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Jill I. Gross
Pace University School of Law, jgross@law.pace.edu

Alexandra D. Dunn
Pace University School of Law, adunn@law.pace.edu

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ARTICLE

Environmental Dispute Resolution in the Law School Curriculum

JILL I. GROSS* AND ALEXANDRA DAPOLITO DUNN**

I. INTRODUCTION

In the spring of 2008, Pace Law School launched the Kheel Center on the Resolution of Environmental Interest Disputes (Kheel Center) with the support of a generous grant by the well-known labor arbitrator and mediator Theodore W. Kheel.[1] The Center's work focuses on critical conflicts arising from climate change and other pressing environmental disputes, such as those concerning water allocation and reuse, energy allocation and distribution, metropolitan area development and infrastructure, sea level rise, natural disaster mitigation, green development, watershed management, open space protection, and land acquisition for conservation purposes. In these types of environmental interest disputes rights are less developed and clear, multiple diverse parties are involved, and scientific facts are imprecise, making these disputes less amenable to resolution by traditional means of adjudication.[2] Thus, these conflicts require innovative resolution strategies and forums.

To devise these innovative strategies and navigate through new environmental dispute resolution processes and forums, lawyers must be equipped with specialized knowledge and training. Part of the Kheel Center's mission is to train law

* Professor of Law and Director, Investor Rights Clinic, Pace Law School.

** Assistant Dean of Environmental Law Programs and Adjunct Professor of Law, Pace Law School.

1. The authors are faculty and academic advisors, respectively, to the Kheel Center.

2. Pace Law School, Kheel Center on the Resolution of Environmental Interest Disputes, http://www.pace.edu/page.cfm?doc_id=31259 (last visited Dec. 15, 2009).

students and practicing lawyers in the distinct skills that they will need now, and in the future, to address environmental interest disputes.

Of course, alternative dispute resolution (ADR) training abounds in law schools, continuing legal education programs, and through ADR services providers. No doubt these trainers can accomplish a great deal in orienting lawyers in the fundamentals of ADR. However, the field of environmental dispute resolution (EDR)[3] requires training of a unique nature. Rather than train lawyers to represent clients in mainstream ADR forums such as arbitration or mediation, EDR professors must train lawyers to understand and adopt the specialized skills necessary to succeed—either as a zealous advocate for a client or as a neutral—in a variety of settlement forums and processes attuned to these emerging environmental disputes.[4]

One aspect of this training is defining what can and should be taught in the Juris Doctorate (J.D.) curriculum. As a result of this focus on the necessary skills training for the resolution of environmental interest disputes, in 2008, Pace Law School developed two new courses for our ADR / EDR curriculum: EDR Theory and EDR Skills. This article will describe the development and implementation of these courses, how they fit into the overall efforts of ADR professors to enhance ADR in the law school curriculum, and their ramifications for the growing field of EDR.

II. A BRIEF HISTORY OF ADR IN THE LAW SCHOOL CURRICULUM

Twenty years ago, a generation of ADR law professors embarked upon a bold pilot to integrate ADR theory and skills into the first-year law school curriculum. Led by Professor Leonard L. Riskin and supported by substantial federal grants, in 1985 the University of Missouri-Columbia School of Law (UMC) "systematically integrated the teaching of ADR into all standard

3. *See* Robert F. Blomquist, *Some (Mostly) Theoretical and (Very Brief) Pragmatic Observations on Environmental Alternative Dispute Resolution in America*, 34 VAL. U. L. REV. 343 (2000) (describing the evolving field of environmental alternative dispute resolution).

4. *See infra* note 29 and accompanying text (discussing the various skills).

first-year law school courses."[5] A decade later, six other law schools adapted and expanded upon the UMC program.[6]

In the 21st century, ADR law professors have sought, and still seek, to integrate ADR across the entire law school curriculum, not just in the first year.[7] However, even today, not all law schools integrate ADR throughout their curriculum. Michael Moffitt recently completed a meta-study of ADR faculty and course offerings at United States law schools to discern trends and identify law school models for ADR in the modern legal academy.[8] He concluded that law schools treat ADR as one of four models: Islands (distinct area of specialization), Vitamins (stand-alone supplements to curriculum), Salt (sprinkled throughout curriculum) or Germs (pervasively incorporated into existing curriculum).[9] He also offered these models as frameworks for future curriculum planning at law schools.[10]

Current research and thoughts about teaching law students to become lawyers and how law students learn has led to a rich

5. *See* Leonard L. Riskin, *Disseminating the Missouri Plan to Integrate Dispute Resolution into Standard Law School Courses: A Report on a Collaboration with Six Law Schools*, 50 FLA. L. REV. 589, 590 (1998); *see also* Ronald M. Pipkin, *Teaching Dispute Resolution in the First Year of Law School: An Evaluation of the Program at the University of Missouri-Columbia*, 50 FLA. L. REV. 609, 626-30 (1998).

6. Riskin, *Disseminating the Missouri Plan to Integrate Dispute Resolution into Standard Law School Courses, supra* note 5, at 590; Pipkin, *supra* note 5, at 612.

7. *See* John Lande & Jean R. Sternlight, *The Potential Contribution of ADR to an Integrated Curriculum: Preparing Law Students for Real World Lawyering*, OHIO ST. J. ON DISP. RESOL. (forthcoming 2009) (describing the development of these efforts as well as suggestions on how to achieve the integration); *see also* Moritz College of Law, Ohio State Journal on Dispute Resolution, 2009 Symposium, The Future of ADR: Incorporating Dispute Resolution into Society, http://moritzlaw.osu.edu/jdr/symposium/2009/index.html (detailing a recent symposium on ADR issues and providing a webcast download of the morning and afternoon sessions); *see generally* Moritz College of Law, Ohio State Journal on Dispute Resolution, The Future of ADR: Incorporating Dispute Resolution into Society, http://moritzlaw.osu.edu/jdr/symposium/2009/brochure.pdf (last visited Dec. 15, 2009) (describing the symposium).

8. Michael Moffitt, *Islands, Vitamins, Salt, Germs: Four Visions of the Future of ADR in Law Schools (and a Data-Driven Snapshot of the Field Today)*, OHIO ST. J. ON DISP. RESOL. (forthcoming 2009), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1446989.

9. *Id.* at 2-3.

10. *Id.* at 28-45.

literature of ADR pedagogy, which consistently has stressed the importance of training students in the role of lawyers as problem-solvers.[11] ADR law professors contend, correctly we think, that the traditional "Langdellian"[12] curriculum does not sufficiently teach students to appreciate the broader context of how legal problems arise and play out day-to-day.[13] Students need a way to gain a more humanistic perspective regarding clients and their disputes.[14]

ADR law professors also identify specific skills that students need to understand, learn and implement in order to function in a world of diverse ADR mechanisms and forums.[15] For example, Chris Guthrie argues that professors should "embrace the emotive aspects" of law by expanding the conventional classroom dialogue to include discussions not only of the legally relevant facts of a case but also of the parties' feelings, interests, and desires.[16] Leonard Riskin urges the training of "mindfulness;"[17]

11. *See, e.g.,* Frank E. A. Sander, Stephen B. Goldberg & Nancy Rogers, *The Teaching of ADR in the 21st Century Law School*, 19 ALTERNATIVES TO THE HIGH COST OF LITIGATION 29 (2001); Carrie Menkel-Meadow, *Aha? Is Creativity Possible in Legal Problem Solving and Teachable in Legal Education?*, 6 HARV. NEGOT. L. REV. 97 (2001); Carrie Menkel-Meadow, *Taking Problem-Solving Pedagogy Seriously: A Response to the Attorney General*, 49 J. LEGAL EDUC. 14 (1999).

12. *See* Lande & Sternlight, *supra* note 7 (discussing the "Langdellian" curriculum).

13. *See, e.g.*, Julie Macfarlane, *What Does the Changing Culture of Legal Practice Mean for Legal Education?,* 20 WINDSOR Y.B. ACCESS JUST. 191 (2001); *see also* JULIE MACFARLANE, THE NEW LAWYER: HOW SETTLEMENT IS TRANSFORMING THE PRACTICE OF LAW (2007) (exploring how the increased role of ADR in the legal profession has altered the skills the practitioner needs to master the modern practice of law).

14. *See, e.g.*, Beth D. Cohen, *Helping Students Develop a More Humanistic Philosophy of Lawyering*, 12 J. LEG. WRITING INST. 141 (2006), *available at* http://www.law2.byu.edu/law_library/jlwi/archives/2006/coh.pdf.

15. *See, e.g.*, Lakshmi Balachandra et al., *Improvisation and Teaching Negotiation: Developing Three Essential Skills*, 21 NEGOT. J. 435 (2005); Chris Guthrie, *The Lawyer's Philosophical Map and the Disputant's Perceptual Map: Impediments to Facilitative Mediation and Lawyering*, 6 HARV. NEGOT. L. REV. 145 (2001); S. J. Schmitz, *What Should We Teach in ADR Courses? Concepts and Skills for Lawyers Representing Clients in Mediation*, 6 HARV. NEGOT. L. REV. 189 (2001).

16. Guthrie, *supra* note 15, at 186.

17. Leonard L. Riskin, *Mindfulness: Foundational Training for Dispute Resolution*, 54 J. LEGAL EDUC. 79 (2004).

Julie Macfarlane suggests that law schools teach their students cooperation and team-building skills.[18]

Dispute resolution teachers have also analyzed the pedagogical values and drawbacks of teaching ADR through a variety of methods, including, in clinics,[19] in conjunction with first-year Civil Procedure,[20] and via simulations, both live[21] and on-line.[22] Even in a more traditional classroom environment, professors can assign materials that supplement the factual recitations in appellate opinions with such items as case studies and readings detailing the background of the dispute.[23]

This scholarship, however, focuses on ADR generally, and seems to assume that students can learn about ADR processes and mediation and then apply the theory and skills to any subject matter or dispute, regardless of whether the dispute arose in a commercial, matrimonial, or real estate context. Similarly, a course on arbitration law or even international arbitration typically teaches the law and practice of arbitration in a domestic or international forum, without regard to whether the dispute at

18. Macfarlane, *What Does the Changing Culture of Legal Practice Mean for Legal Education?, supra* note 13, at 203.

19. *See, e.g.*, James Stark, *Preliminary Reflections on the Establishment of a Mediation Clinic*, 2 CLINICAL L. REV. 457 (1996); *see also* Barbara Black, *Establishing a Securities Arbitration Clinic: The Experience at Pace,* 50 J. LEGAL EDUC. 35 (2000).

20. Jean R. Sternlight, *Separate and Not Equal: Integrating Civil Procedure and ADR in Legal Academia*, 80 NOTRE DAME L. REV. 681 (2005).

21. Becky L. Jacobs, *Teaching and Learning Negotiation in a Simulated Environment*, 18 WIDENER L.J. 91 (2008); Harriet N. Katz, *Evaluating the Skills Curriculum: Challenges and Opportunities for Law Schools,* 59 MERCER L. REV. 909, 926-28 (2008) (discussing the pedagogical value of skills-focused simulation courses).

22. David Spencer & Samantha Hardy, *Deal or No Deal: Teaching On-Line Negotiation to Law Students*, 8 QUT J.L. & JUST. 93 (2008), *available at* http://www.law.qut.edu.au/ljj/editions/v8n1/pdf/6_Lawyers_and_family_dispute_resolution_HARDY.pdf; Alain Pekar Lempereur, Professor at Essec Business School, Presented at the 15th Annual Conference for the Int'l Ass'n for Conflict Mgmt (IACM): Updating Negotiation Teaching Through the Use of Multimedia Tools, *available at* http://ssrn.com/abstract=305201; Lucille M. Ponte, *The Case of the Unhappy Sports Fan: Embracing Student-Centered Learning and Promoting Upper-Level Cognitive Skills Through an Online Dispute Resolution Simulation*, 23 J. LEGAL STUD. EDUC. 169 (2006); Mark R. Poustie, *Engaging Students and Enhancing Skills: Lessons from the Development of a Web-supported International Environmental Law Conference Simulation*, 15 INTL. REV. L., COMPUTERS & TECH. 331 (2001).

23. Guthrie, *supra* note 15, at 186.

issue arose out of an international investment treaty, a maritime contract, an employment agreement, or a securities brokerage account. Is there room in the law school curriculum for conflict resolution courses singularly focused on a specific subject matter dispute? The Kheel Center hopes the answer to that question is—yes.

III. EDR AT PACE

Pace Law School, a leader in the field of environmental law education for decades, has focused recently on the resolution of environmental disputes, following the creation and launch of the Kheel Center. Even before the launch of the Kheel Center, Pace Law faculty had experience teaching and studying dispute resolution in the environmental context through projects undertaken by its Land Use Law Center[24] and Energy and Climate Center,[25] as well as via an advanced land use seminar.[26] Several faculty members also have substantive practice backgrounds involving hands-on EDR work.[27] In addition,

24. *See* Pace Law School, Mediation Tools, Land Use Law Ctr. Publications, http://www.pace.edu/page.cfm?doc_id=23936 (last visited Dec. 29, 2009) (listing publications created by the Land Use Law Center devoted to land use mediation).

25. *See* Pace Law School, Programs, http://www.pace.edu/page.cfm?doc_id=24401 (last visited Dec. 29, 2009) (listing projects conducted by the Pace Energy and Climate Center related to stakeholder involvement and energy mediation).

26. This Seminar focuses on specific topics related to the intersection of the land, water, development, and communities. In the past, students in the advanced seminar have studied how EDR can be used to resolve land use disputes.

27. Jeffrey Miller, Vice Dean of Academic Affairs and former Director of Environmental Law Programs at Pace Law School, has represented clients in negotiation, arbitration and mediation, taught negotiation and served as an arbitrator. Professors Ann Powers and Karl Coplan have participated in negotiated rulemakings and mediation of environmental disputes, respectively. Professor John Nolon has extensive experience in non-litigation approaches to resolving land use conflicts. Dean Alexandra Dapolito Dunn previously collaborated with Lawrence E. Susskind of the MIT-Harvard Public Disputes Program to develop a one-day workshop in 2001 for municipal wastewater attorneys and officials on EDR using Susskind's text *Negotiating Environmental Agreements*. *See* LAWRENCE SUSSKIND, PAUL F. LEVY, & JENNIFER THOMAS-LARNER, NEGOTIATING ENVIRONMENTAL AGREEMENTS: HOW TO AVOID ESCALATING CONFRONTATION, NEEDLESS COSTS, AND UNNECESSARY LITIGATION (2000). Dunn also negotiated a landmark agreement on the highly controversial issue of peak wet weather overflows from separate sanitary sewer systems between the

courses such as the United Nations Environmental Diplomacy Practicum and Environmental Justice Seminar expose students to important dispute resolution concepts such as stakeholder identification and involvement, community outreach, cultural sensitivities and differences, and consensus building.

With Pace's commitment to the Kheel Center, however, came a commitment to training students more deeply in these EDR theories and techniques than in the past through seminar and practicum settings. As environmental conflicts grow in size and complexity, a well-rounded environmental law curriculum should not only train students in litigation models—done quite well through existing courses in civil procedure, Environmental Skills and Practice, an Environmental Litigation and Toxic Torts Seminar, and our Environmental Litigation Clinic—but also offer students the opportunity to undertake a more concentrated study of alternative EDR methods by recognizing that many disputes arising from climate change and natural resource scarcity will not be resolved by litigation.

The Kheel Center and its focus has been popular with Pace students since its inception, particularly those who have expressed an interest in preparing themselves to pursue public policy, counseling, and/or non-traditional legal careers, as opposed to a more traditional litigation practice. EDR is essentially a natural evolution of Pace Law's environmental law school curriculum, which is a skills-based, practical curriculum. Exposing students to EDR techniques will allow them to be fully prepared problem-solvers, bringing not only litigation knowledge to the table for their clients but also the ability to offer innovative, creative, and alternative solutions.

Notably, a model for bringing EDR to the curriculum was not readily at our disposal. Not many law schools teach EDR, and, where they do, it is generally a new course or one that is offered

National Association of Clean Water Agencies and the Natural Resources Defense Council, which was presented to and adapted by the U.S. Environmental Protection Agency and proposed in the Federal Register. *See* National Pollutant Discharge Elimination System Permit Requirements for Peak Wet Weather Discharges From Publicly Owned Treatment Works Treatment Plants Serving Separate Sanitary Sewer Collection Systems, 70 Fed. Reg. 76,013 (Dec. 22, 2005).

irregularly.[28] Our commitment to Mr. Kheel was to quickly integrate EDR courses into our curriculum, and thus we proceeded with a pilot program which made sense based on our robust experiences in the EDR field to date. We knew that we wanted our students to be exposed to and to understand different forms of dispute resolution and conflict management, processes, and theories. We also wanted to emphasize the unique role played by lawyers in creating new forums of discovery, learning, and settlement. Drawing on our faculty experience, we reflected on the types of skills we wanted to include in this new curriculum offering. That reflection yielded the following inventory of skills:

- Situation pre-assessment;
- Fact gathering, joint fact-finding, and fact management;
- Situation analysis;
- Scheduling, deadlines, and sequencing issues;
- Issue identification and framing;

28. A handful of law schools currently offer courses dedicated to EDR (as distinguished from courses in which EDR is merely touched upon as one of a variety of subjects). *See* E-mail from Dean Clark Williams to Alexandra Dapolito Dunn (July 9, 2009) (on file with authors) (stating that the University of Richmond School of Law has offered the course infrequently and is not currently offering it); Lewis & Clark Law School, Environmental & Natural Resources Law Curriculum, http://law.lclark.edu/programs/environmental_and_natural_resources_law/jd_curriculum/ (last visited Dec. 15, 2009) (listing a seminar that is typically offered every other year, entitled "Environmental Negotiation and Mediation Seminar"); *see also* Vermont Law School, Dispute Resolution Program Courses, http://www.vermontlaw.edu/Academics/Dispute_Resolution_Program/Courses.htm (last visited Dec. 15, 2009) (offering several EDR courses); Gonzaga University School of Law, Course Descriptions and Frequency, http://www.law.gonzaga.edu/Academic-Program/curriculum/Course-Descriptions/default.asp #E-F (last visited Dec. 15, 2009) (listing one course in EDR); American University Washington College of Law, Environmental Law, Courses—International Environmental Law, http://www.wcl.american.edu/environment/intlaw.cfm (last visited Dec. 15, 2009) (listing a course in International EDR); Pepperdine University School of Law, Academics, Master of Laws in Dispute Resolution (L.L.M.), http://law.pepperdine.edu/academics/master-laws-dispute-resolution (last visited Dec. 15, 2009) (offering a course in its Master of Dispute Resolution Program on Environmental and Public Policy Dispute Resolution); University of Florida Levin College of Law, Environmental & Land Use Law, Curriculum, http://www.law.ufl.edu/elulp/curriculum/courses.shtml (last visited Dec. 15, 2009) (offering an EDR course); *see also* University of Georgia Law School, Student Handbook, *available at* http://www.law.uga.edu/facstaffstu/students/handbook/course.html (offering an EDR-oriented course).

- Client counseling and representation;
- Utilizing business models and diagnosing business interests;
- Dispelling misconceptions and negative biases about ADR;
- Addressing costs and benefits of different decisions and actions;
- Deliberating in the face of complexity and scientific uncertainty;
- Identifying decision points and gaining incremental consensus;
- Stakeholder identification and coalition building;
- Creating fair processes and level playing fields;
- Addressing informational asymmetry; and
- Agreement drafting, managing agreements, and the post agreement processes.[29]

We also identified the importance of cultivating personal skills such as empathy, listening, tact, judgment, the psychology of problem solving, and the value of building trust.

With these core skills in mind, we embarked on a pilot to bring EDR into the classroom via two, two-credit, upper level J.D. seminars. Masters of Law in Environmental Law candidates were able to enroll in the courses as well. The first course, EDR Theory, a larger seminar accepting up to thirty students, would be designed to introduce as many students as desired to the menu of EDR options via a survey approach. Pace's Environmental Law Skills and Practice course, a mandatory and foundational environmental law course that teaches basic environmental concepts such as rulemaking, permitting, enforcement, and citizen suits using the Clean Water Act as the illustrative statute, is a prerequisite. We authored the brief course description for the EDR Theory class as follows:

29. *See* Pace Law School, Academics & Training, http://www.pace.edu/page.cfm?doc_id=33835 (last visited Dec. 29, 2009) (providing a description of the Kheel Center's academic and training goals).

> The course is designed to explore the common characteristics of environmental disputes and the range of resolution options from rights-based approaches, such as litigation and appellate advocacy, to interest-based approaches such as consensus building, mediation and facilitation. In addition, the course will examine the roles that lawyers can play in these varied approaches. A major theme of this course will be to compare the advantages and disadvantages of adversarial and collaborative approaches in environmental conflicts.[30]

We conceived the EDR Theory course as a prerequisite for J.D. candidates to the second two-credit upper level EDR seminar—EDR Skills. We envisioned that some students would find the Theory course to be sufficient exposure, while those students with a keen interest in the subject matter would enroll in the EDR Skills class to further hone and practice their knowledge. EDR Skills would be limited to sixteen students, and would focus on in-class simulations and exercises. We described the course as follows:

> Through mock negotiations, mediations, facilitations, and consensus-building exercises, this course will emphasize the skills used by neutral third parties and legal counsel for the parties to resolve disputes. This course will emphasize the role of legal advisors for each party in a problem-solving climate created by a third party neutral. A major focus of this course is transmission of the skills used by lawyers to transform adversarial interactions into collaborative interactions. It will include consideration of a number of factors in addition to the law that must be considered in resolving environmental interest disputes.[31]

30. *See* Pace Law School, Pace Law School Receives $1 Million Grant to Create Kheel Center on Resolution of Environmental Interest Disputes, http://www.pace.edu/page.cfm?doc_id=30505 (last visited Dec. 29, 2009) (describing the Environmental Dispute Resolution (Theory) course at Pace Law School).

31. *See id.* (describing the Environmental Dispute Resolution (Skills) course at Pace Law School).

IV. PACE'S EXPERIENCE

The Law School is at the midpoint of its EDR curriculum pilot, having enrolled twenty-seven students in EDR Theory in the spring of 2009. Thus, this section of the Article discusses the content and experience with EDR Theory, and what we anticipate occurring in the EDR Skills Seminar, which is fully enrolled for the fall 2009 semester.

A. EDR Theory

EDR Theory involved significant reading which introduced students to various EDR techniques. The thirteen-week course opened with readings on the Challenges of Environmental Dispute Resolution, which highlighted the evaluation of the relatively new field of "environmental conflict resolution" or ECR.[32] The authors of this reading noted that environmental conflicts are characterized by certain key elements, including that they: (1) involve the environment, natural resources, public lands, or all three; (2) involve multiple parties engaged in a decision-making process who disagree about the endpoint or impacts of choices or outcomes; and (3) generally are public disputes.[33] This reading takes pains to distinguish ECR from EDR, noting that "ECR consists of a set of techniques, processes, and roles that enable parties in a dispute to reach agreement, usually with the help of one or more third-party neutrals,"[34] while EDR "refers collectively to a variety of approaches that allow the parties to meet face to face to reach a mutually acceptable resolution of the issues in a dispute or potentially controversial situation."[35]

The second class covered consensus-building in depth. Drawing on readings by renowned EDR professional Gail Bingham, the discussion reflected on the definition of consensus-building as "voluntary processes in which the participants seek a

32. Kirk Emerson et al., *The Challenges of Environmental Conflict Resolution*, *in* THE PROMISE AND PERFORMANCE OF ENVIRONMENTAL CONFLICT RESOLUTION 3 (Rosemary O'Leary & Lisa B. Bingham eds., 2003).

33. *Id.* at 4.

34. *Id.* at 6.

35. MEDIATING ENVIRONMENTAL CONFLICTS, THEORY AND PRACTICE 248 (J. Walton Blackburn & Willa Marie Bruce eds., 1995) (citing Gail Bingham).

mutually acceptable resolution of their differences."[36] The class reviewed elements of effective consensus processes and some of the ways natural resource disputes can be more challenging, such as the technical and scientific uncertainties, changing incentives, multiple parties, the public and political angle, and institutional limitations.[37]

The third class covered mediation and drew on the writing of Diane R. Smith, an accomplished environmental mediator, and her assessment that "rational behavior is particularly essential in environmental disputes because of the pervasive presence of that all-powerful party or power—the government."[38] The class studied the work of J. Clarence Davies to shed light on the concepts of environmental ADR and the role of the public in such deliberations.[39] In particular, key goals of involving the public in environmental discussions were illuminated, such as: "1) educating the public; 2) increasing the substantive quality of decisions; 3) incorporating public values into decision-making; 4) reducing conflict among competing interests; and 5) rebuilding trust in government agencies."[40] This portion of the class also reflected on working with the media, convening a consensus-building process, assigning roles and responsibilities, group problem solving, reaching agreement, ensuring commitments are met, and ground rules and suggestions, all drawn from the excellent work of the Harvard Program on Negotiation's Larry Susskind.[41]

Recognizing that litigation and remediation brought under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)[42] is one of the areas where ECR and EDR

36. Gail Bingham, *What is Consensus-Building and Why is it Important for Resource Management*, RESOLVE (2008), http://www.resolv.org/publications/reports/consensusbuilding.htm.

37. *Id.*

38. Diane R. Smith, *"Rough Justice," "Fairness," and the Process of Environmental Mediation*, 34 VAL. U. L. REV. 367 (2000).

39. *See* J. Clarence Davies, *Environmental ADR and Public Participation*, 34 VAL. U. L. REV. 389 (2000).

40. *Id.* at 391 (citing Thomas C. Beierle, *Using Social Goals to Evaluate Public Participation in Environmental Decisionmaking*, 16 POL'Y STUD. REV. 3, 3-4 (1999)).

41. LAWRENCE E. SUSSKIND & JEFFREY L. CRUIKSHANK, BREAKING ROBERT'S RULES 169-202 (2006).

42. 42 U.S.C. §§ 9601-9675 (2006).

techniques can improve the likelihood of successful outcomes, the course then looked at several Superfund cases.[43] The reflections of attorney Jamie Adams were then considered. Adams notes that EDR is more efficient than traditional litigation within most CERCLA actions; he also cites to various case studies that were particularly illustrative of this.[44] Given that many CERCLA cleanups involve contested science, the class also reflected on work by Gail Bingham, noting that decisions are more difficult to make in the context of "competing interests and passionately held values, but also scientific and technical uncertainties about what will and will not work" are involved.[45]

The course then delved into collaborative environmental lawmaking, its limitations and promise.[46] Professor Eric Orts makes a passionate case for collaborative environmental law, and while recognizing that it is not the ultimate solution in every case, it does "encourage innovation and creativity" while more actively engaging all parties to "committing to new regulatory schemes."[47] It also allows value balancing, and can "help to elude the well-known 'ossification' of traditional administrative regulation and hamstrung, slow-moving legislatures."[48] In a rebuttal, Professor Cary Coglianese notes that collaborative environmental law "is not at all feasible for making real-world decisions about major environmental problems" and "it is simply not possible for everyone affected by major environmental problems to sit down and talk things over."[49]

43. The Superfund, established by CERCLA, is "the federal government's program to clean up the nation's uncontrolled hazardous waste sites." *See* United States Environmental Protection Agency, Superfund, Cleaning up the Nation's Hazardous Wastes Sites, http://www.epa.gov/superfund (last visited Dec. 15, 2009).

44. *See* Jamie R. Adams, *Using ADR Principles to Resolve Environmental Disputes: How Mediated Settlements Have Helped Struggling CERCLA Survive*, 8 PEPP. DISP. RESOL. L.J. 331, 339-40 (2008).

45. GAIL BINGHAM, RESOLVE, WHEN THE SPARKS FLY: BUILDING CONSENSUS WHEN THE SCIENCE IS CONTESTED 3 (2003), http://www.resolv.org/publications/reports/When_the_Sparks_Fly.pdf.

46. *See* Eric W. Orts & Cary Coglianese, *Collaborative Environmental Law: Pro and Con,* 156 U. PA. L. REV. 289 (2007).

47. *Id.* at 293.

48. *Id.* at 294.

49. *Id.* at 296.

The course next studied how land use law conflicts can be addressed using ECR and EDR techniques before state and local agencies. Reviewing articles highlighting how different states approach EDR,[50] identifying those states with formal programs, and analyzing the choices those states offer (*e.g.*, agency mediator or private neutral) were helpful in demonstrating to the students that the geographic location of a dispute may determine the relevant rules and approaches.[51] The class also studied community-benefit agreements (CBAs). A CBA is "essentially an agreement between the developer and the community negotiated early enough in the development process to bring meaningful improvements to the project and win community support."[52] Brownfields[53] were also a topic of discussion in this portion of the course. Later course discussions delved into the role of EDR in current environmental challenges and matters, such as water rights and natural resource allocation cases, energy, toxic torts, climate change, and international environmental disputes.

The course concluded with a focus on ethics[54] and the changing role of lawyers in the face of the "vanishing trial" phenomenon.[55] In exploring ethics, Professor Brown notes that "the central ethical problem in Environmental ADR is the

50. *See, e.g.*, N.Y. STATE DEP'T OF ENVTL. CONSERVATION, MANUAL: THE USE OF ALTERNATIVE DISPUTE RESOLUTION IN DEC (Sept. 25, 1997).

51. Mitchell E. Burack, Burack Envtl. Law Offices, Address at the American Bar Association Section of Environment, Energy and Resources 11th Section Fall Meeting: Issues and Challenges in Utilizing ADR with State and Local Agencies (Oct. 8-12, 2003), *available at* http://www.abanet.org/environ/committees/adr/issueschallengesburack.pdf.

52. LAURIE KAYE & JERILYN LOPEZ MENDOZA, ENVTL. DEFENSE FUND, EVERYBODY WINS: LESSONS FROM NEGOTIATING COMMUNITY BENEFITS AGREEMENTS IN LOS ANGELES iv (2008), *available at* http://www.edf.org/documents/7675_CBA_Everybody_Wins.pdf.

53. Brownfields are generally underutilized or abandoned and contaminated industrial sites, which can be remediated and put back into service under a variety of state and federal incentives and liability-limiting programs. A legal definition of "brownfield site" was included in amendments to CERCLA. *See* 42 U.S.C. § 9601(39) (2006). The redevelopment of brownfields can be an area fraught with conflict, as communities may find disturbance of a site of concern and may react in diverse ways to redevelopment plans. Accordingly, brownfields can be excellent EDR case studies.

54. Jennifer Gerarda Brown, *Ethics in Environmental ADR: An Overview of Issues and Some Overarching Questions,* 34 VAL. U. L. REV. 403 (2000).

55. Julie Macfarlane, *The Evolution of the New Lawyer: How Lawyers are Reshaping the Practice of Law,* 2008 J. DISP. RESOL. 61.

problem of representativeness"[56] and the public interest "gives rise to ethical issues that are tempting to ignore, but will actually require serious engagement if the quality of Environmental ADR is to remain high."[57] Brown suggests that confidentiality in EDR proceedings can be difficult to manage, as it may be unclear to whom lawyers owe a duty of loyalty, challenges in identifying the relevant community can cause problems preempting subsequent enforcement, and the representation of absent parties complicates the landscape.[58] Professor Macfarlane reflects on the "new" lawyer as one who "will conceive of her advocacy role more deeply and broadly than simply fighting on her clients' behalf. This role comprehends both a different relationship with the client—closer to a working relationship—and a different orientation towards conflict."[59]

The class also undertook an ungraded negotiation simulation involving the siting of an offshore wind farm using stakeholder packets purchased from the Harvard Program on Negotiation.[60] The exercise specifically explored key EDR concepts such as joint fact-finding, disputed scientific information, and technical uncertainty. The students were asked to write a short (one to three page) paper following the exercise discussing what they learned about the collaborative process, how consensus was achieved, and, if appropriate, what kept consensus elusive. Finally, two practitioners spoke to the class during the semester to provide additional "real world" perspectives on their use of EDR techniques in the field.

The class approached the students themselves as stakeholders involved in an active discussion. To engage them in the learning process, the professor selected a number of diverse case studies for the students to research and present to the class. Preliminary information about each case study was given to the students to facilitate their research. Intended to be twenty-minute presentations, the case studies often lasted longer as the

56. Brown, *supra* note 54, at 404.

57. *Id.* at 405.

58. *Id.* at 408-10, 416, 421.

59. MacFarlane, *The Evolution of the New Lawyer, supra* note 55, at 65.

60. Program on Negotiation at Harvard Law School, Clearinghouse, A Resource Center for Negotiation Education, Role Simulations, Offshore Wind Farm Negotiation, http://www.pon.org/catalog/product_info.php?cPath=27&products_id=376 (last visited Dec. 15, 2009).

students delved into the materials. The case studies ranged in scope from large conflicts involving multiple parties, to two-party conflicts. Geographic diversity was also a key part of the case study selection. Some of the case studies that students presented included: the reintroduction of wolves in Yellowstone National Park;[61] the successful and epic battle on New York's Hudson River to preserve Storm King mountain from destruction;[62] the Brown Paper Mill, a two-party dispute involving negotiating with a governmental entity;[63] a conflict over the development of White Flint Mall in Montgomery County, MD, an example of joint problem-solving;[64] and several water allocation, water use, and water management disputes such as the Umatilla Basin and the Snoqualmie Dam in the Pacific Northwest, the New York City watershed and water distribution system, and the Allagash Wilderness Waterway in Maine. Other case studies included the City of Eugene, Oregon where the traffic planning on the west side has stalemated for the last twenty years, and several Superfund disputes such as at Homestake Mining, a gold mining site in South Dakota and Fields Brook, involving PCB contamination outside Cleveland. Other students were assigned to more deeply explore key concepts, such as negotiated rulemaking, community benefit agreements, and state and federal EDR programs. The students were asked to keep key questions in mind as they presented the case studies, such as:

- What was the nature of the dispute?
- What was the history of the dispute?

61. *See* Susan Todd, *Building Consensus on Divisive Issues: A Case Study of the Yukon Wolf Management Team*, 22 ENVTL. IMPACT ASSESSMENT REV. 6, 655-84 (2002).

62. The Storm King battle, also referred to as Scenic Hudson, is widely recognized as helping to significantly advance the field of U.S. environmental law and is one of the earliest cases solidifying the legal concept of citizen standing on behalf of natural resources. *See* Hudson River Fisherman's Ass'n v. Fed. Power Comm'n, 498 F.2d 827 (2d Cir. 1974); *see also* Natural Resource Defense Council, E-law: What Started It All?, http://www.nrdc.org/legislation/helaw.asp (last visited Dec. 15, 2009); Marist College, Marist Environmental History Project, The Scenic Hudson Decision, http://library.marist.edu/archives/mehp/scenicdecision.html (last visited Dec. 15, 2009).

63. LAWRENCE S. BACOW & MICHAEL WHEELER, ENVIRONMENTAL DISPUTE RESOLUTION 56-74 (1984). (discussing the dispute in detail).

64. *Id.* at 74-75.

- What EDR process was used?
- What was the background of the neutral?
- Who were the stakeholders involved?
- What was the length of the process?
- What were the lessons learned?

Our review of several of the student presentations to prepare this Article illustrated that the students delved into the details of each case study's unique factors and drivers to better understand EDR in practice. For example, students presenting on the Umatilla Basin conflict on water allocation between agriculture, fish, and tribes explored how conflict between federal and state law contributed to the disagreement. The students also took note of how ground rules for the mediation (such as "cooperate with each other as a means to avoid litigation," "listen to understand," and "treat others with respect") contributed to more productive discussions. They also reflected on the troublesome impact on the ultimate agreement of deferring contentious issues to the end, and positive outcomes of the mediation, such as new relationships established for the future.

In a presentation on the West Eugene Collaborative, the students explored the role of brainstorming sessions, using small groups to bring ideas to consensus, the importance of a purpose statement and shared vision in promoting consensus, and the value of volunteer-based participants leading discussions in lieu of a community passively awaiting recommendations from appointed policy-makers. The students also noted the value of short, medium, and long-term outcomes for the project.

The Allagash Wilderness Waterway presentation studied the role a neutral facilitator played to resolve conflicts between human uses and conservation goals in the area of one of the most endangered rivers in the United States. In this case, the facilitator identified several factors as key to reaching a successful agreement, including: the use of preparatory assessment interviews to identify and build on common interests among parties before negotiations started; ensuring all stakeholders were represented at the table; timing, in that the situation was ready for resolution after a generation of conflict; strong agency leadership; a focus on the future; and the decision

to endorse a unified statement for closure, public relations, and to prevent a single stakeholder from claiming victory.

The final examination employed a series of short answer questions about different EDR techniques, elements, and when they are used as well as two hypothetical questions that required the students to reflect on the in-class presentations to answer them.

Student feedback on the course was diverse. The students agreed that the course exposed them to a wide variety of concepts and techniques and believed the readings would serve as an excellent resource going forward. The students did not find the peer presentations to be helpful but very much liked the simulated negotiations and the interactive exercises. Some students felt it was hard to classify the case studies within the larger body of EDR. This is because many EDR concepts overlap and intertwine—it is far from a pure form of law or technique allowing students to place examples into clearly defined boxes. Nonetheless, to the extent that we use case studies in future course offerings, we may seek to more clearly "label" the case studies so students can more effectively draw out lessons from them.

B. Lessons for EDR Skills

The Law School is now planning for EDR Skills based on what we learned from EDR Theory. EDR Skills is fully enrolled with fifteen students. The course will begin with an overview and refresher on the scope and nature of environmental conflicts. Following this, basic theories of the dispute resolution continuum will be reviewed. In particular, negotiation styles and strategies will be emphasized, based on the assessment that law students do not get focused training in this area in other courses. Throughout the semester, distinctions between bargaining-based negotiations and interest-based negotiations will receive attention. The course instructor plans to delve deeply into the distinct elements of negotiation, facilitation, and mediation, with specific exercises selected to develop skills in all areas. Students will be asked to view cases from a variety of different perspectives during the course to elucidate the varying skills used by neutrals and advocates. Arbitration, which is used less frequently in EDR, will be addressed, as will collaborative law. Careful attention will be

paid to techniques for case assessment and evaluation, as well as the role of strategy and game theory. The smaller class size will allow for more simulations and exercises, which is clearly something desired by the students.

V. CONCLUSION: THE FUTURE OF EDR CURRICULUM AT PACE

Based upon what we have learned to date, Pace Law School has decided to take a number of key steps to refine the EDR curriculum. We plan to combine EDR Theory and EDR Skills into a three-credit course, which will combine the two approaches. While the concept of a large seminar to appeal to a greater number of students, followed by a more intense small seminar for those truly interested in the subject matter, made sense when planned, in execution it has proven difficult. In particular, the professors found it difficult to segregate teaching materials and concepts to execute our vision for two distinct seminars. We also learned from student feedback that they were frustrated with a semester focused on EDR Theory with only modest tastes of hands-on skills training. Almost universally, the student reviews acknowledged the Theory format of the course, but strongly urged that we integrate Theory and Skills, and expressed a desire that we spend more classroom time on simulations and exercises. Dispute Resolution, whether environmental or subject matter neutral, appears to be a law school course that cannot easily be divorced from experiential learning.

We have learned, however, that dispute resolution can be taught through a specific subject matter lens. Environmental law, as one of those lenses, provides countless examples of dispute resolution techniques in action in very specific settings. The course was well-supported by a variety of readings concentrated exclusively on the evolution of EDR and its unique features in diverse settings. In fact, the professors could have added more readings due to the rich amount of writing and research in this field. Given the globalization of environmental law, while the Pace course focused on domestic environmental conflicts, we could have expanded it to include case studies and readings on international environmental conflicts and how EDR techniques are being used and applied in these settings.

We also hope to capitalize on our students' EDR training in the national law school community. We plan to enter a competitive team drawn from the EDR courses in the University of Richmond School of Law's Robert R. Merhige, Jr. National Environmental Negotiation Competition, fulfilling one of Pace's goals—to combine classroom teaching with extra-curricular, skills-reinforcing experiences.

Finally, we are exploring the possibility of publishing a law school textbook on EDR. Since the EDR Theory students expressed frustration with the lack of a coherent text, clearly there is a need for one. Such a text—which would cover both EDR Theory and Skills—could include exercises, role plays, excerpted readings from ADR scholarship, critical case law emerging from EDR processes and case studies of EDR in practice. Other law schools could develop and implement an EDR course much more readily if the textbook already exists, furthering the mission of Ted Kheel to foster the growth of EDR in the legal academy.

Pace Law School is uniquely positioned to recognize that resolution of the critically important environmental conflicts of today and the immediate future, such as climate change, water allocation, and energy conservation, that require reconciling complex issues, collaboration of diverse stakeholders, participation of government agencies and multi-national cooperation can only occur if the next generation of lawyers has the legal skills necessary to approach and tackle problem-solving. At the end of a year of offering both EDR Theory and Skills, Pace Law School will graduate a new cadre of environmental lawyers equipped with more of the skills necessary to represent clients' interests in modern environmental disputes, whether bilateral or multi-party, whether domestic or international. By augmenting the law school curriculum with EDR courses, Pace's Kheel Center can achieve its mission of training law students to resolve environmental interest disputes.