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## Introduction: Judicial Education, Dispute Resolution, and the Life of a Judge: A Conversation with Judge Jeremy Fogel, Director of the Federal Judicial Center

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# Judicial Education, Dispute Resolution and the Life of a Judge: A Conversation with Judge Jeremy Fogel, Director of the Federal Judicial Center

*The Honorable Jeremy Fogel\* & S.I. Strong\*\**

## I. INTRODUCTION

In January and June 2016, Judge Jeremy Fogel, Director of the Federal Judicial Center,<sup>1</sup> sat down with Professor S.I. Strong to discuss a variety of issues ranging from the civil rules amendments and the case management process to judicial education, mediation and the role of the Federal Judicial Center. Judge Fogel also gave his views on what lawyers, academics and the public need to know about the federal judiciary and the task of judging, thereby providing important and unique insights into the judicial process.

Judge Fogel began his judicial career in 1981, when he began serving as a judge in the California state courts following a career in private practice, where he specialized in mental health advocacy. During his time on the California state bench, Judge Fogel served in a variety of capacities, including as a judge in the family law, civil and criminal divisions. In 1998, he was appointed to be a U.S. District Judge in the Northern District of California, where he presided over a number of complex and high profile matters.

Judge Fogel has demonstrated a longstanding commitment to judicial and legal education. He began teaching in California's judicial education program in 1987, serving as a faculty member for courses on alternative dispute resolution (ADR), ethics, family law and the psychology of decision-making, and he continues to serve as an instructor to the present day. Since 2000, he has also taught for the FJC, offering courses in mediation, patent law and the psychology of decision-making.

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\* J.D., Harvard Law School; B.A., Stanford University. Judge Fogel is the Director of the Federal Judicial Center and a Senior U.S. District Judge of the United States District Court for the Northern District of California.

\*\* Ph.D. (law), University of Cambridge; D.Phil., University of Oxford; J.D., Duke University; M.P.W., University of Southern California; B.A., University of California, Davis. Professor Strong is the Manley O. Hudson Professor of Law at the University of Missouri and a Senior Fellow at Missouri's Center for the Study of Dispute Resolution. She was a U.S. Supreme Court Fellow based at the FJC during the 2012-2013 term.

1. The FJC has had ten directors since its creation in 1967: The Hon. Tom C. Clark (1968-1969); The Hon. Alfred P. Murrah (1970-1974); The Hon. Walter E. Hoffman (1974-1977); A. Leo Levin (1977-1987); The Hon. John C. Godbold (1987-1990); The Hon. William W. Schwarzer (1990-1994); The Hon. Rya W. Zobel (1994-1998); The Hon. Fern M. Smith (1998-2003); The Hon. Barbara J. Rothstein (2003-2011); The Hon. Jeremy D. Fogel (2011-present).

Judge Fogel also taught a course on the psychology of litigation at Stanford Law School from 2003-2011.

In 2011, Judge Fogel was appointed by Chief Justice John Roberts and the agency's governing board to be Director of the FJC, the research and education agency of the federal judiciary.<sup>2</sup> According to 28 U.S.C. §620(b), the FJC's mandate is:

(1) to conduct research and study of the operation of the courts of the United States, and to stimulate and coordinate such research and study on the part of other public and private persons and agencies;

(2) to develop and present for consideration by the Judicial Conference of the United States recommendations for improvement of the administration and management of the courts of the United States;

(3) to stimulate, create, develop, and conduct programs of continuing education and training for personnel of the judicial branch . . . , including, but not limited to, judges, United States magistrate judges, clerks of court, probation officers, and persons serving as mediators and arbitrators;

. . . and

(6) insofar as may be consistent with the performance of the other functions set forth in this section, to cooperate with and assist agencies of the Federal Government and other appropriate organizations in providing information and advice to further improvement in the administration of justice in the courts of foreign countries and to acquire information about judicial administration in foreign countries . . . .<sup>3</sup>

During its fifty-year history, the FJC has experienced a number of changes in how it meets its statutory mission.<sup>4</sup> However, the Center continues to fulfill its core duty of providing educational programming to judges through its Education Division, which offers wide variety of in-person and online educational opportunities to the federal judiciary. Although print publications are still regularly produced, the Education Division also utilizes twenty-first century technology, including an in-house video production unit and an extensive intraweb for members of the federal

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2. See 28 U.S.C §§ 620-29 (2016).

3. 28 U.S.C. § 620(b).

4. Various materials are available on the origins, history and accomplishments of the FJC. See Barbara Rothstein, *The Federal Judicial Center Offers Training and Research*, FED. LAW. 36 (Oct. 2009) (written by a former FJC Director); William W. Schwarzer, *The Federal Judicial Center and the Administration of Justice in the Federal Courts*, 28 U.C. DAVIS L. REV. 1129 (1995) (written by a former FJC Director); Russell Wheeler, *Empirical Research and the Politics of Judicial Administration: Creating the Federal Judicial Center*, 51 L. & CONTEMP. PROBS. 31 (1988) (written by a former FJC Deputy Director); Judge Gabrielle R. Wolohojian, *An Interview With the Honorable Rya W. Zobel*, 58 BOSTON B.J. 10 (Winter 2014) (interviewing former FJC Director Judge Zobel).

judiciary, to serve its constituency.<sup>5</sup> Notably, the FJC's educational efforts are not limited to judges, but extend also to court staff and law clerks.<sup>6</sup>

The FJC also has a Research Division, which conducts empirical and exploratory research on federal judicial processes, court management, and sentencing and its consequences.<sup>7</sup> Many of these projects are undertaken at the request of the Judicial Conference, Congress, or other groups in the federal system.<sup>8</sup>

The FJC is also home to several lesser-known departments. For example, the FJC's History Office develops various programs relating to the history of the federal judiciary, including a summer seminar for high school teachers on the history of the federal courts.<sup>9</sup> The Federal Judicial History Office has also developed for several key publications dealing with the history of the federal judiciary, including the *Guide to Preservation of Judges' Papers*, the *Guide to Research in Federal Judicial History*, and *Debates on the Federal Judiciary: A Documentary History, Volumes I and II* (Volume III forthcoming), which are all freely available from the FJC.<sup>10</sup>

Another relatively little-known unit of the FJC is the International Judicial Relations Office, which liaises with officials of foreign judicial systems to provide information about the U.S. judiciary and learn more about foreign judicial operations so as to help the Center perform its other missions.<sup>11</sup> The International Judicial Relations Office has also produced a series of judicial guidebooks on international litigation, including *Discovery in International Civil Litigation: A Guide for Judges*, *International Extradition: A Guide for Judges*, and *International Commercial Arbitration: A Guide for U.S. Judges*.<sup>12</sup> These and other titles on international procedural and substantive law can all be found on the FJC website.<sup>13</sup>

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5. The work is carried out through the FJC's Education Division, which designs and produces educational programs, services, and resources for judges and court staff, including those in clerk's offices and probation and pretrial services offices. The Education Division organizes a wide variety of in-person and web-based programs as well as numerous manuals, monographs, and other print publications. The Editorial & Information Services Office is responsible for producing and distributing all of the FJC's print and electronic publications and maintains a specialized library collection of materials on judicial administration through the Information Services Office.

6. See FED. JUDICIAL CTR., MAINTAINING THE PUBLIC TRUST: ETHICS FOR FEDERAL JUDICIAL CLERKS (4th ed. 2013), [http://www.fjc.gov/public/pdf.nsf/lookup/Maintaining-Public-Trust-4D-FJC-Public-2013.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/Maintaining-Public-Trust-4D-FJC-Public-2013.pdf/$file/Maintaining-Public-Trust-4D-FJC-Public-2013.pdf) (explaining the professional ethical rules for federal law clerks); SYLVAN A. SOBEL, FED. JUDICIAL CTR., LAW CLERK HANDBOOK: A HANDBOOK FOR LAW CLERKS TO FEDERAL JUDGES (2d ed. 2007), [http://www.fjc.gov/public/pdf.nsf/lookup/ethics2d.pdf/\\$file/ethics2d.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/ethics2d.pdf/$file/ethics2d.pdf); *FJC's Interactive Orientation for Federal Judicial Law Clerks*, NAT'L CONF. OF BANKR. CLERKS (Aug. 1, 2015), <http://ncbcblog.weebly.com/blog/fjcs-interactive-orientation-for-federal-judicial-law-clerks>. Various videos regarding federal clerkships are freely available to the public and can be ordered from the FJC. See FJC, <http://www.fjc.gov> (follow "Educational programs & materials" hyperlink).

7. See FED. JUD. CTR., <http://www.fjc.gov> (follow "Educational programs & materials" hyperlink).

8. Each year, the FJC provides an overview of its research projects in its year-end report, which is publicly available. See *Federal Judicial Center Annual Reports*, FED. JUD. CTR., <http://www.fjc.gov> (follow "General Information about the FJC" hyperlink and then follow the "Federal Judicial Center Annual Reports" hyperlink).

9. See *Federal Judicial History*, FED. JUD. CTR., <http://www.fjc.gov/history/home.nsf/page/index.html> (last visited Dec. 1, 2016).

10. See *Publications & Videos Catalog*, FED. JUD. CTR., [http://www.fjc.gov/library/fjc\\_catalog.nsf](http://www.fjc.gov/library/fjc_catalog.nsf) (last visited Dec 2, 2016).

11. See *International Judicial Relations*, FED. JUD. CTR., <http://www2.fjc.gov/content/international-activities-fjc> (last visited Dec. 2, 2016).

12. See *Publications & Videos Catalog*, *supra* note 10.

13. See *id.*

Although the majority of the FJC's research and educational materials are aimed at a judicial audience, many items are also useful to academics and practitioners.<sup>14</sup> Members of the public can also request certain types of assistance from the FJC on research involving the federal courts.<sup>15</sup> Those who are interested in learning more about the U.S. judiciary and judicial education in the United States can apply to be a fellow at the FJC. Foreign judges, court officials, and scholars are eligible for the Visiting Foreign Judicial Fellows Program.<sup>16</sup> U.S. scholars and practitioners can apply to the U.S. Supreme Court Fellows Program, which is a competitive one-year fellowship that provides a unique, insider's view of the federal judiciary at the highest level.<sup>17</sup>

## II. INTERVIEW

**SS: Judge Fogel, thank you for agreeing to be interviewed for the *Journal of Dispute Resolution*. It's often difficult for people to gain a real overview of the work of the judiciary, particularly with regards to judicial education, and we appreciate your giving us your insights on a number of incredibly important issues. I'd like to begin with a few general questions before turning to more specific issues involving the recent civil rules amendments, alternative dispute resolution, and judicial education. So, to start us off, what does the public need to know about the FJC and about judicial education, at least from your perspective?**

**JF:** A common misperception is that we are just teaching judges the law, as is done in countries with a career judiciary. In those systems, that's what a judicial training institute does: it gets the baby judges who know they're going to be career civil servants, and it has to teach them the substance of law because they don't know it.<sup>18</sup>

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14. Materials can typically be downloaded for free from the FJC's public website or ordered in hard copy. See *id.* Academics have used FJC publications as the basis of their work for decades. See Scott A. Gilbert & Molly Treadway Johnson, *The Federal Judicial Center's 1996 Survey of Guideline Experience*, 9 FED. SENTENCING REP. 2 (Sept./Oct. 1996); Lonny Hoffman, Twombly and Iqbal's Measure: An Assessment of the Federal Judicial Center's Study of Motions to Dismiss, 6 FED. CTS. L. REV. 1 (2011); A. Leo Levin & Deidre Golash, *Alternative Dispute Resolution in the Federal Courts*, 37 U. FLA. L. REV. 29 (1985); Robert Timothy Reagan, *Federal Judicial Center Statistical Examples Software Prototype: Age Discrimination Example*, 42 JURIMETRICS J. 281 (2002).

15. These requests typically involve biographical and other historical information about federal judges and are handled directly by the Center's History Office.

16. See *Visiting Foreign Judicial Fellows Program*, FED. JUD. CTR., <http://www2.fjc.gov/content/visiting-foreign-judicial-fellows-program> (last visited Dec. 2, 2016).

17. See *Supreme Court Fellows Program*, SUP. CT. OF THE U.S. (Dec. 5, 2016), <http://www.supremecourt.gov/fellows/>; S.I. Strong, *The U.S. Supreme Court Fellows Program: The Opportunity of a Lifetime*, 53 JUDGES' J. 27 (Winter 2014) (noting the U.S. Supreme Court Fellows program offers four fellowships a year, including one based at the FJC).

18. *Editors' note:* There are a number of important differences between judicial education in common law countries, such as the United States, and judicial education in civil law countries, which feature a career judiciary. See Emily Kadens, *The Puzzle of Judicial Education: The Case of Chief Justice William de Grey*, 75 BROOK. L. REV. 143, 143-45 (2009); Charles H. Koch, Jr., *The Advantages of the Civil Law Judicial Design as the Model for Emerging Legal Systems*, 11 IND. J. GLOBAL LEGAL STUD. 139, 143 (2004); S.I. Strong, *Judicial Education and Regulatory Capture: Does the Current System of Educating Judges Promote a Well-Functioning Judiciary and Adequately Serve the Public Interest?* 2015 J. DISP. RESOL. 1, 2 [hereinafter Strong, *Judicial Education*].

That's really not a lot of what we do, with the exception of a few specialty areas. We don't teach judges torts or contracts. Instead, we focus a lot more on skills – how to handle a particular type of situation, how to deal with a particular kind of case or a particular kind of litigant.

The skills-based nature of our courses means that we need to transition from the law school model of lectures to a more experiential approach. Historically, FJC courses were eighty percent lecture and twenty percent experiential. Now, our target is roughly thirty percent lecture and the rest experiential.

There's definitely still a role for lectures. People enjoy a good lecture, and it's impossible to do experiential learning the entire time. However, the retention rates for knowledge, skills, and attributes gained through lecturing are not nearly what they are for experiential learning.<sup>19</sup> As a result, we have become really strategic about how we use lectures, following best practices in adult education.<sup>20</sup> Just because many academic institutions follow the lecture model doesn't mean that that's how people actually learn.

**SS: Livingston Armytage has written quite a lot about this concept in the context of judicial education.**<sup>21</sup>

JF: He's great, as are the Canadians.<sup>22</sup> What they're showing us is if you really want what you teach to stick, you have to do it this way.

**SS: Are there any other ways that the FJC has changed since it was first created?**<sup>23</sup>

JF: One of the things we do now is focus more on non-legal issues that arise in cases. As the world has changed, we've had an increased emphasis on science, complex litigation, complex subject matter, the impact of social media and the Internet, and cyber security.<sup>24</sup> I don't think you can be an effective judge in today's environment if your expertise is solely confined to the law. You need to know at least something about the other areas that come up in your cases.

I also think, as a result of my background in psychology, that judges have to be aware that they are dealing with people, not just abstract ideas. People don't always

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19. *Editors' note:* See T. Brettel Dawson, *Judicial Education: Pedagogy for Change*, 2015 J. DISP. RESOL. 175, 185-88 (noting "learning retention increases the more learners are active. Simply hearing (through lecture) is said to result in 5% retention while practising by doing yields retention of 75%."). A useful graphic demonstrating learning retention rates resulting from different pedagogical methods can be found online. See *The Learning Pyramid*, WORLD BANK, [https://sitere-sources.worldbank.org/DEVMARKETPLACE/Resources/Handout\\_TheLearningPyramid.pdf](https://sitere-sources.worldbank.org/DEVMARKETPLACE/Resources/Handout_TheLearningPyramid.pdf) (last visited Dec. 2, 2016). *But see* James Lalley & Robert Miller, *The Learning Pyramid: Does it Point Teachers in the Right Direction?*, 128 EDUC. & INFO. TECH. 64, 76 (2007); Will Thallheimer, *Mythical Retention Data & The Corrupted Cone*, WILL AT WORK LEARNING (Jan. 5, 2015), <http://www.willatworklearning.com/2015/01/mythical-retention-data-the-corrupted-cone.html>.

20. *Editors' note:* See MALCOLM S. KNOWLES, *THE MODERN PRACTICE OF ADULT EDUCATION: FROM PEDAGOGY TO ANDRAGOGY* 45-49 (1980).

21. See LIVINGSTON ARMYTAGE, *EDUCATING JUDGES: TOWARDS IMPROVING JUSTICE – A SURVEY OF GLOBAL PRACTICE* (2d ed., 2015); *see also* Livingston Armytage, *Educating Judges: Where To From Here?* 2015 J. DISP. RESOL. 167.

22. *Editors' note:* See *Building Better Justice*, NAT'L JUD. INST., <https://www.nji-inm.ca/index.cfm/judicial-education/the-nji-s-judicial-education-portfolio/> (last visited Dec. 3, 2016); Dawson, *supra* note 19, at 175.

23. The FJC was created by Congress in 1967. See 28 U.S.C §§ 620-29 (2016).

24. *Editors' note:* Duane Benton & Jennifer A.L. Sheldon-Sherman, *What Judges Want and Need: User-Friendly Foundations for Effective Judicial Education*, 2015 J. DISP. RESOL. 23, 28 (noting the FJC's most popular courses in 2013 were technology-based).

behave in a predictable manner. As a result, I think we have to become, and this is word I always hesitate to use, but I'm from California –

**SS: Go for it – I'm a native Californian, too.**

JF: We have to become more holistic. As judges, we have to think about things more broadly than the legislature tends to do when it's making general rules because the things we see in court are more personal and individualized.

**SS: You talk about a holistic approach to judging, and I notice that over the years, one of your core interests, both at the FJC and earlier, has been alternative dispute resolution.<sup>25</sup> What are some of the challenges that you see facing the field?**

JF: I think there is a lot of confusion both about nomenclature and about the ADR process itself. Part of the problem is that you're dealing with people who have been trained as litigators. Regardless of whether they are judges or lawyer-mediators, they think in a litigation context. They think positionally,<sup>26</sup> strategically, combatively, about how to "win" a mediation.<sup>27</sup> Unfortunately, that is not what mediation is. There is a lack of a real understanding of the paradigm, and it has bothered me ever since I started doing mediations thirty years ago. It's unfortunate, since it means that people talk right past each other when they're arguing about the value of ADR. There are also a whole host of problems with mandatory contractual arbitration where you have a compelled agreement or a contract of adhesion and where the consents to ADR aren't equal.

**SS: Are these problems limited to private practitioners?**

JF: No, it extends to the judiciary as well. One of the endemic problems is that courts tend to practice a hybrid form of ADR. In most court situations, it's not really mediation, it's sort of a settlement conference conducted by an authority figure who tells people what they ought to do in a very evaluative manner. That really isn't mediation. It's more of a guided settlement process.<sup>28</sup>

Mediation, classic mediation, is all about empowering parties. You get critiques of ADR where people are upset with compelled arbitration or with "muscle mediation," where the neutrals in settlement conferences throw their weight around and give opinions where they shouldn't. That process is justly criticized because if

25. Alternative dispute resolution, particularly mediation, has often been said to adopt a more holistic view of the conflict between the parties. See Jennifer W. Reynolds, *Games, Dystopia, and ADR*, 27 OHIO ST. J. ON DISP. RESOL. 477, 497, 524 (2012).

26. *Editors' note:* Interest-based negotiation was first popularized in the early 1980s as an alternative to position-based negotiation. See ROGER FISHER ET AL., *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* 15-80 (2d ed. 1992); ROBERT H. MNOOKIN ET AL., *BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES* 28 (2000) ("Interests reflect the concerns and needs underlying bargaining positions."). Focusing on a person's interests or motivations for wanting a particular outcome or position has since become a common negotiation tactic, although it is not a panacea. See Leonard L. Riskin & Rachel Wohl, *Mindfulness in the Heat of Conflict: Taking Stock*, 20 HARV. NEGOT. L. REV. 121, 128-30 (2015) (discussing how mindfulness can overcome problems with both interest-based and position-based negotiation); Joseph B. Stulberg, *Mediator Misunderstanding of Bargaining Basics: Heading in an Ugly Direction*, 16 CARDOZO J. CONFLICT RESOL. 807, 812-20 (2015).

27. *Editors' note:* Judge Fogel has discussed these types of issues elsewhere. See Jeremy Fogel, *How to Take Control of the Runaway Litigation Train*, 5 PEPP. DISP. RESOL. L.J. 377, 379-80 (2005).

28. *Editors' note:* See Carrie Menkel-Meadow, *For and Against Settlement: Uses and Abuses of the Mandatory Settlement Conference*, 33 UCLA L. REV. 485, 506-11 (1985) (discussing judge-guided settlements as a general proposition); Stephen C. Yeazell, *The Misunderstood Consequences of Modern Civil Process*, 1994 WIS. L. REV. 631, 648 (1994); Perry Zirkel, *Non-Adjudicative? You Be the Judge*, 28 J. L. & EDUC. 231, 233 (1999) (discussing a particular court-guided settlement).

it isn't something the parties choose to do, then they're giving up their autonomy, and because you don't have a record it's the worst of both worlds.<sup>29</sup>

What gets lost in the shuffle is the idea of people voluntarily entering into a facilitated process where they really try to figure out what their interests are, what they are after. That doesn't preclude asking somebody for an evaluation. You can do that at some point – say, “We are stuck, can you give us your opinion?” However, that should grow organically out of the process rather than be what the process is about.

The same is true of caucuses. Caucuses can be really useful if people don't feel comfortable talking to each other. But I think what has happened is that people now go into caucus without even trying to establish a problem-solving relationship. Then you have secrets and the mediator knowing things that they can't tell the other side, which is not what I envision as being optimal.<sup>30</sup>

**SS: How would you describe your preferred style of mediation?**

JF: I am a committed believer in the classic facilitated mediation model.<sup>31</sup> That doesn't preclude evaluation but the desire for evaluation has to come from the parties.<sup>32</sup>

The idea that you have a compromise that everybody hates is another thing you hear a lot about in court mediation. The idea that “if the parties hate it equally, then it's a good compromise” makes my skin crawl. You are not adding any value when you do that, other than ending the case. You are not really producing a better result for the parties. I prefer an integrative solution that combines as many of the interests of both sides as possible.

**SS: How do you reconcile your commitment to mediation with claims made by some authorities, including both judges<sup>33</sup> and academics,<sup>34</sup> that settlement and other types of non-judicial dispute resolution are problematic for society?**

JF: For me, the core principle is party autonomy. I have a problem with compelled arbitration, or coerced arbitration, or coerced settlement, because of the coercive element. Of course, litigation also involves coercion, but at least litigation

29. *Editors' note: See* Edward Brunet, *Judicial Mediation and Signaling*, 3 NEV. L.J. 232, 234-41 (2002/2003) (discussing evaluative judicial mediation and the concept of “muscle mediation”); Nancy A. Welsh, *The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?* 6 HARV. NEGOT. L. REV. 1, 5-6 (2001).

30. *Editors' note: See* Sharon Press & Paul Lurie, *Assessing the Risks and Responsibility of Using the Private Caucus*, 21 DISP. RESOL. MAG. 37, 37 (Fall 2014).

31. *Editors' note: See* Leonard L. Riskin, *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOT. L. REV. 7, 13 (1996) (containing Riskin's grid of mediation techniques); *see also* Leonard L. Riskin, *Mediator Orientations, Strategies and Techniques*, 12 ALT. HIGH COST LITIG. 111 (1994) (same). *But see* Jane Kidner, *The Limits of Mediator “Labels”: False Debate Between “Facilitative” versus “Evaluative” Mediator Styles*, 30 WINDSOR REV. LEGAL & SOC. ISSUES 167, 168-70 (2011) (claiming no difference between facilitative and evaluative mediators).

32. *Editors' note: See* Kidner, *supra* note 31, at 168-70, 177-78.

33. *See, e.g.,* Lord Thomas of Cwmgiedd, Lord Chief Justice of the United Kingdom, *The Bailii Lecture on Developing Commercial Law Through the Courts: Rebalancing the Relationship Between the Courts and Arbitration 2* (Mar. 9, 2016) (criticizing arbitration because it hinders the development of the common law) (transcript available at <http://www.bailii.org/bailii/lecture/04.pdf>); Jennifer W. Reynolds, *Judicial Reviews: What Judges Write When They Write About Mediation*, 5 Y.B. ON ARB. & MEDIATION 111, 111-12 (2013) (surveying judicial literature on mediation).

34. *See* Owen Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1075 (1984); Menkel-Meadow, *supra* note 28, at 513-14.

incorporates a number of due process protections. Litigation is also what produces the common law, although as a judge I'm less concerned about whether the substantive common law is developing one way or another.

Of course, I can understand why in a particular case a party might want to establish precedent, and that is a legitimate reason not to settle. But my point is that people ought to be able to make choices about how they want to resolve their disputes, and it isn't a one-size-fits-all proposition. You shouldn't force people to settle, nor should you force people to litigate.<sup>35</sup>

I see dispute resolution as existing along a spectrum. At one end, you have all-out conflict and at the other end, you have free negotiation. So often, people start out in different places and just work it out.

Once the law gets involved, you start to see how these different permutations play out. At one end, you have binding contractual arbitration in a contract of adhesion where there's no choice. At the other end, you have classic mediation, and there are many other options in between. In my view, none of these options is inherently better than the others. Instead, the parties need to know what choices they have and then choose whatever process they want.

The problem is that people often get herded into an adversarial, conflict-oriented model of dispute resolution, and then, because of the cost and because of pressure from the relevant institutions, they end up settling in a way that is not really productive, since settlement is not arrived at organically. Instead, the settlement is something that is imposed on the parties. This is the type of scenario that I think is most often criticized, and rightfully so. Too often, people are being forced down certain avenues without the protection that the legal system is intended to provide.

**SS: You mentioned that some judges use a hybrid methodology that is not really mediation but is more of a strong-arm tactic to force settlement. What is the FJC doing to help judges recognize and overcome these challenges?**

JF: First, we've had a mediation skills workshop for at least fifteen years.<sup>36</sup> In fact, that's how I first got connected with the FJC, way back when. I was one of the instructors for that course.

One of the goals of the workshop is to model facilitative skills. We do that by using hypothetical problems that can't be solved through a litigation-oriented, strategic approach. For example, we have a discrimination dispute where the plaintiff's feelings of humiliation and injury are so intense that the plaintiff wants a large sum to settle a case that realistically is worth somewhere in the range of \$10,000 to \$50,000. How do you cut that knot?

The standard litigation-oriented approach involves a lawyer-mediator or judge trying to "talk sense" to the plaintiff and telling them they are being unreasonable. This approach might result in the plaintiff being beaten down enough to result in a settlement, but then their feeling about the system would be, "I got beaten down, nobody listened and nobody cared."

The only real way to work through the problem is to think about it differently. What are the interests of the plaintiff in that case? It isn't really about money. They

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35. *Editors' note: See Jeffrey W. Stempl, Reflections on Judicial ADR and the Multi-Door Courthouse at Twenty: Fait Accompli, Failure Overture, or Fledgling Adulthood?*, 11 OHIO ST. J. ON DISP. RESOL. 397, 353 (1996) (noting problems when the decision about what dispute resolution mechanism is used is made by a clerk of court).

36. *Editors' note: See Mediation Skills Workshop for Judges and Mediators*, U.S. DISTRICT CT. OF E.D.N.Y. (Oct. 25, 2013), <https://img.nyed.uscourts.gov/files/forms/CLE25OCT13CoursePacket.pdf>.

want some compensation, but what they want more than anything else is to be heard. They want to be respected. They want to feel that what happened to them matters, that someone cares about the event and cares about them. If you're able to address that as a mediator, then the person can say, "Well, yeah, I finally feel like someone heard me."

Many civil disputes are not really about the money, so we set up hypotheticals that can't be solved by a left-brain analysis. The judges have to pay attention to what's going on with the parties. A lot of the judges in the program over the years have become really frustrated when they can't settle the case using their familiar skills. About halfway through the workshop, some of them have had an "Aha!" moment. They figure out that they have to listen differently and try to identify interests rather than positions.

That is the upside of the FJC mediation skills workshop. The downside is that it has been hard to get district judges to attend because settlement conferences in the federal system are usually conducted by magistrate judges. It's a bit of a conundrum in that respect: district judges don't do settlement conferences so they don't think they need to have mediation skills.

**SS: Is there any way to encourage district judges to take the FJC's mediation workshop?**

JF: One of the ways I push back on district judges' reticence to take this particular workshop is to say well, actually, it's good to do some settlement conferences. Doing the conferences actually develops the skills you need to do them well.

The other thing you can say is that judges use mediation skills in a lot of contexts other than settlement. For example, mediation skills are critical to good case management, whether it's managing discovery disputes or managing scheduling disputes or dealing with lawyers who don't get along. There are so many ways that you can use that particular skill set. That really makes this workshop worthwhile to district judges.

The need for what you might call mediation skills has actually never been higher, since the new civil rules amendments really emphasize active case management.<sup>37</sup> A lot of district judges are uncomfortable with active case management for a variety of reasons, including the fact that they just don't quite know how to do it.<sup>38</sup> Judges are very good at hearing and deciding motions and trying cases, but it's a whole different matter when you're dealing with lawyers who are fighting about what day they're going to have a deposition or how many terabytes of discovery

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37. *Editors' note:* A number of rule amendments, including amendments to Rule 16 of the Federal Rules of Civil Procedure, were proposed on April 29, 2015, and went into effect on December 15, 2015. See Letter from John G. Roberts, Chief Justice of the U.S. Supreme Court, to Hon. John A. Boehner, Speaker of the U.S. House of Representatives (Apr. 29, 2015), available at [http://www.supremecourt.gov/orders/courtorders/frcv15\\_5h25.pdf](http://www.supremecourt.gov/orders/courtorders/frcv15_5h25.pdf); FED. R. CIV. P. 16. Additional amendments were proposed in April 2016. See *Pending Rule Amendments*, U.S. CTS., <http://www.uscourts.gov/rules-policies/pending-rules-amendments> (last visited Dec. 2, 2016).

38. *Editors' note:* Some judges and academics have sought to define what might be meant by the term "active case management." See Steven Baicker-McKee, *Reconceptualizing Managerial Judges*, 65 AM. U. L. REV. 353, 392-93 (2015) (discussing benefits and pitfalls of active case management); Hon. Candy Wagahoff Dale, *Are You Ready? 2015 Amendments to the Federal Rules of Civil Procedure*, 58 ADVOCATE 41 (Oct. 2015); Steven S. Gensler & Hon. Lee H. Rosenthal, *Measuring the Quality of Judging: It All Adds Up*, 48 NEW ENG. L. REV. 475, 480-86 (2014) (discussing active case management and the notion of "the reappearing judge"). Although the concept of active case management has been touted as promoting judicial efficiency, it is occasionally opposed on the grounds that it encourages too much judicial discretion. See Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 424-31 (1982).

they're going to get. Those kinds of problems are endemic to the litigation process, and I think mediation skills are a very useful tool for a judge to have to deal with those issues.

**SS: Have the new civil rules amendments changed how judges and the FJC approach case management skills?**

JF: They have. In our new judge orientation courses,<sup>39</sup> the way we're going to teach case management is to focus on management skills more generally. Historically, judges have simply focused on checking with their local rules and standing orders so that they were set for trial dates. Although that process is of course necessary, that's different from what I'm talking about.

For example, you could have local or federal rules regarding initial disclosure, you could have more than one Rule 16 conference,<sup>40</sup> you could set trial dates and various interim deadlines. That is great, and that has been the traditional approach for keeping cases moving. When I talk about bringing mediation skills into the case management process, I'm talking about a different way of getting agreement from the parties on issues that arise in case management. For example, by asking a lot of open-ended questions and employing active listening, as a skilled mediator would do, you can find out a lot about why the parties are taking the litigation positions they're taking. You can actually prune and shape the case so that time and money aren't spent on tangential disputes, and the key legal and factual issues get teed up and resolved efficiently and fairly.

**SS: Have you found new judges who are coming in to be receptive to this?**

JF: Yes. New judges are often receptive to new ideas because they don't think they know everything. One of the challenges in judicial education is that as people get more experienced, they're more reluctant to change the way that they do things.<sup>41</sup> It is just a human tendency that isn't limited to judges in particular. However, if you have high-achieving people who are used to getting gold stars – and that is who the federal judiciary is – once they reach a place where they are comfortable with the way they do things, it is very hard to inspire change.

As we shift from passive case management to active case management, we can tell new judges, "This is what the rules require of us," and they are going to be receptive because they want to do things the right way. I've learned that you get a

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39. *Editors' note*: The FJC has traditionally offered two rounds of orientation for new federal judges. See Rothstein, *supra* note 4, at 36-39 (including a summary of the orientation programs); see also "Baby Judges School" *Jump Starts Learning Process*, 37 THE THIRD BRANCH (Aug. 2005), <http://www2.fjc.gov/sites/default/files/2014/IJR00020.pdf> (discussing basic content of the orientation sessions, which are meant to prepare new federal judges for their position); *Vanderbilt Law Hosts Second Annual Mid-Career Seminar for U.S. District Judges*, VAND. L. SCH. (Oct. 8, 2015), <http://law.vanderbilt.edu/news/vanderbilt-law-hosts-second-annual-mid-career-seminar-for-u-s-district-judges/> (describing the contents of the first two phases of judicial orientation as well as a new "third phase" of federal judicial education for mid-career judges). The FJC's orientation meetings supplement any orientation that judges may receive from colleagues in their particular districts or circuits. See Barbara S. Meierhoefer, *FJC Staff Paper: In-Court Orientation Programs in the Federal District Courts*, FED. JUD. CTR. 2 (1984), [http://www.fjc.gov/public/pdf.nsf/lookup/orienpro.pdf/\\$file/orienpro.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/orienpro.pdf/$file/orienpro.pdf).

40. *Editors' note*: See FED. R. CIV. P. 16.

41. *Editors' note*: To some extent, this phenomenon can be explained by the concept of acculturation, as Magistrate Judge Wayne Brazil has discussed. See Wayne D. Brazil, *Civil Discovery: Lawyers' Views of Its Effectiveness, Its Principal Problems and Abuses*, 1980 AM. B. FOUND. RES. J. 787, 792, 797 (1980) (noting overexposure to problematic practices dulls perception of impropriety); Wayne D. Brazil, *The Adversary Character of Civil Discovery: A Critique and Proposals for Change*, 31 VAND. L. REV. 1295, 1343 (1978) (noting that judges are also subject to the pressure of acculturation).

lot more resistance with people who have done things differently in the past, so you need to build that into your pedagogy.

The other thing is that you have to do more than just tell people what the outcome is. You've got to show them and give them a chance to experience what it looks like.

**SS: Is that why the FJC continues to offer in-person programming, even with all the advances in technology?**

JF: Definitely. We try to meet the needs of federal judges who can't attend live programs by offering various types of educational materials through the FJC's intranet. Many of these items are also available through FJC's public website and can prove useful to state court judges, academics, and lawyers who are interested in particular subjects, such as how to conduct interest-based mediation.<sup>42</sup> However, we offer as many live programs as we can.

The orientation sessions on active case management are particularly interesting, since we combine videos with live interactive elements. We start by showing a couple of videos comparing different ways to handle case management. One video has a judge sitting in chambers going through Rule 16 statements<sup>43</sup> and making an order without seeing the lawyers, and another one has the judge inviting the lawyers into chambers and they are miles apart about what kind of discovery they want and the judge says simply, "Why do you want it? What is it you are hoping to accomplish? How does it fit into your case plan? Why don't you want to give that to them?" So you've got why, why, why, right from the beginning.

As I always say in the mediation workshop, the most important question ever asked by a mediator is "why." It's not just the first question, it's THE question. Why do you care? Why does this matter? And so, through our new judges' orientation sessions, we set the stage for that type of thinking.

In addition to the video, we use some demonstrations and give people the chance to practice. This type of hands-on experience is important, because this is not something that most people learn when they're in law school or as lawyers and judges.

**SS: Do you find the judges to be receptive to hands-on coursework?**

JF: Yes. Experts in adult education have found that knowledge, skills, and attributes gained experientially "stick" better than material learned passively.<sup>44</sup> We are going through a curriculum build-out right now, and we've found that most judges already have most of the knowledge part – I mean, that's how they got to their current positions, of course they're going to keep that updated. However, there is still a need for knowledge acquisition. What we at the FJC need to do is provide knowledge about things people may not know about – significant changes in the law or new trends in society.

But even that's not what judges tend to need most. Instead, they need skills, things like how to work with juries, how to work with difficult litigants, how to cut the knot in a dispute between counsel, how to listen in a way so that people feel like

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42. See FED. JUD. CTR., <http://www.fjc.gov> (last visited Dec. 3, 2016).

43. See FED. R. CIV. P. 16.

44. *Editors' note: See, e.g., ARMYTAGE, supra note 21* (applying principles found in KNOWLES, *supra* note 20, at 45-49); Dawson, *supra* note 19, at 175 (discussing innovations in Canadian judicial education); *see also supra* note 19 (noting percentage retention rates).

you really understand what they are saying.<sup>45</sup> There are a lot of skills that are relevant to the job that can only be taught experientially, and you have to give people the chance to practice them.

**SS: I don't know if you've seen it, but Judge Posner has recently written a book, *Divergent Paths*, which talks about how academics can help judges do their jobs, either directly or indirectly, by better preparing students who will become judicial clerks or advocates.<sup>46</sup> One of the things he talks about is the importance of hands-on learning and the American Bar Association's new requirement for experiential and clinical education.<sup>47</sup>**

JF: Oh, yes, I heard about that. I'm very interested in the idea of requiring a certain number of hours of skills courses for accreditation and graduation. It seems like a really positive thing, because all the data proves that people remember more if they do something actively rather than passively receiving information.<sup>48</sup> It really is not even debatable.

**SS: Do you think that this new requirement will eventually create judges and lawyers who can avoid the kind of positional thinking that you mentioned earlier?<sup>49</sup>**

JF: Yes, I'm really encouraged by the trend. I think what happened is that the employers said to the law schools, the people you're turning out aren't much good to us. They know how to spot issues, but they have surprisingly weak people skills and they don't know how to listen to clients. I think that message has finally sunk in.

Martha Minow has talked about this in her work.<sup>50</sup> She talks about how law schools are not really preparing people to be who we want them to be. Graduates

45. *Editors' note*: Some authorities refer to these additional skills as "judge craft." See CHERYL THOMAS, REVIEW OF JUDICIAL TRAINING AND EDUCATION IN OTHER JURISDICTIONS 13-17 (May 2006) (noting such skills include matters such as opinion writing, sentencing and dealing with particular types of litigants and evidence), [http://www.ucl.ac.uk/laws/socio-legal/docs/Review\\_of\\_Judicial\\_Train.pdf](http://www.ucl.ac.uk/laws/socio-legal/docs/Review_of_Judicial_Train.pdf); NAT'L JUD. INST., *supra* note 22 (including a course calendar that discusses the "craft of judging," including judge craft, court craft and professional craft).

46. See RICHARD A. POSNER, *DIVERGENT PATHS: THE ACADEMY AND THE JUDICIARY* (2016); S.I. Strong, *How Legal Academics Can Participate in Judicial Education: A How-To Guide by Richard Posner*, 66 J. LEGAL EDUC. 421 (2017) ([hereinafter Strong, *Judge Posner*]).

47. See AM. BAR ASS'N, ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2016-2017, at 15-21 (2016), [http://www.americanbar.org/content/dam/aba/publications/misc/legal\\_education/Standards/2016\\_2017\\_aba\\_standards\\_and\\_rules\\_of\\_procedure.pdf](http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2016_2017_aba_standards_and_rules_of_procedure.pdf); AM. BAR ASS'N, *Accreditation Overview*, [http://www.americanbar.org/groups/legal\\_education/resources/accreditation.html](http://www.americanbar.org/groups/legal_education/resources/accreditation.html) (last visited Dec. 3, 2016); ABA Task Force on the Future of Legal Educ., *Report and Recommendations*, AM. BAR ASS'N, (Jan. 23, 2014), [http://www.americanbar.org/groups/professional\\_responsibility/taskforceonthefuturelegaleducation.html](http://www.americanbar.org/groups/professional_responsibility/taskforceonthefuturelegaleducation.html).

48. *Editors' note*: See Dawson, *supra* note 19, at 185-88 (noting "learning retention increases the more learners are active. Simply hearing (through lecture) is said to result in 5% retention while practising by doing yields retention of 75%").

49. See Fogel, *supra* note 27, at 379-80; see also *supra* notes 26-27 and accompanying text.

50. *Editors' note*: See, e.g., Martha Minow, *Education for Co-Existence*, 44 ARIZ. L. REV. 1, 2 (2002) ("Education offers the chance to shape minds, hearts, and behaviors of succeeding generations. Educational responses express this hope: If only we educated young people to respect others; to understand the costs of group hatreds; to make friends, not stereotypes; to know tools for resolving disputes, to choose to stand up to demagogues, to be peacemakers, then we could hope to prevent future violence and future atrocities."); Martha Minow, *Lawyering for Human Dignity*, 11 AM. U. J. GENDER SOC. POL'Y & L. 143, 158-59 (2002) (calling for increased problem-solving and collaborative teaching methods in law school); Martha L. Minow, *Judging Inside Out*, 61 U. COLO. L. REV. 795 (1990) (discussing the importance of both judging and teaching "from the inside" by recognizing "the impact of perspective on knowledge"

are very smart, they know how to write a brief and they know how to analyze, but they don't understand people.

As an observer of the ABA curricular reform process, I found it very interesting to see how the ABA compromised on the number of hours of skills courses. I talked to some legal academics who said, oh, this is terrible, this is an onerous burden, way too many hours, the courses don't have academic rigor, etc., etc. Then I talked to practitioners who said, you know, they backed down, they didn't take it far enough.

I found this debate particularly intriguing given that one of the most memorable classes I took in law school – and this was a long time ago – was a class called “The Lawyering Process.” It was a skills-based class, and one of the things that I thought was so interesting about it was that it was very rigorous. We had to do a lot of writing, and the professor made it clear that we didn't get to cut any corners.

What I learned from that class is that it's not enough to just be a good person; you also have to do good work. You've got to write good briefs, you've got to make good arguments, you've got to be really thorough. Just because you're representing somebody in a legal aid office, for example, you can't just say, well, I feel good about myself because I'm doing this good work. You have to be at least as good as your adversary who is representing the landlord or the company or whomever. You can't compromise on quality at all. I also loved that the class was really academically rigorous while also being totally skills-based. I think that's a really useful paradigm.

**SS: You said that your course was called The Lawyering Process. At Missouri, we have a class called Lawyering which is required of all our first year students and which includes a significant experiential element.<sup>51</sup> Among other things, we teach active listening skills, counseling skills, and interviewing skills before moving on to negotiation, mediation, and arbitration. We schedule this course in the first term of the first year because we think that it will help frame how students think about the litigation process going forward. You mentioned Martha Minow, and I think she says something about how important the first year is in setting student expectations and understanding.<sup>52</sup> Do you think the Missouri approach is useful?**

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and the way in which “observers have a different understanding than . . . participants” of a particular activity).

51. See CTR. FOR THE STUDY OF DISPUTE RESOLUTION, UNIV. OF MO. SCH. OF LAW, THE ART OF TEACHING DISPUTE RESOLUTION 8-10 (2015), [http://law.missouri.edu/news/files/2014/10/CSDR\\_TeachingEssays.pdf](http://law.missouri.edu/news/files/2014/10/CSDR_TeachingEssays.pdf) (discussing Missouri's first year Lawyering program); Angela Drake & Stacy Nicks, *Perspectives on the Veterans Clinic Model at Law Schools: Lessons Learned by an Instructor and Student*, 45 U. MEM. L. REV. 943, 960-62, 970 (2015) (providing a student's perspective on the value of Missouri's Lawyering program). The program was initially developed pursuant to a grant from the U.S. Department of Education's Fund for the Improvement of Post-Secondary Education (FIPSE) and has evolved somewhat since its early days. See Leonard L. Riskin, *Disseminating the Missouri Plan to Integrate Dispute Resolution into Standard Law School Courses: A Report on a Collaboration with Six Law Schools*, 50 FLA. L. REV. 589, 591-89 (1998) (discussing the original approach). Other models have been developed by other law schools. See Bobbi McAdoo et al., *It's Time to Get it Right: Problem-Solving in the First-Year Curriculum*, 39 WASH. U. J. L. & POL'Y 39, 39-44 (2012); Michael Moffitt, *Islands, Vitamins, Salt, Germs: Four Visions of the Future of ADR in Law Schools (and a Data-Driven Snapshot of the Field Today)*, 25 OHIO ST. J. ON DISP. RESOL. 26, 64 (2010).

52. See Todd D. Rakoff & Martha L. Minow, *A Case for Another Case Method*, 60 VAND. L. REV. 597, 602 (2007) (discussing how the first year curriculum shapes legal thinking for the student's entire career, both in law school and after graduation).

JF: I do. I have had this conversation with numerous legal academics, describing how clinical classes just simply can't be marginalized. If you're serious about experiential education, it needs to be integrated with the rest of the curriculum. That can't happen in the current environment, where clinical classes typically are taught by untenured professors and the courses are considered outliers that are secondary to the core curriculum.<sup>53</sup>

I don't mean in any way, shape or form to be anti-intellectual, but it is really hard to say that learning how to do something – how to listen, how to advocate in an effective way, how to deal with people who are different from you – is less important than learning about the evolution of the dormant commerce clause of the 1930s. Unfortunately, what happens is that more traditional academic interests get prioritized in terms of who gets hired and promoted at law schools, and then you have a whole culture that encourages people to know more than anyone else in the world about this one little tiny pinpoint of information, and that is your claim to fame.

The problem is that the practice of law is a much more holistic thing. I think you can and should teach that subject with a high degree of intellectual rigor and take the same degree of care in teaching clinical courses as doctrinal courses. You can definitely see the difference between experiential classes that are sort of knock-offs and the ones that are dead serious. So it needs to be part of the curriculum, a core part of the curriculum.

**SS: You definitely are not the only one saying this. Judge Posner has said the same thing about clinical education and academic advancement in his recent book.<sup>54</sup> He also mentions that he was surprised to see push-back from some of his own students in response to an experiential course that he taught at the University of Chicago. He says that they were concerned that the class didn't have enough intellectual rigor.<sup>55</sup>**

JF: Again, that takes me back to this lawyering process class that I took forty years ago.<sup>56</sup> I've always remembered that class because the main take-away for me was that this has to be as rigorous as everything else, even if it isn't as abstract. The depth of thinking that you need to put into something to make it a good learning experience and to really make an impression on people is no less in an experiential course than in a doctrinal one.

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53. *Editors' note:* Judge Posner has made similar criticisms and recommendations. See POSNER, *supra* note 46, at 323, 342; Strong, *Judge Posner*, *supra* note 46 (noting similar calls from other authorities).

54. See POSNER, *supra* note 46, at 261-96; see also Richard A. Posner, *Legal Scholarship Today*, 115 HARV. L. REV. 1314, 1320 (2002); Richard A. Posner, *The Deprofessionalization of Legal Teaching and Scholarship*, 91 MICH. L. REV. 1921, 1927 (1990); Strong, *Judge Posner*, *supra* note 46 (noting similar responses from other authorities).

55. See POSNER, *supra* note 46, at 323 (noting the students' concern that the class "slighted legal doctrine"). Judge Posner attributed this critique to his belief that law students are natural formalists. See *id.* at 307, 316. However, this phenomenon raises questions about how students will react to the new ABA requirement about experiential coursework, particularly given the customer-satisfaction (meaning student-satisfaction) model of contemporary legal education. See Cassandra M.S. Florio & Steven J. Hoffman, *Student Perspectives on Legal Education: A Longitudinal Empirical Evaluation*, 62 J. LEGAL EDUC. 162, 162 (2012); James R.P. Ogloff et al., *More Than "Learning to Think Like a Lawyer": The Empirical Research on Legal Education*, 34 CREIGHTON L. REV. 73, 181-83 (2000) (noting that there have been relatively few empirical studies of the effectiveness of law school teaching methods and claiming that most empirical research focuses on student satisfaction rather than learning outcome assessments).

56. See *supra* note 49 and accompanying text.

You know, I taught a class at Stanford for eight years that dealt with the same kinds of issues. The class focused on psychology and how it impacts litigation, and it was really challenging to make that class rigorous so that it wasn't something that students took as an easy out.

I have to admit, it was hard. I don't know if I fully succeeded, but I think I succeeded enough. I've been in touch with this group of students in the years since, and they've said, "What I learned in this class has made a difference in my life as a lawyer." And that's what you always want to hear as a professor, right? You want to feel like you contributed to someone's growth. Still, it was a constant challenge to make the course rigorous enough.

I struggled very hard to find a textbook, since I needed a book on mediation skills, even though you teach mediation skills experientially. Fortunately, I found a book that did a decent job of explaining the process by somebody who had thought about the implications of mediation skills in an adversarial system.<sup>57</sup>

One of the things this process really drove home is that I don't think that overall the legal community has focused enough on the academic discipline of teaching. Missouri's one of the leaders of this, and there are some other people out there doing it as well, but it's a fairly small corner of legal academia.

**SS: I agree, it's definitely an uphill battle. Going back to the discussion about helping judges understand interest-based mediation, one of the things Judge Posner writes about and one of the things that I think the mediation community is and would be very keen to learn about, involves the extent to which academics can get involved in educational programming for judges.<sup>58</sup> Do you have any suggestions for academics interested in getting involved with judicial education?**

JF: The problem is that if a judge wants to take a mediation course at Pepperdine or Harvard or Missouri, they have to do so on their own nickel, which a lot of people don't want to do.<sup>59</sup> Similarly, some judges are concerned about educational programs offered by private providers, since that can raise questions about judicial independence and impartiality.<sup>60</sup>

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57. *Editors' note:* Other useful texts include STEFAN H. KREIGER & RICHARD K. NEUMANN, JR., *ESSENTIAL LAWYERING SKILLS: INTERVIEWING, COUNSELING, NEGOTIATION, AND PERSUASIVE FACT ANALYSIS* (4th ed. 2011); LEONARD L. RISKIN ET AL., *DISPUTE RESOLUTION AND LAWYERS* (5th ed. 2014).

58. See POSNER, *supra* note 46, at 345-60. Other countries have successfully integrated legal academics into the judicial education process. For example, Canada has adopted a "three pillar" approach to judicial education that considers input from judges, academics and the community. See NAT'L JUD. INST., *supra* note 22; see also THOMAS, *supra* note 45, at 50 (constituting a worldwide report prepared for the British Judicial Studies Board); Symposium, *From Myth to Methodology: Judicial Education and the Art of Judging*, 2015 J. DISP. RESOL. 1-190 (discussing a variety of recent initiatives).

59. *Editors' note:* See Peter Robinson, *Adding Judicial Mediation to the Debate About Judges Attempting to Settle Cases Assigned to Them For Trial*, 2006 J. DISP. RESOL. 335, 350 (discussing how Pepperdine's mediation course was adapted for a judicial audience and retitled "Mediation Skills for Judges").

60. *Editors' note:* See, e.g., Chris Young et al., *Corporations, Pro-Business Nonprofits Foot Bill for Judicial Seminars*, CTR. FOR PUB. INTEGRITY (May 27, 2014), <http://www.publicintegrity.org/2013/03/28/12368/corporations-pro-business-nonprofits-foot-bill-judicial-seminars> ("Conservative foundations, multinational oil companies and a prescription drug maker were the most frequent sponsors of more than 100 expense-paid educational seminars attended by federal judges over a 4 ½ year period, according to a Center for Public Integrity investigation."). Twenty years ago, Judge Jack Weinstein offered a number of useful suggestions regarding judicial education from the private sector. See

We've found that we can resolve many of those issues through collaborations where we use the expertise that an academic institution has to offer to get the best of both worlds, an FJC program that also incorporates expertise that we don't necessarily have in-house. In fact, we're always looking out for collaborations like that.

One of the most successful collaborations we've had recently is a mid-career program held at Vanderbilt, where we've relied on their faculty and other experts to help mid-career judges reflect on where they are in their careers.<sup>61</sup> That program has been really successful, and we're always looking for more. It's a just matter of how much energy and how many resources we have and what our priorities are.

**SS: What types of academic expertise are you looking for? You mentioned mediation, but are there other substantive, procedural or skills-based issues that you think would be appropriate for this type of collaboration?**

JF: We have done a lot with science, since that is something that judges are extremely interested in.<sup>62</sup> We have ongoing collaborations with several law schools focusing on neuroscience, biotechnology, genetics, that type of thing. Economics is another important field, and we've done a couple programs on that, Economics for Judges, Economics 101. Another collaborative program has involved water law and environmental regulation. There are a lot of areas where judges need to know things that are outside the standard education model, and it is much easier to do those in collaboration than to try to do them in-house at the FJC.

**SS: Legal academics also try to contribute to the judicial process through their scholarship. Are there any particular types of legal research that you think that judges would find particularly useful?**<sup>63</sup>

JF: Definitely. This is something we're thinking about a lot now as a result of the Chief Justice's year-end message.<sup>64</sup> The entire message was about the civil rules amendments, and we're thinking about various ways of moving the needle on litigation practices.<sup>65</sup> Obviously you can't just pass a rule and change longstanding cultural beliefs and behaviors. However, one of the most powerful ways of implementing change is to empower people to behave differently.

One of the things that lawyers – and, by extension, judges – are not particularly good at is managing people. However, there's a lot of really good scholarship about that in the management area, things like how to get people to collaborate when they don't want to or when they have different interests. So we're looking actively at management issues and would be very interested in seeing scholarship on those types of concerns.<sup>66</sup>

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Jack B. Weinstein, *Limits on Judges Learning, Speaking, and Acting – Part I – Tentative First Thoughts: How Many Judges Learn?* 36 ARIZ. L. REV. 539, 565 (1994).

61. See *Vanderbilt Law Hosts Second Annual Mid-Career Seminar for U.S. District Judges*, *supra* note 39. The program has been referred to as the "third phase" of federal judicial education. See *id.*

62. *Editors' note*: See Benton & Sheldon-Sherman, *supra* note 24, at 28 (noting the FJC's most popular courses in 2013 were technology-based).

63. Judge Posner has offered a number of suggestions in this regard. See POSNER, *supra* note 46, at 261-96; see also *supra* note 46 and accompanying text.

64. *Editors' note*: See generally *Chief Justice's Year-End Report on the Federal Judiciary 2015*, SUP. CT. OF THE U.S. (2015), <http://www.supremecourt.gov/publicinfo/year-end/year-endreports.aspx> (discussing amendments to the Federal Rules of Civil Procedure).

65. *Editors' note*: See Letter from John G. Roberts, *supra* note 37; see also *supra* notes 37-40 and accompanying text (discussing FJC programming on active case management).

66. *Editors' note*: Judge Posner has also enunciated this concern and advocates increased scholarship on matters relating to judicial management. See POSNER, *supra* note 46, at 222-58 (listing ten different

**SS: You mentioned the Chief Justice's year-end report.<sup>67</sup> As I recall, that report made some waves in academic circles as a result of concerns about transparency and the intent of the civil rules amendment process.<sup>68</sup>**

JF: Yes, I remember that. There was a concern that there was a hidden agenda, that there was some sort of back-channel effort to teach judges to diminish the rights of litigants and that kind of thing. Though I appreciate the concern, that's just not true. To the contrary, I think there's a great sensitivity to the fact that the rules are supposed to be neutral and make litigation less expensive and more efficient.

We all know that certain groups and certain individuals have agendas. There are law schools that have agendas, advocacy groups that have agendas – we've even seen blurbs by some defense groups describing how to use the new rules to make it harder for plaintiffs to get discovery. Given this reality, it's important that the academic community scrutinizes the rules amendment process so as to alert educators and judges to the possibility that someone might perceive certain changes as making it harder for plaintiffs to proceed in court as a way of reducing the cost of litigation to corporate defendants. Vigilance is good. However, I don't think that there's a hidden agenda in this case.

The best way for judges to avoid problems in this regard is to be mindful about what they're doing so that they don't run into any unintended consequences. As a judge, you have to actually think about what you're doing when you make a procedural ruling, and you have to ask the advocates to help you. If they're good lawyers, they'll tell you.

For example, you might have a case in which the plaintiff has requested all of the documents created by an international corporation that are relevant to the company's employment policy. In that kind of situation, you need to look at the plaintiff's lawyers and ask, "Why do you need that? Just explain it to me, I just want to know." It's not meant to be a rhetorical question. Instead, it's meant to offer the lawyer the opportunity to tell the judge what the underlying interest is and whether it would be appropriate at this point to do a 30(b)(6) deposition, for example.<sup>69</sup>

As a judge, you just keep asking questions. That's the best way to meet your obligation to be fair and impartial. Let the parties tell you why they need a particular item or why they shouldn't have to produce things. If you do that, it's much less likely that you'll fall into the trap of benefitting one side over the other, which is I

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concerns in this regard, including management of judicial staff, the absence of collegiality, problems in macromangement, managing the system as a whole, judicial work ethic, aging on the bench, excessive travel, workload issues and congressional oversight).

67. See *Chief Justice's Year-End Report on the Federal Judiciary 2015*, *supra* note 64.

68. See Michael Dorf, *Chief Justice Roberts Takes a Fourth Bite at the Apple*, DORF ON LAW (Jan. 4, 2016), <http://www.dorfonlaw.org/2016/01/chief-justice-roberts-takes-fourth-bite.html>; Adam Liptak, *Chief Justice's Report Praises Limits on Litigants' Access to Information*, N.Y. TIMES (Dec. 31, 2015), [http://www.nytimes.com/2016/01/01/us/politics/chief-justices-report-praises-limits-on-claimants-access-to-information.html?\\_r=0](http://www.nytimes.com/2016/01/01/us/politics/chief-justices-report-praises-limits-on-claimants-access-to-information.html?_r=0) (quoting Prof. Stephen Burbank, Prof. Arthur Miller, Prof. Judith Resnik and Prof. Suja Thomas); Suja Thomas, *Via Duke, Companies Are Shaping Discovery*, LAW360 (Nov. 4, 2015), <http://www.law360.com/articles/723092/opinion-via-duke-companies-are-shaping-discovery> (claiming corporations that sponsor the Duke Law Center for Judicial Studies influenced the new amendments of the federal rules of civil rules procedure, since those rules were strongly influenced by an invitation-only conference held at Duke).

69. *Editors' note: See* FED. R. CIV. P. 30(b)(6) (involving the deposition of an organization).

think is at the heart of the academic concerns about the recent rules amendments and the Chief Justice's year-end report.<sup>70</sup>

**SS: As you were speaking, it dawned on me that a lot of academics who have been clerks may conceptualize the judicial process in a certain way as a result of working with that one single judge. One of the things that people may not recognize is the extent to which judicial philosophies differ on matters both large and small and the extent to which judges protect their judicial independence.<sup>71</sup> How does the FJC take those issues into account in its educational programming?**

JF: Judicial philosophy is very important, and it affects every facet of the litigation process. We are very careful not to espouse one philosophy over another, out of respect for judicial independence.

For example, there are people who don't believe in active case management in the way that we're talking about here.<sup>72</sup> They think that the judge's job is to decide disputes that are teed up by the parties, set trial dates, and preside over trials. They don't like the idea that judges should be trying to broker agreements about discovery or about motions. As a result, we make sure that point of view is heard when we design and conduct programming. We also say well, did you look at the many notes to these rules, it's pretty clear what the rules say, right? Ultimately, though, judges are independent and conduct themselves in the way that they think is best.

I think this is very much what the FJC is doing in the context of the recent rules amendments. We identify what the rules say, we discuss what skills are useful to carrying out those rules, but nobody is being compelled to do anything.<sup>73</sup>

This technique is particularly important in sensitive areas like unconscious bias and social context, which are both somewhat controversial in judicial education circles.<sup>74</sup> However, our view is that we're just putting information out there. What the judge does with the information, that's his or her job. The judge is the actor in this. The FJC is not prescribing any particular way to be, but it's important, if your goal is to be competent and fair and civil to people, to know these types of things. Whether and to what extent you utilize these tools, or how you do so, is up to you. That's your decision. We always remember that we're talking to people who are statutorily and constitutionally free to do what they want, so long as they don't commit high crimes and misdemeanors.<sup>75</sup>

70. *Editors' note: See Chief Justice's Year-End Report on the Federal Judiciary 2015, supra* note 64; Letter from John G. Roberts, *supra* note 37.

71. One way to obtain that type of system-wide perspective is through a fellowship at the FJC. *See supra* notes 16-17 and accompanying text (discussing the U.S. Supreme Court Fellows Program and the Visiting Foreign Judicial Fellows Program).

72. *Editors' note: See supra* notes 38-41 and accompanying text.

73. *Editors' note: See Baicker-McKee, supra* note 38, at 358 (noting the new civil rules merely "encourage" active case management); Gensler & Rosenthal, *supra* note 38, at 481, 489 (noting no conflict between encouraging active case management and judicial independence).

74. *Editors' note: See Dawson, supra* note 19, at 179 (discussing courses on implicit bias and social context in judicial education). Numerous judges and scholars have called for this type of programming. *See Hon. John F. Irwin & Daniel L. Real, Unconscious Influences on Judicial Decision-Making: The Illusions of Objectivity*, 42 MCGEORGE L. REV. 1, 8 (2010); Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?* 84 NOTRE DAME L. REV. 1195, 1228 (2009); Strong, *Judicial Education*, *supra* note 18, at 15. Some state courts require judicial education on implicit bias. *See Hon. Patricia Breckenridge, Missouri's Chief Justice Delivers 2016 State of the Judiciary Address*, 72 J. MO. B. 84, 86 (Mar.-Apr. 2016).

75. *Editors' note: See U.S. CONST.*, art. II, §4, art. III, §1; Robert C. Stelle, *Defining High Crimes and Misdemeanors: A Call for Stare Decisis*, 15 J. L. & POL. 309, 324-58 (1999).

**SS: So far, we've been talking a lot about your role as director of the FJC and your experience as a federal judge. However, you also spent a considerable amount of time as a state court judge. What would you say about the difference between the two systems in terms of educational opportunities, educational requirements and educational needs?**

JF: I think we are very lucky in the federal judiciary to have the resources that we have. Congress has for the most part taken good care of us, which is not true of the legislature in many of the states. A lot of states have really suffered from budget problems and are not able to do much in the way of judicial education.<sup>76</sup> State courts are also dealing with really different social situations, and their caseloads in challenging areas such as family law are not going down. Unfortunately, there are just not enough resources. There are too many people, litigation is too expensive, there are too many pro se litigants – it really has become a very different environment from when I was there.

I don't know that judicial education organizations aimed at state court judges are able to keep up with demand.<sup>77</sup> Some are, but most don't have enough money. The one where I worked for many years in California had a reasonably good budget when I was there. We were able to do most of the things that we wanted to do – experiential programs, reflective programs, things like that. Now, that's very limited, because they don't have the funding they used to have. That's a pity, because people who aspire to be judges want to be good at what they do. They take their jobs seriously and try to get the tools that they need – it's just harder to do so in the state courts. I've heard that complaint a lot from state judges.

**SS: One of the possibilities that has been discussed recently by the ABA and others is the possibility of pre-judicial education for aspiring judges.<sup>78</sup> What types of skills or mindset do you suggest that aspiring judges acquire, either on their own or through some type of formal pre-judicial education program?**

JF: Well, this actually is a really good question. In the mid-career program I mentioned earlier,<sup>79</sup> we start that program with a session called “Paradigms and Aspirations for Judging.” That session asks, what is the ideal, what is the paradigm,

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76. *Editors' note:* Judges and scholars have both suggested that underfunding of state courts is a problem of constitutional magnitude. See David J. Barron, *Judicial Independence and the State Court Funding Crisis*, 100 KY. L.J. 755, 756-59 (2011-2012); Margaret H. Marshall, Chief Justice, Supreme Judicial Court of Mass., Benjamin N. Cardozo Lecture, *At the Tipping Point: State Courts and the Balance of Power* 6 (Nov. 10, 2009), [http://www.nycbar.org/pdf/Cardozo\\_post\\_final.pdf](http://www.nycbar.org/pdf/Cardozo_post_final.pdf).

77. *Editors' note:* One well-known program is the National Judicial College, a non-profit organization originally created by the American Bar Association and now one of the leading sources of judicial education in the United States, particularly for U.S. state court judges. See *About the NJC*, NAT'L JUD. C., <http://www.judges.org/about/> (last visited Dec. 3, 2016). There are also a wide variety of private judicial education providers in the United States. See *International Judicial Relations*, *supra* note 11 (providing a listing of other judicial education centers in the United States and abroad).

78. See generally STANDING COMM. ON JUDICIAL INDEP., AM. BAR ASS'N, REPORT OF THE STUDY GROUP ON PRE-JUDICIAL EDUCATION (2005) (discussing reform of judicial education); Marc T. Amy, *Judiciary School: A Proposal for a Pre-Judicial LL.M. Degree*, 52 J. LEGAL EDUC. 130 (2002) (proposing degree programs for aspiring judges); Keith R. Fisher, *Education for Judicial Aspirants*, 43 AKRON L. REV. 163 (2010) (discussing judicial education for aspiring judges). The Administrative Office of the U.S. Courts has also published a series of videos called “Pathways to the Judiciary” that provides first-hand views of how federal judges came to the bench. See *Pathways to the Judiciary*, U.S. CTS., <http://www.uscourts.gov/judges-judgeships/pathways-bench-video-series> (last visited Dec. 3, 2016).

79. *Editors' note:* See *Vanderbilt Law Hosts Second Annual Mid-Career Seminar for U.S. District Judges*, *supra* note 39; see also *supra* note 61 and accompanying text.

what do we hope judges will be.<sup>80</sup> Our view is that a judge is not just a person who is learned in the law and who is really good at writing. We assume that's all in there. What you really want are people who are wise, who can balance justice and compassion. We want people who listen well, who have patience, who are respectful – this whole list of qualities.

What we try to do in that session is identify the key qualities and attributes of a judge and then talk about what's getting in the way, the frustrations that make it hard to live up to those aspirations. In California, there's a now-retired judge whom I used to work with a lot, David Rothman, who was and is considered to be the ethics guru for California judges. He put together what's known as "The Eight Pillars of Judging" to articulate the qualities and principles that we want our judges to have.<sup>81</sup> I think that's exactly the right approach – being smart is important, but it isn't enough. Instead, you have to have some personal qualities that are sometimes difficult to develop. You have to have a sense that this job is a public trust.

An analogy I often make, and this reflects my religious studies background, is to the role of clergy. Clergy often are seen as conduits for spiritual content. In a secular society, you might say that judges play a similar role. We are the conduits for society's aspirations for justice and right. It really isn't about us, and if we let our egos, our irritations or our personal weaknesses get in the way and don't try to do anything about them, then we are not living up to the trust that the public has placed in us.

Of course, the other side of the coin is that we can't possibly be who the public wants us to be all the time. We are all imperfect, we all have our frailties and limitations. Plus, different elements of the public want different things.

That of course makes the job incredibly difficult. You not only have to aspire to be really good, but you have to keep working at it. What's more, you also have to accept the fact that you are never going to be perfect, you're never going to totally get it right. In the end, it's a combination of having some very high aspirations and also having some very realistic expectations, and that's a hard balance to achieve.

**SS: One of the things that we hear about judges involves burnout and cynicism resulting from the difficulties associated with being on the bench. What suggestions do you, as an experienced judge who has kept your optimism, have for sitting judges on how to deal with these sorts of pressures?**

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80. *Editors' note:* Commentators have noted that questions about the task of judging are inextricably linked to the question of judicial education. See Robert G. Bone, *Judging as Judgment: Tying Judicial Education to Adjudication Theory*, 2015 J. DISP. RESOL. 129, 130; Chris Guthrie et al., *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1, 38-40 (2007).

81. *Editors' note:* Judge Rothman suggests that the central principles of being a judge are (1) remaining aware of being a judge, regardless of where you might find yourself; (2) remaining aware in the courtroom by being conscious of what you and others do and say, and remembering to notice your own reactions, emotions and thoughts with respect to proceedings; (3) respecting the rule of law, meaning all decisions and actions must be within the scope of the law; (4) avoiding assumptions by challenging preconceptions and prejudices; (5) keeping a professional distance by not taking things personally or acting as an advocate; (6) ensuring honesty and integrity in terms of both process and outcome; (7) exhibiting righteousness and courage by knowing what is proper under the law and acting accordingly; and (8) being accountable for your actions on the bench. See DAVID M. ROTHMAN, CALIFORNIA JUDICIAL CONDUCT HANDBOOK, App. 3, 1-4 (2013 Supp.), as reproduced in Diane E. Cowdrey, *Teaching New Judges: What It Means to "Be" a Judge*, 4 J. INT'L ORG. FOR JUD. TRAINING 82, 84-88 (2015), <http://www.iojt.org/~media/Microsites/Files/IOJT/Microsite/ijotJournal004.ashx>.

JF: We talk about this in the mid-career program, right after we talk about the aspirations and paradigms of good judges.<sup>82</sup> In this case, we talk about the frustrations and limitations to identify what gets to each particular person. Everyone's different in that regard. Is it bad lawyers, is it bad behavior, is it the defendants or parties, is it the caseload, etc.? Then we talk about coping mechanisms. Sometimes it's pretty simple – taking time out or taking a vacation.

For me, I personally try to cultivate mindfulness, which is something I've gotten very interested in over the years.<sup>83</sup> People do different things, but the key is simply paying attention to what's going on in yourself, your courtroom, and your personal life. If you notice you're getting stressed, you can stop proceedings or figure out what else you can do to address the situation. We actually spend a good amount of time talking about this, because many judges have this sort of heroic view that they shouldn't have these feelings, that they should be better than this, etc. They take it all on themselves when in fact it's just an impossible job. One of the wisest things anyone ever said to me before I became a judge was that in some ways it's an impossible job. And it is. You'll never get everything right, and you have to live with that.

It can be difficult, particularly if you're a perfectionist. I always tell people that I'm a recovering perfectionist. So, one of the keys to mindfulness is recognizing that you're never going to get everything right. Sometimes you're going to mess up, sometimes quite badly, and sometimes you're not going to be able to manage everything. In the end, though, you need to learn how to keep your balance if you're going to keep your sanity.

**SS: Balance is definitely something we can all work on. On that note, I would like to thank you for taking the time to speak and to share your wisdom. I am sure that your words will be read with interest by lawyers, law students, and academics. We all can learn a lot from you and from the fine work of the Federal Judicial Center.**

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82. *Editors' note: See Vanderbilt Law Hosts Second Annual Mid-Career Seminar for U.S. District Judges*, *supra* note 39; *see also supra* note 61 and accompanying text.

83. *Editors' Note: Judge Fogel has recently written a guidebook on judicial mindfulness for the FJC. See JEREMY D. FOGEL, MINDFULNESS AND JUDGING* (2016), <http://www.fjc.gov>; *see also* Clark Freshman & Shauna Shapiro, *Mindfulness in the Judiciary: A Response to Judge Fogel*, 2017 J. DISP. RESOL. (forthcoming 2017). Scholars have discussed mindfulness in the context of judging, mediating and lawyering. *See* Douglas A. Codiga, *Reflections on the Potential Growth of Mindfulness Meditation in the Law*, 7 HARV. NEGOT. L. REV. 109 (2002) (discussing mindfulness for lawyers); Angela Harris et al., *From "The Art of War" to "Being Peace": Mindfulness and Community Lawyering in a Neoliberal Age*, 95 CAL. L. REV. 2073 (2007) (discussing mindfulness for practitioners); Leonard L. Riskin, *Mindfulness: Foundational Training for Dispute Resolution*, 54 J. LEGAL EDUC. 79 (2004) (discussing mindfulness for dispute resolution neutrals); Evan Seamone, *Judicial Mindfulness*, 70 U. CIN. L. REV. 1023 (2002) (discussing mindfulness for judges). Mindfulness has also been discussed with respect to legal education. *See* Richard C. Reuben, *Bringing Mindfulness Into the Classroom: A Personal Journey*, 61 J. LEGAL EDUC. 674 (2012) (discussing mindfulness for law students).