

Session 6.3

How to Teach Judges Alternative Dispute Resolution

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- 1 Why me? I mean, I am an academic, I am an administrator who now is mostly a re-
constructor. Also, I am a certified mediator. Some years ago, ten years ago, maybe
more, when I was fully an academician, I worked for Lviv State University. It is a
very beautiful city in the western part of Ukraine, very much the European style of
city. Lviv State University was in a partnership with Oregon State University in the
United States. It was so fruitful and cooperative a partnership that USAID decided to
continue it for a further three years, so it continued over six years. We have had time
to learn about each other, not only some knowledge and skills but also about people's
experiences. During this time I was trained as a mediator at Oregon State University,
the first in the United States to provide training in mediation for legal students, in
1982.
- 2 This university and its teachers are still maybe the most experienced in the United
States, so I was taught by very good teachers. That is why I am here. I can tell you
something about teaching ADR to judges. I became President of the Academy of
Judges of Ukraine six-and-a-half years ago. I was the President from the very
beginning, from the first steps of the Academy. We tried to provide presentations to
judges about ADR. My presentation content, you will see, consists in: methods, adult
learning theory, presentation methods, adult learning styles and teaching models, and
content, and KAB. That last term sounds too similar to KGB. It is not KGB, it means
Knowledge, Attitudes and Behaviour. The KGB was extremely bad for Ukraine.
Frankly speaking, our memories of the KGB, only 18 years ago, are still fresh. Only
now can we speak of *Knowledge, Attitudes and Behaviour*.
- 3 Let me remind you of how adults learn. Most simply take advantage of what
opportunities present themselves as is the case, I am sure, with many of us. In my
experience, most important of all is to link the teaching to the student's daily practice.
Seek connection with what we do. Next, the teaching must be interactive. The
student must have the opportunity to try and do something practical. Finally, the
study must be entertaining.
- 4 What tasks does learning theory face? First of all, the learning has to be focused on
real-world problems. How is such learning to be applied? We relate the learning to
the learner's goals. We relate the materials to the learner's past experience. We allow
debate and the challenging of ideas. We listen to and respect the opinions of learners.
Encourage learners to be resources to you and to each other. Treat learners like adults.
That may be the main thing, and you know about that. In all the presentations,
yesterday and today, we were told about that. Leave learners with some kind of
control, and by 'control' I mean something like 'feedback'.
- 5 Which presentation style is best? Before, we usually have some lecturing and many
teachers, many trainers, in Ukraine, judges' trainers, continue to be like a professor at
university. They give the student very slow and very boring material. It is usual for
our universities, unfortunately, even in the present day so we tried to change the

methodology of training our newly appointed judges, candidate judges and judges on leave with another methodology of training. For sure, we use, as I am absolutely sure that you also all use, small training presentations, very small, not more than ten minutes. We use role-plays, certainly, individual reading assignments and individual exercises and, of course, we use also some facilitated group discussion, demonstrations, case studies, and video.

- 6 In many of the presentations yesterday and today the presenter used video. It is a very useful device. I know when we type up what judges say during our training sessions and show them afterwards how it looks, sometimes they go ‘wow, it’s me? No, it’s not me, it’s somebody else’. That is interesting, that in Ukraine it is permitted to use video typing in the courtroom. Our judges are very social so we imagine them to have some skill at dealing with the media. This is a topic in itself, that I mention only in passing. We started training judges in cooperating with the media. We called this course “Media and the Judiciary: Cooperation and Partnership”. We teach judges how to behave with journalists, what to say, what not to say, how to look, maybe sometimes not to answer questions, and so on. You know the media, they edit, for example show the bad skin of a judge in a courtroom.
- 7 Maybe it is familiar to you but I remind you how adults learn. What is the adult style? Just twenty percent learn by hearing. Thirty [percent] only see. Fifty percent hear and see. Seventy percent hear, see and talk. The best way, at ninety percent, is to hear, see, talk and do. We tried to use this methodology, especially when training judges in mediation.
- 8 Let me remind you of two models of training. The first is the ‘expert’ model, a classical model that we use still for training students at university legal schools, which is based on the notion of an ‘expert’ providing knowledge to trainees. The second model is the spiral model, which we use in training judges in mediation. It is based on changing experience between trainers and trainees. What does this spiral model show? The spiral model values not only the knowledge and experience of the outside expert but also, and even more, the knowledge and experiences participants. In the spiral model everyone teaches and everyone learns. In a collective process of creating knowledge [inaudible] is not only the teacher teaching and the students learning, as is the case with the expert model. The collective process of creating knowledge is about critical reflection on our own experience, and on the experiences of others. Most learning occurs when people practise what they have learnt. The spiral model ensures that participants have the opportunity to practise their skills in a learning context.
- 9 [audiovisual presentation]
- 10 This small media presentation demonstrated how important it is in Ukraine to use restorative justice as some part of mediation. We have in Ukraine a lot of crime, and much of it is juvenile crime. To use restorative justice is extremely important.
- 11 Next, Knowledge, Attitudes and Behavioural Skills. Knowledge may include but is not limited to: process and procedure; major focus on mediation; values and principles; practice overview; legal framework; conflicting parties (mediation participants); experience with mediation; and research results. Attitudes: to generate curiosity; to overcome negative stereotypes if any are; to become fans, partisan supporters and advocates for ADR and mediation; to share the values behind

mediation process, which are, self-determination and participation, responsibility, respect, trust and cooperation, human dignity, and individual growth and development.

- 12 Next is Behavioural Skills, depending on training purpose and skills, in Ukraine. Judges have to be able to access [inaudible] to refer a case to mediation, or other ADR procedure or process. They must be able to explain mediation process to parties. They must be able to deal with the mediation outcome agreement in a legal process. They must be able to apply certain skills in practice. There is more than one type of ADR: negotiation, facilitation, arbitration and mediation; but, frankly speaking, in the Ukraine our judges deal with just the one, mediation. We do not have another style of ADR so I will speak mostly about mediation and how we train judges in mediation.
- 13 Regarding other possible options and the experience of other programs, we expect our judicial officers to be able to conduct mediation process in a neutral, impartial, non-directive and cooperative manner, and to be able to establish and develop a court-connected mediation program in their own court.
- 14 Regarding Ukrainian achievements and experience, in Ukraine we still do not have court mediation. We just try to explain to the parties, the two sides, at court that they could use mediation. When I make presentations for judges first of all I ask them, do you like divorce cases? They answer, with certainty, no. Do you like cases of domestic or neighbourhood dispute? They usually answer no, for sure. Do you like cases where the landlord is also the neighbour? They answer no. I explain to them that one can send such cases to a mediator and be prepared to agree with a peaceful agreement, a settlement, or at least if one receives these parties again at court they will be much more sedate. So, it is possible to use mediation in Ukraine.
- 15 Now, in Ukraine, the Academy of Judges of Ukraine is in cooperation with the programs of the Ukrainian Standard for Common Ground. Frankly speaking, there is just this one centre in Ukraine that provides regular training, and deep training, of mediators. Now we are going to arrange a school of mediators together with the Academy of Judges of Ukraine and Standard for Common Ground, a non-government organisation, to prepare trainers, and to prepare mediators, due to the fact that we still do not have an organisation of mediators in Ukraine.
- 16 Now, another Ukrainian achievement, judges' mediation training agenda includes items like: basic mediation skills and process, communication skills, mediation ethics, values and principles, legislation both national and international, and referral mechanisms and organisational aspects. In all truth, our legislation does not have special articles about mediation. For example, there are some articles in the criminal court which could be used, which permit the court to use the outcome of the victim/offender reconciliation procedure and to close a criminal proceeding in the case of the first-time or minor offence. The problem is that the Criminal Procedure Code, adopted in 1960 under pressure from the KGB, was replaced by the Criminal Code in 2001. It is very new. There is a big gap between those two codes and so we have few examples to use in mediation, and in particular for restorative justice, because we do not have a regular legal framework. In commercial procedure code and civil procedure code also, there are not special rules about using mediation but some judges try to do it.

- 17 In legislation, I told you about criminal court. Also, we have some general information that the Supreme Court issues, three resolutions regarding mediation in criminal matters. Also we have the instructive letter of the Prosecutor General in August 2008, which recommends informing the parties about the possibility of cooperating with mediation NGO's and also with the Academy, and the instructive letter for juvenile policing, in September 2009.
- 18 In civil and economy [inaudible] commercial law civil-dispute parties have the right to end their dispute with an amicable agreement, or peaceful settlement.
- 19 Mediation Clause in Contract Ukrainian. The Mediation Centre is in the Kiev-Mogyla Business School, and also we have had some Council-fuelled initiatives in commercial courts.
- 20 What are we doing in the Academy of Judges? As much as we can, to put it simply. We have had regular week- or two-week in-service training for judges, all kinds of judges. We have four jurisdictions: general jurisdiction courts, which deal with both civil and criminal matters, commercial courts, and administrative courts. We provide training for all these judges from all these kinds of courts, starting from the first-instance court, the district courts, and finishing with the Supreme Court and High Administrative- and High Commercial Courts. At least, we provide presentations for judges that last for between four and six hours, just to inspire them about the opportunity to use mediation and to explain what mediation is, and we provide some basic forty-hour courses on mediation for judges, including mediation in criminal justice, in civil justice, in commercial justice, and on voluntary settlement and its consequences.
- 21 Together with the courts, with all kinds of courts, we try to generalise judicial practice and provide scientific research regarding the relation of mediation to Ukrainian justice, and preparation for publishing of summary of judicial practice on implementation of European practice of mediation in civil justice. We arranged a big conference called "Mediation Process in Ukrainian Justice" in February of 2004. We have organised thirty seminars on mediation for all kinds of judges.
- 22 When I was trained as a mediator in the United States the first rule that I was taught was, a mediator is absolutely prohibited to advocate, to give advice, to tell parties his own solution or opinion, or to make any judgment. I thought, what does a mediator have to do, if everything is prohibited – to judge, to advise, and so on? It was maybe the main problem, for me as a lawyer as for judges, to separate myself the jurist from my work as a mediator. Just in the end of this forty-hour course I understood what it means. It means, to help parties to make their own decision. Whatever the parties decide they will be responsible for the results. If a judge makes a judgment, always the one side or the one party does not agree with, is not glad with, the decision. Very often in Ukraine, parties go from the first-instance court to appeal, and then to the Supreme Court. It is hard to imagine that the average number of cases per judge in Ukraine, I mean at first-instance level, is 150 cases per month, that is, from the very beginning to the end, to the decision.
- 23 Judges are very busy, extremely busy, not only in the first-instance court but in the appeal courts and the Supreme Courts also. Malit Malik, who represents the World Bank here today, visited the Ukraine and [said] 'have you seen how many cases are in

boxes in the corridors of the Supreme Court?!’ – waiting for the future. So, mediation is one of the ways to solve this problem. The Academy does all its best just to help to promote the idea first of all, and secondly to prepare mediators who will be helpful to the judges.