Lawyering in a Hybrid Adversary System

John S. Dzienkowski
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I. INTRODUCTION

This year, 1996, is the thirtieth anniversary of the publication of Professor Monroe Freedman's article, Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions.¹ Professor Freedman's article stimulated an intense debate within the legal profession and in society about the basic tenets of the adversary system. Although the positions advocated by Professor Freedman were criticized by scholars,² the American Bar Association in 1969 adopted a Canon embracing a lawyer's duty of zealous representation to clients.³ Today, we, as a society, still debate the merits of the adversary model as a basic assumption underlying our legal system.⁴

It is fitting that thirty years later we engage in this dialogue about the limits of the adversary system. Professor Carrie Menkel-Meadow calls upon the proponents of the adversary

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². E.g., Rob Atkinson, Beyond the New Role Morality for Lawyers, 51 Md. L. Rev. 853, 923-24 (1992) (stating that Professor Freedman could have served the law as well by advocating a different position); Charles W. Wolfram, Client Perjury, 50 S. Cal. L. Rev. 809, 824-25 n.54 (1977) (recounting the attempted disbarment of Professor Freedman for his views).

³. ABA CANONS OF PROFESSIONAL ETHICS, reprinted in SELECTED STATUTES RULES AND STANDARDS ON THE LEGAL PROFESSION 349 (John S. Dzienkowski ed., 1994) (noting that the Model Code of Professional Responsibility, including Canon 7, was enacted in 1969).

⁴. For example, see DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY (1988) and the intense debate that it has stimulated. See Stephen Ellmann, Lawyer for Justice in a Flawed Democracy, 90 Colum. L. Rev. 116 (1990) (reviewing LUBAN supra).
system to bear the burden of proving why adversarialness should underlie our legal system.\textsuperscript{5} Professor Menkel-Meadow argues that society should reconsider the goals of the modern legal system and the methods used to achieve those goals.\textsuperscript{6} As others have pointed out,\textsuperscript{7} in principle our legal system has begun the shift away from the adversarial model of justice; this movement, however, is taking place in a haphazard manner without much study or guidance. I thus commend Professor Menkel-Meadow's attempt to focus the discussion on a more deliberate consideration of an ideal model of justice in this postmodern, multicultural world. Professor Menkel-Meadow's article is an important contribution for many reasons. It reminds us in academe that a schism continues to exist between the adversarial ethic in theory and in practice. Further, the article highlights the significant costs that society bears on account of the legal profession's insistence upon clinging to the tenets of the adversarial model.

II. "THE TROUBLE WITH THE ADVERSARY SYSTEM"

Professor Carrie Menkel-Meadow has written a very powerful and eloquent challenge to the assumption that adversarial ethics must underlie the modern legal system. This provocative article calls upon the proponents of the adversary system to bear the burden of proving that adversarialness should continue to pervade lawyering. In this section, I examine the major points made in Professor Menkel-Meadow's article.

Professor Menkel-Meadow's article is a call for reevaluating the goals underlying our system for resolving disputes. We are all, of course, familiar with the argument that our adjudicative system produces the best results when parties present opposing, adverse interests to an impartial, uninvolved judge. We are


\textsuperscript{6} Id.

\textsuperscript{7} See, e.g., Judith Resnik, Failing Faith: Adjudicatory Procedure in Decline, 53 U. CHI. L. REV. 494, 529 (1986) (recognizing that operation of the adversarial system under modern rules of procedure can be farcical); Ellen E. Sward, Values, Ideology and the Evolution of the Adversary System, 64 IND. L.J. 301, 301 (1989) (asserting that "some chinks in the adversarial armor have recently begun to appear").
familiar, also, with the critique that truth is not a primary goal of the modern adversary system. Professor Menkel-Meadow's article takes these traditional arguments and applies them to a postmodern, multicultural world. Her thesis is that "[modern life presents us with complex problems, often requiring complex and multifaceted solutions] and that the adversary system does not properly accomplish the goals that we expect of it."

Professor Menkel-Meadow's critique of the adversary system in today's society is well executed and well founded. Legal institutions and the underlying substantive law often do not and cannot offer parties the remedies or factual presentation that best fit the legal dispute. The bipolar choices offered in traditional civil and criminal adjudication often do not reflect the public and private concerns in the modern legal dispute. This mismatch between the disputes and the legal system may result in parties consciously avoiding the modern legal system. Further, many cases that end up in the litigation system produce significant dissatisfaction for all sides involved. Additionally, the culture of adversarial discourse has been influenced by many aspects of our society.

Professor Menkel-Meadow uses the postmodern critique to illustrate the defects in the form of adversarialness as it cur-

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8. See Menkel-Meadow, supra note 5, at 7 (footnote omitted).
9. Professor Menkel-Meadow calls this "limited remedial imaginations." Id. at 7.
10. Professor Menkel-Meadow points out that the adversary system tends to limit the number of parties that can be involved in a legal dispute. Id. at 9-10. Apart from addressing a remedy that affects multiple parties, such limitations also affect the nature of the proceeding and the quality of the view presented. Id.
11. This mismatch is a major reason for the rise in the alternative dispute resolution movement. See Kenneth Penegar, Foreword: The Elusive Promise of Legal Reform, 46 SMU L. REV. 1889, 1898 (1993).
13. Professor Menkel-Meadow identifies two consequences of using the adversarial model as a pervasive tenet of our legal system. "[The 'adversary' model employed in the courtroom has bled inappropriately into and infected other aspects of lawyering, including negotiations carried on both 'in the shadow of the court' and outside of it in lawyers' transactional work." Menkel-Meadow, supra note 5, at 6-7 (footnotes omitted). Also, "the rhetoric and structure of adversarial discourse prevents not just better and nicer behavior, but more accurate and open thinking." Id. at 10 (footnote omitted).
rently appears in our legal system. She first points out that the imposition of a lawyer's duties to the specific client complicates the concept of oppositional presentation of facts in the legal profession.\textsuperscript{14} The duty to the client, therefore, often interferes with the legal system's search for the truth. Then Professor Menkel-Meadow raises the teachings of postmodernism that question the existence of a truth, or whether "there are immutable, universal, global, and discoverable facts or interpretations of facts."\textsuperscript{15} Complicating the discovery of truth are the filters that individuals use to process information, filters that undoubtedly have "impact . . . on the finding of facts, the interpretation of the law and the production of 'legal knowledge'."\textsuperscript{16} From this perspective, Professor Menkel-Meadow offers a powerful critique of the usefulness of the adversary system in modern society.

Ultimately, Professor Menkel-Meadow says that society should not continue to mildly tinker with the current adversarial model of justice. Instead, we should reevaluate the goals for our adjudication system and decide the role of truth, policy considerations, individual parties' choice, and fairness of outcomes.\textsuperscript{17} In this self-evaluation, Professor Menkel-Meadow believes that society will not so dearly embrace the goals of the adversary system. Instead, our multicultural world more likely will prefer searches for the truth, long term commitment to the fairness of the dispute resolution system, nonmonetary solutions to problems and multiparty involvement in disputes.\textsuperscript{18} I believe that Professor Menkel-Meadow is correct about society's dissatisfaction with the current legal system. I worry, however, about majoritarian control over changing the legal system without sufficient checks and balances to protect the minority.

\begin{footnotes}
\item[14] Id. at 17-18.
\item[15] Id. at 14.
\item[16] Id. at 15.
\item[17] Id. \textit{passim}.
\item[18] Id.
\end{footnotes}
III. INFLUENCE OF THE ADVERSARIAL MODEL UPON LAWYERING

Many scholars argue that the pure form of adversarial justice has long been abandoned in many aspects of our legal system.\textsuperscript{19} Since 1983, the ABA has removed the duty of zealous representation from its national ethics code.\textsuperscript{20} Further, the ABA has reaffirmed explicitly a duty upon lawyer-advocates that overrides client interests when a client commits a fraud on the tribunal.\textsuperscript{21} Additionally, the ethics rules proscribe lawyer involvement in client crimes and frauds.\textsuperscript{22}

Furthermore, there have been significant changes in the manner in which lawyers litigate cases in this country. As Professor Resnik so aptly characterized in her *Harvard Law Review* article,\textsuperscript{23} managerial judges use their supervisory powers to become actively involved in all aspects of the litigation process,\textsuperscript{24} including in settlement discussions.\textsuperscript{25} Reforms in discovery practices have further moved the process away from the traditional adversarial model in which parties present their cases to an imperial and impartial judge.\textsuperscript{26} Further, reforms in Rule 11\textsuperscript{27} and recognition of inherent judicial powers to sanction parties and counsel for court have also undercut the adversarial model

\begin{itemize}
\item \textsuperscript{19} See id.; Resnik, supra note 7; Sward, supra note 7.
\item \textsuperscript{20} Compare MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 7 (1969) with MODEL RULES OF PROFESSIONAL CONDUCT Rules 1.1-1.3 (1994).
\item \textsuperscript{21} See MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3 (1994) (discussing candor to the tribunal).
\item \textsuperscript{22} See id. Rules 1.2(d), 1.16.
\item \textsuperscript{24} Of course, case management is more common in large complex cases and in class action matters. Cf. id. at 443 (noting that a high level of judicial intervention is not required in most cases where the number of discovery requests is small). The practice, however, of hands-on judging has pervaded the adjudicatory methods used in many smaller disputes. See id. at 379 (stating that under recent revisions to the Federal Rules of Civil Procedure, "virtually all cases" require case management).
\item \textsuperscript{25} See generally Carrie Menkel-Meadow, *For and Against Settlement: Uses and Abuses of the Mandatory Settlement Conference*, 33 UCLA L. REV. 485 (1985) (discussing how mandatory settlement conferences threaten the appropriate role of judges in the adjudicatory process).
\item \textsuperscript{27} Fed. R. CIV. P. 11. Rule 11 was modified in 1983 and in 1993. See id. advisory committee's note.
\end{itemize}
of justice. Our legal system quickly has embraced alternative dispute resolution both as a substitute for the trial and as a court annexed feature of the litigation process.

Despite the inroads made toward cutting back the adversarial system, adversarial behavior is prevalent in the legal system. Clearly, a gap exists between theory and practice. Although academics continue to teach the death of the adversarial model, it is alive and well in practice. I now offer several examples of this schism between theory and practice.

For example, the ethics rules are quite unequivocal about a lawyer's duty to disclose client fraud on the tribunal. In fact, this duty is better understood by the criminal defense bar, especially court appointed criminal defense lawyers, than it is by civil litigators. The extent to which lawyers in civil litigation follow their obligation of candor to the court is unclear. Civil litigators often claim that they are uncertain about the truth. Sometimes this ignorance of the truth is the result of disregarding the information or not inquiring too much. On other occasions civil litigators may simply disobey the legal requirement of disclosure.


29. Cf. Geoffrey C. Hazard, Jr. et al., The Law and Ethics of Lawyering, 469-71 (2d ed. 1994) (discussing "[h]ow [a]dversarial ... the [a]dversarial [s]ystem [is]"). Professors Hazard, Koniak, and Cramton note that the "adversarial model may be more of a myth than a reality in many common settings." Id. at 469. They point to high rates of settlement and evidence of cooperative behavior in "routine matters handled on a high-volume basis." Id. at 469-70. They conclude by stating that "Perhaps two trends are proceeding simultaneously: a more aggressive adversarial ethic in high-stakes litigation having a zero-sum character, and a more bureaucratic, cooperative mode of dispute resolution in many areas of law practice involving a high volume of fairly routine claims." Id. at 471.


31. See Nix v. Whiteside, 475 U.S. 157, 166-71 (1986) (asserting that a lawyer's failure to allow perjured testimony is not ineffective assistance of counsel).

32. See, e.g., Abraham P. Ordover, Lawyer as Liar, 2 AM. J. TRIAL ADVOC. 305, 313-20 (1979) (stating that deceptive practices are often employed by attorneys).

33. Model Rule 3.3 only requires disclosure when the lawyer knows that the client
As another example, the ethics rules are relatively clear about the distinction between lawyers delineating the scope of the law and lawyers assisting clients in crimes or frauds against third parties. The last decade of litigation against lawyers in the banking industry provides a vivid image of lawyers advocating aggressive positions for clients. A particular example of the application of adversarialness in the banking regulatory process involves the Kaye, Scholer Lincoln Savings representation. In that celebrated matter, the law firm adopted the position that it was in a litigation posture and thus did not need to comply with any government disclosure obligations in the investigation of a Lincoln Savings fraud. The only constraint against such involvement seems to be the potential civil and criminal penalties that can attach when a lawyer or law firm assists clients in committing and concealing crimes and frauds.

is committing a criminal or fraudulent act upon the tribunal. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3 (1994). Thus, if the lawyer does not know, but, rather, only suspects a criminal or fraudulent act, then the lawyer has no duty of disclosure. See id. Lawyers can avoid asking the question so that they do not know (similar to the debate in criminal law over whether a lawyer should ask a client whether the client committed the act as alleged by the prosecutor). Lawyers may also feel that candor to the court does not apply in depositions or that their obligation to disclose is removed if the case is settled before it gets to trial.

34. See MODEL RULES OF PROFESSIONAL CONDUCT Rules 1.2(d), 1.16 (1994).
35. For a very interesting article examining how lawyers could have stayed quiet during their clients' fraudulent transactions, see Donald C. Langevoort, Where Were the Lawyers? A Behavioral Inquiry into Lawyers' Responsibility for Clients' Fraud, 46 VAND. L. REV. 75 (1993).
In litigation practice, two examples exist in which the Federal Rules of Civil Procedure explicitly sought to cut back on the adversarial nature of the litigation process. In 1983, Rule 11 was amended to impose mandatory sanctions on parties and/or counsel who file motions in court that were not well grounded in fact, well founded in law, or were not based upon a proper purpose. From most accounts, a decade of practice with Rule 11 produced substantial evidence that the rule of procedure had an impact upon litigation practices. In 1993, Rule 11 was modified to make its application discretionary and to add a twenty-one day safe harbor to allow counsel to withdraw pleadings that violate the rule's standards. Under the new Rule 11, it appears that litigation practice today largely ignores the requirements of the rule. Thus, without the threat of mandatory sanctions or firm responsibilities to the court, judges and lawyers prefer to allow the filing of frivolous motions and to let the court system ferret through the arguments made by counsel.

In the other example, in 1993, Congress amended the discovery rules to allow federal district courts to process litigation under a system of open discovery. In open discovery, counsel

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_Little Secret_, 47 VAND. L. REV. 1657 (1994) (discussing civil penalties assessed through malpractice liability).


40. See 5A CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1331 (2d ed. 1990). The rule was mandatory; in other words, judges were required to impose sanctions if a violation was found. _Id._ Sanctions included an award of the opposing side's attorneys' fees to fight the frivolous filing. _Id._ Thus, the rule became a fee-shifting rule for cases weak on the facts or the law, or those filed for an improper purpose.


42. Although all the data on new Rule 11 is not in yet, anecdotal evidence supports a conclusion that judges and lawyers have largely moved away from any regulation of lawyer conduct in the filing of frivolous motions. There seems to be very little activity in the federal courts on the new rule. Laura Duncan, _Sanctions Litigation Declining: Decrease Attributed to One-Year-Old Safe-Harbor Amendments to Rule 11_, ABA J., Mar. 1995, at 17. It is important to note that the court does not see a Rule 11 complaint filed by a party until the 21-day safe harbor has passed and the alleged violator does not correct the conduct that is the object of the complaint. WRIGHT & MILLER, supra note 40, § 1331 (Supp. 1996).

43. See _Fed. R. Civ. P. 26(a)(1)_ (providing that initial disclosures shall commence without formal discovery request).
and parties must submit all documents that are relevant to the litigation and to the opposing parties. This system of discovery opposes the traditional discovery process of interrogatories and document production that can be charitably referred to as a strategic game whereby the more skillful advocate can either compel or avoid compulsion of relevant evidence in litigation. One would think that society would welcome open discovery. Fewer than one-third of the federal courts, however, have chosen to stay with the open discovery procedures. 44 The culture of the legal profession still continues to resist movements away from the adversarial model.

As Professor Menkel-Meadow has noted, the adversarial ethic continues to pervade nonlitigation areas and alternative dispute resolution. 45 In the alternative dispute resolution area, as more and more lawyers have become involved with mediation and arbitration, these means of resolving disputes have adopted many of the features of the litigation system. 46 Moreover, in many areas of nonlitigation practice, lawyers have infused the process with adversarial techniques. 47

One additional example of the influence of adversarial ethos upon the legal profession involves Geoffrey Hazard’s attempt to revive Brandeis’s “counsel for the situation” 48 in Model Rule 2.2. 49 In pushing the adoption of the lawyer-as-intermediary

44. The rule itself allows federal district courts to opt out of the open discovery provision. Id. (stating that local rules can govern initial discovery). About two-thirds of the federal district courts have opted out. Erwin Chemerinsky & Barry Friedman, The Fragmentation of Federal Rules, 46 MERCER L. REV. 757, 762 (1995). Of those courts that opted out of open discovery, some of them have local court rules that place more obligations on counsel than does Rule 26(2)(b). Id. at 762-64.

45. Menkel-Meadow, supra note 5, at 37.

46. When one takes a course out of one of the recent editions of the dispute resolution casebooks, one sees adversarial and strategic behavior appearing in mediation, arbitration, and negotiation. See STEPHEN B. GOLDBERG ET AL., DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, AND OTHER PROCESSES 17-101 (2d ed. 1992) (excerpting from articles, asking questions, and making notes about the competitive model of negotiation).

47. The best example involves adversarial behavior that appears in the competitive model of negotiation. See id.


49. See John S. Dzienkowski, Lawyers As Intermediaries: The Representation of
rule, Professor Hazard sought to legitimize for the legal profession the concept of a middle role for a lawyer that would adjust the rights and responsibilities of two or more clients seeking to enter into a transaction or resolve a dispute. In the early 1980s, it was anticipated that clients would have a need for the lawyer who acted as an intermediary. In drafting the Model Rules, advocates of the mediation process quickly excluded their services from the ambit of Model Rule 2.2. Although most states that adopted the Model Rules enacted this provision, few lawyers ever admit that they act as intermediaries in practice. This lack of recognition signifies that either lawyers do act as intermediaries but refuse to admit their role change, or they refuse to act in such a capacity. Although one can point to many problems in Model Rule 2.2, I believe that part of the resistance to this rule comes from the fact that it flies in the face of the adversary model. Acknowledging that attorneys can act as intermediaries implicitly acknowledges that lawyers and their multiple clients can benefit from nonadversarial relationships.

In summary, it is easy to show that our legal system is in a hybrid state of affairs, caught between the ethos of the adversary model and efforts to temper the costs of adversarialness. Some scholars, like Professor Monroe Freedman, decry the efforts to move away from adversarial justice. At the same time, others see the pervasive influence of adversarialness in our current justice system and recognize that in some instances the costs of adversarialness outweigh the associated benefits. The costs of such a hybrid system, however, are equally significant to society. Those costs bolster Professor Menkel-Meadow’s call for a reconsideration of our adherence to the adversarial ethos and indicate that her conclusion that the system’s goals need reevaluation is both timely and necessary.

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50. Id.
51. See generally id. (describing problems in Model Rule 2.2).
IV. THE FUTURE OF THE ADVERSARY SYSTEM

A. The Reasons Underlying the Legal Profession's Admiration of the Adversary System

Several reasons exist to support the legal profession's continued embrace of the adversary system as the best means of resolving disputes. The most fundamental justification for adversarialism involves the psychology of change. A vast majority of lawyers in this country were trained using the adversarial ethos as an immutable assumption underlying our justice system. Those lawyers' entire perspective on lawyering comes from this view that the adversarial system is immutable and they feel very comfortable with the basic tenets of adversarialness. Thus, any change from the current system presents the strains and tension that accompany most changes in human experience.

Lawyers are wary of any radical change because they are uncertain about the system that might replace the adversarial model. American lawyers' global counterparts have not always enjoyed the best of careers. Changes in the American system could lead to similar results: lawyering could become more ministerial, or it could become less of a profession and more open to competition from other nonlawyers. Lawyers, understandably, would feel uncomfortable giving up the power, prestige, and income that is bestowed upon one of the most hated professions in this country.

The fact that individual lawyers feel comfortable with our legal system influences many institutions in this country. Law firms embrace the adversary system as do such professional organizations as the American Bar Association and the American Law Institute. As lawyers continue to dominate politics, either directly as elected officials or behind the scenes as advisors, our legislative and executive branches firmly believe in the tenets of the adversary system. It is easy, therefore, to explain

53. Lawyers particularly believe in the binary presentation of facts to an impartial judge. See Menkel-Meadow, supra note 5, at 6.
54. See Menkel-Meadow, supra note 5, at 42.
55. See Lynn Ludlow, Lawyers and Hate Jokes, S.F. EXAMINER, July 15, 1993, at A16; Dale Dauten, For Executives Only: In This Case the Winning Lawyers Saw the Light, STAR TRIBUNE (Minneapolis-St.Paul), July 27, 1994, at 2D.
why change has been so incremental and why changes in ethical rules have not resulted in widespread compliance.

The legal profession also has a self-interest in preserving the adversarial system. Law firms and lawyers make the majority of their money by billing time. The adversarial model of resolving disputes presumes the involvement of lawyers at every stage of the process. Furthermore, adversarialness tends to separate the parties from each other—thus increasing the likelihood that the lawyers will spend more time and also bill larger fees. The judiciary also has an interest in preserving the legal system as an adversarial institution. Most judges enjoy the power and prestige that accompany the position. Politicians view judicial appointments as important to preserving the balance of political power in judicial decision making.

B. Reforming the Adversarial System

A major thesis of Professor Menkel-Meadow's article is that adversarialness unthinkingly dominates much of legal process and discourse. She suggests that society should examine carefully which cases require binary solutions and which would benefit from another approach. Professor Menkel-Meadow notes that she would limit the adversary system to where appropriate, by party choice, and as a court of last resort. As was stated earlier in this Comment, she urges society to rethink the prioritization of goals for a legal dispute resolution system.

Professor Menkel-Meadow does offer a broad suggestion for replacing the adversarial model. She suggests that society tailor:

56. Of course, personal injury lawyers often earn their fees through the contingent fee system, and public interest lawyers earn their fees from fee-shifting statutes. Flat-rate billing arrangements also have become increasingly common.

57. See Larry W. Yackle, Choosing Judges the Democratic Way, 69 B.U. L. REV. 273, 279-82 (1989) (asserting that the function of the appointments clause is to ensure the independence of the judiciary even though political values often influence decision making).

58. Menkel-Meadow, supra note 5, at 34. Professor Menkel-Meadow acknowledges that in many legal disputes the parties are free to opt out of the legal process to resolve the dispute through creative negotiation. Id. at 24-25. She believes, however, that settlements are often constrained by "the limited remedial imagination of lawyers who bargain 'in the shadow of both the court and the law.'" Id.

59. See id. at 42-44.
different ways to structure process in our legal system to reflect our multiple goals and objectives. For example, to achieve the goal of determining criminal guilt a different process may be required than is required for allocating money or human, parental, or civil rights. Sometimes, other processes, such as mediation, inquisitorial-bureaucratic investigation, public fora or conversations, “intermediate sites of discourse,” private problem-solving (negotiation) or group negotiation and coalition and consensus building would resolve better the legal and other issues involved.53

The key is to perform a serious and meaningful reexamination of disputes and different methods for resolving them.

As potential alternative dispute resolution systems, Professor Menkel-Meadow lists: (1) multi-party proceedings or mediation, (2) reg-neg or regulatory negotiation, (3) multiparty representational diverse conversation, (4) civil inquisitorial investigative procedure where there is a genuine search for the truth, (5) appropriate dispute resolution without the corruptive influence of adversarialness, (6) fact finding, (7) third party neutraling, and (8) judging.61 The choice of proper system depends upon the individual facts and circumstances of each dispute as well as on the parties’ choice.

Menkel-Meadow’s message is that the adversary system cannot be changed through a series of changes in the ethics rules or procedural rules. Cultural change is needed. Such change should be accomplished by cabining the adversary system where it does its job best and then to consider other forms of conflict and dispute resolution and begin to evaluate their strengths and weaknesses.

Professor Menkel-Meadow also points out that any changes in dispute resolution will require a change in the law of lawyering and legal ethics.62 This is a very important point. Legal ethics will need to be tailored to the varying processes and lawyers will occupy many different roles: “moral activists, problem solvers,

60. Id. at 11-12 (footnotes omitted).
61. Id. at 32-44 (proposing reforms to the adversary system).
62. Id. at 38-40.
lawyers for the situation... discretionary lawyers, civic republicans, or statesmen. ... One could make a good case that the current law of lawyering presents a significant obstacle to innovation in lawyering. For example, Brandeis's efforts to be a lawyer for the situation later were used against him in confirmation hearings. Lawyers who wish to represent multiple parties must conform to conflicts of interests standards which may differ by jurisdiction and court. Thus for lawyers to even consider some of the proposed adjudication processes listed by Professor Menkel-Meadow, the profession must remove the adversary ethics from the law of lawyering.

C. The Role of Legal Education in Our Move Away from the Adversary System

If society is to embark upon Professor Menkel-Meadow's goal of reevaluating the adversary system of justice, institutions in legal education must open the way for changing the manner in which lawyers are educated in this country. To this end, the W.M. Keck Foundation offers an impetus to a number of schools to experiment with new teaching techniques in legal ethics. Much more needs to be done, to educate both lawyers already in the profession and law students. Currently, most law school teaching is done in the context of adversarial litigation. Professors guide students with casebooks containing appellate decisions produced in this adversarial model. The educational mind-set is to teach students to argue both sides of a legal issue—the application of law to facts is best achieved through a presentation and examination of both sides

63. Id. at 43-44.
64. See Dzienkowski, supra note 49, at 748-57; see also John P. Frank, The Legal Ethics of Louis D. Brandeis, 17 STAN. L. REV. 683 (1965) (discussing Brandeis’s situational ethics).
65. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7(b) (1994).
67. The legal profession must find some source of funds to conduct empirical research about the laws and procedures that are in place in this country. Legislatures and scholars often make assumptions that have no founding in empirical study. The development of the law would benefit significantly from more information about which rules produce intended and unintended consequences.
of the case. In teaching how to argue both sides, students are often taught to adopt positions on behalf of clients that lay individuals would not be able to argue with a straight face. Students often expand their notion of colorable arguments and even make arguments that border on the frivolous. Of course, I am not suggesting that law schools abandon the case method. I just think that law schools should encourage the development of classes and teaching methodology that embraces nonadversarial models of dispute resolution.

Education and study should not end with the law schools. Lawyers, judges, and public officials need to be educated about the existence of alternative forms of dispute resolution and about the need to consider innovation in lawyering. Those individuals also need information from empirical studies so as to better perform their tasks and inform their decisions. Without such educational and informational changes, it will be difficult to successfully implement any meaningful shift away from the adversary ethos.

D. Transactional Costs of Changing Our Adversarial Model

My major criticism of a change from our current system of litigation involves the transactional costs that accompany any drastic change. When society makes incremental changes toward and away from adversarialness, it does not require us to rethink entire facets of the legal system. A major shift away from the adversarial model will call into question many established institutions. I particularly worry about its effect on those individuals in the lower economic classes.

For example, contingent fee representation provides many individuals access to legal services without cost unless they are successful in litigation. It is not difficult to imagine that the

68. I am not suggesting that law professors teach students to make frivolous arguments. I am just pointing out that the Socratic method and the teaching of law through litigated cases often leads students to believe that lawyers should be able to make any argument on behalf of a client. In fact, law professors frequently see such misguided arguments on examinations.

69. See HAZARD ET AL., supra note 29, at 530-32. The authors note that the contingent fee is often considered to be the "poor man's key to the courthouse door" as well as discussing the criticisms of the contingent fee. Id. at 532 (citation omitted).
availability of nonadversarial models of dispute resolution discussed by Professor Menkel-Meadow would create many difficulties for clients or attorneys who rely on contingent fee arrangements. The very existence of more nonmonetary remedies complicates the contingent fee representation. If clients could choose between monetary or nonmonetary remedies, a conflict of interest may be accentuated between the lawyer and the client. Of course, one could use a mixed contingent fee/fixed fee to allow a lawyer to collect an hourly rate when a client accepts a nonmonetary settlement. Such arrangements, however, could potentially impact clients who do not have the economic wealth to pay for such choices.

Another example of the difficulties of alternative dispute resolution systems involves access to legal services for all of the other parties that could become involved in multiparty dispute resolution. For example, in a community mediation of a gang problem, one would need to decide whether the participants need legal services, whether the city or police could bring their own lawyers, and the extent of the legal services that the mediation would require. Each of these questions presents a very difficult issue that may only be answered with very broad guidelines. It is imperative, however, that such systems be designed with careful and deliberate study and thought.

IV. CONCLUSION

In the last thirty years, the adversarial model of lawyering has been under assault. The debate has shifted from an outright defense of the model to a series of arguments about specific contours. In many situations, the ultimate defense of adversarialism is based upon the fatalistic view that no better system exists. There is no doubt that the legal profession has made a piecemeal move away from the pure adversarial model. The changes have taken place in a haphazard manner without a

70. See Model Rules of Professional Conduct Rule 1.7(b) (1994).
71. Lawyers have used mixed-fee agreements or options to convert a contingent fee into a fee based upon hourly billing when certain circumstances are met.
72. If the client could not afford the fee based upon hourly rate billing, then the client would need to reject settlement offers primarily focusing on nonmonetary relief.
study of the overall picture.

I commend Professor Menkel-Meadow's attempt to try to focus the debate upon a more deliberative consideration of an ideal model of justice in this postmodern, multicultural world. I agree with the observation that no one model will work in all cases; we must develop different structures to address the special aspects of the different contexts. Further, a new system must have sufficient flexibility to allow the parties to best tailor their dispute resolution mechanism to their more individualized goals.

I am less optimistic than Professor Menkel-Meadow that such changes can be made efficiently. The adversarial ethic is a pervasive influence—almost a religion unto itself—that permeates our legal system. Changes will continue to occur on a haphazard basis without much empirical study. Thus, society will continue to live with the high costs of adversarialness for many decades to come.