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Lawyers' Roles, Responsibilities, and Regulation

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The Limits of Adversarial Ethics

CARRIE MENKEL-MEADOW

Imagine a world in which you have a problem. You know you need help so you look for an advocate and a counselor. If the problem involves law, you may pay generously for this "special purpose" friend. And this friend will typically respond by viewing others involved as potential adversaries.

Welcome, you have entered the world of adversarial lawyering. Here, a special friend will be able to do a great deal on your behalf, including some things that you probably wouldn't want or wouldn't be able to do for yourself if you were acting alone. This assistance may very well be appropriate when you have a clear conflict of values with other parties, when state intervention is essential to resolve a dispute, when you are defending yourself against criminal charges, and when you can readily afford an adversarial battle. But for many other modern transactions, disputes, and social problems, such an approach may not be the best way to accomplish your goals. It may be particularly inappropriate if your problem involves multiple parties, multiple issues, and multiple remedial possibilities.

This essay explores limitations in our adversary legal system and the ethics of advocacy it implies. After examining the attributes of the current system, my analysis suggests that our "culture of adversarialism" has distorted how we think about solving human problems at both societal and individual levels; and that the legal ethics derived from this model are often outmoded, inconsistent, inefficient, and unjust. Most of what passes for legal ethics (a phrase considered oxymoronic by some) rests on the assumption that an adversary system is self-evidently preferable to other possible ways of organizing a legal system. Adversarial processes are often presented as the best way to learn the truth and to protect the legal rights and liberties of disputants. The preference for an adversary system over more inquisitorial, bureau-

In short, the adversary system is structurally and ethically sound for some purposes, but not for all of what lawyers do. Yet courtroom trials have remained the preeminent cultural symbol of the lawyer's work, and courtroom conduct has "bled" into other (and in fact, more empirically common) forms of lawyering where such conduct may be less appropriate.[24]

The Ethics of Adversarialism

America's current adversary system has produced a variety of troubling behaviors, which may or may not be necessary to the proper functioning of an adversarial structure but which are now reinforced by both the formal rules and shared culture of the profession. In a profession that borrows heavily from sports and war metaphors, winning has become such a preeminent goal that it has obscured other values.[25] "Solving the problem," or "achieving justice" are often lost in translation. Although bar ethical codes proclaim that lawyers' advocacy should remain within the "bounds of the law" and their obligations as "officers of the court," the profession's disciplinary rules and practice norms make client loyalty and confidentiality the paramount values.

More specifically, the Model Rules of Professional Conduct require lawyers to preserve client confidences except in highly limited circumstances.[26] Attorneys have no affirmative duty to disclose relevant factual information or witnesses (unless required by procedural, not ethical, rules). Nor are they required to be "truthful" or forthcoming with adversaries, especially in non-courtroom settings.[27] Unless they are prosecutors, lawyers have no obligation to "seek justice" or fairness. Not only are advocates absolved from any responsibility to promote truth, they have a right (and some argue a responsibility) to cross-examine and impugn the credibility of "truthful" opposing witnesses.[28]

To be sure, ethical codes impose some limits on adversarial conduct. For example, lawyers must inform courts of certain adverse legal authority (Rule 3.3). Lawyers may not knowingly use false or perjured testimony and must take remedial action if they have knowledge of a fraud perpetrated on a court (Rule 3.3). They may not assist a client in committing fraudulent or criminal acts (Rule 1.2) (although they may counsel the client about the likely legal consequences of any course of conduct). Bar ethical rules also prohibit lawyers from filing claims or pursuing tactics designed solely to harass the other side, but inventive lawyers can usually escape compliance by identifying some other purpose.

Over the years, any number of proposals to impose greater obligations of candor, justice, and fair dealing have largely failed. For example, in the last effort to rewrite the rules, the Model Rules Commission initially proposed mandatory pro bono service, obligations to disclose material adverse facts, requirements to be truthful in negotiations, and prohibitions on drafting unconscionable agreements.[29] None of these proposals were acceptable to the ABA House of Delegates.

The result has been that adversarial polarizing tactics have too often substituted for thoughtful problem solving.[30] And, as others have suggested, such adversarial models of legal work have affected the legislative process as well, especially where a two-party political system reflects some of the same limitations of a binary litigation framework. It may be no coincidence that European countries manage (if sometimes stressfully) to work with political structures that share power among multiple parties and legal structures that share control among litigants and judges.

What Can Be Done about Adversarialism?

Proposals to reform the adversary process are in ample supply. Most have focused on modifications in ethical rules, although for some of the concerns raised above, more structural or cultural change may be necessary.

Reforms in both ethical and procedural rules could remedy some of the problems of obfuscation of truth by requiring more disclosure by attorneys and more active participation by courts. Some of these changes are already under way. Amendments to federal civil procedural rules have demanded more exchange of discovery information, and have encouraged more active managerial judging.[31] Further reforms could borrow some aspects of the inquisitorial system. For example, we could follow England's proposed example and curtail battles between adversarial experts by more often authorizing one court-appointed expert.[32] We could also rely more heavily on magistrates to provide active supervision of discovery. Other reforms could include mandatory disclosure of material adverse facts. Such a requirement could help challenge the mindset that no attorney should ever have to "do the work" of another, however unjust the result.[33]

Other aspects of the litigation system also require reform. Not only is withholding information a problem, so, too, is deluging opponents with factual material and legal motions that drive up litigation costs. Such "Rambo" tactics have been the source of much rhetorical condemnation and many aspirational civility standards.[34] But significant reform will require more demanding disciplinary rules and stiffer sanctions. Reform proposals also need to address distortions of the truth-seeking process that include overzealous cross-examination, overpreparation of witnesses, inequalities in expert evidence, and failure to investigate dubious client claims.[35]

When preparing for trial, judges or other case managers often seek to "narrow" the issues in order to clarify and expedite the decision-making process. However, reducing issues may also reduce the range of possible solutions. The adversary mindset encourages a view of litigation as a zero-sum game and deflects attention from other possible solutions, such as in-kind exchanges, or apologies.[36] Dispute-resolution experts find that it is usually helpful to broaden, rather than narrow, the issues in order to permit more trades and more ways to maximize complementary interests.[37] Effective reform proposals need to include adequate attention to problem-solving techniques.[38]

two interpretations? Such oppositional frames may restrict judicial decision making in ways that can be as problematic as premature evaluation. Our willingness to permit partial concurrences and dissents, and our reliance on doctrines like comparative negligence implicitly recognize that legal disputes may have more than two sides and need more than either/or solutions. Oppositional frameworks limit the vision of parties as well as judges. Assigning individuals narrowly defined adversarial roles may restrict what parties can hear about and from each other as well as how they conceive of remedies (blameworthy/innocent; winner/loser).

The limited remedial imagination of adversarial processes, which focus on compensatory and backward-looking solutions, may prolong, without resolving, painful past disputes.[43] Even where adversarial processes are most justified, where crucial individual "rights" are at issue, the win/lose solutions may not deliver justice. Some rights, while conflicting, may be equally valuable (e.g., two parents' custodial rights of a child, protection of "free" speech and protection from hurtful "hate" speech). Alternatively, the "right" resolution as a matter of legal doctrine may not be "right" as a matter of social justice.[44] Lower court decisions that adhered to the "separate but equal" holding of *Plessy v. Ferguson* are obvious cases in point.[45] So, too, enforcement of a generally defensible legal rule may work an injustice in a particular case. That is why parties sometimes prefer mediation or other ADR systems that can consider nonlegal factors in dealing with their disputes.

For many modern legal problems, adversarial, dualistic legal structures cannot take account of the complexity of multiparty, multiissue controversies with broad social consequences. Consider matters such as labor-management disputes, environmental siting, billion-dollar mass torts, international trade agreements, corporate reorganization, or municipal budgeting processes. Such matters involve a matrix of possible parties, interests, issues, and responses. A crucial question for legal policy and legal ethics is how to adapt current institutions to meet these complex challenges of contemporary dispute resolution.

Toward an Ethic of Problem-Solving Lawyering

Our profession is in a state of transition. As we consider how to structure effective problem-solving processes, we could draw insights from other professional approaches with different values and different intellectual paradigms. These approaches have influenced processes lumped together as "alternative dispute resolution": for example, mediation, arbitration, minitrials, summary judge or jury trials, early neutral evaluation, med-arb, or other hybrid forms.[46] Experts refer to choices about these systems as "Appropriate Dispute Resolution." A crucial function for lawyers is to determine what kind of process is most likely to be effective for a particular legal matter.[47]

Beyond ADR, however, are innovative approaches and orientations toward problem solving that represent a profound change in culture, and that require a new

"ethics" to match. These approaches focus on outcomes such as party satisfaction, problem solving, collaboration, and sharing, rather than simply as restitution, compensation, or punishment.[48] The goal is to promote self-reliance and empowerment, instead of dependence on professionals. Lawyers in these situations need ethical principles that reflect more than adversarial expectations and values.

The relationship between adversarial and ADR processes remains in dynamic and ongoing tension. Thus far, adversarial practices seem to have influenced ADR processes more than the other way around. Participants talk about "winning at mediation" or "mediation advocacy," and warn that "I am filing an ADR against you."[49] Such references reflect the application of win/lose, zero-sum strategies to processes that aim at joint gain and mutual problem solving. Similar tensions arise from the role of relatively rigid legal standards in processes seeking flexible, participatory solutions. For example, consensus-building approaches in environmental and land-use disputes must still yield results that satisfy zoning requirements or administrative agency regulations. Accommodating these competing needs remains a dialectic challenge of accountability and legitimacy.[50]

These new problem-solving approaches take a variety of forms but share some common elements. Examples include facilitative mediation, consensus building, dialogues, public forums, partnering, study circles, strategic planning, ombudsing, and negotiated rule-making (reg-neg).[51] Such approaches assume that parties have different, often opposing, positions, but also that they are likely to share some common ground, or at least complementary views from which solutions may emerge. Rather than focusing on differences and contentions, they begin with commonalities. Rather than cultivating "toughness," participants value creativity, patience, persistence, flexibility, and resilience.[52] They recognize that some solutions must be provisional and dynamic, based on changes in information, interests, resources, and party alignments. The outcomes are not simply winning and losing but points in a continuum of best case, slightly better case, middle case, or slightly worse case.[53] A multidimensional matrix, rather than a two-sided courtroom contest, structures the alignment of parties and information. As a consequence, participants may develop different configurations or formats than opening/closing, direct/cross-examination, plaintiff/defendant.

Third-party neutrals in such settings seldom "decide" the case or "find" the facts. Rather, these neutrals give form and coherence to the process, monitor participant behaviors, and enforce procedures that participants have jointly chosen. These facilitators are usually trained to help probe for parties' underlying needs and interests, and not simply accept their stated positions.

This is not the place to describe these processes in depth, but a few examples might help to illustrate the variety of different goals that such processes might serve and the different ethical structures that they require. On contested legal and public policy issues such as abortion and affirmative action, various groups have sponsored "dialogues" and "public conversations" that bring together those who hold opposing

views. Goals vary from reducing the violence at abortion clinics or developing public policy to understanding the effects of affirmative action in different social environments. Participants agree to rules of conversation that permit them to speak from personal experience and expose their own assumptions while asking each other to address "the grey areas in your own thinking."[54] Imagine an advocate acknowledging some uncertainty in his position! In some communities, participants have gone on to form action groups to prevent violence and lobby for new regulations, while in other communities, such groups continue as verbal sounding boards to diffuse antagonisms before they fester.

In other settings, conflict is recognized as natural and productive and is harnessed to alternative forms of civic problem solving. Public mediation or study circles have been used to rebuild democracy in contexts involving cases of failed municipal governments, community financial crises, and block-grant funding allocations. Such processes are highly participatory and often contentious; they allow expressions from a wide variety of interest groups (not just two) who, in dealing with each other face to face, can explore the factual issues and remedial possibilities involved.[55] Such groups may ultimately rely on conventional techniques such as voting or consensus building but they may get to the end point in different ways. These processes seek to avoid the acrimony of lawsuits challenging governmental action.

"Partnering" is a preventative approach first used by federal and military construction contractors (not those commonly associated with "touchy-feely" methods). It brings together participants in a project before it begins, in order to troubleshoot potentially difficult issues and personalities. The goal is to develop guidelines and procedures for resolving problems that may arise during the project and avoid later time-consuming litigation or formal grievances.[56]

Environmental disputes have utilized a wide variety of consensus-building processes to deal with the clean-up of toxic or polluted sites, or the new location of developments and waste dumps often labeled NIMBYs (Not in My Backyard). Such disputes often involve multiple parties with different levels of knowledge and resources, and multiple issues involving competing long-term and short-term considerations. In this area, ongoing participation, monitoring, and adaptation are necessary. A single yes/no court decision will seldom resolve the problem, especially in geographic areas where the parties have ongoing relationships.[57]

Some judges have begun to adapt these techniques to modify adversarial processes. "Integrated" court systems now deal with all family issues such as custody, abuse, neglect, support, delinquency, violence, drugs, and "vice." These systems employ a variety of remedial options, including prevention and treatment as well as sanctions and resolution of contested issues. At least one state supreme court justice proudly, and not defensively, calls these "creative social problem solving courts." She is less interested in distinguishing the formal legal aspects of the courts from the "social-work" and "treatment" aspects of their work.[58]

State courts that have established "future commissions," often have envisioned

not only conventional, adversarial dispute-resolution services, but also procedures that allow the judicial system "to solve problems, rather than merely processing the cases that come before it."[59] Many of these commissions have drawn from disciplines other than law, and from public members who are consumers of law. One lesson emerging from this analysis is that legal solutions are sometimes necessary to define and legitimate rules, but are inadequate to provide innovative answers and broad participation to many social and legal problems. Legal processes that can evaluate and judge post-hoc may not be effective for more creative experimentation at the programmatic level.

Some commentators now speak of "broad" (preventative, policy-oriented, many issued, multiplex, multipartied) ADR or "narrow" ADR, focused on resolving one issue or one case.[60] To the extent that lawyers participate in both kinds of processes (and if they don't, they will lose this work to others), new behaviors and ethics will have to develop.[61] Many professionals, including myself, are currently engaged in drafting best practices and rule formulations for the different activities that ADR requires in areas such as conflicts of interest, confidentiality, neutrality, fees, counseling, legal advice, self-determination, and impartiality, both for lawyers who serve as third-party neutrals, and those who serve as representatives or "advocates" within an ADR process.[62] However, the real issue is whether lawyers with adversarial mindsets and adversarial ethics can really learn to "shift paradigms" and change cultural assumptions and behaviors.

Proposals have emerged for different kinds of lawyers—"collaborative" lawyers who will work under assumptions of good faith, fair dealing, and full disclosure of relevant facts—to solve the problem. Under some approaches, if settlement fails, a new lawyer takes over and changes the character of the dispute.[63] Other proposals involve reforming ethical rules, revisiting the question of whether lawyers should be more candid in negotiations or other out-of-court contexts. Some commentators suggest that with increased use of mediation and problem-solving techniques, both in court-mandated programs and in private, voluntary settings, the practice of law will become less adversarial. [64] Others fear, as do I, that increased use of lawyers within mediational processes will do just the opposite—make problem-solving processes more adversarial.[65]

Yet a less adversarial mindset or "problem-solving" orientation to legal issues might inspire a new ethical orientation for all lawyers. Just as William Simon suggests a "contextual approach to legal ethics" with justice as his reference point, I suggest that a "problem-solving" approach to legal ethics might also usefully direct us to some different mileposts.[66] If lawyers were to see their social and legal role less as "zealously representing" clients' interests and more as solving clients'—as well as society's—problems, what legal ethics would follow? Lawyers might have to learn different skills beyond research, argumentation, analysis, and persuasion.[67] They would have to learn to think about "the other side" in a different way—as a "joint venturer" as well as an opposing challenger. They would have to learn to "facilitate"

and "synthesize," as well as analyze and criticize. Lawyers would learn to listen better and pronounce less. Perhaps with difficulty, lawyers would have to learn creativity, to "think out of the box," a somewhat countercultural approach to looking for the "best precedent."[68]

When recently asked what I would suggest as the "ten most important things to add to the existing ethical codes" to encourage more mediational, less adversarial, approaches to lawyering, I suggested the following examples:

1. Lawyers should have an obligation to consider and inform the client about all the possible methods of resolving a dispute, planning a transaction, or participating in legislative, administrative, or other processes that might best address the client's needs. Lawyers should educate themselves and their clients about all available options for handling the client's matter.
2. Lawyers should promptly communicate all proposals to resolve disputes by any process suggested by other parties, clients, or decision makers.
3. Lawyers should consider and promptly communicate all substantive proposals for dispute resolution or transactional agreements to their clients, including both legally based remedies and resolution and those which address other needs or interests. Lawyers should assist a client to consider nonlegal concerns including social, ethical, economic, psychological, and moral implications.
4. Lawyers should not misrepresent or conceal a relevant fact or legal principle to another person (including opposing counsel, parties, judicial officers, third-party neutrals, or other individuals who might rely on such statements).
5. Lawyers should not intentionally or recklessly deceive another or refuse to answer material and relevant questions in representing clients.
6. Lawyers should not agree to a resolution of a problem or participate in a transaction that they have reason to know will cause substantial injustice to the opposing party. In essence, a lawyer should do no harm.
7. Lawyers serving as third-party neutrals should decline to approve or otherwise sanction an agreement achieved by parties that the lawyer has reason to believe would cause substantial injustice to the opposing party and/or another person.
8. Lawyers serving as third-party neutrals (such as arbitrators or mediators) should disclose all reasons that the parties might consider relevant in determining if the neutrals have any bias, prejudice, or basis for not acting fairly and without proper interest in a matter.
9. Lawyers serving as representatives of clients or as third-party neutrals should fully explain to their clients any and all processes and procedures used to facilitate solutions, make claims, or plan transactions.
10. Lawyers should treat all parties to a legal matter as they would wish to be treated themselves and should consider the effects of what they accomplish for their clients or others. In essence, lawyers should respect a lawyer's golden rule.[69]

I have no expectation that such "golden rules" of lawyer behavior would ever be adopted by any regulatory or bar disciplinary body.[70] Nor do I assume that we can mandate by ethical rules a change in lawyers' mindset to be a creative problem solver

or facilitator, rather than a "warrior," neutral partisan, or "gladiator." I know that a myriad of other, substantial issues and objections can be raised about the role of lawyer as "problem solver." Under such a role definition, what happens to rights and legality? Is law to be completely lost in a utilitarian calculus of party satisfaction and external effects? And, as has so often been argued in the debates about ADR, what constitutes justice and by whom should it be measured?[71] Does a problem-solving, joint-gain approach to legal matters assume a model of communitarian justice and social responsibility that conflicts with basic American legal, economic, and cultural commitments to individual rights?

Yet for many of us, it is time to question some of the well-worn aspects of our profession. We became lawyers in order to leave the world in a better state than we found it, to right individual, as well as systematic, wrongs, and to "assist in improving the legal system."[72] To that end, we need not junk the adversary system. Let that system do its work when we need a contest to find facts, declare legal rights and responsibilities, and clarify values. But to the extent that the adversary system and the ethics it inspires has caused us to lose the confidence of our own clients and the better parts of ourselves, we must open up our profession to a greater diversity of approaches. We need better ways of doing justice in the many different forms in which justice is experienced by participants in legal processes. We need an ethics of practice that would seek to solve problems, rather than to "beat the other side" by tenaciously advocating one single "truth." That ethical system would, in turn, require a different orientation to both the parties and the substance of legal problems. Winning would not be everything. Nor would "how you play the game."[73] What would matter is whether more people would be better off with the intervention of a "solution-seeking" lawyer than with a partisan gladiator, or with no intervention at all.

Notes

1. For one of the most extreme, as well as eloquent, defenses of the ethics of the lawyer as advocate who must treat the practice of law as a game ("identifying with the client as with the hero of a novel"), see Charles Curtis, "The Ethics of Advocacy," 4 *Stanford Law Review* 3, 20 (1951).

2. See Kimberlee Kovach, "Lawyers' Ethics in Mediation: Time for a Requirement of Good Faith," *Dispute Resolution Magazine* 5, 6 (Winter 1997).

3. See Deborah Tannen, *The Argument Culture: Moving from Debate to Dialogue* (New York: Random House, 1998); Lon L. Fuller, "The Adversary System," in *Talks on American Law* (ed. Harold J. Berman, New York: Vintage Books, 1961); David Luban, "The Adversary System Excuse," in *The Good Lawyer* (ed. David Luban, Totowa, N.J.: Rowman & Allanheld, 1983); Monroe Freedman, *Understanding Lawyers' Ethics* (New York: Matthew Bender, 1990); and Deborah Rhode, *Professional Responsibility: Ethics by the Pervasive Method,* 2d ed. (New York: Aspen Law and Business, 1998), chap. 5. Perhaps the most classic statement of the advocate's role in the adversary system is Lord Brougham's defense of his role in defending Queen Caroline in her 1820 divorce and adultery trial before the House of Lords: "An advocate, by the sacred duty which he owes his client, knows in the discharge of that office but one person in the

23. See, e.g., Colorado Rules of Professional Conduct (1996), Rule 2.1; Stuart Widman, *Attorneys' Ethical Duties to Know and Advise Clients about ADR, "The Professional Lawyer"* (Chicago: ABA Center for Professional Responsibility, 1993), 18; and Arthur Garwin, "Show Me the Offer," 83 *ABA Journal,* 84 (June 1997), (reporting on ethics opinions from Kansas, Pennsylvania, and Michigan, requiring advice and transmittal of offers to use particular forms of dispute resolution, besides conventional litigation). Some jurisdictions treat the issue of advice about alternative dispute resolution as a mandatory counseling issue like transmittal of substantive settlement offers (Rule 1.2), and others treat the issue as a lawyer-client discussion of either objectives or means of representation.

24. It remains an interesting question why journalism and popular culture continue to focus on the trial lawyer, when the vast majority of attorneys never appear in court and the pinnacle of the profession in terms of income and prestige is the corporate deal maker. Dramatic appeal may be part of the explanation, but most modern litigation bears little resemblance to what the media popularizes.

25. See Elizabeth Thornburg, "Metaphors Matter: How Images of Battle, Sports and Sex Shape the Adversary System," 10 *Wisc. Women's L. J.* 225 (1995).

26. ABA, Model Rules of Professional Conduct, Rule 1.6.

27. Compare ibid, Rule 3.3, with Rule 4.1.

28. Ibid., Rules 1.3, 3.1.

29. ABA Commission on Model Rules of Professional Responsibility Discussion Draft (1980), Rules 4.2, 4.3, 8.4.

30. One example involves "puffing," a form of misrepresentation allowed by the Comments to Rule 4.1. Under the current rules, negotiators have no obligation to truthfully represent the price they will actually pay, the clients they represent, or the "bottom line" settlement they will accept.

31. Judith Resnik, "Managerial Judges," 96 *Harvard L. Rev.* 376 (1982).

32. Woolf, *Access to Justice,* at 140.

33. See *Hickman v. Taylor,* 329 U.S. 495 (1947).

34. Robert Saylor, "Rambo Litigator: Why Hardball Tactics Don't Work," 74 *ABA Journal* 79 (March 1988). See also Louis Pollack, "Professional Attitude," 84 *ABA Journal* 66 (August 1998); Marvin Aspen, "The Search for Renewed Civility in Litigation," 28 *Val. Univ. L. Rev.* 513–530 (1994). Indeed, the D.C. Bar Civil Code goes further and seeks, through "voluntary civility" standards, to enact some substantive rules of "good faith and fair dealing" in representations in business transactions and other negotiations. See "D.C. Bar Voluntary Standards" (Washington, D.C.: D.C. Bar Board of Governors, March 11, 1997), 11–12. See also Marvin Frankel, "The Search for Truth: An Umpireal View," 123 *Univ. Penn. L Rev.* 1031 (1975); and Discussion Draft, Kutak "Commission on Professional Responsibility, Proposed Sections" (1980), 4.2, 4.3, 8.4.

35. See Morley Gorksy, "The Adversary System," in *Philosophical Law: Equality, Adjudication, Privacy* (ed., Richard Bronaugh, Westport, Conn.: Greenwood Press, 1978).

36. For an eloquent argument that our legal system reduces compensable harms to a limited number of injuries (mostly "male-defined") and then also limits remediation to (often) inadequate monetary compensation, see Robin West, *Caring for Justice* (New York: New York University Press, 1997), chap. 2.

37. Howard Raiffa, *The Art and Science of Negotiation* (Cambridge: Harvard-Belknap Press, 1982).

38. A classic text in the legal interviewing field suggests that a good lawyer use the principle of "exhaustion" to identify all the clients' needs, interests, and concerns in the course of representation. See David Binder et al., *Lawyers as Counselors: A Client Centered Approach* (St.

Paul: West Publishing Co., 1991). Both the Code of Professional Responsibility (EC 7–7, 7–8) and the Model Rules of Professional Conduct, Rule 1.2, suggest that lawyers give not only legal, but nonlegal, advice.

39. See James Kakalik et al., RAND Institute for Civil Justice, *Just, Speedy and Inexpensive? An Evaluation of Judicial Case Management under the Civil Justice Reform Act* (Los Angeles: RAND Institute, 1996); James Kakalik et al., RAND Institute for Civil Justice, *An Evaluation of Mediation and Early Neutral Evaluation under the Civil Justice Reform Act* (Los Angeles: RAND Institute, 1996). Cf. Donna Stienstra et al., Federal Judicial Center, *A Study of the Five Demonstration Programs Established under the Civil Justice Reform Act of 1990* (Washington, D.C.: Federal Judicial Center, 1997), demonstrating reduced case-processing time and costs in at least two federal district courts.

40. See Carrie Menkel-Meadow, "Do the Have's Come Out Ahead in Alternative Judicial Systems?: Repeat Players in ADR," 15 *Ohio St. J. on Disp. Resolu.* 19 (1999).

41. Alan Lind et al., *The Perception of Justice: Tort Litigants' Views of Trial, Court Annexed Arbitration and Judicial Settlement Conferences* (Los Angeles: RAND Institute for Civil Justice, 1989).

42. Fuller, "The Adversary System," 40.

43. To anticipate one of the often-stated criticisms of future-oriented mediational approaches, looking to the future for solutions does not mean that one should not or cannot deal with hurt, blame, and the past as well. See Carrie Menkel-Meadow, "What Trina Taught Me: Reflections on Mediation, Inequality, Teaching and Life," 81 *Minn. L. Rev.* 1413, 1419 (1997); and Harlon Dalton, *Racial Healing: Confronting the Fear Between Blacks and Whites* (1995).

44. See, e.g., Simon, *The Practice of Justice;* Luban, "Settlements and the Erosion of the Public Realm"; Judith Maute, "Public Values, Private Justice: A Case for Mediator Accountability," 4 *Georgetown Journal of Legal Ethics* 503 (1991); and Jacqueline Nolan-Haley, "Court Mediation and the Search for Justice Through Law," 74 *Washington University Law Quarterly* 47 (1996).

45. Some of the richest texts in the law and literature canon explore conflicts between laws of nature and laws of the state (Sophocles, *Antigone*), as well as conflicts between the rule of law and justice in particular cases and strict legal interpretation or enforcement (Herman Melville, *Billy Budd;* Nathaniel Hawthorne, *The Scarlet Letter*).

46. For a basic review of these terms and descriptions of the processes, see Center for Public Resources—Institute for Dispute Resolution Glossary of ADR, *Alternatives* 147 (November 1996).

47. See Stephen Goldberg and Frank Sander, "Fitting the Forum to the Fuss," 10 *Negotiation Journal* 49 (1994).

48. As one expert has noted, lawyers now need to become "conceptual thinkers and problem-solvers," not just litigation or transactional strategists. Conversation with Noel Brennan, deputy assistant attorney general, U.S. Department of Justice. At the Justice Department's Office of Justice Programs, lawyers are being organized into new working groups, e.g., "lawyers for public safety," uniting prosecutors, defenders, land-use lawyers; "lawyers for community governance," uniting government, private sector land-use, municipal finance, and election lawyers.

49. See, e.g., John W. Cooley, *Mediation Advocacy* (South Bend, Ind.: National Institute for Trial Advocacy, 1996), in contrast to Eric Galton, "Representing Clients in Mediation" (Dallas: American Lawyer Media, 1994), and Bennett Picker, *Mediation Practice Guide: A Handbook for Resolving Disputes* (Bethesda, Md.: Pike & Fisher–BNA, 1998).

50. See Jody Freeman, "Collaborative Governance in the Administrative State," 45 *UCLA*

L. Rev. 1 (1997), for a detailed exploration of these questions in connection with analysis of empirical case studies. See also Dwight Golann and Eric E. Van Loon, "Legal Issues in Consensus Building," in *Consensus Building Handbook* (ed., Lawrence Susskind, Thousand Oaks, Calif.: Sage Publications, 1999).

51. While it was once easy to distinguish the collaborative problem-solving process of mediation from decisional and adversarial processes like arbitration, recently, mediation itself has decomposed into facilitated or "pure" mediation (with party responsibility for solution crafting) and evaluative mediation in which the third-party neutral takes a more active role in evaluating the merits of cases and even suggesting particular solutions. For definitions and illustrations of these processes, see Susskind, *Consensus Building Handbook;* and "Innovations in Process: New Applications for ADR," 4 *Dispute Resolution Magazine* 3–27 (Summer 1998).

52. Imagine how differently we would consider our leaders if instead of criticizing them for being "wimps" who didn't rigidly adhere to their positions, we valued them for flexibility and the ability to acknowledge mistakes.

53. I recall a dispute with my insurance company in a comparative negligence state that would not acknowledge a 50/50 split of responsibility. The insurance company's position was that at least one of the parties had to be at least 51 percent "at fault" so that the entire loss could be allocated "to the really guilty party."

54. See Menkel-Meadow, "The Trouble with the Adversary System," 34–35; Margaret Herzig, "Public Conversations: Shifting to Dialogue When Debate Is Fruitless," 4 *Dispute Resolution Magazine* 10 (Summer 1998); and Michelle LeBaron and Nike Carstarphen, "The Common Ground Dialogue Process on Abortion," in Susskind, *Consensus Building Handbook.*

55. See Catherine Flavin-McDonald and Martha McCoy, "What's So Bad about Conflict? Study Circles Move Public Discourse from Acrimony to Democracy Building," 4 *Dispute Resolution Magazine* 14–17 (Summer 1998); Paul Martin DuBois and Jonathan Hutson, "Bridging the Racial Divide: A Report on Interracial Dialogue in America"; and Susan Podziba and John Forester, "Social Capital Formation, Public Building and Public Mediation: The Chelsea Charter Consensus Process," in Susskind, *Consensus Building Handbook.*

56. Lindsay Peter White, "Partnering: Agreeing to Work Together on Problems," 4 *Dispute Resolution Magazine* 18–20 (Summer 1998). I used my own minipartnering clause in a home-renovation project with an agreed-to, on-the-driveway, in-the-moment ADR process involving architect, contractors, subcontractor, and owner. Such processes are now utilized in hospitals, government agencies, universities and some corporations, especially where people work on transient projects or who need to develop a dispute resolution system for their specific time-based or specialized subject matter issues.

57. Pat Field and Edward Scher, "Finding the Way Forward: Consensus Building and Superfund Clean-Up," in Susskind, *Consensus Building Handbook* (describing the rescue of an ill-fated multiyear effort to clean up the soils and groundwater of a vast polluted site on Cape Cod with multiparty consensus building and a facilitated solution that resulted in a monitored and staged clean-up effort).

58. See Kaye, "Changing Courts in Changing Times." I know there are shades of nineteenth-century legal paternalism in juvenile courts if rights are not fully recognized, but I wonder how many neglected and abused children or drug addicts would prefer to have full recognition of "rights" or an "effective" alternative to their problems.

59. "To Serve All People," A report from the Commission on the Future of the Tennessee Judicial System (1996).

60. See International Association for Public Participation, Conference Announcement for Synergy, Participation, Involvement, Community, Enrichment (Alexandria, Va., 1998).

61. I have been training the major accounting firms in ADR skills for many years, and, being of an entrepreneurial bent, they have been less resistant to change than lawyers. These accounting firms are offering ADR as part of their litigation analysis, valuation, strategic planning, or business consulting services.

62. See Carrie Menkel-Meadow, "Ethics in Alternative Dispute Resolution: New Issues, No Answers from the Adversary Conception of Lawyer's Responsibilities," 38 *South Texas L. Rev.* 407 (1997); and CPR-Georgetown Commission on Ethics and Standards in ADR, Proposed Model Rule for the Lawyer as Third Party Neutral; Joint Standards for the Conduct of Mediators (AAA-ABA-SPIDR, 1994). See "The Ethics of Representation in Mediation: On the Horns of a Dilemma," Vol. 4, No. 2 *Dispute Resolution Magazine* (Winter 1997); and Carrie Menkel-Meadow, "Ethics in ADR Representation: A Road Map of Critical Issues," 4 (2) *Dispute Resolution Magazine* 3 (Winter 1997).

63. Robert W. Rack, "Settle or Withdraw: Collaborative Lawyering Provides Incentive to Avoid Costly Litigation," Vol. 4, No. 4 *Dispute Resolution Magazine* 8 (Summer 1998). There have been earlier efforts to separate the problem-solving functions from the adversarial litigation functions. See Roger Fisher, "Why Not a Negotiation Speciality?" 68 *ABA Journal* 1220 (1983).

64. One group of researchers, for example, has identified a group of "reasonable lawyers" in a divorce-practice setting where mandatory mediation has introduced more lawyers to this approach. See Craig McEwen et al., "Bring in the Lawyers: Challenging the Dominant Approaches to Ensuring Fairness in Divorce Mediation," 79 *Minn. L. Rev.* 1317 (1995); and "Lawyers, Mediation and the Management of Divorce Practice," 28 *Law & Society Rev.* 149 (1994).

65. John Lande, "How Will Lawyering and Mediation Practices Transform One Another?" 24 *Fla. S. L. Rev.* 125 (1997).

66. Simon, *The Practice of Justice.*

67. See Carrie Menkel-Meadow, "Narrowing the Gap by Narrowing the Field: What's Missing from the MacCrate Report—Of Skills, Legal Science and Being a Human Being," 69 *Wash. L. Rev.* 593 (1994); and "To Solve Problems, Not Make Them: Integrating ADR in the Law School Curriculum," 46 *SMU L. Rev.* 801 (1993) and "Taking Problem Solving Pedagogy Seriously," 49 *J. Legal Educ.* 14 (1999).

68. See, e.g., Martin Gardner, *Aha! Insight* (New York: W. H. Freeman & Co., 1978); James L. Adams, *Conceptual Blockbusting* (Reading, Mass.: Addison-Wesley Publishing Co., 1990); and *The Care and Feeding of Ideas: A Guide to Encouraging Creativity* (Reading, Mass.: Addison-Wesley Publishing Co., 1995). In a clinical setting, I recently heard a brilliant, creative, and I think legally "correct," new argument. The judge rejected it with the observation, "If you can give me no authority approving that reasoning I cannot use it." How can the law develop, if not from lawyers and judges willing to turn innovation into precedent?

69. In another context I have suggested that lawyers should abide by a golden rule of truth telling: the lawyer should inform a client of information the lawyer would want to know if the lawyer was a client. See Carrie Menkel-Meadow, "Lying to Clients for Economic Gain or Paternalistic Judgment: A Proposal for a Golden Rule of Candor," 138 *U. Penn. L. Rev.* 761 (1990). See also Carrie Menkel-Meadow, "Is Altruism Possible in Lawyering?" 8 *Georgia State L. Rev.* 385 (1992).

70. Some of these aspirational rules are extensions of current rules (such as Rule 8.4 prohibiting dishonesty, fraud, deceit, or misrepresentation) such as requiring more candor and explicitness about facts and law than Rule 4.1 currently requires in negotiation and other contexts (as contrasted to the more forceful requirements for truth before tribunals in Rule 3.3). Similarly, Rules 1.2, 1.3 and 1.4 require lawyers to transmit settlement offers (substantive of-