

Survey of Dispute Resolution Processes

Course Syllabus – Fall 2014

Professor Jill I. Gross

Mondays and Thursdays, 11:15 am – 12:40 pm

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This course surveys the dispute resolution processes of negotiation, mediation and arbitration, as well as the legal framework governing and regulating those processes, primarily for domestic, commercial disputes. The course examines the techniques, rules, and procedures of negotiation, mediation and arbitration, explores the roles of the parties, counsel and neutral(s) in these processes, and compares all three processes to litigation. Students will learn about these dispute resolution processes through assigned readings, responses to assigned readings, class discussions, participation in various simulations, oral and written reflection on those experiences, and by writing about the processes.

By the end of this course, you should be able to understand:

- how the processes of mediation and arbitration resolve commercial disputes in the United States;
- the basic differences among the processes of negotiation, mediation, arbitration and litigation;
- the legal framework governing enforcement of agreements to mediate and mediation settlements;
- the legal framework governing the enforcement of agreements to arbitrate and arbitration awards;
- the ethical constraints of ADR neutrals, primarily mediators and arbitrators;
- how to counsel clients as to the pros and cons of each dispute resolution mechanism; and
- how to negotiate and draft a basic ADR clause in a contract.

Grading: There will be no final exam in this course. Your grade in the class will be computed on the basis of 100 points as follows:

Class attendance and participation (including in simulations)	20 points
Negotiation simulation report	10 points
Mediation simulation report	20 points
Arbitration simulation report	20 points
Reaction paper	10 points
Negotiating and drafting a dispute resolution clause	20 points

****All due dates for these assignments are listed in the course syllabus.**

Assigned Text: Riskin, Westbrook, Guthrie, Reuben, Robbennolt & Welsh, DISPUTE RESOLUTION AND LAWYERS, 5th edition (West Academic Publishing 2014) [“DRL”]

Reading assignments: The chart below lists the readings to be completed for each class. “DRL” refers to your assigned textbook. Assigned pages INCLUDE any problems and questions contained on those pages. Additional assigned readings are available on TWEN under “Course Materials,” or “Web Links,” the internet and/or through hand-outs. The schedule of assigned readings is tentative and subject to adjustment during the semester. Please check the TWEN course site frequently for new postings such as site updates, additional course materials, web links, and assignments.

You should also review relevant pages on the websites of the American Arbitration Association (www.adr.org), JAMS (www.jamsadr.com), Mediate.com (www.mediate.com), and FINRA Dispute Resolution (www.finra.org) (click on “Arbitration & Mediation” at the bottom), all of which contain a wealth of information about commercial arbitration and mediation.

Written Assignments: I will post assignments on TWEN in the Assignment Drop Box. The chart below indicates in bold the due date of all written assignments. Assignments are due by 5:00 p.m. that day, by uploading them onto TWEN into the Assignment Drop Box. **NO LATE ASSIGNMENTS WILL BE ACCEPTED WITHOUT ADVANCE PERMISSION** following a *written* demonstration of good cause for the delay. Unless instructed otherwise, you must prepare all written assignments in double-spaced, 12-point text, in a legible font, except that footnotes, headings and blocked, indented quotes *must* be single-spaced. Footnotes may be in 10 or 11 point font. All documents must include a one-inch margin on all sides and page limitations are strictly enforced.

Class Attendance and Participation: The ABA and Pace Law School academic rules require regular attendance in class. In addition, because this course involves, in part, learning from simulations, class attendance and participation is **MANDATORY**. If you know in advance of an irreconcilable conflict that will make it impossible for you to attend class or if you have a personal emergency, you must obtain permission from me by telephone or e-mail to be excused. Excessive absences, especially those that are not excused via advance notice, will be taken into account for grading purposes. In addition, if you miss more than five (5) classes excused or unexcused, absent extraordinary circumstances, you will get a zero (0) for your class participation grade.

Please turn off your cell phone ringers before class begins and refrain from texting during class. Just as it is inappropriate for students to engage in private conversation during class, it is also both improper and unprofessional for students to misuse our school's wireless capability to chat, go on-line (unless it is related to the class discussion), or send and receive IMs or e-mails while class is in session. I find it *very* distracting to my teaching and classroom discussions as do many other students. Students who appear to me to be consistently using classroom time to check their email, shop, send on-line messages, check Facebook, or play computer games will lose class participation points. I also reserve the right to ask a student who is clearly engaged with any electronic device (cell phone, iPad, laptop) for non-classroom purposes (e.g., laughing or grinning during non-funny classroom moments) to leave the classroom. Numerous studies

have shown that students who want to pay attention are unnecessarily distracted by other students' computer screens and phones open to websites not related to the classroom discussion.

Reaction paper: During the semester but no later than December 2, 2014, each student must submit one "reaction paper" of **no more than** three (3) pages that responds to any assigned reading about the negotiation, mediation, or arbitration process. Reaction paper topics could include a student's critical view as to the validity of an author's assertion in a reading, a policy choice in a mediation system design about which you read, a reflection as to what went right and what went wrong during a small in-class simulation, reactions to Supreme Court decisions on arbitration, and many others. Feel free to ask me if you aren't sure whether a topic is appropriate for a reaction paper. Topics that are NOT appropriate for a reaction paper are reflections on the major negotiation, mediation and arbitration simulations, as those are already the subject of other assignments.

Honor Code: The Law School Honor Code prohibits plagiarism (copying another's words or ideas without attribution, regardless of intent), and restricts collaboration (working with another student on an assignment), unless the assignment specifically allows it. While you may discuss generally your assignments with your classmates, your writing must be individual and independent. No one else may review, proofread, or edit your assignments before you hand them in unless I have specifically instructed you otherwise or advised you to consult the Writing Specialist or Office of Academic Success. Any suspected violations of the Honor Code will promptly be reported to the Honor Board.

Office Hours: I do not schedule regular office hours during the semester because I am very frequently in my office Monday through Thursday. You can stop by to see if I am free, or else e-mail me to make an appointment to see me. Please do not hesitate to consult with me as often as necessary for any questions or concerns regarding any topic covered in the course.

Upper Level Skills Requirement: If you would like to use this course to satisfy the Upper Level Skills Requirement, you **MUST** sign up for the role as an **attorney** in both the primary Mediation and Arbitration simulations. If you do not play the role of an attorney in either of those two simulations, you will not be able to use this course to satisfy the requirement. Please speak with me privately if you have any concerns.

Class and Reading Schedule (subject to change with notice):

DATE	TOPIC	Reading for Class
R Sept. 4	Introduction to Appropriate Dispute Resolution	Syllabus – Read ALL information DRL pp. 1-26 TWEN Course Materials: Chart of Dispute Resolution Processes
M Sept. 8	Dispute Resolution and Lawyers	DRL pp. 26-50; 139-143 TWEN Course Materials: General Information on Simulations; Instructions for Simulation Observers
R Sept. 11	Introduction to Negotiation	DRL pp. 145-171
M Sept. 15	Negotiation Strategies and Tactics	DRL pp. 171-195; 216-18; 243-246

		pp. 196-215 (optional)
R Sept. 18	Attorney Ethics in Negotiation	DRL pp. 246-267
M Sept. 22	The Mediation Process	DRL pp. 301-344 TWEN Web Link: AAA Commercial Mediation Procedures Negotiation Simulation Report Due
M Sept. 29	The Role of the Mediator	DRL pp. 354-371; 389-401 TWEN Course Materials: Mediator Opening Statement Checklist
R Oct. 2	Mediator Ethics	DRL pp. 401-436 DRL Appendix D: <i>Model Standards of Conduct for Mediators</i> (Aug. 2005)
M Oct. 6	Mediation Advocacy	DRL pp. 436-477; 789-799 TWEN Web Link: ABA Model Rule of Professional Responsibility 5.5
R Oct. 9	Legal Issues in Mediation	DRL pp. 267-272; 477-512 DRL Appendix C: Uniform Mediation Act
M Oct. 13	Mediation Simulation Planning	Simulation materials; TWEN Course Materials: Dwight Golann, <i>Nearing the Finish Line: Dealing with Impasse in Commercial Mediation</i> , DISP. RESOL. J. at 4 (Winter 2009); Stephen B. Goldberg & Margaret L. Shaw, <i>Is the Mediator's Primary Goal to Settle the Dispute?</i> , DISP. RESOL. J. at 16 (Winter 2009); Douglas E. Noll, <i>The Myth of the Mediator as Settlement Broker</i> , DISP. RESOL. J. at 42 (May/July 2009)
R Oct. 16	Mediation Simulation – Execution	
M Oct. 20	Mediation Simulation – Reflection; Fairness in Mediation	DRL pp. 512-535; 768-789
R Oct. 23	NO CLASS	Mediation reflection report due
M Oct. 27	Introduction to Arbitration; The Federal Arbitration Act	DRL pp. 561-590 DRL Appendix E: The Federal Arbitration Act, 9 U.S.C. §§ 1-16 (2010); DRL Appendix F: Uniform Arbitration Act (1956)
R. Oct. 30	Arbitration Law and Policy I	DRL pp. 590-613; 618-632
M Nov. 3	Arbitration Law and Policy II	DRL pp. 649-671
R Nov. 6	The Arbitration Process I	DRL Appendix G: AAA Commercial Arbitration Rules

		TWEN Course Materials: The Ten Steps of Arbitration; Charles J. Moxley, Jr., <i>Discovery in Commercial Arbitration: How Arbitrators Think</i> , DISP. RESOL. J. 36 (Aug./Oct. 2008)
M Nov. 10	The Arbitration Process II	Arbitration simulation materials TWEN Course Materials: Ruth V. Glick and Laura J. Stipanowich, <i>Arbitrator Disclosure in the Internet Age</i> , DISP. RESOL. J. (Feb./Apr. 2012)
W Nov. 12 NOON	Hopkins Lecture Attendance required in place of cancelled class on Oct. 23	
R Nov. 13	Arbitration simulation – Planning	
M Nov. 17	Arbitration simulation – Hearing	TWEN Course Materials: Edna Sussman & Christi Underwood, <i>Time & Cost Solutions for Commercial Arbitration</i> , DISP. RESOL. J. 23 (Feb./Apr. 2011); Christine L. Newhall, <i>The AAA's War on Time and Cost</i> , DISP. RESOL. J. 20 (Aug./Oct. 2012)
R Nov. 20	Arbitration simulation – Reflection	
M Nov. 24	Arbitration – Judicial Review of Awards; Class Actions	DRL pp. 671-708 <i>Oxford Health Plans v. Sutter</i> , 133 S. Ct. 2064 (2013); <i>American Express Co. v. Italian Colors Restaurant</i> , 133 S. Ct 2304 (2013) Arbitration Reflection Report Due
M Dec. 1	Arbitration Ethics and Fairness	DRL pp. 709-721 TWEN Web Links: The Code of Ethics for Arbitrators in Commercial Disputes; The Arbitration Fairness Act of 2013; AAA Consumer Due Process Protocol
T Dec. 2 (Thursday schedule)	Dispute System Design	DRL pp. 885-916 Reaction Paper Due
R Dec. 4	Negotiating and Drafting an ADR Clause	DRL pp. 959-987 TWEN Course Materials: Edna Sussman & Victoria A. Kummer, <i>Drafting the Arbitration Clause: A Primer on the Opportunities and the Pitfalls</i> , DISP. RESOL. J. at 30 (Feb./Apr. 2012)
M Dec. 15		ADR Clause and Negotiation report due