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**THE DECLINING PREVALENCE OF TRIALS
AS A DISPUTE RESOLUTION DEVICE:
IMPLICATIONS FOR THE ACADEMY**

Blake D. Morant[†]

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I. INTRODUCTION

Celebration of the thirtieth anniversary of my graduation from law school set the stage for a discussion of the state of the legal profession. Though our career paths have varied, my classmates and I concluded that the practice of law had changed dramatically in the thirty years since our graduation. Many of those changes have been natural. Advances in technology manifestly altered the manner in which attorneys engage with clients and colleagues.¹ Substantive changes include the expansive embrace of the administrative process and alternative methods for dispute

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1. See Kristen Konrad Robbins-Tiscione, *From Snail Mail to E-Mail: The Traditional Memorandum in the Twenty-First Century*, 58 J. LEGAL EDUC. 32, 41-42 (2008) (discussing a survey which indicated that new associates are much more likely to communicate with clients and colleagues via e-mail); J.T. Westermeier, *Ethics and the Internet*, 17 GEO. J. LEGAL ETHICS 267, 269 (2004) (suggesting that lawyers increasingly use the internet to communicate with and counsel clients).

resolution.² My classmates unanimously agreed that the most remarkable change in the profession has been the steady decline in the number of cases resolved by a judicial decision maker or jury at the conclusion of a trial. As one of my classmates observed, the “Perry Mason-like scenarios have become absolute fiction.”

The dialogue with my classmates prompted more thoughtful reflection on the full implications of the decline of trials in modern practice. This subject is timely, not only for those actively engaged in the practice of law, but also for legal academics who teach future lawyers. My modest essay examines the implications of the minimal use of trials to resolve legal disputes, and implores the legal academy to take appropriate steps to prepare students for this important new dynamic.

Part II of the essay summarizes the evidence that demonstrates the decline of trials and comments on the clear implications of this phenomenon for parties, practitioners, and, of course, legal educators. Part III implores the academy to reexamine the current educational model, which is dominated by the Langdellian theory of critical thinking, and to prepare students for this new dynamic in the profession. To this end, Part III offers strategies designed to exercise the skills students will need to solve problems collaboratively. The essay concludes with the admonition that, for its continued relevancy, legal education must embrace, *throughout the curriculum*, pedagogical methodologies that ensure students’ ultimate success in a world in which full-blown trials have become anachronisms.

II. THE DIMINISHING USE OF TRIALS IN MODERN PRACTICE

The trend toward fewer trials is indisputable. From the middle of the twentieth century until the present, the number of disputes that are finally decided in judicial proceedings has declined exponentially.³ In fact, scholars more adept in this area than I have

2. See Marc Galanter, *The Hundred-Year Decline of Trials and the Thirty Years War*, 57 STAN. L. REV. 1255, 1267–68 (2005) [hereinafter Galanter, *Hundred-Year Decline*] (“ADR institutions and programs have proliferated.”); Rex R. Perschbacher & Debra Lyn Bassett, *The End of Law*, 84 B.U. L. REV. 1, 16–23, 47 (2004) (discussing the role of the Federal Rules of Civil Procedure in encouraging settlement outside of court, and noting provisions that prohibit oral argument unless specifically requested).

3. Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 459 (2004) [hereinafter Galanter, *Vanishing Trial*].

documented empirically that the number of trials has been steadily decreasing for almost one hundred years.⁴ The decline in trials runs counter to the fact that, at least within the federal judiciary, the number of case filings has risen 152% from 1970 to 1999.⁵

From 1962 to 2002, the number of dispositions in federal courts increased from 50,000 to 258,000 and the number of trials decreased from 5,802 to 4,569.⁶ In that same general period the number of cases tried before a judge fell by about twenty percent.⁷ In fact, a very small percentage of the total number of cases filed actually go to trial,⁸ and two-thirds of cases that go to trial are concluded without any judicial ruling.⁹ A Department of Justice study indicates that of the 98,786 tort cases brought in U.S. district courts in 2002–2003, a mere 1,647, or two percent, were actually tried by a judge or jury.¹⁰ The study also confirms that the number of court cases decided by a judge or jury dropped seventy-nine percent since 1985.¹¹ Notwithstanding the diversity of matters in state courts, trials in that venue have also declined.¹²

The vast number of cases filed compared to the small percentage of those cases that actually go to trial compels scrutiny. One reason for the declining number of cases decided at trial might be the economic burdens associated with litigation.¹³ Extensive time commitments, costly discovery procedures, and the emotionally draining experience of litigation all loom large in a

4. Galanter, *Hundred-Year Decline*, *supra* note 2, at 1257–59.

5. Mark R. Kravitz, *The Vanishing Trial: A Problem in Need of Solution?*, 79 CONN. B.J. 1, 4 (2005) (citation omitted).

6. Galanter, *Vanishing Trial*, *supra* note 3, at 461.

7. *See* Kravitz, *supra* note 5, at 4.

8. *Id.* at 4–5.

9. Emily Fiftal, Note, *Respecting Litigants' Privacy and Public Needs: Striking Middle Ground in an Approach to Secret Settlements*, 54 CASE W. RES. L. REV. 503, 503 (2003) (citation omitted).

10. THOMAS H. COHEN, BUREAU OF JUSTICE STATISTICS, FEDERAL TORT TRIALS AND VERDICTS, 2002-03 1 (2005), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/fttv03.pdf>.

11. *Id.*

12. *See* Galanter, *Vanishing Trial*, *supra* note 3, at 508–10; Hope Viner Samborn, *The Vanishing Trial: More and More Cases are Settled, Mediated or Arbitrated Without a Public Resolution. Will the Trend Harm the Justice System?*, A.B.A. J., Dec. 2002, at 24 (indicating that although data on state court trials is incomplete, the trend toward decreasing trial rates seems to be widespread).

13. Samborn, *supra* note 12 (“Experts suggest a variety of reasons for the decline. Often cited are the push by legislatures and judges for alternative dispute resolution, as well as the increasingly costly and time-consuming nature of courtroom trials.”).

litigant's decision to forego a full-blown trial.¹⁴ In addition, significant opportunity and regret costs—that become more evident as litigation proceeds—motivate parties to reconsider the providence of trials and the economy of settlements or alternative mechanisms to resolve disputes.

As I witnessed during my own years of practice, unpredictable outcomes from trials and lost opportunities to pursue other matters compel parties to settle their disputes. A truism is that any case, regardless of its merits, faces an uncertain resolution in a judicial trial. Several factors tend to contribute to this uncertainty, including a lack of information regarding the strength of an adversary's case, doubt concerning the judge or jury's final decision, or the vagueness of legal standards.¹⁵ The gamble associated with trials can be particularly disconcerting for risk-averse parties.¹⁶

The diminished use of trials may also be attributed to the increased employment of less costly procedures grouped within a discipline commonly known as Alternative Dispute Resolution (ADR).¹⁷ ADR mechanisms such as arbitration, mediation, and negotiation generally accommodate, or at least take into consideration, the idiosyncratic desires of litigants.¹⁸ Employment of a neutral mediator or arbitrator increases the probability of a mutually beneficial outcome.¹⁹ Equality between the parties²⁰ and

14. See *id.*; Galanter, *Hundred-Year Decline*, *supra* note 2, at 1262–63.

15. See Bruce L. Hay, *Effort, Information, Settlement, Trial*, 24 J. LEGAL STUD. 29, 29–30 (1995) (arguing that a judgment is dependent upon factors outside of the parties' control); Laura Inglis et al., *Experiments on the Effects of Cost-Shifting, Court Costs, and Discovery on the Efficient Settlement of Tort Claims*, 33 FLA. ST. U. L. REV. 89, 96–97 (2005) (indicating uncertain results from a lack of information about the nature of a legal claim and the facts upon which it is based); Jeffrey O'Connell et al., *An Economic Model Costing "Early Offers" Medical Malpractice Reform: Trading Noneconomic Damages for Prompt Payment of Economic Damages*, 35 N.M. L. REV. 259, 272 (2005) ("One of the primary causes of disagreement between adverse parties is the vagueness of the legal decision standard; the more vague the standard, the greater the uncertainty . . .").

16. See Hay, *supra* note 15, at 30–31 (suggesting that a party's uncertainty regarding the strength of an adversary's case leads to settlement).

17. See Wayne D. Brazil, *ADR and the Courts, Now and in the Future*, 17 ALTERNATIVES TO HIGH COST LITIG. 85 (predicting that the Alternative Dispute Resolution Act of 1998 will be an influential factor in parties' decisions to settle).

18. See Mariel Rodak, *It's About Time: A Systems Thinking Analysis of the Litigation Finance Industry and its Effect on Settlement*, 155 U. PA. L. REV. 503, 520 (2006) (outlining the economic and substantive benefits of settlement, a subset of ADR).

19. Samuel R. Gross & Kent D. Syverud, *Don't Try: Civil Jury Verdicts in a System Geared to Settlement*, 44 UCLA L. REV. 1, 60–61 (1996).

cooperative dealings, both of which can be elusive in trials, are attractive features of ADR.²¹

Perhaps the most compelling development that has reduced the number of trials has been the judiciary's tendency to encourage settlement. Courts have become influential voices in parties' decisions to forego trials.²² In fact, the management of cases by courts during the pre-trial stages of litigation can often steer parties toward settlement.²³ Based upon their inherent powers, many courts require parties to attend settlement negotiations.²⁴ While settlement conferences are often voluntary, judges can exert extreme pressure that encourages parties to settle their disputes.²⁵ Some courts have influenced parties by sanctioning those who fail to accept a settlement or reach settlement by a court-set deadline.²⁶ Even the U.S. Supreme Court has recognized the strong public policy in favor of settlement over litigation.²⁷

Legislation has also led to the diminished use of trials. Indeed, the federal legislature has amended the Federal Rules of Civil Procedure to streamline litigation, promote the use of alternative

20. Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1076–78 (1984) (arguing that the ADR paradigm is based upon the assumption that a dispute occurs between two similarly situated parties).

21. See Paul D. Carrington, *ADR and Future Adjudication: A Primer on Dispute Resolution*, 15 REV. LITIG. 485, 494 (1996) (suggesting that a party can use a third-party mediator or arbitrator to coerce a weaker party into agreement).

22. Judith Resnik, *Mediating Preferences: Litigant Preferences for Process and Judicial Preferences for Settlement*, 2002 J. DISP. RESOL. 155, 156–59 (2002).

23. Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 403–13 (1982) (discussing methods employed by judges both pre-trial and post-trial to steer parties toward settlement).

24. See Maureen A. Weston, *Confidentiality's Constitutionality: The Incursion on Judicial Powers to Regulate Party Conduct in Court-Connected Mediation*, 8 HARV. NEGOT. L. REV. 29, 39 (2003) (citing *G. Heileman Brewing Co. v. Joseph Oat Corp.*, 871 F.2d 648, 656–67 (7th Cir. 1989) (en banc); *In re Novak*, 932 F.2d 1397, 1407 (11th Cir. 1991)).

25. See Lucy V. Katz, *Compulsory Alternative Dispute Resolution and Voluntarism: Two-Headed Monster or Two Sides of the Coin?*, 1993 J. DISP. RESOL. 1, 16 (1993) (proposing that judicial pressure to settle can be “intense” and recognizing some of the means by which judges exert this pressure); see also Peter H. Schuck, *The Role of Judges in Settling Complex Cases: The Agent Orange Example*, 53 U. CHI. L. REV. 337, 359–61 (1986) (suggesting that judges may coerce parties into settlement through overreaching).

26. Nancy A. Welsh, *The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?*, 6 HARV. NEGOT. L. REV. 1, 64–65 (2001).

27. Fiftal, *supra* note 9, at 503 (citing *Marek v. Chesny*, 473 U.S. 1, 12 (1985) (Powell, J., concurring)).

dispute mechanisms, and prompt litigants to settle.²⁸ Rules 16(b) and 26(f)(1) require judges to schedule, and require attendance to, mandatory conferences at which the parties prepare for the impending litigation and discuss settlement possibilities.²⁹ The Alternative Dispute Resolution Act functions to ease the caseload of trial courts by providing disputants a more efficient means of resolving their disputes.³⁰ The Civil Litigation Management Manual, published by the Judicial Conference of the United States, asserts that judges must ensure that the “case resolution comes at the soonest, most efficacious, and least costly moment in every case.”³¹ As I experienced during my years in practice, some judges counsel the parties to settle their dispute and offer the parties incentives to ensure that they pursue that option.³²

The reduced dependence on resolution from full-blown trials has also resulted from an increased utilization of the administrative process. A significant amount of judicial decision making has been outsourced to agencies, which can more efficiently and economically adjudicate certain disputes.³³ Despite their more efficient procedures, administrative agencies are encouraged to use alternative dispute mechanisms.³⁴

The diminished use of trials has clearly become well entrenched in modern practice and shows no sign of ebbing. This phenomenon, while deserving of study to ensure just decision making, should be accepted as a natural byproduct of market-

28. See Marc Galanter & Mia Cahill, “Most Cases Settle”: *Judicial Promotion and Regulation of Settlements*, 46 STAN. L. REV. 1339, 1340–41 (1994) (noting that procedural reforms, such as the 1983 amendment of Rule 16 of the Federal Rules of Civil Procedure and the Civil Justice Reform Act, require courts to consider alternatives to litigation that would reduce the cost and delay associated with trial); Perschbacher & Bassett, *supra* note 2, at 16, 23 (discussing how Rule 16 and Rule 68 of the Federal Rules of Civil Procedure put pressure on parties to settle).

29. John Lande, *The Movement Toward Early Case Handling in Courts and Private Dispute Resolution*, 24 OHIO ST. J. ON DISP. RESOL. 81, 89 (2008).

30. Caroline Harris Crowne, *The Alternative Dispute Resolution Act of 1998: Implementing a New Paradigm of Justice*, 76 N.Y.U. L. REV. 1768, 1791 (2001).

31. COMM. ON COURT ADMIN. & CASE MGMT., JUDICIAL CONFERENCE OF THE U.S., CIVIL LITIGATION MANAGEMENT MANUAL 8 (2001), available at [http://www.fjc.gov/public/pdf.nsf/lookup/civlitig01.pdf/\\$file/civlitig01.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/civlitig01.pdf/$file/civlitig01.pdf).

32. See Stephen C. Yeazell, *The Misunderstood Consequences of Modern Civil Process*, 1994 WIS. L. REV. 631, 656–60 (1994) (proposing that judges prefer settlement and view trial as a last resort).

33. Judith Resnik, *Whither and Whether Adjudication?*, 86 B.U. L. REV. 1101, 1123–24, 1131–32 (2006).

34. See Katz, *supra* note 25, at 18–19 (discussing the Alternative Dispute Resolution Act, Pub. L. No. 101-552, 104 Stat. 2736 (1990)).

driven forces. The costs and efficiency associated with the diminishing use of trial may also relate, to some extent at least, to effective lawyering.

In my view, the decrease in trials as a manifestation of effective legal representation has a foundation in the historic function of lawyers.³⁵ Lawyers have long been defined as “counselors at law,” a phrase that connotes an attorney’s duty to function holistically to serve her client.³⁶ While an attorney must always represent her client competently and fully, she also must ensure a just and satisfactory resolution of the client’s matter.³⁷ The obligation to serve one’s client is coupled with an attorney’s duty to work for the betterment of society in general.³⁸ This latter function is profound. Taken holistically, an attorney should seek the most efficient solution to a client’s problem while commensurately furthering the interests of societal justice.

Lawyers also have the professional obligation to counsel their clients, discover more effective and economical ways to resolve their clients’ disputes, and contribute to the overall efficiency of the judicial system. The diminished use of trials, which constitutes a strategy that is usually less costly for clients and less burdensome for the judiciary, can fulfill these goals. The following quote by President Abraham Lincoln captures the essence of the professional duty to resolve disputes efficiently: “Never stir up litigation. A worse man can scarcely be found than one who does this. . . . A moral tone ought to be infused into the profession which should drive such men out of it.”³⁹

35. See Warren E. Burger, *The Decline of Professionalism*, 63 *FORDHAM L. REV.* 949, 953 (1995) (quoting Abraham Lincoln, Notes for a Law Lecture (July 1, 1850), in *THE LIFE AND WRITINGS OF ABRAHAM LINCOLN* 327–28 (Phillip Van Doren Stern ed., 1940)); Matt Christensen, *Counselors and Healers at Law*, *ADVOC. (IDAHO)*, Feb. 2009, at 20–21 (suggesting that lawyers have acted as counselors beginning with English law); Edward D. Re, *The Lawyer as Counselor and Peacemaker*, 77 *ST. JOHN’S L. REV.* 515, 517–18 (2003) (proposing that the lawyer’s role as counselor began with Thomas More).

36. See Re, *supra* note 35, at 517–18; see also Paul Brest, *The Responsibility of Law Schools: Educating Lawyers as Counselors and Problem Solvers*, 58 *LAW & CONTEMP. PROBS.* 5, 8 (1995) (“Counseling lies at the heart of the professional relationship between lawyer and client.”).

37. See *MODEL RULES OF PROF’L CONDUCT R. 1.2* (2009).

38. See Edward D. Re, *The Lawyer as Counselor and the Prevention of Litigation*, 31 *CATH. U. L. REV.* 685, 690–91 (1982) (proposing that an attorney acting as counselor provides a beneficial function to society by promoting cooperation and understanding and stabilizing relationships).

39. J. Robert McClure, Jr., *On the Practice of Law*, *A.B.A. J.*, Oct. 1990, at 98.

Of course, the diminished use of trials raises a question as to whether the numerous cases filed today culminate in fair and just decisions. Intuitively, parties with greater resources and bargaining power might function opportunistically to obtain a resolution more favorable to their position. Stated alternatively, those with fewer resources who cannot economically last through full-blown litigation may be forced into resolutions that are less than optimal.

Few lawsuits involve parties of equal power. Many controversies involve a weaker party that asserts a claim against a party with greater bargaining power.⁴⁰ A typical example would be an employer-employee dispute, in which a disparity in power can have severe implications.⁴¹ The employee, who is generally the weaker party, may be unwilling to delay compensation and, therefore, may accept a timelier, yet less judicious, settlement.⁴² The mere possibility of such disparate results compels the judiciary and legislature to monitor outcomes and address any disparities through the adjustment of rules.⁴³

III. A LANDSCAPE WITHOUT TRIALS AND THE ACADEMY'S APPROPRIATE RESPONSE

In my view, the legal academy should appreciate and adjust to the growing trend toward fewer trials. To this end, examination of curricula and teaching methodologies must occur regularly to ensure that students develop the skills necessary to become more adroit problem solvers. Adjustments in pedagogy, however, become a challenge given the dominance of the adversarial model in legal education.

Since the late nineteenth century, the education of lawyers has been rooted in the adversarial system.⁴⁴ Legal education, which

40. Fiss, *supra* note 20, at 1076.

41. *See id.*; *see also* Lisa B. Bingham, *On Repeat Players, Adhesive Contracts, and the Use of Statistics in Judicial Review of Employment Arbitration Awards*, 29 MCGEORGE L. REV. 223, 259 (1998) (suggesting that employers with greater bargaining power than employees leads to arbitration awards that are substantially less than the amount that would be awarded by a jury verdict).

42. Fiss, *supra* note 20, at 1076.

43. *See* Galanter & Cahill, *supra* note 28, at 1340; Perschbacher & Bassett, *supra* note 2, at 23–24 (proposing that disparities in parties' bargaining power compels settlement).

44. *See* Susan Katcher, *Legal Training in the United States: A Brief History*, 24 WIS. INT'L L.J. 335, 347–53 (2006); John O. Sonsteng et al., *A Legal Education Renaissance: A Practical Approach for the Twenty-First Century*, 34 WM. MITCHELL L. REV. 303, 321–27 (2007).

started from the apprenticeship model and ultimately graduated to the Langdellian emphasis on the case method, has focused on the resolution of disputes within a judicial trial.⁴⁵ Most casebooks and other written materials used in legal education feature mainly judicial proceedings, many of which end in a “winner-take-all” scenario.⁴⁶ First-year students who take a traditional curriculum are bombarded with the presentation of legal doctrines within cases that imply that final results are zero-sum games.⁴⁷ Students, therefore, have rooted in their minds that the successful resolution of problems comes from a final judgment at trial.⁴⁸

To prepare students for the realities of the modern legal market, the academy must impress upon them at the earliest stages of their careers the importance of skills needed to resolve matters without resorting to a judicial trial. The traditional curriculum must be supplemented with exercises that expose students to alternative means of dispute resolution.⁴⁹ This supplementation should be multifaceted and develop interpersonal skills and persuasive techniques required to achieve compromise. The inclusion of transactional work, together with the doctrine learned in the traditional case method, provides students with a more balanced understanding of modern-day dispute resolution.⁵⁰ Some law schools have already implemented this suggestion. For example, the University of Wisconsin School of Law has significantly augmented its curriculum to focus on skills that optimize the students’ ability to settle cases.⁵¹

Perhaps the most significant strategy employed by a number of

45. See Jessica Dopierala, *Bridging the Gap Between Theory and Practice: Why are Students Falling Off the Bridge and What are Law Schools Doing to Catch Them?*, 85 U. DET. MERCY L. REV. 429, 431–33 (2008); Jess M. Krannich et al., *Beyond “Thinking Like a Lawyer” and the Traditional Legal Paradigm: Toward a Comprehensive View of Legal Education*, 86 DENV. U. L. REV. 381, 383–86 (2009).

46. See Sonsteng et al., *supra* note 44, at 335–36; Russell L. Weaver, *Langdell’s Legacy: Living with the Case Method*, 36 VILL. L. REV. 517, 566–74 (1991).

47. Krannich et al., *supra* note 45, at 389.

48. See *id.*, at 386–88 (suggesting that traditional legal education “pigeon holes” students into thinking that disputes may be easily categorized and resolved by applying legal principles).

49. See *supra* notes 17–25 and accompanying text (explaining the advantages of ADR).

50. Karl S. Okamoto, *Teaching Transactional Lawyering*, 1 DREXEL L. REV. 69 (2009) (discussing the integration of a transactional component as an alternative to the traditional method of legal education).

51. See Keith A. Findley, *Rediscovering the Lawyer School: Curriculum Reform in Wisconsin*, 24 WIS. INT’L L.J. 295, 326–31 (2006).

law schools has been to expose students firsthand to the mechanics of ADR. Nineteen law schools require students to take classes that focus on ADR.⁵² Forty-one law schools have ADR clinics,⁵³ and another forty-one schools offer ADR certificates.⁵⁴ Eleven law schools have advanced programs in ADR.⁵⁵ One hundred and eleven law schools participate in ADR competitions sponsored by the American Bar Association.⁵⁶ The City University of New York School of Law has continually offered a two-semester Lawyering and the Public Interest course that focuses on mediation.⁵⁷ For years, the University of Missouri-Columbia has integrated ADR processes into its first-year courses.⁵⁸ Missouri-Columbia's method includes the instruction of dispute resolution processes and the staging of simulations within the classroom.⁵⁹ Law schools at DePaul University, Hamline University, Inter-American University, Ohio State University, Tulane University, and the University of Washington have adopted some aspect of the Missouri-Columbia's method in their educational programs,⁶⁰ and this strategy has become entrenched in their curricula.⁶¹

The movement to teach students strategies needed to resolve disputes without a trial should not be confined to specialty programs or courses. In my view, the faculty must exercise problem-solving skills in courses *throughout the curriculum*. This task is admittedly challenging, but certainly achievable. Faculty must first engage in a systematic and continuous conversation on techniques that exercise problem-solving skills. It has been my experience that most faculties devote less time to the discussion of effective teaching than to other institutional issues. This fact is surprising given the true salience of teaching in the legal

52. *Schools with Required ADR Courses*, UNIV. OF OR. SCH. OF LAW APPROPRIATE DISPUTE RESOLUTION CTR., <http://adr.uoregon.edu/aba/search/?abamode=required> (last visited Feb. 13, 2012).

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. Beryl Blaustone, *Training the Modern Lawyer: Incorporating the Study of Mediation Into Required Law School Courses*, 21 SW. U. L. REV. 1317, 1318–19 (1992).

58. Leonard L. Riskin, *Disseminating the Missouri Plan to Integrate Dispute Resolution Into Standard Law School Courses: A Report on a Collaboration with Six Law Schools*, 50 FLA. L. REV. 589, 591 (1998).

59. *Id.* at 597.

60. *Id.* at 599.

61. *Id.* at 602–06.

academy.⁶² It is, nonetheless, a reality that must be changed. Faculties should have regular discussions on teaching, including techniques, utilization of technology, and sensitization to differing learning styles and abilities.⁶³ Certainly, at least one faculty lunch a semester could be devoted to this worthy enterprise, and a key subject in this event should be the incorporation of exercises that improve students' ability to solve problems collaboratively.

A key objective, then, is the development of universally employable exercises for problem-solving skills. A preliminary step toward this objective is the recognition of personal attributes and talents that lead to successful problem solving. My own experience as a litigator and practicing attorney, together with consultation with other professionals, confirms that strong interpersonal skills, effective communication and listening, and collaborative consensus-building are key components in a successful problem solving methodology.⁶⁴ Faculty should, therefore, incorporate into their teaching of doctrinal courses exercises that hone these skills and demonstrate their nexus with critical thinking. This strategy can be accomplished in several ways.

In traditional, doctrinal courses, particularly those taught during a student's first year of study, teachers should include exercises that compel students to problem-solve with their colleagues. For example, in my sixty-student Contracts class, I periodically interrupt Socratic dialogue with an exercise that requires students to strategize solutions to a hypothetical problem in small groups. After introducing the problem, I ask students to turn to their neighbors and decide the appropriate outcome of the controversy. I generally give students three to five minutes to collaborate in groups of three or four. Of course the brevity of consultation connotes the succinct nature of the hypothetical problem. Advantages of the exercise are multifold and profound.

62. See Kent D. Syverud, *Taking Students Seriously: A Guide for New Law Teachers*, 43 J. LEGAL EDUC. 247, 259 (1993) (noting that students are professors' legacies, and professors make the biggest impact through their students).

63. See Susan Sturm & Lani Guinier, *Learning from Conflict: Reflections on Teaching About Race and Gender*, 53 J. LEGAL EDUC. 515, 528–29 (2003) (discussing an experiment, which invites students to address differences in learning styles, and proposing that such curriculum encourages creativity in problem solving).

64. During the panel "Integrating Skills in Doctrinal Courses," which took place during the 2009 annual meeting of the Southeastern Association of Law Schools, Professor Tina L. Stark of the Emory University School of Law noted the importance of collaboration as a skill, and that partners at a number of law schools complained of students' scant abilities to problem-solve as a team.

Students are demonstratively more engaged in scholarly critique. Post-consultative dialogue becomes instantly spirited and reduces linear communication by a “talking head” professor. Students willingly and enthusiastically share their views and speak publicly with greater ease. They are truly vested in their *ad hoc* groups and work diligently to ensure the group’s success. Ultimately, students begin to appreciate the need to work collaboratively to solve problems.

Its benefits notwithstanding, the in-class exercise does require focused thought and planning. A teacher must find or create the appropriate hypothetical problem that complements her pedagogical goals, ensures engagement by the students, and can be effectively discussed in a relatively short period of time. Moreover, once the time for class discussion has concluded, the teacher must effectively manage the post-conference discussion, thereby synthesizing the various responses from the small groups and then intersecting those responses with her teaching points. Executed properly, the exercise energizes the class and compels students to employ skills that will benefit them as practicing attorneys.

Teachers may employ the in-class exercise in virtually any course, regardless of subject matter or class size. Thus, in my Contracts and Administrative courses, which can have enrollments of forty to sixty, students often discuss hypothetical problems in smaller groups. These discussions take place in class as an important part of the pedagogy.⁶⁵ Of course small classes, including seminars, become excellent venues for these collaborative exercises.

Another pedagogical technique that develops the skills needed for collaborative problem solving is a more formalized and structured negotiation. This exercise, which students work on outside of class, requires greater strategic thinking and precise execution. For example, in my Contracts class that may have an enrollment of twenty to forty, I will divide the class into small groups that function as “law firms.” These firms represent various parties to litigation. The firms are then tasked to seek a resolution to a controversy by first engaging in settlement discussions. If a settlement is reached, the firms must agree on and submit a

65. Discussions with a law professor in Australia confirm the utility of the in-class exercise in large classes. My Australian colleague has employed the exercise in classes with enrollment of more than two hundred students. She achieves the positive results that I describe in this essay.

“Statement of Settlement” that describes the terms. Each “member” of the various firms must also submit an individually authored “Memorandum of Personal Contribution,” which details his or her personal contributions that led to the settlement and critiques their colleagues and the exercise itself. The “Memorandum of Personal Contribution” aids in the evaluation of students for individual grades.⁶⁶ At the conclusion of the negotiation, I will often conduct during class my own critique of the students’ performance and a summation of the techniques that contribute to the successful settlement of cases.⁶⁷

This more structured exercise in negotiation has profound effects. To a greater extent than the in-class exercise described previously in this essay,⁶⁸ the “outside of class” exercise compels students to develop the interpersonal skills necessary to effectuate compromise. They eventually understand that legal controversies need not end in a “winner take all” result. Instead, students become acutely aware of the interpersonal nature of these controversies and the lawyer’s role in forging effective, yet economically efficient solutions to clients’ problems. My course evaluations often include comments such as “I had no idea of what it takes to settle a case. I started as a bulldog with a ‘winner take all’ attitude and learned that a true win is obtaining a tenable result with minimal costs.”

Similar to the in-class discussion of hypothetical problems, the out-of-class negotiation requires significant preparation by the teacher. The problem or controversy must be researched and refined to complement the course’s pedagogical objective so that students can complete the exercise within a reasonable time.⁶⁹

66. For an example of the negotiation exercise used in my Contracts class, see *infra* Appendix A.

67. See Harold I. Abramson, *Problem-Solving Advocacy in Mediations*, DISP. RESOL. J., Aug.–Oct. 2004, at 59 (advocating judicious information sharing between parties, and an honest prediction about how the case would likely result at trial); Marty Latz, *The Five Golden Rules of Negotiation for Lawyers*, WIS. LAW., Nov. 2004, at 27 (arguing for information sharing and objective analysis as an effective negotiating and settlement technique); Leonard L. Riskin, *Understanding Mediators’ Orientations, Strategies and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOT. L. REV. 7, 30–31 (1996) (suggesting that successful mediators predict the probable result of trying the case, discover the parties’ interest in the suit and are flexible when making and discussing possible settlement agreements).

68. For a more detailed description of the in-class exercise, see *supra* text accompanying notes 62–67.

69. Note that the students conduct the negotiation outside of class. The exercise must be refined to be challenging, yet not so labor-intensive that it

Properly scaled and prepared, the negotiation not only exercises collaborative problem-solving skills, but also promotes familiarity and collegiality among the students in the class.⁷⁰ It also can be employed in a variety of doctrinal classes, including Administrative Law.⁷¹

IV. CONCLUSION

The casual conversations at my law school reunion have revealed, at least for me, a startling reality. With trials on the decline and the legal market demanding greater practical competence from law graduates, the legal academy must reevaluate the product presented to new law students. Indeed, legal education remains at a critical crossroads in the twenty-first century. Critiques, including the American Bar Association's *MacCrate Report*,⁷² and the now famous *Carnegie Report*,⁷³ confirm that traditional legal education, with its emphasis on critical thinking and analysis, should include educative methodologies that ensure students' functionality as professionals. In this era of diminishing trials, this preparation must hone the skills required

overshadows other studies or class requirements.

70. See Jonnette Watson Hamilton, *The Significance of Mediation for Legal Education*, 17 WINDSOR Y.B. ACCESS TO JUST. 280 (1999) (discussing the integration of mediation components into the curriculum at Canadian law schools); Kate O'Neill, *Adding an Alternative Dispute Resolution (ADR) Perspective to a Traditional Legal Writing Course*, 50 FLA. L. REV. 709 (1998) (explaining a professor's attempt to replace much of the traditional first year Legal Writing program at the University of Washington with an ADR-based alternative); Ronald M. Pipkin, *Teaching Dispute Resolution in the First Year of Law School: An Evaluation of the Program at the University of Missouri-Columbia*, 50 FLA. L. REV. 609 (1998) (describing the University of Missouri-Columbia's first year program which includes a mandatory dispute resolution element).

71. For the exercise I use in my Administrative Law class, see *infra* Appendix B.

72. AM. BAR ASS'N SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM, REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP 233–60 (1992) (the “*MacCrate Report*”); see also Dopierala, *supra* note 45 at 436–39 (discussing the *MacCrate Report*'s emphasis on practical skills as a response to complaints from the practicing bar); Gary A. Munneke, *Legal Skills for a Transforming Profession*, 22 PACE L. REV. 105, 130–37 (2001) (discussing the *MacCrate Report*'s findings and suggesting new sets of practical skills that should be included in a contemporary law school curriculum).

73. WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW (2007) (finding that legal education provides little focus on practical training and advocating an integrated curriculum that would include analytical and practical teaching methods).

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for the effective and efficient resolution of clients' problems. If we impress upon students their obligations to become efficient problem-solvers, they will more thoughtfully and skillfully represent their clients in this era of diminishing trials. Accomplishment of this essential goal not only enriches students, but also fulfills our obligation as educators to ensure the relevancy and potency of legal education.

V. APPENDIX A

CONTRACTS

Negotiation

Acme Honda, Inc. v. Amberville

FACTS:

Ms. Angela Amberville ordered a new Honda Accord from Acme Honda, Inc. The salesperson filled out a standard order form, which Ms. Amberville signed. The form stated in bold letters, “This order shall not become binding until accepted by dealer or his authorized representative.” Although the form was never signed by the dealer or an authorized representative, Acme Honda ordered an Accord for Ms. Amberville. When it arrived, Ms. Amberville had changed her mind and refused to accept the car, claiming no binding contract had ever been formed.

Consider that Ms. Amberville is the offeror and Acme Honda, Inc. is the offeree. Acme Honda has sued Ms. Amberville for breach of contract. Joining Acme Honda as co-plaintiff is Honda, Inc. of North America (manufacturer and distributor). Consumer Affairs, P.C., who represents several other potential Honda buyers who rejected their ordered vehicle and were subsequently sued by Acme Honda, also joins in the suit as a similarly situated defendant. Before trial on the matter, the judge strongly advises all parties to meet and negotiate a settlement.

INSTRUCTIONS:

Assume that you and others in your firm represent [ONE OF FOUR PARTIES IN THE LITIGATION]. You must now meet with counsel for the other three parties and attempt to forge a settlement of *Acme Honda, Inc., et al. v. Angela Amberville, et al.* Your agreement to settle (if reached) should clearly and succinctly specify all terms of settlement. The Settlement Agreement should consist of not more than 750 words (three pages), written in numbered paragraphs (each stipulating the settlement term), and signed by each attorney. The Settlement Agreement must be typed, double spaced, with one-inch (1”) margins (top, bottom, left, and right), and printed in Courier, 12-point font. The format for the settlement should be as follows:

Settlement Agreement
In the Matter of
Acme Honda, Inc., et al. v. Amberville, et al.

[Terms of Settlement - Numbered Paragraphs]

Signed:

Counsel for:
Acme Honda, Inc.

Counsel for:
Honda of N.A.

Counsel for:
Ms. Amberville

Counsel for:
Consumer Affairs, P.C.

If you failed to reach a settlement, each *party* must provide a Statement of Non-Settlement, which should be approximately 750 words in length and explain why the negotiations failed. Be sure to detail particular points of contention. There need only be one statement per attorney group. The statement must be typed,

double spaced, with one-inch (1") margins (top, bottom, left, and right), and printed in Courier, 12-point font. The format for this statement is identical to the Settlement Agreement, except the heading should read as follows:

**Statement of Non-Settlement
in the Matter of
*Acme Honda, Inc., et al. v. Amberville, et al.***

After you have finished your settlement discussions and the drafting of an agreement or non-settlement statement, you (each counsel in the case) must compose a *two-page* summary that details your specific function, ideas, and general participation in the settlement negotiations. Also comment on the functions of your co-counsels and opposition counsel. The format for this summary is as follows:

Name:

Class: Contracts, Sec.5

Date:

Assignment: Summary of Individual Action in *Acme Honda, Inc. et al. v. Amberville, et al.* Settlement Negotiations

The Summary should contain not more than 500 words (two pages), be written with care observing all rules for style and grammar, must be typed, double spaced, with one-inch (1") margins (top, bottom, left, and right), and printed in Courier, 12-point font.

The Settlement Agreement or Statement of Non-Settlement is due in my office not later than [DATE AND TIME]. Your individual summaries are due in my office not later than [DATE AND TIME].

VI. APPENDIX B

**Administrative Law
Negotiation Exercise**

Please refer to the problem on page 66 of your casebook. Recall that the dispute in that problem centered on Rex's (the principal) refusal to renew Doris's (the tennis coach) contract as a part-time tennis coach. You have already researched and argued this matter, and submitted your closing argument.

Your respective client(s) and the agency would like you to broker a settlement or solution without agency or judicial intervention. With that charge, you must now converse and negotiate with your colleagues to perfect a solution that resolves the dispute between Doris and Rex. Your duties are as follows:

1. You should immediately meet with the other co-counsels who represent the interest or client(s) for whom you argued. The purpose of this meeting is to discuss strategies and arguments, and come to some consensus regarding the terms for an acceptable settlement. Each group should then write a *Terms for Settlement* statement that lists in summary fashion your group's desired goals to settle this matter. The caption for this document is:

Administrative Law
Negotiation Exercise
Professor Morant

Terms for Settlement

By: [Individual or Group You Represented,
Your Names and Signed by All]
Date: [due date of assignment]
Subject: In the Matter of Doris, Tennis Coach

The *Terms for Settlement* contains those terms or conditions that your group finds acceptable to settle this matter. While the parties and interveners work on their *Terms for Settlement*, ALJs should meet to achieve some preliminary consensus regarding

resolution of the case. The ALJs should compose a *Preliminary Findings*, which details your preliminary thoughts on how this matter should be resolved. The *Preliminary Findings* should be no more than two pages, double spaced, in Courier font. Neither the *Terms for Settlement* nor the *Preliminary Findings* should be shared with any other group. You should hold onto these documents for your own reference and use them during the negotiations. You must eventually file copies of these documents with me in accordance with instructions described in No. 2 below.

2. After the meetings described in No. 1 above, you and your co-counsels should meet with the opposition teams to discuss possible settlement terms and options. Prior to meeting with the opposition groups, you should attempt to form a cooperative with another group that shares your interests in this dispute, e.g., those representing Doris might join with the Teachers'/Coaches' Association; representatives of Rex might band together with those who represent the Superintendent/School Board. The cooperative would ease the duplicity of the settlement negotiations. After meeting with the opposition group(s) and if settlement terms are reached, all negotiating groups should author a *Joint Settlement Agreement* (JSA). This document identifies in summary form all terms of settlement agreed to by the parties. The JSA should be no longer than two pages, double spaced using Courier font, and contain the following caption:

Administrative Law
Negotiation Exercise

Joint Settlement Agreement

By: [Party or Parties to the Settlement;
Your Names and Signed by All]
Date: [due date of assignment]
Subject: In the Matter of Doris, Tennis Coach

If you were unable to broker a settlement despite concentrated efforts to do so, you must then file a *Statement of Attempted Settlement* (SAS) that explains the specific points on which you

were unable to agree. The caption for the SAS is as follows:

Administrative Law
Negotiation Exercise

Statement of Attempted Settlement

By: [Individual or Group You Represented,
Your Names and Signed by All]

Date: [due date of assignment]

Subject: In the Matter of Doris, Tennis Coach

You must file the *Joint Settlement Agreement* or, in the alternative, the *Statement of Attempted Settlement* with the ALJs not later than [DATE AND TIME]. These documents must be double spaced, printed in Times New Roman, 13-point font. You must also enclose originals of your *Terms of Settlement* and *Joint Settlement Agreement* or *Statement of Attempted Settlement* in a manila envelope that has your group's name on the cover. ALJs should enclose an original of their *Preliminary Findings* in an envelope marked, "Department of Education Administrative Law Judges' Preliminary Findings." This document must be double spaced, printed in Times New Roman, 13-point font. The envelopes containing these statements must be deposited in the marked tray near my office door on [DATE], not later than [TIME].

3. Once presented with the *Joint Settlement Agreement* or, in the alternative, the *Statement of Attempted Settlement* from the parties, ALJs must meet to come to some decision in the case. If the parties were able to reach terms of settlement, you must decide whether those terms are acceptable to close the matter. You must record your opinion on the settlement in your *Findings on Settlement*, a document of no more than three pages that contains the following caption:

Administrative Law
Negotiation Exercise

Findings on Settlement

By: Department of Education Administrative Law Judges –
[Your Names and signatures]
Date: [due date of assignment]
Subject: In the Matter of Doris, Tennis Coach

If the parties were unable to settle the matter, you must reach a decision based on the record to resolve the matter. You must record your decision on the record in a document entitled *Final Decision*. Your Final Decision must be no more than three pages in length, double spaced in Times New Roman, 13-point font, and contain the following caption:

Administrative Law
Negotiation Exercise

Final Decision

By: Department of Education Administrative Law Judges –
[Your Names and signatures]
Date: [due date of assignment]
Subject: In the Matter of Doris, Tennis Coach

The ALJs must serve each group with a copy of their *Findings on Settlement* or, in the alternative, *Final Decision*, on [DATE], not later than [TIME]. ALJs should also enclose an original of their *Findings on Settlement* or, in the alternative, *Final Decision*, in a manila envelope with the inscription, “Department of Education Administrative Law Judges’ Opinion.” ALJs should deposit this envelope in the tray near my office door on [DATE], not later than [TIME].

4. Each class member (including ALJs) must write a *Post Settlement Statement* summarizing the negotiation strategies used to effectuate settlement. You should describe the tactics used to negotiate the settlement and state whether these tactics were effective. Be sure to note what specific contributions you

made to the negotiations. You should also analyze the merits of the final settlement, i.e., whether the settlement was equally beneficial to Rex and Doris, or whether it favored one party more than the other. In addition to your own views of the settlement agreement (or lack thereof), ALJs should comment on the dynamics of the settlement process, i.e., were the parties cooperative in their negotiations, what specific points did you find troublesome or noteworthy in this process. The *Post Settlement Statement* should be at least two, but no longer than three, pages in length, double spaced, in Times New Roman, 13-point font. It should be comprehensive and display excellent writing mechanics. Enclose your *Post Settlement Statement* in your named, manila envelope and deposit the packet in the tray near my office door on [DATE], not later than [TIME].