loss.⁸⁹ For example, the unpromoted employee might be satisfied by appealing the manager’s decision not to promote the employee to a vice president or the human resources department because it will cause the manager great inconvenience and embarrassment. In some cases, however, “hurting” can involve physical violence.

e. The Conflict Expands To Include More People

The longer a conflict progresses, the greater the number of people it sweeps into its ambit.⁹⁰ Seeking greater competitive advantage, parties amass social support to strengthen their cause.⁹¹ Sometimes this social support is in the form of friends and colleagues with whom they can commiserate and gain emotional and psychological strength to carry on the fight.⁹² In addition, parties seek to co-op others who can be useful to them in more tangible ways.⁹³ Our employee, for example, might lobby other managers and coworkers to his cause in an attempt to convince his manager to give him the promotion. He may, as already suggested, appeal the unwelcome employment decision to a higher authority within the organization. The employee may also seek advisers who can help guide him to the most effective path of obtaining the promotion.

Sometimes when parties in conflict feel that they can make no further progress in a conflict without professional assistance, they proceed by hiring a lawyer who may then further escalate the dispute by taking it to the Federal Equal Employment Opportunity Commission or similar state agency. The decision to hire a lawyer is, in its own way, a distinct form of escalation.⁹⁴ Hiring a lawyer takes time, energy, and, frequently, money. It also demonstrates a serious commitment to achieving one’s stated goals. It is paramount for attorneys to appreciate, however, that when they are retained to represent a client in a conflict, they are entering into the

88. *Id.*

89. *See id.*

90. *Id.* at 91.

91. *Id.* at 91, 174.

92. *See id.* at 174.

93. *Id.* at 91.

94. *See id.* at 174.

middle of a dispute, not the beginning of one.⁹⁵ Lawsuits often are interpersonal disputes that have taken on a legal dimension, not legal disputes that have an interpersonal dimension.⁹⁶ To make good strategic decisions about the handling of a dispute, lawyers should have a sense of not just the facts and legal issues relevant to the dispute but also the interpersonal status of the dispute.

3. *The Lawyer's Role in Minimizing Conflict Escalation Cycles:
Early Intervention and Early Settlement*

It is not obvious to many attorneys that early settlement is a course of action that they should seriously consider. Attorneys are taught to assess the strength of disputes on a “full set” of facts instead of partial facts.⁹⁷ Why should they risk an erroneous assessment of a legal conflict by settling the dispute, perhaps for too little or too much, before substantial discovery has been conducted? Attorneys are also specifically guided to operate under the false and limiting belief that it is appropriate for most cases to postpone settlement until after all discovery is completed or, worse, until the eve of trial.⁹⁸ In his deservedly well-regarded law school text *Pretrial*, Professor Mauet says that “[w]hile a case can be settled at any time, settlement possibilities are almost always explored when a case nears the pretrial conference stage and a trial is just around the corner. Discovery will be complete at this point, and there is sufficient information to accurately assess the case.”⁹⁹ He relegated to a *footnote* the observation that “[o]bviously, settlement should be explored earlier as well, for instance just before or just after filing suit, or after the plaintiff’s deposition has been taken, when the costs both in terms of time delay and litigation expenses can be held down.”¹⁰⁰

With this background training, it is not surprising that attorneys are unaware, or do not fully appreciate, that the longer a conflict persists, the greater the likelihood is that it will expand, intensify, and transform in ways that will make its efficient resolution more difficult or impossible.¹⁰¹ Attorneys who are unaware of the principles of conflict escalation see

95. See THOMAS A. MAUET, *PRETRIAL* 4 (7th ed. 2008).

96. SULLIVAN ET AL., *supra* note 8, at 54 (stating that part of a lawyer’s skill is the “continuous translation of human conflicts into legal language”).

97. JULIE MACFARLANE, *THE NEW LAWYER: HOW SETTLEMENT IS TRANSFORMING THE PRACTICE OF LAW* 70–71 (2008).

98. MAUET, *supra* note 95, at 390–91.

99. *Id.* at 390.

100. *Id.* at 390 n.4.

101. Phillip M. Armstrong, *Why We Still Litigate*, 8 PEPP. DISP. RESOL. L.J. 379, 383–84 (2008) (claiming the lack of ADR education in law schools as one reason why lawyers overuse litigation).

little downside in continuing discovery, except for additional time and associated costs. They are not aware that an attempt to settle a conflict even a few months later will be more difficult than an attempt to settle it sooner.¹⁰² In fact, they believe the dispute will be easier to settle because the parties will have more complete information about the matter. But as hostilities increase, parties’ possessing more information simply means that they have more to fight about.

One common behavior in the conflict escalation cycle found in interactions between lawyers in both the litigation and transaction context is “repeatedly offer[ing] the same argument in support of a position [As a result,] the parties get nowhere but seem to be working feverishly [and become] polariz[ed] on issues.”¹⁰³ Escalation theory tells us that even when these coercive tactics are appropriate in the context of litigation or a transaction, they will tend to intensify the conflict because they will inspire the other side to find ways to gain the upper hand, retaliate, and defend in kind.¹⁰⁴ As parties exchange blow for blow, motion for motion, brief for brief, clause for clause, or letter for letter, the conflict becomes progressively intense and complex, building a momentum that is increasingly difficult to control.¹⁰⁵ Although this crescendo of conflict is more characteristic of litigation, it can also arise in the transactional context.

An understanding of competitive conflict escalation cycles instructs differently. The reality is that there are more costs involved in prolonged discovery than the cost of the discovery itself. The longer the discovery process, the greater the likelihood that the conflict will escalate in intensity and hostility and that the parties will become more polarized, making settlement take longer than anticipated, cost more than estimated, and become more difficult to achieve than anyone imagined.¹⁰⁶ They will commit greater resources and energy to “winning” and, in many cases, begin to demonize the other party.¹⁰⁷ The “demonization” of the other party often causes formerly reasonable parties to shift their primary goal from “doing well” in the litigation to hurting the other side at any cost.¹⁰⁸

102. See LULOFS & CAHN, *supra* note 46, at 81.

103. FOLGER ET AL., *supra* note 53, at 24.

104. *Id.* at 27.

105. *Id.* at 29.

106. See PRUITT & KIM, *supra* note 28, at 89–91.

107. *See id.* at 89–90.

108. *Id.* at 90. Closely associated with this concept is the concept of “irrational escalation of commitment,” where parties continue to fight in ways that hurt their self-

Thus, the attorney's original estimate of completing discovery in two months turns into a two-year process because he or she does not account for the increased contentiousness and inflexibility that prolonged litigation often begets. Conflict resolution is "most successful" when parties "focus on substantive issues."¹⁰⁹ The transformations discussed above, which increase in frequency and degree as the conflict proceeds, distract from the substantive issues and direct attention toward less productive paths.¹¹⁰ This makes it more difficult to resolve the dispute.¹¹¹

Dispute resolution pioneer and mediator Eric Green, who successfully mediated the multimillion dollar, highly contentious antitrust lawsuit between the United States and Microsoft in 2001, says that one of the keys to the successful use of ADR practice is that "attorneys and parties have to prepare *just enough* to make economic decisions in a minimal-risk setting."¹¹² Green goes on to say that "[s]ome of the biggest problems in the use of ADR are that cases settle too late, take too long to settle, and settle after too many dollars have been spent."¹¹³ A recent study of the cost of litigation involving major U.S. companies supports Eric Green's assessment that organizational lawyers are often overzealous, even wasteful, in their pursuit of discovery in litigation.¹¹⁴ In a survey of litigation costs and habits of approximately twenty Fortune 200 companies in 2008, the companies reported that in "major cases" that went to trial, they produced on average 4,980,441 documents in discovery of which on average only 4772 were marked as exhibits at trial.¹¹⁵ This means that only one document for every 1044 documents produced was used as a trial exhibit.

A judicious attorney understands the principles of conflict escalation and appreciates that there are countervailing considerations that favor settling a dispute as soon as practicable. Some disputes require an attorney to conduct complete discovery and significant motion practice, some require no formal discovery or motion practice at all, and many legal conflicts fall somewhere in between. In deciding the degree of discovery

interest. MAX H. BAZERMAN & MARGARET A. NEALE, *NEGOTIATING RATIONALLY* 9–15 (1992).

109. LULOFS & CAHN, *supra* note 46, at 93.

110. *See* PRUITT & KIM, *supra* note 28, at 89–91.

111. *Id.* at 89.

112. Lavinia E. Hall, *Eric Green: Finding Alternatives to Litigation in Business Disputes*, in *WHEN TALK WORKS: PROFILES OF MEDIATORS* 279, 281 (Deborah M. Kolb et al. eds., 2001) (emphasis added) (internal quotation marks omitted).

113. *Id.*

114. *See* LAWYERS FOR CIVIL RIGHTS ET AL., *LITIGATION COST SURVEY OF MAJOR COMPANIES 2–3* (2010), available at www.uscourts.gov/uscourts/RulesAndPolicies/rules/Duke%20Materials/Library/Litigation%20Cost%20Survey%20of%20Major%20Companies.pdf.

115. *Id.*

and pretrial procedure required in any legal conflict, the attorney must factor in not only what he or she is likely to accomplish from those activities but also the degree of escalation a prolonged litigation process might engender, which could unduly delay resolution or make it more difficult. Good professional judgment requires that a balance be struck between obtaining enough information and strategic advantage to resolve the matter successfully and dragging the parties down an unnecessarily adversarial path that will further polarize them and thwart an amicable resolution.

C. Productive Conflict Principles: The Path to Early Settlement

Although many attorneys would acknowledge that, in theory, early settlement is certainly best for the parties, attaining this result for clients in practice is a different question. The more challenging inquiry at the heart of this discussion is not whether early settlement is theoretically best but rather how one goes about achieving it. To maximize the opportunities to resolve conflicts early and minimize the risks of unnecessarily escalating conflicts, attorneys must know how to manage conflicts productively. What are the “productive conflict” techniques or principles that attorneys must understand to arrive at a fair, expedient, amicable, satisfying, and long-lasting agreement between parties? More importantly, are attorneys learning these techniques in law school?

If lawyers are going to be useful in their role as conflict manager on behalf of their clients, they will need to be educated in the principles of productive conflict management. Productive conflict is where the interpersonal interaction improves the quality of decisions and strengthens—or at least minimizes harm to—relationships.¹¹⁶ Productive conflict is often characterized by its focus on substantive issues, open dialogue, flexibility of the parties, and consideration of others’ legitimate needs and concerns.¹¹⁷ Productive conflict management skills are to collaborative dispute resolution processes, such as negotiation and mediation, as advocacy skills are to adjudicatory processes, such as arbitration and litigation. Conversely, destructive conflict is where the interpersonal

116. LULOFS & CAHN, *supra* note 46, at 16–17; see MICHAEL A. ROBERTO, WHY GREAT LEADERS DON’T TAKE YES FOR AN ANSWER: MANAGING FOR CONFLICT AND CONSENSUS 117–18 (2005).

117. See WILLIAM A. DONOHUE WITH ROBERT KOLT, MANAGING INTERPERSONAL CONFLICT 10 (1992).

interaction diminishes the quality of decisions and damages relationships.¹¹⁸ The behaviors that often characterize this form of conflict include personal verbal attacks, inflexibility, overcompetitiveness, and minimization of others' legitimate needs and concerns.¹¹⁹ Essentially, productive conflict and destructive conflict are opposite ends of the same spectrum. As destructive conflict increases, productive conflict decreases.

Although there are many principles and techniques to promote productive conflict and minimize destructive conflict, this Article will explore three distinct, but related, social science principles that promote productive conflict. The first is the principle of "interdependence of the parties," the second is the principle of "saving face," and the third is "maintaining flexibility" in the means by which a client's goals are achieved. Traditional law school education largely ignores, and even undermines, the law student's understanding of these principles by generally cultivating an attitude that the parties are separate, do not need each other in any way, and do not need to give any thought to how the other party will feel or react in response to their actions.¹²⁰ Consequently, relationships often become strained and damaged, sometimes irreparably, resulting in an escalation of conflict and a downward spiral in the relationships that make it difficult, or even impossible, to resolve the dispute amicably.¹²¹ With a background understanding of the fundamentals of interpersonal conflict management, however, lawyers will be better equipped to avoid the pitfalls that cause parties to become polarized and to promote productive conflict resolution.

1. Interdependence and the Law School Illusion of "I'll See You in Court!"

Law school education, to the extent that it overemphasizes a litigation-oriented method of study, supplants a fundamental conflict management principle commonly referred to as the interdependence of the parties. This principle holds that participants in conflicts—including legal conflicts—are interdependent in that the underlying needs and concerns that fuel the lawsuit will almost certainly be resolved by each party's consenting to give the other party something in exchange for settlement.¹²² In other words, the parties need each other to resolve the dispute.

118. *Id.*

119. *Id.* at 9–10.

120. Menkel-Meadow, *supra* note 13, at 907.

121. *See id.*

122. *See* FOLGER ET AL., *supra* note 53, at 58–59; LULOFS & CAHN, *supra* note 46, at 5; WILMOT & HOCKER, *supra* note 25, at 14.

Overemphasis on the case-dialogue method cultivates an illusion that most legal disputes are resolved through court or tribunal adjudication.¹²³

The rationale for this method of instruction, as discussed above, is that the law student learns proper analytical reasoning and to “think like a lawyer” in addition to the subject matter presented in each case.¹²⁴ The common pattern that characterizes law school case studies is where one litigant attempts to force his or her legal will upon the other by seeking relief from a court.¹²⁵ In almost all reported cases, there is a party who prevails in whole or in part.¹²⁶ There is a named winner and loser. Litigation is aptly analogized to war—“to the victor belong the spoils.”¹²⁷ It is a war with rules, and like war, participants obtain what they want through aggressive tactics and strategies, using briefs instead of bullets.

Although the case-method approach to legal education unquestionably creates and sharpens legal minds, it is oriented to adversarial and not collaborative processes.¹²⁸ Rarely are law students exposed to cases where the parties settle through a collaborative process prior to a ruling by a judge or jury. It would be no exaggeration to estimate that over 95% of all legal disputes studied in law school involve adjudication by courts and tribunals.¹²⁹ Yet in reality, once law students leave the sheltered environment of law school, they will find that the percentage of disputes

123. Robert W. Gordon, *The Geologic Strata of the Law School Curriculum*, 60 VAND. L. REV. 339, 341 (2007).

124. *Id.* at 342.

125. SULLIVAN ET AL., *supra* note 8, at 53–54.

126. See JAMES C. DUFF, ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: ANNUAL REPORT OF THE DIRECTOR 111 tbl.B-5 (2010), available at <http://www.uscourts.gov/uscourts/FederalCourts/AnnualReport/2010/images/annualReport2010.pdf> (stating 8.3% of those who appeal “win” by having their case reversed on the merits whereas in most other cases, the court affirms the lower court’s rulings).

127. This phrase was first coined by Senator William Learned Marcy in a Senate debate, defending President Andrew Jackson’s appointment of Martin Van Buren as ambassador to Great Britain. See 8 REG. DEB. 1309, 1325 (1833). See generally FREDERICK L. WHITMER, LITIGATION IS WAR: STRATEGY & TACTICS FOR THE LITIGATION BATTLEFIELD (2007) (analogizing litigation to all aspects of war, including offensive and defensive strategies, planning, techniques, and tactics). Whitmer’s text is described as “using the analogy that *litigation is war* to develop strategic principles . . . for the conduct of litigation for anyone involved in the commercial litigation process.” Description of *Litigation Is War*, WESTLAW STORE, <http://store.westlaw.com/litigation-war/141639/40606226/productdetail> (last visited Jan. 9, 2012). The book is loosely based on Carl von Clausewitz’s classic book *On War*. See generally CARL VON CLAUSEWITZ, ON WAR (Michael Howard & Peter Paret eds. & trans., 1976).

128. See SULLIVAN ET AL., *supra* note 8, at 51, 53–55.

129. See *id.* at 55–56; Rubin, *supra* note 10, at 649.

they handle through resolution by a tribunal is almost precisely the reverse of their law school experience. Perhaps only 5% of the disputes they will manage as an attorney will be resolved by a tribunal.¹³⁰ For litigants and lawyers involved in civil lawsuits, the question is not whether they will settle the dispute but rather *when* they will settle and for *how much*.

Law students' pervasive underexposure to disputes resolved through settlement in a traditional law school education creates the false impression that parties and counsel to a legal dispute are independent of each other. *Independent* in this context means that the respective parties do not need each other to satisfy their underlying desires or concerns that motivated the prosecution or defense of the lawsuit.¹³¹ The authors of *Educating Lawyers*—the evaluation of legal education by the Carnegie Foundation for the Advancement of Teaching—rightly observed that law students “learn from both what is said and what is left unsaid.”¹³²

Thus, law students are sent forth into the world often under the mistaken impression that employees suing their employers for unlawful discrimination will vindicate their rights in court! The vendor allegedly denied payment unjustly will obtain relief from the court! Attorneys, of course, sometimes do obtain relief for their clients from courts and other tribunals using adversarial methods. The advocacy and analytical abilities that attorneys use to win cases are essential lawyering skills that have not only helped clients achieve their goals but also advanced important societal goals.¹³³ But an overemphasis on the case-dialogue method can leave law students with the mistaken belief that the parties are independent because adjudication is the rule and settlement the exception, when the reverse is true. Under such a belief, neither party nor counsel perceives that cooperation from the other party and his or her counsel is needed to satisfy litigation goals.¹³⁴ Although going to trial is always a theoretical option in civil legal disputes, it is rarely a practical one for most litigants, including those with sufficient financial resources to afford the long,

130. See Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 459–61, 464 (2004).

131. See LULOFS & CAHN, *supra* note 46, at 81.

132. SULLIVAN ET AL., *supra* note 8, at 140.

133. Through litigation, lawyers have significantly advanced important rights of society at large. See, e.g., *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (ruling that segregation was unconstitutional). However, there is a movement to advance important civil rights in collaborative processes as well as adversarial processes. See, e.g., Jennifer Gerarda Brown, *Peacemaking in the Culture War Between Gay Rights and Religious Liberty*, 95 IOWA L. REV. 747, 749 (2010) (“Mediation offers a way out of the polarization that often characterizes public discourse about the interplay of religious faith and homosexuality.”).

134. See Menkel-Meadow, *supra* note 13, at 907.

costly journey. In over 90% of the lawsuits filed, the costs, time delay, and risk of total loss by adjudication do not outweigh the attractiveness of a settlement.¹³⁵

There are important reasons why parties to a lawsuit should appreciate that they are for all intents and purposes *interdependent*. The perception that their respective legal fates are bound together and controlled by one another has a profound effect on how well or poorly they treat each other in the litigation.¹³⁶ Parties and counsel who view themselves as largely *interdependent* tend to treat each other more civilly and professionally.¹³⁷ Participants in litigation who view themselves as *independent* are more likely to engage in and create destructive conflict interaction, which decreases their chances of doing well in the litigation or transaction.¹³⁸ The characteristics of destructive conflict that are most often applicable to legal disputes are personal attacks and inflexibility.¹³⁹ This form of behavior is highly injurious to effective conflict management and contributes to increased costs to clients.¹⁴⁰ This is not to say that attorneys

135. See Galanter, *supra* note 130, at 477–80, 517.

136. FOLGER ET AL., *supra* note 53, at 58–59 (citing MORTON DEUTSCH, *THE RESOLUTION OF CONFLICT: CONSTRUCTIVE AND DESTRUCTIVE PROCESSES* (1973)).

137. See WILMOT & HOCKER, *supra* note 25, at 13–14.

138. See *Krim v. First City Bancorp. of Tex. Inc.* (*In re First City Bancorp. of Tex. Inc.*), 282 F.3d 864, 866–67 (5th Cir. 2002); FOLGER ET AL., *supra* note 53, at 58–59. Some lawyers mistakenly believe that hostile behavior and personal attacks are just part of “great lawyer[ing].” Mark D. Fox & Michael L. Fox, *It’s No Joking Matter: Our Profession Requires Greater Civility and Respect*, N.Y. ST. B.A. J., Feb. 2009, at 10, 10.

139. See LULOFS & CAHN, *supra* note 46, at 81. A good example of this is the case of *In re First City Bancorp. of Texas Inc.*, 282 F.3d 864. In a class action suit against a Texas bank, plaintiffs’ counsel launched numerous personal verbal attacks on other attorneys in various stages of the litigation. *Id.* at 865–66. In a sampling of some of the more colorful personal attacks upon other attorneys, he called them “stooge,” “puppet,” “weak pussyfooting ‘deadhead,’” and “underling who graduated from a 29th tier law school.” *Id.* at 866. With regard to the chairman of the Texas bank, plaintiffs’ counsel hurled such choice characterizations as “hayseed” and “washed-up has been.” *Id.* In his appeal of the \$25,000 sanction imposed by the lower court, the lawyer trying to justify his behavior argued to the Fifth Circuit that “the statements he made were, for the most part, correct” and that “the court and the opposing attorneys caused his abusive conduct.” *Id.* at 867. Agreeing with the lower court’s finding that the lawyer’s behavior was “egregious, obnoxious, and insulting,” the Fifth Circuit affirmed the sanction. *Id.* at 866–67.

140. Arguably, the perceived independence from one another is, at least in part, one reason for the general decline in professional civility in the legal profession. A 1991 study conducted by the Seventh Circuit of 1300 attorneys found that 42% of them “felt civility was an issue.” Melissa S. Hung, *A Non-Trivial Pursuit: The California Attorney Guidelines of Civility and Professionalism*, 48 SANTA CLARA L. REV. 1127, 1130 (2008). Almost 70% of attorneys surveyed in a 2006 American Bar Association study reported

might not feign greater independence from the other parties than they believe is true as a way to increase negotiating leverage. Presenting a strong alternative to settlement, such as the position that your client will likely prevail at trial, is a legitimate and often effective negotiating tactic.¹⁴¹ The problem arises when attorneys, believing they have true independence from other parties, behave in offensive ways that undermine relationships that they will likely need before all is said and done.

2. *The Importance of Face-Saving and the Law School Ethic of “Say Uncle”*

The adversarial, litigation-oriented emphasis of a traditional law school education also gives law students the flawed understanding that their objective in legal disputes is to be the winner who takes all, bringing law students to a corollary perception—that it is the lawyer’s duty to bring the other side to its knees. In addition to overlooking the practical reality that the vast majority of cases are settled, the law school education largely ignores the interpersonal conflict challenges created by adversarial processes that operate to make the loser “say uncle.” This attitude lacks appreciation for another distinct social science principle in conflict management awareness skills called saving face.

The concept of saving face refers to a person’s desire to maintain a sense of self-worth and a positive public image.¹⁴² This public image is

that “lawyers have become less civil to each other over time.” Terry Votel, *Civility Among Lawyers and Judges*, BENCH & BAR OF MINN. (Feb. 16, 2011), <http://mnbenchbar.com/2011/02/civility-among-lawyers-and-judges/>; Stephanie Francis Ward, *Pulse of the Legal Profession*, A.B.A. J., Oct. 2007, at 30. The line between zealous advocacy and hostility is not a clear one, and even the most affable attorneys can occasionally lose their tempers in the highly stressful and competitive practice of law. There is, however, a significant percentage of attorneys who engage in verbally assaultive behavior because either they think it is not inappropriate or they see verbal attacks as a useful intimidation tactic designed to secure the best deal for their client. Allen K. Harris, *The Professionalism Crisis—The “Z” Words and Other Rambo Tactics: The Conference of Chief Justices’ Solution*, 53 S.C. L. REV. 549, 569–71 (2002).

141. See G. RICHARD SHELL, *BARGAINING FOR ADVANTAGE: NEGOTIATION STRATEGIES FOR REASONABLE PEOPLE* 101 (2d ed. 2006) (explaining that the more desirable one’s alternative to a negotiated agreement appears, the greater that negotiator’s power).

142. FOLGER ET AL., *supra* note 53, at 145. The ethical rules of professional conduct only minimally help to mitigate this situation. Although they require a minimum amount of professionalism, they set minimal and ambiguous standards that are difficult to follow and even more difficult to police. For example, Model Rule 1.2(d) requires that a lawyer not “counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent,” but this language leaves ample room for negative behavior. MODEL RULES OF PROF’L CONDUCT R. 1.2(d) (1983). Similarly, Model Rule 4.4 states that “a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person.” *Id.* R. 4.4. Under this rule, attorneys may rationalize that their bad behavior had some legitimate “substantial purpose” in the litigation, which is a low threshold to meet. In fact, many attorneys see their tactics as

known as face, a person’s “claim to be seen as a certain kind of person.”¹⁴³ Attorneys should understand the concept of face because “[t]he introduction of face issues into a conflict can escalate the severity of the conflict, making it very difficult for people to resolve the original issue.”¹⁴⁴ For all the reasons stated in Part II.C about the litigation-oriented nature of many law schools, attorneys often do not appreciate how aggressive tactics, such as intimidation, personal attacks, and threats, harden their opponents and prevent productive conflict.

There are two types of face: “positive face” and “negative face.”¹⁴⁵ Positive face refers to a person’s desire to be respected and to “maintain a favorable image.”¹⁴⁶ Negative face refers to a person’s desire to be free from intimidation and coercion.¹⁴⁷ When a party threatens another party’s positive or negative face, the threatened party employs defensive “face-saving” strategies to “protect or repair relational images.”¹⁴⁸ These face-saving strategies can take several forms, but all forms of face-saving become obstacles to effective conflict resolution.¹⁴⁹

Threats and intimidation obstruct productive conflict resolution because people will normally become intransigent and inflexible when faced with coercive tactics that cause them to lose face. They also become less willing to engage in collaboration and compromise.¹⁵⁰ Acquiescing to coercive tactics without at least a good fight triggers in most people a

beneficial, even essential, to winning their cases or doing well in negotiations. TAVRIS & ARONSON, *supra* note 30, at 13–17 (reviewing scientific literature relevant to cognitive dissonance theory in which it explores how people use self-justification behavior to excuse unethical behavior). Unfortunately, the idea that lawyers can be both zealous advocates and civil, even friendly, with their “adversary” is often unknown to many law students and lawyers.

143. FOLGER ET AL., *supra* note 53, at 145 (emphasis omitted).

144. LULOFS & CAHN, *supra* note 46, at 294. Although face-saving is always important, it takes on a heightened import in cross-cultural negotiations. See LEIGH L. THOMPSON, *THE MIND AND HEART OF THE NEGOTIATOR* 274 (4th ed. 2009). As lawyering becomes increasingly global, it becomes even more important for attorneys to understand the concept of face-saving. For an excellent discussion of skills that attorneys need to function cross-culturally, see Harold Abramson, *Outward Bound to Other Cultures: Seven Guidelines for U.S. Dispute Resolution Trainers*, 9 PEPP. DISP. RESOL. L.J. 437 (2009), which emphasizes, among other things, the importance of collaborative skills in cross-cultural negotiations.

145. LULOFS & CAHN, *supra* note 46, at 295.

146. FOLGER ET AL., *supra* note 53, at 147.

147. LULOFS & CAHN, *supra* note 46, at 295.

148. FOLGER ET AL., *supra* note 53, at 148 (emphasis omitted).

149. *See id.* at 153.

150. *See id.* at 152.

loss of self-esteem.¹⁵¹ In an effort to maintain—or enhance—self-worth, the normal response to coercive tactics is to hold one’s ground and fight back.¹⁵² If the conflict escalates, people’s resolve can become so rigid that, in the words of one researcher, they “often remain committed to a stand or solution even in light of convincing refutations, not because they still believe it is the best option but because they believe moving away from that position will harm their image.”¹⁵³ When people feel vulnerable and defensive, they are more likely to place “a higher value on consistency than on accuracy,” limiting their ability to adapt to new information.¹⁵⁴

Personal attacks such as name-calling, insults, and other forms of contempt also obstruct productive conflict resolution because a person will normally focus on revenge and retaliation rather than the substantive issues.¹⁵⁵ Revenge and retaliation are common face-saving strategies in response to embarrassment and humiliation that further complicate the dispute.¹⁵⁶ Revenge can even become an additional issue in the conflict.¹⁵⁷ A person’s desire for revenge can “become[] so central an issue that it swamps the importance of the tangible issues at stake and generates intense conflicts that can impede the progress toward agreement and increase substantially the cost of conflict resolution.”¹⁵⁸ Diminished time is spent trying to work through the substantive issues, and the growing hostility increases the chance of impasse. In addition, this behavior sets off a never-ending cycle of the parties’ attacking each other, adopting similar strategies that fuel the conflict.¹⁵⁹

Face-saving issues are particularly insidious because parties often are unaware of them. Not wanting to acknowledge a loss of face, the mind keeps the loss of face hidden while it simultaneously attempts to repair any damage through various face-saving strategies.¹⁶⁰ These strategies are sometimes believed to be related to the substantive issues, but they are really about self-esteem.¹⁶¹ For example, a spouse in divorce litigation may fight vehemently for a dining room set he never liked because he is

151. *Id.* at 148.

152. *Id.*

153. *Id.* at 164.

154. *Id.*

155. *Id.* at 162–63; LULOFS & CAHN, *supra* note 46, at 299.

156. LULOFS & CAHN, *supra* note 46, at 299–301.

157. *Id.* at 301.

158. WILMOT & HOCKER, *supra* note 25, at 77 (quoting Burt R. Brown, *Face-Saving and Face-Restoration in Negotiation*, in NEGOTIATIONS: SOCIAL-PSYCHOLOGICAL PERSPECTIVES 275, 275 (Daniel Druckman ed., 1977)) (internal quotation marks omitted).

159. *Id.* at 79 (stating that “causing another person to lose a sense of dignity and worth” can cause destructive conflict cycles).

160. FOLGER ET AL., *supra* note 53, at 153.

161. *Id.*

motivated by a desire to maintain a sense of control or dignity, not a desire for furniture.

The well-trained, conflict-competent attorney ideally appreciates face issues in promoting productive conflict and attempts always to protect and “give” face to the other party. First, the lawyer will refrain from overly manipulative tactics such as threats, personal attacks, and undue intimidation.¹⁶² Second, the lawyer will initially seek to guide clients, as a general rule, toward collaborative processes in resolving disputes rather than a procedural litigation route. As seen above, even well-managed, traditional adjudicatory processes that rely largely upon adversarial tactics, such as litigation and arbitration, create face issues. Finally, the conflict-competent lawyer will always attempt to minimize damage to the other party’s self-esteem and public image by using techniques designed to give or restore face.

There are several techniques to restore face. One such technique is simply to treat others with respect and good will.¹⁶³ A second technique for giving face is to listen and inquire about the other’s needs and concerns and to address them to the greatest extent possible.¹⁶⁴ These techniques target the party’s need to feel that the means by which the dispute is being resolved are fair.¹⁶⁵ These are sometimes called process needs.¹⁶⁶ Surprisingly, lawyers often overlook a party’s process needs and automatically, and erroneously, assume that the other party is concerned exclusively with outcomes. The third way to restore face is by apologizing.¹⁶⁷ “Apologies are a means of impression management used to restore or minimize damage done to one’s identity and stave off potential punishment from the person offended.”¹⁶⁸

A fourth technique for giving face is to state your preferences and not make demands or threats.¹⁶⁹ The adversarial nature of litigation inspires attorneys to threaten litigation or other negative consequences as a means to force the other party to acquiesce. This form of intimidation

162. WILMOT & HOCKER, *supra* note 25, at 79; *see* LULOFS & CAHN, *supra* note 46, at 294–96.

163. *See* WILMOT & HOCKER, *supra* note 25, at 81.

164. *Id.* at 82.

165. FOLGER ET AL., *supra* note 53, at 162.

166. Nancy A. Welsh, *Making Deal in Court-Connected Mediation: What’s Justice Got To Do with It?*, 79 WASH. U. L.Q. 787, 791–92 (2001).

167. LULOFS & CAHN, *supra* note 46, at 307.

168. *Id.*

169. *See* WILMOT & HOCKER, *supra* note 25, at 82.

often backfires and hardens the other party's resolve rather than weakens it.¹⁷⁰ Thus, stating a desired outcome or course of action as a preference, rather than a demand, makes one's desire known but does so in a way that does not appear to deprive the other party of his or her autonomy.¹⁷¹ For example, a less conflict-wise attorney might say, "If you don't pay my client \$100,000, we will see you in court." A lawyer more attuned to face issues and the problems they may cause in resolving a dispute might frame this same desire as follows: "We don't think going to trial is in anyone's best interest, but we are prepared to do so if it comes to that. Based on my assessment of the facts I have reviewed, my client is entitled to a minimum of \$100,000 to compensate him for injuries that we think your client caused. Is there something you think I'm not taking into consideration?" Both lawyers are communicating the same substantive message—they want a minimum of \$100,000 to settle the case—but the first lawyer is framing the message as a threat while the second lawyer is framing the message as a request.¹⁷² Although the message is the same in both instances, the response is likely to be different.

3. *Interest-Based Problem Solving and the Law School Illusion of "My Way or the Highway"*

Traditional law school education primarily teaches students to advocate a "position," legal or factual, or both, on behalf of a client. Positional thinking focuses on what a party wants in the dispute and seeks to use legal or factual arguments to support that position rather than addressing the underlying reasons for why the party wants it. Lawyers who view their work solely in terms of their legal "positions" engage in more black-and-white analysis and often are inflexible in collaborative processes, neglecting nonlegal facets of the dispute such as business impacts, relationship changes, or other personal needs.¹⁷³ Positional advocacy thwarts amicable resolutions because, unlike the adjudicative process, there is no one to decide who is right and who is wrong.¹⁷⁴ There is no

170. See LULOFS & CAHN, *supra* note 46, at 295.

171. WILMOT & HOCKER, *supra* note 25, at 82.

172. The way offers and statements are presented in negotiation is known as "framing." BAZERMAN & NEALE, *supra* note 108, at 31. The way the offer is framed can increase the likelihood of a favorable response from a negotiating counterpart. Russell Korobkin & Chris Guthrie, *Psychological Barriers to Litigation Settlement: An Experimental Approach*, 93 MICH. L. REV. 107, 130–35 (1994).

173. Menkel-Meadow, *supra* note 13, at 907.

174. THOMPSON, *supra* note 144, at 88. *Substantiation* is the technical term for the type of positional arguments commonly used by attorneys in negotiation. Substantiation has been shown to be a relatively ineffective strategy in collaborative negotiation processes because "[s]ubstantiation begets more substantiation." *Id.* (citing Laurie R.

judge. Accordingly, to be effective conflict managers in collaborative processes, lawyers must often look beyond the legal arguments and to the parties’ interests or underlying needs and concerns in shepherding conflict resolutions.¹⁷⁵ This is the conflict-resolution concept commonly known as interest-based solutions. Interest-based problem solving has received significant attention in academic literature and in law school elective ADR courses. But because it is such an essential concept to effective conflict management and is not yet universally taught to law students, it would be remiss not to discuss it here, at least briefly.¹⁷⁶

The distinction between the parties’ positions and their interests is easily overlooked.¹⁷⁷ Understanding this distinction, on balance, improves the quality of settlements and reduces acrimony. Positions are *what* a party wants and interests are *why* the party is taking that position.¹⁷⁸ Examples of positional statements are “give my client one million dollars in compensation for my client’s injuries”; “rehire my client”; and “stop using my client’s patented technology in your product.” Underlying these positional statements are the parties’ concerns and needs that the positions are designed to satisfy to a lesser or greater extent.¹⁷⁹ Parties’ concerns and needs are commonly referred to as their interests.¹⁸⁰ Thus, the interests underlying the statement “I want you to stop using my patented technology in your product” are, perhaps, the recognition of ownership and profits that naturally flow from it. Having the other party stop using the patented information is one solution—a rights-based solution—but not the only solution. Another potential solution, using an interest-based approach, would be to permit the other company to continue using the patents in its product for a price and with appropriate recognition of the patent holder. This satisfies one party’s need to use

Weingart et al., *Knowledge Matters: The Effect of Tactical Descriptions on Negotiation Behavior and Outcome*, 70 J. PERSONALITY & SOC. PSYCHOL. 1205, 1205–17 (1996)).

175. ROGER FISHER ET AL., *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* 4–7 (2d ed. 1991).

176. See, e.g., *id.* at 41–55; ROBERT H. MNOOKIN ET AL., *BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES* 11–43 (2000); Jim Hilbert, *Collaborative Lawyering: A Process for Interest-Based Negotiation*, 38 HOFSTRA L. REV. 1083, 1087 (2010) (“[T]he vast majority of negotiation and dispute resolution law school courses advocate for the use of interest-based negotiation for doing deals and resolving conflict.”).

177. See FISHER ET AL., *supra* note 175, at 40–41.

178. *Id.* at 44.

179. See *id.* at 42.

180. *Id.* at 40–41.

the technology and the other party's need to be recognized and compensated for its labors in inventing the technology.

Like the patent infringement example above, interest-based solutions often create joint gains by finding value through trades in the negotiation.¹⁸¹ A joint gain is defined as "an improvement from each party's point of view."¹⁸² A simple example of a joint gain in an otherwise positional-looking dispute would be for a defendant in a personal injury suit to agree to pay the plaintiff's settlement demand figure in exchange for allowing the defendant to pay it in monthly installments over one year instead of in one lump sum. Assuming that the plaintiff cares more about the amount of settlement than when it is paid and the defendant cares more about cash flow than the total amount paid, this deal is an improvement for both parties. Although interest-based solutions are not always possible, they should always be considered because they frequently are more beneficial to clients than rights-based solutions when the problem is viewed in its entirety, which includes looking at the legal, business, financial, relationship, and emotional aspects.¹⁸³

This collaborative approach requires flexibility from lawyers regarding the type of solutions that will satisfy their clients' concerns because to voluntarily resolve the dispute, the parties will need to find a solution that satisfies them both, at least minimally.¹⁸⁴ Conflict is productive when the parties remain flexible in their willingness to consider multiple potential solutions to "bridge the apparent incompatibility of positions."¹⁸⁵ Conversely, inflexibility is one of the most common causes of conflict escalation.¹⁸⁶

There are three principal advantages of using collaborative, interest-based processes. First, an amicable settlement is more likely because the very nature of the process is designed to consider what the other party minimally needs to resolve the dispute and then attempts to develop multiple ways to meet those needs.¹⁸⁷ The more potential solutions developed, especially ones designed to meet all parties' underlying needs, the more likely those solutions will be acceptable to all parties.¹⁸⁸ Second, the resolution processes are more efficient because they largely avoid acrimony, ego contests, and gamesmanship that can prolong disputes,

181. DAVID A. LAX & JAMES K. SEBENIUS, *THE MANAGER AS NEGOTIATOR: BARGAINING FOR COOPERATION AND COMPETITIVE GAIN* 32 (1986).

182. *Id.*

183. *See* THOMPSON, *supra* note 144, at 75–76.

184. *See* LULOFS & CAHN, *supra* note 46, at 17.

185. FOLGER ET AL., *supra* note 53, at 9.

186. *Id.* at 21.

187. FISHER ET AL., *supra* note 175, at 41–43.

188. *Id.* at 41–43, 51.

consequently lowering transactions costs.¹⁸⁹ Third, relationships are preserved because the process avoids many of the common “hard” bargaining tactics in positional bargaining, such as threats, demands, and deceptions.¹⁹⁰

Nevertheless, the collaborative, interest-based approach is antithetical to what students actually learn in law schools, unless students have had an ADR-related course. A recent survey of 651 law firm associates reported that 34.1% took negotiations courses in law school and only 21.7% took ADR skills courses.¹⁹¹ Further, an ongoing survey—by Sean Nolon, Director of Dispute Resolution Program and associate professor of law at Vermont Law School—of the 200 ABA-accredited law schools in the United States, 138 of which have responded so far, indicates only 10.9% of the schools require their students to take at least one nonlitigation dispute resolution course to graduate.¹⁹² The vast majority of law school is devoted to teaching students how to “win” legal battles through analytical and advocacy prowess. The “win-lose” attitude created by traditional law school education results in a “‘culture of adversarialism,’ with an emphasis on argument, debate, threats, hidden information, deception, lies, persuasion, declarations, and toughness.”¹⁹³ Although many of these forms of advocacy can be effective in court, assuming they are used appropriately and ethically, they are counterproductive when overused in collaborative processes, such as negotiating business deals and litigation settlements.¹⁹⁴ “[A]rguments for one’s own position or against the other’s position” are one of the most destructive strategies in obtaining interest-based, or “win-win,” agreements.¹⁹⁵ In fact, one of the hallmarks of destructive conflict interaction in collaborative processes is the participants’ “belief that one side must win and the other must lose.”¹⁹⁶

An excellent example of lawyer win-lose tunnel vision and inflexibility is demonstrated by a dispute over teacher assignments in an elementary

189. *See id.* at 4–6.

190. *Id.* at 6–7.

191. NAT’L ASS’N FOR LAW PLACEMENT, *supra* note 19, at 18 tbl.8.

192. Nolon, *supra* note 19.

193. Menkel-Meadow, *supra* note 13, at 907 (footnote omitted) (quoting Carrie Menkel-Meadow, *The Trouble with the Adversary System in a Postmodern, Multicultural World*, 38 WM. & MARY L. REV. 5, 11 (1996)).

194. THOMPSON, *supra* note 144, at 88.

195. *Id.*

196. FOLGER ET AL., *supra* note 53, at 9.

school.¹⁹⁷ Parents of first-grade students were dismayed to find at the opening of the school year that all of the first-grade African American students were assigned to the only African American teacher at the school.¹⁹⁸ In addition to the significant racial implications, the “teacher was thought by many parents to be the least qualified of the four first grade teachers.”¹⁹⁹ The community immediately polarized.²⁰⁰ African American parents met to discuss the matter separate from Caucasian parents, who also met to decide what course of action to take.²⁰¹ The teachers’ association became involved to ascertain whether the teacher’s legal rights had been violated as well.²⁰² Lawyers became involved, people started to demand their “rights,” and “[m]ore than one of the lawyers at least hinted at the possibility of litigation.”²⁰³ As tensions mounted, a school board member proposed an interest-based solution: no one would be reassigned, but “the schedules for the four [first-grade] classes would be realigned so that they would have a number of joint activities, both academic and other; and in-service support and training would be provided to all of the first grade teachers engaged in this experiment in collaborative teaching.”²⁰⁴ All interested parties accepted this “elegant” solution to a conflict that “had enormous potential to degenerate into litigation that might have destroyed the community.”²⁰⁵ A board member who experienced these events firsthand, and who also happened to be a lawyer, recounted his “disappoint[ment] that none of the lawyers for any of the interested parties had proposed a solution other than that to which their clients were entitled.”²⁰⁶ He also lamented that none of the lawyers “even suggested a process by which the interested parties could try to work out a solution that might satisfy the needs of all.”²⁰⁷ This example of lawyer inflexibility and rights-based thinking is illustrative of a systemic problem in legal education (and lawyering) where students receive little or no required education in interpersonal conflict management or collaborative processes.²⁰⁸

197. Alan M. Lerner, *Law & Lawyering in the Work Place: Building Better Lawyers by Teaching Students To Exercise Critical Judgment as Creative Problem Solvers*, 32 AKRON L. REV. 107, 107–08 (1999).

198. *Id.* at 107.

199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.*

203. *Id.* at 108.

204. *Id.*

205. *Id.* at 107–08.

206. *Id.* at 108.

207. *Id.*

208. Mediator Eric Green provides another useful example of a collaborative, interest-based process in a contentious patent infringement matter, *Telecredit Inc. v.*

4. *The Lawyer’s Role in Promoting Productive Conflict*

With a proper understanding of various social science principles of interpersonal conflict, lawyers are in an ideal position to promote productive conflict in the disputes they manage for their clients. They can accomplish this in various ways. First, they can use interpersonal conflict management skills to manage conflict directly themselves. They can also coach clients to manage the process more productively. Moreover, by improving their effectiveness as professional conflict managers, they will also be better able to manage conflicts that arise with clients and colleagues, which are also part of every lawyer’s professional experience. Productive conflict practices improve the quality of decisions, strengthen relationships, and increase productivity within the organization.²⁰⁹ In promoting productive conflict, the role of the lawyer is to look beyond the legal issues and adversarial processes to appreciate the social science-based human dynamics of the parties. It is in this light that the best solutions are uncovered and amicable settlement is more consistently and efficiently obtained.

The interpersonal conflict management principles discussed above are only illustrative of the types of knowledge lawyers need to successfully navigate the conflicts that they will encounter in their professional lives, but which law schools largely ignore. Other social science principles, of which lawyers should be acquainted, are significantly greater and beyond the scope of this Article. Moreover, even law students who take ADR courses, such as Negotiation and Mediation, may not be taught many of

TRW, Inc., No. CV 74-1127-RF (C.D. Cal. 1977), he handled as a young attorney. Hall, *supra* note 112, at 279. Green reports that the litigation had become “financially and personally onerous for all the parties . . . [and] so acrimonious that junior lawyers and paralegals researching documents in opposing counsels’ offices were no longer even allowed coffee from the firms’ coffee pots.” *Id.* To break the costly and destructive cycle of conflict that had already cost the parties hundreds of thousands of dollars in litigation expenses, the parties agreed to an informal “‘information exchange’ that would take place in front of high-level corporate management and a neutral advisor.” *Id.* at 280. After the parties presented their respective arguments to chief executives from each party and the neutral, the chief executives met to discuss possible settlement. *Id.* They reached a settlement within an hour. *Id.* The settlement provided for TRW to obtain a license from Telecredit to use the patent in exchange for a mutually acceptable licensing fee “with credits to be granted based on TRW’s legal fees in the case, which exactly matched the licensing figure.” *Id.* This process later became known as a “mini-trial,” and one side estimated that it cost the parties about \$25,000 but saved them more than \$1 million in anticipated legal fees. *Id.*

209. See *infra* Part II.C.

the most important social science principles if the course is taught stressing legal processes.

A multifaceted and multidisciplinary approach to problem solving, in contrast to a highly legalistic approach, is proved to be highly beneficial to cost-conscious clients and thus an approach that law students should embrace and learn.²¹⁰ Indeed, perhaps the best evidence of the costs of mismanaged conflict to an organization is the savings benefits reaped by proactive organizations that effectively implement quality conflict management programs. In the next Part, this Article will explore several examples of such organizations as further proof that collaborative dispute resolution efforts are almost always more cost effective for clients in the long run.

III. LESSONS FROM ORGANIZATIONAL CONFLICT MANAGEMENT PROGRAMS

An increasing number of organizations are developing conflict management programs with a proactive strategic focus. These organizations are enjoying increased productivity and decreased costs.²¹¹ Although the details of these programs vary among organizations, one common denominator is that they all recognize that effective problem solving requires that lawyers view client problems broadly by considering the client's business concerns and relationships as well as the client's legal issues.²¹² They also incorporate a variety of the social science principles

210. SULLIVAN ET AL., *supra* note 8, at 77 (stating that the “narrow and highly abstract range of vision” that an overemphasis on the case-dialogue approach promotes “can have a corrosive effect on the development of the full range of understanding necessary for a competent and responsible legal professional”).

211. See, e.g., Phillip M. Armstrong, *Georgia-Pacific's ADR Program: A Critical Review After 10 Years*, DISP. RESOL. J., May–July 2005, at 19, 19–20; Ashby Jones, *House Calls*, CORP. COUNS., Oct. 2004, at 88, 88–90.

212. A 2003 landmark study of the American Arbitration Association (AAA) that focused specifically on the activities and role of legal departments within organizations and their dispute resolution practices found that organizations that viewed disputes as multidimensional business problems and not merely narrow legal problems enjoyed significant economic and noneconomic benefits. AM. ARBITRATION ASS'N, DISPUTE-WISE BUSINESS MANAGEMENT: IMPROVING ECONOMIC AND NON-ECONOMIC OUTCOMES IN MANAGING BUSINESS CONFLICTS 3, 8 (2006), available at <http://www.adr.org/si.asp?id=4124>. The study explained that they have “a willingness to take a more global view of the full spectrum of an organization's disputes—addressing each of them in relation to the other disputes in the portfolio with an overall goal of minimizing risk, cost, time spent, and resources expended, while preserving important business relationships.” *Id.* at 4. Under this approach, “winning” is determined not by the number of court victories but rather by “how well the organization manages . . . the overall total economic and non-economic impact . . . of disputes it faces across all facets of its business.” *Id.* at 3 (emphasis added). The most dispute-wise companies report having “stronger relationships with customers, suppliers, employees, and partners, describing these relationships as

examined in Part II above to varying degrees and in different ways. This Article will now take a closer look at four organizations with an eye toward pulling out lessons that might be relevant to lawyers and, ultimately, the law school curriculum. The following case studies are intended to illuminate a path for more efficient ways to solve disputes, both organizational and otherwise, and to provide a context for the reassessment of the case-dialogue instruction.

These four organizations are Toro, Inc., Georgia-Pacific, the University of Michigan Health System (the Health System), and the U.S. Postal Service’s REDRESS mediation program (REDRESS). The first two of these programs—Toro and Georgia-Pacific—have goals similar to that of traditional litigation, which are simply to resolve the dispute as quickly, justly, and cost effectively as possible. However, the latter two—the Health System and REDRESS—have goals that are fundamentally different from simply resolving disputes, which are to learn from disputes so that transformations and improvements in operations and relationships can be made going forward.

A. *The Early Case Assessment Strategy*

In Part II.B, this Article explained how the magnetic pull of conflict escalation cycles makes a strong case for early assessment and settlement of disputes. Early case assessment programs are among the fastest growing organizational conflict management strategies because they provide significant cost savings and control over disputes. A fundamental strategy of these programs is to quickly gather sufficient information about the dispute so that the parties can pursue settlement as soon as reasonably possible, often within weeks or months of the incident. Implicit in these early case assessment programs is recognition of the importance of addressing the dispute at the beginning of the competitive conflict escalation cycle, thereby avoiding negative transformations in the parties’ attitudes and perspectives, which often characterize prolonged interpersonal

excellent/very good.” *Id.* at 8. The most dispute-wise organizations “experience lower legal department budgets . . . [and] are much less likely to describe their departments as ‘lean’ or ‘stretched to the limit.’” *Id.* The price/earnings ratios “for the ‘most dispute-wise’ companies average[] 28% higher than the mean for all publicly-held companies in th[e] survey and 68% higher than the mean for companies in the ‘least dispute-wise’ category.” *Id.*

conflict.²¹³ Litigation costs are thus avoided, which can be significant because they “are often two or three times greater than the settlements themselves.”²¹⁴ An effective method to reduce the high transactional costs of conflict is reducing the length of the conflict, and the simplest way to do this is to avoid litigation whenever possible.²¹⁵

Settling disputes before litigation not only minimizes disputing time, thus saving money, but also affords clients maximum control over the dispute resolution process.²¹⁶ Once a dispute enters litigation, it is constrained by court rules and subject to court supervision that limits clients’ flexibility.²¹⁷ Outside of litigation, clients maintain greater control over information sharing, which allows parties to interact in a less adversarial atmosphere.²¹⁸ Obviously, a degree of cooperation is required among the parties to accomplish early settlement, but when there is so much value to be gained, parties are motivated to cooperate.

Two organizations whose early settlement programs are worthy of review are Toro, Inc. and Georgia-Pacific because they have been quite successful and willing to share information publicly about their experiences.²¹⁹ They provide solid examples of programs that avoid the classic problem of competitive conflict escalation cycle in the traditional adversarial context. Both programs also incorporate features that help to promote productive conflict in the process of managing disputes. The primary goal of each of these organization’s programs is still traditional in nature, which is to settle the dispute as quickly and cost effectively as possible.

1. *Toro, Inc.*

Toro, Inc. tells a remarkable success story about the effective implementation of conflict management strategies. Toro is a multinational company that sells landscaping products and services, such

213. See, e.g., Armstrong, *supra* note 211, at 19–21; Jones, *supra* note 211, at 93, 95.

214. DAVID B. LIPSKY ET AL., EMERGING SYSTEMS FOR MANAGING WORKPLACE CONFLICT: LESSONS FROM AMERICAN CORPORATIONS FOR MANAGERS AND DISPUTE RESOLUTION PROFESSIONALS 77 (2003).

215. See, e.g., Jones, *supra* note 211, at 90.

216. LAURENCE BOULLE ET AL., MEDIATION: SKILLS AND TECHNIQUES 3 (2008).

217. *Id.*

218. *Id.* at 3–4.

219. Other prominent organizations that have instituted early settlement programs are Johnson & Johnson, DuPont, and General Electric, each boasting significant benefits. Jones, *supra* note 211, at 90. Most organizations are not as transparent as Toro, Inc. about the costs savings these early settlement programs provide. Part of the reluctance to share this information may be that it is a form of the organization’s intellectual property that allows the organization to operate more efficiently.

as lawnmowers and sprinkler systems, and also provides landscaping services for golf courses and sports fields.²²⁰ With 4700 employees spread across eighty countries, it earns over \$1.7 billion in annual revenue.²²¹ In 1991, Toro adopted an early settlement assessment program that was, in part, motivated by a loss at trial in which a jury awarded \$1,000,000 to a Florida man who was badly burned when a Toro lawnmower he was operating exploded.²²² Prior to this verdict, Toro had managed litigation according to a traditional aggressive litigation model.²²³ However, Toro’s head of Product Integrity, Andrew Byers, became disillusioned with Toro’s “scorched-earth” litigation policy.²²⁴ Under an aggressive litigation policy, he said, “[o]ur expenses were going up, our caseloads were growing, and we had lost any ability to predict the outcomes of the cases.”²²⁵ Byers began working with Toro’s legal department to shift the company’s approach from an aggressive litigation strategy to an aggressive settlement strategy.²²⁶ The company estimates that this new settlement strategy saved it over \$100 million in legal costs and claimant compensation between the years 1991 and 2005.²²⁷

One key aspect of Toro’s success is its policy of early settlement of claims. “Within days” of receiving word that a customer has been injured using Toro equipment, Toro sets up an in-person meeting with injured customers at their homes, even if the customers have not filed a claim.²²⁸ The purpose of the meeting is to investigate the injury and assess the potential for early settlement.²²⁹ Paralegals attend these meetings, and sometimes they bring along a Toro engineer to help with any technical aspects of the accident.²³⁰ The paralegals have authority in the “mid five figures” to settle claims on the spot.²³¹ Toro is able to settle approximately

220. *Corporate Fact Sheet*, TORO, http://pressroom.toro.com/fact_sheet.pdf (last visited Jan. 9, 2012).

221. *Id.*

222. Jones, *supra* note 211, at 91, 93; *see also* Miguel A. Olivella Jr., *Toro’s Early Intervention Program, After Six Years, Has Saved \$50M*, 17 *ALTERNATIVES TO HIGH COST LITIG.* 65, 65 (1999) (providing a measurement of Toro’s legal costs before and after implementing the early settlement program).

223. *See, e.g.*, Jones, *supra* note 211, at 91, 93.

224. *Id.*

225. *Id.* at 93 (internal quotation marks omitted).

226. *Id.* at 90, 93.

227. *Id.* at 90.

228. *Id.* at 93.

229. *Id.* at 93, 95.

230. *Id.* at 88.

231. *Id.* at 95.

70% of the injury-related complaints and claims at this meeting.²³² Most of the 30% of claims that are not settled by the paralegals within weeks of the injury are referred to mediation.²³³ Toro then retains outside counsel, who understands and embraces Toro's aggressive settlement strategy, to act as its advocate in these mediations.²³⁴ Through mediation, Toro disposes of almost all of the remaining claims.²³⁵ The few remaining claims that have not been resolved through mediation are dismissed through summary proceedings.²³⁶

Another key characteristic of Toro's early settlement program is the emphasis on empathy and customer satisfaction. For the initial meeting in the customer's home, Toro sends one or two paralegals who are highly adept at building rapport and putting people at ease.²³⁷ Lawyers are not involved, and the Toro representatives make a point of emphasizing that they are not lawyers.²³⁸ They dress casually in polo shirts and khaki pants.²³⁹ In the casual setting of the customer's home, often over coffee, the paralegal listens to the customer's concerns and expresses sympathy and regret over the injury.²⁴⁰ They are particularly attentive to the concerns and needs of customers and their families, who are typically still emotional about the injury.²⁴¹ One of Toro's paralegals, Carol Kelly, who regularly participates in these meetings, says that "[w]e understand that coming to terms with anger or grief is part of the healing process, and it also happens to be helpful in resolving cases."²⁴²

Toro is also flexible in settling cases, adopting a willingness to settle even weak claims that the company believes have little chance of success in court.²⁴³ A claim filed by retired telephone engineer and Toro customer James Nolan illustrates this strategy.²⁴⁴ While Nolan was hosing down the underside of a running Toro lawnmower, his index finger was "smashed" by a lug nut that shot out of the mower and ricocheted off the ground.²⁴⁵ Nolan wrote an angry letter to Toro alleging that the lawnmower was improperly designed and threatening to sue.²⁴⁶ Within a week, Toro

232. *Id.*

233. *Id.*

234. *Id.*

235. *Id.*

236. *Id.*

237. *Id.* at 93, 95.

238. *Id.* at 93.

239. *Id.*

240. *Id.* at 93, 95.

241. *Id.* at 95.

242. *Id.* (internal quotation marks omitted).

243. *Id.* at 97.

244. *Id.* at 88.

245. *Id.*

246. *Id.*

paralegal Carol Kelly arranged for a Toro engineer to accompany her to a meeting with Nolan at his home.²⁴⁷ At the meeting, she listened to his account of the accident, expressed sympathy for his injury, and inspected the mower.²⁴⁸ She explained to Nolan that he had improperly used the mower by cleaning it while it was running.²⁴⁹ Even though she thought that Toro could easily defend the claim in court, she settled the claim by giving Nolan a few thousand dollars and a new mower in exchange for a full release.²⁵⁰ Nolan later said that his relationship with Toro went “from bad to wonderful” and in a note thanked Carol Kelly.²⁵¹ In managing the conflict in this way, Toro not only avoided potentially protracted litigation and its associated costs but also retained a customer.

Toro has enjoyed significant financial savings in its litigation expenses since adopting its early settlement program. Toro’s average cost per claim dropped from \$115,000 in 1991 to \$35,000 in 2005.²⁵² Initial critics of the program who warned that an early settlement policy would invite a flood of frivolous litigation are surprised to hear that the number of Toro’s claims has also decreased.²⁵³ In the five-year period before implementing the new settlement policy, Toro received 640 injury-related claims.²⁵⁴ After implementing the new policy, the number of injury-related claims in the next five-year period from 1991 to 1996 dropped to 536 claims and dropped again in the next five-year period from 1996 to 2001 to 404 claims.²⁵⁵ In total, comparing presettlement-policy costs with postsettlement-policy costs, Toro estimates that it saved \$100 million between 1991 and mid-2005.²⁵⁶ This estimate, of course, does not take into account revenues it continues to earn from customers like James Nolan, whom the company was able to retain through early settlement and sympathetic treatment, as opposed to the relationship-alienating process of protracted litigation.²⁵⁷

247. *Id.*

248. *Id.*

249. *Id.*

250. *Id.*

251. *Id.* (internal quotation marks omitted).

252. *Id.* at 90.

253. *Id.* at 91, 95, 97.

254. *Id.* at 91.

255. *Id.*

256. *Id.* at 90.

257. *See generally* LANDE, *supra* note 51, at 54 (explaining the benefits of building collegial relationships with opposing lawyers).

Toro's early settlement program is successful because it incorporates three important interpersonal conflict management principles discussed in Part II: early intervention, face-saving, and flexibility. Responding "within days" to its customer complaints and scheduling in-person meetings with complainants within weeks of the incident allow Toro to deal with the conflict at the beginning of the conflict escalation cycle when parties are more likely to be flexible and substantively oriented. The likelihood of parties' developing lasting negative perceptions and attitudes about the company is also diminished by early settlement. A customer like James Nolan would likely not be favorably disposed to Toro after a year of contentious litigation even if that customer were satisfied with any ultimate settlement. Toro's program also promotes face-saving because timely responses to complaints are a means of demonstrating respect for the parties and their claims regardless of whether those claims are valid. In addition, in-person meetings allow the parties to "feel included, approved of, and respected."²⁵⁸ The Toro settlement paralegals provide one of the most powerful forms of face-saving by sympathetically listening to customer concerns and needs. Finally, Toro's willingness to settle even questionable claims demonstrates a flexibility that has enabled it to avoid costly litigation expenses in most of its disputes. It is wise to consider the transactional cost of litigating a dispute and weigh that cost against other important considerations such as precedent setting and the likelihood of success.

2. *Georgia-Pacific*

In 1995 Georgia-Pacific, a leading manufacturer of paper and packaging products, launched a pilot program involving a "problem-solving approach" to managing its civil disputes as a way of avoiding the undue expenses of protracted litigation.²⁵⁹ It started with a few matters but has since grown dramatically. Between 1995 and 2004, the company estimates that its early settlement program saved the company \$32,780,000.²⁶⁰

Prior to the implementation of the new program, Georgia-Pacific's approach was like those of Toro and many other large, well-funded organizations.²⁶¹ The company would pursue claim resolution through a process involving outside counsel, lawsuits, and discovery proceedings

258. WILMOT & HOCKER, *supra* note 25, at 82.

259. Armstrong, *supra* note 211, at 20.

260. *See id.* Georgia-Pacific has over 40,000 employees spread across 300 facilities in North America, South America, and Europe. *About Us: Company Overview*, GEORGIA-PACIFIC, <http://www.gp.com/aboutus/companyoverview/index.html> (last visited Jan. 9, 2012).

261. Armstrong, *supra* note 211, at 19–20.

that often led them right up to trial before settlement would be achieved.²⁶² Speaking about the previous policy, Georgia-Pacific’s vice president and general counsel stated: “In the old days . . . we might have spent \$100,000 [in legal fees and other costs] and taken two or three years to settle a case that probably could have been resolved for half that amount shortly after the suit was filed.”²⁶³ He went on to say, “We might have felt justified in defending the case, but after it was clear the other side had some legitimate claims, the economics made no sense at all.”²⁶⁴

Assessing whether a claim is “legitimate” is a key feature of Georgia-Pacific’s early settlement program. Both Georgia-Pacific and Toro adhere to an early settlement strategy, but Georgia-Pacific is more selective in qualifying cases for this approach. Georgia-Pacific will not include a case in its early settlement program if the company has been named “because it has a deep pocket” or if the company believes its product has “had no role in the . . . damages alleged.”²⁶⁵ It will typically choose traditional litigation if “an overriding principle or precedent is at stake” or “where the company believes that the case will open the floodgates to frivolous claims.”²⁶⁶ For those cases selected for the early settlement program, Georgia-Pacific tries to settle them within sixty to ninety days and well before a party initiates formal and costly discovery.²⁶⁷ If direct negotiation fails, the company relies primarily on mediation.²⁶⁸ Between 1995 and 2004, the company selected, on average, fifty-five cases per year with savings of \$56,000 per claim, which yielded over \$3 million in savings per year.²⁶⁹ The argument that employing anything less than full-blown, aggressive litigation would “open the floodgates of frivolous

262. *Id.* at 20.

263. Phillip M. Armstrong, *Case Study: Georgia-Pacific’s Aggressive Use of Early Case Evaluation and ADR*, ACCA DOCKET, Nov./Dec. 1998, at 42, 47–48, available at <http://www.agc.net/docs/s06-004.pdf> (alteration in original) (internal quotation marks omitted).

264. *Id.* at 48 (internal quotation marks omitted).

265. Armstrong, *supra* note 211, at 20.

266. *Id.* Interestingly, the company has found that no one type of case is less suitable for early settlement or other forms of ADR, such as mediation, than any other type of case. *Id.* at 21. For example, shortly after the program’s incarnation, the company presumed that personal injury actions were “poor candidates” for the program. *Id.* As this proved to be false, now “virtually all lawsuits or claims undergo an early case assessment and ADR analysis,” but only claims deemed suitable proceed into the program. *Id.*

267. *Id.* at 20.

268. *See id.* at 21.

269. *See id.* at 20.

litigation” was a concern expressed by Georgia-Pacific’s management when it first contemplated initiating the early settlement program.²⁷⁰ Although the company has not released specific data, it has said that its experience with early settlement has been “just the opposite. The program did not invite a host of new lawsuits.”²⁷¹

It is this kind of misunderstanding of the actual consequences of using early settlement and ADR that motivates Georgia-Pacific to continually educate its management and lawyers about its successful program and the benefits of ADR.²⁷² Its experience is that although “most law schools now offer ADR courses,” Georgia-Pacific’s lawyers are frequently unfamiliar with the process and benefits of ADR because ADR courses “are seldom part of the required curriculum.”²⁷³ Also, because of turnover, Georgia-Pacific believes new business managers need to be educated about ADR and “existing managers must be periodically reminded of why ADR works and why it is good for the company.”²⁷⁴

Finally, Georgia-Pacific’s commitment to early settlement and mediation is further bolstered by its practice of using a dispute resolution clause in its contracts.²⁷⁵ Its dispute resolution clause requires the contracting parties to meet at least twice to attempt to negotiate the dispute “in good faith” before suit may be filed and provides a voluntary option to mediate the dispute if the direct negotiations between the parties fail.²⁷⁶ The first round of direct negotiations is between “managers” who “will make every effort to meet as soon as reasonably possible at a mutually agreed time and place.”²⁷⁷ If the managers cannot resolve the dispute “within twenty days of their first meeting,” they must refer the dispute to “Senior Executives *who do not have direct responsibility* for the administration of th[e] Agreement.”²⁷⁸ The senior executives are required to meet to discuss the dispute “within fourteen days of the end of the twenty-day period.”²⁷⁹ If the matter has not been resolved within thirty days of the executives’ first meeting, the matter goes to mediation as long as both parties agree.²⁸⁰ If the matter is not settled at mediation “within thirty days of the commencement of such procedure . . . , either

270. *Id.*

271. *Id.* at 21.

272. *Id.* at 20.

273. *Id.*

274. *Id.*

275. *Id.*

276. *Id.* at 21.

277. *Id.*

278. *Id.* (emphasis added).

279. *Id.*

280. *Id.*

party may initiate litigation or otherwise pursue whatever remedies may be available to such party.”²⁸¹

Georgia-Pacific’s conflict management program demonstrates that an organization can be selective in the disputes it chooses to target for early settlement and still realize significant financial savings. But there are two additional points this case study raises that are relevant to this Article’s inquiry. First, management recognized the need for an ongoing education process for managers and lawyers regarding the benefits of ADR processes so that they would fully embrace the culture of conflict resolution that the company sought to cultivate. This is a point law schools should heed as more and more organizations rely on conflict management systems to enhance the efficiency of their organizations. Second, Georgia-Pacific incorporates a dispute resolution clause in its contracts that specifically requires the parties to use collaborative processes to settle any dispute before commencing litigation. This demonstrates a wise, proactive conflict management strategy that addresses the possibility of a dispute and positions it for early settlement while the parties’ relationship is amicable. Once a dispute arises, parties are often reluctant to be the first to suggest settlement for fear of looking weak and thus losing face. Establishing a predispute contractual settlement policy eliminates this obstacle to early settlement discussions. The clause is also notable because it excludes arbitration, an adversarial process, the cost of which can be considerable.²⁸²

B. The Transformation Through Productive Conflict Strategy

The next two organizations whose early settlement programs are worthy of review are the Health System and REDRESS. These programs are instructive on how organizations can achieve transformative results by implementing a program that looks deeper into the organization to examine what factors within its structure, operations, and relationships are giving rise to disputes. These programs seek success through the healing of the underlying issues that are giving rise to the conflict rather than through resolving each conflict on a case-by-case basis. Like Toro and Georgia-Pacific, these organizations incorporate various social

281. Georgia-Pacific’s initial multistep dispute resolution clause provided for arbitration, but arbitration, although sometimes still used, is no longer required by the clause. *Id.* at 20.

282. *Id.* at 20–21.

science principles with a focus on avoiding conflict escalation cycles through early intervention in disputes and on cultivating productive conflict. By contrast, however, instead of seeking out ways to simply settle disputes quickly and cheaply, the programs actively seek out ways to transform the organization into a more highly functioning organism. This approach views conflict in a more highly evolved manner. It is not simply a problem to be carefully and sensitively diffused and “settled.” Rather, it is an opportunity for growth for one or more parties to the conflict that will lead to a more harmonious organizational environment moving forward.

1. *The University of Michigan Health System*

Organizational conflict, when managed appropriately, can substantively improve an organization’s product and the way it delivers its service.²⁸³ Lawyers are frequently trained to see conflicts as wholly undesirable and attack and extinguish them.²⁸⁴ But conflicts can also be the “active ingredient of interpersonal, social, and organizational creativity and growth.”²⁸⁵ With the view that conflict could also strengthen an organization, the University of Michigan Health System adopted a more collaborative approach in dealing with medical negligence claims against the organization and its staff. In doing so, it has saved tens of millions of dollars, has undoubtedly saved many lives, and has sparked a revolution in the way in which the medical insurance industry handles medical negligence claims.²⁸⁶

In 1999, the Health System, with the assistance of its attorneys, transformed the way the organization addressed medical negligence

283. DONOHUE WITH KOLT, *supra* note 117, at 2–3.

284. Jonathan M. Hyman, *Four Ways of Looking at a Lawsuit: How Lawyers Can Use the Cognitive Frameworks of Mediation*, 34 WASH. U. J.L. & POL’Y 11, 42–49 (2010).

285. BOULLE ET AL., *supra* note 216, at 141.

286. Richard C. Boothman et al., *A Better Approach to Medical Malpractice Claims? The University of Michigan Experience*, J. HEALTH & LIFE SCI. L., Jan. 2009, at 125, 137; SAM TERZICH, ESIS, ACE PROGRESS REPORT: SHOULD HEALTHCARE RISK MANAGERS FOCUS ON IMPROVING PATIENT SAFETY, OR ON SUPPORTING THE CLAIM PROCESS? THEY ACTUALLY NEED TO DO BOTH 2 (2010), available at <http://www2.esis.com/NR/rdonlyres/E2D0AAAB-A851-4F23-BF23-256EA45C4D71/0/healthcareriskmanagersclaimprocess.pdf>. The cost savings, organizational improvement, and ethical benefit of the “accountability and transparency” approach used by the Health System have inspired other medical organizations and medical insurers to adopt a similar approach with similar success. See Boothman et al., *supra*, at 146. These institutions include Kaiser Permanente, Children’s Hospital & Clinic of Minnesota, Catholic Healthcare West, and Johns Hopkins. *Id.* at 146–47. Some have reposted equally impressive success, showing a reduction of claims payments by up to 40% within a few years of implementing a more collaborative approach to conflict management. *Id.* at 147.

claims. It rejected the traditional “deny and defend” strategy used by almost all other health care systems in dealing with medical negligence claims at the time and embraced the strategy of becoming conflict managers.²⁸⁷ Embracing the early settlement philosophy and customer-centered approach explained above, the Health System now strives to learn from the claims it encounters so that it can minimize recurrences of similar claims.²⁸⁸

As with most organizational change, the transformation of the Health System started with the questioning of basic, widely held beliefs among medical professionals and insurers that turned out to be erroneous.²⁸⁹ The erroneous assumptions in this instance were that plaintiffs in medical negligence cases are predominantly concerned with the unwanted medical outcome or are “opportunists trying to squeeze every dime they can from the system.”²⁹⁰ Operating under misguided assumptions, the common strategy among health care systems and insurers in addressing medical negligence claims was, and still is, deny and defend.²⁹¹ A deny-and-defend strategy “urge[s] secrecy, dispute[s] fault, deflect[s] responsibility, and make[s] it as slow and expensive as possible for plaintiffs to continue the fight.”²⁹² To do otherwise, in this traditional view, is to invite frivolous claims and open the proverbial “floodgates of litigation.” A no-holds-barred litigation strategy, however, exacts a high price on plaintiffs and defendants alike. One recent study examining the employment of such a strategy showed that “for every dollar spent on compensation, 54 cents went to administrative expenses (including those involving lawyers, experts, and courts).”²⁹³ More alarmingly, a strategy of secrecy and attitude of denial of fault in medical facilities undermine patient safety. An Institute of Medicine 1999 report, *To Err Is Human*, acknowledged that “as many as 98,000 deaths occurred each year because of medical errors.”²⁹⁴ Medical safety experts believe that “effective and wide-sweeping

287. Boothman et al., *supra* note 286, at 129.

288. *Id.* at 139.

289. *Id.* at 133–34.

290. *Id.* at 133.

291. *Id.* at 129.

292. *Id.* at 128.

293. *Id.* at 129 (quoting David M. Studdert et al., *Claims, Errors, and Compensation Payments in Medical Malpractice Litigation*, 354 NEW ENG. J. MED. 2024, 2024 (2006)) (internal quotation marks omitted).

294. *Id.* at 131 (citing COMM. ON QUALITY OF HEALTH CARE IN AM., INST. OF MED., *TO ERR IS HUMAN: BUILDING A SAFER HEALTH SYSTEM* 31 (Linda T. Kohn et al. eds., 2000)).

patient safety initiatives” are thwarted by an atmosphere of denial and secrecy.²⁹⁵

Unsatisfied with simply reacting to disputes as they arose, the Health System sought a way to reduce medical negligence claims. It chose to manage conflicts proactively.²⁹⁶ In doing so it first questioned what really was motivating patients to bring medical negligence claims. Through research studies, it found that patients who brought medical negligence claims were not, as often assumed, mostly opportunists or solely concerned with medical errors.²⁹⁷ These studies found that the major factors that motivated many patients in bringing formal medical negligence claims were desires to understand how their unwanted injury occurred, prevent the same injury from happening to others, and encourage their caregivers to acknowledge responsibility for the harm caused to them.²⁹⁸ In one study, 37% of respondents reported that “an explanation and apology would have made the difference” in their decisions to file a lawsuit.²⁹⁹ Another study found that in 24% of the cases examined, patients filed a lawsuit after discovering that “the physician had failed to be completely honest with them about what happened, allowed them to believe things that were not true, or intentionally misled them.”³⁰⁰ Armed with more accurate information as to what caused medical negligence lawsuits, the Health System set about designing a process for reducing medical negligence complaints by addressing their underlying cause—causes that were rooted in the patient’s emotional and psychological needs.

The Health System turned its back on the old tradition of deny and defend and embraced a new policy characterized by “accountability and transparency”—concepts that would make even the most hard-boiled litigator weak in the knees.³⁰¹ Three principles formed the foundation of its new medical negligence conflict management program: (1) “[c]ompensate quickly and fairly when unreasonable medical care causes injury”; (2) “[d]efend medically reasonable care vigorously”; and (3) “[r]educe patient injuries (and therefore claims) by learning from patients’ experiences.”³⁰²

295. *Id.*

296. *See id.* at 135–36.

297. *Id.* at 133.

298. *Id.*

299. *Id.* (citing Charles Vincent et al., *Why Do People Sue Doctors? A Study of Patients and Relatives Taking Legal Action*, 343 *LANCET* 1609, 1609–13 (1994)).

300. *Id.* (quoting Gerald B. Hickson et al., *Factors That Prompted Families To File Medical Malpractice Claims Following Perinatal Injuries*, 267 *JAMA* 1359, 1361 (1992)) (internal quotation marks omitted).

301. *See id.* at 139.

302. *Id.*

It is worth pointing out that all health care institutions could profess to embrace these principles, even those who adopt a deny-and-defend strategy. As with many strategies, however, the distinction of the Health System and its unique, groundbreaking success lie in the details and honest application of its strategy. The details of how it applies these foundational principles involve two basic categories of claims: preinjury initiatives and postinjury initiatives. Yet, the same predominant guiding principles of communication and education provide the foundation for both categories of the Health System’s claims management strategy. These principles are very different from deny and defend.

The preinjury initiatives essentially seek to identify problems promptly and bring them into the light of day for discussion and correction. First, the Health System adopts a commitment to establishing “realistic expectations . . . in both patient and caregiver” about the contemplated medical treatment through “thoughtful [and] thorough communication.”³⁰³ Somewhat more unconventional is the Health System’s efforts to “[c]reate institutional appreciation for the value of early detection [and reporting] of unexpected outcomes.”³⁰⁴ To encourage staff to follow through on detection and reporting of unexpected outcomes, the Health System provides caregivers not only resources to identify such outcomes but also support in assisting patients and families in the event of a problem.³⁰⁵

The Health System’s postinjury initiatives seek to identify the root causes of medical negligence lawsuits and institute measures to ensure they are not repeated. Once again, the rule of the day is communication and education. After an unexpected and undesirable medical outcome occurs, caregivers and administrators first concentrate on patient care and communication with the family before turning their attention to remedial action.³⁰⁶ Specifically, the following occurs:

- Patients/families are approached, acknowledged, and engaged in the acute phase.
- Patient care needs are prioritized.
- Patients/families receive answers (to the extent they are known).
- Expectations for follow-up are established, the patient and family understand the situation is being addressed, and the patient and family are doing their parts.

303. *Id.* at 135.

304. *Id.*

305. *Id.*

306. *Id.*

- Patients and families receive acknowledgement of, and an apology for, true mistakes. They receive a thorough explanation regardless.
- The patient’s experience is studied for improvements that later are shared with the patient and family.
- Future clinical care is monitored via metrics established and measured to evaluate efficacy and durability of improvements.³⁰⁷

The emphasis on communication, both internally among employees and externally with the patients and families, is a winning strategy. Clearly, the initiatives listed above focus on promptly initiating patient contact, attending to care needs, sharing information, and promising follow-up. Because patients genuinely appreciate this approach and it makes them feel so much better about the situation, it naturally tends to assuage anger and increase respect for the caregivers.³⁰⁸ The case of “JW” provides a good example of this phenomenon.

JW was a thirty-six-year-old wife and mother of two who alleged that, among other claims, the Health System’s doctors and staff negligently failed to timely diagnose her breast cancer, leaving it undetected and untreated until after it had metastasized, making treatment options more invasive, and “diminish[ing] her opportunity for cure.”³⁰⁹ Applying the Health System’s claim-handling principles, the claim was settled within a year, during which she seemed to respond well to medical treatment for her condition.³¹⁰ Not long before settlement, all interested parties, including “the physicians treating [her] for cancer, the patient [JW], her husband, their attorney, and risk management representatives,” met to discuss the situation.³¹¹ The purpose of this meeting was to give JW and her husband an “opportunity . . . to tell their story” and for the physicians to “share their thoughts and apologize, if appropriate.”³¹² As part of the settlement, JW agreed to have her story videotaped for educational purposes.³¹³ Regarding the meeting she had with the Health System’s representatives and the physicians whom she alleged negligently failed to timely diagnose her cancer, she said:

After that night (of the meeting), I left there like I was on a mountaintop. I felt like I had finally been heard, they listened If that had been the end of the legal pursuit, that would have been fine with me. I was perfectly satisfied after that night. What that apology meant to me was that they had listened finally

307. *Id.*

308. *See id.* at 158.

309. *Id.* at 151–52.

310. *Id.* at 157.

311. *Id.*

312. *Id.*

313. *Id.*

and I had been heard. I can’t even describe how euphoric I felt when I left that meeting³¹⁴

By contrast, if patients are treated as potential opponents in lawsuits, it can become a self-fulfilling prophecy. Patients feel the tension and the dismissal of their needs as adversarial interests take center stage and thus are, in fact, more likely to become legal opponents.³¹⁵ The Health System’s postinjury initiatives are characterized by a belief that prior to litigation, the patient’s and the Health System’s interests are the same—to “seek honest answers to questions raised by the patient’s adverse outcome.”³¹⁶ Believing both sides share this objective, the Health System proceeds cooperatively and with transparency.

Also at the heart of its postinjury initiatives is the establishment of an honest method for distinguishing between reasonable and unreasonable care, in an effort to formulate the best practices for the future. Inherent in this process is an emphasis on education, which helps to prevent future lawsuits. When institutions use the deny-and-defend strategy, they are focused on evaluating the provided care against the backdrop of the law. There is a problem with this approach because it leads to a myopic understanding of “reasonable care.” Lawyers are trained to define reasonable care as the care that can be defended in court and not in the context of avoiding future litigation. Thus, the analysis is highly influenced by legal defenses as opposed to the medical definition of best practices. By contrast, a strategy grounded in accountability and transparency is the best means by which institutions may determine truly “unreasonable” medical care from the standpoint of smooth, uneventful business operations. If institutions are highly committed to learning from past mistakes, they will devote meaningful resources to reforms. These reforms will shape institutions’ activities in a positive, claim-reducing manner.

In an effort to shift the focus from litigation defenses to best medical practices, the Health System hired experienced nurses to work in its risk management department to investigate incidents potentially involving

314. *Id.* at 158.

315. PRUITT & KIM, *supra* note 28, at 154 (explaining that the “self-fulfilling prophecy” is an experimentally proven phenomenon “in which [a] [p]arty’s beliefs and attitudes about [the] [o]ther [party] make [that] [p]arty behave in ways that elicit behavior from [the] [o]ther [party] that reinforces these beliefs”).

316. Boothman et al., *supra* note 286, at 141.

unreasonable care.³¹⁷ This required a “revamp[ing]” of the department, motivated by the notion that the risk management department was in the business of not only making an accurate distinction between reasonable and unreasonable medical care but also improving patient safety and effectively advising clinical services.³¹⁸ To accomplish these goals, the Health System reasoned that “it would be easier to teach claims handling to caregivers than to acquaint claims handlers with complex medical issues.”³¹⁹ Although it is true that the risk management department budget increased because experienced caregivers generally cost more than experienced insurance claims adjusters, the investment yielded significant dividends.³²⁰

In addition to hiring nurses to help in the risk management department, the Health System further enhanced the credibility of the process by forming a committee of care providers who would provide a “check and balance” review of decisions made by the risk management department.³²¹ The committee consists of thirty-two members, representing “nearly 20 specialties.”³²² In each matter it considers, the committee’s charge is to answer two questions: “(1) Was the care at issue reasonable under the circumstances? and (2) Did the care adversely impact the patient’s outcome?”³²³ It is also of note that “the committee considers every case for potential peer review, quality improvement, and educational opportunities.”³²⁴ In comparison with the University of Michigan Health System’s new approach to medical negligence, the earlier committee was composed of only six caregivers whose mission was to serve as “a resource for trial lawyers representing” the institution.³²⁵ Thus, in deciding the reasonableness of medical treatment, the Health System moved from a system dominated by medically untrained claims adjusters and lawyers, whose mission was to defend the institution, to one that is dominated by caregivers, whose mission is to determine whether unreasonable medical mistakes occur and to learn from those mistakes when discovered.³²⁶

The quantifiable benefits of adopting a philosophy of “accountability and transparency” in managing medical malpractice claims have been nothing short of exceptional for the Health System. Since adopting the new approach and becoming a self-insured institution, it has been able to

317. *Id.* at 139.

318. *Id.*

319. *Id.*

320. *Id.* at 140.

321. *Id.*

322. *Id.*

323. *Id.*

324. *Id.*

325. *Id.*

326. *Id.* at 139–40.

reduce its claim reserves from \$70 million in 1999 to \$13 million in 2007.³²⁷ The average time to process claims has also been reduced dramatically.³²⁸ From August 2001 through August 2007, the average time to process medical negligence claims “dropped from 20.3 months to about 8 months.”³²⁹ This drop in processing time, in part, accounts for the reduced cost of malpractice claims. Once again, the Health System’s new program did not open the “floodgates of litigation” but rather significantly reduced the number of claims from 136 claims in 1999 to sixty-one claims in 2006.³³⁰ The company concluded that under the new claims management system, new claims fell by 55% over this time period.³³¹

Like Toro’s and Georgia-Pacific’s conflict management programs, the Health System’s medical negligence conflict management program relies on early intervention as a key feature of its success. But the Health System’s program goes beyond early intervention and even beyond Toro’s practice of sending sympathetic listeners and problem solvers to speak with claimants. It replaced the deny-and-defend face-damaging tactics of threats, intimidation, and stonewalling with accountability, transparency, and the face-giving tactics of sharing information, listening, and attending to parties’ medical and emotional needs. Investing in a credible internal process for determining medical error is also a form of face-giving because it demonstrates a commitment to patient care. As discussed above, when face issues are appropriately managed, parties are more willing to engage in collaboration and compromise.

Using the goodwill it creates with its patients through its accountability and transparency approach, the Health System’s program attempts to collaborate meaningfully with the patient on the medical problem that concerns the patient and the Health System and its staff. It attempts to use a “principled” form of negotiation, popularized by the authors of the classic negotiation book *Getting to Yes*, where negotiators see themselves working together on a problem “side-by-side” rather than in a “personal face-to-face confrontation.”³³² Moreover, the Health System “mines”

327. TERZICH, *supra* note 286, at 2.

328. Boothman et al., *supra* note 286, at 144.

329. *Id.*

330. *Id.* at 143. Specifically, the claims numbered as follows from 1999 to 2006: 136 claims in 1999; 122 claims in 2000; 121 claims in 2001; 88 claims in 2002; 81 claims in 2003; 91 claims in 2004; 85 claims in 2005; and 61 claims in 2006. *Id.*

331. *See id.*

332. *See* FISHER ET AL., *supra* note 175, at 38–40.

the conflict to improve its organization. The risk management review committee considers every unanticipated medical outcome it reviews an opportunity for “quality improvement” and an “educational opportunity.”

2. *The United States Postal Service REDRESS Program*

The U.S. Postal Service’s REDRESS mediation program is a valuable example of a conflict management program that uses early intervention and productive interpersonal conflict management techniques. The U.S. Postal Service’s conflict management system is among the largest public sector conflict management systems.³³³ The REDRESS mediation program was started in 1994 to address the growing problem of employment discrimination claims in the postal service and to “improve workplace culture.”³³⁴ REDRESS mediates, on average, over 1000 disputes a month across ninety U.S. cities, making it the largest employment mediation program in the world.³³⁵ The program has recently undergone a multiyear comprehensive effectiveness study, which has aided in evaluating its success.³³⁶

The REDRESS program has a number of key features. First, the program provides that mediation is voluntary for the complainant but mandatory for the supervisor who acts as the U.S. Postal Service representative.³³⁷ Second, it exclusively uses a “transformative mediation” model,³³⁸ which is characterized by the mediator’s particular emphasis on “assisting the parties to have constructive interaction to improve the relationship.”³³⁹ Unlike facilitative and evaluative mediation models, which are characterized by a focus on party settlement, the transformative mediation model attempts to break the “vicious circle of disempowerment, disconnection, and demonization” that prevents parties in conflict from working together effectively, thereby paving the way for the parties to

333. Lisa Blomgren Bingham et al., *Dispute System Design and Justice in Employment Dispute Resolution: Mediation at the Workplace*, 14 HARV. NEGOT. L. REV. 1, 24 (2009).

334. *Id.*

335. *Id.*

336. A comprehensive, multiyear study tracked the REDRESS program from its inception as a pilot program in 1994 through 2006. The purpose of the study was to evaluate the “effectiveness and unique purpose of the program.” *Id.* at 25. In doing so, it looked at a wide array of data that included “procedural justice [satisfaction with the process], distributive justice [satisfaction with the results], interactional justice [perceptions of fairness], case closure rates, complaint filing rates, and formal complaint flow-through rates.” *Id.* The study considered, among other things, the program’s effect on the EEO filings and the climate of the workplace. *Id.* at 46–48.

337. *Id.* at 26. The REDRESS program currently enjoys a 75% employee participation rate. *Id.* at 29.

338. *Id.* at 22.

339. BOULLE ET AL., *supra* note 216, at 13.

work together more productively in future conflicts as well.³⁴⁰ The transformative mediator attempts to “improve the quality of the conflict interaction” by generating in the parties “empowerment” and “recognition.”³⁴¹ Empowerment means that parties define and decide issues for themselves.³⁴² Recognition means that each party acquires a better understanding of the other party’s perspective of the conflict.³⁴³

Participant survey results reveal that REDRESS largely meets its goals of empowerment and recognition. Regarding empowerment, participants feel free to make their own decision concerning settlement without undue pressure from the mediator in over 85% of the cases.³⁴⁴ There are two statistical findings that demonstrate REDRESS substantially achieves its goal of recognition. First, approximately 75% of all participants reported that they felt the other party listened to them during the mediation.³⁴⁵ The second kind of evidence demonstrating recognition is the number of apologies participants give during mediations. Supervisors say that they “apologize to the complainant about some aspect of the dispute” in approximately 31% of the cases.³⁴⁶ Complainants say they apologize to supervisors approximately 24% of the time.³⁴⁷

In keeping with the transformative mediation model, the REDRESS program identified the goal of “improv[ing] workplace climate” as a strategy for reducing Equal Employment Opportunity (EEO) filings.³⁴⁸ Improving workplace climate was adjudged to include “improv[ing] the way employees and supervisors handle conflict[] and ultimately . . . empower[ing] the participants to more efficiently manage their conflict for themselves, resulting in a better, more productive work environment.”³⁴⁹ Supervisors reported improved conflict management behavior after going through a three-day REDRESS training or participating in a REDRESS

340. ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION: THE TRANSFORMATIVE APPROACH TO CONFLICT* 52–53 (rev. ed. 2005).

341. *Id.* at 22.

342. *Id.*

343. *Id.*

344. Bingham et al., *supra* note 333, at 34 (“Complainants report that they felt pressured to accept a settlement in 15.2% of the cases, while their own representatives and others report that this happened in 10.9% or fewer of the cases.”).

345. *Id.* at 36.

346. *Id.* at 37–38. The precise number is 30.9%. *Id.* at 38.

347. *Id.* at 38. The precise number is 24.1%. *Id.*

348. *Id.* at 25.

349. *Id.* at 42.

mediation.³⁵⁰ The supervisors also reported improved use of listening skills.³⁵¹

Perhaps the best indicator, however, of REDRESS's positive impact on workplace climate comes from employees' perceptions of the workplace and supervisors' behavior. Employees reported an improved open-door atmosphere after implementation of the program.³⁵² In addition, employees reported decreased incidence of "yelling, arguing, disciplining or intimidating" as a way for supervisors to handle conflict.³⁵³ Thus, implementing an in-house mediation program demonstrably improved workplace climate and, as will be examined below, reduced EEO claims.³⁵⁴

The study also concluded that the REDRESS program streamlined the resolution of EEO cases.³⁵⁵ Although settlement is not explicitly a goal of transformative mediation, it is a consequence of conflicted coworkers' managing conflict more effectively. During the period studied, closure rates, which track formal settlement within thirty days of the mediation, ranged from 70% to 80%.³⁵⁶

As importantly, EEO filings dropped precipitously as a consequence of implementing the REDRESS program. EEO complaints dropped from a high of 14,000 complaints in 1997 before REDRESS to 8500 complaints in 2003, with the decline in complaints correlating with the implementation of REDRESS in various cities.³⁵⁷ Overall, adjusting for workforce size, EEO complaints have dropped 30% from their peak in 1997 since the U.S. Postal Service implemented REDRESS and are filed by 40% fewer

350. *Id.* at 43. Before receiving training or participating in mediation, only 13% of supervisors said "they communicated openly to manage conflict at work." *Id.* After training the percentage of supervisors who reported communicating openly to manage conflict increased to 50%. *Id.* The number of supervisors who reported managing conflict by giving direct orders dropped from 30% before the training or mediation to 19% after. *Id.*

351. Before REDRESS, only 10% of supervisors felt that "listening work[ed] best for managing conflict," but after participating in a REDRESS training or mediation, 38% of supervisors felt listening "work[ed] best." *Id.*

352. *Id.* at 44. Before REDRESS, 31% of employees perceived "that employees, supervisors and managers could easily approach each other to discuss problems." *Id.* After REDRESS, the employees' perception of the existence of an open-door atmosphere rose to 53%. *Id.*

353. *Id.* Before REDRESS, the second most common response to the question "how does your supervisor deal with conflict?" was by "yelling, arguing, disciplining or intimidating." *Id.* (internal quotation marks omitted). After REDRESS, this response fell from 17% to 3%. *Id.* (internal quotation marks omitted).

354. *Id.* at 48.

355. *Id.*

356. *Id.* at 31. Settlement rates and closure rates differ. *Settlement rate* refers to the cases settled at the mediation conference. *Id.* The REDRESS settlement rate in 2004 was 54.4%, but the closure rate increased to 72.3%. *Id.*

357. *Id.* at 46.

employees.³⁵⁸ The study did not report actual costs savings realized as a result of the reducing number of EEO claims, but in the private sector, the median cost of the settlement of an EEO claim is \$250,000 and the defense costs can range on average from over \$150,000 to nearly \$1 million.³⁵⁹ Even if the average costs of U.S. Postal Service EEO claims are much less, a 30% reduction in the number of EEO claims adds up to considerable financial costs savings.

REDRESS’s success in accomplishing its uncommon goal of improving workplace climate is directly attributable to the program’s extensive use of the productive conflict management principles that this Article previously examined, which are embodied in the transformative mediation model. Empowering parties to define the issues and decide how to resolve them—a key feature of this model—emphasizes the interdependence of the parties. As discussed, the greater the parties’ perception that they are interdependent—that resolution must come through consent of the other party—the more cooperative they will be with one another in working through the conflict. Although the principle of interdependence is relevant in all conflicts, it takes on a heightened importance in workplace conflicts because parties are more likely to continue their relationship after the conflict is resolved.

The program’s use of mediation plays an important part in promoting interdependence because one of mediation’s key features is party “self-determination.”³⁶⁰ Self-determination is the principle that parties are the masters of their own dispute, deciding when and how to resolve it.³⁶¹ Self-determination and empowerment are particularly prominent features in transformative mediation.³⁶² Facilitative and evaluative models of mediation also empower parties, but those models are arguably less “empowering” because a mediator operating under either of these mediation models is more likely to take an active role in defining the issues and formulating a solution than a transformative mediator.³⁶³

358. *Id.* at 46–47.

359. CHARLES L. HOWARD, *THE ORGANIZATIONAL OMBUDSMAN: ORIGINS, ROLES, AND OPERATIONS* 181–82 (2010).

360. CARRIE MENKEL-MEADOW ET AL., *MEDIATION: PRACTICE, POLICY, AND ETHICS* 94 (2006) (“Self-determination means that parties retain control over both the process and the outcome.”).

361. *Id.*

362. BUSH & FOLGER, *supra* note 340, at 95.

363. BOULLE ET AL., *supra* note 216, at 12–13.

The REDRESS program's use of recognition is another way it enhances productive conflict. Recognition occurs when a party, at least to some degree, can see the conflict from the other party's perspective. The REDRESS program enhances recognition by creating a mediation climate where parties are encouraged to listen and, when appropriate, feel comfortable enough to apologize. Listening and apologizing, as discussed above, are two effective forms of face-giving that improve conflict interactions. The REDRESS data show that a vast number of participants felt as if they were listened to in the mediations, and the significant number of apologies that occurred at the mediations suggest that face-giving was an integral part of the program's success.

Most meaningfully, perhaps, is that by incorporating the productive conflict principles into the mediations and training, the quality of workplace conflict interactions has been improved measurably. Improving workplace climate has lowered EEO complaints.³⁶⁴ Since implementing the REDRESS program, EEO complaints have dropped significantly from their previous high. Particularly important to point out is that the drop in EEO complaints correlated with the rollout of the REDRESS program from city to city. Thus, the program has proved effective not only in resolving conflicts but also in preventing them.

C. The Lawyer as Conflict Manager: The Cost of Conflict

Organizations of all sizes, both public and private, are recognizing that the overuse of adversarial dispute resolution methods and the mismanagement of interpersonal conflict exact unacceptably high costs. The most visible of these costs are legal expenses. Traditional adversarial dispute resolution processes require more time, energy, and money to pursue than collaborative dispute resolution processes.³⁶⁵ And the financial costs of legal services to pursue these more costly processes

364. The Integrated Conflict Management System (ICMS) is worth briefly describing because several large organizations, private and public, have spent considerable time, money, and energy in implementing them, and they are growing in popularity. See, e.g., Judith Cohen, *Why Programs Are No Longer Enough: An Interview on Collaborating at the U.S. TSA*, 27 ALTERNATIVES TO HIGH COST LITIG. 81, 81, 87 (2009) (describing the federal Transportation Security Administration's development of an integrated conflict management system). The ICMS goal is to not only address disputes as they arise in a systematic way but also help minimize disputes. Jennifer F. Lynch, *Beyond ADR: A Systems Approach to Conflict Management*, 17 NEGOT. J. 207, 212–13 (2001). A key feature of this approach is to require managers "to prevent, manage, contain and resolve all conflict at the earliest time and lowest level possible." *Id.* at 212. There are five key features to the ICMS: it is all-encompassing and has conflict-competent cultures, multiple access points, options and choices, and support structures. *Id.* at 212–14.

365. See *infra* Part III.

have risen significantly in recent years and continue to rise. In the five years leading up to the global economic downturn in late 2007, legal fees rose 7% on average annually, nearly twice the rate of inflation.³⁶⁶ The global economic downturn slowed, but did not stop, rising legal costs. The average attorney billing rate in the United States in 2010 was \$385, which represents an average increase of 3.16% annually in the years following the global economic slump.³⁶⁷ Consequently, clients are looking for ways to reduce costs, making legal costs a very attractive area for corporate executives to take a second, and perhaps a third and fourth, look at. These considerations are increasingly leading organizational clients to utilize collaborative processes to resolve their disputes.

More significant than legal expenses in many instances are the indirect costs of adversarial dispute resolution processes. Adversarial dispute resolution processes by their very nature are more likely to destroy or damage relationships between combatants.³⁶⁸ Organizational conflicts often involve important strategic business relationships with customers, business partners, and employees that the organization created and nurtured through considerable investment of time and other limited resources.³⁶⁹ The unnecessary loss of or injury to any of these relationships that could

366. Karen Sloan, *For Firms, 2010 Was Full of Billing Blues*, CONN. L. TRIB., Jan. 10, 2011, <http://www.ctlawtribune.com/getarticle.aspx?ID=39301>.

367. *Id.* The rising cost of billable hours, however, shows only part of the changing legal economic landscape. Another relevant feature is that the total costs of legal work appear to be rising at a rate in excess of the percentage increase in billable hours. A study presented at the Conference on Civil Litigation held in 2010 at Duke Law School found that for Fortune 200 companies, the cost of “outside litigation” alone, which does not include damage awards, rose 73% from 2000 to 2008. LAWYERS FOR CIVIL RIGHTS ET AL., *supra* note 114, app. at 10 fig.6. Demonstrating that the increased cost of outside litigation was not the result of increased commercial activity, the survey found that the “total litigation costs as a percent of US revenue” rose from .34% in 2000 to .57% in 2008, an increase almost twofold. *Id.* Using the 2008 cost of litigation as a percent of revenue figure of .57% from the survey and average profit margins by industry, it can be roughly calculated that litigation expenses by themselves, excluding any damage awards, account for between 18.1% and 31.1% of an organization’s profits. See Letter from Henry N. Butler, Exec. Dir., Northwestern Law Searle Ctr. on Law, Regulation & Econ. Growth, to Hon. Lee H. Rosenthal, Hon. Mark R. Kravitz & Hon. John G. Koeltl, U.S. Dist. Court Judges (June 2, 2010) (on file with author); see also John B. Henry, *Fortune 500: The Total Costs of Litigation Estimated at One-Third Profits*, METROPOLITAN CORP. COUNS., Feb. 2008, at 28, 28, available at <http://www.metrocorpocounsel.com/pdf/2008/February/28.pdf> (reporting that based on litigation data it compiled over an eight-year period, eLawForum estimates the “total cost of litigation to be \$210 billion, equivalent to one-third of the after-tax profit of the *Fortune 500*”).

368. MENKEL-MEADOW ET AL., *supra* note 360, at 32.

369. AM. ARBITRATION ASS’N, *supra* note 212, at 4.

have been avoided through use of a collaborative dispute resolution process has a negative financial impact on the organization. The mere fact that the financial impact is difficult to quantify in many circumstances does not make the loss any less real.³⁷⁰ This is the type of cost that is often overlooked by attorneys narrowly focused on legal issues but felt acutely by clients. One circumstance, however, where the financial impact is reasonably quantifiable is employee turnover.³⁷¹ On average, the cost to replace an exempted employee is the equivalent of that employee's annual compensation, including salary and benefits.³⁷² Because of the considerable cost of replacing employees, organizations are increasingly turning to collaborative dispute resolution processes to minimize employee turnover.³⁷³

To minimize both direct and indirect costs, organizations are developing in-house conflict management systems, such as the ones in the case studies examined above, of varying complexity and breadth that address conflict at its early stage outside of traditional litigation.³⁷⁴ There is no longer any credible doubt that ADR processes, on average, save meaningful time, money, and other valuable and limited organizational resources.³⁷⁵ The organizations in the case studies examined

370. *Id.* (explaining that business "relationships with customers, suppliers, and employees" are "expensive to build and sustain").

371. KARL A. SLAIKEU & RALPH H. HASSON, CONTROLLING THE COSTS OF CONFLICT: HOW TO DESIGN A SYSTEM FOR YOUR ORGANIZATION 15 (1998); J. Douglas Phillips, *The Price Tag on Turnover*, PERSONNEL J., Dec. 1990, at 58, 58–61.

372. SLAIKEU & HASSON, *supra* note 371, at 14–16. Of course, the cost to replace an employee can be much higher. For example, to replace an engineer, Raytheon Corporation calculated the cost at 150% of the engineer's total compensation by accounting for "lost productivity, recruiting fees, interviewing time, staffing department employees' salaries, and orientation and training costs." DANIEL DANA, CONFLICT RESOLUTION: MEDIATION TOOLS FOR EVERYDAY WORKLIFE 22 (2001).

373. Unresolved conflict has a direct impact on an organization's employee turnover rate. DANA, *supra* note 372, at 22. By some reports, "unresolved conflict is a decisive factor in at least 50% of all voluntary departures." *Id.*

374. *See generally* LIPSKY ET AL., *supra* note 214 (discussing the development of ADR in the workplace and describing the nature of ADR). The line between ad hoc ADR use and a conflict management system is not a clear one, even among experts. *Id.* at 11–12. It can be said, however, that a conflict management system is one that stresses "a holistic or integrated approach to the management of conflict. . . . [and] transforms disputes into settlements, or more generally conflict into cooperation, within the boundaries of the organization." David B. Lipsky & Ariel C. Avgar, *Toward a Strategic Theory of Workplace Conflict Management*, 24 OHIO ST. J. ON DISP. RESOL. 143, 150 (2008) (footnote omitted).

375. A comprehensive study examining civil cases handled by the United States Attorney's office in which the federal government was a litigant between 1995 and 1998 found that the use of ADR saved time and money. Lisa Blomgren Bingham et al., *Dispute Resolution and the Vanishing Trial: Comparing Federal Government Litigation and ADR Outcomes*, 24 OHIO ST. J. ON DISP. RESOL. 225 (2009). Out of the 15,288 civil matters that were part of the study, 14,777 went through traditional litigation and 511 went through nonbinding ADR processes. *Id.* at 249. Cases that were sent to ADR

above all realized significant financial savings by moving away from traditional adversarial dispute resolution methods to more collaborative processes early in the dispute. The benefits of these systems to organizational efficiency are too great to ignore, especially in challenging economic climates where organizations are seizing every opportunity to operate more efficiently. As of 1998, about 25% of the Fortune 1000 companies have implemented conflict management systems, and many smaller and midsize organizations have followed suit.³⁷⁶ Fortune 1000 companies that have adopted a conflict management system include General Electric, Chevron, Nestle USA, Johnson & Johnson, and Alcoa.³⁷⁷ Many governmental organizations have also embraced the benefits of conflict management systems, including the Bureau of National Affairs and FEMA.³⁷⁸ Some of the most experienced researchers in this area have stated that “no company or other organization that has adopted a workplace conflict management system, to the best of our knowledge, has yet abandoned that system in favor of more traditional methods of managing conflict.”³⁷⁹ Conflict management systems, and the collaborative

enjoyed a 65% settlement rate as compared with a 29% settlement rate for those that went through traditional litigation. *Id.* at 253. The study demonstrated significant savings in litigation expenses, staff time, and litigation length. *Id.* at 252. The Assistant U.S. Attorneys estimated that on average the government saved \$10,735 in litigation expenses alone by using ADR, which did not include staff time. *Id.* The Assistant U.S. Attorneys also estimated that ADR saved eighty-eight hours of staff time, which was defined as “the number of hours you and others (including paralegals) would have spent on this case if ADR had not been used.” *Id.* at 252 n.123 (internal quotation marks omitted). Finally, U.S. Attorneys estimated that ADR reduced litigation length by six months. *Id.* at 252. Furthermore, a 2006 study on the Center for Mediation Services launched by the New York City Office of Administrative Trials and Hearings (OATH), which is “one of a very small number of municipal workplace mediation programs,” revealed an 80% reduction in monetary costs and dispute time when the city embraced the Center’s program. D. Hardison Wood & David Mark Leon, *Measuring Value in Mediation: A Case Study of Workplace Mediation in City Government*, 21 OHIO ST. J. ON DISP. RESOL. 383, 385, 395–96 (2006). The program also “increas[ed] dispute resolution efficiency, improv[ed] employee morale, and satisf[ied] participants and other interested parties.” *Id.* at 394; *see also* FED. INTERAGENCY ALT. DISPUTE RESOLUTION WORKING GRP. SECTIONS ET AL., REPORT FOR THE PRESIDENT ON THE USE AND RESULTS OF ALTERNATIVE DISPUTE RESOLUTION IN THE EXECUTIVE BRANCH OF THE FEDERAL GOVERNMENT 5–7, 123 (2007) (detailing significant savings through the use of ADR in the executive federal agencies).

376. LIPSKY ET AL., *supra* note 214, at 126 & tbl.4.1, 150.

377. *Id.* at 148.

378. *Id.*

379. *Id.* at 152.

processes they incorporate, are becoming increasingly common in organizational settings.

Collaborative processes and interpersonal conflict management knowledge will help attorneys resolve individual conflicts effectively as much as they help organizations effectively resolve conflicts. Attorneys representing individuals in the areas of personal injury, family, and real estate law, for example, with knowledge of competitive conflict escalation cycles and productive conflict techniques, would save their clients time and money by resolving conflicts sooner and with less acrimony, even in situations where preserving business relations was not of the utmost importance. As stated at the beginning of this Article, most legal conflicts, at their heart, are interpersonal conflicts whether they involve a dispute between two individuals or a dispute between two multinational companies.

IV. CONCLUSION: CREATING THE TWENTY-FIRST CENTURY LAWYER

Wisdom has been defined as having “total perspective—seeing an object, event, or idea in all its pertinent relationships.”³⁸⁰ This explanation of wisdom is helpful in understanding what it means to be an attorney who is a good conflict manager. As the case studies have demonstrated, there is enormous value in viewing clients’ problems from a broader conflict management perspective rather than a narrow legal perspective. The conflict management approach, which views clients’ problems as multidimensional, cuts costs, saves time, and yields a better chance of preserving relationships among disputants. The attorney who adopts this approach not only analyzes the client’s rights under the law but also considers how the manner in which the conflict is managed will affect the client’s relationships with customers, employees, business partners, family members, and friends. The attorney who is a good conflict manager also appreciates the psychological needs of the parties themselves and will attempt to resolve the conflict as soon as practicable. To accomplish this, the attorney must not only understand the proper use of the full spectrum of dispute processes but also possess the interpersonal conflict management skills to work within collaborative processes effectively.

Therefore, law schools have an obligation to assist their students in forming a robust professional identity that includes the role of conflict manager in addition to the other roles attorneys must play to do their jobs well. Law schools have come under justified criticism in recent years for not being as mindful and comprehensive as they should be in helping students form a professional identity that will “orient [them] to the full

380. Will Durant, *What Is Wisdom?*, WISDOM, no. 8, 1957, at 25, 25–26, available at <http://www.willdurant.com/wisdom.htm>.

dimensions of the legal profession.”³⁸¹ An understanding of conflict management processes and interpersonal conflict management principles is one of these missing dimensions. It has been elegantly observed that “[p]rofessional education teaches both a way of understanding how the world works and a distinctive set of skills for working in the world.”³⁸² In failing to instruct all students systematically in relevant conflict management principles, processes, and skills, law schools send forth their graduates with an incomplete, and even distorted, view of the legal world in which they are expected to work effectively.

The time is ripe for law schools to embrace the emerging field of conflict management in their own core content of study instead of offering only related subjects in electives taken by only a minority of students. Law schools could accomplish this by requiring courses in interpersonal conflict management and negotiation, by incorporating these disciplines into existing course work, or by some combination of both these strategies. One solution, as an example, would be for law schools to require their students to take an ADR Survey course *and* a Negotiation course that integrates interpersonal conflict management principles.³⁸³ Although almost all law schools offer ADR-related courses as electives, only a small percentage require them.³⁸⁴ Requiring an ADR Survey course will acquaint law students with the fundamental ADR processes, such as negotiation, mediation, and arbitration, as well as what are referred to as “hybrid processes,” such as med-arb, mini-trial, and summary jury trial.³⁸⁵ Increasingly, ADR Survey course texts include materials on designing dispute resolution systems for organizations.³⁸⁶ Requiring a Negotiation course will acquaint students with the interpersonal conflict management principles and skills essential for successfully advocating in collaborative processes. A client is little advantaged if his or her attorney correctly advises to use mediation to attempt to resolve a dispute but lacks the

381. SULLIVAN ET AL., *supra* note 8, at 29.

382. *Id.* at 185.

383. Or better still, law schools should require all students to take a Psychology of Conflict course as a condition of graduation. The challenge with such a proposal is finding the faculty qualified to teach it.

384. See Nolon, *supra* note 19.

385. See generally JAY FOLBERG ET AL., *RESOLVING DISPUTES: THEORY, PRACTICE, AND LAW* (2d ed. 2010); CARRIE J. MENKEL-MEADOW ET AL., *DISPUTE RESOLUTION: BEYOND THE ADVERSARIAL MODEL* (2005).

386. See, e.g., LEONARD L. RISKIN ET AL., *DISPUTE RESOLUTION AND LAWYERS* 886–923 (4th ed. 2009).

requisite interpersonal conflict management skills to participate meaningfully in mediation. This education will also help students to better manage other inevitable professional conflicts with clients and colleagues, the adroit management of which are often as critical to their success as those conflicts they will manage for clients.

To put this proposal in perspective, American law schools require approximately ninety credit hours for graduation.³⁸⁷ If a law school required a three-credit ADR course and a three-credit Negotiation course, it would amount to approximately 7% of a student's total law school education.³⁸⁸ This is a modest investment of time for topics that are fundamental to the practice of law.³⁸⁹ But it would be a substantial improvement over what almost all law schools are presently requiring, which is nothing. This is, of course, just one way of closing a troubling gap in legal education. A discussion of the full range of possible solutions to this problem is a topic for another article.

This Article has explored only two interpersonal conflict management principles of which attorneys should be knowledgeable—competitive conflict escalation cycles and productive conflict. There are, of course, many other important interpersonal conflict management principles in which lawyers should be educated, and the time is ripe to begin educating law students in those principles. There are at least two compelling reasons why lawyers and law schools can no longer be ambivalent about the role that interpersonal conflict management plays in legal disputes. First, it has never been truer that the collaborative dispute resolution processes are a prominent, even dominant, feature of a lawyer's work.³⁹⁰ It is untenable to not require a minimum degree of education so that future lawyers are more capable of participating meaningfully in those processes. Lawyers can also benefit financially from being conflict managers. The growing number of organizations that are utilizing conflict management systems and collaborative processes to resolve their conflicts

387. SECTION OF LEGAL EDUC. & ADMISSION TO THE BAR, *supra* note 4, at 13–14 (stating that ninety credit hours is the median requirement for graduation for all ABA-approved law schools).

388. *See id.* The precise percentage is 6.6% of the total law school credits taken. There are certainly additional and, perhaps, more effective ways to integrate this education into the existing curriculum than as proposed here, but that discussion is beyond the scope of this Article. For a thoughtful discussion of ways ADR can be incorporated into the law school curriculum, see Lande & Sternlight, *supra* note 17.

389. The MacCrate Report lists ten “fundamental lawyering skills”: problem solving, legal analysis and reasoning, legal research, factual investigation, communication, counseling, *negotiation*, litigation and *ADR procedures*, organization and management of legal work, and recognizing and resolving ethical dilemmas. SECTION OF LEGAL EDUC. & ADMISSION TO THE BAR, *supra* note 45, at 135, 138–40.

390. Galanter, *supra* note 130, at 459 (discussing a study of federal courts showing that in 2002, 98.2% of all civil cases were resolved without trial).

will need professionals to design and maintain those systems and processes, as well as those who know how to work effectively in collaborative environments. Attorneys who have the knowledge and skills to satisfy these needs will reap the financial rewards of expanding into the emerging field of conflict management and prevention.

The second reason why law schools should no longer delay in the teaching of interpersonal conflict management skills to all of their students is that the field of conflict management is growing in knowledge and recognition with each passing year.³⁹¹ Although as a multidisciplinary field it draws extensively upon other more established disciplines for its knowledge base, such as the fields of psychology, sociology, economics, and neuroscience, it is also becoming a distinct field of science in its own right.³⁹² Attorneys must be a part of this emerging conflict-competent culture if they are to serve their clients well in answer to the high calling of their profession. If attorneys do not step up to fill this emerging field of conflict management, there are a small but growing number of nonlawyer professionals with advanced degrees in dispute resolution and conflict management who receive significantly more education in collaborative process and interpersonal conflict management skills than

391. PEACE & JUSTICE STUDIES ASS'N & INT'L PEACE RESEARCH ASS'N FOUND., GLOBAL DIRECTORY OF PEACE STUDIES AND CONFLICT RESOLUTION PROGRAMS (Ian M. Harris & Amy L. Shuster eds., 7th ed. 2006). The first edition of the directory listed thirty-six colleges and universities offering conflict management programs in 1981. *Id.* at v. In 1983, the second edition of the directory listed sixty-seven college and university conflict management programs. *Id.* The seventh edition, published in 2006, “include[d] over 450 entries for undergraduate and graduate education (70%) and research centers (30%).” *Id.* “These are based at some 390 unique institutions, 133 from outside the United States, and represent[] 40 countries on six continents.” *Id.* The *U.S. News & World Report* recently named *mediator* one of the “Best Careers for a Changing Job Landscape.” Marty Nemko, *Best Careers for a Changing Job Landscape*, U.S. NEWS & WORLD REP. (Dec. 19, 2007), <http://money.usnews.com/money/careers/articles/2007/12/19/best-careers-for-a-changing-job-landscape>.

392. PEACE & JUSTICE STUDIES ASS'N & INT'L PEACE RESEARCH ASS'N FOUND., *supra* note 391. There are over 250 conflict management programs in the United States. *See id.* Many of these offer advanced degrees in conflict management that include a focus on business disputes. *See, e.g., Straus Institute for Dispute Resolution*, PEPP. U., <http://law.pepperdine.edu/straus/> (last visited Jan. 9, 2012) (offering a Master's Degree in Dispute Resolution); *Center for Dispute Resolution & Conflict Management*, SMU, <http://smu.edu/education/disputeresolution/> (last visited Jan. 9, 2012) (offering a Master of Arts in Dispute Resolution); *Appropriate Dispute Resolution Center*, U. OR., <http://adr.uoregon.edu/> (last visited Jan. 9, 2012) (offering a Master's program in Conflict and Dispute Resolution).

lawyers presently do, and they will be more than pleased to dominate this field.³⁹³

Although lawyers must be capable advocates and analysts, they must also be capable conflict managers if they are to be competitive in a culture that will increasingly demand conflict-competence from them. Through self-education and continuing formal education, many lawyers are able to bridge the gap between what they learn in law school and what they need to know to practice law well, but many do not. Even those who successfully bridge the divide between their legal education and the real world demands of practice could narrow that gap more efficiently if law schools addressed the “dimensions” of their future careers more completely.

In proposing that lawyers need to be conflict managers, it is tempting to think that the twenty-first century will need a new kind of lawyer—one that can be the “sword” and the “shield” as well as the “problem solver” and “peacemaker.” But deeper reflection will reveal that this is not a new kind of lawyer at all. The best lawyers, of any era, have always been lawyers “for all seasons.”

393. See, e.g., *Graduate School of Arts & Sciences*, GEO. U., http://grad.georgetown.edu/pages/degrees_offered.cfm (last visited Jan. 9, 2012) (offering a Master of Arts in Conflict Resolution); *The School for Conflict Analysis & Resolution*, GEO. MASON U., <http://icar.gmu.edu/academics-and-centers> (last visited Jan. 9, 2012) (offering a Master of Science and Ph.D. in Conflict Analysis and Resolution); NOVA SOUTHEASTERN U., <http://www.nova.edu/academics/college-program-degrees.html> (last visited Jan. 9, 2012) (offering a Master of Science and Ph.D. in Conflict Analysis and Resolution).