

Introduction: Dispute Resolution in the Law School Curriculum: Opportunities and Challenges

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INTRODUCTION: DISPUTE RESOLUTION IN THE LAW SCHOOL CURRICULUM: OPPORTUNITIES AND CHALLENGES*

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I. INTRODUCTION

In this Symposium, a distinguished group of authors explore the impact of Alternative Dispute Resolution (ADR) on our legal system, and how law schools have responded to this development. The articles grew out of a program entitled "Dispute Resolution Throughout the Law School Curriculum: Opportunities and Challenges," sponsored by the Section on Alternative Dispute Resolution of the Association of American Law Schools. They focus on a number of efforts to incorporate dispute resolution into law school curricula. Special attention is given to the efforts of the University of Missouri-Columbia Center for the Study of Dispute Resolution, an early leader in ADR curricular innovations, to help integrate

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dispute resolution into curricula at several other law schools.¹

II. THE RISE OF ALTERNATIVE DISPUTE RESOLUTION IN THE LEGAL SYSTEM

The rise of ADR in the legal system has been well documented.² At the federal level, Congress recently contributed to this rise by passing the Alternative Dispute Resolution Act of 1998, which requires federal district courts to authorize the use of ADR in all civil actions and to encourage litigants to use the ADR process.³ This follows passage of two legislative acts designed to increase the use of ADR by federal agencies,⁴ and two executive orders directing federal litigation counsel to suggest and use ADR in appropriate circumstances.⁵

States also have been very active in adopting ADR measures, with Florida playing a leading role. Florida's use of mediation in the judicial system began in the 1970s, and in 1989, Florida authorized all state courts to require mediation or advisory arbitration in civil litigation.⁶ In 1992, Florida became the first state to adopt mediator ethical standards that could be enforced through complaint and advisory opinion procedures.⁷ In 1998, courts referred more than 120,000 reported cases to mediation,⁸ compared

1. These efforts were funded by a grant from the U.S. Department of Education Fund for the Improvement of Post-Secondary Education.

2. See, e.g., LEONARD L. RISKIN & JAMES E. WESTBROOK, *DISPUTE RESOLUTION AND LAWYERS* (2d ed. 1997); NANCY H. ROGERS & CRAIG A. MCEWEN, *MEDIATION: LAW, AND POLICY, PRACTICE* (1994); STEPHEN B. GOLDBERG, FRANK E.A. SANDER & NANCY H. ROGERS, *DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, AND OTHER PROCESSES* (2d ed. 1992).

3. See Alternative Dispute Resolution Act of 1998, Pub. L. No. 105-315, §§ 3-4, 112 Stat. 2993, 2993-94 (to be codified at 28 U.S.C. §§ 651-658). President Clinton signed the act on October 30, 1998. See Alternative Dispute Resolution Act, 112 Stat. at 2998. Litigants in all civil cases will be required to consider the use of ADR, and courts must provide litigants with at least one ADR process including, but not limited to, mediation, early neutral evaluation, mini-trials, and arbitration. See *id.* § 4, 112 Stat. at 2994 (to be codified at 28 U.S.C. § 652(a)). Moreover, every district must designate an employee or judicial officer who is knowledgeable in ADR practices to implement and evaluate its ADR program. See *id.* § 3, 112 Stat. at 2994 (to be codified at 28 U.S.C. § 651(d)).

4. The two acts are the Administrative Dispute Resolution Act, Pub. L. No. 101-552, 104 Stat. 2736 (1990), which was amended by the Administrative Dispute Resolution Act of 1996, Pub. L. No. 104-320, 110 Stat. 3870, and the Negotiated Rulemaking Act of 1990, Pub. L. No. 101-648, 104 Stat. 4969.

5. See Exec. Order No. 12,278, 56 Fed. Reg. 55, 195 (1991); Exec. Order No. 12, 988, 61 Fed. Reg. 4,729 (1996).

6. See FLA. STAT. § 44.102 (1997); *id.* § 44.103.

7. See Robert B. Moberly, *Ethical Standards for Court-Appointed Mediators and Florida's Mandatory Mediation Experiment*, 21 FLA. ST. U. L. REV. 701, 705 (1994).

8. See Sharon Press, *Introduction to SHARON PRESS & KIMBERLY KOSCH, 1998 FLORIDA MEDIATION/ARBITRATION PROGRAMS: A COMPENDIUM* vi (11th ed. 1998).

to about 34,000 in 1989.⁹ Moreover, since statistics are collected only from those circuits that designate a mediation coordinator, and since many parties now proceed to mediation *prior* to filing a civil action, “the actual number of mediations conducted far exceeds those reported.”¹⁰ The Florida Supreme Court has certified several thousand mediators, and almost 10,000 individuals have completed Supreme Court certified mediation training.¹¹

III. LAW SCHOOL RESPONSE

Law schools gradually responded to this rise in ADR activity. The concept of teaching negotiation and related skills was endorsed by the 1979 American Bar Association Task Force on Lawyer Competency,¹² the 1980 Special Committee for a Study of Legal Education,¹³ the then-Chief Justice of the United States Supreme Court,¹⁴ and the more recent McCrate Report.¹⁵ Law School accreditation standards now recommend that alternative methods of dispute resolution be included in a school’s professional skills curriculum.¹⁶

Since 1983, the American Bar Association Section on Dispute Resolution¹⁷ has periodically surveyed law schools about their ADR offerings. The first survey in 1983 listed forty-three law schools, or about

9. See JENNIFER L. MASON & SHARON B. PRESS, *FLORIDA MEDIATION/ARBITRATION PROGRAMS: A COMPENDIUM* viii (1992).

10. Press, *supra* note 8, at vi. For detailed discussions of the extensive use of ADR in Florida, court-sponsored and otherwise, see generally 1 CONTINUING LEGAL EDUC., FLA. BAR, *ALTERNATIVE DISPUTE RESOLUTION IN FLORIDA* (1991); 2 CONTINUING LEGAL EDUC., FLA. BAR, *ALTERNATIVE DISPUTE RESOLUTION IN FLORIDA* (2d ed. 1995); James J. Alfini, *Trashing, Bashing, and Hashing It Out: Is This The End of “Good Mediation”?*, 19 FLA. ST. U. L. REV. 47 (1991); Sharon Press, *Institutionalization: Savior or Saboteur of Mediation?*, 24 FLA. ST. U. L. REV. 903 (1997); Moberly, *supra* note 7.

11. See Press, *supra* note 8, at vi.

12. See SECTION OF LEGAL EDUC. AND ADMISSIONS TO THE BAR, ABA, *REPORT AND RECOMMENDATIONS OF THE TASK FORCE ON LAWYER COMPETENCY: THE ROLE OF THE LAW SCHOOLS* 3-4 (1979).

13. See ABA, *LAW SCHOOLS AND PROFESSIONAL EDUCATION: REPORT AND RECOMMENDATIONS OF THE SPECIAL COMMITTEE FOR A STUDY OF LEGAL EDUCATION OF THE AMERICAN BAR ASSOCIATION* 103 (1980).

14. “Even fewer law schools focus on training in the skills—the arts—of negotiation that can lead to settlements. Of all the skills needed for the practicing lawyer, skill in negotiation must rank very high.” Warren E. Burger, *Isn’t There a Better Way?*, 68 A.B.A. J. 274, 275 (1982).

15. See SECTION OF LEGAL EDUC. AND ADMISSIONS TO THE BAR, ABA *LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM* 254 (1992) (Report of the Task Force on Law Schools and the Profession: Narrowing the Gap).

16. See STANDARDS FOR APPROVAL OF LAW SCHOOLS Standard 302(a)(4) & Interpretation 302-1 (1998).

17. Previously known as the Special Committee on Alternative Means of Dispute Resolution, and then as the Standing Committee on Dispute Resolution.

25 percent of U.S. law schools, as offering ADR courses.¹⁸ The next survey in 1986 noted that “a majority of the ABA approved law schools in America now offer courses or clinics on ADR. This is a significant achievement in a field that was barely known a decade ago.”¹⁹ In 1989, the survey listed 550 courses in 174 law schools, and the most recent survey in 1997 identified 714 courses in 177 schools.²⁰ Almost all law schools offered dispute resolution courses, most with multiple offerings. The 1997 report noted that “the expansion of ADR courses and clinical programs is dramatic, matching, if not surpassing, the growth in ADR generally.”²¹

At the University of Florida, the College of Law began offering a Negotiation course in the 1970s; its pedagogy included simulated negotiations with videotaping, professorial observation and critiques, and student self-critiques.²² The College subsequently created a course on Mediation and Other Dispute Resolution Processes, that can be offered independently or in combination with Negotiation. The faculty, also, approved an Institute for Dispute Resolution, with the mission of encouraging and enhancing teaching, research and service in dispute resolution. The College has developed a Mediation Clinic²³ and alternative dispute resolution seminars that address advanced subjects such as Dispute Systems Design and Comparative Dispute Resolution. Additionally, faculty members have created specialty ADR courses, such as Environmental Dispute Resolution, International Litigation and Arbitration, Collective Bargaining and Arbitration, and an Advanced Course in Labor Arbitration. With grant funding, the Institute for Dispute Resolution has established an agricultural mediation service, provided conflict resolution training in Haiti, co-sponsored a natural resources leadership institute, initiated a mediation system for juveniles, and partnered with the local court system to create a community mediation program.

18. See generally SPECIAL COMM. ON ALTERNATIVE MEANS OF DISPUTE RESOLUTION, ABA, LAW SCHOOL DIRECTORY OF DISPUTE RESOLUTION PROGRAMS (1983).

19. Frank E.A. Sander, *Foreword* to STANDING COMM. ON DISPUTE RESOLUTION, ABA, DIRECTORY OF LAW SCHOOL DISPUTE RESOLUTION COURSES AND PROGRAMS (1986).

20. See Kimberlee K. Kovach & James J. Alfini, *Foreword* to SECTION OF DISPUTE RESOLUTION, ABA, DIRECTORY OF LAW SCHOOL ALTERNATIVE DISPUTE RESOLUTION COURSES AND PROGRAMS (2d ed., 1997).

21. *Id.*

22. See generally Robert B. Moberly, *A Pedagogy for Negotiation*, 34 J. LEG. EDUC. 315 (1984). This article was part of a symposium on “Alternative Dispute Resolution in the Law Curriculum.” See Symposium, *Alternative Dispute Resolution in the Law Curriculum*, 34 J. LEGAL EDUC. 229 (1984).

23. The mediation clinic is discussed in more detail in Don Peters, *Oiling Rusty Wheels: A Small Claims Mediation Narrative*, 50 FLA. L. REV. 761 (1998).

IV. THE SYMPOSIUM ARTICLES

As noted above, in January of 1998, the Association of American Law Schools Section on Alternative Dispute Resolution sponsored a program entitled "Dispute Resolution Throughout the Curriculum: Opportunities and Challenges." The program focused on diverse efforts to incorporate dispute resolution into the law school curriculum. Past approaches have included adopting dispute resolution units in mainstream courses; adding new courses such as negotiation, mediation, mediation clinics, or general ADR courses; or some combination of these options. The University of Missouri-Columbia Center for the Study of Dispute Resolution, an early leader in ADR curricular innovations, received a grant from the U.S. Department of Education in 1995 to work with six law schools²⁴ that wished to develop adaptations of the Missouri Plan to integrate dispute resolution into traditional courses. In Part I of this symposium, Project Director Leonard Riskin of Missouri provides an overview of the project,²⁵ followed by comments from Professor Ronald Pipkin, a legal sociologist from the University of Massachusetts, who evaluated the project for the Department of Education.²⁶ We then hear from commentators from several of the schools involved in the project. Professors Sarah Cole, Nancy Rogers and Joseph Stulberg discuss Ohio State's incremental expansion of their ADR curriculum into one of the outstanding programs in the country.²⁷ Professor Lea Vaughn explains the efforts to integrate ADR into the curriculum at the University of Washington, providing insight into the faculty dynamics involved in such efforts.²⁸ Professor Kate O'Neill describes how the University of Washington successfully added an ADR perspective to a traditional Legal Writing Course.²⁹ Professor Katheryn Dutenhaver discusses the DePaul program, including the notions that decanal support is critical, and that one must take the faculty as one finds it.³⁰ Professor James Coben of Hamline muses on that school's efforts to

24. The law schools are those at DePaul University, Hamline University, Inter American University, Ohio State University, Tulane University, and the University of Washington.

25. See Leonard L. Riskin, *Disseminating the Missouri Plan to Integrate Dispute Resolution into Standard Law School Courses: A Report on a Collaboration with Six Law Schools*, 50 FLA. L. REV. 589 (1998).

26. See Ronald M. Pipkin, *Teaching Dispute Resolution in the First Year of Law School: An Evaluation of the Program at the University of Missouri-Columbia*, 50 FLA. L. REV. 609 (1998).

27. See Sarah Rudolph Cole et al., *Sustaining Incremental Expansion: Ohio State's Experience in Developing the Dispute Resolution Curriculum*, 50 FLA. L. REV. 667 (1998).

28. See Lea B. Vaughn, *Integrating Alternative Dispute Resolution (ADR) into the Curriculum at the University of Washington School of Law: A Report and Reflections*, 50 FLA. L. REV. 679 (1998).

29. See Kate O'Neill, *Adding an Alternative Dispute Resolution (ADR) Perspective to a Traditional Legal Writing Course*, 50 FLA. L. REV. 709 (1998).

30. See Katheryn M. Dutenhaver, *Dispute Resolution and its Purpose in the Curriculum of*

change the lawyer's standard philosophical map.³¹ This is followed by the commentary of Dean Paul Brest, who developed the "complementary curriculum" at Stanford.³² Finally, Professor Riskin responds to some of the other writings.³³

Part II of this Symposium, to be published in the next issue of the *Florida Law Review*, contains articles by two University of Florida colleagues who have been instrumental in carrying out the mission of the College of Law's Institute for Dispute Resolution. Professor Don Peters, Director of the Mediation Clinic,³⁴ writes a narrative about a small claims mediation, discussing many "hot button" issues in the teaching and practice of mediation.³⁵ Alison Gerencser, Associate Director of the Institute for Dispute Resolution, writes about the public's common confusion regarding the distinctions between mediation and other forms of ADR, such as arbitration.³⁶

V. CONCLUSION

These articles reflect the current state of the art in the teaching of ADR, and should give any law professor or law school considering this subject a variety of ideas on how to incorporate ADR into either an individual course or the curriculum as a whole. The articles also provide members of the bench and bar, many of whom did not receive ADR instruction in law school, a better idea of how law schools are responding to the widespread adoption of ADR in the American legal system. Thus, this issue provides a resource that should be consulted by anyone with a serious interest in the teaching of ADR. Moreover, the ideas and programs discussed here can be expected to provide a framework for future discussions of alternative dispute resolution in the law school curriculum.

DePaul University College of Law, 50 FLA. L. REV. 719 (1998).

31. See James R. Coben, *Summer Musings on Curricular Innovations to Change the Lawyer's Standard Philosophical Map*, 50 FLA. L. REV. 735 (1998).

32. See Paul Brest, *The Alternative Dispute Resolution Grab Bag: Complementary Curriculum, Collaboration, and the Pervasive Method*, 50 FLA. L. REV. 753 (1998). The "complementary curriculum" is a series of courses, including dispute resolution, designed to teach professional judgment. See Paul Brest & Linda Krieger, *On Teaching Professional Judgment*, 69 WASH. L. REV. 527, 527-32 (1994).

33. See Leonard L. Riskin, *A Response to Professor Pipkin*, 50 FLA. L. REV. 757 (1998).

34. Professor Peters also directs the Virgil Hawkins Civil Clinic.

35. See Peters, *supra* note 23.

36. See Alison Gerencser, *Alternative Dispute Resolution has Morphed into Mediation: Standards of Conduct Must be Changed*, 50 FLA. L. REV. 843 (1998).