

YOU BE THE JUDGE – TEACHING SKILLS IN A LARGE SUBSTANTIVE FAMILY LAW CLASS

INTERVIEWING EXERCISE*TECHNIQUE*

The first day of class, anticipating that students will not be prepared, I act as one of my clients and call on students to interview me. This particular client is a domestic abuse victim who is reluctant to talk because she is afraid, and is now having an affair. The only information they have is the client's name and that she wants some information about divorce. When students get frustrated with my reluctance to talk, I ask them to figure out what the problem might be and how to get past it so that the attorney can help the client. As I change persona, students have to deal with a client who goes off on tangents, one who cries, and one who is angry.

We discuss general interviewing techniques. If the student asks me pointed questions, I give reluctant yes, no and short answers. If they begin by asking open questions, I start a long diatribe about how I should have known my husband was no good from the beginning. I stop when the class starts to laugh. We then talk about the use of open ended and short answer questions and the "information funnel." We end the session asking what they need to tell the client before she leaves.

When a student suggests an alternative approach to obtaining useful information, I make them try it out on me. The interactive method is more engaging than lecture or straight discussion, and students become more aware of the effects of the language they use through the client's reactions.

FACTS

Client is a 40 year old female administrative assistant. She is a domestic violence victim who was tied up and threatened at gunpoint the night before her visit with the attorney. Her husband has not worked for years and she is the sole breadwinner in the family, earning a salary that puts her in the lower middle class. She has started an affair with her boss, and is afraid her husband will kill her if she files for divorce. The parties have two teenage children.

GOALS

1. Intro to interviewing techniques
2. Dealing with uncommunicative clients
3. Responding to crying client - men also cry
4. Dealing with anger
5. Setting parameters of the lawyer/client relationship
6. Explaining retainer & fees
7. Concluding the interview
 - a. List of what is needed next
 - b. What to expect next
 - c. When to expect attorney contact & when to call
8. Additional goals
 - a. Begin teaching students how to deal with domestic violence in family law
 - b. Briefly teach fault grounds

NEGOTIATING EXERCISE

TECHNIQUE

Students are given a complex equitable distribution problem that is analyzed and discussed in class. The problem is used later for classes on counseling and negotiation. Students are randomly assigned to represent a party. Each side is provided with confidential instructions from their client about needs and desires. They are randomly paired for one on one negotiation outside of class. A report sheet must be handed in by each pair. They are given two weeks to complete the negotiation, and anyone who has not met with their partner by the second week is sent a reminder from the professor. Results are analyzed and reported back to students in class for discussion and critique (without identifying individual student results).

In class, students are first asked to complete two one on one negotiating exercises for which they are provided confidential instructions from their client. In the first exercise, they are told they have 2 minutes to agree on the wife's share of the husband's pension. They are not permitted to speak or use words, just to trade numbers. At the conclusion of the exercise, I compile each group's results on the board and ask the purpose of the exercise. I then explain this is concessional bargaining in its most rudimentary form. Next, I have them negotiate over possession of a painting that both parties want, but this time I allow them to speak with each other. After a short time, I again compile results, to the extent any groups have reached agreement. I then explain problem-solving negotiation, and its importance in family law.

I review the compiled results of the student negotiations and point out issues that are apparent from the individual reports. I ask a series of questions about the students' experience in the negotiation (frustration, splitting the difference, unreasonable clients, threats, etc.), and discuss how to avoid problems. We complete the session with a discussion of cooperative and collaborative bargaining, and mediation.

FACTS (out of class exercise facts are based on equitable distribution problem & not included here)

CONCESSIONAL BARGAINING FACTS

Husband and wife were married for 8 years. They have no children. Both are 30 years old. Wife is a secretary and husband is an insurance agent. Husband has a pension earned entirely during the marriage currently valued at \$100,000. Wife has no pension.

CONFIDENTIAL INSTRUCTIONS FOR HUSBAND'S ATTORNEY

Husband thinks wife should get 25% because he worked long hours to earn the money, while the wife just "shopped and spent all their earnings." He is willing to give her up to half if you think he has to. He does not want to go to litigation over this.

CONFIDENTIAL INSTRUCTIONS FOR WIFE'S ATTORNEY

Wife thinks she should get at least half but she would like more because she has less earning capacity, no pension, and she took care of the house while the husband was rarely home. She will settle for as little as 25% if you think she has to. She does not want to litigate over this.

PROBLEM-SOLVING FACTS

Husband and wife ran an art gallery together during the marriage. They have divided all of their property except one painting. The entire settlement will fall apart if an agreement is not reached on this item. The painting was a gift to both of them from the artist, a close personal friend. The artist is now dead.

CONFIDENTIAL INSTRUCTIONS FOR HUSBAND'S ATTORNEY

After the death of the artist, the value of his paintings increased substantially and husband does not believe wife realizes the current value of the painting in question. He plans to tell the wife he wants the painting for the status it will lend to his new art gallery, which is partly true, but he is most interested in its value.

CONFIDENTIAL INSTRUCTIONS FOR WIFE'S ATTORNEY

Wife wants the painting for sentimental value and will not budge on this. She feels she was closer with the deceased artist and should get the painting. She was secretly in love with the artist. In no event does wife want the painting sold and the proceeds split because she wants the painting itself.

GOALS

1. Provide initial instruction on problem solving techniques
2. Raise awareness of problem solving possibilities and benefits
3. Reinforce importance of settlement in family law
4. Review equitable distribution and spousal support principles (through one-sided or inadequate results)
5. Discuss details that should be determined through negotiation before drafting settlement agreement

COUNSELING EXERCISE

TECHNIQUE

The professor role plays a client in the equitable distribution problem previously analyzed in class. The professor begins by explaining a proposal by opposing counsel. The professor then begins the role play and students must explain the proposal and counsel client. Students have to deal with a client who is too dependent on the attorney's opinion ("what do you think I should do?"), one who won't agree to anything that doesn't punish the spouse, one who wants peace at any cost, one who is prepared to disregard a visitation order, and one who is verging on clinical depression. We discuss issues with counseling in an unbundled services situation as well.

GOALS

1. Presenting proposals
2. Leaving the decision to the client
3. Dealing with anger
4. Helping a client who just wants to give in to get it over with
5. Dealing with a bad proposal from other side
6. Counseling a client who tells the lawyer s/he will agree to a settlement but not comply
7. Recognizing when a client appears clinically depressed and needs professional help

8. Working with an unrealistic client or a client who relies on info from friends and family

DRAFTING EXERCISE

TECHNIQUE

Students are provided with a one page horrendous (in many ways) settlement agreement and told to be ready to critique it in class. During class, the contract is projected and we review each sentence, calling on students to explain what is missing, what is unclear, etc. At the end of the exercise, we review a powerpoint on necessary paragraphs and details for items such as property settlements, spousal support and custody and visitation.

After completing the drafting exercise, contract clauses that appeared clear but which ended up in litigation are projected for student analysis. Students are asked to determine the court's ruling, and how they would redraft the clause to avoid the ambiguity.

Students are also asked to draft a cohabitation clause in small groups during class. The professor visits with the small groups and, after a while, calls on groups to share their drafts. The class and professor then critique each clause to illustrate that there is no "foolproof" way to draft this provision.

FACTS

See, *Chapman v. Abbot*, 251 S.W.3d 612 (2007 TX. Ct. App.), for an example of poor drafting that appears adequate at first. Divorce stipulation read

"[Guyton] will pay to [Chapman] \$2,200 .00, per month, in two payments of \$1,100.00 each, as and for alimony. These payments will be payable monthly, on or before the 1st and 15th day of each month, beginning on February 1, 2002." ... "[t]he payments will be payable until February 1, 2005, or [Chapman] dies, or [Chapman] remarries, whichever occurs first." The central issue here is whether the divorce decree required Guyton to make an alimony payment on February 1, 2005.

Held – no payment due on last date (only 2 payments/month)

GOALS

1. Pay attention to details - especially with regard to visitation
2. Test each clause carefully - figure out how it might be misconstrued against their client, and redraft it to avoid the problem
3. Teach students about ambiguous or unenforceable clauses and how to explain issues with such clauses to clients
4. Illustrate the time it takes to draft and review a settlement agreement thoroughly

CHILD CUSTODY EXERCISE

TECHNIQUE

Students are provided with a contested custody scenario that has been filed in court. Each factor poses issues for one of the parties - one had an affair, one is in a wheelchair, one sees a psychologist to deal with stress, one is strict while the other is laid back, one may have to relocate, etc. The professor reviews the fact pattern quickly and students are the judges. They may not award joint physical custody. A count is

taken and students are asked why they decided for the husband or wife. After a short discussion, the professor removes the factor that appeared to be the major reason for the majority ruling. Another vote is taken, reasons discussed, and factors removed until nothing is left but gender and approximately the same age. Students are then asked the purpose of the exercise.

Although only a few of my students will become judges, this exercise raises the danger of discretion in custody suits and reinforces the importance of helping clients find a way to settle custody issues outside of court. Inherent bias is exposed, as well as a variety of child raising theories, and students learn that both parties are sullied by contested custody battles.

FACTS

Both parties are 35 years old. They have a 10 year old boy, an 8 year old girl and a 1 ½ year old boy. Mom is an English professor teaching 9 credit hours/semester, and dad is a research chemist who works half time at home and half time at a lab. Mom was primary caretaker from birth until about a year ago. Dad has been primary caretaker for the last year. Mom is physically healthy and dad is wheelchair bound but fairly active. Two years ago, while mom was pregnant, dad was in a car accident that left him paralyzed from the waist down. Mom was not sure if he would live and she found out he was in the car with his mistress. The mistress dumped him after the accident. Mom was upset about the situation, asked her mother to help with the kids, and she began seeing a psychologist to help her deal with the stress and decide what to do. Mom was just denied tenure because the college is laying people off for financial reasons. She will probably have to leave the state to find work as a professor. Dad has no current plans to leave. Mom is a strict disciplinarian with a quick temper. Dad is easy going and believes children should be allowed to make mistakes. The older boy wants to stay with mom because "she needs me," and the girl wants to stay with dad because "he needs me." Mom was angry about the affair and, during an argument, she let slip about it in front of the children. The kids did not know about the mistress until mom let it slip, but dad was fooling around for a year. Both sets of grandparents are close with the children and live in town.

GOALS

1. Expose inherent biases
2. Promote awareness of differing views on parenting
3. Promote the idea that most contested custody battles are a bad idea
4. Make students aware of the dangers of discretion in family law
5. Remind students there are no perfect parents

CLOSING STATEMENT EXERCISE

At the end of an in class analysis of an equitable distribution and spousal support problem, students are divided into small groups and asked to devise a closing statement that "tells a story" about each of the clients in a manner that would potentially render each client's demands more compelling.

Goals – Students learn the importance of characterization in discretionary decisions and begin to understand basic structure of a closing.