

Alternative Dispute Resolution: Theory, Practice and Policy LAWJ-064-09 Professor  
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Class Meets: Monday and Wednesdays 1:55-3:20 Room 160 Attendance is mandatory 3  
credits.

## ALTERNATIVE DISPUTE RESOLUTION: THEORY, PRACTICE AND POLICY

### Course Description

This course will critically examine recent developments in the creation and use of methods alternative to conventional forms of adjudication and trial for dispute resolution. Students should realize that all adjudication (in the form of trial on the merits) occurs in less than ten percent of all cases filed in courts and thus, is the exception, not the "norm," for resolution of conflicts and disputes in our society. Even this figure excludes cases or disputes that are "resolved" before, case is formally filed with a court. ADR (or as we now call it, "appropriate" dispute resolution' includes a wide variety of processes, some of which are quite close to adjudication (arbitration and others which are like adjudication in some ways (like the often adversarial presentations negotiation and mini-trials) but unlike adjudication in other ways (the direct communication o parties in mediation and the "resolution" of problems based on future and interest based conc. rather than past events and rights analysis).

In recent years there has been a virtual explosion of the use of a wide variety of processes and techniques for resolving and dealing with disputes and conflicts both in the public sector and i private arenas. This course will be, in some ways, an advanced Civil Procedure course, exam statutes, cases and policies that affect how courts and agencies are seeking to resolve an expanding and increasingly complex case load and mix of ways of dealing with it. In other way this course will focus on very jurisprudential matters--when is a court no longer a court and a judge no longer a judge, when other functions are absorbed into the traditional roles of factfinding and law-clarification and enforcement. What process goals should our system express When is fairness compromised? Who should be allowed to act and decide things in our legal system?

This course will also engage you experientially, as in a clinical or simulation course. You will asked to perform and participate in 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. (You will not be qualified, however, on the basis of this course, to be a third part

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neutral. If you are interested in mastering the skills in this area you should also take one of the more skills based courses like the Negotiation or Mediation seminars.)

As you engage with the materials in this course--readings, role-plays and exercises, written assignments--consider the following themes:

1. What is the purpose of process? How do particular processes satisfy particular goals of process? Which goals or purposes conduct with each other?
2. What is the historical context of the development of a particular process? What problem was it created to solve? What new problems are created by ~t?
3. What is the relation of process to substance? Are there "trans-substantive" goals to be achieved in a successful process? How are outcomes related to process choices? Are process choices related to substantive area goals? Do parties, counsel and neutrals need to be "expert" in a substantive area in order to resolve disputes (ie. environmental, family, intellectual property, civil rights issues)?
4. Who should have power over process--the parties, their representatives, Congress, the courts, administrative agencies, people affected by disputes, conflicts and controversies? How should power over process be exercised? Who should decide when a particular process should be used for individual disputants; for aggregate parties, for a particular dispute?
5. What are the relations and tensions between "justice" or "fairness", in individual cases and at the aggregate or system level?
6. How has institutionalization of informalism created its own formalism? Is this a good, bad development?
7. What is the evolving nature of process change--what ills are corrected by process changes? What new ills are created by process changes? How should process be monitored, evaluated and changed?
8. What is the lawyer's role, both as a representative of clients and as a policy maker, in process choices?
9. What are the ethics of ADR--both in the macro 'justice' sense and in the micro sense of behavioral and strategic choices and behaviors?

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This course will involve reading, discussion, role-playing and simulation exercises. Attendance mandatory. There will be several short written assignments and a choice between a final paper a take-home examination. Grades will be based on written work, class contributions and

participation and performance in class exercises. Paper topics (which should be discussed with the instructor) might include such things as further exploration of a policy or legal issue discussion in class, such as public access to private settlements, renewal of the Civil Justice Reform Act, mandatory referral to ADR, further elaboration of some of the social issues implicated in AI such as power imbalances, race, ethnicity and gender issues in ADR, case studies of dispute empirical analyses of ADR usage, suggestions for legislative or other reform of ADR mand; analysis of your own participation in some form of ADR.

Classes will differ in format--some will consist of more conventional reading and discussion others will be participatory and in others we will watch films or tapes of ADR processes.

The required course books are:

1. John S. Murray, Alan Scott Rau and Edward Sherman, Processes of dispute Resolution, (2nd. Ed. 1996 Foundation Press) (noted below as Text).
2. Roger Fisher, William Ury and Bruce Patton, Getting to Yes (2nd. Ed. Penguin ] 1991).

I have also ordered for the bookstore and recommend the following titles as supplementary, reading:

1. Kenneth Arrow et al. Barriers to Conflict Resolution (Norton & Co. 1995)
2. Robert Axelrod, The evolution of Cooperation (Basic Books, 1984).

There will also be additional supplemental, xeroxed materials from time to time. Please be prepared--you may be called upon to be an "expert" on a particular reading or topic for a particular class.

### Class Schedule

Please note that the following is an outline of topics, readings and exercises; these are subj. change as announced in class, given our pace and the possibility of new developments and speakers that I hope to arrange. Please be sure to come to class to learn of assignment cha

ADR- LAWJ 64-09 Date	Menkel-Meadow Spring 1997 Topic Reading Assignment and Exercises
M Jan. 6	Introduction to ADR Text pp. 1-34; Med-Arb exercise
W Jan. 8	Choices of Process Text 34-72 -- Negotiation problem
Distributed Processes of ADR M Jan. 13	(No class--to be made up)
W Jan. 15	Negotiation I F & U, Getting to Yes pp. 3-94 Text pp. 83-91; 1 IS-133
Theories Negotiation Problem M Jan. 20	No class-MLK Day How did MLK deal with disputes
And conflict? W. Jan 22	Negotiation II F ~ U, Getting to Yes, pp. 7-187
Behavior Optional: Axelrod; Arrow pp. 26-60	Textpp. 133-175

M	Jan. 27 Mediation I Text pp. 293-310
Structure	Exercise (Ed/Jo)
W	Jan. 29 Mediation II Text pp. 310-322 and distributed
Role of Law	Material
M	Feb. 3 Mediation m Text 323-345; 353-379
Roles in Mediation	
W	Feb. 5 Arbitration I Text 500-534; 691-698; 708
Overview-Uses	723
M	Feb. 10 arbitration Text 534-543; 552-587
Courts and Cases	
	Feb. 12 Arbitration Text 543-552; 596-606; 635-679
Fairness and Constitutionality	
M Feb. 17	No Class-Presidents Day 110
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W Feb. 19	No Class-Faculty Retreat
Thur. Feb. 20	Hybrids- Court Processes Text 436-471
And Private Processes	Civil Justice Reform Act (distr.) (Make-up-Time TBA)
Friday Feb. 21	Text 472-499
Court Administration of ADR	
Legal Issues in Use of ADR	
M Feb. 24	Confidentiality Text pp. 379-419; 24Q-245
W Feb. 26	Enforceability Text pp. 419-423; 218-240; 275-292
M March 3	Judicial Involvement in ADR Text pp. 245-275
W March 5	Liability, Immunity, Secrecy Text pp. 430-435 and distributed
Material	
M March 10	Ethics and Professional Regulation Text pp. 423-430; 96-119
Micro-Behavioral Ethics	—
W March 12	Ethics, Justice and ADR Text pp. 34-48
Distributed Material	

(Luban, Menkel-Meadow)  
Applications of ADR  
M March 17

Comparative ADR  
Film--Little Injustices

(Mexico)  
W March 19

Comparative ADR  
Film--The Story of Qui Ju

(China)

M March 24 and W March 26 No Class--Spring Vacation (short paper on films)

M March 31

Mass Torts  
Distributed Material

(Feinberg, Mullenix)  
W April 2

Public Disputes  
Text pp. 757-771

Exercise  
11.

ADR- LAWJ 64-09  
M April 7

Menkei-Meadow Spring 1997  
Environmental  
Text pp. 771-808 and  
Distributed Material  
Family  
Distributed Material

Reg-neg  
W April 9

Friedman ,Scenes from a Mediation

Critiques of and Problems With ADR

M April 14

Race, Gender, Class  
Text pp. 175-192, 342-353  
Distributed Material (Abel,

And Power Imbalances  
Delgado, Lerman)  
W April 16

Responses to Critiques  
Distributed Material

Behavioral and System Design (White, MetroCourt)  
M April 21

Using ADR for Inter-racial/  
Distributed Material

Inter-ethnic conflict (Gadlin, Chesler, Bobo)

Conclusion  
W April 23

Evaluating ADR--Empirical Studies Distributed Material

Law and Economics and ADR Hensler, RAND, FJC,  
Shavell  
Course Evaluation