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**TEACHING ALTERNATIVE DISPUTE RESOLUTION IN LAW  
SCHOOL:  
WHY, HOW AND WHAT FOR?**

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## **I INTRODUCTION**

Law schools throughout the western world have demonstrated a commitment to teaching alternative dispute resolution (ADR) theory and practice to their students in keeping with the upsurge of clinical education programs and the belief that 'black letter' law subjects expose students to a narrow perspective of law. The commonly held view is that legal education should teach law students 'what lawyers need to be able to do' not just 'what lawyers need to know'.

The rise of ADR education in law schools underscores the central role of lawyers in ADR practice. Whilst lawyers, in their client advocate role, have an ethical obligation to champion their client's case, they also have a duty, as officers of the court, to advise clients of ADR options because ADR has been shown to further the administration of an efficient legal system. The increase in court-connected ADR also highlights the role of lawyers as 'dispute resolution gatekeepers'. Most lawyers are exposed to ADR in some way and are called upon to use their legal skills as collaborative problem solvers rather than 'hired guns'.

The growth of ADR is bolstered by the contemporary culture of consumerism and the humanisation of once haloed professions such as law and medicine. Current professional practice is based on 'shared decision-making' which is consistent with the client focussed paradigm that underlies ADR philosophy.

The literature indicates that ADR is taught in law schools, with varying results, either as a stand alone subject, or by integrating ADR theory and practice into mainstream law subjects. This paper considers the literature on teaching ADR in law school and addresses the question –why teach ADR in law school? Is it really giving students who are bombarded with the adversarial, positional direction of the traditional 'black letter' subjects insights into the collaborative, problem solving approach, essential for 21<sup>st</sup> century lawyering? The paper then describes how ADR is taught in several law schools in the United States (US) and Australia. Finally, the paper considers the

reasons for teaching ADR in law schools. If ADR teaching influences students' attitudes, then ADR education may impact on the way law is actually practised.

## **II WHY TEACH ADR IN LAW SCHOOL?**

Although ADR practice can and often does involve practitioners from a variety of disciplines, lawyers play a key role for several reasons. The first reason touches on aspects of a legal practitioner's professional obligations. Lawyers, in their client advocate role,<sup>1</sup> negotiate settlements of disputes as champions of their clients' legal positions.<sup>2</sup> Whilst the duty of lawyers to advocate their clients' viewpoints and act in their clients' best interests is irrefutable, lawyers also have an ethical responsibility to act as officers of the court in furtherance of the integrity of the legal process.<sup>3</sup> Dal Pont suggests that by proposing ADR to a client, lawyers are acting out their role as officers of the court<sup>4</sup> because ADR is perceived as a positive streamlining, cost-cutting mechanism, assisting the efficiency of the court infrastructure with conflict resolution management.<sup>5</sup>

Whether advising clients on ADR is based on a lawyer's duty to act in their clients' best interests or on their duty to the legal system, it is clear that negotiating settlements on behalf of clients and advising clients on how to settle matters without resorting to litigation is part of current legal practice. Spencer asserts that it is a component of legal professional responsibility for lawyers to advise their clients on

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<sup>1</sup> See, eg, Ian Ramsay, 'Ethical Perspectives on the Practice of Business Law' (1992) 30 (5) *Law Society Journal* 60, 61; Christine Parker, 'A Critical Morality for Lawyers: Four Approaches to Lawyers' Ethics' (2004) 1 *Monash University Law Review* 49, 56.

<sup>2</sup> Melissa Conley Tyler and Naomi Cukier argue that negotiation is a key skill for legal practice. See, eg, Melissa Conley Tyler and Naomi Cukier, 'Nine Lessons for Teaching Negotiation Skills' (2005) 15 (1&2) *Legal Education Review* 61.

<sup>3</sup> *Ibid.*

<sup>4</sup> Gina E. Dal Pont, 'Lawyer's Duty to Encourage Settlement' (2004) 79 *Law Institute Journal* 80.

<sup>5</sup> Mediation in the Supreme Court, <[http://www.supremecourt.vic.gov.au/CA256CC60028922C/page/Support+Services-Mediation?OpenDocument&1=80-Support+Services~&2=10-Mediation~&3=~](http://www.supremecourt.vic.gov.au/CA256CC60028922C/page/Support+Services-Mediation?OpenDocument&1=80-Support+Services~&2=10-Mediation~&3=~http://www.supremecourt.vic.gov.au/CA256CC60028922C/page/Support+Services-Mediation?OpenDocument&1=80-Support+Services~&2=10-Mediation~&3=~)> at 22 February 2007

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ADR options.<sup>6</sup> This view is endorsed by the Law Council of Australia in the *Model Rules of Professional Conduct and Practice* (2002)<sup>7</sup> which has been adopted by the representative bodies of legal practitioners in most Australian jurisdictions.<sup>8</sup> However, the integration of ADR into legal practice carries with it ethical tensions. How does the ADR approach of collaborative problem solving fit in with the competitive strategy of the adversarial system? Will the ADR approach jeopardise a client's chance of winning the case and therefore ethically compromise the lawyer or will it lead to a 'better' outcome?<sup>9</sup>

Another reason for the centrality of lawyers in ADR is that lawyers fulfill a lynchpin role in court-connected dispute resolution processes, in particular mediation.<sup>10</sup> The increase in ADR processes<sup>11</sup> and the growing institutionalisation of ADR have enmeshed ADR practice with legal practice. Fitzgerald predicts that the Australian government will, before long, follow the lead of the United Kingdom (UK) government in directing all government agencies to settle legal disputes by ADR wherever possible.<sup>12</sup>

Due to the key role of lawyers in conflict resolution, they are, in reality, 'dispute resolution gatekeepers'.<sup>13</sup> Sourdin states that few litigation lawyers have not had ADR exposure, and that 'every court and tribunal within Australia now has some reference to ADR processes'.<sup>14</sup> Hedeem and Coy posit that, in an increasingly litigious society,

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<sup>6</sup> David Spencer, 'Liability of Lawyers to Advise on Alternative Dispute Resolution Options' (1998) 9 *Australian Dispute Resolution Journal* 292, 299.

<sup>7</sup> Rule 12.3 states that: A practitioner must where appropriate inform the client about the reasonably available alternatives to fully contested adjudication of the case unless the practitioner believes on reasonable grounds that the client already has such an understanding of those alternatives as to permit the client to make decisions about the clients' best interests in relation to the litigation.

<sup>8</sup> See, eg, Victoria, New South Wales, South Australia, Australian Capital Territory and Northern Territory.

<sup>9</sup> Scott R. Peppet, 'ADR Ethics' (2004) 54 *Journal of Legal Education* 1, 72.

<sup>10</sup> Kathy Douglas, 'Mediation as Part of Legal Education: the Need for Diverse Models' (2005) 24(1) *The Arbitrator & Mediator* 1.

<sup>11</sup> Tania Sourdin, 'To the Bench or Across the Table?' (2006) 13 *Lawyers Weekly*, 18.

<sup>12</sup> Tony Fitzgerald, 'Down with Adversarial Behaviour' (2006) 10 *Lawyers Weekly*, 14.

<sup>13</sup> Frank E. A Sander, 'The Future of ADR The Earl F Nelson Memorial Lecture' (2000) 1 *Journal of Dispute Resolution* 3, 8

<sup>14</sup> Tania Sourdin, *Alternative Dispute Resolution* (2005) 14. For example, under Order 50.07 of Chapter I of the Supreme Court of Victoria Rules, the parties to litigation can be ordered by the Court to proceed to mediation, with or without the parties' consent.

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ADR does not provide an alternative to the courts but rather an alternative to the courtroom.<sup>15</sup> ADR re-enforces the concept of the 'multidoor court-house',<sup>16</sup> yet the viability of such a system within the complex and interrelated Australian court hierarchy is problematic.<sup>17</sup>

In recognition of the centrality of ADR to legal practice, ADR courses have become part of the curricula in law schools, particularly in the US and Australia.<sup>18</sup> The development is a testament to the increasing acceptance of ADR by lawyers throughout the court system both in Australia and overseas.<sup>19</sup> Twenty-first century lawyering increasingly requires practitioners to use skills such as principled negotiation, collaborative bargaining and problem solving<sup>20</sup> and to show familiarity with processes such as mediation, conciliation and arbitration.

A complementary social development is the erosion of the traditional paternalistic role of professionals generally in relation to their clients/patients. Whereas, historically, professionals such as lawyers and doctors were empowered by their expertise and perceived status to conduct professional practice in an authoritative manner, in recent times there has been a marked cultural shift. The culture of consumerism and the demands of litigation brought by clients/patients against professionals have contributed to professional practice being increasingly sensitive to notions such as 'shared decision-making'.<sup>21</sup> Dal Pont considers that the rise of consumerism has 'heralded ... a marked decrease in client loyalty and a willingness to question the

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<sup>15</sup> Timothy Hedeem and Patrick G. Coy, 'Community Mediation and the Court System: The Ties That Bind' (2000) 17(4) *Mediation Quarterly* 351, 362, referring to Jennifer Beer, *Peacemaking in Your Neighbourhood: Reflections on an Experiment in Community Mediation* (1986) 206.

<sup>16</sup> *Ibid* 352.

<sup>17</sup> Sourdin, above n 11, 104.

<sup>18</sup> *Ibid* 2.

<sup>19</sup> Laurence Boulle, 'In and Out the Bramble Bush: ADR in Queensland Courts and Legislation' (2004) 22 *Law in Context* 93, 103.

<sup>20</sup> See, eg, Roger Fisher, William Ury and Bruce Patton, *Getting to Yes* (2<sup>nd</sup> ed, 1991).

<sup>21</sup> See, eg, Judith Gutman, 'The Right Not to Know: Patient Autonomy or Medical Paternalism' (2000) 7 *Journal of Law and Medicine* 286, 290.

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once unquestionable'.<sup>22</sup> The trend accords with the client empowerment model which underlies ADR theory and practice.<sup>23</sup>

Moreover, there is a growing awareness and recognition that professional legal practice requires more than just expertise in 'black letter' law.<sup>24</sup> Consequently, practice-oriented legal skills such as advocacy and client interviewing are being taught at law schools throughout the world along side substantive and theoretical law subjects,<sup>25</sup> and clinical education programs are growing.<sup>26</sup>

Joy remarks that a major thrust in the development of clinical education programs in the 1960s was the accepted view that traditional legal education techniques were fairly ineffective in imbuing professional standards, including legal ethics and professional responsibility.<sup>27</sup> Peden and Riley contend that since the 1987 publication of the Pearce Report criticising traditional law school curricula, contemporary best practice legal education values an orientation concerned with 'what lawyers need to be able to do' not just 'what lawyers need to know'.<sup>28</sup> Menkel-Meadow explains that legal education initiatives seeking 'to understand and teach what lawyers actually do' justify the plethora of negotiation courses in law schools through the United States (US) and the UK.<sup>29</sup> Furthermore, Menkel-Meadow claims that it is no longer enough to just study legal doctrine and procedure in law school.<sup>30</sup> Learning about dispute and conflict resolution and how to make transactions happen involves many disciplines

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<sup>22</sup> Gino E. Dal Pont, *Lawyers' Professional Responsibility* (3<sup>rd</sup> ed, 2006) 12.

<sup>23</sup> Laurence Boulle, *Mediation Principles Process Practice* (2<sup>nd</sup> ed, 2005) 224.

<sup>24</sup> See, eg, Ross Hyams, Susan Campbell and Adrian Evans, *Practical Legal Skills* (2<sup>nd</sup> ed, 2004); See also, Jeff Giddings, 'Using Clinical Methods to Teach Alternative Dispute Resolution: Developments at Griffith University' (1999) 10 (3) *Australasian Dispute Resolution Journal* 206.

<sup>25</sup> Mary Anne Noone and Judith Dickson, 'Teaching Towards a New Professionalism: Challenging Law Students to become Ethical Lawyers' (2004) 4 *Legal Ethics* 127.

<sup>26</sup> Ibid 113; Conley Tyler and Cukier, above n 2, 63.

<sup>27</sup> Peter A. Joy, 'The Ethics of Law School Clinic Students as Student Lawyers' (2004) 45 *South Texas Law Review* 815.

<sup>28</sup> Elizabeth Peden and Joellen Riley, 'Law Graduates' Skills-A Pilot Study into Employers' Perspectives' (2005) 15 *Legal Education Review* 87, 88: citing Australian Law Reform Commission Report No 89 (Canberra: AGPS, 2000) [ 2.21].

<sup>29</sup> Carrie Menkel-Meadow, 'Lawyer Negotiations: Theories and Realities-What We Learn From Mediation' (1993) 56 *The Modern Law Review* 361.

<sup>30</sup> Carrie Menkel-Meadow, 'Dispute Resolution : Raising the Bar and Enlarging the Canon' (2004) 54 *Journal of Legal Education* 4

(eg economics, sociology, psychology and philosophy) which should encourage law teachers to consider more varied ways of teaching.<sup>31</sup>

Even though clinical education programmes generally, and ADR education specifically, have taken a firm hold in academia, the legal profession may not be receiving the pedagogical developments with unequivocal enthusiasm. Peden and Riley conclude from their pilot study<sup>32</sup> aimed at gauging employers' assessments of what skills are important to them when hiring law graduates, that employers favour 'black letter law' knowledge over practical skills because employers believe the latter can be learnt 'on the job'. This finding casts aspersions on the clinical education direction of many law schools especially when clinical education is so resource hungry. However, the limitations of the pilot study are acknowledged by its authors, namely that the sample size was small and the respondents self selected from the control group.<sup>33</sup>

The interface between ADR and legal practice is entrenched and multi-factorial, providing the *raison d'etre* for ADR being part of the law school curriculum.

### **III HOW IS ADR TAUGHT IN LAW SCHOOL?**

Although the nexus between ADR and contemporary legal practice is apparent, and despite law schools being receptive to including ADR in their curricula, no uniform teaching method has been universally accepted. This notwithstanding, simulated exercises have been praised because they engage students in practical skills application. Furthermore, the integration of ADR education into core subjects rather than teaching discrete ADR courses is lauded so as to avoid disconnecting and isolating ADR material.<sup>34</sup>

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<sup>31</sup> Ibid 5.

<sup>32</sup> Peden and Riley, above n 28, 118.

<sup>33</sup> Ibid 119.

<sup>34</sup> See David below.

Moore and Tomlinson describe an early example of ADR training in a law school. Although not classified as ADR instruction, two universities attempted to discover whether bargaining skills could be taught by involving students in simulated bargaining problems. They also sought to discover whether the exercises would contribute to the educational development of third year law students. *Labor Law* students participated in three negotiations involving three different types of negotiation problems<sup>35</sup> with each student spending approximately 34 hours at the bargaining table over the three sessions. The results of the experiment reflected the traditional law schooling the students had experienced as techniques related to active partisanship rather than problem solving were used. The authors conclude that the traditional materials and methods used in law school may leave the graduating students with a curiously lopsided attitude to the problem solving aspects of law.<sup>36</sup> One of the suggestions to improve law training was to use more role plays and teach communication skills, with a special emphasis on nonverbal communications.<sup>37</sup>

Another and more recent view about teaching ADR is posed by Bush. Bush supports the move by many law schools to introduce introductory courses on ADR into their curricula by integrating ADR into standard courses in an attempt to avoid marginalising the ADR subject. He notes that in addition to the traditional teaching method of a lecture or seminar-discussion session, a simulation exercise is now a widespread and accepted way to teach the processes.<sup>38</sup>

Moberley<sup>39</sup> comments that there has been a gradual rise in ADR activity in American law schools and that accreditation standards now recommend ADR methods be

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<sup>35</sup> Denton R. Moore and Jerry Tomlinson, 'The Use of Simulated Negotiation to Teach Substantive Law' (1969) 21 *Journal of Legal Education* 579, 580-581.

<sup>36</sup> Ibid 579.

<sup>37</sup> Ibid 586.

<sup>38</sup> Robert A. Baruch Bush, 'Using Process Observation To Teach Alternative Dispute Resolution: Alternatives to Simulation' (1987) 39 *Journal of Legal Education* 46.

<sup>39</sup> Robert B. Moberley, 'Introduction: Dispute Resolution in the Law School Curriculum: Opportunities and Challenges' (1998) 50 *Florida Law Review* 583.

included in the professional skills curriculum.<sup>40</sup> Moberley's literature review canvasses the diverse labours to incorporate ADR into law school curricula. Past efforts include adopting ADR units into mainstream courses, adding new courses such as negotiation, mediation, mediation clinics or general ADR courses, or a combination of all of these options.<sup>41</sup>

In the Australian context, Giddings describes the Griffith University Law School method of teaching ADR as having a strong focus on clinical skills.<sup>42</sup> The subject assessed by Giddings comprised a one-week intensive<sup>43</sup> teaching workshop followed by a seminar series. Students were then placed with the ADR Branch of the Queensland Department of Justice and Attorney-General. Giddings positively evaluates the Griffith program and emphasises the importance of clinical legal ADR education because it encourages lawyers to provide the parties to a dispute with a wide range of possible solutions, emphasising the need for lawyers to consider the what, where, why, when and how of disputes.<sup>44</sup>

David's classification of ADR teaching methodology provides interesting insights resulting from her anecdotal experience teaching ADR to undergraduate and postgraduate students in Australian law schools.<sup>45</sup> David devises four ways to teach ADR in law schools comprising a four rung scale, descending in her perception of quality of outcomes. In option one (Utopia) ADR is taught as an integral part of the undergraduate degree such as in Criminal Law or Contract classes. The benefit of this approach, as Bush points out above, is that all students would regard ADR as part of

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<sup>40</sup> Ibid 585; From 1983 on, the American Bar Association (ABA) Section on Dispute Resolution has periodically surveyed law schools about their ADR pursuits. In 1983, 43 law schools or about 25 per cent of law schools were offering ADR courses. In 1986, the majority of ABA approved law schools were reported to be offering courses or clinics on ADR. By 1989, 550 courses in ADR were provided in 174 law schools. A 1997 survey identified 714 courses being offered in 177 schools. The data indicates that almost all law schools were offering dispute resolution courses, most with multiple offerings.

<sup>41</sup> Ibid 587.

<sup>42</sup> Jeffrey Giddings, 'Using Clinical Methods to Teach Alternative Dispute Resolution: Developments at Griffith University' (1999) 10(3) *Australasian Dispute Resolution Journal* 206.

<sup>43</sup> Ibid.

<sup>44</sup> Ibid 213.

<sup>45</sup> Jennifer David, 'Integrating Alternative Dispute Resolution (ADR) in Law Schools' (1991) 2 *Australian Dispute Resolution Journal* 5.

the law subject, thus ADR is not on the fringe of legal education.<sup>46</sup> Option two involves teaching ADR in the introductory law course, introducing students to concepts, processes and some skills. These aspects of ADR can then be taught again in later subjects; particularly final year subjects.<sup>47</sup> The third option focuses on ADR being taught outside the normal undergraduate subjects. The students undertake to participate in one or two days per year of a skills course which is taught alongside and parallel to the core subjects. Outside dispute resolution experts could teach the course to prevent courses from becoming too theoretical.<sup>48</sup> David's final option consists of making the basic ADR course optional which would mean the majority of students would not study ADR at all.<sup>49</sup>

From the above, it is evident that, there are several ways, varying in degree of quality, to deliver ADR education in law schools. Teaching method is affected by many factors including acceptance of ADR by those who control curriculum content as well as fiscal considerations. Whilst the content and delivery mode of ADR education is important, a key consideration in teaching method is the effect of the teaching on students and how this translates to legal practice.

#### **IV WHAT IS THE EFFECT OF TEACHING ADR IN LAW SCHOOL?**

In 1984, Riskin and Westbrook<sup>50</sup> initiated an integrated method of teaching *Dispute Resolution* to law students at the University of Missouri. The program was the first in the US to 'infuse dispute resolution instruction into the standard first year curriculum'.<sup>51</sup> The program's principal two goals were, first, to equip new lawyers with an understanding of what ADR activities were. Secondly, Riskin and Westbrook believed that teaching ADR could potentially remedy weaknesses in traditional legal

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<sup>46</sup> Ibid 6.

<sup>47</sup> Ibid 7.

<sup>48</sup> Ibid.

<sup>49</sup> Ibid.

<sup>50</sup> Professors of Law at the University of Missouri-Columbia School of Law. Riskin was also Director of the Centre for the Study of Dispute Resolution.

<sup>51</sup> Ronald M. Pipkin, 'Teaching Dispute Resolution in the First Year of Law School: An Evaluation of the Program at the University of Missouri-Columbia.' (1998) 50 *Florida Law Review* 610.

education,<sup>52</sup> namely, the ideas of the lawyer as ‘hired gun’ rather than ‘problem solver’, and the pervasive assumption that most disputes are resolved in court or pursuant to a rule of law.<sup>53</sup> Broadly, the aim of the program was ‘to prepare students to serve clients and society better’,<sup>54</sup> illustrating Riskin’s attitude towards lawyering, and his value judgment that lawyers who practice law under the umbrella of ADR theory are benefiting society and their clients. Riskin’s approach contrasts with the approach taken by lawyers who see themselves as client advocates and who perceive the collaborative philosophy underlying ADR as compromising their ability to obtain a ‘win’ for their client.

Riskin et al devised a plan to integrate dispute resolution into all standard first year courses at the University, commencing 1985.<sup>55</sup> Called The Missouri Plan, the project produced books, an instructors' manual, videotapes etc to support the interviewing, counselling, negotiation and mediation programs that were integrated into all first year law subjects at the law school.

The Missouri Plan became the basis for implementing a similar project conducted in six other law schools in the US. From 1995-1997 the University of Washington, DePaul, Hamline, Ohio State, Inter-American and the University of Tulane adapted The Missouri Plan for teaching in their law schools<sup>56</sup> focussing on three main teaching goals: 1) to understand that the lawyer’s principal job is to help the client solve the client’s problem; 2) to understand the differences and relationships between adversarial and problem-solving orientations towards disputes and transactions; and 3) to understand the principal characteristics, advantages and disadvantages of dispute resolution processes and when each method may be appropriate.<sup>57</sup> In order to achieve

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<sup>52</sup> Leonard L. Riskin and James E. Westbrook, ‘Integrating Dispute Resolution Into Standard First Year Courses: The Missouri Plan’ (1999) 39 *Journal of Legal Education* 509.

<sup>53</sup> Ibid 514.

<sup>54</sup> Pipkin, above n 51.

<sup>55</sup> Leonard L. Riskin, ‘Disseminating the Missouri Plan to Integrate Dispute Resolution into Standard Law School Courses’ (1998) 50 *Florida Law Review* 590.

<sup>56</sup> Ibid 591.

<sup>57</sup> Ibid 594.

these goals, ADR activities were integrated in subjects such as *Legal Research and Writing* and *Torts*.<sup>58</sup>

At Ohio State University some first-year *Property* students had been trained in mediation prior to the program commencing. These students and a control group were followed up to measure the impact of this training. Preliminary findings suggest that the group with the mediation training were more inclined to use mediation than the control group.<sup>59</sup>

Riskin's research raises two important points that cry out for further research in the areas of legal professional practice and legal education. First, why has ADR been so widely accepted by the legal system? Is it because the ADR movement offers a different and superior view of conflict resolution or is it simply because ADR offers a cheaper and faster method of resolving disputes? The second issue raised by the research goes to the essence of teaching ADR in law school. Riskin describes the unique concept of the 'lawyers' standard philosophical map' that seems to be present in law schools '... [w]ith its assumptions that disputants are always adversaries and that a third party is required to apply a rule of law to reach a decision making it difficult to change both law students and law teachers attitudes'.<sup>60</sup> If law students are inculcated with adversarial and rights-based approaches to conflict resolution by all the law subjects in the curriculum except for ADR subjects, how can law students' attitudes towards conflict resolution change from adversarial to collaborative? How can ADR theory ever be translated into the practice of law?

Evaluations on the project were carried out by Pipkin.<sup>61</sup> Despite the assessment being performed before the program was fully developed, Pipkin was able to document, very early, a high acceptance of the idea of the lawyer as a problem solver.<sup>62</sup>

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<sup>58</sup> Ibid 592.

<sup>59</sup> Riskin, above n 55, 604.

<sup>60</sup> Riskin and Westbrook, above n 52, 520.

<sup>61</sup> Ibid 516.

<sup>62</sup> Ibid.

Pipkin's study focussed on students' learning the culture of professional legal education and on the processes of professionalisation.<sup>63</sup> He surveyed students to see what impact the course had on the students' learning, i.e. did the course alter the effects of the dominant influences in legal education that predispose students toward understanding the lawyer's role as primarily adversarial, urging their clients to litigate? The survey also enquired into the culture of professional legal education and the methods of professionalisation.<sup>64</sup>

The results of Pipkin's evaluation indicated that after taking ADR courses students believed ADR was essentially a concept tied to the cost of litigation and the need for such options was strictly pragmatic. Students used the terms 'ADR' and 'settlement' interchangeably so clients had a choice between litigation and settlement depending on how much justice they could afford. Pipkin felt that some of the teaching had resulted in this narrow view of when ADR could be used so the sense of the marginal role ADR played in professional practice was reinforced.<sup>65</sup>

Pipkin suggests that when law schools incorporated ADR into their curricula, they intended to bring the ideas and training of the external ADR movement into their schools and to find aspects in ADR approaches and techniques that might be appropriate for ordinary legal practice.<sup>66</sup> Pipkin believes this goal was successfully achieved by the Missouri program. The phrase 'dispute resolution' was substituted for 'alternative dispute resolution' and litigation became just another form of a multitude of ways to resolve disputes (eg mediation, arbitration, negotiated settlement) rather than being used as the primary reference.<sup>67</sup> It 'deprivileged' litigation as the status quo and resulted in ADR in legal education being given credibility. Dispute resolution became lawyers' work rather than the activity of those outside the legal profession (mediators, therapists) who were actively building the ADR movement. This resulted in discussions with what Pipkin called 'traditional colleagues' about when litigation is

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<sup>63</sup> Riskin, above n 55, 611.

<sup>64</sup> Ibid

<sup>65</sup> Ibid 642-3.

<sup>66</sup> Ibid 650.

<sup>67</sup> Ibid 651.

or is not the best option. Subsequently, this prompted thought about the meaning of 'best option', 'best' being defined in terms of disputants' interests rather than rules, laws or theories of justice. Pipkin concludes that for mainstream lawyers to accept this view is a big step.<sup>68</sup>

Other observations about the program's success were based on impressions rather than empirical data. This notwithstanding, most students seemed enthusiastic about engaging in more advanced work in ADR and were keen to include it in their professional practices. Most students were sensitised to the notion of lawyers reviewing available alternative processes with their clients. Not surprisingly, some students were more able to question the basic and often unspoken assumptions in legal education.

Importantly, Riskin and Westbrook maintain that the evaluation was unable to show how many students were affected by the program, nor the extent to which they were affected and whether the program will change their attitudes toward, or behaviour in, law practice in the face of lawyers' traditional attitudes.<sup>69</sup>

Coben maintains that although the result of implementing the Missouri Plan at Hamline University was positive,<sup>70</sup> he is not convinced that the goal of the curricular innovations,<sup>71</sup> influencing student perceptions of a lawyer's work, has been achieved. He discusses the problem of overcoming the imprints of Riskin's 'standard philosophical map of lawyering' and how this idea is continually reinforced by the traditional curriculum. He believes that ADR teachers face the monumental task of encouraging critical examination by first year students of the foundational assumptions of professional identity.<sup>72</sup> Disappointing reports from lecturers or

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<sup>68</sup> Ibid 652.

<sup>69</sup> Riskin and Westbrook, above n 52, 516–7.

<sup>70</sup> James R. Coben, 'Summer Musings on Curricular Innovations to Change the Lawyer's Standard Philosophical Map' (2003) 50 *Florida Law Review* 735, 736.

<sup>71</sup> Ibid.

<sup>72</sup> Ibid 737.

mentors about students in three different courses confirmed how powerful the message of the dominant lawyering paradigm was.<sup>73</sup>

Coben confronts the dissonance between theoretical discussions about the promise of ADR in the classroom and the reality of mediation practice.<sup>74</sup> He blames the 'theoretical straightjacket' for the disparity between theory and practice, and stresses that young lawyers should use the collaborative problem-solver, rather than the adversarial, positional-bargainer as their way of viewing the world in general. He is convinced that mediation training, because it emphasises empathy and effective listening as well as other skills necessary for 'client-centred' lawyering, should be the centre of the ADR effort to imprint a different standard philosophical map.<sup>75</sup>

Coben notes that many third year students have said they feel 'damaged' by the law school experience. When debriefing clinic students who were emotionally detached and lacked client empathy, Coben asked whether they would have responded this way prior to law school. Most replied no.<sup>76</sup> This finding presents a scathing criticism of the law school experience and legal education, especially because the students had undertaken ADR courses at law school. It would be interesting to compare this finding with that of a control group to ascertain the effect, if any, of the life experiences of the Coben group on the results.

Hamline University, in an attempt to evaluate whether different levels of ADR content result in different student perceptions of lawyering, administered a modified 'Problem-Solving vs Adversarial Orientations Toward Lawyering' survey to the entire 1996-97 class during orientation and again at the end of first year. All of the sections<sup>77</sup> showed increases in the problem-solving orientations while the group from the all-day section, where most ADR related activities were conducted, showed the greatest

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<sup>73</sup> Ibid 739.

<sup>74</sup> Ibid 740.

<sup>75</sup> Ibid 741.

<sup>76</sup> Ibid 743.

<sup>77</sup> Ibid 744 –7.

increase in problem-solving orientation responses and the highest overall 'problem-solving' orientation at the end of the year.

How successful were these law schools in achieving the central teaching goals of the Missouri Plan? 'Each of the participating schools made substantial progress,' although what was accomplished varied from school to school.<sup>78</sup> Riskin states that despite great progress the 'lawyers' standard philosophical map' still held true. He is hopeful that one day this will change.<sup>79</sup>

Savage's qualitative study of ADR teaching in two law schools<sup>80</sup> concludes that ADR courses 'put back everything law school took out', reintegrating humanity and common sense into the dispute resolution process.<sup>81</sup> Her conclusions and recommendations<sup>82</sup> strongly favour the study of ADR in law schools, especially as law schools provide a forum for potentially reaching all future lawyers. Savage contends that if lawyers understand ADR while still having litigation as a tool to assist clients, they will be able to assess cases and use the processes that benefit their clients most.<sup>83</sup> This proposition is supported by Sander<sup>84</sup> and Zariski,<sup>85</sup> who assert that some established legal practitioners lack knowledge about ADR processes in contrast to more recent professional admittees who experienced the benefit of ADR education in law school.

Nolan-Haley and Volpe's qualitative study,<sup>86</sup> based on their experiences teaching *Mediation and the Law* for four years, claims that knowledge of mediation enhances

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<sup>78</sup> Riskin, above n 55, 601.

<sup>79</sup> Ibid 607.

<sup>80</sup> The University of New Mexico School of Law and the Denver College of Law.

<sup>81</sup> Cynthia Savage, 'Future Lawyers: Adversaries or Problem Solvers? Two Law Programs in Alternative Dispute Resolution' (1989) 7(1) *Mediation Quarterly* 90, 98.

<sup>82</sup> Ibid 99-101.

<sup>83</sup> Ibid 100.

<sup>84</sup> Frank E. A. Sander, 'The Future of ADR: The Earl F. Nelson Memorial Lecture' (2000) 1 *Journal of Dispute Resolution* 7.

<sup>85</sup> Archie Zariski, 'Lawyers and Dispute Resolution: What Do They Think And Know (And Think They Know)? Finding Out Through Survey Research' (1997) 4(2) *E Law Murdoch University Electronic Journal of Law* 1.

<sup>86</sup> Jacqueline M Nolan-Haley and Maria R Volpe, 'Teaching Mediation As a Lawyering Role' (1989) 39 *Journal Of Legal Education*, 572.

law students' lawyering skills, even if they never mediate in practice, by enabling them to think in a problem-solving mode and to consider underlying needs and interests. The writers believe that, even within adversarial practice, if lawyers have been exposed to the mediative perspective, they may recall the value of taking the broadest view of possible issues and interests involved in a specific case, thereby improving their ability to help clients develop solutions to their problems. The authors conclude that teaching mediation as a lawyering role helps students develop a more comprehensive theory of lawyering than they might have acquired. It can even help law teachers clarify and possibly redefine what it means to be a lawyer and highlight the relevance of law in resolving conflicts.<sup>87</sup>

Medley and Schellenberg surveyed a group of Indiana attorneys to try and ascertain their attitudes towards civil (non divorce) mediation and divorce mediation. They contend that knowledge of attitudes may be useful in understanding and predicting practitioners' behaviour.<sup>88</sup> As background information, they note that Indiana had been placed 50<sup>th</sup> in a survey of the most litigious states in the US. The president of the Indiana State Bar Association attributed this low number of lawsuits to the State's use of court-ordered ADR.<sup>89</sup>

Nearly 70 per cent of the Medley and Schellenberg survey respondents believed that mediation helps attorneys and the parties to better understand both the strengths and weaknesses of their cases.<sup>90</sup>

During data analysis many variables (eg, age, income, gender, type of practice, size of practice etc) were considered when looking for differences regarding attitudes towards mediation.<sup>91</sup> The only factor indicating a strong relationship was years of practice – mainly explained in terms of age, with age being the most potent

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<sup>87</sup> Ibid 586.

<sup>88</sup> Morris L. Medley and James A. Schellenberg, 'Attitudes of Attorneys Toward Mediation' (1994) 12(1) *Mediation Quarterly* 185.

<sup>89</sup> Ibid 186.

<sup>90</sup> Ibid 192.

<sup>91</sup> Ibid 197.

background or practice variable for predicting mediation attitudes.<sup>92</sup> The number of years since graduating from law school was linked with age at the time of the survey and these two variables correlated with a negative attitude to mediation.<sup>93</sup> The strength of age as a variable was consistent with the idea that legal innovations were more easily accepted by the younger members of the bar.<sup>94</sup>

The writers conclude that Indiana attorneys were generally knowledgeable regarding mediation, open-minded about the value of mediation to clients and the legal system, and were experienced in working with mediation.

Lerman examines the teaching of ADR in American law schools in the 1980s and questions the way ADR has been taught in some centres.<sup>95</sup> She criticises the ADR content in law school courses, stating that a more traditional lawyering focus is being presented. Despite the many options to teach a variety of processes, especially mediation, many courses just concentrate on negotiation and arbitration skills. She examines the importance of determining the course attitude to the relationship between alternatives to the court and civil litigation and whether this issue has been included in the curricula. Lerman feels that ADR needs to be taught with the class focus on developing a critical attitude to the choice of forum, 'particularly if the choices involve divesting the parties of counsel, legal advice, public hearing and an enforceable remedy'. Alternatively, she suggests that ADR courses that teach the informal aspects of the adversary system may provide an invaluable introduction to lawyering. Lerman also recognises the use of experiential exercises and the use of ADR material in courses such as *Civil Procedure*, as a very positive way of changing students' perceptions of themselves as prospective lawyers.<sup>96</sup>

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<sup>92</sup> Ibid 195.

<sup>93</sup> Ibid 193.

<sup>94</sup> Ibid 197.

<sup>95</sup> Lisa G. Lerman, 'The Teaching Of Alternative Dispute Resolution' (1987) 37(1) *Journal of Legal Education* 38.

<sup>96</sup> Ibid 39.

Lerman queries whether ADR course content is being used to impart lawyering skills and processes that are not being adequately covered elsewhere in the curriculum.<sup>97</sup> However, Lerman concludes that including ADR curricular material, especially participatory simulation in *Civil Procedure* courses, is a very positive way of changing students' perceptions of themselves as prospective lawyers.<sup>98</sup>

Brest describes an experimental program involving first-year law students at Stanford University in 1982. He focuses on the *Lawyering Process* which was taught through simulated clinical exercises, work in small groups and classroom instruction,<sup>99</sup> and he advocates that the course should be made a standard part of the first year curriculum at Stanford University and other law schools. Brest reasons that the subject acts as a counterbalance to traditional doctrinal courses which focus on technical analytical skills and exert strong professionalising influences for first year students, tending to close students to human and social concerns. Brest contends that the problem is exacerbated by summer clerkships at law firms coupled with the anxieties of second year job-hunting, which induce cynicism as well as a narrowing of careerism. He believes that by focusing on these issues at the outset of a law course possibly some students will approach their professional education and practice more reflectively.<sup>100</sup>

Although Phillips' study is profession based his conclusions highlight the interface between professional legal practice and legal education. Phillips considers the evolution of the use of mediation in civil litigation in Missouri. The US District Court for the Western District of Missouri (federal jurisdiction) mandated the use of ADR procedures from 1992 on, whereas the Missouri Supreme Court (state jurisdiction) from 1989 permitted but did not require ADR programs.<sup>101</sup> The experience of his clients, which is supported by empirical data derived from the Western District of Missouri federal court program, was that the mandatory ADR program was quicker,

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<sup>97</sup> Ibid 38.

<sup>98</sup> Ibid 40.

<sup>99</sup> Paul Brest, 'A First-Year Course in the "Lawyering Process"' (1982) 32 *Journal of Legal Education* 344.

<sup>100</sup> Ibid 350.

<sup>101</sup> John R. Phillips, 'Mediation as One Step in Adversarial Litigation: One Country Lawyer's Experience' (2002) 1(1) *Journal of Dispute Resolution* 143.

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cheaper and more satisfactory than expected.<sup>102</sup> In the voluntary ADR program, parties were often not given meaningful opportunities to mediate as the attorneys often failed to recognise when mediation was appropriate or attorneys were reluctant to suggest mediation as this historically was seen as a sign of weakness in the case.<sup>103</sup> Phillips observes that in the last decade, ADR processes in general and more specifically mediation have become both highly indispensable and a very effective tool for advocates in civil litigation. He commends 'those law schools that have had the vision to incorporate ADR use and advocacy into their curriculum...'<sup>104</sup> 'and to courts that encourage or require its use as a step in, not a substitute for, the adversarial process'.<sup>105</sup>

Much less research has focused on Australia. Zariski's Western Australian Dispute Resolution Survey in 1996 was an attempt to discover lawyers' attitudes to ADR practice in Australia. The questionnaire was sent to members of the Western Australian Law Society in a regular monthly mail out of their magazine *Brief*.<sup>106</sup> Four hundred and eighteen responses were received.

Zariski's enquiry does not have a specific legal education focus, his but study is pertinent to legal education. This is because in making an assessment whether certain legal skills should form part of law school curricula, on the basis that the skills are necessary for legal practice, knowledge levels of legal practitioners and practitioners' attitudes are cogent so that universities can tailor courses that will be of optimal value to students, the lawyers of the future.<sup>107</sup>

Zariski's premise is that although professional groups such as lawyers may share a set of ideas and beliefs, characterised as a 'culture' or 'sub-culture' sharing common

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<sup>102</sup> Ibid 143.

<sup>103</sup> Ibid 144.

<sup>104</sup> Ibid 153.

<sup>105</sup> Ibid 154.

<sup>106</sup> Archie Zariski, 'Lawyers and Dispute Resolution: What Do They Think and Know (And Think They Know)? Finding Out Through Survey Research' (June 1997) 14(2) *ELAW Murdoch University Electronic Journal Of Law* <<http://www.murdoch.edu.au/elaw/issues/v4n2/zaris422.html>> at 15 February 2007

<sup>107</sup> Ibid 3.

values, it is possible that they may not be a homogeneous group in some aspects eg, their attitude toward ADR.<sup>108</sup>

Zariski's survey was directed to the question of lawyers' views about how ADR activities play, or do not play, a role in shaping how they (the lawyers) think about themselves as legal professionals.<sup>109</sup> Survey questions probed lawyers' professional and training histories, their experience (or lack of) in ADR and their attitudes and beliefs in relation to ADR processes.<sup>110</sup>

Zariski found that most respondents did not consider ADR activities as lower status or demeaning work. A large percentage of respondents indicated that their firms had no policy to consider ADR processes or to incorporate provisions for ADR alternatives in legal documents they draft. Less than one-fifth of all respondents had received some instruction in ADR processes before being admitted to practice. Zariski saw this finding as an opportunity for law schools, as despite years of practice, many practitioners had never received any ADR training.<sup>111</sup>

Based on his survey results and similar findings of others around the world, Zariski argues that there has been a change in how or what lawyers think about ADR. While numerous studies (including his) show that most lawyers are favourably disposed towards ADR practices, others indicate that the majority of lawyers do not voluntarily choose these alternatives when they are offered. Zariski believes that '...legal education now increasingly incorporates instruction in alternative processes such as mediation. Yet, studies show that such education does little to encourage students to use these processes when they become lawyers'.<sup>112</sup>

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<sup>108</sup> Ibid 4.

<sup>109</sup> Ibid.

<sup>110</sup> Ibid 5.

<sup>111</sup> Ibid 10.

<sup>112</sup> Archie Zariski, 'Disputing Culture: Lawyers and ADR' (June 2000) 7(2) *E Law Murdoch University Electronic Journal of Law*  
<<http://www.murdoch.edu.au/elaw/issues/v7n2/zariski72.html>> as at 22 February 2007.

Zariski<sup>113</sup> considers the broader question of assessing ‘a mindset amongst lawyers – a legal culture, and its relations to the norms, ideas and practices of ADR expressed through beliefs, attitudes, and values that help lawyers identify themselves as professionals with a special role in society.’<sup>114</sup> He considers shared conceptions amongst people otherwise differentiated in their personal circumstances as a strong clue to the existence of an identifiable culture but asks whether criminal and business lawyers, sole practitioners and partners from large firms or urban and rural lawyers have the same shared attitude and beliefs in relation to their work? If so, a professional legal culture can be identified.<sup>115</sup>

Question 13 of Zariski’s survey asked, ‘Should any disputes go through dispute resolution processes which do not involve a judge’s binding decision?’ Ninety-eight percent of legal practitioners who responded answered ‘yes’.<sup>116</sup> Zariski contends that while the research suggests a major change in legal practice in favour of ADR is taking place, the data does not necessarily establish that a change of a cultural nature has occurred.<sup>117</sup> Nevertheless Zariski asserts that some survey findings and indeed his own ‘...do at least indirectly yield some evidence for the existence and impact of a disputing culture....’ defined as ‘...a complex of practices, together with shared ideology, beliefs, values and attitudes that help lawyers identify themselves as professionals concerned with resolving conflict in society’.<sup>118</sup>

In Zariski’s opinion, there is evidence emerging of a new legal disputing culture, that is, ADR theory is becoming part of a professional legal culture, a shared value or attitude that helps to define what it means to be a lawyer.<sup>119</sup>

Responses to other questions related to the legal profession and ADR do not correlate with differences in personal characteristics of lawyers surveyed. ‘However, analysis

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<sup>113</sup> Ibid 4.

<sup>114</sup> Ibid.

<sup>115</sup> Ibid.

<sup>116</sup> Ibid 20.

<sup>117</sup> Ibid 5.

<sup>118</sup> Ibid 6.

<sup>119</sup> Ibid.

reveals that the factor of the year of admission to the bar does appear to be weakly correlated with some beliefs or attitude towards ADR held by Western Australian lawyers'.<sup>120</sup> The correlation between years of practice and attitudes to ADR processes emerged in surveys by Medley and Schellenberg and Wissler's study<sup>121</sup> as well as in Zariski's survey.<sup>122</sup> These findings pose interesting questions for research about the effect of ADR courses taught at law school on professional legal practice as the inclusion of ADR subjects into Australian law school curricula has taken place over the last ten years. To what extent have the courses dislodged Riskin's 'standard philosophical map'?

## V CONCLUSION

The amalgamation of ADR and legal practice has translated effectively into legal education, evidenced by the plethora of ADR courses in law schools in Australia and overseas. The growth of ADR courses underscores the significance of ADR in legal practice and the need for lawyers to adopt a client-centred focus to legal practice and learn skills fundamental to ADR practice such as negotiation and collaborative problem solving.

Although the need for ADR education in law school has been recognised and acted upon, the effect of the ADR input presents persistent questions for legal educators and the legal profession. Do ADR courses counter the rights –based, adversarial approach taught to students in the 'black letter' law subjects which comprise the bulk of the law degree? Riskin and Pipkin's research referred to above, indicates that the lawyer's 'standard philosophical map' is re-in forced by most of the subjects taught in law schools, and dislodges ADR theory. Therefore, empirical research in the Australian context which tries to ascertain any changes in the attitudes of Australian law students after taking ADR subjects would be useful. Law students' attitudinal change,

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<sup>120</sup> Ibid.

<sup>121</sup> Hedeem and Coy, above n 15, 7.

<sup>122</sup> Ibid 6, 7.

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reflecting an interest-based, client-focused direction, may impact on the way law is practised in Australia.