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## On Teaching Mediation

*Edwin H. Greenebaum\**

When I first offered a course in Alternative Dispute Resolution (ADR), I invited an anthropologist<sup>1</sup> to an early class to help us explore the scope of the subject matter. Not far into our discussion, I realized that our visitor was referring to ADR processes of ALL kinds as “mediation,” including arbitration which I had learned, even as a law student, not to be mediation. Upon reflection, this difference in articulation made sense to me as reflecting the different viewpoints of lawyers and anthropologists.

Growing up as a lawyer under the tutelage of Lon Fuller, I learned to consider the forms and limits of contract and adjudication as basic principles of social ordering.<sup>2</sup> What could be more natural for lawyers who justify holding parties bound to results by analysis of the processes that produce them? In this frame of reference, mediation, an essentially contractual process, must be carefully distinguished from the adjudicatory process of arbitration.

Anthropologists *studying the culture of the legal profession* might be interested in such matters, but otherwise their concerns are vastly different. Anthropologists study naturally occurring social processes. Indeed, the varied dispute resolution processes that occur in diverse societies were the discipline’s first interest.<sup>3</sup> Field observation showed that the multiple aspects in which dispute resolution processes may vary can combine in infinite, subtle ways. Indigenous communities develop social processes that work and make sense to them. What could be more natural than for anthropologists to refer, generally, to all dispute resolution processes involving third parties as “mediation,” without concern for analytic boundaries they do not observe?<sup>4</sup> The extent to which ADR should be defined, structured and controlled by law is a pervasive issue in ADR literature.

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\* Professor of Law, Indiana University-Bloomington. I am grateful to Ximen Wolf and Cynthia Baraban for their editorial and research assistance. At several places I cite articles I have written, not because I consider myself good authority for what I say, but to refer readers to discussions in which I have developed some matters more fully than I can here.

1. Carol Greenhouse, Professor of Anthropology, Indiana University-Bloomington.

2. Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 357-65 (1978).

3. See THE DISPUTING PROCESS: LAW IN TEN SOCIETIES (Laura Nader et al. eds., 1978).

4. In support of the anthropologist’s view, arbitration, while adjudicatory in format, is contractually based and can vary considerably in practice. Courses in alternative dispute resolution might more accurately be titled, “alternative methods of settlement.” Indeed, inconsistent uses of ADR labels is widespread both among ADR professionals and laymen.

Mediation, as lawyers understand the term, always involves a “neutral” who assists parties to resolve (or at least reduce) conflict by changes in position or practice to which the parties “agree.”<sup>5</sup> Nevertheless, “mediation” can refer to many different processes. Accordingly, in structuring a course in mediation, one must choose what to teach and how to teach it. The positions individuals and groups take in advocating mediation models (or, indeed, in viewing mediation in any form as an acceptable process) are substantially affected by ideology. No doubt, our choices in teaching mediation are similarly influenced.

In this article, I will delineate the issues and explore the implications of resolving them in different ways. Part I develops a taxonomy of variations in models of mediation. In Part II, I analyze choices and constraints in course design. In Part III, I specify the choices I have made in structuring my own course in mediation. I will relate those choices to the context of my school, to my students’ backgrounds and interests, and to my competencies and goals.

The initial version of this paper was written for my students to read as they entered my course. Pedagogically, the text oriented them to the course and gave them an overview of its content. Just as importantly, the paper (together with the course syllabus) disclosed to the students the “treatment” I proposed to administer to them at a time they could still enroll in other courses if they should chose to do so. In Part IV, I will address mediation teachers’ professional responsibilities; there is an ideology of professional service that informs my approach to these matters that I hope to make explicit.

## I. VARIATIONS IN MEDIATION

The question, “what constitutes mediation?,” depends on the purpose for asking the question. For example, when the term appears in statutes providing a mediation communication privilege or a mediator immunity,<sup>6</sup> the answer will have legal significance. Otherwise, the question of whether an ADR process is “mediation” relates to less official or less formal mechanisms of social control, such as admitting a practitioner to a professional association of “mediators” or deciding what to teach in a course on mediation. Common assumptions in ADR literature and authority are that “mediation” is a negotiation between two or more parties that is facilitated by a third-party who is unbiased in attitude, impartial in behavior, and without interest that will be affected by the outcome.<sup>7</sup> This “neutral” has no authority to make decisions for the parties, but leaves to them the power and responsibility to make decisions in their own interests. Compared to other processes, mediation is thought to have the benefits of producing results that will be more acceptable to the parties, more in their interests and, therefore, more durable. These results, it is argued, will

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5. See LEONARD L. RISKIN & JAMES E. WESTBROOK, *DISPUTE RESOLUTION AND LAWYERS* 4 (2d ed. 1997).

6. A comprehensive collection of statutes governing mediation can be found in 1-2 NANCY H. ROGERS & CRAIG A. MCEWEN, *MEDIATION: LAW, POLICY, PRACTICE* apps. a-c (2d ed. 1994).

7. See JACQUELINE M. NOLAN-HALEY, *ALTERNATIVE DISPUTE RESOLUTION IN A NUTSHELL* 56 (1992); ROGERS & MCEWEN, *supra* note 6, § 1:01.

be achieved with less expense, time, and stress than typically attend litigation and the unassisted negotiation conducted in its shadow. If one views mediation broadly as including any process that is neither negotiation without third-party assistance nor the provision of a binding determination by a non-party (as in litigation and arbitration), an almost unlimited variety of processes may be included, in practice as well as theory.<sup>8</sup> In this section, I will survey some significant variables.

### A. Task Orientation

Mediation authorities frequently divide task orientations by dichotomies that contrast narrower, shorter term, and, perhaps, more readily achievable goals with more pervasive, longer term goals concerned with the functioning and quality of relationships. Two books present interesting versions of this duality.

Kolb and Kressel, concluding a study of the work of twelve prominent mediators, judged that their subjects' task orientations leaned towards either "settlement" or "communication."<sup>9</sup> They found that for those who worked in a settlement "frame," "getting agreements that work is the overriding goal that drives their activities and the primary basis that they use to judge themselves."<sup>10</sup> The task frame for "communication"-oriented mediators views mediation "as a process to enhance communication. Their aim is to have the parties come away from mediation with a different, better understanding of the problem, if not with a definite settlement."<sup>11</sup>

Bush and Folger contrast what they see as the currently dominant settlement (problem-solving) orientation with a "transformative" goal for mediation that they advocate.<sup>12</sup> My students perceive such distinctions as a difference between settlement and therapeutic goals.<sup>13</sup>

An enterprise's task is its organizing principle: it determines relevance, appropriate structure, and necessary resources. However, ascertaining the central task of an enterprise can be a difficult inquiry.<sup>14</sup> This is true of mediators and their organizations.

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8. Some variant processes are sufficiently common to have received labels, e.g., non-binding arbitration. See JOHN S. MURRAY ET AL., PROCESSES OF DISPUTE RESOLUTION: THE ROLE OF LAWYERS 567-68 (2d ed. 1996). See also early neutral evaluation, *id.* at 439-40; and mini-trial, *id.* at 454-55.

9. Deborah M. Kolb & Kenneth Kressel, *The Realities of Making Talk Work*, in MAKING TALK WORK 459-93 (Deborah M. Kolb ed., 1996).

10. *Id.* at 470.

11. *Id.* at 474.

12. ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION* (1994).

13. Cf. KENNETH KRESSEL, *THE PROCESS OF DIVORCE: HOW PROFESSIONALS AND COUPLES NEGOTIATE SETTLEMENTS* ch. 12, *Can Mediation Be Therapy? The Case of the Browns* (1985).

14. See discussion of "primary task" in ERIC MILLER, *FROM DEPENDENCY TO AUTONOMY: STUDIES IN ORGANIZATION AND CHANGE* 16-18 (1993); E.J. Miller & A.K. Rice, *Selections from "Systems of Organization,"* in GROUP RELATIONS READER 62-68 (Arthur D. Colman & W. Harold Bexton eds., 1975).

### B. The Nature of the Dispute

If mediation's task is "dispute resolution," then the nature of the dispute, or how the nature of the dispute is conceived, will be central. The prevailing conception of a dispute will determine what one understands to constitute its resolution.<sup>15</sup>

Lawyers naturally think of disputes in terms of *conflicting claims of legal rights*. These disputes are resolved when the law says they are, by operation of a judgment in litigation, a settlement, a statute of limitations, default, estoppel, waiver, or by some other legal device. But there are other significant concepts of dispute.

*Conflicts of wills (desires, intentions)*. Consider two children quarreling over a toy. Depending on their development, they may rationalize their positions by claims of "rights," but the underlying matter is a conflict of "wants." Conflicts of wills are resolved when disputants' wills are modified (for example, when a party "gives up") or when circumstances effect a disengagement (for example, the children are sent to their rooms). Resolutions of questions of legal rights may not resolve parties' conflicts of wills, although the coercive effects of a legal resolution may effect a disengagement.

*Argument and disagreement*. When lawyers argue the validity of legal principles in court, they do so for instrumental purposes. Principles, however, such as "when does life begin?" and "what is 'the right to bear arms'?" are, themselves, important in public discourse and personal lives. Disagreements may be resolved by learning processes through which one party persuades the other or in which the disputants achieve a shared understanding that differs from the initial position of either. Educational strategies range from coercive (brainwashing) to voluntary, collaborative methods. Sometimes disputants may accept an authoritative resolution (for example, relying on a dictionary or almanac, or the professor teaching the course), and sometimes authority will be accepted if the parties have had an opportunity to present arguments. Sometimes they will accept a resolution for limited purposes. (For purposes of the examination, the professor declares the truth.)

*Unsettled relationships*. Marital and labor management disputes are, most obviously, likely to be this kind of dispute in some of their aspects. Indeed, unsettled relationships are likely to be aspects of many kinds of disputes. When there are *conflicting views or intentions regarding future relations*, the dispute may be formal (that is, contractual) or informal (for example, a dating couple breaking up because only one of them wants to continue the relationship). Negotiation is the means of contracting for future formal relations. There are many schools of counseling and therapy through which the parties may relearn and adjust their roles and relationships to ones which are mutually satisfying, or at least acceptable. Alternatively, the solution may be disengagement or separation.

*Opportunities for growth and increased understanding*. Disputes (and problems generally) may create opportunities for growth and increased understanding for those immediately involved and for their communities (large and

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15. The following analysis is adapted from Edwin H. Greenebaum, *Lawyers' Agenda in Understanding Alternative Dispute Resolution*, 68 IND. L.J. 771, 778-80 (1993).

small). Development of the law through precedent and legislative response is the opportunity side of litigation. The opportunity for community development is one of the principal tenets of the community dispute resolution component of the ADR movement.<sup>16</sup>

*Who are the disputing parties?* The multiple ways in which the parties to a dispute may be conceived will influence who will be seen as essential to the resolution of the dispute, as I will develop further in the next section.<sup>17</sup>

Some disputes have only historical and current *temporal focus* while others raise continuing concerns. Is the dispute a discrete, bounded transaction, or is it an episode in a continuing saga? For example, contrast the dispute that arises from an automobile accident between strangers, where the resolution will determine how much money will be owed between them, here and now, with the dispute between divorcing spouses regarding the continuing rights and obligations they will have with regard to the children whose parentage they share.

In another analytical aspect, it is common to distinguish *rights-oriented from interest-oriented disputes*. In rights disputes, the parties contest their entitlements under authoritative standards (the law). In interest disputes, parties, who by obligation or circumstance need (with varying degrees of compulsion) to establish a future relationship, have, within broad parameters, freedom to contract in their interests. In settlement negotiations in rights disputes, parties also have broad freedom to contract, but such negotiations, it is frequently said, are conducted "in the shadow of the law" that would apply to them coercively in court should they be unable to settle.<sup>18</sup> It is commonplace analysis in ADR texts that disputes are frequently not purely of the rights or interests variety.<sup>19</sup>

Beyond such broad, analytical distinctions, disputes vary greatly depending on their subject matter, varying with the kinds of facts, standards, and relationships involved. Take the problem of "urban decay." The matter is certainly multifaceted, multicentered, and confusing. There are problems of education, housing, law, transportation, and urban management, among others. Our tendency is to try to break large, complex problems into more manageable subproblems, but adopting such a strategy becomes part of the problem definition. Our goals and values, and our priorities among them, are also likely to influence our approach to defining the problem. Urban decay is multifaceted and confusing, but if a riot is in progress, our minds focus, at least for the time being. And sometimes the immediate argument focuses on dispute resolution processes rather than on the subject of the underlying

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16. See Raymond Shonholtz, *Neighborhood Justice Systems: Work, Structure, and Guiding Principles*, 5 *MEDIATION Q.* 3, 13-16 (1984) ("[T]he expression of hostilities and differences within the community serves to inform and educate, which creates a base for greater understanding and mutual work between disputants."). But see SALLY ENGLE MERRY & NEAL MILNER, *Introduction to THE POSSIBILITY OF POPULAR JUSTICE: A CASE STUDY OF COMMUNITY MEDIATION IN THE UNITED STATES* 7 (Sally Engle Merry & Neal Milner eds., 1993) ("Although the community may be portrayed as a haven from state control, a place that encourages voluntary resolution of conflicts based on common experiences and shared meanings, it is rarely free of violence. . . . Arbitrariness, dominance, and coercion are the darker sides of popular justice.").

17. See *infra* Part I.C.

18. Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case for Divorce*, 88 *YALE L.J.* 950, 950 (1979).

19. See, e.g., MURRAY ET AL., *supra* note 8, at 519-22.

dispute. Parties need to select both an approach to conflict resolution and the venue in which to act out the approach, tailored to both of the parties' needs and capabilities. This decision may involve extended assessment and negotiation.<sup>20</sup>

Facts are disputable because we know them only by the mental processes through which we process our sensory experience.<sup>21</sup> Reconstructing history differs from predicting the future, and there is very little that is available for verification in any current moment. Facts may be more concrete because they are more verifiable from immediate, personal, repeated experience or more abstract in that they are more identified by their membership in broader categories, by the processes that produced them, and by evaluative qualities. Facts may be more knowable through common experience or more esoteric and specialized (that is, experience that is common to a narrower group). Facts vary in the degree to which they evoke emotion, which affects how much one cares what the truth of the matter is and how attached one is to a current conception of it. Some conceptions of facts result more from personal experience and some are more socially constructed. Attachment to some conceptions of fact are significant to memberships in important groups. Heresy can result in excommunication. Uncertainty in some facts is an expected, normal problem, but error in determination of other facts is thought to be unnecessary and, sometimes, intolerable. Thus, the law is ambivalent about reopening settlements and judgments for "mistake" and "newly discovered evidence."<sup>22</sup>

Decision-making, in mediation as elsewhere, involves applying values to perceptions of fact. Values coalesce in principles, or standards, intended to guide action. As with facts, standards may relate to dispute resolution processes as well as to the underlying controversy. There may be dispute about the standards to be selected (for example, choice of law) or about their content. Standards may be specific or vague. They may be personal or shared by a significant community. That community may be smaller or more inclusive, relate to different aspects of the individual's life, be more or less "important," and have greater or lesser powers of coercion. Membership in communities may be voluntary or necessary. As a result of these factors, the standard applied may be imposed by authority or voluntarily assumed.

The nature of a dispute is as much a matter of conception as it is a demonstrable reality. In a controversy between a landlord and a tenant whom the landlord has "locked out" (evicted without legal process) for failure to pay several months' rent, the dispute could be about who owes whom how much money or about the tenant's credit rating and the landlord's reputation for fairness and toughness. If to avoid embarrassment, the landlord pays the tenant compensation to which the tenant is not "entitled," is the dispute about justice or power?<sup>23</sup> In such matters, what one notices

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20. See CHRISTOPHER W. MOORE, *THE MEDIATION PROCESS: PRACTICAL STRATEGIES FOR RESOLVING CONFLICT* 98-99 (2d ed. 1996).

21. See Edwin H. Greenebaum, "Understanding . . .": *Processing Information and Values in Clinical Work*, 11 J. LEGAL PROF. 103 (1986).

22. See RESTATEMENT (SECOND) OF CONTRACTS ch. 6 (1979) (mistake); FED. R. CIV. P. 60 (newly discovered evidence and mistake).

23. The hypothetical is inspired by a videotaped mediation demonstration. Videotape: *The Lockout* (Richard A. Salem 1987). The videotape was created for use with a text, NANCY H. ROGERS & RICHARD A. SALEM, *A STUDENT'S GUIDE TO MEDIATION AND THE LAW* (1987).

and how one constructs the details into a picture are conditioned by culture, experience, and values. Lawyers, therapists, management consultants, economists, and so forth, are likely to conceive disputes quite differently. How the dispute is conceived can be influenced by how the story is told, which is one of the reasons a good trial lawyer is so valuable.

Thus, the nature of a dispute can itself be, and frequently is, a matter of controversy, but this failure of agreement is often not brought to the surface. If the nature of the dispute is a matter of contention, whose conception matters: the parties', the professionals' (for example, the parties' lawyers'), the institutions', the public's?<sup>24</sup>

### *C. The Nature of the Participants (Parties and Neutrals) and of the Relationships among Them*

The participants in mediation, including mediators, parties, and influential outsiders, may be individuals or groups. Where a group is involved, the authority of the group's representative will be a question,<sup>25</sup> and negotiations within the party may also require facilitation. Where the participant is an individual, the individual may still represent, or at least be significantly influenced by, a group. Groups are of many kinds: formal and informal, large and small, simple and complex, casual and intimate. Groups may relate to different aspects of members' lives, including their work, social, political, personal, and family lives. Participation in dispute resolution processes, whether by an individual or group, may be direct or through representatives (professional or lay). All of these factors may make it unclear who are the real parties in interest.

Many factors affect participants' competence, practically speaking, even where their formal or legal competence is not in question. Competency varies with capacity, knowledge, and skill. Relative disabilities may be characteristic and inherent in the individual or reactive and situational. For example, the emotions generated by the experience of a dispute may affect functioning.<sup>26</sup> Groups, as well as individuals, may have "competency" problems that prevent them from getting their act together. Inadequacy of resources (economic, time, and support) is disabling. The source of participants' resources affect their independence. Participants who repeatedly engage in disputes of a particular nature ("repeat players") may have added competence resulting from their experience and sophistication, but they may also have interests that increase their vulnerability.<sup>27</sup> Such characteristics may be typical of a category to which an individual is perceived to belong (for example, minors and adults or men and women) or be idiosyncratic

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24. Certainly, the institutional context is significant, which we will discuss *infra* Part I.I.

25. See Edwin H. Greenebaum, *Law Firms and Clients as Groups: Loyalty, Rationality, and Representation*, 13 J. LEGAL PROF. 205, 228-32 (1988).

26. See Edwin H. Greenebaum, *Personal Agenda in Clinical Work*, 15 J. LEGAL PROF. 285 (1990).

27. To explore fully the complex factors that affect the power or influence that individuals are able to exercise would require more than the space available in this paper. Others have done this well. See, e.g., Bernard Mayer, *The Dynamics of Power in Mediation and Negotiation*, 16 MEDIATION Q. 75 (1986).



to the individual. And perception of characteristics, whether of ourselves or others, is as significant as their reality.

Relations among participants range, at the extremes, from strangers to intimates and from those without any existing obligations to each other to those in a fiduciary relationship. Their feelings, responsibilities, and influence regarding each other may be mutual or asymmetrical. Relationships are prompted normatively and influenced practically by the participants' characteristics surveyed above. Relationships are conditioned by participants' expectations generated by culture and ideology. Where a dispute occurs in the context of a significant, continuing relationship, it is important to negotiate in a way that will avoid or minimize injury to relations. In fact, the relationship may be more important to the parties than the substantive outcome of a particular negotiation. Even where the relationship is temporary and distant, negotiators need to maintain a working relationship between them good enough to produce an acceptable agreement, if one is possible, given each side's interests.<sup>28</sup>

#### *D. Model of Problem Solving*

Since mediation is a facilitated negotiation, the model of negotiation on which participants act is a significant variable. And since choosing a method to resolve a dispute is a "problem," the models of problem solving on which participants habitually act significantly affects how they negotiate.<sup>29</sup> Models of problem solving include routine (by the book), disciplined (exploration and evaluation of an extended array of choices), and artistic (fluid action and reflection) approaches.<sup>30</sup>

Problem solving is frequently routinized so that recurring problems can be resolved by rules. One may adopt routines for efficiency, to permit delegation of authority to agents whose judgment one is unwilling to trust, and to assure the implementation of authoritative policies and nondiscriminatory problem solving. Approaching every problem as a novelty is expensive. Among the expenses of non-routine approaches is investing in problem solvers whose training and experience would warrant trusting their discretion. But inappropriate application of routine may make a problem more serious and expensive to resolve.

Routines may be written or unwritten; they may be adopted formally or be the product of culture. When one is confronted with an unfamiliar problem, one is likely to look for processes to imitate, and routinized models may make problem solving feel safer. Negotiation is a multi-party game, and "routine" negotiation implies a

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28. ROGER FISHER & WILLIAM URY, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* 20 (Bruce Patton ed., 1981).

29. I will examine models of problem solving in this section of this paper and models of negotiation in the next. My students find it helpful to identify the different ideas they associate with "problem," "dispute," and "conflict." For myself, I think of a "problem" as a situation in which one or more people are not satisfied with the status quo. In addition, I think of being confronted with a choice as a problem (change of status quo may be thrust on us). One idea of "dispute" is a situation in which there are conflicting intentions regarding the solution of a problem. While I would say "conflict" is where more than one person is involved in a problem with inconsistent intent, we reasonably speak of internal conflict when we are ambivalent.

30. The following discussion is adapted from Greenebaum, *supra* note 15, at 772-78.

patterned give and take in which parties' moves do not disappoint others' expectations.

The elements of problem-solving discipline are definition, searching, evaluation, and choice.<sup>31</sup> The first step is to frame a problem as one of a certain kind, which establishes criteria for relevance and directions for the search for solutions. Because problematic situations frequently are incoherent and have multiple aspects, "defining the problem" is often itself difficult. Not only do problematic situations often come either without labels, or with unreliable labels, but, more fundamentally, even a simple problematic situation can be conceived of in diverse ways.<sup>32</sup>

Disciplined problem solving involves considering the greatest available number and diversity of possible solutions, and separating, at least initially, the process of searching for possibilities from that of evaluating them. This separation functions to avoid attitudes that inhibit the generation of ideas and to avoid making premature judgments.<sup>33</sup> Premature judgment comes when we are captured by a "good idea." Too often the idea seems good because it conforms to our biases and stereotypes. In any case, better ideas may yet be discovered. One lets bad ideas come with good ones, not only to avoid turning off the flow, but also because early in the process we may not be good judges of quality and because the best solution may turn out to be constructed from pieces of bad ones.<sup>34</sup>

One can generate possibilities through research, brainstorming, and play. Research, brainstorming, and play support each other. Brainstorming and play are, indeed, hard to separate. Ideas generated through brainstorming and play may lead to productive research, just as material found in research may be the starting point for brainstorming and play.<sup>35</sup>

One commences evaluating possible solutions when the sources for additional possibilities seem exhausted, when time and other resource constraints require moving on, or when one judges that the marginal utility of new ideas does not justify further investment in searching. Making choices involves applying values to perceptions of facts, including one's understanding of history, of present circumstances, and of the social and natural systems on which one's predictions depend.<sup>36</sup> To judge the benefits and costs of possible solutions, one must identify and assess factual uncertainties and clarify one's conflicting values (including

31. Compare the model of "creativity" articulated in TERESA M. AMABILE, *THE SOCIAL PSYCHOLOGY OF CREATIVITY* 77-91 (1983). For the relevance of a similar model to legal education, see Richard K. Neumann, Jr., *A Preliminary Inquiry into the Art of Critique*, 40 *HASTINGS L.J.* 725, 744-53 (1989).

32. See discussion of conceptions of disputes, *supra* pp. 118-21.

33. This is an aspect of teaching law students "to think like lawyers" in which legal education is not very successful. See Edwin H. Greenebaum, *How Professionals (Including Legal Educators) "Treat" Their Clients*, 37 *J. LEGAL EDUC.* 554, 563-66 (1987).

34. This applies to the framing of the problem as well as its solution once framed.

35. The diverse cognitive styles of different problem solvers will each have advantages and disadvantages for generating possibilities and evaluating them. The logical analysis of linear thinkers will leave no stone unturned following a path of inquiry. Associational/gestalt thinkers will see possibilities and implications not available to the more focused among us. Problem-solving teams of individuals with complementary aptitudes may be better able to create or find the best solutions, but professions and firms of problem solvers may tend to attract, and value, "like-minded" groups.

36. See Greenebaum, *supra* note 21.

tolerance of risks) as they are confronted by the problem and its possible solutions. Where the choice of a solution must be made or accepted by a client, by a group, or among “adverse” parties in a negotiation, assessing factual uncertainties and clarifying values are more than an individual matter.<sup>37</sup> (Indeed, agreeing on an operational reframing of the problem is a first order of business in many negotiations.) The degree to which uncertainty should be eliminated and clarification achieved as predicates for making a choice is yet another problem.

Each possible definition of the problem will lead to a number of possible solutions, each of which needs evaluation. Not only will this branching lead in many directions, but at each stage one may encounter new ideas or data that may prompt looping back to an earlier stage in order to follow yet more new paths. To say the least, disciplined problem solving is not straightforward. Resource constraints will truncate problem solving in all but the simplest situations, requiring good judgment in problem-solving “triage.”

Artistic mastery is acquired with discipline, and artists never leave their disciplines fully behind. Experienced practitioners of problem-solving arts reflect on their work in progress, allowing the work to speak back to them.

Each move is a local experiment which contributes to the global experiment of reframing the problem. Some moves are resisted . . . while others generate new phenomena. As [the artist] reflects on the unexpected consequences and implications of his moves, he listens to the situation’s back talk, forming new appreciations which guide his further moves. . . . Out of his reframing of [the] problem, [the artist] derives a problem he can solve and a coherent organization of materials from which he can make something that he likes . . . .

In [the artist’s] unflinching virtuosity, he gives no hint of detecting and correcting errors in his own performance. He zeroes in immediately on fundamental schemes and decisions which quickly acquire the status of commitments. He compresses and perhaps masks the process by which designers learn from iterations of moves which lead them to reappraise, reinvent, and redraw. But this may be because he has developed a very good understanding of and feeling for . . . “the problem of this problem.” . . . But [the artist] reflects very little on his own reflection-in-action, and it would be easy for a student or observer to miss the fundamental structure of inquiry which underlies his virtuoso performance.<sup>38</sup>

The inexperienced learn problem-solving arts in part by acquiring the discipline’s information and rules, but in larger measure by witnessing models of and receiving guidance from experienced practitioners.

Whether in disciplined structure or artistry, evaluation of options will involve experiment. Much of our experimentation is done through models. We frequently

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37. See GEOFFREY C. HAZARD, JR., *ETHICS IN THE PRACTICE OF LAW* 43-67 (1978).

38. DONALD A. SCHÖN, *THE REFLECTIVE PRACTITIONER: HOW PROFESSIONALS THINK IN ACTION* 94-95, 104 (1983). The passage is adapted from a passage describing a teacher of architecture modeling problem solving for a student.

do this mentally, running possibilities through the models of social, economic, and natural systems that we have in our minds. One can experiment in some situations with game-playing simulations. Sometimes, computerized models may be used.<sup>39</sup> One can sometimes experiment by trial runs of a solution in the actual situation. A married couple's "trial separation" is an expression of this idea. Whatever methods of evaluation we use, one's problem solving is an intervention in the situation and is, to some degree, changing the problem as one seeks to solve it.<sup>40</sup>

The time will come to make a choice and act on it. This may occur when a convincing solution is found or when time and other resources run out. In any case, whether a choice is a commitment or merely an experiment is a matter of degree.<sup>41</sup> It is a comfort that many decisions made under constraints may be revisited. Understanding where one stands, and what to do about it, is always a problem needing a solution.

Routine, discipline, and artistic problem solving are points on one or more scales. At the extreme, routine end, there are procedures that take data inputs and yield results without the exercise of any judgment. Mechanical devices, including computer programs, can do this without any current mental activity. Even the data may come from mechanical sensors. A heat-activated sprinkler system is a simple example. Some distance along the spectrum, one operates in a framework, guided by an understanding of goals and of how the parts of the system within which one is working relate operationally to the whole. With guidance and experience, one learns approaches and procedures that are available and that may be efficient and effective, but both skill and judgment must be developed. Diligence and care are necessary, but more is involved when we speak of learning a discipline. Artists always work with reference to a discipline, but they are more open to unexpected possibilities, make quicker and surer judgments regarding what approaches may be productive and where one can depart from usual ways of proceeding, work more fluidly, and have more productive "conversations" with the work.

Individuals acquire problem-solving habits, good and bad, in their developing years, and then learn problem solving as it applies to different areas of adult experience, including professional practice. The models and instructors they encounter in practice will have themselves developed varying degrees of virtuosity. Some are too likely to believe one can move from life-long habits to becoming artists without attention to discipline. However, if problem solving as an art is not informed by discipline and reflected upon in action, it is likely to amount to muddling. I think we all became artists in our social problem solving (for better and worse) in our earliest years. We make social judgments so readily (too readily) that

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39. See Francis E. McGovern, *Toward a Functional Approach for Managing Complex Litigation*, 53 U. CHI. L. REV. 440, 460-66 (1986).

40. BUSH & FOLGER, *supra* note 12, at 76-77. Bush and Folger state:

Conflicts are inevitably changed as they are processed, and mediators are an inevitable part of that change. Of necessity mediators contribute to the shaping of a conflict as long as they are interacting with the parties. . . . The kind of mediator directiveness prevalent in current practice is what we can expect to see as long as problem solving guides our sense of what conflict is and how we should respond to it.

(citations omitted). *Id.*

41. See *supra* note 22 and accompanying text.

we know not what we do. In any case, problem solving in negotiation and mediation will contain a mixture of routine, disciplined searching and evaluation, and artistry.

### E. Models of Negotiation

Models of negotiation vary in a number of dimensions, among them: interest or positional orientation, collaborative/cooperative or adversarial style, promissory or action-oriented outcomes, explicit or implicit communication, and open-ended or bounded time frame.

An interest is a need that can be satisfied in alternative ways. A position is a commitment to a particular means of satisfaction. In positional negotiations, parties propose particular outcomes, which they believe will meet their needs, and make concessions in their positions to accommodate each other until an agreed outcome, or a stalemate, is reached. "Positions," as I use this multi-use word in relation to negotiation models, equates best with concrete offers and demands. The package of solutions contained in a settlement is a position the parties have agreed to, in this sense. When parties take positions, they are motivated by interests (needs) which they may or may not articulate as part of their rationalizations supporting their positions. Parties may misrepresent their interests in their articulations, or may keep them secret, as part of their negotiation strategy because they believe adverse parties will exploit knowledge of their true interests to their disadvantage. Advantages of the positional bargaining model are said to be that high levels of trust are not required, that negotiations can be conducted at a distance and do not require good personal relationships to succeed, and that a skillful negotiator can exploit the negotiation situation to obtain maximum benefits. Costs of this model may be that minimum concessions and brinkmanship may lead to delay and unnecessary stalemate, that low trust may increase transaction costs (for example, for discovery) and stress, and that concealment of interests and information may lead to missed opportunities.<sup>42</sup>

In an interest-oriented negotiation, the parties avoid commitments to positions, but instead identify the parties' interests, generate a variety of ways in which those interests may be satisfied, and evaluate those possibilities to find the package of solutions that will best meet the parties' needs (acting on the model of disciplined problem solving articulated above).<sup>43</sup> The advantages of interest-oriented negotiations are argued to be more beneficial results, reached with less cost, with better relationships between the parties for their future benefit.<sup>44</sup> Skeptics think interest-oriented negotiations are not possible in a competitive and suspicious world.<sup>45</sup>

Either positional or interest-oriented negotiations may be conducted in more cooperative, collaborative or in more adversarial styles (more in the spirit of

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42. See FISHER & URY, *supra* note 28, at 6-7; MOORE, *supra* note 20, at 238-39.

43. FISHER & URY, *supra* note 28, at 11-12.

44. *Id.* at 5-7.

45. See MURRAY ET AL., *supra* note 8, at 158-59, 161-63; ROBERT M. AXELROD, THE EVOLUTION OF COOPERATION 8-9, 12, 14-15, 20-21 (1984), *reprinted in* PROCESSES OF DISPUTE RESOLUTION, *supra* note 8, at 159-61.

peacemaking or of war).<sup>46</sup> Cooperation relates to the degree of openness, trust, and consideration of other parties' needs that characterizes the negotiators' behavior. Interest orientation and cooperative style are sometimes confused, since interest-oriented negotiation may be more dependant on cooperation than is the trading of positions. But texts advocating interest-oriented negotiation do contain advice on how to cope with adversarial behavior.<sup>47</sup>

Parties may benefit from negotiations by distributive outcomes, by integrative outcomes, by increasing the resources available to them, and by exploiting the relationships between their interests. The idea of *distributive outcomes* relates to those aspects of bargaining situations where there is a fixed, often monetary, resource, available to the parties, and they must divide that resource between them. In this context, one party benefits by obtaining more of that resource at the expense of the other party. Economists view this as a losing transaction, from a community viewpoint, because there are transaction costs in the negotiation with no increased benefits from trade. *Integrative outcomes* are available in situations where the parties have different priorities, values, or costs for different resources. Parties trade goods of less value (priority) for others they value more highly. Similarly, a party may be able to provide a good at a lower cost than the cost at which the other party could obtain the equivalent good from other sources. Integrative opportunities suggest the parties may benefit more if they increase the range of matters over which they bargain.<sup>48</sup> In these ways, the total benefit available to the parties collectively will vary, falsifying the fixed-resource assumption of distributive bargaining. This is how trading maximizes value in a market.

Negotiating parties may also benefit by *increasing resources* available to them. This can happen by discovering entitlements of which they were previously unaware or by subsidy from third-parties interested in the negotiation outcome. Resources may also be increased by testing structural constraints. Assumptions about legal constraints on parties' opportunities may be invalid or relationships may be restructured in ways not previously conceived. Resources of time and geography may be restructured in ways that provide new opportunities. For example, divorcing parents may lose opportunities for parental involvement by restricting themselves to consideration of conventional outcomes in the division of time with their children. The parties can also increase the resources available for their bargaining by recognizing their psychological and procedural, as well as their substantive interests.<sup>49</sup> The satisfaction of a valued relationship or of an apology and the assurance of an efficient and fair means for coping with future problems are examples of goods available for negotiation in situations where parties may

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46. GERALD R. WILLIAMS, LEGAL NEGOTIATION AND SETTLEMENT 49 (1983).

47. *E.g.*, FISHER & URY, *supra* note 28, at 112-33.

48. *See, e.g.*, McGovern, *supra* note 39, at 462.

A program was run to determine if any scenario would satisfy each party's minimum priorities. When the game was limited to the case's legal issues, no negotiated outcome seemed possible. If, however, the issues were expanded to include other items that might be subject to negotiation, some solutions might satisfy the hypothetical minimum interests of the parties.

*Id.*

49. MOORE, *supra* note 20, at 71-73.

otherwise think of themselves as bargaining over money or property. Recognizing these kinds of interests increases what the parties can do for each other, sometimes at little cost. The salience of psychological and procedural interests is one factor making distributive outcomes an inadequate description of many bargaining situations.

Finally, benefit may be obtained from recognizing *the relationship of parties' interests*. Parties' interests may be shared, interdependent, mutual (symmetrical), or conflicting (asymmetrical). Divorcing spouses will share an interest in decreasing tax liabilities because it will increase the resources available to divide between them. A creditor's interest in repayment depends on the debtor's business succeeding. Recognizing that the parties have corresponding interests legitimates sharing resources. In some negotiations, truly conflicting, asymmetrical interests may be less significant than the parties' shared, interdependent, and symmetrical interests, if these factors are recognized. This not only increases their opportunity for benefit, but also legitimates and motivates cooperative bargaining.

Negotiations conducted in any of the alternative models may have outcomes with these diverse benefits, but negotiating in different models may be more likely to obtain them. Positional bargaining is effective for distributive outcomes. One certainly expects positional bargaining in auctions and street markets and in negotiation of insurance claims where it is assumed the only question is how much money will change hands. Integrative outcomes and some aspects of increasing resources are also achievable in positional negotiations, the former resulting from the give and take of offer and counter-offer and the latter because the parties can cooperate to obtain outside resources with little trust of each other. Other means of increasing resources and exploiting the opportunities of the relationships of the parties' interests are more likely to occur through the collaborative problem-solving processes of interest-oriented bargaining. The transaction costs of information, communication, time, and of psychological strain vary for positional and interest-oriented bargaining in different contexts. It is argued that the motivation in positional bargaining to conceal information and interests increases negotiation costs and the likelihood of stalemate while decreasing the ability of the parties to find ways of achieving greater benefit.<sup>50</sup> In positional negotiation, the parties literally play games with each other. These have been hotly debated matters.<sup>51</sup>

Mediation is conducted in both positional and interest-oriented frameworks.<sup>52</sup> Indeed, few complex negotiations are conducted in ways that conform purely to one or the other model. And negotiation artists may work so fluidly between models that one may not easily perceive just what they are doing.<sup>53</sup>

Why do parties engage in positional or interest-oriented bargaining or negotiate more or less cooperatively? This is, as with any social behavior, a multifaceted

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50. See generally FISHER & URY, *supra* note 28, at 8-10; Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754 (1984).

51. See FISHER & URY, *supra* note 28; NOLAN-HALEY, *supra* note 7, at 68-70; Menkel-Meadow, *supra* note 50; James J. White, *Essay Review: The Pros and Cons of Getting to Yes, With following Comment by Roger Fisher* (1984), reprinted in PROCESSES OF DISPUTE RESOLUTION, *supra* note 8, at 133-36.

52. See Susan S. Silbey & Sally E. Merry, *Mediator Settlement Strategies*, 8 LAW & POL'Y 7, 12-19 (1986).

53. Cf. *supra* note 38 and accompanying text.

matter. However, one factor is likely to be that this too is motivated by the parties' perceptions of their interests (a "position" on how to bargain, as it were). One strategy to influence a change in bargaining behavior is to take those interests seriously and explore alternative solutions for meeting them. The aim would be to find a method of negotiating that would attain results satisfying more criteria of what would be beneficial bargaining outcomes for all negotiating parties. Gerald Williams' research indicates that while both "cooperative" and "competitive" negotiation styles are viewed by practitioners as effective, whether in positional or interest-oriented models, there are more effective cooperative than competitive lawyers.<sup>54</sup> Nevertheless, conventional wisdom suggests that the norm in professional behavior has become undesirably adversarial.<sup>55</sup>

Both the positional and interest-oriented models assume that negotiation is conducted through explicit communication and that the outcome of negotiation is an explicit agreement -- whether simple or complex -- that constitutes the parties' commitments to future behavior. Such negotiations are conceived as having clear beginning and ending points. The largest portion of negotiations, however, is not of the explicit offer and acceptance kind. More often, negotiations include a significant element of parties responding by actions to each other's expectations and demands, which themselves are often communicated non-verbally. This is negotiation by acting out.<sup>56</sup> The outcomes of such negotiations are often more custom than contract. It is hard to identify when such negotiations begin, and it is not clear that they ever end, short of terminating the relationship between the parties entirely. While custom often becomes settled and difficult to change, there remains a quality of experiment in the outcomes of these tacit negotiations. Even where an explicit negotiation results in a contract, the parties may continue their negotiation through adjustments in practice which may result in an alteration or amplification of their contract.<sup>57</sup>

Negotiation in dispute resolution always involves two negotiations: the negotiation over the substance of the problem is always accompanied by a negotiation about the process through which it will be resolved. Either negotiation may be tacit, rather than explicit, but the negotiation about process is especially likely to be of the acting out kind. One kind of help that mediators can offer is assistance in dealing explicitly and considerately with choosing a negotiation process. Whether mediators will do so brings us to the question of mediators' roles.

The length of these treatments of problem-solving and negotiation models, in relation to the overall length of this article, suggests that what is taught about these matters, explicitly or tacitly, will be a significant aspect of any course in Mediation.

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54. WILLIAMS, *supra* note 46, at 49.

55. See ROGERS & MCEWEN, *supra* note 6, § 3:02; Wayne Brazil, *The Attorney as Victim: Towards More Candor About the Psychological Price Tag of Litigation Practice*, 3 J. LEGAL PROF. 107 (1978-79).

56. The "Prisoners' Dilemma" exercise is an acting-out negotiation. See AXELROD, *supra* note 45, at 159-61.

57. RESTATEMENT (SECOND) OF CONTRACTS § 223 (1979).



### F. Mediator Role and Functions

The degrees to which mediators lead and control the substance and process of parties' negotiations range on a spectrum from facilitator, to consultant, to advisor, to guardian. Facilitative mediators limit themselves to providing facilities and assisting communication between the parties. This is the most passive role a mediator can play and still make a contribution to a negotiation process. Referees of sporting events are facilitators in this sense. They apply the rules and affect the flow, but they do nothing to help the contestants play the game. Beyond facilitation, mediators may provide information, prompt parties to consider factors of which they were unaware, and to see matters in new ways. Such consultant mediators go further than do facilitators in helping parties understand and appreciate each other's interests and viewpoints, but still seek to avoid influencing negotiation outcomes. This is the idea the *Model Rules of Professional Conduct* has in mind when it says, "'Consult' or 'Consultation' denotes communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question."<sup>58</sup> Further along this spectrum, mediators may advise parties regarding outcomes the mediator thinks best, and may even argue for them. The advisor mediator will still consider it the parties' responsibility to make their own decisions, and will not undercut their ability to do so. Parties should be able to accept or reject the advisor mediator's guidance. Guardians take responsibility for some aspect or aspects of outcomes and may manipulate information, communication, and other aspects of the negotiation to effect acceptable results. Guardian mediators may view themselves as having contracted to assure "fair" results or as being custodians of the public's interests in the dispute. It is unrealistic to think that professionals in all fields do not act as guardians of their clients in some aspects of their work.<sup>59</sup>

Mediators frequently assume different roles regarding different aspects of a negotiation. The large divide in this regard is between substance and process. It is possible for a mediator to be quite passive regarding substance and still move quite far along the spectrum regarding the negotiation process, which is, after all, likely to be the mediator's expertise and the aspect of the negotiation for which the parties are most likely to expect to rely on the mediator. A frequently debated issue, for example, is a mediator's responsibility for managing the power balance between the parties in a manner that produces an adequately wholesome negotiation.<sup>60</sup> Many mediators do provide active consultation regarding the substance of negotiations, especially where the mediator has expertise in the subject matter and the parties are not experienced and do not have alternative sources of professional consultation. In contrast, others eschew consultation regarding substance, arguing that one cannot

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58. MODEL RULES OF PROFESSIONAL CONDUCT Terminology ¶ 2 (1997).

59. See Greenebaum, *supra* note 33, at 573-75. See generally ROBERT BURT, TAKING CARE OF STRANGERS (1979); JAY KATZ, THE SILENT WORLD OF DOCTOR AND PATIENT (1984); Warren Lehman, *The Pursuit of a Client's Interest*, 77 MICH. L. REV. 1078, 1079-84, 1087-93, 1095-96 (1978).

60. See Mayer, *supra* note 27, at 83-85.

provide substantive consultation without influencing, or appearing to influence, the outcome and losing the neutral role that is essential to maintaining the parties' trust.<sup>61</sup>

These role issues are all controversial, and mediation roles vary enormously in practice. Within legal and professional constraints, which provide very wide latitude, mediators are free to offer their services in role dimensions they wish. This is an aspect of contracting with mediators that the negotiating parties may have difficulty understanding, and, depending on the quality and content of their communication with the mediator, the parties may not fully understand the process into which they are entering.

### G. Mediation Models

The mediator's role is, no doubt, the most significant aspect of a mediation model. Other significant model features are communication patterns, how elaborate and formal the mediation process will be, and the process' degree of reactive flexibility.

*Communication patterns.* At one extreme, parties in mediation may never negotiate face to face, but may instead rely on the mediator, "caucusing" separately with each party, to carry messages between them ("shuttle diplomacy").<sup>62</sup> In contrast, mediation can be conducted with the parties always meeting face to face, communicating directly to each other.<sup>63</sup> While there is mediation conducted in both of these patterns, mediation can be conducted in a mixture of these modes, and in different proportions. Even where the parties are meeting face to face, patterns may be adopted wherein the parties address the mediator, speak to each other through the mediator, or speak to each other directly. The parties may or may not communicate directly to each other outside the presence of the mediator. In the mediator's presence or not, the parties may speak for themselves or through agents, such as lawyers. These communication modes may be utilized in accordance with a structured, pre-planned pattern (perhaps different modes for different mediation phases) or be adopted reactively as a mediation progresses.<sup>64</sup> The caucus model, in which the parties are kept separate, gives the moderator maximum control of communication in both content and process. Parties communicating directly with each other in the mediator's presence gives the mediator an opportunity to coach the parties to improve their ability to communicate and negotiate productively with each other. All communication patterns have their risks and opportunities in promoting trust or provoking paranoia and in managing confidential communication.

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61. Another role issue, which interacts with questions of responsibility and influence, is whether one will combine a role as mediator with other professional roles, such as lawyer or therapist. The canons of those other professions may constrain mediators in this regard. See, e.g., A.B.A., STANDARDS OF PRACTICE FOR LAWYER MEDIATORS IN FAMILY DISPUTES Standard IV, ¶ C (1984) ("The mediator may define the legal issues, but shall not direct the decision of the mediation participants based on the mediator's interpretation of the law as applied to the facts of the situation.")

62. MOORE, *supra* note 20, at 319; John W. Cooley, *Mediation Magic: Its Use and Abuse*, 29 LOY. U. CHI. L.J. 1, 7 (1997) ("expos[ing] and explain[ing] the true magic of caucused mediation").

63. See DEBORAH M. KOLB, *THE MEDIATORS* 58-62 (1983).

64. MOORE, *supra* note 20, at 56-58 (distinguishing "general" from "contingent" strategies).

The nature of the parties and the complexity of the dispute constrains the choice of communication patterns. Where a party is a group, communication patterns between the group and its representatives will likely be a problem, and the mediator may or may not facilitate that process. Where there are multiple parties, and especially where some of them are groups (some of them, perhaps, inchoate publics), special techniques will be required to facilitate communication between them.

*Structure: Elaborateness and formalism of the mediation process.* Most mediation texts identify phases of a mediation process. My course syllabus is organized around intake and contracting, analysis and preparation, issue formulation and agenda setting, problem solving, and reaching and finalizing agreements. However, there are many variations on this theme.<sup>65</sup> Identification of such phases can range in intent from a heuristic phase, identifying mediation functions or tasks, some of which are premises for others, to an elaborate structure in which certain activities are accomplished through given modes in a fixed order.<sup>66</sup> Even in a simple structure, the process may be more or less formal in the conceptions applied to the dispute and the modes of proceeding.

*Rigidity.* Mediation can be conducted in accordance with a model chosen in advance and resolutely followed, or the model can be flexible, adapting in response to developing events and what is learned about the dispute. This may be viewed as a matter of the extent to which mediation will be routine, in the sense developed in the above discussion of problem solving. A different rigidity issue is the extent to which, in the contracting process, a mediator will prescribe a process on a take it or leave it basis or will negotiate the process to be followed with the parties. The mediator may know best (in fact or in the mediator's opinion), and negotiating how a mediation will proceed may increase transaction costs, but parties' active participation in designing the process may increase their commitment to it.<sup>67</sup>

#### H. Who Is the Mediator?

When one asks, "who is the mediator?," one is concerned with the mediator's characteristics and qualifications and with the mediator's relations to the parties, to the subject matter, and to institutions.

One articulated distinction is between professional and peer mediation,<sup>68</sup> but this prompts more questions: In what respect is the mediator a professional, and in what respect is the mediator a peer of the parties?<sup>69</sup>

65. See, e.g., *id.* at 66-67.

66. See, e.g., Frederic L. DuBow & Craig McEwen, *Community Boards: An Analytic Profile*, in THE POSSIBILITY OF POPULAR JUSTICE, *supra* note 16, at 150-51.

67. See *id.* at 142.

68. The term "peer mediation" is often used to refer to student-mediator programs for peer disputes in schools. See, e.g., ROGERS & MCEWEN, *supra* note 6, § 12:06. However, in this article the term is used to refer to non-professional mediators who have social characteristics in common with the parties. John Paul Lederach & Ron Kraybill, *The Paradox of Popular Justice: A Practitioner's View*, in THE POSSIBILITY OF POPULAR JUSTICE, *supra* note 16, at 371-73.

69. Deborah Kolb and her colleagues sort the twelve prominent mediators they studied into "those who are public spokespersons and builders of the field, those who practice mediation full time, and those who mediate from outside the profession." DEBORAH M. KOLB & ASSOCIATES, WHEN TALK WORKS: PROFILES OF MEDIATORS 462 (1994). While mediation fit into these individuals' work and personal lives

Premises of “peer mediation” are that mediation is a naturally occurring social activity, and the necessary skills are inherent in generally acquired social maturation.<sup>70</sup> While some acquire mediation-relevant skills more than others and have more or less appropriate temperaments, appropriately selected individuals should require relatively little orientation to enable effective and responsible mediation. Attraction to peer mediation may be prompted by distrust of “professionals,” as well as by the likelihood that staffing mediation programs with volunteers will minimize the cost. Disputing parties may prefer a mediator who is a member of their community and, therefore, who may be like them in experience and values. If the parties are not like each other in this regard, a panel of mediators may meet this need.<sup>71</sup> How much extended experience and identification with the mediator role one can have without being a “professional” is in the eye of the beholder. In any case, the fact that one is not a professional does not necessarily ensure that one shares social and cultural identity with the disputing parties. Community mediation programs servicing populations with inadequate resources to finance professional services, for example, may be staffed by middle-class volunteers<sup>72</sup> or by individuals seeking experience to enable their becoming mediation professionals.

Premises of “professional mediation” are that disputes and relationships between disputants are complex, that a deep understanding of conflict and the mediation process are required to do good and avoid doing harm, and that considerable experience and maturation and, therefore, training and supervision, are required to cope effectively and responsibly with the trials and conflicts of the mediator role.<sup>73</sup> In addition to mediation professionalism, it may be useful to have mediators who are lawyers, therapists, management consultants, and so forth, where the expertise and discipline from such professions is relevant to the dispute’s subject matter.

Mediators should be impartial, unbiased and disinterested regarding the parties and the subject matter of the dispute. In practice, however, mediators may have relationships with the parties or to the subject matter that call these qualities into question. They may have preexisting relationships with the parties, share membership in a community with them, or be strangers to the parties in the fullest sense. While mediators will at least have an interest in the outcome of disputes shared with the public generally, sometimes mediators’ interests will come from sharing a narrower community with the parties. It may be an interest in the dispute that motivates a third party to seek to mediate between the contending parties. Consider, for example, political leaders building consensus among constituencies with diverse perceptions and interests or the circumstance of United States diplomats seeking to mediate a peace agreement between Israel and the Palestinians. Those

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in different ways, they were all sufficiently experienced as mediators to have substantial reputations. *Id.*

70. Lederach & Kraybill, *supra* note 68, at 373-74.

71. See, e.g., Shonholtz, *supra* note 16.

72. See ROGERS & MCEWEN, *supra* note 6, § 12:09.

73. See GOLDBERG ET AL., DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, AND OTHER PROCESSES 164 (2d ed. 1992); JOHN W. (SAM) KELTNER, MEDIATION: TOWARD A CIVILIZED SYSTEM OF DISPUTE RESOLUTION 16-17 (1987); KRESSEL, *supra* note 13, at 184.

who use "mediation skills" in their personal lives are similarly acting as "mediators" in situations in which they have a stake in the outcome.<sup>74</sup> Mediation in such non-independent relationships is offered and sought because of benefits that are perceived to outweigh the inherent risks. It may also occur because of suasion inherent in the situation, which brings us to our next topic.

### *I. Institutional Setting; Voluntary and Imposed Participation*

Individuals are never free from all social influence. There is no idyllic "independent" state. A mediator not dependent on mediation for economic support and working without a sponsoring agency would be as close as one could come, but even that relatively infrequent situation does not leave the mediator entirely free from social influence.

Mediators usually work in the context of a sponsoring agency and will be constrained by the culture and goals of that host institution. Sponsorship may range from referral, to forms of licensing, to employment of mediators and program administration. A sponsor may be a public or private agency, for profit, or charitable. And a mediator can have a wide variety of relationships with a sponsoring institution, including owner, responsible officer, employee, and independent contractor. Further, mediators depend on their ability to attract clients, and reputational needs will be a medium through which external culture will constrain independence. Sometimes mediators will depend on particular referral sources for clients, and meeting the needs of the referring institution becomes an issue.<sup>75</sup> Finally, mediators will depend on how the product of their work is treated after it is completed by the parties, the courts, and others. In the extreme case of fully annexed court mediation programs, the sponsoring institution that employs the mediator is also the referral source for clients and the agency that processes the mediation product.

Institutions will try to ensure that the mediation programs they sponsor are informed by the institutions' ideology and task orientation. The methods they use to do so and how they all, to some degree, fail is a topic beyond the scope of this discussion.<sup>76</sup>

### *J. Voluntary or Imposed Participation*

Ideally, participation in mediation is voluntary, but negotiating parties are never totally free actors. The choice the parties are making may not be all that attractive, but alternatives may appear worse or unavailable. No doubt, mediation is sometimes chosen because financing an alternative is not possible. An employee in a workplace dispute may not feel free to decline the employer's suggestion of mediation

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74. See MOORE, *supra* note 20, at 41-52 for a discussion of "independent," "social network," and "authoritative" mediators, the latter group divided into categories of "benevolent, administrative/managerial, and vested interest" mediators.

75. See generally *id.* at 85.

76. See LARRY HIRSCHHORN, *THE WORKPLACE WITHIN: PSYCHODYNAMICS OF ORGANIZATIONAL LIFE* (1988); MILLER, *supra* note 14.

conducted by the firm's human relations department. And in some jurisdictions, courts have the authority to order parties in some classes of litigation to participate in mediation of various forms before proceeding with the court's binding adjudicatory processes.

Coercive factors can influence parties' initial decision to try mediation, on their willingness to continue with the process, and on their consent to an outcome. General social and economic factors can, of course, affect all phases. The employee who did not feel free to refuse participation in mediation may not feel free to leave the process without "agreeing" to an outcome. Official coercion to mediate, for example, by court order, if it is acceptable at all, should be limited to an initial referral to mediation. Many mediators are willing to accept court mandated referrals on the premise there is little harm in coercing parties to learn about the opportunities of mediation, so long as the parties have the choice not to continue with the process and so long as the time and expense of the introduction is minimal. While there are a few situations where the law requires parties to "bargain in good faith,"<sup>77</sup> it is easier to order them to receive advice.<sup>78</sup> However, courts with authority to order participation in early neutral evaluation or non-binding arbitration have been ambivalent regarding sanctioning inadequate participation.<sup>79</sup> Legally imposing results on parties is not allowed without due process of law in constitutionally sanctioned courts or, sometimes, in other tribunals with judicial review.<sup>80</sup>

### *K. Models of Mediation in Operation*

While contracting for a dispute resolution process specially created to meet the needs of a particular case is always possible, communities with recurrent disputes of similar nature between parties who have similar relationships will develop customary dispute resolution patterns. Such customary patterns invite the trust that comes with a track record. They are sanctioned by community approval, save the parties the costs of negotiating a dispute resolution method from scratch (when the parties are already having a difficult time negotiating), and are serviced by neutrals prepared to work in the customary ways. In each context, the variables discussed in the previous sections interact with and constrain each other to condition dispute resolution processes. I will illustrate with just a few of many possible examples.

*Commercial mediation.* For commercial firms, disputes are an expected occurrence in doing business, and firms will have concerns for their reputations for fair dealing, whether or not the particular disputing parties expect to have future transactions between them. Commercial firms have the sophistication that results from being repeat players.<sup>81</sup> Law and custom create expectations regarding the range of acceptable outcomes for disputes. The parties will want a commercially informed mediator who understands these things, and such mediators may or may not be

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77. See 29 U.S.C. § 158(d) (1994).

78. See, e.g., *AMF Inc. v. Brunswick Corp.*, 621 F. Supp. 456, 463 (S.D.N.Y. 1985).

79. Some courts have been ambivalent regarding sanctioning participation in court ordered, non-binding ADR. See, e.g., *Gilling v. Eastern Airlines*, 680 F. Supp. 169 (D.N.J. 1988).

80. That is, unless the parties have agreed to be bound by a process of their choosing, as in the case of arbitration.

81. ROGERS & MCEWEN, *supra* note 6, § 12:03.

lawyers. Negotiation must fit into the work lives of executives with demanding responsibilities. As experienced players, parties may expect certain negotiation patterns, but sophisticated parties will have a pragmatic mind set that may be open to mediators' improvisations.<sup>82</sup> Paternalistic attitudes in the mediator and the public will be minimal. Accordingly, commercial mediation occurs in diverse forms.<sup>83</sup>

To fit this context, Kenneth Feinberg<sup>84</sup> offers a model of commercial mediation that relies heavily on caucuses. In caucusing models, mediators transmit communications between the parties who usually do not negotiate directly. Caucus models give mediators maximum control over the content and style of communication that passes between the parties.<sup>85</sup> The model also minimizes direct, spontaneous bargaining between the parties, retaining the maximum opportunity for the parties' lawyers to advise and control their clients. Accordingly, contexts in which lawyers have been heavily involved in dispute resolution (such as commercial disputes and the "Civil" mediation described below) may have a strong affinity for caucus oriented mediation. In Feinberg's model, the mediator, after learning the parties' interests and expectations, articulates a proposed settlement that is offered to both parties. This avoids the time and expense of offer and counter-offer moving from distant positions typical of positional negotiation. If the parties do not accept the mediator's proposal, then it can serve as a "single text"<sup>86</sup> that the parties can fine tune to meet their needs.

"Civil" mediation of claims against insurance companies or against parties who carry liability insurance. This mediation, relatively recently developed but becoming very widespread, is another caucus oriented model.<sup>87</sup> Settlement of these disputes occurs very much in the shadow of litigation, which is usually already pending. Indeed, the matter is likely to have been referred to mediation by the court. While the insurance carrier may want to protect its commercial reputation, the parties will usually have no continuing relations. There is a strong expectation that the outcome of these disputes will be an amount of money changing hands. This is an area dominated by lawyer-mediators with experience in litigation of similar cases. The parties' lawyers, who are participating actively in the mediation, are likely to trust the mediator to help manage relations with clients and to orchestrate a pattern of offer and acceptance to reach a conclusion within an acceptable range of results. These meditations are conducted in a positional negotiation model, telescoping into a day or less the same negotiation that would otherwise occur over several months at much greater expense.

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82. See MURRAY ET AL., *supra* note 8, at 454-55; Ronald L. Olson, *An Alternative for Large Case Dispute Resolution*, 6 LITIG. 22 (1980). The term "mini-trial" was attached by a New York Times story to a formal settlement device created in 1977 in connection with a corporate patent infringement dispute. This device combines elements of adjudication with other processes such as negotiation and mediation. *Id.*

83. MURRAY ET AL., PROCESSES OF DISPUTE RESOLUTION: THE ROLE OF LAWYERS 318-19 (1st ed. 1989).

84. KENNETH R. FEINBERG, AVOIDING LITIGATION THROUGH NON-BINDING MEDIATION (1987), reprinted in PROCESSES OF DISPUTE RESOLUTION, *supra* note 83, at 320-24.

85. MOORE, *supra* note 20, at 325.

86. See FISHER & URY, *supra* note 28, at 118-22; MOORE, *supra* note 20, at 260.

87. In each of my Mediation classes of sixteen students, three or four will have worked in law firms (in Indiana) where they will have witnessed this model in operation.

*Labor relations mediation* involves the resolution of collective bargaining contract disputes.<sup>88</sup> These negotiations involve repeat players whose continuing relationships are important to them. In any case, the law requires them to bargain in good faith.<sup>89</sup> They are likely to have strong expectations derived from established patterns of bargaining. These disputes involve complex parties -- union and company -- who will sometimes keep their representatives on a short leash. Giving authority to take a particular position retains more control than does giving authority to exercise judgment to pursue more generally conceived goals, which reinforces the traditional pattern of positional bargaining. While there may be much direct negotiation between the parties, substantial caucusing will be necessary to deal with intra-party issues.<sup>90</sup> In occasional labor disputes, there will be a substantial public interest, involving governmental officials as mediators with vested interests, perhaps alongside a traditional independent mediator.<sup>91</sup>

*Child custody mediation* is an area traditionally staffed by mental health professionals, although lawyers have recently become more actively involved.<sup>92</sup> Because of their responsibilities to the children whose parentage they share, these contests are between parties who cannot escape each other, however much they might like to. The parties are not usually experienced negotiators, at least in this context.<sup>93</sup> These disputes, involving difficult personal relationships, are very stressful for mediators as well as the parties.<sup>94</sup> The explicit, mediated negotiation, with defined beginning and ending points, will be embedded in an acting-out negotiation that starts long before and will continue after the mediation has concluded and a court has approved its results. Much more than money is involved. The public's interest in these disputes is reflected in the necessity of obtaining a court's approval of the parties' agreements. While the law is involved, the standards are vague, permitting a wide range of outcomes. In the context of child custody, a broad range of outcomes reflects the diverse perceptions and values regarding children and families prevalent in society. Accordingly, these disputes present themselves ambiguously as rights and interests negotiations. In these circumstances, there are diverse views of the proper role of mediators, and there is considerable diversity in practice.<sup>95</sup>

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88. Mediation is sometimes employed to handle union members' grievances arising under collective bargaining agreements. ROGERS & MCEWEN, *supra* note 6, § 12:08. However, arbitration is much more common for resolution of grievances. MURRAY ET AL., *supra* note 8, at 535.

89. 29 U.S.C. § 158(d) (1994).

90. KOLB, *supra* note 63, at 80-85.

91. See Elizabeth Shogren, *The Strike Settlement*, L.A. TIMES, Aug. 20, 1997, at 12.

92. One survey indicates that 78% of private sector mediators and 90% of public sector mediators were mental health professionals, while 15% of private sector mediators and 1% of public sector mediators were lawyers. ROGERS & MCEWEN, *supra* note 6, § 12:02, referring to a survey in Jessica Pearson et al., *A Portrait of Divorce Mediation Services in the Public and Private Sector*, 21 CONCILIATION CTS. REV., June 1983, at 1.

93. Since we all have been negotiating all of our lives, the idea of experience in negotiation must really be context specific. And, of course, experience does not equate with competence.

94. See KRESSEL, *supra* note 13, at ch. 10, *The Stresses of the Divorce Mediator's Role*.

95. For example, the mediator may place heavy emphasis on the best interests of the child. ROGERS & MCEWEN, *supra* note 6, § 3:02. These mediators argue that it is the role of the mediator to intervene and influence the substantive outcome of the mediation if the children's interests are violated or not taken into consideration. MOORE, *supra* note 20, at 76. In fact, some statutes require the court mediator



*Public interest disputes* have some of the characteristics of family disputes in the respect that the constituencies cannot escape each other even if they are in severe conflict. These disputes involve diverse, complex parties and come in many shapes and forms. Natural resource management and municipal planning have been active areas of public interest mediation.<sup>96</sup> Federal government agencies have begun using negotiated rule-making as a means of developing regulations that will be acceptable to affected constituencies and that will achieve high compliance.<sup>97</sup> Mediator resourcefulness in designing processes to meet the needs of these negotiations are critical.<sup>98</sup>

*Community mediation* refers to dispute resolution between neighbors or others who are tied to each other by community. Some communities are based on common bonds, such as religious groups and trade associations, while others are based only on geography. In the former context, one is more likely to see social network mediation, where mediators may represent community values,<sup>99</sup> while the latter is likely to provide independent mediation, perhaps with the hope that common community norms will be a by-product of the process.<sup>100</sup> Community mediation, of the geographically based kind, is likely to involve "small" disputes mediated by relatively inexperienced volunteer mediators with modest training, experience, and supervision. These mediators are unlikely to be entrusted with extensive resources or process discretion. The process is likely to be very time constrained. Community mediation programs will depend on public or charitable subsidy. They will also depend on the sponsoring organization for sanction and trust and, likely, on referral sources (such as prosecutors, courts, and welfare departments) for clients. Community mediation programs are informed by diverse ideologies.<sup>101</sup>

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to advocate the children's interests. See CAL. CIV. CODE § 4607(d) (1994); KAN. STAT. ANN. § 23-604 (1985). Other mediators may represent either their own or publicly mandated value positions, such as a preference for joint custody in divorce cases. ROGERS & MCEWEN, *supra* note 6, § 3:02. In such cases, mediators might not be neutral as to the content of an agreement. *Id.* A 1993 qualitative study of mediation sessions for 24 couples in England done by Piper also concluded that mediators shape the way that parties define their problems and how they understand parental responsibility. *Id.* Other mediators argue that parents generally know what is best for the children and the family system as a whole. Therefore, they only need procedural help to assist them in problem solving. MOORE, *supra* note 20, at 75.

96. See, e.g., L. SUSSKIND & J. CRUIKSHANK, *BREAKING THE IMPASSE* 4-11, 93-94, 101-05, 200-01, 241-43 (1987); Lawrence Susskind & Connie Ozawa, *Mediated Negotiation in the Public Sector*, in *NEGOTIATION THEORY AND PRACTICE* 402-04, 407-09 (J. William Breslin & Jeffrey Z. Rubin eds., 1991).

97. See, e.g., Leah V. Haygood, *Negotiated Rule Making: Challenges for Mediators and Participants*, 20 *MEDIATION Q.* 77, 78, 80-83 (1988). The Administrative Dispute Resolution Act of 1990 provides guidelines for agencies in determining whether a negotiated rulemaking or other alternative dispute resolution process is in the public interest. 5 U.S.C. § 572 (Supp. 1995).

98. See McGovern, *supra* note 39.

99. See, e.g., Vicki Shook & Neal Milner, *What Mediation Training Says-or Doesn't Say-About the Ideology and Culture of North American Community-Justice Programs*, in *THE POSSIBILITY OF POPULAR JUSTICE*, *supra* note 16, at 258.

100. See Shonholtz, *supra* note 16; Shook & Milner, *supra* note 99, at 247-48.

101. See MERRY & MILNER, *supra* note 16.

It should be abundantly clear by now that a course in “mediation” could be about a great many different phenomena.<sup>102</sup>

## II. ISSUES IN COURSE DESIGN

I turn now to choices and constraints in course design. Some issues are very general, applying to many courses, and others are specific to a course in Mediation.

### *A. Choices in Designing a Course in Mediation*

*Priorities, technology, and course structure.* At a general level, pedagogical goals can be sorted into the areas of knowledge (information/cognitive understanding), skills (goal effective behavior), and professionalism (making choices regarding professional roles and relationships). While all three are aspects of every clinical event, and learning of each kind is necessary to prepare a student for practice, teaching will, at any moment, focus on one of them.

A course designer needs to consider priorities because resources, especially time, are limited, because marching off in all directions is confusing, and because different educational goals are most effectively supported by different pedagogical methods. To illustrate, skills training requires repetition of isolated, identifiable behaviors -- so practice can make perfect. Such training is time consuming and may necessitate sacrifice of coverage. The choice to teach particular skills is likely to convey messages regarding what is central and important in professional work. Skills training is often very directive.

In contrast, in my course titled Roles and Relations in Legal Practice, I put multiple groups of students in the same role enactment situation, have them act out lawyers' and clients' roles with little instruction, and then facilitate non-directive discussion reflecting on the factors that have influenced the students to make their diverse choices.<sup>103</sup> This is effective for pursuing a professionalism agenda, but does much less for skills development.

Acquiring knowledge, which is done for its own sake and to support skill development and professionalism learning, may use a variety of techniques, depending on the nature of the information and understanding required for different areas. However, structuring a program that allows for adequate opportunity to acquire and test new cognitive structures may well distract from learning both skills and professionalism. Fieldwork clinics with actual clients are contexts for exploring the dynamics of real, complex practice situations and for working alongside experienced lawyers for modeling and mentoring, but “putting it all together” before giving attention to component parts may not be most effective. In courses with

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102. See Carrie Menkel-Meadow, *The Many Ways of Mediation: The Transformation of Traditions, Ideologies, Paradigms, and Practices*, 11 NEGOTIATION J. 217, 236 (1995) (referring to Kolb & Kessel, *supra* note 9 and MERRY & MILNER, *supra* note 16). “If the Kolb and Associates and Merry and Milner authors have shown us anything, it is that mediation is deeply contextual and, when situated in different environments and institutions, it will perform different social tasks.” *Id.*

103. Edwin H. Greenebaum, *The Professional School as a Focus for Clinical Education*, 8 J. LEGAL PROF. 101, 112-15 (1983).

adequate time and other resources, one may be able to pursue multiple goals, but one may need to create substructures with goals, priorities, and suitable technology in order to do so.

*Coherence and structure or open texture in course design.* At one extreme, one would plan only a course's initial event and decide what to do next at every point in the course, following the group's train of thought and pursuing targets of educational opportunity as they present themselves. At the opposite end of the spectrum, course activities would be planned in full detail in advance, occupying the entirety of the course's resources, and the class would follow that schedule without deviation. Too confining a structure will not respond to students' needs as they arise. Not having sufficient structure, which can be shared with the students (for example, in a syllabus), makes it difficult for students to prepare and collaborate. Insufficient planned content and structure also make it difficult to place the course in an educational program extending beyond the course.

A course's issues and topics interact in complex ways. In most courses, one needs to teach everything first and everything last. Certainly, understanding mediation, and conducting an effective mediation, is a polycentric problem.<sup>104</sup> Forcing a course's materials into a linear, logical progression to make the material easier for students to follow and digest, may distort or otherwise sacrifice aspects of the subject.

*Focus on substance or process.* Whether to give priority to substance or process is an issue for any "law" course. Some faculty teaching courses with substantive titles (Torts or Contracts, for example) say they are less interested in teaching any particular substantive doctrine than they are in imparting an understanding of the processes that produced it. Since experiential methods provide opportunities for understanding substantive issues not available in work limited to reading and discussion, this is a choice for clinical courses as well as traditional ones. The substantive opportunities in teaching mediation include:

- The nature of conflict and the social institutions in which conflict is embedded.
- Ideology in professional practice (not just that ideology may affect choices, but the degree to which one wants to use the course to teach an ideology, such as an image of the good lawyer).
- Insight into the substantive area in dispute (labor relations, commerce, divorce, and so forth).
- The "law" of mediation (for example, confidentiality of communication in mediation, enforcement of mediated settlements, and regulation of mediation and mediator qualifications).

*Teaching mediation by itself or in the context of a larger area.* Many of us offer courses focusing on mediation alone, but major casebooks in alternative dispute resolution devote attention to mediation along with other ADR devices, giving ADR teachers the opportunity to teach a course that integrates mediation with other processes.<sup>105</sup> Subject matter courses can also include materials on mediation. Civil

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104. See Fuller, *supra* note 2, at 394-404.

105. See, e.g., STEPHEN B. GOLDBERG ET AL., DISPUTE RESOLUTION (2d ed. 1992); MURRAY ET AL., *supra* note 8; RISKIN & WESTBROOK, *supra* note 5.

Procedure course materials now commonly do so, and courses and seminars in areas in which forms of mediation are commonly used may include mediation exercises, either to teach about the mediation process in that context or as a medium to teach aspects of the substantive area.

*Surveying mediation or focusing on a single area of dispute and / or mediation model.* The degree to which one will focus on a single area of dispute or a single model of mediation practice (as opposed to surveying a wide variety in each regard) is a significant strategic question. The first part of this article demonstrated how diverse the worlds of mediation are, and it would certainly be possible to spread one's course too thin. Breadth sacrifices depth, especially regarding how substance and process affect each other. But focusing narrowly, for the sake of depth, may not give due regard to the variety of choices students might make regarding areas of practice, and it may limit opportunities for comparative studies. To the extent one chooses to focus more narrowly, one is confronted with the choice of what area(s) or model(s) to choose.

*Priority of preparing students for the mediator's role or to the role of a lawyer advising clients regarding dispute resolution strategies.* Of course, one has to teach about the mediator's role to teach about mediation, but relatively few students will practice actively as "mediators." Giving direct attention to the role of lawyers in helping clients choose and participate in mediation, however, will require investment of time and adoption of methods designed for that purpose.<sup>106</sup>

*Use of role enactments or fieldwork placements.* The opportunities and limitations of role enactments (simulations) and fieldwork clinics are long debated issues in clinical legal education. Use of role enactments permits focusing on selected aspects of the process, controlling the sequence and structure in which those aspects will be encountered, giving students comparable experiences to facilitate discussion, having students experience the client's role, and making controlled and predictable demands on students' time. Fieldwork clinics, in contrast, permit students to encounter practice in all its complexity, provide guidance from clinical faculty combining academic and practice perspectives, and provide students direct experience of the subject matter of the dispute.

*Teaching mediation for its own sake or teaching mediation as an opportunity to develop issues of general importance in clinical education.* Interviewing (providing and obtaining information, preparing clients for roles in dispute resolution processes, and making decisions with clients), conflict analysis (nature of disputes, disputing, and power), negotiation, problem solving, the role of ideology in clinical processes, issues of professional and client roles, and professional ethics dilemmas have special characteristics in the context of mediation, but are all pervasively relevant to clinical work. Students, depending on their particular course selections, may not encounter these subjects elsewhere in their law school courses, and, in designing a mediation course, one has the choice to teach these matters for limited purposes or as a vehicle for broader clinical training.

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106. See, e.g., EDWARD BRUNET & CHARLES B. CRAVER, ALTERNATIVE DISPUTE RESOLUTION: THE ADVOCATE'S PERSPECTIVE (1997).

## B. Constraints

*Curricular context.* Whether one's mediation instruction stands alone or is a piece of a structured program makes a significant difference. Typical law school curricula require courses only in students' first year, allowing students to choose among second and third year courses. And even in first-year courses, in larger schools, there can be substantial variation from one section of a required course to another. A course can require prerequisites beyond those otherwise required, but this limits the students who will be able to enroll. In this context, what one can count on in students' backgrounds is limited, especially regarding clinical issues and skills that are not traditionally part of first-year instruction. By the same token, one's course work needs to achieve learning goals that are stable, complete, and useful in themselves because one cannot expect course learning to be reinforced or built upon in later work. While these factors are substantial constraints, they are also liberating. One can work from an assumption that one is writing on a clean slate. And with little expectation of or reliance on what one teaches, one is free to do what one wants.

*Resources, internal.* A good fieldwork clinic requires a low ratio of students to faculty and supervisors. Space and facilities affect what can be done by way of role enactments, videotaping, and so forth. Above all, the time that faculty and students have available to apply to the course's work limits them to reasonable ambitions.

*Resources, external.* The institutions in geographically accessible communities will determine what fieldwork placements might be available for students, should one choose to adopt a fieldwork model. The mediation being practiced in the community will limit the mediation models available for demonstration, whether in the field or in class.

*Expectations and readiness of students.* Instructors have ambitions and ideals for preparing professionals for practice. On the other hand, professionals, including teachers, have to take their clients as they find them. The ideology, as well as the knowledge and skills, students bring with them determines the starting point. Education, like politics, is the art of the possible. "Neither martyrs nor pragmatists are evidently right, on any terms but their own"<sup>107</sup> is an especially apt statement with regard to educators. One struggles for students' hearts as well as their minds, and their expectations and readiness are substantial factors affecting reasonable levels of ambition.

*Competencies and resources available to the instructor.* James Stark and I each approached teaching Mediation for the first time a few years ago.<sup>108</sup> Stark, "[o]ver a period of twenty years, [had] supervised students in a wide variety of client-representing, civil litigation clinics, mainly in the area of civil rights."<sup>109</sup> While I, too, had been engaged in clinical education for twenty years, my practice has been entirely as a legal educator, including courses in civil procedure, federal jurisdiction,

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107. PETER MARRIS, *LOSS AND CHANGE* 15-16 (1974).

108. James H. Stark, *Preliminary Reflections on the Establishment of a Mediation Clinic*, 2 *CLINICAL L. REV.* 457 (1996).

109. *Id.* at 457.

and legal profession, in addition to my clinical courses. Which is to say, I have never practiced law. My clinical courses have relied on simulation and exploitation of the analogy between the relationship of lawyers to clients with the relationship of faculty to students.<sup>110</sup> The knowledge, competencies, and interests derived from our differing experiences were among the factors likely to prompt us to design different mediation courses. Both of us were constrained by our not having been practicing mediators. No doubt, we were both influenced by our habitual styles of coping with the institutional cultures and constraints of our distinctive law schools. Our dispute resolution ideologies were likely to have affected our choices as well. Stark says,

I confess that I am not an ADR True Believer. I care deeply about social justice and still cherish the role of courts in vindicating individual rights. All things considered, I am comfortable with the adversary system and the lawyer's role within it. The Born Again tone of some of the ADR literature frankly makes me squirm.<sup>111</sup>

For myself, I see what professionals and clients do together as heroic efforts, enabled and limited by their strengths and weaknesses, to make the best of the imperfect social institutions available to respond to clients' problems.

Finally, the images of constraints that we carry in our minds affect our choices, and these images correspond only more or less with reality. Thus, our willingness to test our perceptions of constraints is among the constraints that affect us in our course design. Making choices within constraints in designing a course in mediation has much in common with adapting a mediation model for a dispute, and this analogy is available for pedagogical exploitation.

### III. A MEDIATION COURSE

To help convey the ways in which issues of choices and constraints affect each other, I discuss how they have affected me in designing my own mediation course. In principle, any mediation teacher should be able to follow the preceding analysis with a description, explanation, and justification of the choices made in that teacher's specific, likely unique, course.<sup>112</sup>

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110. See Greenebaum, *supra* note 103.

111. Stark, *supra* note 108, at 457. Carrie Menkel-Meadow, another Mediation teacher, states her ideology, although not in the context of discussing her teaching, in Menkel-Meadow, *supra* note 102, at 240.

Nevertheless, I persist in trying to do my own form of transformative mediation (and I think others should continue to do so as well). For me, mediation is transformative because it is educational. At its best, we learn about other people, other ways to conceptualize problems, ways to turn crises into opportunities, creative new ways to resolve complex issues and interact with each other. And we learn about ourselves and, perhaps, new ways to negotiate our next problem.

*Id.*

112. See, e.g., Stark, *supra* note 108.

The easiest way to overview my course is to quote the published course announcement that describes for the students what they can expect if they enroll in the course.

**B771 Mediation (3 credits) - Greenebaum**

Mediation explores a model of mediation in depth and lays the foundation for mediation skills development. Course segments follow an introduction and overview with examination of the various phases and functions in the mediation process. Issues of ethics and public policy are examined in each segment. While the course focuses on mediation, it should assist students' development of general clinical skills, such as interviewing and negotiation. While the mediation model to be developed is one of general application, experiential material will be drawn predominantly from a single area (divorce and child custody) to permit exploration of the relation of process to substance in greater depth.

Course work includes out-of-class role enactments scheduled at class time on days class does not meet (explaining why three 75 minute class periods are reserved on the class schedule). Written work includes journal writing and a final memorandum. There is no end-of-course exam. Enrollment is limited to 16.

My first choice was to teach *separate courses in Alternative Dispute Resolution and Mediation*. My ADR course acquaints students with available dispute resolution devices and studies the legal frameworks in which they operate. Accordingly, this is the course in which I teach about legal issues in mediation. Because there is so little law bearing on mediation as compared to arbitration, arbitration occupies much more of the ADR course's time. Legal regulation looks at mediation and arbitration from the outside. My mediation course endeavors to look at mediation from the inside. The materials and methods of my ADR course are akin to those of traditional law school courses. Mediation uses the technology of clinical education.

I did not think I could do what was required for these two areas in a single semester, three-hour course. Also, I thought shifting gears between the different goals and methods relevant to each area would be difficult within that time constraint.<sup>113</sup> Between the two courses, I offer six hours credit. However, I cannot count on students to take both courses or to take them in a particular order if they do take both. With either course, I occupy a fifth to a quarter of most students' semester curriculum. In these circumstances, my ambitions cannot be too grandiose. Clinical courses are notoriously more time consuming in proportion to the credit offered than are most others, and some of my mediation students complain about this. In our

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113. *Cf. id.* at 463.

In retrospect, the decision [to offer a single semester, fieldwork mediation clinic] was a questionable, if necessary, one. . . . I have found it a struggle to provide high quality training to students in the first part of the semester, while still leaving sufficient time in the second part of semester for students to develop confidence in their fieldwork skills and for seminar discussion of the major policy issues in ADR.

*Id.*

curricular context, however, students would find it difficult to fit a course with more credit hours in their schedules considering the range of courses they perceive the need to take, and increasing the credit hours would increase the cost since tuition at our school is assessed on a credit hour basis. Offering a six-hour course, if my colleagues would let me, would drastically limit enrollment in the context of our school.

In Mediation, I have chosen to *focus more narrowly for greater depth* by exploring primarily a single model of mediation in the context of a single area of law. I consider it important for students to have a deep understanding of the dimensions of a model of dispute resolution, and this requires extended, experiential exploration. (Just reading an article, like this one, will not do the job.) If they understand one model in this way, they will be able to explore other models in depth when they encounter them. I do survey alternative models of mediation in a non-experiential way, for comparative illustration, as part of the theoretical grounding I include in the introductory phase of the course.

The mediation model I select for exploration is defined by an independent mediator facilitating an interest-oriented negotiation (utilizing collaborative, explorative problem solving) in which the parties are active negotiators, with absent lawyers as advisors. The mediator and parties are to be more concerned with the quality of the settlement and the parties' commitment to it than with the speed and expense with which they reach it.

- In my experience, students are culturally more oriented to positional than to interest-oriented negotiation. Helping them understand and appreciate the interest model is, in my view, a pressing need. Further, a sound grounding in interest analysis will support students' work whatever models of negotiation and mediation they come to use in practice, since satisfaction of interests is the goal and the appropriate measure of outcome whatever model of negotiation is followed.
- I have found that students learn substantially from enacting parties' roles. Further, having parties negotiate actively, with absent lawyers as advisors expands students' repertory of negotiation models. I chose not to have both parties and their lawyers as active participants because I believe this "complication" would introduce issues that would distract from the goals to which I have chosen to give priority (and avoiding additional roles makes role enactment administration more manageable).
- I consider it most important for students to develop models of quality in dispute resolution. They will certainly confront issues of speed and expense as practitioners, but professional responsibility will require that they be deliberative about quality issues as they do so.

In sum, this is a good model for the resolution of a significant range of disputes, and learning it provides a good foundation of theory and skills for learning other dispute resolution models.

For the area of substantive focus, I chose divorce and child custody disputes. Much of the area is governed by vague legal standards, placing manageable demands



on students' legal understanding.<sup>114</sup> This area provides good opportunities to learn the elements of conflict analysis and interest-oriented dispute resolution, and students generally accept their validity and importance in this context. Further, while law students often deny the importance of the personal relationship dimensions of clients' "legal" problems, a theme I pursue throughout my clinical teaching, they are generally ready to accept this in family matters. I move the students to a business dispute for their "overview" role enactment at the end of the course, with a problem involving a small business with an overlay of personal relationships. I do this to demonstrate the relevancy of the course's mediation model beyond the domestic relations context and to lay the groundwork for further generalization of students' learning after they leave the course. I also intend to convey the substantive message that many disputes have "family" dimensions, such as ambivalence over relationships and denial and grief for losses.

My principal goal for the course is for students to conceive and understand the model of mediation, and the theory behind it, and to acquire an ability to analyze dispute resolution situations in its terms. That is to say, in this course, I give *priority to cognitive learning over skills and professionalism*. Experiential work is important to achieving this goal, and the course does give students an opportunity to explore their personal relation to professional roles and to develop clinical skills to an extent. But developing understanding of the model of mediation, distinguishing it from other models, and exploring issues of ideology and ethics in dispute resolution lays the ground work for continuing development and for establishing a basis for critique. A benefit of this priority is that I do not judge "performance" in experiential work, making students feel freer to experiment and explore. For this reason, my grading rewards students' cognitive learning, principally evidenced in their written work.

I rely on *role enactment, rather than fieldwork*, for the experiential component of the course. In part this is a function of resources and opportunity. I cannot rely on students coming to the course with developed clinical competencies, and preparing them for fieldwork would occupy a substantial portion of the semester. The population and institutions of Bloomington, Indiana, and surrounding areas, do not provide wide opportunities for fieldwork in mediation, and what is available is not necessarily consonant with the mediation model with which I have chosen to work. Beyond these resource and opportunity issues, and more important, use of role enactments gives students the opportunity to enact clients roles and provides me the control and structure I view as necessary and proper for the goals I have chosen. I do have experienced mediators perform in-class demonstrations and discuss their work with the class.<sup>115</sup>

With the structure and control that role enactments afford me, I *emphasize issues with an eye to generic clinical benefits*. For example, mediation training is a good opportunity to develop understanding of interviewing, counseling, problem solving, and negotiation. Students have less developed images of how mediators work than they do regarding lawyers and may be more receptive in Mediation than

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114. Some aspects of property division are affected by tax, pension rights, and other technical laws, but I design my role enactments to avoid those issues.

115. I intend to develop an opportunity for students to follow up the course with a fieldwork practicum.

they are in “legal” clinics to messages regarding the advantages of being less controlling in client interviews and more interest-oriented in negotiation. Having worked productively with such issues in mediation, students may be readier to apply them in their lawyering. I also try to impart a systemic understanding of clinical service’s phases and functions, including intake, issues of group representation, and design of work for problem setting, solving, and closure. In my mediation course, this translates to identification and work on the tasks of contracting and screening, of preparation by conflict analysis, client education, and strategy development, and of mediation phases of problem setting, problem solving, and settlement. Accordingly, students’ lack of background in these matters is an educational opportunity.

Parts I and II of the article demonstrated the many choices to be made in developing the content and structure of a course in mediation. I have specified here the most significant choices I have made for my own course and why I have made them. In my view, the pieces fit together to make a coherent whole, but one cannot really judge that without experiencing the course. With the variety of phenomena that may reasonably be considered “mediation” and with the variety of factors that may influence course design, there is clearly not a single correct course in Mediation, and further argument that I have made the right choices for the context in which I work would not be very helpful to those working in other contexts. There are, however, professional responsibility issues in how we deal with these matters with our students that I will address in the conclusion of my argument.

#### IV. PATERNALISM AND CONSENT IN EDUCATION AND MEDIATION

I have argued elsewhere that professional schools are clinical institutions and that our educational transactions with our students are clinical events. The features of a “clinic,” for sake of this argument, are an individual or group needing help to achieve, avoid, or mediate change, professional helpers with specialized knowledge and skill which may help obtain that goal, and an organizational context in which professional and client come together in a helping relationship. By this definition, professional schools are clinics since students need help to change their status from laymen to individuals qualified in form and substance to be licensed and practice. Faculty have special qualifications from training and experience to help the client-student achieve this goal, and courses and other organized activities in the school are the institutional contexts in which faculty and their student-clients meet to work together. Whatever the unique features of different professional contexts, clinical work always involves problems: of communicating and testing the reality of information and values, of working in and representing groups, of trust in helping relationships, of conflicting interests and viewpoints of clinic and client, of agreeing on the clinic’s tasks and implementing an organizational structure to accomplish them, and of managing transactions (between clinic and client, between parts of the clinical organization, and between the clinic and its environment) which are necessary for the clinic’s work, but which always represent threats to clinics’ and individuals’ integrity.

Clients seek help to effect a change, to avoid changes being thrust upon them, or to anticipate and mediate change. But I have argued, further, that the services professionals render their clients are “treatments” that effect changes *in* the client. That is, even when changing the client is not the central goal of the professional service contract, clinical work requires changes in cognition, in behavioral skills, and in roles and relationships in order that clients may understand the service sufficiently to consent to and cooperate with it, and so obtain its benefits.<sup>116</sup> “Treatment” is an aspect of clinical experience in all disciplines of professional practice, including education, law, and mediation.

Thus, there are parallels between the educational “clinic” in which we serve our students and the practices our students will enter, and teachers present models of professional practice to students. Students will, in turn, be models for their clients, albeit in different respects. For example, mediators model for their clients coping with and negotiating conflict. Therefore, an aspect of teachers modeling professional practice is presenting a model of modeling. Modeling is an aspect of our teaching whether we are conscious and deliberate about it or not.

Aspects of teachers modeling professional roles include cognitive development, demonstration of possibility, moral example, and students’ experience of the model as client.

- Modeling implies behavior in accordance with the model and recognition of the behavior as such.<sup>117</sup> Modeling can occur without articulate thought, but articulation is necessary for reflection, critique, and communication. Behavior in accordance with the model and articulate communication about it is evidence cognition of the model has occurred.
- Emulation of the model will not occur unless behavior in accordance with the model is perceived to be possible (and safe). Possibility depends on aptitude and context, and demonstration that faculty can behave in accordance with the model as a course instructor does not demonstrate possibility unless students perceive the instructor to be sufficiently like the students in abilities and in vulnerability.
- Motivation to emulate the model is based in values. Emulation is more likely if modeling is witnessed as a moral means effective for achieving goals important to students.
- Modeling the professional-client relationship is in part students’ experience of the model as clients. Effectively and responsibly acting in accordance with the model in students’ professional practices will be facilitated by their experientially developed understanding of the client situation.

How we model the management of tension between paternalism and respecting clients’ autonomy (obtaining their consent) may be the most important aspect of our

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116. See Greenebaum, *supra* note 33. Since interaction with others is not possible without mutual influence, changes inevitably occur in professionals as well as in clients. The professional must digest the client’s situation and research what the professional discipline teaches about that situation. Further, interactions with clients and others in clinical work are significant events through which the professional’s own role and skills develop and grow.

117. *Id.* at 555-60 (“Cognitive Learning”).

professional responsibilities as mediation teachers.<sup>118</sup> In my mediation course, making this article and a syllabus available to students as they enter the course and giving the students an opportunity to have discussion with me regarding these documents' meaning is a reasonable way to begin to inform them of what they may expect, and to respect their right to make an informed choice to take the course. Mediators can take analogous steps to explain the services they are offering in the intake and contracting phase of their work with prospective clients. But as we teachers know only too well, receiving explanation and achieving understanding are not the same thing. (Otherwise, all of our students would earn top grades.) For inexperienced clients, the explanation will be abstract and about unfamiliar phenomena. Further, the introduction will occur in a limited time frame amidst the stresses of clients coping with their problems, of ambivalently establishing a new relationship of dependency on a stranger and amidst the distractions of other things going on in their lives. That clients feel compelled to seek and accept the professional service, with limited choice available to them, contributes to their not listening.

At best, ability to understand a model of professional service without experience is limited, and the effects of "treatment," therefore, will inevitably be surprising in some respects. In principle, consent to professional service is given not only at the beginning, but along the way as well. My students can withdraw from the course, and clients can withdraw from mediation. But it would be wrong to say they can do so freely. The costs of withdrawal include sunk costs (including fees, time, and the stresses of participation), opportunity costs (including other courses my students might have taken and delay in alternative dispute resolution approaches for mediation clients), and social costs (for example, costs to reputation). Such costs are likely to increase the longer our clients continue with us and may be severe. Consequently, once clients consent to professional services at the beginning, they are, to a degree, captured.

Clients have means of withholding consent without terminating the relationship. They may resist understanding explanation, not follow the professional's advice, and fail to cooperate with the programs to which they have purported to agree. Whether these things are done deliberately or unconsciously, they produce perverse results, from the professional's point of view. And professionals are inclined to blame their clients. (Professionals tend to agree they could have great practices if only they had better clients.) Importantly, the perception that clients are prone to injuring themselves motivates paternalism and manipulation.

Resources that professionals have available to them for manipulation, in addition to the capture effect, discussed above, include clients' limited abilities to direct professionals, client trust, and professional trickery.

- Clients' ability to direct their professional helpers is limited by clients' limited expertise and by professionals' sanction from their sponsoring institutions to practice in accordance with professional standards. Where multiple clients are being served in the same matter, the degree to which

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118. *Id.* at 573-75 ("The Ethics and Politics of Treatment").

one can take direction from each of them is practically limited. This is inherently the situation in courses in schools and in mediation.

- In varying degrees, everyone has propensities to trust (and to distrust). Especially when we need help, we may be prone to trust authority figures. Professionals, vouched for by sponsoring institutions, are ready and eligible to assume the role of those who are trusted. Trust can be more and less warranted and does not necessarily continue in a steady state. But to a substantial extent, our students and clients trust us.
- For some things professionals do, “trickery” is not too strong a word, but we all orchestrate the course of “treatment” to make acceptance and cooperation more likely.<sup>119</sup> The line between education and brainwashing is not so easily drawn.

Justifications for paternalism lie in authority from clients and in our authority (and responsibility) as professionals, as citizens, and as persons.

- Clients often put themselves too much in our hands (and, then, hold us responsible for the results). To be sure, clients are ambivalent about being subject to others’ control, especially if the other is a stranger, but clients’ propensity to invest professional expertise with magic supports paternalistic authority.
- To varying degrees and in varying circumstances, professions authorize their members to act as guardians for their clients.<sup>120</sup> This is sometimes based in clients’ (partial) incapacity. But clients are always partially incompetent, especially when under stress. Sometimes it is just a matter of the principle that professionals know best.
- As citizens and as persons, professionals have an interest (and in some respects have the responsibility) to do no harm to clients, to others, and to themselves. Third-party “others” include immediately affected individuals or groups (for example, children in divorce matters), the public (and segments of it), and other clients (whose interests may be harmed if our resources are too invested in the immediate client). Educators of professional students have a responsibility to students’ future clients. Since professionals are usually not in a position to take direction from third parties, they are likely to take the role of guardian to the extent they take third-parties’ interests into account. In whose interests do we act? If we can choose on our own how to act, there is a certain likelihood of acting in our own interests rather than those of clients or others. And acting in our own interests is not necessarily illegitimate (to collect our fees, to survive to serve other clients, to have space in our lives for matters beyond service to the client).

How open should we be with our clients about these issues? Being open increases consent, makes it possible for clients to help keep us honest (is itself being more honest), demonstrates accountability, and bases the working relationship in

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119. Robert D. Benjamin, *The Constructive Uses of Deception: Skills, Strategies, and Techniques of the Folkloric Trickster Figure and Their Application by Mediators*, 13 *MEDIATION Q.* 3 (1995); Cooley, *supra* note 62.

120. See, e.g., A.B.A., MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.14 (1994).

reality. Will greater openness engender greater trust? I like to think honesty breeds trust, but some (including many of my students) argue that clients want their professionals to be omniscient, infallible, and beyond suspicion, and doing anything to undercut that image diminishes trust. Perhaps professionals are entitled to be honest persons and to say to their prospective clients, "if you want an omniscient and infallible professional, go find one." Perhaps this approach would be too insensitive to the needs of our troubled clients. Or perhaps this is a dilemma to which we should respond based on an understanding of each client's needs and on our consciences.

For me, salvation in coping with this dilemma lies in recognizing and accepting clients' power to chose (and thereby authorizing clients' choice), undertaking to learn from clients,<sup>121</sup> and in acknowledging my own vulnerability. One of the submerged truths of professional-client relationships is professionals' vulnerability to clients who have it in their power to sabotage professionals' work and to injure their reputations and status regarding competence and honesty. If there were not vulnerability on both sides, struggles for control between professionals and clients would not be so motivated and fraught.

Is my primary goal in my mediation course cognitive learning of a model of mediation, as I asserted in Part III of this article?<sup>122</sup> Or is it to sell an ideology of professional practice? You, or better, my students, will have to be the judge of that. Perhaps, one cannot have the one without the other.

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121. Cf. Robert F. Condlin, *Socrates' New Clothes: Substituting Persuasion for Learning in Clinical Practice Instruction*, 40 MD. L. REV. 223 (1981).

122. See *supra* Part III.

