

## Alternative Dispute Resolution

Professor Joan Vogel

Fall, 2017

### COURSE MATERIALS:

Carrie J. Menkel-Meadow, Lela Porter Love, Andrea Kupfer Schneider & Jean R. Sternlight, Dispute Resolution: Beyond the Adversarial Model. 2<sup>nd</sup> Ed. (2011)

### COURSE OBJECTIVES:

This class has multiple goals. First, it will attempt to expose you to the great breadth of the field of dispute resolution. While most of your law school classes to date have focused on litigation, and even more narrowly on appellate cases, many lawyers spend the bulk of their time on other activities including interviewing and counseling clients, negotiating transactional documents, or resolving disputes using negotiation, mediation, and arbitration. This class will help to bridge this gap in your education. Focusing primarily on how disputes are handled in the United States, the course will also touch on uses of dispute resolution in other parts of the world. Second, this course is designed to engage you experientially, as in a simulation course. You will be asked to perform and participate in videotaped simulations, role-plays and exercises so that you will understand the issues implicated in the use of ADR from the inside— behaviorally, as well as cognitively. As a survey course, this course will not qualify you to be a third party neutral. If you are interested in mastering the skills in this area you will also have to take more of the advanced arbitration, negotiation and mediation courses we offer. Third, the class will ask you to consider not just the nature of dispute resolution as it currently exists but also how we, as lawyers and/or policy makers, can help to make the world a better place.

### GRADING:

Your final grade in this course will be based on:

- Class Participation (1/3)
- Short Papers (1/3)
- Research Paper or Book Review (1/3)

### **(A) Class participation**

Class attendance is mandatory for this course. We will be doing simulations throughout the course with roles assigned. If you do not attend, your absence will affect other students' ability to do the simulations. I will consider your class attendance and punctuality, your preparation for class, your participation in class discussions, and your performance on in-class exercises and out of class simulations in your final grade in the course. I do not expect you to perform in the exercises and simulations as if you had prior training in dispute resolution techniques, but I will lower your grade if you do not prepare and participate as your role requires. These are group exercises and they cannot work well if everyone does not do their part.

With respect to class discussions, I expect regular, valuable contributions from all members of the class. To prepare for class discussions you will need to do the reading carefully, and give advance thought to the discussion questions in the text. I would prefer to work on a volunteer basis, but if I see this is not working I will call on those students who are not volunteering regularly.

### **(B) Short Writing Assignments**

I will be assigning two short papers throughout the semester connected with the simulations you will be doing in the course. These papers will be graded. You will be doing critiques of the negotiation and mediation simulations that you will be participating in after we finish studying these processes in class. I will expect these critiques to be analytical and detailed discussions of your simulation experience. You will also be expected to relate your experience to class discussions and the readings in the text. The papers must be typed. I will give you more instructions about what I expect and the length required when the assignments are given in class.

### **(C) Research Paper or Book Review**

For the final paper, you will write a paper that is at least 15 pages long, exclusive of footnotes. You will have a choice of writing a research paper on your choice of topic or a book review on a book from the list suggested below. For the research paper, you can write a standard research paper that explores an aspect of dispute resolution in greater detail than we have done in class. For example, you could write about a particular type of dispute resolution (family or employment mediation, construction arbitration; labor arbitration; final offer arbitration used in collective bargaining; baseball salary arbitration; etc.) or a particular issue in dispute resolution (do women negotiate differently than men?); (should more truthfulness be required of lawyers who participate in mediation?); (is it wrong to compel Olympic athletes to resolve disputes over doping through arbitration rather than in court?). Such a paper would draw on books, articles, statutes, cases, etc. but offer your own unique perspective on the particular process. You may get ideas for the topic of the research paper from the notes and questions sections in

our text or from the chapters of the portions of the text that we have not studied in class. Other ideas can be found on the web sites listed below. Of course, there are many other possible sources of ideas as well. Alternatively, you can write a paper that takes what you have learned in this class and applies it to a real-life dispute resolution issue. The real-life dispute could be one that has appeared in the news, or in a book or movie. It should be an issue that has been or could be handled by lawyers (e.g., don't just pick negotiation over purchase of a painting at an art show). After discussing the background of the dispute (this should be at most a third of the paper) you should draw on the theories we have discussed in this class to examine the kind of dispute resolution process that you think would be best for resolving this dispute, and why. If you have other ideas for topics, you must clear that topic with me before proceeding. I will grade the papers based on the quality of the analysis, the organization, and the writing (no typos or grammatical errors please). All papers must be footnoted, and you should follow Blue Book form. In doing your research, I expect you to use books and journals rather than just internet sources. Using only internet sources is the lazy way to do research, and these sources tend to be less reliable.

For the book review, you can choose from the list of books I provide or you can choose another book as long as you clear that book with me. Like the research paper, the book review must be an analytical review of the book not just a regurgitation of what the author has to say. A book review is not a book report. You also should apply what you have learned in class to the subject matter of the book in a detailed and scholarly manner. The book review also has to be at least 15 pages long, exclusive of footnotes. As with the research paper, I will grade the book reviews on the quality of the analysis, the organization, and the writing. I expect you to proofread the papers and pay attention to spelling and grammar.

### **PLAGIARISM:**

You all know not to plagiarize, but some of you may conceivably be confused as to what plagiarism means in this context. Of course you all know that you cannot quote another author without attribution. This includes web sites! Merely altering a few words does not permit you to omit quotation marks. In addition, it is also improper to paraphrase or borrow ideas from another, without attribution. If you got an idea from another author, cite that work. It is often appropriate to explain either in text or footnotes how your own argument differs from that previously made by others. You will find other articles' sources/footnotes to be a rich source of information. However, to the extent that you rely on another article's footnotes you must read all such sources yourself; to make sure they really say what the other author said they said. It is never proper to cite a source you have not yourself read, unless you note that your are "citing Source A citing Source B." This should only be done rarely, when that second source is important but cannot be located. To the extent you use other authors' footnotes as starting points you will often find you need to update such footnotes, e.g., by citing to a more current statute or version of the book. If you have any questions regarding when cites are and are not needed, please ask me, or err on the side of citation. Plagiarism is an Honor Code violation that

will result in an F in the course and a referral to the Vice Dean for Academic Affairs for further action.

### **LIBRARY RESOURCES AND WEB SITES:**

Our library may not contain everything you need. Remember that excellent resources may be available only from other libraries. You can get materials through interlibrary loan as long as you plan ahead sufficiently.

The reference librarians are very capable and can assist you with your assignments. They can help you get books and articles through interlibrary loan and can help you explore our own resources and the internet. However, you need to ask for help sufficiently in advance of when you need the information in order for the librarians to be able to assist you. In the past students have sometimes handed in poorly researched papers with a note stating that they could not get the sources through interlibrary loan in time. I will not consider that to be a valid excuse.

You may find the following web sites useful as you do your research:

American Arbitration Association: <http://www.adr.org>

American Bar Association Section of Dispute Resolution:  
[http://www.americanbar.org/groups/dispute\\_resolution.html](http://www.americanbar.org/groups/dispute_resolution.html)

Association of Conflict Resolution: <http://www.acrnet.org/>

Chartered Institute of Arbitrators (British): <http://www.ciarb.org/>

CPR Institute for Dispute Resolution: <http://www.cpradr.org/>

International Commercial Arbitration Resources in print:  
<http://www.lib.uchicago.edu/~llou/intlarb.html>

International Chamber of Commerce Arbitration (based in Paris):  
<http://www.iccwbo.org/products-and-services/arbitration-and-adr/>

JAMS (private arbitration and mediation provider): <http://www.jamsadr.com>

Mediate.com: <http://www.mediate.com> (site oriented to mediators)

National Academy of Arbitrators (mostly elite labor arbitrators): <http://www.naarb.org/>

National Arbitration Forum (private provider): <http://www.arbforum.com/>

National Conference on Peacemaking and Conflict Resolution:

<http://orgs.tigweb.org/national-conference-on-peacemaking-and-conflict-resolution--ncpcr>

Permanent Court of Arbitration (handles international public disputes):  
<http://www.pca-cpa.org/>

United Nations Commission on International Trade Law:  
<http://www.uncitral.org/uncitral/en/index.html>

## **ATTENDANCE:**

Attendance is mandatory. If you miss more than 20 percent of the classes I will dismiss you from the class. As indicated, non-attendance and non-punctuality will factor into your final grade, as noted above. If you do need to miss a class and have a valid excuse, please send me a note or e-mail in advance of class. I will circulate an attendance sheet every class. If you do not initial the sheet you will be marked absent.

## **Syllabus**

### **I. Introduction**

A. History of Alternative Dispute Resolution

B. Chapter 1: Introduction to Conflict Resolution, Key Concepts in ADR  
pp. 3-21

C. Choice of Process  
pp. 22-36

D. Values in Conflict and Disputes Resolution  
pp. 37-47

### **II. Negotiation**

A. Chapter 3: Theories and Frameworks  
pp. 89-126

B. Chapter 4: Skills and Practices

1. Planning and Setting Goals  
pp. 127-135

2. Talking Persuasively

pp. 136-142

3. Fairness and Standards

pp. 142-146

4. Understanding the other Side

pp. 146-155

5. Listening

pp. 155-157

5. Building Trust and Mood

pp. 157-162

6. Creativity

pp. 162-174

7. Barriers to Negotiation

pp. 174-185

C. Chapter 5: Law and Ethics

1. Ethical Rules for Negotiated Settlements

pp. 187-190

2. How Lawyers (Should?) Behave in Negotiations

pp. 190-221

D. Negotiation Simulation: Blast Negotiation Simulation

**III. Mediation**

A. Chapter 6: Concepts and Models

pp. 223-267

B. Chapter 7: Skills and Practices

1. Mediator Traits and Strategies

pp. 269-296

2. Representation in Mediation

pp. 296-310

3. Differences and Diversity

pp. 311-314

4. The Self-Reflective Practitioner  
pp. 314-319

C. Chapter 8: Law, Ethics and Policy

1. Mediation and the Law  
pp. 321-323

a. Informed Consent  
pp. 323-325

b. Litigation about Mediation  
pp. 325-327

c. Confidentiality  
pp. 327-351

2. Mandatory Mediation  
pp. 351-361

3. Mediator Evaluation  
pp. 362-364

4. Responsibility for Outcomes  
pp. 364-369

5. Ethical Issues  
pp. 369-381

D. Mediation Simulation: Employee Contract Dispute Mediation Simulation

**IV. Arbitration**

A. Introduction to Arbitration: Concepts and Models  
pp. 383-412

B. Arbitration Law and Policy

1. Enforcement of Arbitration Clauses (History)  
pp. 413-427

2. Supreme Court's Expansive Reading of the Federal Arbitration Act  
pp. 427-482, *AT&T Mobility v. Concepcion* & *American Express v. Italian Colors Restaurant* (on Twen)

C. Arbitration Skills, Practices and Ethics

1. Arbitrator Skills  
pp. 483-492
2. Skills of Arbitration Representatives  
pp. 493-498
2. Arbitrator and Attorney Ethics  
pp. 498-518
3. Non-Attorney Ethics  
pp. 518-520

D. Arbitration Simulation

**V. Private and Public Hybrid Processes**

- A. Variations on Arbitration & Med-Arb  
pp. 523-529
- B. Private Judges & Juries  
pp. 531-532
- C. Ombuds  
pp. 533-537
- D. Online Dispute Resolution  
pp. 538-545