Alternative Dispute Resolution  
Fall Semester 2015  
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With  
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Wednesdays, 3:00 – 6:00 p.m.  
(August 26: September 2, 9, 16, 23 and 30; October 7, 21, and 28; November 4, 11, and 18; and December 2, 2015)

Required text  

Required Readings  
This syllabus references a variety of articles that are required readings for each week. Most, if not all, of these can be accessed as pdf’s on the course’s TWEN site or through links in the attached document, appropriately titled: “Links to ADR Syllabus Articles.” In general:

- Articles from the publication Alternatives to the High Cost of Litigation (abbreviated to *Alternatives*) published by the CPR Institute for Conflict Prevention and Resolution are at: [http://www3.interscience.wiley.com/journal/107640508/home](http://www3.interscience.wiley.com/journal/107640508/home).
- Articles from Dispute Resolution Magazine published by the American Bar Association’s Section on Dispute Resolution are at: [http://www.americanbar.org/publications/dispute_resolution_magazine.html](http://www.americanbar.org/publications/dispute_resolution_magazine.html).

Additional Resources  
CPR – Center for Conflict Prevention and Resolution – [www.cpradr.org](http://www.cpradr.org)

CPR’s origin was in a pledge that CPR member corporations would sign, agreeing not to litigate in a case against another [pledged] CPR member, unless and until they had undertaken an ADR process in an attempt to settle their dispute. The organization’s membership is primarily corporate, though it also includes some law firms and neutrals as well as academic members and “faculty” who provide training. CPR also offers panel services for a wide array of disputes and regularly convenes national and international conferences. It is the publisher of *Alternatives to the High Costs of Litigation*, referred to generally as *Alternatives*. CPR’s website provides access to sets of model rules, clauses, and agreements.
for mediation, arbitration [including arbitration appeals], and hybrid processes. From time to time, it
convenes task forces on issues of concern to the ADR community’s users and neutrals. CPR also has a
strong international presence and involvement in international dispute resolution initiatives and
organizations. Your profs are proud to be CPR members and faculty.


The AAA website is a treasure trove of resources including model clauses and agreements, rules,
guidelines, for a wide array of dispute resolution processes, as well as access to neutrals.


JAMS is a national (indeed, international) provider of dispute resolution services. Known as the “high
end” of the market, many of their neutrals are former judges and magistrates. In the mid 90’s, JAMS
merged with (really bought) the company known as Endispute, Inc., which had been a smaller but well
recognized leader in ADR, primarily on the east coast. (One of your profs is proud to have begun her
neutral practice with Endispute, back in the day.). The JAMS Foundation now funds many worthwhile
initiatives in dispute resolution education and in reducing community conflict. Their website is also a
source of great information, forms, and other resources.

Mediate.com

While there are many dispute resolution organizations and neutral service listings, mediate.com probably
captures the largest number of neutrals offering dispute resolution services. (I hereby admit that I have not
done a survey, but I do believe you can find a large percentage of at least U.S. based mediators on
mediate.com.)

On the state and local level

The Cincinnati Bar Association Alternative Dispute Resolution Section, The Mediation Council of
Greater Cincinnati, and The Ohio Mediation Association all include a variety of professionals practicing
in ADR.

The Supreme Court of Ohio has a Dispute Resolution Section and offers references and links to various
dispute resolution resources in Ohio, including a directory of court-connected mediation programs and
services.

Course grading:

At least 25% of your grade will be based upon class participation. This means
preparation for class, clear familiarity with role instructions when we are doing a
simulated mediation, and quality participation in class discussions.

The balance of your grade will be based upon a final take-home paper/project to
be announced, as well as the quality of shorter assignments to be handed in
during the course, including final mediation agreements, commentary on
submitted video segments, and draft arbitration or other dispute resolution
provisions.
The parameters for the final take-home paper/project will be developed after consultation with the class, but will be available prior to fall break. It will not be due until a stated date during exam period.

**Attendance Policy:**
Class attendance is absolutely required! If you must be absent, please make every effort to notify the professor in advance. Unexcused absences will result in a significantly lowered or failing grade. Excused absences (these things happen) will be permitted within strict limits. However, students should speak to the professor about making up work from *any* missed class. At a certain point (generally, two missed classes), students will not receive credit for the course.

**Reassurance regarding early readings:**
Before students take a look at the LONG set of readings for the first class, and decide to exercise the option to drop: please understand and do not fear. Please understand that for many ADR courses, negotiation is a prerequisite or the course begins with a substantial segment on negotiation. I decided against a prerequisite and to insert a bare minimum of straight negotiation in this course – because I strongly believe that students should take a full semester negotiation course. For that reason, I’ve asked you to read a great number of things on negotiation before we start. We will do a VERY quick negotiation in the first class session. But as you will see throughout the course, a sense of the barriers to successful negotiations informs many ADR processes and ADR process design questions.

**Preparation for Class 1 – Wednesday, Aug. 26, 2015**
Read your assigned role information for the Settling Strong case (sent by Professor Aaron) and prepare to negotiate it in class.

*Read, on ADR generally, a light introduction:*

Text – ADR in a Nutshell, pp. 1-16.


*Read, on Negotiation, for conceptual understanding and to inform your performance in the first week’s negotiation exercise:*


Bennett G. Picker, “How to Best Aid Negotiations by Breaking Down Barriers,” 19 Alternatives 11 (December 2001): 251-266. (Also available on Mediate.com.)

Optional Reading (for a more academic spin):

Class 1 – Wednesday August 26, 2015 3:05 – 6:05
- Introduction, administrative issues; course aspirations
- What’s ADR? Defining the alternative dispute resolution continuum
- Why and Why Not ADR? Setting out strengths and some real concerns to revisit
- Negotiation Basics and Barriers
- The Representative Twist for the Lawyer as Negotiator

Preparation for Class 2 – On Collaborative Law Practice

Go to: the website of the International Academy of Collaborative Professionals – IACP.com.

Carefully review the content of the website. (Imagine that you were a potential client, whose lawyer is certified as a Collaborative Professional and has suggested following the Collaborative process in your divorce case.

Focus particularly on the basic description of Collaborative Practice, and the model Collaborative Practice Agreements (which are also available on the course TWEN site).

Read:


Prepare to play the role of client or lawyer in the assigned divorce case.

Class 2 – Wednesday, September 2, 2015 – On Collaborative Law Practice

In the Conference Room of Collaborative Practice
- Distinguished Guests on Collaborative Law Practice
• IACP Past Presidents and highly respected lawyers
• Sherri Goren Slovin, Esq. and Ross M. Evans, Esq.
• Collaborative Practice Introduction – As the Client Hears It
• Collaborative Practice – Attorneys’ Meeting
• Students as Lawyers and Clients in a Four-way Collaborative Negotiation
• Demonstration by Attorneys Goren-Slovin and Ross
• Discussion of the Benefits, Downsides, and Tensions in Collaborative Practice; Insight for Other Alternative Dispute Resolution Processes

Preparation for Class 3 – Making Progress on ADR Continuum, Marching toward Mediation

Read:


Text ADR in A Nutshell, pp 75-107 and 321-334 [The Model Standards of Conduct for Mediators].

The following statutes and local rules governing mediation in Ohio are intended as a resource. All are posted on the course TWEN site. I suggest skimming them for Class 3 (with more careful attention to the Uniform Mediation Act). They are important for understanding the framework within which mediation occurs, and should be used as references as the course progresses.

Ohio’s Uniform Mediation Act., Chapter 2710 of the Ohio Revised Code.

Ohio’s Uniform Mediation Act: A Reader’s Guide.


Hamilton County Rules of Practice of the Court of Common Pleas, Rule 31.

U.S. Court of Appeals for the Sixth Circuit, Local Rule 33.

This course is not aimed at teaching you to become mediators – at inhabiting the neutral’s role. However, it is useful for the mediation advocate to know how a mediator thinks. And, in class on September 9, most (if not all) of you will briefly have the opportunity to be the mediator.

Class 3 – Wednesday, September 9, 2015

Reporting In to the Law Firm, and an Imaginary Not-Really Realistic Mediation Interlude
• Considering C-or-c-ollaborative Law in other legal contexts and on ADR’s continuum.
• Altogether Quick and Unrealistic Dive in to Mediation as Mediators and Clients.
• Deriving and naming mediation’s many challenges for the advocate.
Prepare for Class 4

MOST IMPORTANT: READ YOUR ROLE INFORMATION FOR THE CASE IN WHICH YOU WILL BE THE CLIENT OR REPRESENTING A CLIENT in CLASS 4. THESE WILL BE DISTRIBUTED IN CLASS on September 9, if not earlier.


ABA Model Rules of Professional Conduct: Rule 1.12, 2.4, 3.3, 4.1.

Do reread or this time, read carefully, the basic legal materials on mediation, including the Uniform Mediation Act and related local rules, referenced for Class 3.


I recommend that you start reading the following terrific but somewhat lengthy article for this week. Even skimming it will suggest an approach that will inform your work on preliminary stages of mediation in week four. But you should read it thoroughly in preparation for Class 5.


Class 4 September 16, 2015

Back at the Office
• Explaining and suggesting mediation to your client.
• Initial contacts with a mediator; the importance of first impressions – both ways.
• Negotiating mediator selection and process with opposing counsel.

Preparation for Class 5 – September 23, 2015

THOROUGHLY AND CAREFULLY PREPARE FOR YOUR ROLE IN THIS WEEK’S MEDIATION, with REAL MEDIATORS.

Complete or re-review the reading recommended for last week’s class, PLUS read:


Class 5 – September 23, 2015

First Time In the “Real” Mediation Room

Facilitative Mediation – All the way through…with commentary, and esteemed guest mediators.

Note: we may arrange to video-record these mediations. If so, I will ask that each group review the video and select at least four moments that reflect effective or ineffective advocacy by the student lawyers and effective or ineffective choices by the mediator. Please provide a short paragraph explaining what you see in the video clips and why they were significant. This can be done as a group.

These should be provided to Professor Aaron no later than 10:00 a.m. on Tuesday, September 29.

Preparation for Class 6 – September 30, 2015

If the September 23 mediations were recorded, see instructions above for submitting video selections.

Prepare an enforceable agreement, reflecting what was agreed upon in your mediation. As necessary, negotiate its language with opposing counsel. For the purposes of this exercise in drafting, the in class clients have been transformed into co-counsel. Each co-counsel team may collaborate on the preparation of the final agreement. (I advise you to read the material below regarding the enforceability of agreements reached in mediation before working on your drafts.)

These should be completed and emailed to Professor Aaron by 8:00 p.m. on Sunday evening, September 27, 2015.

Text: ADR in a Nutshell, pp. 107-156.


The Supreme Court of Ohio, Board of Commissioners on Grievances and Discipline, Opinion 209-4 (June 12, 2009). [Note: This piece is offered as a reference for your future practice, particularly if you plan to work in family law and divorce, where lawyers are often not present at mediation. It does rest on the idea that drafting final agreement and implementing documents is a lawyer’s task, and a lawyer cannot represent parties with opposing interests.]

READ YOUR ROLES FOR THE NEXT MEDIATION  (Even though our next mediation won’t take place on Sept. 30, it is coming up the following week. And you should be prepared to be in role as a lawyer in that case for the September 30 law firm meeting.

Class 6 - September 30, 2015

Law Firm Litigation Department Exchange:
– How should we lawyer in mediation, knowing what we know now?

• Bargaining strategies and client issues in facilitative mediation
• Revisiting Mediation’s Legal Context and Concerns
• Managing the blessing and curse of Information
• Insuring or Resisting Enforceability of a Mediation Clause and a Mediation Agreement
• Issues in Mediation Ethics and Law Firm Practice
• Anticipating an evaluative mediator, or a mediator who may evaluate

Preparation for Class 7

Review previously assigned articles on mediation advocacy, as useful.


For those who have not yet taken the Client Counseling Course in the disputes context:
Marjorie Aaron, “Predictable and Potent Psychology, Chapter 5 in Client Science: Advice for Lawyers on Counseling Clients Through Bad News and Other Legal Realities (Oxford 2012): 133- 183. (Please pay particular attention to sections relevant to our ability or inability to predict case outcomes; you can skim the rest.)

DO:
Participate in a conference call with your mediator regarding the upcoming mediation and work through any process or information exchange issues prior to the mediation.

Contact your client, and discuss the idea of going to mediation, as well as the type of mediator and process you would recommend. To the degree practical, try to make sure your client feels prepared for the September 30 mediation.
Class 7 – October 7, 2015, 3:05 – 7:30/8:00
[Pizza Provided]

- Reflections by our mediators.

These mediations will be video-taped. In order to complete the assignment set forth below for October 7, I strongly suggest that you take notes as the mediation progresses, of the approximate time that each caucus begins, or when significant moments occur. This will make your finding clips much more efficient.

I will do everything possible to make sure all members of the class have access to their mediation videos, at least through a dedicated link, by the end of the day on Thursday, October 1.

Preparation for Class 8, October 21, 2015

Review the video of your mediation. “Pull” clips of at least one “effective” and one “not so effective” piece of mediation advocacy. Also, pull at least one clip of mediator behavior or strategic choice that had significant impact, and presented a challenge or difficult choice for the lawyers and clients. For each clip you select, write a paragraph or two discussing what you think the clip shows, and why you believe it reflects effective or ineffective advocacy or significant and challenging mediator behavior.

You may work with a partner to pull these clips, but then there should be at least three clips from each of you.

Your clips and descriptive paragraphs MUST be provided to Professor Aaron by 7:00 p.m. on Sunday October 18. Earlier – particularly before the weekend – would be MUCH appreciated.

FALL BREAK

Class 8 – October 21, 2015

The law firm conference room, imagined with “Computer” [see Star Trek and Galaxy Quest]

- Reviewing Mediation Advocacy Moments, Choices, and Strategic Questions
- With Hindsight, revisiting Mediator Selection and Process Design.
- Take-Aways for Practice: Advice for Lawyers, Clients, and Mediators
- [Possible Guest Appearance]

Within the next few weeks, the rest of the post fall break syllabus will be available. We will move immediately into arbitration, so please do expect considerable reading as well as an assignment for a “real” arbitration to take place within two or three weeks after break.