

ADR ZEALOTS, ADJUDICATIVE ROMANTICS AND EVERYTHING IN BETWEEN: LAWYERS IN MEDIATIONS

LILLIAN CORBIN,* PAULA BARON** AND JUDY GUTMAN***

I INTRODUCTION

This article is concerned with the role and behaviour of lawyers who represent clients in mediations. The lawyer's contribution has the potential to either enhance or detract from the mediation process.¹ In particular, we focus upon the tension between the training of lawyers and the philosophy and practice of alternative dispute resolution ('ADR').

The discussion of this topic takes place within a context in which Australia's adversarial legal system has undergone radical change in recent years. Access to justice is no longer confined to a court system. There is a broader view of justice that extends beyond courts.² In fact, Spencer's empirical study of the number of civil trials commencing in the New South Wales ('NSW') District Court over the period from 1990 to 2004 points to a 'vanishing trial phenomenon'.³ Courts have

* Associate Professor, School of Law, University of New England, Armidale.

** Professor, School of Law, La Trobe University, Melbourne.

*** Senior Lecturer, School of Law, La Trobe University, Melbourne. The authors wish to thank the anonymous reviewers for their comments on earlier drafts, which helped to clarify and develop the arguments in the article.

1 See Mary Anne Noone, 'Lawyers as Mediators: More Responsibility?' (2006) 17 *Australasian Dispute Resolution Journal* 96.

2 Tania Sourdin, 'A Broader View of Justice' in Michael Legg (ed), *The Future of Dispute Resolution* (LexisNexis Butterworths, 2013) 155.

3 David Spencer, 'The Vanishing Trial Phenomenon' (2005) 43(8) *Law Society Journal* 58. See also Marc Galanter, 'The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts' (2004) 1 *Journal of Empirical Legal Studies* 459.

been joined, and in some cases modified by, a range of ADR mechanisms, particularly mediation.⁴ Former Chief Justice Gleeson famously remarked:

People who live in a community where justice is administered in public may easily overlook the fact that there are many places where that is not so. So much decision making, including governmental decision making, takes place in private, that the public need to be reminded of how unusual the judicial process is in this respect.⁵

Despite these very significant changes, lawyers are primarily trained in the adversarial system. Because of this training, those who are called to act for clients in ADR often find it difficult to embrace the philosophy and methodology of ADR. This is particularly so when mediation is involved in the pre-trial protocol that is legislatively required.⁶ By reason of their training and inclinations, many lawyers tend to struggle with the collaborative process of mediation. In this article, we suggest that lawyer engagement in the mediation process is heavily influenced by the lawyer's personal views of mediation. Lawyers who represent clients in mediation can range from those who could be categorised as 'ADR zealots' – those who abhor adversarialism, and who are passionate adherents of ADR, resolving issues by reference to the clashing interests of the parties rather than rights⁷ – to those who are 'adjudicative romantics' – those who favour adjudication.⁸ While it is our view that the current law school curriculum and the personality types of lawyers suggest that there is an over-representation of lawyers who subscribe to the adjudicative romantics style of lawyering, we suggest that the introduction of legal education initiatives and what we believe are more directive professional rules which have recently been introduced may raise the profile of mediation to law graduates. In other words, rather than being persuaded that litigation is the principal problem-solving method, law graduates will give equal credence to ADR methods.

4 We adopt the National Alternative Dispute Resolution Advisory Council ('NADRAC') definition of ADR as 'an umbrella term for processes, other than judicial determination, in which an impartial person assists those in a dispute to resolve the issues between them': NADRAC, *Dispute Resolution Terms* (Paper, September 2003). While this definition is still very useful it should be noted that this organisation has been disbanded. We rely on what has come to be regarded as the classic definition of mediation provided by Folberg and Taylor. Mediation is 'the process by which the participants, together with the assistance of a neutral person or persons, systematically isolate disputed issues in order to develop options, consider alternatives, and reach a consensual settlement that will accommodate their needs': Jay Folberg and Alison Taylor, *Mediation: A Comprehensive Guide to Resolving Conflicts without Litigation* (Jossey-Bass, 1984) 7.

5 Chief Justice Murray Gleeson, 'Judicial Accountability' (1995) 2 *Judicial Review* 117, 123.

6 Tania Sourdin, 'Five Reasons Why Judges Should Conduct Settlement Conferences' (2011) 37 *Monash University Law Review* 145, 165.

7 Hazel Genn, *Judging Civil Justice* (Cambridge University Press, 2010) 83.

8 Chief Justice Wayne Martin, 'Managing Change in the Justice System' (Paper presented at the 18th AIJA Oration, Brisbane, 14 September 2012) 17 <http://www.supremecourt.wa.gov.au/_files/AIJA_Oration_%20Managing_Change_in_the_Justice_System_Martin_CJ_Sept_2012.pdf>.

Before proceeding, first, a note about terminology: in this article, we accept the inherent difficulties in defining mediation, and acknowledge the usefulness of Boule's 'model' approach in dealing with these 'definitional issues'.⁹ Boule acknowledges the vagaries of defining mediation in both theoretical and practice-based terms. Because of varied application and practice, Boule identifies key aspects of mediation, relying on four 'models' of mediation: settlement, facilitative, transformative and evaluative.¹⁰ The 'model' construct assists in describing theory and practice, yet avoids rigidity, allowing both for overlap between models, as well as creativity and innovation. Using Boule's framework, our article is primarily concerned with the facilitative model of mediation, and when we mention mediation, it is to this paradigm that we refer.¹¹

Secondly, we wish to stress that, while focussing upon mediation, there is no intention in this article to advocate the proposition that ADR should replace courts. Nor do we wish to be seen as suggesting that courts ought to operate similarly to the ADR environments or that ADR should be used more extensively than is currently the case. The last four decades have witnessed an evolution in the interrelationship between formal court-based adjudication and a variety of ADR processes. Yet, Locke's assertion that the adjudication of disputes by neutral judges was the most important benefit of civilisation, remains, in our view, persuasive.¹² Moreover, as French CJ has emphasised, '[i]t is the courts and only the courts which carry out the adjudication function involving the exercise of judicial power. ... the courts are not to be seen simply as one species of provider among a number of providers of ADR services'.¹³ Importantly, Legg and Mirzabegian emphasise several positive aspects of litigation, including public policy perspectives such as procedural protections, and the availability of urgent relief remedies.¹⁴ Other factors might also include the courts as an avenue for test cases, continuing their important normative role.

Thirdly, while the discussion focuses primarily on Australia, because the topic and issues are just as relevant to other jurisdictions, there will be references to empirical and other literature from Canada, the United States and the United

9 Laurence Boule, *Mediation – Principles, Process, Practice* (LexisNexis, 3rd ed, 2011) 25.

10 Ibid 44.

11 Ibid 46.

12 Roy McMurtry, *Memoirs and Reflections* (University of Toronto Press, 2013) 181. See also Albert W Alschuler, 'Mediation with a Mugger: The Shortage of Adjudicative Services and the Need for a Two-Tier Trial System in Civil Cases' (1986) 99 *Harvard Law Review* 1808, 1985; Wendy McElroy, *Defining State and Society: Definitions Can Shift Dramatically Depending on the Theoretical Approach of the Speaker* (1 April 1998) Foundation for Economic Education <<http://fee.org/freeman/detail/defining-state-and-society>>.

13 Chief Justice Robert French, 'Perspectives on Court Annexed Alternative Dispute Resolution' (Speech delivered at the Law Council of Australia Multi-Door Symposium, Canberra, 27 July 2009) <<http://www.hcourt.gov.au/assets/publications/speeches/currentjustices/frenchcj/frenchcj27july09.pdf>>.

14 See Michael Legg and Sera Mirzabegian, 'Appropriate Dispute Resolution and the Role of Litigation' (2013) 38 *Australian Bar Review* 55.

Kingdom. We acknowledge that the conclusions of some of these international authors may need to be applied cautiously to Australian lawyers, who arguably may have greater exposure to pre-litigation ADR, and ADR in general, than lawyers in some other jurisdictions.

The article begins by outlining the goals and methods of mediation, contrasting these with adjudication. It will then turn to the notion of lawyers representing clients in mediation sessions, considering the impact of 'lawyer-as-problem-solver' in mediation; and the variables that may impact on the lawyer's behaviour in representing clients in mediation, including lawyer personalities, mediation ideal types and conflict styles. The article concludes by considering the potential impact of legal education and professional rules on lawyers' engagement in mediation processes.

II THE BENEFITS OF MEDIATION

The adjudication process is central to the judicial arm of government and is founded on the traditional legal rights-based adversarial model, driven by legal entitlements and remedies, governed by strict rules of procedure and evidence, and underpinned by the principles of natural justice and the rule of law. The adversarial paradigm of justice is underscored by a struggle between the opposing parties within the confines of the legalistic parameters set by cases and legislation. The judge is a passive arbiter who imposes binding decisions on the parties both in criminal and civil jurisdictions.¹⁵ Judicial intervention in the process is limited in the traditional adversarial model of justice. Decision-making is subject to the doctrine of precedent. Courts are open and public and therefore subject to public scrutiny, and trials are conducted by a neutral and impartial third party who hears all parties according to specific rules.¹⁶

Despite the entrenched nature of adjudication, the growth and acceptance of mediation as a dispute resolution process in both the public and private sectors can be explained as a reaction to the perceived drawbacks of the adjudicative model of justice: court backlogs lead to frustrating delays in hearings; litigation is time-consuming, stressful and very expensive;¹⁷ reliance on procedural and evidentiary rules means that litigation confines disputes to narrow legal boundaries, ignoring the human element of most disputes.¹⁸

15 Guy Cumes, 'Separation of Powers, Courts, Tribunals and the State' (2008) 19 *Australasian Dispute Resolution Journal* 10, 11.

16 Stephen Bottomley and Simon Bronitt, *Law in Context* (Federation Press, 3rd ed, 2006) 67.

17 See David Rood, 'Justice Out of Reach, Says Hulls', *The Age* (Melbourne), 10 June 2008, 1. See also NADRAC, 'A Framework for ADR Standards' (Report, April 2001) 25 [2.61].

18 Jack M Sabatino, 'ADR as "Litigation Lite": Procedural and Evidentiary Norms Embedded within Alternative Dispute Resolution' (1998) 47 *Emory Law Journal* 1289, 1349.

Proponents of ADR argue that layers of legal positions can often be peeled back to reveal disputants' 'needs, wants, and interests' which are best achieved through dialogue.¹⁹ They argue that non-legal issues are often important in dispute resolution. Uncovering 'interests' and humanising the legal process, it is argued, provides a pathway for law to work as a therapeutic agent.²⁰ The inclusion of 'extralegal concerns' recognises the broad power of law and its potential as a healing agent and an agent of change.²¹ In sharp contrast to determinative processes, mediation, particularly facilitative mediation, where 'parties come to agreements based on information and understanding ... [after hearing] each other's points of view',²² focuses on uncovering interests and fleshing out disputants' fears and anxieties with a view to expanding the 'zero-sum game'²³ characteristic of the adversarial contest. In litigation, one side's gain necessarily means a loss for the other side, whereas in mediation, a 'win-win' result may be achievable for all disputants.²⁴ In fact, NADRAC reported that '[o]ne of the most frequently identified benefits relating to mediation as an alternative to court action is the avoidance of stress, tension and the trauma of a possible court hearing'.²⁵

While the intrinsic value of mediation as a humanistic process that satisfies basic human needs is discussed below, we note the importance of the reparative perspective of the consensus-building collaborative problem-solving philosophy that underpins purist mediation theory. This framework addresses individual human concerns. It also spearheads a community-based interface, broadening the justice system from court-based processes to ADR.²⁶

Furthermore, litigants who believe that they do not 'own' their disputes often experience feelings of alienation and powerlessness.²⁷ Stakeholder dissatisfaction with the litigation process and litigated outcomes is common, and not limited to the civil justice forum.²⁸ In the criminal justice context, both victims and offenders are often dissatisfied with the traditional criminal justice 'just deserts'

19 Deborah Tannen, *The Argument Culture: Moving from Debate to Dialogue* (Random House, 1998) 288, cited in David B Wexler, 'Therapeutic Jurisprudence and the Culture of Critique' (1999) 10 *Journal of Contemporary Legal Issues* 263, 265.

20 David B Wexler, 'Therapeutic Jurisprudence and the Criminal Courts' (1993) 35 *William and Mary Law Review* 279, 280.

21 Susan Daicoff, 'Law as a Healing Profession: "The Comprehensive Law Movement"' (2006) 6 *Pepperdine Dispute Resolution Law Journal* 1, 4.

22 Zena Zumeta, 'Styles of Mediation: Facilitative, Evaluative, and Transformative Mediation' on *Mediate.com: Mediators & Everything Mediation* (September 2000) <<http://www.mediate.com/articles/zumeta.cfm>>.

23 Martin E P Seligman, Paul R Verkuil and Terry H Kang, 'Why Lawyers Are Unhappy' (2005) 10 *Deakin Law Review* 49, 60.

24 Ibid 61.

25 NADRAC, 'A Framework for ADR Standards', above n 17, 26 [2.64].

26 Michael King et al, *Non-Adversarial Justice* (Federation Press, 2009) 13.

27 See Nils Christie, 'Conflicts as Property' (1977) 17 *British Journal of Criminology* 1, 1.

28 See John Kleinig, *Ethics and Criminal Justice: An Introduction* (Cambridge University Press, 2008) 208.

paradigm.²⁹ Moreover, the narrow rights-based framework does not address the complex social context of crime. Sentencing options such as incarceration do not necessarily reduce recidivism.³⁰ While, theoretically, one aim of the criminal law may be to rehabilitate offenders, this goal cannot be achieved by sentencing options that do not address the multifaceted nature of criminality.

Restorative justice addresses several drawbacks of the traditional rights-based criminal justice model through the application of mediation principles and practice in the criminal law context. King et al describe victim–offender mediation as an opportunity for a facilitated conversation between victim and offender aimed at ‘victim healing, offender accountability, and restoration of losses’.³¹ Their review of the literature concludes that empirical studies point to positive outcomes from restorative justice processes, such as victim–offender mediation. Research data evidences ‘high levels’ of satisfaction for victims and offenders.³²

Another reason for the success of mediation derives from the inherent strength of the process. In contrast to litigation, mediation is generally seen as inexpensive and quick,³³ although Spencer and Hardy caution against making broad-brush conclusions because of the diverse nature of the mediation field and the varied applications of the process.³⁴ Mediation encourages stakeholders to participate in the process. This powerful characteristic of mediation leads to increased stakeholder satisfaction, because it addresses the human condition, namely the individual’s desire to reduce suffering.³⁵ Bush and Folger refer to the ‘satisfaction story’³⁶ of ADR: due to ‘its flexibility, informality ... consensuality’³⁷ and non-reliance on legal rules, mediation can expand a dispute and satisfy the human needs associated with conflict and disputation.³⁸

29 Charles K B Barton, *Restorative Justice: The Empowerment Model* (Hawkins Press, 2003) 16.

30 Richard Edney and Mirko Bagaric, *Australian Sentencing: Principles and Practice* (Cambridge University Press, 2007) 45.

31 King et al, above n 26, 40, quoting Mark S Umbreit, Robert B Coates and Betty Vos (2004) ‘Victim–Offender Mediation: Three Decades of Practice and Research’ 22 *Conflict Resolution Quarterly* 279, 280.

32 King et al, above n 26, 64.

33 Shirli Kirschner and David Moore, ‘What’s the Problem?’ Choosing an Optimal ADR Process for Resolution of Conflict’ in Michael Legg (ed), *The Future of Dispute Resolution* (LexisNexis Butterworths, 2013) 96; Peter Condliffe, *Conflict Management: A Practical Guide* (LexisNexis, 4th ed, 2012) 121–2.

34 David Spencer and Samantha Hardy, *Dispute Resolution in Australia: Cases, Commentary and Materials* (Lawbook, 3rd ed, 2014) 251.

35 Robert A Baruch Bush and Joseph P Folger, *The Promise of Mediation: The Transformative Approach to Conflict* (John Wiley & Sons, revised ed, 2005) 9.

36 Ibid. The authors refer to several other distinguished authors who ascribe to the ‘satisfaction story’ of mediation’, including Susskind, Mnookin, Folberg and Menkel-Meadow: at 11.

37 Ibid 9.

38 Ibid.

III LAWYERS IN MEDIATIONS

Traditionally, the lawyer's role was primarily to represent clients in court proceedings. The significance of lawyers to the operation of the legal process is emphasised by the *Legal Profession Act 2004* (Vic). The then Victorian Attorney-General, in the second reading speech of the Bill, described the legal profession as being the 'principal source of legal assistance' and therefore as playing 'an important role in the way that justice and the rule of law are delivered and perceived'.³⁹ The delivery of justice has evolved, however, and continues to do so. Adjudication no longer monopolises dispute resolution. With the growth of ADR, lawyers are increasingly the gatekeepers of a range of dispute resolution processes within the legal system.⁴⁰ They are now just as likely to act as representatives of clients in mediations.⁴¹ Importantly, legal practice in the collaborative, interest-based, client-focussed, ADR environment differs significantly from legal practice in the traditional rights-based adversarial context. Lawyers' training and inclination, however, may make the smooth transition to this new practice environment difficult.

A The 'Core' of Lawyering: Problem-Solving

The lawyering role is best described as that of problem-solver: '[l]awyering means problem-solving. Problem-solving involves perceiving that the world we would like varies from the world as it is and trying to move the world in the desired direction'.⁴² The emphasis upon problem-solving skills could lead to the conclusion that lawyers are well-suited to assist clients in either an adjudicative or an ADR environment. However, problem-solving in the adjudicative context is likely to call on skills of advocacy and interpretation of legal rules with a view to winning the case; whereas, in the non-determinative environment, problem-solving may require dialogue and negotiation, a thought process that expands the topic to cover a broader range of interests.

There has been acknowledgement of the fact that problem-solving in different contexts requires different skills and approaches. For instance, the Preamble to the American Bar Association *Model Rules of Professional Conduct* provides:

As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As advocate, a lawyer zealously asserts the client's position under the rules of the

39 Victoria, *Parliamentary Debates*, Legislative Assembly, 16 November 2004, 1541 (Rob Hulls, Attorney-General).

40 Frank E A Sander, 'The Future of ADR' [2000] *Journal of Dispute Resolution* 3, 8.

41 Noone, above n 1. This practice is well accepted and the Law Council of Australia has issued guidelines for lawyers in mediations: Law Council of Australia, *Guidelines for Lawyers in Mediations* (2011) <<http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/a-z-docs/MediationGuidelines.pdf>>.

42 Gerald P López, 'Lay Lawyering' (1984) 32 *UCLA Law Review* 1, 2.

adversary system. As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealings with others. As an evaluator, a lawyer acts by examining a client's legal affairs and reporting about them to the client or to others.⁴³

The 'lawyer-as-problem-solver' can play a valuable role in mediations: in many instances, the parties will have 'unequal levels of education, financial means, and sophistication',⁴⁴ and the presence of lawyers can ameliorate that situation. If lawyers are not present, then it may fall to the mediator to draw up a draft agreement which the parties may need to take to their lawyers, thus delaying approval of the agreement or increasing the possibility that one of the parties will rethink the matter and reject the agreement altogether.⁴⁵ One writer has identified the benefit of lawyer involvement as the potential for obtaining discovery. This provides information needed by the client to make an informed and reasoned decision prior to settlement; and allows the lawyer to give good advice. Without a clear understanding of the client's specific circumstances, it is 'difficult, if not virtually impossible, for a lawyer to offer a professional opinion' as '[i]nformation derived solely from the client is often unreliable or incomplete'.⁴⁶

In representing parties at a mediation, '[t]he aim is to assist [parties] to understand each other's point of view and reach an agreement or resolution that is acceptable to them and in which their needs are met'.⁴⁷ This latter approach is thus said to be interest-based and operates in an integrated mode where it is assumed there 'is a willingness to resolve rather than a fight to win'.⁴⁸ Unlike litigation, it assumes that the disputants will play an integral role. They are to be participants, not just passive observers of lawyers acting on their behalf.

The *Guidelines for Lawyers in Mediations*, produced by the Law Council of Australia, support this understanding. They suggest that each party, in preparing for the mediation, 'should identify what the dispute is about, what their interests and concerns are, which should not be limited to their legal rights, and what are the likely and realistic outcomes'.⁴⁹ If parties choose to have their legal representatives present, then they 'should be there to assist his or her client to make reasonable and genuine attempts to resolve the dispute'.⁵⁰

43 American Bar Association, *Model Rules of Professional Conduct* (at 2004) Preamble [2].

44 Elena B Langan, "'We Can Work It Out': Using Cooperative Mediation – a Blend of Collaborative Law and Traditional Mediation – To Resolve Divorce Disputes' (2011) 30 *Review of Litigation* 245, 272.

45 Ibid 273.

46 Ibid 275.

47 Anne Ardagh and Guy Cumes, 'Lawyers and Mediation: Beyond the Adversarial System?' (1998) 9 *Australian Dispute Resolution Journal* 72, 73.

48 Ibid.

49 Law Council of Australia, above n 41, 7 [8].

50 Ibid 6 [7].

As Michael Kirby has said: ‘ADR is only as good as its practitioners’.⁵¹ We turn now to consider ways in which lawyer training or inclination may detrimentally affect the mediation process.

B Lawyer Training

The training of lawyers has attracted some negative comment in recent years, particularly in relation to its lack of focus on professional skills and values.⁵² NADRAC also produced a major report, the aim of which was to encourage ‘law schools to consolidate and increase the level of ADR law and skills teaching within the Australian law curriculum, as well as giving further consideration to best practice approaches in relation to how ADR knowledge and skills should be taught’.⁵³ We agree that the ways in which law schools present ADR to students requires some thought.

In essence, it is argued that ‘[l]egal education is very much a socialization process’,⁵⁴ and that students are trained to follow the adversarial model whenever they are representing clients. Sturm and Guinier assert that students are inculcated into a culture that ‘over-emphasizes adjudication and discounts many of the important global, transactional, and facilitative dimensions of legal practice’;⁵⁵ and encourages students to compete and conform.⁵⁶ This culture, it is suggested:

emerges from the adversarial idea of law that is inscribed in the dominant pedagogy. It is reinforced by the prevailing metrics of success, which rank students through relentless public competitions (for grades, jobs, law journals, moot court, and clerkships) ...⁵⁷

Further, the requirement that Australian law schools must teach the Priestley 11, a set of doctrinal subjects, represents to students that they should primarily

51 Michael Kirby, ‘Alternative Dispute Resolution – A Hard-Nosed View of Its Strengths and Limitations’ (Paper presented at the Institute of Arbitrators & Mediators Australia, South Australian Chapter, Adelaide, 29 July 2009) 8 <http://www.michaelkirby.com.au/images/stories/speeches/2000s/2009+/2377.Iama_-_Sa_Chapter_Agm_July_2009.pdf>.

52 See William M Sullivan et al, *Educating Lawyers: Preparation for the Profession of Law* (Jossey-Bass, 2007); see also Paula Baron and Lillian Corbin, ‘Thinking like a Lawyer/Acting like a Professional: Communities of Practice as a Means of Challenging Orthodox Legal Education’ (2012) 46 *Law Teacher* 100.

53 NADRAC, *Teaching Alternative Dispute Resolution in Australian Law Schools* (2012) 3 <<http://www.ag.gov.au/LegalSystem/AlternateDisputeResolution/Documents/NADRAC%20Publications/teaching-alternative-dispute-resolution-in-australian-law-schools.pdf>>.

54 Adam M Dodek, ‘Canadian Legal Ethics: A Subject in Search of Scholarship’ (2000) 50 *University of Toronto Law Journal* 115, 125.

55 Susan Sturm and Lani Guinier, ‘The Law School Matrix: Reforming Legal Education in a Culture of Competition and Conformity’ (2007) 60 *Vanderbilt Law Review* 515, 516.

56 Ibid.

57 Ibid 519–20.

aim to pursue the skills of argument employing the substantive law.⁵⁸ However, Mark argues that the focus of traditional legal education on black letter doctrine means that graduates are poorly prepared for practice.⁵⁹ The focus upon substantive content and argument skills in legal education is, it is argued, fundamentally misplaced, as the preponderance of the work done by lawyers in the 21st century marketplace is not accomplished in court, but in ‘advising clients on important matters, and mainly in business affairs’, often in the ADR context.⁶⁰ This means that lawyers need rather different skills:⁶¹ effective leadership, ability to communicate in a multidisciplinary market, and stress tolerance, self-motivation and creativity.⁶² Mansfield and Trubek illustrate what this means when they assert that ‘new’ lawyering means lawyers using data and new technologies and taking on new roles such as collaborators (a multidisciplinary approach); evaluators (evaluating the effectiveness of legal services and being willing to develop more user-friendly services, eg, self-help assistance); and as strategic facilitators (facilitating opportunities for non-lawyer community stakeholders to be heard and negotiating solutions to issues).⁶³

While the law school’s culture is influential, the personality traits of individual lawyers are also significant in influencing lawyer conduct.

C Individual Personality Traits

As a generalisation, lawyers appear to be more inclined to adversarial processes – acting as adjudicative romantics. The basis for this assertion is Daicoff’s study, with its explanations of lawyer personalities and consequent behaviour.⁶⁴ Daicoff finds that ‘[l]awyers appear to be more competitive, aggressive, and achievement-oriented, and overwhelmingly Thinkers (instead of Feelers), as compared to the general population’.⁶⁵

The reference to ‘thinkers’ and ‘feelers’ relates to the Myers-Briggs Type Indicator (‘MBTI’). This test categorises an individual’s decision-making

58 See Tania Sourdin, ‘Not Teaching ADR in Law Schools? Implications for Law Students, Clients and the ADR Field’ (2012) 23 *Australasian Dispute Resolution Journal* 148.

59 Steve Mark, ‘Legal Education and the 21st Century Graduate’ (Paper presented at the Continuing Legal Education Association of Australasia 2008 Conference – Raising the Bar – Professional Development for Legal Education Professions, Sydney, 16 October 2008) 1 <http://www.olsc.nsw.gov.au/agdbasev7wr/olsc/documents/pdf/legal_education_21st_century_law_graduate.pdf>.

60 Ibid 4. See also Judy Gutman and Matthew Riddle, ‘ADR in Legal Education: Learning by Doing’ (2012) 23 *Australasian Dispute Resolution Journal* 189.

61 Judy Gutman, Silvia McCormack and Matthew Riddle, ‘ADR in Legal Education: Evaluating a Teaching and Learning Innovation’ (2014) 25 *Australasian Dispute Resolution Journal* 100, 100.

62 Mark, above n 59, 4.

63 Marsha M Mansfield and Louise G Trubek, ‘New Roles To Solve Old Problems: Lawyering for Ordinary People in Today’s Context’ (2011–12) 56 *New York Law School Law Review* 367, 372–83.

64 Susan Daicoff, ‘Lawyer, Know Thyself: A Review of Empirical Research on Attorney Attributes Bearing on Professionalism’ (1997) 46 *American University Law Review* 1337.

65 Ibid 1408.

according to their preferences for extraversion/introversion, sensing/intuitive, thinking/feeling and judgment/perception.⁶⁶ Richard and Bell, the leading MBTI researchers, define the distinction between thinking and feeling as follows:

Those who prefer to make decisions on the basis of Thinking prefer to come to closure in a logical, orderly manner ... They are excellent problem solvers. They review the cause and effect of potential actions before deciding. Thinkers are often accused of being cold and somewhat calculating because their decisions do not reflect their own personal values. They focus on discovering truth, and they seek justice. Those who prefer to make decisions on the basis of Feeling apply their own personal values to make choices. They seek harmony and, therefore, are sensitive to the effect of their decisions on others. ... They seek to do what is right for themselves and other people and are interested in mercy.⁶⁷

Randall also offers a useful distinction between thinking and feeling: '[p]ersons who prefer thinking decide impersonally on the basis of logical consequences. Individuals who prefer feeling rely on judgments that are based on personal and social values'.⁶⁸ Landwehr observes that someone aligned to a thinking approach makes decisions primarily on rules, as opposed to considerations of what is morally right and wrong.⁶⁹

If this is so, as a general proposition, these traits would suggest that lawyers are more suited to litigation than mediation. Indeed, it is probably fair to say that lawyers generally are better known for their pursuit of rights for their clients, than for their encouragement of clients to consider the consequences of their actions in terms of personal and social values. In fact, lawyers may very well argue – 'I don't want to have a moral dialogue. The client didn't hire me to be a philosopher. If he [or she] wants that kind of advice he [or she] can go to a priest'.⁷⁰

Perhaps even the clients have a preference for lawyers to simply do what they want. For instance, it is understandable that '[c]lients will not exactly flock to a

66 Vernellia R Randall, 'The Myers-Briggs Type Indicator, First Year Law Students and Performance' (1995) 26 *Cumberland Law Review* 63, 75.

67 Susan J Bell and Lawrence R Richard, 'Anatomy of a Lawyer: Personality and Long-Term Career Satisfaction' in Susan J Bell (comp), *Full Disclosure: Do You Really Want To Be a Lawyer?* (Peterson's Guides, 1992) 149, 152, cited in Susan Daicoff, '(Oxymoron?) Ethical Decisionmaking by Attorneys: An Empirical Study' (1996) 48 *Florida Law Review* 197, 217–8.

68 Randall, above n 66, 91.

69 Lawrence J Landwehr, 'Lawyers as Social Progressives or Reactionaries: The Law and Order Cognitive Orientation of Lawyers' (1982) 7 *Law and Psychology Review* 39, 50–1.

70 Austin Sarat, 'Enactments of Professionalism: A Study of Judges' and Lawyers' Accounts of Ethics and Civility in Litigation' (1998) 67 *Fordham Law Review* 809, 819–20.

lawyer who creates obstacles to the achievement of client aims'.⁷¹ Therefore, lawyers who have been trained to zealously pursue their clients' rights in litigation may find it difficult and in fact less than acceptable to pursue their clients' goals according to the principles of mediation.

D Lawyers' Perceptions of Mediation

Studies suggest that some lawyers will act in an adversarial manner even when they are representing their clients in an interest-based collaborative problem-solving milieu, and this has much to do with lawyers' perceptions of mediation.⁷²

1 Lawyers and 'Ideal Types'

With the introduction of mandatory early mediation, Macfarlane conducted an empirical study to gauge its impact on commercial litigators. She sought an answer to the question:⁷³ what do these commercial litigators think about mediation? Macfarlane identified five different perspectives, or as she categorises them, 'ideal types', that is, ideal in the sense of 'the conceptual nature of the types'.⁷⁴ These types are 'a set of attitudes and values towards mediation and adjudication rather than actual individuals'.⁷⁵ Although Macfarlane notes that the

71 Sharon Dolovich, 'Ethical Lawyering and the Possibility of Integrity' (2002) 70 *Fordham Law Review* 1629, 1665. It may also be the case that clients themselves are averse to ADR. For the complexities of this issue in the family law context, see Jill Howieson, 'The Professional Culture of Australian Family Lawyers: Pathways to Constructive Change' (2011) 25 *International Journal of Law, Policy and the Family* 71, 82–4. The problem has been observed internationally in specific contexts such as workplace disputes, where employers may be reluctant to pursue ADR: Suzy Fox and Lamont E Stallworth, 'Building a Framework for Two Internal Organizational Approaches to Resolving and Preventing Workplace Bullying: Alternative Dispute Resolution and Training' (2009) 61 *Consulting Psychology Journal: Practice and Research* 220, 232. It has also been observed internationally in the construction industry: Andrew Agapiou and Bryan Clark, 'Scottish Construction Lawyers and Mediation: An Investigation into Attitudes and Experiences' (2011) 3 *International Journal of Law in the Built Environment* 159, 168–70.

72 See, eg, Helen Rhoades et al, 'Enhancing Inter-professional Relationships in a Changing Family Law System' (Report, University of Melbourne, May 2008); Olivia Rundle, 'Barking Dogs: Lawyer Attitudes towards Direct Disputant Participation in Court-Connected Mediation of General Civil Cases' (2008) 8 *Queensland University of Technology Law and Justice Journal* 77; Christine Parker and Adrian Evans, *Inside Lawyers' Ethics* (Cambridge, 2nd ed, 2014) 206; Kathy Douglas, 'The Importance of Understanding Different Generations of ADR Practice for Legal Education' (2012) 23 *Australasian Dispute Resolution Journal* 157.

73 There were actually a series of questions including 'how the lawyer understands the nature of his relationship with his client and the client's role in dispute resolution' and 'what impact the role of the mediator has on dispute resolution processes and outcomes': see Julie Macfarlane, 'Culture Change? A Tale of Two Cities and Mandatory Court-Connected Mediation' [2002] *Journal of Dispute Resolution* 242, 259.

74 Ibid 254 refers to the meaning of 'ideal' here as that used by Weber: Max Weber, *The Protestant Ethic and the Spirit of Capitalism* (Talcott Parsons trans, G Allen & Unwin, 1930).

75 Macfarlane, above n 73, 254.

interviewees' responses suggest that lawyers may not consistently adhere to only one set of attitudes,⁷⁶ the ideal types she constructs provide some useful information for reflection. These ideal types are: the 'pragmatist', the 'true believer', 'instrumentalist', 'dismitter', and the 'opponentist'.

The 'pragmatist' views mediation as a less costly avenue to settle a matter. For this ideal type, settlement has always been the goal and they expect to be the dominant player,⁷⁷ and so all that has changed in mediation is the setting. The fact that mediations prioritise consensus-building actually promotes the goals of this lawyer, and so it could be suggested that the pragmatist sees mediation as just another model within the adversarial system,⁷⁸ in which their conduct is not 'substantially different'⁷⁹ to how they act when settling a litigation matter. This implies that the pragmatist could also be described as an adjudicative romantic.

Lawyers who are 'instrumental' or 'dismissive' may think similarly to the pragmatist, although for different reasons. The 'instrumental' lawyer sees mediation as a 'tool to be captured and used to advance the client's ... goals' and may involve 'showing up but not engaging', that is, using the mediation session as a 'fishing' exercise. In fact, it is suggested that this lawyer may appear to be taking a conciliatory role, but in fact their attitude is one of acting out a role in 'a game rather than a genuine change in orientation'.⁸⁰ The 'dismitter', too, may comply, but because they see mediation as just a 'fad', they treat the requirements as intrusive.⁸¹ This lawyer sees no difference between a mediation session and the traditional model of negotiation towards settlement.⁸² These findings suggest that lawyers categorised as instrumental or dismissive might also come within the description of adjudicative romantics.

Unlike the previous three categories the 'true believer' and the 'opponentist' are in direct conflict with each other. The 'true believers' embrace the values and goals of mediation as the favoured option to litigation and its adversarial strategies. These lawyers are transformed from adversarial advocates to facilitative agents determined to work to reach a consensus for the opposing parties.⁸³ They 'often appear as shiny-eyed evangelists for whom litigation and adjudication are horrors not to be contemplated' and take 'a zealot-like' approach to mediation that they believe 'offers a nirvana-like vision of [the] world'.⁸⁴ The opponentist, on the other hand, holds fast to the idea that lawyers should strive to win for their clients. They see their professional responsibility as

76 Ibid 319.

77 Ibid 254–5.

78 Ibid 303–4.

79 Ibid 303.

80 Ibid 256–7.

81 Ibid 257–8.

82 Ibid.

83 Ibid 256.

84 Genn, above n 7, 83.

upholding the legal rights of their clients at all costs. These lawyers see mediation as a deficient course of action where all parties must relinquish some of their rights in order to reach an agreement. In doing so, they believe that they lose control of the matter. Further, these lawyers see mediation as a 'front for government inefficiencies and a means to clear court backlogs'.⁸⁵ The oppositionists too are adjudicative romantics.

The implication for the purposes of this article, is that, in effect, lawyers who see mediation through four out of the five ideal types appear to have a strong preference for acting in an adversarial fashion. They are adjudicative romantics, that is, preferring to take a course of action that favours positional bargaining and seeks to pursue 'the legal merits of the dispute'.⁸⁶ Only the true believer has the characteristics of the ADR zealot.

2 Lawyers and 'Conflict Styles'

Goldfien and Robbennolt⁸⁷ conducted an empirical study of lawyers who use mediation, in order to ascertain how a lawyer's conflict style influenced their selection of mediator.⁸⁸ While their findings do not definitively show a clear conflict style, the underlying model and associated "'conflict handling modes" or strategic conflict preferences – competing, collaborating, avoiding, accommodating, and compromising',⁸⁹ provide some useful information regarding factors that might influence lawyer behaviour in the mediation setting. This model suggests that those who are assertive seek to satisfy their needs and interests and those who are empathetic are keen to cooperate and therefore are concerned with meeting the needs of others involved.⁹⁰

Lawyers who adopt the 'competitive' conflict style 'seek to dominate and control the interaction'; are less interested in saving the relationship of the parties; and ultimately want to win.⁹¹ This style to all intents and purposes mirrors that of the adversarial advocate (the adjudicative romantic), and depicts these lawyers as highly assertive and lacking in empathy.⁹²

Other assertive lawyers are those who adopt a 'collaborating' conflict style, but these lawyers are also highly empathetic. In effect, these lawyers want to

85 Macfarlane, above n 73, 258.

86 Ibid 309.

87 Jeffrey H Goldfien and Jennifer K Robbennolt, 'What if the Lawyers Have Their Way? An Empirical Assessment of Conflict Strategies and Attitudes toward Mediation Styles' (2007) 22 *Ohio State Journal of Dispute Resolution* 277.

88 Ibid 278.

89 Ibid 287–8. See above n 67 for a list of theorists who have accepted the credentials of this model and developed the definitions of its components.

90 Ibid 288.

91 Ibid 289.

92 See Christine Parker, 'A Critical Morality for Lawyers: Four Approaches to Lawyers' Ethics' (2004) 30 *Monash University Law Review* 49, 57.

satisfy both their own needs and those of others. It is suggested that these lawyers are inclined to invest time and resources into finding a win-win solution.⁹³ Although these lawyers are highly empathetic, the fact that they are quite assertive implies a certain dominance that may run counter to client involvement, a valued platform of mediation. Therefore, it is difficult to identify whether this group comes within the categories of adjudicative romantic or ADR zealot. Both the 'avoiding' and 'accommodating' styles are at the lower end of assertiveness, but they differ with respect to empathy. Those who have an 'accommodating' style have high empathy unlike those who take an 'avoiding' approach. The latter sidestep pointless conflict; but when necessary, they use tact and diplomacy and can artfully increase their leverage by waiting for others to make the first concession. These lawyers make an effort to win, but place very little emphasis on relationships and in doing so can miss opportunities to settle.⁹⁴ They may very well be adjudicative romantics. While the 'accommodating' lawyers are also not assertive, they are very concerned about maintaining relationships and keen to avoid any unnecessary emotional distress for anyone involved in the dispute. It is suggested that these lawyers prioritise reaching an agreement over winning and overall are in conflict with the 'competitive' lawyer.⁹⁵ In fact, this style of lawyering fits well into the mediation environment and can possibly be equated with the 'true believer' type (the ADR zealot).

The final conflict style is 'compromising'. These lawyers are not overly assertive or empathetic. However, they value fairness and expect compromise in coming to an agreement. Because these lawyers have an expectation that there will be an efficient resolution, they sometimes move too quickly to a solution, and they can miss opportunities for their clients. They may not appreciate that 'the pie' can be expanded, thereby avoiding the give and take that is inherent in the 'compromising' conflict style. This group too, is difficult to categorise conclusively.

Although we are not wedded to a particular interpretation of where each of these conflict styles sits on a continuum, from our initial analysis we would suggest that practitioners who would be categorised as 'accommodating' are probably closely aligned to the ADR zealots; the 'competing' and 'avoiding' practitioners with the adjudicative romantics and that the 'collaborating' and 'compromising' practitioners would sit somewhere in the middle.

Taking into account lawyer personalities, ideal types and conflict styles, it is not unreasonable to conclude that there are still a number of lawyers who reject, or at least find it hard to focus on, client interests or needs, sustaining relationships, and crafting solutions not centred on legal rights. This is the case even when parties they are representing are required to attend a mediation

93 Goldfien and Robbennolt, above n 87, 290.

94 Ibid 289.

95 Ibid.

session.⁹⁶ A lawyer who is reluctant to acknowledge the benefits of mediation and who uses adversarial strategies may also be a 'roadblock to mediation's growth',⁹⁷ and 'a direct impediment to the mediation process'.⁹⁸

A study of lawyer attitudes to encouraging parties to be involved in mediation provides evidence of some of these issues. The study was conducted by Rundle and involved 42 lawyers who practised in the mediation program attached to the Supreme Court of Tasmania.⁹⁹ However, it should be noted that only 13 of these practitioners mentioned direct disputant participation.¹⁰⁰ The lawyers' responses revealed:

[they] are alert to the risks of direct disputant participation and tend to protect against those risks by being the spokesperson for their client. Most lawyers perceive that advocacy is a fundamental part of their job and believe that their clients pay them to speak on the clients' behalf. Therefore, lawyers tend to discourage their clients from participating directly in court-connected mediation.¹⁰¹

The findings of the study are counterintuitive in the context of purist mediation theory which is built on a client-centred and client-empowerment model, predicated on uncovering interests rather than advocating legal positions. In fact, the findings appear to suggest that the participating lawyers are adjudicative romantics.

If it is important to continue to develop ADR mechanisms, and we believe that they are a valuable part of Australia's legal system, then it is important to think about reasons, incentives, and educational strategies that will equip new entrants to the legal profession to see mediation as an effective option for resolving disputes. In addition, it is important to stress that adversarial strategies can undermine the sought-after goals of this alternative environment to the litigation process.

96 Caputo suggests that lawyer reluctance to participating fully in court-annexed mediation is due to them perceiving it 'as a mere "stop" on the way to court': Chiara-Marisa Caputo, 'Lawyers' Participation in Mediation' (2007) 18 *Australasian Dispute Resolution Journal* 84, 87.

97 Bryan Clark, 'Lawyers' Resistance to Mediation: A Scottish Perspective' (Paper presented at the 2nd AMA Conference – Rediscovering Mediation in the 21st Century, Kuala Lumpur, 24 February 2011) 1 <<http://barcouncil.org.my/conference1/pdf/6.LAWYERSRESISTANCETOMEDIATIONASCOTTISHPERSPECTIVE.pdf>>.

98 Law Society of New South Wales, *The Law Society Guidelines for Those Involved in Mediations* (1993) 7, quoted in Bridget Sordo, 'The Lawyer's Role in Mediation' (1996) 7 *Australian Dispute Resolution Journal* 20, 24, cited in Ardagh and Cumes, above n 47, 74.

99 Rundle, above n 72. As Rundle notes, these findings are consistent with the findings of some Victorian researchers. See Elizabeth Ellen Gordon, 'Why Attorneys Support Mandatory Mediation' (1999) 82 *Judicature* 224, 227; J Gerschman, 'Pilot Study Examines Lawyer's Roles in VCAT Mediations' (2003) 7 *VCAT Mediation Newsletter* 7, 9.

100 Rundle, above n 72, 81.

101 *Ibid* 91.

IV MEDIATION AS A VIABLE OPTION

We have suggested that participation in mediation does not appear to come naturally to all lawyers. As Riskin points out, '[m]ost lawyers neither understand nor perform mediation nor have a strong interest in doing either'.¹⁰² We argue that lawyers' personalities and a lack of training goes some way to explaining this situation.

It has been suggested that '[a]sking lawyers to practise facilitative mediation is anomalous without a radical change in legal education, philosophy, training and development of skills'.¹⁰³ Hyman suggests that moving lawyers into modes of facilitative mediation is quite achievable but requires some effort: '[t]here is nothing inherent in "legal thinking" that prevents lawyers from shifting into non-adversarial frameworks in mediation. However, it is not easy to shift from one cognitive framework to another simply by wishing to do so'.¹⁰⁴ The following discussion recognises that those training to be lawyers are in fact experiencing a cultural change in which lawyers will be expected to act as advocates and as mediators, or alternatively to choose to act either as litigators or mediators in the same way that lawyers now choose to practise as solicitors or barristers.

A Cultural Change

Howieson has written suggesting that the Australian government has, for a number of years now, been endeavouring to change the culture of the Australian legal system.¹⁰⁵ She refers to the Australian Law Reform Commission's Report,¹⁰⁶ but notes that 'culture change is psychological', thus requiring those who wish to make changes 'to understand the psychology of those whose behaviour it seeks to modify'.¹⁰⁷ This suggests that an examination of lawyer personalities, ideal types and conflict styles is a useful foundation upon which to build and determine strategies that may facilitate change. Therefore, we will consider a number of factors in light of what we know about how lawyers think and solve problems.

1 *Rules of Professional Conduct*

We observed earlier that lawyers are usually categorised as thinkers and are said to have a preference for using rules to solve issues. Therefore, it follows that they will respect rules that tell them what they should do. Professional conduct rules regulate the activities of lawyers. Traditionally these rules have prioritised a

102 Leonard L Riskin, 'Mediation and Lawyers' (1982) 43 *Ohio State Law Journal* 29, 43.

103 Ardagh and Cumes, above n 47, 74.

104 Jonathan M Hyman, 'Four Ways of Looking at a Lawsuit: How Lawyers Can Use the Cognitive Frameworks of Mediation' (2010) 34 *Washington University Journal of Law & Policy* 11, 12.

105 Howieson, above n 71.

106 Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System*, (Report No 89, 2000) <<http://www.alrc.gov.au/sites/default/files/pdfs/publications/ALRC89.pdf>>.

107 Howieson, above n 71, 71.

lawyer's relations with clients, requiring them to act in the best interests of their clients, only limited by the bounds of the law. However, this directive has led to lawyers acting overzealously for clients with no or very little thought for the interests of the other parties involved, or the consequences for society generally.¹⁰⁸ Obviously this result conflicts with the goals of mediation.

As was mentioned above, the *Australian Solicitors' Conduct Rules* and the *Barristers' Conduct Rules* specifically require solicitors and barristers to discuss alternatives to litigation,¹⁰⁹ and more importantly, explicitly prioritise the lawyer's duty to the court¹¹⁰ and the administration of justice.¹¹¹ The rules now align with the situation in the common law as expressed in *Rondel v Worsley*.¹¹² It is suggested that this alters a lawyer's approach to lawyering from the 'adversarial advocate' (which prioritises the rights of the client) to lawyers acting as what some academics have termed 'responsible lawyers' (an approach where lawyers act for clients, but within the context of the interests of others and the public generally).¹¹³

In addition, the objectives of the draft *Legal Profession National Law* are to 'promote the administration of justice' by 'ensuring lawyers are competent and maintain high ethical and professional standards in the provision of legal services';¹¹⁴ to enhance 'the protection of clients of law practices and the protection of the public generally';¹¹⁵ and to empower 'clients of law practices to make informed choices about the services they access and the costs involved'.¹¹⁶ With respect to this last point, the rules are now quite directive,¹¹⁷ regarding a lawyer's obligation to inform clients of all the possible dispute resolution avenues:

A solicitor must inform the client or the instructing solicitor about the alternatives to fully contested adjudication of the case which are reasonably available to the client, unless the solicitor believes on reasonable grounds that the client already

108 See, eg, *White Industries (Qld) Pty Ltd v Flower & Hart* (1998) 156 ALR 169.

109 Law Council of Australia, *Australian Solicitors' Conduct Rules* (at June 2011) r 7.2 ('ASCR'); Australian Bar Association, *Barristers' Conduct Rules* (at 1 February 2010) r 38 ('Bar Rules').

110 Noting that the definition of 'court', included in the Glossary of Terms attached to the ASCR, includes '(h) an arbitration or mediation or any other form of dispute resolution': ASCR, Glossary of Terms (definition of 'court').

111 ASCR r 3; Bar Rules rr 5(a), (d).

112 [1969] 1 AC 191.

113 Parker, above n 92, 60–1; Lillian Corbin, 'Australian Lawyers as Public Citizens' (2013) 16 *Legal Ethics* 57.

114 National Legal Profession Reform Taskforce, *Legal Profession National Law* (Post-COAG Draft, 31 May 2011) s 1.1.3(b).

115 Ibid s 1.1.3(c).

116 Ibid s 1.1.3(d).

117 Although some might suggest that in comparison to the quite comprehensive treatment of many of the other rules, ASCR r 7.2 is quite generic.

has such an understanding of those alternatives as to permit the client to make decisions about the client's best interests in relation to the litigation.¹¹⁸

These changes to the Rules are important, but we would suggest that to support this cultural change, legal education must also be reformed.

2 Legal Education

Legal education is highly influential in shaping lawyer behaviour.¹¹⁹ Riskin outlines the 'standard philosophical map' ingrained by law school training:¹²⁰

Lawyers are trained to put people and events into categories that are legally meaningful, to think in terms of rights and duties established by rules, to focus on acts more than persons. This view requires a strong development of cognitive capabilities, which is often attended by the under-cultivation of emotional faculties.¹²¹

Riskin also states:

[There are] two assumptions about matters that lawyers handle: (1) that disputants are adversaries – ie, if one wins, the others must lose – and (2) that disputes may be resolved through application, by a third party, of some general rule of law. These assumptions, plainly, are polar opposites of those which underlie mediation: (1) that all parties can benefit through a creative solution to which each agrees; and (2) that the situation is unique and therefore not to be governed by any general principle except to the extent that the parties accept it.¹²²

There is a groundswell of support for legal education to go beyond the rigid limits set out in the black letter law subjects that reinforce the adversarial mindset.¹²³ In this regard, NADRAC has recommended a set of standards that outline the areas of knowledge, skills and ethics of ADR practitioners that could be incorporated into a law degree curriculum.¹²⁴

However, as Kirby notes, '[g]etting lawyers out of these habits is difficult and sometimes impossible'.¹²⁵ Yet there are some encouraging developments that have the potential to address the issues that have been identified. These include: the articulation of certain value statements in a set of Threshold Learning Outcomes ('TLOs') adopted by the Australian Learning and Teaching Council (now the Office of Teaching and Learning);¹²⁶ and the introduction by some law

118 *ASCR* r 7.2. *Bar Rules* r 38 is expressed similarly.

119 Julie Macfarlane, *The New Lawyer: How Settlement Is Transforming the Practice of Law* (University of British Columbia Press, 2008) 223–4. See generally: at ch 2.

120 Riskin, above n 102, 43.

121 *Ibid* 45 (citations omitted).

122 *Ibid* 44 (citations omitted).

123 Gutman and Riddle, above n 60, 189.

124 NADRAC, 'A Framework for ADR Standards', above n 17, 100 [5.3].

125 Kirby, above n 51, 11.

126 Sally Kift, Mark Israel and Rachael Field, 'Learning and Teaching Academic Standards Project: Bachelor of Laws Learning and Teaching Academic Standards Statement December 2010' (Report, Australian Learning and Teaching Council, 11 February 2011) <www.olt.gov.au/system/files/.../altc_standards.LAW_110211_rv2.pdf>.

schools of Alternative Dispute Resolution as either a core subject or an elective. We discuss each of these in turn.

(a) Threshold Learning Outcomes

In contrast to the adversarial nature of lawyering described above by Riskin, TLO 1 extends the traditional understanding of knowledge beyond legal doctrine,¹²⁷ to encompass ‘(b) the broader contexts within which legal issues arise’.¹²⁸ The explanatory notes refer to *The CALD Standards for Australian Law Schools* to suggest that these could include the ‘political, social, historical, philosophical, and economic context’,¹²⁹ and possibly ‘social justice; gender-related issues; Indigenous perspectives; cultural and linguistic diversity; the commercial or business environment; globalisation; public policy; moral contexts; and issues of sustainability’.¹³⁰

TLO 2 ‘Ethics and Professional Responsibility’ reinforces what now is the situation in both the professional conduct rules and the common law. It prioritises a lawyer’s duty to the administration of justice, thus suggesting that lawyers need to consider more than just their client’s wishes. The notes, in discussing ‘professional responsibilities of lawyers in promoting justice and in service to the community’ state: ‘[t]his element of the TLO ... points to lawyers’ roles in promoting justice and the values of fairness, legitimacy, efficacy, and equity in the legal system’. In the ADR environment, the interests of all parties, and the public more generally, ought to be considered.

Further, as noted by Douglas, collaboration approaches are encouraged.¹³¹ TLO 5 ‘Communication and Collaboration’ suggests that law graduates ‘will be able to: (a) communicate in ways that are effective, appropriate and persuasive for legal and non-legal audiences’. The notes explain this as follows:

‘Effective, appropriate and persuasive’ communication goes beyond the mere transmission of information to a passive recipient but requires a graduate to be able to listen to, engage with, and understand the needs of their audiences. Further, to communicate persuasively, a graduate will need to be able to choose the right form of communication for the particular legal context of that communication; for example, approaches to communication that are appropriate for advocacy may not suit a context in which interviewing, negotiation or mediation communication methods are appropriate.¹³²

127 Susan Douglas, ‘Humanising Legal Education: Lessons from ADR’ (2012) 23 *Australasian Dispute Resolution Journal* 216, 220.

128 Kift, Israel and Field, above n 126, 10.

129 Council of Australian Law Deans, *The CALD Standards for Australian Law Schools* (2009) 4 [2.3.3(a)] <[http://www.cald.asn.au/assets/lists/Education/CALD%20Standards%20%20Final%20Version%20as%20adopted%2017%20November%202009%20Booklet\[1\].pdf](http://www.cald.asn.au/assets/lists/Education/CALD%20Standards%20%20Final%20Version%20as%20adopted%2017%20November%202009%20Booklet[1].pdf)>, cited in Kift, Israel and Field, above n 126, 13.

130 Kift, Israel and Field, above n 126, 13.

131 Douglas, above n 127, 220.

132 Kift, Israel and Field, above n 126, 21.

Given the requirement for practitioners to advise clients of alternatives to fully contested adjudication and the strong emphasis on ADR set out in the TLOs, it is clear that law schools must take seriously the suggestions that ADR should be taught as part of the curriculum.

(b) Alternative Dispute Resolution in the Curriculum

While the above are standards that are expected to be applied by the Tertiary Education Quality Standards Agency, they are only standards – they do not determine how the standard should be achieved. The extent to which ADR is taught is a decision for each law school. For a number of years, discussions of ADR have been covered in some core subjects, and a variety of electives and clinical experiences have been included. However, more recently, some law schools have included ADR as a core subject. The latter, we suggest, is the better option. This is the option preferred by a number of authors;¹³³ and in May last year, the Law Council of Australia wrote to the Council of Australian Law Deans to support the view that ADR should be taught as part of civil procedure or as a stand-alone mandatory subject.¹³⁴ A study conducted by Fisher, Gutman and Martens has established that a student's understanding of dealing with legal disputes can favour a collaborative, problem-solving orientation once they are introduced to ADR.¹³⁵ In addition, these skills can easily be part of the transnational legal education agenda described by Hutchinson because ADR processes are widely accepted globally.¹³⁶

V CONCLUSION

It is clear that mediation is now an integral part of the legal system.¹³⁷ Indeed, in some cases it is mandatory.¹³⁸ Whether or not all lawyers will operate in a collaborative manner, according to the principles of mediation, is questionable in light of their personalities and their perspectives on mediation. However, the

133 James Duffy and Rachael Field, 'Why ADR Must Be a Mandatory Subject in the Law Degree: A Cheat Sheet for the Willing and a Primer for the Non-believer' (2014) 25 *Australasian Dispute Resolution Journal* 9.

134 Letter from Law Council of Australia to Council of Australian Law Deans, 15 May 2014.

135 Tom Fisher, Judy Gutman and Erika Martens, 'Why Teach ADR to Law Students? An Empirical Survey' (Pt 2) (2007) 17 *Legal Education Review* 67.

136 Terry Hutchinson, 'The Transnational Lawyer: GATS, Globalisation and the Effects on Legal Education' (2006) 11(2) *Australia & New Zealand Journal of Law & Education* 93.

137 The Australian Government's recent abolition of NADRAC on 8 November 2013 may appear to undermine this statement, although the Government advised that its functions were simply being absorbed into the Attorney-General's Department: Attorney-General's Department, Australian Government, *Alternative Dispute Resolution* (2015) <<http://www.ag.gov.au/LegalSystem/AlternateDisputeResolution/Pages/default.aspx>>.

138 Macfarlane, 'Culture Change?', above n 73, 247.

introduction of legal education initiatives and more directive professional conduct rules could prove influential in changing the lawyering culture.

In addition, there are those who believe that, for various reasons, lawyers will adapt to the new environment. For instance, Abel, who formulated a market control model, posits that the promotion of self-interest, as opposed to service to the community, was the motivation for the formation of the professions.¹³⁹ Macfarlane summaries Abel's views as follows:

once new knowledge and skills are recognized as legitimate and important, the profession will buy into what they regard as a significant means of ensuring their continued professional status – dominance even – in the field of dispute resolution.¹⁴⁰

Moreover, truly recognising that litigation and mediation operate in quite different ideological frameworks will, it is suggested, have the effect of genuinely offering clients the opportunity to choose where their matter will best be resolved or determined, and they can be assured of getting the benefits of both litigation and mediation. It is our view that law students whose education canvasses both litigation and mediation as legitimate elements of the legal system will better be able to determine where their interests and skills lie when they become lawyers. In other words, lawyers who choose to represent clients in mediations will operate as ADR zealots or true believers, adhering fully to the conventions of that environment. On the other hand, those who identify as adjudicative romantics will see themselves as advocates in the court system and recognise that applying adversarial tactics in mediation sessions hinders rather than facilitates the resolution of disputes.

139 See W Wesley Pue, "Trajectories of Professionalism?" *Legal Professionalism after Abel* (1990) 19 *Manitoba Law Journal* 384, 390.

140 Macfarlane, 'Culture Change?', above n 73, 247, citing Richard L Abel, *American Lawyers* (Oxford University Press, 1989).