

ADR STRATEGY IN LITIGATION

Working Syllabus – Fall 2014¹
Professor Elizabeth Tippet
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Wednesdays 3:00-4:50, Room 243

Course Overview

This class is intended to provide you with the knowledge, tools and skills that you will need as a lawyer to settle cases, help your client make an informed decision about settlement, and identify which process may best suit your client's particular needs at any given time. You will be expected to teach yourself the basic concepts through the assigned readings. Class time will in large part be devoted to helping you apply the concepts you have learned, and gain the skills you need to effectively convey that knowledge to your client. The graded and ungraded assignments in this course are intended to help you practice the knowledge and skill you have acquired.

Learning Objectives

As a result of taking this course, students will be able to:

- Identify information relevant to calculating damages
- Estimate damages
- Assess the value of a case based on comparable cases
- Budget litigation expenses
- Assess case value using probability
- Make an Offer of Judgment
- Generate a proposed settlement and justify the settlement offer
- Understand the ethical rules relating to settlement
- Understand and prepare for the mediation process
- Represent a client's interests in mediation
- Understand which cases are subject to arbitration

Required Course Materials

1. Michael Moffitt & Andrea Schneider, *DISPUTE RESOLUTION: EXAMPLES AND EXPLANATIONS*, Aspen 2011 ("E&E") (2d Ed).

¹ Please note that I may need to make additional changes to the Syllabus as the semester progresses. I will give you as much advanced notice as possible regarding any changes.

- Supplemental materials posted on Blackboard. Please do not make additional copies or distribute these materials for non-educational purposes.

Office Hours

My office is in Room 308. I do not have formalized office hours because I am typically in the office during business hours. You are welcome to stop by at your leisure, without an appointment. However, I request that you limit visits to my office during the hour preceding class, as I will likely be

Course Grade

Rather than a final exam, this class includes a final assignment that requires to you to apply the concepts in the readings and discussed in class. Please note that the assignment will likely require a considerable investment of time on your part, equivalent to a substantial research paper.

Assignment	Due Date	Percentage of grade
A memo to a client based on a specified fact pattern that applies the concepts learned over the course of the semester.	December 18	80%

Eighty percent (80%) of your grade will be based upon the following assignment:

The remaining twenty percent (20%) of your grade will be based upon your participation in the course. Participation consists of (i) class attendance; (ii) completing ungraded assignments, (iii) preparation for classroom exercises and simulations and (iv) thoughtful contribution to classroom discussions. The first half of the course will include several ungraded assignments, to give you practice using new skills for which you may not have had previous experience.

In large part, my participation grades reward high quality performance – I give credit for the most thoughtful comments of the day, the best ungraded assignments, and skillful performance in an exercise. Nevertheless, I make note when a student's ungraded work or comments in class reflects inadequate preparation or effort. I will also make note of any failure to complete an ungraded assignment. At the end of the term, I add up all of the "pluses" and "minuses," and then set them on a curve.²

² A formal curve will not be possible given the small size of the class.

High quality participation does not necessarily require you to be the most frequent speaker in the class. In the past, students with the highest participation grades have included those who participate somewhat infrequently, but offer novel, interesting observations, or who outperform the rest of the class on ungraded assignments.

I keep track of attendance in class. Because the class meets only once a week, your classmates and I will rely on your reliable presence each class. Absence is counted as a "minus" in your participation grade, unless it is excused for illness, religious obligation or a family emergency. Please provide me with 48 hours of advanced notice (or as soon as practicable) of any excused absence.

Per the [Student Handbook](#), "substantial participation in classroom discussion is essential to legal education. Credit for any course may be denied for irregular attendance."

Accessible Education for All Students:

The University of Oregon works to ensure inclusive learning environments for all students. We recognize that students bring a variety of learning styles to the course, and that some learning styles may require adjustment to course structure. We are happy to talk with you about such adjustments. Please be in touch with the professor if there are aspects of the instruction or design of this course that result in barriers to your participation as a result of learning style or diagnosed disability. If this course involves anonymous grading, please contact Assistant Dean of Student Affairs, Nicole Commissiong, for information on accommodations. For more information, you are also encouraged to contact the Accessible Education Center (formerly Disability Services) in 164 Oregon Hall at 346-1155 or uoaec@uoregon.edu.

Inclusion and Collegiality:

Our community values inclusion. We are committed to equal opportunities for all faculty, staff, and students to develop individually, professionally, and academically regardless of ethnicity, heritage, gender, sexual orientation, ability, socio-economic standing, cultural beliefs and traditions. We are dedicated to an environment that is inclusive and fosters awareness, understanding, and respect for diversity. If you have concerns around inclusivity issues, please contact Associate Dean of Students Jennifer Espinola at espinola@uoregon.edu or 541-346-1557. The University Bias Response Team is also a resource that can assist you. See <http://bias.uoregon.edu> or call 541-346-2037.

Academic Integrity:

Students are expected to demonstrate high levels of academic integrity and professionalism, and are prohibited from committing or attempting to commit any

act that constitutes academic misconduct. Plagiarism and other forms of academic dishonesty will be grounds for automatic failure in the course. If you have questions about conduct please ask your instructor or review the University Student Conduct Code (available at <http://conduct.uoregon.edu>) or the UO policy at http://www.uoregon.edu/~stl/programs/student_judi_affairs/conduct-code.htm

Computer Use in Class

In your career as a lawyer, you will have access to the internet. It will represent a constant temptation for avoiding difficult or boring tasks. The real work of being a lawyer is substantially more difficult and more boring than sitting through a class. I therefore recommend that you abstain from surfing the web during class to develop mental discipline in that regard. Please note that if I catch you surfing the web for non-class related purposes, I will sentence you to teach the rest of the class, while I read Buzzfeed on your computer and Gchat with your friends.

Recording Class Sessions

You may not create a recording of any class or portion thereof, without my prior consent. You are of course welcome to take notes.

Privacy

Throughout the course, you will receive confidential instructions for various exercises. You should, of course, keep these away from your counterpart until after the negotiation is over (at which time you can both share your confidential instructions, if you like). In addition, please do not share the contents of these confidential instructions with people outside of class. If the content of a case become widely known, then the case becomes less valuable.

Note on Research

Results of exercises and simulations provide rich material for analysis and discussion in class. In addition, the data from these exercises may support useful research. Analyzing such exercise-specific data has been an important part of the continuing development and refinement of negotiation theory and practice.

Accordingly, I would like to inform you about the potential research use of this data. Only aggregate statistical data would be published. Complete anonymity is guaranteed – no personal information would ever be involved. I hope that you are comfortable with this kind of use, but if not, please let me know and I will ensure that your data are removed from any archived results that might subsequently be used for research.

Class #1 - August 27 – How much should this case settle for?

Reading and preparation for today's class:

- Additional materials to be posted on Blackboard.

A big piece of what lawyers do when approaching settlement (and indeed, in selecting cases) is to determine a settlement figure. This class will examine two approaches to estimating a settlement figure (1) likely damages, and (2) comparable cases.

Ungraded mini-project– Review the Martinez v. Oregon State Department of Corrections Complaint. Prepare a set of questions for your client (Martinez) about the damages he has incurred and expects to incur. In addition, go to the "Jury Verdicts & Settlements" section on WestlawNext and search for settlements and verdicts involving facts similar to the Martinez case. Bring these settlements and verdicts to class.

Class #2 - September 3 – How much will it cost to litigate?

- [ABA Section on Litigation's Uniform Task-Based Management System \(Use the litigation Code Set Sample Budget Format\)](#)

For a lawyer to provide helpful advice to a client about pursuing an ADR option, the lawyer must understand the costs and benefits of litigation. Looming large for any client is transaction costs – the attorneys' fees and expenses associated with litigation. In this class, we will examine the pleadings for a case and work on preparing a litigation budget using the ABA's litigation code set.

Ungraded mini-projects – Develop a budget for the following tasks in the Martinez case: (1) your research of additional facts; (2) Your interviews of friendly witnesses; (3) Your deposition of adverse witnesses, and associated preparation; (4) your drafting of document requests to the other side; (5) your engagement of an expert witness. Do not actually perform the tasks – simply try to itemize the tasks involved, estimate the time involved, as well as the cost to your client (assuming an hourly rate of \$100). Categorize the tasks using the ABA's Uniform Task-Based Management System.

Class #3 – September 10 - What is the likelihood this case will proceed to trial?

Reading and preparation for today's class:

- E&E Section 3.3 & 3.4 - "Decision Analysis" (pp 64-81)

While transaction costs are certain in litigation, a favorable outcome is not. How can you advise your client on a favorable settlement in the face of uncertainty over how a court will rule? This week, we will cover a framework for thinking about uncertainty known as “decision-analysis.” It involves a little bit of math, but I promise it will be worth the effort. In class, we will prepare a decision tree using the litigation budget from Class #1.

For September 10

- (1) Do the "Round 2" edits on the Budget Wiki, using the additional guidance I provide in the .ppt document "Budget Guidelines" on Blackboard. Pairings for the Round 2 Edits are in the Budget Guidelines .ppt.
- (2) Prepare some questions for Drew Johnson about his practice as it relates to his settlement and ADR strategy and practices. His firm's website is at www.leimanlaw.com.
- (3) Read page 64-81 of the E&E and practice making decision trees using some of the problems at the end of the chapter.

Class #4 - September 17 - Decision Trees

For September 17

Prepare a decision tree based on the facts of the Patriot National case, handed out at the end of class on September 10.

Class #5 – September 24 - Strong-arm offers - Offers of Judgment

Reading and preparation for today’s class:

- Rule 68 of the Federal Rules of Civil Procedure (Blackboard)
- Wright and Miller §§ 3001, 3002, 3005 & 3006 (Blackboard)

This class will consist of an in-depth discussion of offers of judgment pursuant to Rule 68 of the Federal Rules of Civil Procedure.

Ungraded mini-project –Prepare an Offer of Judgment for the Martinez case. Email it to me at tippett@uoregon.edu by noon on September 23.

Class #6 – October 1 - Negotiation

Reading and preparation for today’s class:

- E&E Chapter 1, “An Introduction to Negotiation”
- Bruce Patton, “Negotiation” in Moffitt & Bordone, THE HANDBOOK OF DISPUTE RESOLUTION (distributed in class).
- Read the pleadings in the Sheehan case on Blackboard – Complaint, Counterclaims, and the disputed contract.

[See additional instructions on following page for October 1]

For October 1

Prepare for your negotiation in the Sheehan case. The groupings for the case are on Blackboard. Prepare using the 7 element framework in the Patton article.

You do not need to hand in your work product, but should bring it to class.

You should also familiarize yourself with Oregon law regarding non-competes and trade secrets so that you can make persuasive arguments during the negotiation.

Class # 7 - October 8 - Ethics & Negotiation

Reading and preparation for today's class:

- E&E Chapter 2. "The Law of Negotiation"
- Read Dan Ariely, "[Why we lie](#)" and related videos on Wall St. Journal website.

For October 8

- (1) Be sure to post comments on the blog as a "client" about another group's agreement. (In person comments during class are fine.)
- (2) Review the comments from your "client" to your agreement, and negotiate with the other side(s) to address those comments and revise the agreement accordingly.
- (3) Post the revised agreement before class. If you reach an impasse, so note on the blog and explain the impasse.
- (4) Also, sign up to attend a settlement conference later this semester by emailing Paul Bruch - (paul_bruch@uscourts.gov).

Class # 8 - October 15 - Mediation

Reading and preparation for today's class:

- E&E Chapter 4. "An Introduction to Mediation"

Class # 9 - October 22- Mediation

For October 22 - Ungraded Mini-Project

Draft a 1 page (single spaced) mediation brief for the mediator. You may attach additional pages for reference. The brief should contain whatever information that might be most pertinent to the mediator, from your client's perspective. This could include relevant facts, your client's story, relevant objective criteria and/or the law (if applicable). Please email it to me by 9AM on Monday October 20th.

Reading and preparation for today's class:

- E&E Chapter 3, Section 3.2 "Psychological Dynamics in Negotiation" (pp 62-64).

Class # 10 – October 29 - Confidentiality in Negotiation and Mediation

Reading and preparation for today's class:

- E&E Chapter 5. "Keeping Secrets: Confidentiality in Mediation"

Class # 11 - November 5 – Confidentiality in Negotiation and Mediation

[Finish writing projects.]

Class # 12 - November 12 - Arbitration

Reading and preparation for today's class:

- E&E Chapter 6: "An Introduction to Arbitration: The Role of the Courts"
- E&E Chapter 7: "The Question of Arbitrability: Must this Dispute Go to Arbitration?"

November 19 – No class – Professor at a conference. You should have attended a settlement conference in lieu of class.

Class # 14- November 26 – Arbitration

Reading and preparation for today's class:

- E&E Chapter 8: "Is this Agreement to Arbitrate Enforceable?"
- Skim E&E Chapter 9 – "Federal Preemption and the Law of Arbitration"

Class #15 – December 3 – Litigation

Reading assignment:

- Owen Fiss, "Against Settlement" (Blackboard) or at http://digitalcommons.law.yale.edu/fss_papers/1215/
- Knowing what you have learned about ADR, under what circumstances would you recommend it to a client? Are there circumstances where ADR would not be advisable?

**** Reminder – The final assignment is due on December 18. Please email your completed assignment to lawexam@uoregon.edu no later than 3:00 PM. ****