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PRELIMINARY REFLECTIONS ON THE ESTABLISHMENT OF A MEDIATION CLINIC

JAMES H. STARK*

I am a middle-aged clinician. Over a period of twenty years, I have supervised students in a wide variety of client-representing, civil litigation clinics, mainly in the area of civil rights. Two years ago, I started a mediation clinic at my law school, our first real beachhead in alternative dispute resolution. These are my confessions.

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

I confess that I started a mediation program largely for self-centered reasons. In my last years as a litigation clinician, I didn't always welcome client telephone calls. The clinic curriculum, developed and refined over many years, seemed to me stale and uninteresting. Conversations with students about issues of tactics, ethics and professional role, once a source of genuine excitement, no longer held quite the same charm, especially on days with three or four student conferences scheduled back-to-back. Perhaps the signs will be familiar to some of my readers: After 20 years in the business, I needed a change.

I confess that when I started this program, I had little notion of what I was doing. It is true that I had represented a variety of clients over the years in mediations and settlement conferences and had formed some sketchy impressions about effective and ineffective mediator behaviors. In 1991 and 1992, I had also the opportunity to conduct two volunteer mediations — experiences that, for reasons that were then mysterious to me, I found deeply rewarding. I even thought that I might have some talent for the role. But, as of the summer of 1993, when I made the decision to establish a student mediation program, I had read virtually nothing about mediation, had

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never attended a mediation training conference, and had certainly never spoken with any directors of any of the existing ADR clinics around the country regarding potential objectives or design choices of such a program.

Nonetheless, after twenty years of perpetuating disputes, something in me needed to try resolving a few. (This became a standard one-liner.) With perhaps a trace of arrogance, I said to myself "I can learn this" and plunged ahead. In the summer of 1993, I read what I could on the subject of mediation, alternative dispute resolution and conflict management. (The literature is huge and, I gradually discovered, generally very interesting; at the time, I made only a small dent.) Mediation clinic directors around the country freely shared their ideas and their course materials with me, and I stole shamelessly from them.¹ I explored and made arrangements for a variety of field placements. And in the Spring of 1994, I began.

I confess that in the beginning I was concerned that few students would sign up. A mediation clinic does not, after all, place law students in the professional role for which most are being trained — that of representing clients. But sign up they did, in numbers and with an enthusiasm that truly startled me. The clinic has been operating for two semesters now, and I have started to teach it for a third time. I have made many changes along the way. It seems a good time to take a breath and reflect on the experience.

Law school mediation clinics are proliferating at a rapid rate around the country. A 1995 directory of ADR clinics indicates that 34 law schools now offer mediation (or mediation and arbitration) clinics and that an additional 13 schools have plans to start one.² Although a few clinics date back to the mid-1980's or earlier, most are of much more recent vintage.³ Mediation also has been the subject of two recent clinical legal education conferences.⁴ Something seems to be happening here. What is it?

In this article, and one to follow, I try to present a balanced view

¹ Doug Frenkel, Lois Knight, Kim Kovach, Carol Liebman, Cheryl McDonald, Nancy Rogers, Cynthia Savage and Suzanne Schmitz all sent me materials. Many spent time with me on the phone answering my naive questions. I am truly grateful to all.

² See CLINICAL SECTION COMMITTEE ON ADR CLINICS, AMERICAN ASSOCIATION OF LAW SCHOOLS, ADR CLINIC DIRECTORY (1995), Appendix *infra* at p.505. The Directory was prepared by Cheryl McDonald and Lela Love.

³ *Id.* Twenty-six of the 34 listed programs have been established since 1990. Fourteen have been established since 1993.

⁴ Several panel discussions were presented on "Alternative Clinics: The Challenges and Promises of ADR and Mediation Clinics" at the 1994 AALS Conference on Clinical Legal Education in Newport Beach, Virginia (June 4, 1994). In May 1995, the Clinical Legal Education Association (CLEA) sponsored the first clinical conference devoted exclusively to mediation. CLEA Workshop on ADR Clinics, St. Louis, Mo. (May 6-7, 1995).

of the distinctive characteristics, strengths and weaknesses of mediation clinics. This first article focuses on skills, supervision and critique. What kinds of skills does a mediation clinic teach? How effective a forum is a mediation clinic for skills training? What kinds of unique challenges does a mediation clinic present in supervision and critique? A future article will address questions of ethics, values and perspectives. What professional and ethical values are inculcated in a mediation setting? What kinds of students are likely to be attracted to a mediation clinic and how are their perspectives on law and legal institutions likely to be affected by the experience? What are the implications of the growth of mediation clinics for the clinical legal education movement and for law schools?

Part I of this essay briefly sketches the evolution and broad outlines of my program. This is by no means an article on how to design a law school mediation clinic; I still consider myself a relative ingenué in the field and my program a work-in-progress. For this reason, readers need to be provided a context from which they may evaluate the validity and generalizability of the statements I make and the conclusions I draw. Part I provides that context.

In part II, I examine a variety of skills training and student supervision issues that arise in a mediation setting. Borrowing language from the syllabus of two experienced mediation clinicians, I have advised my students that the clinic teaches "generic listening, questioning, persuasion and problem-solving skills that are fundamental to the practice of law." In part II, I reconsider the extent to which the skills taught in a mediation clinic are indeed generic or specialized. I also describe how even the teaching of familiar, generic skills may take on a somewhat different coloration in the idiosyncratic context of mediation practice.

Part II also recounts the challenges I have felt in trying to identify, dissect and teach — in the classroom and in the field — the various constituent sub-skills required to be a successful mediator. No doubt in part I have felt challenged because I am a beginner. Nevertheless, skills training in mediation seems inherently more difficult than the "soup to nuts" teaching of interviewing, counseling, negotiation, pretrial and trial skills to which I have been accustomed in a year-long litigation clinic. There are at least three reasons for this. First, it is simply more difficult to teach basic lawyering skills in the highly charged atmosphere of mediation, with two contentious parties, than in the comparatively benign context of the lawyer-client relationship.

Second, there is the problem of disputed norms. What is called "mediation" in the United States is practiced informally, in many dif-

ferent settings, by persons with widely divergent backgrounds and orientations. As a consequence, some of its most basic norms and procedures are controverted. No single, generic "model" of mediation commands the universal respect of mediation theoreticians and practitioners. Practices considered useful or necessary in one setting may be deemed wholly inappropriate in another.

Third, mediation is a fluid, contingent, and often nonlinear process, for which, in many settings, it is difficult to plan. This mediation characteristic will affect, in important ways, the supervisory relationship that the clinician develops with her student. It also means that whatever mediation "model" is espoused in theory by student or teacher may be of limited utility in the hurly-burly of mediation.⁵

Clinicians who are particularly interested and/or skilled in the interpersonal aspects of lawyering may find a mediation clinic a congenial setting. I have found that students who are empathic and diplomatic, who have well-developed intuitions about others and accurately read non-verbal cues — students, to use the current parlance, who have a high emotional intelligence, or "EQ"⁶ — have a decided advantage in a mediation clinic, because they can react quickly and instinctively to emotionally charged situations as they unfold. I am glad to have the opportunity to demonstrate to law students the professional relevance of these kinds of skills. However, the more I read about the skills that comprise interpersonal intelligence, the less certain I am about the extent to which they can be learned, at least in a law school.

In the remaining sections of part II, I address issues in mediation supervision and critique. I argue that the nonlinear, contingent nature of mediation, the precarious authority of student mediators, and the lack of an ongoing collaborative relationship between the student and the supervisor give rise to challenging supervision dynamics. And, although the difficulty of planning in advance for mediation puts a premium on high quality post-performance critique, the nature of mediation is such that it presents less than ideal conditions for critique.

In short, for those clinical instructors who view skills training as a primary objective of their program, a mediation clinic poses some novel and difficult challenges. These are the subject of part II of this essay.

⁵ Perhaps in part because of the absence of universally accepted norms and the inherent subtlety and fluidity of mediation, it is also hard to find sophisticated, process-oriented training materials appropriate for a law student audience.

⁶ See DANIEL GOLEMAN, *EMOTIONAL INTELLIGENCE* (1995); Peter Salovey & John D. Meyer, *Emotional Intelligence*, 9 *IMAGINATION, COGNITION AND PERSONALITY* 185 (1990); HOWARD GARDNER, *MULTIPLE INTELLIGENCES: THE THEORY IN PRACTICE* (1993). See text *infra* accompanying notes 105-26.

The reader who completes part II may find her skepticism about mediation and mediation clinics confirmed, if not reinforced.⁷ I cannot leave her stranded there. In part III, I preliminarily outline some reasons why, despite the various challenges of mediation skills training, supervision and critique, I believe clinical training in mediation to be important work for a law school — indeed perhaps the only form of clinical training that might sensibly be required of all law students. By ending my essay in this self-consciously provocative way, I hope I can whet your appetite for further reading.

I. STARTING A PROGRAM

A. *Nuts and Bolts*

The clinic that I have begun to teach this Spring is easily enough (if unexcitingly) described: It is a one semester program, for which students receive two graded and two ungraded credits. The semester is divided into two parts. The first five weeks are devoted to skills training, simulation and student observation of the mediations in the settings in which they will be placed. During this initial five week training period, classes meet twice a week, for a total of twenty hours.

In the second nine weeks, students conduct mediations in two quite different settings — in Housing Court and either in Family Court or in private divorce mediators' offices — on an alternating week basis. They are responsible for maintaining journals closely analyzing their fieldwork activities and submitting them to me on a regular basis. During this period, students must also observe a mediation in a different setting of their choice — a community, civil rights, commercial or personal injury mediation, for example — and write a report critically evaluating what they observe. In this second part of the semester, class meets once each week for two hours. Students describe and anatomize their mediation experiences, "grand rounds" style, and discuss and debate assigned readings focusing on a variety of policy questions concerning mediation and the alternative dispute resolution movement.

The clinic, as it has evolved, is an in-house program with externship features. All classroom training is conducted in-house. Housing Court mediations are supervised by me or one of several full-time or adjunct instructors. Family Court and divorce mediations, on the other hand, are conducted on an externship basis: by students in col-

⁷ I know many of you are skeptical; I have seen your eyes glaze over when I tell you what I do. Indeed, I have a close friend — a grey eminence in clinical education — who reflexively says "It's a fraud on the people" whenever the words "mediation" or "alternative dispute resolution" come up in a conversation.

laboration with, and under the supervision either of family relations counselors, hand picked for the role by a deputy court administrator, or of experienced private divorce mediators (all lawyers), selected by me. I have accepted ten students into the program this year.

The basic structure of the program is little changed since I began it, and seems well within the mainstream of mediation clinics around the country — not surprising since I have borrowed heavily from the work of other clinicians. I made a decision early on, for example, that I wanted to teach a self-contained, one-semester program, without prerequisites. Some of the specific details of the program — in particular the settings in which students are placed and the movement toward an externship model — have changed over time, in part a consequence of my trying to field the best possible course, in part a result of pragmatic considerations.

B. Basic Structural Decisions: A One-Semester Program

Of the 34 established programs described in the 1995 ADR Clinic Directory, 25 are offered on a one-semester basis. The remaining clinics are either two-semester programs (6 programs) or offer an option to take the course for one or two semesters (3 programs). Of the 25 listed one-semester programs, 8 have ADR policy or skills course prerequisites; the remaining 17 programs do not.⁸

The decision to field a clinic on a semester or full-year basis depends on three primary considerations: First and foremost, the clinician's goals in establishing the course, including the subjects to be taught, their complexity and the anticipated learning curve for students; second, the availability of the instructor(s) to teach the course on a one or two semester basis, considering other demands on instructor time; and third, market forces affecting student demand for the course.

I did not have fully formed ideas about my teaching goals when I began, but in reviewing course materials shared with me by other clinicians, I came across a goals statement, written by Carol Liebman and Barbara Schatz, that I particularly liked.

Why offer (or for that matter, take) a mediation clinic? I have five primary goals in mind: 1) to improve your ability to represent clients effectively by helping you learn, in the context of mediation, generic listening, questioning, persuasion, and problem-solving skills that are fundamental to the practice of law; 2) to help you evaluate the benefits and limitations of mediation and other dispute resolution techniques so that you can both responsibly counsel clients about their choices and, as potential policy makers, make in-

⁸ See Appendix, *infra* at p.505.

formed choices about dispute resolution systems; 3) to help those of you who may make mediation part of your professional lives get off to a good start in terms of both skills and ethics; 4) to help you develop your abilities to critique your own work, learn from experience and understand how your feelings, background, values and personal style affect your performance in a professional role; and 5) to provide high quality mediation services to the parties whose disputes we mediate.⁹

I have used this goal statement for the past two semesters.

When I made the decision to offer the clinic on a one semester basis, I confess that I knew nothing about the ease or difficulty of teaching mediation. (If anything, I suspected that there was relatively little "there" there.) I also had little idea how much ADR policy I wanted or would be able to teach in a one-semester course. My decision to limit the course to a single semester was based on down-to-earth considerations. I had only one quarter of teaching time that I could devote to the course, and, in any event, I suspected that a one-semester mediation course would develop a stronger niche among students than a full-year clinic, in a law school whose other in-house clinical programs all are year-long.

In retrospect, the decision was a questionable, if necessary, one. I was apparently right about student demand; in the three years the clinic has been offered, demand has outstripped available places by a factor of almost three to one, and many students tell me they probably would not have taken the clinic had it been a full-year course.¹⁰ I was certainly wrong about the complexity of the subject. I have found it a struggle to provide high quality training to students in the first part of the semester, while still leaving sufficient time in the second part of the semester for students to develop confidence in their fieldwork skills and for seminar discussion of the major policy issues in ADR. Each semester, I have frontloaded more skills training into the first weeks of the semester. Nevertheless, students tell me that they barely begin to discover their sea legs, especially in Family Court, when the semester comes to an end.

In retrospect, it also seems obvious that there are more and less

⁹ CAROL BENSINGER LIEBMAN & BARBARA A. SCHATZ, COLUMBIA LAW SCHOOL MEDIATION MANUAL (Spring 1994) (on file with the author).

¹⁰ I infer that the decision to design the mediation clinic as a one-semester course has strengthened student demand, since the demand for the mediation clinic seems to have been stronger than the comparable demand for our full-year litigation clinics (themselves almost always over-enrolled). It is clear, however, that two semester clinics can also be very popular. At Cardozo Law School, for example, Lela Love interviews more than 100 students each year to yield a class of sixteen for her two-semester clinic. See Appendix, *infra* at p.506; Telephone Interview with Lela Love, Director, Cardozo Mediation Clinic (Sept. 25, 1995).

demanding settings in which students can learn about mediation, and that the issue of clinic duration — one semester or two — will depend in some measure on the nature of the settings in which students are placed. Different settings may also necessitate different modes of supervision, as I describe in the next section.

C. Evolution of a Program: Choice of Settings and Supervisory Modes

Mediation is a ubiquitous process, capable of being used to resolve almost any kind of dispute, from a grade school cafeteria fight to the Bosnian war. There are some kinds of cases that a law school mediation clinic cannot handle — a multimillion dollar construction contract dispute or a public sector labor negotiation, for example — either because students will lack the necessary expertise or will be so perceived by the parties. But the range of available options for mediation cases and settings is broad, as a glance at the ADR clinic directory shows: mediation clinic students around the country today mediate small claims, landlord-tenant, child custody, truancy, general civil, torts, criminal, civil rights, education, and consumer cases, as well as community and campus disciplinary disputes.

1. Spring 1994: The First Semester

Choosing Placements. In planning cases and settings for my first semester, I began with things familiar. A number of years earlier, when our Civil Litigation Clinic had been doing a good deal of work in the area of housing discrimination, we had searched for a “small case” experience to supplement the more complex cases that our students were litigating. Pursuing the theme of housing, we sent students to a local Housing Court to litigate small claims landlord-tenant monetary disputes involving security deposits, rental payments and property damage claims. The setting seemed a promising one for mediation. I knew from my experience that although the state Housing Courts employed staff mediators, called “housing specialists,” to help process cases, they did not have time to work on small claims cases, concentrating their efforts instead on eviction cases and civil matters involving more than \$2,000. Although the amounts in controversy were small, I knew that these cases were usually factually complex, and would require well-developed interviewing skills to unravel. The cases often contained both claims and counterclaims, and therefore, I thought, would present opportunities for bargaining and trade-off. There was a body of statutes and caselaw, quite technical but manageable in scope, with which students would have to familiarize themselves in order to provide appropriate legal information to dispu-

tants during the mediation process. The parties in these cases generally knew each other, and therefore there would be relational as well as legal issues to sort out. Finally, I knew that, as likely as not, the parties would be appearing in court *pro se*, and might be attracted both by the informality of the mediation process and the opportunity to discuss their case face-to-face with the opposing party.

I also made arrangements that first semester for students to mediate disability discrimination cases pending at the state Commission on Human Rights and Opportunities (CHRO). Here again, the choice was to opt for the familiar; I had done this work as a litigator for a number of years and had confidence that I could supervise students competently. I knew that the CHRO was beginning statewide efforts to establish mediation services for claims arising under the Americans with Disabilities Act, and that various mediation providers were jockeying for a place at the table. I thought that any effort to speed the resolution of these cases was worthwhile, and that some of the cases at least — especially those involving disputes over “reasonable accommodations” — might lend themselves well to mediation. Although I had some concern about my ability to provide adequate substantive law training to students in a fairly complex legal area in the context of a one-semester clinic, I plunged ahead.

I won’t bore you with the details of the various planning meetings that I had with court and agency officials to obtain approval for and set up these placements. If you were to start your own program, I suspect you would have an experience similar to mine: the officials I spoke to were strongly interested in the law school’s foray into mediation, glad to have the assistance of our students, and offered a variety of mediation and observation options from which to choose.

A third possible setting for mediation was suggested to me by outsiders. Indeed, it seems to me that I had barely scraped together a course proposal for faculty review, when word began to spread that the law school was beginning a mediation program and I began to get phone calls. A first-year law student, doing volunteer work in a community mediation center, called to ask if he could be my research assistant. Soon thereafter, representatives of that center, the Hartford Area Mediation Project (HAMP) telephoned to explore the possibility of establishing a link with the law school. I had done a little reading about the community mediation movement and was interested in the possibilities. Soon I had my third and final mediation placement for the first semester — a placement in which students would mediate criminal cases, referred by local prosecutors for community mediation, involving neighbor-neighbor disputes, minor street brawls, boyfriend-girlfriend fights and other low level misdemeanor cases

generally involving persons with an existing relationship, where the criminal "incident" was the tip of one iceberg or another.

Supervision Pragmatics. During the initial planning stages of the clinic, I hadn't given much thought to the pragmatics of supervision in a mediation setting. I was aware that the mediations we would be handling would mostly be one-shot affairs, without the ongoing responsibilities to a client that, in a litigation clinic, necessitate frequent and regular supervisory meetings with students. (At my advanced stage in life, this seemed an attraction.) I also had some consciousness that in a setting where planning for performance was difficult or impossible, supervision and post-performance critique in the field would take on special significance.¹¹ But I did not anticipate the practical issues involved in providing adequate field supervision to students placed in different mediation settings.

Supervising students in the community mediations turned out not to be a problem. Mediations were scheduled, usually one an evening, on most weekday evenings. I could attend as often as I wanted, but on most nights, the director of the program, a former Aetna lawyer in whom I came to have great confidence, was present and available to supervise students and give them feedback on their performance. Similarly, we had arranged with CHRO to schedule the disability discrimination mediations at the law school on our own schedule; I could therefore plan these cases to fit my own calendar.

The Housing Court cases were another matter. Wednesday was small claims day in Hartford and three rooms were available for student mediations, to be conducted simultaneously. Unless I could be three places at once (I couldn't) or was willing to travel to several different courts on several different days of the week (I wasn't), I would need help.

Fortunately, the "if you build it, they will come" phenomenon continued. Several weeks after I began planning the course, a third-year law student at a neighboring law school — who prior to enrolling in law school had been employed privately in the dispute resolution field for many years — called to express interest in working with me in developing the clinic, and as a clinic co-instructor, for independent study credit at his law school. (This began a happy relationship that continues to this day.) Soon thereafter, the director of our first-year Legal Methods program — who, like me, had no background or training in mediation — informed me that, if possible, she too would like to play a role in the program in order to learn more about the media-

¹¹ See, e.g., Anthony G. Amsterdam, *Clinical Legal Education — A 21st Century Perspective*, 34 J. LEGAL EDUC. 612, 616-617 (1984) ("intensive and rigorous *post mortem* critical review" basic to clinical legal education).

tion process. All of a sudden, I had an assemblage of helpers, all working without compensation, willing to assist with the various classroom, simulation and fieldwork components of the course and anxious to see the clinic succeed.¹²

Evaluating the Placements. By the end of the semester, it seemed the Housing Court mediations worked out just about as expected. Given an option whether to mediate or litigate, most litigants chose mediation, producing a steady stream of cases for students to handle. Although the conflict dynamics of every mediation were unique, and more often than not very challenging for students, there was a body of law that students could master and feel comfortable with, while they developed their mediation skills. Students, working in pairs, were able to settle about two-thirds of the cases referred to them and the parties' satisfaction with the process, and the students, appeared high.¹³ At the conclusion of the semester, I thought the setting an excellent one for law student mediations.

The CHRO mediations were problematic. The agency was slow off the mark in referring us potential cases, and as a result, we could not develop a working caseload until the end of the semester. Given these problems in timing, I could not require every student to handle a case, although most chose to. We decided to adopt a co-mediation model, with two students and one attorney supervisor assigned to each case. But the students found the subject matter quite challenging, and even the most confident among them seemed to take a back seat to the supervisors once the mediations began.

Despite these difficulties, there were two aspects of these cases that I particularly liked: First, students were involved in the entry stages of mediation; they had to contact the parties, discuss with them the pros and cons of mediation, answer their questions, deal with any hostility and obtain their consent to proceed. In making these contacts, students were thus forced to think about some of the considera-

¹² This phenomenon has continued each semester I have taught the course. This year, Jon Bauer, the Director of Civil Clinical Programs at our school, and Kathy Forcey, a Professor in our first-year skills course, Lawyering Process, volunteered to help in the clinic, again to teach themselves something about mediation and alternative dispute resolution.

¹³ In the first year of the clinic's operation, in order to evaluate the reaction of litigants to the small claims mediation process and to our performance, court administrators constructed a simple questionnaire to be completed by litigants at the conclusion of each mediation session. 95% of those surveyed were in favor of mediation as an alternative dispute resolution process, with 50% of respondents stating that it should be optional and 45% stating that it should be mandatory. 89% of respondents found the mediation process at least "helpful," with over 50% finding it "very helpful." 90% of the respondents rated the mediators "well prepared" (50%) or "prepared." See David Jackson, Mediation in Housing Small Claims: Results of Litigant Satisfaction Survey (October 13, 1994) (on file with author).

tions that may make mediation appropriate or inappropriate for particular litigants and particular cases,¹⁴ as well as confronting the reality that, for many litigants and their representatives, mediation is a tough sell.

Second, the CHRO cases required substantial legal analysis in order to evaluate their settlement value. As a litigation clinician, I had grown accustomed to teaching students how to evaluate cases for settlement and felt that, if possible, this training should be included in a mediation program.¹⁵ While students had found CHRO case evaluation difficult, I could not decide what effect their late start had had on their learning. I therefore decided to try CHRO cases again the next semester I taught the course.

By the end of the first semester, I had mixed feelings about the community/criminal mediations. If the disability discrimination cases involved too much for law students to master in one semester, these cases involved no law at all. With relatively few exceptions, the criminal mediations all involved first-time offenders; the charges would be *nolled* by prosecutors or at worst result in a fine or community service, no matter what the outcome of the mediation with the victim/complainant. As the semester progressed, I wondered whether it was sensible to send law students to a setting where most of the mediations were conducted by non-lawyer volunteers and where students' legal training was essentially beside the point.

On the other hand, in the absence of relevant legal norms, here was a "pure" mediation setting, in which students could concentrate wholly on helping the parties talk to each other, listen to each other, and develop solutions to their dispute. Here also was a powerful introduction — for some of my students apparently a first introduction — to inner-city problems and inner-city culture. Students continually had to wrestle with the question whether — in framing the issues for discussion in a particular way or in encouraging one possible solution while ignoring another — they were imposing their own middle class, suburban values on poor people. For some of my students, HAMP provided their most exciting and positive experience; others never got over their feelings of fear and intimidation.

¹⁴ For a useful summary of factors that favor and "contra-indicate" the use of mediation, see NANCY H. ROGERS & RICHARD A. SALEM, A STUDENT'S GUIDE TO MEDIATION AND THE LAW 44-59 (1987). See also Lon Fuller, *Mediation — Its Form and Functions*, 44 S. CAL. L. REV. 305, 330 (1971); Harry Edwards, *Alternative Dispute Resolution: Panacea or Anathema*, 99 HARV. L. REV. 668 (1986) (ADR not appropriate when important constitutional or public policy concerns at stake).

¹⁵ There is a debate in the literature — of which I was blissfully unaware when I began — concerning whether mediators should provide parties legal information and evaluation. I examine this debate *infra* at text accompanying notes 71-84.

Whatever decision I might have made about continuing this setting as a regular placement, events overtook me. As the semester progressed, HAMP decided that it needed to train additional volunteers and began outreach programs to attract more minority mediators and mediators fluent in Spanish. By early summer, it was clear that HAMP would no longer be able to provide a steady stream of cases for my students, and I would have to look elsewhere.

2. *Fall 1994: The Second Semester*

Choosing Family Court. The elsewhere I chose to look to was Family Court. I had no previous background in domestic relations law, but I had a layperson's sense that here, perhaps, was the highest calling for a mediator. Mediation has been held out as serving many distinct values: efficiency, empowerment and reconciliation, perhaps in particular.¹⁶ In some family mediation cases at least, I thought, all these values might be served, for the benefit of children and families.

Once again, I found court officials hospitable to the idea of establishing a relationship with the law school. In this case, the Family Court's receptiveness was surprising because the relationship with the clinic that the court insisted on would by no means improve its efficiency in processing cases. Connecticut has a system of mandatory mediation of custody and visitation disputes: Upon referral by any Family Court judge, parents must attend a mediation session to attempt to resolve any disputes they have regarding "parenting." These sessions are co-mediated by one male and one female family relations counselor. In our initial discussions with court officials, we had floated the idea of delegating selected cases to the clinic, to be handled by teams of clinic students and supervisors. This the court was unwilling, perhaps unable, to do. Instead, court officials proposed an externship model, in which over the course of the semester, each student would work under the supervision of one family relations "mentor" of the opposite gender. This commitment to mentoring would clearly be quite time-consuming for the mediators chosen to participate in the program. Any benefit to them would presumably be from the exposure to students' fresh perspectives and ideas, as well, perhaps, as from the opportunities presented to proselytize future lawyers.¹⁷

¹⁶ See notes 51-54 *infra*.

¹⁷ For some of the Family Court mediators who volunteered to work with us, these benefits apparently provided insufficient sustenance. In December 1995, I learned that the court would be able to accommodate only five of my students during the Spring 1996 semester. Working feverishly, I made last minute arrangements to place my remaining students in externships with experienced private divorce mediators around the state. As this article goes to press, these externships are just commencing; it is too soon to determine

I had little previous experience with externship programs, and as I didn't know any of the individuals who would be serving as mentors, or much about the reputation of the staff as a whole, I had qualms about the quality of supervision that students might receive in this setting. Nevertheless, the chance for my students to co-mediate family cases with carefully selected, experienced mediators, as well as to observe from the inside the characteristics, strengths and weaknesses of a system of mandatory court mediation¹⁸ were opportunities I felt I could not pass up. Over the summer, I attended a five day workshop on divorce mediation and, excited by what I experienced and learned, made plans to start the new semester.

How Many Settings? My plan was to continue placing students in three settings, substituting Family Court for the community mediation, and continuing our work in Housing Court and the CHRO. I knew that there would be hardly any law for students to contend with in their family mediations: In deciding custody and visitation issues, trial judges were guided by a statutory "best interests of the child" standard which gave them broad, almost unreviewable discretion;¹⁹ the

how they will work.

¹⁸ The literature on mandatory court mediation is substantial and much of it is critical. A number of scholars argue that alternative dispute resolution processes aggravate existing power inequalities among litigants. See, e.g., Martha Fineman, *Dominant Discourse, Professional Language and Legal Change in Child Custody Decisionmaking*, 101 HARV. L. REV. 727 (1988) (women as a group have been disadvantaged by mandatory mediation in child custody cases because the dominant discourse used by mediators and social workers disadvantages women); Tina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545, 1550 (1991) (mandatory custody mediation "has the potential actively to harm women"); Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WISC. L. REV. 1359 (mediation's lack of formal adjudication procedures places minority, poor and vulnerable litigants at a disadvantage). For a broader criticism of mandatory court mediation, see, e.g., JEROLD AUERBACH, *JUSTICE WITHOUT LAW?* 144 (1983) (charges that informal dispute mechanisms are more or less consciously designed to siphon discontent from the courts, thus reducing the danger of political confrontation and preserving the power of legal institutions); CHRISTENE HARRINGTON, *SHADOW JUSTICE: THE IDEOLOGY AND INSTITUTIONALIZATION OF ALTERNATIVES TO COURT* 172-73 (1985) (ADR is a movement of "anxious professionals and unwilling participants" because social justice concerns have been overtaken by focus on dispute resolution *per se*). But see, e.g., Carrie Menkel-Meadow, *Whose Dispute is it Anyway?: A Philosophical and Democratic Defense of Settlement (In Some Cases)*, 83 GEO. L.J. 2663, 2687-2691 (1995) (arguing that settlements may provide deeper and richer access to justice).

¹⁹ CONN. GEN. STAT. § 46b-56(b) (1994) ("In making or modifying any order with respect to custody or visitation, the court shall (1) be guided by the best interests of the child, giving consideration to the wishes of the child if the child is of sufficient age and capable of forming an intelligent preference, provided in making the initial order the court may take into consideration the causes for dissolution of the marriage or legal separation if such causes are relevant in a determination of the best interests of the child . . ."). See also *Yontef v. Yontef*, 185 Conn. 275, 279, 440 A.2d 899, 903 (1981) ("It is a rare case in which a disappointed litigant will be able to demonstrate abuse of a trial court's broad discretion in

parties in mediation had similar flexibility to fashion their own common sense visitation and custody arrangements for the benefit of their children. Nor would there be much procedure for students to learn; custody and visitation disputes that could not successfully be mediated would be referred for court study, recommendation and judicial determination, the details of which procedures were easily enough mastered. Family Court officials kept telling me that if students were going to be effective in this milieu, there was a great deal that they had to know about such subjects as child development, the psychology of divorce and family systems. But as a litigation clinician, I was accustomed to evaluating the potential challenge for students of particular kinds of cases based primarily on their duration and their legal and procedural complexity. I had little doubt that my students could manage this setting as well as the others I had arranged.

Needless to say, I was wrong. Students soon discovered that not only were the emotional dynamics of family mediation intensely demanding²⁰ but also that, compared to the clarity of the legal issues in Housing Court, the issues to be resolved in family mediation were often extremely tangled and difficult to discern.²¹ Working with seasoned professionals, students often struggled to make a meaningful contribution to their cases. Given the difficulty many students seemed to be encountering in their family mediations, it made no sense to make them take on disability discrimination cases as well. Halfway through the semester, I made the decision to drop CHRO as a mandatory placement, offering it instead as a supplemental opportunity for students with special background or interest in civil rights law.

Two Visions of Mediation. I now had two primary placements for my students, and as the semester progressed I gradually began to realize something important: To a considerable degree, these two settings called for different mediation strategies on the part of students, and tapped different innate skills and abilities as well. Housing Court ap-

family matters.”).

²⁰ One student wrote: “I am very uncomfortable with the Family Court forum. I really don’t feel qualified or able to do the things that are most important in the family setting . . . I am very emotionally drained at the end of these sessions. . . . Both my observations and my first participatory mediation have involved issues of domestic violence and child abuse. . . . I feel so profoundly about the way these are kids are growing up. I guess I’m not very good at the differentiation [one of the family services trainers] said was so essential.” Another commented: “I regret only being able to participate in three housing sessions. Every session was a welcome change from the oppressive, high tension atmosphere of family mediation.”

²¹ One student observed that she liked the “clarity” of the legal issues in housing cases; another said that it “was easier to discern the issues in housing court” than in family court because of the “emotional complexities” of the family law cases. A third student noted that “family court is so hard because you never know what the issues are going to be.”

pealed to students comfortable with legal predictions, "numbers on the table," the structure of law.²² Family Court tended to appeal to students interested in the relational aspects of mediation and comfortable working with strong emotions.²³ I oversimplify here, but one setting seemed to require students to communicate legal information and make deals; the other called on students to facilitate communication and ameliorate conflict. What I did not fully realize at the time was that this dual exposure was, in a sense, an exposure to two different visions of mediation, an exposure that might complicate the task of skills training but would significantly deepen students' perspective concerning conflict and conflict resolution.

II. TEACHING SKILLS

For any clinician starting a mediation program, providing high quality skills training must be an important goal. This is not because the primary purpose of a law school mediation clinic is to train professional mediators; despite increased attention to mediation in recent years, the process is still infrequently used, relatively speaking, to resolve legal disputes, and full-time professional opportunities in the field are hard to come by.²⁴ Rather, it is because if one is going to

²² As one student wrote, "I feel more control in housing court . . . [I]t is so easy to fall back on the statutes. I am able to point to the basis for my suggestions. It is so often a numbers game, with the parties either settling a mediation, or risking it all and facing the magistrate. I feel like a game show host. 'Would you like to settle for half of your security deposit now or do you want to see what's behind curtain #2?' I am more comfortable when it's numbers on the table rather than the deep-seated personal emotions and the future of children's lives like in family court."

²³ For example, a recent college graduate who seemed very comfortable in family court observed: "Because of such sensitive issues as custody, visitation, abuse, alcoholism, etc., family mediations can stir . . . many emotions within the mediators Although not everyone can relate easily to a landlord/tenant dispute, everyone has some sort of family . . . and can draw from that relationship." Another student described a family mediation as "thrilling" because the parents (one "sullen, defensive and close-mouthed," the other "emotional, aggressive and possessive about her child") "grew in their ability to discuss issues during the course of the mediation."

²⁴ The commonplace notion that ADR is a growth industry may be more an expression of hope than of present reality, at least in Connecticut. Martindale-Hubbel lists 147 mediators practicing in Connecticut. MARTINDALE-HUBBEL, DISPUTE RESOLUTION DIRECTORY 5b-98 (1995). The number of Connecticut lawyers in private practice in 1994 was 10,548. AMERICAN BAR FOUNDATION, THE LAWYER STATISTICAL REPORT 54 (1994). Furthermore, in Connecticut, ADR firms are outnumbered by law firms 923 to 8. *Id.* at 56; MARTINDALE-HUBBEL, *supra* at 5b-98.

Much mediation in Connecticut is done by part-time practitioners who also maintain bread and butter law practices, or by mediators (often non-lawyers) who entered the field with well-established reputations and existing sources of business. Generally though, job opportunities in mediation are relatively rare. Telephone Interview with William Logue, Chairman of the Connecticut Bar Association Section on Alternative Dispute Resolution (Feb. 6, 1996).

For a useful discussion of the structural, economic and attitudinal forces that have

send students into the field to mediate disputes, one wants to ensure that they will provide competent service, feel successful, and enhance (or at least not damage) the reputation of the law school. Thus, even a mediation clinician whose principal goal in establishing a clinic is to explore ADR policy must also give substantial attention to students' skills development.

But if skills training in mediation will not directly serve the vocational interests of most students, should a law school expend scarce resources subsidizing it? This will depend in part on the extent to which mediation skills training is specialist training or generic training for the practice of law. It will also depend on the ease or difficulty of teaching generic skills in a specialized context. A starting point for this discussion is to try to list the skills necessary for effective mediation.

A. *What Are the Skills of Mediation?*

Here is my list of mediator skills or competencies, culled from four diverse but representative sources.²⁵ Presenting any list of competencies is daunting. Mediation is pluralistic and highly contextual and commentators therefore tend to disagree about the specific skills that comprise mediator competence.²⁶ Some even doubt that mediation can be reduced to a definable set of behavioral activities.²⁷ For the time being, I postpone discussion of several mediation skills and strategies that are especially controversial, and present a list that I believe would command substantial (though by no means universal) agreement among mediation practitioners and scholars. (Note also that I focus here only on the skills that mediators utilize once the parties are at the bargaining table.²⁸)

inhibited the growth of mediation nationally, see Leonard L. Riskin, *Mediation and Lawyers*, 43 OHIO ST. L.J. 29, 43-49 (1982).

²⁵ KIMBERLEE K. KOVACH, *MEDIATION: PRINCIPLES AND PRACTICE* (1994) (law school mediation text, primarily intended for use in skill-based courses); JOSEPH B. STULBERG, *TAKING CHARGE, MANAGING CONFLICT* (1987) (generalist skills text, written by an attorney); NATIONAL INSTITUTE FOR DISPUTE RESOLUTION, *INTERIM GUIDELINES FOR SELECTING MEDIATORS* (March 1993) (performance-based criteria for training and evaluating mediators); MORTON DEUTSCH, *THE RESOLUTION OF CONFLICT* (1973) (academic analysis of the psychology of conflict and steps mediators can take to stimulate productive conflict resolution).

²⁶ See text accompanying notes 50-90 *infra* for a discussion of contested norms and strategies.

²⁷ See, e.g., Deborah M. Kolb & Jonathan E. Kolb, *All the Mediators in the Garden*, 9 NEG. J. 335 (1993); Sara Cobb, *Einsteinian Practice and Newtonian Discourse: An Ethical Crisis in Mediation*, 7 NEG. J. 87, 87-88 (1991).

²⁸ See text accompanying notes 100-101 *infra* for a discussion of planning for mediation.

1. *Communication*

An effective mediator must have well-developed communication skills, including the ability to explain, listen, question and, in many settings, to facilitate the communication of others.

Explanatory skills include the ability to introduce the mediation process in terms the parties can understand, answer questions, convey information as appropriate during the process, and to speak tactfully but directly.

Listening skills include the ability to attend to verbal and nonverbal nuance and to convey that attentiveness, to read and understand underlying emotions, to clarify responses empathically and nonjudgmentally, and to summarize content.

Questioning skills comprise the full variety of familiar questioning techniques necessary to develop facts, inferences, feelings and motivations of parties in the middle of conflict.

Facilitation skills refer to the mediator's ability to assist the parties in communicating effectively with each other by promoting honesty in communication, restraining destructive or abusive behavior, uncovering distortions in communication, translating or reframing party statements into positive language that can produce mediation progress, and by regulating, as appropriate, the tension between the parties as the mediation proceeds.²⁹ Effective facilitation requires an understanding of interpersonal dynamics and the ability to deal with strong emotions.

2. *Impartiality*

An effective mediator must convey impartiality, by treating both parties evenhandedly and each party with empathy and respect. An effective mediator must recognize and monitor her own biases regarding the parties and struggle not to let them affect the mediation.³⁰ An effective mediator recuses herself from the mediation if some personal interest, or a prior relationship with, or strong negative reaction to,

²⁹ Helping the parties to communicate effectively is a valuable skill in most, but not all, forms of mediation. In some mediation contexts, mediators tend to separate the parties early, thereby controlling the information exchange that occurs. See text accompanying notes 86-87 *infra*.

³⁰ Although the terms "impartiality" and "neutrality" are often not defined or used interchangeably in the mediation literature, I find Josh Stulberg's distinction useful. According to Stulberg, "neutrality" means that the mediator has no personal preference that the dispute be resolved one way or the other, and that she will help the parties develop settlement terms that *they* find acceptable, even if the mediator finds them objectionable. STULBERG, *supra* note 25, at 8, 37. Neutrality is a disputed norm in mediation, which I will take up in detail in the sequel to this article. I introduce the subject of "neutrality versus fairness" at the text accompanying notes 137-39 *infra*.

one of the parties makes it impossible to act evenhandedly.

3. Agenda Development

An effective mediator helps the parties develop the issues necessary to resolve their dispute, which may include issues that are suppressed or unacknowledged. An effective mediator assists the parties in determining what issues are amenable or not amenable to mediation and helps them frame the issues in a way that can lead to constructive discussion. An effective mediator helps the parties decide in what order the issues can most productively be addressed.

4. Problem-solving

An effective mediator must establish a climate in which effective problem-solving can occur. This includes a number of separate skills: assessing the readiness of the parties to resolve their dispute; helping the parties determine their underlying interests; building, to the extent possible, an atmosphere of cooperation; assisting the parties in developing realistic alternative solutions to their dispute; and assessing these potential solutions in light of the parties' shared and differing interests.

Dissecting these skills in greater detail, an effective mediator must be able to determine whether each party is psychologically prepared to work toward resolution of her dispute, asking questions to determine whether mediation is justified and deferring or terminating mediation where appropriate. This skill requires some understanding of the psychology of conflict.

A skilled mediator must be able to recognize the difference between positions and interests and work with both parties to identify their needs and priorities as well as their rights.

To build a cooperative climate, an effective mediator must recognize when information is being withheld, work to assist open and honest communication, emphasize common values and shared concerns, squelch inappropriate threats and coercion and help each party, to the maximum extent possible, recognize the legitimacy of the other's needs. This skill requires not only empathy, but some understanding of the dynamics of competitive bargaining.

A skilled mediator must create an atmosphere in which creativity and innovation are valued, and in which the full resources of the parties are used to find constructive solutions to their dispute. Included here are the abilities to encourage the free exchange of ideas and to help the parties be patient and keep an open mind in the face of inevitable frustration and impasse.

An effective mediator must be able to help the parties choose

effectively from the options they have generated. This skill includes working with the parties to ensure that the solutions they choose are realistic and durable.

5. *Drafting*

Where appropriate, an effective mediator helps the parties draft a mediation agreement that clearly, fully and accurately reflects their agreement.

B. Specialist or Generalist Training?

Even a cursory examination of this list makes plain that while many mediation skills are generally useful in the practice of law, some are not, or at least not obviously so. All effective lawyers must be skillful listeners, questioners and explainers, but the relevance of "communication facilitation" to many legal practitioners is less clear.³¹ Understanding how to draft executory agreements is undoubtedly an important skill for lawyers to acquire; learning to master the skill of evenhandedness — so fundamental to the mediator's role — seems not only irrelevant to, but wholly at odds with, what most practitioners do.³²

What about agenda development? Josh Stulberg describes the mediator as a "chairperson" who "establishes the format of each meeting" and "is responsible for focusing the discussion and maintaining the control over the parties' behavior."³³ Are these peculiarly lawyering skills? It's hard to say so. And yet lawyers are frequently called upon to preside over meetings and to exercise the self-discipline necessary to keep others on task. Surely these are useful generic skills for law students to learn.

³¹ An illustration of a communication facilitation technique from the workshop I attended on divorce mediation: Mary, the divorce seeker, makes a statement ("X"). John — hurt, angry, in terrible pain — mishears the statement and responds as if Mary had said something quite different and attacking ("Y"). The mediator intervenes and asks John to repeat what he heard Mary say; John does so. The mediator asks Mary, "Is that what you said?"; Mary says no. The mediator says to Mary, "What did you say?"; Mary repeats her statement. The mediator now asks John to repeat or paraphrase Mary's statement and to respond to it as he likes. Note that the mediator, upon hearing John's distortion, does not correct it herself, but instead works to improve the parties' own communication.

As Barbara Schatz has pointed out to me, communication facilitation is an important skill for lawyers who represent group clients. It may also be useful for those who work as intermediaries and deal-makers. For attorneys who represent individual clients in contested matters, communication facilitation is of less obvious relevance.

³² I use the phrase "seems . . . wholly at odds" advisedly. I believe that "evenhandedness" or impartiality is little more than the parallel expression of empathy for two people in dispute. As such, although developing the skill of impartiality may seem like poor training for the role of advocate, it does develop generalizable empathy skills.

³³ STULBERG, *supra* note 25, at 31.

Similarly, the skills listed in "problem-solving" seem to a greater or lesser degree, fundamental to the practice of law. Certainly, effective negotiators must help their clients determine their interests and establish their priorities. Effective legal counselors must be able to help their clients brainstorm and assess potential solutions to their problems. And if assessing the psychological state of one's clients and "building cooperation" are not part of the standard job description of most lawyers, perhaps they ought to be; these are skills that all lawyers can utilize in appropriate circumstances.

Readers will draw their own conclusions, but I agree with Carol Liebman and Barbara Schatz that the skills of mediation are, to a substantial degree, generically important skills for the practice of law. The deeper and more interesting question is how teaching, learning and practicing these familiar skills change — and become more challenging — in the specialized context of mediation.

C. Aspects of Mediation that Complicate Skills Training

1. The Problem of Two

The single characteristic that most distinguishes the mediator-disputant relationship from the lawyer-client relationship is this: Unlike a lawyer representing a single client, or multiple clients with shared interests, a mediator must assist and navigate between two or more disputants with differing, if not hostile, interests. Mediation is often conducted in an atmosphere of high tension and emotion. Within this atmosphere, the mediator's job is to help each disputant state her case, develop an understanding of her interests and priorities and engage in problem-solving — all the while maintaining, as best as possible, balance and equilibrium between the parties.

The need to maintain balance between two people experiencing strong emotions makes the mediator's role uniquely precarious. Mediators must constantly monitor how their interventions affect not one, but both parties. As one of my students wrote, mediation is like "piloting a small plane on an important mission through an uncharted area *and* a storm"; if any of the mediator's techniques "backfire . . . it might take a very long time to make up ground."³⁴ Consider how this dynamic may affect the teaching and practice of three representative mediator tasks:

Initial Questioning. It is a commonly stated axiom in the literature that, after preliminary introductions and explanations are completed, a mediator should permit each party to make an opening statement. During this initial "story telling" stage, interruptions by

³⁴ Student journal (on file with author).

the other party are discouraged, and the mediator assists the party who is speaking to vent feelings, describe facts and broadly develop his or her understanding of the issues at stake. Then it is the other party's turn.³⁵ Christopher Moore lists a variety of techniques that can be used at this stage to facilitate each party's communication: including restatement, paraphrasing, active listening, summarization, expansion, grouping and generalization.³⁶

For any clinician familiar with the lawyer-client interviewing literature, this is of course well-trod ground: The initial "story-telling" phase of mediation is much like the "problem-identification" phase of an initial client-lawyer interview — not an accident, inasmuch as these techniques are premised on common psychological assumptions about communication and information exchange.³⁷

But the mediation skills texts are vague when it comes to describing how these initial questioning interventions should be timed and balanced by the mediator. At the beginning of a mediation session, both parties generally are anxious to speak, and any perceived unfairnesses are likely to be strongly felt. How much time can a mediator spend with one party before the other begins to feel aggrieved? If one party is less well organized or articulate than the other, can the mediator take the extra time necessary to help that party develop her story and still appear evenhanded? I do not mean to suggest that there are clear-cut "rules" for dealing with such problems, only that the tasks of fact development and problem development are more complex and challenging in the context of mediation than in an initial client interview, because the mediator must serve two masters.

Active Listening. Ever since I began teaching mediation, I have had the inchoate sense that active listening is an especially critical skill for mediators to master, and I have therefore spent substantial class

³⁵ See, e.g., CHRISTOPHER MOORE, *THE MEDIATION PROCESS* 168-69 (1986); JAY FOLBERG & ALISON TAYLOR, *MEDIATION: A COMPREHENSIVE GUIDE TO RESOLVING CONFLICTS WITHOUT LITIGATION* 40-41 (1984); STULBERG, *supra* note 25, at 64. But see Kenneth Kressel, *Frances Butler: Questions that Lead to Answers in Child Custody Mediation*, in *WHEN TALK WORKS: PROFILES OF MEDIATORS* 17, 25-26 (Deborah M. Kolb et al. eds., 1994) (experienced child custody mediator departs from this "enshrined dogma").

³⁶ MOORE, *supra* note 35, at 168-69.

³⁷ The leading skills texts in both mediation and client interviewing and counseling tend to draw heavily on the work of Carl Rogers and other humanistic psychologists. Rogers' "person centered" psychology emphasizes the importance of demonstrating empathic understanding and sincere positive regard for the client. Compare, e.g., ROBERT M. BASTRESS & JOSEPH D. HARBAUGH, *INTERVIEWING, COUNSELING AND NEGOTIATING: SKILLS FOR EFFECTIVE REPRESENTATION* 30, 26-32 (1990) ("[P]erson-centered techniques offer the most effective means of fact-gathering.") with MOORE, *supra* note 35, at 128-129, 154 ("[P]eople are more likely to accept change — and negotiation means change — voluntarily if the negotiating climate enhances self-acceptance, confirmation of personal worth, feelings of essentiality, and a psychological sense of success.").

time teaching it. As Christopher Moore has written, active listening is a communication technique that allows the speaker and listener to verify the precise content of a statement, ensuring that a speaker has been heard, permits the venting and exploration of emotions and "demonstrates the acceptability of expressing emotions."³⁸ Learning this skill is obviously important in the lawyer-client relationship, but it seems especially significant in the heightened emotional atmosphere of most mediations.

But as important as active listening may be in mediation, there are also distinctive challenges in utilizing the technique in this context. Again, the need to monitor the effect of one's statements on both parties may complicate the mediator's task of demonstrating empathy to each party.

Consider the following example, taken from Folberg and Taylor:³⁹ In response to an opening narrative statement by one of the parties, the mediator says: "You are angry and ashamed that you have been accused of not paying your debts." The authors hold this statement out as a type of reflective comment that permits the direct acknowledgement of feelings, that "contribute(s) to rapport and . . . reduce(s) tension for the participants."

Folberg and Taylor's illustrative statement is the kind that a psychologically-oriented legal interviewer possibly might use if she wanted to capture the full emotional content of a client's narrative. Perhaps it is the case that a mediator serves the parties best by making similar kinds of statements, without regard to the presence of the two parties, thereby modelling a willingness to address all the psychological ramifications of the parties' dispute. More likely, however, empathy in mediation must be practiced with some concern for diplomacy, given the presence of two parties. To continue with Folberg and Taylor's example, arguably a skillful mediator should not identify one party's "shame" in front of the other party, or at least should defer naming it until later in the mediation, when a safer atmosphere has been established for the candid expression of feelings.

I have seen no discussion of this issue in the mediation literature and I recognize that its resolution will depend a good deal on context. But it does complicate the task of teaching students active listening — a skill which, as most clinicians know, many law students find awkward enough to master in the lawyer-client relationship.⁴⁰

³⁸ MOORE, *supra* note 35, at 128.

³⁹ FOLBERG & TAYLOR, *supra* note 35, at 112-115.

⁴⁰ Robert Baruch Bush and Joseph Folger promote a vision of mediation based on "recognition" — helping each party recognize and empathize with the life situation of the other — that seems to require even more advanced active listening skills. In their model,

Issue Framing and Agenda Development. I have previously alluded to the mediator's role in *helping* the parties frame and order the issues for discussion.⁴¹ In fact, scholars disagree about the role a mediator should play in issue framing and agenda development. Some contend that the mediator should take a directive role in framing and ordering the issues for discussion.⁴² Others argue that the mediator should work with the parties to perform these tasks themselves if possible, taking control only as a last resort and with the parties' consent.⁴³ Whatever one's view on this issue, issue framing and agenda development are challenging skills to teach students in the context of mediation, again because of the presence of two parties.

The task of "issue framing" in mediation is analogous to the task of problem diagnosis in legal interviewing: In both cases, the professional's job is to define, organize and develop the issues facing clients in a manner that will be most helpful to them. The legal interviewing literature describes some of the challenges lawyers encounter in fully and accurately diagnosing their clients' problems: clients are reluctant to share sensitive information, especially at the beginning of the interview, or misperceive the nature of their own problems, or see their case in unduly narrow terms.⁴⁴ For their part, lawyers — who, like physicians, are taught to think in diagnostic categories — often pre-

the mediator helps each party hear the emotional content of the other's statements — *e.g.*, "R. seemed to be saying that he felt out of control. Is this one possible way of understanding what he was saying?" The mediator thus serves as active listening *trainer* for each of the parties, a task that may require greater mastery than doing it oneself. ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION* 131-33 (1994). For a further elaboration of Bush and Folger's vision of mediation, see text accompanying notes 63 to 69 *infra*.

⁴¹ See page 475 *supra*.

⁴² See, *e.g.*, STULBERG, *supra* note 25, at 81-88 (A mediator frames the issues in "concrete, specific terms" and "establishes the order in which the negotiated issues are discussed," always discussing first the negotiating issue that the mediator believes will be "easiest to resolve."); KOVACH, *supra* note 25, at 111 (describing agenda-setting as a "strategic move for the mediator" and offering eight possible approaches for the mediator to consider).

⁴³ See, *e.g.*, MOORE, *supra* note 35, at 175-79 ("discussing how *parties and mediators* identify topic areas and issues for negotiations" (emphasis supplied)); *id.* at 182-86 ("The negotiating agenda that disputants alternately follow should be developed and approved either by the parties alone, by the parties in conjunction with the mediator, or by the mediator alone (with the consent of the parties)."). Sara Cobb and Janet Rifkin go further, arguing that when mediators participate in the framing, shaping and construction of the "problems" to be resolved, they act in a manner inconsistent with ideals of mediator neutrality and party autonomy. See Sara Cobb & Janet Rifkin, *Practice and Paradox: Deconstructing Neutrality in Mediation*, 16 LAW & SOCIAL INQUIRY 35 (1991). Directiveness in agenda-setting is partly a matter of mediator style and partly a matter of mediation context or setting. For a discussion of how different settings may affect mediator directiveness and other mediation skills, see text accompanying notes 85-90 *infra*.

⁴⁴ DAVID A. BINDER, PAUL BERGMAN & SUSAN C. PRICE, *LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH* 97-99 (1991).

maturely "classify the flow of reality" into the wrong categories, because of insufficient training or insufficient sensitivity to the unique aspects of each client's situation.⁴⁵ This tendency to pigeonhole prematurely, an occupational hazard for all lawyers, is especially a risk for beginning lawyers; how many times have each of us had to send a student back for a second or third client interview, because the student reached a hasty and incomplete diagnosis of the client's case?

Such difficulties are compounded in mediation, and the risks are greater. If the mediation student wishes to assist parties frame the issues themselves, she must frequently negotiate between contesting "images of reality"⁴⁶ — conflicts between the parties in their agendas, their views of the relevant historical facts, and/or their fundamental values. Sometimes such conflicts in perception and belief can help elucidate the issues for the mediator. Often, however, they complicate the mediator's task, which is not only to diagnose the issues at stake, but to try to help the parties articulate the issues in a neutral manner which does not favor either side.⁴⁷ Articulating the issues fairly requires the mediator to have developed all the relevant underlying facts, including sensitive facts, a task that is also generally more challenging in the highly charged atmosphere of a mediation than in a typical lawyer-client interview.

The mediator who takes it upon herself to frame and order the issues faces an additional danger: the risk of what Greatbatch and Dingwell call "selective facilitation."⁴⁸ This is a phenomenon similar to the problem of pigeonholing in interviewing: The mediator leads the discussion in certain directions but not others, facilitates the examination of particular subjects but not others — a consequence of poor listening or deficient imagination or some bias, perhaps unconscious, on the mediator's part.⁴⁹ In an ongoing lawyer-client relationship, such oversights will generally be discovered and remedied. Many mediations, however, are one-shot affairs. In such cases, the mediator's selective facilitation creates a risk not just of inefficient service, but of biased, weak and deficient agreements.

The preceding examples are intended to be illustrative, not exhaustive. In ways that I must leave to the reader's imagination, I believe that it is harder to listen, harder to question, and harder to assist

⁴⁵ Eliot Freidson, *Dilemmas in the Doctor-Patient Relationship*, in GARY BELLOW & BEA MOULTON, *THE LAWYERING PROCESS: MATERIALS FOR CLINICAL INSTRUCTION IN ADVOCACY* 141 (1978).

⁴⁶ MOORE, *supra* note 35, at 175.

⁴⁷ *Id.* at 180.

⁴⁸ David Greatbatch & Robert Dingwell, *Selective Facilitation: Some Preliminary Observations on a Strategy Used by Divorce Mediators*, 23 *LAW & SOC. REV.* 613 (1989).

⁴⁹ *Id.* at 636-39.

in brainstorming, assessing and choosing among potential solutions to a dispute when dealing with two disputants in a mediation rather than a single client. This makes a mediation clinic a challenging environment in which to teach skills to students, because, for the most part, they will have had no previous clinical training.

2. *Disputed Visions, Disputed Norms*

As Leonard Riskin has written, "almost every conversation about 'mediation' suffers from ambiguity. People have different visions of what mediation is or should be."⁵⁰ Small wonder. Mediation is practiced by persons with widely divergent backgrounds in such varied settings as community storefronts, courthouse corridors, diplomatic anterooms and high school principals' offices, as well as in judges' chambers, if one considers judicial settlement conferences a form of "mediation." Some practitioners and commentators view mediation primarily as a method of case management and docket control.⁵¹ Others speak of its potential for individual empowerment or community self-government.⁵² Some writers are attracted by the problem-solving potential of mediation, focusing on its capacity to produce integrative, "win-win" agreements.⁵³ Others emphasize the relational

⁵⁰ Leonard L. Riskin, *Mediation Orientations, Strategies and Techniques*, 12 *ALTERNATIVES TO HIGH COST OF LITIGATION* 111 (1994).

⁵¹ See, e.g., Warren Burger, Annual Report on the State of the Judiciary (January 24, 1982) (arguing that in order to reduce caseloads, "[w]e need to consider moving some cases from the adversary system to administrative processes, like workmen's compensation, or to mediation . . ."). See also Edwards, *supra* note 14 (suggesting that ADR offers relief from backlog and expenses associated with litigation but ought not be utilized in cases with important constitutional or public policy ramifications). But see Marc Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 *UCLA L. REV.* 4 (1983) (arguing that the litigation explosion is largely overstated).

⁵² See, e.g., BUSH & FOLGER, *supra* note 40, at 82-84 ("In short, conflict affords people the opportunity to develop and exercise both self-determination and self-reliance In a transformative approach, empowerment and recognition are the two most important effects that mediation can produce, and achieving them is its most important objective."). For an enthusiastic endorsement of mediation as a form of community self-government, see, e.g., Raymond Schonholtz, *Neighborhood Justice Systems: Work, Structure and Guiding Principles*, 5 *MEDIATION Q.* 3 (1984).

⁵³ See, e.g., FOLBERG & TAYLOR, *supra* note 35, at 10 ("Unlike the adjudicatory process, the emphasis [in mediation] is not upon who is right or wrong or who wins and who loses, but rather upon establishing a working solution that meets the participants' unique needs. Mediation is a win/win process."). Cf. generally ROGER FISHER & WILLIAM URY, *GETTING TO YES* 59-83 (1981); Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem-Solving*, 31 *UCLA L. REV.* 754 (1984). But see Owen Fiss, *Against Settlement*, 93 *YALE L.J.* 1073, 1082 (1984) (The role of judicial authorities "is not to maximize the ends of private parties, nor simply to secure the peace, but to explicate and give force to the values embodied in authoritative texts such as the Constitution and statutes; to interpret those values and to bring reality into accord with them. This duty is not discharged when the parties settle.").

or spiritual side of mediation, pointing to its capacity to foster communication, ameliorate conflict, "transform" relationships and engender peace.⁵⁴ These different and sometimes conflicting visions of the goals of mediation often give rise to different or conflicting norms of practice.⁵⁵

Exposing clinic students to contested norms of practice can enrich their clinical experience — when done in moderation. Students in litigation clinics are exposed to highly-developed ethical rules regarding the nature and limits of the advocate's role. The skills literature we ask them to read presents them with established principles and received wisdoms regarding many tasks, such as, for example, how to construct an interrogatory or conduct a direct or cross-examination. So if students are also introduced to contested visions of negotiation, or to a client counseling literature that hedges on the question of what kinds of decisions a lawyer may properly make on the client's behalf, they are likely to appreciate the discretion such readings afford them to forge their own professional identity.

The mediator's proper role is less well developed⁵⁶ and more controverted than the advocate's; and as a result some really fundamental questions are up for grabs. This substantially complicates the task of skills training in a mediation program. Consider just two examples:

⁵⁴ See generally Andrew W. McThenia & Thomas L. Shaffer, *For Reconciliation*, 94 YALE L.J. 1660 (1985) (suggesting reconciliation, not resolution, is the true goal of ADR). See also David N. Smith, *A Warmer Way of Disputing: Mediation and Conciliation*, 20 AM. J. COMP. L. 205, 208 (Supp. 1978) ("Therapy and catharsis, rather than an attempt to arrive at some 'truth,' becomes the goal of dispute resolution."). See generally BUSH & FOLGER, *supra* note 40.

⁵⁵ Folberg and Taylor, for example, list a total of thirteen styles and approaches to mediating conflict, including labor mediation (professional mediator, experienced representatives, separate caucusing to explore positions); "therapeutic" mediation (mediators with a mental health background deal with underlying conflict and its causes rather than only the manifest dispute); "muscle" mediation (mediator acts as "closet arbitrator," telling the party what is fair and appropriate; to be avoided, according to the authors); and "lawyer" mediation (focuses more on manifest dispute; lawyers may share with the parties their knowledge of legal parameters and settlement options). FOLBERG & TAYLOR, *supra* note 35, at 130-46.

⁵⁶ In late 1994, the American Bar Association Section on Dispute Resolution, the Society of Professionals in Dispute Resolution (SPIDR), and the American Arbitration Association promulgated new *Model Standards of Conduct for Mediators* (1994). These new standards supplant SPIDR's *Ethical Standards of Professional Responsibility* (adopted June 1986) and the ABA's *Standards of Practice for Lawyer Mediators in Family Disputes* (1984). One should note, however, that the standards are non-binding, and while they represent the current thinking of three prominent mediation organizations, others have not as yet signed on — e.g., the National Institute for Dispute Resolution (NIDR), and the Academy of Family Mediators. The Academy of Family Mediators has its own *Standards of Practice For Family and Divorce Mediation* (1995). And, to further confuse matters, individual state bars have weighed in on the issue of a mediator's role in the form of opinions from their ethics committees. See Leonard Riskin, *Toward New Standards For the Neutral Lawyer in Mediation*, 26 ARIZ. L. REV. 329, 343 (1984).

a. *Should A Mediator Try To Persuade the Parties to Reach A Settlement?*

Conscientious readers may recall one of Carol Liebman and Barbara Schatz's listed goals, thus far not addressed: to teach "in the context of mediation, generic . . . *persuasion* . . . skills that are fundamental to the practice of law."⁵⁷ Persuasion and argumentation certainly are the lawyer's stock in trade. Are they also part of an effective mediator's repertoire?

The dominant view in the literature is that mediation's purpose is to solve problems and promote settlement, and many of the skills texts provide mediators with persuasion and argumentation strategies to accomplish these goals. Josh Stulberg tells his readers, for example, to "highlight needs" and "point to common interests,"⁵⁸ as well as "to capitalize on inconsistencies as well as vulnerabilities,"⁵⁹ "try role reversal,"⁶⁰ and "stroke 'em."⁶¹ He argues that, once a mediator has resolved for herself that mediation is an appropriate procedure for the parties and their dispute, "any agreement [is] better than no agreement at all."⁶²

Robert Baruch Bush and Joseph Folger, in a provocative and important new book,⁶³ take precisely the contrary position. Bush and Folger argue that the "settlement *über alles*" orientation⁶⁴ of many mediation practitioners often produces agreements that are "either illusory or unjust because of mediator directiveness."⁶⁵ Mediation is successful, in Bush and Folger's terms, first "if the parties have been helped to clarify goals, options and resources and then make informed, deliberate and free choices regarding how to proceed at every decision point"; and second, if the parties have experienced a "greater actualization of their capacity for relating to others."⁶⁶ Theirs is a transformative vision of mediation, in which progress and success are judged not by the number of settlements reached, but by the fairness of those settlements⁶⁷ and by the opportunity afforded to the parties "to handle their conflicts for themselves with dignity, self-respect, and consideration for the other side."⁶⁸ Notably, the word "persuasion" is

⁵⁷ See *supra* page 462 (emphasis supplied).

⁵⁸ STULBERG, *supra* note 25, at 102.

⁵⁹ *Id.* at 1.

⁶⁰ *Id.* at 100.

⁶¹ *Id.* at 99.

⁶² *Id.* at 141.

⁶³ See generally BUSH & FOLGER, *supra* note 40.

⁶⁴ These are my words, not theirs.

⁶⁵ BUSH & FOLGER, *supra* note 40, at 273.

⁶⁶ *Id.* at 95.

⁶⁷ *Id.* at 273.

⁶⁸ *Id.* at 276.

not part of Bush and Folger's lexicon. Indeed, they view any form of shaping or steering by the mediator as inappropriate, because it cannot be done neutrally and risks "displac[ing] or obscur[ing]" "the parties' problems and needs."⁶⁹

What is a mediation skills trainer to do if she believes that both visions of mediation have validity? Perhaps what I intend to do this semester: have her students read both books. Bush and Folger quite clearly assert, however, that a problem-solving, settlement-oriented approach to mediation cannot be integrated with a transformative approach, because "taking one approach means doing the opposite of what is called for in the other."⁷⁰ Because I do not know whether they are right or wrong, I do not know whether introducing students to these contrasting visions of mediation will empower students to make their own choices or simply confuse them.

b. Should a Lawyer-Mediator Provide Legal Information to the Disputants and Evaluate their Positions?

This may seem like a no-brainer to litigators whose principal exposure to mediation consists of judicial settlement conferences, special master proceedings, or private mediations in such fields as construction or personal injury law. Court-annexed and lawyer-controlled mediations tend to be highly evaluative: the participants, usually lawyers themselves, want and expect the mediator to "provide some direction as to the appropriate grounds for settlement — based on law, industry practice or technology."⁷¹ They also assume "that the mediator is qualified to give such direction by virtue of her experience, training and objectivity."⁷²

⁶⁹ *Id.* at 75.

⁷⁰ *Id.* at 278-79. The authors argue that a problem-solving approach requires "macrofocusing" on the parties' *situation*, in order to identify the problem and possible solutions," whereas a transformative approach requires "microfocusing on the parties' *interaction* in order to spot opportunities for empowerment and recognition." (Emphasis in the original.) The moves are different, they say, and cannot easily both be kept in mind by the mediator as the mediation progresses.

⁷¹ Riskin, *supra* note 50, at 111. A comprehensive study of early neutral evaluation in California provides evidence that when attorneys represent clients they generally want neutrals to state their views on the merits. See Joshua D. Rosenberg & H. Jay Folberg, *Alternative Dispute Resolution: An Empirical Analysis*, 46 STAN. L. REV. 1487, 1529 (1994).

⁷² Riskin, *supra* note 50, at 111. Such expectations may make it hard for litigators to accept law students as mediators in law-based mediations, even if they are under supervision. In the first year of our program, a very able and self-confident student contacted a local plaintiff's employment lawyer to determine whether he would agree to submit a discrimination case to mediation. He screamed at her, words to the effect of "how can a law student possibly mediate my case?," making clear his view that only an experienced litigator with many years of employment discrimination experience could possibly fulfill the role. The interesting thing about this incident was that his firm is a regular source of refer-

In fact, however, the question of whether a mediator should provide such information and evaluation is vigorously contested.⁷³ The principal tension here is between providing advice and information on the one hand, and retaining the appearance of impartiality on the other. The mediator wants disputants to make fully informed decisions. However, if the mediator gives her opinions, "such opinions might impair the appearance of impartiality and thereby interfere with the mediator's ability to function."⁷⁴ Bush and Folger argue that the mediator should never "tak[e] sides, express[] judgments or be[] directive, all of which are central aspects of advice-giving and advocacy,"⁷⁵ and which add to the strength of one party at the expense of the other. Lela Love has stated categorically that "evaluative mediation is a contradiction."⁷⁶ Nancy Rogers, who was one of the first law school mediation clinicians in the country and whose book, *A Student's Guide to Mediation and the Law*, was the first aimed specifically at a law student audience, spends no less than 28 pages addressing unauthorized practice of law considerations facing law student mediators if they provide legal information or advice.⁷⁷ She and her co-author conclude: "The widely varying interpretations reached in past advisory opinions make it difficult to predict whether the lawyer-mediator will be deemed to have acted unethically in giving legal information or advice With their licenses at stake, lawyer-mediators may be hesitant to provide any legal assistance in jurisdictions where the ethical situation has not been clarified"⁷⁸

I have tried to steer a middle course here. I have no doubt that

raals for our Civil Rights Clinic, in which law students litigate employment discrimination cases under supervision.

⁷³ The new *Model Standards of Conduct for Mediators*, *supra* note 56, adopt a facilitative vision of mediation, while rejecting an evaluative one. The comment to Standard I states that "[t]he primary role of the mediator is to facilitate a voluntary resolution of a dispute." Standard I approves of mediators "provid[ing] information about the process, rais[ing] issues, and help[ing] the parties explore options," but cautions that "[a] mediator cannot personally ensure that each party has made a fully informed choice to reach a particular agreement." The comment further states "it is a good practice for the mediator to make the parties aware of the importance of consulting other professionals, where appropriate, to help them make informed decisions." Rule VI reinforces this idea of role: "Mixing the role of mediator and the role of a professional advising a client is problematic, and mediators must strive to distinguish between the roles. A mediator should therefore refrain from providing professional advice." See Symposium, *Standards of Professional Conduct in Alternative Dispute Resolution*, 1995 J. DISP. RESOL. 95, 127. Evidently, this question of role was hotly debated by the drafting committee. Richard C. Reuben, *Model Ethics Rules Limit Mediator Role*, A.B.A. J., Jan. 1996, at 25.

⁷⁴ Riskin, *supra* note 50, at 111.

⁷⁵ BUSH & FOLGER, *supra* note 40, at 96.

⁷⁶ Symposium, *supra* note 73, at 104.

⁷⁷ ROGERS & SALEM, *supra* note 14 at 107-35.

⁷⁸ *Id.* at 133.

directive, evaluative law-based mediations can be conducted in an extremely narrow and coercive manner, disempowering parties from settling on the basis of "community norms or values that are broader than those the court can consider."⁷⁹ On the other hand, I think that it is misguided to argue that a mediator with knowledge of the law should not share her knowledge with the parties in a law-based mediation — especially if the parties are *pro se*. As Jackie Nolan-Haley has argued, for "parties who choose to bring their conflicts into the public domain of the court . . . law may be an important, if not predominant, value."⁸⁰ When settling their disputes, disputants must be permitted to invoke legal norms if they choose to, and the mediator must take steps to ensure that the parties' choices are knowing and informed.⁸¹ In my view, any threat to the appearance of neutrality and impartiality is a necessary price that mediators must pay for party empowerment and informed consent.⁸²

Because I believe these things, I have structured my clinic to provide students with relevant substantive law training, in the expectation that they will provide appropriate legal information and evaluation in their cases, and have taken steps to ensure that students in the field conducting legal mediations are supervised by lawyers at all times.⁸³

⁷⁹ Menkel-Meadow, *supra* note 53, at 825.

⁸⁰ Jacqueline Nolan-Haley, *Court Mediation and the Search for Justice Through Law*, 74 WASH. U. L.Q. 501, 518 (1996). See also Riskin, *supra* note 56, at 333-36 (arguing that because most Americans wish to understand their legal positions, lawyer-mediators can provide a valuable service to unrepresented parties by explaining their legal rights).

⁸¹ Where parties disagree about governing values, legal norms often provide the only objective criteria for the kinds of principled agreements that Fisher and Ury espouse. See FISHER & URY, *supra* note 53, at 88-89. As Carrie Menkel-Meadow has argued, "all legal negotiations are measured against the legal merits because, in deciding whether to accept a particular proposal, the negotiator must decide whether the negotiated agreement is better than the one which would be achieved at trial." Menkel-Meadow, *supra* note 53, at 825. Mnookin and Kornhauser argue, to similar effect, that in legal negotiations, "the law provides bargaining chips which the parties can claim or forego." Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of Law: The Case of Divorce*, 88 YALE L.J. 950, 968 (1979).

⁸² In fact, I believe that competent mediators can externalize their legal predictions in much the same way as lawyers do, to minimize the danger that they will be perceived to favor one party over another. A mediator who sympathetically informs a disputant that "unfortunately, it is unlikely that the court will award you X" does not appear biased in the same way as a mediator who communicates, overtly or implicitly, her own subjective view that "X is not a fair outcome in this case."

⁸³ CONN. SUPER. CT. R. CIV. PROC. §§ 68-74 (1994). The Connecticut Student Practice Rule is geared towards litigation and does not appear to contemplate law student mediation. Section 68 provides that "an eligible intern may, under supervision by a member of the Connecticut Bar . . . appear in court with the court's approval or before an administrative tribunal . . . on behalf of any person, if that person has indicated in writing his consent . . ." (emphasis supplied). Section 71 permits the intern to prepare pleadings, documents and briefs. Section 74 states however, that "[n]othing contained in these rules shall affect the right of any person who is not admitted to the practice of law to do anything that he

But I also expose students to the theoretical debate regarding the role of law and legal evaluation in mediation; and, in doing so, I have little doubt that some come away perplexed. Clinic students in general often lack confidence in their ability to evaluate cases for settlement. The fact that there is a dispute in the mediation literature regarding whether they *should* do so makes those who would otherwise be reluctant all the more so.⁸⁴

Two Visions, Redux. Again, these examples are meant to be illustrative, not exhaustive, of the problem of disputed norms. I have already alluded to a dispute in the literature regarding how directive a mediator should be in developing and organizing a mediation agenda.⁸⁵ I have mentioned in passing that the relative importance of "communication facilitation" may vary on the setting in which the mediation occurs.⁸⁶ Mediation practioners and scholars differ on other important questions as well, such as, for example, the role of caucusing in mediation, *i.e.*, whether the parties should be separated and what kinds of conversations may properly take place between the mediator and an individual party.⁸⁷ The main reason why such disputes occur is because mediation is pluralistic and contextual⁸⁸: parties and

might lawfully do prior to their adoption" In Connecticut, the vast majority of staff mediators in Family Court and Housing Court are not attorneys. It thus appears that the law student is as free to practice mediation in these settings as any other non-lawyer mediator.

⁸⁴ A number of students commented in their journals about this issue. One student, after observing a highly directive and evaluative demonstration by a housing court staff mediator, observed: "I am somewhat uncomfortable with the housing court specialists being charged with giving legal advice Both parties seemed to rely heavily on what the mediator thought In all, I would say that my first mediation observation did not seem much different from the many arbitration sessions . . . I have seen."

Another student wrote: "Being reluctant to provide 'legal advice,' I may have diluted my ability to communicate effectively to the parties. I found myself saying 'well, the magistrate could rule this way, or he could do that . . . ' I don't think it would do any harm to not qualify every statement about the potential outcome of the case"

⁸⁵ See text accompanying notes 41-43 *supra*.

⁸⁶ See text accompanying note 29 *supra*.

⁸⁷ See, e.g., Christopher W. Moore, *The Caucus: Private Meetings that Promote Settlement in Practical Strategies for the Phases of Mediation*, 16 *MEDIATION Q.* 87 (Spring 1987) (promoting caucusing as an effective tool for surmounting "emotional, procedural, or substantive blocks to negotiation"). *But see* MOORE, *supra* note 35, at 269-90 (cautioning that, despite its benefits, caucusing gives the mediator the ability to control and manipulate information, thus increasing the mediator's power to influence the parties; and warning that caucusing may expose the mediator to an ethical conflict between ensuring confidentiality of information revealed in caucus and disclosing such information if necessary for a fair settlement). See also Gary L. Welton, Dean G. Pruitt, & Neil B. McGillicuddy, *The Role of Caucusing in Community Mediation*, 32 *J. CONFLICT. RES.* 191 (March 1988) (study suggesting that there are distinct benefits and dangers to caucusing).

⁸⁸ See, e.g., Carrie Menkel-Meadow, *The Many Ways of Mediation: The Transformation of Traditions, Ideologies, Paradigms and Practices*, 11 *NEG. J.* 217, 228, 240 (1995) (book review) (arguing that "mediation has become almost as variable as the other human

program providers will have different goals and objectives in different mediation settings and these varying goals will often help define what is meant by "competent" practice in that setting.⁸⁹ Thus, while there no doubt exists a core of generic mediation skills necessary for competent practice in all settings, it is also true, as the Society of Professionals in Dispute Resolution (SPIDR) has recently concluded, that "[a] practice appropriate in one context may be inappropriate in another."⁹⁰

I have little doubt that my students need different skills to be effective mediators in Housing Court and Family Court. In Housing Court, students need to learn case evaluation because the governing legal norms are complex and often deemed important by the parties and because the parties generally lack practical alternative means, short of litigation, to obtain an evaluation of their case. Similarly, utilizing techniques of persuasion, argumentation, caucusing and relatively directive agenda control may be appropriate in Housing Court because the parties are severing their relationship and often value closure above other possible mediation goals.

Different skills are called for in Family Court, where the parties are likely to be confronting fundamental issues pertaining to self-identity, life choices and long-term relations with each other and their children. In such a setting, improving parents' communication, understanding and interaction with each other can be as or more important than striking a deal on visitation and custody. In such a context, teaching students techniques of empowerment, recognition and communication facilitation takes on far greater significance.

I believe that exposing students to varied mediation settings significantly enriches their experience. In addition to observing the different ways in which mediation is practiced, students can be encouraged to consider, for example, whether and to what extent the skills required in various settings complement or contradict each other, and whether it is possible to combine evaluative and facilitative techniques into an integrated mediation practice. Make no mistake, though: the clinician who chooses to expose her students to two such different mediation contexts — each with its own distinctive goals and norms — has undertaken a more complex job of skills training.

processes it was designed to replace or supplement" and that "simple practice routines must be altered depending on the context of the problem or the institution in which the dispute is situated").

⁸⁹ See *Ensuring Competence and Quality in Dispute Resolution Practice*, REPORT NO. 2 OF THE SPIDR COMMISSION ON QUALIFICATIONS (Society of Professionals in Dispute Resolution), April 1995, at 2.

⁹⁰ *Id.* at 14.

3. *The Contingent Nature of Mediation and the Problem of Planning*

What kinds of mediation strategies and interventions work in what kinds of disputes? Recent empirical research suggests that mediator behaviors that are effective in improving relationships or producing settlement in one dispute may be ineffective or even counterproductive in another, and that successful mediators are, above all, adaptive: they utilize different substantive and contextual tactics depending on the contingencies that arise in a particular case.⁹¹ Thus, for example, making suggestions for settlement may be positively and strongly associated with settlement when resistance to mediation is low, but negatively associated with settlement when resistance to mediation is high or there are other "dispute problems," such as poor leadership or poor preparation by the negotiators.⁹² Substantive pressure by the mediator will impair party relations in most types of disputes, but will less clearly do so when the "dispute level" is already high.⁹³ Successful mediators utilize a variety of emotive tactics, such as controlling expressions of hostility or, conversely, letting everyone blow off steam, depending on the circumstances of the particular dispute.⁹⁴

Because the contingencies that can arise in a mediation are virtually limitless, the range of potential mediator interventions is also virtually limitless, and some commentators despair that mediation can be taught at all.⁹⁵ Beryl Blaustone, who strongly argues that mediation can and should be taught in law school, acknowledges that "[m]ediation is a process which involves complex human behavior,"⁹⁶ and which "requires a scientific understanding of conflict and dispute behavior."⁹⁷ While many mediation theorists have described identifiable "stages" of the mediation process,⁹⁸ it seems widely recognized that because mediation is flexible, informal and reactive, these stages

⁹¹ See Peter J. D. Carnevale et al., *Contingent Mediator Behavior and Its Effectiveness*, in *MEDIATION RESEARCH* 213-40 (Kenneth Kressel, Dean Pruitt & Associates eds., 1989).

⁹² *Id.* at 223, 235.

⁹³ *Id.* at 234.

⁹⁴ *Id.* at 217.

⁹⁵ The communication theorist Sarah Cobb concludes, for example, that "[m]anaging a conversation in ways that promote the participation of all parties is still more of an art than a science because we lack adequate tools to describe, prescribe or predict the course of that process." Cobb, *supra* note 27, at 87-88.

⁹⁶ Beryl Blaustone, *Training the Modern Lawyer: Incorporating the Study of Mediation into Required Law School Courses*, 21 Sw. U. L. REV. 1317, 1326 (1992).

⁹⁷ *Id.* at 1325.

⁹⁸ E.g., MOORE, *supra* note 35, at 25 (12 stages); FOLBERG & TAYLOR, *supra* note 35, at 71 (7 stages).

do not necessarily follow a set or linear pattern.⁹⁹

The contingent and nonlinear character of mediation has important implications for planning. Minna Kotkin has described clinical teaching as consisting of five steps: exposing the student to models of lawyering; having the student apply these models in planning a particular task; evaluating the plan with the student; having the student perform the task; and, finally, critiquing the student's performance with the student to examine its conformity to, and the sufficiency of, the model or plan.¹⁰⁰ For some clinical instructors, teaching students habits and modes of planning may be among their most important pedagogic goals.¹⁰¹ In a mediation clinic, this type of planning for performance is very difficult to do.

Let me be clear here. It is certainly possible to prepare students well for mediation by isolating in the classroom and in simulation activities many types of tasks and contingencies that students are likely to encounter in their cases. Students can, for example, practice their introductions and methods of opening questioning and active listening and neutral language. They can consider in advance the circumstances, if any, in which they will use caucuses, and for what purposes. They can examine the problem of abusive or obstreperous conduct by the parties and canvass a variety of techniques for dealing with it. They can be taught methods of agenda control, creative brainstorming and face-saving. The list is long, and the more experience the mediation clinician gains, the longer it becomes.

However, such training is modeling, not planning. It involves generic skill-building rather than preparing for the particular. In some types of mediations, the *legal* dimensions of a case can be carefully evaluated in advance; the mediation clinician may wish to choose settings for her students that place a premium on this kind of legal planning. But the unique interpersonal and human dynamics of mediation seldom can be planned for; and often these dynamics, as much or

⁹⁹ E.g., BUSH & FOLGER, *supra* note 40, at 16, 201, 279 (mediation stages or models are at most useful "signposts" that mark opportunities for empowerment and recognition along the way; mediator must "microfocus" on the parties' interaction to spot these opportunities).

¹⁰⁰ Minna J. Kotkin, *Reconsidering Role Assumption in Clinical Education*, 19 N.M. L. REV. 185, 193-94 (1989).

¹⁰¹ John Bradway, who started the first legal clinic in a modern law school, established as one of his primary goals to teach students "to plan and carry out legal representation, including gathering facts, marshalling facts and legal theories, determining ends and means, and carrying the plan to a reasonable conclusion." See Stephen Wizner, *What is a Law School?*, 38 EMORY L.J. 701, 713 (1989); see also Amsterdam, *supra* note 11, at 613-14; *Report of the Committee on the Future of the In-House Clinic*, 42 J. LEGAL EDUC. 508, 512 (1992) ("developing modes of planning and analysis for dealing with unstructured situations" listed as a principal goal of in-house, live-client clinics).

more than the formal contours of the dispute, will primarily determine the shape of the mediation.¹⁰² In this respect, "planning" for a mediation is something like "planning" for an initial client interview, except that in a mediation the interpersonal dynamics are usually more volatile, and the course of discussion, generally more unpredictable.¹⁰³

As Bush and Folger have written, the skilled mediator never knows how the mediation will unfold or what her next steps will be. She must remain always in a psychologically *responsive* posture, reacting to the unique interactions of the parties in each case.¹⁰⁴ But if this kind of psychological responsiveness is the *sine qua non* of effective mediation, to what extent can it be taught?

4. *The Psychological Dimensions of Mediation Practice*

An effective mediator is a skilled conflict manager, able to analyze the parties' relationship, help them negotiate their disagreements and resolve their conflicts. As Bush and Folger have written, mediators "enter" the parties' conflict; they "become participants in the unfolding interaction and have an influence on the way it develops."¹⁰⁵

In order to be effective conflict managers, mediators must first have some understanding of the psychology of conflict: how strong conflict generally affects people's perceptions and behaviors, the various stages or cycles of feelings that are associated with conflict, and their own individual styles of handling conflict.¹⁰⁶ I believe that effec-

¹⁰² An incident from one of my students' family mediations last year may help illustrate the point. A father insisted on writing down virtually everything his ex-wife was saying during the mediation. This in itself was unremarkable; many mediators will encourage parties to take notes so they will remember what they want to say and not interrupt each other. As this mediation progressed, however, the father constantly quoted back his ex-wife's words in a threatening, cross-examination style, clearly designed to intimidate. This became the principal *motif* of the mediation. This conduct was not controlled by the mediators and, the student later wrote, he regretted it.

¹⁰³ It is interesting to me in this context that although many of the mediation skills texts identify various types of questioning techniques a mediator should use, none really posits a coherent *theory* of mediation interviewing. Kovach is typical: After broadly identifying six types of questions and recommending open-ended questioning at the beginning of a mediation, the book advises prospective mediators merely to encourage the parties to exchange information and question each other, while "maintain[ing] control over the process." KOVACH, *supra* note 25, at 91-95. To a far greater extent than initial client interviews, mediations are nonlinear, making it difficult to postulate a general theory of mediation interviewing.

¹⁰⁴ BUSH & FOLGER, *supra* note 40, at 192-93.

¹⁰⁵ *Id.* at 70.

¹⁰⁶ On the psychology of conflict, *see generally* DEUTSCH, *supra* note 25. On the cycle of conflict, *see, e.g.*, Jeffrey Z. Rubin, *Some Wise and Mistaken Assumptions About Conflict and Negotiation*, in NEGOTIATION THEORY AND PRACTICE 3, 8-10 (J. William Breslin & Jeffrey Z. Rubin eds., 1991); FOLBERG & TAYLOR, *supra* note 35 at 22-23. On individual conflict management styles, *see* the Kilmann Conflict Mode instrument, discussed at notes

tive conflict management also requires a high degree of what Daniel Goleman calls "interpersonal intelligence"¹⁰⁷: the capacity to understand and empathize with other people, to "discern and respond appropriately to [their] moods, temperaments, motivations and desires,"¹⁰⁸ to handle relationships well and "interact[] smoothly with others."¹⁰⁹

Much can be taught law students about the psychology of conflict and a mediation clinic is an effective setting in which to do so. In 20 years of litigation practice and litigation clinic teaching, for example, I never gave any thought to the conditions or processes that produce "productive" and "destructive" conflict.¹¹⁰ The writings of Morton Deutsch have been a beacon of light for me and might, I think, be required reading for all our students before we foist them on an already grumpy public.

Similarly, in my first year of mediation teaching, my colleague Michael Lockaby suggested to me a visualization exercise that powerfully demonstrates the emotional dimensions of conflict and their importance. Students are asked to close their eyes, recall a conflict with a family member, lover or friend, try to recapture the various feelings they associate with that conflict, and then share those feelings with other students in the class. This short, simple exercise allows students to derive, from their own experience, some of the lessons of the literature on conflict: for example, the "seductive" nature of rage and the "self-righteous inner monologue" that often accompanies it, "fil[ling] the mind with the most convincing arguments" about why one is right,¹¹¹ and the healing effects of "reframing": how being encouraged to "see[] things differently can douse the flames" of anger and "put it to rest."¹¹²

In my first semester of teaching the clinic, I also came across a survey instrument that enabled me to explore students' personal attitudes about conflict and their strategies for coping with conflict-laden

113-14 *infra*.

¹⁰⁷ GOLEMAN, *supra* note 6 at 38. The concept of interpersonal skills as a type of intelligence was first popularized by Howard Gardner. See generally GARDNER, *supra* note 6.

¹⁰⁸ GOLEMAN, *supra* note 6, at 39.

¹⁰⁹ *Id.* at 43-44.

¹¹⁰ DEUTSCH, *supra* note 25, at 351-65 ("Destructive" conflict is characterized, *inter alia*, by competition, the tendency to expand and escalate, impoverished communication, enhancement of the view that solutions can only be imposed by force, suspicion, hostility, misjudgment and misperception. "Productive" conflict is characterized by cooperation, open and honest communication, recognition of the legitimacy of others' interests, creative thinking, high level of motivation and "the application of full cognitive resources to the discovery and invention of constructive solutions.").

¹¹¹ GOLEMAN, *supra* note 6, at 59.

¹¹² *Id.* at 60.

situations. The questionnaire, designed by K.W. Thomas and R.H. Kilmann,¹¹³ purports to measure the extent to which individuals are "competitors," "collaborators," "compromisers," "accommodators" or "avoiders."¹¹⁴ In both semesters, I administered the survey to students in the clinic. I believe that taking the survey may have deepened some students' self-awareness in ways that were useful to them in their mediations.

But none of this is really equivalent to teaching students to be psychologically adept in and at mediation. In order to be truly effective in mediation, students must be able to work comfortably at the intersection of thought and feeling. In addition to analyzing and predicting and assessing options (skills ordinarily associated with academic intelligence and I.Q.), students need to be attuned to the often hidden and suppressed emotions that underlie conflict. They need to be adept at reading nonverbal behavior, because 90% or more of the emotional content of statements is nonverbal.¹¹⁵ They must have a considerable degree of empathy; "[p]eople who are empathic are more attuned to the subtle social signals that indicate what others need and want."¹¹⁶ They must be socially competent and skilled at handling other people's relationships.¹¹⁷

¹¹³ K.W. Thomas & R.H. Kilmann, *Thomas-Kilmann Conflict Mode Instrument* in JUDY CORDER, LANELLE MONTGOMERY & MARY THOMPSON, *MEDIATION MANUAL* 26-41 (1991) (on file with author). I have not been able to determine whether this instrument has been validated.

¹¹⁴ Thomas and Kilmann define these five modes of conflict with reference to two traits — assertiveness and willingness to cooperate. The "competing" mode of conflict is highly assertive and uncooperative, a "me first," power-oriented response to conflict. The "avoidance" mode of conflict is both unassertive and uncooperative. An individual operating in the avoidance mode actively pursues neither her own interests, nor those of others with whom she is in conflict. The "accommodating" mode of conflict is unassertive and cooperative, leading to neglect of one's own interest in deference to the other party to the conflict. Those operating in the "compromise" mode score in the middle range in both assertiveness and cooperation. Compromisers "split the difference" as a way of finding a mutually satisfactory solution. The "collaborating" mode is simultaneously assertive and cooperative. Collaborators work for solutions by probing the depths of a conflict to discover solutions which fully satisfy both parties.

The Thomas-Kilmann instrument describes twelve hypothetical conflict situations and provides five alternative ways of handling each situation, which the authors classify as competing, avoiding, accommodating, compromising or collaborating. Respondents are not forced to choose a single way of handling each conflict, but rather may allocate ten points among the five alternative choices for each question. The idea is that there is no one best way to handle conflict, but that most people have certain characteristic ways of handling most conflicts they encounter.

In the years I have administered this survey, while a few of my students have been "competers," most have scored highest in the modes of "collaboration and compromise." I will have more to say about this subject in the sequel to this article.

¹¹⁵ GOLEMAN, *supra* note 6, at 96-97.

¹¹⁶ *Id.* at 96.

¹¹⁷ *Id.* at 284.

These are no doubt critical life skills, and the notion of improving the emotional literacy of law students is an attractive ideal. But the jury is still out on the question of whether and to what degree these skills can be taught, at least to adults.¹¹⁸ The difficulty is that these *interpersonal* skills — empathy and the ability to manage other people's relationships, for example — are believed to be advanced competencies, resting on more fundamental *intrapersonal* skills, such as self-awareness, self-confidence and the ability to manage and harness one's own emotions productively in the service of one's goals.¹¹⁹ The roots of all these skills lie very deep within each of us, tracing their origins to early childhood¹²⁰ and, perhaps, to the neurology of the brain.¹²¹

One therefore wonders how much these skills can be improved in a law school mediation program. While we can teach our students methods and techniques to reflect the feeling and content of party statements, or to "[t]ranslate one party's statements so that the other is more likely to hear them accurately or consider them sympathetically,"¹²² or to "offer possible reinterpretations of parties' actions or motives,"¹²³ or to help the parties to recognize their needs and priorities, not just their positions, we cannot ensure that they will perform any of these tasks with psychological acuity. Stated differently, we can help students appreciate their own capacity for empathy, intuition and insight. We can teach them how to demonstrate these qualities to others. It is questionable how much we can teach students to *be* empathic, intuitive and insightful. Some students have these skills in great measure; occasionally, one encounters students who seem to have them not at all.¹²⁴

¹¹⁸ Goleman argues in his book that, although individuals differ in their interpersonal abilities, "with the right effort" these abilities "can be improved on." *Id.* at 44. But the field is young, and most of the efforts being made today to improve students' interpersonal and intrapersonal competency skills are taking place in primary schools. See, e.g., COLLABORATIVE FOR THE ADVANCEMENT OF SOCIAL AND EMOTIONAL LEARNING (CASL), YALE CHILD STUDY CENTER, STATUS REPORT (Sept. 1995); NORTH CAROLINA DEP'T OF PUBLIC INSTRUCTION, SAFE SCHOOL PROGRAM RESOURCE GUIDE (June 1994) (materials on file with author).

¹¹⁹ GOLEMAN, *supra* note 6, at 283-84.

¹²⁰ *Id.* at 189-94 (description of how approval and encouragement breed confidence and optimism in infants). "The impact of parenting on emotional competence starts in the cradle." *Id.* at 192.

¹²¹ *Id.* at 102-04 (evidence that empathy — the ability to read emotions — is located in the amygdala-cortical circuitry of the brain).

¹²² BUSH & FOLGER, *supra* note 40, at 268.

¹²³ *Id.*

¹²⁴ One of my students concluded at the end of her experience that she was not cut out for mediation. She was right: her reactions were always a beat slow; her interventions were usually off the mark; she simply didn't have the psychological and social skills to be successful in this work.

This observation — that some students are more psychologically adept than others — is hardly deep. Psychological adeptness and responsiveness are ingredients for success in all clinical programs. But these qualities seem to take on added importance in a mediation clinic, in part because the mediation process is so reactive and the opportunities for planning generally so limited, and in part because so many of the tasks one needs to perform to be successful at mediation require them.

Thus, in a litigation clinic, students who lack certain skills can compensate by planning carefully for lawyering tasks and then executing their plans under supervision. For example, a student who does not have naturally good client counseling skills can compensate by assiduously planning for a counseling session, knowing a good deal about her client's situation before the fact. The same is true, to varying extents, of other pretrial, negotiation and trial tasks, which place a premium on skills and abilities such as research, writing, analysis, story telling, verbal acuity, argumentation, perseverance, attention to detail and a sense of drama, to name a few. Most of these tasks can be planned for, and the supervisor can assist the student in executing the plan. There are many ways for a litigation clinic student to have a successful experience.

The opportunities for a successful experience are more limited for the mediation clinic student lacking skill in interpersonal dynamics. I do not wish to overstate this point. As I have argued earlier, two different visions of mediation are prevalent today, and one of them calls upon mediators to make legal predictions and negotiate deals.¹²⁵ Students who are talented at case evaluation, persuasion and argumentation will be successful at settling cases that can be resolved on narrow technical or legal grounds. Moreover, analytical skills certainly matter a good deal in mediation, as for example in the ability to assist the parties in developing a coherent agenda or systematically canvassing options for settlement.

But psychological adeptness cuts very deep in mediation too. It is the foundation of good listening and good facilitation and at the root of much of what we call "problem-solving." (Even if a student is skilled at canvassing options analytically, this will be of little avail to the parties if the student has not isolated and identified their true underlying interests or created a cooperative atmosphere in which these interests can be weighed and integrated.¹²⁶) Moreover, the student

¹²⁵ See text accompanying notes 22-23 *supra*.

¹²⁶ Cf. MARGARET BAHNIUK, *TEACHING PROBLEM-SOLVING: A TOUGH ASSIGNMENT* (July 1983) (effective problem-solving requires isolating and identifying the real problem, gathering high quality data, analyzing the data, listening alternatives, and applying the

who is not psychologically adept is unlikely to have any success in dealing with the deeper, relational aspects of the disputants' conflict, which in many cases will hold the key to a truly satisfying resolution. Finally, for reasons which I describe in the next section, a supervisor may find it difficult to assist her students if they lack the psychological acuity to respond quickly to the needs of the parties in the hurly-burly of mediation.

D. The Teacher's Role During and After a Mediation Session

1. Issues in Mediation Supervision

In a previous article, some colleagues and I examined the tension in clinical supervision between giving students broad authority to carry out lawyering tasks in order to promote their learning, and intervening in their performance to assure high quality client service.¹²⁷ If the recent CLEA Workshop on ADR clinics is any indication, mediation clinicians are deeply concerned about when, why and how a supervisor should intervene in a student's mediation performance.¹²⁸ The unpredictable nature of mediation, the difficulty of planning for it and the precarious authority of student mediators, are all factors that affect mediation supervision and give rise to some unique supervision problems.

When I began supervising students in mediation, I assumed that the relatively low stakes of mediation would militate against much supervisory intervention. The settings in which my students were practicing were, for the most part, settings in which the parties would proceed to litigation (more or less expeditiously) if mediation failed. Mediation was unlikely to damage the parties' relationship; at worst, it would waste their time and perhaps cost them additional attorneys' fees. Here was a setting, I thought, in which I could mostly sit back and observe students' performance, so as to be able to provide good quality post-performance critique.

I did not realize how unruly the mediation process can sometimes be, and how often beginning students might be caught up short by the process. The nonlinear nature of mediation, the need to react quickly and intuitively to the parties, the difficulty or impossibility of planning

right tools to arrive at a solution); DEUTSCH, *supra* note 25.

¹²⁷ James H. Stark, Jon Bauer & James Papillo, *Directiveness in Clinical Supervision*, 3 B.U. PUB. INT. L.J. 35 (1993).

¹²⁸ Cynthia Savage's presentation, a simulation in which the audience was invited to "intervene" in a student mediation filled with gaffes and omissions, was a high point of the conference, producing animated discussion and debate. Cynthia Savage, "Supervisory Skills and Techniques in Mediation," CLEA Workshop on ADR Clinics, St. Louis, Mo. (May 7, 1995).

— all created incentives to intervene that I did not anticipate when I began.

By the same token, it is very awkward and difficult for a supervisor to interject herself into a student's mediation. As practiced in most settings, mediation is a consensual process: the parties voluntarily submit themselves to the authority of the mediator. The mediator's relationship to two disputants is likely in general to be more tenuous than the relationship of a lawyer to a client. The relationship lacks both the continuity and the presumption of loyal advocacy that characterizes a lawyer-client relationship; and, as noted earlier, the mediator must constantly monitor the effects of her interventions on two people rather than one. When a supervisor intervenes to assist a litigation clinic student, most clients in most circumstances will probably feel reassured. If a supervisor intervenes in a student's mediation — perhaps to balance some statement by the student that might appear to favor one disputant over the other, or to move the discussion in a different direction — one or both parties may end up feeling anxious or confused.

In addition, because the student and the supervisor probably have not collaborated in planning the mediation — indeed, because ongoing collaboration is not a characteristic of the mediation clinic student-teacher relationship — *their* relationship may be more tenuous as well. Supervisory interventions that might be perceived as helpful and supportive in a client representational clinic may be experienced, by some students at least, as disconcerting and intrusive in a mediation setting.¹²⁹ Regrettably but inevitably, I think, the price a mediation clinician pays for her extra time, free from all those student conferences, is some loss of a sense of intimacy and collegiality with students.¹³⁰ The supervisor remains more of an authority figure than a teammate, and, as a consequence, may wish to supervise with a lighter touch, to diminish the chances of undermining students' self-confidence.

The net of all this is that the mediation supervisor is likely to feel sharply contradictory impulses as her students' mediations proceed.

¹²⁹ One student wrote, for example, "I did not feel comfortable in my role because I was not quite sure what [the supervisor's] role was I was not at all under the impression that the supervisor/observer would be charting out the course of the mediation for us. I thought, for example, that it would be up to us whether we wanted to mediate as a team of three or as a team of two, with the third student observing I feel that my co-mediator and I were sitting in the 'power seats' but were not actually feeling that the power was ours."

¹³⁰ On intimacy in the clinician-student relationship, see generally Kathleen A. Sullivan, *Self-Disclosure, Separation, and Students: Intimacy in the Clinical Relationship*, 27 IND. L. REV. 115 (1993); Jennifer P. Lyman, *Getting Personal in Supervision: Looking For That Fine Line*, 2 CLIN. L. REV. 211 (1995).

She may wish to intervene on a microprocess level, focusing closely on the parties' interaction and assisting students to negotiate the various interactional minefields they encounter along the way. But a countervailing instinct tells her to sit off to the side, if possible out of the parties' line of sight, and to caucus with students only occasionally and outside of the parties' presence, so as not to undermine students' authority and self-confidence. If she does this, however, it is likely that her primary focus will be more on macro than micro issues, on helping her students identify possible solutions to the parties' overall dispute. It is not surprising, then, if mediation clinicians feel conflicted about how to supervise: these choices implicate not only questions of supervision theory and supervisory style, but, as we have seen, contrasting visions of the mediation process.¹³¹

2. *The Dynamics of Mediation Critique*

The difficulty of collaborating with students to plan for mediation puts a premium on high quality post-performance critique. I confess, however, that at times I have found it difficult to give students good feedback after their mediations. The nature of mediation is such that it presents less than ideal conditions for critique.

The best conditions for critique are those that permit the supervisor to focus, as singlemindedly as possible, on the *student's* performance, rather than on the details of what the client, witness, adversary or judge is saying, or on what the supervisor herself may wish to say or do. Under such conditions, the supervisor can take detailed, transcript-like process notes recording the student's statements, questions and interventions. Whatever subjects are selected by the student or the supervisor for discussion can then be analyzed concretely and with a high degree of attention to phrasing, nuance and timing.¹³²

Many variables will affect a clinical supervisor's ability to concentrate on the details of a student's performance on any given day. But three factors stand out in particular: first, the extent to which the responses of the person with whom the student will be interacting are known in advance or can reasonably be anticipated; second, the risk to the client and the resulting likelihood that the supervisor may wish to intervene to protect the client's interests; and, third, the inherent complexity of the interactions being observed. Judged against these vari-

¹³¹ See note 70 *supra*.

¹³² The educational theorist Madeline Hunter calls this "script-taping," which she considers an "essential tool" for effective supervision, permitting the observer and performer to play back the performance so that salient cause-effect relationships can be identified. See MADELINE HUNTER & DOUG RUSSELL, *MASTERING COACHING AND SUPERVISION* 13 (1990).

ables, and compared to other lawyering tasks that clinic students commonly perform, mediation presents challenging conditions for critique. Consider, for comparison purposes, three cases:

Direct Examination. A student's direct examination of her client is perhaps the easiest type of performance for a clinician to critique. All the relevant facts should be known, and the shape and content of the examination should have been carefully planned and sculpted in advance, with the supervisor's assistance. If surprises occur, they should be at the margins. There ought to be little reason for the supervisor to intervene in the student's performance. As a consequence, the supervisor can sit back and evaluate the performance, and the plan that produced it.

Client Interviewing. An initial client interview is a slightly more challenging task to critique, but still relatively easy. Few, if any, of the facts are known in advance and planning is difficult. But the risks are low and, perhaps as a consequence, previous research indicates that most supervisors do not intervene much in students' performance.¹³³ In addition, the clinician need not concern herself with recording information that the client relates; that is the student's job, and if a lawyer-client relationship is established, there will normally be plenty of time to fill in the details.¹³⁴ Taking good notes on the student's interventions and providing good quality feedback should not be difficult under these conditions.

Negotiation. Critiquing a student's negotiation with an opposing lawyer is more difficult. Negotiation is inherently a complex and fast-paced activity. The opposing attorney's tactics, statements and positions can never be fully known in advance, and need to be closely monitored by the supervisor. Because surprises often occur and a student's mistake may pose great risks to the client, the supervisor may wish to intervene at times to assist. Still, much in negotiation is known in advance: the basic facts of the case, which factual and legal propositions are contested, and the client's interests, priorities and bottom line, for example. And much can be planned, including concession patterns and strategies for informational bargaining.¹³⁵ The supervisor ought to be able to monitor whether the student keeps

¹³³ See Stark, Bauer & Papillo, *supra* note 127, at 44, 49 (89% of survey respondents favored little or no participation by clinical supervisors in initial client interviews, although a greater number appear to behave more directly in practice).

¹³⁴ Of course, this will not always be the case. A criminal clinic student's interview of a client immediately preceding a bail hearing, for example, occurs under conditions of significant time pressure; the student's bail argument will often be based wholly on what the student learns in a brief, pressured, cellblock interview.

¹³⁵ See, e.g., DONALD G. GIFFORD, *LEGAL NEGOTIATION: THEORY AND APPLICATIONS* 45-72 (1989); BASTRESS & HARBAUGH, *supra* note 37, at 412-28, 473-86.

to, or deviates from, her plan and provide good quality feedback.

Mediation, Compared. Compared to these three activities, and for reasons already described, the dynamics of a mediation critique can be very challenging. As in negotiation, the supervisor may find herself concentrating on whether, when and how to intervene to assist the struggling student, rather than on what the student is saying or doing at any particular moment. However, in contrast to negotiation, often little or nothing will be known in advance about the case or the parties, other perhaps than the bare outlines of the dispute. The parties' interaction itself may be complex and tense, and the historical facts may emerge in a confusing, disjointed way. Even a determinedly non-interventionist supervisor will feel a need to attend to the details underlying the dispute ("What was the plaintiff's documentary proof of her claim for damage to the linoleum? Is it sufficient?") if she is going to be able to provide feedback to students on their overall analysis of the case or their evaluations to the parties. Thus, even experienced and able supervisors may find it difficult to provide students with detailed feedback on their choice of language, their timing and their tone.

I do not wish to overstate this point either. Even if supervisors cannot give concrete feedback on the *details* of language and tone, they should be able to provide helpful critique to students on a more general level. Students can be encouraged to reflect deeply on their own experiences, through journals and classroom discussions. But if mediation clinicians are deprived of the many "teaching moments" generally available to other clinicians through months of collaboration and planning with students, one wishes that mediation post-performance critique were less complex.

III. PERSPECTIVES AND VALUES: AN INTRODUCTION

Given all the challenges of mediation skills training, supervision and critique, the reader may wonder: WHY BOTHER? A full exposition of the reasons must await a future article, but in this section I want to sketch a few of the reasons why I believe clinical training in mediation to be important work for a law school and richly rewarding work for the students and professors who do it.

First, whatever shortcomings a mediation clinic may present as a forum for skills training are compensated for by the unique, critical perspective on legal conflict and legal institutions that a mediation clinic can engender in students. Mediation training is training against the dominant paradigm, and in certain respects, is subversive of values deemed fundamental in American legal culture. But the subversive nature of mediation, I believe, makes its teaching more, rather than

less, important in law schools.

The most distinctive feature of a mediation clinic, of course, is that it places students in the role of neutrals rather than partisans. In litigation clinics, we train and prepare students to take sides on behalf of a client; in mediation clinics, we try to help our students not to. This fundamental shift of focus is subversive of the values of adversary justice, because it promotes the expression of parallel concern for both sides to a controversy, rather than single-minded devotion to one client. And yet, paradoxically, I believe that a mediation clinic can do more to foster in students ideals of party empowerment and self-help than, for all our talk of "client-centeredness," a litigation clinic possibly can.

The experience of managing others' disputes — of steering and guiding and trying to control the conduct of parties and their lawyers — also fundamentally alters mediation clinic students' understanding of conflict. The experience powerfully demonstrates to students that, to many persons caught up in legal conflict, the psychological, relational and spiritual aspects of that conflict can be experienced as equally important as, or more important than, the legal or distributional aspects. This, of course, is a message that is also conveyed in our literature on client counseling. But it is often lost sight of in litigation clinics, and, I believe, experienced far more deeply in the context of mediation.

In addition, to a greater or lesser extent, a mediation clinic is inherently subversive of the importance of "law" in resolving legal disputes. As we have seen, some of the mediation literature is anti-law in the sense that it questions the appropriateness of mediators invoking legal rules and making legal predictions in mediation practice.¹³⁶ It is possible to select mediation settings for students in which process is all, and legal rules are wholly or largely irrelevant. Depending on the forums in which students are placed, they may be exposed to court administrators and others who are deeply critical of the role lawyers play in fostering and festering conflict. But even if the mediation clinician rejects — as I have — some or all of these viewpoints and exposes her students to settings in which law matters, the experience of doing mediation fosters in students a deep understanding that law is not *all* that matters: that values such as recognition, cooperation, civility and forgiveness often matter as much or more as notions of distributive justice.

Mediation clinics also hold out considerable promise of fostering an integrative, problem-solving orientation to the practice of law. At

¹³⁶ See text accompanying notes 73-78 *supra*.

this stage in the development of my clinic, I am agnostic on the question of whether the creative aspects of problem-solving can systematically be taught. But I have no doubt that the experience of doing mediation affects students' *attitudes* about problem-solving, and that students in a mediation clinic will more readily adopt a problem-solving stance to negotiation than students in a litigation program.

In addition, the experience of doing mediation has the potential to stimulate deep ethical introspection on the part of students, because they are thrust into a role in which they must examine the justice and fairness of their own actions. Of all the ethical questions that arise in mediation, none is more central to the mediator's role, or more vigorously contested, than the "neutrality vs. fairness" debate. As David Greatbatch and Robert Dingwell have observed, much of the enthusiasm about mediation stems from its commitment to individual self-determination.¹³⁷ The mediator is expected to enhance self-determination, treating each party with equal dignity and respect, resisting paternalism and authoritarianism, and avoiding imposing the mediator's own view on the merits of either side.¹³⁸ But what if a powerful disputant threatens to impose on a weaker disputant a settlement that seems unfair when measured against some external standard of justice? Greatbatch and Dingwell convincingly argue that "[t]he tension between the professed commitment to self-determination and the imposition of an overriding ethical code remains unresolved by the mediation movement."¹³⁹

Many mediation critics, writing primarily from the left, have argued that mediation systematically harms the powerless and provides second class justice.¹⁴⁰ For any student who takes her responsibilities seriously, the experience of doing mediation raises jurisprudential questions that are deep and fascinating. However, my principal interest as a clinician has been on how the tension between neutrality and justice plays out in students' own mediations and affects their ethical development and their views about procedural justice. In a litigation clinic, I have found, students can generally fall back on systematic procedural protections, basic to the adversary system, to guarantee a sense of fair results. They therefore often do not concern themselves too much with issues of "fairness" in their own clinical work. In a mediation clinic, by contrast, a central question that students must regularly ask themselves is: "Am I being fair?" For many students, the mediation experience promotes deeper concern about issues of

¹³⁷ See generally Greatbatch & Dingwell, *supra* note 48.

¹³⁸ *Id.* at 614-15; see also STULBERG, *supra* note 25, at 8, 37.

¹³⁹ Greatbatch & Dingwell, *supra* note 48, at 615.

¹⁴⁰ For some representative writings, see note 18 *supra*.

social justice and sometimes, paradoxically, deeper respect for proceduralism, than may be possible to achieve in a litigation setting.

Finally, there is no ignoring the spiritual side to mediation, although this is a side that seems to make many observers nervous. Mediation emphasizes the fundamental connectedness between people. It offers lawyers opportunities to heal as well as win. It is food for the heart and the soul as well as the intellect. And it seems to resonate deeply for a significant segment of students, some — perhaps many — of whom are turned off by the dominant messages of law school and American legal culture.

I thus conclude that while a mediation clinic may not be the most effective forum for professional training, it is a most powerful context in which critically to examine law and legal institutions. I believe that the perspectives gained by students in a mediation clinic are uniquely important. Indeed, to state my conclusion as provocatively as I can, a mediation clinic — despite its shortcomings as a forum for skills training — is the only clinic that I could conceivably imagine *requiring* of all law students if I were the czar of a law school. And after two years of immersing myself in this work, I confess: I would not be doing anything else.

But that's another story, to be told (next month? next year?) in the exciting sequel to this article: "Further Ruminations on the Establishment of a Mediation Clinic." I hope you'll tune in.

ADR CLINIC DIRECTORY 1995

EXISTING CLINICS¹

School: BRIGHAM YOUNG UNIVERSITY

Clinic Name: Mediation Externships

Address: 430 JCRB, Brigham Young University, Provo, UT 84602

Contact: James Backman or Susan Griffith

E-Mail Address: backman@lawgate.byu.edu

Tel.: (801) 378-2221

Fax: (801) 378-2188

Mediation externships offer 2-6 unit, ungraded, placements for 4-8 students per semester/summer. Students are generally accepted if they apply and, following 20 hours of intensive training, mediate in small claims court, for the state Industrial Commission or arbitrate for the BYU Off-Campus Housing administration. Students are required to have completed either a Negotiations or ADR class. They are supervised by the professor and placement supervisors. The externships have been available since 1993.

School: UNIVERSITY OF CALIFORNIA, LOS ANGELES

Clinic Name: Mediation and ADR

Address: UCLA Law School, 405 Hilgard Ave., Los Angeles, CA 90024

Contact: Carrie Menkel-Meadow

E-Mail Address: meadow@law.ucla.edu

Tel.: (310) 825-3497

Fax: (310) 206-1234

The Mediation and ADR clinic is a 5 unit, 1 semester graded program. 12-15 students, chosen by lottery/wait list mediate (at the law school) campus cases referred by the Ombudsman; and landlord-tenant, community, education and juvenile-civil disputes at a local community DR center and at Santa Monica and Los Angeles courts. The course consists of 60 hours of classroom work, with an intensive weekend of training before students serve as neutrals. Students begin as neutrals after 2 months of classroom instruction and all actual mediations are supervised by faculty. The program has been in operation since 1991.

¹ School name underlined indicates new or revised material as of this edition.

School: BENJAMIN CARDOZO SCHOOL OF LAW

Clinic Name: Cardozo Mediation Clinic

Address: 55 Fifth Avenue, NYC, NY 10003

E-Mail Address: love@yul.yu.edu

Contact: Lela P. Love

Tel.: (212) 790-0365

Fax: (212) 790-0345

The Cardozo Mediation Clinic is an 8 credit, 2 semester, graded program. 16 students, chosen from a pool of approximately 100 applicants on the basis of an interview, their prior experience and their references, mediate cases in a community dispute resolution center, while pursuing an academic program of study and research at the law school. There is a weekly 3 hour seminar and 32 hours of intensive mediation training. The Clinic has been in operation since 1985.

School: CHICAGO-KENT COLLEGE OF LAW

Clinic Name: Mediation and ADR

Address: 565 W. Adams, Suite 600 Chicago, IL 60661

Contact: Pamela Kentra

Tel.: (312) 906-5052

Fax: (312) 906-5299

The Mediation and ADR clinic is a 4 unit, one semester program, which students may elect to continue for a second semester. Approximately 10 students are chosen from a school-wide lottery system. Students are given 36 hours of training and certified as mediators. They then mediate cases in county courthouses, focusing primarily on landlord/tenant disputes and small claims cases. The program has been in operation since 1995.

School: CUNY LAW SCHOOL

Clinic Name: Mediation Clinic of Main St. Legal Services, Inc.

Address: 65-21 Main St., Flushing, NY 11367

Contact: Beryl Blaustone

Tel.: (718) 575-4273

Fax: (718) 575-4478

The Mediation Clinic is a 1 semester, 12 credit program in which 3-7 students who have been screened by the professor, mediate family, community, employment and criminal matters at the law school and a community dispute resolution center. The clinic includes 2 1/5 hours of class twice each week and completion of a 4 credit second year lawyering seminar is a prerequisite to enrollment. Students are super-

vised by the professor. The clinic began operation in 1995.

School: COLUMBIA LAW SCHOOL

Clinic Name: Mediation Clinic

Address: 435 West 116th St., NYC, NY 10027

Contact: Carol B. Liebman

E-Mail Address: cliebman@lawmail.law.columbia.edu

Tel.: (212) 854-8557

Fax: (212) 854-3554

The Mediation Clinic is a 5 credit, 1 semester, graded program. 8 students, chosen by lottery, mediate in a community dispute resolution center, private family services agency and selected cases at the law school. There is a weekly 3 hour seminar and 40 hours of intensive mediation training. The Clinic has been in operation since 1992.

School: UNIVERSITY OF CONNECTICUT SCHOOL OF LAW

Clinic Name: Mediation Clinic

Address: 65 Elizabeth St., Hartford, CT 06105

Contact: James H. Stark

Tel.: (203) 241-4679

Fax: (203) 297-4414

The Mediation Clinic is a 4 credit, one semester, graded program. 14 students, chosen by lot, mediate community criminal disputes, housing, small claims matters, child custody and visitation disputes (in collaboration with Family Relations mediators) and employment discrimination cases involving claims under ADA referred by the Conn. Commission of Human Rights and Opportunities. Students receive approximately 20 hours of mediation training before they begin serving as neutrals, and spend approximately 40 hours in seminar and out-of-class simulations over the course of the semester. The Mediation Clinic has been in operation since 1994.

School: UNIVERSITY OF DENVER COLLEGE OF LAW

Clinic Name: Mediation and Arbitration Center

Address: 7039 E. 18th Street, Denver, CO 80220

Contact: Cynthia Savage

E-Mail: csavage@lib.law.du.edu

Tel.: (303) 871-634

Fax: (303) 871-6847

The Mediation and Arbitration Center is a 5 credit, 1 semester,

graded program. 14 students serve as neutrals in a law school and county court based clinic, serving in small claims, landlord-tenant, community, employment and criminal matters. There is a weekly 3 hour seminar and 30 hours of intensive training as a neutral. The Center has been in operation since 1988.

School: DICKINSON SCHOOL OF LAW

Clinic Name: ADR Clinic

Address: 45 N. Pitt St., Carlisle, PA 17013

Contact: Peter N. Kutulakis or Robert M. Ackerman

Tel.: (717) 249-4665

Fax: (717) 243-3639

The ADR Clinic is a 1 credit, 1 semester ungraded program. Three students mediate (primarily, though they occasionally arbitrate) cases from the docket of the Dickinson Law School Mediation Center. They handle cases involving family, small claims, landlord-tenant and minor criminal matters. They may soon start mediating employment and housing discrimination cases. Students are screened and receive 28 hours of training prior to serving as neutrals. The ADR survey course is a prerequisite in addition to training in the clinic. The course includes 14 classroom hours, one hour weekly. Students are supervised by the professor. The clinic has been in operation since 1993.

School: FORDHAM LAW SCHOOL

Clinic Name: Mediation Clinic

Address: 140 West 62nd Street, New York, NY 10023

Contact: Jacqueline Nolan-Haley

Tel.: (212) 636-6849

The Mediation Clinic is a 3 credit, 1 semester, graded program. 15 students mediate cases in Small Claims Court. There is a weekly 2 hour seminar and 30 hours of intensive mediation training. The Clinic has been in operation since 1987.

School: GONZAGA LAW SCHOOL

Clinic Name: Mediation Clinic

Address: P.O. Box 3528, Spokane, WA 99220

Contact: Larry A. Weiser

E-Mail: larryw@gulaw.gonzaga.edu

Tel.: (509) 324-5791

Fax: (509) 324-5805

The Mediation Clinic is a 3 credit, 1 semester, graded program in which 3 (currently) screened students mediate small claims, landlord/tenant and community cases at the law school, small claims court and a community dispute resolution center. Students receive 40 hours of intensive training over two weekends prior to acting as neutrals, and participate in a weekly class thereafter. They are supervised by the professor. The clinic began operation in 1995 and expects to expand.

School: HAMLINE UNIVERSITY SCHOOL OF LAW

Clinic Name: Family Law Mediation Clinic

Address: 1536 Hewitt Arenne, St. Paul, MN 55104

Contact: Jim Coben

E-Mail Address: jcoben@seg.hamline.edu

Tel.: (612) 641-2137

Fax: (612) 641-2236

The Family Law Mediation Clinic is a one or two semester, 3 credit per semester program. Approximately 12 students represent clients in divorce and family matters using mediation where appropriate; students also act as mediators in small claims and landlord-tenant matters. Students for the full year program are screened. All students receive 25 hours of training prior to acting as neutrals. There is a classroom component meeting twice each week plus intensive training at the beginning of the semester including one all-day weekend session. The clinic has been in operation since 1991.

School: UNIVERSITY OF HAWAII RICHARDSON LAW SCHOOL

Clinic Name: Mediation Clinic

Address: 2515 Dole St., Honolulu, HI 96822

Contact: Benjamin L. Carroll, III

Tel.: (808) 521-6768

Fax: (808) 538-1454

The Mediation Clinic is a 2 credit, 1 semester pass/fail program. 15 students mediate cases in a community dispute resolution center and at Small Claims court. They handle cases involving neighbors, family, landlord-tenant, consumers and juvenile restitution. The course consists of a weekly 2 hour class and mediations are conducted outside class times. Students receive 24 hours of training prior to acting as neutrals; they observe and then co-mediate with experienced mentors from the community center. Students are supervised by the professor

and experienced mediators. The program has been in operation since 1992.

School: INTER-AMERICAN UNIVERSITY OF PUERTO RICO SCHOOL OF LAW

Clinic Name: Community Law Office

Address: 85 Federico Costa St., Hato Rey, Puerto Rico 00918

Contact: Maria D. Fernos

Tel.: (809) 751-1600

Fax: (809) 751-1867

The Community Law Office is a 4 credit per semester, 2 semester, graded clinic in which 5-10 students per semester negotiate family, small claims, landlord/tenant and employment matters at the law school on behalf of parties referred by a local legal services program. Students receive 12 hours of intensive training prior to becoming neutrals and participate in class 4 hours per week. The clinic began operation in 1995.

School: UNIVERSITY OF MARYLAND SCHOOL OF LAW

Clinic Name: Mediation Clinic

Address: 500 W. Baltimore St., Baltimore, MD 21201

Contact: Roger C. Wolf

Tel.: (410) 706-3836

Fax: (410) 706-5856

The current clinic (see also Proposed) is a 4 credit, 2 semester, graded mediation program. 12 Law and Social Work students are selected to mediate Children In Need of Assistance (CINA) cases where a Dept. of Social Services counselor has filed a petition to remove a child. Students receive approximately 40 hours of intensive training, including substantive work and co-mediation with supervisors, prior to serving as neutrals. The course consists of a minimum 2 hours of class per week and student mediations which take place at the court during the day and at the law school at night. Students are supervised by the professor and a MSW. The clinic has been in operation since 1992-93.

School: UNIVERSITY OF MISSOURI-COLUMBIA
Clinic Name: Community Mediation Service
Address: 104 Hulston Hall, Columbia MO 65203
Contact: Deborah Doxsee
E-Mail Address: doxsee@law.missouri.edu
Tel.: (314) 882-2020
Fax: (314) 882-3343

Community Mediation Service is a 1-2 credit, 1 semester, graded program. 6-10 students who have completed or are concurrently enrolled in a substantive Mediation course, mediate cases in a law school-based program, serving in visitation, small claims, landlord-tenant, community, criminal, consumer, contract and business matters. Cases are referred to the clinic from the community, Municipal Court, and the Division of Child Support Enforcement. Students receive 30 hours of intensive mediation training and participate in a 1 and 1/2 hour seminar each week. The program has been in operation since 1988.

School: NOVA SOUTHEASTERN UNIVERSITY SHEPARD BROAD LAW CENTER

Clinic Name: Juvenile Mediation Program
Address: 3305 College Ave., Ft. Lauderdale, FL 33314
Contact: Fran Tetunic
Tel.: (305) 452-6139
Fax: (350) 452-6226

The Juvenile Mediation Program is a not-for-credit, 2 semester program. Student mediators are paid by the Law Center. Approximately 20 students are selected by application and screening; they mediate juvenile restitution, diversionary and parent-child cases referred by the state attorney, court and community organizations. Students receive 18 hours of intensive training prior to serving as neutrals and are supervised by the professor and the program director. The program was begun under federal grant and has been in operation since 1991.

School: THE OHIO STATE UNIVERSITY COLLEGE OF LAW

Clinic Name: Mediation Clinic
Address: 55 West 12th Ave., Columbus, OH 43210
Contact: Nancy Rogers
E-Mail Address: nrogers@magnus.acs.ohio-state.edu
Tel.: (614) 292-4223
Fax: (614) 292-1383

The Mediation Clinic is a 1 semester, 4 credit, graded course. 15 stu-

dents per semester participate in 4 hours of class per week and also mediate small claims, landlord/tenant and general civil cases in the municipal court. Approximately half of each students mediations are supervised by an attorney from the law school. The clinic has been in operation since 1983.

School: UNIVERSITY OF OREGON SCHOOL OF LAW

Clinic Name: Mediation Clinic

Address: 44 W. Broadway, Suite 202, Eugene, OR 97401

Contact: Julia Gold

E-Mail Address: jgold@law.uoregon.edu

Tel.: (503) 683-4921

Fax: (503) 683-5143

The Mediation Clinic is a 3 credit, 1 semester ungraded course. 10 students, usually selected by lottery, mediate family, small claims and landlord-tenant cases in small claims court. The students receive 36 hours of training prior to acting as neutrals. In addition, there is a weekly 2 hour class. Students are supervised by the professor and other experienced mediators. The clinic has been in operation since 1994.

School: UNIVERSITY OF PENNSYLVANIA

Clinic Name: Mediation

Address: 3400 Chestnut St., Philadelphia, PA 19104

Contact: Douglas Frenkel

E-Mail Address: dfrenkel@oyez.law.upenn.edu

Tel.: (215) 898-4628

Fax: (215) 573-2020

Mediation is a 5 credit, 2 semester graded course. 8 students, selected by lottery, mediate family court custody disputes, small claims and student-student campus disciplinary disputes. Students are also required to observe other neutrals in related settings and to work in a policy or program application of mediation (e.g., court or campus system design and/or evaluation). Students receive 20 hours of training prior to serving as neutrals and attend a weekly 2 hour class. They are supervised by the professor. The program has been in operation since 1986.

School: PEPPERDINE LAW SCHOOL
Clinic Name: Dispute Resolution Clinic (DRC)
Address: 24255 Pacific Coast Highway, Malibu, CA 90263
Contact: Cheryl B. McDonald
E-Mail Address: cmcdonal@pepperdine.edu
Tel.: (310) 456-4655
Fax: (310) 456-4437

The DRC is a 2 credit, 1 semester ungraded program. 8-10 students mediate small claims cases at selected courthouses. There is a weekly 2 hour seminar and a prerequisite Mediation Seminar (30 hour simulation) course. Students are supervised by the professor and by experienced attorney/mediator mentors. The DRC has been in operation since 1991.

School: FRANKLIN PIERCE LAW CENTER
Clinic Name: Juvenile/Corrections Mediation Program
Address: 2 White St., Concord, NH 03301
Contact: Dorie Shaw
Tel.: (603) 225-3350
Fax: (603) 229-0423

The Juvenile/Corrections Mediation Program is a 1 credit, 1 semester course. Approximately 6 students are admitted, having completed ADR I as a prerequisite. They receive 24 hours of training prior to serving as neutrals, and have 2 hours of class monthly. The program has been in operation since 1993.

School: FRANKLIN PIERCE LAW CENTER
Clinic Name: Small Claims Mediation Program
Address: 2 White St., Concord, NH 03301
Contact: Dorie Shaw
Tel.: (603) 225-3350
Fax: (603) 229-0423

The Small Claims Mediation Program is a 1 credit, 1 semester ungraded course. Approximately 8 students are admitted, having completed ADR I as a prerequisite. They receive 24 hours of training prior to serving as neutrals in small claims and landlord-tenant disputes. Students are supervised by the professor. The program has been in operation since 1991.

School: RUTGERS LAW SCHOOL - NEWARK

Clinic Name: Mediation

Address: 15 Washington St., Newark, NJ 07102

Contact: Jonathan Hyman

E-Mail Address: jhyman@andromeda.rutgers.edu

Tel.: (201) 648-1309

Fax: (201) 648-1248

Mediation is a 2 credit, 1 semester live practice component of a simulation seminar. 4-6 of the 12 seminar students are permitted (at their choice) to mediate consumer cases under the Consumer Affairs Dispute Resolution Program. In addition to a 2 hour class each week, students are given 8 hours of intensive training prior to acting as neutrals. They are supervised by mediators in the CADR unit. The clinic has been in operation since 1994.

School: ST. LOUIS UNIVERSITY

Clinic Name: Mediation Clinic

Address: 3700 Lindell, St. Louis, MO 63208

Contact: Miranda Duncan

Tel.: (314) 658-2778

Fax: (314) 658-3966

The Mediation Clinic is a 2-3 credit, 1 semester graded course. 8 students mediate small claims, family and landlord-tenant disputes at the court. Students are screened and are given 16 hours of training prior to serving as neutrals. There is 1 classroom hour per week and students are supervised by the professor. The clinic has been in operation since 1988.

School: SOUTH TEXAS COLLEGE OF LAW

Clinic Name: Mediation Clinic/Facilitated Negotiation Clinic

Address: 1303 San Jacinto, Houston TX 77002

Contact: Kimberlee K. Kovach

Tel: (713) 646-1890

Fax: (713) 646-1777

The clinics are 3-4 credit, 1 semester, ungraded programs. 8-10 students mediate or do facilitated negotiation in small claims court or in justice of the peace programs, serving in small claims, landlord-tenant, criminal, and truancy matters. There is a course prerequisite and a weekly 2 hour seminar. The mediation clinic has been in operation

since 1990.

School: SOUTHERN ILLINOIS UNIVERSITY SCHOOL OF LAW

Clinic Name: Alternative Dispute Resolution Clinic

Address: 114 Lesar Law Building, Mailcode 6821, Carbondale, IL 62901-6821

Contact: Mary Rudasill (Clinic Director) and Suzanne Schmitz (ADR Project Coordinator)

Tel: (618) 453-3257

Fax: (618) 453-8727

The ADR Clinic is a 3 credit (per semester), 1 or 2 semester (at the student's election), ungraded program. Approximately 12 students mediate cases from the campus and the community (landlord-tenant, family, employment, elderly) at the law school, a community dispute resolution center and at the Small Claims and Landlord-Tenant Courts. There are 2 course prerequisites and students are given 20 hours of intensive training prior to serving as neutrals. There is 1 hour of class per week. The ADR Clinic has been in operation since 1992.

School: TEMPLE UNIVERSITY

Clinic Name: Custody Mediation Clinic

Address: 1719 N. Broad St., Philadelphia, PA 19122

Contact: Eleanor Flannery

E-Mail Address: eflan@vm.temple.edu

Tel.: (215) 204-4544

Fax: (215) 204-1185

The Custody Mediation Clinic (begun Fall, 1994) is a 3 credit, 1 semester graded course in which 10 students mediate child custody matters referred from Legal Aid and community agencies. Students receive 16 hours of intensive training prior to serving as neutrals and meet for 2 hours of class biweekly. The students are supervised by the professor and a practicing attorney/mediator.

School: UNIVERSITY OF TENNESSEE COLLEGE OF LAW

Clinic Name: Mediation Clinic

Address: Knoxville TN 37996-1800

Contact: Grayfred B. Gray

E-Mail Address: gray@utkvx.utk.edu

Tel: (615) 974-6834

Fax: (615) 974-0681

The Mediation Clinic is a 3 credit, 1 semester, graded program. 12 students mediate at the General Sessions Court, serving in small claims, landlord-tenant, community, employment, criminal and torts matters. There are 23 and 1/2 hours of intensive mediation training included in 39 class hours. The Mediation Clinic has been in operation since 1993.

School: UNIVERSITY OF TEXAS
Clinic Name: Mediation Clinic
Address: 727 E. 26th St., Austin, TX 78705
Contact: Kimberlee K. Kovach
Tel.: (512) 418-8466
Fax: (512) 418-8466

The Mediation Clinic is a 3 credit, 1 semester program. 12 students, who have been screened, mediate in small claims court. They receive 40 hours on intensive training prior to serving as neutrals. The clinic has been in operation since 1995.

School: UNIVERSITY OF TOLEDO
Clinic Name: Dispute Resolution Clinic
Address: Univ. of Toledo College of Law, Toledo, OH 43606-3390
Contact: Elizabeth Guerra
Tel.: (419) 530-6108
Fax: (419) 530-2821

School: UNIVERSITY OF UTAH
Clinic Name: Mediation Clinic
Address: Univ. of Utah College of Law, Salt Lake City, UT 84112
Contact: Linda Smith
E-Mail Address: smith@admin1.law.utah.edu
Tel.: (801) 581-4077
Fax: (801) 581-6897

The Mediation Clinic is a 1 semester, 2 credit field placement (ungraded) for which a 3 credit skills class (graded) is a prerequisite. Approximately 12 students mediate family, small claims, juvenile and employment disputes. Mediation and negotiation training is provided in the classroom portion of the clinic. Students are supervised in their fieldwork by community mediators. The clinic began operation in 1995.

School: GEORGE WASHINGTON UNIVERSITY NATIONAL LAW
CENTER

Clinic Name: Consumer Mediation Clinic

Address: 2000 G. Street, N.W., Suite 200, Washington, D.C. 20052

Contact: Carol Izumi

E-Mail: carol@clinic.nlc.gwu.edu

Tel.: (202) 994-7463

Fax: (202) 994-4946

The Consumer Mediation Clinic is a 2-3 credit, 1 semester graded program. 10-12 students are selected through lottery to mediate, by phone from the law school, consumer-business disputes referred through outreach. Students participate in 2 hours of class each week plus 6-8 hours per week of clinic time. The clinic has been in operation since 1972.

School: UNIVERSITY OF WASHINGTON SCHOOL OF LAW

Clinic Name: Mediation Clinic

Address: 4045 Brooklyn Ave. N.E., Seattle, WA 98195

Contact: Lynne A. Cox

E-Mail Address: lcox@u.washington.edu

Tel.: (206) 543-3434

Fax: (206) 685-2388

The Mediation Clinic is a 7 credit, two quarter, ungraded program. 16 law students, and some lawyers for CLE, are selected by lottery to mediate campus disputes, small claims appeals, family, employment, criminal and consumer protection cases at a clinic adjacent to the campus. Students are given more than 36 hours of training prior to serving as neutrals and meet as a class once a week. They are supervised by the professor. The program has been in operation since 1992.

School: WESTERN STATE SCHOOL OF LAW

Clinic Name: ADR Clinic

Address: 2121 San Diego Ave., San Diego, CA 92110

Contact: Liz O'Brien/Ellen Waldman

Tel.: (619) 297-9700

The ADR Clinic is a 2 credit, 1 semester, ungraded program. 8-12 students do case development and observe mediations at a community dispute resolution center. The students do 12 hours of internship per week. The program has been in operation since 1992.

PROPOSED CLINICS

School: UNIVERSITY OF ARKANSAS AT LITTLE ROCK
Clinic Name: Dispute Resolution Center
Address: 1201 McAlmont St. Little Rock, AR 72202-5142
Contact: Gerard F. Glynn
E-Mail Address: gfglynn@ualr.edu
Tel.: (501)324-991
Fax: (501) 324-9911

School: BOALT HALL, UNIVERSITY OF CALIFORNIA, BERKELEY
Clinic Name: Berkeley Community Law Center
Address: 3130 Shattuck Ave., Berkeley, CA 94705
Contact: Bernida Reagan
Tel.: (510) 548-4040
Fax: (510) 548-2566

The Community Law Center is a 1 semester, pass/not pass advocacy clinic in which students earn up to 4 credits. 15-20 students each semester represent, and negotiate on behalf of, clients in landlord/tenant and welfare cases under the supervision of the professor. The Center is interested in incorporating ADR into its existing program.

School: BOSTON COLLEGE LAW SCHOOL
Clinic Name: None yet
Address: 885 Centre Street, Centre St., Newton, MA 02159
Contact: Robert H. Smith
Tel.: (617) 552-4389
Fax: (617) 552-2615

School: CATHOLIC UNIVERSITY OF AMERICA, COLUMBUS SCHOOL
OF LAW
Clinic Name: None yet
Address: 3600 John McCormack Road N.E., Washington, D.C. 20064
Contact: Sandy Ogilvy
E-Mail: ogilvy@law.cua.edu
Tel.: (202) 319-6195
Fax: (202) 319-4498

School: CALIFORNIA WESTERN SCHOOL OF LAW
Clinic Name: None yet
Address: 225 Cedar St., San Diego, CA 92101
Contact: Mark I. Weinstein
Tel.: (619) 525-1458
Fax: (619) 696-9999

The school is thinking about a clinic and a course in ADR.

School: GONZAGA LAW SCHOOL
Clinic Name: (to be offered in the Spring of 1995)
Address: P.O.B. 3528, Spokane, WA 99220
Contact: Larry Weiser
Tel.: (509) 484-6091
Fax: (509) 484-5805

The Clinic will be a 2-3 credit, 1 semester, graded program. 3-5 students will mediate cases in small claims court and in a community dispute resolution center. There will be a 40 hour intensive mediation training program. The Clinic is being planned for Spring 1995.

School: HARVARD UNIVERSITY
Clinic Name: Family Mediation Project
Address: 122 Boylston St., Jamaica Plain, MA 02130
Contact: Cynthia Monteiro
E-Mail Address: monteiro@hulaw3.harvard.edu
Tel.: (617) 522-3003
Fax: (617) 522-0175

The Family Mediation Project is a 1 semester, 1-2 credit graded program in its pilot phase. 4-5 students co-mediate family matters at a legal services center. Students must have completed a basic and advanced training course and substantive training in family law prior to enrolling in the course. The clinic is expected to begin operation in Spring, 1996.

School: UNIVERSITY OF MARYLAND SCHOOL OF LAW
Clinic Name: Mediation Clinic
Address: 500 W. Baltimore St., Baltimore, MD 21201
Contact: Roger C. Wolf
Tel.: (410) 706-3836
Fax: (410) 706-5856

The law school plans to begin a Mediation Clinic in the 95-96 aca-

demic year. Students will do neighborhood mediations and cases diverted from the courts.

School: UNIVERSITY OF MARYLAND SCHOOL OF LAW

Clinic Name: Securities Arbitration Clinic

Address: 500 W. Baltimore St., Baltimore, MD 21201

Contact: Roger C. Wolf

Tel.: (410) 706-3836

Fax: (410) 706-5856

The law school plans to begin a Securities Arbitration Clinic in the 95-96 academic year.

School: NEBRASKA COLLEGE OF LAW

Clinic Name: None yet

Address: 1116 State Capital, Lincoln, NE 68509

Contact: David Landis

Tel.: (402) 471-2720

School: NORTH CAROLINA CENTRAL UNIVERSITY

Clinic Name: None yet

Address: 1512 S. Ashton Ave., Durham, NC 27707

Contact: M. Tom Ringer, Director, Clinical Programs

Tel.: (919) 560-6115

A grant proposal has been submitted for a Mediation Clinic.

School: QUINNIPIAC COLLEGE SCHOOL OF LAW

Clinic Name: None yet

Address: 275 Mt. Carmel Ave., Hamden, CT 06518

Contact: Carrie Kaas

Tel.: (203) 287-3333

School: ROGER WILLIAMS UNIVERSITY SCHOOL OF LAW

Clinic Name: None yet

Address: 10 Metacom Ave., Bristol, RI 02809

Contact: Carol J. King

E-Mail: cjk@rwulaw.rwu.edu

Tel.: (401) 254-4615

Fax: (401) 254-3525

UPDATED 11-13-95

Please contact Cheryl B. McDonald, Pepperdine University
School of Law, 24255 Pacific Coast Highway, Malibu, CA 90263 with
any changes or corrections. Fax: (310) 456-4437.
