

Teaching Points from “Skills Training for the Lawyer: Teaching How to Use ADR in Litigation of Family Business Disputes”

Program co-sponsored by the ADR and Litigation Sections
AALS Annual Meeting, San Francisco, January 6, 2005

The program was organized by Phyllis E. Bernard (Oklahoma City) and included panelists Douglas N. Frenkel (Pennsylvania), Dwight Golann (Suffolk), Isabelle R. Gunning (Southwestern), Kim Kovach, John Lande (Missouri), Michael W. Martin (Fordham), Michael Pinard (Maryland), Alfreda Robinson (George Washington), Timothy Wilton (Suffolk), and Amy Wind (George Washington).

This stimulating program included demonstrations of parts of a negotiation and mediation of a family business dispute. Panelists commented and the audience engaged in an active discussion. The following outline summarizes views expressed at the program and does not necessarily represent the views of any of the panelists, the AALS, or the ADR or Litigation Sections.

1. We should teach students to think of a range of roles, not just the role of litigator, and to develop skills in addition to making arguments.
2. Court-mandated mediation / ADR requires negotiation and settlement in some cases.
3. Students should appreciate client concerns about dispute resolution procedures. Lawyers should maximize clients’ substantive and procedural goals by finding out clients’ interests, values, and perspectives, perhaps using a client-centered approach.
 - a. Some research shows that many corporate clients really HATE litigation.
 - b. Corporations are made up of individual managers who are emotionally invested in the outcome.
 - c. Litigation is expensive, in more ways than money, e.g., distraction costs. Lawyers should consider the costs of litigation including, for example, whether they increase clients’ costs by acting nasty.
 - d. Lawyers should make sure that they frame their “demands” for what their clients want.
 - e. Lawyers should think carefully about the words they use, e.g., in drafting complaints, to consider whether they may cause counter-productive adversarial reactions.
4. Teachers should encourage students to consider the continuum between combative and collaborative roles in negotiation and mediation.
 - a. Lawyers should consider whether filing litigation is necessary or helpful. Sometimes litigation is a tool needed to initiate serious settlement discussions.
 - b. “Hard nose” litigation can bring concessions but it also risks having negotiations break down.

- c. A competitive approach need not consist of yelling and screaming.
 - d. Instructors should teach students the language, tone, and body language of cooperation.
 - e. Lawyers should consider how to control information provided during ADR processes because clients' interests may be affected by the way that information is disclosed (or not).
 - f. Students should be aware of ethical issues, such as not making threats of criminal prosecution for civil advantage.
5. Issues specific to mediation
- a. Mediators have power – “process” power. Attorneys can “spin” mediators to use the process power e.g., by
 - i. drafting pre-mediation statements
 - ii. getting discovery before mediation
 - iii. talking with mediators before mediation to establish a relationship
 - b. Students should recognize potential benefits of mediation for clients, e.g.,
 - i. allowing for recognition of relationships and emotions
 - ii. allowing the “dirty linen” to be presented / aired in private
 - c. Students should recognize that mediation has potential problems, e.g.,
 - i. Public and community interests may not be addressed and resolved.
 - ii. Power imbalances may not be identified and addressed.
 - d. Consider who controls the type of mediation approach: Client, attorney, judge, mediator? Who SHOULD control it?
6. Goals of simulations include having students recognize:
- a. variety of processes available as tools that they can use to advance clients' interests
 - b. benefits of mediation and negotiation
 - c. variations in mediation goals and techniques
 - d. strategic / business planning aspects of the situation
 - e. value in getting principals to forget “losses” they will incur if they settle
 - f. when impasses occur and how to deal with them
7. Ideas about using simulations
- a. It is important to teach students to take the role playing seriously and internalize the “Instructions.”
 - b. One idea is to get student to “vote” on which approach worked best.
8. Ideas about using “fishbowls” (demonstrations in the front of class)
- a. Teachers need to be careful in using students who are novices
 - b. Possible role-players include:
 - i. actual mediators

- ii. upper level students
- iii. entire class as co-mediator
- iv. actual parties and attorneys in a real case
- v. theater students
- vi. teacher as mediator (though need to be careful not to become the “exalted” one)

9. Miscellaneous ideas

- a. There was a lively discussion about whether the instructor believes that there is a “right” answer to a problem or best general philosophy of dispute resolution. If so, should the instructor express it? When? How? Would that help or interfere with students making their own judgments?
- b. Be careful in using videotapes.
- c. Possibly have students observe an actual lengthy mediation (so that they appreciate the time and detail and not just the pivotal moments).
- d. Teach a failure – where the parties and attorneys do not resolve the matter through mediation.
- e. Teach that NO case – well, maybe, only few cases – are only about money.
- f. Teach students to gather information in mediation is a specialized aspect of a general skill of interviewing.