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Office Hours: Tuesday 2-3pm and by appointment

LAW 573 Fall 2011- 4 credits
MWed 9:50-11:50
Room MPAA 430

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 full adjudication (in the form of trial on the merits) occurs in less than 5 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 a 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 in negotiation and mini-trials) but unlike adjudication in other ways (the direct communication of parties in mediation and the “resolution” of problems based on future and interest based concerns, 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 in private arenas. This course will be, in some ways, an advanced Civil Procedure course, examining 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 ways, 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 fact-finding, 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 be 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.

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 conflict 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 it?
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 (i.e., 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, or mixed 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?

Course Requirements

This course will involve reading, discussion, role-playing and simulation exercises. Attendance is mandatory because each class will have some role-play or exercise and your classmates’ learning will depend on all people being engaged in their roles. If you need to be absent for any reason you must have instructor’s permission. More than 2 (excused) absences will affect your final grade. There will be one short written assignment during the semester and then you will have choice about whether to take a final examination or complete a paper (of 20 pages). Grades will be based on written work, class contributions, and participation and performance in class exercises:

- Class Participation: 15%
- Short Paper: 15%
- Final Examination or Long Paper: 70%

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

The required course book is:

Menkel-Meadow, Love, Schneider, and Sternlight, Dispute Resolution: Beyond the Adversarial Model 2nd ed (Aspen, 2011)

I also 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).
3. Deborah Tannen, The Argument Culture (Ballantine Books, 1999).
4. Roger Fisher, William Ury and Bruce Patton, Getting to Yes, 3rd ed. (Penguin Books, 2011)

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 subject to change as announced in class, given our pace and the possibility of new developments and guest speakers that I hope to arrange. Please be sure to come to class to learn of assignment changes. We will begin class on *Monday, August 29, 2011*. We will have one session (for a complex multi-party negotiation simulation) that will meet all day on *Saturday, Nov. 19* (unless this proves inconvenient for you and then we will jointly negotiate another time) which will serve to make up classes missed on August 22 and 24th and Sept. 7.

<u>Date</u>	<u>Topic</u>	<u>Reading Assignment and Exercises</u>
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Introduction to DR and Process Pluralism: History, Theory and Choices

August 29 M	Introduction to DR and The Lawyer as Problem Solver	Neg-Med-Arb exercise Menkel-Meadow et. al (text) Ch. 2
August 31 W	Key Concepts in Dispute	Text, Menkel-Meadow, et.al

	Resolution and Conflict Theory	Ch. 1, pp. 1-21
September 5 M	Labor Day (no class)	
September 7 W	No Class (to be made up on Nov. 19 - see below)	
September 12 M	Choices of Process	Text, ch. 1, pp. 22-47

Basic Processes of DR

Sept. 14 W	Negotiation I: Theories and Frameworks	Text, ch. 3 Negotiation Problem # 1
Sept. 19 M	Negotiation II: Skills and Behavior	Text, ch. 4 (pg.127-174) Negotiation Problem # 2
Sept. 21 W (<i>International Peace Day</i>)	Negotiation III Barriers to Agreements And Creative Solutions	Text, ch.4 (pg. 174-184; 162-174) Class Exercises
Sept. 26 M	Negotiation IV Role of Law; Ethics & Policies	Text, ch. 5 Negotiation Problem # 3
Sept 28 W	Mediation I: Introduction Overview, Purposes and Uses	Text, ch. 6 <i>Scenes From a Mediation (film)</i> <i>Neighborhood Mediation Center</i>
Oct. 3 M	Mediation II: Skills Roles of Mediators, Parties, Lawyers	Text, ch. 7 Opening Statement Ex.
Oct. 5 W	Mediation III: Ethics, Controversies	Text, ch. 8 <i>Prosando v. High-Tech (film)</i>
<i>Oct. 10 and 12</i>	<i>No class-Mid-semester Review</i>	
Oct. 17 M	Mediation IV: Practicum	Mediation Problem (simulation in class)
Oct. 19 W	Arbitration I: Introduction	Text, ch. 9
Oct. 24 M	Arbitration II: The Law of	Text, ch. 10, pg. 413-452 and

	Binding Arbitration	Distributed cases (e.g. <i>ATT v. Concepcion</i>)
Oct. 26 W	Arbitration III: Skills and Ethics of Arbitration	Text, ch. 11
Oct. 31 M	Arbitration IV: Practicum Practice and legal issues; “Compulsory” arbitration in courts and contracts	Arbitration drafting problem
<u>Applications of DR: Process Pluralism</u>		
Nov. 2 W	Comparative ADR	Film— <i>Little Injustices</i> (Mexico)
Nov. 7 M	Comparative ADR	Film— <i>The Story of Qiu Ju</i> (China)
Nov. 9 W	Hybrids-Complex	Text, ch. 12, pp. 545-580; Short Paper Due: Comparative ADR and film critiques
Nov. 14 M	Hybrids: Private and Other Applications	Text, ch. 12, pp. 521-545 <i>CPR Mini-Trial (film)</i>
Nov. 16 W	Multi-Party and Public Disputes	Text, ch. 13; pp. 581-599; Coalition Ex.
Nov. 19 Sat. 10 pm-4 pm	Multi-Party Disputes	Text., Ch. 13 pp. Class Exercise (<i>all day Multi-Party Dispute Exercise</i>)
Nov. 21 M	Multi-Party Disputes	Mass Torts, Victims Funds, etc. and debrief exercises
Nov. 23 W	Critiques of ADR: Race, Gender, Class and Power Inequalities; Privatization of Justice	Class Exercise
Nov. 28 M	Choosing an Appropriate Process: Clients’ Interests	Text. Ch. 14 pp. 633-644
Nov. 30 W	Choosing and Evaluating DR Processes: Systemic and Justice Issues Course Evaluation	Text, Ch. 14 pp. 644-668

Final Examination or Paper due by end of Semester- December 16