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Teaching Mediation As a Lawyering Role Developments

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The growth of the alternative dispute resolution (ADR) movement has generated an increased interest in the study and practice of mediation as a nonadversarial method of conflict resolution. With mediation, individuals settle their disputes using a neutral third party who has no power to impose a settlement. Historically, mediation has been widely neglected in legal education, and—except for those involved in the labor field—lawyers have not practiced it. Recent gains in visibility have not necessarily resulted in widespread acceptance of mediation. In fact, mediation has even been openly resisted by some members of the legal profession.¹

Law school faculty, however, have been persuaded that mediation merits attention in legal education and have pressed their institutions to include it in the curriculum. Over the last decade, mediation has become part of the curriculum in a growing number of law schools either as part of an ADR survey course, integrated with more traditional legal courses such as negotiation, family law, civil procedure, and professional responsibility, or as a separate course.² It has even been argued that mediation should be integrated throughout the curriculum and not isolated as a separate course.³ Although we agree that the mediation mindset of cooperation and problem solving should be integrated throughout the curriculum, our experience teaching Mediation and the Law since 1985 has convinced us


². See Directory of Law School Dispute Resolution Courses and Programs, 1986 ABA Standing Committee on Dispute Resolution.

that mediation—with its own theory and substantive law issues—deserves a separate course in the law school curriculum. Knowledge of mediation enhances law students' lawyering skills even if they never mediate in their practices. It enables them to think in a problem-solving mode, to consider underlying needs and interests. Even within adversarial practice, the lawyer who has been exposed to the mediative perspective may recall the value of taking the broadest view of possible issues and interests involved in a specific case and thus improve his or her ability to help clients develop solutions to their problems.

I. Mediation

Mediation is generally understood to be a short-term, structured, task-oriented, participatory intervention process.\footnote{See Christopher W. Moore, The Mediation Process 13–19 (San Francisco, 1986); Jay Folberg & Alison Taylor, Mediation: A Comprehensive Guide to Resolving Conflicts Without Litigation 7–9 (San Francisco, 1984).} Ideally, disputants engage voluntarily in the process and agree to work with a neutral third party to reach a mutually acceptable agreement in an informal fashion. At the core of all mediations is the understanding that the mediator will not impose a decision on the parties.

For the most part, mediation is conducted with all disputing parties engaging in ongoing, face-to-face negotiations. However, depending on the mediator's style, his or her philosophical approach, the context within which the mediation is conducted, and the issue involved, private sessions with each party may be held.\footnote{Private mediation sessions are referred to as caucuses. They are likely to be used by mediators in labor, environmental, and international sectors. See Christopher W. Moore, The Caucus: Private Meetings That Promote Settlement, 16 Mediation Q. 87 (1987).} Although the number of stages involved in the mediation process has been variously identified by different students of the process,\footnote{Moore, supra note 4, at 32–33 (identifies twelve steps); Folberg & Taylor, supra note 4, at 39–70 (seven steps); John M. Haynes, A Conceptual Model of the Process of Family Mediation: Implications for Training, 10 Am. J. Fam. Therapy 5 (Winter 1982) (twelve steps); Larry Ray, The Alternative Dispute Resolution Movement, 8 Peace & Change 117, 121–22 (Summer 1982) (six steps); Clarence Cramer & Russell Schoeneman, A Court Mediation Model With an Eye Toward Standards, 8 Mediation Q. 33, 38–46 (June 1985) (five steps).} there are specific activities associated with the mediation process that are constant. Important initial tasks for the mediator are to prepare the parties to work through their differences by screening the cases for suitability and readiness\footnote{John Haynes, Matching Readiness and Willingness to the Mediator’s Strategies, 1 Negotiation J. 79 (1985).} and to explain the process and the mediator's role. The mediator then assists the parties in collecting pertinent information, framing the issues, isolating points of agreement and disagreement, generating options, and encouraging them to consider compromise so that they can bring closure to their differences. Although mediation is often depicted as a linear process,\footnote{See, e.g., Folberg & Taylor, supra note 4, at 39–41.} there is in fact a high degree of interaction between the various activities.
Mediation is really an extension of the negotiation process. Thus, the mediator may rekindle earlier negotiation efforts between the parties that have broken down. Because the field of mediation is currently at a crossroads, it is not clear exactly what skills and knowledge base are suitable. Although efforts are underway to identify the essentials, mediators are not currently compelled to comply with any uniform standards for education, training, or practice. The most significant efforts have been in preparing codes of ethics to guide mediators in their work.

As a process, mediation is seen as more expeditious, inexpensive, and procedurally simple than adversarial problem solving. It enables the parties to define what is satisfactory to them by transcending the narrow issues in the dispute to focus on the underlying circumstances that contributed to the conflict. Mediation occurs outside the adversary system. It lacks the procedural and constitutional protections of that process, such as the right to a jury trial, right to counsel, procedural due-process requirements, and so forth. The assumed tradeoff is that mediation will produce a result that will be more responsive to individuals' needs. Ideally, mediation can reflect the disputants' views of a fair outcome.


10. Comment, The Dilemma of Regulating Mediation, 22 Hous. L. Rev. 841 (1985). Katheryn M. Dutenhauer, Qualifications of Family Mediators, Mediation Q. 3 (Spring 1988). Some developments, however, are under way in various states. For example, the Florida Supreme Court Committee on Mediation/Arbitration Training has determined the essential components of mediation training in court-annexed programs. Memorandum of November 8, 1988, from Michael L. Bridenback, director, Dispute Resolution Center, Supreme Court Building, Tallahassee, Florida 32399 (904 448-8621), regarding mediation training-program standards (on file with the authors). In New York, community mediators are required to complete twenty-five hours of training. N.Y. Jud. Law § 849-b(4)(b).

In October 1987 the president of the Society of Professionals in Dispute Resolution (SPIDR) created a commission to study the qualifications of mediators and arbitrators. One of the central principles recognized by the commission is "that qualification criteria should be based on performance, rather than paper credentials." National Institute of Dispute Resolution (NIDR), Dispute Resolution Forum 7 (May 1989). The Commission identified the following skills as necessary for competent performance as a mediator: "(a) ability to understand the negotiating process and the role of advocacy; (b) ability to earn trust and maintain acceptability; (c) ability to convert parties' positions into needs and interests; (d) ability to screen out non-mediable issues; (e) ability to help parties to invent creative options; (f) ability to help the parties identify principles and criteria that will guide their decision making; (g) ability to help parties assess their nonsettlement alternatives; (h) ability to help the parties make their own informed choices; and (i) ability to help parties assess whether their agreement can be implemented." Id. at 9.

11. See standards cited in note 87 infra; see also Ann Milne, Model Standards of Practice for Family and Divorce Mediation, 8 Mediation Q. 73 (June 1985).


13. E.g., Stephen J. Bahr, Mediation Is the Answer: Why Couples Are So Positive About This Route to Divorce, 3 Fam. Advoc. 32 (Spring 1981).

14. Donald T. Saposnek, What is Fair in Child Custody Mediation? 8 Mediation Q. 9–18 (June 1985). While the goal of mediation is fairness, what is fair is not easily identified.
The use of mediation to solve disputes is not a new phenomena in the United States. Among others, Quaker, Chinese, and Jewish immigrant communities established their own mediation mechanisms, partly as a result of skepticism about a foreign legal system and partly to retain culturally meaningful dispute settlement forums. Until recently, mediation in the United States has been most commonly associated with the settlement of labor conflict. Since the early 1970s, however, mediation efforts have transcended religious, ethnic, and labor interests to become a method of processing other types of disputes. Mediation is now conducted in small claims courts, housing courts, family courts, and neighborhood justice centers, as well as in commercial and family practice areas. Mediation is also used as a method of dispute settlement in school disputes, criminal matters including victim-offender cases, and in racial conflict. One of the newer...
developments is the creation of court-annexed programs in which mediation is mandatory.\textsuperscript{31} Some programs combine mediation with arbitration techniques; when disputants are unable to come to an agreement, a decision is made that can be enforced in court as an arbitration award.\textsuperscript{32}

II. Pedagogy

The study of mediation is essentially interdisciplinary. In Mediation and the Law, for instance, a lawyer and a sociologist do the teaching. The cross-fertilization of disciplines prevents an overly legalistic approach to mediation. In general, most law school professors are not trained formally in understanding interpersonal relationships or group dynamics. The lawyer-sociologist team gives the students a richer understanding of the complexity of the mediation process. It also enhances the jurisprudential aspect of our teaching, which challenges students to reflect on the role of law in settling disputes.

A. Course Goals

Our primary educational goal is to heighten law students' awareness of the professional role of nonadversarial lawyering. We hope to help them recognize the enormous potential for cooperative problem solving,\textsuperscript{33} whether dealing with adversaries or advising clients. Our second goal is to offer a framework that integrates the theory and practice of mediation with professional responsibility issues and with some of the substantive law issues in contracts and torts that affect mediation.\textsuperscript{34} Our third goal is to give students the practical skills they need to perform this new lawyering role. Many of the skills, such as interviewing, counseling, and active listening, complement those learned in a more traditional lawyering process course.\textsuperscript{35} Finally, in our teaching of mediation, we attempt to model the interactive dynamics of the mediation process. Indeed, how we act in the student-teacher relationship may affect how students conduct themselves later as lawyer mediators.\textsuperscript{36} Mediation is a collaborative process. It belongs to the parties, with the mediator as a facilitator who helps the parties to help themselves.

B. Method

The course is taught through lectures, discussions, simulations, videotaping and critique, films, and skill-building exercises. The format enables

\textsuperscript{31.} The Civil Rights Act of 1964, Title X, 42 U.S.C. \textsection 2000g 1–3 (1989) created the Community Relations Service of the U.S. Dept. of Justice to help resolve racial disputes through negotiation and mediation. See also Richard A. Salem, Community Dispute Resolution Through Outside Intervention (Washington, D.C., 1982).

\textsuperscript{32.} E.g., N.Y. Civ. Prac. L. & R., \textsection 7510 (McKinney Supp. 1989). When a mediator becomes an arbitrator in the case, it raises uncomfortable issues concerning fairness, because the arbitrator may have learned information during mediation that should not be considered during the arbitration.

\textsuperscript{33.} Good readings to assign in this area are: Carrie Menkel-Meadow, Toward Another View of Legal Negotiation: The Structure of Problem Solving, 31 UCLA L. Rev. 754 (1984); Roger Fisher & William Ury, Getting to Yes (Boston, 1981).

\textsuperscript{34.} See infra text accompanying notes 37–42.


us to focus not only on the mediation process but on the substantive law and professional responsibility issues confronting lawyer mediators. Such issues include the mediator's liability under tort and contract law, the enforcement of mediation agreements, the effect of fraud or coercion on the mediation agreement, standards of judicial review of mediation agreements, confidentiality, and conflict-of-interest problems.

1. Skills Training

Students are required to attend an intensive skills training session on a weekend at the beginning of the semester. We present a broad-based generic view of the mediation process in sixteen hours of minilectures, films, exercises, and videotaping of simulations. Students become immediately involved in the process and begin to develop a mediative orientation.

Before the weekend training, we have a two-hour class session in which we lecture on conflict, dispute resolution processes, and mediation theory. We begin the weekend training session by showing a film that gives an overview of developments in mediation in the United States. The film sets the stage for group exercises that focus on interpersonal skills necessary in mediation. Students engage in three exercises as part of a systematic skill-building process. First, students participate in an interviewing exercise in which they assume roles that are central to the mediation process—in interviewer, interviewee, listener/notetaker. The next two exercises relate to


41. See infra text accompanying notes 81-87.


43. E.g., adjudication, arbitration, mediation, conciliation, and negotiation.

44. Working in groups of three, each student is assigned a letter—A, B, or C—that corresponds with each of the three roles, interviewer, interviewee, and listener/notetaker. Within a set time frame, usually from three to five minutes, the exercise begins with A asking B questions to elicit as much information as possible about B, including information about B's most challenging experience while in law school. C assumes the role of listener/notetaker. Two successive rounds follow, with students switching roles until everyone has had an opportunity to experience all three roles. In the ensuing discussion, students discuss which role they liked most, which least, and why, and what kind of topics the trials addressed. As part of the exercise, the student who served as listener/notetaker reports to the group, and the person who is reported on is asked to remark on whether the listener modified, added, deleted, or edited any information. This part of the exercise allows students to appreciate the difficulty of listening well when no questions are permitted.

The trainer can draw parallels between the exercise and a mediator's tasks. For example, the trainer may suggest that even "innocent" editing can affect one's objectivity and contaminate the mediation process.
Because mediation is an extension of the negotiation process, it is important that students understand and practice negotiation skills.

We then begin to put the mediation process together by dividing the students into groups of three in which they first arbitrate and then mediate a simple dispute. Students discuss how it feels to be in a situation in which a decision is imposed on them instead of their controlling the outcome. Next we show a film of a complete mediation session and break down the process into its components. Because of the importance of setting the stage for the mediation process, we place strong emphasis on the introductory statement. Students are given role plays and assigned roles of mediator and disputants. Each student is given an opportunity to practice a variety of techniques and skills common to mediation despite diverse settings. With each role play, we develop further the mediation process and the skills necessary to mediate—nonjudgmental questioning, active listening, gathering information, identifying issues, clarifying them through negotiation, generating options, and writing the agreement.

In the second exercise students become aware of how selective perceptions influence negotiating behavior. A sketch of an old woman is given to half of the participants, while that of a young woman is given to the other half. After asking the students to study their sketch, a composite sketch is held up. Students are asked to comment on what they see. Inevitably, some students will see only the old woman, while some will see only the young woman. A few will see both. The trainer asks those who see only the old or young woman to describe exactly what they see and to try to convince those on the other side to see it their way. The exercise is similar to the negotiation process, in which one tries to create doubt in the mind of the other person about the validity of his or her position.

We use the exercise to lead into a class discussion about the preconceptions that individuals bring to a conflict situation. Students are encouraged to give examples of common "baggage" that may influence their approach to conflict—experiences related to education, gender, culture, age, race, ethnicity, and physique.

Before students participate in the final exercise (a group negotiation), we lecture on principled negotiation. We use the widely known NASA moon exercise, copies of which are available from the authors.

This is a version of Leonard Riskin's med/arb exercise, published in Conference Proceedings, 2 Beyond the Adversary Model: Materials on Mediation and Alternative Approaches to Law Practice 71, Center for Law and Human Values [address supra note 3] (June 1984).

Although the film has varied since we started, most recently we have shown an American Arbitration Association film, Mediation: Negotiating Settlements, which shows a lawyer-mediator involved in a personal-injury mediation session.

Students are initially provided with the rationale and relevant content of the introduction. The importance of building trust and preparing disputants to mediate is explained. Students are then asked to rehearse an opening statement with a partner. Subsequently, they practice it with two disputants who do not as yet have a script. Because mediation is often conducted by a team of professionals, we have students work with partners and experience the sharing of the stage setting. Examples of opening statements may be found in Moore, supra note 4, at 154–62; Joseph B. Stulberg, Taking Charge/Managing Conflict 64–65 (Lexington, Mass., 1987).

One group's role-play scenario is videotaped. At the completion of each role play, all of the groups are reassembled and asked to discuss issues, process, and outcome. The videotape is then played and critiqued. This approach provides each student with a common experience to which they can refer.

Students practice caucusing, solo mediation, and co-mediation. They experience dealing with experts, attorneys, and translators in a variety of disputes that address important concerns such as power imbalances, confidentiality, conflict of interest, resistance, hostility, anger, intercultural, and gender-related issues, disclosure of criminal behavior, domestic violence, and child abuse.
2. Seminar Sessions

Following the weekend skills training, classes are held for two hours each week, and students are expected to prepare to discuss assigned readings. Because there is a growing body of literature on mediation, many changes have occurred in our assignments.\textsuperscript{52} Although students are quite receptive to non-case-method texts, we do assign a case from one of the substantive law casebooks and ask the students to consider how the case might have been handled if it had been mediated.\textsuperscript{53} The assignment is a practical way to help students develop a mediative perspective in lawyering and usually leads to a rich classroom discussion because students are already familiar with the case in another setting.

In addition to the readings, students prepare for and participate in eight simulation exercises.\textsuperscript{54} One of the most helpful simulations is "The Lock-out" from the teacher's guide to the Rogers and Salem text.\textsuperscript{55} The role play raises critical questions about confidentiality, legal advice, and power imbalances in mediation. We critique students' performance in class when time permits or during office hours.\textsuperscript{56}

3. Field Observation

Students are also required to observe a minimum of two mediation sessions in a field setting of their choice and to submit a written report of their observation. In the past, students have observed mediation in small claims court, the Institute for Mediation and Conflict Resolution Dispute Resolution Center in New York City, the Brooklyn Mediation Center, Queens Mediation Center, the American Arbitration Association, the Second Circuit Court of Appeals, as well as with individual labor mediators.

\textsuperscript{52} When we first began teaching the course in 1985, we assigned readings from Folberg & Taylor, supra note 4. Since that time we have also used Rogers & Salem, supra note 38, and the mediation readings in John S. Murray, Alan Scott Rau & Edward F. Sherman, Process of Dispute Resolution 247–386 (Westbury, N.Y., 1989). Two excellent texts that focus on the process of mediation are Moore, supra, note 4; Stulberg, supra, note 49. Several more general texts contain very good material on mediation: Leonard L. Riskin & James E. Westbrook, Mediation, in Dispute Resolution and Lawyers 196 (St. Paul, Minn., 1987); Stephen B. Goldberg, Eric D. Green & Frank E. A. Sander, Mediation, in Dispute Resolution, supra, note 12, at 91; Susan M. Leeson & Bryan M. Johnston, Ending It: Dispute Resolution in America (Cincinnati, 1988).

\textsuperscript{53} We use Greene v. Howard University, 412 F.2d 1128 (1969), \textit{reprinted} in John D. Calamari & Joseph M. Perillo's Cases and Problems on Contracts. The case involves a dispute between a university, students, and nontenured faculty members.

\textsuperscript{54} Simulations are available from a variety of sources, including the teacher's manuals accompanying the texts referred to supra note 52; List of Teaching Materials, Dispute Resolution Clearinghouse, Institute for Legal Studies, University of Wisconsin-Madison Law School (1986), available from the National Institute of Dispute Resolution, 1901 L Street N.W., Suite 600, Washington, D.C. 20036 (202 466-4764); Program on Negotiation, Harvard Law School, Case Clearinghouse Catalog (Cambridge, Mass., 1985).

\textsuperscript{55} Rogers & Salem, Teacher's Guide 81 [Student's Guide, supra note 38].

\textsuperscript{56} Rogers and Salem have also prepared a fifteen-minute video of the simulation. The post-role-play discussion is richer if students simulate the role play first and then watch the video. We have found the videotape a helpful adjunct to experiential learning for the students and a valuable aid when we critique their performance.
4. Course Requirements

Mediation and the Law is a two-credit, graded course. Students have the option of writing a research paper on a topic of their choice or taking a final examination.57

III. Pedagogical Challenges

A. Teaching Mediation in an Academic Setting

Mediation has often been taught within the context of a specific model or to cover a subject-matter-specific area such as divorce or community mediation.58 We teach a generic form of mediation that students can adapt to future areas of practice. Because mediation is now used to process disputes in diverse and in some instances highly specialized areas, teaching mediation as a general law course is increasingly challenging. Not all professional responsibility issues crosscut all types of mediated disputes nor are the same mediation skills used in—or even suitable for—mediation in all settings. To give students a broad-based understanding of mediation, readings and simulations have to be structured not only to reflect appropriate content area and professional responsibility issues but also a range of suitable mediation skills and techniques.

The use of simulations that focus on issues in diverse areas—family law, housing law, petty criminal offenses, commercial law, and torts—permits us to expose the students to different mediation models, with variations such as caucusing, type and length of opening statements, gender balancing, solo and team mediation, written and oral agreements, negotiating styles, multiparty and two-party disputes.

B. Confronting the Adversarial Mindset

Teaching mediation in law school gives us the opportunity to move students beyond the adversarial practice mode to realize the potential for collaboration and cooperative problem solving.59 We try to give students a framework within which to practice what Derek Bok has called "the gentler arts of reconciliation and accommodation."60 This is not a "soft" approach to the practice of law but rather a recognition that in most situations lawyers will best advance their clients' interests by understanding not only the clients' needs but those of the "adversary," and then by trying to respond to those needs.

57. The final examination is based on the assigned readings and class discussions. Research papers have covered such topics as confidentiality, the role of lawyers in mediation, problems of divorce mediation, problems of fairness in mediation.
58. E.g., Community dispute centers conduct their own training, geared to issues that surface in community mediation. The American Arbitration Association conducts training for divorce mediation.
59. See Menkel-Meadow, supra note 33.
Students typically come to the course already immersed in the competitive mindset of the winner-loser thinking so ingrained in the traditional law school curriculum. For many students, the course marks the first time that they have been required to think critically about the adversary system, many aspects of which may have attracted them to law school in the first place. Persuasion, problem solving, and peacemaking now take precedence over hierarchal power roles. Initial resistance gives way to slow acceptance as students become involved in simulations and exercises that focus on collaborative problem-solving approaches to conflict.

At the outset of the course, students must be disabused, at least temporarily, of their "law" and "rights" consciousness. The primary concern of mediation is not "rights" but interests, needs, and values. Law exists simply as a reference point in the mediation process and is not determinative of the outcome. For example, law is relevant to two disputing neighbors who must know that neighbor A has the legal right to prevent neighbor B from building a swimming pool that encroaches on A's land. Other values militate against A's exercise of this right, such as (1) A's desire to live civilly with neighbor B and (2) A's preference for a private settlement of the dispute. A mediated settlement may therefore be more responsive than litigation to the needs of both A and B. It is from this perspective that students learn how to practice law in a way that is responsive to their clients' needs.

C. Identifying a Role for Lawyers in the Mediation Process

Connecting mediation to the lawyering process is not an easy task. Parallels can be drawn with the efforts of clinical law scholars who have struggled with the problem of defining lawyering roles. Because mediation is just beginning to develop as a profession, its usefulness to the practicing lawyer may not be readily apparent. Despite the newness of mediation, however, lawyers may become involved in many forms of the mediation process. We ask students to consider the following roles: (1) lawyers who mediate; (2) co-mediators on an interdisciplinary team working collaboratively with, for instance, mental health professionals or


62. Attorneys have also been appointed as special masters to mediate disputes. Dispute Resolution, supra note 12, at 284, 285; Stephen Goldberg, Mediations of a Mediator, 2 Negotiation J. 345 (1986).

Another possibility is Robert Coulson's idea of a certified public mediator who would mediate cases within the court system. Coulson envisions the institutionalization of mediation and predicts that most court-certified mediators would be lawyers. Robert Coulson, Professional Mediation of Civil Disputes 32 (New York, 1984).

social workers; (3) advisory attorneys to the disputing parties and mediators; (4) negotiators for clients during the mediation session; (5) legal reviewers of the mediation agreements on behalf of one of the parties to the agreement; (6) referers of cases to mediation. Lawyers who act as solo mediators or as part of an interdisciplinary team are the focus of our course because these roles seem to be the clearest examples of nonadversarial lawyering.

Lawyers' involvement in the developing profession of mediation raises the question why a consumer might choose a lawyer over a nonlawyer mediator. Lawyer-mediators are able to examine the legal as well as the nonlegal consequences of conduct. Depending on the nature of the conflict, they may suggest several legal alternatives that could be possible solutions to the participant's problems. Although suggesting litigation may seem antithetical to the nature of mediation, it permits disputants to consider the full continuum of dispute resolution processes. Lawyers should also be able to inform the disputants of the relevant law and suggest possible court outcomes. Any legal information, however, should be given in the presence of both parties.

To determine the role of the lawyer-mediator, we reflect on the writings of various scholars on mediation and consider how a mediator's functions are compatible with the traditional roles in which lawyers engage. We

64. Folberg & Taylor, supra note 4, at 255, discuss some of the restraints on co-mediation teams. Melvin Black & Wendy Joffee, A Lawyer/Therapist Team Approach to Divorce, 16 Conciliation Cts. Rev. 1 (1978).


66. The attorney in this model would be acting in a traditional representative capacity for the client. In labor mediation, for example, an attorney may negotiate a contract on behalf of clients.

67. Frank E. A. Sander, Family Mediation: Problems and Prospects, 2 Mediation Q. 8, 9 (December 1983). Sander believes that in complex cases it is necessary to have partisan lawyers who can give good advice to the disputants. See also M. Dee Samuels & Joel A. Shawn, The Role of the Lawyer Outside the Mediation Process, 2 Mediation Q. 13, 16–17 (December 1983). The ABA Standards of Practice for Lawyer Mediators in Family Disputes impose a duty on the mediator to advise each of the participants to obtain legal review prior to reaching any agreement. ABA Standard VI, adopted by the House of Delegates of the American Bar Association in August 1984, reprinted in Student's Guide, supra note 38, app. B at 260, 261.

68. Most people will probably still consult attorneys before choosing a method for dealing with their disputes. Leonard L. Riskin, Mediation and Lawyers, 43 Ohio St. L.J. 29, 42 (1982). Unless lawyers appreciate the benefits of mediation, they may deter their clients from using it.


70. See Lawrence D. Gaughan, Divorce Mediation: A Lawyer's View, 9 Fam. Advoc. 34, 35 (Summer 1986). Gaughan distinguishes between giving legal information (which is general and impartial) and legal advice (which is specific). This area is controversial. Riskin, supra note 65, at 397–422. The ABA Standards of Practice for Lawyer Mediators in Family Disputes provides: "The mediator may define the legal issues, but shall not direct the decision of the mediation participants based upon the mediator's interpretation of the law as applied to the facts of the situation." ABA Standards, IV (C), reprinted in Student's Guide, supra note 38, app. B at 259.
examine the skills required in the lawyer's traditional roles to understand how they might connect to the skills required of the lawyer-mediator. Students are assigned Lon Fuller's classic piece, "Mediation—Its Forms and Functions," in which the mediator is perceived as a neutral facilitator of a process that helps parties to help themselves. Fuller's description is consistent with the lawyering roles of counselor and legal monitor. Using the lawyering skills of active listening and interviewing, the lawyer-mediator is always searching for information about the parties' underlying needs.

We emphasize that the mediator's intervention role may vary depending on a variety of factors including the mediator's style and philosophical approach and on the nature of the dispute. It is not surprising then that experts do not all agree on mediator neutrality. Students read Susskind, who, writing from an environmentalist perspective, conceives of an accountable, nonneutral mediator with power to impose his or her concerns on the parties. Susskind's conception is consistent with the view of the lawyer as advocate who uses skills of persuasion and argumentation to convince a court or opponents of the rightness of a position.

In family law, some experts believe that the mediator must take an active role, particularly when the balance of power between the parties may be unequal. An interesting assignment is "The Life of the Mediator: To Be or Not To Be (Accountable)," a fictional debate between a mediation practitioner and a law professor with differing perspectives on the mediator's role.

In our view, mediation should be client-centered. The client's goals should control the process; the lawyer-mediator's role is to guide the parties toward achieving those goals. A useful article to assist students in formulating a sense of the lawyer-mediator's responsibility is Leonard Riskin's "Toward New Standards for the Neutral Lawyer in Mediation." Riskin believes that lawyers have a duty to promote fairness and maximize interests by encouraging the parties to adopt a cooperative, problem-solving mode instead of a competitive, adversarial one.

D. Addressing the Ethical Issues: The Adoption of Allison

Mediation by lawyers raises unique ethical issues, such as identifying the "client," deciding what it is that the lawyer-mediator does for the "client," determining the lawyer-mediator's responsibility for the outcome and his or her obligations regarding confidentiality. Rather than discussing the ethical issues in a vacuum, it is helpful to integrate them into a simulation problem, with class discussion following the simulation. We have found that an experiential approach enhances the teaching and learning of ethical issues in mediation because the students become highly motivated in working

71. Lon L. Fuller, Mediation—Its Forms and Functions, 44 S. Cal. L. Rev. 305, 308 (1971).
73. Dispute Resolution, supra note 12, at 108.
through simulation problems. The "Adoption of Allison" simulation illustrates how we teach the professional ethical issues involved in mediation practice.\textsuperscript{75} Five students engage in role playing,\textsuperscript{76} four of them assuming the role of disputants, one the role of mediator. The rest of the class observes the role play and considers the issues it raises.

1. General Information

Sara Scott is eighteen years old, single, and a freshman at New Hope University. Three years ago she gave birth to a baby girl whom she named Allison Maria. For two months she cared for Allison in the home of her parents; however, at the strong suggestion of her parents and friends, she placed Allison in foster care in the home of Sue and Tom Johnson. The Johnsons had one daughter, Anna, aged two. Six months later, Sara made an adoption plan and signed a document in which she relinquished all parental rights to Allison and consented to the Johnson family's adoption of the child.

Sara returned to high school and graduated with honors. She received a full scholarship to New Hope University, where she is now a pre-med student. Regretting her decision to place Allison for adoption, Sarah contacted the Johnsons about returning Allison to her. After the Johnsons refused her request, Sara decided to bring a legal action against the Johnsons. She claims that the Johnsons and her parents coerced her into surrendering Allison for adoption. Sara's parents are vehemently opposed to her actions and have threatened to withdraw their financial support.

Unable to afford a lawyer, Sarah filed an action in Family Court seeking an order for the return of Allison. Under the local court rules of the family court, the case was referred to mediation. The court-appointed mediator is an attorney. The Johnsons have an attorney who does not appear at the mediation but who is available to them for consultations throughout the process.

2. Ethical Issues

The first issue the problem presents is identifying the client. Students understand mediation as an extension of the negotiating process, in which the mediator helps the parties to reach an agreement. Unlike negotiation, however, in mediation the identity of the client may not be clear. Is it just the disputing parties, in this case, Sara and the Johnsons? Or, does it include unrepresented third parties, such as Allison or Sara's parents? Students consider the relevance of the ABA Standards of Practice for Lawyer Mediators, which in the context of divorce mediation require that the client

\textsuperscript{75} This problem is based on In re Sara K, 496 N.Y.S.2d 384, 66 N.Y.2d 223, 487 N.E.2d 241, cert. denied, 475 U.S. 1108, 106 S. Ct. 1515, 89 L.Ed. 2d 914 (1986). Before the simulation, students are required to read the case to become familiar with the substantive law.

\textsuperscript{76} Confidential information is distributed to all of the role players one week before the simulation. Readers may obtain copies of this information from the authors.
lawyer-mediator consider the interests of the children.\textsuperscript{77}

The second ethical issue we consider involves what the lawyer-mediator does for the client. Students are comfortable with the idea of the lawyer as negotiator, and they understand that negotiation is what lawyers do most of the time. Negotiation, however, typically takes place within the boundaries of the adversary system, in which lawyers represent one client's interest against the interests of another. Does the lawyer-mediator “represent” anyone? Or, as a neutral, does he or she become a “lawyer for the situation”?\textsuperscript{78} Can the lawyer ever be neutral?\textsuperscript{79}

The problem connects with the notion of “representation,” which is found throughout the \textit{Model Code of Professional Responsibility} and the \textit{Model Rules of Professional Conduct}. Lawyer-mediators do not "represent" anyone. Rather, they facilitate an agreement between parties who may or may not be represented by counsel. They help the parties reconcile their differences. Because the notion of representation involves hierarchial power roles, moving from representation to reconciliation represents a major shift in traditional lawyering perspectives. Reconciliation, however, gives lawyers powers as peacemakers, and peacemaking is a value that we hope students will take from the course.

Student discussion is usually tempered by feelings of sympathy for Sara, who, without legal counsel, appears more vulnerable than the Johnsons. We urge the student who plays the role of lawyer-mediator to become actively involved in equalizing the balance of power between Sara and the Johnsons. Students also consider the responsibility of the lawyer-mediator for the outcome of mediation. Must there be a fair or wise agreement? What if the agreement is illegal? The two roles may come in conflict: for the mediator role the process belongs to the participants; for the lawyer the process is governed by the prohibition against being a party to an illegal agreement.\textsuperscript{80} There is a very real concern that if Sara's consent to the adoption was obtained by fraud or was the product of coercion, it might well be invalid; if so, the legality of the whole adoption proceeding would be in question.

Confidentiality, the final ethical issue we discuss, is essential to the integrity of the mediation process and to the creation of an atmosphere of trust.\textsuperscript{81} Without assurances of confidentiality, the parties may be reluctant to discuss freely the conflict that brought them to mediation in the first place. If the mediation session between Sara and the Johnsons breaks down and Sara goes back to court to bring a legal action, several questions affecting confidentiality arise. Does the attorney-client privilege protect communications between the parties and the lawyer-mediator? To what extent do the rules of evidence protect party-party and party-mediator

\textsuperscript{77} ABA Standards of Practice for Lawyer Mediators in Family Disputes, Standard III (D), reprinted in Student's Guide, supra note 36, app. B at 258.

\textsuperscript{78} Geoffrey C. Hazard, Lawyer for the Situation, in Ethics in the Practice of Law, 58 (New Haven, 1978).

\textsuperscript{79} Riskin, supra note 65.

\textsuperscript{80} Model Code of Professional Responsibility Canon 7 (1980).

\textsuperscript{81} For an excellent discussion of these issues see Note, Protecting Confidentiality in Mediation, 98 Harv. L. Rev. 441 (1984).
communications? To what extent do they support a mediator's privilege not to testify? These are recurring questions when lawyers mediate.

Although much has been written on the need for confidentiality in mediation sessions, the extent to which confidentiality is protected depends on the jurisdiction in which mediation is conducted and the type of mediation involved. In New York, for example, when mediation is conducted in any of the state-funded dispute resolution centers, a broad grant of confidentiality is granted to "any communication related to the subject matter [of mediation] . . ." The statute does not cover private mediation sessions such as those conducted by the American Arbitration Association or by private family practitioners. Thus, lawyers must consider other avenues of protection including Rule 408 of the Federal Rules of Evidence and state counterparts that exclude offers of compromise, and the common-law rule on exclusion of offers of compromise.

Although there is still a great deal of uncertainty in this area, the lawyer-mediator should inform the parties that he or she will respect the confidentiality of the process to the extent permitted by law. In fact, existing professional standards for mediators require as much.

IV. Conclusion

With the emergence of mediation in law school curricula, law professors need additional teaching models. In this article we have examined an approach to teaching mediation from a generic perspective that allows professors to deal with professional responsibility and lawyering role issues without tying them to a specific subject matter or model.

Mediation should not be presented as a panacea for all the problems of the adversary system. One danger of teaching mediation to law students is creating the image that adversarial lawyering is negative and that the vindication of rights based on rules is somehow a niggardly approach to conflict. The danger can be offset by continual reflection in class on when and how the adversary system works best and under what circumstances a nonadversarial process such as mediation is appropriate.

Teaching mediation as a lawyering role helps students develop a more

84. The American Arbitration Association [address supra note 24] has established its own rules for confidentiality in mediation: e.g. Family Mediation Rules, effective June 1, 1983; Commercial Mediation Rules, effective February 1, 1986.
85. Fed. R. Evid. 408.
86. For a discussion of the limitations of the common-law rule within a mediation context see Note, supra note 81, at 447 nn.43-46.
comprehensive theory of lawyering than they might have otherwise acquired. For law professors, teaching mediation helps to clarify and possibly redefine our own notions of what it means to be a lawyer and of the relevance of law in resolving conflict.