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SYMPOSIUM: NEW WINE REQUIRES NEW WINESKINS: TRANSFORMING  
LAWYER ETHICS FOR EFFECTIVE REPRESENTATION IN A NON-  
ADVERSARIAL APPROACH TO PROBLEM SOLVING (Except)

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*And no one puts new wine into old wineskins; or else the new wine will burst the wineskins and be spilled, and the wineskins will be ruined. But new wine must be put into new wineskins, and both are preserved. n1*

### Introduction

The new wine of mediation must have new wineskins, lest it not ferment and sour, left incapable of achieving its full potential. Yet we have assumed that we can merely pour the new wine into the old wineskins of litigation, advocacy, and adversariness, and that it will come of age and endure. Such is not the case. When a new wine is introduced, whether a new vintage or varietal, by its very nature a new wineskin is required. So, too, with the field of alternative dispute resolution ("ADR"), in particular mediation. n2 The wineskins are those parameters that shape lawyers' conduct, commonly ethical guidelines or rules. n3

This essay specifically examines the role of the lawyer representative in the mediation process. The focus is not on lawyers who serve as neutrals, n4 but rather those lawyers who find themselves representing clients at the mediation table instead of in courtrooms

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or at depositions. Although some attention has been paid to this subject in the past, n5 it often has been in making mediation sound more "adversary like," by use of terms such as "mediation advocate" and "winning at mediation." n6 This essay stresses the importance of lawyers understanding and conforming to the appropriate representative role in mediation, a process radically different from the litigation paradigm. n7

Part I of this essay provides an overview of the issues addressed in the piece. Part II explores the inherent differences between mediation and litigation, otherwise referred to here as the adversary system. In so doing, I also outline the various complications that have resulted from the consumption of mediation by litigation. Part III illustrates the background of current ethical standards for lawyers, which originated and are housed in the adversary system. Some of the problems that such an adversarial approach may cause, even for those operating within such a paradigm, are highlighted. This section also examines the inapplicability of adversarial approaches in lesser, or non-adversarial procedures.

## I. Overview

ADR n8 has developed over the last twenty-five years to a point where it is integrated within the legal system of jurisdictions throughout the United States n9 and abroad. n10 This development was, at least in part, a response to observed problems within the legal system, such as cost and delay, along with a general dissatisfaction with the administration of justice. n11 With promises of saving time and money, ADR (most often the mediation process) was introduced to, and soon implemented by, the courts. n12 Simultaneously, and from a related impetus, n13 mediation as a process for resolving conflict also flourished at the non-litigation stage of disputing. This process often is termed "community mediation." n14 Community mediation centers have grown, and a national organization for those involved in this work, the National Association for Community Mediation, was created. n15 More recently, we have seen the proliferation of mediation use in a variety of contexts, ranging from the workplace n16 to nursing homes n17 to managed-care conflicts. n18 With the various applications of mediation, variation in the way the process is approached and conducted also has surfaced. And although the term ADR often is used to describe all of these processes, it is only upon the mediation process that I focus, because it is the process that differs so significantly from our more "traditional" adversarial system. n19 It is the integration of mediation with the litigation process that is the focus of this piece.

Mediation and litigation, or the civil justice system, embrace very different paradigms for dispute resolution and problem solving. Despite the transparency of the previous statement, judges, legislatures, and lawyers have begun to merge the two, n20 often with mixed results. n21 In some jurisdictions that utilize court-annexed mediation, mediation remains a distinct process; n22 whereas in others, mediation is viewed as merely part of pretrial litigation. n23 There are a number of reasons for this latter result, one being the strength of the adversary system itself.

Some of the difficulties in merging mediation and litigation are also due, in part, to lack of planning and a failure to consider early on the inherent differences between mediation and litigation. n24 This piece does not assume that one system or approach is better suited for dispute resolution than another, nor will it offer a direct attack upon the adversary system. n25 Although some are skeptical about which system is more appropriate for a dispute resolution or problem solving role, n26 I contend that both - and, indeed, many - different processes for dispute resolution and problem solving will continue to expand in use. What is most vital to the effective use of dispute resolution is that each method is approached, and the participation therein is commensurate, with the goals and objectives of that particular forum. n27

This essay will not examine the role of the mediator, though many questions - including ethical ones - remain about the role of mediators in general, n28 and, specifically, the role of a lawyer serving as that neutral. n29 In fact, there still is debate over whether the work of a neutral, be it as arbitrator, mediator, or neutral case evaluator consists of the practice of law and, as such, should or can be governed by the ethical considerations for lawyers. n30 Those discussions are continuing to take place, n31 and I leave those for another time. n32 The focus here is on the role of lawyers in representing clients, but doing so in a distinct forum - that of the mediation room as opposed to the courtroom.

In this discourse, I attempt to refrain from reiterating the considerable debate about the various types, styles, and kinds of mediation that are utilized, as that has been done, if not overdone. n33 Instead, I will concentrate on examining the difficulties resulting from the insertion of mediation within litigation. Yet it must be pointed out that some of the confusion n34 and resultant debate about mediation - as to its goals and objectives as well as theoretical underpinnings - have been generated by efforts to integrate, or at least associate, mediation with the adversary system. n35

For clarity in this essay, the type and kind of mediation to which I refer is a process that, by facilitating communication and understanding, assists the parties in achieving a solution that they can accept. n36 In other words, the process is one that is focused on discovering the underlying interests of the parties and on solving a problem rather than one concentrated on obtaining a settlement based upon what the law may be or what it declares the parties' respective rights to be. Although I believe this to be a generally accepted definition of mediation, n37 some disagree and employ other possible definitions. n38

My premise is that mediation has the potential to be a viable alternative to the adversarial paradigm. n39 As long as it continues to reside within the adversarial system of litigation, however, it will never have the opportunity to mature into the independent and unique process that it is designed and promised to be. n40 The goals of mediation are quite different than the goals of the litigation system. Mediation involves a radically distinct and contrasting paradigm - one that embraces a mindset, vision, skill set, and attitude very different from those of the prevailing adversarial norm. n41 Reflecting on what was first expounded on by Professor Leonard Riskin nearly twenty years ago, n42 mediation

involves a different philosophical map, if you will. To participate completely in the process, all participants must adopt this philosophical map. More specifically, to have an effective process, the conduct, performance, and skill set demonstrated by those who represent clients within a system must be consistent with the purposes set forth by the system. Consequently, the rules, and the conduct to be governed by those rules, must be changed if lawyers are to be suitable, capable, and competent representatives in the mediation process. Lawyers from a variety of practice areas have called for specialty codes of ethics. n43 The rationale for distinct ethics codes for specialized practice areas is that different goals in representation necessitate different roles for the lawyer; hence, the codes that set parameters for practice should likewise differ. n44 This same premise justifies the need for different ethical rules for lawyer-representatives in mediation.

## II. Difficulties in the Intersection of Mediation and Litigation

To say that some difficulties resulted from the integration of mediation with litigation is quite an understatement. The intersection of mediation and litigation can be viewed as having produced a train wreck - or at least a significant derailment. Mediation was forced off of the track. n45

Much has been written of late on this phenomenon. Some commentators have observed that the focus of the mediator's role may change in the context of court-annexed work, where the mediation becomes more "evaluative," n46 or the process more akin to a judicial settlement conference. n47 Others contend that mediators should avoid such changes in their practice n48 and remain true to the mediation process. n49 Still others have observed that a hybrid of procedures has resulted. They use the term "liti-mediation" to describe a culture in which it is taken for granted that mediation is the typical way of ending litigation. n50 In that culture, mediators are encouraged to refine skills to fit within the adversarial paradigm. n51 Alternatively, mediation also is viewed as wholly outside of the legal context. n52

Then there are those who contend that ADR is merely old wine in new skins. n53 To the extent that the only contribution made by mediation is assistance in the traditional litigation settlement procedure - with the focus only on risk assessment and predictions of trial outcome - perhaps it is old wine. If that is the case, then the use of the mediation label connotes nothing new or innovative, but is only a re-packaging of an old process. If that is all that we envision from the mediation process, then very little potential is actualized and therefore lost. Alternatively, if we allow mediation to achieve its full promise, to provide parties the opportunity to find creative and satisfactory solutions to problems without the contentiousness of a right-wrong paradigm, then a new model for the resolution of conflict will emerge. For it to ripen and flourish, we must allow a relatively unripe process to mature into a fine instrument of dispute resolution without being overgrown by those models which are more mature and experienced.

In a number of jurisdictions, mediation has become more akin to a pretrial procedure, another hoop to jump through before reaching the trial stage of litigation. The use of mediation in litigation has been the source for the new term "liti-mediation," described by

Professor John Lande in a seminal piece looking at the intersection of mediation and litigation. n54 This development demonstrates how mediation can be, and to some degree has been, consumed by litigation - the very thing advocates of mediation sought to avoid. n55 This phenomenon also is illustrated by the use of the term "litigation lite," n56 which aptly connotes the use of ADR in pending litigation. Part of the reason mediation has been consumed by litigation is that many lawyers conceive of it only in the context of litigation. n57 The possibility of individuals in conflict going to mediation, without first filing a lawsuit, is beyond the consideration of many.

Litigation is viewed also as the default paradigm for conflict resolution should settlement not be achieved through the mediation process. n58 In this version of mediation, the process is used solely to assist in the settlement of lawsuits, thereby squandering mediation's true potential. During this "mediation process," the discussions, actions, and outcomes closely resemble those that occur during adversarial pretrial litigation. As noted by Judge Wayne Brazil, this conduct may include activities such as:

Advancing arguments known or suspected to be specious, concealing significant information, obscuring weaknesses, attempting to divert the attention of other parties away from the main analytical or evidentiary chance, misleading others about the existence or persuasive power of evidence not yet formally presented (e.g., projected testimony from percipient or expert witnesses), resisting well-made suggestions, intentionally injecting hostility or friction into the process, remaining rigidly attached to positions not sincerely held, delaying other parties' access to information, or needlessly protracting the proceedings - simply to gain time, or to wear down the other parties or to increase their cost burdens. n59

The invasion of these kinds of behaviors into the mediation process also is demonstrated by continuing education courses with titles like "How to Win in ADR" and "Successful Advocacy Strategies for Mediations." n60 In these instances, perhaps all mediation has become a "lite" version of the litigation system. In other words, it is not a real alternative. Should the trend continue, I fear that real alternatives no longer will exist. Instead, only two choices will remain: litigation regular and litigation lite. n61

In part, we, the ADR profession, are responsible for this phenomenon. We urged courts and legislatures to require that litigants participate in mediation, with the promise of saving time and money for the litigants as well as the court system. Of course, the use of mediation or ADR can be very effective in saving time and money. Court dockets can be reduced to a manageable size, as cases are settled earlier than they would without intervention. n62 And perhaps mediation does offer a better view of justice than the parties otherwise would have, because the parties themselves are permitted and encouraged to participate in the process. n63

Unfortunately, the fact that mediation is so different from the traditional paradigm for dispute resolution was never stressed, and likely in many instances, never even mentioned. In fact, other commentators now note that both mediation supporters and

court personnel failed to recognize the irony and potential for conflict when combining "a process that rejects the relevance of the law into the very institution which conditions access upon an effective invocation of the law." n64 Perhaps it was because the promise of saving time and expense was sufficient enough to garner interest. n65 In other instances, it was perceived that discussions of mediation and the idea of party participation and empowerment would be considered too "touchy-feely" for litigators, those charging into the battle of the courtroom. n66 Most lawyers were not readily willing, and perhaps not able, to adjust to this very different model of dispute resolution. So to "sell" mediation, the packaging was changed. Lawyers were encouraged to be tough mediation "advocates" and "win" at mediation. The problem is that the process was changed or modified along with the packaging - souring a possibly exquisite vintage.

Another aspect of mediation critical to the realization of its potential is that parties have an opportunity to fashion their own, creative solutions to their problems. To the chagrin of some in the justice system, these solutions are quite unlike and even unrelated to what a court might do in the same situation. Some quarrel with this, particularly in court-related matters, contending that the parties should at least be advised as to what they might achieve in a court proceeding, and therefore be in a position to make better informed decisions about the final outcome or resolution. n67 Others contend that the legal system is the default paradigm to be used, and therefore during the mediation process consideration should be given to the most likely litigation results, n68 and that the mediator has an active role in such deliberations. n69

If mediation is indeed a unique process, then it requires new thinking in order to achieve new solutions. Establishing an innovative process includes establishing new parameters for conduct during that process; yet we have given lawyers little guidance in that regard. Although much time was spent on training and teaching mediators, n70 little attention was given to what the role of the lawyer-representative should be in the new process. Apparently, it was assumed that lawyers would accompany clients into a wholly different process - with a fraction of understanding about mediation and after years of being entrenched in the adversary system - and conduct themselves in a different manner. In most cases, that did not occur. Instead of viewing the participants across the mediation table as "joint venturers" in a problem solving process, n71 lawyers considered them adversaries. Hence, the contentiousness of the adversary system permeated the mediation process.

### III. Background of the Ethical Considerations and Rules for Lawyers

The ethical rules that currently govern lawyers were written with the adversary system in mind. n72 The underpinnings of the adversary system, with a focus on competition and winning at all costs, provide the context for the lawyer's work. Merits of the adversary system, as weighed against a different approach to dispute resolution or problem solving, have been ably explored, n73 yet I mention this system because it underlies the very nature of lawyer conduct. The adversarial system has a long history, and although the encouragement of adversarial behavior and competition works ideally to achieve justice through the determination of truth, n74 difficulties arise as well. In many instances, this

adversary ethic has gone too far. n75 Reports have included even threats of murder and fistfights among lawyers, n76 a result of the argumentation, threats, and deception inherent in the adversarial approach. n77 This extreme adversary ethic is likely responsible, at least partially, for the low regard that the general public holds for lawyers as well as the dissatisfaction the profession feels with itself. n78

Many contend that the behavior of most lawyers today is a direct result of the contentiousness and adversarial culture inherent in the adversary system, both historically and currently. n79 Others note that this culture is not just part of the litigation system, but is a reflection of society generally. n80 Adversary conduct, which may involve ruthlessness, deceit, and verbal warfare, n81 is quite problematic enough in its home environment, n82 let alone in the context of a non-adversarial procedure. The demands of law practices today seem to compel even more extreme behavior, all of which is employed in the name of zealous representation. n83 Even the profession itself realizes that constant conduct in a contentious and litigious manner takes its toll. Lawyers report increased pressure in a ferociously competitive marketplace and complain about having to work in an adversarial environment "in which aggression, selfishness, hostility, suspiciousness, and cynicism are widespread." n84 Moreover, they complain about a lack of civility among lawyers and a lack of collegiality and loyalty with partners. n85 Yet this conduct is reinforced in many instances. Witness the use of metaphors to describe lawyers' work in a way that promotes combativeness and dominance. n86 Recently, the glamorization of the adversary lawyer role in the arenas of television and cinema emphasizes such adversariness. n87 This adversarial attitude begins in law school, itself a competitive endeavor. n88 The student learns that competitive methodology is at the core of the legal system, and that translates to all forms of dispute resolution. n89 Perhaps, as others have pointed out, those individuals who possess a very competitive personality or lack more collaborative tendencies are drawn to law school. n90 And although some continue to call for change and reform of the conduct of lawyers, beginning with legal education as well as legal ethics, n91 and attempts have been made to effectuate changes, others wonder whether such reform is actually possible. n92

The concept of zealous advocacy, although founded within the criminal system, has become part of lawyering. n93 This zealotry, however, has been exaggerated to the extent that some contend it gives rise to an unworkable view of the lawyer's task. n94 The belligerent and aggressive conduct of some lawyers continued to escalate, which resulted in a call for "professionalism" standards. Today, nearly every bar association has a committee or program focused on the civility of lawyers with calls for advancing professionalism and retreating from the "Rambo" approach. n95 Although professional courtesies often are extended, usually this is done only superficially. Many courtesies are ignored in practice, particularly under the stresses of time and the need for billable hours.

What is particularly problematic in the adversary system is that some of the rules permit conduct that may be viewed as deceitful and contentious. Yet this is approved of in the name of zealous representation, even though it is not always effective, even within the adversary paradigm. Many of the very rules that establish parameters or guidelines for lawyers' behavior were written by lawyers who advocated individual liberties and rights,

regardless of morality issues. n96 This mindset was then incorporated into the mainstream and the ABA Model Code of Professional Responsibility. n97

No doubt the adversary system remained the foundation of lawyers' work in the view of the ABA Ethics 2000 Commission on the Evaluation of the Rules of Professional Conduct ("Ethics 2000 Commission" or "Commission") in its new code n98 despite urgings to the contrary. n99 Although modifications were made to accommodate the lawyers as neutrals, n100 only one change aimed at the representative lawyer was enacted, that being a suggestion - but not a mandate - to inform clients about ADR. n101

In the negotiation process, for example, Rule 4.1 provides a very nebulous truthfulness standard. n102 And although more than twenty years ago there appeared, at least in early drafts, a provision calling for more honesty in negotiation, n103 it was deleted and the current provision inserted. n104 The wording of the Comments often is used to support various methods of puffery and trickery in the context of negotiation. Although I do not support these "conventions in negotiation" as it allows representatives and those who negotiate to deceive other parties, it remains at this point the norm, and is still accepted in legal contexts. n105 This clearly should not be the standard in mediation, a process that is dependent upon the direct and truthful exchange of communication.

But this conduct now carries over into the mediation context. If mediation is viewed as nothing more than facilitated negotiation, then what is acceptable conduct in the context of direct negotiation becomes, by extension, acceptable in the facilitated negotiation. This conclusion is contrary to those qualities, attitudes, and conduct basic to the mediation paradigm. Such approaches erode the fertile ground upon which to base non-adversarial resolutions. If it were up to me, and likely others, n106 I would change the "conventions" in the first place. Understanding that much direct negotiation still takes place in the context of the adversary system, however, perhaps it should remain as is, but at least be qualified in the contexts of mediation and other problem-solving, non-adversarial processes, such as consensus building and collaboration. n107

Mediation is a process requiring, even demanding, a distinct mindset - unlike that necessary when entering the battlefield of litigation. But when the mediation process was combined with the highly adversarial litigation approach, mediation was all but consumed. When we examine the goals and objectives of each system, we see that they are very different. Although the adversary system attempts to determine truth, preserve rights, determine right and wrong, and punish a wrongdoer, the mediation process, on the other hand, focuses on the determination of interests, creative problem solving, party empowerment, and process satisfaction. n108

Yet this innovative and unique varietal of wine was placed into the old wineskins of competitiveness and adversariness. In so doing, the potential for mediation to ripen and mature into its own varietal, quite different from that of the adversary model, was lost. As a result, many approaches to mediation are viewed as only litigation lite; n109 and the lawyers who represent clients in that system merely as wolves in sheep's clothing. n110

I contend that we need new wineskins if the wine is to mature to its greatest potential, because wineskins are the parameters that shape the lawyers' conduct. It is possible to modify the lawyer's skill set, so that wolves are taught to act as sheep. Although others contend that both wolf-and sheep-like conduct are called for in many instances, n111 I urge that in most mediation circumstances, a more collaborative and cooperative, sheep-like approach is appropriate. If more specific ethics can be designated for those in collaborative situations, then the old wine in the old wineskins will remain intact. So, too, with the parameters of law practice, which now include those more traditional as well as innovative approaches to problem-solving and conflict resolution. Then, as the parable states, both systems may be preserved.

**FOOTNOTES:**

n1. Luke 5:37-38 (New King James).

n2. Note that some see alternative dispute resolution ("ADR") as merely old wine in new wineskins. *Infra* note 53 and accompanying text.

n3. I could not resist expanding on the wine analogy, as the talk giving rise to this essay was presented at the Association of American Law Schools annual meeting in San Francisco - only miles from Napa-Sonoma. I also wish to recognize that I am not the first person to use this analogy in reference to ADR processes. E.g., Paul H. Haagen, *New Wineskins for New Wine: The Need to Encourage Fairness in Mandatory Arbitration*, 40 *Ariz. L. Rev.* 1039 (1998).

n4. For a discussion of lawyers serving as neutrals, see Carrie Menkel-Meadow, *The Silence of the Restatement of the Law Governing Lawyers: Lawyers as Only Adversary Practice*, 10 *Geo. J. Legal Ethics* 631 (1997) [hereinafter Menkel-Meadow, *Silences of the Restatement*], and Maureen E. Laflin, *Preserving the Integrity of Mediation Through the Adoption of Ethical Rules for Lawyer-Mediators*, 14 *Notre Dame J.L. Ethics & Pub. Pol'y* 479 (2000). See also Carrie Menkel-Meadow, *Ethics in ADR: The Many "Cs" of Professional Responsibility and Dispute Resolution*, 28 *Fordham Urb. L.J.* 979 (2001) (identifying four critical concerns in the practice of ADR); Stephen K. Huber, *The Role of Arbitrator: Conflicts of Interest*, 28 *Fordham Urb. L.J.* 915 (2001) (discussing conflicts of interest among arbitrators as well as the failure of law schools to adequately address the subject).

n5. Jean R. Sternlight, *Lawyers' Representation of Clients in Mediation: Using Economics and Psychology to Structure Advocacy in a Nonadversarial Setting*, 14 *Ohio St. J. on Disp. Resol.* 269 (1999) (calling for a flexible role and division of responsibility between the lawyer and the client based, at least in part, on ascertaining the needs of the client and the barriers to settlement). See also John Cooley, *Mediation Advocacy* (1996); Eric Galton, *Representing Clients in Mediation* (1994); Peter Robinson, *Contending With Wolves in Sheep's Clothing: A Cautiously Cooperative Approach to Mediation Advocacy*, 50 *Baylor L. Rev.* 963 (1998).

n6. The American Bar Association, through the Section on Dispute Resolution, recently has instituted a mediation advocacy competition, which conducted its first National Finals at the Section Annual Meeting in April 2000. To describe more accurately the role of the lawyer, the Section entitled the competition "Representation in Mediation." Section of Dispute Resolution, A.B.A., <http://www.abanet.org/dispute/MediationComp.html>.

n7. *Infra* Part II.

n8. The term "ADR" is used to encompass a panoply of processes or fora for the resolution of conflicts and disputes. As will be emphasized, this paper deals with only one process specifically, that of mediation. With the advent of court-annexed ADR, however, some confusion and blending of these processes has occurred, leading to a debate about which process might be best suited for particular disputes, legal or otherwise. For a discussion of the lawyer's role in assisting the client in selecting an appropriate process, see Frank E.A. Sander and Stephen B. Goldberg, *Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting An ADR Procedure*, 10 *Negotiation J.* 49 (1994); see also Robert F. Cochran Jr., *Professional Rules and ADR: Control of Alternative Dispute Resolution Under the ABA Ethics 2000 Commission Proposal and Other Professional Responsibility Standards*, 28 *Fordham Urb. L.J.* 895 (2001).

n9. In Texas, for example, state courts may order parties to participate. *Decker v. Lindsay*, 824 S.W.2d 247, 250-51 (Tex. Ct. App. 1992) (outlining the courts' ability to compel litigants to participate in ADR). Courts have implemented such participation in various ways. In many courts, the judge orders ADR on a case-by-case basis. Alternatively, Travis County, Texas, follows a standing order that mandates that litigants participate in ADR in order to receive a setting for a jury trial. In Florida, the state court system has had an institutionalized mediation program for a number of years. James Alfini et al., *What Happens When Mediation is Institutionalized?: To the Parties, Practitioners, and Host Institutions*, 9 *Ohio St. J. on Disp. Resol.* 307, 307 (1994). In the federal system, a number of methods for ongoing referral exist. E.g., Elizabeth S. Plapinger & Donna Stienstra, *ADR and Settlement in the Federal District Courts: A Sourcebook for Lawyers & Judges* (1996), available at <http://www.fjc.gov/ALTDISRES/adrsourc/adrone.pdf>; Wayne D. Brazil, *Comparing Structures for the Delivery of ADR Services by Courts: Critical Values and Concerns*, 14 *Ohio St. J. on Disp. Resol.* 715 (1999).

n10. The ADR movement also spread to other countries. For a discussion of ADR in Europe, see <http://www.cpradr.org/european.htm>. In Argentina, Gladys Alvarez has

established the "Programa de Actualizacion en Negociacion y Resolucion de Conflictos," <http://www.fder.uba.ar/derecho/posgrado/area16.htm>.

n11. The Pound Conference, held in 1976 and seen as the beginning of the "modern mediation movement," was based upon Roscoe Pound's 1906 article, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 29 A.B.A. REP. 395 (1906). See also Stephen Goldberg et al., *Dispute Resolution: Negotiation, Mediation, and Other Processes* 6-9 (3d ed. 1999) (discussing the sources and goals of the ADR movement).

n12. E.g., Judith Resnik, *Many Doors? Closing Doors? Alternative Dispute Resolution and Adjudication*, 10 Ohio St. J. on Disp. Resol. 211 (1995); Jeffrey W. Stempel, *Reflections on Judicial ADR and the Multi-Door Courthouse at Twenty: Fait Accompli, Failed Overture, or Fledgling Adulthood?*, 11 Ohio St. J. on Disp. Resol. 297 (1996).

n13. Both the court-annexed movement and community use of mediation often are traced to the Pound Conference in 1976, where alternatives were discussed to respond to the difficulties in the administration of justice. Edith B. Primm, *The Neighborhood Justice Movement*, 81 Ky. L.J. 1067, 1067 (1992-1993).

n14. Community mediation centers were often the first ADR programs in a jurisdiction. *Id.*; see also Timothy Hedeem & Patrick G. Coy, *Community Mediation and the Court System: Ties that Bind*, 17 Mediation Q. 351 (2000) (assessing the relationship between community mediation and the justice system), available at <http://mediate.com/articles/cohed2.cfm>.

n15. National Association for Community Mediation, <http://www.nafcm.org>.

n16. E.g., L. Camille Hebert, *Establishing and Evaluation a Workplace Mediation Pilot Project: An Ohio Case Study*, 14 Ohio St. J. on Disp. Resol. 415 (1999); Carrie Bond, *Resolving Sexual Harassment Disputes in the Workplace: The Central Role of Mediation in an Employment Contract*, 52 Disp. Resol. J. 15 (Spring 1997).

n17. E.g., Shoshana K. Kehoe, Giving the Disabled and Terminally Ill a Voice: Mandating Mediation for all Physician-Assisted Suicide, Withdrawal of Life Support, or Life-Sustaining Treatment Requests, 20 Hamline J. Pub. L. & Pol'y 373 (1999); Diane E. Hoffman, Mediating Life and Death Decisions, 36 Ariz. L. Rev. 821 (1994); Susan N. Gary, Mediation and the Elderly: Using Mediation to Resolve Probate Disputes Over Guardianship and Inheritance, 32 Wake Forest L. Rev. 397, 406-15 (1997).

n18. James W. Reeves, ADR Relieves Pain of Health Care Disputes, 49 Disp. Resol. J. Health Care L. 421 (1999); Edward Dauer et al., Health Care Dispute Resolution Manual: Techniques for Avoiding Litigation (2000).

n19. For an overview of the significant distinctions, see *infra* Part II.

n20. This is what often is termed "court-annexed mediation," in which the court has a very active role in the referral and oversight of the mediation. There is some debate, however, about whether it is an accurate description of the mediation employed in private practice - or whether "court-annexed" should describe only these programs that are actually "housed" in the courthouse. Another term is "court connected." Symposium, The Structure of Court-Connected Mediation Programs, 14 Ohio St. J. on Disp. Resol. 711 (1999); see also Wayne D. Brazil, Continuing the Conversation About the Current Status and the Future of ADR: A View from the Courts, 2000 J. Disp. Resol. 11 (2000). In several court programs described and studied by Professor John McCrory, the mediators were housed in a number of different places including - but probably not limited to - in-house staff mediators, court contracts with nonprofit service providers, private mediators paid by the court, private mediators paid by the parties, volunteer mediators supervised by the court, and mixed programs. John P. McCrory, Mandated Mediation of Civil Cases in State Courts: A Litigants Perspective on Program Model Choices, 14 Ohio St. J. on Disp. Resol. 813, 813-14 (1999).

n21. In some jurisdictions, it appears that mediation maintained a separate identity, although in others, mediation succumbed to the legal process, being changed in terms of basic goals and objectives. Years ago, the analogy of mixing oil and water was used to describe the co-existence of ADR and litigation. Kimberlee K. Kovach, Litigation & ADR: Is It Really Oil & Water?: Art of Advocacy in ADR, S. Tex. C. of L. & The A. A. White Disp. Resol. Inst. (1991). I contended that, as in cooking, oil and water possess different properties and can be combined in many recipes to produce viable and tasty results. Thought and consideration must be given to the combinations, however, lest they become unpalatable.

n22. In Nebraska, for instance, the mediators in the federal court program are very careful to be facilitative in their approach and not engage in what might be termed case evaluation or "pre-trial settlement." And in Maine, for years divorce and family mediations were conducted without the presence of lawyers. Cf., Craig McEwen et al., *Bring in the Lawyers: Challenging the Dominant Approaches to Ensuring Fairness in Divorce Mediation*, 79 Minn. L. Rev. 1317 (1995) (arguing for the presence of attorneys during divorce mediations).

n23. In many jurisdictions in Texas, lawyers are overheard discussing going to mediation as merely normal pretrial activity. On the one hand, it is good that the process has become so integrated in law practice, but when mediation is viewed only in this context, a number of attributes, including self-determination and the creative problem solving potential of the process, are often lost. Nancy A. Welsh, *The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization*, Harv. Negot. L. Rev. (forthcoming 2001) (examining the inherent conflict between achieving self-determination in which mediation focuses on settlement). Welsh addresses *Allen v. Leal*, 27 F. Supp 2d 945 (S.D. Tex. 1998) (discussing whether a settlement reached during mediation constitutes an enforceable contract).

n24. I view this modern mediation movement as having passed through three distinct, somewhat overlapping stages. Beginning in the mid-1970s, was a time of experimentation. The 1980s saw a time of implementation, but without any real thought given to the dilemmas and issues that we now face. The mid-1990s began a time of regulation, in which a number of regulatory issues were - and still are - confronted by courts, legislatures, and membership organizations. The role of lawyers in mediation is but one of the issues for consideration.

n25. Although strong support for the mediation process necessitates the move away from a win-lose perspective, I do not suggest that one system necessarily replace the other. But see Carrie Menkel-Meadow, *The Trouble with the Adversary System in a Post-Modern, Multicultural World*, 38 Wm. & Mary L. Rev. 5 (1996) (arguing that the adversary system is inadequate for the goals of dispute resolution).

n26. E.g., Monroe H. Freedman, *The Trouble with Postmodern Zeal*, 38 Wm. & Mary L. Rev. 63 (1996) (critiquing Carrie Menkel-Meadow's view that alternative dispute

resolution is superior to the adversary system).

n27. In the adversary system, it is necessary that disputants retain zealous representation and compete for slices of a fixed pie; whereas, in more facilitative processes, it is not necessary to think or operate under the same conditions.

n28. E.g., Robert A. Baruch Bush, *A Study of Ethical Dilemmas and Policy Implications*, 1994 J. Disp. Resol. 1 (1994); John D. Feerick, *Toward Uniform Standards of Conduct for Mediators*, 38 S. Tex. L. Rev. 455 (1997); Kimberlee K. Kovach, *Mediation: Principles and Practice*, at Ch. 15 (2d ed. 2000).

n29. E.g., Laflin, *supra* note 4; see also Menkel-Meadow, *Silences of the Restatement*, *supra* note 4.

n30. E.g., Carrie Menkel-Meadow, *Ethics in Alternative Dispute Resolution: New Issues, No Answers from the Adversary Conception of Lawyers' Responsibilities*, 38 S. Tex. L. Rev. 407 (1997); Menkel-Meadow, *Silences of the Restatement* *supra* note 4; see also Douglas Yarn & Wayne Thorpe, *Ethics 2000: Proposed New ABA Ethics Rules for Lawyers-Neutrals and Attorneys in ADR*, *Disp. Resol. Mag.* (forthcoming 2001).

n31. E.g., Symposium, *Is Mediation the Practice of Law?*, NIDR Forum, June 1997; Bruce Meyerson, *Lawyers Who Mediate Are Not Practicing Law*, 14 *Alternatives to the High Cost of Litig.* 74 (1996); Carrie Menkel-Meadow, *Is Mediation the Practice of Law?*, 14 *Alternatives to the High Cost of Litig.* 57 (1996); see also Geetha Ravindra, *When Mediation Becomes the Unauthorized Practice of Law*, 15 *Alternatives to the High Cost of Litig.* 94 (1997).

n32. For example, the ABA Section on Alternative Dispute Resolution is working to resolve some of these issues. Ideally, a resolution from the ABA stating that mediation is not the practice of law could pre-empt state bars from charging mediators with unauthorized practice.

n33. Kimberlee K. Kovach & Lela P. Love, Mapping Mediation: The Risks of Riskin's Grid, 3 Harv. Negot. L. Rev. 71 (1998) [hereinafter Mapping Mediation] (arguing that mediation should not be among the processes where the neutral has an evaluative orientation or role); Leonard L. Riskin, Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed, 1 Harv. Negot. L. Rev. 7 (1996) (depicting on a grid the mediation universe); James J. Alfani, Evaluative Versus Facilitative Mediation: A Discussion, 24 Fla. St. U. L. Rev. 919 (1997); Kimberlee K. Kovach, What Is Real Mediation and Who Should Decide?, 3 Disp. Resol. Mag. 5 (1996) [hereinafter Real Mediation]; Lela P. Love, The Top Ten Reasons Why Mediators Should Not Evaluate, 24 Fla. St. U. L. Rev. 937 (1997); Robert B. Moberly, Mediator Gag Rules: Is It Ethical for Mediators to Evaluate or Advise?, 38 S. Tex. L. Rev. 669 (1997) (arguing against ethical rules that prohibit mediator evaluation); Jeffrey W. Stempel, Beyond Formalism and False Dichotomies: The Need for Institutionalizing a Flexible Concept of the Mediator's Role, 24 Fla. St. U. L. Rev. 949 (1997) (endorsing flexible mediation that permits judicious use of evaluative techniques); Marjorie Corman Aaron, ADR Toolbox: The Highwire Art of Evaluation, 14 Alternatives to the High Cost of Litig. 62 (1996) (describing appropriate uses for mediator evaluation and recommending specific mediator strategies); Kimberlee K. Kovach & Lela P. Love, "Evaluative" Mediation is an Oxymoron, 14 Alternatives to High Cost Litig. 31 (1996); Jeffrey W. Stempel, Identifying Real Dichotomies Underlying the False Dichotomy: Twenty-First Century Mediation in an Eclectic Regime, 2000 J. Disp. Resol. 371 (2000).

n34. E.g., Jeffery W. Stempel, The Inevitability of the Eclectic: Liberating ADR from Ideology, 2000 J. Disp. Resol. 247 (2000) (viewing mediation primarily, if not exclusively, as a supplement to the legal system); cf. John Lande, Toward More Sophisticated Mediation Theory, 2000 J. Disp. Resol. 321 (2000).

n35. E.g., Carrie Menkel-Meadow, Pursuing Settlement in an Adversary Culture: A Tale of Innovaiton Co-Opted or "The Law of ADR," 19 Fla. St. U. L. Rev. 1 (1991).

n36. Interestingly, this is also the definition of mediation. See generally Tex. Civ. Prac. & Rem. Code Ann. 154.023 (Vernon 2000); see also Colo. Rev. Stat. Ann 13-22-302 (West 1999).

n37. E.g., Kovach, supra note 28, at 23-25 (outlining a variety of definitions of the mediation process).

n38. Real Mediation, *supra* note 33.

n39. This would include, but may stop short of, the complete adherence to the transformative model.

n40. The goals and objectives of mediation are quite different from those of the justice system. *Infra* Part II.

n41. Should Mediators Evaluate?: A Debate Between Lela P. Love and James B. Boskey, 1 *Cardozo Online J. Conflict Resol.* 1 (1999-2000), at <http://www.cardozo.yu.edu/cojcr>.

n42. Leonard L. Riskin, *Mediation and Lawyers*, 43 *Ohio St. L. J.* 29 (1982).

n43. E.g., Nancy B. Rapoport, *Our House, Our Rules: The Need for a Uniform Code of Bankruptcy Ethics*, 6 *Am. Bankr. Inst. L. Rev.* 45 (1998) (discussing the creation of a federal law of bankruptcy ethics); Simon M. Lorne, *The Corporate and Securities Adviser, the Public Interest, and Professional Ethics* 76 *Mich. L. Rev.* 423 (1978) (discussing the role of the corporate advisor); Jeffery N. Pennell, *Ethics in Estate Planning and Fiduciary Administration: The Inadequacy of the Model Rules and the Model Code*, 45 *Record* 715 (1990).

n44. E.g., Fred C. Zacharias, *Reconceptualizing Ethical Roles*, 65 *Geo. Wash. L. Rev.* 169 (1997).

n45. Again, it is my view that important goals and objectives of mediation, such as party empowerment, self-determination, and creative problem solving have been forfeited. See Welsh, *supra* note 23 (discussing the difficulties of the intersection of mediation and litigation).

n46. Riskin, *supra* note 33; John Brickerman, Evaluative Mediator Responds, 14 *Alternatives to the High Cost Litig.* 70 (1996).

n47. E.g., Charles R. Pyle, Mediation and Judicial Settlement Conferences: Different Rides on the Road to Resolution, *Ariz. Att'y*, Nov. 1996, at 20; Marc Galanter & Mia Cahill, Most Cases Settle: Judicial Promotion and Regulation of Settlements, 46 *Stan. L. Rev.* 1339 (1994); Carrie Menkel-Meadow, For and Against Settlement: Uses and Abuses of the Mandatory Settlement Conference, 33 *UCLA L. Rev.* 485 (1985).

n48. Kovach & Love, Mapping Mediation, *supra* note 33; Zena Zumeta, A Facilitative Mediator Responds, 2000 *J. Disp. Resol.* 335 (2000).

n49. Kovach & Love, Mapping Mediation, *supra* note 33.

n50. John Lande, How Will Lawyering and Mediation Practices Transform Each Other? 24 *Fla. St. U. L. Rev.* 839, 846 (1997).

n51. See generally Dwight Golann, *Mediating Legal Disputes* (1996) (examining specific techniques and skills used by mediators in resolving lawsuits).

n52. See generally Robert A. Baruch Bush & Joseph P. Folger, *The Promise of Mediation: Responding to Conflict Through Empowerment and Recognition* (1994).

n53. E.g., Jeffery W. Stempel, Theralaw and the Law-Business Paradigm Debate, 5 *Psychol. Pub. Pol'y & L.* 849, 882 n.124 (1999) (stating that "segments of the theralaw and ADR movements are old wines in new skins ...").

n54. Lande, *supra* note 50, at 846. "Liti-mediation" is an adaptation of the term "litigotiation" first set forth by Marc Galanter in 1984. Marc Galanter, *Worlds of Deals: Using Negotiation to Teach About Legal Process*, 34 *J. Legal. Educ.* 268, 268 (1984)

(placing focus on study of the negotiation process within the context of litigation).

n55. E.g., Menkel-Meadow, *supra* note 35, at 6.

n56. Jack M. Sabatino, ADR as "Litigation Lite": Procedural and Evidentiary Norms Embedded Within Alternative Dispute Resolution, 47 *Emory L. J.* 1289 (1998).

n57. Stempel, *supra* note 34.

n58. *Id.*

n59. Wayne D. Brazil, Continuing the Conversation about the Current Status and the Future of ADR: A View from the Courts, 2000 *J. Disp. Resol.* 11, 29 (2000).

n60. *Id.*

n61. Lela P. Love & Kimberlee K. Kovach, ADR: An Eclectic Array of Processes, Rather Than One Eclectic Process, 2001 *J. Disp. Resol.* 295 (2001) (emphasizing that mediation is but one process in a rich array of different dispute resolution processes and that, if not kept separate and distinct, this rich array of processes will no longer exist).

n62. E.g., Toni Heinzl, Mediator Coaxes Couples to Agree; Lawyers Say Divorce Mediation is Fair to Both Sides and Moves Cases Through the Courts More Quickly, *Fort Worth Star Telegram*, Dec. 30, 2000, at 1 (quoting district court judge as stating, "Mediation gets people out of the system faster").

n63. The degree of participation of the actual parties to the litigation differs. Some lawyers take a dominant participant approach while others participate very little. John S.

Murray et al., *Mediation and Other Non-Binding ADR Processes* 150-51 (1996). Nevertheless, early research demonstrates that parties are satisfied with the mediation process because they have the opportunity to participate in resolving the dispute.

n64. Welsh, *supra* note 45, at n.85.

n65. For an overview of a number of court connected mediation programs, see *Court-Annexed Mediation: Critical Perspectives on Selected State and Federal Programs* (Edward J. Bergman & John G. Bickerman eds., 1998).

n66. This is based upon nearly ten years of the author's own experience in Texas, from 1980 to late 1989. When mediation first was discussed with judges and litigators in Houston in the early 1980s, it was perceived as too "touchy-feely" for real lawyers. For that very reason, the first ADR process utilized in the Harris County Civil Courts was the Moderated Settlement Conference, a neutral case evaluation system. Kimberlee K. Kovach, *Moderated Settlement Conferences, St. Mary's Alternative Dispute Resolution, Procedures, Pitfalls and Promises* (1988); see also *Handbook of Alternative Dispute Resolution* ch. 7 (Amy L. Greenspan ed., 2d ed. 1990) (discussing in detail moderated settlement conferences). It was not until 1989, when some litigators realized that they could participate as mediators and achieve full time employment in such roles, that mediation came to be accepted. Even today in Texas - a state that uses mediation and ADR quite extensively - if mediation is focused on the concept of party empowerment and not on settlement, many litigators see little value in the process.

n67. Jacqueline M. Nolan-Haley, *Court Mediation and the Search for Justice Through Law*, 74 *Wash. U. L.Q.* 47 (1996).

n68. Stempel, *supra* note 34, at 249.

n69. Bickerman, *supra* note 46.

n70. E.g., Joseph B. Stulberg, *Training Intervenors for ADR Processes*, 81 *Ky. L.J.* 977

(1992-93).

n71. Carrie Menkel-Meadow, *Ethics and Professionalism in Non-Adversarial Lawyering*, 27 Fla. St. U. L. Rev. 153, 163 (1999).

n72. Steven C. Krane, *Ethics 2000: What Might Have Been*, 19 N. Ill. U. L. Rev. 323, 325 (1999).

n73. Menkel-Meadow, *supra* note 25.

n74. Carrie Menkel-Meadow, *When Winning Isn't Everything: The Lawyer as Problem Solver*, 28 Hofstra L. Rev. 905, 907-09 (2000).

n75. E.g., Henry J. Friendly, *Some Kind of Hearing*, 123 U. Pa. L. Rev. 1267, 1287-89 (1975).

n76. E.g., *Cumuso v. Nat'l R.R. Passenger Corp.*, No. 97-7891, 2000 U.S. Dist. LEXIS 5427, at 3-4 (E.D. Pa. Apr. 25, 2000); Donald P. Baker, *Richmond's Civic Embarrassments; Officials' Troubles and a Fight Over Lee's Portrait Keep City Stewing in it Past*, Wash. Post, June 10, 1999, at B3.

n77. Menkel-Meadow, *supra* note 74, at 907.

n78. E.g., Susan Daicoff, *Asking Leopards to Change Their Spots: Should Lawyers Change? A Critique of Solutions to Problems with Professionalism by Reference to Empirically-Derived Attorney Personality Attributes*, 11 Geo. J. Legal Ethics 547, 553 (1998).

n79. Judith L. Maute, *Sporting Theory of Justice: Taming Adversarial Zeal with a Logical Sanctions Doctrine*, 20 *Conn. L. Rev.* 7, 18-19 (1987).

n80. See generally Deborah Tannen, *The Argument Culture: Moving from Debate to Dialogue* (1998).

n81. Daicoff, *supra* note 78, at n.73.

n82. E.g., Maute, *supra* note 79, at 9-10; Thomas L. Shaffer, *The Unique, Novel, and Unsound Adversary Ethic*, 41 *Vand. L. Rev.* 697, 700-01; Mark Perlmutter, *Why Lawyers and the Rest of us Lie and Engage in Other Repugnant Behavior* (1998); Sol M. Linowitz & Martin Mayer, *The Betrayed Profession: Lawyering at the End of the Twentieth Century* 192 (1994) (noting that many attorneys believe that "zealously" representing clients means pushing all rules of ethics and decency to the limit).

n83. Maute, *supra* note 79, at 9-10.

n84. Patrick J. Schiltz, *On Being a Happy, Healthy, and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession*, 52 *Vand. L. Rev.* 871, 889 (1999) (quoting Amiram Elwork, *Stress Management for Lawyers* 15, 20 (2d ed. 1997)).

n85. *Id.*

n86. Elizabeth G. Thornburg, *Metaphors Matter: How Images of Battle, Sports, and Sex Shape the Adversary System*, 10 *Wis. Women's L.J.* 225, 225-26 (1995).

n87. Nancy B. Rapoport, *Dressed for Excess: How Hollywood Affects the Professional Behavior of Lawyers*, 14 *Notre Dame J.L. Ethics & Pub. Pol'y* 49, 49-51 (2000).

n88. E.g., Janet Weinstein, Coming of Age: Recognizing the Importance of Interdisciplinary Education in Law Practice, 74 Wash L. Rev. 319, 319, 343 (1999).

n89. Daicoff, *supra* note 78, at 548.

n90. *Id.*

n91. E.g., Roger E. Schechter, Changing Law Schools to Make Less Nasty Lawyers, 10 Geo. J. Legal Ethics 367 (1997).

n92. E.g., Jeffrey W. Stempel, New Paradigm, Normal Science or Crumbling Construct? Trends in Adjudicatory Procedure and Litigation Reform, 59 Brook. L. Rev. 659, 688-93 (1993); Bryant Garth, From Civil Litigation to Private Justice: Legal Practice at War with the Profession and its Values, 59 Brook. L. Rev. 931, 945-53 (1993).

n93. James R. Elkins, The Moral Labyrinth of Zealous Advocacy, 21 Cap. U. L. Rev. 735, 739 (1992). See also Janeen Kerper & Gary L. Stuart, Rambo Bites the Dust: Current Trends in Deposition Ethics, 22 J. Legal Prof. 103, 106-110 (1998) (placing the origins of zealous advocacy in both the American and British bars into historical context).

n94. E.g., James R. Elkins, Lawyer Ethics: A Pedagogical Mosaic, 14 Notre Dame J.L. Ethics & Pub. Pol'y 117, 158 n.98 (2000); Kerper & Stuart, *supra* note 93.

n95. E.g., William M. Sage, Physicians as Advocates, 35 Hous. L. Rev. 1529, 1566 (1999); see also Stephan Landsman, A Brief Survey of the Development of the Adversary System, 44 Ohio St. L.J. 713, 713 (1983) (stating that revisions to the lawyer's code of ethics were "designed to substantially reduce the adversarial nature of attorney behavior").

n96. Daicoff, *supra* note 78, at 563-64.

n97. *Id.* at 564; Krane, *supra* note 72, at 325.

n98. Yarn & Thorpe, *supra* note 30. For the entire report of the work on the proposed code, Ethics 2000, see <http://www.abanet.org/cpr/ethics2k.html>.

n99. E.g., Robert F. Cochran Jr., ADR, the ABA, and Client Control: A Proposal that the Model Rules Require Lawyers to Present ADR Options to Clients, 41 S. Tex. L. Rev. 183 (1999).

n100. Yarn & Thorpe, *supra* note 30.

n101. Cochran, *supra* note 99; see also Richard W. Painer et al., Speakers Propose Model Rules Amendments to Ethics 2000 Commission, 9 *The Professional Lawyer*, at 10 (1998). Even this measure was not as some had suggested. I, as chair of the ABA Section of Dispute Resolution, urged that lawyers inform clients about ADR, as well as provide an explanation of the ethical boundaries for lawyer conduct in mediation, particularly that the conduct should differ from that in the adversarial arena.

n102. Model Rules of Prof'l Conduct R. 4.1 (1999).

n103. James J. White, Machiavelli and the Bar: Ethical Limitations on Lying in Negotiation, 1980 *Am. B. Found. Res. J.*, at 926 (1980).

n104. Geoffrey C. Hazard, The Lawyer's Obligation to be Trustworthy When Dealing with Opposing Parties, 33 *S.C. L. Rev.* 181, 190-91 (1981).

n105. E.g., Charles B. Craver, *Negotiation Ethics: How to Deceive without Being Dishonest; How to be Assertive Without Being Offensive*, 38 S. Tex. L. Rev. 713 (1997); Gerald B. Wetlaufer, *The Ethics of Lying in Negotiations*, 75 Iowa L. Rev. 1219 (1990); Geoffrey M. Peters, *The Use of Lies in Negotiation*, 48 Ohio St. L.J. 1 (1987).

n106. See James Alfini, *E2K Leaves Mediation in an Ethics Black Hole*, 7 Disp. Resol. Mag. (forthcoming 2001).

n107. For a discussion of collaborative lawyering, see *infra* notes 254-260 and accompanying text.

n108. Symposium, *Teaching a New Paradigm: Must Knights Shed Their Swords and Armor to Enter Certain ADR Arenas?*, 1 Cardozo Online J. Conflict Resol. (1999), at [http://cardozo.yu.edu/cojcr/new\\_site/issues/vol1/vol1htm](http://cardozo.yu.edu/cojcr/new_site/issues/vol1/vol1htm).

n109. Jack M. Sabatino, *ADR as "Litigation Lite": Procedural and Evidentiary Norms Embedded Within Alternative Dispute Resolution*, 47 Emory L.J. 1289, 1292 (1998).

n110. For further discussion of this phenomenon, see Robinson, *supra* note 5.

n111. Symposium, *supra* note 108.