



CSU
College of Law Library

Cleveland State Law Review

Volume 47 | Issue 1

Article

1999

Fundamental Misconceptions about Mediation Advocacy

Richard M. Markus

Retired judge of the Ohio Common Pleas Court and the Ohio Court of Appeals

Follow this and additional works at: <https://engagedscholarship.csuohio.edu/clevstlrev>



Part of the [Dispute Resolution and Arbitration Commons](#)

[How does access to this work benefit you? Let us know!](#)

Recommended Citation

Richard M. Markus, *Fundamental Misconceptions about Mediation Advocacy*, 47 Clev. St. L. Rev. 1 (1999) available at <https://engagedscholarship.csuohio.edu/clevstlrev/vol47/iss1/3>

This Article is brought to you for free and open access by the Journals at EngagedScholarship@CSU. It has been accepted for inclusion in Cleveland State Law Review by an authorized editor of EngagedScholarship@CSU. For more information, please contact library.es@csuohio.edu.

FUNDAMENTAL MISCONCEPTIONS ABOUT MEDIATION ADVOCACY

RICHARD M. MARKUS¹

I think it was the fall of 1958. The law school I attended in the early 50's began to teach a trial advocacy course, called "Trial Practice." There weren't many schools offering this course then. The school was surprised to find a large number of students who wanted to take the class but only one faculty member who could teach it. I did something I have never done before or since. I wrote the dean, saying that I thought they should meet the student demand for the new course with additional faculty and if necessary bring adjunct faculty from the surrounding area in until the school could acquire appropriate full time faculty.

I told him I would like to have taken that course if it had been available when I was a student, and I thought it was a valuable course. The dean responded by saying, "Frankly I don't think the course is worth giving at all, but since there is some demand the school would satisfy it by admitting students who ranked highest on a special pre-class examination." He added, "After all you are a successful trial lawyer, and you didn't take the course, so obviously it's not necessary."

At that time, in the 60's and before, there were three conventional methods by which a law school graduate learned to be a trial lawyer. One was the unsupervised "sink or swim" protocol. The client retained a young lawyer, who would appear in court and make an enormous number of mistakes. The client could suffer, but the lawyer might learn. The second learning technique was the "second chair" method. The young lawyer sat behind a senior lawyer who often made many technical and strategic mistakes. The young lawyer learned how to perpetuate those errors, learned all the bad habits available. The third learning procedure relied on seminars where senior lawyers recounted "war stories" about their cases and experiences.

Collectively, the conventional wisdom created the familiar adage: "In my youth, I lost many cases I should have won. When I was older I won many cases I should have lost. All in all and on the average, justice was done."

At that time academia and the profession denied that trial advocacy can or should be a teachable discipline. Some still have that view. Some still feel that skills are not teachable. Some deny that skills are dignified scholarship. Indeed, many legal academicians still say that law schools should teach people to think like lawyers, not to satisfy a lawyer's responsibilities. "It's not a trade school" is their standard response. In effect, in their view law schools should teach students to be appellate

¹Judge Richard M. Markus presented the substance of these remarks as the first lecture in the "Visiting Scholars Program" for 1999-2000 at the Cleveland-Marshall College of Law. Judge Markus is a retired judge of the Ohio Common Pleas Court and the Ohio Court of Appeals, who has been recalled to service for "senior status" assignments. In addition to his service for more than twenty years as an Adjunct Professor at Cleveland-Marshall and as a current Visiting Professor there, he has served on the faculties of Harvard Law School, Case Western Reserve Law School, M.I.T., the National Judicial College, the Ohio Judicial College, and the Institute for Judicial Administration at New York University. He is the sole founding trustee of the National Institute for Trial Advocacy who remains on its Board from its inception.

court judges not trial court lawyers. They still disregard the McCrate Commission Report and its local counterpart from the Ohio State Commission on the Education of Lawyers, which insist that law schools must train students to solve practical client problems.

If medical schools followed that model, they would train students to conduct scientific research rather than treat patients. Indeed, when I proposed today's topic, one of my colleagues said, "Isn't this really a CLE lecture." I hope that these comments suggest something more than lawyer techniques.

Following an historically strong disfavor for teaching trial advocacy, several academically oriented entities planned and established organized programs to teach those skills. I was proud to participate in creating one of the leaders, the National Institute for Trial Advocacy, which designed simulated clinical exercises where students performed mini-exercises for each separately definable trial process. Videotapes recorded the student's performance, so the student's own observations could supplement a trained instructor's affirmative critique. Other programs adopted that approach. Indeed, NITA's format is now the most popular method of teaching trial advocacy in law schools and CLE programs in the United States and elsewhere.

An explosion of trial advocacy or trial practice courses followed. In the early 60's, very few law schools offered those courses, and very few academicians identified themselves as trial advocacy faculty. Now if you look at the American Association of Law Schools Directory, you will find approximately 800 academicians who list themselves as trial and appellate advocacy faculty. They teach students to be effective advocates not trial or appellate court judges.

Contemporaneously, law schools supplemented simulated clinical training with supervised, clinical, courtroom experience. Courts and other governing bodies changed professional conduct rules to accommodate that development, so law students could have direct courtroom training.

Now I suggest that we face the need for similar developments in a new advocacy field. Within the last decade, mediation has blossomed enormously as a dispute resolution tool for litigation matters. Certainly mediation is not a new activity. From before recorded history, most cultures have used it to address conflict. In our society, it has been a common practice in negotiating and resolving collective bargaining disputes; business mergers, acquisitions, and dissolutions; and community development. Laws sometimes mandate its use for disputes with critical government employees such as police, firefighters, and school teachers; or disputes which unreasonably threaten the society at large.

On a broader scale, humankind has linked mediation to the resolution of its most debilitating disputes, which otherwise produce war, political chaos, or economic instability. The "Sermon on the Mount" taught us: "Blessed are the peacemakers for they shall be called the children of God." We remember Henry Clay as "the Great Compromisor," not the senator who lost three presidential elections. In his first inaugural address, President Richard Nixon said: "The greatest honor history can bestow is the title of peacemaker. This honor now beckons America . . . this is our summons to greatness." More recently, our nation's government has tried to mediate devastating political disputes in the Middle East, the Balkans, Ireland, and other international hotspots. Most Nobel Peace Prize Laureates have been mediators.

In the last decade mediation has received increased attention as a means to resolve litigation. There is a great difference between mediation to resolve litigation and mediation to resolve other kinds of disputes. Other disputes typically have no

tribunal that will ultimately give an enforceable, dispositive answer. No tribunal can control or decide the disputes in the Middle East, the Balkans or Ireland, so mediation is the only external tool available to facilitate some mutually acceptable response. Exclusively consensual answers seek to avoid or mitigate unacceptable indecision - where the alternative may be war, political chaos, or other major losses with no predictable resolution. By contrast, litigation presumes a method which will ultimately resolve the dispute with some degree of finality.

The development and acceptance of mediation to resolve litigation disputes has been a relatively new phenomenon, particularly prominent in the last decade. Here the parties anticipate that a tribunal will decide the dispute in a foreseeable time, to the satisfaction or dissatisfaction of one or both. One phrase typically produces more litigation settlements than any argument or explanation: "Call the jury." Somebody is going to answer the question now. When someone else is about to resolve their dispute, the parties are anxious to participate in finding the answer themselves. Mediation can and has increasingly become a means to facilitate that process.

An explosion in mediation for litigation issues encouraged the creation of numerous profit and non-profit ventures. I'm sure you're familiar with some of them: The Center for Public Resources (or CPR), Judicial Arbitration and Mediation Services (or JAMS), the American Arbitration Association Center for Mediation, Resolute, and a dozen or more other national organizations. In at least three states, statutes and/or court rules mandate mediation for many civil litigation matters: California, Texas and Florida. Increasingly, commercial contracts require the parties to employ mediation as well as or instead of arbitration to resolve their disputes.

Indeed, all forms of alternative dispute resolution have literally "caught on" in this last decade. Eight years ago when I served as president of the state bar association, we circulated a proposal among Ohio's major business and industrial enterprises, asking them to consider alternative dispute resolution before beginning any litigation. One hundred forty-eight major Ohio companies signed the pledge.

In this decade Ohio's General Assembly enacted twenty-nine new statutory provisions for mediation. At least twenty-four Ohio Common Pleas Courts have local rules prescribing mediation. You may be familiar with Cuyahoga County Common Pleas Court Local Rule 21.2(E), its Domestic Relations Local Rules 17 and 32, the Eighth District Court of Appeals Local Rule 22, the United States District Court for the Northern District of Ohio Local Rule 16.6, and the United States Court of Appeals for the Sixth Circuit Local Rule 18, all of which result from the enormously greater attention this mechanism receives in every litigation forum.

By common law or formal rule, we have long preserved and enforced confidentiality for settlement negotiations. In 1997, Ohio's legislature established special statutory protections for confidentiality in mediation activities, which again reflect the increased interest in this procedure. My own involvements, as counsel or judge in pretrial settlement conferences for more than thirty-five years and as a commercial mediator for more than ten years, have caused me to ask myself whether we're doing it right. I'm going to suggest here today that we're doing many things wrong, that we're making many dubious assumptions that we probably should not make.

Let's begin by recognizing the typical format of a mediation effort for litigation matters. There are of course many variations, but typically the participants are: (1) decisional personnel for each party, one or more persons who have ultimate discretion and decisional authority for each party; and (2) a neutral mediator or

facilitator. For more substantial disputes, the participants may include counselors who assist each party's decisional personnel; they may be lawyers, accountants, experts, spouses or whoever gives the parties meaningful guidance and direction. At the outset, each party or that party's representative typically asserts and explains that party's position. The parties may or may not question each other. The parties may propose solutions with settlement demands or offers.

Thereafter, the neutral may encourage further discussion among the parties, and will almost always meet separately with each party's participants to discuss the issues and their possible resolution. In those separate meetings, the neutral often explains each party's apparent weaknesses, gathers information which explains the adverse party's weaknesses, and communicates proposals. The mediator can have both a reactive and a pro-active role. In those separate meetings, the neutral may react to any party's proposal by explaining how it facilitates or defeats the likelihood of agreement. Further, the neutral may offer and promote the neutral's own proposals, which hopefully advance the agreement process, and which may differ in kind or amount to proposals that either or both parties offered.

The mediator may offer interim proposals or final solutions to the parties jointly or separately. The mediator may seek other persons to counsel the parties and influence their decisional process. The mediator may propose and promote additional alternative dispute mechanisms including other kinds of mediation or arbitration. The success of the mediation depends significantly on the resourcefulness of the parties and the mediator.

This brings us to what I term popular misconceptions for litigation mediation. I begin by recognizing that some may not share my views that these are popular conceptions, let alone popular misconceptions.

First, many lawyers assert that mediation advocacy is very much like trial advocacy. I disagree. I assert that these two advocacy skills are quite different. I have heard many skilled lawyers say, "It's easy to participate in a mediation, all you do is give an opening statement and then negotiate." Wrong. Wrong.

Lawyers don't provide litigation-style opening statements in mediation sessions. A courtroom opening statement addresses a different audience than a mediation statement. Skilled communicators recognize that every advocate must carefully consider the audience whom he or she seeks to persuade. It is axiomatic in the applicable academic discipline, as the faculty of the nearby Communications Department will emphatically confirm, that the advocate must identify, understand, and appeal to the specific audience.

The advocate usually addresses a believing audience in a church service, a political party meeting, or a sports pep rally. The listeners there are ready to stand and cheer and say amen or whatever else the speaker requests, because they expect to believe the speaker. The classroom instructor addresses an analytical audience. The class wants to listen, absorb, understand, and recall the speaker's message. In a courtroom, the lawyer faces a doubting audience. The judge and jury test both advocates but plan to accept part or all of whatever at least one asserts. In mediation, the attorney seeks to persuade an opposing party, a classical hostile audience who expects to disagree unalterably with everything the adverse advocate asserts.

Some lawyers mistakenly view the mediator as the audience. The mediator gathers information solely to challenge one or both sides privately. The true audience is the opposing side. In mediation, counsel aims to persuade the other side while recognizing that the other side discounts almost everything he or she may say.

Too often the mediation audience is angry about whatever they hear from the opposing advocate. An advocate requires very different skills to persuade a hostile audience.

Though I don't pretend to know the answers to this challenge, I suspect that the lawyer should pursue at least five goals: (1) demonstrate the advocate's knowledge - the other side is more concerned if the opposing advocate has keen knowledge of the case; (2) demonstrate the advocate's skill - even though each side's participants disagree with the opposing advocate's presentation, they will probably evaluate the adversary's skill; (3) highlight the strengths of the party whom the advocate supports and the opposing party's weaknesses - the opponent will try to disregard those arguments but may lose confidence in otherwise entrenched perceptions; (4) avoid exaggeration which encourages the opponent to dismiss all the advocate's arguments because some are easily refuted; and (5) reassure the opposing party that mutual compromise is important.

Certainly it's routine in evaluating litigation matters that each lawyer evaluates opposing counsel and reports that evaluation to his or her client. In mediation, the client personally sees and evaluates the adverse counsel's knowledge, skill, strength, and propensity for settlement. In effect, the mediation advocate must politely threaten adversity while simultaneously encouraging conciliation. Such advocacy requires unusual preparation, skill, and thought - but most lawyers give them little or no special attention.

Mediation is not another form of negotiation. Mediation usually occurs because negotiation has failed. Negotiations necessarily involve puffing and posturing. In negotiations, each party exaggerates its own position and demeans the opponent's position in an effort to persuade the opponent and reinforce its own confidence. In negotiations, each party knows that the adverse party is puffing and posturing. In mediation, someone who has no stake in the dispute separately assists the parties to avoid or diminish their respective posturing, and to consider their opponent's unexaggerated position rationally.

These processes typically require privacy from the adverse party, where each party can at least temporarily shed the negotiation mantle. To preserve their posturing, I have heard lawyers tell their clients in their separate meeting to discount or disregard the mediator's concerns or cautions. They might benefit more by asking their clients to weigh the mediator's comments as an objective outsider's reactions to their position. In negotiation, each party seeks the best result or the best answer for itself. Mediation seeks a mutually acceptable result, regardless of each party's preference for something else.

Risk and cost are the two factors that control settlement decisions: the risk of success or failure, the risk of greater or less success, the economic cost of prolonged litigation, the personal and/or organizational cost in time and emotional strain of public conflict. A mediator seeks to focus the participants' attention on their respective risks and costs. Mediation asks the parties to accept equal pain, not to gain equal pleasure. Some have described successful negotiation as "getting to yes." I suggest that we might better describe successful mediation as "testing no." When will the parties unequivocally say "no," rather than "maybe?" When will they refuse to consider what they prefer to avoid?

In negotiations, each side reacts to the opponent's proposal, a process that encourages posturing and discourages agreement. The plaintiff traditionally expects to receive less than plaintiff's counsel demands, and the defendant assumes that

subterfuge. The defendant typically expects to pay more than defendant's counsel offers, and the plaintiff assumes that duplicity. In mediation, the neutral learns each party's secret or confidential position. Like an escrow agent, the mediator cannot disburse either party's confidences to the adverse party without instructions from their source. In mediation, the neutral often asks each party for confidential proposals without receiving or conveying the adversary's confidential proposals. The mediator independently determines how to steer the process to accommodate the opposing secrets.

Most lawyers learn to negotiate, to react to an adversary's proposal. They are much less comfortable in assisting their clients to reach acceptable answers unguided by an opponent's proposal - or in communicating those acceptable answers to anyone else even with confidentiality assurances. They fear that they will "bid against themselves." Reliance on the typical negotiation format, what does the claimant want and how does the adverse party respond, diminishes the mediation format's benefit.

We do not train lawyers how to function in mediation where they emphasize different services than they provide in traditional negotiation. In the negotiation situation, counsel are primarily advocates and secondarily counselors for their clients. In the mediation situation, counsel are initially advocates but soon become counselors who advise clients objectively without advocating anything. Many lawyers have great difficulty in shedding their advocate's cloak when they advise their clients, because they fear their clients may doubt their zeal.

Some parties disregard the mediation format by sending representatives with less than full discretion and authority to act for them. A party that lacks a representative with unrestricted decisional power handicaps itself and reduces its chances of obtaining an acceptable settlement, by impairing its decider's ability to gather critical impressions and by discouraging its opponent's willingness to address issues seriously. A party that sends a messenger to mediation instead of a decider fails to recognize the difference between negotiation and mediation.

I suggest a second popular misconception: all mediations are substantially similar. I've heard it many times. Not true, any more than all trials are substantially the same. Obviously underlying disputes vary, but mediations like trials for substantially similar disputes, differ markedly with different participants or different participant efforts.

Among many varying factors are the knowledge and personalities of the parties, their non-lawyer counselors, their advocate attorneys, and the mediator. A party's knowledge dominates the party's ability and willingness to act and react. Mediations function best when each side has made a meaningful effort to educate the other side. Mediations function poorly when each side relies exclusively on its own claims or defenses. The other side will never appreciate risks or costs if they don't know about and understand them.

In litigation, lawyers sometimes prefer to hold back important evidence which they can later spring on a surprised opponent. In mediation, the party may need to disclose that same evidence if the party hopes to persuade the opponent. Recognizing that mediation may not produce a settlement, those lawyers face a dilemma. Skillful mediation advocates use the mediator to disclose bits and pieces of that evidence to the adverse party if and as they move closer to a settlement.

Many possible settlement alternatives surface in the mediation process: the payment amount, payment terms, property transfers, future business relationships,

public statements, and policy changes. The mediator's skill and knowledge can be enormous factors in a mediation's success.

A mediation's success sometimes depends on the time available to the participants: the parties, the non-lawyer counselors, the lawyer-advocates, and the mediator. Participants who fail to reserve sufficient time, proportionate to the gravity of the dispute they seek to resolve, invite an ineffective proceeding. Indeed, some mediations require multiple meetings with intermissions during which the parties can consider and reconsider their options.

As my third popular misconception, I cite the frequent statement that mediations are desirable whenever they occur. This misperception has two mistaken corollaries: early mediations are best before the parties' combative trial preparations; or mediations are best shortly before trial.

First, mediation is not suitable for every litigation dispute. Some parties refuse to consider any compromise, and some give little or no weight to an opponent's rational arguments. Some litigants seek a court decision for its precedential significance to current or prospective disputes with other parties. In those situations, mediation has little attraction. Indeed, the skillful advocate attempts to determine whether and when to mediate.

As noted earlier, risk and cost control most settlement decisions. If the economic costs of litigation and/or its personal or organizational costs dominate the decisional process, then early mediation is desirable before the parties incur those costs. As they expend those costs, they have less incentive to resolve the less important risks.

If risk is the driving factor, which is typical when the controversy is larger, the parties more willingly accept and absorb costs while they gather information with which they can measure that risk. Early mediation before the parties can effectively evaluate their risks is less successful when risks control and nobody understands those risks. For these cases, mediation very shortly before trial is clearly more effective than mediation at an earlier stage.

I've heard much about early neutral evaluation as a favorable mediation mode. It can be most helpful where cost will be the controlling factor, but probably not much help where risk is the controlling factor. Where risk dominates, each side must gain information to evaluate its own risks and must educate its opponent about the opponent's risks to maximize a mediation's effectiveness.

Next misconception: Mediation advocacy requires little or no preparation. Sadly I have seen many lawyers appear for a mediation session totally unprepared. Apparently they expect the mediator to resolve their dispute without their participation or assistance. They expect to have almost no role, or at most a passive role consisting of inactive attendance. Those lawyers seriously hamper their client's ability to accomplish anything productive.

Oliver Wendell Holmes wrote Harold Laski: "If I had more time I could write a shorter letter." Woodrow Wilson reportedly told his friends: "I need more time to prepare a short speech." Mediations may not consume much time, but they can be the most important episode in a litigation matter. Counsel need substantial preparation for a mediation session. They are not passive participants. They have a very active role.

Before the mediation occurs counsel must select an effective mediator. The mediator should have subject matter knowledge, credibility, and mediation skills. Before they arrive at the mediation session, each side's counsel must affirmatively educate the other side. A party assigns little or no weight to the adverse party's

contentions and data unless the party learns about them early enough to test and evaluate them.

Effective advocates confer with their clients before the mediation session to explain the procedure, to help them understand their risks and costs, and to explore possible solutions. In preparing for a mediation session, counsel might prepare a formal settlement agreement with blanks for negotiable terms. This process helps them recognize terms that may be more or less important to the opposing parties, which permit trade-offs that lead to agreement. Written proposals for some terms encourage written responses for those and/or other terms, more than oral proposals about less than all the terms. The mediator may solicit written offers and written responses at an appropriate stage of progress. If the parties reach an agreement during the mediation, they can execute a written document that reduces later controversy about the agreed terms.

Too many lawyers decline or belittle their opportunity to explain their position at the mediation session, asserting that everyone knows the issues and the evidence so the advocate need not restate them or elaborate on them. They remind me of the lawyer who routinely relies on a trial or appellate brief and waives oral argument. At the mediation, the person who will ultimately decide whether to settle has not studied those written materials as carefully as that party's lawyer. This is the advocate's best chance to communicate directly with the opposing party who may never understand the advocate's message so clearly. Hence, the advocate's presentation requires careful preparation.

My fifth misconception is that mediation fails if no settlement results then. Not true. There are at least three goals for every mediation session. One goal is to settle the case. But if the parties do not settle then, there are two perhaps equally valuable goals. One is to narrow the dispute: to identify which issues remain, to clarify the range and area of dispute, and to facilitate later efforts to resolve it. The fact that the mediation session does not produce a settlement then does not deny its value. I have participated in many mediations where the case settled one week or two weeks later, because of developments at the mediation session.

The third goal a mediation can serve is to demonstrate that the parties for whatever reason are intractably antagonistic, are so far apart that further settlement discussions will serve no purpose unless or until one or both parties very substantially revise their settlement position. The advocates can then direct their attentions and resources to trial preparation, without worrying that more vigorous settlement efforts might avoid those travails. Lawyers and their clients greatly appreciate that knowledge, which permits them to concentrate on more productive activity. Without that knowledge, the parties hesitate to expend resources, and the resulting delay may ultimately harm their litigation success.

Finally, my sixth and final misconception is that mediation advocacy is not or cannot be a teachable discipline. I strongly suggest that mediation advocacy is and should be a teachable discipline. Academically oriented faculty can isolate and analyze various aspects of mediation advocacy and develop an effective course design. I anticipate that it will be very different from the typical trial advocacy course.

We cannot rely again on the sink or swim method, as we did for too long before we began teaching trial advocacy. We cannot send untrained lawyers to mediations in the hope that they will learn how to become mediation advocates. We cannot rely again on the second chair technique, as we did too often before we began teaching

trial advocacy. We cannot encourage young lawyers to copy mistakes that older but uncounseled mediation advocates demonstrate. We cannot rely again on seminar lectures like this one, as we did too easily before we began teaching trial advocacy. We cannot expect young mediation advocates to devise their own training or develop their own skills solely from someone else's experiences or comments.

We need simulated clinical training and/or supervised clinical training in mediation advocacy. At the very least, we need mediation advocacy training as part of any trial advocacy curriculum. Thus far, our profession and its academic counterpart have not seriously considered the special characteristics of mediation advocacy, which might permit them to develop teaching techniques that communicate responsive skills most effectively. This venture may well require interdisciplinary studies with other fields of academic training and knowledge, because we are dealing here with advocacy that our profession has inadequately addressed.

Law schools now offer courses in trial advocacy to train advocates for analytical or doubting audiences. We must develop a course design that trains advocates to persuade a hostile adversary, particularly in the mediation format. Negotiation courses may be a step in that direction, but they usually fail to give sufficient weight to the differences between negotiation and mediation.

Some law schools now offer mediation courses. Some seminars concern mediation practices. However, most mediation classes and mediation seminars train mediators rather than mediation advocates. Before we taught trial advocacy, we taught students to become appellate court judges rather than trial court lawyers. Too often we repeat that mistake now by teaching students to become mediators rather than mediation advocates.

An examination of the Index to Legal Periodicals shows that since 1980 there have been 636 published articles on trial advocacy, 344 articles on negotiations, and 919 articles on mediation - but only 60 articles on mediation advocacy. In this institution's law library, there are 220 publications on trial advocacy, 323 publications on negotiation, and 254 publications on mediation - but only 3 on mediation advocacy. Two academicians here teach ADR courses. I commend their efforts, but I suggest that all of us must address this rapidly growing forum more seriously. We must devise a meaningful curriculum to train a new discipline.

The American Association of Law Schools Directory now lists approximately 800 academicians who teach trial and appellate advocacy. The same directory has no listing for mediation, although it has an otherwise undefined alternative dispute resolution category, which presumably includes multiple forms of arbitration and mediation. I suggest that mediation has little resemblance to arbitration, other than their use to avoid courtroom litigation. Arbitration advocacy is closer to trial advocacy than to mediation advocacy. The directory has no separate category for mediation advocacy, and no category that includes mediation advocacy with some other subject.

I challenge the profession to recognize a new forum, a new arena, a new problem, and a new subject which we must consider. I challenge law school academicians to explore and map the still uncharted territory for this new form of advocacy. We must train students to be mediation advocates, not merely to recognize why or when mediation can help or even how to conduct mediation sessions.

I doubt that mediation advocacy is like trial advocacy. I doubt that all mediations are substantially similar. I doubt that mediations are desirable whenever they occur,

or that they are uniformly best if they are early or if they are late. I doubt that mediation requires little or no preparation. I doubt that mediation fails when no settlement results. I doubt that mediation advocacy is not and should not be a formally teachable discipline.

On March 2, 1775, in his second speech on conciliation with the American Colonies, less than seven weeks before the shots heard around the world at Lexington and Concord, Edmund Burke said to Parliament: "All government, indeed every human benefit and enjoyment, every virtue and every prudent act, is founded on compromise." We must train people to be advocates in compromise as well as advocates in litigation. The time to prepare is now, not after the casualties of war, not even after the casualties of litigation wars. I suggest that the time is now. The mediation alternative to litigation war is rapidly becoming something that our society and our clients demand. We have to be prepared to service them effectively.