

## Summer Musings on Curricular Innovations to Change the Lawyer's Standard Philosophic Map

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SUMMER MUSINGS ON CURRICULAR INNOVATIONS  
TO CHANGE THE LAWYER'S STANDARD  
PHILOSOPHICAL MAP

*James R. Coben\**

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I. INTRODUCTION

Having walked the hallways of faculty row during June for a decade, I would have thought that I was immune from the predictable annual cycle of malaise. My colleagues teaching first year courses are prone to grumble about unsatisfying textbooks; graduating students moan about bar exam preparation; non-matriculating students who have neglected their summer job search scramble to find positions. Everyone in my university-wide community seems a little down as they consider the short duration of the summer to come and the long list of commitments made. This year I too find myself succumbing, despite trying to be optimistic about the efficacy of our FIPSE-inspired\*\* Alternative Dispute Resolution (ADR) curriculum innovation efforts. After all, at its core the project is tackling a Herculean task—effecting change in what Leonard Riskin defined years ago as the “lawyer’s standard philosophical map.”<sup>1</sup>

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\*\* FIPSE is the U.S. Department of Education’s Fund for the Improvements of Post-Secondary Education (FIPSE).

1. See Leonard L. Riskin, *Mediation and Lawyers*, 43 OHIO ST. L.J. 29, 43-44 (1982). This

When Hamline's participation in the grant was announced several years ago, we at Hamline saw it as an opportunity to help achieve our stated strategic-plan objective to ensure that every graduating student "will have basic knowledge about ADR and the opportunity for simulation experience in ADR."<sup>2</sup> Our FIPSE grant working-group<sup>3</sup> established the following objectives to guide our curriculum-development effort: (a) emphasize the importance of ADR by formally recognizing it as "substance"; (b) help students confront the standard philosophical map of lawyers and promote an "alternative" definition of lawyer as "problem-solver";<sup>4</sup> (c) provide a baseline familiarity with rule vs. interest and position vs. interest<sup>5</sup> distinctions; and (d) provide a definitional overview of ADR processes and ways they differ from the traditional litigation model. The working group concluded that a student leaving Hamline should have a combination of substantive knowledge, skills training, and experience to: (a) effectively listen to a client; (b) understand legal and other interests; (c) choose the most appropriate dispute resolution process; and (d) differentiate between law as a tool for justice and law as a tool to accomplish individual client objectives.

On paper, I can make a strong case for having accomplished a great deal during the two years of the FIPSE project, as well as the subsequent academic year just completed. Indeed, with the tremendous cooperation of my colleagues, at Hamline we have pledged to continue many ADR-related curricular innovations in the first year (which are described in detail below). Despite such progress and considerable good will and enthusiasm from all involved, I am not as convinced as I would like to be that our efforts actually influence student perceptions of a lawyer's work. After all,

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standard philosophical map is based on two basic assumptions: "(1) that disputants are adversaries—i.e., if one wins, the others must lose—and (2) that disputes may be resolved through application, by a third party, of some general rule of law." *Id.* at 44.

2. Hamline University School of Law Strategic Plan, Mar. 1995, at 6 (copy on file with author).

3. In addition to the author, working-group members included Professor Ed Butterfoss (now Dean of the Law School), Associate Professors Marilynne Roberts and Bobbi McAdoo (since June 1998 Professor of Law and Director of Advanced Studies at the University of Missouri-Columbia School of Law), Legal Writing Director Alice Silkey, and Kenneth Fox, Director of Conflict Resolution Program Development at Hamline University.

4. See Leonard L. Riskin, *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOTIATION L. REV. 7, 14 (1996). This problem-solving approach, in contrast to a traditional, more purely adversarial, positional-bargaining approach, "seeks to bring out and meet the underlying interests of the parties—i.e., the needs that motivate their positions." *Id.*

5. See WILLIAM L. URY ET AL., *GETTING DISPUTES RESOLVED: DESIGNING SYSTEMS TO CUT THE COSTS OF CONFLICT* 5 (1988) (defining interests as "needs, desires, concerns, fears—the things one cares about or wants. They underlie people's positions—the tangible items they say they want.").

changing student perceptions should be the goal of these curricular innovations.

## II. THE STRAITJACKET OF THE DOMINANT PARADIGM

My current uncertainty stems from three unrelated conversations at the semester's end. The exchanges leave me convinced that the traditional first year curriculum not only benignly imprints what Riskin refers to as the standard philosophical map of lawyering, but actually accomplishes something more maleficent. First year students become wrapped in a doctrinal straitjacket from which they (and we) need Houdini-like skills to escape. The basic fabric is made up of the two fundamental assumptions noted by Riskin as part of the standard philosophical map.<sup>6</sup> But the jacket comes loaded with a host of additional ideological "straps" reinforced over and over again by the traditional curriculum of first year, including the notion of law as the exclusive measure of fairness and equity, the assumption that justice is done within the adversarial system when the zealous advocate vigorously represents her clients' interests without regard to other's interests,<sup>7</sup> and the idea that a duty exists to zealously exploit rules and processes to aid the client. We are faced with the monumental task of encouraging critical examination by first year students of these foundational assumptions of professional identity, or more overtly, giving them permission and help to loosen or even remove the ideological straps that bind them into often extraordinarily unproductive behavior.<sup>8</sup>

The first disheartening exchange involved debriefings with second and third year students enrolled in my ADR clinic.<sup>9</sup> Each year for the last five, students in my ADR clinics have, as a small part of their required course work, played the role of mediator in 90 minute simulated settlement conferences. The settlement conferences are held in mid-April as the

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6. See Riskin, *supra* note 1.

7. See, e.g., MODEL RULES OF PROFESSIONAL CONDUCT, PMBL. ¶ 7 (1997).

8. See Riskin, *supra* note 1, at 44. Students face many pitfalls, including blindness to critical information, remaining unaware of interconnections between and among disputants, being insensitive to and ignoring emotional needs of all parties, and an inability to recognize the importance of non-legal and non-material interests. *Id.* at 44-45.

9. This clinic takes advantage of a collaboration between Hamline, the Minneapolis office of the Equal Employment Opportunity Commission (EEOC), the Minnesota State Department of Human Rights, and the Minnesota State Office of Dispute Resolution. Students are offered the opportunity to represent discrimination claimants in mediation proceedings. The clinic is designed to focus on the role of the lawyer in alternative dispute resolution venues, including but not limited to mediation. As part of their clinic work, students represent victims of alleged employment discrimination whose cases have been referred to mediation by the EEOC or State Department of Human Rights. Students also are trained as mediators, observe ADR processes conducted by court appointed neutrals, and conduct court-annexed housing-court and conciliation-court mediations.

culminating exercise in a year-long simulation<sup>10</sup> used by Professor Jim Pielemeier, in one section of our first year civil procedure course. Each clinic student mediates with three first year students who role-play as attorneys for the three different parties in the simulation.

As always, I eagerly awaited the simulation debriefings. This time around, I was anticipating feedback that the first year lawyers were particularly adept at thinking beyond the narrow legal problems presented and would focus on a broad range of client interests in a problem-solving manner. I expected a wide array of creative settlements, involving mutual promises of much more than simple exchanges of cash. After all, these first year students had been, relative to other first year Hamline classes, virtually bombarded with the concept of interests, including multiple mediation exercises where they observed or participated as parties, lawyers, or neutrals. Alas, as the debriefing unfolded, I felt myself sinking ever more deeply into my chair.

Notwithstanding the barrage of ADR content, my clinic student mediators collectively reported that the concept of “interests” appeared to be as foreign to their first year lawyer role players as fruit trees on the moon. The clinic students succinctly summarized it for me:

Look, day in day out, the first years read cases with winners and losers. Everything on mediation and ADR was so obviously alternative and not mainstream that it [was] easily rejected. This interest stuff is great in theory but in reality people know that lawyers are tough bargainers concerned by the bottom line.

I sunk lower in my chair and listened. They continued, “[W]hat seemed to matter most was how well the role players got along with each other and whether the concessions in monetary demands made during the negotiation dance were logical.”

I interrupted in a hopeful tone, “Were the student lawyers at least able to articulate their client’s interests beyond a simple monetary demand?”

One of the better student mediators in the group responded, “I asked about the parties’ interests, every which way I knew how and they [the first years] just looked at me like I was from another planet.”

This dose of reality from my clinical students was quickly reaffirmed several days later in a conversation with Associate Professor Marilynne Roberts, a stalwart proponent and supporter of our efforts. Professor Roberts mentioned to me in the hallway that few, if any, of the students in

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10. See PHILIP G. SCHRAG, CIVIL PROCEDURE: A SIMULATION SUPPLEMENT (1990). The simulation helps students explore civil procedure by following the processing of a tort case in federal district court.

her Torts II class, took up her invitation, clearly outlined in the call of one of her final exam questions, to discuss parties' interests.<sup>11</sup> This mildly surprised me because many students probably would report feeling an "onslaught" of focus on interests and problem-solving in Professor Roberts' class compared to other classes in this law school (and I suspect anywhere in the nation). Yet when push came to shove and the students were in exam mode, the blinders to "interests" were on.

The third conversation occurred several days later when I sat down with Alice Silkey, the director of our legal writing program, to review confidential surveys of the various ADR-related activities used in her program this past year. We noted that while many students commented favorably on the simulations, a common refrain was that "the alternative stuff" took them away from their "real work," which they defined narrowly as writing legal research memos. Many students also noted that one ADR exercise was enough. They "got it" without needing a second dose.

My initial reflections on these three unrelated conversations were entirely dismissive. I was tempted at first glance to chalk up my clinic students' critique of the first years to the arrogance of upperclassmen. I was interested in, but not dismayed by, Professor Roberts' report about her Torts exam. After all, I rationalized, the call of the question was precise in asking about potential causes of action and the most likely outcome if the case proceeded to trial. The reference to interests was oblique. I was also initially inclined to discount the grumbling from the first years about too much ADR in the legal writing program. A colleague reminded me that we heard similar complaints several years ago when we did an intensive legal method "boot-camp" as part of an extended orientation for one of our three first year sections. At that time, a number of students opined six weeks into the semester that they had enough of legal method during orientation and did not need more of it during the first year.

But later, as I sat at my desk pondering our ambitious summer efforts to expand on the foundation created by our FIPSE efforts, I concluded that these three conversations should not be dismissed at all. Implicit in them was an extremely powerful message about the allure of the dominant lawyering paradigm. Simply put, removing the straitjacket is not easy

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11. The call of the question reads as follows:

Satch's mother comes to you for advice about any kind of recovery she might get for the death of her only beloved son. *She wants other parents made more aware of the dangers of glue sniffing, and to see that hardware stores and clerks know of the provisions of Caledonia law.* Advise her as to potential causes of action, including possible defendants. Regarding each, what is the most likely outcome if the case proceeds to trial?

Marilynne Roberts, Torts II Final Exam (May 18, 1998) (emphasis added).

work.

On the bright side, I feel gratified that my predominantly third-year clinical students recognized a problem in the first year students' inability to articulate and negotiate the wide range of their client's interests. Yet, I cannot say that I see the same clarity in my students' self critiques. Indeed, for some time I have been experiencing a clear dissonance between the theoretical discussions about the promise of ADR in the classroom and our actual lawyering performance at the mediation table, which I summarize as follows:<sup>12</sup>

<i>Theory</i>	<i>Practice</i>
Mediation is facilitative and the mediator is non-directive (particularly as to outcome)	Ask/expect/want evaluation from the mediator
Legal arguments secondary to client interests	Articulate/exploit "winning" theory of case
Past facts secondary to current needs	Dramatic use of past facts to expand power and leverage
Mediator is an impartial participant without decision-making authority whose primary task is to assure self-determination	Active attempts to enlist the mediator in the hope that she will (overtly or subtly) influence a settlement in my client's favor
Interest-based, cooperative bargaining is preferred negotiation technique	Positional bargaining ploys and "scripted" strategies regularly employed (escalated demands, threatened walk-out, feigned emotion, etc.)
Mediation holds promise of much more than simply facilitated negotiation	Mediation is nothing more than facilitated negotiation
In advance of mediation articulate all interests, imagine creative options, and come to the table with open mind toward other possible solutions	Pre-determined settlement objectives (or at least a settlement range) guide a pre-planned strategy
The client does the talking; lawyer as resource	Speak for the client; "muzzle" the client

There are numerous reasons for this chasm between theory and practice,<sup>13</sup> including quality and training of the neutrals themselves and the

12. In all candor, I experience the same tensions myself when representing clients and not simply when I supervise students doing so.

13. I currently am finishing an article entitled "Confessions of a Mediation Advocate," which

culture of neutral practice (at least as it has emerged and evolved in Minnesota, with a heavy focus on settlement and a highly caucused model of traditional shuttle diplomacy). But the chief culprit, I believe, is the all powerful lawyer's philosophical map which infects the way lawyers view the world in general and problem-solving in particular. Why should I ever have expected that some minor adjustments in the curriculum would allow our students to shed the straitjacket we put them in?

Moreover, day in and day out, my clinical students and I interact with clients who reaffirm this world view. Consumers of our services, being themselves indoctrinated in a competitive, adversarial, positional-bargaining view of the world, are disinclined to moderate our adversarial urges. Clients often urge us to be positional and adversarial. They want and expect us to be aggressive. They want and expect a third party (be she a judge, a mediator, or some other neutral person) to decide who is right. Frequently, our clients do not want to actively participate in resolving the dispute. Lawyers operating within the standard philosophical map, and hindered by the theoretical straitjacket, are especially the wrong people to rely upon to engage clients in a productive dialogue about the advantages and disadvantages of the varied approaches to problem-solving!

Yet this is precisely what we need to equip young lawyers to do for effective practice in the new millennium. To the extent that lawyers have a "default" philosophical map, we would do well to make sure it is that of the collaborative problem-solver, rather than the adversarial, positional-bargainer.

Moreover, I am more convinced than ever that mediation training, as opposed to other aspects of ADR, should be at the center of our effort.<sup>14</sup> The emphases on empathy, effective listening, open-ended questioning, non-directiveness, empowerment and self-determination are hallmarks of what I consider to be an ideal lawyering paradigm, that of the "client-centered" lawyer.<sup>15</sup>

A client-centered conception assumes that most clients are capable of thinking through the complexities of their problems. In particular, it posits that clients are usually more

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more fully explores this theme.

14. I say this with some unease. I have always felt a touch of guilt in participating in the massive proliferation of mediation skills training at American law schools. To the extent such training unintentionally conveys the message that full-time careers as neutrals await a significant percentage of each graduating class, the effort is misguided. Moreover, as a former board chair of a state-funded community dispute resolution program, I am especially concerned that the growing domination of mediation by lawyers actually does harm to the development of the field precisely because of the standard philosophical map, *see supra* note 1, that lawyers bring to the table.

15. *See generally* DAVID A. BINDER ET AL., *LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH* (1991).

expert than lawyers when it comes to the economic, social and psychological dimensions of problems. The client-centered conception also assumes that, because any solution to a problem involves a balancing of legal and nonlegal concerns, clients usually are better able than lawyers to choose satisfactory solutions. Moreover, the approach recognizes that clients' emotions are an inevitable and natural part of problems and must be factored into the counseling process. Finally, the approach begins with the assumption that most clients seek to attain legally legitimate ends through lawful means.<sup>16</sup>

This model of lawyering is far more likely to yield dispute resolution that reflects a clients' actual, and varied, interests.

Moreover, the emphasis in mediation on the need for empathy, and the importance of recognizing and interpreting multiple levels of communication,<sup>17</sup> is dramatically undervalued in traditional teaching about the work of a lawyer, much to the detriment of effective interviewing and counseling.<sup>18</sup> The client-centered approach is also, I would argue, most

16. *See id.* at 17. The "traditional" lawyering model is in stark contrast:

[L]awyers view client problems primarily in terms of existing doctrinal categories such as contracts, torts, or securities. Information is important principally to the extent the data affects the doctrinal pigeonhole into which the lawyer places the problem. Moreover, in the traditional view, lawyers primarily seek the best "legal" solutions to problems without fully exploring how those solutions meet clients' nonlegal as well as legal concerns.

*Id.*

17. *See, e.g.,* KIMBERLEE K. KOVACH, *MEDIATION: PRINCIPLES AND PRACTICE* 31-35 (1994).

18. *See, e.g.,* Gay Gellhorn, *Law and Language: An Empirically-Based Model for the Opening Moments of Client Interviews*, 4 *CLINICAL L. REV.* 321, 327 (1998). Based on empirical data, Gellhorn theorizes:

[C]lients reveal critical self-information in their opening words, regardless of when those words occur and regardless of the legal interviewer's role in eliciting them. This information usually is not acknowledged by legal interviewers, with negative consequences. Failure to hear and see affects the legal interviewer's ability to form a relationship with a client, to comprehend the full range of information the client needs to share, and to collaborate with the client to tell a story in legally and emotionally effective language.

*Id.* (footnote omitted). Gellhorn goes on to note that "[t]oo often, legal professionals troll for 'facts,' ignoring that their clients do not present 'facts' in isolation from the context of their lives. Emotional expression is a recurrent event that should be expected, and lawyers should be prepared to respond." *Id.* at 322.

conducive to individual lawyer well-being.<sup>19</sup>

As a clinician, I believe I have a unique window (relative to others in the legal academy) to evaluate how our traditional teaching model affects young lawyers. For the most part, I interact with third year students, many of whom interact with clients for the first time under my supervision. Many say outright that they feel they have been “damaged” by the law school experience. Debriefings of initial interviews by my students with new clients are most telling. For example, when I handled immigration and family unification cases in one of our clinics serving the region’s diverse Southeast Asian community, I regularly witnessed interviews. Cambodian clients would relate ghastly personal stories of escape from the killing fields or Hmong refugee clients would describe their flight from the Pathet Lao through the mountains of Laos and across the Mekong River to Thai border camps. Many clinic students would, at initial interviews, be so extremely emotionally detached and unempathetic, that their relationship with the client was severely harmed. A typical exchange in an interview of this type might go as follows:

Client: “And then we ran to the shore and jumped into the water. The bullets were striking everywhere. My husband was hit in the right shoulder and went under. I tried to hold him up but the waters carried him away. I never saw him again.”  
[breakdown into tears]

Student attorney: “What happened next?”

In debriefing such an interview, I always ask if the student would have responded the same way prior to law school. “Of course not,” would be the universal response. “As a person, I would want to reach out to her, and acknowledge her pain in some way and express my awe at what she has lived through.”

“What about as a lawyer?” I ask.

“Well, a lawyer is different,” comes the inevitable response.

In the hope the initiatives here at Hamline might be helpful to others

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19. Of course, current professional rules deem consideration of the lawyer’s well-being irrelevant and ethically dangerous. *See, e.g.*, MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 cmt.6 (1997). But must this be so, especially in light of widespread dissatisfaction with practice felt by so many lawyers, many of whom choose to leave the profession altogether? The developing body of therapeutic jurisprudence suggests that “law itself can be seen to function as a kind of therapist or therapeutic agent. Legal rules, legal procedures, and the roles of legal actors (such as lawyers and judges) constitute social forces that, whether intended or not, often produce therapeutic or antitherapeutic consequences.” Bruce J. Winick, *The Jurisprudence of Therapeutic Jurisprudence*, 3 PSYCHOL. PUB. POL’Y & L. 184, 185 (1997). Evaluating the consequences of the adversarial, positional-bargaining paradigm on the advocate merits study to ascertain whether, in the language of therapeutic jurisprudence, “the law’s antitherapeutic effects can be reduced, and its therapeutic effects enhanced, without subordinating due process and other justice values.” *Id.*

moving forward to challenge the traditional lawyering paradigm and help imprint a different standard philosophical map, I have summarized below the results of our efforts over the two years of the grant and the academic year that followed.

### A. *What We Accomplished During the Grant*

#### 1. Integration Into First Year Courses

Our first year class was divided into three sections: morning, afternoon, and all day. We chose to provide different levels of ADR activities in each of the three sections. In part, the program design was driven by realistic assessments of faculty cooperation. At the same time, we were interested in examining whether different levels of ADR content result in different student perceptions of lawyering.

To provide all first year students with a baseline exposure to ADR, we conducted mediation simulations in all sections of the required first-year legal writing program. In each legal writing section, ten total for Fall 1996 (six different problems) and nine total for Fall 1997 (five different problems), a mediation simulation was derived from the legal writing open memo problem the students had been writing on in their section.<sup>20</sup> Faculty served as mediators; first year legal writing students and third year clinic students volunteered to play the role of lawyers and parties. The exercise had two primary objectives: 1) introduce fundamentals of mediation (including the role of the lawyer in preparing for and participating in the process); and 2) highlight the distinction between rule and interest.

The intensive ADR “push” was in our all-day section. In this section we had cooperative faculty and a civil procedure professor who was already using a year-long simulation giving students client interviewing, case planning, negotiation, and mediation opportunities. To build on this solid foundation, we created special modules for the torts,<sup>21</sup> contracts,<sup>22</sup> and

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20. One of the 1996 simulations, “Bartell v. King” is published in *INSTRUCTOR’S MANUAL FOR DISPUTE RESOLUTION AND LAWYERS* (Leonard L. Riskin et al., eds., 2d ed. 1998) [hereinafter *INSTRUCTOR’S MANUAL*].

21. The torts module and follow-up law firm activity were designed to encourage students to grapple with the following questions as they read cases: (1) What do the parties want to happen (to be answered in a context broader than a specific rule of law)?, (2) Is filing and prosecuting a lawsuit the best way to get there?, (3) What interests are served by litigation? What interests are not served?, and (4) What are the limits of court relief in a particular case? We wanted to encourage students to consider in a more general sense the following two questions: (1) What are the best kinds of problems to have in court?, and (2) What kinds of things do you want to know in advising a client to use litigation or some other form of dispute resolution?

The module required a student lawyer to interview a client (either a potential plaintiff or defendant). The facts of the simulation were derived directly from *LaBrier v. Anheuser Ford, Inc.*,

property<sup>23</sup> classes. The torts and contracts modules were followed up by a

612 S.W.2d 790 (Mo. Ct. App. 1981), a torts case that the students had read approximately a week earlier. Students playing the lawyer's role were instructed to interview the client for thirty minutes, and together with the client, decide what the client should do about the incident described in the simulation materials. The Professor then led a collective debriefing exploring the wide range of questions noted above.

This large group exercise was then followed up three days later with a small group "law firm." Ten members of the faculty volunteered to lead law firm discussions (six students in each section). The law firm was designed to show students that the lessons learned in torts several days earlier were equally applicable to other first year subjects, and indeed throughout the law school curriculum. We demonstrated this linkage in the law firm by asking students to grapple with the questions posed above as they applied to *Local 1330, United States Steel Workers v. United States Steel Co.*, 631 F.2d 1264 (6th Cir. 1980), a case they read and discussed in their contracts class several days earlier.

22. The contracts module and law firm follow-up were designed to introduce students to negotiation and suggest differences between collaborative and competitive negotiation styles. During a special two-hour contracts class, the students role-played "The Mason-Dixon (Product) Line (a.k.a. The Carton Contract)," a transaction negotiation exercise created by Professor William H. Henning, University of Missouri-Columbia School of Law. See INSTRUCTOR'S MANUAL, *supra* note 20, at 190. They then watched the University of Missouri-Columbia video of the same negotiation (see LEONARD L. RISKIN, DISPUTE RESOLUTION AND LAWYER'S VIDEOTAPE SERIES, Videotape II, Transaction Negotiation: The Carton Contract (West 1991)). The large group exercise was followed up by another law firm module ("bridging" the contracts lessons to torts). In the small group meeting, students were asked to participate in pre-negotiation planning of a hypothetical tort case involving premises liability. Students completed a simple pre-negotiation planning instrument that encouraged them to identify each party's interests and assess the likely justiciable outcome before deciding on a negotiating strategy. The hypothetical was derived from *Wassell v. Adams*, 865 F.2d 849 (7th Cir. 1989), a case the students read and discussed in torts several days earlier.

During the law firm module, students were first asked what they gleaned from their first experience as a legal negotiator in the previous day's exercise. Did they self-identify as competitive or cooperative bargainers? Why? Students then discussed the interests of each party in the torts hypothetical and then were asked to predict the likely justiciable outcome of the hypothetical in light of the *Wassell* case they read and discussed in torts class earlier in the week. Finally, in light of their assessment of the likely justiciable outcome and each party's interests, students were asked to begin to formulate a negotiation strategy for each party to settle the case without a trial.

23. The property module was designed to teach first year law students that an understanding of the parties' underlying interests is an important part of fully analyzing a case (in addition to traditional case briefing methods, which typically focus on legally relevant facts, issues, rules, application and legal conclusions). Within this overall goal, the exercise has several objectives: (1) to remind/teach first year students that fully understanding a case requires information and analysis beyond what is reported in the appellate opinion, (2) to practice looking past the reported opinion to consider party interests, as well as other contextual issues (such as social or political dynamics), and (3) to link the question of party interests to an exploration of what legal process options, other than traditional litigation, might be appropriate to the case.

We selected one case that would otherwise have been briefed and discussed in the traditional manner, *State v. Shack*, 277 A.2d 369 (N.J. 1971), reprinted in JOHN W. SINGER, PROPERTY LAW: RULES, POLICIES, AND PRACTICE 188-193 (1993). Unlike some other cases in the book, *Shack* contains facts, issues and commentary that naturally lend themselves to a broader exploration of party interests, without the need for additional research or reading. Following the case are notes and

law firm (six students and a faculty facilitator) meeting designed to “bridge” the ADR exercises to the classes which do not feature ADR curriculum or exercises.

In the afternoon section, we created a single, two-class civil procedure module.<sup>24</sup> Students in that section also spent one criminal law class focusing on restorative justice. There were no law firm activities in the afternoon section.

Here are the activities completed, organized by section (each section containing between 51 and 62 students):

All Day Section	<ol style="list-style-type: none"> <li>1) Mediation Simulations in all Legal Writing Sections</li> <li>2) Torts Module and Follow-up Law Firm</li> <li>3) Contracts Module and Follow-up Law Firm</li> <li>4) Civil Procedure Year Long Simulation</li> <li>5) Property Module: Using Case Briefs to Explore Interests</li> </ol>
Afternoon Section	<ol style="list-style-type: none"> <li>1) Mediation Simulations in all Legal Writing sections</li> <li>2) Civil Procedure Case Evaluation Exercise</li> <li>3) Criminal Law Presentation on Restorative Justice</li> </ol>
Morning Section	<ol style="list-style-type: none"> <li>1) Mediation Simulations in all Legal Writing Sections</li> </ol>

questions regarding the role of law in dispute resolution. *See* SINGER, *supra*, at 193-97. Other cases with similar characteristics would also work.

We told students in advance that we would treat the case somewhat differently than other cases and would discuss alternative processes. We did not ask them to brief it for party interests. Discussion of the case in class began with the traditional Socratic method and a narrow focus on traditional legal analysis.

We then shifted the discussion to raising questions to uncover underlying party interests and to exploring the broader context in which *Shack* was brought. *Shack* raises public policy issues regarding the right to exclude from private property and is set during the time farmers versus migrant farm workers' rights were being tested. *See Shack*, 277 A.2d at 369-75. Students were asked to put themselves in the position of counsel for the parties and then discuss how, in light of the broader context of the case and the identified party interests, they would advise their clients. The property module, “Using Case Briefing to Explore Interests” by Kenneth Fox, is reproduced in INSTRUCTOR’S MANUAL, *supra* note 20, at 91.

24. This two-class module, designed by civil procedure Professors Bobbi McAdoo and David Cobin (and conducted in David’s civil procedure class), was created to introduce students to examples of facilitative, evaluative, and adjudicative ADR processes and factors that should be considered in choosing an ADR forum. In part one of the module, students were asked to consider what ADR process should be used to resolve the issues presented in *Garcia v. Hilton Hotels Int’l.*, 97 F. Supp. 5 (D. P.R. 1951), a defamation case that they had read earlier in the week as part of an introduction to Federal Rule of Civil Procedure 12(b)(6).

In part two of the module, students participated in an arbitration and mediation exercise called Senate Table. Gary Weisman & Barbara McAdoo, *The Senate Table: An Introductory Adjudication/Mediation Exercise*, in INSTRUCTOR’S MANUAL, *supra* note 20, at 60. In the exercise, students first present a dispute to an arbitrator, but then process the same dispute as a mediation.

Overall, seventeen (out of 24) members of the full-time faculty participated in our FIPSE-related efforts, either by conducting ADR modules in first-year or upper-level classes, facilitating first-year law firm discussions, or playing the role of mediator in legal writing mediation simulations. In addition, all members of the legal writing staff assisted in the creation of legal writing mediation simulations. In the 1997-98 academic term, every student observed and participated in at least two ADR simulations. Many participated in multiple ADR activities.

## 2. Integration Into Advanced Courses

We developed a mediation simulation for use in our "Tax I: Taxation of Individuals" survey course.<sup>25</sup>

## 3. Separate Dispute Resolution Courses

During the term of the grant, Hamline steadily expanded upper level ADR offerings, including new two-credit courses in Mediation and Arbitration. Heavy student demand has resulted in our two-credit ADR survey course to now be offered every semester (rather than choosing alternating semesters). This past summer marks Hamline's Seventh Dispute Resolution Summer Institute. The Summer Institutes have been extremely successful, offering a rich array of theory and skills-based courses taught by nationally recognized experts involved in ADR practice, research, publication, and training. In part due to high demand for Summer Institute courses, we created a new Certificate Program in Dispute Resolution (requiring fourteen credits of study, including five required courses and four elective credits). In January 1997, we first offered a "J" term set of ADR course offerings to help meet student demand for required Certificate Program courses. In September 1997, in the new Hamline University Conference Center located adjacent to the law school, the Tenth Annual Symposium on Law, Religion, and Ethics, "Dispute Resolution and the Religions Traditions," featured presentations and opportunities for conversation on how various faiths and religious traditions might serve as a resource for understanding, organizing, and undertaking peacemaking and peaceful resolution of conflict through mediation and other forms of dispute resolution. In October 1998, the Eleventh Annual Symposium on Law, Religion and Ethics will again have an ADR focus: "Restorative

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25. As tax issues arose and proposals were made (relative to alimony, disposition of the marital homestead, and payment of attorneys fees), the parties were advised by the mediator to consult with their respective attorneys for tax advice. The parties (volunteers from the tax class) then make "phone calls" to their counsel (the rest of the class). The exercise served multiple teaching objectives, including modeling mediation, exploring client counseling issues, and reviewing the substantive tax law of divorce.

Justice and Religious Traditions.”

#### 4. Clinical Experiences

In Spring, 1997, Hamline embarked on a collaborative effort with the Minneapolis office of the EEOC, the Minnesota State Department of Human Rights, and the Minnesota State Office of Dispute Resolution to provide free representation for discrimination claimants whose cases were referred to mediation.<sup>26</sup> This clinical opportunity in mediation advocacy provides a cutting-edge opportunity for students to define and implement roles for themselves as advocates in ADR processes.

##### B. *What Difficulties Were Encountered*

A critical issue in developing integrated first-year ADR activities is finding enough time to organize everyone's activities. Our faculty is tremendously supportive, but without a catalyst like the grant, it would have been impossible to generate so much coordinated activity. Some faculty members expressed concern that, particularly in first semester courses, there is already a “triage” problem in covering the most basic substantive content. Encouraging these faculty members to add ADR exercises will take more time (and innovation). A 1996-97 Academic Affairs Committee planning effort to implement comprehensive changes to the first year program was both an opportunity and a liability (too much change, too fast) for developing faculty consensus for ambitious and permanent incorporation of ADR into the first-year curriculum. There is also some resistance from students. Our first year effort primarily targeted one of three sections. Some students in this section felt that the ADR activities were a burdensome “add-on” that were not “core” because they were not implemented for the entire class.

Most of these obstacles can be overcome. First, curricular innovations need to be completed much farther in advance of implementation than we were able to manage during the course of the grant. Much of our planning took place during the summer, when faculty were hard to organize for meetings. Materials were also prepared in the same semester they were implemented. Second, a faculty member should be charged with coordinating ongoing ADR curriculum activities (with appropriate course release or committee assignment recognition). Third, whatever ADR activities are chosen, they ideally should be implemented so that the entire first year class gets a more or less equal dose.

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26. *See supra* note 9.

### C. *How the Work Was Received on the Campus*

As noted above, seventeen members of the full-time faculty, as well as all six members of the legal writing staff, participated in our FIPSE efforts. Assuming the ongoing coordination issue can be dealt with, retaining faculty good will and involvement will not be a problem at Hamline. As noted in my initial comments, student reaction is harder to gauge. Those third year students whom we asked to help plan and participate in the project think it is a tremendous idea. Reaction among first year students at the time of the actual exercises and modules has been mixed. Many students in our all-day section felt that the "extra" activities were interesting, but clearly "alternative" and not "core." Some resented having to commit extra time when other sections did not do the same activities.

### D. *The Results of Formal Project Assessment*

To help evaluate whether different levels of ADR content result in different student perceptions of lawyering, we administered a modified "Problem-Solving vs. Adversarial Orientations Toward Lawyering" survey<sup>27</sup> to the entire 1996-97 first-year class during orientation and again at the end of first year. All three sections showed increases in "problem-solving" orientation—due primarily to increases in such orientation among women students.<sup>28</sup> Not surprisingly, the all-day section, where we conducted the most ADR related activities, saw the greatest increase in "problem solving" orientation responses and highest overall "problem-solving" orientation at year end (with women members of that section showing the most dramatic shift in orientation of any section group). In general, Hamline women students began the school year with a more adversarial orientation than men students; by year end, the trend was completely reversed, with men having become slightly more adversarial in orientation, and women becoming substantially more problem-solving in orientation.<sup>29</sup> The following table displays the results of the surveys:

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27. For a discussion of the survey instrument, see Ronald M. Pipkin, *Project on Integrating Dispute Resolution into Standard First-Year Courses: An Evaluation: Final Report to the University of Missouri-Columbia School of Law 21-24 (1993)* (unpublished report available from the Center for the Study of Dispute Resolution, University of Missouri-Columbia School of Law).

28. Higher scores mean higher problem-solving orientation. "Problem-solving" responses received "1" point for a maximum high score of "9". "Adversarial" responses received "0" points for a maximum low score of "0".

29. At Hamline (and perhaps at other schools as well), there appears to be strong differences along gender lines both in students' perception ADR activities and in registration for ADR courses. Over the last six semesters, sixty percent of the enrollment in our introductory ADR survey course has consisted of women even though women made up less than half of Hamline's total student body.

	<i>Beginning of Year Average</i>	<i>End of First Year Average</i>
All Students	4.826	5.115
Men Only	4.935	4.887
Women Only	4.630	5.382
Morning Section	4.711	4.870
Men Only	4.571	4.594
Women Only	4.833	5.166
All Day Section	4.750	5.353
Men Only	5.000	4.871
Women Only	4.353	6.100
Afternoon Section	5.077	5.173
Men Only	5.222	5.176
Women Only	4.545	4.944

### *E. An Estimate of the Likelihood That the Reform Undertaken Will Be Institutionalized*

Some reforms are already institutionalized. Mediation simulations are now a formal part of our excellent legal writing program. The FIPSE grant allowed us to create templates that facilitate the quick creation of new simulations each year based on the fall semester open-memo research problems developed for each legal writing section. Moreover, after the grant was completed, we produced a second appellate mediation simulation for use in all the legal writing sections during spring semesters. All sections of civil procedure have express ADR content in the curriculum and most (but not all) civil procedure professors are using simulations to explore ADR-related themes. Other first-year and upper-level professors will continue to integrate ADR content (and the simulations and exercises we developed during the grant) into their courses on an ad hoc basis. The fact that we used some of the FISPE project funds to purchase additional ADR library resources (as well as simulations and other innovative teaching materials) has promoted increased integration. Our use of FIPSE funds to help catalog and increase access to our existing ADR resources also was helpful.

While the specific torts and contracts modules (including the time and

labor intensive law firm debriefings) used during 1996-97 were not repeated for the 1997-98 academic term, some parts of these modules will be used in future years. In Spring, 1997, the faculty approved implementation of law firms<sup>30</sup> and the bridge curriculum<sup>31</sup> in all sections of the first year class commencing with the 1998-99 academic year. Planning is ongoing for both initiatives, which are natural vehicles for integrating FIPSE project objectives into the curriculum.

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30. The entire first-year class will be divided into law firms of ten students (roughly five law firms per section). Each firm will be supervised by a faculty member (senior partner) and a second- or third-year student (associate). Several times each semester, including during the first week of school, law firms will meet to discuss substantive issues, participate in simulations, or “process” teaching methods. While the faculty chose to implement this concept for a variety of reasons, the opportunity to structurally facilitate integration of alternative dispute resolution concepts, methodologies and skills was chief among them.

31. Once or twice a semester the content of all the first-year substantive courses will be coordinated to focus on a single cross-course theme. In addition, first-year faculty will be encouraged to “link” two substantive courses at appropriate points in the semester. During a 1993-94 experiment at Hamline with linked curriculum, an “employment law” bridge (presenting an at-will employment problem) involved discussions in contracts (employment contracts, at-will relationships, etc.), property (employment as a property right), civil procedure (motions to dismiss, summary judgment, etc.), as well as regulatory approaches to employment relationships (through distribution and discussion of labor law materials). Other 1993-94 “bridge” topics included consent and the reasonable person standard. Implementing the bridge concept was approved for a variety of pedagogical reasons, including the desire to infuse the curriculum with problem-solving opportunities for students, and to model collaboration—objectives at the heart of our FIPSE effort.

