

Teaching a New Paradigm: Must Knights Shed their Swords and Armor to Enter Certain ADR Arenas?

PROFESSOR LELA LOVE: Good afternoon. I am Lela Love, the Director of the Kukin Program for Conflict Resolution at the Benjamin N. Cardozo School of Law. It is a pleasure to see so many friends here this afternoon and to welcome you to this gathering. We should recognize the work of the students of the forthcoming Cardozo Online Journal of Conflict Resolution, who have engineered this event, and the generosity of Jacob Burns in sponsoring this symposium. We are most appreciative that this distinguished panel, two of whom have traveled a long distance to be here, is with us. I would also like to welcome the rest of you, professionals, alumni, students, and faculty. We hope that everyone will participate by both learning from our speakers, asking questions and making comments at the end of the panel presentation.

You may have heard the riddle, “How many mediators does it take to hang a picture?” The usual answer to that question is, “None. Mediators don’t hang pictures, they frame them.” Like a mediator, I will try to frame and moderate this discussion. However, unlike an ideal mediator, my frame will be a partisan one, not the neutral frame that a mediator would normally give. I apologize for diverging from that traditional role. Once I make some introductory remarks, we will turn to the panel, and each speaker will have twelve minutes to speak. We will keep to that time frame so that we will have a half an hour at the end for questions and comments.

Now, for my partisan frame. I believe that teaching mediation in law school involves imparting a radically different vision than the prevailing adversarial norm. Mediation, I believe, involves a different philosophical road map, a term of Professor Leonard Riskin,⁽¹⁾ for parties and their lawyers, than does the litigation process. If you consider mediation as being designed to enhance communication and collaboration between the parties, to generate creative options to address concerns that parties raise, and ultimately to resolve conflict by helping parties achieve an outcome that represents the maximum good possible for each of the participants, that is an entirely different paradigm than litigation. Those goals do not fit an adversarial adjudicative process. Achieving those goals requires special attitudes, skills and knowledge both on the part of participants in mediation and their advocates or representatives. Given this perspective – which is not universally shared – the advocates in mediation should come, metaphorically speaking of course, in Leonardo Da Vinci renaissance garb, rather than the swords and armor of knights or gladiators.

However, as mediation has become more legalized, as more and more cases are mandated into mediation from the court system and lawyers are increasingly involved, a different process has emerged. The question becomes for law professors and for mediation trainers: What process do we teach? How shall we advise lawyers to attire themselves for mediation, if mediation can mean many different things in different contexts?

A recent article in the Emory Law Journal by Jack Sabatino casts Alternative Dispute Resolution (ADR) as litigation “lite.”⁽²⁾ You spell that last word, l-i-t-e. Professor Sabatino’s thesis is that ADR is a stand-in in many respects for the traditional court system, the way lite ice cream is a stand-in for the real thing. That is, the same fundamental idea, the same paradigm, but ADR removes the fat as lite ice cream does. For example, ADR can remove the delay, excessive costs, overly formalistic rules and procedures, and over-burdensome discovery of litigation. If all we have done after all these years is to build litigation lite, it is, I believe, profoundly disappointing because the mediation paradigm offers an alternative in kind, not just in degree, to litigation.

So we ask our panelists: Is mediation a variant of litigation lite, where advocates best keep their swords and armor? Or is it a different paradigm altogether, a real thing, rather than a lite version of some heavyweight process, where lawyers must navigate with a different philosophical road map, must learn new skills and adopt different perspectives and dress for a different role altogether?

It is with great pleasure that I introduce our distinguished panelists. I will go down the row in the order in which they are speaking.

Professor Kimberlee Kovach teaches and directs a mediation clinic at the University of Texas School of Law. She recently chaired the ABA Section on Dispute Resolution. She wrote the first West publication on mediation. She has trained many of the current leaders in the mediation field. She regularly produces journal articles and serves on panels all over the country. Professor Kovach doubly has her pulse on the field. In addition to the accomplishments I just described, if they were not enough to have your pulse on the field, she is married to Eric Galton, also a noted mediator, prominent player in this ADR arena, and author of a book on mediation advocacy.(3)

Sitting next to Professor Kovach is Peter Robinson from the Straus Institute for Dispute Resolution of Pepperdine University School of Law. Professor Robinson is the associate director of that Institute and as such is part of the team that took Pepperdine to the number one spot among dispute resolution programs in law schools, according to the survey of US News and World Report. Professor Robinson is also an active mediator, serving on a variety of mediation panels and in many different arenas from court-annexed cases to church-related matters.

Sitting next to Professor Robinson is Professor Carol Liebman of Columbia Law School. Professor Liebman directs the mediation clinic at Columbia and teaches negotiation courses as well. I think of her as a savvy mover and shaker in the ADR field. She recently completed three years of service as chair of the inaugural Special Committee on ADR for the Association of the Bar of the City of New York and started many different projects in New York during that three-year term. She also chaired the ADR Section of the Association of American Law Schools. Professor Liebman is an accomplished mediator in a variety of contexts. One of her impressive cases is the successful mediation, in the Spring of 1996, of the student takeover of Hamilton Hall at Columbia University.

And finally, next to Professor Liebman is Professor Baruch Bush. Professor Bush is a scholar extraordinaire. He is one of the most articulate thinkers and writers in the mediation field today. He is the Rains Distinguished Professor of Alternative Dispute Resolution Law at Hofstra Law School. He has authored numerous journal articles that have had a major impact on this field. His recent book, co-authored with Joe Folger, *The Promise of Mediation*(4), received the 1995 annual book award from the International Association of Conflict Management. In addition to his impressive scholarship, Professor Bush has practiced mediation in a variety of contexts, including directing a clinical program at Hofstra, and starting in 1976, a community mediation program in San Francisco. So we have a most eminent group of people to answer the questions posed today by the Cardozo Online Journal: "Must Knights Shed Their Swords and Armor to Enter Certain ADR Arenas?" We will look to this group for answers.

PROFESSOR KIMBERLEE KOVACH: Good afternoon. You will probably guess by some of my remarks why Professor Love and I co-authored an article(5). I will begin by setting forth a framework by which to view the merging of mediation within the adversary system.(6)

If you notice the overhead, the picture depicted is a rock. This is because, in my opinion, that is what has happened in this current struggle. When the mediation process directly confronted the adversary system, it appears to have hit an inflexible, unmoving, unyielding, rigid object. While these two systems of dispute resolution exist, incompatibilities, inconsistencies, contradictions and, yes, conflicts, arise. It is time that we begin to recognize that the two shall never merge; at least not in any way that allows the mediation process to remain intact in a form that many of us had envisioned it. (7) We must now move toward the explicit recognition that mediation and the legal system are two very distinct systems, and consequently, a separation and disassociation of the two may be appropriate. The current attempts at this alliance or blending of mediation within the current litigation system, has actually transformed, or mutated the mediation process into just another form of pretrial litigation — or "Litigation Lite".

I am not suggesting that the adversary system, in and of itself, needs to be changed or is not a valuable tool as a means of resolving disputes. However, I do question the prudence in trying to merge the two systems.

While a lengthy discourse on the history of the adversarial system is quite beyond the scope of these remarks,(8) an examination of the underlying goals and objectives of the adversary system may be helpful to better understand the differences between, and difficulties in merging mediation and litigation. Because the goals and objectives of each system are quite different and distinct, I am afraid the most we can expect is simultaneous co-existence.

The adversary paradigm has the following goals and objectives: to find truth; preserve rights for a party; determine a right or a wrong; and perhaps punish the wrongdoer. We accomplish this through the offer of proofs, evidence, reasoned argument, and party presentation of evidence in a competitive setting. The very terms adversary and argument are essentially contradictory to mediation. The parties are called opponents and the process is one that takes on the characteristics of a battle. The sides frequently view themselves as warriors. During the course of litigation, many of you who are lawyers may have experienced that a case takes on a life of its own. It has become the battle. That is a common phenomenon in litigation. And even with the advent and urging of civility in the legal system, (9) as a practical matter, there is still little expectation of cooperation and collaboration when engaged in the adversarial arena termed the legal system.

Hence the swords and armor.

On the other hand, some very different goals and objectives underly mediation. We attempt to discover the underlying interests and needs of the parties. We try to engage in creative problem solving. We provide an opportunity for the parties themselves to participate, which, in turn, allows them to be empowered in the process. There is little need for battle-like regalia.

Parties are satisfied with the process as well as the result through their participation. Moreover, a final determination or resolution can be achieved without the determination of either facts or fault. While in the legal system, in this alleged search for truth or determination of facts, the focus is on the past. It is based upon looking at and attempting to prove what happened at some earlier time. In the legal process, lawyers who are seeking to achieve the client's goals by "winning" will often distort "the truth".

However, through the mediation process a resolution or result to the dispute can be achieved without a right-wrong determination and without a factual finding. In contrast to the legal system, the focus in mediation is on the future, specifically, what the future may hold for the parties. By focusing on the future, the participants are encouraged to formulate creative and satisfactory solutions to their disputes. Resolution can be accomplished without the need to battle with the other party. The participants in a mediation do not need to see the others as opponents. Hence, no need for either armor or swords.

We know, of course, how mediation and litigation became acquainted. The court system has a great many cases and disputes in need of resolution, thereby presenting opportunities for alternative methods. Seeing that courts were in need of alternative methods of dispute resolution, mediators went to the court, specifically to judges and court administrators, and said, "Here is a process that will help." The perspective, however, urged that mediation could be beneficial because it saves time and money. This is what has now become, as Professor Love noted, litigation-lite. Now in retrospect, was that a good thing to do? I do not know. Had mediators and ADR professionals gone to the courts and said, "Here is a great new process and it is going to make the parties feel better about disputes and we do not know what affect it will have on your docket, "(10) I doubt that the courts or judges would have listened or been interested in implementing such a process. So, efficiency was how we marketed the mediation process to the courts. (11) As such, expectations about what mediation is, as well as limitations of the mediation process, have been established. The primary, if not only, focus is on settlement.(12) I think at one time, and perhaps it was naive, but some of us expected the result to be, to use a former President's words, a kinder, gentler court system.

What we have seen, however, is not that the mediation process has transformed the litigation system, but rather that the litigation system, as depicted by my Rock, has blocked the potential of the mediation process. The legal system and its culture, if we look historically at attempts to change the adversariness, has resisted change, and not just in terms of what mediation or ADR might accomplish. For example, an examination of

some of the federal rule changes regarding open discovery and the free flow of information has been resisted by lawyers as has compliance to Rule 11 requests. (13) It is not surprising then that it is the same with mediation. The legal system or adversarial paradigm has resisted the changes that mediation promised or could provide. Lawyers retain their familiar customs and behaviors, having emerged from an adversarial model of dispute resolution. This is true even when they find themselves in non- or less- adversarial paradigms such as mediation and negotiation.(14)I wonder if an examination of something perhaps even deeper, is appropriate here. Looking at the underlying belief systems of the participants in an adversary system and a mediation system may provide some insight.

Professor Wangerin has examined both the adversary and ADR systems in an attempt to better understand them in a larger context.(15) He suggests that an adversary dispute resolution system rests on the notion that human beings are by nature self interested and competitive. Hence, we have the win-lose, right-wrong paradigm. On the other hand, societies, individuals and systems that might adhere to a mediative-like or consensus- building, collaborative type of dispute resolution process have as an ideology that human beings are, by nature, cooperative and altruistic. That belief system or philosophy then shapes our view of disputing. The belief system will also translate to our behaviors and conduct. If our belief system is one of competitiveness, then what we are looking for in a dispute resolution system are methods and procedures to assess blame or determine fault. On the other hand, in a cooperative or collaborative system, we can view the problem as a mutual one that can be solved together. We seek processes which provide such opportunities. And while much of the modern mediation movement has attempted to blend into the adversarial legal system, I do not believe that transitions are easily made. In the attempt to use a non-adversarial process, mediation, within an adversarial paradigm without even so much as requesting the participants to leave behind their armor and swords, we have altered the mediation process and lost the possibility for a new and distinct dispute resolution method.

Well, what does this mean for those of us who find ourselves in positions which help law students and lawyers learn about dispute resolution paradigms? What does this mean for law students and other professionals in terms of professional conduct? Can the same individual be effective in an adversary system as well as in a mediative system? I began my remarks with an unequivocal “yes” to the question, “Must Knights Shed Their Swords and Armor to Enter Certain ADR Arenas?” and contend that this is true specifically with regard to mediation and problem solving negotiation.(16)Not only are the goals, objectives and underlying theories of the two paradigms quite distinct, but the skill sets and activities are different as well. This has been illustrated by the map presented in an article Professor Love and I authored (17) depicting the differences between adjudicative or evaluation processes and a facilitative or mediation model. (18)

However, I remain indecisive about whether an affiliation between the two can be made. For example, would it be possible to develop a process which may utilize both problem solving and adversarial approaches? In addition, I question whether one individual can shift from one paradigm to the other and be effective in each. Might one individual be a “quick change artist” and swap hats, views and conduct? Can a lawyer who is a zealous advocate for his client also be competent in the representative mode in a mediation or other non-adversarial process?

As to the other specific questions posed at the beginning of the program, I will briefly address my views. Taking the last question first, it is my belief that the traditional “warrior” background and mind-set of lawyers has proven to be a detriment in terms of participation in a consensus-building process such as mediation. The argument, use of language, posturing and defending of positions that takes place in adversarial processes are antithetical to that of consensus building. As to whether students are prepared in law schools for mediation and negotiation, I suppose it depends. It depends upon the educational program as well as the extent individual students can appreciate the distinct differences between the processes.

And finally, “Whether the extent of ADR in law schools has engendered a real paradigm shift,” my answer would be, “Not yet.” In my experience, students who come to ADR come in three groups: those already with a belief in non-adversarial paradigms for dispute resolution; those who believe that it is important to know in order to be a good lawyer, but still see themselves as warriors dressed in full regalia; and then those who want to know about it only to undermine the process, the ones with their swords already drawn.

Of course, I cannot provide all of the answers to these questions. Rather it is my hope that the other panelists, as well as you, will help find additional answers. And we may not do it today. Despite differences, is there any connection between these two distinct paradigms? And if there is an ability to move from one to another, perhaps we should look at the skill sets and attributes of the lawyer-advocate, as well as the skills of the mediation-representative. As an aside, please note that I no longer use the term advocate in mediation, but rather representative in mediation.

Now, what are those skills? What are those behaviors and conduct that might be common to both paradigms, and can we separate them from those that need to be very different?

And how do we then, teach and convey those skills, ideas, and beliefs? Thank you.

PROFESSOR LELA LOVE: Thank you. Peter Robinson will go next.

PROFESSOR PETER ROBINSON: First of all, I express my appreciation for the opportunity to be here to Professor Love, the students that organized this and I especially appreciate you taking the time to be here and to listen to us discuss something that is important to us as this field matures.

Professor Kovach answered it in one word when she spoke, and unfortunately, I am not going to be that simple about it. For me, there are some “yes’s” and some “no’s.” As I looked at the series of questions that were presented in the promotional material about this conference, the first question was: “Do we have a new paradigm? Is there a new philosophical map for lawyers and students?” I believe the answer to that question is, “Yes!”

The old paradigm was that a lawyer’s duty of zealous advocacy required an exclusively competitive ethic. That was the dominant model presented to me in law school and as a young lawyer for the U.S. Government twenty years ago. That was the limit of it and I think that came from anticipating the adversarial trial system.

But we have known for a long time that approximately ninety percent of the cases settle before trial. Thus, the question becomes, “What ethic should govern the behaviors of the lawyers in the pre-trial processes, in which the vast majority of cases are resolved.”

The old paradigm said that our adversarial justice system casts a long shadow. Therefore, when an attorney was negotiating and seeking to settle a dispute, that attorney should still be very, very adversarial. That was how many of us were trained and mentored and how we thought it was supposed to be.

In the last twenty years, we have seen the rise of a collaborative influence. The Negotiation Project at Harvard, Getting to Yes,⁽¹⁹⁾ many scholarly articles, as well as the advent of the mediation movement challenged attorneys to recognize the potential of joint gains.

“Can lawyers add value in a dispute that lends itself to experiencing joint gain by cooperating, collaborating, and taking a problem-solving approach?” I believe there is a new paradigm for lawyers and law students of this generation.

That paradigm says there is a competitive trial system that governs our country and sometimes being competitive in pre-trial procedures is appropriate. However, there are also times when good lawyers will use better judgement about when to be cooperative and when to help clients capture the opportunities for joint gain. Therefore, my assessment is that there is a new paradigm. I would like to move to the second question presented by this conference: “Must knights shed their swords and armor?” My answer is “no.” I fear for how this is starting to develop in the dispute resolution field. Law students and lawyers are choosing between identities and personalities of warrior or peacemaker. Thus, if you are a knight you must embrace the sword and die by the sword.

My sense is that the new paradigm includes both collaboration and competition. That is the reality of our lives and our society. Rather than being isolated in one camp or the other, we invest the professionals, lawyers, and future lawyers with the discretion and trust in their judgement. Thus, we educate them about making good choices and about when to be competitive and when to be cooperative.

I am concerned because the lack of structure in mediation and negotiation requires as vigilant competition as an adversarial trial. In litigation, there are numerous rules designed to lead to a just result. As the ADR movement institutionalizes, less formal processes with less structure, i.e., fewer rules of evidence and procedure, suddenly an advocate's understanding and attentiveness to the rules of civil procedure, discovery and evidence become paramount because you create a customized set of similar rules for that particular case.

An advocate has to decide what kind of information to share in pre-suit activities. Those decisions should stem from an understanding of the purposes behind the variety of rules that result in our burdensome legal system. I view the legal system as burdensome but law school converted me as to the necessity and good intentions of this burden.

I went to law school very suspicious of our legal system. To me, the first year of law school was designed to reveal the purposes behind the legal system's rules and that this collection of complex burdensome rules evolved from a good faith quest for justice.

We should keep that perspective in mind as the ADR movement leads us back to less formal processes. We need to be cognizant of the abuses that the rules of litigation are designed to prevent. So, for example, in a mediation, what is relevant? Everything is relevant. In fact, the "interest based" approach to mediation would suggest that it is wonderful to get more and more kinds of information. The various kinds of information create additional options and empower us to look for other ways to settle the case. I agree entirely.

But I am also concerned that there could be an abuse, that there could be a relaxed advocate at a mediation who fails to contribute what he or she knows about procedural fairness that leads to a fair outcome. So my sense is that knights can keep their armor. I found it interesting that Professor Love made the reference to Leonardo de Vinci. I was trying to metaphorically connect with your word picture, and I decided to request a diplomat's cape to go over the knight's armor.

A good advocate certainly approaches settlement looking for opportunities to cooperate. But a good advocate must also be very, very alert and concerned about the risk that there could be a lopsided result if only one person is seeking a collaborative outcome.

I guess my views about this are an extension of my personal values. As I walked thirty blocks down Fifth Avenue to Law School today, I was passed by a variety of people, some whose appearance caused me to be apprehensive. I realized that I don't want to be, or raise my children to be, always defensive and competitive, and that was my early role model for lawyers. Questions of casting off armor also makes me realize that I also do not think it is good to ask my children to always be trusting.

Thus, as we move into an era of lawyering that has been influenced by collaboration and cooperation, I think the best lawyers will ask, "How can I serve my client best?" I will capture joint gains and work with people when I can. I will also need to be careful because there are dangers and some people are "wolves in sheep's clothing."

This raises the conference's next question, "How are students prepared?" Are students prepared adequately in law school to participate in negotiation and mediation? First, permit me to say that law schools are making great progress; within the last decade law schools have moved beyond trial practice and have been routinely offering lawyering skills classes in pre-trial settlement processes. Now that we have classes in negotiation and mediation, law students are exposed to those kinds of experiences and that is progress. At the same time, exposure to those classes is optional at most law schools. I know that at Pepperdine, one-sixth of our

students enroll in a fourteen unit dispute resolution emphasis, and another two-thirds of our students take an ADR course or two. That means that about one-sixth of our students study at a school with an extensive dispute resolution curriculum, but graduate without being exposed to or prepared for this area of practice.

So it is at the law student's discretion as to how well prepared he or she wants to be. The good news is that there is certainly the opportunity. As we begin to think about the law student's experience in dispute resolution courses, I have a corollary concern. I fear that law school courses in negotiation and mediation may over emphasize the possibility of capturing potential joint gains. Thus, the people who choose to expose themselves to the dispute resolution curriculum in many law schools, are exposed to a curriculum that says, "We need to figure out how to collaborate. We need to look for joint gains. We need to learn to share our interests, learn other people's interests, and be able to solve problems."

My concern is that the world of practicing lawyers is sometimes different from that, and I fear that these students are not well prepared to practice law after they have had that law school experience. I fear that some of them leave our law school too optimistic and too trusting. When they go to their first mediation representing clients, they are disoriented because many times the merging of litigation and mediation, as Professor Kovach mentioned, and the influence that litigation has had on the way mediation is practiced for litigated cases, is more competitive than the law school simulated experience.

They have valuably enhanced their philosophical road map by being aware of cooperation. I would encourage law schools to continue to refine our curricula to not only equip law students with a lawyering ethic that includes cooperation, but to empower students to be competent in the competitive dynamics within negotiation and mediation as well.

PROFESSOR LELA LOVE: Thank you. Carol Liebman will speak next.

PROFESSOR CAROL LIEBMAN: Thank you. It is a pleasure to be here. Listening to Kim and Peter, I have been thinking about how to characterize my approach. I am not sure whether I would describe myself as being reactionary or naive, maybe a little cynical, or maybe it is just that I am in a grip of March madness, and so that piece of me is coming through.

As mediators, we all know how important it is to be transparent about the process. So let me be very transparent about the structure of my remarks. We were given the one mega question that you are all familiar with from the brochure publicizing this event. Then, we were asked to address three other questions.

Let me very quickly give you my short answer to all the questions and then discuss several of those answers in a bit more detail. The first question, the mega question, is "In teaching a new paradigm, must knights shed their swords and armor to enter certain ADR arenas?" I think that is the wrong question.

I would change it to one of two formulations, either, "When should knights shed their swords and armors to be effective champions in ADR arenas?", or, "What can we learn from knights about how to be effective in multiple arenas?" I'm not so pessimistic about what the knights, the competitors, have to offer if they are given the right forum.

The second question we were asked to address is, "Has the introduction of ADR classes in law schools created a paradigm shift so that lawyers have another philosophical map to consider as effective counselors and advocates for their clients?" Remember, the first part of that question, "Has the introduction of ADR courses in law schools shifted the paradigm?" My first answer to that is very simple: "Are you kidding?"

Third, "Are students prepared sufficiently in law school to represent clients effectively in negotiation and/or in mediation?" Another simple one: "No." Unless they have also participated in a good in-house advocacy clinic and understand the mediation process.

And the final question we were asked to address is, “Whether the traditional legal background is an asset or a liability in consensus building processes?” My answer to that is also very simple: absolutely.

Now, let me go back and address some of those questions in a little more detail. In terms of knights and what they should do with their swords and armor, or what we can learn from them, let me read you a description of a knight, a lawyer knight, when he was being honored about ten years ago.

He was described as someone honored “for his perceptions about the process of representing the poor and for strategies for doing it well. Strategies which are based,” –this is a knight, a lawyer knight, an adversarial knight, “strategies that are based upon a profound belief that the lawyer’s job is to empower his or her client, so as to make the client stronger, more independent, more self-confident, more able to steer by his or her own star, to attain his or her own destiny and to find his or her own fullness of spirit.” This is Tony Amsterdam⁽²⁰⁾ speaking about Gary Bellow.⁽²¹⁾ They are two of the leading innovators in legal education, in clinical education, and two of the most powerful teachers of the adversary model or the advocacy model of lawyering that you’ll find in the country.

However, notice those descriptors and those values. If you dropped out the first part about litigation, they would describe what we mediators say we do as well: empower the clients, let the clients find fulfillment, and honor client values. So, I think it is a mistake to dichotomize and to say litigators are valueless, and we, the mediators and negotiators, are the ones with values. I think it is a question of technique, of setting, and of being more sophisticated about when we use the armor and when we use the swords.

I was tempted to take the knight and armor metaphor and run with it, and I thought talking about chivalry might be a perfect way to extend the metaphor. Then I looked chivalry up in the dictionary. Webster’s Dictionary defines chivalry as the code of honor for knights, which calls on knights “to protect the poor, the weak and women.” So I thought maybe that is not such a great analogy. But I think there is a serious point about this knight: What tools do you need when you are functioning as a representative, as an advocate, and as a knight?

It would be wonderful if all we had to do in life was enlarge the pie, but there comes a time, no matter how big the pie, when you have to divide it. The tools that help you enlarge that pie are not necessarily the tools that are effective when it comes time to divide the pie.

To pretend you need, or you value, only the pie enlarging skills and not pay attention to the pie dividing skills does clients a real disservice. So I think it is a much harder question to answer whether you leave the knight’s tools outside the negotiation session or not. Perhaps we should be asking when to use various tools.

Let me go out of order to the question about whether students are prepared to represent clients through mediation and negotiation courses. I think those courses only do part of the job. If we are going to prepare students to be good advocates, good mediators, good representatives in mediation, they need to know interviewing skills, they need to know how to plan and evaluate a case, and they need to know how to counsel.

Now some skills, such as questioning, listening or summarizing, are used in multiple settings – in interviewing, counseling, mediation and negotiation. But you use the skills with different goals in different contexts. Even those of us who are proud of what we are teaching in negotiation and mediation are not preparing our students to be fully effective in either the negotiation or the mediation forum if we do not also give them training in counseling, interviewing, and case evaluation and planning.

The only place law students are learning that full panoply of skills is through in-house clinical programs and in a few simulation courses. The clinical students learn interviewing, counseling and case planning and, if they are lucky, they also get into negotiation and mediation courses.

As for the final question, whether traditional legal education is a liability in consensus building processes, I think it is and it is not. Certainly being able to recognize issues, reason with rigor and discipline, identify principles and social norms, evaluate problems, sort through data, anticipate the way events may play out, think in alternatives, be loyal to one's client and be able to articulate the client's positions are all part of traditional law school training. Those are valuable skills, whether you are using the warrior or the peacemaker tools of the trade. It is certainly also true that legal education has many gaps. I am repeatedly struck by the fact that too many students cannot distinguish between advocacy and adversarialness. They do not know how to deal with emotions, feelings, and other non-economic values. They have very little opportunity for collaborative work. Much of the law school experience, whether in the classroom or in the examination forum, are win-lose experiences. The reward system is, to a large extent, a win-lose system.

In conclusion, I want to go to what I think is the most interesting question we were asked to address, and that is, what about this idea of paradigm shift? Are we developing another philosophical map? And as I said, my first reaction when I read this was, "Are you kidding?" I would like to believe that we are bringing about a paradigm shift, but I do not see that happening.

Instead, we are engaged in a much more incremental process. If you look around the country, you may find mini-paradigm shifts, especially in states where there has been wide scale institutionalization of mediation by the courts. For example, I have a friend who is a lawyer in Florida. When Florida's program was first put into place, I would say, "Well, tell me about mediation," and he would say, "Grumble, grumble, it's terrible. I don't want it." A few years later, after he had been to some mediations he reported that sometimes it was really good, and sometimes it was really bad. Recently he said, "You know, now I have this list of mediators for one kind of case, and there's this list I call if I have a different kind of case." And then he went on to say that now he has a problem because he and many of the Florida lawyers want to get access to the court mediators before filing a case because they realized that filing suit escalates the conflict.

I think the evolution of his thinking indicates something of a paradigm shift. In the states where there has been a change in the culture, and I hope, Kim, that you will talk a little bit about the changes in Texas, one hallmark is that they have done it right. They did not cut corners as they established ADR programs. They have insisted on standards for mediators and mediation programs. There is a real risk that those who believe in the potential of mediation will succumb to the temptation—in order to get a foot in the door or a program in the courthouse – to cut corners and compromise too much. This is a serious threat to the credibility of mediation.

The kind of compromise that poses the greatest threat is getting programs going with mediators who have little or no training. If you do not think this is happening let me read you an email I received this week from a colleague in another law school in New York. He wrote that for the past few years, there has been a mediation program in housing court in his community. "The mediators for the most part have come from the landlords' bar. At a recent meeting, I raised the issue of training for those mediators and was told, 'There is none.' When I made a motion that the bar develop a mediation training program for those mediators, it was defeated. The reason being, 'Those mediators know about landlord tenant law and practice and that is all that is necessary.'" I think that programs which get started with lack of understanding of the mediation process and with no training for mediators are going to discredit mediation. There is also a risk that because administrators want to settle cases and clear the docket, mediators will be pressured to rush through the process. And there is a risk that mediators are going to be pressured to evaluate, not as a matter of last resort, if ever, but as a first resort. I fear we are going to wind up like the patient who takes only a few pills because she cannot afford the whole course of an antibiotic. The patient does not get well, and she may make the problem a great deal worse and more difficult to cure – for herself and for society.

I wish there were paradigm shifts, and I wish I were more optimistic about it. What we are doing is certainly having some impact, but there are risks of which we need to be aware. It may be more important to think about how we can collaborate with people who do not yet see the value of ADR rather than set them up as the bad guys. Thanks.

PROFESSOR LELA LOVE: Thank you, and finally, Professor Bush.

PROFESSOR ROBERT BUSH: Well, this is both a delight and a torture. A delight to share this time with my colleagues on the panel, a torture to try and say my piece in twelve minutes, but we will do what we can.

I am actually going to be rather editorial about answering these questions and not try to answer all of them. The one that interests me most, and I think really underlies the others, is this question about whether introducing ADR in law schools, or for that matter, into the legal system, has created a paradigm shift, or engendered a new “philosophical map.”

Now being a good scholar, when Lela suggested this subject I dug out my well worn copy of Len Riskin’s 1982 article, “Mediation and Lawyers,” that introduced this idea that mediation might be able to change the lawyer’s “standard philosophical map.”(22) In a few minutes, I’ll return to what he meant by that expression. Just to answer the general question — has ADR in law schools, or ADR in the legal system, created a new paradigm, a new philosophical map — my answer to that would be, not yet. I guess that is partly negative, partly hopeful. But it seems to me that to answer that question, it helps to back up and ask what we mean by a philosophical map?

What Riskin says is, that the lawyer’s standard philosophical map is determined largely by the power of two assumptions about matters that lawyers handle.(23) The first one is that the disputants are adversaries – meaning that one wins, the other must lose. The second is that disputes may be resolved through application by a third party of some general rule of law. Then Riskin goes on to explain why those assumptions are not the same as those employed by mediators.

I would say that buried under Len’s version of the lawyer’s philosophical map is a more general philosophical map — a map of the way we see the world and the people that we are interacting with in it. I submit that there are three crucial parts of that map for anybody involved in the field of conflict, whether in mediation, negotiation, litigation, etc.

These three parts of the map represent our basic assumptions about: (1) human nature, (2) human motivation, and (3) the nature of conflict as a human or social phenomenon. Our philosophical map displays what we think about these three things. Now, in the map that Len projects onto lawyers, the answers to those questions are as follows, although I am obviously oversimplifying greatly here and I hope you will excuse me and give me a little bit of poetic license to do this in twelve minutes.

First, as far as the nature of human beings, human beings are separate, self-interested, rational individuals. Second, the theory of motivation is that those individuals are motivated by some sort of essential acquisitive impulse, an impulse to fulfill themselves, and satisfy their self-defined desires.

Those two lead to the third, which is the assumption that conflict is a phenomenon that arises from incompatible desires among individuals that lead to competition over scarce resources, which should be resolved by some defined set of rights. The aim, therefore, in the activity of conflict, is individual gain — to win whatever you define as the stakes of the case.

This larger philosophical map underlies Riskin’s stated assumptions about how lawyers see the world. It supports adversariness as an assumption. It also supports the assumption that these conflicts over resources and rights can be solved through application of general rules, to resolve the dispute in concrete terms. And as for the ethic of this map — earlier we discussed the ethic of chivalry — at least once we bring it into the legal process, it is what we could call the ethic of fair competition: competition, but with rules.

Now, I do not know if everyone will accept that idea as a fair characterization or not. But working from that base, we could ask, “What has the study of mediation and negotiation over the last twenty to twenty-five years added to that map? Considering such resources as the model of needs and interests bargaining put forth in *Getting to Yes*,(24) built on earlier models at Harvard and elsewhere; considering cooperative models of conflict resolution based on identification of needs and interests instead of positions — what does all this add? How does it change this philosophical map?”

It seems to me that it creates some significant shifts. For example, it moves us from what we might call narrow self-interest to enlightened self-interest. It moves us away from a totally narrow view of self-interest, to a more enlightened view that takes the other individual into account. However, as recent feminist research on negotiation theory has suggested,⁽²⁵⁾ that theory of enlightened self-interest still basically sees the other party as a separate adversary individual. The other is an instrument who, by cooperating with, I use to fulfill my own needs. But the other is not someone whom I am interested in for their own sake.

Second, mediation and negotiation studies have shifted us from a focus on legal definitions of problems, and an application of formal rules to resolve issues, to a broader definition of what is at stake in a dispute. Our focus is now on needs and interests broadly defined, which are subject to the heuristics or problem solving approach. We ask how we can package those interests differently, and by doing so create a larger pie — which has to be divided up eventually, but which at least makes the problems soluble. So we have changed the way we define issues, and the approach we take to solving them, although we are still interested in solving issues. So, as to defining and solving issues, we have changed the terms of our discourse. We have broadened it, and that is a shift.

In effect we could say we have shifted from a view of conflict as inherently competitive to a view of conflict as at least potentially and partially cooperative.

That certainly seems to be a shift, according to which the aim is not an individual gain, but joint gain: win/win, not win/lose.

Now is that a significant change? Is that a paradigm shift? Well, there are things that change as we have seen. I would suggest that what is more interesting is there are things that do not. As we have made that shift, there are things that do not change.

For example, I believe the fundamental assumption of individual self-interest as the basis of our conception of human nature, whether narrow or enlightened (but still adversary), persists. So does the fundamental assumption that human motivation stems from the drive for acquisition, satisfaction, and gain, whether individual or joint. Therefore, we also still place fundamental reliance on some system involving a third party, whether the judge, the arbitrator, or the mediator — to supply certain kinds of principles whether they are legal rules or problem-solving heuristics, to produce a good solution, an outcome.

All of these things stay the same in our shift over these last twenty-five years from the world before our recent focus on mediation and negotiation to the world after that new emphasis on mediation and negotiation. So to sum up, there has been a change in our map, but it is a change of degree, not a change of kind. Not a paradigm shift.

It is indeed as Lela Love's friend suggested, "Litigation Lite". It is Bud Lite, but not fruit juice or for that matter raw vegetables. It is not something completely different. It is a modulation of the same basic paradigm: less emphasis on rights; a move from win/lose to win/win, a move from gain to joint gain.

As a matter of fact, I think that is one reason, if what I am suggesting is descriptively accurate, that lawyers have in many ways embraced mediation in recent years. And it is also one reason that others have suspected and been very worried about mediation — especially advocates of the have-nots who are concerned about what parties may wind up sacrificing in mediation because of the "wolf in sheep's clothing" phenomenon. What explains both attitudes is the fact that although we are talking about cooperation, in fact our fundamental assumptions have not changed that much. To go back to the question of our "ethic", we have moved from an ethic of fair competition to an ethic of cooperation for the sake of getting the best result. Now that is certainly a change. But I question whether it is a paradigm shift.

Now, maybe we are not interested in a paradigm shift. That is also fine. But if we were looking for a paradigm change, the interesting question for me is, what would it look like? As Monty Python says, "Now for something completely different!" What would it really look like if we were not drinking Bud, or Bud Lite, but

something entirely different? It seems to me that we can go back to Len Riskin himself for a hint of what that might be. In a piece that he wrote in 1984, two years after his article on “Mediation and Lawyers,” he addressed the question of mediation ethics for the lawyer during mediation.(26) He discussed two themes in mediation. One of them was the theme of joint gain that we’ve mentioned. The other was a very different theme he himself took from literature in the field of political theory and moral development, specifically focusing on the work of Carol Gilligan in that article. (27) He described it as an ethic of caring and connection, and argued that this is what underlies mediation, and this is why it is really a different philosophical map.

What is the different map according to that ethic? Again I do not have enough time to be very complete here. However we might sketch the elements of this map as involving first of all, a different conception of human nature, of who and what we are. In the world chartered by this map, humans are not separate, unconnected, disconnected individuals, but beings with intrinsic connections despite our separateness. Our separateness and our connectedness results in an inherent tension between the two which is itself connected to a different theory of human motivation. According to this different paradigm, our primary motivation is not acquisition at all, whether gain for ourselves or mutual gain. Our primary motivation is interaction — finding a way to interact and relate to one another, successfully balancing our sense of self and our responsiveness to others. This leads in turn to a different definition of what the phenomenon of conflict is all about, one in which conflict is not about resources at all, but is instead about interaction.

Conflict is a crisis in human interaction. And our aim in conflict is not gain, individual gain or joint gain, but finding a different way of interacting in conflict, one which allows us to both stand up for ourselves and be responsive to others. Our aim is to find a way of being neither victims nor victimizers, but partners in an ongoing human interaction which is always going to involve instability and conflict.(28)

Now that would be a different philosophical map if anyone were interested in it. I happen to be interested in it; and I think there are other people who are interested in it. It has largely informed a lot of the work that I and colleagues of mine have done focusing on mediation, over the last several years, because we see the potential for grounding the practice of mediation on that kind of philosophical map.

Now, that leaves me pretty far afield. But let me come back to the general topic of lawyers, shields and swords, and skills training in law school. Again, to come back to the idea of a professional “ethic”, this different philosophical map — with a different view of human nature, human motivation and the nature of conflict as a social phenomenon — leads us to a different ethic — not an ethic of competition, but also not an ethic of cooperation. An ethic of cooperation says: You must cooperate. You must do everything mutually and find a mutual, joint-gains solution. In many ways that is as uncomfortable for me as the ethic of competition. I do not find it expressive of what it is that real human beings go through in conflict.

To me, the ethic that emerges from this different philosophical map is an ethic of communication. Not competition, not cooperation, — which are both about getting something at the tail end, at the outcome end, — but rather human communication itself. It is ethic that puts the greatest importance on trying to figure out a way to walk through the conflict process in a human and humane way, regardless of what the conflict is about, and regardless of what the outcome will be. In this paradigm, in this ethic of conflict, it may be that shields and swords are often valid. However, there is a way of saying that the pen is mightier than the sword. What is implied in that phrase is that communication is more powerful than almost any other mode of human behavior.

The ethic suggested here, an ethic of communication, suggests that what we mostly need to focus on in training, whether it is training lawyers or training mediators, are the skills involved in supporting the human communication process. It seems to me that in the twenty years I have been teaching law school, we have paid little attention and placed little importance, comparatively speaking, on teaching those skills. Carol Liebman mentioned that teaching client counseling and interviewing in a regular law school class is rare.

I have come more and more to include this in my classes on mediation and ADR. And what one sees, the more you focus on that, is that the skills involved in counseling clients, and even in advocacy, are skills of

communication — of clarification, of being able to listen and understand better and explain better, what it is that people are talking about, what matters to them, and how to help them communicate it to someone else.

Our skills as lawyers tend to be very, very narrowly drawn. If we are to pursue this different kind of paradigm, it seems to me that the skills we need to focus most on are how to be better at human communication ourselves, and how to help our clients do it better. Maybe that does not require putting away our swords, but it certainly involves learning to use other instruments of a very different kind. Thank you.

PROFESSOR LELA LOVE: Thank you all for those wonderful remarks. We would very much welcome remarks from others here. There are distinguished professors in this audience. We would love to hear from students, your reactions to these presentations. There is a mike here. Please feel free to either ask a question or make a statement. The gentleman in the back. Please introduce yourself.

LEONARD MARLOW: I am only doing this because I know that the first question is the hardest to get. My name is Leonard Marlow. It seems to me that if we are using a term such as a “paradigm shift,” it might help us to have some basic understanding of what that represents, because it affects the answer to the question that we posed here today.

A paradigm shift means, of necessity, to view the world differently. We look out at the same world, but what we see is very different. Thomas Kuhn used the term “incommensurate” to express this, and what he meant by that was that the problems in the new view of the world do not solve the problems of the old world. Rather, what was a problem in the old world is simply not a problem in the new world. As I listened to the presentations here, it seemed to me that all the discussion about a paradigm shift proceeded on the assumption that this shift was taking place within that old world. The point is that if there has been a real paradigm shift, an attorney’s role could not be the same as it was before. Conversely, if it is the same, then there has not been any paradigm shift.

To give you an example of this, consider the discussion of what human nature is. Are we basically competitive? Or are we basically cooperative? It would seem that an appreciation of Thomas Kuhn’s instruction would tell us that just as facts are theory dependent, what we call human nature is also a by-product of the world that we find it in. The technical term for that is context.

Many of us who have worked in mediation know that you take people and put them in one context, and they will think and act in one way. And you place them in a different context—a different world—and they will act very differently. In other words, our adversarial system is in many respects a self-fulfilling prophecy. It proceeds on the assumption that the parties are adversaries and that organizes them as adversaries.

The only way that you are going to be able to counter that is to create a different world. But that requires that those worlds, those different paradigms, be grounded in different conceptions of the world itself.

I’m sorry, but I didn’t hear any evidence today of any thinking in that regard. Thank you.

PROFESSOR LELA LOVE: Thank you. Are there other comments or questions for a particular speaker here?

ROBERT RIGOLSI: Hi, I’m Robert Rigolosi, and my question involves what does this mean for law students right now, who are involved in mediation, but are cognizant of the fact that mediation is really embryonic? Also, what advice do you have for law students today who are interested in becoming mediators?

PROFESSOR LELA LOVE: Would you like to address that to any particular speaker here?

ROBERT RIGOLSI: Sure. Professor Kovach since you had such a clear vision.

PROFESSOR KIMBERLEE KOVACH: Thank you. I probably could not have resisted answering the question as it is the topic of a current discussion on an ADR listserv. Some believe and contend that you must have litigation experience before you can mediate. And that you cannot walk out of law school and mediate. Yet, the legal system allows individuals to walk out of law school and litigate, which is a much more complex process. A belief system that contends you are competent to be an advocate but not an intermediary is troublesome to me. Perhaps it is what the marketplace has decided. Those mediators that have come from a background in litigation want to say that litigation experience is necessary.

And as long as we see mediation in that context and in that view, that belief will continue. But just as anybody, starting a new enterprise or a new business, can walk out tomorrow and plan and market their business, so can a mediator.

In the courts in particular, judges and lawyers contend that litigation experience is important. I think it depends upon the real issues in dispute — which often have little relationship to the litigation. I am aware of several Texas mediators, particularly in the family law area, who have come right out of law school and begun a practice, never having litigated a case, so it can be done. But it will likely take some time and effort to eliminate those assumptions.

PROFESSOR CAROL LIEBMAN: I think Kim is absolutely right. It helps to have been battle tested at least for some types of mediation. But you can find opportunities early in your professional careers to use your mediation skills. You may not be appointed to mediate in a court-annexed program, but you can use your skills when you counsel a client and help him or her explore options. You can use your skills within the organization where you are practicing. And you can alert your colleagues to the advantages of mediation. You have expertise about ADR — let that expertise be known. When a client comes in the door, he or she has a problem and you already know more about processes which can help solve the problem than many senior lawyers.

A few years ago I was in a legal aid office saying, “Why don’t you send us some cases to mediate,” and one of the lawyers said, “I cannot do that. When clients come in the door, they want to know what their legal rights are, and you cannot do that in mediation.” And I thought, wait a minute, I have been a litigator for fifteen years. I have never had a client walk in the door and say, “What are my legal rights?” They usually come in with a messy problem. Use your mediation skills to counsel your client and work with the other side to solve the problem.

So keep on using those skills in the practice of law and then remind yourself that you have just used a mediation skill and you will keep the skills sharp and build opportunities.

PROFESSOR ROBERT BUSH: Just two quick things to add to that. At the very least you might think about the need for further training, if you were interested in mediating, and there is a lot of that available these days. What I would also suggest, stemming from my earlier remarks, is to be an educated consumer of training. There are different types of training available that are based on very different views of the premises as underlying the mediation process, and what I would counsel you to do is to be an educated consumer of the kind of further training that you may need and may want to get in the market place. Pay attention to the premises and assumptions underlying the training. The other thing that I would say to you as a graduating lawyer is: Do not worry so much about yourself. If you are interested in this field, think about the field as a whole. Therefore, one of the things that you might begin doing, even in law school and certainly after law school, is joining bar committees and other kinds of committees. Be someone who pushes people to think about some of the questions that we have asked today, rather than being like the members of that committee that Carol described who said, “Well, why shouldn’t our landlord lawyers just serve as mediators? And what the heck do they need training for? They know the law.” So, you have a role to serve as a kind of citizen policy maker in the bar as soon as you get your legal credential.

One more point: realize that the mediation field is made up of a lot of people who are not lawyers, who have a lot to teach you and us, me, everybody. So one good way of moving into practice is to partner with someone: and when you think of who you want to partner with, maybe you do not necessarily want to partner

with another lawyer. Maybe there are skills, for example communication, that you may be able to learn better from someone who comes from a different tradition of learning. Those partnering opportunities are very rich out there and very rewarding.

PROFESSOR PETER ROBINSON: My only comment would be that when you say you cannot mediate when you graduate from law school, I think you are assuming mediating cases, referred to lawyers, representing their clients [and you then meeting with them.] I would agree with you that the marketplace dictates that it wants someone who has gone down the path before: right, wrong or indifferent. I think that is reality. So that if you are going to lead them to settlement land, they want you to have walked through the trenches for awhile.

But there are a lot of other places to mediate. And there are other organizations and programs that [if you will say, I need to get paid 300 dollars an hour and have very prestigious lawyers bring their very prestigious clients to me fresh out of law school] if you're willing to start somewhere lower than getting paid three hundred dollars an hour, I think there are places where you can make a contribution.

PROFESSOR LELA LOVE: Thank you. We have five more minutes, so be thinking if you want to make some comment.

QUESTION: Do the discussions in mediation, which can bring in a lot of information beyond just the legal issues, interfere with fact-finding procedures or impede the judicial process? And do adversarial parties really share information in mediation?

PROFESSOR PETER ROBINSON: We'll go in reverse order this time. My sense is that usually people talk about the facts of the case and that they lay that foundation. And then the opportunity of the mediation is for us to invite them to explore other dimensions. So my sense is that those have not been competitive, although there have been situations where people bring up things and they start to move forward with the conversation. And I know I am ignorant of whatever they're talking about but both of them seem to be at peace that they've both taken care of the factual foundation and want to move into other dimensions. So my sense is it hasn't haunted me. My sense is that people come to the table and have good conversations, especially when there are lawyers involved.

I think that one of the panelists, I forget who, talked about lawyers coming to tables and having certain skills about organizing complex fact situation and what have you. So, I don't think it's an impediment.

PROFESSOR CAROL LIEBMAN: And I think in skilled negotiation before you get to court, it's common to talk about things that would never be talked about in court. So I think it facilitates that part of the process and I don't think it gets in the way at all.

PROFESSOR KIMBERLEE KOVACH: Let me add a dimmer perspective. From the view of ADR as "litigation lite," one of the contentions that a lot of lawyers will make is, "If I've got secret evidence that will win my case in court, well, I can't disclose that in mediation."

And of course, we know mediation is about sharing information. My question to them is, are you at mediation as only a pre-trial process or procedure and your ultimate goal is trial? Or are you really here to settle the case? How they answer that question determines whether they're going to share that information.

PROFESSOR PETER ROBINSON: And I would complicate it by saying that I love to be with lawyers who aren't there necessarily to settle the case, and sometimes I think our assumptions about mediation is that people in good faith will come and they will be ready to, the phrase I like to say is, stand naked before each other and then decide if they can settle the case.

And my sense is that there are times where people come and have a conversation and they go away. And I feel like we had a wonderful time.

PROFESSOR LELA LOVE: Well, that is a nice note to end on. We had a wonderful time here. Before we adjourn to refreshments that are over to my right, I would like to take this moment to celebrate what the Cardozo Online Journal of Conflict Resolution has done by bringing us all here together.

Cardozo Law School's dispute resolution program has evolved over the years, thanks to many people here in the room, including, of course, both current and past students. We are deeply grateful for your support, as well as the support and participation of our panelists. So a moment of celebration. You will see this event posted on the web shortly. One of the opportunities of a website is that we can continue this conversation. So that if you formulate your thoughts on this subject, if you have the bon mot of what the knights should wear, whether it's a diplomat's cloak, renaissance garb, or a sword and shield, you will have an opportunity to express your view on our web site. Thank you and enjoy the refreshments.

(1) See Leonard L. Riskin, *Mediation and Lawyers*, 43 OHIO ST. L.J. 29 (1982) (describing the lawyer's standard philosophical map).

(2) See Jack M. Sabatino, *ADR as "Litigation Lite": Procedural and Evidentiary Norms Embedded Within Alternative Dispute Resolution*, 47 EMORY L.J. 1289 (1998).

(3) See ERIC GALTON, *REPRESENTING CLIENTS IN MEDIATION* (Texas Lawyer Press 1994).

(4) See ROBERT A. BARUCH BUSH and JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION* (Jossey Bass 1994).

(5) See Kimberlee K. Kovach & Lela P. Love, *Mapping Mediation: The Risks of Riskin's Grid*, 3 HARV. NEG. L. REV. 71 (1998).

(6) See generally Carrie Menkel-Meadow, *Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-Opted or "The Law of ADR"*, 19 FLA. ST. L. REV. 1 (1991); See also John Lande, *How Will Lawyering and Mediation Practices Transform Each Other?* 24 FLA. ST. U. L. Rev. 839 (1997); Robert B. Moberly, *Mediator Gag Rules: Is it Ethical for Mediators to Evaluate or Advise?* 38 S. TEX. L. REV. 669 (1997).

(7) See Kimberlee K. Kovach & Lela P. Love, *Mapping Mediation: The Risks of Riskin's Grid*, 3 HARV. NEG. L. REV. 71 (1998) (discussing the influence of lawyering conduct within the mediation process); c.f., Lande, *supra* note 6, at 847 (describing the process as "liti-mediation").

(8) See generally Paul T. Wangerin, *The Political and Economic Roots of the "Adversary System" of Justice and "Alternative Dispute Resolution"*, 9 OHIO ST. J. ON DISP. RESOL. 203 (1994); See also STEPHAN LANDSMAN, *READINGS ON ADVERSARIAL JUSTICE: THE AMERICAN APPROACH TO ADJUDICATION* (1988).

(9) For a number of years now, the American Bar Association, along with other state and local bars, have enacted codes of civility and professionalism. See Section of Litigation (visited Oct.4,1999) Section of Business Law (visited Oct. 4, 1999) Tort and Insurance Practice Section (visited Oct.4,1999).

(10) See Jeffrey W. Stempel, *Reflections on Judicial ADR and the Multi-Door Courthouse at Twenty: Fait Accompli, Failed Overture or Fledgling Adulthood?*, 11 OHIO ST. J. ON DISP. RESOL. 297 (1986) (discussing Court annexed ADR); See also Thomas J. Stipanowich, *The Multi-Door Contract and Other Possibilities*, 13 OHIO ST. J. ON DISP. RESOL. 303 (1998).

(11) Two views of mediation have evolved which have been described as the "efficiency" model where focus and emphasis is on settlement and the goals of saving time and money; and the "empowerment" model, where significance is placed upon party participation in, and satisfaction with, the process.

(12) See BUSH and FOLGER, *supra* note 4 (discussing the process of mediation without emphasis on settlement); See also Kimberlee K. Kovach, *MEDIATION: PRINCIPLES AND PRACTICE* (1994) (same).

(13) Wangerin, *supra* note 8, at 228; Menkel-Meadow, *supra* note 6, at 38-41.

(14) We have seen this when lawyers talk about “winning” the mediation and about being an “advocate” in mediation. At a minimum, many of these litigation-type behaviors are inappropriate for mediation; in other instances they may stalemate the entire process. See Menkel-Meadow, *supra* note 1.

(15) Wangerin, *supra* note 8.

(16) Many variations exist in the negotiation process. Sometimes in more traditional or distributive model takes on an adversarial approach. However, in the interest based or integrative methods, the parties in a negotiation will more likely engage in problem-solving. See Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 *UCLA L. REV.* 754, 795 (1984).

(17) See Kovach & Love, *supra* note 5, at 106-07.

(18) See Carrie Menkel-Meadow, *Ethics in Alternative Dispute Resolution: New Issues, No Answers from the Adversary Conception of Lawyers’ Responsibilities*, 38 *S. TEX. L. REV.* 407 (1997).

(19) See ROGER FISHER, WILLIAM URY & BRUCE PATTON, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* (1991).

(20) Clinical Professor at New York University Law School.

(21) Clinical Professor at Harvard Law School.

(22) See Riskin, *supra* note 1.

(23) *Id.*

(24) FISHER, URY & PATTON, *supra*, note 19.

(25) See e.g., DEBORAH M. KOLB and LINDA L. PUTNAM, *Through the Looking Glass: Negotiation Refracted Through the Lens of Gender*, *WORKPLACE DISPUTE RESOLUTION* 231, (S. Gleason ed., 1997).

(26) See Leonard L. Riskin, *Standard for the Neutral Lawyer in Mediation*, 26 *ARIZ. L. REV.* 329 (1984).

(27) See e.g., C. GILLIGAN, *IN A DIFFERENT VOICE* (1982).

(28) For a fuller exposition of this different “map”. See BUSH and FOLGER, *supra* note 12, at 229-59.