

## The Future of Legal Education – What’s ADR Got to Do With It?

*The author considers modern day clinical legal education and suggests that teaching on alternative dispute resolution should be integrated directly into mainstream legal teaching in Scotland. This article is based on an address given at the conference entitled “Modernising Scotland’s Justice System - What next?” on 20 April 2010.*

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The Civil Courts Review which we are here to discuss makes the following assertion:

*‘Mediation and other forms of alternative dispute resolution (ADR) have a valuable role to play in the civil justice system.’<sup>1</sup>*

I will not repeat today my criticisms of the Review, as they are already set out in my Analysis for January’s Edinburgh Law Review<sup>2</sup> (but in a nutshell I describe how the Review has set its face against even the gentlest form of encouragement for the use of mediation based apparently on the evidence of its most trenchant critics). Rather, I will take these words at face value and ask two questions:

- 1) What impact will this have on the way lawyers fulfil their role?
- 2) How do we prepare law students for this role?

### Lawyering in the 21<sup>st</sup> Century

It is hardly new to suggest that lawyers spend little of their time actually litigating. In 2004 US academic Mark Galanter famously devoted 112 pages to ‘the vanishing trial’, informing us that the number of US federal cases resolved by trial dropped from 11.5% in 1962 to 1.8% in 2002.<sup>3</sup> This followed up his earlier assertion that ‘most cases settle’<sup>4</sup>, although more recent evidence suggests that, rather than settle, a significant proportion simply fail.<sup>5</sup> They certainly don’t settle by themselves (indeed, a sobering finding by Professors Genn and Paterson was that, compared to England and Wales, ‘expressions of powerlessness and

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<sup>1</sup> Civil Courts Review, p.25

<sup>2</sup> Irvine, C (2010) ‘The Sound of One Hand Clapping: Gill Review’s Faint Praise for Mediation’ 14 *Edinburgh Law Review* 85-92

<sup>3</sup> Galanter, M (2004) ‘The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts’ 1 *Journal of Empirical Legal Studies* (3) 459-570

<sup>4</sup> Galanter, M & Cahill, M (1994) ‘Most Cases Settle: Judicial Promotion and Regulation of Settlements’ 46 *Stanford Law Review* 1339-1391

<sup>5</sup> Eisenberg, T & Lanvers, C (2009) ‘What is the Settlement Rate and Why Should We Care?’ 6 *Journal of Empirical Legal Studies* (1) 111-146 (finding average settlement rates closer to 65%, as low as 45% for some types of cases in eastern USA, and as low as 11% in Taiwan)

*general pessimism were more common in Scotland*<sup>6</sup>). And all of this begs the question of how lawyers, and more widely the legal system, help their clients solve their legal problems.

Indeed, the very ills that the Review sets out to address (*'antiquated' procedures, 'inadequate' remedies and slow, inefficient and expensive' service to the public*<sup>7</sup>) suggest that what clients seek from their legal representatives is not a headlong rush to court. The fact that most of Scotland's top legal firms have morphed their litigation departments to 'Dispute Resolution'<sup>8</sup> departments tells us something of the culture shift that is underway. And even the most committed litigators will tell you they consistently advise their clients to avoid the courts.

So what are the skills required of a modern lawyer in a modern legal system? I draw on recent work by John Lande and Jean Sternlight who look at the contribution that ADR teaching can make to *'real world lawyering'*<sup>9</sup>. They suggest that, while the bulk of a lawyer's education focuses on legal research, analysis and reasoning, the real-life work of a lawyer requires: *'various other strengths including perseverance, judgment, interpersonal skills, and the ability to communicate effectively both orally and in writing.'*<sup>10</sup> They also set out six important roles lawyers need to fulfil:

- 1) Interviewer
- 2) Counsellor
- 3) Process-selection advisor
- 4) Negotiator
- 5) Advocate
- 6) Transactional problem-solver (drafting agreements, obtaining authorisations or permits, facilitating projects)<sup>11</sup>

They enumerate further flaws in the traditional 'case-based' approach to legal education. Because the bulk of the cases studied are appeals, *'the facts as established by the trial court are necessarily viewed retrospectively and with great certainty'*.<sup>12</sup> By contrast, in the real world lawyers have to think in advance about uncertain, disputed and sometimes

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<sup>6</sup> Genn, H & Paterson, A (2001) *Paths to Justice Scotland: What People in Scotland Do and Think About Going to Law* Oxford: Hart Publishing, p.252

<sup>7</sup> Civil Courts Review, p.i

<sup>8</sup> *'It's all about not going to court'* [www.biggartbaillie.co.uk/services/dispute-management](http://www.biggartbaillie.co.uk/services/dispute-management)

<sup>9</sup> Lande, J & Sternlight, J (2010) 'The Potential Contribution of ADR to an Integrated Curriculum: Preparing Law Students for Real World Lawyering' *25 Ohio State Journal on Dispute Resolution* 247-298

<sup>10</sup> Lande & Sternlight, 2010, p.259

<sup>11</sup> c/f MacFarlane, J & Manwaring, J (2006) 'Reconciling Professional Legal Education with the Evolving (Trial-less Reality of Legal Practice' *Journal of Dispute Resolution* 253-272 @ Appendix A Following a 'skills audit' these authors list 6 skills new lawyers need to learn: client relationships; managing a client file (dispute resolution); managing a client file (transactions and applications); legal research and writing; practice management; ethical issues and professionalism

<sup>12</sup> *Id*, p.265

unprovable facts. This factor is arguably more significant than 'the law' in the majority of cases.

Furthermore, they argue that legal education fails to provide an adequate '*apprenticeship of identity*<sup>13</sup>' – that is, what kind of lawyers are they going to be? '*Law students would understandably think that disputes are mostly resolved by judges and that lawyers spend most of their time in appellate litigation.*<sup>14</sup> In reality, as the above list suggests, there is a huge hinterland of legal work quite unconnected to litigation.

### How would ADR teaching help?

In the USA, unlike Scotland, the vast majority of law schools offer courses in ADR.<sup>15</sup> However, nearly all are offered as electives, a specialism for the enthusiastic minority. I want to propose that Scotland takes the opportunity to skip this phase and integrate ADR teaching directly into mainstream legal teaching. For the reasons outlined below, a grounding in alternative dispute resolution techniques makes for better lawyers, even if they never conduct a mediation.

First of all, of course, training in ADR is valuable in itself. Clients, whether from business or the public sector, are increasingly careful about how they spend their money. If lawyers fail to direct them towards the cheapest and fastest route for resolving their particular problem they will look elsewhere. Lawyers who understand and are familiar with mediation, arbitration and negotiation will more effectively fulfil the role of 'process-selection advisor', as well as being able to carry out the work itself when the occasion requires it.

Negotiation warrants particular attention. Although, or perhaps because, negotiation is so central to lawyers' day-to-day work, it is hard to find any reference to it within a Scottish undergraduate degree. It sneaks into the Diploma in Legal Practice, and then appears more centrally in Professional Competence Courses for trainees. It is as if negotiation is an 'add-on', a technique which can be tacked on to the doctrinal and analytical knowledge which students quickly learn is 'real' law. And yet, in practice, not only is negotiation a significant skill in its own right, with its own theory and techniques, but we all know from experience that some people are better at it than others. Even more importantly, real legal problems which are settled by negotiation are tangibly different from those which students learn about in case law. The application of the law to a particular situation is not just a theoretical matter: how we negotiate the outcome of a dispute depends on a complex cocktail of practical, evidentiary, financial, motivational and legal factors. I propose that negotiation be integrated into the legal curriculum from the outset.

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<sup>13</sup> Sullivan, W et al (2007) *Educating Lawyers: Preparation for the Profession of Law* cited in Lande & Sternlight, p.266

<sup>14</sup> *Id*, p.266

<sup>15</sup> 140 out of 151 included in an American Bar Association survey in 2002. See *id*, note 101

This leads to the second benefit of ADR instruction, a multi-disciplinary perspective. Negotiation and mediation courses particularly draw on knowledge from other disciplines: economics, communication theory, sociology and psychology to name but four.<sup>16</sup> Where else might lawyers learn about the distorting effects of cognitive biases such as the 'self-serving bias': *'the tendency ... to conflate what is fair with what benefits oneself'*?<sup>17</sup> And where else will lawyers learn how to work with their clients' (and their own) emotions? Lande and Sternlight also list *'insights with respect to memory, lying, listening, empathy and persuasion.'*<sup>18</sup> This is not to say that a thorough knowledge of black-letter law is unimportant. It is just that real life lawyering involves wrestling with messy, disputed facts; with subjective or even 'unreasonable' clients; and sometime, dare we say it, opposite numbers or even judges who are less than perfectly rational.

A third by-product of an ADR approach is to get beyond what might be termed the 'pathological' approach of case law, its emphasis on the past and on disputes. *'The gist of teaching lawyering is to encourage students to think not only as a judge, but also as a client and an attorney.'*<sup>19</sup> A great many of the legal problems brought to law firms relate to prospective matters, where the avoidance of disputes is the primary goal and factors like cost and the pros and cons for particular steps come into play. And more often than not it is the clients' interests rather than the 'facts' which matter. 'Principled Negotiation'<sup>20</sup>, a root of both negotiation and mediation training, contains the injunction to *'focus on interests, not positions'*. Clients' interests are broad, but they hardly appear in traditional legal education. Students could be forgiven for thinking that the goal of effective lawyering is proving facts and winning cases. Yet sometimes clients need a lawyer to help them think through the *'economic, reputational, psychological, moral, and justice implications of alternative courses of action.'*<sup>21</sup> ADR teaching helps lawyers to consider this range of clients' interests, including less tangible matters like the desire for an apology and to prevent others going through the same trouble as them.

Finally, thinking about our own jurisdiction, a further and particular contribution that ADR teaching can make to the lawyers of the future is this: confidence. It is hardly considered remarkable among those who teach law that Scottish students are often unprepared to speak up, lack conviction about their own views and seem ill-prepared to begin life as forceful and effective lawyers. The current style of teaching does little to help. An American academic recently wrote: *'When I went to Scotland for graduate school, I discovered that the script for attending class involved sitting quietly and taking notes while*

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<sup>16</sup> Kenneth Cloke identifies 40 disciplinary sources for mediation. See Cloke, K (2007) 'Let a Thousand Flowers Bloom: A Holistic, Pluralistic and Eclectic Approach to Mediation' *ACResolution Winter 2007* 26-30

<sup>17</sup> Babcock, L & Lowenstein, G (1997) 'Explaining Bargaining Impasse: The Role of Self-serving Biases' *11 Journal of Economic Perspectives (1)* 109-126 at p.110

<sup>18</sup> Lande & Sternlight, 2010, p.267

<sup>19</sup> Lande & Sternlight, 2010, p.279

<sup>20</sup> Fisher, R, Ury, W and Patton, B (1991) *Getting to Yes: Negotiating Agreements Without Giving In'* London: Random House

<sup>21</sup> Lande & Sternlight, 2010, p.261

*the professor lectured.*<sup>22</sup> By contrast, in any form of ADR teaching students learn both to listen and speak. They learn how to use questions and summaries effectively, how to ensure that their and the client's understanding are the same and how to problem-solve by developing a range of options, all through learning by doing. This is not to criticise current courses in advocacy or negotiation, but the fact that they are electives rather than core is troubling. Are we saying that effective communication is an optional extra?

### Challenge for the immediate future

I suggest, then, that ADR teaching, focusing in particular on negotiation and mediation, provides four tangible benefits for law students:

- 1) Familiarity with the processes themselves, enabling them to fulfil the role of 'process-selection advisor' as well as become the mediators of the future
- 2) Gain key insights from other disciplines
- 3) A broader perspective on clients' needs and interests beyond simply winning in court
- 4) Confidence, flowing from the 'learning by doing' approach of ADR

All of this begs the question: what are Scottish law schools doing to face up to this challenge? An honourable mention goes to University of Dundee, with its LLM in International Dispute Resolution; and University of Strathclyde Law School will be running a Postgraduate Certificate in Mediation and Conflict Resolution from September, forming the first year of a part-time Masters programme. However, neither of these breaks the mould of elective, specialist courses.

Closer to the above vision is Strathclyde Law School's proposed Clinical LLB. This builds on its highly successful Law Clinic which since 2003 has given students the opportunity to put their legal knowledge into practice by advising and representing clients. Most cases are negotiated and settled before court thus teaching students that courts are usually a last resort. Students who follow the clinical path will learn law from the outset via a 'problem-solving' method, much as medical students have done in Glasgow for more than a decade. In keeping with the vision of this paper, negotiation, mediation and ethics are taught as core skills alongside advocacy in one of the four core clinical classes and students are encouraged to reflect throughout on the effectiveness of the legal system in delivering justice.

This seems the ideal opportunity to integrate negotiation and mediation approaches from the outset. For example, why not get students to work through the 'snail in the ginger-beer bottle', meeting the clients, establishing their interests, negotiating and mediating? And if no settlement is achieved, representing them in their subsequent court actions? As well as learning about this famous precedent, students would emerge with a keen sense of the

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<sup>22</sup> Docherty, J, (2003) 'Culture and Negotiation: Symmetrical Anthropology for Negotiators' *87 Marquette Law Review*, 711-722

perspectives and interests of all the players. It only takes a little imagination to see how ADR teaching could enrich the lawyers of the future.

This article does not dwell on the other challenges thrown up by the Review: how to ensure that the current generation of practitioners and judges are properly informed about ADR, for example. Scotland may not rush to embrace novel ideas in the same way as our New World cousins, but when we do choose to do something we tend to do it thoroughly and well. I believe that the 'Scottish model' of mediation is developing as we speak, and that the next generation of law students will embrace this approach to lawyering as something entirely normal.