

## Oklahoma City University School of Law

---

From the Selected Works of Phyllis E. Bernard

---

2001

# Teaching Ethical, Holistic Client Representation in Family ADR

Phyllis E. Bernard, *Oklahoma City University School of Law*



Available at: [https://works.bepress.com/phyllis\\_bernard/18/](https://works.bepress.com/phyllis_bernard/18/)

# TEACHING ETHICAL, HOLISTIC CLIENT REPRESENTATION IN FAMILY ADR

*Phyllis E. Bernard\**

## I. INTRODUCTION

At the Oklahoma City University School of Law ("OCU"), the Center on Alternative Dispute Resolution conducts a Summer ADR Institute designed to train law students in the skills needed for an attorney to represent a client appropriately outside the courtroom. This paper describes the Summer Institute's track of courses in family law, with an emphasis on the class solely devoted to client counseling in domestic violence situations. All three classes in the family law track operate on the fundamental paradigm—that the attorney has an ethical obligation under the ABA Model Rules of Professional Conduct ("MRPC") to identify whether domestic violence is a factor in the divorce or child custody matter undertaken by the attorney; and, further, that the attorney has an ethical obligation to protect the client from receiving or inflicting additional harm. (The basis of this ethical obligation will be discussed more in Part VII *infra*.)

As with all classes in the Summer Institute, the family law track attempts to ground the learning experience as firmly as pos-

---

\* Professor of Law and Founding Director, Center on Alternative Dispute Resolution, and Director of the Early Settlement Central Mediation Program, Oklahoma City University School of Law, Oklahoma City, Okla. A.B. *cum laude* 1976, Bryn Mawr College, Bryn Mawr, Pa.; M.A. 1978, Graduate School of Arts and Sciences, Columbia University, New York, NY; J.D. 1981, University of Pennsylvania Law School, Philadelphia, Pa. I wish to express my unending thanks to the "midwives of change" who inspired and especially supported creating the Family Law Track described in this paper: Sue Darst Tate, Bobbie Burbridge Lane, Carole Hansen, Stephanie Hudson, Gail Puckett, and Gay Hellman.

sible in real life, using a coherent statutory, procedural, and ethical structure. This structure is found in the Oklahoma Dispute Resolution Act,<sup>1</sup> which established the Oklahoma Supreme Court's statewide mediation program, known as Early Settlement.<sup>2</sup> The Institute uses the implementing rules adopted by the Oklahoma Supreme Court,<sup>3</sup> including the Code of Professional Conduct for Mediators,<sup>4</sup> and Early Settlement training protocols.<sup>5</sup> To the maximum extent feasible, all case studies employed for role plays, simulations, etc. are drawn from the case files of Early Settlement with names, locations, and some facts changed to protect the privacy of the parties.

We did not originally intend to focus our course offerings so heavily on domestic violence. This evolved as a necessary response to the lack of understanding the Early Settlement Central office (a part of the OCU Center on Alternative Dispute Resolution) encountered in some dealings with attorneys and judges in the three-county area served by the program. As mandated by the Oklahoma Supreme Court, Early Settlement Central conducts

---

1. OKLA. STAT. ANN. tit. 12, § 1801 (West 1993).

2. *Id.*

3. See OKLA. STAT. ANN. tit. 12, ch. 37, apps. A-D (West 1993).

4. *Id.* app. A (Code of Professional Conduct for Mediators).

5. As designed and implemented, the Family and Divorce Mediation Project of the Supreme Court of Oklahoma holds:

Those cases considered inappropriate are those in which spousal abuse, child abuse or neglect, mental illness, and/or active substance abuse or alcoholism are reported by either or both parties. In order to identify whether or not these inappropriate issues are present, each party will be asked to complete an intake screening adapted from the work of Linda Girdner, Ph.D.

Case Referral, Selection and Screening in the Report of the Task Force on Mediation of Divorce Issues and the Dispute Resolution Advisory Board [hereinafter Task Force Report] (also referred to as the Oklahoma Plan for Family & Divorce Mediation), Memorandum to the Supreme Court of Oklahoma at 2 (Nov. 29, 1995).

The Early Settlement Family and Divorce Mediation Flow Chart appended to the Task Force Report explicates the system for "Arranging the Mediation." *Id.* The Early Settlement director or intake worker contacts each party by letter or by telephone to arrange a convenient time to individually complete the intake screening adapted from the work of Dr. Girdner. *Id.*; *Mediation Triage*, 7 *MEDIATION Q.* 365-76 (1990). The person completing intake will also inquire as to whether each party has attended a parenting through divorce class or would like further information about classes. See Memorandum to the Supreme Court of Oklahoma at 5. The Early Settlement director or intake worker accepts/declines the case based on the outcome of the intake screening. See *id.* (Cases deemed inappropriate are those in which spousal abuse, child abuse or neglect, mental illness, or active substance abuse or alcoholism are reported by either or both parties.) *Id.* at 7.

extensive pre-mediation interviews with both parties to a proposed family mediation. The 45-minute to one-hour separate, private interviews screen for past or present occurrences of domestic violence, current alcohol abuse or other substance abuse, and various other factors which may indicate a gross and unacceptable imbalance of power between the parties. Following the rules of the Oklahoma Supreme Court for its own mediation program—not mandatory for other mediations not under Early Settlement—such cases are denied.<sup>6</sup> Sometimes a denial has raised the ire of the judge who ordered the case to mediation; or, of the attorney who saw Early Settlement mediation as the most affordable route for resolving their client's case. Through the Oklahoma Supreme Court's annual Judicial Conference, the Administrative Office of the Courts has undertaken to educate judges about handling domestic violence cases generally.<sup>7</sup> Throughout the summer, ADR Institute OCU School of Law has undertaken to educate lawyers-in-training about domestic violence cases and ADR specifically.

## II. MEDIATION AND DOMESTIC VIOLENCE

The American Bar Association Commission on Domestic Violence in a 1999 report tackled the difficult question: is mediation appropriate when a divorce or child custody case involves domestic violence?<sup>8</sup> This is a contentious issue among the lawyers,

---

6. OKLA. STAT. ANN. tit. 12, ch. 37, § R. 8 ("An initial interview will be conducted . . . for the purpose of determining the identity of the parties, if the matter is appropriate for mediation and if the parties are capable of meaningful participation in the mediation process."). See also *supra* note 5.

7. Each year the Administrative Office of the Courts presents an extensive series of continuing legal education classes for all judges in the state of Oklahoma. Since 1996 the Annual Judicial Conference has featured major presentations on domestic violence, educating judges, attorneys, and court personnel about the psychological, emotional, and social aspects of the problem, and about the justice system's appropriate response. Featured presenters have included Paul Mones, Esq., *Domestic Violence is Child Abuse*, at the Winter Judicial Conference Nov. 11–15, 1996; Sarah Buel, Esq., *Domestic Violence*, at the 1997 Summer Judicial Conference, July 14–17, 1997. Oklahoma Attorney General Drew Edmondson has recently undertaken a major educational effort under the auspices of a grant by the United States Department of Justice to raise the level of understanding among judges, law enforcement, and social service agencies. Conversation with Deborah Bruce, J.D., Coordinator of Judicial Education, Administrative Office of the Courts (Nov. 28, 2000).

8. In 1999–2000 the American Bar Association Commission on Domestic Violence submitted to the House of Delegates a Recommendation and Report "that the American Bar

judges, family therapists, and social workers who deal with family law cases all the time.<sup>9</sup> It is, or should be, an important question as law schools instruct students in client counseling.

OCU's decision to instruct law students in identifying spousal battery was not a radical feminist attempt to recreate the law school curriculum. This was a forward-looking acknowledgment that sweeping changes have occurred in how states handle (1) domestic violence and (2) child custody. From the 1990s onward one could little dispute the fact that spousal battery has increasingly been treated as a crime; not merely a lover's quarrel.<sup>10</sup> It became a public matter for prosecution, instead of a private

---

Association recommends that court-mandated family law mediation include an opt-out prerogative in any action in which one party has perpetrated domestic violence upon the other party or a child of either party." Report to the House of Delegates, Draft of April 2000. As the report goes on to explain, mediation may be:

counter-productive and dangerous when one parent has perpetrated domestic violence against the other. . . . First, domestic violence arises under circumstances where an imbalance of power is entrenched in the relationship. Second, perpetrators of domestic violence may use the legal system to further manipulate and abuse their victims. Third, mediation may endanger victims by placing them in a situation where they have to see their abusers in person and discuss issues that threaten the abuser's sense of control.

*Id.* at 2. This position was endorsed by the ABA Section on Dispute Resolution at the 2000 Annual Meeting and adopted by the House of Delegates in August 2000. See generally ABA Commission on Domestic Violence, Multidisciplinary Responses to Domestic Violence Commission Home Page, available at <http://info@abanet.org>.

9. A good summary of this discussion at mid-decade can be found in Dane A. Gaschen, *Mandatory Custody Mediation: The Debate over Its Usefulness Continues*, 10 OHIO ST. J. ON DISP. RESOL. 469 (1995). The *Ohio State Journal on Dispute Resolution* (the scholarly publication of the American Bar Association Dispute Resolution Section) continued to be a major forum for this debate. By the end of the 1990's a growing body of experience with mandatory mediations was being examined and began to influence the debate. See Jennifer P. Maxwell, *Mandatory Mediation of Custody in the Face of Domestic Violence: Suggestions for Courts and Mediators*, 37 FAM. & CONCILIATION CTS. REV. 335 (1999); Kerry Loomis, *Domestic Violence and Mediation: A Tragic Combination for Victims in California Family Court*, 35 CAL. W. L. REV. 355 (1999). But see Kara C. Utzig, *Entering the Debate on Spousal Abuse Divorce Mediation: Safely Managing Divorce Mediation When Domestic Violence is Discovered*, 7 CIRCLES BUFF. WOMEN'S J. L. & SOC. POL. 51 (1999); Donna Coker, *Enhancing Autonomy for Battered Women: Lessons From Navajo Peacemaking*, 47 UCLA L. REV. 1 (1999).

10. For a condensed review of statutory changes see Holly Joyce, *Mediation and Domestic Violence: Legislative Responses*, 14 J. AM. ACAD. MATRIMONIAL L. 447 (1997). For a compendium of changes in the attitudes and actions of law enforcement see Nancy Egan, *The Police Response to Spouse Abuse: A Selective, Annotated Bibliography*, 91 LAW. LIBR. J. 499 (1999). A recent update is found in Sally F. Goldfarb, *Violence Against Women and the Persistence of Privacy*, 61 OHIO ST. L.J. 1 (2000).

matter to be resolved behind closed doors. Yet the transition still has far to go.

With this in mind, it seems ironic that during this transition toward the criminalization of spousal abuse many legislatures and courts would promote referral to mediation for all family cases involving child custody. Generally, this trend was intended to support improved parental contact with both parents often irrespective of whether one parent has been identified as a batterer.<sup>11</sup> In all too many areas such referrals were mandatory, non-discretionary, with no prior screening for the presence of domestic violence.

Critics of such practices arose and some found their voice in the eloquence of the late Professor Trina Grillo. Her article, *Process Dangers for Women*,<sup>12</sup> became the touchstone for serious examination of the ethics, fairness, and effectiveness of mandatory referrals. Do such mediations result in lopsided agreements that are the result of duress? Do mediators in such cases surreptitiously arrogate to themselves the power of an adjudicator, without offering to the disempowered spouse the protections of the courtroom? Professor Grillo's article has been cited innumerable times in the growing body of work by scholars attempting to make sense of this rapidly developing process. But now the real question is: What do we do about it? How do we respond to her insights as more than an academic exercise?

### III. THE ATTORNEY'S ROLE IN FAMILY ADR

Professor Penelope Bryan has provided a great service to the field through her series of articles analyzing the dynamics of power in mediation and negotiation of divorce and child custody cases; and, more pointedly, the proper response of the attorney.<sup>13</sup>

---

11. See D. Lee Khachaturian, *Domestic Violence and Shared Parental Responsibility: Dangerous Bedfellows*, 44 WAYNE L. REV. 1745 (1999). A thoughtful examination of the practices of several states is presented by Clare Dalton in *When Paradigms Collide: Protecting Battered Parents and Their Children in the Family Court System*, 37 FAM. & CONCILIATION CTS. REV. 273 (1999).

12. Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545 (1991).

13. See Penelope E. Bryan, *Killing Us Softly: Divorce Mediation and the Politics of Power*, 40 BUFF. L. REV. 441 (1992); Penelope E. Bryan, *Reclaiming Professionalism: The*

The paradigm Professor Bryan has articulated answers some of the dilemmas presented to me when I first began discussing—naively—the benefits of mediation as an empowering experience for the woman who is divorcing.

At an informal lunch discussion sponsored by the University of Oklahoma Women's Studies Department, I spoke about family mediation, including how and when a mediation works well, that it can permit a woman who has been psychologically or emotionally victimized to reclaim her personal power. Almost every woman in the room had been divorced, except for myself. They shared with me that their experience would suggest this "empowerment" comes at too high a price. Literally. They believe that the estranged wife would be required to pay for this honesty through reduced alimony, child support, or other financial arrangements concerning the dissolution of the marital estate. As Professor Judith Maute reminded me that day, if the attorney abdicates her role as the client's protector, the client may well end up among the largest segment of people in poverty: women and children who have gone through divorce. Professor Maute's advice and Professor Bryan's would be in sync: The attorney retains a responsibility to assess when the attorney should be the lightning rod for the estranged husband's anger, and when the client needs to consider other venues for reclaiming personal power, such as therapy.

How can an attorney make such an assessment when the issues are so sensitive and emotional? The attorney well trained in ADR will interview and counsel fully with the client, well in advance. She is seeking to learn the full picture of the client's tangible resources (income, education, occupation) and intangible resources (intelligence, status, attitude toward risk, emotional states). What is the client's need for psychological closure? Is the client operating from a position of guilt? Low self-esteem? Low expectations? By developing this full picture, the lawyer can identify whether their client is "high-risk." As Professor Bryan describes it:

---

*Lawyer's Role in Divorce Mediation*, 28 FAM. L.Q. 177 (1994); Penelope E. Bryan, *The Coercion of Women in Divorce Settlement Negotiations*, 74 DENV. U. L. REV. 931 (1997); Penelope E. Bryan, *Women's Freedom to Contract at Divorce: A Mask for Contextual Coercion*, 47 BUFF. L. REV. 1153 (1999).

When a husband and wife possess vastly different negotiating power, mediation is likely to produce a lopsided agreement. As proclaimed neutrals, mediators cannot protect the at-risk spouse. Only the spouse's lawyer can provide adequate protection. An attorney who can identify which spouse has less power can predict when mediation is likely to prove disadvantageous and when lawyer intervention will be necessary.<sup>14</sup>

Most attorneys are trained solely to operate in the courtroom, in an environment where behavior is bounded by the rules of civil procedure, evidence, and local court rules. The bulk of the Model Rules of Professional Conduct reference litigation far more frequently than negotiation or mediation.<sup>15</sup> Nevertheless, most clients, particularly in a divorce or child custody case, will need to consider whether some form of ADR is more suitable than litigation for all or part of their situation. As several authors have recently noted, the experience of many practicing attorneys in family mediation has been—generously phrased—sub-optimal.<sup>16</sup> Perhaps, I would argue, this is because these authors have not had the opportunity to learn the different approaches required by the attorney in settings outside the courtroom. Legal education focuses little attention on the lawyer as counselor and advisor, despite the clear mandate of Model Rule of Professional Conduct 2.1 Advisor, and its commentary.<sup>17</sup> Consider especially comment 2 of Rule 2.1:

Advice couched in narrowly legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant. Purely technical legal advice, therefore can be inadequate. It is proper for a lawyer to refer to

14. Bryan, *Reclaiming Professionalism*, *supra* note 13, at 193.

15. Professor Carrie Menkel-Meadow has been a leader in the effort to articulate the ethics of the non-adversarial process. See, e.g., Carrie Menkel-Meadow, *Ethics in Alternative Dispute Resolution: New Issues, No Answers from the Adversary Conception of Lawyers' Responsibilities*, 38 S. TEX. L. REV. 407, 408-15 (1997).

16. See Mary P. Treuthart, *In Harm's Way? Family Mediation and the Role of the Attorney Advocate*, 23 GOLDEN GATE U. L. REV. 717, 731-42 (1993); Susan W. Harrell, *The Mediation Experience of Family Law Attorneys*, 20 NOVA L. REV. 479, 486-88 (1995).

17. MODEL RULES OF PROF'L CONDUCT R. 2.1 (2000). "In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation."



be inadequate. It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice. Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied.<sup>18</sup>

Further, a brittle ethos seems to have developed that renders many lawyers mute about considerations of morality and interpersonal skills in client representation. Lawyers often feel adrift; law students even more so. Without systematic training support for the attorney in this new arena, it is not surprising that in some regions one finds that family law attorneys have little enthusiasm for mediation.

#### **IV. THE REAL LIFE CONTEXT FOR TEACHING ABOUT DOMESTIC VIOLENCE AND ADR IN OKLAHOMA**

The Summer ADR Institute operates in close connection with the Early Settlement program. This provides a coherent, real life context for all instruction. The "universe" is defined procedurally and ethically. It is concrete, not hypothetical. Nor could a student claim that it was a moral "blank slate," leaving them with little guidance other than instinct. The Oklahoma Supreme Court has already addressed directly or indirectly many of the policy matters that an attorney must take into consideration. Let us, then examine the contours of this instructional universe.

##### **A. A General Description of the Court-Connected Dispute Resolution Program Operated by Oklahoma City University School of Law**

The OCU Center on Alternative Dispute Resolution holds the contract with the Oklahoma Supreme Court to provide mediation and other conflict resolution services in central Oklahoma. The Administrative Office of the Courts centrally administers a state-wide dispute resolution established under the Oklahoma Dispute Resolution Act,<sup>19</sup> which sets forth a comprehensive and advanced

---

18. MODEL RULES OF PROF'L CONDUCT R. 2.1 cmt. 2.

19. OKLA. STAT. ANN. tit. 12, §§ 1801-1806 (West 1993 & Supp. 2000).

statute and implementing body of court rules governing mediation, including confidentiality.<sup>20</sup> Under the Protective Services for the Elderly Act of 1977<sup>21</sup> and Title 21, Section 846<sup>22</sup> which deals with persons under age eighteen, the mediator is responsible for reporting information to the proper agencies upon learning that any elderly or handicapped person or child has had physical injury or injuries inflicted upon him or her, by other than accidental means, where the injury appears to have been caused as a result of physical abuse or neglect, conflicts of interest,<sup>23</sup> and an enforce-

20. OKLA. STAT. ANN. tit. 12, § 1805. Section 1805 of the Oklahoma Dispute Resolution Act establishes broad and firm confidentiality protection for mediation communications:

A. Any information received by a mediator or a person employed to assist a mediator, through files, reports, interviews, memoranda, case summaries, or notes and work products of the mediator, is privileged and confidential. . . .

C. No mediator, initiating party, or responding party in a mediation proceeding shall be subject to administrative or judicial process requiring disclosure of any matters discussed or shall disclose any information obtained during any part of the mediation proceedings.

*Id.* The Code of Professional Conduct for Mediators details more guidelines concerning confidentiality:

(1) The mediator shall not reveal, outside the negotiations, information gathered during mediation.

(2) The mediator may disclose information from mediation after obtaining the expressed, written permission of all pertinent parties or when permitted by statute.

OKLA. STAT. ANN. tit. 12, ch. 37, app. A.

21. OKLA. STAT. ANN. tit. 43A, §§ 10–101 (West 1990).

22. OKLA. STAT. ANN. tit. 21, § 846 (West 1983).

23. The Code of Professional Conduct for Mediators addresses conflicts of interest in several sections:

B. When it is improper to be a mediator:

(1) The mediator who has represented or counseled a client beforehand shall not accept the role of mediator.

(2) The mediator who has prior acquaintance with a party shall not accept the role of mediator, unless the current parties, when informed of the prior acquaintance, mutually agree that the mediator shall conduct the mediation.

(3) The mediator who has biases or prejudices either for or against one of the parties or the issues in dispute shall not accept the role of mediator.

C. Mediator's impartiality

(1) The mediator shall maintain impartiality at all times.

(2) The mediator does not represent a party of mediation in court concerning the issues which were the subject of mediation. . . .

(4)(a)(3) The mediator shall work within the policy of the sponsoring agency, and shall avoid the appearance of impropriety.

(4)(a)(4) The mediator shall not use the third-party role of personal gain or advantage.

(5) The mediator shall not accept money nor anything of value for services, other than the collection of fees listed elsewhere in the Oklahoma Rules and Procedures for Dispute Resolution Act.

able code of ethics dating from 1986.<sup>24</sup> The system is funded through a modest allocation of court filing fees, with the result that mediation services are provided free of additional charge for any case filed in an Oklahoma district (county) court.<sup>25</sup> Other cases are mediated for the flat fee of five dollars per party, although even this minimal fee can be waived if it presents a financial hardship.<sup>26</sup>

The statewide system consists of eleven Early Settlement offices that offer services to every part of the state. Early Settlement Central at OCU School of Law serves a geographic region roughly equivalent to the northern half of the state of New Jersey, the western two-thirds of the state of Massachusetts, or the greater New Orleans and Baton Rouge areas combined. Early Settlement Central is used as a resource for all Early Settlement programs statewide when a mediation involves persons with a tribal affiliation, or for a mediation between private citizens and public officials or governmental bodies, where a transformative approach is preferred. Thus, in these specialized areas of dispute resolution, Early Settlement Central's service region extends to the entire state, an area larger than any state east of the Mississippi River.

Under the direction of the Oklahoma Dispute Resolution Act and implementing rules by the Oklahoma Supreme Court, the Administrative Office of the Courts provides uniform training and monitoring of all volunteer mediators in the court-connected program. The Court certifies Early Settlement mediators through the directors/coordinators of each designated area's program. At Early Settlement Central we maintain a roster of fifty to seventy certified mediators annually, including approximately twenty mediators who have been trained and certified in advanced techniques for mediating cases involving divorce, child custody and post-decree modifications of child custody orders. Each year roughly ten of Early Settlement Central's mediators will be OCU

---

(6) The mediator shall not voluntarily incur obligations or perform professional services that might interfere with the ability to act as an impartial mediator.

OKLA. STAT. tit. 12, ch. 37, app. A.

24. *Id.*

25. OKLA. STAT. ANN. tit. 12, § 1809 (West Supp. 2000).

26. *Id.*

law students participating in the Mediation Clinic for academic credit.

## V. GENERAL DESCRIPTION OF THE SUMMER ADR INSTITUTE

Because so many law students are interested in learning about alternative dispute resolution and because the number of students who can be accommodated in the Mediation Clinic is limited, the Center on Alternative Dispute Resolution established a Summer ADR Institute ("Institute") in 1999. The Institute, a "summer training camp for the best all-around lawyer," does not certify students as trained neutrals. Rather, the Institute focuses on educating law students, practicing attorneys, and paralegals in the ethical and effective use of negotiation, mediation, and arbitration to best serve a client's interests. In order to provide a consistent and real-world context for all classes, the Institute's teaching materials include the American Bar Association Model Rules of Professional Conduct (with references to Oklahoma's often more demanding adaptations of the MRPC), the Oklahoma Dispute Resolution Act, Supreme Court Rules, and Early Settlement training manuals and modifications of actual cases. Instruction blends theory with practice through a series of lectures and discussions, "fish bowl" group exercises, and individual simulations, often coached by Early Settlement certified mediators. Approximately forty to fifty law students participate in the Summer ADR Institute each summer.

The Summer ADR Institute offers, sequentially, three concentrated (eleven-day) foundational courses each for two credit hours: (Part I) Client Representation in Negotiated Settlement; (Part II) Client Representation in Mediation; and (Part III) Client Representation in Arbitration. At the end of each foundation course the Institute offers a weekend one credit hour class which focuses on how the newly acquired skills might be applied in a more specialized setting. To provide a coherent and in-depth learning experience, students are encouraged to complete a full three-class track in either Tribal Affairs<sup>27</sup> or Family Law.

---

27. The Tribal Affairs Track begins with an overview class in Native American History and Cultures, in order to establish a common understanding of how traditions, spirituality and

All classes in the Family Law Track are team-taught by one male and one female professor. In order to provide continuity, one professor from each class continues on to the next class. The professors attempt to model for the students the type of facilitative, client-centered, problem-solving<sup>28</sup> approach that the Institute encourages students to adopt for their own practice. It is a challenging venture: helping students identify and then counsel clients regarding appropriate choices to resolve their divorce or child custody matter, while keeping in mind that domestic violence may well be present or potential in twenty to twenty-five percent of cases they will encounter.<sup>29</sup>

The three-class sequence on this track is: Client Counseling in Domestic Violence Situations, ADR in Divorce and Child Custody Cases, and ADR in Post-Decree Modifications for High Conflict Families. Following is a more detailed description of the class specific to domestic violence, a more concise description of the other two classes, and an overall description of the Family Law Track.

---

law intersect. Next, students take a short class in Native American Law and ADR, to learn the basics of federal, state, and tribal laws governing areas where ADR might be particularly effective: e.g., Indian Child Welfare Act cases, cases involving communal use of land, and reconciling juveniles to their community when a crime has been committed. The capstone class is Tribal Peacemaking, which introduces how the OCU Center on Alternative Dispute Resolution has adapted Early Settlement's generic model of mediation to bridge the gap between law and culture. All classes in the Tribal Affairs Track are taught by Native American professors.

28. Much of our pedagogical structure draws from the seminal work of David A. Binder, Paul Bergman, and Susan C. Price. See generally DAVID A. BINDER, *LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH* (1991). See also Linda F. Smith, *Interviewing Clients: A Linguistic Comparison of the "Traditional" Interview and the "Client-Centered" Interview*, 1 CLINICAL L. REV. 541, 544-52 (1995); Michelle S. Jacobs, *People From the Footnotes: The Missing Element in Client-Centered Counseling*, 27 GOLDEN GATE U. L. REV. 345, 349-61 (1997).

29. The most recent and most comprehensive national report on the prevalence and incidence of intimate partner violence estimates that 24.8% of women and 7.6% of men report having been raped or physically assaulted by their partner during their lifetime. PATRICIA TJADEN & NANCY THOENNES, U.S. DEP'T OF JUSTICE, *EXTENT, NATURE, AND CONSEQUENCES OF INTIMATE PARTNER VIOLENCE: FINDINGS FROM THE NATIONAL VIOLENCE AGAINST WOMEN SURVEY 9* (2000).

## VI. DESCRIPTION OF THE FAMILY LAW TRACK—SPECIAL FOCUS ON DOMESTIC VIOLENCE

The guiding principles of the Summer ADR Institute for teaching about domestic violence are those established by the Oklahoma Supreme Court in founding the state's court-connected family mediation services. After studying the difficult experiences of other jurisdictions, voluminous research concerning the latest findings on the prevalence and patterns of domestic violence, and careful consideration of the philosophy and resources of the Oklahoma legal system, the Oklahoma Supreme Court determined that domestic violence is a criminal matter best handled through the power of the court and the police.<sup>30</sup> A victim of domestic violence who is compelled to sit at the table with his or her abuser to negotiate the dissolution of their marriage or the custody of their children faces a severe power imbalance that can undermine the integrity of the mediation process itself and call into question the fairness of agreements made under such duress. Further, the court determined that the victim of domestic violence who participates in good faith in a facilitative mediation may face an unreasonable risk of deadly retribution by the abuser.<sup>31</sup> Therefore, Early Settlement programs statewide conduct pre-mediation interviews separately with both parties to screen out domestic violence, alcoholism or other substance abuse—indicia that a party to the mediation may not be acting voluntarily and knowledgeably, a fundamental statutory requirement for the court-connected program.

In the Summer ADR Institute, law students are introduced to the profound moral, psychological, and legal responsibilities that an attorney faces when she undertakes a divorce or child custody matter. Despite a practice by some family court judges in certain jurisdictions to refer all family cases to mediation, the attorney retains an ethical obligation to use her considered, professional judgment to assess whether mediation is appropriate in her client's case. It may be that some aspects of the case could be me-

---

30. See *supra* note 5.

31. Alison E. Gerencser, *Family Mediation: Screening for Domestic Abuse*, 23 FLA. ST. U. L. REV. 43, 44, 58 (1995). I shared this article with the Early Settlement Directors statewide early in the development of the court-connected family mediation program. It proved an extremely valuable framework for our decision-making as we evaluated cases day by day.

diated face-to-face, between the parties, while others require negotiation by the attorneys, while still other aspects may require arbitration or adjudication. The Institute teaches that one of the most critical elements in making this assessment will be the past, present or future potential for domestic violence.

For the first time in their legal training, students are compelled to deal with how the advice they render to a client or the actions they take or fail to take may have, quite literally, a life-or-death impact on the client, a member of the client's family, or the attorney herself. Finally, the Institute encourages students to consider not only the short-term impact of decision-making, but also the long-range effect of lawyering choices; not merely as a matter of strategy, but as a matter of ethics and human dignity. Because of the extremely sensitive nature of the issues involved, both for the law student and for the would-be client, the Center on Alternative Dispute Resolution has elected not to use "live" cases but instead utilizes client simulations.

## VII. CLIENT COUNSELING IN DOMESTIC VIOLENCE SITUATIONS

OCU chose not to approach domestic violence as a poverty law issue.<sup>32</sup> Early Settlement gives first priority to rendering service where the parties find it a financial hardship to pay private for-fee mediators. Nevertheless, the Center on Alternative Dispute Resolution wanted to ensure that law students did not take away the unintended lesson that the attorney will encounter domestic violence only in families living below the poverty line. The summer Institute emphasizes both in didactic presentation and, perhaps more importantly, in the selection of simulated clients and student roleplays, that spousal abuse does not respect divisions of race, ethnicity, religion, class, or profession.

---

32. Other law schools have taken this approach, and should be commended for their efforts. See, e.g., Margaret M. Barry, *A Question of Mission: Catholic Law School's Domestic Violence Clinic*, 38 HOW. L.J. 135 (1994) (describing Catholic University's attempts to reach beyond ad hoc litigation to coordinate social and economic reforms to address bedrock issues affecting domestic violence); Peter Margulies, *Representation of Domestic Violence Survivors as a New Paradigm of Poverty Law: In Search of Access, Connection and Voice*, 63 GEO. WASH. L. REV. 1071 (1995).

### **A. Defining Domestic Violence—Bridging the Professional and the Personal**

The first class in the Family Law Track began by defining the term “domestic violence.” It can include many forms—psychological, emotional, financial, in addition to physical abuse. To give the class a clear focus, we limited class work to physical violence between spouses: assault and battery, rape, etc. Video-tape interviews with victims of domestic violence (*e.g.*, “You Can’t Beat a Woman,” produced by the National Film Board of Canada) lay an early foundation for discussion, using neutral teaching examples not tied to any particular student’s personal experience.

In this first year of presenting the class, we had not anticipated the large number of students who would be interested in studying this grim subject matter. This probably heightened the relevance of the obvious corollary to the pervasiveness of domestic violence, namely, the national statistics on intimate partner violence would probably be consistent with our own law students, including many enrolled in this class. We found it a lively task to strike an appropriate balance between necessary candor to break down student resistance and ignorance, while preserving each student’s personal integrity. All students had been informed in advance, in writing, that this would not be a passive learning experience; rather, it would be interactive and perhaps emotionally challenging. Notwithstanding the prior admonitions, we attempted to build into the class format ways to ease the potential stress.

Students were initiated into the subject matter by beginning with the standard classroom fare of lecture, video, analysis, and discussion. The balance I chose as program director was initially to employ less invasive teaching methods as we first asked the students to become deeply immersed in the volatile subject matter that could resonate strongly with their own personal experiences. The instructors needed to obtain feedback from the students to gauge their reactions, and to get some sense of how vigorously to pursue particular issues. Further, students had to begin the process of self-reflection in order to handle the upcoming roleplay exercises. More generally, of course, self-expression was seen as valuable and worth encouraging.



How could we bridge these needs? Oral feedback during the class sessions could always be anticipated from the more vocal, assertive students. However, that would likely constitute only ten percent or so of the class. Thus all students were supplied on the first day with standardized materials for providing written, anonymous feedback to the instructors. Both informal and formal feedback were structured in a formalized manner to preserve student dignity and to encourage as much disclosure as any student felt necessary, without risking embarrassment or ridicule by classmates.

Each student was given an ample supply of sticky notes to provide written comments, questions, and insights to the instructors. These notes were placed, without names, in the "parking lot" (a large tri-fold display) at the rear of the classroom. These notes were gathered hourly, reviewed by the instructors, and used to develop coordinated responses for the class as a whole. When the instructors reached areas that required more searching, personal feedback, these questions were put to the class as a whole—but anonymous responses were written on standard three-by-five index cards that had been distributed to all students.

## **B. Understanding the Legal and Extra-Legal Responses to Domestic Violence**

The class explored the various responses of social institutions, including but not limited to, the legal system. Students were introduced to the law relating to domestic violence in family situations, both procedural and statutory. However, the class did not attempt to substitute for the regularly scheduled semester-long course Family Law.

Indeed, some students found this sufficiently exciting that we could well have met their perceived needs with only this segment. For many students this class presented their first opportunity to synthesize their prior classroom learning in a complex, integrated series of problems. Knowledge gained in compartmentalized courses on torts, civil procedure, criminal law, and property had to be accessed and considered jointly. Moreover, students were compelled to analyze and work through each situation by using the ABA Model Rules of Professional Conduct as their guide. The

class became, then, in large measure a class in applied legal ethics.

Finding the law that could govern such a situation may ultimately be the easier part of the client representation. Helping a client to make appropriate choices about her life and welfare is probably the most difficult part. Our class therefore focuses primarily on the skills lawyers need once they recognize that this is more than a matrix of legal problems: it's a people problem.

### **C. The Ethical Obligation to Interview a Client Effectively Concerning Domestic Violence**

Interviewing skills form the bedrock for a successful relationship between a domestic violence practitioner and his or her client. Students are taught that lawyers have an affirmative ethical duty to know whether their family law case involves domestic violence. While there may still be some who quibble about this obligation, the OCU Center on Alternative Dispute Resolution (as we instruct students in the use of court services offered under the Oklahoma Dispute Resolution Act) does not treat these obligations as ambiguous or tentative. While acknowledging that some practitioners may elect a different approach, the Summer Institute makes clear its philosophy that the attorney's ethical obligations compel sincere and skillful attempts to identify the presence of domestic violence and to deal with it appropriately. These obligations are grounded in Model Rules of Professional Conduct 1.1 (Competence),<sup>33</sup> 1.2 (Scope of Representation),<sup>34</sup> 1.4 (Communication with Client),<sup>35</sup> 1.6 (Confidentiality),<sup>36</sup> and 2.1 (Advisor).<sup>37</sup> In the state of Oklahoma, as discussed below, lawyers face further statutory obligations to report physical or sexual abuse of a child, the elderly, or the handicapped. These mandatory reporting requirements supercede even the confidentiality provisions of the Oklahoma Rules of Professional Conduct.<sup>38</sup>

---

33. MODEL RULES OF PROF'L CONDUCT R. 1.1 (1983)

34. *Id.* R. 1.4.

35. *Id.* R. 1.4.

36. *Id.* R. 1.6.

37. *Id.* R. 2.1

38. See OKLA. STAT. ANN. tit. 5, § 3 (West 1996).

#### D. Model Rule of Professional Conduct 1.1—Competence

The ABA Model Rules of Professional Conduct ("MRPC") begin with the beginning: defining and detailing the client-lawyer relationship.<sup>39</sup> An attorney's very first, most fundamental obligation is to provide "competent representation."<sup>40</sup> The Rules do not leave competence as a loosely defined matter subject to any number of interpretations. The black letter rule clarifies that representation meeting this standard will demonstrate "the legal knowledge, skill, thoroughness and preparation reasonably necessary" for the representation.<sup>41</sup> The "Terminology" of the Rules further removes any doubts concerning how to measure reasonableness. The Rules adopt an objective standard, not a subjective one.<sup>42</sup> Case preparation will be measured by the "conduct of a reasonably prudent and competent lawyer."<sup>43</sup>

Would a reasonably prudent and competent lawyer know the most basic facts of the case before her? Would she know whether it is a civil or a criminal matter? Whether the client faces physical danger for which the attorney should seek protection? On what timetable is the client operating, and due to what pressures? This brief sequence of questions may appear almost comically rhetorical; but they are not intended as such. They are presented for the purpose of demonstrating how the most fundamental factual issues in a divorce or child custody case may well be profoundly influenced by the presence of domestic violence. An attorney who does not know whether and how domestic violence has impacted the client's situation has not—and cannot be—adequately prepared as required under Model Rule 1.1.

How much preparation is needed? How much information must the attorney obtain concerning domestic violence? Comment Five to Model Rule 1.1 describes a sliding scale of proportionality: "The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more elaborate treatment than matters of lesser

---

39. See MODEL RULES OF PROF'L CONDUCT R. 1.1.

40. *Id.*

41. *Id.*

42. *Id.* at Terminology, § 7.

43. *Id.*

consequence.<sup>44</sup> Students in the Summer ADR Institute are taught that the so-called simple family law matter is probably as emotionally complex as any major litigation may be complex in terms of law and finance. Further, the potential down-side risks for all involved in a family dispute are of the highest consequence—life, safety, or death; and at its most benign, the emotional and social welfare of the next generation.

The curriculum of the Summer ADR Institute focuses on Oklahoma's court-connected ADR program and the domestic violence situation in this particular state in order to provide a consistent, real-world context for learning. Unfortunately, though, domestic violence is so prevalent that the attorney's obligations under Model Rule 1.1 would not differ in other jurisdictions. In Oklahoma, as nationally, a reasonably prudent attorney would be expected to recognize that one out of every four or five family law cases in which he may be involved will entail some level of physical abuse. The Institute wholeheartedly concurs in the position taken by Professor Kathleen Waits in her 1995 article that domestic violence screening is a fundamental, requisite skill for family lawyers.<sup>45</sup>

The Summer Institute recognizes, however, along with Professor Waits, that most victims and perpetrators of domestic violence are unlikely simply to declare their status.<sup>46</sup> Clients may actively attempt to conceal the presence of domestic violence.<sup>47</sup> Clients may be in denial and not yet have the ability to acknowledge and assess their level of danger.<sup>48</sup> Sensitive, non-confrontational interviewing skills are essential in order to solicit needed information. Questions must be carefully styled to approach specific subject matters from multiple, sometimes rather oblique directions. Responses layer one upon the other until a clearer picture emerges.

---

44. MODEL RULES OF PROF'L CONDUCT R. 1.1 cmt. 5.

45. Kathleen Waits, *Battered Women and Family Lawyers: The Need for an Identification Protocol*, 58 ALB. L. REV. 1027, 1041-44 (1995).

46. *Id.* at 1034.

47. *Id.*

48. *Id.*

For example, asking the client bluntly "Are you a victim of domestic violence?" will likely result in a flat negative. On the other hand, if the attorney asks open-ended questions about how the couple has dealt with conflicts, the client may reveal far more information. The Summer Institute initiates students in the fundamentals of active listening. Then students are asked to apply these skills in a series of client interviews. Instructors share with the class information about the screening instrument used in Early Settlement. Indeed, students use limited portions of the Girdner questionnaire to structure their "client" interviews. However, we do not allow the full use of the Early Settlement questionnaire, nor do we distribute copies (to prevent possible future coaching of clients).

Professor Waits suggests using the American Medical Association Diagnostic and Treatment Guidelines on Domestic Violence and the Guidelines for Mental Health Practitioners in Domestic Violence Cases.<sup>49</sup> Both contain some of the questions used in our class, although we work with the students to modify the questions so they are more open-ended, offering more opportunity for the client to tell her/his own story and offer more insights to the attorney. Some of the common questions include:

"What happens when your partner does not get his way?"

"We all fight at home. What happens when you and your partner fight or disagree?"

"Do you have guns in your house? Has your partner ever threatened to use them when he was angry?"<sup>50</sup>

The Summer Institute seeks to employ a greater use of open-ended variations on the questions listed above to assist the lawyer in understanding more fully the client's perspective on the situation. The critical issues from the lawyer's perspective may not be the same as the critical issues from the client's perspective.

---

49. Waits, *supra* note 45, at 1044-47.

50. *Id.* at 1045-47.

### **E. Model Rule of Professional Conduct 1.2—Scope of Representation**

Once the attorney has identified whether domestic violence exists what should be done with that information? Model Rule 1.2 (a) lays out the principal-agent relationship between the client and attorney: “A lawyer shall abide by a client’s decisions concerning the objectives of representation . . . and shall consult with the client as to the means by which they are to be pursued. A lawyer shall abide by a client’s decision whether to accept an offer of settlement of a matter.”<sup>51</sup>

A female client who has been battered might engage a lawyer’s services to achieve the objective of a quick, quiet, and non-confrontational divorce. Does “divorce” also include obtaining emergency victim’s protective orders? Must the attorney also assume responsibility for guiding the client through the psychological, emotional, and financial morass of leaving a dangerous home situation?

Students in the Summer ADR Institute are taught “yes.” A practice that includes divorce and child custody matters will require the attorney to tackle such gritty realities of life. However, the lawyers-in-training are first educated in the psychological, emotional, social, and financial dynamics of abuse, with a special focus on battering. Students are introduced to local resources, such as the YWCA Women’s and Children’s Shelter (mirrored in similar programs throughout the nation). Preferred written materials are drawn from the ABA Commission on Domestic Violence and the Oklahoma Department of Mental Health and Substance Abuse Services’ Victim Services Division. Students learn about the limitations on access and how to counsel their client about preparation to leave. Once more, the format of instruction begins with a didactic presentation, followed by demonstration and analysis before the group, followed by simulation in one-on-one role-play.

Once students have adequately digested this larger perspective on spousal abuse, they are required to explore how they might

---

51. MODEL RULES OF PROF’L CONDUCT R. 1.2(a) (1996).

convey this information to their client. In-class exercises take the students through roleplaying, taking turns both as the client, and as the attorney, to experience both sides of the communication challenge.<sup>52</sup> Self-evaluation and self-awareness are critical to the learning process. We encourage the students to acknowledge their own insecurities, confusion, and agitation both as the client and as the attorney. When they were the client, did they feel comfortable with their attorney's explanation? How effective were the attorney's verbal and non-verbal communication? When they played the role of attorney, how did they grapple with the issue of their own inexperience? How did they manage to blend confidence with compassion, to build their client's trust?

Even more difficult issues arise when we examine the appropriate fit between a client's objectives and the attorney's strategies. If the client's objective is a non-confrontational dissolution of the marriage, may the attorney file a barrage of claims in order to obtain leverage in negotiations? Does the attorney unreasonably jeopardize the physical health and safety of the client by engaging in such "hard ball" lawyering? The Summer ADR Institute teaches that although each case needs to be assessed on its own merits, the lawyer must analyze strategies in terms of potential for physical danger. Indeed, the Institute attempts to educate students to think not only about repercussions against their client, but also against themselves. Some training is provided in basic precautions for lawyers engaged in cases involving domestic violence, recognizing that a victim's attorney may become the abuser's next target.

Probably the most troublesome ethical issues confront the lawyer who has identified their own client as the abusive spouse. Must not the lawyer also protect this person and while attempting to achieve his objectives? Does such an obligation exist even if the client's objectives are morally repugnant to the lawyer? This

---

52. MODEL RULES OF PROF'L CONDUCT R. 1.4 (1996). Communication sets forth an unequivocal obligation that "a lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." *Id.* R. 1.4(b) The Summer Institute teaches that "reasonableness" here should probably be measured—realistically—in terms of how a bar disciplinary committee or jury in a legal malpractice (or wrongful death?) action might later view the attorney's actions.

leads us into our deeper examination of the competing demands of confidentiality and the lawyer's role as an officer of the court.

#### **F. Model Rule of Professional Conduct 1.6—Confidentiality**

Even the lay person educated solely by television crime dramas knows that a lawyer must not reveal information told to him, in confidence, by his client. This general and mandatory rule clearly forms the beginning of our discussion. However, the greater portion of our time is spent on dealing with the permissive language of Model Rule of Professional Conduct 1.6 (b) (1) which provides: "A lawyer may reveal such information to the extent the lawyer reasonably believes necessary . . . to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm."<sup>53</sup>

May the attorney who learns his client is an abuser inform the police? Inform the wife? Inform the judge? Typically, we suggest that this is a discretionary matter, to be weighed according to the attorney's conscience and sense of the ethical and tort law.<sup>54</sup> It is possible that the attorney's appropriate action in Oklahoma is easier to divine than elsewhere. The exceptions of Model Rule 1.6(b)(1) are, in Oklahoma, more expansive than in other jurisdictions.<sup>55</sup> The version of Model Rule 1.6 adopted by the Oklahoma Supreme Court includes not only threats of bodily but also non-bodily harm as permitted disclosures.<sup>56</sup> Further, Okla-

---

53. MODEL RULES OF PROF'L CONDUCT R. 1.6 (b)(1).

54. We discuss here the implications of a landmark case of an intimate partner stalking that ended in murder, and in a massive change concerning professional confidences and the professional's duty to warn an identified victim. *Tarasoff v. Bd. of Regents of the Univ. of Cal.*, 551 P.2d 334 (Cal. 1976).

55. OKLA. STAT. ANN. tit. 5, app. C; *see also* MODEL RULES OF PROF'L CONDUCT R. 1.6 (b)(1)–(2).

56. Oklahoma's adaptation of the ABA Model Rules of Professional Conduct concerning Confidentiality of Information at Rule 1.6 does not limit permissive warnings solely to those actions by a client that will inflict serious bodily harm or death, as Model Rule 1.6 characteristically has been applied. OKLA. STAT. ANN. tit. 5, app. C. Instead, the Oklahoma attorney is allowed to "disclose[] the intention of the client to commit a crime and the information necessary to prevent the crime." *Id.* R. 1.6 (b)(1). Further, subsection (c) makes explicit the Oklahoma attorney's mandatory obligations to comply with statutory responsibilities, such as those embodied in the mandatory reporting laws for child abuse, and abuse of the elderly or



homa's mandatory reporting requirements for abuse of children, the elderly, and the handicapped supercede even the attorney's obligations under Oklahoma Rule of Professional Conduct 1.6.<sup>57</sup> These mandatory reporting requirements do not include physical battery of a spouse, nor necessarily psychological abuse of a child. Therefore, an attorney who has not found the children to be directly at physical risk would likely be unable to claim that "the statute made me do it."

We pose to the students the troubling question of strategy. If we help a battering spouse to get custody of the children, are we putting the children in harm's way? Is the abuser attempting to use our legal services to commit a crime or fraud? Is the client insisting upon an objective that "the lawyer considered repugnant or imprudent?" Then the lawyer may need seriously to consider the guidance of Model Rule 1.16—Declining or Terminating Representation.<sup>58</sup>

### VIII. ADR IN DIVORCE AND CHILD CUSTODY CASES

The theme of the second class in the Family Law Track probably could be "no aggression, but no abdication, either." This class helps students identify when the different tools of negotiation, mediation, or arbitration may be appropriate for various aspects of divorce and child custody cases. Again, students are taught that the presence of current domestic violence is a chief indicator that a case should not go to mediation between the parties. Rather, the attorney should undertake direct negotiations with the other attorney, and/or use the courts.

---

the disabled: "A lawyer shall reveal such information when required by law or court order." OKLA. STAT. ANN. tit. 5, app. C, R. 1.6(c).

57. Oklahoma has the most explicit and demanding language on mandatory reporting of abuse that will be found in any state. The key feature which distinguishes Oklahoma's position on this issue compared to other states is its clear abrogation of the attorney-client privilege. See OKLA. STAT. ANN. tit. 10, § 7103 (A)(1). It provides: "Every [health care professional] . . . and other person having reason to believe that a child . . . is a victim of abuse or neglect shall report the matter promptly to the . . . Department of Human Services. . . ." *Id.* "No privilege or contract shall relieve any person from the requirement of reporting pursuant to this section." *Id.* § 7103(A)(3). "Any person who knowingly and willfully fails to promptly report any incident . . . shall be guilty of a misdemeanor." *Id.* § 7103(c).

58. MODEL RULES OF PROF'L CONDUCT R. 1.16.

The interviewing techniques introduced in Client Counseling remain important. As Professor Bryan explains in her series of articles, the lawyer must have a full picture of the client's situation, the client's perspective's, and the client's underlying needs, in order to negotiate effectively on her behalf.<sup>59</sup> The approach taken by the court-connected ADR program is that mediators provide a complementary service for attorneys. They are not a replacement. Indeed, the Code of Professional Conduct for Mediators developed under the Supreme Court's Rules expressly prohibits an Early Settlement mediator from making decisions for the parties, or providing legal advice.<sup>60</sup> Moreover, Early Settlement mediators are instructed by their ethics code to encourage parties to seek the advice of attorneys to assess their legal position.<sup>61</sup>

Early Settlement Central will often accept a case upon the express condition that the attorney(s) is/are present in cases where our evaluation reveals a troubling imbalance of power between the parties, but no violence. Early Settlement Central might also offer a mediator to facilitate a settlement conference between the two attorneys, without the parties being present.

## IX. ADR IN POST-DECREE MODIFICATIONS FOR HIGH CONFLICT FAMILIES

An attorney-mediator and two psychologist-mediators team teach to show an approach for dealing with extremely emotional, volatile—but not physically violent—family situations. Students are introduced to ways of identifying the areas of a case that belong more with the legal professional, and those areas that belong more with a mental health professional. The ethical and licensing restraints, and practice objectives for attorneys and psychologists, differ. The professional language spoken may also differ.<sup>62</sup>

---

59. See generally Bryan, *supra* note 13.

60. OKLA. STAT. ANN. tit. 12, ch. 37, app. A (West 1998).

61. *Id.* tit. 12, ch. 37, app. A(B)(2)(d).

62. The foundation article for this class was Janet R. Johnson, Ph.D., *Building Multidisciplinary Professional Partnerships with the Court on Behalf of High-Conflict Divorcing Families and Their Children: Who Needs What Kind of Help?*, 22 U. ARK. LITTLE ROCK L. REV. 453 (2000). Other scholarship that has significantly influenced the design of this course include: Lisa Parkinson, *Mediating with High-Conflict Couples*, 38 FAM. & CONCILIATION CTS. REV. 69 (2000); H. Patrick Stern, M.D. et al., *Professionals' Perceptions of Divorce*

Students learn methods for working effectively with mental health professionals to manage cases that involve severely dysfunctional families. Students practice interviewing the client to understand the deeper areas of conflict, and counseling with the client to use mental health referral sources.

We use an ongoing, evolving case study as a teaching tool in fish-bowl exercises. Simulated clients are portrayed by Early Settlement mediators—except for the child. We show the initial interview with the mother as the prospective client, then explain more of the psychological theory involved. We demonstrate more as the story evolves. Then the class analyzes the narrative within the context of the theory just explicated. We continue problem-solving by moving to the next steps: What would an interview between the guardian *ad litem* and the child be like? Does the attorney see a different perspective on the situation than was presented by the mother? How does the attorney broach with the client the need to see a mental health professional? How does the attorney obtain from the mental health professional the information the attorney needs?

These can be especially stressful representations, in part because the high conflict client may draw the attorney into conflict also. The class, therefore, also teaches students about attorney self-care and setting appropriate limits.

## X. CONCLUSION

Designing and presenting the Family Law Track has been a most challenging and exhilarating endeavor. This paper has already highlighted a number of the pedagogical challenges. Let me now note some of the rewards, if only to encourage other law teachers to consider investing their energy and resources in developing a similar class.

I am grateful for the support of the Curriculum and Academic Standards Committee, and of Dean Lawrence Hellman and

---

*Involving Children*, 22 U. ARK. LITTLE ROCK L. REV. 593 (2000); Hugh McIsaac, *Programs for High-Conflict Families*, 35 WILLAMETTE L. REV. 567 (1999) (former Director of Family Court Services in Portland, Oregon and former Director of Family Court Services for the Los Angeles County Superior Court).

Associate Dean Norwood Beveridge. They did not visibly hesitate to approve this experiment. Without institutional support such innovations are not possible.

Was it easier to address domestic violence as a summer course than in the regular term? Surely. Especially in a law school curriculum that contains one and a half years of required courses, students and faculty have little room for electives in the fall or spring semesters. A summer option designed to present theory and skills in a concentrated series of tightly focused classes does not compare with a full semester course or clinic. However, we managed to reach a much broader cross-section of students than we would otherwise have been able to accommodate. Their interest in the subject matter has been piqued. They are now prepared to pursue these interests more deeply through other venues.

Notwithstanding the support of faculty and administration, the Family Law Track would have been for naught if the students themselves had not responded so enthusiastically. It was humbling to find not ten, not seventeen, but thirty-three students enrolled; so many, that we could not accommodate members of the practicing bar, as planned. The courageous and energetic response of our law students renewed my innate optimism about the future of the legal profession.

