Class 2

Alternative Dispute Resolution

Court Ordered Alternative Dispute Resolution

- Many court systems have experimented with forcing parties into alternative dispute resolution procedures before going to trial.
- Usually, this has had the effect of speeding up the process and saving money, and even increasing litigant satisfaction.
- How court-ordered ADR techniques encourage settlement:
  - Relieves the attorneys of having to be the first to propose settlement talks.
  - Stimulates attorneys to seek early settlements.
  - Promotes involvement of key early settlements.
  - Uses attorneys as neutrals.
  - Provides flexibility more so than formal court proceedings.
  - Avoids involving presiding judge in every pre-trial decision.

Problems with ADR and Pitfalls to Watch For

- Litigation creates case law, which establishes how the law will be applied in specific situations. No case law can be gleaned from arbitration. Will this make the status of the law more uncertain?
- "Public trials" are public for a reason: to make sure the public and media can supervise the administration of justice. Is that available in arbitration or mediation?
- Is there a guarantee that the arbitrator/ mediator has the same level of objectivity as would be required of a judge?
- During civil litigation, judges are subject to all sorts of procedural safeguards to protect against unfairness (e.g., no *ex parte* communications, etc.) Is the same always true of mediators and arbitrators?
- To what extent should arbitration decisions and settlements be challengeable in court? If too much, does that decrease the effectiveness of ADR?

Steps that Should be Taken in Anticipation of Negotiation

1. Be knowledgeable about the facts of the case.
2. Know and analyze the strengths and weaknesses of both sides' cases.
3. Specifically plan whether you're going to take a cooperative/ friendly approach, a hard-line approach or what level in between; you can always adjust on the fly, but it's important to have an idea where you're going before you set out.
4. Understand the goals and objectives of your client.
5. Understand the minimum that is acceptable to your client.
6. Understand ethical constraints on direct dealing with opposing parties.
7. Research applicable law to know how much negotiating leverage you have.
8. Have a contingency plan. Make sure you know if your client is willing to go to court should negotiations not work out.
9. Determine what information can be given to opposing party and what should be kept confidential before you step into the room.

Stages of Negotiation

1. Initial analysis and preliminary steps (as covered in the first slide)
2. Initial discussion with opposing party ("feeling out" period)
3. Giving/ receiving initial offers
4. The bargaining process
5. Compromise
6. Agreement or impasse
7. Drafting and executing a written settlement agreement
   OR
8. Moving on to another manner of dispute resolution

QUIZ TIME!

Differences in Tone of Negotiation

More Contentious	More Cooperative
Initial contact is at arm's length and not much is divulged initially	Parties discuss their points of view and goals with more candor
All discussions and negotiations by formal memoranda and formal letters	Discussions are more informal and with less preparation and planning
Deadlines set and enforced; threats made	Timing not rigorously enforced
Formal settlement proposals or agreements drafted by each party and exchanged so that each party can scrutinize the other party's proposal	Agreements, if any, made informally orally or through memoranda