

Teaching Old Dogs New Tricks: Can Lawyers Be Effective At Mediation?

Florence Karimi Shako

Riara Law School, Riara University, Kenya.

ABSTRACT

This study focuses on the question of whether mediation training can equip lawyers with the necessary guidance and skills for effective dispute resolution. It has been suggested that the traditional law school curriculum inappropriately privileges an adversarial approach to disputes and pays undue attention to the case-based method at the expense of more holistic or contextualized understanding of grievances.¹ This study argues that with the proper training, lawyers can be effective at mediation.

INTRODUCTION

Most Alternative Dispute Resolution teachers reiterate the argument of Professor Derek Bok of Harvard University that the traditional law school curriculum is tilted towards preparing students for ‘legal combat’ rather than the ‘gentler arts’ of reconciliation and accommodation.² Practicing lawyers know that litigation is a last resort for solving clients’ problems; that most work is to prevent litigation and that the greatest amount of time is spent counseling clients and negotiating with other lawyers.³ Students are rarely exposed to these skills in the traditional curriculum.⁴ Therefore the traditional school curriculum is in favor of teaching students to be adversarial yet most cases end up being negotiated and settled.

Because the conceptual framework underlying mediation is completely different from litigation, the rules of the game are changed and lawyers are asked to do different things, to

¹ Mulcahy, L. ‘Can leopards change their spots? An evaluation of the role of lawyers in medical negligence. mediation’ (2001) 8 *International Journal of the Legal Profession*, 206-207.

² Carr-Gregg, S. ‘Alternative Dispute Resolution in Practical Legal Training - Too Little Too Late?’ (1997) 10 *Journal of Professional Legal Education*, 23.

³ Carr-Gregg, *supra*, 24.

⁴ Carr-Gregg, *supra*, 25.

approach each other with different mind-sets, and to seek different outcomes for their disputes.⁵ It is important to be cognitive of changing one's mind-set because the "adversary model" is a powerful heuristic; and if lawyers, who have been trained and primarily practice as litigators, are not conscious of its effects, they will operate subconsciously out of the adversary model.⁶ Lawyers who become mediators for their clients must agree to limit their mediation conduct to a non-directive, non-judgmental, non-evaluative style that, in various forms, has been termed "broad" and "facilitative," or "transformative."⁷

One of the goals of teaching law students to mediate is to provide future lawyers with a framework to diagnose problems and evaluate the appropriate applications and limitations of all dispute resolution processes.⁸ This means that a competent lawyer ought to know the alternatives that exist to litigation, their benefits and limitations. Litigation is not the solution to every problem presented by the client but at the same time neither is mediation. Lawyers should be armed with knowledge regarding both processes in order to serve their clients better.

Lawyers play a number of roles in dispute resolution and these include:

- a) negotiating agreements incorporating dispute resolution processes,
- b) designing processes for clients,
- c) serving as "architects and engineers of dispute resolution,"
- d) judges, legislators and government officials, bar committee
- e) members, members of community organizations, and advisors
- f) to private and public enterprises,
- g) advising clients about ADR,
- h) preparing clients and cases for mediation,
- i) representing clients at mediation sessions as silent advisors,
- j) co-participants, and as dominant or sole participants,
- k) providing post-mediation representation in regard to settlement
- l) or preparation for the next stage of dispute resolution,

⁵ Lawrence, J. K. L. 'Mediation Advocacy: Partnering with the Mediator' (1999) 15 *Ohio State Journal On Dispute Resolution*, 425.

⁶ Lawrence, J. K. L., *supra*, 425.

⁷ Hyman, J. M. 'Slip-Sliding into Mediation: Can Lawyers Mediate their Clients Problems' (1998) 5 *Clinical Law Review*, 53.

⁸ Marcel, K. W. & Wiseman, P. 'Why We Teach Law Students to Mediate' (1987) *Journal of Dispute Resolution*, 77.

m) serving as mediators.⁹

It is therefore important that lawyers receive adequate and relevant training to be able to play their role in mediation effectively.

Lawyers have always been able to advise their clients to attempt to negotiate a settlement in a dispute or to recommend the use of a third party to act as a mediator or facilitator in the negotiations.¹⁰ The entire legal profession - lawyers, judges, law teachers - has become so mesmerized with the stimulation of the courtroom contest that we tend to forget that they ought to be 'healers of conflict.'¹¹ Gilbert goes on to argue that one important fact for all lawyers to remember is that almost all lawsuits settle and never go to trial; that even for the most savvy trial lawyer, the mediation process is a different and possibly intimidating universe.¹² Alternative dispute resolution is an art to be mastered, not a body of rules to be learned.¹³ Gilbert emphasizes in his article that there is a need to assist trial lawyers in better understanding the mediation process so that they may represent their clients more ably in the mediation setting.¹⁴

Mediation presents the lawyer with a role to which he or she is not accustomed. It requires skills, which do not necessarily complement those of a successful negotiator.¹⁵ Lawyers are trained to negotiate and the measure of an attorney's mettle is his or her ability to win for the client.¹⁶ An attorney who wishes to use alternative dispute resolution techniques, particularly mediation, must shift gears.¹⁷ This change in role from being partisan to neutral is not easy for lawyers.¹⁸

This article examines whether suitable training can help lawyers be successful at mediation whether as lawyer-mediators or when representing their clients in a mediation setting where a third party acts as the mediator. Part 1 of this article argues that the claims that the traditional law school curriculum is deficient are valid. That there is a gap left by the current legal training in law schools that leaves lawyers as inefficient mediators. Part 2 discusses what is meant by

⁹ Schmitz, S. J. 'What Should we Teach in ADR Courses: Concepts and Skills for Lawyers Representing Clients in Mediation' (2001) 6 *Harvard Negotiation Law Review*, 189.

¹⁰ Chinkin, C. 'Educating lawyers about mediation' (1998) 10 *Journal of Professional Legal Education*, 44.

¹¹ Gilbert, L. 'Preparation of the Trial Lawyer for Mediation' (2003) 7 *Jones Law Review*, 85.

¹² Gilbert, *supra*, 85.

¹³ Gilbert, *supra*, 85-86.

¹⁴ Gilbert, *supra*, 86.

¹⁵ Maida, P. R. 'Engagement of Lawyer-Mediators in Client Conflict' (1988) 4 *Ohio State Journal On Dispute Resolution*, 49.

¹⁶ Maida, *supra*, 50.

¹⁷ Maida, *supra*, 49-50.

¹⁸ Maida, *supra*, 51.

‘proper training’, looking at the different ways in which mediation could be taught at law schools. Different approaches are discussed such as having a ‘modern’ lawyering curriculum, teaching objectivity and what it entails, training lawyers how to be ‘wise’, embracing cognitive and behavioral knowledge in mediation training and teaching lawyers to become emotionally intelligent. Part 3 of this article contends that once lawyers receive proper training, they can be effective in dispute resolution as they address clients’ problems beyond litigation. However, there are also arguments that lawyers cannot be successful mediators. This article gives insight into the role of lawyers in mediation and especially how that role can be improved through training that goes beyond the usual combative, adversarial instruction.

1. Is legal training deficient when it comes to mediation?

Legal writing pedagogy in the first semester in most schools focuses narrowly on teaching students to form an “objective” conclusion about the law in a hypothetical situation (usually a dispute) and requires students to justify that conclusion in writing by appropriate reference to authority: the classic memorandum of law.¹⁹ This is the case based method of learning. An important goal is to build students’ skills in what is loosely termed “formal” legal reasoning techniques, i.e., the ability to induce legal principles from multiple common law sources, to reason by analogy, and to deduce the effect of legal principles on various factual situations.²⁰ This means that an important part of legal training is to be able to reduce the clients’ problems into a dispute recognized by law. Legal training tends to be reductionist in nature.

However, according to Marcel *et al*, the case method gives students a distorted perspective on what lawyers do in practice.²¹ They further argue that mediation training and practice enhance communication skills and requires students to view problems objectively, to appreciate their complexity, and to look for creative, integrative solutions.²² They contend that mediation exposes students to the problems of real people and consequently increases student awareness and understanding of human nature and behavior.²³ Mediation training is therefore an excellent

¹⁹ O’neill, K. ‘Adding an Alternative Dispute Resolution Perspective to a Traditional Legal Writing Course’ (1998) *50 Florida Law Review*, 711.

²⁰ O’neill, K., *supra*, 711.

²¹ Marcel, K. W. & Wiseman, P. ‘Why We Teach Law Students to Mediate’ (1987) *Journal of Dispute Resolution*, 81.

²² Marcel K. W. & Wiseman, P., *supra*, 86.

²³ *Ibid*.

vehicle for teaching students to be effective lawyers as each of these skills is essential to effective advocacy.²⁴ Legal training is therefore deficient in the sense that it fails to develop the law students' communication skills and they lack full appreciation of the clients' problems.

Nolan-Haley argues that many lawyers simply lack a basic understanding of the mediation process, the premises and values which drive it, and the creative outcomes which are possible.²⁵ She argues that the less than ideal representative lawyers may act like combatants or, just as some lawyers do in adversarial practice, they may fail either to understand or to present their clients' underlying needs and interests, try to take control of the process, fail to inform clients about what is happening in mediation, or coerce clients into settling.²⁶ Too often, in lawyer-controlled mediation, lawyers do not listen to their clients but presume to know their goals and then dictate what should occur in mediation.²⁷

This can arguably be attributed to the legal training received in law schools where the emphasis is on being adversarial. Law students are not taught how to take their clients' interests into account. They are taught to represent them and 'win' the case for them. However, what the lawyer may perceive as a 'win' may not be what the client wants or needs. Lawyers for example, may focus on getting financial compensation in the form of damages for their clients yet in some cases, the clients' underlying interest and need has nothing to do with money. Sometimes they need an alternative remedy such as an apology but the legal training a lawyer has may fail to help him perceive these underlying interests and needs.

Attorneys are also often unable to comprehend the non-adversarial nature of mediation and thus conduct themselves in ways that hinder settlement or miss opportunities to bring about settlement.²⁸ Their conduct may make the entire process unsuccessful, as the training they received did not prepare them for peaceful negotiation of disputes. They may also hinder settlement due to over optimism that should the case go to trial, they would be sure to win.

The lawyer of the next century will need to be able to diagnose and analyze problems, to talk to and listen to people, to facilitate conversations, to negotiate effectively, to resolve disputes, to understand and present complex material, to use ever-changing technologies, to plan, to evaluate

²⁴ Ibid.

²⁵ Nolan-Haley, J. 'Lawyers, Clients and Mediation' (1997) 73 *Notre Dame Law Review*, 1373.

²⁶ Nolan-Haley, J., 'Lawyers, Clients and Mediation', 1380-1381.

²⁷ Nolan-Haley, J., 'Lawyers, Clients and Mediation', 1381.

²⁸ Schmitz, S. J. 'What Should we Teach in ADR Courses: Concepts and Skills for Lawyers Representing Clients in Mediation' (2001) 6 *Harvard Negotiation Law Review*, 189.

both economic and emotional components and consequences of human decision-making, and to be creative-to use tried and true methods when they are appropriate, but not to fear new and category-smashing ideas or solutions.²⁹

Christine Chinkin argues that adequate preparation for mediation is an important factor in achieving a successful outcome, both from the perspective of reaching settlement and from that of client satisfaction.³⁰ Lawyers need to assist their own clients to prepare for mediation by discussing the client's interests and suitable outcomes for the client; the client must be aware of the realities of not reaching agreement.³¹ This means that should a lawyer have inadequate knowledge as to the process and content of mediation, they cannot be effective. Lawyers will be unable to adequately prepare their clients for mediation.

Chinkin further contends that while lawyers should be aware of these services and be prepared to recommend them in appropriate cases, they also need to avoid making an assumption that all such cases are suitable for mediation.³² Mediation requires the parties to confront each other in their attempt to reach an agreement and this might be unacceptable in some circumstances, for example, where there has been a history of violence such as domestic violence.³³ In such situations, the power imbalance may render mediation ineffective.

Marion Roberts³⁴ reiterates this point by arguing that in some cases many couples appear not to manage to engage in face-to-face discussions, let alone discussion free from the tumult of anger, bullying and rowing. In such cases, mediation might not be the answer.

The case method causes students to look at legal problems abstractly, divorced from reality and human nature.³⁵ Many client problems might be solved with more satisfying results at less expense and in less time, if lawyers understood what their clients really wanted and knew how to respond to their clients' needs.³⁶ Law students following the adversarial method act as zealous advocates while ignoring altogether the client for whom they purport to act. There is a need to

²⁹ Menkel-Meadow, C. 'Taking Problem Solving Pedagogy Seriously' (1999) 49 *Journal of Legal Education*, 14-19.

³⁰ Chinkin, C. 'Educating lawyers about mediation' (1998) 10 *Journal of Professional Legal Education*, 47.

³¹ *Ibid.*

³² Chinkin, C., *supra*, 46.

³³ Chinkin, C., *supra*, 46-47.

³⁴ M. Roberts, *Mediation in Family Disputes: Principles of Practice* (Aldershot, Hampshire and Burlington, USA: Ashgate Publishing Limited, 3rd ed., 2008).

³⁵ Carr-Gregg, S. 'Alternative Dispute Resolution in Practical Legal Training - Too Little Too Late? (1997) 10 *Journal of Professional Legal Education*, 25.

³⁶ Carr-Gregg, S., *supra*, 26.

look beyond acting as a champion of the clients' rights and actually listening to the reality of his or her situation and ensuring he or she gets what they truly want.

Carr-Gregg therefore argues that certain kinds of cases are clearly best handled using non-adversarial or a combination of non-adversarial or co-operative approaches; for example, in contract negotiations it may be important to foster the ongoing relationship between clients so that adversarial techniques are inappropriate.³⁷ It is not in all circumstances that the lawyer needs to be adversarial. It is therefore important for law students to gain not just the basic legal training but what is being referred to in this article as 'proper training.'

2. What kind of training constitutes 'proper training?'

2.1. A modern lawyering curriculum

According to Blaustone, proper training would involve requiring the study of mediation in law school as part of a "modern" lawyering curriculum; a mandatory mediation instruction that confronts students with a shift in perspective which they must react to by developing critical thinking skills about process and role.³⁸ Blaustone argues that a "modern" lawyering curriculum is one which, in its totality, views the competent lawyer as a capable problem solver both in and out of the courtroom and presents knowledge about mediation as a necessary and fundamental part of a competent lawyer's awareness, and as part of the circumstances she or he will face in law practice.³⁹ This means that lawyers will stop thinking of litigation as the answer to all the clients' problems and will be aware that alternative dispute resolution processes such as mediation exist. This will enable them to think critically about the best way to approach the situations that face their client and follow the best possible process. Even if they do choose to litigate, the decision is an informed one.

Teaching students early to explore risk analysis emphasizes that valuation of a case is both a mathematical and a human problem.⁴⁰ Asking students to look deeper into their cases-to understand that the apparent dispute is often only the tip of the iceberg; it enables the student to

³⁷ Carr-Gregg, S., *supra*, 27.

³⁸ Blaustone, B. 'Training the Modern Lawyer: Incorporating the Study of Mediation Into Required Law School Courses' (1992) 21 *Southwestern University Law Review*, 1317.

³⁹ Blaustone, B., *supra*, 1318, 1321.

⁴⁰ Menkel-Meadow, C. 'Taking Problem Solving Pedagogy Seriously' (1999) 49 *Journal of Legal Education*, 16.

see the lawyer's potential to bring added value to any case.⁴¹ The lawyer who can contextualize a problem and "solve" its constituent elements or create a new transaction, relationship, or entity will surely make a client feel better about the legal process.⁴² Menkel-Meadow therefore agrees with Blaustone in favor of a curriculum that teaches law students to be critical thinkers and problem solvers.

Blaustone further contends that the study of mediation should be part of the law school curriculum and that attention should be paid to developing proficiency in basic communication skills. .⁴³ When lawyers listen to their clients' problems instead of advocating for what they think is in the best interests of the clients, their overall lawyering skills are improved.

Thus, it can be argued that by introducing such a "modern" lawyering curriculum, law students can then be better equipped to be effective mediators in future as they will have been given the necessary tools to better appreciate the problem.⁴⁴ From Blaustone's point of view, law students will better develop an appreciation of the role of lawyer as a problem solver; begin to develop an ability to perform conflict analysis; receive both a theoretical and a skills exposure to mediation; be able to competently advise their clients regarding the selection of a resolution process; acquire introductory levels of ability in interviewing and listening skills associated with quality communication and fact investigation; improve their ability to think critically and become open to alternative interpretations.⁴⁵

2.2 Objectivity by Lawyer-Mediators

Maida argues that successful negotiation relies upon detached observation; mediators need distance from the object studied so as to obtain valid and reliable observations upon which successful negotiating depends.⁴⁶ He argues that by engaging the mediator, negotiators can distract him or her, so that he or she may not hear what the other parties to the conflict are saying.⁴⁷ Lawyer-mediators need to learn to let the parties tell their story. This empowers the

⁴¹ Menkel-Meadow, C., *supra*, 16.

⁴² Menkel-Meadow, C., *supra*, 16.

⁴³ Blaustone, B., *supra*, 1322.

⁴⁴ Blaustone, B., *supra*, 1324.

⁴⁵ Blaustone, B., *supra*, 1325-1329.

⁴⁶ Maida, P. R. 'Engagement of Lawyer-Mediators in Client Conflict' (1988) 4 *Ohio State Journal On Dispute Resolution*, 49.

⁴⁷ Maida, P. R., *supra*, 50.

parties as they feel heard and not alienated by the process. To be effective at mediation, they need to shed the cloak of representative advocate and stop speaking on behalf of the clients.

Maida also posits that for the lawyer-mediator, a frame includes all contact with the client and the rules of conduct which govern this contact thus the clients' conflicted system is brought into the lawyer-mediator's frame and becomes part of it.⁴⁸ To be effective, lawyer-mediators must manage the boundaries of the frame so that the client's response to the mediator's actions is devoid of subterfuge or attempts to co-opt the mediator into the parties' conflict; the effectiveness of the mediator depends upon proper frame management.⁴⁹ Should the lawyer-mediator handle the frame well, he will be able to divorce himself from the parties' conflict and act as an objective mediator.

Legal and mediation training should therefore include a study of systems theory, the scientific aspects of fact-finding as it relates to neutrality and frame analysis. Lawyer-mediators should be trained to: (1) verify what has been observed through the use of introspection; (2) be aware of their reactions in naturalistic settings; (3) use feedback as a technique to decrease subjectivity; and, (4) reflect upon their own experiences.⁵⁰ This kind of training will better prepare law students for the mediation field and the kind of objectivity that is expected from them in the mediation process.

2.3 Training lawyers to be 'wise' through intensive mediation training

Weinstein argues that intensive training in mediation could help law students gain the insight necessary to fulfill the high aspirations held for the lawyer, that he or she might become a "wise" person, able to assist others in an empowering way.⁵¹ We perceive a wise person to be one who can listen to others and exercise professional judgment, knowledge, emotions, and concern in a non-paternalistic way.⁵² Therefore, she argues that to be an effective mediator, the lawyer needs to be trained to appreciate the context of the conflict, not just the legal context but the economic, social, cultural and psychological concerns of the client. By listening without judgment and showing concern, the lawyer improves his overall lawyering skills.

⁴⁸ Maida, P. R., *supra*, 58.

⁴⁹ Maida, P. R., *supra*, 57.

⁵⁰ Maida, P. R., *supra*, 64.

⁵¹ Weinstein, J. 'Teaching Mediation in Law Schools: Training Lawyers to be Wise'(1990) 35 *New York Law School Law Review*, 199.

⁵² Weinstein, J., *supra*, 201.

The “standard philosophical map” of lawyers has two dimensions: a belief in the efficacy of rules to resolve disputes and the assumption that conflict is a zero-sum game in which the interests of the parties are necessarily adversarial.⁵³ By being exposed to the mediation process, law students could expand their philosophical maps to include the ideas that conflict may be resolved by tailoring the resolution to the peculiar needs of the parties, and that such resolutions might allow both sides to get what they need.⁵⁴ Expanding their philosophical maps will mean moving from a win-lose thought process to a win-win mentality and giving creative solutions based on the clients’ concerns.

Weinstein met the following five goals and argues that through accomplishing them and conducting fairly intensive training, the law students had significant learning. These include: (1) creating a model which would draw forth the students’ wisdom and creativity; (2) changing the lawyer’s philosophical map; (3) increasing lawyering skills; (4) achieving clinical goals of increased self-knowledge and understanding of the learning process; (5) remaining open and actively participating in them learning process.⁵⁵ Therefore these goals could act as a blue print for proper training of law students in the art of mediation. This would significantly improve their appreciation of what it means to be a mediator and the skill set that is required.

2.4 Cognitive and Behavioral knowledge

Dispute resolution education provides an ideal opportunity for students to learn how to be lawyers on two levels-“thinking like a lawyer” (cognitive and intellectual understanding of legal and policy processes) and “doing like a lawyer” (behavioral competency in using the skills and judgment that constitute the actual work in which the concepts of law and lawyering are expressed).⁵⁶ Menkel-Meadow therefore argues for mediation training that encompasses both cognitive and behavioral knowledge. She argues that it is still important for law students to learn the legal processes but this should be supplemented with learning skills that would be helpful to enable a lawyer engage in mediation.

Intensive skills work actually teaches students different behaviors than they are taught to master in the rest of their legal education-openness to clients, receptivity, synthetic powers of

⁵³ Weinstein, J., *supra*, 202.

⁵⁴ Weinstein, J., *supra*, 203.

⁵⁵ Weinstein, J., *supra*, 217.

⁵⁶ Menkel-Meadow, C. ‘To Solve Problems, Not Make Them: Integrating ADR in the Law School Curriculum’ (1992) 46 *Southern Methodist University Law Review*, 1997.

reasoning, creativity, listening, discretion and judgment.⁵⁷ In learning to systematically solve problems, students learn to expand the issues in a problem (rather than narrow them) to encourage more “trades” and possible combinations of solutions, rather than to reduce disputes to zero-sum claims about money.⁵⁸ The emphasis on reduction of clients’ problems into a legally framed dispute is removed and replaced by expansion of disputes in order to get to know what the client really needs.

According to Menkel-Meadow, in designing an ADR curriculum, the ideal form would be a fully sequenced program with some introduction in the first year, either through pervasive course treatment or a survey course, followed by clinical courses or seminars devoted to particular skills or processes (interviewing, counseling, negotiation and mediation), with either or both simulation and real case experience, and a concluding seminar designed to explore the larger jurisprudential and policy issues implicated in the use of a greater variety of dispute resolution formats.⁵⁹ Menkel-Meadow contends that such a curriculum would better prepare law students to be effective mediators.

2.5 Emotional intelligence

Proper training of lawyers would also involve giving law students practical experience in the community in a bid to develop their emotional intelligence. Einesman exposed law students to juvenile hall and saw a remarkable change in their emotional intelligence. The emotionally intelligent lawyer is one who focuses on relationships with people, rather than one who concentrates solely on facts and law.⁶⁰ This lawyer would be one who has command of the essential human competencies, such as self-awareness, self-control, and empathy, and the arts of listening, resolving conflicts, and cooperation.⁶¹

Einesman argues that when law students are exposed to different people from different cultures, they begin to empathize with the problems of the disputants and this transforms the students from polarized adversaries into effective facilitators and creative problem solvers.⁶²

⁵⁷ Menkel-Meadow, C., *supra*, 2002.

⁵⁸ Menkel-Meadow, C., *supra*, 2002.

⁵⁹ Menkel-Meadow, C., *supra*, 2003.

⁶⁰ Einesman, F. & Morton, L. ‘Training a New Breed of Lawyer: California Western's Advanced Mediation Program in Juvenile Hall’ (2002) 39 *California Western Law Review*, 53.

⁶¹ Einesman, F. & Morton, L., *supra*, 54.

⁶² Einesman, F. & Morton, L., *supra*, 54-55.

Emotionally intelligent lawyers are not only self-aware, but they are able to interpret the emotions of others, focus on relationships with people and consider the intricacies of these relationships when solving problems and resolving conflicts.⁶³

Professor Riskin observed nearly two decades ago that most lawyers operate according to a “standard philosophical map” which rests on the twin assumptions that disputants are adversaries and that disputes should be resolved according to the application of law to fact.⁶⁴ Lawyers put people and events into categories that are legally meaningful, think in terms of rights and duties established by rules and focus on acts more than persons.⁶⁵ To do this, lawyers exercise formidable cognitive skills but are often plagued by an under-cultivation of emotional faculties.⁶⁶

This underdevelopment of emotional faculties makes it difficult, if not impossible, for lawyers to do what facilitative mediators must be aware of the many interconnections between and among disputants and others, appreciate the qualities of these connections, and be sensitive to emotional needs of all parties.⁶⁷ Guthrie argues that law schools and law professors can enrich the lawyer’s standard philosophical map by encouraging law students enrolled in the traditional law school curriculum- particularly the first-year curriculum-not only to *think* like lawyers but also to *feel* like lawyers.⁶⁸ The development of the law students’ emotional faculties will go a long way in enabling them to be more efficient in mediation. They will greater appreciate their clients’ positions.

3. What training would make lawyers effective mediators?

Teaching law students and lawyers about non-litigation methods for handling conflict and about their appropriate uses provides lawyers with choices and enables them to critically evaluate all options before making selections which best benefit their clients.⁶⁹ Mediation

⁶³ Einesman, F. & Morton, L., *supra*, 60.

⁶⁴ Guthrie, C. ‘The Lawyer’s Philosophical Map and the Disputant’s Perceptual Map: Impediments to Facilitate Mediation and Lawyering’ (2001) 6 *Harvard Negotiation Law Review*, 145.

⁶⁵ *Ibid.*

⁶⁶ *Ibid.*

⁶⁷ Guthrie, C., *supra*, 155.

⁶⁸ Guthrie, C., *supra*, 185.

⁶⁹ Marcel, K. W. & Wiseman, P. ‘Why We Teach Law Students to Mediate’ (1987) *Journal of Dispute Resolution*, 87.

training supplements the case method by offering students additional and, in certain respects, unique opportunities to develop and master the analytic and practical skills of good lawyering.⁷⁰

Lawyers must reaffirm a commitment to professionalism in which the problem-solving and peacemaking activities of mediation are valued in the practice of law.⁷¹ Lawyers and clients who can truly listen to each other, who can debate civilly with one another, and who can persuade each other based on reasoned discourse will make all the difference.⁷² When legal training that encompasses mediation training is given, there is a shift in the mentalities of law students as they think beyond that which is adversarial to a critical problem-solving mind set. This makes them more effective at mediation.

Teaching mediation as a lawyering role helps law students develop a more comprehensive theory of lawyering than they might have otherwise acquired.⁷³ Knowledge that is disseminated on listening skills, communication, objectivity and an overall more co-operative approach to dispute resolution gives insight to the students as to what lawyering truly entails in practice. They will need to learn how to negotiate in order to settle cases and need to see that side of the legal process.

The lawyer must be able to grasp and promote not only legal rights and positions; she must be able to identify and articulate underlying interests and the motives or goals that impel people to act.⁷⁴ An understanding of the underlying philosophy, history, strengths and weaknesses of each alternative dispute process is necessary for a lawyer to appreciate how and when it can be used in helping clients resolve their disputes.⁷⁵ The aim is to bring litigation into perspective; to permit students to see it as a system of dispute resolution, one with its own virtues and failings, but not an inevitable or the only process for resolving legal disputes.⁷⁶

Training students in mediation presents an opportunity to re-awaken the idea of lawyer as counselor and problem solver in a new and creative way.⁷⁷ By teaching law students about the mediation process, they remember that the practice of law is actually about helping clients reach an agreement or settlement and improving their lives, not about winning court cases irrespective of whether the clients' needs are met.

⁷⁰ Ibid.

⁷¹ Nolan-Haley, J. 'Lawyers, Clients and Mediation' (1997) 73 *Notre Dame Law Review*, 1390.

⁷² Ibid.

⁷³ Nolan-Haley, J. 'Teaching Mediation As a Lawyering Role' (1989) 39 *Journal of Legal Education*, 571.

⁷⁴ Schmitz, S. J. 'What Should we Teach in ADR Courses: Concepts and Skills for Lawyers Representing Clients in Mediation' (2001) 6 *Harvard Negotiation Law Review*, 189.

⁷⁵ Ibid.

⁷⁶ Ibid.

⁷⁷ Weinstein, J., *supra*, 237.

Students need to learn that there may be multiple solutions to problems: early misdiagnosis and narrow closure on a problem can be dangerous.⁷⁸ When many students work on the same problem, as in a simulation, they learn that there may be more than one Pareto optimal solution to a problem.⁷⁹ In particular, through courses in negotiation, mediation, and other forms of ADR, students can learn that money is not the only way to settle a lawsuit or solve a problem: apologies, job transfers, nonmonetary solutions, “cathartic” processes, and simply the ability to vocalize a complaint (so often thwarted in our lawyer-led negotiated settlements) may increase satisfaction with the legal system.⁸⁰ There are many solutions that mediation offers and law students need to become open minded to them. Once they get that awareness, they do become better and more effective at mediation.

With proper training, the law student is fully able to grasp the unique satisfactions and frustrations of mediation; the personal and professional conflicts it raises; the tendencies inherent in both the legal and the mediational perspectives toward undermining the salutary contributions of the other; the willingness and ability of an individual lawyer to mediate or help determine whether a given case is suitable for mediation.⁸¹ Riskin suggests having mock mediations for the law students to get practical experience.

As Professor Riskin notes in his report, one major purpose of this undertaking is to change the “lawyer’s standard philosophical map” meaning that he wants the lawyers’ ordinarily adversarial, rules-based focus to be expanded so that lawyers engaged in dispute resolution would always consider interests beyond the solely legal ones as well as a broader framework of possible dispute resolution processes.⁸² The standard philosophical map limits the law student in his thinking and he is unable to see the clients’ underlying interests and needs. By changing it, the law students’ overall lawyering skills are improved and they are better able to become effective mediators.

On the other hand, there are those who believe that even with proper training, lawyers cannot be effective at mediation. According to Simon Roberts, there is a breathtaking arrogance in the assumption that lawyers can effortlessly take on a delicate, complex, unfamiliar form of

⁷⁸ Menkel-Meadow, C. ‘Taking Problem Solving Pedagogy Seriously’ (1999) 49 *Journal of Legal Education*, 19.

⁷⁹ *Ibid.*

⁸⁰ *Ibid.*

⁸¹ Riskin, Leonard L. ‘Mediation and Lawyers’. (1982) 43 *Ohio State Law Journal*, 50.

⁸² Vaughn, L. B. ‘Integrating Alternative Dispute Resolution (ADR) into the Curriculum at the University of Washington Law School: A Report and Reflections’ (1998) 50 *Florida Law Review*, 679.

intervention as if it were just another part of legal practice.⁸³ If it is, indeed, the assumption that lawyers experienced in litigation can move with a minimum of retraining into a mediatory role, he argues that, we must recognize the uncomfortable truth that lawyers pose a particular threat to the integrity of mediation.⁸⁴ As active, dominant professionals, accustomed to occupying partisan advisory and representative roles, lawyers should recognize that they might have great difficulty in adapting to the posture of impartial facilitator of other peoples' decision making.⁸⁵ Therefore, lawyers may be unable to adapt to the role of selective facilitator if they are only subjected to a minimum retraining of mediation courses. The instruction must become part and parcel of the law school curriculum to be ingrained into them.

Guthrie also casts doubt on whether lawyers can ever be effective mediators. He argues that for all their analytical skills, most lawyers seem fairly uninterested in and unskilled at, dealing with emotional and interpersonal content.⁸⁶ Moreover, lawyers tend to be so adversarial, it seems likely that their mediation behavior will be influenced, even if only subtly, by their awareness of potentially applicable legal principles and procedures.⁸⁷ It seems unlikely, in other words, that lawyers, in contrast to other professionals with different personalities, skills, and knowledge, will truly be able to mediate outside "the shadow of the law" and the legal system.⁸⁸

Riskin also argues that unless lawyers grasp mediation's potential, they may be inclined to see these programs solely as ways of maintaining the *status quo-by* processing poor people's disputes so as to relieve court congestion and reduce violence in the community.⁸⁹ The danger is that this perspective could emphasize speed over quality in mediation and might therefore exclude the possibilities that mediation holds for helping people take charge of their own lives instead of -expecting elites-whether government or business, physicians or lawyers-to satisfy their needs.⁹⁰ If lawyers are unable to fully understand the mediation process, they cannot be effective mediators. Failure to perceive the point of mediation, which is to empower the parties, and to appreciate its merits, will lead to lawyers never fully becoming effective mediators.

⁸³ Roberts, S. 'Mediation in the Lawyers Embrace' (1992) 55 *The Modern Law Review*, 258-264.

⁸⁴ Roberts, S., *supra*, 261.

⁸⁵ Roberts, S., *supra*, 261.

⁸⁶ Guthrie, C. 'The Lawyer's Philosophical Map and the Disputant's Perceptual Map: Impediments to Facilitate Mediation and Lawyering' (2001) 6 *Harvard Negotiation Law Review*, 158.

⁸⁷ Guthrie, C., *supra*, 163.

⁸⁸ Guthrie, C., *supra*, 164.

⁸⁹ Riskin, Leonard L. 'Mediation and Lawyers'. (1982) 43 *Ohio State Law Journal*, 41.

⁹⁰ Riskin, Leonard L., *supra*, 42.

CONCLUSION

Whether it is because of their innate personalities, their legal training, the realities of law practice, or some combination thereof, lawyers tend to mirror the adversarial system.⁹¹ Research shows that lawyers are competitive and aggressive and that they perceive the world in rule-based, law-and-order, and rights-oriented terms.⁹² Lawyers tend to operate, in other words, on the assumption that society can best resolve its disputes through the aggressive application of rules to facts.⁹³ In order to be effective at mediation, lawyers need to shed their adversarial, combative demeanor and become facilitative and co-operative.

To achieve this change in their perceptions, lawyers need to be trained right from law school on the importance and role of mediation in dispute resolution. The methods suggested in this article are arguably a good starting point. Employing a ‘modern’ lawyering curriculum will help teach students how to be more creative and problem solving. It will improve their overall lawyering skills. It is important for law students to remember that each legal problem or transaction has (for each party) a who (the parties), a what (the “res” or thing in dispute or to be bargained for), a when (timing for the performance of particular acts), a how (means or methods of payment, transacting business, apologizing, or doing something for or with the other), a where (the place or jurisdiction of action) and a why (the underlying reasons for the dispute or transaction) that can be explored, expanded and rearranged to create greater numbers of possible solutions, thereby increasing the quality and quantity of possible solutions.⁹⁴

Teaching objectivity will definitely help law student better manage conflict and avoid engagement with the clients’ problems. It will help them learn the neutral stance that a mediator ought to take. Training lawyers how to be ‘wise’ will improve their communication and interpersonal skills and help law students expand what Riskin calls ‘the standard philosophical map’. Embracing cognitive and behavioral knowledge in mediation training helps law student’s move away from reduction of disputes into a problem recognized by law to understanding the

⁹¹ Guthrie, C. ‘The Lawyer's Philosophical Map and the Disputant's Perceptual Map: Impediments to Facilitate Mediation and Lawyering’ (2001) 6 *Harvard Negotiation Law Review*, 160.

⁹² Ibid.

⁹³ Ibid.

⁹⁴ Menkel-Meadow, C. ‘To Solve Problems, Not Make Them: Integrating ADR in the Law School Curriculum’ (1992) 46 *Southern Methodist University Law Review*, 2002.

underlying needs and interests of the clients. Teaching lawyers to become emotionally intelligent is also a move towards effective mediation skills as law students begin to not appreciate the clients' problems and show concern for them beyond advocating for their legal rights. They begin to care about their clients, as human beings ought to care for one another.

The future of mediation rests heavily upon the attitudes and involvement of the legal profession.⁹⁵ If society is to use mediation to its fullest advantage-properly employing it in minor disputes and extending its application to more major ones-and protect against the dangers of it's a legal character, lawyers must be involved, but carefully.⁹⁶ Riskin argues that two developments are required if mediation is to be used well, that is, many lawyers must come to understand mediation and when it can be useful and that a significant number of lawyers must begin serving explicitly as mediators, in ways that also employ their legal skills.⁹⁷

When lawyers undergo all these forms of training, they become better human beings. The law profession has often been the subject of ridicule, that lawyers are cold and heartless, as they only want to aggressively meet their objectives. Through mediation training, the more humane side of lawyers can be seen and appreciated and the pride of the profession can slowly be restored.

One could argue against those who do not believe in lawyers being able to acquire the skills to be facilitative by contending that the adversarial nature of advocates is learnt from as early as the first year of law school. Should law students, right from the beginning, be exposed to more co-operative discourse, they can move away from the mindset that they must be combative in all circumstances. This is not to say that the legal training in law schools is unimportant. Clients will expect lawyers to have knowledge of the legal principles and remedies and knowledge of precedents set. Therefore, the case method is not without its merits. However, in order to serve clients better, there is a need to pay attention to their underlying interests and needs and come up with solutions that can best meet them.

Development of interpersonal skills, communication and problem solving skills all make the lawyers more effective mediators. One can argue that the reason lawyers find mediation an unsettling experience is the lack of exposure and lack of understanding of the process. By being exposed to it from the time they are students, lawyers will be better placed to interact with clients

⁹⁵ Riskin, Leonard L. 'Mediation and Lawyers' (1982) 43 *Ohio State Law Journal*, 41.

⁹⁶ *Ibid.*

⁹⁷ *Ibid.*

and to know what their role is in mediation. This way, they will not sabotage the process. Carr-Gregg argues that to make the greatest impact on the professionalization of law students, dispute resolution should appear early in first year, followed by a variety of later year options suited to different kinds and levels of interest.⁹⁸ First year law has a powerful impact on the way law students think about the law and the role of lawyers.⁹⁹

Some lawyers may feel reluctant to recommend a process which operates outside the formal rules of procedure to which they are accustomed and may prefer to follow the familiar route of litigation.¹⁰⁰ Indeed many lawyers who received their legal training before mediation processes were given any attention either in the law schools, or professional training programs may remain unaware of their scope and increasing pervasiveness.¹⁰¹ Clients are becoming aware of the possibilities of ADR processes and may seek and expect to receive advice specifically on them and lawyers who are unable to satisfy these expectations may incur client dissatisfaction.¹⁰² The need for some form of education and training for lawyers in ADR processes seems unarguable.¹⁰³ Therefore, it is important that lawyers be given the proper training so that they can advise their clients on all the options available and the best course of action. Clients are therefore able to make an informed decision.

The question of the role of lawyers in mediation remains a contentious issue to date. While others feel that mediation is completely outside the scope of the lawyers' expertise and that they cannot become facilitative in nature, my argument is that it is just a lack of training. The adversarial nature is part of the training given in law schools. Should this be adjusted and with the proper training, lawyers can be effective at mediation and will be well placed to fulfill their role in it.

⁹⁸ Carr-Gregg, S. 'Alternative Dispute Resolution in Practical Legal Training - Too Little Too Late?' (1997) 10 *Journal of Professional Legal Education*, 28.

⁹⁹ Ibid.

¹⁰⁰ Chinkin, C. 'Educating lawyers about mediation' (1998) 10 *Journal of Professional Legal Education*, 44.

¹⁰¹ Ibid.

¹⁰² Ibid.

¹⁰³ Ibid.

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