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WHY TEACH ALTERNATIVE DISPUTE RESOLUTION TO LAW STUDENTS? PART ONE: PAST AND CURRENT PRACTICES AND SOME UNANSWERED QUESTIONS

JUDY GUTMAN*, TOM FISHER** AND ERIKA MARTENS***

I INTRODUCTION

This article comprises Part One of a two part research project which examines alternative dispute resolution (ADR)¹ education in law schools. As Thornton cogently writes:²

The university is not only a primary site of the production of new knowledge, but also of new knowledge workers. Accordingly, it is expected to play a key role in the process of transforming society and ensuring acceptance of the discourse of the market. The law discipline is central to this process of transformation, as it is expected to train ever-increasing numbers of legal technocrats to serve the new knowledge economy.³

Thornton's remarks draw attention to the links between university teaching and professional outcomes that have been central to clinical legal education. Thornton's comments also invite questions about the effect that ADR teaching at law school has on the attitudes of law students, the legal practitioners of the future. Does ADR education instil the client-centred, interest-based, collaborative attitudes that are fundamental to ADR theory, or are these values somehow negated

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¹David Spencer and Tom Altobelli, *Dispute Resolution in Australia Cases, Commentary and Materials* (2004) 6 attribute the coining of the phrase 'Alternative Dispute Resolution' (ADR) to an American lawyer and academic Professor Eric Green when involved in a large commercial case.

²The project was funded by a school grant from Law La Trobe University, Bundoora. Human Ethics Committee approval was granted for the project by the Human Ethics Committee Faculty of Law and Management, La Trobe University, Bundoora.

³Margaret Thornton, 'The Idea of the University and the Contemporary Legal Academy' (2004) 26 *Sydney Law Review* 481.

by traditional law subjects and/or other factors? These questions are discussed in this article and further addressed in Part Two.

Part One of the research considers the development of ADR, describes its acceptance into the Australian legal framework and outlines the ways in which ADR subjects have been taught in Law Schools in Australia and the United States (US). Part One also reviews the literature on the impact of teaching ADR to law students. The attitudinal, cultural and practical significance and change, if any, which may ensue as a result of teaching ADR subjects to law students remains an important question for research in both the fields of legal education and legal professional practice and comprises the subject matter of Part Two of the research.

II FRAMING ISSUES: THE NEED FOR FURTHER RESEARCH IN ADR EDUCATION

Non-curial methods of dealing with conflict have been described since biblical times,⁴ yet judicial determination of disputes has long been the orthodox mode of conflict resolution in many western countries.⁵ Because of this orthodoxy, dispute resolution processes outside the courts such as mediation and conciliation have been perceived and labelled 'alternative'. Nevertheless, the term ADR covers multiple processes, which themselves can be classified as facilitative, advisory or determinative. Such processes may include negotiation (long a staple of legal practice), facilitation, partnering, conferencing, mediation, conciliation, neutral evaluation, case appraisal, dispute counselling, expert referral, expert determination, independent fact finding, mini-trial, and arbitration, among others.⁶ Mediation is a form of ADR that is now widely taught in law schools and is the subject of legislation and practitioner guidelines, but it is now recognised that mediation itself is difficult to define and embraces a variety of styles and approaches. Boulle offers four models,⁷ Wade an 'abacus',⁸ Bush and Folger four 'stories',⁹

⁴Robert A Baruch Bush, 'Mediation and Adjudication, Dispute Resolution and Ideology: An Imaginary Conversation' (1989–1990) 3 *Journal of Contemporary Legal Issues* 1, 17.

⁵David H Yarn, *Dictionary of Conflict Resolution* (1999) 153 distinguishes 'dispute' and 'conflict'. Disputes exist only when a claim is made and rejected whereas conflict is necessary for the claim to be made. Therefore conflict is fundamental to disputing. See, eg, William Felstiner, Richard Abel and Austin Sarat, 'The Emergence and Transformation of Disputes: Naming, Blaming, Claiming...' (1980–1) 15 *Law and Society Review* 832.

⁶Tania Sourdin, *Alternative Dispute Resolution* (2005) 20.

⁷Laurence Boulle, *Mediation Principles Process Practice* (2nd ed, 2005) 43–7.

⁸John Wade, 'Forever Bargaining in the Shadow of the Law: Who Sells Solid Shadows? (Who Advises What, How and When?)' (1998) 12 *Australian Journal of Family Law* 256, 285.

⁹Robert A Baruch Bush and Joseph P. Folger, *The Promise of Mediation* (rev ed, 2005) 9–18.

and Riskin a grid of mediator 'orientations'.¹⁰ Spegel remarks that 'lawyers will increasingly require a sufficiently sophisticated understanding of mediation to be able to determine what style of mediation ... is suitable for their client's disputes'.¹¹

Although alternative dispute resolution practice can and often does involve practitioners from a variety of disciplines, lawyers play a key role for several reasons. The first reason touches on aspects of a legal practitioner's professional obligations. Lawyers, in their client advocate role,¹² negotiate settlements of disputes as champions of their clients' legal positions.¹³ Whilst the duty of lawyers to advocate their clients' viewpoints and act in their clients' best interests is irrefutable, lawyers also have an ethical responsibility to act as officers of the court in furtherance of the integrity of the legal process.¹⁴ Dal Pont suggests that by proposing ADR to a client, lawyers are acting out their role as officers of the court¹⁵ because ADR is perceived as a positive streamlining, cost-cutting mechanism, assisting the efficiency of the court infrastructure with conflict resolution management.¹⁶

Whether advising clients on ADR is based on a lawyer's duty to act in their clients' best interests or on their duty to the legal system, it is clear that negotiating settlements on behalf of clients and advising clients on how to settle matters without resorting to litigation is part of current legal practice. Spencer asserts that it is a component of legal professional responsibility for lawyers to advise their clients on ADR options.¹⁷ This view is endorsed by the Law Council of Australia in the *Model Rules of Professional Conduct and Practice* (2002)¹⁸ which has been adopted by the representative bodies of

¹⁰ Leonard L Riskin, 'Understanding Mediators' Orientation, Strategies, & Techniques' (1996) 1 *Harvard Negotiation Law Review* 7.

¹¹ Nadja M Spegel, 'Queensland Lawyers Attitudes Towards Mediation-Implications for Training and Education' (1998) 1 *National Law Review* 1.

¹² See, eg, Ian Ramsay, 'Ethical Perspectives on the Practice of Business Law' (1992) 30 (5) *Law Society Journal* 60, 61; Christine Parker, 'A Critical Morality for Lawyers: Four Approaches to Lawyers' Ethics' (2004) 1 *Monash University Law Review* 49, 56.

¹³ Melissa Conley Tyler and Naomi Cukier argue that negotiation is a key skill for legal practice. See, eg, Melissa Conley Tyler and Naomi Cukier, 'Nine Lessons for Teaching Negotiation Skills' (2005) 15(1) & (2) *Legal Education Review* 61.

¹⁴ *Ibid* 60.

¹⁵ Gina E Dal Pont, 'Lawyer's Duty to Encourage Settlement' (2004) 79 *Law Institute Journal* 80.

¹⁶ Supreme Court of Victoria, *Support Services* (2006) Supreme Court of Victoria <<http://www.supremecourt.vic.gov.au/CA256CC60028922C/page/Support+Service-Mediation>> at 2 November 2006.

¹⁷ David Spencer, 'Liability of Lawyers to Advise on Alternative Dispute Resolution Options' (1998) 9 *Australian Dispute Resolution Journal* 292, 299.

¹⁸ Rule 12.3 states that: A practitioner must where appropriate inform the client about the reasonably available alternatives to fully contested adjudication of the case unless the practitioner believes on reasonable grounds that the client already has such an understanding of those alternatives as to permit the client to make decisions about the clients' best interests in relation to the litigation.

legal practitioners in most Australian jurisdictions.¹⁹ However, the integration of ADR into legal practice carries with it ethical tensions. How does the ADR approach of collaborative problem solving fit in with the competitive strategy of the adversarial system? Will the ADR approach jeopardise a client's chance of winning the case and therefore ethically compromise the lawyer or will it lead to a 'better' outcome?²⁰

Another reason for the centrality of lawyers in ADR is that lawyers fulfil a lynchpin role in court-connected dispute resolution processes, in particular mediation.²¹ The increase in ADR processes²² and the growing institutionalisation of ADR have enmeshed ADR practice with legal practice. Fitzgerald predicts that the Australian government will, before long, follow the lead of the United Kingdom (UK) government in directing all government agencies to settle legal disputes by ADR wherever possible.²³

Due to the key role of lawyers in conflict resolution, they are, in reality, 'dispute resolution gatekeepers'.²⁴ Sourdin states that few litigation lawyers have not had ADR exposure, and that 'every court and tribunal within Australia now has some reference to ADR processes'.²⁵ Hedeem and Coy posit that, in an increasingly litigious society, ADR does not provide an alternative to the courts but rather an alternative to the courtroom.²⁶ ADR re-enforces the concept of the 'multidoor court-house',²⁷ yet the viability of such a system within the complex and interrelated Australian court hierarchy is problematic.²⁸

In recognition of the centrality of ADR to legal practice, ADR courses have become part of the curricula in law schools globally.²⁹ The development is a testament to the increasing acceptance of ADR by lawyers throughout the court system both in Australia and

¹⁹ For example, Victoria, New South Wales, South Australia, Australian Capital Territory & Northern Territory.

²⁰ Scott R Peppet, 'ADR Ethics' (2004) 54 *Journal of Legal Education* 1, 72–78.

²¹ Kathy Douglas, 'Mediation as Part of Legal Education: The Need for Diverse Models' (2005) 24(1) *The Arbitrator & Mediator* 1.

²² Tania Sourdin, 'To the Bench or Across the Table?' (2006) 13 *Lawyers Weekly*, 18.

²³ Tony Fitzgerald, 'Down with Adversarial Behaviour' (2006) 10 *Lawyers Weekly*, 14.

²⁴ Frank E A Sander, 'The Future of ADR: The Earl F Nelson Memorial Lecture' (2000) 1 *Journal of Dispute Resolution* 3, 8.

²⁵ Sourdin, above n 6, 14. For example, under Order 50.07 of Chapter I of the Supreme Court of Victoria Rules, the parties to litigation can be ordered by the Court to proceed to mediation, with or without the parties' consent.

²⁶ Timothy Hedeem and Patrick G Coy, 'Community Mediation and the Court System: The Ties That Bind' (2000) 17 *Mediation Quarterly* 351, 362, referring to J Beer, *Peacemaking in Your Neighbourhood: Reflections on an Experiment in Community Mediation* (1986) 206.

²⁷ *Ibid* 352.

²⁸ Sourdin, above n 19, 104.

²⁹ *Ibid* 2.

overseas.³⁰ Twenty-first century lawyering increasingly requires practitioners to use skills such as principled negotiation, collaborative bargaining and problem solving,³¹ and to show familiarity with processes such as mediation, conciliation and arbitration.

A complementary social development is the erosion of the traditional paternalistic role of professionals generally in relation to their clients/patients. Whereas, historically, professionals such as lawyers and doctors were empowered by their expertise and perceived status to conduct professional practice in an authoritative manner, in recent times there has been a marked cultural shift. The culture of consumerism and the demands of litigation brought by clients/patients against professionals have contributed to professional practice being increasingly sensitive to notions such as 'shared decision-making'.³² Dal Pont considers that the rise of consumerism has 'heralded ... a marked decrease in client loyalty and a willingness to question the once unquestionable'.³³

Robertson and Giddings make the point that currently there is a shift in Australia towards clients (consumers) contributing to the provision of their own legal services³⁴ and that this trend is transforming legal service delivery.³⁵ For example, the authors note the Family Court of Australia's promotion of mediation³⁶ and the 'unbundling' of the legal full-service delivery model.³⁷ Including the client's input in the legal service undermines the lawyer's control but empowers the client.

Although Robertson and Corbin describe the dynamic between lawyer and client as 'the client delegator seeking the lawyer reliever',³⁸ the authors recognise a variety of permutations and combinations of lawyer and client characteristics that alters the passive/active paradigm.³⁹ In addition, the authors note from their empirical study a strong belief among lawyers that clients should

³⁰ Laurence Boule, 'In and Out the Bramble Bush: ADR in Queensland Courts and Legislation' (2004) 22 *Law in Context* 93, 103.

³¹ See, eg, Roger Fisher, William Ury and Bruce Patton, *Getting to Yes* (2nd ed, 1991).

³² See, eg, Judith Gutman, 'The Right Not to Know: Patient Autonomy or Medical Paternalism' (2000) 7 *Journal of Law and Medicine* 286, 290.

³³ Gina E Dal Pont, *Lawyers' Professional Responsibility* (3rd ed, 2006) 12.

³⁴ Michael Robertson and Jeff Giddings, 'Legal Consumers as Coproducers: The Changing Face of Legal Service Delivery in Australia' (2002) 40 *Family Court Review* 63.

³⁵ *Ibid* 64.

³⁶ *Ibid*.

³⁷ *Ibid*. Robertson and Giddings adopt Mosten's description of 'unbundled legal services' whereby clients 'can be in charge of selecting from lawyers' services only a portion of the full package and contracting with the lawyer accordingly'.

³⁸ Michael Robertson and Lillian Corbin, 'To Enable or to Relieve? Specialist Lawyers' Perceptions of Client Involvement in Legal Service Delivery' (2005) 12 *International Journal of the Legal Profession* 121, 140.

³⁹ *Ibid* 121.

be involved in decision making, particularly regarding settlement issues.⁴⁰

The changes in the lawyer/client relationship and in the provision of legal services described above accord with the client empowerment model that underlies ADR theory and practice⁴¹ and which is discussed in Part Two.

Moreover, there is a growing awareness and recognition that professional legal practice requires more than just expertise in ‘black letter’ law.⁴² Consequently, practice-oriented legal skills such as advocacy and client interviewing are being taught at law schools in Western countries such as Australia and the United States (US), alongside substantive and theoretical law subjects,⁴³ and clinical education programs are growing.⁴⁴

Joy remarks that a major thrust in the development of clinical education programs in the 1960s was the accepted view that traditional legal education techniques were fairly ineffective in imbuing professional standards, including legal ethics and professional responsibility.⁴⁵ Peden and Riley contend that since the 1987 publication of the Pearce Report criticising traditional law school curricula, contemporary best practice legal education values an orientation concerned with ‘what lawyers need to be able to do’ not just ‘what lawyers need to know’.⁴⁶ Menkel-Meadow explains that legal education initiatives seeking ‘to understand and teach what lawyers actually do’ justify the plethora of negotiation courses in law schools through the US and the UK.⁴⁷ Furthermore, Menkel-Meadow claims that it is no longer enough to just study legal doctrine and procedure in law school.⁴⁸ Learning about dispute and conflict resolution and how to make transactions happen involves many disciplines (for example economics, sociology, psychology

⁴⁰ Ibid 122.

⁴¹ Boule, above n7, 224.

⁴² See, eg, Ross Hyams, Susan Campbell and Adrian Evans, *Practical Legal Skills* (2nd ed, 2004); Jeff Giddings, ‘Using Clinical Methods to Teach Alternative Dispute Resolution: Developments at Griffith University’ (1999) 10 *Australasian Dispute Resolution Journal* 206.

⁴³ Mary Anne Noone and Judith Dickson, ‘Teaching Towards a New Professionalism: Challenging Law Students to Become Ethical Lawyers’ (2004) 4 *Legal Ethics* 127.

⁴⁴ Ibid 113; Conley Tyler and Cukier, above n 8, 63.

⁴⁵ Peter A Joy, ‘The Ethics of Law School Clinic Students as Student Lawyers’ (2004) 45 *South Texas Law Review* 815.

⁴⁶ Elizabeth Peden and Joellen Riley, ‘Law Graduates’ Skills — A Pilot Study into Employers’ Perspectives’ (2005) 15 *Legal Education Review* 87, 88 citing Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System* (2000) [2.21].

⁴⁷ Carrie Menkel-Meadow, ‘Lawyer Negotiations: Theories and Realities — What We Learn From Mediation’ (1993) 56 *The Modern Law Review* 361.

⁴⁸ Carrie Menkel-Meadow, ‘Dispute Resolution: Raising the Bar and Enlarging the Canon’ (2004) 54 *Journal of Legal Education* 4, 4–6.

and philosophy) which should encourage law teachers to consider more varied ways of teaching.⁴⁹

Even though clinical education programmes generally, and ADR education specifically, have taken a firm hold in academia, the legal profession may not be receiving the pedagogical developments with unequivocal enthusiasm. From their pilot study aimed at gauging employers' assessments of what skills are important to them when hiring law graduates, Peden and Riley conclude that employers favour 'black letter law' knowledge over practical skills because employers believe the latter can be learnt 'on the job'.⁵⁰ This finding casts aspersions on the clinical education direction of many law schools especially when clinical education is so resource hungry. However, the limitations of the pilot study are acknowledged by its authors, namely that the sample size was small and the respondents self selected from the control group.⁵¹

Notwithstanding the above, it is apparent that the legal system in general embraces ADR. Zariski quotes Sir Gerard Brennan's approving comments as follows:

Mediation and arbitration will continue to be familiar and prominent features of the system of dispute resolution in the future. There is no reason why, in the vast majority of cases, mediation should not be compulsory in the sense of being a condition of the right of any party to have the dispute brought on for a fair trial. But let it be court-attached mediation.⁵²

Similarly, the former Chief Justice of the Supreme Court of Victoria John Harber Phillips endorses ADR as follows:

It should be stressed that mediation is not an inferior type of justice. It is a different type of justice. All studies of dispute resolution show that people greatly value quick resolution of disputes and the opportunity to put their case in the presence of a neutral person. Mediation satisfies both these requirements.⁵³

Whilst the abovementioned eminent jurists clearly support ADR practice, it is not clear upon what foundation that commitment is made. Is it made on the same grounds as ADR theorists or is their support evidence of a more pragmatic disposition? Neither have referred to the 'satisfaction story'⁵⁴ of ADR namely that due to 'its flexibility, informality ... consensuality ...'⁵⁵ and non-reliance on legal rules,

⁴⁹ Ibid 5.

⁵⁰ Peden and Riley, above n 34, 118.

⁵¹ Ibid 119.

⁵² Archie Zariski, 'Disputing Culture: Lawyers and ADR' (2000) 7(2) *Murdoch University Electronic Journal of Law* 1,12.

⁵³ Supreme Court of Victoria, *Support Services* (2006) Supreme Court of Victoria <<http://www.supremecourt.vic.gov.au/CA256CC60028922C/pageSupport+Service-Mediation>> at 2 November 2006.

⁵⁴ Bush and Folger, above n 9, 9.

⁵⁵ Ibid.

ADR can expand the parameters of a dispute and satisfy the human needs associated with conflict and disputing.⁵⁶ The dichotomy between support for ADR practice and theory can be illustrated by Lauritsen's description of the mediation process in the Magistrates' Court,⁵⁷ where attendance is compulsory and where unresolved mediations are 'fast tracked'. Lauritsen illustrates how mediation has been grafted on to mainstream processes for expediency reasons rather than theoretical commitment, and queries whether in so doing, major hallmarks of the process such as voluntariness are sacrificed.

Hedeem and Coy question whether the integration of ADR into the traditional justice system is motivated by efficiency concerns such as court backlogs, costs and/or time savings rather than the quality of the process and the 'humanistic goals embraced by the broader alternative dispute resolution movement'.⁵⁸ Spiegel's investigation into the knowledge of, attitudes to, and practices in mediation of Queensland lawyers found that 'pragmatic factors' such as time and costs savings prompted legal practitioners to suggest mediation to clients.⁵⁹ Given that judges such as Phillips CJ may see ADR as a cheaper and quicker alternative to litigation, and are not necessarily committed to the ideology behind ADR, Menkel-Meadow raises a pertinent query when asking whether ADR will change the court system, or alternatively, whether ADR will be contaminated by the mainstream adversarial process.⁶⁰ This conundrum presents several challenges to law schools that teach ADR. Whilst ADR theory and practice is being taught in many law schools, an important concern is whether the curriculum is opening law students' thinking to the interest based, client-centred, problem-solving role of the lawyer engaged in ADR or just as an additional pragmatic skill.

As US research shows,⁶¹ 'the standard philosophical map' of a rights-based adversarial approach is traditionally ingrained by a law school education. Will this attitude lead to ADR adopting the traditional legal system's values, or will the converse occur? Part Two considers this question. In addition, Part Two examines the effect of teaching ADR to law students and whether ADR education in law school is an adjunct to mainstream values or whether it provides the setting for real changes to legal practice and some of the principles that underpin it. Questions persist not only about the value and effect

⁵⁶ Ibid 9.

⁵⁷ Peter Lauritsen, 'Increased Jurisdiction in the Magistrates' Court: The New Rules' (2005) 79(3) *Law Institute Journal* 34.

⁵⁸ Hedeem and Coy, above n 21, 355, quoting Edward J Bergman and John G Bickerman, *Court-Annexed Mediation: Critical Perspectives on Selected State and Federal Programs* (1998).

⁵⁹ Spiegel, above n11, 8.

⁶⁰ Carrie Menkel-Meadow, 'Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-opted or the Law of ADR' (1991) 19 *Florida State University Law Review* 1.

⁶¹ See references to research by Risken and Pipkin set out below.

of teaching law students about ADR, but also about the appropriate place for ADR in the law school curriculum.⁶²

III HISTORICAL OVERVIEW

To enable a better understanding of ADR teaching and its effect on legal practice it is necessary to chronicle the growth and development of the ADR movement.

Astor and Chinkin argue that what we now label as ADR has for a long time been the dominant method of resolving disputes worldwide.⁶³ There has been extensive academic writing about the development of ADR,⁶⁴ tracing its roots as a tribal, customary method of resolving disputes and culminating in its current acceptance and status, within, outside and beside the formal legal system.⁶⁵

Western industrialised societies, with the US being the front-runner, 'rediscovered' ADR around the 1970s with the establishment of neighbourhood justice centres in the US.⁶⁶ Australia accepted the ADR concept with the opening of Community Justice Centres in New South Wales in 1980⁶⁷ which were the first example of ADR within the Australian institutional context.⁶⁸ Similar centres, using different models, arose throughout Australia, some of which were integrated into the formal justice system. In these centres, mediation was the chosen method of conflict resolution as it promised both peaceful and consensual decision making without the controlling influence of professionals⁶⁹ and a faster and cheaper⁷⁰ alternative to a court system plagued with backlogs and litigant dissatisfaction.⁷¹ Fisher attributes the initial impetus for the establishment of Victoria's Dispute Settlement Centres in the 1980s as stemming from the

⁶² See, eg, Jennifer David, 'Integrating Alternative Dispute Resolution (ADR) in Law Schools' (1991) 2 *Australian Dispute Resolution Journal* 5.

⁶³ Hilary Astor and Christine Chinkin, *Dispute Resolution in Australia* (2nd ed, 2002) 5.

⁶⁴ Jerome T Barrett and Joseph Barrett, *A History of Alternative Dispute Resolution: The Story of a Political, Social and Cultural Movement* (2004); Astor and Chinkin, above n 51, 5; See, eg, Gordon Pears, *Alternative Dispute Resolution in Australia* (1989) 1.

⁶⁵ See, eg, Peter Condliffe, 'Conflict Management: A Practical Guide' in David Spencer and Tom Altobelli, *Dispute Resolution in Australia Cases, Commentary and Materials* (2004) 34–38 which succinctly covers the development of dispute resolution in Australia. On page 5 of the Condliffe extract, the key developments in Australian ADR from 1992 until 1996 are highlighted.

⁶⁶ Tom Fisher, 'Victoria's Dispute Settlement Centres in 1992: Principles, Structure, Operations and Distinctive Features' (1993) *La Trobe University Melbourne* 1.

⁶⁷ *Ibid* 2.

⁶⁸ David Purnell, 'Mediation Theory and Practice: A Practitioner's Reflections on Developments in Mediation' (2005) 7(10) *ADR Bulletin* 183.

⁶⁹ Astor and Chinkin, above n 51, 5.

⁷⁰ Laura Cooper, 'Teaching ADR in the Workplace Once and Again: A Pedagogical History' (2003) 23 *Journal of Legal Education* 1.

⁷¹ Richard Birke, 'Evaluation and Facilitation: Moving Past Either/Or', [2000] (2) *Journal of Dispute Resolution* 310, 311.

Legal Aid Commission of Victoria's concern about 'the numbers of people who sought advice about problems which conventional legal means could neither treat nor resolve — problems often involving neighbours or family members'.⁷²

Similarly, family disputes were also regarded as being suitable for conflict management outside the adjudication system. In fact, what is now referred to as the Primary Dispute Resolution (PDR) system in the family law jurisdiction includes mediation⁷³ as recognition of the fact of the personal and often emotional nature of the conflict and the inability of the traditional dispute resolution system to deal with the relationship and social issues stemming from family disputes.⁷⁴ Zifcak notes that in the adjudication model, lawyers act for their clients without taking note of the interests of others.⁷⁵ They are outcome-oriented and see their primary task as seeking to answer a legal problem.⁷⁶ By contrast, the PDR model adopted by the Family Court of Australia subscribes to the social work model, which is more process-oriented, incorporating a broader social and relationship context.

Thus, since the 1995 amendments to the *Family Law Act 1975* (Cth), mediation, along with counselling, has been perceived as the preferred method of conflict resolution for family disputes.⁷⁷ Whilst ADR was initially used to describe dispute resolution processes that were outside the formal legal system, for example mediation and conciliation,⁷⁸ it soon became incorporated into statutory regimes dealing with issues related to families, and thereafter ADR was strongly associated with the formal justice system, particularly the Family Court of Australia.⁷⁹ In 2005, this oft-modified Act was amended again to entrench PDR approaches more firmly by introducing 'initiatives aim[ed] to bring about a cultural shift in how people think about family relationships and how family separation is managed: away from litigation and towards cooperative parenting with the focus on the children'.⁸⁰ Meanwhile, in 1999, the Federal

⁷² Fisher, above n 54, 2 citing Chief Justice John Doyle, *Case Study: Neighbourhood Mediation Service* (1986) 3.

⁷³ See, eg, Tom Fisher, 'Family Mediators and Lawyers Communicating About Children: PDR-Land and Lawyer-Land' (2003) 9 *Journal of Family Studies* 201.

⁷⁴ Birke, above n 58, 311.

⁷⁵ Spencer Zifcak, 'Towards a Reconciliation of Legal and Social Work' in Philip Swain (ed), *In the Shadow of the Law: The Legal Context of Social Work Practice* (1995) 275–279.

⁷⁶ *Ibid* 284.

⁷⁷ See, eg, Tom Fisher and Julia Pullen, 'Children and the Shadow of the Law: A Resource Guide for Primary Dispute Resolution Professionals' (2003) 9 *Journal of Family Studies* 81.

⁷⁸ Purnell, above n 55, 183.

⁷⁹ *Ibid* 6.

⁸⁰ *Family Law Reforms* (2005) Family Relationships Online <<http://www.familyrelationships.gov.au/media/mediafactsheet5.html>> at 25 July 2006. The *Family Law Amendment (Shared Parental Responsibility Bill) 2005* (Cth) came into force on 1 July 2006.

Government created the Federal Magistrates' Service (now the Federal Magistrates' Court), which has an express purpose to promote PDR.⁸¹

Non-adversarial modes of resolving family disputes are being further developed by the Australian Government in its promotion of the practice of collaborative law.⁸² Best practice collaborative law regards litigation as a last resort. The parties and their lawyers focus on settlement rather than litigation and on the parties' shared goals. Other key elements are the voluntary and free exchange of information, interest-based negotiation, legal advice directed towards speedy, cost-contained, fair and just outcomes for both parties, and a commitment to the best interests of children.⁸³

The initial grafting of ADR onto the family law mainstream process coincided with the use of ADR processes in other areas of law such as environmental law, discrimination law and industrial law. Soon after, statutory schemes and tribunals adopted ADR to increase their repertoire of dispute resolution methods.⁸⁴

According to Sourdin, the significant growth of court and community-based dispute resolution schemes in Australia and overseas has led to the institutionalisation of ADR.⁸⁵ As a result of new legislation, ADR processes cover a much wider range of contexts, new standards have redefined accreditation, business and community-based ADR programs have emerged, and there has also been rapid expansion in online ADR (ODR) and complaints handling systems and processes.⁸⁶ Representative bodies such as Lawyers Engaged in Alternative Dispute Resolution (LEADR)⁸⁷ have developed.⁸⁸

In 1995, The Australia National Alternative Resolution Advisory Council (NADRAC) was set up to advise the Attorney-General about how to provide high quality, economic and efficient ways

⁸¹ *Federal Magistrates Act 1995* (Cth) pt 4.

⁸² See *Collaborative Law* (2006) Australian Government Attorney General's Department Family Law Council Newsletter No 40 Autumn/Winter <http://www.ag.gov.au/agd/WWW/flcHome.nsf/Page/Publications_Newsletters_News_Number_40> at 1 November 2006.

⁸³ *Draft Best Practice Guidelines for Collaborative Family Law Practice* (2006) Family Law Council Sub-Committee for Consultation <[http://152.91.15.12/agd/WWW/rwpattach.nsf/VAP/89F1F6C871DBA8C45DA2DCE598C20BF8~DR_AFT+guidelines+for+consultation+\(June+2006\).pdf/](http://152.91.15.12/agd/WWW/rwpattach.nsf/VAP/89F1F6C871DBA8C45DA2DCE598C20BF8~DR_AFT+guidelines+for+consultation+(June+2006).pdf/)> at 1 November 2006.

⁸⁴ *Ibid.*

⁸⁵ Sourdin, above n 19, 5; and see, eg, Peter Lauritsen, 'Increased Jurisdiction in the Magistrates' Court: The New Rules' (2005) 79(3) *Law Institute Journal* 34 for the mediation scheme introduced into the Magistrates' Court in Victoria. Another example is the Koori Court established by *Magistrates' Court (Koori Court) Act 2002* (Vic); see, eg, Kate Auty, et al, 'The Koori Court — A Positive Experience' (2005) 79(5) *Law Institute Journal* 40.

⁸⁶ Sourdin, above n 19, 5.

⁸⁷ Note this is now called Leading Edge Alternative Dispute Resolvers.

⁸⁸ Sourdin, above n 19, 14.

to resolve disputes without adjudication.⁸⁹ The development of NADRAC, which also researches conflict resolution methods and advises on appropriate standards, qualifications and training for ADR practitioners, acknowledges the important place of ADR in Australia.⁹⁰

The rapid, unflinching growth and favourable reception of ADR processes within legal institutions laid the foundation for a similar transcendence of the discipline within the academy.

IV ADR IN LAW SCHOOLS

In recognition of ADR's increasingly entrenched position in the formal legal apparatus, law schools in Australasia, UK and US have introduced a range of ADR subjects into their curricula.⁹¹ As modern ADR was first practised in the US, most research studies have been undertaken there.⁹²

Birke explains the growth of ADR courses within law schools as being consumer driven. He argues that once consumers demanded mediation as a dispute resolution process, the supply side responded. 'Law schools started the 1960s with barely a course in the entire nation devoted to mediation and skills training, and they entered the 1990s with barely a school that didn't offer such training.'⁹³ The popularity and acceptance of ADR practice within the general and legal communities provides only a limited explanation for the expansion of law school curricula to include ADR subjects. As mentioned above, contemporary lawyering requires lawyers to be skilled negotiators, collaborative bargainers, problem solvers, and mindful of time-costs-benefits analysis. ADR theory and practice develops listening and communication skills and broadens the professional legal skills base from the traditional uni-dimensional adversarial model taught in law school. The importance of teaching these skills to law students is underscored both by the institutionalisation of ADR and by the central role of lawyers in ADR practice. As Branson J notes:

The skills required of a mediator are different skills from those required of a litigator. A well-conducted mediation is not simply an occasion for each side to give consideration, with the assistance of the mediator, to the strength of its legal case and concomitantly to the extent to which it may be willing to compromise on its formal legal position.⁹⁴

⁸⁹ Purnell, above n 55, 183.

⁹⁰ Ibid 184.

⁹¹ See, eg, Bond University. La Trobe Law, La Trobe University, Victoria, Australia, has, for the last ten years, offered a suite of conflict resolution subjects taught at undergraduate and postgraduate level. The unit *Dispute Resolution* taught in the undergraduate program at La Trobe Law is described in Part Two of the research.

⁹² Gordon Pears, *Alternative Dispute Resolution in Australia* (1989) 1.

⁹³ Birke, above n 58, 312.

⁹⁴ *Hopeshore Pty Ltd v Melroad Equipment Pty Ltd* (2004) 212 ALR 66, 32 (Branson J); Dal Pont, above n 28, 463.

Savage's qualitative study found that two beliefs drive the decision to teach ADR processes in law schools. The first, a conceptual force, stems from an appreciation that the traditional litigation process is not always the best method for resolving disputes. The second has a dual practical orientation as academics recognise that not only is ADR being used more and more often to resolve disputes, but also that some legal processes require ADR, for example residence and contact arrangements, thereby making ADR part of the legal system. Savage asserts that the strongest argument for teaching ADR processes in law schools derives from ADR becoming acknowledged as a legal system component. As a result, a law school education must have ADR content in keeping with the pedagogical view that law students need to be educated about all aspects of the legal system.⁹⁵

Savage suggests that lawyers need to be taught to become problem solvers first and adversaries only when necessary. Therefore it is vital that law students, as soon as they enter law school, be exposed to ADR and how to integrate legal practice with ADR processes.⁹⁶ Law school provides a forum for reaching all future lawyers, not just those who are interested or are accidentally exposed to a problem solving approach to lawyering. Savage contends that if lawyers understand ADR and are not afraid to use it appropriately, they can guide the development of ADR processes.⁹⁷ In addition, a comprehensive legal education that incorporates ADR ensures that litigation will only be used for appropriate cases, instead of being the only path for every client in every case.⁹⁸

Cooper traces academic acknowledgement of the inappropriate emphasis on adversarial dispute resolution models in legal education to 1947.⁹⁹ She describes how in the late 1950s and the early 60s the focus on peaceful labour relations methods including arbitration and mediated collective bargaining, which was being taught using a simulation pedagogy, was replaced by courses in conflict in labour

⁹⁵ Cynthia Savage, 'Future Lawyers: Adversaries or Problem Solvers? Two Law School Programs in Alternative Dispute Resolution' (1989) 7(1) *Mediation Quarterly* 90.

⁹⁶ Ibid 99.

⁹⁷ Ibid 100.

⁹⁸ Ibid 101.

⁹⁹ Laura Cooper, 'Teaching ADR in the Workplace Once and Again: A Pedagogical History' (2003) 53(1) *Journal of Legal Education* 1, 2. Cooper describes how law schools in Australia and America have taught courses (especially labour law) from the 1940s through to the 1990s. To put things in perspective, she starts with a description of a conference sponsored by the Association of American Law Schools (AAALS) in 1947 where the conference participants concluded that current law courses were inappropriately focused on the adversarial role of lawyers in litigation. They decided that courses should emphasise the more amicable means of conflict resolution, such as arbitration and mediation instead. Teachers outlined new and innovative approaches, for example simulated ADR exercises that they had employed successfully to teach these new lawyering roles. These teaching initiatives formed the basis of simulation based teaching methods in ADR courses.

relations, including strikes and litigation. She explains that changes in legal and social attitudes led to the rejection of ADR methods and that law courses changed to reflect this.¹⁰⁰ Cooper writes that in one report the negotiation exercise was apologetically described as a ‘Mickey Mouse’ and a ‘fun and games’ period.¹⁰¹

The above evidence presents a strong argument for the inclusion of ADR subjects in the law school curriculum. Law schools have included ADR material in law school courses, demonstrating that they value the skills taught to their students by ADR subjects.

V METHODS OF TEACHING ADR TO LAW STUDENTS

Despite law schools being receptive to including ADR in their curricula, no uniform teaching method has been universally accepted. Nevertheless, simulated practical exercises have been praised because they engage students in ‘hands on’ skills application. Further, ADR teachers support the integration of ADR education into core law subjects rather than teaching discrete ‘stand alone’ ADR courses that may result in disconnecting and isolating ADR material.

Moore and Tomlinson describe an early example of ADR training in a law school. Although not classified as ADR instruction, two universities attempted to discover whether bargaining skills could be taught by involving students in simulated bargaining problems. They also sought to discover whether the exercises would contribute to the educational development of third year law students. *Labour Law* students participated in three negotiations involving three different types of negotiation problems,¹⁰² with each student spending approximately 34 hours at the bargaining table over the three sessions. The results of the experiment reflect the adversarial model ingrained by traditional law schooling as students used techniques related to active partisanship rather than problem solving. The authors conclude that the traditional materials and methods used in law school may leave the graduating students with a curiously lopsided attitude to the problem solving aspects of law.¹⁰³ One of the suggestions to improve law training was to use more role plays and teach communication skills, with a special emphasis on nonverbal communications.¹⁰⁴

Another and more recent view about teaching ADR is posed by Bush. Bush supports the move by many law schools to introduce introductory courses on ADR into their curricula by integrating ADR into standard courses in an attempt to avoid marginalising the ADR

¹⁰⁰ Ibid 11–12.

¹⁰¹ Ibid 14.

¹⁰² Denton R Moore and Jerry Tomlinson, ‘The Use of Simulated Negotiation to Teach Substantive Law’ (1969) 21 *Journal of Legal Education* 579, 580–81.

¹⁰³ Ibid 579.

¹⁰⁴ Ibid 586.

subject. He notes that in addition to the traditional teaching method of a lecture or seminar-discussion session, a simulation exercise is now a widespread and accepted way to teach the processes.¹⁰⁵

Moberley comments that there has been a gradual rise in ADR activity in American law schools and that accreditation standards now recommend ADR methods be included in the professional skills curriculum.¹⁰⁶ Moberley's literature review canvasses the diverse labours to incorporate ADR into law school curricula. Past efforts include adopting ADR units into mainstream courses, adding new courses such as negotiation, mediation, mediation clinics or general ADR courses, or a combination of all of these options.¹⁰⁷

In the Australian context, Giddings describes the Griffith University Law School method of teaching ADR as having a strong focus on clinical skills.¹⁰⁸ The subject assessed by Giddings comprised a one-week intensive teaching workshop followed by a seminar series. Students were then placed with the ADR Branch of the Queensland Department of Justice and Attorney-General. Giddings positively evaluates the Griffith program and emphasises the importance of clinical legal ADR education because it encourages lawyers to provide the parties to a dispute with a wide range of possible solutions, emphasising the need for lawyers to consider the what, where, why, when and how of disputes.¹⁰⁹

David's classification of ADR teaching methodology provides interesting insights resulting from her anecdotal experience teaching ADR to undergraduate and postgraduate students in Australian law schools.¹¹⁰ David devises four ways to teach ADR in law schools comprising a four rung scale, descending in her perception of quality of outcomes. In option one (Utopia) ADR is taught as an integral part of the undergraduate degree such as in Criminal Law or Contract classes. The benefit of this approach, as Bush points out above, is

¹⁰⁵ Robert A Baruch Bush, 'Using Process Observation To Teach Alternative Dispute Resolution: Alternatives to Simulation' (1987) 39 *Journal of Legal Education* 46; Spencer, above n 12, 47.

¹⁰⁶ Robert B Moberley, 'Introduction: Dispute Resolution in the Law School Curriculum: Opportunities and Challenges' (1998) 50 *Florida Law Review* 583, 585. From 1983 on, the American Bar Association (ABA) Section on Dispute Resolution has periodically surveyed law schools about their ADR pursuits. In 1983 forty-three law schools or about 25% of law schools were offering ADR courses. In 1986, the majority of ABA approved law schools were reported to be offering courses or clinics on ADR. By 1989 550 courses in were provided in 174 law schools. A 1997 survey identified 714 courses being offered in 177 schools. So, almost all law schools were offering dispute resolution courses, most with multiple offerings.

¹⁰⁷ *Ibid* 587.

¹⁰⁸ Jeffrey Giddings, 'Using Clinical Methods to Teach Alternative Dispute Resolution: Developments at Griffith University' (1999) 10(3) *Australasian Dispute Resolution Journal* 206.

¹⁰⁹ *Ibid* 213.

¹¹⁰ Jennifer David, 'Integrating Alternative Dispute Resolution (ADR) in Law Schools' (1991) 2 *Australian Dispute Resolution Journal* 5.

that all students would regard ADR as part of the law subject, thus ADR is not on the fringe of legal education.¹¹¹ Option two involves teaching ADR in the introductory law course, introducing students to concepts, processes and some skills. These aspects of ADR can then be taught again in later subjects; particularly final year subjects.¹¹² The third option focuses on ADR being taught outside the normal undergraduate subjects. The students undertake to participate in one or two days per year of a skills course which is taught alongside and parallel to the core subjects. Outside dispute resolution experts could teach the course to prevent courses from becoming too theoretical.¹¹³ David's final option consists of making the basic ADR course optional which would mean the majority of students would not study ADR at all.¹¹⁴

From the above it is evident that there are several ways, varying in degrees of quality, to deliver ADR education in law schools. Teaching method is affected by many factors including acceptance of ADR by those who control curriculum content as well as fiscal considerations. Whilst the content and delivery mode of ADR education is important, a key consideration in teaching method is the effect of the teaching on students. This point is examined in Part Two.

VI THE IMPACT OF TEACHING ADR IN LAW SCHOOLS

In 1984, Riskin and Westbrook¹¹⁵ initiated an integrated method of teaching *Dispute Resolution* to law students at the University of Missouri. The program was the first in the US to 'infuse dispute resolution instruction into the standard first year curriculum.'¹¹⁶ The program's principal two goals were, first, to equip new lawyers with an understanding of what ADR activities were. Secondly, Riskin and Westbrook believed that teaching ADR could potentially remedy weaknesses in traditional legal education,¹¹⁷ namely, the idea of the lawyer as 'hired gun' rather than 'problem solver', and the pervasive assumption that most disputes are resolved in court or pursuant to a rule of law.¹¹⁸ Broadly, the aim of the program was 'to prepare students to serve clients and society better',¹¹⁹ illustrating Riskin's

¹¹¹ Ibid 6.

¹¹² Ibid 7.

¹¹³ Ibid.

¹¹⁴ Ibid.

¹¹⁵ Professors of Law at the University of Missouri-Columbia School of Law. Riskin was also Director of the Centre for the Study of Dispute Resolution.

¹¹⁶ Ronald M Pipkin, 'Teaching Dispute Resolution in the First Year of Law School: An Evaluation of the Program at the University of Missouri-Columbia' (1998) 50 *Florida Law Review* 610.

¹¹⁷ Leonard L Riskin and James E Westbrook, 'Integrating Dispute Resolution Into Standard First Year Courses: The Missouri Plan' (1999) 39 *Journal of Legal Education* 509, 509-510.

¹¹⁸ Ibid 514.

¹¹⁹ Pipkin, above n 104, 610.

attitude towards lawyering and his value judgment that lawyers who practice law under the umbrella of ADR theory are benefiting society and their clients. Riskin's approach contrasts with the approach taken by lawyers who see themselves as client advocates and who perceive the collaborative philosophy underlying ADR as compromising their ability to obtain a 'win' for their client.

Riskin et al devised a plan to integrate dispute resolution into all standard first year courses at the University, commencing 1985.¹²⁰ Called The Missouri Plan, the project produced books, an instructors' manual, videotapes etc to support the interviewing, counselling, negotiation and mediation programs that were integrated into all first year law subjects at the law school.

Evaluations on the project were carried out by Pipkin.¹²¹ Despite the assessment being performed before the program was fully developed, Pipkin was able to document, very early, a very high acceptance of the idea of the lawyer as a problem solver.¹²²

Pipkin's study focussed on students learning the culture of professional legal education and on the processes of professionalisation.¹²³ He surveyed students to see what impact the course had on the students' learning, i.e. did the course alter the effects of the dominant influences in legal education that predispose students toward understanding the lawyer's role as primarily adversarial, urging their clients to litigate? The survey also enquired into the culture of professional legal education and the methods of professionalisation.¹²⁴

Pipkin comments on the remarkable growth in new ADR course offerings at law schools in the twelve years during which he observed the Missouri program. He refers to an Association of American Law Schools' (AALS) survey of new course offerings that reported between 1991 and 1997 more than half of the reporting schools (44) added courses in dispute resolution in the advanced curricula.¹²⁵ He writes that ADR instruction in legal education has developed from a marginal activity to one of growth, and notes that the Missouri program over the years has also grown and encompassed more faculty and more courses in their advanced curriculum while retaining its original focus on first-year curriculum.

The results of Pipkin's evaluation indicated that after taking ADR courses, students believed ADR was essentially a concept tied to the cost of litigation and the need for such options was strictly pragmatic.

¹²⁰ Leonard L Riskin, 'Disseminating the Missouri Plan to Integrate Dispute Resolution into Standard Law School Courses' (1998) 50 *Florida Law Review* 590.

¹²¹ Pipkin, above n 104, 610.

¹²² *Ibid.*

¹²³ *Ibid* 611.

¹²⁴ *Ibid.*

¹²⁵ *Ibid* 613.

Students used the terms ‘ADR’ and ‘settlement’ interchangeably so clients had a choice between litigation and settlement depending on how much justice they could afford. Pipkin felt that some of the teaching had resulted in this narrow view of when ADR could be used so the sense of the marginal role ADR played in professional practice was reinforced.¹²⁶ This issue is considered in Part Two.

Pipkin suggests that when law schools incorporated ADR into their curricula, they intended to bring the ideas and training of the external ADR movement into their schools and to find aspects in ADR approaches and techniques that might be appropriate for ordinary legal practice.¹²⁷ Pipkin believes this goal was successfully achieved by the Missouri program. The phrase ‘dispute resolution’ was substituted for ‘alternative dispute resolution’ and litigation became just another form of a multitude of ways to resolve disputes (for example mediation, arbitration, negotiated settlement) rather than being used as the primary reference.¹²⁸ It ‘deprivileged’ litigation as the status quo and resulted in ADR in legal education being given credibility. Dispute resolution became lawyers’ work rather than the activity of those outside the legal profession (mediators, therapists) who were actively building the ADR movement. This resulted in discussions with what Pipkin called ‘traditional colleagues’ about when litigation is or is not the best option. Subsequently, this prompted thought about the meaning of ‘best option’, ‘best’ being defined in terms of disputants’ interests rather than rules, laws or theories of justice. Pipkin concludes that for mainstream lawyers to accept this view is a big step.¹²⁹

Other observations about the program’s success were based on impressions rather than empirical data. This notwithstanding, most students seemed enthusiastic about engaging in more advanced work in ADR and were keen to include it in their professional practices. Most students were sensitised to the notion of lawyers reviewing available alternative processes with their clients. Not surprisingly, some students were more able to question the basic and often unspoken assumptions in legal education.

Importantly, Riskin and Westbrook maintain that the evaluation was unable to show how many students were affected by the program, nor the extent to which they were affected and whether the program will change their attitudes toward, or behaviour in, law practice in the face of lawyers’ traditional attitudes.¹³⁰ This important finding is canvassed in Part Two.

¹²⁶ *Ibid* 642–643.

¹²⁷ *Ibid* 650.

¹²⁸ *Ibid* 651.

¹²⁹ *Ibid* 652.

¹³⁰ Riskin and Westbrook, above n 105, 516–517.

The Missouri Plan became the basis for implementing a similar project conducted in six other law schools in the US. From 1995–97 the University of Washington, DePaul, Hamline, Ohio State, Inter-American and the University of Tulane adapted The Missouri Plan for teaching in their law schools,¹³¹ focussing on three main teaching goals: 1) to understand that the lawyer's principal job is to help the client solve the client's problem; 2) to understand the differences and relationships between adversarial and problem-solving orientations towards disputes and transactions; and 3) to understand the principal characteristics, advantages and disadvantages of dispute resolution processes and when each method may be appropriate.¹³² In order to achieve these goals, ADR activities were integrated in subjects such as *Legal Research and Writing* and *Torts*.¹³³

At Ohio State University some first-year *Property* students had been trained in mediation prior to the program commencing. These students and a control group were followed up to measure the impact of this training. Preliminary findings suggest that the group with the mediation training were now more inclined to use mediation than the control group.¹³⁴

Riskin's research raises two important points that cry out for further research in the areas of legal professional practice and legal education. First, why has ADR been so widely accepted by the legal system? Is it because the ADR movement offers a different and superior view of conflict resolution or is it simply because ADR offers a cheaper and faster method of resolving disputes? The second issue raised by the research goes to the essence of teaching ADR in law school. Riskin describes the unique concept of the 'lawyers' standard philosophical map' that seems to be present in law schools '[w]ith its assumptions that disputants are always adversaries and that a third party is required to apply a rule of law to reach a decision making it difficult to change both law students and law teachers attitudes'.¹³⁵ If law students are inculcated with adversarial and rights-based approaches to conflict resolution by all the law subjects in the curriculum except for ADR subjects, how can law students' attitudes towards conflict resolution change from adversarial to collaborative? How can ADR theory ever be translated into the practice of law?

Coben maintains that although the result of implementing the Missouri Plan at Hamline University was positive, he is not convinced that the goal of the curricular innovations, influencing student perceptions of a lawyer's work, has been achieved.¹³⁶

¹³¹ Ibid 591.

¹³² Ibid 594.

¹³³ Ibid 592.

¹³⁴ Riskin, above n 108, 604.

¹³⁵ Ibid 520.

¹³⁶ James R Coben, 'Summer Musings on Curricular Innovations to Change the Lawyer's Standard Philosophical Map' (2003) 50 *Florida Law Review* 735, 736.

He discusses the problem of overcoming the imprints of Riskin's 'standard philosophical map of lawyering' and how this idea is continually reinforced by the traditional curriculum. He believes that ADR teachers face the monumental task of encouraging critical examination by first year students of the foundational assumptions of professional identity.¹³⁷ Disappointing reports from lecturers or mentors about students in three different courses confirmed how powerful the message of the dominant lawyering paradigm was.¹³⁸

Coben confronts the dissonance between theoretical discussions about the promise of ADR in the classroom and the reality of mediation practice.¹³⁹ He blames the 'theoretical straightjacket' for the disparity between theory and practice, and stresses that young lawyers should use the collaborative problem-solver, rather than the adversarial, positional-bargainer as their way of viewing the world in general. He is convinced that mediation training, because it emphasises empathy and effective listening as well as other skills necessary for 'client-centred' lawyering, should be the centre of the ADR effort to imprint a different standard philosophical map.¹⁴⁰

Coben notes that many third year students have said they feel 'damaged' by the law school experience. When debriefing clinic students who were emotionally detached and unempathetic with clients, Coben asked whether they would have responded this way prior to law school. Most replied no.¹⁴¹ This finding presents a scathing criticism of the law school experience and legal education, especially because the students had undertaken ADR courses at law school. It would be interesting to compare this finding with that of a control group to ascertain the effect, if any, of the life experiences of the Coben group on the results.

Hamline University, in an attempt to evaluate whether different levels of ADR content result in different student perceptions of lawyering, administered a modified 'Problem-Solving vs Adversarial Orientations Toward Lawyering' survey to the entire 1996–97 class during orientation and again at the end of first year. All of the sections¹⁴² showed increases in the problem-solving orientations while the group from the all-day section, where most ADR related activities were conducted, showed the greatest increase in problem-solving orientation responses and the highest overall 'problem-solving' orientation at the end of the year. Women in this section showed the most dramatic shift in orientation of any section group. In general, the female students at Hamline began the year as more adversarial than male students. However at the end of the year the

¹³⁷ *Ibid* 737.

¹³⁸ *Ibid* 739.

¹³⁹ *Ibid* 740.

¹⁴⁰ *Ibid* 741.

¹⁴¹ *Ibid* 743.

¹⁴² *Ibid* 744–747.

trend was completely reversed. The men had become slightly more adversarial and the women substantially more problem-solving in orientation.¹⁴³

How successful were these law schools in achieving the central teaching goals of the Missouri Plan? ‘Each of the participating schools made substantial progress’ although what was accomplished varied from school to school.¹⁴⁴ Riskin states that despite great progress the ‘lawyers’ standard philosophical map’ still held true. He is hopeful that one day this will change.¹⁴⁵

Savage’s qualitative study of ADR teaching in two law schools¹⁴⁶ concludes that ADR courses ‘put back everything law school took out’, reintegrating humanity and common sense into the dispute resolution process.¹⁴⁷ Her conclusions and recommendations¹⁴⁸ strongly favour the study of ADR in law schools, especially as law schools provide a forum for potentially reaching all future lawyers. Savage contends that if lawyers understand ADR while still having litigation as a tool to assist clients, they will be able to assess cases and use the processes that benefit their clients most.¹⁴⁹ This proposition is supported by both Sander and Zariski, who assert that some established legal practitioners lack knowledge about ADR processes in contrast to more recent professional admittees who experienced the benefit of ADR education in law school.¹⁵⁰

Nolan-Haley and Volpe’s qualitative study, based on their experiences teaching *Mediation and the Law* for four years, claims that knowledge of mediation enhances law students’ lawyering skills, even if they never mediate in practice, by enabling them to think in a problem-solving mode and to consider underlying needs and interests.¹⁵¹ The writers believe that, even within adversarial practice, if lawyers have been exposed to the mediative perspective they may recall the value of taking the broadest view of possible issues and interests involved in a specific case, thereby improving their ability to help clients develop solutions to their problems. The authors conclude that teaching mediation as a lawyering role helps students develop a more comprehensive theory of lawyering than they might have acquired. It can even help law teachers clarify and

¹⁴³ Ibid 749.

¹⁴⁴ Riskin, above n 108, 606.

¹⁴⁵ Ibid 607.

¹⁴⁶ The University of New Mexico School of Law and the Denver College of Law.

¹⁴⁷ Savage, above n 80, 98.

¹⁴⁸ Ibid 99–101.

¹⁴⁹ Ibid 100.

¹⁵⁰ Frank E A Sander, ‘The Future of ADR: The Earl F Nelson Memorial Lecture’ 2000 (1) *Journal of Dispute Resolution* 7; Archie Zariski, ‘Lawyers and Dispute Resolution: What Do They Think and Know (And Think They Know)? Finding Out Through Survey Research’ (1997) 4(2) *E Law Murdoch University Electronic Journal of Law* <<http://www.murdoch.edu.au/elaw/issues/v4n2/zaris422.html>> at 31 October 2006.

¹⁵¹ Jacqueline M Nolan-Haley and Maria R Volpe, ‘Teaching Mediation as a Lawyering Role’ (1989) 39 *Journal Of Legal Education* 572.

possibly redefine what it means to be a lawyer and highlight the relevance of law in resolving conflicts.¹⁵²

Medley and Schellenberg surveyed a group of Indiana attorneys to try and ascertain their attitudes towards civil (non divorce) mediation and divorce mediation. They contend that knowledge of attitudes may be useful in understanding and predicting practitioners' behaviour.¹⁵³ As background information, they note that Indiana had been placed 50th in a survey of the most litigious states in the US. The President of the Indiana State Bar Association attributed this low number of lawsuits to the State's use of court-ordered ADR.¹⁵⁴

Nearly 70 percent of the Medley and Schellenberg survey respondents believed that mediation helps attorneys and the parties to better understand both the strengths and weaknesses of their cases.¹⁵⁵ During data analysis, many variables (for example, age, income, gender, type of practice, size of practice etc) were considered when looking for differences regarding attitudes towards mediation.¹⁵⁶ The only factor indicating a strong relationship was years of practice — mainly explained in terms of age, with age being the most potent background or practice variable for predicting mediation attitudes.¹⁵⁷ The number of years since graduating from law school was linked with age at the time of the survey and these two variables correlated with a negative attitude to mediation.¹⁵⁸ The strength of age as a variable was consistent with the idea that legal innovations were more easily accepted by the younger members of the bar.¹⁵⁹

The writers conclude that Indiana attorneys were generally knowledgeable regarding mediation, open-minded about the value of mediation to clients and the legal system, and were experienced in working with mediation.

Lerman examines the teaching of ADR in American law schools in the 1980s and questions the way ADR has been taught in some centres.¹⁶⁰ She criticises the ADR content in law school courses, stating that a more traditional lawyering focus is being presented. Despite the many options to teach a variety of processes, especially mediation, many courses just concentrate on negotiation and arbitration skills. She examines the importance of determining the course attitude to the relationship between alternatives to the court and civil litigation, and whether this issue has been included in the curricula. Lerman

¹⁵² Ibid 586.

¹⁵³ Morris L Medley and James A Schellenberg, 'Attitudes of Attorneys Toward Mediation' (1994) 12(1) *Mediation Quarterly* 185.

¹⁵⁴ Ibid 186.

¹⁵⁵ Ibid 192.

¹⁵⁶ Ibid 197.

¹⁵⁷ Ibid 195.

¹⁵⁸ Ibid 193.

¹⁵⁹ Ibid 197.

¹⁶⁰ Lisa G Lerman, 'The Teaching of Alternative Dispute Resolution' (1987) 37 (1) *Journal of Legal Education* 37, 38.

feels that ADR needs to be taught with the class focus on developing a critical attitude to the choice of forum, ‘particularly if the choices involve divesting the parties of counsel, legal advice, public hearing and an enforceable remedy’.¹⁶¹ Alternatively, she suggests that ADR courses that teach the informal aspects of the adversary system may provide an invaluable introduction to lawyering. Lerman also recognises the use of experiential exercises and the use of ADR material in courses such as *Civil Procedure* as a very positive way of changing students’ perceptions of themselves as prospective lawyers.¹⁶² Lerman queries whether ADR course content is being used to impart lawyering skills and processes that are not being adequately covered elsewhere in the curriculum.¹⁶³

Brest describes an experimental program involving first-year law students at Stanford University in 1982. He focuses on the *Lawyering Process* which was taught through simulated clinical exercises, work in small groups and classroom instruction,¹⁶⁴ and he advocates that the course should be made a standard part of the first year curriculum at Stanford University and other law schools. Brest reasons that the subject acts as a counterbalance to traditional doctrinal courses which focus on technical analytical skills and exert strong professionalising influences for first year students, tending to close students to human and social concerns. Brest contends that the problem is exacerbated by summer clerkships at law firms coupled with the anxieties of second year job-hunting, which induce cynicism as well as a narrowing of careerism. He believes that by focusing on these issues at the outset of a law course possibly some students will approach their professional education and practice more reflectively.¹⁶⁵

Although Phillips’ study is profession-based, his conclusions highlight the interface between professional legal practice and legal education. Phillips considers the evolution of the use of mediation in civil litigation in Missouri. The US District Court for the Western District of Missouri (federal jurisdiction) mandated the use of ADR procedures from 1992 on, whereas the Missouri Supreme Court (state jurisdiction) from 1989 permitted but did not require ADR programs.¹⁶⁶ The experience of his clients, which is supported by empirical data derived from the Western District of Missouri Federal Court program, was that the mandatory ADR program was quicker, cheaper and more satisfactory than expected.¹⁶⁷ In the voluntary ADR program, parties were often not given meaningful opportunities to

¹⁶¹ Ibid 39.

¹⁶² Ibid 39.

¹⁶³ Ibid 38.

¹⁶⁴ Paul Brest, ‘A First-Year Course in the “Lawyering Process”’ (1982) 32 *Journal of Legal Education* 344.

¹⁶⁵ Ibid 350.

¹⁶⁶ John R Phillips, ‘Meditation as One Step in Adversarial Litigation: One Country Lawyer’s Experience’ (2002) 1(1) *Journal of Dispute Resolution* 143.

¹⁶⁷ Ibid 143.

mediate as the attorneys often failed to recognise when mediation was appropriate, or attorneys were reluctant to suggest mediation as this historically was seen as a sign of weakness in the case.¹⁶⁸ Phillips observes that in the last decade, ADR processes in general and more specifically mediation have become both highly indispensable and a very effective tool for advocates in civil litigation. He commends ‘those law schools that have had the vision to incorporate ADR use and advocacy into their curriculum ...’¹⁶⁹ ‘and to courts that encourage or require its use as a step in, not a substitute for, the adversarial process’.¹⁷⁰

Much less research has focused on Australia. Zariski’s Western Australian Dispute Resolution Survey in 1996 was an attempt to discover lawyers’ attitudes to ADR practice in Australia. The questionnaire was sent to members of the Western Australian Law Society in a regular monthly mail out of their magazine *Brief*.¹⁷¹ Four hundred and eighteen responses were received.

Zariski’s enquiry does not have a specific legal education focus, but his study is pertinent to legal education. This is because in making an assessment whether certain legal skills should form part of law school curricula, on the basis that the skills are necessary for legal practice, knowledge levels of legal practitioners and practitioners’ attitudes are cogent so that universities can tailor courses that will be of optimal value to students, the lawyers of the future.¹⁷²

Zariski’s premise is that although professional groups such as lawyers may share a set of ideas and beliefs, characterised as a ‘culture’ or ‘sub-culture’ sharing common values, it is possible that they may not be a homogeneous group in some aspects, for example, their attitude toward ADR.¹⁷³

Zariski’s survey was directed to the question of lawyers’ views about how ADR activities play, or do not play, a role in shaping how they (the lawyers) think about themselves as legal professionals.¹⁷⁴ Survey questions probed lawyers’ professional and training histories, their experience (or lack of) in ADR, and their attitudes and beliefs in relation to ADR processes.¹⁷⁵

Zariski found that most respondents did not consider ADR activities as lower status or demeaning work. A large percentage

¹⁶⁸ Ibid 144.

¹⁶⁹ Ibid 153.

¹⁷⁰ Ibid 154.

¹⁷¹ Archie Zariski, ‘Lawyers and Dispute Resolution: What Do They Think and Know (And Think They Know)? Finding Out Through Survey Research.’ (1997) 4 (2) *E Law Murdoch University Electronic Journal of Law* <<http://www.murdoch.edu.au/elaw/issues/v4n2/zaris422.html>> at 31 October 2006.

¹⁷² Ibid 3.

¹⁷³ Ibid 4.

¹⁷⁴ Ibid.

¹⁷⁵ Ibid 5.

¹⁷⁶ Ibid 10.

of respondents indicated that their firms had no policy to consider ADR processes or to incorporate provisions for ADR alternatives in legal documents they draft. Less than one-fifth of all respondents had received some instruction in ADR processes before being admitted to practice. Zariski saw this finding as an opportunity for law schools as, despite years of practice, many practitioners had never received any ADR training.¹⁷⁶

Based on his survey results and similar findings of others, Zariski argues that there has been a change in how or what lawyers think about ADR. While numerous studies (including his) show that most lawyers are favourably disposed towards ADR practices, others indicate that the majority of lawyers do not voluntarily choose these alternatives when they are offered. Zariski believes that ‘legal education now increasingly incorporates instruction in alternative processes such as mediation. Yet, studies show that such education does little to encourage students to use these processes when they become lawyers’.¹⁷⁷

Zariski¹⁷⁸ considers the broader question of assessing ‘a mindset amongst lawyers — a legal culture, and its relations to the norms, ideas and practices of ADR expressed through beliefs, attitudes, and values that help lawyers identify themselves as professionals with a special role in society’.¹⁷⁹ He considers shared conceptions amongst people otherwise differentiated in their personal circumstances as a strong clue to the existence of an identifiable culture, but asks whether criminal and business lawyers, sole practitioners, and partners from large firms or urban and rural lawyers have the same shared attitude and beliefs in relation to their work? If so, a professional legal culture can be identified.¹⁸⁰

Question 13 of Zariski’s survey asked, ‘Should any disputes go through dispute resolution processes which do not involve a judge’s binding decision?’ Ninety-eight percent of legal practitioners who responded answered ‘yes’.¹⁸¹ Zariski contends that while the research suggests a major change in legal practice in favour of ADR is taking place, the data does not necessarily establish that a change of a cultural nature has occurred.¹⁸² This idea is reviewed in Part Two. Nevertheless Zariski asserts that some survey findings and indeed his own ‘do at least indirectly yield some evidence for the existence and impact of a disputing culture...’, defined as ‘a complex of practices, together with shared ideology, beliefs, values and attitudes

¹⁷⁷ Archie Zariski, ‘Disputing Culture: Lawyers and ADR’ (June 2000) 7(2) *E Law Murdoch University Electronic Journal of Law* <http://www.Murdoch.edu.au/elaw/issues/v7n2/zariski72/_text.html> at 31 October 2006

¹⁷⁸ *Ibid.* 4.

¹⁷⁹ *Ibid.*

¹⁸⁰ *Ibid.*

¹⁸¹ *Ibid.* 20.

¹⁸² *Ibid.* 5.

that help lawyers identify themselves as professionals concerned with resolving conflict in society'.¹⁸³

In Zariski's opinion, there is evidence emerging of a new legal disputing culture, that is, ADR sentiment is becoming part of a professional legal culture, a shared value or attitude that helps to define what it means to be a lawyer.¹⁸⁴

Responses to other questions related to the legal profession and ADR do not correlate with differences in personal characteristics of lawyers surveyed. 'However, analysis reveals that the factor of the year of admission to the bar does appear to be weakly correlated with some beliefs or attitude towards ADR held by Western Australian lawyers.'¹⁸⁵ The correlation between years of practice and attitudes to ADR processes emerged in surveys by Medley and Schellenberg and Wissler's study referred to above as well as in Zariski's survey. These findings pose interesting questions for research about the effect of ADR courses taught at law school on professional legal practice as the inclusion of ADR subjects into Australian law school curricula has taken place over the last ten years. To what extent have the courses dislodged Riskin's 'standard philosophical map'?

From the above review of research findings it is apparent that legal educators who have brought ADR subjects into a law school curriculum and thereafter researched the impact of their courses on law students share a common opinion about the legal system and the lawyer's role within that system. They appear dissatisfied with the prevailing adversarial legal culture and seek change by introducing to prospective lawyers the notion of the lawyer as problem solver rather than client advocate. Furthermore, they seem to pose a broader social approach to lawyering, seeking to expand traditional conception to encompass the public interest and client counselling.¹⁸⁶

VII CONCLUSION

Mahatma Gandhi is reputed to have said 'the duty of a lawyer is to reunite parties riven asunder'.¹⁸⁷ The statement underscores the primacy of lawyers in dispute resolution. In Australia, lawyers have 'stop[ped] shopping just in the corner shop where only litigation is available, and [have]... take[n] clients through the shopping centres, where a whole range of ADR techniques are available'.¹⁸⁸ Clearly,

¹⁸³ Ibid 6.

¹⁸⁴ Ibid.

¹⁸⁵ Ibid.

¹⁸⁶ Christine Parker, 'A Critical Morality for Lawyers: Four Approaches to Lawyers' Ethics' (2004) 30(1) *Monash University Law Review* 49.

¹⁸⁷ Bridget Sordo, 'The Lawyers Role in Mediation' (1996) 7(1) *Australian Dispute Resolution Journal* 20.

¹⁸⁸ David Spencer, 'Liability of Lawyers to Advise on Alternative Dispute Resolution Options' (1998) 9(4) *Australian Dispute Resolution Journal* 292 quoting Gavin B Robertson, 'The Lawyer's Role in Commercial ADR' (1987) 61 *Law Institute Journal* 1148.

the Australian legal system is committed to ADR processes and the commitment has been translated into the legal education forum.

Yet, despite apparent acceptance of ADR practice, questions remain about whether the culture of ADR has permeated the legal system. If ADR has been adopted for utilitarian reasons rather than ones pertaining to the 'philosophical road map' for lawyers, perhaps the dominant adversarial culture will continue to persist, and opportunities for creative lawyering and enhancing clients' voices will be missed. An example of the pragmatic, functional approach to ADR appears in the following quotation from the 'Report of the Chief Justice of the Supreme Court's Policy and Planning Committee on Court Annexed Mediation':

Mediation is much cheaper than litigation ... It has been said that the mediation of a commercial dispute by the Australian Commercial Disputes Centre costs 5% of the costs of litigating or arbitrating the same matter.¹⁸⁹

A challenge in legal education research in Australia lies in mapping the existence of ADR in the law curriculum and in ascertaining the effects of teaching ADR to law students, the lawyers of the future. To the extent that ADR is currently taught, what impact, if any, will ADR courses taught in law schools have on the 'standard philosophical adversarial map' reinforced by the 'black letter law' subjects? Will lawyers be able to incorporate ADR into their practice in the Gandhi spirit, or will ADR be a mere adjunct of the litigation system, imbued with its values based on positional, competitive, lawyer-centred legal practice? Some of these questions are addressed in Part Two of the research whilst others provide the impetus for further research in the areas of legal education and legal practice.¹⁹⁰

¹⁸⁹ Sourdin, above n 19, 120.

¹⁹⁰ Part Two of this research project describes the results of an empirical study on the Dispute Resolution unit taught at La Trobe Law in 2005 and explores the effects of teaching Dispute Resolution on student attitudes towards the ways in which lawyers manage legal disputes.