

## **ADR IN THE WORKPLACE: FALL 2014** Law-7603-601

*Professor Michael Z. Green Office: Rm. 124 e-mail: mzgreen@law.tamu.edu phone: 817-212-4140*

**Course website:** For any changes or additions, check the course website at Westlaw under THE WEST EDUCATIONAL NETWORK (TWEN). To access the TWEN course go to <http://lawschool.westlaw.com> and use your WESTLAW password to gain access. Then click on TWEN at the top of the page and you will see a listing of TWEN courses for Texas A&M by the professor name. Click on the course ADR in the Workplace with Professor Green and add it to your list of courses by Monday, August 25<sup>th</sup>. NOTE: I will give you a copy of my special class preparation policy during the first class meeting.

**Class Meetings:** Mon: 6:00-7:50 p.m., Room 206. Although not expected, if it becomes necessary, make-up classes may be scheduled pursuant to school policy. **FIRST CLASS MEETING:** Mon AUGUST 25, 2014 and **LAST CLASS MEETING:** Mon December 1, 2014

**Office Hours:** ROOM 124: TU: 2-6 p.m & by appointments on Monday or Tuesday evenings.

**Final Exam:** There is no required final examination for this seminar course.

**Course Description:** The following statements constitute introductory notes about the course, ADR in the Workplace, Fall 2014. As a seminar, you are able to take the course and complete a final paper for the rigorous writing requirement.

**1. Students Seeking Rigorous Writing Requirement.** If you are interested in taking this course to meet the rigorous writing requirement, you must identify through email to me via TWEN this is your purpose at the beginning of the course and by no later than the end of the second class meeting with no changes thereafter. You will be required to have me confirm to the Registrar at the end of the semester that you have completed a paper in this course consistent with the School's Rigorous Writing Requirements. If you do plan to seek the rigorous writing requirement, you will then be given instructions regarding the rigorous writing and research requirements that I will expect of you in order to meet the rigorous writing requirement, including the intent of preparing your paper so that it will be of publishable quality and will address a subject involving labor, employment or dispute resolution. There will also be at least two major drafts required and deadlines will be set for the drafts throughout the semester. I will talk to you about the final length of the paper as required by school policy at the time that we establish your intent to use it for the rigorous writing requirement. Also, you will be required by school policy to obtain a grade of B- or higher on the paper in order for your paper to count for the rigorous writing requirement. Under no circumstances will I agree to allow you to use any paper for the rigorous writing requirement if you did not sign up for approval by the end of the second class meeting. Finally, you will be expected to do a presentation near the end of the semester explaining the scope of your paper.

**2. Students Not Seeking Rigorous Writing Requirement.** If you are interested in taking this course for some other reason, then please pay attention to the course scope on the next page. There are no general prerequisites to this class. Although you should have completed all your required lockstep courses before taking this elective course. Also, it may be of some advantage to you if you have already taken an employment-related course or if you have some strong background or interest in the subject. By the end of the second class meeting, students who are not seeking the advanced writing requirement will be able to choose to have a major portion of their grade be determined by writing shorter papers throughout the semester including a final post-hearing brief related to one of our simulations. Please try to notify me of your choice by e-mail by 5 p.m. Friday, August 29, 2014. Once you sign up, you cannot change it.

**3. All Students.** Because this is also a quasi-skills-based class, all students will be involved in doing some role playing and simulation of dispute resolution techniques as part of the course methodology. This may include acting out roles in various employment dispute resolution schemes such as labor arbitration, mediation of a labor dispute, mediation of an employment discrimination dispute, arbitration of an employment discrimination dispute, litigation of an employment discrimination dispute or litigation of a wrongful termination and employment law dispute and defamation case; and litigation of a gender discrimination, wrongful termination, and defamation case. 30% of all students' grades will be based upon their responsible performance of the skills-based exercises and their class participation and discussion of assigned readings and presentations, subject to my special class participation policy. If you are excited about the exploration of dispute resolution as it pertains to employment-related claims and you are committed to spending the time and effort required to explore this field, you should get a lot out of this class.

### **Scope of the Course:**

**1. Content.** The great increase in legal regulation of the employment relationship since the enactment of Title VII of the Civil Rights Act of 1964 has naturally produced a comparably great number of claims. Some of those claims went to trial but the vast majority stopped short. Many of those resolved before trial were settled by alternative dispute resolution mechanisms such as arbitration and mediation. With the explosion of the Alternative Dispute Resolution (ADR) movement over the last decade and its application to statutory employment claims, a number of courts and administrative agencies are mandating the use of ADR to resolve employment claims. Likewise, the judicial enforcement of adhesion agreements to use ADR to settle future employment disputes as a condition of employment has increased the use of ADR in employment issues. Consequently, any attorney who practices in the employment arena must now become familiar with ADR implications and how to apply ADR tools in representing clients involved in employment disputes. This course explores the legal status and practical application of ADR in employment. It begins with the most familiar alternative to litigation, labor arbitration. It then examines labor arbitration's first cousin, individual employment arbitration. Then the course will shift into a discussion on mediation of employment disputes. Throughout the course, we will also review litigation of employment disputes as a necessary component of the foundation for exploring the pros and cons of using ADR versus litigation.

This is not a general ADR course. It addresses only employment-related ADR. It will be of most use to those who have taken or are taking one of the basic employment law courses (Labor Law, Employment Law, and Employment Discrimination). Other students with practical experience or a strong intellectual interest in employment dispute resolution are also welcome and will find value in this course. Those without such a background or interest are likely to find the course of limited utility.

**2. Objectives.** These are two: (a) to convey information about the history, legal status, nature, and practice of ADR in the workplace, and (b) to develop the skills necessary to use alternatives to employment litigation.

**3. Methodology.** The doctrinal component will be developed through assigned readings and class discussions. The reading assignments are likely to be heavy, particularly because we will need to use a lot of our class time to discuss readings, watch videos or perform simulation exercises. Nevertheless, I expect all students to be fully prepared for every class. The skills component will be developed through a series of group and individual written or simulation exercises.

**4. Text.** Our primary text is Cooper, Nolan, Bales, and Befort, *ADR IN THE WORKPLACE* (3<sup>rd</sup> ed. West 2014). For those seeking to complete the rigorous writing requirement, you will also have assigned readings in Elizabeth Fajans & Mary R. Falk, *SCHOLARLY WRITING FOR LAW STUDENTS: SEMINAR PAPERS, LAW REVIEW NOTES AND LAW REVIEW COMPETITION PAPERS* 4th ed. West 2011). You will probably also receive photocopied supplements early and throughout the course, along with materials for the various simulations.

**5. Recommended Readings and Reference Sources.** Each section of the text has suggestions for further readings. Here are a few of the most important works you should consider. For general ADR, with an excellent section on Employment Arbitration and Labor Arbitration, see Stephen J. Ware, *ALTERNATIVE DISPUTE RESOLUTION HORNBOOK* (West 2d Ed. 2007). On labor arbitration, the most popular reference is Elkouri & Elkouri, *HOW ARBITRATION WORKS* (BNA Kenneth May 7<sup>th</sup> Ed. 2012) and for a little more general description of Labor and Employment Arbitration, see Dennis R. Nolan, *LABOR AND EMPLOYMENT ARBITRATION IN A NUTSHELL* (West Group 2d Ed. 2006). For a general description of Arbitration issues, see Thomas E. Carbonneau, *ARBITRATION IN A NUTSHELL* (3<sup>rd</sup> Ed. 2012). For a more general introduction to the ADR field, see Jacqueline M. Nolan-Haley, *ALTERNATIVE DISPUTE RESOLUTION IN A NUTSHELL* (West Group 3d. Ed. 2008). For a general reference on mediation, see Kimberlee K. Kovach, *MEDIATION IN A NUTSHELL* (West Group, 2d Ed. 2010). For litigation of employment disputes, see *LITIGATING THE EMPLOYMENT TORT CASE*, Ed. Daniel J. Rose (ABA 2d Ed. 2001); Cathy Beveridge, *EMPLOYMENT LITIGATION HANDBOOK* (ABA 2d Ed. 2010). There are lots of specialized books and articles. To find them, start with Appendix A in the textbook. Relevant statutory provisions are printed in Appendix B of the textbook. Be sure to read the full text of any statutory sections cited in the readings. For writing sources, see Richard Delgado, *How To Write A Law Review Article*, 20 *U.S.F.L. Rev.* 445 (1986); Eugene Volokh, *Writing A Student Article*, 48 *J. Leg. Educ.* 247 (1998); Richard Wydick, *PLAIN ENGLISH FOR LAWYERS* (Carolina Academic Press 5<sup>th</sup> Ed. 2005); and Heather Meeker, "Stalking the Golden Topic: A Guide to Locating and Selecting Topics for Legal Research Papers," 1996 *Utah L. Rev.* 917. Another text on scholarly writing is an excellent source, too. See Eugene Volokh, *ACADEMIC LEGAL WRITING: LAW REVIEW ARTICLES, STUDENT NOTES, SEMINAR PAPERS, AND GETTING ON LAW REVIEW* (3d Ed. 2007).

**6. Grading.** All grading is subject to adjustment based upon my class participation policy which will be given to you on the first day of class. You will be graded based upon class participation and performance in class discussions, individual and group exercises or presentations and either through a series of short papers with a final short paper due on the date of the last class meeting or other specified date or a single longer final paper in relation to the rigorous writing requirement. Class participation, including preparation of and performance of assigned roles in simulation exercises, discussion of cases and textbook readings and other assignments will constitute 30% of your grade in the course. The remainder of the grade (70%) may be determined by doing assigned shorter research papers throughout the semester or a single final paper to meet the rigorous writing requirement. If you choose the shorter papers option, you will be assigned 1-4 short memos that will constitute a total of 15-20% of your grade and a final shorter paper that will be due on the date of the last class meeting or other specified date which will be worth 50-55% of your grade. If you choose to take this course to achieve the rigorous writing requirement, 70% of your grade will be based upon a final paper due by 5 p.m. on Tuesday, December 2, 2014 with the expectation that you will have submitted two drafts prior to that date. That same date and time will also be when the

final shorter paper will be due for those choosing that option in lieu of the rigorous writing requirement. Those choosing the shorter papers assignments will be given short research projects and memos to draft as if you are associates working at a labor and employment law firm dealing with ADR in the Workplace issues. Practical work will be the largest single component of your class participation grade especially during the simulations and presentations. Informed participation in class discussion will also count significantly toward that grade.

**7. Attendance.** Your attendance will be especially important to your success in this course and to you, in general, as you establish a professional practice. Attendance shows your respect not only for learning, but also for the efforts of your fellow students who play a dynamic part in making the ADR in the Workplace course come alive. Attendance will be taken at every class meeting pursuant to school policy. Your failure to attend class can have negative consequences pursuant to the school's policy and it is your responsibility to know that policy and how it applies to you. Tardiness is discouraged. Repeated tardiness may result in a finding that the student is considered absent for each class that the student continues to be tardy. Also, please limit the number of instances where you have to get up and leave the class once it has started. Use of beepers and cellular phones is not allowed. Don't even bring them in class and we won't even have to address excuses that they went off by accident. If they go off during class, I reserve the right to consider that as an absence for the class and may consider other punitive action including dropping grade points. Because class discussion and participation in the simulations is so important to understanding this material, attendance at the simulations is strictly mandatory. Failure to appear at a simulation can result in dropping a letter grade in the course (A- to B+ or B to a B- or C+ to a C). To avoid problems, please limit early absences in the event you have an emergency need later. Also, notify those who may be relying upon you whenever you will be unable to attend a class.

**8. Consultation.** I hope that no serious questions will go unasked or unanswered. Students are welcome to stop by my office (Room 124) during my office hours or at any time other than the hour before a class. If I do not already know you, feel free to drop by to introduce yourself. I look forward to meeting you. You can reach me by e-mail (preferred) or telephone. Also, I will be scheduling consultations with students who are seeking the rigorous writing requirements after their first drafts are submitted.

**9. Law School Disability Policy.** Texas A&M School of Law adheres to a disability policy that is in keeping with relevant federal law. The law school will provide appropriate accommodation as determined by the Assistant Dean of Student Affairs, Rosalind Jeffers, in consultation with the University's disability services. Students must notify the Assistant Dean of Student Affairs of any permanent or temporary disabilities and must provide documentation regarding those disabilities prior to the granting of an accommodation. Due to the law school's policy of testing anonymity, students should not discuss their disabilities with individual professors and should seek assistance through consulting the Dean of Student Affairs who may or may not need to consult the individual professor(s) involved.

**10. Academic Integrity Statement and Policy.** Texas A&M School of Law's Honor Code follows the Aggie Code of Honor: "An Aggie does not lie, cheat or steal, or tolerate those who

do.” Pursuant to the Texas A&M University School of Law Honor System, each member of the Law School community should assist in ensuring compliance with the Honor System Rules by immediately bringing to the attention of the Associate Dean for Academic Affairs or instructor any act that may reasonably be considered to constitute a violation of the Honor System rules. All members of the Law School community share a responsibility to take appropriate action when potential violations of the Honor Code occur.

**11. Learning Objectives.**

<b>Key Learning Objectives</b>	<b>How Achieved</b>
<p>1. Students will learn legal and non-legal theories describing how labor and employment disputes are resolved through arbitration and mediation under federal law.</p>	<p>Through readings in the textbook and related articles and classroom discussions of the reading, students will be able to identify and understand the processes of arbitration and mediation in the workplace and the strengths and weaknesses of those processes as alternatives to litigation.</p>
<p>2. Through the lens of simulations involving arbitration and mediation of a collective bargaining dispute and an employment dispute, students will learn how to practically apply mediation and arbitration processes to resolve workplace disputes as advocates for employers or employees.</p>	<p>Students will develop a minimum competency in understanding how arbitration and mediation can be used to resolve labor disputes and employment disputes through performed simulations and discussions about class reading and viewing videotape simulations of arbitrations and mediation. They will see how these processes can be used from a practical perspective while representing an employer or an employee in a problem.</p>
<p>3. Students will learn about a labor or employment or dispute resolution topic through rigorous examination of the topic.</p>	<p>Students will have to research topics, develop a thesis, support that thesis through well-written discussion of a labor or employment or dispute resolution topic as part of an in-depth scholarly writing exercise.</p>

<p>4. Encourage active participation in the discussion and learning of workplace adr theories during the course.</p>	<p>Students will be provided an opportunity to obtain extra credit points based upon their overall contribution to classroom discussions by being fully prepared and accountable to be called upon to discuss the assigned readings or problems for a particular class session.</p>
--	---

**12. Simulations.** There will be approximately two(2) simulations conducted this semester depending on the size of the class and the number of final paper presentations. They are likely to include: (1) labor arbitration under a collective bargaining agreement; (2) mediation under a collective bargaining agreement; (3) mediation, arbitration, litigation and British and American comparative resolution of a sexual harassment dispute; (5) mediation of an Americans with Disabilities Act dispute in a non-union setting; (6) arbitration of an Americans with Disabilities Act dispute in a non-union setting; or (7) arbitration of an expense reimbursement dispute.

In simulations, you will have an assigned role that could include the role of a neutral, an attorney, a party, a witness or a commentator. I will make every effort to distribute roles equitably, but absolute equality is unlikely to be achieved. Some roles will require major preparation outside of class. In some roles, you may be required to submit a very short (one-to two-page) written assignment. For some simulations, it may be necessary to schedule the class session at another time in order to maximize our two-hour class period. I will not do that unless I find it absolutely necessary and will give plenty of notice and try to schedule the simulations at times when everyone is available to attend and participate, preferably Friday evenings. Other scheduled classes may be cancelled as needed to make up for extra simulation sessions or other unusual out-of-class time commitments.

**13. Tentative Course Outline & Proposed Assigned Readings.** I will make an effort to address the materials at a reasonable pace, and omit materials as appropriate, so that we can achieve a depth of understanding with those materials that are covered. Simulations will be interspersed with discussion of assigned readings after the relevant readings have been considered and will be scheduled at times that permit participants to prepare for the simulation after the readings have been considered. That means that we will have regular interruptions to a discussion of a topic so that we can do a simulation based on portions of the readings just concluded. The simulation exercises will be time-consuming and will follow strict deadlines. If your educational and personal schedules are already demanding and inflexible, you may need to reconsider your commitments to take this course.

## **A. TENTATIVE: COURSE OUTLINE**

### LABOR ARBITRATION/MEDIATION:

- I. History and Background and Introduction to Grievance Resolution (Chapters I& II)
- II. Subjects of Labor Arbitration
  - A. Discipline and Discharge (Chapter VII. B)
  - B. Management Rights (Chapter VII. C)
  - C. Past Practice (Chapter VII.. D)
- III. Evidence (Chapter VI. A)
- IV. Discovery (Chapter VI. C)
- V. Mediation-Intro. & Labor Grievance Mediation (Chapter XIII. B, C, D, G)
- VI. SIMULATION: Labor Arbitration & Labor Grievance Mediation
- VII. The Role of External Law in Labor Arbitration (Chapter V. B)
- VIII. The Role of Precedent (Chapter VI. D)
- IX. Judicial Review of Labor Arbitration Awards (Chapter III. C)
- X. Perspectives on Labor Arbitration (Chapter IX. A & B)

### EMPLOYMENT ARBITRATION/MEDIATION:

- XI. Employment Law Litigation and Introduction to Individual Employment Arbitration (Chapters X, XI, and XII).
- XII. Employment Law Mediation (Chapter XIII, A, E, F).
- XIII. SIMULATION: Mediation, Arbitration and Litigation of Individual Employment Dispute
- XIV. PRESENTATIONS ON COURSE RIGOROUS WRITING PAPERS
- XV. FINAL PAPERS DUE: TUESDAY, DECEMBER 2, 2014

## **B. Proposed Reading Assignments**

**WEEK 1:** Read Cooper, Nolan Text, pp. 3-31, 309-310, 322-25 for first class meeting on August 25, 2014. Also, try to answer questions on pp. 30-31. If you plan to take this class for rigorous writing credit, you should also read the first chapter of the Fajans and Falk book for the first class meeting. At the first class meeting, we will discuss proposed reading assignments for the semester. Changes to reading assignments for the remainder of the semester will be provided to you in a similar fashion. I'm assuming you will read what I believe to be the latest version of Fajans and Falk that came out in 2011 (the 4<sup>th</sup> Edition) .

ADR IN THE WORKPLACE:TENTATIVE READING ASSIGNMENTS After 8/25/14

Professor Michael Z. Green: Fall 2014

Sep. 1, No class meeting. Labor Day!!!

Sep. 8, Discipline/Discharge, pp. 325-375, Rigor: Read Fajans Chap. 2. PROOF OF THE MATTER OR NURSE KEVIN VIDEO ARBITRATION.

Sep. 15, Discipline/Discharge (cont.), Management Rights, Past Practice & Arbitration Research, pp. 376-426, Skim 1011-1045, Research (not discussed in class and listed mainly as a resource, but I will answer questions about this part of the reading if you have them), Handouts Labor Arbitration & Mediation Simulation and Roles Assigned. Rigor: Read Fajans Chap. 3. PROOF OF THE MATTER OR NURSE KEVIN VIDEO ARBITRATION.

Sep. 22, Evidence, Discovery, Grievance Mediation, pp. 229-249, 275-285, 922-929, 947-952, 981-986, Thesis Statements Due, MEDIATION VIDEO. Read Fajans Ch. 4, pp. 62-71.

Sep. 29, SIMULATION: Labor Arbitration/Mediation Simulation.

Oct. 6, Role of External Law and Role of Precedent in Arbitration, pp. 214-228, 285-307, Debrief Labor Arbitration Simulation, Completed Outlines Due: Include an Introduction section, Background section, Analysis section and Conclusion section. See pages 71-77 of Fajans, Chapter 4.

Oct. 13, Judicial Review of Labor Arbitration Decisions and Perspectives on Labor Arbitration: Ethics, pp. 84-120, 651-662, Rigor: Read Fajans 77-97.

Oct. 20, Ethics (cont.) and Criticism of Labor Arbitration, pp. 662-689, 720-735, Rigor: Fajans 97-124. First Draft Due

Oct. 27, Individual Employment Arbitration, Introduction, Judicial Application, Formation, pp. 737-795. Handouts on Employment Dispute Simulation and Roles determined. WORLD'S GREATEST ARBITRATOR VIDEOTAPE. FIRST DRAFT CONFERENCES.

Nov. 3, Individual Employment Arbitration, Judicial Application, Unconscionability, Fees, Discovery, Use of External Law, Judicial Review & Writing Post-hearing Arbitration Brief, pp. 795-839, 848-857. FIRST DRAFT CONFERENCES. LAW FIRM VIDEO MEDIATION.

Nov. 10, Employment Arbitration in Practice: Discrimination Claim, pp. 874-882, 891-896; Mediation of Employment Cases and Law Affecting Mediation Process, pp. 921-922, 929-946, Skim Again pp. 922-929. LAW FIRM VIDEO MEDIATION. ADDITIONAL CONFERENCES AS NEEDED BASED ON FINAL of FIRST AND EARLY SECOND DRAFTS.

Nov. 17, Employment Dispute Simulation. Separate Conferences on Second Drafts.

Nov. 24, Presentations and Review of Course, Final Discussion of Second Drafts

Dec. 1, Presentations.

Dec. 2, No Class Scheduled. This is a Tuesday, but it is considered a Friday on the Schedule. FINAL PAPERS due BY 5 p.m.