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COMMENT

MEDIATION AND MEDICAL MALPRACTICE DISPUTES: POTENTIAL OBSTACLES IN THE TRADITIONAL LAWYER'S PERSPECTIVE

I. INTRODUCTION

As Doug Llewelyn concludes an episode of the popular television program, "The People's Court," he advises the audience that if they have a dispute with another party, they should not take matters into their own hands but rather "take them to court."¹ Perhaps in no other area of the law is this orientation more prominent than in the field of medical malpractice disputes.

St. Paul Fire and Marine Insurance Company, a leading writer of medical malpractice insurance, reports a fifty-five percent increase in claim frequency since 1980, and a ninety-five percent increase in claim severity from 1979 to 1983.² In addition, the average medical malpractice jury award rose from \$404,726 in 1980 to \$954,858 in 1984.³ Thus, it seems clear that despite the tort reforms enacted in the mid-seventies to combat the emerging medical malpractice "crisis," claim frequency and severity continue to increase.⁴

1. *The People's Court*, a daily syndicated television program.

2. Danzon, *The Frequency and Severity of Medical Malpractice Claims: New Evidence*, 49 *LAW & CONTEMP. PROBS.* 57, 58 (1986) (citing ST. PAUL FIRE & MARINE INS. CO., PHYSICIANS AND SURGEONS UPDATE: A SPECIAL REPORT 3 (1985)). Claim frequency increased from 10.5 claims per 100 physicians in 1980 to 16.3 in 1984. Claim severity increased from \$27,408 in 1979 to \$53,482 in 1983. *Id.*

3. *Id.* at 57-58.

4. For example, state legislatures have responded to increased medical malpractice litigation in a variety of ways including pre-trial screening, arbitration systems, placing ceilings on damage awards, shortening statutes of limitation, or modifying evidentiary standards. The primary goal of these proposals seems to be to reduce litigation of malpractice claims by either somehow reducing the incentive to bring such a claim (i.e. placing ceilings on damage awards) or by establishing arbitrary rules which make it more difficult to get into court successfully (i.e. shorten the statute of limitations). See Qual, *A Survey of Medical Malpractice Tort Reform*, 12 *WM. MITCHELL L. REV.* 417 (1986); Danzon, *The Effects of Tort Reforms on the Frequency and Severity of Medical Malpractice Claims*, 48 *OHIO ST. L.J.* 415, 417 (1987).

The consequences of this continued increase are significant, and in some fields of medicine professional liability has reached "crisis proportions."⁵ The General Accounting Office reported to Congress that insurance costs for all physicians and hospitals increased from 2.5 billion dollars in 1983 to 4.7 billion dollars in 1985.⁶ Not only is this added cost passed on to health care consumers in the form of increased fees,⁷ but in some cases the high cost of maintaining insurance premiums has driven physicians from practicing in certain geographical areas and in certain types of specialties.⁸ For example, because of the increasing incidence of birth-related malpractice suits, pregnant women who live in rural communities or those who are at high risk of complications are having increased difficulty finding a physician to deliver their babies.⁹ Furthermore, the reduction of qualified neurosurgeons in Florida, in part, has caused the American Medical Association to call south Florida "the Beirut of the medical malpractice crisis."¹⁰ Adding to this problem are the suddenly shrinking numbers of insurance companies willing to write medical malpractice insurance. Even if insurance companies are willing to do so, the tendency is to reduce the limits of insurance available to physicians.¹¹

In addition to increased insurance costs and the consequences which follow therefrom, expenses resulting from the practice of defensive medicine (costly and usually unproductive techniques in the treatment of a patient to avoid liability) total an estimated \$15.1 billion annually.¹² For example, the Institute of Medicine, a branch of the National Academy of Sciences, recently reported that the obstetricians' fear of being sued if complications arose in a normal delivery resulted in rising numbers of caesarean sections performed each year in the United States.¹³ The report also concludes that the fear of lawsuits tends to sour doctor-patient relationships while increasing expensive and sometimes unnecessary medical tests and procedures.¹⁴

Against this background of increasing costs and the other concerns mentioned above surrounding the medical malpractice "crisis," numerous avenues of reform have been advocated by doctors, insurance companies and legal scholars.¹⁵ State

5. Mixson, *The Spring of Hope*, 67 OBSTETRICS & GYNECOLOGY: J. AM. C. OBSTETRICIANS & GYNECOLOGISTS 153 (1986); Nye, Gifford, Weeb & Dewar, *The Causes of the Medical Malpractice Crisis: An Analysis of Claims Data and Insurance Company Finances*, 76 GEO. L.J. 1495, 1495-96 (1988); Danzon, *supra* note 4, at 415-17. See generally Posner, *Trends in Medical Malpractice Insurance: 1970-1985*, 49 LAW & CONTEMP. PROBS. 38, 38-40 (1986).

6. Nye, Gifford, Weeb & Dewar, *supra* note 5, at 1495-96.

7. *Id.* at 1507.

8. *Id.* at 1496-97.

9. *Id.*

10. *Id.* at 1495-96; see also *infra* note 13, at A-1, col. 1.

11. See Posner, *supra* note 5, at 51.

12. SPECIAL TASK FORCE ON PROFESSIONAL LIABILITY AND INSURANCE, AMERICAN MEDICAL ASSOCIATION, PROFESSIONAL LIABILITY IN THE '80'S, REPORT 1, at 6 (1984).

13. See The Kansas City Times, Oct. 12, 1989, at A-1, 6, col. 1.

14. *Id.*

15. Qual, *supra* note 4, at 417-20.

legislatures have responded with a variety of tort reforms including mandating pre-trial screening or arbitration, placing ceilings on damage awards, shortening statutes of limitation, modifying evidentiary requirements, limiting attorneys' fees, and creating a patient compensation fund.¹⁶ Other proposals include the adoption of a no-fault system or perhaps accepting contractual limits to liability.¹⁷

This Comment will examine the applicability of mediation in the resolution of medical disputes and the advantages its proponents assert can be achieved with its use. The focus, however, will be upon the lawyer's perspective towards this alternative method and the obstacles that may be present which would impede or prevent the success of mediation.

II. MEDIATION AS AN ALTERNATIVE

Mediation is generally defined as "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."¹⁸ This definition is often said to refer specifically to "pure" mediation, but individual programs and processes of mediation vary as to the role of the mediator and the cooperation of the parties and their lawyers, if present, during the process.¹⁹ In addition, the actual provisions of a mediation program will play a role in the type of mediation process which occurs between the parties. This Comment will focus upon the "pure" form of mediation in the resolving of medical malpractice disputes and will assume that the parties directly communicate with one another in a joint attempt to resolve the problem rather than an adversarial mediation process.²⁰

Proponents of mediation assert numerous advantages of this process over the court system that is often used today. First, mediation has the greatest potential

16. See generally Tancredi, *Designing a No-Fault Alternative*, 49 LAW & CONTEMP. PROBS. 277 (1986).

17. See generally Ginsburg, Kahn, Thomhill & Gambardella, *Contractual Revisions to Medical Malpractice Liability*, 49 LAW & CONTEMP. PROBS. 253 (1986).

18. Riskin, *The Special Place of Mediation in Alternative Dispute Processing*, 37 U. FLA. L. REV. 19, 24 (1985) [hereinafter Riskin, *The Special Place of Mediation*].

19. *Id.* at 24-27.

20. Actual mediations vary with respect to how strongly the aspects of the above definition appear. For example, if the parties understand that the mediator lacks the power to impose a solution yet does so anyway through the force of his personality or by his influence in other areas of the parties' lives, this process would not be "pure" mediation as defined above but would seemingly pass for mediation just the same. *Id.* at 24. Likewise, if the parties are required to mediate as are divorcing couples in California, the lack of voluntariness removes that mediation from the "pure" form but such a process seems to be a mediation in its essential character. *Id.* at 25. If the parties approach the mediation with an intention not to cooperate with the other party or mediator and resist any attempt to mutually resolve their problem on the basis that they must somehow "win" the dispute, this adversarial process would fall outside of the definition of "pure" mediation. Here the trial attorney may see the mediation process as simply a tool for a favorable (i.e. his client "wins") settlement of the case rather than an opportunity for both parties, through mutual cooperation, to resolve the dispute. This Comment does not consider such a process but will address the adversary orientation of the lawyer as an obstacle to "pure" mediation of medical malpractice disputes. See *infra* text accompanying notes 47-65.

for improving relationships between parties through direct communication among the people involved in the dispute.²¹ In the course of direct contact between the parties, mediation tends to enhance the human values of trust, caring, and respect, while emphasizing similarities between the parties rather than their differences.²² Second, mediation is an extremely flexible technique as compared to the adversarial process, and is "cheaper, faster, and potentially more hospitable to unique solutions that take more fully into account nonmaterial interests of the disputants."²³ Mediation is not encumbered by procedural and substantive rules which dominate the adversarial process; this allows the participants to explore the underlying needs and desires of the other party and any other community interests which may be involved.²⁴ In addition, the mediation process often avoids the delay in resolving medical malpractice disputes which is associated with litigating such claims in the court system, especially in highly populated urban areas.²⁵ Furthermore, the courts can generally only give monetary relief to an individual who has suffered from the medical negligence of a physician. This relief may or may not satisfy the underlying needs of that person. Mediation allows those needs to be fully explored, and hopefully, through direct communication, satisfied by the joint agreement of the parties.²⁶

Some scholars suggest that medical malpractice disputes lend themselves to resolution by a process of mediation.²⁷ The view here is that mediation allows both the doctor and patient to examine the underlying conflict through direct communication in an attempt to satisfy the underlying needs and interests of the parties; rather than allowing the current court system to put "a band-aid of dollars on festering wounds of anger and hostility."²⁸ This process increases each party's awareness of the interests and needs of the other and may even increase the accountability of the physician towards the patient.²⁹ In addition, the process of mediation may improve the future relationship between the parties through achieving a new level of understanding of the other party's interests and needs.³⁰

A good example of a medical malpractice mediation success story comes from the Huron Street office of Resolve Dispute Management Inc., a private

21. Riskin, *The Special Place of Mediation*, *supra* note 18, at 26-27.

22. *Id.* Of course, the ability to enhance these human values depends to a large degree on the ability of a skillful mediator during the process. Thus, the selection of a competent and experienced mediator is especially important in the field of medical malpractice mediations. The selection process, however, is outside the scope of this Comment.

23. Riskin, *Mediation and Lawyers*, 43 OHIO ST. L.J. 29, 34 (1982).

24. *Id.*

25. De Zutter, *Proponents Say ADR Spells Relief*, *Illinois Legal Times*, Vol. 2, No. 9, January, 1988, at 1, col. 1. For example, the logjammed Cook County courts in Chicago, Illinois take three to five years to reach and resolve a medical malpractice claim. *Id.*

26. See generally Riskin, *Mediation and Lawyers*, *supra* note 23, at 34-35.

27. Comment, *Healing Angry Wounds: The Roles of Apology and Mediation in Disputes Between Physicians and Patients*, 1987 MO. J. DISP. RESOL. 111.

28. *Id.* at 130.

29. *Id.* at 131.

30. *Id.*

dispute settlement firm in Chicago, Illinois.³¹ A sixty-two year old man sought treatment for pain in his scrotum, and his physician diagnosed a diseased testicle which required removal. A urologist operated on the man but negligently removed the healthy testicle; obviously, a second operation was necessary to remove the diseased testicle which rendered the man impotent. Both the man and his wife were outraged; such reprehensible conduct by the doctor seemed to demand the most drastic response possible—take the doctor to court.³²

The victim, however, did not sue the urologist, though he was about to do so. The patient wanted \$400,000, but because the insurance company only offered \$25,000 to settle the lawsuit, the couple was on the verge of filing a claim in court.³³ At this point the doctor's insurance company contacted the couple and talked them into mediating the matter at Resolve Dispute Management, Inc., which employs the "pure" form of mediation discussed above: the parties meet face-to-face in front of a neutral party to express themselves with minimal interference from the attorneys or mediator.³⁴ The mediator's main role is to provide a framework for the discussions, help the parties through any impasse which may develop, and to suggest possible solutions for the parties.

A lawsuit may have provided a form of "cathartic revenge" for the man and his wife, but it would also prolong the anger towards the doctor as well as the payment of the claim.³⁵ A trial in the congested Cook County courts was three to five years away: the man and his wife would spend three to five years hating the doctor, his insurance company, and the doctor's lawyer as well as wondering about the skills of their own attorney and the likelihood of winning their case in court. Both the victim and the physician would be living with the case on a daily basis for three to five years.³⁶

The man, his wife, and the doctor were directly involved in the mediation hearing, and they were apparently able to resolve the bitter and awkward feelings involved in the case.³⁷ The victim and his wife were able to vent their anger and frustration with the doctor by telling their own side of the story, which apparently brought them a great deal of relief and satisfaction. It is not very often that a plaintiff gets to "tell off" the doctor that he is suing for malpractice.³⁸

The doctor also had the opportunity to apologize. He told the couple that although he was proud of his reputation as a physician in the community, he was absolutely mortified by the error he had made in the operating room. He said he was wrong and apologized.³⁹

31. See De Zutter, *supra* note 25, at 1, col. 1.

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.* at 13, col. 2.

38. *Id.*

39. *Id.*

As the first mediation session came to a close, the patient said to the doctor: "I have wanted to hate you and have hated you, but the truth of the matter is that you are an excellent doctor and I would refer anyone to you."⁴⁰ Thus, the case of the mistaken testicle was resolved one week after the first mediation session. The man accepted a settlement of \$75,900. Mr. Brian Muldoon, founder of the private dispute firm and mediator in the above matter, reported that the parties were happy to put the matter behind them and move on with their lives.⁴¹

Based in part on the types of success stories illustrated above, at least one state legislature has proposed using mediation to resolve medical malpractice disputes. Wisconsin has recently passed legislation establishing a system of mediation to provide "informal, inexpensive and expedient means" for resolving disputes involving health care liability without litigation.⁴² Although it is too early to determine the exact procedures established by the statute, the system apparently consists of mediation panels that assist in the resolution of disputes regarding medical malpractice between patients and their health care providers.⁴³ While the process is initially voluntary, once any party requests mediation prior to court action, the claimant and all the respondents named in the request "shall" participate in the mediation process.⁴⁴ This is significant because it will seemingly require increased involvement of lawyers when their client or opponent requests mediation and it becomes mandatory under state law. Obstacles, which are the focus of this Comment, become that much more important for lawyers to overcome if they are to stay involved in medical malpractice disputes.

Regardless of whether the mediation system is run by a private clinic or is provided for in legislative enactments, the future of the process as a whole "rests heavily upon the attitudes and involvement of the legal profession."⁴⁵ Leonard Riskin, professor at the University of Missouri-Columbia School of Law and director of the Center for the Study of Dispute Resolution, outlines two developments that must occur if mediation, in the form discussed above, is to be a successful alternative: (1) lawyers must come to understand mediation and when that process is appropriate, and (2) a substantial number of lawyers must begin serving entirely as mediators.⁴⁶ This Comment will outline and discuss some of the potential obstacles present in the lawyer's perspective when faced with the alternative of mediating or advising a client to mediate a medical malpractice dispute. Although the comments below may also apply to other forms of dispute resolution and other areas of litigation, the focus is upon the litigator involved in medical malpractice claims and the potential obstacles of that particular orientation.

40. *Id.* at 13, col. 3.

41. *Id.*

42. WIS. STAT. ANN. § 655.42 (West Supp. 1988).

43. *Id.* §§ 655.42(2), 655.61.

44. *Id.* § 655.43.

45. Riskin, *Mediation and Lawyers*, *supra* note 23, at 41.

46. *Id.*

III. POTENTIAL OBSTACLES IN THE TRADITIONAL LAWYER'S PERSPECTIVE

A. *The Lawyer's Standard Philosophical Map*⁴⁷

Lawyers can inhibit or prevent mediation's potential for flexibility and enhancing relationships between the parties through direct communication.⁴⁸ They often do this by inappropriately imposing an adversarial orientation, based on the foundation imposed by the standard philosophical map, which stresses material values, protection of the client at all costs, and the superior role of the attorney to solve the client's problems through the court system.⁴⁹

Professor Riskin notes that two primary assumptions form the lawyer's standard philosophical map: (1) the parties are adversaries in a win-lose situation over a limited resource, usually money, and (2) disputes may be resolved through the application of a rule of law imposed by a third party.⁵⁰ These two assumptions are exact opposites of the assumptions which underlie mediation: (1) each party benefits from the creative solutions which mediation allows and produces, and (2) each dispute is unique, making general rules or principles not necessarily applicable.⁵¹ Thus, lawyers, from the initial interview with the client, embark on a trail of gaining information using the standard map as their guide, thereby limiting the information they receive as they attempt to put facts and events into categories that are legally significant.⁵²

When faced with a medical malpractice dispute, therefore, many lawyers transform physician-patient disputes into lawsuits by focusing on the injury and the elements necessary for a negligence cause of action rather than the underlying needs or emotions of the parties.⁵³ From the initial interview forward, a lawyer following the standard philosophical map tends to ignore his client's feelings and emotions because he finds this information to be subordinate to the concrete facts which fill in the pigeon holes of the malpractice cause of action. For example, a patient may not necessarily want to recover money through the lengthy process of litigation, but rather would like "a chance to be alone in the room with the defendant doctor for about fifteen minutes" in an attempt to release unresolved anger concerning her condition.⁵⁴ Likewise, physicians often view a malpractice suit as an extreme form of criticism which exposes emotional vulnerabilities and

47. Riskin, *The Special Place of Mediation*, *supra* note 18, at 27.

48. *Id.*

49. *Id.*

50. See generally Riskin, *Mediation and Lawyers*, *supra* note 23, at 44.

51. *Id.*

52. *Id.* at 45.

53. See generally Menkel-Meadow, *The Transformation of Disputes by Lawyers: What the Dispute Paradigm Does and Does Not Tell Us*, 1985 MO. J. DISP. RESOL. 25, 31.

54. See generally Bernzweig, *The Revenge Factor in Litigation*, MEDICAL MALPRACTICE: A CENTER OCCASIONAL PAPER 4 (1971).

may even endanger their financial stability.⁵⁵ Therefore, physicians may often seek to avoid the extended and emotional process of litigation.

The above discussion illustrates the risk in bringing attorneys into medical malpractice mediation. The standard philosophical map most lawyers follow causes their analysis to be quantitative (i.e., when, where, how, and why about the particular incidents giving rise to the dispute at issue) rather than qualitative (i.e., what are the client's feelings and emotions? How does the client want the problem solved? What does the client want from the other party?) as they seek to fulfill the perceived expectations of their clients.⁵⁶ This view will restrict many lawyers' abilities to recognize the value of mediation in illustrating and fulfilling each party's underlying needs. It may also impair their ability to serve as mediators themselves unless lawyers learn to participate in the process without undermining its potential.⁵⁷ In addition, a lawyer's presence as advocate may inhibit the informality and openness characteristic of the process unless he has a full understanding and appreciation of mediation techniques and their goals.⁵⁸

Not only may this standard philosophical map hinder effective assistance for lawyers in the mediation process, it may also make lawyers less likely to refer clients to mediation services to resolve medical malpractice disputes.⁵⁹ First, a lawyer may perceive possible professional responsibility problems. For example, if an attorney is serving as a mediator, there seems to be a substantial concern about giving impartial or neutral legal advice to the parties if they have conflicting legal interests.⁶⁰ In addition, the lawyer owes a duty to his client to protect his

55. L. LANDER, DEFECTIVE MEDICINE—RISK, ANGER, AND THE MALPRACTICE CRISIS 132-133 (1978).

56. See generally Riskin, *The Special Place of Mediation*, *supra* note 18, at 27.

57. *Id.*

58. *Id.*

59. Riskin, *Mediation and Lawyers*, *supra* note 23, at 42.

60. See generally *id.* at 38-39; Canon 5 requires that a lawyer exercise independent professional judgment on behalf of any client. MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 5 (1981). "The principal danger of dual representation is that one of the parties will take unfair advantage of the other, knowingly or not." Riskin, *Mediation and Lawyers*, *supra* note 23, at 39. However, the traditional rules prohibiting dual representation have been somewhat liberalized in the recent past; the American Bar Association's MODEL RULES OF PROFESSIONAL CONDUCT Rule 2.2 (1982) permits a lawyer to act as an intermediary if:

(1) The lawyer discloses to each client the implications of the common representation, including the advantages and risks involved, and obtains each client's consent to the common representation;

(2) The lawyer reasonably believes that the matter can be resolved on terms compatible with the clients' best interests, that each client will be able to make adequately informed decisions in the matter and that there is little risk of material prejudice to the interest of any of the clients if the contemplated resolution is unsuccessful;

(3) The lawyer reasonably believes that the common representation can be undertaken impartially and without the improper effect on other responsibilities the lawyer has to any of the clients.

Id. In addition, the lawyer must withdraw as intermediary if any client so requests or any condition above can no longer be met. *Id.* Thus, although the rules have been liberalized in the sense that dual representation is seemingly allowed, the requirements are so restrictive in Rule 2.2 that in practice dual

legal interests, and he may hesitate to refer that client to a mediation forum where those interests may not be protected with the same zeal as in the court system. Second, a lawyer may feel that medical malpractice claims, given the complexity of the issues and often the enormous sums of money involved, should be handled by lawyers, based on the perception that lay persons could not adequately reach decisions on a variety of complex medical issues.⁶¹ Third, the lawyer may feel that he is not living up to his client's expectations of the "courtroom champion" and that referrals to mediation services might somehow violate the trust a physician or patient puts in his lawyer.⁶² Fourth, the traditional perspective might make a lawyer view a referral to mediation as a loss of both control over and of fees from the client's dispute, thus making the lawyer much less likely of making such a referral.⁶³

Given the above discussion, one might conclude that the standard philosophical map should be discarded entirely. This does not seem to be the appropriate approach. The adversary perspective has long been appropriate in many cases as it gives a strong presentation of the client's legal interests which in turn creates a great deal of loyalty between client and lawyer and fulfills the expectations of society.⁶⁴ However, the adversary perspective may not be appropriate in all cases just as mediation may not be appropriate under certain circumstances.⁶⁵ The point is, for purposes of this Comment, that no matter how appropriate or successful such an orientation is in the court system, by dominating the professional consciousness of a lawyer, the adversarial perspective must be seen as an obstacle to the success of a mediation program that might be established which requires, at least to some degree, a nonadversarial orientation to satisfy the underlying needs of patients and physicians.

B. Money

Many lawyers see mediation of medical malpractice disputes as an economic threat. Medical malpractice cases are usually extremely complex and require extensive research and preparation in order to achieve successful results in the court system. Since defense attorneys, in preparing a medical malpractice case, normally charge an hourly rate for their service, an enormous amount of money can be made by preparing the client's case for trial.⁶⁶ On the other hand, plaintiffs' attorneys in malpractice cases often receive legal fees based upon a

representation would rarely be ethical under a strict interpretation of this rule.

61. Riskin, *Mediation and Lawyers*, *supra* note 23, at 42.

62. *Id.*

63. *Id.*

64. *Id.* at 58-59.

65. The appropriateness of litigation or mediation in a given case under certain circumstances is outside the scope of this Comment. For an introduction to this topic, see Riskin, *Mediation and Lawyers*, *supra* note 23. For an interesting argument that alternative dispute resolution processes may be inappropriate, see Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984).

66. See Riskin, *Mediation and Lawyers*, *supra* note 23, at 48-49.

portion of the amount of judgment recovered.⁶⁷ As previously noted, the average medical malpractice jury award is in excess of \$950,000 and certain cases involving birth defects or deaths or cases involving neurosurgeons may bring a jury verdict in the millions of dollars.⁶⁸ Thus, plaintiffs' lawyers can potentially make a great deal of money in the court system's resolution of medical malpractice claims.

Mediation, whether performed by the lawyer himself or by another mediator, is likely to save time thereby reducing the period of extensive preparation and legal fees for the defense attorney.⁶⁹ There seems to be less of a need for intensive discovery of legally significant facts and circumstances revolving around the dispute in order to satisfy the underlying needs of the parties through mediation. Likewise, mediation may also reduce the amount recovered, because by focusing on the underlying needs of each party, nonmaterial considerations, such as respect or recognition, may take the place of monetary awards.⁷⁰ Therefore, lawyers who bring a medical malpractice dispute to mediation instead of handling it in an adversarial manner will often receive less money than they would otherwise through the court system.⁷¹ Because medical malpractice cases present extreme investments in time and the possibility of recovering enormous amounts of money through the court system, it is not hard to imagine some lawyers' extreme reaction against mediation as an alternative to resolving these types of disputes.

In addition, some lawyers may even feel a future economic threat from introducing a client's problem to mediation rather than to the court system, because the lawyer may believe that the client may lose trust in that lawyer's ability to represent him in a future adversary proceeding which may become necessary under certain circumstances.⁷²

The view of Mr. Barry D. Goldberg, a Chicago attorney specializing in medical malpractice, is illustrative of many lawyers' perceptions. In an interview published in the *Trial Diplomacy Journal*, Mr. Goldberg states that "reforms should not be at the expense of the legitimate claimant . . . or by closing the door to the Courthouse to the individual *and the lawyer representing him*."⁷³ This illustrates the concern of many lawyers that sweeping reform in the area of medical malpractice will sever the role of lawyers from controlling their client's cause of action and somehow leave them at the courthouse door without the once lucrative fees.

67. *Id.*

68. See Danzon, *supra* note 2, at 58.

69. Riskin, *Mediation and Lawyers*, *supra* note 23, at 49.

70. *Id.*

71. *Id.*

72. *Id.*

73. *Interview with Barry D. Goldberg—Medical Malpractice*, 8 TRIAL DIPL. J. 10, 13 (1985) (emphasis added).

Adherence to the adversarial orientation in resolving medical malpractice disputes and the perception that any alternative will substantially reduce the amount of legal fees recovered stand as significant obstacles to the involvement of the legal profession necessary to make the mediation alternative a success.

C. Confidentiality of Mediation Proceedings

Confidentiality may or may not be an obstacle to the successful resolution of medical malpractice disputes through mediation. Many lawyers fear that statements made by any participant or the mediator during the process may be admissible in a subsequent judicial proceeding. However, state law may provide otherwise.⁷⁴ For example, Missouri has recently enacted a statute which provides that "no admission, representation, statement, or other confidential communication made in setting up or conducting such [mediation] proceedings not otherwise discoverable or obtainable shall be admissible as evidence or subject to discovery."⁷⁵ A check of the particular jurisdiction's rule on confidentiality, if there is one, is necessary before entering the mediation process. If the jurisdiction lacks a confidentiality rule such as the one Missouri has adopted, it may prevent full disclosure of the interests and underlying needs of each party which is essential to the success of mediating a medical malpractice dispute.

D. Perceived Role of Deterrence and Retribution in the Court System

Some lawyers may feel that the current court system and its use of substantive laws serve the function of enforcing social norms, or in this case, preventing future medical malpractice.⁷⁶ According to this view, substantive laws set social behavior requirements for physicians. Should a physician commit an act of medical negligence, a sanction is imposed which reinforces public values by awarding the patient monetary damages and deterring future negligent conduct of both the particular physician involved and the medical community as a whole.⁷⁷ In addition, most lawyers have been trained to embrace the idea that wrongdoers

74. At least one jurisdiction, Wisconsin, has adequate statutory protection for confidentiality concerns in its medical malpractice mediation program. Several states have statutes creating broad protection for all mediation while others only protect state-supported mediation programs. See COLO. REV. STAT. § 13-22-307 (1988); FLA. STAT. § 44.201 (1988); ILL. REV. STAT. ch. 37, ¶ 856, § 6 (1987); IOWA CODE § 679.12 (1987); MO. REV. STAT. § 435.014(2) (1988); N.Y. JUD. LAW § 849-b(6) (Consol. 1989); OKLA. STAT. tit. 12, § 1805 (1987); 1989 TEX. GEN. LAWS 109, 249-37; VA. CODE ANN. § 8.01-581.22 (1988); WASH. REV. CODE § 7.75.050 (1988); WIS. STAT. § 655.58 (1987-88). The provisions of these laws vary and should be checked to ensure that the particular mediation process used by the parties is covered by a confidentiality provision.

75. MO. REV. STAT. § 435.014(2) (1988).

76. See generally Brunet, *Questioning the Quality of Alternative Dispute Resolution*, 62 TUL. L. REV. 1, 16 (1987).

77. See generally *id.* at 16-17.

can be called to account for their negligent behavior and made "to pay" for their wrongful conduct.⁷⁸ Actions of a wrongful party kindle a desire for personal and social retribution and "the world seems a 'righter' place where such wrongdoing is detected and social values of good conduct are overtly emphasized."⁷⁹

Under this view, a lawyer may feel that mediation allows the parties to avoid the impact of the policies underlying the substantive law.⁸⁰ A physician, for example, may avoid the potentially harsh consequences of the court system if the patient simply desires an apology from him, rather than monetary compensation.⁸¹ Some lawyers may thus perceive mediation as inadequate to serve the public policies of deterrence and retribution for physicians who commit medical malpractice.

This view may also incorporate a perception among litigators that mediation is a "light" or "weak" process which allows the physician to somehow escape the consequences of his negligent act. Proponents of this point of view focus not upon the underlying needs of the particular parties and their unique dispute, but rather upon enforcing social norms within a community. To these lawyers, a physician must "pay" for what he has negligently done to his patient not only because "he deserves it," but also because he and the rest of the medical community are less likely to do it again.

Perhaps Mr. Bovbjerg best sums up this viewpoint: "The American consciousness often naturally turns to tort law and litigation—with their clear-cut battles over right and wrong—to vindicate these philosophic and emotional desires for accountability and retribution."⁸² When the consciousness of the medical malpractice attorney turns to such an orientation, it serves as an obstacle to the success of mediation, because he or she may perceive the process as inadequate to enforce appropriate social norms.

E. Education

Simply stated, lawyers lack education about the mediation process as a whole and the particular skills or techniques necessary for a successful outcome through the mediation process. For many years, law schools failed to provide exposure to mediation, and the skills and training underlying the procedure were not otherwise emphasized in law school. The same was true for the legal community as a whole. Although in the past there was no opportunity to gain such knowledge, the situation is increasingly improving.⁸³ More law schools are beginning to provide education concerning mediation and the skills necessary to use the process in

78. Bovbjerg, *Medical Malpractice on Trial: Quality of Care is the Important Standard*, 49 LAW & CONTEMP. PROBS. 321, 325 (1986).

79. *Id.*

80. See generally Brunet, *supra* note 76, at 17.

81. See Comment, *supra* note 27, at 111.

82. Bovbjerg, *supra* note 78, at 325.

83. See generally Riskin, *Mediation and Lawyers*, *supra* note 23, at 49-50.

specialized classes as well as alternative dispute resolution exercises in traditional first-year law courses. "Court and community based mediation programs offer training to lawyers and nonlawyers alike."⁸⁴ For example, the Family Mediation Association presents five-day programs across the country while the Center for the Development of Mediation in Law emphasizes training lawyers in the workshops it conducts.⁸⁵

For mediation to be a successful technique in resolving disputes, including those where the underlying claim is one of medical malpractice, lawyers must be educated both about mediation as a whole and the techniques and skills essential for its success. However, the strength of the standard lawyer's "philosophical map and the assumption that increased use of mediation will result in an economic threat to the lawyer will impede" education efforts in this area.⁸⁶ The educational opportunities discussed above require a great deal of initiative on the part of the lawyer, and the traditional lawyer's perception may prevent her from taking it.⁸⁷

Education about mediation and its techniques might open up a whole new career to lawyers who are disinterested with the adversarial process of resolving disputes, and such an education in law school might result in students who wish to pursue a career in mediation.⁸⁸ A class of these persons, legally trained but without an adversarial orientation, would greatly enhance a program designed to resolve medical malpractice or any other types of disputes. In addition, an exposure to mediation, especially in law school, would soften the adversarial orientation of many lawyers by introducing them to the various techniques often used such as active listening, joint problem solving, and the ability to generate a large number of options to resolve a certain dispute.⁸⁹ These techniques and many others will be helpful to any attorney, even one who practices law in an adversarial form, as he discusses the interests of his clients and in solving their disputes.

F. *Lawyers Like to Talk*

Closely connected to the discussion of the lawyer's standard philosophical map and her desire to have control over her client's situation, is the love of the litigation attorney to talk. Mr. Brian Muldoon, organizer of Resolve Dispute Management Inc., states that lawyers have a need to give speeches to audiences, and that "[s]ome who use our services ask for quasi-courtrooms with red carpets

84. *Id.*

85. *Id.*

86. *Id.* at 51.

87. *Id.* at 49.

88. *Id.* at 50-51.

89. C. MOORE, *THE MEDIATION PROCESS: PRACTICAL STRATEGIES FOR RESOLVING CONFLICT* 168-171 (1986).

and microphones . . . [b]ut these things are not necessary to getting cases resolved."⁹⁰

The type of mediation contemplated by this Comment involves direct communication between the parties in an effort to discover and illustrate their underlying interests and needs. Upon discovery, the parties should attempt to fashion a solution which meets those interests and needs. Obviously, if an attorney who attends such a mediation feels the need to assert his client's position in his own words or is constantly interrupting his client or the other parties, then the effort to discover their underlying needs and interests will be impaired. If lawyers attend this type of mediation, they must avoid the temptation to talk, unless a matter arises which would directly impair the client's legal rights.⁹¹ The underlying purpose is to address the needs and concerns of the client, not the needs of the client as perceived or presented by the lawyer.

IV. CONCLUSION

The excessive monetary and emotional costs involved in medical malpractice are in part a result of the parties' failure to work toward common goals through compromise.⁹² Insurance companies, doctors, and patients apparently share the same goals of reducing the occurrence of medical negligence while reducing both the economic and emotional costs of resolving any dispute which may arise between the parties.⁹³ However, each one of these groups, aided by lawyers that often follow an adversarial orientation, continues to advocate its own interests and positions rather than pooling resources with the other groups.⁹⁴

The problem of resolving medical malpractice disputes is better approached with a more realistic effort toward compromise, and the arena of mediation seems well suited because it allows the parties to directly communicate in order to uncover and resolve underlying needs and interests of the dispute.⁹⁵ However, the effort to employ mediation as a method to resolve medical malpractice disputes is not without obstacles from the legal profession. The standard philosophical map, the perceived economic threat, the lack of confidentiality laws, the lawyers' general lack of education in mediation, and the perception that mediation does not enforce social norms as well as the court system impair the overall success a mediation program for medical malpractice disputes could achieve. In fact, given the high dollar signs often involved in medical malpractice cases and the extreme

90. Illinois Legal Times, Vol 2, No. 9, January, 1988, at 15, col. 1.

91. For example, if during a mediation session, it becomes apparent that one party is purposefully delaying the proceedings so that numerous sessions will be required, and the statute of limitations for bringing a claim in court is close to running, it would seemingly be appropriate for the lawyer to notify his client and the mediator of this impression.

92. Qual, *supra* note 4, at 456.

93. *Id.*

94. *Id.*

95. See generally *id.*

emotional costs that often accompany this type of litigation, one could argue that obstacles to mediation here are more severe than in other types of litigation.

However, the obstacles facing the legal profession are not insurmountable. To overcome the standard adversarial map, lawyers must recognize what type of orientation they employ in their practice of law and analyze the underlying assumptions of that viewpoint. It may be that such an orientation and its assumptions are inappropriate to resolving a particular dispute or in dealings with a certain client. Lawyers must simply be more conscious of their problem-solving approach with clients and must tailor their approach according to the needs and desires of the client rather than a predisposition towards one particular problem-solving process to be used in all cases.

Education about mediation and the techniques and skills employed in that process must become available in both law schools and in the legal community, and law students and lawyers must take the initiative to familiarize themselves with the process.⁹⁶ Even those individuals who choose not to follow a career in mediation will find a new perspective on the underlying needs and feelings of their clients.⁹⁷

Perhaps the biggest obstacle is the economic threat medical malpractice lawyers fear with the use of mediation to resolve these types of disputes. As discussed above, a great deal of money is at stake in a medical malpractice dispute in the traditional litigation setting, and the use of mediation to resolve disputes will require lawyers to change their view. Lawyers will have to change the way they relate to clients, and because they will be valued for their ability to settle medical malpractice cases, rather than the time they are able to spend on a case, they will have to change the way they are reimbursed.⁹⁸ Brian Muldoon, of Resolve Management Inc., claims that clients that save money through the mediation system will be "so grateful they'll reward their lawyers with more business," and that such business may be "much more rewarding and personally satisfying" for the lawyer.⁹⁹

It seems that the legal profession will be involved in medical malpractice disputes in order to protect the legal rights of the parties, and if more states adopt the approach that Wisconsin has, lawyers may have little choice in facing a mediation process to resolve these types of disputes. Those jurisdictions which have yet to pass legislation that provides for the confidentiality of mediation proceedings should do so to allow full disclosure by the parties without threatening their legal rights. The lack of confidentiality laws is a serious obstacle to an open and honest discussion between the parties to reveal and mutually resolve their dispute.

Lawyers and their clients must broaden their vision beyond victory in the courtroom and focus upon resolving medical malpractice disputes so as to end the

96. Riskin, *Mediation and Lawyers*, *supra* note 23, at 51.

97. Riskin, *The Special Place of Mediation*, *supra* note 18, at 26-27.

98. De Zutter, *supra* note 25, at 13, col. 1.

99. *Id.*

medical malpractice "crisis" and the serious side effects it brings upon society as a whole. Perhaps Abraham Lincoln provided appropriate guidance to the medical malpractice attorney when he said: "Discourage litigation. Persuade your neighbor to compromise whenever you can. As a peacemaker, the lawyer has a superior opportunity of being a good man. There will still be business enough."¹⁰⁰

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100. LEGAL BRIEFS: A LAWYER'S QUOTATION BOOK 21 (J. Charlton ed. 1990).