1992

Training the Modern Lawyer: Incorporating the Study of Mediation into Required Law School Courses

Beryl Blaustone
CUNY School of Law

How does access to this work benefit you? Let us know!
Follow this and additional works at: http://academicworks.cuny.edu/cl_pubs
Part of the Law Commons

Recommended Citation
http://academicworks.cuny.edu/cl_pubs/312

This Article is brought to you for free and open access by the CUNY School of Law at CUNY Academic Works. It has been accepted for inclusion in Publications and Research by an authorized administrator of CUNY Academic Works. For more information, please contact AcademicWorks@cuny.edu.
TRAINING THE MODERN LAWYER:
INCORPORATING THE STUDY OF
MEDIATION* INTO REQUIRED
LAW SCHOOL COURSES

Beryl Blaustone†

I. INTRODUCTION

This article is a response to the old, enduring cacophony of unenlightened voices among law students and legal educators about lawyering and mediation. One way to transform this cacophony into an epiphany of reflective questions is to require the study of mediation in law school as part of a “modern” lawyering curriculum. Mediation is conceptually different from adjudication and relies on different assumptions. Mandatory mediation instruction confronts students with a shift in perspective which they must react to by developing critical thinking skills about process and role. These critical abilities contribute to the develop-

* Mediation is one of the processes associated with “Alternative Dispute Resolution” (ADR). The author, however, generally dislikes the ADR label, and prefers to call the “movement” Dispute Resolution. This title is more appropriate because decision-making is a continuum of processes which includes both adjudication and mediation. Therefore, the reader will not find the label ADR in the text of this article.

† Assistant Professor of Law, City University of New York Law School (CUNY) at Queens College. Ms. Blaustone has specialized in conflict management and dispute resolution for eleven years. She has mediated a variety of cases including interpersonal, organizational, commercial, personal injury, construction, education, landlord-tenant, and family disputes. For ten years she has taught advocacy skills, as well as mediation, to law students, lawyers and others. Nationally, she assists other mediation teachers, mediators, academic programs at all levels, university service projects, and other service programs. She is currently co-chair of the American Association of Law Schools Section on Alternative Dispute Resolution. Ms. Blaustone is a member of the Special Committee on Alternative Dispute Resolution of the ACLU which is charged with formulating proposed policy to protect civil liberties in the use of alternative dispute resolution mechanisms.

The author is indebted to her colleagues Susan Bryant, Peter Margulies, Ernie Tannis, Maria Volpe, Len Riskin, and Larry Hoover for their contributions to the evolution of this article, and to Nicholas Kambolis, her principal research assistant for his insights and his extensive research contributions. Jeffrey Cohan, research assistant, has also made valuable contributions to this piece. Lastly, the author thanks Marybeth Rogers, Paul Regan, and Paul McDevitt, research assistants, for their help.
ment of the student as a future attorney who is a capable problem solver and advisor. At CUNY Law School at Queens College, where I teach, this mandatory instruction is a specific learning unit incorporated into a second-year course, Lawyering and the Public Interest (LAPI).

A "modern" lawyering curriculum is one which, in its totality, views the competent lawyer as a capable problem solver both in and out of the courtroom. In this article, I will show why the "modern" lawyering curriculum must incorporate the mandatory introduction to the theory and practice of mediation. This article describes in detail how I

1. See infra note 5 for a description of the substantive content of the course.

3. My discussion refers to the required mediation exposure, and not the elective seminar in mediation which I also teach at CUNY Law School. However, this framework can also serve as the theoretical basis for constructing an entire separate course on mediation.

I do not make the theoretical argument for mandatory instruction of mediation in the law school curriculum. That argument has been superbly made by Leonard Riskin in his article Mediation and Lawyers, 43 OHIO ST. L.J. 29 (1982) [hereinafter Riskin, Mediation and Lawyers]. Rather, I
have accomplished this through several teaching methods, including simulation. This article also illustrates my response by presenting a hypothetical case, Smith v. Jones, which students mediate as part of mandatory mediation instruction at CUNY. Further, this article examines how such an experience can be limited to a smaller learning unit within a required law school course. Although parts of this material are readily transferable to course work in academic settings other than law school, I focus on teaching mediation as part of teaching a critical lawyering perspective.4

At CUNY Law School, this material is one of the learning units for the two semester LAPI course. This course also covers: evidence, an introduction to trial practice skills, case planning, and related issues of professional responsibility in trial advocacy settings.5 I have placed mediation coverage in the second year curriculum at CUNY because the

---
4. On several occasions I have taught mediation courses for colleges, universities, and other institutions which focus on elements other than teaching a critical lawyering perspective. When using the phrase "critical lawyering perspective," I refer to the ability to apply theory, with some level of flexible sophistication, in counseling clients which dispute resolution process is most appropriate. Of course, this requires the student to be conversant in the sometimes subtle distinctions and attributes of both mediation and litigation. However, I include some instruction on this critical thinking perspective in all my teaching of mediation. I believe that a good mediator must know the limitations of the process and be able to have some ability to ask questions regarding whether the matter needs the attention of counsel before proceeding further. If the non-lawyer mediator is aware, and possesses an ability to ask the appropriate questions, she or he can then discuss the matter with the parties and make the appropriate referral.

5. LAPI's primary goal is for students to absorb these learning units within a broad problem-solving framework. The mandatory mediation coverage is intended to help realize this goal. I inform students from the beginning that LAPI requires them to assess the strengths and weaknesses of utilizing any particular rule or forum. Further, I tell students that they are expected to develop an integrated perspective from which they will use the same interpersonal communication skills vital to effective performance in either mediation or litigation. A student who achieves LAPI's basic goal
critical lawyering agenda associated with this material is too advanced for beginning first-year students. First-year students have little idea of the form, let alone the realities, of the litigation process. This diminishes their capacity to evaluate when either litigation or mediation or some combination of processes might be appropriate for their client. Although second-year law students are more developed in their understanding of litigation, they nevertheless operate from stereotypes about the law and the role of lawyers in solving clients’ problems. I often hear these stereotypes from students at the beginning of the mandatory mediation curriculum.

II. SOUNDS FROM THE CACOPHONY OF LAW STUDENTS' VOICES PRIOR TO THE REQUIRED STUDY OF MEDIATION

Traditional Lawyer:

“I do not need to understand dispute resolution and mediation because I am going to be a trial lawyer. My work will be in the courtroom. Besides, I am interested in protecting my client’s legal interests and rights. Mediation does not do that. Dispute resolution does not deal with the law, let alone law practice. I need to devote myself to my other studies. After all, this is law school and I am paying good money to learn how to be a lawyer.”

should come to view the processes of litigation and mediation to encompass both the potential use of advocacy and collaboration skills.

However, LAPI primarily focuses on an introduction to trial practice skills and evidence. The development of trial skills centers on the communication abilities involved with fact analysis. The specific skills here include: hearing descriptions — training the ear to hear content; recalling and describing events; monitoring one’s own opinions and conclusions; planning the steps required to complete a legal task; and the technical advocacy skills of presenting the facts, expanding the facts, and persuading the fact-finder of the truth of a version of the facts. The coverage of evidence is interwoven with the trial advocacy coverage. LAPI also requires students to examine the Federal Rules of Evidence for their underlying rationale.

Finally, the course examines issues of professional responsibility and the lawyering role in light of the public dimension of law practice. Additionally, the accountability of public sector lawyers and the limitations of public practice are explored.

6. Although I have been primarily responsible for the design and instruction of this work, I have not done this work alone. Over the years, CUNY colleagues have consistently collaborated in the design, implementation, and evaluation of this coverage.

7. See Riskin & Westbrook, Integrating Dispute Resolution, supra note 3, at 510. The Missouri Plan integrates similar material into the overall law school curriculum. However, this coverage is primarily in the first year of law school. The faculty at Missouri concluded that this material would be incorporated into the first year because this is the time when law students are most impressionable to professionalization. Although I agree with this premise, I observe that many of the role questions tend to remain superficial abstractions for the first-year law student.

8. These voices are composites from statements that I have recorded from CUNY law students as they begin the required study of mediation.
Uncritical Cooperative Conflict Avoider:

"Dispute resolution is all that I really care about. I want to study mediation in law school because I do not like being an advocate. I do not like to argue and I am not the competitive type. I never want to litigate. As a future attorney, I will try to mediate everything."

Liberal Passive Resister:

"I think mediation has its place within the legal system, but I am not the mediator type. I am not going to become a mediator and I will never mediate anything. I will never encounter mediation in my future work as an attorney. Therefore, I do not need to know this material. This is not the type of training I need. This coverage should be an elective and I should be able to opt out."

The Expert:

"Dispute resolution and mediation may be relevant to law practice, but this is such a simplistic concept. I already know how to do all these tasks. It is insulting to us that our professor thinks we need such basic coverage. Intuitively, we all know how to solve problems effectively. We already possess adequate communication skills; the fact that we were all reasonably capable human beings before entering law school shows that we acquired these skills. Do not waste my time. Teach me doctrine, or at least teach me something useful like the hard-core skills of lawyering, such as how to conduct cross-examination. Okay, this class may even be fun, but I am not going to take this material seriously. I can fake this course for the law professor."

III. THE RESPONSE: MANDATORY MEDIATION INSTRUCTION

The response to this cacophony is mandatory mediation curriculum for all law students. Such a curriculum presents knowledge about mediation as a necessary and fundamental part of a competent lawyer's awareness, and as part of the circumstances she or he will face in law practice.9 Thus, the study of mediation should be part of the overall lawyering skills curriculum. Attention to proficiency in basic communication skills, such as that gained in the study of mediation, is the foundation for the application of most lawyering skills. Further, the required study of mediation should be viewed as increasing the law student's critical thinking skills.10 The law student's critical thinking skills are enhanced when

---

9. See Riskin, Mediation and Lawyers, supra note 3. Leonard Riskin, in this groundbreaking article, articulates the changing framework of lawyering to include mediation and other forms of dispute resolution.

10. See infra part V.H for a definition of critical thinking skills.
she or he is required to analyze mediation and litigation options on behalf of a client. The exploration of the lawyer’s role in advising clients about and representing clients in the mediation process, is an important aspect of the required study of mediation. These purposes serve as the framework for the design of the mandatory mediation curriculum in the second year of study at CUNY Law School.

IV. THE TWO FUNDAMENTAL CONSIDERATIONS: QUALITY PROCESS AND COMPETENT ADVICE

Two fundamental considerations guide the design of the mandatory mediation curriculum. First, students examine issues that face the mediator in providing quality process. This study both defines and gives texture to the student’s understanding of mediation. Thus, students learn more than generic theories and skills. This point is crucial to understanding any aspect of the design of this curriculum. Second, students examine the issues facing an attorney in competently advising clients about participation and representation of clients in the process. Obviously, competent advice requires not only understanding what constitutes quality process, but also several other factors which are developed later in this article.

For the reader to understand the basis for the selection of characteristics that constitute quality process, I must explain my theoretical vision of mediation. To begin with, mediation is not a value-free process. Like adjudication, it is a process intended to realize certain core values. Commonly, many adherents and detractors of mediation ascribe the values of speediness, efficiency, flexibility, affordability, and accessibility to mediation. Certainly, depending upon the particular case, I ascribe the

11. For an understanding of the theoretical distinctions between adjudication and mediation, see Lon L. Fuller, Mediation — Its Forms and Functions, 44 S. CAL. L. REV. 305 (1970-71); Riskin, Mediation and Lawyers, supra note 3.

same values to the process. However, the overriding value to be realized in mediation is the empowerment of the participants. The primary


However, some scholars have commented that empowerment can not occur because mediation poses a danger of extending state authority and de facto elite control. Richard Hofrichter, Justice Centers Raise Basic Questions, in NEIGHBORHOOD JUSTICE, ASSESSMENT OF AN EMERGING IDEA 193 (Roman Tomsic & Malcolm M. Feeley eds., 1982). Judith Resnik operates from a definition of empowerment which is similar to mine, but argues that this goal should be fought for in the courts rather than by privatizing the conflict which permits the exercise of uncontrolled state power. She advocates this view even though she characterizes the current state of court systems as being coercive in nature, insisting on compliance, and requiring the imposition of one’s truth upon another. See Judith Resnik, On the Bias: Feminist Reconsiderations of the Aspirations for Our Judges, 61 S. CAL. L. REV. 1877, 1940-43 (1988). Timothy Terrell argues that there are moral flaws in the jurisprudential implications of informal dispute resolution. Timothy P. Terrell, Rights and Wrongs in the Rush to Repose: On the Jurisprudential Dangers of Alternative Dispute Resolution, 36 EMORY L.J. 541 (1987).
value of mediation should be to enable the participants to make informed choices in developing solutions to their issues and concerns. Making such choices requires the participants to consider the needs and concerns of the other participants. Thus, this enabling process, or empowerment, is equivalent to realizing self-determination in conflicts or disputes.

However, for empowerment to occur in mediation, concerns of justice cannot be ignored; participants should regard the result they reach as both informed and principled. Further, the results of a particular mediation should not significantly overreach or mislead any of the parties. A mediation must not lead to an outcome in which the mediator thinks that a serious disadvantage has occurred. At the same time, the mediator must respect the parties' choices when those choices are informed, and where each party is truly capable of participating in the process. The achievement of such objectives in mediation requires nurturing respect for diversity.

The two fundamental considerations of quality process and competent advice form the basis for identifying the learning objectives necessary to adequately expose students to the mediation process. These learning objectives are the desired outcomes of the law student's brief yet serious engagement with this substance. These outcomes are also framed in light of the minimal knowledge of mediation that a law school graduate should possess. The following section explains each of these learning objectives. The reader should bear in mind that the goal in each of these objectives is to awaken students to what is material and to aid them in developing a beginning level of ability. In the end, students should be able to discern whether quality process exists and to act upon that understanding. Because this is but one learning unit in a larger course curriculum, the teacher would be unrealistic to think this coverage makes her students either lawyer-ready or mediator-ready.

14. I believe that the empowerment model of mediation inherently requires attention to justice concerns. If one thinks otherwise, this can lead to settlements that cause grave injury or that are a product of material misrepresentation. Under these circumstances, empowerment has not occurred in substance although it may appear so in form. Edward Brunet also links justice concerns to the realization of empowerment in dispute resolution mechanisms. See generally Brunet, supra note 12. Eve Hill finds common ground between the feminist perspective and the "quality of justice" argument for a dispute resolution mechanism such as mediation. Eve Hill, Alternative Dispute Resolution in a Feminist Voice, 5 OHIO ST. J. DISP. RES. 337, 340-41, 373-75 (1990) [hereinafter Hill]. Bush disagrees with me. He sees empowerment and justice as two distinct values in competition which cannot co-exist equally without distorting the empowerment model. See Bush, supra note 13, at 267-68.

15. See infra part VII.E.

16. Of course, individual students' abilities may prove to be quite sophisticated. I emphasize, however, that this curriculum is not mediation training. Rather, this curriculum includes a skills focus which concretizes the learning objectives for the student.
V. THE LEARNING OBJECTIVES

A. Law Students Should Develop an Appreciation of the Role of Lawyer as a Problem Solver

Law students should become keenly aware of the range of the dispute resolution processes. To do so requires that they view litigation as merely one option within their range of choices, rather than assuming that it is the appropriate choice in any given case. Students’ ability to appreciate the availability of this range of options requires them to clinically evaluate the facts and circumstances of every case in light of several factors that govern the selection of any dispute resolution process.17

B. Law Students Should Begin to Develop an Ability to Perform Conflict Analysis

Effective conflict analysis involves acquiring a scientific understanding of conflict and dispute behavior. Students should develop this interdisciplinary understanding by using a variety of different sources. These sources include psychological theory, communications theory, sociological theory,18 dispute resolution theory, and literature on the attorney’s professional role. Students should understand that conflict is a regular and broadly-defined occurrence, only parts of which are appropriate for an adversarial perspective. In this context, the term “adversarial perspective” refers to a positional perspective based on attitudes or values, and not to the actual resort to litigation or some other adversarial procedure. In fact, depending on the type of case, litigation strategies should normally include an examination of the possible non-litigation alternatives for resolution; by the same token, other problem-solving strategies should normally include an examination of the litigation option.19

17. Law students should learn about the whole spectrum of methods of dispute resolution. A lawyer must be familiar with negotiation, mediation, litigation, arbitration, fact-finding, early neutral evaluation, summary jury trials, and mini-trials in order to best advise a client how to proceed in a case. Students learn this type of survey coverage elsewhere in the CUNY curriculum. My mediation unit focuses on comparing and contrasting adjudication and mediation. This focus provides students with a model of different perspectives which increases their understanding of the nature of adjudication and of the utility of meaningful alternatives. Further, the focus on mediation and adjudication sharpens issues regarding the lawyering role.


19. It has become more common for law firms to conduct such reviews of their cases. It should also be kept in mind that practitioners regularly negotiate settlements and incorporate such possibilities into their litigation strategies. See Jim Freund & Margurite Millhauser, ADR: A Conversation, Nat’l L. J., Feb. 27, 1989, at S1; Michael Landrum, National Practice Institute, Mediation: Preparation and Representation in Commercial and Personal Injury Cases
C. Law Students Should Receive Both a Theoretical and a Skills Exposure to Mediation

Educators can achieve combined theoretical and skills learning only by adding experiential learning methods to instruction. Without the experiential learning component, the process is too abstract and subtle to provide students with any meaningful long-term theoretical understanding. Such an understanding is an essential foundation for students to develop an ability to make choices in the future.

Certain basic principles of learning theory support my assertion that teaching process without experiential learning leaves the student with only cognitive abstractions. The role of practice in the learning process is most significant here. Mediation is a process which involves complex human behavior both on the part of the mediator and the disputants. Students need the opportunity to integrate the theory with the practical challenges of first perceiving, and then understanding, innumerable subtle cues. The student also needs to be made aware of several factors influencing the course of the mediation process. It is difficult to develop any textured understanding of mediation unless the theory is connected to reality.


Notably, national legislation has been proposed which would, in any state or federal civil action for damages, require a lawyer to file a notice with the initial or responsive pleading certifying that she has advised her client of all possible dispute resolution options. Senator McConnell planned to reintroduce the Lawsuit Reform Act in 1991. S. 1100, 100th Cong., 1st Sess. (1989).

The Colorado Bar Association is proposing an amendment to the State Code of Professional Responsibility requiring lawyers to advise their clients of other dispute resolution techniques besides litigation, or face disciplinary action. Colorado Businesses Pledge Their Allegiance to A.D.R., Bar Leader, Jan.-Feb. 1991, at 10.


The case of one law student, Debbie, is illustrative. Debbie enrolled in my mediation seminar, which I was teaching at another law school, after a semester-long family mediation course at her law school. My seminar format covers the theory and practice of mediation, and students are not required to have any previous exposure to mediation. At her law school, the semester long course had
D. Law Students Should be Able to Competently Advise Their Clients Regarding the Selection of a Resolution Process

This task requires an accurate understanding of the client’s desires, resources, priorities, needs, and valid legal interests. Both in the role as mediator and as advocate, the student should become conversant with the factors to be examined when determining whether a case is “mediatable,” and whether the particular parties are suitable for the process. Furthermore, when advising their clients about the selection of a specific resolution process, students should precisely understand their professional responsibility as a lawyer.

E. Law Students Should Understand the Functions and Responsibilities of a Mediator

Of course, this inquiry helps the student understand what mediation is. Significantly, however, the attainment of this goal also equips students with the knowledge necessary to determine whether an intervener in their case is mediating, or is engaging in some other form of dispute resolution or diversion. Armed with this knowledge, the law student, in his or her future role as lawyer, can make more deliberate judgments with the client about remaining or withdrawing from the process when an intervener does not act according to the basic precepts of mediation.

F. Law Students Should Explore What Their Professional Responsibilities Are in Counseling and Representing a Client Participating in Mediation

Lawyers need to know how to function in mediation when their clients have selected the process. In addition, students should become aware of the skills they need to exercise in order to give effective representation in the mediation context. no skills agenda nor any classroom exercises. Upon entering my course, Debbie had a limited understanding of the process. At the end of my course, she determined that there was little similarity between the two academic experiences. It bears noting here that Debbie’s overall academic achievement in law school was good, as were both her cognitive and skills performance in my class.

22. I articulate this objective for my students as a basic premise about lawyering. I tell my students that competent lawyering requires the ability to be both a warrior and a peacemaker. Furthermore, a good lawyer is thoughtful in deciding when to be the warrior and when to be the peacemaker. See infra part VII.E for a discussion of such factors in the simulation.

23. This area is new terrain, and there is no definitive understanding of what is competent representation in the mediation process. However, several core premises affect how an attorney should assist a client in the process and several concerns exist that the attorney should monitor. See infra part VII.E for a discussion of many of these concerns. See also Landrum, supra note 19; Paddock, supra note 19; M. Dee Samuels & Joel A. Shawn, The Role of the Lawyer Outside the Mediation Process, 1983 Mediation Q. 13 (Dec. 1983). Mark Rutherford put forth new ethical
G. Law Students Should Acquire Introductory Levels of Ability in Interviewing and Listening Skills Associated with Quality Communication and Fact Investigation

Generally, fact investigation in mediation is more inclusive than fact investigation in litigation. However, effective fact investigation in litigation often requires inquiry into concerns beyond legally relevant facts. Students should develop abilities to fully elicit the client's circumstances, to satisfy the client that she or he is understood as intended, and to develop the client's agenda, as contrasted from their own.24

H. Law Students Should Improve Their Ability to Think Critically and Become Open to Exploring Alternative Interpretations

Critical thinking involves the ability to withhold judgment or to be non-judgmental. This, in turn, requires the ability to identify and examine the assumptions in one's conclusions. Using this ability, students should transform their conclusions into issues for inquiry. Specifically, students should improve their ability to provide textured evaluation

standards which he argues should govern the activity of the independent outside counsel. He views counsel as responsible for insuring fairness and maximizing resources. However, his view of the "mediating attorney" is governed by issues of liability rather than an affirmative perspective on the role of the client's lawyer in the mediation process. See Mark Rutherford, Lawyers and Divorce Mediation: Designing the Role of "Outside Counsel," 1986 MEDIATION Q. 17, 21-23 (June 1986). For a fictional dialogue representing limited perceptions of the mediation process by both the mediator and the client's attorney, see Stephen B. Goldberg et al., A Dialogue on Legal Representation in Divorce Mediation, 1985 MEDIATION Q. 5 (June 1985). Apparently, Michael Zipfle finds that independent counsel maintains at least a fiduciary duty with a client in mediation. I, however, find the responsibilities of the attorney-client relationship in such a situation. He does argue that attorneys who refer clients to mediation and who advise them in the process should be aware of their responsibilities as independent counsel. He does not enumerate what these responsibilities are. Michael Zipfle, The "Attorney Mediator": Protection Through Representation, 92 DICK. L. REV. 811, 824-25, 829, 836 (1988).

Leonard Riskin explores when individuals involved in mediation need legal assistance. For example, a party might need help in the following areas: information regarding legal rights; information on the likely results of litigation; protection from the other party's maneuvering; or, the drafting of the final agreement. A lawyer, in this capacity, may have difficulty in understanding her or his role. Riskin suggests that confusion about role can be resolved through attorney-client dialogue. Further, Riskin analyzes the role of a "neutral lawyer" in the mediation process. These "neutral" lawyers may vary from the traditional advocate in mediation in the type of legal services they provide, and the extent to which they emphasize the substantive law. In addition to the mediator, some "neutral lawyers" go so far as to facilitate settlement. Leonard L. Riskin, Toward New Standards for the Neutral Lawyer in Mediation, 26 ARIZ. L. REV. 329, 333-35 (1984).

of issues rather than conclusive positions containing unexamined assumptions.

I. Law Students Should Understand that Certain Mediation Skills Are Also Necessary to Effectively Perform Many Different Legal Tasks

There are many overlapping skills used in mediation and litigation. One example, mentioned previously, is communication skills. Another example is the ability to articulate inferences behind fact conclusions. Identifying inferences greatly aids parties in mediation, and this same ability is necessary to prepare admissible evidence.

J. Law Students Should be Familiar with Current Developments in the Use of Dispute Resolution Mechanisms

Innovative mechanisms of dispute resolution, as well as new uses of previously existing methods, are an integral part of a competent understanding of current conditions. Such innovations come from within the legal system, from government, and from the private sector. The law student should become acquainted with sources of developing trends in dispute resolution and become accustomed to using these sources in reaching an appropriate solution to a particular case.

VI. Designing the Learning Unit — Setting Substantive Coverage Priorities

In implementing these learning objectives, I selected particular aspects of the mediation process which provide the best basis for understanding what quality process is and the lawyer’s role in that process. The selection process necessarily precluded studying other aspects that did not achieve these goals as effectively. To start, I selected key stages of the process that when understood by the student, provide him or her with a good theoretical framework from which to address the mediation process in future work. After introducing the students to general concepts of mediation and its stages, I devote portions of class time and the exercise sessions to some of the stages.26 I have identified particular

25. For a discussion of the theory that many of these skills are fundamental to effective lawyering in mainstream legal tasks, see Blaustone, supra note 2.
26. For definitions and an explanation of the relation between class and exercise session, see infra part VII.B. In my first class I conduct an exercise in which students experience both adjudication and mediation. From this exercise students articulate the characteristics of both processes. I then frame a fuller definition of mediation. Jack Himmerstein first introduced me to a similar version of this exercise at the first CUNY law faculty retreat in 1983. Another version of this exercise
stages of mediation as most essential in giving the student a basis for comparing and contrasting adversarial problem-solving and mediation. I also cover selected ethical issues for both attorney and mediator, and explore the controversial issues arising from mediation, using a critical lawyering perspective on mediation.

I begin the more intensive coverage of mediation with "Establishing the Process," which is the preliminary stage of mediation. This portion covers the following issues: trust, informed consent, withholding judgment, neutrality, and confidentiality. I examine these points in


In this class, students also develop a list of strengths and weaknesses they think they bring to the learning of mediation. This list helps students to express some of their misgivings about the process vis-a-vis their law training. In addition, this listing allows the students to begin to develop their individual clinical inventory of the strengths and weaknesses they bring to the practice of mediation. Lastly, students develop a series of concerns about mediation from their experiences with the exercise. Here, students first articulate their own sense of the controversial issues in the use of mediation. This segment is significant, because it embraces students' concerns from the beginning, and because it teaches the process by means of a critical examination of its pros and cons. In their Master File Questions, students must identify their top three concerns in how the process is used. See infra parts VII.B, X for a discussion of the Master Files Questions. Furthermore, later in the work, these concerns are periodically revisited and developed in more depth. Thus, at the end of the unit, the student will have had the opportunity to regularly examine the points they have identified as the critical issues in relating mediation to lawyering.


However, over the years, I developed my own nomenclature and division of the process as follows: 1.) Establishing the Process, 2.) Fact Investigation and Analysis, 3.) Framing Issues, 4.) Agenda setting and Brainstorming, 5.) Evaluation of Options, and 6.) Closure.

28. Trust refers to what I label as "minimum trust," or the basic willingness to begin mediated discussions, and to work with the person(s) serving as mediator. Once the process begins, effective mediation deepens the disputants' levels of trust in both matters. Here the instruction includes identifying which skills and perceptions increase trust, and which ones decrease it.

29. "Informed consent" refers to the quality of the disputants' understanding of the mediation process. I focus on the points about which the parties need education. In addition, I emphasize the difference between providing explanation and achieving actual (although introductory) understanding of what will be experienced. I believe the latter is necessary for securing meaningful agreement to participate in the process. Therefore, I have attached the label "informed consent" to this concept.

30. I use the term "withholding judgement" to convey the skills used by the mediator so that neither of the disputants sees her or him as judging either the issues or individuals. These skills involve internal monitoring of bias within the mediator herself or himself, as well as the interpersonal skills she or he uses to be experienced as nonjudgmental.
connection with studying the content of the mediator's opening statement at the mediation conference.

I then move on to the second stage: fact investigation and analysis. Here, I focus on two major skills that control whether the mediator is really able to develop the full story from all disputants' perspectives, not simply for herself, but also for all of the disputants. The first set of skills are those of "effective listening." These skills include: listening attentively; clarifying responses; making different perspectives explicit; summarizing content; developing details of general concern; re-directing discussion; parroting, paraphrasing, and articulating participants' values, beliefs, opinions, and feelings without approval or disapproval; and translating the meaning or intentions expressed by the parties. Secondly, I focus on the examination of the mental process of inferential reasoning because a mediator must probe what lies behind assumptions, conclusions, and categorizations.33

I then teach with some depth the stage of framing issues. This coverage seeks to familiarize students with the distinction between normative and mediatable issues. If students fully achieve this goal, they will experience how to identify the needs and interests of the parties in mediation. This requires students to articulate those concerns of both sides which are genuinely capable of resolution in this process. Furthermore, the students should be able to identify the potentially mediatable issues in a given fact pattern. This focus is instrumental in helping students understand what mediation is, how it differs from litigation, and how litigation tasks may not reflect adversarial problem-solving. Students should begin to develop an appreciation for those concerns that are not mediatable — what I label "normative issues." These are issues that require the mediator to determinate their truth or falsity, rightness or wrongness. Such issues are generally not appropriate for joint discussion in mediation. Legal issues are examples of normative issues. Generally, this process of broadening the issues is difficult for the law student.

In cursory fashion, I refer to the skills and tasks involved in the

31. I use the term "neutrality" to refer to the theoretical characteristic of the mediator as an impartial intervener, which is part of the definition of the generic mediation process.

32. I use the term "confidentiality" to convey two closely related aspects of the mediation process. Primarily, I refer to the definitional requirement that when mediated discussions occur the mediator pledges not to disclose, without prior agreement, any of the deliberations' content. Secondarily, I use the term confidentiality to refer to the mediator's obligation to ensure that communications in meetings with each disputant remain confidential. The mediator must clarify with each disputant what may not be shuttled to the other disputant(s).

33. Spending time on the inferential reasoning process is extremely valuable since it applies to most lawyering tasks, including understanding facts and how they relate to evidence rules. This, of course, is also part of the learning agenda for the LAPI course.
remaining stages of the process. In class, I simply highlight key points for students to remember. Rather than concentrate on these later stages, I choose to emphasize the limitations and concerns that a lawyer should bear in mind when considering whether the process is an appropriate option for a specific case. This is the type of instruction necessary for educating students how to thoughtfully advise their future clients on all potential options. In addition, I focus on the lawyering objectives, and the means to obtain those objectives, when representing a client participating in this process. Finally, I also incorporate class problems that raise ethical questions for the mediator, regarding how to handle a particular case. This coverage is useful in helping students develop flexibility and depth in their understanding of the core principles in mediation. In addition, this type of instruction encourages the student to critically analyze the matter rather than rely upon quick conclusions.

VII. Smith v. Jones: An Example of Teaching From Simulation, Focusing on the Fundamental Considerations and Learning Objectives

Smith v. Jones is one of the hypothetical cases at CUNY Law School that exposes students in the mediation process to the fundamental considerations and learning objectives. I have divided the following discussion of Smith v. Jones into distinct sections. First, I provide a synopsis of the facts of the case.34 I then explain the larger methodology of which Smith v. Jones is a part. Next, I briefly discuss how I administer the initiation of the role play. Thereafter, I thoroughly discuss how to teach the simulation's skills agenda, and its relationship to the fundamental considerations and learning goals. Finally, I explore the factors which a lawyer must consider in advising whether Janet Smith should participate in mediation.35

A. Synopsis of the Facts

Janet Smith is in her forties. She returned to school after several years as a full-time homemaker and mother. She is presently a Ph.D. candidate in clinical psychology, and is on academic probation due to substandard seminar papers in two of her previous courses. She is at the last stage of her pre-dissertation status. She submitted her pre-disserta-
tion paper, a substantial independent writing and research assignment; this paper is the last requirement for entry into her final dissertation year. This assignment serves as the foundation for the final Ph.D. dissertation. In contrast to the unsatisfactory seminar papers, this assignment is well-researched and well-written. In her paper, Janet wrote on selected issues regarding death and dying; she has stressed these issues in her recent clinical work. Janet's clinical abilities in working with dying patients and the families of dying patients are considered excellent by both her faculty and field supervisors. One of the better hospitals in the city has offered Janet a coveted full-time clinical position contingent upon the successful completion of her Ph.D. the following year.

Janet is having difficulties with her graduate advisor, Dr. Jones. Because Dr. Jones did not submit a passing grade for Janet, her name did not appear on the department list of students whose pre-dissertation papers are satisfactory and who are now considered ready for their dissertation. He believes she plagiarized the work, since the quality is far superior to anything else Janet has produced. Janet meets with Dr. Jones to discuss why her name is not on the dissertation-ready list. A confrontation occurs and Janet walks out in haste.

The following day, Dr. Jones finds that his office has been ransacked and that key portions of his manuscript files have been destroyed. Further, he finds an empty coffee cup on the floor by his manuscript files, with coffee stains appearing on many of the torn papers. He recognizes this coffee cup as one he has seen Janet use.

Dr. Jones is currently up for tenure. He is considered to be a top theorist in behavioral psychology. He does not value clinical skills, but is generally considered to have great promise in research. Many of his senior tenured colleagues in the department value his knowledge, but remain neutral about his candidacy. Dr. Jones believes that it is important to his career that his advisees perform well in the department. Moreover, both his publisher and his tenure committee expect that he will meet his deadlines for finishing his current manuscripts.

Janet files an informal complaint with the campus affirmative action office. She believes Dr. Jones may be biased against her because of her age and gender. Pursuant to the affirmative action office's internal regulations, a mediation hearing has been scheduled in this case with a trained mediator who is on the office staff. Both Janet Smith and Dr. Jones have indicated that they do not want a public proceeding in the matter. They are quite concerned about avoiding any publicity at this time.
B. Part of a Larger Methodology

The provocative facts in Smith v. Jones are integral to the methodology of the larger learning unit on mediation. This methodology requires the student to actively engage with the subject and to theoretically understand the material. The curriculum design for the mediation coverage combines regular class hours, along with a specially designated time for exercise sessions for the mediation roleplays.\(^{36}\) Generally, I teach five or six regular classes combined with four exercise sessions.\(^{37}\) I teach the regular class hours on mediation, sometimes with the assistance of a colleague. The regular class hours introduce the work done in the exercise sessions. The exercise sessions are held outside of the large classroom, in seminar-like conditions at regularly scheduled times. In these exercise sessions, students are required to meet for an introduction to the exercise, to do the exercise, and to discuss the exercise in light of the previous class. At least two hours are needed for an exercise session, but two-and-a-half to three hours are better.

I lead these exercise sessions with the assistance of outside mediators and other involved faculty members. This design allows us to divide the students into smaller sections for the exercise session taught by a team of instructors. The mediation exercise sessions are regularly limited to approximately forty students in each section. Each section is co-taught by a law school faculty member and a guest teacher. In addition, other law school faculty may participate as part of the team of instructors for that section.\(^{38}\)

---

\(^{36}\) For the first three semesters at CUNY Law School, students work in groups of twenty in the Lawyering Seminars, where simulation activity occurs. Students study material from the courses and apply them to the work of the Lawyering Seminars. The Lawyering Seminar provides me with the necessary, specially designated time for mediation exercise sessions. Teachers at other law schools will need to create a format and allocate time for the exercise sessions within the limits of their students’ class schedules and free time.

Along with my reading assignments, students receive a background memorandum discussing the nature and requirements of the mediation learning unit. This article contains much of the substance of this memorandum. The entire background memorandum and the LAPI syllabus are on file with the author.

\(^{37}\) Instructors arrange the logistics of the exercise sessions so as to permit each law student to have at least one opportunity to play the role of mediator for at least forty minutes. It is important that each student has the opportunity to play the role of mediator because the experience enhances the student’s understanding of the functions and challenges facing the mediator. Inevitably, this experience enriches the students’ comments in class regarding the material.

The students also play the role of disputants in the various roleplays when they are not acting as mediators. The value of the experiential learning in the role of disputant is very high because students can use their experience to critically analyze how the process was delivered. Further, by critiquing how the theoretical issues in the roleplay affected them, students address specific concerns regarding the use of the mediation process.

\(^{38}\) Each year I coordinate the selection, pairing, orientation, and training of all of these col-
At the beginning of each exercise session, the students receive Master File Questions that indicate the general learning goals for that exercise session and the previous class. Students must submit written answers to these questions. The answers are kept in their Mediation Master File which is filed at the school. The Master File Questions are intended to encourage directed reflection on the material. The questions provide the student with a means to synthesize the readings, the class, and the exercise into a more complete understanding of the process.39 Furthermore, the Master File offers the teacher a relatively quick way to check general comprehension, and later serves as one indicator of each student's performance for evaluation and grading.40

In the first exercise session, the entire group of students prepares one of the teachers to perform an opening statement. The teacher then performs the opening statement exactly as instructed by the students. The group then discusses the opening statement in several respects. First, students explore its strengths and weaknesses. Second, students relate the experience to the theory regarding the definition and functions of the process. Third, students examine feedback techniques for the performance that they must replicate in the subsequent exercise sessions. In each of the succeeding exercise sessions, the students roleplay one of my simulations.

The second exercise session is devoted to the preliminary issues of fact investigation, such as active listening. In this session, the entire group stays together to observe and give feedback to at least three students who rotate in the role of mediator. Here, the remaining students have the role instructions for one side or the other. They are told to know their side well and to follow the proceedings closely as they may be called on to switch places with one of the disputants. Keeping the students together for this large group exercise is particularly useful to set expectations for their participation. Specifically, setting expectations involves modeling how to do a roleplay, and demonstrating the use of guidelines, professional reflection, and principled feedback.

40. Eve Hill notes that teaching non-objective material that emphasizes feminist sensitivity does not neatly fit into objective grading systems. See Hill, supra note 14, at 376-79. Master File Questions address this concern.
The remaining sessions focus on additional concerns in fact investigation and issue framing. In these sessions, students work in groups of three when doing the simulation. The students were told how to play the role of a disputant in the mediation simulations at the beginning of the first session, when they were divided up into the smaller groups for the roleplaying.

Each of the simulations is designed to highlight the substance covered in the previous class session, to enhance skills, and to raise thorny substantive questions such as how to protect civil liberties, legal interests of the parties, neutrality, and power imbalances. After the simulation, the co-teachers discuss the experience with the students. This discussion covers a series of questions which focus specifically on the learning objectives for this particular stage of the learning unit. These questions are related to the Master File Questions for that segment. Lastly, the instructors reserve some questions for discussion in the following large class.

1. The Examination Component

Both to encourage synthesis and as an evaluation device, I give a written, in-class open book examination which requires each student to apply the key skills necessary to frame issues in mediation. Students watch a video tape depicting the fact statements in a mediation. From this scenario, students are asked to identify the needs and interests of each party, the potential mediatable issues, and the normative issues which are inappropriate for mediation. Further, the examination requires students to assume the role of lawyer and counsel their clients as to which process they should pursue given the particular facts of the

41. Teachers may choose to assign the students roles or have the students select their own groups. The principal concern is to make sure the students rotate in playing the role of mediator in each exercise session, so that by the end of the instruction each student has had the opportunity to play mediator at least once. I recommend that teachers encourage a change in group composition with each exercise session in order to best simulate actual mediation conditions. It is also a matter of preference whether to assign students to the role of observer who has specific duties in the feedback discussion. Clearly, a number of different techniques facilitate administration of the roleplays, and it is beyond the scope of this article to specifically examine all the clinical teaching techniques in the use of simulation.

42. Margaret Shaw and Susan Herman assisted me in the design and drafting of three simulations: Smith v. Jones, Ferraro v. Smith, and Kielly v. Campbell. Smith v. Jones appears in Appendix A, below. See infra part IX. The latter two roleplaying exercises are on file with the author.

43. Although I create the fact pattern and make the video for the exam, several videos of mediation exist that a teacher can easily use to test for the same comprehension and skills. The National Institute for Dispute Resolution has published a thorough annotated bibliography of dispute resolution tapes. JAY FOLBERG & K. CLAUS, NAT'L INST. FOR DISPUTE RESOLUTION, DISPUTE RESOLUTION EDUCATION AND TRAINING: A VIDEO REFERENCE GUIDE (1989).
case. Students must explain their recommendations and explicitly address the analysis of leading commentators in the field of mediation to support their recommendations. The examination has worked quite well as a catalyst for students to synthesize the mediation subject matter. Moreover, since the material is compulsory, most students take the material seriously enough to perform satisfactorily on the examination. Past experience has shown that, in the absence of such an examination, the disinterested student was able to avoid serious study of the process.

C. Administration of the Roleplay

The facts of Smith v. Jones are sufficiently complex to give the student mediators ample opportunity to develop the combined fact pattern. Thus, this roleplay works most effectively in a session where all students are assigned to small groups for a mediation exercise, rather than in a large group demonstration. Further, instructors should only use this roleplay after presenting the overview to the process of “establishing the process” and fact investigation. To maximize the instructional value of this roleplay, students should be previously exposed to some of the basic concepts and skills in fact gathering, inferential reasoning, and active listening. The exercise session should provide the experiential basis for examining how the students apply their understanding of these specific skills.

Smith v. Jones is particularly useful for teaching fact investigation and issue-framing, and for exploring the process’ appropriate limitations. Smith v. Jones provides a good fact pattern for teaching how to frame issues in mediation. Following this exercise session, students learn about issues in mediation and, as part of the large classroom discussion, they then formulate the potential mediatable and normative issues using the Smith v. Jones facts. These facts are also used as a basis for a serious examination of the factors students should consider to determine whether mediation is the appropriate dispute resolution mechanism for the specific disputants.

At the beginning of this exercise session, the team instructors focus on the content of the previous large class, fact investigation and active listening, and particularly emphasize practicing the skills that were introduced. The team instructors highlight particular points from their

---

44. The readings are listed in the LAPI syllabus (on file with the author).
45. Hill posits that objectivity in traditional grading is a form of traditional maleness. The challenge to the educator is to create accountability and foster sensitivity to the feminist perspective at the same time. Hill, supra note 14, at 378.
own perspective. They then introduce students to the subject matter and nature of the specific role play. Students learn that *Smith v. Jones* involves issues of potential illegal discrimination and bias, or possible civil liberties concerns in higher education. Before students begin preparing for the *Smith v. Jones* roleplay, instructors ask them to note for themselves what they should experience from the mediator in the roleplay. Students also receive their Master File Questions, which they are asked to keep in mind during and after the roleplay. Additionally, students are asked to think about whether mediation is the appropriate means to resolve this particular dispute. Students then break into small groups for the exercise. Students receive the role instructions, and have ten minutes to prepare their roles prior to commencing the actual roleplay. They perform the roleplay in the allotted time and locations; locations are designated in a manner that allows the team instructors to circulate and observe the students at work. After the allotted time for the roleplaying, the students spend a few additional minutes together giving each other feedback in the manner modeled in the earlier exercise sessions. Finally, students reconvene as one group in order to process the *Smith v. Jones* roleplay.

D. *The Skills Agenda: The First Fundamental Consideration — Quality Process*

The skills agenda in *Smith v. Jones* is based upon the first fundamental consideration: providing quality process. This section specifically illustrates the connection between the skills agenda and the learning objectives for the instruction. Several of the learning objectives are tied into the teaching of the simulation.

In performing the *Smith v. Jones* simulation, students focus on culti-

---

46. I regularly provide the team leaders with a teaching "manual" for each exercise session and meet with the lead instructors to review progress and modify the agenda as necessary.

47. See supra part VII.E.

48. Ten minutes may seem inadequate for preparation and might therefore encourage the students to disregard the experience. However, this conclusion demonstrates a misunderstanding of the role of experiential learning in this mediation unit. Students should not have the opportunity to deeply study the instructions, because the average student tends to unnecessarily complicate the facts and she or he usually gravitates towards generating normative issues. Extensive role preparation at these introductory stages has often led law students, during the actual roleplaying stage, to adopt unrealistic adversarial postures. Additionally, I did not intend that the exercise sessions unreasonably increase the student work load. Rather, I choose to fill the workload outside of class and the exercise sessions with assigned readings and reflective responses to the Master File Questions. In my mediation seminars and when we have assigned a major part of the third semester simulation to a mediation component, students received advance instructions for preparation of an extensive mediation which is videotaped and later discussed in class.
vating the interviewing and listening skills underlying quality communication and fact investigation.49 In mediation, the mediator must help the parties develop their facts for each other in order to expand each person's viewpoint. Students become aware of the challenges inherent in developing the facts among people who are in the midst of conflict.50 This is a drastic departure from the traditional experience of interviewing a client or witness. Furthermore, students gain greater skill in fully developing the party's circumstances, and making the party feel understood by both the mediator and the other disputant. Moreover, the students learn to advance the party's agenda rather than their own.

Essentially, the basis for achieving these learning goals depends on student exposure to three broad categories of "building block" skills. The reader should remember that because this instruction is limited in scope, and depends upon what areas are actually discussed, a few selected skills will receive more detailed attention.51 The first of these building blocks is entitled "Withholding Judgment," which involves a number of distinct sub-skills.52 These are: avoiding charged language; making different perspectives explicit; translating meaning or intention for the parties; acknowledging the values, beliefs, opinions, and feelings of the parties without expressing approval or disapproval; and monitoring one's own assumptions, opinions, and conclusions in order to remain objective in the mediation process. A second building block is entitled "Active Listening." Active Listening includes: conveying attentiveness; re-directing discussion; parroting; and paraphrasing. The third category of building block skills is entitled "Interviewing Skills." Interviewing Skills include: the use of both broad and narrow open questions; identifying the inferences behind assumptions or conclusions for the parties; clarifying information; developing details of general concerns; and summarizing content.

In the large classroom, prior to the Smith v. Jones exercise session, I instruct on the theory and technique of these skills. Thereafter, students are asked to articulate the characteristics of an individual whom they have recently experienced as a good listener. Students are then asked to modify that set of characteristics to fit someone who is listening to people who disagree with each other in order to help them find mutually accept-

49. See supra part V.G.
50. See supra part VII.B.
51. These specific "building block" skills are covered in the first stages of establishing the process and fact investigation. Thus, they receive primary coverage in two classes and two exercise sessions. They receive additional coverage only as a secondary matter when the issues arise in the subsequent instruction of the mediation curriculum.
52. These three areas of skills have no hierarchical ranking.
able solutions to their disagreements; in other words, students should describe a good mediator. By participating in this exercise, students further develop their understanding of the mediation process, and of the tasks of the mediator. Students then discuss the value of these specific skills in accomplishing the purposes of fact investigation in mediation. Additionally, students critique the use of communications skills in various mediation scenarios. Finally, students are asked to recommend specific changes in the use of communication skills in the different mediation scenarios.

The Smith v. Jones exercise session begins with a discussion of which specific questioning and listening techniques the students would select for fact investigation in mediation and why. Team instructors lead this discussion, which is more textured than the preliminary large classroom exposure. Students are asked to identify which behaviors they would avoid during fact investigation in mediation, and why. This discussion helps the student distinguish among different resolution processes, and in particular, between mediation and litigation. The mediator/instructor is able to relate the skills to her or his own practice. The non-mediator law teacher can identify the role that many of these specific skills play in lawyering activity.

The focus on this particular skills agenda helps the students see how easily mediators may lose their impartiality, or how the disputants may perceive them to favor one side over the other. Again, this observation increases the students' understanding of the nature of the mediation process. Smith v. Jones is particularly useful for discussing neutrality. Some students in the mediator role invariably comment on their inability to remain neutral about the dispute. Also, some students in the role of Smith or Jones inevitably mention that they experienced the mediator as favoring the other side. The discussion of neutrality or impartiality occurs, in large part, because the fact pattern is a familiar one to which most law students have been previously exposed.

Students next identify the specific techniques that were used to develop the facts in Smith v. Jones. They then explain why a particular technique helped them disclose the facts. For instance, a student playing the role of Janet Smith may identify and explain how she felt better understood after the mediator acknowledged her anxiety over not being placed on the dissertation-ready list. A student playing the role of Dr.

53. See supra part V.E.
54. See supra part V.A, D.
55. See supra part V.I.
56. See supra part V.E.
Jones may remark on the usefulness of being asked for more detail concerning why he doubts the authorship of the pre-dissertation paper. Students are then asked to make specific suggestions regarding how to improve the fact investigation in the next mediation. Here, for example, a student playing the role of Janet Smith may observe that being asked, “Well, you heard Dr. Jones, did you plagiarize the paper?” put her immediately on the defensive. She interpreted the question to indicate that the mediator believed Dr. Jones, rather than her. Therefore, the student may suggest that the mediator would be more successful if, instead, she or he would ask something like, “Would you like to tell Dr. Jones how you wrote your paper?” On the other hand, a student playing Dr. Jones might offer that he became defensive when asked, “Like Janet said, don't you think you should have spoken to her directly before you decided not to submit a passing grade for the paper?” This student may suggest the mediator take a different approach. For instance, “What are your reactions to Janet's concerns about not talking with you about this matter before the grades were posted?”

This discussion is usually quite animated with students sharing their different perspectives on the experience. This provides the instructors with an opportunity to highlight the influence of perspective on fact interpretation. Moreover, the instructors can emphasize the differences in how various students handled the single case. This observation encourages the students to understand that there is no generic Janet Smith or Dr. Jones. Rather, many different types of Smiths and Jones exist, and the specific differences greatly influence how to administer the process and the final outcome as well.

A primary focus in this post-roleplay skills discussion is to reinforce the skill of effectively paraphrasing the facts while also acknowledging emotional content. This focus helps the student understand how to respond to another individual in a way which demonstrates adequate understanding to that individual. Students often comment that, contrary to what they had originally thought, this level of paraphrasing was difficult for them during the roleplay in Smith v. Jones. They remark that this task requires complete concentration and much practice. They also often remark that they experienced personal satisfaction when paraphrased accurately. The instructors reinforce such remarks as positive indications of students' awareness of the skills they need to perfect to conduct adequate fact investigation. Finally, all these observations provide a basis from which students begin to understand that many of the skills used in
mediation are also used in law practice.57

Later, in the large class, students use the facts of Smith v. Jones to identify the needs and interests of the two parties, to frame mediatable issues, and to identify potential normative issues.58 The identification of all possible needs and interests includes those concerns that may not be appropriate for mediation, or which mediation cannot resolve. This application of theory to the facts is done after the instruction on framing issues in mediation and is contrasted with the framing of normative issues.59

As an illustration, students are expected to articulate answers similar to the following examples; these examples are correct, but not exhaustive. Janet Smith's needs and interests might include the following considerations. She needs to determine how to be admitted to the final dissertation year. She needs to graduate on time. She needs to have her work acknowledged as her own. She needs to develop an academic relationship with her supervisor with clear expectations regarding supervision and performance for both the teacher and student. Furthermore, she does not want to be associated with the vandalism.

Some of Dr. Jones' needs and concerns can be articulated as well. He needs to be free from vocal advisee dissatisfaction and criticism during his tenure review process. He needs to restore his research and finish his manuscripts. He is concerned about his reputation among his tenured colleagues. He needs to have academically productive doctoral students. He needs to uphold specific academic standards within his field and within his department. He needs to effectively articulate the meaning of these standards to his advisees. He needs confirmation, or collateral evidence, that Janet Smith is indeed the sole author of her pre-dissertation paper. He needs to establish whether Janet should remain his advisee. If so, he needs an academic relationship with clear expectations regarding supervision and performance for both himself and Janet. Dr. Jones may also need to resolve, at least within himself, how the vandalism issue relates to his ability to continue to serve as Smith's supervisor.

To frame some of the above needs and concerns as explicit mediatable issues requires transforming these points into less partisan inquiries. These inquiries might take the following form. What constitutes adequate assurance of authorship for the pre-dissertation paper?

---

57. See supra part V.I.
58. See supra part VI.
59. Using case scenarios from the simulations to teach mediation is similar to using the "problem method" in teaching doctrine.
should be the guidelines for the protection of both reputations in the future? What should be the expectations for supervision and performance in the doctoral advisor-advisee relationship? What are the specific academic requirements for Smith to continue the academic program? What are the possible time constraints facing both individuals? How, if feasible, can the time constraints be accommodated?

Potential normative issues in Smith v. Jones might include the following formulations: Did Janet Smith commit plagiarism? Did Janet Smith vandalize Dr. Jones' office? Is Dr. Jones biased against female and/or older students? Has Janet been unresponsive to academic criticism? Did Dr. Jones unlawfully discriminate against Janet Smith due to her sex, in violation of Title IX of the Education Amendments of 1972, when he evaluated her doctoral candidacy? Here, it is imperative that students understand that some of these normative concerns may be explored during the factual investigation. However, the actual formulation of explicit issues would not take the form of the concerns worded in this manner. Likewise, judgmental determinations of these concerns would not be worded so as to characterize either party positively or negatively. This is especially true when both parties have not expressed a desire for these determinations in their discussions with each other.

When students are able to articulate needs and interests, mediatable issues and normative issues, they have achieved certain learning goals in the mandatory study of mediation. The ability to perform these skills reflects some understanding of conflict analysis. The student responses come from their simulating the facts of the case. Thus, students are able to move from the concrete application of mediation skills back to the theoretical understanding of the work. This is the purpose of the learning objective in providing experiential learning. Student response also indicates they understand some of the functions and responsibilities of the mediator. This understanding helps the student determine, in her or his role as attorney, whether the mediation process meets the particular goals and needs of a client.

61. See supra part VI.
62. See supra part V.B.
63. For a discussion of the purpose for providing experiential learning as part of the mediation study, see supra part V.C. See also supra part VII.B. Furthermore, this purpose is achieved not only by discussing issue-framing, but also by using Smith v. Jones to study fact investigation and by discussing whether mediation is appropriate in this case.
64. See supra part V.E.
65. See supra part VII.D.
E. Is Mediation Appropriate for Janet Smith? The Second Fundamental Consideration — Competent Advice

The second fundamental consideration in designing this mandatory mediation curriculum comprises a significant part of the student's work with Smith v. Jones. Students, in role as lawyers, explore in depth the considerations in advising their client about which resolution process to pursue. Depending upon whether students played the role of Janet Smith, Dr. Jones, or the mediator, their responses to many of the following inquiries will vary. This variation is desirable because it demonstrates the analytical texture necessary in a specific case before deciding whether mediation is an appropriate vehicle for dispute resolution. Further, this diverse discussion should help students understand that abstraction cannot satisfactorily resolve issues such as those concerning power imbalances and bias involving gender, race, or any excluded class. Whether a student is asked to think like a mediator or an advo-

66. See supra note 35.

67. For an introductory analysis to the concept of bias in mediation, see Christopher Honeymann, Patterns of Bias in Mediation, 1985 MO. J. DISP. RES. 141 (1985). The risks of race, age, gender, and disability-based bias, as well as homophobia, have concerned both adherents and critics because of their adverse effects on mediation participants. Delgado argues that mediation is at best a dubious forum for minorities, and implicitly for women as well, because the parties are not protected by the rules of evidence and procedure. See Delgado, Fairness and Formality, supra note 12. See also Robert H. Mnookin & Lewis Kornhauser, Bargaining in the Shadow of the Law: The Case of Divorce, 88 YALE L.J. 950, 978-80 (1979) (parties at a power disadvantage may suffer more harm because of a lack of predictability in outcome). Using social psychology theory as authority, Delgado concludes that the risk of prejudice in mediation is high because bias is environmental, advocates do not handle confrontation, parties may have differing socio-economic status, and the matter is personal. See Delgado, Fairness and Formality, supra note 12. This argument is not individual-specific. Rather, it is made on a class-wide basis. The authors suggest that mediation should be banned entirely when all of the above negative qualities are present, making the danger of bias too great. See id. at 1404. I submit that Smith v. Jones has all of the qualities in question. Thus, Delgado would bar mediation, and Janet Smith would not have the opportunity to explore and choose mediation even with the help of her attorney. From my perspective, Delgado's view perpetuates bias because a stranger decides for all Janet Smiths that they all have the same qualities and that they are not capable of effectively using mediation. Under Delgado's view, a paternalistic figure from afar would, without regard to the specifics of the particular case, determine what is best for a class of people. I advocate that responsible consideration of these negative qualities requires that the specifics of a particular case inform the decision to mediate, as the later discussion of Smith v. Jones illustrates.

Delgado's thesis does not rely on any empirical evidence comparing outcomes in mediation and adjudication. However, a few quantitative studies are in progress. One such study will test the Delgado thesis, and has been carefully and scientifically structured. Michelle Hermann, one of the researchers, is a noted mediator, law professor, clinician, and feminist. I encourage readers to write for a copy of the project's proposal, Proposal for an Empirical Study of the Effects of Race and Gender on Small Claims Adjudication and Mediation, published by the Institute of Public Law, University of New Mexico School of Law.

However, Delgado's thesis has received additional support from two recent scholarly articles. In the first article, Ian Ayres statistically documents the adverse effects of institutionalized bias in
mediate, the student must become conversant with the several factors which determine whether Smith and/or Jones are amenable to the mediation process. 68

At least one large classroom discussion is devoted to the issues involving the decision of whether mediation is an appropriate avenue. 69 Students must describe their reasoning in identifying the factors or standards they use in determining whether mediation is desirable. This study is further reinforced in the examination, which requires students to counsel their client on the choice of process. 70

Three important spheres of inquiry determine whether to advise Janet Smith that she should participate in mediation. First, this determination depends upon who Janet Smith is. This requires identifying some of her personal characteristics, abilities, and circumstances. Second, the decision to participate in the mediation depends upon who the mediator is. The advocate must have some sense of the intervener's specific abilities to use certain key skills, and a sense of her or his theoretical perspective regarding the values that mediation serve. Third, the decision to mediate also depends upon an evaluation of any other viable options available to

---

68. See supra part V. This study contributes to the student's clinical abilities to evaluate a case. The understanding gained by students increases their awareness of the tasks they will face, as a lawyer, in meeting their professional responsibility in helping their clients best manage a dispute. In sum, this study accomplishes several of the learning objectives described earlier in this article.

69. As with each aspect of the mediation study, students are assigned readings that cover these topics. These readings are specified in both the background memorandum and the LAPI syllabus. Both documents are available from the author.

70. See supra text accompanying note 43 for a discussion on the nature and content of this examination. The examination is scheduled at the end of the mediation study.
Janet Smith in resolving the matter. Each of these areas entails substantial analysis and reflection.

Initially, a determination to participate in mediation must focus on the profile of the affected individual, in this case Janet Smith. I teach the generic characteristics for participation and ask the students to develop a series of questions which they need to answer to determine Janet Smith's amenability to the process.71 Parties in a successful mediation must possess certain attributes which enable and empower them to reach a principled result.72 To determine the presence of these attributes requires answers to many questions. The following inquiries target the key characteristics that Janet should possess to effectively participate in mediation.73 Is Janet Smith psychologically able to question the mediator, or is she intimidated by the process or the intervener? In other words, is she able to speak for herself? Is Janet Smith able to identify and explore her

---

71. Gary Friedman was among the very first mediator/attorneys to articulate a series of characteristics regarding amenability to the process. See GARY FRIEDMAN, THE CENTER FOR DEVELOPMENT OF MEDIATION IN LAW, TRAINING MATERIALS (August, 1983). For access to these materials, contact Gary Friedman, Director, The Center for Development of Mediation in Law, 34 Forrest Street, Mill Valley, CA. I am grateful for his delineation. I have since developed my own listing that expands upon his earlier work.

72. See supra part IV for the author's theoretical perspective on the values that mediation should serve. The author's theoretical perspective on the values embodied in mediation is the foundation for the discussion of who the mediator is that follows. The choice of values makes a difference in the process the parties will actually experience. For instance, an intervener who merely embraces the value of settlement, in and of itself, will not be as committed to performing all the tasks which promote individual empowerment in the process. Furthermore, such an intervener may not be motivated to do her utmost to equalize power disparities and to reduce the influence of bias, including her own. Such bias detracts from the opportunity for genuine equal participation in the process by people of color, women, gays and lesbians, older people, and the differently abled. The threat of bias in human interaction is great because institutions and people operate through informal and formal rules that create a dynamic disposed to bias. See Stephanie M. Wildman, *Integration in the 1980's: The Dream of Diversity and the Cycle of Exclusion*, 64 TUL. L. REV. 1625, 1669-70 (1990). See also note 67. The reduction of bias in mediation requires that the mediator value bias elimination; also, the mediator must be able to monitor and control bias.

In addition, the attorney should also be concerned about the mediator's potential lack of "cultural awareness." Bias is easily detected as overt and conscious prejudgment. "Cultural awareness" is a more subtle test, and an important indicator of whether the mediator appreciates the symbolic effects of words and actions in their cultural context. Professor Charles Lawrence proposes a "cultural awareness" test for equal protection claims, in which the standard for intent would shift from purposeful intent to whether the common person in the dominant culture would symbolically link the effect of a statement or action to bias. If so, Lawrence argues, the actor acted on bias, even if unconsciously. In this sense the victim has been deprived equal protection of the law. See Charles Lawrence, *The Id, The Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 356-58, 364-81 (1987). Attorneys could apply a derivation of Lawrence's "cultural awareness" test to assist their investigation of potential mediators by gauging sensitivities and thereby minimize the risk that their client will face discrimination in mediation.

73. Because of the potential for bias in this case, Janet's attributes become decisive in electing whether to mediate. See supra notes 67, 72.
issues regarding the problem? Is she able to examine her needs without subjugating her concerns and interests? Is she able to accept assistance from the mediator? Is she able to explore alternative solutions? Is she able to consider different ideas about fairness? How important is vindication to her? Does she want to try mediation? What are her motivations for preferring mediation? Does she understand the mediation process? Is she able to explore Dr. Jones’ perspective? Does she have access to the resources she needs to enable her to engage in informed and self-determined bargaining?

Once a lawyer determines whether an individual is amenable to mediation, the lawyer should focus her attention on getting a sense of the mediator’s abilities and the mediator’s perspective on the values that mediation serves. Janet Smith’s lawyer would want to know the particular biases and experience of the prospective mediator. Many excellent, well-trained mediators are sensitive to the subtle and complex issues in cases such as Smith v. Jones. However, attorneys also need to know that some mediators are not sensitive to these concerns at all. Furthermore, there are mediators who are generally competent, but who lack abilities in certain areas. The goal of finding a suitable mediator is similar to judgment-shopping. However, here the concerns involve finding someone who is sensitive to the special dimensions of the case, rather than favorably disposed to particular issues. Meeting this goal is crucial to an equitable resolution of the case. Thus, in Smith v. Jones, if it appears that the

74. A major concern in the prevention of bias against women in informal transactions is the possibility that women operate from an unquestioned ethic of care, or a relational perspective that prevents a woman from being able to identify and assert her individual needs. See generally CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN’S DEVELOPMENT (1982); DEBORAH TANNEN, YOU JUST DON’T UNDERSTAND: MEN AND WOMEN IN CONVERSATION (1990); Grillo, supra note 67, at 1555-56.

75. The individual mediator controls the process. She or he influences not only which issues, but how issues are discussed. See Susan S. Silbey & Sally E. Merry, Mediator Settlement Strategies, 8 LAW & POL. 4 (1986).

76. The case of one of my colleagues comes to mind. Eleven years ago she and I were part of the same training program for a court-annexed Neighborhood Justice Center. Thereafter, she and I, among others, mediated many cases for that program. We also co-mediated on a few cases. I regarded her as one of the better skilled mediators at the program. Much later, she and I were among those chosen for special Persons in Need of Supervision (PINS) mediation training. In these types of mediations, the mediator must provide process among parents, children, and institutional representatives. During the training, my colleague roleplayed the mediator in a typical case. I was startled when she openly accused the mother of not being fair to the daughter. After the roleplay, she declared that she could only look at the dispute in a biased way because of her own strongly-held parenting views. She was not able to withhold judgment, and she uncontrollably came forth with her statement. Clearly, she was not suited to mediate PINS cases. Unlike this colleague, many mediators are unaware of their own limitations and biases. Therefore, the attorney and the consumer in general must pay attention to this concern. See supra notes 67, 72.
designated mediator is not well-suited for Janet, and if the selection of another mediator is not possible, Janet’s only option may be to decline mediation.

Mediation has not yet come under a regulatory scheme having a clear set of definitions and guidelines. Even if such regulation existed, it would not necessarily conform to the author’s empowerment scheme. Thus, the lawyer cannot presume that regulation insures the kind of in-depth inquiry into the party’s amenability to process as described above. It is necessary, therefore, that attorneys examine the previous inquiries for their clients, as well as investigate who the mediator would be. Such investigation is not an easy task given the absence of state or national mediator data banks. However, attorneys may take certain steps that should yield important information. First, they may ascertain the mediator’s reputation by discussing her or his qualifications and characteristics with the source of referral or the mediator’s agency or supervisor, and by talking with individuals whose cases the mediator handled. Second, speaking directly with the mediator should yield some valuable insights for the attorney. For instance, after such a conversation, the attorney may ask herself how well the mediator investigated and responded to her concerns. A mediator who works within an empowerment framework should welcome and facilitate inquiries regarding the nature of the process, her or his perspective, and her or his skills. Furthermore, a mediator who works within the empowerment context should be willing to refer an attorney to previous clients.

77. Several organizations have issued policy statements, model codes of ethics, and clear guidelines for mediators. For instance, the American Bar Association’s Standards of Practice for Lawyer Mediators in Family Disputes require lawyer-mediators to define and describe the process of mediation and its costs before the parties agree to mediate. Additionally, these standards require the mediator to be impartial, to keep the process confidential, to require informed and voluntary agreement, to suspend or terminate mediation if the process would harm a party, and to advise parties before an agreement is reached.

The Association of Family and Conciliation Courts’ (AFCC) Model Standards of Practice for Family and Divorce Mediations have similar standards for family mediators. These standards are more detailed than the ABA standards. In addition to defining and describing the mediation process, these guidelines prescribe that the mediator should identify the issues to be resolved, determine the appropriateness of mediation for the parties, disclose any bias, and describe the training received to be a mediator. Not only should the mediator describe the costs of the mediation, she or he should set an explicit, fair and reasonable fee. In addition, she should not charge contingent fees or commissions for referrals. The AFCC standards emphasize impartiality, neutrality, and confidentiality. They explicitly require the self-determination (empowerment) of the parties.

The Society of Professionals in Dispute Resolution has promulgated The Ethical Standards of Professional Responsibility, a broad set of standards for all neutral interveners in dispute resolution who belong to the Society, including mediators, arbitrators, negotiators, and other interveners. These standards address issues of impartiality, the parties’ informed consent, confidentiality, self-determination of the parties, and the intervener’s duty to expedite the process.
In Janet Smith's case, the mediator must possess several core characteristics that will reduce the chance for bias in the process and that can enable Janet to make well-informed and responsible choices. Of course, a good mediator in any case should possess these characteristics. However, the presence of these characteristics is vital in the prevention of bias and bargaining inequality in mediation. In a case where these hazards are not present, the corruption of the process by the mediator's weaknesses in these areas is less likely to result in serious injury.

First, the mediator must be able to fully develop Janet's story. To do so, the mediator must be a master of the active listening skills. This also means the mediator must elicit Janet's history and perspective on the matter to Janet's satisfaction. For instance, although a mediator may possess adequate listening skills, she may fail to probe Janet's perceptions about Dr. Jones' attitudes towards her. A mediator should not neglect these facts. If neglected, it is more likely that Janet will not feel understood. Although feeling misunderstood is never a desirable condition, this perception is especially dangerous to quality process when the individual is subject to actual or perceived bias and bargaining inequality.

Second, the mediator must be self-aware. This means Janet's mediator must be intrapersonally reflective and able to question her or his own potential for bias. The danger is that Janet's mediator may be unaware of her own potential gender or age biases, which may affect her ability to hear Janet accurately. Armed with this awareness, Janet's mediator should consciously utilize all the techniques at her disposal in order to offset this potential, and, on a more cognitive level, to withhold judgment. A good mediator will not mediate Janet's case if she harbors strong reactions to the parties or the subject matter.

Another core characteristic is that Janet's mediator must respectfully nurture Janet's ability to examine the situation from alternative perspectives. Janet needs to be able to see her situation from at least two different points of view, hers and Dr. Jones'. By reinforcing or expanding Janet's field of vision to include both views, she will be better able to explore the different possibilities for resolving the matter. For

---

78. These core characteristics have no hierarchial ranking.
79. For instance, is the mediator at all aware of holding any expectations that women act in certain ways simply because they are women? See Joan C. Williams, Deconstructing Gender, 87 MICH. L. REV. 797, 813 n.61 (1989). See also supra notes 67, 72. One author, also a mediator, makes general gender assumptions about behavior. See Isolina Ricci, Mediator's Notebook: Reflections on Promoting Equal Empowerment and Entitlements for Women, 8 J. DIVORCE 49 (Spr./Summ. 1985). Such thinking is a good example of the types of class assumptions I argue that mediators should avoid. Rather, any conclusions about behavior should come from understanding the individual woman as disputant.
instance, any mediator for Janet would be expected to help Janet explore the basis for Dr. Jones' expectations and standards. However, because of the actual or perceived bias in this case, a good mediator for Janet must take extra precautions to explore the matter in a way that does not appear to dismiss Janet's experience. The goal of providing the mediation process from the empowerment perspective is to create the opportunity for the parties to explore different possibilities in a reflective and empowered manner; it is not to secure a settlement apart from these concerns. Therefore, Janet's lawyer should tailor her investigation of the mediator to probe for these concerns.

Third, we must identify and evaluate any other existing options available to Janet in handling this matter. This is the last significant sphere of inquiry necessary for determining whether to recommend participating in mediation. This sphere of inquiry includes addressing concerns regarding time, cost, access to legal forum, personal satisfaction, release of anger, and enforcement. Time concerns require the attorney to specifically estimate the time Janet needs to resolve the matter by mediation or litigation. The attorney should also investigate Janet's time constraints. For instance, when must she graduate in order to accept the hospital's job offer? In addition, this analysis includes Janet's current time needs which may inhibit her pursuing a more lengthy or complex resolution process. The complexity of the facts and issues, and all the parties' profiles should permit the attorney to estimate the issue of delay in litigation and mediation. The financial cost also needs consideration. This includes the actual costs of representing Janet in each of the potential processes, and an assessment of mediator fees, court costs, and any other anticipated costs to prepare for and participate in either process.

Of course, the attorney for Janet Smith should advise her about her access to a legal forum. First, her attorney must determine whether she has a viable cause of action for illegal discrimination based on Title IX of the Education Amendments of 1972 and/or on the Age Discrimination Act of 1975. The students should realize that they need to ask several questions regarding whether Janet has meaningful access. These questions must go beyond the threshold of determining whether she has a cause of action, and should include the following concerns. What are the predictable outcomes of a litigation strategy for Janet? How does this

---

80. For purposes of this learning unit, students do not examine the appropriateness of all of the dispute resolution mechanisms. Rather, they focus exclusively on mediation and litigation. The other dispute resolution mechanisms are covered elsewhere in the curriculum.

strategy comport with Janet’s priorities about how she wishes to invest her energies and time? What are the procedural impediments, if any, to pursuing litigation? Is this a case where the law is unsettled and should be clarified by litigating these particular claims? In addition, students are encouraged to think about the theoretical issues inherent in a full analysis of court access. Therefore, class discussion here may segue into any of the following issues. Does mediation in Janet Smith’s case convey a message which discourages the public from seeking appropriate legal protection in matters such as this one? Is litigation in this case nothing more than a contest of resources? Does this type of litigation favor the more powerful party? Is this a case where mediation is (or can be) court-supervised or made part of a larger adjudicative framework? Or, is this a case where some issues should be mediated and other issues handled differently?

Lastly, several distinct enforcement concerns exist. Janet Smith’s attorney needs to examine these before advising Janet whether to participate in mediation. Among these concerns, students should address the following issues: What is the likelihood that this particular “Janet Smith” and “Dr. Jones” will adhere to a negotiated settlement? What external mechanisms and oversight of the agreement could encourage compliance with the negotiated settlement? What participation in the mediation process is available to the parties’ lawyers? If we decide to litigate, how likely is a favorable judgment and what specific types of relief may be available? How does that relief compare with what Janet wants and what she can ask for in mediation? Further, what are the choices and costs in securing court enforcement of the judgment?

VIII. Conclusion

The textured examination described in the last section leads students to understand the complexity of the lawyer's clinical evaluation\textsuperscript{83} of process options for a specific client. Students gain an appreciation of the strengths and weaknesses in either adjudication or mediation. Also, students improve their ability to develop a more thorough factual grasp of a case. This transforms the initial cacophony of law student voices into an epiphany about the relation between lawyering and mediation. Questions now replace many assumptions. The movement from assumption to question, or from vague question to lucid question, demonstrates im-

\textsuperscript{83} The term “clinical” refers to the ability to identify and diagnose problems in terms of objectives and alternative strategies, to assess probabilities of risks and benefits, and to reflect and learn from experience.
provement in critical thinking.\textsuperscript{84} Because of the students' growth to this extent, making the study of mediation mandatory and incorporating it into one of the required courses at CUNY Law School has been a correct curriculum choice.

In closing, the voices below are composites that I have recorded from CUNY law students during and after the required study of mediation. This epiphany demonstrates that many law students have achieved the learning objectives as they continue in their legal education, and integrate their professional and personal selves.

\textit{A. The Sounds from the Epiphany of Law Students' Voices After the Required Study of Mediation}

\textit{Initial Traditional Lawyer:}

"Why do I view my work as a lawyer as excluding a lot of this work on understanding others? How will I explore my clients' interests when they come to me for help? Will I see only the legal issues? What am I going to do about their other concerns in handling their problem?"

\textit{Initial Uncritical Cooperative Conflict Avoider:}

"Why do I dislike all advocacy work? What does that mean for what type of lawyer I will become? Is insecurity about my abilities to be a competent advocate a possible source for my dislike of advocacy?"

\textit{Initial Liberal Passive Resister:}

"How do my biases affect my ability to examine different process options for my client? I can see that this ability would be important for many clients. If I can't or won't do this for a client, how do I explain that fact to the client? What am I going to do about the consequences of not doing any of this? What am I professionally obligated to do for the client? What should I be professionally obligated to do for the client?"

\textit{Initial Expert:}

"I sense I am missing out on something here. What is it? I must be overlooking something because other students that I respect do not seem to think their time is being wasted. What am I not getting here? Privately, I ask myself whether I am simply more advanced or educated? Maybe I do not know it all. Actually, this study is thought provoking and some of the material does have merit, but the coverage is too superficial."

\textsuperscript{84} I draw significant support for my view of the lawyer as a reflective practitioner from the work of Donald Schon. \textit{See generally DONALD A. SCHON, THE REFLECTIVE PRACTITIONER: HOW PROFESSIONALS THINK IN ACTION} (1983). He posits a model of effective practice that requires knowledge through reflection in action.
IX. Appendix A*

A. Role Instructions for Smith v. Jones

1. General Information and Instructions for Mediator

Janet Smith is a doctoral student in family psychology at Bayside University. She is forty-seven years old. She returned to graduate studies two years ago after raising her family. Janet has been specializing in counseling the dying and the families of the dying.

Janet was assigned a new academic advisor last year, Dr. Jones. Dr. Jones and Janet have not had a good academic working relationship. Recently, the situation has seriously deteriorated.

You are a grievance officer with the University Affirmative Action Program. Both individuals have come to your office to request your assistance to try mediation so that public proceedings and adverse publicity may be avoided. You should try to find out from the disputants what they think has happened.

You should start out with both of them in joint sessions with you. You may find that you wish to speak to Janet and Jones separately to explore more what concerns each person. Prior to caucusing make sure to state that you are not taking sides, to state that you are trying to understand the situation as best as possible, and to state that you will not betray anyone's confidence. Establishing trust by your active listening skills and lack of judgmentalism will aid your understanding of the fact universe of the dispute from both parties' perspective.

You also need to help the parties develop a full set of interests and needs that become formulated as an explicit agenda of issues for resolution of the matter. It is useful to get the parties to focus on what they think meets their circumstances. You may begin to develop several points for agreement or disagreement among the parties. The disputants do have a lot of information about themselves, and it will be useful to solicit as much of this information as you can.

2. Instructions for Janet

You are forty-seven years old. You have spent the last several years being a homemaker and caring for your family. You are experiencing a difficult time returning to school. You have performed marginally on

* The author has a copyright on the Smith v. Jones facts and the Master File Questions in Appendix B. However, readers are welcome to use the facts and Master File Questions as long as attribution is given to the author. The author encourages readers who do use Smith v. Jones or the Master File Questions to provide feedback to: Beryl Blaustone, CUNY Law School, Queens College, 65-21 Main Street, Flushing, N.Y., 11367.
Informal that papers. Cause ized the ning writing that far dissertation both these satisfactory papers displayed experience. Analysis performance." Gist. Jones 1354 Your 1354 You Your standing tried gram. Your finally exams direct for exams. Jones is highly esteemed as a theoretical and research-oriented psychologist. He has been extremely impatient with your "level of academic performance." Your last written requirement was the major pre-dissertation analysis which requires each doctoral student to synthesize the existing literature that will be used in dissertation. Your grasp of the theory in counseling the dying is very well-developed and is based upon extensive experience. You submitted your paper directly to Jones. You feel that it was an excellent critical review of the literature. For once, you felt you displayed a solid theoretical analysis.

Before this assignment, you received poor marks on two previous papers this semester by other professors. Jones was notified of your unsatisfactory performance and has had two conferences with you about these papers. At each conference, Jones suggested that you may not be capable of doing the work and staying in the program. Each time you both ended up arguing.

Your name did not appear on the posted list of grades for the pre-dissertation analysis. You were extremely upset at the omission of your name and went directly to Jones. Jones said that the paper was indeed excellent. Further, he said the paper was researched, written and edited far better than any previous work you had submitted. Jones finally said that he wanted to be assured that you did not receive any assistance in writing this paper, and that it is an accurate reflection of your abilities.

You left Jones office upset and unable to respond. You were planning to see him again, but then the situation got worse. Jones says that the day after you saw him his manuscript files in his office were vandalized and substantially destroyed. Jones believes you were responsible because he found a coffee cup you frequently use beside the damaged papers. You know this because one of your clinical supervisors told you that Jones told her this at a faculty party.

Jones is up for tenure. You don't know much about it. You filed an informal complaint with a grievance officer of the University Affirmative
Action Program to mediate in order to minimize the chance of your problems becoming public. You are concerned that you will not be permitted to stay in the program and complete your studies. You would like to be assigned a new academic advisor. You want to find a way to meet the pre-dissertation requirement and move on.

3. Instructions for Dr. Jones

You are a highly esteemed theoretical and research-oriented psychologist in "family systems." You are a professor in the department of family psychology at Bayside University. You became Janet Smith's doctoral advisor last year. The dean of your department assigned her to you without your approval. You have several students to supervise and this makes your ability to produce research results more difficult.

You have been with the department for five years. You know you are regarded as a brilliant researcher. You are up for tenure next year and the dean is concerned that you have not published sufficiently. You want to stay at Bayside, and you want the security that tenure can bring to your research projects. Your published work is highly regarded, but you are unpopular with several of the senior professors in the department. This is in part due to the fact that you have pre-empted your older colleagues in the field. You are worried about your tenure appointment and you feel that you will be prejudiced by students who perform poorly at the thesis preparation level. You see Janet Smith as a potential problem.

Janet has had a difficult time returning to school. Last year she was on academic probation and she is borderline in meeting minimum academic standing this year. Good standing is required for Janet to advance towards her doctoral defense.

Janet's last written requirement was the major pre-dissertation analysis which requires the student to synthesize the existing literature that will be used in the dissertation. You were surprised at the superb paper Janet submitted. She has done poorly on two previous papers that other professors have showed you. You have met with Janet and have found her to be resistant regarding her academic difficulties. Previously, you have expressed to her that she may not be capable of successfully completing her doctoral work. You have heard that she is gifted in the clinical work. However, academic competence is also required. You thus deleted Janet's name from the posted list of doctoral students that successfully completed the pre-dissertation paper. When Janet saw you, you told her that the paper was researched, written, and edited far better than any previous work that she had submitted. You requested an assur-
ance that Janet did not receive outside assistance on this assignment. You expressed your need as advisor to be sure that Janet did possess the competence reflected in the paper. Janet became upset and left the office without responding.

The day after Janet left your office, your manuscript files were vandalized and substantially destroyed. An entire file is missing, and several remaining papers were torn and have coffee stains all over them. You are distraught over the damage because the manuscript is already overdue and the publisher is ready to cancel the agreement to publish. Should this happen, you will be in worse shape for getting your tenure appointment. Beside your manuscript file-boxes you found a half full coffee cup that you have seen Janet use several times. You believe Janet is responsible for the damage and should be dismissed from the program. You are concerned that Janet's behavior is adversely affecting your reputation in the department. This is the type of thing the senior professors can use against you. For this reason you are not interested in making this problem more public than it already is.

Janet Smith filed an informal complaint with the University Affirmative Action Program. You are interested in participating in mediation to avoid adverse publicity.

X. APPENDIX B

A. Master File Questions: Selected Examples of Assigned Questions from Several Courses

1. General Questions

1. What concerns, questions, or reservations do I have about the use of mediation: Why? (name at least three). Please discuss these concerns during the semester, where appropriate, in the remainder of your master file and in class discussion.

2. In the mediation roleplay which took place at the end of class, to what

---

85. Several years ago, I started to label these written reflection questions "Master File Questions" instead of "Journal Questions." I made this change primarily because I did not intend that the written answers reflect on whatever the student is motivated to write regarding the material. Rather, the questions should reinforce coverage of my primary learning objectives for that portion of substantive material. Additionally, because many students oppose the concept of written reflection in legitimate lawyering training, I felt that the title change would be less distracting. Law students generally experience the file system as a more appropriate format for this type of inquiry in professional education. Therefore, this kind of written reflection on experiential learning differs from writing a journal, and the change in label is much more than a semantic change in name.

All these Master File Questions in this appendix were not distributed at the same time. Rather, specific questions were assigned for specific classes, and not all of them were used in one specific course.
extent were facts elicited from both disputants to "paint" the "big picture" (larger framework of the entire dispute)?

3. What specific behavior by the mediator(s) aided or hindered increased understanding of the facts by the disputants?

4. List the needs, concerns, and interests for both Smith and Jones. What was the actual phrasing of the issues which were jointly discussed? Upon reflection, how would you have formulated the mediatable issues?

5. Did you omit any of the concerns that either side identified as major interests? Why was that? Could you have avoided that omission? How?

6. How precisely did you phrase and discuss the issues? What techniques did you use to more precisely formulate the issues?

7. Discuss what, if any, reservations you have about using mediation in cases such as Smith v. Jones where certain fundamental civil liberties are implicated? Does this mean that any case where there is alleged bias, grievance mechanisms should be prohibited? Should the courts be the sole forum for entertaining such complaints? (Please note that an affirmative response indicates prejudice against significant administrative agency processing as well.)

8. In framing the issues did the mediator dominate the substantive content of the outcome? Why or why not?

9. What specific criteria are you developing to determine what are mediatable issues and who are competent parties?

2. Questions for Mediators

1. Were you able to identify the needs and concerns of each party? How could you tell? What techniques did you use? Did you observe your disputants become less positional? How and at what points? At what point in the discussions were you able to brainstorm options? What initiative did the parties take and what techniques did you use?

2. What were your specific goals?

3. What did you do to achieve those goals?

4. What did you do that stood in the way of achieving those goals?

5. In what ways were you satisfied with the process you provided?

6. In what ways were you dissatisfied?

7. What else could you have done to make the parties more satisfied?

8. Where and what assumptions did you find yourself making about the parties?

9. What were the biases and values which operated during the process (please do not respond none)?

10. Was this a mediatable case? Why?
11. Did your role instructions raise questions for you about whether you were the appropriate intervener?
12. Should your “impartiality” have been questioned?
13. What points from this experience do you want to keep in mind when you mediate next?

3. Questions for Disputants

1. Did you move from your original position? Did you experience coercion in the process? How? Did you become genuinely focused on what would solve your concerns? Did you consider the needs of the other party? Why was that?
2. At what point did you start brainstorming possible solutions? At whose initiative? How was the timing for you? What are your reactions to the mediator's techniques?
3. How did you want the mediator to behave?
4. What did you want from her or him?
5. In what ways were you satisfied?
6. In what ways were you dissatisfied?
7. What important information was not elicited from you?
8. In what ways do you think you were treated fairly?
9. In what ways were you treated unfairly?
10. Do you think the other party was treated fairly? Why?
11. Did your view of the problem change? Why?
12. Did you view the mediator as impartial? How?
13. Did the fact pattern raise questions for you about whether you should be in mediation?
14. What were those questions?
15. How would you handle this problem if you were not mediating or if this one was unsuccessful?
16. What points from this experience do you want to keep in mind when you mediate next?
17. What, if any, important item of information was not solicited from you nor volunteered by you in the mediation simulation? Why did that occur?
18. Did you stay in an adversarial mode? Did the mediator do anything to account for this movement or lack thereof?
19. Did you gain an understanding of your opponent’s story? To what extent? Did your view of the dispute undergo any change? In what ways? What specific behavior of the mediator aided or hindered increased understanding of the facts?
20. How well did the mediator perform the opening statement and establish legitimacy for herself or himself and the process? Why?