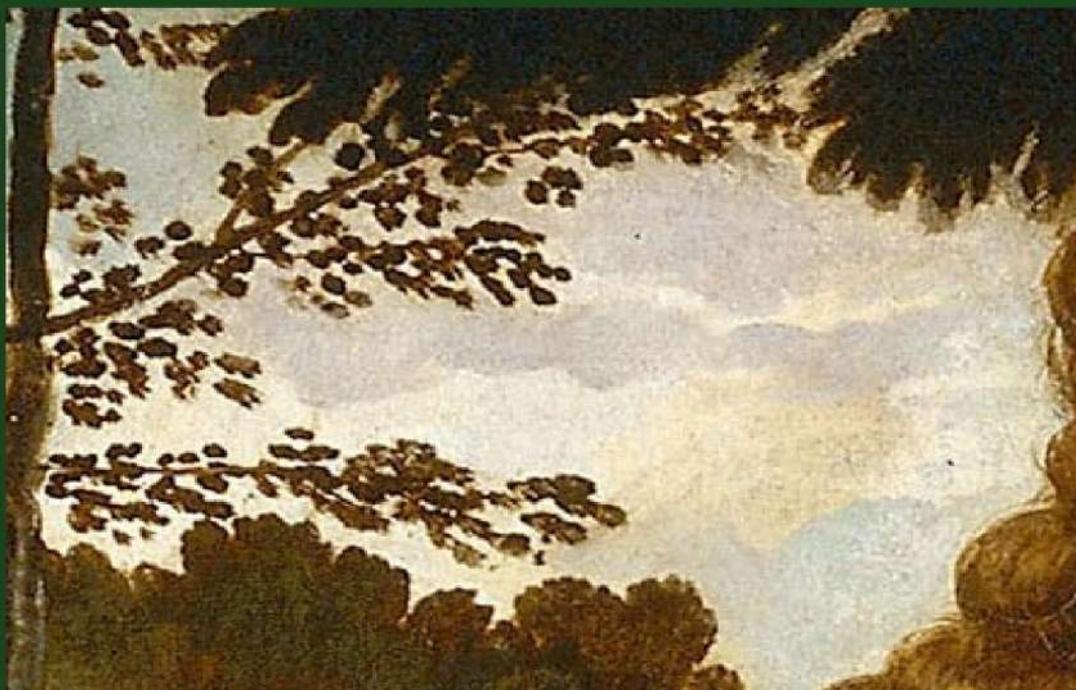


# The Italian Law Journal



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## **Training Young Lawyers in the European Mediation Framework: It's Time to Devise a New Pedagogy for Conflict Management and Dispute Resolution**

Luigi Cominelli\*

### **Abstract**

Mediation as a dispute resolution method is being rediscovered today in Western legal systems. Modern jurisdictions now tend to promote mediation according to a 'formal legislative approach', based on recommendations issued by international organizations, in response to the pressure of public opinion that shows discontent with constant crisis in the justice system. The EU Directive of 2008 on civil and commercial mediation has in vague terms imposed the obligation to ensure the quality of mediation services, and by declaring as desirable only a certain level of training for mediators, it has left it up to member states to decide whether to make accreditation compulsory. In such a framework, where there is likely to be a further push towards regulation, we need to discuss what the basic skills of a mediator are. The point is that the mediator's professionalism is not easily pigeonholed in a set of disciplinary skills. The mediation model that the European Union has sought to promote and regulate is highly legal, but good mediation skills are not necessarily the same as the ones required to earn a degree in law and then pass the bar exam. University education must not necessarily train mediators, but rather form professionals who should be aware of the skills needed in mediation, or who know enough about mediation to direct their clients to mediation when the need arises. In order to prepare for anticipated future disputes and discern when to negotiate and when to fight, it becomes important to simulate conflict experientially, and to field-test what works in managing it, and when possible, in solving it. Simulating conflict using audio recordings, videos, and feedback reports allows the teacher to make the learner relive what happened: decisive moments, what could have been said differently or better, what should have not been said, posture, signs of nervousness, proxemics, all that which makes us feel more comfortable or uncomfortable in a situation. Empirical research using a socio-psychological paradigm has shown, for example, that mediators are assessed as effective when they are able to create an atmosphere of trust in mediation meetings, adapting flexibly to the situation, and transmitting energy, optimism and a non-judgmental attitude.

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## I. Introduction

Mediation as a dispute resolution method is being rediscovered today in Western legal systems, and in all systems that are influenced by them. Despite being the oldest method involving the intervention of third parties in disputes, mediation has been virtually marginalized by the rule of law principle and by the construction of a contemporary judiciary power.<sup>1</sup> Modern jurisdictions now tend to promote mediation according to a ‘formal legislative approach’,<sup>2</sup> based on recommendations issued by international organizations,<sup>3</sup> and giving in to the pressure of public opinion, tired of the constant justice crisis.<sup>4</sup> In recent years, a growing number of States have introduced specific normative frameworks for various forms of mediation, and particularly for civil and commercial mediation.<sup>5</sup>

Mediation, as a method of dispute resolution, has been theorized and debated upon in legal theory and deontology,<sup>6</sup> as well as in legal sociology<sup>7</sup>

<sup>1</sup> J.P. Bonafé-Schmitt, *La Médiation: Une Autre Justice* (Paris: Syros-Alternatives, 1992).

<sup>2</sup> N. Alexander, ‘Mediation and the Art of Regulation’ 8 *Queensland University of Technology Law and Justice Journal*, 1-23, 4 (2008).

<sup>3</sup> European Commission Green paper on alternative dispute resolution in civil and commercial law (COM/2002/0196 final); EU Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings (2001/220/JHA); Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters (Res. 12/2002); Recommendation adopted by the Committee of Ministers of the Council of Europe on Mediation in penal matters, no R(99)19, 15 September 1999.

<sup>4</sup> W.K. Olson, *The Litigation Explosion. What Happened When America Unleashed the Lawsuit* (New York: Penguin, 1991); G. De Palo and G. Guidi, *Risoluzione alternativa delle controversie. ADR. Alternative Dispute Resolution nelle Corti Federali degli Stati Uniti* (Milano: Giuffrè, 1999); S. Chiarloni, ‘Strumenti per migliorare l’efficienza della giustizia civile a legislazione invariata’, in C. Beria D’Argentine ed, *La crisi della giustizia civile in Italia: che fare? – Atti del Convegno dell’Osservatorio ‘Giordano Dell’Amore’, 14-15 novembre 2008. Palazzo di Giustizia, Milano* (Milano: Giuffrè, 2009).

<sup>5</sup> Suffice it to note that among the jurisdictions providing forms of mandatory mediation for certain types of dispute are Argentina, Australia, Canada, Croatia, Egypt, India, Japan, Italy, Lebanon, Rwanda, plus some of the most populous US states. Twenty-one of the sixty jurisdictions examined in the latest treaties also provide forms of compulsory mediation by order of a judge: M. Schonewille and F. Schonewille, *The Variegated Landscape of Mediation. A Comparative Study of Mediation Regulation and Practices in Europe and the World* (The Hague: Eleven International Publishing, 2014).

<sup>6</sup> L. Fuller, ‘Mediation. Its Forms and Functions’ 44 *Southern California Law Review*, 305 (1971); C. Menkel-Meadow, ‘Whose Dispute Is It Anyway?: A Philosophical and Democratic Defense of Settlement (In Some Cases)’ 83 *Georgetown Law Journal*, 2663-2696 (1995).

<sup>7</sup> T. Eckhoff, ‘The Mediator, the Judge and the Administrator in Conflict-Resolution’, in B.M. Persson Blegvad ed, *Contributions to the Sociology of Law* (Copenhagen: Munksgaard, 1992), 148; J. Kurczewski, ‘Dispute and Its Settlement’, in M. Cain and K. Kulcsar eds,

and in the philosophy of law.<sup>8</sup> It has also been highlighted that mediation and interest-based negotiation are a legacy of the legal realism movement.<sup>9</sup> In a way, the mediation revival is a critique of a system of dispute management that has become ‘the worst example of legal constructivism’.<sup>10</sup>

The ways of resolving disputes, which in some cases can only contain and manage the conflict, rather than resolve it, have been analyzed from many points of view in the social sciences, and lend themselves to an analysis which is by definition multidisciplinary, as we will better explain. This, however, requires the jurist to make an effort of epistemic adaptation. Lawyers trained in a formalist temper refer instinctively to a conflict theory based implicitly on the assumption of scarcity, on bilateralism and dualism, on compelled and strategic forms of competition and on mistrust of direct communication.<sup>11</sup> This model was completely unchallenged until a few decades ago. The more optimistic reorientation that followed in the social sciences – starting in the 1970s and the 1980s – and that is bearing fruit only now, shifted from dualism to sharing, by exploring the themes of integrative bargaining, peace keeping, creative problem solving and social cooperation.<sup>12</sup> This particular interpretation key might explain at least partially why a non-adjudicative method such as mediation is becoming a relevant topic for lawyers.<sup>13</sup>

## II. The Mediation Revival

Non-adjudicative methods of dispute resolution, often referred to in legal *vulgata* as ‘alternative dispute resolution’ (and that in lawyers’ view include the adjudicative method of arbitration), have been gradually reintroduced in the Italian legal system through company law conciliation in 2003 (Decreto Legislativo 17 January 2003 no 5) and, more importantly, with the legislative decree on civil and commercial mediation in 2010

*Dispute and the Law* (Budapest: Akadémiai Kiadó, 1983); G. Simmel, *Il Mediatore* (Rome: Armando Editore, 2014).

<sup>8</sup> G. Cosi and M.A. Foddai, *Lo spazio della mediazione: conflitto di diritti e confronto di interessi* (Milano: Giuffrè, 2003).

<sup>9</sup> C. Menkel-Meadow, n 6 above, 2677.

<sup>10</sup> E. Resta, ‘Giudicare, Conciliare, Mediare’ *Politica Del Diritto*, 541-575, 545 (1999).

<sup>11</sup> C. Menkel-Meadow, ‘The Case for Mediation: The Things That Mediators Should Be Learning and Doing’ 82 *Arbitration: International Journal of Arbitration, Mediation and Dispute*, 22-33, 24 (2016).

<sup>12</sup> R. Axelrod, *The Evolution of Cooperation* (New York: Harper Collins, 1984); M. Deutsch, *Distributive Justice: A Social-Psychological Perspective* (New Haven and London: Yale University Press, 1985); P. Singer, *A Darwinian Left. Politics. Evolution and Cooperation* (New Haven and London: Yale University Press, 2000).

<sup>13</sup> F.E.A. Sander, ‘Varieties of Dispute Processing’, in R. Wheeler and A. Levin eds, *The Pound Conference: Perspectives on Justice in the Future* (Rochester: West, 1979).

(Decreto Legislativo 4 March 2010 no 28). The mediation revival has brought the process of training and professionalization of mediators<sup>14</sup> to center stage.

The mediator's activity is improperly referred to as a profession, because it is not assisted (nor hindered) by the guarantees of a thoroughly regulated professional register. In order to act as mediators with the privileges of Decreto Legislativo 4 March 2010 no 28, candidates must undergo accreditation training, and become affiliated with a registered mediation provider. Notwithstanding the problem of the mediator's professional status, the issue of training and skills in conflict management is the most relevant. From my personal experience, law school freshmen immediately comprehend the appeal of mediated solutions, even if they miss the importance of the relationship with the client. But, for the majority of would-be mediators, these skills must be created or reinforced in mature adults, and they pose first of all an andragogic problem. We are presently facing the issue of how to train professionally accomplished lawyers, when this may also signify deconditioning mental patterns and automatic reflexes.

The EU Directive of 2008 on civil and commercial mediation<sup>15</sup> has imposed in vague terms the obligation to ensure the quality of mediation services, and by declaring only a certain level of training for mediators as desirable, it has left it up to member states to decide whether to make accreditation compulsory.<sup>16</sup> All member states have established measures to promote mediator training (more through regulation than with funding), but educational standards fluctuate greatly in Europe, with accreditation or certification programs varying from thirty to three-hundred hours. The most frequent choice is to provide a concentrated training program of forty to fifty hours. By all accounts, minimum training required for accreditation is not sufficient to form good mediators. In Italy, the problem was solved by making mediation providers responsible for selecting the best accredited mediators on the market, and verifying that they comply with continuing education requirements.

It should also be recalled that mediation practice is still allowed, even in civil and commercial matters, outside of the regulation of Decreto Legislativo 4 March 2010 no 28, which implemented the EU directive in Italy. This is already the case for family mediation, where training and

<sup>14</sup> G. De Palo and L.R. Keller, 'The Italian Mediation Explosion: Lessons in Realpolitik' 28 *Negotiation Journal*, 181 (2012).

<sup>15</sup> Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters, OJ L 136, 24.5.2008, 3–8.

<sup>16</sup> M.C. Reale, 'La mediazione civile e l'Europa' *Sociologia del diritto*, 95-120 (2014).

accreditation follow best practices. It would be completely contrary to the nature of mediation to prevent a mediator, who might be perhaps accredited abroad, to play a role as facilitator in the resolution of disputes between Italian subjects or in Italy. The mediator might be engaged directly by the parties to the dispute who are not interested in the advantages bestowed by Italian legislation. It is currently not possible to predict whether a public international accreditation process, or mutual recognition of the existing accreditation mechanism in each European country subject to the directive, will be established.

### III. Mediator Skills

In such a framework, where there is likely to be a further push towards regulation, we need to discuss what basic mediator skills are. The point is that the mediator's professionalism is not easily pigeonholed in a set of disciplinary skills. The mediation model that the European Union has sought to promote and regulate is highly legal. In most cases, disputes are brought to mediation only once legal advice has been requested, and when positions have been already framed and subsumed under some legal right. At that point, it is clearly more difficult to return to speak of the parties' needs and interests. The lawyer who cares about her client will certainly do so, but this behavior is seen as an extra, going beyond ethical obligations. If she does, it is thanks to her humanity, and not necessarily as an exercise of her professional skills. The assessment of needs and interests, and the ability to effectively convey these issues, are the bulk of the mediator's skills.

The political choice of granting *ex lege* accreditation as mediator to all Italian attorneys is in a sense a signal that the topic has not been understood. This choice was then wisely tempered by the decision to subject them to the same training requirements as all mediators. A good mediator can also be a good lawyer, and in the vast majority of cases this is helpful, because it gives him *gravitas* that he would not otherwise have. Perceived legal expertise is especially useful in breaking down the initial wall of distrust between the parties.<sup>17</sup> Besides, any mediation can start even after a lawsuit is filed, in which case it is even more useful that the dispute be mediated by someone who knows what will happen if the parties do not settle, and who is aware that mediation is a negotiation 'in the shadow of the law'.<sup>18</sup> But the mediator's core business is something different. Good

<sup>17</sup> S.B. Goldberg and M.L. Shaw, 'Who Wants to Be a Mediator?' 16 *Dispute Resolution Magazine*, 24-29 (2010).

<sup>18</sup> R.H. Mnookin and L. Kornhauser, 'Bargaining in the Shadow of the Law: The

mediation skills are not necessarily the same as the ones required to earn a degree in law and then pass the bar exam. First, to manage a conflict and hopefully resolve a dispute, we need communication abilities, empathy and an understanding of psychological dynamics that has been defined as ‘emotional intelligence’.<sup>19</sup> This set is a complex mix of psychology, expressive arts, cognitive science and theology. In reconstructing the identity of the intellectual fathers of the dispute resolution field, Carrie Menkel-Meadow identified social psychologists and organization studies scholars<sup>20</sup> as a first choice. It is quite difficult to find so many varied skills in the official résumé of a single individual. In recent years, most of the young students having taken part in the Italian Mediation Competition, organized by the University of Milan and by the Chamber of Arbitration in Milan, are law students, although students in economics or cognitive sciences also join in. However, the few university degrees specifically dedicated to training mediators have strong ties with psychology, peace studies and international relations, rather than with law.

The process of legalization and formalization of ADR and mediation<sup>21</sup> calls for a serious debate. Let me return to what we asserted above. When we refer to mediation in Italy today, we refer mainly to civil and commercial mediation, which represents the larger volumes of mediated disputes. Certainly family mediation, not to mention criminal or social mediation, have different reference models. In many cases, family mediation is actually marriage counseling, with no direct or obvious legal consequences. The ‘dispute resolution professional’ is at the crossroads of many disciplines, and practices a method which one might define as an ‘applied science’.<sup>22</sup> The careers of several mediators are eclectic, each with its own style and idiosyncrasies. Mediation is a ‘sensibility’ about how to approach others and the world in general,<sup>23</sup> and is an all-encompassing method, because it requires the mediator to plunge into a totalizing phenomenon such as conflict.

#### IV. Training University Students in Conflict Management

Case of Divorce’ 88 *The Yale Law Journal*, 950-997 (1979).

<sup>19</sup> D. Goleman, *Intelligenza Emotiva* (Milano: BUR, 1999).

<sup>20</sup> C. Menkel-Meadow, ‘Chronicling the Complexification of Negotiation Theory and Practice’ 25 *Negotiation Journal*, 415-429, 423 (2009).

<sup>21</sup> T.J. Stipanowich, ‘Arbitration: the “New Litigation” ’ 1 *University of Illinois Law Review*, 1-59 (2010); J. Nolan-Haley, ‘Mediation: The “New Arbitration” ’ 17 *Harvard Negotiation Law Review*, 61-95 (2012).

<sup>22</sup> C. Menkel-Meadow, ‘Mothers and Fathers of Invention: The Intellectual Founders of ADR’ 16 *Ohio State Journal on Dispute Resolution*, 35 (2000).

<sup>23</sup> C. Menkel-Meadow, ‘The Case for Mediation’ n 11 above, 24.

Besides mastering the scant legislation that governs mediation in each domestic system, what can be useful for students in training? Conflict management skills begin to form at a very young age, often in the family and at primary or secondary school. The aim of tertiary education then, is to strengthen some of the soft skills that are common to all professions, or to eliminate some dysfunctional tendencies (hyper-sensitivity, nervousness, insecurity). In order to promote citizens' confidence in mediation services, it is quite obvious that clarifying the powers and establishing some sort of core curriculum for the mediator would certainly be helpful. It is also true that standardization implies renouncing the flexibility which in some cases is so essential in treating a 'social creature' like conflict. Mediation is a process with an affinity with international diplomacy. The procedural rules are minimal and remain in the background: there are certain protocols or traditions, but codifying the process beyond a certain limit is likely to be counterproductive, because communicating and interpreting interests require a strong degree of flexibility.

The example of private sessions between the mediator and one of the parties (or *caucus*) is particularly interesting. So-called *transformative* mediators do not use separate sessions, or use them as little as possible, that is, they try to hold all mediation meetings in the presence of both parties. Since they are mostly oriented to healing the broken relationship, it would not make sense to separate the disputants. On the contrary, other mediators who are more settlement-oriented may even decide not to have the parties meet until they have both decided to proceed beyond the first informative session, and to initiate true mediation itself, and in any case, once mediation has officially started, they may suggest the parties meet separately with each of them when an impasse is reached. Each choice has its pros and cons, and most mediators are usually able to modify their habits pragmatically to adjust to the nature of the conflict. However, it could also be argued that this discrepancy of standards might be perceived as a lack of professionalism, or as proof of the procedure's poor reliability. Keeping each party informed of what is happening, to explain the reason for this flexibility, can lead the mediator to address the situation,<sup>24</sup> but still does not solve the problem.

These are open questions. University education must not necessarily train mediators, but rather form professionals who should be aware of the skills needed in mediation, or who know enough about mediation to

<sup>24</sup> M. Schonewille and J. Lack, 'Mediation in the European Union and Abroad: 60 States Divided by a Common Word?', in M. Schonewille and F. Schonewille eds, *The Variegated Landscape of Mediation. A Comparative Study of Mediation Regulation and Practices in Europe and the World* (The Hague: Eleven International Publishing, 2014).

direct their clients to mediation when the need arises. National and international moot mediation competitions engage students in the role of the party and counsel, while the role of the mediator is entrusted to a professional mediator, who facilitates the negotiation. Among the negotiator/mediator techniques that are teachable and that can be developed in a university classroom, are abilities to detect prejudice, appreciate socio-cultural diversity, master advanced communication techniques (oral or visual), investigate the interests of others, manage anger, deal with collective problems and interface with more than one person at a time.<sup>25</sup>

## V. Building a Dispute Pedagogy

However, not everything can be taught to university students. Teachers and instructors, who are not necessarily pedagogues after all, feel a duty to rattle off all the knowledge produced so far on one particular matter, and still do not pay enough attention to skills. The lawyer is trained in an adversarial attitude, which is useful primarily in the judicial defense of the client: it is expected that in a trial, the only effective strategy is to be as convincing as possible on the merits of your position. Although professionals realize that most disputes are actually resolved on the basis of a reasonable balance between requests, and thus with an interest-based negotiation, they prepare for battle during most of their education. At the end of the trial, someone wins and someone loses, because litigation is necessarily a zero-sum game.<sup>26</sup> The clear delimitation of available legal remedies implies that the judge will simply cut the negotiation pie fairly, without inquiring about whether or not this satisfies the substantial interests of the parties. In fact, due to the way in which the legal profession is organized, lawyers make their living through advice or expert opinion only if their clients enter into a dispute, potential or actual. But lawyers do not need to necessarily trigger the conflict in legal forms to provide a remunerable service. We have still a long way to go on this idea. Recent empirical research conducted on over two-hundred mediators in civil and commercial matters found that the persons most effective in bringing the parties to an extra-judicial settlement were not necessarily those who had legal training.<sup>27</sup> In civil law jurisdictions, it is

<sup>25</sup> D.K. Crawford and R.J. Bodine, 'Youths, Education and Dispute Resolution', in M.L. Moffit and R.C. Bordone eds, *The Handbook of Dispute Resolution*, 475-486, 471 (San Francisco: Jossey-Bass, 2005).

<sup>26</sup> L. Riskin, 'Mediation and Lawyers' 43 *Ohio State Law Journal*, 29-60, 44 (1982).

<sup>27</sup> L. Cominelli and C. Lucchiari, 'Mediators with Italian Characteristics. Styles, Conflict

also believed that a pre-litigation settlement equals decreased revenues. On the contrary, the expert assistance of a negotiation professional is likely to generate a greater number of cases and build client loyalty, which could bring the lawyer other potential issues. With a constant litigation rate, a higher number of less contentious disputes could emerge without altering the lawyer's profitability, since this would allow the client to solve more problems that are usually abandoned or are taken somewhere else. Lawyers would find new clients through a cheaper legal advice and negotiation assistance model.<sup>28</sup> Negotiation theory claims that any dispute can be mediated, except for certain specific ones, which must be adjudicated so that the most important principles of law have a clear application in practice, and form the 'shadow' under which other disputes are resolved in mediation. We should reverse the traditional perspective of singling out criteria to identify disputes that *can* be mediated, such as the existence of lasting relationships, or the presence of a relational aspect. This is a rather subversive move on the part of lawyers. Instead, disputes *not to be mediated* would be only those in which the imbalance of forces between the parties is evident, when there is a public interest in an authoritative judicial interpretation and thus general principles of law or constitutional norms are being discussed, if there is an appreciable interest in establishing a binding precedent on a new issue, or, finally, whenever potential difficulties in the enforcement of the agreement that ends the dispute are foreseen. Defenders of the tradition will argue that we are surrendering to commodification of the law, but it is quite difficult to understand how the legal business can remain immune from upheavals in contemporary economy, and the commodification of services in general. Professionals must now justify their bills differently. In my opinion, the argument that promoting of-court settlements is basically a privatization of justice<sup>29</sup> has been convincingly refuted in the doctrine, by appealing to the right to decide on one's own disputes.<sup>30</sup>

## VI. Building Conflict Management Skills

How does all this translate into pedagogy of mediation? The educational path generally starts in university, but could start earlier, with school and

Attitudes and Settlement Rates' (28 February 2016), available at <http://ssrn.com/abstract=2739263> (last visited 24 May 2016).

<sup>28</sup> L. Riskin, n 26 above, 54.

<sup>29</sup> W. Twining, 'Alternative to What? Theories of Litigation, Procedure and Dispute Settlement in Anglo-American Jurisprudence: Some Neglected Classics' 56 *The Modern Law Review*, 380-392 (1993); O.M. Fiss, 'Against Settlement' 93 *Yale Law Journal*, 1073-1090 (1984).

<sup>30</sup> C. Menkel-Meadow, 'Whose Dispute Is It Anyway?' n 6 above; E. Resta, n 10 above.

peer mediation programs. There are several social skills of emotional intelligence to be developed: self-awareness, self-discipline, motivation, creativity and empathy.<sup>31</sup> Though these skills seem rather obvious and not really central to professional training, they are basic relationship skills in the lawyer-client relationship, and can be exercised even by someone who is not naturally sociable. In law school education, the client as a person is a purely metaphysical concept, because academic excellence does not require interpersonal abilities of communication and negotiation.<sup>32</sup> Creativity is rarely perceived as pivotal among lawyers' basic skills,<sup>33</sup> but in any negotiation that is not reduced to a Dutch auction, creativity is essential to generating alternative options and overcoming the impasse that inevitably arises in a context of conflicting rights.<sup>34</sup> Family lawyers who deal with separation and divorce, for example, have to educate the ex-spouses in long-term conflict management.

In order to prepare for the dispute and discern when to negotiate and when to fight, it becomes important to simulate conflict experientially, and to field-test what works in managing it, and when possible, in solving it.<sup>35</sup> Simulating conflict using audio recordings, videos, and feedback reports allows the teacher to make the learner relive what happened: decisive moments, what could have been said differently or better, what should have not been said, posture, signs of nervousness, proxemics, all that which makes us feel more comfortable or uncomfortable in a situation. Reliving what happened in the conflict is a very powerful tool for identifying weaknesses and taking action.<sup>36</sup> Being scolded for a mistake is one thing, seeing oneself making that mistake has a completely different impact. Sports psychology identifies simulation and games as a means of improving performance. According to evolutionary psychology, the essential reason why children play and love to be told stories is because it allows them to prepare for life by mentally simulating what will or might happen. This type of practical training is therefore not a whim: it is helpful to repeat automatisms, especially to control oneself and not lose one's temper, when

<sup>31</sup> L.S. Schreier, 'Emotional Intelligence and Mediation Training' 20 *Conflict Resolution Quarterly*, 99-119, 100 (2002).

<sup>32</sup> J. Macfarlane, *The New Lawyer: How Settlement Is Transforming the Practice of Law* (Vancouver, Toronto: UBC Press, 2008), 14-15.

<sup>33</sup> C. Menkel-Meadow, 'Aha? Is Creativity Possible in Legal Problem Solving and Teachable in Legal Education?' 6 *Harvard Negotiation Law Review*, 97-144, 114 (2001).

<sup>34</sup> R. Fisher and W.L. Ury, *Getting to Yes. Negotiating Agreement Without Giving In* (New York: Penguin, 1981).

<sup>35</sup> L. Riskin, n 26 above, 50.

<sup>36</sup> N. Ebner and K. Kovach, 'Simulation 2.0: The Resurrection', in C. Honeyman, J. Coben and G. De Palo eds, *Venturing Beyond the Classroom* (St. Paul, MN: Dispute Resolution Institute Press, 2010), 263-264.

one finds oneself in situations of stress and fatigue, which happens regularly in a cognitively strenuous event. After all, we are beings based on simple mechanisms. Some studies criticize classroom simulations, claiming that they obtain only marginal benefits in terms of real skills.<sup>37</sup> But the important thing, even in the classroom, is to reproduce the tensions of the real situation.<sup>38</sup> Professional life is probably another matter, but the tension you feel in student competitions such as ICC Moot Mediation<sup>39</sup> is palpable, and is quite comparable to that of real experiences. While simulated cases cannot be real and the involvement is not quite real, the pressure certainly is. In any case, simulations are more effective than purely frontal lecturing. Although they do not necessarily permit a deeper understanding of conflict dynamics, they do help students internalize the mechanisms needed to manage them.<sup>40</sup>

In fact, like most people, professionals are not at ease in conflictual situations. This is natural for all lawyers, who tend to cling to formalism to maintain a safe distance from the conflict, hoping that things will resolve themselves.<sup>41</sup> The tendency to refer exclusively to form to avoid the substance of the conflict is one of the reasons leading to overburdened litigation and legal constructivism in our social and legal systems. Professional mediators, above all, should seek to avoid being overwhelmed by the conflict, but at the same time avoid becoming too detached, by maintaining a level of involvement and empathy which reassures the client and keeps them involved in the resolution.

Last, we come to the psychological and cognitive skills that are not explicit in the traditional curriculum of conflict professionals: the ability to analyze problems and possible obstacles (especially cognitive biases) that prevent a consensual solution. Negotiating skills are historically disdained in the social sciences (perhaps a little less so in business studies). Scholars generally consider negotiation a natural gift that cannot be taught. This set of skills is beginning timidly to enter the curriculum of jurists.<sup>42</sup> A lazy negotiator becomes a *satisficer*, ie someone who settles for a halfway

<sup>37</sup> N. Alexander and M. LeBaron, 'Death of the Role-Play', in C. Honeyman, J. Coben and G. De Palo eds, *Rethinking Negotiation Teaching. Innovations for Context and Culture* (Saint Paul, MN: Dispute Resolution Institute Press, 2009), 179-197, 185.

<sup>38</sup> R. Smolinski and P. Kesting, 'World Championship in Negotiation? The Role of Competitions in Negotiation Pedagogy' 29 *Negotiation Journal*, 355-369, 361 (2013).

<sup>39</sup> G. Bond, 'Mediation and Culture: The Example of the ICC International Commercial Mediation Competition' 29 *Negotiation Journal*, 315-328 (2013).

<sup>40</sup> D. Druckman and N. Ebner, 'Games, Claims, and New Frames: Rethinking the Use of Simulation in Negotiation Education' 29 *Negotiation Journal*, 61-92, 65-66 (2013).

<sup>41</sup> L.S. Schreier, n 31 above, 110.

<sup>42</sup> C. Menkel-Meadow, 'Doing Good Instead of Doing Well? What Lawyers Could be Doing in a World of "Too Many" Lawyers' 3 *Oñati Socio-Legal Series*, 378-408, 391 (2013).

compromise. The definition of ‘satisficer’ derives from the work of Herbert Simon: the drive to maximize results in a negotiation is constrained by our cognitive limitations, which push us to be happy (satisfied) with a result which is just enough (suffice). The story of the Camp David peace agreements<sup>43</sup> illustrate how a negotiation in which one might simply try to ‘split the baby in half’, does not necessarily have to leave solutions on the table that might mutually satisfy all interests. These stories are impactful in the classroom, even when expressed in a purely scholarly way. Stories, examples and anecdotes catch our attention like few other methods can.

## VII. Conclusion

The most farsighted members of the bar have realized that something is changing, and led the way through ‘collaborative law’ practices that apply interest-based systems of dispute resolution. When retained by a client, collaborative lawyers commit to not resort to litigation to resolve the problems. This is spelled out in a specific clause in the engagement agreement. The ability to learn mediation techniques and to rationalize negotiation techniques stems from the need to redefine the lawyer’s tasks. It is now becoming commonplace in many countries to complain that there are too many lawyers on the market, and this raises a question about their function. The problem for a lawyer who is overly dependent on litigation is the risk of becoming irrelevant or socially dysfunctional in social perception, as in that of the business world, where the control of consumption and costs has become a priority.<sup>44</sup> It is also a growth and sustainability problem. We must provide the whole picture to prepare young lawyers for the future that awaits them. Clients are becoming more demanding and will not settle for standard solutions. In the age of internet and zero-cost information, deference to any professional is in danger, and the client always has a say in every choice.<sup>45</sup>

Adjudicative litigation is, and will remain for a long time, the most common mode of dispute resolution. In addition to disputes that should not be mediated, we must consider the psychological need that many clients have to delegate responsibility for the conflict,<sup>46</sup> and to vent their anger through a lawyer in an adversarial setting.<sup>47</sup> In these cases, bringing a dispute to mediation requires the lucky coincidence that both counsels

<sup>43</sup> R. Fisher and W.L. Ury, n 34 above.

<sup>44</sup> J. Macfarlane, n 32 above, 2.

<sup>45</sup> Ibid 130.

<sup>46</sup> Ibid 142.

<sup>47</sup> Ibid 155.

are sympathetic to the option. The niche that non-adjudicative methods occupy today, however, will hardly remain so marginal. The signs are already there, as evidenced by the recent statistics of the Italian Ministry of Justice.<sup>48</sup> Several countries are studying the Italian model, where compulsory mediation is tempered by a first mediation meeting at no cost for the parties, devoted to explaining how the process works and allowing them to decide whether to opt out of mediation.

The more structured and challenging courses dedicated to the profession of mediator are advanced university degrees that combine theory and 'black letter law', with relationship skills and communication.<sup>49</sup> Knowledge of underlying substantive law, that is, what the law says if we were to go to court, is undeniably a plus for the mediator. It is true that the mediator may not have to use this knowledge, but it is always better to have it. In any case, this knowledge is not necessarily monopolized by jurists. In certain areas, the non-lawyer may already have, or easily acquire, the legal concepts he needs to be a good mediator in a dispute with legal implications. This is not because he has to provide legal advice. It is enough for him to know when specific and thorough legal advice from a lawyer will be needed. In mediation, the law is one of the facts of the dispute. After all, no one would argue that psychologists have a monopoly on relational skills.

Therefore, emotional, relational and expressive skills that make a good mediator do not depend, or depend only in part, on a university or professional title. Empirical research using a socio-psychological paradigm has shown, for example, that mediators are assessed as effective when they are able to create an atmosphere of trust in mediation meetings, adapting flexibly to the situation, and transmitting energy, optimism and a non-judgmental attitude.<sup>50</sup>

Other qualities considered essential in successful mediators, besides legal expertise, are patience and persistence.<sup>51</sup> However, there is no consensus on the most appropriate style of mediation, whether facilitative (psychological-relational) or evaluative (legally-oriented problem solving).<sup>52</sup> Mediation is guided by practice. This does not mean that the mediator's talents cannot be educated or developed through exercise, starting in the

<sup>48</sup> Italian Ministry of Justice, Statistics on Civil and Commercial Mediation, 31 December 2015, available at <https://webstat.giustizia.it/Analisi%20e%20ricerche/Mediazione%20civile%20al%2031%20dicembre%202015.pdf> (last visited 24 May 2016).

<sup>49</sup> B.M. Harges, 'Mediator Qualifications: the Trend Toward Professionalization' 78 *Brigham Young University Law Review*, 687, 709 (1997).

<sup>50</sup> K. Kressel, T. Henderson, W. Reich and C. Cohen eds, 'Multidimensional Analysis of Conflict Mediator Style' 30 *Conflict Resolution Quarterly*, 135-171, 160-161 (2012).

<sup>51</sup> S.B. Goldberg and M.L. Shaw, n 17 above, 24.

<sup>52</sup> N.A. Welsh, 'Institutionalization and Professionalization', in M.L. Moffit and R.C. Bordone eds, n 25 above, 487-506, 495.

classroom. There will probably be just a few mediators with pure natural talent, while many potentially good or excellent mediators only need to be discovered.<sup>53</sup> It may be even more important to let future lawyers experiment with different dispute management techniques. Unless a lawyer is familiar with mediation and with the situations in which mediation can be useful, it is unlikely he will recommend it to its clients,<sup>54</sup> because he does not fully understand its advantages compared to arbitration or direct negotiation. Is there any additional advice for university students? It is rare that students in training are already interested in a job as mediator where employment opportunities are still limited. Students whose interest has blossomed during a course in mediation or negotiation should perhaps be advised to specialize and become first good engineers, psychologists, lawyers or accountants, and then cultivate their talent for resolving disputes on the side. This is a profession that gives enormous satisfaction, but for now, we have to treat it as a second-level profession, to be combined with an existing professional background.

<sup>53</sup> B.M. Harges, n 49 above, 712.

<sup>54</sup> L. Riskin, n 26 above, 41.