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Why We Teach Law Students to Mediate

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I. INTRODUCTION

It has become fashionable, if it was not always, to find fault with the legal system and those who operate it. For people seeking alternatives to, or substitutes for, the traditional system of justice, mediation and other non-litigation processes are appealing.[1] As a general proposition, we are neither advocates for nor opponents of mediation as a process for handling and resolving disputes. Our experiences in observing mediations and in mediating have led us to conclude that there are appropriate and inappropriate uses of mediation as there are appropriate and inappropriate uses of other processes including litigation. Indeed, one of our goals in teaching law students to mediate is to provide future lawyers a framework in which to diagnose problems and to evaluate the appropriate applications and limitations of all dispute resolution processes.[2]

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1. For a definition and discussion of the process of mediation, *see infra* note 12 and accompanying text.

2. *See generally* Sander, *Varieties of Dispute Processing*, 70 F.R.D. 111 (1976); Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978). A principal factor in the choice of litigation over other dispute processes is the perception that litigation equalizes disparities in bargaining power because litigation, unlike mediation and non-contractual arbitration, is coercive. *See* Riskin, *The Special Place of Mediation in Alternative Dispute Processing*, 37 U. FLA. L. REV. 19 (1986); Perritt, *And the Whole Earth Was of One Language-A Broad View of Dispute Resolution*, 29 VILL. L. REV. 1221 (1984). Litigation, however, is expensive, time-

Mediation is one point along a continuum of problem solving approaches a lawyer should consider in offering legal services to his clients. It is not our view, however, that all lawyers should mediate. In fact, in many settings it

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consuming, and adversarial. *See* Trubek, Sarat, Felstiner, Kritzer & Grossman, *The Costs of Ordinary Litigation*, 31 UCLA L. REV. 72 (1983). If a settlement is not reached prior to trial, the result is a win/lose outcome in which the parties do not directly participate.

ADR, on the other hand, typically utilizes less formal procedures than litigation and therefore is usually more expeditious and less costly. Informal processes like arbitration, mediation, and negotiation permit the parties to create, or at least to identify, the standards or principles by which their conflict will be resolved. *See* Fuller, *infra* note 4. With arbitration, the parties may select a decisonmaker who has expertise in the subject matter of the dispute. But, in arbitration, it is still a third-party neutral rather than the parties themselves who hears the dispute and decides the result, whether or not binding on the parties. If the arbitrated decision is not binding, an additional layer of costs and time will have been imposed on the parties should one or both decide to litigate. To the extent parties are unable to resolve the conflict themselves through negotiation or mediation because of some perceived power imbalance, or because the conflict is factual in nature, or because the parties lack the incentive to settle, some adjudicatory process like litigation or arbitration is needed. Otherwise, a more cooperative processs may offer the parties advantages, particularly when maintaining the relationship is important to them. *See infra* discussion in text accompanying note 10.

Professor Perritt distinguishes between "interests" and "rights" disputes in analyzing the appropriateness of a resolution process:

> The civil litigation system was designed to deal with rights disputes. Rights disputes presuppose an external principle or standard by which the claim can be settled. Interest disputes, in contrast, do not presuppose such a principle or standard. A simple negligence action or breach of contract claim are examples of rights disputes.

Perritt, *supra* at 1229.

An example of an interest dispute is a conflict between neighbors over barking dogs or a loud stereo. Many rights disputes can be resolved by non-litigation processes as long as there is no significant power imbalance, or a perception of one, and as long as the parties are motivated to settle the conflict and are willing to abide by their agreement. Thus, a city housing authority might utilize mediation to resolve a conflict with a landlord over inadequate housing conditions although mediation might not be appropriate between a tenant and landlord over slum housing. *See infra* discussion in Section V of text. Among the dangers inherent in mediation and negotiation is the potential that uninformed disputants might unknowingly contract away their legal rights. *See* Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984); J. AUERBACH, JUSTICE WITHOUT LAW (1983). *See also* discussion *infra* in note 13. Some commentators like Auerbach are also concerned that non-adjudicatory processes are second-class forms of justice because frequently the individuals who utilize these processes are those who have limited access to the traditional legal system.

The disputants' perceptions of the value of their claims or interests also play a role in whether an adjudicatory or cooperative process is selected. The parties may be willing to bear the costs and delays of litigation if they believe what is to be gained exceeds the costs in terms of time, money and relational interests. *See infra* note 13 and accompanying text. In contrast, the perception of the parties that losses may be greater than any gains will provide the incentive to one or both disputants to settle their differences through some cooperative effort.

would be inappropriate and unethical for an attorney to act in the role of a mediator.[3] Thus, an attorney might refer his client to a mediation service in situations where the role of a lawyer as an advocate for his client's position would conflict with the neutral posture of a mediator. Nevertheless, our experiences as mediators and as law teachers have demonstrated to us that mediation training can play an important part in the education of law students and lawyers distinct from any value mediation offers as a method for handling legal and social conflict. This article will recount our experiences with mediation training of law students and will discuss our reasons for believing such training has significant potential as a pedagogical tool in legal education.

II. Mediation Training at Georgia State University College of Law

The College of Law at Georgia State University, which opened its doors in 1982, was in a unique position to experiment with some of the innovative ideas and approaches being suggested to improve legal education. The law school's location in the heart of Atlanta's political, legal, and business community permitted us to draw upon extensive resources and expertise in dispute resolution processes. In the past decade, Atlanta has distinguished itself as the home of one of the most successful mediation programs in the country, the Neighborhood Justice Center of Atlanta (NJCA). The American Arbitration Association (AAA), the National Labor Relations Board (NLRB), and the Better Business Bureau also have regional offices in the city. Numerous other organizations and individuals in Atlanta offer a variety of dispute resolution services as well, including: the Carter Center, the Christian Conciliation Service, and the Federal Mediation and Conciliation Service. Thus, it was apparent there was little need for the College of Law to directly provide dispute resolution services. Nevertheless, with the richness of the community's resources available to us, and with the encouragement and support of our founding dean and the enthusiasm of our faculty and student body, we undertook to design a dispute resolution program for our curriculum because we believe that it is vital for law students to be exposed to what Professors Lon Fuller and Henry Hart of Harvard called "the social processes by which these various forms of 'law' come into being."[4]

The authors teach the course in dispute resolution processes in which we explore the concepts, theories, methodologies, and issues which arise in selecting a dispute resolution method. Negotiation, mediation, arbitration,

3. *See* Comment, *The Attorney as Mediator—Inherent Conflict of Interest?*, 32 UCLA L. Rev. 986 (1985); Riskin, *Toward New Standards for the Neutral Lawyer in Mediation*, 26 Ariz. L. Rev. 329 (1984).

4. *See* Fuller, *Mediation—Its Forms and Functions*, 44 S. Cal. L. Rev. 305, 307 (1971).

litigation, and hybrid approaches are covered in the course through class discussions and problem simulations.[5]

As a component of this course, we offer students, faculty and staff of the law school a mediation training course funded by the University and taught once each year by NJCA. This course is comprised of 20 hours of classroom training over a weekend consisting primarily of simulations and practice in various components of mediation including communication skills, policies and procedures and legal issues which arise in mediation. Last year, 30 students took the training course and 15 became NJCA certified mediators.

In conjunction with the theoretical course and the mediation training course, students who become certified mediators may also participate in one-quarter internships with the Center for law school credit. As interns, students provide 90 hours of service to the Center including intake counselling, court visitation, and mediation. Court visitations and intake counselling require interns to evaluate whether a particular dispute is appropriate for mediation at the Center.[6]

Interns are expected to learn and participate in every aspect of the Center's operation. The interns are also required to complete a project for the Center. Among the projects completed by students who have participated in the internship program are a mediation training manual for lawyers, a manual for interns, an empirical study on client satisfaction with mediation, a mediation referral manual for judges, an empirical study on client satisfaction with mediation, an analysis of the proposed court-annexed arbitration program for Fulton County, and a thorough revision of client referral services.[7]

III. Critique of Traditional Legal Education

Lawyers are legal problem solvers.[8] The principal diet of law students has, for the last century, been the case method. Pursuant to this approach,

5. We have adopted the excellent book by (Professors) S. Goldberg, E. Green & F. Sander, Dispute Resolution (1985) as our primary course materials. We also assign R. Fisher & W. Ury, Getting to Yes: Negotiating Agreement Without Giving In (1981). The major component of a student's grade in the course is comprised of a paper in which the student is asked to evaluate the strengths and weaknesses of various dispute resolution methodologies as applied to a particular case or substantive area such as environmental problems, contractor disputes, custody battles or the like. Students are also graded on class participation and their performance in some of the simulations and exercises.

6. *See supra* note 2.

7. The program has been very successful. Students who have taken our course and the mediation training course have reportedly learned a great deal not only about mediation but also about lawyering in general.

8. *See* Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. Rev. 754 (1984).

students read virtually nothing but appellate decisions, and class discussion emphasizes case analysis and synthesis. This method gives students a distorted perspective on what lawyers do in practice. Although effective as a vehicle for teaching substantive law and legal analysis, the case method conveys the impression that every dispute is litigated and that all legal problems are best handled through an adversarial approach.[9] Practicing lawyers know that litigation is a last resort for solving clients' problems. Indeed, much of what a lawyer does is designed to avoid embroiling her clients in litigation. The greater part of a practicing lawyer's time is spent counselling clients and negotiating with other lawyers, skills to which students were rarely exposed in the traditional curriculum. Although law schools now offer such skills training through simulations and clinical programs, even these courses or programs primarily teach students litigation skills and emphasize the adversarial approach to legal problem solving.

Neither the traditional nor the modern curriculum equips students to determine the most appropriate method or methods for solving clients' problems. Certain kinds of cases are clearly best handled using nonadversarial or a combination of nonadversarial and cooperative approaches. For example, contract negotiations require a lawyer to identify areas of common interest between the parties to a transaction. Where a lawyer's client is in an ongoing relationship with other parties, which is often the case in transactional negotiations, treating the relationship as adversarial usually causes it to deteriorate.[10]

Similarly, adversarial approaches to family law problems have been widely criticized.[11] Although the relationship between divorcing parties may be ad-

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9. *See* Tractenberg, *Training Lawyers To Be More Effective Dispute Preventers and Dispute Settlers: Advocating for Non-Adversarial Skills*, 1984 Mo. J. DISP. RES. 87 (1984). Professor Tractenberg suggests that of four "clusters" of skills and knowledge identified by lawyers as important to their effectiveness (fact-related skills; interpersonal skills; law-related skills; and communication skills) law schools have traditionally focussed on the law-related, namely, doctrinal analysis skills and substantive legal knowledge. *See also* Fuller, *supra* note 4.

10. *See* Fuller, *supra* note 4 at 308:

> [M]ediation is commonly directed, not toward achieving conformity to norms but toward the creation of the relevant norms themselves. This is true, for example, in the very common case where the mediator assists the parties in working out the terms of a contract defining their rights and duties toward one another . . . . It may be suggested that mediation is always, in any event, directed toward bringing about a more harmonious relationship between the parties, whether this be achieved through explicit agreement, through a reciprocal acceptance of the "social norms" relevant to their relationship, or simply because the parties have been helped to a new and more perceptive understanding of one another's problems.

11. *See, e.g.*, Kraut, *Domestic Relations Advocacy —Is There A Better Alternative?*, 29 VILL. L. REV. 1379 (1984); Mnookin & Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979). Mediation of

versarial, continuing contact is often necessary particularly when children are involved. Asking the courts to decide custody and visitation questions too often absolves the parties of responsibility for decisions that they should make. Frequently, divorcing parties are hostile and are unable or unwilling to agree on these matters, but one must question the extent to which uncritical resort to the adversarial system discourages parties from adopting the cooperative attitudes that are usually called for in these situations.

Legal education fails to sensitize, and may even desensitize, lawyers to the emotional dimensions and hidden agendas involved in clients' seeking adversarial solutions to their problems. The case method causes students to look at legal problems abstractly, divorced from reality and human nature. At the appellate level, human problems have been distilled into pure questions of law and hypothetical fact. However, few clients' problems are devoid of emotional content. Many clients' problems might be solved with more satisfying results at less expense and in less time if lawyers understood what their clients really wanted and how to respond to their clients' needs.

An example from the practical experience of one of the authors illustrates this point. One year out of law school, this young lawyer was asked to serve as co-counsel in the litigation of a medical malpractice case. The client claimed the physician's treatment of a serious dermatological condition with intravaneous injections of cortisone over an extended period caused the client to contract iatrogenic Cushing's syndrome, a debilitating, disfiguring and sometimes fatal disease. As an abstract matter, the case seemed, on both legal and factual grounds, to be a sure winner.

Following four days of testimony in plaintiff's case, the defendant offered a settlement of several hundred thousand dollars. Despite the recommendation of his lawyers, the plaintiff refused the offer. The jury rendered a verdict for the defendant following only a half day of testimony on the defendant's case and two hours of deliberation. When questioned by plaintiff's counsel at the conclusion of the case, members of the jury remarked that they did not like the plaintiff, thought him to be a malingerer, and they did not want to ruin the doctor's practice or reputation for one mistake.

Prolonged discussions with the client after the verdict revealed that the client had refused settlement because he wanted vindication from a jury of his peers. Had plaintiff's counsel better understood the needs of their client, they may have been successful in responding to those needs while negotiating an acceptable settlement for the client. And perhaps had their legal education not so emphasized legal abstraction, plaintiff's counsel may have been better equipped to communicate with the jurors and so have obviated the negative reaction to their client.

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domestic relations disputes is becoming quite widespread. Riskin, *Mediation and Lawyers*, 43 OHIO ST. L.J. 29, 32 (1982).

Traditional legal education does not typically offer students insight into the rich texture of real life legal problems. We believe mediation training and practice is one way to fill this gap.

IV. MEDIATION AND LAWYERING SKILLS

Mediation is a private informal process in which a neutral third party assists disputants in resolving their differences.[12] The mediator is not a decisionmaker. However, a good mediator will actively participate in the dispute resolution process by helping the parties identify issues of disagreement and possible solutions.

In the NJCA model, the mediator will initially meet with both parties, each of whom will give an opening statement describing the problem. If no solution readily suggests itself, the mediator might caucus with each party individually. Whatever the mediator learns from a caucus will be kept confidential unless the party agrees otherwise.

The purpose of individual caucasing is to allow a party to ventilate views she is not comfortable in disclosing directly to the other party. Through caucusing, the mediator also has an opportunity to identify potentially common interests between the disputants and to suggest to the party realistic and reasonable options for resolution of the dispute. After caucusing with each party, the mediator will try to focus the parties' attention on the central issues and potential solutions. Although the mediator may express opinions, she will avoid forcing on the parties her views about the dispute or possible resolutions of it.

If the parties reach an agreement, it is set down in writing and signed by each party and the mediator. Although these agreements are contracts and can be enforced in court, a major goal of mediation is to avoid litigation. Thus, mediation works best when the parties have directly participated in and are responsible for any agreement reached during the mediation.[13] If the parties have worked out the solution to the dispute themselves and the agreement is straightforward, clear, and realistic, the risks of subsequent litigation

12. *See* Riskin, *supra* note 2, at 24:

> The generally accepted definition of mediation is a voluntary process in which a neutral third party, who lacks authority to impose a solution, helps participants reach their own agreement for resolving a dispute or planning a transaction.

13. Mediated solutions are more likely to stick than non-mediated solutions, especially when the disputants are in a continuing relationship. *See* Cooke, *Mediation: A Boon or a Bust?*, 28 N.Y.L. SCH. L. REV. 3, 12 (1983).

concerning the agreement decrease significantly.[14] Mediation is fundamentally a process of assisted negotiation.[15] A mediator must therefore be very sensitive to the factual context of a dispute, to the interests of each party, whether articulated or not, and to terms of agreement which might satisfy both parties. Exposing law students to this process gives them an opportunity to observe real people with real problems and it deters students from treating these problems impersonally or legalistically.

Mediating encourages students to listen and to talk to the parties, to be creative, and to think on their feet. Mediation demands active listening; that is, the mediator must listen for what is meant, not simply to what is said and the mediator must rearticulate the parties' statements into a form both parties can understand. The contributions of the mediator in this respect may help the parties to reconceptualize the issues and better appreciate each other's positions. By emphasizing objective views and common interests, the mediator may be successful in diffusing highly charged emotional reactions. The practice of mediation, therefore, demands that the mediator understand human nature and learn to guide human behavior into more cooperative expression.[16]

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14. The success of a mediation can depend upon a number of variables. The attitudes and relative bargaining power of the parties and the perception of the parties regarding the desirability of settling the matter themselves rather than having a decision imposed on them by a third party are important factors. The mediator offers expertise in the process of mediation but must avoid coercing the parties into a settlement. Therefore, the extent of the mediator's creative problem-solving skills can play a significant role in the outcome of a mediation. Without losing her neutrality, a skillful mediator can assist the parties in gaining a realistic perspective about their conflict and how it might be to their respective advantages to settle their differences and to abide by their voluntary agreement. To some degree, a capable mediator can also neutralize power disparities between the parties. However, a mediator should avoid taking sides or counselling or advising the parties about the law or their legal rights other than regarding matters of common knowledge. It is therefore not the place of a mediator/lawyer to advise one or the other of the parties against a proposed settlement which the lawyer, if representing the party, might think is a mistake. A mediator/lawyer who perceives that one or the other of the parties is not adequately informed about her legal interests or positions might suggest that the party seek legal advice and return to mediation after doing so. Thus, a mediator/lawyer need not sit idly by while a party, out of ignorance, negotiates away her legal rights. At the same time, if the parties are well informed, they may decide it is not in their best interests to emphasize legalistic solutions to the conflict.

15. *See, e.g.*, H. RAIFFA, THE ART AND SCIENCE OF NEGOTIATION (1982).

16. *See* Riskin, *supra* note 11, at 36:

> One of the principal functions of the mediator is managing the communications process. He must intervene carefully at the correct moments. Accordingly, he must understand interpersonal relations and negotiations. He must be able to listen well and perceive the underlying emotional, psychological, and value orientations that may hold the keys to resolving more quantifiable issues. And he must arrange for these to be honored in the

Mediation thus enables law students to see and appreciate all sides of a dispute. By stepping outside the conflict and by not being a participant in it, a mediator must view the problem in a larger context. Although an effective advocate must do the same, the skill seems more easily acquired in a context where the student does not have a stake in the outcome. In the early stages of litigation, adversaries are, to a significant degree, insulated from the other side of the dispute, and except for their opponent's rhetoric, the opponent's true position is often left to the imagination. While opposing parties may similarly obfuscate to some extent in mediation, as mediators, students have to speculate less about opposing positions because they are presented with differing views by the parties themselves; and, particularly in caucus, the parties are less likely to conceal their true positions. In order to assess whether settlement is a realistic possibility, a mediator must also learn to distinguish between the bargaining and "bottom line" positions of the parties. The experience of mediation thus equips law students to better anticipate and identify appropriate responses to an opponent's position when in practice.

The type of objectivity necessary in mediation sharpens critical thought and encourages creative problem solving. In her book *In A Different Voice: Psychological Theory and Women's Development*,[17] Carol Gilligan describes two fundamentally different approaches to problem solving. She describes a moral dilemma first set forth by Kohlberg for a study of moral development in children. Because a druggist refused to lower the price, a man named Heinz considers whether to steal a drug he cannot afford in order to save his wife's life. The subjects were asked, "Should Heinz steal the drug?" Gilligan identifies two kinds of responses to the dilemma. The first, typically, though not invariably, the male response, is that Heinz should steal the drug on principle, because it is the "right" thing to do, i.e., he should act autonomously. The second, more usually female response, is more complex, viewing Heinz's problem in a larger context of relationships. The second kind of respondent would suggest that Heinz attempt to work out an arrangement with the druggist by identifying ways to satisfy their respective interests. This same integrative approach to problem solving is at the core of Fisher and Ury's negotiating techniques described in *Getting to Yes*.[18]

As Fisher and Ury point out, negotiations are often characterized either by a power or hard response in which one party "wins" because of superior power, or by a weak or soft response, in which one party "loses" by giving

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mediation process, the agreement, and the resulting relationship. A like sensitivity is essential for good lawyering as well, but it occupies a more prominent place on the list of skills required of a mediator. (footnotes omitted)

17. C. GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT (1982).

18. R. FISHER & W. URY, *supra* note 5.

in. In both approaches, the parties typically focus only on a single solution which they find unilaterally acceptable. However, success in a negotiation usually depends as much upon identifying ways to satisfy an opponent's interests, or some of them, as it does upon identifying one's own goals in the negotiation.

An integrative approach as suggested by Gilligan, and by Fisher and Ury, will in many situations lead to better results which maximize the interests of all parties. As a consequence, party satisfaction with the results of the negotiation will increase, which is particularly important when the parties have a continuing relationship.[19] Mediation requires students to take an integrative perspective and acknowledge the larger context of the emotional agendas and relationships in which peoples' problems arise.

Mediation training and practice enhance communication skills. They require students to view problems objectively, to appreciate their complexity, and to look for creative, integrative solutions. Mediation exposes students to the problems of real people and consequently increases student awareness and understanding of human nature and behavior. Each of these skills is essential to effective advocacy. Mediation training is therefore an excellent vehicle for teaching students to be good lawyers.

V. Lawyers As Agents of Social Change

Mediation and other forms of dispute resolution will never displace litigation. Litigation is entirely appropriate for some kinds of disputes. For example, it is unlikely that the questions presented by such cases as *Brown v. Board of Education*[20] and *Roe v. Wade*[21] could ever have been mediated or informally resolved because these cases were vehicles for the resolution of larger societal issues. Mediation might be appropriate in a conflict between a landlord and a tenant over return of a security deposit. But insofar as a dispute is a microcosm of a larger social problem, such as slum housing, mediation between an individual tenant and the landlord would be inadequate. Mediation is often inappropriate for resolving disputes between an abusive and an abused spouse or children. Nonetheless, when appropriate, mediation often provides a satisfactory option to people who cannot otherwise gain access to the judicial system or whose problems might better be solved outside that system.

When mediation works, it typically leads to greater party satisfaction than the win-lose results of litigation. When mediation or other informal processes fail, litigation will usually still be available. However, one value in

19. *See supra* note 13.
20. 347 U.S. 483 (1954).
21. 410 U.S. 113 (1973).

mediation training and practice for law students and lawyers is that it exposes us to problems and people that many lawyers do not typically encounter in practice.[22] Such exposure increases the profession's awareness of its responsibilities for addressing social problems which the judicial system often seems incapable of adequately resolving.

VI. CONCLUSION

We have observed an interesting phenomenon in teaching our dispute resolution course and in training law students to mediate. After studying the varieties of dispute resolution and after having the opportunities to practice them, students invariably become enamored of non-litigation processes and begin to view them as panaceas for the world's ills. We remind our students that uncritical acceptance of any concept or process is anathema to effective lawyering.

Exposing law students to the wide range of people and processes that make up our legal and social systems does not pose a threat to the status of the lawyer as the preeminent professional conflict manager unless, of course, lawyers choose to ignore some of those people or processes. Teaching law students and lawyers about non-litigation methods for handling conflict and about their appropriate uses provides lawyers with choices and enables them to critically evaluate all options before making selections which best benefit their clients. Accordingly, the goals of legal education and our goals in teaching law students to mediate are similar. Mediation training supplements the case method by offering students additional and, in certain respects, unique opportunities to develop and master the analytic and practical skills of good lawyering.

Social and economic pressures on finite resources force society to adopt more cooperative methods for dealing with conflict. Today, more than ever, lawyers and the adversarial system have no monopoly on conflict resolution. The lawyer who fails to utilize and encourage when appropriate the cooperative perspective will not serve his clients well.[23] Mediation training, more than other forms of dispute process training, provides that perspective.

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22. Thus, while important, the value of mediation training to introduce to law students people whom they are unlikely to meet in legal practice is really incidental. The fact that mediation in practice tends to be used to resolve disputes between people who cannot afford any other method has led some commentators to criticize mediation as second-class justice. *See generally* J. AUERBACH, *supra* note 2.

23. Another incentive for lawyers to adopt more cooperative attitudes can be found in procedural provisions like Rule 68 of the Federal Rules of Civil Procedure which requires a federal court to impose costs on a party who refuses a good faith settlement offer when the judgment is less than the offer. The 1983 amendments to Federal Rules of Civil Procedure 11 and 23, which impose a "stop and think" standard on lawyers before filing suit or taking other procedural actions like discovery, represent other attempts of the legal system to find solutions to the problems inherent in litigation.