

ADR EDUCATION FROM A LITIGATOR/EDUCATOR PERSPECTIVE

C. MICHAEL BRYCE[†]

Litigation through the years has significantly advanced the public interest and provided justice for those who otherwise have no real power to effectuate just results.¹ Without litigation, specific advances in civil rights,² consumer law,³ environmental protection,⁴ and other areas of the law would not have occurred. The one true leveling force has been an independent judiciary of both state and federal courts.

The landmark changes brought about by litigated case decisions would not have occurred through negotiation, settlement, mediation, or any other form of alternative dispute resolution (“ADR”). Many of these disputes simply were not amenable to being settled, compromised, or resolved, except in litigation. The nature of the issues, policies, parties, timing, intransigence, bias, appeals to justice, and other circumstances precluded any alternate form of dispute resolution.

[†] Associate Professor of Law and Director of Clinical Programs, University of Detroit Mercy School of Law. Many thanks to Professor David Gregory of St. John’s University School of Law for organizing the Transatlantic Perspectives on ADR Conference and to Frank Cavanagh and Joseph Murphy of the St. John’s Law Review for their wonderful assistance and editorial review. Additional thanks to Sunim Kim for essential input during the early drafts and for providing an understanding of Contemplation in Action.

¹ I approach Mediation Education from the perspective of a litigator and educator. Before teaching law school at St. John’s University School of Law, I was an environmental litigator, having worked on the Love Canal litigation for the New York Attorney General’s Office. Now as a Clinical Professor at the University of Detroit Mercy School of Law, my work continues in teaching students how to litigate. In so doing, I do not perceive litigation in the same negative context that many of the conference attendees do.

² See *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

³ See *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965).

⁴ See *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971).

Nevertheless, many, if not most, legal disputes today can avoid a litigation path. Many domestic relations cases are better resolved in forums other than courtrooms.⁵ The same can be said of cases involving drug and alcohol offenses.⁶ Even many commercial and environmental cases are now more amenable to arbitration⁷ and mediation.⁸

Moreover, when one considers that ninety-eight percent of "all" cases eventually settle prior to trial,⁹ a more expeditious and less costly method for settlement is seemingly necessary. ADR, and especially mediation, offer a way for resolving conflicts nearer to the beginning of a dispute rather than at the bitter end. In situations where litigation continues, the positions of the parties frequently harden. More energy and time are then required to unravel the conflicting positions, and a settlement only occurs after the parties reach the juxtaposed steps of the courthouse. A faster route to settlement would be more cost-effective and efficient, and hopefully would reach a resolution each party could accept and live with.

As in other areas of the United States, mediation in Michigan is becoming a major component of the legal system.¹⁰

⁵ See Bill Ezzell, Comment, *Inside the Minds of America's Family Law Courts: The Psychology of Mediation Versus Litigation in Domestic Disputes*, 25 LAW & PSYCHOL. REV. 119, 127 (2001).

⁶ See Judge Stephen C. Cooper, *The Carrot and the Stick*, 82 MICH. BAR J. 20, 22 (2003).

⁷ See Roger S. Haydock & Jennifer D. Henderson, *Arbitration and Judicial Civil Justice: An American Historical Review and a Proposal for a Private/Arbitral and Public/Judicial Partnership*, 2 PEPP. DISP. RESOL. L.J. 141, 147, 164-65 (2002).

⁸ See Matthew Patrick Clagett, Comment, *Environmental ADR and Negotiated Rule and Policy Making: Criticisms of the Institute for Environmental Conflict Resolution and the Environmental Protection Agency*, 15 TUL. ENVTL. L.J. 409, 412 (2002) (discussing the mediation of the Storm King Mountain dispute).

⁹ See JOHN R. VAN WINKLE, *MEDIATION: A PATH BACK FOR THE LOST LAWYER* 10-11 (2005) (discussing the vanishing existence of trials and the work of Professor Marc Galanter).

¹⁰ In Michigan, the court rules generally establish requirements for ADR. Mich. Ct. R. 2.410 allows judges to send cases to mediation after local courts had developed ADR plans. Mich. Ct. R. 2.411 provides the requirements for General Civil Mediation, and Mich. Ct. R. 3.216 provides the requirements for Domestic Relations Mediation. Forums for mediation in addition to court appointments and self-selected mediations include Friend of the Court Mediation, set forth in MICH. COMP. LAWS ANN. § 552.513 (West 2006), and Community Dispute Resolution Programs (usually by county), set forth in MICH. COMP. LAWS § 691.1551 (2006). Case Evaluation, Mich. Ct. R. 2.403, provides an independent form of resolution where a panel of attorneys hears the arguments of parties and then provides a monetary evaluation of the case. Tort cases in Michigan are mandated to go through the Case Evaluation

As mediation becomes even more integral to our legal system, it is fair to ask whether law schools in the United States are keeping pace with the far-reaching changes occurring in legal practice. Are law schools adequately teaching ADR to future lawyers? Are they universally developing courses in negotiation, mediation, and arbitration? Are they establishing clinics and simulations for doing ADR and for developing MacCrate skills?¹¹ Are they establishing ADR Centers and creating law school courses that offer ADR education across the curriculum? Are law schools really open to the innovative and unique educational methods utilized in teaching ADR, especially where the courses have student-faculty ratios that are far smaller than normal law classes? Do law schools recognize the importance of ADR in present day legal practice? Or, conversely, do law schools see ADR as some lesser settling activity, one that is not on a par with litigation or appellate practice?

Historically, legal education has focused predominantly on adversarial resolution of legal disputes. In fact, law schools are inherently adversarial in nature. They are competitive for admission, making law review, grades, graduating, passing the bar, getting the best jobs available, and eventually becoming a partner in a law firm, a judge, or a law professor.¹² The model for

process. MICH. COMP. LAWS. ANN. § 600.4901–4969 (2006). The number of mediation cases going through community dispute resolution programs has been growing significantly in Michigan. Nevertheless, a complete survey needs to be done to determine at what pace private mediations are growing and to determine also the growth of family law mediations.

¹¹ ABA, SECTION ON LEGAL EDUC. AND ADMISSION TO THE BAR, REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP (Jul. 1992), <http://www.abanet.org/legaled/publications/onlinepubs/maccrate.html> (identifying ten areas of lawyering skills necessary for developing into a competent attorney); see also Bruce J. Winick, *Using Therapeutic Jurisprudence in Teaching Lawyering Skills: Meeting the Challenge of the New ABA Standards*, 17 ST. THOMAS L. REV. 429, 429–32 (2005). Professor Winick discusses the more recent changes in the ABA Standards for Approval of Law Schools, specifically to Standard 302, which was amended in 2005 and now requires law schools to provide students educational opportunities not only in trial-related skills, but also in other professional skills important to lawyering in general. *Id.* Moreover, the centrality of simulations is highlighted by Professor Winnick and ADR courses are identified as the kind of courses that law schools should be offering to their students. *Id.*

¹² Karen A. Zerhusen, *Reflections on the Role of the Neutral Lawyer: the Lawyer as Mediator*, 81 KY. L.J. 1165, 1168 n.5 (1993) (citing Leonard L. Riskin, *Mediation and Lawyers*, 43 OHIO ST. L.J. 29, 43–44 (1982)); see also Leslie Larkin Cooney, *Heart and Soul: A New Rhythm for Clinical Externships*, 17 ST. THOMAS L. REV. 407, 413–14 (2005).

practice and for life learned in law school is one of triumphal adversarial domination. It is perceived that students must excel at this individualist dominance in order to be successful. Concepts like teamwork, cooperation, conciliation, mutual problem-solving, and peacemaking (maybe even studying together) are not normally considered a relevant part of legal education.

Law students, however, can become excellent attorneys without solely pursuing an adversarial individualism. They can do so by learning to work with others, including working with clients as counselors and eventually working with opposing counsel in reaching beneficial resolutions for each side.

To accomplish a "new" learning approach, significant institutional changes by law schools are required, regarding not only intellect and mind but heart and spirit as well.¹³ Innovations like these are already occurring in some sectors of the legal community¹⁴ and may eventually occur in legal education if the manner of its delivery can change.¹⁵

What follows is not so much an attempt to answer all of the questions about the sufficiency of American legal education or to fully expound on the adequacy of ADR education throughout every law school. Rather, the purpose is to identify certain beneficial aspects of mediation legal education, including the way it is effectively being delivered to law students, especially at the University of Detroit Mercy School of Law ("UDM"), and why mediation education is overall such an effective pedagogical approach to legal education.

¹³ See Deborah Maranville, *Infusing Passion and Context into the Traditional Law Curriculum Through Experiential Learning*, 51 J. LEGAL EDUC. 51, 57-58 (2001).

¹⁴ One group of attorneys seeking to alter the adversarial milieu and related lifestyle of attorneys is the Renaissance Lawyers. The Renaissance Lawyer Society states that its vision is to have "a legal system that is based on problem-solving, healing conflicts, and supporting us all in working and living together in peace." Renaissance Lawyer Society, About Renaissance Lawyer Society, <http://renaissance-lawyer.org/WhoWeAreRLS/whowearehome.htm> (last visited Jan. 24, 2007). Their mission is to "bring law and the legal community, its values and practices, into alignment with the gains of progress and social development in the whole of modern society." *Id.*

¹⁵ See Bethany Rubin Henderson, *Asking the Lost Question: What Is the Purpose of Law School?*, 53 J. LEGAL EDUC. 48, 77-79 (2003). In addition, the further development of Therapeutic Jurisprudence in legal education may well impact on the development of "new" forms of learning at law schools. See Winick, *supra* note 11, at 431.

We will first consider how mediation education is being offered at some pioneering law schools and next examine in depth how it is being offered through a two-stage program at UDM. Our examination will then view how mediation education unwittingly, but beneficially, utilizes numerous educational precepts inherent to Jesuit education.¹⁶ Use of these important and long-standing educational precepts amplify and enhance the pedagogical effectiveness of mediation education and underline why mediation education is such an excellent methodology for conducting legal education.

I. SOME LAW SCHOOLS HAVE BEEN DEVELOPING SIGNIFICANT ADR PROGRAMS AND CURRICULA FOR A NUMBER OF YEARS

A discrete number of law schools have been offering outstanding courses in ADR for a number of years. The following brief description of eleven of these schools and their courses and clinics is derived from data and descriptions contained in various law school web sites. Nine of the law schools discussed are ranked by U.S. News & World Report among the top eleven schools with an ADR specialty.¹⁷ Three of the schools in the top eleven are law schools with a Jesuit tradition, including: Marquette, Fordham, and Georgetown.

One of the highest ranked schools is the University of Missouri-Columbia School of Law, which has long been a leader in the field of ADR legal education. Over twenty years ago, the school integrated dispute resolution into its first-year courses.¹⁸ In the late 1990s, it pursued a three-year grant program, along with six other law schools, to develop a first-year ADR course curriculum for the six schools.¹⁹ Each of these schools has since moved forward to develop their own extensive ADR curricula and education.²⁰ A number of other law schools have also developed “Centers” or “Institutes” for ADR and its education. These Centers and Institutes offer a wide array of ADR courses and

¹⁶ See Father General, R.P. Peter-Hans Kolvenbach, *The Characteristics of Jesuit Education* (Dec. 8, 1986), <http://www.jesuitalumni.org>.

¹⁷ *America's Best Graduate Schools 2008, Exclusive Rankings (Law Schools)*, U.S. NEWS & WORLD REP., Mar. 30, 2007, at 46.

¹⁸ See Leonard L. Riskin, *Disseminating the Missouri Plan To Integrate Dispute Resolution into Standard Law School Courses: A Report on a Collaboration with Six Law Schools*, 1998 FLA. L. REV. 589, 591 (1998).

¹⁹ See *id.* at 590, 597.

²⁰ See *id.* at 602–05.

clinical opportunities for law students, as well as providing needed mediation services to the community.

A program centered in California is the Straus Institute for Dispute Resolution at Pepperdine University School of Law. The Straus Institute offers J.D. courses in Dispute Resolution as well as an L.L.M. program that offers degrees concentrating in arbitration, mediation, international dispute resolution, and litigation.²¹ Law students can participate in externships at Pepperdine by shadowing a mediator, doing a judicial externship, or helping organizations set up dispute resolution programs. In some cases, the externs are actually able to mediate. The Straus Institute also has a dispute resolution clinic that provides law students with opportunities to mediate cases in Los Angeles Superior Court.²² The Institute separately provides a certificate in dispute resolution program for its students and conducts programs for organizations outside of the academic setting. These include reconciliation and church programs as well as numerous business related programs. Moreover, Pepperdine's library has been given the largest collection of materials in the world on conflict resolution by the American Arbitration Association.²³

Hamline University School of Law similarly has an extensive Institute in ADR.²⁴ The Institute's focus is on globalization, but it also offers ADR courses in religious conflict, health care dispute systems design, and international aspects of restorative justice. In fact, the Institute offers over thirty other ADR courses and operates a web site with a database containing almost all of the mediation cases reported on Westlaw.²⁵

Cardozo School of Law has been a leader in developing an ADR curriculum, establishing the Kukin Program for Conflict

²¹ See Pepperdine University School of Law: LLM Program, http://law.pepperdine.edu/straus/academic_programs/llm.html (last visited Mar. 15, 2007).

²² See Pepperdine University School of Law: Practical Experience Opportunities, http://law.pepperdine.edu/straus/practical_experience_opportunities/ (last visited Mar. 15, 2007).

²³ See Press Release, Pepperdine University, School of Law Awarded the World's Largest Conflict Resolution Library (Oct. 2006), <http://www.pepperdine.edu/pr/releases/2006/october/aaa.htm>.

²⁴ See Dispute Resolution Institute at Hamline, http://www.hamline.edu/law/adr/dispute_resolution.html (last visited Mar. 15, 2007).

²⁵ See Hamline University School of Law: Introduction to Mediation Case Law Project, http://www.hamline.edu/law/adr/Mediation_Case_Law_Project/mediation_case_law_project_intro.html (last visited Mar. 15, 2007).

Resolution.²⁶ The Program's director, Professor Lela P. Love, is one of the more prodigious writers on ADR, and the Kukin Program itself includes a number of ADR courses, including international ones. Other courses include a mediation clinic, a conflict resolution journal, and an ADR certificate program, and the school conducts extensive conferences on ADR through various symposia.

The Willamette College of Law has had a Center for Dispute Resolution since 1983.²⁷ Courses offered at the Center include negotiation, mediation, and arbitration. A specialized certificate is offered to students if they complete an ADR concentration. The Center also contains a simulation bank of role-playing exercises and an extensive web site that lists recent developments in dispute resolution. Willamette also offers CLE classes in ADR to the local bar association.

Stanford Law School has the Gould Negotiation and Mediation Program.²⁸ The core curriculum for the Program is based on simulations and includes "seven sections of the Negotiation Seminar; two sections of Advanced Negotiation Seminar; a Mediation Seminar; an Interdisciplinary Seminar,"²⁹ and other courses in ADR. The courses are taught in small classes that are overseen by seven faculty members.

Harvard has one of the oldest ADR programs, which is known as the "Program on Negotiation" ("PON").³⁰ It is renowned in part because of the leading ADR scholarship produced by the project members, including, among other books: *Getting to Yes*,³¹ *Difficult Conversations*,³² and more recently *Beyond Reason*.³³ Another aspect of PON scholarship is the Clearinghouse, which publishes various ADR educational materials, including books and videos. PON also has a mediation

²⁶ See Kukin Program for Conflict Resolution, <http://www.cardozo.yu.edu/kukin/> (last visited Mar. 15, 2007).

²⁷ See Willamette College of Law Center for Dispute Resolution, <http://www.willamette.edu/wucl/cdr/> (last visited Mar. 15, 2007).

²⁸ See Stanford Law School Gould Negotiation and Mediation Program, <http://www.law.stanford.edu/program/centers/gnmp/> (last visited Mar. 15, 2007).

²⁹ *Id.*

³⁰ See Program on Negotiation at Harvard Law School, <http://www.pon.harvard.edu> (last visited Mar. 15, 2007).

³¹ See *infra* note 57.

³² See *infra* note 75.

³³ ROGER FISHER & DANIEL SHAPIRO, *BEYOND REASON: USING EMOTIONS AS YOU NEGOTIATE* (2005).

clinic that started in 1981 and a separate negotiation clinic. There, mediation clinic students handle "small claims, advanced civil, housing, family and divorce"³⁴ cases. Law students also participate in the Harvard Negotiation Law Review and in interdisciplinary courses and seminars.

The Moritz College of Law at Ohio State University has developed a significant ADR program.³⁵ Over twenty-five law faculty members offer some form of ADR education in the curriculum for the law school. Students have the opportunity to do externships and to earn a certificate in dispute resolution. Students also do mediations as part of the well-established mediation clinic. Other work includes participation in the Ohio State Journal on Dispute Resolution.

Fordham Law has a number of programs that involve various areas of ADR.³⁶ There is an extensive curriculum of courses, including Advanced Negotiation and Mediation, Commercial Arbitration, International and Inter-Ethnic Conflict, etc. There are also ADR clinics, including a Mediation Clinic, where students mediate cases in Small Claims Court, and a Securities Arbitration Clinic, where students represent clients in securities arbitrations at the New York Stock Exchange. Fordham also has developed the new Feerick Center for Social Justice and Dispute Resolution. The Center's goal is to create solutions for problems facing the urban poor. The work of the Center, among numerous other activities, includes a law school clinic to train students to use dispute resolution techniques to achieve social justice. Working conferences on urban problems are also a part of the Center's work.

Another developing program at Fordham is a Dispute Resolution Society. It is a student organization that looks to ADR as an alternative to traditional litigation. Many of the participants in the program are involved in interscholastic or international ADR moot court competitions where they have had significant success.

³⁴ Program on Negotiation at Harvard Law School, <http://www.pon.harvard.edu/education/hmp.php> (last visited Mar. 15, 2007).

³⁵ See The Ohio State University Moritz Law Alternative Dispute Resolution, <http://moritzlaw.osu.edu/programs/adr/> (last visited Mar. 15, 2007).

³⁶ See Fordham Law Conflict Resolution & ADR Program, <http://law.fordham.edu/ihtml/adr-2home.ihtml?id=212> (last visited Apr. 3, 2007).

Marquette Law School also has an extensive ADR program,³⁷ including courses centered on Family Law and ADR, Dispute Resolution in the Workplace, Restorative Justice, and ADR in the Sports Industry. The law school also has two clinics, a Mediation clinic and a Restorative Justice Clinic. In addition, various workshops are conducted, including one on the Negotiation of Business Transactions and another on Mediation Advocacy. The workshops are designed to incorporate theory and doctrine into practice. Two seminars are also offered on International Arbitration and International Conflict Resolution, providing an important understanding of ADR in the global polity. Like Fordham Law, Marquette also has an ADR society for students who participate in outside moot court competitions and do so with significant success. The society also brings in speakers on ADR, and the law students publish in the Wisconsin Association of Mediators (WAM) Journal.

And finally, at the Georgetown Law Center, the law students are finding numerous opportunities in ADR.³⁸ First, Georgetown discerns that its students should be exposed in first-year to ADR in their civil procedure course. Next, students should take a basic skills course, including potentially a seminar in ADR. Students can subsequently take other courses or seminars in ADR while also participating in the Barrister's Council. This is a student-run organization that operates moot court, mock trial, and ADR programs. Students who participate in the Barrister's Council division participate in interscholastic competitions, and Georgetown's ADR teams have been very successful. Georgetown in recent years has also established an academic chair in dispute resolution and a program in conflict resolution and legal problem solving—the Georgetown-Hewlitt Program. This program includes an LL.M degree track, an academic lecture program, and a Commission on Ethics and Standards in ADR.

By 2003, 184 law schools in the United States already offered 887 courses in ADR.³⁹ Forty-six law schools in the US

³⁷ See Marquette Law School, Alternative Dispute Resolution, <http://law.marquette.edu/cgi-bin/site.pl?adr/index> (last visited Apr. 3, 2007).

³⁸ See Georgetown Law, Alternative Dispute Resolution, http://www.law.georgetown.edu/curriculum/tab_clusters.cfm?Status=Cluster&Detail=4 (last visited Apr. 3, 2007).

³⁹ See University of Oregon School of Law, American Bar Association Directory,

had alternate dispute resolution clinics, thirty-one of which were mediation clinics. The number of mediation clinics and ADR courses is still increasing, exemplified by UDM's recent initiation of a mediation training course and a mediation clinic.⁴⁰

Nevertheless, it is not fully evident that law schools are keeping pace with the rapid growth of ADR in the legal field. The need for additional courses in ADR and pre-trial practice is driven by the demands of the new and revolutionary practice of law in the twenty-first century.⁴¹ The key will be to ensure that law students are exposed to ADR concepts before they graduate. This can be done through the offering of sufficient elective ADR courses or commensurately by mandating that each student participate in at least one ADR course while he/she is in law school.⁴²

II. INTRODUCTION TO THE UDM MEDIATION PROGRAMS

UDM School of Law has not as yet established an ADR Center or Institute, but it has initiated a two-stage mediation program that is becoming one of the most sought-after course programs at the law school.⁴³ Students who participate in the program complete both an "academic" forty-hour mediation training course (two-credits) and later, a mediation clinical course (two-credits). The two-stage program is one that can be initiated at most law schools without an overwhelming infusion

<http://www.law.uoregon.edu/aba/> (last visited Mar. 15, 2007).

⁴⁰ *See id.*

⁴¹ *See supra* note 11 and accompanying text.

⁴² In May 2006, the University of Detroit Mercy School of Law faculty voted to make clinical education a mandatory part of the curriculum. Each student, beginning with the 2008–09 school year, will be required to take one in-house clinical class or an externship class before graduation. The goal is to ensure that every student receives some experiential learning while they are in law school. Eventually, the intent is to have every student participate in an in-house clinic. Right now, for evening students, the Mediation Clinic is the best opportunity to do an in-house clinical class. It is anticipated that the Mediation Clinic will grow over the next few years to have fifty to sixty students participating in it throughout the entire year.

⁴³ The mediation training program at UDM is oversubscribed with applications by a ratio of 2.5:1 students to each class slot. The oversubscription results in a long waiting list. The reality is that getting a place in the mediation training program is now becoming one of the most highly coveted prizes in the law school. Because of this strong demand, two additional mediation training courses will be taught next year. In addition, the Mediation Clinic will be offered in both the fall and spring semesters.

of additional resources. The UDM model is being received well in Michigan and is also recognized by long-standing law school mediation educators.⁴⁴

III. THE DUAL MEDIATION TRAINING COURSES AT UDM

The baseline for mediation training is a forty-hour interactive course designed to develop abilities for bringing parties together in the midst of a dispute.⁴⁵ In Michigan, a forty-hour civil mediation training course must meet the mandate of Michigan Court Rule (“MCR”) 2.411. Specific requirements are set forth in the Mediator and Training Standards and Procedures (“MTSP”) established on January 4, 2001 and amended April 1, 2005 by the Office of Dispute Resolution, Michigan Supreme Court Administrative Office (“SCAO”).⁴⁶

The main structural requirement for a mediation training course in Michigan is the forty hours in the classroom.⁴⁷ The course includes a copious manual⁴⁸ and additional readings in the field of mediation. The curriculum must be amenable to multiple learning styles⁴⁹ and must be approved by the SCAO.⁵⁰

⁴⁴ Douglas Van Epps, the Director of the Office of Dispute Resolution for the Michigan Supreme Court Administrative Office (“SCAO”), has recognized the benefits of the two-stage UDM mediation program, and Professor Jacqueline Nolan-Haley of Fordham University School of Law, the author of extensive scholarship in mediation education, has commented that the two-stage mediation program allows the UDM mediation clinic to be a “Cadillac” clinic.

⁴⁵ The requirements for mediation training were developed by the SCAO and its ADR office, headed by Mr. Van Epps. The methods for the trainings developed, in part, out of trainings conducted by Professors Joseph B. Stulberg and Lela P. Love. See JOSEPH B. STULBERG & LELA PORTER LOVE, CONDUCTING THE MEDIATOR SKILL-BUILDING TRAINING PROGRAM (rev. ed. 1997) (on file with the SCAO). In 2000, Professor Stulberg participated as a consultant to the SCAO in developing the requirements for the mediation trainings. More recently, the amendments reflected in 2005 include input from other mediator trainers in Michigan. E-mail from Douglas Van Epps, Michigan Supreme Court Admin. Office Mediation, to author (Nov. 17, 2006) (on file with author). Training Courses at UDM are in fact taught by mediator trainers who studied and learned from both Professor Stulberg and Professor Love. Their influence and contribution is therefore evident in the structure and content of the UDM classes.

⁴⁶ OFFICE OF DISPUTE RESOLUTION STATE COURT ADMIN. OFFICE, MICH. SUPREME COURT MEDIATOR TRAINING STANDARDS AND PROCEDURES (2005), available at <http://courts.michigan.gov/scao/resources/standards/odr/TrainingStandards2005.pdf> [hereinafter MEDIATOR TRAINING STANDARDS AND PROCEDURES].

⁴⁷ See *id.* § 1.1.

⁴⁸ See *id.* § 1.4.

⁴⁹ See *id.* § 1.6.1.

⁵⁰ See *id.* § 4.0.

The mediation course can be conducted through lecture, demonstration, case studies, media, and role plays, or all of the above.⁵¹ Every student must eventually participate as a mediator in two long role playing exercises, including one hour as a mediator and then as a party.⁵² The role playing exercises are supervised by a ratio of at least one supervisor/coach to five students.⁵³

Each course is required to teach elements of mediation theory and practice, including:

- a) overview of training program
- b) ADR overview and mediation's place within the structure
- c) overview of the mediation process
- d) beginning a mediation
- e) mediator information gathering techniques
- f) crystallizing the negotiating agenda
- g) generating negotiation flexibility [and]
- h) meeting separately with the parties/representatives.⁵⁴

The course must also cover ethical questions that can arise in mediations.⁵⁵

During the two-week interstice that exists between the spring and summer semesters, UDM offers two simultaneous forty-hour Mediation Training courses. The two courses are conducted in accordance with the state guidelines, as set forth above. While both courses are based on the normal forty-hour training model, they each have a unique pedagogical basis of their own, including academic components that are taught in addition to the forty-hour training itself.

The purpose of copiously discussing the two UDM mediation training courses and the mediation clinic is to highlight the significant effectiveness of mediation legal education and to illustrate how mediation education is fulfilling long-standing theories of effective pedagogy.

⁵¹ *See id.* § 1.6.1.

⁵² *See id.* § 1.6.3(b).

⁵³ *See id.* § 1.6.3(d).

⁵⁴ *Id.* § 2.0. The requirements here reflect in part the BADGER acronym initiated by Professor Joseph B. Stulberg: B=Becoming (the opening), A= Agenda creation, D=Developing the agenda, G=Generating options, E=Escaping to caucus and R=Resolving the matter by finishing with a written agreement.

⁵⁵ *See id.* § 2.1(j).

A. WMC Mediation Interstice Training Course

The Wayne Mediation Center (“WMC”) mediation training program⁵⁶ is a somewhat unique program because it has twelve law students participating in the forty-hour training component with twelve community members who are also training to become mediators. The mix of law students and community members provides a kinetic milieu. Although the law students incorporate and participate in a separate academic component for the course,⁵⁷ they also learn from the community members, including practicing attorneys, in the basic forty-hour training. Strong bonds develop between the students, the community members, and the faculty. These bonds produce positive cross-pollination in cooperative active learning.

The WMC forty-hour mediation training class is completed in nine days. During the first eight days each class meets for four hours, and on the ninth day the class meets for eight hours of continuous role play.

On the first day, the faculty members model a mediation for students and explain what mediation is. The class analyzes various conflict styles and looks at what circumstances can lead to conflict. A video satirizing all conflict is then viewed and analyzed.

Using handouts and overheads, the second day’s class begins with a lecture on mediation, specifically looking at facilitative and evaluative methods.⁵⁸ The acronym **MEDIATE**⁵⁹ is

⁵⁶ The Wayne Mediation Center program is a community-based program created in part with funding from the State of Michigan. WMC’s Director, Howard Lischeron, and Assistant Director, Matt Vititoe, conduct a mediation training class for UDM during the two-week interstice in the spring.

⁵⁷ Law students who participate in the WMC Mediation Training also read ROGER FISHER & WILLIAM URY, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* (Bruce Patton, ed., 2d ed., Penguin Books 1991) (1981), and are required to write on different mediation issues posed by the faculty during the course. This usually means students write three pieces that are reviewed by the faculty, with then a quick turnaround and copious feedback. WMC is now considering additional readings for the academic component, including BERNARD S. MAYER, *THE DYNAMICS OF CONFLICT RESOLUTION: A PRACTITIONER’S GUIDE* (2000).

⁵⁸ A former debate about the merits of facilitative or evaluative mediation can be found in Lela P. Love & James B. Boskey, *Should Mediators Evaluate?: A Debate Between Lela P. Love and James B. Boskey*, 1 *CARDOZO ONLINE J. CONFLICT RESOL.* 1 (1999/2000), available at www.westlaw.com, 1 CDZOJCR 1.

⁵⁹ M=Measure readiness for mediation, E=Explain process, D=Draw out information and interests, I=Identify issues, develop agenda, and frame issues, A=Ask for options, T=Test options (using needs and interests) and negotiate, E=End

introduced to the students to represent specific components of a mediation and to also outline what is scheduled to be learned throughout the rest of the course.

The entire group next participates in a mock scripted exercise concerning an initial meeting (from hell) that occurs prior to a mediation. The exercise highlights all of the things that can go wrong at an initial meeting. The group concludes by evaluating the mediator's preparedness to actually begin the mediation. When the exercise is concluded, the students are questioned and debriefed about what they might have been done differently.

After the debriefing, the faculty members go on to separately model an opening statement of mediation for the students. This is designed to assist them in creating their own opening statements, which they will deliver the following day. The student openings are copiously critiqued and debriefed by the faculty after they are given the next day.

Subsequently, the students participate in an exercise on making assumptions.⁶⁰ The exercise contains nine questions, to which the only correct answer is: "I don't know." Notwithstanding this obvious answer for each question, the students labor to create elaborate assumptions and seek to provide different and wrong answers for each of the nine questions. The exercise and its results teach students that they must guard against making assumptions while conducting a mediation. The group also examines ways to perform careful and active listening while drawing out information from the parties.⁶¹

A hypothetical fact pattern is then given to the students about a restaurant and a drycleaner business that exist in close proximity to each other at a mall. The two businesses are in a dispute over the dry cleaner's emissions and their impacts on the

the process/resolve the dispute. The acronym *MEDIATE* has been used for a number of years by two mediation trainers in Michigan, Susan Hartman and Susan Butterwick. See SUSAN HARTMAN, *CIVIL MEDIATION TRAINING MANUAL FOR COURT-RULE MEDIATORS, THE DISPUTE RESOLUTION CTR., WASHTENAW AND LIVINGSTON COUNTIES, ANN ARBOR, MICH.* 15–16 (2004). Compare *MEDIATE* with the *BADGER* acronym. See *supra* note 54.

⁶⁰ This exercise is one specifically developed by Professors Stulberg and Love. Telephone Interview with Howard Lischeron and Barbara Johannessen, Mediation Specialists, Inc., in Detroit, Mich. (Aug. 21, 2006).

⁶¹ The active listening encouraged in this exercise is not unlike the active listening discussed in DAVID A. BINDER & SUSAN C. PRICE, *LEGAL INTERVIEWING AND COUNSELING: A CLIENT-CENTERED APPROACH* 20–37 (1977).

restaurant. The facts and issues of the conflict provide grist for the shorter role plays conducted throughout the rest of the training.

On the fourth day students attempt to reframe and summarize what the issues and disputes actually are in the restaurant/dry cleaner case. The students also work on creating an agenda for mediating the issues discerned.

As students enter the fifth day, they review the distinction of “positions v. interests”⁶² held by the parties and discuss how to get at the true interests of the parties by peeling away the layers of disputing positions through a scalpel of effective questioning and active listening. Mediator bias is also examined to see what impact a person’s individual bias can have on a mediation. Finally, the students divide up into individual pairs and disagree on a current events issue. Each student attempts to explain why he/she holds certain views and why he/she is right. Each student listens carefully to the other side and attempts to understand the opposing point of view. The exercise tests one’s ability to be objective, or at least to be open to hearing opposing views. The exercise also provides important training for active listening.

Ethical issues in mediation are the concentration of day six, with various issues of mediator conduct evaluated.

Day seven addresses how to resolve an impasse in mediation and how to deescalate conflict. Mediation is attempted in small groups, including caucusing, joint problem-solving, and dealing with difficult parties, such as ornery lawyers. Important feedback is provided by the faculty and coaches. Students then work on writing effective closing agreements.

The Wayne Mediation Center training concludes on days eight and nine, with students participating in longer role plays. Each student is either a mediator or a party, and each student receives constant and individual feedback from the numerous faculty and coaches who are participating.

B. Mediation Specialists Interstice Training

The second Interstice mediation training course has eighteen law students participating and is also conducted over a nine day period. It also has four hours of class each day for eight days, and then an eight hour class on the last day. The Mediation

⁶² The roots of this dichotomy can be seen in FISHER, *supra* note 57, at 1–10.

Specialists Training course⁶³ is incredibly interactive and has the stated purpose of developing artists in mediation.⁶⁴ Strategic thinking and reflection are regarded as two of the most important keys for developing the meditative skills of artistry. These skills are to be conveyed to the students throughout the entire course.

On the first day of training, the faculty lectures about mediation and discusses how the training will be conducted. The first group exercise is actually an interesting variation of the well-known ugly orange negotiation⁶⁵ and is called an "orange auction."⁶⁶ The student's bid on scarce oranges, and once they complete the bidding they are debriefed on their decisions either to bid independently or conversely to seek a mutually-beneficial bidding partner.

Students then move on to answer a series of twenty six questions and plot out on the Riskin grid⁶⁷ their specific styles

⁶³ Barbara Johannessen is the head of Mediation Specialists, Inc. and conducts a mediation training course during the Interstice at UDM. She is also the 2006–07 President of the Michigan State Bar ADR section.

⁶⁴ See MICHAEL D. LANG & ALISON TAYLOR, THE MAKING OF A MEDIATOR: DEVELOPING ARTISTRY IN PRACTICE (2000); cf. Robert A. Creo, *Mediation 2005: The Art and the Artist*, THE ADR NEWSL. (Alternative Disp. Resol. Sec. of the St. Bar of Mich., Lansing, Mich.), Mar. 2006, at 1–3 (discussing the nature of mediation as a process that requires active engagement and interaction with participants).

⁶⁵ See John Barkai, *Teaching Negotiation and ADR: The Savvy Samurai Meets the Devil*, 75 NEB. L. REV. 704, 711, app. B (1996). Professor Barkai offers a thorough discussion of the ugly orange exercise, and the actual exercise itself is contained in the Appendix to his article. In this well-known exercise, students are divided into pairs and given two sets of facts. The facts indicate a finite number of oranges available on the market and both parties must have more than half of the oranges for their own needs. What they don't know initially is that one party needs only the rinds of the orange and the other party only needs the juice. In the litigation clinic, students at UDM do the ugly orange exercise (for negotiation). Many catch on to how they can both use the finite number of oranges to their benefit by sharing. A number of students, however, simply hone in on ways to pressure each other and approach it as a win-lose negotiation.

⁶⁶ Students in the Mediation Training course do a variation of the ugly orange exercise by instead having a set of facts where each side attempts to bid on the oranges from the original owner. Here the question becomes whether the students will work together in the bidding to form a win-win cooperation or whether they will instead bid against each other in a win-lose competition.

⁶⁷ The twenty questions are from an MCI index created by Jeffrey Krivis and Barbara McAdoo. See Jeffrey Krivis & Barbara McAdoo, *A Style Index for Mediators*, 15 ALTERNATIVES TO HIGH COST LITIG. 157 (1997), available at <http://www.mediate.com/articles/krivis4.cfm?plain=t>. The index is based on the Grid of Mediator styles developed by Professor Leonard Riskin. See Leonard L. Riskin, *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1

and mediation approach. The students learn that clients will rarely change their beliefs and styles in mediation. The mediator, therefore, must be flexible enough to alter his/her style to ensure the mediation will move forward.

On the second day, the students review the stages of mediation outlined in the SCAO requirements, including: 1) opening a mediation, 2) information gathering and summarizing, 3) defining issues and setting the stage, 4) segueing into joint negotiation, 5) approaching parties through separate sessions, and 6) drafting a closing agreement.⁶⁸ All subsequent “role plays” are designed to be incremental by sequentially repeating each of these six step as they are learned.

A third session includes students concentrating on active listening and learning to gather information. During one active listening exercise, students listen to a person who is very agitated. Utilizing techniques such as summarizing, reframing, and reflecting, the students convey to the agitated person that he/she is being heard. As a follow up, the students look at the structure of certain language to see how it can create either a defensive atmosphere or a cooperative atmosphere during a mediation.

The fourth day’s session centers on defining issues and setting an agenda for the mediation. Dispersing into specific groups of four, each student group develops an agenda for the upcoming mediation. The groups then return and present the agendas they have developed. Although each group has the same facts, they diverge significantly on the proposed agendas and potential approaches. The variation highlights the differing routes and styles that are available to successfully mediate a conflict. The remainder of the day involves joint negotiation between the parties and determining what positions, interests, and needs each of the parties really has. The class concludes

HARV. NEGOT. L. REV. 7, 17–35 (1996). Barbara Johannessen of UDM remains a firm believer in the effectiveness of the original Riskin Grid and utilizes the Style Index with students to allow them to develop an idea of what type of mediator they may be. For various critiques and comments on the first Riskin Grid, see Leonard L. Riskin, *Decisionmaking in Mediation: The New Old Grid and the New New Grid System*, 79 NOTRE DAME L. REV. 1 (2003), Kimberlee K. Kovach & Lela P. Love, *Mapping Mediation: The Risk of Riskin’s Grid*, 3 HARV. NEGOT. L. REV. 71 (1998), and Joseph B. Stulberg, *Facilitative Versus Evaluative Mediator Orientations: Piercing the “Grid” Lock*, 24 FLA. ST. U. L. REV. 985 (1997).

⁶⁸ MEDIATOR TRAINING STANDARDS AND PROCEDURES, *supra* note 46, § 2.0.

with a fishbowl exercise⁶⁹ and feedback, examining the worst nightmares that can arise in a joint negotiation. The faculty provides guidance on how to successfully approach a joint negotiation as a mediator.⁷⁰

The fifth day continues with further joint negotiations. A number of additional fishbowl exercises are conducted together with a videotape of good negotiation techniques. The class also examines power balances between parties in a joint negotiation and analyzes whether various imbalances create integral issues of injustice.⁷¹

⁶⁹ Fishbowl exercises are conducted in a way so the actors in the role play are viewed by the other members of the class, who then critique the role players on the outcome of the role play. The name "fishbowl" emanates from actors being seen like the fish in a bowl by the rest of the group. This is a very valuable method of learning for students, especially those who find it hard to speak up in a group.

⁷⁰ Mediation training also utilizes "brainstorming" to come up with ideas for new learning and to get the parties to think about solutions in different ways. See Harold I. Abramson, *Problem-Solving Advocacy in Mediations*, 59 DISP. RESOL. J., Aug.-Oct. 2004, at 56, 61. It requires the parties to work together in tossing around ideas in order to work toward a resolution. See *id.* Probably the opposite of analytical, this method might be regarded by the overused phrase "thinking outside the box," a concept that appears key to successful mediation. See Charles B. Craver, *The Negotiation Process*, 27 AM. J. TRIAL ADVOC. 271, 323 (2003); Andrea M. Seielstad, *Community Building as a Means of Teaching Creative, Cooperative, and Complex Problem Solving in Clinical Legal Education*, 8 CLINICAL L. REV. 445, 514 n.116 (2002).

⁷¹ There are a host of questions about the efficacy of mediation when dealing with an unrepresented party on one side and a legally-represented party on the other side. This is especially true where the unrepresented party is without resources and the mediator is ethically precluded from intervening on behalf of either party. One question that arises is whether the unrepresented party can even understand what is a good mediated settlement and what may not be in relation to the legal interests of both parties. Whether justice is actually being done in these situations is somewhat overlooked when evaluating the effectiveness of mediation. Instead, there seems to be a rapid rush to ensure that each case settles (settlement percentages are frequently bandied about to confirm the efficacy of mediation). From the perspective of a litigator, more needs to be done to protect the rights of unrepresented and impoverished participants who enter mediation. This subject has been addressed significantly by a number of other writings and symposia. See, e.g., Michael Coyle, *Defending the Weak and Fighting Unfairness: Can Mediators Respond to the Challenge?*, 36 OSGOODE HALL L.J. 625 (1998); Jonathan M. Hyman & Lela P. Love, *If Portia Were a Mediator: An Inquiry Into Justice in Mediation*, 9 CLINICAL L. REV. 157 (2002); Lela P. Love, *Preface to the Justice in Mediation Symposium*, 5 CARDOZO J. CONFLICT RESOL. 59 (2004); Jacqueline M. Nolan-Haley, *Court Mediation and the Search for Justice Through Law*, 74 WASH. U. L.Q. 47 (1996); Larry R. Spain, *Alternative Dispute Resolution for the Poor: Is It an Alternative?*, 70 N.D. L. REV. 269 (1994); Ellen Waldman, *The Concept of Justice in Mediation: A Psychobiography*, 6 CARDOZO J. CONFLICT RESOL. 247 (2005).

On the sixth day, the faculty models the initial four stages of mediation, including an opening, information sharing, issue identification, and agenda, together with a transition into a joint negotiation. The students do role plays incorporating all four components and then receive extensive debriefing and feedback from the coaches.

Questions of ethics and related issues are addressed on the seventh day. The entire class considers and responds to various hypothetical ethical issues that may arise in mediation practice. The students then break off into groups of four to work on caucusing back and forth during a joint negotiation.

As part of the eighth class, students perform short role plays incorporating five of the six components of mediation, including caucusing.⁷² The coaches then debrief and critique the students on their efforts. On the latter part of the eighth day, the students work on drafting a closing agreement and then begin the final role plays in groups of three. On the ninth day, the students do their final role plays, which are long in duration and extensively critiqued and debriefed by the faculty and coaches.

IV. THE ADVANCED MEDIATION CLINIC

After completing one of the mediation training courses, students do two observations of a mediation and then a co-mediation with a community mediation center representative.⁷³ This takes place during the summer. Once the students complete the three requirements they qualify for court appointments as a mediator from local district courts. Students also qualify to participate in the second stage of the UDM mediation training program: the Mediation Clinic, which is offered during the fall semester.⁷⁴

⁷² Caucusing is one device that mediators use to facilitate communication between parties, identify issues, and promote settlement. See Stuart M. Israel, *Mediator's Guide to Caucuses*, THE ADR NEWSL. (Alternative Disp. Resol. Sec. of the St. Bar of Mich.), Feb. 2004, at 1.

⁷³ Michigan Court Rule 2.411(F) governs the states' qualifications for mediators. MICH. CT. R. 2.411(F) (2006).

⁷⁴ Martin Reisig, former Chair of the Oakland County Bar Association ADR Committee in Michigan and a state-wide mediator, initiated and teaches the Mediation Clinic at UDM. Mr. Reisig is a former successful litigator with the United States Attorney's Office who now recognizes the increasing importance of ADR, not only in dispute resolution but in legal education.

As part of the Mediation Clinic, students are required to perform twenty hours of mediation, although a number of students do as many as three additional hours per week during the semester, totaling up to forty-two hours. The students essentially spend a morning in a district court and handle whatever case the judge may send over. District courts are the lowest trial level courts in the State of Michigan and encompass small claims courts as well. The types of matters the students will mediate runs the gamut from neighborhood disputes to repair and mechanic complaints. If a resolution cannot be reached, the case goes back to the judge for a bench trial and decision. Although official records are not kept of the students' settlement rates overall, anecdotal evidence suggests a very high rate of satisfied resolution.

In addition to mediation work in district courts, the students participate in a weekly classroom component where they examine and analyze two books—*Difficult Conversations*⁷⁵ and *Bringing Peace into the Room*⁷⁶—along with numerous ADR articles.⁷⁷ The students also keep journals and reflect on their learning in class and on their work in mediations.⁷⁸

Certain precepts for effective mediation are stressed every week in the clinic, including: 1) establishing calmness, 2) establishing an atmosphere to resolve rather than blame, 3) establishing empathy for both parties and allowing the parties to feel understood, 4) establishing tones of a learning conversation, wherein the parties are listening and sharing, 5) utilizing role reversal to get the parties to see the other side's interests, 6) discussing contribution to the conflict by both sides,

⁷⁵ DOUGLAS STONE ET AL., *DIFFICULT CONVERSATIONS, HOW TO DISCUSS WHAT MATTERS MOST* (1999) [hereinafter *DIFFICULT CONVERSATIONS*].

⁷⁶ *BRINGING PEACE INTO THE ROOM, HOW THE PERSONAL QUALITIES OF THE MEDIATOR IMPACT THE PROCESS OF CONFLICT RESOLUTION* (Daniel Bowling & David Hoffman, eds., Jossey-Bass 2003) [hereinafter *BRINGING PEACE*].

⁷⁷ Numerous Bar Association articles and Mediate.com articles are utilized in the clinical class to spark discussion on subjects such as restorative mediation, getting people to open up in mediation, managing lawyers in mediation, representing clients in mediation, planning the mediation, facilitative mediation in business cases, initiating a mediation practice, and marketing yourself as a mediator.

⁷⁸ To fully understand the effectiveness of journal writing in legal education see Gerald F. Hess, *Learning to Think Like a Teacher: Reflective Journals for Legal Educators*, 38 GONZ. L. REV. 129, 130 (2003); J.P. Ogilvy, *The Use of Journals in Legal Education: A Tool for Reflection*, 3 CLINICAL L. REV. 55, 56 (1996).

7) showing how the dispute looks to the mediator as an observer and outsider, 8) attempting to have the parties generate solutions that may be acceptable to the other side, 9) making sure everyone in the room feels respected throughout the process by developing an atmosphere of trust and safety, and 10) maintaining balance and calmness at all times.⁷⁹

In the first class of the clinic, the students discuss at a roundtable significant persons in their lives who have been models of peace.⁸⁰ They describe in some detail how the person(s) brought peace and harmony to their family or community. The exercise underlines the effectiveness of ADR and of mediation in particular. It also brings the group together in a very positive and productive way as a clinic.

Throughout the rest of the semester, students enter into other roundtable discussions and garner peer critiques, faculty critiques, and numerous insights about how they can best perform their mediations. Outside experts are brought into the classroom to lecture on different styles and methods of mediation. For example, these experts will discuss facilitative, evaluative, and transformative styles of mediation.⁸¹ Students interact directly with the experts and discuss the various methods and techniques and how they can be effective under different circumstances.

The course book, *Difficult Conversations*, provides an understanding of how to “deal creatively with tough problems, while treating people with decency and integrity.”⁸² Probably the most important concept offered by the book is how difficult conversations are never really about who is right or wrong, but rather about conflicting perceptions, interpretations, and values between people.⁸³ Unfounded assumptions can create disaster by fixing blame or identifying incorrect intentions of the other party.⁸⁴ The key is to “hear” the other person’s story and convert

⁷⁹ These ten precepts are guiding principles for Reisig in conducting the Mediation Clinic.

⁸⁰ Reisig, for example, has stated that his parents and neighbors have served as “peacemakers” in the mediator role model context. Martin I. Reisig, *Mediator Role Models*, LACHES, (Oakland County Bar Association, Michigan), Nov. 2003, at 1.

⁸¹ JAMES J. ALFINI ET AL., *MEDIATION THEORY AND PRACTICE* 170–96 (2006).

⁸² *DIFFICULT CONVERSATIONS*, *supra* note 75, at XVIII, Introduction.

⁸³ *Id.* at 30.

⁸⁴ *Id.* at 44–50.

absolute certainty about the dispute into an open curiosity about how the dispute developed overall⁸⁵ and how it can be resolved.

Effective curiosity begins in questioning each party's interests and concludes with empathy allowing for a more informative dialogue.⁸⁶ The key to addressing difficult conversations is in creating not just an analytical change in each party's approach but in creating a change of their demeanor and interaction, thereby allowing for adequate reflection of the issues and a greater understanding of the interests of the adversary. Although *Difficult Conversations* is written as a negotiator's tool, it provides a roadmap for new mediators in deescalating the power of conflict and establishing a beneficial mediation environment.

Bringing Peace into the Room also addresses how a mediator can deescalate conflict by clearly understanding his or her role in the mediation. A series of essays in the book provide different perspectives on how mediators impact the mediation process by creating peace and resolution. Understanding one's own personal qualities and how they relate to the mediation process is an important stage in the professional development of a mediator.⁸⁷ The various essays portray the mediators as healers,⁸⁸ as tricksters,⁸⁹ as psychological evaluators,⁹⁰ as enlighteners,⁹¹ and as mindful meditators mediating.⁹² Students

⁸⁵ *Id.* at 37–40.

⁸⁶ *Id.* at 37, 184.

⁸⁷ See Daniel Bowling & David A. Hoffman, *Bringing Peace into the Room, the Personal Qualities of the Mediator and Their Impact on the Mediation*, in BRINGING PEACE, *supra* note 76, at 14, 16–18, 21–24, 39–44.

⁸⁸ Lois Gold, *Mediation and the Culture of Healing*, in BRINGING PEACE, *supra* note 76, at 183.

⁸⁹ Robert D. Benjamin, *Managing the Natural Energy of Conflict: Mediators, Tricksters, and the Constructive Uses of Deception*, in BRINGING PEACE, *supra* note 76, at 79.

⁹⁰ Marvin E. Johnson, Stewart Levine & Lawrence R. Richard, *Emotionally Intelligent Mediation, Four Key Competencies*, in BRINGING PEACE, *supra* note 76, at 151.

⁹¹ David A. Hoffman, *Paradoxes of Mediation*, in BRINGING PEACE, *supra* note 76, at 167.

⁹² Daniel Bowling, *Mindfulness, Meditation and Mediation: Where the Transcendent Meets the Familiar*, in BRINGING PEACE, *supra* note 76, at 263; *cf.* Barry Nobel, *Meditation and Mediation*, 43 FAM. CT. REV. 295, 295 (2005) (“[M]editative practices have played a significant role in conflict resolution for centuries.”); Leonard L. Riskin, *The Contemplative Lawyer: On the Potential Contributions of Mindfulness Meditation to Law Students, Lawyers, and Their Clients*, 7 HARV. NEGOT. L. REV. 1, 3, 9 (2002) (noting that many students and

examine these numerous mediator roles and are asked to study and evaluate how each role relates to his or her own style and approach to mediation.

When the students complete the mediation clinic course, many of them continue to work as volunteers with community mediation organizations until graduation and even beyond. Evaluations done by the students of the mediation training program illustrate the significant change students undergo in their experiential learning.⁹³ This presents a balance to the malaise infecting most law students in their third year.⁹⁴

V. WHY IS THE MEDIATION PROGRAM SO EFFECTIVE AS LEGAL EDUCATION?

Although this paper does not separately evaluate and equate the excellent recommendations set forth in the “Best Practices for Legal Education” document created by the professors of the Clinical Legal Education Association (“CLEA”),⁹⁵ or the just released Carnegie Foundation report “Educating Lawyers: Preparation for the Profession of Law,”⁹⁶ it is apparent that mediation education meets and accomplishes many of the beneficial objectives set forth in both of these documents, which identify and encourage good legal education methodology.⁹⁷

practitioners across the U.S. engage in mindful meditation and that such mindfulness can both “help[] lawyers feel and perform better” as well as improve the quality of legal services “through better listening and negotiation”); Evan M. Rock, Note, *Mindfulness Meditation, the Cultivation of Awareness, Mediator Neutrality and the Possibility of Justice*, 6 CARDOZO J. CONFLICT RESOL. 347, 349–50 (2005) (“The benefits of such awareness and its cultivation through mindfulness meditation have been increasingly discussed in the context of Alternative Dispute Resolution (ADR) and in the practice of law.”).

⁹³ One student stated that she didn’t fully learn until she attempted to do mediation.

⁹⁴ See Mitu Gulati, Richard Sander & Robert Sockloskie, *The Happy Charade: An Empirical Examination of the Third Year of Law School*, 51 J. LEGAL EDUC. 235, 246 (2001); Cent. for Postsecondary Research, Ind. Univ., Law School Survey of Student Engagement 2005 Annual Survey Results, The Law School Years: Probing Questions, Actionable Data 12–13, (2006), available at http://nsse.iub.edu/lssse/2005_Annual_Report/pdf/LSSSE_2005_Annual_Report.pdf (finding that the third year of law school is a time of underproductivity and using the section title “They Bore You to Death”).

⁹⁵ ROY STUCKEY ET AL., BEST PRACTICES FOR LEGAL EDUCATION (2007), available at http://law.sc.edu/faculty/stuckey/best_practices/best_practices.pdf.

⁹⁶ WILLIAM M. SULLIVAN ET AL., CARNEGIE FOUND. FOR THE ADVANCEMENT OF TEACHING, EDUCATING LAWYERS: PREPARATION FOR THE PRACTICE OF LAW (2007).

⁹⁷ Many of the educational precepts recognized as part of Jesuit pedagogy and

The various creators of the forty-hour mediation training program definitely had their fingers on the pulse of the way students effectively absorb and learn. This is true, in part, because mediation education unknowingly utilizes a number of important educational precepts that have been part of Jesuit education for hundreds of years.

The Jesuits have been historically recognized as the "Schoolmasters of Europe," with even their bitterest enemies giving them grudging respect for their unmatched prowess in excellent teaching and learning.⁹⁸ A central idea in Jesuit education is contemplation in action, learning while being engaged in the world,⁹⁹ and it is evident that mediation education is wholly engaged in the world, through learning to resolve disputes.

Jesuit pedagogy places emphasis on the social dimension of learning and teaching, by encouraging "close cooperation and mutual sharing of experiences and reflective dialogue among students" in their learning.¹⁰⁰ Personal human relationships lead to "appreciation of the lives of others, and of the actions, policies or structures that help or hinder mutual growth."¹⁰¹

Mediation education beneficially mirrors the educational purposes and the methods used by the Jesuits. These methods include:

- A) Care for the individual student;¹⁰²

mediation learning are now being identified as essential in the Carnegie Report and the Best Practices for Legal Education. *See, e.g.*, STUCKEY ET AL., *supra* note 95, at 134–81; SULLIVAN, *supra* note 96. Moreover, the CLEA document's discussion of simulations, *see id.* at 173–81, reflects closely the work now being accomplished in the law school mediation courses nationwide.

⁹⁸ WILFRED L. LACROIX, *THE JESUIT SPIRIT OF EDUCATION: IGNATIUS, TRADITION AND TODAY'S QUESTIONS* 1 (1989) (stating that Francis Bacon, a great opponent of the Jesuits, wrote: "As for the pedagogical part, the shortest rule would be, consult the schools of the Jesuits; for nothing better has been put in practice."); *see also* JOHN W. DONOHUE, *JESUIT EDUCATION: AN ESSAY ON THE FOUNDATIONS OF ITS IDEA* 63–64 (1963) (reiterating Bacon's grudging respect for the Jesuits and their excellent education).

⁹⁹ LACROIX, *supra* note 98, at 54.

¹⁰⁰ THE GENERAL CURIA OF THE SOCIETY OF JESUS, *IGNATIAN PEDAGOGY: A PRACTICAL APPROACH* § 76 (1993), *reprinted in* THE JESUIT RATIO STUDIORUM: 400TH ANNIVERSARY PERSPECTIVES § 76, at 265 (Vincent J. Duminuco ed., 2000) [hereinafter *IGNATIAN PRACTICAL PEDAGOGY*].

¹⁰¹ *Id.*

¹⁰² ALLAN P. FARRELL & MATTHEW J. FITZSIMMONS, *A STUDY OF JESUIT EDUCATION: THE REPORT OF A STUDY OF JESUIT EDUCATION PRESENTED TO THE EXECUTIVE COMMITTEE OF THE JESUIT EDUCATIONAL ASSOCIATION* 116, 188 (1958);

- B) Dividing larger classes into smaller breakout groups;¹⁰³
- C) Utilizing active learning with a variety of stimulating exercises, so the students are involved in the learning all the time;¹⁰⁴
- D) Structuring the learning process so students learn in a sequential order;¹⁰⁵
- E) Use of repetition and review, so students understand what they have learned;¹⁰⁶
- F) Incorporating visuals and drama into the course to reinforce learning;¹⁰⁷
- G) Incorporating prelection, a method where a short lecture is given to advise students how to prepare for the next stage of learning. It can also provide modeling by the teacher of what is to be learned next.¹⁰⁸
- H) Providing guidance and feedback to the students.¹⁰⁹

First and foremost, mediation education, like Jesuit education, recognizes the need to care for the individual student.¹¹⁰ The success of mediation education can be directly attributed to the attention that is paid to individual students. The mediation faculty work in direct contact with each student and show a personal interest in his or her development. The ultimate rationale for doing so is simple. Students in mediation

GEORGE GANSS, SAINT IGNATIUS' IDEA OF A JESUIT UNIVERSITY: A STUDY IN THE HISTORY OF CATHOLIC EDUCATION 187 (1954). The first volume is on file at the University of Detroit Mercy Library (LC 493.F331). Both of these sources essentially explain "cura personalis" as the care for others and in this specific case as care for all students in their learning.

¹⁰³ LACROIX, *supra* note 98, at 41.

¹⁰⁴ ALLAN P. FARRELL, THE JESUIT CODE OF LIBERAL EDUCATION: DEVELOPMENT AND SCOPE OF THE RATIO STUDIORUM 404 (1938); *see also* FARRELL & FITZSIMMONS, *supra* note 102, at 114.

¹⁰⁵ FARRELL & FITZSIMMONS, *supra* note 102, at 134.

¹⁰⁶ *Id.* at 114, 127–28; FARRELL, *supra* note 104, at 404.

¹⁰⁷ *Cf.* John W. O'Malley, *How the First Jesuits Became Involved in Education*, in THE JESUIT RATIO STUDIORUM: 400TH ANNIVERSARY PERSPECTIVES 56, 59 (Vincent J. Duminuco ed., 2000) (exploring the Jesuits' creation of humanistic schools, in which the curriculum included art, music, drama, and the like in order to cultivate the students' character formation).

¹⁰⁸ FARRELL & FITZSIMMONS, *supra* note 102, at 123–24; DONOHUE, *supra* note 98, at 37.

¹⁰⁹ IGNATIAN PRACTICAL PEDAGOGY, *supra* note 100, §§ 10, 28, 35, 36; FARRELL & FITZSIMMONS, *supra* note 102, at 121.

¹¹⁰ *See* J. A. Panuska, *The Jesuit Experience with Graduate Education and Education for the Professions*, in JESUIT HIGHER EDUCATION: ESSAYS ON AN AMERICAN TRADITION OF EXCELLENCE 124, 130 (Rolando E. Bonachea ed., 1989) ("We are well aware that the graduate student or the professional student is very often an individual in genuine need of personal attention.").

education become good mediators if they are adequately mentored. They develop the ability to provide close and careful attention to parties in disputes. The ability to show concern for others and to listen carefully may not necessarily lead to the settlement of a dispute, but the failure to do so can definitely undermine any potential resolution.

Another outstanding feature of Jesuit education and of mediation education is the use of smaller breakout groups for students to do role plays, critiques, and discussions.¹¹¹ These smaller groups are possible in mediation education because of the nature and makeup of both the training course and the clinic. Each student participates extensively in smaller groups and learns quickly about what he/she is doing well or is not doing so well. The students' understanding further develops through their own engagement and extensive feedback.

The Jesuits have long recognized the importance of feedback and guidance in education.¹¹² During the shorter role plays that the mediation students perform, faculty feedback is given almost immediately. The students also receive feedback when debriefed on certain exercises conducted by the group as a whole. The most comprehensive feedback occurs in the final role plays, where numerous faculty and coaches provide copious reviews and comments. This extensive and immediate feedback assists the students in developing points of reference for self-critique and ways to improve.

The Jesuits have also recognized boredom as the enemy of education.¹¹³ To combat boredom, they constantly change the mode and style of education in their classes throughout the day.¹¹⁴ This creates renewed interest and concentration among the students at each new juncture. Concepts of primacy and recency play a role in this ability to keep students' interests heightened.

Mediation education operates in a similar manner. The students participate in various exercises, lectures, and group sessions. Several types of learning techniques are used throughout the day. Varying the techniques and methods keeps

¹¹¹ See *supra* note 103 and accompanying text.

¹¹² See *supra* note 109 and accompanying text.

¹¹³ See FRANCIS P. DONNELLY, PRINCIPLES OF JESUIT EDUCATION IN PRACTICE 36 (1934).

¹¹⁴ FARRELL & FITZSIMMONS, *supra* note 102, at 114, 119.

the students on their toes and engaged in the mediation education. The exercises teach varying learning methods, and in so doing, achieves another goal of Jesuit education by allowing for “repetition” of important concepts in different ways.¹¹⁵ This repetition reinforces the students’ understanding of important concepts without being redundant or tiresome. By repeating important points through different techniques at least three times, the students retain what they have learned in an exponential way.

Video presentations, power point presentations, and overheads are also utilized extensively in mediation education. These methods fulfill a Jesuit predilection for learning contextually through drama and visual presentations.¹¹⁶ The role plays are also a form of experiential drama providing a “real” context from which to evaluate the effectiveness of the mediation theories and methods.

The faculty members also provide a “prelection,”¹¹⁷ by ending each day’s session with information and discussion about what will be covered in the next session. An example of this can be found when mediation faculty members model and discuss an opening statement for the students. The modeling provides a framework for students to begin to work on their own opening statements for the following day.

Prelection is important because it provides a framework and an organization to approach future learning.¹¹⁸ I liken it to showing students where the next playing field is and what the rules are.¹¹⁹ In utilizing prelection, the mediation faculty is not spoon feeding the students on what they need to know, but rather giving them the context they will be working in and what it is they will be learning next.¹²⁰ By pointing out precise objectives, the faculty provides the students with an

¹¹⁵ *Id.* at 127; ROBERT SCHWICKERATH, JESUIT EDUCATION: ITS HISTORY AND PRINCIPLES VIEWED IN THE LIGHT OF MODERN EDUCATIONAL PROBLEMS 466–67 (1903).

¹¹⁶ FARRELL, *supra* note 104, at 123; SCHWICKERATH, *supra* note 115, at 519; *see also* JOSEPH F. MACDONNELL, S.J., COMPANIONS OF JESUITS: A TRADITION OF COLLABORATION, ch. 4, THE PLAY’S THE THING, (1995), *available at* <http://www.faculty.fairfield.edu/jmac/sj/cj/cj4drama.html>.

¹¹⁷ FARRELL, *supra* note 104, at 62 n.12.

¹¹⁸ DONOHUE, *supra* note 98, at 149–50.

¹¹⁹ FARRELL & FITZSIMMONS, *supra* note 102, at 125 (referring to the prelection as the “coaching” period).

¹²⁰ SCHWICKERATH, *supra* note 115, at 479.

understandable framework for their learning. Moreover, the prelection provides an opportunity to initially motivate the interest of the students in the subject matter,¹²¹ thereby encouraging them to pursue the subject matter with zest.

Another important Jesuit method utilized in mediation education is structuring the learning process so the students learn in a "sequential order."¹²² The forty-hour mediation training is designed so that students initially learn the policies underlying mediation as an alternative form of dispute resolution. Next, they study the steps for conducting a mediation, including learning to lead an initial meeting. They then learn how to present themselves to the parties, identify the issues involved, and establish an agenda for resolution. Finally, the students learn effective negotiation techniques such as how to encourage interaction between the parties in order to promote an agreement to compromise.

Students move sequentially in the two-stage mediation education program at UDM by first learning in the mediation training program, then doing required observations and co-mediations, and finally learning as a participant in the Clinic. The students utilize introspection and self-analysis to determine the type of mediator they are. They begin to differentiate between mediation styles and to discern the techniques that operate most effectively in various circumstances. The students constantly reflect on theories of successful mediation and on their own abilities to be mediators. All of this requires a sequential approach of increasingly complex evaluation, analysis, and understanding.

Jesuit education has been described as the "continual interplay of . . . EXPERIENCE, REFLECTION, and ACTION."¹²³ The Ignatian pedagogical paradigm actually includes five steps composed of context, experience, reflection, action, and evaluation.¹²⁴ This paradigm fits well in describing both mediation education and mediation itself.

¹²¹ FARRELL & FITZSIMMONS, *supra* note 102, at 123.

¹²² LACROIX, *supra* note 98, at 67.

¹²³ IGNATIAN PRACTICAL PEDAGOGY, *supra* note 100, § 27 (alteration in original); *see also id.* §§ 22, 23 (explaining that the constant interplay of experience, reflection, and action of the Ignatian pedagogical paradigm is consistent with Jesuit educational and ministerial goals).

¹²⁴ *Id.* § 32.

For example, the context for mediation education includes a trusting environment for learning. Mediation education is conducted in a structured environment that nevertheless welcomes and embraces students. Students move with faculty members and their peers from one learning experience to the next in an organized way. The development of trust and camaraderie along the way is emblematic of the environment that mediators need to develop in their own mediations. Enthusiasm and motivation are key aspects of UDM's successful approach.

Experience similarly plays an important role in mediation learning. In the Jesuit paradigm, the learning of new concepts must be accomplished in accord with one's own experience. "New facts, ideas, viewpoints, theories often present a challenge to what the student [already] understands."¹²⁵ Vicarious experience can be inculcated through "[s]imulations, role playing, [and the] use of audio visual materials."¹²⁶ This is exactly how mediation education can provide students with an experiential understanding necessary to exercise growing judgment in conducting mediations.

The third component of the paradigm is reflection.¹²⁷ For Jesuits, reflection is "a thoughtful reconsideration of some subject matter, experience, idea, purpose or spontaneous reaction, in order to grasp its significance more fully."¹²⁸ A person's understanding of his or her experience is deepened through reflection. It allows for new insights as to what is being learned. In mediation education, reflection plays an important role in developing the ability to understand and mediate well. Consideration and reflection on the stances and positions taken

¹²⁵ *Id.* § 44.

¹²⁶ *Id.* § 45.

¹²⁷ Reflection is an extremely important element for learning. Ignatius of Loyola stressed the need for reflection in his Spiritual Exercises. The "Examen" was utilized to reflect not only on what had been learned, but also on what a person had experienced throughout the day. See DONOHUE, *supra* note 98, at 15, 16. More recently, Donald Schon, Architectural Professor at MIT, wrote extensively on the importance of reflection in learning. See DONALD A. SCHON, EDUCATING THE REFLECTIVE PRACTITIONER: TOWARD NEW DESIGN FOR TEACHING AND LEARNING IN THE PROFESSIONS 26-40 (1987); Donald A. Schon, *Educating the Reflective Legal Practitioner*, 2 CLINICAL L. REV. 231, 244-50 (1995). Schon's own reflections provide an understanding of how we learn to become proficient and competent as a professional.

¹²⁸ IGNATIAN PRACTICAL PEDAGOGY, *supra* note 100, § 49.

by the parties provide the mediator with a better understanding of how to approach the parties and how to move them toward a resolution. Common sense is also uniquely a part of the experience and reflection aspects of the Jesuit paradigm¹²⁹ and is also important to mediation.

Action, putting what has been discerned into play, is the fourth component of the Jesuit paradigm.¹³⁰ In mediation training, action occurs both when the students tackle mediation experiences and as they develop their abilities to reflect. Students then put experience and reflection into further action by conducting the mediations themselves, through the clinic. They do so by conducting live mediations, where they learn to interact successfully with disputants in pursuit of a successful resolution. Professors at UDM hope that as students gain experience they will begin to develop that elusive ability known as judgment. As they become even more experienced, mediators should aspire to develop the ultimate goal, wisdom.

CONCLUSION

The final component of the Jesuit pedagogical paradigm is evaluation. But this component is left to you, the reader, to evaluate whether the educational precepts of the Jesuit paradigm and of mediation education,¹³¹ and their promise of ensuring that students will learn and retain what they have been taught, should be brought to bear on legal education.¹³² Although

¹²⁹ See LACROIX, *supra* note 98, at 13.

¹³⁰ IGNATIAN PRACTICAL PEDAGOGY, *supra* note 100, §§ 59, 62.

¹³¹ See generally Winick, *supra* note 11 (arguing that the use of therapeutic jurisprudence in legal education will enable students to learn the variety of skills that the modern lawyer needs); Henderson, *supra* note 15; see also STUCKEY ET AL., *supra* note 95 (referencing the CLEA document on best legal education practices and the Carnegie Report). The precepts inherent to both definitely play an important role in the future of legal education.

¹³² See DONNELLY, *supra* note 113, at 86–87. When the lecture method is used, some law students never absorb the content the professor intends to teach them. *Cf.* FARRELL & FITZSIMMONS, *supra* note 102, at 140. With only final exams to consider and with no feedback given to the students, there is no mechanism by which a law professor can know whether students retain the knowledge presented in class. This conundrum highlights a central problem for law schools until the final exam, when the course is already over, there is no assessment of whether the teaching methods are effective. Legal education is therefore an indirect educational approach that is juxtaposed to the engaged methodology of Jesuit Education. Present day legal education will never be confused with lifelong learning. Nor will many law professors be remembered as mentors who made a difference in a law student's

the following quotation appears to be much more than 400 years old, a number of legal writers have referenced it in recent years,¹³³ and the concept remains incredibly relevant to creating an understanding of effectively teaching both present and future students: “Tell me and I will forget; show me and I may remember; But, involve me and I will understand!”¹³⁴

The wonderful involvement and student passion in mediation education mirrors the incredible engagement and success of Jesuit education. By emulating the integral educational precepts of both these methods, legal education potentially can become incredibly more exciting for both our intellect and our senses. The hope that incorporation of these experiential and contextual precepts will also help students not only to think like lawyers, but also to understand and become excellent lawyers,¹³⁵ is an enduring thought that this litigator, educator, and optimistic mentor continues to entertain.

learning and growth to becoming an excellent attorney. The anonymity and human disassociation brought about by Christopher Columbus Langdell’s educational model of 136 years ago must change. The law and its study may well be analytical, but it is also human. The development of legal education in the twenty-first century cannot stay mired in a distant Victorian pseudoscience.

¹³³ See Erica M. Eisinger, *The Externship Class Requirement: An Idea Whose Time Has Passed*, 10 CLINICAL L. REV. 659, 666 n.22 (2004); Greg K. McCann, David J. Tarbert & Michael S. Lenetsky, *The Sound of No Students Clapping: What Zen Can Offer Legal Education*, 29 U.S.F. L. REV. 313, 346 n.125 (1995); Michael L. Richmond, *Teaching Law to Passive Learners: The Contemporary Dilemma of Legal Education*, 26 CUMB. L. REV. 943, 943, 953 (1996).

¹³⁴ Conflicting anecdotal information suggests that either Confucius, Lao Tsu, or Native American sages may be credited with this quotation. The quotation is a timeless truism that legal educators remain ignorant of at our own peril. The Jesuits, however, did not ignore this important concept; rather, they literally devoted their entire lives to student learning and pursued genuine student understanding as the ultimate goal.

¹³⁵ Nancy L. Schultz, *How Do Lawyers Really Think?*, 42 J. LEGAL EDUC. 57, 72–73 (1992) (“Ultimately, the more variations students are exposed to . . . the more likely they are to emerge as well-rounded, thoughtful, mature professionals. . . .”). As Ignatius would have described it, students must “think[] through to a reflective understanding.” LACROIX, *supra* note 98, at 41.