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# SYMPOSIUM

## Working with Len

*James E. Westbrook\**

Len Riskin joined the MU faculty in 1984. Our faculty had voted in response to a recommendation of Dean Dale Whitman to begin a new emphasis on alternative dispute resolution. My recollection is that we had a group of very capable teachers with a traditional bent. On the other hand, they had an open mind about trying something new and they got along with each other very well. The kind of faculty we had and the leadership provided by Len, Dale Whitman and a few faculty members such as Tim Heinsz enabled us to do something that surprised a lot of people in legal education.

Most of our panelists will focus on topics Len has worked on more recently, but I want to go back to the beginning of Len's work at MU because I think he made some of his most significant contributions to this law school and to legal education in general during that period of time.

What can we say about Len's efforts and successes during those early days.

Len led the development and implementation of what came to be known as The Missouri Plan.<sup>1</sup> When Len joined our faculty in 1984, he was already committed to a set of ideas that he thought would, if implemented, enable lawyers to serve their clients better, which would in turn improve the justice system and perhaps even make the world a better place. Looking back, I would say he had a certain missionary zeal.

The cornerstone of Len's program was the need to change the "Lawyer's Standard Philosophical Map."<sup>2</sup> He introduced his discussion of this map by referring to a story told by E.F. Shumacher in his *Guide for the Perplexed*. Shumacher could find no reference on his map to the large churches he saw in Leningrad, Russia. When an interpreter told him they do not show churches on their maps, Shumacher pointed to one he could see. The interpreter explained that it was a museum, not a living church. The point of the story is that what we see and what we are shown depends on the assumptions we and others make. The lawyer's philosophical map differs from that used by mediators because of "the power of two assumptions about matters that lawyers handle[:]"<sup>3</sup> (1) Disputants are adversaries and if one wins the other must lose; and (2) lawyers and judges help resolve disputes by applying rules of law.<sup>4</sup> Mediators, on the other hand, seek solutions

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1. An excellent treatment of this story was published in a symposium in *Florida Law Review* in 1998. *Symposium, Dispute Resolution in the Law School Curriculum: Opportunities and Challenges*, 50 FLA. L. REV. 583, 583-760 (1998).

2. Leonard L. Riskin, *Mediation and Lawyers*, 43 OHIO ST. L. J. 29, 43-48 (1982).

3. *Id.* at 44.

4. *Id.*

that all parties can agree to.<sup>5</sup> They also assume that each dispute is unique and need not be resolved by a general principle.<sup>6</sup> The lawyer's philosophical map makes it harder for lawyers to help clients solve their real problems because the focus is not on the underlying interests of the parties to a dispute. Len thought, and thinks, that lawyers can learn things from mediation that will enable them to do a better job of helping clients further their underlying interests.

Len thought that defining the lawyer's role as problem solver rather than advocate or hired gun would help point students in the right direction. The term problem solver is admittedly ambiguous and means something different in other contexts. Len and I stuck with problem solver in writing our casebook because we couldn't think of a better term.

Len started meeting with an advisory committee of Dale Whitman, Joan Krauskopf, Tim Heinsz and me soon after he arrived at MU. The advisory committee and other faculty members accepted Len's suggestions on the lawyer's philosophical map, the notion of underlying interests, and the emphasis on problem solving. We agreed that these ideas could be taught while introducing students to client interviewing and counseling, negotiation, mediation and arbitration. There was a consensus that we did not think that alternative processes were superior to litigation. The desirability of a particular process will vary with a particular client's unique situation and underlying interests. If nothing else, the study of process choice and problem solving might cause lawyers to act on the basis of analysis rather than habit. A client centered approach would emphasize how lawyers can assist clients in making process choices. To use a phrase coined by Sander and Goldberg, we would introduce students to the lawyer's role in helping fit the forum to the fuss. I think it is important to remember that Len was the primary source of these ideas and others during our discussions.

After much discussion and consideration of the various ways this material could be incorporated into the curriculum, we decided to attempt what seemed to be the most difficult approach to implement. We would try to sell our faculty on systematic integration of dispute resolution into all first year courses, using simulations that would give students relatively direct experience. We also decided that the dispute resolution exercises would be conducted by the faculty members assigned to the first year courses, ideally using exercises prepared by these same faculty members.

Persuading the faculty to adopt this plan was not easy. Several of us spent days talking to our colleagues. We heard all of the reservations about alternative processes that have been raised by lawyers and scholars through the years. The most significant obstacle to faculty approval was the request to first year faculty to teach parts of dispute resolution in their own courses, using simulations for the most part. Various faculty were concerned about time constraints, their lack of expertise in the field and their inexperience in the use of simulations. There was the innate resistance to having others involved in making decisions that affected one's turf. Len was the leader in this effort and needed all of his political and mediation skills. The faculty did approve the plan, and perhaps the most remarkable thing about the Missouri plan is that they supported it and made it work.

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5. *Id.*

6. *Id.*

The program was supported by grants from the Fund for the Improvement of Post-Secondary Education (FIPSE) of the U.S. Department of Education and from the National Institute for Dispute Resolution (NIDR). Professor Ronald Pipkin conducted a comparative evaluation at MU, Indiana University-Bloomington, and Willamette University. As Missouri embarked upon its program, Willamette taught dispute resolution to all first-year students in a single course during the second semester, and Indiana, where the first-year curriculum was traditional, provided a control setting.

Missouri's Center for the Study of Dispute Resolution also received a grant to involve other law schools in incorporating dispute resolution into their curriculum. DePaul, Hamline, Inter-American, Ohio State, Tulane, and University of Washington participated in this effort. These schools took different approaches and each succeeded in advancing dispute resolution activities in ways that were appropriate for their culture.

Len and Jim Levin, the Associate Director of the MU Dispute Resolution Center did the work to obtain and implement the grants. For more than twelve years beginning in 1985, Len and Jim Levin were intensely involved in working with many law schools in pursuing the goals of the grants. It took even more years to wind things up. Len traveled frequently to the participating law schools. The results were significant and nowhere more significant than at Missouri. Thousands of students and faculty were exposed to and involved in dispute resolution ideas and activities. Numerous casebooks, instructor's manuals, guide books, simulation exercises, and video tapes were produced. Several casebooks for traditional courses now include dispute resolution materials.

Len also made many presentations to academics and practitioners at meetings and conferences, law schools not involved in the grant projects, and law firms. He wrote articles for law reviews and co-wrote the Dispute Resolution and Lawyers casebook, which is now in its third edition. Len and I taught dispute resolution at several other law schools, using our casebook.

Dispute resolution instruction in legal education has grown rapidly. A 1997 article reported that a survey showed that new courses on dispute resolution were rare in 1991, but that between 1991 and 1997 more than half of the law schools that participated in the survey had added such courses in their advanced curricula.<sup>7</sup> This dramatic growth continues.<sup>8</sup>

There has been growth and innovation in dispute resolution processes in both the public and private spheres.<sup>9</sup> "Today, significant ADR initiatives can be found in most federal and state trial courts, and in all federal and many state appellate courts as well."<sup>10</sup> ADR is used widely in federal and state agencies.<sup>11</sup> ADR is

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7. Deborah Jones Merritt & Jennifer Cihon, *New Course Offerings in the Upper Level Curriculum: Report of an AALS Survey*, 47 J. LEGAL EDUC. 524, 551-52 (1997).

8. See Symposium, *Dispute Resolution: Raising the Bar and Enlarging the Canon*, 54 J. LEGAL EDUC. 4 (2004).

9. See generally LEONARD L. RISKIN, JAMES E. WESTBROOK, CHRIS GUTHRIE, TIMOTHY J. HEINSZ, JENNIFER K. ROBBENOLT & RICHARD C. REUBEN, *DISPUTE RESOLUTION AND LAWYERS* 34-61, 755-89 (3d ed. 2005).

10. *Id.* at 34.

11. *Id.* at 46.

widely used in the private sphere.<sup>12</sup> “It is hard to find an area where mediation is not used for resolving disputes.”<sup>13</sup>

Of course, Len has not been solely responsible for the growth in course offerings and in the use of alternative processes. I submit, however, that he has to be included in any short list of those most influential in bringing about these changes. Not only was Len a tireless advocate for change, but he created and encouraged the creation of a mountain of teaching materials while implementing the FIPSE and NIDR grants.

Len has been one of the most influential faculty members at our law school since I joined the faculty in 1965. It is difficult to measure a person’s influence, but I have been around the law school since Len’s arrival and I have had an insider’s view of his work and how it has affected the law school. It seems to me that the implementation of the Missouri Plan has changed the attitudes and assumptions of many faculty and students. One of the reasons we opted for including some dispute resolution in each first year course was to educate faculty. I believe more faculty understand and appreciate ideas such as the lawyer as problem solver, underlying interests, and process choice than would otherwise have been the case if we had not included some dispute resolution in each first year course.

Professor Ronald Pipkin distributed questionnaires to first year students at Missouri, Indiana-Bloomington, and Willamette in the Fall of 1990. The survey was repeated with the same respondents in the Spring of 1991, and then again near the end of the Fall semester in 1991.<sup>14</sup>

Pipkin’s findings include the following:

(a) The second survey asked students the degree to which law school had taught them about negotiation, mediation, and arbitration. The Indiana students reported almost no knowledge of these subjects. Most Missouri students reported knowledge of these subjects; they also reported greater amounts of learning about these processes than the students at Willamette.

(b) A short test designed to assess students’ technical knowledge of dispute resolution was included in the second and third surveys. In the second survey Willamette students averaged 75% correct; Missouri students averaged 67% correct, and Indiana students averaged 42% correct. In the third survey, Willamette students averaged 84% correct, Missouri students averaged 73% correct, and Indiana students averaged 48% correct.

(c) Students were asked nine questions in all three surveys to force a choice between a problem solving and an adversarial approach. In the first survey students at Missouri were more inclined toward an adversar-

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12. *Id.* at 48.

13. CARRIE MENKEL-MEADOW, LELA PORTER LOVE & ANDREA KUPFER SCHNEIDER, *MEDIATION: PRACTICE, POLICY, AND ETHICS* 99 (2006).

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

ial view than students at Willamette or Indiana. In the second survey, taken at the end of the first year, Pipkin reported that Missouri students “moved dramatically away from the adversarial toward the problem solving end of the scale.” Students at Willamette and Indiana moved in the opposite direction. The move toward a more adversarial approach was slightly less at Willamette than at Bloomington. In the third survey, Missouri students opted for a problem solving orientation to an even greater degree.<sup>15</sup>

The success of our earlier efforts led to substantial budget enhancement for our dispute resolution activities. We created an LL.M. program in dispute resolution, we added new faculty to teach dispute resolution, we strengthened our mediation Clinic, and we enhanced our offerings of advance dispute resolution courses.

Missouri’s dispute resolution program tied for first place in the 1999 survey of such programs conducted by U.S. News & World Report,<sup>16</sup> and has consistently ranked high in subsequent surveys.

## CONCLUSION

I think it is appropriate as he makes the move to the University of Florida, to recognize, as I indicated earlier, that Len Riskin has to be included in any short list of those who were most influential in the growth of education about and reliance upon alternative processes. Those of us associated with the Missouri Law School were fortunate that he did much of his work here.

Since the early implementation of the Missouri Plan, our faculty has substituted a Lawyering course in the first year for the original pervasive approach in the first year curriculum. I am not sure which approach is better. One of the problems with the original plan was the need for a designated faculty member to devote many hours to coordinating the exercises in the various first year courses. I do believe that the original plan did a good job of focusing the entire faculty’s attention on what we were about. I suspect, therefore, that it was the right thing to do at that time.

I want to acknowledge that Len has touched my life in a very significant and very positive way. Early on, he engaged me in highly interesting discussions and debates. I was less idealistic than Len and not as convinced that we could make significant changes in the law and in legal education. Over time, he influenced me more than I influenced him. I will always be grateful that I was able to work with him and have him as a friend.

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15. *Id.*

16. Best Graduate Schools, *Specialties*, U.S. NEWS & WORLD REP., Mar. 29, 1999, at 95.

