Common Ground

Can everybody win? The law school shifts the focus from conflict toward compromise.

BY CHARLES E. REINEKE

COURT LENDS ITSELF TO THE LANGUAGE OF COMBAT: Lawyers wage legal battles and aggressively represent their clients; adversarial motions are filed and hostile witnesses deposed; prosecutors are zealous and defenders wily. Little wonder that the English word for trial, "an examination of evidence and law," also connotes "a state of pain or anguish caused by a difficult situation."

Scholars at the MU School of Law are convinced there is a better way.

"Lawyers shouldn't just be litigators," says Leonard Riskin, a professor of law at MU and director of the School of Law's Center for the Study of Dispute Resolution. "It's time we came to think of ourselves as problem solvers with a range of options for settling disputes—court being simply one of these."

Consider Mr. Alvarez, a landlord in Houston, who wants to evict Mrs. Grant, a tenant who has failed to pay her rent. Several years ago Riskin mediated the case for the Houston Neighborhood Justice Center, one of the dozens of nonprofit dispute resolution centers that in recent years have sought to lighten the nation's civil court dockets.

Grant says she didn't pay the rent because Alvarez didn't keep the apartment in repair. I didn't keep the place in repair because you didn't pay the

Illustration by Curtis Parker

rent, he retorts. You've got three days to get out or I'll have you thrown out. Court looms.

The case serves as a simple, direct example of why alternative dispute resolution often succeeds in a way court can't: It gets claimants, rather than just their attorneys, talking about solutions. "I asked Mrs. Grant what outcome she wanted and she said, 'I'm willing to leave. I'm glad to leave. But I need a month,' " Riskin recalled. Alvarez said he'd give her two weeks. "Fine," Grant answered. Case closed. The whole process lasted two minutes.

MU was one of the nation's first law schools to take seriously the notion that arbitration, mediation and counseling often produce less costly, more equitable solutions to even the most intractable legal problems. Mizzou is now among the most prominent.

In January 1999, for example, the center received an award for "outstanding practical achievement" from the CPR Institute for Dispute Resolution, an international alliance of law firms and corporations working to encourage alternatives to expensive litigation. Earlier this year, *U.S. News & World Report* magazine ranked MU's dispute resolution program No. 1 among America's 181 accredited law schools—the third year in a row that MU has had at least a share of the publication's top ranking.

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NONE OF THIS MATTERED MUCH TO Darryl Smith, 33, a recent School of Law graduate. For him, resolving legal disputes meant one thing: "Basically, going into court and using every legal means possible to achieve the outcome that is desired by your client, even if that means devastating the other party."

But as fewer legal matters are actually resolved in court—an estimated 4 percent of criminal cases and 5 percent to 10 percent of civil suits, according to the American Bar Association—there is less need for the sort of litigator Smith imagined he'd become. Instead, firms are looking for fewer caustic counselors. Smith got the message.

"I still want to be a litigator, a fire-breathing litigator, and if we go to court, I'm still going to do everything in my power to take you out," he says. "But now I've learned that sometimes it's best to resolve the problem before we get to court."

Alternative dispute resolution (ADR) won't work for every type of legal matter—notably those cases involving violence or abuse. But most everything else is fair game. "ADR gives you the opportunity to develop solutions that would not be available in court," Smith says. "In court you have a winner and you have a loser. With ADR you come up with solutions that work best for most people."

Such solutions usually involve some form of arbitration or mediation, procedures that Smith says his instructors began talking about "even in the law school orientation program. "They are something this school believes in," he says.

ARBITRATION IS BEST KNOWN AS THE method by which professional ball players and reluctant team owners come to terms on multimillion dollar contracts. In general, it involves submitting one's claim to a neutral party whose decision carries the force of law and cannot be overturned by the courts.

Mediation is an even kinder procedure. It employs a neutral third party to open lines of communication between opposing sides, encouraging them to air grievances that might otherwise fester in the atmosphere of recrimination and mutual suspicion that so often accompanies legal action.

Child-custody battles often represent the most quarrelsome of such disputes. During 15 years of practicing in Missouri, attorney and court-appointed mediator Daphne Halderman has witnessed such turmoil. Her mediation efforts have helped hundreds of families achieve out-of-court accord.

A local rule in Jackson County, Mo., where Halderman often mediates, requires that contending parties in custody disputes spend at least two hours with a mediator before a judge will place their case on the court's docket. Halderman recalls one such session with a Kansas City couple whose three adopted children—preteens whose birth parents had been killed in a car accident—were the focus of a contentious custody fight. Both adoptive parents acknowledged that the other loved the kids, but each said they themselves were best suited to take on their full-time care.

The mediation began badly: anger, frustration, name-calling. This is typical of such cases, Halderman says: "The first hour it might just be a pitched battle, because their emotions and feelings have become a central part of the conflict. They need to iron that out before they can start talking rationally."

Throughout this process, Halderman keeps things, as she puts it, "from getting out of hand." As the venting in this particular case wound down, she recalls reminding the Kansas City couple of their common interest—the three children. More talk revealed that both parents wanted the kids to have full-time parental supervision, though neither would be able to provide it. "Does either of your jobs allow flexibility in scheduling?" Halderman asked. When the father answered that he could probably work his 40-hour week in four days, the way forward suddenly seemed obvious: Joint cus-

tody providing three days with Dad, four days with Mom.

Both parents agreed, then Halderman sent them home to work on options for implementing the plan. These options were to include a scheme for handling holidays, provisions for transporting the kids, and other logistics. The parents then reconvened, and, with the help of their attorneys, hammered out a joint custody agreement, which was approved by the family court judge.

AT EVERY STAGE OF THEIR LEGAL studies, students at Mizzou are immersed in similar examples of alternative dispute resolution techniques, says MU law professor and ADR expert James Levin. First-year students are introduced to theoretical concepts in the general curriculum. More advanced students are required to enroll in courses emphasizing the practicalities of working as negotiators, mediators and arbitrators. Classes are centered around simulations in which students role-play the various interests in a hypothetical dispute, often videotaping themselves to assess their performance under pressure.

Some students spend a semester working at the school's Mediation Clinic, a community-service program that assigns law student mediators to real-world cases referred to the clinic by the Missouri Commission on Human Rights, the Cole County Small Claims Court or from the Columbia community at large. Last year the clinic helped more than 50 clients resolve disputes that likely would have added to the court's severely stretched docket.

Across the nation, organizations such as the American Arbitration Association have seen demand for arbitrators and mediators skyrocket. The arbitration association alone handled more than 60,000 arbitration and mediation cases last year—a sum equivalent to one-fourth of the entire federal court docket. This rising demand for alternatives to court is, in part, a testament to the pioneering work of educators at MU.

"There's no doubt that our work here is widely recognized as helping to fulfill a national need," Levin says. When MU began its ADR program in 1984, fewer than 50 law schools offered similar course work. Today more than 700 courses are offered at 177 law schools.

MU continues to lead the nation in such innovations. Last year, for example, the University established the nation's first master of laws in dispute resolution. The program allows practicing attorneys to more fully incorporate the latest dispute resolution techniques into their caseloads. Daphne Halderman is among those who have signed on.

"We've been calling it the logical next step in legal training," says program founder Barbara McAdoo. She was director for advanced studies at the center until July 2000 and is one of the nation's most prominent advocates of alternatives to litigation. "It's about what today's lawyers will be doing in the next century—how they will look at the whole field of practicing law. All of that is really changing."

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INSTEAD OF PLOWING AHEAD WITH THE adversarial negotiations that typically characterize even out-of-court settlements, future lawyers are likely to employ a more humane "problem-solving" approach. As in Halderman's Kansas City mediation, they will focus less on exploiting their opponent's weaknesses than on sizing up what *both* parties in a dispute are looking for—a common ground that each can feel good about.

"The reality for a lot of people who are involved in conflict is that it's not a good place for them. They don't want to be there," McAdoo says. "Often they're going to be involved with the people with whom they're disagreeing for a long time, whether it's a corporation or an individual. So, of course, you prefer to find some way for the litigants to reach, if you will, a point of collaboration."

Employment discrimination is a particularly poignant case in point, she says. Workers who believe they are being treated unfairly often have perfectly reasonable complaints, but these seldom rise to the legal level of employment discrimination. Employees who sue anyway almost always lose. Left without a job and with a blot on their employment record, "They may never get back on their feet," McAdoo says.

Employers, on the other hand, seldom want to be the agents of office angst, and they may be genuinely baffled by their employee's unhappiness. Lawyers trained in mediation can help ask the questions that might bring both parties together:

" 'What kind of changes need to be made? What kind of training needs to happen for an employment situation to improve?' Most companies are willing to address these questions in a mediation session. They would never touch them in a litigation situation," McAdoo says.

Collaboration rather than contention; accord instead of ascendancy. These are concepts McAdoo admits most attorneys will take some getting used to, but many of their clients have already seen the light.

"They don't want the bad publicity that will come in litigation, even if they win. They don't want the time it's going to take for maybe high-level employees to miss work and go to trial and have depositions. And they don't want to spend all the money," McAdoo says. "I think at one time—and this was a number of years ago—one of the big employers in the Twin Cities estimated that, even for the cases they won, it cost them at least $50,000 to litigate an employment-discrimination case. What a waste. What a complete waste." ✹