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The Alternative Dispute Resolution Grab Bag: Complementary Curriculum, Collaboration, and the Pervasive Method

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THE ALTERNATIVE DISPUTE RESOLUTION GRAB BAG: COMPLEMENTARY CURRICULUM, COLLABORATION, AND THE PERVASIVE METHOD

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Rather than report on any specific activity at Stanford, let me comment on several issues raised during the Symposium.

The first concerns skills, in addition to the core analytic, legal research, and writing skills, that are useful for a wide variety of law practices. I put together a bunch of these under the heading of "complementary curriculum"[1]—without the pretense of its having any intellectual coherence. Rather, it is a grab bag, responsive to what everyone on the panel has implicitly said: that a client comes to a lawyer, typically, not to find out what the law is, but because he or she has a problem and senses that the law has something to do with it. (Otherwise the client might go to an accountant or a psychiatrist or a physician.) The core of the complementary curriculum focuses on the skills, attitudes, and values necessary to be a problem solver for the client—that is, to understand the client's problem, to analyze its legal aspects, and work with the client to solve the problem, taking into account its legal aspects. Quite often, the legal problem largely disappears, and the lawyer still plays an important role in counseling the client.

So what are those skills and bodies of knowledge? The ones that are most familiar to all of us include interviewing and counseling, negotiation, and mediation. Though not discussed by the panelists, litigation is obviously important as well. A skill that may get somewhat less attention is planning. Lawyers spend a lot of time planning, and this can be learned. The same is true of creativity.

Let me mention another skill about which I have become evangelical: collaboration. Watching my son go through a J.D.-M.B.A. program made me aware of some comparative strengths and weaknesses of law and business schools. The analytic skills that every law school teaches from the first day would be very useful in business and nearly every other profession. At the same time, we could learn from business schools' emphasis on collaboration. From day one, MBA students are involved in collaborative projects. MBA students do almost everything in teams. While our students work collaboratively on journals and in some clinical courses, they generally work in isolation. Collaboration is a skill that can be

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1. Paul Brest, *The Responsibility of Law Schools: Educating Lawyers and Counselors and Problem Solvers*, 58 LAW & CONTEMP. PROBS. 5 (1995).

learned. Many of us do not come by it naturally. To teach it properly, one must be attentive to group process. One must deal with the group dynamics when those dynamics do not work quite as well as they should.

Also in my grab bag are some bodies of knowledge that may be useful across a range of our graduates' careers. Game theory, transaction cost economics, and cognitive psychology are areas of growth in legal scholarship. The interesting question is how relevant they are to teaching our students lawyering skills such as counseling, negotiation, and mediation. My own view is that important insights can be learned. It remains to be seen, however, just how broadly or deeply relevant the theories are.

I would also like to comment on the pedagogy of the pervasive method—particularly in the first year—whether used to teach ethics, ADR, or any other subject. There is a tremendous appeal to doing everything in the first year because that is when you have the students' greatest attention. In some cases, the pervasive method really works. The symposium participants have related success stories and some of you may have them from your own experience.

However, Professor Katheryn Dutenhaver made a point about one limitation which bears emphasis. You take the faculty as you find them.[2] Let me illustrate this from Stanford's experience in trying to integrate ethics into first year courses. As you may know, Deborah Rhode of our faculty is the author of a book on ethics by the pervasive method[3] that offers ethical problems for different courses. (It is dedicated to me because she claims that I coerced her to write it.) We tried it in the first year and it proved Professor Dutenhaver's point about taking the faculty as you find them.

If a professor does not want to teach ethics as part of his or her torts or criminal law or constitutional law course, the ways of subverting it are myriad. There is no worse message you can give to students than one faculty member did when he announced: "Here comes the sermon." Part of it is just obstinance. One of the things that leads us to become law professors is that we value autonomy. But I think there is a point that goes beyond obstinacy or autonomy. There are two reasons that faculty may be uncomfortable in doing pervasive this or that. One, which I think is true of ADR as well as ethics, is that to take something seriously as an intellectual subject means getting a command of a quite substantial body of knowledge, which is every bit as complex, every bit as analytically demanding, as knowing contracts, property, or torts. One can understand

2. *See* Katheryn M. Dutenhaver, *Dispute Resolution and its Purpose in the Curriculum of DePaul University College of Law*, 50 FLA. L. REV. 719, 729 (1998).

3. *See* DEBORAH RHODE, PROFESSIONAL RESPONSIBILITY: ETHICS BY THE PERVASIVE METHOD (2nd ed. 1998).

a faculty member who says that to teach several hours of ethics or dispute resolution in a first year course requires developing a command over a new body of materials. In some sense, the more seriously we take a subject, the more we should wonder about asking somebody to do a snippet in the first year course. That is the shallowness point that Professor Lea Vaughn made.[4]

And there is also a pedagogic point that Professor Ron Pipkin made: that the pedagogies we use in dispute resolution require skills unfamiliar to many law professors.[5] Teaching through simulation seems a risky endeavor for many instructors. It takes a lot of work. It requires some courage for a faculty member who likes the distance between himself or herself and the students that the typical law school classroom offers. Not everyone has that courage and those skills.

Doing things pervasively is a wonderful idea, but there are some very real limits, which may explain some of the frustrations of those who would like to see issues of ethics, issues of dispute resolution, and other subjects integrated into substantive courses. Maybe not everything can be stuffed into the first year curriculum.

4. *See* Lea B. Vaughn, *Integrating Alternative Dispute Resolution (ADR) into the Curriculum at the University of Washington School of Law: A Report and Reflections*, 50 FLA. L. REV. 679, 699-700 (1998).

5. *See* Ronald M. Pipkin, *Teaching Dispute Resolution in the First Year of Law School: An Evaluation of the Program at the University of Missouri-Columbia*, 50 FLA. L. REV. 610, 613-14 (1998).